United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor,

Complainant

v.

FreightCar America, Inc.,

Respondent.

OSHRC Docket No.: **18-0772**

Appearances:

Emily O. Roberts, Esq.
Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee
For Complainant

John J. Coleman, III, Esq. and Emily C. Burke, Esq.
Burr & Forman, Birmingham, Alabama
For Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

On February 28, 2018, two workers at a railcar manufacturing facility in Cherokee, Alabama, were injured when one of the end panels of a railcar they were assembling fell on them. On March 1, 2018, the Occupational Safety and Health Administration received an employer referral notifying it of the accident. OSHA assigned Compliance Safety and Health Officer (CSHO) Javier Rodriguez to investigate the incident. After completing his inspection, Rodriguez recommended the Secretary cite FreightCar America, Inc., the corporate entity Rodriguez believed to be the owner and operator of the facility (and the employer of the injured workers), for a violation of § 5(a)(1), the general duty clause, of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 654(a)(1).

On April 23, 2018, the Secretary issued a one-item Citation and Notification of Penalty to FreightCar America, Inc. (Respondent) alleging a serious violation of the general duty clause for exposing employees to struck-by hazards during a railcar assembly. The Secretary proposes a penalty of $12,934 for Item 1.

Respondent contends the Secretary failed to establish a violation of the general duty clause but also vigorously argues the Secretary cited the wrong employer—Respondent claims FreightCar

Alabama, LLC, not FreightCar America, Inc., owns and operates the facility and urges the Court to vacate the Citation because it is not the employer of the affected employees.

For the reasons that follow, the Court finds the Secretary properly cited Respondent FreightCar America, Inc. as the employer of the affected employees at the cited facility. The Court finds, however, the Secretary failed to establish the condition, as described in the Citation, presented a hazard. Accordingly, the Court **VACATES** Item 1 of the Citation.

JURISDICTION AND COVERAGE

Respondent timely contested the Citation on May 9, 2018. The parties stipulate the Commission has jurisdiction over this action and Respondent is a covered employer under the Act (*Joint Prehearing Statement*, ¶¶ D.1-2; Tr. 32). 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 Respondent is a covered employer under § 3(5) of the Act.[2]

BACKGROUND

At the manufacturing facility commonly referred to as the "Shoals facility" (it is near Muscle Shoals, Alabama), located at 1200 Haley Drive in Cherokee, Alabama, workers assemble railcars (Exh. CX-1; Tr. 56). At the assembly area designated Line 4, Position 13 (the assembly area at issue), a four-man crew had been assembling railcars in accordance with a specific product assembly document (PAD) for approximately one month in February 2018 and had assembled about a dozen (Exh. CX-6; Tr. 277, 319, 387).[3] The crew consisted of the Team Lead and Welders #1, #2, and #3. Until February 28, 2018, the railcar assembly had been without incident.

To assemble a railcar, the crew members welded together four panels (also referred to as "walls"), consisting of two sides and two ends, to the floor component of the railcar. Two gantry cranes lifted the 50-foot long sides panels into place, and one overhead crane was used to lift and place the ends, one after the other (Exh. CX-16; Tr. 142, 214, 313, 325-26). The end panels weighed 400 to 500 pounds apiece. The weight was not evenly distributed—the panels were top-

[2] In addition to stipulating jurisdiction and coverage, the parties stipulated the following: "The entity cited in the sole citation in this case is FreightCar America, Inc." and "An accident occurred at 1200 Haley Drive, Cherokee, Alabama 35616 ("workplace") on or about February 28, 2018 when the end side of a rail car fell, injuring two hourly employees[.]" (*Joint Prehearing Statement,* ¶¶ D. 3-4)

[3] The Team Lead and Welder # 3 both testified their crew had been working together for about a month and had built a dozen or "well over a dozen" railcars (Tr. 387). The Team Leader stated they built an average of four railcars a day (Tr. 319). No explanation can be found in the record reconciling the evidence that the crew had been building railcars for about a month but had completed only a dozen or so while averaging four railcars a day.

heavy (Tr. 137, 271, 320, 391). As each panel was placed the welders inserted large pins at the top of the four corners to secure the panels to each other (Exhs. CX-17, CX-21; Tr. 139-40, 148). Welder #3 explained each pin "is going through a hole on the side sill and then a hole on the end sill as well, all the way through. And then it sets it and holds it in place." (Tr. 384) Until the pins were inserted, the end panels remained attached to the crane with a hookup mechanism, designed "[t]o support the end wall to make sure it doesn't fall." (Exh. CX-19; Tr. 145)

Until shortly before the accident, the welders used four "fit up bolts" to attach the bottoms of each of the end panels to the floor component to aid in aligning the panels for welding (Tr. 141, 143, 147). Welder #3 stated fit up bolts "go on the bottom [of the panels] to fit up the end sill to make sure it's straight and parallel and even with the sides." (Tr. 386) The Team Lead testified use of the bolts "made it easier for the fit up . . . as far as lining up the end to the floor. It had four holes at the bottom securing the ends to the floor. . . . It made our job easier, more efficient and so forth." (Tr. 309-10) The fit up bolts did not provide structural support that would prevent the panels from falling (Exhs. CX-18, RX-22; Tr. 197, 210).

Shortly before the day of the accident, Shoals facility engineer Neil McNeil instructed the crew members to stop using the fit up bolts. The crew members then used a crowbar to align the ends (Tr. 164, 309-11). On February 28, 2018, the four crew members were having trouble aligning the last end panel placed by the crane.[4] The crane had been unhooked from the end panel, and the two pins inserted at the top corners of the end panel provided the only support. To realign the end panel, Welder #1 removed the pins from the corners. Without the support of the crane or the pins, the end panel fell, striking the Team Lead and Welder #2. The Team Lead sustained a fractured knee and a severe laceration above the knee, and Welder #2 sustained broken ribs and a broken leg (Tr. 167, 281-82). The day after the accident, Respondent amended the PAD to include a new instruction: "ALL WORK IN POSITION MUST BE COMPLETE PRIOR TO UNHOOKING CRANE/GANTRY FROM ENDS AND SIDES." (Exh. CX-62, p. 2) (emphasis in original)[5]

[4] The Team Leader testified the problem was not alignment of the end panel, but that the panel was bowed. Whether the problem was alignment or bowing, it was the reason Welder #1 removed the pins (Tr. 311).

[5] In the Citation, the Secretary proposed this instruction as a feasible means to eliminate or materially reduce the hazard, along with another instruction from the PAD: "Locate Corner Connection . . . on Side Assembly . . . with Retainer Pin and weld as shown." (*Id.*) In other words, insert the pins at the top corners of the end panel.

In response to Respondent's referral report of a work-related accident, CSHO Javier Rodriguez visited the facility on March 7 and March 22, 2018, and conducted an inspection, including taking photographs, interviewing employees, and requesting employer documents (Tr. 111-16). As a result of Rodriguez's inspection, the Secretary issued a Citation to FreightCar America, Inc. on April 23, 2018.

WAS RESPONDENT THE EMPLOYER OF THE AFFECTED EMPLOYEES?

The Secretary cited "FreightCar America, Inc." as the employer of the affected employees. Respondent contends "FreightCar Alabama, LLC" is the correct employer, and so the Citation issued to FreightCar America, Inc. should be dismissed.[6] It is the Secretary's burden to establish FreightCar America, Inc. is the properly cited employer in this proceeding.

> Only an "employer" may be cited for a violation of the Act, *see* 29 U.S.C. § 658(a), and the Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site.

Allstate Painting & Contracting Co., Nos. 97-1631 & 97-1727, 2005 WL 682104, at *2 (OSHRC March 15, 2005) (consolidated).

The Secretary believes this issue should be analyzed using the Supreme Court's *Darden* test, set out in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 316, 323 (1992) (Looking to "the hiring party's right to control the manner and means by which the product [was]

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[6] On May 24, 2018, the Secretary issued another Citation and Notification of Penalty to Respondent, alleging a serious violation of the general duty clause occurred at the Shoals facility on April 2, 2018, due to employee exposure to slip and fall hazards. Respondent timely contest the Citation and again argues it is not the employer of the exposed employees. That case (Docket No. 18-0970) was also assigned to the Court but, the cases were not consolidated for hearing. The Court held a hearing in the present case (Docket No. 18-0772) on February 8 and March 14, 2019, and a hearing in Docket No. 18-0970 on March 14 and 15, 2019. On March 6, 2019, the parties submitted a joint stipulation:

> The Complainant and Respondent in the above captioned matter stipulate that the evidence admitted at the hearing in OSHRC Docket No. 18-0772 pertaining to the issue of whether FreightCar America, Inc. is the properly cited employer may be considered in OSHRC Docket No. 18-0970; and the evidence admitted on that issue at the hearing in OSHRC Docket No. 18-0970 may be considered in OSHRC Docket No. 18-0772. The parties have agreed that the proof on this specific issue may be considered in both cases in the interest of judicial economy and ask that the Administrative Law Judge accept this joint stipulation.

(Exh. J-1)

The Court accepted the joint stipulation and has considered evidence from the records in both cases regarding the issue of whether the Secretary properly cited Respondent as the employer of the affected employees. Citations to the transcript and exhibits in Docket No. 18-0970 will be preceded by "No. 18-0970." Citations without a designated docket number are from this proceeding, Docket No. 18-0772.

accomplished" to determine the employer/employee relationship). Respondent claims it is not the employer of the affected employees based on an almost 30-year old unreviewed ALJ decision that addresses the issue of limited liability. *Hills Department Stores, Inc.,* No. 89-1807, 1990 WL 146495, at *2 (OSHRC Sept. 12, 1990) ("Under the doctrine of limited liability, recourse is against the corporation itself, not against its parent company or shareholders. Generally, a parent is not liable for the acts of its subsidiary.").[7]

The Court finds the Secretary has established he properly cited Respondent FreightCar America, Inc. as the employer of the affected employees. The testimony of the witnesses and the documentary evidence demonstrate FreightCar America, Inc. exercised substantial control over the Shoals facility sufficient to qualify it as the employer of the affected employees.

Testimony of CSHO Javier Rodriguez and Documentary Evidence

CSHO Rodriguez testified that when an employer calls in to report an accident, OSHA's duty officer takes "all the information directly from the caller and input[s] that information into a system[.] . . . We take exactly what the employer tells us that happened. And then, when that is assigned to a compliance officer, the compliance officer is to do the investigation." (Tr. 95-96) On March 1, 2018, OSHA's duty officer received a telephone call from management official "Fred Parson," who identified the "Establishment Name" of the accident site at 1200 Haley Drive in Cherokee, Alabama, as "FreightCar America, Inc." (Exh. C-8) As part of OSHA's standard procedure, Rodriguez conducted a business entity search on the Alabama Secretary of State's website (which he referred to as the "database") (Tr. 122-23). The Alabama Secretary of State's website has an entry for "FreightCar Alabama, LLC" with the following pertinent information:

Principal Address:	Two North Riverside Plaza Ste. 1300, Chicago, IL 60606
Status:	Exists

[7] The Court is of the opinion this issue would best be analyzed under the single employer test, as set out in *Southern Scrap Materials Co., Inc.,* No. 94-3393, 2011 WL 4634275, at *34 (OSHRC Sept. 28, 2011) ("Under Commission precedent, the factors relevant to determining whether separate entities are regarded as a single employer include whether they share a common worksite, are interrelated and integrated with respect to operations and safety and health matters, and share a common president, management, supervision, or ownership."). Under that test, the Court would find FreightCar America, Inc. and FreightCar Alabama, LLC constitute a single employer—the entities share a common worksite (the Chicago headquarters) (Exhs. CX-1 & CX-2); Shoals facility management employees used the names of the two entities and their variations interchangeably and pay statements for its employees are issued through the Chicago headquarters, among other interrelated operations (Exhs. CX-5, RX-13, RX-15; No. 18- 0970, Exhs. RX-7, RX-8, RX-18); and the entities share at least a common corporate director of EHS, Fred Pearson, who is located at the Shoals facility but is responsible for FreightCar facilities in other cities (Tr. 369-70). Neither party argued or briefed the single employer test.

Formation Date: 2-8-2013

Reporting Address: 1200 Haley Dr., Cherokee AL 35616-5369

(Exh. CX-2). In its *Corporate Disclosure Statement*, Respondent stated FreightCar Alabama, LLC is one of several of its "[a]ffiliates and/or subsidiaries."

CSHO Rodriguez met with environmental health and safety (EHS) management employees Fred Pearson and Scott Tittle when he visited the Shoals facility on March 7 and 22 (Tr. 113, 118). He later called Pearson to clarify the correct employer name for the facility.

> I asked [Pearson] about . . . the legal name of the company because . . . I went through the . . . database and I found the Alabama Secretary, I found "FreightCar Alabama, LLC," and I also found "FreightCar America, Inc." So I remember specifically asking, look, I'm confused, which one it is. Could you get with your -- somebody in your legal department and just get back with me. He says, okay. And that's what happened. . . . I can't remember if I called him back the next day or -- or two days after or he called me back and he said, look, as far as I know, it's "FreightCar America, Inc." So that's how it was entered.

(Tr. 121)

CSHO Rodriguez also looked at the website of FreightCar America, Inc. (Tr. 125). Small print at the bottom of the website states, "All content is © 2018 FreightCar America, Inc." (Exh. CX-1) Under "Locations," the website lists five cities and the designated functions of their facilities for FreightCar America, Inc.:

Chicago: Headquarters

Muscle Shoals: Manufacturing

Roanoke: Manufacturing

Johnstown: Parts

Nebraska: Parts

(*Id.*).

The address for the Chicago headquarters of FreightCar America, Inc. is 2 North Riverside Plaza, Suite 1300, Chicago Ill. 60606, which is the same address listed for FreightCar Alabama, LLC on Alabama's Secretary of State website. The text for the Muscle Shoals facility states, "Opened in 2008 and located in the Shoals region of Alabama, this state-of-the-art production facility was designed to build a wide variety of railcar types. FreightCar commenced operations in February 2013, subleasing 25% of the plant from Navistar. In February 2018, FreightCar announced the acquisition of Navistar's assets and is now the sole tenant of the 2.2-million-square-foot facility." (*Id.*)

The *Employer's First Report of Injury* required by the State of Alabama was filed in the name of FreightCar America, Inc. The Employer Identification Number (EIN) used on that form is different from the EIN for FreightCar Alabama, LLC that Respondent provided to CSHO Rodriguez (Tr. 106, 364).

As part of his inspection, CSHO Rodriguez requested several documents from Respondent, including its OSHA 300 logs. (Tr. 100-02). Respondent provided CSHO Rodriguez with a copy of the facility's *OSHA's Form 300A, Summary of Work-Related Injuries and Illnesses* for the years 2015 through 2018. The front page of the summary for each year features a box in which the employer enters "Establishment Information." Written above the signature line is: "*Knowingly falsifying this document may result in a fine.* I certify that I have examined this document and that to the best of my knowledge the entries are true, accurate, and complete." (Exh. CX-5, p. 1) (emphasis in original) In 2015, the entry next to "Your establishment name," is "FREIGHTCAR AMERICA, INC." The bottom of the "Establishment Information" box is illegibly signed and dated 1-8-16 by someone who listed his or her title as "GEN MANAGER." (*Id.*)

For 2016, "Your establishment name" is entered as "FreightCar America – Shoals" by someone with the title "VP" (again with an illegible signature) and is dated 1/30/17 (Exh. CX-5, p. 5). Despite the Summary page for 2016 stating the establishment is "FreightCar America – Shoals," two of the log pages for 2016 list the establishment name as "FreightCar Alabama, LLC" (Exh. CX-5, pp. 6-7) For 2017, "Your establishment name" is "FreightCar America" (no "Inc."). It is signed illegibly by someone who lists his or her title as "VP Ops," and is dated 1/29/18 (Exh. CX-5, p. 8). There is no summary page with a signature line for 2018, but the single log page provided for that year lists the "Establishment name" as "FreightCar America." (Exh. CX-5; p. 14).

Respondent also provided CSHO Rodriguez with a copy of its *Incident Report* for the February 28, 2018, accident (Tr. 125-26). It bears the "FreightCar America" logo and is titled *FCA Shoals Incident Report.* The five handwritten witness statements are on forms headed "FreightCar America, Inc. Statement of Witness." (Exh. CX-7) The Shoal's facility PAD showing how to assemble the railcars on Line 4 is marked "FreightCar America." (Exh. CX-6).

CSHO Rodriguez interviewed the Team Lead, writing his questions and the Team Lead's answers on a standard OSHA witness statement form. The Team Lead signed and initialed the form. When asked for his employer's name, the Team Lead stated, "FreightCar America." (Exh.

CX-22) Respondent submitted the Team Lead's W-2 form for 2017, which states his employer is FreightCar Alabama, LLC and gives its address as 129 Industrial Park Rd., Johnston PA 15909 (Exh. RX-12). Respondent also submitted an earning statement from 2018 for the Team Lead, which states his employer is FreightCar Alabama, LLC but gives its address as 2 N Riverside PLZ, Ste 1300, Chicago IL 60606, the shared address for FreightCar America, Inc. (Exh. RX-13).

Respondent adduced several documents through Cris Stephenson, HR manager for the Shoals facility (Tr. 339), including three W-2 forms for employees naming their employer as FreightCar Alabama, LLC and giving the Johnstown, Pennsylvania address (Exhs. RX-14, RX-16, and RX-17). Exhibit RX-15 is an earning statement for an employee employed by FreightCar Alabama, LLC but showing the Chicago address. Respondent also adduced an NLRB *Stipulated Election Agreement* between the International Association of Sheet Metal Air Rail Transportation Workers (SMART) and "FreightCar Alabama, LLC, a Subsidiary of FreightCar America, Inc.," dated May 22, 2018, a month after the Secretary issued the Citation in this proceeding (Exh. RX-3). In Docket No. 18-0970, the Secretary submitted through CSHO Rodriguez a client service agreement between Lyons HR, Inc. (a temporary staffing agency) and "FreightCar America – Shoals Facility," dated April 5, 2017 (No. 18-0970, Exh. CX-5, p. 4; No. 18-0970, Tr. 58). Pay statements for Shoals facility employees show their employer to be FreightCar Alabama, LLC but are paid from the Chicago headquarters address of FreightCar America, Inc. (No. 18-0970, Exhs. RX-7, RX-8, RX-18).

CSHO Rodriguez was also the investigating CSHO in Docket No. 18-0970 and testified in that proceeding. During cross-examination, Respondent's counsel read from Rodriquez's deposition testimony (No. 18-0970, RX-23, p. 27).

> "QUESTION: Let's assume for a second that this individual was not -- was -- and then I say have -- was an employee of Lyons. No question about that. But that the facility you inspected was neither not operated by FreightCar America, Inc. and that the employees on-site were not directed by FreightCar America, Inc., that they were instead directed by Rodriguez Cars Inc.? ANSWER: Okay. QUESTION: Would you agree with me that the citation against FreightCar America, Inc., if that were true, should be dismissed? ANSWER: If we are assuming, yes. QUESTION: Right. We're assuming. ANSWER: Yes."

(No. 18-1970, Tr. 81-82)

CSHO Rodriguez later clarified his answer.

> Q.: So what's your understanding of assuming that for sake of answering those questions?

> CSHO Rodriguez: Like the words say, he's assuming. It's not the real thing. He's assuming.
>
> Q.: So for the sake of the assumption or hypothetical, you agree, but do you, in fact, agree with that FreightCar America, Inc. should be dismissed?
>
> . . .
>
> CSHO Rodriguez: No, it should not be dismissed.

(No. 18-0970, Tr. 132-33)

Respondent argues Rodriguez's deposition testimony "foreclosed contrary evidence," and constitutes an admission by the Secretary that the Citation should be dismissed in this proceeding and in No. 18-0970 (Respondent's brief, p. 14, n. 105). The Court disagrees. As is evident from the deposition excerpt read by Respondent's counsel, as well as CSHO Rodriguez's subsequent clarification, the question posed by Respondent's counsel was clearly hypothetical and Rodriguez's answer is not a binding admission by the Secretary.

Respondent's counsel read another excerpt from Rodriguez's deposition (No. 18-0970, RX-23, p. 82).

> "QUESTION: Okay. Are you aware that FreightCar Alabama, LLC operates the site -- the job site that you inspected in looking into [the injured employee's] accident? ANSWER: Please repeat the question? QUESTION: Are you aware FreightCar Alabama, LLC operates the job site and employs the employees on the site you inspected? ANSWER: Yes."

(No. 18-0970, Tr. 82)

Rodriguez's deposition was taken under Fed. R. Civ. P. 30(b)(6). Respondent interprets his statement as an admission by the Secretary. Rodriguez's statements are not dispositive of the issue since "'the Commission is not bound by the representations or interpretations of OSHA Compliance Officers." *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1128 (D.C. Cir. 2001) (citing *L.R. Wilson & Sons, Inc. v. Donovan*, 685 F.2d 664, 676 (D.C.Cir.1982))

Testimony of Corporate Director of EHS Fred Pearson

Fred Pearson testified he has worked for FreightCar Alabama, LLC since September 2017 as its corporate director of EHS (Tr. 44-45).[8] Pearson's demeanor on the stand was uncomfortable and evasive, and his testimony was notable for its vagueness, lapses in memory, and general lack

[8]In this proceeding, on February 8, 2019, Pearson testified his title was "corporate director of EHS." Five weeks later, on March 15, 2019, he testified in Docket No. 18-0970, without explanation, that his title was "senior director of manufacturing risk." (No. 18-0970, Tr. 180)

of awareness. He testified he believed there is no company name on the Shoal's facility gate when in fact there is a large sign that bears the name "FreightCar America." (Tr. 40; No. 18-0970, Tr. 153, 185). The visitor parking permits provided for the Shoals facility read: "Parking Permit, Visitor. Permit must be displayed at all times. If lost or stolen report to security. FreightCar America." When asked to read the permit aloud, however, Pearson substituted "Alabama" for "America" and had to be corrected by the Secretary's counsel (Tr. 43). He could not remember the company name displayed on his own business card and was reminded it was FreightCar America, Inc. when shown the card he had provided to CSHO Rodriguez during the OSHA inspection (Tr. 47-48). Despite being a corporate officer, Pearson did not know the name or location of FreightCar Alabama, LLC's president (Tr. 59). Pearson was similarly incurious about the relationship between FreightCar America, Inc. and FreightCar Alabama, LLC.

> Q.: [Y]ou're claiming that [FreightCar Alabama, LLC] is not associated with FreightCar America?
>
> Pearson: I don't know directly how it's set up to be associated with.
>
> Q.: But you know that it is associated with the FreightCar America, Chicago location?
>
> Pearson: Yes

(Tr. 56)[9]

Pearson refused to concede even incidental background information to the Secretary's counsel.

> Q.: [T]he Muscle Shoals facility has 2.2 million square feet; is that correct?
>
> Pearson: No.
>
> Q.: No?
>
> Pearson: No.
>
> Q.: How many square feet is it?
>
> Pearson: I don't know the Muscle Shoals facility.

[9] In Docket No. 18-0970, this exchange occurred:

> Q. Mr. Pearson, you don't deny that FreightCar Alabama, LLC is a fully owned site -- subsidiary of FreightCar America, Inc.?
>
> Pearson: I have absolutely no idea.

(No. 18-0970, Tr. 182)

Q.: Okay. Is the Cherokee, Alabama facility called the Shoals facility sometimes?

Pearson: It's called the Shoals facility.

Q.: Okay. Would that be in reference to the Muscle Shoals we're in right now?

Pearson: Not to my knowledge.

(Tr. 56)

Pearson acknowledged he had corporate responsibilities for FreightCar America, Inc. facilities other than the Shoals facility.

Q.: Where are you physically located?

Pearson: I'm officed out of the Shoals facility.

. . .

Q.: And you have some responsibility for other places. Can you remind us where those are?

Pearson: One is in Roanoke, Virginia, one is in Richland, Pennsylvania, one is in Grand Prairie, Nebraska and until recently, one was in Danville, Illinois.

. . .

Q.: How often [do you go] to Roanoke?

Pearson: Quite frequently.

Q.: Once every couple of months, once a month; how often?

Pearson: Once every couple of months.

(Tr. 369-70)

Pearson was vague and forgetful when testifying about the telephone conversation between him and CSHO Rodriguez regarding the proper legal name of the business entity operating the Shoals facility. The first day of the hearing took place less than a year after the February 28, 2018, accident occurred, an event in which Pearson, as corporate director of EHS, was directly involved. He met twice with CSHO Rodriguez during his visits and was in contact with him by telephone. He provided requested documents to OSHA. The Secretary issued the Citation in the name of FreightCar America, Inc. less than two months after the date of the accident. The significance of the correct identity of the actual employer of the affected employees was clear from the outset of this proceeding. Yet Pearson seemed to find the details of his participation in clarifying the issue inconsequential.

Q.: And [you] told the OSHA inspector that FreightCar America, Inc. was the legal name of the company, correct?

Pearson: I told him the parent was FreightCar America, Inc.

. . .

Q.: He actually asked you what the legal name of the company was?

. . .

Pearson: Yes.

Q.: Okay. And that was in a phone call, correct?

Pearson: I don't know.

Q.: Okay. So you recall that he did ask you what the legal name of the company was, but you don't know when that was, or do you?

Pearson: I don't -- I don't know the -- if it was on the phone or in person. I don't know.

. . .

Q.: Do you recall him asking what the legal name of the company was?

. . .

Pearson: Yeah, I vaguely remember. Yes.

Q.: And you had to actually check with somebody, right, before you could get back to him?

Pearson: I had to check with somebody to get the -- there was a number, a [Dun & Bradstreet Number] or something I had to get for him.

Q. Okay. And when you got back to him, you told him it was FreightCar America, Inc., right?

Pearson: I gave him the [Dun & Bradstreet Number] that he had asked for. I think it was a Dun & Bradstreet No. or something like that, he was looking for that, I had to go get from somebody else.

Q.: Okay. So was that a "yes or a no" as still whether when you got back to him, you told him the company's legal name was FreightCar America, Inc.?

Pearson: I don't recollect.

(Tr. 77-80)

He also professed to not "recollect" whether he placed the initial employer referral call to OSHA to notify the agency of a work-related accident (Tr. 368). Pearson did not deny he was the source of the information but engaged in a coy attempt to sidestep the question. Respondent's counsel showed him Exhibit CX-9, a copy of the referral report listing the referral source as "Fred Parson."

Q.: Does any of that information come from you?

Pearson: It appears to be from Fred Parson.

Q.: Is that you?

Pearson: No.

(Tr. 369)

Testimony and Statements of Employee Witnesses

The Team Lead identified "FreightCar America" as his employer when giving his signed statement to CSHO Rodriguez (Exh. CX-22). In Docket No. 18-0970, the employee injured in the accident that resulted in that proceeding testified as follows:

Q.: And who's your employer?

Employee: FreightCar Alabama, LLC.

Q.: Does it go by any other names? Do you know?

Employee: The name of -- well, the side and front [of the facility] says FreightCar America.

Q.: What do you know it as?

Employee: FreightCar America.

. . .

Q. Prior to this accident if someone were to ask you who you worked for, who would you say?

Employee: FreightCar America.

(No. 18-0970, Tr. 153)

A former employee of the Shoals facility also testified in Docket No. 18-0970 regarding his employer, requiring some prompting from Respondent's counsel.

Q.: Who do you work for[?]

Former Employee: FreightCar –

Q.: Or who have you worked for? Right now you're unemployed, but who have you worked for in the past?

Former Employee: FreightCar America.

Q.: FreightCar America or FreightCar Alabama?

Former Employee: FreightCar Alabama, LLC.

(No. 18-0970, Tr. 185)

Credibility Determination

CSHO Rodriguez testified he spoke with Pearson by telephone and asked him to verify the identity of the employer at the Shoals facility. A day or two later the men spoke again by telephone

and, according to CSHO Rodriguez, Pearson stated, "[A]s far as I know, it's 'FreightCar America, Inc.'" (Tr. 121) Pearson does not deny this statement but claims he does not recollect what he told CSHO Rodriguez.

The Court observed the demeanor of each witness and assessed the consistency and logic of his testimony. CSHO Rodriguez set out his step-by-step process as he attempted to determine the correct employer to cite. His search of the Alabama's Secretary of State website yielded a result indicating FreightCar Alabama, LLC shared a business address as well as a workplace address with FreightCar America, Inc. CSHO Rodriguez consulted with Pearson, his contact at the Shoals facility and a corporate officer, who informed him the correct employer was FreightCar America, Inc. In his testimony, CSHO Rodriguez manifested an earnest attempt to resolve a discrepancy by going directly to a management official who could be expected to have or be able to find the correct information. The Court finds CSHO Rodriguez to be credible on this subject.

On the other hand, Pearson was evasive, vague, and forgetful in his testimony. He displayed little knowledge of his employer's corporate structure and avoided answering questions by either talking about something else or pleading forgetfulness. His testimony appeared rehearsed or coached. The Court accords Pearson's testimony little weight. Furthermore, the Court finds it more likely than not that Pearson called in the referral report on March 1, 2018, to inform OSHA of the work-related accident. CSHO Rodriguez reasonably believed "Parson" was a typographical error for "Pearson." (Tr. 100). Pearson did not directly deny he called in the referral, but stated the information given in the telephone call (including the identification of FreightCar America, Inc. as the employer) "appear[ed] to be from Fred Parson." (Tr. 369) If there were an employee working at the Shoals facility with a name one vowel off from his own name, a witness's normal response would be to explain the situation. Pearson is a management official tasked with overseeing safety issues, and he was one of the two contact people dealing with OSHA. He or Scott Tittle (who called in the referral for the accident in Docket No. 18-0970) are the two people most likely to report a work-related accident to OSHA.

The Court finds CSHO Rodriguez consulted with Pearson in an attempt to identify the correct employer for the Shoals facility, and Pearson informed him it was FreightCar America, Inc.

Analysis

The Secretary assumes the *Darden* test applies here. The *Darden* Court looks primarily to "the hiring party's right to control the manner and means by which the product [was] accomplished." *Darden*, 503 U.S. at 323. Factors pertinent to that issue include:

> the skill required for the job, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits and the tax treatment of the hired party.

Id. at 323-24 (citing *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)).

The Eleventh Circuit, in which this case arises, has noted it has not explicitly affirmed the application of the *Darden* test to cases involving OSHA violations but has applied the test when the parties have not disputed its application.[10] Here, the Secretary argues FreightCar America, Inc. exercises sufficient control over the Shoals facility to meet the *Darden* requirements qualifying it as the employer of the facility's employees. Respondent neither disputes nor agrees with *Darden's* application—it does not address the test at all.[11]

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[10] The Eleventh Circuit has explained its approach to Commission cases in which the *Darden* test is applied:

> Three other circuits have affirmed the application of the *Darden* test to OSHA violations. *See Slingluff v. Occupational Safety & Health Review Comm'n*, 425 F.3d 861, 867-69 (10th Cir.2005); *IBP, Inc. v. Herman*, 144 F.3d 861, 865 (D.C.Cir.1998); *Loomis Cabinet Co. v. Occupational Safety and Health Review Comm'n*, 20 F.3d 938, 941-42 (9th Cir.1994). One circuit has ruled that *Darden's* reasoning is not directly applicable to the Act. *See Sec'y of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 402 (3d Cir.2007) ("[*Darden*] was decided under ERISA and has no impact on the question of whether the scope of the OSH Act is broad enough to cover workers who are not employees under the common law definition."). The parties here assume in their briefs that the *Darden* test applies. Therefore, we apply the *Darden* test here without deciding explicitly whether the Commission's interpretation of 29 U.S.C. § 652(6) is permissible.

Quinlan v. Sec'y, U.S. Dep't of Labor, 812 F.3d 832, 837 (11th Cir. 2016).

[11] Respondent argues the issue of whether it is the properly cited employer should be determined by the analysis set forth in *Hills Department Stores, Inc.,* No. 89-1807, 1990 WL 146495, at *2 (OSHRC Sept. 12, 1990). *Hills* is an unreviewed ALJ decision and, as such, is not precedent. "[I]t is well-settled that an unreviewed administrative law judge's decision has no precedential value. *See In re Cerro Copper Prods. Co.*, 752 F.2d 280, 284 (7th Cir. 1985) (holding that '[a]n unreviewed ALJ decision does not bind the OSHRC or the courts as precedent') (citations omitted)." *Elliot Constr. Corp.,* No. 07-1578, 2012 WL 3875594, at *4, n. 4 (OSHRC Aug. 28, 2012). The Court finds that, in addition to being nonprecedential, *Hills* is inapposite to this proceeding. In *Hills,* the ALJ granted respondent's motion to dismiss the citation on the grounds it had no employees and was not engaged in a business affecting commerce. The record established respondent was a holding company and the affected employees were

The *Darden* factors are not particularly apposite to this proceeding. This is not a typical *Darden* situation, where, for example, a construction contractor claims OSHA cited it incorrectly because a subcontractor at a multi-employer worksite was the actual employer of the affected employees. Weighing the *Darden* factors in this case would not illuminate the employment relationship. For most of the factors, there is either no evidence in the record, or the factor does not weigh in favor of one of the entities over the other (e.g., skill required for the job). A more helpful test is the economic realities test, which the Commission has held to be consistent with *Darden. See Don Davis*, No. 96-1378, 2001 WL 856241, at *4 (OSHRC July 30, 2001).

> To determine whether an employment relationship exists, the Commission has applied an "economic realities test." The test emphasizes the substance over the form of the relationship between the alleged employer and the workers. The Commission has considered a number of factors when making such a determination, including the following:
>
> 1) Whom do the workers consider their employer?
> 2) Who pays the workers' wages?
> 3) Who has the responsibility to control the workers?
> 4) Does the alleged employer have the power to control the workers?
> 5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?
> 6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
> 7) How are the workers' wages established?

Loomis Cabinet Co., No. 88-2012, 1992 WL 117116, at *2-3 (OSHRC May 20, 1992).

As with *Darden*, not all of these factors are relevant or ascertainable from the record. Questions #6 and #7 will not be considered for those reasons. The other factors are, however, more applicable to the circumstances of this case than are the *Darden* factors.

1. Whom do the workers consider their employer?

Pearson told CSHO Rodriguez the proper employer name for the Shoals facility was FreightCar America, Inc. His business card displayed that name (Tr. 47-48, 121). The Team Lead identified his employer as FreightCar America, Inc. in his witness statement to OSHA (Exh. CX-22). The injured employee in Docket No. 18-0970 testified he believed he worked for FreightCar America, Inc. at the time of his accident (No. 18-0970, Tr. 153). The Former Employee who

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employed by its subsidiary. The Court finds the economic realities test to be more applicable to the employment relationship issue here than is *Hills.*

testified in that proceeding reflexively responded he had worked for FreightCar America, Inc. when asked where he worked before being prompted by Respondent's counsel (No. 18-0970, Tr. 185).

The Court concludes the Shoals facility employees for whom evidence exists considered their employer to be FreightCar America, Inc. at the time of the OSHA inspection.[12]

2. Who pays the workers' wages?

The pay statements identify workers' employer as FreightCar Alabama, LLC, but payments are processed through the corporate headquarters of FreightCar America, Inc. in Chicago (No. 18-0970, Exhs. RX-7, RX-8, RX-18).

3 and 4. Who has the responsibility to control the workers? and Does the alleged employer have the power to control the workers?

The PAD for the railcar assembly is marked on each page with the words "FreightCar America," and provides instructions and specifications for the workers to follow (Exh. CX-6). The internal *Incident Report* is marked with "FreightCar America" and each employee statement page states, "FreightCar America, Inc. Statement of Witness" at the top (Exh. CX-7). These documents indicate FreightCar America, Inc. has the responsibility and power to control the workers.

5. Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?

Exhibit R-18 comprises five copies of the "Employee Warning and Disciplinary Report" for Welder #1. Each report is headed "FreightCar America." Four of the reports state "Description of Infraction: Reference FreightCar America Employee Handbook, page 3" (*Id.*) The report dated March 16, 2018, has "Last chance warning" written on it (*Id.* at p. 2). This indicates FreightCar America, Inc. had the power to fire the workers or modify the employment condition of the workers.

The client service agreement, dated April 5, 2017, with Lyons HR, Inc. (a temporary staffing agency) is with "FreightCar America – Shoals Facility," indicating FreightCar America, Inc. had the power to hire workers (No. 18-0970, Exh. CX-5, p. 4). The Court does not find the NLRB *Stipulated Election Agreement* between the SMART union and "FreightCar Alabama, LLC,

[12] The Court does not consider the testimony of employee witnesses at the proceedings that they worked for FreightCar Alabama, LLC to be probative. At that point they were aware identification of the employer was a central issue, and they appeared well prepared to identify their employer as FreightCar Alabama, including carefully enunciating the "LLC."

a Subsidiary of FreightCar America, Inc.," to be probative because it is dated May 22, 2018, three months after the accident and a month after the Secretary issued the Citation in this proceeding, when Respondent knew the identity of the Shoals facility employer was a central issue (Exh. RX-3).

Taken together, the economic realities test weighs in favor of finding FreightCar America, Inc. to be the employer of the Shoals facility. It is the entity the workers considered to be their employer, and its name, with or without the Inc., is prominently featured on documents originating from the Shoals facility. The only factor weighing in favor of finding FreightCar Alabama, LLC to be the employer is its name on the pay statements, but even that is undercut by the fact the address on the pay statements is that of FreightCar America, Inc.'s corporate headquarters.

Prior to the February 28, 2018, accident, hourly employees at the Shoals facility believed they worked for FreightCar America, Inc. Management employees at the facility were careless about using "FreightCar America, Inc." interchangeably with "FreightCar Alabama, LLC" or some other variation of the name. They were slipshod with the employer's name in their paperwork, including the OSHA 300 logs, where four variations of the name are used over the course of four years, with two variations appearing in 2016 (Exh. CX-5). FreightCar America, Inc. places its name physically on the Shoals facility. It touts the Shoals facility on its website. It enters into contracts for the Shoals facility in that name. The Court of Appeals for the First Circuit has found an employer's representations to the public could be considered as a factor in determining whether it is the properly cited employer. *A.C. Castle Construction Co. v. Acosta*, 882 F.3d 34, 41 (1st Cir. 2018).

The Court determines the Secretary properly cited FreightCar America, Inc. as the employer at the Shoals facility.

THE CITATION

The Secretary's Burden of Proof

> Section 5(a)(1) of the Act, known as the general duty clause, states that "[e]ach employer ... shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). To establish a violation of the general duty clause, the Secretary must prove: "(1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard." *S. J. Louis Constr. of Tex.*, 25 BNA OSHC 1892,

1894 (No. 12-1045, 2016).

Quick Transp. of Arkansas, LLC, No. 14-0844, 2019 WL 33717, at *2 (OSHRC March 27, 2019). "The Secretary also must prove that the employer 'knew, or with the exercise of reasonable diligence could have known, of the violative conditions.' *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1535 (No. 86-360, 1992) (consolidated)." *A.H. Sturgill Roofing, Inc.,* No. 13-0224, 2019 WL 1099857, at *2 (OSHRC Feb. 28, 2019).

Alleged Serious Violation of § 5(a)(1)

Item 1 of Citation No. 1 alleges,

> On or about 02/28/2018 – Assembly area, Line [4][13], Position 13, employee(s) were exposed to struck-by hazards from failure to ensure an end wall panel weighing approximately 400 pounds was securely attached to the floor sheet of the rail car during assembly.

The Secretary Failed to Establish the Cited Hazard Existed

It is clear a struck-by hazard existed that caused serious physical harm to two employees at the Shoals facility. The problem for the Secretary is the alleged violation description of the Citation does not describe a condition that created a struck-by hazard.

"[T]he Secretary must define the cited hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices over which the employer can reasonably be expected to exercise control." *Otis Elevator Co.,* No. 03-1344, 2007 WL 3088263, at *3 (OSHRC Sept. 27, 2007). "The Secretary must draft a citation 'with sufficient particularity to inform the employer of what he did wrong, i.e., to apprise reasonably the employer of the issues in controversy.' *Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256, 261 (3d Cir. 2002) (quoted case omitted); see 29 U.S.C. § 658(a) (requiring that citations "describe with particularity the nature of the violation")." *L & L Painting Co., Inc.*, No. 05-0050, 2008 WL 4542427, at *4 (OSHRC September 29, 2008).

[13] The Citation as written alleges the assembly area at issue is "Line H, Position 13," based on a misreading of CSHO Rodriguez's handwritten inspection notes, in which the "4" looks like an "H." (Tr. 170). The Court deems this a clerical error, recognized as such by both parties, and amends it *sua sponte* to conform with the record. "Amendments, including *sua sponte* amendments, are permissible where the amendment does not alter the essential factual allegations contained in the citation. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1517 (No. 91-373, 1993) (amendment proper because it does not alter citation's factual allegations), *A. L. Baumgarten Construction, Inc.*, 16 BNA OSHC 1995, 1997 (No. 92-1022, 1994) (*sua sponte* amendment after hearing permitted)." *Film Allman, LLC., Respondent.,* No. 14-1385, 2015 WL 6941313, at *43, n. 17 (OSHRC Sept. 28, 2015), *aff'd* 682 Fed. Appx. 860 (11th Cir. 2017) (unpublished).

Here, the Citation alleges Respondent's employees were exposed to a struck-by hazard caused by "failure to ensure an end wall panel . . . was securely attached to the floor sheet of the rail car during assembly." The record establishes, however, use of the fit up bolts to attach the end panels to the floor component of the railcar did not affect their structural stability, and omission of the fit up bolts did not create struck-by hazards. Every witness who testified regarding the fit up bolts affirmed this.

The Team Lead conceded eliminating fit up bolts from the assembly process created problems with alignment.

> Q. But you do know that taking the fit up bolts out of the procedure has made your job more difficult, correct?
>
> Team Lead: Yes.
>
> Q.: Because the walls would bow out or be misaligned?
>
> Team Lead: Just misaligned.
>
> Q.: Okay. And that was happening with more frequency since the fit up bolts had been removed from your procedure -- from your procedures for doing the side application?
>
> Team Lead: Yes.

(Tr. 331-32)

Although it was more difficult to align the end panels without the fit up bolts, the Team Lead testified they provided no structural support. The fit up bolts were small and were used only as a guide to align the end panels (Exh. RX-22; Tr. 297, 309-10).

> Q.: Do fit up bolts play any role whatsoever in keeping the end from falling down?
>
> Team Lead: None.

(Tr. 326)

> Q.: Would fit up bolts keep an end from falling if there's no crane attached and no pins in?
>
> Team Lead: Of course not.

(Tr. 328)

Welder #3 testified fit up bolts were used to ensure the end panel was "straight and parallel and even with the sides" of the railcar and "absolutely not" used to support the weight of the end panel (Tr. 386).

Q.: Does it matter whether this end is aligned as far as whether or not it's going to fall off as long as the pins are on?

Welder #3: No, it does not.

. . .

Q.: Now, before the pins are inserted, what is supporting the end? What's keeping it from falling down?

Welder #3: The crane is. The cranes is.

Q.: So the crane alone can support the end?

Welder #3: Yes, that's correct.

(Tr. 411)

CSHO Rodriguez also testified the fit up bolts did not support the end panels. He described his understanding of how the accident occurred. "Basically, what happened was that the crane was removed too early and then when the crane was removed the only thing that was holding the end wall was the safety pins that you see on CX-21. At that time, the -- the supervisor or the person in charge of the crew, told them to remove the pins because the wall needed to be aligned with the fit up bolts.[14] And when they -- the minute they removed the safety pins the wall fell down because the crane was not supporting the end wall." (Tr. 150-51) Rodriguez believed "that if the fit up bolts were in place, they wouldn't have to move that wall when they were doing the -- the welding." (Tr. 164)

CSHO Rodriguez acknowledged, however, that the fit up bolts did not support the end panels and Respondent's election to omit them did not cause the end panel to fall.

Q.: [T]hese fit up bolts do not hold the end to the sides, do they?

CSHO Rodriguez: They don't.

Q.: They also don't hold up the end piece, do they?

CSHO Rodriguez: They don't.

(Tr. 197)

Rodriguez identified the cause of the accident as being the removal of both the support mechanisms, the crane and the pins, from the end panel before it was welded to the side panels.

[T]he end wall fell because the crane was removed too early. The crane -- the crane was supporting . . . the end wall and they were in the process of welding the sides.

(Tr. 149)

[14]As discussed below, Respondent disputes the Secretary's contention the Team Lead instructed Welder #1 to remove a pin or pins.

Q.: If I take these pins out, the end of that car is going to fall down unless there is a crane attached; is that your understanding?

CSHO Rodriguez: Yes.

(Tr. 198)

Q.: And just to be clear so that we understand, the difference between what's in the citation and what really happened, am I correct, that this wall did not fall because the thing was not attached to the floor, it fell because there were no pins or crane attached to the top, correct?

CSHO Rodriguez: Yes.

Q.: And the exposure occurred when the wall fell. It was a falling-objects hazard, correct?

CSHO Rodriguez: Yes.

Q.: [A]m I correct, that this wall did not fall because the thing was not attached to the floor, it fell because there were no pins or crane attached to the top, correct?

CSHO Rodriguez: Yes.

(Tr. 210)

The Secretary argues, "Respondent presented no qualified testimony or evidence to support the assertion that the fit up bolts provided no support to the end wall." (Secretary's brief, p. 17) This is a straw man argument. Respondent does not have the burden of establishing the cited condition did not present a hazard. It is the Secretary's burden to establish a condition or activity in the workplace presented a hazard. The Secretary nowhere argues the fit up bolts provided support to the end walls and there is no evidence in the record that suggests they do.

The Secretary then pivots, stating, "[T]he issue is not whether the fit up bolts could hold up an end wall on their own, but whether the lack of secure attachment between the end wall and the floor—or anywhere else for that matter—during the assembly process exposed employees to the hazard of being struck by a wall." (Secretary's brief, p. 17) The record does not establish the absence of fit up bolts exposed employees to struck-by hazards. The "secure attachment" the Secretary refers to is use of the fit up bolts, which are not "secure" in the sense they will stabilize the end wall.

The Secretary states, "The [Team Lead] knew that the wall needed to be aligned and that the only way to do that was to remove the pins," and cites to page 311 of the transcript (Secretary's brief, p. 21). This is a misreading of the testimony.

Q.: In this case, the accident happened when the end wall wasn't aligned correctly, right? Before the accident the end wall wasn't aligned correctly, right?

> Team Lead: It was. We would use a crowbar to line up the holes.
> . . .
> Q.: When the accident -- before the accident happened, the end wall that fell was not aligned, correct?
> Team Lead: To me it was.
> Q.: Okay. So [Welder #1] was the one manually aligning side "A" wall, correct?
> Team Lead: Yes.
> Q.: Okay. Because the walls were bowed and they needed to be straightened, right?
> Team Lead: Yes.
> Q.: Okay. And to do that, to get it aligned he removed a pin, correct? . . . To get it unbowed, to get it in place where it had to be so you guys could finish this railcar, he removed a pin, right?
> Team Lead: Yes.

(Tr. 310-11)

The Team Lead first asserts his crew used a crowbar to align the end panels after they stopped using fit up bolts. When asked about the specific day of the accident, the Team Lead states Welder #1 removed the pin in that instance, not that his crew routinely did so or "that the only way to [align the panels] was to remove the pins." (Secretary's brief, p. 21) There is no evidence the crew members had to remove the pins to align the end panel. The record does not establish anyone knew of the pin removal except for the employee who did it, Welder #1.[15]

There is no causal connection between omitting use of the fit up bolts and the creation of a struck-by hazard from a falling end panel. Witnesses stated without dispute that the end panel will fall (thus creating a struck-by hazard) if the crane hook and both corner pins are removed at the same time before welding is completed. Removal of both those support systems before the welding

[15] CSHO Rodriguez interviewed Welder #1 at the at the Shoals facility. Welder #1 told him the Team Lead instructed him to remove a pin or pins to align the end panel (Tr. 177). When Rodriguez interviewed the Team Lead, he did not ask him if he directed Welder #1 to remove the pins (Tr. 226, 284-85). At the hearing, the Team Lead flatly denied he had instructed Welder #3 to remove the pins, and Welder #3, who was working next to Welder #1 the day of the accident, testified he did not hear that instruction (Tr. 280, 394-95). Welder #1 was responsible for the action that led to the accident. He accused the Team Leader of being responsible for instructing him to remove the pins, either because it was true or because he wanted to shift some of the blame. Each employee had a plausible reason for making self-serving statements. The Court finds the record evidence does not establish by a preponderance of the evidence the Team Lead instructed Welder #1 to remove the pins or otherwise knew of his actions. The Team Lead's testimony was not disputed at the hearing and was corroborated by the testimony of Welder #3. It is also undisputed Welder #1 and Welder #3 were working inside the railcar at the time of the accident, and the Team Lead was outside, at the other end of the 50-foot long railcar (Tr. 281, 394). He walked toward the end where the welders were working. As he rounded the corner, he saw the end panel falling, "and it happened in two or three seconds." (Tr. 281) When asked why Welder #1 removed the pins, the Team Lead stated, "I have no idea why he would do that." (Tr. 282)

is done is the intervening cause of the struck-by hazard's creation. The omission of the fit up bolts is a step removed from the creation of the hazard and is not a hazard in and of itself.

The Court finds the Secretary failed to establish Respondent's elimination of the use of the fit up bolts exposed employees to a struck-by hazard. The struck-by hazard was created by removing the crane and the corner pins at the same time, leaving the top-heavy end panel unsupported.

Item 1 is vacated.

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, alleging a serious violation of § 5(a)(1), is **VACATED,** and no penalty is assessed.

/s/
Sharon D. Calhoun
Administrative Law Judge
Washington, D.C.

Dated: September 27, 2019

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