United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, The Secretary, v. ELITE BUILDERS, INC., Respondent.	OSHRC Docket No. 22-0947

Appearances:

Seema Nanda, Christine Heri, Evert Van Wijk, Megan McGinnis, Jeffrey Mendoza, Department of Labor, Office of Solicitor, Kansas City, MO,
For The Secretary

Mark Bratetic, Self-Represented Litigant,[1] Papillion, NE,
For Respondent

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

DECISION AND ORDER

I. PROCEDURAL BACKGROUND.

On January 31, 2022, two Compliance Safety and Health Officers (CSHOs) inspected a jobsite in Gretna, Nebraska, in accordance with a regional emphasis program that required CSHOs

[1] Although the Commission recognizes the difficulties a self-represented litigant may face when participating in the Commission's proceedings, the Commission still requires the self-represented litigant to follow the rules and exercise reasonable diligence in the legal proceedings in which it is taking part. *Sealtite Corp*., No. 88-1431, 1991 WL 132733, at *4 (OSHRC, June 28, 1991). An unrepresented employer must "exercise reasonable diligence in the legal proceedings" and "must follow the rules and file responses to a judge's orders, or suffer the consequences, which can include dismissal of the notice of contest." *Wentzell*, No. 92-2696, 1993 WL 488210, at *3 (OSHRC, Nov. 19, 1993) (citations omitted).

to initiate an inspection if they observe employees exposed to a fall hazard at a construction site. As a result, the Occupational Safety and Health Administration (OSHA) issued a Citation and Notification of Penalty (Citation) to Respondent Elite Builders, Inc. The Citation alleged four Serious violations and one Willful-serious violation, with a total proposed penalty of $46,264. Elite Builders timely contested the Citation by filing a Notice of Contest with the Occupational Safety and Health Review Commission.[2] The Chief Administrative Law Judge designated the matter for conventional proceedings. A trial was held on June 27, 2023, in Omaha, Nebraska. The following individuals testified at trial: (1) Mark Bratetic, Owner of Elite Builders; (2) CHSO Richard Razey; and (3) Matthew Thurlby, Area Director of OSHA's Omaha Area Office.

The Parties timely filed post-trial briefs, which were considered by the Court in reaching its Decision.[3] Pursuant to Commission Rule 90(a), 29 C.F.R. § 2200.90, after hearing and carefully considering all the evidence and the arguments of the Parties, the Court issues this Decision and Order as its findings of fact and conclusions of law.

II. STIPULATIONS.

Before trial, the Parties stipulated to many facts underlying this case. (*See* Joint Stipulation Statement). The Joint Stipulation Statement was introduced into the record as Joint Exhibit No. 1. (Tr. 12). In lieu of reproducing the stipulations in their entirety, the Court will

[2] "[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). [redacted]

[3] Affirmative defenses not asserted in a respondent's answer or discussed in post-trial submissions are deemed waived. *Ga.-Pac. Corp.*, No. 89-2713, 1991 WL 132732, at * 3 (OSHRC, June 28, 1991).

refer to the specific stipulation when referencing it (example, hereinafter "J. Stip. 3.").

At trial, Bratetic, as the sole owner and representative of Elite Builders, also stipulated the Secretary established the *prima facia* elements required to prove a serious violation of:

1. 29 C.F.R. § 1926.102(a)(1) (Citation 1, Item 1);
2. 29 C.F.R. § 1926.451(g)(1) (Citation 1, Item 3); and
3. 29 C.F.R. § 1926.501(b)(13) (Citation 2, Item 1).[4]

All stipulations are accepted by the Court.[5] *See Armstrong Utils. Inc.*, No. 18-0034, 2021 WL 4592200, at *2 n.2 (OSHRC, Sept. 24, 2021) (finding it was "plain error" to not accept parties' stipulation); *CF & T Available Concrete Pumping, Inc*., No. 90-329, 1993 WL 44415, at *4 (OSHRC, Feb. 5, 1993) (the Commission accepted the parties' stipulation of the alleged violation, if any, was serious).

III. THE ISSUES TO BE DECIDED BY THE COURT.

Elite Builders' main defense to the Citation is that it was not the "employer" at the jobsite, so the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et. seq.*, (OSH Act) does not apply.[6] Based on the stipulations as to Citation 1, Item 1 and 3 and Citation 2, Item 1, and analyzing Elite Builder's only defense, the Court's decision is limited to the following issues:

1. Was Elite Builders an "employer" within the meaning of the OSH Act at the time of the inspection?

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[4] Citation 2, Item 1 was issued as a Willful citation. With Elite Builders' stipulation as to this Item, the only issue for the Court to decide is whether the classification of the Citation Item is Willful.

[5] The Court will discuss the penalties to be imposed for violations of the cited standards in Section VIII, *infra*.

[6] Elite Builders raised several affirmative defenses during trial, including infeasibility, greater hazard, and vindictive or selective prosecution. A respondent must identify all affirmative defenses in its Answer. Commission Rule 34(b)(3), 29 C.F.R § 2200.34(b)(3). "Under Commission Rule 34(b)(4), 29 C.F.R. § 2200.34(b)(4), affirmative defenses not raised in the answer may not be raised unless those defenses are otherwise asserted as soon as practicable." *Manti*, No. 92-2222,

2. Did the Secretary prove the violation alleged in Citation 1, Item 2?

3. Did the Secretary prove the violation alleged in Citation 1, Items 4(a) and 4(b)?

4. Did the Secretary prove the violation alleged in Citation 2, Item 1 was willful?

5. What penalty to assess for violations proven?

IV. BACKGROUND.

Elite Builders is a residential framing construction and siding company based in Nebraska. (J. Stip. 1). Mark Bratetic has owned Elite Builders for 16 years. (Tr. 49). He directs employee work at Elite Builders jobsites, and he has the power to hire and fire individuals working at Elite Builders jobsites. (J. Stip. 3, 4; Tr. 49).

On January 31, 2022, Bratetic was performing construction work on a two-story residential home he personally owned located at [redacted], Gretna, NE 68028 (jobsite).[7] (Tr. 56-57). Four other men were also performing construction work on the residential home: Eduardo Pena, Roberto Pena, Jorge Chavez, and Vladimir Jara Gutierrez. (Tr. 56). Eduardo and Vladimir were established Elite Builders employees. (J. Stip. 9, 10). According to Bratetic, Roberto was officially hired as an Elite Builders employee a few days later, and Jorge never sought permanent employment with Elite Builders after January 31, 2022. (Tr. 115; Ex. R-7).

1993 WL 464253, at *2 (OSHRC, Nov. 4, 1993). "'As soon as practicable' means that the issue is raised with enough time for the opposing party to meaningfully respond." *Id.* Elite Builders did not raise its affirmative defenses in its Answer and gave no reason for its failure to do so earlier than on the day of the trial. Accordingly, those affirmative defenses are deemed waived. *See Mansfield Indus*., No. 17-1214, 2020 WL 8871368, at *3 (OSHRC, Dec. 31, 2020) (rejecting preemption defense when it was not raised in the Answer), *aff'd*, No. 21-60169, 2021 WL 5354110 (5th Cir. Nov. 16, 2021).

[7] A few days after the inspection, Bratetic transferred the property to his other company, Buckland Homes, LLC. (Tr. 57; Ex. R-3).

CSHOs Richard Razey and Carlos Alberos[8] were in the area when they observed men at the jobsite working on the roof. (Tr. 158). They took photographs and approached the jobsite to conduct an inspection in accordance with a regional emphasis program. (Tr. 158, 227). The CSHOs conducted an opening conference with Bratetic and did a walk-around of the jobsite. (Tr. 159). Eduardo and Roberto were standing on a platform raised by a rough terrain forklift cutting rafters. (Tr. 60-61; *see* Ex. C-6). The platform was raised approximately 11 feet high. (Tr. 174). The CSHOs inspected the platform but did not see any method by which the platform was secured to the forklift. (Tr. 170). Bratetic lowered the platform for inspection by the CSHOs. (Tr. 76).

Meanwhile, Jorge and Vladimir were standing on the roof doing framing work. (Tr. 63, 160; Ex. C-6 at 5). There were no guardrails on the roof, and neither Jorge nor Vladimir were wearing fall protection. (Tr. 64, 160). There was also no safety net system installed. (Tr. 160). Vladimir was using a pneumatic nail gun, and he was not wearing any form of eye protection. (Tr. 165).

The CSHOs also observed an incomplete set of stairs connecting the first and second floors of the residential structure. (Tr. 179; Ex. C-10; J. Stip. 13). The stairs were made up of more than four risers at a height higher than 30 inches, and there were no guardrails along the stairs. (J. Stip. 14, Tr. 107). One side of the stairwell was bordered by framing lumber (also referred to as studs), but the other was open. (Ex. C-10). The upper landing did not have any guardrails in place and was open. (Tr. 180-81; Ex. C-10).

The CSHOs spoke with some of the workers at the jobsite. (Tr. 183). Bratetic wanted the CSHOs to speak with Eduardo, his long-time foreman. (Tr. 184). However, the CSHOs overheard him direct Eduardo to tell the CSHOs that "you're helping us out here, doing us a favor, kind of a

[8] CSHO Alberos was no longer employed with OSHA at the time of trial. (Sec'y Post-Trial Brief at 3).

vacation thing." (Tr. 184). The CSHOs "wanted to speak to another individual that hadn't appeared to be coached." (Tr. 184). So, they interviewed Roberto, who gave the CSHOs some basic information and said it was his first day on the job. (Tr. 183). The interview with Roberto was conducted in Spanish, and CSHO Alberos, who was bilingual, acted as translator. (Tr. 184).

The CSHOs left the jobsite to inspect another residential construction site down the road from the jobsite. (Tr. 185). While they were conducting interviews at the new location, they noticed Bratetic's workers had returned to the roof to continue construction. (Tr. 185). Like before, those workers were on the roof without any form of fall protection. (Tr. 185).

V. JURISDICTION AND INTERSTATE COMMERCE ENGAGEMENT.

a. Commission has Jurisdiction.

The Commission obtained jurisdiction under section 10(c) of the OSH Act upon Elite Builders' timely filing of a Notice of Contest. 29 U.S.C. § 659(c); *see also Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, U.S. Dep't of Labor*, 518 F.2d 990, 995 (5th Cir. 1975), *aff'd sub nom., Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) (describing "Enforcement Structure of OSHA").

b. Elite Builders 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*.

The Commission has consistently held that "[t]here is an interstate market in construction materials and services and therefore construction work affects interstate commerce." *Clarence M.*

Jones d/b/a Jones Co., No. 77-3676, 1983 WL 23870, at *2 (OSHRC, Apr. 27, 1983) (citing *NLRB v. Int'l Union of Operating Eng'rs, Local 571*, 317 F.2d 638, 643 n.5 (8th Cir. 1963) (taking judicial notice that construction industry affects interstate commerce)). Even small construction companies affect interstate commerce. *Slingluff v. OSHRC*, 425 F.3d 861, 866-67 (10th Cir. 2005); *Jones*, 1983 WL 23870, at *2 ("even if [the employer's] contribution to this stream of commerce was small and his activity and purchases were purely local, they necessarily had an effect on interstate commerce when aggregated with the similar activities of others").

Bratetic testified Elite Builders was a residential construction company engaged in framing and siding work, as well as roofing. (Tr. 50). These activities fall within the OSH Act's definition of "construction work," which includes "work for construction, alteration, and/or repair . . ." 29 C.F.R. § 1926.32(g). The Court finds Elite Builders was engaged in a business affecting commerce.

VI. ELITE BUILDERS WAS AN EMPLOYER UNDER THE] OSH ACT.

a. Elite Builders was an Employer under *Darden*.

"Only an 'employer' may be cited for a violation of the OSH Act." *Vergona Crane Co.*, No. 88–1745, 1992 WL 184539, at *1 (OSHRC, July 22, 1992). The Secretary bears the burden to establish Elite Builders is an "employer" as it relates to the jobsite on the day of the inspection. *The Hartford Roofing Co.*, No. 92-3855, 1995 WL 555498, at *3 (OSHRC, Sept. 15, 1995). Since the Supreme Court issued its decision in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992), the Commission has consistently applied the common law agency doctrine set forth in that decision to employment relationship questions arising under the OSH Act. *Freightcar Am., Inc.*, No. 18-0970, 2021 WL 2311871, at *2 (OSHRC, Mar. 3, 2021); *All Star Realty Co., Inc., D/b/a All Star Realty & Constr., Co.*, No. 12-1597, 2014 WL 533165, at *2 (OSHRC, Feb. 3, 2014). The common law agency doctrine set forth in *Darden* "focuses on 'the hiring party's

right to control the manner and means by which the product is accomplished.'" *All Star Realty Co.*, 2014 WL 533165, at *2 (quoting *Darden*, 503 U.S. at 323). Factors relevant to that inquiry include:

1. the skill required;
2. the source of the instrumentalities and tools;
3. the location of the work;
4. the duration of the relationship between the parties;
5. whether the hiring party has the right to assign additional projects to the hired party;
6. the extent of the hired party's discretion over when and how long to work;
7. the method of payment;
8. the hired party's role in hiring and paying assistants;
9. whether the work is part of the regular business of the hiring party;
10. whether the hiring party is in business;
11. the provision of employee benefits; and
12. the tax treatment of the hired party.

Darden, 503 U.S.at 323–24.

While no single factor is determinative, the primary focus is whether the putative employer controls the workers. *Allstate Painting and Contracting Co., Inc*., No. 97-1631, 2005 WL 682104, at *2 (OSHRC, Mar. 15, 2005) (consolidated); *S. Scrap Materials Co*., No. 94-3393, 2011 WL 4634275, at *16 (OSHRC, Sept. 28, 2011) (holding that in the context of the OSH Act, the control exercised over a worker is the "principal guidepost").

Elite Builders maintains the property was owned by Bratetic, individually, and the workers at the jobsite were on vacation but decided to assist him with work on his personal home as a favor.

In other words, Elite Builders argues the individuals at the jobsite were volunteers, not paid employees, so Elite Builders could not be their employer. However, the label of "volunteer" does not foreclose an employment relationship under *Darden*. *See Griffin & Brand of McAllen, Inc*., No. 14801, 1978 WL 7060, at *3 (OSHRC, June 9, 1978) (disregarding crew leader's independent contractor status to determine employer status, noting "the formal structure[s] of the employment relationship . . . are not determinative, however, if they present a false image of the employment relationship").

Elite Builders argues the individuals at the jobsite were on vacation, paid through vacation pay, and therefore "volunteers" on the day of the inspection. Yet, the method of payment of workers is but one of many factors considered by the Commission, and it is not the dispositive factor. *See Marie v. Am. Red Cross*, 771 F.3d 344, 353 (6th Cir. 2014) ("remuneration is not an independent antecedent requirement, but rather it is a non dispositive factor that should be assessed in conjunction with the other *Darden* factors to determine if a volunteer is an employee"). Moreover, Eduardo and Vladimir were paid for their work that day,[9] and Roberto was rewarded with a permanent position with Elite Builders just three days later.[10]

In any event, the Court is skeptical of the veracity of Bratetic on this point. It is undisputed the CSHOs heard Bratetic instruct Eduardo to say he was volunteering his time as a favor to

[9] Elite Builders offered into evidence to rebut the Secretary's evidentiary position that it was an "employer" under the OSH Act pay stubs purportedly showing the men were given vacation pay for the day at issue. (Exs. R-5, R-6). The Court is skeptical of the authenticity of these pay stubs, as well as other documents offered by Elite Builders in support of its defense, due to his statement to Eduardo. In addition, there is no evidence to demonstrate it had a paid vacation policy to which it had adhered in previous years. Eduardo and Vladimir, as long-standing employees of Elite Builders, would have qualified for paid vacation in the past and that documentation would have been available. (*See* Ex. R-2 and R-3, which are incomplete and self-serving).

[10] The Court agrees that if Bratetic was working on his personal home alone, OSHA regulations would not apply.

Bratetic, seemingly in a disingenuous effort to create facts in support of this defense. Although Bratetic maintains he told Eduardo and Vladimir to take paid vacation leave while they worked on his home, Elite Builders had no written vacation leave policy. (Tr. 112). In addition, Bratetic could not recall another instance when all his employees had taken paid vacation leave at the same time—especially during the peak building season. (Tr. 112; Ex. C-2 at 37). In another inconsistency on this topic, Bratetic initially said in his recorded statement that vacation leave was awarded after six months of employment with Elite Builders. (Ex. C-2 at 29-32). Yet, at trial, Bratetic testified vacation leave was awarded after one year of employment with Elite Builders. (Tr. 112). All this to say: The Court is reluctant to give any credence to the argument that Elite Builders employees were instructed to take paid vacation leave and yet chose to spend their vacation time working for their boss on his personal residence. *See Arlie R. Hawk, Gen. Contractor*, No. 6688, 1976 WL 5974, at *1 (OSHRC, May 19, 1976) (affirming the ALJ's holding and citing his language that "[i]t strains credulity to conclude that two grown men tarried at a construction site for the better part of a day and then leaped into a 13 foot deep excavation to spread sand with shovels merely for the sake of friendship and healthful exercise"). Allowing Elite Builders' defense that the individuals at the jobsite were volunteers would strain the scope and intent of the OSH Act and would simply encourage other employers to use the same tactic to avoid liability. The Court declines the invitation of Elite Builders on this argument.

In sum, taking into consideration only the evidence related to the method of payment, the Cout concludes this factor weighs in favor of finding Elite Builders to be the employer. The Court makes no distinction between regular pay or vacation pay under the facts of this case. Vacation pay is a form of payment especially when, as in this instance, the workers were working under the control of the owner of Elite Builders. The Court could locate no case law in which vacation pay

was not considered taxable compensation. In fact, under section 61 of the Internal Revenue Code, vacation pay is deemed to be taxable compensation. 26 U.S.C. § 61(a) (compensation for services is a taxable source of income and includes benefits); *see also* 26 C.F.R. § 31.3401(a)-1 ("Amounts of so-called 'vacation allowances' paid to an employee constitute wages. Thus, the salary of an employee on vacation, paid notwithstanding his absence from work, constitutes wages.").

The Court finds other *Darden* evidence introduced by the Secretary to support a finding Elite Builders was an "employer" at the jobsite and under the OSH Act. Elite Builders was a construction company usually engaged in the type of work taking place at the jobsite. The workers on site were using tools and equipment furnished by Elite Builders, including a forklift, a pneumatic nail gun, and a trailer. (J. Stip. 7, 8). Based on Bratetic's testimony at trial, the Court infers that he supplied the lumber and other building materials used at the jobsite. *See Okland Constr. Co*., No. 3395, 1976 WL 5934 (OSHRC, Feb. 20, 1976) (reasonable inferences can be drawn from circumstantial evidence). Eduardo and Vladimir were on site performing construction work they would typically perform in the course of their work with Elite Builders. They had the skills necessary to complete the work. Bratetic was also on site and gave instructions on what needed to be completed and controlled the work. (J. Stip. 11, 12). *Freightcar Am., Inc.*, 2021 WL 2311871, at *2 ("control exercised over a worker is the 'principal guidepost'"). Bratetic had the power to hire or fire the workers, and he had discretion over when and how that work was to be performed. *Don Davis*, No. 96-1378, 2001 WL 856241, at *6 (OSHRC, July 30, 2001) ("One who cannot hire, discipline, or fire a worker, cannot assign him additional projects, and does not set the worker's pay or work hours cannot be said to control the worker"). In short, the evidence establishes Elite Builders was an "employer" under the OSH Act pursuant to the *Darden* analysis. Elite Builders' misinterpretation or misunderstanding of the law is no excuse. *See Odyssey Capital*

Grp. III, L.P. v. Occupational Safety and Health Review Comm'n, 26 F. App'x 5, 7 (D.C. Cir. 2001) ("Ignorance of the law is not a defense.").

b. Elite Builders and Bratetic, under the *Alter Ego Doctrine*, are an Employer under the OSH Act.

The Court further concludes, in the alternative, that Bratetic exercised control over the workers on the jobsite and was acting as the *alter ego* of Elite Builders such that Elite Builders may be cited by OSHA as an employer. As noted, "the Commission has the statutory authority and responsibility to determine initially if a cited party is in fact an employer." *Altor and/or Avcon, Inc.*, No. 99-0958, 2011 WL 1682629 (OSHRC, Apr. 26, 2011). "Indeed, the Secretary may seek to pierce the corporate veil to hold an individual responsible as an 'employer' not just as a means to collect defaulted penalties, but also to serve as a predicate for future abatement orders as well as repeat characterizations of future violations." *Id.*

The Commission recognizes the *alter ego* doctrine and applies the law of the Circuit. *See, e.g. Eric K. Ho, Ho Ho Ho Express, Inc*.,[11] No. 98-1645, 2003 WL 22232014, at *7 (OSHRC, Sept. 29, 2003) (deferring to Circuit precedent on application of *alter ego* doctrine); *Altor, Inc*., No. 99-0958, 2011 WL 1682629, at *3 (OSHRC, Apr. 26, 2011) (applying the *alter ego* doctrine to cases arising out of the OSH Act using the state law within the relevant Circuit), *aff'd,* 498 F. App'x 145 (3d Cir. 2012) (as amended).

[11] The Commission reversed a portion of this case on other grounds in *E. Smalis Painting Co., Inc*., 2009 WL 1067815, at *1 (OSHRC, Apr. 10, 2009) ("We also conclude the Secretary permissibly cited the medical surveillance and training provisions of the standard on a per-employee basis and, in so doing, overrule the contrary portion of the Commission majority's decision in *Eric K. Ho*").

This case arises out of the Eighth Circuit, which applies both federal common law and state law when examining the *alter ego* doctrine. *See Minn. Laborers Health & Welfare Fund v. Scanlan,* 360 F.3d 925, 927–29 (8th Cir. 2004) (applying the Tenth Circuit's federal common law factors to federal question context (ERISA)); *HOK Sport, Inc. v. FC Des Moines, L.C.*, 495 F.3d 927, 935 (8th Cir. 2007) (applying Iowa state law to a diversity action). The Court finds grounds to pierce the corporate veil and consider Bratetic and Elite Builders as *alter egos* under both federal common law and Nebraska law.

1. Federal Common Law.

The two-prong federal common law test adopted by the Eighth Circuit considers: (1) whether there was unity of interest and lack of respect given to separate identity of corporation by its shareholders, so personalities and assets of corporation and individuals are indistinct, and (2) whether adherence to such corporate fiction sanctions fraud, promotes injustice, or leads to evasion of legal obligations. *Scanlan*, 360 F.3d at 927–28 (quoting *N.L.R.B. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993)). Later, the Eighth Circuit elaborated on the two-prong *Scanlan* test. *N.L.R.B. v. Bolivar-Tees, Inc*., 551 F.3d 722, 728 (8th Cir. 2008). With respect to the first prong, courts are to consider the degree to which corporate legal formalities have been maintained and the degree to which individual and corporate assets and affairs have been commingled. *Id*. Courts should also consider whether the corporate form was used as a mere shell or instrumentality of an individual, and whether there has been a diversion of the corporate funds or assets to noncorporate purposes. *Id*. (citation omitted). With respect to the second prong, courts are to consider whether the corporate structure has been misused to perpetrate fraud, evade existing obligations, or circumvent a statute. *Id*. at 729. Courts should also consider whether individuals have disregarded the separateness of the corporate identity and whether this disregard led to

injustice, inequity, or fraud, and whether the individuals share some level of culpability for the injustice, inequity, or fraud. *Id.*

Here, Elite Builders is 100% owned by Mark Bratetic. Bratetic testified there is no real distinction between himself and Elite Builders, going as far as to testify that "Elite Builders is Mark Bratetic." (Tr. 117). In other words, Elite Builders is merely an instrumentality of Bratetic and vice versa. The personalities of corporation and individual are indistinct.

Likewise, the assets of Elite Builders and Bratetic are also indistinct. In fact, Bratetic used Elite Builders tools and supplies at the jobsite despite maintaining this was a personal project that did not involve Elite Builders as a corporate entity. Bratetic used Elite Builders workers to perform work on his personal residence. Eduardo and Vladimir were paid vacation pay by Elite Builders to perform construction work on Bratetic's residence, which they would typically perform in the course of their regular employment with Elite Builders on any Elite Builders jobsite. In short, Bratetic used Elite Builders' workers, supplies, equipment, and money as if such were his own. There is no evidence that Bratetic reimbursed Elite Builders for the use of its supplies, equipment, personnel, and funds, and Bratetic did not so assert at trial.

Moreover, Elite Builders is trying to rely on a false distinction between itself and Bratetic to circumvent OSHA's safety and health standards owed to its workers. Elite Builders argues in its trial brief that "Elite Builders was not contracted to perform work at the [jobsite]" and that "the home was a personal home being built by Mark Bratetic on January 31, 2022, and so forth not governed by OSHA standards." (*See* Resp'd Brief). These technicalities do not shield Elite Builders from its legal duties. Moreover, the documents produced by Bratetic in support of his argument that the workers were volunteers on paid vacation leave are suspect, particularly when viewed in light of the CSHO's testimony that Bratetic instructed Eduardo to tell the CSHOs he

was on vacation leave. Deceptive bookkeeping and payment practices cannot be used to escape liability and evade legal responsibility for the safety of workers on a build site. Thus, the Court concludes Bratetic and Elite Builders shared an identity of interest and thus, under federal common law, Elite Builders may be considered the employer here.

2. Nebraska Law

If the Eighth Circuit applied Nebraska law rather than federal common law, the outcome remains the same: Elite Builders and Mr. Bratetic "may be deemed one" for purposes of liability under the *alter ego* doctrine. Under Nebraska law, when a corporation is or becomes the mere *alter ego*, or business conduit, of a person, it may be disregarded. *Carpenter Paper Co. of Neb. v. Lakin Meat Processors, Inc.*, 435 N.W.2d 179, 183 (Neb. 1989) (discussing *alter ego* in the context of defrauding creditors). "A court will disregard a corporation's identity only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another." *Moss v. Associated Underwriters, Inc*., 948 N.W.2d 273, 282–83 (Neb. App. 2020) ("[t]he separate entity concept of the corporation may be disregarded where the corporation is a mere shell, serving no legitimate business purpose, and is used as an intermediary to perpetuate fraud").

Here, Mr. Bratetic perpetrates an act in contravention of another by trying to circumvent regulations designed to protect Elite Builders workers. His position that because the workers were volunteering their time to assist him individually—not in his capacity as owner of Elite Builders and their boss—is in contravention to the duty which he owed Elite Builders' employees by complying with OSHAs safety and health standards. As noted above, Bratetic's document production and bookkeeping practices merely demonstrate his coordinated attempt to evade legal responsibility for the men working at the jobsite and likely perpetrate a fraud. In reality, Bratetic

used Elite Builders workers to perform work on his personal residence. Those workers used tools and equipment owned and furnished by Elite Builders. Those workers were paid by Elite Builders, albeit under the guise of vacation pay. Those workers performed construction work on Bratetic's residence that they would typically perform in the course of their employment with Elite Builders. There is no evidence that Bratetic reimbursed Elite Builders for the use of its supplies, equipment, personnel, and funds.

In short, the evidence establishes Elite Builders and Bratetic acted as one to in an attempt to commit fraud and violate a legal duty that Elite Builders and Bratetic owed to their workers to provide a safe and healthy work environment. In doing so, under the *alter ego* doctrine, Elite Builders and Bratetic were the *alter ego* of one another and acted as a single employer. Accordingly, the Court will disregard any distinction between Elite Builders and Bratetic for purposes of the Citation. Elite Builders was the employer at the jobsite at issue here. The Court finds the Secretary has carried her burden, and Elite Builders was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act, 29 U.S.C. §§ 652(3) and (5).

VII. DISCUSSION.

a. Legal Standard.

For most standards, including the ones at issue here, the Secretary is not required to prove the existence of a hazard each time a standard is enforced. *Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 834 (5th Cir. 1981); *Greyhound Lines-West v. Marshall*, 575 F.2d 759, 762 (9th Cir. 1978) (Secretary not required to prove violation related to walking and working surfaces constituted a hazard). To establish the violation of a safety standard under the Act, the Secretary must prove: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; 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). The Secretary has the burden of establishing each element by a preponderance of the evidence. *The Hartford Roofing Co.*, 1995 WL 555498, at *3.

b. Citation 1, Item 1 - 29 C.F.R. § 1926.102(a)(1).

Elite Builders stipulated to a violation of Citation 1, Item 1 which alleged a violation of 29 C.F.R. § 1926.102(a)(1) (use of a pneumatic nail gun without eye protection) if Elite Builders were found to have been the employer at the jobsite. Since the Court accepted the Stipulation, the Court AFFIRMS Citation 1, Item 1.

The Court affirms Citation 1, Item 1 as a Serious violation. The potential hazard of using a pneumatic nail without eye protection included scratches, abrasions, and possible punctures. (Tr. 167). An unprotected eye struck by a piece of wood or other substance could result in temporary or permanent disability. *See Stearns-Roger, Inc.*, No. 76-2326, 1979 WL 8520, at *2 (OSHRC, Oct. 31, 1979) ("we note that the eye is an especially delicate organ and that any foreign material in the eye presents the potential for injury"); *Vanco Construction, Inc.*, No. 79-4945, 1982 WL 22670, at *4 (OSHRC, Dec. 22, 1982) ("We find that given the delicateness of the eye, serious physical harm would be substantially probable if an employee were struck in the eye by a particle or chip of concrete from one of the hammers.").

c. Citation 1, Item 2 - 29 C.F.R. § 1926.451(c)(2)(v).

The Secretary cited Elite Builders for a serious violation of 29 C.F.R. § 1926.451(c)(2)(v), which sets forth criteria for the use of scaffolds. The regulation provides: "Fork-lifts shall not be used to support scaffold platforms unless the entire platform is attached to the fork and the fork-

lift is not moved horizontally while the platform is occupied." 29 C.F.R. § 1926.451(c)(2)(v). The Secretary described the violation as follows:

> The employer failed to protect the employee from fall hazards. This was most recently documented on or about January 31st, 2022, in Gretna, Nebraska 68028. Employees were observed conducting framing operations on a mobile platform that wasn't secured to the forklift.

(Citation at 7).

1. The Cited Standard Applies.

Under Commission precedent, "the focus of the Secretary's burden of proving the cited standard applies pertains to the cited conditions, not the particular cited employer." *See Southern Pan Services Co*., No. 08-0866, 2014 WL 7338403, at *4 (OSHRC, Dec. 8, 2014) (citing *Ryder Transp. Servs.*, No. 10-0551, 2014 WL 5025979, at *2 (OSHRC, Sept. 29, 2014) (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here")); *see also KS Energy Servs., Inc.,* No. 06-1416, 2008 WL 2846151, at *6 (OSHRC, July 14, 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); *Arcon, Inc.,* No. 99-1707, 2004 WL 1505408, at *2 (OSHRC, July 1, 2004) ("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions.").

The cited regulation is set forth in Part 1926, Subpart L governing scaffolds. This Subpart applies to all scaffolds used in construction workplaces covered by the regulation. Here, Mr. Bratetic admitted workers were standing on a platform supported by a "rough terrain forklift" while engaged in work related to framing. (Tr. 62; Ex. C-8). The portable forklift is covered by Part 126, Subpart L. The Court finds the standard applies.

2. The Standard was Violated.

Elite Builders contends, however, that the standard was not violated because the platform was secured to the forklift. Specifically, Bratetic maintains he had a hook and chain system in place on the forklift whereby a chain with a hook was drilled into the carriage, and the hook could simply be attached to the plank to keep it from sliding off.[12] (Tr. 137). Bratetic insisted at trial he had secured the platform, and then later said either he or Eduardo secured the platform to the forklift using the hook and chain system. (Tr. 77, 82). However, this conflicts with his other sworn statements. In his administrative statement, he admitted it did not appear the hook and chain system was in place, and he opined the system was not in place was because the platform was secured "up against the house . . . so there is no way it could fall forward and off the forklift." (Ex. C-2 at 77, 78). Then, in his deposition, Bratetic said he did not remember whether the hook was secured but admitted he did not hook the platform himself. (Ex. C-3 at 64, 67).

However, the CSHO testified he inspected the platform and did not observe anything securing it to the forklift. Although the CSHO admitted he was unable to visually inspect the front of the platform because it was "almost up against the residential structure" (Tr. 170), the Court affords the CSHO's testimony greater weight than that of Bratetic because Bratetic's testimony has shifted throughout this proceeding. Moreover, the Court's understanding of the location of the hook and chain system indicates it would have been visible to the CSHO had it been used on January 22, 2022. The Court's understanding of the location of the hook and chain being visible is supported by Bratetic's testimony in his administrative statement where he admitted it did not appear the hook and chain system was in place. (Tr. 77, 78). The Secretary established the standard was violated.

3. Employees were Exposed to a Hazard.

[12] At trial, the Court ruled photographs taken by Bratetic two days before trial were inadmissible.

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Prods., Inc.*, No. 93-1853, 1997 WL 694096, at *2 (OSHRC, Nov. 7, 1997) (citations and footnotes omitted). The Commission's longstanding "reasonably predictable" test for hazard exposure requires the Secretary to "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." *Delek Ref., Ltd.*, No. 08-1386, 2015 WL 1957889, at *11 (OSHRC, Apr. 23, 2015) (*citing id.*); *see also Rockwell Intl. Corp.*,[13] No. 12470, 1980 WL 10706 (OSHRC, Nov. 28, 1980); *Gilles & Cotting*,[14] No. 504, 1976 WL 5933 (OSHRC, Feb. 20, 1976).

The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, No. 09-1072, 2013 WL 949386, at *18 (OSHRC, Mar. 4, 2013) (citing *RGM Constr. Co.*, No. 91-2107, 1995 WL 242609, at *5 (OSHRC, Apr. 24, 1995)). The zone of danger is determined by the hazard presented by the violative condition and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Constr.*, *Co.*, 1995 WL 242609, at *5; *Gilles & Cotting, Inc*., 1976 WL 5933, at *2.

The Secretary established exposure to a hazard. Eduardo and Roberto were standing on the platform cutting roof rafters and therefore within the zone of danger. (Tr. 60; Ex. C-8 at 6). The

[13] A portion of the holding of *Rockwell* was overruled on other grounds. *See George C. Christopher & Sons, Inc*., No. 76-647, 1982 WL 189089, at *6 (OSHRC, Feb. 26, 1982) ("The holding of *Rockwell* that "appropriate standards therefor" refers to standards adopted by organizations listed in 41 C.F.R. § 50–204.2 is therefore overruled".).

[14] In *Gilles & Cotting, Inc*., the Commission rejected the "actual exposure" test, which required evidence that someone observed the violative conduct, in favor of the concept of "access," which focuses on the possibility of exposure under the conditions. *See Gilles & Cotting, Inc*., 1976 WL 5933, at *2 (holding "that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure").

platform could have slipped or shifted, causing those workers to fall from a height of 11 feet. (Tr. 174).

4. Elite Builders Had Constructive Knowledge.

Lastly, the Court turns to the element of knowledge. "In order to establish knowledge, the Secretary must show that [the employer] knew of, or with the exercise of reasonable diligence could have known, of the noncomplying condition." *Precision Concrete Constr.*, No. 99-0707, 2001 WL 422968, at *4 (OSHRC, Apr. 25, 2001). In the absence of actual knowledge, "[c]onstructive knowledge is established where the evidence shows that the employer could have known about the cited condition with the exercise of reasonable diligence." *Greenleaf Motor Express, Inc*., No. 03-1305, 2007 WL 962961 at *3 (OSHRC, Jan. 29, 2007). In assessing reasonable diligence, the Commission has considered "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*., 2001 WL 422968, at *4.

Here, the record shows Elite Builders failed to adequately supervise its employees or take measures to prevent the occurrence of violations. Bratetic was on the jobsite the day of the inspection. *PAR Elec. Contractors Inc*., No. 99-1520, 2004 WL 334488, at *3 (OSHRC, Feb. 19, 2004) (foreman's presence at jobsite establishes that violation could have been found with reasonable diligence); *see also Phoenix Roofing, Inc*., No. 90-2148, 1995 WL 82313, at *3 (OSHRC, Feb. 24, 1995) ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation."), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Bratetic was operating the forklift to raise the platform. Yet, he did not personally secure the platform to the forklift or inspect the platform before raising it. Likewise, he did not direct any

of his workers to secure the platform or inquire whether any of his workers had secured the platform. *Greenleaf Motor Express, Inc*., 2007 WL 962961, at *4 (lack of diligence established found where employer failed to make reasonable inquiries). The Secretary established constructive knowledge.

The Court AFFIRMS Citation 1, Item 2. Next, the Court affirms the Secretary's characterization of this violation as Serious. A violation is Serious if there is a substantial probability that death or serious physical could result from the violation. Section 17(k), 29 U.S.C. § 666(k). Although the platform here was against the residential structure, Eduardo and Roberto were nevertheless working within the zone of danger at a height of 11 feet on an unsecured platform. *See A. J. McNulty & Co., Inc.*, No. 94-1758, 2000 WL 1490235, at *25 (OSHRC, Oct. 5, 2000) (holding a fall of 10 feet presents a significant hazard). If the platform were to shift, they would be exposed a fall from a significant height, which could result in death or serious physical injury.

d. Citation 1, Item 3 - 29 C.F.R. § 1926.451(g)(1) (Citation 1, Item 3).

Elite Builders stipulated to a violation of Citation 1, Item 3 (no fall protection on a scaffold). Since the Court accepted the Stipulation, the Court AFFIRMS Citation 1, Item 3.

The Court also affirms the Citation 1, Item 3 as a Serious violation. The hazard presented was a fall from a height of 11 feet. (Tr. 174). A fall from this height could result in death or serious physical injury. Section 17(k), 29 U.S.C. § 666(k); *see A. J. McNulty & Co., Inc.*, 2000 WL 1490235, at *25 (holding a fall of 10 feet presents a significant hazard).

e. Citation 1, Items 4(a) and 4(b) - 29 C.F.R. § 1926.1052(c)(1)(ii) and 29 C.F.R. § 1926.1052(c)(12).

The Secretary also cited Elite Builders for violations related to a stairway present in the residential construction connecting the first and second floors. In Citation 1, Item 4(a), the

Secretary alleged a serious violation of 29 C.F.R. § 1926.1052(c)(1)(ii), which provides: "The following requirements apply to all stairways as indicated . . . Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with . . .one stair rail system along each unprotected side or edge." 29 C.F.R. § 1926.1052(c)(1)(ii). The Secretary described the violation as follows:

> The employer failed to protect the employee from fall hazards. This was most recently documented on or about January 31st, 2022, in Gretna, Nebraska 68028. An employee was observed using stairwell that had more than four risers without a stair rail system along each unprotected edge.

(Citation at 9).

In Citation 1, Item 4(b), the Secretary alleged a serious violation of 29 C.F.R. § 1926.1052(c)(12), which provides: "Unprotected sides and edges of stairway landings shall be provided with guardrail systems. Guardrail system criteria are contained in subpart M of this part."[15] The Secretary described the violation as follows:

> The employer failed to protect employees from fall hazards. This was most recently documented on or about January 31st, 2022, in Gretna, Nebraska 68028. An employee was observed using a stairwell that did not have a guard rail system. The stairwell landing did not have a guardrail system in place.

(Citation at 10).

Before addressing whether the Secretary established the standard was violated for Citation 1, Item 4(a), the Court finds Citation 1, Item 4(b) is duplicative of Citation 1, Item 4(a). Violations are considered duplicative "where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in the abatement of the other item as well." *Rawson Contractors, Inc.*, No. 99-0018, 2003 WL 1889143, at *6 n.5 (OSHRC, Apr. 4, 2003). Here, the CSHO testified that these Citation items were grouped because "the abatement

[15] Guardrail system requirements are detailed in 29 C.F.R. § 1926.502(b).

for one violation would take care of a second violation." (Tr. 224). Both Citation items involved the same set of stairs, and both Citations required the same abatement measure: a guardrail system. The Court finds the stairs without a guardrail system to be a single instance of noncompliance improperly cited under two regulations. *Cf. MJP Construction Co., Inc.,* No. 98-0502, 2001 WL 1464398, at *8 (OSHRC, Nov. 16, 2001) (separate items proper for different dates and locations), *aff'd without published opinion*, 56 F. App'x 1 (D.C. Cir. 2003). Accordingly, Citation 1, Item 4(b) is VACATED.

1. The Standard Applies – Citation 1, Item 4(a).

The cited regulation is set forth in Part 1926, Subpart X governing stairways and ladders. This Subpart applies to all stairways in construction workplaces covered by the regulation. Here, Elite Builders admitted the stairwell at issue had more than four risers and were more than 30 inches. (Tr. 98). The Court finds the cited regulation in Citation 1, Item 4(a) applies.

2. The Standard was Violated – Citation 1, Item 4(a).

Elite Builders acknowledged there were no guardrails but maintained studs along one side of the stairs were the equivalent of guardrails. (Tr. 101-02; Ex. C-10). "If a specifications standard does not provide for any alternative form of compliance, the fact that the employer has implemented an alternative measure instead of the specified measure cannot, in itself, justify vacating a citation." *R & R Builders, Inc*., No. 88-0282, 1991 WL 11668265, at *10 (OSHRC, Nov. 25, 1991). A legal excuse from compliance may include a variance granted by the Secretary, a judicially created defense (such as infeasibility), or a settlement agreement that excuses legal compliance with the terms of a standard but imposes a requirement for alternative protective measures. *Stone Container Corp*., No. 88-310, 1990 WL 139160, at *4 (OSHRC, Aug. 29, 1990). Any of these defenses require the employer to provide an alternative means of protection. *Id.*

Here, the standard offers no exception for the use of guardrails, and there is nothing absolving Elite Builders of its responsibility to install guardrails as required by the regulation. *See Warnel Corp*., No. 4537, 1976 WL 6296, at *4 (OSHRC, Mar. 31, 1976) (even though, in a particular case, guardrails might not be as effective as another protective measure, this fact "cannot excuse the absence of guardrails where the standard requires them and their use is possible"); *see also R & R Builders, Inc*., 1991 WL 11668265, at *10; *see also RJCL Corp. dba RNV Constr.*, No. 20-0456, 2021 WL 6014137, at *3 (OSHRCALJ, Dec. 21, 2021) (rejecting method used because it was not one of those defined in the specification standard). Moreover, the undisputed evidence shows that even if the studs provided protection one side of the stairs, the stairs were left unguarded on the other side. In addition, the top landing was entirely unguarded.

Similarly, to the extent Elite Builders tried to assert the affirmative defense of infeasibility,[16] it failed to establish that literal compliance with the requirements of the standard was infeasible. *See John H. Quinlan*, No. 92-0756, 1995 WL 242593, at *3 (OSHRC, Apr. 19, 1995) ("An employer who raises the affirmative defense of infeasibility must prove that: (1) literal compliance with the requirements of the standard was infeasible under the circumstances and (2) either an alternative method of protection was used or no alternative means of protection was feasible."). The Secretary established the cited standard was violated.[17]

3. Exposure is Established – Citation 1, Item 4(a).

[16] Infeasibility was not raised as an affirmative defense in Elite Builder's Answer and is deemed waived. *See* Fns. 3 & 6, *infra*.

[17] Although not argued by Elite Builders, the Court concludes there is insufficient evidence in the record for the Court to conclude the violation was *de minimus* because the protection offered by the studs was incomplete. *See Phoenix Roofing, Inc., v. Secretary*, 874 F.2d 1027, 1032 (5th Cir. 1989) (a *de minimis* classification may be appropriate "where there is no significant difference between the protection provided by the employer and that which would be afforded by technical compliance with the standard").

Next, the Court examines whether any of Elite Builder's employees were exposure to the hazard. Elite Builders admitted nothing prevented his workers from using the stairwell to access the second floor and roof, but he said none of the workers used the stairwell because they used a ladder to access the roof. (Tr. 101; 143). Yet, the CSHO saw two workers on the second floor, and he photographed one of the workers using the stairs. (Tr. 101; Ex. C-10 at 3). The Secretary has established Elite Builders' employees were exposed to the hazard.

4. Actual and Constructive Knowledge is Established – Citation 1, Item 4(a).

The Secretary has also established knowledge. "In order to establish knowledge, the Secretary must show that [the employer] knew of, or with the exercise of reasonable diligence could have known, of the noncomplying condition." *Precision Concrete Constr.*, No. 99-0707, 2001 WL 422968, at *4 (OSHRC, Apr. 25, 2001). In the absence of actual knowledge, "[c]onstructive knowledge is established where the evidence shows that the employer could have known about the cited condition with the exercise of reasonable diligence." *Greenleaf Motor Express, Inc*., No. 03-1305, 2007 WL 962961 at *3 (OSHRC, Jan. 29, 2007). In assessing reasonable diligence, the Commission has considered "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*., 2001 WL 422968, at *4.

Elite Builders built the stairs and acknowledged there was no railing. Bratetic was actively involved in the construction of the home. He had actual knowledge the railing was missing. And, even in the absence of actual knowledge, the Secretary established constructive knowledge of the violative condition by showing the condition was open and obvious. *Hamilton Fixture*, No. 88-1720, 1993 WL 127949, at *10, 13 (OSHRC, Apr. 20, 1993) ("Where the cited condition is readily

apparent to anyone who looked, employers have been found to have constructive knowledge."), *aff'd on other grounds*, 28 F.3d 1213 (6th Cir. 1994).

The Secretary met her burden to establish a violation of the cited standard. The Court will AFFIRM Citation 1, Item 4(a).

Upon consideration, the Court also affirms the characterization of Citation 1, Item 4(a) as Serious. A violation is Serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The hazardous conditions at issue here could result in a fall from a significant height. It is likely that if a worker were to fall from that height, he would be seriously injured. *See Secretary of Labor v. Trinity Indus.*, 504 F.3d 397, 401 (3d Cir. 2007) (internal citations omitted) ("The 'substantial probability' portion of the statute refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result, even in those cases in which an accident has not occurred or, in fact, is not likely to occur."); *see also Mosser Constr.*, No. 08-0631, 2010 WL 711322, at *1-2 (OSHRC, Feb. 23, 2010).

f. Citation 2, Item 1 - 29 C.F.R. § 1926.501(b)(13).

The Secretary cited Elite Builders for a willful violation of 29 C.F.R. § 1926.501(b)(13), which sets forth requirements for fall protection during construction. The regulation provides:

> (13) Residential construction. Each employee engaged in residential construction activities 6 feet (1.8 m), or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

29 C.F.R. § 1926.501(b)(13). The Secretary describes the violation as follows:

> The employer failed to protect employees from fall hazards associated with framing operations. This was most recently documented on or about [sic] January 31st,

> 2022, in Gretna, Nebraska 68028. Employees were observed conducting framing operations at heights greater than 6 feet with no apparent means of fall protection.

(Citation at 11).

Elite Builders, through Bratetic, acknowledged workers were on the roof conducting framing operations at a height greater than 6 feet (in fact, Bratetic testified it was 8 feet), and Bratetic stipulated to a finding there was a violation of the standard. However, Elite Builders challenges the willful classification. Due to the Stipulation of Elite Builders that the cited regulation was violated, the only issue for the Court to decide is the classification of the violation.

"A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference." *First Marine, LLC*, No. 18-1287, 2023 WL 2951422, at *6 (OSHRC, Apr. 6, 2023) (consolidated). "This state of mind is evident when the employer was actually aware, at the time of the violative act, that the act was unlawful, or when the employer possessed a state of mind such that if it were informed of the standard, it would not care." *Id*.; *see also A.E. Staley Mfg. Co. v. Sec'y of Labor*, 295 F.3d 1341, 1351 (D.C. Cir. 2002) (stating that "conscious disregard" and "plain indifference" are two "alternative" forms of willfulness). "Mere negligence or lack of diligence is not sufficient to establish an employer's intentional disregard for or heightened awareness of a violation." *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1264 (D.C. Cir. 2003). The state of mind of a supervisory employee may be imputed to the employer for purposes of finding that the violation was willful. *Branham Sign Co*., No. 98-752, 2000 WL 675530, at *2 (OSHRC, May 15, 2000).

Thurlby, the Area Director, testified the following factors were considered in making the Willful classification. First, Elite Builders had a history with OSHA and had been previously cited for violations of fall protection and residential construction regulations. (Tr. 218-20). Specifically, the Commission found Elite Builders to be in violation of 29 C.F.R. § 1926.501(b)(13) at two

separate worksites. *See Elite Builders, Inc.,* No. 15-1645, 2017 WL 4083647, at *1 (OSHRCALJ, Aug. 2, 2017) (consolidated) (Ex. C-1). Moreover, in the inspection at issue here, the CSHOs expressly told Bratetic that fall protection was required. (Tr. 220). Bratetic told the CSHOs he understood the requirements of the fall protection regulation yet told his workers to use their discretion regarding the use of fall protection. (Tr. 66; 219-220). After the inspection, the CSHOs observed workers back on the roof of the residential construction without fall protection. (Tr. 220).

The Secretary established Elite Builders, through Bratetic, was "actually aware, at the time of the violative act, that the act was unlawful." *Propellex Corp*., No. 96-0265, 1999 WL 183564, at *8 (OSHRC, Mar. 30, 1999). Bratetic told the CSHO he understood the requirements of the regulation, and he so testified at trial. Nevertheless, his workers returned to the roof without fall protection shortly after the CSHOs left the jobsite. In addition, Elite Builders had been cited for identical violations in the past, which supports a finding of heightened awareness. *See Revoli Constr. Co., Inc*., No. 00-0315, 2001 WL 1568807, at *5 (OSHRC, Dec. 7, 2001) (finding heightened awareness through prior citations of the same standard). Elite Builders has demonstrated a heightened awareness and conscious disregard sufficient to support a finding of willfulness.

And, even assuming the Secretary did not meet the conscious disregard threshold, there is ample evidence in the record that Elite Builders exhibited plain indifference. *Williams Enters. Inc.*, No. 85-355, 1987 WL 89134, at *9 (OSHRC, Apr. 27, 1987) ("Plain indifference" may be established by showing that the employer possessed a state of mind such that if the employer had known of an OSHA requirement, "the employer would not have cared that the conduct or conditions violated it). Bratetic was alerted by the CSHOs that allowing his workers to be on the roof was a violation of the fall protection regulations. Yet, Bratetic demonstrated that he did not

care about the violative condition because he allowed workers to return to the roof shortly thereafter without requiring that they wear fall protection. Moreover, there is nothing to support a defense of good faith. *See Arcadian Corp.*, No. 93-0628, 2004 WL 2218388, at *20 (OSHRC, Sept. 30, 2004) ("[W]illfulness will be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible."). A Willful classification is appropriate here.

VIII. PENALTY.

Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria when assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. §666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J. A. Jones Constr. Co.,* No. 87-2059, 1993 WL 61950, at *15 (OSHRC, Feb. 19, 1993).

The Citation alleges four Serious violations and one Willful violation, with a total proposed penalty of $46,264. The recommended penalty for all Citation Items included a reduction of seventy percent (70%) due to Elite Builders' size (four employees) and an increase of ten percent (10%) due to Elite Builders' history with OSHA. (Tr. 168). Specifically, Elite Builders had been previously found to have violated fall protection standards. (Tr. 168; Ex. C-1). Elite Builders was given no adjustment for good faith. These assessments are uniform for all Citation Items affirmed. The gravity assessed per Citation Item will be discussed below.

Citation 1, Item 1. The Court affirms the Secretary's proposed penalty. Although the potential for serious bodily injury was present, the CSHO concluded the severity was low, the likelihood of major injury was low, and the probability that injury could occur was lesser. (Tr.

166). Taking into consideration a reduction for size and an increase for history, the Court assesses a gravity-based penalty of $2,051.

Citation 1, Item 2. The Court affirms the penalty recommended by the Secretary. The CSHO testified the severity of the violation was medium based on the position of the platform against the house and the length of exposure. (Tr. 171). He opined that the probability of injury to be lesser since the platform appeared to be close to the residential structure. (Tr. 172). He properly concluded the overall gravity of the violation to be moderate and recommended a gravity-based penalty of $2,735 after calculating a reduction for size and an increase for history. (Tr. 172-73). The Court will access a penalty of $2,735 for Citation 1, Item 2.

Citation 1, Item 3. The Court affirms the Secretary's proposed penalty. The CSHO testified the severity was high based on the height from which a worker could fall. (Tr. 176). The probability was greater because there was no apparent means of fall protection in place. (Tr. 176). And the overall gravity of the violation was high based on the duration of time (2 hours) the workers were on the elevated platform. (Tr. 177-178). Taking into consideration a reduction for size and an increase for history, the Court assesses a gravity-based penalty of $4,786.

Citation 1, Item 4(a). Citation 1, Item 4(a) was previously grouped with Item 4(b) which the Court vacated above. As to Citation 1, Item 4(a), the CSHO determined the severity of the violation to be high based on the condition itself and the potential that death, broken bones, or other serious injury could occur because of a fall. (Tr. 181). The probability that injury could occur was greater due to the number of risers and the approximate height of the fall from either the stairs or landing. (Tr. 182). Overall, the CSHO concluded the gravity of the violation was high. (Tr. 182). The total proposed penalty for both items was $4,786, which included a decrease for size and

increase for history with OSHA. (Tr. 182). Due to the vacation of Citation 1, Item 4(b) the Court will assess a penalty of $2.350 for Citation 1, Item 4(a).

Citation 2, Item 1. The Court affirms the Secretary's proposed penalty amount of $31,096. The CSHO testified the severity of the violation to be high since if an employee were to fall, the most likely injury to occur would be death, broken bones, or other serious bodily harm. (Tr. 162). The CSHO further testified that the probability was greater based on the fact the employees were working at an elevated height with no fall protection. (Tr. 163). The CSHO testified the gravity was determined to be high, and that the maximum possible statutory penalty for a willful violation was $145,027. (Tr. 164, 220). The CSHO explained that after reducing the maximum penalty for the employer's size and increasing the penalty for the employer's history, the proposed penalty was $31,096. The Court will assess a penalty of $31,096 for Citation 2, Item 1.

ORDER

The foregoing decision constitutes the Court's findings of fact and conclusions of law in accordance with Commission Rule 90(a), 29 C.F.R. § 2200.90(a). Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. As stipulated, Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1926.102(a)(1) is AFFIRMED, and a penalty of $2,051 is ASSESSED.
2. Citation 1, Item 2, alleging a Serious violation of 29 C.F.R. § 1926.451(c)(2)(v) is AFFIRMED, and a penalty of $2,735 is ASSESSED.
3. As stipulated, Citation 1, Item 3, alleging a Serious violation of 29 C.F.R. § 1926.451(g)(1) is AFFIRMED, and a penalty of $4,786 is ASSESSED.
4. Citation 1, Item 4(a), alleging a Serious violation of 29 C.F.R. § 1926.1052(c)(1)(ii) is AFFIRMED, and a penalty of $2,350 is ASSESSED.

5. Citation 1, Item 4(b), alleging a Serious violation of 29 C.F.R. § 1926.1052(c)(12) is VACATED.
6. Citation 2, Item 1, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is AFFIRMED, and a penalty of $31,906 is ASSESSED.

SO ORDERED.

/s/ Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Date: August 5, 2024
Denver, Colorado