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.

FREIGHTCAR AMERICA, INC.,

Respondent.

OSHRC Docket No. 18-0970

ON BRIEFS:

Louise McGauley Betts, Senior Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For the Complainant

John J. Coleman, III, Esq. and Emily C. Burke, Esq.; Burr & Forman LLP, Birmingham, AL
For the Respondent

DECISION

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

BY THE COMMISSION:

In April 2018, a worker was seriously injured when he fell onto equipment at a railcar manufacturing facility in Cherokee, Alabama. The Occupational and Safety Health Administration inspected the facility following the incident and issued FreightCar America, Inc., a citation alleging a serious violation of section 5(a)(1) of the Occupational Safety and Health Act, 29 U.S.C. 654(a)(1), based on employee exposure to a "slip and fall" hazard. Administrative Law Judge Sharon D. Calhoun affirmed the violation and assessed the proposed penalty of $4,712. We reverse the judge's decision and vacate the citation because the Secretary has failed to establish that FreightCar America, Inc., is properly cited as an employer responsible for the alleged violation.

BACKGROUND

Two accidents occurring six weeks apart at the Cherokee railcar manufacturing facility resulted in OSHA issuing two citations under different OSHA inspection numbers to FreightCar America, Inc. Respondent contested both citations and the cases were docketed separately by the Commission (Docket Nos. 18-0772 and 18-0970). Judge Calhoun was assigned to adjudicate both cases, which have not been consolidated, and she held a separate hearing in each case. She also accepted the parties' stipulation that "the evidence admitted at the hearing in . . . Docket No. 18-0772 pertaining to the issue of whether FreightCar America, Inc.[,] is the properly cited employer may be considered in . . . Docket No. 18-0970."

Before the judge in both cases, the parties disagreed on which corporate entity employed the workers at the Cherokee facility. The Secretary identified the employer as FreightCar America, Inc., whereas Respondent argued that the workers are employed by FreightCar Alabama, LLC, a subsidiary of FreightCar America, Inc. The judge found in both cases that FreightCar America, Inc., was the employer of the workers at the facility. Our review of this issue, however, is limited to whether FreightCar America, Inc., has been properly cited as an employer in Docket No. 18-0970.[1]

DISCUSSION

The Secretary argued to the judge that application of the common law agency doctrine set forth in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), shows that an employment relationship exists between FreightCar America, Inc., and the workers at the Cherokee facility. The judge agreed that such an employment relationship exists, but rather than applying the *Darden* common law doctrine to reach this conclusion, she applied the "economic realities" test articulated by the Commission in *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994). The judge relied on this test because, in her view, the factors set forth in *Darden* "are not particularly apposite to this proceeding." In addressing this question on review, the parties were also asked to discuss whether the single employer test should be applied in resolving this issue. *Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356, 1359 (No. 02-1174, 2011) (consolidated) (explaining Commission's single employer test), *aff'd*, 692

[1] In Docket No. 18-0772, the judge vacated the citation on its merits and her decision in that case subsequently became a final order of the Commission.

F.3d 65 (2d Cir. 2012). We therefore analyze whether an employment relationship existed between FreightCar America, Inc., and the Cherokee workers, as well as whether FreightCar Alabama, LLC, and FreightCar America, Inc., functioned as a single employer under the OSH Act.[2]

Employment Relationship

Since the Supreme Court issued *Darden*, 503 U.S. 318, in 1992, the Commission has consistently applied the common law agency doctrine set forth in that decision to employment relationship questions arising under the OSH Act instead of the economic realities test that the judge applied here. *See, e.g., All Star Realty Co.*, 24 BNA OSHC 1356, 1358-59 (No. 12-1597, 2014) (applying *Darden* factors); *Lake Cty. Sewer Co.*, 22 BNA OSHC 1522, 1523-24 (No. 07-1786, 2009) (same); *see Timothy Victory,* 18 BNA OSHC 1023, 1026 (No. 93-3359, 1997) (recognizing that, in light of *Darden*, Commission had found that term "employee" should be interpreted consistent with common law principles, and finding that "the Secretary was mistaken in relying on [*S&S Diving Co.*, 8 BNA OSHC 2041, 2042 (No. 77-4234, 1980), which applied the economic realities test] and other Commission decisions before [*Vergona Crane Co.*, 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992)] as to the operative test of an employment relationship"). The Commission relies on this doctrine because the OSH Act's definition of "employee" is "unhelpfully circular."[3] *Don Davis*, 19 BNA OSHC 1477, 1479-80 (No. 96-1378, 2001); *see Darden*, 503 U.S. at 323 ("adopt[ing] a common-law test for determining who qualifies as an 'employee' under [Employee Retirement Income Security Act of 1974]" because statute's "nominal definition of 'employee' . . . is completely circular and explains nothing"). Under such circumstances, the Supreme Court has found that Congress intended "the term 'employee' . . . to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Don Davis*, 19 BNA OSHC at 1480 (quoting *Darden*, 503 U.S. at 322-23); *see Vergona Crane Co.*, 15 BNA OSHC at 1784 (noting that Supreme Court held in *Darden* that "the term 'employee' in a federal statute should be interpreted under common law principles, unless the particular statute specifically indicates otherwise"). Thus, consistent with our precedent, we apply

[2] We do not reach the other issues that were raised in the briefing notice, which include whether the citation provided notice to Respondent of the recognized hazard at issue, whether a promulgated standard preempts the alleged general duty clause violation, and whether Respondent had knowledge of the hazardous condition.

[3] The OSH Act defines "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(6).

that doctrine here to determine whether FreightCar America, Inc., is the employer of the workers at the Cherokee facility.

The common law agency doctrine set forth in *Darden* "focuses on 'the hiring party's right to control the manner and means by which the product is accomplished.' " *All Star Realty Co.*, 24 BNA OSHC at 1358 (citing *Darden*, 503 U.S. at 323). The Supreme Court recognized the following factors as "relevant to this inquiry":

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-24. In the context of the OSH Act, the Commission has held that the control exercised over a worker is the "principal guidepost." *S. Scrap Materials Co.,* 23 BNA OSHC 1596, 1612 (No. 94-3393, 2011); *Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1506 (No. 97-1839, 2004) (quoting *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003)).

Applying the *Darden* factors here, we conclude the Secretary has failed to establish that the workers at the Cherokee facility are employees of FreightCar America, Inc. The W-2 forms and pay/earnings statements in evidence for workers at the facility, including those in managerial roles such as "production supervisor" and "HR manager," identify FreightCar Alabama, LLC, as the employer.[4] These forms specify the pay, retirement, and health benefits that workers received, as well as the amounts of state and federal taxes withheld. *See Darden*, 503 U.S. at 323-24 (listing as factors "the method of payment; . . . the provision of employee benefits; and the tax treatment of the hired party"). In addition, a document titled, "United States of America[,] National Labor Relations Board[,] Stipulated Election Agreement," lists the workers' employer as "FreightCar Alabama, LLC, a subsidiary of FreightCar America, Inc.," and provides the address of the

[4] The judge found that these pay/earning statements are "processed through the corporate headquarters of FreightCar America, Inc.[,] in Chicago." But it is undisputed that the corporate headquarters for FreightCar Alabama, LLC, is located at the same address. Given that "FreightCar Alabama"—and not FreightCar America, Inc.—is the company identified on each of these statements, we find that the record does not support the judge's finding.

"Employer's . . . Cherokee, Alabama facility" as the location of the election.[5] *Id.* (listing "the location of the work" as a factor). Finally, as to the railcars manufactured at the facility (the "product"), the OSHA compliance officer who inspected the facility acknowledged that he did not know whether FreightCar America, Inc., gets "customers, decides what railcars to build, [or] decides how they are going to be built," and we have found no evidence that FreightCar America, Inc., rather than FreightCar Alabama, LLC, is responsible for these product-related activities. *All Star Realty Co.*, 24 BNA OSHC at 1358 (noting that common-law agency doctrine "focuses on 'the hiring party's right to control the manner and means by which the product is accomplished' " (citing *Darden*, 503 U.S. at 323)).

To support her conclusion that FreightCar America, Inc., exercises authority over the Cherokee facility's workers, the judge relied on visual references to "FreightCar America" that appear throughout the facility, including on various documents such as the facility's log of visitors and its parking permits. But many of these references appear to be to the brand name "FreightCar America" rather than the corporate entity, and to the extent that the corporation is identified in certain documents, their content is silent regarding what authority—if any—FreightCar America, Inc., exercises over the facility and its workers. Specifically, the name "FreightCar America" appears on a sign outside the Cherokee facility and on the workers' uniforms, and also as a header or heading (in most cases, without the "Inc.") on a "Product Assembly Document" and several safety program documents, as well as on the visitors' log and parking permits. In addition, "FreightCar America"—both with and without the "Inc."—is identified as the "establishment name" on several of the facility's OSHA 300 forms, though the forms from 2016 identify the establishment name, interchangeably, as "FreightCar America – Shoals" and "FreightCar Alabama, LLC." Finally, the facility's agreement with the temporary employment agency that supplied the worker whose injury resulted in the inspection here lists the contracting party as "FreightCar America – Shoals Facility," which as noted with respect to the 2016 OSHA 300 forms,

[5] The judge found that this agreement was not probative because it is dated May 22, 2018, a month after the Secretary issued the citation in the other case not before us (Docket No. 18-0772). As to the case at issue on review, the agreement was signed about a month and a half following the accident, but OSHA did not issue the citation until two days after the agreement was signed. Moreover, the fact that "FreightCar Alabama, LLC," is identified as the employer in the agreement is consistent with the identification of the employer in the W-2 forms and pay/earning statements, some of which predate the accident in either case.

is a name that on at least one occasion has been used interchangeably with "FreightCar Alabama, LLC."

Without additional evidence that directly addresses or explains the parent company's role at the Cherokee facility, we cannot conclude that these references to FreightCar America, either as a brand name or a corporate entity, prove that the company exercises sufficient control over the facility's workers to establish an employment relationship. Indeed, the W-2 forms and pay/earning statements, along with the stipulated election agreement, are the only documents that explicitly identify the "employer" of these workers, and they all name FreightCar Alabama, LLC, *not* FreightCar America, Inc. This documentary evidence also undermines the judge's reliance on the belief of some workers that their employer is FreightCar America, Inc. With no explanation in the record for *why* they held this belief, such statements, alone, do not show that FreightCar America, Inc., employed the workers.

Finally, we are troubled by the lack of evidence addressing many of the factors listed in *Darden*. And as discussed above, the factors that the evidence does address weigh in favor of a finding that the workers at the Cherokee facility are employed by FreightCar Alabama, LLC, not FreightCar America, Inc. A finding here that the Secretary carried his burden of proof under *Darden* would create an impermissibly low bar for establishing the test and strip it of its intended purpose. This is especially true when the Commission has previously enunciated that the control exercised by a cited company over the workers at issue is the "principal guidepost" under a *Darden* analysis. *S. Scrap Materials Co.,* 23 BNA OSHC at 1612. Little, if any, actual control exercised by FreightCar America Inc. over the workers at the Cherokee facility is demonstrated in the record before us. We therefore conclude that the preponderance of the evidence does not show that FreightCar America, Inc., is the employer of the Cherokee facility's workers. *All Star Realty Co.*, 24 BNA OSHC at 1358 ("[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." (citing *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated))).

Single Employer

The judge opined in her decision that the employment relationship issue would have been better analyzed under the Commission's single employer test, which assesses whether two entities should be treated as a single employer for purposes of the OSH Act. *Loretto*, 23 BNA OSHC at 1358 ("Commission precedent hold[s] that 'related employers are regarded as a single entity

where . . . they share a common worksite, have interrelated and integrated operations, and share a common president, management, supervision, or ownership.' " (citation omitted)). The judge did not base her decision on this theory of employer liability because neither party raised it as an issue, but she nonetheless noted that the record evidence shows the two companies are a single employer.[6] In response to our briefing notice request that the parties address this question, the Secretary urges us to apply the single employer test to the inquiry at hand. But even under this test, the record evidence does not establish that FreightCar America, Inc., is a responsible employer in this case.

The Secretary bears the burden of establishing that the cited entity is part of a single employer relationship. *Loretto*, 23 BNA OSHC at 1358 n.4. The factors relevant to this inquiry include whether the two entities "share a common worksite, are interrelated and integrated with respect to operations and safety and health matters, and share a common president, management, supervision, or ownership." *S. Scrap Materials Co.*, 23 BNA OSHC at 1627. The record evidence showing that such a relationship exists here is thin. Although the Secretary established that the corporate headquarters for the two companies is at the same address in Chicago, Illinois, the record does not show that the companies "share" the worksite at issue—the Cherokee facility. There is also no evidence showing that the two companies share "a common president, management, supervision, or ownership." *Id.* In fact, nothing in the record identifies the occupants of these positions for FreightCar America, Inc.

As to interrelation and integration of the two companies "with respect to operations and safety and health matters," much of the record evidence lacks the necessary context. As discussed above, "FreightCar America" appears to be visually represented throughout the Cherokee facility as a brand name rather than a corporate entity. This is not unlike the branding practice among other affiliated enterprises, where there is a common brand name but independent commercial enterprises carry out the work—such examples include hospital systems, airlines, and hotel chains.

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[6] Given that the employment relationship issue was before the judge, we note that she could have exercised her discretion to apply the most appropriate legal framework to resolve the issue. *See C.T. Taylor Co.*, 20 BNA OSHC 1083, 1086-88 & n.5 (No. 94-3241, 2003) (consolidated) (holding that, in raising sua sponte and applying single employer test, judge properly relied on longstanding Commission precedent; "[t]he judge here merely recognized that the facts pleaded and shown by the Secretary led to the legal conclusion that [the two companies] functioned as a 'single employer' under Commission precedent").

Further, the evidence does not address the extent, if any, to which FreightCar America, Inc. is involved in operational and safety and health matters at the Cherokee facility. And the mere fact that employees at the facility believed at the time of the inspection that their employer was FreightCar America, Inc., is insufficient to establish the existence of a single employer relationship.[7] *See Loretto*, 23 BNA OSHC at 1359-60 (finding single employer relationship was not established where entities "shared the same president, chief executive officer, and chief financial officer" and there was some evidence that companies interacted on safety and health matters, but companies did not share common worksite and record did not show companies "handled safety matters as one company"); *compare Vergona Crane Co.*, 15 BNA OSHC at 1783 (finding single employer relationship where two companies were owned by same family, had same president, and operated out of same office, and leases for crane at issue appeared to use names of companies interchangeably); *C.T. Taylor Co.*, 20 BNA OSHC 1083, 1087 (No. 94-3241, 2003) (consolidated) (finding single employer relationship where two companies were owned and controlled by same individual and operated out of same office, and one company, on behalf of other, essentially performed all administrative functions and, as to job at issue, controlled and directed employee work and maintained responsibility for employee safety).

In arguing that the two companies operate as a single employer, the Secretary focuses on a Cherokee facility safety manager's "dual role as a corporate safety director for FreightCar America and onsite safety director." We find, however, that the record evidence is insufficient to establish that this safety manager was either employed by FreightCar America, Inc., or acted as a corporate director for the company. During hearing testimony, a business card was read into evidence that

[7] The compliance officer testified that following the accident in the other case not before us, one of the two safety managers at the Cherokee facility informed the "duty officer" at OSHA during a phone call that the establishment at issue was "FreightCar America, Inc." The compliance officer also testified that he subsequently asked this safety manager which corporate entity should be cited by OSHA and the safety manager identified FreightCar America, Inc. We note that at both hearings, the safety manager did not admit to providing this information, but for the reasons discussed by the judge, which include a compelling assessment of the safety manager's credibility, we think it likely that the safety manager did, for whatever reason, inform OSHA on at least two occasions that FreightCar America, Inc., was the responsible entity. However, in the absence of additional supporting evidence explaining FreightCar America, Inc.'s role at the facility, the safety manager's unsubstantiated statement of personal belief in this regard is not enough to satisfy the Secretary's burden of establishing a single employer relationship between FreightCar America, Inc., and FreightCar Alabama, LLC.

listed FreightCar America, Inc., under the safety manager's name and duty title. The actual business card, however, was not admitted into evidence. Regardless of the business card's reference to FreightCar America, the safety manager claimed that he worked for FreightCar Alabama, LLC.

Other than the business card and the safety manager's testimony about it, there is no other evidence presented as to which company actually employed the safety manager. Indeed, at no point during either hearing did the Secretary's counsel attempt to elicit evidence concerning the identity of the safety manager's employer, including when the human resources manager authenticated and testified about the pay records of other individuals who worked at the Cherokee facility. Although the judge properly accorded the safety manager's testimony little weight based on her sound demeanor-based credibility determinations, she then simply presumed that the safety manager must be an employee of FreightCar America, Inc., even though the Secretary never submitted this manager's W-2 forms and pay/earning statements into the record. *See Nordam Grp.*, 19 BNA OSHC 1413, 1416 (No. 99-0954, 2001) ("The Commission will ordinarily accept a credibility finding when it is based on the judge's observation of a witness's demeanor and is clearly explained."), *aff'd*, 37 F. App'x 959 (10th Cir. 2002) (unpublished). Absent such documentation, which would be the most definitive evidence of his employer's identity, the judge's inference lacks sufficient support.[8]

[8] Commissioner Sullivan notes that the burden of proof is not to be taken lightly as due process requires the party bearing the burden to meet the necessary threshold in order to prove its case. Scott Turow described this role of carrying the burden best when he said, "[t]he prosecutor, who is supposed to carry the burden of proof, really is an author. He's got different voices through different witnesses. He has to present a compelling narrative and there's got to be a moral to his story." Robert McCrum, *'To Hell with Perry Mason'*, THE GUARDIAN, Nov. 24, 2002, http://www.theguardian.com/books/2002/nov/24/crime.saulbellow. In order to be effective authors, successful litigators have found a number of ways to ensure they have the necessary evidence to prove their cases. Whether it be a formal proof analysis or a thorough knowledge of the law developed over years of practice leading to a realization of what evidence is lacking in his or her case, a means of understanding the holes in one's case is necessary. Those holes in one's case may be closed through the use of the Commission's procedural rules regarding discovery, motions to compel, and sanctions. *See generally* 29 C.F.R. § 2200.52. It is incumbent on the parties to engage in discovery in order to build their cases. If information is sought from an opposing party and that party fails to respond appropriately, then the party seeking the information must file a motion to compel or will suffer the consequences of its inaction.

Nor are we persuaded to find otherwise based on the compliance officer's testimony that this safety manager said he was employed by FreightCar America, Inc. Considering the factors enunciated in *Darden*, 503 U.S. at 323-24, this fact alone does not establish that FreightCar America, Inc., is his employer, particularly when considered with a second safety manager's pay statement that identifies his employer as "FreightCar Alabama."[9] Indeed, there is no evidence in the record showing that FreightCar America, Inc., exercised control over either safety manager or their work at the Cherokee facility. The Secretary points out that the safety manager who testified at the hearing confirmed that he had "some responsibilities" at other facilities associated with FreightCar America, but since no further inquiry was conducted, it is unclear what his role was at these facilities or whether he was even acting on behalf of FreightCar America, Inc., rather than FreightCar Alabama, LLC, in meeting those responsibilities. With the limited information before us, there remains a significant amount of confusion as to the nature of the relationship between FreightCar America, Inc. and FreightCar Alabama, LLC, and as such, we decline to infer what the exact nature of their relationship is. Therefore, we conclude that the record does not establish an employment relationship between the Cherokee facility's safety managers and FreightCar America, Inc.

As to whether either safety manager acted as a corporate director for FreightCar America, Inc., the Secretary directs us to the manager's testimony that his business card includes "FreightCar America, Inc." under his title, "Corporate Director of Environmental Health and Safety." Putting aside that the business card, like the safety manager's pay records, was never submitted into evidence, his testimony—which was otherwise discredited—is insufficient to establish that he *in fact* functions as a corporate director for FreightCar America, Inc. Moreover, there is no testimony or documentary evidence *from FreightCar America, Inc.*, confirming that either safety manager was a corporate director. Thus, we also conclude that the record does not establish that these safety managers were corporate directors for FreightCar America, Inc.

Simply put, the record evidence concerning FreightCar America, Inc.'s role at the Cherokee facility falls short. We therefore conclude that the Secretary has failed to establish that

[9] The pay records in evidence include a pay statement for a managerial employee who held *the same position* at the Cherokee facility as the safety manager who testified at the hearing. This pay statement identifies "FreightCar Alabama" as the other safety manager's employer.

FreightCar America, Inc., is an employer responsible for the violation alleged in Serious Citation 1, Item 1.

Accordingly, we reverse the judge and vacate the citation.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
James J. Sullivan, Jr.
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: March 3, 2021

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036-3457

Secretary of Labor,

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FreightCar America, Inc.,

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OSHRC Docket No.: **18-0970**

Appearances:

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Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee
For Complainant

John J. Coleman, III, Esq. and Emily C. Burke, Esq.
Burr & Forman, Birmingham, Alabama
For Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

On April 2, 2018, a worker at a railcar manufacturing facility in Cherokee, Alabama, was injured when he slipped and fell while walking across a roller bed platform. On April 10, 2018, Compliance Safety and Health Officer (CSHO) Javier Rodriguez of the Occupational Safety and Health Administration opened an inspection at the facility. After completing his inspection, Rodriguez recommended the Secretary cite FreightCar America, Inc., the corporate entity Rodriguez believed to be the owner and operator of the facility (and the employer of the injured worker), for a violation of § 5(a)(1), the general duty clause, of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 654(a)(1).

On May 24, 2018, the Secretary issued a one-item Citation and Notification of Penalty to FreightCar America, Inc. (Respondent) alleging a serious violation of the general duty clause for

exposing employees to slip and fall hazards when welding atop the roller bed platform. The Secretary proposes a penalty of $4,712 for Item 1.

Respondent contends the Secretary failed to establish a violation of the general duty clause but also vigorously argues the Secretary cited the wrong employer—Respondent claims FreightCar Alabama, LLC, not FreightCar America, Inc., owns and operates the facility and urges the Court to vacate the Citation because it is not the employer of the affected employees.

For the reasons that follow, the Court finds the Secretary properly cited Respondent FreightCar America, Inc. as the employer of the affected employees at the cited facility. The Court also finds the Secretary established the cited violation. Accordingly, the Court **AFFIRMS** Item 1 of the Citation and assesses a penalty of $4,712.

JURISDICTION AND COVERAGE

Respondent timely contested the Citation on June 14, 2018. The parties stipulate the Commission has jurisdiction over this action and Respondent is a covered employer under the Act (*Joint Prehearing Statement*, p. 4; Tr. 13). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Respondent is a covered employer under § 3(5) of the Act.

STIPULATIONS

The parties stipulated the following pertinent "Proposed Facts":

> 6. The employee [who slipped and fell] sustained injuries requiring hospitalization.
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> 7. The roller bed platform is roughly 42" above the ground and 53' long by 12' wide.
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> 8. Employees accessed the steel sheet atop the elevated covered roller bed to conduct welding work five times per day, for seven weeks.
>
> 9. The sheets of steel on which the injured employee worked rest on rollers mounted on vertical girders supported by protruding horizontal girders laid out in a cross brace "x" pattern.
>
> 10. The facility at 1200 Haley Drive, Cherokee, Alabama, 35616, manufactures rail cars.
>
> 11. Following the April 2, 2018, accident and inspection, the prescribed abatement was that the employees would no longer work on top of the platform, but perform all welding from below, and a work rule has adopted the abatement.

(*Joint Prehearing Statement*, pp. 4-5; Tr. 15-16)

BACKGROUND

The cited railcar manufacturing facility is commonly referred to as the "Shoals facility" (it is near Muscle Shoals, Alabama) (Tr. 15; No. 18-0772, Exh. CX-1).[1] The Shoals facility has several production lines with roller beds. At the roller bed at issue, large steel sheets are welded together by an automated butt welder, then moved along the roller bed to an area (the cut off station) where the welded sheet is clamped in place. Workers at the station cut metal tabs off the steel sheet with grinders (Tr. 156, 158-59, 187).[2] A wooden three-step staircase is placed on either side of the roller bed. Before the April 2, 2018, accident, workers would perform the grinding work by climbing one of the staircases and stepping onto the metal sheet lying on top of the roller bed to cut off the tabs. They would then climb down the stairs to wait either for the rest of the steel sheet to move into place to cut off the remaining tabs or for the next steel sheet. The first time the steel sheet is clamped in place, workers cut off two tabs. After the steel sheet is moved forward and clamped again, workers cut off four tabs. The Former Employee estimated it takes less than two minutes to cut off four tabs (Exh. RX-10; Tr. 42, 46, 159, 170, 188).

Employee #1 was a temporary employee hired by Respondent from Lyons HR, a temporary staffing agency (Tr. 154).[3] He worked the second shift on the cut off station, and his

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[1] On April 23, 2018, the Secretary issued a Citation and Notification of Penalty to Respondent, alleging a serious violation of the general duty clause occurred at the Shoals facility on February 28, 2018, due to employee exposure to struck-by hazards. Respondent timely contest the Citation and argued it was not the employer of the exposed employees. That case (Docket No. 18-0772) was also assigned to the Court but the cases were not consolidated for hearing. The Court held a hearing in that case on February 8 and March 14, 2019, and a hearing in this case (Docket No. 18-0970) on March 14 and 15, 2019. On March 6, 2019, the parties submitted a joint stipulation:

> The Complainant and Respondent in the above captioned matter stipulate that the evidence admitted at the hearing in OSHRC Docket No. 18-0772 pertaining to the issue of whether FreightCar America, Inc. is the properly cited employer may be considered in OSHRC Docket No. 18-0970; and the evidence admitted on that issue at the hearing in OSHRC Docket No. 18-0970 may be considered in OSHRC Docket No. 18-0772. The parties have agreed that the proof on this specific issue may be considered in both cases in the interest of judicial economy and ask that the Administrative Law Judge accept this joint stipulation.

(No. 18-0772, Exh. J-1) The Court accepted the joint stipulation and has considered evidence from the records in both cases regarding the issue of whether the Secretary properly cited Respondent as the employer of the affected employees. Citations to the transcript and exhibits in Docket No. 18-0772 will be preceded by "No. 18-0772." Citations without a designated docket number are from this proceeding, Docket No. 18-0970.

[2] The butt welder is the large blue structure in the background of Exh. RX-10. The horizontal metal bars and rollers of the roller bed can be seen in the foreground (Tr. 169).

[3] It is undisputed Lyons HR provided new employee orientation only, such as payroll and benefits information, and did not provide safety training to employees. Job-specific safety training was done by Respondent (Tr. 145).

supervisor was J.M. (Tr. 154, 189-90). On April 2, 2018, Employee #1 was standing on top of a steel sheet on the roller bed platform after he had finished cutting off its tabs. To get to the staircase he wanted to use, Employee #1 stepped off the metal sheet onto one of the horizontal bars (or "beams") of the roller bed and proceeded to step from one bar to the next.[4] He lost his footing and fell forward onto the bars, injuring his face and abdomen (Exh. RX-11; Tr. 47, 167). He suffered a broken nose, facial lacerations, and a pancreatic contusion (Tr. 55-56, 165). He was hospitalized and missed "roughly a month" of work (Tr. 165-66). He returned to work for Respondent but in a different area of the facility (Tr. 156).

In response to Respondent's report of a work-related accident and hospitalization, CSHO Javier Rodriguez opened an inspection at the facility on April 10, 2018, taking photographs and measurements, interviewing employees, and requesting employer documents (Tr. 30-32). As a result of Rodriguez's inspection, the Secretary issued a Citation to FreightCar America, Inc. on May 24, 2018.

WAS RESPONDENT THE EMPLOYER OF THE AFFECTED EMPLOYEES?

The Secretary cited "FreightCar America, Inc." as the employer of the affected employees. Respondent contends "FreightCar Alabama, LLC" is the correct employer, and so the Citation issued to FreightCar America, Inc. should be dismissed. It is the Secretary's burden to establish FreightCar America, Inc. is the properly cited employer in this proceeding.

> Only an "employer" may be cited for a violation of the Act, *see* 29 U.S.C. § 658(a), and the Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site.

Allstate Painting & Contracting Co., Nos. 97-1631 & 97-1727, 2005 WL 682104, at *2 (OSHRC March 15, 2005) (consolidated).

The Secretary believes this issue should be analyzed using the Supreme Court's *Darden* test, set out in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 316, 323 (1992) (Looking to "the hiring party's right to control the manner and means by which the product [was] accomplished" to determine the employer/employee relationship). Respondent claims it is not the employer of the affected employees based on an almost 30-year old unreviewed ALJ decision that addresses the issue of limited liability. *Hills Department Stores, Inc.,* No. 89-1807, 1990

[4] The wooden staircases were movable. The Former Employer testified, "I slide my stairs wherever they needed to go." (Tr. 187) It appears likely from his testimony Employee #1was not aware he could move the staircases along the roller bed.

WL 146495, at *2 (OSHRC Sept. 12, 1990) ("Under the doctrine of limited liability, recourse is against the corporation itself, not against its parent company or shareholders. Generally, a parent is not liable for the acts of its subsidiary.").[5]

The Court finds the Secretary has established he properly cited Respondent FreightCar America, Inc. as the employer of the affected employees. The testimony of the witnesses and the documentary evidence demonstrate FreightCar America, Inc. exercised substantial control over the Shoals facility.

Testimony of CSHO Javier Rodriguez and Documentary Evidence

In Docket No. 18-0772, CSHO Rodriguez testified that when an employer calls in to report an accident, OSHA's duty officer takes "all the information directly from the caller and input[s] that information into a system[.] . . . We take exactly what the employer tells us that happened. And then, when that is assigned to a compliance officer, the compliance officer is to do the investigation." (No. 18-0772, Tr. 95-96) On March 1, 2018, OSHA's duty officer received a telephone call from management official "Fred Parson," who identified the "Establishment Name" of the accident site at 1200 Haley Drive in Cherokee, Alabama, as "FreightCar America, Inc." (No. 18-0772, Exh. CX-8) As part of OSHA's standard procedure, Rodriguez conducted a business entity search on the Alabama Secretary of State's website (which he referred to as the "database") (No. 18-0772, Tr. 122-23). The Alabama Secretary of State's website has an entry for "FreightCar Alabama, LLC" with the following pertinent information:

Principal Address:	Two North Riverside Plaza Ste. 1300, Chicago, IL 60606
Status:	Exists

[5] The Court is of the opinion this issue would best be analyzed under the single employer test, as set out in *Southern Scrap Materials Co., Inc.,* No. 94-3393, 2011 WL 4634275, at *34 (OSHRC Sept. 28, 2011) ("Under Commission precedent, the factors relevant to determining whether separate entities are regarded as a single employer include whether they share a common worksite, are interrelated and integrated with respect to operations and safety and health matters, and share a common president, management, supervision, or ownership."). Under that test, the Court would find FreightCar America, Inc. and FreightCar Alabama, LLC constitute a single employer—the entities share a common worksite (the Chicago headquarters) (No. 18-0772, Exhs. CX-1 & CX-2); Shoals facility management employees used the names of the two entities and their variations interchangeably, and pay statements for its employees are issued through the Chicago headquarters, among other interrelated operations (No. 18-0772, Exhs. CX-5, RX-13, RX-15; Exhs. RX-7, RX-8, RX-18); and the entities share at least a common corporate director of EHS, Fred Pearson, who is located at the Shoals facility but is responsible for FreightCar facilities in other cities (No. 18-0772, Tr. 369-70). Neither party argued or briefed the single employer test.

Formation Date: 2-8-2013

Reporting Address: 1200 Haley Dr., Cherokee AL 35616-5369

(No. 18-0772, Exh. CX-2) In its *Corporate Disclosure Statement*, Respondent stated FreightCar Alabama, LLC is one of several of its "[a]ffiliates and/or subsidiaries."

CSHO Rodriguez met with environmental health and safety (EHS) management employees Fred Pearson and Scott Tittle when he visited the Shoals facility on March 7 and 22 (No. 18-0772, Tr. 113, 118). He later called Pearson to clarify the correct employer name for the facility.

> I asked [Pearson] about . . . the legal name of the company because . . . I went through the . . . database and I found the Alabama Secretary, I found "FreightCar Alabama, LLC," and I also found "FreightCar America, Inc." So I remember specifically asking, look, I'm confused, which one it is. Could you get with your -- somebody in your legal department and just get back with me. He says, okay. And that's what happened. . . . I can't remember if I called him back the next day or -- or two days after or he called me back and he said, look, as far as I know, it's "FreightCar America, Inc." So that's how it was entered.

(No. 18-0772, Tr. 121)

CSHO Rodriguez also looked at the website of FreightCar America, Inc. (No. 18-0772, Tr. 125). Small print at the bottom of the website states, "All content is © 2018 FreightCar America, Inc." (No. 18-0772, Exh. CX-1) Under "Locations," the website lists four cities and a state with the designated functions of their facilities for FreightCar America, Inc.:

Chicago: Headquarters

Muscle Shoals: Manufacturing

Roanoke: Manufacturing

Johnstown: Parts

Nebraska: Parts

(*Id.*).

The address for the Chicago headquarters of FreightCar America, Inc. is 2 North Riverside Plaza, Suite 1300, Chicago Ill. 60606, which is the same address listed for FreightCar Alabama, LLC on Alabama's Secretary of State website. The text for the Muscle Shoals facility states, "Opened in 2008 and located in the Shoals region of Alabama, this state-of-the-art production facility was designed to build a wide variety of railcar types. FreightCar commenced operations in February 2013, subleasing 25% of the plant from Navistar. In February 2018,

FreightCar announced the acquisition of Navistar's assets and is now the sole tenant of the 2.2-million-square-foot facility." (*Id.*)

The *Employer's First Report of Injury* required by the State of Alabama was filed in the name of FreightCar America, Inc. The Employer Identification Number (EIN) used on that form is different from the EIN for FreightCar Alabama, LLC that Respondent provided to CSHO Rodriguez (No. 18-0772, Tr. 106, 364).

As part of his inspection, CSHO Rodriguez requested several documents from Respondent, including its OSHA 300 logs. (No. 18-0772, Tr. 100-02). Respondent provided CSHO Rodriguez with a copy of the facility's *OSHA's Form 300A, Summary of Work-Related Injuries and Illnesses* for the years 2015 through 2018. The front page of the summary for each year features a box in which the employer enters "Establishment Information." Written above the signature line is: "*Knowingly falsifying this document may result in a fine.* I certify that I have examined this document and that to the best of my knowledge the entries are true, accurate, and complete." (No. 18-0772, Exh. CX-5, p. 1; Exh. CX-10) In 2015, the entry next to "Your establishment name," is "FREIGHTCAR AMERICA, INC." The bottom of the "Establishment Information" box is illegibly signed and dated 1-8-16 by someone who listed his or her title as "GEN MANAGER." (*Id.*)

For 2016, "Your establishment name" is entered as "FreightCar America – Shoals" by someone with the title "VP" (again with an illegible signature) and is dated 1/30/17 (No. 18-0772, Exh. CX-5, p. 5; Exh. CX-10). Despite the Summary page for 2016 stating the establishment is "FreightCar America – Shoals," two of the log pages for 2016 list the establishment name as "FreightCar Alabama, LLC" (No. 18-0772, Exh. CX-5, pp. 6-7; Exh. CX-10) For 2017, "Your establishment name" is "FreightCar America" (no "Inc."). It is signed illegibly by someone who lists his or her title as "VP Ops," and is dated 1/29/18 (No. 18-0772, Exh. CX-5, p. 8; Exh. CX-10). There is no summary page with a signature line for 2018, but the single log page provided for that year lists the "Establishment name" as "FreightCar America." (No. 18-0772, Exh. CX-5; p. 14; Exh. CX-10).

Respondent also provided CSHO Rodriguez with a copy of its *Incident Report* for the February 28, 2018, accident (No. 18-0772, Tr. 125-26). It bears the "FreightCar America" logo and is titled *FCA Shoals Incident Report.* The five handwritten witness statements are on forms headed "FreightCar America, Inc. Statement of Witness." (No. 18-0772, Exh. CX-7) The

Shoal's facility PAD showing how to assemble the railcars on Line 4 is marked "FreightCar America." (No. 18-0772, Exh. CX-6)

CSHO Rodriguez interviewed a Shoals facility Team Leader, writing his questions and the Team Leader's answers on a standard OSHA witness statement form. The Team Leader signed and initialed the form. When asked for his employer's name, the Team Leader stated, "FreightCar America." (No. 18-0772, Exh. CX-22) Respondent submitted the Team Leader's W-2 form for 2017, which states his employer is FreightCar Alabama, LLC and gives its address as 129 Industrial Park Rd., Johnston PA 15909 (No. 18-0772, Exh. RX-12). Respondent also submitted an earning statement from 2018 for the Team Leader, which states his employer is FreightCar Alabama, LLC but gives its address as 2 N Riverside PLZ, Ste 1300, Chicago IL 60606, the shared address for FreightCar America, Inc. (No. 18-0772, Exh. RX-13).

Respondent adduced several documents through Cris Stephenson, HR manager for the Shoals facility (No. 18-0772, Tr. 339), including three W-2 forms for employees naming their employer as FreightCar Alabama, LLC and giving the Johnstown, Pennsylvania address (No. 18-0772, Exhs. RX-14, RX-16, and RX-17). Exhibit RX-15 in Docket No. 18-0772 is an earning statement for an employee employed by FreightCar Alabama, LLC but showing the Chicago address. Respondent also adduced an NLRB *Stipulated Election Agreement* between the International Association of Sheet Metal Air Rail Transportation Workers (SMART) and "FreightCar Alabama, LLC, a Subsidiary of FreightCar America, Inc.," dated May 22, 2018, a month after the Secretary issued the Citation in Docket No. 18-0772 (No. 18-0772, Exh. RX-3).

CSHO Rodriguez was also the investigating CSHO in this proceeding. The Secretary submitted through CSHO Rodriguez a client service agreement between Lyons HR, Inc. (a temporary staffing agency) and "FreightCar America – Shoals Facility," dated April 5, 2017 (Exh. CX-5, p. 4; Tr. 58). Pay statements for Shoals facility employees show their employer to be FreightCar Alabama, LLC but are paid from the Chicago headquarters address of FreightCar America, Inc. (Exhs. RX-7, RX-8, RX-18). During cross-examination, Respondent's counsel read from Rodriquez's deposition testimony (Exh. RX-23, pp. 27-28).

> "QUESTION: Let's assume for a second that this individual was not -- was -- and then I say have -- was an employee of Lyons. No question about that. But that the facility you inspected was neither not operated by FreightCar America, Inc. and that the employees on-site were not directed by FreightCar America, Inc., that they were instead directed by Rodriguez Cars Inc.? ANSWER: Okay. QUESTION: Would you agree with me that the citation against FreightCar

America, Inc., if that were true, should be dismissed? ANSWER: If we are assuming, yes. QUESTION: Right. We're assuming. ANSWER: Yes."

(Tr. 81-82)

CSHO Rodriguez later clarified his answer.

Q.: So what's your understanding of assuming that for sake of answering those questions?

CSHO Rodriguez: Like the words say, he's assuming. It's not the real thing. He's assuming.

Q.: So for the sake of the assumption or hypothetical, you agree, but do you, in fact, agree with that FreightCar America, Inc. should be dismissed?

. . .

CSHO Rodriguez: No, it should not be dismissed.

(Tr. 132-33)

Respondent argues this testimony "foreclosed contrary evidence," and constitutes an admission by the Secretary that the Citation should be dismissed in this proceeding and in No. 18-0970 (Respondent's brief, p. 8, n. 45). The Court disagrees. As is evident from the deposition excerpt read by Respondent's counsel, as well as CSHO Rodriguez's subsequent clarification, the question posed by Respondent's counsel was clearly hypothetical and Rodriguez's answer is not a binding admission by the Secretary.

Respondent's counsel read another excerpt from Rodriguez's deposition (Exh. RX-23, p. 82).

"QUESTION: Okay. Are you aware that FreightCar Alabama, LLC operates the site -- the job site that you inspected in looking into [the injured employee's] accident? ANSWER: Please repeat the question? QUESTION: Are you aware FreightCar Alabama, LLC operates the job site and employs the employees on the site you inspected? ANSWER: Yes."

(Tr. 82)

Rodriguez's deposition was taken under Fed. R. Civ. P. 30(b)(6). Respondent interprets his statement as an admission by the Secretary. Rodriguez's statements are not dispositive of the issue since "'the Commission is not bound by the representations or interpretations of OSHA Compliance Officers." *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1128 (D.C. Cir. 2001) (citing *L.R. Wilson & Sons, Inc. v. Donovan*, 685 F.2d 664, 676 (D.C.Cir.1982))

Testimony of Corporate Director of EHS Fred Pearson

In Docket No. 18-0772, Fred Pearson testified he has worked for FreightCar Alabama, LLC since September 2017 as its corporate director of EHS (No. 18-0772, Tr. 44-45).[6] Pearson's demeanor on the stand was uncomfortable and evasive, and his testimony was notable for its vagueness, lapses in memory, and general lack of awareness. He testified he believed there is no company name on the Shoal's facility gate when in fact there is a large sign that bears the name "FreightCar America." (No. 18-0772, Tr. 40; Tr. 153, 167, 185). The visitor parking permits provided for the Shoals facility read: "Parking Permit, Visitor. Permit must be displayed at all times. If lost or stolen report to security. FreightCar America." When asked to read the permit aloud, however, Pearson substituted "Alabama" for "America" and had to be corrected by the Secretary's counsel (No. 18-0772, Tr. 43). He could not remember the company name displayed on his own business card and was reminded it was FreightCar America, Inc. when shown the card he had provided to CSHO Rodriguez during the OSHA inspection (No. 18-0772, Tr. 47-48). Despite being a corporate officer, Pearson did not know the name or location of FreightCar Alabama, LLC's president (No. 18-0772, Tr. 59). Pearson was similarly incurious about the relationship between FreightCar America, Inc. and FreightCar Alabama, LLC.

> Q.: [Y]ou're claiming that [FreightCar Alabama, LLC] is not associated with FreightCar America?
>
> Pearson: I don't know directly how it's set up to be associated with.
>
> Q.: But you know that it is associated with the FreightCar America, Chicago location?
>
> Pearson: Yes

(No. 18-0772, Tr. 56)[7]

Pearson refused to concede even incidental background information to the Secretary's counsel.

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[6] On February 8, 2019, in Docket No. 18-0772, Pearson testified his title was "corporate director of EHS." Five weeks later, on March 15, 2019, he testified in this proceeding, without explanation, that his title was "senior director of manufacturing risk." (Tr. 180)

[7] This exchange occurred in the instant proceeding:

> Q. Mr. Pearson, you don't deny that FreightCar Alabama, LLC is a fully owned site -- subsidiary of FreightCar America, Inc.?
>
> Pearson: I have absolutely no idea.

(Tr. 182)

Q.: [T]he Muscle Shoals facility has 2.2 million square feet; is that correct?

Pearson: No.

Q.: No?

Pearson: No.

Q.: How many square feet is it?

Pearson: I don't know the Muscle Shoals facility.

Q.: Okay. Is the Cherokee, Alabama facility called the Shoals facility sometimes?

Pearson: It's called the Shoals facility.

Q.: Okay. Would that be in reference to the Muscle Shoals we're in right now?

Pearson: Not to my knowledge.

(No. 18-0772, Tr. 56)

Pearson acknowledged he had corporate responsibilities for FreightCar America, Inc. facilities other than the Shoals facility.

Q.: Where are you physically located?

Pearson: I'm officed out of the Shoals facility.

. . .

Q.: And you have some responsibility for other places. Can you remind us where those are?

Pearson: One is in Roanoke, Virginia, one is in Richland, Pennsylvania, one is in Grand Prairie, Nebraska and until recently, one was in Danville, Illinois.

. . .

Q.: How often [do you go] to Roanoke?

Pearson: Quite frequently.

Q.: Once every couple of months, once a month; how often?

Pearson: Once every couple of months.

(Tr. 369-70)

Pearson was vague and forgetful when testifying about the telephone conversation between him and CSHO Rodriguez regarding the proper legal name of the business entity operating the Shoals facility. The first day of the hearing in Docket No. 18-0772 took place less than a year after the February 28, 2018, accident occurred, an event in which Pearson, as corporate director of EHS, was directly involved. He met twice with CSHO Rodriguez during his visits and was in contact with him by telephone. He provided requested documents to

OSHA. The Secretary issued the Citation in the name of FreightCar America, Inc. less than two months after the date of the accident. The significance of the correct identity of the actual employer of the affected employees was clear from the outset of this proceeding. Yet Pearson seemed to find the details of his participation in clarifying the issue inconsequential.

> Q.: And [you] told the OSHA inspector that FreightCar America, Inc. was the legal name of the company, correct?
>
> Pearson: I told him the parent was FreightCar America, Inc.
>
> . . .
>
> Q.: He actually asked you what the legal name of the company was?
>
> . . .
>
> Pearson: Yes.
>
> Q.: Okay. And that was in a phone call, correct?
>
> Pearson: I don't know.
>
> Q.: Okay. So you recall that he did ask you what the legal name of the company was, but you don't know when that was, or do you?
>
> Pearson: I don't -- I don't know the -- if it was on the phone or in person. I don't know.
>
> . . .
>
> Q.: Do you recall him asking what the legal name of the company was?
>
> . . .
>
> Pearson: Yeah, I vaguely remember. Yes.
>
> Q.: And you had to actually check with somebody, right, before you could get back to him?
>
> Pearson: I had to check with somebody to get the -- there was a number, a [Dun & Bradstreet Number] or something I had to get for him.
>
> Q. Okay. And when you got back to him, you told him it was FreightCar America, Inc., right?
>
> Pearson: I gave him the [Dun & Bradstreet Number] that he had asked for. I think it was a Dun & Bradstreet No. or something like that, he was looking for that, I had to go get from somebody else.
>
> Q.: Okay. So was that a "yes or a no" as still whether when you got back to him, you told him the company's legal name was FreightCar America, Inc.?
>
> Pearson: I don't recollect.

(No. 18-0772, Tr. 77-80)[8]

He also professed to not "recollect" whether he placed the initial employer referral call to OSHA to notify the agency of a work-related accident (Tr. 368). Pearson did not deny he was the source of the information but engaged in a coy attempt to sidestep the question. Respondent's counsel showed him Exhibit CX-9 from Docket No. 18-0772, a copy of the referral report listing the referral source as "Fred Parson."

Q.: Does any of that information from you?

Pearson: It appears to be from Fred Parson.

Q.: Is that you?

Pearson: No.

(Tr. 369)

Testimony and Statements of Employee Witnesses

The Team Leader interviewed in Docket No. 18-0772 identified "FreightCar America" as his employer when giving his signed statement to CSHO Rodriguez (No. 18-0772, Exh. CX-22). Employee #1, the worker injured in the accident that resulted in this proceeding, testified as follows:

Q.: And who's your employer?

Employee #1: FreightCar Alabama, LLC.

Q.: Does it go by any other names? Do you know?

Employee #1: The name of -- well, the side and front says FreightCar America.

Q.: What do you know it as?

Employee #1: FreightCar America.

. . .

Q. Prior to this accident if someone were to ask you who you worked for, who would you say?

Employee #1: FreightCar America.

(Tr. 153)

[8] Respondent's counsel attempted to reshape Pearson's response into a more emphatic denial in this proceeding, with little success.

Q.: [D]id you ever tell [CSHO] Rodriguez that FreightCar America, Inc. was your employer?

Pearson: Not to my recollection.

(Tr. 180)

A former employee of the Shoals facility also testified in this proceeding regarding his employer, requiring some prompting from Respondent's counsel.

> Q.: Who do you work for[?]
>
> Former Employee: FreightCar –
>
> Q.: Or who have you worked for? Right now you're unemployed, but who have you worked for in the past?
>
> Former Employee: FreightCar America.
>
> Q.: FreightCar America or FreightCar Alabama?
>
> Former Employee: FreightCar Alabama, LLC.

(Tr. 185)

Credibility Determination

CSHO Rodriguez testified he spoke with Pearson by telephone and asked him to verify the identity of the employer at the Shoals facility. A day or two later the men spoke again by telephone and, according to CSHO Rodriguez, Pearson stated, "[A]s far as I know, it's 'FreightCar America, Inc.'" (No. 18-0772, Tr. 121) Pearson does not deny this statement but claims he does not recollect what he told CSHO Rodriguez.

The Court observed the demeanor of each witness and assessed the consistency and logic of his testimony. CSHO Rodriguez set out his step-by-step process as he attempted to determine the correct employer to cite. His search of the Alabama's Secretary of State website yielded a result indicating FreightCar Alabama, LLC shared a business address as well as a workplace address with FreightCar America, Inc. CSHO Rodriguez consulted with Pearson, his contact at the Shoals facility and a corporate officer, who informed him the correct employer was FreightCar America, Inc. In his testimony, CSHO Rodriguez manifested an earnest attempt to resolve a discrepancy by going directly to a management official who could be expected to have or be able to find the correct information. The Court finds CSHO Rodriguez to be credible on this subject.

On the other hand, Pearson was evasive, vague, and forgetful in his testimony. He displayed little knowledge of his employer's corporate structure and avoided answering questions by either talking about something else or pleading forgetfulness. His testimony appeared rehearsed or coached. The Court accords Pearson's testimony little weight. Furthermore, the Court finds it more likely than not that Pearson called in the referral report on

March 1, 2018, to inform OSHA of the work-related accident. CSHO Rodriguez reasonably believed "Parson" was a typographical error for "Pearson." (No. 18-0772, Tr. 100). Pearson did not directly deny he called in the referral, but stated the information given in the telephone call (including the identification of FreightCar America, Inc. as the employer) "appear[ed] to be from Fred Parson." (No. 18-0772, Tr. 369) If there were an employee working at the Shoals facility with a name one vowel off from his own name, a witness's normal response would be to explain the situation. Pearson is a management official tasked with overseeing safety issues, and he was one of the two contact people dealing with OSHA. He or Scott Tittle (who called in the referral for the accident in this proceeding) are the two people most likely to report a work-related accident to OSHA.

The Court finds CSHO Rodriguez consulted with Pearson in an attempt to identify the correct employer for the Shoals facility, and Pearson informed him it was FreightCar America, Inc.

Analysis

The Secretary assumes the *Darden* test applies here. The *Darden* Court looks primarily to "the hiring party's right to control the manner and means by which the product [was] accomplished." *Darden*, 503 U.S. at 323. Factors pertinent to that issue include:

> the skill required for the job, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits and the tax treatment of the hired party.

Id. at 323-24 (citing *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)).

The Eleventh Circuit, in which this case arises, has noted it has not explicitly affirmed the application of the *Darden* test to cases involving OSHA violations but has applied the test when the parties have not disputed its application.[9] Here, the Secretary argues FreightCar America,

[9]The Eleventh Circuit has explained its approach to Commission cases in which the *Darden* test is applied:

> Three other circuits have affirmed the application of the *Darden* test to OSHA violations. *See Slingluff v. Occupational Safety & Health Review Comm'n*, 425 F.3d 861, 867-69 (10th Cir.2005); *IBP, Inc. v. Herman*, 144 F.3d 861, 865 (D.C.Cir.1998); *Loomis Cabinet Co. v. Occupational Safety and Health Review Comm'n*, 20 F.3d 938, 941-42 (9th Cir.1994). One circuit has ruled that *Darden's* reasoning is not directly applicable to the Act. *See Sec'y of Labor v. Trinity*

Inc. exercises sufficient control over the Shoals facility to meet the *Darden* requirements qualifying it as the employer of the facility's employees. Respondent neither disputes nor agrees with *Darden's* application—it does not address the test at all.[10]

The *Darden* factors are not particularly apposite to this proceeding. This is not a typical *Darden* situation, where, for example, a construction contractor claims OSHA cited it incorrectly because a subcontractor at a multi-employer worksite was the actual employer of the affected employees. Weighing the *Darden* factors in this case would not illuminate the employment relationship. For most of the factors, there is either no evidence in the record, or the factor does not weigh in favor of one of the entities over the other (e.g., skill required for the job). A more helpful test is the economic realities test, which the Commission has held to be consistent with *Darden. See Don Davis*, No. 96-1378, 2001 WL 856241, at *4 (OSHRC July 30, 2001).

> To determine whether an employment relationship exists, the Commission has applied an "economic realities test." The test emphasizes the substance over the form of the relationship between the alleged employer and the workers. The Commission has considered a number of factors when making such a determination, including the following:
>
> 1) Whom do the workers consider their employer?
> 2) Who pays the workers' wages?
> 3) Who has the responsibility to control the workers?
> 4) Does the alleged employer have the power to control the workers?
> 5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?

> *Indus., Inc.*, 504 F.3d 397, 402 (3d Cir.2007) ("[*Darden*] was decided under ERISA and has no impact on the question of whether the scope of the OSH Act is broad enough to cover workers who are not employees under the common law definition."). The parties here assume in their briefs that the *Darden* test applies. Therefore, we apply the *Darden* test here without deciding explicitly whether the Commission's interpretation of 29 U.S.C. § 652(6) is permissible.

Quinlan v. Sec'y, U.S. Dep't of Labor, 812 F.3d 832, 837 (11th Cir. 2016).

[10] Respondent argues the issue of whether it is the properly cited employer should be determined by the analysis set forth in *Hills Department Stores, Inc.,* No. 89-1807, 1990 WL 146495, at *2 (OSHRC Sept. 12, 1990). *Hills* is an unreviewed ALJ decision and, as such, is not precedent. "[I]t is well-settled that an unreviewed administrative law judge's decision has no precedential value. *See In re Cerro Copper Prods. Co.*, 752 F.2d 280, 284 (7th Cir. 1985) (holding that '[a]n unreviewed ALJ decision does not bind the OSHRC or the courts as precedent') (citations omitted)." *Elliot Constr. Corp.,* No. 07-1578, 2012 WL 3875594, at *4, n. 4 (OSHRC Aug. 28, 2012). The Court finds that, in addition to being nonprecedential, *Hills* is inapposite to this proceeding. In *Hills,* the ALJ granted respondent's motion to dismiss the citation on the grounds it had no employees and was not engaged in a business affecting commerce. The record established respondent was a holding company and the affected employees were employed by its subsidiary. The Court finds the economic realities test to be more applicable to the employment relationship issue than *Hills.*

6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
7) How are the workers' wages established?

Loomis Cabinet Co., No. 88-2012, 1992 WL 117116, at *2-3 (OSHRC May 20, 1992).

As with *Darden*, not all of these factors are relevant or ascertainable from the record. Questions #6 and #7 will not be considered for those reasons. The other factors are, however, more applicable to the circumstances of this case than are the *Darden* factors.

1. Whom do the workers consider their employer?

Pearson told CSHO Rodriguez the proper employer name for the Shoals facility was FreightCar America, Inc. His business card displayed that name (No. 18-0772, Tr. 47-48, 121). The Team Leader identified his employer as FreightCar America, Inc. in his witness statement to OSHA (No. 18-0772, Exh. CX-22). Employee #1 in this proceeding testified he believed he worked for FreightCar America, Inc. at the time of his accident (Tr. 153). The Former Employee who testified in this proceeding reflexively responded he had worked for FreightCar America, Inc. when asked where he worked before being prompted by Respondent's counsel (Tr. 185).

The Court concludes the Shoals facility employees for whom evidence exists considered their employer to be FreightCar America, Inc. at the time of the OSHA inspection.[11]

2. Who pays the workers' wages?

The pay statements identify workers' employer as FreightCar Alabama, LLC but payments are processed through the corporate headquarters of FreightCar America, Inc. in Chicago (Exhs. RX-7, RX-8, RX-18).

3 and 4. Who has the responsibility to control the workers? and Does the alleged employer have the power to control the workers?

The PAD for the railcar assembly is marked on each page with the words "FreightCar America," and provides instructions and specifications for the workers to follow (No. 18-0772, Exh. CX-6). The internal *Incident Report* is marked with "FreightCar America" and each employee statement page states, "FreightCar America, Inc. Statement of Witness" at the top (No. 18-0772, Exh. CX-7). These documents indicate FreightCar America, Inc. has the responsibility and power to control the workers.

[11] The Court does not consider the testimony of employee witnesses in the proceedings that they work for FreightCar Alabama, LLC to be probative. At that point they were aware identification of their employer was a central issue, and they appeared well prepared to identify their employer as FreightCar Alabama, including carefully enunciating the "LLC."

5. Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?

Exhibit R-18 in Docket No. 18-0772 comprises five copies of the "Employee Warning and Disciplinary Report" for Welder #1. Each report is headed "FreightCar America." Four of the reports state "Description of Infraction: Reference FreightCar America Employee Handbook, page 3" (*Id.*) The report dated March 16, 2018, has "Last chance warning" written on it (*Id.* at p. 2). This indicates FreightCar America, Inc. had the power to fire the workers or modify the employment condition of the workers.

The client service agreement with Lyons HR, Inc. (a temporary staffing agency) is with "FreightCar America – Shoals Facility," indicating FreightCar America, Inc. had the power to hire workers (Exh. CX-5, p. 4).). The Court does not find the NLRB *Stipulated Election Agreement* between the SMART union and "FreightCar Alabama, LLC, a Subsidiary of FreightCar America, Inc.," to be probative because it is dated May 22, 2018, three months after the accident and a month after the Secretary issued the Citation in Docket No. 18-0772, when Respondent knew the identity of the Shoals facility employer was a central issue (No. 18-0772, Exh. RX-3).

Taken together, the economic realities test weighs in favor of finding FreightCar America, Inc. to be the employer of the Shoals facility. It is the entity the workers considered to be their employer, and its name, with or without the Inc., is prominently featured on documents originating from the Shoals facility. The only factor weighing in favor of finding FreightCar Alabama, LLC to be the employer is its name on the pay statements, but even that is undercut by the fact the address on the pay statements is that of FreightCar America, Inc.'s corporate headquarters.

Prior to the February 28, 2018, accident, hourly employees at the Shoals facility believed they worked for FreightCar America, Inc. Management employees at the facility were careless about using "FreightCar America, Inc." interchangeably with "FreightCar Alabama, LLC" or some other variation of the name. They were slipshod with the employer's name in their paperwork, including the OSHA 300 logs, where four variations of the name are used over the course of four years, with two variations appearing in 2016 (No. 18-0772, Exh. CX-5). FreightCar America, Inc. places its name physically on the Shoals facility. It touts the Shoals facility on its website. It enters into contracts for the Shoals facility in that name. The Court of

Appeals for the First Circuit has found an employer's representations to the public could be considered as a factor in determining whether it is the properly cited employer. *A.C. Castle Construction Co. v. Acosta*, 882 F.3d 34, 41 (1st Cir. 2018).

The Court determines the Secretary properly cited FreightCar America, Inc. as the employer at the Shoals facility.

THE CITATION

The Secretary's Burden of Proof

> Section 5(a)(1) of the Act, known as the general duty clause, states that "[e]ach employer ... shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). To establish a violation of the general duty clause, the Secretary must prove: "(1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard." *S. J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016).

Quick Transp. of Arkansas, LLC, No. 14-0844, 2019 WL 33717, at *2 (OSHRC March 27, 2019). "The Secretary also must prove that the employer 'knew, or with the exercise of reasonable diligence could have known, of the violative conditions.' *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1535 (No. 86-360, 1992) (consolidated)." *A.H. Sturgill Roofing, Inc.,* No. 13-0224, 2019 WL 1099857, at *2 (OSHRC Feb. 28, 2019).

Alleged Serious Violation of § 5(a)(1)

Item 1 of Citation No. 1 alleges,

> On or about 04/02/2018 – Cut Off Station North 701, employees were exposed to slip and fall hazards when conducting welding work on top of the roller bed platform.
>
> Among other methods, feasible and acceptable methods to correct these hazards would be not allowing employees to access the roller bed platform, and conducting all welding work from the ground level.

Preemption by a More Specific Standard

Respondent argues § 1910.28(b)(6)(i), applies more specifically to the cited condition and thus preempts the general duty clause. "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." § 1926.20(d)(1).

Section 1910.28(b)(6)(i) provides:

> The employer must ensure:
>
> (i) Each employee less than 4 feet (1.2 m) above dangerous equipment is protected from falling into or onto the dangerous equipment by a guardrail system or a travel restraint system, unless the equipment is covered or guarded to eliminate the hazard.

The parties stipulate the roller bed platform was less than 4 feet high.[12] The issue is whether employees on top of the platform were "above dangerous equipment." Section 1910.21(b) provides:

> *Dangerous equipment* means equipment, such as vats, tanks, electrical equipment, machinery, equipment or machinery with protruding parts, or other similar units, that, because of their function or form, may harm an employee who falls into or onto the equipment.

Respondent contends the roller bed platform had "protruding parts" and, therefore, exposed employees on the platform to a fall into or onto dangerous equipment. Respondent's counsel had CSHO Rodriguez circle two bolt heads at either end of the horizontal bar on which Employee #1 fell, as shown in photographic Exhibit RX-11-A. Respondent contends these are the protruding parts which transformed the structure of the roller bed from "equipment" into "dangerous equipment." CSHO Rodriguez disagreed.

> CSHO Rodriguez: Now, [§ 1910.28(b)(6)] calls for – the vertical standard that [Respondent's counsel] is referring to calls for falling onto dangerous equipment with protruding parts, which in this case, by looking at the pictures the way that he fell, he fell on top of a set of bars, laying horizontally, flat, zero protruding parts.
>
> Q.: The parts that he is indicating are off to the side, right?
>
> CSHO Rodriguez: Correct. Those are bolts that are underneath so there is no way -- he will have to fall and on purpose hit that little thing that -- the surface, the area that is -- that the bolt has. And he's calling that "protrusion and dangerous equipment." That's not -- that's not the case. By looking at the pictures, clearly you can see that he fell on top of the flat bar. . . . [T]he key word that he is using there is "protrusion." So he's looking at any protrusion in that picture, and he just found two bolts that are underneath . . . the grid per se.

(Tr. 134-35)

The Court agrees with CSHO Rodriguez's assessment. The bolt heads are flat and rise only slightly above the surfaces into which the bolts had been inserted. They are also underneath

[12] "The roller bed platform was roughly 42" above the ground[.]" (*Joint Prehearing Statement*, p. 4)

other parts of the structure, such that it is difficult to see how anyone could come in contact with the bolt heads, should he or she fall (Exh. RX-11-A).

Perhaps recognizing the bolt heads do not qualify as "protruding parts," Respondent also argues the roller bed platform itself is dangerous equipment. "[The] horizontal brace units that [Employee #1] struck pose such a hazard because they are designed to be strong enough to support the rollers, and thus cannot give way when a falling body part strikes them." (Respondent's brief, p. 15) If this were the case, then there would be no difference between any equipment constructed of solid, inflexible material (i.e., virtually all equipment) and "dangerous" equipment. This interpretation renders "dangerous" superfluous in the standard, violating a central tenet of statutory construction.

> "It is our duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche,* 348 U.S. 528, 538–539, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (quoting *Montclair v. Ramsdell,* 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883)); see also *Williams v. Taylor,* 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (describing this rule as a "cardinal principle of statutory construction"); *Market Co. v. Hoffman,* 101 U.S. 112, 115, 25 L.Ed. 782 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'"). We are thus "reluctan[t] to treat statutory terms as surplusage" in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.,* 515 U.S. 687, 698, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995)[.]

Duncan v. Walker, 533 U.S. 167, 174 (2001).

The Court finds § 1910.28(b)(6)(i) is not more specific to the cited condition than the general duty clause. It does not preempt the cited standard.

(1) The Activity Presented a Hazard

"A hazard must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Arcadian Corp.,* No. 93-0628, 2004 WL 2218388, at *7, (OSHRC Sept. 30, 2004). The alleged violation description (AVD) defines the hazard here as "slip and fall hazards when conducting welding work on top of the roller bed platform." At the time of the accident, workers at the cut off station stood on the steel sheet lying on the roller bed platform while cutting off the steel sheet tabs. The workers used grinders to cut off the tabs. Respondent trained the workers in the use of grinders as part of their welding training (Tr. 155-56). The workers cut off the tabs used to hold the metal sheets together when the butt welder welded the

seams (Tr. 156-57). Respondent does not dispute the cut off station workers were conducting welding work when cutting the tabs off the metal sheets.

Respondent disputes the AVD provided fair notice in its characterization of the hazard occurring during "work on top of the roller bed platform."

> Here, the condition cited—"slip and fall hazards when conducting welding work on top of the roller bed platform"—gave no fair notice of a recognized hazard. DOL made clear the sole basis of the citation was that the work was being done 42 inches "above the ground" on top of steel—not that the employee performing it later chose to violate procedure by walking on the beams.

(Respondent's brief, p. 10)

Respondent is referring to CSHO Rodriguez's deposition testimony, where this exchange occurs:

> Q.: Does it make any difference to you whether [Employee #1] was walking on the roller bed or standing on the steel as far as knowledge goes?
>
> CSHO Rodriguez: No, but, again—again, that's what I told you. I'm basing my knowledge not on the fact that he's walking on the . . . beams. On the fact that he's going up above the ground to conduct the work.
>
> . . .
>
> Q.: And you concluded the exposure potential for injury was not where he was walking but where he was—he would have been standing even if he had been standing on the piece of steel?
>
> CSHO Rodriguez: Correct.

(Exh. RX-23, p.66-67)

First, as noted previously, the Secretary is not bound by "representations or interpretations" of OSHA CSHOs. *Kaspar Wire Works, Inc.,* 268 F.3d at 1128. But even if Rodriguez's deposition testimony were binding, it is not at odds with the AVD of the Citation. He is not stating walking on the horizontal bars is not a hazard; he is stating the activity that presented a hazard was created when cut off station employees accessed the top of the roller bed platform, regardless of whether they were standing on the steel sheet or walking on the bars of the platform. The AVD does not differentiate between standing on the steel sheet or walking on the bars—it defines the hazard as "conducting welding work on top of the roller bed platform." The workers were on top of the roller bed platform whether they were standing on the steel sheet for the purpose of conducting welding work or walking on the platform bars to get to a staircase. CSHO Rodriguez agreed with Respondent's counsel that he "concluded the exposure potential"

was created when the workers stood on the steel sheet. This is consistent with the Commission's view of exposure to the zone of danger.

> Reasonably predictable exposure is established by proving that "either by operational necessity or otherwise (including inadvertence) ... employees have been, are, or will be in the zone of danger." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012) (citations omitted). Employees may come within the zone of danger "while in the course of assigned working duties, personal comfort activities while on the job or their normal means of ingress-egress to their assigned workplaces." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976); *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985) ("'access,' not exposure to danger is the proper test"). The Secretary need not show it was certain that employees would be in the zone of danger, but he must show that exposure was more than theoretically possible. *Fabricated Metal Prods., Inc*. 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997); *Phoenix Roofing*, 17 BNA OSHC at 1079; *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2195 (No. 90-2775, 2000) (finding that it was "'reasonably predictable' that an employee would come into contact with the unguarded belt and pulley either while attempting to reposition the fan, or inadvertently while passing nearby"), aff'd, 268 F.3d 1123 (D.C. Cir. 2001).

Calpine Corp., No. 11-1734, 2018 WL 1778958, at *3 (OSHRC April 6, 2018), *aff'd Calpine Corp. v. OSHRC*, 774 Fed. Appx. 879 (5th Cir. 2019) (unpublished).

Here, Employee #1 was in the course of his assigned duties (cutting off tabs on the steel sheet) when he chose to exit the roller bed platform by walking on the horizontal bars rather than on the steel sheet. This exposure, which required only a step from the steel sheet to a horizontal bar for the worker, was more than theoretically possible.

Furthermore, the Court finds even if the AVD defined the hazard only in terms of standing on the steel sheet, the parties tried by consent the issue of whether walking on the horizontal bars of the roller bed platform presented a hazard.

> Under Federal Rule of Civil Procedure 15(b)(2), "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Trial by consent exists "only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue." *See McWilliams Forge Co.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) (internal footnote omitted).

Envision Waste Servs., LLC, No. 12-1600, 2018 WL 1735661, at *7 (OSHRC April 4, 2018). The parties squarely recognized the Secretary was alleging walking on the horizontal bars of the platform presented a hazard, and they both elicited testimony and adduced exhibits consistent with that recognition.

The Court determines workers "conducting welding work on top of the roller bed platform," as alleged in the AVD, had access to slip and fall hazards. The cited activity presented a hazard.

(2) The Employer or Its Industry Recognized the Hazard

> A hazard is deemed "recognized" when "the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry." *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2003 (No. 89-265, 1997) (quoting *St. Joe Minerals v. OSHRC*, 647 F.2d 840, 845 (8th Cir. 1981)).

Quick Transp. of Arkansas, LLC, 2019 WL 33717, at *5.

The Secretary adduced no evidence of industry recognition. The record establishes, however, Respondent recognized the potential danger of the cut off station workers working on top of the roller bed platform.

Respondent represents it had a workrule that "[b]eam walking was forbidden." (Respondent's brief, p. 13). Respondent presented evidence it may have had a verbal rule prohibiting employees from walking on the horizontal bars of the roller bed platform (Tr. 102, 104, 148, 188). "Work rules addressing a hazard have been found to establish recognition of that hazard. *See Otis Elevator*, 21 BNA OSHC at 2207 (recognition established by work rules and safety protocols); *Gen. Elec. Co.*, 10 BNA OSHC 2034, 2035 (No. 79-0504, 1982) (recognition established by safety 'precautions [employer] has taken'); *Wheeling-Pittsburgh Steel Corp.*, 10 BNA OSHC 1242, 1246 (No. 76-4807, 1981) (consolidated) ('That [the employer] took some [safety] measures ... to protect against this hazard, demonstrates that the hazard was recognized within the meaning of Section 5(a)(1).')[.]" *Integra Health Mgmt., Inc.,* No. 13-1124, 2019 WL 1142920, at *8 (OSHRC March 4, 2019).

(3) The Hazard Likely to Cause Death or Serious Physical Harm

Here, Employee #1 slipped and fell while walking on the horizontal bars of the roller bed platform, the cited hazard. He sustained serious injuries requiring hospitalization and missed work for approximately a month. The Court finds the cited hazard was likely to cause serious physical harm.

(4) A Feasible and Effective Means Existed to Eliminate or Materially Reduce the Hazard

The Secretary proposed as a means of abatement "not allowing employees to access the roller bed platform and conducting all welding work from the ground level." This is the

abatement Respondent implemented the day after the April 2, 2018, accident (Exh. CX-4; Tr. 72-73).

> The Secretary has the burden of "demonstrat[ing] both that the [proposed abatement] measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enters.*, 19 BNA OSHC at 1190, 2000 CCH OSHD at p. 48,981. "Feasible means of abatement are those regarded by conscientious experts in the industry as ones they would take into account in 'prescribing a safety program.'" *Id.* at 1191 (quoting *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973)). If the proposed abatement "creates additional hazards rather than reducing or eliminating the alleged hazard, the citation must be vacated for failure to prove feasibility ...." *Kokosing*, 17 BNA OSHC at 1875 n.19, 1995-1997 CCH OSHD at p. 43,727 n.19. But the Secretary is not required to show that the proposed abatement would completely eliminate the hazard. *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122, 1993-1995 CCH OSHD ¶ 30,048, p. 41,279 (No. 88-572, 1993).

Acme Energy Servs., No. 08-0088, 2012 WL 4358852, at *6 (OSHRC Sept. 19, 2012), *aff'd Acme Energy Servs. v. OSHRC*, 542 F. Appx. 356 (5th Cir. 2013).

Here, the record establishes the proposed abatement measure was actually put into effect. Respondent does not claim the abatement method creates an additional hazard nor is there any evidence it does. The abatement method completely eliminates the slip and fall hazard by removing employees from access to the zone of danger. The Court finds a feasible and effective means existed to eliminate the hazard.

(5) The Employer Knew of the Violative Activity

The Secretary must prove that the employer had either actual or constructive knowledge of the violative conditions. The record does not establish Respondent had actual knowledge of the violative condition. Employee #1 worked on the cut off station during the second shift. His supervisor was J.M. (Tr. 154, 185, 189). He testified that although he and other workers at the cut off station walked on the horizontal bars of the roller bed platform daily, he was not aware if his supervisor observed him doing so.

> Q.: Did your supervisor ever see you walking on the metal bars?
>
> Employee #1: I don't recall him ever seeing me, ever.
>
> Q.: Did he -- do you know if he saw others?
>
> Employee #1: No, I don't.
>
> Q.: Okay. How often did you walk on the metal bars, each shift? You can estimate. . . How many times a day did you have to get on top of the roller bed?

Employee #1: Maybe 30 or 40 times.

Q.: Okay. So that's 30 times up and 30 times down?

Employee #1: Yes.

Q.: Okay. And where did your supervisor work?

Employee #1: I was unsure of that. He would just walk by every so often.

(Tr. 163-64)

> Q.: Did other employees who worked in your same position, doing the same job also walk on the beams?
>
> Employee #1: Yes.
>
> Q.: Okay. How often?
>
> Employee #1: The same as me.

(Tr. 173)

Although the above-quoted testimony does not establish actual knowledge of supervisor J.M., it provides the basis for finding constructive knowledge.

> An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have. . . . In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, *see New York State Elec. & Gas Corp.,* 88 F.3d at 105–06 (citations omitted), with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable.

ComTran Grp., Inc. v. U.S. Dep't of Labor, 722 F.3d 1304, 1308 (11th Cir. 2013).

Employee #1 estimated he walked on the roller bed platform "30 or 40 times" a shift, as did other cut off station workers. Yet, J.M. failed to observe this violation of a company workrule occur. Respondent failed to exercise reasonable diligence in taking steps to ensure employees were working safely. The Eleventh Circuit has held supervisory failure to monitor compliance with safety rules establishes constructive knowledge in a case involving a construction worksite.

> [S]ubstantial evidence supports the ALJ's determination that Florida Lemark had constructive knowledge of the hazard because it failed to take reasonable steps to monitor compliance with safety requirements. *See id. N.Y. State Elec. & Gas Corp. v. Sec'y of Labor,* 88 F.3d 98, 105–06 (2d Cir.1996) ("[C]onstructive knowledge may be predicated on an employer's failure to establish an adequate program to promote compliance with safety standards."). The record establishes that Florida Lemark knew which elements were being erected each day but that it

> conducted no routine inspections of the work its employees performed, nor did it kept track of the columns it had grouted or train its employees what to do if a column went ungrouted. Nothing prevented Florida Lemark from taking steps to ensure that grouting was inspected, and therefore completed, before columns were loaded. Consequently, substantial evidence supports the ALJ's determination that Florida Lemark failed to implement an adequate safety program to ensure that grouting was performed before columns were loaded.

Fla. Lemark Corp. v. Sec'y, U.S. Dep't of Labor, 634 F. App'x 681, 688 (11th Cir. 2015) (unpublished).

The Court finds the Secretary has established Respondent failed to take reasonable steps to monitor compliance with its workrule prohibiting employees from walking on the roller bed platform bars. Respondent's failure to establish an adequate safety program made it foreseeable employees would engage in the hazardous conduct. Respondent had constructive knowledge of the violative activity.

UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE

Respondent asserted the affirmative defense of unpreventable employee misconduct (UEM) in its answer but did not brief the issue. "To establish that a violation was the result of UEM, an employer is required to show that it: '(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered.' *Manganas Painting Co.,* 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007)." *Calpine Corp.,* 2018 WL 1778958, at *8.

Respondent contends it had a workrule prohibiting employees from walking on the roller bed platform bars and called the Former Employee to testify to this effect. The Former Employee worked the first shift for six to eight months at the cut off station, while Employee #1 worked the second shift. They had different supervisors, and their respective supervisors trained them (Tr. 189-91, 198).[13] The Former Employee testified regarding the workrule.

Q.: Are you ever supposed to walk on the rollers?

Former Employee: No, sir.

Q.: How do you know that?

[13] Although their work experiences differed, there is no discrepancy in the testimony of the two witnesses that requires a credibility determination. They did not work the same shift and did not have the same colleagues or supervisor. It is plausible the work environments and level of safety compliance differed depending on the personnel working the shifts.

Former Employee: Supervisor is the one to say if you walk on the rollers.

(Tr. 188)

Respondent's rule, when communicated, was communicated verbally, not in writing. The Secretary's counsel asked the Former Employee if there was a written procedure detailing how employees were supposed to access and egress the roller bed platform. The Former Employee first said there was a yellow file or yellow board next to the work station containing a document that informed the employee how to perform the job, but then stated the document only addresses cutting and grinding details (Tr. 191-93). He replied, "It's just common sense," when asked how he knew not to walk on the roller bed platform bars (Tr. 193). He then backtracked and implied perhaps there were instructions on how to get on and off the platform.

> Q.: But the instructions did not tell you to use the stairs to get up there and then to use the stairs to get down, did they?
>
> Former Employee: I mean, it's all right there if you read your instructions.
>
> Q.: Are you saying they were -- it was written in the instructions?
>
> Former Employee: I didn't read the instruction. . . . So I'm clearly -- it's in the instructions on how you do your job right there. You just read your instructions.
>
> Q.: Okay. So you believe it's in the instructions, but you didn't read it yourself?
>
> Former Employee: It's in there. No, I had glanced over it. But, you know, I never did just completely read it.
>
> Q.: I gotcha. Okay. Okay. Well, so you wouldn't know then whether the instructions say, do not walk on the roller bed?
>
> Former Employee: That's common sense not to walk on the roller bed.

(Tr. 194-95)

The Secretary called CSHO Rodriguez as a rebuttal witness. He testified Respondent had produced only Exh. CX-13, a product assembly document (PAD), in response to his request for instructions for work procedures for the cut off station (Tr. 204). The PAD is dated November 1, 2017, and it was revised April 3, 2018, to reflect the change in the cut off station procedure stating workers were no longer allowed on the roller bed platform (Exh. CX-13; Tr. 211). Other than the post-accident revision, there is no workrule prohibiting walking on the roller bed platform bars.

> Q.: Is there anything else in this document that discusses walking on the roller bed or side assembly?

CSHO Rodriguez: No.

Q.: Is there anything that references stairs?

CSHO Rodriguez: No.

Q.: Or how to access the roller bed?

CSHO Rodriguez: No.

Q.: Or how to access the metal sheet?

CSHO Rodriguez: No.

(Tr. 212)

Respondent has established at least one supervisor verbally instructed one employee not to walk on the roller bed platform bars. It did not produce a written safety program or other document showing the rule. Employee #1 testified no one had informed him of the rule.

To the extent the workrule existed, Respondent failed to establish it adequately communicated it to its employees. The Former Employee said he knew employees were not supposed to walk on the platform bars, but whether this was due to training or "common sense" is unclear. He testified, somewhat ambiguously, that the supervisor "is the one to say if you walk on the rollers." (Tr. 188) It may be his supervisor was more competent and conscientious than J.M., Employee #1's supervisor.[14] The Former Employee seemed better informed about the technical aspects of the cut off station position (including the fact the workers could move the staircases) than Employee #1. But Respondent's duty to adequately communicate its workrules extends to all employees on all shifts. Respondent produced no supervisory employee witnesses or documentation, such as training sign-in sheets, to show it had communicated the workrule at issue to Employee #1.

As noted in the section addressing constructive knowledge, Respondent failed to take steps to discover violations. Despite walking on the roller bed platform bars "30 or 40 times" a day, Employee #1 was never discovered doing so by J.M. This failure is highlighted by Respondent's failure to establish the last element of the UEM defense, effective enforcement of the workrule. No disciplinary records were adduced citing employees for walking on the roller bed platform bars prior to the accident. Respondent's counsel asked witnesses if they were aware Employee #1 was disciplined for walking on the platform bars following the accident that

[14] Pearson testified J.M. no longer worked for Respondent at the time of the hearing and had "left under other circumstances" that were not voluntary (Tr. 181).

gave rise to this proceeding, but no written evidence of the discipline was adduced and the person administering the disciplinary action was not identified (Tr. 148, 213-14).

The Court concludes Respondent has failed to establish the UEM defense. The Secretary has established a violation of § 5(a)(1).

CHARACTERIZATION OF THE VIOLATION

The Secretary characterized the violation of § 5(a)(1) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k).

Employee #1 sustained serious injuries, including a broken nose, facial lacerations, and a pancreatic contusion (Tr. 55-56, 165). The violation is properly characterized as serious.

PENALTY DETERMINATION

"In assessing penalties, section 17(j) of the Act requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith. 29 U.S.C. § 666(j). 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.,* No. 00-1052, 2005 WL 696568, at *3 (OSHRC February 25, 2005) (citation omitted). "Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors." *Natkin & Co. Mech. Contractors*, No. 401, 1973 WL 4007, at *9, n. 3 (OSHRC April 27, 1973).

Respondent employed approximately 700 employees at the Shoals facility. It had a history of violations (Exh. CX-1; Tr. 70-71). "With regard to good faith, the Commission has given consideration to various factors including the employer's safety and health program and its commitment to assuring safe and healthful working conditions. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972)." *Capform, Inc.,* No. 99-0322, 2001 WL 300582, at *5 (OSHRC March 26, 2001). Because the Court finds Respondent's safety program to be inadequate, no reduction for good faith is given.

The gravity of the violation is moderate. Although Employee #1 testified other employees on his shift walked on the roller bed platform as often as he did, the Secretary

adduced no evidence regarding the number of employees. The Court calculated the penalty based on one exposed employee, who engaged in the hazardous activity approximately 30 times a day. The likelihood of injury is high, and Respondent took no precautions against injury.

Based on these factors, the Court determines the Secretary's proposed penalty of $4,712 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED**:

Item 1, alleging a serious violation of § 5(a)(1), is **AFFIRMED,** and a penalty of $4,712 is assessed.

/s/ Sharon D. Calhoun
Administrative Law Judge
Washington, D.C.

Dated: September 27, 2019