United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W.
Washington, D.C. 20036

SECRETARY OF LABOR, **Complainant,** **v.** **WRIGHT TOUCH LANDSCAPING & HEAVY EQUIPMENT, INC.,** **Respondent.**	**OSHRC Docket No. 17-0070**

Appearances: Nicholas C. Geale, Acting Solicitor of Labor
Stanley E. Keen, Regional Solicitor
Karen E. Mock, Counsel
Monica R. Moukalif, Trial Attorney
U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia

For the Complainant

Princess Wright, Owner
Wright Touch Landscaping & Heavy Equipment, Inc., Miami, Florida

For the Respondent

Before: Covette Rooney
Chief Administrative Law Judge

DECISION AND ORDER

On June 28, 2016, a tree-trimming worker was hospitalized from an incident on a residential worksite in Miami, Florida. The worker did not leave the hospital and eventually passed away. After an investigation, the Occupational Safety and Health Administration

(OSHA) issued a citation to Wright Touch Landscaping & Heavy Equipment, Inc. (Wright Touch or Respondent), alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the OSH Act) and proposing a total penalty of $9,516. Respondent filed a timely notice of contest, bringing this matter before the Occupational Safety and Health Review Commission (Commission). The parties filed pre-hearing pleadings, and a hearing was scheduled in Miami, Florida on October 12, 2017. Respondent did not appear. The Secretary presented his case at the hearing. The Secretary filed a post-hearing brief, Respondent did not file a post-hearing brief. For the reasons set forth below, the citations and proposed penalties that remain at issue are affirmed.[1]

JURISDICTION AND COVERAGE

The record establishes that Respondent filed a timely notice of contest and that, as of the date of the alleged violation, it was an employer engaged in business affecting commerce within the meaning of section 3(3) and 3(5) of the Act.[2] Respondent owned and operated, in Florida, equipment that was manufactured in Kentucky. (Tr. at 36-38; Ex. C-7); *Lewis Cty. Dairy Corp.*, 21 BNA OSHC 1070, 1071 (No. 03-1533, 2005) (remanding on basis that even intrastate commerce affects interstate commerce when there is an interstate market of industry materials); *see also* Admissions ¶¶ 1, 2, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16, 18, 24, 25; Tr. at 66-68 (reading

[1] The Secretary has withdrawn one of the citation items, Serious Citation 1 Item 1, an alleged violation of 29 C.F.R. § 1910.67(c)(2)(ii)("Only trained persons shall operate an aerial lift"). (Sec'y Pre-Hr'g Statement at 3; Tr. at 8.) This citation item is not adjudicated in this decision. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 5-6 (1985) (holding that the Secretary's discretion to withdraw citation is unreviewable).

[2] The conclusion of law regarding the employment relationship between Respondent and the decedent is set forth in more detail after the findings of fact in this Decision and Order.

Admissions into the record). Based upon the record, the undersigned concludes that the Commission has jurisdiction over the parties and subject matter in this case, and Respondent is covered under the Act.

PROCEDURAL EVENTS: DISCOVERY, PRE-HEARING PLEADINGS, AND THE HEARING

The Secretary cited Respondent on December 20, 2016. The citation was mailed to Respondent at the following address: Wright Touch Landscaping & Heavy Equipment, Inc. and its successors, 10029 NW 14th Ave, Miami, FL 33147.[3] Respondent filed a timely notice of contest, and this case was docketed at the Commission on January 19, 2017. The Secretary filed the Complaint for this case on February 22, 2017,[4] and Respondent filed an Answer on March 13, 2017.[5]

The Answer was handwritten, and Respondent is before the Commission without an attorney, or *pro se*. The handwritten Answer, signed by Respondent's Owner, Ms. Princess Wright, includes the following:

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[3] This address has been used by the Commission for all mailings in this matter, no other address for Respondent is in the record. The undersigned finds that this address is Respondent's record address as defined in the Commission's rules. 29 C.F.R. § 2200.6 ("Record Address").

[4] On February 16, 2017, when my office called Respondent to confirm that it declined to electronically file documents for this matter, Respondent explained to my office that it had no electronic mailing address. While the undersigned accepts Respondent's explanation, it is also noted that Respondent's business card, in evidence as being in use on the day of the incident, contains an electronic mailing address for Respondent. (Ex. C-3.)

[5] This matter had initially been placed under Simplified Proceedings, however, upon an opposed motion by the Secretary, was placed on Conventional Proceedings. *See* Order dated February 16, 2017 (agreeing with Secretary that cases involving a fatality are not appropriate for simplified proceedings at the Commission).

> I am denying the allegations that Wright Touch Landscaping & Heavy Equipment Inc. was the employer engaged in business, and was not providing any landscaping service, on the date of the alleged violations.
>
> The employer on the date of the incident Realtor Daniel Carriazo owned the property where the incident occurred. Wright Touch was not working for Mr. Carriazo. [The decedent] was employed by the realtor, and owner of the property Mr. Daniel Carriazo.[6] Mr. Carriazo was a repeating customer of [the decedent]. At no time before are(*sic*.) on the date of the incident did [the decedent] work for Wright Touch Landscaping & Heavy Equipment.

(Answer at 1.)

On April 5, 2017, the Notice of Hearing and Order for Parties to Confer and Submit Planning Recommendations was sent out to both parties – and this notice was not returned by the U.S. Post Office to the Commission – notifying the parties of the hearing date and ordering the parties to confer by April 19, 2017. On April 19, the Secretary submitted the Parties' Recommendations for Time Limits, and certified that Respondent agreed to the recommendations and authorized the Secretary to sign the document for Respondent. The next day, April 20, 2017, the Notice of Hearing, Scheduling order and Special Notices was sent out to both parties – and this notice was also not returned by the U.S. Post Office to the Commission.

On August 25, 2017, the Secretary filed a Motion to Have Complainant's First Requests for Admission Deemed Admitted, and the undersigned granted the Secretary's motion on September 21, 2017.[7] *See* Order Granting Complainant's Motion to Have Complainant's First Requests for Admissions deemed Admitted dated September 21, 2017. On this same day, September 21, the Notice of Precise Location of Hearing was sent out to both parties – and both

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[6] For personal privacy reasons, the name of the decedent has been omitted throughout this decision.

[7] The order granting the Secretary's motion was sent out on September 21, 2017, followed by another issuance of the same order, this time with attachment, on October 5, 2017.

this notice and the order issued this same day were not returned by the U.S. Post Office to the Commission.

On September 28, 2017, the Secretary submitted the Secretary's Pre-Hearing Statement. In this statement, the Secretary stated that despite numerous attempts at contact, Respondent had not returned telephone calls or letters since September 20, 2017.[8] (Sec'y Pre-Hr'g Statement at 1 n.1; Tr. at 7). The Secretary called Respondent, but could not leave a voicemail because the voicemail box was full. (Sec'y Pre-Hr'g Statement at 1 n.1; Tr. at 7). Because Respondent did not use electronic mail, the Secretary sent an overnight letter to Respondent regarding the Prehearing Statement and exhibits, and Respondent did not reply. (Sec'y Pre-Hr'g Statement at 1 n.1; Tr. at 7).

As the Secretary had not been in contact with Respondent, my office also attempted to contact Respondent on October 5, 2017; and again, on October 11, the night before the hearing, leaving voice messages each time regarding the hearing on October 12, 2017. Respondent, however, did not respond to the voicemails or appear at the hearing. (Tr. at 8.) As there is no evidence in this record that the U.S. Postal Service failed to properly fulfill its duties, it is presumed that Respondent received all mailings from my office. *Powell v. Commissioner*, 958 F.2d 53, 54 (4th Cir. 1992) (holding that, in the absence of evidence to the contrary, it is reasonable to presume that the United States Postal Service officials have properly discharged their duties). The undersigned holds Respondent responsible for its mail handling procedures.

[8] As noted in the September 21, 2017 order, Respondent had until this time been in contact with the Secretary regarding this matter.

La.-Pac. Corp., 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (holding that the Commission expects employers to maintain orderly procedures for handling important documents).

Accordingly, the hearing for this case took place as scheduled on October 12, 2017.[9] Respondent was not in attendance. (Tr. at 6-7). Counsel for the Secretary presented her case. Several exhibits were admitted into evidence at the hearing. (Tr. at 14, 16, 25, 38, 43, 64; Exs. C-2 through Ex. C-7.) Additionally, the Secretary's First Requests for Admissions, previously admitted under Commission Rule 54(b),[10] were read into the record. (Tr. at 65-68); *see also* "Order Granting Complainant's Motion to Have Complainant's First Requests for Admission Deemed Admitted Attachment A" dated September 21, 2017 (attachment sent out on October 5, 2017); Sec'y Pre-Hr'g Statement at 3-5. According to Commission Rule 54(c), these admissions

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[9] Although the Commission recognizes the difficulties a *pro se* litigant may face when participating in the Commission's proceedings, the Commission still requires the *pro se* litigant to follow the rules and exercise reasonable diligence in the legal proceedings in which it is taking part. *Sealtite Corp*., 15 BNA OSHC 1130 (No. 88-1431, 1991); *Wentzell d/b/a N.E.E.T. Builders*, 16 BNA OSHC 1475, 1476 (No. 92-2696, 1993) (stating that "[a] *pro se* employer is required to exercise reasonable diligence… [they must] follow the rules and file responses to a judge's orders, or suffer the consequences…").

[10] Commission Rule 54(b) states in pertinent part:

> *Response to requests.* Each matter is deemed admitted unless, within 30 days after service of the requests or within such shorter or longer time as the Commission or Judge may allow, the party to whom the requests are directed serves upon the requesting party a written answer specifically admitting or denying the matter involved in whole or in part, or asserting that it cannot be truthfully admitted or denied and setting forth in detail the reasons why this is so, or an objection, stating in detail the reasons therefor. The response shall be made under oath or affirmation and signed by the party or his representative.

29 C.F.R. § 2200.54(b); *see also Samsonite Corp.*, 10 BNA OSHC 1583 (No. 79-5649, 1982) (discussing Federal Rule of Civil Procedure 36, "Requests for Admission," in context of Commission proceedings).

are conclusively established in this matter.[11] 29 C.F.R. § 2200.54(c). These admissions are reproduced *infra*.

After the hearing, the Secretary served a copy of his post-hearing brief upon Respondent on November 30, 2017. Respondent neither offered any exhibits into the record nor filed a post-hearing brief. Commission Rule 64 states that the failure of a party to appear at a hearing "may result in a decision against that party." 29 C.F.R. § 2200.64(a). A failure to appear may be excused where good cause is shown, but a request for reinstatement must be made within five days of the hearing. 29 C.F.R. § 2200.64(b). Respondent has made no such request. Despite the numerous attempts by both the Secretary and my office, Respondent effectively abandoned this case by not showing up to trial and by not communicating with my office since that time.

The evidence produced by the Secretary is therefore uncontested since Respondent failed to appear at the hearing, proffer any trial exhibits, or file any post-hearing brief.

ADMITTED FACTS

The following facts are conclusively established for this matter:

1) On June 28th, 2016, Respondent's principal business activity included landscaping services.

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[11] Commission Rule 54(c) explains what it means to have a matter deemed admitted:

> (c) *Effect of admission.* Any matter admitted under this section is conclusively established unless the Judge or Commission on motion permits withdrawal or modification of the admission. Withdrawal or modification may be permitted when the presentation of the merits of the case will be subserved thereby, and the party who obtained the admission fails to satisfy the Commission or Judge that the withdrawal or modification will prejudice him in presenting his case or defense on the merits.

29 C.F.R. § 2200.54(c)(emphasis added).

2) On June 28th, 2016, Respondent's principal business activity included tree trimming services.

3) Princess Wright does not personally perform landscaping services for Wright Touch.

4) Princess Wright does not personally perform tree trimming services for Wright Touch.

5) Wright Touch solicits landscaping work from homeowners in the Miami, Florida and Broward area.

6) When a person hires Wright Touch to perform landscaping work, Princess Wright negotiates the details, including cost and scope of the landscaping work to be done.

7) On June 28th, 2016, Princess Wright was present at the work site.

8) As of June 28th, 2016, Respondent operated at least one vehicle that required the driver to hold a valid commercial driver license.

9) On June 28th, 2016, Princess Wright held a commercial driver license.

10) Princess Wright transported [the decedent] to the work site on June 28th, 2016.

11) On June 28th, 2016, [the decedent] was performing tree trimming work at the work site.

12) On June 28th, 2016, [the decedent] performed tree trimming work from Respondent's elevated truck-mounted bucket.

13) [The decedent] used the Respondent's truck-mounted bucket to access the roof at the work site.

14) On June 28th, 2016, [the decedent] did not use a body belt and lanyard at any time while in Respondent's truck-mounted bucket.

15) On June 28th, 2016, [the decedent] was in Respondent's truck-mounted bucket while it was elevated over four feet above the ground.

16) On June 28th, 2016, [the decedent] performed work from Respondent's truck mounted bucket while it was elevated over four feet above the ground.

17) On June 28th, 2016, Princess Wright knew that [the decedent] did not use a body belt and lanyard while using Respondent's truck-mounted bucket to access the roof and/or to trim trees at the work site.

18) On June 28th, 2016, [the decedent] performed tree trimming work while on the roof at the work site.

19) On June 28th, 2016, Respondent did not provide [the decedent] with fall protection equipment while he performed his work activities while on the roof at the work site.

20) On June 28th, 2016, Princess Wright knew that [the decedent] was working from the roof at the work site without using fall protection.

21) On June 28th, 2016, [the decedent] stood at the edge of the roof at the work site while performing tree trimming.

22) On June 28th, 2016, [the decedent] stood within five feet of the edge of the roof at the work site while performing tree trimming.

23) On June 28th, 2016, Princess Wright knew that [the decedent] worked near the edge of the roof at the work site without using fall protection.

24) Respondent provided the necessary tools for [the decedent] to perform his work at the work site on June 28th, 2016.

25) On and before June 28th, 2016, Respondent paid [the decedent] to perform tree trimming work.

"Order Granting Complainant's Motion to Have Complainant's First Requests for Admission Deemed Admitted Attachment A" dated September 21, 2017 (attachment sent out on October 5, 2017); Sec'y Pre-Hr'g Statement at 3-5; (Tr. at 66-68) (reading admissions into the record).

BACKGROUND & FINDINGS OF FACT

Ms. Princess Wright owns Wright Touch, a small landscaping and tree-trimming company. To obtain business, Ms. Wright drives out into the community in the company vehicle and solicits individual homeowners for landscaping and tree-trimming work. Ms. Wright presents a business card to the individual homeowner and negotiates the terms of the project with the homeowner. Ms. Wright does not perform the work herself, instead she hires workers to perform the work. Once the landscaping or tree-trimming job is completed by these workers, Ms. Wright collects payment from the homeowner and then pays the workers, keeping a portion for herself.

The OSHA Investigation

On or around September 13, 2016, OSHA received a referral regarding the decedent's accident on June 28, 2016, from the Miami Police Department. (Tr. at 29-30; Citation at 9 (beginning date of OSHA inspection).) Prior to receiving this referral in September from the Miami Police Department, OSHA had not received notice from Respondent of the decedent's incident in June. (Tr. at 30.) At the beginning of OSHA's investigation, Compliance Officer Juan Roa held an opening conference with Ms. Wright at her residence, having identified Respondent as the employer by speaking with the homicide detective involved with referral. (Tr. at 30.) During this opening conference, Ms. Wright told CO Roa that the decedent was not her employee. (Tr. at 31.) CO Roa, however, learned that Ms. Wright had driven the decedent to the worksite, had provided the decedent with "utilities," and had paid the decedent for "the service that had been rendered." (Tr. at 31.)

During the OSHA investigation, CO Roa interviewed and took statements from Ms. Wright and Mr. Jack Davis, the other worker on the worksite on the day of the incident. (Tr. at 35, 39, 58; Exs. C-2, C-5); *Beta Constr. Co.*, 16 BNA OSHC 1435, 1441-1442 (No. 91-102, 1993) (noting that out-of-court, contemporaneous statements made by the employee to the OSHA compliance officer during the OSHA investigation are admissible and can be given weight to the extent that they are reliable).[12] Through these interviews, CO Roa determined that

[12] On September 29, 2016, Mr. Davis signed the statement he gave to CO Roa. (Tr. at 40; Ex. C-5.) About a month later, on October 31, 2016, CO Roa called Mr. Davis to ask him a follow up question. (Tr. at 42.) CO Roa wrote down, "There was no harness on his back when he came off the house from the bucket truck," on the bottom of the statement. (Tr. at 41-42.) CO Roa read this statement back to Mr. Davis over the phone and asked him whether it was accurate. (Tr. at 42-43.) CO Roa testified that Mr. Davis told him over the phone that the statement was accurate.

the decedent had been working on a residential roof, trimming trees and "cleaning out branches," "without any type of fall protection, with no harness, or lanyard, or tied off to anything." (Tr. at 35.)

The Worksite

CO Roa visited the worksite, a one-story residence with tall oak trees surrounding it. (Tr. at 31); *see* Ex. C-6 (pictures of the worksite). CO Roa determined, by using a measuring tape, that the distance from the eaves of the roof (the lowest point of the roof) to the ground was nine feet eight inches. (Tr. at 32-34.) Ms. Wright told CO Roa that she personally "elevated [the decedent] to the roof with an aerial lift." (Tr. at 35.) Ms. Wright also told CO Roa that the decedent had not used a lanyard while working. (Tr. at 35.) According to CO Roa, Mr. Davis was at ground level and did not engage in any activity in the bucket or on the roof. (Tr. at 56-57.)

The project at issue in this case began when Ms. Wright approached homeowner Daniel Carriazo in front of Mr. Carriazo's home.[13] (Tr. at 10.) Mr. Carriazo testified that Ms. Wright told him that her company had been working on another project in the area but that it fell through, and she asked Mr. Carriazo whether he was interested in landscaping or tree-trimming work. (Tr. at 10.) She presented her business card to him, which had Respondent's name and contact information on it. (Tr. at 12-14; Ex. C-3.) Mr. Carriazo testified that the decedent was

(Tr. at 42.) There is no signature or further notation from Mr. Davis near this additional sentence on the bottom of the statement. (Tr. at 42; Ex. C-5.)

Ms. Wright reviewed and signed the statement she gave to CO Roa, who wrote down what Ms. Wright said, on November 16, 2016. (Tr. at 57-60; Ex. C-2.)

[13] The worksite was located at: 8605 Southwest 107 Street, Miami, Florida, 33156. (Tr. at 16.)

standing with Ms. Wright during this conversation. (Tr. at 11.) Ms. Wright and Mr. Carriazo negotiated a deal which entailed trimming oak trees, "trimmed them, and cleaned them up and thinned them out," on Mr. Carriazo's property in exchange for $650. (Tr. at 14, 18, 63; Ex. C-2 at 5.) Mr. Carriazo testified that before this moment, he had never met the decedent. (Tr. at 11-12.)

The Workers

The decedent, according to his wife's testimony, had performed work for Ms. Wright in the past. (Tr. at 20.) The decedent's wife testified that her "son-in-law's cousin" knew Ms. Wright, knew that the decedent "needed work," and so connected Ms. Wright and the decedent. (Tr. at 20.) According to his wife, the decedent did not solicit his own landscaping jobs, did not own his own business, did not own tree-trimming or landscaping tools, and did not have his own transportation. (Tr. at 20-21.) Ms. Wright would provide the decedent transportation to the worksites as well as the tools to perform the work she told him to do.[14] (Tr. at 21.) The decedent's wife testified that Ms. Wright would call their home in the morning to arrange the time at which Ms. Wright would pick up the decedent to go to work. (Tr. at 21.) One time, according to the decedent's wife, Ms. Wright told her to tell the decedent to be ready to be picked up at 10a.m.[15] (Tr. at 21.)

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[14] Ms. Wright, however, admitted that she did not provide fall protection equipment to the decedent at the worksite on the day of the incident. (Admission at ¶ 19; Tr. at 67-68.)

[15] The decedent's wife also testified that the she had a "Wright Touch tree-trimming T-shirt" that had Respondent's contact information and a license number on it. (Tr. at 22-23; Ex. C-4.) She testified that her husband never wore the T-shirt because it did not fit him, but he kept it in his bag. (Tr. 23-24.) She testified that Ms. Wright gave the decedent the T-shirt and that "they're supposed to have on T-shirts to match the company they work for to let people know that he's working for that company." (Tr. at 24.) The undersigned notes that the license number (License

Mr. Davis told CO Roa that he (Davis) had worked for Ms. Wright "about eight times in a month." (Tr. at 40-41.) Mr. Davis said that he was on the worksite all day on the day of the incident, and that Ms. Wright paid him for the work he did on the day of the day of the incident, as she did for the other jobs he performed for her. (Tr. at 41.)

The Aerial Lift

Respondent owned a truck-mounted aerial lift to perform its services. (Tr. at 36, 55; Ex. C-7.) Ms. Wright communicated to CO Roa that the truck was hers, and the truck has a "Wright Touch Tree Service" sign on it. (Tr. at 36; Ex. C-7.) Ms. Wright told CO Roa that Respondent utilized this truck on the worksite on the day of the incident. (Tr. at 37.) This truck was manufactured in Elizabethtown, Kentucky. (Tr. at 37; Ex. C-7 at 2.) This truck was the only truck with an arm attached to it on the worksite on the day of the incident; the only other truck on the worksite that day was a pick-up truck. (Tr. at 38.) Mr. Carriazo testified that Respondent drove a truck, that had Respondent's name on it, onto his property, through his side gate, and into his backyard. (Tr. at 15-16; Ex. C-6.) The term "bucket" is used in Ms. Wright's statement as well as within her Admissions as the "truck-mounted bucket." *See, e.g.*, ¶ 13 ("[The decedent] used the Respondent's truck-mounted bucket to access the roof at the work site.") The undersigned finds that the "bucket" referred to here is the elevated work platform that is attached to Respondent's aerial lift.

The Work Tasks

658116-0) on this T-shirt is the same as that on the business card and the sign on Respondent's truck. (Exs. C-3, 4, and 7.)

Ms. Wright described the work that was performed at the worksite on the day of the incident. (Ex. C-2 at 2-3; Tr. at 61-62.) The decedent, Mr. Davis and Ms. Wright arrived at the worksite sometime between 11a.m. and 1p.m. (Ex. C-2 at 2; Tr. at 61.) The decedent used the "bucket," which was attached to the truck which was parked on the side of the house, to get on the roof. (Ex. C-2 at 2; Tr. at 61.) Ms. Wright told CO Roa that she herself elevated the decedent to the roof using the bucket of the aerial lift. (Tr. at 35.) The decedent then trimmed the trees in front of the house from the roof. (Ex. C-2 at 2; Tr. at 61.) Mr. Davis also used the bucket to get up on the roof at this time. (Ex. C-2 at 2; Tr. at 61.) Ms. Wright then left the worksite for about 20-30 minutes. (Ex. C-2 at 2; Tr. at 61.) When she returned, the decedent and Mr. Davis came down. Ms. Wright stated that she did not see the decedent or Mr. Davis "tied off to anything while they were on the roof." (Ex. C-2 at 2; Tr. at 61.)

The decedent then used the bucket in front of the house to trim some trees by the house and by the driveway. (Ex. C-2 at 2-3; Tr. at 61.) He used a "pull saw," and while Ms. Wright stated that she thought the pull saw belonged to him, not remembering if he had used her "pruning saw," she later admitted to providing the necessary tools for the decedent to perform his work that day. (Ex. C-2 at 3; Tr. at 61; Admissions at ¶ 24.) The decedent also trimmed trees from the bucket away from a black awning in the back yard. (Ex. C-2 at 3; Tr. at 62.) Ms. Wright stated that the decedent was in the bucket for "15 minutes maximum," and did not know "how he had to get up to trim the trees in the back." (Ex. C-2 at 3; Tr. at 62.) At this time, the decedent and Mr. Davis began cleaning up. They loaded the big branch debris in the truck. (Ex. C-2 at 3; Tr. at 62.) The decedent "got back on the truck to blow the awning off clean, which

took 5-7 minutes." (Ex. C-2 at 3; Tr. at 62.) Then the decedent "got back down, and they loaded up the truck with the debris that was left in the back." (Ex. C-2 at 3; Tr. at 62.)

Notably, Ms. Wright stated the following: "[The decedent] did not have a harness on while he was on the roof. [The decedent] did not have a harness on while he was trimming the trees from the bucket truck." (Ex. C-2 at 3-4; Tr. at 62.)

The Incident

Regarding the incident itself, the record contains circumstantial evidence. No one saw what happened. Neither Ms. Wright nor Mr. Davis testified at the hearing. In her statement, Ms. Wright stated:

> [The decedent] and Jack stayed in the back to clean up, and I parked the truck in the front of the house. I was waiting for about 10 minutes, and finally I got out and I walked back. The gate was open, and I found [the decedent] by the corner of the post. His head was toward the gate and his legs toward the street. He was facing up. When I found him on the floor, he did not have a harness. I found [the decedent], and I went to get Jack, and I told him that [the decedent] was passed out. We came back and Jack stayed with [the decedent]. I ran to the front of the house and got the attention of the people inside. They did not speak English. I called 911 before I got Jack.

(Ex. C-2 at 4-5; Tr. at 62-63.) Mr. Davis stated: "I think he was on the truck because he had to cut two tree limbs in the front. That's after the truck had left out back and had gone to the front." (Ex. C-5; Tr. at 41.)

Mr. Carriazo also did not witness the accident. He testified that he had left his house and returned to find his relative in the road in front of his home, waving him (Mr. Carriazo) down. (Tr. at 17.) Mr. Carriazo testified that his relatives did not know what happened. (Tr. at 17.) Ms. Wright was talking to Mr. Carriazo's relatives, who did not speak English, trying to get

towels. (Tr. at 17.) Mr. Carriazo sent his relatives inside his home and then went to find the decedent. Mr. Carriazo stated that he found the decedent:

> on the ground face up. He was trying to sit up and speaking. In my opinion, it didn't make sense what he was saying, but he was trying to get up, and I was telling him to relax. We got some towels. And by that time within seconds, I would say the police and the ambulance got there of me arriving there, probably 30 seconds, probably – maybe less.

(Tr. at 17-18.)

Ms. Wright stated that she called 911 on the worksite on the day of the incident. She told the operator that "[the decedent] was bleeding from the back of the head. The operator told me to get a towel. I ran inside the house, and I laid down to try to explain what was happening. I got up, and the owner of the house arrived, and I went up to him and told him what happened." (Ex. C-2 at 5; Tr. at 63.) Ms. Wright further said:

> Once the paramedics picked [the decedent] up and I saw a rock in the ground. The rock was about the size of a CD, and it was sticking out about one inch. I don't remember if the rock was smooth or jagged. The last time I saw him, he was trying to fix a Christmas light in the back of the house at ground level. [The decedent] told me that the owner was a repeat customer of his.

(Ex. C-2 at 6; Tr. at 63-64.)

At around 2 p.m., according to the decedent's wife, Ms. Wright called her from the decedent's cell phone. Ms. Wright told the decedent's wife that "he had an accident, and that he was on the ground, and paramedics and the police were there." (Tr. at 26.) The decedent's wife testified that she then spoke to "the officer," who told her that [the decedent] fell. He was on the ground, and they was transporting him to [the hospital]." (Tr. at 26.) The decedent was taken to the hospital on June 28, 2016, and never left the hospital. (Tr. at 26-27.)

After the accident, Ms. Wright stated that: "The owner of the house gave me the money for the job, and I gave some to the wife. The owner gave me $650. I gave the wife $150. I gave Jack $100 or $150. I kept $300 because he owed me money." (Ex. C-2 at 5-6; Tr. at 63.)

DISCUSSION

Was There an Employer/Employee Relationship?

The OSH Act places duties on "employers" to protect the health and safety of "employees." 29 U.S.C. § 654(a). An employer is defined as "a person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). "Only an employer may be cited for a violation of the Act." *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated) (*Allstate*). The Act requires each employer to comply with occupational safety and health standards and regulations promulgated under the OSH Act. *Id*. The Secretary has the burden of proving Respondent is the employer of at least one affected employee at the worksite. *Allstate*, 21 BNA OSHC at 1035; *Poughkeepsie Yacht Club, Inc.*, 7 BNA OSHC 1725, 1727 (No. 76-4026, 1979).

To determine whether the Secretary has established the existence of an employer employee relationship, the Commission relies upon an analysis of the factors elucidated in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (*Darden*). *See Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010) (*S&W*). In *Darden,* the following factors are considered:

> the skill required [for the job]; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the

> extent of the hired party's discretion over when and how long to work, the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324 (citation omitted). When following *Darden*, the Commission emphasizes that the critical factor in the analysis is the "right to control the manner and means by which the product [was] accomplished." *S&W*, 23 BNA OSHC at 1289, quoting *Darden*, 503 U.S. at 323.

The record supports a finding that Respondent employed the decedent at the Miami residential worksite on June 28, 2016. Contrary to what Ms. Wright wrote in Respondent's Answer, Ms. Wright later admitted to facts that establish that the decedent was her employee on the day of the incident. For example, Ms. Wright owned the landscaping and tree-trimming company, and advertised its services and commercial license number using business cards and a sign on her truck that she owned. The decedent was given a T-shirt to wear with the purpose of identifying him as a representative of Wright Touch.[16]

Ms. Wright also controlled where and when the decedent would work. She would call the decedent the morning of and direct him to be ready to be picked up at a specific time to be transported to the worksite. Ms. Wright also negotiated the terms of the project with the homeowner, and then directed the decedent to perform those tasks. Ms. Wright also provided the tools with which the decedent used to perform those tasks. Finally, Ms. Wright paid the

[16] The undersigned finds it irrelevant that the decedent did not wear this T-shirt. The salient point is that Respondent gave the decedent the T-shirt with instructions to wear it. The record also establishes that the decedent stood with Ms. Wright while she presented her business card to the homeowner while introducing herself and the company; there is no evidence that the decedent represented to the homeowner that he (the decedent) was not associated with Respondent at that time.

decedent from the proceeds of the payment – which was issued to her – after the decedent performed the tasks.

Under these circumstances, the undersigned finds that Respondent employed the decedent, and therefore, Respondent was responsible for protecting the health and safety of the decedent at the Miami residential worksite on June 28, 2016.

Allegations

To establish a prima facie case for the violation of an OSHA standard, the Secretary must show "(1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013). A violation is "serious" if a substantial probability of death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k).

While the record is unclear exactly how the decedent's incident occurred, the fall protection citation items are affirmed here because the record supports the finding that Respondent violated these standards before the incident even occurred. Regarding the reporting standard, the record also supports a finding that whatever caused the decedent's injury on the day of the incident was work-related.

Citation 1, Item 2: The Alleged Aerial Boom Fall Protection Violation

For this citation item, the Secretary alleges a serious violation of 29 C.F.R. § 1910.67(c)(2)(v), which provides in pertinent part:

> (c)(2) *Extensible and articulating boom platforms*. (v) A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

29 C.F.R. § 1910.67(c)(2)(v). The definitions section of this cited standard explains that an aerial device is "any vehicle-mounted device, telescoping or articulating, which is used to position personnel." 29 C.F.R. § 1910.67(a)(1). An extensible boom platform is an aerial device (except ladders) with a telescopic or extensible boom." 29 C.F.R. § 1910.67(a)(4).

At the hearing, CO Roa explained that this "standard requires basically fall protection anytime you're working from a bucket truck … [because] an employee can be easily catapulted out with any sort of movement." (Tr. at 44-45.) CO Roa testified that Respondent was cited for a violation of this standard because Ms. Wright stated, in the interview, that the decedent did not use fall protection "in the bucket" while the decedent "had been in the bucket, you know, to cut the trees and to access the roof." (Tr.at 45-47.) CO Roa testified that Ms. Wright stated that she was "right there at the site, and [] watched [the decedent] get on and off." (Tr. at 46.)

The evidence supports the Secretary's allegations. To determine which standard applies, the Commission looks to the cited working conditions. *S. Pan Servs. Co.*, 25 BNA OSHC 1081, 1085 (No. 08-0866, 2014) *aff'd*, 685 F. App'x 692 (11th Cir. 2017) (unpublished). Respondent was performing tree-trimming work at a residential worksite. According to the homeowner, he contracted with Respondent to "clean up" the trees and to "thin them out." The undersigned finds this type of tree-trimming work is preventative in nature, so as to prevent damage to the residence. Preventative tree-trimming work is considered maintenance and therefore falls under the general industry standards in section 1910 instead of OSHA's construction standards in section 1926. *Consumers Power Co.*, 5 BNA OSHC 1423 (No. 11107, 1977). Additionally, Respondent's truck qualifies as an aerial lift because it has a structure mounted on it which was used to elevate the decedent into position to trim trees, and to lift him to the roof. The bucket is

found to be an extensible boom platform because the decedent stood in it while it transported him to his work tasks. The decedent worked trimming trees from the bucket. The cited standard applies.

Ms. Wright stated that the decedent did not wear any kind of harness while working from the bucket. Ms. Wright also admitted that she did not provide fall protection equipment to the decedent, even after providing other equipment for him to use while working from the bucket. The standard has been violated.

Ms. Wright stated that she personally operated the truck, lifting the decedent in the bucket up to the roof of the residence. Ms. Wright also stated that the decedent worked from the bucket, trimming trees, without a harness on. The Secretary has established exposure.

"Commission precedent holds[s] that a supervisor's knowledge is imputable to the employer." *Empire Roofing Co. Se., LLC,* 25 BNA OSHC 2221, 2222 (No. 13-1034, 2016) *aff'd*, *Empire Roofing Co. Se., LLC v. Occupational Safety & Health Review Comm'n*, No. 16-17309, 2017 WL 4708162, at *3 (11th Cir. Oct. 19, 2017) (unpublished). Both the worksite and Wright Touch's principal place of business, according to Ms. Wright's business card, are in Florida, which is located in the Eleventh Circuit. Therefore, the Eleventh Circuit would have jurisdiction over an appeal filed by either party.[17] *See* 29 U.S.C. § 660(a), (b). "Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

[17] Wright Touch could also seek review in the D.C. Circuit. *See* 29 U.S.C. § 660(a).

The 11th Circuit has issued several recent decisions addressing knowledge of a supervisor in a Commission case. For example, in *ComTran*, the 11th Circuit held that the Secretary must do more than establish a "supervisor's knowledge of his own malfeasance" in order to prove the knowledge element of an OSHA violation. *Comtran*, 722 F.3d 1304. In such a situation, the supervisor's knowledge of his own misconduct is not imputable to the employer. *Id*. In *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832 (11th Cir. 2016), the 11th Circuit held that a "supervisor's knowledge of [a] subordinate employee's violative conduct could be imputed to his employer under [the OSH Act] when [the] supervisor himself was simultaneously involved in violative conduct." *Id*. at 832. These cases have slightly different factual scenarios than the one at issue here.

However, the recent *Empire Roofing Co. Se., LLC*, 2017 WL 4708162 (11th Cir. Oct. 19, 2017) (unpublished), is a case with similar facts to the case at issue: a supervisor operating an aerial lift, elevating his subordinates who failed to wear fall protection. *Empire Roofing Co. Se., LLC*, 2017 WL 4708162, at *3. The supervisor knew that his subordinates were not wearing fall protection. *Empire Roofing Co. Se., LLC*, 2017 WL 4708162, at *3. The 11th Circuit, expounding on *ComTran* and *Quinlan*, held that this situation was a "classic situation" of supervisor knowledge properly imputable to the employer:

> 'The classic situation in which knowledge of a supervisor is imputed to an employer is when the supervisor is on the scene looking on, sees the subordinate employee violating a safety rule, knows there is such a violation, but nonetheless allows it to continue.' *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 841 (11th Cir. 2016). Thus, in the "ordinary case" — in which the Secretary proves that a supervisor had actual or constructive knowledge of a subordinate employee's violation — the general rule is that the knowledge of the supervisor is imputed to the employer. *ComTran*, 722 F.3d at 1307–08 & n.2.

Empire Roofing Co. Se., LLC, 2017 WL 4708162, at *3.

Here, Ms. Wright, the supervisor, admitted to knowing that the decedent did not wear fall protection while he worked from the aerial lift bucket; and, Ms. Wright stated that she elevated the bucket with the decedent in it, while he was not wearing fall protection. The undersigned finds that this situation is analogous to the "classic situation" of the supervisor "looking on," while the subordinate worked without fall protection in the bucket of an aerial lift. *Quinlan*, 812 F.3d at 841; *see also 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). The Secretary has established actual knowledge. The alleged violation is affirmed.

CO Roa testified that the violation was characterized as serious because a fall from the bucket of an aerial lift could cause the employee to "break their bones and/or death." (Tr. at 46.) This testimony establishes that death or serious physical harm could result from the decedent not wearing fall protection while working from the bucket.

This violation is affirmed as serious.

Citation 1, Item 3: The Alleged Roof Fall Protection Violation

The Secretary alleges a serious violation of 29 C.F.R. 1910.132(a), which requires in pertinent part:

> Protective equipment…shall be provided, used, maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards…encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

29 C.F.R. 1910.132(a). CO Roa explained that this "standard requires a personal protective equipment when an employee is exposed to a hazard. In this case, [the decedent] was exposed to a fall hazard from the eaves of the roof while working on it, doing tree trimming." (Tr. at 49.)

CO Roa testified that Ms. Wright stated that the decedent had no fall protection while he was working on the roof, and that Ms. Wright said she watched him work on the roof with no fall protection. (Tr. at 49-50.)

The record establishes that the decedent and Mr. Davis worked from a residential rooftop, which was over 9 feet high. In this situation, a fall hazard existed on this worksite, and therefore, Respondent was obligated to provide fall protection equipment to its workers, and those workers were obligated to use the fall protection equipment. The cited standard applies.

The record also establishes that Respondent did not provide fall protection equipment to the decedent, despite providing other tools for the job, and the decedent did not wear fall protection while he was on the roof. The cited standard was violated.

The decedent worked from the rooftop, which was over 9 feet high, in the front of the house and the back of the house. He traversed the rooftop from the edge on which he accessed it from the bucket, to the front of the house and to the back of the house. He was trimming trees away from the roof, and thus had to approach the edge of the rooftop to reach those branches, all while not being protected from falling from the rooftop. Exposure has been established.

With regard to knowledge, Ms. Wright admitted that she did not provide fall protection to the decedent to use while he performed work on the rooftop. Ms. Wright also admitted that she knew that the decedent did not wear fall protection while he was working near the edge of the roof trimming trees. She also stated that she elevated the decedent to the roof with the aerial lift, knowing that he did not have fall protection to wear while being on the roof. The undersigned finds that this situation, like the aerial lift citation item, is analogous to the "classic situation" of the supervisor "looking on," while the subordinate worked without fall protection; this time from

a rooftop with a fall of more than 9 feet. *Quinlan*, 812 F.3d at 841 ; *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079 (awareness of violative conditions sufficient to establish knowledge element of violation). Actual knowledge of the violation of this standard is established. The violation is affirmed.

CO Roa applied the same characterization analysis as he did to Citation 1, Item 2. (Tr. at 51-52.) The undersigned finds that a fall from a roof over 9 feet tall can result in serious bodily injury or death. The violation is affirmed as serious.

Citation 2, Item 1: The Alleged Reporting Violation

The Secretary cited Respondent for an alleged other-than-serious violation of 29 C.F.R. 1904.39(a)(2), which provides in pertinent part:

> Within twenty-four (24) hours after the in-patient hospitalization of one or more employees or an employee's amputation or an employee's loss of an eye, as a result of a work-related incident, you must report the inpatient hospitalization, amputation, or loss of an eye to OSHA.

29 C.F.R. 1904.39(a)(2). CO Roa testified that "Wright Touch was cited because Wright Touch had never contacted the Agency within 24 hours, you know, of the accident, you know, informing us that there had been someone hospitalized – and employee hospitalized from the company." (Tr. at 52-53); *see also Yelvington Welding Serv.*, 6 BNA OSHC 2013, 2014 (No. 15958, 1978) (explaining that the reason for the "reporting requirement is to provide the Secretary with prompt notification of serious accidents so that he can take timely action to avoid further injuries.")

There is no dispute that the decedent was hospitalized, and that Respondent failed to notify OSHA within 24 hours of decedent's hospitalization. The decedent never left the hospital, supporting a finding that he died as a result of his head injury. Based on the evidence in the

record, the undersigned also finds that the decedent's head injury was work-related. "An injury is work-related if an event or exposure in the work environment either caused or contributed to the resulting condition." 29 C.F.R. § 1904.5(a). For an injury to be considered work-related, the Secretary must establish an "identifiable event" at the worksite that caused the employee's injury. *Home Depot #6512*, 22 BNA OSHC 1863, 1864-1865 (No. 07-0359, 2009).

Here, Respondent was found at the worksite, face up, with blood coming from the back of his head. Ms. Wright stated that, in looking to determine what caused the injury, she noticed a rock under where the decedent's head was on the ground. Mr. Davis suggested that the decedent fell while working from the bucket, stating "I think he was on the truck because he had to cut two tree limbs in the front. That's after the truck had left out back and had gone to the front." The police officer at the scene told the decedent's wife that the decedent fell. The decedent's injury was severe enough to have resulted in his hospitalization, from which he never recovered, and spurred the Miami County Police Department to notify OSHA. The record establishes that the decedent had been working on an aerial lift and from a rooftop without any fall protection. There is nothing in the record that suggests anything not work-related caused the decedent to hit his head. The record supports a finding that the decedent hit his head while performing work-related tasks on the Miami residence worksite, and was therefore hospitalized as a result of a work-related incident. Applicability and non-compliance of the cited standard are established.

Regarding knowledge, the record shows that Ms. Wright was present with the decedent when the emergency responders took the decedent away from the worksite. The record also establishes that Ms. Wright was directed to administer a towel to the decedent's head in response to his bleeding. Ms. Wright also stated that she noticed a rock sticking up from out of the ground

under his head, supporting a finding that Ms. Wright suspected that the decedent's head injury resulted from his work on the worksite. The incident occurred to the decedent, while he was on her worksite. Ms. Wright herself transported the decedent to this worksite. Actual knowledge for this citation item is established. *Empire Roofing Co. Se., LLC,* 25 BNA OSHC at 2222; *Phoenix Roofing, Inc*., 17 BNA OSHC at 1079.

This citation item is affirmed.

With regard to characterization, a violation is "other-than-serious" if the evidence in the record does not support a finding that failure to comply with the cited standard would likely result in death or serious physical harm. 29 U.S.C. § 666(k); *Miniature Nut & Screw Corp.*, 17 BNA OSHC 1557, 1559 (No. 93-2535, 1996). CO Roa explained that this citation item was characterized as "other-than-serious" because "it's a regulatory citation. It's there basically to, you know, prevent employees from not reporting, you know, the accident that happened at the job site." (Tr. at 53.) The record supports a finding that this affirmed citation item is properly characterized as "other-than-serious."

PENALTY

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally accorded greater weight. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

Regarding Serious Citation 1, Item 2, the aerial lift violation, CO Roa testified that he assigned a "higher" severity to the penalty due to the consequences of a fall from 9 feet 8 inches (broken bones and/or death), but a "lesser" probability due to the "very short time period of approximately 30 minutes" of the decedent working during the violative condition. As a result, the violation was assigned a "moderate gravity" and the Secretary proposed a $8,990 penalty. (Tr. at 47.) The penalty was then adjusted to take into account the small size of the employer (70% deduction from the original penalty). (Tr. at 48.) No adjustments were made for good faith because Respondent had no safety program, oral or written. (Tr. at 48.) No adjustment was made for history, deduction or increase, because Respondent had not before been cited or inspected by OSHA. (Tr. at 48.) The resulting proposed penalty was $2,672.

Regarding Serious Citation 1, Item 3, the roof violation, CO Roa arrived at the same proposed penalty as he did for Citation 1, Item 2, after adjusting for size: $ 2,672. (Tr. at 51-52.)

Regarding Other-Than-Serious Citation 2, Item 1, the reporting violation, CO Roa testified that severity, gravity and probability were not factored by OSHA in determining the proposed penalty of $5,000 because "it's a flat penalty assessed by the Agency." (Tr. at 53.) Like Citation 1, Items 2 and 3, OSHA adjusted the penalty due to small size of the employer, but did not adjust for good faith or history, for a final adjusted proposed penalty of $1,500. (Tr. at 54.)

After consideration of the statutory factors with regard to the penalties for the affirmed violations, the undersigned agrees with the penalty amounts proposed by the Secretary for each citation item. The proposed penalty amounts are assessed for each affirmed citation item.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

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

1) Citation 1, Item 1 was withdrawn by the Secretary and is thus VACATED,

2) Citation 1, Item 2, alleging a Serious violation of 29 C.F.R. § 1910.67(c)(2)(v), is AFFIRMED, and a penalty of $2,672 is ASSESSED,

3) Citation 1, Item 3, alleging a Serious violation of 29 C.F.R. § 1910.132(a), is AFFIRMED, and a penalty of $2,672 is ASSESSED,

4) Citation 2, Item 1, alleging an Other-Than-Serious violation of 29 C.F.R. § 1904.39(a)(2), is AFFIRMED, and a penalty of $1,500 is ASSESSED.

SO ORDERED.

/s/Covette Rooney
COVETTE ROONEY
Chief Judge, OSHRC

DATE: February 1, 2018
Washington, D.C.