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

SECRETARY OF LABOR, Complainant, v. JACOBS TECHNOLOGY INCORPORATED, Respondent.	OSHRC DOCKET NO. 21-0267

Appearances: Seema Nanda, Solicitor of Labor
Oscar L. Hampton III, Regional Solicitor
Michael P. Doyle, Regional Counsel for OSHA
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U.S. Department of Labor, Office of the Solicitor, Philadelphia, PA

For the Complainant

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For the Respondent

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

Respondent Jacobs Technology Incorporated provides maintenance, operations, and engineering services to the National Aeronautical Space Administration (NASA) Langley Research Center (Center) in Hampton, Virginia. Respondent subcontracts with other contractors to supply many of these services to the Center. The project at issue in this case was the removal

of lead-based paint and asbestos while using hazardous chemicals within underground steam tunnels.

After receiving a complaint, the Occupational Safety and Health Administration (OSHA) initiated an inspection of the steam tunnel project on December 11, 2020. As a result of the inspection, OSHA issued to Respondent a Citation and Notification of Penalty (Citation) on January 25, 2021.[1] The Citation alleges a serious violation of OSHA's lead in construction standard found at 29 C.F.R. § 1926.62(d)(1)(iii) promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act), as well as a serious violation of OSHA's personal protective equipment (PPE) standard found at 29 C.F.R. § 1926.28(a), and proposes a total penalty of $15,604.

Respondent filed a timely notice of contest, bringing this matter before the Occupational Safety and Health Review Commission (Commission). A virtual hearing was held April 11-13, 2022. Both parties filed post-hearing and post-hearing reply briefs. As discussed below, the citation items are AFFIRMED and the penalty is AFFIRMED as proposed.

JURISDICTION AND COVERAGE

The Commission gains jurisdiction to adjudicate an alleged violation of the OSH Act by an employer if the employer is engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act, and, if the employer timely contests the citation. 29 U.S.C. §§ 652(5), 659(c). The record establishes that Respondent, as of the date of the alleged violation, was an employer engaged in business affecting commerce within the meaning of section 3(5) of

[1] This decision resolves the final two citation items at issue in this matter. The other citation items in this matter – all of which arose out of OSHA inspection numbers 1506718 and 1506781 – have been resolved either by withdrawal by the Secretary at the hearing or settlement by the parties after the hearing. (Tr. 9); Order Discontinuing Case Consolidation and Severing Cases (Sept. 27, 2022); Order Terminating Proceeding, No. 21-0266 (Nov. 21, 2022).

the OSH Act. 29 U.S.C. § 652(5); (Jt. Pre-Hr'g Stmt. at 4 ¶ III.2; Tr. 12, 427). Respondent also timely filed a notice of contest to the Citation in this case. 29 U.S.C. § 659(c); (Jt. Pre-Hr'g Stmt. at 4-5 ¶ III.3; Tr. 12, 427). The Court concludes that Respondent is covered under the Act and that the Commission has jurisdiction over this matter.

BACKGROUND

Project Overview

The Center – likened to a college campus – is 780 acres and has 220 buildings, providing a hub for about 3200 people to work. (Tr. 840.) NASA "awarded a long-term contract to Jacobs Technology Incorporated[2] to provide Center Maintenance, Operations and Engineering (CMOE) to the NASA Langley Research Center in Hampton, Virginia." (Jt. Pre-Hr'g Stmt. at 4 ¶ III.2; Tr. 427). Per this long-term contract, Jacobs was responsible for numerous projects throughout the Center requiring a range of distinct and specialized services. To meet much of its contractual responsibility with NASA, Respondent awarded various subcontracts to "general" / "prime"/ "head-hunter" contractors, which, in turn, would then award a subcontract to "trade" / "tier" contractors.[3]

[2] Upon unopposed motion by Respondent at the hearing, the pleadings in this matter were amended – retroactive to the citation – to reflect Respondent's correct name from Jacobs Tidewater Operations Group to Jacobs Technology Incorporated. (Tr. 321-322, 612.)

[3] The Court is mindful that the terms used by the parties to denote the type of contractors in this case are terms of art due to the multi-employer doctrine, which has been developed by case law. *See Stormforce of Jacksonville, LLC*, No. 19-0593, 2021 WL 2582530, at *3 (OSHRC, Mar. 3, 2021) citing *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1200-01, 1203 (No. 05-0839, 2010) (noting that "[t]he Commission's test of employer liability, which grew out of the reasoning in these early cases, held an employer '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' "; overruling *Summit Contractors, Inc.*, 21 BNA OSHC 2020 (No. 03-1622, 2007), *vacated*, 558 F.3d 815 (8th Cir. 2009), and "restor[ing] the Commission's well-settled precedent on multi-employer liability"), *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished). In this case, the Court analyzes the relationships and responsibilities of the contractors relying on the substance of the evidence rather than solely on the terms used by either party.

At any one time, Respondent had "over a hundred projects going on with teams everywhere in the Center[.]" (Tr. 755, 839.) Examples of such projects included "installing a new boiler at a facility[,] repairing a patch of concrete that's been broken [, or performing] underground utility work." (Tr. 629.) The Center has "miles and miles and miles of steam tunnels" underground. (Tr. 840.) During the relevant timeframe of this case, October – December 2020, Jacobs had roughly 400 total employees working at the Center. (Tr. 589.) Roughly the same number of other workers onsite at this time were subcontractors; in this case, the relevant workers worked for the companies Riesbeck Contracting, Inc. (Riesbeck) and RPC Industries, Inc. (RPC). (Tr. 831.)

This case concerns the work performed in one of the Center's underground steam tunnels, Utility Tunnel #2, in which lead-based paint was to be removed from steam pipes and asbestos insulation removed and replaced with fiberglass insulation. (Tr. 337.) Jacobs employees who worked the steam tunnels unlocked padlocked hatches in the ground for entry into the tunnels.[4] (Tr. 273, 642-643.) RPC workers then opened the hatch and closed the door behind them after descending into the tunnel. Anyone who entered and exited the tunnels had to sign the tunnel entry sheet at the control room – so that it is known who has gone in the tunnel and who has come out of the tunnel because "if no one signs out at the end of the day, we have a man missing." (Tr. 243, 269-270, 635, 649, 676.) The record establishes that RPC workers and Jacobs workers regularly entered, exited and walked through the utility tunnel at issue in this case in October – December 2020.

[4] As shown in the picture in Ex. JX-1 at 3, workers entered the tunnels through hatches located in the ground, which were closed after entry, and descended ladders underground. (Tr. 281; Ex. JX-1 at 3.)

The tunnels were tight spaces about four to five feet from wall to wall. (Tr. 260, 412-413); *see e.g.*, JX-12 at 1 (picture demonstrating width of typical tunnel) (Tr. 337-340, 355). No hatches could be left unattended and so no hatches were opened for the purpose of ventilation. (Tr. 280-281.) Mechanical ventilation – to get the heated steam out of the tunnel – was achieved by fans set up at the beginning of the steam plant. (Tr. 280-281, 494-496.) Once inside the tunnel, RPC workers set about the task of lead-based paint abatement.

Utility Tunnel #2 Lead-Based Paint Abatement Task

In October 2020, RPC Laborer Algernon Holloway performed lead-based paint abatement work in Utility Tunnel #2. [5] Inside the tunnel, RPC was tasked to remove lead-based paint from steam pipes. Laborer Holloway testified to his experience with this multi-step, multi-day process. Each day, pairs of RPC laborers worked together with the goal of working on 500 feet of pipe per day inside the tunnel. (Tr. 254-255, 279.)

The record establishes that RPC used different chemicals during different phases of the lead-based paint abatement project. These hazardous chemicals were required by OSHA regulation[6] to be accompanied by a safety data sheet (SDS)/material safety data sheet (MSDS), which provides safety protection information for a given exposure. (Tr. 359; Exs. JX-3 (Peel Away SDS), JX-6 (Bar-Rust MSDS), JX-7 (Tru-Glaze SDS).) Each of the hazardous materials

[5] RPC Laborer Algernon Holloway was a credible witness, who answered questions on direct and cross-examination, thoughtfully, without exaggeration. Laborer Holloway was a direct, first-hand, witness of the Utility Tunnel #2 worksite conditions. His first-person observations of visual, auditory, and olfactory information are given great weight. His testimony was very helpful.

[6] Section 1910.1200(g), "Hazard Communication: Safety data sheets," requires employers to "have a safety data sheet in the workplace for each hazardous chemical which they use." 29 C.F.R. § 1910.1200(g)(1). Section 1910.1200(c), "Definitions," defines "hazardous chemical" as "any chemical which is classified as a physical hazard or a health hazard, a simple asphyxiant, combustible dust, pyrophoric gas, or hazard not otherwise classified." 29 C.F.R. § 1910.1200(c).

in this case contain chemicals which have an OSHA permissible exposure limit (PEL) according to their SDS/MSDS.[7] (Tr. 358-361, 397-410.) The SDS/MSDS for two of the hazardous materials – Bar-Rust and Tru-Glaze – instruct respirator usage if employees experience symptoms or if air monitoring demonstrates exposure to chemicals above their OSHA PEL. (Tr. 402-407; Ex. JX-6 at 8; Ex. JX-7 at 7.)

As to the process, first, RPC workers either brushed or hand-rubbed the chemical called Peel Away onto the lead-based paint on the pipe. (Tr. 252, 276.) During this process, the workers wore Tyvek suits and rubber gloves because the Peel Away would burn through skin without protection. (Tr. 257-258, 274-275.) According to Laborer Holloway, the Peel Away had no strong odor. (Tr. 257.) The pipe was then wrapped in paper and as necessary the Peel Away cured overnight. (Tr. 252-253, 275.) During this application phase of the Peel Away to the pipes, the work area was not demarcated as a "do not enter" area such that Laborer Holloway observed Jacobs steam plant employees walking through the area approximately two to three times per week in October 2020 checking pipe valves and flanges, and looking for pipe leaks. (Tr. 247, 253, 255-256, 273-274.) Additionally, during this application phase of the Peel Away, respirators were not required. (Tr. 275.)

The next day, after the Peel Away application, RPC workers set up lead removal signs to demarcate the Peel Away area as a "do not enter" area for "uncertified" workers. (Tr. 247-248, 253.) The RPC workers put on respirators and gathered materials to then "remove the paper [and] wipe the Peel Away off of the pipes, which should remove about 80 percent to 90 percent of the

[7] For example, Tru-Glaze contains isopropyl alcohol, among many other chemicals, which OSHA limits permissible exposure to 400 parts per million per eight-hour time weighted average (TWA). (Tr. 398; Ex. JX-7 at 4-6.) Bar-Rust contains ethylbenzene, among many other chemicals, which OSHA limits permissible exposure to 100 parts per million TWA. (Tr. 400; Ex. JX-6 at 4-8.)

lead paint. If not, [the RPC workers would] repeat that step…The last 2 percent, if it's a small area no bigger than an inch, we would pretty much scrape it off." (Tr. 253.) According to Laborer Holloway, the demarcation signs were necessary only when they were peeling or wiping the Peel Away off the pipes – not before or after. (Tr. 253, 255.) Respirators were required during the peeling phase of the Peel Away. (Tr. 275.)

The following day, the workers applied a primer layer of paint – called Bar-Rust – to the scraped off pipes. (Tr. 254.) After allowing the Bar-Rust to dry, typically overnight, the workers then applied the chemical Tru-Glaze to the pipe. The workers applied Bar-Rust and Tru-Glaze using a roller or a paintbrush. Notably, only during the peeling phase of the Peel Away was the area demarcated and respirator protection required. During the painting phases of the Peel Away, Bar-Rust and Tru-Glaze – unlike the peeling phase of the Peel Away – the area was not demarcated, respirators were not required for the painters, and the steam plant Jacobs employees were free to, and did, walk through the area performing their own tasks. (Tr. 248, 253, 255-257, 277, 731.) As noted above, Laborer Holloway testified that he saw Jacobs steam plant workers walk through the area approximately two to three times per week in October 2020. (Tr. 247, 256, 273-274.) Laborer Holloway testified that he also saw the Jacobs Construction Manager "from time to time" in the tunnel in October 2020 checking on RPC's progress of the lead abatement work. (Tr. 295-96, 715.)

Laborer Holloway testified that he never saw anyone monitor the air inside the tunnel and he did not wear an air monitor during his time in the tunnel. (Tr. 288.) Laborer Holloway testified that the Bar-Rust had "very low fumes," but that Tru-Glaze had such strong fumes that even the Jacobs employees remarked on the fumes as they walked through "from the other end of the tunnel." (Tr. 258-261.) Laborer Holloway also testified that he observed RPC employees

voluntarily wearing respirators, and that his own RPC supervisor highly recommended using respirators during the Tru-Glaze painting phase due to the strong odor of the Tru-Glaze, but that respirators were not "forced" on him.[8] (Tr. 264, 277-279.) He then testified that he did not wear a respirator after September 19, 2020 because he "failed the respirator medical test" and was not medically capable of wearing a respirator, but he painted pipe anyway.[9] (Tr. 257, 278-280.) Laborer Holloway left the company on October 27, 2020. (Tr. 241, 268.)

Contractual Relationships for the Utility Tunnel #2 Project

For the Utility Tunnel #2 project, "Jacobs subcontracted with Riesbeck Contracting, Inc. (Riesbeck), and Riesbeck subcontracted the lead and asbestos remediation abatement work with RPC Industries, Inc. (RPC), who was licensed to perform such work." (Jt. Pre-Hr'g Stmt. at 4 ¶ III.3; Tr. 427.) Phillip Edwards is a Jacobs Subcontracts Manager and "solicits and administers contracts for work to be performed at NASA." (Tr. 527.) He solicited and oversaw the Jacobs CMOE contract with Riesbeck for the project at hand. (Tr. 530.) Mr. Edwards testified that Riesbeck was one of eight general contractors that were solicited for bids on this project because those companies are "able and licensed to hire additional contractors to perform work as needed

[8] This testimony – that Laborer Holloway's supervisor encouraged him to wear a respirator while working with Tru-Glaze – was not objected to at the hearing. Respondent cites this testimony in its post hearing brief. (Resp't Br. 65.) The Court gives this relevant out-of-court statement its natural probative weight. *Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1111 (No. 12-0379, 2012) (holding that relevant out-of-court statements are admissible and entitled to their natural probative weight when there is no objection). This testimony was also reinforced on cross-examination. (Tr. 278-279.) The Court finds that this out-of-court statement is consistent with Laborer Holloway's observations of RPC workers voluntarily wearing respirators and is therefore corroborative evidence regarding voluntary respiratory usage by RPC employees.

[9] It is unclear on this record whether Laborer Holloway, despite his medical condition, wore a respirator during the peeling phase of the Peel Away, when, as he testified, "respirators are only used when the Peel Away was taken off, when we removed the Peel Away from the pipes." (Tr. 256.)

under them, tier contractors." (Tr. 530-531; Ex. JX-8 (solicitation).[10]) Of those eight companies, two submitted bids to Jacobs, and Riesbeck was selected because "they were the low bid." (Tr. 530.) The record establishes that Jacobs drafted the scope of work for the Utility Tunnel #2 project, the scope of work was incorporated into Riesbeck's contract with RPC, and Jacobs had authority over RPC with regard "to the scope of work or specifications for the job." (Tr. 580-582, 590, 716.)

Mr. Edwards testified that Riesbeck has "done a significant amount of work at the Center" over the past approximately 20 years. (Tr. 531.) Similarly, according to Mr. Edwards, RPC has performed work at the Center since 2008. (Tr. 534.) Mr. Edwards testified that both Riesbeck and RPC are reliably safe employers for the work that had been assigned and he knew of no major issues arising out of their work at the Center. (Tr. 534-535.) Mr. Edwards testified that, as the subcontract manager, he did not check to see if Riesbeck had any OSHA violations or a history of OSHA violations. (Tr. 579.) Similarly, for this project, he did not check whether RPC had any OSHA violations. (Tr. 579.)

As relevant to this case, NASA also contracted with MTI, which, according to Jacobs, was NASA's "third party representative [that inspects] work for codes and compliance." (Tr. 538, 620.) Notably, the record establishes that no Jacobs witness knew exactly what MTI's responsibilities were regarding the specific project at issue in this case. (Tr. 592-593 (Edwards), 621-622 (Tanner), 696 (Tanner), 759-762 (Quinn).) Similarly, Respondent insinuates that Riesbeck contracted with the company "Applied Laboratory Services" to perform air monitoring by providing "an independent oversight function to ensure RPC was in compliance with these

[10] The parties stipulated that the document entitled "Solicitation, Offer, and Subcontract Award," is a correct and accurate copy of the contract entered into between the company Jacobs Technology Inc. and subcontractor Riesbeck Contracting, Inc., as well as the solicitation and offer. (Tr. 613-14; Ex. JX-8).

obligations." (Resp't Br. 39.) The record, however, establishes only that Riesbeck subcontracted with Applied Laboratory Services, it does not establish what services Applied Laboratory Services supplied. *See* Ex. JX-10 at 7. Jacobs Construction Manager Tanner testified that he knew that Applied Laboratory Services was a subcontractor on this project, but he did not know what services they provided. (Tr. 693-695.)

In sum, with regard to the Utility Tunnel #2 project, NASA contracts with Jacobs and MTI. Jacobs contracts with Riesbeck. Riesbeck contracts with RPC, whereas Jacobs has no contractual relationship with RPC (and neither does NASA nor MTI). (Tr. 622.) Jacobs and MTI also have no contractual relationship. (Tr. 582.) Jacobs was the only entity in this case that had direct interactions regarding the progress of the steam tunnel project with all of the other entities, and in some instances, Jacobs provided direction to RPC and MTI. (Tr. 716.)

Jacobs Utility Tunnel #2 Project Management

Jacobs's Construction Manager, Christopher Tanner, worked on the Utility Tunnel #2 project among his total of three to four projects he managed during the relevant timeframe. (Tr. 628.) Construction Manager Tanner coordinated with all entities to keep the Utility Tunnel #2 project going. (Tr. 619.) Mr. Tanner testified that he was responsible "to ensure completion of the [Jacobs] statement of work as it's written." (Tr. 619.) This was done "by coordination with facility coordinators, with inspectors." *Id*. On this project the facility coordinators were Jacobs operators at the steam plant. (Tr. 619-620). Regarding the project in Utility Tunnel #2, Construction Manager Tanner would first meet with the Riesbeck superintendent to see "where he has guys working for that day, what they're doing." (Tr. 631.)

Construction Manager Tanner then went to the steam plant (or access point at the tunnels) to meet with RPC workers, and reviewed and signed the safety plan of action (SPA) each morning

before "anyone goes into the tunnels." (Tr. 251-252, 630-631, 634-638.) Sometimes he would go into the tunnels to check on their progress, but not when the area was demarcated for lead abatement. (Tr. 636.) He testified that he was responsible for making sure RPC adhered to "the statement of work developed by Jacobs issued to Riesbeck[.]" (Tr. 716.)

Construction Manager Tanner also coordinated "with the [Jacobs] operators [at the] steam plant to let them know what activities are taking place at – in their tunnels and what locations so they're aware of the work that's going on." (Tr. 619-620.) Construction Manager Tanner would also notify MTI to inspect the portion of RPC's work that Riesbeck deemed complete. (Tr. 620.)

The safety plan of action (SPA) was the document filled out every morning that listed hazards for the job tasks that day. RPC workers filled out the daily SPA and Jacobs Construction Manager Tanner reviewed it and signed it. (Tr. 630-631.); s*ee, e.g.*, Ex. JX-5 (SPAs for October 5-8, 2020). Only after Construction Manager Tanner signed the SPA would RPC workers enter the tunnel to begin work. (Tr. 251-252.) Construction Manager Tanner testified that anyone who entered RPC's worksite was supposed to first review the SPA. (Tr. 676-677.) As relevant below, this evidence is sufficient to establish that Construction Manager Tanner had a "gatekeeping" role on this project – his signature on the daily SPA was required for RPC to begin work that day and for anyone else, including other Jacobs employees, to enter Utility Tunnel #2.

Prior to the start of the Utility Tunnel #2 project, Construction Manager Tanner was not aware of anyone from Jacobs asking RPC or Riesbeck for air monitoring, and he had never seen air monitoring or a hazard assessment from Riesbeck or RPC for lead, Peel Away, Tru-Glaze or Bar-Rust. (Tr. 728, 731-732.) The SPAs dated during the relevant timeframe in this case indicate that while "working with chemicals" was marked, "there were no checks put on review SDS hazards and precautions for identifying the proper PPE, respirators, clothing, et cetera." (Tr. 421-

422; Ex. JX-5 at 1-2, 3-4, 5-6.) Construction Manager Tanner testified at the hearing that in his opinion those boxes should have been checked. (Tr. 720-721.) Additionally, the SPA did not indicate that lead was present even though the task at hand says, "scrape pipe and repaint with epoxy." (Tr. 520; Ex. JX-5 at 7-8. *See* JX-5 at 3-4.) Construction Manager Tanner testified that the "lead present" box should have been checked. Mr. Tanner assumed with "scraping the pipe . . . there's some lead flakes coming off." (Tr. 722-723.)

Jacobs Safety Practices

Alton "Chip" Quinn is the Jacobs safety lead for the CMOE contract for the Center. (Tr. 750.) Safety Lead Quinn was responsible for the safety of all Jacobs employees that worked on projects that fall under the CMOE contract, including the project at issue. (Tr. 753-754.) Safety Lead Quinn testified that Jacobs had approximately 110 Jacobs employees devoted to preventative maintenance, 150 Jacobs employees dedicated to operations, and 100 Jacobs employees dedicated to engineering work. (Tr. 751-752.) Safety Lead Quinn testified that he does not know whether Riesbeck or RPC conducted a hazard assessment/worksite walk-through, and he does not recall asking Riesbeck or RPC what type of PPE was needed on the Utility Tunnel #2 jobsite.[11] (Tr. 779, 782-784, 806.)

Jacobs Safety Lead Quinn reports to Jacobs Health and Safety Manager Dennis Pryor. (Tr. 753, 809-811.) Safety Manager Pryor oversees the three full-time Jacobs safety

[11] Safety Lead Quinn testified that he was not "the safety person that started on the task, so I don't recall what was done" before the job started or when the job started. (Tr. 777.) The record indicates that "H.C. Redfield" served as Respondent's "Safety Site Rep" on this Utility Tunnel #2 worksite before he transferred to another contract in Georgia. (Tr. 417, 624-625, 682, 744; Ex. JX-9 at 3.) At the time he served as Respondent's Safety Site Rep on the Utility Tunnel #2 worksite, H.C. Redfield reported to Safety Lead Quinn. (Tr. 744.) The Court finds, based on Safety Lead Quinn's testimony, that whatever information H.C. Redfield had regarding "periodic safety inspections conducted by Jacobs with Riesbeck and RPC" was not passed on to Safety Lead Quinn when H.C. Redfield left the project.

representatives at the Center and also develops and "owns" "a number of safety-related documents in our ISO-9000 system," including the SPA. (Tr. 810, 815-816.) Safety Manager Pryor testified that during the relevant timeframe in this case, the only safety professional Jacobs had onsite at the Center was Safety Lead Quinn. (Tr. 811.)

According to Safety Manager Pryor, the SPA was a "Jacobs best practice," and its purpose is to "increase communication amongst the workers." (Tr. 816.) Jacobs asks contractors to use this form when working onsite and trains them how to complete the SPA (along with "basic safety requirements") before allowing them access to the Center.[12] (Tr. 542-543, 818.) It is expected that the actual crew performing the work fills out the SPA, and then the Jacobs Construction Manager reviews the form on a daily basis. (Tr. 819.) Safety Manager Pryor testified that the Jacobs Construction Manager reviews the form for two reasons: (1) to ensure that the contractor is "executing the best practice as we intended them to," and (2) "if you are at the site, you are subject to the same hazards that the team has identified, so you reviewing that is a way to keep yourself safe." (Tr. 819-820.) It was not expected that the Jacobs Construction Manager would perform the hazard assessment himself. (Tr. 822-823.)

As far as safety enforcement at the Center, Jacobs Safety Manager Pryor described it as a "bottom up" approach. (Tr. 831.) For example, Respondent encourages all workers, including contractors, to report safety hazards to anyone including OSHA. (Tr. 837-839.) Additionally, Safety Manager Pryor testified that the hazard assessment safety action plan (HASAP) is a "collaborative" document and, while submitted by the contractor and reviewed by Jacobs as "part

[12] Jacobs Subcontracts Manager Edwards testified that this training was a yearly requirement (that Jacobs provided) for subcontractors – including Riesbeck and RPC – to maintain their badge credentials to get access to the Center. (Tr. 542-543; Ex. JX-8 at 8.)

of [Respondent's] process that we have in place," Respondent does not ensure that the contractor follows the HASAP during the project. (Tr. 828-829; Ex. JX-9.)

Respondent also has no system in place to identify hazards and relies on the subcontractors, such as Riesbeck and RPC, to identify hazards. (Tr. 832.) When asked whether Jacobs had any independent way of verifying whether Riesbeck or RPC were "doing what they're supposed to do safety wise," Safety Manager Pryor testified:

> [w]orking at NASA is a premier opportunity for many small businesses, and we essentially are able to hire the cream of the crop. The only thing I can think of recently with a subcontractor was somebody that came to the gates smelling of marijuana. Those are the typical problems we have with subcontractors, not subcontractors not following safety procedures. If they get a notice of violation, they would be prevented from doing business on the Center, again which for many of them is a substantial portion of their revenue. So, in general we don't…we just don't have problems, and I can't think of any examples to answer your question about specific events that might have caused a problem safety wise.

(Tr. 829-830.) Safety Manager Pryor testified that Respondent "absolutely" does not do safety audits and that Respondent is not the "safety police," in part because Respondent does not "have the resources to run down all the subcontractors and all the possible things that could have happened." (Tr. 831-832.) Safety Manager Pryor testified that Jacobs does not control the work practices of RPC because (1) Riesbeck should be watching what RPC does, and (2) Jacobs does not have the manpower to control their safety. (Tr. 839-840.)

With regard to the Utility Tunnel #2 project, Safety Lead Quinn is not aware of anyone from Jacobs, prior to the start of the Utility Tunnel #2 project, looking at MSDS or SDS to determine if any testing or monitoring was to be done for chemicals, or PPE to be worn. (Tr. 774-775.) *See* Ex. JX-9 (HASAP) at 18. Similarly, Safety Lead Quinn is not aware of any personal monitoring for lead prior to the start of the Utility Tunnel #2 project. (Tr. 778-779). *See* Ex. JX-9 (HASAP) at 18 ("In the tunnels, it is assumed that . . . all existing paint is lead based, unless testing is performed to prove otherwise.") He testified that he also does not know whether a

Jacobs employee confirmed with Riesbeck or RPC that a hazard assessment for the Utility Tunnel #2 project was performed during October – December 2020. (Tr. 784.)

Safety Manager Pryor testified that Jacobs did not ask the subcontractors on the Utility Tunnel #2 project if a hazard assessment has been conducted. (Tr. 827.) Safety Manager Pryor did not know whether Jacobs asked RPC or Riesbeck whether they performed personal monitoring for the Utility Tunnel #2 worksite or whether it was required. (Tr. 827.)

OSHA Inspection

Upon receipt of an employee complaint - specifically against RPC – regarding respiratory protection, confined space issues, and chemical exposures, OSHA commenced an inspection of the Center worksite on December 11, 2020. (Tr. 302-303.) Compliance Safety and Health Officer (CO) Alexander Lasky and CO Robert Polite arrived at the Center and requested to meet with the safety department for NASA.[13] (Tr. 303.) After describing the complaint and naming RPC, the OSHA COs were escorted by NASA representatives to the primary entrance for the steam tunnel about which the complaint was made. (Tr. 303.) At that point, OSHA held an opening conference with a "large crowd of people," including RPC employees and management as well as with Jacobs Safety Lead Quinn. (Tr. 304-305, 750.) Riesbeck did <u>not</u> attend the opening conference although it staffed a trailer on the property. (Tr. 173, 305, 559, 560-561, 631-632.)

[13] Alexander Lasky is a federal OSHA compliance safety and health officer (CO) and an industrial hygienist who works out of the Norfolk OSHA Area Office. (Tr. 299.) CO Lasky has a bachelor's degree in biology from James Madison University and a master's degree in environmental health from Old Dominion University. (Tr. 300.) CO Lasky has worked for federal OSHA for two-and-a-half years and had worked for three years prior at a shipyard in industrial hygiene and safety. (Tr. 301).

CO Robert Polite has been an OSHA safety compliance officer for 14 years. He has a bachelor's degree in education from Southern Illinois University. (Tr. 36-37.) He works the "safety side of the house" in the Norfolk OSHA Area Office, and inspected other aspects of the worksite, most of which have been resolved as noted above. (Tr. 302.)

CO Lasky determined that RPC performed the work in the steam tunnel, but he "wanted to know what the line of command and basically who was the general contractor or the contractors that owned RPC all the way up to NASA because we knew that it was a NASA site and a NASA abatement project." (Tr. 305.) After performing a walkaround inspection with RPC representatives, CO Lasky and CO Polite met with Respondent Safety Director Quinn when "it was more firmly established just how much involvement Jacobs had as an overseeing general contractor to RPC." (Tr. 308.)

CO Lasky testified that he determined Jacobs's involvement with the steam tunnel project based on his conversations with Respondent Safety Lead Quinn, and with the RPC employees, as well as a review of the SPA documents provided by RPC. (Tr. 243-52, 255-257, 262, 273-74, 285-88, 292-296, 308-309.) [14] CO Lasky also testified that Riesbeck did not "come up very much" during his discussions with these employees, whereas the RPC employees "continued to refer back to Jacobs because Jacobs was the Construction Manager[,] Jacobs checked the SPAs[,] and they reported to Jacobs for the progress of their work." (Tr. 287-88, 439, 444-445.) In contrast, CO Lasky had the impression that Riesbeck was more like a "headhunter" contractor in that "they would write the checks to RPC, but that they weren't directly managing RPC's day to day tasks." (Tr. 436-437.)

CO Lasky asked for "Job Hazard Analysis / Hazard Determinations (industrial hygiene sampling, insulation characterization, environment sampling, etc.) – SPA sheets" directly from Jacobs Safety Lead Chip Quinn during his investigation. (Tr. 520-523; Ex. GX-13 at 8.) CO Lasky credibly testified that he did not receive any air monitoring data for lead and the hazardous

[14] CO Lasky's testimony regarding his conversations with RPC employees is confirmed by the credible, direct testimony of RPC Laborer Holloway.

chemicals Peel Away, Tru-Glaze and Bar-Rust. (Tr. 520-523.) During the inspection, Jacobs did not provide to OSHA "hazard determinations with personal exposure sampling to justify why respiratory protection was not required for the epoxy painting or the lead removal tasks." (Ex. GX-13 at 11.)

Evidence Ruling

CO Lasky testified on direct and cross-examination that, during the OSHA inspection, he also requested lead samples and air monitoring data from RPC Lead / Supervisor David White and the requested information was never provided. (Tr. 407, 499-501, 504, 508-510.) At the time of the OSHA inspection, David White worked as a Lead for RPC, the specialty subcontractor for the lead and asbestos remediation work on the Utility Tunnel #2 project. (Tr. 292). During the hearing, an evidence question was raised as to CO Lasky's testimony regarding his conversations with Mr. White. A final ruling was held in abeyance pending receipt of post-hearing briefs. (Tr. 56-59, 123-128, 163-164, 854-855.)

CO Lasky's testimony concerning his conversations with RPC Lead White, was offered by the Secretary as non-hearsay admissions against Jacobs, a party opponent, pursuant to Federal Rule of Evidence 801(d)(2)(D). (Rule 801(d)(2)). (Sec'y Br. 19-21). The Secretary contends statements made to CO Lasky by RPC employees, including Mr. White, are non-hearsay admissions "as RPC was acting as an agent of Jacobs and the statements were made within the scope of that agency." (Sec'y Br. 19). The Secretary broadly contends on this Utility Tunnel #2 project, Jacobs, as the principal, gave directions to RPC and it was RPC's duty, as Jacobs's agent, to obey those directions. To support this broad claim, the Secretary relies on project documents in evidence, the daily SPA, HASAP, and Lead Abatement Plan. (Ex. JX-5; JX-9; JX-11). The Secretary contends that RPC was acting as an agent of Jacobs and was authorized to speak on

Jacobs's behalf regarding safety related issues. Therefore, the statements made by RPC employees, including Mr. White, are admissible as non-hearsay admissions. (Sec'y Br. 20-21).

Respondent contends no RPC employee was authorized to speak on behalf of Jacobs and there is no evidence that RPC subcontract workers were "agents" or "employees" of Jacobs. Respondent objects to CO Lasky's statements regarding his out of court conversations with Mr. White as non-admissible hearsay, pursuant to Rule 801(d)(2)(C) and (D). (Tr. 553-556; Resp't Br. 33-34, 69-72). Respondent notes that on the Utility Tunnel #2 project Jacobs's contract was with Riesbeck. Riesbeck, in turn, subcontracted the project to RPC. Jacobs's contact with Riesbeck states that Riesbeck is an independent contractor and not an agent or employee of Jacobs. (Ex. JX-8 at 29, ¶ 15). Respondent denies Jacobs has a principal-agent relationship with RPC. (Resp't Br. 70-72).

Use of the terms agent or employee in Rule 801(d)(2)(D), without definition, disclose Congressional intent to describe the traditional master / servant relationship as understood by common law agency doctrine. *See Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322-323 (1992); *Lippay v. Christos*, 996 F.2d 1490, 1497 (3d Cir. 1993). As the proponent of the statements made by RPC employees and Mr. White to CO Lasky, the Secretary has the burden to demonstrate that the statements fall within the scope of an agency relationship between Jacobs and RPC. *Lippay v. Christos*, 996 F.2d at 1497. *See Reed Eng'g Grp., Inc*., No. 02-0620, 2005 WL 23293319, *3 (OSHRC, Sept. 8, 2005) ("[B]efore allowing testimony in under Rule 801(d)(2)(D), the judge must be satisfied that an agency relationship exists between the declarant and the employer against whom the testimony is being offered.")

Here, the Secretary has not met its burden to demonstrate an agency relationship between Jacobs and RPC, within the meaning and scope of Rule 801(d)(2)(D), to permit receipt of the out

of court statements as admissions against Jacobs, an opposing party. The record is insufficient to establish a common law agency relationship. RPC's subcontract with Riesbeck is not in evidence. Little evidence was presented regarding Mr. White, other than his identification as the worksite lead for RPC. The record reveals, at times, Mr. White signed Jacobs's worksite SPA. (Ex. JX-5 at 7.) No evidence was elicited regarding Mr. White's role or authority within RPC's business organization or regarding the Utility Tunnel #2 project. No evidence identifies Mr. White as an employee of Jacobs. The project documents alone, cited by the Secretary to support an agency relationship between Jacobs and RPC, are insufficient. It is noted that at the time of the hearing, Mr. White was still employed by RPC, and working at the Center, and yet neither party called him as a witness. (Tr. 741.) *See* Jt. Pre-Hr'g Stmt. at 3 ¶ II(A)5 (Mar. 18, 2022); Notice Hr'g Participants (Mar. 25, 2022); Jt. Hr'g Mgmt. Plan (Mar. 31, 2022.)

CO Lasky's testimony regarding his out-of-court conversations with RPC Lead White are hearsay, not received as admissions pursuant to Rule 801(d)(2)(D). The Secretary presented the direct testimony of RPC Laborer Holloway. As noted above, Laborer Holloway's testimony is granted great weight. CO Lasky's general testimony regarding conversations with RPC employees is accorded no weight, unless corroborated by the direct testimony of Laborer Holloway, an RPC employee at the relevant time.

DISCUSSION

The Citations are Affirmed

To prove a violation of an OSHA standard, the Secretary must establish that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *N & N Contractors, Inc. v. Occupational Safety &*

Health Rev. Comm'n, 255 F.3d 122, 125–26 (4th Cir. 2001) (*N & N*). A violation is "serious" if a substantial probability of death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k).

Respondent is a "Controlling" and an "Exposing" Employer

The Secretary claims that Respondent is responsible for the cited conditions on this worksite because Jacobs's own employees as well as RPC employees were exposed to the cited conditions. (Sec'y Br. 11, 24, 26.) The Secretary argues that "to the extent that the violations rest on RPC's employees' exposure, OSHA relies on the multi-employer citation policy[,]" and states that Respondent is a "controlling employer." (Sec'y Br. 11); *see also* OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy § X.E.4 (Dec. 10, 1999) (MEP). Respondent argues that Jacobs is not the "exposing" nor the "controlling employer" for the Utility Tunnel #2 project because "in its administrative role as one of the construction managers for NASA, Jacobs does not direct or control the work performed by the general contractors it hires or their respective subcontractors." (Resp't Br. 25-28.)

> Under Commission precedent, an employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act, 29 U.S.C. § 666(a)(2), *to protect not only its own employees, but those of other employers 'engaged in the common undertaking'*…Specifically, the Commission has concluded that an employer may be held responsible *for the violations of other employers* 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'

McDevitt St. Bovis, Inc, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000) (*McDevitt*) (emphasis added).[15] A controlling employer whose own employees are exposed to a cited condition may be

[15] Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case – even though it may differ from the Commission's precedent. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Commission "follow[s] [its] own precedent" where the circuit court "has neither decided nor directly addressed [an] issue." *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096 n.4 (No. 10-0359, 2012). The Act provides that the employer or the Secretary may appeal a final decision and order to the federal

held responsible for complying with the cited standard. *Calpine Corp.*, No. 11-1734, 2018 WL 1778958, *9 (OSHRC, Apr. 6, 2018), *aff'd*, 774 F. App'x 879 (5th Cir. 2019) (unpublished) (citing *McDevitt*).

The record establishes that Jacobs had significant supervisory authority and control with regard to the Utility Tunnel #2 worksite such that it could reasonably be expected to prevent or detect and abate the cited conditions at issue in this matter. *McDevitt*, 19 BNA OSHC at 1109. As noted above, Jacobs is the only entity on the project that interacts with every other entity involved so as to keep the entire project on track. Indeed, as Construction Manager Tanner testified, he – a Jacobs employee, not a Riesbeck employee – was responsible for ensuring that RPC performed according to the statement of work that Jacobs drafted that had been included in RPC's contract with Riesbeck. Additionally, as opposed to Jacobs's ubiquitous presence, Riesbeck had a lesser presence on the worksite such that CO Lasky was constantly referred to Jacobs as the entity in control by the employees he interviewed. RPC Laborer Holloway was not

court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the alleged violation occurred in Virginia, which is in the Fourth Circuit, and Respondent's principal office is in Tennessee, which is in the Sixth Circuit.

It appears that the DC Circuit and the Fourth Circuit, two circuits to which this case could be appealed, have not yet decided nor directly addressed the issue of multi-employer liability in a case brought under the OSH Act. *But see, e.g., Century Cmtys., Inc. v. Sec'y of Labor*, 771 F. App'x 14 (D.C. Cir. 2019) (unpublished opinion denying petition for review of Commission final order relying on multi-employer worksite doctrine) citing *IBP, Inc. v. Herman*, 144 F.3d 861, 865–66 & n.3 (D.C. Cir. 1998) (questioning multi-employer worksite policy). Eight other circuit courts of appeals – including the Sixth Circuit (another relevant circuit here) – have "adopt[ed] the principles associated with multi-employer liability." *Summit Contracting Grp., Inc.*, No. 18-1451, 2022 WL 1572848, at*3 & n.6 (OSHRC, May 10, 2022) (listing circuit cases upholding the principles associated with multi-employer liability including *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 817-19 (6th Cir. 1998)). This decision therefore adheres to Commission precedent and follows the principles associated with multi-employer liability. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC at 2096 n.4.

even aware of RPC's relationship with Riesbeck.[16] (Tr. 288.) Riesbeck did not attend CO Lasky's opening conference, but Jacobs did. Moreover, RPC workers did not enter the tunnels until Jacobs Construction Manager Tanner reviewed and signed the SPA that day. This routine was consistent with Jacobs Safety Manager Pryor's testimony that Jacobs "makes sure" and "intends" contractors on the site, including RPC, to execute Jacobs's "best practices." (Tr. 819-820.) This routine was consistent with the HASAP. (Ex. JX-9, at 1, 3, 4, 5).

Respondent argues that its contract with Riesbeck "clearly states that Jacobs is not the 'controlling' employer." (Resp't Br. 32.) The contract states, "the Subcontractor shall remain solely responsible for day-to-day safety programs, procedures and practices. Company [Jacobs] and Subcontractor [Riesbeck] agree that Company is not a 'Controlling Employer' as that term has been interpreted under the Occupation Safety and Health Act (to 'Act')." (Resp't Br. 32-33 citing Ex. JX-8 at 54). Respondent requests that this contractual language "be given its full legal weight." (Resp't Reply Br. 3-4.)

However, "the Act, not [a] contract, is the source of [the employer's] responsibilities." *Brock v. City Oil Well Serv. Co.*, 795 F.2d 507, 512 (5th Cir. 1986); *see also Summit*, 23 BNA OSHC at 1206-07, citing *Froedtert Mem'l Lutheran Hosp. Inc.*, 20 BNA OSHC 1500, 1508-09 (No. 97-1839, 2004) (an employer cannot "contract away its legal duties to its employees or its ultimate responsibility under the Act by requiring another party to perform them" (citation omitted)); *Cent. of Ga. R.R. Co. v. OSHRC*, 576 F.2d 620, 624-25 (5th Cir. 1978) (noting that Commission precedent establishes that "an employer may not contract out of its statutory responsibilities under" the OSH Act). The substance of Respondent's actions related to the Utility

[16] Similarly, RPC Laborer Holloway had never heard of Applied Labs or MTI. (Tr. 288.)

Tunnel #2 project is greater, more direct, and hands-on, when compared to the wording within Respondent's contract with Riesbeck.

Respondent claims that the HASAP and the SPAs do not themselves establish "control" over RPC's work. (Resp't Br. 35-36.) Perhaps, but this argument does not address Jacobs Safety Manager Pryor's testimony that both documents were developed as Respondent's "best practices" and Jacobs reviewed and signed the documents as "part of Respondent's process" to ensure that all on the worksite "executed" Jacobs's practices. (Tr. 819-820, 828-829.) When viewing these documents in conjunction with Jacobs Safety Manager Pryor's testimony and Jacobs Construction Manager Tanner's actions, this Court rejects Respondent's arguments that these documents do not support the finding of controlling employer liability. (Ex. JX-5 (SPA); JX-9 (HASAP)). Respondent also argues that Jacobs, specifically Construction Manager Tanner, "is not qualified or licensed to supervise the lead or asbestos abatement work performed by RPC" and that MTI contracted directly with NASA to independently confirm RPC's workmanship within Utility Tunnel #2. (Resp't Br. 29-32.) As noted above, Construction Manager Tanner himself contacted MTI when RPC was ready for their review. Construction Manager Tanner walked the Utility Tunnel #2 worksite multiple times per week with the purpose of observing the progress of the project so as to keep the entire project on track. He had the authority to observe and correct the work – through Riesbeck – such that it adhered to the statement of work within RPC's contract with Riesbeck.

Respondent's actions establish its overall authority and control of the Utility Tunnel #2 project. Given this amount of authority and control of this project, Jacobs was in such a position "where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *McDevitt*, 19 BNA OSHC at 1109. The

Court therefore finds that Respondent was a "controlling employer" on this worksite consistent with the principles of multi-employer worksite liability.

The Court also finds that Jacobs is an exposing employer regarding its own employees. *S. Pan Servs. Co.*, 25 BNA OSHC 1081, 1085 (No. 08-0866, 2014) (an employer whose own employees are exposed to a hazard has a statutory duty to comply with a standard even if it did not create or control the hazard), *aff'd*, 685 F. App'x 692 (11th Cir 2017) (unpublished). Respondent argues that no Jacobs employee performed any of the lead removal work at issue in Citation 1, Item 1 or the paint activity at issue in Citation 1, Item 3. However, it is undisputed that Construction Manger Tanner regularly went into the tunnel to check on the progress of RPC's work and to ensure that RPC was complying with the statement of work as written. RPC Laborer Holloway testified that he saw Construction Manager Tanner in the tunnel. Laborer Holloway also testified that he saw Jacobs's steam tunnel employees checking pipe valves and for leaks regularly in the tunnel while he (Holloway) worked in the tunnel. (Tr. 255-257, 259-261, 273-274, 292-296.) Despite Respondent's argument, it does not matter that its employees performed no work that is the subject of each citation item – their presence in Utility Tunnel #2 nevertheless exposed them to the hazards that are the subject of each citation item (as discussed below).

Respondent also claims that CO Lasky's OSHA violation worksheets do not reference any Jacobs employee as being exposed to any alleged hazard. (Resp't Br. 28.) Respondent then points to CO Lasky's testimony:

> Q: Based on your investigation, you did not actually identify any Jacobs' employees that were exposed to these respiratory hazards, right?
>
> A: That is correct.

(Resp't Br. 28 n.107 citing Tr. 463.)

The issue of exposing employer liability was raised in the joint pre-hearing statement and at the hearing. (Joint Pre-Hr'g Stmt at 16-17; Tr. 428.) The Secretary, moreover, is not bound by CO Lasky's construction of a citation as written down in an OSHA violation worksheet or in testimony at a hearing. *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir. 1973) (*Nat'l Realty*) (the Secretary is not bound by the "narrow construction of citations issued by his inspectors," which include compliance officers who are not legal professionals). The Secretary introduced evidence into the record, and raised arguments in her post-hearing brief, that Jacobs exposed its own employees to the hazards at issue in each citation item. (Sec'y Br. 11, 24, 26-27.) In its Reply Brief, Respondent does not dispute that exposing employer liability was raised and litigated in this case; rather, Respondent contends the Secretary failed to establish Jacobs's employees' exposure to the hazards alleged. (Resp't Reply Br. 13).

The Court therefore also considers Respondent an "exposing employer" on this worksite and analyzes the citation items accordingly.

Respondent Failed to Exercise Reasonable Care as a Controlling Employer

"On a multi-employer worksite, a controlling employer is liable for a contractor's violations if the Secretary shows that [the controlling employer] has not taken reasonable measures to 'prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'" *Stormforce of Jacksonville, LLC*, No. 19-0593, 2021 WL 2582530, at *6 (OSHRC March 8, 2021) (*Stormforce*) citing *Suncor Energy (U.S.A.) Inc.*, No. 13-0900, 2019 WL 654129, at *4 (OSHRC Feb. 1, 2019) (*Suncor*). It is well-established, however, that "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.' " *Id*. The Secretary claims that

Respondent failed to live up to even the "modest duty of reasonable care placed upon controlling employers." (Sec'y Br. 25.) The Court agrees.

"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." *Suncor*, 2019 WL 654129, *4. Below, in the knowledge section of the discussion of each citation item, this decision addresses each alleged violative condition – and Respondent's associated secondary duty of reasonable care as a controlling employer. Here in this section, the decision discusses Respondent's secondary duty to monitor or inspect as a controlling employer on the Utility Tunnel #2 worksite. "[W]e assess the extent of [the controlling employer'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." *Suncor*, 2019 WL 654129, *7.

The nature of the work – lead abatement work using hazardous chemicals within Utility Tunnel #2 – has some specialty expertise associated with it; however, Respondent placed its own Project Manager in a "gatekeeping" role on this project, limiting access to the Utility Tunnel #2 jobsite to those that reviewed the SPA that Project Manager Tanner signed. Additionally, Project Manager Tanner was expected to enter the tunnel and check the progress of the lead-based paint project. The Commission has noted, "[f]ar from requiring the contracting employer to duplicate the safety efforts of the specialist, the Act demands only that general contractors apprise themselves of which safety efforts their specialty subcontractors have chosen to make in completing their assignments." *Blount Int'l Ltd.*, 15 BNA OSHC 1897, 1900 n.3 (No. 89-1394, 1992) (*Blount*); *see also R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 819 (6th Cir. 1998)

("A general contractor may rely on the expertise of a subcontractor, unless the general contractor has reason to believe that the work is not being performed safely.") Despite Project Manager Tanner's role in the project, the record is replete with evidence that Respondent was completely hands off in terms of protection from lead and the hazardous chemicals.

The record establishes that RPC workers did not enter the tunnel until Construction Manager Tanner reviewed the SPA, which indicated safety efforts on the part of RPC. Safety Manager Pryor testified that the Jacobs Construction Manager reviews the SPA form for two reasons: (1) to ensure that the contractor is "executing the best practice as we intended them to," and (2) "if you are at the site, you are subject to the same hazards that the team has identified, so you reviewing that is a way to keep yourself safe." (Tr. 819-820.) Construction Manager Tanner entered the tunnels regularly to check on the status of the lead abatement project. His review of the SPA affected himself, the RPC employees, as well as the Jacobs steam plant employees who regularly passed through the tunnels.

Construction Manager Tanner visited Utility Tunnel #2 while RPC employees were painting. Jacobs's own steam tunnel employees were also exposed to the hazards as they walked through the tunnel multiple times per week checking valves and for leaks. The record establishes during the painting of the Peel Away, the pipes were still covered in lead-based paint. The record also establishes that during the painting of the Bar-Rust and the Tru-Glaze, the chemicals emitted hazardous substances which exposure levels were regulated by OSHA. As the controlling and exposing employer on this worksite, Jacobs had a responsibility to the RPC workers and to its own workers greater than absolute, unquestioned, reliance on RPC. This is especially true where Construction Manager Tanner himself again reviewed the relevant SPAs at the hearing and indicated that they should have been filled out differently. (Tr. 720-723.)

This is not a case where Construction Manager Tanner was not required to enter the tunnels or had to request a debriefing from RPC. Rather, this is a case where Respondent's Project Manager's review and signature of the SPA affected anyone who entered the worksite – which happened to include Respondent's own employees as well as RPC employees. The SPA was already presented to Construction Manager Tanner every morning – he just needed to read the form critically with an eye toward safety and confirm its accuracy as it related to his own health and that of other Jacobs employees. *Suncor*, 2019 WL 654129, at *7. The Court finds that Jacobs's secondary duty of reasonable care, in light of Construction Manager Tanner's daily review and signing of the incorrectly completed SPAs, included Jacobs's questioning RPC to learn which safety measures they had implemented, which it is undisputed Respondent did not do. *Blount*, 15 BNA OSHC at 1900 n.3; *Suncor* 2019 WL 654129, at *7-8.

The scale of the project – specifically, the size, complexity and timeframe – also weighs in favor of finding that Respondent did not meet its duty of exercising reasonable care. *Id.*, at *8 (holding that safety efforts by controlling employer must be "commensurate" with the size, complexity, and timeframe of the project). The record establishes that Jacobs provided yearly "basic safety requirement" training which included instructions on how to complete the SPA to all contractors on the site, including Riesbeck and RPC. (Tr. 542-543.) After the training, however, Respondent's safety efforts dropped considerably such that, according to Jacobs Safety Manager Pryor, Respondent relied on a "bottom up" approach to enforce safety precautions. This level of safety effort by Respondent was not commensurate with the lead-based paint abatement project in Utility Tunnel #2.

While Construction Manager Tanner had several projects he was managing, he reviewed this project's SPA every morning and visited inside the tunnel worksite multiple times per week

for the purpose of keeping the project on track. The parties agree that Construction Manager Tanner did not review the SPA with an eye toward safety; rather, he reviewed the SPA only to ensure that the SPA was filled out. *See* e.g., Resp't Br. 37, 39. The relevant timeframe of this project was several weeks, not hours. *Suncor*, 2019 WL 654129, at *8. According to RPC Laborer Holloway, the paint fumes during the project were such that they were noticeable to all who visited and some who could detect them from outside the hatch. (Tr. 260-261, 294.) The Court finds that the hazards and tasks associated with the project were not so complex, or short lived, that Project Manager Tanner could not have questioned whether RPC was working safely, especially when the SPAs were filled out incorrectly and others at the worksite depended on his signature before beginning work or walking by the worksite. (Tr. 721); *Suncor*, 2019 WL 654129, at *8.

Finally, Respondent points to Riesbeck's and RPC's extensive history of working safely at the Center. (Resp't Br. 40; Resp't Reply Br. 2.) However, Jacobs Subcontracts Manager Edwards testified that he did not look into either company's OSHA history when sending the project out to bid and when evaluating the bid. (Tr. 579.) Indeed, it is undisputed that Respondent relied completely on its contractors for safety purposes and would never "audit" them. (Tr. 723, 764, 770, 776, 828, 831-832.) Instead, Respondent relied on the "bottom up" safety culture of the Center, which, according to Safety Manager Pryor, was anchored on contractual gain rather than safety performance. (Tr. 829-830.) This is not a situation where Jacobs "made concerted efforts to hire only safety-conscious contractors." *Suncor*, 2019 WL 654129 at *9. Jacobs did not even know whether its contractors follow Jacobs's "best practices." Jacobs's safety efforts for the Utility Tunnel #2 project were so undisputedly limited in scope, such that Jacobs was not

justified in relying on RPC, or Riesbeck, to perform their work safely. *Suncor*, 2019 WL 654129 at *8-9.

Taking into account the objective factors of the nature of the work, the scale of the project and safety history and experience of the contractors involved, the Court finds that Respondent failed to meet its secondary duty of reasonable care as a controlling employer. *Suncor*, 2019 WL 654129, at *4. Further discussion regarding Respondent's secondary role to each violative condition is discussed below in each citation item section.

Respondent's Sasser Defense: Reliance on a Specialty Contractor

"Reasonable reliance on a specialty contractor ... is an affirmative defense to constructive knowledge, and therefore Respondent ha[s] the burden of proof." *Manua's, Inc.*, No. 18-1059, 2018 WL 6171790, at *3-4 (OSHRC Sept. 28, 2018), *aff'd*, 948 F.3d 401 (D.C. Cir. 2020) (*Manua's*). Respondent argues that it reasonably relied on RPC "to protect against hazards related to RPC's expertise" and cites *Sasser Elec. & Mfg. Co.*, 11 BNA OSHC 2133, 2136 (No. 82-178, 1984), *aff'd*, No. 84-1961, 1985 WL 1270163 (4th Cir. Aug. 8, 1985) (unpublished) (*Sasser*). (Resp't Br. 39-40.)

In *Sasser*, the Commission found that the cited employer's reliance on a hired crane operator to maintain sufficient distance from power lines was reasonable because its employees had never operated cranes, it had no reason to foresee the crane operator would violate the cited standard, and the cited hazard fell within the operator's expertise. *Sasser*, 11 BNA OSHC at 2135-2136. Since *Sasser*, the Commission has stated that "for the holding of *Sasser* to apply, there must be *reasonable* reliance on a contractor." *Manua's*, No. 18-1059, 2018 WL 6171790, at *1. The Commission defined *reasonableness* in accordance with *Blount*, requiring the employer to "make reasonable inquiries" to the specialty subcontractor so as "to apprise itself of which safety

efforts the specialty subcontractor has chosen to make in performing the work." *Manua's*, No. 18-1059, 2018 WL 6171790, *3 citing *Blount*, 15 BNA OSHC at 1900 n.3.

Respondent claims that it reasonably relied on Riesbeck and RPC to safely perform the specialty lead abatement task in Utility Tunnel #2 because of their "long histories of safely performing work at [the Center,]" and because Jacobs "understood RPC was being monitored by two independent expert specialty contractors, MTI and Applied Labs." (Resp't Br. 40.) Respondent also claims that it merely "administrates RPC's work," and that it "had no direct oversight of the subcontractor with lead and asbestos expertise, was not legally licensed to supervise or perform RPC's work, and often had no right to access the regulated work area." (Resp't Br. 41.) But all these claims are superficial, with no supporting evidence, despite Respondent having the burden to establish this affirmative defense. *Manua's, Inc.*, No. 18-1059, 2018 WL 6171790, at *3-4. Also, "[s]haring control is not relinquishing control." *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1083 (D.C. Cir. 2007).

Here, Respondent's actions speak louder than its words. As mentioned above, Jacobs did not check Riesbeck's or RPC's OSHA history before awarding the contract for the Utility Tunnel #2 contract. While Respondent required RPC/Riesbeck to submit the HASAP as part of its contract and required RPC to fill out a SPA every morning during the Utility Tunnel #2 project, the record reflects that Jacobs had absolutely no knowledge of what kind of safety precautions RPC was taking in a worksite with potential lead and hazardous material exposures.[17] Construction Manager Tanner's review of the SPA was administrative only in nature and without an eye toward safety even for himself. The Secretary has established that Respondent did not

[17] Respondent's citation to the Fifth Circuit's decision in *Trinity Industries* is inapt and unhelpful. (Resp't Br. 40, n.172). This case does not concern an employer's reliance on a specialty contractor. *Trinity Indus., Inc. v. OSHRC*, 206 F.3d 539, 542-43 (5th Cir. 2000).

"make reasonable inquiries" to Riesbeck or RPC so as "to apprise itself of which safety efforts [RPC] ha[d] chosen to make in performing the work." *Manua's*, No. 18-1059, 2018 WL 6171790, *3 citing *Blount*, 15 BNA OSHC at 1900 n.3.

Respondent's *Sasser* defense is rejected.

Serious Citation 1, Item 1: Sample Monitoring

Serious Citation 1, Item 1 alleges a violation of 29 C.F.R. § 1926.62(d)(1)(iii), which provides that:

> With the exception of monitoring under paragraph (d)(3), where monitoring is required under this section, the employer shall collect personal samples representative of a full shift including at least one sample for each job classification in each work area either for each shift or for the shift with the highest exposure level.

29 C.F.R. § 1926.62(d)(1)(iii). The Secretary alleges that Respondent violated 29 C.F.R. § 1926.62(d)(1)(iii) when:

> a) NASA Tunnel #2: On or about 10/09/2020, employees were assigned to work lead abatement jobs without the employer having conducted a hazard assessment which included personal samples representative of a full shift including at least one sample for each job classification in each work area.

(Compl. Ex. A at 8.) The Secretary proposed a $7,802 penalty for this item.

The Court finds that OSHA's construction standards apply to Respondent's worksite. The project in Utility Tunnel #2 entailed lead and asbestos abatement work, including removing existing paint, prepping and painting the pipe, removing asbestos insulation and installing new fiberglass insulation. (Tr. 337, 552-553.) These tasks fit into the plain definition of construction work as defined by OSHA. *See* 29 C.F.R. § 1910.12(a) (construction industry standards prescribed in Part 1926 apply to "every employment and place of employment of every employee engaged in construction work."); 29 C.F.R. § 1910.12(b) ("construction work" as used in section 1910.12(a) "means work for construction, alteration, and/or repair, including painting and

decorating."); *see also Brand Energy Solutions*, 25 BNA OSHC 1386, 1388 (No. 09-1048, 2015) (finding that installing new insulation was "not merely preventative[.]") Respondent also does not claim that OSHA's lead in construction standards do not apply to its worksite for this citation item.

Further, the cited lead-in-construction standard also applies to Respondent's worksite. The cited standard, 29 C.F.R. § 1926.62(d)(1)(iii), "applies to all construction work where an employee may be occupationally exposed to lead." 29 C.F.R. § 1926.62(a) (Scope). In Appendix B to 29 C.F.R. § 1926.62(d), OSHA instructs directly that, "[i]f lead is present in your workplace *in any quantity*, your employer is required to make an initial determination of whether any employee's exposure to lead exceeds the action level (30 μg/m^3 averaged over an 8-hour day)." 29 C.F.R. § 1926.62 App. B (emphasis added); *see also S. Scrap Material Co.,* 23 BNA OSHC 1596, 1618 (No. 94-3393, 2011) (following Appendix B to general industry lead standard to interpret the word "may" in similar initial exposure assessment requirement).

It is undisputed that lead was present inside Utility Tunnel #2 as it was the subject of a lead-based paint removal project. *See* e.g, Ex. JX-12 at 3 (representative photograph of flaking lead-based paint on steam pipe); (Tr. 340, 348.) It is also undisputed that Jacobs's employees regularly passed through the Utility Tunnel #2 worksite during the course of the project. It is reasonable to find that the work RPC employees were doing would disturb the lead-based paint, occupationally exposing anyone who worked on the project (i.e., the RPC workers) and anyone who walked by the project (i.e., Construction Manager Tanner and Jacobs's steam plant workers) while RPC workers performed their lead abatement tasks to lead hazards. The cited standard applies to the worksite in this case.

Respondent claims that the cited standard is being misapplied citing the subsequent standards that allow employers to rely on historical data to satisfy the requirements of the cited standard. (Resp't Br. 56-57.) However, none of this historical data is in the record. While Respondent claims that the *Secretary* had the burden of showing that RPC did *not* use this data, the burden of establishing an exception to a requirement of a cited regulation, as the Secretary points out, falls on the one claiming the exception. (Sec'y Reply Br. 1-3 citing *Bianchi Trison Corp. v. Sec'y of Labor*, 409 F.3d 196, 206-208 (3d Cir. 2005)); *see also Armstrong Steel Erectors*, 17 BNA OSHC 1385, 1389 (No. 92-262, 1995) ("A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception.").

As noted above, the record establishes that CO Lasky did not receive any sample monitoring for the lead abatement task in Utility Tunnel #2 despite asking Respondent Safety Lead Quinn for such sample monitoring.[18] Respondent was in the position to provide such documentation to CO Lasky when he requested it from Safety Lead Quinn. *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-1343 (No. 00-1986, 2003) (holding that "when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party's case.") *aff'd*, 391 F.3d 56 (1st Cir. 2004) (*Capeway*). At no time in this matter was this documentation submitted into evidence when it could have helped Respondent's case. Additionally, the record includes undisputed testimony from RPC Laborer Holloway, as well as Construction Manager Tanner, Safety Lead

[18] Respondent argues that the Secretary is relying only on hearsay testimony provided by CO Lasky to establish the fact that RPC did not have personal sampling to support its use of respiratory protection. (Resp't Br. 55.) Respondent's argument here concerns CO Lasky's request to RPC's supervisor regarding monitoring. However, this fact is not determinative as the Secretary has established that CO Lasky also requested such documentation from Respondent Safety Lead Quinn.

Quinn, and Safety Manager Pryor, that they all were unaware of any sample monitoring for lead during the relevant timeframe. The Secretary has established that the terms of the cited standard were violated.

Respondent claims that no one was exposed to a hazard since RPC required respiratory protection during the peeling process of the Peel Away product. (Resp't Br. 55, 58; Resp't Reply Br. 14.) But the standard requires personal sample monitoring even before the Peel Away was applied to the lead-painted pipes. *See* 29 C.F.R. § 1926.62 App. B (explaining that monitoring was required if lead was present in any quantity and employees may be occupationally exposed to it). Given the nature of the job task, the Court finds that RPC workers may have been occupationally exposed to lead when handling the lead-painted pipes before painting the Peel Away.

Additionally, Respondent argues that the Secretary "offers no evidence that Jacobs's employees entered the restricted area while the lead paint removal work was being performed." (Resp't Reply Br. 13.) However, as noted above, the tunnel area was *not* restricted during the painting phase of the Peel Away. To the contrary, the record establishes that both Jacobs steam plant workers and Construction Manager Tanner were in the tunnel during the times RPC was painting the Peel Away or were free to walk the tunnel during the painting of the Peel Away. The record establishes that Jacobs steam tunnel workers walked through the worksite and checked valves and for leaks in the tunnel two to three times per week, and Construction Manager Tanner was similarly in the tunnel to check on RPC's progress.

The record also establishes that the tunnels were confined such that ventilation was needed and tight such that the walls of the tunnel were only 4-5 feet wide. It is reasonable to find that these workers were exposed to or in the zone of danger of being occupationally exposed to lead

without first monitoring how much lead was in the work area. 29 C.F.R. § 1926.62(d)(1)(iii); *S&G Packaging Co.,* 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001) (exposure established if it is "reasonable predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger") (quoting *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (*S&G Packaging*)). The Secretary has established exposure for this citation item.

Respondent claims that Jacobs had no reason to suspect that RPC had not conducted an appropriate hazard assessment. (Resp't Br. 60-62.)

> On a multi-employer worksite, a controlling employer is liable for a contractor's violations if the Secretary shows that [the controlling employer] has not taken reasonable measures to 'prevent or detect and abate the violations due to its supervisory authority and control over the worksite'…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.

Suncor, 2019 WL 654129, *4. As found above, Respondent failed to meet its duty to monitor or inspect on this worksite as a controlling employer. The record also establishes that Jacobs failed to meet its duty of care with regard to the violative condition itself – working in a lead abatement job without the employer having conducted a hazard assessment. (Compl. Ex. A at 8.)

With regard to lead monitoring in particular, Construction Manager Tanner testified that the SPA that he reviewed at the time was filled out incorrectly such that the presence of lead was not indicated for this lead abatement project. (Tr. 520, 722-723; Ex. JX-5 at 3-4, 7-8.) He determined that the SPA was filled out incorrectly at the hearing under examination, but did not do so during the project itself, which lasted weeks. The record establishes that Respondent – all the way up to Safety Manager Pryor – was completely hands off with regard to the lead abatement work on this project and the Court finds that this affected Construction Manager Tanner's review of RPC's SPAs. Furthermore, the Court finds that Safety Manager Pryor's testimony regarding

how Jacobs approaches safety at the Center – let alone the Utility Tunnel #2 worksite – renders Construction Manager Tanner's actions foreseeable. *New River Elec. Corp. v. OSHRC,* 25 F.4th 213, 221 (4th Cir. 2022) ("To avoid unfairly imposing liability on an employer for a rogue supervisor, our circuit requires the Secretary to prove that a supervisor's misconduct was 'reasonably foreseeable' to establish the employer had constructive knowledge.")

Consequently, Construction Manager Tanner could have known with reasonable diligence that RPC was incorrectly approaching safety for this lead abatement task. *McDevitt*, 19 BNA OSHC at 1109 (constructive knowledge charged to controlling employer when violative condition was in plain view for a significant period of time). This constitutes constructive knowledge of the violative condition on this worksite. *David Weekley Homes*, 19 BNA OSHC 116, 1119 (No. 96-0898, 2000). The Commission will impute the constructive knowledge of a violation of a foreman or a supervisor to a controlling employer. *Summit Contractors, Inc.*, 23 BNA OSHC at 1207 citing *N & N*, 18 BNA OSHC at 2123. Jacobs's duty of reasonable care, in light of Construction Manager Tanner's daily review and signing of the incorrectly completed SPAs, included Jacobs's critical review of the daily SPAs with an eye toward safety and also questioning RPC to learn which safety measures they had implemented.

As Respondent's duty to Construction Manager Tanner, and to Jacobs's steam plant employees present in the tunnel to check valves, flanges, and for steam leaks, was primary, rather than secondary to RPC's employees, the Court finds that the Secretary has also established Respondent's constructive knowledge of the hazardous conditions as an exposing employer. *McDevitt*, 19 BNA OSHC at 1109; *see also N & N*, 18 BNA OSHC at 2123 ("The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer.").

This citation item is affirmed.

Serious Citation 1, Item 3: PPE

Serious Citation 1, Item 3 alleges a violation of 29 C.F.R. § 1926.28(a), which provides that:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

29 C.F.R. § 1926.28(a). The Secretary alleges that Respondent violated 29 C.F.R. § 1926.28(a) when:

> a) NASA Tunnel #2: On or about the week of 10/09/2020, employees were assigned to work painting jobs using products which contained multiple substances with recognized OSHA permissible exposure limits. The product's safety data sheets instruct respirator usage in cases where personal exposure sampling indicates exposures above the exposure limits. The employer assigned this work without having conducted a hazard assessment of employee's exposure, as determined from breathing-zone samples measured as an 8-hour time-weighted average.

(Compl. Ex. A at 10.) The Secretary proposed a $7,802 penalty for this item.

With regard to applicability, the Secretary has shown that the hazardous substances Peel Away, Bar-Rust and Tru-Glaze were used on the worksite and the exposure to all three of these chemicals are regulated by OSHA. The safety data sheets (SDS)/material safety data sheet (MSDS) for all three chemicals relevant to this case – Peel Away, Bar-Rust and Tru-Glaze – are in the record. (Exs. JX-3 (Peel Away SDS), JX-6 (Bar-Rust MSDS), JX-7 (Tru-Glaze SDS).) CO Lasky testified that hazardous chemicals are required by OSHA regulation to be accompanied by an SDS, which provides safety protection information for a given exposure. (Tr. 359.) Each of the chemicals in this case have an OSHA permissible exposure limit (PEL) according to their SDS/MSDS. (Tr. 358-361, 397-410.)

Respondent, citing 29 C.F.R. § 1910.5(c)(1)[19], argues that the respirator standards found at 29 C.F.R. § 1910.134, "Respiratory Protection," preempt the cited general safety standard.[20] (Resp't Br. 63; Resp't Reply Br. 14-16.) Respondent claims that CO Lasky agreed that section 1926.103[21], the "more specific construction standard that applies to the cited condition[, …] in turn, defers to the respiratory standard under general industry standard 1910.134." (Resp't Br. 63; Resp't Reply Br. 14-15.) Respondent then points to two provisions of the respiratory standards that are, allegedly, inconsistent with requiring "a hazard assessment of employee's exposure, as determined from breathing-zone samples measured as an 8-hour time-weighted average." (Resp't Br. 63-64; Compl. Ex. A at 10.)

Respondent claims that section 1910.134(c)(3), "Respiratory Protection Program," would essentially "impose" on Jacobs the responsibility of providing a "qualified program administrator" for the Utility Tunnel #2 project, which Respondent asserts no Jacobs employee is, rather RPC's program manager was supposed to comply with the appropriate standard. (Resp't Br. 63-64.) Respondent further claims that section 1910.134(d)(1)(iii), "Selection of Respirators: General Requirements," another allegedly "applicable standard," does not mandate that

[19] Section 1910.5(c)(1) provides: "If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process."

[20] The Secretary claims that Respondent failed to raise this preemption argument in its Answer and therefore Respondent waived this affirmative defense. (Sec'y Reply Br. 4.) This argument is rejected because Respondent raised this argument in its joint pre-trial statement which provided the Secretary enough notice that this argument would be litigated at trial. *See* Jt. Pre-Hr'g Stmt. at 32-34; *Henkels & McCoy, Inc.*, No. 18-1864, 2022 WL 3012701, at *8 n.16 (OSHRC, July 21, 2022). The Secretary also failed to claim or show that allowing this defense would prejudice his case. *Bill C. Carroll Co.*, 7 BNA OSHC 1806, 1812 n.17 (No. 76-2748, 1979).

[21] Section 1926.103, "Respirator Protection," provides: "Note: The requirements applicable to construction work under this section are identical to those set forth at 29 CFR 1910.134 of this chapter." 29 C.F.R. § 1926.103.

Respondent "conduct breathing-zone air samples measured as an 8-hour time-weighted average to assess a respiratory hazard related to the brush painting of the pipes." (Resp't Br. 64; Resp't Reply Br. at 14-15.) Rather, according to Respondent, the "correct standard" requires only a "reasonable estimate" of employee "exposure when using the paint products at issue." (Resp't Br. 64; Resp't Reply Br. 14.) Respondent, however, does not address how this particular standard is geared toward which respirator to select, rather than whether to wear a respirator in the first place. For the following reasons, Respondent's preemption argument is rejected.

First, Respondent does not address how CO Lasky clarified that his testimony may not be accurate. He testified that "there's a respiratory protection for 1926 and there's a respiratory protection for 1910. The specific decision of which standard that falls into is the decision that I'm sometimes a part of but does ultimately fall above me." (Tr. 513.) Indeed, as noted above, the Commission has long held that legal conclusions by an OSHA compliance officer do not bind the Secretary or the Commission. *See Kasper Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1128 (D.C. Cir. 2001) (noting "the Commission is not bound by the representations or interpretations of Compliance Officers" quoting *L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 676 (D.C. Cir.1982)); *Nat'l Realty*, 489 F.2d at 1264.

Second, the Commission has already addressed the issue of the cited general safety standard's relationship with other specific PPE standards, such as a respirator PPE standard. The Commission has held that the cited general safety standard, section 1926.28(a), when read in conjunction with other specific PPE standards, *requires the wearing of PPE* if there is a need for it:

> [C]ertain personal protective equipment standards in Part 1926, Subpart E, may not explicitly specify that use of such equipment is required, but § 1926.28 makes clear that those standards do impose a use requirement if they 'indicate the need

> for using such equipment to reduce ... hazards,' and if employees are in fact exposed to hazardous conditions.

Custom Built Marine Constr., Inc., 23 BNA OSHC 2237, 2239 (No. 11-0977, 2012); *see also Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 (4th Cir. 1979) (holding that section 1928(a) complements the Subpart R specific standards by *requiring the wearing* of PPE when there is a need to reduce a hazard) (*Bristol*). Respondent does not address this case law. Respondent also does not claim that any part of section 1910.134 is more specifically applicable to the *wearing requirement* that the cited 1926.28(a) standard mandates. 29 C.F.R. § 1910.5(c)(1).

Instead, Respondent points to the two sections of 1910.134 that it claims are inconsistent with the alleged violative conditions, but Respondent fails to show how either of those two sections are more specifically applicable to the cited conditions – that the hazardous materials that were being used had safety data sheets that "*instruct respirator usage in cases where personal exposure sampling indicates exposures above the exposure limits*." (Compl. Ex. A at 10.) The Secretary alleges that "the employer assigned this [painting] work without having conducted a hazard assessment of employee's exposure, as determined from breathing-zone samples measured as an 8-hour time-weighted average," and failed to "ensure that those employees were wearing the correct PPE." (Compl. Ex. A at 10; Sec'y Br. 25-26.) Respondent's preemption argument is therefore rejected. The cited standard applies.

With regard to non-compliance, "under section 1926.28(a), the Secretary has the burden of showing that a hazardous condition was present and that another standard put the employer on notice that personal protective equipment would reduce the risk to employees." *Andrew Catapano Enters., Inc.*, 17 BNA OSHC 1776, 1783 (No. 90-0050, 1996) (consolidated). In other words, the Secretary must establish that a reasonably prudent employer familiar with painting using hazardous materials would have protected against the hazard of overexposure by personal

exposure sampling to determine whether to require its employees to wear respirators. *See Bristol*, 601 F.2d at 724 (requiring the Secretary to carry the burden of meeting reasonably prudent employer test to satisfy notice requirement of a citation to a general safety standard).

The Secretary claims that the standard was violated by Jacobs because it "was aware of employee exposure to hazardous chemicals and did not ensure that [the exposed] employees were wearing the correct PPE." (Sec'y Br. 25-26.) RPC employees and Jacobs Construction Manager Tanner and Jacobs steam plant employees were present in the tunnel worksite when RPC employees painted pipes with hazardous chemicals. Jacobs did not inquire of RPC regarding what safety measures they implemented to determine if the hazardous material levels were above applicable limits. RPC did not require respirator use when some employees voluntarily sought out respirator protection when working with the hazardous materials. (Tr. 278-279.)

The record shows that all three hazardous materials had SDS/MSDS that noted that the substance was regulated by OSHA. CO Lasky testified, with regard to Bar-Rust and Tru-Glaze, their SDS/MSDS require respirator protection in two instances: (1) in the event of "eyewatering, headache, or dizziness," or (2) if air monitoring demonstrates dust, vapor, and mist, levels are above applicable limits[.]" (Tr. 506-507.) Laborer Holloway testified that he had to take breaks and leave the tunnel occasionally due to the fumes from Tru-Glaze, and that he observed his fellow RPC worker voluntarily wearing respirators. (Tr. 278-280.) CO Lasky also testified that he asked for air monitoring records, along with the lead sampling request, and he did not receive any such documentation. CO Lasky testified that he requested air monitoring records along with lead sampling records from Jacobs but did not receive any such documentation. (Tr. 520-523; Ex. GX-13 at 8; *See* Tr. 508-510.)

"When an employer knows that an air contaminant covered by section 1910.1000 is generated in the workplace, reasonable diligence requires the employer to make measurements to determine whether and how much the employees are overexposed." *Seaboard Foundry, Inc.*, 11 BNA OSHC 1398, 1402 (No. 77-3964, 1983). Consistent with this case law, CO Lasky testified that the purpose of the hazard assessment was to determine the appropriate PPE that should be worn, and it must be based on a quantitative measurement. (Tr. 515-516.)

Both RPC and Jacobs had copies of these SDS/MSDS for all of the chemicals used during the lead-based paint abatement project. (Exs. JX-6 at 8; JX-7 at 7; JX-9 at 18.) RPC Laborer Holloway testified that he painted using Bar-Rust and Tru-Glaze while not wearing a respirator due to his medical condition. It is undisputed that respirators were not required by RPC while its workers painted using Bar-Rust and Tru-Glaze. For those workers walking the tunnels, like Construction Manager Tanner and the Jacobs steam plant workers, there is no evidence in this record that they were required to wear respirators in the tunnel. Instead, Safety Lead Quinn testified that the basic level of PPE for anyone to walk the tunnels that Jacobs requires includes hard hat, bump cap, safety glasses, safety shoes and flashlight. (Tr. 797.) The necessity of respirators, on the other hand, was determined by the subcontractor, not Jacobs.

The record establishes that respirators were not required during the application of Bar-Rust and Tru-Glaze, nor was there any monitoring to determine what level of exposure caused some RPC employees to voluntarily seek out respirator protection. (Tr. 278-279, 521-522, 797-798.) Respondent had the opportunity to rebut CO Lasky's testimony that he received no such monitoring documentation despite his request to Jacobs Safety Lead Quinn, but his testimony remains unrebutted. *Capeway*, 20 BNA OSHC at 1342-1343. Furthermore, no witness recalled seeing or knew of any air monitoring during the relevant timeframe of the Utility Tunnel #2

project. (Tr. 288 (Holloway), 731-732 (Tanner), 779 (Quinn), 827-828 (Pryor).) The Secretary has established non-compliance for this citation item.

Regarding exposure, the Secretary claims that both RPC employees as well as Jacobs Construction Manager Tanner and Jacobs steam plant employees were exposed to the hazardous condition. (Sec'y Br. 26-27; Tr. 257, 259-260). The record establishes that RPC employees handled the hazardous materials, and some employees voluntarily sought our respirator protection while working with the hazardous materials. The Secretary has established RPC employee exposure to the hazardous condition.

The record also establishes that Construction Manager Tanner regularly entered the tunnel, which was confined such that mechanical ventilation was used, and the walkway of the tunnel was only 4-5 feet wide. RPC Laborer Holloway testified that he regularly saw Construction Manager Tanner in the walkway as he checked RPC's progress. Laborer Holloway also observed Jacobs's steam plant workers in the tunnel as the RPC employees painted the pipes with the hazardous chemicals. The Jacobs employees commented on the strong paint fumes. (Tr. 257, 259-260, 294.) According to RPC Laborer Holloway, Construction Manager Tanner was not restricted from passing by the worksite while they were using Bar-Rust and Tru-Glaze – the only time the work area was restricted was during the peeling phase of the Peel Away. The Court therefore finds that Jacobs Construction Manager Tanner and Jacobs steam plant employees also had access to the hazardous condition of overexposure to the hazardous materials Bar-Rust and Tru-Glaze while performing their work tasks. *S&G Packaging Co.,* 19 BNA OSHC at 1506. The Secretary has established that Jacobs employees were exposed to the hazardous condition.

Respondent claims that it did not know and could not have known through the exercise of reasonable diligence that RPC did not comply with the cited standard. (Resp't Br. 66.)

Respondent argues that they are not the specialty contractor and that no RPC employee complained of any symptoms to Jacobs. (Resp't Br. 67.) Respondent claims that the respirator standard allows compliance with the standard by "reasonably estimating" its employees' exposure and that "RPC may have complied" with the cited standard in that fashion. (Resp't Br. 67.)

"On a multi-employer worksite, a controlling employer is liable for a contractor's violations if the Secretary shows that [the controlling employer] has not taken reasonable measures to 'prevent or detect and abate the violations due to its supervisory authority and control over the worksite.' " *Suncor*, 2019 WL 654129, *4.

> An employer has constructive knowledge of a violation if the employer fails to use reasonable diligence to discern the presence of the violative condition[.] Factors relevant in the reasonable diligence inquiry include the duty to inspect the work area and anticipate hazards, the duty to adequately supervise employees, and the duty to implement a proper training program and work rules.

N & N, 255 F.3d at 127 (citations omitted); *see also Bristol*, 601 F.2d at 724 (requiring the Secretary to carry the burden of the reasonably prudent employer test to satisfy notice requirement of a citation to a general safety standard).

With regard to the violative condition of not ensuring employees wore required PPE while working with hazardous chemicals, the record establishes that Respondent did not take reasonable measures to prevent or detect the violations. Respondent does not address Construction Manager Tanner's testimony that the SPAs were filled out incorrectly regarding working with hazardous chemicals. As noted above, the SPAs dated during the relevant timeframe in this case indicate that while "working with chemicals" was marked, "there were no checks put on review SDS hazards and precautions for identifying the proper PPE, respirators, clothing, et cetera." (Tr. 421-422; Ex. JX-5 at 1-2, 3-4, 5-6.) After critical review of the document at the hearing, Construction Manager Tanner testified that in his opinion those boxes should have been checked. (Tr. 720-721.) As found in Citation 1, Item 1, the Court finds again that Construction Manager Tanner's

daily review of the incorrectly completed SPAs provided notice that further inquiry by Jacobs was necessary to learn what safety measures RPC had implemented for employees working with hazardous chemicals. Jacobs's unquestioning, uninformed, reliance on RPC, a specialty contractor, was a failure to exercise reasonable care.

Respondent's general approach toward safety at the Center and on the Utility Tunnel #2 worksite rendered Construction Manager Tanner's actions foreseeable. Respondent is liable as a controlling employer on this worksite, and regarding this citation item, Respondent failed to exercise reasonable care in ensuring that RPC required the appropriate PPE while RPC workers were exposed to Bar-Rust and Tru-Glaze in the Utility Tunnel #2 project. Construction Manager Tanner's constructive knowledge is imputed to Respondent. *Summit Contractors, Inc.*, 23 BNA OSHC at 1207.

As Respondent's duty to its own employees was primary, rather than secondary to RPC's employees, the Court finds that the Secretary has also established Respondent's knowledge of the hazardous conditions as an exposing employer. *McDevitt*, 19 BNA OSHC at 1109. Respondent's entire argument in this matter was that it had no responsibility for the respiratory protection for the Utility Tunnel #2 worksite. But Respondent assigned its own employees to enter a tunnel, where hazardous chemicals were being used, to perform work – Tanner regularly assessed the project's progress and ensured that the project was being completed to specification and the steam employees checked valves and for leaks – but *not* to check what kind of hazardous conditions in which the subcontractor worked. *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.") These Jacobs employees did not even know whether they needed respiratory protection despite the purpose of the SPA –

that Construction Manager Tanner reviewed – was to be informed of the hazardous conditions to which they were being exposed while passing by the Utility Tunnel #2 worksite. (Tr. 819-820.) The Secretary has established knowledge on the part of Jacobs as an exposing employer for this citation item. *N & N*, 18 BNA OSHC at 2123.

This citation item is affirmed.

Characterization

The Secretary characterized both citations in this matter as serious violations. A violation is "serious" if a substantial probability of death or serious physical harm could have resulted from the violative condition. *See* 29 U.S.C. § 666(k). The Secretary argues that "there was a substantial probability that death or serious physical harm could result from the conditions [inside Utility Tunnel #2] and therefore the violations were serious in nature." (Sec'y Br. 28.)

As the Secretary points out, CO Lasky testified that "overexposure to lead and hazardous chemicals could produce illness and effects that would be beyond first aid measures." (Sec'y Br. 28; Tr. 334, 423.) CO Lasky testified that "whenever they perform lead abatement, there's the potential for overexposure." (Tr. 334.) Here, because the Respondent did not perform "a study to be able to determine the correct type of controls to be used," the employees could have been exposed to lead poisoning. (Tr. 335.) Similarly, CO Lasky testified that workers were exposed to the OSHA regulated chemicals Tru-Glaze, Bar-Rust and Peel Away. (Tr. 393-397.) CO Lasky testified that the reason OSHA regulates these chemicals is because over exposure could be "life-threatening." (Tr. 397-399.)

Respondent does not address the Secretary's proposed characterization of these citation items. Based on the above evidence, these citation items are both characterized as serious. 29 U.S.C. § 666(k).

PENALTIES

"In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005) (citation omitted).

The proposed penalty was the same for both violations – $7,802 each. CO Lasky testified how the penalty for each citation item was calculated and proposed for this matter. (Tr. 383-387, 422-425; Exs. GX-6, 9, 10.) In terms of gravity, CO Lasky testified that because the severity of the resultant health effect was "medium," and that the probability was determined to be "lesser," the gravity of the violations was determined to be "moderate." (Tr. 384-385, 423.) Respondent was then given no reduction of the gravity-based penalty for the size of the company. (Tr. 385, 423-424.) With regard to history, CO Lasky testified that a reduction for history was not applied because Respondent had no significant history that would affect the calculation of the penalties in this matter. (Tr. 385, 423-424.) CO Lasky also testified that no good faith reduction was applied because it is a "rare variable that we would use." (Tr. 424.) The Secretary argues that the proposed penalties should be affirmed based on the record evidence. (Sec'y Br. 28-29.) Respondent did not address the calculation of the penalty amounts for the citation items at issue in its briefs.

After consideration of the statutory factors, the Court agrees with the calculation of the penalty amounts proposed by the Secretary for each citation item. The proposed penalty amounts are assessed for each affirmed citation item.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1) Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.62(d)(1)(iii), is AFFIRMED as SERIOUS and a penalty of $7,802 is ASSESSED.

2) Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1926.1101(e)(2), WITHDRAWN by the Secretary, is DISMISSED.

3) Citation 1, Item 3, alleging a violation of 29 C.F.R. § 1926.28(a), is AFFIRMED as SERIOUS and a penalty of $7,802 is ASSESSED.

SO ORDERED.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC

DATE: September 25, 2023
Washington, D.C.