



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

SECRETARY OF LABOR,

Complainant,

v.

MPS PRODUCTS CORP.,

Respondent.

OSHRC DOCKET NO. 17-0372

Appearances:

James Polianites, Esq.,
Office of the Regional Solicitor, Boston, MA
For the Complainant

Paul J. Katz, Attorney
Chestnut Hill, MA
For the Respondent

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

Respondent MPS Products Corp. (Respondent or MPS) is a business engaged in steel erection construction. In response to a complaint, the Occupational Safety and Health Administration (OSHA) inspected Respondent's steel erection worksite in Rockland, Massachusetts. Following inspection, OSHA issued to Respondent a two-item serious citation and a notification of penalty alleging employee exposure to fall hazards, in violation of steel erection standard 29 C.F.R. § 1926.760(a)(1) and in violation of section 5(a)(1) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 654(a)(1). The Secretary proposed a total penalty of \$10,140.00 for the citation.

Respondent MPS timely contested the citation, bringing the matter before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c). A hearing was held in Boston, MA on February 23, and March 15, 2018.¹ Both parties were represented by counsel at the hearing. Both parties filed post-hearing briefs. Respondent filed a reply brief.

For the following reasons, serious citation 1, item 1 is vacated, serious citation 1, item 2 is affirmed, and a total penalty of \$5,070.00 is assessed.

JURISDICTION

Based on the record, I find that at all relevant times Respondent MPS was engaged in a business affecting interstate commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. I also find that the Commission has jurisdiction over the parties and subject matter of this proceeding. (Tr. 9; Answer; Resp. Br. 4).

ISSUES

Complainant, the Secretary of Labor (Secretary), contends that Respondent MPS violated OSHA steel erection standard 29 C.F.R. §1926.760(a)(1), when employees were exposed to falls greater than fifteen (15) feet to the ground, while working on a horizontal steel beam without using fall protection. Respondent denies violating the standard cited. Respondent contends that any violation found was due to unpreventable employee misconduct?

The issues are:

1. Did MPS violate steel erection standard 29 C.F.R. § 1926.760(a)(1)?
2. Did MPS know or with the exercise of reasonable diligence could MPS have known of the hazardous worksite condition violative of the standard?
3. If standard 1926.760(a)(1) was violated, was the violation due to unpreventable employee misconduct?

¹ Respondent's introduction of exhibits at the hearing was disorganized and redundant. (Tr. 145-54, 174-75, 181-200, 216-18, 227, 255-56, 296-304, 351-54). See Attachment A – Exhibit Summary.

Present both hearing days were OSHA Compliance Officer (CO) Alfonso Leone, MPS President Michael Pimental and MPS Foreman Riccardo Servizio. (Tr. 7, 253-54, 260, 265, 393-94, 411).

The Secretary also contends that Respondent MPS violated section 5(a)(1) of the Act, the general duty clause, when an employee was exposed to fall hazards, of up to twenty-nine (29) feet, while climbing and standing on the guardrails of an up-right self-propelled scissors lift and when exiting the lift to access the structure's upper level where employees were working. Respondent denies violating the general duty clause. Respondent contends that any general duty clause violation found resulted from unpreventable employee misconduct.

The issues are:

4. Did MPS violate the general duty clause, section 5(a)(1) of the OSH Act?
5. Did MPS know or with the exercise of reasonable diligence could MPS have known of the hazardous worksite condition violative of the general duty clause?
6. If the general duty clause was violated, was the violation due to unpreventable employee misconduct?

FINDINGS OF FACT

The Company and the Inspected Worksite.

MPS is a steel erection company. MPS works on large projects erecting steel buildings and on small, miscellaneous, iron installation projects. MPS has been in business since approximately 2014. MPS works on between ten and thirty projects in a year. (Tr. 105, 114, 160-61, 173, 235, 238, 319).

Michael Pimental is the President of MPS Products Corporation. (Tr. 113-14). Mr. Pimental has been an ironworker most of his life. (Tr. 117, 319-20). Typically, for approximately the year before the OSHA inspection, Mr. Pimental worked in the office, estimating, bookkeeping, and project managing. (Tr. 117). He described himself as stuck in the office. (Tr. 143).

MPS has approximately eight employees. Employees always work in crews. There is always a foreman, also known as a competent person, on each jobsite, working with the crew, watching the workers. (Tr. 114, 130-31). MPS has three Foremen, including Riccardo Servizio and Jose dos Santos Pais.² (Tr. 313, 316, 345). MPS foremen have an OSHA-30 card, training in

² Foreman Jose dos Santos Pais is also identified in the record as Jose dos Santos Paris, and Jose Dosparis. (Tr. 312-13; Attachment B).

CPR, first-aid, and in key industry hazards, fall protection and connecting. (Tr. 130-31, 232-35, 361; Ex. R-35(c); Attachment B).

According to Mr. Pimental the highest risk factor in the steel erection industry is falls. (Tr. 115-16, 162). Foreman Servizio agreed. Ironwork is a dangerous job. The biggest hazard any MPS employee encounters is falling from the steel structure since serious injury or death may result. (Tr. 317-18, 321-22, 347).

The MPS Worksite on the Day of the OSHA Inspection

On the day of the OSHA inspection, January 13, 2017, MPS was engaged in the steel erection of a building, at 276 Weymouth Street, Rockland, Massachusetts. (Tr. 319). The project was known as “Upper Baby” (Uppa Baby), the name on the plans for the steel building MPS was erecting.³ (Tr. 271-75, 296, 400; Ex. R-40; Ex. R-42). The worksite superintendent was Herb Volpe, who worked for Integrated Builders. (Tr. 25). Other than MPS, no other company was on the worksite that day. (Tr. 319).

At this worksite, the MPS competent person was Foreman Riccardo Servizio.⁴ The crew was Foreman Servizio’s responsibility. The foreman is responsible for enforcing MPS’s safety rules, including the fall protection rule. (Tr. 350, Ex. R-1, p. 2). Foreman Servizio’s job was to tell the employees what to do for the day and to make sure the job flowed. (Tr. 114, 131, 317, 319).

On the day of the OSHA inspection, Foreman Servizio was the only MPS foreman on site. (Tr. 318, 390). There were seven MPS employees under his supervision, including Sabastian dos Santos,⁵ Marcello DaCruz, and Romiro Jorge.⁶ (Tr. 319, 332, 338-40; Ex. R-9; Ex. R-16, Ex. R-

³ Work on this project began sometime after January 5, 2017. (Tr. 295-96).

⁴ Foreman Servizio worked with MPS since the beginning. (Tr. 115, 132, 316-17). Working with MPS, at the time of the Upper Baby project, Foreman Servizio had been an ironworker for nine years and a foreman for three years. (Tr. 316-17).

⁵ Employee Sebastian dos Santos’s first name also appears in the record as Sebastiao and Sebastio. (Ex. R-16; R-35(a); Attachment B). Employee dos Santos worked with MPS since the beginning. (Tr. 226).

⁶ Foreman Servizio sometimes worked with employees dos Santos, DaCruz, and Jorge. They were not part of his usual crew. (Tr. 357). The other MPS employees on the jobsite that day are not identified in the record.

33). Foreman Servizio described the work performed that day as routine and repetitive. The work was to connect the steel, land the joists, spread them. (Tr. 360). On the day of the OSHA inspection the project was on schedule. (Tr. 227). The project was halfway erected. (Tr. 328).

At the morning meeting that day, Foreman Servizio told worker DaCruz to weld the bridging out of the lift.⁷ DaCruz was told to stay in the lift. (Tr. 170, 325-27, 334-36, 344, 388). It was anticipated that DaCruz's work assignment may take him from the first level to the second level of the structure. (Tr. 326-27). While not present at the worksite that day, it was Mr. Pimental's understanding that worker Jorge also was assigned to weld the bridging of the structural member. (Tr. 144-45).

Worker DaCruz was assigned to work at a location halfway down the project, about eighty to one hundred feet (80 – 100 feet) from where Foreman Servizio was working giving direction to the connectors and to the workers rigging steel. (Tr. 327-29). Foreman Servizio recalled that worker Jorge worked in the vicinity of worker DaCruz.⁸ (Tr. 330). The other MPS employees

⁷ On a steel structure, joists span across beams. Bridging goes through the joists and ties them together. (Tr. 325, 382).

⁸ Foreman Servizio's testimony regarding where employee Jorge worked on the morning of the OSHA inspection was inconsistent and confused. First, Foreman Servizio testified that Jorge was the only employee working near employee DaCruz halfway down the project. (Tr. 330). Foreman Servizio later contradicted this testimony, stating employee Jorge worked near Foreman Servizio, connecting the bolts behind the connectors. (Tr. 337, 340, 381-82). Thereafter, Foreman Servizio confirmed that the inspection photographs taken of employees DaCruz and Jorge, by CO Leone, show only part of the jobsite. The other part of the jobsite, where employees worked with Foreman Servizio is not shown in the OSHA photographs in evidence. (Tr. 392-93; Ex. C-2).

Foreman Servizio's testimony was confused regarding the events on the morning of the inspection. Specifically, his testimony was unclear regarding where employee Jorge was working and whether employee Jorge had been instructed to weld bridging or connect bolts. (Tr. 330, 337, 340, 381-82). When shown the OSHA inspection photographs during cross examination, Foreman Servizio agreed that employee Jorge appears in a photograph taken by CO Leone. (Tr. 384-85; Ex. C-2, p.1). Great weight is given to CO Leone's testimony that this inspection photograph was taken of the worker he observed climb the lift rails to access the structural steel. (Tr. 31-32; Ex. C-2, p.1).

Foreman Servizio's testimony that employee Jorge worked near him connecting bolts behind the connectors is not credited. Foreman Servizio's inconsistent, confused, testimony reveals his poor recollection of the events on the day of the OSHA inspection.

worked near Foreman Servizio. (Tr. 330). That day, employee dos Santos worked as a “connector,” connecting the steel.⁹ (Tr. 332, 338-40).

The OSHA Inspection.

On the morning of January 13, 2017, at 9:00 a.m., the OSHA Boston South (Braintree), Massachusetts, Area Office received a complaint about possible fall hazards on a steel construction worksite in Rockland, Massachusetts. In response to the complaint, that day OSHA Compliance Safety and Health Officer (CO) Alfonso Leone traveled to the worksite to conduct an inspection. CO Leone arrived at the worksite, located at 276 Weymouth Street, Rockland, Massachusetts, around 11:00 a.m. Upon arrival, CO Leone parked on the side of Weymouth Street and observed an active construction worksite. Two levels of steel were in place. (Tr. 17-18, 20, 26; Ex. C-1).

CO Leone observed a worker sitting and standing on a steel beam, on the second level, the top level of the structure. The worker wore a harness, but the worker was not tied off using fall protection. The worker appeared to be handling a welding lead. CO Leone photographed the individual on the second level of the steel, from his location on Weymouth Street, offsite, beginning at 11:03 a.m.¹⁰ (Tr. 19-23, 63, 66-68, 94; Ex. C-2, pp. 5, 6, 7, 8; Ex. C-5). The worker photographed, assigned to do welding, was later identified by Mr. Pimental and Foreman Servizio as Marcello DaCruz.¹¹ (Tr. 170, 381-84; Ex. C-2, pp. 6, 7; Ex. R-5(b), p. 3). Worker DaCruz had

⁹ Subpart R – Steel Erection, Section 29 C.F.R. § 1926.751, definitions state, in pertinent part:

Connector means an employee who, working with hoisting equipment, is placing and connecting structural members and/or components.

Hoisting equipment means commercially manufactured lifting equipment designed to lift and position a load of known weight to a location at some known elevation and horizontal distance from the equipment’s center of rotation. “Hoisting equipment” includes but is not limited to cranes, derricks, tower cranes, barge-mounted derricks or cranes, gin poles and gantry hoist systems.

¹⁰ CO Leone was a credible, forthright, witness who answered questions to the best of his recollection on direct and cross examination, without exaggeration. (Tr. 74-75). CO Leone worked in construction for 20 years. (Tr. 63).

¹¹ Employee DaCruz’s name also appears in the record as Marcelo Da Cruz, Marcello Decosta, Marcello Cruz. (Ex. R-35(b)); Attachment B). At the time of the inspection employee DaCruz had worked for MPS for approximately three years. He was regarded as a safe, dependable ironworker. (Tr. 325, 329-30, 346, 358).

been instructed to weld the bridging of the structural steel from the scissor lift. (Tr. 170, 325-27, 335, 388).

Mr. Pimental testified that worker DaCruz had a harness and lanyard when photographed. He did have a beamer.¹² He was not using fall protection. (Tr. 120). Foreman Servizio agreed that the OSHA inspection photograph shows worker DaCruz, out of the lift, walking along on the steel without being tied off. (Tr. 386, 388-89; Ex. C-2, pp. 7, 8). Foreman Servizio agreed that it would have been apparent to him or anyone in authority that worker DaCruz was not working from the scissor lift as instructed. (Tr. 388-89).

CO Leone photographed employees on the worksite for several minutes. He then drove onto the worksite and parked. CO Leone entered the office trailer and spoke to worksite Superintendent Volpe. Mr. Volpe identified the worker on the steel as employed by MPS. CO Leone explained that OSHA received a complaint about an alleged fall hazard on the jobsite and he was present to conduct an inspection. At CO Leone's request, Mr. Volpe contacted MPS to have them provide a representative for the OSHA opening conference. (Tr. 24-27, 65; Ex. C-5). Superintendent Volpe showed CO Leone the site drawings, indicating the height of the second level of steel as twenty-nine (29) feet.¹³ (Tr. 35, 37-38, 95-96; Ex. C-2, p. 4). Mr. Volpe said he believed the employees were connecting. (Tr. 61).

As Mr. Volpe contacted the MPS representative for the OSHA opening conference, before the opening conference began, CO Leone stepped outside onto the front platform of the office trailer. While on the front platform, CO Leone observed a worker climb out of a red Skyjack scissor lift. To exit the red scissor lift, the worker stepped on the lift's mid-rail and top rail, and then pulled himself up onto the steel beam. The worker wore a harness but was not tied off. CO Leone observed the worker, on the steel, with a harness and lanyard in hand. Once on the steel beam, he still was not tied off. CO Leone photographed the worker on the steel beam at 11:21 a.m. (Tr. 27-32, 39, 45, 72, 94, 166; Ex. C-2, pp. 1, 2, 3; Ex. C-5).

¹² A beamer is a fall protection device that provides an anchorage point for the worker to tie off to the structural steel. (Tr. 119-20, 164, 340-41, 349; Ex. R-4)

¹³ CO Leone did not take measurements at the worksite. (Tr. 35, 69).

The worker photographed, who exited the red Skyjack scissor lift by climbing the lift's rails, was later identified by Mr. Pimental and Foreman Servizio as Romiro Jorge.¹⁴ Mr. Pimental testified that the OSHA inspection photograph shows worker Jorge on the beam walking, with a beamer in his hand. (Tr. 140, 166, 384-85; Ex. C-2, p.1; Ex. 5(b), p. 4). It was Mr. Pimental's understanding that worker Jorge had been assigned to weld the bridging of the structural member. According to Mr. Pimental, MPS rents all-terrain scissor lifts so employees can weld bridging out of the lift per their usual procedure. Lifts are used on all MPS jobsites. There is no evidence Foreman Servizio specifically instructed worker Jorge to work from the lift that day. (Tr. 135, 144).

From outside the trailer looking up, CO Leone also observed and photographed Foreman Servizio working on the second level of the steel. (Tr. 38). When Foreman Servizio was called to the meeting with the OSHA compliance officer, he told the workers to take lunch. (Tr. 387, 390, 392). Walking to the office trailer for the meeting, Foreman Servizio did not look up to see where the workers were working or whether they were wearing their safety equipment. (Tr. 387).

In the office trailer, before the OSHA opening conference began, CO Leone introduced himself to Foreman Servizio and explained the reason for his presence at the worksite, that OSHA had received a complaint regarding fall protection. (Tr. 32-34, 391-92; Ex. R-16, pp. 2-3). Foreman Servizio said the height of the top portion of the steel was twenty-nine (29) feet. CO Leone asked why the worker was not tied off. Foreman Servizio said the MPS worker who was working at the height of twenty-nine (29) feet was welding. The workers were not tied off because they were connecting. CO Leone asked the current stage of the steel erection. Foreman Servizio answered they were in the connecting stage. CO Leone asked at what height fall protection is required. Foreman Servizio answered thirty (30) feet. (Tr. 32-34, 61-62).

During the inspection, Foreman Servizio told CO Leone that MPS works with a safety consultant. He said MPS holds mandatory safety meetings for all MPS employees, including at this worksite. (Tr. 75-77).

¹⁴ Employee Jorge's first name also appears in the record as Ramiro or Romero. (Ex. R-5(b), p. 4). Employee Jorge's work safety record was pretty good. (Tr. 330). Documents disclose that employee Jorge worked for MPS for at least three years. Worker Jorge attended training sessions on June 23, 2014 and March 30, 2016. (Ex. R-39, Ex. R-69; Attachment B). Worker Jorge signed an MPS Safety Program certification on June 12, 2017. (Ex. R-44, p. 3).

CO Leone conducted the OSHA opening conference, in the office trailer, with Foreman Servizio and a representative from Integrated Builders. CO Leone stated that he may interview employees and advised of the employee protections stated in section 11(c) of the Act. (Tr. 34-35).

Following the opening conference, CO Leone conducted a walk-around of the worksite. (Tr. 35, 361-62). During the walk-around, CO Leone does not recall observing the welder or other employees working on the second level of the steel at twenty-nine (29) feet. (Tr. 36, 53, 362). During the walkaround, Foreman Servizio testified the workers were at lunch. (Tr. 390).

During the walk-around, CO Leone observed that when the MPS employees had been working at twenty-nine (29) feet, they could have been seen from virtually every angle. Nothing interfered with his or Foreman Servizio's view to the second level of the structure from the ground. If Foreman Servizio had looked up when the MPS workers were on the steel, they would have been in plain view. (Tr. 38).

CO Leone noted that the structure appeared to be fully bolted. He walked around the building perimeter. There was a crane in the back of the building. During CO Leone's inspection, the crane was not in use or positioned to hoist structural components, columns, or beams to the next level. During the walk-around, CO Leone inspected the crane. The crane was out of service for maintenance. There were tools and an oil pan under the crane. (Tr. 36-37, 41-42, 88, 389; Ex. R-9, p. 2; Ex. R-33, p. 1).

On the day of the OSHA inspection, a crane from Chelmsford Crane Service, Inc., was on site.¹⁵ (Tr. 244, 332-34, 371, 389; Ex. R-42). During a segment of that day, the crane was not

¹⁵ It is not disputed that a crane was on site on the OSHA inspection day. MPS received an invoice, dated January 21, 2017, from Chelmsford Crane Service, Inc., for the week of January 9, 2017, including January 13, 2017. The invoice was for "Hook Work," rental of a crane and operator, on the Uppa Baby worksite. (Ex. R-42, p. 1). Hook work describes putting structural members on the crane's hook and swinging the structural members into place to be connected. (Tr. 332-34, 371, 400-01). The crane rental invoice does not identify, during any specific day, the hours when the worksite crane was not operational or temporarily out of service for on-site repair.

Mr. Pimental testified that the invoice includes a handwritten verification of hours the crane was on site and what the crane was doing, signed by the foreman, at the end of the week. (Tr. 400; Ex. R-42, p. 2). This description of the invoice is rejected. The copy of the Chelmsford invoice, page two, reviewed by Mr. Pimental at the hearing was illegible. (Tr. 400, 403). This likely impacted his description of the invoice, page two. In fact, the legible copy of the invoice, page two, located before the hearing closed and received in evidence, shows the document date and signatures at the *beginning* of the week, on January 9, 2017. The signature on the document, while

operating, as maintenance was needed.¹⁶ CO Leone credibly testified that from the time he arrived at the worksite, at approximately 11:00 a.m., until the conclusion of the OSHA inspection, the crane was out of service. When CO Leone photographed workers on the structural steel, the crane was not operating. (Tr. 36-37, 41-42, 88; Ex. C-2; Ex. R-9, p. 2; Ex. R-33, p. 1).

CO Leone asked Foreman Servizio to speak to the two workers he photographed during the inspection. CO Leone asked to speak to the worker he observed climbing the rails to exit the lift onto the steel beam, whom he photographed on the beam. In response to CO Leone's request, one worker came over to speak with him.¹⁷ The worker said he received fall protection training and lift training. The worker said he climbed out of the lift because there was no place to put a ladder on the steel. CO Leone did not speak to the other worker, a welder. (Tr. 37-40, 53; See Ex. R-16, pp. 2-3).

During the inspection, CO Leone recalled seeing a ladder from the ground to the first level of the structure. He did not see a ladder from the ground to the second level of the structure. (Tr. 47. See Ex. R-16, pp. 2-3).

CO Leone conducted a closing conference. He reminded the participants that the employee he interviewed had protections under section 11(c) of the OSH Act. CO Leone reviewed his inspection observations regarding the lack of fall protection. CO Leone stated that because the

not clearly legible, does not match Foreman Servizio's acknowledged signature, on other documents in evidence. (Tr. 408). (*Compare* Ex. R-42, p. 2 *with* Ex. R-5(b), p.1; Ex. R-35(c), pp. 5, 7; Ex. R-40; Ex. R-44, p.1). The invoice, page two, reflects crane work hours anticipated, not a verification of hours the crane was operational on any specific day.

¹⁶ Great weight is given to CO Leone's observation that the crane was out of service when he was present at the worksite. CO Leone's photographs taken while offsite were taken before the lunch break that day, which began when Foreman Servizio left the steel structure for the OSHA opening conference. (Tr. 36-37, 41-42, 88; Ex. C-2; Ex. R-9, p. 2; Ex. R-33, p. 1). Mr. Pimental's testimony that the crane was in use the entire day is not credited. Mr. Pimental was not present on the worksite. He lacks first-hand knowledge. (Tr. 396). Foreman Servizio's testimony that the crane was operational the entire day is not credited. (Tr. 332-34, 371-72, 389-90). Foreman Servizio's testimony disclosed his poor recollection regarding the OSHA inspection day and is not reliable. See Note 8.

¹⁷ CO Leone's handwritten inspection notes record he spoke to an ironworker identified as Sabastiao dos Santos. (Tr. 60, 71-72; Ex. R-16, pp. 2-3; Ex. R-33). Ironworker dos Santos was assigned to work as a connector on the day of the OSHA inspection. (Tr. 332, 338-40). See Notes 5 and 9 and accompanying text.

worker was welding and not connecting, and because there was no hoisting equipment being used, the worker was required to be protected from falls at fifteen (15) feet. (Tr. 40-41; Ex. R-16, pp. 2-3). Foreman Servizio recalled a brief closing conference.¹⁸ (Tr. 339).

Following the on-site inspection, CO Leone contacted Mr. Pimental to advise of the inspection. Mr. Pimental provided training certifications to OSHA. (Tr. 43-44, 70).

Foreman Servizio testified that at some point on the morning of the OSHA inspection, he looked up and observed that workers DaCruz and Jorge were tied off. (Tr. 380-81, 386). Foreman Servizio had a clear view to the location where DaCruz and Jorge were assigned to work that morning to observe that they were tied off. Later that morning, when DaCruz and Jorge worked on the steel without fall protection, Foreman Servizio's view likewise would have been unobstructed.¹⁹ At the hearing, after reviewing the OSHA inspection photographs, Foreman Servizio assumed that between 11:00 a.m. and 11:20 a.m. that morning, when CO Leone was photographing the worksite, he did not look up to observe the workers. Later that morning as he walked to the office trailer to meet with CO Leone, at approximately 11:45 a.m., Foreman Servizio also did not look up to observe the workers. (Tr. 386-89; Ex. C-2, pp. 1, 6, 7).

MPS's Workplace Safety Rules and Safety Training

From the beginning MPS worked closely with a safety consultant Contractors Risk Management (CRM) to put together a safety plan. MPS uses CRM to stay current with safety

¹⁸ Respondent's representatives state they learned OSHA issued citations based on the inspection when the citations were received in the mail. (Tr. 252, 339, 346, 388). Promptly following the inspection, Mr. Pimental disciplined the workers photographed and identified during the OSHA inspection, as exposed to the worksite fall hazards. (Tr. 170, 190, 313-14, 394-95; Ex. R-5(b), pp. 3, 4). Worker Marcello DaCruz received a verbal warning for not tying off on January 13, 2017. Worker Romero Jorge received a verbal warning for not tying off on January 16, 2017. The citation issued on January 24, 2017, eleven days after the inspection. (Complaint, Exhibit A).

Respondent claims that the OSHA closing conference was inappropriate and prejudicial, as the exposed employees were not identified, and no information was provided regarding possible violations. Respondent's claims are rejected, as contrary to the credited record evidence. (Resp. Br. 14-18, 21-22, 33, 36; Resp. Reply Br. 5).

¹⁹ Foreman Servizio's testimony that he had to move or change position from his work location to observe whether the employees were working safely is not credited. (Tr. 329).

training and new regulations. Since 2013, CRM provided most of the training sessions for MPS employees. (Tr. 104-05, 116, 118, 281, 287-88, 291; Ex. R-1, Ex. R-5(a); Attachment B).

MPS's Safety Program has many components, including safety rules, formal and informal mandatory training sessions, jobsite hazard analyses for some projects, safety oversight by jobsite foremen, safety monitoring inspections conducted by CRM and, when competing work demands permit, by Mr. Pimental. Review of the hearing record reveals that, in the period before and during the OSHA inspection, there were gaps in the execution of MPS's Safety Program. The MPS Safety Program prepared by CRM includes a progressive disciplinary policy to address safety violations and unannounced safety monitoring inspections conducted by CRM. The record reveals that when CRM observed and reported unsafe conditions during worksite inspections, MPS did not follow through and discipline the workers or foremen who engaged in the observed unsafe actions. In the period before and during the OSHA inspection, the record reveals MPS's Safety Program lacking, due to inadequate safety oversight by the worksite foreman and lax enforcement when the safety rules were violated.

Workplace Safety Rules and Disciplinary Policy

In 2014, CRM prepared MPS's Safety Program to follow the OSHA Subpart R Steel Erection regulations.²⁰ (Tr. 118-19, 281, 287-88). One chapter in the Safety Program concerns fall protection. (Tr. 118-19). The Safety Program states that for general employees, detail crews, and deckers "[e]mployees on a walking / working surface with an unprotected edge more than 15 feet above a lower level must be protected." (Ex. R-1, p. 45). The Safety Program also includes fall protection requirements for employees working as "Connectors – meaning those working with a hoisting device."²¹

²⁰ Safety Program excerpts are in evidence. (Ex. R-1, pp. 2, 28, 24, 75; Ex. R-44).

²¹ The MPS Safety Program states that for employees working as "Connectors – meaning those working with a hoisting device," employees

- Must have connector training.
- No fall protection is required when working less than 15 feet from a surface below.
- When working between 15 – 30 feet – employees must be provided with a personal fall arrest system, positioning device system or fall arrest system and wear the equipment necessary to be able to be tied off; or be provided

Foreman Servizio stated MPS's fall protection safety rule provides that a worker, who is not connecting, must be tied off if he is on the steel at fifteen (15) feet or higher. If the worker is connecting, he is allowed up to thirty (30) feet before being tied off. (Tr. 322, 337). Fall protection includes the worker's harness, lanyard, and beamer to clamp to the steel as an anchor point. The workers must wear their fall protection equipment. (Tr. 322-23, 340-41).

The MPS Safety Program in evidence does not set forth safety rules regarding scissor lifts, generally, or exiting scissor lifts, specifically. (Ex. R-1). MPS recognizes that standing or climbing lift railings exposes the worker to a fall hazard. This conduct is improper. (Tr. 136-40). CRM provides MPS employees lift safety training. (Tr. 139; Attachment B). Foreman Servizio testified that MPS has a rule that workers are not to climb the rails of a lift. (Tr. 334-35).

Foreman Servizio testified that the fall protection rule and the rule that workers are not to climb the rails of a lift are very important, because if a worker falls off the steel, the worker could be hurt or possibly die. Throughout Foreman Servizio's employment with MPS, these two rules have been active. (Tr. 347).

MPS has a progressive disciplinary policy regarding safety violations, included in the MPS Safety Program, prepared by CRM in 2014. Pursuant to the policy, discipline for safety violations will progress as follows: 1st Violation: Verbal Warning, with documentation from the supervisor. 2nd Violation: Written Warning, signed by you and your supervisor, to be placed in your permanent record. 3rd Violation: Up to one-week suspension without pay, with documentation placed in your permanent record. 4th Violation: Grounds for termination. (Tr. 167-70, 172, 350-51; Ex. R-1; Ex. R-5(a)). The disciplinary policy included in the MPS Safety Program is dated May 2014; however, before the OSHA inspection, there are no records supporting Respondent's claim that MPS workers were aware of this policy. Before the OSHA inspection, there are no signed documents that MPS employees understand the terms and conditions of the policy.²² (*Compare* Ex. R-5(a))

with other means of protection from fall hazards. This means carrying all equipment with you.

- When working over 30 feet – 100 % fall protection required.

(Ex. R-1, p. 45).

²² Mr. Pimental testified that MPS has a revised disciplinary policy. (Tr. 154-55). The MPS "disciplinary action report" was not provided to the Court or to Counsel for the Secretary until the second hearing date, long past the extension of time granted for prehearing exhibit identification.

and Ex. R-44 *with* Ex. R-5(b) and Ex. R-35(a), pp. 3, 4, 5). There is no evidence that an employee was disciplined for a safety violation, pursuant to this disciplinary policy, prior to the OSHA inspection.

Mr. Pimental testified that employees sign a certification located at the back of the Safety Program, stating that they read, understand, and will follow the Safety Program. (Tr. 121-22, 128-29, 357; Ex. R-1; Ex. R-44). The only signed Safety Program certifications in evidence are dated June 12, 2017, six (6) months after the OSHA inspection, signed by Foreman Servizio and workers DaCruz and Jorge.²³ (Tr. 280-82, 409; Ex. R-44).

A different progressive discipline policy regarding MPS rules, including safety rules, is set forth in the June 11, 2015 letter from Mr. Pimental to employees. In addition to safety, the June 2015 letter addresses various MPS rules including conduct while on and off the job, approval for supply pickup, the responsibility of foremen for assigned trucks after hours, employees not allowed in the shop office area, no yelling or profanity, and metal scrapping, among other rules. (Ex. R-35(a), pp. 3,4; Ex. R-35(b), pp. 3, 4; Ex. R-35(c), pp. 4, 5). Pursuant to the policy stated in the June 11, 2015 letter, discipline for rule violations will progress as follows: first offense - verbal warning, second offense - \$150.00 fine, third offense - one week off with no pay. There is no

The disciplinary action report and Foreman Servizio's testimony that this report has been active throughout his employment with MPS are accorded little weight. (Tr. 354-57, 366-68; Ex. R-70).

²³ Mr. Pimental asserted that employees sign Safety Program certifications every year. (Tr. 279-80; Ex. R-44). This assertion, unsupported by documentation, is not credited. Mr. Pimental claims he does not have earlier certifications, before June 2017, because when MPS's office moved stuff got lost and mixed-up. (Tr. 280; Resp. Br. 11 n.4, 36-38). This claim is rejected. The MPS office move was in approximately 2014. (Tr. 397). The office move does not explain the failure to introduce Safety Program certifications signed by MPS employees in 2015 and 2016, if those certifications existed. As discussed below regarding the limited CRM training certifications and sign-in sheets offered into evidence, Respondent's claimed reason for the loss of relevant business records is not persuasive and is not credited. *See* Note 26 below.

Review of the entire record reveals that Respondent "selectively" chose specific records to offer into evidence. Respondent requests that the "selected" records be regarded as examples, representative of more extensive MPS safety records prepared prior to the OSHA inspection, but not offered into evidence. Respondent's request is rejected.

It is reasonable to infer that if MPS or CRM had additional records prior to the OSHA inspection that supported Respondent's claim of a comprehensive safety program, that those additional records would have been produced and offered into evidence. *See Capeway Roofing Sys. Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1986, 2003).

evidence that an employee was disciplined for a safety violation, pursuant to this disciplinary policy, prior to the OSHA inspection. (Ex. R-5(b), pp. 1, 2 (written and signed verbal warnings issued to foremen).

Safety Training

Mr. Pimental testified that he cares about the safety of his employees. “I don’t feel that I am lucky because I haven’t had an accident since the start of the company. I feel that I’ve done the proper training.” (Tr. 223-24, 225; *See* Tr. 115, 132, 317).

All MPS employees receive new safety equipment: harnesses, retractable lanyards, hardhats, and beamers. Every employee has a beamer, some employees have two beamers. The beamer instruction manual is used in MPS fall protection training. (Tr. 119-20, 164, 341, 349, 164-66; Ex. R-4).

During new employee orientation, Mr. Pimental asserts that the MPS Safety Program is reviewed with the new employee, pointing out the highest risk factors in the industry. (Tr. 121-22, 128-29, 135, 163-64, 356-57; Ex. R-1). As part of the new employee orientation program, every employee receives CRM training, including fall protection and lift safety training. (Tr. 122, 135, 159, 347, 361; Attachment B). Following orientation, the new employee is assigned to “shadow” a foreman on the jobsite, to familiarize the employee with MPS procedures and safety practices. (Tr. 121-23, 159, 337, 347, 356-57, 361).

CRM provides most MPS employee safety training. (Tr. 116). Except for the very first CRM training session at MPS, all subsequent CRM training sessions at MPS were conducted by CRM Safety Specialist Armand Bisson.²⁴ (Tr. 238, 268-69; Ex. R-36). Three or four times a year,

²⁴ Armand Bisson remained employed by CRM at the time of the hearing. (Tr. 396). He was not called to testify. His absence was not explained.

Instead, Respondent called as a witness CRM employee, Brian Stevens, PhD. Prior to the hearing, Mr. Stevens spoke on the telephone with Armand Bisson and Respondent Counsel regarding MPS. Mr. Stevens had limited familiarity with MPS’s Safety Program. Mr. Stevens did not visit MPS’s Upper Baby project, the jobsite inspected by OSHA and by CRM. Mr. Stevens never presented a training module to MPS employees. He participated in one unannounced inspection of MPS, at Endicott College. Mr. Stevens was not personally involved in any MPS disciplinary actions. (Tr. 101-07, 391).

In response to a leading question from Respondent Counsel, Mr. Stevens answered that MPS has an excellent safety program. (Tr. 106). The weight accorded Mr. Stevens’s response is

CRM comes to the MPS office to retrain all MPS employees. These training and refresher training sessions are mandatory. (Tr. 142-43, 162-63, 307, 344-45, 365). Prior to the OSHA inspection, CRM provided connector, fall protection, boom lift, scissor lift, and controlled decking zone training, to MPS employees.²⁵ (Tr. 104-05, 163, 305-06, 344-45, Ex. R-39; Ex. R-69; Attachment B). Following receipt of the OSHA citation in this case, Mr. Pimental had everyone go through safety retraining on key points, fall protection, connecting, and ladder safety. The OSHA citation revealed refresher training was needed. MPS posted the OSHA citation. (Tr. 136, 141, 235; Ex. 10(a)).

CRM documents each training session with a sign-in sheet. All CRM training sign-in sheets are on file with CRM for 2014, 2015, and 2016.²⁶ (Tr. 143, 172-73, 226). CRM prepares and issues training certification cards to document the training session topic and the employee who attended the training. Mr. Pimental maintains the CRM employee training certification cards. Also all CRM training certification cards are on file with CRM. (Tr. 122, 143, 158-59, 163, 304-08, 344-45, 365; Ex. R-39; Ex. R-69; Attachment B). All the CRM training certification cards that predate the OSHA inspection that were in Mr. Pimental's possession are in evidence. (Tr. 307-08; Attachment B).

A review of the CRM training certification cards during the period prior to the OSHA inspection for identified MPS employees working on the Upper Baby worksite discloses the following training. Foreman Servizio and workers DaCruz, Jorge, and dos Santos received boom lift and scissor lift training on June 23, 2014 and fall protection training on March 30, 2016.

limited, as he did not know how MPS administered discipline. (Tr. 107). In other words, Mr. Stevens did not know how MPS enforced safety rules when employees engaged in unsafe behavior. Mr. Stevens's assessment is based principally on his review of records and telephone conversations, rather than direct experience with MPS.

²⁵ Prior to the OSHA inspection, in 2015 and 2016, MPS paid CRM \$5,622.50 for safety training. (Tr. 175-79, 226; Ex. R-14).

²⁶ Respondent introduced into evidence CRM training sign-in sheets for MPS employee training conducted in 2017, after the OSHA inspection. Respondent contends these CRM 2017 sign-in sheets are representative of the training CRM provided to MPS employees in 2014 and 2015. (Tr. 236-38, 241; Ex. R-10(a); Resp. Br. 14, 20, 36-38). This contention is rejected. CRM retains records of all training it provides to MPS employees. MPS easily could have requested copies of the 2014, 2015, and 2016 training records from CRM, prior to the hearing or in the interim between the first and second hearing dates. (Tr. 154, 158-59, 172-73, 226). Respondent failed to do so.

Foreman Servizio and worker DaCruz received OSHA Subpart R for controlled decking zone training on June 24, 2014. Foreman Servizio and workers DaCruz and dos Santos received connector safety training on March 30, 2016. (Tr. 156-58, 223-35, Ex. 35(a)(b)(c); Ex. R-39; Ex. R-69; Attachment B).

There is no evidence that worker Romiro Jorge received connector safety training. Mr. Pimental was unable to state the training worker Jorge received. (Tr. 156; Attachment B).

Respondent highlights MPS's claimed "excessive" training at hearing and in post hearing briefing. (Tr. 226; Resp. Br. 14, 21, 24). Review of the CRM training certification cards in evidence disclose that only Foreman Servizio and worker DaCruz attended all CRM training sessions, prior to the OSHA inspection. (Attachment B).

In addition to CRM training, MPS also provides informal employee safety training. Each workday before work begins, the MPS foreman conducts a morning meeting at the jobsite. At the morning meeting, Foreman Servizio directs the workers regarding their work assignment for the day, such as welding or connecting. He also reminds employees who will work on the steel to tie off. (Tr. 326, 344-45, 359, 365). On large jobs for which a job hazard analysis (JHA) has been conducted, the job foreman will informally communicate the JHA to employees at the morning meeting. (Tr. 123-24, 129-30, 159-61, 342-43, 361).

Toolbox Talks are conducted by the jobsite foreman, each Wednesday. Different safety topics related to commercial construction are presented on a rotating basis, such as housekeeping, fall protection, lift safety, ladder safety, and hydration on hot days, among others. Several undated Toolbox Talk training records were offered into evidence, as examples.²⁷ The workers in attendance sign the bottom of the Toolbox Talk training sheet. (Tr. 124-25, 141-42, 161-64, 200-10, 342-43, 345; Ex. R-35(a), pp. 3, 4).

Two days before the OSHA inspection, Foreman Servizio conducted a Toolbox Talk for the workers at the Uppa Baby jobsite. Workers DaCruz and Jorge attended the talk. The general

²⁷ All Toolbox Talk records Mr. Pimental had on file are in evidence. (Tr. 211). It is uncertain whether the undated Toolbox Talk records in evidence were presented before or after the OSHA inspection. (Tr. 200-10; Ex. R-26; Ex. R-27; Ex. R-29; Ex. R-30; Ex. R-31; Ex. R-32; Attachment A).

Mr. Pimental stated that some Toolbox Talk records went missing when he moved his shop. Respondent's claim that when MPS's office moved, in approximately 2014, records were lost and mixed-up is unpersuasive and rejected. *See* Note 23 above. This is especially so, as Mr. Pimental testified he keeps these documents to use in an OSHA proceeding. (Tr. 211; Resp. Br. 15).

training topic was Construction Safety Guidelines. Twenty recommendations to maintain safe work practices are listed on the training sheet. (Tr. 270-79; Ex. R-40). Foreman Servizio did not testify regarding this Toolbox Talk; therefore, the record is silent regarding the amount of time spent discussing this Toolbox Talk and which of the twenty safe work practice recommendations were discussed. Generally, Foreman Servizio presented Toolbox Talks by reading “the piece of paper,” explaining the paper, and answering any questions asked. (Tr. 342-43).

Worksite Safety Monitoring and Enforcement

CRM conducts unannounced worksite safety inspections of MPS’s larger projects to check whether MPS employees are compliant with the safety rules. MPS scheduling of the CRM unannounced safety inspections is job specific. Mr. Pimental testified that he usually sends CRM to a specific worksite every other week. (Tr. 136, 198, 240, 284, 364).

Following their worksite safety inspection, CRM prepares a written safety report for MPS. Once received, Mr. Pimental reviews and files the report. If the report notes deficiencies, Mr. Pimental speaks with CRM to find out what they observed at the jobsite. (Tr. 184, 198, 290-91, 300, 396). Mr. Pimental estimates that he receives a worksite safety report from CRM every other week. If this estimate is accurate, for 2015 and 2016, the two years prior to the OSHA inspection, MPS would have approximately fifty CRM worksite safety inspection reports. Mr. Pimental testified MPS has numerous CRM worksite safety reports on file. (Tr. 284, 290-91, 364). Again, Respondent “selected” a small number of CRM Work Site Safety Inspection Reports to offer in evidence, as examples.²⁸ (Ex. R-13; Ex. R-20(a); Ex. R-20(b); Ex. R-41; Ex. R-57).

²⁸ Like the CRM training records, CRM retains copies of the CRM Work Site Safety Inspection Reports. MPS could have obtained a copy of any specific CRM Work Site Safety Report requested. Respondent Counsel obtained documents from CRM regarding an MPS Work Site Safety Inspection Report, with a simple email request. (Ex. R-20(a), p. 5). MPS could have obtained any Work Site Safety Inspection Reports for the period prior to the OSHA inspection. Respondent chose not to introduce a more complete overview of CRM safety inspection findings that a larger, more representative sample of CRM Work Site Safety Inspection Reports would have provided.

Mr. Pimental asserts that the CRM Work Site Safety Inspection Reports show MPS is safety compliant. (Tr. 240). Had a more complete, less “selective,” production of the CRM inspection reports of MPS worksites supported this assertion of MPS safety compliance, I find that the more complete production of CRM inspection reports would have been offered into evidence.

It is notable that CRM inspected MPS's Upper Baby worksite twice, once before the OSHA inspection and once after. (Tr. 391). The Upper Baby CRM Work Site Safety Inspection Reports would be most relevant to the fact finding in this case. Respondent did not introduce these reports into evidence.²⁹

Some of the select reports Respondent placed in evidence show safety compliance and only minor safety violations.³⁰ Other reports disclose serious safety violations and safety concerns observed by CRM. There is no evidence that MPS disciplined the foremen or workers observed violating safety rules noted in the CRM Work Site Safety Inspection Reports.

For example, CRM inspected the MPS worksite at Herb Chambers Lincoln Volvo, on September 17, 2015. The MPS Foreman was Shawn Hysette. *See* Attachment B. The CRM Project Work Site Safety Inspection Report notes "serious" fall protection violations. Workers John and Sebastian were observed and photographed not properly tied off. Their lanyards were wrapped around steel and tied back to themselves. Also Sebastian was observed walking to the work area across steel before tying off. The need to maintain one hundred percent fall protection while on steel above fifteen (15) feet was noted. The condition of the fall protection equipment available for use was discussed with the foreman. CRM suggested that a thorough inspection be done on all fall protection available for use. (Ex. R-13, pp. 1, 4).

Absent production of this ready and available documentation to support the broad assertion that the CRM worksite safety inspections show MPS as safety compliant, this assertion is rejected.

²⁹ As the CRM Work Site Safety Inspection Reports for the Upper Baby jobsite were not introduced into evidence, I do not credit Foreman Servizio's general statement that CRM found no safety violations during those inspections. (Tr. 391). When he testified, Foreman Servizio's recollection had faded and was not reliable. *See* Note 8 above. Further, had these important, relevant CRM Work Site Safety Inspection Reports supported Foreman Servizio's statement, I find that Respondent would have offered these reports into evidence. *See Capeway*, 20 BNA OSHC at 1342-43 (the party would have provided the evidence had it been helpful).

³⁰ *See* August 20, 2015 CRM Project Work Site Safety Inspection Report, concerning the MPS worksite at Herb Chambers Lincoln Volvo. (Ex. R-13, pp. 2, 3) (inspection notes no fall protection hazards observed); December 6, 2016 CRM Work Site Safety Inspection Report, concerning MPS worksite at Mansfield 620 West Street. (Ex. R-20(a)) (inspection notes workers were tied off while installing decking and in lifts; January 5, 2017 CRM Work Site Safety Inspection Report, concerning MPS worksite at East Pier. (Tr. 293-96; Ex. 57) (inspection noted ironworker detailing steel from scissors lift design).

MPS did not discipline Foreman Hysette or workers John or Sebastian for this serious fall protection safety violation. (Tr. 300, 377-78; Ex. R-13, pp. 1, 4).³¹ Foreman Servizio did not hear anything about these employees not being tied off in 2015. The identified employees have worked on Foreman Servizio's crew. Foreman Servizio does not recall either employee receiving discipline for not tying off in 2015.³² (Tr. 377-78).

As a further example, on November 16, 2016, CRM inspected the Parcel 25 Project. The CRM client was NEI General Contracting, not MPS. MPS workers were on the worksite at the time of the inspection. A steel erector was observed using a beam clamp with PFAS [personal fall arrest system]. Also observed was an MPS ironworker engaged in unsafe behavior, having no personal protective equipment (PPE), safety glasses / face shield when using a cutoff saw. Mr. Pimental recalls following up with CRM regarding this report. (Tr. 283-91; Ex. R-41). There is no evidence that the ironworker was disciplined for the safety violation of working without PPE.

The final example offered details another worksite inspection. On December 13, 2016, CRM conducted a work site safety inspection of the MPS jobsite located at 141 Needham Street. The Foreman was Jose dos Santos Pais. While the fall hazards are noted as well protected, the report also noted that the foreman did not know what an SDS [safety data sheet] was and the safety program was not on site. The report noted the unsafe condition of the access ladder to the roof not extending three feet above the landing. The CRM inspector specifically included his observation that "this crew needs an update in steel erection standards." (Tr. 191-93, 197-98, 312-13; Ex. R-20(b)).

Regarding MPS jobsite visits, prior to the OSHA inspection, Mr. Pimental had limited opportunity to step away from his office responsibilities and make unannounced site visits. Typically, beginning approximately a year before the OSHA inspection, Mr. Pimental worked in the office, estimating, bookkeeping, and project managing. (Tr. 117). He characterized it as being stuck in the office. (Tr. 143). Mr. Pimental testified that it was difficult to say how often he visited

³¹ The exhibit Foreman Servizio examined at the hearing is incorrectly identified in the transcript as Ex. R-48. The correct exhibit number is Ex. R-47, which exhibit was rejected as a duplicate of Ex. R-13 already in evidence. (Tr. 300).

³² During his employment with MPS, Foreman Servizio had no recollection of any MPS employee found not tied off. (Tr. 375). When Foreman Servizio was asked whether the MPS foreman ever discussed workers and discipline received, he answered "occasionally." (Tr. 378).

job sites, “a few times a month, but again, it’s all on my workload.”³³ (Tr. 240). Mr. Pimental did not visit the Upper Baby worksite during the week of the OSHA inspection. (Tr. 396).

Respondent issued only two disciplinary notices for safety violations prior to the OSHA inspection. These notices were issued to MPS foremen. On October 5, 2016, Foreman Jose dos Santos Pais received a verbal warning for not having his retractable lanyard hooked on while in the boom lift. On November 14, 2016, Foreman Riccardo Servizio received a verbal warning for not having his hard hat. Foreman Servizio had no recollection of receiving discipline for this hard hat safety violation. (Tr. 169-70, 190, 313-14, 379; Ex. R-5(b), pp. 1, 2). Mr. Pimental confirmed these are the only MPS disciplinary documents prior to the OSHA inspection. (Tr. 173). Notably, prior to the OSHA inspection no disciplinary notices were issued to MPS employees.

The only other disciplinary records in evidence are the verbal warnings given to workers DaCruz and Jorge for being on the steel, not being tied off, on the day of the OSHA inspection. Worker DaCruz’s verbal warning is dated January 13, 2017. Worker Jorge’s verbal warning is dated January 16, 2017. Mr. Pimental and Foreman Servizio testified that worker Jorge was disciplined for exiting the lift by climbing the lift railings. The lift rail climbing safety violation is not stated on the verbal warning worker Jorge received. (Tr. 140-41, 170, 190, 313-14, 346-47, 381, 389, 394-95; Ex. R-5(b), pp. 3, 4). Foreman Servizio was not disciplined for the fall protection violations observed on the day of the OSHA inspection. (Tr. 379).

ANALYSIS

Alleged Violations

- a. Serious citation 1, item 2 – alleged violation of standard 1926.760(a)(1) steel erection fall hazard.*

The Secretary alleges that MPS violated 29 C.F.R. § 1926.760(a)(1),³⁴ on or about January 13, 2017 at the inspected worksite, when employees working without fall protection and engaging

³³ Foreman Servizio’s recollection that since approximately 2014, Mr. Pimental conducted surprise visits, walking the jobsite, every few weeks, is given less weight. (Tr. 364, 396-97). Foreman Servizio’s testimony revealed his poor recollection. He was an unreliable witness. *See* note 8 above.

³⁴ Section 1926.760(a)(1) states:

Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking / working surface with an unprotected

in steel erection activities, while working on horizontal steel beams, were exposed to fall hazards greater than fifteen (15) feet to the ground below. Respondent's workers were not protected from falls by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems, or fall restraint systems. (Complaint, Ex. A; Ex. R-9).

Applicable Law

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts, (2) the employer failed to comply with the terms of that standard, (3) employees had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e. the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Applicability and Violation.

Respondent was engaged in steel erection work at the inspected worksite. In post-hearing briefing, Respondent admits the Secretary proved that the cited fall protection standard was applicable to the worksite hazard cited and was violated. (Resp. Br. 27, 38; Resp. Reply Br. 3-4).

Both workers Romiro Jorge and Marcello DaCruz were observed and photographed by CO Leone walking and working on steel beams at a height of twenty-nine (29) feet above the ground level without being tied off to an anchor point.³⁵ They were exposed to the hazard of falling from that height. The standard requires that employees walking or working on structural steel fifteen (15) feet above a lower level be protected from fall hazards.³⁶ (Tr. 19-23, 63, 66-68, 94, 140, 166, 170, 325-27, 355, 381-86, 388-89; Ex. C-2, pp. 1, 5, 6, 7, 8).

side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.”

³⁵ Together with his supervisor CO Leone recommended the citation for the 29 C.F.R. § 1926.760(a)(1) violation. (Tr. 44-45, 67, 72).

³⁶ In post-hearing briefing, Respondent admits the Secretary proved that the cited fall protection standard applied and was violated. (Resp. Br. 27, 38; Resp. Reply Br. 3-4). Respondent does not contend that the connector exception to the Subpart R Steel Erection fall protection requirements applied to the MPS employees photographed by the OSHA inspector, who were not tied off while

The fall protection standard cited was applicable to the worksite hazards observed. The standard was violated.

Exposure

The OSHA inspection photographs show workers DaCruz and Jorge exposed to fall hazards while walking and working on steel beams at a height of twenty-nine (29) feet above the ground level without being tied off to an anchor point. (Ex. C-2, pp. 1, 5, 6, 7, 8). Respondent agrees ironwork is a dangerous job. The biggest hazard any MPS employee encounters is falling from the steel structure since serious injury or death may result. (Tr. 115-16, 162, 317-18, 321-

working on the steel more than fifteen (15) feet and less than thirty (30) feet above a lower level. (Resp, Br. 10 n.3, 36).

The standard regarding employees working as connectors is an exception to the Subpart R Steel Erection fall protection requirements. 29 C.F.R. §§ 1926.760(a)(1)(3); 1926.760(b). It would be Respondent's burden to prove the exception applied. *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000) *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001) (citations omitted).

The connector exception applies only to employees who have "completed connector training in accordance with § 1926.761." 29 C.F.R. § 1926.760(b)(2). Respondent produced no evidence that worker Romiro Jorge completed connector training. (Attachment B). The connector exception does not apply.

Further, the steel erection standard defines "connector" as "an employee who, working with hoisting equipment, is placing and connecting structural members and / or components." 29 C.F.R. § 1926.751. The credible record evidence discloses that during the OSHA inspection of the Upper Baby worksite the on-site crane was out of service for maintenance. The workers photographed by OSHA were not working with hoisting equipment. *See* notes 15 and 16 and accompanying text above. Also, that day workers DaCruz and Jorge had not been assigned to work with hoisting equipment. Safety Standards for Steel Erection, 66 Fed. Reg. 5196, 5203 (Jan. 18, 2001) (to be codified at 29 C.F.R. part 1926) notes a specific definition for this exception in the Final Rule:

The [connector] definition is very specific; connecting is distinguished from other steel erection activities by the elements in the definition. For example, spreading and securing bar joists by hand would not be considered connecting, since that work is not done "with hoisting equipment." Therefore, an employee is a "connector" only when working with "hoisting equipment."

The connector exception does not apply.

22, 347). Workers DaCruz and Jorge were exposed to the hazards the steel erection fall protection standard 29 C.F.R. § 1926.760(a)(1) addresses.

Knowledge

Respondent's knowledge of the serious violation may be established by showing that the employer knew, or with reasonable diligence could have known of the violative condition. 29 U.S.C. § 666(k). *See e.g., Nat'l Eng'g & Contracting Co. v. OSHRC*, 928 F.2d 762, 767 (6th Cir. 1991); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). An employer's awareness of the violation may be shown through actual or constructive knowledge of the hazardous condition. The actual or constructive knowledge of a supervisor may be imputed to the employer. *See N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2069 (No. 96-1719, 2000); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369. 1991).

To establish constructive knowledge, an employer must fail to exercise reasonable diligence in discovering the hazardous condition. *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001). Whether an employer was reasonably diligent rests on a variety of factors, "including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Id.*; *See Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

Constructive knowledge is imputed where a supervisory employee knew or should have reasonably known about the safety violation. *P. Gioioso & Sons, Inc. v. OSHRC*, 675 F.3d 66, 73 (1st Cir. 2012) (*Gioioso II*), citing *Cent. Soya de P.R., Inc. v. Sec'y of Labor*, 653 F.2d 38, 40 (1st Cir.1981) (where two supervisors in charge of facility knew of the hazard, the supervisory employees' knowledge of the hazardous condition existing within the scope of their supervisory responsibility, was properly imputed to the employer).

The Secretary contends that MPS had constructive knowledge of the violative conduction, as MPS failed to exercise reasonable diligence to discover and prevent the fall protection violation. Foreman Servizio failed to effectively monitor worker compliance with Respondent's safety rules. Foreman Servizio knew or reasonably should have known of the fall protection safety violations. (Sec'y Br. 10-11, 14-15).

Regarding knowledge, Respondent contends that the violation occurred in a matter of seconds and could not have been known to the foreman. (Resp. Br. 3, 9).

MPS had work rules and training programs to address steel erection fall hazards. The MPS Safety Program includes a rule requiring employees to wear and use fall protection when working at heights fifteen (15) feet above a lower level. (Ex. R-1, p. 45). Both workers DaCruz and Jorge received CRM fall protection training. (Appendix B). Foreman Servizio testified that when workers are assigned to work on the steel, he reminds the workers to tie off. On the day of the OSHA inspection, workers DaCruz and Jorge had not been assigned to work on the steel. The Secretary does not dispute that Respondent had work rules that it communicated to its employees. (Sec'y Br. 15, n.1).

MPS's fall protection rule and CRM fall protection training show that Respondent anticipated the fall hazards present for workers engaged in steel erection. Respondent acknowledged that the biggest hazard any MPS employee encounters is falling from the steel structure as serious injury or death may result. MPS's fall protection rule was communicated to employees during CRM training sessions, new employee orientation, morning meetings with the jobsite foreman, and Toolbox Talks.

Close review of the hearing record reveals that on the Upper Baby worksite on the day of the OSHA inspection, Foreman Servizio provided inadequate safety oversight and supervision to the MPS employees. That day both workers DaCruz and Jorge were observed and photographed by CO Leone walking on steel beams at a height of twenty-nine (29) feet above the ground level without being tied off to an anchor point. Both workers were exposed to the hazard of working on the structural steel without fall protection. (Ex. C-2, pp. 1, 5, 6, 7, 8). It is the obligation of the worksite foreman to supervise the work and call attention to employee safety lapses. (Tr. 31).

That day, before the workers left the steel structure for their lunch break, Foreman Servizio also worked on the second level of the steel. Between 11:00 a.m. and 11:20 a.m. that morning, when CO Leone was photographing the worksite, Foreman Servizio assumed that he did not look up. That morning as he walked to the office trailer to meet CO Leone at approximately 11:45 a.m., Foreman Servizio did not look up to see where the workers were working or whether they were wearing their safety equipment. (Tr. 38, 386-89; Ex. C-2, pp. 1, 6, 7). The inspection photographs document the violative activity for approximately twenty (20) minutes. (Ex. C-2).

During the OSHA inspection walk-around, CO Leone observed that when the MPS employees had been working at twenty-nine (29) feet, they could have been seen from virtually every angle. Nothing interfered with his or Foreman Servizio's view to the second level of the structure from the ground. If Foreman Servizio had looked up when the MPS workers were on the steel, they would have been in plain view. (Tr. 38).

Foreman Servizio testified that he directed worker Da Cruz to work from the scissor lift. OSHA inspection photographs reveal that workers DaCruz and Jorge were walking and working on the steel, not working from the scissor lifts. Foreman Servizio agreed that it would have been apparent to him or anyone in authority that worker DaCruz was not working from the scissor lift as instructed. (Tr. 386, 388-89; Ex. C-2, pp. 7, 8).

The safety violations of workers DaCruz and Jorge were readily apparent had Foreman Servizio taken steps to observe them. The record reveals that Foreman Servizio's attention during the workday was on the specific tasks in which he was directly engaged, not on ensuring compliance with the workplace safety rules generally. Foreman Servizio testified that when he has a "moment" to move away from the work he is supervising, he "tries" to look around the jobsite to make sure everyone is in compliance. (Tr. 329, 347-48). Foreman Servizio testified that he "tries" his best to keep an eye on his crew to make sure everyone is in compliance. "I try to stay on them best I can, but I'm very busy." (Tr. 363). On the morning of the OSHA inspection, Foreman Servizio's attention was on the crane, flying the steel, and giving direction to the connectors and the workers rigging the steel. (Tr. 327-28).

The facts and testimony confirm that Foreman Servizio's safety oversight and supervision was inadequate. Obvious safety violations were in plain view had Foreman Servizio only looked. *See Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996) ("The conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area warrant a finding of constructive knowledge."); *Hamilton Fixture*, 16 BNA OSHC 1073, 1089 (No. 88-1720, 1993) (finding an employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel), *aff'd* 28 F.3d 1213 (6th Cir. 1994); *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012, 2016 (No. 13390, 1981) (the leadman "would have been in a position to observe" the employee engaged in the hazardous conduct.).

Further, it appears Foreman Servizio did not recognize that workers DaCruz and Jorge working on the steel at twenty-nine (29) feet without being tied off was a safety rule violation.

Foreman Servizio incorrectly believed that the worker who was welding was “connecting” and the fall protection requirement to be being tied off was not required below thirty (30) feet.³⁷ (Tr. 32-34, 61-62, 322, 337). *See* Note 36 above. The record does not disclose whether Foreman Servizio knew worker Jorge had not received connector training. Failure to properly monitor and enforce the steel erection fall protection rules on this worksite also discloses inadequate supervision.

MPS did not take adequate measures to prevent the occurrence of violations. Review of the hearing record reveals that in the period before and during the OSHA inspection, there were gaps in the execution of MPS’s Safety Program. The MPS Safety Program prepared by CRM includes a progressive disciplinary policy to address safety violations and unannounced safety monitoring inspections conducted by CRM. The record reveals that when CRM observed and reported unsafe conditions during worksite inspections, MPS did not follow through and discipline the workers or foremen who engaged in the observed unsafe actions. In the period before and during the OSHA inspection, the record reveals MPS’s Safety Program lacking, due to inadequate safety oversight by the worksite foreman, as discussed above, and lax enforcement of worksite safety when safety rules were violated.

MPS has a progressive disciplinary policy regarding safety violations, included in the MPS Safety Program. (Tr. 167-70, 172, 350-51; Ex. R-1; Ex. R-5(a); Ex. R-44). The disciplinary policy included in the MPS Safety Program is dated May 2014; however, before the OSHA inspection, there are no records supporting Respondent’s claim that MPS workers were aware of this policy. Mr. Pimental testified that employees sign a certification located at the back of the Safety Program, stating that they read, understand, and will follow the Safety Program. However, the only signed Safety Program certifications in evidence are dated June 12, 2017, six (6) months after the OSHA inspection. (Ex. R-44). *See* Note 23 and accompanying text above. There is no evidence that an

³⁷ On December 13, 2016, one month before the inspection that is the subject of this citation, CRM conducted a work site safety inspection of the MPS jobsite located at 141 Needham Street. The MPS foreman was Jose dos Santos Pais. The report specifically includes the observation of the CRM inspector that “this crew needs an update in steel erection standards.” (Tr. 191-93, 197-98, 312-13; Ex. R-20(b)). MPS employs approximately eight employees. (Tr. 114). Including Foreman Servizio there were eight employees working on the Upper Baby worksite. (Tr. 319). It is likely MPS employees on the Needham Street crew also worked on the Upper Baby crew. CRM did not provide refresher training regarding fall protection, ladder safety, and connecting hazards to MPS employees, including Foreman Servizio, until February 6, 2017. (Ex. R-10(a), p. 1).

employee was disciplined for a safety violation, pursuant to this disciplinary policy, prior to the OSHA inspection.

MPS has a different progressive discipline policy regarding MPS rules, including safety rules, set forth in the June 11, 2015 letter from Mr. Pimental to employees. (Ex. R-35(a), pp. 3, 4; Ex. R-35(b), pp. 3, 4; Ex. R-35(c), pp.4, 5). There is no evidence that any employee was disciplined for a safety violation, pursuant to this disciplinary policy, prior to the OSHA inspection. (Ex. R-5(b), pp. 1, 2 (verbal warnings issued to foremen); Ex. R-35(a), pp. 3, 4). There is no evidence either MPS progressive disciplinary policy was used to enforce safety violation prior to the OSHA inspection.

CRM conducts unannounced safety inspections of MPS's larger projects to check MPS employee compliance with the safety rules, as noted previously. Following the worksite safety inspection, CRM prepares a written safety report for MPS, which Mr. Pimental reviews and files. If the report notes deficiencies, Mr. Pimental speaks with CRM to discuss their worksite observations. (Tr. 184, 198, 240, 290-91, 300, 364, 396).

Review of the few, select, CRM Work Site Safety Inspection Reports Respondent offered into evidence disclose serious safety violations or safety concerns observed by CRM. There is no record of MPS issuing discipline to the foremen or workers observed violating the safety rules. There is no evidence of safety program enforcement through MPS's progressive disciplinary policies. Respondent witness CRM employee Brian Stevens testified that he did not know how MPS administered discipline. In other words, Mr. Stevens did not know how MPS enforced safety rules when employees engaged in unsafe behavior. (Tr. 107). *See* Note 24 above.

In September 2015 CRM inspected the MPS worksite at Herb Chambers Lincoln Volvo. The CRM September 2015 report notes "serious" fall protection violations. MPS did not discipline the worksite foreman or workers observed engaging in the serious fall protection safety violations. (Tr. 300, 377-78; Ex. R-13, pp. 1, 4). Foreman Servizio did not hear anything about these employees not being tied off in 2015.³⁸ (Tr. 377-78).

On November 16, 2016, CRM inspected the Parcel 25 Project. The CRM client was NEI General Contracting not MPS. An MPS ironworker was observed engaged in unsafe behavior, no

³⁸ The Secretary contends that the record "strongly suggests" that when employees were disciplined for safety violations, there was no practical follow through by management to ensure information regarding safety derelictions was disseminated between foremen. (Sec'y Br. 17).

personal protective equipment (PPE), safety glasses / face shield when using a cutoff saw. (Tr. 283-91; Ex. R-41). There is no evidence that the ironworker was disciplined for the safety violation of working without PPE.

Respondent issued only two disciplinary notices for safety violations to foremen prior to the OSHA inspection. On October 5, 2016, Foreman Jose dos Santos Pais received a verbal warning for not having his retractable lanyard hooked on while in the boom lift. On November 14, 2016, Foreman Riccardo Servizio received a verbal warning for not having his hard hat. Foreman Servizio had no recollection of receiving this discipline, showing this warning lacked the intended consequence of promoting safety compliance. (Tr. 169-70, 190, 313-14, 379; Ex. R-5(b), pp. 1, 2). Mr. Pimental confirmed that these are the only MPS disciplinary documents prior to the OSHA inspection. (Tr. 173). Before the OSHA inspection, there is no evidence that MPS issued disciplinary notices for safety violations to any MPS employee.

The only other disciplinary records in evidence are the verbal warnings given to workers DaCruz and Jorge for being on the steel, not being tied off, on the day of the OSHA inspection. Respondent contends that worker Jorge was disciplined for exiting the lift by climbing the lift rails. The lift rail climbing safety violation is not stated on the verbal warning worker Jorge received. (Tr. 140-41, 170, 190, 313-14, 346-47, 381, 389, 394-95; Ex. R-5(b), pp. 3, 4). Foreman Servizio was not disciplined for the fall protection violations observed on the day of the OSHA inspection. (Tr. 379; Sec'y Br. 16-17).

The record reveals that in the period before and during the OSHA inspection, MPS's safety program was lacking, due to lax enforcement of worksite safety. *CF & T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195 (No. 90-329, 1993) (Employer's lack of safety enforcement program established constructive knowledge.).

Knowledge Summary

On the day of the OSHA inspection, the fall protection safety rule noncompliance of workers DaCruz and Jorge was in plain view, readily observable by worksite Foreman Servizio. The fall protection violations were apparent and should have been known to Foreman Servizio. Foreman Servizio's failure to see the open and obvious fall protection violations, that were in plain view, is evidence of Foreman Servizio's lack of reasonable diligence. I find Respondent, through Foreman Servizio, had constructive knowledge that workers DaCruz and Jorge were working on

the structural steel at twenty-nine (29) above the ground without using fall protection. *See Simplex Time Recorder Co. v. Brock*, 766 F.2d 575, 589 (D.C. Cir. 1985) (knowledge found where the violations cited were “based on physical conditions and on practices . . . readily apparent to anyone who looked and indisputably should have been known to management.”).

Respondent also failed to exercise reasonable diligence through its lax enforcement of worksite safety when safety rules were violated. Respondent’s failure to exercise reasonable diligence establishes constructive knowledge. Respondent had two written progressive disciplinary policies concerning safety. These policies remained on paper unused regarding observed, reported, MPS employee safety violations. Respondent’s lax enforcement of worksite safety discloses Respondent failure take measures to prevent the occurrence of violations.

Classification

The Secretary characterizes the violation of 29 C.F.R. § 1926.760(a)(1) as serious. A violation is “serious” if there is a substantial probability that death or serious physical harm could have resulted from the hazardous condition. The OSH Act, section 17(k), 29 U.S.C. § 666(k); *Nat’l Eng’g & Contracting Co. v. OSHRC*, 928 F.2d at 767. Workers DaCruz and Jorge were observed and photographed working on structural steel at the height of twenty-nine (29) feet, without using fall protection. It is not disputed that a fall from the structural steel at twenty-nine (29) feet could result in severe injury or death. (Tr. 54-55, 162, 317-18, 321-22, 347). The citation item is properly characterized as serious.

b. *Serious citation 1, item 1 – alleged section 5(a)(1) fall hazard violation.*

The Secretary alleges that MPS violated section 5(a)(1) of the OSH Act, the general duty clause,³⁹ on or about January 13, 2017, at the inspected worksite, when an employee was exposed to fall hazards of up to twenty-nine (29) feet from the top rails of an up-right self-propelled scissors lift, model Skyjack SJ 683 ZRT (Skyjack lift), while climbing and standing on the guardrails and exiting the lift to access the structure’s upper level where employees were working.

³⁹ Section 5(a)(1) states “Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1).

The Secretary alleges that one feasible means to abate the hazard, among others, would be to utilize a ladder to access the upper working surface, after the steel decking is put in place and a Controlled Access Zone is established. The use of a boom lift of proper size and design for the terrain⁴⁰ would also serve this purpose.

Further, the Secretary alleges that another feasible means to abate the hazard would be to access and egress the upper working surface of the steel beam through the access gate of the aerial lift after the employee secures himself to a fall protection system. (Tr. 47-51; Complaint, Ex. A; Ex. R-16).

Applicable Law

To prove a violation of the general duty clause, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard, (2) the employer or its industry recognized the hazard, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *See, e.g., Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004) (citation omitted). The Secretary must also establish that the employer knew, or with the exercise of reasonable diligence could have known, of the hazardous condition. *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1949 (No. 07-1899, 2010) (citations omitted) *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished).

Respondent does not contest that the actions of a worker, climbing the scissors lift rails to access the upper level of the structure, presented a workplace hazard, recognized by Respondent and the steel erection industry, that was likely to cause death or serious physical harm. Respondent does not contest that the Secretary proved a feasible and effective means existed to eliminate or materially reduce the hazard cited. (Resp. Br. 28, 38; Resp. Reply Br. 3). Respondent contends that the Secretary has not proved constructive knowledge regarding the general duty clause violation. (Resp. Reply Br. 1-3).

The hazardous workplace activity

During the OSHA inspection, CO Leone observed worker Jorge climb out of a red Skyjack scissor lift. To exit the scissor lift, worker Jorge stepped on the lift's mid-rail and top rail, and

⁴⁰ At the hearing and in post hearing briefing the Secretary did not contend a feasible means of abatement includes use of a boom lift. (Tr. 46-51; Sec'y Br. 5-6).

then pulled himself up onto the steel beam, to access the upper level of the structural steel, at twenty-nine (29) feet above the ground. When he exited the lift and pulled himself up onto the steel beam, worker Jorge was not tied off. CO Leone photographed worker Jorge walking on the steel beam not tied off. (Tr. 27-32, 39, 45, 72, 94, 140, 166, 384-85; Ex. C-2, pp. 1, 2, 3). The Secretary asserts that a worker climbing the guardrails to enter and exit an aerial lift, exposes the worker to fall hazards, and potentially subjects the lift to destabilizing stresses for which it was not designed. (Tr. 50).

Worker Jorge's actions of climbing the lift's mid-rail and top rail to exit the scissor lift to access the upper level of the structural steel, at twenty-nine (29) feet above the ground, is a hazardous activity.

Hazard recognition

There is no dispute, a worker climbing the rails of a scissor lift, raised to the height of approximately twenty-nine (29) feet above ground, is a hazard likely to cause death or serious physical harm. The MPS Safety Program in evidence does not set forth safety rules regarding scissor lifts, generally, or exiting scissor lifts, specifically. (Ex. R-1). MPS recognizes that standing or climbing lift railings exposes the worker to a fall hazard. This conduct is improper. (Tr. 136-40; Resp. Br. 9, 39).

Foreman Servizio testified that MPS has a rule that workers are not to climb the rails of a lift. A worker climbing the lift rails could slip and fall. Throughout Foreman Servizio's employment with MPS, this rule has been active. (Tr. 334-35, 34, 360; Resp. Br. 9).

The manufacturer's Skyjack Operating Manual, in the section entitled Safety Precautions, includes a pictogram of an individual climbing on the lift's guardrails, covered by the universal NO sign, a circle with a crossline. The accompanying text states: "**DO NOT** sit, stand or climb on the guardrails." (Ex. C-4, p. 2, manual p. 15; Tr. 45, 48-49, 137-38).

Mr. Pimental testified that MPS employees receive CRM lift training that includes the Skyjack Operating Manual. Foreman Servizio testified he believes the MPS rule that workers are not to climb the rails of a lift was adopted from the lift manufacturer's operating manual. (Tr. 137-39, 334-35; Ex. C-4; Attachment B; Resp. Br. 20).

The construction industry also recognizes the hazard of climbing the mid-rail and top rail to exit an aerial lift. The American National Standards Institute (ANSI) standard for self-propelled

elevating work platforms, ANSI/SIA A92.6-2006, also instructs that the railings of an aerial platform should not be climbed.⁴¹

Hazard likely to cause death or serious physical harm

There is no dispute, a worker climbing the rails of a scissor lift, raised to the height of approximately twenty-nine (29) feet above ground is a hazard likely to cause death or serious physical harm. Respondent acknowledged the highest risk in steel erection is falls. Foreman Servizio testified that the MPS rule that workers are not to climb the rails of a lift is very important, because if a worker falls off the steel, the worker could be hurt or possibly die. (Tr. 162, 347; Resp. Br. 38).

Feasible abatement of the hazard

Respondent does not contest that the Secretary has proved a feasible and effective means existed to eliminate or materially reduce the hazard cited. (Resp. Br. 28, 38).

The Secretary proposes two feasible means to abate the hazard presented by a worker climbing and standing on the lift guardrails to exit the lift to access the structure's upper level where employees were working. First, a feasible means to abate the hazard would be to utilize a ladder to access the upper working surface. (Tr. 47, 51; Complaint Ex. A). It is not disputed that use of a ladder is a feasible means to abate the hazard.

Second, the Secretary asserts another feasible means to abate the hazard would be to access and egress the upper working surface of the steel beam through the access gate of the aerial lift after the employee secures himself to a fall protection system. CO Leone testified that the lift could be repositioned, elevated to the working surface level, to enable the worker to exit the lift through the lift gate. (Tr. 46-51; Sec'y Br. 10; Complaint Ex. A.). This alternative method to abate

⁴¹ ANSI/SIA A92.6-2006, Section 8.10 **Operator warnings and instruction. (9) Personnel footing.**

Personnel shall maintain firm footing on the platform floor while working thereon. Climbing by occupants on the midrail or toprail of the aerial platform is prohibited. The use of planks, ladders, or any other devices on the platform for achieving additional height or reach is prohibited.

(Tr. 45-46; Ex. C-3).

the hazard is rejected, as it is contrary to the safety precautions stated in the manufacturer's Skyjack Operating Manual.⁴²

Use of a ladder to access the upper level of the structure is a feasible means to abate the hazard. It would materially decrease the fall hazard presented by the worker accessing the structure's upper level by climbing the lift's rails.

Knowledge of the hazardous workplace activity

The Secretary contends that MPS had constructive knowledge of the violative conduction. In ignoring readily observable hazards, Foreman Servizio had constructive knowledge of the fall hazard to which worker Jorge was exposed. (Sec'y Br. 10-11).

Respondent contends that the Secretary has not proved constructive knowledge regarding the general duty clause violation. Respondent's contends that the violation occurred in a matter of seconds and could not have been known to the foreman. (Resp. Br. 3, 9; Resp. Reply Br. 1-3).

During the OSHA inspection, while standing on the front platform of the office trailer, CO Leone observed worker Jorge climb out of a red Skyjack scissor lift. To exit the red scissor lift, worker Jorge stepped on the lift's mid-rail and top rail, and then pulled himself up onto the steel beam. In the time it took CO Leone to photograph worker Jorge, he was on the steel, with a harness and lanyard in hand. On the steel beam, he was not tied off. CO Leone photographed worker Jorge on the steel beam, after he climbed out of the lift at 11:21 a.m. (Tr. 27-32, 39, 45, 72, 94, 166; Ex. C-2, pp. 1, 2, 3; Ex. C-5).

⁴² The Skyjack Operating Manual includes Safety Precautions that entry and exit from the aerial platform should only be done from the ground when the aerial platform is in the fully retracted position. The Manual states:

! Warning.
Entering and Exiting the aerial platform should only be done using the 3 point contact system. <ul style="list-style-type: none">• Use only equipped access openings and ladders.• Enter and exit only when the elevating aerial platform is in the fully retracted position.

- **Do Use Three Point Contact To Enter And Exit The Platform.** Enter and exit the platform from the ground only. Face the machine when entering or exiting the platform.

(Ex. C-4, p. 3, manual p. 16).

MPS did not have actual knowledge of the worker Jorge's hazardous conduct in climbing the lift's rails. Mr. Pimental and Foreman Servizio had never seen an employee climb out of a lift. (Tr. 43-44, 360).

Whether an employer exercises reasonable diligence involves the consideration of several factors, "including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Precision Concrete Constr.*, 19 BNA OSHC at 1407. Constructive knowledge may be established from an employer's failure to exercise reasonable diligence in inspecting the worksite. Evaluating the reasonable diligence factors, the Commission considers evidence of the violation's duration when determining whether the employer could have known of the conditions with the exercise of reasonable diligence. *See Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2085 (No. 06-1542, 2012); *Kaspar Wire Works, Inc.*, 18 BNA OSHC at 2196-97; *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999).

Here, one worker's conduct climbing the lift's rails was very brief. Considering the extremely short time during which this violative conduct took place, I find that evidence of what MPS's foreman saw or could have seen, with the exercise of reasonable diligence, does not establish MPS's knowledge of the lift rail exit climbing alleged as a general duty clause violation. Therefore, citation 1, item 1, is vacated.

Respondent's Affirmative Defense – Unpreventable Employee Misconduct.

Respondent asserts the affirmative defense of unpreventable employee misconduct to each alleged violation. To establish this affirmative defense of unpreventable employee misconduct, "an employer must demonstrate that it (1) established a work rule to prevent the reckless behavior and / or unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance, and (4) effectively enforced the rule whenever employees transgressed it." *P. Gioioso & Sons*, 115 F.3d 100, 109 (1st Cir. 1997) (*Gioioso I*) (citations omitted); *E.g., Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007).

The First Circuit recognized the "OSH Act requires that an employer do everything reasonably within its power to ensure that its personnel do not violate safety standards" and that

the employer must prove the affirmative defense of unpreventable employee misconduct to not be liable for the violative conduct. *Modern Cont'l. Constr. Co., Inc. v. OSHRC*, 305 F.3d 43, 51 (1st Cir. 2002) citing *Gioioso (I)*, 115 F.3d at 109.

The factors illustrating Respondent's constructive knowledge of the worksite hazardous condition also show that Respondent's unpreventable employee misconduct defense fails. *Burford's Tree, Inc.*, 22 BNA OSHC at 1951-52 (the factors for evaluating constructive knowledge are the same factors for evaluating the unpreventable employee misconduct defense).

Respondent contends, if the Secretary establishes any violation, it was the result of unpreventable / unforeseeable employee misconduct.⁴³ (Resp. Br. 8-9, 20, 22-27, 34).

The Secretary contends that Respondent's unpreventable employee misconduct defense fails because Respondent did not establish that Foreman Servizio took sufficient steps to discover the safety rule noncompliance of workers DaCruz and Jorge. Respondent's defense also fails because Respondent did not establish that MPS effectively enforced its safety rules when employees transgressed the rules. (Sec'y Br. 14-15).⁴⁴

MPS's had fall protection rules designed to prevent the violations cited. The MPS fall protection rules were communicated to employees during CRM training sessions, new employee orientation, morning meetings with the jobsite foreman, and Toolbox Talks.

Respondent failed to take steps to discovery incidents of safety rule noncompliance

As described above, in the discussion regarding Respondent's constructive knowledge of the violation of standard 29 C.F.R. § 1926.760(a)(1), MPS's worksite supervision of the employees on the Upper Baby project was not adequate. On the day of the OSHA inspection, the safety rule noncompliance of workers DaCruz and Jorge was in plain view, readily observable by worksite Foreman Servizio. The fall protection violations were apparent and should have been known to Foreman Servizio. Foreman Servizio's failure to see the open and obvious fall protection

⁴³ Regarding citation 1, item 1, the general duty clause violation, Respondent contends that it is the Secretary's burden to prove Respondent's safety program was inadequate. (Resp. Br. 22, 27-29, 38-39; Resp. Reply Br. 2, 4).

⁴⁴ The Secretary does not dispute that Respondent had safety rules that were communicated to Respondent's employees. (Sec'y Br. 15 n.1).

violations, that were in plain view, is evidence of Foreman Servizio's failure to take steps to discover incidents of safety rule noncompliance.

Also, it appears Foreman Servizio did not recognize that workers DaCruz and Jorge working on the steel at twenty-nine (29) feet without being tied off was a safety rule violation. Foreman Servizio incorrectly believed that the worker who was welding was "connecting" and the fall protection requirement to be being tied off was not required below thirty (30) feet. Failure to properly monitor and enforce the steel erection fall protection rules on this worksite also discloses a failure to take steps to discover rule noncompliance.

CRM conducts unannounced safety inspections of MPS's larger projects to check MPS employee compliance with the safety rules. Review of the few, select, CRM Work Site Safety Inspection Reports Respondent offered into evidence discloses serious safety violations or safety concerns observed by CRM. There is no record of MPS issuing discipline to the foremen or workers observed violating the safety rules. There is no evidence of safety program enforcement through MPS's progressive disciplinary policies.

It is notable that CRM inspected MPS's Upper Baby worksite twice, once before the OSHA inspection and once after. (Tr. 391). The Upper Baby CRM Work Site Safety Inspection Reports would be most relevant to the fact finding in this case. Respondent did not introduce these reports into evidence.

In the year before the Upper Baby project, Mr. Pimental had limited opportunity to step away from his office responsibilities and make worksite visits. (Tr. 117, 143, 240). This potential avenue of safety enforcement was not achieved or effective.

Respondent contends that the unpreventable employee misconduct defense succeeds where the violative conduct is truly idiosyncratic, implausible, and unforeseeable. (Resp. Br. 3, 7, 26, 31, 38; Resp. Reply Br. 3). Respondent had a safety rule requiring fall protection when working at fifteen (15) above a lower level. Respondent provided formal and informal fall protection training to employees. That said, Respondent also knew that serious fall protection violations previously had been observed on one of its worksites inspected by CRM. Respondent failed to enforce the fall protection safety rule and discipline the foreman and workers observed to have engaged in the unsafe conduct. The fall hazards cited in this case were known and foreseeable by Respondent. The conduct of workers DaCruz and Jorge was foreseeable. It was not idiosyncratic.

In summary, Foreman Servizio failed to effectively monitor MPS's Upper Baby worksite to discover worker noncompliance with MPS fall protection safety rules. On the OSHA inspection day, workers DaCruz and Jorge were observed and photographed by CO Leone walking on steel beams at a height of twenty-nine (29) feet above the ground level without being tied off to an anchor point. Obvious safety violations were in plain view had Foreman Servizio only looked. Foreman Servizio's safety oversight and supervision was inadequate.

Respondent did not effectively enforce its safety rules when violations of the rules were discovered

The Secretary contends that MPS's disciplinary program was haphazard and ineffective in its general application and inconsistent in safety rule enforcement when safety violations were discovered. (Sec'y Br. 17).

Respondent claims it used a progressive disciplinary system for when employees did not follow the safety rules. (Resp. Br. 21). The record shows otherwise.

Respondent had two written progressive disciplinary policies concerning safety. These policies remained on paper unused regarding observed, reported, MPS employee safety violations. MPS had a progressive disciplinary policy regarding safety violations included in the MPS Safety Program. (Ex. R-1; Ex. R-5(a); Ex. R-44). There is no evidence that an employee was disciplined for a safety violation, pursuant to this disciplinary policy, prior to the OSHA inspection.

MPS had a different progressive discipline policy regarding MPS rules, including safety rules, set forth in the June 11, 2015 letter from Mr. Pimental to employees. (Ex. R-35(a), pp. 3, 4; Ex. R-35(b), pp. 3, 4; Ex. R-35(c), pp.4, 5). There is no evidence that an employee was disciplined for a safety violation, pursuant to this disciplinary policy, prior to the OSHA inspection. (Ex. R-5(b), pp. 1, 2 (verbal warnings issued to foremen); Ex. R-35(a), pp. 3, 4). There is no evidence either MPS progressive disciplinary policy was used to enforce safety violations prior to the OSHA inspection.

Review of the few, "select," CRM Work Site Safety Inspection Reports Respondent offered into evidence disclose serious safety violations or safety concerns observed by CRM. The CRM September 2015 inspection report of the MPS worksite at Herb Chambers Lincoln Volvo notes serious fall protection violations. MPS did not discipline the worksite foreman or workers observed engaging in the serious fall protection safety violations. (Tr. 300, 377-78; Ex. R-13, pp. 1, 4). Foreman Servizio was unaware of these fall protection violations. Communication by

Respondent to foremen and employees regarding safety breaches was lacking. The opportunity to learn from the safety violation and promote safety compliance in the future was absent. (Tr. 377-78).

The only other disciplinary records in evidence are the verbal warnings given to workers DaCruz and Jorge for being on the steel, not being tied off, on the day of the OSHA inspection. (Ex. R-5(b), pp. 3, 4). As these verbal warnings were issued in response to fall hazards observed by the compliance office during the OSHA safety inspection, they are accorded limited weight when evaluating MPS's enforcement of its worksite safety rules. Foreman Servizio was not disciplined for the fall protection violations observed on the day of the OSHA inspection.

In the period before and during the OSHA inspection, MPS did not take adequate steps to discover violations of MPS's fall protection safety rules, and MPS did not effectively enforce the safety rules when violations were discovered. For the reasons set forth above, regarding Respondent's constructive knowledge of the violation of standard 29 C.F.R. § 1926.760(a)(1), Respondent's unpreventable employee misconduct defense fails. Respondent failed to meet its proof burden regarding this affirmative defense.

Penalty Determination

Under section 17(j) of the OSH Act, the Commission has the authority to assess civil penalties for the violation of citations. 29 U.S.C. § 666(j). In assessing penalties, the Commission is instructed to give due consideration to the size of the employer's business, the gravity of the violation, the employer's good faith, and its history of previous 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 afforded greater weight in assessing an appropriate penalty. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992).

Regarding citation 1, item 2, CO Leone testified that the gravity assessed was high because of the fall hazards to which the employees were exposed and the severity of the injuries that could occur. A fall from the structural steel at twenty-nine (29) feet above ground could have resulted in death or permanently disabling injuries. The probability was greater as the two exposed workers DaCruz and Jorge walked and worked on the steel beams, a very small working surface, without fall protection. The workers were exposed to the hazard throughout the time CO Leone was present at the worksite photographing the workers. The gravity-based penalty for this citation was

\$12,675.00. Respondent was given a sixty (60) percent penalty reduction because of the employer's size. The Secretary proposed penalty was \$5,070.00. (Tr. 45, 53-55; Ex. R-9).

Regarding history, although Respondent had not been previously cited, there is no evidence of past OSHA inspections. (Tr. 80-81, 94-95). Therefore, Respondent's history warrants neither an increase nor a decrease in the penalty amount. *See M.V.P. Piping Co., Inc.*, 24 BNA OSHC 1350, 1352 (No. 12-1233, 2014) (finding that the history factor did not support a low penalty when the employer had not been inspected within the past five years).

In calculating the penalty, Respondent did not receive credit for good faith. (Tr. 80-82, 95; *See* Tr. 212-13; R-34). I find that the high gravity of this citation item warrants that factor receiving the most weight. Considering each statutory factor, a penalty of \$5,070.00 is affirmed for citation 1 item 2.

In Summary

1. MPS violated steel erection standard 29 C.F.R. § 1926.760(a)(1).
2. MPS with the exercise of reasonable diligence could have known of the hazardous worksite condition violative of the standard.
3. Standard 1926.760(a)(1) was violated. The violation was not due to unpreventable employee misconduct.
4. MPS did not violate the general duty clause, section 5(a)(1) of the OSH Act.
5. MPS did not know and with the exercise of reasonable diligence could not have known of the hazardous worksite condition violative of the general duty clause.
6. The general duty clause was not violated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.

ORDER

Based on the foregoing decision, it is hereby ORDERED:

Citation 1, item 2, alleging a serious violation of 29 C.F.R. § 1926.760(a)(1) is Affirmed and a penalty of \$5,070.00 is assessed.

Citation 1, item 1, alleging a serious violation of the general duty clause is Vacated.

SO ORDERED.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC

Dated: October 13, 2020
Washington, DC

MPS Products Corp. # 17-0372
 OSHA Inspection # 1202721
 Inspected worksite: 276 Weymouth Street, Rockland, MA 02370

ATTACHMENT A – EXHIBIT SUMMARY

Complainant's Exhibits	Description	Received	Notes
C-1	OSHA Notice of Alleged Safety or Health Hazards. Four pages.	Tr. 18	
C-2	OSHA Inspection Photographs. Eight pages.	Tr. 43	
C-3	ANSI/SIA A92.6 – 2006. Self-Propelled Elevating Work Platforms: Standards 8.7 – 8.10. Three pages.	Tr. 52	
C-4	SKYJACK Operating Manual, including model 6832, pages 15 and 16. Three pages.	Tr. 52	
C-5	Worksite drawing. One page.	Tr. 53	
Respondent's Exhibits	Description	Received	Notes
R-1	Select pages from <u>MPS Products Inc. Safety Program</u> , May 2014. Pages 2, 28, 45, and 75. Five pages.	Tr. 137	
R-4	Guardian Fall Protection Performance Safety Gear. Product Name: <u>Beamer 2000. Instruction Manual</u> . Consistent with the page numbers in the Table of Contents, there are 14 pages, with the Manual Cover unnumbered. There is a blank page between pages 5 and 6. Sixteen pages.	Tr. 167	
R-5(a)	MPS Disciplinary Policy forms signed on 07.12.17 by Frank Coughlin; Johnathan Shea; Waverson Gomi; Sebastiao P. dos Santos; Brandon Seibert. Three pages.	Tr. 172	
R-5(b)	Records of MPS verbal warnings: p. 1 - Foreman Riccardo [Servizio] on 11.14.16 (no hard hat). p. 2 – Foreman Jose [dos Santos Pais] on 10.05.16 (retractable lanyard not hooked while in boom lift).	Tr. 172; 313-14	

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ATTACHMENT A – EXHIBIT SUMMARY

	p. 3 – Marcello [DaCruz] on 01.13.17 (not tying off). p. 4 – Romero [Jorge] on 01.16.17 (not tying off). Four pages.		
R-9	OSHA Violation Worksheet, Citation 1, Item 2, Standard 1926.760(a)(1). Two pages.	Tr. 181	
R-10(a)	Contractors Risk Management, Inc. - Training Seminar – Attendance Sheets, for training at MPS, all post-date the OSHA inspection (dates 02.06.17; 02.24.17; 08.28.17; 09.20.17; and 10.04.17). Five pages.	Tr. 241	
R-13	Project Work Site Safety Inspection Reports for two MPS Products work sites. Four pages.	Tr. 185, 218	Note: Ex. R-47 was rejected as a DUPLICATE of the first two pages of Ex. R-13. (Tr. 297, 300, 408). Also: Ex. R-47, on occasion in the record, is incorrectly referenced as Ex. R-48. (Tr. 376-77, 408).
R-13, pages -1 and 4.	Project Work Site Safety Inspection Report for MPS Products Job Site: Herb Chambers Lincoln Volvo, date: 2015-09-17. Site Foreman: Shawn Hyselle. NOTE: Fall protection hazards observed for John, Sebastian, and Shawn Hyselle as foreman.	Tr. 185, 218	
R-13, pages -2 and 3.	Project Work Site Safety Inspection Report for MPS Products Job Site: Herb Chambers Lincoln Volvo, date: 2015-08-20. Site Foreman: Shawn Hyselle.	Tr. 185, 218	
R-14	MPS Products Corp. Transactions by Account, dated 11.22.17. <u>Received in evidence</u> - Closing Entries for 2015 and 2016. One page.	Tr. 179	
R-16	OSHA Violation Worksheet, Citation 1, Item 1, Section (5)(a)(1), general duty clause. Three pages.	Tr. 186-87.	

MPS Products Corp. # 17-0372
 OSHA Inspection # 1202721
 Inspected worksite: 276 Weymouth Street, Rockland, MA 02370

ATTACHMENT A – EXHIBIT SUMMARY

R-20(a)	Contractors Risk Management Work Site Safety Inspection Report. MPS Products. Work site: Mansfield 620 West Street. Date: 2016-12-06. Supervisor: Ricci Servizio. Five pages.	Tr. 197-98; 218	
R-20(b)	Contractors Risk Management Work Site Safety Inspection Report. MPS Products. Work site: 141 Needham St. Date: 2016-12-13. Supervisor: Jose [dos Santos Pais]. Six pages.	Tr. 197-98, 218, 312-13.	
R-26	Undated Training Record: Toolbox Talk. Accident / Incident Reporting. One page.	Tr. 203-04	
R-27	Undated Training Record: Toolbox Talk. Listening Safety. One page.	Tr. 205	
R-29	Undated Training Record: Toolbox Talk. What Does an Accident Cost? One page.	Tr. 207	
R-30	Undated Training Record: Toolbox Talk. Shop Safety. One page.	Tr. 210	
R-31	Undated Training Record: Toolbox Talk. Recognizing Unsafe Conditions. One page.	Tr. 210	
R-32	Undated Training Record: Toolbox Talk. Why Accidents Occur. One page.	Tr. 210	
R-33	OSHA Compliance Officer handwritten inspection notes. Two pages.	Tr. 98-99, 407-08.	
R-34	OSHA Letter to MPS Products, dated 01.24.17. Two pages.	Tr. 216	
R-35(a)	Sabastian dos Santos training records. MPS Products Corporation 06.11.15 letter signed by Sabastian dos Santos. MPS Products Safety and Health Program Certification. Sabastian dos Santos. Dated: 06.12.17. Five pages.	Tr. 227-28, 234.	See Training Summary. Attachment B.

MPS Products Corp. # 17-0372
 OSHA Inspection # 1202721
 Inspected worksite: 276 Weymouth Street, Rockland, MA 02370

ATTACHMENT A – EXHIBIT SUMMARY

R-35(b)	Marcello DaCruz training records. MPS Products Corporation 06.11.15 letter signed by Marcello DaCruz. MPS Products Safety and Health Program Certification. Marcello DaCruz. Dated: [06.12.17 (Tr. 281)]. Five pages.	Tr. 231, 234.	See Training Summary. Attachment B.
R-35(c)	Riccardo Servizio Hoisting Engineer License; training records. MPS Products Corporation 06.11.15 letter signed by Riccardo Servizio. MPS Products Safety and Health Program Certification. Riccardo Servizio. Dated: 06.12.17. Seven pages.	Tr. 234	See Training Summary. Attachment B.
R-36	Contractors Risk Management, Armand Bisson, Safety Specialist, letter to MPS Products, dated 01.07.15. Two pages.	Tr. 269, 409	
R-39	Copies of multiple employee training cards. Five pages.	Tr. 309, 409.	See Training Summary. Attachment B. [Some cards also appear in Ex. R-69.] Note: Ex. R-59 was rejected as a DUPLICATE of R. 39, with reordered pages. (Tr. 303-04)
R-40	Training Record: Toolbox Talk. Topic C001: Construction Safety Guidelines. Worksite: Uppa Baby. Instructor: Ricci Servizio. Date: 01.11.17. One page.	Tr. 270-71, 278, 408-09.	
R-41	Contractors Risk Management Work Site Safety Inspection Report. NEI General Contracting. [The worksite general contractor, not MPS Products] (Tr. 286-87). Site: Parcel 25 Project #16-10-0001. Date: 2016-11-16. Supervisor: The NEI Superintendent. Four pages.	Tr. 291, 409	

MPS Products Corp. # 17-0372
 OSHA Inspection # 1202721
 Inspected worksite: 276 Weymouth Street, Rockland, MA 02370

ATTACHMENT A – EXHIBIT SUMMARY

R-42	Chelmsford Crane Service, Inc. Invoice to MPS Products. Typed Invoice date: 01.21.17. Initial handwritten Invoice dated: 01.09.17. Job location: Uppa Baby. 276 Weymouth Street, Rockland, MA. Bill for crane and operator. Hook Work. Two pages.	Tr. 403, 408	
R-44	MPS Products Safety and Health Program Certification. Three pages. Detailed below.	Tr. 282, 409	
R-44, page 1	MPS Products Safety and Health Program Certification. Riccardo Servizio. Dated: 06.12.17.		DUPLICATE. See Ex. R-35(c) p. 7.
R-44, page 2	MPS Products Safety and Health Program Certification. Marcello DaCruz. Dated: [06.12.17 (Tr. 281)].		DUPLICATE. See Ex. R-35(b) p. 5. (Tr. 282).
R-44, page 3	MPS Products Safety and Health Program Certification. Romiro Jorge. Dated: 06.12.17.		
R-57	Contractors Risk Management Work Site Safety Inspection Report. MPS Products. Work site: East Pier. Date: 2017-01-05. Supervisor: Ricci. Three pages.	Tr. 295, 409	
R-69	Copies of multiple employee training cards. Five pages.	Tr.309, 409	See Training Summary. Attachment B. [Some cards also appear in Ex. R-39]. Note: Ex. R-50 and Ex. R-68 were rejected as a DUPLICATES of Ex. R-69, with reordered pages. (Tr. 303-04)
R-70	MPS Products Corp. Discipline Policy for violation of safety rules and procedures. Five pages.	Tr. 368, 409.	Includes Disciplinary Policy dated May 2014. See Ex. R-5(a). (Tr. 351-53).

ATTACHMENT B – SUMMARY OF CRM TRAINING CARD RECORDS

(Training prior to OSHA Inspection 01.13.17). Ex. R-35 (a)(b)(c), Ex. R-39, and Ex. R-69.

Trainer: Armand Bisson, Contractors Risk Management (All cards). (Tr. 238, 311-12).

Employee	Boom Lift Genie S-65 Per OSHA 1926.453 and ANSI A92 Date: 06.23.14	Scissor Lift JLG 3394 RT Per OSHA 1926.451, 1926.452 (w) & 1926.454 Date: 06.23.14	Subpart R OSHA for Controlled Decking Zone Training Date: 06.24.14	Connector Safety Training (2 hours) Date: 03.30.16	Fall Protection Training (2 hours) Date: 03.30.16
Danny Aimole			x		
Renato Barbosa	x	x			
Fabio Bolarinho	x	x		x	x
John Buckley				x	x
Marcelo DaCruz	x	x	Marcello Decosta	Marcello Cruz	Marcello Cruz
Jose Dos Santos Paris	Jose Dos Santos Pais	Jose Dos Santos Paris		Jose Dosparis	Jose Dosparis
Sebastio Dos Santos	x	x		Sebastian Dos Santos	Sebastian Dos Santos
Chad Gagnon			x		
Shawn Hyselle			x		
Thomas Jayroe					x
Romiro Jorge	x	x			x
Garrett Ledwell				x	x
Robert Ledwell				x	x
Shawn McGonnigal					x
Michael Pimental	x	x	Michael Pimento		
Patrick J. Ruane				x	x
Brandon Seibert					x
Riccardo Servizio *	x	x	x	x	x
Jonathan Shea				x	x
Marco Soares					x
Joseph Tobin			x		
Adam Wetson			x		

- Riccardo Servizio completed additional training with Contractors Risk Management: National Safety Council (NSC) First Aid Course, dated 08.22.16, and NSC CPR and AED Course, dated 08.18.16. Ex. R-35(c).