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

SECRETARY OF LABOR,

Complainant,

v.

TODD'S ENVIROSCAPES, INC.,

Respondent.

OSHRC DOCKET NO. 20-0066

APPEARANCES:

Patrick L. DePace, Esquire
Department of Labor, Office of the Solicitor, Cleveland, Ohio
For the Secretary

Tod T. Morrow, Esquire
Morrow & Meyer LLC, Canton, Ohio
For Respondent

BEFORE:

Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act).

At about 8:00 a.m., E.D.T., on July 25, 2019, [redacted] ([redacted]), an employee about 50 years in age of Todd’s Enviroscares, Inc. (Respondent or Enviroscares) was injured while mowing a customer’s property in Clarington, Ohio (Clarington site or worksite). Mr. [redacted] was taken by Pedro Antonio Moreno-Trejo (Trejo) to the emergency room of a nearby hospital and subsequently life-flighted by helicopter at about 11:13 a.m. to the University of Pittsburgh Medical Center (UPMC) in Pittsburgh, Pennsylvania. David R. Lint, Director of Operations for Enviroscares, visited Mr. [redacted] at UPMC on July 26, 2019, after his surgery.¹ (Tr. 158-59, 190). Mr. [redacted] returned to Canton, Ohio two or three days after the accident. (Tr. 188). Mr. Lint made eight trips to UPMC for appointments Mr. [redacted] had with doctors and where Mr. [redacted] had other surgeries.² The accident resulted in the amputation of his thumb, index finger and the tips of his ring and pinky fingers of his left hand.³ (Tr. 48, 174, 178; Exs. C-5, p. 1, C-6; S. Br. 7). Mr. Lint testified that Mr. [redacted] was “very severely impacted, because of the accident,” (Tr. 189).

On November 8, 2019, OSHA received a complaint about the July 25, 2019 accident and Safety Compliance Officer (CO) Chris Escalona opened an OSHA inspection. (Tr. 202-05). OSHA issued a Citation and Notification of Penalty (Citations) to Respondent on December 19, 2019, with two citations, each with one item. The first citation, Citation 1, Item 1, was an alleged serious violation of section 5(a)(1) of the Act (general duty clause) for using a riding mower on

¹ Respondent’s “Incident Investigation” report erroneously indicates that Mr. [redacted] was not hospitalized overnight. The Court finds that Mr. [redacted] was hospitalized overnight. (Tr. 158-59, 188; Ex. C-5 at p. 1).

² Mr. Lint also arranged for hotels, transportation and food for Mr. [redacted]’ wife and children while they were in Pittsburgh. (Tr. 174, 178).

³ Citation 2, Item 1, inaccurately alleged that three fingers were amputated. (Tr. 10).

hazardous slopes with a proposed penalty of \$11,934.⁴ The second citation, Citation 2, Item 1, alleged an other-than-serious violation of the reporting requirement at 29 C.F.R. § 1904.39(a)(2), because Respondent did not report the July 25, 2019 amputation injury within 24 hours to OSHA. (S. Br. 8, 23-24). OSHA proposed a penalty of \$8,525 for the second alleged violation.

Respondent timely contested the two Citations.

A one-day in-person trial was held in Cleveland, Ohio on August 10, 2021. Three witnesses testified at the trial: CO Escalona, and Messrs. Lint and Respondent's Field Supervisor Kenneth Williamson. (Tr. 19, 156, 202). Post-trial briefs were filed by both parties, as well as reply briefs.

The key issues in dispute are whether the Secretary established that hazardous slopes are a recognized hazard for riding mowers, whether the Secretary proposed a feasible abatement for the asserted hazard, and whether Envirosapes had knowledge of the hazardous condition at the Clarington worksite. -

As set forth below, the Court finds the Secretary has not proven his prima facie case for Citation 1, Item 1, thus the citation is vacated. With respect to Citation 2, Item 1, the Court finds the Secretary proved his prima facie case, affirms the citation, and assesses a penalty of \$6,630.

I. Jurisdiction

Based upon the record, the Court finds Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5). (Tr. 15). The Court finds the Commission has jurisdiction over the parties and subject matter in this case.

II. Admitted Facts

⁴ Methods recommended by OSHA to alleviate the hazard included using a string trimmer instead of a riding mower on excessively steep slopes and marking obstacles such as ruts. (S. Br. 7, 24-25).

The following facts were set forth in the parties' joint pretrial statement and read into the trial record. (Tr. 14-16; Joint Pretrial Statement, p. 3; C-1, at pp. 1-2).

“Respondent is, and at all times relevant to this proceeding was, a corporation with an office and place of business at 7727 Paris Avenue in Louisville, Ohio.” (Tr. 15).

“Respondent is, and at all times relevant to this proceeding was, engaged in landscaping.” (Tr. 15).

“At all times relevant to this proceeding Respondent had a workplace in Clarington, Ohio where it was engaged in landscaping.” (Tr. 15).

“At all times relevant to this proceeding Respondent was engaged in a business affecting interstate commerce in that Respondent was engaged in purchasing and using goods or materials which had been moved in interstate commerce.” (Tr. 15).

“At all times relevant to this proceeding, Respondent was an employer employing employees at its worksite located in Clarington, Ohio.” (Tr. 15).

“Respondent failed to report to OSHA within 24 hours the amputation suffered by employee [redacted] on July 25, 2019, while working for Respondent.” (Tr. 15-16).

III. Findings of Fact

A. Background

1. Company history, business and clients

Enviroscapes is a landscaping services company based in Louisville, Ohio. (Tr. 15, 26, 204-05). Enviroscapes provides commercial landscaping services that include mowing, landscape maintenance, and snow removal. (Tr. 15, 20). Respondent provides most of its services during the mowing season, April through November. (Tr. 77). Enviroscapes' clients are primarily

commercial properties scattered throughout Ohio, Pennsylvania, West Virginia and Kentucky. (Tr. 20, 157). The size of a client's property ranged from small up to 50 acres. (Tr. 93, 176-77).

Todd Pugh, the owner and Chief Executive Officer (CEO), founded Respondent in 1987. (Tr. 164). Mr. Lint has worked for Respondent for over 20 years. He has been the Director of Operations since 2012. (Tr. 156-57). Mr. Lint oversees the operations and sales for the company by working directly with branch managers and the company's CEO and Chief Financial Officer (CFO). (Tr. 158). Mr. Williamson has been with Respondent for thirteen years, the last ten as a field supervisor. (Tr. 21). As of July 2019, Enviroscapes had six branch offices. (Tr. 162).

Enviroscapes is an active participant in the lawn maintenance industry; they consult with manufacturers, they attend five to eight trade shows per year, and the owner has several industry-related patents. Mr. Lint also participates in several industry peer groups. (Tr. 183-84). Mr. Lint testified that it was industry practice to prohibit the use of riding mowers on slopes greater than 20 degrees. (Tr. 184).

2. Company structure & mowing process

Mr. Williamson is one of four management employees at Respondent's Canton, Ohio branch office. (Tr. 21, 73). Respondent has about 240 to 250 employees. (Tr. 157). The Canton branch has about 20 to 23 employees and provides services for 200 to 250 property sites either weekly or every other week. (Tr. 22, 74). Mr. Williamson's duties include scheduling, equipment maintenance, worksite observation, quality checks, and safety of the crews he supervises. (Tr. 21, 32-33). He typically supervises six to nine landscaping crews. (Tr. 21). Each crew consists of two or three employees. Each crew has a dedicated route of mowing locations, and the crews work in the same locations each week. (Tr. 21-22). Mr. Williamson testified that he goes to each work site about every two to three weeks. (Tr. 67).

A crew may be responsible for between ten to seventy sites per week. (Tr. 22). A customer's property can take as little as 15 minutes to mow, and a large location can take several hours. (Tr. 93). Crews are provided with a digital site map, riding mowers, string trimmers (also known as "weed eaters"), flags and marking paint to perform work at their assigned sites. (Tr. 44-45, 63, 81, 87; S. Br. 18).

3. The Clarington worksite

The Clarington site (also known as the East Ohio Clarington Station) was the location of the July 25, 2019 accident that led to the OSHA inspection. (Tr. 8, 39-40, 59, 157). The Clarington site was a gas transfer site for Dominion Energy Transmission, Inc. (Dominion). (Tr. 59; Exs. C-11, R-H). A gas transfer site is a location where the pipeline comes out of the ground allowing Dominion to inspect the line. (Tr. 59). Mr. Williamson described the Clarington site as a site that "had two areas, one in front and one behind, to the right side. There's a concrete pa[d] at the middle tier, and there's a slope above that, to the right of that concrete, that needs to be weed-eated."⁵ (Tr. 42). Respondent's procedure is to first mow and then weed-eat. (Tr. 134). On some of the sloped area, the riding mower could be used; the sloped area to the right of the concrete pad had to be cut with a hand-held string trimmer, not a mower, because the slope was over 20 degrees. (Tr. 41-43, 81-84, 144; Exs. R-G, R-H)

Respondent's Canton branch was responsible for maintenance of the Clarington site. (Tr. 40, 157-58). Messrs. Trejo and [redacted] worked out of the Canton branch and were the two-person crew assigned to the Clarington site on July 25, 2019.⁶ (Tr. 38-40). Messrs. Trejo and [redacted] were employed by Envirosapes through the H-2B Visa Program that allows temporary work in the United States. (Tr. 115, 173). Mr. [redacted] had worked for Envirosapes during the

⁵ Mr. Williamson had performed inspections of the site four or five times before. (Tr. 40).

⁶ Mr. [redacted] was the lead employee of the two given his experience. (Tr. 146). The Secretary acknowledged in his post-trial brief that "[redacted] was an experienced employee and was the lead worker on the site." (S. Br. 42).

mid-2000's and then again in 2018 and 2019. (Tr. 74, 115, 172). Messrs. Trejo and [redacted] were a 2-person crew that Mr. Williamson supervised from the Canton branch. (Tr. 40-41). Mr. Williamson had also worked with Mr. [redacted] many years before, out of the Louisville, Ohio location. (Tr. 87).

The Clarington site had two slopes that required the use of a string trimmer rather than a walk-behind or riding mower, because of a steep slope or proximity to the gas pipeline. (Tr. 41-45, 81-82). The remaining 25-33% of the site could be cut with the riding mower. (Tr. 83). The mower used at the Clarington site was a Toro GrandStand Multi Force Mower, Model 74523, Serial No. 404862996. (Tr. 56, 187). Mr. Lint testified that the GrandStand Multi Force Mower with 52in or 60in TURBO FORCE Cutting Unit Operator's Manual for Model No. 74523, Serial No. 316000001 and Up, Form No. 3415-584, Revision C, copyright 2018 (Employer's Manual) at Exhibit C-17 applied to the mower ridden by Mr. [redacted] at the job site on July 25, 2019. (Tr. 185-87; C-17).

On the day of the accident, Messrs. Trejo and [redacted] were responsible for mowing about 15 sites, including the Clarington site where they were maintaining the yard through mowing and weed-eating. (Tr. 40-43). The crew had two string trimmers for use at the Clarington site, as well as "irrigation flags"⁷ and marking paint to mark any holes or ruts at the site. (Tr. 44-45). Mr. Trejo had worked at the Clarington site multiple times before; Mr. [redacted] had worked at the worksite one time in 2018.⁸ (Tr. 40-41, 71, 94-95, 133). On Mr. Trejo's first visit to the Clarington site, he asked for clarification on the dividing line between the area that could be mowed with the riding mower and the area requiring use of the string trimmer. Mr. Williamson walked him through the worksite, clarifying the outline of the steeper slope. (Tr.

⁷ Irrigation flags were little metal stake flags with an orange flag top that were used to mark any hazards. (Tr. 44).

⁸ Mr. Williamson testified that Mr. [redacted] did not voice any concerns to him about the Clarington site in 2018. (Tr. 133).

71). The work at the Clarington site could generally be completed in about 30 to 90 minutes by a two-person crew. (Tr. 43).

Mr. Williamson testified that he had been to the Clarington site four or five times prior to July 25, 2019. (Tr. 40). He had not seen any hazards at the worksite that were not included on the Clarington site's digital map. (Tr. 45-46). Mr. Williamson had observed Mr. [redacted] work several times at various other sites where he also walked him through what areas were safe to mow and what areas needed to be done by hand with the weed-eater. He did not walk Mr. [redacted] through what areas were safe to mow at the Clarington Site. (Tr. 71, 87-88, 123).

B. Accident on July 25, 2019

Mr. [redacted] was injured while using the Toro mower on a 19-degree slope at the Clarington site around 8:00 a.m. on July 25, 2019. (Tr. 62-63, 89-90, 187; Ex. C-6, p. 3). The riding mower was the type with a platform at the rear of the mower where the operator stands up and on during operation. (Tr. 57, 187; Ex. C-17). After mowing a sloped area, Mr. [redacted] travelled down the slope toward the concrete pad and hit a rut⁹ that was hidden by the grass near the slope's base. (Tr. 49, 92, 94, 110; Ex. C-5). Mr. [redacted] then jumped off the mower, lost his balance, and fell to the ground. The mower then ran over his left hand, ultimately resulting in the amputation of his thumb and index finger and two fingertips.¹⁰ (Tr. 48, 178-79; Ex. C-5). Mr. Trejo was working at another area at the Clarington site and did not see the accident. (Tr. 53; Ex. C-6, p. 3). Mr. [redacted] got Mr. Trejo's attention and Mr. Trejo took Mr. [redacted] to a local

⁹ Mr. Williamson testified that the area of the rut (also referred to as a tire mark or hole) is shown on the Photograph at Exhibit G, at "A" and on the photograph at Exhibit H, at "B". (Tr. 105-09; Exs. G, at "A", H, at "B"). He also identified where some portion of Mr. [redacted]'s amputated thumb and/or finger were found in the gravel area shown on the photograph at Exhibit H, at "D". He also identified the area Mr. [redacted] had mowed up and down on the photograph at Exhibit G, at "B". He further identified the area Mr. [redacted] had mowed across, side-to-side, on the photograph at Exhibit H, at "A". (Tr. 107; Ex. H, at "A").

¹⁰ Based on the available evidence, the Court finds that Mr. [redacted] saw the rut at the last moment, jumped off the mower, lost his balance after he jumped, and fell to the ground. In his written statement, Mr. [redacted] states that he "blacked out for a moment" when he hit the ground. (Tr. 178-79; Ex. C-5).

emergency room and contacted Mr. Williamson about the accident. (Tr. 89-90; Ex. C-6). There was no manager or supervisor at the worksite at the time. (Tr. 39, 46).

Upon hearing of the accident from Mr. Trejo, Mr. Williamson first stopped by the Clarington site to ensure the gate to the property was locked¹¹ and then proceeded to the emergency room where Mr. Trejo had taken Mr. [redacted]. (Tr. 40, 89-90). By the time he arrived, Mr. [redacted] had been taken to a hospital in Pittsburgh, Pennsylvania so Messrs. Williamson and Trejo went back to the Clarington site to take pictures of the worksite before moving and securing the mower and other equipment. (Tr. 90-91, 101-06). After photographs were taken, Mr. Williamson loaded the mower and equipment onto the company truck and left it at the worksite. (Tr. 90-91). Messrs. Williamson and Trejo then travelled to Pittsburgh to check on Mr. [redacted]' condition. (Tr. 91).

After his release from the hospital, Mr. [redacted] continued to have follow-up medical care in Pittsburgh. (Tr. 174). Mr. [redacted] did not return to work at Envirosapes. (Tr. 147, 173).

C. Respondent's post-accident review

Envirosapes conducted an internal review of the accident. Messrs. Williamson, Lint, Dallas May (Canton Branch Manager), and the company's CFO, Cyndy Host, were involved in the accident review. (Tr. 91, 111, 158-59, 174, 178-79, 188).

Mr. Williamson returned to the Clarington site the day after the accident. (Tr. 72, 91-92). During the two visits to the site after the accident, he observed, based on the mower's tracks, that one area (to the left of the area that was the subject of the accident area) had been mowed side-to-side, horizontal to the slope. (Tr. 95-96, 106-07; Ex. R-H). He also observed a second area at the

¹¹ Mr. Williamson did not move any of the equipment at the site when he first stopped by to shut and lock the gates to the property. (Tr. 89-90).

site that had been mowed up-and-down, vertically with the slope (marked as “B” on Ex. R-G). (Tr. 107; Ex. R-G). Because the second area was sloped, that area should also have been mowed side-to-side in accordance with company policy. (Tr. 106-07, 143-44, 146, 148, 152). On Enviroscaapes’ digital map, both of these slopes allowed the use of a riding mower. (Tr. 106-07, 143-44, 146; Exs. R-G, R-H). There was no indication the riding mower had been used in any part of the worksite with slopes over 20 degrees. (Tr. 96-97).

The photograph Mr. Williamson took on July 25, 2019 after the accident shows the mower upright on the concrete pad. (Tr. 110; Ex. R-H). Mr. Williamson found no evidence that the mower had tipped over.¹² There were no scuff marks on the control tower, on the mower, or oil on the concrete or deck, or smoke when the mower involved in the accident was later started up. There was also no visible damage to the mower. (Tr. 94, 110). Bair’s, the company that provides Respondent with ninety percent of its mowers, inspected the mower immediately after the incident and found no damage and nothing wrong with it. (Tr. 56-57, 94).

The rut, which was believed to have caused Mr. [redacted] to fall off the mower, was near the base of the vertically-mowed slope.¹³ The concrete pad was at the base of the slope. (Tr. 108-10; Exs. R-G, R-H). The rut was 24 to 30 inches long, the width of a truck tire, in the grass that was next to the transition area of gravel bordering the concrete pad. (Tr. 92, 108-09, 142-43; Ex. R-H). The rut was covered in grass. (Tr. 92). The rut appeared to have been made by a tire. To Mr. Williamson it appeared that a truck had driven off the edge of the concrete pad after a rainy

¹² The Court finds that the mower had not tipped over at the time of the accident as alleged in Citation 1, Item 1. (Tr. 94, 110; R. Br. 16).

¹³ Mr. Williamson testified that “[i]t was the rut at the bottom of the hill that caused the accident, not the slope.” (Tr. 149).

day. (Tr. 92). The rut was new and had not been identified prior to July 25, 2019.¹⁴ (Tr. 54, 153).

Based on the appearance of the worksite, Mr. Williamson believed that Mr. [redacted]' plan had been to first use the Toro riding mower in the areas where mower use was allowed and then to cut the grass in the remaining higher sloped areas with the string trimmer. (Tr. 105-06, 144; Ex. R-G). Mr. Williamson concluded that Mr. [redacted] hit the rut that was near the bottom of the slope and was dislodged from the mower. (Tr. 54, 111). Mr. Williamson never spoke with Mr. [redacted] about the accident. (Tr. 91). But he spoke to Mr. Trejo about information Mr. Trejo had got from Mr. [redacted].¹⁵ (Tr. 54).

Mr. Williams completed Enviroscapes' Incident Investigation form after his initial investigation of the worksite. (Tr. 48-49; Ex. C-5, p. 1). On the form, he wrote, "[redacted] was mowing a hill at Dominion Clarington, up and down. He was mowing down the hill, when the mower started to skid down the hill.¹⁶ Once the mower got to the bottom of the hill, it bumped over a six to eight-inch rut, along the bottom edge of the hill, causing [redacted] to fall off the left to the ground. The mower continued rolling. The edge of the mower deck went over the top of [redacted]'s left hand." (Tr. 48-49; Ex. C-5, p. 1).

Mr. Lint talked to Mr. [redacted] several times after the accident, including at the hospital the next day.¹⁷ (Tr. 159). Mr. [redacted] told Mr. Lint that the crew had walked the worksite looking for hazards prior to mowing that morning. (Tr. 176, 191-92). Mr. [redacted] told Mr.

¹⁴ The Secretary asserts that the rut "was a new hazard likely created on July 25, 2019 or shortly before that date." (S. Br. 22). He further stated, "the rut that was encountered by [redacted] was a new hazard that had not been previously identified." (S. Br. 41).

¹⁵ Mr. Lint never spoke to Mr. Trejo about the accident. (Tr. 175).

¹⁶ At trial, Mr. Williamson testified that he had observed a slide mark on one of the mower passes during the morning of July 25, 2019 after the accident and he assumed that the mower had skidded. He said he did not know that the mower had skidded, and no one told him that it had. (Tr. 98-99).

¹⁷ Mr. Lint testified that he had hours of conversation with Mr. [redacted] while Mr. [redacted] was in the hospital in Pittsburgh. (Tr. 178).

Lint that he saw the rut at the last minute, so he jumped off the mower, lost his balance after he jumped, and fell to the ground. (Tr. 178-79). It was Mr. Lint's understanding and his conclusion that the crew at the Clarington site had conducted an inspection of the worksite. (Tr. 176, 191-92). Mr. Lint testified that Mr. [redacted] did not see the rut when he "walked the site" before beginning to mow the Clarington site. (Tr. 191-92; R. Reply Br. 9).

Mr. Lint was at the Clarington site the day after the accident. (Tr. 177). Based on Mr. Williamson's pictures, he had a general idea of where the rut was located. (Tr. 177-78). Even so, he could not see the rut immediately, but when he "walked like baby steps" he was able to feel the rut with his feet. (Tr. 177-78). Mr. Lint observed the rut was covered by grass. (Tr. 177). He saw that the sloped area above the rut (Ex. C-12, at "B") had been mowed up and down based on the mowing lines. (Tr. 189).

Mr. Lint had Mr. May obtain Mr. [redacted]' written statement two or three days after the accident when Mr. [redacted] had returned to Canton. (Tr. 50, 188, 190). Norma Camacho, an Envirosapes employee, later translated the written statement from Spanish into English. (Tr. 159-60; Ex. C-5).

D. Digital maps

Respondent has a digital map for all of the property sites it mows. The sales team initially creates the digital site map when the company bids for a mowing contract. (Tr. 35-36, 162). When owners of a property become a client, a branch field supervisor (such as Mr. Williamson) does a walk-through of the site with the sales account manager and the map is updated with hazard information. Mowing zones are determined before the property is added to a crew's route. (Tr. 35-36, 122). Slopes greater than 20 degrees are identified as hazards on the map. (T. 139, 143, 152-53; Exs. R-K, C-17, p. 7). Other hazards are also identified on the map, such as holes,

ruts and rocks. (Tr. 36-37, 121-22, 153, 163). The map shows the hazard areas in purple. (Tr. 80-81, 122-23, 140-41, 144). Mr. Williamson testified that the area where Mr. [redacted] was mowing when the accident occurred would have been shown as green, indicating there was no identified hazard, on the map for the Clarington site on July 25, 2019. (Tr. 139, 144, 147-48; Ex. R-G at “B”).

The digital map is available to each crew through Enviroscaapes’ digital routing system. (Tr. 122). A field supervisor can update the maps when changes or new hazards are identified. (Tr. 37-38, 163). Employees can access the map with their phones. (Tr. 76, 80-82, 122, 154, 162-63; Ex. R-K).

E. Respondent’s Safety Measures

1. Training of employees

Each mowing season there is a three to four hour “spring cleanup” training for all returning employees, and for new employees there is a 3-day initial spring training. (Tr. 77, 112-14; Exs. R-A through R-C). Safety is a covered topic in both trainings. (Tr. 78). In addition, there are monthly safety meetings and each morning there is a huddle at the start of the shift where safety issues are discussed. (Tr. 78). In 2019, Mr. [redacted] attended both the 3-day initial spring training and spring cleanup training provided by the company. (Tr. 75, 112-17, 142).

The 3-day new employee spring training is required for any employee that had not worked for Respondent in the prior twelve months, even if they worked for Respondent at some time in the past. (Tr. 75, 165). The first training day is onboarding at the corporate office in Louisville, with classroom training in the morning, and field training in the afternoon. (Tr. 27, 165-66). The next two days of training are at the branch location where the employee is assigned. (Tr. 26, 166-

67). For the first hour, the new hire has time alone with the field supervisor or branch manager and then joins the rest of the employees for the two days of training at the branch office. On the final day the employee is introduced to his assigned crew. (Tr. 26-27, 166-67).

The classroom training uses a PowerPoint presentation¹⁸ to go over subjects such as personal protective equipment (PPE), equipment used on a site, and equipment trailer connection. (Tr. 23-30; Exs. C-2 through C-4¹⁹). When a piece of equipment is discussed, employees are provided information on its safe operation and any PPE that is needed while using the equipment. (Tr. 23-24).

Most of the training is hands-on in field conditions. (Tr. 27-29, 31, 192). Training includes how to work on hills, slopes, near poles, trees and operating manual's instructions for equipment on slope safety. (Tr. 22-23, 28-29, 31, 64). It is a company rule to not use a mower on slopes over 20 degrees.²⁰ (Tr. 75-76, 85, 142, 152, 193-194). Employees are taught that slopes over 20 degrees must be cut using a string trimmer. (Tr. 45, 75-76, 85). For slopes under 20 degrees, employees are taught and required to mow across slopes rather than up and down. (Tr. 55, 67, 148, 152, 194).

Employees are also taught to use a string trimmer on a slope that is less than 20 degrees whenever they believe it would be unsafe to operate the riding mower, such as on wet grass or near a drop-off. (Tr. 28-29, 34-35, 75-76, 97-98). Enviroscapes considers walk-behind or push mowers too hazardous for use on a slope over 20 degrees. (Tr. 44-45).

¹⁸ The PowerPoint presentation is titled, "New Team Member Introduction to Training and the Safety Guide." (Ex. C-2).

¹⁹ Exhibits C-2 and C-3 are also provided to Spanish speaking employees in Spanish. (Tr. 31-32).

²⁰ Respondent's 20-degree rule is also based upon the Employer's Manual applicable to the mower used at the worksite. (Tr. 85-86; Ex. C-17).

Employees are trained to evaluate each site for hazards, such as changes in terrain, and to mark obstacles, such as holes, ruts, rocks and other hazards, with orange flags and marking paint. (Tr. 28-29, 44-45, 47, 64-65, 92-93, 99, 142). Crew members are to notify their supervisor of any new hazards found at a site, so the digital map can be updated. (Tr. 37-38, 76, 162-63). Mr. Williamson stated that it was not feasible for a crew to walk over each inch of a site prior to mowing because that would take more time than cutting the grass at the site. (Tr. 93-94, 176-77).

Crew members are trained that if they do not feel comfortable working at a particular location they should contact their crew leader or supervisor. (Tr. 35, 100, 168-69, 180-81). When encountering any hazardous conditions, employees are told to cut the grass with a string trimmer, skip the site until conditions improve, or ascertain from a manager how to proceed taking care of any such areas.²¹ (Tr. 76-77, 100).

The cell phone number of the company's owner, Todd Pugh, is provided to all employees and they are encouraged to call him or their supervisor if they have any questions or concerns about safety. (Tr. 79-80, 100, 168-169, 180-81).

Employees are trained on the instructions in the mower's operating manual. (Tr. 64). The Employer's Manual applicable to the mower used by Mr. [redacted] at the worksite on July 25, 2019 includes the following section on slope safety. (Ex. C-17, p. 7).

Slope Operation

All slopes and ramps require extra caution. If you feel uneasy on a slope, do not mow it.

- Remove obstacles such as rocks, tree limbs, etc. from the mowing area.
- Watch for holes, ruts or bumps, Tall grass can hide obstacles.

²¹ Mr. Williamson testified that one or two sites are skipped at least once a week because of unsafe conditions during spring. (Tr. 100). He said that the Clarrington site was never skipped while he supervised that worksite. (Tr. 114).

- Use caution near drop-offs, ditches, or embankments. The machine could suddenly turn over if a wheel goes over the edge of a cliff or ditch, or if an edge caves in.
- Use extra care with grass catchers or other attachments. These can change the stability of the machine.
- Keep all movements on slopes slow and gradual.
- Do not make sudden changes in speed or direction.
- Mow slopes side to side.
- Do not mow slopes greater than 20 degrees.

(Ex. C-17, p. 7).

Employees are also trained to use good judgement based on their training, sight, and experience in various scenarios. (Tr. 85, 181-82, 192-93).

2. Safety meetings

As field supervisor, Mr. Williamson holds a 15-minute morning huddle with his crews each day to discuss the day's weather,²² hazards to avoid, and any crew reports from the prior day's work. (Tr. 34-35, 78, 117-19). Mr. Williamson may advise a crew to skip an area or avoid a site at a certain time based on the weather conditions. (Tr. 34). Sometime prior to the date of the accident, he relayed to Messrs. Trejo and [redacted] that two areas at the Clarington site "needed to be weed-eated." (Tr. 41-44). But Mr. Williamson gave no specific instructions to the crew for the Clarington site on July 25, 2019.²³ (Tr. 42-44).

Mr. Williamson conducts monthly safety meetings with the crews to cover topics relevant to the current seasonal conditions. (Tr. 78, 117-19). For example, different equipment is used at the beginning of the season when the sites are cleaned up than the equipment used for the ongoing

²² These weather conditions may include dew on the ground, rain, lightning or thunder. (Tr. 28-29, 34-35).

²³ Mr. Williamson found that Mr. Trejo understands English well and could translate for Mr. [redacted], if needed. (Tr. 42). However, Mr. [redacted] spoke "pretty good English." (Tr. 42, 88-89).

maintenance of the site throughout the season. (Tr. 118). Safety topics range from ladder safety, use of hedge shearers, bee stings, poison ivy, and backing a trailer. (Tr. 118). On the morning following Mr. [redacted]' accident, there was a company-wide meeting to discuss the accident and ways to prevent it. (Tr. 198-200).

3. Supervision of employees

Field supervisors spend approximately 80 percent of their time out in the field, observing and monitoring the mowing crews with respect to safe work practices. (Tr. 32, 73-74, 78-79).

Mr. Williamson monitors each of his crews in the field three to four hours each week. (Tr. 32).

The monitoring of the crew is documented on the company's IPS digital system. (Tr. 32-33, 80-81). Before employees begin to cut grass at a site, management evaluates the property in terms of any safety hazards using digital maps generated by Respondent's account managers on the initial walk-through. These digital maps show property boundaries, hazards, mowing frequency, vegetation control areas, fence lines and parking lots. (Tr. 80, 122, 140-41; Ex. R-K).

The IPS digital system is available to all crew leaders and employees when they are going through their route. (Tr. 80-81, 122, 141). A digital map was available for the Clarington site on July 25, 2019 that showed which sections were to be weed-eated. (Tr. 81-82, 122). Mr.

Williamson testified that the accident did not occur in an area where the ride-on mower was prohibited; *i.e.*, in a no mow zone over 20 degrees. He said that the accident occurred close to a no mowing boundary, but was within a 15 to 20-degree slope area. (Tr. 83-84, 149). He

identified the approximate area where the accident occurred on the photograph at Exhibit C-12, at "A", and the photograph at Exhibit R-H, at "C". (Tr. 102-04, 109-10; Exs. C-12, R-H). Mr.

Williamson also identified that part of the area shown on the photograph at Exhibit C-12, at "B" that had a slope less than 20 degrees. He said Mr. [redacted] was mowing up and down in that

area prior to the accident. (Tr. 104, 147-48; Ex. C-12). He further identified the area where a weed eater would have been used on the photograph at Exhibit C-12, at “C”. (Tr. 105; Ex. C-12).

The monitoring documentation maintained within Respondent’s IPS digital system also includes whether a crew uses PPE, the quality of work, and safety compliance. (Tr. 33, 78-81). Mr. Williamson often observes a crew from a distance to ensure that the crew is unaware of his presence. (Tr. 65-66).

The crew is not required to document its review of the site conditions prior to mowing. (Tr. 47). During his field observations, Mr. Williamson can observe whether a crew has done a site review before starting work and is following safe work practices. (Tr. 32, 64-65, 78-79). Once or twice a week, Mr. Williamson asks a crew for a recap of site conditions at the end of a shift. (Tr. 47). Supervisors also verify compliance with slope safety procedures by examining the mowing marks at a site. (Tr. 66). The appearance of mowing tracks shows where the riding mower was used. The absence of such marks indicates that string trimmers were used. Mowing marks can also reveal the direction of the mowing; that is, whether the area was mowed side-to-side across the slope or vertically on the slope. (Tr. 49, 66-67; 95-96).

Mr. Lint spends 15-20% of his time in the field visiting various locations, helping the crews, or riding along and observing them. (Tr. 167-68). Mr. Lint works out of the corporate office in Louisville, Ohio. (Tr. 167, 197).

4. Discipline of employees

Respondent enforces safety compliance with coaching notices, also referred to as a “write-up”. (Tr. 79). The coaching notice is to make sure an employee is aware of his or her actions and any safety concerns. It is also used to coach employees to use better practices. (Tr. 79). In his ten years as a crew supervisor, Mr. Williams has given between 50 and 100 coaching notices.

(Tr. 68, 119-20). Most of those notices were about PPE use—use of safety glasses, ear plugs, etc. (Tr. 68). Mr. Williamson could recall giving one coaching notice about eight years earlier to a crew that was using a mower on an unsafe slope. (Tr. 68-70). A couple of weeks after the notice was issued and the crew had been told to use a string trimmer to cut the slope, a riding mower turned over while being used on the slope. (Tr. 68-69). The crew was immediately terminated. (Tr. 68-69, 79, 165).

Had Mr. [redacted] returned to work after the accident, he would have been disciplined and he would have received a coaching notice for mowing up and down a slope, instead of mowing side-to-side in the area shown on the photograph at Exhibit R-G, at “B”.²⁴ (Tr. 54-55, 67, 147-48, 189, 195; Ex. R-G, at “B”). However, Mr. Lint was not confident that mowing side-to-side would have prevented the July 25, 2019 accident. (Tr. 195).

Mr. Lint was not aware of any other injuries to an operator using a riding mower.²⁵ (Tr. 164; R. Br. 30). Years before, when Mr. Lint was crew leader, Mr. [redacted] had been on one of his crews for three or four seasons from about 2005 through 2008.²⁶ (Tr. 172-73). Mr. Lint found Mr. [redacted] to be a very intelligent, loyal, hard-working, reliable, trustworthy, and safe employee. (Tr. 172-73). Even though Spanish was Mr. [redacted]’ first language, both Messrs. Williamson and Lint found that did not generally affect Mr. [redacted]’ ability to communicate in English. (Tr. 88, 173).

²⁴ Mr. Williamson testified that Mr. [redacted] would have been disciplined for mowing up and down even though that area where he was mowing was marked in green on the IPS digital map. The green color signified that mowing side-to-side in that area was safe because the slope there was less than 20 degrees and no hazards had been identified. (Tr. 147-52; Ex. R-G, at “B”). He further said the area shown on the photograph at Exhibit R-G, at “C”, is a hazard because the slope is greater than 20 degrees and an employee cannot use a riding mower there at all. (Tr. 152; Ex. R-G, at “C”).

²⁵ Mr. Williamson also testified that he was not aware of Respondent having any other accidents involving a riding mower. (Tr. 107).

²⁶ Mr. [redacted] was on a work visa, so typically would work from April through November. (Tr. 173).

Mr. Williamson was Mr. [redacted]' supervisor for the entire time Mr. [redacted] worked for Respondent from 2018 through 2019. (Tr. 115). Over the years, he had observed Mr. [redacted] on more than twenty occasions. (Tr. 74, 87-88). During the 18 months before the accident, he had observed Mr. [redacted] working safely on slopes at two or three sites. (Tr. 123). Mr. Williamson testified that Mr. [redacted] was very detailed in his work, "very intentional on safety", and performed his job correctly. (Tr. 88).

F. OSHA Inspection

CO Escalona opened the inspection at the Louisville corporate office with Mr. Lint on November 8, 2019.²⁷ (Tr. 205-06). CO Escalona then scheduled a visit to the Canton, Ohio location for November 14, 2019. (Tr. 206, 212). At the Canton location, CO Escalona took pictures of the mower that had been used by Mr. [redacted] on July 25, 2019—which by that time had been set up with the snowplow attachment instead of the cutting blades. (Tr. 211; Exs. C-8 through C-9). He recorded the mower's serial number and took photos of the hazard stickers on the mower. (Tr. 212; Ex. C-9). On November 18, 2019, CO Escalona met with Mr. Williamson, and they went to the Clarington site where Mr. [redacted] was injured. (Tr. 207). CO Escalona took pictures at the Clarington site and used his trenching rod to measure the degree of the slope approximately where the accident happened.²⁸ (Tr. 59-60, 111-12, 207-10; Exs. C-10 through C-13, C-15 through C-16). The slope area above where Mr. [redacted] hit the rut was a 19-degree slope. (Tr. 60, 62, 111-12, 209-10; Exs. R-G, C-14). Back in the office, CO Escalona searched the Toro website to find an owner's manual that matched the model and serial number of the

²⁷ CO Escalona served as an OSHA CO for three-and-a-half years. He has done about 150 to 170 OSHA inspections. He has never before done an inspection of a landscaping company. (Tr. 202-05).

²⁸ Mr. Williamson testified that the photograph at Exhibit C-10 taken by the CO in Mr. Williamson's presence on November 18, 2019, accurately depicted, other than the color of the grass and the absence of leaves on the tree, the conditions at the worksite on the day of the accident. (Tr. 59; Ex. C-10). He further said that the CO measured, in his presence, the grade of the slope there several times at 19 degrees. (Tr. 61; Ex. C-13). Mr. Williamson testified that the placement of the rod where the degrees were measured is shown on the photograph at Exhibit R-G, at "B".

mower. (Tr. 212-14; Ex. C-7). The Operator's Manual, TORO, Form No. 3425-657, Model No. 74523, Serial No. 316000001 and Up, Revision A, copyright 2018, at Exhibit C-7 (CO's Website Manual) that the CO found on the Toro website included the following slope safety section:

Slope Safety

Slopes are a major factor related to loss of control and rollover accidents, which can result in severe injury or death. You are responsible for safe slope operation. Operating the machine on any slope requires extra caution. Before using the machine on a slope, do the following:

- Review and understand the slope instructions in the manual and on the machine.
- Evaluate the site conditions of the day to determine if the slope is safe for machine operation. Use common sense and good judgment when performing this evaluation. Changes in the terrain, such as moisture, can quickly affect the operation of the machine on a slope.
- Operate across slopes, never up and down. Avoid operation on excessively steep or wet slopes.
- Identify hazards at the base of the slope. Do not operate the machine near drop-offs, ditches, embankments, water, or other hazards. The machine could suddenly roll over if a wheel goes over the edge or the edge collapses. Keep a safe distance (twice the width of the machine) between the machine and any hazard. Use a walk-behind machine or a handheld tool to operate in these areas.
- Avoid starting, stopping, or turning the machine on slopes. Avoid making sudden changes in speed or direction; turn slowly and gradually.
- Do not operate a machine under any conditions where traction, steering or stability is in question. Be aware that operating the machine on wet grass, across slopes or downhill may cause the machine to lose traction. Loss of traction to the drive wheels may result in sliding and a loss of braking and steering. The machine can slide even if the drive wheels are stopped.
- Remove or mark obstacles such as ditches, holes, ruts, bumps, rocks, or other hidden hazards. Tall grass can hide obstacles. Uneven terrain could overturn the machine.
- Use extra care while operating with accessories or attachments. These can change the stability of the machine and cause a loss of control. Follow directions for counterweights.

• If you lose control of the machine, step off and away from the direction of travel of the machine.

(Ex. C-7. pp. 14-15). This was the only manual the CO found while searching the Toro website that matched the model and serial number of the mower used at the worksite. (Tr. 215; Ex. C-7). CO Escalona understood at that time that the CO's Website Manual at Exhibit C-7 that he obtained from Toro's website was the manual for the mower that was involved in the accident. He later testified at trial that after populating his case file during his inspection with Exhibit C-7 as the mower's operator's manual, he was now aware that the Employer's Manual was another Toro Operator's Manual at Exhibit C-17 that would also apply to the mower ridden by Mr. [redacted] at the worksite on July 25, 2019.²⁹ (Tr. 214-15; Exs. C-7, C-17). After concluding his inspection, the CO recommended the two citation items that were issued to Respondent. (Tr. 215).

IV. Citations

A. Citation 1, Item 1

General Duty Clause Violation

To prove a violation of section 5(a)(1) of the Act, also known as the general duty clause, the Secretary must demonstrate by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees; (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. *Arcadian Corp.*, No. 93-0628, 2004 WL 2218388, at *7 (O.S.H.R.C., Sept. 30, 2004). (S. Br. 25, 27). The Secretary must also show that the employer knew or with the exercise of reasonable diligence

²⁹ The Secretary's position is that one of these two manuals "was an update of the other." (S. Br. 23).

could have known of the hazardous condition. *Otis Elevator Co.*, No. 03-1344, 2007 WL 3088263, at *2 (O.S.H.R.C., Sept. 27, 2007).

The Secretary asserts the hazard was “hazardous slope operations” for a riding mower. (S. Br. 26; S. Reply Br. 1-3). The Secretary asserts the hazard is recognized both by the Respondent and by the landscaping industry. (S. Br. 26). The Secretary asserts the feasible means of abatement for hazardous slopes is the use of a string trimmer and marking ruts and holes prior to mowing. (*Id.* at 33-34). Further, the Secretary asserts Respondent’s knowledge of the hazard is shown by the training it provides to employees on the proper use of mowers on slopes and the digital site map that indicated a large portion of the grass at the Clarington site could not be cut with a riding mower. (*Id.* at 35-36).

Respondent acknowledges that it recognizes there are hazards associated with operating a riding mower on a slope and asserts that it had effective work rules, practices and procedures in place addressing the hazards. (R. Br. 18-19). Mr. Williamson testified that the rut that caused the accident was a hazard,³⁰ but was not identified on the IPS digital map as a hazard as of July 25, 2019 and was not known by Respondent before the accident. (Tr. 153; Ex. R-G, at “A”). Further, Respondent asserts that it could not have known of the rut on the slope at the Clarington site on the morning of July 25, 2019. (R. Br. 30).

1. Hazard Definition and Recognition

For a general duty clause violation, the Secretary must identify the hazard “in a way that appraises the employer of its obligations and identifies conditions or practices over which the employer can reasonably be expected to exercise control.” *Arcadian Corp.*, 2004 WL 2218388, at *7. “The adequacy of the employer's work practices to reduce the risk of, or prevent the

³⁰ Mr. Williamson testified that had he known of the rut he would have marked it as a hazard. (Tr. 153; Ex. R-G, at “A”).

occurrence of, the hazard is a separate issue from the question of how the recognized hazard is defined.” *Id.* at *8. The “Commission has held that it is the hazard, not the specific incident that resulted in injury or might have resulted in injury, that is the relevant consideration in determining the existence of a recognized hazard.” *Id.* at *9.

“A safety hazard at the worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur.” *Baroid Div. of NL Indus., Inc. v. Occupational Safety & Health Review Comm’n*, 660 F.2d 439, 444 (10th Cir. 1981). (S. Br. 26). Here the hazard is defined as hazardous slope operations for a riding mower. The employee is exposed to harm due to improper operation of a riding mower on a slope, including use of a mower on a slope that is too steep or encountering a hidden ground hazard on a slope.

Hazard recognition “may be shown by proof that ‘a hazard ... is recognized as such by the employer’ or by ‘general understanding in the [employer's] industry.’” *Otis Elevator Co.*, 2007 WL 3088263, at *4 quoting *Kokosing Constr. Co.*, No. 92-2596, 1996 WL 749961, at *4 (O.S.H.R.C., Dec. 20, 1996).

The Secretary asserts that hazardous slope operations for a riding mower is recognized both by the Respondent and by the landscaping industry. (S. Br. 26, 28; S. Reply Br. 1-3). In his reply brief, the Secretary clarified that the mention of a 15-degree slope in the citation was merely a fact that described the conditions at this particular worksite; the degree of the slope was not a part of the Secretary’s definition of the recognized hazard.³¹ (S. Reply Br. 1). Respondent acknowledges there are hazards associated with operating a riding mower on a slope. (R. Br. 22).

³¹ Because the Secretary clarified that it was not asserting that a 15-degree slope was a recognized hazard, Respondent’s arguments that it had not received fair notice of the applicability of any 15-degree rule or that it was not standard industry practice to prohibit the use of riding mowers on slopes greater than 15 degrees are moot and are not considered here. (Tr. 184; S. Reply Br. 1, R. Br. 14, 16).

For the reasons set forth below, the Court finds that Respondent recognizes there are hazards affiliated with use of a riding mower on a slope. The Court also finds the industry has recognized hazards affiliated with use of a riding mower on a sloped area, as demonstrated by the two Toro operator's manuals in evidence. (Exs. C-7, C-17). Operator Manuals can serve to establish industry recognition of a hazard. *Elite Builders, Inc.*, No. 16-0119, 2017 WL 4083647, at *18 (O.S.H.R.C.A.L.J., Aug. 2, 2017).

Enviroscapes' recognition of the hazard of hazardous slope operation for a riding mower is demonstrated through its work rules, digital site map, and training. *See Integra Health Mgmt., Inc.*, No. 13-1124, 2019 WL 1142920, at *8 (O.S.H.R.C., Mar. 4, 2019) ("Work rules addressing a hazard have been found to establish recognition of that hazard.")

Enviroscapes' work rules address the use of a riding mower on slopes. For a slope over 20 degrees, use of a riding mower is prohibited. (Tr. 35, 75, 85, 152, 193-94). For lesser slopes, employees are required to mow across a slope (horizontally), not up-and-down (vertically). (Tr. 55, 67, 148, 152, 194).

The digital map for each site identifies the slopes over 20 degrees as a hazard area where riding mowers are not allowed. (Tr. 139, 143, 152-53; Ex. R-K). The hazard areas are shown in purple on the digital map. (Tr. 80-81, 122-23, 140-41).

Finally, several aspects of Respondent's training show recognition of hazards related to riding mowers on slopes. Training includes how to work on hills and slopes and includes the operating manual's instructions for slope safety. (Tr. 22-23, 28-29, 64). Employees are taught that slopes over 20 degrees must be cut using a string trimmer. (Tr. 45). For slopes under 20 degrees, employees are taught to mow across slopes rather than up and down. (Tr. 55, 67, 148, 152, 194). Employees are also taught to use a string trimmer on a slope that is less than 20

degrees whenever they believe it would be unsafe to operate a riding mower, such as on wet grass or near a drop-off. (Tr. 28-29, 34-35, 97-98). And finally Respondent trains its employees that under certain conditions, such as wet grass, a riding mower should not be used on a lesser slope.³² (Tr. 179-80). Respondent recognizes the hazard of riding mower use on slopes. Mr. Williamson testified that it would be a hazard to mow on the two slopes that needed to be weed-eated³³ at the worksite. (Tr. 41-42). He also said, “There’s a hazard on any slope.” (Tr. 152).

The two Toro operator’s manuals in evidence show industry recognition of the hazard of using a riding mower on a slope. (Exs. C-7, C-17). The Employer’s Manual had a section entitled “Slope Operation” that identified special guidelines for use of the riding mower on a slope. (Ex. C-17). This slope safety section included a general statement that “[a]ll slopes and ramps require extra caution” and listed several guidelines for operating on slopes, such as, to watch for holes, ruts, or bumps; to use caution near drop-offs, ditches, and embankments; to keep movement slow and gradual; to mow slopes side-to-side; and to not use the mower on slopes greater than 20 degrees. (Tr. 135; Ex. C-17, pp. 7-8).

The CO’s Website Manual included a section entitled “Slope Safety.” (Tr. 213-14; Ex. C-7, pp. 14-15). The section had a general caution that “slopes are a major factor related to loss and control . . . [o]perating the machine on any slope requires extra caution” and to operate across a slope (not up and down), to avoid operating on excessively steep or wet slopes, to avoid sudden changes in speed or direction, to remove or mark obstacles such as ruts, bumps or hidden hazards, and to not operate where conditions affect traction, steering or stability. (Ex. C-7, pp. 14-15).

The Court finds the two Toro operator’s manuals show the landscaping industry recognizes there are hazards in operating a riding mower on a slope. *See Young Sales Corp.*, No. 8184, 1979 WL

³² Mr. Williamson testified “that I wasn’t physically there [at the accident site], so I don’t know if it [the ground] was wet that morning [July 25, 2019].” (Tr. 126).

³³ Mr. Williamson testified that areas that need to be weed-eated cannot be mowed. (Tr. 42).

8441, at *2 (O.S.H.R.C., May 1, 1979) (manufacturer's warning as probative evidence of existence of recognized hazard under general duty clause).

As another means to show the landscaping industry recognizes the hazard, the Secretary, in footnote 3 in his post-trial brief, asks the Court to take judicial notice of a document on an OSHA webpage.³⁴ (S. Br. 33-34). The document in question is an OSHA webpage with some safety recommendations for riding mowers, entitled “Dangers of Roll-Overs of Riding Mowers.” See <https://www.osha.gov/riding-mowers>. (S. Br. 34). The Secretary also cites to this webpage to support this statement in his brief--“OSHA recommends that an operator evaluate the terrain and slope conditions to ensure that the mower is operated in a safe manner and to avoid mowing on slopes with an angle of over 15 degrees” when manufacturer instructions are not available or do not provide a maximum slope.³⁵ (S. Br. 33-34). However, in his reply brief the Secretary states that 15 degrees is not the threshold for defining the recognized hazard but was simply a description of the violative condition in the citation. (S. Reply Br. 1).

After the Secretary rested his case, Respondent moved for a directed verdict and stated that, among other things, the Secretary had not provided evidence supporting its assertion that a 15-degree slope is an industry-recognized hazard.³⁶ (Tr. 220-21). In response, the Secretary’s counsel stated that OSHA’s position was set forth in a webpage document entitled “Dangers of Rollovers of Riding Mowers” on OSHA’s website.³⁷ (Tr. 227). Respondent asserted this

³⁴ Federal Rule of Evidence 201(b) permits judicial notice of a "fact" that is not subject to reasonable dispute because it: “(1) is generally known within the court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Federal Rule of Evidence 201, which is applicable to Commission proceedings pursuant to Commission Rule 71, 29 C.F.R. § 2200.71.

³⁵ In this case, manufacturing instructions were available in the Employer’s Manual which stated that operators were not to mow slopes greater than 20 degrees. (Ex. C-17, p. 7).

³⁶ Motion for directed verdict was denied. (Tr. 231).

³⁷ The document on the webpage states:

- that the “guidelines discussed below are based on safety principles issued by the California Department of Industrial Relations, which includes Cal/OSHA; the Canadian Centre for

webpage did not supply the necessary notice to employers of a “15-degree rule” for operating a riding mower on slopes. (Tr. 229). Respondent further asserted that this webpage did not include the date that it was posted online or the date it was applicable. (Tr. 229). The Secretary’s counsel agreed that the webpage was undated, that it did not include the name of the issuing OSHA department or authority, and was a guideline and not an interpretation letter. (Tr. 228). A printout of the OSHA webpage was not produced at the trial, offered into evidence, or attached to the Secretary’s post-trial briefs.

The Court declines to take judicial notice of this OSHA webpage. The Secretary did not provide any information for when this page was developed or what its contents were at any given time in the past. The webpage includes no date information to establish when OSHA set forth the recommendations it contains. Further, the cases issued by administrative law judges that the Secretary relies on to support taking judicial notice of this webpage are unhelpful.³⁸ (S. Br. 34, fn 3). They do not support taking judicial notice of a webpage with contents that cannot be established at a point in time. Finally, the current content of the webpage notes the guidelines do

Occupational Health and Safety; and the Outdoor Power Equipment Institute (OPEI).”

- “This is one in a series of information webpages highlighting OSHA programs, policies, or standards. It does not impose any new compliance requirements.”

See Dangers of Roll-Overs of Riding Mowers at <https://www.osha.gov/riding-mowers> (accessed on November 29, 2021).

³⁸ In *Grismer Tire Co.*, No. 13-1939, 2016 WL 5118268, at *12, n. 13 (O.S.H.R.C.A.L.J., Aug. 9, 2016), the Judge took judicial notice that an OSHA interpretation letter was published on OSHA’s website (in response to the Secretary’s hearsay objection) when it was offered as an exhibit at the trial. In *J&M Miller Constr.*, No. 14-1765, 2016 WL 5118269, at *22, n. 29 (O.S.H.R.C.A.L.J., Aug 1, 2016 (consolidated)), this Court took judicial notice that an OSHA publication was an accurate source of information regarding the hazard of eye injuries created by ricocheting nails and was not subject to reasonable dispute. In *Cooper Tire & Rubber Co.*, No. 11-1588, 2016 WL 233385, at *17, n.26 & *37, n.44 (O.S.H.R.C.A.L.J., Jan. 7, 2016), the Judge, *sua sponte*, took judicial notice of two Chemical Safety Board (CSB) reports the parties had repeatedly referred to during the trial yet had not admitted as evidence. The Judge found the accuracy of “the CSB reports are a source whose accuracy cannot be reasonably questioned.” The Judge also took judicial notice of an OSHA Standard Interpretation letter concerning the Classification of Combustible Dusts.

not impose any new compliance requirements. There is a reasonable dispute as to whether this information existed at the time of the violation here, July 25, 2019. (Tr. 227-28). Because there is no date associated with the information on this webpage, it is not helpful in determining the outcome of the issues in this case.

The Court finds that both Enviroscapes and the landscaping industry recognize there are hazards when operating a riding mower on a slope. (S. Br. 37).

2. Exposure to condition/activity that presented a serious hazard.

The Secretary must prove employees were exposed to the asserted hazard and it was likely to cause death or serious physical harm.” *Peacock Engineering, Inc.*, No. 11-2780, 2017 WL 3864205, at *5 (O.S.H.R.C., Apr. 27, 2017). The criterium is “whether, if an accident occurs, the results are likely to cause death or serious harm.” *Id.* Respondent does not dispute that the hazard is serious.

Enviroscapes has work rules regarding the use of a riding mower on a slope to mitigate the hazard presented. Employees are to either mow across the slope or use a string trimmer to cut the grass. Here, the likely harm resulting from an accident with the riding mower includes contact with the blades that can result in amputation, which is undisputedly a serious injury. (S. Br. 35).

Mr. [redacted] was exposed to the hazard of operating a riding mower on a slope. Here, he operated the riding mower up-and-down the slope, instead of side-to-side. He fell from the mower and the mower ran over his hand, resulting in the amputation of two fingers and two fingertips.

3. Abatement

The Secretary must set forth proposed abatement measures and show those measures are feasible and will materially reduce the incidence of the hazard. *Arcadian Corp.*, 2004 WL

2218388, at *7. The “Secretary has the burden of coming forward with evidence on the feasibility issue.” *Whirlpool Corp. v. OSHRC*, 645 F.2d 1096, 1098 (D. C. Cir. 1981).

In Citation 1, Item 1, the Secretary sets forth three methods to abate the hazard of operating on a hazardous slope. First, is to “follow the guidelines in the Operator’s Manual. . . Model No. 74523 . . . Slope Safety.” The second is to “use walk behind machines or hand held tools, such as but not limited to string trimmer.” And, finally to “use markers to identify holes or abrupt changes to the terrain.” (Citation, 1, Item 1, p.6; S. Br. 23).

Respondent asserts that it had already implemented the abatement measures the Secretary sets forth. Specifically, Respondent follows the Toro Employer’s Manual; it requires employees to use string trimmers on slopes over 20 degrees instead of a riding mower; it requires employees to mow side-to-side on lesser slopes; it provides a digital map with identified hazards for each site; and it provides flags and marking paint for employees to mark holes or other hazards in the mowing area. (R. Br. 17-19; R. Reply Br. 4). Mr. Williamson testified that the use of markers such as a flag would “absolutely” help eliminate a hazard where a slope, cut, or divot were not visually apparent. (Tr. 45). He said Mr. [redacted] should have marked the hole that he hit if he happened to have noticed it before starting.³⁹ (Tr. 100). But he said that there were no hazards that were visible to the employees at the Clarington site on July 25, 2019 that required a marking. (Tr. 45-46, 143). Mr. Williamson testified that Respondent does not require employees to first walk the entire area of a property being mowed each time they are there. (Tr. 93).

When an employer already has abatement measures in place, it is the Secretary’s burden to set forth additional specific measures that would materially reduce the hazard beyond what an employer already had in place. *See Sec’y of Labor v. U.S. Postal Serv., Nat’l Ass’n of Letter*

³⁹ The Secretary asserts that “Respondent alleges that [redacted] should be disciplined for the failure to mark the rut.” (S. Br. 45). This mischaracterizes Mr. Williamson’s testimony that said Mr. [redacted] should have marked the hole if he saw it. Respondent’s position is that Mr. [redacted] did not see the rut beforehand. (Tr. 45-46, 143, 191-92; R. Br. 9, 26, R. Reply Br. 9).

Carriers, No. 04-0316, 2006 WL 6463045, at *7 (O.S.H.R.C., Nov. 20, 2006) (the Secretary failed to show that reflective material on postal uniform was less effective than ANSI-compliant garment); *see also, Pepperidge Farm, Inc.*, No. 89-265, 1997 WL 212599, at *51 (O.S.H.R.C., Apr. 26, 1997) (citation vacated where the Secretary did not identify additional steps that were feasible and reduced the hazard); *Cerro Metal Prod. Div., Marmon Grp., Inc.*, No. 78-5159, 1986 WL 53467, at *6 (O.S.H.R.C., May 7, 1986) (vacating citation where record evidence did not show a “specific, feasible additional step” that employer could have taken to abate the hazard).

a. The Operator’s Manuals

With respect to the Secretary’s proposed abatement of following the guidelines of the Toro Operator’s Manual, two Toro operator’s manuals were placed into evidence. The first, at exhibit C-7, is the CO’s Website Manual that the CO found when he searched the online Toro website. (Tr. 214; C-7). The second, at Exhibit C-17, is the Employer’s Manual from Enviroscapes’ Canton Branch Office. Mr. Williamson testified that Respondent follows the safety guidelines in the Employer’s Manual, including the guidelines and instructions in the section called Slope Safety. (Tr. 63-64, 131; Ex. C-17). He said that the Employer’s Manual is the most current manual that he had in his possession. (Tr. 129-31, C-17). He said that the Employer’s Manual was the manual for the mower that was involved in the accident. (Tr. 131).

The mower used at the Clarington site was a Toro GrandStand Multi Force Mower, Model 74523, Serial No. 404862996. (Tr. 187). Both manuals in evidence apply to the Toro riding mower model used at the Clarington site. (Exs. C-7, C-17). However, both manuals were issued in 2018. (Tr. 187; Exs. C-7, C-17). The Secretary argues that the CO’s Website Manual is more germane here than the Employer’s Manual. It is the Secretary’s burden to show the CO’s Website

Manual is more germane here than the Employer's Manual. He has failed to meet this burden.⁴⁰

Thus, where there are relevant differences between the two versions of the Operator's Manual, the Court defers to the specific requirements of the Employer's Manual. Accordingly, the Court finds that the Employer's Manual was in effect at Respondent's business on July 25, 2019 more so than the CO's Website Manual. (Tr. 131, 136; C-17).

The Secretary acknowledges that Enviroscares trains employees to follow the guidelines of the Employer's Manual. (S. Br. 31, 34). Mr. Williamson testified that Respondent's employees are trained to comply with the general rule outlined in the Employer's Manual that it is unsafe to mow slopes that have a slope of over 20 degrees. (Tr. 85, 128; Ex. C-17). The CO's Website Manual does not mention any specific degree of slope. It says only to "[e]valuate the terrain to determine the appropriate equipment" (Tr. 86; Ex. C-7, p. 11). Respondent's employees do not actually measure the degree of every slope prior to mowing. They rely upon their experience, sight, common sense, and training to ascertain whether or not a slope is greater than 20 degrees. (Tr. 84-86, 123-25, 181-82; Ex. C-17, p. 7). The Secretary does not propose additional specific abatement measures related to following the operator's manual beyond those Enviroscares had in place. Thus, the proposed abatement measure of following the operator's manual was already implemented by Respondent.

b. The use of a string trimmer or walk-behind machine

The Secretary asserts the use of a walk-behind machine or handheld tools, such as a string trimmer, would substantially eliminate the hazards related to mowing on a slope.⁴¹ (S. Br. 23, 27, 33-34). The Secretary acknowledges that Respondent provided its crews with string trimmers. (S. Br. 34).

⁴⁰ Mr. Lint did not know which manual was first printed. The Secretary provided no evidence as to which manual was more current at the time of the incident on July 25, 2019. (Tr. 135-36, 187; Exs. C-7, C-17; S. Br. 14).

⁴¹ The Secretary acknowledges that Respondent knew that using a string trimmer and marking holes were feasible means of abatement. (S. Br. 35).

Respondent provided string trimmers to each crew and required its employees to use a string trimmer, rather than the ride-on mower, on slopes over 20 degrees. (Tr. 44-45, 84-86). Respondent provides a digital map of each worksite, which identifies the areas where a ride-on mower is not allowed and that a string trimmer must be used (mowing areas with no hazards are shown in green; hazard areas are shown in purple). (Tr. 80-81, 122-23, 140-41, 143; Ex. R-K). For the slopes over 20 degrees, Respondent finds the use of a string trimmer eliminates the hazard.⁴² A walk-behind mower is not allowed as Respondent believes it is just as hazardous as a riding mower on a 20-degree-plus slope. (Tr. 44-45).

For the lower sloped areas (less than or equal to 20 degrees), the Respondent required its employees to mow across the slopes, side-to-side, rather than up-and-down. (Tr. 55, 67, 148, 152; Ex. C-17, p. 7). The Secretary did not propose this particular abatement method. Nonetheless, the CO's Website Manual states the mower should be "[o]perate[d] across slopes, never up and down," which is consistent with Respondent's work rule. (Ex. C-7, pp. 14-15). The Employer's Manual states the operator should "[m]ow slopes side to side." (Ex. C-17, p. 7). Neither manual prohibits the use of a riding mower on every slope. (Exs. C-7, C-17).

Additionally, Respondent trains its employees to evaluate the site conditions and not use the riding mower when the grass is wet, due to possible lack of traction. (Tr. 28-29, 34-35, 46, 97-98). Employees are trained to seek guidance from a supervisor when site conditions are not ideal, and the supervisor then tells them to either use a string trimmer or skip that area. (Tr. 76-77, 100, 168-69). The Secretary did not specify this method of abatement; it was already included in Respondent's work rules and training regarding cutting grass on slopes.

⁴² Mr. Williamson testified that the use of a string trimmer on the slope at the Clarington site reduced the hazard by "[a] hundred percent." (Tr. 45).

The Court finds the Secretary did not propose additional abatement beyond the measures Respondent had already implemented for use of a string trimmer on a slope. Thus, the Court finds the Secretary's proposed abatement to use a string trimmer on a slope in lieu of a riding mower was already implemented by Respondent.⁴³

c. Marking ruts, holes or other hazards

The Secretary also asserts that marking holes, ruts, and other hidden hazards prior to mowing will substantially eliminate the hazards affiliated with mowing on a slope. (S. Br. 27, 34). The Secretary acknowledges that Envirosapes provided flags to employees for marking holes, ruts or other hidden hazards and a digital map showing hidden hazards, such as holes, that had previously been identified at a worksite. (S. Br. 17, 19, 21, 27, 34). The Secretary also acknowledges that Envirosapes trained its employees to evaluate the site for hazards, such as ruts and holes. (S. Br. 17).

The Secretary seems to suggest that Respondent should implement an additional measure with respect to marking holes and ruts. The Secretary states generally that Respondent needs to implement a method to confirm whether its employees actually evaluate each worksite for new hidden hazards and whether the provided flags are actually used to mark hazards prior to mowing. (S. Br. 38, 40-41). The Secretary asserts that Respondent cannot simply rely on its employees to follow their training. (S. Br. 38). And that before "relying extensively on employee judgment, Respondent should have some means to confirm that employees were appropriately identifying previously undetected hazards, such as ruts and holes that had not existed when the map was created." (S. Br. 41)

⁴³ The Secretary implies that the slope that Mr. [redacted] was mowing at the time of his accident "required" the use of a string trimmer. (S. Br. 19). However, the Secretary provides no explanation why that particular sloped area required the use of a string trimmer or why Respondent's rule to mow that slope side-to-side with a riding mower was not adequate abatement.

Respondent asserts that it “works hard to verify that employees follow” its rules and practices on safe mowing. (R. Br. 20). Toward that end, Respondent’s field supervisors spend about 80% of their time in the field observing work crews at various sites. Each crew is supervised three to four hours each week. A crew is responsible for between ten to seventy sites each week. The Canton branch alone services about 250 sites. (Tr. 22, 32, 73-74, 78-79, 87; R. Br. 20-21, R. Reply Br. 7).

The Secretary suggests that a manager could be at every site with every work crew just prior to operating a riding mower to verify whether the crew is actually identifying and eliminating hazards prior to work. (S. Br. 41; R. Br. 21). However, the Secretary also acknowledges it is not feasible for Respondent “to monitor crews on each worksite each day” in this way. (S. Br. 41-43, R. Reply Br. 5-6). Respondent argues that the general duty clause does not require the constant presence of a supervisor at the worksite citing to *Brennan v. OSHRC (Hanovia Lamp Div.)*, 502 F.2d 946, 949 (3d Cir. 1974) (“requiring that each employee be constantly watched by a supervisor, would be totally impractical and in all but the most unusual circumstances, an unnecessary burden.”) and *Conn. Light & Power Co.*, No. 85-1118, 1989 WL 223325, at *6 (O.S.H.R.C., Apr. 26, 1989) (rendering a workplace free of recognized hazards does not impose supervisory duties that require constant one-on-one supervision at the work site). (R. Br. 21, R. Reply Br. 7-10).

The Secretary points out what it sees as the flaws in the Respondent’s reliance on employees to review the site and report new hazards to the supervisor. The Secretary also states it is inadequate for the supervisor to inspect mowing tracks at a site to determine if Enviroscapes rules have been implemented. (S. Br. 41-42). However, the Secretary does not set forth an alternative means for Respondent to verify employees are always checking the site before

mowing and using the flags to mark hazards. It is the Secretary's burden to propose a feasible, effective means of abatement. Here, where the Respondent already implemented abatement measures, the Secretary must set forth specific additional measures beyond what the employer has in place. *See Cerro Metal Prod. Div., Marmon Grp., Inc.*, 1986 WL 53467, at *6 (vacating citation where record evidence did not show a "specific, feasible additional step" that employer could have taken to abate the hazard).

The Secretary also seems to suggest that the crew could walk the entire site to detect any new hidden hazards, such as a rut or hole. (S. Br. 40-41). However, the Secretary did not provide evidence this would effectively identify new holes, ruts or similar hidden hazards at a worksite or if it would be a feasible means of abatement. Further, the Secretary seems to credit Respondent's position that walking an entire site prior to mowing would not be feasible. (S. Br. 40). The Secretary's suggestion that the entire worksite could be walked prior to mowing is unsupported and rejected.

The Court finds that Respondent already implemented the Secretary's recommended abatement of following the operator's manual, using a string trimmer on slopes, and marking holes and ruts with flags. Further, the Court finds that the Secretary did not provide evidence of an additional means of abatement that would be feasible and effective. *See Pepperidge Farm, Inc.*, 1997 WL 2122599, at *51 (citation vacated where "the Secretary has not shown that the additional steps not taken by [employer] were feasible and that their efficacy in reducing the hazard was so compelling that the failure to have implemented them by the time of the inspection rendered [employer's] process inadequate.").

The Secretary did not carry his burden of setting forth an additional effective, feasible abatement beyond what the Respondent already had in place.

4. Knowledge.

The Secretary must show that the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition. *Peacock Eng'g, Inc.*, No. 11-2780, 2017 WL 3864205, at *2 (O.S.H.R.C., April 27, 2017). “The actual or constructive knowledge of a supervisor is imputable to the employer.” *Jacobs Field Servs. N. Am.*, No. 10-2659, 2015 WL 1022393, at *3 (O.S.H.R.C., Mar. 4, 2015).

The Secretary asserts Respondent had actual knowledge that its “crew working on the Clarington, Ohio site were exposed to the hazards of operating a riding mower on slopes” (S. Br. 37-39). The Secretary asserts that Respondent’s knowledge is shown through its evaluation of each site for hazards and its digital site map of hazardous slopes. (S. Br. 35-37). Specifically, the Clarington site had a large portion designated for the use of a string trimmer rather than a riding mower because it had a slope over 20 degrees. (S. Br. 36). However, the Secretary does not assert that Respondent had actual knowledge of the rut that seemed to cause the employee’s accident. (S. Br. 39).

Respondent concedes that both it and the commercial lawn care industry recognize that using a riding mower on a slope is a potential hazard that could cause serious injury. Respondent and the industry also recognize the use of string trimmers and flags are feasible methods of abating the hazard. (R. Reply Br. 3). Respondent does not dispute that it knew of the hazardous slope at the Clarington site. Respondent had designated the portion where the slope was over 20 degrees as a hazard for a riding mower and required the use a string trimmer there.⁴⁴ (R. Br. 5-6, 22). For the other sloped areas at the site, that were less than 20 degrees, employees were required to mow side-to-side across the slope with the riding mower. (Tr. 55, 67, 148, 152). Mr. Williamson had been at the site several times before and had even walked Mr. Trejo through

⁴⁴ Mr. Williamson testified that the grade level of any slope over 20 degrees is considered hazardous. (Tr. 62).

where the area that required the string trimmer began. (Tr. 71). Respondent knew of the slopes at the Clarington site.

However, Respondent asserts that it had no actual knowledge of the hidden tire rut and could not have known with reasonable diligence the rut existed or that it was not marked as a hazard before the accident. (Tr. 54, 92-93; R. Br. 25-26). Respondent asserts the rut was a new hazard at the site that was hidden by the grass and difficult to find. (R. Br. 26). Mr. Williamson testified that he did not know if Messrs. Trejo and [redacted] had seen any hazard at the base of the slope prior to the accident. (Tr. 72). Mr. Williamson testified that the rut at the bottom of the hill “had the potential to be a hazardous condition.” (Tr. 54).

The Secretary also asserts Respondent had constructive knowledge of the violative conduct engaged in by the crew; *i.e.*, operating a riding mower on a slope when it was not safe to do so and failing to mark a hazardous rut on the slope. (S. Reply Br. 3-4). In the Sixth Circuit, courts look to the following factors in determining whether an employer had constructive knowledge: “[the] employer’s obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.” *Mountain States Contractors v. Perez*, 825 F.3d 274, 285 (6th Cir. 2016). The Secretary asserts that with reasonable diligence Respondent could have known of the rut on the slope at the Clarington site. (S. Br. 37-39). In particular, the Secretary asserts that Respondent was not diligent because it relied on an employee’s own judgement at a worksite without a reasonable basis to expect an employee to exercise good judgement. (S. Br. 38, S. Reply Br. 4). The Secretary asserts Respondent took no measures to prevent the hazard of an unmarked hole on a slope, such as the rut at the Clarington site. (S. Br. 38; S. Reply Br. 4). But here, the crew had walked the site looking for hazards prior to mowing that morning. (Tr. 176, 191-92). Mr. [redacted] did not see

the rut when he “walked the site” before beginning to mow the Clarington site. (Tr. 176, 191-92).

Mr. Lint, knowing approximately where the rut was from Mr. Williamson’s photograph, could only find the rut when he “walked like baby steps” and felt the rut with his feet. (Tr. 177).

Respondent also provided its crews with a IPS digital site map that showed hazardous conditions, flags and marking paint to perform work at their assigned sites. (Tr. 44-45, 63, 81, 87).

Respondent exercised reasonable diligence when its crew tried to identify the hazard of an unmarked hole on the slope at the Clarington site prior to mowing. (R. Br. 26-27).

The Secretary asserts that the lack of written documentation of a supervisor’s worksite monitoring demonstrates a lack of reasonable diligence. (S. Br. 40). To the contrary, Mr. Williamson credibly testified the monitoring was documented.⁴⁵ (Tr. 32-33). The burden is on the Secretary to prove there was a lack of reasonable diligence by the Respondent and the Secretary provided no persuasive evidence that it attempted to obtain the documentation of worksite monitoring from Respondent. Thus, the Secretary’s assertion that monitoring was not documented is rejected.

The Secretary also asserts that Respondent was not reasonably diligent because it needed a more effective way to monitor its crews’ pre-mow site assessments, yet the Secretary does not set forth a particular measure to abate this.

As discussed above, Respondent’s field supervisors spend about 80% of their time in the field monitoring the work crews which results in each crew being monitored for three to four hours each week. (Tr. 32). The Secretary seems to suggest that a manager needs to be onsite with each crew at the beginning of work at each site to monitor a crew’s site assessment; however, the Secretary also seems to suggest it is not feasible for a manager to be at every site every time. (S.

⁴⁵ The Court observed Mr. Williamson’s demeanor while he was testifying and based upon his appearance, expression, tone, and responsiveness found him to be honest, knowledgeable, confident and persuasive.

Br. 41-42). As discussed above, it is the Secretary's burden to propose abatement measures that are feasible and effective. Here, the Secretary made a general suggestion about additional abatement needed yet provided no abatement measure that a reasonably diligent employer could implement. Thus, the Secretary's argument is rejected.

Respondent asserts that, without walking the site inch-by-inch before mowing, the rut could not have been discovered because it was hidden in the grass. (R. Br. 25-26). The Court agrees. The rut had not been previously identified as a hazard at the site and was not readily discernible. (Tr. 51, 72, 153). The evidence submitted shows that Mr. [redacted] only noticed the rut at the moment the mower encountered it. (Tr. 178-79). To Mr. Williamson, it appeared the rut had been created by the tire of a gas company service truck that had driven off the concrete pad on a rainy day. (Tr. 92). Mr. Lint, knowing approximately where the rut was from Mr. Williamson's photograph, could only find the rut when he "walked like baby steps" and felt the rut with his feet. (Tr. 177).

Further, the Secretary provided no evidence of a feasible abatement method that would have led to the mowing crew discovering a rut, hidden by grass, prior to encountering it with the mower. Because there is no evidence to rebut Respondent's position that it was not reasonable to have discovered the rut prior to mowing the slope, the Court finds that Respondent could not have, with reasonable diligence, known of the hazard on the slope at the Clarington site.

The Secretary's assertion that Respondent had constructive knowledge of the hazard at the Clarington site is rejected.

The Secretary did not carry its burden of proof for Citation 1, Item 1 and thus Citation 1, Item 1, is vacated.⁴⁶ In particular, the Secretary did not prove the necessary element of feasible

⁴⁶ Because the Secretary failed to prove his prima facie case, the Court has not addressed Enviroscapes' asserted defense of unpreventable employee misconduct. To establish this defense the employer is required to show that it "(1) established work rules designed to prevent the violation; (2) has adequately communicated the rules to its employees; (3) has taken steps to discover violations of the rules; and (4) has effectively enforced the rules when

abatement beyond the measures already in place by the Respondent and did not show that Respondent had knowledge of the hazardous condition at the Clarington site.

B. Citation 2, Item 1

To establish a violation of an OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prod.*, No. 78-6247, 1981 WL 18810, at *4 (O.S.H.R.C., July 30, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982). The Secretary has the burden of proving his case by a preponderance of the evidence. *Id.*

The Secretary issued an other-than-serious citation alleging Respondent violated 29 C.F.R. § 1904.39(a)(2), which requires:

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

Respondent has admitted that it failed to report to OSHA within 24 hours the amputation suffered by employee [redacted] on July 25, 2019, while working for Respondent. (Tr. 15-16; Ex. C-1, at p. 3; Joint Pretrial Statement, p. 3). Respondent asserts that it did not report the injury within 24 hours because it believed, as Mr. Lint testified, it was only required to report an accident “if there was three or more injuries or hospitalizations of it.” (Tr. 182-83; R. Br. 9). Mr. Lint further testified that he did not dispute that Respondent failed to report the accident within 24 hours. He stated, “It was a mistake” and “We own that.” (Tr. 182-83, 218; R. Br. 30). Respondent asserts that its “failure to report was based upon an honest mistake and was not done willfully.” (R. Br. 9).

violations were detected.” *Am. Eng’g & Dev. Corp.*, No. 10-0359, 2012 WL 3875599, at *3 (O.S.H.R.C., Aug. 27, 2012). (S. Br. 49, R. Br. 28-29).

1. Applicability, Employee Exposure, Violation of the Standard and Knowledge

Respondent does not dispute the applicability of the standard or that an employee was exposed. An employee had fingers amputated as a result of a work-related incident. (Tr. 15-16, 48-52; Ex. C-1, p. 3). The standard applies and employees were exposed. (S. Br. 53).

Respondent admits that it did not report the amputation suffered by Mr. [redacted] within 24 hours as required by the standard. (Tr. 15-16; Ex. C-1, p.3; Joint Pretrial Statement, p. 3). Both Messrs. Lint and Williamson knew that Mr. [redacted] had been hospitalized resulting in the amputation of two fingers and two fingertips. (Tr. 89-90, 176-77). Their knowledge is imputed to Respondent.

The Secretary has proved the standard applied, an employee was exposed, the standard was violated, and Respondent had knowledge of the violative condition. Citation 2, Item 1, is affirmed.

2. Characterization and Penalty

Respondent argues that the monetary penalty for the recordkeeping violation should be reduced below the penalty proposed by the Secretary. (R. Reply Br. 11-12). The Secretary characterized the violation as other-than-serious and proposed a penalty of \$8,525.⁴⁷ The Commission has stated an other-than-serious violation “is one in which there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm.” *Crescent Wharf & Warehouse Co.*, No. 1, 1973 WL 4327, at *3 (O.S.H.R.C., Apr. 27, 1973). The Court agrees the violation was other-than-serious; but also agrees that the proposed penalty should be reduced.

⁴⁷ “Enviroscapes submits that a \$1,000.00 penalty is more appropriate for this OTS violation.” (R. Br. 31).

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations.⁴⁸ *Compass Env'tl., Inc.*, No. 06-1036, 2010 WL 24004289, at *5 (O.S.H.R.C., Jun. 10, 2010) *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally accorded greater weight. *See J. A. Jones Constr. Co.*, No. 87-2059, 1993 WL 61950, at *15 (O.S.H.R.C., Feb. 19, 1993).

The maximum penalty amount is \$13,260⁴⁹ for an other-than-serious violation. The CO assessed the gravity as severe due to the amputation injury. A 10% reduction was applied for company size. (Tr. 216). There was no adjustment for history or good faith. (Tr. 217).

The Court finds a further reduction to the penalty is warranted. The CO testified that Respondent had been inspected previously but received no citation. (Tr. 217). He testified that Respondent “essentially had a clean history.” This inspection history merits a discount. Further, the CO testified that Respondent was “very cooperative” during the inspection. (Tr. 217-18). At trial, Mr. Lint accepted responsibility for, and did not dispute, the recording keeping violation. He said, “[i]t was a mistake” and “[w]e own that.” (Tr. 182-83, 218).

Taking all the criteria and the record into consideration, the Court assesses a \$6,630 penalty for Citation 2, Item 1.

V. Findings of Fact and Conclusions of Law

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

⁴⁸ The Commission owes no deference to the Secretary’s proposed penalty. *Hern Iron Works, Inc.*, No. 88-1962, 1994 WL 53780, at *3 (O.S.H.R.C., Feb. 18, 1994).

⁴⁹ OSHA's statutory maximum penalties were increased pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015) as updated at 81 Fed. Reg. 43430 (July 1, 2016). The violation in the instant case occurred after November 2, 2015, and was assessed between January 23, 2019 and January 15, 2020, thus the statutory maximum of \$13,260 applies.

ORDER

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

1. Citation 1, Item 1, alleging a Serious violation of section 5 (a)(1) of the OSH Act is
VACATED.
2. Citation 2, Item 1, alleging an Other-than-Serious violation of 29 C.F.R. § 1904.39 (a)(2)
is AFFIRMED and the Court assesses a penalty in the amount of \$6,630.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: April 19, 2022
Washington, D.C.