United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SCHINDLER ELEVATOR CORPORATION, Respondent, and INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS (IUEC), LOCAL 31 Authorized Employee Representative	OSHRC Docket No.: 24-0070

Appearances:

Seema Nanda, John Rainwater, Lindsay A. Wofford, and Aletsey Z. Hinojosa, Esq., Department of Labor, Office of Solicitor, Dallas, TX,
For The Secretary

Paul Waters, Waters Law Group, Clearwater, FL,
For Respondent

Before: Judge Patrick Augustine – U. S. Administrative Law Judge

DECISION AND ORDER

I. PROCEDURAL BACKGROUND.

On July 24, 2023, the Occupational Safety and Health Administration (OSHA) commenced an inspection of Respondent Schindler Elevator Corporation's workplace located at the Wells Fargo Plaza located at 1000 Louisiana Street, Houston, Texas (Worksite). As a result, OSHA issued a *Citation and Notification of Penalty* (Citation) to Schindler Elevator. The Citation alleged

three Serious violations, with a total proposed penalty of $26,787.00. Schindler Elevator timely contested the Citation by filing a *Notice of Contest* with the Occupational Safety and Health Review Commission.[1]

Schindler Elevator filed a *Motion for Summary Judgment* (Motion) alleging the Citation in its entirety should be dismissed since the work being performed was construction work, and the Citation was improperly issued under the general industry regulations. Schindler Elevator, therefore, argues the cited regulation does not apply. Complainant filed a Response in which she concedes the appropriate regulations should be the construction standard. Complainant argues, however, that Schindler Elevator's Motion is moot because she had filed a timely motion to amend the Citation to cite the violation under a construction standard. The issue has been fully briefed and is before the Court.

II. JURISDICTION AND INTERSTATE COMMERCE ENGAGEMENT.

a. Commission has Jurisdiction.

The Commission obtained jurisdiction over this case under section 10(c) of the Occupational Safety and Health Act (OSH Act) upon Schindler Elevator's timely filing of its *Notice of Contest.* 29 U.S.C. § 659(c); *see also Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 995 (5th Cir. 1975), *aff'd sub nom., Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977) (describing

[1] [T]he Commission is responsible for the adjudicatory functions under the OSH Act." *StarTran, Inc. v. OSHRC*, 290 F. App'x 656, 670 (5th Cir. 2008) (unpublished), and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7 (1985) (per curiam). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *Martin v. OSHRC,* (*CF&I Steel Corp*.), 499 U.S. 144, 151 (2012).

"Enforcement Structure of OSHA"). Schindler Elevator admitted to the Commission's jurisdiction. Answer, ¶ 1.

b. Schindler Elevator was Engaged in Interstate Commerce.

"In enacting the Occupational Safety and Health Act, Congress intended to exercise the full extent of the authority granted by the commerce clause of the Constitution." *Burk Well Serv. Co*., No. 79-6060, 1985 WL 44776, at *1 (OSHRC, Dec. 12, 1985). "Accordingly, an employer comes under coverage of the Act by merely affecting commerce; it is not necessary that the employer be engaged directly in interstate commerce." *Id.* "Nevertheless, the Secretary bears the burden of establishing the threshold jurisdictional fact." *Id*. Schindler Elevator has admitted it was an employer engaged in interstate commerce at the time of the inspection. Answer, ¶ 2.

III. BACKGROUND.

Schindler Elevator has moved for summary judgment on its affirmative defense that the standards cited do not apply. Answer ¶ 10. Specifically, Schindler Elevator argues the undisputed material facts show the work performed by it at the time of the inspection was construction work covered by the construction industry standards in Part 1926 of Complainant's regulations. Citation 1, Items 1, 2a and 2b[2] allege violations of Part 1910, the general industry standards. Schindler Elevator argues because the construction industry standards apply, Citation 1, Items 1, 2a, and 2b should be vacated. *See* 29 C.F.R. § 1910.12(a).

In late 2018, Schindler Elevator was awarded a contract to completely replace and upgrade the existing elevators at the Worksite (the "Project"). *See* Motion Affidavit of Matthew Franck attached as Exh. A at ¶¶ 3, 6. The Project was listed with a "valuation of construction" of twenty-

[2] Citation 1, item 1 alleges a violation of 29 C.F.R. § 1910.132(a). Citation 1, item 2a alleges a violation of 29 C.F.R. § 1910.147(f)(1), while item 2b alleges a violation of 29 C.F.R. § 1910.147(f)(1)(ii).

four million, one hundred eighty-six thousand, three hundred fifty-five dollars ($24,186,355) before taxes. Motion Exh. A at ¶ 4; Exh. A, Attachment 1. The Project's work began shortly after the Houston Public Works department issued a permit for "Commercial Elevator Installation" on December 6, 2019.

Complainant admits Schindler Elevator was hired to remove the existing elevators at the Worksite, build new elevators, and replace and upgrade the elevator drive machines, controllers, and other elevator components at the Worksite. *See* Complainant's Responses to Respondent's Requests for Admission, attached to Motion as Exh. B, at nos. 1 and 2.

Schindler Elevator's work entailed removing nearly all existing elevator equipment of every elevator on the Worksite – forty-eight traction (cabled) elevators and one hydraulic elevator – and replacing that equipment with modern, state-of-the-art elevator equipment and technology. The Project also included installing dispatching equipment to make the elevators meet applicable Texas elevator code provisions. Motion Exh. A at ¶¶ 6-8. The Project involved removing and replacing nearly every component of the elevator equipment, from the hoisting machines, steel cables (ropes), and controllers, to the elevator cab finishes, elevator cab control equipment, and elevator and hoistway doors, to the elevator car top equipment, such as the inspection control stations, elevator car door operators, and car top sheaves. *Id*.

At the time of his accident, a Schindler Elevator's employee (Employee 1) was working on the final stages of installing one of the Project's forty-nine elevators. Specifically, Employee 1 was installing rope retainers on an elevator car top sheave on the new elevator 39. When installed and permitted, elevator 39 was part of a group that would run from floor 59 to the building's top floor, floor 71. See Motion Exh. A, ¶¶ 10-11; Exh. A, Attachment 2.

IV. STANDARDS ON MOTION FOR SUMMARY JUDGMENT.

The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and demonstrating the absence of a genuine issue of material fact as to the issue(s) raised. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to prevail on a motion for summary judgment, there must be no genuine dispute as to any material fact, and the moving party must be entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). *See also* 29 C.F.R. § 2200.40(g)(j) (motions for summary judgment governed by Fed. R. Civ. P. 56)[3]; *Ford Motor Co. – Buffalo Stamping Plant*, 23 BNA OSHC 1593 (No. 10-1483, 2011). In resolving a motion for summary judgment, a judge does not decide factual disputes; rather, the role of the judge is to determine whether any material factual disputes exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (2005) (emphasis added). In making such a determination, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 83 (2d Cir. 2006). If there is any evidence in the record from which a reasonable inference in favor of the nonmoving party can be drawn, summary judgment is improper. *Celotex*, 477 U.S. at 324. Conversely, if a review of the entire record could not lead a rational trier of fact to find for the nonmoving party, then there is no genuine issue for trial, and summary judgment is appropriate. *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

As to whether a fact is "material," the Supreme Court has stated:

> [T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or

[3] Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56.

> unnecessary will not be counted. *See generally* 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93–95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

Anderson, 477 U.S. at 248.

Under Federal Rule of Civil Procedure 56(c), a party to a summary judgment motion "asserting that a fact cannot be or is genuinely disputed must support the assertion," and if a party "fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion . . . ." Fed. R. Civ. P. 56(e). A nonmovant cannot, in other words, overcome summary judgment merely based on the possibility that material facts it has not yet identified exist; instead, it must "present facts essential to justify its opposition" (unless it shows "by affidavit or declaration" that such facts are not yet available to it "for specified reasons"). Fed. R. Civ. P. 56(d); *see also Celotex*, 477 U.S. at 324 (the nonmovant must "designate specific facts showing that there is a genuine issue for trial").

V. NO DISPUTED MATERIAL FACTS.

Schindler Elevator's Motion squarely hits at first prong of the Secretary's *prima facie* case: whether the cited standards apply to the work being performed. Under Commission precedent, "the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014) (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"); *KS Energy Servs., Inc.,* 22 BNA OSHC

1261, 1267 (No. 06-1416, 2008) (finding "the cited . . . provision was applicable to the conditions in KS Energy's traffic control zone"), *aff'd*, 701 F.3d 367 (7th Cir. 2012); *Active Oil Serv., Inc.,* 21 BNA OSHC 1092, 1094 (No. 00-0482, 2005) (finding "that the confined space standard applies to the cited conditions" because "the vault was a confined space"); *Arcon, Inc.,* 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004) ("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions.").

Here, Section 1926.12 defines construction work as "work for construction, alternation, and/or repair, including painting and decorating." 29 C.F.R. § 1926.12. This regulation only applies to employers who are engaged in construction work or in operations that are integral or necessary to construction work. *B. J. Hughes,* 10 BNA OSHC 1545 (No. 76-2165, 1982). Activities that could be regarded as construction work should not be so regarded when they are performed solely as part of a non-construction operation. *Id.* Moreover, activities that are ancillary to and in aid of primarily non-construction activities are not construction work. *See Royal Logging Co.,* supra. Maintenance work is not considered construction work. *Gulf States Utilities Co.,* 12 BNA OSHC 1544, 1546 (No. 82-867, 1985). However, it is evident from the scope of the work discussed in this Decision the work being performed at the Worksite was construction, not maintenance. Specifically, the work being performed by Employee 1 at the time of the accident was in furtherance of and a part of the construction and installation of elevator 39 and the Project. Elevator 39 was still under construction at the time of the accident and had not been inspected by, nor issued a final operating permit by, the Houston Public Works department. Motion Exh. A, ¶ 12.

Complainant admits the work Schindler Elevator was performing at the worksite was "construction work" as defined by 29 CFR § 1910.12(b). Motion Exh. B, no. 6. In addition, in her Response to the Motion, Complainant stated as follows:

> The Court should deny Schindler Elevator Corporation's Motion for Summary Judgment. Schindler's motion is premature, as the company's argument is predicated on the Secretary citing a general industry standard. The Secretary has moved to amend[4] the pleadings before the December 22, 2024, deadline to change the citation in question to a construction standard. *See generally Scheduling Order*, OSHRC Docket No. 24-0070 (May 29, 2024) (amendment of the pleadings 30 days before the hearing). Amending the pleading will render Respondent's Motion moot. For this reason, the Court should deny Schindler's Motion.

See Comp't Response to Motion.

The Court concurs with the agreement of the Parties that no material disputed fact exists, and the issued Citation is governed by the constriction standards. The Secretary has confessed, as stated above, the appropriate standards for the work activity being performed at the Worksite are the construction standards codified at 29 C.F.R. § 1926.01 *et seq.* The applicability of the cited standard is a material fact which is not disputed.

The Court's resolution of the present dispute is limited to the sole issue of whether genuine issues of material fact remain such that summary judgment is inappropriate. The Court has reviewed the Motion, the Response, accompanying arguments, and exhibits and finds there are no disputed issues of material fact. Accordingly, for the foregoing reasons, material issues of fact do not exist between the parties, rendering the entry of Summary Judgment for Schindler Elevator appropriate. The Motion is GRANTED.

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[4] In a separate Order dated January 3, 2025, the Court denied Complainant's *Motion to Amend*. Therefore, Complainant's Response, which was predicated on the Court's approval of the *Motion to Amend*, is further acknowledgement the appropriate standards to have cited Respondent in this case were the construction standards under 29 C.F.R. § 1926.01 *et seq.*

VI. DISPOSITION OF CITATION - ORDER.

The Court finds the appropriate standards which Schindler Elevator should have been cited are the construction standards. Therefore, Citation 1, Items 1, 2a, and 2b, which are based on the general industry standard, are VACATED.[5]

SO ORDERED.

/s/ Patrick B. Augustine

Judge Patrick B. Augustine
Judge - OSGRC

Denver, CO
Dated: January 13, 2025

[5] The Court notes the Secretary acknowledged in her *Motion to Amend* that if the construction standards are applied, Citation 1, Items 2a and 2b should be vacated as they are predicated on the Lock Out Tag Out standard, which is not applicable under the construction standards. The Secretary withdrew Citation 1, Items 2a and 2b on that basis.