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

SECRETARY OF LABOR,
Complainant,

v.

SKYLINE RESTORATION, INC.,
Respondent.

OSHRC Docket No. 19-1736

DECISION AND ORDER

APPEARANCES:

For the Complainant:

Andrew Karonis, Esq.
B. Carina De La Paz, Esq.
Office of the Solicitor
U.S. Department of Labor
New York, New York

For the Respondent:

Michael Rubin, Esq.
Stefan Borovina, Esq.
Goldberg Segalla, LLP
Buffalo, New York

BEFORE: Administrative Law Judge William S. Coleman

INTRODUCTION

On April 10, 2019, in Brooklyn, New York, an employee of a subcontractor named Jaen Restoration Corp (Jaen) fell to his death from the flat roof of a twelve-story building. The general contractor for the project was the Respondent, Skyline Restoration, Inc. (Skyline).

Skyline had subcontracted to Jaen the entire scope of work that was specified in its general contract. That scope of work entailed performing masonry and waterproofing repairs on and around the building's rooftop water tower. On the day of the fatal fall, the decedent was one of

two Jaen employees working on the project. No Skyline employees were present at the time of the fall.

The Occupational Safety and Health Administration (OSHA) conducted an inspection and investigation into the work-related fatality and ultimately issued separate citations to both Skyline and Jaen. The separate citations averred that each company had violated the same OSHA standards in precisely the same manners. The Secretary's theory in issuing nearly identical citations to each company was that Skyline was responsible for the violations as the "controlling" employer at the multi-employer construction site, and that Jaen was responsible for the same violations as the "exposing" or "creating" employer. (T. 188).

Both companies formally contested their respective citations. Jaen resolved its contest within about five months thereafter by entering into a formal settlement agreement in which Jaen accepted all seven alleged violations (OSHRC Docket No. 19-1796).

The citation issued to Skyline (just like the citation that had been issued to Jaen) alleges that Skyline violated the following OSHA standards: one violation of the accident prevention responsibilities in construction workplaces standard (29 C.F.R. § 1926.20(b)(2)); three violations of the fall protection in construction workplaces standard (§§ 1926.501(b)(1) & (b)(3); § 1926.502(d)(6)(i)); and three violations of the hazard communication standard (HCS) (§ 1910.1200, as applicable to construction workplaces by § 1926.59). All seven violations were classified as "serious" violations, and one of the three alleged HCS violations was alleged also to have constituted a "repeated" violation.

The undersigned conducted an evidentiary hearing on Skyline's contest utilizing videoconference technology on May 24–26, 2021. Post-hearing briefing was completed on August 20, 2021.

The following witnesses testified in the Secretary's case-in-chief:

- Mr. Zhao-Hong Huang—the OSHA compliance safety and health officer (CO) who conducted OSHA's inspection and investigation.
- Ms. Janaina Siguencia—a former special investigator with the New York City Department of Investigations (DOI), who had provided Spanish-English translation services during investigative interviews of a Jaen employee (Jorge Aucanshala) and a Skyline employee (Jose Sanchez).
- Mr. Julio Rueda—Skyline's project manager.

The two individuals for whom Special Investigator Siguencia translated in the investigative interviews (Jorge Aucanshala and Jose Sanchez) had been identified by the Secretary as witnesses that the Secretary might call to testify. Skyline also identified Sanchez (but not Aucanshala) as a possible trial witness for its case-in-chief. (Jt. Preh'rg Stmt. 6, May 10, 2021).

The Secretary attempted to secure the presence of Mr. Aucanshala (a/k/a Jorge Arellano) to testify at the hearing. An attorney for the Secretary succeeded in making telephone contact with Aucanshala prior to the hearing, but Aucanshala refused to disclose where he could be located, and so the Secretary lacked sufficient information to serve him with a subpoena. (T. 161). (The Secretary did not request an adjournment of the hearing to allow further efforts to compel Aucanshala to testify.)

Mr. Sanchez, whose testimony both parties had intended to present in their respective cases-in-chief, had been Skyline's project superintendent/supervisor for the project, but by the time of the hearing he was no longer in Skyline's employ. (Jt. Prehr'g Stmt. 6; T. 406-07). Neither the Secretary nor Skyline indicated whether Mr. Sanchez had been served with a hearing subpoena, but on the day Sanchez had been expected to testify, the attorney for Skyline reported that "[w]e did believe [Sanchez would] be testifying today, but he has advised Skyline he cannot testify today

and won't testify today," and so "we will not be proceeding with Mr. Sanchez."[1] (T. 406-07). Neither Skyline nor the Secretary requested an adjournment to undertake efforts to compel Mr. Sanchez to appear and testify.[2]

Skyline presented the testimony of two witnesses in its case-in-chief. Both witnesses were employees of a company called Andromeda Advantage, Inc. (Andromeda), which Skyline has described as an affiliated company, although the nature of the affiliation is not of record. (T. 326-27, 351-52). The two Andromeda employees who testified were Daniel Wilenchik, Esquire, who is an in-house attorney for Andromeda, and Ms. Patricia Perez, who is Andromeda's Senior Risk Manager. (T. 393).

The principal issues for decision are:

- Did Skyline have the status of "controlling employer" over the multi-employer construction worksite?

  Decision: Yes.

[1] The parties had agreed that both Skyline and the Secretary would conduct their respective direct examinations of Mr. Sanchez (for the purposes of their respective cases-in-chief) upon Skyline presenting his testimony during Skyline's case-in-chief. That agreement was made so that Mr. Sanchez would be called to testify just one time, rather than two separate times in each party's respective case-in-chief. (Jt. Preh'rg Stmt. 16; T. 406-07).

[2] In addition to intending to present Mr. Sanchez as witness during the presentation of the Secretary's case-in-chief, the Secretary sought also to introduce in evidence a memorandum dated May 16, 2019, that Special Investigator Ross Hoffman of the New York City DOI had prepared. The memorandum sets forth Hoffman's account of what Sanchez said during the interview that Hoffman and the CO had conducted about five weeks earlier on the day of the fatal fall, April 10. That memorandum was marked for identification as Exhibit C-1. The undersigned sustained Skyline's objection to the admission of Exhibit C-1, ruling that the memorandum itself did not qualify as an exception to the hearsay rule as a business record because it had not been made at or near the time of the event as required by Federal Rule of Evidence 803(6)(A). (T. 230-31). Nevertheless, both CO Huang and Special Investigator Siguencia, who translated the questions and answers during the April 10 interview, were permitted to testify to their recollections of what Mr. Sanchez had said during the interview. Their testimony of what Mr. Sanchez said during the interview does not constitute hearsay under Federal Rule of Evidence 801(d)(2)(D). (T. 232-34).

- Was the evidence preponderant that the subcontractor had not complied with the cited standards?

  Decision: A preponderance of the evidence established that the subcontractor had not complied with four of the seven cited standards.

- Was the evidence preponderant that Skyline failed to take reasonable measures to prevent, or to detect and abate, the subcontractor's proven failures to comply with cited standards, so that Skyline was liable for those violations as the controlling employer?

  Decision: Yes.

- Did the Secretary prove by a preponderance of the evidence that Skyline is responsible for the HCS violations as a "creating employer"?

  Decision: Yes.

As described below, four of the seven alleged violations are affirmed, and penalties totaling $25,194 are assessed.

FINDINGS OF FACT

Except where the following numbered paragraphs expressly state that there was no evidence respecting a matter of fact, the following facts were established by at least a preponderance of the evidence:

1. Skyline Restoration, Inc. (Skyline) is a New York corporation that maintains its offices in Long Island City, New York. (Answer ¶ 2). Skyline is a general contractor that specializes in exterior façade restoration, such as masonry, waterproofing and roofing work. (T. 255-56). Skyline has approximately 40 to 50 employees. (T. 283-84, 328; Ex. J-11).

2. Skyline's construction projects mostly arise from general contracts that it makes with building owners and building management companies. (T. 257).

3. Skyline's employees do not perform any trade labor construction work in the performance of its general contracts, and none of its employees are employed as skilled labor. Skyline's corporate model is to subcontract the entire scope of work specified in its general contracts. (T. 257-58, 303, 364; Ex. J-11).

4. After making a general contract, Skyline assigns an employee to serve as the "project manager" and assigns other employees, who are subordinate to the project manager, to serve as "project supervisors" (also referred to as "project superintendents" or "supers") to administer the project. (T. 256-58, 272-75, 283-84, 303-04, 353; Ex. J-11).

5. In March 2019, Skyline made a general contract to perform certain masonry and roofing repair on and around the rooftop water tower on a 12-story building in Brooklyn, New York (worksite) for a contract sum of $4,400. (T. 10-11, 40-41; Ex. J-14). The rooftop was about 130 feet above ground level. (T. 124; Ex. J-14, p. 2).

6. One of the water tower's four brick-veneer supporting columns (also referred to as "piers") was the focus of the repair work. The general contract specified the repairs as follows (Ex. J-14):

- Remove and replace 20 square feet of the column's brick façade (representing $1,200 of the contract sum)
- Remove and repoint another 20 square feet of brick mortar joints (representing $200 of the contract sum)
- Install waterproofing membrane at steel penetrations into the column and the water tank's drain valve (representing $1,800 of the contract sum)
- Caulk utility boxes anchored to the column (representing $200 of the contract sum)
- Waterproof air conditioner tubing (representing $1,000 of the contract sum)

7. On April 1,[3] Skyline subcontracted with Jaen Restoration Corp. (Jaen) for Jaen to perform the entire scope of work specified in its general contract for a subcontract sum of $1,800. (Ex. R-3 at 13).

8. Jaen does not employ any supervisory employees. The only individual at Jaen with managerial or supervisory authority is Jaen's owner and sole officer. Jaen's owner is married to

[3] All references herein to dates in April pertain to the year 2019.

Skyline's vice president. (T. 14-15, 106-07, 396-97).

9. Skyline was familiar with Jaen because beginning in 2016 or 2017 Jaen had been a subcontractor for Skyline on multiple prior projects that had involved façade restoration, masonry, and waterproofing work. (T. 260-61). By virtue of these prior subcontracts with Jaen, Skyline had learned, or reasonably should have learned, that Jaen does not have any employees who act in the role of foreman or supervisor at Jaen's worksites. (T. 315).

10. Skyline expected that Jaen would complete the project in two days. (T. 104; Resp't Br. 3).

11. Skyline expected that its supervisors would manage the Jaen employees and assign them the work on the project. (T. 107).

12. Skyline and Jaen executed a subcontractor agreement using Skyline's "standard" subcontract form. (T. 264, 308, 313). The subcontract identified the worksite address and described the subcontract's scope of work simply as "Masonry & roofing" and nothing else. Pertinent provisions of the subcontract included the following (bold typeface in original):

> **ARTICLE 3 CONTRACTOR**
> **§ 3.1 SERVICES PROVIDED BY THE CONTRACTOR**
> **§ 3.1.1** The Contractor [Skyline] shall cooperate with the Subcontractor [Jaen] in scheduling and performing [Skyline's] Work …. As soon as practicable after execution of this Agreement, [Skyline] shall provide [Jaen] copies of [Skyline's] construction schedule and schedule of submittals, together with such additional scheduling details as will enable [Jaen] to plan and perform [Jaen's] Work properly… .
>
> * * *
>
> **§ 3.1.3** Except as provided in Article 14, [Skyline's] equipment will be available to [Jaen] only at [Skyline's] discretion and on mutually satisfactory terms.

§ 3.2 COMMUNICATIONS

* * *

§ 3.2.3 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by [Skyline], a subcontractor or anyone directly or indirectly employed by them (other than [Jaen]), [Skyline] shall, prior to harmful exposure of [Jaen's] employees to such substance, give written notice of the chemical composition thereof to [Jaen] in sufficient detail and time to permit [Jaen's] compliance with such laws.

§ 3.3 CLAIMS BY THE CONTRACTOR

* * *

§ 3.3.2 [Skyline's] claims for services or materials provided [to Jaen] shall require: two (2) days' prior written notice except in an emergency; written compilations to [Jaen] of services and materials provided and charges for such services and materials no later than the fifteenth day of the following month.

* * *

ARTICLE 4 SUBCONTRACTOR
§ 4.1 EXECUTION AND PROGRESS OF THE WORK

§ 4.1.1 [Jaen] shall supervise and direct [Jaen's] Work, and shall cooperate with [Skyline] in scheduling and performing [Jaen's] Work to avoid conflict, delay in or interference with the Work of [Skyline], other subcontractors or Owner's own forces. [Jaen] must adhere to the schedule/drop schedule approved by [Skyline], unless otherwise agreed upon.

* * *

§ 4.3 SAFETY PRECAUTIONS AND PROCEDURES

§ 4.3.1 [Jaen] shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by [Skyline] and with applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract. …

§ 4.3.2 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by [Jaen], [Jaen's] Sub-subcontractors or anyone directly or indirectly employed by them, [Jaen] shall, prior to harmful exposure of any employees on the site to such substance, give written notice of the chemical composition thereof to [Skyline] in sufficient detail and time to permit compliance with such laws by [Skyline], other

subcontractors and other employers on the site.

* * *

§ 4.3.4 [Jaen] shall be responsible for providing Personal Protective Equipment (PPE) including, but not limited to, hard hats, work gloves, harnesses, lanyards and eye protection.

* * *

ARTICLE 8 THE WORK OF THIS SUBCONTRACT

§ 8.1 The Subcontractor shall execute the following portion of the Work described in the Subcontract Documents, including all labor, materials, equipment, services and other items required to complete such portion of the Work, except to the extent specifically indicated in the Subcontract Documents to be the responsibility of others.

> As per Project Conditions, the Project Manual and Contract Drawings.

* * *

ARTICLE 14 … SUBCONTRACTOR RESPONSIBILITIES

* * *

§ 14.2 [Jaen] shall assign an experienced and capable foreman, approved by [Skyline's] project management, with sufficient skills for proper interaction with project management. [Skyline] maintains the ability to demand a new project foreman for any or no reason.

§ 14.3 [Jaen] agrees to comply with all of [Skyline] policies, including but not limited to safety, health and safety program (H.A.S.P.), fine schedule, and violation prevention policies. A failure to comply with [Skyline] policies will result in commercially reasonable penalties that are related to the scope of the policy breach.

§ 14.4 If penalties or violations—for example, issued by the New York Department of Buildings, OSHA, etc.—are assessed to [Skyline] because of [Jaen] mishandling, omission, negligence, etc., then reasonable monetary penalties, the cost of the violation and related attorney fees, and all ancillary costs including but not limited to, costs due to work stoppages, shall be charged to [Jaen].

§ 14.5 [Jaen] agrees, accepts, and acknowledges that all material and equipment orders placed through [Skyline] will be subject to a gross 2.5 percent backcharge/fee of the order.

§ 14.6 [Jaen] shall comply with any and all city, state, and

> **federal agency requirements for this project including but not limited to Equal Employment Opportunity, Federal Labor Standard Regulations and any and all other regulations imposed against [Skyline]. [Jaen] shall indemnify and defend [Skyline] for any breaches of Article 14 to the fullest extent of the law.**

13. The subcontract included a "Subcontractor Training and Certification Rider" that included the following provisions:

> **SECTION I. SUBCONTRACTOR WORKER CERTIFICATION REQUIREMENTS.** [Jaen] agrees to send all of its workers — that are to work on any of [Skyline's] project sites — to receive training and certification from a training school that meets [Skyline's] … standards and requirements. [Jaen's] workers must have valid Certifications as required by all New York City, New York or New Jersey State, and Federal Agencies, specifically including but not limited to New York City Department of Buildings and OSHA requirements ("Training").
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> * * *
>
> **SECTION 6. TERMINATION.** (i) Should [Jaen] fail to rectify any contractual deficiencies with [Skyline] including failure to provide fully certified laborers with all Certifications on their person at all time [sic] while on a job with [Skyline], [Skyline] shall have the right to take whatever steps it deems necessary to correct said deficiencies and charge the cost thereof to [Jaen], who shall be liable for the full cost of [Skyline's] corrective action, including overhead, profit and actual attorney's fees. (ii) [Skyline] may at any time eject [Jaen's] worker or workers for not having the required Certifications from any [Skyline's] job site (iii) [Skyline] may back charge [Jaen] against any existing contract with one or more of [Skyline's] up to $5,000 to offset penalties or potential penalties from New York City, New York State, and Federal agencies imposed upon [Skyline] in addition to any contractual penalties per [Skyline's] fine schedules incorporated herein by reference.

14. The "fine schedule" referred to in the "Termination" provision quoted in the preceding paragraph specifies 26 infractions for which Skyline may impose a "fine" (also referred to in the document as a "monetary penalty") on Jaen ranging from $100 to $25,000 depending on the infraction (e.g., $5,000 fine for "no or improper fall protection"). The fine schedule's introductory

paragraph states: "The below fines can and will be enforced by any and all [Skyline] Personnel and are not a substitute or in lieu of any additional fines, fees, or administrative charges by any governing agencies. The fine is the maximum charge issued for [Skyline] per person per infraction." (Ex. R-3 at 16).

15. Skyline has an arrangement with a company called Andromeda Advantage, Inc., (Andromeda) for Andromeda to provide certain administrative services to Skyline. Skyline and Andromeda share office space in Long Island City, and the companies are affiliated, although the record does not disclose the nature of that affiliation except that it is *not* a parent-subsidiary relationship. (T. 326-27, 351-52; Skyline's "Amended Disclosure of Corporate Parents, Subsidiaries, and Affiliates" dated Jan. 28, 2020). Besides providing Skyline certain administrative services, Andromeda has similar arrangements with other construction companies to provide certain administrative services. Some of those other companies are also affiliated with Andromeda, although there is no evidence of the nature of those affiliations. (T. 351-52).

16. The administrative services that Andromeda provides Skyline include general administrative, accounting, risk management, contract administration, and legal assistance. The administrative services that Andromeda provides Skyline also includes managing for Skyline a catalogue of subcontractors for Skyline to use in its projects. (T. 255, 293-94, 349). There are over 100 subcontractors in the catalogue of subcontractors that Andromeda maintains for Skyline, about 40 of which Skyline has subcontracted with multiple times. (T. 259-61, 294-95).

17. Before Jaen commenced work on the project here, Andromeda's Senior Risk Manager (Patricia Perez) had confirmed that Jaen had not been previously cited by OSHA for workplace safety and health violations. She confirmed this by checking Jaen's inspection history on OSHA's public website. Perez also confirmed that the Jaen employees who had been identified

to work on the project had completed all formal safety and health training that local authorities require. (T. 276-77, 293, 356-57, 365-66, 379-380). Some of that formal training had been provided by a training school called Andromeda Academy of Construction Trades, which is affiliated with Andromeda in some fashion, although no evidence was presented describing the nature of the affiliation. (T. 350).

18. Skyline assigned Jose Sanchez as a project superintendent/supervisor for the project. (T. 11; Stip. 4). Skyline also assigned another Skyline superintendent/supervisor, Mr. Angel Cajilima, to work on the project. (T. 11, 101).

19. Skyline assigned Julio Rueda to be the project manager for the project. As project manager, Rueda was responsible for overseeing the project superintendents Sanchez and Cajilima. (T. 11, 353).

20. The project manager Rueda did not communicate with anyone from Jaen over the course of the project. Rueda never saw Skyline's subcontract with Jaen. (T. 417, 420-21).

21. The week before Jaen started work on the project, Skyline superintendent Sanchez went to the worksite to assess it. (T. 142, 425). He determined that fall protection would be needed for the Jaen employees working on the rooftop, and so in multiple telephone conversations with the other Skyline supervisor involved in the project, Angel Cajilima, Sanchez and Cajilima agreed that by April 8 (the day before the Jaen employees were to start work on the project), Cajilima would have anchors installed on the rooftop (for use as a component of a personal fall arrest system (PFAS)) and that Cajilima would also have a guardrail system installed on the rooftop. (T. 101, 139, 141-42, 235-36).

22. Sanchez's effort to have certain fall protection equipment installed before Jaen was to start work on April 9 indicates that the Skyline supervisors expected that Skyline, not Jaen,

would be responsible for providing and installing anchors and a compliant guardrail system, notwithstanding that the subcontract assigned those responsibilities to Jaen. There is no evidence that Skyline and Jaen had agreed that Skyline would charge Jaen for the installation and use of the fall protection equipment that Skyline intended to provide and install before Jaen started work.

The Worksite

23. All the areas specified for repair in the general contract were on and around the northwest column of the building's rooftop water tower. The rooftop was flat, and its edges were unprotected. (T. 11, 49; Exs. J-2, J-3, J-9, J-12). The building's penthouse balcony was the immediate next lower level from the rooftop and was about ten feet lower. The width of the balcony was not uniform for all sides of the building's perimeter. (Ex. J-2).

24. The edges of the penthouse balcony were protected by a parapet wall that was topped by a railing that was of sufficient height and strength to protect workers from falling off, so no fall protection was necessary for work done from the balcony floor. (T. 171, 183-84; Exs. J-2, J-4, J-10).

25. The roof was not accessible to the Jaen employees from the interior of the building by elevator or staircase. Rather, the Jaen employees could access the rooftop only from the balcony. (T. 114, 183-84). To get to the roof, the employees climbed a fixed ladder that ran from the balcony floor to the rooftop. (T. 116, 147; Ex. J-12). The width of the balcony where the fixed ladder was located was less than four feet. (Ex. J-10).[4]

26. The water tower on the building's roof had a square shaped footprint. Four brick-clad columns formed the four corners of the square shape and supported an elevated platform on

[4] The determination that the width of the balcony was less than four feet in this part of the balcony is based upon the photograph at Exhibit J-10 that shows the dimensions of the balcony's floor tiles to be approximately 18x18 inches based on the scale indicated by the five-gallon bucket in the photo. (T. 146).

which the water tank was located. The elevated platform was about eight feet higher than the rooftop. Portions of the elevated platform extended over the balcony, beyond the rooftop's unprotected edges. (Exs. J-2, J-3, J-9).

27. The west face of the column under repair (the northwest column) abutted the rooftop surface to form a right angle. (Exs. J-2, J-3, J-5, J-9). The part of the column's brick façade to be repaired was on an inward face of the column, the foot of which similarly abutted the flat rooftop, and so the masonry work specified in the general contract could be done from a position on the rooftop surface. (T. 248-49; Exs. J-2, J-3, J-6, J-9).

28. To move from the balcony to the northwest column, workers would climb the fixed ladder, step onto the rooftop, and then walk about 15 to 20 feet to reach the column. (Exs. J-2, J-3, J-4. J-9). A worker either exiting from or mounting onto the fixed ladder at the rooftop would necessarily come within two to three feet of the roof's unprotected edge in that location. (Exs. J-3, J-4, J-9).

Mortar Containing Hazardous Chemical

29. Skyline provided the mortar that the Jaen employees were to use at the worksite. (T. 12; 384; Ex. J-16 at 3). The mortar was Portland Spec Mix Type N and Portland Spec Mix Type S. (T. 12). The mortar contained Portland cement, which is a hazardous chemical that can cause severe chemical burns to the skin when mixed with water or contacting perspiration. (T. 55, 71, 75; Exs. J-15 & J-16). The Jaen employees mixed the dry mortar with water on the balcony and then moved buckets of the mixed mortar to the rooftop. (T. 56-57, 386-87; Ex. J-9).

30. A hazard communication plan (HCP) that conformed with § 1910.1200(e)(i) would have explicitly identified the mortar containing Portland cement as being present at the worksite. Neither Skyline nor Jaen had developed, implemented, or provided at the worksite an HCP that

conformed to the requirements of 29 C.F.R. § 1910.1200(e).[5] (T. 57-58, 74, 77-78, 97, 312-13, 398-99).

31. Neither Skyline nor Jaen provided or had available to the Jaen employees at the worksite the mortar's safety data sheet. (T. 12; Ex. J-16 at 3).

32. Skyline did not inform Jaen prior to the start of work that the mortar that Skyline would be providing to Jaen contained the hazardous chemical Portland cement. Skyline neither provided *written* notice of this as § 3.2.3 of the subcontract specified nor did Skyline provide Jaen such notice in any non-written form.

33. Skyline did not inform or train the Jaen employees prior to the start of work, or during their work, about the hazards of the mortar that Skyline was providing for the Jaen employees to use for masonry work. (T. 12; Ex. J-16 at 4).

34. There was no evidence that Jaen had provided the Jaen employees with any information or training on the hazards of the mortar that Skyline had introduced to the worksite. (e.g., T. 57-58, 398). There is no evidence that Skyline inquired to determine whether Jaen had provided information or training to Jaen's employees on the hazards of the mortar that Skyline was introducing to the worksite for the Jaen employees to use.

35. The only evidence of training and information that the Jaen employees had received that would meet the requirements of OSHA's hazard communication standard (HCS), 29 C.F.R.

[5] During the investigation, the CO twice asked the individual who was acting as the representative for both Skyline and for Jaen to provide the written HCPs of each company. After getting no response to his first request, the CO informed the representative in his second request that if no HCPs were provided, he would conclude that neither company had one. (T. 58, 74, 77-78). That representative contacted Jaen's owner and sole officer and asked to be provided Jaen's HCP, but Jaen never provided an HCP to the representative. (T. 398-99). At the hearing, Skyline did not offer into evidence any written HCP for Skyline or for Jaen (whether conforming or non-conforming to § 1910.1200(e)(1)), and there was no testimonial evidence that either company had developed a conforming or non-conforming written HCP.

§ 1910.1200(h), was training required by 29 C.F.R. § 1926.1153(i) that relates to respirable crystalline silica. (Exs. R-2 & R-3). (There is no evidence that respirable crystalline silica was known to be present at the worksite.)

Events of April 9, 2019

36. On April 9, Skyline superintendent Sanchez picked up the two Jaen employees (Aucanshala and the decedent) and drove them to the worksite. (There is no evidence of the location(s) where Sanchez collected the two workers.).

37. Sanchez also picked up the bricks and several bags of dry mortar that the Jaen employees to use in doing the masonry work. (T. 12). Skyline had purchased the mortar, but there is no evidence whether Skyline had also purchased the bricks. (T. 284-85, 337-38).

38. Sanchez dropped the Jaen employees off at the building, and the Jaen employees unloaded the bricks and mortar from Sanchez's vehicle onto the sidewalk. (T. 12). Sanchez did not go onto the rooftop on April 9 before the Jaen employees started working. Rather, Sanchez simply departed the area, and he did not return until the end of the workday. (T. 184-85, 241-42). There is no evidence that while the Jaen employees worked on the project on April 9 that Sanchez attended to any matters relating to the project.

39. Materials used at the worksite included bricks, mortar, and chemical waterproofing material. (T. 11-12, 146). The Jaen employees moved these materials from the street level to the balcony on April 9. (T. 56; Ex. J-7). The Jaen employees did some demolition work on the rooftop on April 9. (T. 342-44; Ex. J-17 at 3-4). There is no evidence that the Jaen employees moved bricks and mortar or other materials from the balcony to the rooftop on April 9. There is no direct evidence that the decedent worked on the rooftop on April 9, or that if he did work from the rooftop that he failed to use a compliant PFAS. There is no evidence addressing what type of fall protection, if any, was used for the demolition work done on the rooftop on April 9.

40. At the end of the first workday (April 9), Sanchez returned to the worksite to collect the Jaen employees and transport them from the worksite. (T. 105, 142). (There is no evidence of the location(s) to which Sanchez drove the Jaen employees.) But before departing, Sanchez went inside the building and up the roof to look at the work area. Upon doing so, he discovered that Skyline supervisor Cajilima had not installed the anchors or the guardrail system that Cajilima had previously agreed he would have installed before the Jaen employees started work on April 9. (T. 13, 105, 142, 235).

41. In an investigative interview conducted on the day of the fatal fall, Sanchez told the CO and other governmental investigators that while driving the Jaen employees from the worksite on April 9 (after he had discovered that no fall protection equipment had been installed as he had expected), he told them to be careful and to remember to "tie off" for the next day's work. (T. 105, 143).

42. During a post-fatality internal investigation that Andromeda conducted in its support of Skyline, Sanchez said that as he was driving the Jaen employees from the worksite at the end of the workday on April 9, he instructed the decedent not to work on the rooftop on the next day of work (April 10). Sanchez said that he instructed the decedent to work from the balcony level (i) removing demolition debris from the day before, and (ii) assisting Aucanshala, who would be on the rooftop, in the hoisting of materials to the rooftop. (T. 342-44; Ex. J-17 at 3).

43. Sanchez instructed the decedent not to work on the rooftop on April 10 because Sanchez had determined that whatever fall protection equipment that would be available to the decedent at the worksite would be inadequate to provide the decedent with compliant fall protection on April 10.

44. Sanchez did not take any positive action to have anchors or a guardrail system

installed on the rooftop before the Jaen employees returned to work on the project on April 10. (T. 235-36). Sanchez did not report the absence of that fall protection equipment to anyone at Skyline or Jaen.

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45. Aucanshala and the decedent returned to the worksite on April 10. (There is no evidence addressing whether Sanchez again transported them or whether they returned to the worksite by some other means.)

46. Aucanshala worked on the rooftop on April 10, and he used some form of PFAS while doing so. (T. 12, 343-44). There is no evidence that the PFAS Aucanshala used did not conform to the requirements for a PFAS that are specified in 29 C.F.R. § 1926.502(d). (T. 165).

47. Sometime after the Jaen employees started work on April 10, the decedent fell to his death to the ground level courtyard. (T. 35-36, 116, 148, 211-12, 218-19, 248, 250, 299; Exs. J-6, J-9).

48. There was no guardrail system or safety net system installed on the rooftop at any time to protect the decedent from falling off the roof's unprotected edges. (T. 13, 52-53, 127-29, 221-23). There were no anchors installed on the rooftop that would have enabled the decedent to use a compliant PFAS to protect him in any fall from the roof's unprotected edges. (Findings of Fact ¶ 43).

49. Sanchez returned to the building soon after learning about the fatal fall. He went to the courtyard where the decedent had fallen, and he then went up to the rooftop. (T. 12-13, 138-39, 148, 184-85). While on the roof, Sanchez erected a rope over the roof's unprotected edge between the fixed ladder and the water tower. Sanchez erected the rope in that location because he concluded that decedent had fallen over the roof's edge in that area, and he intended the rope

to indicate the presence of the unprotected edge. (T. 138-39; Exs. J-3, J-4, J-12).

50. Compliance Safety and Health Officer (CO) Huang of OSHA was assigned to investigate the fatal fall. (T. 35). When the CO arrived at the building on April 10, the police had control of the premises and investigators from the New York City Department of Investigations (DOI) were at the scene. (Tr. 35, 118). The police told the CO that the decedent had fallen into the building's courtyard, and the building manager took the CO to view that location. The CO was positioned in that location in the courtyard when he took the photograph received in evidence as Exhibit J-5 looking upward toward the water tower. (T. 36, 123). The CO then went to the penthouse balcony and then onto the rooftop to inspect those areas along with the DOI investigators. (T. 36).

51. The CO observed opened bags of dry mortar on the balcony floor. (Ex. J-7). He also observed a five-gallon bucket of waterproofing material on the balcony floor at the foot of the fixed ladder. A rope was tied to the bucket's handle. The rope's other end was tied to the top of the fixed ladder. (T. 127, 145, 219-20; Exs. J-3, J-4, J-10).

52. On the rooftop, near the base of the water tower structure, there were buckets of wet mortar and a stack of approximately 50 to 60 bricks, along with some hand tools. (T. 57, 94-95, 112-14, 250; Ex. J-3, J-9). The bricks and mortar were about 10 to 15 feet from the fixed ladder. (Exs. J-2, J-3, J-9).

53. Sometime before the fatal fall, the Jaen employees had moved the bricks and buckets of the wet mortar from the balcony to the rooftop. They did so by tying a rope to the handle of the bucket to be hoisted and using the rope to pull the loaded bucket up from the balcony to the rooftop. The hoisting was done from a position at the roof's unprotected edge near the fixed ladder.

54. After the CO inspected the balcony and rooftop, he went to the lobby of the building

where he met Skyline's project manager, Mr. Rueda. (T. 37, 104, 424). The CO also met Mr. John Tsampas, who identified himself as the "principal" at Skyline. (T. 37-39). Tsampas informed the CO that Andromeda would act as Skyline's safety consultant/representative for the OSHA inspection and investigation, and he asked that all investigatory communications be made to Andromeda. (T. 37). The CO honored that request. The two Andromeda employees with whom the CO communicated during his investigation were an in-house attorney for Andromeda (Mr. Daniel Wilenchik) and Andromeda's Senior Risk Manager (Ms. Patricia Perez). (Both Wilenchik and Perez testified at the hearing in Skyline's case-in-chief. [T. (T. 37, 78-79, 106, 255, 263, 315-16, 329-33].)

55. Andromeda also served as the identified representative of Jaen for the OSHA investigation. (T. 315-16, 329-31).

56. After departing the worksite on April 10, the CO went with two DOI investigators, Ross Hoffman and Janaina Siguencia, to NYPD Precinct 84 to interview Skyline superintendent Sanchez and Jaen employee Aucanshala. (T. 37-38, 129-30, 223). Sanchez and Aucanshala were interviewed separately. (T. 223). Ms. Siguencia was the Spanish-English interpreter for both interviews. (T. 131-32, 207-08, 226).

Performance of Subcontract Provisions

57. Jaen did not submit to Skyline the name of any "experienced and capable foreman" (or the name of any designated "foreman" at all) that Jaen intended to assign to the project for Skyline to approve, and Jaen further did not assign any employee to act as foreman for the project, even though § 14.2 of the subcontract required Jaen to do so. (T. 348; Ex. J-17, p. 3).

58. There is no evidence that either Aucanshala or the decedent had been designated as a foreman under § 14.2 of the subcontract, and thus there is no evidence that Jaen supervised or directed the work of the Jaen employees as § 4.1.1 of the subcontract required.

59. Skyline's superintendent for the project, Jose Sanchez, was the sole onsite superintendent/supervisor, even though § 4.1.1 of the subcontract required Jaen to "supervise and direct" Jaen's work. (Tr. 100-01, 241-42). The only evidence of any active supervision of the Jaen employees is the supervision and instructions provided by Skyline's supervisor Jose Sanchez.

60. No provisions of the subcontract expressly empower Skyline to stop the work of Jaen employees for safety violations, or to remove the offending employee or the subcontractor itself from the worksite, but Skyline regarded itself to possess such authority. (T. 278, 348-49).

61. Section 14.3 of the subcontract requires Jaen to comply with the provisions Skyline's health and safety program (HASP), and Skyline's practice is to include its HASP in a binder that it provides for each worksite. Skyline did not provide such a binder at the worksite, and there is no evidence that Skyline otherwise provided Jaen with a copy of Skyline's HASP. (T. 74, 77-78, 310-13).

62. There is no evidence that Skyline assessed any fines or monetary penalties against Jaen arising out of the performance of the subcontract.

63. There is no evidence that Jaen requested that Skyline provide Jaen with any equipment for Jaen's performance of the subcontract, which under § 3.1.3 of the subcontract would be made "available to [Jaen] only at [Skyline's] discretion and on mutually satisfactory terms."

64. There is no documentary evidence that Skyline made any record of the bricks and mortar that it provided to Jaen or that Skyline made any claim for the cost of those materials to Jaen for performance of the subcontract as contemplated by § 3.3.2 of the subcontract. (T. 333-38).

65. There is no evidence that Skyline gave Jaen prior written notice of the chemical composition of the mortar that Skyline intended to supply to the Jaen workers to use in performing

the subcontract work "in sufficient detail and time to permit [Jaen's] compliance with" Jaen's duty to notify its employees and otherwise comply with the HCS as § 3.2.3 of the subcontract provided.

Issuance of Citations

66. On the same day that OSHA issued the Citation and Notification of Penalty to Skyline, OSHA issued a separate Citation and Notification of Penalty to Jaen that cited Jaen for violating the same standards for which OSHA was citing Skyline.[6] Jaen resolved that citation by entering into a formal settlement agreement which had the effect of affirming all seven citation items. (T. 79).[7]

67. On August 17, 2017, OSHA had previously issued a citation to Skyline that had alleged a violation of § 1910.1200(e)(1). (Ex. C-2). That 2017 Citation was resolved through a formal settlement agreement which became a final order of the Commission on April 23, 2018, and which affirmed the violation with a classification of "other than serious." (T. 14, 83-84; Exs. C-2, C-5). The formal settlement agreement amended the original citation's description of the

[6] The violations alleged against both Skyline and Jaen in the separate citations were identical in their form and language except that one of the citation items issued to Skyline was alleged to have been a repeated violation, and so the grouping of the alleged violations was different, as were the proposed penalty amounts. Papers filed with the Commission in Jaen's contest of the citation do not reflect the agreed classifications of the seven citation items or the agreed penalty amounts.

[7] The findings in ¶ 66 are based on official notice of the case filings in Commission Docket No. 19-1796, which is the docket number assigned to Jaen's contest of the citation issued to it in connection with OSHA inspection number 1392258 that was precipitated by the inspection and investigation into the fatal fall on April 10, 2019. *See Keating Bldg. Corp.*, No. 04-0774, 2006 WL 508323, at *1 n.1 (OSHRC ALJ February 2, 2006) (taking judicial notice of documents filed in a different Commission proceeding); *accord Copomon Enters., LLC*, 24 BNA OSHC 2177, 2179 n.1 (No. 13-0709, 2018) (ALJ). Such notice is taken subject to the provisions of Federal Rule of Evidence 201(e) and 5 U.S.C. § 556(e), which provide the parties the opportunity to challenge the propriety of taking such notice and the opportunity to show the contrary. *See L & L Painting Co., Inc.*, 22 BNA OSHC 1346, 1349 (No. 05-0050, 2008). Any objection to such official notice should be raised with the undersigned prior to the date the decision and report is to be filed with the Commission's Executive Secretary for docketing pursuant to Commission Rule 90(b)(2).

alleged violation to read as follows: "Subcontractor employers did not implement a written hazard communication program for employees required to perform demolition of masonry concrete structures that contain silica and work with masonry chemicals that contain silica, including but not limited to Sika Quick 1000 hardening mortar, Sika YOH vertical and overhead repair mortar and Sika Armatec Bonding Agent." (Ex. C-5 at 3).

DISCUSSION

The Commission obtained jurisdiction under section 10(c) of the Act upon the Secretary's forwarding to the Commission the notice of contest that Skyline had timely filed. (T. 10). 29 U.S.C. § 659(c); 29 C.F.R. § 1903.17(a). Skyline has employees and is engaged in a business affecting commerce, and so Skyline is an "employer" as defined by the Act and thus subject to the Act's applicable compliance obligations. 29 U.S.C. §§ 652(3) & (5); § 654(a)(2); Findings of Fact ¶ 1.

Non-adjudication of Secretary's Argument that Skyline was Common-law Employer of the Jaen Employees

The Secretary stipulated that the two workers performing the subcontract work were Jaen employees (T. 12), but the Secretary nevertheless argues that *Skyline* was the common-law employer of the Jaen employees for purposes of compliance with the Act under the common-law agency test articulated in *Nationwide Mut. Ins. Co. v. Darden* (*Darden*), 503 U.S. 318 (1992). Sec'y Br. 15-26. *See, e.g., Froedtert Mem'l Lutheran Hosp. Inc. (Froedtert*), 20 BNA OSHC 1500, 1505-08 (No. 97-1839, 2004) (determining that a host employer of temporary workers was the common law employer of the temporary workers under the *Darden* test, and thus host employer was subject to the requirements of the Act with respect to those temporary workers). For the following reasons, the Secretary's argument grounded in the common-law agency test of *Darden* is not adjudicated herein.

The Secretary's theory of the violations as embodied in the original Citation was grounded in the Secretary's Multi-Employer Citation Policy (MECP) under which the Secretary regarded Skyline to have the status of "controlling employer" at the multi-employer construction worksite. Under that theory, not only would Jaen be liable for its violations, but Skyline could also be found liable for Jaen's violations.[8] (T. 188; Sec'y Br. 27); OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy § X.A (Dec. 10, 1999) ("On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates an OSHA standard").[9]

Under the "controlling" and "creating" employer theories of Skyline's responsibility for the alleged violations, it is presumed that no employment relationship existed between Skyline and the Jaen employees. *See Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1204 (No. 05-0839, 2010) (noting that in a "multi-employer construction worksite case … the lack of an employment relationship between the cited controlling or creating employer and the exposed employee is presumed"), *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished). If Skyline were determined to have been the common-law employer of the Jaen employees, that determination would convert

[8] At the hearing and in post-hearing briefing, the Secretary asserts also that as to some, but not all, citation items, Skyline also had the statuses of "correcting" and/or "creating" employer under the MECP. All contentions respecting Skyline's status as controlling, correcting, or creating employer are adjudicated in this decision. But Skyline's alleged status as "exposing" employer by dint of being the common-law employer of the Jaen employees is not adjudicated. Since no Skyline employees were exposed to the alleged violations, Skyline could be deemed the "exposing" employer only if Skyline were determined to have been the common-law employer of the Jaen employees.

[9] The Secretary's MECP (OSHA Instruction CPL 02-00-124) was identified in the joint prehearing statement as a potential hearing exhibit, but neither party offered it in evidence. However, both parties have cited to the MECP in their respective post-hearing briefs. The undersigned regards these arguments to amount to an implied joint request to take judicial notice of the written MECP pursuant to Federal Rule of Evidence 201. That implied joint request is granted.

the Citation's "controlling employer" theory of responsibility to an "exposing employer" theory. MECP § X.C.1 (defining an "exposing employer" as an "employer whose own employees are exposed to the hazard"). Under both the Secretary's MECP and Commission precedent, an "exposing employer" has a greater duty of care to protect its own employees than does a "controlling employer." *See Suncor Energy (U.S.A.) Inc. (Suncor*), No. 13-0900, 2019 WL 654129, at *4 (OSHRC, Feb. 1, 2019) ("A controlling employer's duty to exercise reasonable care is less than what is required of an employer with respect to protecting its own employees")*; Fama Constr., LLC*, 19-1467, 2023 WL 2837610, at *2 (OSHRC, Mar. 29, 2023), *appeal docketed*, No. 23-12346 (11th Cir. July 20, 2023) (noting that the "standard required of an employer whose own employees are exposed to the alleged violative conditions" is "more stringent" than the standard required of a "controlling employer"); MECP § X.A.2 ("the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees").

The Secretary first raised the common-law employer theory of Skyline's responsibility (i.e., the "exposing employer" theory) in the Secretary's opening statement at the outset of the hearing, when an attorney for the Secretary stated: "This case involves joint employers, Jaen and Skyline, with a straightforward division of responsibility: Jaen[] to provide laborers and Skyline to supervise those laborers" (T. 24); and "Skyline should be held liable as an employer of the exposed employees or, at the very least, as a controlling employer."[10] (T. 25).

[10] The Secretary had stipulated on the record, mere minutes before making this opening statement, that the two workers performing the repairs were employees of Jaen, which prompted the undersigned at the conclusion of the opening statement to query the attorney about the Secretary's newly stated "joint employer" theory. (T. 25-26).

The notice pleading requirements embodied in Commission Rule 34 may not necessarily require that the Secretary expressly allege in the formal complaint that the cited employer's alleged violation is grounded in a common-law employer theory of responsibility. *See* Rules of Procedure; Final Rule, 57 Fed. Reg. 41676, 41678 (Sept. 11, 1992) (to be codified at 29 CFR Part 2200) (reinstituting "notice pleading" in Commission proceedings at the complaint and answer stage). Even so, there was nothing in the joint prehearing statement that the parties filed two weeks before the hearing to indicate that any of the issues of fact or law to be litigated at the hearing would pertain to Skyline being the common-law employer of the Jaen employees. *Cf. Excel Modular Scaffold & Leasing Co. v. OSHRC*, 943 F.3d 748, 754 (5th Cir. 2019) (joint prehearing statement filed prior to Commission hearing was binding on parties as to affirmative defenses to be litigated). In the same vein, in Skyline's post-hearing reply brief the attorney for Skyline represents that no discovery (or any other pre-hearing communication between the attorneys) had addressed the *Darden* test. (Resp't Reply Br. 3). It is unsurprising therefore that the record evidence is scant respecting many of the *Darden* factors and non-existent as to some others. *Cf. FreightCar Am., Inc.*, No. 18-0970, 2021 WL 2311871, at *4 (OSHRC, Mar. 3, 2021) (determining the evidentiary record was insufficient to establish common-law employment relationship, noting that "we are troubled by the lack of evidence addressing many of the factors listed in *Darden*").

In view of the foregoing, the Secretary's contention that Skyline was the common-law employer (i.e., the "exposing employer") of the two Jaen employees for purposes of the alleged violations is not adjudicated herein because the parties did not try, and they did not consent to try, that alternative theory of responsibility. *See McWilliams Forge Co.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) (stating that an unpleaded issue may be adjudicated only where "the parties *tried* an unpleaded issue and that they *consented* to do so").

Even if the parties had tried (and had consented to try) the issue of Skyline's asserted responsibility as the common-law employer of the two Jaen employees, the record evidence is insufficient to establish the Jaen employees to have been Skyline's common-law employees for the work performed under the subcontract.[11] *FreightCar Am.,* at *4 (concluding "that the preponderance of the evidence does not show that [respondent] is the employer of the … workers")*; cf. Jammal v. Am. Fam. Ins. Co.*, 914 F.3d 449, 453–55 (6th Cir. 2019) (observing that the determination of whether a person is an "employee" under the *Darden* test "is a mixed question of law and fact" and that a district court's "findings underlying its holding on each of the *Darden* factors are factual findings, and the court's ultimate conclusion as to whether the [workers] were employees is a question of law").

Skyline's Status as the "Controlling Employer"

As previously noted, the Secretary cited Skyline under the theory that it was the "controlling employer" at the multi-employer construction site. Skyline does not dispute that the project involved a "multi-employer" construction worksite on which it was the general contractor but does dispute that it had the status of "controlling employer" there. (Resp't Br. 3).

[11] If Skyline had been determined to have been responsible for the alleged violations as the exposing employer, then conceptually Jaen could not also have been the "exposing employer" and would not have borne any of the compliance obligations of an "exposing" employer. *See Froedtert*, 20 BNA OSHC at 1508 n.4 (declining to address "joint employer" theory of responsibility under the OSH Act that would impose upon both the common-law (host) employer of temporary workers and the staffing agency that provided the temporary workers with the shared responsibility to comply with OSHA standards); *MLB Indus., Inc.*, 12 BNA OSHC 1525, 1530 n.12 (No. 83-231, 1985) (determining the borrowing employer was the employer of loaned employees for purposes of the Act, and declining to impose "duplicative liability" for the violations on both the borrowing employer and the loaning employer). Thus, holding Skyline responsible as the "exposing employer" would be conceptually incongruous with the (nearly) identical citation that was issued to Jaen that was grounded in Jaen's alleged status under the Secretary's MECP as the "exposing" and/or "creating" employer. (As noted at the outset, Jaen resolved that citation by entering into a formal settlement agreement in which it accepted all seven alleged violations.)

The Secretary bears the burden of proving that a general contractor in charge of a multi-employer construction site has the status of "controlling employer." *StormForce of Jacksonville, LLC,* (*StormForce*) No. 19-0593, 2021 WL 2582530, at *3 n.5 (OSHRC, Mar. 8, 2021). To establish that Skyline had the status of controlling employer, the Secretary was required to prove by a preponderance of the evidence that Skyline had "general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them." *Summit Contractors, Inc.*, 22 BNA OSHC 1777, 1780-81 (No. 03-1622, 2009) (agreeing with and quoting the definition of "controlling employer" set forth in MECP § X.E.1). A putative controlling employer's "general supervisory authority" over the worksite need not necessarily include "the right to control the manner and means by which the product is accomplished" (which is the central inquiry of the common-law analysis of *Darden*, 503 U.S. at 323), but the putative controlling employer's "general supervisory authority" must at least include having "control over matters affecting the safety of the workers on the jobsite." *Fama Constr., LLC v. U.S. Dep't of Lab.*, No. 19-13277, 2022 WL 2375708, at *4 (11th Cir. June 30, 2022) (unpublished). An example of "control over matters affecting the safety of the workers on the jobsite" is "the authority and ability to control the workers' use of safety equipment and adherence to safety procedures." *Id.*; *see also* MECP ¶ X.E.1 *supra* (defining "controlling employer").

Skyline argues that it was not the controlling employer at the worksite because it "subcontracted the entire scope of work associated with the two-day project, including the supervision of the work, to the subcontractor Jaen." (Resp't Br. 3). Skyline points to provisions of the subcontract that required Jaen to (1) "pay for all materials, equipment and labor used in connection with the performance of this Subcontract," (2) "take reasonable safety precautions," (3) "be responsible for providing [PPE], including but not limited to hard hats, work gloves,

harnesses, lanyards and eye protection," and (4) "assign an experienced and capable foreman, approved by [Skyline's] project management, with sufficient skills for proper interaction with project management." (Resp't Br. 3; Ex. R-3).

These cited contractual provisions might have successfully thwarted any contention that Skyline had been a "controlling employer" *if* the contracting parties' actual performance had conformed to the subcontract. But the parties' actual performance bore little resemblance to many salient contractual provisions.

Skyline essentially relieved Jaen of its obligation to comply with many of the subcontract's provisions. In some instances, Skyline undertook the performance of responsibilities that the subcontract assigned to Jaen (most significantly, the requirement to provide and install necessary fall protection equipment), and in other instances Skyline simply did not require Jaen to comply with provisions that Skyline knew Jaen was not following. Moreover, respecting one of the few subcontract provisions that expressly assigned to Skyline a safety and health role (the provision that required Skyline to provide Jaen with written notice that Skyline would be providing mortar containing a hazardous chemical), Skyline breached its contractual duty. (Ex. R-3, § 3.23; Findings of Fact ¶ 32).

The record provides ample support for the Secretary's argument that "the subcontractor agreement that Skyline relies upon to shield itself from liability does not appear to have played any meaningful role in defining the reality of its relationship with Jaen." (Sec'y Br. 36). Noteworthy examples of variances between the terms of the subcontract and the parties' actual performance under the subcontract include:

- The subcontract required Jaen to "assign an experienced and capable foreman, approved by [Skyline's] project management." (Ex. R-3, ¶ 14.2). Jaen did not assign any foreman to the project because Jaen does not employ any individuals as

"foremen." And because Jaen does not employ any individuals as foremen, Jaen did not submit to Skyline's project manager for prior approval the name of a foreman for the project, as the subcontract required.

- The subcontract required Jaen to "supervise and direct the [Jaen's] Work" (Ex. R-3 § 4.1.1), but Jaen does not employ any individuals as "supervisors," and so Jaen had no supervisors to assign to the project. The only supervisor with whom the Jaen employees had contact was a Skyline supervisor (Sanchez).
- On the first day of Jaen's work (April 9), Skyline supervisor Sanchez transported the two Jaen employees to and from the worksite—this could be viewed as incongruous with Jaen's contractual responsibilities for supervising and directing its employees and for performing the general contract's entire scope of work.
- Even though the subcontract required Jaen to comply with all applicable safety requirements (Ex. R-3 § 4.3.1), Skyline did not hold Jaen responsible for providing all components of compliant fall protection systems. Rather, the Skyline superintendents communicated between themselves about Skyline providing and installing certain fall protection equipment for the Jaen employees, and they had planned for that equipment to be in place before the Jaen employees started work. (T. 101, 139, 235).
- When a Skyline supervisor (Sanchez) discovered that another Skyline supervisor (Cajilima) had not provided and installed anchors and a compliant guardrail system on the rooftop as they had previously agreed between themselves, Sanchez took no action to require the Jaen employees to install the equipment, which under the terms of the subcontract was wholly Jaen's responsibility.
- The subcontract made Jaen wholly responsible to "supervise and direct" the Jaen employees, but Skyline superintendent Sanchez said he assigned specific tasks to both Jaen employees. Andromeda's Senior Risk Manager indicated this was Skyline's common practice. (T. 107). Sanchez said he assigned Aucanshala to hoist materials onto the roof from a position on the rooftop, and that he instructed the decedent to assist Aucanshala as he did so from a position on the balcony. (Ex. J-17 at 3-4; T. 343-44). Sanchez also said that he instructed Aucanshala to "tie off," likely expecting that Aucanshala would tie off to an I-beam that was part of the water tower structure rather than to an anchor that Sanchez had expected Cajilima to have installed before work began. (See T. 423). *Cf.* Part 1926, subpart M, Non-mandatory Appendix C § II(h)(1)(i) (indicating that under some

circumstances a structural I-beam may provide an anchor point for a PFAS). (Ex. R-3 § 4.1.1; Ex. J-17 at 3-4; T. 343-44).

- Even though the subcontract required Jaen to pay for all materials and equipment (Ex. R-3 § 4.1.6), Skyline provided materials (bricks and mortar) and certain equipment (chisels and trowels) used to perform the subcontract work. (Ex. J-16 at 3). There is no evidence that Skyline maintained a record of the materials that it provided to Jaen in preparation for back-charging Jaen, as the subcontract would permit, for the cost of these materials or for the use of this equipment. Nor is there any evidence that Jaen otherwise paid or intended to pay Skyline for the materials or the use of equipment that Skyline provided for the performance of the subcontract work. (T. 333-38).
- Skyline did not provide written notice to Jaen regarding the hazardous chemical contained in the mortar mix that Skyline provided for the Jaen employees to use in performing the repairs, as Skyline was required to do by § 3.2.3 of the subcontract, so that Jaen could then comply with the requirements of the HCS.
- The general contract, which set forth the detailed scope of work, was not annexed to the subcontract as the terms of the subcontract stated that it was, and the subcontract's description of the scope of work was limited to simply "Masonry & Roofing" at the project address. (Ex. R-3 at 1, 13).
- Skyline's Health and Safety Program (HASP) was not attached to the subcontract as the subcontract stated that it was (Ex. R-3 at 10-11), and there is no evidence that the HASP had been provided to Jaen prior to Jaen starting work on the subcontract. (T. 310-11). Providing Jaen with a copy of Skyline's HASP would be necessary for Jaen to perform the subcontract's requirement that Jaen comply with the HASP, as well as to be subject to certain penalties for failing to comply with it. (Ex. R-3 § 14.3).[12]

[12] These examples of variances between the terms of the subcontract and its actual performance are provided under the operative presumption that the subcontract had been the product of an arms-length transaction between Skyline and Jaen. *See Transaction*, Black's Law Dictionary (11th ed. 2019) (defining "arm's-length transaction" as follows: "1. A transaction between two unrelated and unaffiliated parties. 2. A transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises").

It is worthy of note, however, that record evidence (along with some evidence that was not

admitted in evidence) would support a reasonable suspicion that the subcontract had not been the product of an arm's-length transaction, and further that Skyline and Jaen never intended or expected their performance to conform to the subcontract's terms. Information that would support such a reasonable suspicion includes the following:

- The sole owner and sole officer of Jaen is married to the vice-president of Skyline, and Jaen's owner is the only individual at Jaen who possesses managerial or supervisory authority. (Findings of Fact ¶ 8).
- Skyline's project manager (Rueda) had previously acted as the project manager for other projects involving Jaen at least a "few" times. (T. 418-22). Rueda had never heard the name of the only individual at Jaen who has supervisory authority—Jaen's owner and sole officer. (T. 107). Rueda did not communicate with any Jaen supervisory personnel in connection with this subcontract, and he could not identify any Jaen supervisory personnel by name, although he claimed that he had had contact with Jaen supervisory personnel in connection with Jaen's work on previous Skyline projects. (T. 419-22).
- Prior to this project, Skyline had subcontracted work on its projects to Jaen on multiple subcontracts (Finding of Fact ¶ 9; T. 260-61, 390-91, 417-19), presumably utilizing the same standard subcontract form that Skyline used for this project (T. 264, 308, 313), which requires the subcontractor (Jaen) to assign an experienced foreman to be approved by Skyline. Skyline subcontracted with Jaen multiple times even though Jaen's performance of those prior subcontracts likely would have revealed to Skyline that Jaen does not employ any supervisory foremen, and thus that Jaen would not comply with the provision requiring Jaen to "assign an experienced and capable foreman, approved by [Skyline's] project management."
- Skyline supervisors sometimes assign the employees of its subcontractors, including Jaen, to work on different Skyline projects, depending on Skyline's requirements and needs. (T. 424-25).
- The subcontract sum ($1,800) appears potentially undervalued relative to the general contract sum ($4,400), considering that Jaen was responsible for performance of the entire scope of work, to include providing all materials, equipment, and supervision.
- Jaen identified Andromeda to be its representative over the course of OSHA's inspection and investigation, even though Jaen is not one of those companies for which Andromeda has an arrangement to provide administrative services (as Andromeda provides to Skyline and to other contractors).
- Andromeda and Skyline are affiliated companies (Andromeda's in-house attorney testified that he did not know the nature of the affiliation, although he confirmed that that the two companies share office space). The only Skyline employee to testify at the hearing was the project manager Rueda. The other two witnesses that Skyline presented were both employees of Andromeda (Andromeda's in-house attorney, and its Senior Risk Manager).
- Andromeda identified the same individual (its Senior Risk Manager, Ms. Perez) to be

Moreover, Skyline's former in-house attorney (who is now an in-house attorney for Andromeda) testified that as a general matter Skyline would have the authority to order a subcontractor to stop work upon detecting violations of Skyline's safety standards, notwithstanding that Skyline's standard subcontract form, which was used here, contains no express provisions to that effect, but rather provides only for the subcontractor to pay penalties to Skyline for non-compliance with Skyline's health and safety program (HASP). (T. 348-49; Ex. R-3 §§ 14.3 & 14.4). It is thus evident that Skyline regards implied provisions of Skyline's standard subcontract form (or at least regards its administration of its subcontracts), to extend to "control over matters affecting the safety of the workers on the jobsite." *Fama Constr., LLC v. U.S. Dep't of Lab.*, No. 19-13277, 2022 WL 2375708, at *4 (11th Cir. June 30, 2022)

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the point of contact for OSHA officials in Andromeda's dual representation of both Skyline and Jaen in the OSHA inspection and investigation. (T. 393-95). As the Senior Risk Manager for Andromeda, Ms. Perez regards herself to serve in that same capacity for all contractors to which Andromeda provides administrative services (which includes Skyline). (T. 399-400).

- After the separate citations were issued to Skyline and Jaen, two different in-house attorneys for Andromeda filed separate notices of contest on behalf of each. (*See supra* footnote 7, as to official notice of the filings in OSHRC Docket No. 19-1796).
- One of the decedent's training credentials was from Andromeda Academy, which is a related company to Andromeda. (Ex. R-1 at 3).
- Mr. Aucanshala, the other Jaen employee working on the rooftop, was purported to have said during an investigative interview that was conducted at a police station on the day of the fatal fall that he had been employed by *Skyline* for eight years (but that he received his paycheck from Jaen, even though he does not know anybody from Jaen), that he reports on a daily basis to *Skyline's* project manager (Rueda), and that both he and the decedent were assigned to *Skyline's* "emergency repair unit," which works on projects that usually take only a few days to complete. (The written memorandum of this interview [Ex. C-4 for identification], as well the testimony of the CO and Special Investigator Siguencia regarding their recollections of what Aucanshala had said in the interview, were not admitted in evidence on hearsay grounds as described infra at footnote 15, except to the extent that Skyline was ruled to have "opened the door" to the CO's hearsay testimony as to some of what Aucanshala had said in that interview [T. 191-92].)

(unpublished).

The Commission has approvingly quoted language from the Secretary's MECP that states an employer may be deemed to be a controlling employer at a multi-employer worksite "by the exercise of control in practice." *StormForce*, 2021 WL 2582530, at *3 n.4 (quoting MECP ¶ X.E.1); *see also* MECP § X.E.5.d. (stating that "[e]ven where an Employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site").

The great weight of the evidence establishes that Skyline exercised control in practice over matters affecting the safety of the Jaen employees and thus had the status of controlling employer at the worksite. Perhaps the most prominent example of that control in practice was Skyline undertaking to provide and to install fall protection equipment on the rooftop before the Jaen employees started work, even though that responsibility was wholly Jaen's under the subcontract. Skyline's undertaking of that task demonstrates that Skyline did not expect Jaen to do it, and further that Jaen understood that Skyline would do it. The apparent mutual understanding about which company would provide and install fall protection equipment substantially supports the conclusion that Skyline's status at the multi-employer construction site was that of "controlling employer." Similarly supportive of that conclusion was the Skyline superintendent's effort to mitigate Skyline's failure to provide and install the fall protection equipment by instructing the decedent at the end of the first day of work to work only from the balcony level on the next day, which was the day of the decedent's fatal fall.

The Secretary has proven by a preponderance of the evidence that Skyline had the status of controlling employer at the multi-employer construction worksite. *See StormForce*, 2021 WL 2582530, at *6 (finding general contractor to have the status of controlling employer

notwithstanding provisions in the subcontract that provided the general contractor "does not retain supervisory control of such joint use areas for purposes of liability for unsafe conditions" and "shall not be able to ensure [subcontractor's] adherence to safety standards and the [OSH] Act because [general contractor] cannot reasonably be expected to prevent, detect or abate violative conditions by reason of its limited role on the project"); *cf.* MECP § X.E.5.b.(2) (providing an example of an employer that was *not* a controlling employer because the employer had insufficient contract rights to "confer control over the subcontractors" *and* the employer "did not exercise any control over safety at the site").

Skyline's Duty as a "Controlling Employer"

"It is well-established that a controlling employer has a secondary safety role and therefore its duty to exercise reasonable care is *less than* what is required of an employer with respect to protecting its own employees." *Fama Constr.*, 2023 WL 2837610, at *2, quoting *Suncor*, 2019 WL 654129, at *4, *6-7.

"On a multi-employer worksite, a controlling employer is liable for a contractor's violations if the Secretary shows that [the controlling employer] has not taken reasonable measures to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Suncor*, at *4 (quoting *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994)); MECP § X.E.2 (stating a "controlling employer must exercise reasonable care to prevent and detect violations on the site").

Where "a controlling employer has actual knowledge of a subcontractor's violation, the controlling employer has a duty to take *reasonable measures* to obtain abatement of that violation." *StormForce*, 2021 WL 2582530, at *6; *see also Summit Contractors*, 22 BNA OSHC at 1781 (determining that a controlling employer/general contractor that had actual knowledge of a subcontractor's violation "failed to take reasonable precautionary measures to obtain

abatement").[13]

But where the controlling employer lacks *actual* knowledge of a subcontractor's existing violation, then "the pertinent inquiry is whether the controlling employer met its obligation ... to 'exercise reasonable care,' i.e., to take 'reasonable measures' to 'prevent or detect' the violative conditions." *Summit Contracting Grp., Inc.*, No. 18-1451, 2022 WL 1572848, at *4 (OSHRC May 10, 2022), quoting *StormForce*, at *8. That inquiry "requires an assessment of 'the nature, location, and duration' of the violative conditions, as well as 'objective factors' relating to the controlling employer's role at the worksite and its relationship with other onsite employers." *Summit Contracting Grp., Inc.*, 2022 WL 1572848, at *4, citing to and quoting *Suncor*, 2019 WL 654129, at **5-9. The "objective factors" that must be assessed include "the nature of the work, the scale of the project, and the safety history and experience of the contractors involved."[14]

[13] The Commission has indicated that whether the measures that a controlling employer has taken to obtain abatement of a known subcontractor's violation have met the controlling employer's duty to exercise reasonable care will depend on the circumstances, but that adequate "reasonable measures" could be as simple as making a "mere request" that the subcontractor abate the violation. *Summit Contractors*, 22 BNA OSHC at 1781, n.11. However, some situations might demand that the controlling employer take tougher measures, "such as temporarily or permanently barring from the premises specific individuals who, after warning, repeatedly violate [a standard], suspending the subcontractor's work, withholding progress payments, or terminating the contract." *Id.*

[14] With respect to a controlling employer that does not have actual knowledge of a subcontractor's violations, the factors that the Commission considers in determining whether the controlling employer had exercised reasonable care are the same factors the Commission considers in determining whether such a controlling employer had constructive knowledge of the violative condition in adjudicating the "employer knowledge" element of the Secretary's prima facie case. *See Suncor*, 2019 WL 654129, at *4, *5–10 (noting further that "[t]o establish constructive knowledge, the Secretary must prove that the employer, with the exercise of reasonable diligence, should have known of the hazardous condition"); *cf. Summit Contracting Grp., Inc.*, 2022 WL 1572848, at *7 n.13 (finding "it inappropriate to analyze the adequacy of [a controlling employer's] own safety program as an independent basis for proving [the controlling employer's] constructive knowledge" of a subcontractor's violation). Thus, where the Secretary proves that a controlling employer had constructive, but not actual, knowledge of a violative condition in

Suncor at *7, *citing* MECP §§ X.E.2 & X.E.3.

And so, the duty of the controlling employer to exercise reasonable care has two components: (1) with respect to another employer's violation about which the controlling employer has actual knowledge, to take reasonable measures to obtain *abatement* of (or prevent employee exposure to) the violative condition; and (2) with respect to another employer's violation about which the controlling employer lacks actual knowledge, to *prevent* and *detect* the violative condition.

Citation Items

To establish a violation of an OSHA standard, the Secretary must prove by a preponderance of the evidence: (1) the standard applies; (2) there was noncompliance with its terms; (3) employees were exposed to, or had access to, the violative condition; and (4) the cited employer had actual or constructive knowledge of the violative condition. *Donahue Indus. Inc.,* 20 BNA OSHC 1346, 1348 (No. 99-0191, 2003); *D.A. Collins Constr. Co. v. Sec'y of Lab.*, 117 F.3d 691, 694 (2d Cir. 1997).

Snaphook Use in PFAS
(*§ 1926.502(d)(6)(i)— Citation 1, Item 4*)

Citation 1, item 4, alleges a serious violation of § 1926.502(d)(6)(i), which provides:

> (6) Unless the snaphook is a locking type and designed for the following connections, snaphooks shall not be engaged:
> (i) directly to webbing, rope or wire rope[.]

The Secretary alleges that Skyline violated this standard on or about April 9 and 10 when "an employee utilizing a personal fall arrest system approximately 130 feet above lower levels engaged the snaphook of his lanyard directly to the webbing of his lanyard." The Secretary's theory of the

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proving the elements of the alleged violation, the Secretary has necessarily also proven that the controlling employer had failed to satisfy its duty as the controlling employer to exercise reasonable care to prevent or detect that unknown violation.

violation is that Aucanshala, not the decedent, was the Jaen employee involved in the alleged violation. (T. 164).

The Secretary has not identified any evidence in its post-hearing briefs that Aucanshala had improperly used a snaphook in the manner alleged, and the undersigned discerns no such record evidence. [15] (Sec'y Br. 46-47). There being no evidence showing non-compliance with the

[15] The attorney for the Secretary made an offer of proof at the hearing pursuant to Commission 72(b) that if the CO had been permitted to testify to what Aucanshala had said during the CO's investigation, then the CO would have testified that Aucanshala had described having violated § 1926.502(d)(6)(i) in the manner alleged. (T. 164). The undersigned had previously sustained Skyline's objection to the CO testifying to what Aucanshala had said to him, as well as to the admission of a written memorandum dated October 9, 2019, that Special Investigator Ross Hoffman of the New York City Department of Investigation had prepared. That memorandum sets forth Hoffman's account of the in-person interview of Aucanshala that he and CO Huang conducted on the day of the fatal fall *six* months earlier. That memorandum was marked for identification as Exhibit C-4 but was ruled inadmissible because it did not qualify under the business record exception to the hearsay rule because it had not been made at or near the time of the interview, as Federal Rule of Evidence 803(6)(A) requires. (T. 165-66).

Even if the memorandum had qualified for admission under Federal Rule of Evidence 803(6) or some other exception to the hearsay rule, the statements attributed to Aucanshala set forth therein are themselves hearsay and could not have been accepted for their truth unless what Aucanshala was reputed to have said conformed to an independent exception to the hearsay rule. *See* F.R.E. 805 "Hearsay within hearsay." Contrary to the argument of the Secretary, Aucanshala's reputed statements as recounted in Exhibit C-4 (or as independently recalled by either the CO or the interpreter, who both participated in the interview) do not qualify as non-hearsay under Federal Rule of Evidence 801(d)(2) because Aucanshala had not been established to have been Skyline's agent or employee within the meaning of 801(d)(2)(D). Moreover, the hearsay statements attributed to Aucanshala in the memorandum could not be relied upon to establish that Aucanshala was Skyline's agent or employee for purposes of categorizing those statements as non-hearsay under Federal Rule of Evidence 801(d)(2)(D). (T. 238-40). *See* Fed. R. Evid. 801(d)(2) (providing that the "statement … does not by itself establish … the existence or scope of" an employee or agent relationship under 801(d)(2)(D)); *Reed Eng'g Grp., Inc.*, 21 BNA OSHC 1290, 1291 (No. 02-0620, 2005) ("*before* allowing testimony in under Rule 801(d)(2)(D), the judge must be satisfied that an agency relationship exists between the declarant and the employer against whom the testimony is being offered" [emphasis added]).

The undersigned also determined the memorandum and any testimony from the CO or the interpreter about what Aucanshala said in the interview had not been established to qualify for admission under the residual exception to the hearsay rule set forth in Federal Rule of Evidence 807. (T. 154, 159-60, 163, 240).

cited standard, Citation 1, item 4 must be vacated.

Fall Protection for Unprotected Sides and Edges[16]
(*§ 1926.501(b)(1)— Citation 1, Item 3a*)

Citation 1, Item 3a, alleges a serious violation of 29 C.F.R. § 1926.501(b)(1), which provides as follows:

> *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

The Secretary alleges Skyline violated the standard when, on April 9 and 10, 2019, "[a]n employee was working at the unprotected edges of the building roof approximately 130 feet above lower levels to repair the northwest brick column of the water tower without being protected from falling by an adequate fall protection system." The Secretary's theory of this violation when issuing the Citation was that the decedent, not Aucanshala, had engaged in the alleged violative conduct.[17]

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[16] The Secretary argues that Skyline has responsibility for the three alleged fall protection violations not only in its status as the "controlling" employer but also as a "correcting" employer. (Sec'y Br. 31-32). The Secretary's MECP defines "correcting employer" as follows: "An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices." MECP ¶ X.D.1. (The undersigned notes that the Secretary has not cited to any Commission precedent that explicitly recognizes a "correcting employer" theory of responsibility, and the undersigned has located none.)

While Skyline undertook to install fall protection anchors and a guardrail system on the rooftop, Jaen had contractual responsibility to provide fall protection at the worksite. As far as the record shows, Skyline had no contractual responsibility to do so. And so, Skyline's failed endeavor to provide and install the fall protection equipment does not impress upon Skyline the status of "correcting employer." Rather, Skyline's failed effort bears on the issue of whether Skyline met its obligation as the controlling employer to exercise reasonable care to prevent or detect and abate Jaen's alleged fall protection violations.

[17] The Secretary argues in post-hearing briefs that Aucanshala also violated the cited standard on April 9 and 10. (Sec'y Br. 40; Sec'y Reply Br. 16-18). However, having failed to

Applicability of the Standard

The cited standard requires that fall protection be provided when an employee is on a walking/working surface with an unprotected edge that is six feet or more above the next lower level. A walking/working surface is defined as "any surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, … but not including ladders … on which employees must be located in order to perform their job duties." § 1926.500(b). The repair work occurred on a roof with unprotected edges that was about 10 feet above the balcony level and about 130 feet above the ground level. (T. 11, 127-28, 221-22; Ex. J-3). The standard applies to the work performed on the rooftop.

Compliance with the Standard and Employee Exposure

The circumstantial evidence is clear and convincing that at the time of the fatal fall the decedent was on the rooftop and was not protected by any compliant form of fall protection. Even though Sanchez said he had instructed the decedent at the end of the first day of work (April 9) not to work from the rooftop the next day and instead to work from the balcony level, it is reasonably inferable from the fact of the fatal fall that the decedent disobeyed that instruction. Moreover, it was foreseeable that the decedent *would* disobey that instruction. The operational requirements of the project made it unlikely that there would be any useful work activities for the decedent to perform while on the balcony after he had finished doing what Sanchez told him to do there—clear demolition debris and help Aucanshala as Aucanshala hoisted materials from a position on the rooftop. If Sanchez genuinely expected the decedent to refrain from going onto the roof to help his co-worker with the repairs, that expectation was wholly unreasonable. For the decedent

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establish Citation 1, Item 4 alleging that Aucanshala was utilizing a non-compliant PFAS on either April 9 or 10, the Secretary has similarly failed to prove that Aucanshala violated § 1926.501(b)(1) on those days.

to follow Sanchez's instruction would have meant that the decedent would have remained on the balcony with no work to do while his co-worker did all the work on the roof to finish a job that Skyline had expected to be completed in two days by two workers both working on the roof.

Sanchez's actions on the rooftop in the aftermath of the fatal fall support this reasonable conclusion that the decedent disobeyed Sanchez's instruction and worked on the rooftop without fall protection. When Sanchez went back on the roof after the fatal fall, he erected a rope over the roof's unprotected edge between the fixed ladder and the water tower. That part of the roof is where Sanchez concluded the decedent had fallen based upon where the decedent's body was discovered on the ground-level courtyard. (T. 138, 145).

Contrary to Skyline's argument, it is reasonably inferable from the circumstantial evidence that the decedent did *not* fall from the balcony level. (Resp't Br. 8). First, there is no evidence of any operational necessity for the decedent to climb over the metal railing that topped the balcony's parapet wall to perform any tasks. Second, Skyline presented no scientific evidence about the trajectory the decedent's body would have taken upon falling over the unprotected edge. It is entirely plausible that the trajectory could have carried decedent on or over the parapet wall and railing that protected the less than four-foot-wide balcony. (Exs. J-2, J-3, J-4, J-10, J-12).

The occurrence of the fatal fall supports the reasonable inference that the decedent was not utilizing any compliant PFAS when he fell.[18] Moreover, Sanchez's instruction to the decedent that he work only from the balcony on April 10 supports the reasonable inference that there was no compliant PFAS equipment at the worksite on April 10 for the decedent to use.

[18] The other two fall protections systems that would meet the cited standard's requirements—a safety net system or a guardrail system—were not place on the rooftop on the day of the fall, so a compliant PFAS would have been the only other alternative for providing the decedent with compliant fall protection on the day of the fatal fall. (Findings of Fact ¶ 48).

For these same reasons, the circumstantial evidence is clear and convincing that the decedent was exposed to the violative condition of not being protected by a compliant fall protection system while working near an unprotected edge that was six feet or more above the next lower level.

Employer Knowledge

To establish knowledge, the Secretary must prove that Skyline "knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Am. Eng'g & Dev. Corp*., 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012).

The evidence is insufficient to establish that Skyline had actual knowledge of the violative condition. After Sanchez discovered on April 9 that supervisor Cajilima had not succeeded in providing and installing the anchors or the guardrail system that Sanchez and Cajilima had agreed Cajilima would be responsible for having installed, Sanchez said that he instructed the decedent not to work on the rooftop. The only reason for Sanchez to give that instruction would be because he knew that the decedent did not have the equipment necessary for a compliant PFAS for him to work on the rooftop. But since the decedent *could* have complied with the instruction not to work on the roof, Sanchez (and thus Skyline) did not have actual knowledge that the decedent had disobeyed that instruction the next day by going on the rooftop to work without any compliant form of fall protection.

There is abundant evidence, however, to establish that Sanchez should have known that the decedent was likely not to comply with his instruction to work only from the balcony on April 10, and thus the evidence is sufficient to establish that Skyline, through its supervisory agent Sanchez, had constructive knowledge of the violative condition. *N.Y. State Elec. & Gas Corp v. Sec'y of Lab.*, 88 F.3d 98, 105 (2d Cir. 1996) ("Knowledge or constructive knowledge may be imputed to an employer through a supervisory agent").

As noted *supra* in footnote 14, the factors for determining whether a controlling employer is deemed to have had constructive knowledge of a subcontractor's violations are the same factors that are considered for determining whether a controlling employer has met its obligation to exercise reasonable care in taking measures to prevent or detect a subcontractor's violations. *See Suncor*, 2019 WL 654129 at *4, *5–10. "[T]he pertinent inquiry is whether the controlling employer met its obligation ... to exercise reasonable care, i.e., to take reasonable measures to prevent or detect the violative conditions." *Summit Contracting Grp., Inc.*, 2022 WL 1572848, at *4.

Sanchez's instruction to the decedent to work only from the balcony, absent any other affirmative efforts, did not satisfy Skyline's obligation as the controlling employer to exercise reasonable care to prevent the violation. Sanchez knew, or he reasonably should have known, that the decedent was unlikely to abide by his instruction. For the decedent to follow that instruction would have left him with hardly any work to do on the balcony and would have left Aucanshala doing all the work on the rooftop, which is where all the actual repair work had to be done. Sanchez did not alert his supervisor, the project manager Rueda, or any other Skyline official about the absence of fall protection for the decedent. Sanchez took no affirmative steps himself to stop the work and provide and install the necessary fall protection equipment, as was Skyline's original plan to do.

Sanchez knew that neither Jaen employee had been appointed crew foreman, and so he also knew that he was the only individual actively supervising the Jaen employees. There is no evidence that Sanchez heightened his monitoring of the worksite on April 10 to enforce his instruction that the decedent work only from the balcony. Increased monitoring to assure compliance with that instruction would have been in order because Sanchez knew or should have

known that complying with that instruction would slow work progress and exert pressure on the otherwise unsupervised Jaen employees to disobey the instruction so they could finish the project in the two days allocated for it.

And even though Andromeda, in providing administrative support to Skyline, had confirmed before the start of work that both Jaen employees had completed all required workplace safety and health training (Exs. R-1, R-2; T. 361-79), that formal training provided no reasonable assurance that the otherwise unsupervised laborers would abide by an unrealistic instruction that the decedent stay on the balcony and not work on the roof.

The two Jaen employees were unsupervised and were working on a small ($1800) subcontract expected to be completed in two days. The Jaen employees had likely expected that necessary fall protection equipment was going to be installed at the worksite before they started work. Yet even though that equipment had not been installed as they likely expected, Sanchez nevertheless, in essence, instructed the Jaen employees somehow to "work around" the lack of that necessary equipment and finish the job without it.

The measures that Skyline took to prevent or detect Jaen's non-compliance with § 1926.501(b)(1) were palpably inadequate to satisfy Skyline's duty to take reasonable measures to prevent or detect the violation. Reasonable care required more than (1) Sanchez giving the decedent a work instruction that he knew or reasonably should have known the decedent was likely to disobey, (2) Andromeda determining that Jaen had not previously been cited for any workplace safety or health violations, and (3) Andromeda confirming that the two Jaen employees had completed the formal training required by local authorities. (T. 379-84).

For these reasons, the great weight of the evidence establishes that Skyline, through its supervisory agent Sanchez, failed to take reasonable measures to prevent or detect Jaen's violation

of § 1926.501(b)(1) on April 10. Skyline is therefore deemed to have had constructive knowledge of the violation.

For these same reasons, Skyline is responsible for Jaen's violation as the controlling employer at the worksite because Skyline did not meet its duty to exercise reasonable care by taking reasonable measures to prevent the violation, or to detect the violation and then taking reasonable measures to cause abatement of the violative condition. *Summit Contracting*, 2022 WL 1572848, at *4.

Classification and Penalty

The Secretary alleges that Citation 1, item 3a should be classified as serious. A violation is properly classified as serious under section 17(k) of the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). The violation here, involving a fatal fall, very obviously meets the Act's definition of "serious."

Section 17(j) of the Act requires that in assessing penalties the Commission give "due consideration" to the gravity of the violation, the size of the employer's business, the employer's good faith, and the employer's prior history of violations. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164 (10th Cir. 2011). Gravity is the primary consideration among these four criteria and is determined by "such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The maximum penalty for the serious violation here is $13,260. 29 C.F.R. § 1903.15(d)(3) (2019). The Secretary proposed a single "grouped" penalty of $9,282 for the proven violation of § 1926.501(b)(1) and for the alleged violation of § 1926.501(b)(3), which as discussed next the Secretary did not prove. Even though one of the two grouped violations was not proven, the

undersigned nonetheless concurs in the Secretary's calculus for the fall protection violation that was proven and adopts the Secretary's proposed penalty for the serious violation of § 1926.501(b)(1). (T. 143-44). Accordingly, a penalty of $9,282 is assessed for Citation 1, item 3a.

Fall Protection in Hoist Area
(*§ 1926.501(b)(3)— Citation 1, Item 3b*)

Citation 1, item 3b, alleges a serious violation of § 1926.501(b)(3), which provides in relevant part as follows: "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." The Secretary alleges that Skyline violated this standard on or about April 9 and April 10, 2019, when "[a]n employee hoisting materials and equipment to the roof was not protected from falling approximately 130 feet by any type of fall protection system." The Secretary's original theory of this alleged violation was that the decedent, not Mr. Aucanshala, was the employee who had violated the standard.[19] (T. 186).

The standard requires that an employee working in a hoist area be protected from falling six feet or more to lower levels by either a guardrail system or a PFAS. A Jaen employee hoisted buckets loaded with construction materials from a location near the fixed ladder at the roof's unprotected edge. The area where the employee hoisted the materials constituted a "hoist area" within the meaning of the cited standard. (Exs. J-3, J-4). The standard applies to the employee's activity of hoisting the materials from that hoist area.

[19] The Secretary argues in its post-hearing briefs that if Aucanshala had done any hoisting of the materials to the rooftop, he would have been violating the "hoist area" standard. (Sec'y Br. 42-43; Sec'y Reply Br. 16-17). However, as discussed in connection with the alleged violation of § 1926.502(d)(6)(i), the Secretary failed to prove that Aucanshala was not protected by a compliant PFAS while he was working on the rooftop, and so the evidence similarly fails to establish that Aucanshala violated the hoist area standard while hoisting any of the materials to the rooftop.

The standard requires that employees in a hoist area be protected from falling by either a guardrail system or PFAS. No guardrail system was in place at the worksite. And the equipment that would be necessary to provide a compliant PFAS for the decedent was not present at the worksite. (Findings of Fact ¶ 43; T. 13, 52-53, 127, 221-22). Even so, the record evidence is insufficient to establish that the decedent, and not Aucanshala, hoisted the materials from the rooftop hoist area. It is plausible that the decedent complied with Sanchez's instruction that he remain on the balcony while Aucanshala hoisted up materials to the rooftop, and that the decedent climbed up to the roof only after Aucanshala had finished hoisting all the materials. The record evidence is thus insufficient to establish by a preponderance that the decedent was in the hoist area on the rooftop. *Cf. Home Depot #6512*, 22 BNA OSHC 1863 (No. 07-0359, 2009) (reversing as unsupported by a preponderance of the evidence a Commission judge's finding of fact that a Home Depot parking lot employee had sustained a head injury in a fall in the store parking lot, where the employee had been discovered unconscious on the ground of the parking lot and later died from "blunt head trauma"). The record evidence is therefore insufficient to establish that the Jaen employees violated the "hoist area" standard in the manner alleged. The Secretary having failed to prove non-compliance with the cited standard, the alleged violation of § 1926.501(b)(3) must be vacated. [20]

[20] The apparent factual basis for the Secretary's theory of the alleged "hoist area" violation was what Aucanshala is reported to have said to the CO and local investigators on the day of the fatal fall, which was documented in a memorandum marked for identification as Exhibit C-4 (and not admitted into evidence as described *supra* in footnote 15). That memorandum of the Aucanshala's interview states in part as follows:

> Prior to the day of the incident, [Aucanshala] and [decedent] were tasked with bringing the new bricks up to the roof for the replacement of the older ones. He stated that this was about one hundred and fifty (150) bricks that were to be replaced along. [Aucanshala] stated that [decedent] was a helper for the company

Hazard Communication Standard (HCS) Citation Items
(§§ 1910.1200(e)(1), (h)(1) & (g)(1) – Citation 2, Item 1; Citation 1, Items 1a and 1b)

Skyline's Status as "Creating Employer"

An employer at a multi-employer worksite who creates a cited hazard is regarded to be a

> and that he would [help][Aucanshala] on a daily basis and that [decedent] was still learning the construction trade. At the time of the incident, [Aucanshala] was working on the northwest column at the base of the water tower. He was replacing the bricks and replacing the waterproofing materials at the base. Furthermore, [decedent] was tasked with bringing the bricks up to the column of the water tower from the lower roof. [Decedent] was placing the bricks in a "Bucket" on the lower roof, than [sic] would climb the ladder to the water tower, and "Pull" the bucket up to the base of the water tower with a rope that was attached to the base of the water tower and empty the bucket of bricks. In theory, they were hoisting the bricks up to the water tower in the bucket. [Aucanshala] stated that he did not notice that [decedent] has fallen off the roof. Throughout the day, [decedent] was going up and down the ladder without any issues. [Aucanshala] only noticed that [decedent] had fallen when the door attendant of the building had rushed up to the roof to notify him that someone had fallen. [Aucanshala] than [sic] realized that it was [decedent] who had fallen off the roof while he was working on the water tower. [Aucanshala] stated that while he was working on the roof, he was always "Tied-off" and would always were [sic] a harness. He was "Tied-off" to the cross brace of the water tower. [Aucanshala] stated that [decedent] was not wearing a harness at the time of the fall, and he was not tied off to anything.

As described *supra* in footnote 15, the undersigned sustained Skyline's objection to the admission of Exhibit C-4, and further sustained Skyline's objection to testimony from the CO and the interpreter about what Aucanshala had said in the investigative interview. Accordingly, Aucanshala's purported statements have not been relied upon to support any findings of fact or conclusions of law herein. Nevertheless, the undersigned notes for the benefit of any reviewing tribunal that if the undersigned is determined to have erred in excluding Exhibit C-4 from evidence, then upon consideration of Exhibit C-4 and the evidentiary record as a whole, the undersigned would have found that a preponderance of the evidence had established that the decedent's activity had violated § 1926.501(b)(3) in the manner alleged in Item 3b of Citation 1. The undersigned would have further found Skyline responsible for the violation as the controlling employer based upon Skyline having constructive knowledge of the violative condition. The undersigned further would have classified the violation to have been serious and would have adopted the Secretary's proposed penalty by grouping the penalty with the penalty assessed for Citation 1, item 3a [§ 1926.501(b)(1)].

"creating employer" and has a duty under section 5(a)(2) of the Act to protect not only its own employees from the hazard but also the employees of other employers who are engaged in the common undertaking. *McDevitt St. Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000); MECP § X.B.1 (defining a "creating employer" as "[t]he employer that caused a hazardous condition that violates an OSHA standard").

Although a *controlling* employer's duty to the employees of an exposing employer is not as stringent as an exposing employer's duty to its own employees,[21] a *creating* employer's duty to employees of an exposing employer is certainly more stringent than that of a controlling employer. Commission precedent suggests that a creating employer's duty to the employees of another employer is the near equivalent, if not the equivalent, of the exposing employer's duty to its own employees. *See Smoot Constr.,* 21 BNA OSHC 1555, 1557 (No. 05-0652, 2006) ("the employer who creates a violative or hazardous condition is obligated to protect its own employees as well as employees of other contractors who are exposed to the hazard"); *see also Summit Contractors, Inc.*, 23 BNA OSHC at 1207 (finding the controlling/creating employer had constructive knowledge of the violative condition because it failed to "exercise reasonable diligence to discover the hazard").

The Secretary asserts that Skyline is responsible for the three alleged violations of the hazard communication standard (HCS), § 1910.1200, as both the controlling employer at the worksite and as a creating employer of the alleged HCS violations.[22] (Sec'y Br. 32-33).

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[21] *See Fama Constr., LLC*, No. 19-1467, 2023 WL 2837610, at *2 (OSHRC, Mar. 29, 2023) (noting that the standard required of an exposing employer is "more stringent" than the standard required of a controlling employer).

[22] An example of a controlling employer also being a creating employer is where the controlling employer has created a hazard by causing "noncompliant equipment to be brought onto the construction worksite." *See Summit Contractors, Inc.*, 23 BNA OSHC at 1206 (general

As discussed below, a preponderance of the evidence establishes that Skyline is responsible for the three HCS violations in its roles as both a creating employer and as the controlling employer at the multi-employer worksite. As a creating employer, Skyline is responsible for its direct violations of the HCS. As a controlling employer, Skyline is responsible for Jaen's violations of the three cited HCS provisions.

Citation 2, Item 1
(*Alleged Repeat Violation § 1910.1200(e)(1)*)

The hazard communication standard (HCS), § 1910.1200, "requires … all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training." § 1910.1200(b)(1).

The requirements of the HCS, § 1910.1200, apply to construction work through 29 C.F.R. § 1926.59, "Hazard Communication," which provides: "The requirements applicable to construction work under this section are identical to those set forth at [29 C.F.R.] § 1910.1200."

The HCS "applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency." § 1910.1200(b)(2).

Skyline introduced the mortar containing a hazardous chemical to the worksite by providing it to the Jaen employees to use in the masonry work. (Findings of Fact ¶ 29; T. 12, 55). Skyline thereby caused the HCS to apply to the construction worksite and to all employers at the

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contractor that had secured faulty equipment, brought it to worksite, and required subcontractor to use the equipment, held responsible for the violation as both the controlling employer and the creating employer). Another example is the controlling employer creating a non-compliant excavation and then failing to take adequate actions to prevent employees of subcontractors from entering it. *See Smoot Constr.,* 21 BNA OSHC 1555 (No. 05-0652, 2006).

worksite whose employees "may be exposed under normal conditions" to that hazardous chemical.

Citation 2, item 1, alleges a repeat violation of subparagraph (e)(1) of the HCS. That provision (including its subparagraph (i), which is shown for completeness) provides:

> (e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met, and which also includes the following:
>
> (i) A list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas)[.]

The Secretary alleges Skyline violated § 1910.1200(e)(1) in that on or about April 9 and April 10, Skyline "did not develop a written hazard communication program for employees who use mortar for brick repair work."

Creating Employer Responsibility

Skyline was the creating employer of the alleged violation of § 1910.1200(e)(1). Because Skyline introduced the hazardous chemical to the worksite and therefore knew that the hazardous chemical was present at its worksite, § 1910.1200(e)(1) required *Skyline* to "develop, implement, and maintain" at that workplace a written hazard communication program (HCP) that addressed certain specified matters. For multi-employer workplaces like the construction worksite here where "employees of other employer(s) may be exposed" to a hazardous chemical, Skyline's written HCP was required to address, among other things, (1) methods for supplying employers of other employees with the safety data sheet for each hazardous chemical to which those employees may be exposed [§ 1910.1200(e)(2)(i)], and also (2) methods to inform those other employers of any precautionary measures that need to be taken to protect their employees

[§ 1910.1200(e)(2)(ii)].[23]

Skyline failed to comply with the cited standard as the creating employer because Skyline did not "develop, implement, and maintain" at the construction site a written HCP as the standard required that it do. (Findings of Fact ¶ 30).

Employees of another employer at the worksite (Jaen) were exposed to a hazardous chemical for which Skyline had not developed, implemented, or maintained at the worksite a written HCP that conformed to the requirements of the cited standard, thereby exposing those employees to the violative condition of Skyline's failure to develop and maintain at the worksite such an HCP.

Skyline knew that it was introducing the hazardous chemical to the worksite, and it had actual knowledge that it had not developed a written HCP addressing that hazardous chemical that it had introduced to the workplace. [24]

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[23] Section 1910.1200(e)(2) provides:

> (2) *Multi-employer workplaces*. Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (e) include the following:
>
> (i) The methods the employer will use to provide the other employer(s) on-site access to safety data sheets for each hazardous chemical the other employer(s)' employees may be exposed to while working;
>
> (ii) The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and,
>
> (iii) The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

[24] Skyline could attempt to meet its duty for maintaining a compliant HCP at the multi-employer construction site through a private arrangement with a third party such as Jaen, but that

Skyline violated § 1910.1200(e)(1) in the manner alleged in Citation 2, item 1, and is responsible for that violation in its status of creating employer.

Controlling Employer Responsibility

By virtue of Skyline's introduction of the hazardous chemical to the workplace for the Jaen employees to use, Jaen was similarly required by § 1910.1200(e)(1) to develop and maintain at the worksite a written HCP, the content of which was required to address the hazardous chemical that the Jaen employees would be using. Jaen had not developed or maintained at the worksite any such written HCP. The Jaen employees were exposed to that violative condition of their employer failing to develop a written HCP that addressed a hazardous chemical that they used in the workplace. Skyline knew, or in the exercise of reasonable diligence should have known, that Jaen had not developed or maintained at the worksite a written HCP that addressed the hazardous chemical to the worksite, because Skyline had introduced the hazardous chemical to the worksite on the first day of work, and Skyline further knew that it had not previously notified Jaen that it would be introducing that hazardous chemical as Skyline was required to do pursuant to § 3.2.3 of its subcontract. Skyline failed to take any measures to obtain abatement of the violative condition. Skyline thus failed to meet its duty as the controlling employer to take reasonable measures to obtain abatement of Jaen's known violation of § 1910.1200(e)(1) and is therefore responsible for Jaen's violation in its status as controlling employer. *StormForce*, 2021 WL 2582530, at *6.

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third party's failure to discharge that duty on behalf of Skyline could subject Skyline to liability for non-compliance with the cited standard. *See Froedtert*, 20 BNA OSHC at 1508 ("An employer may carry out its statutory duties through its own private arrangements with third parties, but if it does so and if those duties are neglected, it is up to the employer to show why he cannot enforce the arrangements he has made," quoting *Central of Georgia R.R. Co. v. OSHRC*, 576 F.2d 620, 624 [5th Cir. 1978]). To the extent Skyline contends it had delegated to Jaen its responsibility for maintaining at the worksite an HCP that complied with the cited standard, Skyline has failed to establish that it had effectively delegated its responsibility to Jaen. *Id.* The same analysis would apply to the two other HCS violations.

Serious and Repeat Classifications; Penalty

The Secretary alleges that Citation 2, item 1 should be characterized as both serious and repeated. (Compl. ¶¶ VI & VII). The Jaen employees were exposed to a hazardous chemical in the mortar without any components of a compliant HCP having been implemented. Their exposure to hazardous chemical without the benefit of a compliant HCP could have resulted in injury requiring hospitalization. (T. 68, 71, 95-96). The Secretary established the violation to have been serious.

A violation may be deemed repeated "if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979). A prima facie showing of substantial similarity is established by a final order of the Commission that had previously determined the employer to have violated the same standard. *Id.* The employer may rebut such a prima facie showing "by evidence of the disparate conditions and hazards associated with these violations of the same standard." *Id.*

OSHA had previously cited Skyline for a violation of 29 C.F.R. § 1910.1200(e)(1). (T. 14, 79-80; Ex. C-2). Skyline resolved that alleged violation by entering into a Stipulated Settlement wherein Skyline accepted the alleged violation of § 1910.1200(e)(1) as an "other than serious" violation. That violation became a final order of the Commission on April 23, 2018, less than one year before the violation here. The description of the prior violation is set forth in Findings of Fact ¶ 67, and from its phraseology it is apparent that Skyline's liability was grounded in its status as the "controlling employer." But regardless of the theory of Skyline's liability for that prior violation, whether as controlling employer or otherwise, Skyline presented no evidence and has made no argument to rebut the prima facie showing that the prior violation and the violation here were substantially similar. The Secretary has established the basis for the repeat classification.

The maximum penalty for the repeated violation here is $132,598. 29 C.F.R. § 1903.15(d)(2) (2019). The Secretary proposed a penalty of $10,608, after arriving at a gravity-based penalty for the violation based on a "moderate" gravity ("lesser" probability and "medium" severity), in part by assessing that employee exposure to the hazardous chemical would not have been lethal or have caused permanent injury. (T. 95-96). The proposed penalty included a 30% reduction to account for Skyline's smaller size and provided no adjustments for either good faith or history of violations. (T. 96). This was Skyline's first repeated violation of the cited standard, and so under the Secretary's penalty protocol for repeated violations, the calculated gravity-based penalty was doubled. (T. 96). The undersigned concurs in and adopts the Secretary's penalty calculus. Accordingly, a penalty of $10,608 is assessed for Citation 2, item 1.

Safety Data Sheet
(*§ 1910.1200(g)(1) -- Citation 1, Item 1a*)

Citation 1, item 1a, alleges a serious violation of 29 C.F.R. § 1910.1200(g)(1), which provides in relevant part as follows: "Employers shall have a safety data sheet in the workplace for each hazardous chemical which they use." The Secretary alleges that Skyline violated this standard on April 9 and 10 because Skyline "did not have safety data sheets for mortar which was used by employees for brick repair work."

Creating Employer Responsibility

The HCS defines the term "use" as follows: "*Use* means to package, handle, react, emit, extract, generate as a byproduct, or transfer." § 1910.1200(c). Skyline "used" the mortar containing the hazardous chemical at the worksite and so paragraph (g)(1) of the HCS required *Skyline* to have a safety data sheet (SDS) for the mortar at the worksite to be available to employees who may be exposed to the mortar. Skyline did not have an SDS available at the worksite. Employees at the worksite used the mortar in performing the repairs and were thereby exposed to

the violative condition of using mortar containing a hazardous chemical without having an SDS for the mortar available to them. Skyline had actual knowledge that it had not made an SDS available to the employees who were to use the mortar. (Findings of Fact ¶¶ 29-32). Skyline violated § 1910.1200(g)(1) in the manner alleged in Citation 1, item 1a, and is responsible for that violation as the creating employer of the violative condition.

Controlling Employer Responsibility

By virtue of Skyline's introduction of the hazardous chemical to the workplace for the Jaen employees to use, Jaen was similarly required by paragraph (g)(1) of the HCS to have an SDS for the mortar available to its employees at the worksite. Jaen did not take any measures for doing so, and so the employees were exposed to the violative condition of using the mortar without having an SDS available to them. Skyline knew, or in the exercise of reasonable diligence should have known, that Jaen did not have an SDS for the mortar available at the worksite for the Jaen employees because Skyline knew that it had not previously notified Jaen that it would be providing Jaen with mortar containing a hazardous chemical. Skyline was required to inform Jaen of this pursuant to § 3.2.3 of the subcontract. Skyline failed to take any measures to obtain abatement of Jaen's violative condition (or to abate its own violation as a creating employer). (Findings of Fact ¶¶ 29-32). Skyline thus failed to meet its duty as the controlling employer to take reasonable measures to obtain abatement of Jaen's known violation of § 1910.1200(g)(1) and is therefore responsible for Jaen's violation in its status as controlling employer. *StormForce*, 2021 WL 2582530, at *6.

Employee Information and Training
(*§ 1910.1200(h)(1) -- Citation 1, Item 1b*)

Citation 1, item 1b, alleges a serious violation of paragraph (h)(1) of the HCS, which provides:

> (h) *Employee information and training.* (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets.

The Secretary alleges that Skyline violated this standard on April 9 and 10 because it "did not provide employees with information or training regarding the hazards associated with mortar that was used by employees for brick repair work."

Creating Employer Responsibility

The cited standard required that Skyline provide training and information to the Jaen employees respecting the mortar containing a hazardous chemical that Skyline provided the employees to use on the project. Skyline provided no such training or information and took no measures to determine whether Jaen had provided any such training and information to its employees. Skyline further took no measures to inform Jaen that Skyline would be introducing the mortar to the worksite as it was required to do pursuant to § 3.2.3 of the subcontract, and thus Skyline had no basis for concluding that Jaen would have provided its employees with any such information and training about the mortar. Employees at the worksite used the mortar in performing the repairs and were thereby exposed to the violative condition of using mortar containing a hazardous chemical without having received the information and training required by the cited standard. Skyline had actual knowledge that it had not provided any information and training about the mortar and had actual knowledge that Jaen had not informed Skyline that Jaen had provided its employees with any such information and training. (Findings of Fact ¶¶ 33-35). Skyline violated § 1910.1200(h)(1) in the manner alleged in Citation 1, item 1a, and is responsible

for that violation as the creating employer of the violative condition.

Controlling Employer Responsibility

By virtue of Skyline's introduction of the hazardous chemical to the workplace for the Jaen employees to use, Jaen was similarly required by § 1910.1200(h)(1) to provide to its employees the information and training about the mortar that is required by that standard. Jaen did not provide that required information and training, and its employees were thereby exposed to the mortar without the benefit of the information and training that the standard requires. Skyline knew, or in the exercise of reasonable diligence should have known, that Jaen had not provided the information and training required by the cited standard because Skyline knew that it had not previously notified Jaen that it would be providing the mortar for the Jaen employees to use as Skyline was required to do pursuant to § 3.2.3 of the subcontract. (Findings of Fact ¶¶ 33-35). Skyline thus failed to meet its duty as the controlling employer to take reasonable measures to obtain abatement of Jaen's known violation of § 1910.1200(g)(1) and is therefore responsible for Jaen's violation in its status as controlling employer. *StormForce*, 2021 WL 2582530, at *6.

Classifications and Penalty
(*Grouped Items 1a & 1b, Citation 1*)

The Secretary alleges that both items 1a and 1b of Citation 1 should be classified as serious. The employees were exposed to a hazardous chemical in the mortar without having available to them the mortar's SDS or having received information and training about the hazards of the mortar as the standards required. Their exposure to those violative conditions could have resulted in injury requiring hospitalization. (T. 68, 71, 95-96). The serious classifications are affirmed for both items 1a and 1b of Citation 1.

The maximum penalty for the serious violations here is $13,260. 29 C.F.R. § 1903.15(d)(3) (2019). OSHA proposed grouping the penalties for the two violations to assess a

single grouped penalty of $5,304. (T. 75-76). The Secretary's calculus for that proposed penalty was based on "moderate" gravity in consideration of the intermittent use of the mortar over two days and because lethal or permanent injuries were unlikely. (Tr. 71-72, 95-96). The proposed penalty included a 30% reduction of the gravity-based penalty to account for Skyline's size but included no reductions for good faith or history. (T. 68-69). The undersigned concurs in and adopts the Secretary's penalty calculation for grouped items 1a and 1b of Citation 1.

A grouped penalty of $5,304 is assessed for Citation 1, items 1a and 1b.

Worksite Inspections
(*§ 1926.20(b)(2) – Citation 1, Item 2*)

Citation 1, item 2, alleges a serious violation of § 1926.20(b)(2). That provision provides as follows (with paragraph (b)(1) included for context):

> (b) *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 [29 C.F.R. part 1926].
> (2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

The Secretary alleges that Skyline violated this standard on or about April 9 and April 10 when "a competent person did not perform frequent and regular inspections of the jobsite and equipment." The Secretary argues that "Skyline did not exercise reasonable diligence to ensure that a competent person *from Jaen* was inspecting the Worksite." Sec'y Br. 56 (emphasis added). The Secretary's theory of the violation thus appears grounded on Skyline's liability as the controlling employer for Jaen's violation of the cited standard. *See Fama Constr., LLC*, 2023 WL 2837610, at *4 (involving a controlling employer's alleged violation of § 1926.20(b)(2) and observing: "On a multi-employer worksite, a controlling employer is *liable for a contractor's violations* if the Secretary shows that [the controlling employer] has not taken reasonable measures to prevent or detect and abate the violations due to its supervisory authority and control over the

worksite" [emphasis added]). For Skyline to be found liable as controlling employer for Jaen's violation, the Secretary must first prove that Jaen failed to comply with the cited standard.

The term "competent person" as employed in the cited standard means "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." § 1926.32(f). There is some evidence that the decedent, if not also Aucanshala, had received sufficient formal training to enable him to function as a "competent person" at the worksite. (T. 361-62, 369-70; Exs. R-1 & R-2).

The evidence is not preponderant that Jaen violated the cited standard by failing to establish a program for the frequent and regular inspections of worksites by a competent person as the standard requires, or that Jaen had failed to designate Aucanshala and/or the decedent to act as "competent persons" to perform such frequent and regular inspections at the worksite. There is no direct evidence Jaen violated the standard by failing to designate one of the employees to act as a competent person to make frequent and regular inspections of the worksite. This is so even though Jaen's catastrophic violation of the fall protection standard is near conclusive evidence that neither employee was discharging the responsibilities of a competent person at the worksite. Violations of other standards may constitute circumstantial evidence that Jaen had not complied with the cited standard, but proof of such other violations it is not conclusive evidence of a violation of § 1926.20(b)(2). *See Barnhart, Inc.*, No. 10-0108, 2011 WL 6284749, at *5 (OSHRC ALJ, May 20, 2011) (stating that controlling employer liability for a violation of § 1926.20(b)(2) "is not established by evidence violative conditions existed at the worksite," but rather "is established by evidence showing no competent person made frequent and regular inspections of the worksite"); *cf. Superior Masonry Builders, Inc.,* No. 96-1043, 2003 WL 21525277, at *8 (OSHRC July 3,

2003) (finding the lead laborer on a work crew "was not a competent person" because he had not been "instructed about the specific hazards presented" by the work activity that he was directing "and thus was not capable of identifying the hazard"). While the circumstantial evidence would reasonably support a conclusion that Jaen had failed to comply with the cited standard, that circumstantial evidence is found not to be preponderant. *Cf. Dade Builders Contractors, Inc.*, No. 19-0988, 2020 WL 2612201, at *7 (OSHRC ALJ, Apr. 13, 2020) (finding insufficient evidence that subcontractor had failed to comply with § 1926.20(b)(2) and thus insufficient to hold the general contractor liable for the alleged violation as controlling employer). The evidence that Jaen did not comply with the cited standard not being preponderant, there exists no predicate violation on which to hold Skyline responsible as the controlling employer.[25] Citation 1, item 2, is therefore vacated.

[25] This is not to say that Skyline did not have the independent duty, separate from Jaen's duty, to meet the requirements of § 1926.20(b)(2). Skyline could attempt to meet its own duty through a private arrangement with a third party such as Jaen, but that third party's failure to discharge that duty on behalf of Skyline could subject Skyline to liability for failure to discharge its own duty under the cited standard. *See Froedtert* in footnote 24 *supra*. While the Secretary advances arguments that Skyline's inspections were not sufficiently regular and frequent, those arguments bear on (1) whether Skyline had constructive knowledge as controlling employer of Jaen's alleged violative conduct, and (2) whether Skyline met its duty of reasonable care as a controlling employer. *See supra* footnote 14; MECP §§ X.E.3.a.–e. (setting forth in five subparagraphs "[f]actors that bear on how frequently and closely a controlling employer must inspect to meet its standard of reasonable care"). These arguments would also have been germane to whether Skyline had met its own duty to comply with the cited standard, but the Secretary's theory of Skyline's responsibility is tied to Jaen's failure to comply with the standard, not any failure of Skyline to comply. *Cf. David Weekley Homes*, 19 BNA OSHC 1116, 1118 (No. 96-0898, 2000) (determining that the Secretary had failed to prove that the general contractor at a multi-employer construction site had inadequately implemented the safety program required by § 1926.20(b)(1) because the Secretary failed to establish that the general contractor had not taken "those measures for detecting and correcting hazards [that] a reasonably prudent employer similarly situated would adopt").

ORDER

The foregoing includes findings of fact, conclusions of law, and the reasons or bases for them, on all material issues of fact, law, or discretion presented on the record, in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1). Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1, Item 1a, alleging a serious violation of 29 C.F.R. § 1910.1200(g)(1), is AFFIRMED, and Citation 1, Item 1b, alleging a serious violation of 29 C.F.R. § 1910.1200(h)(1), is AFFIRMED. A single penalty of $5,304 is assessed for the two grouped violations.

2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.20(b)(2), having not been proven, is VACATED.

3. Citation 1, Item 3a, alleging a serious violation of 29 C.F.R. § 1926.501(b)(1), is AFFIRMED, and a penalty of $9,282 is assessed.

4. Citation 1, Item 3b, alleging a serious violation of 29 C.F.R. § 1926.501(b)(3), having not been proven, is VACATED.

5. Citation 1, Item 4, alleging a serious violation of 29 C.F.R. § 1926.502(d)(6)(i), having not been proven, is VACATED.

6. Citation 2, Item 1, alleging a serious and repeated violation of 29 C.F.R. § 1910.1200(e)(1), is AFFIRMED, and a penalty of $10,608 is assessed.

William S. Coleman
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: September 12, 2023