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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

ACTING SECRETARY OF LABOR,

Complainant,

v.

BARRY BILLCLIFF d/b/a BARRY JAMES
d/b/a MERRIMACK VALLEY ROOFING
d/b/a WWW.MERRIMACKVALLEY
ROOFING.COM d/b/a MERRIMACK
VALLEY ROOFING & GUTTER d/b/a
MERRIMACK VALLEY ROOFING &
GUTTER, LLC d/b/a BILLCO ROOFING
d/b/a BILLCO ROOFING LLC d/b/a
MERRIMACK VALLEY ROOFING, INC.
d/b/a MERRIMACK ROOFING LLC d/b/a
BAY STATE EXTERIORS d/b/a
MARRIMACK VALLEY ROOFING d/b/a
JOHN WOLF(E) d/b/a MERR VALLEY
R&G LLC d/b/a THE MARRIMACK
VALLEY ROOFING CO, LLC d/b/a
MERRIMACK VALLEY ROOFING LLC,
and any successor(s) of any of the foregoing,

Respondent.

OSHRC DOCKET NO. 22-0448

APPEARANCES:

Nathan E. Henderson, Esquire
Niamh E. Doherty, Esquire

Joseph R. Landry, Esquire

Department of Labor, Office of the Solicitor, Boston, Massachusetts
For the Acting Secretary

Barry James Billcliff,¹ appearing *Pro se*
496 Main Street
Sandown, New Hampshire 03873
For Respondent Barry Billcliff, d/b/a Billco Roofing, d/b/a Billco Roofing LLC

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 OSH Act or the Act). The case involves allegations by the Occupational Safety and Health Administration (OSHA) that Respondent, Barry Billcliff, operating in his individual capacity and/or using fifteen “doing business as” [D/B/A or d/b/a]² names identified in the above case caption (Respondent or Mr. Billcliff), was the controlling employer at the Devens SpringHill Suites Marriott Hotel (Devens SpringHill Suites or hotel) and Devens Commons Conference Center (Conference Center) at 31 Andrews Parkway, Devens, Massachusetts (job site or Devens Project) where on October 7, 2021: 1) Respondent did not ensure that frequent and regular inspections were performed by a competent person, 2) a worker was not provided a hard hat, 3) roofers were not protected from falling during unloading of materials on a roof from the ladder hoist, 4) roofers on a steep roof were not protected by fall arrest systems, 5) Respondent did not train its supervisor and

¹ See Transcript (Tr.) 1911.

² The term “d/b/a” preceding a business name “signals that the business may be licensed or incorporated under a different name.” D/b/a, Black’s Law Dictionary (11th ed. 2019). A business entity and its assumed name do not constitute two separate legal entities. *Siobhan James, et al., v. PRS Partners, LLC*, 1:20CV134, 2021 WL 309115, *5 (M.D.N.C., Jan. 29, 2021); *Bauer v. Pounds*, 61 Conn.App. 29, 36, 762 A.2d 499, 503 (2000)(“It appears well settled that the use of a fictitious or assumed business name does not create a separate legal entity and that the designation d/b/a is merely descriptive of the person or corporation who does business under some other name.”)(Internal quotation marks omitted).

subcontractor employees at the job site in the recognition of fall hazards, and 6) a portable ladder did not extend at least three feet above the roof's edge. Mr. Billcliff denies the allegations and asserts that he was not the controlling employer because he was never at the job site, did not assign or direct any supervisor at the job site, did not have any employee(s) at the job site, did not engage any subcontractor to provide roofers, was not involved in any of the work done at the job site, and never received or deposited any payment for the roofing work performed at the job site.

An in-person trial was conducted from April 4 through April 6, 2023 and June 13 through June 15, 2023 at Boston, Massachusetts producing a 2,363 page transcript. On August 24, 2023, Respondent filed its Post Trial Brief (Resp't PT Br.).³ On August 29, 2023, Complainant filed her Post Trial Brief (Sec'y PT Br.).

On September 5, 2023, Respondent filed its Response to Secretary's Post Trial Brief (Resp't Reply Br.). Complainant filed her Acting Secretary's Reply Brief on the same date. (Sec'y Reply Br.) In this Brief, she asserts that Respondent makes two main arguments in its Post-Trial Brief: (1) the testimony of virtually every key witness other than himself who testified at trial should be disregarded; and (2) the admission of various trial Exhibits should be reconsidered. She argues that both of these two arguments should be rejected. She argues that the Court should reject Mr. Billcliff's first argument because: 1) to disregard the testimony of every witness other than himself would be to ignore those who had first-hand knowledge of the relevant facts, to include both OSHA and non-OSHA witnesses, 2) to disregard their testimony would also mean ignoring the overwhelming extent to which the other witnesses provided consistent testimony on the material points, such as Mr. Billcliff's visits to the job site, Mr. Billcliff's involvement in scheduling and

³ The Court finds Respondent's Post Trial Brief to be of little or no value. It cites to no trial transcripts. It attempts to cite to a hodgepodge of cases most of which have no precedential effect upon the Court. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2204 (No. 87-2059, 1993) (When submitting post-trial briefs, Commission emphasizes "that it is the obligation of a party to present its positions in a logical and discernible fashion." This Respondent has failed to do.

coordinating the roofing work, Mr. Billcliff's directing of Mr. Vaughn to oversee that work, Mr. Billcliff's failure to ensure a safe job site, and Mr. Billcliff's conversation with Compliance Officer (CO) Brett Bussell on October 7, 2021, and 3) Mr. Billcliff's complete lack of citing to the transcript in his Post-Trial Brief appears to show that he is relying on what he contends happened at trial, as opposed to what actually happened. The Acting Secretary argues that the Court should not reconsider the admission of any Exhibits because Mr. Billcliff complained about messages like those in Exhibit 107, which consists of a series of messages between Mike Costa, the Asset Manager for the Devens SpringHill Suites, and the foreman05 email account that Mr. Billcliff used. The Court only admitted this Exhibit after Mr. Billcliff withdrew his objections so that he himself could use the Exhibit with Mr. Costa on cross examination. (Tr. 188-91). Similarly, Mr. Billcliff complained about Exhibit 142, which is the May 2022 settlement agreement from a previous case in which Mr. Billcliff admitted he was an "employer" under the OSH Act and accepted a Serious fall protection citation. The Court only admitted this Exhibit after Mr. Billcliff withdrew his objections in connection with being warned that the Acting Secretary would otherwise call a witness to show there was no basis for Mr. Billcliff's contentions regarding the Exhibit. (Tr. 1845-48). Further, Mr. Billcliff complained about Exhibits 123, 124, and 125, which are the documents submitted by his son as part of the permit application for the Devens Project. The Court only admitted each of these Exhibits after a non-OSHA witness provided foundation and Mr. Billcliff stated that he had no objections. (Tr. 274-88). Lastly, Mr. Billcliff complained about the pages in Exhibit 155 that were admitted, which are a subset of the bank records that were obtained via the subpoena from the Court after Mr. Billcliff repeatedly failed to provide them himself. The Court only admitted these pages after: (1) reviewing the business records certifications provided by the Acting Secretary, (2) hearing the live testimony of Stephanie Lee, the Merrimack Valley Credit Union Vice President of

Operations, and (3) giving Mr. Billcliff ample opportunity to cross-examine her. The Acting Secretary also notes that Mr. Billcliff erroneously complained about an Exhibit that was not actually admitted into evidence; *i.e.*, Exhibit 143. (Tr. 227, 259; Sec’y Reply Br.). The Court agrees with the Acting Secretary and finds no basis to either disregard the testimony of: 1) CO Aaron Epstein, 2) Gregory Phillips, 3) Michael Costa, 4) Louis Byrne, 5) Leonardo Bonicenha, and 6) CO Bussell, or reconsider its rulings regarding trial Exhibits, including Exhibits 107-08, 110, 122-26, 128, 130, 133, 140, 142, 148-57, 158-59, 169-71, that were admitted at trial.

On September 8, 2023, Complainant filed her Acting Secretary’s Request for Attorneys’ Fees Incurred As a Result of Respondent’s Failure to Comply with 11/29/2022 Order Regarding Bank Records (Sec’y Request for Attorneys’ Fees).

Photographs, documents, and witness testimony presented at trial prove the Acting Secretary’s case and contradict Respondent’s version of events. The Willful/Serious citation and the five other serious citations are all affirmed and a penalty of \$162,274 is assessed by the Court, along with the Court assessing an additional \$3,215 as sanctions as an award of attorneys’ fees with regard to Mr. Billcliff’s failures to comply with his obligations regarding the bank records set forth in the Court’s November 29, 2022 Order.

I. CITATIONS AND PLEADINGS

On April 4, 2022, OSHA issued its citations to Respondent identifying the company name:

Company Name: Barry Billcliff, dba Barry James; d/b/a Andover Roofing; d/b/a Barrysroofing INC; d/b/a Bilco Roofing; d/b/a Danbar LLC; d/b/a Daniel James Billcliff LLC; d/b/a Local Musicians United; d/b/a Merr. Valley Gutters and Roofing Specialist LLC; d/b/a Merrimack Valley R & G; d/b/a Merrimack Valley Roofers LLC; d/b/a Merrimack Valley Roofing; d/b/a Merrymack Valley Roofing PLLC; d/b/a MVRAG LLC; d/b/a Newburyport Roofing; d/b/a The Marrimack Valley Roofing Companies LLC; d/b/a The Marrimack Valley Roofing and Gutter Company LLC. [emphasis in original Citations].

On April 27, 2022, Complainant amended her original Citations and Notification of Penalty by deleting about fourteen d/b/a's identified in the original citation and adding about seven new d/b/a's stating:

The Secretary amends the Citations in Exhibit A under 29 C.F.R. § 2200.34(a)(3) to clarify that the Respondent, Barry Billcliff, is being cited is as follows:

BARRY BILLCLIFF d/b/a BARRY JAMES d/b/a
MERRIMACK VALLEY ROOFING d/b/a
WWW.MERRIMACKVALLEY ROOFING.COM d/b/a
MERRIMACK VALLEY ROOFING & GUTTER d/b/a
MERRIMACK VALLEY ROOFING & GUTTER, LLC
d/b/a BILLCO ROOFING d/b/a BILLCO ROOFING
LLC d/b/a MERRIMACK VALLEY ROOFING, INC.
d/b/a MERRIMACK ROOFING LLC d/b/a BAY
STATE EXTERIORS d/b/a MARRIMACK VALLEY
ROOFING, and any successor(s) of any of the
foregoing. (Original Complaint)

On February 2, 2023, Complainant filed her First Amended Complaint adding four new d/b/a's to the April 27, 2022 case caption as now appears in the above current case caption. CO Bussell testified that OSHA identified as Respondent d/b/a's in the case caption those names that it had documentation that showed connections to Mr. Billcliff. (Tr. 1783; First Amended Complaint).

On February 14, 2023, Respondent filed its "Answers to Amended Complaint" identifying only "BARRY BILLCLIFF, D/B/A BARRY/S ROOFING" in its caption. In its Answers to Amended Complaint, Respondent asserts a general denial of the citations' allegations, including asserting that Mr. Billcliff was not an employer under the OSH Act, he did not have knowledge of any unsafe work conditions, "the occurrence was an unpreventable employee misconduct", "the penalties are not correct", "the offenses do not qualify as Repeat", and "the alleged violations do not constitute as 'Willful' nor 'Serious'". (Answers to Amended Complaint).

II. RELEVANT FACTS

A. Mr. Billcliff and his Employment at D/B/As

1. Mr. Billcliff said that he Owned and was Employed at Billco Roofing d/b/a Billco Roofing LLC at the time of the Devens Project.

At the start of the trial, Mr. Billcliff stated that he represented himself and Billco Roofing d/b/a Billco Roofing LLC. He stated that he owned Billco Roofing d/b/a Billco Roofing LLC and was employed at Billco during all aspects of the Devens Project. He said that Billco was an active company at that time. (Tr. 2245). Mr. Billcliff testified that he and his son, Daniel Grzybowski, do the work for Billco. Mr. Grzybowski testified that Mr. Billcliff was his boss at Billco Roofing. (Tr. 1307, 1325, 2035; Stipulation Number (Stip. No.) 5). He said that there was no Billco email address. (Tr. 2035-37). Mr. Billcliff testified that he filled out the abatement form that came with the violation notice and sent it right in. (Tr. 2261). He gave [redacted] address at 496 Main Street, Sandown, New Hampshire 03873, [redacted].⁴ Mr. Billcliff did not give any business address. (Tr. 17-19, 1015, 2035, 2276; Stip. Nos. 3, 5). He said that he did not represent any of the other d/b/a names that are identified in the case caption. (Tr. 19).

2. Mr. Billcliff also said that he was employed at: a) Merr Valley R&G LLC, b) Merrimack Valley Roofing & Gutter, LLC, c) Merrimack Valley Roofing, and d) Merrimack Valley Roofers, during the time of the Devens Project.

Mr. Billcliff testified that he was also an employee of Merr Valley R&G LLC during the time of the Devens Project, which he said was the same company as Merrimack Valley Roofers. He said that both Merr Valley R&G LLC and Merrimack Valley Roofers were “active” during the Devens

⁴ CO Bussell testified that Mr. Billcliff stated in his deposition that [redacted] at 126 Beach Plain Road, Danville, NH 03819. That address is akin to an address at 126 “Bench” Plain Rd Danville, NH 03819 that was listed on a website attributed to Merrimack Valley Roofing & Gutter, LLC. The CO stated that the physical address of 126 “Bench” Plain Road, Danville, NH does not exist. (Tr. 1623-24; Ex. 122 at 1).

Project. (Tr. 884, 2243-44, 2285-87). Mr. Billcliff testified that Merr Valley R&G was never a “d/b/a”. (Tr. 2260).

CO Bussell testified that he did not recall Mr. Billcliff initially stating that he worked for Merr Valley R&G LLC or that Jeremy Coito, who Mr. Billcliff alleged owned Merrimack Valley Roofing, was his employer. (Tr. 884, 1870, 2169, 2242-43).

CO Bussell testified that Mr. Billcliff later said that he worked for Merr Valley R&G, LLC. (Tr. 1872-73). During his February 11, 2022 deposition in a separate OSHA case, Docket No. 21-0382, Mr. Billcliff stated that he predominantly did marketing and advertising at Merrimack Valley Roofing and that he first started working for Merrimack Valley Roofing in “maybe 2010.”⁵ (Tr. 1962, 2006-10). Mr. Billcliff testified that he did not know if there was any Massachusetts Commonwealth tax withholding from his Merrimack Valley Roofing paycheck. (Tr. 2324). He also testified that Mr. Grzyboski was an employee of Merrimack Valley Roofing. Mr. Grzyboski testified at trial that Zachary Haleson, Cameron Tinkham, and Tim Crebase were also Merrimack Valley Roofing employees. (Tr. 1037-39; Stip. No. 5). Mr. Billcliff stated that Merrimack Valley Roofing was “a semantic term that’s used for Merr Valley R&G LLC, which is also the same company as Merrimack Valley Roofing.” (Tr. 2007-08). Mr. Billcliff testified that “during the entire duration of this case [he] was employed by Merr Valley R&G LLC which is better known as Merrimack Valley Roofing & Gutters, LLC.” (Tr. 2259).

B. Mr. Billcliff Obtains the Devens Project Roofing Job.

⁵ The website for Merrimack Valley Roofing also includes separate email addresses for Barry [Billcliff], John [Wolfe] and Daniel [Grzyboski] at MerrimackValleyRoofing. (Ex. 122, at 1). During his February 11, 2022 deposition in Docket No. 21-0382, Mr. Billcliff stated that Barry@MerrimackValleyRoof.com was his email address at Merrimack Valley Roofing. (Tr. 2036).

At 7:45 AM, August 4, 2021, Mike Costa⁶ sent a message to Mr. Billcliff at foreman05merrimackvalleyroofing@yahoo.com,⁷ that stated, in part: “Good Morning Barry I understand you did some work for Republic at Robert’s house at [redacted] We have a hotel we own in Devens that is need of evaluation and estimate for numerous leaks we get during the winter months. This is the Springhill Suites.”⁸ (Tr. 313; Ex. 107, at 6, Ex. 150, Part A, at 32-33). Mr. Costa testified that he was referring to Merrimack Valley Roofing as having done roof work for one of RA Ventures’ general contractors. He also said that he solicited a bid for the Devens SpringHill Suites from Prime Roofing Corporation for the roofing job. He said that he hired Merrimack Valley Roofing because Prime Roofing Corporation did not provide pricing for the bid. (Tr. 311-12, 353-54). He testified that he sent about forty to fifty emails to “Barry James” [Barry Billcliff], all to foreman05merrimackvalleyroofing@yahoo.com, over the course of six months about the project at Devens SpringHill Suites.⁹ (Tr. 314, 348-49). Mr. Costa testified that he discussed with Barry: 1) scope of work, 2) timing, 3) the actual areas that needed to be replaced, 4) roof measurements, 5) product specifications, 6) color selection and availability, 7) contract negotiation, 8) pricing, 9) payment terms, 10) permitting,¹⁰ 11) proposals, 12) invoices for the work, material deliveries, and 13) scheduling. (Tr. 315-18). He said they negotiated payment terms where Barry wanted one-half of the payment at the beginning and one-half at the end of the project. (Tr. 317). Mr. Costa testified

⁶ Mr. Costa worked for Ryan Development, which sometimes does business as RA Ventures, a commercial real estate developer for hotels, industrial real estate, restaurants, and retail. He has worked at Ryan Development for four years as an asset manager and property manager. In those roles, he hires contractors to arrange for work, including roof replacements, performed at the properties he manages. (Tr. 307-09).

⁷ Mr. Billcliff testified that he is the only one that had access to and used this email address who has appeared at the trial as a witness. He admitted that he did email Mr. Costa, “but can’t verify which ones were which.” (Tr. 1981, 2011-12, 2234).

⁸ Louis Byrne, an engineer at the Devens SpringHill Suites, testified that a man who worked for the owner of Devens SpringHill Suites contacted Jonathan Mehlmann, the SpringHill Suites General Manager, and told him a guy was coming out to the hotel to give him a price to replace the roof. (Tr. 79-80).

⁹ The parties stipulated that Mr. Billcliff sometimes uses the name “Barry James”. (Stip. No. 2). CO Bussell testified that Barry Billcliff uses Barry James because of legal woes, past issues, and plenty of derogatory information that you can find about him online. (Tr. 1797).

¹⁰ Mr. Costa said that Barry never showed him or gave him a copy of the permit for the job. (Tr. 342).

that the responses that he received from Barry James used a signature block that said: Barry James, Foreman, Merrimack Valley Roofing, Inc., with telephone numbers: 978-884-6732 and 978-866-1860.¹¹ (Tr. 314-15; Ex. 107). Mr. Costa said that Merrimack Valley Roofing was the only contractor that he knew of being on the job site. (Tr. 349). He said that he was never told that someone other than Barry, including Mike LaChance, was taking over the project at the job site. (Tr. 349-50). Mr. Costa said that Barry never mentioned the name Mike LaChance to him and that he never had any communication with Mike LaChance about the project. (Tr. 350-52, 470).

On August 4, 2021, 8:04 AM, Barry James sent a message to Mr. Costa¹², Subject Re: Devens, that stated: “Good morning Mike, I would be happy to stop by and do an inspection and get you a proposal for repair or replace I will start on this today and be in touch. Thank you Barry James”.¹³ (Ex. 150, Part A, at 29).

Chief Engineer Louis Byrne testified that he first met Mr. Billcliff at the Devens SpringHill Suites around August 4, 2021.¹⁴ Mr. Byrne said that he was asked to meet Mr. Billcliff, “bring him up on the roof and show him around.” He said Mr. Billcliff introduced himself as “Barry Billcliff”, the owner of Merrimack Roofing, and that he had come out to look at the roof.¹⁵ Mr. Byrne stated

¹¹ CO Bussell testified that the photograph at Exhibit 148 [sealed] shows Mr. Billcliff pointing to a Clear Channel Outdoor, LLC (Clear Channel) billboard that displays a Merrimack Valley Roofing and Gutter LLC logo and a phone number ending in 866-1860. (Tr. 405-06, 1626; Ex. 148, at DOL000917[Sealed]). The CO testified that Mr. Billcliff was identified to Clear Channel as the point of contact for Merrimack Valley Roofing and Gutter LLC. (Tr. 1639). The Clear Channel contract with Merrimack Valley Roofing & Gutter, LLC, 496 Main Street, Sandown, NH 03873-2100, dated October 20, 2019, for outdoor advertising identified “Barry James”, foreman05.merrimackvalleyroofing@yahoo.com, phone #: 978-884-6732, as the advertiser and contact. (Tr. 403-04; Ex. 101). CO Bussell said that the number is on the Merrimack Valley website and the side of the company van. (Tr. 1640-41).

¹² RA Ventures technically owned the Devens SpringHill Suites hotel. (Tr. 93).

¹³ Mr. Billcliff testified that he never did an on-site visit to the job site as discussed in an email exchange with Mr. Costa. (Tr. 2208). The Court finds this testimony to not be credible.

¹⁴ Mr. Byrne testified that he has served as the Chief Engineer at the Devens SpringHill Suites for six years. He said that he runs the day-to-day maintenance from inside to the outside of the hotel. He has a crew of a couple of guys. He reports to Jonathan Mehlmann, the Devens SpringHill Suites Hotel Manager. (Tr. 75).

¹⁵ Mr. Byrne testified that Mr. Billcliff gave him a business card, which he tossed in the trash because he thought that one of two other roofers, either Revolution Roofing or a company out of Framingham, was going to do the job. (Tr. 141, 172-73).

that Mr. Billcliff had his son, Daniel Grzyboski, with him.¹⁶ He said that new roofs were needed for two buildings that were connected by a bridge, the SpringHill Suites and the next door Conference Center. The roofs were about twenty years old and had a lot of leaks in multiple places. Mr. Byrne said that the job “was a large, very large roofing job”; “the size of a football field.” He stated that “[t]he roof was a very difficult roof to shingle. There was a lot of flat spots, a lot of slopes.” (Tr. 74-80, 134-35, 150, 168-73, 188, 198-99, 311, 333-34, 1015; Ex. 107, at 6-7). Mr. Byrne testified that the hotel roof was three stories above the ground and had no guardrail around it. (Tr. 78). He said that he took Mr. Billcliff and his son up to the roof from the inside of the building since Mr. Billcliff did not have any ladders with him.¹⁷ (Tr. 81-82, 170-71). He said they spent about 20-30 minutes on the roof. He said Mr. Billcliff told him: “you just need a new roof.” (Tr. 83). Later, Mr. Byrne said he learned from his boss, Jonathan Mehlmann, that Merrimack Valley Roofing was going to do the job. Mr. Byrne said RA Ventures, the Devens SpringHill Suites property ownership group, hired Merrimack Valley Roofing to do the job. (Tr. 83, 93, 152-53, 195, 201-03). Mr. Mehlmann testified that RA Ventures’ Mike Costa hired “Merrimack Valley Roofing” to do the work on the project. (Tr. 203). Mr. Mehlmann testified that the SpringHill Suites ultimately paid for the roofing work to be done at the hotel.¹⁸ (Tr. 202). It was Mr. Mehlmann’s understanding that Merrimack

¹⁶ Mr. Byrne identified Mr. Grzyboski in the courtroom as the man who accompanied Mr. Billcliff during the August 4, 2021 roof inspection at the Devens SpringHill Suites. (Tr. 198-99). At trial, Mr. Grzyboski testified that he never did a walk-through on any job site with his father. (Tr. 1310). Mr. Billcliff testified that his son is an honest person. (Tr. 2207-08). The Court credits Mr. Byrne’s testimony and finds that Messrs. Billcliff and Grzyboski visited the SpringHill Suites’ roof on August 4, 2021. When testifying, the Court found Mr. Byrne’s demeanor was forthright and conveyed truthfulness.

¹⁷ At trial, Mr. Billcliff testified that he never walked with Mr. Byrne through the property or across the roof. (Tr. 2206-07, 2234-35). The Court finds this testimony to not be credible.

¹⁸ Mr. Mehlmann testified that on September 10, 2021 the Devens SpringHill Suites issued payment of the initial deposit to the contractor, Merrimack Valley Roofing LLC, in the amount of about \$45,300 for the hotel portion of the work to be performed at Devens SpringHill Suites. He also said that on November 12, 2021 the hotel issued a final payment to Merrimack Valley Roofing LLC in the amount of \$45,714 for the hotel portion of the work performed at Devens SpringHill Suites. These two payments did not include payments for work performed at the adjacent Conference Center. (Tr. 209-12, 217-18, 333-34; Exs. 110, 149, at 6, Ex. 155, at 147, 508). Mr. Mehlmann testified that the two checks were sent to “Merrimack Valley Roofing LLC, P.O. Box 1214, Newburyport, Massachusetts 01950.” (Tr. 218-19, 1538-39; Exs. 110, 155, at 147, 508). Check Nos. 015640 and 015777 were deposited into an account at Merrimack Valley

Valley Roofing was responsible for: 1) purchasing materials and equipment, 2) coordinating deliveries to the project, 3) communicating with the permitting agency, 4) overseeing the work, 5) overseeing safety, 6) and setting up the job site. (Tr. 204).

On August 4, 2021, 8:03 PM, Barry James sent a message to Mr. Costa, Subject Re: Fwd: EagleView Report 41571777-27 Andrews Pkwy, Devens, MA (Premium, \$80.00, 45621 sq ft), that attached an EagleView Report on the project that EagleView prepared for: Barry James, Merrimack Valley Roofing, P.O. Box 1214, Newburyport, MA 01950, 978-884-6732, that showed the total roof area of the Devens SpringHill Suites and Conference Center to be 45,621 sq ft.¹⁹ The Report also states that the predominant pitch of the roof is 5/12, and that the roof is greater than one story high. It also includes photographs of the job site clearly showing the Devens SpringHill Suites hotel to be a three-story building. (Tr. 324-25, 332-33, 1636; Ex. 149, at 1, 5-6).

During the evening, August 4, 2021, “Merrimack Valley Roofing & Gutter” submitted its proposal from Barry James at Foreman05.MerrimackValleyRoofing@yahoo.com, (978) 884-6732 [FOREMAN CELL,²⁰](#) to Mr. Costa, 27 Andrews Parkway, Devens, MA for “FULL STRIP AND RE-ROOF OF HOUSE ROOF” for \$117,850, with options to cut in peak and install ridge vent system for \$2,100 and to install ice and water shield full coverage to entire roof for \$29,150 (Proposal). The proposal called for 1/3 payment upon scheduling, 1/3 upon material delivery and 1/3 within 30 days of completion. (Tr. 334-35, 368, 1622; Ex. 126).

Credit Union for which Mr. Billcliff was the only authorized signer. The address for the account was 496 Main Street, Sandown, New Hampshire; [redacted]. (Tr. 246, 259-61; Ex. 155, at 147, 508, 4-page Certification of Business Records). Mr. Billcliff closed the account on August 12, 2022; a month after receiving the Secretary’s discovery requests in July 2022. (Tr. 246).

¹⁹ Mr. Billcliff testified that he does not recall obtaining this EagleView report. (Tr. 2020-22; Ex. 149).

²⁰ Mr. Billcliff testified that the (978) 884-6732 phone number shown on the proposal was his personal cell phone number. (Tr. 2025, 2289; Stip. No. 4). He also said that the MerrimackValleyRoofing.com web address shown on the proposal was Merrimack Valley Roofing’s web address. (Tr. 2025-26; Ex. 126).

On August 5, 2021, at 7:53 AM, Mr. Costa sent a message to Barry James that stated: “Barry were you able to check this out and confirm it’s the shingles that are the probably (sic)?²¹ Are they past their life here? We built this in 2005, so only about 16 years old.” (Tr. 319; Ex. 107, at 4).

On August 5, 2021, at 8:19 AM, Barry James, foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mr. Costa, Subject Re: Devens, that stated: “Yes, many of the thermos-seal lines were already broken. They are not completely dead shingles, but at this age they are unable to withstand any extreme weather. They should last another 7 to 10 years of normal conditions. They are not able to keep water out during heavy storms.” (Tr. 320; Ex. 107, at 3). Mr. Costa testified that this exchange of emails indicated that Barry was physically on site at the Devens SpringHill Suites. (Tr. 320).

On August 5, 2021, at 2:11 PM, Barry James, foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mr. Costa, Subject Re: Devens, that stated: “Good afternoon Mike, Thank you for inviting us out to handle this roof project. Please see your proposal attached to replace the shingled roof of the hotel at 27 Andrews Parkway. Feel free to give me a call if i can answer any questions for you. Barry James Foreman Merrimack Valley Roofing Inc. (978) 884-6732²² c (978) 866-1860²³” (Tr. 320, 372-73; Ex. 107, at 3, Ex. 150, Part A, at 17). CO Bussell testified that “Mr. Costa and the Government believed some” of the

²¹ At trial, Mr. Costa testified that he meant to write “problem” and not “probably”. (Tr. 319).

²² Mr. Billcliff admitted that 978-884-6732 was his personal phone number. (Tr. 953, 1545, 1637, 1804, 1820, 2013; Stip. No. 4). CO Bussell testified that the same number was on the side of Merrimack Valley Roofing & Gutters’ van. (Tr. 1640). Leonardo Bonicenha, co-owner of L&A Property Services (L&A), Respondent’s subcontractor who provided roofers at the job site, testified that he had two phone numbers for Mr. Billcliff, 978-884-6732 and a number that ended in 1256. (Tr. 594). Mr. Bonicenha also testified that he received a phone call and messages from 978-904-1254 that he believed originated from a man who he thought was named “Mike”. (Tr. 592, 596-97).

²³ CO Bussell testified that he believed Mr. Billcliff answered the telephone when he called 978-866-1860. (Tr. 1833). He testified that the person who answered the call said that he did not want anything to do with the case and abruptly ended the call. (Tr. 1834).

emails between Mr. Costa and Mr. Billcliff that Mr. Billcliff produced to the Government were fabricated. (Tr. 1831, 1883).

C. On August 11, 2021, Mr. Costa Proposes that Mr. Billcliff Meet with him at the Devens SpringHill Suites on August 12, 2021

At 3:00 PM, August 11, 2021, Mike Costa sent a message to Mr. Billcliff that stated, in part: “Barry we have a site meeting to discuss this tmo [tomorrow] What does your availability look like if we were to proceed....” (Ex. 150, Part A, at 15-16).

At 4:26 PM, August 11, 2021, Barry James

foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mr. Costa, Subject Re: Devens, that stated: “need to know what day you need to meet you (sic) there if you feel my presence is necessary. It took me almost 2 hours per direction with traffic, so I would need to clear half a day.” (Tr. 337-39; Ex. 150, Part A, at 13). Mr. Costa interpreted Barry’s message as confirming that he had already been to the job site. (Tr. 338-39).

D. Mr. Billcliff Negotiates the Terms of the Agreement to Perform the Devens Project roofing work

At 3:11 PM, August 19, 2021, Mike Costa sent a message to Mr. Billcliff that stated: “Barry we are ready to move forward with this. I’m working up a PO for this project.²⁴ What do you need from me to get started. Thanks” (Tr. 416-17; Ex. 150, Part A, at 9, Ex. V, at R-306).

At 3:21 PM, August 19, 2021, Barry James

foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mr. Costa, Subject Re: Devens, that stated: “We will need to sign copies of the proposals. Indications on any options, choice of shingle color, and deposit. From there we will put it together and send it to the city for permitting.

²⁴ Mr. Costa testified that from his perspective the parties to a purchase order need the proper scope of work, the contract, certificate of insurance, the W9 [W-9], “and the correct entity that it’s coming out of”; in this case Merrimack Valley Roofing. He said the purpose of the purchase order is “[t]o hold both parties accountable and agreeable.” (Tr. 416-17).

Once the permit is released, assuming the availability of materials, we can get it right on the schedule” (Ex. 150, Part A, at 8).

At 2:54 PM, August 30, 2021, Mike Costa sent a message to Mr. Billcliff that stated: “Hi Barry We’re ready to move forward. I’d like to add the ridge vent in as well.... (*Id.*, at 6-7).

At 3:17 PM, August 30, 2021, Barry James foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mr. Costa, Subject Re: Devens, that stated, in part:

Good afternoon Mike. Unfortunately not do those payment terms. I’m not sure if you’ve checked product cost recently, but about ½ of the job is stock because we did not raise our price range to match the grossly inflated material costs. We now have only one half of each job to handle both labor and profit margin. We can do the ½ upon scheduling and then the other half within 30 days of completion. Or 1/3 upon scheduling, 1/3 upon material delivery, and the last third 30 days from completion. If you’re OK with the terms of your current proposal, we can get the job ball rolling and get that project done within the next two weeks.... (Ex. 150, Part A, at 6-7, Part B Re: Devens.msg).

At about 3:34 PM, August 30, 2021, Mike Costa sent a message to Mr. Billcliff that stated, in part: “OK I’ll go ½ now and the other half 30 days after completion. Can you get me a deposit invoice? We’ll work up a contract in the meantime.” (Tr. 420-22; Ex. 150, Part A, at 6, Ex. V, at R-308).

At 6:24 PM, August 30, 2021, Barry James foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mr. Costa, Subject Re: Devens, that stated: “Good afternoon Mike Please see your deposit invoice attached Feel free to call if you have ant (sic) questions Thank you Barry James Foreman Merrimack Valley Roofing Inc. (978)884-6732 c (978)866-1860 o (978)296 3448 f”. (Tr. 425-26; Ex. 150, Part A, at 6, Ex. V, at R-309).

On September 2, 2021, Mike Costa signed and dated the Merrimack Valley Roofing & Gutter's proposal²⁵ and sent it to Barry James. A copy was also sent to the team that manages the hotel.²⁶ (Tr. 337; Ex. 126). The signed proposal has Mike Costa's name crossed out and "SHS" written in. CO Bussell testified that "SHS" stood for SpringHill Suites. (Tr. 1890; Ex. 126). Mr. Costa testified that the scope of work included in the proposal came from Barry James and that Barry James learned of the details about the scope of work by visiting the site. (Tr. 336; Ex. 126).

At 2:19 PM, September 2, 2021, Mike Costa wrote in a message to Mr. Billcliff that stated, in part: "Barry just spoke to hotel. They are requesting the deposit be split 2 ways"; one for Devens Commons Conference Center at 31 Andrews Parkway with a deposit amount of \$14,500 and another for Devens Hospitality LLC at 27 Andrews Parkway with the deposit amount of \$45,300. (Ex. 150, Part A, at 5).

Mr. Costa testified that, based on his negotiations with Barry, Barry James was responsible for: 1) scheduling the work, 2) setting the daily schedule, 3) determining how many days of work would occur, 4) obtaining permits, 5) determining sequencing of the work on the project stages, 6) disposal services, 7) purchasing materials, 8) how many materials to buy, 9) purchasing equipment, 10) ensuring that the work met contract specifications, 11) supervising the work, 12) overseeing safety on the project, 13) inspecting the job site for hazards, 14) ensuring that the workers had proper safety equipment, and 15) ensuring that the workers on their project received proper safety

²⁵ CO Bussell testified that "a good majority" of the 400 cases that he has been a part of at OSHA had a permit pulled and "a vast majority of permits don't have a proposal on them." He said that "the city only uses this proposal for the amount they charge you for the permit." (Tr. 1894). He said that the proposal signed by Mr. Costa could be used to receive a permit. (Tr. 1890-91, 1895-96). CO Bussell testified that "there's a lot of work that is done where there's no signature on a contract, especially for roofing." (Tr. 1894). He said New Hampshire does not require a permit for roofing, but Massachusetts does. (Tr. 1897).

²⁶ CO Bussell testified that OSHA asked for the contracts in a subpoena to Respondent, but Respondent never submitted them to OSHA. (Tr. 1892). Mr. Billcliff testified at trial that Respondent's Supplemental Response to the Secretary's discovery requests stated that he looked for such contracts, but did not have any. (Tr. 2000-01; Ex. 100, at 18).

training. Mr. Costa stated that Barry told him that Jason Vaughn²⁷ would be Mr. Billcliff's site contact for the project. He said that Barry never told him that he would be subcontracting out any work. (Tr. 321-23).

E. Devens SpringHill Suites Owner Pays Mr. Billcliff the first half of the Agreed upon Price.

At 5:33 PM, September 2, 2021, Barry James

foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mr. Costa, Subject Re: Devens, that stated, in part: "Good afternoon Mike. Please see the separated invoices attached ... Barry James Foreman Merrimack Valley Roofing Inc. (978)884-6732 c (978)866-1860 o (978)296 3448 f". (Tr. 334; Ex. 150 Part A, at 5). Mr. Costa testified that he received a deposit invoice # 264825A tied to proposal # 1012929, from Merrimack Valley Roofing LLC, calling for \$45,300.00 to be due and paid by September 2, 2021 from Barry from "Foreman05@MerrimackValleyRoofing@yahoo.com." (Tr. 331, 1538-39; Ex. 110, at 1, Ex. 155, at 9, Ex. 190-B, at 1).

At 11:20 AM, September 13, 2021, Barry James

foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mr. Costa, Subject Re: Devens, that stated: "Once the contract and deposit are both recorded, we file for the permit with the town and put the supplies on order.²⁸ From there it is usually a 5 to 7 day process depending on the city[.]" (Ex. 150, Part A, at 3).

²⁷ Mr. Billcliff testified that he and Mr. Vaughn are long-term friends. He said that Mr. Vaughn is honest to the extreme level. He said that he knew that Mr. Vaughn had no real construction experience. (Tr. 693, 1951-52, 1983, 2207-08). Mr. Vaughn testified that he wants Mr. Billcliff to win this case. (Tr. 696). At trial, he testified that Mr. Billcliff told him that he [Billcliff] could be facing "a couple hundred thousand dollar fine" when this first happened. He thought Mr. Billcliff was "going to be pissed and beat the s_t out of me for it. That's my opinion because you're [Billcliff] a tough guy. You [Billcliff] could beat me up." (Tr. 803-04).

²⁸ CO Bussell testified that he did not know why Merrimack Valley Roofing would be talking about a permit that Billco later pulled. (Tr. 1795).

At 12:32 PM, September 13, 2021, Mike Costa sent a message to Mr. Billcliff that stated: “I am told the checks went out on Friday.²⁹ You have the signed contract from me. Once you file with Mass Development, please let me know.” (Ex. 150, Part A, at 3).

Mr. Costa testified that he never received a purported email from Barry James, foreman05.merrimackvalleyroofing@yahoo.com, on September 13, 2021, at 1:55 PM,³⁰ that stated “Barry will not be available for this project. Mike LaChance³¹ will contact you soon. Thank you. Jon.” (Tr. 351-52, 1977-80). The Court finds that the purported September 13, 2021 email from “Jon” and/or Barry James (Mr. Billcliff) to Mr. Costa was not actually sent by “Jon” and/or Barry James to Mr. Costa, or received by Mr. Costa, on September 13, 2021. The Court finds that this purported email was fabricated sometime thereafter. (Tr. 1977-80).

At 12:45 PM, September 14, 2021, Barry James foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mr. Costa, Subject Re: Devens, that stated: “Correct Were you sending a hard copy of the proposal with the checks?” (Ex. 150, Part A, at 2).

At 12:47 PM, September 14, 2021, Mike Costa sent a message to Mr. Billcliff that stated: “Signed proposal sent on 9/2. Attached here” (Tr. 430; Ex. 150, Part A, at 2, Ex. V, at R-317).

F. Mr. Billcliff arranges for Subcontractor L&A to Provide Labor to Re-roof the Devens SpringHill Suites and Conference Center.

²⁹ CO Bussell testified that the two checks for payment to Merrimack Valley Roofing LLC were sent to Merrimack Valley Roofing’s P.O. Box. 1214, Newbury, MA 01950, a post office box that was paid for in 2020 and 2021 by checks drawn on an account for Merrimack Valley Roofing Co., LLC, created by Mr. Billcliff on which he is the sole signatory. (Tr. 1541, 1623-24). Mr. Billcliff testified that Tim Shanahan owns P.O. Box 1214 in Newburyport, Massachusetts for Merrimack Roofing. (Tr. 2257-58). The Court gives little weight to this testimony by Mr. Billcliff and finds that Mr. Billcliff had access to this P.O. Box.

³⁰ The Acting Secretary believes that this email was fabricated. (Tr. 1977-80).

³¹ Mr. Billcliff testified that he did not personally know Mr. LaChance. (Tr. 2253).

CO Bussell testified that a picture on Mr. Bonicenha's phone showed a September 16, 2021 message from Mr. Billcliff³² from phone ending in 1254, that stated:

Hi, this is Mike from Baystate exteriors ... I would like to know your availability, we need to hire a couple more bruise for this season. We have many job stock and ready to go and not enough dollars to do that. Do you have time to do jobs? Baystate exteriors inc, 484 Lowell Street Peabody Mass 01960 Please send c o i³³ to Wolfjohnm@aol.com[.]³⁴

(Tr. 502-03; Ex. 128, at 1).

In response to a leading question by Mr. Billcliff, Mr. Bonicenha said "Yes" that he met Mr. Billcliff at the Devens SpringHill Suites' parking lot on "July 10th" [2021].³⁵ He testified that Mr. Billcliff told him that the roofing materials were going to come from ABC Supply.³⁶ (Tr. 499, 611-12). At the Devens Project parking lot he talked with Mr. Billcliff about the price, where the materials were coming from, and the dumpster. He said, "Barry asked me if you have all of the harnesses and the rope; I said yes. That's the conversation." (Tr. 517-18, 612, 628).

On September 20, 2021, at 12:32 PM, Barry James

foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mr. Costa, Subject Re: Devens, stating:

Good afternoon Mike,³⁷ We got all the paperwork in order today. We secured the shingles and are currently working on finding the rubber ro[unintelligible] now. If we can find a source that has enough EPDM rolls, we should be able to get that on the schedule within a

³² Mr. Bonicenha testified that he believed that a man referred to as "Mike" sent him this message. (Tr. 629; Ex. 128).

³³ Mr. Bonicenha testified that "c o i" stood for certificate of insurance. (Tr. 503).

³⁴ CO Bussell testified that Mr. Bonicenha told him that he could not remember ever speaking to a "Mike" and that he thought it was "a Brian or a Barry at this number." (Tr. 1755; Ex. 128). CO Bussell also testified that he believed that the Wolfjohnm@aol.com email address actually belonged to Mr. Billcliff. (Tr. 1814). Yahoo's Gregory Phillips testified that the recovery phone number provided by the account user for wolfjohnm@aol.com was 19788846732 [Mr. Billcliff's phone number]. (Tr. 1083-84; Ex. 159, at 12). The Court notes that "Baystate Exteriors" is sometimes referred to in this case as "Bay State Exteriors."

³⁵ The Court finds that Mr. Billcliff improperly framed the leading question using a July 10th date that he said Mr. Bonicenha had said before when he actually had not previously testified to that date before. The Court finds that Mr. Bonicenha met Mr. Billcliff at the Devens SpringHill Suites' parking lot sometime after September 16, 2021, but before October 7, 2021. (Tr. 629; Ex. 128, at 1-2). Mr. Bonicenha also testified that he was "very bad with the dates. I don't remember like the dates." (Tr. 631).

³⁶ Mr. Bonicenha testified that Mr. Billcliff bought all of the materials for the roofing project; except for the one material where Mr. Bonicenha was told to keep a receipt. (Tr. 499-500, 612).

³⁷ Mr. Bonicenha testified that he never met anyone named "Mike" pertaining to the Devens Project. (Tr. 515-16).

week [] the release of the permit[.] I will update you again when we have an exact date. Thank you John Wolfe³⁸ (Tr. 370-71, 379; Ex. 150, Part A, at 2).

At 12:32 PM, September 20, 2021, Mike Costa sent a message to Mr. Billcliff that stated:

“Thanks Barry” (Tr. 434, 471; Ex. 150, Part A, at 1-2, Ex. 150, Part B, Ex. V, at R-319).

G. Mr. Billcliff deposited the Initial two partial payment Checks made out to Merrimack Valley Roofing LLC into his Merrimack Valley Credit Union, Merrimack Valley Roofing Co., LLC Bank Account, on September 20, 2021.

CO Bussell testified that on September 20, 2021, 1:49 PM, Mr. Billcliff deposited a check into an account where Mr. Billcliff was the only person authorized to deposit checks³⁹ into that account at the Plaistow branch, Merrimack Valley Credit Union, with an unidentifiable signature on behalf of Merrimack Valley Roofing appearing on the back of check number 015640, dated September 10, 2021, issued by Devens Hospitality LLC, 27 Newburyport, MA 01950 in the amount of \$45,300 made out to Merrimack Valley Roofing LLC, PO Box 1214, Newburyport, MA 01950 and drawn on Unibank.⁴⁰ (Tr. 1556-60, 1855, 1861-65, 2079-80, 2259-61; Ex. 155, at 9, 13 [Sealed], 107-08).⁴¹ CO Bussell testified that telephone number (978) 866-1860 is associated with

³⁸ Mr. Costa testified that he never met or talked with John Wolfe. (Tr. 470). Mr. Bonicenha also testified that he never met anyone named John Wolf before, during, or after working on the project. (Tr. 516). Mr. Grzyboski also admitted telling CO Bussell during his March [8], 2022 interview that he never met John Wolfe. (Tr. 1184-86, 1192). At trial, Mr. Grzyboski also testified that he never met Messrs. Byrne and Bonicenha. (Tr. 1308-09).

³⁹ Bank official Ms. Lee testified that “Barry Billcliff was the only individual that was authorized to exercise all powers that were listed in the resolution, so opening accounts, endorsing checks, obtaining loans, et cetera.” (Tr. 535-36; Ex. 155, at 472-73). She said that Mr. Billcliff was the only authorized signer; *e.g.*, authorized to sign checks and obtain monthly account statements, on the account and the only person authorized to close the account. She said the authorized signer is also able to obtain documents relating to the account after it is closed. (Tr. 535-38).

⁴⁰ The Merrimack Valley Credit Union’s Monthly September 2021 bank statement for The Merrimack Valley Roofing Co, LLC d/b/a CO Barry Billcliff, 496 Main Street, Sandown, NH 03873, shows a deposit of \$70,315 made on September 20, 2021. (Tr. 538-40; Ex. 155, at 326). Ms. Lee said that check 015640 made out to Merrimack Valley Roofing LLC could be deposited into the Merrimack Valley Roofing Company’s LLC, d/b/a Andover Roofing account. (Tr. 564-65). In its July 11, 2022 responses to the Secretary’s Interrogatory Nos. 4 and 5, Respondent stated respectively that “Respondent does not have immediate knowledge of the Account nor signers” and “Respondent has no personal knowledge (sic) [of] the Account”[.] The Court finds both these responses to be false. (Tr. 2090; Ex. 100, at 10).

⁴¹ Ms. Lee testified that the photographs at Exhibit 155, at 107, show the person depositing check 015640 at the Plaistow branch of the Merrimack Valley Credit Union on September 20, 2021. (Tr. 549-50; Ex. 155, at 107). She further said that the photographs at Exhibit 155, at 108, show the person depositing check 015777 at the Seabrook location of the Merrimack Valley Credit Union on November 16, 2021. (Tr. 549-50; Ex. 155, at 108). Mr. Billcliff testified that, although the person does look a lot like a younger version of himself, he is not the person shown in the four “9/20/21” photographs at Exhibit 155, at 107, and in the three “11/16/21” photographs at Exhibit 155, at 108. (Tr. 2259-60, 2287;

this Merrimack Valley Credit Union's Merrimack Valley Roofing Co., LLC bank account. (Tr. 1641). Mr. Billcliff testified that he had "no personal knowledge about these" [two checks for \$45,300 and \$45,714].⁴² On March 8, 2022, Mr. Billcliff told CO Bussell and Assistant Area Director (AAD) LeRose that he could not recall⁴³ whether he had seen the two checks from the Devens Project before and that he highly doubted that these two checks were deposited into an account that was connected to his name.⁴⁴ (Tr. 2070-71; Ex. 155, at 9, 11).

CO Michael C. Grover testified that checks written out to Merrimack Valley Roofing, Merrimack Valley Roofing and Barry Billcliff valued at \$2,019,981.08 were deposited from October 2019 through July 2022 into the same account at the Merrimack Valley Credit Union into which Mr. Billcliff deposited the checks from Devens Commons Conference Center, LLC for \$14,500 and from Devens SHS Devens Hospitality LLC for \$45,300 on September 10, 2021 and from Devens Commons Conference Center, LLC for \$14,436 and from Devens SHS Devens Hospitality LLC for \$45,714 on November 12, 2021. (Tr. 1434-42, 2323-24; Exs. 155, at 13-14 (sealed), 169).

The Court finds that Mr. Billcliff's trial testimony that he knows that Unibank check numbers 015640 and 015777 at Attachment 2 in the Secretary's discovery request were not true and correct copies of the checks that he actually received from Devens Hospitality (Devens SpringHill Suites) concerning the roofing work performed at the job site to not be credible. (Tr. 2087; Ex. 155, at 9, 11). The Court further finds that Respondent's July 8, 2022 assertions in its Responses to the Secretary's Requests for Admissions (RFA) Nos. 7 and 8 that it [Mr. Billcliff] has no personal knowledge that Unibank check numbers 015640 and 015777 were received by Respondent from

Ex. 155, at 107-108). The Court finds this testimony by Mr. Billcliff to not be credible and further finds that the photographs all show Mr. Billcliff in them.

⁴² The Court finds this testimony to not be credible.

⁴³ Likewise, Mr. Billcliff stated during his January 12, 2023 deposition that he could not recall ever endorsing or cashing checks on behalf of Merrimack Valley Roofing. (Tr. 2116-17).

⁴⁴ The Court finds that these March 8, 2022 statements by Mr. Billcliff to CO Bussell and AAD LeRose were false.

Devens Hospitality (Devens SpringHill Suites) concerning the roofing work performed at the job site and that Mr. Billcliff has no recollection of depositing the checks into the Merrimack Valley Credit Union's Merrimack Valley Roofing Co., LLC bank account to be without any reasonable basis and to be false assertions.⁴⁵ (Tr. 2088; Ex. 100, at 8, Ex. 155, at 9, 11, 13-14 [sealed]).

H. Mr. Billeliff directs his son, Daniel Grzyboski, to apply for the Permit to perform the Roofing work at the Devens SpringHill Suites and the Conference Center.

On September 22, 2021, 5:21 PM, Barry James

foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mike Costa that stated:

Hey Mike, just so you know, all the paperwork is in order, we applied for the permit. We ordered the materials.⁴⁶ The rubber roofing materials are not in stock but have been ordered through the manufacturer. As soon as the materials are consolidated and ready for delivery. I'll let you know and we will put that on the schedule. I'm assuming about two weeks out[.] (Ex. 150, Part A, at 1).

On September 22, 2021, 12:32 PM, Mike Costa sent a message to Barry saying: "Thanks Barry"[.] (Ex. 150 Part A, at 1-2).

Mr. Costa testified that he did not sign as the "Homeowner"⁴⁷ at either of two places that appear on the permit application at Exhibit 123, at 5, that are dated September 23, 2021. He said that the signature appearing at both places for the homeowner to sign was illegible to him. (Tr. 345-47; Ex. 123, at 5). At trial, Mr. Grzyboski testified that he told CO Bussell during his March [8], 2022 interview that he signed directly below the "John Wolfe" homeowner's signature⁴⁸ on the permit application at Exhibit 123, at 5, at "F". (Tr. 1175-77, 1192, 1329, 1336-38; Ex. 123, at 5, at

⁴⁵ During his January 12, 2023 deposition, Mr. Billcliff stated that he did not recall depositing check numbers 015640 and/or 015777 into a bank account. (Tr. 2111-13; Ex. 155, at 13-14 [sealed]).

⁴⁶ Mr. Billcliff testified that he did not purchase any materials for the Devens Project job site. (Tr. 2219). The Court finds this testimony to not be credible.

⁴⁷ "Homeowner" refers to the owner of the Devens SpringHill Suites and/or Conference Center.

⁴⁸ The homeowner's signature is at Exhibit 123, at 5, at "D". (Tr. 1178; Ex. 123, at 5, at "D"). At trial, Mr. Grzyboski testified that he did not know who signed there. At trial, he was evasive as to whether or not John Wolfe was the owner of the Devens SpringHill Suites or Conference Center properties. (Tr. 1178-79, 1235, 1340-45; Ex. 125, at 5, at "D"). He said that he did not know what properties John Wolfe owned. (Tr. 1349). The Court notes that Mr. Wolfe is also sometimes referred to as "Wolf" in the trial transcript and herein. (Tr. 704).

“F”). At trial, Mr. Grzyboski testified that he could not confirm that the signature at the bottom right [above “Contractor’s Signature NOTICE”] of page 5, Exhibit 123, or at Exhibit 123, at 5, at “F”, was his signature. (Tr. 1256, 1262, 1329, 1338-39; Ex. 123, at 5).

Acting upon Mr. Billcliff’s order to get the permit for the Devens Project, on September 24, 2021, Daniel Grzyboski signed, under penalties of perjury, with telephone number [redacted],⁴⁹ a Department of Industrial Accidents Office of Investigations form that identified Billco Roofing LLC,⁵⁰ 496 Main Street, Sandown, NH as the insured and applicant employer with 4 employees to do roof repairs at 27 Andrews Parkway, Devens, MA using “Insurance Solutions Corporation” as the workers’ compensation insurer. (Tr. 274, 280-81; Ex. 123, at 8, Ex. 124, at 2-3; Stip. No. 6). At trial, Mr. Grzyboski testified that Billco Roofing’s business address is 496 Main Street, Sandown, New Hampshire 03873. (Tr. 1016, 1030). He said that he was primarily employed as a general laborer and has helped with “installs” at Merrimack Valley Roofing and Gutter, LLC for roughly the past ten years where he reports to Mr. Billcliff and others, including “John” (last name unknown), but also helps out “a handful a year” at Billco Roofing. (Tr. 1020-21, 1033-34, 1119, 1314). He testified at trial that his Merrimack Valley Roofing and Gutter, LLC employer’s business address was 520 Merrimack Street, Methuen, Massachusetts. (Tr. 1113, 1311).

CO Bussell testified that he contacted Peter Lowitt, Director of the Devens Enterprise Commission, as part of his OSHA investigation and asked him for documents used in the permit application to do the roofing work at Devens SpringHill Suites, which he provided. (Tr. 1528-30). Mr. Lowitt testified that Exhibit 124, at p. 6, appeared to be a copy of the contract between Billco Roofing LLC, 496 Main Street, Sandown, NH 03873 (978) 884-6732 and 27 Andrews Parkway, for

⁴⁹ At trial, Mr. Grzyboski stated that [redacted] is his cell phone number. (Tr. 1169, 1191-92).

⁵⁰ CO Bussell testified that Billco LLC was not actively registered as an LLC in either New Hampshire or Massachusetts as of October 7, 2021. (Tr. 1532-33).

a roofing job for \$60,000.00.⁵¹ (Tr. 281; Ex. 124, at 6). The “contract” identified “Barry” as the “Contact” “c/o John Wolf GC”, “Phone: (978) 866-1860”. It also identified Daniel Grzyboski as the Supervisor.⁵² Mr. Grzyboski testified at trial that he did “not know John’s [Wolf] last name,”, but said he briefly met “John” more than ten times. He described “John” as probably somewhere between 67 to 72 inches tall. (Tr. 281-82, 1035-36, 1264, 1530-31; Ex. 124, at 6).

Another picture on Mr. Bonicenha’s phone showed a September 24, 2021 message from Mr. Billcliff from his phone ending in 1254 to Mr. Bonicenha, that stated: “I haven’t received a Certificate of Insurance from you yet. I have a couple of very big projects coming up in two weeks and I need many more guys. Are you able to help?” (Tr. 503-04, 651; Ex. 128, at 1).

On September 27, 2021, Daniel Grzyboski submitted, at Mr. Billcliff’s request, a permit application to the Devens Enterprise Commission for Billco Roofing LLC, 496 Main Street, Sandown, NH, telephone number: 978 884-6732 [Mr. Billcliff’s cell phone number],⁵³ to “strip and roof of shingled portion of roof (304 sq)” located at the Marriott SpringHill Suites, 27 Andrews Parkway, Devens, Massachusetts. (Tr. 273-76, 1055, 1126-27, 1141, 1530-31, Stip. No. 4; Ex. 123). At trial, Mr. Grzyboski admitted that he told CO Bussell during his March 2022 interview that he

⁵¹ There is no signature page included in the “contract” and Mr. Costa first saw the “contract” on February 23, 2023. (Tr. 300; Ex. 124, at 6).

⁵² Mr. Vaughn testified at trial that he never saw Mr. Grzyboski, who was a “really close friend” of his, at the Devens Project job site. (Tr. 786-88). At trial, Mr. Grzyboski admitted telling CO Bussell in March [8], 2022 that he was never at the Devens Project job site from when work started to when work finished. He also testified to that effect at trial. (Tr. 1129-30, 1192, 1307-08).

⁵³ The Workers’ Compensation Insurance Affidavit of the permit application states that “I [company name: Billco Roofing LLC] am an employer providing workers’ compensation for my employees working on this job.” At trial, Mr. Grzyboski admitted that he told CO Bussell during his March 8, 2022 interview that he filled out and signed the Affidavit dated September 24, 2021. (Tr. 1192-94; Ex. 124, at 3). The permit application did not identify any subcontractors to Billco Roofing LLC that were going to work at the job site and any such subcontractors should have been indicated in the permit application. (Tr. 277-78, 297-98; Ex. 123, at 3). Mr. Vaughn testified at trial that L&A was a subcontractor on the project. (Tr. 790, 810, 939).

used his Massachusetts Construction Supervisor’s license⁵⁴ to fill out the permit application.⁵⁵ (Tr. 1132-33; Ex. 125, at 2; Stip. No. 7). He also admitted at trial that during his March [8], 2022 interview he told CO Bussell that he wrote the numbers alongside the “CONST. SUPER. LIC. NO.” (Tr. 1145, 1192; Ex. 123, at 2). At trial, he also acknowledged that his address, at “496 Main Street, Sandown, NH” appears below “Builder Daniel Grzybowski”. (Tr. 1149; Ex. 123, at 2). At trial, he also admitted telling CO Bussell during his March [8], 2022 interview that he filled out the whole document at Exhibit 123 and wrote in “Mike Costa, 27 Andrews Parkway, Devens, MA, phone: 978 866 1860” (a phone number used by Mr. Billcliff) alongside and below the “Owner.”⁵⁶ (Tr. 1152-55, 1192, 1833; Ex. 123, at 2, at “A”). The application identified “Mike Costa”, phone number: 978 866 1860,⁵⁷ as the owner of the SpringHill Suites.⁵⁸ (Tr. 1155-56; Ex. 123, at 2, at “B”). Mr. Costa testified that he did not sign the document as the owner and phone number 978-866-1860 was not his phone number.⁵⁹ He also said that he did not give anyone authorization to sign the building permit application for him. (Tr. 343-44; Ex. 123, at 2). CO Bussell identified the scribbled signature appearing alongside the “Owner Signature” as “John Wolfe”.⁶⁰ (Tr. 1531; Ex. 123, at 2).

⁵⁴ At trial, Mr. Grzybowski was very evasive and would not identify the photograph of him that was on his Massachusetts Construction Supervisor License saying that he believed that “you guys [OSHA and Department of Labor personnel] do not act in good faith, ...” He also was evasive when he declined to confirm that pages were part of the permit application that he submitted to the Devens Enterprise Commission. (Tr. 1135-40, 1237; Exs. 123, 125, at 2).

⁵⁵ At trial, Mr. Grzybowski testified that he was not a construction supervisor at the Devens job site. (Tr. 1216-17).

⁵⁶ At trial, Mr. Grzybowski admitted telling CO Bussell during his March [8], 2022 interview that “my father [Mr. Billcliff] asked me to fill out the permit, so I filled out the permit” and inserted Billco Roofing, LLC in the permit. (Tr. 1173, 1192; Ex. 123, at 3).

⁵⁷ At trial, Mr. Grzybowski also admitted telling CO Bussell during his March [8], 2022 interview that 978 866 1860 was the phone number for Merrimack Valley Roofing. (Tr. 1157-58, 1192; Ex. 123, at , at “B”).

⁵⁸ Director Lowitt testified that Robert Walker is the owner of Devens SpringHill Suites hotel and all of the buildings in that complex. (Tr. 273, 278, 1533).

⁵⁹ Mr. Billcliff testified that he agreed that 978-866-1860 was not Mr. Costa’s phone number. (Tr. 2058).

⁶⁰ Director Lowitt testified that the scribbled signature appeared to show the signature of Mr. Walker. (Tr. 279; Ex. 123, at 2). The Court finds that the first name of the scribbled signatures appears more like “John”, and is definitely not “Robert”; so it credits CO Bussell’s testimony that the scribbled signatures purport to be that of John Wolfe on the Building Permit Application at pages 2 and 4. (Tr. 1531; Ex. 123, at 2, 4). CO Bussell testified that the owner’s signatures on the Building Permit Application are significant in that they show the owner agrees with the permit being sought. He said that there is no John Wolfe affiliated with RA Ventures or Robert Walker, the owner of Devens SpringHill Suites. (Tr. 1535-36). CO Bussell testified that, in his lay opinion as a compliance officer, the John Wolfe signatures that appear in the Building Permit Application are “forged.” (Tr. 1533-37; Ex. 123, at 2, 4). *See* F.R.E., Rule

At trial, Mr. Grzyboski admitted telling CO Bussell during his March [8], 2022 interview that “John”,⁶¹ who he said worked for Merrimack Valley Roofing and Billco, signed alongside the “Owner Signature”. (Tr. 1159-61, 1192; Ex. 123, at 2, at “C”). The application shows that the name printed below the builder’s signature is “Daniel Grzyboski” with a telephone number: “[redacted]” and is dated “9-27-21”. (Tr. 279; Ex. 123, at 3). The permit application showed that the estimated cost of the construction was written in with \$60,000.⁶² (Ex. 123, at 2). The permit application included a required photocopy of Mr. Grzyboski’s Massachusetts Construction Supervisors License along with photo identification.⁶³ (Tr. 1054-55; Ex. 123, at 2, 4). Mr. Grzyboski also certified that he was authorized by the owner to make the permit application as his/her authorized agent. (Tr. 282, 411; Ex. 124, at 7). Mr. Costa testified that he gave Merrimack Valley Roofing permission to pull a permit. (Tr. 411). But Mr. Costa testified that neither he, nor anyone in his office, authorized Mr. Grzyboski to submit the permit application that contained the permit materials that appear therein. (Tr. 347-48; Exs. 123-24). Mr. Costa testified that Mr. Billcliff did not tell him that: 1) his home

701. The Court agrees with CO Bussell and finds that the signatures purported to be at the Owner Signature at page 2 at “C”, and at page 5, at “D” and “E”, Exhibit 123, contained in the building permit application materials are forgeries and were not made by the property owner of the Devens Project, or by Robert Walker or John Wolfe.

⁶¹At trial, Mr. Grzyboski testified that he did not recall “John’s” last name. (Tr. 1161-63, 1167).

⁶² Director Lowitt testified that the Devens Enterprise Commission charges \$13 per thousand in value based on the project value. (Tr. 279). He said that check no. 411, dated September 27, 2021, signed by Mr. Grzyboski from “Marrimack Valley Roofing Co, LLC, PH: 978-866-1860” for \$780.00 was received by the Devens Enterprise Commission for the “Permit”. At trial, Mr. Grzyboski said that he did not know if the signature appearing on check no. 411 was his. (Tr. 1199; Ex. 133 [filed under seal]). At trial, Mr. Grzyboski testified that he did not recall how the \$780.00 fee was paid. (Tr. 288-90, 1196-97, 1640-41; Ex. 133 [filed under seal]). At trial, he also admitted saying during his February [9], 2023 deposition that he did not recall ever writing a check for the Merrimack Valley Roofing Co., LLC. (Tr. 1200-01, 1218). Mr. Costa testified that the \$60,000 amount shown on the building permit application as the estimated cost of construction was not accurate. (Tr. 344-45; Ex. 123, at 2). At trial, Mr. Grzyboski testified that he did not know where the three \$20,000 schedule payment amounts totaling \$60,000 shown on the permit application atop page 5 of Exhibit 123 came from. (Tr. 1176-77; Ex. 123, at 5).

⁶³ Mr. Grzyboski’s Massachusetts Construction Supervisors License showed his address at: 496 Main Street, Sandown, NH 03873. (Tr. 283-84, 303, 1118; Ex. 123, at 4, Ex. 125; Stip. No. 6). Mr. Billcliff testified that his son, Daniel, could apply for a permit. (Tr. 2046). Mr. Grzyboski was trained on OSHA’s fall protection and proper use of ladder requirements and discussed these requirements with Mr. Billcliff. He testified that Mr. Billcliff knew about the need to use fall protection at or above six feet and to wear hard hats. He said that Mr. Billcliff took an OSHA fall protection course. (Tr. 1055-63).

improvement contractor's license had been revoked,⁶⁴ 2) he did not have a construction supervisor's license,⁶⁵ and 3) he, himself, was unable to obtain a permit from the permitting agency for the Devens Project. (Tr. 348). Mr. Costa testified that a construction supervisor's license was needed to pull a permit. (Tr. 410). The building permit application documents included a Certificate of Liability Insurance dated "6/4/2021" identifying "BILLCLIFF BARRY DBA BILLCO ROOFING 496 Main St" and another Certificate of Liability Insurance also dated "6/4/2021" identifying "Billco Roofing LLC, 496 Main Street" as the insured. (Tr. 274, 280; Ex. 123, at 8; Ex. 124, at 2). These two Certificates of Liability Insurance identify Merrimack Valley Roofing Inc., 520 Merrimack Street, Methuen, MA 01844 as the Certificate Holder. (Ex. 123, at 8, Ex. 124, at 2).

Director Lowitt testified that the Devens Enterprise Commission ultimately issued a permit in response to Mr. Grzybowski's application, shortly after September 27, 2021.⁶⁶ (Tr. 288). He testified that the permit "must have been picked up."⁶⁷ (Tr. 295). Mr. Lowitt said that his office did not receive another permit application from anyone other than Billco Roofing, LLC for the October 2021 roofing job at Devens SpringHill Suites. (Tr. 278). He further testified that the Devens Enterprise Commission has yet closed out the permit because it has not yet received a final inspection request for the job. (Tr. 296).

⁶⁴ During his February 11, 2022 deposition in a separate OSHA case, Docket No. 21-0382, Mr. Billcliff said that he held a Massachusetts home improvement contractor's license in the 2000s. (Tr. 2044-45). Mr. Billcliff also testified that his Massachusetts home improvement license was taken away from him. At his February 11, 2022 deposition in Docket No. 21-0382, he said that his Massachusetts home improvement license was taken away from him after a court hearing. (Tr. 2025, 2042-44).

⁶⁵ At trial, he testified that he never had a Massachusetts construction supervisor's license. (Tr. 2045).

⁶⁶ Mr. Billcliff initially testified that, to the best of his knowledge, the Devens Enterprise Commission never issued the permit for the job site. (Tr. 2231). Shortly thereafter, he testified that a permit was issued long after the job was completed. (Tr. 2233).

⁶⁷ Mr. Billcliff testified that his order to his son to pull a permit "was a temporary order" and when he found out that Billco was not doing the job, he told his son "not to sign off and not to go get it [permit] and activate it [the permit]." (Tr. 2301).

- I. Mr. Billcliff's Supervisor and Subcontractor L&A start Roofing work at the Job Site in early October 2021.

In early October 2021, Mr. Billcliff or someone else acting on his behalf, arranged for both a dumpster and roofing materials to be delivered for the Devens Project and confirmed same with Mr. Costa. (Tr. 205, 339-40; Ex. 108, at 2; Ex. 151). On October 1, 2021, Mr. Billcliff emailed Mr. Costa to provide a schedule for the work. (Ex. 108, at 5, Ex. 151).

Mr. Bonicenha testified that his company, L&A, was hired by Mr. Billcliff to do roofing work at the SpringHill Suites and Conference Center.⁶⁸ He said that he communicated with Mr. Billcliff only through phone calls before starting the Devens Project.⁶⁹ He said that the job was scheduled to be completed in two weeks. He said that he had about eight or nine workers on the job every day. (Tr. 497-98). Mr. Billcliff did not make any effort to determine whether Mr. Bonicenha was qualified or competent to supervise the safety conditions at the Devens Project. The only conversation Mr. Billcliff had about safety with Mr. Bonicenha was to inquire if he had "all of the equipment." (Tr. 517). Mr. Vaughn did not discuss safety with Mr. Bonicenha prior to when OSHA came to the worksite. (Tr. 518).

On October 4, 2021, 6:16 AM, Mr. Costa sent a message to "Barry James" that stated: "How

⁶⁸ Mr. Bonicenha testified that he had previously done a small flat roofing job at a garage in Lawrence for Mr. Billcliff after Mr. Billcliff had seen a L&A van on a highway. (Tr. 506, 604-07). He said that Mr. Vaughn was Mr. Billcliff's supervisor on that job and he sat for the duration of the job in the same black Dodge that he later sat in during the Devens Project. (Tr. 604-05). He said that he first met Mr. Billcliff when he [Billcliff] stopped by the job and gave him [Bonicenha] a couple of tubes of caulk to apply to the roof. Mr. Bonicenha testified that Mr. Billcliff introduced himself as Barry Billcliff, owner of Baystate Exterior. (Tr. 606-07). He said that Mr. Billcliff gave his [Bonicenha's] "labor guy" the contract for the Lawrence job at the end of the job, along with the cash payment called for in the contract. (Tr. 607-08, 678-79).

⁶⁹ Mr. Bonicenha said that after he started the Devens Project, he also communicated with a man named "Mike" [allegedly from Baystate exteriors inc (sic), 484 Lowell Street Peabody Mass 01960, c/o Wolfjohnm@aol.com] that used a number ending in 1254 [978-904-1254] by text messaging. He said that Mr. Billcliff's number was 978-904-1254. (Tr. 500-08, 634; Ex. 128). He said he went to that address one time to look for Mr. Billcliff and Baystate Exteriors Inc. and was told by the building owner there that Baystate Exteriors Inc. had left the building eight years before. (Tr. 504). Mr. Bonicenha testified that "Mike" sent him a message toward the end of the job and told him to tell his workers to listen to Mr. Vaughn when Mr. Vaughn told his workers to wear their harnesses and hard hats. (Tr. 635).

long do you think this project will take? Also hotel has asked that no work begin before 8am.” (Tr. 326, 1923; Exs. 152, I).

On October 4, 2021, 6:33 AM, Barry James

foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mike Costa that stated: “Ok, 6 days plus rain outs like today.” (Tr. 326; Ex. 152).

On October 5, 2021, 11:08 AM, Mr. Costa sent a message to Barry James that stated: “Barry did you guys start today?” (Ex. 108, at 4).

On October 5, 2021, 11:10 AM, Barry James

foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mike Costa, Subject: Re: Devens, that stated: “No, tomorrow. It’s raining today” (Ex. 108, at 3-4).

On October 5, 2021, 11:12 AM, Mr. Costa sent a message to Barry James that stated, in part: “My only ask is you communicate any delays or issues with me so I can let the hotel know.” (Tr. 438; Ex. 108, at 3, Ex. V, at R-322).

On October 5, 2021, 11:33 AM, Mr. Costa sent a message to Barry James that stated, in part: “I am the one you should communicate with during this project for any delays, or days when your crew isn’t going to be on site.” (Tr. 436; Ex. 108, at 2, Ex. V, at R-321).

On October 5, 2021, 11:45 AM, Barry James

foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mike Costa that stated:

OK, my apologies. So we plan on starting tomorrow about 8 o’clock. We will have someone on site around seven and the rest of the crew will show up around 730. We know that we cannot start making any noise until eight. We will have 12 to 14 guys there with four vehicles and will coordinate with you as far as closing and reopening entries or other egress issues. Our contact that will be on site the entire time is Jason Vaughn. He is a tall fellow with a beard and usually has a blue hoodie. Only your office number is on your email, is that the best way to get hold of you or do you have a cell phone to communicate via text? (Tr. 323, 339-40; Ex. 108, at 1).

J. Jason Vaughn was Mr. Billcliff's on-site Supervisor at the Devens Project.

One picture taken by CO Bussell on October 7, 2021 of Mr. Bonicenha's cell phone showed an 11:14 AM [no date identified] message from Mr. Billcliff from 978-904-1254 to Mr. Bonicenha that stated: "I'm going to have the site manager, Jason, give you a call to set up a big job. He will be there for the entire job and get you anything that you need."⁷⁰ (Tr. 502-03, 507-09, 1525-26, 1665-68; Ex. 128, at 2-4).

When Mr. Bonicenha visited the job site for about three to four hours a day, he spoke with Mr. Vaughn, who he understood was Mr. Billcliff's supervisor at the job site.⁷¹ Mr. Bonicenha testified that "Jason used to tell me all the time I [Mr. Vaughn] am going to take care of all of these guys [L&A workers] and all of the jobs for you [Bonicenha] because I [Bonicenha] have another job going – going at the same time. He [Vaughn] said I [Vaughn] take care of those guys and their job is going well." Mr. Bonicenha testified that Mr. Vaughn's job at the job site was to make it safe for the workers; but that he [Vaughn] did "nothing" to do so.⁷² Mr. Bonicenha testified that he normally stayed at his worksites and ensured that his workers wore harnesses; but on the Devens Project he was free to be present at his other jobs because Mr. Vaughn was the supervisor at the Devens Project job site.⁷³ (Tr. 618). He said that he called Mr. Vaughn "a couple of times in the day" to check on the job and Mr. Vaughn said everything is good. (Tr. 627). He said that Mr. Vaughn told him that he

⁷⁰ CO Bussell testified that OSHA traced back the messages received by Mr. Bonicenha at Exhibit 128 to Mr. Billcliff. (Tr. 1726; Ex. 128).

⁷¹ Mr. Bonicenha said that he met only Messrs. Billcliff and Vaughn at the job site. He said that he met Mr. Billcliff twice at the job site including once a week before L&A started the roofing job where Mr. Billcliff showed him the scope of the roofing project before the materials arrived at the job site, and a second time where Mr. Billcliff reviewed the "numbers" the following week. (Tr. 501, 610-11). Mr. Bonicenha said that Mr. Billcliff never came to the job site to check on the status of the Devens Project. (Tr. 519).

⁷² Mr. Bonicenha testified that Mr. Vaughn "confessed to me [Bonicenha] he [Vaughn] don't know nothing about the construction." (Tr. 522).

⁷³ At the trial, Mr. Vaughn testified that Mr. Bonicenha was present at the job site "a good majority" of the time; "Eighty, 90 per cent. I don't know." (Tr. 734-35). But, at his February 9, 2023 deposition, Mr. Vaughn said Mr. Bonicenha "was never there", and that he was not there much of the Devens Project. (Tr. 736-37).

told Bonicenha's workers to wear their harnesses. (Tr. 588). He said that Mr. Vaughn told him that he worked for his friend, Mr. Billcliff, and was to be paid around \$800 per week.⁷⁴ (Tr. 498-99, 508, 518-22, 627-28).

Near the end of the Devens Project, Mr. Bonicenha asked "Mike" [in reality Mr. Billcliff] and/or Mr. Vaughn for some more materials, including two boxes of nails and shingles. He said that Mr. Billcliff provided some shingles,⁷⁵ and he [Bonicenha] bought some of the materials, nails and ridge vent, to get the job completed.⁷⁶ He testified that Mr. Billcliff [who was referring to himself as "Mike"] told him that if he saved the receipt, he [Billcliff] was going to pay him at the end of the job. (Tr. 499-500, 520, 636-38, 761-62, 901-08). Mr. Bonicenha testified that he and Mr. Billcliff agreed that the price for L&A's roofing work was \$47,850. He said that the messages at Exhibit 128 constituted the whole agreement between Mr. Billcliff and L&A. (Tr. 508-09; Ex. 128).

During the first day of the job; *i.e.* October 6, 2021, Mr. Byrne testified he first met Jason Vaughn and Mr. Vaughn told him that he "was supervising the job" "for Merrimack Roofing."⁷⁷ (Tr. 84-85, 100, 208). Mr. Byrne further testified that he did not really want to talk with Mr. Vaughn anymore because it was his understanding that Mr. Vaughn was not going to go up onto the roof

⁷⁴ At trial, Mr. Vaughn testified that he was paid "under 500 bucks" for "private phone calls" that he "just did something [make the phone calls] to kill time and did them there [at the job site]." (Tr. 968-73). When asked at his February 9, 2023 deposition, Mr. Vaughn admitted at trial saying then that he did not know or did not recall whether the phone calls that he made to Mr. Billcliff were about: 1) the work happening at the hotel, 2) whether the workers were wearing harnesses, 3) the use of ladders, 4) purchasing materials, 5) scheduling, 6) subcontracting, and/or 7) OSHA coming to the job site. (Tr. 970-71). The Court finds Mr. Vaughn's testimony regarding his sweeping characterization that the phone calls that he made at the job site were "private phone calls" to be incredulous.

⁷⁵ At trial, Mr. Vaughn said that Mr. Bonicenha would sometimes ask him for things that he needed for the job. (Tr. 794). Mr. Vaughn confirmed that Mr. Bonicenha indicated that he needed more shingles to complete the job and he [Vaughn] decided where to put the shingles at the job site when they were delivered. He said that Mr. Billcliff handled the procurement of the shingles. (Tr. 738-39, 761-63, 794, 901-08). Mr. Vaughn said that there were two or three deliveries throughout the Devens Project and that he told Mr. Billcliff when each arrived at the job site. (Tr. 764).

⁷⁶ Mr. Vaughn also testified at trial that he [Vaughn] bought some roofing nails from Home Depot for the Devens Project. (Tr. 761-62, 899-900).

⁷⁷ At trial, Respondent objected to the question that solicited this answer based upon hearsay. The Court finds that the answer is admissible as an exclusion from hearsay under Federal Rule of Evidence 801(d)(2). (Tr. 85-86).

because he was afraid of roofs.⁷⁸ (Tr. 84-86, 175-76, 792-93). During the course of the job, Mr. Byrne said that he gave some instructions about the job to Mr. Vaughn. As examples, he said he told Mr. Vaughn to: 1) remove a ladder that barely made it up to the roof,⁷⁹ 2) clean up, and remove nails at, the Devens Project's parking lot, and 3) remove plastic paper and shingles from trees located in front of the building.⁸⁰ (Tr. 86-87, 175, 177, 180, 728-29, 734). Mr. Mehlmann also testified that Mr. Vaughn was "perfectly fine" with being told by him "to make sure the parking lot's cleared, what time they were starting as to not interrupt, you know, our guests that were staying at the hotel, making sure what time they'd be done at night...."⁸¹ (Tr. 207-08, 729-30). Mr. Byrne stated that Mr. Vaughn "sat in his car for the whole project, mostly. He just – moved his car from side to side. He would get out and walk around."⁸² (Tr. 87-88, 739). Mr. Mehlmann also testified that Mr. Vaughn "was sitting in his car or just watching them work really." (Tr. 207). Mr. Byrne saw Mr. Vaughn try to communicate with the workers using sign language since the workers did not

⁷⁸ Mr. Byrne testified that he told Mr. Mehlmann that he was "very concerned" that Mr. Vaughn was supervising the job because he was not a roofer and was afraid to go up onto the roof. While waiting for Mr. Mehlmann in the parking lot and before OSHA arrived at the job site, Mr. Byrne testified that he saw workers on the roof stripping it and shingling without wearing any fall protection. Mr. Byrne then introduced Mr. Mehlmann to Mr. Vaughn who confirmed that he was not a roofer and was afraid to go up onto the roof. (Tr. 89-91, 109, 115-16, 197-98, 208; Ex. 129, at DOL000324[p. 3], DOL000334[p. 12]). Mr. Mehlmann said that Mr. Vaughn "was the supervisor or part of Merrimack Valley, who was our point of contact for on-site." He said that Mr. Vaughn told him that he worked for Merrimack Valley. (Tr. 206, 209). Mr. Vaughn told Mr. Mehlmann that his role at the job site was to make sure that the workers got "their job done." (Tr. 208). Mr. Mehlmann testified that he saw workers on the roof working without wearing any fall protection. (Tr. 206, 262). Mr. Billcliff testified near the end of the trial that "everyone that's testified has said they all know that's not true" that nobody on the roof was wearing a harness. (Tr. 2235). The Court finds that there is no evidence that anyone working on the roof, before CO Bussell informed Mr. Vaughn of his presence on October 7, 2021, was wearing a harness and properly tied off.

⁷⁹ Mr. Byrne testified that he told Mr. Vaughn that the presence of ladders was "very serious", and Mr. Vaughn told him that "I'll make sure that they're taken down tomorrow." (Tr. 177-78). At trial, Mr. Vaughn confirmed that a hotel employee told him on his first day at the job site to ensure that all ladders were not standing against the hotel at the end of each day. He said he called Mr. Billcliff about this and after that "the ladders were never left up at the end of the night." (Tr. 731-32).

⁸⁰ Mr. Byrne testified that to the best of his knowledge Mr. Vaughn complied and also took care of the paper in the trees and the nails in the parking lot. (Tr. 177). At the trial, Mr. Vaughn confirmed that he made these things happen. (Tr. 728-29).

⁸¹ At the trial, Mr. Vaughn confirmed that hotel employees told him to make sure work did not start before a certain time and that he [Vaughn] told Mr. Bonicenna that his workers could not start work before either 7:00 or 8:00 a.m. (Tr. 729-30).

⁸² Mr. Vaughn confirmed this during his trial testimony. (Tr. 739).

speak English.⁸³ Mr. Byrne testified that Mr. Vaughn “was incapable of supervising the job, a roofing job of that scope. He was definitely incapable of it.” (Tr. 178-79). He also said that the roofers, who were part of Mr. Bonicenha’s crew at the job site, “don’t know how to do roofing.” (Tr. 178-79, 183-84). Mr. Byrne said that Mr. Bonicenha told him that he was subcontracted to Mr. Billcliff, and it was Mr. Byrne’s understanding that Mr. Bonicenha was a partner with another gentleman. (Tr. 184-86). Mr. Byrne testified that before OSHA arrived at the job site, he saw more than one person “riding up and down the shingle lift, and they were walking up the other one [ladder] that could barely make it to the roof.”⁸⁴ (Tr. 186, 196-97). He said the ladder “basically made it to the gutter.” (Tr. 186).

K. OSHA’s October 7, 2021 Inspection at the Devens Project Job Site

On October 6, 2021, OSHA received a complaint of employees working on a roof with no fall protection. (Tr. 1488). On October 7, 2021, AAD Joe LeRose assigned the OSHA inspection to CO Bussell.⁸⁵ (Tr. 1488). CO Bussell observed safety hazards at the job site that were in plain view of Mr. Vaughn, including workers working in a hoist area at a height above 6 feet without adequate fall protection, workers working on a steep roof at a height above 6 feet without adequate fall protection, workers not wearing protective hard hats where required, and ladders not extended at least three feet above the point at which the ladder contacted the building. (Tr. 1489-1503, 1508-

⁸³ Mr. Vaughn confirmed this at trial. (Tr. 733-34). He also said that “[t]here was a communication barrier ... -- Culture barrier.” He said “[t]hese people [the workers] seemed to abide by the rules for a couple of hours or whatever” (Tr. 773-74, 933).

⁸⁴ Mr. Billcliff testified that he did not believe a lift is “able to bring a person up to the top, physically.” (Tr. 2217).

⁸⁵ CO Bussell has since been promoted to AAD at either the Andover or North Boston Area Office, Andover, Massachusetts. CO Bussell will generally be referred to as CO Bussell herein since that was the position that he held on October 7, 2021. (Tr. 1485). From 1999 until 2009, he served as a civil engineering technician for the U.S. Air Force. He was a construction inspector and project manager performing duties that included inspecting for job safety in accordance with OSHA and the Army Corps of Engineers Engineering Manual for all aspects of job site safety. He has a degree in civil engineering technology or construction technology from the Air Force Community College. (Tr. 1486-87). He has conducted well over 200 OSHA inspections as a CO and has overseen well over 200 OSHA inspections as an AAD. He said at least 50 percent of these inspections related to fall hazards. (Tr. 1487-88).

09; Ex. 129). CO Bussell saw five employees working on the roof without any fall protection. He also saw employees on the ground working in a hoisting area. One employee did not have any personal protective equipment (PPE) or a hard hat on within that hoisting area.⁸⁶ (Tr. 1489-90). He also saw employees using a ladder to access, and egress from, the roof. (Tr. 1490). He took many photographs at the job site on October 7, 2021 that he testified accurately reflected the conditions at the Devens SpringHill Suites hotel. (Tr. 585-86, 922, 1491-93; Ex. 129). CO Bussell described the job site as a large three-story hotel, several hundred yards long, with a roof greater than 30 feet in height. (Tr. 1493).

CO Bussell testified that the photographs at Exhibit 129, at 26-28, show Jason Vaughn walking around the job site observing the workers as they worked. CO Bussell perceived this man to be the person in charge of the job site and learned that Mr. Vaughn was the site manager for Merrimack Valley Roofing. (Tr. 586, 1503-04, 1506; Ex. 129, at 26, 28). He performed an opening conference and opened an inspection with Mr. Vaughn.⁸⁷ (Tr. 1504-05). Mr. Vaughn told the CO that he was there to oversee the Devens Project, and he had been there for two days. (Tr. 1506, 1511). CO Bussell testified that Mr. Vaughn told him that he had “zero” roofing experience. (Tr. 2194-95). CO Bussell testified that workers at the job site told him that Mr. Vaughn was responsible for telling them when to start and stop their day. (Tr. 2198). He also said that no worker at the job site told him that Mr. Billcliff trained them personally. (Tr. 2198).

CO Bussell told Mr. Vaughn that the workers on the roof were not protected from falls and asked him to remove the employees from the hazard, which he did. (Tr. 1505). Mr. Vaughn called

⁸⁶ In its Answers to Amended Complaint, Respondent admitted “an employee moving into position did not properly retrieve his hard hat in time for the [OSHA] inspection.” It also admitted that a “female employee took her hard hat off when Jason Vaughn went to the bathroom” and that “[s]he kept it off while in the vicinity of the hoist.” (Answers to Amended Complaint, at 6).

⁸⁷ At trial, Mr. Vaughn said that he did not think that OSHA is “out for safety. I think they’re out for money. That’s it.” (Tr. 923). He said at trial, “in my opinion I think this whole thing is obnoxious”, “[t]his to me is absurd” and “[i]t’s insane. It’s a total waste of money by them.” (Tr. 930, 932).

his supervisor, Mr. Billcliff, so that he could provide the CO with a phone number for the business that he worked for.⁸⁸ He told the CO that if he had any issues with changes or the quality of the work that he would call Mr. Billcliff. (Tr. 1506-07, 1511). Mr. Vaughn asked the CO if he would talk directly to Mr. Billcliff, which he did after Mr. Vaughn handed him his phone. The CO saw “Barry” on Mr. Vaughn’s cell phone’s screen. CO Bussell told Mr. Billcliff who he was, and that he was there to open an OSHA inspection.⁸⁹ Mr. Billcliff provided a phone number for the company that ended with 1860. Mr. Billcliff told the CO that he worked for Merrimack Valley Roofing, but that Merrimack Valley Roofing was not doing the job.⁹⁰ He said that the job was being done by Bay State Exteriors and Mike LaChance and gave the CO the phone number ending in 1254 to reach Mr. LaChance.⁹¹ Mr. Billcliff told the CO that he was not the owner of Merrimack Valley Roofing, which he said was owned by John Wolfe, who had a phone number ending in 1860.⁹² Mr. Billcliff

⁸⁸ Mr. Vaughn confirmed that he called his boss, Mr. Billcliff, during his trial testimony. (Tr. 744-46). Mr. Billcliff testified that he normally did not work on job sites during the past five years. (Tr. 2276).

⁸⁹ During the trial, Mr. Billcliff denied that he spoke with CO Bussell, while the CO was using Mr. Vaughn’s cell phone, on October 7, 2021. (Tr. 1951-52). The Court finds that Mr. Billcliff’s denial is without any basis and not credible.

⁹⁰ CO Bussell testified that there were at least three to four other OSHA inspections of Merrimack Valley Roofing; many of which were later dropped by OSHA. (Tr. 1663-64).

⁹¹ CO Bussell was unable to verify that Bay State Exteriors ever had employees working at the job site or that a Mike LaChance ever worked for it. (Tr. 1512). The Court finds that Mr. Billcliff’s October 7, 2021 statements to CO Bussell that Merrimack Valley Roofing was not doing the job and that the job was being done instead by Bay State Exteriors and Mike LaChance were false. The Court finds that Mr. Billcliff was doing the Devens Project Roofing job individually and/or using d/b/a names identified in the case caption, including Merrimack Valley Roofing.

⁹² CO Bussell was unable to make contact with John Wolfe after “exhaustive”, repeated attempts to do so at the telephone number ending with 1860 and at a condominium address where Mr. Billcliff and Merrimack Valley Roofing had done eight roofing jobs that Mr. Billcliff later gave to the Complainant. The property management company that managed the condominium complex told the CO that he had dealt directly with Mr. Billcliff on these jobs and that no John Wolfe lived there. (Tr. 1513-15). CO Bussell testified that he also tried to contact JohnWolfe at cell phone number 603-331-5351 that Mr. Billcliff later gave to Complainant’s counsel and the person who answered the call appeared to be trying to disguise his voice. The CO said that cell phone had been purchased in December 2021 and was registered to a John Wolfe at 496 “Maine” Street, Sandown, New Hampshire. That is Mr. Billcliff’s address except with a different spelling of Main Street. (Tr. 1641-42, 1653; Ex. 156, at 17). TracFone Wireless (TracFone) is a prepaid cell phone company. TracFone’s Subpoena Compliance Manager, Winston Chambers, testified that TracFone’s subscriber information records for 603-331-5351 showed that the credit card holder for the purchase of the phone with number 603-331-5351 that occurred on December 9, 2022 was John Wolfe, 496 Maine Street, Sandown, New Hampshire [03873, email: wolfjohnm@aol.com]. He said that there were no TracFone records that showed another person, or another address associated with 603-331-5351 from December 20, 2019 through January 6, 2023 (Tr. 480-81, 487; Ex. 156, at 17). Mr. Chambers said that TracFone has “lots of customers that purchase” their phones to avoid being located. (Tr. 492-93). CO Bussell testified that he perceived that the person trying to disguise his voice was Mr. Billcliff. (Tr. 1515-1522, 1641-42). Mr. Billcliff denied that he pretended to be John Wolfe during that call. (Tr. 1963-64). Although

testified that “a lot of times I’ll call him [John Wolfe] at” 978-866-1860 “three or four times in a day.” He also testified that the email address for John Wolfe shown on his phone is “John@Merrimack Valley, the WolfJohn”. (Tr. 2253-54). Mr. Billcliff testified that he made John Wolfe aware of this case and Mr. Wolfe “said he was going to take care of it.” (Tr. 2255). Mr. Billcliff testified that “[t]here’s still questionability about his [John Wolfe’s] full name.”⁹³ (Tr. 704, 1931, 2170). CO Bussell said that Mr. Billcliff gave him Mr. Wolfe’s email address and told him Mr. Wolfe lived at a condominium with over 80 units.⁹⁴ (Tr. 2170). During one of his interviews, Mr. Vaughn told CO Bussell that he had never heard of, or met, John Wolfe.⁹⁵ (Tr. 745, 1506-07, 2195-97). CO Bussell testified that Mr. Vaughn told him that he was speaking to Mr. Billcliff on October 7, 2021. Mr. Vaughn testified that CO Bussell and Mr. Billcliff talked for about 45 minutes or so on October 7, 2021. CO Bussell testified that the only place he got the name “LaChance” was from Mr. Billcliff during his discussion conducted on Mr. Vaughn’s cell phone that showed “Barry” on October 7, 2021.⁹⁶ (Tr. 747, 1723, 1827-28, 1837). The Court finds that Mr. Billcliff’s October

given the opportunity to call John Wolfe to testify and make an offer of proof at the trial, Respondent never presented John Wolfe at the trial. (Tr. 1520-21, 2061).

⁹³ CO Bussell testified that this phone number, 978-866-1860, belonged to and was registered to Mr. Billcliff [redacted] at 496 Main Street, Sandown, New Hampshire. (Tr. 1530-31, 1541-42, 1613, 1623-24, 1640, 1652-53). Verizon Wireless employee Melissa L. Sandoval also testified that Verizon Wireless’ records show that phone number (978) 866-1860 was registered to Barry Billcliff and he was the only name associated with that phone number from December 20, 2019 through December 21, 2022. She also said that he is the account holder. (Tr. 978-81, 1006; Ex. 158, at 14, 29, 45). Mr. Billcliff testified that he did not purchase or register a phone ending in “1860”. (Tr. 2225-26, 2278). The Court finds Mr. Billcliff’s testimony that phone number (978) 866-1860 was not registered to him to be incredulous and, instead, credits the testimony of Ms. Sandoval.

⁹⁴ Mr. Billcliff did not give CO Bussell the unit number where Mr. Wolfe lived. (Tr. 2171). CO Bussell testified that AOL/Yahoo records showed that the account recovery number for email address: WolfeJohnM@aol.com was Mr. Billcliff’s personal cell phone number. (Tr. 1613, 1652).

⁹⁵ At trial, Mr. Vaughn also testified that he saw “John Wolf” very briefly at the job site on the first day of the job. He said that he had a very brief conversation with John Wolf that he does not remember. He said, “I don’t remember the conversation to be honest with you.” He said that he only knew it to be John Wolf now at trial. (Tr. 917-18). The Court finds Mr. Vaughn’s trial testimony that he saw and spoke with John Wolf at the job site on October 6, 2021 to be incredulous.

⁹⁶ CO Bussell called “Mike LaChance” at telephone number 978-904-1254 on multiple occasions and left a message. No one answered his calls. (Tr. 1639, 1803-04). CO Bussell testified that subpoenas confirmed that Mr. Billcliff owned that telephone number and that it was registered to “Barry James” at 496 “Maine” Street, Sandown, New Hampshire. (Tr. 1639-40, 1653, 1804). CO Bussell also testified that Mr. Bonicenha told him that he had talked to Barry at that number. (Tr. 1639). The CO testified that there was no evidence that a person named Mike LaChance went to the job

7, 2021 statement to CO Bussell that Mr. Wolfe owned Merrimack Valley Roofing was false. (Tr. 745-46, 798-800, 1507, 1511-13).

CO Bussell determined that Mr. Vaughn was not competent to recognize and address any safety hazards or perform regular job site inspections because he did not know why the roofers were not tied off, at what height they were required to be tied off, or how far the ladder needed to be above the roof's edge.⁹⁷ Mr. Vaughn had not received any OSHA fall protection training, and told the CO that he did not "know s _ _ _ about construction." (Tr. 782-83, 922, 1508-11). CO Bussell found that there was no safety plan for the work site.⁹⁸ (Tr. 1508-09, 1526). He also learned that the employees at the job site were not trained in safety. Mr. Bonicenha told the CO that his employees had not been trained.⁹⁹ (Tr. 1509, 1526). The CO saw that, although there were a couple of harnesses in L&A's van, there were not enough harnesses for all of the employees up on the roof. He also saw that there were no hard hats¹⁰⁰ at the job site. (Tr. 1510, 1526). CO Bussell testified

site. (Tr. 1522). The Court finds that Mike LaChance was a fictional character made up by Mr. Billcliff. Mr. Billcliff testified that the phone ending in 1254 was not registered to him, but admitted that "it's possibly, vaguely linked to my home address, or to a name of - I know somebody else named Barry James that I'm associated with, that other people in the company are associated with." (Tr. 2278). Mr. Chambers testified that the name on the credit card that was used to purchase the TracFone with telephone number 978-904-1254 was Barry James, 496 Main Street, Sandown, New Hampshire 03873 on August 11, 2021. He also said that TracFone had no records that showed any other purchase for a phone with phone number 978-904-1254 from December 20, 2019 through January 6, 2023. (Tr. 479; Ex. 156, at 16). Mr. Billcliff testified that he believed that a credit card exists that says Barry James on it that "I don't have that links to an account that's only used for company stuff." He further said that "I don't own that card, I don't have that card, it's not a card that I have or use." (Tr. 2225).

⁹⁷ Mr. Vaughn testified that he did not have a Massachusetts construction supervisor license. (Tr. 788). He said that he thought that the job site was safe until CO Bussell informed him on October 7, 2021 that it was not. (Tr. 948).

⁹⁸ Mr. Billcliff testified that he made "them" aware at some point of "Merrimack Valley's Safety plan." But no written safety plan is in the record. (Tr. 2316-17).

⁹⁹ Mr. Bonicenha testified that he never had a conversation with Mr. Billcliff about ladder safety or whether L&A employees had received any safety training. He also testified that he never had a conversation with Mr. Vaughn about ladder safety, whether L&A employees had received any safety training, or fall protection. (Tr. 517-18). Mr. Bonicenha testified that some of his employees do not know how to set up a ladder. He also said that he did not show some of his workers how to wear hard hats. (Tr. 625-26, 675). Mr. Bonicenha testified that he sometimes does not have time to train his workers, especially because of worker turnover. He said he did not talk with his employees, other than "Avon" - a worker who has worked for him off and on for about three to four years, about safety protocols. (Tr. 619-23). He said that he and Messrs. Vaughn and Avon were responsible for setting up a ladder correctly and ensuring that the workers wore hard hats and harnesses. (Tr. 625-26).

¹⁰⁰ Mr. Billcliff testified that hard hats are "a real pain in the butt to be able to size." (Tr. 2218).

that there was no evidence that showed that Mr. Vaughn told the L&A workers at the job site to wear fall protection or hard hats before the CO arrived.¹⁰¹ He also said that there was no evidence to show that Mr. Vaughn did anything to ensure that the job site was safe for the workers who were there. (Tr. 1527-28).

When Mr. Bonicenha showed up at the job site, CO Bussell opened a second inspection of L&A, who had employees on the roof and ladder. He presented his credentials to him and went through all of the hazards that the CO had observed from his camera, and went over the ways to mitigate those hazards. He also interviewed Mr. Bonicenha and workers at the job site. (Tr. 520, 586-88, 773, 1524-28; Ex. 129). CO Bussell testified that he took pictures of Mr. Bonicenha's cell phone during his October 7, 2021 inspection.¹⁰² CO Bussell asked Mr. Bonicenha how he knew about the Devens Project and Mr. Bonicenha told him that he "received text messages from Barry and then he showed me the chain." (Tr. 1675).

CO Bussell testified that Wolfjohnm@aol.com was "the email address for that employer [L&A] to email documents to." (Tr. 1665-66, 1752; Ex. 128, at 1). CO Bussell testified the first part of the September 16, 2021 message from Mr. Billcliff to Mr. Bonicenha was inaccurate because: 1) Bay State Exteriors was not involved with the Devens Project, 2) the CO believed that Mr. Billcliff never intended to pay L&A, 3) the 484 Lowell Street address was fictitious, and 4) the Wolfjohnm@aol.com email address was actually tied to Mr. Billcliff. (Tr. 1722-23; Ex. 128). CO Bussell testified that Mr. Bonicenha thought he had a contract with Bay State Exteriors. (Tr. 1753).

CO Bussell testified that the messages between Messrs. Bonicenha and Billcliff at Exhibit 128 constituted the "contract" between L&A and Mr. Billcliff to do the work at the job site. (Tr.

¹⁰¹ Mr. Vaughn testified at trial that he did not wear a hard hat while he was at the job site unless he was really close to the building whereupon he took a hard hat from a L&A worker's truck. (Tr. 918).

¹⁰² Mr. Bonicenha testified that he showed CO Bussell the messages that he had received from Mr. Billcliff and all of Mr. Billcliff's companies regarding the project. (Tr. 502, 594).

1726; Ex. 128). CO Bussell testified that the four photographs that he took of Mr. Bonicenha's cell phone were taken in the context of identifying the employer and to prove the contract. (Tr. 1754-55). Mr. Billcliff testified at trial that he knew "nothing" about L&A before the Devens Project began. (Tr. 1984-85). The Court finds this statement to not be credible.

CO Bussell testified that OSHA issued a citation to L&A, co-owned by Mr. Bonicenha, assessing the same fines as Respondent, except for that relating to frequent regular inspections by a competent person.¹⁰³ He said L&A had zero OSHA history and was fined about \$25,000. (Tr. 1528, 1662-63, 1718, 1721; Ex. 128, at 4). CO Bussell testified that Mr. Bonicenha was not actively supervising his employees working at the job site on October 7, 2021. CO Bussell testified that October 7, 2021 was the second day of roofing work at the job site. (Tr. 1757). Mr. Bonicenha had not been at the job site on October 7, 2021 prior to the OSHA inspection. CO Bussell testified that Mr. Bonicenha told him later that day on October 7, 2021 that L&A was only providing labor at the job site and that the "quality control, the supervisor, all that at the site was being performed by Merrimack Valley Roofing."¹⁰⁴ He said that Mr. Vaughn managed the project when he [Bonicenha] was not there. (Tr. 593, 1734-35, 1522, 1525-27).

CO Bussell said that "Jason was there to oversee the job site" and Mr. Vaughn was "identified several places as being manager of the job site." (Tr. 1742). CO Bussell testified that Mr. Vaughn "told the hotel manager he was there to supervise the site. He [Vaughn] told me [CO Bussell] he was there to oversee the site, grab materials and water."¹⁰⁵ (Tr. 1743, 1827). CO Bussell also testified that there were messages that stated Mr. Vaughn was the manager or supervisor and that there were emails to Mike Costa that said that Mr. Vaughn was either the supervisor or

¹⁰³ L&A was located at 126 Nichols Street, Everett [no state identified]. (Ex. 128, at 4).

¹⁰⁴ Mr. Billcliff testified that Mr. Bonicenha, and not himself, was in control of the job site. (Tr. 2221-22, 2279).

¹⁰⁵ Mr. Billcliff testified that, to his knowledge, Mr. Vaughn did not purchase any materials for the job site. (Tr. 2219).

manager. (Tr. 1743). He also said that Mr. Billcliff sent a message to Mr. Bonicenha that identified Mr. Vaughn as the site manager.¹⁰⁶ (Tr. 1743-44; Ex. 128, at 2). CO Bussell also testified that Mr. Vaughn introduced himself to Jonathan Mehlmann as the site supervisor and told him that if there were any issues with the job he should come directly to him. (Tr. 1744). After CO Bussell left the job site on October 7, 2021, Mr. Vaughn testified that he informed the hotel manager, Jonathan [Mehlmann], that there were harness, hard hat and ladder infractions. (Tr. 940).

CO Bussell testified that Mr. Vaughn told him that he had been in contact with Mr. Billcliff about issues with the job, including trying to obtain Mr. Billcliff's approval for a possible change order because Mr. Billcliff had to approve all change orders. (Tr. 791, 1747). CO Bussell testified that he felt that the job site:

was Mr. Vaughn's site. He dictated the quality. ... he purchased the materials. He was there to do the quality. He was the only one that was authorized to interact with the property owner. He was responsible, like I said, for procuring additional materials. It really appeared to me that Mr. Vaughn was the site manager or in control of that site.... I asked Mr. Bonicenha are you going to be staying here this entire time, and he said no, and I said, well then you need to understand – have an understanding between you and Mr. Vaughn that, like, the frequent regular inspections need to be performed by a competent person. You need to have an inspection program. You need to be out there observing these employees to make sure they're being tied off. As a manager, that knowledge is imputed back to the company owner, and I explained some of that to them, to Mr. Bonicenha for sure. (Tr. 1527, 1759-60).

¹⁰⁶ CO Bussell testified that Mr. Vaughn was the only Jason at the job site. (Tr. 1744). At trial, Mr. Vaughn testified that he spoke with someone, whose name he did not know, at Merrimack Valley about the project schedule and identified that man at trial as John Wolf. He said that he assumed that he was Mr. Billcliff's boss and the owner of Merrimack Valley Roofing. He admitted that he said that he did not remember the name of the man he spoke with when deposed on February 9, 2023. (Tr. 823-26, 893; Ex. 128, at 2). Mr. Vaughn testified that he spoke with "John" briefly to coordinate things. He said he met John in brief passing at the shop and once he spoke with "John" when "John" called him by phone while he [Vaughn] was at the Devens Project job site. (Tr. 703-04, 707). He also said that he was "not very good with names." (Tr. 706-07). Mr. Vaughn testified that he later learned from the CO or Government counsel that "John's" last name was "Wolf". (Tr. 704). But, on March 8, 2022, Mr. Vaughn told CO Bussell that he did not correspond with anyone other than Mr. Billcliff from Merrimack Valley Roofing during his time working on the Devens Project. (Tr. 706). Mr. Vaughn testified that he did not know how tall or how old Mr. Wolf was, and that he did not look or sound like Mr. Billcliff. (Tr. 827-28). The Court puts no weight upon Mr. Vaughn's trial testimony that he spoke with a John Wolf about scheduling or anything else relating to the Devens Project.

CO Bussell testified that Mr. Vaughn gave him Mr. Billcliff's name when he first walked onto the job site on October 7, 2021. (Tr. 1675). Mr. Vaughn told him that he [Vaughn] was the site supervisor. (Tr. 1676). The SpringHill Suites hotel manager, Jonathan Mehlmann, also told CO Bussell that Mr. Vaughn had introduced himself as the "Site manager, site supervisor" and told him to contact him if there were any issues.¹⁰⁷ Mr. Vaughn also told Mr. Mehlmann that the proposal for the job was from Merrimack Valley Roofing. (Tr. 1522-23, 1676). Mr. Byrne also testified that he told CO Bussell when the CO came to the job site that Mr. Vaughn was the supervisor and running the job. (Tr. 174-75).

CO Bussell testified that there were five workers atop the roof and four workers on the ground. These nine workers were all L&A employees. (Tr. 1525, 1826; Ex. 129, at 3, 6-12, 16-18, 20-21, 23). CO Bussell testified that the photograph at Exhibit 129, at 18, shows an employee wearing a bright yellow shirt with a hood right at the roof's edge without any fall protection or guardrails.¹⁰⁸ (Tr. 1500; Ex. 129, at 9, 16-18). CO Bussell testified that the photographs at Exhibit 129, at 3, 6-7, show that there were also no harnesses being worn by a second employee wearing a pale yellow shirt and hood.¹⁰⁹ He said that "employee has no harness, no rope, no lanyard, nothing connected to his person for fall protection." He said that the photograph at Exhibit 129, at 8, shows the same employee carrying a 50 to 70 pound roll of material on his shoulder while walking across a pitched roof that "really further increase[s] the likelihood of a fall..."¹¹⁰ He said the employee was

¹⁰⁷ Mr. Vaughn testified that he gave Mr. Mehlmann his phone number at the beginning of the Devens Project and told him to call him [Vaughn] if there were any questions. Mr. Vaughn said that he spoke with the Devens SpringHill Suites hotel manager throughout the Devens Project. (Tr. 728).

¹⁰⁸ At trial, Mr. Vaughn agreed that CO Bussell pointed out to him that workers on the roof were not wearing harnesses, and he could see what CO Bussell was referring to. (Tr. 751). He said that when the CO "saw them [the workers on the roof] "they [the harnesses] were off." (Tr. 926-27).

¹⁰⁹ Mr. Billcliff testified that harnesses are not easy to put on and take off. (Tr. 2215-16).

¹¹⁰ Mr. Bonicenha identified the worker in the photograph who was walking atop the 34 to 35 foot roof as being one of his employees. (Tr. 586-87; Ex. 129, at 8).

also not wearing a hard hat.¹¹¹ (Tr. 1494-95, 1822-23; Ex. 129, at 3, 6-8). CO Bussell testified that the photograph at Exhibit 129, at 11, shows a third employee, who is wearing a bright neon yellow shirt, “talking on his cell phone and traversing the roof without any fall protection.” Mr. Bonicenha agreed that the roofer was not wearing any fall protection. (Tr. 587, 1495; Ex. 129, at 1, 11). In its Answers to Amended Complaint, Respondent admitted “one employee removed his harness lanyard and did not re-install it in time [for the OSHA inspection].” (Answers to Amended Complaint, at 7). CO Bussell said that the photograph at Exhibit 129, at 12, shows a fourth employee, who is wearing a black shirt and baseball cap, removing the previous shingles while not wearing any fall protection. Mr. Bonicenha agreed that the roofer was one of his workers and that he was not wearing any fall protection.¹¹² (Tr. 587, 618, 1495; Ex. 129, at 12). The CO said that the photograph at Exhibit 129, at 23, shows a fifth employee, who is wearing a gray shirt and black hat, bringing materials around the roof with tripping hazards at his feet within feet of the roof’s edge while “not wearing any harness or other means of fall protection.” (Tr. 1495-96; Ex. 129, at 23). CO Bussell said that the same employee who was shown earlier kneeling atop the roof with a red-pad on his mid-back in the photograph at page 18, Exhibit 129, was also not wearing a harness at that time.¹¹³ (Tr. 587-88, 1497, 1762; Ex. 129, at 17-18, 23). CO Bussell further testified during cross examination that the person shown on the roof in the photograph at page 23, Exhibit 129, was “absolutely not wearing a harness.” (Tr. 1761-62; Ex. 129, at 23). CO Bussell also testified that harnesses “just weren’t being worn” by the workers at the job site. (Tr. 1781).

¹¹¹ At trial, Mr. Vaughn admitted that “one worker on the ground may not have had their hard hat on I know there was a hard hat infraction.... (Tr. 751). At trial, he also said that “a couple [of] people [were] not wearing a harness and a hard hat.” (Tr. 926).

¹¹² Mr. Bonicenha testified that before OSHA arrived at the job site on October 7, 2021, “maybe someone is not doing it safe,” *i.e.*, using harnesses and tying off, and wearing hard hats. (Tr. 684).

¹¹³ CO Bussell said that the person shown kneeling in the photograph at page 18, Exhibit 129 is the same person shown not wearing a harness later walking along the roof at page 23, Exhibit 129. (Tr. 1762; Ex. 129, at 18, 23). Mr. Bonicenha testified that he knew the two workers shown at the ladder in the photograph at Exhibit 129, at 17. (Tr. 587-88; Ex. 129, at 17-18).

CO Bussell testified that the photograph at page 22, Exhibit 129, shows that the laddervator was not affixed to the roof and there was nothing affixed to the edge of the roof that goes three feet above for the workers to grab onto. (Tr. 1763-64; Ex. 129, at 22). He further said that the photograph at Exhibit 129, at 20, shows that:

There's also no guardrails in and around that hoisting area, so as you're reaching off the roof's edge to then take materials off of that hoist, those guardrails would be there or that fall protection would be there to help prevent you from falling off the roof as you're off balance grabbing bundles of, you know, anywhere from 50 to 70 pounds of material from that and then trying to bring it up onto the roof, so – (Tr. 1497-1500; Ex. 129, at 20).

He said that he saw employees taking rolls of underlayment¹¹⁴ and ice and water shield¹¹⁵ off of the roof. (Tr. 1501-02; Ex. 129, at 22).

CO Bussell testified that the photographs at pages 20-21, Exhibit 129, show an employee coming down a ladder that's not three feet above the roof, so the employee has nothing to grab onto as he transitions from the roof around onto the ladder. (Tr. 1498-99, 1502, 1763-64, 1770-77; Ex. 129, at 20-21). CO Bussell said that “[t]he violation was to prove the ladder wasn't three feet above.” Mr. Bonicenha admitted that the ladder probably extended only one foot and a half beyond the roof surface. He identified “Flaco” as one of his workers who is shown using the ladder in the photograph at Exhibit 129, at 21. He also identified the worker [wearing a red vest] standing on the roof by the ladder to the left as being one of his workers. (Tr. 590, 682, 1773-74, 1780; Ex. 129, at 19-21). CO Bussell saw five employees using the ladder to come down from the roof. (Tr. 1499).

CO Bussell testified that when he left the job site following his inspection on October 7, 2021 there were no hazards because nobody was working on the roof, on ladders or within the hoisting zone. (Tr. 1741-42). He said he explained to Messrs. Vaughn and Bonicenha every hazard

¹¹⁴ Underlayment is a felt-type material that comes in rolls and goes on the roof below the shingles to add another layer of protection should the shingles leak. (Tr. 1501).

¹¹⁵ Ice and water shield is a mastic or asphalt type material that goes on the first three to six feet of the roof where ice dams may occur to provide a stronger barrier. (Tr. 1501).

and what they had to do to mitigate those hazards and if they did so the employees could go back to work.¹¹⁶ (Tr. 750-51, 923-24, 1522-23, 1742, 1745, 1758-59, 1801-02). Mr. Vaughn testified at trial that CO Bussell said to him: “put the harness – put harnesses on, the hard hats, the ropes, get all that done, adjust the height of the ladder to the three feet, and you’re good to go.” Mr. Vaughn said that he told the L&A workers to put their harnesses and hard hats on. He said, “in a way I feel responsible for this, but I don’t.” (Tr. 935-36).

Mr. Vaughn testified that when he first arrived at the job site, he “didn’t have the confidence to instruct” the workers to wear harnesses and hard hats. (Tr. 765, 810). Mr. Vaughn testified that after CO Bussell departed the job site on October 7, 2021, he [Vaughn] changed his role at the job site and he laid “down the law per se” and told the workers to wear hard hats and harnesses “at all times and essentially be more than what Leo [Bonicenha] was,....” He said he “was never letting that happen again, no way.” He also told the workers to make sure that the ladder extended at least three feet over the edge of the roof.¹¹⁷ He said that he “kept an eye on the hard hat, harness and ladder.” (Tr. 752-53, 756, 772). He said that he “was very militaristic in the way that I spoke and handled things ...”, or “I guess you could say” “more stern.” (Tr. 764-65, 890-91). He also said that he spoke with Mr. Billcliff about doing this. (Tr. 766). Mr. Vaughn testified that after CO Bussell came to the job site it was his [Vaughn’s] obligation to tell the workers to wear harnesses and hard hats. (Tr. 807-08).

¹¹⁶ CO Bussell testified that there were no hard hats available at the job site when he departed the job site on October 7, 2021. (Tr. 1744-45). CO Bussell testified that when he left the job site on October 7, 2021, he left the job site in the hands of both Messrs. Vaughn and Bonicenha since it was a multi-employer site. (Tr. 1759).

¹¹⁷ Mr. Vaughn testified at trial that before CO Bussell showed up at the job site on October 7, 2021 “he had no clue” about “the ladder situation.” He said, “I didn’t know the ladder thing was such a big deal.” (Tr. 774-75).

Mr. Billcliff testified at trial that during his January 12, 2023 deposition he said that he did not do anything to ensure that inspections of the project were performed by a competent person, or that he conducted any safety-related inspection of the job site. (Tr. 1986-89).

On about October 7, 2021, CO Bussell performed research that he used to prepare the “Summary Exhibit of Business Names Respondent Used in Connection with the Project” (Summary of Business Names) that appears at Exhibit 170. (Tr. 1872-73; Ex. 170). He said that he found that Merrimack Valley Roofing¹¹⁸, www.merrimackvalleyroofing.com, Merrimack Valley Roofing & Gutter,¹¹⁹ Merrimack Valley Roofing & Gutter, LLC, Billco Roofing,¹²⁰ Billco Roofing LLC, Merrimack Valley Roofing, Inc¹²¹, Merrimack Valley Roofing, Merr Valley R&G LLC, The Merrimack Valley Roofing Co, LLC, and Merrimack Valley Roofing LLC were not registered as Corporations in New Hampshire or Massachusetts as of October 7, 2021. (Tr. 1538-39, 1542, 1563-69, 1623; Ex. 170).

On October 19, 2021, 11:12 AM, Barry James foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mike Costa, Subject: Devens, that stated, in part: “For the most part, we should be complete with the roof by Wednesday, and back on Thursday to do the final inspections and any small items that came up on the punchlist.” (Tr. 327, 340-41; Ex. 153, at 2).

L. Mr. Billcliff sends Devens SpringHill Suites and Conference Center final Invoices seeking Payment for the roofing work done there.

¹¹⁸ Mr. Billcliff testified that Merrimack Valley Roofing “was always a valid LLC” and that he “traced it back to the ‘80s.” (Tr. 2241-42). The Court credits CO Bussell’s testimony and finds that Merrimack Valley Roofing was not registered as a corporation or LLC in New Hampshire or Massachusetts as of October 7, 2021. (Tr. 1564-65).

¹¹⁹ CO Bussell testified that “Merrimack Valley Roofing & Gutter is not a registered corporation or Inc.” (Tr. 1887).

¹²⁰ CO Bussell testified that Billco Roofing is a trade name owned and registered by Mr. Billcliff. It is not a corporation. (Tr. 1573-77, 1881-82; Ex. 170, at 2).

¹²¹ In Respondent’s December 6, 2022 Supplemental Response to the Secretary’s written discovery, Mr. Billcliff stated that he also checked the Secretary of State website and found that the name Merrimack Valley Roofing, Inc. did not exist on the Secretary of State website. (Tr. 2038).

On October 20, 2021, 9:44 PM, Barry James

foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mike Costa, Subject: Re: Devens, that stated, in part: “Good afternoon Mike, Thank you for inviting us out to handle this roof project[.] Please see your final invoice attached...” (Tr. 327; Ex. 153, at 1).

Mr. Costa testified that on about October 20, 2021, he received a purported “final invoice” # 264825 tied to proposal # 1012929, from Merrimack Valley Roofing LLC, calling for \$59,975.00 to be due and paid by October 20, 2021. The purported “final invoice” was sent to Mr. Costa from Barry from “Foreman05@MerrimackValleyRoofing@yahoo.com.” (Tr. 341; Ex. 153, at 3). Mr. Costa testified that this was not the final invoice because it reflected “an incorrect final amount.” (Tr. 341).

Mr. Costa testified that on about October 20, 2021, he received a final corrected invoice # 264825B tied to proposal# 1012929, from Merrimack Valley Roofing LLC, calling for \$45,714.00 to be due and paid by October 20, 2021. The final corrected invoice was sent to Mr. Costa from Barry from “Foreman05@MerrimackValleyRoofing@yahoo.com.” (Tr. 331, 341, 1538-39; Exs. 110, at 3, 190-B, at 3).

On October 21, 2021, Mr. Bonicenha testified that he received a message from 978-904-1254 from someone he thought was named “Mike”¹²² that stated: “Just so you know, we just got an email from Brett Bussell from OSHA. He needs me to go meet with him tomorrow morning in North Andover (sic) discuss the violations[.]” Mr. Bonicenha said that he never met “Mike.” (Tr. 596-97, 633; Ex. 130, at 1).

On October 22, 2021 at 6:06 PM, Mr. Billcliff sent a message to Mr. Bonicenha from phone number 978-904-1254 that stated:

¹²² The Court finds that someone allegedly named “Mike” that communicated with Mr. Bonicenha was actually Mr. Billcliff. (Tr. 597).

Where is a punch list for the hotel. We have a couple other issues some of the guys not listed on the workman's comp, the liability is for siding, not for roofing, and they want to assess us \$42,000 in fines call the violations. There (sic) are also very upset that the fire department reported that the guys were still not wearing harnesses and lanyards even after OSHA stop by. I [Billcliff] had to make the guys put on harnesses many times and Jason had to make the guys put on harnesses and follow OSHA guidelines over and over and over again. We need to see if the guys can go to an OSHA training course and then they will bring the fines down and abate some of them[.]

(Tr. 597-98; Ex. 130, at 4).

On October 22, 2021, at 6:13 PM, Mr. Bonicenha sent a message to Mr. Billcliff at 978-904-1254 that stated: "Look, I'll tell you something I also got a fine at work. Each one of you is at risk. Let's see what has to be done at work and you pay me[.]" (Tr. 598; Ex. 130, at 5). Mr. Bonicenha testified that his OSHA citation and fine that he received was for a lack of fall protection because his workers were not wearing harnesses on the roof. (Tr. 598).

On October 25, 2021, at 7:29 AM, Mr. Billcliff sent a message to Mr. Bonicenha from 978-904-1254 that stated:

They came back out on Wednesday, but there was nobody left on the roof because the project was pretty much done, there was only people cleaning up. But even those people were not wearing the right Footwear, guess, or hard hats for the construction site being that there was still a trust issues and debris on the ground and that was even more fine[.]
(Ex. 130, at 8).

Shortly thereafter at 7:36 AM, October 25, 2021, Mr. Bonicenha received a message from 978-904-1254 from Mr. Billcliff that stated:

Define everybody. New Management Company, the general contractor, the company that pull the permits, the company that bought the materials, the contractor, and the subcontractor. The GC [general contractor] pays the most by far because we are the ones that are responsible for the job. (Tr. 598-600; Ex. 130, at 11).

Mr. Bonicenha testified that the general contractor for the Devens Project was "Barry Billcliff." (Tr. 600).

Mr. Bonicenha testified at trial as follows:

Q. And what is your opinion as to Mr. Billcliff's truthfulness?

A. I have my opinion about Mr. Billcliff is a fake guy. He is a very liar to us you know? He lies all the time. That's my opinion.

(Tr. 603).

On November 3, 2021, Mr. Costa sent a message to Mr. Billcliff that stated:

I received the final invoice kicked back from out (sic) hotel mgmt ... company. Please see my notes below.

- 1) Final invoice has remainder amount of \$59,975. We supplied ½ down (\$59,800), shouldn't the remainder be the same?
- 2) Assuming the above is correct, can you please split them up again as we did for the deposit? Breakdown below.

Devens Commons Conference Center
31 Andrews Parkway
Deposit Amount: \$14,500
Devens Hospitality LLC
27 Andrews Parkway
Deposit Amount: \$45,300

I am waiting to hear back from them on anything that may have come up after last week's storm. Will let you know shortly.

Thanks again.

(Tr. 440; Ex. V, at R-328).

On November 12, 2021, the Devens SpringHill Suites issued a final payment to Merrimack Valley Roofing LLC in the amount of \$45,714 for the hotel portion of the work performed at the Devens Springhill Suites. This payment did not include payment for work performed at the adjacent Conference Center. (Tr. 209-12, 217-18, 333-34, 341; Exs. 110, at 4, 149, at 6). Mr. Costa said that he regrets hiring Mr. Billcliff to do the Devens Project. (Tr. 352).

CO Bussell testified that on November 16, 2021, 10:58 AM, Mr. Billcliff deposited check number 015777 into an account where Mr. Billcliff is the sole person authorized to deposit checks into that account at Merrimack Valley Credit Union. The check had an unidentifiable signature on behalf of Merrimack Valley Roofing appearing on the back of the check. Check number 015777, dated November 12, 2021, was drawn on Unibank, issued by Devens Hospitality LLC, 27

Newburyport, MA 01950, in the amount of \$45,714 to Merrimack Valley Roofing LLC, PO Box 1214, Newburyport, MA 01950.¹²³ (Tr. 1556-60, 1855, 1861-65, 2080-81; Ex. 155, at 11, 14 [Sealed], 107-08).

CO Bussell testified that he confirmed that the two checks at Exhibit 155, at 13-14 [sealed], were deposited at Merrimack Valley Credit Union in an account named “Marrimack” Valley Roofing/Barry Billcliff.¹²⁴ (Tr. 1553-54, 2118-19; Ex. 155, at 13-14 [sealed]). CO Bussell identified Mr. Billcliff in a photograph taken on November 16, 2021 at the Merrimack Valley Credit Union. (Tr. 1866-68; Ex. 108). During his March 8, 2022 interview with CO Bussell, Mr. Billcliff told him that he could not recall receiving or depositing checks that were payment for the Devens Project roofing job, or that he had been paid well over \$100,000 for the work at the job site. (Tr. 1551-52). At trial, Mr. Billcliff admitted saying during his January 12, 2023 deposition that he could not recall receiving any payment at all related to the Devens Project. (Tr. 2110). Vice President of Operations Lee also testified that both check numbers 015640 and 015777 were deposited into the account where Barry Billcliff, 496 Main Street, Sandown, New Hampshire 03873,

¹²³ The Merrimack Valley Credit Union’s Monthly November 2021 bank statement for The Marrimack Valley Roofing Co, LLC d/b/a CO Barry Billcliff, 496 Main Street, Sandown, NH 03873 account, shows a deposit of \$60,325 made on November 16, 2021. (Tr. 541-42; Ex. 155, at 231).

¹²⁴ At trial, Mr. Billcliff admitted that he opened a bank account for the “Marrimack Valley Roofing Company, or something similar to that”, where the two checks from the Devens Project were deposited. He also testified that he could not recall being an authorized signer for that account in September, October, and November 2021 and August 2022. He agreed that the bank statements for these months showed his name, and no other name, and his home address. (Tr. 2118-24; Ex. 155, at 37, 229, 323). Ms. Lee testified that her credit union verifies the identification of the person, including home address or phone number, who opens an account by using a government issued identification. (Tr. 558-59, 566). The Court finds that Mr. Billcliff was the only authorized signer for this bank account through August 2022. (Tr. 1444, 2120-24; Ex. 155, at 37, 229, 323). Mr. Billcliff testified that he agreed that he controlled the money in the account and \$2 million was deposited into the account in a two-and-a-half-year period and that “equaled the amount of money out.” He said that he did not know who prepared or filed federal or state tax returns related to the money in this account. (Tr. 1434-42, 2320-25; Ex. 169. At trial, Mr. Billcliff testified that on August 12, 2022 he withdrew \$12,000 in cash from the account and closed the account. (Tr. 2124-25; Ex. 155, at 511-13). He said “that the total amount in profit in that at the end was under \$12,000. All the money in was the money out. There was no profit. You don’t see me taking anything from that account. You don’t see me profiting off of that account. ...” (Tr. 2339). The Court gives little or no weight to Mr. Billcliff’s testimony in this regard. Ms. Lee testified that on August 12, 2022, Mr. Billcliff withdrew \$12,879.72 which was everything remaining in the Marrimack Valley Roofing Co. account and closed the account. She said the money was transferred to an account in the name of Barry Billcliff. (Tr. 542-46; Ex. 155 at 512).

tele: 978-884-6732, email: barry@merrimackvalleyroofing.com,¹²⁵ is the owner/signer on that account. (Tr. 532; Ex. 155, at 9, 11, 469-71).

Mr. Billcliff testified at trial that he “wouldn’t know” if he ever paid Mr. Bonicenha the more than \$47,000 he was owed in the fall of 2021 for work L&A did on the Devens Project. He said neither he nor Merrimack Valley Roofing was responsible for paying him. He said it was his understanding that Mike LaChance would have paid him. But, although he heard Mr. Bonicenha’s testimony in Court saying that he was not paid, Mr. Billcliff said that he had also heard that Merrimack Valley paid him. He said, “I don’t have any personal knowledge either way.” (Tr. 2327-29). Mr. Bonicenha testified that no one has paid L&A the \$47,000 that it is owed for the work that it did at the Devens Project in October 2021. He said that Mr. Billcliff owes him “\$47,000 and something.” (Tr. 594-95, 614).

M. The Devens SpringHill Suites requests Mr. Billcliff resolve leaks that Continue after Mr. Billcliff and L&A installed the new roof.

Mr. Byrne testified that after Respondent and L&A finished working at the job site there were “more leaks” than existed before the roof was redone. (Tr. 92-93). He said “I had 20 leaks before the roof got re-roofed and then I had a hundred leaks. It was a disaster. All I could do was put buckets underneath them, the leaks.” (Tr. 93). Mr. Byrne testified that Mr. Mehlmann contacted RA Ventures about the leaks. (Tr. 93). Mr. Costa testified that the SpringHill Suites hotel was still having issues with leaks, so he asked Barry to revisit those issues. On December 20, 2021, Mr. Costa sent a message to Mr. Billcliff and stated: “Barry I am told someone from our team at the

¹²⁵ The Limited Liability Company Authorization Resolution for the account, dated March 9, 2016, states: I, Barry Billcliff, certify that I am a Manager or Designated Member of the above named [The Merrimack Valley Roofing Co., LLC w/ DBA Andover Roofing] Limited Liability Company organized under the laws of New Hampshire, Federal Employer I.D Number ... engaged in business under the trade name of The Merrimack Valley Roofing Co., LLC. w/ DBA Andover roofing Signed “Barry Billcliff/manager” (Tr. 532-33, 885; Ex. 155, at 472-73). The Secretary’s position at trial was that Merrimack Valley Roofing and Gutter was not a registered corporation as of October 7, 2021. (Tr. 885).

Springhill Suites that there was a leak over the weekend. Can you have someone check it out?” (Ex. 154, at 2). Later in the day on December 20, 2021, Mr. Billcliff then replied by sending a message: “Sure, I can swing over there in a little bit, do you have any information as to around where it came in.” (Ex. 154, at 1-2).

On December 21, 2021, Mr. Costa sent a message to Mr. Billcliff that stated: “Not sure, the GM, Jon, pinged me. If you swing through, can you check in with him?” (Tr. 442-46, 468; Ex. V, at R-331).

On December 22, 2021, at 11:18 AM, Mr. Costa sent a message to Barry James that stated: “Barry can you let me know when you plan on swing over?” (Tr. 341-42, 354-55, 357; Ex. 154, at 1).

Mr. Byrne testified that the leaks continued, and Mr. Billcliff came out to the hotel to see some photographs Mr. Byrne had taken of the leaks.¹²⁶ Mr. Byrne said that he was not giving Mr. Billcliff the photographs because he already had them. Mr. Byrne testified that Mr. Billcliff was “yelling at me and screaming at me” in the hotel lobby.¹²⁷ Overhearing Mr. Billcliff’s yelling and screaming, Mr. Mehlmann came running over and told Mr. Billcliff to leave.¹²⁸ (Tr. 94-95, 150-52, 154-55, 228). Mr. Byrne testified that Mr. Billcliff had repeatedly failed to show up to do repairs of the roof. (Tr. 143-46). He said two men eventually went back up to the roof for about half an hour

¹²⁶ Mr. Billcliff testified that it was his understanding that there was “one small leak ... that was never part of the original contract anyway, and was fixed ...” (Tr. 2236, 2241). The Court credits Mr. Byrne’s testimony as to the extent of the leaks. The Court found Mr. Byrne’s testimony to be credible based upon observing his demeanor when testifying. He was candid, confident and recalled events convincingly.

¹²⁷ CO Bussell testified that Louis Byrne was very disgusted with the quality of Respondent’s work, Mr. Billcliff coming back to the SpringHill Suites hotel yelling, hooting, hollering and screaming at him, and that he hired Mr. Billcliff to perform roof repairs and they were still having leaks upon leaks, more leaks than they had before the roof was repaired. (Tr. 1798-99).

¹²⁸ Mr. Billcliff testified that Mr. Mehlmann mistakenly testified that it was Mr. Billcliff who was arguing with Mr. Byrne. The Court credits Mr. Mehlmann’s testimony based upon observations of his demeanor. His testimony was direct and persuasive. The Court finds that it was Mr. Billcliff who Messrs. Byrne and Mehlmann interacted with at the SpringHill Suites hotel about the leaks after work was ended in October 2021.

and put silicone on a few spots. He said that Merrimack Roofing was scheduled to come out to the SpringHill Suites hotel to do some roof repairs on December 24, 2021. But, he said it did not show up on that date. Mr. Byrne also testified that he doubted that any Merrimack Roofing roofers showed up at the Devens SpringHill Suites on December 25, 2021. He said that was the last that Merrimack Roofing had to do with the job. (Tr. 95, 143-44, 149-50, 155). Mr. Byrne said that he regretted that the SpringHill Suites hotel hired Barry Billcliff and Merrimack Valley to do the job because it was “one of the worst roofing jobs I ever saw done in my life.” (Tr. 97, 163, 195-96). Mr. Byrne testified: “There were holes that you could stick your hand in. There were holes that animals could go through. There were holes that the rain could go through. There were parts that were missing shingles. There were parts that weren’t shingled correctly.” (Tr. 196).

On Monday, December 27, 2021, 3:23 PM, Barry James

foreman05.merrimackvalleyroofing@yahoo.com, sent a message to Mr. Costa, Subject: Re: Devens Hotel, that stated, in part:

We had a crew over there on Friday [December 24, 2021]. There was nothing seen out of place or any smoking guns. We put some silicone on some of the flashing in other areas that are susceptible being as none of the shingles have had a chance to stick down yet. The thermos-seal lines have not had enough time in heat to set 100%. Our speculation is that wind driven rain got underneath shingles and were able to ride down the nail holes. (Tr. 357; Ex. 154, at 1).

Messrs. Byrne and Costa testified that eventually, another company, Prime Roofing Corporation, did all the roof repairs over the period of about a month. (Tr. 96, 194-95, 312).

N. CO Bussell’s first in-person December 21, 2021 Administrative Interview of Mr. Billcliff.

On December 21, 2021, CO Bussell conducted an administrative interview of Mr. Billcliff at the OSHA Andover area office for which he issued an administrative subpoena for Mr. Billcliff to

also bring 37 document items to the interview.¹²⁹ Mr. Billcliff brought no documents to the interview. (Tr. 1542-44). CO Bussell testified that during Mr. Billcliff's December 21, 2021 interview, he told him that he had no knowledge of the job or that his son Daniel had pulled the permit for the Devens Project. CO Bussell also said that Mr. Billcliff told him that he had never been to the job site.¹³⁰ He told the CO that he uses Barry James (James being his middle name) commonly in correspondence due to past legal woes. (Tr. 1544-46, 1841-43, 1888-89, 2016-17). CO Bussell also testified that Mr. Billcliff told him during the interview that the messages between Messrs. Costa and James were not from him and "that somebody else had signed the emails Barry James and used his personal cell phone number in the signature or it said Barry James with a cell phone number right below it, that somebody else was using that email and sending those emails."¹³¹ (Tr. 1544-45, 1929). CO Bussell also testified that Mr. Billcliff told him during the December 21, 2021 interview that the CO had spoken with someone else when using Mr. Vaughn's cell phone on October 7, 2021, and that it was not him [Billcliff] who he had talked to that day.¹³² (Tr. 1546). CO Bussell testified that he determined that Mr. Billcliff was being "evasive and untruthful" during his December 21, 2021 interview. (Tr. 1546-47).

O. OSHA's January 12, 2022 Administrative Interview of Mr. Vaughn

¹²⁹ AAD LeRose also attended the interview. (Tr. 1543).

¹³⁰ The Court finds that these three statements given by Mr. Billcliff to the CO on December 21, 2021 were all false.

¹³¹ The Court finds that the communications between Messrs. Costa and Billcliff [aka James] were all actually between Messrs. Costa and Billcliff and that Mr. Billcliff's December 21, 2021 statement to CO Bussell that these communications did not involve him was false.

¹³² Mr. Billcliff also denied speaking to CO Bussell by cell phone on October 7, 2021 in its "Respondents (sic) Response to First Set of Requests for Admissions," RFA No. 11, dated July 8, 2022. (Tr. 1950-51; Ex. 182, at 2). The Court finds that the CO had spoken with Mr. Billcliff on October 7, 2021 when using Mr. Vaughn's cell phone and further finds that Mr. Billcliff's December 21, 2021 statement and Respondent's Response to RFA No. 11, First Set of RFAs, to the contrary to be false.

CO Bussell testified at trial that during an OSHA administrative interview of Mr. Vaughn that he conducted on January 12, 2022,¹³³ Mr. Vaughn stated that he was paid for his time at the work site.¹³⁴ (Tr. 1699-1701). Mr. Vaughn also told the CO on January 12, 2022 that he never received any “paycheck” for his work at the job site. He told the CO that he received only small cash payments for the work that he did at the job site for two days. (Tr. 720, 1645-46). He told the CO that “I’m there trying to earn a paycheck. I’m there trying to see to [too] if I actually like the job and if it was something I can actually do, so I go there and I give it a few-day trial, and I go – I’m in trouble with OSHA because I don’t know a f---ing ting about what I’m doing.”¹³⁵ (Tr. 1646). At trial, Mr. Vaughn admitted that he told CO Bussell on January 12, 2022 that he received cash payments for the work that he did for two days, just for the hours he put in.¹³⁶ (Tr. 726).

At trial, Mr. Billcliff testified that he paid Mr. Vaughn “[z]ero for being at the work site.” (Tr. 2334). He said he paid him “small amounts that do not pertain to this, anything about this case whatsoever in any way, manner, form.” He said that “this was him helping me out with some personal stuff that has nothing to do with construction whatsoever....” He said Mr. Vaughn “was

¹³³ Mr. Vaughn had legal counsel present during the interview. (Tr. 724).

¹³⁴ CO Bussell testified that Mr. Vaughn changed the story he initially told to him and later made statements that he received money for making personal phone calls, which were not work related. (Tr. 2191-93). CO Bussell testified that during his February 9, 2023 deposition Mr. Vaughn gave a different answer and said he was only paid to make personal phone calls when he was at the job site. CO Bussell testified that it was “completely unbelievable” that Mr. Vaughn received “zero payment” after having spent two weeks at the job site since his car was being repossessed, he was not able to pay his bills, and he needed money. (Tr. 1699). CO Bussell said, “you can’t unring the bell” and what Mr. Vaughn said “closest to the inspection”; *i.e.* on January 12, 2022, was more credible. (Tr. 2191-93).

¹³⁵ Mr. Billcliff testified that he had a conversation with Mr. Vaughn “about harnesses and all that” before Mr. Vaughn went to the job site and added “he [Vaughn] doesn’t like heights, he doesn’t know anything about roofing, he does know a lot about roofing safety.” (Tr. 2282). Mr. Billcliff testified that, “even before OSHA showed up” he called and spoke with Mr. Vaughn numerous times while he was on the job site and was told that workers kept taking harnesses and hard hats off while being yelled at by Messrs. Bonicenha and Vaughn to put them back on. Mr. Billcliff said: “And in this case Vaughn [Mr. Billcliff was actually referring to Mr. Bonicenha], like I say, wasn’t on site, he was 40 minutes away from what I understand, and Vaughn went in to go to the bathroom when Mr. Bussell pulled up. So he pulled up at the time when they weren’t being yelled at to put it right back on.” (Tr. 2282-84). The Court finds this testimony relating to the time before OSHA arrived at the job site on October 7, 2021 to be incredulous.

¹³⁶ Mr. Vaughn testified that he was at the job site “[g]ive or take eight” hours per day. (Tr. 955). He said that his commute from his home at Hampton to the job site was “maybe 45 minutes” each way. (Tr. 956, 966-67).

there working for free,” Mr. Billcliff testified that he quite likely paid Mr. Vaughn less than \$1,000. (Tr. 2334-37). In his Answers to Amended Complaint, Mr. Billcliff stated Mr. Vaughn “did attest that the job under Merrimack Valley Roofing as a supervisor, which is uncontested to be the reason he was on site to observe, consists of enforcing OSHA compliance and doing regular inspections of the jobsite, materials, and equipment.” (Answers to Amended Complaint, at 5). At trial, Mr. Vaughn testified that while interacting with subcontractors or others at the job site he wanted “it to be representative of” Mr. Billcliff. (Tr. 814-15). The Court finds any trial testimony by Messrs. Billcliff and Vaughn that he did not receive any payment for his being at the job site as a supervisor for two weeks to not be credible. (Tr. 814).

P. OSHA March 8, 2022 Interviews of Messrs. Billcliff, Grzyboski, and Vaughn

1. OSHA March 8, 2022 Interview of Mr. Billcliff

On March 8, 2022, CO Bussell again interviewed Mr. Billcliff during which Mr. Billcliff told him that he told Merrimack Valley Roofing that he was going to originally take on the Devens roofing project and he had a contract to do so. (Tr. 1916-18, 1936). The CO said Billcliff told him that he did marketing and advertising¹³⁷ for Merrimack Valley Roofing & Gutters.¹³⁸ (Tr. 1548). This time, Mr. Billcliff told CO Bussell that he had instructed his son Daniel to pull the permit for the roofing job under his [Billcliff’s] Billco company, but used a Merrimack Valley check to pay for the permit.¹³⁹ Mr. Billcliff told CO Bussell that he “was originally going to sub that job for

¹³⁷ During the trial, Mr. Billcliff denied having taken multiple OSHA courses. (Tr. 1967). The Court finds this statement to not be credible because during his February 11, 2022 deposition in Docket No. 21-0382 he stated that he had done health or safety training, including OSHA courses, OSHA-10, and fall protection training. (Tr. 1968-70).

¹³⁸ At trial, Mr. Billcliff said that he was a salaried employee who interacted with “a bunch of different people.” (Tr. 2306). He said that Jeremy Coito was his boss. (Tr. 2307-08). The Court gives little weight to this trial testimony because during his February 11, 2022 and January 12, 2023 depositions Mr. Billcliff stated that he did not recall if Mr. Coito was his supervisor. (Tr. 1955-56, 2331-32).

¹³⁹ At trial, Mr. Billcliff also testified that he instructed his son, Daniel, to obtain the permit for the Devens Project. (Tr. 1015, 2046).

Merrimack Valley through my Billco company. It was going to be our first big job, and as I said, I was very upset that they¹⁴⁰ wound up subbing it to somebody else instead,”¹⁴¹ (Tr. 1548-50, 1843, 2047). Mr. Billcliff told CO Bussell that he did not perform a site visit at the Devens SpringHill Suites on August 4, 2021, or meet with Mr. Byrne there. (Tr. 1945-47).¹⁴²

2. OSHA March 8, 2022 Interview of Mr. Grzyboski.

On March 8, 2022, CO Bussell interviewed Mr. Grzyboski, then allegedly an employee of Merrimack Valley Roofing. He told CO Bussell that he did not know the name, Mike LaChance. (Tr. 1115-16). Mr. Grzyboski said that he understood that the information that he provided during the March 8, 2022 interview must be true, accurate, and correct to the best of his knowledge and memory. (Tr. 1333-36).

3. OSHA March 8, 2022 Interview of Mr. Vaughn

On March 8, 2022, CO Bussell conducted another interview of Mr. Vaughn where Mr. Vaughn told him that he had “zero” roofing experience. At trial, Mr. Vaughn admitted telling the CO on March 8, 2022 that he called Mr. Billcliff while the CO was at the job site. (Tr. 1647-48). He further told the CO that while he was at the job site he only communicated with Mr. Billcliff, and he did not know of anyone else who worked at Merrimack Valley Roofing. Mr. Vaughn also told the CO that Mr. Billcliff told him to make sure that the guys on the roof are tied off and that he had “no

¹⁴⁰ On March 8, 2022, Mr. Billcliff told CO Bussell that he could not recall who he dealt with at Merrimack Valley Roofing about the contract for the Devens Project and subbing the work. He also told the CO he did not know who was in charge of Merrimack Valley Roofing when he [Billcliff] was involved with the Devens Project. He also told the CO that he did not particularly report to anybody at Merrimack Valley Roofing. (Tr. 1939-42, 1957-59). During his February 11, 2022 deposition in another OSHA case, OSHRC Docket No. 21-0382, Mr. Billcliff said that he did not know the name of person in charge of the business at Merrimack Valley Roofing and that he did not recall the name of his supervisor or anyone that tracked his hours at Merrimack Valley Roofing. (Tr. 1955-56). He also said that he did not recall if Merrimack Valley Roofing had a written safety program, a person responsible for safety, or someone who trains workers. (Tr. 1971-72, 1991).

¹⁴¹ The Court finds that this statement by Mr. Billcliff during his March 8, 2022 interview with the CO to be false.

¹⁴² The Court finds this statement by Mr. Billcliff made to CO Bussell on March 8, 2022 to be false.

clue” who the roofers worked for. (Tr. 1648-50). Mr. Vaughn also told the CO that he had never heard of “Bay State Exteriors” or “John Wolfe”.¹⁴³ (Tr. 747-48, 1651).

Q. CO Bussell’s March 23, 2022 Interview of Mr. Bonicenha

CO Bussell testified that Mr. Bonicenha told him on March 23, 2022 that Mr. Billcliff saw the telephone numbers on the side of a L&A’s van going down the road and called and spoke with Mr. Bonicenha or his partner Alex; and that is how Mr. Billcliff originally contacted L&A. (Tr. 1717-18, 1725). CO Bussell testified that he saw one of L&A’s vans on highway 495 that had “L&A Property” displayed on it. (Tr. 1729). Mr. Billcliff denied calling Mr. Bonicenha when testifying. (Tr. 2239). The Court credits Mr. Bonicenha’s testimony in this regard over the denial by Mr. Billcliff.

CO Bussell testified that he showed Mr. Bonicenha photographs of Mr. Billcliff on March 23, 2022 that were taken off of Mr. Billcliff’s Facebook page. (Tr. 1715).

R. OSHA Issues Three Citations to Mr. Billcliff and his D/B/A Names on April 4, 2022

CO Bussell testified that OSHA issued citations to Mr. Billcliff and various other d/b/a names. Three citations were issued on April 4, 2022 to Respondent; all recommended by CO Bussell. (Tr. 1653-55).

S. Discovery and Trial Testimony after OSHA issued its Citations

1. Respondent’s December 6, 2022 Supplemental Response to the Acting Secretary’s Discovery Request.

In his December 6, 2022 Supplemental Response to the Acting Secretary’s Discovery request nos. 9 and 16, Mr. Billcliff claimed that Merrimack Valley Roofing gave the Devens Project job to

¹⁴³ At trial, Mr. Vaughn testified that he did not know the name Bay State Exteriors, and he was not working for it. He also initially said that he did not remember ever hearing the name, John Wolf, but equivocated later saying he did not “recollect” the name. (Tr. 747-48). But he admitted at trial telling CO Bussell on March 8, 2022 that he never heard the name John Wolf before. (Tr. 750).

Leo Bonicenha and Mike LaChance, who was responsible for the job.¹⁴⁴ (Tr. 1973-76; Ex. 185, at 5). Respondent did not include any information in Respondent's December 6, 2022 Supplemental Response to the Secretary's written discovery that: 1) Mr. Billcliff closed the Merrimack Valley Roofing account at the Merrimack Valley Credit Union on August 12, 2022, 2) Mr. Billcliff was the only authorized user on that account from September, 2021 through August, 2022, 3) Mr. Billcliff's name was the only name associated with the account, 4) the name and address of Mr. Billcliff was the name and address on each monthly bank statement for the account,¹⁴⁵ and 5) Mr. Billcliff deposited the Devens Project checks into the account. (Tr. 2110-32; Ex. 185).

At trial, Mr. Billcliff testified that he agreed that his response to Request No. 36, at page 17 of Respondent's December 6, 2022 Supplemental Response to the Secretary's written Discovery requests stated that he could not remember any instance where he may have given any discipline to any subcontractor as pertains to this case in the last two years. (Tr. 1999-2000; Ex. 185, at 17).

2. Mr. Billcliff's January 12, 2023 Deposition

On January 12, 2023, Mr. Billcliff was deposed in this case. (Tr. 1941, 2007). At trial, Mr. Billcliff admitted saying during his January 12, 2023 deposition that he did not know if John Wolfe is his "actual name or not; not sure." He also said that he was "Unsure" if a person named John Wolfe worked at Merrimack Valley Roofing. He further said that he did not have any relationship at all with John Wolfe. He said that he did not recall ever seeing John Wolfe working at Merrimack Valley Roofing or on a Merrimack Valley Roofing job site, meeting John Wolfe in person, speaking to him on the phone, or emailing him. He stated that he could not recall when asked to describe the physical characteristics of John Wolfe. (Tr. 2062-68). At trial, Complainant stated her position that

¹⁴⁴ The Court finds this assertion regarding Mr. LaChance to be false.

¹⁴⁵ Mr. Billcliff testified that he never received a monthly statement from Merrimack Valley Federal Credit Union. (Tr. 2321-22). The Court places no weight on this testimony.

“John Wolf is an extremely mysterious identity here that connects back to Mr. Billcliff, ...” (Tr.

863). The Court finds that John Wolfe is a fictional character made up by Mr. Billcliff.

At trial, Mr. Billcliff admitted saying in his January 12, 2023 deposition:

Q. So before Mr. Grzybowski applied for the permit for the project you had the contract.”

A. We would have had to have.

Q. Who did you have that contract with?

A. I don’t recall.

Q. Was the contract with Merrimack Valley Roofing?

A. Most likely.

(Tr. 1941-42).

At trial, Mr. Billcliff also admitted saying during his January 12, 2023 deposition:

Q. Do you work with Jeremy Coito?

A. Not today.

Q. Does Jeremy Coito work at Merrimack Valley Roofing?

A. Possibly.

Q. Have you interacted with Jeremy Coito at Merrimack Valley Roofing?

A. Possibly.

Later in the deposition, Mr. Billcliff stated:

Q. Does Jeremy Coito direct you at Merrimack Valley Roofing?

A. I do not recall.

Q. Is he your supervisor?

A. I do not recall.

(Tr. 2331-32).

At trial, Mr. Billcliff further admitted saying during his January 12, 2023 deposition that he denied ever working with Mr. Bonicenha on a job prior to the Devens project. (Tr. 1943). At trial, Mr. Billcliff testified that he never met with Mr. Bonicenha in person regarding the Devens Project in the fall of 2021. Mr. Billcliff admitted that he had represented to the Court in a prior filing that “it was a straight out lie that [he] had ever met with Leo Bonicenha,” that he “had never even heard of Leo prior to this case,” and that he had “never had any form of contact with Leo in [his] life.” (Tr. 1944-45, 1984-88). The Court finds Mr. Billcliff’s assertions that he never heard of Mr. Bonicenha before work on the Devens Project started to not be credible.

3. Mr. Vaughn's February 9, 2023 Deposition

On February 9, 2023, Mr. Vaughn was deposed by Government counsel in this case. (Tr. 694-96). During his deposition, Mr. Vaughn, upon advice of his legal counsel, refused to answer a question as to whether he had had “any discussion with Barry Billcliff in preparation for your deposition today?” based upon the Fifth Amendment.¹⁴⁶ (Tr. 694-96).

4. Mr. Grzybowski's February 9, 2023 Deposition

Mr. Grzybowski stated that he said during his February 9, 2023 deposition that a construction supervisor was “someone who is on the site ... to make sure both the job goes smoothly and the process overall goes safe and there's no sort of any issues as far as anything from the OSHA regulations to state requirements....” (Tr. 1121). At trial, Mr. Grzybowski admitted saying during his February [9], 2023 deposition that Mr. Billcliff was one of the people who told him what to do at Merrimack Valley Roofing. (Tr. 1117-18, 1218).

5. Mr. Vaughn's testimony at trial.

Mr. Vaughn testified that he has a degree in criminal justice with a minor in sociology from Salem State College. (Tr. 698). At the time of trial, he said that he was the owner of a ceramic coating and window cleaning company that has no employees. (Tr. 698-99). At trial, Mr. Vaughn testified that the cash payments that he received at the time of the Devens Project from Mr. Billcliff

¹⁴⁶ See *Juan G. Quevedo-Garcia*, No. 20-1029, 2022 WL 1218613, at *28 (OSHR CALJ, Mar. 8, 2022)(consolidated). An adverse inference may be drawn based upon an invocation of Fifth Amendment privileges in an OSHA case in certain circumstances. The Acting Secretary did not request any adverse inference be drawn based upon Mr. Vaughn's refusal to answer the question during his February 9, 2023 deposition as to whether he had had “any discussion with Barry Billcliff in preparation for your deposition today?” and Respondent made no issue of it. No adverse inference is made by the Court. See *Woolston Constr. Co., Inc.*, No. 88-1877, 1989 WL 406362, at *10, n. 12 (OSHR CALJ, Nov. 22, 1989)(“It is noted that the case law on the propriety of drawing adverse inferences from the assertion of a Fifth Amendment privilege is not totally uniform.”), *aff'd*, 1991 WL 133666 (OSHR C, June 28, 1991), *aff'd*, No. 91-1413, 1992 WL 117669 (D.C. Cir. May 22, 1992).

were “[n]ot for the time on the project,” because he was “never employed”. (Tr. 720, 892). Mr. Vaughn testified “I wasn’t going to be paid” and Mr. Billcliff’s cash payment to him was “[n]ot for this job.” (Tr. 811-14, 831, 957, 961). But he also testified that he was on the Devens Project to help pay his bills. (Tr. 956). He also admitted at trial saying at his February 9, 2023 deposition that “I needed the money to pay my bills, and that’s it.” (Tr. 962). The Court finds Mr. Vaughn’s testimony that he was at the job site not as an employee, but on his own volition, free will and without pay, to not be credible.

Mr. Vaughn testified that he had “pretty much zero” construction experience and “never really had a construction job.” He also said that Mr. Billcliff knew this. (Tr. 699-701, 770). He said that Mr. Billcliff knew that he was out of work and was looking to earn a paycheck before he started his job with Mr. Billcliff at the Devens Project. (Tr. 702-03). He said that initially Mr. Billcliff talked with him about setting up the job, watching for the work on the project, to see whether the workers were working, taking long lunch breaks, and ensuring that the L&A workers were not stealing things. He said he was to report on these things to Mr. Billcliff, which he did. Mr. Vaughn testified that he typically called Mr. Billcliff at the end of every day and told him how things went for the day. He said he reported the progress made on the roof of the SpringHill Suites hotel and Conference Center buildings every day to Mr. Billcliff. Mr. Vaughn said that these conversations were work related “for the most part.” (Tr. 708-11, 737, 756-60, 889, 894).

At the trial, Mr. Vaughn said that he was to be Mr. Billcliff’s eyes on the project. He testified:

Q. Mr. Vaughn, what did you mean by being Barry’s eyes on the project?

A. Just overseeing the job as far as, you know, he told me to make sure that everyone’s wearing their hard hats and their harnesses, make sure they’re not stealing as you stated, just make sure everything’s kind of in order and there’s nothing really, you know, it’s not a circus. It’s a construction site. It’s looking clean and stuff like that. That’s about it.

(Tr. 711-12).

Mr. Vaughn testified at trial that, although he had no specific memory of it or the date it occurred, Mr. Billcliff told him before OSHA showed up at the job site to “make sure everyone has their hard hats and harnesses on at all times and that’s what I did.” (Tr. 715, 785, 795-96, 835-37). Mr. Vaughn’s vague recollection at the trial being told by Mr. Billcliff, before OSHA showed up at the job site, to make sure the workers wore hard hats and harnesses on at all times was impeached by his prior February 9, 2023 deposition testimony where he said “I don’t exactly know [when Mr. Billcliff told him]. I would assume it was prior to, but you’re – you’re asking me to give a specific date. I don’t know, sir, I couldn’t tell you.” He further said: “I couldn’t tell you if you told me before or after. You’re trying to make me recollect something that was almost two years ago. This is – that’s absurd.” (Tr. 716). He also said during his deposition that he had “no clue” before OSHA’s CO showed up at the job site about the need for the workers to wear harnesses. (Tr. 719). At trial, Mr. Vaughn also admitted saying at his deposition that: “If I had known that s__t [the OSHA rules about harnesses], sir, don’t you think that I would have f__king told them to put it [a harness] on. Honestly, if I had known that this had to be done and this had to be done, I would have made sure it was done.” (Tr. 775-76). The Court finds that Mr. Billcliff did not tell Mr. Vaughn to make sure that the workers wore hard hats and harnesses at all times before Mr. Bussell appeared at the job site on October 7, 2021. The Court finds any testimony at trial by Mr. Vaughn that is contrary to the Court’s finding to not be credible. (Tr. 778-80).

At trial Mr. Vaughn also admitted saying at his February 9, 2023 deposition that:

Q. And before Mr. Bussell showed up, what did you do, if anything, to detect OSHA violations on the job site?

A. If I had known there was OSHA violations, they wouldn’t have f__king done that. I have no idea. Listen, I’m somebody that I’m not going to put up with crap. If you’re supposed to do something, do it, and I’m going to make you do it. I’m a pretty intimidating guy when I want to be, so if I knew the rules, I would have made them abide by it. If I had known they

had to wear a harness and be tethered like you told me and the ladder was supposed to be a certain height over, I would have made sure they did it every freaking time, but I didn't know, sir. That's what I don't get. You can ask me 700 questions. There's the answer. It's in a nutshell.
(Tr. 777).

He also testified at trial that Mr. Billcliff told him to "learn the OSHA rules as the job went along, but as soon as I dealt with this, I wanted – I didn't even care. I wasn't even going to look because I didn't give a s__t. Sorry...." He said that he "never" studied the OSHA guidelines. (Tr. 717, 913). At trial, Mr. Vaughn testified that no one told him before OSHA arrived at the job site about any safety plan, safety policies, safety disciplinary policies, fall protection plan, or job hazard analysis. (Tr. 718). He further said that it was not his job to supervise the workers at the job site, because it was Mr. Bonicenha's job to do so. The Court finds the testimony that Mr. Vaughn was not at the job site to supervise the workers to not be credible. (Tr. 712-14).

6. Mr. Billcliff's Trial Testimony

Mr. Billcliff testified that he was not an employer, had no employees and did not hire employees, including any employees on the job site.¹⁴⁷ (Tr. 1928-29, 2202-04, 2278). He said that he did not pay, or set wages for, any employees working on the job site. He said that he paid only Billco and Relocation employees who were not connected to this case. (Tr. 2202-04, 2278). He said that he did not schedule or assign work to, or determine the hours of, any employee involved in this case. He said that he did not train or discipline any employees involved in this case. Mr. Billcliff testified that he did not establish employee benefits for any employees involved in this case. (Tr.

¹⁴⁷ The Court finds these statements to be false. On May 4, 2022, Mr. Billcliff agreed in a Stipulated Settlement Agreement between Barry Billcliff, d/b/a Barry's Roofing and the U.S. Department of Labor that he was an employer under section 3(5) of the OSH Act pertaining to OSHRC Docket No. 21-0382 and Inspection No. 1498677. At trial, Mr. Billcliff said that he voiced his disagreement with this stipulation with the Acting Secretary, but signed the Stipulated Agreement nonetheless and ultimately did not object to the admissibility of the Stipulated Agreement as evidence in this case. (Tr. 2297-98). The Workers' Compensation Insurance Affidavit of the permit application signed by Mr. Grzyboski also states that "I [company name: Billco Roofing LLC] am an employer providing workers' compensation for my employees working on this job." (Tr. 1192-94; Ex. 124, at 3).

2204). He said that he had not worn a hard hat or been in a situation that required wearing a hard hat in ten years. (Tr. 2204).

During cross examination by Mr. Billcliff at trial, CO Bussell characterized Mr. Billcliff as “[e]vasive, dishonest, untruthful, all along the lines of that. Uncooperative” and “lacking integrity.” (Tr. 1677-78). He said Mr. Billcliff “cooperated zero with the investigation process. I didn’t know what companies you were doing business as. I didn’t know how many employees.... I couldn’t find any legitimate companies, so I don’t know what things you do business as, what entities you do business as,” (Tr. 1783).

7. Mr. Grzyboski’s Trial Testimony

Mr. Grzyboski testified at trial that on March 27, 2023 he [Grzyboski] filed a document with the New Hampshire Secretary of State’s website registering a newly formed limited liability company called Merrimack Valley Roofing and Gutter, LLC. He said that he did so because he wanted to get into a management position sometime in the future. Before this filing he said that he did not know if there was any Merrimack Valley Roofing and Gutter, LLC. (Tr. 1021-23, 1027-28). At trial, Mr. Grzyboski invoked his Fifth Amendment right and refused to answer the Secretary counsel’s question as to what is the street address of the principal office of Merrimack Valley Roofing and Gutter, LLC.¹⁴⁸ (Tr. 1032-33).

T. Mr. Billcliff’s Prior January 4, 2021 OSHA Fall Protection Citation in Docket No. 21-0382

OSHA Compliance Officer Aaron D. Epstein testified that on October 15, 2020 he conducted an inspection of a worksite at 77 Bradford Avenue, Bradford, Massachusetts 01835 of Barry Billcliff, d/b/a Barry’s Roofing, 496 Main Street, Sandown, NH 03873, where its employees

¹⁴⁸ The Acting Secretary did not request any adverse inference be drawn based upon Mr. Grzyboski’s refusal to answer the question at trial to identify the street address of the principal office of Merrimack Valley Roofing and Gutter, LLC, and Respondent made no issue of it. No adverse inference is made by the Court. *See* fn. 146, above.

were stripping a roof atop a garage. (Tr. 1360-1415; Ex. 140, Ex 141, at 3). He further said that on January 4, 2021 OSHA issued a 1 item Repeat-Serious citation to Barry Billcliff, d/b/a Barry's Roofing for a violation of 29 C.F.R. § 1926.501(b)(13) because "employees were working at heights greater than 6 feet without personal fall protection exposing them to a fall hazard." The foreman at the Bradford job site told CO Epstein that he worked for Mr. Billcliff, and the foreman identified Mr. Billcliff as the owner of the company doing the work on the garage's roof.¹⁴⁹ The foreman told the CO that he and his sons, who at the time were atop the garage's roof, worked for Merrimack Valley Roofing and Gutter.¹⁵⁰ He told the CO that they knew that they were required to have fall protection since they were working above six feet, but that the fall protection was in the van. (Tr. 1368-80; Exs. 140-41). CO Epstein also stated that the foreman told him that a white van at the job site was owned by Merrimack Valley Roofing and Gutter and registered to Mr. Billcliff at 496 Main Street, Sandown, NH 03873. The CO said that the van had the same telephone numbers, 978-866-1860 and 978-884-6732, showing on its side that were the phone numbers of the foreman's employer, Mr. Billcliff.¹⁵¹ The CO testified that the van's license plate number was [redacted]. (Tr. 1368-78, 1416-17; Ex. 140, Ex. 41, at 5-6, Ex. 145). CO Epstein said that he hand-delivered the January 4, 2021 citation to Mr. Billcliff's home on March 23, 2021. (Tr. 1381, 1421). On May 4, 2022, Mr. Billcliff signed a "Stipulated Settlement Agreement" that resolved the January 4, 2021 citation and stated that "Respondent [Barry Billcliff, d/b/a Barry's Roofing] is an employer under section 3(5) of the [OSH Act of 1970] Act." (Ex. 142).

U. Even though Ordered by the Court to do so, Mr. Billcliff did not Produce many relevant documents.

¹⁴⁹ CO Epstein testified that the foreman called Mr. Billcliff from the job site while the CO was there. (Tr. 1372-73, 1417-18)

¹⁵⁰ CO Epstein testified that the homeowners of the garage told him that Mr. Billcliff bid the Bradford garage roofing job and that they paid Merrimack Valley Roofing and Gutter to do the work. (Tr. 1411-12).

¹⁵¹ The van also displayed "Merrimack Vally Roofing & Gutter" on its side. (Tr. 1416-18; Ex. 141, at 6).

Mr. Billcliff said at trial that he did not recall if Merrimack Valley Roofing had a written safety program, a person responsible for safety, or someone who trains workers. (Tr. 1971-72, 1991). Mr. Billcliff testified at trial that he searched for, but found no, documents that described the qualifications, work experience, hazard or safety assessments, written fall protection plans, and training, including safety training, of any of the workers present at the Devens Project on October 7, 2021, including copies of job applications, resumes, and training certificates. He also testified that he searched for, but found no, documents that showed the extent to which the workers at the Devens Project had been provided with fall protection as of October 7, 2021. (Tr. 1992-98; Ex. 100, at 19, 25, 27-28). Mr. Billcliff also testified at trial that he searched for, but found no, documents concerning safety and health policies, including employee handbooks and safety manuals. (Tr. 1993-95; Ex. 100, at 8-9).

Mr. Billcliff also did not produce documents concerning: 1) any hazard or safety assessment(s) which Respondent or any subcontractor, Parent, or Affiliates of Respondent conducted prior to the issuance of the Citations concerning the hazards that workers may encounter while working at the job site, 2) any discipline given to a worker or supervisor at a roofing job by Respondent or any subcontractors, Parent, or Affiliates of Respondent for failing to follow any safety rule at any worksite other than the job site for the two years preceding the date of the OSHA inspection, October 7, 2021, and/or 3) contracts, subcontracts, agreements, or other documents concerning any work performed by any of Respondent's subcontractors, Parent or Affiliates at the job site. (Tr. 1989-2001; Ex. 100, at 8-9, 12, 16, 18-19, 24-25, 27-29, 52-53).

III. STIPULATIONS OF FACT

The following facts were stipulated to by both parties in the Joint Pre-Hearing Statement (J. Pre-Hr'g Statement) and the stipulations were accepted by the Court. (Tr. 67; J. Pre-Hr'g Statement, at 17).

1. Prior to the time of the underlying inspection, Barry James Billcliff ("Mr. Billcliff") had already been working in the roofing & construction industry for more than 15 years.
2. Mr. Billcliff sometimes uses the name "Barry James."
3. [redacted] 496 Main Street, Sandown, New Hampshire.
4. Mr. Billcliff's personal cell phone number is 978-884-6732.
5. Daniel Grzyboski is Mr. Billcliff's son.
6. [redacted] 496 Main Street, Sandown, New Hampshire, [redacted].
7. Mr. Grzyboski holds a Massachusetts Construction Supervisor's License.
8. [redacted]. [FN omitted]
(Tr. 67; Sec'y PT Br., at 3-4).

During the trial, the parties also stipulated that Mr. Grzyboski "can give a long list of instances where he contends his father was truthful." (Tr. 1306).

IV. ALL OF THE VIOLATIONS ARE AFFIRMED.

The evidence at trial established the following:

- A. Mr. Billcliff was an employer.

Under the OSH Act, an employer is "a person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). Both Messrs. Billcliff and Grzyboski admitted that Mr. Grzyboski is an employee of Merrimack Valley Roofing, one of the d/b/a names. (Tr. 1037, 1115, 1117-18, 2007-08, 2118). And as Mr. Grzyboski further testified, Mr. Billcliff was his supervisor and

told him what to do as an employee, to include applying for the permit for the Devens Project. (Tr. 1034, 1118, 1126-28). There were also multiple other employees of Merrimack Valley Roofing other than Mr. Grzybowski. (Tr. 1037-39, 2007-08). Still further confirmation that Mr. Billcliff is an employer is provided by the fact that he paid Mr. Vaughn to be onsite at the Devens Project and supervise the roofing work being done there on Mr. Billcliff's behalf. (Tr. 321, 552, 702-03, 726; Ex. 108, at 1). On September 24, 2021, Daniel Grzybowski also signed, under penalties of perjury, a Department of Industrial Accidents Office of Investigations form that identified Billco Roofing LLC, a company Mr. Billcliff said he owned and was employed at during all aspects of the Devens Project, as the applicant employer with 4 employees to do roof repairs at 27 Andrews Parkway, Devens, MA. (Tr. 280-81, 2245; Ex. 124, at 3). On May 4, 2022, Mr. Billcliff also admitted that he was an employer under section 3(5) of the OSH Act pertaining to OSHRC Docket No. 21-0382 and Inspection No. 1498677 when he signed the settlement agreement in that prior case. (Ex. 142, at 1, ¶ 1(d)).

B. Mr. Billcliff was a controlling employer.

The Commission's application of the multi-employer worksite doctrine is well established. *See, e.g., McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000). Under this doctrine, a controlling employer is liable if "it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Stormforce of Jacksonville, LLC*, No. 19-0593, 2021 WL 2582530, at *6 (OSHRC, March 8, 2021). An employer that is a controlling employer is liable for violations of the OSH Act.¹⁵² The multi-

¹⁵² Under the current OSHA multi-employer policy directive, an employer having control over a worksite who could have prevented and detected a violation through the reasonable exercise of its supervisory authority may be citable for a hazardous condition that violates an OSHA standard as a controlling employer, whether or not its own employees were exposed. OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy (Dec. 10, 1999).

employer citation policy addresses “the peculiar needs of preventing hazards at construction sites, which ‘often entail different employees being exposed to hazards created by more than one employer.’” *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1724 (No. 95-1449, 1999) quoting *U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 985 (7th Cir. 1999). A controlling employer may be held responsible for the violations of other employers where it could reasonably be expected to prevent or detect and abate violations due to its supervisory authority and control over a worksite. *See Summit Contractors, Inc.*, 22 BNA OSHC 1777, 1781 (No. 03- 1622, 2009) (stating “[t]he Secretary’s multi-employer citation policy is to the same effect” as Commission precedent), *aff’d*, 442 F. App’x 570 (D.C. Cir. 2011); *Centex-Rooney Constr. Co.*, No. 92-0851, 1994 WL 682931, at *2 (OSHRC, Dec. 2, 1994). A controlling employer at a multi-employer worksite is responsible for taking reasonable steps to protect the exposed employees of subcontractors. *Am. Wrecking Corp.*, No. 96-1330, 2001 WL 1668964, at *8 (OSHRC, Dec. 20, 2001)(consolidated), *aff’d in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003).

The evidence shows that Mr. Billcliff was a controlling employer given the role that Mr. Vaughn had onsite and Mr. Billcliff’s actions. Mr. Billcliff ensured that his supervisor, Jason Vaughn, would be onsite during the entire Devens Project. As Mr. Vaughn described it, he was to be “Barry’s eyes on the Project.” (Tr. 711). Mr. Vaughn testified that his job was to get the workers what they needed, watch them work, and ensure they were working. (Tr. 709-10).

Mr. Billcliff informed Mr. Costa that Mr. Vaughn would be onsite. (Ex. 108, at 1). Mr. Costa testified that his understanding, based on his discussions with Mr. Billcliff, was that Mr. Billcliff would be responsible for all aspects of the Devens Project, including the fifteen matters identified at Section II, D, above. (Tr. 321-23).

Mr. Billcliff also expressly informed subcontractor Leo Bonicenha that “Jason,” the “site manager,” would “be there for the entire job and get [him] anything that [he] need[s].” (Tr. 1506-08, 1527; Ex. 128, at 4). Mr. Vaughn told Mr. Bonicenha he would be responsible for the job site when Mr. Bonicenha could not be there because of another job. (Tr. 518-19). CO Bussell observed Mr. Vaughn walking around at the Devens Project, overseeing the roofing work. (Tr. 1503-04). Mr. Vaughn told CO Bussell that Merrimack Valley Roofing was responsible for the Devens Project, and that he was the supervisor onsite to oversee the work. (Tr. 1506). When CO Bussell indicated that the roofers were exposed to fall hazards, Mr. Vaughn yelled to them to remove them from the roof, and they followed his instruction. (Tr. 518-19, 591, 1505). Mr. Vaughn testified that, after OSHA came onsite, he instructed the workers to wear harnesses and hard hats and they complied. (Tr. 752-56, 806-07). Mr. Vaughn also testified that, after OSHA came onsite, he then spoke daily with Mr. Billcliff about the Devens Project, to include reporting on progress and whether the workers were wearing harnesses and hard hats and complying with the OSHA fall protection and hard hat requirements. (Tr. 522, 756, 702-03, 726, 761-66).

Mr. Billcliff controlled every aspect of the Devens Project, from initially obtaining the job, to arranging permitting, materials, and labor, and receiving all payments for the work as provided by the documents admitted into evidence, including Mr. Billcliff’s messages with Mr. Costa about subjects such as the scope and specifications of the Devens Project, payment terms, color selections, the permit application and related documents, and the relevant bank records. (Tr. 312-17, 332, 1115-17, 2008; Exs. 107-08, 123-25, 149, 151-54).

As a controlling employer under the OSH Act, Mr. Billcliff was required to ensure that reasonable steps were taken to comply with the requirements of the cited standards. But, as detailed below, he did not do so.

C. Complainant has Shown d/b/a's were Properly Named in the Case.

“Barry James” is listed as a d/b/a because Mr. Billcliff admitted that is the name he often uses and that name was used multiple times in connection with the Devens Project *e.g.*, in the messages to Mike Costa in which the name “Barry James” appeared with Mr. Billcliff’s personal telephone number ending in 6732. (Tr. 2016-17; *e.g.*, Ex. 107 at 3, Ex. 149)

“John Wolf(e)” is listed as a d/b/a because Mr. Billcliff told CO Bussell on October 7, 2021 that John Wolf was the owner of Merrimack Valley Roofing¹⁵³ and could be reached at the telephone number ending in 1860. (Tr. 1507). CO Bussell testified that he was never able to speak with the alleged Mr. Wolf in person, despite his best efforts. (Tr. 1513-15). When CO Bussell tried to speak with the alleged Mr. Wolf by telephone, he believed the person on the other end was Mr. Billcliff pretending to be the alleged Mr. Wolf. (Tr. 1515-22). The evidence at trial showed that: (a) the only demonstrably real person connected to the telephone numbers and email address that Mr. Billcliff provided for the alleged Mr. Wolf was Mr. Billcliff himself,¹⁵⁴ and (b) Mr. Billcliff did not call anyone named John Wolf to testify, even though the Court repeatedly stated to Mr. Billcliff that

¹⁵³ Mr. Billcliff sometimes also claimed that the alleged Mr. Wolf was a supervisor. (Tr. 1518).

¹⁵⁴ In his December 6, 2022 supplemental written discovery responses that he filed on the case docket, Mr. Billcliff again stated on page 28 that 978-886-1860 was the telephone number to use for the alleged Mr. Wolf. On page 29 of same, Mr. Billcliff further stated that the alleged Mr. Wolf could also be reached by email at wolfjohnm@aol.com, which was the same email address given to subcontractor Leo Bonicenha by text. (Ex. 128, at 1). On page 16 of the J. Pre-Hr’g Statement, Mr. Billcliff gave a second telephone number for the alleged Mr. Wolf, 603-331-5351. The evidence at trial showed that:

- the 1860 telephone number was registered to “Barry Billcliff” during the time of the OSHA investigation. (Tr. 978-80; Ex. 158, at 10, 14, 29, 48).
- the 603-331-5351 number was associated with Mr. Billcliff’s home address. (Tr. 480-81; Ex. 156, at 17).
- the wolfjohnm@aol.com email address was associated with Mr. Billcliff’s personal telephone number ending in 6732. (Tr. 1082-84; Ex. 159, at 12).
- Mr. Bonicenha never met anyone named “John Wolf” in person. (Tr. 515-16).
- the 978-904-1254 number, from which Mr. Bonicenha received the relevant messages, was purchased by Mr. Billcliff using his home address. (Tr. 477-79; Ex. 156, at 11, 16).

(Sec’y PT Br., at 18-19).

he could call the alleged Mr. Wolf to make an offer of proof. (Tr. 1519-21). Here, the Court has found that John Wolfe is a fictional character made up by Mr. Billcliff.

The remainder of the d/b/a names at issue here are “business” names, not the names of individuals, alleged or otherwise. The following table, as largely depicted in the Acting Secretary’s post-trial brief, summarizes business names that were properly included as a d/b/a in the case caption.¹⁵⁵ There was no persuasive evidence at trial that any of these purported business names was actually a registered corporation or limited liability company in either New Hampshire or Massachusetts as of the time of the OSHA inspection, October 7, 2021. Mr. Billcliff is not entitled to hide behind any business name that was not actually used in connection with the roofing work at issue, especially when that business name was not incorporated or otherwise registered as of the relevant time in New Hampshire or Massachusetts. (Sec’y PT Br., at 25).

Business Names Used by Mr. Billcliff		
d/b/a “business” name	Connection to the Devens Project	Evidence showing that the d/b/a was not a registered corporation or limited liability company on October 7, 2021
Merrimack Valley Roofing, Inc. and the related website ¹⁵⁶	On October 7, 2021, Mr. Vaughn stated that he was working for Merrimack Valley Roofing and that his supervisor was Mr. Billcliff. (Tr. 506). Mr. Billcliff also stated that he works for same. (Tr. 2006). The website is listed on the proposal for the Devens Project. (Ex. 126). Mr. Billcliff admitted that he helped set up the website. (Tr. 2026-27).	CO Bussell testified that he searched the New Hampshire and Massachusetts Secretary of State’s websites and no entity by this name was registered as a corporation or limited liability company as of October 7, 2021. (Tr. 1531-32, 1564-65; Ex. 170, at 1)

¹⁵⁵ The table does not include the individual names of Barry James and John Wolf(e) as they are discussed elsewhere, and Merrimack Roofing LLC. The Court makes no finding as to whether or not Merrimack Roofing LLC was registered with Massachusetts or New Hampshire as a corporation or limited liability company as of October 7, 2021.

¹⁵⁶ The website for the name also included in the case caption is www.merrimackvalleyroofing.com. (Ex. 122).

Business Names Used by Mr. Billcliff		
d/b/a “business” name	Connection to the Devens Project	Evidence showing that the d/b/a was not a registered corporation or limited liability company on October 7, 2021
Merrimack Valley Roofing & Gutter	This business name is listed on the proposal for the Devens Project. (Ex. 126).	CO Bussell testified that he searched the New Hampshire and Massachusetts Secretary of State’s websites and no entity by this name was registered as a corporation or limited liability company as of October 7, 2021. (Tr. 1565; Ex. 170, at 2).
Merrimack Valley Roofing & Gutter, LLC	This name appears on its website. (Ex. 122, at 1).	CO Bussell testified that he searched the New Hampshire and Massachusetts Secretary of State’s websites and no entity by this name was registered as a corporation or limited liability company as of October 7, 2021. (Tr. 1565-66; Ex. 170, at 2).
Billco Roofing	This name appears in the permit application for the Devens Project that was submitted by Mr. Billcliff’s son, Mr. Grzyboski — specifically, as “BILLCLIFF BARRY DBA BILLCO ROOFING.” (Ex. 124, at 2).	CO Bussell testified that he searched the New Hampshire and Massachusetts Secretary of State’s websites and no entity by this name was registered as a corporation or limited liability company as of October 7, 2021. (Tr. 1566; Ex. 170, at 2). As CO Bussell explained, “Billco Roofing” is a trade name for Barry Billcliff, the individual. (Tr. 1576-77; Ex. 170, at 2).
Billco Roofing LLC	This name appears in the permit application for the Devens Project that was submitted by Mr. Billcliff’s son, Mr. Grzyboski. (Ex. 123, at 3, 8; Ex. 124, at 3, 6).	CO Bussell testified that he searched the New Hampshire and Massachusetts Secretary of State’s websites and no entity by this name was registered as a corporation or limited liability company as of October 7, 2021. (Tr. 1532-33, 1566; Ex. 170, at 3).

Business Names Used by Mr. Billcliff		
d/b/a “business” name	Connection to the Devens Project	Evidence showing that the d/b/a was not a registered corporation or limited liability company on October 7, 2021
Merrimack Valley Roofing, Inc.	This name appears in the permit application for the Devens Project that was submitted by Mr. Billcliff’s son, Mr. Grzyboski. (Ex. 123, at 8; Ex. 124, at 2).	CO Bussell testified that he searched the New Hampshire and Massachusetts Secretary of State’s websites and no entity by this name was registered as a corporation or limited liability company as of October 7, 2021. (Tr. 1566-67; Ex. 170, at 3). Mr. Billcliff also admitted that no entity by this name actually existed at the relevant time. (Tr. 2037-38).
Bay State Exteriors	Mr. Billcliff falsely claimed on October 7, 2021 that this business was handling the Devens Project. (Tr. 1507). Mr. Bonicenha was also given this business name via text and an address for it in Peabody, MA. (Ex. 128, at 1).	CO Bussell testified that OSHA investigated and no business by this name was at the address given. (Tr. 1512).
Marrimack Valley Roofing	Since Mr. Billcliff sometimes spells “Merrimack” with an “a” in place of the “e,” this name was included as well.	CO Bussell testified that he searched the New Hampshire and Massachusetts Secretary of State’s websites and no entity by this name was registered as a corporation or limited liability company as of October 7, 2021. (Tr. 1567; Ex. 170, at 4).
Merr Valley R&G LLC	Mr. Billcliff alleged that this is the name of his employer. (Tr. 883-84).	CO Bussell testified that he searched the New Hampshire and Massachusetts Secretary of State’s websites and no entity by this name was registered as a corporation or limited liability company as of October 7, 2021. (Tr. 1567; Ex. 170, at 4). There is also no document in evidence showing that any entity by this name was in existence as of October 7, 2021.

Business Names Used by Mr. Billcliff		
d/b/a “business” name	Connection to the Devens Project	Evidence showing that the d/b/a was not a registered corporation or limited liability company on October 7, 2021
The Marrimack Valley Roofing Co., LLC	This is the name of the bank account to which the checks for the Devens Project were deposited, and on which Mr. Billcliff’s name was the only name associated. ¹⁵⁷	CO Bussell testified that he searched the New Hampshire and Massachusetts Secretary of State’s websites and no entity by this name was registered as a corporation or limited liability company as of October 7, 2021. (Tr. 1567-68; Ex. 170, at 4).
Merrimack Valley Roofing LLC	This is the name to which the invoices for the Devens Project directed that the checks be written. (Ex. 110, at 1, 3). This is also the name to which the checks were actually written. (Ex. 110, at 2, 4).	CO Bussell testified that he searched the New Hampshire and Massachusetts Secretary of State’s websites and no entity by this name was registered as a corporation or limited liability company as of October 7, 2021. (Tr. 1568; Ex. 170, at 4). Mr. Billcliff also admitted that no entity by this name actually existed at the relevant time. (Tr. 2038-42).

(Sec’y PT Br., at 19-22).

D. Merrimack Valley Roofers LLC (Name not Included in Current Case Caption)

CO Bussell testified that “Merr Valley R&G LLC”, Business ID 631702, had been administratively discharged before October 7, 2021 and was not an active corporation in New Hampshire as of October 7, 2021. (Tr. 1588-89, 1871-73, 1876-77, 2162; Ex. 170, at 4). Merr Valley R&G, LLC was previously Merrimack Valley Roofers LLC as filed in New Hampshire. (Tr. 2167; Ex. 175, at 1). CO Bussell testified that he put “zero stock” into the name Merrimack Valley Roofers LLC because he had no documents related to it and found it “not relevant” to the OSHA

¹⁵⁷ (Tr. 1444; Ex. 155, at 5, 8-11, 106-08, 147, 229-31, 323-26, 469-70, 472-73, 508).

inspection. (Tr. 1870-71, 2167-68). He said that neither Merrimack Valley Roofing LLC nor Merrimack Valley Roofing Inc. were registered in New Hampshire in October 2021. (Tr. 1531-32). CO Bussell testified that Merrimack Valley Roofers, LLC “was not a consideration at 10/7/2021” and “does not pertain to this job site.”¹⁵⁸ (Tr. 1590, 1595, 1612-13). CO Bussell testified that Mr. Billcliff “changed a different company to match a different Business ID 711562 to match that name –”. (Tr. 1588-90, 1872-73). That differently named company was changed to Merr Valley R&G, LLC, Business ID: 711562, on January 27, 2023. (Tr. 885, 1578, 1588-96, 1617, 1876, 2162-66; Ex. 175, at 1). At trial, Respondent stated its position that Merrimack Valley Roofers and Merr Valley R&G, LLC were merged then. (Tr. 885).

- E. Respondent Knew, or with Reasonable Diligence, Could Have Known that: 1) frequent and regular inspections were not performed at the job site as of the time of CO Bussell’s arrival, 2) at least one employee was not provided with a hard hat on October 7, 2021, 3) employees were not protected from falling during the unloading of materials onto a roof on October 7, 2021, 4) employees working on the roof were not protected from falling on October 7, 2021, 5) it did not ensure the workers at the job site, including Mr. Vaughn, were properly trained in the recognition of fall hazards, and 6) a portable ladder was used to access an upper landing surface that did not extend at least 3 feet above the upper landing surface.

It is well-established Commission law that an employer will be charged with knowledge of a hazard if it knew, or with the exercise of reasonable diligence could have known, of the presence of the violative condition. *Astra Pharm. Prods.*, No. 78-6247, 1981 WL 18810, at *4 (OSHRC, July 30, 1981), *aff’d in relevant part*, 681 F.2d 69 (1st Cir. 1982). Reasonable diligence involves consideration of several factors, including the employer’s obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations. *Danis Shook Joint Venture XXV*, No. 98-1192, 2001 WL 881247, at *5 (OSHRC, Aug. 2, 2001) (citing *Pride Oil Well Serv.*, No. 87-692, 1992 WL

¹⁵⁸ The Court notes that Merrimack Valley Roofers LLC does not appear in the Summary Chart of Business Names Respondent Used in Connection with the Project at Exhibit 170. (Tr. 1594-95; Ex. 170).

215112, at *6 (OSHRC, Aug. 17, 1992), *aff'd*, 319 F.3d 805 (6th Cir. 2003)). The actual or constructive knowledge of the employer's foreman or supervisor can be imputed to the employer. (*Id.*). Respondent had no written rules on inspections, hard hats, unloading of materials onto a roof, fall protection, hazard recognition training, and ladders. Respondent did not: 1) maintain programs that provided for frequent and regular inspections at the job site, 2) perform any such inspections, and 3) Mr. Vaughn was not competent to perform these inspections, at or before CO Bussell's arrival onto the job site. (Tr. 782-83, 922, 1508-11). *N. Y. State Elec. & Gas Corp.*, 88 F.3d 98, 105-06 (2nd Cir. 1996) ("constructive knowledge may be predicated on an employer's failure to establish an adequate program to promote compliance with safety standards."). Mr. Billcliff's supervisor at the Devens Project, Mr. Vaughn, observed the workers without hard hats over at least a 20-minute period on October 7, 2021 that were exposed to the hazard of possible falling materials. (Tr. 1490, 1502-04; Ex. 129, at 26-28). Mr. Billcliff's supervisor at the Devens Project, Mr. Vaughn, observed the employees using the materials hoist to transfer roofing materials from the ground to the roof. Mr. Vaughn observed the employees at the roof's edge unloading materials from the hoist to the roof without fall protection. (Tr. 1502-05, 1763-64; Ex. 129, at 26-28). On October 6 and October 7, 2021, Mr. Billcliff's supervisor Mr. Vaughn was at the Devens Project and observed employees exposed to fall hazards over 1½ days from a roof height of approximately 30 feet. Mr. Vaughn took no action to eliminate the hazards. (Tr. 587, 618. 1491-1504, 1510-11, 1527-28; Ex. 129, at 1-12, 16-23, 26-28).

Mr. Billcliff did not train Mr. Vaughn or the roofers at the Devens Project, and Mr. Billcliff knew that Mr. Vaughn was not trained. (Tr. 1491-1504, 1502-03, 1510-11, 1526, 2198; Ex. 129, at 2-12, 16-23, 26-28). Mr. Billcliff did not claim that he or anyone else from Merrimack Valley Roofing had trained either Mr. Vaughn or any of the workers at the job site. Mr. Billcliff did not

produce any documents or other evidence showing that any workers, including Mr. Vaughn, had been trained in hazard recognition. The fact that Respondent failed to train Mr. Vaughn and the rooftop workers at the job site on or before October 7, 2021 “establishes that [Respondent] had at least constructive knowledge of the inadequacy of its training program.” *Pressure Concrete Constr. Co.*, No. 90-2668, 1992 WL 381670, at *8 (OSHR, Dec. 7, 1992). Mr. Vaughn “could not be reasonably expected to instruct” the workers “on matters or hazards about which [he himself] had not been taught, ...”. (*Id.*). Where, as here, the alleged violative condition is inadequate training of employees, employer knowledge of the violative condition “will almost invariably be present.” *Compass Env’tl*, 663 F.3d 1164, 1168 (10th Cir. 2011). On October 7, 2021, CO Bussell observed operations at the Devens Project for approximately 20-25 minutes, during which time Mr. Billcliff’s supervisor, Mr. Vaughn, was watching the employees on the roof, with the violative ladder in plain view in the same position the entire time. (Tr. 1489-90, 1499-1500, 1502-04; Ex. 129, at 19-22, 26-28). Mr. Vaughn instructed the employees to come off the roof, using the same ladder. (Tr. 1490, 1499). Mr. Vaughn knew of the hazardous condition. He could see that the ladder did not extend at least three feet above the roof edge.

Mr. Vaughn’s supervisory knowledge of his own actions or inactions are imputed here to Respondent. *Pride Oil*, 1992 WL 215112, at *6.

F. The Secretary Has Proven Each of the Cited Serious Violations and that Mr. Billcliff committed the Serious violations tried.

Section 5(a)(2) of the OSH Act requires an employer to “comply with occupational safety and health standards promulgated under this Act.” 29 U.S.C. § 654(a)(2). To prove a violation, the Acting Secretary must prove by a preponderance of the evidence that: (1) the standard applies to the facts; (2) the employer failed to comply with its terms; (3) that employee(s) had access to the hazard(s); and (4) the employer could have known of the hazards in the exercise of reasonable

diligence. *Astra Pharm. Prods., Inc.*, 1981 WL 18810, at *4; *Atl. Battery Co.*, No. 90-1747, 1994 WL 682922, at *6 (OSHRC Dec. 5, 1994). The Commission defines a preponderance of the evidence as enough to convince the trier of fact that the facts asserted are “more probably true than false.” *Astra Pharm. Prods. Inc.*, 1981 WL 18810, at *5. To prove a Serious violation, the Acting Secretary must further show that the hazard posed the risk of serious bodily harm or death. (Sec’y PT Br., at 25-26).

For the Acting Secretary to establish employee exposure to a hazard, she must show that it is reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. *Fabricated Metal Prods.*, No. 93-1853, 1997 WL 694096, at *3 (OSHRC, November 7, 1997). The zone of danger is “that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.” *RGM Constr. Co.*, No. 91-2107, 1995 WL 242609 at *5 (OSHRC, April 24, 1995). It is sufficient for the Acting Secretary to prove access to the zone of danger, rather than actual exposure to the immediate risk of injury or death. *Am. Wrecking Corp.*, 364 F.3d 321, 327 (D.C. Cir. 2004). (Sec’y PT Br., at 26).

The Acting Secretary proves employer knowledge with evidence that the employer knew or with the exercise of reasonable diligence could have known of the violative condition. *Revoli Constr. Co.*, No. 00-0315, 2001 WL 1568807, at *3 (OSHRC, December 7, 2001). The employer’s knowledge is directed to the physical condition that constitutes a violation. *Phoenix Roofing, Inc.*, No. 90-2148, 1995 WL 82313, at *3 (OSHRC, February 24, 1995) *aff’d*, 79 F.3d 1146 (5th Cir. 1996). It is not necessary to show that the employer knew or understood the condition was hazardous. *Id.*; *see also Min. Indus. & Heavy Constr. Grp. v. OSHRC*, 639 F.2d 1289, 1294 (5th Cir.

1981) (noting that the “goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors”). (Sec’y PT Br., at 26).

As shown in the tables below, the Acting Secretary has shown that: 1) each cited standard applies, 2) Mr. Billcliff failed to comply with the cited standard, 3) employees had access to the hazards, 4) Respondent knew, or could have known, of the hazard, and 5) the hazard posed the risk of serious bodily harm or death.

1. Citation 1, Item 1

The cited standard, 29 C.F.R. § 1926.20(b), states:

Accident prevention responsibilities.

- (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.
- (2) Such programs shall provide for frequent and regular inspections of the jobsites, materials, and equipment to be made by competent persons designated by the employers.

As summarized in the table below, the Acting Secretary proved each element required to establish a Serious violation of the cited standard.

Citation 1, Item 1 (Inspections)	
Element	Evidence
The standard applies.	The cited standard at issue, 29 C.F.R. § 1926.20(b)(2), states the requirements for safety programs in the construction industry. Specifically, the regulation requires frequent and regular inspections by a competent person at a worksite. Since roofing constitutes construction work, the standard applies to the cited conduct.

Citation 1, Item 1 (Inspections)	
Element	Evidence
Mr. Billcliff failed to comply with the standard.	On October 7, 2021, upon inspecting the Devens Project, CO Bussell determined that there were no regular inspections occurring, and no competent person at the job site. (Tr. 1508-09). CO Bussell also determined that Mr. Billcliff's onsite supervisor of the Devens Project, Mr. Vaughn, was neither a competent person, nor did he perform regular inspections at the Devens Project. (Tr. 517-18, 1508, 1647-48). CO Bussell also noted that there was no safety program or plan in place at the Devens Project, nor was one ever produced during the OSHA investigation, despite CO Bussell's requests. (Tr. 1508-09). Further, even though it was specifically requested of him, Mr. Billcliff did not produce any such documents in litigation either. (Tr. 1989-2001). Mr. Bonicenha testified that Mr. Vaughn did nothing to make the job site safe. (Tr. 519-25). The Court finds that Respondent did not initiate and maintain programs which provided for frequent and regular inspections of the job site, materials and equipment made by a competent person. The Court finds that on October 7, 2021 Mr. Vaughn was not a person competent to perform any such inspection(s). This element is therefore established. (Tr. 782-83, 922, 1508-11).
Employee(s) had access to the hazards.	The subcontractor's employees and Mr. Vaughn ¹⁵⁹ at the Devens Project were exposed to hazards, including falling materials and fall hazards from a roof exceeding 30 feet off the ground. (Tr. 1490-1504, 1510-11; Ex. 129, at 2-12, 16-23, 26-28).

¹⁵⁹ The Court finds that Mr. Vaughn was an employee of Mr. Billcliff's during at least the two-week period that he worked as the supervisor at the job site commencing on October 6, 2021. The Commission applies the *Darden* factors to determine if an affected worker is an employee of the cited employer. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992); *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010). The common-law agency doctrine set forth in *Darden* focuses on the company's "right to control the manner and means by which the product" is accomplished. *Sharon & Walter Contr.*, 23 BNA OSHC at 1289. The company's control over the worker is a "principal guidepost" to determine the existence of an employment relationship. *Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1506 (No. 97-1839, 2004). Additional factors relevant to the *Darden* analysis include:

the skill required [for the job]; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; [and] the provision of employee benefits and the tax treatment of the hired party.

Sharon & Walter Contr., 23 BNA OSHC at 1289 (citing *Darden*, 503 U.S. at 323-24).

Mr. Billcliff controlled the manner and means by which Mr. Vaughn worked at the job site. No special skill was required of Mr. Vaughn by Mr. Billcliff for the job. Mr. Billcliff directed the dates, times, and location of Mr. Vaughn's work at the job site. He directed the duration of the relationship between the two men. Mr. Billcliff had the right to assign additional tasks to Mr. Vaughn. Mr. Vaughn had no discretion over when and how long to work at the job site. Mr. Billcliff dictated the method and amount of cash payments to Mr. Vaughn. Mr. Billcliff hired Mr. Vaughn to be his on-site supervisor. Roofing work was part of Mr. Billcliff's regular business.

Citation 1, Item 1 (Inspections)	
Element	Evidence
Mr. Billcliff knew, or could have known, of the hazard in the exercise of reasonable diligence.	Mr. Billcliff’s supervisor at the Devens Project, Mr. Vaughn, was present during the entire Devens Project, knew “zero” about safety, did not perform any inspection(s) on or before CO Bussell’s arrival at the job site on October 7, 2021, and was not aware of any safety program. Mr. Vaughn observed the workers over at least a 20-minute period exposed to several hazards in plain view. (Tr. 782-83, 922, 1490-94, 1502-11; Ex. 129, at 2-12, 16-23, 26-28). Mr. Billcliff knew that Mr. Vaughn was not a competent person and he did not take any reasonable steps to determine whether anyone else at the job site on or before CO Bussell’s arrival on October 7, 2021 was competent to conduct inspections and oversee safety. Mr. Vaughn knew that he was not competent to perform any safety inspection(s) and that he had not performed any safety inspection(s) before CO Bussell arrived at the job site. Mr. Billcliff also knew there was no competent person onsite at or before that time. (Tr. 1986-89). Mr. Vaughn’s knowledge as Mr. Billcliff’s on-site supervisor is imputed to Mr. Billcliff. Knowledge is established.
The hazard posed the risk of serious bodily harm or death.	Since there was no inspection of the job site prior to when OSHA arrived, there were no measures in places to protect employees against the hazards present. Employees falling from the roof or while egressing onto the ladder from a height of 30-plus feet would most likely sustain fatal or permanently disabling injuries, such as a broken back or paralysis. (Tr. 1657). Employees without hard hats working at the base of the materials hoist could sustain serious or permanently disabling injuries in the event roofing material fell from 30 feet above onto them. (Tr. 1657-58).

(Sec’y PT Br., at 26-28).

2. Citation 1, Item 2

The cited standard for head protection, 29 C.F.R. § 1926.100(a), states:

Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

As summarized in the table below, the Acting Secretary proved each element required to establish a Serious violation of the cited standard.

Citation 1, Item 2 (Hard hats)	
Element	Evidence
The standard applies.	The cited standard at issue, 29 C.F.R. § 1926.100(a), states the requirements for employees working in areas where there is a possible danger of head injury from impact, or falling or flying objects. The roofing work at the Devens Project is covered under the construction standards. The standard therefore applies to the cited conduct.
Mr. Billcliff failed to comply with the standard.	On October 7, 2021, CO Bussell observed at least one employee working without a hard hat. He also observed an employee without a hard hat working at the base of a materials hoist. Mr. Vaughn admitted at trial that “a couple [of] people [were] not wearing ... a hard hat.” (Tr. 926, 1488-95, 1510, 1526, 1657-58, 1744-45, 1822-23).
Employee(s) had access to the hazards.	Employees at the Devens Project were exposed to hazards, including falling materials and fall hazards from a roof exceeding 30 feet off the ground. (Tr.1490, 1505, 1657-58; Ex. 129, at 26).
Mr. Billcliff knew, or could have known in the exercise of reasonable diligence, of the hazard.	Mr. Billcliff’s supervisor at the Devens Project, Mr. Vaughn, was present during the entire Devens Project and observed the workers without hard hats over at least a 20-minute period exposed to the hazard of possible falling materials on October 7, 2021. (Tr. 1490, 1502-04; Ex. 129, at 26-28). Mr. Vaughn’s knowledge as Mr. Billcliff’s on-site supervisor is imputed to Mr. Billcliff. Knowledge is established. ¹⁶⁰
The hazard posed the risk of serious bodily harm or death.	Employees without hard hats working at the base of the materials hoist could sustain serious or permanently disabling injuries if, e.g., 70 pounds of roofing material fell from 30 feet above onto them. (Tr. 1657-58).

(Sec’y PT Br., at 29-31).

3. Citation 1, Item 3

The cited standard, 29 C.F.R. § 1926.501(b)(3), states:

Hoist areas. Each employee in a hoist area shall be protected from falling 6 feet (1.8 m) or more to lower levels by guardrail systems or personal fall arrest systems. If

¹⁶⁰ Mr. Vaughn testified that it was not until after CO Bussell came to the job site that he came to understand that it was part of his job to ensure that workers were wearing hard hats. (Tr. 807). Had Mr. Billcliff taken even minimal steps to prepare Mr. Vaughn to oversee safety prior to OSHA arriving at the job site, Mr. Vaughn would have better known what type of things of which to be aware, to include the failure to wear a hard hat.

guardrail systems, [or chain, gate, or guardrail] or portions thereof, are removed to facilitate the hoisting operation (e.g., during landing of materials), and an employee must lean through the access opening or out over the edge of the access opening (to receive or guide equipment and materials, for example), that employee shall be protected from fall hazards by a personal fall arrest system.

As summarized in the table below, the Acting Secretary proved each element required to establish a Serious violation of the cited standard.

Citation 1, Item 3 (Hoist)	
Element	Evidence
The standard applies.	The standard cited, 29 C.F.R. § 1926.501(b)(3), states that each employee in a hoist area shall be protected from falling 6 feet or more to lower levels by guardrail systems or personal fall arrest systems. The roofing work at the Devens Project is covered under the construction standards. CO Bussell observed employees using a materials hoist to transfer roofing material from the ground to the roof at the Devens Project. The employees were at the roof's edge reaching to unload materials off of the hoist onto the roof without fall protection. (Tr. 1494-98, 1500-01, 1763-64; Ex. 129, at 17-18, 20, 22-23). The standard therefore applies to the cited conduct.
Mr. Billcliff failed to comply with the standard.	CO Bussell observed employees on October 7, 2021 using a materials hoist to transfer roofing material from the ground to the roof at the Devens Project. The laddervator was not affixed to the roof and there was nothing affixed to the edge of the roof that goes three feet above for the worker to grab onto. The employees were at the roof's edge reaching to unload materials off of the hoist onto the roof without fall protection. (Tr. 1494-98, 1500-01, 1763-64; Ex. 129, at 17-18, 20, 22-23).
Employee(s) had access to the hazards.	The employees were exposed to fall hazards because they were working near the edge of the hotel's roof while unloading roofing materials from the hoist without fall protection. (Tr. 1495-98, 1500-01, 1763-64; Ex. 129, 17-18, 22-23).
Mr. Billcliff knew, or could have known in the exercise of reasonable diligence, of the hazard.	Mr. Billcliff's supervisor at the Devens Project, Mr. Vaughn, was present during the entire Devens Project and observed the employees using the materials hoist to transfer roofing materials from the ground to the roof. Mr. Vaughn observed the employees at the roof's edge unloading materials from the hoist to the roof without fall protection. (Tr. 1502-05, 1763-64; Ex. 129, at 26-28). Mr. Vaughn's knowledge as a supervisor is imputed to Mr. Billcliff. Knowledge is established.

Citation 1, Item 3 (Hoist)	
Element	Evidence
The hazard posed the risk of serious bodily harm or death.	Employees working near the edge of a 30-foot roof to access and unload materials from a materials hoist without fall protection could sustain permanently disabling or fatal injuries from a fall. (Tr. 1497-1500, 1656-58, 1763-64).

(Sec’y PT Br., at 30-31).

4. Citation 3, Item 1

The cited standard, 29 C.F.R. § 1926.503(a)(1), states:

(a) Training program. (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

Specifically, Citation 3, Item 1 states: Type of Violation – Serious

29 CFR 1926.503(a)(1): The employer did not provide a training program for each employee potentially exposed to fall hazards to enable each employee to recognize the hazards of falling and the procedures to be followed in order to minimize these hazards.

(a) Location – 27 Andrews Parkway, Devens, MA

On or about 10/07/21, the Supervisor assigned to the job site was not trained in the recognition of fall hazards.

As summarized in the table below, the Acting Secretary proved each element required to establish a Serious violation of the cited standard.

Citation 3, Item 1 (Training)	
Element	Evidence
The standard applies.	The cited standard at issue, 29 C.F.R. § 1926.503(a)(1), states that an employer shall provide a training program for each employee who might be exposed to fall related hazards. The roofing work at the Devens Project is covered under the construction standards. The standard therefore applies to the cited conduct.
Mr. Billcliff failed to comply with the standard.	After conducting interviews, to include questioning the workers, CO Bussell determined that none of the workers at the Devens Project had been trained in safety. (Tr. 1509). Mr. Bonicenha told the CO that his employees at L&A had not been trained. Mr. Billcliff admitted that he did not train any employees involved in this case. CO Bussell also determined that the Devens Project supervisor, Mr. Vaughn, was not trained in the recognition of fall hazards, and was not a competent person. (Tr. 619-23, 782-83, 922, 1508-11, 1526, 1647-48, 2204). Additionally, even though Mr. Billcliff was ordered to do so by the Court in litigation, he stated that he searched for but could not find any written fall protection plan for the Devens Project, nor could he find any other safety-related documents such as documents describing training provided to any workers, documents sufficient to show the extent to which workers were provided with fall protection equipment, and/or any hazard analyses concerning the jobsite. ¹⁶¹ (Tr. 1989-2001; Ex. 100, at 19, 25, 27-28). When Mr. Billcliff was asked during a deposition four months after OSHA’s onsite inspection in this matter, Mr. Billcliff could not or would not: (a) state whether Merrimack Valley Roofing had a written safety program; (b) identify the person, if any, at Merrimack Valley Roofing responsible for safety; and/or (c) identify the person, if any, at Merrimack Valley Roofing responsible for training workers. (Tr. 1970-72, 1991).
Employee(s) had access to the hazards.	L&A workers and Mr. Billcliff’s employee, Mr. Vaughn, ¹⁶² were exposed at the Devens Project to hazards, including falling materials and fall hazards from a roof exceeding 30 feet off the ground because no competent supervisor onsite was trained to recognize the hazards and/or ensured the employees were trained. (Tr. 1490-1504, 1510-11, 1526; Ex. 129, at 2-12, 16-23, 26-28).

¹⁶¹ During the trial, Mr. Billcliff gave a copy of a “safety manual” to Complainant’s counsel that was not admitted into evidence. (Resp’t Reply Br., at 10).

¹⁶² See fn. 159.

Citation 3, Item 1 (Training)	
Element	Evidence
Mr. Billcliff knew, or could have known in the exercise of reasonable diligence, that Mr. Vaughn and the L&A workers at the Devens project had not been trained before CO Bussell arrived at the job site on October 7, 2021.	Mr. Billcliff did not train Mr. Vaughn or the roofers at the Devens Project, and Mr. Billcliff knew that. (Tr. 1491-1504, 1502-03, 1510-11, 1526, 2198; Ex. 129, at 2-12, 16-23, 26-28). Mr. Billcliff did not claim that he or anyone else from Merrimack Valley Roofing had trained either Mr. Vaughn or any of the workers at the job site. Mr. Billcliff did not produce any documents or other evidence showing that any workers had been trained. There is no evidence in the record that Merrimack Valley Roofing had any sort of written fall protection program. Mr. Billcliff was well aware of the training-related hazard. (Tr. 782-83, 922, 1508-11, 1970-72).
The hazard posed the risk of serious bodily harm or death.	Employees working on a 30-foot roof without fall protection or on the ground below with no hazard recognition training could sustain permanently disabling or fatal injuries from a fall or falling materials. (Tr. 1657).

(Sec’y PT Br., at 32-34).

5. Citation 3, Item 2

The cited standard, 29 C.F.R. § 1926.1053(b)(1), states, in part:

(b) Use. The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:

(1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

As summarized in the table below, the Acting Secretary proved each element required to establish a Serious violation of the cited standard.

Citation 3, Item 2 (Ladder)

Element	Evidence
The standard applies.	The cited standard at issue, 29 C.F.R. § 1926.1053(b)(1), states the requirements for portable ladders used for access to upper landing surfaces. The roofing work at the Devens Project is covered under the construction standards. The CO observed at least five L&A employees using the ladder, and that it remained in the same position on October 7, 2021. (Tr. 1498-1502, 1770-77; Ex. 129, at 19-21). The standard applies to the cited conduct.
Mr. Billcliff failed to comply with the standard.	On October 7, 2021, upon inspecting the Devens Project, CO Bussell determined that the ladder used by at least five L&A employees to access the roof of the hotel did not extend at least 3 feet above the roof's edge. The CO also noted that it was the only ladder set up at the site to access the roof. (Tr. 1498-1503, 1508-09; Ex. 129, at 19-21). Mr. Bonicenha admitted that the ladder probably extended only one foot and a half beyond the roof surface. (Tr. 590).
Employee(s) had access to the hazards.	On October 7, 2021, CO Bussell observed five L&A employees utilizing the ladder to move from the roof to the ground, approximately 30 feet below. (Tr. 1493-94, 1499). Mr. Bonicenha identified "Flaco" as one of his workers who is shown using the ladder in the photograph at Exhibit 129, at 21. He also identified the worker [wearing a red vest] standing on the roof by the ladder to the left as being one of his workers. (Tr. 590, 682, 1773-74, 1780; Ex. 129, at 19-21).
Mr. Billcliff knew, or could have known in the exercise of reasonable diligence, of the hazard.	On October 7, 2021, CO Bussell observed operations at the Devens Project for approximately 20-25 minutes, during which time Mr. Billcliff's supervisor, Jason Vaughn, was watching the employees on the roof, with the violative ladder in plain view in the same position the entire time. (Tr. 1489-90, 1499-1500, 1502-04; Ex. 129, at 19-22, 26-28). Mr. Vaughn instructed the employees to come off the roof, using the same ladder. (Tr. 1490, 1499). Mr. Vaughn had been at the Devens Project since October 6, 2021 overseeing the Devens Project. (Tr. 1506). Mr. Billcliff hired Mr. Vaughn to oversee the job site without ensuring that he knew how to safely use ladders. As Mr. Vaughn testified, if he had known an insufficiently extended ladder was an OSHA violation, he would have addressed it "every freaking time," but he "didn't know." (Tr. 777, 782-83, 922, 1508-11). Mr. Vaughn knew of the hazardous condition. He could see that the ladder did not extend at least three feet above the roof edge. Mr. Vaughn's knowledge as Mr. Billcliff's supervisor is imputed to Mr. Billcliff. Knowledge is established.

Citation 3, Item 2 (Ladder)	
Element	Evidence
The hazard posed the risk of serious bodily harm or death	Employees working on a roof 30 feet above the ground using a ladder that did not extend at least three feet from the upper landing surface of the roof could sustain permanently disabling or fatal injuries from a fall. (Tr. 1489-1503, 1508-09, 1657; Ex. 129).

(Sec’y PT Br., at 34-38).

G. The Secretary Has Proven Citation 2, Item 1, including the underlying cited Serious Violation as well as cited Willful violation of 29 C.F.R. § 1926.501(b)(11).

1. The Secretary proved the underlying Serious violation.

To prove that Item 1 in Citation 2 is Willful, the Acting Secretary must first establish a Serious violation. The cited standard, 29 C.F.R. § 1926.501(b)(11), states:

(b)(11) Steep roofs. Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

As summarized in the table below, the Acting Secretary proved each element required to establish a Serious violation of the cited standard.

Citation 2, Item 1 – Serious (Fall Protection)	
Element	Evidence
The standard applies.	The cited standard at issue, 29 C.F.R. § 1926.501(b)(11), states the requirements for protecting employees working on a steep roof with unprotected sides and edges 6 feet or more above lower levels from falling by guardrails, safety net or personal fall arrest systems. The roofing work at the Devens Project is covered under the construction standards. CO Bussell observed five L&A employees on the roof of the SpringHill Suites Hotel without any fall protection. CO Bussell also observed the employees utilizing a ladder to move off of the roof to the ground, approximately 30 feet below. (Tr. 587, 618, 1489-90, 1493-1503; Ex. 129, at 1-12, 16-18, 20-23, 26, 28). The standard applies to the cited conduct.

Citation 2, Item 1 – Serious (Fall Protection)	
Element	Evidence
Mr. Billcliff failed to comply with the standard.	Upon inspecting the Devens Project on October 7, 2021, CO Bussell observed five L&A employees on the roof of the SpringHill Suites Hotel without any fall protection. CO Bussell also observed the employees utilizing a ladder to move off of the roof to the ground, approximately 30 feet below, and at all times Mr. Billcliff’s supervisor Jason Vaughn was overseeing and watching these activities. (Tr. 586-87, 618, 1488-1503, 1508-09; Ex. 129, at 1-12, 16-18, 20-23, 26, 28). Both Messrs. Byrne and Mehlmann also testified that they observed workers not wearing fall protection while Mr. Vaughn was supervising the Devens Project. (Tr. 89-91, 206). CO Bussell also testified that harnesses “just weren’t being worn” by the workers at the job site. (Tr. 1781). At trial, Mr. Bonicenha agreed that several of his workers were not wearing fall protection atop the roof. (Tr. 587, 618, 1495, Ex. 129, at 1, 11).
Employee(s) had access to the hazards.	On October 7, 2021, CO Bussell observed five L&A employees working on the roof of the SpringHill Suites without fall protection, as well as utilizing a ladder to move from the roof to the ground, approximately 30 feet below, without fall protection. Several of these exposures were further confirmed by photographs. (Tr. 585-87, 618, 922, 1490-1504, 1510-11; Ex. 129, at 1-12, 16-23, 26-28).
Mr. Billcliff knew, or could have known in the exercise of reasonable diligence, of the hazards.	On October 6 and October 7, 2021, Mr. Billcliff’s supervisor, Jason Vaughn, was at the Devens Project and observed employees exposed to fall hazards over 1½ days from a roof height of approximately 30 feet. Mr. Vaughn took no action to eliminate the hazards. Mr. Billcliff also knew that he did not train Mr. Vaughn or the roofers at the Devens Project to recognize or address the fall hazards. (Tr. 587, 618, 1491-1504, 1510-11, 1527-28; Ex. 129, at 1-12, 16-23, 26-28). Mr. Vaughn’s knowledge as a supervisor is imputed to Mr. Billcliff. Knowledge is established.
The hazard posed the risk of serious bodily harm or death.	Employees working on a roof 30 feet above the ground could sustain permanently disabling or fatal injuries from a fall. (Tr. 1656-58).

(Sec’y PT Br., at 36-38).

2. The Secretary Has also Proven the cited Willful violation of 29 C.F.R. § 1926.501(b)(11) at Citation 2, Item 1.

To prove that Citation 2, Item 1 is Willful, the Secretary must further show that Mr. Billcliff acted with, e.g., plain indifference or intentional disregard. *See Brock v. Morello Bros. Constr., Inc.*,

809 F.2d 161, 164 (1st Cir. 1987); *Dayton Tire v. Sec’y of Labor*, 671 F.3d 1249, 1254 (D.C. Cir. 2012); *Kaspar Wire Works, Inc.*, No. 90-2775, 2000 WL 1182904, at *3 (OSHRC, July 3, 2000) (internal citations omitted), *aff’d*, 268 F.3d 1123 (D.C. Cir. 2001); *see also Propellex Corp.*, No. 96-0265, 1999 WL 183564, at *8 (OSHRC, Mar. 30, 1999) (explaining that the Commission will, for example, find “heightened awareness” where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that violative conditions exist); *Birdsboro Kosher Farms Corp.*, No. 16-1575, 2019 WL 5656486, at *14 (OSHR CALJ, Sep. 23, 2019) (consolidated) (noting that “Respondent’s conscious actions were part of an on-going failure to prioritize safety.”), *aff’d*, 831 F. App’x 516 (D.C. Cir. 2020) (unpublished). The Secretary need not, however, show that an employer acted with evil or malicious intent. *See Kaspar*, 2000 WL 1182904 at *3. Here, the Court finds that Mr. Billcliff acted with plain indifference to and intentional disregard of the cited OSHA standards.

Willfulness may also be shown where the Secretary proves that the violator’s “state of mind is such that, if he were informed of the rule, he would not care.” *AJP Constr., Inc. v. Sec’y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004). To prove this careless state of mind, courts may consider “the employer’s general attitude towards safety and good faith efforts made to comply” with the OSH Act’s requirements. *Timberline Hardwood Floors, LLC*, Nos. 18-1211, 2020 WL 4965237, at *17 (OSHR CALJ, July 20, 2020) (consolidated). When evaluating willfulness, the Court may also consider the extent to which the Respondent failed to cooperate with OSHA during the investigation and/or made false statements concerning the alleged violation(s). *E.g., Tony Watson, D/b/a Countryside Tree Serv.*, No. 16-2022, 2019 WL 5704681, at *30 (OSHR CALJ, Sept. 27, 2019) (“Watson’s false statement to the police in the immediate aftermath of the fatality ... evinces a consciousness of wrongdoing”); *Hern Iron Works, Inc.*, No. 89-433, 1990 WL 122699, at *21

(OSHRCALJ, May 7, 1990) (“It appears to this Judge the summary was completed in a fashion deliberately designed to mislead OSHA inspectors into believing this was not a lost time accident...”), *aff’d as modified*, 1993 WL 132975 (OSHRC, Apr. 27, 1993).

Here, Citation 2, Item 1, was Willful for the following reasons:

First, Mr. Billcliff plainly knew what was required. He admitted that he had years of experience in the roofing industry, that he had done a “ton” of OSHA courses, and that he had been specifically trained in fall protection well before the inspection began. (Stip. No. 1; Tr. 1063, 1968, 1970).

Second, on January 4, 2021 OSHA issued a 1 item Repeat-Serious citation to Barry Billcliff, d/b/a Barry’s Roofing, for a violation of 29 C.F.R. § 1926.501(b)(13) because “employees were working at heights greater than 6 feet without personal fall protection exposing them to a fall hazard[.]” The January 4, 2021 violation alleged a violation of 29 C.F.R. § 1926.501(b)(13) that was closely related to a standard in this case; *i.e.* 29 C.F.R. § 1926.501(b)(11). (Tr. 1361-62, 1368-80; Ex. 140, at 1, 6, Ex. 141). Relevant here is that, because the citation herein specifically alleged that Mr. Billcliff had violated the standard by allowing workers to work at heights above 6 feet without personal fall protection, Mr. Billcliff knew on October 7, 2021 that fall protection was required above such heights.

Third, despite having received clear notice before October 7, 2021 of what was required, Mr. Billcliff did not make any effort to ensure that Mr. Vaughn and the subcontractor L&A’s employees at the Devens Project had been trained on fall protection and/or knew what was required. (Tr. 516-19). Nor did Mr. Billcliff put in place any measures that would have at least potentially mitigated the fall protection hazard; such as a fall protection program, a general safety plan, any hazard analyses at the job site, or any plan for inspections of the job site by a competent person. (Tr. 522,

715-18). Mr. Billcliff chose as his Devens Project supervisor his friend Mr. Vaughn, knowing that Mr. Vaughn had “no real construction experience” and had never “swung a hammer before.” (Tr. 1983). At trial, Mr. Vaughn admitted saying at his February 9, 2023 deposition that Mr. Billcliff did nothing to prepare him for the responsibility of being the on-site supervisor at the Devens Project. (Tr. 777).

Fourth, Mr. Billcliff repeatedly lied during the inspection, litigation, and at trial; and these falsehoods are additional evidence of willfulness. As detailed in the Section II above, this included his falsehoods about whether: 1) as of December 21, 2021 he had any knowledge of the Devens Project, 2) as of December 21, 2021 he knew his son, Daniel Grzybowski pulled the permit for the Devens Project, 3) records of communications between him and Mr. Costa did not actually involve him, 4) he was an employer or not, 5) he ever visited the job site, 6) he spoke with CO Bussell by means of Mr. Vaughn’s cell phone on October 7, 2021, 7) he deposited the payment checks for the roofing work at the SpringHill Suites hotel and Conference Center into his Merrimack Valley Roofing Company account at the Merrimack Valley Credit Union on September 20, 2021 and November 16, 2021, 8) he hired Mr. Vaughn to be his on-site supervisor, 9) he was responsible for virtually every aspect of the Devens Project as the controlling employer, 10) the Devens Project was being done by Bay State Exteriors and Mr. LaChance, 11) Mr. Wolfe, a fictional character, owned Merrimack Valley Roofing, and 12) he purchased any materials for the Devens Project; as well as his evasiveness regarding the bank account that he controlled at the Merrimack Valley Credit Union. (Section II, above and Section VII, below).

As the court in *Hern Iron Works, Inc.* explained, a willful finding is appropriate where a defendant deliberately designed a story to mislead OSHA during its investigation, and this was compounded by the defendant’s trial demeanor, “internal inconsistency of his testimony, and

contradictory extrinsic evidence.” *Hern Iron Works, Inc.*, 1990 WL 122699, at *21. Such was the case herein.

V. PENALTIES

The Commission has authority to assess civil penalties for violations of the OSH Act. In doing so, the Commission looks to four statutory factors: the employer’s size, the violation’s gravity, the employer’s good faith, and the employer’s history of previous violations. 29 U.S.C. § 666(j); *accord Revoli Constr. Co., Inc.*, 2001 WL 1568807, at *11. Among these factors, gravity is the “primary element.” *See Contour Erection & Siding Sys. Inc.*, No. 06-0792, 2007 WL 4463127, at *4 (OSHRC, Dec. 13, 2007).

A. Calculation of the Penalties Originally proposed by OSHA.

CO Bussell testified that the OSHA fine was to Barry Billcliff and his doing business on October 7, 2021 as Merrimack Valley Roofing, Billco and other d/b/a names that were not actually then corporations, LLCs, or Inc.’s. (Tr. 1528, 1712). As CO Bussell testified, at the time the citations were issued, OSHA considered the size of the employer’s business, the gravity of the violation, the good faith efforts of the employer and the employer’s history of previous violations. (Tr. 1655-61). He said that OSHA was not able to discount the serious violation fines by more than 30 percent based on size because Mr. Billcliff never told OSHA how many people he or any of his named d/b/a’s, including Merrimack Valley Roofing, actually employed. (Tr. 1655, 1658, 1926-28). The CO testified that the severity was high because the items involved fall hazards from a height of 30-plus feet. He said that the most likely injury arising from these fall hazards would be injury, death, or permanent disability, such as a broken back or paralysis. He also said that 70-pound rolls of felt could roll off the roof and fall 30 feet below onto the head of workers hoisting material from the ground, causing serious injury. (Tr. 1656-58). He said that the probability factor that OSHA

determined was “greater” because employees were seen working in and around the roof’s edge without any fall protection. CO Bussell testified that gravity was “high” because it is a combination of severity and probability. (Tr. 1658). He said that there was no good faith adjustment because Respondent had shown “zero good faith through this whole process.” (Tr. 1658). He further said that there was a history adjustment increase of 10 per cent because Mr. Billcliff had a prior history with OSHA. (Tr. 1658-59). Accordingly, CO Bussell’s testimony shows OSHA’s maximum fine for a serious violation as of April 4, 2022 of \$14,502 was reduced by a size reduction of 30% [\$4,351] = \$10,151, with a 10% increase for history adding \$1,016 (rounded up) resulting in a fine proposed by OSHA for each of the serious violations amounting to \$11,167.

As to the Willful-Serious Citation 2, Item 1, CO Bussell said that the Area Director elected to give a 50 percent reduction for size from the maximum amount that could have been assessed by OSHA against Respondent.¹⁶³ (Tr. 1659). CO Bussell’s testimony shows OSHA’s maximum fine for a willful violation as of April 4, 2022 of \$145,027 was reduced by a size reduction of 50% [\$72,514] = \$72,513, with a 10% increase for history adding \$7,252 (rounded up) resulting in a fine proposed by OSHA for the willful violation amounting to \$79,765.

CO Bussell testified that had he known of Respondent’s lack of cooperation during the discovery process he would recommend no reductions in the fines whatsoever because: 1) applying any size reduction would not advance the deterrence goals of the OSH Act; 2) Mr. Billcliff’s behavior “has been extremely evasive throughout this whole process”, 3) Mr. Billcliff has taken “zero responsibility” for the job site and workers at the job site, 4) Mr. Billcliff “lied about ever being at the job site”, 5) Mr. Billcliff refused to admit that he was paid over \$100,000 to perform the work at the job site and went to great lengths to prevent OSHA from obtaining bank records relevant

¹⁶³ CO Bussell did not offer any rationale for the disparity of the two different size reductions used by OSHA.

to the payments, 6) Respondent never paid L&A the \$47,000 that it owed for the workers at the job site, 7) Respondent used a litany of business names to confuse issues, 8) Mr. Billcliff always redirected responsibility away from himself and onto a Mike LaChance, John Wolfe or “someone named Jeremy”,¹⁶⁴ and 9) Mr. Billcliff misled, deceived, and denied basic facts. (Tr. 1660-61).

B. The Secretary Now Asserts that Mr. Billcliff Should not be Given any Size Reduction by the Commission.

The Acting Secretary asserts in her Post Trial Brief that the evidence is more than sufficient for the Court to assess the penalties consistent with the factors considered by OSHA at the time the citations were issued. (Sec’y PT Br., at 54). Now, however, the Acting Secretary asserts that the Court should not grant any size reduction in its penalty calculation for two reasons. First, neither Mr. Billcliff nor his son, Mr. Grzyboski, would state, or estimate, how many employees Respondent had. (Tr. 1034-35, 1038-42, 1927-28). Even though Mr. Billcliff was involved with Merrimack Valley Roofing for more than 15 years, he declined to state or estimate at trial how many employees worked there.¹⁶⁵ Mr. Billcliff testified as follows:

Q. Mr. Billcliff, your son Daniel Grzyboski could not, or would not, estimate the number of employees that work at Merrimack Valley Roofing. Would you do that, please? As of today how many employees at Merrimack Valley Roofing?

A. I can’t give you a hundred percent either.

Q. I’m not asking for a hundred percent answer. How many people do you think work there?

¹⁶⁴ Mr. Billcliff testified that what occurred at the job site was “not my actions. So I’m not going to take responsibility for it.” (Tr. 1934). Mr. Billcliff testified that upon a date that he could not recall he started claiming that he was not involved in the Devens Project and should not have been cited by OSHA for anything to do with it. (Tr. 1935-37).

¹⁶⁵ In its Reply Brief, Respondent asserts that “Barry had no employees during the job depicted and his side company had two employees in total.” (Resp’t Reply Br., at 20). The Court gives no weight to this post trial assertion. On September 24, 2021, Mr. Grzyboski stated in the Billco Roofing permit application that it had 4 employees. The Court also puts no weight on this assertion due to the many fabrications contained within the permit application materials. (Exs. 123-24). The fact that more than \$2 million dollars passed through Mr. Billcliff’s Merrimack Valley Roofing Company account at the Merrimack Valley Credit Union from November 2019 through about July 2022 provided ample resources to pay at least 26 employees working at any one time within the twelve months preceding October 7, 2021. (Ex. 169; FOM, Table 6-2: Size Reduction, at 6-10).

A. I wouldn't venture to guess. If I don't understand a hundred percent, I'm not going to give you anything under a hundred percent for an answer. You have five attorneys, and a whole class working all of you against me. If I say one wrong word, you're going to wind up sticking me to the wall. So if I'm not a hundred percent sure, I don't feel comfortable giving you an answer.

Q. Is it more than 50?

A. That's a possibility.

Q. Is it more than a hundred?

A. Anything is a possibility. I'm not going to venture to guess.

(Tr. 1926; Stip. No. 8).

The Acting Secretary asserts that Respondent should not benefit by having the resulting ambiguity construed in its favor when considering what size reduction in the penalties is appropriate. (Sec'y PT Br., at 53-56).

Second, the Acting Secretary argues that this is the relatively rare case where the greatest penalty possible is needed to accomplish the purpose of the OSH Act. CO Bussell testified that, had he known at the time of his inspection what he learned about Mr. Billcliff by the time of trial, he would have "vehemently recommended" no penalty reduction. (Tr. 1660). The CO testified that applying any reduction factor would not advance the deterrence goals of the OSH Act. *Id.* CO Bussell said that Mr. Billcliff's behavior throughout the investigative and litigation process was "extremely evasive", he has "never taken responsibility" for the job site or the workers there, and he lied to OSHA about ever being at the job site. *Id.*

C. The Court allows a Size Reduction of 30 Percent in its Penalty Calculation for each Citation.

The OSHA Field Operations Manual (FOM) allows a penalty size reduction of 30% for each of the serious citations. (FOM, Table 6-2, at 6-10). The Court agrees with the Acting Secretary that an adjustment to the size reduction for the willful violation of Citation 2, Item 1 is appropriate. However, a 50% reduction, as made by the Area Director, is not appropriate for the following

reasons. There was no 50% size reduction identified and authorized in the OSHA FOM Size Reduction Table at Table 6-2 for citations issued on April 4, 2022. (FOM, Table 6-2, at 6-10). The FOM states:

Size Reduction

- a. A maximum penalty reduction of 70 percent is permitted for small employers. “Size” of an employer shall be calculated on the basis of the maximum number of employees for an employer at all workplaces nationwide, including State Plan states, at any one time during the previous 12 months.
- b. The rates of reduction to be applied are as follows.

Table 6-2 Size Reduction

Employees	Percent Reduction
...	...
26-100	30

FOM, Table 6-2: Size Reduction, at 6-10.

A 30 % size reduction is appropriate where an employer has between 26 to 100 employees.

(*Id.*). Mr. Billecliff testified that Merrimack Valley Roofing possibly had more than 50 employees.

D. The Court finds that no Percent Increase for History by OSHA for the Citations was Appropriate.

The Court finds that no allowable percent increase for history is appropriate here. The FOM states:

B. Penalty Adjustment Factors ...

2. History Adjustment ...

b. Allowable Percent Increase.

An increase of 10 percent shall be applied to employers who have been issued serious high gravity citations that have become a **final order** by the Commission ... within the past five years. [emphasis in original].

OSHA INSTRUCTION Directive Number: CPL 02-00-163, Effective Date: 09/13/2019, Subject: FOM, at 6-7.

On January 4, 2021 OSHA issued a 1 item Repeat-Serious citation to Barry Billcliff, d/b/a Barry’s Roofing, for a violation of 29 C.F.R. § 1926.501(b)(13) under Inspection No. 1498677 because “employees were working at heights greater than 6 feet without personal fall protection

exposing them to a fall hazard” at 77 Bradford Avenue, Bradford, Massachusetts 01835. That citation was settled on May 4, 2022 and became a final order of the Commission on June 8, 2022. (Ex. 142). A 10 percent price increase for history is not called for by the FOM because the citation issued to Mr. Billcliff on January 4, 2021 did not become a final order of the Commission until after April 4, 2022, the date OSHA issued the Citations here.

E. Court Assessed Penalties for Each Citation

OSHA’s maximum fine for a serious violation as of April 4, 2022 of \$14,502 reduced by the appropriate size reduction of 30% [\$4,351] = \$10,151, results in the Court assessing a fine of \$10,151 for each of the five serious violations at Citation 1, Items 1-3, and Citation 3, Items 1-2. OSHA’s maximum fine for a willful violation as of April 4, 2022 of \$145,027 reduced by the appropriate size reduction of 30% [\$43,508] results in a fine for the willful violation assessed by the Court amounting to \$101,519. In addition, taking into consideration the deterrence goals of the OSH Act and the falsehoods made by Messrs. Billcliff, Grzyboski and Vaughn during the OSHA investigation, ensuring litigation, and trial justify the Court assessing an additional \$10,000 to be added to the above \$101,519 resulting in the Court assessing an overall penalty for the willful violation of Citation 2, Item 1, in the amount of \$111,519.¹⁶⁶ The Court is not bound by the FOM and has broad discretion when assessing penalties. The Court acknowledges that employers are entitled to mount a spirited defense to any and all citations issued by OSHA; but false statements made by Messrs. Billcliff, Grzyboski and Vaughn to the OSHA compliance officer, Acting Secretary’s counsel, and/or to the Court throughout the disposition of these matters is neither permitted nor tolerated.

¹⁶⁶ This total penalty awarded by the Court for the willful violation of Citation 2, Item 1, is less than the statutory penalty maximum for a willful violation as of April 4, 2022 of \$145,027.

VI. RESPONDENT DID NOT ESTABLISH ANY DEFENSE TO THE CITATIONS.

Respondent did not introduce sufficient evidence at trial to establish any defense to the citations. In its Answers to Amended Complaint, Respondent asserted a general denial of the citation allegations, including asserting that Mr. Billcliff was not an employer under the OSH Act, he did not have knowledge of any unsafe work conditions, “the occurrence was an unpreventable employee misconduct (UEM)”, “the penalties are not correct”, “the offenses do not qualify as Repeat”, and “the alleged violations do not constitute as ‘Willful’ nor ‘Serious’”. The Court has already found here that Mr. Billecliff was an employer under the OSH Act, he did have knowledge of the unsafe work conditions, the alleged violations constituted a Willful/Serious violation and five other “Serious” violations. The Court has also made adjustments to OSHA’s proposed penalties and Complainant has withdrawn its original characterization of Citation 3, Item 1, as a Repeat. (Tr. 22). Respondent’s affirmative “unpreventable employee misconduct” defense was not raised further in its Post-Trial Brief. Affirmative defenses not raised in Respondent’s Post Trial or Respondents (sic) Response to Secretary’s Post Trial Brief may be deemed waived and abandoned by Respondent. *Corbesco, Inc. v. Dole*, 926 F.2d 422, 429 (5th Cir. 1991) (Affirmative defenses not argued waived); *Ga.-Pac. Corp.*, No. 89-2713, 1991 WL 132732, at *3 (OSHRC, Jun. 28, 1991) (“Commission declines to reach issues on which the aggrieved party indicates no interest.”). However, Respondent did briefly discuss its alleged “unpreventable employee misconduct” affirmative defense in its Resp’t Reply Br.; giving the Acting Secretary no opportunity to address UEM in her Reply Brief filed the same day. (Resp’t Reply Br., at 7 (at ¶¶66-67), 16, 21).

Respondent has not met its burden as to this affirmative defense. Respondent had no purported rules designed to prevent the hazards identified in the citations. There is insufficient evidence to show that on-site supervisors yelled at workers to put their harnesses and hard hats on

before CO Bussell arrived at the job site. Even had the yelling occurred, it is not enough to show that Respondent had adequate rules in place designed to prevent the hazards. *Danis Shook*, 2001 WL 881247, at *5-6 (rejecting defense despite “general rule requiring employees to wear PPE ‘as needed[.]’”); *Superior Custom Cabinet Co., Inc.*, No. 94-200, 1997 WL 603024, at *5 (OSHRC, Sept. 26, 1997)(denying defense despite unwritten rule to call the office if delivering to the second floor was “unsafe” because it “gave employees too much discretion in identifying unsafe conditions....”), *aff’d*, 158 F.3d 583 (5th Cir. 1998); *Automatic Sprinkler Corp. of Am.*, No. 76-5089, 1980 WL 10595, at *7 (OSHRC, May 9, 1980)(“the formulation and communication of a general work rule is not enough”). Moreover, there is insufficient evidence showing that fall protection, hazard recognition, ladder use and PPE training was provided to the workers at the job site, including Mr. Vaughn. Because Respondent took inadequate steps to prevent the hazards identified in the citations, it cannot prove that the violations were unpreventable.

To establish unpreventable employee misconduct, an employer is required to prove: “(1) that the employer has established work rules designed to prevent the violation; (2) that it has adequately communicated those rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered.” *Precast Servs., Inc.*, No. 93-2971, 1995 WL 693954, at *1 (OSHRC, Nov. 14, 1995) (quoting *Nooter Constr. Co.*, No. 91-0237, 1994 WL 27750, at *6 (OSHRC, Jan. 31, 1994)), *aff’d*, 106 F.3d 401 (6th Cir. 1997); *see also*, *Capform, Inc.*, No. 91-1613, 1994 WL 530815, at *3 (OSHRC, Sept. 29, 1994). In order to prevail on its UEM defense, Respondent must prove each of the elements of the defense. On this record, Respondent is unable to do so and thus, its UEM defense fails. Prior to CO Bussell’s arrival at the job site, Respondent: 1) had no established work rules designed to prevent the violations; (2) did not adequately communicate any relevant rules to its employees; (3)

took no steps to discover violations; and (4) did not effectively enforce any rules when violations have been discovered. Respondent did not produce any documents concerning any discipline given to any worker, supervisor or subcontractor for failing to follow any safety rule at the job site or any worksite other than the Devens Project job site for the two years preceding the date of the Inspection, October 7, 2021. (Tr. 1989-2001; Ex. 100, at 8-9, 12, 16, 18-19, 24-25, 27-29, 52-53). *See, e.g., Davis H. Elliot Co., Inc.*, No. 15-0799, 2017 WL 3217818, at *45 (OSHR CALJ, June 19, 2017) (Rejecting UEM because “[w]ith no established rule and only on-the-job training, there was no consistency of the procedures or methods that were conveyed to employees....”); *Superior Custom Cabinet*, 1997 WL 603024, at *3. An employer “cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge of their dangerous working practices.” *Pride Oil*, 1992 WL 215112, at *8 (quoting *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1247 (8th Cir. 1978)). “An employer who has failed to address a hazard by implementing and enforcing an effective work rule cannot shift to its employees the responsibility for assuring safe working procedures.” *Pride Oil*, 1992 WL 215112, at *8 (citing *Stuttgart Mach. Works, Inc.*, No. 77-3021, 1981 WL 18841, at *4 (OSHR C, Feb. 24, 1981)); *Davis H. Elliot Co.*, 2017 WL 3217818, at *45; *Pressure Concrete Constr.*, 1992 WL 381670 at *6 (rejecting argument that dangerous conditions at issue were “obvious and a reasonable employee would be aware of” them and “act accordingly” because it “erroneously places the burden on employees to be more aware and alert than their employer....”).

On this evidence, Respondent’s effort to raise UEM as a defense to liability to any of the citations fails. The Court finds that all of Respondent’s defenses are rejected because they either lack merit or have been abandoned, or both. Accordingly, all of the citations are affirmed.

VII. RESPONDENT IS SANCTIONED FOR MR. BILLCLIFF'S EVASIVE CONDUCT REGARDING COMPLAINANT'S REQUEST FOR BANK RECORDS, DONE WITH THE DELIBERATE INTENT OF OBSCURING THE EXTENT OF HIS INVOLVEMENT IN THE DEVENS PROJECT ROOFING WORK, AND IN CONTEMPT OF THE COURT'S NOVEMBER 29, 2022 ORDER.

As the Acting Secretary asserts, each time prior to trial that Mr. Billcliff was asked about the Devens Project payments and the bank account to which they were deposited, he should have answered truthfully, summarized his role, and admitted that the Devens Project payments were deposited to the bank account that he alone controlled. Mr. Billcliff, however, did none of those things. Instead, he repeatedly failed to admit or otherwise acknowledge his role, including after he was ordered to do so by the Court. Consequently, the Acting Secretary had to spend considerable additional time obtaining the bank records directly from Merrimack Valley Credit Union and then proving at trial both that Mr. Billcliff alone controlled the account and that he received/controlled the payments for the Devens Project. Mr. Billcliff knew exactly what the Court ordered him to do, but deliberately chose not to comply. (Sec'y PT Br., at 45-46).

A. Facts Regarding Bank Records.

Mr. Billcliff refused to admit or otherwise acknowledge his role regarding the bank account and the Devens Project payments until after the Acting Secretary obtained the bank records directly from the Merrimack Valley Credit Union. During his February 11, 2022 deposition, Mr. Billcliff claimed he could not recall the name of the bank where Merrimack Valley Roofing did its banking. (Tr. 2070-71). During his March 8, 2022 interview, CO Bussell showed him the checks for the Devens Project roofing work, but Mr. Billcliff claimed he could not recall whether he had ever seen the checks before. (Tr. 2071). When he was asked during the interview about whether the checks from the Devens Project had been deposited into an account connected to his name, Mr. Billcliff stated that he "highly doubt[ed] that." (Tr. 2071).

On July 8, 2022, the Acting Secretary served requests for production of documents (Document Request), request for interrogatories (Interrogatory), and RFA on Mr. Billcliff. (Ex. 100, at 2-7). The Acting Secretary requests included:

1. Document Request 1 asked for monthly statements for the Account¹⁶⁷;
2. Document Request 2 asked for copies of checks deposited to the Account;
3. Document Request 4 asked for documents sufficient to show who was authorized to take various actions regarding the Account, to include closing it;
4. Document Request 5 asked for documents sufficient to show who was receiving monthly statements for the Account;
5. Interrogatory 1 asked Mr. Billcliff to describe all roles he had concerning the Account;
6. Interrogatory 2 asked Mr. Billcliff to describe deposits to the Account;
7. Interrogatory 4 asked Mr. Billcliff to describe who was authorized to take various actions regarding the Account, to include closing it;
8. Interrogatory 5 asked Mr. Billcliff to identify the persons to whom monthly statements were sent or made available;
9. RFA 7 asked Mr. Billcliff to admit that the attached checks were true and correct copies of checks received by him from Devens Hospitality regarding the Devens Project; and
10. RFA 8 asked Mr. Billcliff to admit that he deposited the attached checks into the Account.

(Tr. 2074-82, 2087-89; Ex. 100, at 2-7).

On July 8, 2022, Mr. Billcliff filed responses to the Secretary's RFAs. (Ex. 100, at 7-8). On July 11, 2022, Mr. Billcliff filed responses to the Secretary's interrogatories and document requests. (Ex. 100, at 8-12). Mr. Billcliff did not produce any documents in response to the above document requests. (Tr. 2086). He did not provide any substantive information in response to the above interrogatories. (Tr. 2088-89; Ex. 100, at 11). He denied the above RFAs. (Tr. 2089-90; Ex. 100 at 8). Mr. Billcliff falsely claimed in response to each of the above document requests that he did not

¹⁶⁷ Each of these discovery requests defined the relevant account — the “Account” — as the account to which the checks for the Devens Project had been deposited. (Tr. 2074-87). At trial, Mr. Billcliff admitted that the definition of “Account” was clearly set forth in the Secretary's written requests, and that he understood that the same definition was used in the subpoena to the Merrimack Valley Credit Union that the Court issued. (Tr. 2082, 2086-87, 2119, 2132).

believe he owned or controlled any account under Merrimack Valley Roofing, and that he did not have immediate access to any account as defined in the definition of “Account.” (Tr. 2085-86; Ex. 100, at 8). He also falsely claimed in response to Interrogatory 4 that he had no immediate knowledge of the Account nor any of its signers. (Tr. 2090; Ex. 100, at 11). He further falsely claimed in response to Interrogatory 5 that he had no personal knowledge of the Account.¹⁶⁸ (Tr. 2090; Ex. 100 at 11). On August 12, 2022, Mr. Billcliff closed the Account. (Tr. 2124-25; Ex. 155, at 512). He did not, however, inform the Secretary of that in any supplement to his July 2022 written discovery responses. (Tr. 2124-27). (Sec’y PT Br., at 47-48).

On October 18, 2022, the Secretary moved to compel, including as regards to the above written requests. (Ex. 100, at 12). On November 29, 2022, the Court granted the relevant portions of the Secretary’s motion to compel. (Ex. 100). The Court ordered Mr. Billcliff to supplement his written discovery responses, including to Document Requests Nos. 1-2, 4, and 5; to Interrogatories Nos. 1-2, 4, and 5; and to RFAs 7 and 8. (Ex. 100, at 53-54). The Court also found that Mr. Billcliff’s attempt to limit his discovery responses to just his immediate personal knowledge was both unreasonable and a failure to answer, and ordered him to conduct a reasonable inquiry of the information and documents in his possession, custody, or control before he responded to each request. (*Id.*, at 52). The Court further directed that this reasonable inquiry had to include searching for information and documents in the possession, custody, or control of the named d/b/a’s. (*Id.*). The Court further ordered that, if Mr. Billcliff did not produce the bank records and information the Secretary had requested within 15 days, he was both: (a) required to inform Merrimack Valley Credit Union in writing that he did not object to the bank producing those records to the Secretary

¹⁶⁸ At trial, Mr. Billcliff admitted that he understood in July 2022 that his responses to both the document requests and the interrogatories were required to be accurate. (Tr. 2090).

directly, and (b) provide a copy of that notice to the Secretary. (*Id.*, at 53-54). Mr. Billcliff admitted that he read the Court's Order. (Tr. 2093-94). (Sec'y PT Br., at 48).

Mr. Billcliff did not comply with the Court's November 29, 2022 Order. Instead, on December 6, 2022, Mr. Billcliff filed supplemental written discovery responses, including to the above discovery requests. (Tr. 2095). At trial, Mr. Billcliff admitted that he did not produce any of the bank records that the Secretary had requested, nor did he provide any of the information about the Account that the Secretary had requested. (Tr. 2095-98). Further, when Mr. Billcliff was given the opportunity at trial to identify where in his supplemental responses he admitted or acknowledged in any way his role regarding the Account, Mr. Billcliff was not able to point to any such information. Specifically, Mr. Billcliff could not identify any place in his supplemental responses where he stated that: (a) he was the only Authorized Signer on the Account from at least September 2021 through August 12, 2022, when the Account was closed; (b) that the only name associated with the Account at Merrimack Valley Credit Union was his; (c) that it was his name and home address on each monthly statement for the Account; (d) that he had deposited the checks regarding the Devens Project into the Account; and/or (e) that he had closed the Account in August 2022. (Tr. 2127-32). (Sec'y PT Br., at 48-49). Mr. Billcliff did not produce the bank records to the Secretary. Mr. Billcliff also did not inform Merrimack Valley Credit Union in writing that he did not object to the bank producing the records to the Secretary directly and provide a copy of same to the Secretary, as he was ordered to do by the Court. (Tr. 2104-07). Instead, Mr. Billcliff provided a letter from the Merrimack Valley Credit Union dated December 1, 2022 stating that Mr. Billcliff had no business account there as of that date. (Tr. 2107-09; Ex. P, at R-259). The Credit Union's letter did not include any discussion of the account(s) that existed prior to that date, including the Account, which

Mr. Billcliff knew he had closed in August 2022, but had not disclosed to the Secretary. (Tr. 2108, 2124-27; Ex. P, at R-259). (Sec’y PT Br., at 48-49).

Since Mr. Billcliff did not comply with the Court’s November 29, 2022 Order, the Acting Secretary asserts that she had no choice but to ask the Court to issue a document subpoena to Merrimack Valley Credit Union. The Court issued the subpoena, and the Acting Secretary then served the subpoena on Merrimack Valley Credit Union. (Ex. 155, at 1-12). (Sec’y PT Br., at 49).

When the Acting Secretary tried to obtain information about the bank records from Mr. Billcliff during his January 12, 2023 deposition, Mr. Billcliff claimed that he could not recall whether: (a) he ever received any payment at all related to the Devens Project; (b) whether he deposited the checks received for the roofing work; (c) whether he ever signed checks for Merrimack Valley Roofing; (d) whether he had ever cashed checks for Merrimack Valley Roofing; and/or (e) whether he had ever accessed online banking at Merrimack Valley Credit Union. (Tr. 2110-17). (Sec’y PT Br., at 49).

On January 23, 2023, the Acting Secretary moved for sanctions against Mr. Billcliff, including in regard to his failures to comply with his obligations regarding the bank records set forth in the Court’s November 29, 2022 Order. (Sec’y PT Br., at 49).

On January 26, 2023, Merrimack Valley Credit Union produced the requested bank records to the Acting Secretary. Later that same day, the Acting Secretary filed a further supplement to the Motion for Sanctions titled “Second Supplement to 1/23/2023 Motion for Sanctions Regarding 1/26/2023 Credit Union Production Showing Mr. Billcliff Deposited the Checks Used to Pay for the Project into the Account.” This filing summarized what the bank records showed and included various records as Exhibits. (Sec’y Br., at 49-50).

Later in the day on January 26, 2023, Mr. Billcliff filed a response to the Acting Secretary's Second Supplement to the Motion for Sanctions in which Mr. Billcliff dealt with the fact that the Acting Secretary had obtained the bank records directly from the Merrimack Valley Credit Union and she had provided that information to the Court. It was only at this point that Mr. Billcliff changed his story from what he had previously claimed. For the first time, Mr. Billcliff admitted that he had been in control of the money in the Account and that he had "oversight" of the Account. (Tr. 2320-21). He further claimed that he closed the account long before any information from the account was requested. This assertion was false, given that he had responded to the Secretary's requests in July 2022, but not closed the Account until August 12, 2022. (Tr. 2126-27; Ex. 100, at 7-12). (Sec'y PT Br., at 50).

At trial, Mr. Billcliff objected to the Acting Secretary introducing any of the bank records into evidence at trial. Because of his objection, the Acting Secretary had to present live testimony from a records custodian. At trial, CO Michael Grover testified that he had reviewed the bank records and helped prepare Trial Exhibit 169, which showed that more than \$2 million had been deposited into the bank account in an approximately 2.5 year period. (Tr. 1435-44; Ex. 169). CO Grover also testified that the only name he saw associated with the Account in the bank records was Mr. Billcliff's name. (Tr. 1444). At trial, CO Bussell testified that the person shown in the photographs depositing the checks from the Devens Project at Merrimack Valley Credit Union was Mr. Billcliff. (Tr. 1558-60). The Court admitted into evidence the key bank records over Mr. Billcliff's objections, including the screenshots that CO Bussell testified showed Mr. Billcliff depositing the checks for the Devens Project. (Tr. 1560-61; Ex. 155, at 107-08). (Sec'y PT Br., at 50).

B. Legal standard for Sanctions

Commission Rule 52(f)(2) states that “[i]f a party fails to comply with an order compelling discovery, the Judge may enter an order to redress the failure” and issue “any sanction stated in Federal Rule of Civil Procedure 37.” (*Id.*). Federal Rule of Civil Procedure 37, in turn, states that if a party fails to obey an order to provide or permit discovery, the Court may issue further orders:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A). Rule 37 goes on to state that the Court “must order the disobedient party to pay the reasonable expenses, including attorney’s fees, caused by the failure.” Fed. R. Civ. P. 37(b)(2)(C) (explaining that an award of expenses, including attorney’s fees, is required unless the failure was substantially justified or such an award would be unjust); *see also Roy’s Constr., Inc.*, No. 11-0892, 2012 WL 4872800, at *9 n.26 (OSHR CALJ, June 29, 2012) (outlining law on attorneys’ fees and expenses in connection with motions to compel and motions for sanctions); *Exterior Insulation & Stucco, Inc.*, No. 99-0710, 1999 WL 34813136, at *1 (OSHR CALJ, Nov. 1, 1999) (Judge may order sanctions for failure to comply with order compelling discovery); *Sealtite Corp.*, No. 88-1431, 1991 WL 132733, at *6 (OSHR CALJ, June 28, 1991) (explaining that

administrative law judges have “very broad discretion in imposing sanctions for noncompliance with [their] orders”).¹⁶⁹

C. Sanctions are Appropriate here.

As described above, Mr. Billcliff repeatedly failed to provide the information and documents requested by the Acting Secretary concerning the Account, even after the Court ordered him to do so. Mr. Billcliff had ample opportunity to provide information readily available to him but he did not do so; not in his responses to the Acting Secretary’s requests for production of documents, not in his interrogatory responses, not in his RFA responses, and not at his January 12, 2023 deposition. The Court has found that the \$90,000+ that Mr. Billcliff received in payment for the Devens Project roofing work was deposited into an account controlled by Mr. Billcliff at the Merrimack Valley Credit Union. The Court also finds that: (a) Mr. Billcliff opened the Account, (b) he was the only

¹⁶⁹ Since Mr. Billcliff failed to admit RFAs 7 and 8 and the Acting Secretary later proved the document that was the subject of RFA No. 7 to be genuine and the matter that was the subject of RFA No. 8 to be true, Rule 37 provides a still further basis for requiring Mr. Billcliff to pay the Secretary’s reasonable expenses, including attorney’s fees. *See* Fed. R. Civ. P. 37(c)(2):

Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

- (A) the request was held objectionable under Rule 36(a);
- (B) the admission sought was of no substantial importance;
- (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (D) there was other good reason for the failure to admit.

See also, e.g., Iron Workers Local No. 60 Annuity Pension Fund v. Solvay Iron Works, Inc., No. 5:15-CV-0054 (BKS/DEP), 2017 WL 1458772, at *3-4 (N.D.N.Y. Apr. 24, 2017) (expressly confirming that the authenticity of documents is an appropriate subject for RFAs, noting that a party serving RFAs is under no obligation to use deposition time to authenticate documents that could be authenticated via RFA, and observing that the responding party is not allowed to simply respond to such requests by stating that the document “speaks for itself”); *LeMond Cycling, Inc. v. Trek Bicycle Corp.*, No. 08-1010 (RHK/JSM), 2009 WL 10678176, at *4-6 (D. Minn., Nov. 30, 2009) (imposing sanctions because the responding party failed to conduct the reasonable inquiry required in response to a request to admit the authenticity of a document).

Authorized Signer, (c) his name was the only name the Merrimack Valley Credit Union ever had associated with the account; (d) each monthly statement was addressed to Mr. Billcliff at his home address, and (e) he closed the Account on August 12, 2022 after receiving the Secretary's written discovery requests. There is no excuse for Mr. Billcliff failing to provide that information and the associated documents following the Court's November 29, 2022 Order.

Consequently, the Court orders that Mr. Billcliff is sanctioned because his conduct regarding the requested bank records was evasive, done with the deliberate intent of obscuring the extent of his involvement in the Devens Project roofing work, and in contempt of the Court's November 29, 2022 Order. The Court therefore awards the Acting Secretary reasonably incurred attorneys' fees that she incurred because of Mr. Billcliff's failure to comply with the Court's November 29, 2022 Order regarding the requested bank records and related information.

On September 8, 2023, as directed by the Court's Order, dated September 6, 2023, the Acting Secretary submitted documentation requesting that Respondent Barry Billcliff d/b/a various names be ordered to pay a total of at least \$3,215 in attorneys' fees because of his failure to comply with the Court's November 29, 2022 Order regarding the requested bank records and related information. (Sec'y Request for Attorneys' Fees).¹⁷⁰

Many courts, including the First Circuit, typically follow the "lodestar" method for calculating reasonable fees. *Tenn. Gas Pipeline Co. v. 104 Acres of Land*, 32 F.3d 632, 634 (1st Cir. 1994). The lodestar method involves "multiplying the number of hours productively spent by a reasonable hourly rate to calculate a base figure." *Torres-Rivera v. O'Neill-Cancel*, 524 F.3d 331, 336 (1st Cir. 2008) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The first step in calculating the lodestar is to determine the number of hours the attorneys reasonably expended for

¹⁷⁰ Respondent's response to the Acting Secretary's Request for Legal fees was due by October 4, 2023. Respondent did not file any response to the Acting Secretary's Request for Legal Fees.

the prevailing party, excluding those hours that are “excessive, redundant, or otherwise unnecessary.” *Hensley*, 461 U.S. at 434; *see also Grendel’s Den, Inc. v. Larkin*, 749 F.2d 945, 950 (1st Cir. 1984) (explaining that a court should subtract “hours which [are] duplicative, unproductive, excessive, or otherwise unnecessary”); *see also Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 297 (1st Cir. 2001) (explaining that the court may reduce the hours claimed if there is insufficient evidence/documentation of same). (Sec’y Request for Attorneys’ Fees, at 2).

The second step in calculating the lodestar requires the determination of a reasonable hourly rate which is benchmarked to the “prevailing rates in the community” for lawyers of like “qualifications, experience, and specialized competence.” *Gay Officers Action League*, 247 F.3d at 295. In determining a reasonable hourly rate, a court must consider “the type of work performed, who performed it, the expertise that it required, and when it was undertaken.” *Grendel’s Den*, 749 F.2d at 951. The party requesting fees bears the burden of establishing an appropriate level of skill and experience. *See, e.g., Martinez v. Hodgson*, 265 F. Supp. 2d 135, 142 (D. Mass. 2003). Finally, the court multiplies the reasonable number of hours and hourly rate to arrive at the “lodestar,” which the court may adjust upward or downward for other factors. *Spooner v. EEN, Inc.*, 644 F.3d 62, 68 (1st Cir. 2011).¹⁷¹

¹⁷¹ Examples of other factors include:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of employment by the attorney due to acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the ‘undesirability’ of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases.

Diaz v. Jiten Hotel Mgmt., Inc., 741 F.3d 170, 177 n.7 (1st Cir. 2013) (citing *Hensley*, 461 U.S. 424, 430 n.3).

The Acting Secretary asserts that her attorneys Senior Trial Attorney (STA) Joseph Landry and OSHA Counsel (OC) Henderson reasonably expended 13 hours of time because Mr. Billcliff failed to comply with the Court's November 29, 2022 Order regarding the bank records; including the time associated with actions such as: (a) attempting to get Mr. Billcliff to comply with the Order; (b) obtaining a subpoena to the bank directly from the Court after Mr. Billcliff did not comply; (c) serving the subpoena on the bank; (d) moving for sanctions regarding the bank records and related information; (e) providing copies of the records received from the bank to Mr. Billcliff; (f) having to call a live witness at trial after Mr. Billcliff objected to the business records certification included with the bank records; (g) examining Mr. Billcliff at trial regarding his failure to comply with the Court Order in regard to the bank records and related information, and (h) preparing the section in the Acting Secretary's Post-Trial Brief regarding sanctions directed solely to the bank records and related issues.

Here, the Court finds that \$275/hour and \$375/hour are reasonable rates for STA Landry and OC Henderson, respectively, for the reasons stated in the Acting Secretary's Request For Attorneys' Fees, at 7-9. Since some of the time STA Landry spent arguably involved work such as emailing Mr. Billcliff copies of things and filing/serving the briefs and Exhibits involved, the Acting Secretary voluntarily treated 3 hours of STA Landry's time as paralegal time and only seek \$75/hour for that time, for a subtotal of \$225, leaving 7.6 hours for STA Landry at \$275/hour, for a subtotal of \$2,090. As regards the 2.4 hours for OC Henderson, at \$375/hour that is a subtotal of \$900. Together, \$225, plus \$2,090, plus \$900 is \$3,215. The Acting Secretary therefore seeks at least \$3,215 in fees here. The Court finds that the amount of attorneys' fees that the Acting Secretary now seeks to be reasonable. The Court awards and assesses Respondent Mr. Billcliff \$3,215 to be paid by him to the Acting Secretary within forty days of the date of this order at an address and in

accordance with procedures to be provided by the Acting Secretary to him.¹⁷²

VIII. 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.

IX. CONCLUSION

As discussed above, the elements of applicability, employee exposure, violation and knowledge of the cited conditions are proved as to all items. The Court finds that Mr. Billcliff is individually and personally responsible and liable for the violations alleged in all of the underlying citations and the corresponding penalties assessed herein by the Court in the amount of \$162,274; as well as \$3,215 as sanctions and an award of attorneys' fees described above.

X. ORDER

Based upon the foregoing findings of fact and conclusions of law, IT IS ORDERED that: Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1926.20(b)(2), is AFFIRMED and the Court assesses a penalty in the amount of \$10,151; IT IS FURTHER ORDERED that: Citation 1, Item 2, alleging a Serious violation of 29 C.F.R. § 1926.100(a), is AFFIRMED and the Court assesses a penalty in the amount of \$10,151; IT IS FURTHER ORDERED that: Citation 1, Item 3, alleging a Serious violation of 29 C.F.R. § 1926.501(b)(3), is AFFIRMED and the Court assesses a penalty in the amount of \$10,151;

¹⁷² By filing no response to the Acting Secretary's Request for Attorneys' Fees, Mr. Billcliff does not dispute the amount or reasonableness of the attorneys' fees sought by the Acting Secretary.

IT IS FURTHER ORDERED that: Citation 2, Item 1 alleging a Willful-Serious violation of 29 C.F.R. § 1926.501(b)(11), is AFFIRMED as both a Willful and Serious violation and the Court assesses a penalty in the amount of \$111,519;

IT IS FURTHER ORDERED that: Citation 3, Item 1, alleging a Serious violation of 29 C.F.R. § 1926.503(a)(1), is AFFIRMED and the Court assesses a penalty in the amount of \$10,151;

IT IS FURTHER ORDERED that: Citation 3, Item 2, alleging a Serious violation of 29 C.F.R. § 1926.1053(b)(1), is AFFIRMED and the Court assesses a penalty in the amount of \$10,151; and

IT IS FURTHER ORDERED that Mr. Billcliff pay \$3,215 as sanctions and an award of attorneys' fees described above to the Acting Secretary within forty days of the date of this order at an address and in accordance with procedures to be provided by the Acting Secretary to him.

SO ORDERED.

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

Dated: November 13, 2023
Washington, D.C.