United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-345

SECRETARY OF LABOR, Complainant, v. SUNCOR ENERGY (U.S.A) INC., Respondent.	OSHRC DOCKET NO. 13-0900

ON BRIEFS:

Ronald Gottlieb, Appellate Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Ann Rosenthal, Associate Solicitor of Labor; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Patrick J. Miller; Rodney L. Smith; Sherman & Howard L.L.C., Denver, CO
For the Respondent

DECISION

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

BY THE COMMISSION:

Suncor Energy (U.S.A.) Inc. operates a refinery in Commerce City, Colorado. The Occupational Safety and Health Administration inspected the refinery in response to a complaint that an employee had fallen and was seriously injured. As a result of the inspection, OSHA issued Suncor a citation alleging two serious violations and one other-than-serious violation of various provisions of the general industry permit-required confined spaces standard, 29 C.F.R. § 1910.146, with a total proposed penalty of $12,000. The Secretary subsequently amended Item 2 of the serious citation—which alleged a violation of 29 C.F.R. § 1910.146(d)(4)(iv) (addressing the provision of personal protective equipment)—to allege in the alternative a violation of 29 C.F.R.

§ 1926.451(g)(1), a construction standard requiring fall protection on scaffolds over 10 feet high, with a proposed penalty of $7,000.[1]

Following a hearing, former Administrative Law Judge John H. Schumacher issued a decision determining that the general industry standards did not apply to the cited conditions and vacating the two violations alleged under those standards; he affirmed, however, the alternative violation of § 1926.451(g)(1) and assessed the proposed $7,000 penalty.[2] For the reasons discussed below, we reverse the judge's decision and vacate the citation.

BACKGROUND

Suncor's Commerce City refinery, which covers 230 acres, has three separate plants. In fall 2012, Suncor engaged in an approximately 30-day shutdown, known as a "turnaround," of Plant 2 to perform capital projects, inspections for regulatory compliance, cleaning, and maintenance. One of the capital projects involved replacing the tubes in a heater known as "H-401," one of three heaters in Plant 2's Reformer Unit. The heater is a cylindrical structure that measures nearly 14 feet in diameter on the outside and almost 12 feet in diameter on the inside. The heater tubes run vertically from the bottom of the heater until they reach the top, at which point they converge towards the center. The bottom floor of the heater is about 10 feet above grade and the top of the heater tubes is about 47 feet above grade.

The process of removing and replacing the heater tubes in H-401 involved several different contractors. Of relevance to this case are four of those contractors: Safway Services, which constructed scaffolding within the heater; RECON Refractory and Construction, Inc. (Recon), which welded the tubes; Mistras Group, which examined the welds performed by Recon; and Total Safety, which provided a confined space attendant and general safety support for confined space entry into H-401. None of Suncor's employees performed any of the work associated with the replacement project.

For work performed inside the heater, which Suncor and its contractors treated as a permit-required confined space, Suncor required each contractor to obtain a "safe work permit" from

[1] The other citation items—alleging violations of § 1910.146(c)(8)(v) (host employer must debrief contractor at conclusion of entry operations) and § 1910.146(f) (entry permit requirements)—were not amended by the Secretary and are not at issue on review.

[2] The judge's determination that the work being performed at the refinery was construction, not general industry, is not at issue on review.

Suncor's operations division. The contractor had to first initiate and generate the permit on Suncor's computerized system. The permit was then electronically transferred to Suncor's operations division, where Suncor's turnaround coordinator and confined space supervisor would review and approve it. The permit included information about the conditions inside the confined space as well as the protective equipment required for entry, including fall protection. Contractors also had to follow Suncor's safety program, as well as its Turnaround Fall Protection Plan, developed specifically for the 2012 turnaround. The purpose of the Fall Protection Plan was first, to attempt to make as many scaffolds as possible "Non-Harness Required" by equipping them with guardrails, and second, to establish a protocol for establishing tie-off points (when it was necessary for workers to tie-off), either on a point beside the scaffold, which was preferred, or, as a last resort, on the scaffold itself.[3]

Safway erected the scaffold inside H-401 on October 17, 2012. The scaffold had three levels with outrigger platforms located approximately 20 inches above the top level and approximately 25 feet above the heater floor. A three-foot gap remained between the outrigger platform and the heater tubes, which run along the wall of H-401. The entire scaffold had a complete set of guardrails on the date it was erected. Between that date and October 29, Suncor issued seven safe work permits to Safway to enter the heater and modify the scaffold. Safway made these modifications in response to requests from other contractors who needed access to various parts of the heater; there is no record of which contractors requested these modifications or what the requested modifications specifically were.

Suncor's safety program required all contractors to attach a yellow "scaffold tag" labeled "Incomplete Scaffold" to any scaffold that had "inadequacies such as holes in the floor, access problems, or incomplete guardrails."[4] For the scaffold inside H-401, Safway had attached a yellow tag to the heater entrance at some time no later than October 26.[5] The tag had a checklist on its

[3] Suncor developed the Fall Protection Plan in response to tension between Suncor's rule that all workers had to use fall protection at elevations four feet and higher, and a separate rule that workers could not use scaffolding as an anchor point for fall protection.

[4] Scaffold tags were color-coded: yellow meant the scaffold was incomplete, green meant there were no issues on the scaffold, and red meant the scaffold could not be used.

[5] It is possible that the yellow tag had been in place since the scaffold was erected on October 17, as Safway's site manager testified that a scaffold inside a confined space would never be green-tagged.

face that, as to the scaffold inside H-401, showed that the scaffold's guardrails were not complete, a harness was required, and an access gate was missing. The tag also stated that Safway had inspected the scaffold on October 26 and October 28.

On October 29, Mistras was scheduled to examine a series of welds done by Recon in H-401. Mistras's turnaround coordinator requested a safe work permit early that morning from Suncor so that two Mistras employees could enter the heater to do their work. The permit was approved and issued that day by Suncor's turnaround coordinator, who gave the permit to a third Mistras employee. The permit had a section entitled "Rescue/Fall Protection," which included six check boxes: "body harness," "lifeline," "yo-yo," "rescue device," "other," and "N/A." Only the "N/A" box had been checked—according to Suncor's turnaround coordinator, this was the default setting for the computerized permit form.

After obtaining the safe work permit from Suncor and before starting work on the morning of October 29, the Mistras crew performed a job safety analysis, as required by Mistras, which identified a potential fall hazard from an elevated surface and stated the need for fall protection and a harness. The two Mistras employees assigned to examine the welds then entered H-401 wearing harnesses, but neither employee used a lanyard, yo-yo, or any other fall-restraining device. A third Mistras employee served as primary confined space attendant, known as a "hole watch," while a Total Safety employee served as secondary hole watch.

Once inside H-401, one Mistras employee inspected the welds from the outrigger platform, which did not have guardrails, while the other Mistras employee assisted him from a lower level.[6] After approximately two to three hours of work, the Mistras employee working on the unguarded outrigger platform fell through the gap between the scaffolding and the wall of the heater, landing on the ground 25 feet below and sustaining severe injuries.

DISCUSSION

The Secretary alleges that Suncor violated § 1926.451(g)(1) because the company "did not ensure that [Mistras's] employees were protected from falling while working on a tubular welded system scaffold." Section 1926.451(g)(1) states in relevant part: "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." The Secretary asserts, and the judge agreed, that Suncor was a controlling employer at the refinery

[6] Although neither employee used personal fall protection while working on the scaffold, only one employee was on the outrigger platform without guardrails.

because it had general supervisory authority over its contractors and controlled their access to the inside of H-401 through its permit system. *See* OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy § X.E.1 (Dec. 10, 1999) (MEP) (defining controlling employer as "[a]n employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them"); *Summit Contractors Inc.*, 22 BNA OSHC 1777, 1780-81 (No. 03-1622, 2009) (agreeing with and quoting the MEP's definition of a controlling employer); *McDevitt Street Bovis Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000) (finding general contractor to be controlling employer where supervisor had "authority to demand a subcontractor's compliance with safety requirements, to stop a subcontractor's work if safety violations were observed, and to remove a subcontractor from the worksite"); *see also Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2062-63 (No. 10-0551, 2014) (finding construction standards applicable to general industry employer who hired subcontractor to perform construction work at its facility).

Suncor does not dispute that it was a controlling employer, nor does it claim that the Secretary failed to meet his burden on three elements of his prima facie case—applicability of the cited standard, employee exposure to the hazardous condition, and noncompliance. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 169 (1st Cir. 1982). It argues only that the Secretary failed to establish that Suncor had constructive knowledge of the violative condition as a controlling employer on a multi-employer worksite. We agree.

To establish constructive knowledge, the Secretary must prove that the employer, with the exercise of reasonable diligence, should have known of the hazardous condition. *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015). On a multi-employer worksite, a controlling employer is liable for a contractor's violations if the Secretary shows that it has not taken reasonable measures to "prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994); *see Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1709 (No. 96-1330, 2001) (consolidated) (noting that general contractor at multi-employer worksite "was responsible for taking reasonable steps to protect the exposed employees of subcontractors"); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 12775, 1976) (holding general contractor "responsible for violations it could reasonably have been expected to prevent or abate by reason

of its supervisory capacity"). A controlling employer's duty to exercise reasonable care " 'is less than what is required of an employer with respect to protecting its own employees.' " *Summit*, 22 BNA OSHC at 1781 (quoting MEP § X.E.2); *see* MEP § X.E.2 ("The extent of the measures that a controlling employer must implement to satisfy [its] duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as frequently . . . as the employer it has hired.").

Here, the judge found that Suncor failed to exercise reasonable care because it did not make use of various opportunities "to become aware of [the violative condition] and prevent the accident[]," and therefore "should have known of the violative condition." As an initial matter, we find that the judge erred by focusing on whether Suncor should have known that guardrails on the H-401 scaffold were absent rather than whether the company should have known that the Mistras employee failed to use personal fall protection while working on the unguarded outrigger platform. The absence of guardrails alone is not a "violative condition"—the cited provision requires fall protection, and that may be achieved by using either guardrails *or* personal fall protection. *See* § 1926.451(g)(1)(vii). Therefore, the judge should have assessed whether Suncor failed to exercise reasonable care in determining that *no* form of fall protection was being used by Mistras during the period covered by the citation. As discussed below, this is of particular significance to assessing the duration of the violative condition, a factor that informs what would constitute reasonable diligence on Suncor's part.

With this in mind, we turn to the judge's rationale for concluding that Suncor failed to exercise reasonable care. According to the judge, the company: (1) never "audited" (i.e., verified) the H-401 scaffold's condition, noting that Suncor's confined space supervisor believed that "tools" within confined spaces, such as the scaffold, did not fall within his job responsibilities, so he did not verify that "safe work practices" were being followed; (2) was unaware of the yellow scaffold tag hanging outside H-401, which reflected that the guardrails were incomplete and that a harness was required; (3) failed to review Safway's change orders to be aware of and evaluate the modifications made to the scaffold; and (4) failed to review the safe work permits for entry into H-401 issued to various contractors, which would have enabled it to note that the permits had inconsistent fall protection requirements. In addition, the judge noted that the yellow scaffold tag at the heater entrance did not include information about the location of available tie-off points and

where guardrails were absent and that this missing information, in combination with the failure of the safe work permit to specify that personal fall protection was required, created confusion on the part of Mistras as to what safety precautions were required for its work on the day in question.

Determining whether a controlling employer has met its duty to exercise reasonable care involves analyzing several factors: those that relate to the alleged violative condition itself and those that relate to the employer's duty to monitor or inspect.

Nature, Location, and Duration of the Violative Condition

Whether a controlling employer should have known of the conditions giving rise to the violations of another employer depends in part on the "nature, location, and duration of th[e] conditions." *David Weekley Homes*, 19 BNA OSHC 1116, 1119 (No. 96-0898, 2000). Addressing duration, the judge—having erroneously considered the "cited condition" to be the absence of guardrails—found the evidence "equivocal." However, as explained above, the absence of guardrails would not constitute a violation of the cited standard if employees used personal fall protection, so the amount of time the heater scaffold lacked guardrails does not dictate what constitutes the duration of the cited condition. As to the time during which the Mistras employee worked on the unguarded outrigger platform without any form of fall protection, the evidence is not equivocal; it was three hours, the time between the employee's 6:49 a.m. entry into the heater on October 29, 2012 and the 9:57 a.m. accident.

Regarding the nature and location of the violative condition, the record shows that both the absence of guardrails and failure to use personal fall protection were hidden from view. Not only was the scaffold itself within a confined space, but the unguarded outrigger platform could only be seen after climbing up to the third level of the scaffold. No one outside H-401, or even inside on a lower level, would have been able to tell if an employee was working on the outrigger platform without using personal fall protection. In addition, because no Suncor employees worked inside the heater, the violative condition was not in plain view of Suncor's own personnel.

In sum, as to the factors regarding the violative condition itself, we find no basis to conclude that Suncor should have known of the Mistras employee's failure to use personal fall protection. *See Knutson Constr. Co.*, 4 BNA OSHC 1759, 1761 (No. 765, 1976), *aff'd*, 566 F.2d 596 (8th Cir. 1977) (finding a lack of constructive knowledge because hazard was hidden from view). *Compare McDevitt Street Bovis Inc.*, 19 BNA OSHC at 1110 (controlling employer charged with constructive knowledge where its subcontractor's noncompliant scaffold was in plain

view and had been erected for "significant period of time"); *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996) (finding constructive knowledge where violative condition was in conspicuous location and of readily observable nature and where employer's crews were in the area); *Centex-Rooney*, 16 BNA OSHC at 2130 (controlling employer charged with constructive knowledge where inadequate guardrails and uncovered floor openings created by subcontractors were in plain view and had existed for "significant period of time").

Controlling Employer's Duty to Monitor and Inspect

Before turning to the next group of factors, two threshold issues merit discussion. First, we agree with Suncor that the judge incorrectly assessed and analyzed the company's actions by relying, contrary to *Summit* and the Secretary's own policy, on exposing employer precedent as the benchmark for how reasonable diligence or care is assessed for a controlling employer whose own employees are not exposed. As stated above, a controlling employer's duty to exercise reasonable care "is *less than* what is required of an employer with respect to protecting its own employees." *Summit*, 22 BNA OSHC at 1781 (quoting MEP § X.E.2) (emphasis added).

Second, the judge found that Suncor failed to exercise reasonable care in inspecting its own workplace on the basis that it did not fully implement various aspects of its own safety program. He should have assessed Suncor's actions, however, based on an objective standard of conduct. *See, e.g., Peavey Co.*, 16 BNA OSHC 2022, 2024 (No. 89-2836, 1994) (knowledge and perceptions of "reasonable person" are external, objective criteria); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541 (No. 86-360, 1992) (consolidated) (whether employer's efforts to comply were "reasonable" under the circumstances is objective test of good faith); *Gold Kist, Inc.*, 7 BNA OSHC 1855, 1860 (No. 76-2049, 1979) ("reasonable person test" is external and objective test). Indeed, under the judge's approach, a controlling employer that attempts to implement a safety program that exceeds its "secondary" safety role could be liable for failing to take actions that otherwise would not have been required. *See Summit*, 22 BNA OSHC at 1781. Moreover, this approach is inconsistent with precedent recognizing that employers should not be penalized for attempting voluntary safety efforts.[7] *See Falcon Steel Co.*, 16 BNA OSHC 1179, 1187 (No. 89-

[7] We also note that the judge analyzed this issue by assessing the evidence *Suncor* pointed to "in support of its argument that it was reasonably diligent . . . ." It is the *Secretary*, however, who bears the burden of establishing that a cited employer was not reasonably diligent as a basis for proving constructive knowledge. *See Jacobs*, 25 BNA OSHC at 1218 (Secretary must prove employer, with exercise of reasonable diligence, should have known of hazardous condition).

2883, 1993) (consolidated) ("[H]olding the results of a company's voluntary self-audits against it would not ultimately serve the interests of employee safety and health."); *Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2066 (No. 78-1443, 1984) (consolidated), *aff'd*, 764 F.2d 32 (1st Cir. 1985) ("If employers are not to be dissuaded from taking precautions beyond the minimum regulatory requirements, they must be able to do so free from concern that their efforts will be relied on to establish their knowledge of an alleged hazard." (citing *S&H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1284 (5th Cir. 1981); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1338 (6th Cir. 1978))); *see also Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2007 (No. 89-0265, 1997) (employer's voluntary safety efforts generally insufficient alone to establish employer recognition of hazard).

Consequently, we assess the extent of Suncor's duty given its secondary safety role as a controlling employer in light of objective factors—the nature of the work, the scale of the project, and the safety history and experience of the contractors involved. *See* MEP §§ X.E.2, X.E.3 (noting factors that "affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care" and stating that "controlling employer is not normally required to inspect for hazards as frequently . . . as the employer it has hired"); *Summit*, 22 BNA OSHC at 1781 ("[T]he extent of measures a controlling employer must implement to satisfy the duty of reasonable care 'is less than what is required of an employer with respect to protecting its own employees.' " (quoting MEP § X.E.2)).

Nature of the Work

We find that the judge erred by implying that Suncor's duty of reasonable care included inspecting inside the heater itself. As Suncor points out, the new Confined Spaces in Construction Final Rule, which was promulgated on May 4, 2015—after the citations in this case were issued—states that a host employer or controlling contractor is not required to enter any confined space to collect information regarding the hazards inside that space *unless* the employer has or will have its own employees working in that space. *See* 29 C.F.R. § 1926.1203(h), note. On review, the Secretary concedes that this new standard reflects "OSHA's rulemaking determination that controlling employers are not required to enter confined spaces to verify the information they receive about confined space hazards," and likewise, Suncor was not required to enter H-401.

We also disagree with the judge to the extent he implied that Suncor could have obtained information about conditions inside the heater by debriefing its contractors, as advocated by the

Secretary. OSHA's current standards contemplate that instead of entering a confined space, a host employer or controlling contractor will use other methods to obtain information about hazards inside the confined space, such as by debriefing its contractor. *See* 29 C.F.R. §§ 1910.146(c)(8)(v) (host employer must debrief contractor at conclusion of entry operations) and (c)(9)(iii) (contractor must inform host employer of hazards confronted or created during entry); 29 C.F.R. § 1926.1203(h)(5) (communication required between controlling contractor and entry contractors after entry operations). Indeed, debriefing would have enabled Suncor to learn that the scaffold did not have guardrails—a condition that likely existed for three days before the accident.[8] Again, however, the violation here is not the absence of guardrails but the failure to use personal fall protection in light of their absence. Simply knowing that the outrigger platform was unguarded would not have enabled Suncor to discover that the Mistras employee was working without personal fall protection for the three *hours* he was inside the heater on October 29. Given this short amount of time, debriefing its contractors would not have enabled Suncor to obtain this information before the violation occurred. Accordingly, in light of the nature of the work, Suncor's duty of reasonable care neither required it to inspect inside the heater nor debrief its contractors.[9]

[8] The record shows that the guardrails were removed as of October 26, 2012. Safway's site manager testified that Safway had modified the scaffold on October 26 to remove planks from the outrigger platforms to allow the welding contractor to insert new heater tubes. According to Safway's site manager, that modification would also have required Safway to remove the guardrails. A safe work permit issued to Safway on the evening of October 26 states the permit was issued "to build, modify, *dismantle* scaffold inside of [H]-401." (Emphasis added.) This is the only permit that includes the word "dismantle" and it corroborates the testimony of Safway's site manager. Once the welding contractor finished inserting the tubes, Safway would have had to submit a new change order to reinstall the planks and guardrails, but Safway's site manager did not know when or if that was done.

Between the time this permit was issued on the evening of October 26 and the time the accident occurred on October 29, Suncor issued one safe work permit to Safway to "build and modify [the] scaffold" on October 28. The heater's scaffold tag indicated that the scaffold was inspected on October 26, which means the scaffold had been tagged as lacking guardrails and requiring the use of personal fall protection at least as of that date. Because Safway only entered the heater to work on the scaffold one time between that date and the accident, and the guardrails were absent on the date of the accident, the scaffold was without guardrails at least since the evening of October 26.

[9] Similarly, although the record supports the judge's finding that Suncor could have discovered there were no guardrails by reviewing the scaffold tag hanging outside the heater entrance for at least three days or by reviewing the change orders Safway had submitted to modify the scaffold, these actions would not have revealed the Mistras employee's failure to use personal fall protection.

Finally, we disagree with the judge that, prior to October 29, Suncor was deficient in not reviewing the safe work permits it issued for entry into the heater; according to the judge, performing such a review would have enabled Suncor to determine if there were any discrepancies in the fall protection required. The Secretary references both the general industry and construction confined space standards as the benchmark for reasonable care in this regard, but: (1) there is no dispute that the general industry standard did not apply here; (2) the new construction standard post-dates the alleged violation and, therefore, is inapplicable; and (3) even if either the general industry or construction confined space standard were applicable, they require routine review of permits only on an annual basis and there is no evidence Suncor failed to do that here. *See* 29 C.F.R. § 1910.146(d)(14) (the employer shall "[r]eview the permit space program, using the canceled permits retained under paragraph (e)(6) of this section within 1 year after each entry and revise the program as necessary, to ensure that employees participating in entry operations are protected from permit space hazards"); 29 C.F.R. § 1926.1204(n) (same).

Scale of the Project

The record shows that the 2012 turnaround involved 250,000 worker-hours, with 6,000 worker-hours involved in the execution phase of the H-401 project alone. Over a three-week period, Suncor documented 354 audits of scaffold tags, including 16 infractions; 408 audits of scaffold use, including 13 infractions; and 542 audits of "fall protection," including 33 infractions.[10] We find that this shows Suncor's safety efforts were more than commensurate with the size, complexity, and short time frame associated with this project. Indeed, the judge acknowledged that the Suncor safety team leader "charged with ensuring safety in a complex and volatile environment, put together an admirable audit program" and that "[t]he sheer number of audits is impressive given the time frame of the turnaround." At the same time, the judge found that this extensive audit program was insufficient with respect to the work occurring in H-401, because the Suncor safety team leader "placed reliance on the presumption that the rules were

[10] These numbers do not capture every finding of compliance; Suncor's safety team leader testified that he did not document all in-compliance audits. Suncor's audits involved completing two documents: "Safety Procedure Comprehensive Audit Forms," which contain specific questions regarding various safe work practices, and procedures that anyone, including contractors, could fill out; and "Safety Field Audit Reports," which contain lines for various safety requirements being reviewed, such as whether scaffolds are compliant or the use of fall protection, that Suncor and contractor safety personnel used to assess safety compliance throughout a particular day.

being followed without actually looking inside H-401," and no one from Suncor's safety team had checked the scaffold tag on H-401 prior to the day of the accident. As discussed above, not even the Secretary would have required Suncor to inspect inside the heater. And as Suncor argues, the judge's almost exclusive focus on this particular scaffold tag despite the hundreds of others the company audited during this period of time effectively imposes strict liability.[11]

Suncor's Contractors – Safety History & Experience

The record supports Suncor's claim that it made concerted efforts to hire only safety-conscious contractors. It is undisputed that before a contractor is hired to work at the refinery, it must pass a screening by a third party, Pacific Industrial Contractor Screening, that examines the contractor's safety policies, training program, OSHA and Mine Safety and Health Administration records (Suncor requires documentation of abatement if applicable), OSHA recordable rate, and insurance rate information. Suncor also extensively trains contractor employees on safety and its

[11] Commissioner Sullivan concludes that the judge's criticisms of Suncor's extensive audit program are emblematic of a larger concern: the Secretary's over-zealous exercise of prosecutorial discretion in what is evidently a practice of automatically citing every potential employer—including controlling employers who have no employees of their own exposed to cited conditions—without regard to the particular circumstances of the employer's role and involvement in the work at the multi-employer worksite. *See, e.g., David Weekley*, 19 BNA OSHC at 1119 (vacating citations alleging multiple willful violations with more than $200,000 in proposed penalties where controlling employer had a "limited presence" on the worksite and the bulk of the violations were created by three subcontractors who were also cited). Here, Suncor was cited by OSHA despite overwhelming evidence that it had a rigorous safety program in place for this project and in disregard of Commission precedent—and the Secretary's own directive—which clearly state that a controlling employer in Suncor's shoes is not required to inspect the worksite as intensively as an employer whose own employees are exposed. *See Summit*, 22 BNA OSHC at 1781; MEP § X.E.2. No doubt, the Secretary believes that his scattershot approach promotes full compliance with workplace safety standards. While the purpose of enhancing workplace safety is clearly the principal reason for the MEP, using it to in effect hold controlling employers strictly liable for the safety shortcomings of their contractors is both unfair and counter-productive.

The Secretary has the obligation under the Act to enforce compliance with OSHA regulations, yet his decision to prosecute a case such as the one before us here, where the "controlling" employer has clearly demonstrated that it has fully complied with its obligations, does nothing to further the purposes of the Act. To the contrary, it may actually impede those purposes by discouraging employers from implementing comprehensive safety programs such as Suncor's and diverting resources that could be utilized by safety and health professionals to enhance the safety of a workplace, to attorneys and experts the employer will have to hire to defend a citation that likely should not have been issued in the first place.

own work rules,[12] and it has a policy that provides for punishing safety violators that the Secretary does not dispute is strict. Indeed, on two separate occasions during the 2012 turnaround, Suncor immediately removed contractor employees from the refinery who were observed not tied-off.

Given this evidence, we agree with Suncor that it was reasonable for the company to rely on its contractors to perform their work safely and to follow its work rules. Indeed, less frequent inspections by a controlling employer may be appropriate if its contractor has a demonstrated history of compliance and sound safety practices. *See* MEP § X.E.3 (more frequent inspections if contractor has history of noncompliance or if relationship between contractors is relatively new; less frequent inspections where there is history of compliance and sound safety practices). *Compare Blount Int'l Ltd*, 15 BNA OSHC 1897, 1900 (No. 89-1394, 1992) (finding controlling employer's reliance on subcontractor unreasonable where there was no evidence controlling employer took any precautionary measures to protect workers and no evidence on how subcontractor was selected as competent subcontractor).

Although the judge was correct in stating that a controlling employer cannot place "total" reliance on its "experienced and safety-conscious contractors," we find that he erred in finding that Suncor's failure to issue a permit that accurately specified that personal fall protection was required showed a lack of reasonable care. It is true that Suncor's permit provided Mistras with information that conflicted with the heater's scaffold tag in terms of whether personal fall protection was required. The fact that Suncor made an error in the implementation of its safety program is insufficient, however, by itself, to establish a lack of reasonable care in meeting its controlling employer obligations. Rather, this single error must be considered in light of: (1) whether Suncor was required to issue the permit in the first place; (2) whether Mistras's ability to comply with the cited standard was dependent on knowing that Suncor believed personal fall protection was

[12] Every contractor employee working at the Suncor refinery completes an orientation course comprised of two components: a standardized course used in the refining industry that serves as a "consistent on-boarding process" and site-specific training. The orientation specifically covers fall protection and the rule that fall protection must be used at an elevation of four feet or greater, and it informs contractor employees that scaffolds will be tagged and that they must "read all the tags on all scaffolds." All contractors working at the Suncor refinery also receive copies of Suncor's Safe Work Practices, which address confined space entry, fall protection, scaffold inspection and use, and safe work permits; the contractors working on the 2012 turnaround were also informed of Suncor's Fall Protection Plan.

necessary; and (3) the extent to which Suncor was otherwise successful (or unsuccessful) in meeting its controlling employer obligations.

None of these points support the Secretary's position. His arguments again seem to presume—erroneously—the applicability of the general industry confined space standard, which, as noted, was rejected by the judge and not challenged on review; in any event, the issuance of a permit under the standard would have been Mistras's responsibility as the exposing employer, not Suncor's.[13] In addition, the evidence shows that Suncor's opinion on the matter was not necessary for Mistras to be able to comply with the standard: the scaffold tag indicated the need for personal fall protection, Mistras's own job safety analysis recognized that need, and the absence of guardrails (and thus the need for personal fall protection) would have been obvious to the Mistras employee upon seeing the outrigger platform.[14] *See Associated Underwater Servs.*, 24 BNA OSHC 1248, 1251 (No. 07-1851, 2012) ("Commission precedent require[s] an employer to detect and assess the hazards to which its employees may be exposed, even those it did not create."). Finally, the evidence discussed above shows that Suncor: (1) made a serious effort to hire only contractors with a good safety record; (2) disciplined contractors who had failed to use fall protection; (3) conducted hundreds of audits to assess safety compliance, including the use of fall protection; and (4) provided extensive training to its contractors' employees. Suncor also expected its contractors to follow OSHA standards, including those related to fall protection, and that expectation was set forth in the contractor orientation and in contractor policies and procedures.

For all these reasons, we find that Mistras could have easily ascertained that the fall protection information in the Suncor-supplied permit—which Mistras, as an exposing employer, was not entitled to rely on—was incorrect. Given the scope of Suncor's safety efforts, which demonstrably exceeded the secondary role of a controlling employer, we find Suncor's error on

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[13] Under the requirements of the general industry standard, the duties of a host employer do not include issuing permits for entries by contractors into a permit-required confined space if its own employees do not enter the space; that is the responsibility of the exposing employer. *See* 29 C.F.R. §§ 1910.146(c)(3) (requirements for employer who decides its own employees will not enter) and (c)(8) (host employer responsibilities).

[14] We note that Mistras's turnaround coordinator testified that if there was an inconsistency between the scaffold tag and the permit, Mistras could ask Suncor for clarification. In addition, the Mistras employee who was working on the lower level testified that Suncor would review the permit with Mistras when it was issued, and if Mistras saw that something was missing or there was an error on the permit, it could have Suncor add to or correct it.

this one permit insufficient to establish that the company failed to exercise reasonable care, particularly given that Suncor was justified in relying on Mistras to be able to recognize if personal fall protection was required and to use it in those circumstances.[15] *See Summit*, 22 BNA OSHC at 1781; *cf. LJC Dismantling Corp*., 24 BNA OSHC 1478, 1481 (No. 08-1318, 2014) (exposing employer lacked constructive knowledge and exercised reasonable diligence where condition existed for only two hours, superintendent inspected worksite multiple times a day, and the employee involved in the violation had no previous safety violations). C*ompare R.P. Carbone Constr. Co.*, 166 F.3d 815, 820 (6th Cir. 1998) (general contractor's reliance on its subcontractor's safety efforts was unjustified because general contractor failed to inform itself as to what safety measures the subcontractor had implemented and violation was in plain view for two weeks).

In conclusion, we find the Secretary has not shown that Suncor failed to exercise reasonable care in its efforts as a controlling employer to detect and prevent the violative condition. The 2012 turnaround was a massive project, and Suncor had an extensive, comprehensive safety program in place to address this work. The Secretary concedes that Suncor was not obligated to inspect inside the confined space, and he has failed to demonstrate that Suncor was required to debrief its contractors since that would not have enabled Suncor to discover a violative condition that existed for only three hours. Finally, a single permit error cannot serve as a basis for showing a lack of reasonable care given Suncor's secondary role, its extensive safety efforts, and the obvious absence of guardrails to any contractor working on the scaffold inside H-401. Therefore, we conclude that the Secretary has not established that Suncor had constructive knowledge of the alleged violative condition.

[15] The parties dispute whether Suncor reasonably relied on Safway to inform it when personal fall protection was required on the scaffold, but we find that question is inapposite because Suncor being told that personal fall protection was required would not have enabled it to determine that the Mistras employee was working without fall protection.

Accordingly, we reverse the judge's decision and vacate the citation.

SO ORDERED.

/s/
Heather L. MacDougall
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
James J. Sullivan, Jr.
Commissioner

Dated: February 1, 2019

Some personal identifiers have been redacted for privacy purposes.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SUNCOR ENERGY (U.S.A) INC., Respondent.	OSHRC DOCKET NO. 13-0900

Appearances:

Jennifer Casey, Esq. and Kristi Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado
For Complainant

Patrick Miller, Esq. and Rodney Smith, Esq., Sherman & Howard, LLC, Denver, Colorado
For Respondent

Before: Administrative Law Judge John H. Schumacher

AMENDED DECISION AND ORDER

I. Procedural history

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). In response to a complaint that an employee had fallen and was seriously injured, the Occupational Safety and Health Administration ("OSHA") initiated an inspection of Suncor Energy LLC's ("Respondent") refinery, located at 5801 Brighton Boulevard in Commerce City, Colorado, on January 14, 2013. (Tr. 37, *Citation and Notification of Penalty*). As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging two serious violations and one other-than serious violation of the Act with a proposed total penalty of $12,000.00. Respondent filed a timely notice of contest, bringing this matter before the Commission. On December 2, 2013, Complainant filed a *Motion to Amend*

Complaint and Citations to Allege, in the Alternative, Violations of Part 1926 and/or Part 1910, which the Court granted on January 21, 2014. Accordingly, in Citation 1, Item 2, Complainant has pled a violation of a general industry standard, and, in the alternative, a violation of a construction standard. A trial was held on October 20–24, 2014, in Denver, Colorado. Both parties have filed post-trial briefs.

II. Stipulations

The parties submitted a set of Joint Proposed Stipulations to the Court. The Stipulations are as follows:

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act.

2. At all relevant times, Respondent was engaged in business affecting commerce within the meaning of section 3(3) and 3(5) of the Act and was an employer within the meaning of section 3(5) of the Act.

3. Respondent timely contested the citation at issue herein and the penalties proposed, pursuant to the provision of section 10(c) of the Act.

4. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

5. In October 2012, Respondent was engaged in a Turnaround at Plant No. 2 of the Commerce City, Colorado refinery.

6. Respondent conducts Turnarounds at the Commerce City, Colorado refinery approximately every five (5) years.

7. One of the projects associated with the Fall 2012 Turnaround was the re-tubing of Heater 401.

III. Jurisdiction

As stipulated to by the parties, the Court finds that jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 651 *et seq.* Further, Respondent has also stipulated that it is an employer engaged in a business and industry affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *See Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005).

IV. Factual Background

A. Witnesses

Thirteen witnesses testified at trial: (1) Compliance Safety and Health Officer ("CSHO") Robert Klostermann; (2); Michael Lynham, OSHA Region 8 Assistant Regional Administrator; (3) Thomas Stockton, Suncor Chief Operator; (4) Troy Mota, Mistras Inspector; (5) Jacob Applegate, Mistras Non-Destructive Examination (NDE) Technician; (6) Elmer Perez, Mistras Technician; (7) Kelly Fulton, Mistras Regional Safety Manager; (8) Shane Ping, Suncor Turnaround Manager; (9) William Schwartzkopf, President of Sage Consulting and Respondent's designated expert; (10) Tye Hansen, Safway Construction Manager; (11) David Mollendor, Suncor Pipefitter and Turnaround Mechanical Coordinator; (12) Seth Calkins, Suncor Safety Team Lead; and (13) Tina Rutledge, former Investigation Coordinator and current Area Operations Cross-Functional Team Manager for Plants 2 and 3 at Suncor.

B. Respondent's Business Operations

Respondent operates a refinery in Commerce City, Colorado and employs approximately 500 employees. (Tr. 691–692). The refinery has three separate plants, which collectively refine approximately 108,000 barrels of crude oil per day. (Tr. 368–69, 694–98; Ex. R-1). Through the

refining process, Respondent produces gasoline, asphalt, jet fuel, diesel, propane, butane, and miscellaneous byproducts. (Tr. 698).

According to Respondent, the three plants (1, 2, and 3) operate independently of one another. (Tr. 694–97). Plant 2 has 12 separate operating units. (Tr. 700–701). Each of the units performs different functions. (Tr. 369–70). The incident giving rise to this case occurred in what is known as the Reformer Unit, which uses a combination of heaters and reactors to increase the octane level of the petroleum product. (Tr. 758–59). The incident giving rise to the present case occurred in Heater 401 (H-401), which is a part of the Reformer Unit in Plant 2. (Tr. 370).

C. Turnaround Operations

Approximately every five years, the refinery performs what is known as a turnaround. (Tr. 698). A turnaround involves shutting down a significant portion of the refinery—in this case, all of Plant 2—to perform capital projects, regulatory inspections, cleaning, and maintenance. (*Id.*). Some of these projects involve construction. (*Id.*).

Due to the scope and complexity of a turnaround, Suncor dedicates an entire group, known as the Turnaround Management Group, to plan, schedule, and direct the turnaround. (Tr. 698–99). This group is managed by Shane Ping and has a full-time staff of approximately 12 employees, which include schedulers, planners, inspectors, and logistics personnel. (Tr. 699). The staff carries out a multi-step process to carry out the turnaround. These steps include gathering information about the projects to be completed, logistical planning, integration of tasks into a schedule, preparation of equipment for execution, carrying out the tasks, documenting engineering or equipment changes, and completion. (Tr. 703–708). The combination of planning and execution can take approximately 24 months to complete. (Tr. 701).

The planning phase of the turnaround that took place in the fall of 2012 was initiated in October 2010. (Tr. 702). Because Plant 2 was scheduled to be completely shut down, Respondent

characterized this turnaround as "Class 1" turnaround, which involves more than 200,000 man-hours, three or more units in the refinery, and 20% capital projects. (Tr. 700, 708-709). According to Respondent, the turnaround involved 17 different capital projects, most of which involved modifications to existing equipment. (Tr. 709–10; Ex. R-3); *see also Resp't Br.* at 6–7 (detailing specific projects). The projects identified as "capital projects" cost Respondent $24 million; however, the turnaround as a whole also included other projects costing an additional $36 million.[1] (Tr. 709–711). In addition, the turnaround also involved 35 separate contractors, two shifts per day, 200 employees per shift, and approximately 250,000 field labor hours. (Tr. 712–13). Due to the large number of projects, Respondent created and adhered to detailed schedules, which identify the project, necessary steps, labor hours, and scheduled start/stop times. (Tr. 736–739; Ex. R-7).

Respondent has a maintenance department that performs routine maintenance on a day-to-day basis during normal operations. Mr. Ping testified that this typically involves activities such as instrument calibration, checking motors and circuit breakers, and oil changes. (Tr. 752). During a turnaround, the 60-man maintenance department either continues to perform maintenance on the parts of the refinery still in operation or can work in turnaround-specific jobs, such as coordinators. (Tr. 755–56). Ping also testified that, although they perform preventive maintenance during turnarounds, he estimated that only 10% of the turnaround projects are of this sort. (Tr. 757).

D. Heater 401 Project

The work performed on H-401 was one of the identified capital projects. (Tr. 42–43, 709; Ex. R-3). H-401 is one of three heaters in the Reformer Unit. (Ex. R-12 at 0065). It is a cylindrical structure that measures nearly 14 feet in diameter on the outside and almost 12 feet in diameter on the inside; the bottom floor is approximately 10 feet above grade; and the top of the radiant section

[1]. According to Respondent, the additional projects are also capitalized. (Tr. 710).

was approximately 47 feet above grade. (*Id.*). The three heaters are tied together at the top in what is known as the convection section. (Ex. R-2). The heater itself is powered by four gas-fueled burners, which heat the petroleum product traveling through the heater tubes. (Tr. 759–760). Heater tubes run vertically from the bottom of the heater until they reach the top, at which point they converge towards the center. (Ex. C-1; Ex. R-12). H-401 was fast-tracked as a turnaround project because inspections revealed that the vertical portions of the heater tubes, also known as the radiant section, were thinning to the point that they would fail prior to the next scheduled turnaround. (Tr. 760–61, 787–88, Ex. C-26 at 3).

According to Ping, during the planning phase of the project, Respondent determined that it needed to upgrade the metallurgy in the tubes. (Tr. 733). Prior to the turnaround, Respondent had been using tubing that was designed for temperatures of 1100-degrees Fahrenheit. (Tr. 763–64). This tubing was identified as A335 Gr P-22 ("P-22"), which indicates that it is a Chrome-Molybdenum ("chromoly") base steel containing 2% chrome. (Tr. 764). It is considered to be one of the lowest grades of chromoly. (Tr. 765). Notwithstanding its designed operating temperature, Respondent had been operating at 1200-degrees Fahrenheit for at least a few years prior to the turnaround. (Ex. R-5 at 2). In response, Respondent contracted with Tulsa Heaters, Inc. to design, fabricate, and deliver new heater tubes constructed of P-91 grade chromoly, which is comprised of 9% chrome and is designed to withstand higher temperatures.[2] (Tr. 768).

The complexity of replacing the heater tubes is reflected in the personnel required to carry it out. With respect to the H-401 project alone, Respondent fielded a management team, which

[2]. Contrary to Complainant's assertion that this upgrade was only based on the improvements in technology that occur with the passage of time, Respondent points out that P-22 chromoly tubes are still available on the market. (Tr. 766). Further, the Court does not glean much from Tulsa Heaters' characterization of the tubes as "replacement in-kind" other than that they were compatible with the existing system. (Ex. R-4).

included a project manager, a project engineer, a project controller, a project scheduler, quality control, a field coordinator, multiple engineers, a project estimator, a turnaround planner, a turnaround coordinator, a metallurgist, and an inspector. (Tr. 769–770; Ex. R-5). In addition to Tulsa Heaters, Respondent contracted with RECON Refractory and Construction, Inc. to weld the tubes; Mistras Group to perform examinations of the welds performed by RECON; Winslow Crane to aid in the removal and insertion of the tubes into the heater; Safway to construct scaffolding; Superheat to perform heat treatment for specialized welding required by P-91 tubes; Western Refractory to remove and replace refractory within H-401; RSC to provide medium-sized tools; and Total Safety to provide hole watches and general safety support for confined space entry into H-401. (Tr. 715–723; 774).

E. Safe Work Practices and Policies

The parties agree that H-401 is a permit-required confined space. Accordingly, Suncor required all employees and contractors entering into the space to comply with its confined space program.[3] (Tr. 89–90, 382–84, 1185–86; Ex. C-2, Suncor Confined Space Entry Safe Work Practice ("SWP")). Pursuant to this program, Respondent's operations department was responsible for prepping the space for entry and for issuing confined space permits.[4] (Tr. 385–95, Ex. C-2). According to Stockton, the confined space was prepared by ensuring the removal of hazardous substances from the pipes and "blinding" them to prevent additional substances from entering the confined space, isolating energy sources, and performing lockout/tagout. (Tr. 388–

[3]. Respondent implements a contractor vetting program to ensure it hires safety conscious contractors. (Tr. 1015). The employees of the contractors that are hired are required to go through orientation training, which includes basic refinery safety principles and site-specific training on issues such as fall protection, scaffolding, and confined space entry. (Tr. 1020–21; Exs. R-36, R-37).

[4]. Respondent does not use a specific confined space permit; rather, it uses its own Safe Work Permit, which can be used for confined space entry.

389). As permit issuer, Respondent's confined space supervisor was responsible for knowing the hazards associated with the specific confined space; ensuring that the permit was correctly filled out; and terminating the permit at the end of entry operations. (Tr. 389–90, Ex. C-2). That said, Respondent's confined space program also requires contractors to "inform operations of any hazards confronted or created in permitted confined spaces, either through a briefing before or during the entry operations." (Ex. C-2 at 4).

In order to enter into H-401, a contractor communicates with Suncor operators to "jointly fill out the sections of the permit relating to job preparation and special personal protective equipment required for the job." (Ex. R-33 at 6; Ex. C-8). The permit itself can be initiated by the contractor entering information into the computer system, or by the operator doing so on the basis of the information received from the contractor. (Tr. 1072–1074). Once submitted, the operator determines the conditions associated with the work to fill out the portions of the permit dealing with equipment and site prep. (*Id.*).

Because the lion's share of the work in H-401 was performed from a scaffold, contractors were also expected to comply with Respondent's policies on scaffolds and fall protection. (Exs. C-3, C-5). As a general rule, Respondent's policy required fall protection for work performed at elevations of four feet and above that is not protected by guardrails. (Ex. C-3 at 8). That policy had a strict prohibition against tying off to the scaffold. (Ex. C-3 at 7; C-5 at 13). In H-401, however, there were no approved tie-off points on the structure itself, thus Respondent had to modify its fall protection plan for the turnaround to allow for tie-off points on the scaffold. (Tr. 1055–1062). These alternative tie-off locations were supposed to be identified with a white tag that would be appended to the existing scaffold tag. (Tr. 1059–60; Ex. C-4).

In order to address the condition of the scaffold system, Respondent utilizes what are known as scaffold tags. (Ex. C-5, C-6). These tags contain information regarding when the

scaffold was built, who built it, the competent person's signature and date, the load-bearing characteristics, and inspection records. (Ex. C-5 at 14–15). Tags are color-coded: green means no problems and no fall protection required; yellow tags indicate that the scaffold is incomplete in some respect, as in guardrails; and red tags indicate that the scaffold should not be used. (*Id.* at 15). One of the spaces on the yellow tag requires the drafter to indicate whether the guardrails are complete and another provides a space to indicate what specific hazards or deficiencies are present on the scaffold. (Ex. C-6). The tag also has a checkbox to indicate whether a harness is required—according to Stockton, Mollendor, and Calkins, "harness required" is the equivalent of "fall protection". (Tr. 433, 999–100, 1051). Although Respondent provided the tags, it was the obligation of Safway to complete the information on the tag. (Tr. 1051; Ex. C-6).

Throughout the turnaround, various modifications had to be made to the scaffold. (Ex. C-31). These modification requests were submitted to David Mollendor, Respondent's mechanical coordinator for the turnaround. (Tr. 992–96). Once he received a request—typically from a contractor—he would contact Safway to schedule and carry out the modification.[5] (Tr. 993–94). Mollendor testified that he would not ask the requestor, whether Safway or a contractor, what the nature of the modifications were; instead, he only communicated who had made the request. (Tr. 994). Mollendor claimed that this was due, in no small part, to the fact that he was responsible for carrying out such requests multiple times a day throughout the turnaround. (Tr. 997). The change order gave no indication as to the nature of the modifications made by Safway. (Tr. 996–97; Ex. C-31). If Safway modified the scaffold such that fall protection was required, it was supposed to notify Respondent of the change so that the white-tag procedure discussed above could be implemented. (Ex. C-4).

[5]. In some instances, however, the contractor would submit a modification request to Safway, who would then communicate with Mollendor. (Tr. 998).

The foregoing safe work practices and policies were relayed to contractor employees and supervisors through training programs, regular safety meetings, and the distribution of materials related thereto. (Tr. 1020–21, 1037–56; Exs. C-17 to C-22). In some instances, training was coupled with testing materials to ensure that they were understood. (Tr. 1042, 1045). Respondent's Safety Department also performed safety audits during the turnaround, which were intended to identify gaps in knowledge or execution of the permit process. (Tr. 1086–88; Ex. R-24, R-25). The scope of these audits, however, did not include an actual inspection of the work inside H-401. (Tr. 1109, 1138–40).

F. Scaffolding inside H-401

The space inside H-401 was accessed in two ways. Employees entering the space used a ladder that accessed the lower part of the heater. (Ex. C-1 at 1). In order to take out the old tubes and insert the new ones, Respondent hired Recon to remove a three-foot diameter hole in the roof. (Tr. 800–801). The tubes were flown in and out of H-401 using a crane provided by Winslow Crane. (Tr. 800).

Safway was hired to install scaffolding inside H-401 so that other contractors could access the tubes for welding, non-destructive examination (NDE), and heat treatment. (Ex. C-1 at 22–23). The scaffold was erected on October 17, 2012. (Ex. C-6). Due to the shape of the heater, Safway installed a three-tier scaffold, with outrigger platforms located approximately 20 inches above the top tier and approximately 25 feet above the heater floor. (Tr. 45–46; Ex. C-1). This platform was designed to provide contractors with more direct access to the tubes, but a three-foot gap remained between the outrigger platform and the heater tubes, which run along the wall of H-401. (Tr. 45; Ex. C-1). The consensus was that the entire scaffold had a complete set of guardrails as of the date that the scaffold was erected. (Tr. 429, 944).

According to Respondent's records, Safway was issued six individual permits to modify the scaffold inside H-401. (Ex. C-16). Neither the permits nor the change orders indicate that guardrails had been removed or when; however, Tye Hansen testified that a Safway crew removed some planks on the scaffold to permit the insertion of new heater tubes, which would have required removal of guardrails. (Tr. 950–51; Ex. C-24). Unfortunately, no one could testify as to when exactly the guardrails were removed or which contractor had made the request. The yellow scaffold tag attached to the entrance of H-401 indicated that Safway had inspected the scaffold on October 26 and October 28, 2012. (Ex. C-6). The tag was labeled "Incomplete Scaffold", noted that guardrails were not complete, and indicated that a harness was required. (Ex. C-6). In the section of the tag for identifying deficiencies, Safway only noted that the access gate was missing. (*Id.*). Even though the tag indicated that guardrails were incomplete, there were no white tags on the scaffold to indicate an approved tie-off point. (Tr. 1121).

G. The Accident

On October 29, 2012, Mistras was scheduled to perform examinations of the welds done by Recon. (Tr. 451–52). Mistras' turnaround coordinator, Elmer Perez, initiated a safe work permit, which was approved by Tom Stockton, who served as Respondent's turnaround coordinator and permit issuer. (Tr. 364, 367–68, 371, 569, 580; Ex. C-8 at 1). The permit was requested to allow two Mistras employees, Troy Mota and [redacted], access to H-401 to examine the welds performed by RECON. (Tr. 512, 580; Ex. C-8 at 1). Jacob Applegate, another Mistras employee, received the permit from Mr. Stockton. (Tr. 513).

As previously noted, portions of the permit were filled out by Mr. Perez—according to Stockton, all of the sections above "Equipment Preparation and Condition" were the responsibility of the contractor. (Tr. 396–97). The permit also has a section entitled "Rescue/Fall Protection", which includes six check boxes: body harness, lifeline, yo-yo, rescue device, other, and N/A, for

"not applicable". (Ex. C-8). The N/A box had been checked on Mistras' permit. (*Id.*). Stockton testified that the form was prepopulated in the system that way and that he made no attempt to correct the entry because he said that he had no information to indicate that fall protection was required. (Tr. 429). Based on the information available to him at the time, Stockton testified he only would have checked "body harness", which, for purposes of confined spaces, means a harness for rescue. (Tr. 408, 429). He believed, as did the hole watch[6] hired by Respondent, that the scaffolding was green-tagged. (Tr. 429; Ex. R-34 at 00034; C-7 at 9).

Once Applegate had retrieved the permit, the Mistras crew performed a job safety analysis (JSA), which identified a potential fall hazard from an elevated surface. (Ex. C-19). The JSA also stated the need for fall protection and a harness. (*Id.*). Mota and [redacted] entered H-401 wearing a harness, but did not use a lanyard, yo-yo, or any other fall-restraining device. (Tr. 482). Applegate served as primary hole watch due to the use of radiation during the non-destructive examination process. (Tr. 501–504). Applegate did not recall any specifics of the conversation he had with Mota and [redacted] prior to their entry into H-401.

According to Mota and Applegate, they understood the yellow tag's "harness required" requirement to mean a harness for rescue purposes, because nearly all confined space entries require a harness. (Tr. 479, 521). In support of this proposition, Complainant notes that the permit indicated that fall protection was "not applicable", that it only identified a missing access gate as a deficiency, and that no white tags were present on the scaffold. (Ex. C-6). Applegate also testified that the fall hazard/fall protection information in the JSA referred only to the general hazard of working at elevation and that guardrails were considered a form of fall protection. (Tr. 536–37).

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[6]. Respondent hired a contractor to perform hole watch services for confined space entry. (Ex C-7 at 9).

After Mota and [redacted] entered H-401, [redacted] inspected the welds from the outrigger platform and Mota assisted him from a lower level in order to reduce his exposure to radiation. (Tr. 455–56). Around 9:55 a.m. on October 29, [redacted] fell through the gap in the scaffolding and the wall of the heater and landed on the ground 25 feet below. (Tr. 87–88; Ex. C-7 at 5). As a result of the fall, [redacted] is now paraplegic. (*Id.*).

H. Post-Accident Inspections

As noted earlier, Complainant initiated an inspection of the refinery in response to a fall protection complaint and concluded that Respondent violated the Act in multiple respects. (Ex. C-9). In addition to Complainant's inspection, Respondent and Mistras also performed their own investigations of the accident. (Tr. 628, 1167; Ex. C-7, C-21).

Kelly Fulton, Mistras' Mountain Region Safety Manager, performed an inspection on behalf of Mistras. In his report, he noted that the Mistras JSA identified a potential fall hazard and also noted that "[i]ndividuals performing work did not stop the job due to unsafe conditions or unsafe scaffolding." (Ex. C-21 at 2). That said, Fulton also testified that the yellow scaffold tag should have indicated "100% tie-off" and that, as it was written, the yellow tag did not necessarily inform entrants that a lanyard or other fall-restraining device was necessary. (Tr. 648–49).

Tina Rutledge, who worked as an inspector for Respondent at the time of the accident, concluded that the root cause of the accident was a product of human error; namely, [redacted]'s failure to follow procedures. (Tr. 1172; Ex. C-7). She noted, "The contractor did not tie off because he chose not to follow or heed the caution and direction of the yellow tag on the scaffold on the day of the incident." (Ex. C-7 at 2, 8). Notwithstanding the training Mota and [redacted] received, Rutledge found that they failed to follow Respondent's or their own fall protection and scaffolding rules. (Ex. C-7). In addition to her "root cause" analysis, Rutledge also found that: (1) there were

"inconsistencies in the understanding of the actual working conditions of the scaffold in the heater"; (2) detailed records of H-401 scaffold modifications were not kept; (3) there was insufficient notification to the appropriate individuals that the scaffold had been modified and required different PPE; (4) there were discrepancies in the confined space entry permit issued for H-401; and (5) "[t]he parties involved in issuing, reviewing and accepting the permit did not engaged in an effective dialogue to ensure all identified hazards were documented on the permit." (Ex. C-7 at 2–3).

V. Applicable Law

To establish a *prima facie* violation of Section 5(a)(2) of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the 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. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

VI. Discussion

A. Construction Versus Maintenance

As noted at the beginning of this Decision, Complainant requested and received leave to amend his *Complaint* to allege an alternative basis for the violation described in Citation 1, Item 2. The original Citation Item cites 29 C.F.R. § 1910.146(d)(4)(iv). Part 1910 standards govern general industry, including, as is germane to the present case, so-called maintenance activities. *See Gulf States Utility Co.*, 12 BNA OSHC 1544, 1546 (No. 82-807, 1985) (quoting dictionary definition of 'maintenance' as "[t]he work of keeping something in proper condition"). The amended Citation Item cites 29 C.F.R. § 1926.451(g)(1). Part 1926 standards govern construction work, which is defined as, "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b). *See Jimerson Underground*, 21 BNA OSHC 1459, 2006

WL 741753 at *2 (No. 04-0970, 2006) ("Work that involves replacing existing equipment is considered 'work for . . . alteration' and, therefore 'construction work,' under this section." (quoting *United Telephone Co. of the Carolinas*, 4 BNA OSHC 1644, 1646 (No. 4210, 1976))). *But see Pub. Utils. Maint., Inc. v. Sec'y of Labor*, 417 Fed. Appx. 58 (2d Cir. 2011) ("[W]hile painting performed as a part of a construction project would be considered construction, painting performed as maintenance . . . would not be."); *Gulf States Utility Co.*, 12 BNA OSHC 1544, 1546 (No. 82-807, 1985) (holding that replacement of damaged insulators, although a "repair", constituted maintenance governed by Part 1910). Respondent contends that the plain language of 1910.12(b), its regulatory history, and Complainant's prior interpretations all support the determination that the work on H-401 was construction. Complainant, however, argues that the Court should adopt its reasonable interpretation of the standard, which would characterize the work on H-401 as maintenance. *See Unarco Comm. Prods.*, 16 BNA OSHC 1499 (No. 89-1555, 1993) (holding that Court may defer to agency's reasonable interpretation of standard when plain meaning and regulatory history do not clarify standard's applicability).

According to *Solis v. Summit Contractors, Inc.*, "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." 558 F.3d 815, 823 (8th Cir. 2009) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The particular dispute in this case is whether the removal and replacement of heater tubes in H-401 constitutes maintenance or construction. As noted above, the work on H-401 was one part of a larger project involving $60 million in capital improvements to Plant 2 of the Suncor refinery. The work on H-401 involved: (1) a precise timeline for the work, expected to take 3–4 weeks, which was developed months in advance of the actual project; (2) specially ordered engineered steel, chro-moly tubes; (3) hiring multiple contractors; (4) removing a sizeable portion of the roof to remove and install tubes; (5) use cutting torches to remove existing

tubes in their entirety; (6) removing refractory; (7) using a crane to both remove old tubes and insert new tubes; (8) installing new thermocouples; (9) upgrading the metallurgy of the pipes; and (10) utilizing specialized welding techniques for upgraded piping.

Respondent focuses its argument on the term "alteration", which *Merriam-Webster* defines as "mak[ing] different without changing into something else." *See Resp't Br.* at 43 (citing WEBSTER, n.d. Web. 20 Nov. 2014 (www.merriam-webster.com/dictionary/alter)); *see also Jesco, Inc.*, 24 BNA OSHC 1076 (No. 10-0265, 2013) (citing favorably to dictionary in plain meaning analysis). Indeed, the Commission has found that a particular type of work is construction based on this plain reading of the standard. *See Jimerson Underground*, 21 BNA OSHC 1459, 2006 WL 741753 at *2 (replacing existing sewer line); *Ryder Transp. Svcs.*, 2014 O.S.H.D. (CCH) ¶ 33,412, 2014 WL 5025979 at *2 (No. 10-0551, 2014) (installing new electrical equipment); *United Telephone Co. of the Carolinas*, 4 BNA OSHC 1644, 1646 (No. 44210, 1976) (removal and erection of telephone poles and transferring of lines). Merely replacing something, however, does not necessarily constitute construction. *See Gulf States Utility Co.*, 12 BNA OSHC at 1546 (replacing damaged porcelain insulators with epoxy insulators is maintenance because "lines were simply maintained in the same condition they were before the insulators were damaged").

Based on the foregoing plain language interpretation, Respondent contends that the upgrade from P22 to P91 chro-moly tubes, the upgraded thermocouples, and the modifications to the body of the heater during the turnaround constituted an alteration. Complainant, however, argues that H-401 does not perform any differently than it did prior to the turnaround. The idea behind the upgraded tubes was to allow for a higher operating temperature—1200-degrees Fahrenheit. (Ex. C-26). The lower grade tubes, however, had been operating at that higher temperature for a few years prior to the turnaround. (Ex. C-26 at 3). In response, Respondent argues that it risked failure by running H-401 at higher temperatures, which is no longer the case

now that it has installed the upgraded heater tubes. Further, Respondents points out that H-401 was significantly altered to accommodate the work—approximately one-third of the roof was removed, *all* of the tubes were removed and replaced, and a scaffold was installed inside of it to facilitate the removal and installation of the tubes.

The Court agrees with Respondent. The Commission has consistently applied the plain meaning of the term "alteration" in determining whether a particular type of work is construction. *See Jimerson*, 21 BNA OSHC 1459; *Ryder*, 2014 O.S.H.D. (CCH) ¶ 33,412; *Active Oil Svc., Inc.*, 21 BNA OSHC 1184 (No. 00-0553, 2005) (holding that conversion from oil to gas heat was an alteration of temple and surrounding property). This is not a case where an employer was merely installing a liner or sleeve into an existing system to prevent a breakdown of the system itself. *See Public Service Co. of Colorado d/b/a Xcel Energy*, Nos. 08-0634 & 08-0635. Rather, Respondent removed the physical tubes, which are a sizeable and integral part of the refining process and replaced them with tubes of higher quality, which were designed to withstand higher operating temperatures. (Tr. 237).[7] Coincident with that change, Respondent also installed new thermocouples to accommodate the increase. This process involved removing a significant portion of the heater's roof, utilizing a crane to remove and insert the tubes into the heater, and constructing a three-tier scaffold within the heater to provide access to the welders—who had to use specialized welding techniques for the upgrade in steel—and the NDE technicians, who inspected the welds.

Although H-401 still performs the same function as it did prior to the turnaround, it was not "simply maintained in the same condition . . . ." *See Gulf States Utility Co.*, 12 BNA OSHC at 1546. Respondent made a conscious decision to upgrade the metallurgy of the tubes in order to accommodate the higher temperatures at which the heater was running. Whether Respondent

[7]. CSHO Klostermann agreed that the heater tubes were a major component of the heater.

should have been operating the old system at higher-than-recommended temperatures is not before the Court, but the fact that it did so does not compel the conclusion that the installation of higher-quality tubes was not an alteration. Rather, but for the upgrade in tubes, the system would likely break down or fail much sooner if the replacement was truly one-for-one. (Tr. 765–68). In other words, simply because the system was operating at the higher temperature prior to the turnaround does not, of itself, mean that the metallurgical- and component-related upgrades were not alterations. As such, the Court finds that the work on H-401 was construction.

Notwithstanding the foregoing conclusion, and as an alternative to it, the Court will also address the remaining two steps in the regulatory interpretation hierarchy—regulatory history and the reasonableness of Complainant's interpretation. As noted above, there is a fair amount of crossover in the terms used to define construction. For example, not all construction work involves an alteration. *See Brand Energy Sol'ns LLC*, 2015 WL 1957888 (No. 09-1048, 2015) (agreeing with Secretary that "whether a structure is altered during work project is not necessarily determinative"). Likewise, not all work that maintains the structure or equipment in normal operating condition is maintenance. *United Telephone*, 4 BNA OSHC at 1646 (holding that telephone pole replacement is construction). Regardless of which interpretive tool is applied, however, the Court still finds that the work performed during the turnaround of Plant 2 was construction.

Contrary to Respondent's analysis, the Court does not find that the applicable regulatory history provides any additional insight into the interpretation of 1910.12(b), at least as it is applied to this set of facts. OSHA's Part 1926 standards were adopted, in part, from the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 3704 ("CSA"), which covered certain contracts involving the Federal Government that involved "construction, alteration, and repair, including painting and decorating." 40 U.S.C. § 3704(a). OSHA utilized this terminology when it defined

"construction work." *See* 29 C.F.R. § 1910.12(b). Section 1910.12(b) further directs regulated parties to 29 C.F.R. § 1926.13, which provides:

> The terms *construction, alteration, and repair* used in section 107 of the [Construction Safety] Act are also used in section 1 of the Davis-Bacon Act (40 U.S.C. 276a), providing minimum wage protection on Federal construction contracts, and section 1 of the Miller Act (40 U.S.C. 270a), providing performance and payment bond protection on Federal construction contracts. . . . The use of the same or identical terms in these statutes which apply concurrently with section 107 of the [Construction Safety] Act have considerable precedential value in ascertaining the coverage of section 107.

29 C.F.R. § 1926.13(a); *see also* 29 C.F.R. 1910.12(b). The Davis-Bacon Act ("DBA") uses roughly the same definition of "construction" as the one provided in 29 C.F.R. § 1910.12(b). It states:

> The terms construction, prosecution, completion, or repair mean . . . [a]ll types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work within the meaning of paragraph (l) of this section . . . , including without limitation . . . altering, remodeling, installation on the site of the work of items fabricated off-site; painting and decorating . . . .

See 29 C.F.R. § 5.2(j)(1)(i)–(ii).

Part of the problem with using the DBA to define construction in the context of the OSH Act is that the OSH Act and the DBA have different aims. "The language of the [Davis-Bacon] Act and its legislative history plainly show that it was . . . enacted to . . . protect . . . employees from substandard earnings by fixing a floor under wages on Government projects." *United States v. Binghamton Const. Co.*, 347 U.S. 171, 177 (1954). The OSH Act, on the other hand, was enacted to assure safe and healthful working conditions for working men and women by enacting standards suited for that purpose. *See generally* 29 U.S.C. § 651. "In other words, the reason for characterizing a particular industry, i.e., as construction versus maintenance, is to ensure that employees receive adequate protection against safety and health hazards that may be present in

their particular profession." *Public Svc. Co.*, Nos. 08-0634 & 08-0635 (citing different Parts of 29 C.F.R. that govern industries such as construction, marine, and agriculture).

As discussed by Judge Augustine in *Public Service*, under the DBA, "the primary considerations are the location and object of the work and the parties to the contract." *Id.* This is confirmed by the structure of the DBA, which defines the terms "construction, prosecution, completion, or repair" to mean "*[a]ll types of work done on a particular building or work at the site thereof* . . . ." *Id.* § 5.2(j)(1) (emphasis added). These are not the primary concerns of the OSH Act. As such, courts have held that while statutes such as the DBA have considerable precedential value, they are not determinative. *See CH2M Hill, Inc. v. Herman*, 192 F.3d 711, 719 (citing 29 C.F.R. §§ 1910.11(b) & .12(c) ("Thus, while the Secretary may have referenced other federal statutes as having precedential value, she clearly did not adopt the definitions of these statutes and their regulations in their entirety."); *Underhill Constr. Corp. v. Sec'y of Labor and OSHRC*, 526 F.2d 53 (1975). Although there may be instances where the regulatory history aids in the interpretation of the term "construction", the Court agrees with Judge Augustine that such is not the case here.

If the applicability of a regulatory provision cannot be determined with resort to the plain meaning, legislative history, or related provisions, the Court may defer to a reasonable interpretation developed by the agency charged with administering the challenged statute or regulation. *See Unarco Comm. Prods.*, 16 BNA OSHC 1499 (No. 89-1555, 1993). In assessing the reasonableness of the Complainant's interpretation, the Court must consider whether the interpretation "sensibly conforms to the purpose and wording of the regulations." *Martin v. OSHRC (CF&I Steel)*, 499 U.S. 144, 151 (1991) (internal citations omitted). This evaluation takes into account whether Complainant has consistently applied the interpretation and whether the regulated parties have been provided with adequate notice. *Union Tank Car Co.*, 18 BNA OSHC

1067, 1069 (citing *CF&I Steel*, 499 U.S. at 150, 157–58). "The weight of such [an interpretation] in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control." *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851 (No. 89-1300, 1992) (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

Based on Complainant's interpretation of the standard, he concludes that the facts establish that the work on H-401 was construction. This conclusion is premised on two factors: (1) the nature of the work; and (2) the context in which the work occurs. Citing to *Gulf States*, Complainant argues that the work performed on H-401 was to maintain proper functioning of the heater. *See Gulf States*, 12 BNA OSHC at 1546. Complainant also contends that the turnaround itself was nothing more than a large-scale event to maintain the refinery itself in proper working order, and, as such, any events taking place during the turnaround would be considered maintenance. *See Compl't Br.* at 16–17 (citing *Cenex Refinery*, 14 BNA OSHC 1727 (No. 89-1350, 1990) (ALJ)). Respondent, on the other hand, claims that Complainant's interpretation is unreasonable based, in part, on its inconsistency with prior agency interpretations of "construction" versus "maintenance". The Court agrees with Respondent.

Starting in 1983, Complainant began issuing letters of interpretation ("LOI"), official memoranda, and directives discussing the distinction between construction and maintenance. *See* John B. Miles, Jr., Letter of Interpretation, Oct. 25, 1983 ("Miles LOI"). That first letter only reiterated the definition of construction found in 1910.12(b); however, in subsequent iterations, Complainant has added additional factors to consider. In 1994, Deputy Assistant Secretary James Stanley issued a more comprehensive Memorandum addressing the definition of construction versus maintenance. (Ex. C-10, James W. Stanley, Policy Memorandum, August 11, 1994

("Stanley Memo")). As to construction, Mr. Stanley wrote that "construction work is not limited to new construction. It includes the repair of existing facilities. The replacement of structures and their components is also considered construction work." *Id.* As to maintenance, Mr. Stanley noted that there is no specified definition in the regulations and opted for a definition taken from the directive on confined spaces—"making or keeping a structure, fixture or foundation (substrates) in proper condition in a routine, scheduled, or anticipated fashion." *Id.* That memorandum also stated that "determinations of whether a contractor is engaged in maintenance operations rather than construction activities must be made on a case-by-case basis, taking into account all information available at the site." *Id.*

In 1999, Complainant issued two LOI that address two additional factors to consider when making the "case-by-case" determination of whether a particular activity is construction or maintenance. (Ex. C-12, Randall A. Tindell, Letter of Interpretation, February 1, 1999 ("Tindell LOI"); Ex. C-13, J. Nigel Ellis, Letter of Interpretation, May 11, 1999 ("Ellis LOI")). The Tindell LOI reiterates the Stanley Memorandum's definition of "maintenance" and also introduces a new factor—size. In that respect, the LOI states that size is a factor "if, because of its size, the process of removal and replacement involves significantly altering the equipment that the valve is in." (Ex. C-12). To illustrate, the LOI discusses two similar scenarios that, based on their facts, could be characterized as maintenance or construction. In the first scenario, the LOI concludes that the removal and replacement of a household water shut-off valve is maintenance because it can be done "without making major alterations to the heating system." *Id.* In the second scenario, the LOI concludes that the removal and replacement of a 36-inch valve, which is one of three major components in a processing system and requires 50 percent of all parts in the system to be cut, moved, altered or replaced, would constitute construction. *Id.* The Ellis LOI, on the other hand, further defines maintenance as being an "anticipated, routine, and periodic event" to maintain

structures and equipment in their original condition" and further notes that longer periods of time do not necessarily alter that determination. (Ex. C-13).

The most recent interpretive document issued by Complainant was a letter sent to a Raymond V. Knobbs from the Directorate of Construction. (Ex. C-14, Raymond V. Knobbs, Letter of Interpretation, November 18, 2003 ("Knobbs LOI")). This letter is the most comprehensive statement from Complainant regarding the maintenance-versus-construction distinction. Of particular note are the following passages:

- "Construction work is not limited to new construction, but *can include the repair of existing facilities or the replacement of structures and their components*. For example, the replacement of one utility pole with a new, identical pole would be maintenance; however, if it were replaced with an improved pole or equipment, it would be considered construction."

- "In addition to the concept of one-for-one replacement versus improvement, the scale and complexity of the project are relevant. This takes into consideration concepts such as *the amount of time and material required to complete the job*."

- "[I]f a steel beam in a building had deteriorated and was to be replaced by a new, but identical beam, the project would be considered a construction repair rather than maintenance *because of the replacement project's scale and complexity*."

- "Replacement of a section of limestone cladding on a building, though not necessarily a large project in terms of scale, would typically be considered construction because *it is a complex task in view of the steps involved and tools and equipment needed to do the work*."

- "Note that, though the work may itself occur during a scheduled "maintenance outage," *this alone is not enough to qualify it as maintenance*. For example, it is possible that the work may be construction, but scheduled during a maintenance outage to minimize lost productivity."

(Ex. C-14) (emphasis added).

As noted by the Commission, the deference due to Complainant's interpretation depends, in part, on its consistency with other agency interpretations on the same topic and the validity of its reasoning. *See Simpson*, 15 BNA OSHC 1851. The Court finds that Complainant's

interpretation in this case is inconsistent with published guidance documents and that his rationale is flawed.

As to the nature of the work on H-401, Complainant overemphasizes the end result—keeping the heater in proper condition—and discounts the work that was actually performed. Indeed, the end result of the work was a fully-functioning heater, same as before the work began; however, as noted in the Knobbs LOI, construction can include the repair of existing facilities or the replacement of structures and their components, as was the case here. Likewise, though context is important to this determination, Complainant has stated that even though work occurs during a scheduled maintenance outage, "this alone is not enough to qualify it as maintenance." Nevertheless, Complainant urges the Court to not only characterize the entire turnaround project as maintenance but to also conclude, contrary to its own guidance, that any activities taking place during the turnaround are also maintenance. *Compl't Br.* at 16–17.

In support of its interpretation, Complainant cites favorably to Commission case law, which holds that: (1) work that would not normally be considered construction will be characterized as construction if it is integral to a construction project; and (2) work that would be considered construction work in isolation will not be considered construction work if it is incidental to a non-construction project. *See Compl't Br.* at 16 (citing *Active Oil*, 21 BNA OSHC 1184; *B.J. Hughes*, 10 BNA OSHC 1545, 1547, (No. 76-2165, 1982); *Royal Logging*, 7 BNA OSHC 1744, 1750 (No. 15169, 1979)). The refurbishment of H-401 was only one part of a $60 million dollar capital improvement project scheduled to take place during the turnaround. Whether regarded as an individual activity or as part of a larger project, the work on H-401 would still be construction according to the interpretive documents published by Complainant.

Complainant's interpretation in this case also seems to disregard, or at the very least minimize, the importance of scale and complexity, two factors which feature prominently in both

the Tindell and Knobbs LOI. It is also at odds with the interpretation that he recently proffered before the Commission. *See Brand Energy Sol'ns LLC*, 2015 WL 1957888 at *2. In *Brand Energy*, Complainant "point[ed] out that whether a structure is altered during a work project is not necessarily determinative." *Id.* Instead, Complainant, citing the interpretive documents describe above, urged the Commission to also consider the scale and complexity of the project and whether it was a routine activity. *Id.* The work at issue in *Brand Energy* involved installing a 16-level scaffold around the outside of a crude oil distillation column, which was a 220-foot tall, cylindrical structure, and repairing and replacing the insulation damaged by a storm. *Id.* The Commission agreed with Complainant's assertion that the work was construction and cited the following factors in support: (1) it took eleven workers three weeks to install half of the scaffolding required to complete the project, thus supporting the conclusion that the project was large in scale and complex in implementation; (2) the work was not merely preventive, but involved repairing damage and installing new insulation; (3) the work was scheduled in anticipation of the need for routine upkeep. *Id.* at 3. Complainant's attempts to deemphasize its prior interpretive documents by saying that they "lack the force and effect of law even for the examples they address" and "provide no basis for rejecting the interpretation embodied in the citation" ring hollow when compared to its previous attempts to assert the importance of those documents. *Compl't Br.* at 23; *see also Ryder*, 2014 WL 5025979 at n.3 (noting Secretary has previously indicated relevance of scale and complexity and finding that length of time work took, coupled with nature of tasks, supported finding that work was construction).

At trial, CSHO Klostermann did not discuss any of the foregoing interpretive documents and instead focused solely on CPL 2.100, which addresses the construction-versus-maintenance distinction in the context of confined spaces. (Ex. C-11). Specifically, it characterizes the refurbishing of existing equipment as maintenance. (*Id.*). It also provides examples of so-called

maintenance activities, including the patching or total removal of tank lining and its replacement. (*Id.*). CSHO Klostermann equated the removal and relining of the tank with the removal and reinstallation of the heater tubes in H-401. (Tr. 166). The Court finds CSHO Klostermann's assessment unpersuasive. Although the CPL characterizes refurbishment as maintenance, it also states that "[t]he reconfiguration of space or the installation of substantially new equipment (as for a process change) is usually construction." (Ex. C-11). In lieu of relying on the most up-to-date and comprehensive interpretations, which entertain a more holistic approach to the analysis, Klostermann focused almost exclusively on the concept of refurbishment. The problem, however, is that a tank liner and a series of conduits for transporting refined petroleum are only analogous insofar as they can be found inside a piece of equipment.[8] The heater tubes in H-401 are the sole means by which petroleum product is transported through the heater. A liner, on the other hand, is not integral to the function of a tank or pipe; rather, its purpose is to prevent oxidation and other chemical processes that reduce the useful life of the equipment it protects. All of the examples in the CPL are of this sort—relining a tank, relining a furnace with refractory, tuckpointing and individual brick placement in a manhole, and repainting as part of scheduled program to maintain a system—and none of them address the removal and replacement of equipment required to make that system function.

Region 8's Assistant Regional Administrator, Mike Lynham, also focused on the end result of the work, as opposed to the work itself.[9] Specifically, he concluded that the work was

[8]. Further, the Stanley Memo also states that the definition in CPL 2.100 is not dispositive and that the determination must be made on a case-by-case basis. (Ex. C-10).

[9]. This is best illustrated in the following passage: "And in the end, you look at what was the end game? What was the goal of this particular project? Again, it was the refurbishment of heater 401 to restore it to its regular, normal operating parameters so the entire reformer unit could function as designed." (Tr. 349). Thus, rather than assessing the "nature of the work", Lynham and Klostermann were focused on its result. *Sec'y Br.* at 16.

maintenance because the function of the heater was the same both before and after the turnaround. (Tr. 33, 332). Further, in response to questions regarding the similarity of the repairs on H-401 and the examples of construction found in the Knobbs LOI, Lynham also testified:

> Now, if you remove a significant structural component of a piece of equipment then, in fact, yes, I would agree with you even though it's a one-to-one replacement identical beam, that would e [sic] construction activity. Because when you look at the overall alteration of the space, you've taken a major component, a bigger component. It affects the structure and stability of that piece of equipment and replaced it with a new one. That's construction activity. That's going beyond refurbishment of that type of equipment.

(Tr. 341–42). Even if the Court grants some credence to Lynham's assertion regarding function—which is only partly useful in light of the construction examples in the Knobbs letter, the end results of which did not change the function of the equipment or structure being repaired—the foregoing statement is wholly inconsistent with his conclusion that the removal and replacement of the heater tubes is maintenance. The heater tubes in H-401 were a significant structural, or at the least functional, component of the heater. To suggest that the removal and replacement of those tubes is more akin to respraying a liner in a tank or pipe than to the replacement of a 36-inch valve, limestone cladding, or a structural steel beam strikes the Court as unreasonable at best, and disingenuous at worst. (Ex. C-14, Knobbs LOI).

Further, the Court disagrees with Complainant's analogy to the situation in *Public Service*, wherein Judge Augustine determined that a two-month project to reline a portion of a penstock, which is essentially a large pipe, was maintenance. *Public Svc.*, *supra*. The relining involved removing old, deteriorated coal tar lining and replacing it with epoxy. *Id.* Not all of the original lining was removed and the new lining was compatible with the old. *Id.* Indeed, the scope of the project was larger both in terms of the size of the object to be worked on and the length of time

required to complete it.[10] However, the project did not involve removal and replacement of significant structural or functional components; rather, it targeted the lining that protected those components. As such, the Court finds that the facts of *Public Service* are analogous to the maintenance examples found in CPL 2.100, all of which address the concept of replacing a lining, as opposed to the construction examples found in the Knobbs LOI.

Whether analyzing the construction-versus-maintenance distinction from the standpoint of plain language, agency interpretation, or the Commission case law referenced above, the Court finds that the conclusion is the same—the work on H-401, as well as the entire scope of the turnaround, was construction. Accordingly, Citation 1, Item 1 and Citation 2, Item 1 are hereby VACATED. Likewise, the original allegation of Citation 1, Item 2, insofar as it alleges a violation of the general industry standard, is also VACATED. Thus, the Court shall proceed to an analysis of whether Complainant has proved a violation of 29 C.F.R. § 1926.451(g)(1).

B. Citation 1, Item 2 (Alternative Violation)

Complainant alleged a serious violation of the Act as follows:

> 29 CFR 1926.451(g)(1): Each employee on a scaffold more than 10 feet above a lower level was not protected from falling by the use of a personal fall arrest systems [sic], or by the use of a guardrail system:
>
> a) Suncor Energy, Inc. at 5801 Brighton Boulevard, Commerce City, CO 80022: On or before October 29, 2012, the employer did not ensure that weld inspector subcontractor employees were protected from falling when working on tubular welded system scaffold. Three outrigger scaffolds were missing guardrails, and person al fall arrest systems were not in use. Condition exposed employees to fall hazards of up to 25 feet.

The cited standard provides:

> 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

[10]. It must also be remembered that size and complexity are only factors if, because of the size of an object or component involves significant alteration of the equipment the component is in. (Ex. C-12, C-14).

> 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.

29 C.F.R. § 1926.451(g)(1).

1. The Standard Applies and its Terms were Violated

The Court has already determined that the construction standards found in Part 1926 apply to the work on H-401. *See* Section VI.A, *supra*. Further, this specific standard applies because [redacted] was working on a scaffold outrigger platform, which was more than 25 feet above the heater floor. It is undisputed that the outrigger platform did not have guardrails and that neither [redacted] nor Mota were wearing adequate fall protection for the hazards presented. Accordingly, the standard applies and was violated.[11]

2. Respondent Knew or, With the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

Complainant contends that Respondent knew or should have known of the condition in H-401 because, as the controlling employer over the worksite, it had an obligation to take reasonable measures to detect and prevent the violation. *See* OSHA Instruction CPL 2-00.124, Multi-Employer Citation Policy ¶ X.B.D (1999). Respondent contends that it did not have actual knowledge that the scaffold had been modified or what the specific conditions inside H-401 were on the day of the accident. Respondent also contends that, though it may qualify as a "controlling employer", it took all reasonable measures necessary to discover hazardous conditions and, thus, cannot be charged with constructive knowledge of the hazards. Based on the facts of this case, the Court finds that Respondent should have known of the violative condition.

"In assessing reasonable diligence, the Commission has considered 'several factors, including the employer's obligation to have adequate work rules and training programs, to

[11]. Respondent does not appear to dispute these elements, focusing instead on the elements of knowledge and exposure. *See Resp't Br.* at 82–97.

adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.'" *Greenleaf Motor Express, Inc.*, 21 BNA OSHC 1872 (No. 03-1305, 2007) (quoting *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1406 (No. 99-0707, 2001)). One of those measures includes "a general obligation to inspect its workplace for hazards." *Hamilton Fixture*, 16 BNA OSHC 1073 (No. 88-1720, 1993). This obligation "requires a careful and critical examination, and is not satisfied by a mere opportunity to view equipment." *Austin Commercial v. OSHRC*, 610 F.2d 200, 202 (5th Cir. 1979). When reviewing the foregoing factors, the Court must also consider how long the condition has existed and whether the condition was "readily apparent". *Shaw Areva Mox Svcs., LLC*, 23 BNA OSHC 1821 (No. 09-1284, 2012) (citations omitted).

According to the Commission, "an employer who either creates or controls the cited hazard has a duty under section 5(a)(2) of the Act to protect not only its own employees, but those of other employers 'engaged in the common undertaking.'" *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1009 (No. 97-1918, 2000) (quoting *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199 (No. 3694, 1976)). Thus, an employer "may be held responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'" *Id.* (quoting *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994)).

In support of its argument that it was reasonably diligent, Respondent points to the following: (1) its safety audit program; (2) the turnaround fall protection program and the associated training; (3) the safe work permit process; and (4) the scaffold tag process. The Court will address each of these issues in turn.

With respect to the safety audit program, Respondent points out that it had dedicated safety staff examining numerous issues every day and conducting safety discussions with contractors

after each shift. (Tr. 1092). For example, Calkins testified that fall protection was audited 542 times during the turnaround; scaffold tags were audited 354 times; and scaffold use was audited 408 times.[12] These audits include review of important documents, such as permits and scaffold tags, as well as field audits of actual work practices, such as scaffold use. (Tr. 1100; Ex. R-25 at 13609). The sheer number of audits is impressive given the time frame of the turnaround; however, even though Respondent's safety team audited scaffold use 408 times, there is no indication that those audits included the scaffolding *inside* H-401. (Tr. 1109, 1137; Ex. R-25). Calkins explained:

> Well, there were hundreds of different jobs going on. Thousands of jobs during the course of the turnaround. So as we're working our way through the different work areas, we're addressing issued based on priority, based on risk, based on what we can see. I couldn't see inside the heater. I had no reason to believe they wouldn't be wearing fall protection.

(Tr. 1109). This statement concerns the Court. Based on the nature of the work inside H-401—confined spaces, radiation-based testing, hot work (welding), scaffolding, and working at elevation—it would seem that the risk would be significant. However, because Calkins could not see inside the heater, an assumption was apparently made that safe work practices would be followed, even if they were not verified. Further, scaffold tags were audited 354 times, and yet Calkins testified that no one in his group had seen the scaffold tag on H-401 prior to the day of the accident.[13] (Tr. 1108).

Calkins was not the only person whose job duties appear to have been impacted by the scope and scale of the turnaround. According to Stockton, who is the confined space supervisor, he was focused on preparing the equipment, such as blinding the conduits and isolating the confined space and that "tools", such as the scaffold, do not fall under that purview. (Tr. 419–420).

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[12]. These totals reflect audits performed during the turnaround as a whole, not just H-401.

[13]. According to Calkins, October 29, 2012, was the first time that he saw the tag or entered H-401. (Tr. 1109).

This characterization is at odds with the description provided by Respondent's Safe Work Practice 404, Confined Space Entry, which requires the confined space supervisor to: "*[k]now the hazards* that may be faced during entry, including information on the mode, signs, or symptoms and consequences of the exposure" and "[b]e responsible for preparing the permit, ensure[] permits have been completed correctly, and that *all additional safety concerns are addressed* prior to authorizing entry." (Ex. C-2) (emphasis added). Based on the language of SWP 404, there is no limitation on the types of hazards that the confined space supervisor must be aware of, and yet it appears that Stockton believed his role, at least in this respect, was limited to ensuring the preparation of the confined space "equipment". (Tr. 419–20). This likely explains why Stockton testified that the turnaround group only did a comprehensive walkthrough of the space prior to the initial entry and when an equipment change (breaking lock-out/tag-out) occurred within the space. (Tr. 401–402). Although the Court understands that Stockton's knowledge of the hazards in the confined space is premised, at least in part, on the information given to him by other parties, SWP 404 still requires that he "know the hazards" and address "all additional safety concerns". (Ex. C-2).

Dave Mollendor, who coordinated mechanical work during the turnaround, was responsible for processing change orders, which included modifications to scaffolding in H-401. (Tr. 995). According to Mollendor, he signed off on at least 10 change orders every day during the turnaround and was responsible for coordinating 15–100 different jobs. (Tr. 997). However, he also stated that he did not necessarily know the scope of the work contained in the change order because he did not have time. (Tr. 1007). Again, although the Court recognizes that Mollendor himself was likely limited in his ability to track the specifics of each change, the change orders represented an opportunity for Respondent to review and evaluate changes in the workplace. The same could be said with respect to Stockton and Calkins, each of whom had the opportunity to

discover hazards or changes within H-401 but nonetheless limited themselves based on what they could see or what they perceived the scope of their job to be.

The safe work permit process, as implemented in this case, also presents concerns. Stockton testified that he was responsible for reviewing and issuing permits. (Tr. 389). According to SWP 404, part of that responsibility also includes ensuring the permit is filled out correctly and addressing all additional safety concerns. (Ex. C-2). Both Stockton and Applegate testified that they did not engage in any sort of dialogue regarding the hazards in H-401 prior to Mistras' entry on October 29, 2012. (Tr. 429, 512–15). More concerning, however, are the discrepancies between the various permits that were issued with respect to entries into H-401 in the days leading up to the accident. (Exs. C-16, C-17, C-18). One of the last lines on the permit is a series of check boxes under the heading "Rescue/Fall Protection". (Ex. C-16). Those check boxes indicate "body harness", "lifeline", "yo-yo", "rescue device", "other", and "N/A". (*Id.*). Stockton testified that the permit system prefills certain items based on the default settings of the computer, which are set by Respondent. (Tr. 393–404). According to Stockton, the "N/A" box was prefilled because, to his knowledge, the scaffold had been green-tagged and did not require personal fall protection.[14] (Tr. 429). This is reflected in the Mistras permits found in Exhibit C-17, all of which indicated N/A under Rescue/Fall Protection. (Ex. C-17). The permits in C-16, which were issued during the same period of time, all indicate that a body harness was required. (Ex. C-16). The permits in C-18 also indicate that a body harness is required, but also include an indication under "other", which states, "if required by scaffold." (Ex. C-18) At the very least, this discrepancy should have prompted further inspection of the space or inquiry into the contractor's assessment of the hazards in H-401.

[14]. According to Tye Hansen, Safway does not green tag scaffolds in confined spaces. (Tr. 959).

Respondent also attempts to place the onus on Mistras to uncover and report hazards that are found in H-401. (Ex. C-7 at 2). The Court does not dispute the role that Mistras played in the events that unfolded in H-401; however, Mistras' failures do not necessarily mean that Respondent was blameless. The report of Tina Rutledge is instructive. Regardless of how Ms. Rutledge characterizes her findings—whether "root cause" or "other findings"—it is clear that Respondent had reasonable opportunities to become aware of and prevent the accident.[15] In particular, Rutledge points out that "[i]nterviews identified inconsistencies in the understanding of the actual working conditions of the scaffold in the heater." (Ex. C-7 at 2). Although Respondent contests that any real confusion existed, the testimony of various witnesses suggests otherwise. Respondent's own confined space supervisor testified that, in the context of the safe work permit, "body harness" means for rescue, whereas fall protection would require checking both "body harness" and an additional checkbox, such as "yo-yo". (Tr. 408–409). This comports with the Mistras employees' understanding of "harness required" on the scaffold tag.[16] It also makes sense considering that almost all confined space entries require a harness for rescue purposes. (Tr. 418).

Nonetheless, Respondent points out that most of the people who testified indicated that "harness required" listed on the scaffold tag means "fall protection required". (Tr. 931, 1000, 1051). If that was the case, however, Mistras' confusion regarding what was actually required was likely compounded by the information contained on the scaffold tag, which indicated that a harness was required but did not indicate specific fall hazard locations (other than a missing access gate) or any tie-off points within the structure of H-401, as required by the turnaround fall protection

[15]. In that respect, the Court is not bound by Ms. Rutledge's characterization of an event as a "root cause" or merely an "other finding".

[16]. Although Mistras' JSA indicates a fall hazard, the Court is convinced by Applegate's testimony that the JSA refers to the hazard of working from elevation generally, regardless of the specific fall protection used, i.e., guardrails or personal fall arrest systems. (Tr. 528–29).

plan.[17] (Exs. C-4, C-6). When coupled with a deficient permit (at least as compared to other permits issued at or around the same time), it is clear that confusion over the process was not merely ancillary to the end result in this case.

Ms. Rutledge also found that Respondent did not keep detailed records of the scaffold modifications, which would have alerted Respondent to potential hazards within H-401. As the Court previously noted, these change orders represented an opportunity for Respondent to review and evaluate changes in H-401 to ensure that its fall protection plan, scaffold plan, and permitting process were being followed. According to Hansen, Safway would not modify the scaffold without Suncor's approval. (Tr. 943). Thus, Respondent was aware that modifications occurred within H-401, even if it chose not to review the details of them.

The foregoing illustrates that Respondent had multiple opportunities to become aware of changes within H-401, but did not take advantage of them. According to Tye Hansen, the scaffold in H-401 was modified on October 26, 2012, in order to remove planks from the outrigger platforms for Repcon, the welding contractor, to allow for the insertion of new heater tubes. (Tr. 948–50). To accomplish this, Hansen testified that guardrails would also have to be removed. (Tr. 951). Hansen also testified that, once the tubes were inserted, a new change order would have to be submitted to return the scaffold back to the way it was, though he did not know when or if that was done. (Tr. 952–53). The change orders and entry permits are also unclear as to what modifications were made and when. (Ex. C-16, C-31). Nevertheless, Complainant contends that the condition existed for at least three days prior to the accident.

The Court finds equivocal the evidence regarding the length of time that the condition existed. Safway's permits indicate multiple entries to modify the scaffold inside H-401 between

[17]. Even Calkins testified that the scaffold tag was not clear regarding the nature of the hazards within H-401. (Tr. 1114).

October 26 and October 29, but do not show what modifications occurred. (Ex. C-16). However, though the evidence may be unclear as to how long condition lasted, we do know that Safway removed guardrails from the scaffold on October 26, 2012. When that modification occurred, the tag was not contemporaneously modified to reflect that change, nor was a white tag appended to the scaffold tag to indicate appropriate tie-off points, consistent with the mandates of the Turnaround Fall Protection Plan. (Ex. C-6). The Court also notes that none of the documents associated with the work inside H-401 during the three days prior to the accident—safe work permits, change orders, scaffold tag, or JHAs/JSAs—either reflect the actual conditions or modifications inside H-401, nor are they consistent with one another in terms of their hazard description or the personal protective equipment required to abate the hazard. (Exs. C-16, C-17, C-18, C-24).

The problem with the foregoing is a breakdown in the process of communicating and documenting hazards. Perhaps any one of the "other findings" indicated in Rutledge's report or the missed opportunities documented above, occurring individually, would not be an adequate basis to assess liability to Respondent. When viewed collectively, however, the evidence illustrates a process that was well-thought out but inadequately implemented and resulted in a catastrophic failure. To be sure, [redacted] should have been wary of the missing rails as he accessed the outrigger platform, but he entered immediately after another contractor whose work he was examining. According to Mota, those workers were not wearing lanyards or other fall restraining devices, which likely further strengthened their assumption that the "harness required" admonition on the scaffold tag was quite literal.[18] In either case, the condition should never have been allowed to occur.

[18]. Even though the Safe Work Permit indicated "N/A".

Respondent admits that it is a controlling employer. As such, these breakdowns in process are the types of events that an employer with a birds' eye view is privileged to see and obligated to correct. As noted above, there were multiple opportunities for Respondent to both be aware of the changes in H-401 and take action to ensure that proper precautions were taken. Mollendor may not have seen the problem because he had enough to do in coordinating multiple, complicated projects simultaneously. Stockton, though certainly justified in relying on his experienced contractors to an extent, relied too strongly on their assessments without independently verifying those determinations—as confined space supervisor, it was his duty to know *all* of the hazards associated with the space. (Ex. C-2). This required doing at least some field supervision of the process beyond the initial shutdown of equipment, which likely would have cleared up the confusion over whether the scaffold was yellow- or green-tagged. Calkins, charged with ensuring safety in a complex and volatile environment, put together an admirable audit program, but even he placed reliance on the presumption that the rules were being followed without actually looking inside H-401.

Respondent is correct that "a controlling employer is not required to make continuous inspections of the work site to fulfill its supervisory responsibilities." *E.P. Guidi Inc.*, 21 BNA OSHC 1367, 1372 (Nos. 04-1055 & 04-1056, 2005) (ALJ). Complainant's Multi-Employer Citation Policy reflects this understanding: "The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees." *See Resp't Br.*, Ex. A. Thus, the policy lays out factors to consider when assessing the controlling employer's duty of care, such as: (1) the scale of the project; (2) the nature of the work; (3) safety history and experience of the contractors; (4) more frequent inspections required if contractor has a history of noncompliance or the relationship

is relatively new; and (5) less frequent inspections if contractor has history of compliance and illustrates sound safety practices. *Id.*

Even under the more lax requirements of the Multi-Employer Citation Policy, the Court still finds that Respondent did not exercise reasonable care. The Policy indicates that "less frequent inspections may be appropriate" when a contractor has a solid safety history. *Id.* According to Respondent, Mistras and Safway fit that bill. In this case, however, there is no evidence to suggest that Respondent performed any field inspections of the confined space inside H-401. Calkins testified that he based his inspections on risk and what he could see, which did not include the inside of H-401 until *after* the accident. Respondent's confined space supervisor was not aware of what color the tag was on the scaffold, even though it was hanging, unobscured, outside of H-401. (Ex. C-6). Even a cursory review of the safe work permits issued to enter H-401 would have revealed discrepancies in the hazard assessments performed by the contractors. (Ex. C-16, C-17, C-18). In the multi-employer context, the controlling employer should be able to rely on the assessment of experienced and safety-conscious contractors; however, such reliance cannot be total. As a controlling employer, Respondent is still obliged to ensure the integrity of the process and take action to correct deficiencies.

At bottom, the Court is not convinced that Suncor took all reasonable efforts to ensure compliance with rules, instead placing undue reliance on its contractors without much oversight as to the actual work inside H-401. Clearly, the work required to modify H-401 was complex and technical, and the expertise required to carry out the work was not necessarily in the wheelhouse of Suncor personnel. That, however, does not excuse the failure to conduct even basic field inspections of contractors to ensure compliance with turnaround policies under actual conditions. Accordingly, the Court finds that Respondent should have known of the violative condition.

3. Respondent's Employees Were Exposed to the Hazard

In order to prove that Respondent's employees[19] were exposed to a hazard, Complainant must show that:

> During the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in a zone of danger.

RGM Constr. Co., 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995). The evidence clearly shows that [redacted] was exposed to the condition, which Respondent does not dispute. *Resp't Br.* at 94. However, Respondent takes issue with Complainant's determination that the RECON employees who occupied the space prior to [redacted] and Mota were exposed to the same condition.

[redacted] and Mota were charged with examining the welds performed by RECON. RECON had just vacated H-401 prior to [redacted] and Mota entering the space. Thus, it is at least reasonable to assume that RECON employees occupied the same location on the scaffolding as [redacted]. The question then becomes whether they were actually exposed to the fall hazard.

According to Mota, he observed RECON employees exiting H-401 without lanyards and some employees without a harness at all. (Tr. 472). Further, there is no indication that the scaffold was modified in the time period between when RECON exited H-401 and when Mistras entered, which means that the scaffold was in the same condition during both entries. Although no one directly observed RECON employees on the outrigger platform with no guardrails, the Court finds that the evidence permits the reasonable inference that at least one RECON employee was similarly exposed to the hazard. *See Ultimate Distribution Systs., Inc.*, 10 BNA OSHC 1568 (No. 79-1269, 1982) (concluding Secretary established violation based on reasonable inferences drawn by judge

[19]. Though [redacted]was not an employee of Respondent, Respondent was nonetheless responsible for his safety as the controlling employer of the worksite.

from circumstantial evidence). This is not mere speculation or conjecture, as argued by Respondent. Mistras was charged with examining welds performed by RECON. RECON just completed welding activities before Mistras entered H-401, and the exiting employees were not wearing the full complement of fall protection gear. One of the welds examined by [redacted] was adjacent to an unguarded outrigger platform. Thus, the Court finds that the RECON employees responsible for welding the tube adjacent to the outrigger scaffold were exposed in the same manner as [redacted]. Accordingly, the Court finds that this element has been satisfied.

4. The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

The violation was serious. [redacted]'s fall illustrated that the failure to provide fall protection, whether through the use of guardrails or a personal fall arrest system, exposed employees and contractors to a fall of nearly 25 feet. A fall from that height can, and did, result in serious physical harm.

VII. Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number

of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

In determining the penalty, the Court has considered the size of Respondent, the scale of the turnaround, the complexity of the tasks required to carry it out, and the difficulty of managing and coordinating multiple contractors engaged in hundreds of work tasks. Respondent is a large employer, with over 500 employees at the Commerce City refinery. As regards good faith, the Court finds that Respondent's safe work policies were comprehensive, even if not effectively implemented in every aspect. Notwithstanding Respondent's policies, however, the Court finds that the gravity of the violation was high. The Court determined that at least two employees were exposed to the condition, which lasted, at the very least, since Safway's last entry into H-401 on October 28, 2012, prior to the investigation. (Ex. C-16 at 5). Further, the Court finds that the likelihood of injury was also high, considering that [redacted] had to stretch out over a gap of nearly three feet in order to reach the tubes he was charged with examining. This was no less the case with the RECON employee who welded those tubes prior to [redacted]'s entry.

Based on the foregoing considerations, the Court finds that a penalty of $7000 is appropriate.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. The alternative allegation in Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1926.451(g)(1) is AFFIRMED, and a penalty of $7,000.00 is ASSESSED

SO ORDERED.

/s/ John H. Schumacher
John H. Schumacher
Judge, OSHRC

Date: July 31, 2015
Denver, Colorado