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

SECRETARY OF LABOR, Complainant, v. NDC CONSTRUCTION COMPANY, Respondent.	OSHRC DOCKET NO. 17-1689

APPEARANCES:

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Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Anthony Tilton, Esquire
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For Respondent

BEFORE:

Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §

659(c) (the Act). On April 5, 2017, OSHA's Compliance Safety and Health Officer (CO) Gerardo Ortiz,[1] and Assistant Area Director (AAD) Maveline Perez-Ramos,[2] inspected a residential construction site in Bradenton, Florida. (Tr. 24, 47). NDC Construction Company (NDC or Respondent) was the construction manager and general contractor at the site. (Tr. 24, 618). The inspection was opened because AAD Perez-Ramos had seen employees working without fall protection when she drove by the site several days before. (Tr. 155-56, 202-03).

OSHA issued a citation and notification of penalty (Citation) to NDC on September 1, 2017, for one serious violation. The violation alleged four instances of noncompliance with OSHA's construction fall protection standard with a proposed penalty of $8,873. (Ex. A, at 6).

NDC timely contested the Citation. (Tr. 26). A four-day trial was held in Tampa, Florida on July 19-20, 2018 and August 28-29, 2018. Five witnesses testified at the hearing: AAD Perez-Ramos; CO Ortiz; Charles Scott, project executive; [3] James Brumbaugh, project

[1] CO Ortiz has been an OSHA CO for 14 years, including 5 years in the 1980's and since 2008. He has conducted more than 50 OSHA inspections at construction sites, many involving residential fall protection. In between, he managed occupational safety and health matters at 10 manufacturing plants of the General Electric Company for five or six years and served as an Environmental Health and Safety Manager to the Eaton Cutler-Hammer Corporation. He also worked as an Environmental Health and Safety and Transportation Manager in Puerto Rico, a safety specialist at Progress Energy in Ocala, Florida, and an Environmental Health and Safety Manager at the Boeing Company. He was assigned to be the subject matter expert on fall protection at Boeing in Puget Sound. (Tr. 37-43). He earned a Bachelor of Science degree in Biology from Interamerican University of Puerto Rico in 1982, a Master's degree in Environmental Health from the University of Puerto Rico in 1986, and a Doctoral degree in Public Health from the University of Texas Health Science Center, Houston in 2014. (Tr. 41, 141).

[2] AAD Perez-Ramos has served as an OSHA AAD and Supervisory Safety Engineer since July 2014. Before that, she served as an OSHA safety engineer since December 2000. She has conducted more than 300 OSHA inspections, with about 50% relating to construction. In about 1999, she owned a safety consultant firm in Tampa, Florida. From about 1995 through 1999, she was a safety engineer for a general contractor construction company in Puerto Rico. From about 1992 through 1995, she was a compliance officer for the OSHA State Plan in Puerto Rico. She is a civil engineer. She received a Bachelor's degree from the University of Puerto Rico and Polytechnic University of Puerto Rico in 1992 and earned a Master's degree in Occupational and Safety and Health from Columbia Southern in Alabama in 2014. (Tr. 149-53, 172, 194-201).

[3] From 1984 through 2003, Mr. Scott worked at Modern Continental. His final project there was as senior project manager overseeing the Terminal E reconstruction at Logan Airport. He then worked as a Project Director at Environmental Interiors in Florida until joining NDC. In 1980 he earned an Associate Degree in Architectural Engineering from Vermont Technical College and in 1984 he earned a Bachelor of Science degree in Civil Engineering from Wentworth Institute in Boston. He has worked in the construction industry for 34 years. (Tr. 609-10).

superintendent;[4] and James A. Miller, project supervisor.[5] Post-hearing briefs were filed by both parties, as were reply briefs.[6]

The key issues in dispute are: a) whether NDC was a controlling employer under OSHA's Multi-Employer Citation Workplace Policy; b) what was NDC's duty for the safety of its subcontractors' and/or sub-subcontractor's employees; and c) whether NDC had knowledge of the cited hazardous conditions. As set forth below, the Court finds the Secretary has proven his prima facie case and the serious Citation is affirmed and a penalty of $7,986 is assessed by the Court for the following reasons.

Jurisdiction

Based upon the record, the Court finds Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5). (Tr. 25-26; Answer, at ¶¶1-3, at 1). The Court finds the Commission has jurisdiction over the parties and subject matter in this case.

Findings of Fact

Stipulated facts

The parties stipulated to the following facts. On and before April 5, 2017, Respondent was the general contractor of a construction project known as Preserve at the Villages located at 1015 Manatee Avenue East, Bradenton, Florida 34208 ("the jobsite", "worksite" or "work site").

[4] Mr. Brumbaugh has worked at NDC for four and one-half years. His duties include project scheduling, setting priorities for the work schedule, making sure subcontractors are in compliance with the plans and specifications, and coordination with the owner. He also was responsible for enforcing the safety rules at Exhibit "F", Safety Rules for Employees, OSHA 1926.59 Hazard, Communication (NDC Safety Plan), that were in subcontracts. Before that, he worked in a supervisory capacity in the construction industry since 1980 at JM Williams, Shamrock, Derma Tech and Centex. Before that, he worked as a carpenter and lead man. (Tr. 272-74, 443-44, 545-46, 583; Exs. 30, Ex. 57, at Exhibit "F").

[5] Prior to working at NDC, Mr. Miller worked in construction at PAR in Houston, Texas, for about 3 years, as a Lead Superintendent at Colonial in Alabama from about 2005 through 2008, and as a Project Manager/superintendent at Power Contracting at Bradenton, Florida. Overall, he has been employed for more than forty years in the construction industry. (Tr. 808-09). He has a degree in criminology from Miami Dade South. (Tr. 810).

[6] The trial transcript was 1,054 pages in length and the case involved many exhibits. (Tr. 1-1054). Post-trial briefs comprised 168 pages. (Sec'y Post Hrg. Br. and Reply Br., Respt's. Post-trial Br. and Reply Br.)

(Tr. 24; Ex. 19, ¶11, at 3). The following people were Respondent's employees at the job site on April 5, 2017: Project Superintendent, James Brumbaugh; Project Manager, Brando Fetzek;[7] Assistant Project Manager, Chris Barjuca; General Superintendent, Nick Kloepfer; and Supervisor, James A. Miller. (Tr. 24-25, 673; Ex. 19, ¶10, at 3). NDC had the authority to remove a subcontractor from the job site. (Tr. 25, 263).

NDC as the General Contractor at the Jobsite

NDC was a construction management firm with its principal place of business at 1001 3rd Avenue West, Bradenton, Florida 34205. (Tr. 26, 618). To oversee its construction projects, NDC employed project managers, superintendents, assistant project managers, assistant superintendents, and project engineers. (Tr. 615). NDC contracted with subcontractors to perform the labor at the construction sites. (Tr. 275, 618, 816-17).

NDC was hired by Preserve Bradenton LLC, (Owner) to manage the construction of the Preserve at the Villages project (Preserve project or Project). (Ex. 57, at 1). The Preserve project was a multi-family residential apartment complex of fourteen structures on about twelve to twenty acres. (Tr. 47, 233, 274-75, 279, 620-21, 814). There were 252 units ranging from 750 to 1200 square feet, each with a balcony or patio. About two-thirds of these units had elevated balconies. The third level units had patios that were 22-feet above the ground. The units were in seven multi-unit residential buildings that were three-story walkups with stairs and breezeways separating the units. (Tr. 94, 275, 367, 485, 621, 814). Additional buildings in the complex included the clubhouse, three garages, a maintenance facility, a mail kiosk building, and a dumpster compactor building. (Tr. 621).

NDC worked with developers and architects for cost estimates, prepared schematics and

[7] According to Mr. Brumbaugh, Messrs. Brumbaugh and Fetzek were "partners on the job site." He said that they reported to each other and coordinated everything they did together. (Tr. 278). Later on, he said that Brando Fetzek was his superior. (Tr. 444).

designs, maintained project budgets, selected subcontractors, developed subcontracts, and managed the construction process through scheduling, jobsite reviews, dispute resolution, and weekly subcontractor meetings. (Tr. 274-76, 611-12, 618-19). NDC had over 48 different subcontractor agreements, involving 30 to 40 subcontractors, to provide the construction work. NDC employees did not provide labor at the Project. (Tr. 275, 618-19). At the peak of construction, about 150 to 172 laborers, including plumbers, roofers, painters, masons, drywall workers, electricians, carpenters[8] and air conditioning technicians, worked at the jobsite. (Tr. 276, 300, 618-19, 817). NDC contracted with the Emerald Coast Structure Company (ECS), located in Pensacola, as the framing subcontractor based on the complete scope of work in its bid (including materials) and the recommendation of a large construction contractor. (Tr. 70, 291, 548, 620-26; Exs. 57, R).

NDC generally had three to five employees at the jobsite each day. (Tr. 820). NDC oversaw the subcontractors' work product and was ultimately responsible for the project's completion. (Tr. 616). NDC inspected the subcontractors' work for compliance with building plans, quality, cleanliness, and whether a subcontractor had enough materials and workers present to timely complete the job. (Tr. 813-16, 818-21, 870-71). The four instances alleged in the Citation pertain to A&D Berrios Framing Company (A&D Berrios or AD Berrios) and Cascade Renovation and Construction (CR Companies) workers who Respondent asserts were not its employees. (Ex. A, at 6, Ex. 22, ¶24, at 6).

Weekly Subcontractor Meetings

[8] Mr. Brumbaugh testified that there were 65 framing carpenters on site. (Tr. 589).

Each week, beginning August 31, 2016, NDC had a group meeting with subcontractors.[9] (Tr. 276; Exs. 59, S, at 1). Mr. Brumbaugh led the weekly meeting, which each subcontractor's supervisor or foreman was supposedly required to attend. (Tr. 276, 282, 812, 830). The meeting was every Tuesday morning at 9 a.m. and lasted about 45 minutes to an hour. (Tr. 282). The purpose of the meeting was to discuss issues at the worksite and the project's schedule for the next three weeks, so that everyone was equally informed. (Tr. 283).

Each meeting began with a review of the safety issues from the prior week, outstanding safety issues, and safety reminders. (Tr. 281-83, 421, 425, 826). Safety topics discussed included hard hats, fall protection, safety rails, and cleanliness. (Tr. 826). Mr. Brumbaugh requested subcontractors share information about any safety violations they observed at the subcontractor meetings, but "there was no consequence if somebody didn't tell me something." (Tr. 425-26, 440). NDC recorded minutes of the meetings and distributed them by email to all of the subcontractors. (Tr. 277-83).

The Meeting Minutes show that on November 1, 2016, "Another ECS item: Controlled access zones will be required for trash (framing debris) or construction activities ongoing from elevated decks. Plan needs to be submitted to NDC for approval ASAP. NDC has advised that ECS will be shut down from operations if plan is not implemented."[10] (Tr. 482-91, Ex. 25, at 1, Ex. 63, at 1). The Meeting Minutes show that on November 8, 2016, NDC warned its subcontractors of its authority to withhold pay application payments "until correction[s] are

[9] Neither ECS nor CR Companies attended the first subcontractors' meeting. (Ex. S). The first meeting ECS attended occurred on September 6, 2016. The Meeting Minutes for that meeting state: "All proper PPE will be enforced throughout the project." (Ex. S, at 7). There is a check mark to the right of CR Companies and Dan Gorecki on the attendance sheet for Subcontractor Meetings ## 23 and 24 that occurred on February 7 and 14, 2017. (Ex. X, at 5, 20). CR Companies' Steve Smith attended Meetings ## 29 and 30 held on March 21 and 28, 2017. (Ex. Y, at 14, 19).

[10] Mr. Miller testified that a controlled access zone occurs when a subcontractor wants to haul materials up to a roof using a forklift or crane. The subcontractor ropes off the area below using tape and has someone standing down on the ground to ensure that nobody walks in the roped off area to avoid being exposed to a fall hazard. (Tr. 873).

made" to items which it noted in deficiency logs. (Ex. U, at 26). The Meeting Minutes show that on November 29, 2016, "ECS has not implemented a Controlled Access Zone program/protocol. Formal notice of safety violation will be issued today as a follow up. … Tom Mair has committed to addressing both."[11] (Tr. 491-99, Ex. 26, at 1, 5). The Meeting Minutes show that on December 13, 2016, NDC advised ECS that "Tie-off of workers working along leading edges above 6' is also not acceptable." (Ex. W, at 15). The Meeting Minutes show that on December 20, 2016, "NDC has observed continued breaches in company safety policies of ECS. NDC will continue to issue written safety notices." (Tr. 516-17; Ex. W, at 1). The Meeting Minutes show that on January 10, 2017, "Reiterated Notice to Tighten up all Safety Rails throughout. … Safety Officers to coordinate all Safety Issues across trades." (Tr. 368-69; Ex. W, at 21). The Meeting Minutes show that on January 24, 2017, "Any safety railings that have been removed must be reinstalled." (Ex. W, at 5). The Meeting Minutes show that on January 31, 2017, "Safety Rails at doors openings need to be reinstalled. Observe Warning signs on doors. Fall Protection Harnesses are not being properly utilized." (Tr. 366-67, 532-33, 686-88, 785-87; Exs. 52, at 1, 66, at 1, W, at 10). The Meeting Minutes show that on February 7, 2017, "All crews instructed to tie-off on all patio work." (Ex. 66, at 1, Ex. X, at 1). The Meeting Minutes show that on February 21, 2017, "As Garcia crews move on to new Buildings, they will no longer be responsible for safety railings for buildings they are out of. Safety signs are posted on Blgs#1 & 2 – DANGER FALL PROTECTION REQUIRED. Post on other buildings as needed." (Tr. 375-76, 478-79; Ex. 67, at 1, Ex. X, at 6). The Meeting Minutes show that on February 28, 2017, "Superintendents requested to meet with their employeed (sic) to review proper PP&E." (Ex. 68, at 1, Ex. X, at 11). The Meeting Minutes show that on March 21, 2017, "Reminder for all subs to Attach Safety

[11] Mr. Brumbaugh testified that Mr. Mair (sometimes in the record spelled Maier) was ECS's on site supervisor. (Tr. 369, 578).

Rails as Needed." (Ex. Y, at 10). The Meeting Minutes show that on March 28, 2017, "Blg 5 & 6 need some safety rails re-attached."[12] (Tr. 380, Ex. 70, at 1, Ex. Y, at 15). The Meeting Minutes show that on April 4, 2017, "Reminder: Fall protection required on balconies w/o barriers." (Tr. 382; Ex. Z, at 1). The Meeting Minutes show that on April 11, 2017, "Extended discussion of OSHA Compliance … Safety Rails continue to be insufficient…. Reiterated that the burden of Safety Practices lie[s] squarely on Subcontractor. Yesterday NDC had 2 specific meetings with … Cascade Renovation regarding specific Safety Issues that were identified in the field."[13] (Tr. 382-86, 535-37; Ex. Z, at 5). The Meeting Minutes show that on April 18, 2017, "Reiterated that Safety Measures i.e. training, equipment, ladders, hoists, harnesses, hard hats, etc. are the responsibility of the Contractor, not NDC. Reminder to wear Fall Protection for all work performed on open patios." (Ex. Z, at 10).

NDC's relationship with its subcontractors

There was a standard contract (Subcontractor Agreement) between NDC and each subcontractor it originally hired. (Tr. 243, 302; Ex. 57; Ex. 19, at 1-2). The Agreement stated that the subcontractor had the "sole responsibility for the means and methods of performing the Work required under this Agreement" (Ex. 57, at Exhibit "A", ¶2.I., at 7), for preventing accidents to its own employees (Ex. 57, at Exhibit "A", ¶10.A., at 19), and was required to stop work when ordered by NDC until the condition was corrected in a satisfactory manner.[14] (Ex. 57, at Exhibit "A", ¶10.A., at 19). The Subcontractor Agreement also gave NDC the right to remove a second tier subcontractor contractor, like AD Berrios, from the job site if AD Berrios

[12] Mr. Brumbaugh testified that the Jobsite Inspection Checklist dated 3-28-17 showed that safety rails at Building Nos. 5 and 6 needed to be reattached. (Tr. 534-36; Exs. 54-55).
[13] Mr. Brumbaugh testified that a supervisor named Carlos [Rodriguez] represented CR Companies at the meeting. (Tr. 386; Ex. H).
[14] The Subcontractor Agreement stated: "When so ordered, subcontractor agrees to stop any part of the work which contractor deems unsafe until corrective measures satisfactory to contractor have been taken and further agrees to make no claim for damages growing out of such stoppages." (Tr. 701-02; Ex. 57, at Exhibit "A", ¶10.A., at 19).

did not follow a Safety Policy adopted by AD Berrios.[15] (Tr. 710-12; Ex. 57, at Exhibit "A", ¶ 10.A., at 20). Mr. Scott testified that NDC could stop an ECS employee working on a balcony from working if he was doing so unsafely. He also said that NDC could hire someone to replace missing safety rails if a subcontractor refused to fix the safety rails and NDC could charge the cost to the refusing subcontractor. (Tr. 702-10; Ex. 57, at Exhibit "A", ¶¶10.A., at 19-20, 13.D., at 25). Exhibit "F" to the Subcontractor Agreement required, among other things, a subcontractor to appoint a competent person, instruct workers in safe work practices, immediately correct unsafe work practices when discovered, provide personal protective equipment (PPE) to workers, conduct weekly "tool box" meetings with workers, and notify NDC of hazardous conditions created by other subcontractors. (Tr. 650, 656, 663-64; Ex. 57, at Exhibit "F", at 2-3). Mr. Brumbaugh testified that subcontractors provided PPE to their employees. (Tr. 292). The subcontractor meeting minutes for September 6 and 13, 2016 state that "All proper PPE will be enforced throughout project." (Tr. 299; Ex. S, at 7, 14).

Prior to beginning work at the site, each subcontractor had a preconstruction meeting with NDC to review the scope of work and the Agreement's requirements. (Tr. 302). This meeting included the subcontractor's onsite supervisor. (Tr. 302). Each subcontractor was required to provide a copy of its safety manual, which NDC kept in the worksite construction trailer.[16] (Tr. 650, 656, 659-60, 827; Exs. II-JJ). The subcontractor was required to provide

[15] The Subcontractor Agreement stated, "If Subcontractor, or any person who enters the job site under an employment or a direct or indirect contractual arrangement with Subcontractor, fails to enforce Safety Policy, Contractor shall have the right to bar such party from the job site. Any resulting damage (including damage for delay) will be the responsibility of subcontractor." (Tr. 711-12; Ex. 57, at Exhibit "A", ¶10.A., at 19-20).

[16] ECS's Safety Manual designated Tom Maier as ECS's Competent Person to implement its Fall Protection Plan. ECS's Safety Manual stated:

III. Enforcement
Constant awareness of and respect for fall hazards, and compliance with all safety rules are considered conditions of employment. The crew supervisor or foreman, as well as individuals in the Safety and Personnel Department, reserve the right to issue disciplinary warnings to employees, up to and including termination, for failure to follow the guidelines of this program. (emphasis in original) (Ex. JJ, at 8).

NDC with documentation of its weekly tool box talks. (Tr. 299-300).

When more than one subcontractor worked in a building, the subcontractors sometimes conducted a group safety walkthrough on a non-routine basis. (Tr. 360, 363). The subcontractors used a two or three-page checklist of safety issues that included, first aid, PPE, housekeeping, fire protection, material storage, tools, welding, electrical, ladders, scaffolds, handrails, excavation, and foreman's communication with the crew. (Tr. 358, 362-63; Ex. OO, Ex. 19, ¶7, at 2). The completed checklist was submitted to NDC. (Tr. 361-62; Ex. OO).

The Subcontractor Agreement between NDC and ECS, dated July 11, 2016, called for NDC to pay ECS $2,696,000 for wood framing and rough carpentry.[17] (Tr. 70, 291, 548, 620-26; Exs. 57, R). ECS built the framing, installed Tyvek house wrap, and installed all related framing hardware at the site.[18] (Tr. 622-23). NDC "bought basically a complete shell from Emerald Coast." (Tr. 623-24; Ex. WW, ¶1a., at 1-3). Mr. Brumbaugh testified that ECS had about 60 men working at the job site.[19] (Tr. 419-20). Mr. Brumbaugh testified that AD Berrios was a third-party working for ECS.[20] He testified that he was "not sure" if AD Berrios was "financially" a subcontractor to ECS. He was not sure that AD Berrios was a "subcontractor or not" to ECS, but he believed that they were. (Tr. 70, 293-94, 430, 669). NDC did not have a contract with AD Berrios. (Tr. 669-70). AD Berrios workers were alleged to have been working without fall protection in instances (a), (b), and (c) of the Citation.

On July 22, 2016, NDC hired CR Companies located outside of Chicago, Illinois, to install siding for the project at a cost close to two million dollars because it had completed

[17] ECS's Final Revised Proposal, dated June 16, 2016, to NDC for the project is at Exhibit FF. NDC purchased the trusses at $754,000 directly from A-1 Truss reducing ECS's proposal from $3,450,000 to $2,696,000. (Tr. 634-37; Ex. FF).
[18] Mr. Brumbaugh testified that NDC also contracted with the framing subcontractor to install safety rails. (Tr. 292-93, 582).
[19] Mr. Scott testified that AD Berrios had "60, 70 guys on the job site at times." (Tr. 797).
[20] Mr. Scott testified that AD Berrios was a second tier subcontractor to NDC and a third party working for ECS. (Tr. 712-15).

several large multi-family unit projects before and NDC found no issues with its work at a nearby project. (Tr. 96-97, 291, 620, 639-42; Ex. Q). CR Companies was recommended by the HardiPlank siding manufacturer and another material supplier. (Tr. 640-41). A CR Companies employee was alleged to have been working without fall protection in instance (d) of the Citation.

Key NDC Employees

Charles Scott

Since 2005, Charles Scott has been a Senior Vice President at NDC. He was the project executive for the Preserve project. (Tr. 608, 681-82). As a project executive, Mr. Scott worked with a project's owner from the initial design phase to turnover at the end of construction. (Tr. 611-13). At any given time, Mr. Scott was responsible for three or four NDC projects. (Tr. 613). For the Preserve project, Messrs. Brumbaugh and Fetzek reported directly to Mr. Scott. (Tr. 443, 615). Mr. Scott said that the project superintendent is "in charge of the site work on a day-to-day basis. Overseeing the subcontractors, making sure the subcontractors are working where they're supposed to be working." (Tr. 616). He said NDC is a construction manager, with no NDC tradesmen, and not a general contractor. (Tr. 618).

Mr. Scott visited the Preserve worksite one to three times a week. (Tr. 613-14). When there, he walked the site with the project manager and superintendent, discussed problems with them, and reviewed the project's progress. (Tr. 613-14). He did not identify safety issues, including fall protection, as an issue in the field that he would need to get involved in. (Tr. 614). He said that he, the project manager, and superintendent all do site walks. (Tr. 616). Mr. Scott said sometimes NDC did safety walks with subcontractors. (Tr. 722-23; Ex. 23, ¶25, at 3).

If Mr. Scott observed a safety issue on a site walk, he had Mr. Brumbaugh contact the subcontractor to have it corrected. (Tr. 617, 663-64). To Mr. Scott's knowledge the subcontractors corrected the safety issues when notified. (Tr. 617, 682, 775, 786). Mr. Scott would only get involved if a subcontractor refused to correct problems. (Tr. 775-76). He said, "It's the responsibility of the subcontractor to make sure that their people are working safely." (Tr. 656-58). He also said that "the subcontractor is responsible for monitoring their own safety, training their employees, making sure their employees have proper personal protective equipment." (Tr. 663-64).

Mr. Scott testified that NDC dealt with ECS's on-site superintendent and fulltime safety monitor Tom Mair on a daily basis in the field. He said ECS' owner, John Toth III, made "maybe four or five site visits." (Tr. 629-30, 637, 652-53, Ex. JJ, at 2). He said ECS used a framing subcontractor, AD Berrios, to supplement its own framers. He said NDC had no contractual relationship with AD Berrios. Mr. Scott said that every two weeks ECS and AD Berrios put together a pay application and NDC issued joint checks to both ECS and AD Berrios until midway through the project.[21] (Tr. 669-70, 714, 734, 796-97; Ex. 18, at 9-10, Ex. 22, ¶17, at 3, Ex. 23, ¶¶21-22, at 1-2, Ex. 57, at Exhibit "A", ¶4E, at 14). He said that NDC had direct contact with AD Berrios employee, Louis (Louis or Luis) Garcia.[22] Louis Garcia attended NDC's subcontractor coordination meetings along with Mr. Mair. If Mr. Mair could not attend, Louis Garcia participated, at times, in the meetings representing ECS. (Tr. 670-71). Mr. Scott testified that one of the first topics at the meetings was "to remind all subcontractors that … they're

[21] Respondent's Responses to Complainant's First Set of Interrogatories, Interrogatory No. 14, states from midway through the project "NDC issued checks directly to AD Berrios" and "payment were issued from NDC to its sub-subcontractor, AD Berrios, in order to facilitate the work, the subcontractor, Emerald Coast, failed to complete." (Ex. 18, at 9-10).

[22] Mr. Scott testified that Louis Garcia was an on-site foreman who worked for either ECS or AD Berrios. (Tr. 658-59, 773).

responsible for the safety of their employees." (Tr. 671). He stated NDC instructed subcontractors to use fall protection on all balconies above the first floor. (Tr. 688).

On January 19, 2017, Mr. Scott said he sent ECS a "Notice of Default" letter by certified mail and email pursuant to Article 13, Default and Termination, of their Subcontractor Agreement, that put ECS on notice that it had repeatedly failed to provide sufficient skilled workers and materials to Buildings 3 and 4.[23] (Tr. 631, 780-81; Ex. 57, at ¶13, at 23; Ex. 19, ¶4, at 2, Ex. 23, ¶24, at 2-3, Ex. 85). On January 23, 2017, ECS asked NDC in an email, "With Garcia framing as usual is this contract still in process or have you terminated it? (Ex. QQ, at 5). On January 24, 2017, NDC told ECS that it was not terminating their contract, but stated, "We are supplementing your contractual obligation." (Ex. QQ, at 5). Later that day, ECS's Mr. Toth sent an email to NDC's Mr. Scott that stated, in part: "Okay I'll play the game. By supplement do you mean you are now paying Garcia directly?" (Ex. QQ, at 4). In an email dated January 25, 2017 from Mr. Toth to Messrs. Fetzek and Brumbaugh, Mr. Toth stated, "It appears James [Brumbaugh] has told Tom [Mair] not to show up tomorrow [January 26, 2017]." (Ex. QQ, at 3). In an email response later that day, Mr. Scott told ECS their contract had not been terminated, but that NDC was supplementing ECS's work force and would be paying ECS's subcontractors and vendors directly. (Ex. QQ, at 3).

Mr. Scott testified that he was aware of some safety and health issues with regard to ECS, but understood they were taken care of.[24] He agreed that NDC issued nine or more fall protection

[23] Mr. Scott said he told ECS's Mr. Toth a few days later that NDC had not terminated ECS and that AD Berrios was going to do the remaining work on Buildings 3 and 4. (Tr. 780-81; Ex. 23, ¶24, at 2-3, Ex. QQ, at 2-5). Mr. Scott testified and denied that NDC hired ECS' subcontractor, AD Berrios, out from under ECS. (Tr. 781). Respondent's Responses to Complainant's Second Requests for Admissions states, in part, "Emerald Coast's work was supplemented via executed change orders and back-charges resulting from Emerald Coast's ongoing and repeated failure to supply enough skilled labor at the Jobsite." (Ex. 23, ¶24, at 2-3).

[24] Mr. Scott testified:
Q If ECS's workers weren't using fall protection, NDC would know?
A If we saw them not using fall protection, we notified them.
Q So the answer to my question is yes, then?
A Yes.

violations to ECS and that he was aware of them.[25] (Tr. 683, 753-63, 770, 782). Mr. Scott said NDC would not do anything more than just notify ECS of unsafe fall hazard violations as long as ECS continued to correct the reported fall hazard violations. (Tr. 753-63). He said "[t]here was no discipline" by NDC against anyone for a worker not wearing fall protection. (Tr. 774). He recalled seeing some emails where Mr. Toth said, "please remove these two men from the job site." Mr. Scott stated employees that worked without fall protection "should be released by their employer." (Tr. 684-85). He said that NDC did not terminate ECS for cause "[b]ecause they would correct the issue right away." He also said that "it's very difficult to terminate a subcontractor" for cause because it would "Probably be converted to convenience" and ECS would have received an equitable adjustment of revenue, profit and overhead. (Tr. 664-68, 785). Mr. Scott testified that he could not fire a subcontractor's employee; but agreed NDC had the right to bar workers from the job site who were not following safety rules. (Tr. 685-86, 711-12). He said NDC could terminate any NDC employee, including Mr. Brumbaugh, if the employee "was not using fall protection and they put themselves in an imminent life threatening danger situation." Mr. Scott further stated that NDC would notify the owner, or a superintendent, of ECS and have them deal with a worker who violated safety rules "by removing him from the job site."[26] (Tr. 685, 699, 719; Ex. 57, at Exhibit "F", at ¶41, at 8). Mr. Scott stated NDC had the authority to correct safety violations itself or require others to correct them.[27] (Tr. 749-52).

(Tr. 769).

[25] The record shows that NDC notified ECS of fall protection violations on, at least, November 29, 2016, December 6, 2016, December 7, 2016, December 12, 2016, December 13, 2016, January 9, 2017, January 10, 2017, January 20, 2017, January 30, 2017, January 31, 2017, and February 7, 2017; a period of about two months and one week. (Exs. 26-27, 30, 32, 35, 38, 41-42, 47, 51-52, 55, GG).

[26] The Sub-contractor Agreement between NDC and ECS included Exhibit "F", NDC Safety Plan, that stated: "41. Willful Violation of these or other Safety Rules of the Project will be cause for Dismissal." (Tr. 719; Ex. 57, at Exhibit "F", ¶41, at 8). Mr. Scott said that he was unaware of any willful violation of safety rules on the project. (Tr. 794).

[27] Mr. Scott's testimony contradicts Respondent's response to Interrogatory No. 24, NDC's Answers to Complainant's Second Set of Interrogatories, that states: "Respondent was not an employer who had general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them." (Tr. 731, 751-52; Ex. 22, ¶ 24, at 6). Mr. Scott was one of several NDC representatives that

Mr. Scott testified that CO Ortiz made him aware that employees of CR Companies were working without fall protection on April 5, 2017. He recalled seeing at least one photograph on either April 5 or April 7, 2017. (Tr. 779). Mr. Scott testified that NDC made sure CR Companies followed the CR Companies rules set forth in its "Accident Prevention and Safety Program for CR Companies Inc.", but he could not say if NDC made sure CR Companies implemented every single one of these rules. (Tr. 777-79, 801-02; Ex. II). CR Companies safety manual called for an "immediate one-day suspension" for an employee who violated its fall protection policy a second time. Mr. Scott said he did not know whether CR Companies suspended anybody. (Tr. 777-78; Ex. II, at 10).

Mr. Scott testified that ECS "was doing a good job" and despite having [at least] nine reported fall protection violations in eight months ECS was properly supervising its workers. (Tr. 769-70). He said that both ECS and CR Companies finished the project. (Tr. 629, 643). Mr. Scott testified that he was unaware of any illnesses, injuries or fatalities at the Preserves project. (Tr. 680).

James Brumbaugh

Mr. Brumbaugh was the onsite project superintendent at the Preserve project from June 2016 through June 2017. (Tr. 272, 278, 399). He did not have the authority to terminate a subcontractor. (Tr. 421). Each day, Mr. Brumbaugh either walked or drove a golf cart around the entire 12 to 20-acre Preserve worksite. (Tr. 276, 279, 368, 374-75, 412-13). This daily site review occurred at various times of day and lasted from 15 minutes to several hours. (Tr. 279, 413). During his daily site review, he verified compliance with work plans and measurements, observed the size of the work crews, progress of scheduled priorities, and building placement. (Tr. 279-80). If Mr. Brumbaugh saw an unsafe condition or noncompliance with a safety policy,

certified that NDC's responses were accurate to the best of his knowledge. (Tr. 729-31).

he immediately called the supervisor or foreman to correct the unsafe condition; at times, he would also text a picture of the condition. He said NDC never tried to ascertain the name of anyone who committed a safety violation. (Tr. 450-51). He did not attempt to see if every worker had fall protection every day. He admitted that he observed AD Berrios employees working on balconies and not wearing harnesses. He did not communicate directly with subcontractor, non-supervisory, employees about safety. He never told a subcontractor employee to use fall protection. He never asked a subcontractor employee if the employee had been provided a harness or had fall protection equipment. He said, he and NDC did not perform safety inspections since NDC was a construction manager. Mr. Brumbaugh said, "We're not in charge of safety."[28] He said they "pointed out something to subcontractors." (Tr. 280-81, 401, 405-09, 414, 440). Neither he nor Mr. Scott ever checked about the safety history with OSHA of any NDC subcontractor, including ECS, CR Companies, and AD Berrios. (Tr. 410-11, 764-67). Mr. Brumbaugh said he was always able to contact the supervisor of a subcontractor's employee who he had observed violating a safety rule within five minutes. (Tr. 450). Mr. Brumbaugh, or to his knowledge, NDC, never asked a subcontractor, including ECS and CR Companies, to take disciplinary action against one of their employees. (Tr. 451-52). He never issued a stand down from work order to ECS relating to fall protection. (Tr. 533-34). Mr. Brumbaugh had not heard that NDC had a safety tracking system to track safety occurrences. (Tr. 453).

In addition to the telephone call, he sometimes emailed a written Notice of Safety Violation to the subcontractor's management. (Tr. 296, 415-16, 448; Ex. W, at 26). He did not send a written Notice of Safety Violation or keep a record when a safety issue was promptly resolved by just a telephone call. (Tr. 414-19). He does not know how many safety violations ECS committed at the job site. (Tr. 419).

[28] "NDC does not contend it was a site safety police force." (Resp't. Post-Trial Br., at 27).

During the year that he worked at the project, he estimated that he brought safety issues to the attention of subcontractors about a half a dozen times, including a few times where he found balcony guard rails missing. Mr. Brumbaugh said he sent out about half a dozen written Notices of Safety Violations. (Tr. 296-97, 418). He said each time he notified a subcontractor about a safety issue, he believed it was corrected. (Tr. 281, 444-45). For fall protection issues, Mr. Brumbaugh testified that abatement meant that either fall protection equipment was used or the employee simply came down from the balcony and nothing more. (Tr. 435-36, 453-55).

On November 29, 2016, NDC emailed a Notice of Safety Violation signed by Messrs. Brumbaugh and Fetzek to ECS addressed to Mr. Toth.[29] The Reason for the Notice states: "**This notice is to make you aware of safety issues that are presently Occurring on the project.** 24 hour notice of safety violations."[30] (emphasis in original). The Notice stated that the "**LOCATION OF YOUR PROBLEM(S)**: Controlled Access Zone at buildings. (emphasis in original). The Notice further stated:

> Specifically related to Controlled Access Zone safety of all workers. NDC has now for the 4th week requested that ECS comply with unconditional effort of your company safety manual. To date, your firm continues to remove trash and load materials without installation of tape, barricades or other means of protection for workers from falling debris.
> As set forth in section INSTALLATION OF ROOF TRUSSES, specifically states a monitor will be present when on top of walls and installing rafters/trusses. Your firm installs the 2x4 post for rails on the exterior walls during erection of walls but does not install the rails until after completion of decking. Something needs to be done to protect them during the sheeting process. Additionally, as workers access patios beyond the double rails at the doorway, they need to be tied off.
> … **NOTE: ALL VIOLATIONS MUST BE ADDRESSED AND RESOLVED IMMEDIATELY** (emphasis in original).

[29] Mr. Brumbaugh testified he did not recall speaking with Mr. Toth about the reported safety violation before sending out the notice. (Tr. 496; Ex. 26, at 6). NDC waited 28 days to issue the notice after ordering ECS to implement its Controlled Access Zone plan. (Tr. 488-92). In its Responses to Complainant's First Request for Admissions, Respondent stated that it "[d]enied that Respondent issued safety notices for violations of NDC rules. Such rules were issued for perceived violations of OSHA standards." (Ex. 19, ¶16, at 3-4).

[30] Mr. Brumbaugh testified that meant ECS had 24 hours to correct the safety violations. (Tr. 417, 495; Ex. 30). Mr. Scott said he was not aware that NDC's Notice of Safety Violation gave subcontractors 24 hours to correct a reported safety violation. (Tr. 758-59).

(Tr. 491-99; Ex. 19, ¶16, at 3-4, Ex. 26, at 1, 6, Ex. JJ, at 4).

On December 6, 2016, NDC emailed a Notice of Safety Violation signed by Mr. Brumbaugh to ECS addressed to Mr. Toth. The Reason for the Notice states: "**This notice is to make you aware of safety issues that are presently Occurring on the project.** 24 hour notice of safety violations 2nd notice of fall protection life safety issues"[31] (emphasis in original). The Notice stated that the "**LOCATION OF YOUR PROBLEM(S)**: Fall Protection (emphasis in original). The Notice further stated:

> Specifically related to Fall Protection. Yesterday, your team was escorted around site and in excess of 12 different balcony and breezeway openings were left with no handrails. As of this morning, several areas remain unsafe. NDC has daily pointed out areas of fall protection and now demands immediate abatement of all life safety issues and your firm is to maintain a full time safety personnel to mitigate ongoing issues.
>
> … **NOTE: ALL VIOLATIONS MUST BE ADDRESSED AND RESOLVED IMMEDIATELY** (emphasis in original).
> (Tr. 499-504; Ex. 19, ¶6, at 2, ¶17, at 4, Ex. 27).

On December 7, 2016, NDC emailed a Notice of Safety Violation signed by Mr. Brumbaugh to ECS addressed to Mr. Toth. The Reason for the Notice states: "**This notice is to make you aware of safety issues that are presently Occurring on the project.** 24 hour notice of safety violations Continuing notice of fall protection life safety issues" (emphasis in original). The Notice stated that the "**LOCATION OF YOUR PROBLEM(S)**: Fall Protection (emphasis in original). The Notice further stated:

> Specifically related to Fall Protection. Today your firm has 2 men working out of a trash box 35' in the air lifted by a lull. The box is not OSHA approved and neither of your employees are harnessed. Stop this unsafe practice immediately. Tom has been made aware. To further the insult, there is a boom lift at building 1 not being used.
>
> … **NOTE: ALL VIOLATIONS MUST BE ADDRESSED AND RESOLVED IMMEDIATELY** (emphasis in original).

[31] Mr. Brumbaugh testified that there was a previous notice of fall protection/life safety issues issued to ECS. (Tr. 501). He said when he issued the December 6, 2016 Notice of Safety Violation all of ECS's fall protection violations had not been abated. (Tr. 501).

(Tr. 504-07; Ex. 30).

On December 12, 2016, NDC's Messrs. Brumbaugh, Fetzek and Barjuca, attended a Weekly Coordination Meeting with Messrs. Louis Garcia and Tom Mair. Louis Garcia is identified with ECS and as a "(Sub Sub)." Mr. Mair is identified with ECS. A Jobsite Inspection Checklist dated December 12, 2016 is attached to the summary of the meeting. An "X" appears under the "No" column for "B. Personal Protective Equipment 5. Safety harnesses and lanyards worn for fall protection?"[32] "X"s also appear under the "No" column for "K Handrails and Hole Covers 1. Perimeters and drop-offs protected by rails or cables?[33] and 2. Railings sturdy, continuous, and have midrails?" (Tr. 361-63, 507-08; Ex. V, at 11, 13-17, Ex. OO, at 1-3).

On December 13, 2016, Mr. Brumbaugh sent an email to Messrs. Toth, Mair and Fetzek, Subject: Fall Protection, along with a photograph, that stated "This is your idea of fall protection 37 feet down to ground." Mr. Brumbaugh took the photograph shown at Exhibits 33 (in color) and 35, at 2 (in black and white). He said the photograph "depicted a man is up on – setting the roof trusses on a tower." He admitted that the photograph showed a fall protection violation. (Tr. 508-12; Exs. 33, 35). Mr. Brumbaugh said it was ECS's responsibility to address the issue with their employees.[34] (Tr. 512, 572-76). He said that he "dealt with them [ECS] every day all day." (Tr. 574).

On December 15, 2016, Mr. Brumbaugh sent an email to Messrs. Jose Garcia,[35] Toth, and Mair with a cc to Mr. Fetzek, Subject: Preserve Safety on going violations, that stated:

> Gentlemen, your firm has not turned in a safety meeting [weekly report] since 12/01/16, if ECS/Garcia were doing safety as required weekly, I believe that the communication would get out there. NDC requires weekly safety tool box meeting by all subcontractors. With

[32] "N/A NOTE 1" also appears under the Comments column. (Ex. Y, at 15). Mr. Brumbaugh said he did not investigate whether or not the subcontractors identified anyone not wearing harnesses or lanyards. (Tr. 508).
[33] "Building 1,2, 7 NOTE 4" also appears under the Comments column. (Ex. V, at 17).
[34] Mr. Scott testified that he would expect Mr. Brumbaugh to direct the worker to get off the trusses. (Tr. 760-61)
[35] Mr. Brumbaugh testified that Jose Garcia was an ECS supervisor and Jose and Louis Garcia were brothers. (Tr. 577).

> that said, we are continuing to encounter repeat violations and a complete lack of control for safety by all of the framing crews. You have received several notices and pictures of these repeat violations as well as weekly subcontractor meeting minutes and the report from our team safety walk this week.
> John/Tom/Garcia Builders, we need to get the communication out to the workers.
> (Tr. 513-16, 578; Ex. 38).

Mr. Brumbaugh testified that up to December 15, 2016, ECS was acting reasonably in terms safety because it had the largest number of men on the job site with different crews coming in and out. (Tr. 516).

On January 9, 2017, NDC emailed a Notice of Safety Violation written and signed by Mr. Brumbaugh to ECS addressed to Messrs. Toth, Jose Garcia[36] and Tom Mair.[37] The Reason for the Notice states: "**This notice is to make you aware of safety issues that are presently Occurring on the project.** 24 hour notice of safety violations 2nd Notice of fall protection life safety issues." (emphasis in original). The Notice stated that the "**LOCATION OF YOUR PROBLEM(S)**: Fall Protection, safety rails at opening, failure to use PPE fall protection." (emphasis in original). The Notice further stated:

> Specifically related to Fall Protection. Yesterday, your team was escorted around the site and in excess of 12 different balcony and breezeway openings were left with no handrails. As of this morning, several areas remain unsafe. NDC has daily pointed out areas of fall protection and now demands immediate abatement of all life safety issues and your firm is to maintain a full time safety personnel to mitigate ongoing issues.
> … **NOTE: ALL VIOLATIONS MUST BE ADDRESSED AND RESOLVED IMMEDIATELY** (emphasis in original).
> (Tr. 369-70, 414-15, 518-20; Exs. 41; Ex. W, at 26).

Mr. Brumbaugh testified that the fall protection was "abated immediately" and the railings were fixed within two hours. (Tr. 370). He did not watch ECS's work any more closely after issuing ECS a Notice of Safety Violation. (Tr. 402-03). CO Ortiz testified that NDC was responsible for making sure that guard rails were being maintained. (Tr. 344-45).

[36] The Notice of Safety Violation was addressed to Louis Garcia. (Ex. 41).
[37] Mr. Brumbaugh testified he had first spoken to Mr. Mair about the reported safety violation before sending out the notice. (Tr. 417-18; Ex. 30).

On January 10, 2017, NDC emailed a Notice of Safety Violation written and signed by Mr. Brumbaugh to ECS addressed to Messrs. Toth, Mair and Louis Garcia. The Reason for the Notice states: "**This notice is to make you aware of safety issues that are presently Occurring on the project.** notice of safety violations Continuing notice of fall protection life safety issues." (emphasis in original). The Notice stated that the "**LOCATION OF YOUR PROBLEM(S)**: Fall Protection Building 1." (emphasis in original). The Notice further stated:

> See attached photos of improper/no fall protection being used. … **NOTE: ALL VIOLATIONS MUST BE ADDRESSED AND RESOLVED IMMEDIATELY** (emphasis in original).
> (Tr. 520-21; Exs. 42-45).

The referenced photographs were sent by an email dated January 10, 2017 addressed to Messrs. Toth, Louis Garcia, and Mair, with copies to Messrs. Fetzek, Kloepfer, and Miller, Subject: Preserve Safety Violations. The email stated: "Please see attached photos, one has no fall protection and the other is harnessed and not tied to anything. Please properly train your personnel and stop all unsafe practices." (Tr. 521-25; Exs. 42-45).[38] Mr. Brumbaugh testified that the two photographs depicted another fall protection violation. (Tr. 522-23, 579-81; Exs. 42-45).

On January 20, 2017, NDC emailed a Notice of Safety Violation written and signed by Mr. Brumbaugh to ECS addressed to Messrs. Toth, Jose Garcia and Tom Mair. The Reason for the Notice states: "**This notice is to make you aware of safety issues that are presently Occurring on the project.** notice of safety violations notice of fall protection life safety issues." (emphasis in original). The Notice stated that the "**LOCATION OF YOUR PROBLEM(S)**: Fall Protection, safety rails at opening, failure to use PPE fall protection." (emphasis in original). The Notice further stated:

[38] During the trial, the parties stipulated that "the notice in Exhibit 42 dated 1-10-2017 is the notice contained within Exhibit 43, dated 1-10-2017." (Tr. 523; Exs. 42-43).

> Specifically related to Fall Protection. Thru-out the week we have continued to address the safety rails. The same men installing them are taking them down to work on patios. Furthermore, the men on patios are standing on ladders and are not tied off. NDC has pointed out areas of fall protection and now demands immediate abatement of all life safety issues and your firm is to maintain a full time safety personnel to mitigate ongoing issues.
> … **NOTE: ALL VIOLATIONS MUST BE ADDRESSED AND RESOLVED IMMEDIATELY** (emphasis in original).
> (Tr. 526-31; Exs. 48-50).

The Notice of Safety Violation was sent in an email by Mr. Brumbaugh to Messrs. Toth, Mair, and Jose Garcia, with a copy to Messrs. Fetzek, Miler and Kloepfer, Subject: Preserve life safety fall protection, along with a photograph showing a worker working without fall protection and a harness on a third story balcony at about 3:04 p.m., January 20, 2017. (Tr. 526-31; Exs. 48, 50). Mr. Brumbaugh's 3:49 p.m. email stated, "I tried to reach Tom twice at 3:04 and 3:08 this afternoon with no answer and not on site. Luis I sent you a picture and it is still not fixed. Again, supervision, quality control is needed." (Ex. 48).

A two-page Jobsite Inspection Checklist dated January 30, 2017, not identified to any particular subcontractor working on the Preserves Project, also had an "X" appearing under the "No" column for "B. Personal Protective Equipment 5. Safety harnesses and lanyards worn for fall protection?"[39] (Tr. 530-31; Ex. OO, at 4-5, Ex. 19, ¶14, at 3).

On April 6, 2017, Mr. Brumbaugh sent CR Companies an email that stated that "You have only had one safety meeting for all of the weeks you have been on site you are required to have one every week and turn in to NDC a copy." (Tr. 542-45; Ex. 72).

James A. Miller

The Preserve project was Mr. Miller's first assignment as an NDC employee. (Tr. 814). He was the assistant superintendent at the site, where he reported to Mr. Brumbaugh and worked

[39] "See Notes" also appears under the Comments column. (Ex. OO, at 4).

with project manager Fetzek. (Tr. 278, 807-08, 814). Mr. Miller was at the worksite from January 2017 to April 2017, and July 2017. (Tr. 814-15).

Mr. Miller was at the Preserve project 8-10 hours each day and of that he spent 7-8 hours out in the field. (Tr. 816). He inspected the framing, checked structures for compliance with building plans, insured subcontractors were following NDC's Safety Rules, and worked with inspectors. (Tr. 816, 898-99; Ex. 59, at 5-7). He walked through the structures with the trades to have quality issues corrected. (Tr. 816). Mr. Miller prepared the three-week lookahead construction schedule for the weekly subcontractor meeting. (Tr. 812). Fall protection was a topic brought up at these meetings and NDC reminded subcontractors that "they're responsible for their own safety, we're not, and they need to stay on top of it." (Tr. 826, 885).

Mr. Miller did not have a set time that he walked around the worksite to review compliance with the project's plan. (Tr. 821). There were between 80 to 150 workers on the job site, depending on the work. (Tr. 817). He was not a safety officer. He said that he addressed subcontractor safety issues by going through subcontractor supervisors or foremen to have the issues corrected, either in-person or by telephone. (Tr. 403-04, 821-25, 865). He said it was NDC policy to contact the worker's supervisor; he did not directly contact the worker. (Tr. 734-35, 865, 871). Mr. Miller knew the issue was corrected when the supervisor called him back to tell him it was fixed or when he personally observed that it was fixed. (Tr. 821, 865, 869). If a safety issue that Mr. Miller observed was corrected, he did not inform Mr. Brumbaugh of the safety issue. (Tr. 885). He said, "[h]e get[s] paid enough money to handle everything I can without bringing in anybody else." (Tr. 888). Mr. Miller said that NDC's Safety Rules gave NDC the power to remove a worker, provided Mr. Miller "knew the guy." He further said that he was not expected

to identify the name of any subcontractor employee that he saw not following a safety rule. (Tr. 900-01).

At about 9:00 a.m., April 5, 2017, Mr. Miller was standing outside the west end of Building 2 at "A", Exhibit HH, at 4, when he first saw CO Ortiz and AAD Perez-Ramos outside at the west end of Building 1, at "C", Exhibit HH, at 4. He said the distance between the two locations was about 100 feet. (Tr. 838-39; Ex. HH, "A", "C"). Mr. Miller said that the photograph at exhibit 15 shows two men on the third floor balcony of Building 4. (Tr. 840-42; Ex. 15, Ex. HH, at "E", at 4). He said that the distance between where he was at "A" to where the two men were working at "E" was about 350 to 450 feet.[40] (Tr. 842-43, 932; Ex. 15, Ex. HH, at "A", "E", at 4).

Mr. Miller testified that he did not recall seeing any men working at Building 4 from where he was at "A" that morning. (Tr. 843; Ex. 15, at Ex. HH, at "A", "E", at 4). Mr. Miller testified that when he was standing with CO Ortiz and AAD Perez-Ramos on April 5, 2017 he did not look over in the direction of Building 4. Mr. Miller said CO Ortiz showed him his OSHA badge while they were standing at location "A", Exhibit HH, at 4. Mr. Miller testified that CO Ortiz told him he was driving by and saw "man lifts" on the air.[41] Mr. Miller further said CO Ortiz said to him, "I just want to ask you some questions." Mr. Miller testified that he told CO Ortiz "no" and that he needed to go to the trailer and talk with James, the lead guy on the jobsite.[42] (Tr. 844, 861, 921-24; Ex. HH, at "A"). Mr. Miller further testified that he told CO Ortiz, "I'm not answering any questions." He said CO Ortiz did not ask him any questions and did not

[40] The Court finds the distance between locations "A" to "E", exhibit HH, as estimated by Mr. Miller to be of much less significance because of Mr. Miller's later testimony that workers at location "E", south side of Building 4, would have been visible to anyone looking in the direction of location "E" from location "A", while standing at the north side of Building 2. (Tr. 932-33; Ex. 15, at "A", "E").
[41] Mr. Miller testified that a "man lift" is shown at the photograph at Exhibit 15, at "A"). (Tr. 924; Ex. 15, at "A").
[42] Mr. Miller testified that the trailer was on the corner of 4th Avenue and 12th Street East, at Exhibit 15, at "G", about 700 to 800 steps away from where they were standing at "A". (Tr. 844-45, 848; Ex. 15, at "A", "G").

attempt to talk with him about conditions at the jobsite. He said the conversation that occurred at location "A", Exhibit HH, at 4, took "[t]wo to three minutes." He admitted that his experience at that time was that if OSHA stopped at a jobsite it was because OSHA had seen something that gave them cause for concern from a safety perspective. (Tr. 850-51, 860-62, 921-22; Ex. HH, at "A", at 4). Mr. Miller also said he had seen workers at the jobsite not properly protected from falls "a couple times a week." (Tr. 864-65). Mr. Miller said he "adamant"[ly] asked CO Ortiz and AAD Perez-Ramos "[t]hree or four times" to go to the trailer. (Tr. 845, 850-51, 923).

Mr. Miller said CO Ortiz did not show him any photographs or see CO Ortiz take any photographs. (Tr. 845). He said CO Ortiz did not try to direct Mr. Miller's attention, or point, to Building 4. (Tr. 879-81). He further said he [Mr. Miller] did not recall looking over in the direction of Building 4 because he had no reason to after CO Ortiz and AAD Perez-Ramos walked away from him. Although he said that he personally did not actually see any workers at location "E", on the balcony at Building 4, when speaking with CO Ortiz at location "A" standing outside the north side of Building 2 because he was at that time not looking in that direction toward Building 4, Mr. Miller testified workers on the balcony at location "E" would have been visible to him or anyone standing at location "A". (Tr. 932-33; Ex. 15, Ex. HH, at "A", "E", at 4). But, he testified that after they walked away, he called the framer foreman, either Tom Mair[43] or Louis Garcia,[44] and CR Companies foreman, Carlos [Rodriguez], and told them "OSHA's on site, tighten up."[45] (Tr. 432, 845-46, 859-60; Ex. H). He also called Manny at Bay City, the sheet rock company. (Tr. 847).

[43] Mr. Miller testified that he did not know whether Mr. Mair was at the job site on the morning of April 5, 2017. (Tr. 882).
[44] Mr. Miller testified that he did not know whether Louis Garcia was at the job site before he [Mr. Miller] talked with CO Ortiz and AAD Perez-Ramos at about 9:00 a.m., April 5, 2017. (Tr. 883).
[45] Later, Mr. Miller testified that he thought that he called Louis Garcia. (Tr. 932).

Later, on April 5, 2017, Mr. Miller met with Mr. Scott about a photograph he was supposedly shown by CO Ortiz. Mr. Miller told Mr. Scott that he had not seen the photograph. (Tr. 998-99). Mr. Miller also testified he thought that on April 6, 2017 at least one OSHA inspector had a meeting with "the group" in the trailer office.[46] He said he went to the trailer and was asked, and denied, if the male inspector had showed him any photographs the day before. He said, "they threw a photo out at me and said: 'He said he showed you that.'" Mr. Miller said he had not previously seen that photograph. (Tr. 850). Mr. Miller said he did not recall speaking with CO Ortiz again after his 9:00 a.m., April 5, 2017 encounter. (Tr. 851).

Mr. Miller initially testified that he did not recall CO Ortiz taking any photographs, including a photograph in the general direction of Building 4. He acknowledged preparing an initially written, later typed, statement for Mr. Scott on April 6 or April 7, 2017. His statement notes that CO Ortiz took a photograph in the general direction of Building 4 and that he [Mr. Miller] repeated that CO Ortiz needed to go to the office and see James [Brumbaugh]. He did not recall making the assertion in his written statement that he saw CO Ortiz take a photograph even after being reminded of it, but stated he would rely upon the written assertion since it was made "basically right then and there." (Tr. 902-03, 996-97, 1006-08).

The OSHA inspection

CO Ortiz was assigned to conduct the April 5, 2017 inspection at the Preserve project after AAD Perez-Ramos had seen two workers without fall protection while at a stoplight on Manatee Avenue next to the Project about ten days before. (Tr. 46-47, 155-57, 202-05; Ex. 1, at 1). AAD Perez-Ramos accompanied CO Ortiz on the inspection in order to conduct an on-the-job evaluation of CO Ortiz. (Tr. 48, 155-57; Ex. 1, at 1).

[46] Mr. Miller did not identify those who were in this "group" when he was shown the photograph in the trailer. (Tr. 850).

CO Ortiz said that because the site was so large and covered several blocks, they drove around the perimeter to understand the magnitude of the job site and determine if there were other workers exposed to fall hazards. (Tr. 54). When they spotted a possible exposure, they parked, and CO Ortiz took a photograph to verify no fall protection was used. (Tr. 57, 162-67; Exs. 1-14).

CO Ortiz and AAD Perez-Ramos spent approximately one hour and fifteen minutes driving and walking around the Project's perimeter and taking photographs before entering the worksite from the east side. During that time, CO Ortiz testified that he saw about twelve exposed workers without fall protection. (Tr. 55-61, 66, 102, 108, 162-67, 1028-30; Exs. 1-13, HH, Ex. WW, ¶1a., at 1-3). CO Ortiz testified:

> Q And okay, so did you encounter a NDC official?
>
> A I did, after numerous attempts of trying to find a management representative around the job site we went and asked several employees. Some of them said they did not know who even they worked for. They tried to contact their supervisor and they were not successful. So I continued looking for what would've been and appeared a management representative.
> (Tr. 62).

NDC's citation was based on four instances; identified as Citation One, Item 1, Instances (a) through (d). (Tr. 76). NDC was not cited for all the exposures CO Ortiz and AAD Perez-Ramos saw on April 5, 2017.[47] CO Ortiz testified that the exposures other than instances (a) through (d) were not cited because the workers were not on the worksite after the opening conference. (Tr. 76-77).

Instance (a): When they arrived at the street next to the Project, they saw two workers doing carpentry work sheeting a garage roof about nine feet from the eave to the next lower level, without fall protection. (Tr. 47-49, 89-90, 160-61; Ex. 1, at 2, Exs. 2-3, Ex. WW, ¶3, at 4).

[47] NDC was not cited for any fall violations shown in photographs 4-6, 8-10, and 14 that relate to at least 5 other AD Berrios employees working at Buildings 3 and 4, and elsewhere. (Exs. 4-6, 8-10, and 14).

CO Ortiz testified that "[f]rom the naked eye it was obvious that they were not wearing fall protection." CO Ortiz photographed the workers, both with and without the OSHA camera's zoom feature. (Tr. 49-50, 91, 1025; Ex. 1, at 2, Exs. 2-3). CO Ortiz used the zoom feature on the camera to verify the workers were not wearing personal fall arrest equipment and that no other fall protection was in use. (Tr. 50; Ex. 1, at 2, Exs. 2-3). These workers were employed by AD Berrios. (Tr. 89-90). It was obvious to him that they did not have harnesses on. (Tr. 91-92). When he saw them later that day, after the opening conference, the two workers had harnesses on and were using personal fall arrest equipment. (Tr. 90). OSHA's Violation Worksheet states two AD Berrios employees, including Juan Pablo Hernandez, were exposed to the fall hazard alleged at Instance (a). (Ex. C, at 2, Ex. WW, ¶3, at 4).

Instance (b): Instances (a) and (c) through (d) were seen by CO Ortiz and AAD Perez-Ramos while driving around the project's perimeter and before they entered the worksite. They observed instance (b) after they entered the worksite. CO Ortiz and AAD Perez-Ramos were unable to find the jobsite's construction trailer during that time, so they parked the car and walked into the jobsite to find a supervisor. (Tr. 61, 164, 212). They then saw a worker on a ladder near the edge of a third story balcony of Building 4, about thirty feet from the ground. (Tr. 64-65, 109-10, 170-71; Ex. 15, Ex. WW, at ¶4, at 4). The worker was not wearing a personal fall arrest system and there was no other fall protection used. (Tr. 65-66, 170; Ex. 15). This worker, and the other worker partially shown in the photograph at Exhibit 15, were employed by AD Berrios. (Tr. 231).

Around 9:00 a.m., April 5, 2017, Mr. Miller saw the CO and AAD near Building 1, about 100 feet away. (Tr. 831, 834, 837, 839). After a worker "pointed to that manager, Jim Miller," CO Ortiz and AAD Perez-Ramos came over to where Mr. Miller was standing outside

of an apartment at the first floor, Building 2. (Tr. 63-64, 109-10, 171, 1017; Ex. 1, at 5, Ex. HH, at "A", at 4). CO Ortiz identified himself as an OSHA investigator and told Mr. Miller that he had observed several employees exposed to fall hazards. (Tr. 64; Ex. 1, at 5). Mr. Miller recalled that CO Ortiz introduced himself, presented his badge, mentioned that they had seen employees working from manlifts when they drove by, and they had some questions. (Tr. 843). Mr. Miller asked if they had checked in with Superintendent Brumbaugh at the construction trailer.[48] Mr. Miller told the CO and AAD that NDC policy was that all safety matters had to be addressed by the site superintendent and instructed them to go to the company trailer to address any safety concerns. (Tr. 65, 171-72, 844-45, 851, 861, 922-23; Ex. 1, at 5).

CO Ortiz testified that he directed Mr. Miller's attention to two employees working without fall protection on a third-floor balcony in Building 4 and asked Mr. Miller to intervene and take action. (Tr. 65-66, 111, 331-32, 1018, 1032; Ex. 1, at 6, Ex. C, at 3, Ex. 15, Ex. HH, at "E", at 4, Ex. XX, ¶9, at 3). OSHA's Inspection Narrative states that CO Ortiz "asked Mr. Miller whether he could take action to protect an employee that was standing on a ladder at the edge of the balcony on the third floor (the balcony had no guard rails). Mr. Miller indicated for the second time that all safety matters needed to be dealt by the General Superintendent and instructed CSHO and AAD to go to the general contractor's trailer." The Inspection Narrative also states that "the fall exposure was obviously evident at plain sight from where the conversation was taking place." (Ex. 1, at 6, 8, Ex. 15). Building 4 was about 125 yards across the worksite from Building 2. (Tr. 841-42, 932, Ex. HH, at "B"- "C"). CO Ortiz testified that the two employees were in "plain view" from Mr. Miller's position at Building 2 and could be observed "without the need of any artificial enhancements." CO Ortiz said, "It was a plain view.

[48] Mr. Miller testified that he was not the lead on the worksite and that he was following NDC's protocol by referring AAD Perez-Ramos and CO Ortiz to Mr. Brumbaugh. (Tr. 65, 171-72, 844-45, 851, 861, 922-23).

There was no building, there was no structure, there was no environmental condition that would impede the visibility." CO Ortiz stated that Mr. Miller could see the violative condition from where Mr. Miller was standing.[49] He said that he made Mr. Miller "aware of a (sic) exposure that was taking place immediately in front of us." (Tr. 331-32, 1018, 1031-32, Ex. HH, at "E", at 4). CO Ortiz testified: "So it was right across where we were. Plus we indicated. We pointed out the direction and we described the scene. He [Mr. Miller] did not take any action." (Tr. 65-66, 111, 331-32, 1018; Ex. 1, at 8, Ex. HH, at "A", "E", at 4, Ex. WW, ¶1a., at 1-3). CO Ortiz further said on cross examination:

> Q But you can't tell me if Mr. Miller saw those individuals noncompliant; is that right?
> A Well, we told him. We indicated, we showed it to him. We –
> Q "You showed it to him." What do you mean by that?
> A We directed him to look at this. This is happening right in front of us. And all he replied was go to the trailer, all safety issues need to be addressed by the site superintendent. Immediate action for me was that: Okay, let's stop the operation right now and make that employee safe. That's immediate to me.
> (Tr. 114).

CO Ortiz explained that he took a photograph of the exposed employees from approximately where they talked to Mr. Miller. CO Ortiz believes he took the photograph at exhibit 15 after having spoken with Mr. Miller, but he is not 100 percent sure. (Tr. 110, 1018, 1031; Exs. 15, HH, at "E", at 4). AAD Perez-Ramos, standing with CO Ortiz, testified that she had a clear and unobstructed view of the worker. (Tr. 170-71; Ex. 15). AAD Perez-Ramos said she "saw employees working on balcony, standing on the ladder without fall protection and, of course, more than six feet." (Tr. 170, 213). AAD Perez-Ramos testified that Mr. Miller repeatedly told CO Ortiz that he had to go to the office to address the noncompliance issue they had observed. (Tr. 171-72, 1032-33). AAD Perez-Ramos testified that she expected a general contractor would immediately seek to abate an unsafe situation. She said Mr. Miller did not

[49] CO Ortiz testified that he did not "know if he [Mr. Miller] saw them [the two employees] or not. I pointed it out to him, look in that direction." (Tr. 1036; Ex. 15).

immediately seek to abate the unsafe situation that she and CO Ortiz brought to his attention. (Tr. 173, 232-33). CO Ortiz testified that NDC was responsible for immediately correcting the hazard that he brought to Mr. Miller's attention. (Tr. 336-38).

Mr. Brumbaugh testified that Mr. Miller called the construction trailer and said OSHA was there and had taken a picture and that there was an issue that he [Mr. Miller] was going to address. Mr. Brumbaugh said he did not recall all of the telephone conversation and could not recall if Mr. Miller said he saw a worker not using fall protection. (Tr. 433-35). Mr. Brumbaugh said OSHA showed him two photographs in the trailer, including one showing a worker on a ladder that Mr. Brumbaugh was unable to identify. He said that Mr. Miller "spoke to whoever out in the field" and "[t]he problem was abated" and "[t]he worker was off the patio." (Tr. 432-37).

OSHA's Violation Worksheet states two AD Berrios employees, including Salvador Collaza, were exposed to the fall hazard alleged at Instance (b).[50] (Ex. C, at 2).

Instance (c): As CO Ortiz and AAD Perez-Ramos drove and walked around the worksite's perimeter and before entering the worksite, they observed two additional workers, about nine feet above the ground, sheeting the roof of the mailbox building. One of the workers, AD Berrios Foreman Louis Garcia, is shown on the right of the photograph at Exhibit 13.[51] The

[50] Complainant's Response to Respondent's Interrogatories to Complainant No. 4 also identifies Freddie Reyes as a worker performing work near an open-sided balcony relating to Instance (b). (Ex. 15, Ex. WW, ¶4, at 4). The Court finds that two AD Berrios employees, including Mr. Collaza, were exposed to the fall hazard at Instance (b). (Ex. 15, Ex. C, at 2).

[51] The Meeting Minutes for October 18, October 25, November 1, 2016, and November 29, 2016, identify Louis Garcia with ECS. (Tr. 310-11, 353-55; Ex, 61, at 6, Ex. 62, at 6, Ex. 63, at 6, Ex. T, at 19, 25, Ex. U, at 17). The Meeting Minutes for January 24, 2017, January 31, 2017, February 7, 14 and 21, 2017, March 7, 2017, and April 18, 2017, identify Louis Garcia with Lacoste Framing and ECS. (Ex. 65, at 1, 5, Ex. W, at 10, 14, Ex. X, at 1, 5-6, 10-11, 15-16, 20, 1, 5, Ex. Y, at 1, 5, Ex. Z, at 10, 14). The Meeting Minutes for November 15, 2016, identify Louis Garcia with ECS/Ed Barrios. (Tr. 352-53; Ex. 64, at 5, Ex. U, at 5). The Meeting Minutes for March 28, 2017, and April 4, 25, 2017, identify Louis Garcia with only Lacoste Framing. (Tr. 387-88; Ex. Y, at 15, 19, Ex. Z, at 1, 15, 19). Mr. Brumbaugh also testified that Louis Garcia was an ECS supervisor. (Tr. 310). The Court finds that Louis Garcia was not employed by ECS on April 5, 2017.

other worker shown on the left is also an AD Berrios employee. (Tr. 60, 74, 106, 145-46, 333; Ex. 1, at 2, 4 (bottom photograph), Ex. 13, Ex. WW, ¶5, at 4-5). CO Ortiz and AAD Perez-Ramos saw that no fall protection was used by either worker. (Tr. 60, 108, 169-70; Ex. 13). CO Ortiz did not see any anchors on the roof. AD Berrios employees told him that there were no anchors on the roof. (Tr. 89). There were also no guard rails or safety nets. CO Ortiz photographed the workers from the street (Ex. 13) and later from inside the construction site (Ex. 14). (Tr. 60-61, 74, 145-46, 169-70; Exs. 13-14). Both supervisor Louis Garcia and another worker were employed by AD Berrios. (Tr. 106-07; Ex. 1, at 4). CO Ortiz testified that when a supervisor "doesn't follow the rule it will be hard, very difficult to expect their subordinates will follow with that, too." (Tr. 343-45). OSHA's Violation Worksheet identifies one AD Berrios employee, Freddie Reyes, as being exposed to the fall hazard alleged at Instance (c).[52] (Ex. C, at 2).

Instance (d): As CO Ortiz and AAD Perez-Ramos continued to try to find the construction office trailer and the person in charge, they observed a worker on a third-floor balcony of Building 1 without any fall protection in plain view. (Tr. 55-56, 164-65; Ex. 1, at 5, Ex. 7). The worker, employed by CR Companies, was moving materials or looking for something while standing on a balcony that exposed him to a fall of more than six feet. The worker was not wearing a harness and was not tied off. CO Ortiz took a photograph of the worker while inside the car. (Tr. 55-57, 96, 164-65; Ex. 7, Ex. WW, ¶6, at 5). He said the exposed worker was a CR Companies supervisor [Carlos Rodriguez]. (Tr. 345-46). OSHA's

[52] The Court finds that two AD Berrios employees, including Foreman Louis Garcia, were exposed to the fall hazard alleged at Instance (c). (Tr. 106-07; Ex. 1, at 4, Ex. 13, Ex. C, at 2). Complainant's Response to Respondent's Interrogatories to Complainant No. 5 identifies Luis Perez as a worker performing work on the mailbox relating to Instance (c). (Ex. WW, ¶5, at 4-5). Whether Mr. Perez or Mr. Reyes is the second worker shown in the photograph at exhibit 13 need not be resolved since the Court has found two AD Berrios employees were exposed to the fall hazard at Instance (c), including Foreman Louis Garcia. Respondent also does not dispute that workers were exposed to the fall protection hazards alleged in Instances (a) through (d) of the Citation.

Violation Worksheet states two CR Companies employees, including Luis Perez, were exposed to the fall hazard alleged at Instance (d).[53] (Ex. C, at 2, Ex. WW, ¶6, at 5).

Opening Conference: After talking with Mr. Miller about Instance (b), CO Ortiz and AAD Perez-Ramos headed toward the trailer. (Tr. 65-67, 845). Mr. Miller did not accompany them because he felt annoyed after telling them to see Mr. Brumbaugh several times. (Tr. 845, 924-25). Mr. Miller called Messrs. Fetzek and Brumbaugh to let them know that OSHA was coming to the trailer. (Tr. 432, 845).

NDC's onsite construction office was a double-wide trailer located outside the jobsite on Fourth Street, approximately 100 feet from the construction jobsite's east entrance. (Tr. 72, 928; Ex. HH, at "G"). There, CO Ortiz and AAD Perez-Ramos conducted the opening conference with Messrs. Brumbaugh, Fetzek, Kloepfer and Scott at about 9:30 A.M. (Tr. 67, 673; Ex. D, at 1). Mr. Scott testified that CO Ortiz and AAD Perez-Ramos told them they were there because "they saw some fall protection issues." Mr. Scott said he "was shown a picture on a camera of someone [on a building 4 balcony] in a fall hazard position by Mr. Ortiz." (Tr. 673-74). He testified that CO Ortiz told him he had showed Mr. Miller the photograph. (Tr. 676-78). Mr. Scott testified that NDC helped OSHA determine that one of the photographs showed a CR Companies employee and another photograph showed an ECS employee. (Tr. 676-77). An NDC representative told CO Ortiz and AAD Perez-Ramos that ECS was hired by NDC to act as its shell contractor. (Tr. 623-24; Ex. WW, ¶1a., at 1-3). After the conference, Mr. Scott said he spoke with Mr. Miller because Mr. Ortiz had told him that he had walked up to Mr. Miller and pointed the fall hazard out to him. (Tr. 674).

When CO Ortiz and AAD Perez-Ramos walked back onto the worksite after the opening

[53] The Court finds that two CR Companies employees, including Supervisor Carlos Rodriguez, were exposed to the fall hazard alleged at Instance (d). (Ex. 7, Ex. C, at 2, Ex. H, at 1-2).

conference, they saw no further fall protection violations. (Tr. 103, 267). CO Ortiz observed that some of the employees that had not been using fall protection earlier, were now using fall protection. (Tr. 103, 122, 130). He interviewed AD Berrios Foreman Louis Garcia at about 1:00 p.m. Foreman Garcia told him he had about 15 employees but did not know if they all worked for AD Berrios. He also told him he arrived at the job site that day at 10:00 a.m.[54] He told CO Ortiz that he screamed at the employees to tie off, but that it was a constant battle. Foreman Garcia stated to CO Ortiz that "[t]he employees that I saw on the picture are at risk of falls and I recognize it." (Ex. I). Other employees that CO Ortiz had observed earlier were no longer at the jobsite. (Tr. 102, 106). He did not interview any NDC employee during the April 5, 2017 inspection. (Tr. 112, 123-24). The NDC managers told CO Ortiz that ECS had supervisory responsibility over AD Berrios and for the safety of the carpenters. But, ECS did not have anyone at the worksite on April 5, 2017. (Tr. 70-71, 81-82; Ex. 1, at 6-7).

On April 6, 2017, CO Ortiz spoke by telephone with ECS's owner/GM John Toth III, who told him that ECS, including its equipment, had been contractually removed from the jobsite by NDC in December 2016/January 2017 because of a disagreement with scheduling.[55] ECS's owner told CO Ortiz that since then ECS had no representative on site to address the safety of AD Berrios and other framers, including fall protection. (Tr. 81-82, 136-37, 622). Mr. Toth told CO Ortiz that ECS was not a contractor working on the project at the time of OSHA's inspection.[56] When asked by CO Ortiz and AAD Perez-Ramos who had oversight responsibilities over A&D Berrios, "NDC Construction Company admitted that they assumed oversight responsibilities previously held by Emerald Coast Structures, LLC over A&D Berrios

[54] The Court finds that Louis Garcia was at the job site earlier since he appears in a photograph taken by CO Ortiz shortly before about 9:00 a.m., April 5, 2017. (Ex. 13).
[55] Later, Mr. Toth told CO Ortiz in an email that "he was removed from the project on about 1/22/2017." (Ex. 1, at 8, Ex. C, at 3).
[56] The Inspection Narrative states that at the time of the OSHA inspection NDC was directly responsible for A&D Berrios and A&D Berrios was not actually a subcontractor of a contractor. (Ex. 1, at 7).

(i.e. coordination of work schedule, sequence of work and payment to A&D Berrios)." (Tr. 255, Ex. 1, at 7, Ex. XX, at ¶14, at 4, Ex. WW, at ¶14, 10-11). Complainant's Response to Respondent's Interrogatories to Complainant No. 14, states, "Respondent's assumed oversight of AD Berrios Framing, Inc. is evidence of Respondent's authority to correct unsafe conditions affecting the employees of AD Berrios Framing, Inc. on matters of safety and health." (Ex. WW, at ¶14, at 10-11).

Complainant's Response to Respondent's Interrogatories No. 8 states that there is evidence that Respondent: 1) "directly supervised, inspected and paid for the work activities and materials of the employees of AD Berrios Framing, Inc. and CR Companies, Inc., and that it had general supervisory authority over the Jobsite[.]" 2) "had authority to pay for, order, inspect and approve equipment utilized by employees of AD Berrios Framing, Inc. and CR Companies, Inc.," 3) could "determine when its employees could begin and end work, store materials, and keep equipment", 4) "provided employees of AD Berrios Framing, Inc. and CR Companies, Inc. with safety training and instruction," 5) "may have paid, employed, and had authority to discipline the employees of AD Berrios Framing, Inc. and CR Companies, Inc." 6) "had authority to demand compliance with safety and health regulations from the employees of AD Berrios Framing, Inc. or CR Companies, Inc." and 7) had "the authority to 'stop employees of AD Berrios Framing, Inc. or CR Companies, Inc. due to safety violations.'" (Ex. WW, ¶¶8, 11, at 6-8).

OSHA's Inspection Narrative states (in part):

APPLICATION OF THE MULTI-EMPLOYER WORKSITE POLICY

CSHO followed the multi-employer citation policy to determine the role of NDC Construction Company and whether their actions met their obligations. CSHO followed the two-step process as described in the Multi-Employer Citation Policy CPL 2-0.124 to accomplish this.
Step one-

What kind of employer was NDC Construction Company CPL 2-0.124?
… The evidence supports the fact that NDC Construction Company was the controlling employer. They had general supervisory authority over the worksite including the power to correct safety and health violations itself (or require others to correct them). They claimed that they conducted (sic) regularly inspecting (sic) the site during their daily walkarounds and asked the contractors to correct safety violations and the fact that they assumed a direct supervisory role over AD Berrios.
Step two-
Did NDC Construction Company met(sic) their obligations with respect to OSHA requirements as a controlling employer? …

1. **NDC Construction Company claimed that Emerald was responsible for the safety of their subcontractors …**

2. The Emerald Coast Structures, LLC was not a contractor at the time of the inspection. Mr. Toth indicated that James and Brando Fetzek negotiated with Louis and Joe Garcia of Berrios (AD Berrios) to take over the remainder of the work at the project." (emphasis in original). …

3. NDC Construction Company assumed the role of Emerald Coast Structures, LLC
The NDC Construction Company admitted that they assumed all oversight responsibilities previously held by Emerald Coast Structures, LLC over A&D Berrios. This fact support (sic) the notion that NDC was directly responsible for A&D Berrios. In practice, A&D Berrios was directly contracted by the NDC Construction Company despite the absence of a contract. (emphasis in original). …

Conclusions
The evidence in this case supports that the NDC Construction Company had controlling authority to prevent and detect violations at the site. The evidence also supports that NDC failed to exercise reasonable care in controlling the workplace hazards observed by CSHO and AAD during the inspection.

In reaching this conclusion, CSHO is aware that the extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care are less, than what is required of an employer with respect to protecting its own employees. Under normal circumstances, the NDC Construction Company as a controlling employer would not normally be required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as Emerald Coast Structures, LLC. However, the fact that Emerald Cast Structures, LLC was separated from the project and that NDC Construction Company assumed the day to day responsibilities on their behalf strongly supports their role as an employer of the AD Berrios employees.
(Tr. 326-30; Ex. 1, at 7-9, Ex. C, at 3, Ex. P, Ex. WW).

The NDC managers also gave CO Ortiz a telephone number for the project manager or superintendent for CR Companies located in Indiana. CO Ortiz spoke with CR Companies'

project manager by telephone and told him about the exposure he had observed at the jobsite. (Tr. 71). Messrs. Scott and Brumbaugh testified that NDC dealt with three CR Companies representatives: Project Manager Steve Smith,[57] owner Danny (also referred to as Denny) Deckinga, and Carlos [Rodriguez] for only a short time. (Tr. 556, 641-42, 661; Exs. 74, H). Mr. Scott spoke with Mr. Smith after the OSHA opening conference. The NDC managers also called an AD Berrios foreman Louis Garcia, and CO Ortiz spoke with Louis Garcia outside the trailer after the OSHA opening conference. (Tr. 71, 106, 674-75, 773).

On April 6, 2017, NDC representatives walked around and saw that the missing rails were replaced and "they were wearing their fall protection equipment." (Tr. 675).

CO Ortiz returned to the worksite on Friday, April 7, 2017. (Tr. 116; Ex. D, at 1). He conducted a walkaround of the site with Messrs. Brumbaugh, Scott, and Kloepfer. (Tr. 118, 679-80). He saw no instance of missing fall protection during the April 7 visit. (Tr. 118-19, 126, 680). His primary objective that day was to interview employees of AD Berrios and CR Companies. (Tr. 118). AD Berrios Foreman Louis Garcia told him that some of the exposed employees that the CO had observed on April 5 were not at the jobsite on April 7, 2017 and Louis Garcia could not identify them. (Tr. 76-77, 106). CO Ortiz interviewed and the obtained written statements from some of the workers he had seen without fall protection two days before. He interviewed the AD Berrios worker who was photographed on the ladder at Building 4 on April 5, 2017. (Tr. 116, 142, 332; Ex. 15). He also interviewed CR Companies Supervisor Carlos Rodriguez. Supervisor Rodriguez admitted he was one of the two workers shown in the photograph presented by CO Ortiz. He admitted working on the unguarded third floor balcony, Building 1, without using fall protection because the job was quick. He also admitted that the other worker shown in the photograph was not wearing any fall protection. (Exs. 7, H).

[57] Mr. Scott said Mr. Smith visited the job site every two weeks. (Tr. 642-43).

During the course of his investigation, CO Ortiz learned that "personal protective equipment in the forms of fall protection was not necessarily provided to the employees and that training was not provided either." CO Ortiz said employees told him "that they don't get fall protection equipment." (Tr. 74-75, 133, 144, 147). He learned that "the normal rule is that they [the workers] operate without fall protection" and that there were "no meaningful consequences" for doing so. (Tr. 76, 125, 137). CO Ortiz testified that AD Berrios and CR employees told him that they did not wear fall protection at all during the morning of April 5, 2017. (Tr. 131-33). He said he learned from his walk-around the worksite that "enforcement of fall protection is not the rule." (Tr. 125, 256-57).

CO Ortiz testified that NDC "had knowledge about the safety hazards of falls" based upon the past experience of one of its superintendents and its managers' daily walks around the worksite, safety inspections, and "frequent safety meetings with their contractors." (Tr. 80-81).

CO Ortiz testified that NDC's "means and methods to ensure that the unsafe operation gets promptly abated is not consistent with safety management practices." He said that NDC's "methods for abating hazards entailed sending electronic correspondence to the contractors and pictures of unsafe conditions of the violations they observed during either their walkarounds or during their safety meetings" and were "an ineffective way to correct unsafe conditions." He said that NDC had "no way of knowing whether the contractor follows through on these observations." (Tr. 80-81, 126). CO Ortiz testified that "NDC has control of the job site" and "failed to exercise control" when Mr. Miller took no quick action to "stop an immediate danger" involving an AD Berrios employee doing carpentry work on an open sided balcony at the third floor of building 4 on April 5, 2017, as alleged at Instance (b). (Tr. 115; Ex. 15). CO Ortiz testified that NDC's safety program "wasn't robust and I observed conditions that supported that

they had flaws." (Tr. 135).

CO Ortiz testified that "falls in the construction industry is the number one cause of death." (Tr. 43).

Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods*., No. 78-6247, 1981 WL 18810, at *4 (O.S.H.R.C., July 30, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982). The Secretary has the burden of proving his case by a preponderance of the evidence. *Id.*

Multi-Employer Citation Worksite Policy

Respondent was cited as a controlling employer under the Multi-Employer Citation Worksite Policy. Although Respondent stated that it "does not desire to litigate the validity of the multiemployer doctrine," NDC asserts that Eleventh Circuit precedent does not impose liability on a general contractor for the actions of a separate entity's employees under the multiemployer policy and cites to *Calloway v. PPG Indus., Inc.,* 155 F. App'x 450, 455 (11th Cir. 2005) (unpublished) (*Calloway*), which relied on Fifth Circuit precedent, as support. (Resp't. Post-Trial Br., at 20). This assertion fails for several reasons. *Calloway* is not an OSHA construction case and is about liability for a property owner that was not a general contractor and thus inapt. The cases relied upon in *Calloway* are no longer controlling case law for application of OSHA's Multi-Employer Citation Worksite Policy.[58] *Hensel Phelps Constr. Co.,* 909 F.3d 723, 743 (5th

[58] In *McDevitt St. Bovis, Inc.,* the Commission determined that the Eleventh Circuit had not "decided nor directly addressed the issue of multi-employer liability" and distinguished Respondent's line of cases and applied Commission precedent. *McDevitt St. Bovis, Inc.,* No. 97-1918, 2000 WL 35559662, at *2 (O.S.H.R.C., Sept. 28, 2000; *see also S. Pan Servs.*, 685 F. App'x 692, 695–96 (11th Cir. 2017) (unpublished) where the Eleventh Circuit abrogated the line of cases Respondent cites, calling it "in its entirety, our predecessor court's opinion" and noting it was decided "before the Commission articulated the current exposing-employer doctrine in *Anning-Johnson."*

Cir. 2018). In 2018, the Fifth Circuit reversed its prior position and determined the Secretary's interpretation of the Act for its Multi-Employer Citation Policy must be deferred to and prior cases were obsolete to the extent they conflicted with the policy. *Id.* ("*Brand X*,[59] in tandem with *Chevron*,[60] instructs us to defer to the Secretary's reasonable interpretation that § 654(a)(2) authorizes him to issue citations to controlling employers at multi-employer worksites").

The Commission and seven courts of appeals, including the D.C. Circuit, have upheld the Multi-Employer Citation Policy as a proper exercise of the Secretary's statutory authority.[61] *See Summit Contractors, Inc. v. Sec'y of Labor*, 442 F. App'x. 570, 571-72 (D.C. Cir. 2011) (unpublished); *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 818 (8th Cir. 2009); *Universal Constr. Co. v. Occupational Safety & Health Review Comm'n*, 182 F.3d 726, 727-32 (10th Cir. 1999); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982 (7th Cir. 1999); *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 803-04 (6th Cir. 1984); *Beatty Equip. Leasing, Inc. v. Sec'y of Labor*, 577 F.2d 534, 536-37 (9th Cir. 1978); *Brennan v. OSHRC (Underhill Constr. Corp.)*, 513 F.2d 1032, 1037-38 (2d Cir. 1975). And in *Martin v. OSHRC (CF&I)*, 499 U.S. 144 (1991), the Supreme Court specifically affirmed OSHA's authority to issue authoritative interpretations of OSH Act regulations such as 29 C.F.R. § 1910.12(a), which OSHA has interpreted to permit citation of controlling employers.

Respondent's argument the multi-employer worksite doctrine cannot be applied in the Eleventh Circuit is rejected.

Respondent was a controlling employer

Under OSHA's multi-employer enforcement policy, a general contractor or other employer may be cited for a violation, whether or not its own employees were exposed to the

[59] *Nat'l. Cable & Telecomm. Ass'n., v. Brand X Internet Serv.,* 545 U.S. 967 (2005).
[60] *Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc*., 467 U.S. 837 (1984).
[61] Respondent asserts that it "does not ask this Court to overturn OSHRC precedent which upholds the multiemployer doctrine." (Resp't. Post-Trial Br., at 20).

hazard. *See* Ex. P; OSHA Instruction CPL 2-00.124, *Multi-Employer Citation Policy* (Dec. 10, 1999) https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=2024&p_table=DIRECTIVE S. (CPL, Multi-Employer Citation Worksite Policy, or Multi-Employer Citation Policy). The CPL provides that an employer may be responsible for the existence of a violation that endangers workers employed by other companies if the controlling employer exercised control at the jobsite. *Id.*

Under the policy, an employer is a "controlling employer" if it exercises general supervisory control of the worksite, and such an employer is citable if it should have detected and prevented a violation through the reasonable exercise of its supervisory authority. *Centex-Rooney Constr. Co.,* No. 92-0851, 1994 WL 682931, at *2 (O.S.H.R.C., Dec, 2, 1994) ("An employer is 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."). A controlling employer is responsible for monitoring potential hazards with reasonable diligence and correcting them. *Id*. A court must first determine whether an employer is engaged in a common undertaking with another employer and had sufficient authority and control of the worksite. Once that is established, a court asks whether an employer has the ability, with reasonable diligence, to detect and abate the potential hazard. *Id.*

The Commission's application of the Multi-Employer Citation Worksite Policy is well established. *See McDevitt St. Bovis, Inc.,* 2000 WL 35559662, at *1; *see also Summit-Contractors,* No. 03-1622, 2009 WL 2857148, at *4 (O.S.H.R.C., July 27, 2009) (Summit I) (a general contractor is a controlling employer at a worksite where it has "the ability to prevent or abate hazardous conditions created by subcontractors through the reasonable exercise of supervisory authority"). As in *McDevitt St. Bovis, Inc.*, NDC was engaged in a common

undertaking with its subcontractors and maintained control over the entire jobsite through the presence of on-site management personnel, including superintendents, assistant superintendents, project managers, and a senior vice president. (Tr. 24, 547, 615-16; Ex. 19, ¶11, at 3). NDC was directly involved in the construction process. It directly paid its framing subcontractor, AD Berrios, biweekly for labor and provided some equipment and material, including paying $754,000 for wood trusses. NDC had the authority to demand that a subcontractor comply with worksite fall protection rules. At times, NDC directed subcontractor compliance with its safety requirements, both verbally and through the use of formal violation notices. Mr. Brumbaugh testified that when he observed a subcontractor's employees working without fall protection or breaking another safety rule, he would telephone the superintendent. (Tr. 414-16). If the violation was not fixed immediately, he would issue a formal "violation notice" that required the subcontractor to comply within 24 hours. (Tr. 822). By April 5, 2017, NDC had issued six violation notices and sent several additional emails demanding compliance with NDC's fall protection safety rules. (Exs. 26-27, 30, 32, 35, 38, 41-42, 47, 51-52, 66, SS). NDC also told subcontractors to comply with its fall protection safety rules and requirements at weekly subcontractor meetings. (Tr. 299-300; Exs. 52, 66). NDC went beyond merely pointing out unsafe practices. At times, it directed its subcontractors to abate certain practices it found to be in violation of NDC safety rules relating to fall protection. (Ex. SS, at 3, 5, 16).

In *McDevitt St. Bovis, Inc.*, the Commission found the general contractor's authority to "stop subcontractor's work" and "remove a subcontractor from the worksite" as strong evidence of control. NDC had authority by contract to do both of those things. NDC's rules for the construction site directed that a subcontractor's employee be removed from the jobsite after three safety violations and also required removal of a subcontractor's employee if NDC determined the

employee unsatisfactory. (Exs. 57, S, at 4-5). NDC had the authority to terminate a subcontracted entity from the project for safety violations. It had the authority to withhold pay until corrections were made.

AAD Perez-Ramos testified that NDC was issued the Citation on the basis that it was a "controlling employer." She said NDC was a controlling employer based upon its "general supervisory control of the work site," and its contract with ECS, which showed NDC had "authority to oversee subcontractors and employees. They [NDC] have rules there for subcontractor, venders and other parties plus employees. That's the safety plan that they [NDC] presented to us." AAD Perez-Ramos further stated that NDC controlled "the site so they have overall control of the site, so they tell the subcontractor what to do and when to behave in a construction site." She said that the application of the Multi-Employer Citation Worksite Policy included consideration of "[g]eneral supervisory control of the work site and power to abate the situation, the unsafe situation itself or have other people to correct them" and the "employer's actions to recognize safety and health violations." (Tr. 174-82, 187-88, 205-07, 243; Exs. 57, at 3, ¶2.A, Supervision, Exhibit "F", at 2).[62]

Here, NDC exercised a high degree of control over its framing subcontractor, AD Berrios, as of the date of the OSHA inspection. Just over two months earlier, in late January 2017, NDC ordered the removal of ECS and ECS's supervisor/competent person, Tom Mair, from the jobsite. NDC sent ECS a "Notice of Default" letter that put ECS on notice that it had repeatedly failed to provide sufficient skilled workers and materials to Buildings 3 and 4. Thereafter, NDC "leap-frogged" over ECS and used AD Berrios, originally a second tier subcontractor to ECS, to perform framing on the remainder of the project. From the point on, NDC either "stood in the

[62] Mr. Brumbaugh testified that the NDC Safety Plan applied to ECS, AD Berrios, and CR Companies employees. (Tr. 430; Ex. 57, Ex. 23, ¶21, at 1-2). Mr. Scott testified that ECS and CR Companies had to follow NDC's Safety Plan. Mr. Scott said that "AD Berrios would be required to follow the safety policies by Emerald Coast" and not NDC because NDC did not have a contract with AD Berrios. (Tr. 714-15).

shoes" of ECS and elevated AD Berrios, for practical purposes, from a second tier subcontractor to a first tier contractor to NDC, or left ECS's shoes empty. Respondent argues its efforts were "realistic" given its inability to ensure 100% compliance from employees it did not pay. But here, NDC paid AD Berrios directly and relied upon AD Berrios' superintendent/foremen, and not ECS, to supervise the framing work, including at Building 4 where Instance (b) occurred. With no contract between NDC and AD Berrios, there was no contractual limitation stopping NDC from withholding pay from AD Berrios for unsafe work performed by AD Berrios' employees. AD Berrios used Superintendent/Foreman Louis Garcia to supervise the framing workers and he set a poor example for his workers by himself not using fall protection as shown in the photograph at exhibit 13, Instance (c). (Tr. 631, 780-81; Ex. 13, Ex. 15, Ex. 19, ¶4, at 2, Ex. 23, ¶24, at 2-3, Ex. 57, at ¶13, at 23, Ex. 85, Ex. QQ; Resp't. Reply Br., at 4).

The parties stipulated that NDC was the general contractor at the Preserve project. (Tr. 24). As the general contractor, NDC oversaw the entire construction process for the project. (Tr. 611-12). The subcontractor Agreement between NDC and ECS gave NDC the authority to require a subcontractor to correct safety issues at the worksite.[63] (Tr. 174-75, 184, 333, 650, 656, 663-64, 694; Ex. 57, at 3, ¶ 2.A., Exhibit "F", at 2). NDC had contractual authority to issue violation notices and discipline subcontractors.[64] (Tr. 24-25). The Subcontractor Agreement also

[63] The contract stated any subcontractor employee "found in violation of Safety Rules or policies will be removed from Company Property and barred from working on any NDC Construction Co. Project." (Tr. 176, 466-67; Ex. 57, at Exhibit "F", at 2). NDC's "Safety Rules & Regulations" stated: "If an employee is given (3) three written notices of a safety violation for any safety violation while on this project, NDC Construction will demand removal of that employee from the jobsite. … Three safety violations constitute "unsatisfactory" supervision as defined in exhibit "A" of the subcontract agreement…." (Tr. 339-40; Ex. S, at 4-5). Mr. Scott testified that no NDC supervisor ever requested the removal of an individual from the project. (Tr. 790).

[64] *See R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815 (6th Cir. 1998) ("There is a presumption that a general contractor has sufficient control over its subcontractors to require them to comply with safety standard.").

gave NDC the authority to remove a subcontractor from the job site.[65] (Tr. 25, 176, 179-80, 263, 694-98; Ex. 57, at Exhibit "F", at 2, Ex. S, at 4-5).

Under applicable Commission precedents, NDC was the controlling employer. It was a controlling employer for the Project due to its supervisory authority and high degree of control over the worksite, which was shown through its active oversight role at the site and the terms of the Agreements it had with each subcontractor. (Tr. 327-34; Exs. 1, P). Respondent's assertion that it was not a controlling employer at the worksite is rejected.

Duty of a controlling employer for the employees of its subcontractors

A controlling employer is liable for a subcontractor's violations if the Secretary shows it has not taken reasonable measures to "prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Suncor Energy (U.S.A.) Inc.*, No. 13-0900, 2019 WL 654129, at *4 (O.S.H.R.C., Feb. 1, 2009). "A controlling employer's duty to exercise reasonable care "is less than what is required of an employer with respect to protecting its own employees." *Id. citing Summit I,* 2009 WL 2857148, at *4.

The extent of the controlling employer's duty to the employees of its subcontractors depends on the degree of its supervisory authority and control. *Id.; see also, Summit II,* No. 05-0839, 2010 WL 3341872, at *9 (O.S.H.R.C., Aug. 19, 2010) (A "general contractor's duty to detect violations depends on what measures are commensurate with its degree of supervisory capacity."). The controlling employer's duty is based on its "secondary safety role as a controlling employer." *Suncor*, 2019 WL 654129, at *6-7.

Degree of NDC's supervisory authority and control

[65] The Subcontract Agreement stated, "The Subcontractor [ECS] shall immediately remove from the Project any employee, including the superintendent, who is not satisfactory to Contractor's [NDC] Project Manager [Mr. Fetzek], Owner, or Owner's authorized representative at no cost to Contractor [NDC] and with no extension of time." This provision includes, according to Mr. Scott, removing employee's "who are not working safe." (Tr. 694-98; Ex. 57, at Exhibit "A", ¶ 2.A. Supervision, at 3).

NDC had a general supervisory oversight role at the worksite. It had contractual authority over the subcontracting entities. Excluding AD Berrios, NDC had a signed contractual agreement with each first-tier subcontractor. The agreements specified that the subcontractor was responsible for prevention of accidents and must adopt a safety policy for its employees. (Tr. 428-29, 550; Ex. 57, at Exhibit "A", ¶10.A., at 19-20, Exhibit "F", Ex. 19, at 1-2). The agreements required NDC's subcontractors, including ECS and CR Companies, to have a responsible and competent person "who, at the least, shall be in attendance full-time at the Project site during the progress of the Work" and "present at the project site at all times that subcontractors work is in progress," provide personal protective equipment, immediately correct unsafe work practices, conduct weekly tool box talks and notify NDC of hazardous conditions created by other subcontractors at the site. (Tr. 243-44, 299-300, 636-38, 650, 656, 663-64, 713-14; Ex. 57, at Exhibit "A", ¶¶2.A., at 3, 10.A., 10.C., at 20, Exhibit FF). Mr. Scott initially testified that NDC's Subcontractor Agreement with ECS did not require AD Berrios to have a competent person present at the job site at all times since NDC had no contractual relationship with AD Berrios. (Tr. 713-15). But, later Mr. Scott agreed that AD Berrios had to follow NDC's safety rules and policies since NDC's subcontract with ECS stated, "other third parties [including AD Berrios], while on Company Property and in the performance of their work, shall comply with all Safety Rules and Policies established by NDC Construction Company." (Tr. 714-17; Ex. 57, at Exhibit "F", at 2). NDC's subcontract with ECS also stated, "All work shall be in strict accordance with all Federal, State, and Local Codes and Ordinances and shall comply with all OSHA requirements" and "SAFETY The Subcontractor agrees that, its agents, employees and sub-subcontractors, will perform the contractual obligations of this Agreement in compliance with applicable regulations issued pursuant to the Construction Safety Act of 1969 and the

Occupational Safety and Health Act of 1970." (Ex. 57, at Exhibit "C", at 1, Ex. 19, ¶9, at 3). Mr. Scott said that he was unaware of any contractual relationship between ECS and AD Berrios.[66] (Tr. 715). NDC was allowed to terminate its Agreement with ECS for cause if ECS failed to cure a default within three days following written notice to the subcontractor. (Tr. 733-34, Ex. 57, at Exhibit "A", ¶13.B., at 23-24; Ex. 19, ¶8, at 2). NDC's Safety Rules and Regulations that were attached to subcontractor meeting minutes, stated: "8. Sub-contractors and sub-sub subcontractors are the responsibility of the subcontractor. This applies to safety and supervision." (Tr. 286-89, 293; Ex. S, at 4-6).

In its oversight role, NDC held a weekly meeting with the subcontractors' foremen and supervisors, walked the site daily, reported any safety issues it observed to the subcontractor's foreman or supervisor, and issued written safety notices to the subcontractor's management. Mr. Brumbaugh walked the worksite at least once a day to check the progress of construction and verify quality compliance. (Tr. 279, 412). Mr. Miller spent most of his day on the worksite reviewing the progress and quality of construction and working with inspectors. (Tr. 816, 821). NDC's policy was to immediately notify the subcontractor and request abatement when an unsafe condition was observed by its employees. (Tr. 280, 865). When Messrs. Miller or Brumbaugh saw a violative condition, they said they contacted the onsite foreman or supervisor to have it corrected.

Here, Mr. Scott, NDC's senior Vice President, testified that NDC had the authority to correct safety violations itself or require others to correct them.[67] (Tr. 749-52). Mr. Scott also

[66] Respondent's Answers to Complainant's Second Set of Interrogatories, Interrogatory No. 25, states, "NDC is without knowledge as to the safety and health requirements or contractual terms negotiated between the Respondent's subcontractor, Emerald Coast, and the Respondent's sub-subcontractor, AD Berrios." (Ex. 22, ¶25, at 6-7, Ex. 23, ¶22, at 2). On the other hand, Respondent's Response to Request for Admission, No. 20, states, in part, "As a contractually-bound subcontractor, AD Berrios served as representative and agent for Emerald Coast and was responsible for completing the scope of framing work originally contracted-for at the Jobsite." (Ex. 23, ¶20, at 1).

[67] *See* OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy, § X.E.1 (Dec. 10, 1999) that defines a controlling employer as "[a]n employer who has general supervisory authority over the worksite, including the power

said he would expect Mr. Brumbaugh to direct the worker that Mr. Brumbaugh saw on December 13, 2016 without fall protection to get off roof trusses that were 37 feet above ground. (Tr. 760-61; Exs. 33, 35). He also said that NDC could stop an ECS employee working on a balcony from working if he was doing so unsafely. (Tr. 702-10). The subcontractor Agreement between NDC and ECS gave NDC the authority to require a subcontractor to correct safety issues at the worksite. (Tr. 174-75, 184, 333, 650, 656, 663-64, 694; Ex. 57, at 3, ¶ 2.A., Exhibit "F", at 2).

NDC operated in an oversight capacity at the worksite. Each subcontractor had the primary safety responsibility for its employees and was required to correct safety hazards at the site. NDC's oversight role was consistent with Commission precedent that the controlling employer's safety role may be secondary. *See Suncor*, 2019 WL 654129, at *6-7; *Summit I,* 2009 WL 2857148, at *4. Whether NDC exercised reasonable diligence in implementing this secondary role is discussed below.

Citation 1, Item 1

The Secretary alleges that Respondent violated 29 C.F.R. § 1926.501(b)(13), which requires:

> (13) *Residential construction.* Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. (Exs. A-C).

Respondent does not dispute the Applicability, Violation and Exposure of the Cited Standard

At trial and in its Post-Trial and Reply Briefs, NDC did not advance arguments against the first three elements that the Secretary must prove involving applicability, compliance, and

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to correct safety and health violations itself or require others to correct them." *See also, Suncor*, 2019 WL 654129, at *3 (same); *Summit I.,* 2009 WL 2857148, at *3 (agreeing with and quoting the Multi-Employer Citation Policy's definition of a controlling employer); *FAMA Constr., LLC,* 17-1173, 2019 WL 3210613, at *16 (O.S.H.R.C.A.L.J., June 5, 2019) (consolidated) (Employer a controlling employer where it had the power to correct safety violations or require others to correct them and exercised considerable control over subcontractor work crews).

employee access. Respondent has waived all arguments against these elements except those related to whether NDC was a controlling employer and knew or could have known about the hazards with the exercise of reasonable diligence. *See Astra Pharma. Prods*., 1981 WL 18810, at *4.

Employees were engaged in residential construction at the worksite and worked at heights 6 feet or higher. The cited standard is applicable. The Secretary cited four instances where no fall protection measure was used at the Project.

> (a) Employee of the A&D Berrios Framing Company doing sheeting work on the roof of a garage building was exposed to a fall of more than 9 feet (distance from the eave to the next lower level).
>
> (b) Employee of the A&D Berrios Framing Company doing carpentry work on an open sided balcony at the third floor of building 4 was exposed to a fall of approximately 30 feet (distance to the next lower level according to blueprints).
>
> (c) Employee of the A&D Berrios Framing Company doing carpentry work on the mailbox building were exposed to a fall of 9 feet (distance to the next lower level according to blueprints).
>
> (d) Employee of the CR Companies that was working on an open sided balcony in building one was exposed to a fall of more than 30 feet (distance to the next lower level according to blueprints).

(Ex. A, at 6).

Respondent does not dispute that the subcontractors' employees in these four cited instances were working without fall protection at heights greater than 6 feet at the time the CO and AAD observed them on April 5, 2017. The record shows, through photographs and testimony, there was a lack of fall protection in use for the four cited instances. Employee exposure and lack of compliance with, and applicability of, the cited standard is proved.

Knowledge

A. Overview

The Secretary asserts that NDC had constructive knowledge of all four cited instances and actual knowledge of cited instance (b).[68] In his Response to Respondent's Interrogatories to Complainant No. 13, Complainant stated that "Respondent was aware, or should have been aware, of the violative conduct committed by employees of the subcontracted entities." (Ex. WW, at ¶14, at 10). Respondent asserts it had no actual knowledge of these conditions. Further, Respondent asserts it exercised reasonable diligence in its role as the controlling employer, so there was no constructive knowledge of the cited conditions. (Resp't. Post-Trial Br., at 7, 10-14, 19). Both agree that a general contractor has constructive knowledge if it could reasonably foresee the violation committed by its subcontractor. (Sec'y Reply Br., at 14-15; Resp't. Post-Trial Br., at 14-16).

In the context of the Multi-Employer Worksite Policy, the Secretary must prove that an employer had knowledge of the violative condition despite not having any of its own employees exposed to it. If the Secretary proves actual knowledge, the analysis ends, and the Secretary need not prove that Respondent acted with reasonable diligence in general. *Summit I,* 2009 WL 2857148, at *5 (holding that because the employer stipulated at hearing to having actual knowledge of the violative conditions, failure to inform the subcontractor of the violation alone demonstrates it did not take reasonable precautionary measures). In the absence of actual knowledge, the Secretary must prove that an employer had constructive knowledge of the violative conditions by showing that the conditions were open and obvious, or, relatedly, that the employer failed to exercise reasonable diligence in preventing or detecting the violative conditions. *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307–08 (11th Cir. 2013);

[68] Complainant's Response to Respondent's Interrogatories No. 9 states that "Respondent had knowledge of the conditions and practices that created [the] hazard." (Ex. WW, at ¶9, at 7).

Hamilton Fixture, No. 88-1720, 1993 WL 127949, at *10, 13 (O.S.H.R.C., Apr. 20, 1993), *aff'd* on other grounds, No. 93-3615 (6th Cir. July 1, 1994).

Here, credible testimony from CO Ortiz and AAD Perez-Ramos prove that Mr. Miller had actual and/or constructive knowledge of the violative condition alleged at Instance (b). (Tr. 114). The conditions of all four instances at the jobsite on the morning of April 5, 2017 were open, obvious, and readily apparent to both to Superintendent Miller and Respondent's other supervisors on the jobsite and knowledge is imputed to NDC based on the nature of the violative conditions and NDC's supervisory presence on the Jobsite at that time. The open, obvious and readily apparent nature of the routine lack of use of fall protection at the jobsite by numerous subcontractor workers is based upon: 1) the recurring documented observations by NDC of ECS and AD Berrios workers not using fall protection from late November, 2016 through February, 2017, and beyond, 2) AAD Perez-Ramos's observation of two workers not using fall protection about 10 days before OSHA's inspection as she was driving by the jobsite, 3) CO Ortiz's and AAD Perez-Ramos's finding a dozen AD Berrios and CR Companies' workers not using fall protection in about 75 minutes during OSHA's inspection, and 4) workers at the jobsite telling CO Ortiz that it was normal for workers to routinely not wear fall protection at the jobsite. The Court finds that NDC had constructive knowledge of the rampant lack of use of fall protection by subcontractor personnel at the jobsite in the months preceding the OSHA inspection and on April 5, 2017. The Court further finds that NDC knew that its, and its subcontractor's efforts, to abate the lack of use of fall protection by ECS, AD Berrios, and CR Companies workers was wholly ineffective. There was no consequence for workers not wearing fall protection. It was readily foreseeable to NDC that AD Berrios and CR Companies employees were not using fall protection during the morning of April 5, 2017. The Act requires more of a general contractor who is aware

of these shortcomings, even where it is measured while performing in a secondary safety role. Under OSHA's Multi-Employer Worksite Policy, the Secretary has established the three factors of analysis that determine whether an employer acted with reasonable diligence in preventing or detecting the violative conditions. NDC did not act with reasonable diligence, and constructive knowledge is found for all four instances.

The evidence in this case establishes that Respondent had actual and/or constructive knowledge of the violative condition alleged at Instance (b) and constructive knowledge of the violative conditions alleged in Instances (a), (c) and (d).

B. NDC had actual and/or constructive knowledge of Instance (b) and constructive knowledge of Instances (a), (c), and (d)

1. NDC had actual and/or constructive knowledge of Instance (b)

In order to prove actual knowledge, the Secretary must prove that an employer's supervisor was aware of the violative condition(s). *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d at 1307–08 ([W]here the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed on the employer."); *The Kansas Power & Light Co.*, No. 11015, 1977 WL 8014 (O.S.H.R.C., Mar. 30, 1977) (Actual knowledge shown when a supervisor sees misconduct). The Commission does not require the Secretary to secure an admission from a manager in order to prove that the employer had actual knowledge of violative conditions. In *Horst Constr. dba Horst Grp., Inc.* No. 15-1482, 2016 WL 3960199 (O.S.H.R.C.A.L.J., June 14, 2016), the court credited "a CO's own observations" that a supervisor had been "standing in the area where the employees were working in plain view" in order to find actual knowledge — even though the employer disputed that its manager had seen the violation.

Credible testimony from CO Ortiz and AAD Perez-Ramos prove that Mr. Miller knew of

the violative condition alleged at Instance (b). CO Ortiz testified that Mr. Miller was aware of the fall protection violation alleged at Instance (b) that was taking place in front of them, saying, "I have no doubt the employer had knowledge of this [sic] conditions and situation. It was proven to me by the fact of my conversation with Jim Miller." (Tr. 78; Ex. 15). CO Ortiz also testified: "And I asked him whether he can intervene and get him put in a safe condition." (Tr. 64-65; Ex. 15). CO Ortiz further testified: "Q So you pointed out to Superintendent Miller this gentleman that's on the third balcony up in the photo? A Yes, that was a plain view." (Tr. 64-65; Ex. 15).

At a minimum, Mr. Miller heard the words CO Ortiz spoke to him, and was made aware of the violative condition alleged at Instance (b). *See Flintlock Constr. Servs. LLC*, No. 13-2181, 2016 WL 3856169, at *19-20 (O.S.H.R.C.A.L.J., June 6, 2016) (holding actual knowledge because employer "was informed by [the on-site safety manager] the scaffold was not in compliance."). CO Ortiz testified, "I told him that, you know, the reason for me being there was the fact that I observed several instances of employees exposed to falls and that I had the intention of conducting a safety inspection at the time. Superintendent Miller acknowledged that and indicated that . . .." (Tr. 64).

At trial, Mr. Miller did not remember CO Ortiz telling him that workers in the building across from them were openly working without fall protection or that CO Ortiz took a photograph of the workers. (Tr. 434, 997, 1007; Ex. 15). Upon reviewing a statement that he had prepared within a day or two of the incident, he changed his testimony to say that he remembered writing that OSHA had taken a picture of Building 4 — even though he still did not remember that actually taking place.[69] (Tr. 246, 434, 880; Ex. 15). The Court finds that Mr.

[69] Mr. Brumbaugh testified that when Mr. Miller called the trailer to alert them that OSHA was onsite and headed their way, he told him that the compliance officer had taken a photograph and that there was an issue that Mr. Miller was going to address. (Tr. 433-35). Mr. Scott also testified that, during the opening conference, CO Ortiz told him that he [CO Ortiz] had earlier shown Mr. Miller a photograph depicting a fall hazard. (Tr. 676-78).

Miller did not have an accurate memory at trial of what took place when he talked with CO Ortiz and AAD Perez-Ramos at about 9:00 a.m., April 5, 2017. (Tr. 997, 1007). Given CO Ortiz's contemporaneous photograph of the fall protection violation shown in the photograph at Exhibit 15, his testimony that the violation was open and obvious and in plain view from where they were standing using only the naked eye, and CO Ortiz's testimony that he pointed out the violation to Mr. Miller, the Court finds that CO Ortiz's testimony is far more credible than any testimony to the contrary by Mr. Miller.[70] (Tr.91).

AAD Perez-Ramos's credible testimony also corroborates CO Ortiz's testimony. AAD Perez-Ramos testified that CO Ortiz pointed out the violative conditions, which were in plain view. (Tr. 171-72). Moreover, CO Ortiz's contemporaneous notes and narrative were reviewed for accuracy by AAD Perez, who was present during CO Ortiz's conversation with Mr. Miller, and they demonstrate that Mr. Miller had actual knowledge of the violative condition on the balcony at Building 4. (Tr. 59, 157; Ex. B, at 5-6, Ex. G, at 8, Ex. 15). The OSHA Inspection Narrative states, "CSHO and AAD … made him [Mr. Miller] aware of the safety conditions observed while walking around the construction jobsite . . .. CSHO and AAD also highlighted to Mr. Miller a safety hazard that was taking place immediately in front where the conversation was taking place. CSHO asked Mr. Miller whether he could take action to protect an employee that

[70] Based upon its observations of CO Ortiz's courtroom demeanor while testifying, the Court finds CO Ortiz's testimony to be credible. CO Ortiz testified in a direct, convincing, and clear manner. On the other hand, the Court finds, based upon its view of Mr. Miller's courtroom demeanor, that Mr. Miller's testimony that CO Ortiz did not point out to him the fall protection violation occurring before them and that Mr. Miller did not see the violation himself at that time, to not be credible. Mr. Miller appeared to be confused and had a loss of memory while testifying of what actually occurred when he met with CO Ortiz and AAD Perez-Ramos while standing on the north side of Building 2 on April 5, 2017. (Ex. HH, at 4, at "A"). The Court finds that, while standing on the north side of Building 2, Mr. Miller saw and had actual knowledge of the fall protection violative condition that occurred at about 9:00 a.m., April 5, 2017, on the balcony at Building 4. (Ex. 15). Alternatively, as discussed further in the following constructive knowledge section, the open and obvious violation, its duration, and the clear visibility from location "A" where the conversation between Mr. Miller, CO Ortiz, and AAD Perez-Ramos occurred and location "E", Exhibit HH, at 4, shows that Mr. Miller had, at least, constructive knowledge of the fall protection violative condition that was occurring on the balcony of Building 4. (Tr. 233; Ex. 15, HH, at 4, at "A", "E").

was standing on a ladder at the edge of a balcony on the third floor (the balcony had no guard rails)." (Ex. B, at 5-6). Mr. Miller did not take immediate action to stop the fall hazard violation occurring before him. Instead, he called AD Berrios's supervisor Luis Garcia and informed him that OSHA was on the job site and directed AD Berrios to "tighten up." Mr. Miller did not identify the names of the two workers not wearing fall protection on the balcony of Building 4 (Instance (b)), but thought that they may be framing workers. Since two of the four instances, Instances (c) and (d), involved supervisors/foremen who were themselves not wearing fall protection, Mr. Miller might have been able to adhere to his interpretation of NDC's policy that he was not to directly interact with just workers had a supervisor been one of the two workers not wearing fall protection on Building 4's balcony. The fall protection violative condition was eventually abated sometime later and may have been so by the workers simply moving away from the balcony to do other work elsewhere. Mr. Brumbaugh did not see any fall protection violation occurring on Building 4's balcony when he looked toward it many hours later. NDC viewed all reports of fall protection violations as having been abated at the end of the day when all the workers got off the balcony and went home even though the cause of the violation had not been addressed and corrected. (Tr. 444-45, 551-52).

2. NDC had constructive knowledge of Instances (a), (c), and (d).

The Secretary asserts that NDC had constructive knowledge because the cited conditions were open and obvious. The Secretary also asserts that constructive knowledge is shown through NDC's lack of reasonable diligence in its adequate onsite inspections, its ineffective method to obtain abatement of unsafe conditions, and its lack of discipline for its subcontractors. (Sec'y Post Hrg. Br., at 42). In his Response to Respondent's Interrogatories to Complainant No. 13, Complainant stated "Respondent's method to ensure that owners of subcontracted entities aided

by OSHA rules was inadequate because the work rules related to fall protection were not enforced, even after violations were discovered by Respondent…." (Ex. WW, at ¶13, at 10).

a. Instances (a), (c), and (d) were readily apparent

The Commission has held that where a cited condition is "'readily apparent to anyone who looked,' they 'indisputably should have been known to management'", and employers are found to have constructive knowledge. *Hamilton Fixture*, 1993 WL 127949, at *16. When a supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have, he is said to have constructive knowledge of the misconduct. *Id.,* at *16-19 (holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). Constructive knowledge is often found when the hazard is in plain view. *See Kokosing Constr. Co.,* No. 92-2596, 1996 WL 749961, at *2 (O.S.H.R.C., Dec. 20, 1996) ("The conspicuous location, the readily observable nature of the violative condition and the presence of the [employer's] crews in the area warrant a finding of constructive knowledge."); *Native Textiles Co.,* No. 01-1636, 2003 WL 21077999, at *9 (O.S.H.R.C.A.L.J., Jan. 8, 2003) (holding employer has knowledge of a safety violation where the condition is in plain view and is "open and obvious.").

b. Knowledge is Imputed to Respondent.

In this case, knowledge of violative conditions is imputed to Respondent through its Superintendents, including Messrs. Brumbaugh and Miller. *See ComTran Grp., Inc*., 722 F.3d at 1307–08 ("[W]here the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed on the employer."). CO Ortiz credibly testified that the violative conditions "were right there in plain view in front of us" and that he made Mr. Miller aware "of at least one that was obviously in plain view." AAD Perez-Ramos also credibly testified that she was able to see a worker

without fall protection while standing alongside Mr. Miller. (Tr. 171-72). Mr. Miller himself conceded that had he looked toward Building 4, it would have been possible to see the workers on the third floor balcony of Building 4 from where his conversation with CO Ortiz and AAD Perez-Ramos took place on the north side of Building 2 at location "A", Exhibit HH, at 4. (Tr. 933). He estimated that he was approximately 350-450 feet away from Building 4 when he spoke with OSHA's representatives. (Tr. 842). Based upon his testimony that he believed OSHA's representatives to likely be on site because they had spotted a violation, he was aware of the probability that a violation was then occurring on the jobsite. (Tr. 861, 997, 1007).

Knowledge of the four instances of the violative conditions is also imputed to Respondent through its supervisory employees who had constructive knowledge of the presence of at least nine open and obvious fall protection hazards involving at least twelve workers on the jobsite during the morning of April 5, 2017. Respondent stipulated that it had five supervisory employees who were present on the jobsite on the day of the inspection. (Tr. 24-25, 275). CO Ortiz and AAD Perez-Ramos saw, at least, twelve workers being exposed to fall hazards at Buildings 3 and 4, the garage, and the mailbox building over the course of an hour and fifteen minutes. (Tr. 61; Exs. 2-15). Ten of the exposed workers were visible from the city streets surrounding the project. (*Id*.). As is established by the many photographs in the record, the lack of guardrails and harnesses, as well as the ladders near the edges of balconies, would be obvious to anyone bothering to look. On the whole, the lack of fall protection on the jobsite can only be considered a pervasive, "open and obvious" and readily apparent condition. Accordingly, given the open and obvious nature of the condition and the daily presence of one or more of Respondent's five supervisory employees within the jobsite, any one of whom had authority to correct the unsafe condition, constructive knowledge of Instances (a), (c), and (d), is imputed to Respondent. *See e.g., Island Lathing & Plastering Inc.*,

No. 92-1935, 1993 WL 369051 (O.S.H.R.C.A.L.J., Aug. 27, 1993) (holding that any of the employer's multiple supervisors at the worksite could have seen the employee without fall protection in the aerial lift).

NDC Did Not Exercise Reasonable Diligence in Preventing Hazards at the Jobsite.

A. Overview

In *Anning-Johnson Co.*, No. 3694, 1976 WL 5967 (O.S.H.R.C., May 12, 1976) (consolidated), and *Grossman Steel & Aluminum Corp.*, No. 1275, 1976 WL 5968, at *4 (O.S.H.R.C., May 12, 1976), the Commission articulated the position that:

> The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors ... Thus, we will hold the general contractors responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.

Id.

Under the Commission's Multi-Employer Citation Worksite Policy, "[A]n employer owes a duty under section 5(a)(2) of the Act not only to its own employees but to other employees at the worksite when the employer creates and/or controls the cited condition." *Summit II*, 2010 WL 3341872, at *8 ("[A]n employer's duty to exercise reasonable care where its own employees are not exposed to the hazard 'is less than what is required of an employer with respect to protecting its own employees,' such that a general contractor need not inspect the worksite as frequently as an employer whose own employees are exposed to the hazard." *See also Summit I,* 2009 WL 2857148, at *5 (citing OSHA's Multi-Employer Citation Policy, OSHA Instruction CPL 02-00-124 § X.E.2 (Dec. 10, 1999)). Under this precedent, a controlling contractor has a responsibility to seek to have worksite hazards corrected, if it was aware of the hazards or could reasonably be expected to have detected them. In *Knutson Constr. Co.*, No. 765, 1976 WL 6122, at *2 (O.S.H.R.C., Oct. 12, 1976), the Commission stated, "[W]e will hold a general contractor

responsible for violations it could reasonably be expected to prevent or abate by reason of its supervisory capacity . . . . since the general contractor is normally in an appropriate position to discover hazards and obtain abatement either through its own resources or through its supervisory role with respect to other contractors." *Aff'd,* 566 F.2d 596 (8th Cir. 1977). *See also Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 601 (8th Cir. 1977) (where the Eighth Circuit found that a general contractor's duty to detect violations depends on what measures are "commensurate with its degree of supervisory capacity"). This is especially so here, where the superintendents/foremen of both AD Berrios and CR Companies were themselves not complying with fall protection safety requirements at Buildings 1 and 4 at the time of the OSHA inspection. (Exs. 7, 13).

A "general contractor's duty to detect violations depends on what measures are commensurate with its degree of supervisory capacity." *Summit II,* 2010 WL 3341842, at 9; *see also, Am. Wrecking Corp*., No. 96-1330, 2001 WL 1668964, at *8 (O.S.H.R.C., Dec. 20, 2001) (consolidated) (controlling employer "responsible for taking reasonable steps to protect the exposed employees of subcontractors"). The controlling employer's duty is based on its "secondary safety role as a controlling employer." *Suncor*, 2019 WL 654129, at *6-8. NDC's duty to monitor safety and inspect the worksite is viewed "in light of objective factors—the nature of the work, the scale of the project, and the safety history and experience" of the subcontractors it hired. *Id.* The controlling employer's duty of reasonable care is based on an objective standard not whether it implements its own safety program. *Id.*

"Determining whether a controlling employer has met its duty to exercise reasonable care involves analyzing several factors: those that relate to the alleged violative condition itself and those that relate to the employer's duty to monitor or inspect." *Id.* "Whether a controlling

employer should have known of the conditions giving rise to the violations of another employer depends in part on the 'nature, location, and duration of th[e] conditions.'" *Id*. *quoting David Weekley Homes*, No. 96-0898, 2000 WL 34338140, at *4 (O.S.H.R.C., Sept. 28, 2000).

1. Three Factor Reasonable Diligence Analysis

OSHA's Multi-Employer Worksite Citation Policy contains three main factors for determining whether an employer exercised reasonable care: 1) whether the controlling employer "conducted periodic inspections of appropriate frequency"; 2) whether the controlling employer "implemented an effective system for promptly correcting hazards"; and 3) whether the controlling employer enforced the other employer's compliance with safety and health requirements through an effective, graduated system of enforcement and follow-up inspections.[71] (Ex. P, § X.E.4, at 6). *See also Summit I,* 2009 WL 2857148, at *5* (citing OSHA's Multi-Employer Citation Policy, OSHA Instruction CPL 02-00-124 § X.E.2 (Dec. 10, 1999)). When analyzing whether an employer exercised reasonable diligence, the Commission evaluates the controlling employer "in its totality" and in terms of "whether a reasonable employer would have done more." *Capform, Inc.*, No. 91-1613, 1994 WL 530815, at *2 (*citing Elec. Smith, Inc.*, 666 F.2d at 1273-74); *All Fla. Tree & Landscape, Inc*., No. 13-0373, 2015 WL 1201610 (O.S.H.R.C.A.L.J., Jan. 22, 2015); *Centex-Rooney Constr. Co.,* 1994 WL 682931, at *2 (holding that a controlling employer must exercise its responsibility of monitoring potential hazards with reasonable diligence on the worksite and correcting them.). In *Summit II*, the Commission specified that reasonable diligence requires the formulation and implementation of adequate work rules and training programs to ensure that work is safe, as well as adequate supervision of employees. *Summit II,* 2010 WL 3341872, at

[71] In its Reply Brief, Respondent states the "Three Factor Reasonable Diligence Analysis is simply the Unpreventable Employee Misconduct Defense in a different cloak." (Resp't. Reply Br., at 5).

*11 (quoting *N & N Contractors, Inc.*, No. 96-0606, 2000 WL 665599, at *2 (O.S.H.R.C., May 18, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001).

In exercising diligence, a controlling employer may not simply rely on another employer. *Stein, Inc.*, No. 94-810, 1995 WL 431486 (O.S.H.R.C.A.L.J., May 8, 1995) (citing *Carlisle Equip. Co. v. Sec'y of Labor,* 24 F.3d 790, 794 (6th Cir. 1994)) ("Reasonable diligence implies effort, attention, and action, not mere reliance upon the action of another."). A controlling employer's duty to detect violations depends on what measures are "commensurate with its degree of supervisory capacity." *Marshall v. Knutson Constr.*, 566 F.2d at 601.

NDC could have known of the violative conditions of, at least, Instances (a) through (d), with the exercise of reasonable diligence. Mr. Miller testified that he saw "two fall protection violations a week" at the job site." (Tr. 547, 872-73). As discussed below, NDC failed to act with reasonable diligence because it failed to adequately and effectively detect and prevent the fall protection violative conditions described in the Citation.

a. NDC did not inspect its framing and siding contractors' work frequently or closely enough.

The first factor of the CPL's three factor framework evaluates whether an employer inspected the work of its contractors closely or frequently enough. (Ex. P, at §X.E.4.a., at 6). *See Pub. Utils. Maint., Inc. v. Sec'y*, 417 F. App'x 58, 63 (2d Cir. 2011) (unpublished) (citing *N. Landing Constr. Co*., No. 96-721, 2001 WL 826759, at *9 (O.S.H.R.C., July 20, 2001) ("OSHRC has previously indicated that 'reasonable diligence' for the purpose of constructive knowledge involves, among other factors, an employer's 'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.'"). A controlling employer's duty to inspect its subcontractors varies

and is lessened or heightened depending on circumstances particular to the jobsite and its relationship with its subcontractors. OSHA's CPL articulates five predecessor factors to determine a controlling employer's duty under factor one. (Ex P, at §X.E.3., at 6).

The scale of the project may heighten a controlling employer's duty to conduct more frequent and close inspections in order to prevent and detect hazards. (Ex. P, at § X.E.3.a., at 6). Second, the nature and pace of the work matters, including the frequency with which the number or types of hazards change as work progresses. (Ex. P, at § X.E.3.b., at 6). A controlling employer may need to conduct more frequent and close inspections of a worksite with a myriad of dynamic, frequent hazards. Third, how much a controlling employer knows both about the safety and history practices of the employer it controls and about that employer's level of expertise affects how frequently and closely it must inspect that employer. (Ex. P, at § X.E.3.c., at 6). If an employer does not have experience in or knowledge of working with the employer it controls, then it may need to conduct more inspections in the exercise of reasonable diligence. When the employer knows that the employer it controls has a history of noncompliance, or doesn't know its compliance history at a particular phase of the project, then it may need to conduct more frequent and close inspections of that employer. Fourth, if a subcontractor has not demonstrated a consistently high level of compliance, a controlling employer may have to conduct more frequent and close inspections to exercise reasonable diligence. (Ex. P, at § X.E.3.d., at 6). Finally, a controlling employer's knowledge or lack thereof regarding whether the employer it controls utilizes an effective, graduated system of enforcement for non-compliance with safety and health requirements, coupled with regular jobsite safety meetings and safety trainings, may determine how frequently and closely it must inspect the employer. (Ex. P, at § X.E.3.e., at 6; Resp't. Post-Trial Br., at 16).

NDC had a heightened duty to conduct frequent inspections of AD Berrios and CR Companies as of April 5, 2017 due to the size and scale of their work on the project, the nature and fast pace of their work and the frequency with which fall protection hazards arose and changed,[72] NDC's knowledge of ECS/AD Berrios'[73] and CR Companies'[74] unsafe practices and noncompliance with fall protection safety rules, and NDC's failure to enforce its graduated system for enforcement for non-compliance with safety rules.[75] (Sec'y Post-Hrg. Br., at 52-68; Sec'y Reply Br., at 19; Tr. 54, 274-75, 335, 356, 367, 403, 411, 451-52, 546-47, 551, 687, 853; Ex. HH).

NDC did not believe that looking for safety issues was its responsibility. Superintendent Brumbaugh testified, "No one was specifically looking for safety violations. We're not safety officers." (Tr. 547). NDC did not inspect ECS more closely or frequently even though it knew ECS had incurred a history of repeated fall protection violations at the jobsite in a relatively short period of time. Superintendent Brumbaugh noted that the framing crews were guilty of "repeat violations" and had "a complete lack of control for safety." (Tr. 403, 515-16, 768-69; Ex. 38). Even though it knew ECS committed repeated fall protection violations, its overall identification of fall protection hazards at the jobsite was inadequate. Superintendent Brumbaugh testified that he did not walk the jobsite when he arrived each morning — and would not get around to all the buildings for several hours. He testified that on some days, he would spend as little as fifteen minutes outside of the trailer. (Tr. 279, 411-

[72] Given the number of workers, the number of balconies and the daily or hourly pace at which life-threatening fall protection hazards emerged, NDC ought to have conducted frequent and close inspections of AD Berrios's and CR Companies' workers to detect and prevent fall protection hazards.
[73] NDC knew of at least twelve fall protection violations by ECS/AD Berrios during the two-month, one week period from November 29, 2016 through February 7, 2017. (Exs. 26-27, 30, 32, 35, 38, 41-42, 47, 51-52, 55, GG).
[74] By April 5, 2017, NDC knew that CR Companies had only submitted meeting minutes from one tool box talk for all the weeks it had been on the job site. (Tr. 543-45; Ex. 72).
[75] NDC's system of enforcement did not involve any investigation into the cause of the violation, the identity of the perpetrator, or whether progressive discipline was followed. (Tr. 451).

13). Mr. Miller also indicated that his walk-by on the day of the OSHA inspection was not comprehensive, saying, "I only walked by fleetingly." (Tr. 833).

NDC's observations of the jobsite did not lead to effective abatement of fall protection hazards. It did not investigate the causes of fall protection violations or why repeated fall protection violations kept happening. (Tr. 437-38). When an NDC employee did see a fall protection violation, it was often addressed by a telephone call and no record was made of the violation and there was no attempt to ascertain the name of the person who had committed the violation. (Tr. 414, 451). NDC was mistaken about its responsibility as a controlling employer to conduct inspections for safety violations committed by subcontractors. NDC's superintendents testified NDC was not responsible for the safety of any subcontractor's workers at the job site at any time. (Tr. 440, 463, 685-86, 698, 826, 872-73). NDC's confusion as to whether it was responsible in any way for the safety of its subcontractors' employees is itself evidence of a lack of reasonable diligence. *See e.g. Meadows Constr. Co.,* LLC, No. 12-2142, 2018 WL 1309479, at *38 (O.S.H.R.C., Feb. 26, 2018) (noting employer "testified that he was not responsible for safety[.]" and its belief that it was not responsible for safety at the worksite was one factor in determining it failed to act diligently in regard to safety).[76] NDC did not participate in safety walks conducted by its subcontractors because it did not believe that it was responsible for inspecting its subcontractors. (Tr. 368, 532-33, 779). NDC did not ensure that hazards identified on these safety walks were corrected because "they're not my employees. I don't correct them." (Tr. 532).

CO Ortiz and AAD Perez-Ramos saw, at least, twelve workers being exposed to fall hazards at Buildings 3 and 4, the garage, and the mailbox building over the course of an hour

[76] *See Summit II*, 2010 WL 3341872, at *10 (holding an employer cannot contract away its duties "under the Act by requiring another party to perform them.") (quoting, e.g., *Froedtert Mem'l Lutheran Hosp. Inc*., No. 97-1839, 2004 WL 2308763, at *10 (O.S.H.R.C., Jan. 15, 2004)); *see also*, *Archer-W. Contractors, Ltd*., No. 87-1067, 1991 WL 81020 (O.S.H.R.C., Apr. 30, 1991), *aff'd*. 978 F.2d 744 (D.C. Cir. 1992).

and fifteen minutes. (Tr. 61; Exs. 2-15). *See Meridian Constr. & Dev., LLC,* No. 06-0454, 2006 WL 2781633, at *10 (O.S.H.R.C.A.L.J., Sept. 5, 2006) ("[T]he number of unsafe conditions observed . . . during [the OSHA Compliance Specialist's] short walk-through of the worksite shows Meridian's inspection program was inadequate. Meridian's two superintendents on site failed to conduct proper inspections.").

b. NDC did not implement an effective system for promptly correcting fall hazards.

NDC failed to implement an effective system for promptly correcting fall hazards. It used a system whereby it would call or contact a subcontractor's superintendent and describe a violation it had seen and expect the subcontractor's superintendent, who like CR Companies' Mr. Smith might be away from the jobsite, to try and fix the problem. This system was ineffective and left workers exposed to fall hazards. (Tr. 80-82, 126). CO Ortiz testified that the system was "ineffective" and "set them up for failure" because NDC did not follow-up to find out more about why the incident happened, who was involved and if the reason was promptly and properly corrected. (Tr. 407-08, 450). Superintendent Brumbaugh never asked subcontractor employees if they received fall protection training, or whether they had fall protection equipment. (Tr. 81-83). CO Ortiz also testified that the person receiving NDC's message was often not onsite and could not be reached.[77] (Tr. 82).

NDC's claim that every safety violation it telephonically identified was abated immediately is contradicted by the fact that it sent at least six formal, written fall protection safety violation notices to ECS. NDC did not ensure that fall hazards were abated immediately or whether or not hazards were resolved at all. (Tr. 865-66). When asked if NDC waited to see if its safety issues were abated, Mr. Miller testified, "I would be lying if I told you yes" and indicated

[77] *See Stanley Roofing Co., Inc.,* No. 03-0997, 2006 WL 741750, at *2 (O.S.H.R.C., Mar. 3, 2006) (holding "offsite supervision via cellular phone communication . . . inadequate in this case.").

after reporting a violation he would go about his business. In a Safety Violation Notice dated December 6, 2016, Superintendent Brumbaugh stated, "Yesterday, your team was escorted around site and in excess of 12 different balcony and breezeway openings were left with no handrails. As of this morning, several areas remain unsafe." (Tr. 505-06; Ex. 27). The frequency of fall protection violations at the jobsite that NDC brought to the attention of ECS ranged from daily to approximately two per week. (Tr. 506; 825, 865; Exs. 26-27, 30, 32, 35, 38, 41-42, 47, 51-52, 66).

Senior Vice President Scott testified that a subcontractor could not be terminated, even after many repeated violations for the same conduct, if the subcontractor corrected the problem within 72 hours. (Tr. 489-90). Mr. Brumbaugh testified that that subcontractors were required to abate a fall protection violation, both immediately and within 24 hours. (Tr. 417; Ex. GG). At times, NDC's allowed subcontractors too much time to remedy life-threatening violations. OSHA stated and NDC's own superintendent admitted that getting a subcontractor to abate in 10 minutes (far less than 72 hours) is too long when the situation involves a worker on a balcony without fall protection. (Tr. 83, 759). Superintendent Miller's failure to act upon CO Ortiz's plea to abate an ongoing, serious threat to the life of two construction workers on a third-floor balcony was a failure in reasonable diligence sufficient to support a finding of constructive knowledge of the hazard. *See Calang Corp.*, No. 85-0319, 1990 WL 140086, at *2 (O.S.H.R.C., Sept. 12, 1990) (finding that the employer could not in good faith have believed that it complied with the standards after the compliance officer explained the requirements and pointed out deficiencies the employer failed to correct); *Altor, Inc.,* No. 99-0958, 2011 WL 1682629, at *15 (O.S.H.R.C., Apr. 26, 2011) (Failing to "to halt construction" and install guardrails in response to a CO pointing out

a hazard "plainly demonstrate a cavalier attitude towards employee safety" and even was sufficient for a finding of willfulness.)

(Sec'y Post-Hrg. Br., at 68-74).

c. NDC did not sufficiently enforce ECS's, AD Berrios' and CR Companies' compliance with fall protection safety requirements

Constructive knowledge of a violative condition also can be established by the Secretary's demonstration that the employer's safety program was inadequate. *ComTran Grp., Inc.*, 722 F.3d at 1308 (noting a lack of a safety program can establish the knowledge element "with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable."); *see also, Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803–04 (11th Cir. 2014) (same) (unpublished). An employer's safety program may be deemed inadequate if it is not effectively communicated to employees. *Id.* (citing *PSP Monotech Indus.,* No. 06–1201, 2008 WL 5432286, at *3 (O.S.H.R.C., Aug. 14, 2008); *H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 820 (5th Cir. 1981) (finding, in the context of establishing a defense of negligent employee misconduct, substantial evidence in the record supported a finding that a company failed to communicate and enforce its work rules needed to comply with OSHA standards).

The Secretary may show constructive knowledge when: (1) conditions prohibited by an OSHA standard could occur unless employees followed certain safety rules; and (2) the employer failed to take adequate steps to obtain their compliance with the necessary safety rules. *CF&T Available Concrete Pumping, Inc.*, No. 90-329, 1993 WL 44415 (O.S.H.R.C., Feb. 5, 1993); *see, e.g., Gary Concrete Prods.,* No. 86–1087, 1991 WL 100580, at *2 (O.S.H.R.C., May 16, 1991) (holding an employer failed to use reasonable diligence to discover improper stacking of concrete pilings, because it failed to ensure adequate supervision of employee responsible for stacking, and failed to train employees effectively in avoiding the hazards). If an employer's safety program

lacks the elements of an effective safety program, which include work rules designed to prevent violations, adequate communication of the rules to employees, methods of discovering whether violations occur and enforcement of the rules if violations are discovered, it is reasonable to conclude that the violation was preventable. *Id.* Furthermore, a violation is considered preventable and constructive knowledge will be found where an employer's safety program does not have a series of progressively more severe consequences for violators. *See Crowther Roofing & Sheet Metal of Fla.,* No. 10-1081, 2010 WL 5128951 (O.S.H.R.C.A.L.J., Oct. 15, 2010). A general contractor does not act with reasonable diligence when it unreasonably relies on a subcontractor who lacks an effective safety program.[78] *See also McDevitt Street Bovis, Inc.*, 2000 WL 35559662, at *2.

Evidence that an employer failed to implement a graduated system of enforcement and follow-up inspections is evidence that the employer did not act with reasonable diligence. Here, NDC failed to implement a graduated system of enforcement. It did not discipline its subcontractors and did not ask its subcontractors to discipline their offending employees.[79] (Tr. 452). When asked whether NDC had ever requested a subcontractor to take disciplinary action against an employee, Superintendent Brumbaugh said, "I never asked them to take disciplinary [sic] — spanking them, firing them, or otherwise." Although NDC did notify its subcontractors of violations it happened to see, CO Ortiz testified that there were no meaningful consequences for violators. (Tr. 77, 137-38). The result was a construction site where lack of fall protection was a normal occurrence and even the supervisors for the framing and siding contractors exposed

[78] *See Meadows Constr. Co.,* LLC, No. 12-2142, 2018 WL 1309479, at *25 (O.S.H.R.C., Feb. 26, 2018) (ALJ Decision and Order appended to Commission case which held that although Employer "was very responsive whenever he saw incidents of noncompliance . . . "the record does not show how effectively [it] enforced its machine guarding rule.").

[79] *See Precast Servs., Inc.*, No. 93-2971, 1995 WL 693954, at *2 (O.S.H.R.C., Nov. 14, 1995) (holding program consisting only of pre-inspection verbal warnings is insufficient to establish employee misconduct defense), *aff'd.* 106 F.3d 401 (6th Cir. 1997).

themselves to fall hazards. (Tr. 77, 343-46; Exs. 7, 13). Superintendent Miller testified that he saw and called on subcontractors to correct fall hazards twice a week. He never issued a violation notice or otherwise documented the incident. (Tr. 403-04, 419).

Although NDC included a list of safety rules in its contracts with its subcontractors, it failed to communicate or effectively enforce those rules. (Tr. 289). NDC had a rule which stated that if an employee was given three notices of a safety violation on the project, then NDC would demand removal of that employee from the jobsite. (Tr. 899-901). Mr. Miller testified that although that rule applied to subcontractors, NDC did not enforce this rule because it did not keep track of the identity of the violators. (Tr. 899-901). NDC's managers did not effectively communicate whether a subcontractor was responsible for following NDC's rules regarding fall protection, or its own company's rules, and what role, if any, the subcontractors had in enforcing NDC's safety rules. (Tr. 65, 69, 407, 451-52, 469, 685-86, 779).

NDC's near sole reliance on the ECS, AD Berrios and CR Companies to fully comply with OSHA's fall protection requirements during the project was unreasonable given its knowledge of their repeated violations and their lack of enforcement of an effective safety program. NDC was aware of repeated, continuous health and safety violations by these subcontractors. (Tr. 77). CO Ortiz testified that no fall protection was the normal rule, with no meaningful consequences. (Tr. 146). AD Berrios supervisor Louis Garcia admitted employees repeatedly failed to use fall protection and that he struggled with enforcement of fall protection safety rules. (Tr. 355). CO Ortiz testified that supervisors in charge of safety for ECS had not been at the construction site for months, and two supervisors responsible for safety on the day of the inspection were photographed while exposed to fall hazards themselves, with unprotected subordinate workers standing alongside them. (Tr. 83, 137, 343-346; Exs. 7, 13). *See Bill C. Carroll Co., Inc.*, 1979

WL 8511, at *5 (No. 76-2748, 1979) (holding violations by supervisors "is strong evidence that implementation of the safety policy is lax."). NDC knew that CR Companies was not holding tool box talks. (Tr. 545). NDC believed that ECS had a "complete lack of control for safety" and was not training or communicating safety rules to its employees. (Tr. 524-25; Ex. 38). (Sec'y Post-Hrg Br., at 74-81).

Respondent's Policy Arguments that OSHA's: 1) Multi-Employer Citation Policy Disincentivizes General Contractors from taking an Active Safety Role and 2) Alleged Inability to Provide Compliance Insight is Highly Prejudicial are Without Merit and Offer No Defense to the Citation.

A. The Multi-Employer Citation Policy does not Disincentivize Safety with General Contractors.

"It is Respondent's position the Multi-Employer Citation Policy, as it was applied to this Project, disincentivizes general contractors from taking an active role in safety and health at worksites." It makes a policy argument that requiring it to enforce its safety program and conduct safety inspections does not further the purposes of the Act. Respondent asserts general contractors who encourage safety at their worksites will cease doing so if they are fined by OSHA. (Resp't. Post-Trial Br., at 32-33).

The Commission has repeatedly upheld OSHA's position that the controlling employer doctrine furthers the goals of the Act. *Grossman Steel & Aluminum Corp.*, 1976 WL 5968, at *3 ("We therefore conclude that, on a construction site, the safety of all employees can best be achieved if each employer is responsible for assuring that its own conduct does not create hazards to any employees on the site, and that imposing liability on this basis would not place an unreasonable or unachievable duty on contractors."). "General contractors normally have the responsibility and the means to assure that other contractors fulfill their obligations with respect to employee safety where those obligations affect the construction worksite." *Marshall v. Knutson Constr. Co.*, 566 F.2d at 599. And "[a]s a practical matter, the general contractor may be

the only on-site person with authority to compel compliance with OSHA safety standards." *Universal Constr. Co.*, 182 F.3d at 730. A general contractor who is a controlling employer who encounters a life-threatening safety violation may not ignore it. A general contractor, who is a controlling employer, who knew or should have known of a serious safety violation and had the power to correct it, needs to do so or risk receipt of an OSHA citation for not taking prompt, meaningful, and effective corrective action.

B. Lack of Prejudice Regarding OSHA's Compliance Insight.

Respondent argues Complainant must identify conduct that Respondent should have pursued to avoid receiving the Citation. It asserts CO Ortiz and AAD Perez-Ramos were unable to provide any insight into what conduct NDC should have engaged in to absolve itself from the Citation. Consequently, citing to the Commission decision in *David Weekley Homes*, 2000 WL 34338140, at *3, Respondent argues that it ought to be absolved of its responsibility as a controlling employer under the Act. (Resp't. Post-Trial Br., at 28-29; Resp't Reply Br., at 4, n. 1).

The Secretary, on the other hand, argues that Respondent is misreading *David Weekley Homes* and asserts OSHA's CPL case law provides adequate guidance as to what a controlling employer must do to comply with the Act. He asserts that *David Weekley Homes* does not require OSHA to provide NDC with "an unrealistic amount of detail as to how to comply with the cited standard." The Secretary also asserts that OSHA provided Respondent with a great deal of notice pertaining to what went into its determination that NDC had knowledge of the violative conditions. The Court agrees with the Secretary. Complainant cites to his post-hearing brief and testimony presented by CO Ortiz and AAD Perez-Ramos at trial concerning what NDC should

have done, constructive knowledge, and what OSHA expected of NDC as a controlling employer. (Sec'y Post Hrg. Br., at 68–81, Sec'y Post Hrg. Reply Br., at 23-25; Tr. 136-38, 257).

The Secretary further argues *David Weekley Homes* holds that, only where there is an ambiguous regulation, the Secretary must explain how the employer's conduct fell short and what it could have done to comply.[80] (Sec'y Post Hrg. Reply Br., at 25). There is no ambiguous regulation. The regulation at issue provides three well-defined options to protect employees: "by guardrail systems, safety net system, or personal fall arrest system . . .." 29 C.F.R. § 1926.510(b)(13).

This case involves a standard with specific ways to comply identified. *Cf. See Buckeye Indus., Inc.,* No. 8554, 1975 WL 5244, at *3 (O.S.H.R.C., Dec. 22, 1975) ("We do not consider it incumbent upon the Secretary to demonstrate what the employer should have done to comply with section 1910.212(a)(3)(ii). The standard itself prescribes the performance performance [sic] required by guarding."). While the Commission vacated the four citations issued to David Weekley Homes as the controlling employer, it did not hold in its constructive knowledge analysis that OSHA must define "reasonable diligence" with the same level of specificity. *David Weekley Homes,* 2000 WL 34338140 at *4-6. In *McDevitt St. Bovis, Inc.,* the Commission held a general contractor responsible for subcontractor violations it could reasonably have been expected to prevent. Here, OSHA's representatives testified NDC should: 1) have conducted safety

[80] In *David Weekley Homes*, an employer was given two citations as the creating employer and four "substantive" citations as the controlling employer. *David Weekley Homes*, 2000 WL 34338140 at *4-5. Although all of the citations were vacated, only the creating employer citations were vacated due to the ambiguity concerning what constituted compliance. *Id.,* at *5. With regard to the first citation alleging the employer failed to inspect and provide a safe and healthful workplace, the Commission held "the Secretary has not shown that Weekley's conduct was insufficient, particularly in light of the combination of its limited onsite presence and actual exercise of safety responsibilities." *Id.,* at *3. Similarly, it vacated the second citation, for failing to provide fall protection training, because the Secretary failed to define what would have constituted compliance under the circumstances and how Weekley's conduct was deficient. *Id.,* at *4.

inspections instead of ad hoc quality control walks, 2) not just have sought immediate abatement through phone calls, and 3) have documented and implemented a graduated system of enforcement of its work rules. (*See* Sec'y Post Hrg. Br., at 74-80). OSHA is not required to affirmatively define in detail every element as to how an employer is to comply with the standard with the specificity demanded by Respondent. Respondent has not been highly prejudiced by OSHA not doing so.

Respondent has Abandoned any Greater Tripping Hazard Defense

In its answer, Respondent asserted the defense of greater hazard as its nineteenth affirmative defense. (Answer, at 5). In its Answers to Complainant's Second Set of Interrogatories, Respondent asserted that "the use of Personal Fall Arrest Systems in the constrained work spaces at the jobsite would create a greater tripping hazard to employees than the harm the protective equipment is designed to prevent." (Ex. 22, ¶23, at 5-6). "To establish a defense of greater hazard, an employer must prove that: (1) the hazards created by complying with the standard are greater than those of noncompliance, (2) other methods of protecting employees from the hazards are not available, and (3) a variance is not available or application for a variance is inappropriate." *Seibel Modern Mfg. & Welding Corp.*, No. 88-821, 1991 WL 166592 (O.S.H.R.C., Aug. 9, 1991).

Respondent has not established its defense of greater hazard. It failed to present any evidence in support if its nineteenth affirmative defense of greater hazard at the trial and did not raise it further at trial or in its Post-Trial and Reply Briefs.[81] Consequently, the Court finds that Respondent has abandoned its greater hazard affirmative defense and that it has no merit. *Fl. Gas*

[81] In its Answer, Respondent asserted twenty "affirmative" defenses. (Answer, at 2-7). Many of these defenses were not raised further at trial or in its Post-Trial and Reply Briefs. With the exception of the Court finding merit in Respondents "Second Affirmative Defense" pertaining to a penalty reduction for a lack of prior history with OSHA, the Court finds all of the remaining defenses lack merit and are rejected.

Contractors, Inc., No. 14-0948, 2019 WL 995716, at *7 (O.S.H.R.C., Feb. 21, 2019) (failure to raise any argument results in abandonment of that argument).

Citation 1, Items 1(a) through (d), was Properly Classified as Serious and the Penalty Assessed by the Court is Appropriate

Section 17(j) of the Act, 29 U.S.C. 666(j), requires the Complainant to consider four factors in proposing penalties: the gravity of the violation and the employer's good faith, history, and size. The Act does not prescribe how or what weight to apply to the factors. *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1001 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977) (OSHA penalties are meant to "inflect pocketbook deterrence"). Penalty assessment requires application of administrative discretion. *D.S. Grading Co., Inc. v. Sec'y of Labor*, 899 F.3d 1145, 1148 (11th Cir. 1990). Usually, the gravity of the violation is the factor of greater significance. *Caterpillar, Inc.,* No.: 97-922, 1993 WL 44416, at *15 (O.S.H.R.C., Feb. 5, 1993). Under section 17(k) of the Act, 29 U.S.C. § 666(k), a serious violation exists where there is substantial probability that death or serious harm could result from a condition that exists in a place of employment.

Respondent's failure to comply with 29 C.F.R. §1926.501(b)(13) on April 5, 2017 at the Preserve at the Villages in Bradenton, Florida exposed employees to fall hazards and serious physical injury. The evidence in this case establishes that there is a high probability of death or serious bodily harm if an accident occurs. (Tr. 112, 164; Ex. C). On April 5, 2017, the workers were observed at varying heights from greater than six feet to greater than thirty feet. (Tr. 162-64, Exs. B-C). When asked what the likely injury would be from a six-foot fall, AAD Perez-Ramos said the likely result would be serious bodily injury. She further said, "Can be serious injuries. Can have broken bones depending on how you fell. You can die from that height, too." (Tr. 112, 160-64). CO Ortiz further testified that:

> [t]he probability of an accident in this case was high. Employees were working continuously. The severity of an incident. Falling from 40 feet is definitely a greater severity. People most likely will not survive a fall from a balcony while standing on a ladder. Or if they survive they will have irreversible injuries, there's no question about it. (Tr. 83).

The gravity-based penalty proposed for Citation 1, Item 1 was $12,675. The violation was assigned a high severity, greater probability, and high gravity. (Tr. 83; Ex. C). The item was assigned high severity because workers were exposed to heights that could cause irreversible injury and or death. It was assigned a greater probability because workers were continuously exposed to fall hazards every day. (Tr. 83, 112-13; Ex. C). The Secretary reduced the proposed gravity-based penalty by 30% for size. (Tr. 83, 186; Ex. C, at 2, Ex. D, at 4). The calculated proposed penalty was $8,873. (Ex. C, at 2, WW, at ¶10, at 7). The Secretary did not give any reductions for good faith or history. (Tr. 84, 184-85, 120-21, 208-09; Ex. C, at 2, Ex. XX, at ¶7, at 2). AAD Perez-Ramos testified that a good faith reduction is based upon the Area Director's discretion. She said the Tampa OSHA office provides no good faith reduction in fall hazard cases. (Tr. 186).

Respondent argues that it is entitled to a penalty reduction in consideration of its lack of prior history with OSHA. (Answer, Second Affirmative Defense, at 2; Resp't. Post-Trial Br., at 34-35). Respondent is correct. The record shows that NDC had a history of no proven OSHA violations.[82] The FOM calls for a 10% reduction for no prior OSHA history.[83] (Tr. 139-43; Ex. 1, at 2, Ex. XX, at ¶6, at 2). OSHA made appropriate and supported determinations of all of the

[82] The record shows that OSHA conducted a prior inspection of NDC, #1139126, opened on April 7, 2016, that led to no substantiated violation. (Tr. 139-40, 143, 210; Ex. 1, at 2, Ex. XX, ¶5, at 2). AAD Perez-Ramos testified that OSHA did not decrease or increase the penalty by 10 percent due to history because a citation OSHA previously issued to NDC was "deleted." She said OSHA would "give a 10 percent reduction in penalty" if NDC had no previous history with OSHA. (Tr. 184-86, 209-12).

[83] Ch. 6, § III.B.2.a., FOM, states:
Allowable Percentage Reduction.
A reduction of 10 percent shall be given to employees who have been inspected by OSHA nationwide, or by any State Plan State in the previous five years, and the employers were found to be in compliance or were not issued serious violations. (Ex. XX, at ¶6, at 2).

required factors, except history. (Tr. 83-84). This evidence is sufficient to support a serious citation. The violation was properly classified as "Serious." The Court has considered all of the required factors and affirms Citation 1, Item 1, Instances (a) through (d), as a serious violation and assesses a penalty of $7,986, calculated as $8,873 less a 10% reduction of $887 for history. (Sec'y Post Hrg. Br., at 81-83, Sec'y Reply Br., at 28-29; Resp't. Post-Tr. Br., at 34-35).

Conclusion

NDC was a controlling employer at the Preserve project. As discussed above, the elements of applicability, employee exposure, violation and knowledge of the cited condition are proved.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

Order

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that: Citation 1, Item 1, Instances (a) through (d), alleging a Serious violation of 29 C.F.R. § 1926.501(b)(13), is AFFIRMED and the Court assesses a penalty in the amount of $7,986.

/s/ Dennis L. Phillips
The Honorable Dennis L. Phillips

U.S. OSHRC Judge

Dated: September 4, 2020
Washington, D.C.