Some personal identifiers have been redacted for privacy purposes

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. AVADEK, INC., Respondent.	OSHRC DOCKET NO. 23-0748

Appearances:

Raymond Lee Jr. and Allyson Gault, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Anthony G. Stergio and Bryan V. Acklin, Andrews Myers, P.C., Houston, Texas
For Respondent

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

DECISION AND ORDER

I. Introduction

Respondent was hired to install a canopy over the entrance to the Bryan Midtown Park Sports & Event Center in Bryan, Texas. During the quality control phase of the project, one of Respondent's foremen was killed when he fell from the canopy to the ground below. Complainant was notified of the death and initiated an inspection that same day.

Based on the Compliance Safety and Health Officer's inspection, Complainant issued a Citation and Notification of Penalty (Citation). Complainant alleges Respondent failed to ensure its employees conducted competent person inspections that were sufficient in scope and frequency,

in violation of 29 C.F.R. § 1926.20(b)(2). In response, Respondent contends it maintains a robust program for inspections. Specifically, Respondent contends: (1) Complainant failed to prove a violation of the standard; and (2) it could not have known its foreman-employee would fail to perform his duty as a competent person.

Based on the following facts and conclusions of law, the Court finds Complainant failed to carry her burden of proof in this matter. The preponderance of the evidence does not establish that Respondent failed to maintain an inspection program or that its foreman failed to inspect the Bryan, Texas worksite. Alternatively, assuming Complainant established non-compliance with the cited standard, the Court finds that Complainant failed to establish the foreman's actions were foreseeable. *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006). Accordingly, the Citation is VACATED.

II. Procedural History

As a result of the inspection of the Bryan worksite, OSHA issued a Citation to Respondent, alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act) and proposing a total penalty of $20,092. The Citation was issued on April 14, 2023, and alleged serious violations of 29 C.F.R. §§ 1926.20(b)(2) (Citation 1, Item 1) and 1926.502(d)(6)(i) (Citation 1, Item 2). Respondent filed a timely Notice of Contest, bringing this matter before the Commission.

A trial was held on February 22, 2024, in San Antonio, Texas. Prior to trial, the parties filed a Notice of Partial Settlement, resolving Citation 1, Item 2. Thus, the only remaining item under consideration is Citation 1, Item 1, which alleges a serious violation of 29 C.F.R. § 1920.20(b)(2). Complainant has proposed a penalty of $10,046 for that violation. (Tr. 11; Ex. C-1). During the trial, the following witnesses testified: (1) Jose Ledesma, a manager for Respondent;

(2) Jorge Longoria, a safety coordinator for Respondent; (3) OSHA Assistant Area Director (AAD) Michael Jarvis; (4) Juan Mata, a safety coordinator manager for Respondent; and (5) Tyson Barrow, Vice President of Respondent. Both parties submitted Post-Trial Briefs for the Court's review

III. Stipulations and Jurisdiction

Complainant and Respondent reached a number of stipulations prior to trial, both factual and legal, which the Court will incorporate by reference.[1] Those stipulations include: (1) the Commission has jurisdiction over this matter under section 10(c) of the Act, and (2) Respondent is an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act. (Jt. Stip. Nos. 1, 2).

IV. Factual Background

a. Respondent's Business

Respondent was hired by a general contractor, SpawGlass, to install an aluminum tube canopy at the Bryan Midtown Park Sports & Event Center in Bryan, Texas. (Ex. R-1). The construction of an aluminum tube canopy requires two types of crews: installation and quality control. Each crew is made up of different employees and supervised by different managers. (Jt. Stip. Nos. 9, 11). As you would expect, the installation crew is responsible for installation work, whereas the quality control crew comes afterwards to ensure the installation conforms to the original plans. (Tr. 25; Jt. Stip. No. 12). In this case, from September 1 to September 28, 2022, one of Respondent's installation crews installed a canopy[2] over the entrance to the Midtown Park

[1] The parties reached 18 separate stipulations. *See* First Amended Joint Stipulation Statement, No. 23-0748 (Feb. 20, 2024); (Tr. 14-15). Where applicable, the Court shall cite to those stipulations as follows: Jt. Stip. No. ___.

[2] Pictures from the worksite indicate that the "canopy" is an overhead roof-like structure built atop and over a portion of the front façade. (Tr. 30-31; Ex. R-7).

Sports & Event Center. Beginning on October 19, 2022, one of Respondent's quality control (QC) crews, which was supervised by the decedent-foreman, was tasked to "correct some errors [on the canopy] from the previous install." (Tr. 29; Jt. Stip. No. 16).

The QC crew consisted of the foreman,[3] [redacted], and [redacted]. (Jt. Stip. Nos. 14, 15). The QC crew was managed by Jose Ledesma. (Tr. 46). On October 19, Ledesma visited with the foreman on the Bryan worksite and showed him the adjustments that needed to be made using the design drawings of the canopy. (Tr. 25-27). Ledesma and the foreman discussed the need for an aerial lift while working on the canopy project, and Ledesma placed an order for an aerial lift to be delivered to the Bryan worksite. (Tr. 28-32, 40-41, 45; Ex. R-7 at 2). Ledesma reminded the foreman that the aerial lift was the approved method for canopy work and that Respondent's fall protection policy required tying off while in the lift. (Tr. 28, 40). During his discussion with Ledesma, the foreman noted the employees of other contractors were not using fall protection on their own aerial lift. (Tr. 41). Ledesma told the foreman to worry about his own safety and to use the aerial lift to tie off. (Tr. 41). The aerial lift was delivered to the Bryan worksite later that day. (Tr. 40, 45).

After their discussion and walk-around, which lasted 10-15 minutes, Ledesma and the foreman went to lunch. (Tr. 28). After lunch, Ledesma returned to his Houston office and the foreman went back to the Bryan worksite. (Tr. 28, 41). After he left for Houston, Ledesma received a telephone call from the aerial lift driver asking where to park the lift on the Bryan worksite. (Tr. 45). Ledesma did not see the foreman again until the following day at the Houston office, where

[3] For privacy reasons, the name of the foreman decedent has been removed from this Decision and Order.

the foreman was gathering tools. He had no other interaction with the foreman or the Bryan worksite until after the incident on October 21, 2022. (Tr. 29, 34, 139-140).

b. Respondent's Safety Programs

i. Inspections

a. *Competent Person Inspections*

The record contains many sources of Respondent's approach to safety inspections regarding fall protection. Three documents in the record are consistent with each other: the Avadek Site Safety Plan, the Avadek Safety Manual and the Avadek Employee Safety Handbook. (Exs. C-2, R-4, R-10). All the documents discuss safety inspections with regard to fall protection equipment. All of them require regular and frequent inspections regarding fall protection.

For example, Respondent's site safety plan and the safety manual state the following:

> Responsibility
>
> The Safety Director is responsible for complying with all OSHA requirements, including maintenance of all equipment. The Safety Director is also responsible for training both current and new employees on the proper usage of such equipment, or designating the appropriate supervisors to conduct training. The Safety Director, *or his/her delegate*, must also perform a hazard assessment *whenever conditions change to determine if hazards exist that require the use of PPE*. If hazards are found, the Safety Director, *or his/her delegate*, must either eliminate them or provide employees with proper protection from them. *The Safety Director must document in writing that a workplace hazard assessment has been performed. The following form should be completed whenever performing a hazard assessment*.

(Ex. C-2 (Avadek Site Safety Plan) at 22-23 (Personal Protective Equipment (PPE); Ex. R-4 (Avadek Safety Manual) at 73) (emphasis added). Respondent's site safety plan and the safety manual also provide:

> FACILITY/PRO[J]ECTS EVALUATION
>
> The workplace will be assessed *before each assigned job* for potential fall hazards. Proper fall arrest equipment will be used for jobs requiring fall protection when elimination of the hazard(s) is not possible. This company will evaluate the facility and projects to determine fall hazards. This preliminary evaluation will detail the

> required steps for protecting employees from fall hazards. *A fall hazards assessment sheet will be used to document these assessments*. A complete list of fall hazard locations and protective measures/procedures will be maintained in this document as APPENDIX A.

(Ex. C-2 (Avadek Site Safety Plan) at 27) (Fall Protection Program; Ex. R-4 (Avadek Safety Manual) at 88) (emphasis added). Respondent's site safety plan provides the following inspection instructions for fall protection in particular:

> INSPECTION AND MAINTENANCE
>
> To ensure that fall protection systems are ready and able to perform their required tasks, *a program of inspection and maintenance will be implemented and maintained*. The following as a minimum, will comprise the basic requirements of the inspection and maintenance program:
>
> A. Equipment manufacturer's instructions will be incorporated into the inspection and preventive maintenance procedures
> B. All fall protection equipment will be inspected *prior to each use*, and a documented inspection at intervals not to exceed 6 months, or in accordance with the manufacturer's guidelines.
> C. The user will inspect his/her equipment *prior to each use* and check the inspection date.
> D. Any fall protection equipment subjected to a fall or impact load will be removed from service immediately and inspected by a qualified person (sent back to the manufacturer).
> E. Check all equipment for mold, damage, wear, mildew, or distortion.
> F. Hardware should be free of cracks, sharp edges, or burns.
> G. Ensure that no straps are cut, broken, torn or scraped.
> H. Special situations such as radiation, electrical conductivity, and chemical effects will be considered.
> I. Equipment that is damaged or in need of maintenance will be tagged as unusable, and will not be stored in the same area as serviceable equipment.
> J. A detailed inspection policy will be used for equipment stored for periods exceeding one month.
> K. Anchors and mountings will be inspected *before each use* by the user and supervisor for signs of damage.

(Ex. C-2 (Avadek Site Safety Plan) at 31) (Fall Protection Systems).

These portions of Respondent's site safety plan and safety manual are consistent with the testimony in the record regarding daily inspections of the workplace that the foreman – as the designated competent person of the worksite – was responsible for doing. For example, QC

Manager Ledesma testified to the following:

> Q. And you also testified that it was your expectation that [the foreman] would perform an inspection of the jobsite, right?
>
> A. Yes.
>
> Q. What -- what is your expectation based on?
>
> A. He was asked to look around his work -- workplace, his -- any hazards. Also his equipment, a visual inspection and function of their equipment.
>
> Q. How do you know he was supposed to do that?
>
> A. It's something we do daily.

(Tr. 44). Likewise, Respondent Safety Coordinator Longoria testified to the policy behind its daily inspections:

> Q. What is Avadek's policy on conducting inspections of jobsites, material and equipment?
>
> A. That they got to do it daily.
>
> Q. Why daily?
>
> A. Because we never know what's happened on the last day. Something can change to that particular equipment or tool.

(Tr. 63). Respondent Safety Coordinator Manager Mata also testified about daily inspections:

> Q. Based on Avadek's training and standards, when would a competent person have been required to inspect the worksite materials and equipment on October 21st of 2022?
>
> A. That would be at the beginning of the day.
>
> Q. What about on October 20th of 2022?
>
> A. At the beginning of the day as well.
>
> Q. And the same question for the 19th?
>
> A. Same thing, at the beginning of the day.

(Tr. 127). Mata further explained:

> Q. What -- and just to be clear, for the record, what type of three-phase inspection are competent people required to do on a worksite?
>
> A. Yes. So they're required to do workplace inspection, visual inspection, and any equipment that is involved. Functional – function inspection as well.
>
> Q. If during the course of their inspection they find something that's askew or just out of place, what are they supposed to do?
>
> A. So they have to take the initiative to -- depending on what the problem is, for example, if it's a hole opening or anything like that to have hole-protection covers on and so forth. It will depend on what the issue is, but the competent person has to take the initiative to resolve or take some form of measure to try to reduce anything like that, that issue.

(Tr. 128-129).

All witnesses questioned on the issue identified the foreman as the Respondent's designated competent person. (Tr. 41, 53-54, 75, 99, 121).

b. *Safety Audit Inspections*

Respondent's employee safety handbook also provides that periodic, safety audit inspections will occur at workplaces:

> Periodic Inspections
>
> It is the policy of our Company that workplaces are subject to periodic safety and health inspections to ensure implementation and execution of our policies and procedures as related to employees, contractors, and/or vendors.
>
> All employees are responsible for cooperating during these inspections and managers and supervisors are responsible for initiating corrective actions to improve items discovered during the walk-through inspection.

(Ex. R-10 at 5). This portion of Respondent's employee safety handbook is consistent with Mata's and Longoria's testimony regarding the audit-like inspections they performed.

For example, Longoria testified that his audit inspections as a safety coordinator are different from the daily inspections performed by a competent person. (Tr. 51-53, 67, 135). He

testified he occasionally does inspections on a daily basis, but not at the same jobsite and the sites selected are sometimes done at random. (Tr. 52-53). Mata similarly described his inspections as a safety coordinator:

> Q. As a safety coordinator, what does your inspection look like?
>
> A. My inspections are more safety audits. So compliance, making sure equipment is in good condition, ladders are in good working conditions, fire extinguisher, power tools, extension cords, et cetera.

(Tr. 124). Mata testified that he and Longoria perform similar audit inspections as safety coordinators. (Tr. 129-130). Mata testified that he visited the Bryan worksite during the installation of the canopy, which was in September, but not when the QC crew was at the Bryan worksite in October. (Tr. 130-131). Longoria reported he stopped doing his inspections "during COVID." At the time of trial, however, Longoria testified he intended to resume them. Although Mata performed an inspection of the Bryan worksite in September 2022 during installation, neither he nor Longoria performed an audit inspection of the Bryan worksite in October 2022. (Tr. 53, 78-79).

c. Job Safety Analyses

Yet another type of inspection noted in the record is a job safety analysis (JSA) or a joint hazard assessment/job hazard analysis (JHA). These terms were used interchangeably by the parties. *See, e.g.*, Tr. 54-55; (Compl. Br. 3, 9; Resp't Br. 7). Both parties appeared to be referring to the term JSA (or JHA) as it is used in Respondent's subcontract with the general contractor of the Bryan worksite, SpawGlass:

> All Subcontractors shall submit daily *Jobsite Safety Analysis forms (JSA's)* pertaining to each significant task to be performed for that day to the Project Superintendent prior to commencing work each day. Workmen will not be permitted to start or continue work until the *JSA's* are reviewed and submitted for record. This is a requirement for receipt of monthly payment and before work crews will be allowed to commence working for the day.

(Ex. R-1 at 4) (emphasis added).

The abbreviation, JSA, as discussed in the contract between Respondent and SpawGlass, is not the same thing as the daily inspection required by Respondent's safety policy. As Longoria testified:

> Q. Aren't – isn't an inspection that an Avadek employee is required to do daily the same thing as a JHA?
>
> A. No.
>
> Q. Those are separate concepts, correct?
>
> A. Yes, sir.
>
> Q. And so even if I don't have to fill out a JHA as an Avadek employee, I still have to do an inspection, correct?
>
> A. Yes, sir.

(Tr. 63). Longoria testified that the contract required the foreman to fill out a JSA on the Bryan worksite and submit it to SpawGlass, but he did not.[4] (Tr. 54-55).

[4] Adding to the confusion regarding the term JSA in this case, Respondent's site safety plan also uses the term JSA:

> As part of the supervisor's responsibilities, and in conjunction with the Safety Director and/or Safety Committee, a *Job Safety Analysis (JSA)* will be completed for all safety-sensitive and non-routine tasks. A copy of the completed *JSA* on the employee's regular duties should be provided to the treating physician, along with the following Job Physical Assessment form. The Safety Director or Supervisor should request the treating medical provider complete this form. The supervisor should identify a modified-duty position to offer the employee that is within their physician's restrictions.

(Ex. C-2 (Avadek Site Safety Plan) at 16) (Return-To-Work Policy) (emphasis added).

The Court notes that the term JSA as used in Respondent's site safety plan is located in a separate section (the Return-To-Work Policy section) than the sections referring to inspections of the workplace and equipment. *See, e.g.*, Ex. C-2 at 16, 22, 27. No testimony at the hearing connects the term JSA as used in the site safety plan as being interchangeable with the how the term JSA is used throughout the rest of the record.

d. Third-Party Inspections

Finally, SpawGlass conducted safety inspections through a third-party. (Tr. 81, 96). During its investigation, OSHA received a report of a safety inspection that took place the day before the incident. According to AAD Jarvis, the report alleged that the foreman and his helper were working on the canopy using inappropriate fall protection. (Tr. 81). The report itself is in the record, offered by Respondent, but it was not referred to at all during the hearing, nor does it offer the level of specificity testified to by AAD Jarvis. (Ex. R-16). The report states: "Workers observed conducting activities on canopy structure not using leading edge decelerators (corrected)." (Ex. R-16 at 5). AAD Jarvis testified that Respondent did not receive a copy of this report until after the fatal incident occurred. (Tr. 82). No other witness testified to this report at the hearing.

ii. Training

Respondent provides its employees with fall protection training. Employees go through safety orientation, which includes a fall protection component, as well as refresher fall protection training throughout their career with Respondent. (Tr. 63, 119-120, 147; Exs. R-2, 12). Employees also receive other safety training such as OSHA 10s, aerial lift training, forklift training, CPR, and first aid. (Tr. 26, 35-36, 119).

As noted above, the foreman received competent person training in fall protection in February 2022. (Tr. 47, 62-63, 121; Ex. R-13).

iii. Safety Program Discipline

Respondent's Vice-President, Tyson Barrow, testified that Respondent disciplines employees who violate safety rules. (Tr. 148). He testified the disciplinary measures include "verbal warnings, written warnings, suspensions up to, you know, three days. And then termination if it's a repeat offense." (*Id.*). The record contains written safety discipline for multiple

workers—not including the foreman—for various infractions, including fall protection, at different worksites in the five years prior to the incident at issue in this case. (Ex. R-3).

Ledesma testified he had never written up the foreman on any safety issues and, other than their discussion on October 19, 2022, about the need for an aerial lift and the tie-off requirement, they had not discussed any other safety issues. (Tr. 45). Longoria, on the other hand, testified he knew of one incident, on another worksite, in which the foreman worked from a roof without fall protection. (Tr. 57-58). Longoria testified he did not discipline the foreman for that instance, because it was the foreman's direct supervisor who was responsible for taking disciplinary action. (Tr. 58, 65-66). The foreman's supervisor was Respondent's safety director, who passed away around the same time as the foreman.[5] (Tr. 66, 147-148). Mata, Respondent's current Safety Director, was not asked about the foreman's safety discipline history, and there is no evidence of written discipline for the foreman in the record.

c. The Incident

Nobody who testified was at the worksite when the incident occurred. The only evidence in the record that addresses what happened on the day of the incident is a document offered by the Respondent at the beginning of the trial. (Tr. 18; Ex. R-6). This 40-page exhibit contains the foreman's personnel records, including his death certificate, medical records, life insurance claim forms, direct deposit form, driver's license, social security card, payroll forms, W-4 form, background check form, employee handbook acknowledgment form, and toxicology report. Buried within all these forms is a detailed Incident Investigation Report authored by a third-party named Compliance Safety Consulting. (Ex. R-6 at 7-10). None of these forms, including the

[5] The Safety Director's death was unrelated to the foreman's death.

Incident Investigation Report, was mentioned, let alone discussed, by any of the witnesses at the trial.[6]

The pertinent portion of the Incident Investigation Report is found under the section, Description of the Root Cause, and provides:

> **Contributing Factor**: [The foreman] stood on the t[r]ellis tubes as he was unbolting the tubes to perform the re-alignment created an unstable walking surface.
>
> **Contributing Factor**: The fall protection system in use had several deficiencies.
>
> - A fall protection cart [Stinger] located on the roof of the canopy [that did not belong to the company] was used as the anchor point. The crew did not have access to the fall protection cart's manufacturer specifications to verify inspection, installation, use and limitations of the equipment.
>
> - A 3/8's cable equipment with loops on each side-secured with 2 saddle clamps was installed by [the foreman]. Only cable systems designed, tested and approved by a qualified person shall be used as part of an approved fall protection systems.
>
> - The 3/8's cable's length exceeded the fall distance required to stop the fall prior to reaching/hitting the lower level. **Fall Distance**: Approximately 25 ft. **Cable Length**: Approximately 55 ft.
> [Please note: [The foreman's] wire rope tied from loop-to-loop measured 55 ft.]
>
> **Note**: An aerial boom lift was provided to access and perform the elevated work. [The foreman] should not have accessed the canopy roof to perform the work.

(Ex. R-6 at 8). None of this information was discussed at the trial.

[6] Nor, based on who testified, would they have been able to, because, as noted earlier, none of the witnesses had first-hand knowledge of its contents or the events upon which its conclusions were based. Further, neither party sought to establish its contents as exceptions to the hearsay rule.

While the Court is bound to consider the entire record,[7] the Court is troubled by Complainant's substantial, if not exclusive, reliance on this document in her Post-Trial Brief. Respondent introduced, and Complainant agreed to pre-admit, the Incident Investigation Report. (Tr. 18). No context was provided for its introduction, and no one testified as to its contents. It is unknown who drafted it or whether that individual—or the individuals who provided statements upon which the report's conclusions were reached—had direct knowledge of the events discussed in the report. Because it is not a document kept in the ordinary course of either party's business, the report itself is hearsay. Further, to the extent there are statements contained in the report made by people with knowledge of the events of October 21, 2022, the statements are also hearsay absent an applicable exception. Neither party provided adequate foundation to establish an exception to either layer of hearsay, and neither party proffered testimony from the individuals who supplied the statements that made it into the report.

In the Court's view, although this report appears to catalog damaging evidence about the foreman's actions on the day of the fall, it is a document without context and little corroboration. While the parties stipulated to the admissibility of this report, that agreement does not mean the Court is obliged to accept the statements contained therein as truth, especially when the statements contained therein, as well as the document itself, are hearsay. *See A.E. Staley Mfg. Co.*, No. 91-0637, 2000 WL 1535899, at *15, n.27 (OSHRC, October 18, 2000) (consolidated) ("We would not assign controlling weight to this unsubstantiated hearsay where the declarant is not only

[7] The Court is bound to consider the *entire* record before it, irrespective of who introduced the evidence. *See C. Kaufman, Inc.*, No. 14249, 1978 WL 6993, at *2, n.1 (OSHRC, Jan. 11, 1978). In that case, the Commission upheld a violation even though the Secretary failed to adduce credible evidence of a violation in her case-in-chief. The Commission noted Respondent failed to move for dismissal at the close of the Secretary's case and subsequently put on evidence providing the "requisite evidence" of a violation in the Secretary's case. *Id*.

unavailable for cross-examination, but not even identified.") *aff'd*, 295 F.3d 1341 (D.C. Cir. 2002). Accordingly, the Court will assign weight to the portions of the Incident Investigation Report that are corroborated by other evidence in the record. *Leo J. Martone & Assocs., Inc.*, No. 11175, 1977 WL 7030, at *3, n.3 (OSHRC, Apr. 11, 1977) (probative value of hearsay evidence "is increased when there is … corroborating evidence."). For example, the Court finds that the foreman fell from a height of 25 feet. (Tr. 31-32; Exs. R-6 at 8; R-7 at 2). Based on the reasons above, any other information in this report that is not corroborated by other evidence in the record is assigned little, if any, weight.

d. OSHA Investigation

Respondent reported the death to OSHA, and OSHA AAD Michael Jarvis assigned the matter to Compliance Safety and Health Officer (CSHO) Corby Czajka. (Tr. 72, 88). CSHO Czajka inspected the worksite and interviewed witnesses. AAD Jarvis did not visit the Bryan worksite. (Tr. 97). AAD Jarvis and CSHO Czajka interviewed two management witnesses jointly– Ledesma and Longoria. (Tr. 91-92). AAD Jarvis did not interview Mata. (Tr. 91). Mata testified that he spoke with two OSHA representatives on the telephone regarding the incident, but he did not remember who the representatives were. (Tr. 127-128). AAD Jarvis testified that CSHO Czajka interviewed "an employee on the ground and an employee on the roof with the [foreman]." (Tr. 98).

None of these interviews were recorded. (Tr. 95). Ledesma spoke with CSHO Czajka twice: once on the day of the incident and again two months later. (Tr. 136). Ledesma testified that CSHO Czajka inaccurately remembered a portion of Ledesma's first interview:

> He said that I have said on the previous statement that we use that device, the fall protection – the counterweight fall protection before, which that wasn't true. The day that he asked me, I said 'No. We never use it. This is the first time that I see

> that.' We use something that we call parapet clamp that is used for fall protection. But we couldn't use it on the jobsite because there was no way.

(Tr. 136-137). Shortly after the interviews, CSHO Czajka left the employment of OSHA and did not testify at the hearing. (Tr. 88-90).

AAD Jarvis testified Respondent provided Complainant with its safety policies and fall prevention protection program training. (Tr. 100). AAD Jarvis did not request any JHAs from Respondent and did not know whether CSHO Czajka requested any JHAs from Respondent. (Tr. 96-97). AAD Jarvis testified OSHA received some documentation from SpawGlass; namely, the report of the inspection by a third-party safety consultant performed on the Bryan worksite the day before the incident. (Tr. 79-82, 96; Ex. R-16). AAD Jarvis testified that Respondent did not receive this third-party safety report until *after* the incident occurred. (Tr. 82).

V. Analysis

a. Legal Standard

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).

b. Citation 1, Item 1

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.20(b)(2), of which pertinent provisions provide:

> (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 this part.
>
> (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.

29 C.F.R. §§ 1926.20(b)(1), (2). The Citation alleges:

> 29 CFR 1926.20(b)(2): The employer did not initiate and maintain programs that provided for frequent and regular inspections of the job site, materials, and equipment to be made by a competent person(s):
>
> On or about October 21, 2022, and at times prior thereto, employees were reinstalling an aluminum tube canopy without inspections being conducted by the employer, exposing employees to hazards such as, but not limited to, falls.

(Citation at 1). Respondent argues Complainant failed to present evidence sufficient to establish Respondent violated the terms of the standard. In addition, Respondent contends Complainant failed to show Respondent knew or could have known the foreman would fail to perform an adequate inspection.

The Court agrees that Complainant failed to prove a violation of the cited standard.

i. <u>The Standard Applies</u>

The parties stipulate that Respondent's QC workers were engaged in construction work on the Bryan worksite from October 19, 2022 to October 21, 2022. (Jt. Stip. No. 7). *See Ryder Transp. Servs.*, No. 10-0551, 2014 WL 5025979, at *2 (OSHRC, Sept. 29, 2014) (holding that OSHA's construction standards cover activities that constitute construction work, which is defined as "work

for construction, alteration, and/or repair, including painting and decorating."). Accordingly, the Court finds the cited standard applies.

ii. Complainant Failed to Establish a Violation of the Standard

Complainant claims Respondent failed to provide for frequent and regular inspections of the Bryan worksite, materials, and equipment by a competent person, and that, even if it did, such inspections were inadequate. (Compl. Br. 8-13). Respondent claims it implemented and maintained an adequate inspection program and conducted adequate inspections pursuant to that program. Respondent also contends Complainant's position stems, at least in part, from confusion over the meaning of the term "inspection", as that term was used by Mata and Longoria in their conversations with AAD Jarvis and CSHO Czajka. (Resp't Br. 10-15). The Court agrees with Respondent.

a. *What the Standard Requires*

The cited standard requires an employer to initiate and maintain a program of "frequent and regular" inspections of "job sites, materials, and equipment", which should be conducted by a competent person designated by the employer. *See* 29 C.F.R. § 1926.20(b)(2). In *J. A. Jones Construction Co.*, No. 87-2059, 1993 WL 61950 (OSHRC, Feb. 19, 1993), the Commission held that "frequent" and "regular" inspections, as written in the cited standard, must be "conducted to keep track of safety hazards at the site" and "to keep abreast of the pace of work at the site." *Id*., at *6. Going further, the Commission noted:

> "[R]egular" . . . has a generally understood meaning in common parlance. Ordinary dictionary definitions of the term include "consistent or habitual in action" and "recurring at set times." Webster's New World Dictionary 1196 (2d ed. 1972). Although "frequent" is a nonspecific term, we conclude that a reasonable person familiar with the size of the worksite and the magnitude of the ongoing construction activity would understand how often inspections would have to be conducted to keep track of safety hazards at the site. *See id.* at 1388 … (characterizing the phrase

> "frequent and regular inspections" as stating "relatively straightforward specifications").

Id. (quoting *R & R Builders, Inc.*, No. 88-0282, 1991 WL 11668265, at *8) (OSHRC, Nov. 25, 1991).

b. *Respondent Had a Duty to Inspect*

The canopy roof consisted of tubes the workers were tasked to "correct" or re-align. (Tr. 29, 31, 39-40). The record shows that Ledesma and the foreman met for 10-15 minutes, walked the site, so to speak, and discussed the use of an aerial lift to access and repair a canopy roof, which was located 25 feet above the ground. (Tr. 28, 40-41, 45; Ex. R-6 at 8). Based on this conversation, and subsequent confirmation the aerial lift had been delivered to the worksite, Ledesma had no reason to believe the lift would not be used to perform the repairs. (Tr. 32, 40). Safety coordinator manager Mata agreed that using the aerial lift was consistent with Respondent's and OSHA's standards "for completing work at that height." (Tr. 126). These facts illustrate Respondent had a known duty to have a competent person inspect the worksite for fall protection on the roof canopy project. *R & R*, 1991 WL 11668265, at *6 ("An employer can reasonably be expected to conform a safety program to any known duties.").

The Court further finds the walkaround and discussion between Ledesma and the foreman—the designated competent person—regarding the aerial lift was, at the least, one of the required inspections of the Bryan worksite. This discussion was consistent with the preliminary project assessment for fall protection as set forth in Respondent's safety program. (Ex. C-2 at 27). Ledesma testified he told the foreman he needed "to be tied off to his equipment [the aerial lift] completely." (Tr. 41). As to the remainder of the project, Ledesma knew the foreman was the competent person on the job and he was to remain on the job until it was finished. (Tr. 41-42). As the designated competent person on the job, the foreman was expected to conduct inspections of

the worksite each day before he commenced work. (Tr. 42). The initial meeting between Ledesma and the foreman supports a finding that Respondent implements and maintains a safety program that calls for inspections generally and competent person inspections specifically.

c. *Respondent Initiated and Maintained a Program Requiring Frequent and Regular Inspections*

Complainant claims Respondent's safety plan "did not specify *how often* a competent person was supposed to conduct a job inspection." (Compl. Br. 9) (emphasis added). As noted above, however, the record contains ample evidence regarding Respondent's various worksite inspection and assessment policies in this matter. Respondent's written safety program requires inspections to be performed on the worksite and equipment "whenever conditions change," and "before each assigned job" by the "*Safety Director or his/her delegate*." (Exs. C-2 at 22-23, 27; R-4 at 73, 88). Inspections of equipment, such as PPE, must be inspected "prior to each use," and "before each use." (Ex. C-2 at 31). Testimony in the record by Respondent's management employees corroborate Respondent's written safety program—all the witnesses testified that the competent person on the worksite is expected to perform "daily" inspections of the worksite. (Tr. 44, 63, 128-129).

Complainant fails to show how the "daily" and prior-to-use inspections called for in Respondent's policies were inadequate for the Bryan worksite. There is no evidence that "conditions changed" more frequently than daily, if at all, with respect to the canopy project. Thus, the Court finds that Respondent's fall protection inspection regime satisfies the "frequent and regular" requirement of the cited standard. *R & R*, 1991 WL 11668265, at *7-8 ("The standard imposes the concept of a regular schedule, not a special schedule, and points to physical things--the 'job site, materials, and equipment"--not the operations themselves.").

d. *The Cited Standard Does Not Require Documentation*

Complainant claims Respondent "made no efforts to keep track of safety hazards" at the Bryan worksite. (Compl. Br. 9). Complainant states that Respondent had "no measures in place" to ensure that competent persons submitted JHAs to its general contractor in violation of its contract and its own safety plan. (*Id*.) Complainant also alleges "Respondent did not otherwise have any written procedures to make sure that inspections took place at the [Bryan worksite]." (*Id*.)[8] Complainant argues that, without such "inspections or mechanisms to ensure the same, no reasonable person familiar with the [Bryan worksite] and the reinstallation project could have kept track of the safety hazards at the [Bryan worksite]." (*Id*.)

The contract and Respondent's own safety plan, however, are not OSHA regulations. The cited OSHA standard does not require that inspections be documented. (Tr. 108-109). Respondent argues Complainant "conflates" JHAs with "inspections," and the record supports this observation. As noted above, JHAs are a "related but distinct" concept from the daily safety inspections performed by the competent person. (Tr. 63). The Court notes that Respondent has "measures in place" like safety audit inspections designed to uncover safety violations, and it has a progressive discipline program designed to enforce its safety rules.

Complainant claims that Respondent's program was "deficient" because it "unreasonably relied" on the competent person to conduct inspections instead of "specific instructions and rules to ensure hazard detection." (Compl. Br. 9). But as noted above, Respondent has rules in its safety plan regarding multiple types of inspections of fall protection hazards. The cited standard requires that the program "provide for" such inspections by a designated competent person. *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) (noting the well-established principle

[8] The Court is unable to determine why the Complainant cites to the foreman's death certificate for this point. (Compl. Br. 9 citing "Ex. R-6, pp. 2-3").

that a "regulation should be construed to give effect to the natural and plain meaning of its words"). Respondent's safety programs, as noted above, not only provide for such inspections but also dictate the when, the how, and the what of such inspections. Nothing in the cited standard requires the documentation or written proof that Complainant is reading into the cited standard.

Complainant points to testimony by Ledesma and Longoria that they "assumed" and "expected" the foreman to perform a safety inspection as required by the standard and by Respondent's own safety policies to suggest a lack of oversight. (Compl. Br. 9). Complainant also seems to misunderstand Ledesma's role on the Bryan worksite. He was the project manager; not the designated competent person. Neither Respondent's policy, nor the cited standard, required Ledesma to remain on the Bryan worksite to ensure Respondent's designated competent person did his job correctly. (Tr. 41). *See N.Y. State Elec. & Gas Corp. v. Sec'y of Lab.*, 88 F.3d 98, 109 (2d Cir. 1996) ("Insisting that each employee be under continual supervisor surveillance is a patently unworkable burden on employers."). Further, as testified to by Mata, Respondent had a safety audit program, which was designed to ensure compliance with safety rules. Indeed, Mata testified he had inspected the Bryan worksite during the installation phase of the project.

Despite Respondent's safety program requiring written documentation of certain inspections, there is no evidence that the foreman of the Bryan worksite created such a record. *See, e.g.*, Ex. C-2 at 27. The standard, however, does not require documentation; thus, despite Respondent's own requirements, the Court cannot automatically conclude that the failure to document is evidence of a failure to inspect. Complainant introduced no affirmative evidence establishing the foreman failed to conduct an inspection before or after the aerial lift arrived on the Bryan worksite. *R & R*, 1991 WL 11668265, at *8 (holding that Secretary must "affirmatively" prove actual deficiency in inspection).

e. *Respondent's Foreman Was a Competent Person*

Complainant next claims that "there was contradictory evidence regarding [the foreman's] classification as a competent person." (Compl. Br. 10).

> ***Competent person*** 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.

29 C.F.R. § 1926.32(f). Respondent designated the foreman to be the competent person on the Bryan worksite. *Armstrong Steel Erectors, Inc.*, No. 97-0250, 1999 WL 72216, at *6 (OSHRC, Feb. 12, 1999) (emphasizing the need for employer to designate a competent person). As the competent person, the foreman had the authority to take prompt corrective action to eliminate hazards on the Bryan worksite. (Tr. 53-54, 129). Complainant contends the foreman's authority is "called into question" because he had to report issues to Ledesma. Ledesma was the project manager, so it stands to reason the foreman would report issues to him. However, simply because Respondent has a chain of command and reporting requirement does not mean the foreman lacked the authority to immediately fix any safety hazards arising on site.

Safety Coordinator Longoria testified that the foreman "had the knowledge to identify safety issues" based on "training that we gave him and the time that he had worked for the company." (Tr. 53-54). QC Manager Ledesma testified that the foreman "wouldn't have been a foreman … if he didn't have his training or anything," and that the foreman "had to have his OSHA training and every single other training there has to be." (Tr. 43). The record contains training documentation for the foreman, including fall protection competent person training taken in February 2022. (Tr. 47, 62-63, 121; Ex. R-13). While Complainant claims that this training documentation "casts more doubt" on the foreman's classification, she fails to identify any deficiency or provide evidence of the training he should have taken. *Ed Taylor Constr. Co.*, No.

88-2463, 1992 WL 155474, at *5-7 (OSHRC, June 18, 1992) (analyzing "competent person" with regard to alleged hazard). As such, the Court finds Complainant failed to show the foreman was "[in]capable of identifying existing and predictable" fall hazards on the Bryan worksite. 29 C.F.R. § 1926.32(f).

f. *The Incident Investigation Report*

Complainant relies substantially on the Incident Investigation Report, which states that two recognizable hazards contributed to the foreman's fatal fall: 1) using a 3/8's cable that exceeded the fall distance, and 2) using an unauthorized fall protection cart. (Compl. Br. 10-11). Complainant argues an adequate inspection would have uncovered these recognizable hazards.

Complainant's reliance on the Incident Investigation Report is understandable. The entries showing the foreman used incorrect PPE and anchorage points at the Bryan worksite is strong circumstantial evidence that the foreman may not have been "capable of identifying" the hazard to which he was exposing himself. *Ed Taylor Constr.*, 1992 WL 155474 at *8, n.8 ("That these three employees all entered the shaft without taking any precautions whatsoever is strong circumstantial evidence that they were not 'capable of identifying' the hazard to which they were exposing themselves."). However, for the reasons noted above, these details from the Incident Investigation Report are given limited weight. (Ex. R-6 at 8).

Due to the substance of the Incident Investigation Report, the Court's position regarding the weight it should be accorded may seem problematic. The information contained in the report paints an unflattering picture of the foreman's actions and calls into question the quality of whatever inspection he may have performed. However, it is equally problematic to draw inferences or conclusions from a document: (1) that no witness discussed; (2) whose author is unknown; and (3) that contains statements from first-hand observers that did not testify at trial. Even though the

parties stipulated to the report's admissibility, the Court is not obligated to accord the document any more weight than it is due.

g. *Complainant Failed to Provide Affirmative Evidence of a Deficiency*

The key to Complainant's claim of a violation of the inspection standard is the foreman's fall, as recounted in the Incident Investigation Report. According to Complainant, the fall and the circumstances under which it occurred are evidence that the foreman failed to conduct a compliant inspection. In support of this proposition, Complainant cites to *Superior Custom Cabinet Co., Inc.*, No. 94-200, 1997 WL 6033024 (OSHRC, Sept. 26, 1997), and the unreviewed administrative law judge decision *Keenan, Hopkins, Suder & Stowell Contractors, Inc., DBA KHS&S Contractors*, No. 18-1091, 2020 WL 5815505 (OSHRC, June 8, 2020) (ALJ Augustine), to compare to the facts here.[9]

In *Superior Cabinet*, the hazard was an unguarded stairwell and top landing on the second floor of a residential home. *Superior Cabinet*, 1997 WL 603024, at *1. The employee-inspector testified that, while he inspected the first floor, he did not inspect the second floor because "the delivery ticket did not show any cabinets to be delivered to the second floor." *Superior Cabinet*, 1997 WL 603024, at *4. The Commission found that it was "unreasonable" for the employee-inspector not to inspect the second floor. In making this finding, the Commission relied on the "the totality of the evidence," which included testimony of multiple witnesses at the worksite at the time of the violative condition establishing that a cabinet was to be delivered to the second floor. *Id*.

[9] *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976 WL 5912, at *2 (OSHRC, Feb. 10, 1976) (An unreviewed administrative law judge decision is not binding precedent for the Commission).

In *Keenan*, the hazard at issue was a hole in the floor of decking that was covered by a piece of plywood, exposing employees to falling through the hole. Evidence in the record included photographs and testimony establishing the location of the hole, the plywood, how long the condition was apparent, and who was available to see it at the time of the violation. Based on this evidence, the ALJ was able to determine whether the employee-inspector was put "on notice to further inquire" about the plywood covering the hole, and thus discover the hazard. *Keenan*, 2020 WL 5815505, at *26-27.

In both *Superior Cabinet* and *Keenan*, the employee-inspectors testified to the scope of their respective inspections. In both cases, the evidence was sufficient to establish what the inspectors did and why their inspections were deficient. Here, the record contains nothing from which to establish what the foreman inspected and what he did not inspect. Nobody testified at the trial to establish what the foreman observed or, for that matter, what anyone observed first-hand about the worksite that would justify a similar finding in this case. Complainant claims—with zero basis—that "like the leadmen in *Superior Cabinet* and *Keenan*," the foreman here did not investigate the 3/8s cable or the fall protection cart. (Compl. Br. 12-13). No such affirmative evidence is in this record. *R & R*, 1991 WL 11668265, at *5. In this regard, the case at bar is distinguishable from both *Superior Cabinet* and *Keenan*.

Accordingly, Complainant has failed to establish non-compliance with the cited standard.

iii. Complainant Failed to Establish Knowledge

In addition to the foregoing, the Court finds Complainant failed to establish Respondent had knowledge of the alleged violation.

To establish the knowledge, Complainant has the burden to show the employer either knew or could have known with the exercise of reasonable diligence of the violative conditions.[10] *Yates*, 459 F.3d 604, 607 (5th Cir. 2006). "In assessing reasonable diligence, the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring." *S.J. Louis Constr. of Tex.*, No. 12-1045, 2016 WL 561092, at *2 (OSHRC, Feb. 5, 2016). A supervisor's actual or constructive knowledge of the violative condition is imputable to the employer. *Dover Elevator Co.*, No. 91-862, 1993 WL 275823, at *7 (OSHRC, July 16, 1993). However, "[A] supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." *Yates*, 459 F.3d at 608-09.

Complainant attempts to establish knowledge in two ways: (1) through Ledesma and Longoria; and (2) through the foreman. With respect to Ledesma and Longoria the Court finds Complainant places too much emphasis on a misunderstanding regarding the types of inspections each employee performs. With respect to the foreman, the Court finds Complainant failed to establish his actions were foreseeable to Respondent given the company's rules, training, discipline, and specific instructions with respect to this particular project.

[10] The alleged violation in this case occurred in Texas, which is in the Fifth Circuit. The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) and (b). The Commission has held that where it is highly probable that a case will be appealed to a particular circuit, it generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent. *Kerns Bros. Tree Serv.*, No. 96-1719, 2000 WL 294514, at *4 (OSHRC, Mar. 16, 2000). The Court therefore applies the precedent of the Fifth Circuit here in this Decision and Order.

Complainant claims the actions of Longoria and Ledesma establish knowledge on behalf of Respondent. (Compl. Br. 14-15). Complainant first focuses on the fact that Longoria stopped conducting his inspections during the COVID pandemic and had not restarted them. (*Id*.) While Longoria stopped his audit inspections, Mata did not testify that he stopped performing audit inspections. Indeed, Mata inspected the Bryan worksite during the initial installation of the canopy. Complainant, however, does not address Mata's audit inspections, including his inspection of the Bryan worksite during the initial installation of the canopy. Second, Complainant points to the interviews CSHO Czajka and AAD Jarvis conducted with Ledesma and Longoria, wherein they purportedly stated they did not perform inspections. As was clarified later, Ledesma and Longoria perform safety audit inspections to ensure compliance; they do not perform the daily inspections expected of people like the foreman.

Complainant then claims that knowledge is established by Ledesma and Longoria because they did not require the foreman "to submit any proof verifying that [he] had conducted JHA's and did not have a written procedure requiring the same." (Compl. Br. 15). As discussed above, JHA's on this record are not the same thing as inspections as required under the standard. Additionally, the cited standard does not require documentation of an inspection. Most importantly, even assuming the foreman used the fall protection cart instead of the aerial lift as noted in the incident investigation report, there is no evidence that Ledesma could have anticipated the foreman would use equipment that (a) did not belong to Respondent; and (b) was outside of the scope of work that was explicitly discussed by Ledesma and the foreman on the very first day.

Complainant next claims that the foreman's actions were foreseeable because Respondent's "safety policy with respect to supervisors gave [the foreman] too much discretion in identifying unsafe conditions, rendering it too general to be effective." (Compl. Br. 15-17).

Complainant further states that Respondent's safety plan is "silent as to how often a competent person like [the foreman] was supposed to employ these measures." (Compl. Br. 16). The Court disagrees. Complainant disregards both the testimony of Respondent's managers, as well as the clear requirements within its policies, regarding "daily" inspections of the worksite, the specific inspections of PPE "prior to each use", and the three-part nature of those inspections.

Finally, Complainant claims that Respondent's disciplinary policy is "too lax" because the record does not contain written discipline for the foreman, specifically. (Compl. Br. 16). Complainant states the foreman was "supposedly reprimanded for fall protection issues" on another worksite when Longoria verbally reprimanded the foreman for working on a canopy without fall protection. (*Id*). According to the evidence, verbal reprimands are part of Respondent's discipline program. (Tr. 148). *See Stahl Roofing, Inc.*, No. 00-1268, 2003 WL 440801, at *3 (OSHRC, February 21, 2003) (consolidated) (holding oral, undocumented reprimands were acceptable as part of a progressive disciplinary program). Complainant then states the foreman should have been issued written discipline as a result of the inspection by SpawGlass on the day prior to the date of the incident. (Compl. Br. 16). Presumably, this would have illustrated the need for additional supervision and strengthened the case for foreseeability. The evidence shows, however, that the inspection report was not received by Respondent until *after* the fatal incident occurred. (Tr. 82). For these reasons, Complainant failed to establish the knowledge prong of her prima facie case.

In sum, Complainant failed to carry her burden of establishing a violation of the cited standard for multiple reasons. First, Complainant either misunderstands or misconstrues Respondent's written safety program, which requires the type of inspection Complainant alleges was not occurring. Further, Complainant incorrectly interpreted or dismissed testimony illustrating

the scope and structure of Respondent's safety program, which provides for daily competent person inspections, as well as safety audit inspections to ensure compliance with the safety program. Second, Complainant failed to establish the foreman's failure, if any, was foreseeable. Third, aside from his initial meeting with Ledesma, Complainant failed to produce any affirmative evidence about what the foreman did on the Bryan worksite during the canopy project. The only potential affirmative evidence regarding the foreman's actions was buried in a report, within a purported "personnel file", and completely devoid of context.

The Court finds Complainant has failed to establish knowledge for this citation item. Accordingly, Citation 1, Item 1 is VACATED.

VI. Conclusion

The Court concludes that the cited standard—29 C.F.R. § 1926.20(b)(2)—applies to the cited condition. Complainant, however, failed to establish that Respondent was in noncompliance with section 1926.20(b)(2). Alternatively, the Court concludes Complainant failed to establish Respondent knew or could have known of the noncompliant condition. Therefore, the Court does reach the questions of employee exposure or Respondent's affirmative defense of employee misconduct. The Court also does not address whether the violation was properly characterized as serious.

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. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

(1) Citation 1, Item 1 is VACATED,

(2) Citation 1, Item 2 was settled by the parties prior to trial and noted for the record.

SO ORDERED.

/s/ Joshua R. Patrick

Date: October 30, 2024
Denver, Colorado

Joshua R. Patrick
First Judge, OSHRC