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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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Secretary of Labor,
Complainant,
v.
Film Allman, LLC.,
Respondent.

OSHRC Docket No. **14-1385**

Appearances:

Karen Mock and Monica Moukalif, Esquire, U.S. Department of Labor, Atlanta, Georgia
For the Complainant

Amanda R. Clark Palmer, Donald F. Samuel, and Edward T. Garland, Esquire,
Garland, Samuel and Loeb, PC, Atlanta, Georgia
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

In 2013 Randall Miller and Jody Savin formed Film Allman, LLC, for the purpose of filming a movie called *Midnight Rider: The Gregg Allman Story*, based on Gregg Allman's 2012 autobiography *My Cross to Bear* (Exh. J-1, *Stipulated Facts*, ¶ 1; Exh. C-25, pp. 24-25; Tr. 1017, 1021). Film Allman planned to film in and around Savannah, Georgia, in February and March of 2014 (Schwartz deposition, pp. 22; Tr. 1070). On February 20, 2014, a number of Film Allman's employees arrived at the Doctortown train trestle, which spans the Altamaha River near Jesup, Georgia, to film a scene on the trestle. The scene was a dream sequence which called for the character of Gregg Allman to wake up in a hospital bed placed across the railroad tracks of the trestle (Exh. J-1, *Stipulated Facts*, ¶¶ 32, 55; Exh. J-3; Exh. C-32). At approximately 4:30 p.m., while twenty to twenty-three Film Allman employees were located on the trestle approximately 100 feet from the southern bank of the river, the employees realized a northbound train was approaching. The employees on the trestle hurriedly gathered the equipment they had carried with them and moved toward the oncoming train because that was the fastest way to exit the trestle. Several employees attempted to move the hospital bed off the

tracks, but it came apart when they picked it up. Some of the bed parts were still on the tracks when the train hurtled across the trestle. Film Allman's Second Camera Assistant, twenty-seven year old [redacted], was killed by the train as it passed and several other crew members were injured, some seriously (Exh. J-1, *Stipulated Facts*, ¶¶ 57-61; Tr. 746).

John Vos, a compliance safety and health officer (CSHO) for the Occupational Safety and Health Administration (OSHA), conducted a fatality investigation of the accident from February 21 to August 4, 2014 (Tr. 708). Based on CSHO Vos's investigation, the Secretary issued a Citation and Notification of Penalty to Film Allman on August 14, 2014. Items 1a and 1b of Citation No. 1 allege Film Allman committed serious violations of 29 C.F.R. §§ 1910.23(c)(1) and (e)(1), respectively, by failing to adequately guard the west and east sides of the Doctortown trestle, exposing employees to fall hazards. The Secretary proposes a grouped penalty of \$ 4,900.00 for Items 1a and 1b of Citation No. 1.

Item 1 of Citation No. 2 alleges Film Allman committed a willful violation of § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act), by failing to implement safety procedures for filming on the trestle, exposing employees to the hazard of being struck by a train. The Secretary proposes a penalty of \$ 70,000.00 for Item 1 of Citation No. 2.

Film Allman timely contested the Citation. The Court held a four day hearing in this matter in Savannah, Georgia, from March 31 to April 3, 2015. The Court did not close the record in this proceeding on April 3 but left it open for receipt of two trial depositions, taken on April 27 and 28, 2015. The Court received transcripts and videos of the depositions in early May and subsequently made evidentiary rulings on various objections made by the parties' counsel to the testimony and documents offered into evidence during the depositions. The Court closed the record of this proceeding on May 15, 2015. The parties filed simultaneous post-hearing briefs on July 14, 2015. Film Allman stipulates to most of the elements of the Secretary's burden of proof for the cited items but argues the classifications and penalties of the alleged violations should be reduced.

For the reasons that follow, the Court AFFIRMS Items 1a and 1b of Citation No. 1 and assesses a grouped penalty of \$ 4,900.00. The Court also AFFIRMS Item 1 of Citation No. 2 and assesses a penalty of \$ 70,000.00.

Jurisdiction and Coverage

The parties stipulate the Commission has jurisdiction over this action and Film Allman is a covered business under the Act (Exh. J-2, *Stipulated Points of Law*, ¶¶ 1-2). Based on the parties' stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Film Allman is a covered business under § 3(5) of the Act.

PRELIMINARY ISSUES

Subpoena Service

On March 12, 2015, the Secretary issued subpoenas to First Assistant Director Hillary Schwartz and Unit Production Manager Jay Sedrish, both California residents, to appear as witnesses at the hearing held in this proceeding in Savannah, Georgia. On March 24, Schwartz filed a motion to quash or revoke the subpoena on the grounds she resides more than 100 miles from the hearing site and the Secretary failed to tender mileage and fees at the time of service, citing Fed. R. Civ. P. 45(b)(1) and (c)(1)(A). (Sedrish did not file a motion to quash the subpoena served on him.) Schwartz also argued,

Hillary is serving a term of probation [for conviction of criminal trespass and involuntary manslaughter] which expressly forbids her from leaving the State of California without express, specific, written approval from the probation department. Furthermore, at this stage Hillary has not been assigned a probation officer and is not clear when such assignment will be made and/or when a probation officer will be assigned.

(Motion to Quash and/or Revoke Subpoena, ¶ 15)

The Court found no merit in Schwartz's arguments regarding geographical limits or tendering of mileage and fees, but agreed her representation regarding the terms of her probation warranted a modification of the subpoena. Following a conference call with the parties on March 30, 2015, the Court issued an order on March 31 stating, "[I]n accordance with the agreement reached during the conference call, Ms. Schwartz will testify by Trial Deposition, which is to be taken and submitted to the Court by April 30. The record will be left open."

(Order Partially Granting Motion to Quash, p. 2)

At the hearing, Film Allman objected to the Court's order permitting the Secretary to take the trial depositions of Schwartz and Sedrish.

We respectfully disagree with the Court's ruling that the 100 mile limit is inapplicable. . . . Commission's rules don't address that issue; and consequently, we believed and continue to believe that the 100 mile limit required by the

Federal Rules of Civil Procedure does apply. And so we object to any depositions that are being taken after this hearing is over. Those parties both, as I understand it, either objected or didn't respond to a subpoena, believing that it was inapplicable.

(Tr. 14-15) The Court overruled Film Allman's objection and instructed the parties to proceed with the trial depositions after the hearing (Tr. 18).

The parties conducted trial depositions of Schwartz and Sedrish subsequent to the hearing. Although Film Allman does not renew its objection to taking the depositions in its post-hearing brief, for the purpose of clarification the Court will more fully address the objection raised at the hearing.

Commission Rule 2, 29 C.F.R. § 2200.2, provides:

(a) *Scope*. These rules shall govern all proceedings before the Commission and its Judges.

(b) *Applicability of Federal Rules of Civil Procedure*. In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure.

The Commission Rules of Procedure have a specific provision governing service of subpoenas. Commission Rule 57(b), 29 C.F.R § 2200.57(b), provides:

(b) *Service of Subpoenas*. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein may be made by service on the person named, by certified mail return receipt requested, or by leaving a copy at the person's principal place of business or at the person's residence with some person of suitable age and discretion residing therein.

The language of Commission Rule 57(b) is analogous to the language of Fed. R. Civ. P. 45(b)(1) except the Commission Rule omits any reference to fees and mileage. Fed. R. Civ. P. 45(b)(1) states,

Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

Schwartz and Film Allman apparently overlooked the last sentence of Fed. R. Civ. P. 45(b)(1) when arguing the Secretary's subpoena was ineffective because the Secretary did not tender fees and mileage to Schwartz at the time he served the subpoena. Even under the Federal

Rules, “when the subpoena issues on behalf of the United States or any of its officers or agencies,” tendering of fees and mileage is not required.

The Commission Rules are silent on the issue of geographical limits. Film Allman concludes from this silence that Fed. R. Civ. P. 45(c)(1)(A) must necessarily apply. Fed. R. Civ. P. 45(c)(1)(A) states,

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where a person resides, is employed, or regularly transacts business in person[.]

Contrary to Film Allman’s interpretation, the Court concludes from the silence of Commission Rule 57(b) regarding geographical limits that it imposes no such limitation on service. The language of the Act supports this interpretation. Section 12(i) of the Act provides, “For the purposes of any proceeding before the Commission, the provisions of section 11 of the National Labor Relations Act (29 U.S.C. 161) are hereby made applicable to the jurisdiction and powers of the Commission.” Section 11 of the National Labor Relations Act authorizes subpoena power to the National Labor Relations Board and mandates that attendance of witnesses and production of evidence “may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.”

Furthermore, the Advisory Committee Notes to Fed. R. Civ. P. 45(c)(1)(A) state the 100-mile limitation “does not apply to the enforcement of subpoenas issued by *administrative officers and commissions* pursuant to statutory authority. . . . Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States. Among such statutes are . . . U.S.C., Title 29, § 161 (Labor Relations Board) [and] U.S.C., Title 41, § 6507 (Secretary of Labor).” (Fed. R. Civ. P. 45, Advisory Committee Notes, 1937 Adoption) (emphasis added)

Based on the statutory authority of § 11 of the National Labor Relations Act, which applies to the jurisdiction and powers of the Commission as authorized by §12(i) of the Act, the Commission is empowered to issue subpoenas anywhere within the United States. The subpoenas issued to Hillary Schwartz and Jay Sedrish, both for attendance at the Savannah hearing and at the California depositions, were properly served.

Witness Statements and Informer's Privilege

In its post-hearing brief, Film Allman renews its objection to “witness statements taken by OSHA not being provided pursuant to the informer’s privilege.” (Film Allman’s brief, p. 44) These witness statements were the subject of several motions to compel filed by Film Allman prior to the hearing and of objections raised by Film Allman during the hearing. Film Allman invoked both *Brady v. Maryland*, 373 U.S. 83 (1963)¹ and the Jencks Act² (laws that apply in criminal proceedings) in its quest to obtain witness statements taken by OSHA during the fatality investigation that gave rise to this administrative proceeding (Tr. 18-19, 786-788). In response to Film Allman’s discovery requests, the Secretary provided redacted witness statements. In response to a motion to compel filed by Film Allman, Dr. David Michaels, the Assistant Secretary for OSHA, formally asserted the informer’s privilege. The Court denied Film Allman’s motions for unredacted witness statements.

After the Secretary completed his direct examination of witnesses at the hearing, the Court instructed the Secretary’s counsel to provide the unredacted statement of each witness to Film Allman and gave Film Allman time to review the statement, in accordance with *Massman-Johnson (Luling)*, 8 BNA OSHC 1369, 1376 (No. 76-1483, 1980)³ (Tr. 22). In so doing, the Court adhered to well-established Commission precedent.

The Commission has long recognized the applicability of an informer's privilege in its proceedings. *Stephenson Enters., Inc.*, 2 BNA OSHC 1080, 1082-83, 1973-1974 CCH OSHD ¶18,277, p. 22,401-02 (No. 5873, 1974), *aff'd*, 578 F.2d 1021 (5th Cir. 1978). . . . The purpose of the privilege is to protect the identity of

¹ In *Brady*, the Supreme Court held “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87.

² The Jencks Act, 18 U.S.C. § 3500, requires the government to turn over any pretrial statements of government witnesses during criminal prosecutions. The statute enacted into law principles first announced in *Jencks v. United States*, 353 U.S. 657 (1957).

³ [W]hen a witness has completed testifying for the Secretary on direct examination, the Secretary shall, upon motion by a respondent, turn over to it all the witness's prior statements that are in the government's possession and that relate to the subject matter of the witness's testimony. . . . The Respondent shall be entitled to a recess for such reasonable time as is necessary to evaluate a statement and prepare to use it in the hearing. In the event that a statement disclosed at the hearing contains material that the respondent could not have discovered previously and that bears on the issues in the case, the respondent shall be entitled upon request to a recess or continuance for such time as is reasonably necessary to meet or take advantage of the new evidence.
Id. at 1376.

informers, and thus it protects a communication to the extent that its contents would reveal the informer's identity. . . . The Secretary may invoke the informer's privilege to prevent disclosure of the identity of individuals who assist in OSHA investigations. *See Roviario v. United States*, 353 U.S. 53, 59 (1957)[.]

Birdair, Inc., 23 BNA OSHC 1493, 1494 (No. 10-0838, 2011).

Prior to the hearing, Film Allman argued the informer's privilege should not apply to people who were not employees of Film Allman (meaning witnesses employed by Rayonier or CSX) because they had no fear of retaliation. The informer's privilege, however, is not limited to employees--it extends to any person who assists the Secretary with witness statements. It is well-settled that "the informer's privilege is applicable to any person furnishing information to the government regarding violations of Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, regardless of the informer's employment relationship to the cited employer." *Donald Braasch Const., Inc.*, 17 BNA OSHC 2082, n. 4 (No. 94-2615, 1997) (citing *Quality Stamping*, 7 BNA OSHC 1285, 1287 (No. 78-235, 1979)). The informer's privilege applied to witnesses who were not employees of Film Allman.

Film Allman also argued it no longer had any employees, thus the informer's privilege should not apply. "None of the people interviewed by OSHA or the Secretary of Labor are still on the payroll. Film Allman, LLC is a company that was set up expressly for the movie *Midnight Rider*. Since that movie is no longer in production, Film Allman has no employees. Thus, any risk of retaliatory action by the employer against employees who provided information to OSHA is nonexistent." (Film Allman's March 5, 2015, motion, p. 5)

The informer's privilege does not disappear once an employee parts company with the employer. Former employees are still subject to the possibility of retaliation.⁴

First, it is a fact of business life that employers almost invariably require prospective employees to provide the names of their previous employers as references when applying for a job. Defendant's former employees could be severely handicapped in their efforts to obtain new jobs if the defendant should brand them as "informers" when references are sought. Second, there is the possibility that a former employee may be subjected to retaliation by his new employer if that employer finds out that the employee has in the past cooperated with the Secretary. Third, a former employee may find it desirable or necessary to seek reemployment with the defendant. In such a case the former employee would stand the same risk of retaliation as the present employee. There is no ground for

⁴ Each of Film Allman's former employees who testified at the hearing was commanded to appear by a Court-ordered subpoena.

affording any less protection to defendant's former employees than to its present employees. *Wirtz v. B. A. C. Steel Products, Inc.*, 312 F.2d 14 (4th Cir. 1962).

Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 306 (5th Cir. 1972).

The Court determined the informer's privilege applied to witnesses who were former employees of Film Allman. To waive the informer's privilege, a waiver "must be a voluntary disclosure of the identity of the informer. It is not enough . . . that the identity of the informant or informants appears obvious." *Braasch*, 17 BNA at 2084. Here, Film Allman argued there was no need to protect the identities of informers because the identities of everyone present at the accident worksite was known to both sides (Film Allman's March 5, 2015, motion, p. 5). Film Allman's awareness of the limited set of people OSHA may have interviewed does not constitute a waiver of the informer's privilege. *See Braasch*, 17 BNA at 2084 ("It is not enough . . . that the identity of the informant or informants appears obvious."); *Dole v. Local 1942, Int'l Bhd. Of Elec. Workers*, 870 F.2d 368, 375 (7th Cir. 1989) (the fact that individuals were knowledgeable about events does not mean that they actually gave information to the Department of Labor). Film Allman's knowledge of who may have given statements did not, in itself, overcome the privilege. None of the witnesses at issue waived the informer's privilege.

In proceedings before the Commission, "an employer can overcome the informer's privilege by showing that (1) it has a substantial need for the information that outweighs the government's entitlement to the privilege, and (2) the information is essential to the preparation of its case and it is unable to obtain it by any other means." *Birdair*, 23 BNA at 1495. "[A] mere assertion that the information may be helpful to prepare a defense is not enough." *Braasch*, 17 BNA at 2085.

Film Allman argued it needed the privileged information in the statements to develop impeachment information for the primary witnesses against it and to develop favorable exculpatory information for its defense. (Film Allman's March 5, 2015, motion, p. 5). Film Allman asserted that without knowing what favorable information had been provided to OSHA or the Secretary, it did not know which witnesses to call in its defense at the hearing. (*Id.* at 6).

This argument did not establish the requisite substantial need to overcome the privilege. The Commission has held, "The need to effectively cross-examine a witness is not sufficient justification in and of itself for prehearing disclosure of such a witness's statement. After a witness has completed testifying on direct examination, however, respondents are entitled, upon request, to obtain copies of all statements in the government's possession relating to the subject

matter of the witness's testimony." *Massman-Johnson (Luling), A Joint Venture*, 8 BNA at 1378. There was no need for Film Allman to review an informer's statement for impeachment purposes until that individual actually testified as a witness.

For these reasons, the Court determined witnesses in this proceeding, both non-employees and former employees of Film Allman, were covered by the informer's privilege and none of them had waived that privilege.⁵

Other Objections by Film Allman to Witness Testimony

At the hearing, the Secretary moved to admit the pre-hearing depositions of Cinematographer Michael Ozier and Unit Production Manager Jay Sedrish, taken by OSHA on May 5, 2014, and of First Assistant Director Hillary Schwartz, taken by OSHA on June 26, 2014 (proffered Exhs. C-26, C-30, and C-31). Film Allman objected to the depositions on the basis that the deponents were no longer employees of Film Allman at the time of their depositions. Film Allman argued the depositions were not admissible as statements made by Film Allman's employees on matters within the scope of that relationship under Fed. R. Evid. 801(d)(2)(D).⁶ Film Allman contended the employment relationship with those witnesses ended within a few days of the February 20, 2014, death of [redacted].

The Court reserved ruling on these depositions pending the receipt of the post hearing trial depositions of Sedrish and Schwartz (Tr. 1187-1188). A review of the record confirms Film Allman's employment relationship with most of its employees ended the day after the death of [redacted], when representatives of the International Alliance of Theatrical Stage Employees (IATSE) arrived at Film Allman's offices in Meddin Studios and shut down production of *Midnight Rider* (Tr. 1120.) Schwartz submitted her resignation on February 24, 2014 (Tr. 1121). By May 5, 2014, when OSHA took their depositions, neither Ozier nor Sedrish were employees or agents of Film Allman. The Court now rejects Exhibits C-26, C-30, and C-31.⁷ (The

⁵ In its post-hearing brief, Film Allman does not point to a single witness statement which, if available to it before the hearing, would have aided or altered Film Allman's defense. Film Allman does not show or claim the unavailability of unredacted witness statements prejudiced its case.

⁶ Fed. R. Civ. P. 801(d)(2)(D) provides that a statement is not hearsay if it meets this condition: "The statement is offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed[.]"

⁷ OSHA also took depositions of Randall Miller and Jody Savin on May 6, 2014 (Exhs. C-25 & C-29). As owners of Film Allman, LLC, Miller and Savin are agents for the company and their depositions are not hearsay under Fed.

Secretary subsequently took post-hearing trial depositions of Schwarz and Sedrish that are part of the record.)

Film Allman also objected at the hearing to the “testimony of [CSHO] John Vos which was based on employee interviews that were not provided to Film Allman” and testimony of Charley Baxter and Hillary Schwartz regarding incidents when Randall Miller filmed scenes of a movie without permission from the property owners (Film Allman’s brief, p. 44; Tr. 138-143). The Court overruled Film Allman’s objections and will not revisit those rulings here. The Court notes it did not rely on the disputed testimony as the basis for any findings of fact or conclusions of law.

Background

Film Allman Personnel

Randall Miller and Jody Savin, who are married to each other, write and produce films together. They met while attending the American Film Institute in Hollywood, California, from which they received MFA degrees (Exh. C-25, pp. 8-10; Tr. 1010). Randall Miller has also directed films and television shows (Tr. 1012-1013). Their residence is in Pasadena, California, where they formed Unclaimed Freight Productions, Inc., in 1998. Unclaimed Freight is an independent production and personal services company for Miller and Savin. It was the managing company for Film Allman (Exh. C-25, pp. 17-18; Tr. 1015-1016, 1143).

In 2010 Miller and Savin began an association with Meddin Studios, located in a former meatpacking plant in Savannah, Georgia, when they produced a film called *Savannah* (Exh. C-25, p. 37; Tr. 914-917, 1073-1074). They then wrote and produced (and Miller directed) *CBGB*, a film about the iconic New York music club. Although the film is set in New York, Miller filmed many of *CBGB*’s scenes in Savannah, with the support of Meddin Studios (Tr. 1020-1021).

Miller and Savin also wrote an unproduced screenplay about Dennis Wilson of the Beach Boys. This screenplay brought them to the attention of Gregg Allman’s agent, who approached them about adapting *My Cross to Bear*, Allman’s autobiography, for film (Exh. C-25, pp. 24-25). Gregg Allman and his older brother Duane were two of the founders of The Allman Brothers Band, which was inducted into the Rock and Roll Hall of Fame in 1995. Duane Allman died in a

R. Civ. P. 801(d)(2)(D) (Exh. C-29, p. 14). The Court admitted Exhibits C-25 and C-29 without objection (Tr. 710, 719).

motorcycle accident in 1971 at the age of 24, an event which deeply affected Gregg Allman and figures prominently in his autobiography (Exh. C-25, pp. 27-29, 54; Tr. 1045-1046). Miller and Savin read the autobiography and subsequently met with Gregg Allman. After negotiations, it was agreed Miller and Savin would write the adapted screenplay and produce the film (now called *Midnight Rider: The Gregg Allman Story*). Allman was an executive producer on the film and Miller agreed to direct it (Exh. C-25, p. 26; Tr. 1021-1022).

Miller and Savin formed Film Allman, LLC, for the purpose of producing the film. Producers of independent films form production companies for individual movies because, as Miller explained, “[Y]ou have investors for every single movie and they’re different from the other investors from the last movie.” (Tr. 1015) The budget for *Midnight Rider* was approximately \$5,000,000.00 (Exh. C-25, p. 20; Tr. 965). Miller and Savin retained Meddin Studios once again to provide them with production services (Tr. 925, 1045).

Film Allman (through Miller and Savin) hired Jay Sedrish as the movie’s Unit Production Manager (UPM) and Executive Producer (Exh. J-1, *Stipulated Facts*, ¶ 6; Exh. C-25, p. 38). The position of UPM is defined as a supervisory position by the Director’s Guild of America (DGA). The UPM is “in charge of fiscal and hiring people,” among other duties (Tr. 1026) Film Allman hired union employees for *Midnight Rider*, including members of DGA, Teamsters, IATSE, Studio Mechanics, and Screen Actors Guild (SAG). Each of the department heads of the film hired union employees appropriate to his or her department (Exh. C-25, p. 21-22, 44; Tr. 1033-1034).

UPM Sedrish hired five or six employees as front office staff (Tr. 1027). Director Miller hired Hillary Schwartz as the First Assistant Director (AD) (Exh. J-1, *Stipulated Facts*, ¶ 7; Exh. C-25, p. 45, 48; Tr. 1028). As First AD, Schwartz prepared the shooting schedule and supervised the safety of the crew and cast members on the set (Tr. 1028, 1029, 1034). Sedrish hired Michael Ozier as Cinematographer, Melissa (Missy) Stewart as Production Designer, and Charles (Charley) Baxter as Location Manager (Exh. J-1, *Stipulated Facts*, ¶¶ 8, 11, 12). As Location Manager, Charley Baxter was responsible for scouting and securing locations for filming. (Exh. J-1 *Stipulated Facts*, ¶ 9) Baxter hired an Assistant Location Manager (Exh. J-1, *Stipulated Facts*, ¶ 10). In their capacity as producers or department heads, Miller, Savin, Sedrish, Schwartz, Ozier, Stewart, and Baxter were management personnel with supervisory authority over subordinate, or below-the-line, crew members (Exh. C-25, p. 48).

Film Allman also hired approximately 40 actors, including William Hurt and Tyson Ritter who were cast as older and younger versions of Gregg Allman, and Wyatt Russell as Duane Allman (Tr. 1042-1043, 1063-1064). First AD Schwartz scheduled the film to begin shooting in late February and to continue for twenty-four or twenty-five days. One of Schwartz's primary concerns with scheduling was William Hurt was only available for "a week of prep and a week of shooting, the first week of shooting, five days." (Schwartz deposition, p. 21).

January 27, 2014, Email from CSX

The screenplay for *Midnight Rider* originally featured a scene involving Gregg and Duane Allman riding together on a motorcycle (Exh. J-4). In the scene, the brothers are stopped in traffic by street construction. "[I]nstead of waiting to go around it, they whipped over and got on the railroad tracks and rode down the railroad tracks to get around it." (Tr. 133) (This is not the scene Film Allman was attempting to film on the Doctortown trestle on February 20, 2014 (Tr. 214-215).)

It was Location Manager Charley Baxter's responsibility to find railroad tracks on which the scene could be filmed. CSX Transportation owns a number of railroad tracks in and around Savannah. Baxter testified "CSX tracks were pretty much all around us. They were near our production office and a lot of places that we went to. So it was a natural request to go to them." (Tr. 133) Baxter contacted a representative of CSX to request permission to film the motorcycle scene on CSX railroad tracks. The CSX representative responded with an email on January 27, 2014.

Dear Mr. Baxter:

Thank you for contacting us regarding filming on CSX property.

In accordance with our company protocol, CSX does not permit filming on our property. This is based on concern for the safety of those accessing and working on our railroad, security considerations, and our commitment to ensuring on-schedule train operations for the customers we serve.

Our first priority is safety. CSX strives to be a good neighbor in the communities in which we operate. We hope you understand our position, and we apologize that we are unable to accommodate your request.⁸

(Exh. C-24)

⁸ Employees of Film Allman had worked on productions in the past for which CSX permitted movie and television companies to film on its property (Tr. 113, 395, 397, 591).

Miller and Savin rewrote the scene so that Duane and Gregg Allman rode through some woods rather than on railroad tracks (Tr. 216). Miller testified he told Baxter, “Well, it could be the same thing if he goes off the road and goes through some trees and comes back on. Find that.” (Tr. 1047).

Scene 14

The screenplay for *Midnight Rider* comprises 197 scenes (Tr. 1041). The first scene scheduled for shooting was Scene 14, a wordless dream sequence that begins with a close-up of the older Gregg Allman, played by Hurt:

He opens his eyes, disoriented, and looks around:

EXT. TRAIN TRACK (D5)

His hospital bed is in the middle of a train track. Gregg gets out of the bed in his hospital whites and bare feet. He sees a BRIDGE ahead, a train trestle. It is TWIGHLIGHT. On the opposite side he sees the silhouette of a person, long hair rustling in the breeze.

Gregg takes a step forward; the beauty of the image lures him. The silhouette moves to the light. It appears to be Duane, but he doesn't motion, doesn't speak. Gregg stops still. The message is clear: Don't cross this bridge.

(Exh. J-3) (emphasis in original) Director Miller anticipated Scene 14 would last “[t]hirty seconds max” in the finished film (Tr. 1054).

Film Allman wanted to film Scene 14 between 4:00 and 6:00 p.m. on February 20, 2014, because that time period would encompass “the magic hour and the light is quite pretty at that time.” (Schwarz deposition, p. 78) This scheduling was “a creative decision made by Randy [Miller] and Mike [Ozier]” and had nothing to do with scheduling around expected train traffic (*Id.*).

Location Manager Charley Baxter and his department worked with Production Designer Missy Stewart to find a location for Scene 14 (Tr. 115). They were looking for “a train trestle, preferably with some interesting architectural feature, with tracks that go over water.” (Tr. 116) In early February of 2014, a Film Allman employee performed a Google search and found the Doctortown train trestle, located at 1300 Doctortown Road in Jesup, Georgia (Exh. J-1, *Stipulated Facts*, ¶ 13; Tr. 115).

The historic Doctortown trestle (site of a Civil War battle) spans the Altamaha River and at one time was operated as a draw bridge (Exh. C-25, pp. 81-82; Tr. 809-810, 1060). The distance between the areas of the Doctortown train trestle where the employees were located at

the time of the accident and the Altamaha River below is 25 to 30 feet (Tr. 728). From edge to edge, the trestle is approximately 13½ feet wide. The distance between the rails is approximately 5 feet (Exh. C-7). A narrow walkway made of grated metal runs along the right side of the bridge beam on the east side (Exhs. C-1, C-2, C-7, C-20). The width of the grated walkway is approximately 3 feet (Exh. C-7, C-9). Two lengths of wire cable form a top rail and intermediate rail at the outer edge of the walkway (Exh. C-2a).

The railroad tracks leading to the trestle on the southern side of the Altamaha River run across private property owned by Rayonier Performance Fibers, LLC. Baxter contacted Rayonier seeking access to the trestle. He ultimately reached Rayonier's Communications Manager (Exh. J-1, *Stipulated Facts*, ¶ 14; Tr. 117). Rayonier's Communications Manager agreed to allow a group of Film Allman management employees onto Rayonier's property to scout the location. On February 7, 2014, the Communications Manager greeted Baxter, Schwartz, Ozier, Sedrish, and Stewart at one of the gates of Rayonier's fenced property and escorted the group to the Doctortown trestle. The visit lasted thirty to sixty minutes. No trains passed by during the visit. At some point during the February 7 visit, Rayonier's Communications Manager informed Film Allman's management personnel that CSX owned the railroad tracks (Exh. J-1, *Stipulated Facts*, ¶¶ 15-20).

Doctortown Trestle Not Scouted During February 12, 2014, Tech Scout

Film Allman stipulated, "On February 12, 2014, a 'tech scout' was done for multiple locations. Film Allman did not go to the Doctortown trestle on this tech scout [and it] did not conduct a tech scout for the Doctortown train trestle." (Exh. J-1, *Stipulated Facts*, ¶¶ 22-24) The Key Grip stated it is standard to do a tech scout for each location but Film Allman "never actually went on a tech scout for the [trestle] location at all." (Tr. 384)

Baxter explained a technical or tech scout occurs when a film's director and department heads travel as a group to "each one of the locations that have been chosen. And the director and director of photography and the first assistant director kind of walk everybody through. . . . [T]he point of the tech scout is to discuss all the technical aspects, . . . as many of the details as we can so we can plan to be prepared on the day that we start filming." (Tr. 119-120) Tech scouts are time-consuming. They are "fourteen to fifteen hours sometimes. Or at least twelve or thirteen hours, spending fifteen to twenty minutes, maybe thirty minutes at each one. You're lucky to get it done over two days in a lot of circumstances where there's a lot of locations." (Tr.

121) Generally, a film company performs the tech scout “three or four days in advance” of filming “to prepare for the things that you find out.” (Tr. 120)

Director Miller stated a tech scout is a valuable tool for addressing potential complications prior to filming. A tech scout is “generally a way to sort of disseminate information and then people will tell you problems. They’ll tell you this is a problem because of *x*. This is a problem because of *y*.” (Exh. C-25, p. 86) He testified Film Allman had considered and rejected conducting a tech scout of the Doctortown trestle site. “[W]e probably talked about it, and the idea was that it was an hour and a half away and the tech scout -- we had about thirty people on the tech scout. . . [b]eing paid \$20 an hour, some \$40 an hour. . . . In retrospect, yeah, we should have done a tech scout on that one because what this is costing and everything, of course, but unfortunately hindsight's 20/20 and everything. It was probably a financial reason we didn't go there.” (Exh. C-25, p. 89)

Safety Bulletin # 28

“[First AD] Schwartz and [UPM] Sedrish were responsible for approving the Call Sheet prior to its issuance to [Film Allman’s] employees. Schwartz [and Sedrish] declined to attach Safety Bulletin # 28 Guidelines for Railroad Safety to the Call Sheet for February 20, 2014.” (Exh. J-1, *Stipulated Facts*, ¶¶ 27-29)

A call sheet is a fact sheet for each crew member detailing what is planned for the next day. It lists the location and scenes to be filmed, who is required to be there and when, and special requirements from departments, such as props and transportation. It is standard industry practice to include safety-related information on or attached to the call sheet for the day’s filming regarding the location and potential hazards. Call sheets can include information to alert the cast and crew to weather conditions or whether they need to wear protective clothing. Call sheets can also alert employees to safety issues that may be present at a location, including working near a road, on or over water, around helicopters, at heights that may present a fall hazard, with weapons or pyrotechnics, and around stunts (Tr. 125, 471-472, 532-533, 592).

Contract Services Administration Trust Fund (CSATF) provides safety bulletins for the motion picture and television industry. Its *Safety Bulletin # 28* addresses *Guidelines for Railroad Safety* (Exh. C-28). *Safety Bulletin # 28* states in pertinent part,

There are strict rules governing rail work. These rules must be communicated to and followed by all cast and crew. . . . Prior to starting rail work, the Production, in conjunction with the railroad representative, will conduct a safety meeting with

all involved personnel to acquaint cast and crew members with possible workplace risks.

* * *

10. Be aware that the train is significantly wider than the track's width. 15 feet from either side of the track is considered a safe distance. Closer distances need to be approved by the designated railroad representative.

* * *

12. Never sit, walk or stand on the rails, ties, switch gear, guardrails or other parts of the track or structure. Be aware that tracks can move.

* * *

14. Do not place any objects on the rails, switches, guardrails or other parts of the track structure. If the performance of any of these activities is required for production purposes, specific permission must be obtained from the designated railroad representative and additional safety precautions may be required.

(Exh. C-28, pp. 1-3)

The Key Second Assistant Director prepared the call sheet for February 20, 2014, under the supervision of Schwartz. He asked her if he should attach copies of *Safety Bulletin # 28* to the call sheets. Schwartz told him no, then reconsidered and told him to ask Sedrish about it (Schwartz deposition, p. 66). Sedrish testified the Key Second Assistant Director asked him about attaching the safety bulletin. "And I said, 'No, no, no.' It's a pet peeve of mine, like, making the packet—the call sheet packet so big that it's, you know—you see pieces of paper everywhere. If you want one, grab one." (Sedrish deposition, p. 97) "I don't like to put a bunch of attachments on the call sheet." (*Id.* at p. 96). Sedrish stated he told him to place the safety bulletins in a stack somewhere in Meddin Studios so they were available if crew members wanted to take one.

Baxter testified he was familiar with *Safety Bulletin # 28* because "the other films that I worked on, these [safety bulletins] were generated to be attached to the call sheet so that the crew and everybody else involved would know the safety protocol to make sure everybody stays safe." (Tr. 124-125) First AD Schwartz testified it is industry practice to attach safety bulletins to call sheets. "It's one way to disseminate safety [bulletins]." (Schwartz deposition, p. 66)

Miller, who is a member of DGA and who has worked in the film industry for more than twenty-five years, stated he was unfamiliar with CSATF safety bulletins.

Q. I'm going to flip it to the third page. And this is -- it's industrywide labor management safety committee, safety bulletin number 28, guidelines for railroad safety. Have you ever seen that before?

Miller: No, I've never seen this before. . . . This is from the IA? Who's this from?

Q. This is from -- this is from the Contract Services Administration Trust Fund, CSATF.org. Have you ever heard of that?

Miller: No. Is that something to do with movies? Yeah. No, I have not seen this before.

Q. Are you a member of the Directors Guild?

Miller: I'm a member of the Directors Guild, the Writers Guild, and the IA.

Q. Do you know, does the Directors Guild have a website you can go to?

Miller: Yes.

* * *

Q. Have you ever looked at the safety section of it?

Miller: I have not looked at the safety section of that one, no.

(Exh. C-25, pp. 134-135)

*CSX Denies Film Allman's Request for Permission
to Film on Tracks near Doctortown Trestle Site*

Following the trestle site visit, Baxter and Rayonier's Communications Manager continued to correspond regarding the possibility of Film Allman shooting a scene on the CSX tracks on Rayonier's property on February 20, 2014. (Exh. J-1, *Stipulated Facts*, ¶ 21). On, Friday, February 14, 2014, at 7:14 p.m., Baxter sent a CSX employee an email, which he first reviewed with Schwartz and Sedrish (Exh. J-1, *Stipulated Facts*, ¶ 26). The email Baxter sent stated in pertinent part,

Thank you for taking the time to try and help us with our request. *Midnight Rider* is an independent film based on the life of the legendary Gregg Allman from the Allman Brothers Band. The movie will star Oscar winner William Hurt as the older Gregg.

Specifically we would like permission to access CSX tracks with 5 people and no vehicles on Thursday February 20, 2014 for 20 minutes between 4 PM and 6 PM.

We will have 15 people with us; however, only 5 will need access to the tracks.

We are simply filming two actors staring at each other from approximately 50 yards apart. We will not be attaching anything to the tracks or ties.

The tracks are located on Rayonier's Jessup Mill location, 4470 Savannah Hwy. Jessup, GA 31545.

The site we're requesting is just south of the Doctor Town Trestle on the Altamaha River.

Rayonier has embraced our film and we are staging on their property. I've cc'd [Rayonier's Communications Manager] on this email. . . . [Rayonier's Communications Manager] and I would like the opportunity to meet your Safety Inspector at the location so we can explain the request in more detail.

(Exh. J-1, *Stipulated Facts*, ¶ 25)

In the third paragraph of the email, Film Allman purposefully misrepresented the number of employees it planned to have on the tracks for Scene 14. Twenty to twenty-three Film Allman employees were on the railroad tracks of the Doctortown trestle at the time of the accident, not the five employees indicated by the email (Exh. J-1, *Stipulated Facts*, ¶ 56). Sedrish (who as UPM had supervisory authority over the Location Manager) testified he overrode Baxter's initial estimate.

Charley and I wrote this email. Okay. And I said—I was the one who said, “We’ll have fifteen people with us, and five will need access to the tracks.” Okay. And that was based on my having read the script and also based on the fact that we were going to have to keep it small if we were going to get permission. Okay. And that’s something I was—I said that because Charley said, “Well, it’s going to be more.” I said, “No. If you want to get permission, it has to be small.” And so that’s what we sent.

(Sedrish deposition, pp. 40-41)

In the sixth paragraph of the email, Film Allman also misrepresented the location of the railroad tracks on which it wanted film Scene 14. Film Allman stated, “The site we’re requesting is *just south of* the Doctor Town [sic] trestle,” implying the film company was not seeking permission to film on the trestle itself. The record evidence establishes, however, Film Allman always intended to film on the trestle.

The week Film Allman sent the email, CSX was “dealing with weather-related issues . . . because of the crazy weather up north.” (Exh. R-18) The following Monday, February 17, was Presidents Day. Baxter did not hear from the CSX employee until Thursday, February 20, 2014, at 10:47 a.m., when he received an email denying Film Allman permission to film on CSX’s property:

Mr. Baxter,

I am sorry for the delay in getting back with you. Unfortunately, CSX not [sic] able to support your request. As discussed, I do suggest that you reach out to the short line railroads as they routinely will support filming support [sic].

Thanks so much, it sounds like a great production.

(Exh. J-1, *Stipulated Facts*, ¶ 30)

Baxter forwarded the email to the email addresses of Miller, Savin, Sedrish, Schwartz, Stewart, and his Assistant Location Manager (Exh. J-1, *Stipulated Facts*, ¶ 31). Baxter discussed

the email with Sedrish, Schwartz, and Stewart that morning. He stated, “[A]fter we looked at the email we were like, “Oh, well, there you go.” (Tr. 135)

Stealing a Shot

In the film industry, stealing a shot is filming at a location without permission (Exh. C-25, pp. 207-208). UPM Jay Sedrish testified that prior to receiving the February 20, 2014, email from CSX, he had “some vague” discussions with his colleagues about what to do if CSX denied permission to film near the Doctortown trestle (Sedrish deposition, p. 45). When asked what was discussed, Sedrish responded, “What should we do? Do we—can we get Randy to write it out? What are our options? Can we cheat⁹ the shot; make it look like we’re on the tracks but not on the tracks? Can we—I know this is a bad term to use—can we steal the shot, you know, do it without permission . . . ? This was rejected.” (*Id.* at 46).

Later in his testimony, Sedrish seems more equivocal about Film Allman’s rejection of the option to steal a shot.

Q. And when you said “steal a shot,” did you say that you rejected that idea?

Sedrish: Yes. We all—well, let me see. I—no one like that idea. . . . If I remember, when it actually came up, nobody liked that idea.

Q. Who was the “nobody” that you remember?

Sedrish: I can’t—I mean, I know I had that conversation with Missy [Stewart]. And I would be guessing as to who else I had the conversation with.

(Sedrish deposition, p. 100)

On Location at the Doctortown Trestle

Despite CSX’s explicit denial of permission to film on its tracks, Film Allman proceeded with its plan, as set out in its February 20 call sheet, to leave Meddin Studios at approximately 1:30 p.m. with employees in three shuttle vans and travel to the Doctortown trestle. Some employees arrived in their personal vehicles. (Exh. J-1, *Stipulated Facts*, ¶¶ 32-33; Exh. J-7). Rayonier’s Communications Manager met Film Allman’s employees at one of the gates to Rayonier’s property. She had arranged with Rayonier’s security service, identified as DSI, for two of DSI’s security guards to unlock the gate and permit Film Allman’s employees to enter and access the railroad tracks (Exh. J-1, *Stipulated Facts*, ¶¶ 34-35). The film company parked the vans, personal vehicles, trailers, and equipment vehicles in an area east of the railroad tracks

⁹ To *cheat the shot* means to use camera angles to make it appear as though actors or objects are located in areas where they are not (Sedrish deposition, p. 98).

and north of Doctortown Road, which crossed the tracks. The film company referred to the parking area as base camp or the staging area (Exh. J-14; Tr. 469).

Miller, Savin, Sedrish, and Schwartz knew the railroad tracks were live tracks, in active use by CSX, and that CSX had refused permission to film on the tracks (Exh. J-1, *Stipulated Facts*, ¶¶ 49-50). Supervisors Miller, Savin, Sedrish, Schwartz, and Ozier were aware no CSX representatives were present at the site to control train traffic while the employees were on the trestle. None of Film Allman's supervisors informed the crew and cast members that CSX would not be on site and would not be controlling train traffic while they were filming on the tracks (Exh. J-1, *Stipulated Facts*, ¶¶ 49-52).

A Hairstylist for Film Allman testified she learned on February 20, 2014, she was to travel with the film company to another location a few minutes before the 1:30 departure time. Film Allman did not give her a safety bulletin or inform her they were planning to film on railroad tracks.¹⁰ No one discussed rail work safety with her during the ride to the location. The Hairstylist rode in the same van as Randall Miller, Jody Savin, and Hillary Schwartz, among others (Tr. 165-167).

After the film company arrived at the Doctortown trestle, one of the actors sustained a slight injury and asked for an adhesive bandage. The Hairstylist stated, "And that's when we realized that there wasn't a medic, because we were looking for a medic to get him a Band-Aid." (Tr. 169) She found it odd there was no set medic that day. "[T]here's usually always a medic on location." (Tr. 169) Location Manager Baxter was also absent from the Doctortown trestle site that day. He sent his Assistant Location Manager in his place (Tr. 136).

According to all the former crew members who testified, First AD Schwartz did not hold a safety meeting before the first shot of the day, as is customary on a film set (Tr. 170, 294, 396, 545).¹¹ The Key Grip described how the First AD usually runs a safety meeting.

Normally when we would do something that could be considered hazardous, whether it's a stunt or whether it's just the location itself could be dangerous, we

¹⁰ The Key Grip testified Film Allman was scheduled to conduct a camera test at the Doctortown trestle site on February 20 and not actually film a scene for the movie. He believed Film Allman had scheduled the following Monday, February 24, as the first day of filming (Tr. 387)

¹¹ Schwartz claims she provided two safety briefings or announcements on February 20 but admits she did not affirmatively call people together for either announcement and assumed those within earshot could hear her (Schwartz deposition, pp. 44, 71-72, 122-127). The Court credits the testimony of Film Allman's former crew members who testified Schwartz did not hold a safety meeting on February 20 as the term is understood in the film industry.

would have a safety meeting and somebody that was -- normally it would be the First AD would come up and would say something. If there was a stunt person that was in charge of a stunt, that would be when they would come in and say what was going to happen. *On train tracks, normally you would have the CSX person there and they would tell you what's going on and what the flow is of the day and how it would be handled.*

(Tr. 395) (emphasis added)

The Key Set Costumer testified that generally the First AD used the safety meeting to go over the expected events of the day and instruct the crew members how to react to unexpected events.

[A safety meeting is] a coming together of the crews so that everybody can be on point to know what was going happen or what they were anticipating happening and what you would do in the event that something went awry. With firearms, the prop master would show the entire crew that the chamber was empty. He would walk around so that each person could see that. If we were doing explosives, the safety meeting would usually entail having the special effects person give instructions about what needed to happen, what needed not to happen. You know, and turn your walkies off -- you know -- you know, kind of like cues so that everybody could be anticipating what was going to happen and what would happen in the event that, you know -- if somebody caught on fire. A lot of time they would give -- you know, say who would do what so that we would know that if something went wrong.

(Tr. 541-542)

After everyone arrived at the site, most of the film company congregated near the railroad tracks south of the Doctortown trestle. Some employees, including Savin and Sedrish, remained at base camp near the parked vehicles. Miller and Ozier started filming some shots of Hurt in the hospital bed set up on the western side of the railroad tracks (Exh. C-19; Tr. 1090, 1098). The film company stayed to the side of the railroad tracks until two trains passed by, within fifteen to twenty minutes of each other. The Hairstylist noted, "The first train came through fast, but the second train came through faster." (Tr. 173-174) The B Camera Operator used his phone to record video of the second train (Exh. C-19). He stated, "[M]y attempt was to take a video of the first train that was going by because I was kind of alarmed how fast it was going and how close we were. But I actually couldn't get my phone out in time to take the video. So when the second train came by, I did." (Tr. 297) He testified the second train "was moving remarkably fast and

was really—you know, the wind coming off the train was very strong.” (Tr. 299) The Key Grip also stated the trains were “going pretty fast.” (Tr. 403)¹²

After the second train passed, Miller and Ozier walked out on the trestle. This was the first time Director Miller viewed the trestle in person. Miller had not accompanied Film Allman’s management employees on the February 7 location scout and Film Allman did not conduct a tech scout of the site. Based on Ozier and Schwartz’s descriptions after the location visit, Miller had originally planned to film Scene 14 with the hospital bed situated in the middle of the trestle’s span across the river. Upon seeing the trestle for himself, however, Miller was surprised at its immensity. “I hadn’t been to the location, so when I got there and I realized it was a lot bigger or whatever than I imagined . . . I was scared to go out there. . . . [W]hen you look through it, it was like you see down. . . . And I said, no, no, no, no. Let’s just do it over here, because I don’t want to be that far out. That’s scary for me.” (Exh. C-25; pp. 74-75)

Crew members began carrying equipment and props out on the trestle, including the hospital bed (Exh. J-1, *Stipulated Facts*, ¶¶ 53-55). The Gaffer helped carry the hospital bed onto the trestle. He stated the hospital bed “was heavy. And once we got to the trestle, I remember it was difficult to walk because of the gaps between the railroad ties. So we had to really watch our step as we were going out.” (Tr. 611) The hospital bed was placed perpendicular across the tracks, approximately 100 feet from the south end of the trestle (Exh. C-14). As Second Camera Assistant, [redacted] duties included moving accessories and gear and operating the slate (Tr. 289). The camera crew had two cameras, a case of lenses, and a bag of accessories on the trestle (Tr. 310).

The Hairstylist described the difficulty the cast and crew members experienced with their footing on the trestle. “[Y]ou had to be very careful where you stepped. I was very mindful of each step, because it wasn’t -- well, you could just go at a pace, I would say, without falling. . . . [b]ecause of the little holes that it had in the middle of the tracks. There were a lot of little holes that I know for myself I would have been afraid to fall and get my foot stuck in it or something.” (Tr. 181) The Key Set Costumer also stated footing on the trestle was treacherous. “I stepped to the middle of the track, you know, which was also uncomfortable because I felt like there were some areas of the track that you can see the water through. So it was just -- I was just being as

¹² Film Allman misrepresents the perceived speed of the trains in its post-hearing brief: “Two trains went by. The trains appeared to be traveling at a slow or moderate speed[.]” (p. 17)

careful -- carefully footed as possible to -- to, you know, take care of myself as much as I could while I was up there.” (Tr. 549)

Two Trains and Sixty Seconds

Film Allman’s former crew members stated repeatedly they were told by First AD Schwartz and the Assistant Location Manager that only two trains were scheduled to cross the Doctortown trestle on February 20, 2014 (Tr. 175, 293, 295, 335, 399, 412-413, 478, 608). This proved to be wildly inaccurate.

James Murray is CSX’s trainmaster for the railroad tracks at issue (Tr. 60). He testified CSX’s train schedules are not available to the public due to security concerns (Tr. 74).¹³ He stated, however, trains on those tracks run both southbound and northbound and that it is probably one of “our busiest sections of track that we have. This is pretty much a pipeline from—one of two pipelines from the rest of the —our network into the state of Florida.” (Tr. 79) Murray testified regarding the frequency of trains traversing the Doctortown trestle on the day [redacted] was killed.

We have roughly anywhere from twenty-seven to thirty-three scheduled trains a day that come through that location. That's northbound and southbound. We have anywhere probably I'd say between six and ten non-scheduled trains, such as coal trains and rock trains. Those run as needed to, you know, power plants in Florida or, you know, rock facilities that need ballast and things like that for making highways and stuff like -- you know, things of that nature. So those trains run unscheduled. We don't know -- they don't run every day. But we [have] anywhere from twenty-seven to thirty-three trains that run seven days a week through this location. So on average you're probably looking about thirty-five trains a day with the scheduled and non-scheduled per day going through that location. Could be a little more, could be a little less.

(Tr. 71)

Murray estimated that when the accident occurred on the Doctortown trestle at approximately 4:30 p.m. on February 20 “probably fifteen to twenty trains” had already crossed the trestle since midnight (Tr. 72). He stated, “[Y]ou could have four or five trains in an hour and you may not have one for maybe an hour. It’s very seldom you probably go that line without the train coming within an hour, hour and a half.” (Tr. 88)

¹³ Miller, Sedrish, and Schwartz testified they learned the Transportation Security Administration has prohibited the public availability of freight train schedules since 9/11. Schwartz and Sedrish testified they learned following the February 7 site visit to the Doctortown trestle that CSX’s train schedule was not publicly available for those tracks (Exh. C-25, p. 120; Schwartz deposition, p. 87; Sedrish deposition, p. 30).

Incredibly, given Film Allman's reliance on the information that only two trains were scheduled to cross the Doctortown trestle on February 20, 2014, no one from the film company inquired whether any trains had passed prior to its midafternoon arrival. Had Film Allman inquired, the two DSI security guards who unlocked the Rayonier gate for the film company would have informed them they saw a train cross the Doctortown trestle as they waited at the gate shortly after lunchtime (Tr. 854, 870). The "third" train or accident train was, in fact, at least the fourth train to cross the trestle since early afternoon on February 20.

As the film company prepared to shoot Scene 14, several members of the cast and crew were standing on the trestle near the hospital bed, including First AD Schwartz, Hurt, the Hairstylist, and the Gaffer. The Hairstylist testified, "Before the third train¹⁴ came, we were already on the trestle. And Mr. Hurt asked if another train was coming. The response was no. And then Mr. Hurt asked, 'In the event of another train coming, how much time do we have to get off?' And the response [from Schwartz] was sixty seconds." (Tr. 183; 191) Hurt replied, "That's not a lot of time." (Tr. 309). Schwartz did not reply to Hurt's observation (Tr. 312). When asked what the crew members should do about the bed in the event another train arrived, Schwartz replied, "I don't know. I guess we take it." (Schwartz deposition, pp. 42-43) Schwartz identified this exchange as one of the two safety briefings she provided to employees that day.

Schwartz obtained the "sixty seconds" information by radioing the Second Second AD, who was standing next to the Assistant Location Manager near the parked vehicles at base camp. The Assistant Location Manager had originally told the Second Second AD no trains would pass by while the film company was onsite, but later stated, "If there was a train coming, there would have been two of them (Tr. 476; 506). When Schwartz radioed the Second Second AD to ask how long the employees had to clear the trestle, he relayed the question to the Assistant Location Manager. He testified, "So I confirmed¹⁵ with the Locations Assistant there and sixty seconds was what was determined." (Tr. 485)

There is no explanation in the record how the Assistant Location Manager arrived at the sixty seconds estimate. Neither party adduced evidence establishing how far from the end of the

¹⁴ Film Allman's former employees referred to the accident train as the third train. The accident train was the fourth train the DSI security guards saw cross the Doctortown trestle the afternoon of February 20, 2014.

¹⁵ From the context, the Court considers it likely the Second Second AD meant to say, or possibly did say, "conferred" rather than "confirmed."

trestle the trains were when the employees first saw them or heard their horns or whistles. The respective speeds of the three trains observed by the film company were not established.¹⁶ Based on the testimony of the witnesses regarding the location of base camp, as well as the map and aerial photograph (Exhs. C-32 and J-14), it is evident the Second Second AD and the Assistant Location Manager were well within a mile of the end of the trestle. Miller testified that at the time the first two trains went by, he could see all of Film Allman's employees on the site from his vantage point at the foot of the trestle (Tr. 1095-1096).

There is no evidence Film Allman sent employees farther south on the tracks to observe how many seconds it took for a train to pass between two points or from how far away employees could hear a train's horn or whistle. It is difficult to determine how the Assistant Location Manager was able to ascertain how much time employees had to clear the trestle when a train approached. It is not clear if she calculated this herself or if she learned it from another Film Allman employee or a third party. The Assistant Location Manager did not testify at the hearing.

The Accident

Before Hurt lay down on the hospital bed, he said to Schwartz, "So, two trains?" and Schwartz replied, "Yes, two trains, but it couldn't be confirmed." (Tr. 612) This prompted the Gaffer to ask Schwartz what she meant by that statement. "I asked her about six times, Hillary, 'What does that mean, it can't be confirmed—what's the plan? What does that mean it can't be confirmed?' And she didn't answer me." (Tr. 612) The Gaffer exited the trestle and sat on the ground next to the beginning of the trestle (Tr. 613). From this position, the Gaffer was one of the first employees to realize the third train was approaching. "I heard a horn and then I looked back in the opposite direction from the trestle and saw the train like coming around the corner. And I stood up at the beginning of the bridge and yelled, 'Train!'" (Tr. 617)

This occurred at approximately 4:30 p.m., while twenty to twenty-three Film Allman employees were located on the trestle approximately 100 feet from the southern bank of the river (Tr. 811). The employees on the trestle gathered the equipment they had carried with them and hurried in the direction of the oncoming train. The Hairstylist described her horrific experience.

[T]he location that I was on the trestle, I was more or less in the middle at the end where the water was. And I started to run, but watching my step to get off the

¹⁶ The maximum speed allowed for trains crossing the Doctortown trestle is 70 mph, but maximum train speed is also determined by train type (intermodal, freight, Amtrak, etc.) (Tr. 74-75).

trestle to go towards the land. But by the time I saw the light of the train, the train was coming really fast. So I realized that I couldn't get off. So instead of trying to go to the land, I ran to the side and held on to the iron girder as tight as I could. . . Once I held onto the iron girder, the train had already been coming. And the pressure from the train was really strong. So it felt as if it was sucking me off of what I was holding on to. And it did. It pulled me where I couldn't hold on. And my arm went back into the train and it hit it and snapped it in half. As soon as the train hit my arm, I grabbed it really quick, fell down and I held onto the cable and wrapped myself up around the cable really tight while holding my arm. And a sheet from the bed fell in front of me on the cable. So I grabbed . . . the sheet and wrapped my arm up and made a tourniquet and just held on until the train stopped.

(Tr. 183-184)

Several employees attempted to move the hospital bed off the tracks, but it came apart when they picked it up. The Key Grip recounted the confusion on the trestle.

Well, while we were out there, all of a sudden we heard a horn and someone hollered "train." When we looked up, we saw the train light coming around the corner. So everybody was trying to grab their gear to get it out of the way. And at that time, William Hurt jumped up off the bed. And Randy [Miller] came running up, and he said, "Get the bed, get the bed." So William Hurt was trying to grab the bed, and I was like, man, you don't have any shoes on. Go ahead and get off of here, you know, you're going to get hurt. So we started to try to grab the bed. And at that time when Randy ran up, he grabbed at the bed and it slid off of the -- the wood rungs of the railroad track and went in between the rungs. And that's what caught . . . one of the set dressers. It caught him in the leg and pinned him down. And like I said, all of this happened in seconds. So I don't totally recall how everything really happened. So we were trying to get the bed off the track. We were trying to get [the set dresser] off of there. I remember grabbing a piece of the bed and throwing it off of the trestle and getting [the set dresser] out of the way. And at that time, that was when -- and like I said, everything happened split second. And I remember Randy was right next to me, and he said, "We're not going to make it. We're not going to make it." And then basically I stepped over to the side right before the train came through. And I don't know how I got around the post but ended up on the other side up against the cable until the train stopped.

(Tr. 410-411)

The B Camera Operator was on the trestle north of the hospital bed when he heard the Gaffer yell, "Train!" (Tr. 316) He stated, "The legs of the bed get stuck in between the . . . railroad ties and they're having trouble getting it out. And—and that creates a bottleneck that—that anybody behind the bed can't get off." (Tr. 316) "[W]hen the train hit, I was I would say ten, fifteen feet from the edge of the trestle, I think. And—and I was kind of penned against the wire guardrail. . . . So I was—I was hit with a piece of debris when—when the bed exploded."

(Tr. 319) Another employee removed the camera that was dangling from the B Camera Operator's shoulder. Although injured, the B Camera Operator was able to limp off the trestle and onto the gravel to the side of the tracks (Tr. 319).

Exhibit J-19 is a video clip taken from the actual filming of Scene 14. It opens with Hurt, playing Gregg Allman, lying in the hospital bed. The camera is pointed south and the end of the trestle is visible beyond the hospital bed. Seventeen seconds into the video, two crew members appear at the end of the trestle in response to the approach of the northbound train (there is no audio accompanying the clip). As the actors and some crew members hurry off using the walkway on the east side of the trestle, Miller and several other crew members start picking up the bed. The cameraman who is filming is caught behind the obstruction caused by the collapsing bed. Most of the crew members on the trestle are behind him. At approximately the fifty-seven second mark (approximately forty seconds after it appears the crew members first become aware of the approaching train), the cameraman gives up trying to exit the trestle and instead leans against the wire cable as the train rushes by.

Exhibit J-20 is a video clip taken by Film Allman's Still Photographer on the set. She pushed the video button on her camera apparently inadvertently and ended up filming some of the film company's chaotic attempt to exit the trestle. (At one point [redacted] was pinned on the trestle by one of the bed sections and the Still Photographer ran back and helped him extricate himself (Exh. C-25, pp. 152-153)). Exhibit J-20 shows the employees attempting to remove the bed as it falls apart, while the train is rushing towards them. The clip is only seventeen seconds long and does not include the first few seconds after employees became aware a train was approaching, but it is apparent upon viewing it the employees had fewer than the sixty seconds Film Allman assured them they would have to clear the trestle (Tr. 1115). Viewing the two video clips, it appears a few employees were able to exit the trestle before the train reached it, but most of them were still on the trestle when the train arrived approximately forty seconds after the employees realized a third train was coming.

Some of the bed parts were still on the tracks when the train hurtled across the trestle. As the train braked to a stop, the Gaffer ran onto the trestle. "I went back to try to see how I could help. And I noticed that everybody was very distraught when I walked onto the bridge and saw [redacted] on the ground. And then I walked back and saw who was hurt. And then I went to try to find a set medic but there wasn't one." (Tr. 618-619) First AD Schwartz found the Gaffer by

the parked vehicles. She grabbed him and told him, “[W]e need to do a head count. And let’s gather everybody.” (Tr. 621)

The Second Second AD called 911 but did not know how to direct the emergency personnel to the Doctortown trestle. “[O]nce we started talking, we had to figure out our – the location itself, which I couldn’t pinpoint if I tried. So I found a -- I think a transportation employee to help me nail down where we were.” (Tr. 487)

The following day, Film Allman was holding a meeting at Meddin Studios to discuss going forward with the project. Representatives from IATSE arrived and shut down the production. Film Allman has not resumed filming *Midnight Rider* (Tr. 1120).

Criminal Proceedings

On March 9, 2015, Randall Miller pleaded guilty to the charges of criminal trespass on the Doctortown trestle on February 20, 2014, and involuntary manslaughter for causing the death of [redacted] without the intention of doing so by the commission of criminal trespass. That same day, Jay Sedrish entered a plea of guilty under the provision in *Alford v. North Carolina*, 400 U.S. 25 (1970), to the same charges. On March 10, 2015, Hillary Schwartz was found guilty of criminal trespass on the Doctortown trestle and of involuntary manslaughter for causing the death of [redacted] without any intention to do so by the commission of criminal trespass (Exh. J-1, *Stipulated Facts*, ¶ 80-85). At the time of the hearing in this proceeding, Miller was incarcerated in the Wayne County Jail in Jesup, Georgia, where he is serving a two year sentence for the criminal trespass and involuntary manslaughter charges (*See, Order Directing Wayne County Sheriff to Produce Inmate Randall Miller*, dated March 30, 2015).

CITATION NO. 1

Items 1a and 1b: Alleged Serious Violations of § 1910.23(c)(1) and (e)(1)

Item 1a

Item 1a of Citation No. 1 alleges Film Allman failed to provide fall protection to its employees working on the trestle: “West side of Doctortown Trestle, on or about February 20, 2014, employees were working near the edge of a train trestle that was not guarded, exposing employees to a fall hazard.” Section 1910.23(c)(1) provides in pertinent part:

Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder.

It is the Secretary's burden to establish four elements of a violation of a § 5(a)(2) standard. "In order to prove a violation of the cited standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). Film Allman stipulated to all four elements of the violation of § 1910.23(c)(1), thus establishing the Secretary's *prima facie* case.

The Cited Standard Applies

Film Allman stipulated, "The requirements of 29 C.F.R. § 19[10].23(c)(1) applied to Respondent's work site on February 20, 2014 as described in Citation 1, Item 1a."¹⁷ (Exh. J-2, *Stipulated Points of Law*, ¶ 3)

Film Allman Failed to Comply with the Cited Standard

Film Allman stipulated it "failed to comply with 29 C.F.R. § 19[10].23(c)(1) when the west side of the Doctortown trestle did not have standard railings on February 20, 2014." (Exh. J-2, *Stipulated Points of Law*, ¶ 4) The photographic exhibits show the west side of the Doctortown trestle is not equipped with guardrails, standard or otherwise. The areas between the metal girders that rise at an angle to form an inverted V are open-sided (Exhs. C-1 through C-4, C-8, C-14).

¹⁷ Items 1a and 1b of Citation No. 1 cite subsections §§ 1910.23(c)(1) and (e)(1), respectively, of the § 1910.23 general industry standard. Those subsections are the ones addressed by the Secretary and Film Allman in their post-hearing briefs. In Exhibit J-2 (*Joint Exhibit 2—Stipulated Points of Law*), however, stipulated points ¶¶ 3, 4, and 7 refer to §§ 1926.23(c)(1) and (e)(1), subsections of the § 1926.23 construction standard. This is a clerical error (§ 1926.23 states in its entirety, "First aid services and provisions for medical care shall be made available by the employer for every employee covered by these regulations. Regulations prescribing specific requirements for first aid, medical attention, and emergency facilities are contained in Subpart D of this part." There are no subsections (c)(1) and (e)(1) in the § 1926 standard.). The language of the stipulations reflects the language used and the hazard addressed in §§ 1910.23(c)(1) and (e)(1). The Court *sua sponte* amends stipulated points 3, 4, and 7 of Exhibit J-2 to refer to §§ 1910.23(c)(1) and (e)(1), in conformance with the record. The parties are not prejudiced by the amendment, which merely corrects clerical errors. Amendments, including *sua sponte* amendments, are permissible where the amendment does not alter the essential factual allegations contained in the citation. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1517 (No. 91-373, 1993) (amendment proper because it does not alter citation's factual allegations), *A. L. Baumgarten Construction, Inc.*, 16 BNA OSHC 1995, 1997 (No. 92-1022, 1994) (*sua sponte* amendment after hearing permitted).

Film Allman's Employees Had Access to the Violative Condition

Film Allman stipulated its “employees were exposed to a fall hazard while working near the unguarded edge on the west side of the Doctortown train trestle on February 20, 2014.” (Exh. J-2, *Stipulated Points of Law*, ¶ 5) CSHO Vos estimated the distance between the section of the Doctortown train trestle where the employees were located and the Altamaha River below was 25 to 30 feet (Tr. 728). From edge to edge, the trestle is approximately 13.5 feet wide.¹⁸ The distance between the rails is approximately 5 feet (Exh. C-7). Exhibit C-14 is a photograph showing several employees standing on the trestle. An employee is shown standing at the foot of the hospital bed that has been placed perpendicular to the tracks. The railroad tracks run underneath the bed. The two legs at the head of the bed sit outside the right track and next to the right bridge beam on the east side of the trestle. The two legs at the foot of the hospital bed sit outside the left track and next to the left bridge beam on the west side of the trestle. The bed entirely blocks the area between the east and west bridge beams. The employee at the foot of the bed only has room to stand on the left bridge beam, which does not accommodate the length of his foot. Large bolts rise above the tops of the bridge beams, creating uneven surfaces (Exh. C-14). CSHO Vos stated the employee standing with the toes of his shoes overhanging the uneven bridge beam was “about 20 inches basically from falling off the west side of the trestle to the water below.” (Tr. 728)

Film Allman Knew of the Violative Condition

Film Allman stipulated it “knew or could have known its employees were working near the unguarded edge of the west side of the Doctortown train trestle on February 20, 2014.” (Exh. J-2, *Stipulated Points of Law*, ¶ 6) In Exhibit C-14, Randall Miller is standing in the center of the railroad tracks at the side of the bed while the employee at the foot of the bed is standing on the west bridge beam. Supervisors Hillary Schwartz and Mike Ozier were also on the trestles and aware of the open-sided edge. Miller stated that “out in the middle there, there’s no side” on the trestle (Exh. C-25, p. 144).

Item 1b

Item 1b of Citation No. 1 alleges Film Allman failed to provide adequate fall protection to its employees working on the trestle: “East side of Doctortown Trestle, on or about February

¹⁸ CSHO Vos took measurements with a trench rod that was calibrated in feet and tenths of a foot, rather than feet and inches.

20, 2014, employees were walking/working on a walkway platform on the east side of a train trestle. The guardrails on the open side of the walkway were not the proper height to prevent employees from falling off of the trestle.” Section 1910.23(e)(1) provides in pertinent part:

A standard railing shall consist of top rail, intermediate rail, and posts, and shall have a vertical height of 42 inches nominal from upper surface of top rail to floor, platform, runway, or ramp level. The top rail shall be smooth-surfaced throughout the length of the railing. The intermediate rail shall be approximately halfway between the top rail and the floor, platform, runway, or ramp. The ends of the rails shall not overhang the terminal posts except where such overhang does not constitute a projection hazard.

Film Allman stipulated to three of the four elements of the violation of § 1910.23(e)(1).

The Cited Standard Applies

Film Allman does not stipulate § 1910.23(e)(1) applies to the cited condition. Film Allman’s rationale for disputing the applicability of § 1910.23(e)(1) appears to be ignorance of its responsibility to comply with the requirements of the Act.

Film Allman had no knowledge on February 20, 2014 that there was an OSHA standard requiring a minimum height for guardrails, or that the OSHA standard would apply to the Doctortown trestle worksite, or that Film Allman would be expected to make modifications to a bridge they didn’t own in order to be in compliance with the standard. Nor could they be expected to know this.

(Film Allman’s brief, p. 43)

It is not the Secretary’s burden to establish an employer was aware of the requirements of a specific OSHA standard (the Secretary must establish the employer was aware of the violative condition). “The constitution does not require that employers be *actually* aware that the regulation is applicable to their conduct.’ *Willson III*, 773 F.2d [1377,] 1387 [D.C. Cir. 1985)] (quoting *Faultless Div., Bliss & Laughlin Indus. v. Secretary of Labor*, 674 F.2d 1177, 1185 (7th Cir.1982) (emphasis in original)).” *Brock v. Williams Enterprises of Georgia, Inc.*, 832 F.2d 567, 572 (11th Cir. 1987).

Section 5(a)(2) of the Act states, “Each employer . . . shall comply with the occupational safety and health standards promulgated under this Act.” Film Allman stipulated it was an employer as defined by § 3(5) of the Act (“a person engaged in a business affecting commerce who has employees[.]”). As a covered employer, Film Allman was responsible for complying with OSHA standards addressing hazards to which its employees had access. “A company may not, practically as a matter of policy, altogether ignore its known OSHA duties and then plead ignorance when it is caught in violation of an OSHA regulation.” *Georgia Elec. Co. v. Marshall*,

595 F.2d 309, 320 (5th Cir. 1979). Film Allman had adequate notice of its responsibility to comply with § 1910.23(e)(1) because the Secretary's interpretation is a straightforward reading of that subsection.

Film Allman's argument that the cited standard does not apply because Film Allman could not have known it "would be expected to make modifications to a bridge they didn't own in order to be in compliance with the standard" is misplaced. "Under Commission precedent . . . the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *Southern Pan Services Co.*, 25 BNA OSHC 1081, 1085 (No. 08-0866, 2014). An employer whose own employees are exposed to a hazard or violative condition (an exposing employer) has a statutory duty to comply with a particular standard even where it did not create or control the hazard. See *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198-99 (No. 3694, 1976) (consolidated) (holding that the exposure of a subcontractor's "employees to a condition that the employer knows or should have known to be hazardous, in light of the authority or 'control' it retains over *its own* employees, gives rise to a duty under section 5(a)(2) of the Act[.]").

Thus, even if Film Allman believed it could not "make modifications to a bridge they didn't own" without permission from the bridge owner, it still had an obligation to comply with the standard, by providing an alternate means of fall protection or by prohibiting its employees from accessing the zone of danger.

Each employer has primary responsibility for the safety of its own employees. Simply because a subcontractor cannot himself abate a violative condition does not mean it is powerless to protect its employees. It can, for example, attempt to have the general contractor correct the condition, attempt to persuade the employer responsible for the condition to correct it, *instruct its employees to avoid the area where the hazard exists* if this alternative is practical, or in some instances provide an alternative means of protection against the hazard.... In the absence of such actions, we will still hold each employer responsible for all violative conditions to which its employees have access.

Grossman Steel & Alum. Corp., 4 BNA OSHC 1185, 1189 (No. 12775, 1975) (footnote omitted) (emphasis added)

"[S]uch a requirement is consistent with Commission precedent requiring an employer to detect and assess the hazards to which its employees may be exposed, even those it did not create." *Associated Underwater Servs.*, 24 BNA OSHC 1248, 1251 (No. 07-1851, 2012). See "Gregory N. Dale & P. Matthew Shultz, eds., *Occupational Safety and Health Law* (3d ed. 2013,

Ch. 3.III) ('OSHA must show that a condition that violates a standard existed. This element does not require proof that the cited employer *itself* violated the standard, i.e., that the cited employer created the violative condition; OSHA need prove only that a violative condition existed, regardless of who or what caused it.')

Southern Pan Services Co., 25 BNA at 1086 (emphasis in original). An employer in Film Allman's position still has an obligation to make reasonable efforts to protect its employees from fall hazards.

Section 1910.23(e)(1) requires an employer to install guardrails with a vertical height of 42 inches on open-sided floors, platforms, runways, or ramp levels 4 feet or more above the adjacent level. The east edge of the Doctortown trestle was open-sided and was 25 to 30 feet above the Altamaha River at the location where Film Allman's employees were located (Tr. 728). The Court determines § 1910.23(e)(1) applies to the cited conditions.

Film Allman Failed to Comply with the Cited Standard

Film Allman stipulated it "failed to comply with 29 C.F.R. § 19[10].23(e)(1) when the open side of the walkway on the east side of the Doctortown trestle did not have 42-inch high guardrails on February 20, 2014." (Exh. J-2, *Stipulated Points of Law*, ¶ 7) Unlike the unguarded west side of the trestle (where the left bridge beam marks the outer edge of the trestle on the left side), a narrow walkway made of grated metal exists to the right of the right bridge beam on the east side (Exhs. C-1, C-2, C-7, C-20). The width of the walkway is approximately 3 feet (Exh. C-7, C-9). Two lengths of wire cable form a top rail and intermediate rail at the outer edge of the walkway (Exh. C-2a). CSHO Vos testified "the rails were not sufficient according to OSHA regulations." (Tr. 731)

Film Allman's Employees Had Access to the Violative Condition

Film Allman stipulated its "employees were exposed to a fall hazard while walking or working on the east side of the Doctortown train trestle on February 20, 2014." (Exh. J-2, *Stipulated Points of Law*, ¶ 8) CSHO Vos estimated the distance between the section of the Doctortown train trestle where the employees were located and the Altamaha River below was 25 to 30 feet (Tr. 728). Exhibits C-11 and C-15, among other photographic exhibits, show numerous employees walking and standing on the 3 foot wide walkway, next to the inadequate wire cable rails.

Film Allman Knew of the Violative Condition

Film Allman stipulated it “knew or could have known its employees were walking or working on the walkway on the east side of the Doctortown train trestle on February 20, 2014.” (Exh. J-2, *Stipulated Points of Law*, ¶ 9) In Exhibit C-14, Randall Miller is standing in the center of the railroad tracks at the side of the bed while employees are standing or walking in plain view on the walkway. Supervisors Hillary Schwartz and Mike Ozier were also on the trestle and aware of the inadequate wire cable rails (Exhs. C-11 and C-15).

Based on the parties’ stipulated facts and stipulated points of law, as well as the record evidence, the Court finds the Secretary has established Film Allman committed violations of §§ 1910.23(c)(1) and (e)(1).

Film Allman’s Belated Infeasibility Defense

In its brief, Film Allman argues, “It was not feasible for Film Allman to modify the trestle bridge structure[.]” (p. 39) and “[i]t would be infeasible, expensive, and impractical for a small company such as Film Allman to modify the trestle bridge for such a short period of work.” (p. 42) Commission Rule 34, § 2200.34, addresses *Employer contests*. Rule 34(b)(1) requires the employer to file an answer with the Commission within 20 days after service of the complaint. Rule 34(b)(3) provides, “The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, ‘infeasibility,’ ‘unpreventable employee misconduct,’ and ‘greater hazard.’” Rule 34(b)(4) cautions, “The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.”

Film Allman failed to raise the affirmative defense of infeasibility in its answer. It did not list the infeasibility defense as an issue in dispute in the parties’ *Joint Pre-hearing Statement*. The Secretary lacked notice Film Allman was asserting the infeasibility defense and did not present evidence to rebut it or address it in his post-hearing brief. The Court determines Film Allman failed to timely raise the infeasibility defense.¹⁹

¹⁹ Even if the Court were to determine Film Allman had timely raised the affirmative defense, Film Allman would not prevail. In order to prove the affirmative defense of infeasibility, the employer must show: (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically infeasible after its implementation, and (2) there would have been no feasible alternate means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994). The Commission expects

Classification of the Violations

The Secretary has established Film Allman committed violations of § 1910.23(c)(1) and (e)(1). He classified the violations as serious. Under § 17(k) of the Act, “a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists[.]” Film Allman stipulated that, had an accident occurred on February 20, 2014, as a result of its employees working near the east or west side of the Doctortown train trestle, “it could have resulted in serious bodily injury or death to an employee.” (Exh. J-1, *Stipulated Facts*, ¶¶ 65, 69)

Based on Film Allman’s stipulations and the record evidence, the Court determines the Secretary properly classified Items 1a and 1b as serious. Items 1a and 1b are affirmed as serious violations.

CITATION NO. 2

Item 1: Alleged Willful Violation of § 5(a)(1)

The Secretary alleges Film Allman committed a willful violation of § 5(a)(1). Item 1 of Citation No. 2 states,

Doctortown Train Trestle, on or about February 20, 2014, employees were working from a live railroad trestle without any safety procedures established such as securing the tracks from any type of train traffic in the area, or having a plan that would allow ample time for everyone to exit the trestle with all of their equipment and props. This exposed employees to a hazard of being struck by a train traveling on the tracks.

One feasible means of abatement, among others, would be to: 1) obtain permission from the railroad company to film on the trestle; 2) control train traffic so that no trains would travel through while employees were working on the trestle.

The elements of proof for a § 5(a)(1) (the general duty clause) violation differ from the elements of proof for a § 5(a)(2) OSHA standard violation. Section 5(a)(1) of the Act mandates that each employer “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

employers to exercise some creativity in seeking to achieve compliance. *Pitt Des Moines, Inc.*, 16 BNA OSHC 1429 (No. 90-1349, 1993). Film Allman asserts “it would be infeasible, expensive, and impractical” to install an adequate guardrail on the east side of the trestle, but adduced no evidence of either technological or economic infeasibility. Film Allman also failed to adduce evidence it implemented an alternative protective measure, such as providing employees with life preserver jackets or positioning an employee in a boat beneath the trestle (Tr. 406-407, 472, 550-551).

physical harm to his employees.” 29 U.S.C. § 654(a)(1). To establish a violation of the general duty clause, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *Pegasus Tower*, 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005). In addition, the evidence must show that the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition. *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007).

As with Item 1a of Citation No. 1, Film Allman stipulated to all four elements of the violation of § 5(a)(1).

Filming on an Active Train Trestle Presented a Hazard

Film Allman stipulated, “On or before February 20, 2014, working on a live train track presented the hazard of being struck by a train. . . . [redacted], Second Camera Assistant, was killed by the passing train and several other crew members were injured, some seriously.” (Exh. J-1, *Stipulated Facts*, ¶¶ 61, 70)

Film Allman and the Film Industry Recognized Filming on an Active Train Trestle Presented a Hazard

Film Allman stipulated, “On or before February 20, 2014, the film and television industry [and] . . . Respondent recognized that working on a live train track presented the hazard of being struck by a train.” (Exh. J-1, *Stipulated Facts*, ¶¶ 71-72).

Filming on an Active Train Trestle Was Likely to Cause Death or Serious Physical Harm

Film Allman stipulated, “Being struck by a train could result in serious bodily injury or death to an employee On February 20, 2014, Respondent’s employees were exposed to the hazard of being struck by a train while filming *Midnight Rider* on the Doctortown train trestle.” (Exh. J-1, *Stipulated Facts*, ¶¶ 73-74).

A Feasible Means Existed to Eliminate or Materially Reduce the Hazard

Film Allman stipulated, “One feasible means to abate the hazard of being struck by a train is to obtain permission from the railroad company to film on the trestle in order to control train traffic so that no trains will travel through while Respondent’s employees are working on the trestle.” (Exh. J-1, *Stipulated Facts*, ¶ 78).

The means of abatement the Secretary recommends is both feasible and standard in the film industry. As Location Manager, Baxter was familiar with the standard protocol when

planning to film on active railroad tracks. He had worked as the location manager on a previous movie for which he secured permission from CSX to film on its tracks. He testified that at one point approximately six CSX representatives were on set, which “was quite expensive also.” (Tr. 113) Baxter stated the movie company was not permitted to film until CSX held a mandatory safety meeting with the company.

We, as a group, the assistant director, production manager -- I think we had a key grip and maybe it was one of the working guys, transportation. There were about seven people from our company who met with CSX at the location. And we went through do's and don'ts. Anybody who's working on or around the tracks would have to wear steel toed boots. You'd have to wear a vest so they can see you. You can't go out there and do anything unless you need to go out there and do something. You have to kind of explain that, because it's very carefully monitored. *And then they talk about what happens when a train comes. How much time they're going to give us and where we have to move and how far we have to back up to. And we can't come back until the representative from the railroad is, "Okay. You can come back."* And it was all laid out very carefully on there and make sure we understood.

(Tr. 114-115) (emphasis added)²⁰

Film Allman Knew of the Hazardous Condition

Film Allman contends, “No one from CSX or Rayonier gave Film Allman any reason to believe that they were filming in a place they weren’t allowed to be, or proceeding in an unsafe manner” at the Doctortown trestle on February 20, 2014 (Film Allman’s brief, p. 25). The statement with regard to CSX is patently false. A representative of CSX had emailed Film Allman that morning stating Film Allman did not have permission to film on those railroad tracks specifically (Exh. J-1, *Stipulated Facts*, ¶ 30). This email arrived approximately three and a half weeks after another CSX representative emailed Film Allman, informing the film company categorically “CSX does not permit filming on our property.” (Exh. C-24)

²⁰ Despite stipulating to all the elements of a § 5(a)(1) violation, in its post-hearing brief Film Allman argues the Secretary did not establish the feasibility element because “based on the available information, waiting to film until such time as any known danger was confirmed to have passed, waiting until the only two trains expected had already passed, waiting until they believed the tracks were, in effect, inactive due to a cessation of train passage was a feasible method of abating the hazard of being hit by a train.” (Film Allman’s brief, pp. 25-26) This is nonsensical and obviously untrue. CSX’s trainmaster testified the railroad tracks crossing the Doctortown trestle are part of one of CSX’s busiest sections. On average, thirty-five trains a day, both scheduled and unscheduled, cross the Doctortown trestle. CSX does not post a publicly available schedule for its trains. It was impossible for Film Allman to wait “until such time as any known danger was confirmed to have passed.” The Court rejects Film Allman’s argument.

Film Allman claims it could not know CSX objected to its presence on the trestle (despite the two refusals of permission in writing) because the first two CSX trains it observed prior to the one that killed [redacted] passed without incident.

The expected two trains traversed the tracks when the crew was on the side of the tracks, set up, and filming. . . . The film crew was in plain view of the passing trains. They weren't hiding from the trains. They weren't disguising their presence or what they were doing. In fact, the engineers and conductors testified that they saw the film crew on the side of the tracks. . . . Neither of those trains made any report to dispatch, or to anyone else, regarding the film crew's presence besides the tracks, nor were they concerned by the film crew's presence or about anyone being in danger of being hit by a train.

(Film Allman's brief, p. 24) (citations to the transcript omitted)

This argument is untenable. The film company arrived at approximately 3:30 p.m. and the accident occurred at approximately 4:30 p.m. The Doctortown trestle is a remote location. Even if a crew member of one of the trains had reported the presence of the film crew to dispatch, CSX reasonably could not be expected to respond to the Doctortown trestle in the short period of time before the accident. Furthermore, Item 1 of Citation No. 2 refers specifically to the film company's presence on the trestle. At the time the first two trains passed by, none of the film company's members was on the trestle—they were at the sides of the railroad tracks. The CSX employees who testified stated it was normal to see people by the side of railroad tracks as they passed by and they would only report to dispatch if someone or something was “fouling the tracks,” meaning a person or object was “pretty much within the edge of the cross ties” that a train could hit as it passed (Tr. 77). Murray stated locomotive engineers or conductors generally do not call in reports of people near the tracks. “If we reported every incident where we had someone next to our track or even close to our tracks, you know, it would hinder railroad operation. We have a lot of folks . . . taking pictures or next to our tracks or working close to our tracks.” (Tr. 78)

Film Allman stipulated, “On February 20, 2014, Miller, Schwartz, Savin, and Sedrish knew that Respondent did not have permission from CSX Transportation to film on the tracks or Doctortown train trestle that traverses Rayonier property in Jesup, Georgia[, and] . . . did not have anyone from CSX Transportation present on location to ensure no trains would come through the work site while its employees were working on the trestle.” (Exh. J-1, *Stipulated Facts*, ¶¶ 50, 76) Baxter also knew Film Allman did not have permission from CSX to film on the tracks or trestle (Tr. 130-131). Miller and Savin had supervisory authority over Sedrish,

Schwartz, and Baxter. Sedrish also had supervisory authority over Schwartz and Baxter (Exh. C-25, p. 48). In their positions as subordinates to Miller and Savin, Sedrish and Schwartz failed to comply with the requirements of § 5(a)(1), as cited in Item 1 of Citation No. 2. Miller and Savin’s knowledge of their subordinates’ noncomplying behavior is imputed to Film Allman. Sedrish’s knowledge of Schwartz’s noncomplying behavior is also imputed to Film Allman. “When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor’s knowledge actual or constructive of noncomplying conduct of a subordinate.” *Mountain States*, 623 F.2d [155,] 158 [(10th Cir. 1980)]. It is reasonable to do this because a corporate employer can, of course, only act through its agents—as several of the above-cited cases have recognized—and the supervisor acts as the “eyes and ears” of the absent employer.” *ComTran Grp., Inc. v. U.S. Dep’t of Labor*, 722 F.3d 1304, 1317 (11th Cir. 2013).

Film Allman knew CSX had twice refused the company permission to film on its railroad tracks and yet Film Allman instructed its employees to work on active tracks running across the Doctortown trestle on February 20. Based on the parties’ stipulated facts and the record evidence, the Court finds the Secretary has established Film Allman committed a violation of § 5(a)(1).

WILLFUL CLASSIFICATION

The Secretary classified the cited violation as willful. Film Allman’s challenge to this classification is the primary focus of this proceeding. Film Allman’s state of mind is at issue as a result of the willful classification.

“The hallmark of a willful violation is the employer’s state of mind at the time of the violation—an ‘intentional, knowing, or voluntary disregard for the requirements of the Act or ... plain indifference to employee safety.’” *Kaspar Wire Works, Inc.*, 18 BNA OSHC at 2181, 2000 CCH OSHD at p. 48,406 (citation omitted). [I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, pp. 41,256 57 (No. 89-433, 1993). This state of mind is evident where “the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.” *AJP Constr. Inc. v. Sec’y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (emphasis and citation omitted).

Thomas Indus. Coatings, Inc., 23 BNA OSHC 2082, 2091 (No. 06-1542, 2012).

Film Allman Contends Its Violation of § 5(a)(1) Was Not Willful

Film Allman argues the Secretary cannot meet his burden of proving intentional disregard to the requirements of the Act or plain indifference to employee safety because the film company reasonably relied on a third party's assurance that only two trains were expected the day of the accident. There are significant gaps in the record regarding the origins of the "two trains" canard. At the hearing, Film Allman identified Rayonier's Communications Manager as the source of the misinformation, characterizing her as a star struck movie fan who overstated her influence with CSX in order to ingratiate herself with a film company. Director Randall Miller presented a vivid portrait of his first meeting with the Communications Manager after he arrived at the Doctortown trestle site on February 20.

Miller: I met her shortly after getting out of the vans.

Q. It -- where the vans were parked?

Miller: Yeah.

Q. And did she say who she worked for?

Miller: You know, I don't -- I do -- yeah, she did say she worked for Rayonier but I don't remember -- I didn't know at the time whether she owned the property or what her situation was.

* * *

Q. Did -- was she excited to meet the actors?

Miller: She was -- she was thrilled to meet the director. . . . She was thrilled to meet the director. She said something about . . . She was thrilled to meet me. . . . She was thrilled to meet me. She was thrilled to meet all the various crew and the actors.

Q. Star struck kind of attitude?

Miller: Definitely was. . . . Definitely excited.

(Tr. 1083-1084)

Miller's account at the hearing took place more than a year after the events of February 20, 2014. His description of this meeting and the Communications Manager's fawning behavior is contradicted by his testimony taken by OSHA on May 15, 2014, less than three months after the accident, when he testified he did not meet Rayonier's Communications Manager when he arrived at the site:

Miller: Well, [Baxter and Sedrish] had gone out there a week or so before with [Rayonier's Communications Manager] who I didn't know. I didn't really know

her. I never met her or anything, but she was the one that had been the representative at Rayonier.

Q. Did you meet her out on the location the day of the accident?

Miller: *I didn't meet her until after the accident.* And I went up to her and I said – I said, what the hell is this? You know? It's like that. I was like really upset.

Q. And what did she say?

Miller: I don't recall what she said. I was pretty much in shock.

Q. Okay. So Charley [Baxter] was working with [Rayonier's Communications Manager] and CSX?

Miller: Well, as far as I know, what the story was is that she was -- she -- she had -- she thought she had some -- it's hard because now I've seen e-mails afterwards, you know? . . . But she had some ability to like, you know, make it all happen, you know, because she was the -- she was the communications director there and she had some past history with CSX.

(Exh. C-25, p. 188-189) (emphasis added)

Film Allman's own management employees do not agree on the source of the "two trains" information. Producer Jody Savin stated she first heard about the two trains from Baxter on February 19 at Meddin Studios (Exh. C-29, p. 59). "I know that two trains were going down the tracks because Charley told me the day before." (*Id.* at 81) She stated she did not discuss the expected two trains with Rayonier's Communications Manager at the Doctortown trestle site on February 20, but "after the second train went by I walked over to [Rayonier's Communications Manager] and I said, 'So, that's our two trains, right? And she . . . nodded to me and so I thought we're clear.'" (*Id.* at 96).

UPM Sedrish could not specifically recall whether he heard the "two trains" information from Baxter or from Rayonier's Communications Manager (Sedrish deposition, pp. 54-58, 88-89). In contrast to her colleagues, First AD Schwartz testified she cannot recall hearing any information regarding two trains until she was actually on the Doctortown trestle on February 20, the day she was supervising safety on the set.

Q. And at that point in time, when you went out onto the trestle to join Randy [Miller] and Mike [Ozier], what was your understanding of what the train traffic was going to be that day?

Schwartz: I don't remember. But I remember, when we were on the trestle, [the Assistant Location Manager] got on the radio and told me that the two trains that we were expecting had not passed.

Q. Okay. But before [the Assistant Location Manager] communicated with you via radio, did you have any understanding at that point of what the train traffic—the expected train traffic was going to be?

Schwartz: I don't remember.

Q. Okay. Do you recall whether you had any information before talking with [the Assistant Location Manager] on the radio about the number of—the number of trains?

Schwartz: I don't remember.

Q. Okay. Did you—do you recall whether you had any information about what time the trains were going to be coming through?

Schwartz: I don't believe I ever had any . . . information at that time.

Q. Did you have any information before talking with [the Assistant Location Manager] about the direction of travel of the trains?

Schwartz: I don't recall.

(Schwartz deposition, pp. 28-29)

Location Manager Baxter was the Film Allman employee who worked most closely with Rayonier's Communications Manager. In the numerous email exchanges with Baxter that Film Allman adduced at the hearing, the Communications Manager makes no mention of "two trains." (Exhs. R-15 through R-20) Baxter did not testify she told him only two trains were expected that day. Film Allman's counsel did not ask Baxter during his cross-examination if Rayonier's Communications Manager told him only two trains were expected to cross the Doctortown trestle on February 20 (Tr. 207-266). In his opening statement, one of counsel for Film Allman stated, "We've taken a deposition of [Rayonier's Communications Manager]. If the Secretary doesn't call her, I'm sure we'll be calling her[.]" (Tr. 39) Neither party called Rayonier's Communications Manager to testify. Film Allman did not offer her deposition into evidence.

Even if Film Allman could trace the faulty "two trains" information to Rayonier's Communications Manager (which it has not), Film Allman could not rely on it reasonably. The Communications Manager works for Rayonier, not CSX. Her job involves promoting Rayonier in local media (Tr. 850). Film Allman argues it "reasonably relied on [Rayonier's Communications Manager] to have superior knowledge about the condition of the train tracks crossing its property." (Film Allman's brief, pp. 29-30) Film Allman failed to adduce any evidence establishing Rayonier's Communications Manager had "superior knowledge" regarding the train tracks or CSX's train schedule. It simply was not reasonable for Film Allman to rely on

any representations a Rayonier public relations employee made with regard to CSX's train schedule. There is no evidence CSX authorized the Communications Manager to speak for it or gave her access to its train schedule.

The absurdity of Film Allman's argument is highlighted by its failure to inquire, upon arrival at the Doctortown trestle site, whether any trains had passed by yet. This would appear to be crucial information for a filming schedule premised on the "two trains" theory. If Film Allman actually believed only two trains were scheduled to cross the Doctortown trestle on February 20, 2014, it was incumbent upon one of the several Film Allman supervisors present that day to inquire whether any trains had passed by the time the film company arrived at approximately 3:30 in the afternoon. No one from Film Allman asked that question of the two DSI guards who witnessed the earlier train and who were on the site from the time of the film company's arrival until after the accident occurred. Film Allman's argument it relied on information from Rayonier's Communications Manager is without merit.

The "two trains" story appears to be a smokescreen concocted to afford Film Allman plausible deniability with respect to the hazards to which it exposed its employees on February 20, 2014. Miller explained Film Allman's purported plan when it arrived at the Doctortown trestle site on February 20. "[L]et's wait for the two trains to go by if there are going to be two trains. If two trains don't come by, then we're not going out on that trestle. I'm not going out on the trestle [until after two trains pass]." (Exh. C-25, p. 158)

The sincerity of this plan is suspect given Miller's testimony about an earlier conversation he had with Schwartz and Sedrish concerning the difficulty of scheduling Scene 14 around Hurt's limited availability.

Hillary and Jay . . . were thinking that we were to go to this—this location in Jesup and they were talking about the difficulty of the fact that William Hurt had one week that we had contracted him for. And so it was a distant location so it was going to be difficult in the middle of the day to drive to Jesup to do this—this scene. . . . We had six days with him. So there was one extra day that we could [go] somewhere. And so that was what was decided. I really wasn't part of that. It just showed up in a schedule that I saw.

(Tr. 1071)

In his post-hearing brief, the Secretary points out the shortcomings of Film Allman's continued reliance on its "two trains" theory.

It simply does not make sense that Respondent would have taken its lead actor, a second actor, and at least 20 crew members to just sit at a distant location to wait

and see if two trains go by. But, if that was the plan, one would expect that on arrival at the site, someone would, at minimum, go ask [the DSI] security guards [] who let the crew onto Rayonier's property, if a train had come through before the crew arrived. (Ex. J1 ¶ 34). However, there is no evidence Respondent attempted any such inquiry. Had Respondent asked, it would have learned that a train had passed within the last half-hour before the crew arrived. (Tr. at 854, 870). This lack of inquiry only underscores that at the time, Respondent did not hold a genuine belief that only two trains were expected to traverse the trestle on February 20, 2014. Respondent simply did not believe, at the time its employees accessed the trestle, that no other trains would come down that track. Any belated attempt to promote this theory at the hearing does not show that Respondent held a plausible or reasonable belief that the tracks were safe to access. *See General Motors*, 22 O.S.H. Cas. (BNA) at 1044 (affirming a willful violation where the employer's belief was neither "plausible nor reasonable").

Second, Respondent's assumption that the two trains would happen to traverse the trestle only after it arrived at the work site is also objectively unreasonable and not worthy of credence. *See id.* Respondent knew well in advance of February 20, that it planned to film Scene 14 during the "magic hour," between 4:00 and 6:00 p.m. (Schwartz Depo. at 78; *see also* Ex. J11). This was a creative decision that had nothing to do with the expectation of train traffic. (Schwartz Depo. at 78). And yet, Respondent did not seek out any information about what time the trains would allegedly come through. (Schwartz Depo. at 33; Sedrish Depo. at 56). In fact, on February 20, 2014, Respondent's managers had no idea what the train frequency was at the Doctortown trestle. (*See* Schwartz Depo at 89; Tr. at 1145).

(Secretary's brief, pp. 46-47)

The Court finds the Secretary's argument persuasive. Film Allman's argument that it reasonably relied on its mysteriously sourced "two trains" information is rejected.

State of Mind of Supervisory Personnel Imputed to Film Allman

The Court must determine whether the record establishes Film Allman, as a corporate entity, had a heightened awareness of the illegality of its conduct and a state of mind manifesting plain indifference to employee safety. It is not solely Miller's state of mind that determines whether the willful classification is warranted. The Court may impute to Film Allman the state of mind of any supervisor who exhibited a heightened awareness of the illegality of the conduct or conditions and a state of mind of conscious disregard or plain indifference to employee safety. *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000) ("The state of mind of a supervisory employee ... may be imputed to the employer for purposes of finding that the violation was willful.").

"Knowledge" by a corporate entity is necessarily a fiction; the corporation can only be said to 'know' information by imputing to it the knowledge of natural

persons who serve as its agents.” *Central Soya de Puerto Rico, Inc. v. Secretary*, 653 F.2d 38, 39 (1st Cir.1981). See also *Acme Precision Products, Inc. v. American Alloys Corp.*, 422 F.2d 1395, 1398 (8th Cir.1970) (“knowledge of officers and key employees of a corporation, obtained while acting in the course of their employment and within the scope of their authority, is imputed to the corporation itself”).

Caterpillar, Inc., 17 BNA OSHC 1731, 1732 (No. 93-373, 1996), *aff’d Caterpillar, Inc. v. OSHRC*, 122 F.3d 437 (7th Cir. 1997).

The Court finds the evidence that Film Allman’s supervisory personnel had a heightened awareness of the illegality of their conduct on February 20, 2014, is overwhelming. Film Allman manifested plain indifference to the safety of its subordinate employees. The supervisors knowingly provided misleading information to their subordinates, assigning them tasks that required them to gather without CSX’s permission on active railroad tracks running across a narrow trestle. The subordinate employees were unaware their supervisors did not know the train schedule for that location or that they did not have an emergency exit plan.

Location Manager Baxter testified that any time a film production wants to film on private property, it “would have to have a location agreement signed by the owner of the property.” (Tr. 103) He explained that it was his responsibility “to represent the company that I’m working for. And the companies that I work for in this industry provide me with a location agreement that’s been vetted through their legal. And then I’m obligated to get the owner of the property to sign that agreement. So it’s really -- if the owner doesn’t want to sign the agreement, then I would have to move on to another location.” (Tr. 104)

Baxter knew Film Allman needed permission from CSX to film Scene 14 because “they owned the tracks. . . . We can’t go onto their property without their permission. . . . I mean, there’s the legal aspect of it, but there’s also the safety. You have to have their cooperation so you understand what might be coming down those tracks.” (Tr. 127)

Although Sedrish and Schwartz testified Baxter had indicated the February 20, 2014, email from the CSX representative was not a definitive refusal of permission to film on its tracks that day, Baxter unequivocally recognized the CSX email as a denial.

Q. “Unfortunately, CSX will not be able to support your request.” What was your understanding -- what was your takeaway from that email statement?

Baxter: That we didn’t have permission to film there on that day.

Q. Well, it says “Not able to support your request.” I mean –

Baxter: Well, if they can't support our request then we can't film there. Because to support our request would be to provide the safety personnel and the information that we need, a schedule of the trains and direction and how many and all of those things. We need -- we only could get that information from CSX. And if they say that they can't support our request, then we can't get that information, which means we can't film there.

(Tr. 131-132)

Despite this refusal, Film Allman determined to go ahead with its plan to depart from Meddin Studios at approximately 1:30 p.m. and travel to the Doctortown trestle. Baxter understood Film Allman was “going to go down to Rayonier property, which they had permission to be on, and that they were going to wait until they felt like they had the opportunity to film on the tracks and-- and do it without permission.” (Tr. 136) Film Allman planned to steal a shot.

Baxter stated that based on the February 20, 2014, email from CSX, he did not accompany Film Allman’s employees to the Doctortown trestle “[b]ecause we didn’t have permission. . . . I knew they were going to go onto CSX property and I didn’t want to be a part of it. I thought it was wrong. I have a reputation to uphold. And I just said, ‘I’m not going because we don’t have permission. I don’t want to participate in that kind of behavior.’” (Tr. 137) Baxter’s claim is undermined somewhat by a text exchange with Rayonier’s Communications Manager that occurred on February 19, 2014, at 7:07 p.m., more than fifteen hours before he received the email from CSX denying permission to film on its railroad tracks. It indicates he had decided to skip the Doctortown trestle shoot even before CSX emailed its denial of permission to access its tracks.

Hello I just emailed you all of the insurance requests
Thx again
Charley

Awesome. Thanks!! Sorry I won't get to see you tomorrow.

I'm trying to make it. . just a little swamped ... wish all the locations were as pleasant to deal w/as you
Thank you

(Exh. R-22)

Regardless of his reason for not going to the Doctortown trestle, Baxter did not tell cast and crew members, who were not privy to the CSX email, that CSX had denied Film Allman permission to film on the railroad tracks. He testified he did not believe they were in danger

because he had “a certain amount of respect and confidence in Jay Sedrish and Randy and Hillary, that they wouldn’t do anything to put anybody—so I felt there was proper adult supervision that would have been there. And I didn’t—no, I did not have a fear about anybody getting hurt.” (Tr. 138) His confidence was misplaced.

Film Allman made the conscious decision to proceed with its plan to film Scene 14 at the Doctortown trestle. Having been explicitly denied permission by CSX to do so, Film Allman knew it was trespassing. Film Allman also knew the train traffic would continue as scheduled and that schedules are not publicly available. Under these circumstances, Film Allman might be expected to increase its safety precautions. Instead, Film Allman compromised industry safety standards at virtually every stage of the location filming. The film company had already failed to conduct the customary tech scout of the location, which might have provided Miller and the department heads the opportunity to realistically assess the risks associated with filming on the site.

Sedrish and Schwartz decided not to attach Safety Bulletin # 28 to the February 20 call sheet. This was not a mere oversight. The Key Second AD asked both Schwartz and Sedrish if he should attach the bulletin and both told him no (or in Sedrish’s case, “No, no, no.” (Sedrish deposition, p. 97)). This decision denied Film Allman’s employees access to relevant safety information, including ¶ 14:

Do not place any objects on the rails, switches, guardrails or other parts of the track structure. If the performance of any of these activities is required for production purposes, specific permission must be obtained from the designated railroad representative and additional safety precautions may be required.

(Exh. C-28, p. 3)

First AD Schwartz did not hold a safety meeting prior to filming at the Doctortown trestle site. Safety Bulletin # 28 mandates that before filming a scene involving rail work, a film company “in conjunction with the railroad representative, will conduct a safety meeting with all involved personnel to acquaint cast and crew members with possible workplace risks.” (*Id.* at p. 1)

There was no medic at the site. Film Allman knew it was going to a remote location where its employees would be working over a river on an antebellum railroad trestle on active tracks. Miller could provide no plausible explanation for the absence of the medic that day.

[W]e generally always have a medic. We had a medic hired because we had a medic at the production meeting the week before, was at the production meeting. I

don't really know why there was not a medic there. I can't say why. In retrospect I'm sort of surprised there wasn't a medic there, but we had hired a medic for the shoot. He came to the production meeting[.]

(Exh. C-25, p. 167)

Film Allman did not have an emergency exit plan in the event of an unexpected train. First AD Schwartz, who was in charge of safety, testified she did not know until she was on the trestle that only two trains were supposed to pass. She did not know how long the employees had to clear the trestle in the event of another train and the information radioed to her (“sixty seconds”) appears to have been pulled out of thin air. She did not explain the exit “plan” to employees until they were already on the trestle and then did so only in response to a question. Film Allman, disastrously, did not have a procedure in place to attend to the hospital bed blocking the trestle between the bridge beams. Film Allman’s utter lack of forethought in formulating a coherent emergency exit plan is mystifying.

The Secretary notes, “At every possible point that Respondent could have provided valuable information to its employees regarding their working conditions and the known hazards at the trestle location, it chose, instead, to obfuscate the actual conditions.” (Secretary’s brief, p.42) The most egregious failure in this regard is Film Allman’s decision to conceal from its employees that they were on active railroad tracks without CSX’s permission. Film Allman deprived its employees of accurate information regarding the extreme dangers to which they were exposed.

Film Allman contends it could not have manifested plain indifference to employee safety because supervisors Miller, Schwartz, and Ozier were also on the trestle and they would not knowingly have placed themselves in a hazardous situation. The Court rejects this argument. Baxter explained the location department sometimes joked a film company needs adult supervision.

It's me or one of my assistants. It's to make sure that we, as a company, kind of do what we said we were going to do and stay within the bounds of where we said we were going to be. And the employees and the enthusiasm and energy that's usually created with a film is similar to tunnel vision. To -- I like to sometimes call it like a bird dog. They focus on their job and they really don't pay attention to anything else. And you need somebody who's a little bit more objective to keep them out of the road, be aware of traffic, to not go into property that they don't have permission to go into. It's -- it's a term of endearment.

(Tr. 107-108)

Whether the presence of the supervisors on the trestle resulted from tunnel vision, bird dog concentration, or lack of adult supervision, they were plainly indifferent to their own safety as well as to that of their subordinates. Each supervisor has an obligation to expand his or her focus beyond merely completing a task and ensure the task is completed safely. A supervisor must anticipate predictable hazards. The injuries to the supervisors' co-workers and the death of [redacted] were not the results of a freak accident—they were the entirely predictable consequences of working on active tracks without the railroad owner's permission.

Film Allman's cast and crew members relied on their supervisors to ensure safe working conditions. The cast and crew members entrusted their continued wellbeing to the management personnel who had authority over them. The Key Set Costumer became aware for the first time the film company was working on active railroad tracks when the first train since the film company's arrival passed. Even then, she expressed confidence in Film Allman's supervisors. When asked if hearing that a third train may be coming evoked a reaction from her, she stated,

Not one of alarm because, you know, my thought was that we were on live tracks so of course there would possibly be a third train. I had no idea that that third train was so close. It -- it did not cross my mind that the third train would even come when we were there. But I had a safety that [the Second Second AD] was obviously in touch with somebody who was aware of the -- of the train schedules. So, you know, there was an assurance that we were at least in the loop. I had no idea that we weren't in the loop completely.

(Tr. 553)

At one point in Schwartz's deposition, the Secretary asked, "[Y]ou didn't tell any of the crew members that they didn't have to participate in that shoot if they didn't want to?" To which Schwartz replied, "No. But I didn't tell them they had to participate either." (Schwartz deposition, pp. 55-56) It is disingenuous to assume crew members filming on location would inform their supervisors they did not want to participate in an assigned task. Given the hierarchical nature and departmentalization of a film company, it is unrealistic to expect subordinate employees to give voice freely to their safety concerns. Sedrish acknowledged raising safety concerns could cause problems for a below-the-line crew member. "In general, you don't want to get a reputation as a troublemaker." (Sedrish deposition, p. 78) Several of the witnesses stated they became uneasy with the working conditions on the trestle but were reluctant to raise their concerns to their supervisors. The Key Grip testified he and the other employees gradually realized they were at risk.

It was kind of -- in a way it was almost kind of casual talk amongst the crew and with Mr. Hurt as well. And basically that was, you know, when people were asking as far as, you know, what are we supposed to do and what's going to happen if something happens, so to speak. And that's kind of when, I guess, we realized that it's, you know, maybe we're not really in the right place, if you know what I'm saying.

(Tr. 407)

The Key Set Costumer stated she found it disconcerting when Schwartz radioed the Second Second AD to ask if it were possible a third train may pass by. "But I did think . . . when I heard her request the train schedule[,] I thought a good time to have known the train schedule -- a good time to know the train schedule would have been before we got there. That was my thought when she made that request. So I -- I have a lot of guilt that I didn't speak up and express what was going on in my head." (Tr. 554)

The Hairstylist expressed similar qualms. She stated she felt unsafe when she first ventured out onto the trestle and that she regretted not speaking up about it. When asked why she did not, the Hairstylist replied, "You know, I had just been there, like, two days. So I'm just starting the job. And just the fear of losing a job or being a troublemaker, you know, and a person that causes problems. You know, and you don't want to be that person. And I regret not saying anything because of what I may have felt. And I still have to carry that with me." (Tr. 185)

Significantly, Hurt was the only employee who questioned Film Allman's assurances only two trains were expected and the film company would have sixty seconds to clear the trestle. As the production's lead actor, he was not subject to the same economic realities and power dynamic as the below-the-line crew members. Even so, Film Allman's supervisors did not seriously address his safety concerns.

The onus was not on Film Allman's subordinate employees to opt out of working conditions which they believed were unsafe. "After all, '[r]esponsibility under the Act for ensuring that employees do not put themselves into any unsafe position rests ultimately upon each employer, not the employees, and employers may not shift their responsibility onto their employees.' *Secretary of Labor v. V.I.P. Structures, Inc.*, 1994 WL 362276, *3 (O.S.H.R.C.)." *Caterpillar Inc. v. Occupational Safety & Health Review Comm'n*, 122 F.3d 437, 441 (7th Cir. 1997).

Film Allman's original transgression was trespassing on the Doctortown trestle to steal a shot. But at several different stages supervisors could have increased precautions that may have provided some measure of protection to the employees. The supervisors of Film Allman had the authority to step in and halt the filming on the trestle (Exh. J-1, *Stipulated Facts*, ¶¶ 36-46). Although Schwartz, as First AD, was designated as the person in charge of safety on the set, she shares responsibility with Miller, Savin, and Sedrish for the events of February 20. Miller, Savin, Sedrish, and Schwartz were all present at the Doctortown trestle location and all knew the film company was trespassing on active tracks with no train traffic control. Yet they failed to devise or even discuss an emergency exit plan prior to instructing the cast and crew members to set up on the trestle. This collective failure placed the unsuspecting employees on a narrow trestle above a river in winter. As the train approached, the sections of the collapsed bed strewn across the railroad ties exacerbated the already precarious footing on the trestle, creating tripping hazards. The crew members were required to maneuver past the obstacles on the trestle while encumbered with equipment. The quickest way to safety was moving towards the onrushing train.

Film Allman's cumulative choices to ignore CSX's denial of permission to film on its tracks, forsake standard safety protocols, and withhold crucial information from its subordinate employees reflect plain indifference to employee safety. This indifference resulted in serious injuries to a number of employees and, most grievously, the death of [redacted].

The Court finds Film Allman's violation of § 5(a)(1) is properly classified as willful.

PENALTY DETERMINATION

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

Film Allman employed approximately ninety employees on February 20, 2014. It has no history of OSHA inspections (Tr. 749-750). The Court does not credit Film Allman for good faith based on the awareness of its management personnel that the film company was trespassing

when it instructed its employees to work on the Doctortown trestle on February 20, 2014. *Gen. Motors Corp., CPCG Okla. City Plant*, 22 BNA OSHC 1019, 1048 (No. 91-2834E, 2007) (consolidated) (giving no credit for good faith when management tolerated and encouraged hazardous work practices).

The gravity of Item 1a of Citation No. 1 is high. CSHO Vos described the risks to which Film Allman's employees were exposed on the west side of the trestle where no guardrails existed.

[T]he potential was high rate that an accident could occur. And that was based on the employee having to stand on such a small area and also the bolts that were going through -- the bolt went through the wood holding it into place were potential trip hazard for someone who was trying to carry material or walking could trip over them and cause them to fall off.

(Tr. 731-732)

Twenty to twenty-three employees were exposed for approximately one hour to a 25 to 30 foot fall into the Altamaha River. Film Allman took no precautions against injury.

Item 1b of Citation No. 1 addresses the inadequate cable guardrails on the eastern edge of the trestle's walkway. The number and exposure of employees for Item 1b are the same as Item 1a, but the Court finds the gravity of the violation is moderate. CSHO Vos stated, "[T]here were rails in place so somebody could hold on to to prevent them from falling off. So there was going to be lesser probability [an accident could occur]." (Tr. 732) At least three employees testified they clung to the cables as the train rushed by them (Tr. 183-184, 319, 410-411).

The Court assesses a grouped penalty of \$4,900.00 for Items 1a and 1b of Citation No. 1

The gravity of Item 1 of Citation No. 2 is of the highest order. Twenty to twenty-three employees of Film Allman were working on active tracks on a train trestle without accurate knowledge of the train schedule. Film Allman did not formulate an emergency exit plan prior to assembling its employees on the trestle and the impromptu safety information it did provide them was incorrect. Three of Film Allman's management employees were convicted of criminal trespass and involuntary manslaughter for their conduct on February 20, 2014.

The Court assesses the maximum penalty of \$70,000.00 for Item 1 of Citation No. 2.

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:

1. Items 1a and 1b of Citation No. 1, alleging serious violations of §§ 1910.23(c)(1) and (e)(1), are AFFIRMED and a grouped penalty of \$ 4,900.00 is assessed, and

2. Item 1 of Citation No. 2, alleging a willful violation of § 5(a)(1), is AFFIRMED and a penalty of \$70,000.00 is assessed.

SO ORDRED.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Date: September 28, 2015
Atlanta, Georgia