United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. Lang Masonry Contractors, Inc., Respondent.	OSHRC Docket No.: **17-0143**

Appearances:

Adam Lubow, Esq., U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For the Secretary

Douglas J. Suter, Esq., Hahn & Loeser & Parks, LLP
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Lang Masonry Contractors, Inc., (Lang) contests a one-item Citation and Notification of Penalty issued December 28, 2016, by the Secretary. The Secretary issued the Citation as a result of an inspection by the Occupational Safety and Health Administration in response to a report an elevator mechanic sustained serious injuries while working on the renovation of the LeVeque Tower in Columbus, Ohio. A piece of a concrete block fell down an elevator shaft from the fourteenth floor to the basement, striking the elevator mechanic on the head (the elevator mechanic was wearing a protective helmet). The Secretary cites Lang for a serious violation of 29 C.F.R. § 1926.706(a)(1) for failing to establish a limited access zone prior to the construction of a masonry wall. The Secretary proposes a penalty of $7,857.00.

Lang timely contested the Citation. The Court held a hearing in this matter on October 24, 2017, in Columbus, Ohio. The parties filed briefs on December 4, 2017. Lang argues the Secretary failed to establish the cited standard applies to the cited condition and that Lang knew of the alleged violative conduct. The Court agrees the Secretary failed to prove Lang had either actual or

constructive knowledge of the violative conduct. For this reason, the Court **VACATES** the cited item and assesses no penalty.

JURISDICTION AND COVERAGE

Lang timely contested the Citation and Notification of Penalty on January 10, 2017. The parties stipulate the Commission has jurisdiction over this action and Lang is a covered business under the Act (Joint Exhibit 1, *Joint Prehearing Statement*, p. 2, ¶ D). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Lang is a covered employer under § 3(5) of the Act.

STIPULATED FACTS

On August 1, 2017, the parties submitted a *Joint Prehearing Statement*. Paragraph D of that document lists the following nineteen stipulations:

> **D. Admitted Facts**
>
> 1. OSHA has jurisdiction over OSHA Inspection Number 1180638.
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> 2. The OSHRC has jurisdiction over this contested OSHA proceeding.
>
> 3. The worksite at 50 West Broad Street, Columbus, Ohio entailed the renovation of the historic LeVeque Tower and was a multi-employer worksite.
>
> 4. On the LeVeque Tower worksite on September 22, 2016, at approximately 3:20 p.m., a ThyssenKrupp employee working inside an elevator shaft was struck in the head by a piece of concrete block that measured 8 inches x 6 inches x 1½ inches thick weighing approximately six pounds, which is believed to have fallen from the 14th floor.
>
> 5. A concrete block measuring 8 inches x 6 inches x 1½ inches thick weighing approximately six pounds falling from 14 stories creates a substantial probability of serious physical harm.
>
> 6. The ThyssenKrupp employee struck by the falling block suffered fractured vertebrae and other serious injuries.
>
> 7. Marquee Development Group was the construction manager who managed and coordinated the work of both Lang Masonry and ThyssenKrupp Elevator.
>
> 8. At approximately 9:30 – 9:50 a.m. on September 22, 2016, Lang Masonry Employee Casey Martin and Construction Manager Chris Coffman of Marquee Development discussed the work needed on the elevator shafts on the 14th floor.
>
> 9. During that 9:30 a.m. conversation, Marquee Development's Supervisor Chris Coffman had a phone conversation with ThyssenKrupp's Tom Hause. Lang

Masonry Employee Casey Martin was in the presence of Chris Coffman for this phone call.

10. Marquee Development Supervisor Chris Coffman removed the wooden barrier surrounding the elevator door on the 14th floor on September 22, 2016, in order for Lang Masonry Employee Casey Martin to lay block around the premises of the elevator shaft door on the 14th floor.

11. Following the 9:30 a.m. conversation, Lang Masonry Employee Casey Martin collected materials to perform the block work on the 14th floor elevator enclosure. Around 11:00 a.m., he left the 14th floor for an unrelated meeting. He returned to the 14th floor elevator enclosure at approximately 1:00 p.m. and began laying blocks.

12. Lang Masonry Employee Casey Martin stopped performing block work on the 14th floor elevator enclosure at approximately 2:15 p.m. on the afternoon of September 22, 2016, and moved to the 16th floor.

13. OSHA made no independent determination as to how the piece of concrete block fell down the elevator shaft at the LeVeque Tower worksite at approximately 3:20 p.m. on September 22, 2016.

14. ThyssenKrupp was also responsible for inspecting the elevator barricades before performing work inside the elevator shafts on the LeVeque Tower project.

15. Marquee Development had general supervisory authority over the LeVeque Tower worksite, including the power to correct safety and health violations itself or require other contracts to correct the condition.

16. Marquee Development was issued an OSHA citation as a result of the September 22, 2016, accident (OSHA Inspection Number 1180641).

17. OSHA issued the citation to Marquee Development as "creating, controlling, and correcting" employer.

18. OSHA later reclassified the "Serious" citation issued in OSHA Inspection Number 1180641 to an "Other Than Serious" citation.

19. None of the other Lang Masonry employees at the LeVeque Tower worksite on September 22, 2016, were management.

(Joint Exhibit 1, *Joint Prehearing Statement,* pp. 2-3)

TESTIMONY OF WITNESSES

Three witnesses testified at the hearing. The Secretary called Compliance Safety and Health Officer (CSHO) Dustin Schnipke as his only witness. Lang called Casey Martin, the mason responsible for laying the concrete blocks on either side of the elevator door at issue, and Greg Adams, the company's safety director.

CSHO Schnipke

Commencement of Inspection

CSHO Dustin Schnipke served in the United States Navy for five years. He has a Bachelor's degree in Occupational Safety and a Master's degree in Business Administration. At the time of the hearing he had worked in OSHA's Columbus area office for five and a half years (Tr. 28).

On Monday, September 26, 2016, CSHO Schnipke received an assignment to conduct an accident investigation at the historic LeVeque Tower located at 50 West Broad Street in Columbus, Ohio. OSHA had been notified an elevator mechanic had been struck in the head by a piece of a concrete block that fell from the 14th floor to the basement of the building. The accident had occurred on Thursday, September 22. On Tuesday, September 27, CSHO Schnipke went to the LeVeque Tower. The building was undergoing extensive renovations and many workers representing numerous subcontractors were at the worksite. Marquee Development Group (Marquee), owned by Edward Alford, was the construction manager for the project. CSHO Schnipke spoke with Mr. Alford, who gave him an overview of the project and provided information about the September 22 accident (Exh. J-C, pp. 59-63; Tr. 28-32).

After speaking with Mr. Alford, CSHO Schnipke narrowed his investigation to three employers at the worksite: (1) Marquee, who had general supervisory authority over the worksite and who coordinated the work schedules of the subcontractors; (2) ThyssenKrupp Elevator (TKE), the elevator subcontractor who employed the injured employee; and (3) Lang, the masonry subcontractor responsible for laying the concrete blocks on either side of the 14th floor elevator door (Tr. 32).

Configuration of Concrete Blocks on Either Side of Elevator 5 on 14th Floor

CSHO Schnipke went to the 14th floor and inspected the area around elevator 5, which opens to the hoistway above the basement area where the TKE employee was struck by the concrete block piece. He observed a wooden barricade in place around the door of elevator 5, preventing access to it (Exh. J-D, p. 6; Tr. 38). When the barricade was removed, CSHO Schnipke observed concrete blocks laid three blocks high on the left and right side of the elevator door. On the left side of the elevator door, a steel beam was in place between the area where the concrete blocks were laid and the hoistway space, preventing objects from falling from the 14th floor into the hoistway (Exh. J-D, pp. 8-11; Tr. 33-36). On the right side of the elevator door, however, there

was no steel beam to prevent objects from falling. "The right-hand side is open to the interior of the elevator hoistway." (Tr. 35-36)

On the right side of the elevator door, CSHO Schnipke observed a gap between two concrete blocks on the top level, measuring approximately 1½ inches (Exh. J-D, p. 12; Tr. 36-37). On the other side of the concrete blocks (the side nearest the open hoistway) is a ledge approximately 20 inches in width (Exh. J-D, p. 14; Tr. 38). CSHO Schnipke surmised the piece of concrete block that struck and injured the TKE employee had been placed in this gap by Lang's mason (Tr. 37).

From interviews with Marquee supervisor Chris Coffman and with several TKE employees, CSHO Schnipke learned there were seventeen other wooden barricades, similar to the one located at elevator 5, in the 44-story building. Marquee instructed the carpentry subcontractor to construct the barricades. TKE personnel inspected the barricades (Tr. 45).

Routine Coordination of Work Schedules for Lang and TKE

One of Lang's tasks on the renovation project was to lay concrete blocks on either side of the elevator doors, as was done at elevator 5 on the 14th floor in this case. CSHO Schnipke learned Lang's performance of this task on a Thursday during the daytime shift was an anomaly.

> CSHO Schnipke: [E]very other time that the wall was built around other elevator doors, it was performed either on the weekend or in the evening, and it was scheduled and coordinated with the elevator contractor to ensure that they were not -- no one was working in the elevator shaft. … The other times when [Lang] did the work, built the wall around the new elevator door … they did it on the weekends, and they did it in the evenings when the elevator crew was not working. And in addition, they also -- the elevator was positioned at -- so at the level below where the work was being performed so that the masons could stand on top of the elevator and work from the inside of the shaft.
>
> Q.: So what was the purpose of parking an elevator one level below where the work was being done?
>
> CSHO Schnipke: Well, for one, it would tell the elevator employees that someone was working in the shaft, if --and it would provide a work platform for the masons to work on the inside of the shaft.
>
> Q.: Did it also have any purpose with regard to falling debris?
>
> CSHO Schnipke: Yes. It would -- if the elevator was there, it would catch the falling debris.
> …

Q.: Did [TKE] ever allow work to be done above them?

CSHO Schnipke: No. It was their standard practice never to -- never to allow any work to be performed above them while they were in the elevator pit.

(Tr. 45-47)

However, on September 22, 2016, a Thursday, TKE's elevator mechanics were working in the pit of elevator 5 during the day when Lang's mason laid the concrete blocks on the 14th floor. As CSHO Schnipke learned, this departure from the standard scheduling procedure occurred due to last minute changes in Lang's schedule and poor communication between the subcontractors and the construction manager.

Coordination of Work Schedules for Lang and TKE on September 22, 2016

Lang was scheduled to lay the concrete blocks on either side of elevator 5 on the 14th floor on Saturday, September 24, 2016, when TKE was not scheduled to work. "The plan was to do exactly what they had done every other previous time. When they constructed the wall, the masonry wall, around the elevator doors, the plan was to have the elevator parked at the floor where the masons could work from, from the inside. … So the mason could stand on top of the elevator car." (Tr. 48) The morning of September 22, Lang mason Casey Martin wanted to meet with Marquee superintendent Chris Coffman on the 14th floor "to evaluate the work that needed to be done over the weekend." (Tr. 49) He went to the 19th floor, where he had been told Mr. Coffman was, and found him talking with TKE supervisor Kevin Calopy and other TKE employees (Tr. 42, 58).[1] Mr. Martin "asked Chris [Coffman], while Kevin [Calopy] was there, if he could go down to the 14th floor and take a look at the work that needed to be performed, and Kevin [Calopy], who is the elevator supervisor, said it needed to be done on the weekend. . . . because no one would be working in the elevator shaft." (Tr. 58-59)

Mr. Coffman and Mr. Martin proceeded to the 14th floor. Once there, Mr. Coffman used a hand drill to remove the screws attaching the elevator barricade to the wall. After looking at the area around elevator 5, Mr. Coffman and Mr. Martin "decided that the work that needed to be done on Saturday was too much, too much work to be performed in one day. Therefore, Casey [Martin] asked to start work that day." (Tr. 49)

[1] Mr. Calopy's name is spelled "Calopick" in the transcript. His signatures on the two pages of his employee statement show the correct spelling (Exh. J-C, pp. 64-65).

At approximately 9:50 a.m., Mr. Coffman used his cell phone to call Tom Hause, a TKE mechanic subordinate to TKE supervisor Calopy, who was working in the elevator pit (Exh. J-C, p. 67; Tr. 50). Mr. Coffman asked Mr. Hause "if Casey [Martin] could start working on the masonry wall, *only on the left side where the steel beam was.*" (Tr. 50) (emphasis added) CSHO Schnipke interviewed both Mr. Coffman and Mr. Hause during his investigation. He noted their recollections of the telephone call diverged on this point, and they presented him with "conflicting statements." (Tr. 50)

Mr. Hause of TKE stated that when Mr. Coffman asked if Mr. Martin could work on the left side only of the elevator 5, he responded, "[N]o, no way. Nobody is perfect, and we don't allow people to work above us." (Tr. 50) Mr. Hause claims he categorically denied Mr. Coffman's request to permit *any* work to be performed overhead while TKE's employees worked in the pit below.

Marquee's Mr. Coffman stated Mr. Hause gave his "[o]kay to working on the left side of the door where the beam was, but still not working on the right side, where it was open into the hoistway." (Tr. 51) Mr. Coffman claims Mr. Hause gave Lang limited permission to work only on the left side of the elevator, where a steel beam served as a barrier between the work area and the hoistway.

Mr. Martin did not participate in this phone call, but he was standing next to Mr. Coffman as it occurred. Mr. Coffman told Mr. Martin he could work on the left side of elevator 5. Mr. Martin told him he was going to "stock the floor" (bring the masonry material and tools to the work area). Mr. Coffman departed from the 14th floor with the barricade for elevator 5 still removed (Tr. 52).

The Accident

Mr. Martin stocked the floor. He told CSHO Schnipke that he then met with a vendor before he began laying the concrete blocks at approximately 1:00 p.m. Mr. Martin stated he stopped working at 2:20 p.m.[2] He left "to go check on some other guys" on another floor. He did not plan to return to the 14th floor that day but he did not replace the barricade to elevator 5 (Tr. 60). He did not inform Mr. Coffman that he was finished for the day, nor did he ask him to replace the barrier. Mr. Martin told CSHO Schnipke he ran out of mortar just before placing the last piece

[2] The parties stipulated Mr. Martin "stopped performing block work on the 14th floor elevator enclosure at approximately 2:15 p.m. on the afternoon of September 22, 2016." (Joint Exhibit 1, *Joint Prehearing Statement,* p. 3)

of concrete block. "So he just set this piece in there, just dry with no mortar. And so that's how he left it." (Tr. 61) Mr. Martin explained he did this so "the next person that would come on Saturday—they would know that that needed to be mortared in right there." (Tr. 61) Mr. Martin stated he ran out of mortar while working on the *right side* of elevator 5. He was aware of the 20-inch ledge between the concrete blocks and the open hoistway, "and he felt that would catch anything that dropped." (Tr. 62) Mr. Martin was aware TKE employees were working in the hoistway because "the cars were going up and down." (Tr. 62) Mr. Martin stated, "[T]he original plan was to park the car there, but they couldn't do it because they were working." (Tr. 63)

Meanwhile, TKE's mechanics were working in the pit. TKE changed shifts at 2:00 p.m. At approximately 3:20 p.m. (approximately one hour after Mr. Martin claims he stopped working), a piece of concrete block fell down the hoistway of elevator 5 and struck a TKE mechanic in the head. The mechanic sustained fractured vertebrae and other serious injuries as a result of the impact (Tr. 54).

Mr. Martin did not set up a limited access zone prior to beginning work in the area of elevator 5. He did not set up a limited access zone in the basement notifying employees that work was being performed above near the hoistway (Tr. 69-70).

Casey Martin

Casey Martin has worked as a mason for approximately 25 years. He has been with Lang since 2014 (Tr. 128, 141). He stated masonry work at the LeVeque Tower included "blocking around pipe chases, putting brick in the holes, blocking around elevator doors, things of that nature, nothing outside, just inside to get the hotel and condominium complete." (Tr. 129) Mr. Martin stated rows of bricks or concrete blocks are called "courses." (Tr. 154) He had constructed courses on the sides of two other elevator doors at the LeVeque Tower prior to the September 22, 2016, accident (Tr. 145). On those occasions, TKE brought the elevator car to the floor below the work area so Mr. Martin could stand on top of it and lay the concrete blocks from inside the hoistway (Tr. 145-146).

September 22, 2016

Mr. Martin gave his account of the events of September 22, 2016:

> It was about 6:30 in the morning. I arrived for work. I knew my supervisor was not going to be there that day. Around 9 o'clock, I knew that we had to get some work done on this elevator door on the 14th floor, so I talked to Chris [Coffman] and see if we would go over the work and see what was going on, see

what I had to accomplish, see what needed to be done, what materials needed to be stocked, and so forth. …He told me that they needed this enclosure around this elevator door done. And I told him it was longer than a one-day job. It was actually a two-day job with trying to get materials and stuff down to that floor, and one person doing that job, it's longer. So I asked him if I could stock materials on that floor, and I also asked him if I could lay a couple of courses because on the elevator door, it takes a minute. It's not just laying on a simple piece of concrete. You've got to have a nice established base. … Chris said go ahead and stock it. I think he made a phone call to one of the elevator guys. He did not make a call to the elevator supervisor. He made a call to Tom, and I didn't hear what their conversation was about, so after he proceeded with that call, he said, go ahead and start. And I started stocking block and materials of -- or bags of mortar-- on that floor. And then we had a vendor come about 10:30, 11, and I spent a good hour and a half with him. And then I started laying block about 1 o'clock. I ran out of mortar around 2, 2 o'clock or so, and I left a piece of block on top of the wall on the right side. I cleaned up my area, left. About 2:20 I went back up to the 16th floor to finish out the day. We work 10-hour days, so I had a couple more hours to go. And Chris called me about an hour later, said that there was a piece of block that fell down the elevator shaft.

(Tr. 131-134)

On cross-examination, Mr. Martin conceded the TKE employees working in the pit believed he was still working on the 14th floor when the piece of concrete block fell and struck the TKE mechanic in the head at approximately 3:20 p.m.

Q.: Okay. Around 3:20 that day you get a phone call from Chris –

Mr. Martin: Yes, sir.

Q.: -- that the block had fallen.

Mr. Martin: Yes, sir.

Q.: And you went down to the basement.

Mr. Martin: Yes, sir.

Q.: And the Thyssen employees had found the block.

Mr. Martin: Yes, sir.

Q.: You went back up to 14.

Mr. Martin: Yes, sir.
Q.: And you went with the Thyssen employees.

Mr. Martin: Yes, sir.

Q.: They confronted you.

Mr. Martin: Yes, sir.

Q.: They were mad.

Mr. Martin: Yes, sir.

Q.: Really pissed off. They accused you of dropping the brick.

Mr. Martin: No.

Q.: They didn't accuse –

Mr. Martin: Well, they accused me of dropping the brick, but -- yes.

Q.: So you told them you had just left the block there dry.

Mr. Martin: I left the block on top of the wall, yes, sir.

Q.: Okay. And you weren't still working at the time.

Mr. Martin: I was –

Q.: You weren't still working on 14 at the time.

Mr. Martin: No, sir.

(Tr. 157-159)[3]

Mr. Martin said he did not realize Mr. Coffman intended him only to work on the left side of the elevator door. "That's what I misunderstood. He said you could lay a couple of courses on the right side. … That's what I misunderstood, that I thought he said that." (Tr. 148-149) Mr. Martin denies knowing TKE employees were working at the bottom of the hoistway as he

[3] CSHO Schnipke testified he was unable to determine the cause of the piece of concrete block falling into the hoistway (Exh. J-A, 54-55; Tr. 101-102). "I don't know whether it was dropped out of someone's hand or whether it fell due to an elevator going by or whatever reason." (Tr. 122) Any suggestion by the Secretary that Mr. Martin was still working by elevator 5 on the 14th floor when the piece of concrete block fell and injured the TKE mechanic is foreclosed by the parties' stipulation: "Lang Masonry Employee Casey Martin stopped performing block work on the 14th floor elevator enclosure at approximately 2:15 p.m. on the afternoon of September 22, 2016, and moved to the 16th floor." (Joint Exhibit 1, *Joint Prehearing Statement,* p. 3)

constructed the courses on the 14th floor. The elevator door was closed so he could not look down the hoistway. "You need a special key to open that door." (Tr. 136) Although not certain of TKE's work schedule, he believed TKE employees would not spend a lot of time in the pit of the hoistway of elevator 5.

> What I understood was they were in like two or three or four different shafts that day doing work, and they just had limited work in that pit of that day, and they were running two shifts. I did not know exactly where they were at through the day or whatnot. I didn't see any elevator guys through the day, so . . .

(Tr. 134-135)

Supervisory Status of Casey Martin

Lang had temporarily designated Mr. Martin as a supervisor in the spring of 2016 at the LeVeque Tower for a period of two or three weeks (Tr. 140). "We were a little behind on the schedule, and I was just going in there, doing wall patches, and stuff like that, a lot of hole patches on the upper floors. We were kind of scattered out of the company at the time, so I think Mike had enough confidence in me -- Mike is one of my supervisors at the time. Mike had enough confidence in me that I could get the job done." (Tr. 141) On May 23, 2016, Mr. Martin gave a tool box talk to Lang's crew on proper lifting techniques. He signed his name on the sign-in sheet for the tool box next to the space marked "Supervisor." (Exh. J-A, p. 70; Tr. 140)

Mr. Martin stated he was not a supervisor on September 22, 2016. Corey Dille was Lang's supervisor at the LeVeque Tower during that time, but he was not onsite that day. Mr. Martin was the most senior employee of the three Lang employees present (Tr. 142-143). Mr. Martin was asked why he told CSHO Schnipke, during a telephone interview on October 31, 2016, that he was "the boss" on site for Lang the day of the accident.

> Mr. Martin: I guess I took it in -- yeah, took it in responsibility that day because I was the senior mason, and [Lang's regular supervisor] Corey [Dille] was not there that day, so I guess I would say I was boss. But I never was technically . . . the boss, so --
> Q.: But you told Dustin [Schnipke] that you were the boss.
>
> Mr. Martin: Yes.
>
> Q.: Okay. And that's because Corey was off.
>
> Mr. Martin: Yes, sir.

(Tr. 144)

Greg Adams

Greg Adams has been with Lang approximately 15 years. He started as a mason and eventually transitioned to the position of safety director (Tr. 163). He did not work onsite at the LeVeque Tower, but visited it every two or three weeks (Tr. 170).

Mr. Adams described the work Mr. Martin was performing on either side of elevator 5 as "an infill." (Tr. 169) He does not classify infill work as "construction of a masonry wall. It's just filling in an area." (Tr. 169) Mr. Adams stated Mr. Martin's job title on September 22, 2016, was "mason," and no Lang management personnel had designated him as a supervisory employee (Tr. 169). When asked if there were times Lang did not have a supervisor on site, Mr. Adams responded, somewhat confusingly, "Well, considering that Casey is a mason, our project manager generally will have multiple sites, and he can stop in while he's in Columbus if there [are] issues or meetings or things like that. So I would say a designated employee that can provide disciplinary action or things of that nature of upper management, I would say yes." (Tr. 171)

THE CITATION

The Secretary's Burden of Proof

"An employer is liable for violating an OSHA safety standard if the Secretary of Labor can show the following by a preponderance of the evidence: (1) the standard applies to the cited conditions, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or should have known of the hazardous condition with the exercise of reasonable diligence." *R.P. Carbone Const. Co. v. Occupational Safety & Health Review Comm'n*, 166 F.3d 815, 818 (6th Cir. 1998)

Item 1: Alleged Serious Violation of § 1926.706(a)(1)

Item 1 of the Citation alleges,

> At the worksite located at 50 West Broad Street, Columbus, Ohio, on the 14th floor, the employer failed to ensure a limited access zone was established prior to the beginning construction of a masonry wall around the newly installed #5 elevator door, thereby exposing other contractors' employees to a struck-by hazard of falling material into the elevator hoistway.

Section 1926.706(a) states,

> A limited access zone shall be established whenever a masonry wall is being constructed. The limited access zone shall conform to the following:
>
> (1) The limited access zone shall be established prior to the start of construction of the wall.

Section 1926.400(b)(4) defines "limited access zone" as "an area alongside a masonry wall, which is under construction, and which is clearly demarcated to limit access by employees."

(1) Applicability of the Cited Standard

Section 1926.706(a)(1) is found in *Subpart Q—Concrete and Masonry Construction* of the construction standards. Section 1926.700(a) sets out the scope and application of the subpart. "This subpart sets forth requirements to protect all construction employees from the hazards associated with concrete and masonry construction operations performed in workplaces covered under 29 CFR Part 1926."

As the full name of the company indicates, Lang is a masonry contractor and its employees are masons. Lang contends, however, mason Casey Martin was not constructing masonry walls on either side of the 14th floor elevator on September 22, 2016, and, therefore, the requirement under § 1926.706(a)(1) to establish a limited access zone does not apply. Lang bases this argument on Mr. Adams's testimony that he did not consider the infill work on either side of elevator 5 to be wall construction and CSHO Schnipke's acknowledgement that infill work is not "the typical scenario" in which OSHA would cite § 1926.706(a)(1). The typical scenario to which the cited standard applies would involve a tall, freestanding wall. Yet, CSHO Schnipke testified, § 1926.706(a)(1) also applies to the infill work because "it was a wall, even though it wasn't a big wall. It was a wall that was constructed to apportion off part of a building." (Tr. 65)

In promulgating §1926.706, OSHA specifically considered, and rejected, applying the standard to masonry walls of a minimum height. The agency stated, "If the wall *is 8 feet or under in height,* the limited access zone must remain in place until the wall is adequately supported to prevent overturning and collapse. Such support can be obtained as a result of the wall having reached sufficient strength to prevent overturning and collapse, having been permanently supported, or having been braced." *Concrete and Masonry Construction Safety Standards,* 53 Fed. Reg. 22612-01 (June 16, 1988) (emphasis added). No exception is made for walls of low height.

The infills constructed by Mr. Martin are three courses high (Exh. J-D, pp. 9-10). Using the dimensions of the piece of concrete block that fell, as stipulated by the parties, the infills constructed by Mr. Martin were approximately 2 feet high (*Joint Prehearing Statement,* p. 2). As Lang's safety director acknowledged, the method of constructing an infill is the same as of a masonry wall.

Q.: You referred to this work as infill.

Mr. Adams: Yes, sir.

Q.: And that is laying the blocks around the outside of the elevator door.

Mr. Adams: Correct.

Q.: And that is to connect the new elevator door to the existing wall.

Mr. Adams: Correct.

Q.: Okay. You are laying concrete blocks?

Mr. Adams: You will.

Q. And those are considered masonry blocks.

Mr. Adams: Correct.

Q.: They're stacked?

Mr. Adams: Yes.

Q.: And they're mortared.

Mr. Adams: Yes.

Q.: They partition off a section of the building.

Mr. Adams: They will.

Q.: By partitioning the elevator shaft from the outside of the elevator.

Mr. Adams: Correct.

(Tr. 171-172)

As described in Mr. Adams's testimony, construction of the infills is indistinguishable from construction of a masonry wall. The Court determines § 1926.706(a)(1) applies to the cited condition in this case.

(2) Terms of § 1926.706(a)(1) Were Violated

Section 1926.706(a)(1) requires the employer to establish a limited access zone prior to the start of the construction of the wall. CSHO Schnipke testified that in order to establish the limited access zone, Lang needed to verify the TKE employees (and any other employees) were

removed from the hoistway and then set up a barricade in the basement to prevent employees from entering the hoistway (Tr. 68-69). Mr. Martin did not do this (Tr. 69-70).

Lang argues it did not violate § 1926.706(a)(1), based on a *Standard Interpretation Letter* issued by OSHA February 6, 1989, in response to questions raised by the Colorado Masonry Construction Association. The first question answered in the Letter indicates it is the responsibility of the exposing employer (in this case, TKE) to establish a limited access zone.

> 1. Which employer is responsible for the creation/establishment of the Limited Access Zone?
>
> Suggested Response: The establishment of the zone is the responsibility of the employer(s) whose employees are exposed. This is not to say that the exposing employers will actually mark off, barricade, etc. the zone, but they must ensure the establishment of the zone, the bracing of the wall, and/or otherwise supporting the wall to protect their exposed employees. An analogy would be the application of the zone, the bracing of the wall, and/or otherwise supporting the wall to protect their exposed employees.

(*Standard Interpretation Letter* for § 1926.704(a))[4]

Lang ignores the follow-up question, which establishes the creating employer (Lang) may be held responsible for establishing the limited access zone in certain circumstances, including one present in this case.

> 3. If only employees of other contractors are exposed to a wall and no Limited Access Zone has been established, can the mason contractors be cited for not establishing the zone?
>
> Suggested Response: [T]the mason contractors may or not be cited, depending on whether or not the exposing employer(s) met the "Legitimate Defense Test". To determine this, certain questions must be answered: (1) Who created the hazard, (2) Who had the authority or the ability to correct the hazard, (3) Was there reasonable effort made to persuade the controlling contractor to correct the hazard, and (4) Did the exposing employer instruct/train his employees on how to avoid or minimize dangers associated with the conditions. If it is determined that the exposing employers took all possible actions, short of walking off the job, to protect his employees, that employer would not be cited. Then the employer(s) in the best position to correct the hazard could be cited.

Id.

Here, (1) Lang created the hazard; (2) Marquee and Lang had the authority to correct the hazard; (3) TKE was not aware Lang was working on the 14th floor next to the exposed hoistway

[4] The *Standard Interpretation Letter* can be found at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=19743.

on September 22, 2016, but it made a reasonable effort generally to protect its employees by having Marquee erect protective barriers around the elevator doors; and (4) TKE instructed its employees to avoid the associated dangers by implementing a strict rule that employees of other employers could not work above TKE's employee. The record establishes Lang was in the best positon to correct the hazard.

The Secretary has established Lang failed to comply with the terms of § 1926.706(a)(1)

(3) Employees Had Access to the Violative Condition

At least two TKE employees, Tom Hause and the injured employee, were working in the pit of the elevator 5 hoistway on September 22, 2016, because no limited access zone had been established to warn them of overhead work, or to prevent their access to the hoistway. Lang argues Hause was not an exposed employee because the Secretary "did not prove or present any evidence or testimony that any [TKE] employees, or any employees on the LeVeque site for that matter, were in the 14th floor elevator shaft between 1:00 p.m. and 2:15 p.m. when Lang Masonry employee Casey Martin was performing his masonry work." (Lang's brief, p. 9)

It is not the Secretary's burden, however, to establish an employee was actually exposed to a hazard—it is sufficient to show it was reasonably predictable employees could be in the zone of danger.

> [T]he Commission has recognized that exposure may be established by showing "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." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012). … *See N. Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1471 (No. 96-0721, 2001) (exposure established where "bracket installation work was so close to ... energized parts that minimal upward movement, inadvertent or otherwise, would have placed some part of [an employee's] body closer than [the OSHA standard's minimum working distance]").

Briones Util. Co., 26 BNA OSHC 1218, 1219 (No. 10-1372, 2016).

Here, it was part of the TKE mechanics' work assignment to be in the pit of the hoistway. They had continual access to the hoistway because there was no limited access zone established to prevent them from entering the area.

> Employees may be in the zone of danger "when they engage in activities in the course of their assigned working duties, their personal comfort while on the job, or their normal means of ingress and egress to their assigned workplaces." *Id.* The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Constr. Co.*,

> 17BNA OSHC1229, 1234, 1993-95CCH OSHD ¶ 30,754, p.42,729 (No. 91-2107,1995).

KS Energy Servs., Inc., 22 BNA OSHC 1261, 1265 (No. 06-1416, 2008).

Lang also is too narrow in its conception of the time period of the exposure, asserting exposure could only occur "between 1:00 p.m. and 2:15 p.m. when Lang Masonry employee Casey Martin was performing his masonry work." (Lang's brief, p. 9) The violation was failing to establish a limited access zone "prior to the start of construction of the wall." Section 1926.706(a)(5) provides:

> The limited access zone shall remain in place until the wall is adequately supported to prevent overturning and to prevent collapse unless the height of wall is over eight feet, in which case, the limited access zone shall remain in place until the requirements of paragraph (b) of this section have been met.

Contrary to Lang's argument, its violation of § 1926.706(a)(1) did not begin and end with Mr. Martin's hands-on time working on the infills on either side of elevator 5 on the 14th floor. The violation continued until the infills were "adequately supported to prevent overturning and to prevent collapse." The violation did not end when Mr. Martin stated he ended his work on the 14th floor at 2:15 or 2:20 on September 22, 2016. The injured employee was actually exposed to the hazard created by Lang's violation of the standard, and it was reasonably predictable that any of the TKE employees working that day had access to the hoistway.

The Court determines the Secretary has established TKE's employees were exposed to struck-by hazards created by Lang's violation of the cited standard.

(4) Employer Knowledge

> The fourth and final condition for a prima facie violation of the Act requires that the employer knew of the hazardous condition, or could have known through the exercise of reasonable diligence. … The knowledge of a supervisor or foreman, depending on the structure of the company, can be imputed to the employer. See *Danis–Shook Joint Venture XXV*, 319 F.3d at 812 (observing that "the knowledge of a supervisor may be imputed to the employer" and ascribing the foreman's knowledge of his own failure to wear protective gear to the defendant company).

Mountain States Contractors, LLC v. Perez, 825 F.3d 274, 283–84 (6th Cir. 2016).

It is on this element the Secretary's case stumbles. According to the record evidence, Casey Martin was the only Lang employee on or off site who was aware of his decision to construct the infills on either side of the elevator 5 on the 14th floor on September 22, 2016, instead of waiting until the scheduled Saturday date. To prove actual knowledge of the violation of § 1926.706(a)(1),

the Secretary must show Mr. Martin was a supervisory employee of Lang, in order to impute his knowledge to Lang.

The Secretary asserts it did so, based on the following evidence: (1) Mr. Martin told CSHO Schnipke in his October 31, 2016, telephone interview that he was "the boss" for Lang the day of the accident; (2) Mr. Martin was the most senior of the three Lang employees working at the site that day, and no upper management personnel were onsite; (3) Mr. Martin spoke with Marquee's Chris Coffman to determine Lang's scope of work that day; (4) Mr. Martin met with a scaffolding vendor; and (5) Mr. Martin "checked" on the two other Lang employees after he finished the infill work on the 14th floor.

With regard to points (1) and (2) of the Secretary's argument, Mr. Martin's self-designation as "the boss" and his status as the most senior employee on site on September 22, 2016, are insufficient grounds to determine he was acting as a supervisor. "In deciding whether an employee qualifies as a supervisor, '[i]t is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority.'" *Dover Elevator Co*., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). Here, as Mr. Adams testified, no one delegated supervisory authority to Mr. Martin (Tr. 169).

Mr. Martin's initiative in discussing Lang's scope of work with Chris Coffman and meeting with the scaffolding vendor likewise fail to confer upon him the indicia of supervisory authority. The hallmark of a supervisor is authority over other employees.

> The Commission has long recognized that "an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor" for the purpose of establishing knowledge. *Access Equip. Sys*., 18 BNA OSHC at 1726, 1999 CCH OSHD at p. 46,782. … (knowledge imputed from "a leadman . . . 'in charge of' . . . two [other] employees," whom the employer's general manager "considered . . . to be 'like the lead person for' [those two employees]"); *Iowa S. Utils. Co.*, 5 BNA OSHC 1138, 1139, 1977-78 CCH OSHD ¶ 21,162, p. 25,945 (No. 9295, 1977) (knowledge imputed from a "temporary working foreman . . . vested with some degree of authority over the other crew members assigned to carry out the specific job involved"); *Mercer Well Serv., Inc*., 5 BNA OSHC 1893, 1894, 1977-78 CCH OSHD ¶ 22,210, p. 26,722 (No. 76-2337, 1977) (imputing knowledge of employee "considered to be in charge of the crew when [his supervisor] was not present").

American Engineering & Development Corp., 23 BNA OSHC 2093, 2096 (No. 10-0359, 2012).

In this case, the testimony of the three witnesses establishes Mr. Martin worked alone on September 22, 2016. He made the decision to construct the infills, he stocked the floor, and he

performed the masonry work. There is no indication he informed the two other Lang employees onsite of his decision, or notified anyone in a management position offsite. Mr. Martin worked solo, exercising no authority over any other Lang employee.

Point (5) of the Secretary's argument involves the only evidence that hints that Mr. Martin had some degree of authority over the other two Lang employees. CSHO Schnipke testified Mr. Martin told him that when he finished working on the 14th floor, "He said that he went to check on some other guys. … He had to go check on other Lang employees." (Tr. 60) When Mr. Martin was asked if he went to the 16th floor after he finished working on the 14th floor to "check on the other workers," he responded, "To not exactly check, but start working on 16 and finish out my day." (Tr. 155) This is simply not enough to establish Mr. Martin was "vested with some degree of authority over the other crew members assigned to carry out the specific job involved." *Iowa S. Utils. Co.*, 5 BNA at 1139.

The fact Lang had designated Mr. Martin as a supervisor for two or three weeks in the spring of 2016 does not advance the Secretary's case. It rather contrasts the difference between Lang's official delegation of temporary authority to Mr. Martin when the company fell behind schedule and Mr. Martin's unapproved assumption of authority based on seniority on a day Lang's supervisor was not present. The Secretary has failed to establish Lang had actual knowledge of Mr. Martin's violative conduct.

The Secretary has also failed to establish constructive knowledge. Construction of the infills was scheduled for Saturday, September 24, when TKE was not working. CSHO Schnipke testified it was Lang's "standard practice" to schedule the infill work on Saturdays or after hours. The exercise of reasonable diligence would not have revealed to Lang that one of its employees, in concert with the construction manager's superintendent, would circumvent the scheduling over the refusals of two TKE representatives.

The Court determines the Secretary failed to establish Lang had either actual or constructive knowledge of Mr. Martin's violative conduct in failing to establish a limited access zone before constructing the infills on the 14th floor of the LeVeque Tower. For this reason, the Court **VACATES** the cited violation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED:**

Item 1 of Citation No. 1, alleging a serious violation of § 1926.706(a)(1), is **VACATED** and no penalty is assessed.

SO ORDERED.

/s/

Date: February 21, 2018

SHARON D. CALHOUN
Administrative Law Judge
Atlanta, Georgia