**UNITED STATES OF AMERICA**
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>TUTOR PERINI BUILDING CORP., and its successors,<br><br>Respondent. | DOCKET NO. 18-1546 |

Appearances:

Tara Stearns, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, CA
For Complainant

Mark F. Wendorff, Esq., Nida & Romyn, P.C., Los Angeles, CA
For Respondent

Before: Administrative Law Judge Brian A. Duncan

## DECISION AND ORDER

### Procedural History

Respondent was hired to oversee the remodel and expansion of the Barona Casino and Resort. (Tr. 216-17). On March 16, 2018, toward the end of the project, a foreman for American Sheet Metal (ASM) fell from the roof of the newly-built expansion and died as a result of his injuries. (Tr. 59). Complainant was notified of the accident by the San Diego District Attorney's Office and sent Compliance Safety and Health Officer ("CSHO") Eric Christensen to conduct an accident investigation. (Tr. 59). During his inspection, CSHO Christensen noticed missing guardrails on two ends of a scaffold platform where workers could access the roof. (Tr. 60). Though unrelated to the cause of the ASM foreman's fall, CSHO Christensen determined the missing guardrails were a violation of 29 C.F.R. § 1926.451(g)(4)(i). After conducting interviews

with employees of the subcontractor responsible for the scaffold, CSHO Christensen concluded the guardrails were missing for approximately 10 days prior to his inspection. (Tr. 110-111). Thus, he determined Respondent, as general contractor, should have identified the condition and corrected the missing guardrails.

Based on CSHO Christensen's recommendation, Complainant issued a *Citation and Notification of Penalty*, alleging that Respondent, as controlling employer of the worksite, committed a serious violation of 29 C.F.R. § 1926.451(g)(4)(i) and proposed a penalty of $11,641. Respondent timely contested the *Citation*, which brought the matter before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the OSH Act.

A trial was held on October 3-4, 2019. The following individuals testified: (1) CSHO Eric Christensen; (2) Project Manager, Mike Maland; (3) Project Superintendent, Albert Ros; and (4) Respondent's Expert, Fred Wilton. Both parties timely submitted post-trial briefs for consideration.

## Jurisdiction & Stipulations

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 47). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

## Factual Background

While the fall from the roof prompted CSHO Christensen's investigation, the focus of this case is the missing guardrails located on the upper-level platforms on the east and west side of the scaffold. In order to assess whether Respondent should be held liable for those missing rails, the

Court must assess Respondent's role as the general contractor, the measures it took to ensure compliance with safety rules, and the evidentiary support for the conclusions drawn by Complainant as a result of CSHO Christensen's inspection.

Respondent's Role as General Contractor

Respondent did not have a substantial presence at the worksite. According to Maland, Respondent had six employees allocated to the Barona Casino project, including himself, Albert Ros, Scott Blais, and two laborers that cleaned up around the worksite.[1] (Tr. 161). Thus, Respondent's duties at the worksite were predominantly supervisory. (Tr. 161). Maland, as project manager, was primarily responsible for business matters, including change orders, contracts, negotiations, but he also helped Ros when he needed assistance. (Tr. 174). Ros, as superintendent, observed the work performed in the field, ensured compliance with the schedule, aided procurement, confirmed the work being performed, and addressed general safety matters. (Tr. 261-62). Both were at the worksite every day. (Tr. 162, 190). Blais, the regional safety director, performed what Respondent termed "periodic" inspections; though, the last documented inspection performed by Blais was in July 2017, which was roughly eight months before the accident.[2] (Tr. 98; Ex. C-13). According to Respondent, Blais had not performed a thorough inspection of the project since then because the project was coming to an end, had fewer contractors on site, and, thus, did not require the same level of oversight as the beginning of the project. (Tr. 186). Maland told CSHO Christensen, however, that Blais came to the worksite once every one to three months. (Tr. 96).

[1]. The evidence is unclear as to the names of all salaried employees on site.
[2]. Prior to the July 2017 inspection, the last documented inspection by Blais was in September 2016. (Tr. C-12). According to Maland, these inspections were no longer occurring because the project was approximately 85% complete. (Tr. 186).

The actual work of building and remodeling fell to the subcontractors. (Tr. 161). Respondent hired Brady SoCal to install, maintain, and inspect scaffolding.[3] (Tr. 169-70; Ex. C-17). Brady was required to provide access to the scaffold to the other subcontractors, including ASM, who need to access the various parts of the building. (Tr. 169-70; Ex. C-17). In turn, those subcontractors were required to sign an indemnity agreement and Scaffold Safe Work Permit with Brady, which set the requirements for accessing the scaffolding, including requiring the individual contractors to appoint a competent person capable of inspecting the scaffold prior to using it. (Tr. 108, 171; Ex. R-8, C-11). If a project required the scaffold to be modified, the subcontractor would have to request such changes through Brady. (Tr. 180). As a reflection of this level of control, Maland referred to Brady as the scaffold "general contractor". (Tr. 178).

Safety Program and Execution

According to Maland, Respondent retained the authority to enforce safety rules and correct hazards. (Tr. 98). Pursuant to Respondent's safety program, all subcontractor employees were required to take safety orientation training provided by Respondent. (Tr. 196; Ex. R-12 to R-15). Further, subcontractors were required to submit job site safety plans and daily reports to Respondent, indicating the work to be performed and any required inspections, including the scaffold. (Tr. 99, 100-101; Ex. C-7). As a precursor to subcontractor employees performing their own inspections, Brady appointed two competent persons, who were supposed to perform daily inspections of the entire scaffold before work began. (Tr. 205). Those inspections were documented on an inspection sheet and certified on a green tag, which was affixed to the lone

[3]. Brady was also hired to install fascia on the exterior of the building, as well as interior framing and drywall. (Tr. 169-70, 222). The actual installation of the scaffold was further subcontracted out to a company called A Step Above, which was Brady's scaffold erection company. (Tr. 106).

scaffold entrance and was supposed to indicate the inspection did not reveal any hazards. (Tr. 74-75; Ex. C-2A at 8).

As noted above, Ros testified he walked the site each day to ensure work was being performed according to schedule and to correct any safety problems he discovered. (Tr. 261). As part of those walks, Ros testified he would check the scaffold tag "most of the time every day." (Tr. 268). He and Maland relied on the tag because Brady had the requisite expertise and designated competent persons to conduct the required inspections. (Tr. 188). That said, Maland testified there were occasions on this job where he or Ros applied red tape to certain areas of the scaffold when they identified hazards to which workers could be exposed; though the context for such interventions was not entirely clear based on the testimony. (Tr. 188-89).

Subsequent investigation by CSHO Christensen revealed some deficiencies in the program's execution. First, it was discovered ASM had not signed its indemnity agreement with Brady, nor had it submitted its daily reports to Respondent since February 21, 2018. (Tr. 99-100, 172; Ex. C-7). According to Maland, ASM's failure to submit the indemnity agreement was the result of an oversight by Brady. (Tr. 172). As for the daily reports, though they were required to be filled out daily, Respondent did not always collect them on the same schedule. (Tr. 185). According to CSHO Christensen, ASM did not submit daily reports for the period between February 21st and March 13th; however, according to Maland, this was because ASM did not work during that period. (Tr. 183). ASM started working again on March 13th through the date of the accident but had not submitted reports to Respondent. (Tr. 184). This did not appear to be a concern because Maland also noted ASM had a good track record of submitting reports and documenting their inspections throughout the project. (Tr. 184). As it turned out, ASM had documented their inspections and daily reports. Upon further review, there was no indication of a

safety hazard or missing guardrails on the scaffold in those daily reports. (Ex. C-7). Second, after the accident, Respondent and CSHO Christensen discovered Brady's competent person had not inspected the upper level of the scaffold, which means his certification on the green tag was incomplete. (Tr. 75, 249). According to Ros, Respondent did not have any reason to question the quality of the inspections because there had been no reports of incomplete scaffolding or unsafe conditions, nor had there been any indication Brady failed to perform its duty as steward of the scaffold. (Tr. 272-73, 249-50).

CSHO Christensen's Inspection

CSHO Christensen testified he was dispatched to the Barona Casino after his office received a call from the San Diego District Attorney's Office, which reported a worker had fell from the scaffold and died as a result of his injuries. (Tr. 58). Upon arriving at the worksite, he was greeted at the entrance by a police officer and Maland. (Tr. 59). During this initial meeting, he was informed the worker had fallen from the roof of the casino expansion, not from the scaffold as originally reported. (Tr. 59). From this location, CSHO Christensen testified he could see the scaffolding through an opening in the fence. (Tr. 59). When asked what he was able to see, CSHO Christensen testified he was able to see the victim's body on the ground, as well as a missing guardrail along the top of the scaffold on the western elevation. (Tr. 60; Ex. C-2A at 1). According to workers at the site, as well as illustrated in a surveillance video, the western elevation was where the deceased ASM foreman had accessed the roof before he fell. (Tr. 61; Ex. C-4). When he inquired about who had been on the scaffold where the missing rail was identified, CSHO Christensen learned Brady employees had been installing Densglass, a drywall material, on the

exterior of the building on March 7-13, finishing a few days before the accident. (Tr. 66). He also learned ASM employees had been installing roof panels the week the accident occurred.[4] (Tr. 67).

During his tour of the scaffold, CSHO Christensen traveled to the level directly below the top tier of the west side of the platform and was able to take measurements of the area. (Tr. 76). He noted the platform with the missing guardrails was 29 feet above the ground, but also noted that it was only 76-inches above the next lowest level (the scaffold platform underneath). (Tr. 77; Ex. C-2A, p.12). He actually stood on the lower level scaffold underneath the missing guardrail to take his measurements. (Ex.C-2A, p.12). As he went back to ground level, CSHO Christensen observed the top tier of the eastern end of the scaffold, which was a mirror image of the western side, had a missing guardrail in the exact same place. (Tr. 80; Ex. C-2A at 20). In both instances, CSHO Christensen speculated that an employee falling from the top tier had the potential to fall all the way to the ground, because they might fall out the end at an angle away from the building, missing the lower level, or fall off the unprotected end and and roll underneath the midrail of the lower level. (Tr. 113, 148-51; Exs. C-2A, pp. 1, 2, 20).

Based on his conversations with unidentified Brady employees,[5] CSHO Christensen determined the guardrails had been missing since Brady started installing Densglass on March 7, 2018. According to the statements he gathered, the guardrails were missing while they were installing the Densglass. (Tr. 157). Under cross-examination, CSHO Christensen testified one of Brady's employees told him the rails were up, while the other said he could not recall. (Tr. 158). On redirect, CSHO Christensen clarified he had multiple interviews with these unidentified

[4]. On the day of the accident, however, only ASM's foreman accessed the roof; the other employees decided not to go up there because it had rained the day prior and the roof was wet. (Tr. 143). Instead, they opted to install window flashing. (Tr. 70).

[5]. None of the employees from Brady or ASM, who were alleged to have been exposed to the hazard, testified at trial. As will be discussed later, the Court questions the reliability of such testimony because they were not identified, nor were they employees of Respondent, which implicates hearsay concerns.

employees. In these subsequent discussions, which he characterized as more formal, CSHO Christensen testified both employees stated the guardrails were missing. (Tr. 158). During these discussions, one employee stated he was using fall protection, while the other employee said he did not. (Tr. 157). Complainant did not call any of the purportedly exposed employees to testify at trial. Complainant called only CSHO Christiansen to the stand, then rested. (Tr. 159).

Based on these observations and discussions, Complainant determined Respondent failed in its duty as a controlling employer to identify and correct hazards on the Barona Casino worksite, over which it exercised substantial control. Accordingly, Complainant issued a single-item, serious citation alleging a violation of 29 C.F.R. § 1926.451(g)(4)(i), which is discussed in detail below.

## Discussion

### Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.451(g)(4)(i): Guardrail systems were not installed along all open sides and ends of platforms.
>
> In the following instances, the north endge of the scaffold had an open side that did not have a standard guardrail affixed. Employees were exposed to fall hazards.
>
> a) Barona Casino Buffet Expansion Project – West scaffold elevation: At the north end of the upper scaffold platform, employees were exposed to 29 foot falls to the ground from the northwest corner.
> b) Barona Casino Buffet Expansion Project – East scaffold elevation: At the north end of the upper scaffold platform, employees were exposed to 29 foot falls to the ground from the northeast corner.

*Citation and Notification of Penalty* at 6.

The cited standard states:

> Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews.

29 C.F.R. § 1926.451(g)(4)(i).

To establish a *prima facie* violation of a specific standard promulgated under section 5(a)(2) of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

Respondent was a Controlling Employer

Although Complainant provided an exhaustive explanation as to Respondent's status as a controlling employer, there is no real dispute on this issue. Respondent admitted as much in its brief: "[I]t is undisputed that Respondent was a Controlling Employer with respect to the subject scaffolding, as Respondent had general oversight of the Project and had the power to demand that its subcontractor correct any deficiency in the scaffolding when it was detected." *Resp't Br.* at 5. *See Summit Contractors, Inc.*, 22 BNA OSHC 1777 (No. 03-1622, 2009) ("[A]n employer may be held responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite."' *McDevitt Street Bovis Inc.*, 19BNA OSHC1108, 1109 (No. 97-1918, 2000) (quoting *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994)). The crux of this case is whether it was reasonable to expect Respondent to "prevent or detect and abate" the missing guardrails identified by CSHO Christensen.[6] The Court finds Complainant did not prove Respondent, as a controlling employer, failed to exercise reasonable diligence in the prevention or detection of the missing guardrails.

[6]. Respondent did not have any employees who worked on the scaffold.

The Standard Applied

According to 29 C.F.R. § 1926.451(g)(1), "Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level." The platform of the scaffold where the guardrails were missing was located 76 inches above the next level of the scaffold below, and was located 29 feet above the ground. Complainant contends an employee could fall from the top platform of the scaffold onto the next lower level and continue to fall to the ground for a couple of reasons: (1) there were no toeboards to prevent the employee from rolling or falling off the side of the next level after he landed, and (2) depending on how the worker may have been oriented at the time he fell, he may not have fallen directly onto the walkway below. In response, Respondent argues (1) Complainant's assessment is based on speculation without supporting expert testimony, and (2) that the top platform is set back from the one below it, thereby limiting the fall exposure to only the level immediately below.

The distance between the top level of the scaffold and the level immediately below seems to be less than the distance threshold requiring the use of protection; however, the definition of the term "lower levels" encompasses Complainant application this case. "Lower levels means areas below the level where the employee is located and *to which an employee can fall*. Such areas include, but are not limited to, ground levels, floors, roofs, ramps, runways, excavations, pits, tanks, materials, water, and equipment." 29 C.F.R. § 1926.450(b) (emphasis added). Although 1926.451(g)(1) uses the singular "a lower level", the Court finds this is a reference to any one of the lower levels included within the definition cited above. *Id.* The plain language of the definition uses the word "can", which connotes possibility, as the measurement of where an employee may fall. While it is likely an employee would fall to the level immediately below the area with the

missing guardrail, Complainant articulated plausible ways in which it would be possible for an employee to fall to the ground from the top level of the scaffold.

The accident that precipitated the investigation leading to the present case is illustrative: the ASM foreman apparently fell from the roof onto the guardrail of the next lowest level and nonetheless continued to fall to the ground 29 feet below. (Tr. 78-79, 117; Ex. C-2A at 19). Notwithstanding its distance from the immediately adjacent level, a fall from the top level of the scaffolding to the ground was within the realm of possibility and thus not precluded from the application of the standard. Accordingly, the Court finds the standard applied to the working conditions.

The Terms of the Standard Were Violated

The standard requires guardrails "along all open sides and ends of platforms . . . ." 29 C.F.R. § 1926.451(g)(4)(i). Neither party disputes the top platforms on the east and west sides of the scaffold were missing a guardrail, and the evidence clearly illustrates this fact. (Ex. C-2A). Accordingly, the Court finds the terms of the standard were violated.

Respondent Did Not Have Constructive Knowledge of the Violation

The standard for knowledge is whether Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *See Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). If a supervisor is, or should be, aware of a hazardous condition, it is reasonable to charge the employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980). In the case of a controlling employer, however, the Commission has held the controlling employer's duty to exercise reasonable care is less than what is required of an employer whose own employees are exposed to a hazard. *See Summit Contractors*, 22 BNA OSHC 1777, 1781 (No. 03-1622, 2009) (citing OSHA Instruction

CPL 02-00-124, Multi-Employer Citation Policy § X.A.2 (Dec. 10, 1999) (hereinafter "MEP"). "This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired." *See* MEP § X.A.2.

There was no evidence that Respondent had actual knowledge of the two missing guardrails. Complainant contends the missing guardrails were open and obvious and that they had been missing for ten days prior to CSHO Christensen's inspection. Respondent argues Complainant's evidence in support of how long the guardrails were missing is unreliable, the missing guardrails were not in plain view from the normal path of Ros's daily walks through the worksite, and it reasonably relied on Brady to perform thorough competent person evaluations of the scaffold. Based on the evidence presented, the Court finds Complainant failed to present sufficient evidence to prove Respondent had constructive knowledge of the missing guardrails.

In evaluating whether Respondent could reasonably be expected to prevent or detect a violation, the Court must consider the "nature, location, and duration" of the condition. *See David Weekley Homes*, 19 BNA OSHC 1116, 1119 (No. 96-0898); *see also Suncor Energy (USA), Inc.*, 2019 WL 6564129 at *5 (No. 13-0900). The "nature" of the condition is simple: whether the violation at issue is something that could be detected by simple observation. *See Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1979) (affirming Commission's determination that general contractor did not fail to exercise reasonable diligence when it did not uncover a crack on the underside of the scaffold). The "location" of the violation is closely related to its nature: whether the violative condition is in a place where the employer in question would be in a position to observe it. *See David Weekley*, 19 BNA OSHC 1116 (noting the inconspicuous location of the condition in one item and the vantage point required to view the condition in another item); *Suncor*

*Energy*, 2019 WL 6564129 at *5 (condition inside a confined space, where Respondent's employees did not enter, was hidden from view both from inside space and from lower level within the space). Finally, with respect to its duration, a condition must exist long enough for an employer to have a chance to see it. *See Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127 (No. 92-0851, 1994) (upholding violation when condition existed "for months"); *Suncor*, 2019 WL 6564129 at *5 (vacating violation that only existed for three hours); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 819-20 (6th Cir. 1998) (general contractor liable for subcontractor's lack of fall protection where condition was in plain view and lasted for two weeks).[7]

At issue in this case are two missing guardrails, which were supposed to be affixed to the ends of a level of a scaffolding system. The nature of the condition, alone, did not require any expertise or specialized experience to diagnose; anyone can identify a missing guardrail. More problematic, however, is the location of the missing guardrails. The platforms in question were located at the top of the scaffold system, four tiers above the ground. (Ex. R-34 at 1). The top platforms were recessed from the main scaffold body, which made the guardrails more difficult to observe from within the construction site. (Tr. 274; Ex. C-2a at 3, 20, R-34 at 59). Some of the pictures introduced by CSHO Christensen used to illustrate the obviousness of the condition were either taken from a vantage point outside the construction site or in areas not typically traveled by Respondent. (Tr. 274-80; Ex. C-2A at 1, 26). The remainder of the multiple levels of scaffolding were apparently compliant, and this condition was not blatant or widespread. *Compare with McDevitt Street Bovis*, 19 BNA OSHC 1108 ("[T]he scaffold which was owned, erected, and maintained by CPD was not erected under the supervision and direction of a competent person, was not properly decked, and lacked cross-bracing, guardrails, and an access ladder.").

[7]. The Commission case law typically upholds violations when the conditions have existed for a "significant period of time." *See, e.g., McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000).

According to Ros, though he could not recall the last time he walked the scaffold, he indicated he had done so after it was initially built and at times thereafter when issues were called to his attention. (Tr. 296-97). During those visits to the scaffold, he testified he did not observe any missing rails. (Tr. 297). Otherwise, Respondent relied on Brady, who appointed two competent persons to perform an inspection at the start of each workday. (Tr. 249). Ros, in turn, checked the tag at the entrance to the scaffold nearly every day. (Tr. 267-68). The tag was supposed to be signed after the competent person performed their inspection and represented that the daily inspection had taken place. (Tr. 249-50; Ex. C-2A at 8). In addition to Brady's own competent persons, each subcontractor who needed to use the scaffold were also required to appoint their own competent persons to assess the scaffold prior to using it. Despite these individuals all (purportedly) performing scaffold inspections on a daily basis, not one reported missing guardrails directly to Respondent, nor did they indicate any issues in their Daily Take 5 reports. (Tr. 256-57).

Complicating matters further is the question of duration. Complainant contends the condition existed at least 10 days prior to CSHO Christensen's inspection. The only evidence proffered in support of this claim is CSHO Christensen's hearsay testimony,[8] wherein he recounted interviews with two unidentified Brady SoCal employees, who gave conflicting statements regarding the presence of the guardrails in question and whether they were wearing alternative fall protection. Initially, one worker told CSHO Christensen the guardrail at one end was there, while the other worker said he could not recall. (Tr. 158). In a follow-up interview, both unidentified workers allegedly told CSHO Christensen the guardrail was missing. (Tr. 158). One employee

[8]. The statements by CSHO Christensen are hearsay because they are out-of-court statements made by employees of Brady, not Respondent, offered to prove how long the guardrails were missing. *See* F.R.E. 801(c). Because the statements were not made by Respondent's own employees, they do not fall under the exception noted in *Regina Construction Company*, 15 BNA OSHC 1044 (No. 87-1309, 1991).

said he was wearing a harness while working in the area, while the other said he was not. (Tr. 157). As noted in the previous paragraph, no one reported this condition to Brady or Respondent. As noted earlier, neither of the employees was called to testify at trial. The Court also notes that CSHO Christiansen acknowledged on cross-examination at trial that he did not know when the missing rails were taken down, who took them down, or whether the missing guardrails were taken off/put back on at various times. (Tr. 140-141).

In *R.P Carbone*, the Sixth Circuit evaluated a CSHO's hearsay testimony on the topic of duration using a multi-factor analysis outlined by the Supreme Court. *See R.P. Carbone Constr. Co.*, 166 F.3d at 818-19 (citing *Richardson v. Perales,* 402 U.S. 389, 402–06, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971)). The Sixth Circuit stated that, in certain circumstances, hearsay testimony can constitute substantial evidence depending on consideration of the following factors:

> (1) the independence or possible bias of the declarant, (2) the type of hearsay material submitted, (3) whether the statements are signed and sworn to as opposed to anonymous, oral, or unsworn, (4) whether the statements are contradicted by direct testimony, (5) whether the declarant is available to testify and, if so, (6) whether the party objecting to the hearsay statements subpoenas the declarant, or whether the declarant is unavailable and no other evidence is available, (7) the credibility of the declarant if a witness, or of the witness testifying to the hearsay, and finally, (8) whether the hearsay is corroborated.

*See id.* (citations omitted).[9] In *Carbone*, the Sixth Circuit found the hearsay presented to the ALJ was properly relied upon as substantial evidence because: (1) the statements of the employees corroborated each other and were corroborated by their manager who said the employees did not know they needed fall protection while performing certain activities; and (2) those statements were also corroborated by an anonymous complaint filed with OSHA that the employees had been in violation of fall protection requirements for a significant period of time. *Id.*

[9]. This analysis was also relied upon by the 9th Circuit in *Calhoun v. Bailar,* 626 F.2d 145, 149 (9th Cir. 1980), which also cited the *Richardson v. Perales* case cited above.

In the present case, however, the Court finds the hearsay evidence offered by Complainant to be less reliable for the following reasons: (1) the statements were attributed to unidentified employees of another employer; (2) there is no evidence to suggest the workers providing the statements were unavailable; in fact, the employees actually exposed to the hazard were not called to testify; and (3) not only was there no independent corroboration regarding the duration of the condition, but the Brady employees' statements, which were only given to the CSHO, were initially inconsistent with each other and with subsequent statements given later in time. Further, there was very little context surrounding the statements to properly evaluate whether Brady's employees even saw the missing guardrails when they began work on March 7, or at some point thereafter; whether Brady's employees removed the guardrails at some point; how long Brady's employees worked on the upper level of the scaffold during the time it was installing Densglass to the exterior of the entire building; whether both individuals interviewed by CSHO Christensen worked on the upper platform, and if so, where on the platform. In light of the foregoing, the Court finds CSHO Christensen's hearsay statements to be an insufficient basis upon which to conclude the condition existed for a "substantial period of time". Complainant did not present persuasive or competent evidence to indicate how long the condition existed such that Respondent should have been aware of it.

In addition, the Court also finds Respondent, given its position as general contractor, exercised reasonable diligence in detecting hazardous conditions. Although it appears Respondent's safety director had not performed a documented inspection in the previous nine months, Maland attributed this to the fact that, at the time of CSHO Christensen's inspection, the job was 85% complete and thus did not require that kind of comprhnsive review. (Tr. 185). Further, Maland also testified Blais' visits to the site were periodic, occurring every one to three

months. (Tr. 96). While these visits were not documented, that does not mean they did not occur. Maland also testified they had no disciplinary issues warranting additional or more searching review of Brady as the scaffolding contractor. (Tr. 106, 152, 162). *See* MEP § X.E.3.d & e (discussing frequency of inspections based on phase of project and experience with "other employers", i.e., subcontractors). Independent of inspections performed by the safety director, Ros and Maland testified they walked the worksite daily and walked the scaffold when the need arose. (Tr. 189, 261-62, 287, 294). Maland testified he and Ros worked with Brady when they identified any issues with scaffolding, or when work on the interior of the building might impact the work on the scaffold. (Tr. 188-89).

Although Respondent exercised general control over the worksite as a whole, Brady exerted significant and substantial control over the scaffolding. Prior to using the scaffold, Brady required subcontractors to sign an Indemnity Agreement and Scaffold Safe Work Permit & Plan. (Tr. 245-47; Ex. R-8). As part of a subcontractor's agreement with Brady, the subcontractor was required to appoint its own competent person and conduct daily inspections of the scaffold, which the company was then required to submit to Brady daily. (Tr. 248; Ex. R-8). In other words, the scaffolding, depending on who was using it, was inspected multiple times in one day. As further indication of Brady's control—and one that reiterates the required paperwork—it also appears Brady posted a sign at the scaffold, which stated, "Permission to use this scaffold must be obtained in writing from Brady SoCal." (Ex. R-34 at 60).

**Conclusion**

Ultimately, the Court finds Complainant failed to prove, by a preponderance of the evidence, that Respondent failed to exercise reasonable diligence to discover the two missing guardrails on the top level of scaffolding. The platforms at issue were set back from the main body

of the scaffold, making the missing pieces of rail difficult to see depending on a person's ground location (for example, see Ex. C-2A, pp. 3, 6, 7, 20). Though they may have been more easily seen from a different vantage point, i.e., the roadway outside of the construction area, or other areas not typically used by Respondent during work activities. *See David Weekley*, 19 BNA OSHC 1116 (discussing vantage of CSHO approaching worksite from a block away and calling into question visibility of condition).

While Complainant questions whether checking the scaffold tag for evidence of an inspection was sufficient to fulfill Respondent's duty to prevent and detect hazardous conditions, this was not the only way Respondent verified Brady was performing its contracted job. Ros testified he walked the scaffold towards the beginning of the project when it was first built, and that he walked the scaffold on subsequent occasions to check on certain subcontractors. (Tr. 297). In some instances, this led to corrections being made, as testified to by Maland. However, as the project came closer to completion, there were fewer workers on site, far less work activity, and Respondent had nearly two years of experience working with and relying on Brady for scaffolding compliance. (Tr. 185-86). Complainant did not introduce any evidence to suggest Respondent's reliance on Brady's (or other subcontractors') competent persons was unreasonable. Notwithstanding multiple entries onto the scaffold, and at least one inspection of the scaffold per day, there were few, if any, reports of hazardous conditions, nor was there any other basis to call Brady's scaffolding assessments into question. While Respondent may not have performed on-scaffold inspections in the ten-day period leading up to the investigation in this case, such does not suggest Respondent failed in its duties to be reasonably diligent.

Finally, and perhaps most importantly, Complainant failed to convincingly show how long the condition existed. The testimony supporting Complainant's assertion that the condition existed

for at least 10 days is unreliable, premised on vague hearsay, which was inconsistent and uncorroborated by any other evidence save for the missing rails photographed on the day of the accident. Without reliable evidence of how long the condition existed, the Court cannot conclude that Respondent failed to exercise reasonable diligence in not detecting the condition. The Court finds Complainant failed to prove that Respondent, as a controlling employer, knew, or with the exercise of reasonable diligence, should have known of the violative condition. Accordingly, Citation 1, Item 1 will be VACATED.

**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1 is VACATED.

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/s/ Brian A. Duncan

Date: June 23, 2020
Denver, Colorado

**Judge Brian A. Duncan**
U.S. Occupational Safety and Health Review Commission