

THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING

COMMISSION REVIEW



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

SECRETARY OF LABOR,

Complainant,

v.

ONEKEY, LLC,

Respondent.

OSHRC DOCKET NO. 18-0242

Appearances: Kate S. O'Scannlain, Solicitor of Labor
Jeffrey S. Rogoff, Regional Solicitor
Suzanne Demitrio Campbell, Senior Trial Attorney
Orly S. Godfrey, Attorney
U.S. Department of Labor, Office of the Solicitor, New York, New York

For the Complainant

Travis W. Vance, Esq.
David I. Klass, Esq.
Fisher & Phillips LLP, Charlotte, North Carolina

For the Respondent

Before: Keith E. Bell
Administrative Law Judge

DECISION AND ORDER

Respondent Onekey, LLC, is a builder, general contractor, and construction management company. One of Respondent's projects is the development of 300 residential units and

commercial space (worksites) along the Hudson River in Poughkeepsie, New York. In early 2017, Respondent implemented a soil compaction plan on the worksite that had been designed by a soil engineering company under contract with Respondent. The soil compaction plan dictated using a “surcharge,” which was described as a “mountain” of soil at least 15 feet high that spanned and overlapped the footprint of each pre-constructed building, to slowly compact and settle the earth beneath it. (Tr. 248.)

On August 3, 2017, portions of a surcharge and an adjacent concrete block wall collapsed on the worksite, killing one of Respondent’s subcontractor’s workers and injuring another. The Occupational Safety and Health Administration (OSHA) investigated the worksite the next day, August 4, 2017. OSHA took the following picture during the inspection on August 4, the day after the accident.



(Ex. C-15.)

As a result of the inspection of the Poughkeepsie worksite, OSHA issued to Respondent a Citation and Notification of Penalty (Citation) on January 19, 2018. The Citation alleged one serious two-item violation, and one willful two-item violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act), and proposed a total penalty of \$281,583.00. Respondent filed a timely notice of contest, bringing this matter before the Occupational Safety and Health Review Commission (Commission). A hearing was held in New York City from July 9 – 11, 2019, and was continued in Greenbelt, Maryland from September 10-12, 2019. Both parties filed post-hearing briefs.

As discussed below, the Citation and proposed penalty are AFFIRMED.

ALLEGED VIOLATIONS

Serious Citation 1, Item 1 alleges a violation of 29 C.F.R. § 1926.21(b)(2), which provides that “the employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.” 29 C.F.R. § 1926.21(b)(2). The Secretary alleges that Respondent violated 29 C.F.R. § 1926.21(b)(2) when:

- a) At the 1 Dutchess Avenue, Poughkeepsie, NY, west of Surcharge, on and before August 3 of 2017, workers were exposed to a crushing hazard associated with a soil surcharge collapse that could cause the concrete retaining wall to collapse. Employees were not informed of the potential sudden collapse of the retaining wall and surcharge soil pile. Workers were not trained to keep a safe distance away from the surcharge and retaining wall.

(Citation 6.) The Secretary proposed a \$12,934 penalty for serious Citation 1, Item 1.

Serious Citation 1, Item 2 alleges a violation of 29 C.F.R. § 1926.501(b)(12), which provides that:

‘Precast concrete erection.’ Each employee engaged in the erection of precast concrete members (including, but not limited to the erection of wall panels, columns, beams, and floor and roof "tees") and related operations such as grouting of precast concrete members, who is 6 feet (1.8 m) or more above lower levels shall

be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems, unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

29 C.F.R. § 1926.501(b)(12). The Secretary alleges that Respondent violated 29 C.F.R.

§ 1926.501(b)(12) when:

- a) At the 1 Dutchess Avenue, west of Surcharge D, in Poughkeepsie, NY, on or about July 28, 2017, employees were installing pre-cast concrete blocks to a level of 8 feet high without the use of fall protection.

(Citation 7.) The Secretary proposed a \$9,977 penalty for serious Citation 1, Item 2.

Willful Citation 2, Item 1 alleges a violation of 29 C.F.R. § 1926.701(a), which provides the following:

Construction loads. No construction loads shall be placed on a concrete structure or portion of a concrete structure unless the employer determines, based on information received from a person who is qualified in structural design, that the structure or portion of the structure is capable of supporting the loads.

29 C.F.R. § 1926.701(a). The Secretary alleges that Respondent violated 29 C.F.R. § 1926.701(a)

when:

- a) At 1 Du[t]chess Avenue, in Poughkeepsie, NY, on the west side of the Building D surcharge soil pile, on and before August 3 of 2017, workers were exposed to being crushed by a concrete stacked bin-block wall, that was retaining a soil surcharge. The wall was not approved or designed by a qualified engineer. Workers were in close proximity to the wall while tying rebar, pouring foundation, operating equipment, collecting personal items and tools, and while walking through the job site.

(Citation 8.) The Secretary proposed a \$129,336 penalty for willful Citation 2, Item 1.

Willful Citation 2, Item 2 alleges a violation of section 5(a)(1) of the OSH Act. Section 5(a)(1), which is commonly known as the “general duty clause,” requires 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 physical harm to his employees.” 29 U.S.C. § 654(a)(1). The Secretary alleges that Respondent violated the general duty clause when:

- a) At the 1 Dutchess Avenue in Poughkeepsie, NY for the Building D soil surcharge, between July 25 through 28 of 2017, the employer did not protect Onekey, LLC employees from the hazards associated with a soil surcharge collapse. The employer did not maintain a slope of 45 degrees at the edge of the soil surcharge as per engineer design. Employees were exposed to fatal crushing injuries from a collapsed soil surcharge while working near the surcharge and constructing the concrete stacked bin-block wall.

(Citation 9-10.) The Secretary proposed a \$129,336 penalty for willful Citation 2, Item 2.

JURISDICTION AND COVERAGE

The Commission gains jurisdiction to adjudicate an alleged violation of the OSH Act by an employer if the employer is engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act, and, if the employer timely contests the citation. 29 U.S.C. §§ 652(5), 659(c). The record establishes that Respondent, as of the date of the alleged violation, was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act. 29 U.S.C. § 652(5); Complaint & Answer ¶¶ 2, 3. Respondent also timely filed a notice of contest to the Citation in this case. The Court concludes that Respondent is covered under the Act and that the Commission has jurisdiction over this matter.

BACKGROUND

Project Overview

Onekey has approximately 200 employees and a net worth of \$2 million. (Tr. 852-853.) Its headquarters are in Hackensack, New Jersey and it has projects in Connecticut, New Jersey, and New York. (Tr. 853.) Onekey's construction projects include multi-family housing, retail, mixed use, and historic restoration. (Tr. 853.) The Poughkeepsie, New York project began in 2010, when Onekey began readying the worksite. The site itself was a "brownfield," meaning that the land was industrially contaminated, and remediation was necessary to prepare the ground for building use. (Tr. 885.) Remediation included soil testing, removing contaminated soil, and then "the site had to be capped with a minimum of two foot of fill materials." (Tr. 885.)

Onekey had never worked on a "brownfield" project. (Tr. 853.) It contracted with SESI, a soil engineering company, to help "clean up" the brownfield. (Tr. 886.) During this remediation phase of the project, SESI was responsible for "giving direction" and "to create the clean-up plan" for Onekey to follow. Onekey completed the remediation phase of the site in 2014. (Tr. 886.)

The next phase of the project was the site improvement work. (Tr. 716.) Onekey again retained SESI for its geotechnical services for this phase of the project. (Tr. 888; Ex. C-51 (Onekey/SESI contract).) According to Onekey Director of Operations Finbar O'Neill, SESI engineer Ken Quazza was the lead "in charge of geotechnical in particular" at the worksite and Finbar O'Neill¹ worked primarily with Quazza regarding SESI's geotechnical services during this phase of the project. (Tr. 887.)

¹ Finbar O'Neill's nephew, Aaron O'Neill later joined the project as a Onekey superintendent in the summer of 2017. (Tr. 1135.) As both Finbar O'Neill and Aaron O'Neill play principal roles in this case, this decision uses both of their first and last names to identify them.

To improve the land so it would be sufficient for the planned construction, Quazza developed a plan to compact the soil beneath the footprints of each future building on the worksite. For the purposes of this case, the future buildings at issue here have been named: A, B, C, D, E F, and future townhouses. (Exs. C-4, R-31.) As seen on the map of the worksite, the entire worksite follows along the eastern banks of the Hudson river. (Exs. C-4, R-31.) Buildings B, C and D, the pertinent areas of construction leading up to the time of the accident, were planned to be four-story residential buildings. Buildings B and C were planned to hold 43 units and Building D was planned to hold 50 units. (Ex. C-4.) The footprints for these three building formed a horseshoe configuration along the Hudson River: Buildings B and C were parallel to each other and Building D bridged perpendicularly across the eastern sides of them (parallel to the Hudson River). (Ex. C-4.) An amenities courtyard-like area was planned within the Building B-C-D horseshoe configured area.



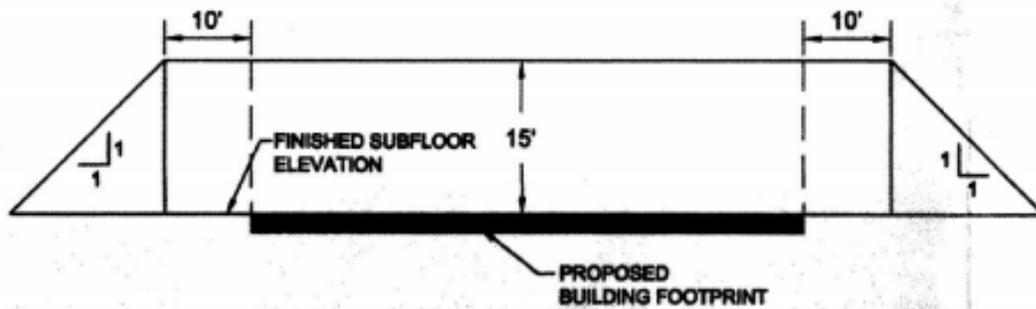
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(Ex. C-4.)

The first part of SESI's soil compaction plan was dynamic compaction, which was "basically dropping a heavy weight from a height up to 50 feet and dropping it onto the ground." (Tr. 740.) During this phase, SESI was on the Onekey worksite every day inspecting the compaction progress. Once the footprints had been compacted, Onekey leveled the depressions from the dynamic compaction operation and brought the site grades back up to ground elevation, to the bottom of the proposed floor slabs for each building. (Tr. 740-741.) "We had an inspector there full-time when the site was having compacted fill placed on the ground to raise it back up to the elevation of the proposed buildings. And then our services were temporarily halted." (Tr. 716.) The dynamic compaction phase of SESI's compaction plan occurred on the site from 2012-2014. (Tr. 893.) Afterward, the second part of SESI's soil compaction plan began – the surcharge. (Tr. 741.)

The Surcharge

According to Quazza, a "surcharge is a temporary load that's placed on the ground to occur prior to the placement of the building. Once the settlement has occurred that soil – it's generally soil, the surcharge material is then removed, and the building is then constructed." (Tr. 699.) As originally designed in 2013, SESI's surcharge plan called for over 100,000 cubic yards of fill (soil) that Onekey was to ship in by barge up the Hudson River to the worksite. (Tr. 746, 750; Ex. C-46.) Originally, the plan was to first surcharge the footprint of Building A; then Buildings B, C and D simultaneously; then Buildings E and F; and then the future townhouses on the worksite. (Tr. 754.) SESI's plan called for the fill used to form each surcharge to cover each building's entire footprint plus extend ten feet beyond the footprint in every direction, and then slope down to the ground. (Tr. 741-742; Exs. C-45, 52, 53.) The fill was to be piled at least 15 feet high and sloped at 45 degrees (a one-to-one ratio) from the top of the fill to the ground. (*Id.*)



**TYPICAL SURCHARGE CROSS-SECTION
DETAIL "A"
(BUILDINGS A,B,C,D,E & F)**

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(Ex. C-53.)

Around 2013-2014, Quazza learned that the simultaneous surcharge plan was impossible to implement. (Tr. 751, 902.) Critically, the necessary amount of fill, over 100,000 cubic yards, proved impossible for Onekey to obtain. (Tr. 751.) Quazza testified that “at the time that the plan was developed we were considering one surcharge on all of the buildings. Once they found out the difficulty in getting the material, they went down to one building at a time.” (Tr. 752.) Quazza then testified that “he only had 40,000 yards of fill instead of 110,000 yards of fill. I only had so much fill. I had enough fill to only put a surcharge on one building footprint” at a time. (Tr. 752.) To accommodate this issue, SESI and Onekey changed the simultaneous surcharge plan to a “rolling” surcharge plan. With this modification, Onekey would transfer the surcharge from one building footprint to another building footprint once compaction was achieved for the first building

footprint. Onekey put the rolling surcharge into effect before placing the first surcharge at the site. (Tr. 752, 756, 902.)

According to Quazza, the difference between the simultaneous surcharge method and the rolling surcharge method is that:

in one instance you can start construction sooner...A downside would be that possibly a surcharge could interfere with the construction of a building that had already been surcharged because of the close proximity of the buildings, the 10-foot overlap[,] the 15 more feet additional for the one-on-one slope, the distances between the buildings. You could have surcharges interfering with other building construction, which is just what happened with Building C.

(Tr. 755.) Quazza testified that Onekey never consulted him or raised the issue about what to do about a surcharge overlapping another building's footprint and interfering with the construction of that building. (Tr. 799.) Quazza testified that he did not realize that this issue existed or how Onekey chose to address it before the accident. (Tr. 800.) He never discussed with Finbar O'Neill or anyone else at Onekey the use of a retaining wall for any of the surcharges. (Tr. 800.) Nor did he discuss the issue of cutting back any surcharge steeper than one-to-one slope. (Tr. 800.) The following testimony by Quazza is noteworthy:

Q: Did you know that Onekey had never worked with a surcharge before working at this location?

A: I had suspicions when Fin and I first started discussing this. We had quite a few discussions on how different things could be dealt with, and so on and so forth. So I got the general feel that he maybe not had done a surcharge prior.

Q: Is it fair that you understood that Onekey and Mr. Finbar O'Neill was relying upon your expertise regarding how to construct surcharges at the site?

A: Yes.

(Tr. 809.)

As opposed to its full-time presence during the dynamic compaction phase from 2012-2014, SESI was not onsite regularly while Onekey implemented the surcharge plan. According to

Quazza, Onekey began “bringing in the surcharge material which would be coming in on truckloads. So, for us to stand there and watch trucks of dirt come in it was not really practical. And the surcharge was then constructed.” (Tr. 716.)

Surcharge and Construction: The Precast Concrete Bin-Block Wall

By 2017, having begun the rolling surcharge plan, Onekey was also ready to start building on the remediated worksite. First, Onekey needed to roll the surcharge from the building footprint of one building to another. This took time, and the timing of the removal was controlled by Quazza. (Tr. 765-766.) However, the method by which Onekey removed the surcharge from the building footprints was not controlled by Quazza. (Tr. 763-764.)

In January or February of 2017, Quazza and Finbar O’Neill met on the worksite and stood on top of the surcharge for Building B. (Tr. 766, 800, 919-920.) Finbar O’Neill testified that he brought up the idea of a temporary retaining wall using “bin blocks” with Quazza while discussing construction during the surcharge. (Tr. 896, 930.) Finbar O’Neill claimed that Quazza said that the temporary retaining wall using bin blocks “was a good idea.” (Tr. 896.) Finbar O’Neill clarified that this conversation was in the larger context of a “general discussion” and that “we didn’t get into the real details of the site.” (Tr. 897.) Quazza denied that he discussed the use of any retaining wall for the surcharges with Finbar O’Neill during this conversation. (Tr. 800.) Quazza also testified that he did not see any retaining walls when he stood on top of the surcharge with Finbar O’Neill, and that no surcharge was cut back steeper than a one-to-one angle at that time.² (Tr. 800.) Notably, around this same time is when Onekey project manager Steve Fiore

² Other than this visit, according to Quazza, SESI had no consistent presence on the worksite in 2017. (Tr. 716, 782.) Quazza himself remotely monitored the compaction of the building footprints by the surcharges, using settlement data transmitted to him by a third-party surveyor who gathered the readings on the worksite. (Tr. 804-805.)

began working on the worksite. (Ex. C-62 at 10.) In early February 2017, according to Fiore, “[B]uilding B was half of a pile of dirt[,] [B]uilding C was a pile of dirt[,]” and Building D had a “lower pile,” “not much” on it. (Ex. C-62 at 11-13.)

In March 2017, according to Finbar O’Neill, Onekey began building the concrete bin-block “temporary retaining wall” (bin-block wall)³ against the surcharge of Building D, beginning on the footprint of Building B, “to retain the soils to keep everyone safe while they worked on C and B originally before C.” (Tr. 931-932.) The bin blocks were precast concrete blocks, also referred to as “mafia blocks,” that were two feet wide, two feet deep, and six feet long, and weighed 3600-pounds each. (Tr. 78, 80, 83, 463; Exs. C-23, C-24, C-25, C-49 C-62 at 42.) The bin blocks that made up the wall were designed to be an interlocking system, using a “key” or “tongue and groove” system, as they are stacked. (Tr. 1122; Ex. C-62 at 41-42.) According to Fiore, he directed workers to build the wall three bin blocks high at this time. (Ex. C-62 at 35, 40.)

Fiore stated that in late March 2017, the surcharge for Building B was cleared so that Onekey could begin working on Building B’s foundation. (Ex. C-62 at 13.) Onekey then moved the surcharge to Building C. (Ex. C-62 at 13.) On May 2, 2017, Quazza released the surcharge on the southern half of Building C. (Ex. R-54 at 1-4.)

Robert Tedone

On May 16, 2017, Onekey hired superintendent Robert Tedone. (Tr. 429, 485-486.) Tedone was on the worksite from May 16 until June 28, 2017, when he resigned. (Tr. 485-486.) As the superintendent, Tedone reported to Fiore, who reported to Finbar O’Neill. (Tr. 430.)

³ In this Decision, the terms “temporary retaining wall” and “bin-block wall” both refer to the precast concrete bin-block wall at issue in this case. The use of the term “retaining wall” is derived from the words used at the hearing by counsel and the witnesses – this term is not used by this Court to connote any geotechnical capability of the wall.

Tedone testified that he never met Aaron O'Neill. (Tr. 440.) Tedone coordinated with the "trades," meaning he "assisted with scheduling and job site coordination of which trades coming when, whose performing what, deliveries, that kind of thing." (Tr. 430.) During his five weeks on the worksite, the foundation on Building B was completed. (Tr. 444.) He testified that he never worked on building the temporary retaining wall himself. (Tr. 441.)

When Tedone began working on the worksite, the temporary retaining wall looked as shown in Exhibit C-33. (Tr. 441-442.) He had concerns about the safety of the wall at one time because it was bowed and tilted. (Tr. 445-446.) The wall was tilted away from the dirt pile, towards the foundation that was being laid on Building B. (Tr. 453.) He saw that the surcharge was pushing against the wall when he stood on top of the surcharge pile and looked down at the wall. (Tr. 455-456.) He went up the surcharge pile on a regular basis observing the worksite, and he "more than once" drove a dump truck of dirt up the surcharge and dumped the dirt for the bulldozer to push it around on the surcharge pile. (Tr. 456-457.) Tedone testified that he reported his safety concerns about the temporary retaining wall to Fiore. (Tr. 445-446.) After his conversation, according to Tedone, Fiore directed workers to "remove at least the top two courses"⁴ of the wall. (Tr. 452.) He clarified that the workers took "down several courses and put the block back, and then we stored dirt behind it[,]" which, according to Tedone, corrected and straightened the wall at that time. (Tr. 458.)

Tedone also testified that Finbar O'Neill was on the worksite two times per week. (Tr. 430-431.) During his time on the worksite, Finbar O'Neill directed workers to move the surcharge

⁴ Based on testimony in the record, the Court finds that the term "course" refers to a row of concrete bin blocks. (Tr. 502, 566, 1140, 1164.)

from Building C to Building D.⁵ (Tr. 435-439; Ex. C-52a.) Tedone testified that there was no controlled access zone, or safe proximity safety rule, regarding the surcharge or the wall while he was on the worksite. (Tr. 466-467.) Tedone testified that he did not see a “shear vertical” wall of dirt while he was on the worksite. (Tr. 491.)

Tedone testified that he and Finbar O’Neill discussed extending the temporary retaining wall along the surcharge from Building B, through the courtyard and heading past Building C. (Tr. 462.) Tedone testified that he told Finbar O’Neill that building the wall that way “without any engineering was going to be a bad idea.” (Tr. 462-463.) He testified that he told Finbar O’Neill the following: “You’re going to have 15 Mexicans working directly under this wall and someone’s going to get killed.” (Tr. 466.) According to Tedone, Finbar O’Neill replied, “Fuck that, it will be fine.”⁶ (Tr. 466.)

Tedone also testified about the “traverse points” on the worksite. (Tr. 471-474.) A traverse point is set by the surveyor who marks a spot to use as an offset “to have a visible invisible like to make sure you’re running straight.” (Tr. 472.) Traverse points are typically stakes in the ground with a flag on it, they are never moved, and they are protected using “extreme measures” because

⁵ On May 30, 2017, Quazza released the surcharge on the northern half of Building C. (Tr. 781); *see also* Ex. C-62 at 13.

⁶ Finbar O’Neill categorically denied that this entire conversation ever took place. (Tr. 965.) Based on his demeanor during the hearing, the Court found no issue with Tedone’s credibility despite his colorful and coarse testimony. Respondent asserts that Tedone was “a disgruntled employee” and is not to be believed concerning his statement that the wall would result in dead workers. (Resp’t Br. 14-15 ¶ 57.) Yet, in another breath, Respondent admits that Fiore fixed part of the bin-block wall in direct response to a safety complaint made by Tedone. (Resp’t Br. 14 ¶ 54.) Tedone’s testimony at the hearing and his complaint to Fiore are entirely consistent. On this issue, Respondent may not have its cake and eat it too. It is also noteworthy that Tedone resigned and was not fired, undermining Respondent’s characterization that Tedone was “disgruntled.”

“you got to refer back to it constantly to make sure you’re running straight, where you’re supposed to be.” (Tr. 472, 477.) He testified that there were several traverse points on the Onekey worksite. (Tr. 472.) A “mason would have used them, again, to either locate the corners of the building or they would have been offsets for him so that he could locate where the corners of the building were going to go.” (Tr. 472.) He agreed that one would “have to walk physically up to it and be near it” to use it; “you would set your equipment right up over it [] and that’s how you would spin your angle and get your lines.” (Tr. 472-473.) Tedone then identified the location of a traverse point that was five feet from the temporary retaining wall. (Tr. 473-475; Exs.C-15(a), C-33(a).)

Summer of 2017: Ever Growing Surcharge and “Evolving” Bin-Block Wall

On June 28 or 29, 2017, Tedone resigned from his job at Onekey. (Tr. 429, 465, 486, 492.) In his place, Onekey hired Aaron O’Neill, Finbar O’Neill’s nephew, as the site superintendent on June 28 or 29, 2017. (Tr. 1012, 1102-1103.) Aaron O’Neill testified that when he arrived onsite at that time, “[B]uilding B had the foundation work completed. It was all stoned out, ready for a concrete slab. Just previous to the pour of the concrete. And [B]uilding C had the foundation just started.” (Tr. 1107.) At that time, there was a surcharge on Building D and “a little bit” of surcharge remaining on the east side of Building C. (Tr. 1107.)

Aaron O’Neill also testified that when he got to the worksite, part of the temporary retaining wall along the surcharge for Building D was already there. (Tr. 1119.) There was a temporary retaining wall “along part of the surcharge on [B]uilding D,” the full length of the east side of Building B and extended “another 20 to 30 feet hearing north.” (Tr. 1107-1108.) Aaron O’Neill did not know who built the temporary retaining wall, who designed it, or where the bin blocks came from, but from the day he started on the worksite on June 28, “we extended the wall on past, to continue on over by [B]uilding C,” in the same manner as the wall had been previously

constructed. (Tr. 1119, 1122, 1136.) Other than being away on vacation from July 3 – July 18, he was on the worksite every day until the day of the accident. (Tr. 1128.)

Aaron O’Neill understood that the purpose of the retaining “wall was to keep the workers safe, whenever they’re working near to the surcharge, or come into the building.” (Tr. 1120.) He also testified that the Building D surcharge, as designed (with the 10-foot exceeding the footprint of the building), prohibited work from being done on both Buildings B and C. (Tr. 1119-1121.) Aaron O’Neill testified that the surcharge had been there months before he arrived onsite on June 28, 2017. (Tr. 1128.) He walked “along the western side of the surcharge on [B]uilding D,” where the temporary retaining wall was, “daily, sometimes a few times daily,” from the end of June to the day of the accident. (Tr. 1129.)

Fiore testified that Finbar O’Neill was his boss, and that Fiore considered himself the “lead guy” on the site. (Ex. C-62 at 14, 19.) Fiore testified that Aaron O’Neill supervised the subcontractors. (*Id.* at 21.) Fiore also testified that Aaron O’Neill decided to build the wall between the footprints for Buildings B and C, that Aaron O’Neill directed the Onekey site employees and workers who installed the wall, and that he (Fiore) did not know why the wall, under Aaron O’Neill’s direction, was four courses high (rather than three). (*Id.* at 38, 40-41.) Fiore did not believe any engineer was involved with designing the temporary retaining wall on the worksite. (*Id.* at 40.) The surcharge drawings did not coordinate with his construction drawings of the worksite, and no calculations were performed of the ever-growing surcharge on the temporary retaining wall. (*Id.* at 44.) Fiore testified that the retaining wall just “evolved” over time. (*Id.* at 40.) Regarding the surcharge, Fiore testified that his main role was to contact the surveyor to take “elevation shots to monitor the surcharge.” (*Id.* at 49.) Fiore did not actively

monitor the slope of the surcharge, specifying that the “surcharge wasn’t my bailiwick,” and that he was “not a soil guy.” (*Id.* at 47, 49-50.)

July-August 2017: Subcontractor Observations

The worksite was busy. According to Respondent, Onekey, SESI, and “a host of third parties, including engineers, inspectors, and subcontractors also performed work at the [worksite] in the months leading up to the accident.” (Resp’t Br. 18.) According to Finbar O’Neill, SESI, M.A. Day (engineering firm), GPI (structure engineer), Larry Lynn (surveyor), and IMTL (testing and inspections) were all “consistently” active on the worksite. (Tr. 921-922, 934, 941.) IMTL tested materials, inspected concrete and rebar for footings, and inspected the framing on the worksite. (Tr. 933-934.) IMTL performed consistent daily, every other day, weekly inspections, depending what work had progressed. They inspected the concrete or the rebar on Building B in July of 2017. (Tr. 934.)

About a month after starting at the site, sometime between July 20 and July 25, 2017, Aaron O’Neill met with an SESI geotechnician who was testing the compaction on the east side of Building C, within 4-10 feet of the surcharge on Building D, and 80-100 feet away from the temporary retaining wall that was being built along the surcharge for Building D.⁷ (Tr. 1113-1114.) At that time, the temporary retaining wall extended about halfway along the surcharge of Building D. (Tr. 1114.)

⁷ After the surcharges were moved, representatives from SESI also inspected the footings for Building B (May 2) and Building C (July 12 and July 20, 2017) to prepare for the next phase of construction. (Tr. 770, 775, 778; R-54 at 5-6.) “[A] footing inspection occurs after the excavation of the building site is done, and the engineer tests the materials below to ensure that it is adequate to support a concrete foundation.” (Resp’t Br. 12 n 5.) Quazza testified that all three of the footing inspections were performed outside of the SESI contract, as SESI was not contracted to perform those footing inspections. He believed that “somebody on both ends of [the picture] were misinformed on both sides. Why would they call us if they weren’t using us and why would we send somebody if we knew we weren’t providing them with the service?” (Tr. 702-703, 770-773, 778, 798-799, 803.)

According to OSHA Area Director Robert Garvey, OSHA determined that approximately 30-40 workers were on the worksite during the time of the alleged hazardous conditions: 6-8 Onekey employees and the rest subcontractors Onekey had retained. (Tr. 425.) Other subcontractors on the worksite included MG Commercial Concrete and Madeira Framing. MG Commercial Concrete had about eight employees at the site who built foundations: they were supervised by Guido Gonzalez, and included Saul Saban-Jacobo and the fatality victim, Saban-Jacobo's cousin. (Tr. 262-263; Sec'y Br. 4.) Madeira Framing is owned by Paulo Madeira, who employed about eight people onsite including his brother Jay Madeira. (Tr. 301, 343.) Saban-Jacobo speaks Spanish, and Paulo Madeira and Jay Madeira speak Portuguese. They all testified at the hearing through the use of an interpreter. (Tr. 231-232, 244, 284, 311.)

Saban-Jacobo, a worker for MG Commercial Concrete, testified that he was onsite beginning three months before the accident and was on the worksite every day. (Tr. 240.) Saban-Jacobo's job duties included "putting iron bars together, building walls and footing." (Tr. 237.) He identified the photographs Ex. C-4, C-5, and C-12 as accurate to the worksite during the time he was there. (Tr. 236-240, 248.) Over the three months he was there, he watched as workers added dirt to the surcharge pile on Building D, until the surcharge resembled a "mountain." (Tr. 247-248.) He watched as the temporary retaining wall was built while he was on the worksite. (Tr. 247-248.) He saw that they "opened holes" so that one of the blocks could be in the ground. (Tr. 252.) Saban-Jacobo testified that Aaron O'Neill was in charge of the bulldozers, and that Aaron O'Neill approached Guido Gonzalez two to three times a week to give instructions. (Tr. 240, 245.) Saban-Jacobo began to have concerns about the surcharge when it became higher than the temporary retaining wall. (Tr. 254.) He testified that he worked within 5-6 feet of the temporary retaining wall 3-4 days per week. (Tr. 254.) The temporary retaining wall was built one month before the accident. (Tr. 252.) He was never told to stay a certain distance away from the wall. (Tr. 254.) Saban-Jacobo testified that he did not know the

name Finbar O'Neill. (Tr. 276.) He was asked, "You wouldn't purposefully put yourself in harm's way, would you?" He replied, "No, but I need the money." (Tr. 279.) Saban-Jacobo was working on the worksite on the day of the accident that killed his cousin. (Tr. 262-263.)



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(Ex. C-5.)

Paulo Madeira owns Madeira Framing, the subcontractor in charge of installing the wooden framing, or “structural part,” of the building. (Tr. 285, 343.) He was on the worksite “less than a month” when the accident occurred, and he was on the worksite 1-2 days per week. (Tr. 286, 291.) He was not in the worksite on the day of the accident. (Tr. 300.) He identified the worksite as depicted in the pictures in Exhibits C-4, C-5, C-12, and C-21. (Tr. 288-295.) He testified that he worked on the framing of Building B. (Tr. 291; Ex. C-4a.) Paulo Madeira testified that he “always” reported to Aaron O’Neill. (Tr. 292.) When he started, there was a “pile of dirt” on Building D, and over the course of the month, “they” put more dirt on it. (Tr. 295.) He testified that he watched the temporary retaining wall being built. (Tr. 295.) He testified that he “always” worked closer than 10 feet from the “pile of dirt” and the wall. (Tr. 296-297.) Paulo Madeira was not given instructions to stay away from the “pile of dirt” because that was where the framing had to be. (Tr. 297-299; Ex. C-21.) He also testified that the “people that worked with the cement on the foundation” had to work close to the “big pile of dirt” and the wall. (Tr. 300.)



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(Ex. C-21.)

Jay Madeira, Paulo Madeira's brother, also works for Madeira Framing. (Tr. 311, 343.) Like his brother, Jay Madeira was on the worksite for about a month when the accident occurred, but, unlike his brother, Jay Madeira was on the worksite Monday-Friday, sometimes Saturdays, for 7.5-8 hours per day. (Tr at 315.) He was on the worksite, in his trailer, when the accident occurred. (Tr. 331.)

Jay Madeira identified the worksite as depicted in the photograph in Exhibit C-12, and the parties stipulated that Jay Madeira and Paulo Madeira worked in the same location on the worksite on Building B together. (Tr. 316-318.) Jay Madeira testified that Aaron O'Neill was in charge of the job, but unlike his brother, Jay Madeira spoke English with Aaron O'Neill. (Tr. 315.) He saw Aaron O'Neill on the worksite every day and talked with him almost every day, about work and "the culture in different countries." (Tr. 313-314.) Jay Madeira also watched the temporary retaining wall being built. (Tr. 318-319.) He testified that he worked closer than 6 feet from the "pile of dirt" and the wall for about a week and a half. (Tr. 319.) Like his brother, Jay Madeira testified that no one told him to stay away from the wall and the "big pile of dirt." (Tr. 320-321.)

Worksite Safety

Both Fiore and Aaron O'Neill were responsible for employee safety onsite, they were both authorized to verbally discipline employees for Onekey safety rule infractions, including fall protection safety rules, and they both were empowered to report greater safety infractions requiring more than verbal counseling to Finbar O'Neill. (Tr. 1012-1014, 1025-1026); *see also* Exs. R-1, R-2, R-3, R-4, R-5, R-6, R-7, R-8, R-9, R-10, R-11, R-12, R-13 (Onekey safety policies and procedures). Aaron O'Neill testified that he verbally disciplined employees for not having "harnesses on," while he was onsite from June 28 or 29 until the date of the accident, August 3, 2017. (Tr. 1105-1106.) Respondent claims that Aaron O'Neill and all Onekey employees have "stop work authority" should a safety issue be unresolved. (Resp't Br. 15 citing Tr. 1103.) All workers, including subcontractors, take an OSHA 10 course before appearing on a Onekey worksite. (Tr. 385, 1106.) Onekey employees and subcontractors also attended weekly safety meetings. (Tr. 1104-1105.)

Aaron O'Neill testified that "it's my understanding, I'm not sure, but every contractor is required to take the safety manual from Onekey, whenever they sign the contract. I don't know

that for sure, but it's my understanding that's what they did." (Tr. 1127.) Fiore testified that he did not know who wrote Onekey's safety plan. (Ex. C-62 at 74.) Fiore testified that there were no work rules regarding how close someone could get to the surcharge or the temporary retaining wall. (*Id.* at 83-84.) It is undisputed that Onekey had no written safety rule specifically regarding safe distance from the surcharge or the temporary retaining wall at issue here.

Finbar O'Neill testified, however, that although he did not personally direct the temporary retaining wall construction for the Building D surcharge in the summer of 2017, he *expected* his workers "not to go close enough to it to get themselves in harm's way." (Tr. 1006-1007, 1009.) He testified that "you wouldn't want to go where the pile is taller than yourself." (Tr. 1009.)

Worksite Warnings

According to Finbar O'Neill, none of these contractors ever expressed to him any safety issues regarding the temporary retaining wall or the surcharge. (Tr. 948-950.) Despite the "host" of engineers, inspectors, and subcontractors on the worksite, Respondent argues that no one brought any safety concerns to Finbar O'Neill or Aaron O'Neill at all. (Resp't Br. at 18; Tr. 934-935 (IMTL), 946 (M.A. Day), 947-948 (City of Poughkeepsie), 1109-1110 (the surveyor), 1116-1117 (IMTL), 1118 (M.A. Day, City of Poughkeepsie).)

The record, however, is replete with testimony from those at the worksite warning Finbar O'Neill, as well as other members of Onekey management, about safety issues with the temporary retaining wall or the surcharge, or both the wall and the surcharge.

The Secretary accurately summarized this testimony in his brief as provided below:

First, Superintendent Robert Tedone, who was on site for five weeks in June 2017, testified that he spoke to Finbar O'Neill about the wall: "So we talked about the construction process of the retaining wall, and I advised him that building the wall there without any engineering was going to be a bad idea." Tr. 462:21-463-1 (Tedone). Mr. Tedone told Mr. O'Neill that he should have an engineer design the wall, but Mr. O'Neill said no. Tr. 464:7-11,13-21 (Tedone). Mr. Tedone then spoke to Mr. O'Neill "about the proximity of the workers directly in front of what would be the new wall,

even the wall that had existed.” Tr. 466:3-8 (Tedone). Mr. Tedone said, “You’re going to have 15 Mexicans working directly under this wall and someone’s going to get killed.” Tr. 466:9-13 (Tedone). Mr. O’Neill rebuffed him, saying “Fuck that, it will be fine.” Tr. 466:14-18 (Tedone).

Next, Jay Madeira of Madeira Framing spoke to Superintendent Aaron O’Neill in July 2017, about two weeks before the fatality. Tr. 325:20-22 (J. Madeira). He told Mr. O’Neill “that the wall was tilted, and like it is going to fall, to fall down.” Tr. 325:16-19 (J. Madeira). He raised an alarm “[b]ecause you could see how tilted the wall was. And because of the amount of dirt that was on the other side, and nothing to counter-balance that on the other side, what would hold the wall from falling?” Tr. 325:23-3 (J. Madeira). Mr. O’Neill responded by shrugging his shoulders. Tr. 331:14-25 (J. Madeira).

Finally, Saul Saban, an employee of M.G. Commercial Concrete, raised concerns about the surcharge and wall. Tr. 255:3-7 (Saban). M.G. Commercial Concrete’s onsite supervisor Guido Gonzalez spoke to Aaron O’Neill, but Mr. O’Neill did not do anything about the surcharge or wall. Tr. 259:7-260:3, 262:12-14 (Saban).

(Sec’y Br. 8.)

Respondent denies all of these warnings in the following manner:

Many of the subcontractors at the Site spoke little to no English; indeed, they all needed translators to testify at the hearing. For example, Aaron O’Neill was able to speak with Paulo Madeira, from Madeira Framing, who spoke some English, but O’Neill was not able to have a conversation with Jay Madeira because of the language gap. Tr. 1124:4-1125:2. Neither Jay nor Paulo Madeira raised any safety concern with Aaron O’Neill regarding the surcharge or the wall. Tr. 1125:3-9.

Similarly, despite testimony presented by the Secretary, Aaron O’Neill did not have any conversations with other subcontractors’ employees- including Saul Eduardo Saban Jacobo - let alone conversations regarding any safety concerns, about the surcharge or the wall. Tr. 1125:10-24. Aaron O’Neill, rather, spoke only with the subcontractors’ foremen. Tr. 1125:21 - 24. While Aaron O’Neill would speak with one foreman, Guido Gonzalez, Gonzalez’s English was broken, and the two would use a woman named Tanya as a translator. Tr. 1125:25-12. Gonzalez also never raised any safety concern to Aaron O’Neill about the surcharge or the wall. Tr. 1126:13-21.

(Resp’t Br. 19-20.) Regarding Tedone, Respondent states that “Finbar O’Neill denies Tedone’s unsupported claim that he told O’Neill that the retaining wall would result in dead workers.”

(Resp’t Br. 14 citing Tr. 964.) Respondent questions Tedone’s credibility as a “disgruntled employee,” and someone who “appeared at a deposition for OSHA without a subpoena and

testified at trial without a subpoena, yet when Onekey tried to subpoena him for a deposition, he avoided service.” (Resp’t Br. 14 citing Tr. 484-485.) As noted above in footnote 6, the Court rejects Respondent’s arguments regarding Tedone’s credibility on this issue.

Expert Witness Testimony

Both parties introduced expert testimony regarding the design of the temporary retaining wall. Dr. Alan Lu (the Secretary’s expert) and Matthew Gardiner (Respondent’s expert) hold civil engineering degrees and professional engineering licenses. (Tr. 513-514, 1031, 1034.) The Court admitted the testimony of Dr. Lu after deciding that he was qualified to testify as a “geotechnical expert,” and the Court admitted the testimony of Mr. Gardiner after deciding that he was qualified in “engineering, including structural issues, and matters relating to surcharges and retaining walls[.]” (Tr. 527, 1036.) Notably, both experts agreed that the temporary retaining wall on the Onekey worksite was not designed to withstand the load posed on it by the surcharge in the summer of July 2017. (Tr. 559 (Lu), 1073 (Gardiner), 1083 (Gardiner).)

Summary of Dates of Alleged Hazards

The accident occurred on August 3, 2017. (Tr. 36-37.) Portions of the Building D surcharge and portions of the bin-block wall collapsed, crushing Onekey’s subcontractor and injuring another while they were nearby. (Tr. 263, 359, 786.) OSHA Safety and Health Compliance Officer (CO) Rickey Foster investigated Respondent’s worksite on August 4, 2017. (Tr. 37.) After CO Foster’s investigation, OSHA Area Director Garvey issued the citations and proposed the penalties in this matter. (Tr. 358.)

In his post-hearing brief, the Secretary provides the dates of the alleged violative conditions. The Secretary claims that the hazardous condition alleged in Citation 1, Item 1 (failure to instruct employees of unsafe conditions) occurred on or before August 3, 2017. (Sec’y Br. 35-

26.) The alleged violative condition in Citation 1, Item 2 (failure to use fall protection) occurred “on or about July 28, 2017[.]” (Sec’y Br. 37.) The hazards posed by the bin-block wall in Citation 2, Item 1, allegedly occurred from July 28, 2017 to August 3, 2017. (Sec’y Br. 28.) The hazards posed by the surcharge allegedly occurred on or before July 28, 2017. (Sec’y Br. 27-28.)

DISCUSSION

The Citations are Affirmed

To prove a violation of an OSHA standard, the Secretary must establish that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff’d in relevant part*, 681 F.2d 691 (D.C. Cir. 1980). A violation is “serious” if a substantial probability of death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k).

Serious Citation 1, Item 1: Safety Training

The Secretary claims that Respondent violated 29 C.F.R. § 1926.21(b)(2), which provides that “the employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.” 29 C.F.R. § 1926.21(b)(2). The Secretary alleges that Respondent violated 29 C.F.R. § 1926.21(b)(2) when:

- b) At the 1 Dutchess Avenue, Poughkeepsie, NY, west of Surcharge, on and before August 3 of 2017, workers were exposed to a crushing hazard associated with a soil surcharge collapse that could cause the concrete retaining wall to collapse. Employees were not informed of the potential sudden collapse of the retaining wall and surcharge soil pile. Workers were not trained to keep a safe distance away from the surcharge and retaining wall.

(Citation 6.)

Respondent concedes, that “Onekey did not instruct its employees specifically related to claimed hazards regarding the surcharge or the wall[.]” (Resp’t Br. 24-25.) Indeed, it is undisputed that Onekey had no proximity rule associated with the surcharge or the temporary retaining wall. Instead, Respondent claims that Onekey was not responsible for the “claimed hazards” of the surcharge or the wall because the use of a surcharge was “uncommon” on construction worksites and the sole purpose of the temporary retaining wall it chose to build was to protect its workers from the surcharge. (Resp’t Br. 24-26.) Respondent then claims that “the Secretary cannot prove that a reasonably prudent employer would have instructed its employees regarding the claimed hazards[.]” (Resp’t Br. 25.)

As an initial matter, the Court finds that the cited standard applies to Respondent’s worksite. The construction standards in Part 1926 apply because Respondent’s worksite was a construction worksite.

The Court also finds that Respondent was responsible for the crushing hazard presented by sudden collapse of the soil surcharge as well as the bin-block wall. “Under § 1926.21(b)(2), an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware.” *Capform, Inc.*, 19 BNA OSHC 1374, 1376 (No. 99-0322, 2001) *aff’d*, 34 F. App’x 152 (5th Cir. 2002) (unpublished); *see also N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2126 (No. 96-0606, 2000) (“To establish noncompliance with a training standard, the Secretary must show that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances.”), *aff’d*, 255 F.3d 122 (4th Cir. 2001); *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992) (“An employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware.”); *W.G.*

Fairfield Co., 19 BNA OSHC 1233, 1236 (No. 99-0344, 2000) (where underlying violation is of a generalized standard, the “employer’s obligation to train is dependent upon the specific conditions, whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard”) (citation omitted), *aff’d*, 285 F.3d 499 (6th Cir. 2002).

The Court finds that the cut-back surcharge presented a hazardous condition to the workers on the worksite. Although it is undisputed that the use of a surcharge is uncommon not only to Respondent, but also in the construction industry in general, the record supports a finding that the conditions on this worksite were hazardous.

As discussed above, the record establishes that soil on the footprint of Building D was slowly, over months, piled up at least 15 feet high, spanning the footprint of a 40-unit apartment building, and one side of this massive pile of soil was cut back such that a vertical (or at least far exceeding a one-to-one slope) soil wall was formed. This massive pile towered over workers’ heads as they walked by, sometimes within mere feet of the cut-back surcharge. Pictures of the worksite depict an astonishingly vast pile of dirt sloped at an excessively steep angle with workers busy nearby performing various construction tasks. *See, e.g.*, Exs. C-6, C-11, C-12, C-13. The record also establishes that the “toe” of the surcharge was “cut back” because it interfered with constructing the nearby Buildings B and C. (Tr. 538, 551, 755, 799, 1119-1121.)



(Ex. C-6.)

All of the record testimony is consistent regarding how a vertical, or near-vertical, wall of soil towering over a worker's head is an obvious hazard. The Secretary's expert explained that the vertical wall of soil from the surcharge created a collapse or cave-in hazard. (Tr. 552.)

Respondent's expert agreed, noting "there was a time when the soil had been cut back but the wall was not yet fully built[, and that] during that time there was something that should have been done to protect those employees building the wall from the collapse of the soil." (Tr. 1085 (Gardiner testifying, "Well, what I would've done is I would've benched it.")) Finbar O'Neill directed workers to build the bin-block wall to protect the workers from soil falling on them. (Tr. 1006-1007.) Finbar O'Neill himself claimed he expected workers to keep their distance from the vertical wall of soil while they built the bin-block wall. (Tr. 1009.) However, there is no evidence that his expectation was ever communicated to anyone, let alone the exposed employees.

Although the surcharge was not part of excavation work during the pertinent time of the alleged violations, the hazards typically associated with trenching and excavations (such as soil collapse) were considered relevant to the surcharge by both OSHA's expert and Finbar O'Neill. (Tr. 535, 537-538, 551-552, 554, 1006); *see Bardav, Inc.*, 24 BNA OSHC 2105, 2115 (No. 10-1055, 2014) (holding that long-standing Commission precedent requires employers to provide excavation safety instructions under section 1926.21(b)(2) to employees engaged in excavation work "regardless of whether the potential hazards posed by excavations are actually present."). OSHA Area Director Garvey testified that Onekey "could use common sense recognition that there's a hazard there," with respect to the cut-back surcharge pile. (Tr. 400.)

As for the bin-block wall, the record also supports a finding that the wall was not strong enough to withstand the loading from the massive surcharge. Both experts agreed that no one designed the wall properly for the load of the surcharge, and that the wall failed because of the loading by the surcharge. (Tr. 559, 1073, 1083.) The failure of the wall presented a crushing hazard by the 3600-pound precast concrete bin blocks. (Tr. 122, 408.)

Based on the above, the Court finds that the record establishes that the cut-back surcharge pile on Building D presented a crushing hazard associated with a collapse and/or cave-in to Onekey's employees and subcontractors on the worksite. The Court also finds that the precast concrete bin-block wall presented a crushing hazard to Onekey's employees and subcontractors on the worksite.

Furthermore, based on the above-described undisputed evidence, the Court finds that a reasonably prudent employer would have been aware of the collapse hazards presented by the cut-back surcharge and the bin-block wall, and would have instructed its workers in the awareness and avoidance of these hazards. *Pressure Concrete Constr. Co.*, 15 BNA OSHC at 2015 ("An employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware."). The Court is not persuaded by Respondent's argument that the wall's purpose was to protect workers. To the contrary, Aaron O'Neill testified that it was impossible to construct Building B with the surcharge "as designed." (Tr. 1119-1120.) Onekey decided to cut-back the surcharge to allow workers to construct Building B, even though cutting back the surcharge created a steeper slope than was designed. Despite Respondent's claim, the Court finds that the bin-block wall was not there solely to protect employees. Instead, it was there to facilitate the concurrent construction of Building B.

Regarding the remaining elements of this violation, the record supports the Secretary's claims. Onekey employees and subcontractors, without receiving the training required by the standard, worked within a few feet of the cut-back surcharge while building the bin-block wall and worked on the foundation for Building B. Additionally, knowledge is established as Respondent concedes that it did not instruct its workers to avoid the surcharge and bin-block wall hazard. *Bardav, Inc.*, 24 BNA OSHC at 2115 citing *Pressure Concrete Constr.*, 15 BNA OSHC at 2018

("[t]he fact that [the company] failed to train [employees] in the recognition and avoidance of dangerous conditions establishes that it had at least constructive knowledge of the inadequacy of its training program."); *see also Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (knowledge is imputed to the employer "through its supervisory employee.").

With regard to characterization, this citation item is properly characterized as serious. 29 U.S.C. § 666(k) (A violation is "serious" if a substantial probability of death or serious physical harm could have resulted from the violative condition). CO Foster testified that violation of this standard presented a crushing hazard by both the surcharge and the wall. (Tr. 121-122.) The tragic circumstances of this case establish that death and serious physical harm resulted from this hazard. This citation item is affirmed.

Serious Citation 1, Item 2: Fall Protection

The Secretary claims that Respondent violated 29 C.F.R. § 1926.501(b)(12), which provides that:

'Precast concrete erection.' Each employee engaged in the erection of precast concrete members (including, but not limited to the erection of wall panels, columns, beams, and floor and roof "tees") and related operations such as grouting of precast concrete members, who is 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems, unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

29 C.F.R. § 1926.501(b)(12). The Secretary alleges that Respondent violated 29 C.F.R. § 1926.501(b)(12) when:

- a) At the 1 Dutchess Avenue, west of Surcharge D, in Poughkeepsie, NY, on or about July 28, 2017, employees were installing pre-cast concrete blocks to a level of 8 feet high without the use of fall protection.

(Citation 7.)

This citation item is based on the condition depicted in photographs admitted into the record as Exhibits C-11 and C-12 and are also found as OSHA-4 and OSHA-5 in the deposition of Onekey Project Manager Steven Fiore. (Exs. C-11, C-12, C-62 at 113-114.) During his deposition, Fiore was shown the photographs pictures labeled “OSHA-4” and “OSHA-5.” These pictures depict a Onekey employee working on top of the bin-bock wall at a height greater than 6 feet without fall protection. (Ex. C-62 at 37-38; Ex. C-62 at 113-114.) Fiore explained that he walks the site “at least once a day [and] take[s] photos,” and indeed took the photos in OSHA-4 and OSHA-5. (Ex. C-62 at 22, 37.) He testified that “most all of [the photos]” are his, and that he took a “general walk usually every day at least to see what progress because I did have to keep my head up so I can do the daily field reports.” (*Id.* at 22.)

Regarding deposition photographs OSHA-4 and OSHA-5, Fiore testified that the correct date of the pictures is July 28, 2017, and it would coincide with the, presumably, electronic “dates on the folders” of the files provided under subpoena by Respondent to OSHA. (*Id.* at 36-37.) These photographs referred to in the deposition were the same as those entered into the record at the hearing, according to CO Ricky Foster. He used the photographs as the basis for recommending Citation 1, Item 2 (the alleged fall protection violation). (Tr. 119, 131-136; Exs. C-11, 12.) Additionally, regarding the photograph in Exhibit C-12, Saban-Jacobo, Paulo Madeira and Jay Madeira testified that they recognized the photograph’s depiction as what the worksite looked like when they worked on the worksite. (Tr. 248, 295, 318.)

The Court has reviewed these photographs. Exhibit C-11 appears identical to OSHA-4, and Exhibit C-12 appears identical to OSHA-5. *See* Exs. C-11, C-12, C-61 amended at 113

(“OSHA-4”), C-61 amended at 114 (“OSHA-5”). Thus, the Court finds that Exhibits C-11 and C-12 are OSHA-4 and OSHA-5 as identified in Exhibit C-62 (Fiore’s deposition). (Tr. 1138-1139, 1187; Ex. C-62 amended at 113-114.) As Fiore authenticated that he took these photographs on July 28, 2017, and the subcontractors testified to Exhibit C-12’s accurate representation of what they saw when they were on the worksite in the summer of 2017, these photographs are given weight to show the conditions on Respondent’s worksite on that day. *See* FED. R. EVID. 901(a) (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”)

Regarding applicability, the Court finds that the cited standard applies to Respondent’s worksite. Respondent was engaged in construction at the Poughkeepsie worksite, and was working with precast concrete bin blocks on July 28, 2017. (Tr. 78, 80, 83, 463; Exs. C-11, C-12, C-23, C-24, C-25, C-49 C-62 at 42.) As the Secretary notes, photographs in the record show a Onekey employee, identified by Fiore and Aaron O’Neill as Shawn Hazel, on top of the wall with no fall protection. (Tr. 1139; Exs. C-11, C-12, C-62 at 104-105, 114.) Hazel is at least eight feet above ground. The photographs show him on top of four stacked 2-foot tall bin blocks. (Tr. 86, 132-134.) There are no guardrails or safety nets, and Hazel is not wearing a personal fall arrest system. (Tr. 135-138.) The Secretary has established non-compliance with the cited standard and the exposure of a Onekey employee to the violative condition.

With regard to knowledge, Onekey’s project manager had actual knowledge of the violative condition because he photographed it. (Sec’y Br. 38.) As Onekey’s project manager, Fiore had the authority to discipline employees for safety infractions. His knowledge can be imputed to Onekey. *Am. Eng’g & Dev. Corp.*, 23 BNA OSHC at 2095 (knowledge is imputed to

the employer “through its supervisory employee.”). The Court finds that the Secretary established a *prima facie* case for this citation item.

Respondent claims the unpreventable employee misconduct (UEM) defense. (Resp’t Br. 27-29.) Only after the Secretary has established his *prima facie* case of a violation of an OSHA standard does the burden shift to the employer to establish the affirmative UEM defense. *N.Y. State Elec. & Gas Corp. v. Sec’y of Labor*, 88 F.3d 98, 108 (2d Cir., 1996). To establish the UEM defense, the employer must show that it: (1) it established work rules to prevent the violation; (2) these rules were adequately communicated to the employees; (3) it took steps to discover violations; and (4) it effectively enforced the rules when infractions were discovered. *Pub. Utilities Maint., Inc. v. Sec’y of Labor*, 417 F. App’x 58, 64 (2d Cir. 2011) (unpublished), *citing D.A. Collins Constr. Co. v. Sec’y of Labor*, 117 F.3d 691, 695 (2d Cir.1997).

Respondent has a fall protection safety program in place. Both Fiore and Aaron O’Neill were responsible for employee safety onsite. They were both authorized to verbally discipline employees for Onekey safety rule infractions, including fall protection safety rules, and report greater safety infractions to Finbar O’Neill. (Resp’t Br. 27-28; Tr. 1012-1014, 1025-1026); *see also* Exs. R-5, R-9 (Onekey safety policies regarding fall protection). Aaron O’Neill testified that he had verbally disciplined employees for not having “harnesses on,” while he was onsite from June 28 or 29 until the date of the accident, August 3, 2017. (Tr. 1105-1106.) All workers, including subcontractors, take an OSHA 10 course before appearing on a Onekey worksite. (Tr. 385, 1106.) Onekey employees and subcontractors also attend weekly safety meetings. (Tr. 1104-1105.)

However, as the Secretary notes, no evidence in the record reveals that Hazel was disciplined for not having fall protection on July 28, 2017, even though Fiore had actual knowledge

of the violative condition and he was authorized to verbally discipline, and report fall protection violations. This suggests that Onekey did not effectively enforce its fall protection rule. *D.A. Collins Constr. Co.*, 117 F.3d at 695-696 (holding that employer's claim of adequate enforcement was undercut in part by persuasive evidence that the supervisor failed to enforce its safety rules); *Nat'l Realty and Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1267 n. 38 (D.C. Cir. 1973) ("the fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax.") Additionally, CO Foster testified that the only feasible kind of protection that could be used in the situation the photographs depict was a personal fall arrest system. (Tr. 135-136.) Yet, as the Secretary points out, Hazel is not wearing a harness at all and there is no tie-off point for him to use even if he were wearing a harness. (Sec'y Br. 39 citing Tr. 137-138.) Considering this lax enforcement of its fall protection rules, Respondent failed to establish the UEM defense for this citation item. *D.A. Collins Constr. Co.*, 117 F.3d at 695-696.

Turning to characterization, this citation item is properly characterized as serious. 29 U.S.C. § 666(k) (A violation is "serious" if a substantial probability of death or serious physical harm could have resulted from the violative condition). CO Foster testified that violation of this standard presented a fall hazard to the employee and he could break a bone or be hospitalized. (Tr. 140.) This citation item is affirmed as serious.

Willful Citation 2, Item 1: Bin-Block Wall

The Secretary claims that Respondent willfully violated 29 C.F.R. § 1926.701(a), which provides the following:

Construction loads. No construction loads shall be placed on a concrete structure or portion of a concrete structure unless the employer determines, based on information received from a person who is qualified in structural design, that the structure or portion of the structure is capable of supporting the loads.

29 C.F.R. § 1926.701(a). The Secretary alleges that Respondent violated 29 C.F.R. § 1926.701(a) when:

- a) At 1 Du[t]chess Avenue, in Poughkeepsie, NY, on the west side of the Building D surcharge soil pile, on and before August 3 of 2017, workers were exposed to being crushed by a concrete stacked bin-block wall, that was retaining a soil surcharge. The wall was not approved or designed by a qualified engineer. Workers were in close proximity to the wall while tying rebar, pouring foundation, operating equipment, collecting personal items and tools, and while walking though the job site.

(Citation 8.) Respondent argues that the standard does not require a “design,” and that Finbar O’Neill discussed the bin-block wall with Quazza, and Quazza said that the bin-block wall would be a good idea. (Resp’t Br. 29.) Respondent also claims that it lacked actual and constructive knowledge that “building the wall in the manner it did was a violation,” because Finbar O’Neill and Aaron O’Neill both believed the wall was built to protect workers. Respondent also contends that SESI was contractually obligated to notify Onekey of any safety concerns. (Resp’t Br. 30.) Respondent further claims that no one, including Tedone and the subcontractors on the worksite, raised any safety concerns regarding the wall to Onekey. (Resp’t Br. 30-31.)

A) Merits

The cited standard applies to the precast concrete bin-block wall. It is undisputed that the bin blocks are made from precast concrete and that the bin blocks were part of an interlocking system Onekey used to form the wall. The Court finds that a wall made of precast concrete bin blocks constitutes a concrete structure. It is also undisputed that the surcharge loaded the wall such that the wall collapsed on August 3, 2017. Accordingly, the surcharge load constituted a construction load because it was part of Onekey’s construction project at the Poughkeepsie worksite. *See* 29 C.F.R. § 1910.12(a) (construction industry standards prescribed in Part 1926 apply to “every employment and place of employment of every employee engaged in construction

work.”); 29 C.F.R. § 1910.12(b) (“construction work” as used in section 1910.12(a) “means work for construction, alteration, and/or repair, including painting and decorating.”).

Respondent did not comply with the standard. Onekey did not determine, based on information received from a person qualified in structural design, that the bin-block wall, or any portion of the bin-block wall, was capable of supporting the surcharge load. 29 C.F.R. § 1926.701(a). The bin-block wall changed as the worksite progressed. For example, Fiore testified that he used three layers of bin blocks, whereas Aaron O’Neill used four layers of bin blocks, to construct the wall. The record also establishes that the surcharge itself, and therefore its load on the bin-block wall, changed throughout the project. Fiore testified that hardly any soil was on building footprint D when he arrived on-site in February of 2017. Tedone testified that he himself dumped soil on the surcharge of Building D while he worked on the worksite in June 2017. All three subcontractors who testified in this case stated that they watched as more and more soil was added to the surcharge of Building D’s surcharge during the summer, until it reached at least 15 feet high.

None of these changes in the bin-block wall or surcharge loading were discussed by Finbar O’Neill and Quazza when they stood on top of the Building B surcharge in January/February 2017 and, allegedly, discussed whether a bin-block wall was a good idea. The record shows that there was no surcharge on Building D at that time. Even Finbar O’Neill concedes that this conversation was “general” and did not go into detail about the dimensions of the bin-block wall, the dynamic loading of the surcharge over the course of the summer, or the dynamic shape of the surcharge over the course of the summer. Further, at the time of this alleged conversation, which Quazza denies, there is no dispute that Onkey had not yet cut back any surcharge at a steep slope, and there was no bin-block wall on the worksite. In addition, it is undisputed that Quazza was not asked nor

did he aid in the design of the bin-block wall at all. The parties also agree that Quazza did not return to the site after the January/February alleged discussion, and that the SESI inspectors that did visit the site in May and July 2017 were there to inspect poured concrete footings, not the surcharge or the bin-block wall. Quazza also testified that those inspections were outside of the Onekey/SESI contract.

Respondent's actions regarding this bin-block wall reflect an all too casual approach, especially given that Respondent had *never worked with a surcharge before and that the use of a surcharge is uncommon even in the construction industry*. None of the people involved with the bin-block wall were qualified in structural design. These same people altered the surcharge by cutting it back to a near vertical slope, and thus also altered the loading on the bin-block wall. Additionally, the alleged conversation between Finbar O'Neill and Quazza, in which Finbar O'Neill said was general and not detailed, is not what the cited standard contemplates. Under these circumstances, the Court finds that Respondent cannot credibly claim it relied on Quazza or any other subcontractors on the worksite to raise safety concerns regarding the bin-block wall. *See, e.g., Acchione & Canuso, Inc.*, 7 BNA OSHC 2128, 2131 (No. 16180, 1980) (“[A]n employer remains accountable for the health and safety of its employees . . . and cannot divest itself of its obligations under the [OSH] Act by contracting the responsibility to another employer.”); *Wiley Organics, Inc. d/b/a Organic Tech.*, 17 BNA OSHC 1586, 1597 (No. 91-3275, 1996), *aff'd*, 124 F.3d 201 (6th Cir. 1997) (“An employer has a general obligation to inform itself of the hazards present at the worksite and cannot claim lack of knowledge resulting from its own failure to make use of the sources of information readily available to it.”) (citations omitted).

Under the terms of the cited standard, Respondent was obligated to determine whether the precast concrete bin-block wall could withstand the surcharge load, and it failed to do so.

To establish the exposure element of his *prima facie* case, the Secretary must prove actual exposure to the violative condition or that access to the violative condition was reasonably predictable. *See Calpine Corp.*, 27 BNA OSHC 1014, 1016 (No. 11-1734, 2018) (citing *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished)), *aff'd*, 774 F. App'x 879 (5th Cir. 2019) (unpublished); *S & G Packaging Co.*, 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001). It is undisputed, and the record is replete with evidence, that not only were the victims of the accident exposed to the hazard of the bin-block wall collapse, but that Onekey's employees and subcontractors routinely worked in close proximity to, and sometimes on, the wall during their construction duties. *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012) (citations omitted) (Reasonably predictable exposure is established by proving that "either by operational necessity or otherwise (including inadvertence) . . . employees have been, are, or will be in the zone of danger."); *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985) (" 'access,' not exposure to danger is the proper test"). The Secretary has established exposure for this citation item.

The Court also finds that Respondent had actual knowledge of the violative condition in that Onekey did not determine whether the bin-block wall was capable of withstanding the surcharge load. *See Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079 ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation"). Finbar O'Neill testified that he asked Quazza "generally" about the bin-block wall, but he did not ask about the wall's details, including what load it could withstand. Fiore testified that the bin-block wall "evolved" over time. He did not know why the wall's design changed from three blocks high to four blocks high when Aaron O'Neill took over the wall task. Aaron O'Neill testified that he never consulted an engineer about the design of the bin-block wall or the surcharge

load that would be placed on it. (Tr. 1135.) This shows actual knowledge of the violative condition. Because all supervisory employees knew about it during the summer of 2017, their knowledge is imputed to Respondent. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079; *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC at 2095 (knowledge is imputed to the employer “through its supervisory employee.”).

The merits of this citation item constitute a violation of the cited standard.

B) Characterization

The Secretary claims that this violation is properly characterized as willful. The Secretary argues that despite multiple warnings to management regarding the safety of the bin-block wall, Onekey dismissed them all in “conscious disregard” of the cited standard’s requirement and the hazard. (Sec’y Br. 26.) Respondent counters, arguing that:

[b]ecause geotechnical engineering and the science of surcharges is highly technical and not within the knowledge of most general contractors – facts admitted even by the Secretary’s own proposed expert – Onekey rightfully and in good faith relied upon the expertise of [SESI] to monitor the surcharges at the [worksite,] including the use and placement of a temporary retaining wall related to the surcharges.

(Resp’t Br. 37-38.) Onekey claims it “had no reason to believe that SESI would not adequately monitor the surcharge or the retaining wall and had no reason to believe that it would not notify Onekey of any safety concerns with either the surcharge or the retaining wall[.]” (Resp’t Br. 38.)

“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 2178, 2181 (No. 90-2775, 2000) (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

[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 (No. 89-433, 1993); *see also Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 208 (3d Cir. 2005) (A willful violation of the OSH Act “constitutes an act done voluntarily with either an intentional disregard of, or plain indifference to, the OSH Act’s requirements”).

There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it.

Williams Enters. Inc., 13 BNA OSHC 1249, 1257 (No. 85-355, 1987).

“The state of mind of a supervisory employee ... may be imputed to the employer for purposes of finding that the violation was willful.” *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000); *Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2116-17 (No. 07-1578, 2012) (finding plain indifference when supervisor knew from prior experience and the day of the accident that carbon monoxide would be present and yet failed to monitor for it); *Adrian Constr. Co.*, 7 BNA OSHC 1172, 1175 (No. 15414, 1979) (“A violation is willful if the evidence shows that the employer ignored an obvious and grave danger . . .”).

Heightened Awareness

The Court finds that the Secretary has established that Respondent had a heightened awareness that Onekey had not determined, based on information received from someone who is qualified in structural design, that the bin-block wall could support the surcharge load. 29 C.F.R. § 1926.701(a); *see Hern Iron Works, Inc.*, 16 BNA OSHC at 1214 (“A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions...”). As

discussed above, both experts agreed that the wall was not designed properly for the surcharge load.

Fiore testified that he knew that the bin-block wall “evolved” as the project went on. (Ex. C-62 at 40.) He testified that there were several revisions of the wall and that the wall was “redone” multiple times when needed across the worksite between March 2017 and August 3, 2017. (Ex. C-62 at 35-36.) Fiore “straightened” out a previous version of the bin-block wall that appeared tilted and bowed to Tedone when Tedone brought up his concern.⁸ (Tr. 449, 452, 457-458.) Despite correcting one version of the wall, Fiore did not transfer knowledge about the wall to Aaron O’Neill when Aaron O’Neill took over directing the construction of the bin-block wall. Indeed, Aaron O’Neill testified that he did not know who designed the wall or how it was designed; he merely continued the construction of it along the length of the surcharge of Building D over the summer. (Tr. 1119, 1122.)

Aaron O’Neill also did not ever communicate the change in the bin-block wall’s design (from 3 bin blocks high to 4 bin blocks high) to Fiore. Fiore testified that he did not know why the wall had four courses of bin block during the summer when he had directed workers to stack the bin blocks only three courses high when he (Fiore) was in charge of the wall. (Ex. C-62 at 40-41.) The lack of communication regarding the change of the wall is a concerning and telling course of conduct because both Fiore and Aaron O’Neill were in charge of safety and had stop-work authority. (Tr. 867, 1012-1014, 1025-1026.) Aaron O’Neill, as the site superintendent, reported to Fiore, the project manager, and Fiore reported to Finbar O’Neill. (Tr. 430, 855.) Yet, Fiore did not know how the bin-block wall was being revised once Aaron O’Neill began directing the work.

⁸ Respondent does not deny that this safety communication between Tedone and Fiore occurred. (Resp’t Br. 14.)

The Court is not persuaded that this lack of communication should result in less than heightened awareness that the bin-block wall was in violation of cited standard. *See United States v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998) (“ ‘actual knowledge and deliberate avoidance of knowledge are the same thing’ ” and “[b]ehaving like an ostrich supports an inference of actual knowledge”) (citation omitted).

In addition to the wall changing over the summer, the surcharge of Building D also grew over the summer. Neither Fiore nor Aaron O’Neill consulted with any engineer about the bin-block wall even though the bin-block wall’s design changed from three courses to four, and the surcharge loading increased over time. For these reasons, the record supports a finding that Onekey knew that the loading on the bin-block wall changed, and that Onekey changed the bin-block wall, over the course of 2017 up until the day of the accident. Onekey did not consult with anyone qualified in structural design to determine whether the bin-block wall could support the changing surcharge load, despite one instance that the wall had to be “corrected” at one time due to safety concerns. *Branham Sign Co.*, 18 BNA OSHC at 2134 (“state of mind of a supervisory employee ... may be imputed to the employer for purposes of finding that the violation was willful.”)

Based on the above, the Court finds that Onekey had a heightened awareness of the illegality of its conduct which is revealed by its failure to communicate changes to the wall construction and failure to ensure that the bin-block wall was designed to support the load placed upon it.

Plain Indifference

Despite this heightened awareness, Respondent acted with plain indifference toward its workers’ safety with respect to the bin-block wall over the course of the summer of 2017.

Anderson Excavating & Wrecking Co., 17 BNA OSHC 1890, 1892-94 (No. 92-3684, 1997) (plain indifference found based in part on failure to provide safety program, training and protective equipment, combined with supervisory involvement and failure to act after notification of violations of the same standard at other sites) *aff'd*. 131 F.3d 1254 (8th Cir. 1997).

As noted earlier, Aaron O'Neill testified that it was impossible to construct Building B with the surcharge "as designed." (Tr. 1119-1120.) Onekey decided to cut-back the surcharge to allow workers to begin constructing Building B, even though cutting back the surcharge created a steeper slope than called for by the original design. Even to Onekey, this steeper slope seemed like a hazard. Indeed, according to Respondent, Onekey acted to address this obvious hazard by building the bin-block wall to prevent slope failure. (Resp't Br. 37-38.)

"[W]illfulness will be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible. Good faith is a question of fact." *Arcadian Corp.*, 20 BNA OSHC 2001, 2018 (No. 93-0628, 2004) (citations omitted). However, if an employer's measures to address a hazard were to maintain production rather than a genuine effort to abate the hazard, the violation is still willful. *Coleco Indus.*, 14 BNA OSHC 1962, 1967-68 (No. 84-0546, 1991).

From July 2017 through the day of the accident, Aaron O'Neill directed workers to build the bin-block wall along a "mountain" of soil, sloped at a near vertical angle, that towered overhead at least 15 feet. (Tr. 247-248; Ex. C-13.) He testified that he did so to allow work to proceed on the nearby Building B foundation. (Tr. 1119-1120.)

Onekey claims that it is not knowledgeable about geotechnical matters, arguing it relied on SESI to monitor and bring up safety concerns regarding the bin-block wall. (Resp't Br. 37-38.) As noted above, this argument is unpersuasive. Onekey knew that Quazza monitored the surcharge remotely using data from a surveyor and was not on-site during this time. The actions performed

by SESI regarding the worksite do not match up to Respondent's claimed heavily reliant expectations – and they did not match up for over six months. Indeed, the bin-block wall went through several “revisions,” and neither Fiore nor Aaron O'Neill consulted with anyone with expertise in structural design regarding those revisions. As noted above, Onekey's approach to the bin-block wall was all too casual given that it had never before worked with a surcharge. Even when Onekey deviated from the surcharge design, to facilitate concurrent construction in which workers were placed in harm's way, Onekey failed to consult with anyone qualified in structural design regarding the bin-block wall. Onekey was plainly indifferent to its workers' safety.

The Court finds Onekey's willfulness arguments unpersuasive. This citation item is properly characterized as willful.

Willful Citation 2, Item 2: Surcharge

The Secretary alleges that Respondent willfully violated section 5(a)(1) of the OSH Act, the “general duty clause,” which requires 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 physical harm to his employees.” 29 U.S.C. § 654(a)(1).

The Secretary alleges that Respondent violated the general duty clause when:

- b) At the 1 Dutchess Avenue in Poughkeepsie, NY for the Building D soil surcharge, between July 25 through 28 of 2017, the employer did not protect Onekey, LLC employees from the hazards associated with a soil surcharge collapse. The employer did not maintain a slope of 45 degrees at the edge of the soil surcharge as per engineer design. Employees were exposed to fatal crushing injuries from a collapsed soil surcharge while working near the surcharge and constructing the concrete stacked bin-block wall.

(Citation 9-10.)

A) Merits

To prove a violation of the general duty clause, the Secretary must establish 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 causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC at 2007. The Secretary must also show that the employer knew or, with the exercise of reasonable diligence, could have known that the hazardous condition existed at its worksite. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-0469, 1992).

1) The Cut-Back Surcharge Presented a Hazard

To constitute a cognizable hazard under the general duty clause, a worksite condition must pose more than the mere possibility of harm. *See, e.g., Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986) (“Defining the hazard as the ‘possibility’ that a condition will occur defines not a hazard but a potential hazard.”); *Pratt & Whitney Aircraft v. Donovan*, 715 F.2d 57, 64 (2d Cir. 1983) (“[T]he Secretary must show more than the mere possibility of injury; he must show that the potential hazard presents a significant risk of harm.”)

As discussed in the analysis of Citation 1, Item 1 (the training violation), the Court found that the surcharge cut back to a near-vertical slope presented a collapse and cave-in hazard to Onekey’s employees and subcontractors who worked nearby. In Citation 1, Item 1, this hazard warranted training by Onekey. For this citation item, Citation 2, Item 2, this hazard establishes the first prong of the general duty clause analysis.

While Respondent argues that the Secretary did not establish that the surcharge’s steep slope caused the precast concrete bin-block wall to fail on the day of the accident, the relevant timeframe for this citation item is July 25-July 28, 2017. As noted above, pictures taken by Fiore on those dates are authenticated and entered into the record. *See* Exs. C-5, C-11, C-12. Also noted above, those pictures were identified by Saban-Jacobo, Paulo Madeira, and Jay Madeira as representative of what they saw on the worksite when they worked that summer of 2017. All three

of these witnesses testified that they watched Onekey build the bin-block wall while they were on the worksite. (Tr. 247-248, 295-297, 318-319.) Saban-Jacobo was on the worksite for three months prior to the accident, and Paulo Madeira and Jay Madeira were on the worksite starting from about a month prior to the accident. (Tr. 240, 286, 291, 315.) Additionally, “the Commission has held that it is the hazard, not the specific accident that resulted in injury . . . that is the relevant consideration in determining the existence of a recognized hazard.” *Kelly Springfield Tire Co.*, 10 BNA OSHC 1971, 1973 (No. 78-4555, 1982), *aff’d*, 729 F.2d 317 (5th Cir. 1984).

The record shows that Onekey employees working on the bin-block wall were exposed to the hazard of the cut-back surcharge from July 25-28, 2017. (Tr. 107, 1085.) Specifically, Onekey employee Shawn Hazel worked in close proximity to the cut-back surcharge. (Tr. 1139; Exs. C-11, C-12, C-62 at 104-105.) The Secretary has established that the hazard presented by the cut-back surcharge, with its greater than 45-degree (one-to-one) slope, existed on Onekey’s worksite on July 25-July 28, 2017.

2) Onekey Recognized the Hazard

Hazard recognition “may be shown by proof that ‘a hazard . . . is recognized as such by the employer’ or by ‘general understanding in the [employer’s] industry.’ ” *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007) (quoting *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996)); *see Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984) (“Establishing that a hazard was recognized requires proof that the employer had actual knowledge that the condition was hazardous or proof that the condition is generally known to be hazardous in the industry.”).

“That [the employer] took some [safety] measures . . . to protect against this hazard, demonstrates that the hazard was recognized within the meaning of Section 5(a)(1).” *Wheeling-*

Pittsburgh Steel Corp., 10 BNA OSHC 1242, 1246 (No. 76-4807, 1981) (consolidated); *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1061 (No. 89-3097, 1993) (employer recognition depends on whether the employer actually knew that conditions created the hazard); *see also Mo. Basin Well Serv., Inc.*, 26 BNA OSHC 2314, 2317-18 (No. 13-1817, 2018) (supervisor's recognition of hazard imputed to the company); *Coleco Indus., Inc.*, 14 BNA OSHC at 1966 (hazard recognition established through actual knowledge of supervisor).

Respondent concedes that it directed the construction of the bin-block wall on its worksite, allegedly because it was concerned about slope failure of the cut-back surcharge. (Resp't Br. 37-38.) Finbar O'Neill and Aaron O'Neill testified that they believed that the purpose of the wall was to protect employees from the surcharge. (Tr. 931-932, 1120.) Finbar O'Neill said he expected his workers "not to go close enough to it to get themselves in harm's way," because "you wouldn't want to go where the pile is taller than yourself." (Tr. 1006-1007, 1009.) This, along with the other record evidence, shows that Onekey recognized the hazard the cut-back surcharge presented on its worksite during the construction of the bin-block wall on July 25-July 28, 2017.

3) The Cut-back Surcharge Was Likely to Cause Death or Serious Harm

"[T]he criteria for determining whether a hazard is "causing or likely to cause death or serious physical harm" is not the likelihood of an accident or injury, but whether, if an accident occurs, the results are likely to cause death or serious harm." *Waldon*, 16 BNA OSHC at 1060. Here, the tragic circumstances of the accident on August 3, 2017 establish that when the cut-back surcharge failed, it caused the nearby bin-block wall to suddenly collapse, killing one worker and injuring another. These facts establish that the cut-back surcharge hazard was likely to cause death or serious harm. The Secretary satisfied this prong of the general duty clause analysis.

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

To establish the feasibility and efficacy of a proposed abatement measure, the Secretary must “demonstrate both that the measure[] [is] capable of being put into effect and that [it] would be effective in materially reducing the incidence of the hazard.” *Arcadian Corp.*, 20 BNA OSHC at 2011 (citations omitted). The Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard. *Id.* (citing *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122 (No. 88-572, 1993)). Where an employer has undertaken measures to address the cited hazard, the Secretary, in establishing efficacy, must also show that such measures were inadequate. *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006).

As a threshold matter, the Court finds that the bin-block wall was inadequate to address the hazard of soil collapse from the cut-back surcharge on its worksite. As discussed above in the analysis for Citation 2, Item 1, Onekey failed to consult with experts in structural design regarding the bin-block wall. Onekey “revised” the wall multiple times and the surcharge loading grew greater and greater over the summer as Onekey gradually added more dirt to the surcharge on Building D. None of these changes were discussed with anyone knowledgeable of structural design. Moreover, both experts testified that the wall was not designed to withstand the loading from the surcharge. (Tr. 559 (Lu), 1073 (Gardiner), 1083 (Gardiner).) These measures were plainly inadequate to address the hazard of the cut-back surcharge on Onekey’s worksite. *U.S. Postal Serv.*, 21 BNA OSHC at 1773-74.

The Secretary has introduced evidence of feasible and effective abatement measures that Onekey could have taken to address the hazard from the cut-back surcharge. In the citation, the Secretary listed the following abatement measures that Onekey could have implemented to address the hazard:

- Follow engineer design
- Consult with a qualified engineer to develop a written plan/procedures for changing the height or slope of the surcharge
- Consult with a qualified engineer to develop written plan/procedures to determine when to remove employees from the danger zone when significant signs of failure appear.
- Implement safeguards to protect employees when significant soil surcharge horizontal and/or vertical movement is observed.
- Inspect conditions of the surcharge pile.
- Training employees on the identification and reporting of unsafe conditions related to the surcharge soil piles.
- Establish restricted zones to ensure site safety.

(Citation 9-10.) In his brief, the Secretary argues that the “simplest ways” to feasibly abate this hazard were “to follow SESI’s existing surcharge design, or else to ask SESI to make a new plan as they did after the collapse.” (Sec’y Br. 32.) Indeed, Quazza testified how he redesigned the surcharge for Onekey’s worksite, and Onekey implemented the new plan after the accident. (Tr. 790-791, 794.) *See SeaWorld of Fla. v. Perez*, 748 F.3d 1201, 1214 (D.C. Cir. 2014) (proposed abatement measures feasible where cited employer “implemented many of [them] on its own”). Respondent’s own expert testified that “he would’ve benched the surcharge” until a suitable retaining wall could be built. (Tr. 1084-1085.) *Arcadian*, 20 BNA OSHC at 2011 (“[F]easible means of abatement are established if ‘conscientious experts, familiar with the industry’ would prescribe those means and methods to eliminate or materially reduce the recognized hazard.”) (citations omitted).

Respondent does not claim that any of these proposed methods are infeasible or that the measures would not materially reduce the hazard created by the cut-back surcharge. *Chevron Oil Co., Cal. Co. Div.*, 11 BNA OSHC 1329, 1330 (No. 10799, 1983) (“The Commission has

repeatedly held that the Secretary need not prove that the cited employer or his industry recognizes the abatement measures recommended by the Secretary.”) (citing *Kan. City Power & Light Co.*, 10 BNA 14 OSHC 1417, 1422 (No. 76-5255, 1982) (“[T]he recognition element of an employer’s duty under the general duty clause refers to knowledge of the hazard, not recognition of the means of abatement.”).) The Secretary established feasible measures to address the hazard presented by the cut-back surcharge.

5) Knowledge

Regarding knowledge, Respondent argues that its management employees with decades of construction experience had no knowledge “of any hazard” related to the surcharge. (Resp’t Br. 33-34.) Onekey claims that it “relied upon SESI to inform it of any safety issues with the surcharge as a condition of the contract for SESI’s work at the [worksite].” (Resp’t Br. 33-34.) It claims that because no one from SESI, or any other contractor, expressed safety concerns regarding the surcharge to Onekey, it cannot be held responsible for knowledge that the slope of the surcharge posed a hazard. (Resp’t Br. 34.)

These arguments are rejected. Respondent deviated from the surcharge plan that Quazza developed by cutting back the surcharge to a significantly steeper than a 45-degree (one-to-one) slope. Onekey did this without consulting Quazza, and for the purpose of allowing foundation work on the adjacent, nearby Building B. (Tr. 701, 1006, 1120.) As noted above, Onekey management officials Finbar O’Neill and Aaron O’Neill had concerns about the safety of the cut-back surcharge and implemented an inadequate safety measure to address the hazard. *See Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015) (“To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation.”). This knowledge is imputed to

Onekey. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079; *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC at 2095 (knowledge is imputed to the employer “through its supervisory employee.”). Knowledge is established for this general duty clause violation.

This citation item is affirmed.

B) Characterization

The Commission has affirmed a willful characterization of a violation of the general duty clause by focusing on whether an employer consciously disregarded its duty to provide a workplace free of recognized hazards. *See, e.g., Arcadian Corp.*, 20 BNA OSHC at 2016. In *Arcadian*, the Commission held:

A willful violation is one committed ‘with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety[. It] is well settled that the Secretary has a more stringent and more difficult burden of proof to show willfulness where the employer is charged with a violation of section 5(a)(1) than she does where failure to comply with a specific standard is concerned. The Secretary must not only show that the employer had knowledge that a hazardous condition existed but must also adduce evidence that the employer intentionally disregarded or was indifferent to employee safety with respect to the hazard in question.’

Id. at 2016 (citations omitted). The Commission found that the employer “consciously ignored the warnings and deliberately failed to shut down the reactor [that was the source of the hazard] even after it had been warned of the hazardous condition with previous accidents.” *Id. at 2018*. The Commission also noted that the employer “had no program to check and keep clear its weep hole warning system.” *Id.* The Commission then held that the employer’s “conscious disregard of [the employer’s] duty under section 5(a)(1) of the Act establishes a *prima facie* case of willfulness.” *Id.*

Here, Respondent intentionally deviated from the surcharge plan that Quazza developed by cutting back the surcharge to a significantly steeper than 45-degree (one-to-one) slope. Onekey

did this without consulting Quazza, and for the purpose of facilitating foundation work on the adjacent, nearby Building B. (Tr. 701, 1006, 1120.) Recognizing the issue with the surcharge pile, Respondent built the inadequate bin-block wall, again without consulting Quazza, which introduced an additional crushing hazard on Onekey's worksite. *See Coleco Indus.*, 14 BNA OSHC at 1967-68 (holding that if an employer's measures to address a hazard were to maintain production rather than a genuine effort to abate the hazard, the violation will be found to be willful).

Finbar O'Neill testified that although he did not personally direct the temporary retaining wall construction for Building D's surcharge in the summer of 2017, he expected his workers "not to go close enough to it to get themselves in harm's way," explaining that one should not "go where the pile is taller than yourself." (Tr. 1006-1007, 1009.) Despite this recognition of the hazard, it was impossible to build the bin-block wall without being close to the cut-back surcharge. (Ex. C-21.) The subcontractors engaged in the foundation and framing work were forced to work close to the surcharge as that was the location of the work that had to be done. After being asked, "You wouldn't purposefully put yourself in harm's way, would you?," Saban-Jacobo replied, "No, but I need the money." (Tr. 279.) None of these workers, including Onekey employees, were provided protection from the cut-back surcharge wall, or even trained to identify and warned to avoid the hazards associated with the cut-back surcharge. On the contrary, these workers' job tasks necessarily placed them in the hazardous position of being within feet of the 15-foot high, near-vertical cut-back surcharge. This citation item is properly classified as willful.

PENALTIES

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

OSHA Area Director Garvey testified to how the penalty for each citation item was calculated and proposed for this matter. (Tr. 359-367.) With regard to history, Garvey testified that he did not apply a reduction for history because “Onekey had never been inspected and found to be in compliance in the previous five years.” (Tr. 360.) Garvey also testified that he did not apply a good faith reduction to the penalties for any of the violations because Onekey was issued willful violations. (Tr. 361.) Similarly, no size reduction was applied to three of the violations because the violations were related to a fatality. (Tr. 361.)

For Citation 1, Item 1 (the training violation), OSHA proposed a gravity-based penalty of \$12,934. (Tr. 359.) This penalty took into account the high severity of the violation, given that the probable injury was permanent disability or death. One employee died and another was injured on the worksite. (Tr. 359.) OSHA found that the probability of injury was high, because of the frequency and duration of exposure, the proximity of workers to the hazard, the stress level, and whether they were trained. (Tr. 359-360.) The proposed penalty for Citation 1, Item 2 (the fall protection violation) is \$9,977. Garvey applied a 10% reduction for size for Citation 1, Item 2 (the

fall protection violation) because it was not related to the fatality. That citation item also reflected a moderate severity and greater probability because the employee was working on a narrow block near the excavator and surcharge pile, and if he fell, the expected injury would be a fracture. (Tr. 361-362.)

OSHA's evaluation of injury, severity, and probability was the same for Citation 2, Item 1 (the bin-block wall) and Citation 2, Item 2 (the surcharge). No reductions were given to the proposed \$129,336 gravity-based penalties for these willful violations. (Tr. 362-366.) Both were assigned high severity and greater probability, resulting high gravity, due to the number of employees exposed for the length of the exposure. (Tr. 366-367.)

Respondent did not address the calculation of the amount of the proposed penalties in its brief. After consideration of the statutory factors, the Court agrees with the penalty amounts proposed by the Secretary for each citation item. The proposed penalty amounts are assessed for each affirmed citation item.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

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

- 1) Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1926.21(b)(2), is AFFIRMED and a penalty of \$12,934 is ASSESSED.
- 2) Citation 1, Item 2, alleging a Serious violation of 29 C.F.R. § 1926.501(b)(12), is AFFIRMED and a penalty of \$9,977 is ASSESSED.

- 3) Citation 2, Item 1, alleging a Willful violation of 29 C.F.R. § 1926.701(a), is AFFIRMED and a penalty of \$129,336 is ASSESSED.
- 4) Citation 2, Item 2, alleging a Willful violation of section 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1), is AFFIRMED and a penalty of \$129,336 is ASSESSED.

SO ORDERED.

/s/
Keith E. Bell
Judge, OSHRC

DATE: January 4, 2021
Washington, D.C.