



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. CUSTOM HOUSE
721 19TH STREET, ROOM 407
DENVER, COLORADO 80202-2517

SECRETARY OF LABOR,

Complainant,

v.

C PACIFIC CORPORATION, dba FIVE
STAR BUILDERS,

Respondent.

OSHRC DOCKET NO.: 24-1509

Appearances:

Audrey J. Koontz, Esq., Nisha Parekh, Esq., Department of Labor, Office of the Solicitor,
Washington D.C.
For Complainant

Freddie Catuluna, President and Owner, Self-Represented, C Pacific Corporation dba Five Star
Builders
For Respondent

Before: Judge Joshua R. Patrick – U. S. Administrative Law Judge

DECISION AND ORDER

I. Introduction

On July 23, 2024, the Occupational Safety and Health Administration (OSHA) conducted an inspection of a car dealership undergoing construction in Puerto Rico, Saipan. During the inspection, Compliance Safety and Health Officers¹ (CSHO) observed Respondent's employees

¹ The inspection, which involved 11 different employers, was carried out by two CSHOs, Pologa Setu and Austen Cook. CSHO Cook did not participate in the inspection of Respondent, nor did he testify at the trial in this matter.

working on a scaffold with deficient planking, handrails, and stair rails, which exposed them to a fall hazard ranging from 5 to 20 feet. Based on his observations, CSHO Pologa Setu recommended, and Complainant issued, a Citation and Notification of Penalty (Citation), alleging Respondent committed three serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act). In response, Respondent contends it utilized alternative forms of fall protection, including personal fall arrest systems (PFAS); that the hazards were limited to a few areas and were “promptly” corrected by the scaffolding contractor; and that it lacked authority to fix the scaffolding and abate the hazards. *Resp’t Br.* at 3.

Based on the following findings of fact and conclusions of law, the Court finds Complainant proved Respondent violated the standards as alleged. For the reasons set forth in detail below, Citation 1, Items 1, 2, and 3 shall be AFFIRMED, and a grouped penalty of \$7,000 shall be assessed.

II. Procedural History

CSHO Setu conducted a programmed inspection of Respondent’s worksite on July 23, 2024. (Tr. 46-47). On September 27, 2024, Complainant issued to Respondent a Citation, which alleged three serious violations of the Act and proposed a penalty of \$20,973. (Ex. C-10). Respondent timely contested the Citation and proposed penalty, which brought the matter before the Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Act.

The Court held a virtual trial on July 8, 2025, under the Commission’s Simplified Proceedings. 29 C.F.R. § 2200.200, *et seq.* Prior to trial, the parties were directed to exchange and subsequently identify the exhibits they planned to submit. Respondent failed to provide Complainant with any documents or exhibits, so the record is limited to the exhibits submitted by

Complainant. The following individuals testified: (1) CSHO Pologa Setu; and (2) Arturo Pangilinan, Respondent's supervisor at the worksite. Both parties submitted Post-Trial Briefs for the Court's review.²

III. Stipulations and Jurisdiction

Complainant and Respondent reached a number of stipulations prior to trial, both factual and legal, which the Court incorporates by reference.³ Among those, the parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to section 10(c) of the Act, and at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce as defined in section 3 of the Act, 29 U.S.C. §§ 652(3) & (5). (Tr. 25; *Compl't Br.* at 9; *Resp't Br.* at 4).

IV. Factual Background

A. Respondent's Business

Respondent is a construction company based in San Antonio, Saipan in the Commonwealth of the Northern Mariana Islands. (Ex. C-11). Respondent has approximately 26 full-time employees, of which 10 were present at the time of Complainant's programmed inspection. (Tr. 47; Ex. C-11). Respondent was hired by GPPC, a general contractor, to install aluminum cladding to the exterior of the Atkins Kroll Dealership, located in Puerto Rico, Saipan. (Tr. 45, 47, 51; Ex. C-11 at DOL 000025). Respondent designated Ariel Cabigting and Arturo Pangilinan to supervise the installation crew. (Tr. 53-54). According to Pangilinan, he and Cabigting were responsible for

² During its review of the transcript, the Court noticed that approximately 40 pages of the transcript had been duplicated within the transcript itself. The Court issued an Errata Order, which directed the Court Reporter to remove the duplicate pages and provide a corrected transcript. All references to the transcript in this Decision reference the corrected transcript.

³ The parties reached thirteen separate stipulations. (*See* Ex. J-1). Where applicable, the Court shall cite to those stipulations as follows: Jt. Stip. No. ____.

providing instruction and direction to the employees, observing the work as it was carried out, and ensuring the work was completed safely. (Tr. 53-54).

B. Respondent's Work at the Construction Site

Respondent was one of eleven contractors hired by GPPC to work on the construction of the Atkins Kroll Dealership. (Tr. 48). According to CSHO Setu, the main structure of the building was complete at the time of the inspection. (Tr. 46). Respondent was hired to install aluminum cladding, which is a type of fascia installed over the surface of a building. (Tr. 51). The building was approximately 25 feet tall, which required Respondent to utilize scaffolding to perform the installation. (Tr. 106). Respondent, however, is not a scaffolding contractor, so it relied on GPPC to build the scaffolding before it could begin installing cladding. (Tr. 59; Ex. C-9 at DOL 000021).

The cladding was designed to cover the entire wall depicted in Exhibit C-2. (Ex. C-2 at DOL 000063). According to Pangilinan, the process began with locating the panels in the storage room, conducting inventory, and planning the layout before installing the cladding. (Tr. 193-96, 198). The layout, or mock-up, as Pangilinan referred to it, required Respondent's employees to take measurements of the wall from the scaffolding. (Tr. 196, 200-02). Once the planning phase was over, the installation process began with Respondent's employees attaching a mount onto the wall. (Tr. 95). The mount, which is a grid-shaped structure, is attached to the wall, and the cladding is then attached to the mount. (Tr. 111; Ex. C-2 at DOL 000070). Pangilinan testified they had been installing the mount for five days at the time of CSHO Setu's inspection.⁴ (Tr. 199, 207).

⁴ There appeared to be a dispute over how long Respondent's employees had been on the worksite installing the cladding mount; however, Pangilinan clarified that, at the beginning of the install, their use of the scaffolding was not as extensive as it was at the time of the inspection. (Tr. 207-09).

The scaffold consisted of four elevated levels, each of which was connected by a stairway and separated by approximately five vertical feet.⁵ (Tr. 56; Ex. C-2 at DOL 000063). According to CSHO Setu, in order to install the mount, the supervisors positioned themselves at the top of the scaffold. (Tr. 155). The supervisors then directed their two teams of three employees to stand on different platforms so that the employees could pass the mounting materials from the base of the scaffold to the top. (Tr. 102, 155, 157). The materials were passed through a space between the platforms and the uprights. (Tr. 102, 155; Ex. C-2 at DOL 000070). The uprights are the vertical members of the scaffold structure and are painted yellow. (*See, e.g.*, Ex. C-2 at DOL 000063). The scaffold was also equipped with X-shaped cross-braces along the outside. (Ex. C-2).

C. The Inspection

CSHO Setu was assigned to inspect Respondent at the close of the opening conference, which included all eleven companies working at the Atkins Kroll dealership. (Tr. 49). He began his inspection by asking who was in charge of the workers on the scaffold, and “everybody” pointed to Ariel Cabigting. (Tr. 53). Cabigting and Arturo Pangilinan told CSHO Setu that they were in charge of Respondent’s employees, including directing the installation and ensuring safety. (Tr. 129, 131). Both told CSHO Setu they directed employees to use the scaffold to perform work and observed those same employees using the scaffold in the course of their duties. (Tr. 174). CSHO Setu made similar observations during his inspection.

Early into his inspection, CSHO Setu noticed extensive deficiencies on the scaffold, including platforms that were not fully planked, missing guardrails, and stairways that did not have rails. (Tr. 56, 67-68, 70-74, 80-89, 91, 95; Ex. C-2). Nevertheless, Respondent’s employees were on the scaffold and working during the course of CSHO Setu’s inspection. (Tr. 65). In fact, given

⁵ The testimony indicates there were five levels; however, the best image of the height of the scaffold illustrates four elevated levels, as well a ground level. (Ex. C-2 at DOL 000066).

that the mounting brackets covered the entire wall, CSHO Setu determined Respondent's employees had been using the scaffold in that condition for the duration of the project. (Tr. 111-12). That fact appears to be confirmed by photographs taken roughly a week prior to the inspection, which also show some of the deficiencies identified by CSHO Setu. (Tr. 106-07; Ex. C-8 at DOL 000061, 000062). Neither Cabigting nor Pangilinan disputed this fact. Instead, at trial, Pangilinan testified he knew about the missing planks, stair rails, and guardrails. (Tr. 175, 183-84). According to Pangilinan, they were informed the supplier was only in Saipan for a short time and that the work needed to be completed quickly. (Tr. 200). Respondent did not attempt to install additional planks, stair rails, or guardrails during the time the scaffold was in use. (Tr. 175-76). The deficiencies were only fixed after they were identified by CSHO Setu. (Tr. 205-206)

The deficiencies observed by CSHO Setu were not limited to one part of the scaffold or one type of missing equipment but were, instead, present across the entire structure and involved three discrete types of hazards. (Tr. 56). First, CSHO Setu observed multiple areas with missing planks in areas where employees were engaged in the installation process. (Tr. 135-37; Ex. C-12, C-15). In some instances, CSHO Setu noticed employees kneeling at the edge of the platform, where additional planking should have been placed. (Tr. 85; Ex. C-2 at DOL 000069, C-15). One of the supervisors indicated the spaces were designed to accommodate the stairways. (Tr. 112, 135-36). While this appears to be the case in some instances, this was not the case in every area. (Ex. C-2 at DOL 000065, C-12, C-15, C-17). For example, as illustrated in Exhibit C-17, there were locations where there was a gap between the planking and the uprights/cross-members, some of which exceeded 9.5 inches. (Ex. C-17). Further, as will be discussed in more detail below, the areas where planks were removed to accommodate stairways were missing rails along the stairs and at the edge of the platforms adjacent to the stairs. (Ex. C-15).

Second, as previously noted, there were multiple stairways built into the scaffold to permit climbing from one level to the next and which the supervisors said was the only way to reach the upper levels. (Tr. 72, 179, 180). None of those stairways had stair rails along the side to prevent falling to the level below or, in some instances, all the way to the ground level. (Tr. 107; Ex. C-15, C-18).

Third, and perhaps most concerning, is that CSHO Setu observed the scaffold was missing guardrails on nearly every level. (Tr. 67, 73-74, 87, 89, 91, 95-96; Ex. C-2, C-14, C-16, C-19). The missing guardrails can be observed at the ends of the scaffold, the side of the scaffold up against the side of the building, as well as the side of the scaffold facing away from the building. (Ex. C-2, C-15 to C-20). As pointed out earlier, CSHO Setu actually took photographs of the employees working at the edge of the platforms with no guardrails in place. (Ex. C-2 at DOL 000068, C-13, C-17). A limited number of locations had 2x4's installed as guardrails, but these were far outnumbered by locations that did not. (Ex. C-14). The only barriers present in many of these locations were the cross-braces. (Ex. C-2 at DOL 000071, 000073). According to CSHO Setu, cross-braces can be used to serve as a guardrail as long as they conform to the height requirements of the standard for scaffolding guardrails. (Tr. 98). However, when CSHO Setu measured the distance where the cross-braces intersect to the floor of the scaffolding platforms, the open space measured anywhere from 33 to 37 inches. (Tr. 98-100; Ex. C-4, C-5). This did not conform with the scaffold guardrail standard and, according to Pangilinan, the cross-braces were roughly the same throughout. (Tr. 100-01).

In response to CSHO Setu's observations, Respondent points out that some employees had personal fall arrest system harnesses on. *Resp't Br.* at 3. CSHO Setu testified that he saw only "one or two guys" with harnesses on; however, most of the employees he observed were not outfitted

with harnesses. (Tr. 149). Among those without harnesses were employees who were working on the elevated platforms without adequate railing. (Tr. 149; Ex. C-2 at DOL 000068).⁶ Ultimately, the use of harnesses was inconsistent and was not the result of a coordinated response to identified hazards. (Tr. 205-06).

At the close of CSHO Setu's inspection, he recommended the issuance of a *Citation* alleging three violations of the Act and proposed a penalty of \$20,973. The Area Director concurred in the recommendation, and Complainant issued the *Citation* items that are discussed in more detail below.

V. Analysis

To establish a prima facie violation of section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, No. 90-1747, 1994 WL 682922, at *6 (OSHRC, Dec. 5, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *The Hartford Roofing Co.*, No. 92-3855, 1995 WL 555498, at *5 (OSHRC, Sept. 15, 1995). Preponderance of the evidence has been defined as:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Preponderance of the Evidence, BLACK'S LAW DICTIONARY (12th ed. 2024).

⁶ The Court also notes that while the employee in the photograph has a harness on, it is not anchored to anything, the lanyard is rolled and tied up, and the anchor point is dangling from the structure above the employee's head. (Ex. C-2 at DOL 000068).

A. Citation 1, Item 1

In Citation 1, Item 1, Complainant alleges a serious violation of 29 C.F.R. § 1926.451(b)(1) as follows:

29 CFR 1926.451(b)(1): Each platform on all working levels of scaffolds was not fully planked or decked between the front uprights and the guardrail supports as specified in paragraphs 1926.451(b)(1)(i)-(ii).

Scaffolding in front of building: The scaffolding used to install aluminum cladding to the front wall was not fully planked exposing employees to fall hazards.

Citation at 6. The cited standard provides:

(b)(1): Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports as follows:

(b)(1)(i): Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).

(b)(1)(ii): Where the employer makes the demonstration provided for in paragraph (b)(1)(i) of this section, the platform shall be planked or decked as fully as possible and the remaining open space between the platform and the uprights shall not exceed 9½ inches (24.1 cm).

Exception to paragraph (b)(1): The requirement in paragraph (b)(1) to provide full planking or decking does not apply to platforms used solely as walkways or solely by employees performing scaffold erection or dismantling. In these situations, only the planking that the employer establishes is necessary to provide safe working conditions is required.

29 C.F.R. § 1926.451(b)(1)(i)-(ii).

i. *The Standard Applies*

Respondent does not dispute the applicability of the cited standard. Nevertheless, it is incumbent upon Complainant to establish that it applies. According to 29 C.F.R. § 1926.450(a), designated as the “*Scope and application*” paragraph, “This subpart [L] applies to all scaffolds used in workplaces covered by this part. It does not apply to crane or derrick suspended personnel

platforms. The criteria for aerial lifts are set out exclusively in § 1926.453.” Subpart L is entitled “Scaffolds” and includes both the scope and application paragraph, as well as each of the standards cited by Complainant in this case. The standard cited in Citation 1, Item 1 states requirements for “each platform on all working levels of scaffolds”. *Id.* § 1926.451(b)(1). Respondent’s employees were working from a scaffold to install aluminum cladding on the side of a building. Accordingly, each platform is required to be fully planked. The Court finds the standard applies.

ii. *The Standard Was Violated*

The standard’s requirements are specific: each platform unit shall be spaced no more than 1 inch away from adjacent units or from the scaffold uprights unless the employer can demonstrate that a wider space is necessary. Even if a wider space is necessary, the open space between platform and uprights cannot exceed 9.5 inches. There is an exception for platforms used solely as walkways or only by employees who are erecting or dismantling the scaffold.

Through photographs and the testimony of CSHO Setu, Complainant showed multiple areas on the scaffold where the planking was incomplete. For example, in one photograph there is a platform in the upper right hand corner that is missing planks on both the front and back of the platform area. (Ex. C-2 at DOL 000068). In another, there is an employee sitting right next to an area that is not fully planked, as indicated by the red markings. (Ex. C-17). Complainant argues that Respondent failed to argue or establish the unplanked spaces were necessary under paragraph (b)(1)(i). Further, Complainant notes that, even if Respondent had made such a showing, the spaces between the offending planks and uprights were greater than the 9.5-inch limit set by paragraph (b)(i)(ii). This is not disputed by Respondent.

As illustrated above, there were many locations where the planking was incomplete and did not stretch to the scaffolding uprights. In some cases, the gap between the last plank and the uprights was up to 12 inches. (Tr. 79-80; Ex. C-2 at DOL 000064). While the Court concedes there are certain areas where planks were missing to accommodate a stairway, the deficiency was not limited to the stairways. Further, where planks were removed to accommodate a stairway, the stairway did not have appropriate handrails, and, in some cases, the resulting gap did not have appropriate guardrails. (Tr. 135-40; Ex. C-12, C-13, C-18). Further, there is no evidence to suggest either of the standard's exceptions apply: the scaffold was not solely used as a walkway and Respondent explicitly disclaimed any responsibility for the erection or dismantling of the scaffold. (Tr. 134, 175). The terms of the standard were violated.

iii. *Respondent's Employees Were Exposed to the Hazard*

To establish exposure, Complainant "must show that it is reasonably predictable, either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). In this case, there were multiple zones of danger, as identified above in the photographs taken by CSHO Setu. Further, as established above, CSHO Setu observed Respondent's employees working on all levels of the scaffold, which required use of the stairs and locations with inadequate planking. CSHO Setu also observed multiple employees on the upper levels of the scaffold without PFAS. This exposure occurred over the course of days: Pangilinan testified that the scaffold looked the same on the first day of installation as it did on the day of CSHO Setu's inspection. (Tr. 183). Accordingly, the Court finds Respondent's employees were exposed to the hazard.

iv. *Respondent Was Aware of the Hazardous Condition*

In order to prove Respondent was aware of the hazardous condition, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *See Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). To determine whether Respondent was reasonably diligent, the Court must consider several factors, including “the employer’s obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.” *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001). Complainant does not need to show Respondent knew the condition was hazardous, only that Respondent was aware of the conditions constituting a hazard. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995). Such knowledge can be actual or constructive. *Atl. Battery Co.*, 1994 WL 682922, at *6. Further, the actual or constructive knowledge of one of Respondent’s supervisors may be imputed to Respondent. *See Propellex Corp.*, No. 96-0265, 1999 WL 183564, at *3 (OSHRC, Mar. 30, 1999).

Respondent’s employees had been working on the scaffold for approximately five days. According to Pangilinan, the scaffold was in the same condition at the beginning of their project as it was at the time of CSHO Setu’s inspection. This is buttressed by the fact that Respondent produced a photograph to Complainant, which predated the inspection, showing the scaffold in substantially the same condition, with the same hazards present. (Tr. 107; Ex. C-8). Both Pangilinan and Cabigting, Respondent’s project supervisors, told CSHO Setu they were present during the entirety of the project, observed employees using the scaffold, and directed employees to perform work that required them to use all sections of the scaffold. In fact, Pangilinan testified that they moved forward with the scaffold in that condition because “the supplier” was in town for

a limited time and needed to provide a visual of the mockup installation prior to returning to China. They did not fix the deficiencies, nor did they request that GPPC to do so, until they were pointed out by CSHO Setu.

Based on the foregoing, the Court finds Respondent's supervisors were aware of the hazardous conditions on the site, or, at the very least, should have been aware of those conditions given the length of time they had been on site and the fact they worked on the scaffold and directed work to take place on it. Because Pangilinan and Cabigting were undisputably supervisory employees, the Court also finds their knowledge of the conditions is imputable to Respondent.

v. *The Violation Was Serious*

A violation is serious where there is a "substantial probability that death or serious physical harm could result" from the cited condition. *See* Section 17(k) of the Act, 29 U.S.C. § 666(k); *Manganas Painting Co., Inc.*, No. 94-0588, 2007 WL 6113032, at *14 n.20 (OSHRC, Mar. 23, 2007). According to CSHO Setu, Respondent's employees were exposed to falls of up to 20 feet due to the missing planks. (Tr. 132). He also testified that falls from that height can result in multiple injuries up to, and including, death. (Tr. 78, 92-93). The Court finds the violation was serious.

vi. *Respondent's Affirmative Defense*

Respondent makes many arguments in an attempt to counter the claim that it, specifically, was responsible for the violations found on the scaffold. First, Respondent attempts to minimize exposure by stating that "the vast majority" of scaffold bays were fully planked and that any gaps identified were isolated to an individual bay where a stair tower was installed. *Resp't Br.* at 7. To the extent there was any exposure to an identified hazard, Respondent contends its employees wore

PFAS, thereby negating exposure to any hazard caused by the missing planks.⁷ *Resp't Br.* at 7. Next, Respondent contends GPPC, the general contractor, was responsible for the construction and maintenance of the scaffold, and, therefore, Complainant cannot prove Respondent had the duty or ability to repair. *Resp't Br.* at 7. Curiously, Respondent also appears to suggest its leadmen identified the problem and closed access until GPPC could remedy the missing planks, and that any exposure was brief, controlled, and avoided whenever possible. *Resp't Br.* at 7.

Respondent did not formally assert an affirmative defense in a formal Statement of Affirmative Defenses or at the Initial Simplified Proceedings Telephone Conference. *See* 29 C.F.R. § 2200.207(b) (“At the pre-hearing conference, the parties may discuss the following: Settlement of the case; the narrowing of issues; an agreed statement of issues and facts; all defenses; witnesses and exhibits; motions; and any other pertinent matter. Except under extraordinary circumstances, any affirmative defenses not raised at the pre-hearing conference may not be raised later.”). Nevertheless, Respondent has been fairly consistent in its assertion that it was not responsible for the state of the scaffold, so the Court will give Respondent the benefit of the doubt. Respondent argues it should not be held responsible for the deficiencies observed by CSHO Setu because: (1) GPPC was responsible for the construction and maintenance of the scaffold, and (2) Respondent claims it took reasonable steps to address the hazards present on the scaffold. Complainant does not dispute GPPC was the general contractor and, thus, the controlling employer at the worksite; however, Complainant argues that does not absolve Respondent of its obligation to ensure its employees are protected from worksite hazards.

According to the Commission, “[A]n employer whose own employees are exposed to a hazard or violative condition—an ‘exposing employer’—has a statutory duty to comply with a

⁷ Respondent also asserts this as a defense against Citation 1, Items 2 and 3.

particular standard even where it did not create or control the hazard.” *S. Pan Servs. Co.*, 25 BNA OSHC 1081, 1085 (No. 08-0866, 2014), *aff’d*, 685 F. App’x 692 (11th Cir. 2017); *see also Capform Inc.*, 16 BNA OSHC 2040, 2041-42 (No. 91-1613, 1994) (finding violation when employer whose employees were exposed to a hazard failed to take “reasonable alternative steps to protect its employees”). The Commission cautioned, however, that “it is normally not difficult to assert that the subcontractor could conceivably have done something more to protect its exposed employees”, so it is incumbent on the Court to view the employer’s conduct as a whole and in terms of “whether a reasonable employer would have done more.” *Capform*, 16 BNA OSHC at 2042 (quoting *Electric Smith, Inc. v. Secretary of Labor*, 666 F.2d 1267, 1273-74 (9th Cir. 1982)).

The testimony and evidence show Respondent’s employees were working from all levels of the scaffold, including those areas where the planking was incomplete, which exposed them to a hazard. As such, Respondent is an exposing employer and thus obligated to comply with the standard or otherwise take reasonable alternative steps to protect its employees. This is so irrespective of who built the scaffold or is ultimately responsible for its maintenance or correction. In *Capform*, the Commission found a subcontractor-employer failed to take reasonable efforts to protect its employees because the employer only complained once to the general contractor approximately a month before the OSHA inspection. *Id.* The Commission also determined that mere warnings to stay away from the hazard were insufficient. *Id.* Contrariwise, in *Electric Smith*, the Ninth Circuit upheld the employer’s assertion of the multi-employer defense because the employer “made repeated complaints to the general contractor, directed employees to stay away from the hazardous areas, and provided an alternative physical barrier” *Id.* (citing *Electric Smith*, 666 F.2d at 1273-74).

The onus is on Respondent to prove it took reasonable alternative measures to address the hazard posed by the missing planks. *See id.* at 2043 (“The party claiming an affirmative defense has the burden of proving it.”). To start, the only evidence that a deficiency was reported to GPPC was on the day of CSHO Setu’s inspection. Considering Respondent had been using the scaffold for days at that point, the Court finds this hardly constitutes reasonable alternative compliance, especially when it required the CSHO identifying the deficiencies to prompt Respondent and GPPC to remedy them. *See Resp’t Br.* at 7 (“Respondent’s crew avoided using those particular runs (using other means of access) and immediately ceased all use of the stair tower *when OSHA arrived.*”) (emphasis added). Respondent also contends it addressed the hazard by requiring its employees to wear PFAS in areas where they would be exposed to a fall hazard. According to CSHO Setu, however, he observed only “one or two” of Respondent’s employees equipped with harnesses, but Respondent had six employees working on the scaffold. Further, CSHO Setu testified there were employees working high up on the scaffold without harnesses or without a clear anchor point. (Tr. 151).⁸

The Court agrees with Complainant. While it appears some of Respondent’s employees were equipped with PFAS, the Court credits CSHO Setu’s testimony that, on the day of the inspection, there were multiple employees on the scaffold that were not adequately protected by either guardrails or by being equipped with PFAS. In addition to CSHO Setu’s on-site

⁸ Respondent took issue with Complainant’s assertion that there is no safety harness exception to the guardrail requirement, pointing to 29 C.F.R. § 1926.451(g)(1)(vii), which permits the use of PFAS or guardrails for fall protection “[f]or all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi)”. While PFAS can be used for fall protection, they do not supplant the requirement for guardrails under the cited standard. *See* 29 C.F.R. § 1926.451(g)(4)(i) (“Guardrail systems *shall be installed along all open sides and ends of platforms.* Guardrail systems shall be installed before the scaffold is released for use by employees other than the erection/dismantling crews.”) (emphasis added). The use of PFAS is not a defense to compliance, which is mandated by the use of the word “shall”; however, its use could serve as a counter to the allegation of exposure. In this case, though, the Court has already found that the use of PFAS was not consistently required by Respondent nor observed by the CSHO during his inspection.

observations, he also took photographs illustrating employees on upper levels of the scaffolding without fall protection. While it appears there were isolated cases of PFAS use, Respondent failed to show that employee use of PFAS was required or otherwise designed as an intentional response to an identified hazard. Further, Respondent's reliance on the actions it took *after* CSHO Setu identified the scaffold deficiencies is misplaced. Respondent had ample time to inform GPPC of the scaffold deficiencies during the five days it was installing cladding prior to the inspection but chose not to do so. (Tr. 183).

Based on the foregoing, the Court rejects Respondent's multi-employer defense and finds Respondent violated the terms of the standard. While some efforts were made to address fall hazards on the scaffold, those efforts were incomplete and appear to be in response to the OSHA inspection, not as part of any independent inspection conducted, or directed, by Respondent's management. Accordingly, Citation 1, Item 1 is AFFIRMED.

Insofar as Respondent asserts multi-employer defense with respect to each of the alleged violations, the Court finds the foregoing analysis is applicable to all three and rejects the multi-employer defense as to each.

B. Citation 1, Item 2

In Citation 1, Item 2, Complainant alleges a serious violation of 29 C.F.R. § 1926.451(e)(4)(i) as follows:

29 CFR 1926.451(e)(4)(i): A stairrail consisting of a toprail and a midrail was not provided on each side of each scaffold stairway.

Scaffolding in front of the building: Stairrails were not installed on each side of the stairway used to access the scaffolding exposing employees to fall hazards.

Citation at 7. The cited standard provides:

A stairrail consisting of a toprail and midrail shall be provided on each side of each scaffold stairway.

29 C.F.R. § 1926.451(e)(4)(i).

i. *The Standard Applies*

As previously noted, Respondent does not dispute the applicability of the cited standard. Further, the Court incorporates by reference its findings in Section V.A.i. This particular standard applies to stairways on scaffolds. The photographs illustrate multiple stairways on the subject scaffold. Accordingly, the standard applies.

ii. *The Standard Was Violated*

According to Respondent's own brief, "It is undisputed that some sections of the scaffold stair tower initially lacked installed handrails." *Resp't Br.* at 6. Respondent also claims that its "employees were instructed to avoid using the unprotected stair run; they used proper PFAS when working near any edges; and Respondent promptly notified GPPC [] of the issue." *Id.* at 8.

Respondent's own statements to the Court reveal the standard was violated; however, Respondent attempts to minimize the nature and extent of the hazard, as well as its role in addressing it. Respondent claims that the violation was limited to "some sections"; however, a review of CSHO Setu's photographs (as well as one of Respondent's) illustrates that none of the stairways on the scaffold have compliant handrails. (Ex. C-2, C-12, C-13). There are occasional 2x4's and cross-bracing adjacent to the stairway, but there is nothing equivalent to a toprail or midrail on either side of the cited stairway. Further, as evidenced by the photographs, and the testimony of CSHO Setu, there were multiple employees using the stairway. (Ex. C-2 at DOL 00068, 000075; Tr. 112). Even though some of those employees were wearing harnesses, their use was inconsistent and some photos show employees were not properly anchored to the structure. For example, in Exhibit C-2 at DOL 000068, there is an employee on the stairway wearing a harness, but the lanyard/tether is wrapped up and is not attached to anything. Finally, as stated

earlier, Respondent cannot rely on the abatement measures taken by GPPC *after* the deficiencies were identified by CSHO Setu. The standard was violated.

iii. *Respondent's Employees Were Exposed to the Hazard*

In response to Complainant's assertion that Respondent's employees were exposed to a hazard, Respondent argues that "[t]he Secretary did not establish that any employee was actually exposed to a fall hazard on the unrailed stair sections for anything more than a moment" *Resp't Br.* at 8. Again, Respondent attempts to minimize the extent of the hazard and its employees' exposure to it. There was not a single section of the stairway that had a compliant handrail attached to it. There were multiple employees at various levels of the scaffold—including performing work on the stairway itself—at the time of the inspection, and this state of affairs was documented in multiple photographs taken by CSHO Setu. There is no indication the employees used an alternative method to ascend the scaffold, and the pictures of the employees performing work on the scaffold stairways belies any assertion that their exposure to the hazard was limited to brief moments. Further, this level of exposure occurred over the course of days: Pangilinan testified that the scaffold looked the same on the first day of installation as it did on the day of CSHO Setu's inspection. Accordingly, the Court finds Respondent's employees were exposed to the hazard.

iv. *Respondent Was Aware of the Hazardous Condition*

Respondent's awareness of this condition is no different than its awareness of the missing planks. The condition was open, obvious, and had existed for an extended period of time. In lieu of rehashing the same analysis, the Court incorporates by reference its findings in Section V.A.iv, *supra*. Accordingly, the Court finds Respondent was aware of the hazardous condition alleged in Citation 1, Item 2.

v. *The Violation Was Serious*

Similarly, the Court finds the hazard identified in Citation 1, Item 2 was serious for the same reasons as Citation 1, Item 1. Accordingly, the Court incorporates its analysis from Section V.A.v, *supra*.

C. Citation 1, Item 3

In Citation 1, Item 3, Complainant alleges a serious violation of 29 C.F.R. § 1926.451(g)(4)(i) as follows:

29 CFR 1926.451(g)(4)(i): Guardrail systems were not installed along all open sides and ends of platforms.

Scaffolding in front of building: Guard rails were not installed around all working platforms employees used to install aluminum cladding on the wall exposing employees to fall hazards.

Citation at 8. The cited standard provides:

Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews.

29 C.F.R. § 1926.451(g)(4)(i).

i. *The Standard Applies*

As previously noted, Respondent does not dispute the applicability of the cited standard. Further, the Court incorporates by reference its findings in Section V.A.i. This particular standard applies to guardrails along open sides and ends, and there is no exception to the standard's requirements.⁹ Accordingly, the Court finds the standard applies.

ii. *The Standard Was Violated*

Of the three deficiencies noted by CSHO Setu, the missing guardrails violation was the most pervasive. At trial, CSHO Setu marked multiple locations where guardrails should have been

⁹ See footnote 7, *supra*.

located but were conspicuously absent. (Ex. C-14, C-16, C-19). This condition was not limited to one location on the scaffold, but was present on all four sides. Contrary to Respondent's assertion that "wide shots show that guardrails were in place in extensive sections of the scaffold, and areas where rails were temporarily incomplete", the Court finds the photographs illustrate there were more locations without guardrails than with them. The requirement to install compliant guardrails is mandatory prior to anyone other than an erection or dismantling crew using the scaffold. While there were crossbraces in some locations, they crossed at a point between 33 and 37 inches, rendering them noncompliant as either a toprail or a midrail. *See* 29 C.F.R. § 1926.451(g)(4)(ii) (requiring top edge height of toprails or equivalent members to be between 38 and 45 inches); *id.* § 1926.451(g)(4)(iv) (requiring midrails to be installed approximately midway between the top of the guardrail and platform surface); *id.* § 1926.451(g)(4)(xv) (indicating circumstances under which crossbracing is acceptable in place of mid- or toprail, neither of which were present here). Accordingly, the Court finds the terms of the standard were violated.

iii. *Respondent's Employees Were Exposed to the Hazard*

As noted above, this deficiency was present throughout the scaffold. Absent a few wooden rails scattered here and there, the Court is hard-pressed to find any consistent use of guardrails on the scaffold. (Ex. C-2, C-12, C-14, C-16, C-17, C-19). In other words, it appears there was exposure to a fall hazard on just about every level and location on the scaffold. Further, as noted previously and incorporated herein, the Court does not find Respondent adequately protected its employees from the hazard through its inconsistent use of PFAS. There are photographs showing employees on the structure either without PFAS or without the harness being anchored to the structure. (Ex. C-2 at DOL 000068, 000075, C-12, C-13, C-15). Again, as noted above, this

condition existed for five days and was not remedied until CSHO Setu identified the hazard. Respondent's employees were exposed to a hazard.

iv. *Respondent Was Aware of the Hazardous Condition*

Respondent's awareness of this condition is no different than its awareness of the missing planks or stairrails. The condition was open, obvious, and had existed for an extended period of time. In lieu of rehashing the same analysis, the Court incorporates by reference its findings in Section V.A.iv, *supra*. Accordingly, the Court finds Respondent was aware of the hazardous condition alleged in Citation 1, Item 3.

v. *The Violation Was Serious*

The Court finds the hazard identified in Citation 1, Item 3 was serious for the same reasons as Citation 1, Items 1 and 2. Accordingly, the Court incorporates its analysis from Section V.A.v, *supra*.

VI. Penalty

Under the Act, the Secretary has the authority to propose a penalty according to Section 17 of the Act. *See* 29 U.S.C. §§ 659(a), 666. The amount proposed, however, merely becomes advisory when an employer timely contests the matter. *Brennan v. OSHRC (Interstate Glass)*, 487 F.2d 438, 442 (8th Cir. 1973). Ultimately, it is the province of the Commission to "assess all civil penalties provided in [Section 17]", which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, No. 93-0239, 1995 WL 139505, at *3 (OSHRC, Mar. 29, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). "[T]he Act requires that "due consideration" be given to the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations." *Briones Util. Co.*, No. 10-1372, 2016 WL 7424575, at *4 (OSHRC, Dec. 14, 2016) (citing 29 U.S.C. § 666(j)). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, No.

87-2059, 1993 WL 61950, at *15 (OSHRC, Feb. 19, 1993) (citation omitted). Rather, the Commission assigns the weight that is reasonable under the circumstances. *See, e.g., Merchant's Masonry, Inc.*, No. 92-424, 1994 WL 723829, at *1 (OSHRC, Dec. 30, 1994). It is the Secretary's burden to introduce evidence bearing on the factors and explain how he arrived at the penalty he proposed. *Valdak Corp.*, 1995 WL 139505, at *4. "Gravity is typically the most important factor in determining an appropriate penalty and depends upon the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished).

Complainant alleges the total penalty of \$20,973 is appropriate because six of Respondent's employees were exposed to fall hazards resulting from the violative conditions. Complainant alleges the gravity of the violations was moderate because there were not a lot of missing planks and because the presence of crossbraces, while not sufficient for compliance, was likely to mitigate the consequences of a fall from the scaffold. Respondent contends the same conditions warrant a low or nominal penalty assessment.

The Court finds the appropriate penalty amount lies somewhere in between the two. There is no doubt the violations existed, that Respondent's employees were exposed to the hazards caused by those violations, and that Respondent had ample opportunity to notify GPPC in the days leading up to the OSHA inspection. That said, the Court is also mindful of the fact that Respondent was not the contractor responsible for the erection or modification of the scaffold and that, though they may have been incomplete, Respondent took some steps to address the hazard by equipping some employees with PFAS. As discussed above, Respondent, as an exposing employer, could have remedied this issue by notifying GPPC about the deficiencies, requesting their abatement,

and limiting exposure until GPPC fixed them.

The Court finds the foregoing circumstances justify a grouped penalty. “In its discretion, the Review Commission sometimes groups violations together and assesses a single penalty even when the Secretary proposes multiple penalties.” *Dakota Underground, Inc. v. Secretary of Labor*, 200 F.3d 564, 569 (8th Cir. 2000). This discretion is usually exercised when the citations involve “similar violations that could be cured by a single act of abatement.” *Id.* (quoting *Pentecost Contracting Corp.*, 17 BNA OSHC 2133, 2135 (No. 92-3789, 1997)). The Commission has also exercised such discretion in situations where there are “distinct but potentially overlapping violations.” *Hackensack Steel Corp.*, No. 97-0755, 2003 WL 22232017, at *10 (OSHRC, Sept. 25, 2003). In *Hackensack*, the Commission grouped the penalty for two separate, yet related, fall protection items, stating, “[W]e note that even though the regulations undergirding both items specify different means of abatement, both standards address fall hazards.” *Id.* Similarly, this Court finds that, not only do each of the cited items address fall hazards, but they address fall hazards on the same structure that were the result of the general contractor’s failure to properly erect the scaffold. While putting up guardrails would not cure the planking violation and vice versa, the action Respondent needed to take as an exposing employer to remedy the problem was singular: notify GPPC of the deficiencies so that GPPC could remedy them. Further, while Respondent’s efforts to address the hazards were incomplete, the Court is also mindful of the fact that Respondent made attempts to address fall hazards through the use of PFAS.

Accordingly, the Court finds a grouped penalty of \$7,000 for all three violations is appropriate.

VII. Order

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. In accordance with those Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED.
2. Citation 1, Item 2 is AFFIRMED.
3. Citation 1, Item 3 is AFFIRMED.
4. A grouped penalty of \$7,000 is ASSESSED for Citation 1, Items 1, 2, and 3.

SO ORDERED.

Date: June 1, 2026
Denver, Colorado

/s/ Joshua R. Patrick

Joshua R. Patrick
First Judge, OSHRC