UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MIDWEST STEEL, INC., and its successors, Respondent.	OSHRC DOCKET NO. 15-1471

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For Complainant

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For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On February 24, 2015, the Occupational Safety and Health Administration ("OSHA") El Paso Area Office received a report of a fatality on Respondent's worksite at 200 Constitution Avenue, Fort Bliss, Texas. (Tr. at 823-825; Ex. C-8.) In response, OSHA sent Compliance Safety and Health Officer (CSHO) Billy St. Clair and CSHO Hugo Villegas to conduct an inspection. (Tr. at 823, 833, 850). As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging one three-item serious violation of the Act and proposed a total penalty of $18,900. The Citation was issued on

July 27, 2015. Respondent timely contested the Citation, bringing this matter before the Commission.

On July 8, 2016, the Court issued an order granting *Complainant's Amended Unopposed Motion for Leave to Amend the Complaint and Citations*. Complainant amended the Complaint with regard to Citation 1, Item 1, which alleged a violation of the Act's general duty clause.[1] Complainant amended Citation 1, Item 1, to also allege, in the alternative, a violation of a specific OSHA standard promulgated under section 5(a)(2) of the Act.[2] 29 U.S.C. § 654(a)(2) (requiring employers to comply with promulgated occupational safety and health standards).

A four day trial was held from September 19 through September 22, 2016, in El Paso, Texas. Seven witnesses testified: (1) Midwest Welding Supervisor Robert Younk; (2) Local 263 Business Agent Jerrod Strange; (3) Midwest Site Superintendent Garth Gruno; (4) Professional Engineer David Ruby; (5) Union Ironworker Foreman Manny Marmolejo; (6) CSHO Billy St. Clair; and (7) Midwest Safety Director Scott Stevens. Both parties filed post-trial briefs.

Based on what follows, the Court vacates Citation 1, Item 1, and affirms Citation 1, Items 2, 3a and 3b.

II. Stipulations

The parties entered into stipulations ("Joint Stipulation Statement") prior to the beginning of trial. The Joint Stipulation Statement was introduced into the record as Joint Exhibit No. 1 (hereinafter "Ex. J-1.") (Tr. at 19.) In lieu of reproducing the Stipulations m in their entirety, the Court shall make references to the Joint Stipulation Statement as necessary.

[1] Section 5(a)(1) of the Act, the general duty clause, requires 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).

[2] As to this procedure, the Commission has established guidance in *McWilliams Forge Co., Inc.*, 11 BNA 2128 (No. 80-5868, 1984).

III. Jurisdiction

The Joint Stipulation Statement states, and the record supports, Respondent is engaged in a business affecting interstate commerce and is an employer within the meaning of the Act. (Exs. C-7 at 1-2; J-1 at 1.) Accordingly, the Court has jurisdiction over this proceeding pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c). (Ex. J-1 at 1); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, U.S. Dep't of Labor*, 518 F.2d 990, 995 (5th Cir. 1975), *aff'd sub nom. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) (describing "Enforcement Structure of OSHA").

IV. Factual Background

The worksite involved the construction of a hospital at Fort Bliss, Texas. Respondent is a steel-erection subcontractor of the United States Army Corps of Engineers ("Corps") retained to build the new hospital. (Tr. at 92.) Respondent has about 200 employees, but has "quite a few jobs around the country." (Tr. at 828, 982.) For this worksite, Respondent hired union welders from the Local Ironworkers Union 263 ("Local 263"). (Tr. at 278.) One of these welders was the decedent, a 51-year old Local 263 ironworker, who had an American Welding Society ("AWS") welding certification, and approximately 18 years of journeyman ironworker experience.[3] (Tr. at 308, 326, 853; Ex. R-2.) At the time of the incident, the decedent had been part of the Local 263 for 10 years, since 2005.[4] (Tr. at 289.) Decedent had a good reputation for working well and

[3] For personal privacy reasons, the name of the decedent has been removed from this Decision. *See* 29 C.F.R. § 2200.8 and Fed.R.Civ.P. 5.2(a).

[4] The record suggests decedent had worked as a journeyman ironworker in non-union positions for eight years prior to 2005. (Tr. at 326-327.) During his 10 year time after 2005 with Local 263, decedent did a "brief stint" in Local Ironworkers Union 495 in Albuquerque, New Mexico, and returned to Texas in November, 2013. (Tr. at 289-290.)

working safely; there is no evidence in the record Midwest management had any safety or quality concerns regarding decedent's work. (Tr. at 110-111, 303-304, 420.)

The tasks the decedent was performing on February 24, 2015 were the following: decedent himself built a temporary work platform that had the purpose of supporting him while he worked. (Tr. at 150-152, 303; Ex. C-19 at 4.) This work platform consisted of the following elements: two parallel angle irons; two 2 by 10 wooden "OSHA planks"[5] set between the two angle irons to serve as the standing surface; and one clamp, that secured the outermost "OSHA plank" to an angle iron, thereby stabilizing, allegedly, the standing surface between the two angle irons. (Tr. at 183-188; Exs. C-19 at 20; R-18 at 1.) According to Respondent's expert, Respondent had four possible configurations of this temporary work platform, depending on the design of the column on which the ironworker was working, and decedent built one of the configurations. (Tr. at 681.) After building this temporary work platform, decedent attached it to the subject column with quarter-inch fillet welds, each weld two inches in length. (Tr. at 677-678.)

The column decedent was working on at the time of the incident was on the sixth floor. (Tr. at 96.) The drop from decedent's temporary work platform was down to the fourth floor of the skeletal hospital, a drop of 33 feet. (Tr. at 93.) While on this temporary work platform,

[5] The supervisory ironworkers who testified at trial referred to these two pieces of wood as "OSHA planks" or "OSHA boards." (Tr. at 379 (Younk), 445-447 (Gruno), 599-600 (Gruno), 806-807 (Marmolejo). The record suggests the Corps similarly referred to these pieces of wood. *See* Ex. C-47 at 2 (referring to temporary work platform as "elevated OSHA planking.") CSHO St. Clair testified that he "didn't know that there's an OSHA planking." (Tr. at 929.) This testimony is consistent with OSHA's 2004 interpretation letter regarding similar terminology:

> Subpart L does not require that scaffold planks be graded and stamped by a qualified grading agency, nor does it require OSHA to approve any planking material. OSHA does not 'approve' any particular type of plywood to be used in forming a scaffold deck, just as it does not approve any other material. It is the responsibility of the employer to ensure that whatever material is used meets the requirements of Subpart L.

OSHA Interpretation Letter, Re: "Whether plywood may be used to make platform decking for scaffolds under Part 1926 Subpart L (Scaffolds)…" (Jun 21, 2004). CSHO St. Clair further testified the planking he inspected was "scaffold-grade planking," and he did not notice any defects in the platform's planking, "other than the way it was clamped." (Tr. at 930.)

decedent performed exterior column splice work.[6] (Tr. at 202, 303.) After finishing the splice work at one location, decedent would then remove his temporary work platform from the exterior column of the skeletal hospital, move it to the next location on the exterior of the skeletal hospital, re-weld the temporary working platform to the next exterior column, and continue his splice work at that new location on an exterior column of the skeletal hospital. (Tr. at 156.)

For fall protection, while he was on this temporary work platform, decedent wore a personal fall arrest system ("PFAS") device, which consisted of a wire rope choker, a harness, and a synthetic lanyard. (Tr. at 101-102; Ex. C-20 at 28-30.) Decedent wrapped the wire rope choker around the column he was working on (which was directly in front of him), resting the wire rope choker on an extension piece (perpendicular to the column) called a "dog ear," and then attached his synthetic lanyard, using what appears to be a metal clip, to the wire rope choker's O-ring. (Tr. at 102-103; Ex. C-20 at 30.) In this manner, the wire rope choker did not slip down the column as decedent was working because it was resting on top of the "dog ear." (Tr. at 103.) While the decedent was standing on his temporary work platform doing the exterior column splice work, no other forms of fall protection, such as guardrails or safety nets, were provided to decedent; other than his PFAS. (Tr. at 1011.)

There are no witnesses to what happened at the time of the incident. But, at 10:15 am on February 24, 2015, the decedent fell from his temporary work platform on the sixth floor down to the fourth floor below. (Tr. at 93; Ex. C-8.) Decedent sustained mortal wounds and died at the scene. (Ex. C-6 at 40.) Later, inspectors discovered decedent's synthetic lanyard had severed, having been melted through. (Tr. at 253; Ex. C-6 at 40.) It was determined right before he fell, decedent "in all likelihood" was "repairing a weld on the surface of the splice" by preheating the

[6] The "splice work" in terms of the facts of this case means the connection of the ends of two vertical steel columns using a wire welding technique. (Tr. at 235, 708, 799.)

welds, using a "weed burning device" on the exterior column, to which he had secured his synthetic lanyard.[7] (Tr. at 521-522.) It was never determined, in this case, exactly how the synthetic lanyard had been melted through. (Tr. at 895.)

After receiving a report of the fatality, Complainant sent CSHOs Billy St. Clair and Hugo Villegas that same day to conduct an OSHA inspection of the fatal accident. (Ex. C-7.) CSHO St. Clair was the lead investigator for this matter, and CSHO Villegas assisted him.[8] (Tr. at 833.) After CSHOs St. Clair and Villegas were admitted to the worksite,[9] they held opening and closing conferences, toured the worksite and accident scene, took pictures, and interviewed workers. (Exs. C-6, C-7.) As a result of the investigation, Complainant issued Respondent the Citation, targeting the synthetic lanyard and the temporary work platform.

The workers CSHO St. Clair interviewed, and who testified at trial, are the following:

Robert Younk was Respondent's welding foreman and decedent's direct supervisor on the day of incident. (Tr. at 106.) Younk's crew consisted of eight welders, including decedent. (Tr. at 107.) Younk has 40 years of welding experience, 28 years of ironworking experience, 20 years in a local union, and had worked for Respondent for 18 years as both a welder and a foreman on different projects in Michigan and "other places," including Texas. (Tr. at 109, 177-178.) Younk has "experience in putting in what we call the work platform" dating to the "late 1980s,"

[7] A "weed burner" is a two-foot long tool used to preheat a "hot zone" of 225-250 degrees on the exterior column in preparation for welding work. (Tr. at 97-98, 144, 375; Ex. C-19 at 9.) The record establishes that the ambient temperature on the worksite was below 60 degrees in February, 2015. (Tr. at 261-262.)

[8] CSHO St. Clair has a two-year degree in criminal justice from Western New Mexico University, and a bachelor's degree in criminal justice from New Mexico State University. He has taken OSHA courses through the OSHA Training Institute and the University of Texas at Arlington. He joined OSHA in June 2010. (Tr. at 822-823.) Before joining OSHA, he had an Army career. (Tr. at 823.) CSHO St. Clair has never been a welder or a steel erector. (Tr. at 823.) He has performed ten steel erection investigations, "two to three" where he was the lead. (Tr. at 832-833.) This case was his first injury/fatality involving fall protection arising out of welding on a steel erection investigation. (Tr. at 833-834.) CSHO Villegas did not testify at the trial.

[9] They were delayed upon their arrival by two hours because the Army Criminal Investigation Command had secured the worksite to conduct their investigation. (Tr. at 842; Ex. C-6.)

estimating he has assembled and installed hundreds of these work platforms (Tr. at 178-180.) He testified he learned based on "on-the-job training" and watching other people. (Tr. at 178-179.) On the Fort Bliss worksite, Younk's job responsibilities included assigning the location and task for his crewmembers, checking his welders' PPE at the beginning of the day, ensuring their equipment was set up properly before, during, and after their shift, and checking the welders' work (i.e., the preheat or the welding). (Tr. at 113-114.) As of the day of the incident, Younk had supervised the decedent for five months. (Tr. at 106.) On the day of the incident, Younk personally observed the decedent that morning, at 9:15 am, including the placement of his PPE, which, at the time of Younk's observation, was correct. (Tr. at 106, 222.) Younk reported to the general foreman, who in turn reported to Garth Gruno.[10] (Tr. at (107.)

Garth Gruno is Respondent's Fort Bliss site superintendent. (Tr. at 403.) He has been employed by Respondent for 11 years as a site superintendent at various Midwest worksites for half that time, and as the superintendent at Fort Bliss for the entire time the decedent was there. (Tr. at 403.) Gruno worked up from a welder, to foreman, to a general foreman, and finally to site superintendent. (Tr. at 404.) Gruno did not know the decedent prior to the decedent's arrival at the worksite. (Tr. at 404-405.) Part of his responsibilities are discussing safety, including the selection of fall protection for various applications, with the welders. (Tr. at 407.) Gruno testified that if anyone had been disciplined on the worksite, he would have known about it. And he was not aware of any instances of discipline on the worksite. (Tr. at 420-421.) In his 22 years of experience using the elevated platforms, he never considered it to be an "actual scaffold." (Tr. at 449-451.) Gruno was designated as a "competent person by Respondent for this project for safety, steel, erection, fall protection and rigger." (Tr. at 451.) According to Gruno, Respondent was

[10] Younk directly reported to general foreman Erickson. (Tr. at 107.) Erickson did not testify at trial.

obligated to Clark McCarthy (the general contractor) to designate certain people as "competent." (Tr. at 454.)

Jerrod Strange is the Business Agent and vice-president elect for Local 263. (Tr. at 278.) He was responsible for procuring work for local members, including decedent. (Tr. at 278.) One of his responsibilities was ensuring the people he refers to worksites, including the decedent, were qualified for the job. (Tr. at 278-279.) According to Strange, the decedent's records, dating back ten years, indicated decedent was a certified ironworker, but Strange had no knowledge as to whether decedent had "any sort of recognized degree, certificate or professional standard concerning scaffolding." (Tr. at 290-295, 347; Ex. C-57.) Strange also stated decedent did not hold a "certified welding inspector license," which he explained was an extra test provided by the American Welding society "to achieve that status." (Tr. at 305, 344.)

Strange visited the Fort Bliss worksite 20 times from the day it started to the day of the incident. According to Strange, there were 1,000-2,000 workers at the worksite. (Tr. at 324-325.) Strange testified the general contractor held weekly Wednesday training sessions for all of those workers, using "bullhorns and yelling and screaming," and he thought those training sessions were not very effective. However, Strange was not critical of Respondent's training sessions (*i.e.*, toolbox meetings), which occurred immediately after the general contractor's training sessions. (Tr. at 324-325.) Strange testified decedent attended those toolbox meetings. (Tr. at 325.)

Manny Marmolejo was also a welding foreman on the "Midwest job."[11] (Tr. at 798.) His crew worked on "side plates" doing "flat welds," while Younk's crew worked on interior and exterior columns doing "column splices." (Tr. at 202, 802.) Marmolejo has worked on what he

[11] The record is unclear to whom Marmolejo reported. He testified he has been a union ironworker for his entire 35 year career and is currently part of the Local 75 from Phoenix, Arizona. (Tr. at 787-788.) He has his OSHA 10, OSHA 30, "pretty much every one of my classes for my welding certificates… training for foreman, training for supervisor or superintendent," scaffold training, and he is certified by the American Welding Society. (Tr. at 791.)

called "stand-ups" before while doing column work. (Tr. at 793, 802-803; Ex. R-8.) He gave toolbox talks to his welding crew as well as Younk's crew every morning. (Tr. at 117, 201,800.) As part of the toolbox talks, Marmolejo discussed the proper positioning of PPE while welding. (Tr. at 204, 801.)

Scott Stevens is Respondent's Director of Corporate Safety. Stevens has worked in loss prevention and safety management since 1990. He started working for Respondent in 2004 as a site safety manager, and became the safety director in 2009. As the safety director, Stevens "set[s] the tone for the company as far as policy and procedures go." He is not involved in the day-to-day operations of Respondent's jobs. According to Stevens, prior to decedent's incident, Respondent had never had an injury or death due to the burning through of a synthetic lanyard in its 46 year history. (Tr. at 990.)

V. Discussion

A. Applicable Law

In order to prove a violation of the general duty clause, Complainant must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986); *see also* 29 U.S.C. § 654(a)(1). In addition, the evidence must show the employer knew or with the exercise of reasonable diligence, should have known of the hazardous condition. *Otis Elevator Company*, 21 BNA OSHC 2204 (No. 03-1344, 2007). Whether a work condition poses a recognized hazard is a question of fact. *See Baroid Div. of NL Indus., Inc. v. OSHRC*, 660 F.2d 439, 446 (10th Cir. 1981).

To establish a *prima facie* violation of section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *Id.*

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co*., 17 BNA OSHC 1361, 1365-66 (No. 92-3855, 1995). Preponderance of the evidence has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, *Preponderance of the evidence* (10th ed. 2014) (emphasis added).

B. Citation 1, Item 1 – The Alleged Lanyard Violation

1. Citation 1, Item 1 as originally pleaded as a general duty clause violation

Complainant alleges a serious violation of the Act as follows:

OSH ACT of 1970 Section (5)(a)(1): The employer did not furnish employment

> and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to a fall hazard.
>
> On February 24, 2015, an employee conducting hot-work/welding was exposed to a fall hazard greater than 10 feet while welding on the outer steel columns located in the sixth floor of the hospital construction site. The fall protection equipment selected by the employer was not suitable for the workplace conditions.
>
> Among other methods, some feasible methods to correct this hazard would be to complete the following: Follow the following ANSI Z359.1-2007 sections: 7.1, 7.1.8, 7.1.9 and 7.2.

See Citation at 6. Complainant alleges, in the alternative, a serious violation of the Act as follows:

> 29 CFR 1926.95(c): 'Design.' All personal protective equipment shall be of safe design and construction for the work to be performed.
>
> On or about February 24, 2015, and at times prior thereto, an employee conducting hot-work/welding was exposed to a fall hazard greater than 10 feet while welding on the outer steel columns located on the 6th floor at the hospital construction site. The fall protection equipment selected by the employer was not of safe design and construction for the work to be performed.

Complainant's *Unopposed Motion for Leave to Amend Complaint and Citations at* ¶ 2.[12]

1. The Alleged General Duty Clause Violation

Complainant alleges Respondent violated the general duty clause because, "the fall

[12] In his post-trial brief, Complainant reversed the order in which he alleged these two violations, without an express motion to amend the Complaint. *See Complainant's Amended Unopposed Motion for Leave to Amend the Complaint and Citations* at ¶ 2; *compare* Tr. at 72, 76, 950-951 (Counsel for Complainant first arguing, at trial, the alleged general duty clause violation before the alleged section 1926.95(c) violation during opening statement and response to request for directed verdict) *with* Sec'y Br. at 26-27 ("In the event that the Court finds that the synthetic lanyard selected by Midwest was 'of safe design and construction,' (and therefore the terms of 1926.95(c) were not violated) Complainant argues in the alternative the PPE selected by Midwest was not suitable for the workplace conditions and therefore violated the general duty clause."); *see also Tower Maint. Corp*., 25 BNA OSHC 2146, 2147 (No. 13-0777, 2016) (remanding for judge to rule on unclear procedural posture of alternative allegations in the Complaint). Upon consideration of the record and Commission case law, the Court finds the proper course of analysis here is via a primary alleged violation of the general duty clause, and then through the alternative alleged violation of section 1926.95(c). *See Tower Maint. Corp.*, 25 BNA OSHC at 2147. Here, while Complainant switched the order of the alleged violations in his brief, Respondent did not. (Resp't Br. at 16-27.) Respondent pursued the same course of analysis it began within its Answer: raising the affirmative preemption defense to the alleged general duty clause violation. Indeed, Respondent claims section 1926.95(c) actually applies in this case and it complied with that standard. (Resp't Br. at 23-27.)

protection equipment selected by the employer was not suitable for the workplace conditions." (Citation at 6.) Complainant argues the synthetic material of the lanyard was not suitable for the "hot-work/welding" decedent was doing on the exterior columns of the worksite because it could not withstand the temperature, and as illustrated by this case, melted through due to the high temperature of decedent's splicing work, causing decedent to fall from a height greater than ten feet. Complainant claims Respondent could have abated this issue by following the "Equipment Selection, Rigging, Use, and Training" sections of the American National Standard Institute (ANSI) "Safety Requirements for Personal Fall Arrest Systems, Subsystems, and Components," standard Z359.1-2007.[13] (Citation at 6.) As discussed below, the Court finds Complainant has failed to establish a violation of the general duty clause.

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[13] Notably, neither party brought up the similar OSHA standards, "Criteria for fall protection equipment," for steel erection activities found in Subpart R at 29 C.F.R. § 1926.760(d)(2), incorporating by reference OSHA's Fall Protection standards in Subpart M found in section 1926.502. 29 C.F.R. § 1926.760(d)(2). Additionally, neither party identified any of the long line of Commission and circuit court cases addressing the issue of when OSHA's steel erection standards apply versus when OSHA's general standards apply for steel erection activities. *See., e.g.*, *Safeway, Inc. v. Occupational Safety & Health Review Comm'n*, 382 F.3d 1189 (10th Cir. 2004); *Peterson Bros. Steel Erection Co. v. Reich*, 26 F.3d 573 (5th Cir. 1994); *Brock v. Williams Enterprises of Georgia, Inc.*, 832 F.2d 567 (11th Cir. 1987); *L. R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664 (D.C. Cir. 1982); *Bristol Steel & Iron Works, Inc. v. Occupational Safety and Health Review Comm'n,* 601 F.2d 717 (4th Cir.1979).

Overall, the circuits agree the more specific steel erection standards do not preempt the general construction standards "where the steel erection standards provide no protection." *Peterson Bros. Steel Erection Co. v. Reich*, 26 F.3d at 577; *see also* 29 C.F.R. §§ 1926.20(d)(1)("If a particular standard is specifically applicable to a condition, practice, means, method, operation or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation or process"); (d)(2)("On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry even though particular standards are also prescribed for the industry to the extent that none of such particular standards apply.").

Here, however, the Court has found two standards that appear to be relevant to the facts of this case: (1) 29 C.F.R. § 1926.502(d)(11)("Lifelines shall be protected against being cut or abraded.") and (2) 29 C.F.R. § 1926.502(d)(14)("Ropes and straps (webbing) made in lanyards, lifelines, and strength components of body belts, and body harnesses shall be made from synthetic fibers.") It is undisputed the project at issue was a steel erection project, and the activity decedent was doing, exterior column splicing/welding, was a covered steel erection activity. 29 C.F.R. §§ 1926.750(a), (b)(1), & (b)(2). The fact these two steel erection standards appear to contradict Complainant's arguments in this case confounds the Court. However, both parties, who presumably know the steel erection industry and their associated OSHA standards far better than this trier of fact, failed to address this issue throughout this proceeding. Because of this, the Court does not vacate Item 1 on preemption or applicability alone, as to assuage any notice issue. Indeed, it is unnecessary as Complainant failed to carry his burden independently of these steel erection standards. The Court, however, makes note of these steel erection standards here to inform the reader of this potential pitfall the Court has considered in determining the outcome of this case.

A. Nature of the hazard

The hazard "must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Arcadian Corp.*, 20 BNA OSHC 2001 at *7 (No. 93-0628, 2004). It is not defined in terms of the absence of a particular abatement method; rather, it is defined "in terms of the physical agents that could injure employees . . . ." *Chevron Oil Co.*, 11 BNA OSHC 1329, 1331, n.6 (No. 10799, 1983). In that regard, it should be noted that the Commission may define the hazard on its own. *See, e.g.*, *Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984). Complainant has alleged the selection of the synthetic lanyard presents a fall hazard. (Citation at 6; Tr. at 876.)

Decedent had a single form of fall protection while doing exterior column splice work standing on a platform that was elevated 33 feet above the floor below. Additionally, decedent was wielding with a high-heat tool capable of severing the synthetic lanyard, and the record contains multiple references that warn of keeping the lanyard away from high heat, including Respondent's safety policies and on-site hazard analyses. Respondent's Safety Plan lists five different types of fall hazards – including "fall from heights, while welding and detailing." (C-45, at 2; Tr. at 133-34.) This was the type of activity decedent was engaged in. Respondent's Safety Procedures require appropriate PPE be provided to "suit the task and known hazards." (C-27, at 273, bullet 1.1; Tr. at 408.) If the single form of fall protection were to fail, the welder would be left with no fall protection on the platform and subject to a fall of 33 feet. (Tr. at 478-79, 1011.) And finally, Respondent's Plans and Hazard Analyses indicate it recognized the fall hazards posed by the type of work being performed at the worksite. (C-44, C-45).

Likewise, ANSI 2359.1-2007 Section 7.1 recognizes a fall hazard in this type of work by

requiring the use of a personal fall arrest system ("PFAS") in worksites like the Fort Bliss project. (C-54).

Respondent testified at trial it had in its possession one version of the Manufacturer's Standard Operating Procedures ("SOP"). The Manufacturer's SOPs establish the industry recognized the fall hazard by setting forth recommendations on what the PFAS should consist of and how it should be used. (C-11 at 602-604, C-13, C-14). The SOP was consistent with ANSI and reflects industry consensus of a fall hazard when a lanyard is improperly selected due to the type of work being performed.

Respondent does not refute any of the above facts. Respondent, however, argues there was no hazard at all because Respondent had not had an incident like the one at issue here in its 46 year history, that Respondent had not had a single injury during "5.8 million hours of work" performed by Respondent in the last seven years, and 100,010 man-hours of work on the Fort Bliss project alone, attributable to improper fall protection equipment. (Resp't Br. at 19.) These arguments are unpersuasive given the preventative nature of the Act. *See Titanium Metals*, 579 F.2d 536, 542 (9th Cir. 1978) *citing Allis-Chalmers Corp. v. OSHRC*, 542 F.2d 27, 31 (7th Cir. 1976) ("(A)lthough the fact petitioner had an accident-free or injury-free record could properly be considered in determining the gravity of the violation for which it was cited, we are not impressed with petitioner's argument that its past record is dispositive in light of the Commission's finding that there existed a general fall hazard, and in light of the Act's declared policy to prevent the occurrence of accidents and injury.").

Respondent, as well as the industry, knew a fall hazard would be present if the lanyard selected failed. Complainant has established a fall hazard.

B. Recognition of a recognized hazard

1. Recognition of the fall hazard

"[W]hether or not a hazard is 'recognized' is a matter of objective determination." *Ed Taylor Const. Co. v. Occupational Safety & Health Review Comm'n*, 938 F.2d 1265, 1272 (11th Cir. 1991). A "recognized hazard" is a condition that is "known to be hazardous." *Georgia Electric,* 595 F.2d 309, 321 (5th Cir. 1979) (citation omitted). "This element can be established by proving the employer had actual knowledge that a condition is hazardous." *Id*. (citation omitted). A "recognized hazard" may also "be shown by proving that the condition is generally known to be hazardous in the industry." *Ed Taylor*, 938 F.2d at 1272 (citation omitted). "An activity or practice may be a 'recognized hazard' even if the employer is ignorant of the existence of the activity or practice or its potential for harm." *Titanium Metals Corp. of America*, 579 F.2d at 541 citing *National Realty & Constr. Co.*, 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973). In that regard, courts and the Commission have looked to industry standards to determine whether a particular industry recognizes the hazard cited. *See Bethlehem Steel Corp. v. OSHRC & Marshall*, 607 F.2d 871 (3d Cir. 1979) (safety officer admitted that advisory ANSI standard represented industry consensus); *Betten Processing Corp.*, 2 BNA OSHC 1724 (No. 2648, 1975) (holding judge erred in failing to consider ANSI standard as evidence of industry recognition).

Respondent recognized the fall hazard associated with using a synthetic lanyard while doing exterior column splice work at heights greater than ten feet. Respondent had policies in effect and provided training sessions instructing the welders to "position" the lanyard out of the way of the heat; in order to avoid the lanyard from being damaged that could result in a fall from heights over ten feet. Respondent's Safety Plan (C-45, at 2; Tr. at 133-34), Safety Procedures (C-27, at 273, bullet 1.1; Tr. at 408) and Respondent's Plans and Hazard Analyses (C-44, C-45) all establish Respondent recognized the fall hazard. By adopting these policies and implementing

training Respondent recognized the existence of a fall hazard.

The Commission has held industry standards and guidelines, such as those published by the American National Standards Institute (ANSI), are evidence of industry recognition. *Kokosing Constr. Co., Inc*., 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996); *Cargill, Inc*., 10 BNA OSHC 1398, 1402 (No. 78–5707, 1982). ANSI 2359.1-2007 recognizes the existence of fall hazards and also sets forth guidelines for the industry to follow to eliminate or reduce the existence of a fall hazard. (C-54).

Industry recognition may also be shown through the knowledge or understanding of safety experts familiar with the workplace conditions or the hazard in question. *See Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 322 (5th Cir. 1984) ("The [industry] recognition standard centers on 'the common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question.' " (citation omitted)); *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1187 (No. 91-3344, 2000)(consolidated)(same). Respondent's expert testified he was aware a fall hazard exists when a lanyard is damaged while welding.[14] (Tr. at 738-739.)

2. Recognition of the condition known to be hazardous

The analysis now proceeds to a determination of whether Respondent or the industry had

[14] Respondent's expert, David Ruby, has a bachelor's degree in structural engineering from Rennsalear Polytech, and became a licensed professional engineer and structural engineer in Illinois in 1968. He has reciprocity in 32 other states, including Texas. Ruby has lectured at Purdue University, Michigan Tech University of Michigan, and Lawrence Technological University; he has authored American Institute of Steel Construction (AISC) Design Manual, Design Guide No. 23 "Constructability for Steel Buildings," and published several articles in "Modern Steel Construction" and "Structure." (Tr. at 633.) Ruby is a member of the American Welding Society, American Institute of Steel Construction, National Society of Profession Engineers, Structural Engineers Association of Michigan and National Council of Structural Engineer's Association. (Tr. at 633.) Graduating in 1960, he worked for many different structural engineering businesses and organizations, beginning with bridge design and then structural steel facility design. (Tr. at 635.) Projects he has worked on include Chicago's John Hancock Building, the Sear's Tower and Standard Oil Tower, Atlanta's Renaissance Center, the Peach Tree Center, the Bonaventure Hotel in Los Angeles, the Brussels World Trade Center, and other structures. (Tr. at 636-637.) Over the course of many years, he saw "a lack of structural engineers that understand construction, that understand what it takes to hug a beam, what the problems are and the issues are and certain bolts and how those things need to be – if they can be engineered correctly." (Tr. at 638.) Ruby formed Ruby and Associates in 1984, with clientele that are "contractors, erectors, construction managers, fabricators and owners." (Tr. at 638.)

recognized the *condition* that is "known to be hazardous." *Georgia Electric*, 595 F.2d at 321 (emphasis added). The crux of Complainant's case at trial was had Respondent read the most recent version of the Manufacturer's SOP, in accordance with the ANSI standards, it would have known not to use the synthetic lanyard in hot areas of more than 180 degrees. (Sec'y Br. at 26).

Complainant has not established whether Respondent or industry recognized the hazardous "condition." As stated above, the crux of Citation 1, Item 1 and the focus of his trial strategy, was Complainant's contention the synthetic lanyard should not have been selected in accordance with ANSI due to the 180 degree restriction contained in a certain version of Manufacturer's SOP. Complainant can only prevail if he establishes Respondent or industry recognized the SOP containing the 180 degree restriction and the version was in effect at the time the Citation was issued.

a. The Most Recent Version

The lanyard the decedent was using was manufactured by Ultra Safe.[15] Complainant introduced three versions of the Manufacturer's SOPs on the proper use of the synthetic lanyard into the record. (Exs. C-9, C-10, and C-11.) The most recent version states that it meets a 2012 ANSI standard, has eleven bullets, with the last bullet containing a limitation that the lanyard cannot withstand more than 180 degrees. ("Most Recent Version")(Ex. C-9 at CX048-049.) Complainant relied on this version to support his argument regarding the 180 degree restriction.

The second version also states that it meets a 2012 ANSI standard, but it only contains 9

[15] Complainant also argues a Standard Operating Procedure of Guardian which designs, constructs and distributes harnesses, body belts, lanyards and other types of personal protective equipment ("PPE") used on the worksite contained a 180 degree temperature restriction. (Tr. at 141-142.) This argument is not persuasive. First, decedent was not wearing a Guardian type lanyard on the day of the incident. Second, Complainant offered no proof what Guardian's PPE was comprised of and whether such composite makeup was equal to or made exactly with the same composite materials as the Ultra Safe lanyard. It is possible the Ultra Safe lanyard is made of entirely different materials which would render a 180 degree restriction reasonable for it and render it unfit for other PPE. (Sec'y Br. at 29.) Finally, Guardian lanyard equipment was not used during the time of the Inspection. (Tr. at 407.)

bullets, indicating that extra precaution should be taken in areas of hot work, and it does not contain a 180 degree limitation. ("Second Version")(Ex. C-10 at CX0117-0118.)

The third version, the one that Respondent claims to have had a the time of the incident, states that it meets a 2007 ANSI standard, it does not have a reference to taking extra precautions on hot work, and it also does not have a 180 degree limitation. ("Third Version")(Tr. at 602; Ex. C-11 at 602-604.)

The Commission has held industry standards and guidelines, such as those published by the American National Standards Institute (ANSI), are evidence of industry recognition. *Kokosing Constr. Co., Inc*., 17 BNA OSHC at 1873; *Cargill, Inc*., 10 BNA OSHC at 1402. ANSI 2359.1-2007 recognizes the existence of fall hazards and also sets forth guidelines for the industry to follow to eliminate or reduce the existence of the fall hazard. (C-54). However, the Court notes the ANSI standard does not contain the 180 degree limitation; that limitation is only contained in the Most Recent Version.

Complainant's claim Respondent recognized the hazardous condition because of the Most Recent Version containing the 180 degree limitation fails in light of the evidence. Complainant failed to establish actual recognition by Respondent. Complainant put on no evidence which indicated Respondent actually knew of or had possession of the Most Recent Version. Respondent presented evidence that it did not have the Most Recent Version at the time of the Inspection. (Tr. 602). Complainant simply attempts to meet its burden under this prong of his *prima facie* case by arguing if Respondent would have read the Most Recent Version it would have known of the heat restriction and selected a different lanyard and therefore had recognition. Again, this simple approach weighs heavy on the fact the Most Recent Version would have had to been in effect on the date of the Citation was issued and he did not establish that critical point.

Complainant has the burden of proving which Manufacturer SOP was in effect at the time of the Inspection to establish industry recognition of the hazardous condition at the time of the Inspection, but failed to do so. CSHO St. Clair testified he pulled the Most Recent Version up on the Internet after the investigation and more than six months after the incident. (Tr. at 888-889.)[16] The record does not establish when the Most Recent Version went into effect. Complainant did not proffer evidence of what it could have readily obtained in discovery for the Most Recent Version - a simple date to establish knowledge of when the Most Recent Version was effective. Thus, we have a failure of proof on this very important issue. Complainant has failed to establish the Most Recent Version was in effect at the time of the incident in order to establish industry recognition.

In addition, the Court infers the Most Recent Version did not come into existence until after the incident. *Capeway Roofing Systems, Inc*., 20 BNA OSHC 1331 (No. 00-1968, 2003) (citations omitted)("[W]hen one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, i.e., that the evidence would not help that party's case."). An adverse inference undermines Complainant's position the Most Recent Version, which contains the 180 degree limitation relied on by Complainant at trial, was in effect at the time of the incident.[17] Therefore, the Court cannot find the industry recognized the 180 degree limitation

[16] It is disingenuous for Complainant to argue if Respondent had read the Most Recent Version before the incident it would have recognized the hazardous condition when CSHO St. Clair himself did not have the Most Recent Version until after the Citation was issued (Tr. at 889-890).

[17] At trial CSHO St. Clair was asked which version of the Manufacturer's SOP he had in his investigation file. CSHO St. Clair testified he had the Most Recent Version. (Tr. at 898-901). The testimony of CSHO St. Clair is not found credible on this point. The Court finds by inference CSHO St. Clair did not have the Most Recent Version at the time the Citation was issued. One would expect, Complainant to clearly state the 180 degree limitation – the major issue in this case - clearly in the Citation work papers as a further basis for the issuance of the Citation just as he did Sections 7 and 9 of the Second Version. Exhibit C-3 (CX 0006) comes from CSHO St. Clair's file. The two sections in the Second Version (Nos. 7 and 9) are referenced clearly by CSHO ST. Clair as the basis for Respondent violating the general duty clause. Sections 7 and 9 are also in the Most Recent Version. If CSHO St. Clair did indeed have the Most Recent Version the Court is perplexed as to why he did not set out this critical element in his file? The evidence also clearly demonstrates CSHO St. Clair did not have the Most Recent Version at the time of the Citation was issued because the Court was informed the Most Recent Version was pulled from the Internet after the Citation was issued.

(the hazardous condition) at the time the Citation was issued.

b. The Second Version

The Second Version states it meets a 2012 ANSI standard, but it only contains 9 bullets, indicating that extra precaution should be taken in areas of hot work, and it does not contain a 180 degree limitation. ("Second Version")(Ex. C-10 at CX0117-0118.) This is the version the Court has determined CSHO St. Clair had during the course of his Inspection and the one he relied on in issuance of the Citation. Since the CSHO had the Second Version it was in effect during the Inspection and the industry recognized the contents of this version. Complainant has established the industry recognized the Second Version which did not contain the 180 degree limitation.[18] *Okland Construction Co*., 3 BNA OSHC 2023, 2024 (No. 3395, 1976) (reasonable inferences can be drawn from circumstantial evidence).

Under these circumstances, during the time of the inspection and when the Citation was issued, Complainant, therefore, has established both Respondent and industry recognition of the fall hazard but has not established that either the industry or Respondent recognized the hazardous condition - i.e. the 180 degree limitation - based on the Most Recent Version. Complainant has established recognition of hazardous conditions, which does not contain the 180 degree limitation, based upon industry recognition of the Second Version.

Okland Construction Co., 3 BNA OSHC 2023, 2024 (No. 3395, 1976) (reasonable inferences can be drawn from circumstantial evidence)("[T]he Commission may draw reasonable inferences from the evidence[.]" *Fluor Daniel*, 19 BNA OSHC 1529, 1531 (Nos. 96-1729 & 96- 1730, 2001) (citing *Atlantic Battery Co*., 16 BNA OSHC 2131, 2159 (No. 90-1747, 1994)).

[18] Respondent testified it did not have the Second Version. Respondent testified to possessing the Third Version. (Ex. C-11 at 602-604.) It is not necessary Complainant establish Respondent recognized the Second Version. The case law is clear that recognition of a hazardous condition can either be established through industry recognition or recognition by Respondent. See *S&G Packaging Co.*, 19 BNA OSHC 1504, 1507 n.12 (No. 98-1107, 2001) (holding lack of knowledge of what the regulations require is not a defense.)

C. Likely to cause death or serious physical harm

The Commission does not require there be a significant risk of the hazard coming to fruition, "only that if the hazardous event occurs, it would create a 'significant risk' to employees." *Waldon Health Care Ctr*, 16 BNA OSHC 1052, 1060 (No. 89-3097, 1993)(citing *National Realty & Constr. CO. v. OSHRC*, 489 F.2d 1257, 1260-61 (D.C. Cir. 1973). Thus, the Commission has made clear "the 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 1063. "When evaluating whether the hazard presented the likelihood of serious physical harm, we do not inquire into whether the absence of the abatement method was what presented the likelihood; we remain focused on the hazard alone, and a hazard is likely to cause serious physical harm if the likely consequences of employee exposure would be serious physical harm." *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122 (No. 88-572, 1993).

Decedent was wearing the synthetic lanyard while performing exterior column splice work at a height of more than ten feet. His lanyard failed, and he fell from his temporary elevated work platform, sustained serious injuries, and died from those injuries. (Tr. at 100.) In addition, the warning label for the retractable lanyard decedent was wearing on the date of the incident states "Manufacturer's instructions must be followed or it could result in serious injury or death." (C-19, at 14; Tr. at 149.)

Complainant has established the fall hazard is likely to, and did, cause serious physical harm and death.

D. Feasible means of abatement

A method of abatement is feasible under section 5(a)(1) if Complainant "demonstrate[s] 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." *Beverly Enters., Inc*., 19 BNA OSHC 1161, 1190 (No. 91-3344, 2000) (consolidated); see *Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 640 (5th Cir. 1979) ("It is the Secretary's burden to show that demonstrably feasible measures would materially reduce the likelihood that such injury as that which resulted from the cited hazard would have occurred."). Complainant is not required to show that the proposed abatement would completely eliminate the hazard. *Acme Energy Servs*., 23 BNA OSHC 2121, 2127 (No. 08-0088, 2012), *aff'd,* 542 F. App'x. 356 (5th Cir. 2013); *Morrison-Knudsen Co./Yonkers Contracting Co*., 16 BNA OSHC at 1122. "Feasible 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." *Arcadian*, 20 BNA OSHC 2001 at *13 (quoting *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2032 (No. 89-0265, 1997).

The Citation, as to implementation of feasible and reasonable means of abatement, states as follows:

> Among other methods, some feasible methods to correct this hazard would be to complete the following: Follow the following ANSI Z359.1-2007 sections: 7.1, 7.1.8, 7.1.9 and 7.2.

See Citation at 6.

However, as a precedent to assessing whether feasible and reasonable means of abatement have been established by Complainant the Respondent could have taken, Complainant must first establish Respondent violated the general duty clause as alleged. The filing of the *Notice of Contest* by Respondent served to toll the abatement compliance requirement until there is a final Order of the Commission. *Reich v. Manganas,* 70 F.3d 434 (6th Cir. 1995). *See* section 10(b) of

the Act. *See also Secretary v. Matthews and Fritts, Inc*., 2 BNA OSHC 1149 (No. 3998, 1974). Abatement is tolled pending a final decision of the Commission so employers will not be required to abate conditions that may not be in violation of the Act. Thus, Complainant must prove Respondent, irrespective of the proposed means of abatement he set forth in the Complainant, violated the Second Version.

In assessing whether or not Respondent was providing employment and a place of employment which was free from recognized hazards, the Court needs to determine what the Second Version requires, what Complainant alleges Respondent did not follow under the Second Version and what Respondent actually did. Thus, the Second Version and CSHO St. Clair's report and conclusions are the governing benchmarks to assess compliance of Respondent.

At trial, Complainant specifically relied on Sections 7 and 9 under the "Inspection" subheading of the Second Version in setting forth his arguments Respondent did not comply with the Second Version. (Tr. at 902; Ex. 3 at CX0006.)

Specifically, Sections 7 and 9 state as follows:

> 7.) Check the lifeline for cuts, burns, chemical damage, abrasions, loose strands, or corrosion, the lifeline must not be damaged.
>
> 9.) Use of this equipment in areas where surrounding hazards exist may require additional precautions to reduce the possibility of injury to the user or damage to the equipment. Hazards may include, but are not limited to: high heat, caustic chemicals, corrosive environments, high voltage power lines, explosive or toxic gases, moving machinery or overhead materials that may fall and contact the user or fall arrest system.

See Ex. C-10 at 2.

Respondent argues that "having a clear and specific policy to keep the lanyard away from hot work" and having a policy of inspecting PPE for burns or other damage complied with the Sections 7 and 9 of the Second Version.

As to Section 7, Respondent offered its policies which require the lanyard be inspected for cuts, burns, chemical damage, abrasions, loose strands, or corrosion, the lifeline must not be damaged. (Tr. at 409; C-27 at 326, C-44, C-45).[19] Younk testified his job responsibilities included checking his welders' PPE at the beginning of the day, ensuring their equipment was set up properly before, during, and after their shift, and checking the welders' work (i.e., the preheat or the welding). (Tr. at 113-114.) Respondent's actions in this regard stand mainly unrefuted by Complainant. Respondent's policies and management oversight procedures comply with Section 7.

Complainant argues Respondent's method of "positioning" the lanyard was insufficient to make the synthetic lanyard suitable because Respondent was essentially relying on "human factors." (Sec'y Br. at 24-26.) Complainant argues that the positioning policy was not in writing and therefore it was not effective. (Tr. at 104-106). The Court is persuaded by the consistent testimony of the witnesses from the industry that "positioning" of a lanyard was standard practice during exterior column splice work, and that training programs regularly include this instruction, and if done properly reduces the risk of cuts, burns, abrasions and other damages which could contribute to the fall hazard. (Tr. at 204, 218, 567, 573, 595-596, 608.) Complainant offered no evidence to refute this evidence. In implementing the "positioning" policy, the Court finds Respondent had a work rule it followed even though it was not in writing and it trained its welders to follow it. The rule is consistent with the industry. Respondent also took additional precautions to reduce the possibility of injury as acknowledged by Complainant. Complainant acknowledges Respondent did "make an assessment of workplace conditions" and "identify the presence of hot

[19] Testimony was presented the lanyards were regularly inspected. Decedent had, prior to the date of the incident, turned in a damaged lanyard and was issued a new one. (Tr. 103,410, 998). This supports employees were trained to inspect their equipment for damage and to take it out of production in addition to the inspection done by the worksite supervisors.

objects, sparks, flames, and heat producing properties" as required by Respondent's own plans (C-44, C-45 and Sec'y Br. at 28.) Accordingly, Respondent would be in compliance with Section 9.

Having determined Respondent is in compliance with Sections 7 and 9 of the Second Version, the Court finds Complainant failed to establish Respondent, in the first instance, had violated the Second Version which was established to be in effect at the time of the issuance of the Citation. For this reason, Citation 1, Item 1 as originally pleaded is VACATED.

2. Alternative alleged violation of 29 C.F.R. § 1926.95(c)

Complainant, in the alternative, claims Respondent violated section 1926.95(c) because the synthetic lanyard was not of safe design and construction for the work to be performed.[20] (Sec'y Br. at 23.) Respondent claims the opposite; that the synthetic lanyard was of safe design and construction for the decedent's exterior column splice work. (Resp't Br. at 23.) Using much of the same evidence applied in vacating the primary alleged violation of the general duty clause, the Court finds Complainant has not carried his burden of proof for this alternative alleged violation. The Court, to avoid duplicative discussion, incorporates the parties arguments and evidence and the Court's findings of fact and discussion set forth in its analysis of the general duty clause violation.

a. Standard is applicable

The parties stipulated this standard applies to the facts of this case (if the general duty clause was found not to apply).[21] (Sec'y Br. at 23; Resp't Br. at 24-25; Ex. J-1 at 1.)

b. The standard was not violated

[20] Section 1926.95(c) provides: All personal protective equipment shall be of safe design and construction for the work to be performed.

[21] The Court notes Respondent states this standard "should apply to [Respondent] unless a more specific provision is applicable to the alleged conduct." (Resp't Br. at 25.) However, Respondent did not identify any other possible specific provision, like the fall protection standards in Subpart R as specified *supra*.

The design of the synthetic lanyard at issue here is consistent with section 1926.104(d), which requires that a lanyard be "a minimum of ½ inch nylon, or equivalent, with a maximum length to provide for a fall of no greater than 6 feet. The rope shall have a nominal breaking point of 5,400 pounds." 29 C.F.R. § 1926.104(d); *see Jesco, Inc.*, 24 BNA OSHC 1076, 1078 (No. 10-0265, 2013) (holding that "[a] standard must be read as a coherent whole and, if possible, construed so that every word has some operative effect.") Complainant has not disputed this claim. Therefore, there is no dispute the synthetic lanyard was safe design and construction.

Complainant argues the synthetic lanyard was not properly designed and constructed "for the work that was being performed." The parties in assessing compliance with this standard are essentially making the same arguments they made under the general duty clause analysis. Specifically, to determine suitability for the work being performed at the worksite, the parties would have to resort to the Manufacturer's SOPs in effect at the time of the issuance of the Citation. There is very little difference between what Complainant has alleged is the violation under the general duty clause and what it is under this specific standard - under both Complainant has alleged the synthetic lanyard was not proper for the work conditions existing at the worksite. The Court finds, for the same reasons above in the general duty clause analysis,[22] Complainant failed to establish Respondent's non-compliance with this cited standard. Accordingly, Complainant has not met his burden for this Citation violation alleged in the alternative.

Citation 1, Item 1 as cited in the alternative is VACATED.[23]

C. Threshold Issue for Items 2, 3a, and 3b: Is the Temporary Working Platform a Scaffold as defined by OSHA's standards?

[22] The Court specifically relies on its analysis and findings relating to hazardous condition recognition and Respondent being in compliance with the Second Version of the Manufacturer's SOP.

[23] As the Court vacates this Citation Item as originally pleaded and in the alternative, Respondent's affirmative defenses need not be addressed as they have been rendered moot. (Resp't Br. at 40-43.)

Before analyzing Citation 1, Items 2, 3a and 3b, which allege scaffold violations, the Court must first determine whether the temporary working platform at issue here is a scaffold subject to OSHA's scaffolding regulations. Without this finding, the cited standards would not apply to Respondent. The Court finds Respondent's temporary working platform is a scaffold and subject to the cited regulations.

Respondent claims the platform is not a scaffold, as it is permanently attached to the column by a weld. (Resp't Br. at 27.) In this way, Respondent claims it is an extension of the floor being worked on. All of the witnesses who testified, who actually work in the industry, do not consider the platform to be a scaffold. (Tr. at 155, 309-310, 448-449, 451, 475, 774).

OSHA, however, has defined what it means by a scaffold that is subject to its scaffolding regulations. 29 C.F.R. § 1926.450(b)("Definitions"). Section 1926.450(b) defines a scaffold as the following: "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." 29 C.F.R. § 1926.450(b). A "platform" is defined as a "work surface elevated above lower levels. Platforms can be constructed using individual wood planks, fabricated planks, fabricated decks, and fabricated platforms." 29 CFR 1926.450(b). "When determining the meaning of the standard, the Commission must first look to its text and structure." *The Davey Tree Expert Co.*, 2016 WL 845440 at *1 (No. 11-2556) (citing *Superior Masonry Builders Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003)). If the meaning of the standard's language is "sufficiently clear" the inquiry ends. *Unarco Comm. Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993).

Based on review of the plain language of the definition, the Court finds the definition of a scaffold is clear and unambiguous. The platform at issue here, where the decedent was actually standing, is elevated 33 feet above the floor below. Younk, Strange and Gruno all testified they

agreed to this fact. (Tr. at 154-155, 341-342, 447-448, 544.)[24] It is also undisputed the platform at issue was used to support decedent while he performed exterior column splice work. Finally, it is undisputed after finishing the splice work at one location decedent would then remove the platform from the exterior column and move it to another location. (Tr. at 156).

In *Armstrong Steel Erectors*, 17 BNA OSHC 1385, 1389 (No. 92-262, 1995) the Commission addressed a similar issue where the employer argued that a "painter's pick" was not a scaffold as defined in OSHA's regulations. In that case, the Commission ruled, "whether a surface constitutes a scaffold is a question of fact to be answered by comparing the definition of a scaffold to the characteristics of the surface in question." *Armstrong Steel Erectors*, 17 BNA OSHC at 1389. The Commission ruled that the "painter's picks" were considered temporary, even though they were welded into place, because the workers moved and removed the "painter's picks" at the end of the project. Thus, the Commission determined the painter picks were considered scaffolds. *Armstrong Steel Erectors*, 17 BNA OSHC at 1389. Similarly, here, the elevated platform decedent was standing on was moved to a new location once he was finished splicing, despite being welded into place.

Respondent's expert testimony the platform is not considered a scaffold by the industry is undermined as his own firm authored a document designing a modified angel wing which was used by Respondent after the incident. The angel wing document indicated it is subject to the ANSI scaffold standards. (Ex. C-25.) It is hard to differentiate between the elevated wooden work platform and the angel wing - they both are temporary, they are both elevated, both can be moved and removed and people work on both. The Court questions how the expert could consider one a

[24] While Younk and Gruno testified they did not consider the platform to be a scaffold, they were asked whether the platform met the components of the OSHA definition of a scaffold. Both of them agreed the platform was elevated and served to support a worker while performing a task. It is undisputed the platform was moved to a new location when the worker finished his splicing task. (Tr. at 156.)

scaffold and one not a scaffold. The Court also notes Respondent's expert testified that "the term between scaffolding and work platform, it's probably something we need to resolve internally within the industry to be in compliance…." (Tr. at 774.) When questioned regarding whether the platform was temporary "by virtue of the fact that you either have to cut it off or use a grinding wheel," the expert replied, "I'm somewhat semantics with regard to it. It's temporary because it's not part of the permanent facility structure. It would not be left in place." (Tr. at 675-676.) Respondent's expert opinion, on the issue on whether the platform was considered a scaffold, is given no weight. The Court finds just because an industry practice is out of sync with the regulation, the industry does not override the requirement of the OSHA regulation.

Respondent has not argued or advanced a lack of fair notice affirmative defense for this issue. In any event, the defense would be difficult to shoulder in light of the *Armstrong. See Corbesco Inc. v. Sec'y of Labor*, 926 F.2d 422, 428 (5th Cir. 1991) (holding notice is provided through Commission decisions).

The Court determines the subject platform is a scaffold, as defined by OSHA regulations. This ruling is applicable to Citation 1, Items 2, 3a and 3b.

D. Citation 1, Item 2 – The Alleged Scaffold Design Violation

Complainant alleged a violation of the Act as follows:

29 C.F.R. 1926.451(a)(6): Scaffolds were not designed by a qualified person:

> On or about February 24, 2015, and at times prior thereto, employees were exposed to fall hazards greater than 10 feet while welding from scaffolds located on the 6th floor of the replacement hospital that were not designed by a qualified person.

See Citation at 7. The cited standard, section 1926.451(a)(6), provides in pertinent part: "General requirements. (a) Capacity (6) Scaffolds shall be designed by a qualified person and shall be constructed and loaded in accordance with that design." 29 C.F.R. § 1926.451(a)(6).

It is undisputed Respondent does not know specifically who designed the scaffold at issue here. (Resp't Br. at 31.) Respondent claims the design has been passed down by journeymen for decades, but also, decedent himself constructed and loaded his scaffold in accordance with that design. (Resp't Br. at 31-32.) Thus, the relevant issues for the Citation item are whether the "decades of journeyman" evidence in this case is sufficient to constitute a "qualified person," as defined by OSHA regulations, and whether the evidence supports Respondent's claim decedent constructed and loaded the scaffold in accordance with that design or decedent himself was a qualified person. As discussed below, the Court finds that the scaffold was not designed by a qualified person, as required by OSHA's regulations.

1. The Standard Applies

As found above, the subject temporary work platform is a scaffold under the terms of this standard. The cited standard applies.

2. The Standard Was Violated

Complainant claims Respondent violated the standard because the temporary work platform was not designed by a qualified person. (Sec'y Br. at 32-34.) Respondent argues although Respondent does not know precisely who designed the temporary work platform:

> the design of this work platform has been passed down from prior generations of iron workers to current generations of iron workers. In this regard, *each work platform is designed by the iron worker constructing it* and utilizing it. No two work platforms are identical.

(Resp't Br. at 31)(emphasis added). Respondent also claims the decedent was a "qualified person" as defined by OSHA's regulations. (Resp't Br. at 30.)

The relevant OSHA regulation provides:

> *Qualified* means one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience,

> has successfully demonstrated his/her ability to solve or resolve problems related to the subject matter, the work, or the project.

29 C.F.R. § 1926.450(b). Applying the definition to the facts of this Citation Item, the question becomes whether the scaffold at issue here was designed by someone who has demonstrated the ability to solve or resolve problems *in the subject scaffold* by either (1) possession of a recognized degree, certificate or professional standing, or (2) extensive knowledge, training and experience.[25]

Here, the Court finds to satisfy the qualified person requirements, the evidence must show Respondent's qualified person who designed the subject scaffold, whoever that may be, must be qualified in scaffolding design. It is undisputed the record does not contain any evidence of a previous journeyman's "recognized degree, certificate or professional standing" in scaffold design demonstrating the ability to solve or resolve problems in the subject scaffold. 29 C.F.R. § 1926.450(b)("qualified"); (Resp't Br. at 31.) Therefore, in order to satisfy the requirements of the cited standard, Respondent must establish its qualified person who designed the subject scaffold had "extensive knowledge, training and experience" that demonstrated the ability to solve or resolve problems in the subject scaffold. 29 C.F.R. § 1926.450(b)("qualified"). At a minimum, the Court finds the qualified person must demonstrate knowledge and training and work experience of the OSHA scaffolding regulations found at 29 C.F.R. § 1926.454.[26] A review of those

[25] Respondent gleams over the clear interpretation of the definition which requires "training, experience and knowledge." Respondent argues long term experience from being on the job meets the requirement all three. The Court interprets the person must be qualified by extensive experience and training and experience. The use of the word "and" as opposed to "or" is a clear indication a person must possess all three to be a qualified person. *See, e.g., United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) ("[W]ords in statutes should not be discarded as 'meaningless' and 'surplusage' when Congress specifically and expressly included them...."); *accord* [*AKM LLC dba] Volks [Constructors v. Secretary of Labor*], 675 F.3d [752,] 756 [(D.C. Cir. 2012)] ("[W]e must be 'hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.' " (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011))." *Delek Ref., Ltd. v. Occupational Safety & Health Review Comm'n*, 845 F.3d 170, 177–78 (5th Cir. 2016).

[26] The training requirements for scaffold erection, disassembly, moving, operating, repairing or maintaining or inspecting a scaffold state as follows:

1926.454(b) The employer shall have each employee who is involved in erecting, disassembling, moving, operating,

regulations reveals the qualified person must have demonstrated knowledge that includes horizontal and vertical loading, load-carrying capacities, structural integrity, and scaffolding hazards, of the subject scaffold. *See, e.g.*, 29 C.F.R. §§ 1926.454.(a)(4), (b)(1), (b)(3). The record does not contain such evidence for any of the previous journeymen or decedent himself.

For example, in contrast to the expert's post-mortem analysis, there is no evidence of pre-construction knowledge of maximum horizontal and vertical loading calculations, load placement, structural integrity, placement of the welder and front end scaffold design by anyone, including the decedent. Similarly, there is no evidence of knowledge of anyone's ability to recognize a hazard that might present itself when the scaffold is constructed, including the decedent. There is also no evidence anyone knew the calculations of the angle iron arms, the placement of boards to prevent slippage, or the placement of the pitch to avoid tripping on the subject scaffold, including the decedent. Additionally, one with knowledge of the regulations and hazard recognition, and

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repairing, maintaining, or inspecting a scaffold trained by a competent person to recognize any hazards associated with the work in question. The training shall include the following topics, as applicable:

1926.454(b)(1)

The nature of scaffold hazards;

1926.454(b)(2)

The correct procedures for erecting, disassembling, moving, operating, repairing, inspecting, and maintaining the type of scaffold in question;

1926.454(b)(3)

The design criteria, maximum intended load-carrying capacity and intended use of the scaffold;

1926.454(b)(4)

Any other pertinent requirements of this subpart.

trained in OSHA regulations which require damaged equipment to be taken out of production, would not have put damaged equipment into use.[27] (Tr. at 354-356.)

While the qualified person does not need to be an engineer to design it – the qualifications of the qualified person must demonstrate more knowledge than what was imparted to the Court at the trial. Merely giving the Court training records, and relaying bullet points of a toolbox talk, does not demonstrate what someone learned and the knowledge the person possessed. Additionally, telling the Court the courses someone took without detailing the content of the courses does not provide much in the way of demonstration of that person's abilities.[28] Finally, the expert's analysis, completed post incident, does not establish compliance since his analysis of the scaffold was limited to assessing load capacity, focusing on the loading at the weld that attached the scaffold to the column on which decedent was working. (Tr. at 770; Ex. R-18.) The expert's testimony and report did not analyze any other aspect of the subject scaffold, such as the pitch point of the planks, or other scaffolding requirements, such as the minimum gap requirement between the planks of the scaffold. (Tr. at 780.) The expert also testified the boards were loose and could move in the forward direction, which could destabilize the person working on it.[29] (Tr. at 700-701.)

While Respondent's qualified person may have been an experienced welder and ironman – the subject matter at issue here is scaffold design. Merely reproducing a platform that had been developed by someone in the past and having no accidents, until now, does not make the person who constructed the scaffold a qualified person as defined by OSHA's regulations. *Mineral*

[27] 29 CFR 1926.451(f)(4). Evidence indicates the side bar is missing about a 1.2 inch of length. (Ex. C-10 at 29).
[28] The testimony indicates decedent had basic scaffold training. The training would not have dealt with the design of the scaffold. (Tr. at 292-294; Ex. C-57.)
[29] He testified that it was "likely" the worker would be restrained from falling in that instance because he would be wearing a retractable lanyard. (Tr. at 701.) However, the issue for this Citation Item is not the lanyard, but demonstration of the knowledge of the requirements of a scaffold, which includes a stable platform. 29 C.F.R. § 1926.454.

Industries & Heavy Constr. Group v. OSHRC, 639 F.2d 1289, 1294 (5th Cir. 1981) ("The goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors.").

To the extent Respondent claims there was no hazard because the platform was adequately designed based on prior generations of qualified journeymen, the Court rejects this argument. *Bunge Corp.*, 638 F.2d 831, 834 (5th Cir. 1981) ("Unless the general standard incorporates a hazard as a violative element, the proscribed condition or practice is all that the Secretary must show; hazard is presumed and is relevant only to whether the violation constitutes a 'serious' one."). Respondent's expert indicated, due to the opening in front of the elevated platform, it was possible that a worker could lose his balance. (Tr. at 700-701.) In losing his balance, the worker could fall or sustain a serious injury. (Tr. at 701. On the drawing the expert prepared, there appears to be a 10-12 inch gap. (Ex. R-18 at 3); *see also* Exs. C-19 at 7-8 (picture shows the gaps and the decedent's attempts to fill the gap with a smaller board). CSHO St. Clair also testified a pivot point caused by the clamp was located at a place on the platform that could cause a worker backing up to trip. (Tr. at 932.) Thus, while after the fact testing by the expert reveals it was structurally sound from an engineering standpoint, therefore eliminating a collapse hazard, the design did not take into consideration the probability of the board moving forward and the pivot point being a tripping or fall hazard. The pivot point prevented the back board from moving, but nothing prevented the front one from moving and the possibility of tripping over the pinch point.

The Court finds Respondent has not shown a qualified person, as defined by OSHA's regulations, designed the scaffold at issue here. The terms of the standard have been violated.

3. The Decedent Was Exposed to the Violative Condition

Complainant claims decedent was exposed to a fall hazard by working on a temporary working platform that was not designed by a qualified person. (Sec'y Br. at 34.) Respondent has made no claims in this regard. The Commission does not require definitive proof of actual exposure to the hazard; rather, the question is whether employees have access to the hazard. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). Access to a hazardous condition exists "if there is a 'reasonable predictability' that employees 'will be, are, or have been in' the 'zone of danger.'" *Kokosing*, 17 BNA OSHC 1869 (citing *Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994)). Here, it is undisputed decedent was working on the scaffold at issue, for hours, on the day of the incident. (Tr. at 235.) Complainant established exposure for this Citation Item.

4. Respondent Knew or, with the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

Complainant must establish the employer had knowledge of the violative condition. *W.G. Yates & Sons Const. Co. v. OSHRC*, 459 F.3d 604, 607 (5th Cir. 2006); *see also Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568 (5th Cir. 1976). "To establish knowledge, Complainant must prove the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Jacobs Field Svcs*. *N.A.,* 25 BNA OSHC 1216 (No. 10-2659, 2015) (citing *Contour Erection & Sliding Sys., Inc*., 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007)).

Complainant claims Respondent had knowledge decedent worked on a temporary working platform was not designed by a qualified person. (Sec'y Br. at 34-35.) Respondent has not made any express argument in this regard, other than claiming it believes the temporary working platform was not a scaffold, and that even so, decedent was a qualified person. The Court rejects Respondent's arguments, and finds that, under Commission precedent, Respondent had knowledge it knew of the violative conditions related to the temporary working platform.

Despite Respondent's witnesses claiming they did not consider the temporary work platform as a scaffold, Respondent is responsible for knowing OSHA's requirements. *See S&G Packaging Co.*, 19 BNA OSHC 1504, 1507 n.12 (No. 98-1107, 2001) (holding that even though no one else in the industry takes the precaution that OSHA prescribes, lack of knowledge or lack of notice is not established essentially because a standard that prescribes a particular precaution gives notice that it is required without regard to what industry thinks). As discussed above, Younk and Gruno knew well the characteristics of the platform: that it was elevated, in this instance 33 feet above the floor below; and it was used to support decedent as he worked. Younk and Gruno also knew the decedent's qualifications, and lack thereof in scaffolding certification and training. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation"), *aff'd,* 79 F.3d 1146 (5th Cir. 1996) (unpublished). Younk's and Gruno's knowledge, as supervisors, is imputed to Respondent. *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999) ("[K]nowledge can be imputed to the cited employer through its supervisory employee.")

Complainant has established knowledge of this violation for this Citation Item.

5. The Violation was Serious

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability an accident would occur; he need only show if an accident did occur,

serious physical harm could result. *See Trinity Industries, Inc.*, 504 F.3d 397, 401 (3d Cir. 2007). The facts of this case show the violation of this standard resulted in decedent falling from a height of 33 feet, and died as a result. The violation here is properly classified as serious.

Based on the foregoing, the Court finds Complainant has established a serious violation of 29 C.F.R. § 1926.451(a)(6). Accordingly, Citation 1, Item 2 shall be AFFIRMED as a serious citation..

E. Citation 1, Item 3a – The Alleged Scaffold Inspection Violation

Complainant alleged a violation of the Act as follows:

> 29 C.F.R. 1926.451(f)(3): Scaffolds and scaffold components were not inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's integrity:
>
> On February 24, 2015, the employer did not ensure site built scaffolds were inspected by a competent person before each shift. This condition exposed employees to fall hazards greater than 10 feet.

See Citation at 8. Section 1926.451(f)(3) provides in pertinent part: "(f) Use. (3) Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after an occurrence which could affect a scaffold's structural integrity." 29 C.F.R. § 1926.451(f)(3).

1. The Standard Applies

As noted above, the temporary work platform has been found to be a scaffold, as defined by the OSHA's requirements. The cited standard applies.

2. The Standard Was Violated

The issue here is whether the decedent was a competent person, as defined in OSHA's regulations.[30] The relevant regulation provides that a:

[30] The requirements of a qualified person, as discussed above regarding Item 2, are slightly different than the requirements of a competent person at issue for this Citation item, Items 3a and 3b.

> *Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

29 C.F.R. § 1926.450(b)("Definitions"). Regarding section 1926.451(f)(3), the preamble provides:

> [T]"he Agency notes that the criteria for a "competent person" depend on the situation in which the competent person is working. For example, a "competent person" for the purposes of this provision must have had specific training in and be knowledgeable about the structural integrity of scaffolds and the degree of maintenance needed to maintain them. The competent person must also be able to evaluate the effects of occurrences such as a dropped load, or a truck backing into a support leg that could damage a scaffold. In addition, the competent person must be knowledgeable about the requirements of this standard. A competent person must have training or knowledge in these areas in order to identify and correct hazards encountered in scaffold work.

Final Rule, "Safety Standards for Scaffolds Used in the Construction Industry," 61 Fed. Reg. 46026-01 (Aug. 30, 1996). OSHA has also issued a letter of interpretation regarding the requirements of a competent person:

> Thus, successful completion of a course does not, alone, necessarily establish an individual as a 'competent person' for a number of reasons. By its terms, the definition of a 'competent person' compels the employer to select an employee based upon his or her **capability** to identify hazards. The course may not be sufficiently comprehensive with respect to the information needed to meet the knowledge requirement in the definition. Remember that the type and extent of the knowledge will vary with what is necessary to successfully perform the task required of the competent person in the standard. Also, the course may not adequately test the employee's understanding of the course material.
>
> Finally, the definition of a competent person requires the individual to have the authority to take prompt corrective action. No course can provide that authority, since it can only be provided by the employer.

OSHA Interpretation Letter ("Re: Requirements for being designated a competent person under Part 1926 Subpart L (Scaffolds)", June 17, 2005 (emphasis in original). Simply stated a competent person is one:

1. Who knows the hazards existing and likely to exist;

2. Knows how to control or eliminate the hazards; and
3. Has been given the authority to promptly correct the hazards and does.

The Court determines, at a minimum, the competent person must, for the purpose of the scaffold regulations, satisfy requirements with regard to what is included in the training regulations for scaffolds found at 29 C.F.R. § 454. A person cannot be deemed a competent person under the scaffolding regulation unless he possess at least knowledge of the scaffolding requirements. As discussed below, the record indicates decedent was not a competent person because his training records and work experience do not demonstrate this capability.

Respondent claims decedent was a competent person because he was trained in constructing the work platform, and had the authority to correct any hazard he saw associated with it. (Resp't Br. at 8, 37.) Complainant argues this arrangement was insufficient to meet the requirements of the standard because Respondent did not designate in writing the decedent was a competent person, as required in Respondent's safety policy. (Sec'y Br. at 3, 25, 38.) The Court is unpersuaded by this particular argument by Complainant. While Respondent may have violated its own rules as to written verification of who it has designated as a competent person, there is no regulatory requirement the competent person designation be in writing.

The Court finds more persuasive the dearth of evidence in the record regarding decedent's capability to identify hazards associated with the work platform and how to control or eliminate them. It is undisputed decedent did not receive scaffolding training complainant with 29 C.F.R. § 1926.454; therefore, the Court looks to decedent's work experience to see if he had the capability to identify hazards associated with the work platform. Respondent claims decedent erected fourteen of them at this worksite. (Resp't Br. at 12; Tr. at 545-546.) However, this statement is insufficient evidence. There is no evidence to demonstrate decedent's capability with the work platform or with OSHA's scaffolding regulations at 29 C.F.R. § 1926.454. *R. Williams*

Construction Company v. OSHRC and Chao, 464 F.2d 1060 (9th Cir. 2006)(holding that "we disagree the Company discharged its OSHA duties merely by relying on the general work experience … 'or common sense.'"). Younk, decedent's direct supervisor, also testified that he did not consider decedent to be a competent person with respect to scaffolding because he was not aware of decedent's background, education, or training in scaffolding. (Tr. at 158.)

Finally, the evidence fails to establish whether decedent had the ability to promptly correct any hazard he found. Respondent claims it considered every worker, including the decedent, on its worksite a competent person[31] who had the ability to stop work and correct a hazard. (Resp't Br. at 11-12.) While decedent had the ability to correct his own work, the evidence has not established decedent, or any other non-supervisory ironworker, had the right to stop the work of others and demand its immediate correction. In fact, in response to questioning from the Court, Gruno testified while a non-supervisory worker has the right to stop his work and then locate his supervisor who would then access the situation and determine the correct course of action, he could not recall an instance where a non-supervisory worker has stopped the work of the entire gang. (Tr. at 465-466.) Also, this scenario does not vest in the employee the immediate authority to stop unsafe work of others. The Court finds this ability is not equivalent to immediate authority to correct a hazard. A competent person must have the right to immediately correct the work of others and not just his own work. There is also no evidence regarding whether decedent knew and understood Respondent's safety policies so as to know whether they were violated and how to

[31] The authority to correct is very broad. The competent person has to have the final word in the operation of the work. Thus, a foreman, superintendent or even a project manager has no authority to overrule the decision of the competent person. Reading the regulations as a whole contemplates the employer will designate certain persons as competent versus making a global designation as argued by Respondent in this case. This set up ensures accountability and oversight. The Court understands many employers train their entire staff and then call them competent persons and establish company policy to state anyone who is a competent person can stop work due to a safety concern. This course of action, while not to be discredited as it gives the employees the ownership to take safety into their own hands, is perilous because when many employees work together only one person can be the competent person. Even though everyone may be capable, only one can have the requisite authority to make the final decision.

enforce them. The Court finds the decedent was not a competent person in the subject work platform as defined in OSHA's regulations.

Respondent also argues Younk, decedent's supervisor, was a competent person in the subject work platform as defined by OSHA's regulations. (Resp't Br. at 37.) However, at trial, Younk was adamant the subject work platform was not a scaffold. (Tr. at 241-242.) He testified about his training in other types of scaffolds, but did not agree the decedent constructed, worked on, and fell from one. This testimony convinces the Court that Younk cannot be a competent person, as defined by OSHA standards, with regard to the subject work platform, which has been found to be a scaffold. In addition, there is no proof Younk's scaffold training including training meeting the requirements of 29 C.F.R. § 1926.454.

Therefore, no competent person inspected decedent's scaffold. Complainant has established Respondent violated the cited standard.

3. The Decedent Was Exposed to the Violative Condition

As discussed in Item 2, decedent worked from the subject scaffold for hours, and fell from it. Complainant has established exposure to the violative condition for this Citation Item.

4. Respondent Knew or, with the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

Complainant claims Respondent had knowledge decedent worked on a temporary working platform which was not inspected by a competent person. (Sec'y Br. at 38.) As discussed with Item 2, knowledge of violating the terms of a standard is not required; all that is required is knowledge of the violative conditions. *Jacobs Field Svcs. N.A.*, 25 BNA OSHC 1216, 2015 WL 1022393 at * 3. Younk knew decedent did not have the qualifications of a competent person to inspect the subject platform. (Tr. at 158.) Younk also testified Respondent did not have a scaffold inspection policy for the subject platform as it did for other scaffolds on the worksite. (Tr. at 158-

159.) Younk also testified he considered himself a competent person for certain types of scaffolds, but did not consider the subject platform a scaffold. (Tr. at 241-242, 251; Ex. C-33.) Younk knew of the violative conditions with respect to inspecting the subject work platform. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079. Younk's knowledge is imputed to Respondent. *Access Equip. Sys., Inc.*, 18 BNA OSHC at 1726. Complainant has established Respondent's knowledge.

5. The Violation was Serious

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *See Trinity Industries, Inc.*, 504 F.3d 397, 401 (3d Cir. 2007). The facts of this case show the violation of this standard resulted in decedent falling from a height of 33 feet, and died as a result. The violation here is properly classified as serious.

Based on the foregoing, the Court finds Complainant has established a serious violation of 29 C.F.R. § 1926.451(f)(3). Accordingly, Citation 1, Item 3a shall be AFFIRMED as a serious citation.

F. Citation 1, Item 3b – The Alleged Scaffold Erection Violation

Complainant alleged a violation of the Act as follows:

> 29 CFR 1926.451(f)(7): Scaffolds were not erected, moved, dismantled, or altered, by trained and experienced employees under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration; Activities were not performed only by experienced and trained employees selected for such work by the competent person.

> On February 24, 2015, the employer did not ensure site built scaffolds were erected under the direction of a competent person. This condition exposed employees to fall hazards greater than 10 feet.

Citation at 9. Section 1926.451(f)(7) provides in pertinent part:

> Scaffolds shall be erected, moved, dismantled or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving dismantling or alteration. Such activities shall be performed only by experienced and trained employees selected for such work by the competent person.

29 C.F.R. § 1926.451(f)(7). Regarding this section, the preamble states:

> The Agency has also clarified that the actual work be performed by experienced and trained employees, selected by the competent person...In particular, a member of the Advisory Committee stated 'it needs to be employees that are properly trained and experienced being the only ones allowed to do this kind of work.' OSHA agrees with this recommendation because, unlike other individuals on a finished scaffold, erectors and disassemblers are exposed to the hazards of working on a partially completed structure, and a competent person is needed to select the proper individuals to do this work."

Final Rule, "Safety Standards for Scaffolds Used in the Construction Industry," 61 Fed. Reg. 46026-01 (Aug. 30, 1996).

1. The Standard Applies

As noted above, the temporary work platform has been found to be a scaffold, as defined by the OSHA's requirements. The cited standard applies.

2. The Standard Was Violated

Decedent erected the subject scaffold, under the direction of Younk. As found above, decedent and Younk do not have the qualifications to be considered a competent person as defined by OSHA's regulations. Complainant has established the standard was violated.

3. Decedent Was Exposed to the Violative Condition

As discussed in Item 2, decedent worked from the subject scaffold for hours, and fell from it. Complainant has established exposure to the violative condition for this citation item.

4. Respondent Knew or, with the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

Complainant claims Respondent had knowledge decedent did not erect the subject scaffold under the supervision of a competent person. (Sec'y Br. at 38.) As discussed with Item 2, knowledge of violating the terms of a standard is not required; all that is required is knowledge of the violative conditions. *Jacobs Field Svcs. N.A.*, 25 BNA OSHC 1216, 2015 WL 1022393 at * 3. As discussed above, Younk and Gruno knew they, and the decedent, did not have the qualifications of a competent person for the erection of the subject scaffold. (Tr. at 157-158, 172, 241, 453, 476.) Younk knew of the violative conditions with respect to inspecting the subject work platform. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079. Younk's and Gruno's knowledge is imputed to Respondent. *Access Equip. Sys., Inc.*, 18 BNA OSHC at 1726. Complainant has established knowledge of this violation for this citation item.

5. The Violation was Serious

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *See Trinity Industries, Inc.*, 504 F.3d 397, 401 (3d Cir. 2007). The facts of this case show the violation of this standard resulted in the decedent falling from a height of 33 feet, and died as a result. The violation here is properly classified as serious.

Based on the foregoing, the Court finds Complainant has established a serious violation of 29 C.F.R. § 1926.451(f)(7). Accordingly, Citation 1, Item 3b shall be AFFIRMED as a serious citation.

VI. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Court to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995).

Complainant proposed the maximum penalties for each the affirmed violations, with a 10% deduction due to Respondent's size.[32] (Tr. at 827-830.) Respondent employs approximately 200 workers nationwide, but had less than 200 workers on the Fort Bliss worksite. (Tr. at 828-829; Ex. C-3.) As for gravity, Complainant considers the violations were "high gravity" with "greater probability." (Tr. at 827.) According to CSHO St. Clair, "several individuals were exposed on this stand." (Tr. at 827.) According to CSHO St. Clair, the duration of exposure was "all day,

[32] The court notes that OSHA's statutory maximum penalties were increased pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015), but for violations occurring after November 2, 2015. 81 Fed. Reg. 43430 (July 1, 2016). Here, the violations occurred before November 2, 2015, so the statutory maximum for a serious violation of $7,000 applies.

many days" for as long as the workers performed their exterior column splice work. (Tr. at 827.) Respondent has not disputed CSHO St. Clair's claims with regard to the Complainant's proposed penalty assessments. Complainant did not propose a reduction in penalty due to good faith or history because the violations here were "high gravity" and resulted in a fatality. (Tr. at 829.) Based on this assessment, Complainant proposed a penalty of $6,300 for each of the Citation items. (Citation at 7-9.)

The Court agrees with Complainant's assessment. The record shows the gravity of the violations was high as illustrated by the grave consequences in this case. Respondent directed ironworkers with no documented scaffold training to build a pre-designed, but undocumented, structure. It was this structure the ironworker depended on to keep him safe while he concentrated on the task that he was actually trained in, welding; a task that utilized tools, such a as a weed-burner, to which he was trained to use cautiously due to their dangerous high-heat nature. While the record shows Respondent does not have a documented history of OSHA violations, the Court agrees with Complainant no reduction for history or good faith should be applied here due to the high gravity of the violations. Accordingly, the Court shall assess the penalties as proposed for each affirmed citation item.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 as originally pleaded and pleaded in the alternative is VACATED.
2. Citation 1, Item 2 is AFFIRMED as SERIOUS, and a penalty of $6,300.00 is ASSESSED.

3. Citation 1, Items 3a and 3b are AFFIRMED as SERIOUS, and a grouped penalty of $6,300.00 is ASSESSED.

SO ORDERED.

/s/
Patrick B. Augustine
Judge, OSHRC

Date: September 13, 2017
Denver, Colorado