United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama St. S.W
Building 1924 Room 2R90
Atlanta, GA 30303-314

SECRETARY OF LABOR, Complainant, v. SAMSSON CONSTRUCTION, INCORPORATED, Respondent.	OSHRC Docket No. 16-0287

DECISION AND ORDER

COUNSEL:

John A. Black, Attorney, Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, for Complainant.

Clay C. Schuett, Attorney, Schuett Law Group, Seminole, FL, for Respondent.

JUDGE: Honorable John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

Samsson Construction, Inc. (Samsson) was a General Contractor at a construction worksite located in Port Richey, Florida, when the United States Department of Labor's Occupational Safety and Health Administration (OSHA) inspected the worksite, which resulted in the issuance of two citations under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq.,[1] with proposed penalties totaling $32,000.00 for alleged serious and willful violations[2] of 29 C.F.R.

[1] The Secretary of Labor (Secretary) delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health, who heads OSHA, and assigned responsibility for enforcement of the Act to OSHA. *See* 65 Fed.Reg. 50017 (2000). The Assistant Secretary has promulgated occupational safety and health standards, *see e.g.*, 29 C.F.R. Parts 1910 and 1926, and has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties to enforce the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[2] Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§666(a), (b), (c). A serious violation is defined in the statute; the other two degrees are not. *Id.* §666(k).

§ 1926.451, OSHA's general requirements for scaffolds. More specifically, the Secretary asserts in Citation 1, Item 1a[3] that Samsson committed a serious violation of 29 C.F.R. § 1926.451(e)(l)[4] when its employees "were using the scaffold frame to climb up and down to the upper level exposing them to a 13 foot fall hazard, in that, a ladder was not used for safe access." In Citation 2, Item 1, the Secretary asserts that Samsson committed a willful violation of 29 C.F.R. § 1926.451(b)(l)[5] when its employees "were exposed to a 13 foot and a 6 feet 5 inch fall hazards, in that, the scaffold was not fully planked." The Secretary asserts in Citation 2, Item 2 that Samsson committed a willful violation of 29 C.F.R. § 1926.451(g)(4)(i)[6] when its employees "were exposed to a 13 foot fall hazard, in that, the scaffold was missing the top and mid guardrails."

After Samsson contested the citations, the Secretary filed a formal complaint[7] with the Act seeking an order affirming the citations and proposed penalties. A bench trial was subsequently held in Tampa, Florida. Pursuant to Commission Rule 90(a), after carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings. For the reasons indicated *infra*, the remaining citation items and proposed penalties are **AFFIRMED**.

II. BACKGROUND

Samsson's principal place of business is in Spring Hill, Florida, where it engaged in construction at the worksite at issue located in Port Richey, Florida. (Tr.7- 8; Stipulated Fact No. 4.)[8] On September 3, 2015, OSHA Compliance and Safety Officer Elvin Santiago, and his supervisor, Assistant Area Director Erin Sanchez, conducted a safety inspection at the worksite where Samsson was constructing a Verizon store. (Tr. 23-24, 26-27.) As of the date of the

[3] At trial, the Secretary withdrew Citation 1, Item 1b.

[4] When "scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access." 29 C.F.R. § 1926.451(e)(l).

[5] Each platform on all working levels of scaffolds "shall be fully planked or decked between the front uprights and the guardrail supports[.]" 29 C.F.R. § 1926.451(b)(l).

[6] Guardrail systems "shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews." 29 C.F.R. § 1926.451(g)(4)(i).

[7] Attached to the complaint and also adopted by reference were the two citations at issue. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R §2200.30(d).

[8] *See* Pretrial Order, Attach. C.

inspection, Samsson had approximately 20 employees. (Tr. 148; 235.) Samsson did not have a written safety program; its program consisted solely of once-a-week meetings led by its safety director, which did not cover scaffold safety. (Tr. 166, 179-180, 249, 254-255.)

Floyd Wood, who was hired by Samsson for the stucco crew to apply stucco to walls of the building, had been on the job at the worksite for approximately a month when the inspection occurred. (Tr. 103, 104.) Floyd Wood and his son, John Wood,[9] were "leads" of the stucco crew, and Floyd Wood was the supervisor over the stucco crew.[10] (Tr. 257-258.) The stucco crew also included Floyd Wood's nephew, Tyler Checo, who worked on the crew as a laborer or mud tender and "would get up on the scaffold to dump the mud buckets onto our mud board."[11] (Tr. 105, 106-108.) Both Floyd Wood and John Wood were "competent persons" under the cited standard. (Tr. 109-110.) Faillace did not rely on Jimmy Larson for any scaffolding experience but rather, relied on John Wood and Floyd Wood for their scaffold expertise. (Tr. 169, 170.)

Floyd Wood had 58 years' experience working from scaffolds, doing stucco work, and had built approximately 1,500 scaffolds. (Tr. 107, 108.) Floyd Wood admitted he knew the OSHA requirements regarding planking and guardrails and understood Samsson was required to have guardrails on the top level to protect against falls and planking that was the full width of the scaffold. (Tr. 108-109.) He also admitted he was aware of these requirements prior to OSHA's inspection. (Tt. 110.) When OSHA conducted the inspection, Floyd Wood knew the scaffold lacked the guardrail mandated by OSHA requirements and he also knew the scaffold decking was not OSHA-compliant. (Tr. 110-111). Floyd Wood explained the scaffold was not compliant because he was "in a hurry to get the job done, [so] I took my own chances on it." (Tr. 111.)

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). To achieve this purpose, the Act imposes two duties on an employer: a "general duty" to provide 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); and a specific duty

[9] Since there are two Woods referenced herein, they are referred herein by their given names and their surnames.

[10] John Wood was also "more or less" a supervisor. (Tr. 111.)

[11] Another worker on the stucco crew was Bill Diecidue. (Tr. 105.) However, it is not clear whether he was exposed to the violative conditions.

to comply with all applicable occupational safety and health standards promulgated under the Act. *Id.* § 654(a)(2). Pursuant to that authority the Secretary promulgated the standard at issue in this case. However, "[a]s has often been said, OSHA does not impose strict liability on an employer but rather focuses liability where the harm can in fact be prevented." *Central of Ga. R.R. Co. v. Occupational Safety & Health Review Comm'n*, 576 F.2d 620, 623 (5th Cir.1978).[12]

Under the law of the Eleventh Circuit, the jurisdiction in which this case arose,[13] the Secretary will make out a prima facie case for the violation of an OSHA standard by showing "(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." *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 836 (11th Cir. 2016) (*citing ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013)); *Florida Lemark Corp. v. Sec'y, U.S. Dep't of Labor*, 634 F. App'x 681, 685 (11th Cir. 2015); *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014). "If the Secretary establishes a prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Eller-Ito Stevedoring*, 567 F. App'x at 803 (*citing ComTran Grp.*, 722 F.3d 1308).

The first three elements of the Secretary's prima facie case regarding the remaining citations at issue have been stipulated to by the parties. (*See* Resp't's Proposed Findings of Fact ¶¶ 1, 3; *see also* Resp't's Post-Trial Br. 2; Tr. 16, 33-34, 151.) As to the fourth element, Samsson makes the same argument as to all those remaining citations, to wit: that it "disputes that it had actual or constructive knowledge of the actions of its rogue employees sufficient to charge it with

[12] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. Immediately after the split, the Eleventh Circuit stated in *Bonner v. City of Prichard, Alabama*, 661 F. 2d 1206 (11th Cir. 1981), that any opinion issued by the Fifth Circuit before the close of business on September 30, 1981 is binding precedent on the Eleventh Circuit.

[13] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Florida, which is in the Eleventh Circuit. In general, where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has 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). The Court therefore applies the precedent of the Eleventh Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

the citations at issue." (Resp't's Post-Trial Br. 1; *see also* Resp't's Proposed Findings of at 1 & ¶ 41; Resp't's Proposed Conclusions of Law at ¶¶ 7, 8, 10.)

Knowledge of Violations

The Act imposes liability on the employer for serious violations "only if the employer knew, or 'with the exercise of reasonable diligence, [should have known] of the presence of the violation[s].'" *Florida Lemark*, 634 F. App'x at 687 (citation omitted) (quoting 29 U.S.C. § 666(k)). Thus, to satisfy the fourth element of his prima facie case, "the Secretary must prove the employer had knowledge of the violation[s]." *Quinlan*, 812 F.3d at 837. Samsson argues it "did not have knowledge sufficient to charge it with the citations at issue." (Resp't's Post-Trial Br. at 2.) The Court does not agree.

"When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of noncomplying conduct of a subordinate." *ComTran*, 722 F.3d at 1317 (*citation omitted*). "It is reasonable to do this because a corporate employer can, of course, only act through its agents . . . and the supervisor acts as the 'eyes and ears' of the absent employer. That makes his knowledge the employer's knowledge." (*Id.*) See also *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1271 (11th Cir. 2009); *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985) (a corporation "cannot act other than through its officers, employees, and agents.").

"The knowledge element of the prima facie case can be shown in one of two ways." *Eller-Ito Stevedoring*, 567 F. App'x at 803 (citing *ComTran*, 722 F.3d at 1307). "First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer." *Id.* (citing *ComTran*, 722 F.3d at 1307–08). "In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable." *Id.* at 803-04 (citing *ComTran*, 722 F.3d at 1308).

"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*, 812 F.3d at 841. 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.

The uncontested evidence shows that Samsson's supervisor, Floyd Wood, knew his subordinates John Wood and Tyler Checo were using a scaffold that was not in compliance with the planking and guardrail requirements. Therefore, if this were the "ordinary case," Floyd Wood's actual knowledge would be Samsson's knowledge. However, the "ordinary case" is distinct from one where the supervisor is the "actual malfeasant" who creates the hazard. *Florida Lemark*, 634 F. App'x at 688 (citing *ComTran*, 722 F.3d at 1308 n. 2).

As the Eleventh Circuit held in *ComTran*, where the supervisor himself is the one who engaged in the conduct that violated the Act, the "supervisor's 'rogue conduct' cannot be imputed to the employer in that situation." *ComTran*, 722 F.3d at 1316. Here, Floyd Wood was the "actual malfeasant" who created the hazard by using a scaffold that was not in compliance with the planking and guardrail requirements. Therefore, the Secretary cannot impute Floyd Wood's knowledge *of his own misconduct* to Samsson— since he was the "actual malfeasant" that created the hazard. *Florida Lemark*, 634 F. App'x at 688 (citing *ComTran*, 722 F.3d at 1308 n. 2).

Nonetheless, in *Quinlan*, the Eleventh Circuit held that when the exposed employees include not only the supervisor, but also one or more subordinate employees, "the general rule should apply in this case—i.e., that the knowledge of a supervisor of a subordinate employee's violation should be imputed to the employer." *Quinlan*, 812 F.3d at 841. Here, as in *Quinlan*, the Court sees "little difference in principle between that classic situation in which knowledge is imputed and the instant situation involving supervisor [Floyd Wood] and subordinate[s] [John Wood and Tyler Checo]. In both cases, the supervisor sees the violation by the subordinate[s], knows there is a violation, but disregards the safety rule for one reason or another." *Id.* Thus, Floyd Wood's knowledge that his subordinates were working on a scaffold that was not in compliance with OSHA's planking and guardrail requirements is imputed to Samsson under *Quinlan*.

"In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable." *Quinlan*, 812 F.3d at 837 (citing *ComTran*, 722 F.3d at 1307-08). As the Court noted *supra*, Samsson had no rule or procedure in place for ensuring compliance with the cited standard and its safety program consisted solely of

once-a-week meetings led by its safety director, which did *not* cover scaffold safety. "Therefore, constructive knowledge was established because the alleged misconduct was reasonably foreseeable." *Florida Lemark*, 634 F. App'x at 688 (citing *ComTran*, 722 F.3d at 1308 n. 3).

Therefore, the Secretary has established both Samsson's actual knowledge and its constructive knowledge of the violations remaining at issue.

"Willful" Classification

Section 17(a) of the Act provides, in relevant part, that an employer who "willfully or repeatedly violates" any OSHA standard, rule, or order, may be assessed a penalty of no more than $70,000 but no less than $5,000 for each willful violation. 29 U.S.C. § 666(a). Samsson argues the Secretary "failed to present ANY evidence, much less enough evidence to sustain [his] burden of proving that the alleged violations were willful." (Resp't's Post-Trial Br. at 2.) Although the Act does not define the term "willful," the Eleventh Circuit has held that in order for a violation to be deemed "willful,"

> proof must be adduced either that (1) "an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard," or (2) that, if the employer did not know of an applicable standard or provision's requirements, it exhibited such "reckless disregard for employee safety or the requirements of the law generally that one can infer that ... the employer would not have cared that the conduct or conditions violated [the standard]."

Fluor Daniel v. Occupational Safety & Health Review Comm'n, 295 F.3d 1232, 1240 (11th Cir. 2002) (quoting *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1355 (11th Cir. 2000) (quoting *Williams Enters., Inc.,* 13 BNA OSHC at 1257).

Likewise, the Commission has held that "where an employer has actual knowledge of the requirements of a standard and is aware that the conditions at the site do not meet those requirements, 'failure to take positive steps to comply ... constitutes a least a careless disregard of the mandate of the Act' (emphasis added)."*Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1922 (No. 96-05293, 1999) (quoting *Kehm Constr. Co.*, 7 BNA OSHC 1976, 1979 (No. 76-2154, 1979).[14] Thus, the Eleventh Circuit has held a "willful" violation "is, in its simplest form, 'an

[14] See e.g., *Lakeland Enters. of Rhinelander, Inc. v. Chao,* 402 F.3d 739, 747-48 (7th Cir. 2005) ("[I]gnoring obvious violations of OSHA safety standards amounts to 'plain indifference' for purposes of a finding of willfulness."); *Stark Excavating, Inc. v. Perez,* 811 F.3d 922, 924 (7th Cir. 2016) (affirming willful characterization of§ 1926.652(a)(l) violation in which foreman, "from a vantage point at the top edge of the hole, observed [an employee] working there for approximately 10 minutes," but "took [no] action to slope the excavation so as to comply with the requirements of the Act").

intentional disregard of, or plain indifference to, OSHA requirements." *Fluor Daniel*, 295 F.3d at 1239 (citing *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1152 (11th Cir. 1994) (quoting *Georgia Elec. Co. v. Marshall,* 595 F.2d 309 (5th Cir.1979)).

Samsson argues "neither upper management nor supervisor James Faillace, who was not scaffold competent and was not present at the jobsite that morning, had actual or even constructive knowledge of the violation."[15] (Resp't's Post-Trial Br. at 6.) The Court does not agree with Samsson. As indicated *supra*, pursuant to *Florida Lemark*, constructive knowledge was established because the alleged misconduct was reasonably foreseeable. Further, Floyd Wood's knowledge that his subordinates were working on a scaffold that was not in compliance with OSHA's planking and guardrail requirements is also imputed to Samsson under *Quinlan*.

The Eleventh Circuit has also instructed that a "willful" violation generally requires that a party possessed a "heightened awareness" of the applicable OSHA regulation. *Lanzo Const. Co. v. Occupational Safety & Health Review Comm'n.*, 150 F. App'x 983, 986 (11th Cir. 2005) (citing *Williams Enters., Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987)). Thus, as the Commission has noted, "the focal point of a willful classification is the employer's state of mind when the violation was committed." *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000) (citing *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987); *Monfort of Colorado, Inc.*, 14 BNA OSHC 2055, 2062 (No. 87-1220, 1991)).

Therefore, the Court must determine whether the record establishes Samsson, as a corporate entity, had a heightened awareness of the illegality of its conduct and a state of mind manifesting plain indifference to employee safety. The Court may impute to Samsson the state of mind of not only upper management but *any* supervisor who exhibited a heightened awareness of the illegality of the conduct or conditions and a state of mind of conscious disregard or plain indifference to employee safety. *Branham Sign Co.*, 18 BNA OSHC at 2134 ("The state of mind of a supervisory employee, his or her knowledge and conduct, may be imputed to the employer for purposes of finding that the violation was willful.") (citing *Continental Roof Sys., Inc.*, 18 BNA

[15] James Faillace was Samsson's site foreman or vertical foreman on the Verizon jobsite and was "in charge of the whole job, plus the vertical construction, meaning the building." (Tr. 227-228.) However, Faillace had no experience or training with regard to scaffolding. (Tr. 168.) Jimmy Larson was Samsson's civil (concrete or vertical) foreman on the Verizon jobsite "in charge of the site construction, digging the pond, grading, pouring concrete, et cetera, getting the underground utility in." Although Larson had scaffolding safety training with a previous job over ten years earlier, he had no experience or training regarding building or assembling scaffolding. (Tr. 198, 221, 223, 224-225.) Neither Faillace nor Larson was a "competent person" under the cited standard. (Tr. 127, 168-171, 202).

OSHC 1070, 1071 (No. 95-1716, 1997); *Conie Constr., Inc.*, 16 BNA OSHC 1870, 1872 (92-264, 1994), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995).

As indicated *supra*, Floyd Wood had 58 years' experience working from scaffolds, doing stucco work, had built approximately 1,500 scaffolds, had actual knowledge of the requirements of the cited standard, and was aware that the conditions at the site did not meet those requirements. Therefore, Floyd Wood had a "heightened awareness" of the applicable OSHA regulation. As a "competent person"[16] under the cited standards, Floyd Wood, was authorized to take prompt corrective measures to eliminate the hazardous exposure. Despite his knowledge that employees were exposed to the cited hazards, Floyd Wood failed to correct or eliminate the hazardous exposure because he "was in a hurry to get the job done" and took "his own chances on it." Therefore, Floyd Wood consciously disregarded the standard and manifested plain indifference both to his own safety and to the safety of his subordinate employees. His failure to take positive steps to comply constitutes a least a careless disregard of the mandate of the Act. Floyd Wood's state of mind, his knowledge, and his conduct is imputed to Samsson for purposes of finding that the violations were willful. Therefore, the two items in Citation 2 were properly classified as willful violations.

Preventable Employee Misconduct Defense

As indicated *supra*, if the Secretary establishes a prima facie case with respect to all four elements, "the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Eller-Ito Stevedoring*, 567 F. App'x 803 (*citing ComTran Grp.*, 722 F.3d 1308). However, "[t]his defense requires the employer to show that it: (1) created a work rule to prevent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover noncompliance; and (4) enforced the rule against employees when violations were discovered." *Eller-Ito Stevedoring*, 567 F. App'x at 804. Samsson did not have a work rule to prevent the violation at issue since it did not have a written safety program and its program consisted solely of once-a-week meetings led by its safety director, which did not cover scaffold safety. Therefore, Samsson failed to establish this defense.

IV. PENALTY DETERMINATION

[16] "*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).

Under the Act, an employer who commits a "serious" violation may be assessed a civil penalty of up to $7,000 for each such violation, and not more than $70,000 for each "willful" violation. *See* 29 U.S.C. § 666(a)-(b).[17] The Secretary proposed a penalty of $2,000 for the serious Citation 1, Item 1a violation, $14,000 for the willful Citation 2, Item 1 violation, and $14,000 for the willful Citation 2, Item 2 violation. Since the Commission is empowered to "assess all civil penalties provided in this section," 29 U.S.C. § 666(j), the Court "will consider the amount of the Secretary's penalty *de novo*." *ComTran*, 722 F.3d at 1307. In assessing penalties, the Court must give "due consideration to the appropriateness of the penalty" with respect to (1) the size of the business of the employer being charged, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. 29 U.S.C. § 666(j). After giving due consideration to the appropriateness of the penalty with respect to these four statutory factors, the Court finds the Secretary's proposed civil penalties are appropriate.

"These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citing Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992)). The gravity of the violation includes the number of exposed employees, the duration of exposure, the precautions taken to prevent injury, and the degree of probability that an injury would occur. *Merchant's Masonry, Inc.*, 17 BNA OSHA 1005, 1006-07 (No. 92-424, 1994). With respect to the gravity of the citations at issue, the Court finds the number of exposed employees was small since there were only three employees of Samsson at the worksite. The duration of exposure and the degree of probability that an injury would occur related to Citation 1, Item 1a was limited since the exposure involved only climbing up to and down from the upper level. However, for the Citation 2 violations, the duration of exposure and the degree of probability was significant since they involved the scaffold itself, which was the working area for the exposed employees. As to precautions taken to prevent injury related to the cited condition, the Court finds no evidence in the record establishing any; to the contrary, the evidence shows the weekly safety meetings led by Samsson's safety director failed to cover scaffold safety.

[17] In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act, which directs agencies to adjust their penalties for inflation each year and requires agencies to publish "catch up" rules to make up for lost time since the last adjustments. As a result of OSHA's "catch up" rules, an employer who commits a violation after November 2, 2015, may be assessed on or after August 1, 2016, up to $12,471 for each serious violation and up to $124,709 for each willful or repeated violation. *See* 29 C.F.R. § 1903.15(d).

With respect to the size of the business, Samsson was small, with approximately 20 employees, which merits a penalty reduction. The Secretary provided a 60% penalty reduction for the serious violation and an 80% penalty reduction for each willful violation, which the Court finds appropriate. As to history, since there is no evidence Samsson has been previously inspected, the Court concludes Samsson should receive neither a reduction, nor an increase in the penalty based on their OSHA inspection history. As to the good faith factor, good faith can be a mitigating factor, even for willful violations. *See e.g., Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1922 (No. 96-0593, 1999. However, the evidence required to establish that a violation was willful often negates a finding of good faith. *See e.g., Kaspar Wire Works, Inc.*, 268 F.3d 1123, 1132 (D.C. Cir. 2001). Here, again, there is no evidence in the record establishing Samsson's effort to implement an effective workplace safety program related to the cited conditions. Therefore, Samsson is not entitled to a good faith penalty reduction. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Citation 1, Item 1b is **VACATED**.

IT IS FURTHER ORDERED THAT Citation 1, Item 1a is **AFFIRMED** and Samsson is assessed and directed to pay to the Secretary a civil penalty of $2,000.00.

IT IS FURTHER ORDERED THAT Citation 2, Item 1 is **AFFIRMED** and Samsson is assessed and directed to pay to the Secretary a civil penalty of $14,000.

IT IS FURTHER ORDERED THAT Citation 2, Item 2 is **AFFIRMED** and Samsson is assessed and directed to pay to the Secretary a civil penalty of $14,000.[18]

SO ORDERED.

/s/ John B. Gatto
John B. Gatto
Administrative Law Judge

Dated: January 17, 2017
Atlanta, GA

[18] *See* section 17(l) of the Act, which mandates that civil penalties owed under this Act "shall be paid to the Secretary for deposit into the Treasury of the United States[.]" 29 U.S.C. §666(l).