United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. RJCL CORPORATION, d/b/a RNV CONSTRUCTION, Respondent.	OSHRC Docket No. 22-0360 and 22-0362 (Consolidated)

Appearances:

Seema Nanda, Marc Pilotin, Joshua Falk, Julia Hayer, Department of Labor, Office of Solicitor, San Francisco, CA,
For Complainant

Moises Tagle, Self-Represented Litigant,[1] Saipan, MP, Northern Marina Islands
For Respondent

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

DECISION AND ORDER

I. PROCEDURAL BACKGROUND

On October 27 and 28, 2021, a Compliance Safety and Health Officer (CSHO) inspected two worksites (the Capitol Hill worksite and the COTA Building worksite) in Saipan, North Marina Islands, in accordance with a regional emphasis program focused on construction projects.

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

As a result, the Occupational Safety and Health Administration (OSHA) issued two Citations and Notifications of Penalty to Respondent RJCL Corporation, d/b/a RNV Construction (RNV Construction). The Citation for the Capitol Hill worksite (Capitol Hill Citation) alleges four serious violations and four other-than-serious violations, with a total proposed penalty of $26,106. The Citation for the COTA Building worksite (COTA Building Citation) alleges three serious violations and one other-than-serious violation, with a total proposed penalty of $18,648. RNV Construction timely contested the Citations, and the Office of Executive Secretary docketed these two inspections as separate cases: one for the Capitol Hill Citation (No. 22-3060) and another for the COTA Building Citation (No. 22-3062).

The Chief Administrative Law Judge designated both matters for conventional proceedings, and the cases were consolidated on May 24, 2022. A trial was held on February 15-17, 2023, in Saipan.[2] An interpreter certified in Tagalog was retained throughout the trial to ensure an accurate transcription of the testimony and the proceedings.[3] The following individuals testified at trial: (1) CSHO Pologa Setu; (2) Milo Naval, Site Superintendent for RNV Construction; and (3) Moises Tagle, Jr., Construction Manager for RNV Construction at the time of the inspections at issue.

[2] "[T]he Commission is responsible for the adjudicatory functions under the OSH Act," *StarTran, Inc. v. OSHRC*, 290 F.App'x 656, 670 (5th Cir. 2008) (unpublished), and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7 (1985) (per curiam). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *Martin v. OSHRC,* (*CF&I Steel Corp*.), 499 U.S. 144, 151 (2012).

[3] When dealing with persons with limited English proficiency (LEP), the Court follows its language access plan to ensure individuals with LEP have the same access to the Court as everyone else. This plan was developed and implemented in compliance with Executive Order 13166.

After the trial concluded, both parties timely filed post-trial briefs, which were considered by the Court in reaching its Decision.[4] Pursuant to Commission Rule 90(a), after hearing and carefully considering all the evidence and the arguments of the parties, the Court issues this Decision and Order as its findings of fact and conclusions of law.

II. STIPULATIONS

The parties stipulated to many facts underlying these cases.[5] At trial, the Court discussed the joint stipulation statement and its impact with RNV Construction's representative, who signed the joint stipulation statement in the Court's presence. The stipulations were thereafter entered in the record. (Tr. 25). Accordingly, in the event testimony conflicts with the joint stipulations, the Court will generally assign greater weight to the joint stipulations. The Court shall incorporate by reference the joint stipulations and refer to them as necessary in this Decision.

III. JURISDICTION

The Court finds the Commission has jurisdiction over these proceedings pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. § 651, *et. seq.* by Respondent filing its Notice of Contest. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 518 F.2d 990, 995 (5th Cir. 1975), *aff'd,* 430 U.S. 442 (1977) (describing "Enforcement Structure of OSHA"); *see also Joel Yandell*, 18 BNA OSHC 1623, 1628 n.8 (No. 94-3080, 1999); 29 U.S.C. § 659(c).

[4] Affirmative defenses not discussed in post-trial submissions are deemed waived. *Ga.-Pac. Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

[5] *See Armstrong Utils. Inc.*, No. 18-0034, 2021 WL 4592200, at *2 n.2 (OSHRC, Sept. 24, 2021) (finding it was "plain error" to not accept parties' stipulation); *CF & T Available Concrete Pumping, Inc*., 15 BNA OSHC 2196, 2199 (No. 90-329, 1993) (the Commission accepted the parties' stipulation the alleged violation, if any, was serious).

The Court also finds at all times relevant to this proceeding, RNV Construction was engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652 (3) and (5), at both worksites. (J. Stip. 4). The Commission has consistently held that "[t]here is an interstate market in construction materials and services and therefore construction work affects interstate commerce." *Clarence M. Jones d/b/a Jones Co*., No. 77-3676, 1983 WL 23870, at *2 (OSHRC, Apr. 27, 1983) (citing *NLRB v. Int'l Union of Operating Eng'rs, Local 571*, 317 F.2d 638, 643 n.5 (8th Cir. 1963) (judicial notice taken that construction industry affects interstate commerce).

IV. ISSUES NEEDING RESOLUTION

RNV Construction does not dispute it was the sole contractor at the COTA Building worksite and its employees were present at that site. (J. Stip. 53, 60, 65-66). Thus, the Court concludes RNV Construction was the "employer" for purposes of the COTA Building Citation.

However, RNV Construction argues it was not the employer at the Capitol Hill worksite. (Resp't Answer, No. 22-0360, at 1). RNV Construction maintains that Mr. Villacrusis—owner of RNV Construction—was the employer and independently hired workers to perform work on his private residence. (Resp't Post-Trial Br. at 3). The Secretary bears the burden to establish RNV Construction is an "employer" as it relates to the Capitol Hill worksite. *The Hartford Roofing Co.*, No. 92-3855, 1995 WL 555498, at *3 (OSHRC, Sept. 15, 1995).

Since the Supreme Court issued its decision in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992), the Commission has consistently applied the common law agency doctrine set forth in that decision to employment relationship questions arising under the OSH Act. *Freightcar Am., Inc.*, No. 18-0970, 2021 WL 2311871, at *2 (OSHRC, Mar. 3, 2021). The common law agency doctrine set forth in *Darden* "focuses on 'the hiring party's right to control

the manner and means by which the product is accomplished.' "*All Star Realty Co.*, No. 12-1597, 2014 WL 533165, at *2 (OSHRC, Feb. 3, 2014) (quoting *Darden*, 503 U.S. at 323). Factors relevant to that inquiry include:

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

Darden, 503 U.S.at 323–24. While no single factor is determinative, the primary focus is whether the putative employer controls the workers. *Allstate Painting and Contracting Co., Inc*., No. 97-1631, 2005 WL 682104, at *2 (OSHRC, Mar. 15, 2005) (consolidated); *S. Scrap Materials Co*., No. 94-3393, 2011 WL 4634275, at * 16 (OSHRC, Sept. 28, 2011) (holding that in the context of the OSH Act, the control exercised over a worker is the "principal guidepost").

The Court finds the following facts support its finding that RNV Construction was the employer at the Capitol Hill worksite. RNV Construction was a construction company engaged in the type of work taking place at the Capitol Hill worksite. (J. Stip. 4). RNV Construction furnished building materials for the Capitol Hill worksite from its warehouse. (J. Stip. 46; Tr. 300, 303). RNV Construction's representative at trial testified workers at the Capitol Hill worksite were paid through RNV company money. (Tr. 328-29). An RNV Construction project supervisor created the schedules at the Capitol Hill worksite, assigned workers to the Capitol Hill worksite, handled sick leave requests for the Capitol Hill worksite, and, on the day of the inspection, an RNV foreman was on-site directing the work being performed. (J. Stip. 43, 45; Tr. 299-301); (Tr. 64-65). Workers at the Capitol Hill worksite had regular work hours with a one-hour lunch break. (J. Stip. 44). The electricians working at the Capitol Hill worksite on October 27, 2021, were RNV Construction

employees.[6] (J. Stip. 39, 42). Moreover, workers at the Capitol Hill jobsite identified RNV Construction as their employer when interviewed by the CSHO. (Tr. 225; Ex. C-11, C-15).

RNV Construction argues that Mr. Villacrusis was the employer at the jobsite, so OSHA cited the wrong entity. The Court also concludes RNV Construction and Mr. Villacrusis "may be deemed one" for purposes of liability under the alter ego doctrine. *See United Enters., Inc. v. King*, Nos. Civ.A.93-1174 & 94-046, 1995 WL 1943000, at *2 (N. Mar. I., Nov. 30, 1995) (evaluating the alter ego theory under the common law of the Commonwealth of the Northern Marina Islands); *see also Altor, Inc*., No. 99-0958, 2011 WL 1682629, at *3 (OSHRC, Apr. 26, 2011) (applying the alter ego doctrine to cases arising out of the OSH Act using the state law within the relevant Circuit) *aff'd,* 498 F. App'x 145 (3d Cir. 2012) (as amended). Under the law of the Commonwealth of the North Marina Islands, the Court may consider the following factors to evaluate whether an owner and company are identical for purposes of liability:

> 1. Whether the individual is in a position of control or authority over the entity;
> 2. Whether the individual controls the entity's actions without need to consult others;
> 3. Whether the individual uses the entity to shield himself from personal liability;
> 4. Whether the individual uses the business entity for his or her own financial benefit;
> 5. Whether the individual mingles his own affairs in the affairs of the business entity; [and]
> 6. Whether the individual uses the business entity to assume his own debts, or the debts of another, or whether the individual uses his own funds to pay the business entity's debts.

King, 1995 WL 1943000, at *2. The Court also considers whether the failure to observe corporate formalities renders the interest of the owner "so intertwined with those of the corporation that separate entities no longer exist." *Arman v. JN Saipan CNMI, LLC,* No. 1:21-CV-00024, 2022 WL 3156501, at *9 (N. Mar. I., Aug. 9, 2022).

[6] The Court notes that Mr. Naval testified that workers at the Capitol Hill worksite were subcontractors and not employees of RNV Construction. (Tr. 301). This conflicts with the parties' joint stipulations and the evidence as a whole. This testimony diminishes Mr. Naval's credibility. Accordingly, the Court affords this testimony no weight.

Here, the record demonstrates Mr. Villacrusis had authority over the work performed by RNV Construction, and he had supervisory authority over all RNV Construction employees. (J. Stip. 12). There is no indication in the record he needed to consult someone else when making decisions about the company. Mr. Villacrusis used the company's resources—such as tools, equipment and manpower—for his personal benefit; namely, the renovation of his personal residence. (Tr. 300; J. Stip. 14, 46-47). He paid workers from RNV Construction coffers, thus co-mingling his finances with that of the company's. (Tr. 328). Alternatively, under the alter ego doctrine, the Court concludes Mr. Villacrusis and RNV Construction may be deemed one for purposes of liability for violations cited by OSHA and RNV Construction deemed to be an employer.

After careful review and on the above basis, the Court finds the workers at the Capitol Hill worksite were RNV Construction employees and RNV Construction was their employer. Although RNV Construction argues, and the CSHO admitted, there was no RNV Construction sign outside the Capitol Hill jobsite—a common feature of RNV Construction worksites—this fact alone does not change the Court's findings that RNV Construction was in fact the employer at the Capitol Hill worksite under the *Darden* factors and alternatively, the alter ego doctrine. (*See* Resp't Post-Trial Br. 1; Tr. 201).

RNV Construction's also argues the Capitol Hill inspection was illegal. RNV raised a defense in RNV Construction's Answer, namely: "We believe that the inspection was conducted in a manner contrary to the existing OSHA regulations." (Resp't Answer, No. 22-0360). RNV Construction did not raise this argument in its Post-Trial Brief. However, after reviewing the record, the Court assumes RNV Construction may be arguing the consent to inspect given by

Ronald Acuyong[7] was invalid. At trial, Mr. Tagle testified Mr. Acuyong was not an RNV Construction employee or foreman, which could support an argument he was not authorized to give consent. (Tr. 316). However, this testimony directly contradicts the joint stipulation, which explains Mr. Acuyong worked as lead man for RNV Construction with the duties to supervise and assign the work being performed. (J. Stip. 40). Given the contradiction between Mr. Tagle's testimony and the stipulation, the Court gives greater weight to the stipulation than contradictory evidence. Mr. Acuyong is found to be a leadman/foreman of RNC Construction. Therefore, he had the authority to consent to the inspection, which he did. The Court also finds the consent valid. Alternatively, the Court rejects any argument concerning invalid consent as the argument was waived when RNV Construction did not raise that defense in its post-trial brief.

Finally, RNV Construction argues the inspection of the COTA Building worksite was also illegal because the CSHO did not present his credentials or conduct an opening conference with the employer's representative. (*See* Resp't Answer at 2, No. 22-0362). RNV Construction also argues the CSHO was not wearing personal protective equipment, such as a safety vest, during his inspection. (*See* Resp't Post-Trial Br. 1). In essence, RNV Construction argues the CSHO failed to comply with section 8(a) of the OSH Act, so the inspection was unlawful, and the COTA Building Citation should be vacated.

Generally, section 8(a) of the OSH Act authorizes CSHOs to enter, inspect, and investigate places of employment. 29 U.S.C. § 657(a). The Commission has held where an OSHA citation is not preceded by a lawfully conducted inspection, it must be vacated. *Raymond Hendrix*, No. 1228, 1973 WL 3984, at *10 (OSHRCALJ, Apr. 2, 1973), *aff'd on other grounds,* 511 F.2d 1139 (9th

[7] The spelling of this individual's name is inconsistent in the record. (Compare Tr. 65 and Sec'y Post-Trial Br. at 12 ("Acuyon") with J. Stip. 40 ("Acuyong"). The Court will adopt the spelling provided in the joint stipulation.

Cir. 1975); *see also Genesee Valley Indus. Packaging,* No. 79-2452, 1980 WL 10112, at *2 (OSHRCALJ, Mar. 5, 1980) (vacating an inspection conducted without consent). If an employer claims it did not consent to an inspection, the Commission has found that failure to object to a CSHO's inspection may be characterized as consent. *See Kropp Forge Co. v. Sec'y of Labor,* 657 F.2d 119, 122 (7th Cir. 1981) ("Since Kropp's representatives were present at all times during those inspections and did not raise any objections when informed of the intended sampling, any Fourth Amendment objection to those surveys was waived."); *see also Lakeland Enters. of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 745 (7th Cir. 2005) (ALJ correctly held any Fourth Amendment objection was waived because "evidence indicates that . . .when [the inspector] identified himself as an OSHA compliance officer and announced the reason for his presence, Lakeland employees acquiesced and cooperated in the inspection.").

Here, RNV Construction's argument the Secretary failed to comply with section 8(a) of the OSH Act because the compliance officer failed to present his credentials at the commencement of the inspection is without merit. The CSHO credibly testified he "did what we're supposed to do as CSHO." (Tr. 135). He found the foreman, showed his credentials, and explained the scope of the inspection. *(Id.*). The CSHO explained when he arrived at the COTA Building worksite and explained who he was, the employees brought over the person in charge of the site. (Tr. 140). An individual came over and identified himself as the foreman, explaining that he directed the work on the site. (*Id.*). The foreman then accompanied the CSHO while the CSHO conducted his inspection. (*Id.*). The CSHO testified he explained the scope of the inspection to the foreman during the opening conference, and Mr. Tagle arrived while he was finishing up his inspection. (Tr. 135). The foreman left after Mr. Tagle arrived. (Tr. 139). There is no evidence in the record that Mr. Tagle objected to the inspection or notified the CSHO the foreman was not authorized to

consent to the inspection. And, even if RNV Construction were to present that argument, the Court finds it unlikely the work at the COTA Building worksite was taking place without anyone in charge.

In addition, there is no evidence in the record the CSHO failed to wear proper equipment. Even if the CSHO was not wearing appropriate personal safety equipment, such would not invalidate the "consent" aspect necessary for an inspection to be proper. Accordingly, the Court concludes the CSHO was at the COTA Building worksite with the permission of persons who controlled the area and were capable of giving consent and the COTA Building inspection was valid. *See Pullman Power Prods., Inc.*, No. 78-4989, 1980 WL 10641, at *3 (OSHRC, July 31, 1980); *see also Reg'l Scaffolding & Hoisting Co., Inc.*, No. 93-577, 1997 WL 111082, at *3 (OSHRC, Mar. 11, 1997) ("as soon as the compliance officer made a physical entry onto the worksite, he presented his credentials to Regional's foreman and afforded Regional its right to accompany him on a walk-around inspection, which is all that section 8(e) requires").

The Court notes even if RNV Construction could show there was a violation of section 8(e), it would be unable to show it was prejudiced by the violation. An employer asserting an inspector failed to comply with inspection procedures must establish it was prejudiced by the violation. *See GEM Indus., Inc.*, No. 93-1122, 1995 WL 242612, at *3 (OSHRC, Apr. 20, 1995). Specifically, "[t]he test to be applied in determining whether to grant relief to an employer because of the Secretary's failure to meet the walkaround requirements of section 8(e) of the Act is whether the employer suffered prejudice in the preparation and presentation of its defense." *Pullman Power Prods., Inc.*, 1980 WL 10641, at *3. RNV Construction has not met its burden. It has not claimed its ability to defend against this case has been affected in any way by the CSHO's inspection methods. In fact, RNV Construction stipulated to many observations made by the CSHO during

his inspections and individuals who were present at the time. The Court cannot conclude RNV Construction may have been prejudiced such that the COTA Building Citation should be vacated. Accordingly, any alleged failure of the CSHO to adhere to section 8(e) of the OSH Act is not credible and does not establish grounds for dismissal of the COTA Building Citation.

V. BACKGROUND

Every year, OSHA regional offices identify certain kinds of worksites that pose a high hazard to employees and then conduct regional emphasis inspections at those types of worksites. (Tr. 205-06). Worksites in Saipan fall within OSHA's Region 9, which identified construction work as a high hazard and included construction projects in its regional emphasis program. (Tr. 205-06, 287). The regional office therefore identified active construction sites in Saipan and scheduled planned program inspections of those worksites. (Tr. 205-06). These consolidated cases concern inspections of two construction sites—the Capitol Hill worksite and the COTA Building worksite—and the Citations issued as a result.

A. The Capitol Hill Worksite Inspection

The Capitol Hill worksite inspection took place on October 27, 2021. (J. Stip. 13). The worksite was the personal residence of RNV Construction's owner. (J. Stip. 14). Upon arrival at the worksite, the CSHO asked to speak with the foreman, and employees notified Ronald Acuyong, who introduced himself to the CSHO as the foreman for the project. (Tr. 64-65). The CSHO presented his credentials and conducted an opening conference, at which time he explained the scope of his inspection. (Tr. 65). The CSHO then invited the foreman to accompany him during the inspection. (Tr. 66).

From the outset, the CSHO noted this was a very unsafe jobsite, and he shared his concern with the foreman. (Tr. 66, 70). Outside, the CSHO saw a 25-foot scaffold located at the front of

the building, and he observed workers climbing the scaffold's cross-braces to access the scaffold and work on the roof. (J. Stip. 29-32). The scaffolding platforms were at least 15 feet above a point of access. (J. Stip. 48).

Inside, the CSHO entered the kitchen and observed a fluorescent light suspended from a metal wire attached to the kitchen ceiling. (J. Stip. 33; Tr. 124; Ex. C-29). Anthony Regaton (an electrician), the foreman, and another worker were working in the kitchen. (J. Stip. 34; Tr. 125). Then, in the hallway, the CSHO observed spliced wires being used to power a light. (J. Stip. 35). Mr. Regaton was also working in the hallway. (J. Stip. 36). In another hallway outside the laundry room, the CSHO observed a make-shift extension cord powering a chipping gun. (Tr. 128-29,132). The extension cord connected the chipping gun to the generator and was made up of two spliced wires connected by an electrical receptacle box lacking a protective cover. (J. Stip. 18, 19; Tr. 78, 132). Florante Reyes, another electrician, was using the chipping gun, and other workers were in the area. (J. Stip. 20, 21, 42; Tr. 82).

In the master bedroom, the CSHO observed a fluorescent light mounted to a pole in the center of the room. (J. Stip. 25). The fluorescent light lacked a protective cover and was being used for illumination while workers painted. (J. Stip. 25). The CSHO also observed two electrical receptacle boxes without protective covers in the master bedroom. (J. Stip. 22, 24). The first was mounted on the light pole. (J. Stip. 24). The cord for the fluorescent light lacked a plug head, so the electrical wires were inserted directly into the electrical receptacle box. (J. Stip. 26). The second electrical receptacle box was on the floor being used as part of an extension cord that powered the fluorescent light. (J. Stip. 22; Ex. C-10). Mr. Regaton was working in the master bedroom, along with the foreman and two other workers, and some were using metal tools to plaster the walls. (J. Stip. 27; Tr. 99).

The CSHO took photographs during his inspection and discussed the various violations he observed with the foreman. (Tr. 71). The foreman explained he had requested certain tools—such as extension cords—from the front office but was told they were unable to provide those supplies. (J. Stip. 41; Tr. 97-98). The CSHO also conducted interviews with some of the workers at the Capitol Hill worksite. (Tr. 82, 86; Ex. C-11; Ex. C-15). He spoke with Mr. Reyes, who explained he had been working in the laundry room chipping through the cement to install a pipe through which electrical wire could run. (Tr. 82). He said the foreman had given the make-shift extension cord for him to use, and he noted that "[a] lot of people need more tools." (Tr. 82; Ex. C-15).

The CSHO also interviewed Mr. Regaton, who noted the lack of tools, such as extension cords. (Ex. C-11). With the foreman's approval, Mr. Regaton connected the fluorescent light's cord directly into the electrical receptacle box in the master bedroom. (Tr. 86; Ex. C-11). Mr. Regaton recalled the foreman complaining the worksite lacked sufficient tools and had made a request to the office. (Ex. C-11).

The CSHO filled out the witness statement forms as he interviewed Mr. Reyes and Mr. Regaton. (Tr. 109-11). Then, both men signed their respective statements and, under their signatures, identified "RNV" as their employer. (Tr. 110, 112; Ex. C-11, C-15). The CSHO testified no one had issues speaking English and they appeared to understand what he was saying. (Tr. 210; 215). No one at the Capitol Hill worksite asked for an interpreter, and no one was forced to sign the statements prepared by the CSHO. (Tr. 225).

B. COTA Building Inspection

On October 28, 2021, the same CSHO who conducted the Capitol Hill inspection conducted an inspection of the COTA Building worksite, where RNV Construction was the sole construction contractor. (J. Stip. 51-53). When the CSHO arrived, he requested to speak with the

foreman or person in charge. (Tr. 135). An individual walked over, identified himself as the foreman, and explained he was in charge of tasking workers with certain jobs.[8] (Tr. 140). The CSHO conducted an opening conference with the foreman, explaining the scope of the inspection. (Tr. 135). The foreman then accompanied the CSHO on the initial stages of the inspection. (Tr. 183). The foreman also called Mr. Tagle to inform him of the inspection, and Mr. Tagle made his way to the worksite. (Tr. 310).

Construction at the COTA Building was taking place primarily in a large square hall. (Tr. 135). Relevant to this Citation were two scaffolds located in that hall: one on the east side and one on the west side. (Tr. 135). The scaffold on the east side was a mobile scaffold and measured 15 feet high. (J. Stip. 56). The CSHO observed an RNV Construction electrician—Crisosimo Hernandez—using the east scaffold's cross braces to climb to the top and then connecting his harness to the railing as an anchor point. (Tr. 176; J. Stip. 57, 58; Ex. C-47). At the time of the inspection, Mr. Hernandez was conducting "light work" and running some wire. (Tr. 311; J. Stip. 55). The CSHO's testimony contradicts the written statement of Mr. Hernandez which indicated he climbed the side braces. (Ex. C-54).

The CSHO noted the east scaffold was not sufficiently planked because it only had a single plank with a two-foot gap on the backside. (Tr. 145). The CSHO testified the floor of the scaffold on which employees were working should have been completely covered with planking. (Tr. 144).

The scaffold on the west side measured 11 feet high and was also a mobile scaffold. (J. Stip. 62). The CSHO observed three workers painting the wall while on the west scaffold, and they

[8] The CSHO did not recall or document the foreman's name. (Tr. 139). He "disappeared" after Mr. Tagle arrived on site. (Tr. 139). This is not fatal to the Secretary's case because Mr. Tagle had ample opportunity to object to the inspection when he arrived at the COTA Building worksite. He did not do so, nor did he so testify. Also, upon arrival at the COTA Building worksite, employees directed the CSHO to the individual who identified himself as the foreman.

left the scaffold when they saw the CSHO. (J. Stip. 60; Tr. 252). One of those painters was Alvin Jimenez. (J. Stip. 63, 65). The CSHO also noted the west scaffold was not fully planked, creating gaps that could cause a worker to fall or trip. (Tr. 152-56; Ex. C-59).

Mr. Tagle arrived at the worksite at the end of the CSHO's walkaround with the foreman. (Tr. 135, 310). The CSHO explained the violations concerning the east scaffold, and Mr. Tagle informed him the scaffold was not fully planked because "the electrician who is working at the time is only doing light work and that would be a quick job." (Tr. 311).

Then, the CSHO interviewed Mr. Hernandez and Mr. Jimenez. (Tr. 138, 158; Ex. C-54, C-60). Mr. Hernandez explained the foreman asked him to climb the east scaffold to pull electrical wire. (Ex. C-54; Tr. 148). He said he was on the scaffold for about 20 minutes, and he climbed the side braces because there was no ladder. (Ex. C-54). The CSHO also interviewed Alvin Jimenez. (Tr. 257; Ex. C-60). Mr. Jimenez stated he had been on the west scaffold painting the wall with an airbrush. (Ex. C-48, C-60). He used personal protective equipment while on the west scaffold, including a mask and gloves. (Ex. C-60). He also explained there had been three workers painting the wall that day, and they had been on the west scaffold for about two hours. (Ex. C-60). The CSHO wrote the information given by both men on the statement form, and then they reviewed and signed it. (Tr. 148-149, 257).

C. The Issuance of the OSHA Citations

After his inspections, the CSHO ultimately concluded RNV Construction committed four serious and four other-than-serious violations at the Capitol Hill worksite. (Ex. C-4). He also concluded RNV Construction committed three serious and one other-than-serious violations at the COTA Building worksite. (Ex. C-41). Roger Forstner, the OSHA Area Director for Honolulu, reviewed the files and approved the issuance of the Citations. (Tr. 75-76). The total proposed

penalty for the Capitol Hill Citation was $26,106, and the total proposed penalty for the COTA Building Citation was $18,648.[9]

VI. APPLICABLE LAW

To establish the violation of a specification safety standard under the OSH Act, the Secretary must prove: (1) the cited standard applies;[10] (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard;[11] and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, No. 90-1747, 1994 WL 682922, at *6 (OSHRC, Dec. 5, 1994).[12] For most specification standards the Secretary is not required to prove the

[9] The proposed penalty for other-than-serious Citation items at both worksites was $0.

[10] Under Commission precedent, "the focus of the Secretary's burden of proving the cited standard applies pertains to the cited conditions, not the particular cited employer." *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014) (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here").

[11] The Commission's longstanding "reasonably predictable" test for hazard exposure requires the Secretary to "show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd.*, 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015). The zone of danger is determined by the hazard presented by the violative condition and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction*, Co., 17 BNA OSHC at 1234; *Gilles & Cotting, Inc*., 3 BNA OSHC at 2003.

[12] "The knowledge element can be shown in one of two ways." *Eller-Ito Stevedoring*, 567 F. App'x 801, 803 (11th Cir. 2014) (unpublished) (citing *ComTran,* 722 F.3d 1304, 1307 (11th Cir. 2013)). First, the Secretary may prove a supervisor had actual knowledge of the violation. *Id*. It is not 43e necessary to show the employer knew or understood the condition was hazardous. *Phoenix Roofing*, 17 BNA OSHC 1076, 1078 (No. 90-2148, 1995) (citations omitted). Second, the Secretary can establish a supervisor had constructive knowledge by proving "that the 'employer . . . could have known with the exercise of reasonable diligence of the conditions constituting the violation.' " *Contour Erection & Siding Sys., Inc.,* 22 BNA OSHC 1072, 1073, (No. 06-0792, 2007) (citation omitted). Alternatively, the Secretary can show constructive knowledge based upon the employer's failure to implement an adequate safety program, with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable." *See New York State Elec. & Gas Corp*., 88 F.3d 103, 105-06 (2d Cir. 1996) (citations omitted). Generally, "knowledge can be imputed to the cited employer through its supervisory employee." *Am. Eng'g & Dev. Corp.*,

existence of a hazard each time a standard is enforced since, by the wording of the standard, the hazard is presumed. *Greyhound Lines-West v. Marshall*, 575 F.2d 759, 762 (9th Cir. 1978) (Secretary not required to prove violation related to walking and working surfaces constituted a hazard). The Secretary has the burden of establishing each element by a preponderance of the evidence. *The Hartford Roofing Co.*, 1995 WL 555498, at *3. To avoid duplication when each Citation Item is analyzed, the Court will employ this legal framework for each Citation Item to determine if the Secretary has established her *prima facie* case.

VII. DISCUSSION

A. Capitol Hill Citation

OSHA issued four serious Citation items and four other-than-serious Citation items for violations observed at the Capitol Hill worksite.

1. Citation 1, Item 1 (Capitol Hill)

OSHA cited RNV Construction for a serious violation of 29 C.F.R. § 1926.403(b)(2), a standard that regulates electrical conductors. The regulation provides, "Installation and use. Listed, labeled, or certified equipment shall be installed and used in accordance with instructions included in the listing, labeling, or certification." 29 C.F.R. § 1926.403(b)(2). The Secretary described the violation as follows:

> Listed, labeled[,] or certified equipment was not installed and used in accordance with instructions in the listing, labeling[,] or certification:
>
> a. Outside the laundry room door: An electrical receptacle box designed to be installed on a wall was used on the end of an extension cord. Employees were exposed to fire and electrical hazards.

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23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (quoting *Access Equip. Sys.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). However, as will be discussed in the narrative of the Decision, certain circuits require the Secretary to prove foreseeability before the knowledge of a supervisor engaging in the violative condition may be imputed to the employer.

> b. Light pole in master bedroom: An electrical receptacle box designed to be installed on a wall was used on the end of an extension cord. Employees were exposed to fire and electrical hazards.

Capitol Hill Citation at 6 (Ex. C-4).

The cited standard is set forth in Part 1926, Subpart K of the regulations. This Subpart addresses electrical safety requirements necessary for the practical safeguarding of employees doing construction work which involves electrical work. The parties stipulated (J. Stip. B7), and the Court concludes, the standard applied. Electrical receptable boxes were being used at the worksite, and § 1926.403(b)(2) regulates the installation and use of those boxes.

The standard was violated. The CSHO testified to comply with the standard, the electrical receptacle box would need to be mounted on the wall. (Tr. 81). Specifically, the body of the box should have been installed in the wall, and the face of the box should be outside the wall and covered so employees could safely plug things into it. (Tr. 84). The Court finds the CSHO knew the requirements for the installation and use of electrical receptacle boxes by way of his education and experience. (Tr. 59-62); *see Okland Constr. Co*., No. 3395, 1976 WL 5934, at *2 (OSHRC, Feb. 20, 1976) (reasonable inferences can be drawn from circumstantial evidence). The record indicates the electrical receptacle boxes were not being used properly. Specifically, they were used as components to create an extension cord, and one of the electrical receptacle boxes was mounted to a make-shift light pole. (Ex. C-10, C-13). The foreman admitted they were misused because the worksite lacked extension cords. (Tr. 106).

Next, the Court concludes due to the misuse of the electrical receptacle boxes, RNV Construction employees were exposed to a hazard. The failure to properly install the electrical receptacle boxes exposed live electrical components that would normally be protected by a cover and the wall. (Tr. 78). If an employee were to make contact with those live electrical components,

he could be exposed to electrical hazards. (Tr. 84). The CSHO testified Mr. Reyes was using a chipping gun that was directly connected to the improperly installed electrical receptacle box in the hallway, exposing him to a hazard while plugging or unplugging the gun. (Tr. 79; Ex. C-7, C-8). Employees working in the master bedroom holding metal tools were in very close proximity to the electrical receptacle box mounted to the light pole in that room and could have foreseeably bumped into or touched the electrical receptacle box, exposing them to a hazard. (Tr. 84-85, 99; Ex. C-10). The proximity of the employees to the electrical hazard demonstrates they were within the zone of danger required under Commission precedent. The Secretary has established employee exposure to the hazard of exposed energized components in the electrical receptacle boxes.

The Court next turns to whether RNV Construction had actual or constructive knowledge of the violation. As previously set forth, generally, the knowledge of a supervisor or foreman can be imputed to the company. If the foreman himself is engaging in the cited misconduct, the Commission does not require the Secretary to establish foreseeability. *Angel Bros. Enters., Ltd*., No. 16-0940, 2020 WL 4514841, at *3 (OSHRC, July 28, 2020) *aff'd*, 18 F.4th 824 (5th Cir. 2021). The Ninth Circuit, unlike other Circuit Courts of Appeal, has not ruled on the issue of whether the Secretary must establish whether a supervisor's misconduct when the supervisor is engaging in the misconduct was foreseeable in order to impute knowledge to the employer. The Ninth Circuit has ruled consistent with the Commission's holding that permits a supervisor's knowledge to be imputed to the employer absent a finding of foreseeability. *R. Williams Constr. Co. v. Occupational Safety & Health Review Comm'n*, 464 F.3d 1060, 1064 (9th Cir. 2006) (finding knowledge where supervisor "had reason to know that its employees would enter the trench on the day of the cave-in and had actual knowledge that two of its employees entered the trench prior to the cave-in") Thus, the Ninth Circuit and the Commission are consistent in the application of the law regarding imputation of supervisory knowledge to the employer. These collective holdings permit imputation of the

foreman's knowledge, even in the event of the foreman's own misconduct, to the employer without the establishment of foreseeability. *See Am. Eng'g & Dev. Corp.*, 23 BNA OSHC at 2095 n.4 (Commission "follow[s] [its] own precedent" where the circuit court "has neither decided nor directly addressed [an] issue") (citation omitted).

The Court finds Respondent had actual as well as constructive knowledge which can be imputed to RNV Construction. The foreman was aware of the misused electrical receptacle boxes, in one instance going as far as to supply the electrician with the violative extension cord to power the electrician's chipping gun due to lack of supplies. (Tr. 80). The foreman was also working in the master bedroom, where the violative electrical receptacle box was plainly visible. *See Simplex Time Recorder Co. v. Sec'y of Labor,* 766 F.2d 575, 589 (D.C. Cir. 1985) (holding where the alleged "violations [were] based on physical conditions and on practices . . . which were readily apparent to anyone who looked," they "indisputably should have been known to management"). Thus, the foreman had actual and constructive knowledge that can be imputed to RNV Construction. The Secretary established a violation of 29 C.F.R. § 1926.403(b)(2).

However, the Court finds the Secretary did not present sufficient evidence to prove her classification of this Citation Item as serious. A violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), "if there is a substantial probability that death or serious physical harm could result." Here, the CSHO testified any injury would not result in death or serious physical injury (Tr. 88), and the Secretary has offered no evidence that contradicts the CSHO's assessment. The evidence in this case does not show the violation would result in a substantial probability of death or serious physical harm, and thus the Court re-classifies and affirms this Citation Item as other-than-serious.

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

A penalty reduction is warranted based on the change in characterization as well as the consideration of the four factors identified by the Commission. The CSHO determined the gravity of the violation to be low. (Ex. C-6). He testified the severity was low because the most serious injury that could result is temporary illness not requiring hospitalization, and the probability was lesser because exposure was for a short and brief duration. (Tr. 88-89; Ex. C-6). The penalty was reduced due to the size of RNV Construction, which has 205 employees, but he did not give a good-faith or history reduction because there were too many hazards on the jobsite and RNV Construction has a history of past violations. (Tr. 90-91; Ex. C-6).

After giving due consideration to the gravity, severity, probability of the violation, the employer's size, history of violations, and good faith (Tr. 88-89), the Court assesses a zero penalty which is consistent with the recommended penalties of the other Items classified as other-than-serious having the same gravity, severity, and probability factors as this Item.

2. Citation 1, Item 2 (Capitol Hill)

Next, RNV Construction was cited for a serious violation of 29 C.F.R. § 1926.405(j)(1)(i), a standard regulating wiring methods for lighting fixtures and receptacles, which provides:

> Live parts. Fixtures, lampholders, lamps, rosettes, and receptacles shall have no live parts normally exposed to employee contact. However, rosettes and cleat-type

> lampholders and receptacles located at least 8 feet (2.44 m) above the floor may have exposed parts.

The Secretary described the violation as follows:

> Fixtures, lampholders, lamps, rosettes, or receptacles had live parts normally exposed to employee contact:
>
> a. Master bedroom floor: The receptacle box used to power the extension cord for the light was missing a cover, exposing employees to electrical hazards[; and]
>
> b. Light pole in master bedroom: The receptacle box used to power the light was missing a cover, exposing employees to electrical hazards.

Capitol Hill Citation at 7.

The cited standard is set forth in Part 1926, Subpart K of the regulations. This Subpart addresses electrical safety requirements necessary for the practical safeguarding of employees doing construction work which involves electrical work. The parties stipulated, (Jt. Stip. 25, 33) and the Court concludes, the standard applied because the Capitol Hill worksite used fluorescent lights which should not have exposed wires.

Before addressing whether the Secretary established the standard was violated, the Court finds Citation 1, Item 2, Instance (b) (receptacle box mounted on the light pole in master bedroom) is duplicative of Citation 1, Item 1, Instance (b) (receptable box on the light pole in the master bedroom). Both Citation Instances involved the same receptacle box on the same light pole in the same room. Violations are considered duplicative "where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in the abatement of the other item as well." *Rawson Contractors, Inc.*, No. 99-0018, 2003 WL 1889143, at *6 n.5 (OSHRC, Apr. 4, 2003). Here, the abatement of the receptacle box located on the light pole in the master bedroom is the same under Citation 1, Item 1, Instance (b) and Citation 1, Item 2, Instance (b): The receptable box can either be removed or installed properly. The evidence

supports a finding "The cords with junction boxes were removed" and no longer used at the worksite. (Ex. C-6 at 2; C-12 at 2); *see Ne. Precast, LLC and Masonry Services, Inc.*, No. 13-1169, 2018 WL 1309480, at *6 (OSHRC, Feb. 28, 2018) (consolidated) (finding citation items duplicative because abatement for both items consisted of removing and relocating the power line) *aff'd*, 773 F. App'x 70 (2d Cir. 2019) (unpublished). In addition, alternatively, if the receptacle box was properly installed as required under Citation 1, Item 1, Instance (b) then there would be no violation under Citation 1, Item 2, Instance (b) since the installation and use the receptacle box per manufacturer's requirements required the receptable box to be placed in the wall with the use of face plates. (Tr. 84). Accordingly, the Court vacates Citation 1, Item 2, Instance (b) as being duplicative.

Therefore, the Court will only consider whether the receptacle box on the master bedroom floor violated the cited standard and is not duplicative of Citation 1, Item 1. The electrical receptacle box on the master bedroom floor was not identified in Citation 1, Item 1. It was wholly separate from the electrical receptacle box mounted on the light pole, although it was connected as part of a makeshift extension cord. Even if the electrical receptacle box mounted on the light pole was properly mounted in the wall, it could still theoretically be improperly connected to the electrical receptacle box on the floor. Therefore, the receptacle box on the floor would require a different abatement method and is thus not duplicative of any of the instances cited in Citation 1, Item 1.

It is undisputed that a live electrical receptacle box on the floor of the master bedroom, which was designed for installation in the wall, was being used as part of an extension cord to power the light pole. (J. Stip. 23). This electrical receptacle box was missing a protective cover.

(J. Stip. 24). An electrical receptacle box that is not properly installed in a wall exposes workers to energized electrical parts. (Tr. 78). The Secretary has established a violation of the standard.

The Secretary has established exposure to an electrical hazard. If an employee were to make contact with those live electrical components, he could be exposed to electrical hazards. (Tr. 84). The foreman and other workers were working in the master bedroom, which is a small room, so they were in close proximity to the electrical receptacle box on the floor. (Tr. 85). It is reasonably foreseeable that an employee would come into contact with or trip over the electrical receptacle box, exposing that employee to an electrical hazard. The employees were therefore located in the zone of danger while performing work. The Secretary has established employee exposure.

Lastly, the Secretary established actual and constructive knowledge. The foreman was working in the master bedroom and could see the unprotected electrical receptacle box on the floor. *See Hamilton Fixture*, No. 88-1720, 1993 WL 127949, at *18 (OSHRC, Apr. 20, 1993) (finding knowledge when "a physical condition or practice is 'readily apparent to anyone who looked") (citation omitted) *aff'd*, 28 F.3d 1213 (6th Cir. 1994). The foreman's knowledge may be imputed to the employer. *See* discussion in Section VII(A)(1) on imputation of knowledge. The Secretary has established a violation of 29 C.F.R. § 1926.405(j)(1)(i).

The Secretary failed to establish that Citation 1, Item 2, Instance (a) should be classified as serious. *See Pete Miller, Inc.*, No. 99-947, 2000 WL 1810060, at *3 (OSHRC, Dec. 8, 2000) (a violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), "if there is a substantial probability that death or serious physical harm could result."). The CSHO found the gravity of the violation to be low. (Ex. C-12). He testified the severity was low because the most serious injury that would probably result was temporary with no hospitalization, and the probability was lesser

because employees would not frequently come into contact with the receptacle box. (Tr. 99, 100). Based on the evidence, the Court finds the proper classification of this Citation item is other-than-serious.

A penalty reduction is therefore warranted based on the change in characterization. The Court incorporates it discussion of RNV Construction's size, history and good faith as set forth in Citation 1, Item 1. After giving due consideration to the gravity, severity, probability of the violation, the employer's size, history of violations, and good faith (Tr. 100-01), the Court assesses a zero penalty which is consistent with the recommended penalties of the other Items classified as other-than-serious having the same gravity, severity, and probability factors as this Item.

3. Citation 1, Item 3 (Capitol Hill)

The next Citation Item was a serious violation of 29 C.F.R. § 1926.405(j)(1)(iii), which requires portable lamps to be wired with a flexible cord and an attachment plug of the polarized or grounding type. The Secretary described the violation as follows:

> Master bedroom: The plug was missing from the cord used to power the light and the electrical connection was accomplished by inserting the wires into the receptacle. Employees were exposed to electrical hazards.

Capitol Hill Citation at 8.

Based on the record, the Court concludes the standard applies. The cited standard is set forth in Part 1926, Subpart K of the regulations. This Subpart addresses electrical safety requirements necessary for the practical safeguarding of employees doing construction work which involves electrical work. The parties stipulated (J. Stip. B9), and the Court concludes, the standard applied. The cited regulation applies to portable lamps and the regulation sets forth the requirements the flexible cord must meet along with any attachment.

The CSHO observed a light in the master bedroom being powered by wires inserted directly into the electrical receptacle box because the plug head was missing. (J. Stip. 26; Ex. C-17). Mr. Regaton was working in the master bedroom and explained he had to connect the light directly to the outlet because the cord had no plug. (J. Stip. 27; Ex. C-11). The master bedroom was small, and the light was in the middle of the room, so the men were in close proximity to the electrical hazard while performing the work. (Tr. 85). Employees were also exposed to a hazard every time they had to insert the wires into the outlet or remove them because it could create sparks or arc flashes. The Court finds employees were within the zone of danger of the hazard. (Tr. 105) The Secretary has established the standard was violated and there was employee exposure to the electrical hazard.

RNV Construction had actual knowledge since the foreman was working in the master bedroom and explained they had to power the light in this way due to lack of supplies and equipment at the worksite. (Tr. 85; 106). The foreman's knowledge can be imputed to RNV Construction under the analysis set forth in Section VII (A)(1). The Secretary has established a violation of 29 C.F.R. § 1926.405(j)(1)(iii).

However, the Secretary again failed to establish the classification of the violation as serious. *See Pete Miller*, 2000 WL 1810060, at *3 (a violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), "if there is a substantial probability that death or serious physical harm could result."). Here, the CSHO found the gravity of the violation to be low. (Ex. C-16). He noted the severity was low because the most serious injury or illness that could reasonably be expected to occur would be temporary and not require hospitalization, and exposure would be of short duration (Ex. C-16; Tr. 106-07). Accordingly, the Court affirms Citation 1, Item 3, but reclassifies the Item to other-than-serious.

Taking into account the size of the employer's business, gravity of the violation, good faith, and prior history of violations which are discussed in Section VII(A)(1), and which are applicable here, the Court assesses a zero penalty which is consistent with the recommended penalties of the other Items classified as other-than-serious having the same gravity, severity and probability factors as this Item. (Tr. 107).

4. Citation 1, Item 4 (Capitol Hill)

Next, RNV was cited for a serious violation of 29 C.F.R. § 1926.451(e)(1), which provides:

> When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Cross braces shall not be used as a means of access.

The Secretary described the violation as follows:

> Front of building: Employees climbed the scaffolding braces to access the scaffolding work on the roof. Employees were exposed to fall hazards.

Capitol Hill Citation at 9.

The cited regulation is set forth in Part 1926, Subpart L governing scaffolds. This Subpart applies to all scaffolds used in construction workplaces covered by the regulation. It does not apply to cranes or derrick suspended personnel platforms nor to aerial lifts. The Court finds the standard applies and is supported by the stipulation of the parties. The Capitol Hill worksite used scaffolding at the front of the building that had platforms more than 2 feet above the point of access. (J. Stip. 28, 29).

The standard was violated. The CSHO observed employees climbing the scaffolding cross braces to perform work on the roof because it lacked a ladder or other means of access. (J. Stip. 30; Ex. C-18 at 3; Tr. 114).

The CSHO interviewed a worker, who explained that climbing the braces was the only means of climbing the scaffold. (Tr. 117). This means of access not only exposed workers to a fall hazard but placed them in the zone of danger. A worker could slip or miss a cross brace, resulting in a fall up to 25 feet. (Tr. 118). In addition to the Secretary establishing employee exposure to the hazard, these facts also support the finding the standard was violated.

Lastly, the Secretary established actual as well as constructive knowledge. The foreman admitted the scaffold had been in its then-existing condition for "some time." *See Phoenix Roofing, Inc*., No. 90-2148, 1995 WL 82313, at *3 (OSHRC, Feb. 24, 1995) ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation.") *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Moreover, the lack of a ladder or other means of access was open and obvious. *See Hamilton Fixture*, 1993 WL 127949, at *18 (finding constructive knowledge when "a physical condition or practice is 'readily apparent to anyone who looked' ") (citations omitted). The foreman's knowledge can be imputed to RNV Construction under the analysis set forth in Section VII (A)(1). The Secretary has established a violation of 29 C.F.R. § 1926.451(e)(1),

The Secretary properly characterized the violation as serious. *See Pete Miller,* 2000 WL 1810060, at *3 (a violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), "if there is a substantial probability that death or serious physical harm could result."). Although the duration of exposure was short, a fall from the scaffold could lead to serious injury or death. (Tr. 119). The Court affirms Citation 1, Item 4 as a serious citation.

In making his penalty assessment, the CSHO found the gravity of the violation to be moderate. (Ex. C-18). The duration of exposure was short, so the probability was lesser. (Tr. 119). However, the severity was high because a worker could fall 25 feet to his death. (Tr. 119). Taking

into account these gravity, severity, and probability ratings and the size of the employer's business, good faith, and prior history of violations, which are discussed in Section VII(A)(1), and which are applicable here, the Court assesses a penalty of $9,324.

5. Citation 2, Item 1 (Capitol Hill)

RNV Construction in Citation 2, Item 1 was cited for an other-than-serious violation of 29 C.F.R. § 1926.405(a)(2)(ii)(E), which requires that "[a]ll lamps for general illumination shall be protected from accidental contact of breakage." The Secretary described the violation as: "Master bedroom: The fluorescent light used for illumination during painting was not protected from breakage, exposing employees to laceration hazards." Capitol Hill Citation at 10. The Secretary proposed a zero penalty.

The cited standard is set forth in Part 1926, Subpart K of the regulations. This Subpart addresses electrical safety requirements necessary for the practical safeguarding of employees doing construction work which involves electrical work. The parties stipulated (J. Stip. 25; Ex. B-10), and the Court concludes, the standard applied. The cited standard applied to lights being used at the Capitol Hill worksite.

The standard was violated in addition to finding there was employee exposure. The CSHO observed a fluorescent light without a cover mounted on a pole in the master bedroom. (J. Stip. 25; Tr. 122). The light was standing in the middle of the small master bedroom, and the foreman and Mr. Regaton maneuvered around it while using tools to plaster the walls. (Tr. 122). This establishes the employees were within the zone of danger and exposed to a laceration hazard, as these employees could hit the light and break it while executing their work. (Tr. 122).

Actual knowledge has been established. The foreman admitted to the CSHO he was aware of the condition of the light. (Tr. 123). The foreman's awareness regarding the violation can be

imputed to RNV Construction under the analysis set forth in Section VII (A)(1). The Secretary has established a violation of 29 C.F.R. § 1926.405(a)(2)(ii)(E).

The CSHO noted the severity of the violation was minimal because any injury would be temporary and require only minor supportive treatment. (Ex. C-25). In addition, the CSHO determined the probability was lesser due to the short period of exposure. Taking into account these factors, and the size of the employer's business, good faith, and prior history of violations which are discussed in Section VII(A)(1) and which are applicable here, the Court finds the Secretary has properly classified Citation 2, Item 1 as an other-than serious citation and assesses a zero penalty.

6. Citation 2, Item 2 (Capitol Hill)

In Citation 2, Item 2 RNV Construction was cited with another other-than-serious violation, this time of 29 C.F.R. § 1926.405(a)(2)(ii)(F). The cited standard provides: "[t]emporary lights shall not be suspended by their electric cords unless cords and lights are designed for this means of suspension." 29 C.F.R. § 1926.405(a)(2)(ii)(F). The Secretary described the violation as: "Kitchen ceiling: The temporary lighting string was suspended overhead from the electrical cord by metal wire. Employees were exposed to electrical hazards." Capitol Hill Citation at 11. The Secretary proposed a zero penalty.

The Court concludes the cited standard applied. The cited standard is set forth in Part 1926, Subpart K of the regulations. This Subpart addresses electrical safety requirements necessary for the practical safeguarding of employees doing construction work which involves electrical work. The parties stipulated (J. Stip. B11), and the Court concludes, the standard applied. The cited standard applied to lights being used at the Capitol Hill worksite.

The standard was violated. Temporary lights were present at the Capitol Hill worksite, and, while walking through the kitchen, the CSHO observed a temporary light suspended from the ceiling with only the support of a metal wire (J. Stip. 33; Ex. C-29; Tr. 123-24). The temporary light was not designed to be installed and used in this manner. (Tr. 124).

In addition, the Secretary established employees were in the zone of danger and were exposed to the hazards. It is undisputed the foreman, Mr. Regaton, and another employee were working in the kitchen. (J. Stip. 34; Tr. 125). Work was taking place all around the kitchen, bringing workers into close proximity with the light. (Tr. 125). The CSHO testified the light could have fallen, breaking the bulb and exposing workers to laceration hazards. (Tr. 124-25). He also testified the wire to the light itself could have been damaged, exposing workers to electrocution and shock hazards. (Tr. 123-24).

Lastly, the Secretary established actual knowledge. The foreman was aware of the condition of the light since he was working in the kitchen, and he explained that the electrician had to rig the light in this way so they could do the work in the kitchen. (Tr. 125-26). The foreman's awareness regarding the violation can be imputed to RNV Construction under the analysis set forth in Section VII (A)(1). The Secretary has established a violation of 29 C.F.R. § 1926.405(a)(2)(ii)(F).

The CSHO listed the severity and gravity of the violation as minimal because any injury would not cause death or serious physical harm. (Ex. C-28). He noted the probability was lesser because exposure to the hazard was of short duration. (Ex. C-28). Thus, taking into account these ratings and the size of the employer's business, good faith, and prior history of violations, which are discussed in Section VII(A)(1) and which are applicable here, the Court finds the Secretary has properly classified Citation 2, Item 2 as an other-than serious citation and assesses a zero penalty.

7. Citation 2, Item 3 (Capitol Hill project)

Citation 2, Item 3 identifies a violation of 29 C.F.R. § 1926.405(g)(2)(iii), which requires that "[f]lexible cords shall be used only in continuous lengths without splice or tap." The Secretary described the violation as follows:

> a. Outside the laundry room: Wires were spliced and used as extension cord to power a chipping gun, exposing employees to fire and electrical hazards.
>
> b. Middle of hallway: Spliced wires were used to power a light, exposing employees to fire and electrical hazards.

Capitol Hill Citation at 12. The Secretary proposed a zero penalty.

The cited standard is set forth in Part 1926, Subpart K of the regulations. This Subpart addresses electrical safety requirements necessary for the practical safeguarding of employees doing construction work which involves electrical work. The parties stipulated (Jt. Stip. B12), and the Court concludes, the standard applied. Flexible extension cords to power equipment were used at the Capitol Hill worksite. (Tr. 126).

The standard was violated in two specific instances, both located in the same high-traffic hallway. In the first, the CSHO observed the power cord to the chipping gun was spliced[13] and covered with electrical tape. (Tr. 127; Ex. C-31). In the second, the CSHO observed a spliced wire hanging on the side of a hallway. (Tr. 129). The CSHO explained these spliced wires posed an electrocution and shock hazard if an employee came into contact with a live wire or if water came into contact with the wire. (Tr. 127-28; 130).

The spliced wires were in a high-traffic hallway, and Mr. Reyes was working primarily in this area. (Tr. 128). Other employees passed through the area and were exposed to the hazard posed by the spliced wires. The Secretary has established employee exposure.

[13] A wire is "spliced" when a wire is cut and then connected again and taped. (Tr. 127).

Lastly, RNV Construction possessed the requisite knowledge. When the CSHO noted the spliced cord during his inspection, the foreman admitted he took one spliced wire from Mr. Reyes and gave him the other spliced wire to power the chipping gun. (Tr. 130). Both spliced wires ended up being used in the high traffic hallway, and the foreman handled both. (Tr. 130). Actual knowledge is established. The foreman's awareness regarding the violation can be imputed to RNV Construction under the analysis set forth in Section VII (A)(1). The Secretary has established a violation of 29 C.F.R. § 1926.405(g)(2)(iii).

The CSHO testified the severity and gravity of the violation was minimal because any injury that might occur would not cause death or serious physical harm. (Tr. 130; Ex. C-30). The CSHO noted on the violation worksheet that the short period of duration resulted in a probability rating of lesser. (Ex. C-30). Taking into account these ratings and the size of the employer's business, good faith, and prior history of violations, which are discussed in Section VII(A)(1) and which are applicable here, the Court finds the Secretary has properly classified Citation 2, Item 3 as an other-than serious citation and assesses a zero penalty.

8. Citation 2, Item 4 (Capitol Hill project)

The final citation item issued on the Capitol Hill project identified a violation of 29 C.F.R. § 1926.405(g)(2)(iv), which requires that "[f]lexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws." The Secretary described the violation as: "Generator outside the laundry room: The outer insulation to the cord used to provide power to the lights was pulled from the plug, exposing employees to electrical hazards." Capitol Hill Citation at 13. The Secretary proposed a zero penalty.

The cited standard is set forth in Part 1926, Subpart K of the regulations. This Subpart addresses electrical safety requirements necessary for the practical safeguarding of employees doing construction work which involves electrical work. The parties stipulated (Jt. Stip. B13), and the Court concludes, the standard applied. The record establishes the Capitol Hill project used flexible cords at the worksite. (Tr. 127; Ex. C-31).

The standard was violated. During his inspection, the CSHO observed an extension cord plugged into the generator that caused him concern. (Tr. 131-33). The extension cord was connecting the generator to the chipping gun, and its outer insulation was pulled back from the plug. (Tr. 132-33; Ex. C-35 at 2). Pulling on the extension cord could damage the interior wire's insulation, exposing live wires, in violation of the cited standard. (Tr. 132; Ex. C-35 at 2).

Employees were exposed to an electrical hazard because if they were to pull on the extension cord while using it, they would uncover live wires that then posed an electrocution or shock hazard. (Tr. 132). The CSHO observed a worker using a chipping gun connected to the extension cord, and that worker would likely come into contact with the live wires when unplugging the extension cord. (Tr. 133).

The Secretary also established actual knowledge. The foreman himself handled the violative extension cord and allowed Mr. Reyes to use it. *(Id.)*. The foreman's awareness regarding the violation can be imputed to RNV Construction under the analysis set forth in Section VII (A)(1). The Secretary has established a violation of 29 C.F.R. § 1926.405(g)(2)(iv).

The CSHO determined the gravity and severity of the violation to be minimal because any injuries sustained would be minor. (Tr. 134; Ex. C-35). The CSHO noted the probability as lesser due to the short period of exposure. (Ex. C-35 at 2). Taking these ratings and the size of the employer's business, good faith, and prior history of violations, which are discussed in Section

VII(A)(1) and which are applicable here, the Court finds the Secretary has properly classified Citation 2, Item 4 as an other-than serious citation and assesses a zero penalty.

B. COTA Building Citation

The day after the CSHO completed his inspection of the Capitol Hill worksite, he conducted an inspection of another RNV Construction worksite located at the COTA Building. The CSHO ultimately issued four Citation items.

1. Citation 1, Item 1a (COTA Building)

The CSHO identified two violations of 29 C.F.R. § 1926.451(b)(1) at the COTA Building worksite. This scaffold platform construction standard, which is the focus of Citation 1, Item 1(a), requires "[e]ach platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports." 29 C.F.R. § 1926.451(b)(1). The standard then sets out more specifically that:

> Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).

29 C.F.R. § 1926.451(b)(1)(i). The standard also provides that where the employer establishes proper planking, the remaining open space between the platform and the uprights shall not exceed 9 ½ inches. 29 C.F.R. § 1926.451(b)(1)(ii).

The Secretary described the violations as follows:

> 29 CFR 1926.451(b)(1): Each platform on all working levels of scaffolds was not fully planked or decked between the front uprights and the guardrail supports as specified in paragraphs 1926.451(b)(1)(i)-(ii)
>
> a. East scaffolding: An Employee was pulling electrical wire while standing on mobile scaffolding that was not fully decked, and was exposed to fall hazards.

> b. West scaffolding: Employees were painting the wall from a scaffolding that was not fully decked, and were exposed to fall hazards.

COTA Building Citation at 6. The violations were grouped for penalty purposes because they involved similar or related hazards. *Id.*

The cited regulation is set forth in Part 1926, Subpart L governing scaffolds. This Subpart applies to all scaffolds used in construction workplaces covered by the regulation. It does not apply to cranes or derrick suspended personnel platforms nor to aerial lifts. The Court finds the standard applied because the COTA Building jobsite used scaffolding, and that finding is supported by the stipulation of the parties. (J. Stip. 55-63).

The CSHO testified he observed employees working on scaffolding platforms—referred to as the east scaffold and the west scaffold—that were not fully planked. (Tr. 144-45; Ex. C-44, CC-45, C-57). RNV Construction does not offer any evidence the scaffolds were properly planked. Thus, the standard was violated.

With regard to employee exposure to a hazard on the west and east scaffold, which also supports the finding of the standard being violated, the CSHO observed Mr. Hernandez standing on a single plank on the east scaffold performing work. (Tr. 145; 148). The foreman had directed Mr. Hernandez to pull wires for lighting. (Tr. 148; Ex. C-54). The east scaffold was 15 feet high, and there were "big fall-off area[s]" to Mr. Hernadez's left and right sides, as well as behind him. (J. Stip. 56; Tr. 145, 147; Ex. C-44, C-45). An employee standing on the inadequate planking was in the zone of danger and could fall, resulting in injury. The Secretary established employee exposure to a hazard with regard to the east scaffold.

As for the west scaffold, the CSHO testified he observed three employees, including Mr. Jiminez, painting while standing on the west scaffold. (Tr. 152). RNV Construction contends that "there is no worker on the scaffold" because it was "[in] the state of demolition." (Resp't Post-

Trial Br. 2). At trial, Mr. Tagle testified the bottom of the scaffold was already dismantled. (Tr. 307). However, RNV Construction stipulated workers were on the west scaffold doing work. (J. Stip. 61, 63). The CSHO testified he saw no evidence the scaffold was being dismantled and no one told him the scaffold was being dismantled. (Tr. 292-93). The CSHO's testimony, which is in accord with the stipulated facts, is more credible than the contradictory testimony provided by Mr. Tagle. The Court concludes workers were standing on the west scaffold, which was 11 feet high, on planks that did not fully cover all the crossbeams and left gaps large enough that a person could fall or trip. (Tr. 153, 155-56; J. Stip. 62; Ex. C-59). The Secretary established employee exposure to a hazard with regard to the west scaffold.

The Secretary established actual and constructive knowledge regarding the condition of both scaffolds. The foreman could plainly see the inadequate planking on both east and west scaffolds. (Tr. 161). He directed workers to use the scaffolds for various tasks. (Tr. 161). Moreover, Mr. Tagle admitted that even though the east scaffold was not fully planked, it was fine because the electrician was performing a quick job. (Tr. 311). The foreman—and Mr. Tagle—knew or could have known with the exercise of reasonable care about the violative condition. The foreman's knowledge regarding the violation can be imputed to RNV Construction under the analysis set forth in Section VII (A)(1). The Secretary has established a violation of 29 C.F.R. § 1926.451(b)(1)(i) and 29 C.F.R. § 1926.451(b)(1)(ii).

The Court affirms Citation 1, Item 1a as a serious violation because a fall from 11 to 15 feet could result in death or serious physical harm. 29 U.S.C. § 666(k). The CSHO testified an employee could die or sustain very serious injuries from such heights (Tr. 161), and the Court agrees.

The Secretary proposed a penalty of $9,324.00. The CSHO concluded the gravity of the violation was moderate. (Ex. C-43). He testified the severity was high due to the severity of potential injury that could occur. (Tr. 161-62). He rated the probability as lesser. (Tr. 162; Ex. C-43). Specifically, he testified there was only one employee on the east scaffold, and he was stationary. (Tr. 162). On the west scaffold, the CSHO explained that although there was a missing plank, there was still a guardrail, which could provide a worker with additional stability. (Tr. 162).

Taking into account the gravity, severity and probability ratings discussed above and the size of the employer's business, good faith, and prior history of violations, which are discussed in Section VII(A)(1), and which are applicable here, the Court assesses a penalty of $9,324.

2. Citation 1, Item 1b (COTA Building)

Next, the CSHO cited RNV Construction for a violation of 29 C.F.R. § 1926.502(d)(15), which requires:

> Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kn) per employee attached, or shall be designed, installed, and used as follows:
>
> (i) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and
>
> (ii) under the supervision of a qualified person.

The Secretary described the violation as follows: "East scaffolding: The mobile scaffolding railing was used as an anchor point for a personal fall arrest system. Employee was exposed for fall hazards." COTA Building Citation at 7.

The cited regulation is set forth in Part 1926, Subpart L governing scaffolds. This Subpart applies to all scaffolds used in construction workplaces covered by the regulation. It does not apply to cranes or derrick suspended personnel platforms nor to aerial lifts. The CSHO observed Mr.

Hernandez standing on the east scaffold on which the railing was used as an anchor point for a personal fall arrest system. (J. Stip. 57; Tr. 169; Ex. C-47). The Court finds the standard applies.

However, the Secretary has not established the standard was violated. Mr. Hernandez was using the top rail of the east scaffold as an anchor. (Tr. 169; Ex. C-47). The CSHO testified the top rail did not meet the cited standard, which requires anchor points for personal fall arrest systems to support 5,000 pounds. (Tr. 170). He stated that in the event of failure, the employee could fall and be seriously injured. (Tr. 170). The CSHO offered no explanation to support his conclusion the rail or anchorage point could not support 5,000 pounds. The 5,000-pound threshold is a specific requirement of the standard. Therefore, since the Secretary bears the burden of proof, she must affirmatively establish the scaffold rail was not able to withstand 5,000 pounds. More evidence than the CSHO's opinion is needed for the Secretary to meet her burden of proof on this matter. The CSHO testified the scaffold should have had rails on all four sides of the platform, negating the need for using the rail as an anchor point. (Tr. 170-71; Tr. 273). However, this is not relevant to the question of the rail's ability to serve as an anchor or withstand 5,000 pounds. After reviewing the record, the Court concludes the Secretary has not met her burden on this Citation Item. *See Caterpillar Tractor Co*., No. 80-4061, 1986 WL 53446, at *3 (OSHRC, Apr. 16, 1986) ("Normally, where the record in a case lacks sufficient evidence on a disputed issue, we would resolve that issue against the party having the burden of proof."). Citation 1, Item 1b is therefore vacated.

3. Citation 1, Item 2 (COTA Building)

The CSHO also cited RNV for a violation of 29 C.F.R. § 1926.451(e)(1), which applies to "scaffold access for all employees" and requires:

> When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold

> stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Cross braces shall not be used as a means of access.

The Secretary described the violation as follows: "East scaffolding: The scaffolding braces were used to access the top of the mobile scaffolding to pull electrical wire. Employee was exposed to fall hazards." COTA Building Citation at 8.

The cited regulation is set forth in Part 1926, Subpart L governing scaffolds. This Subpart applies to all scaffolds used in construction workplaces covered by the regulation. It does not apply to cranes or derrick suspended personnel platforms nor to aerial lifts. The Court finds the standard applied and was supported by the stipulation of the parties. The standard applied because scaffolds were being used at the worksite and accessed by workers. (J. Stip. 58; Tr. 176).

During his inspection, the CSHO testified he observed a worker using the cross-braces of the scaffold to climb it, access the top platform, and pull electrical wire for lights in the hall. (Tr. 176; Ex. C-62 at 2). The CSHO testified there was no ladder or other means of access to get up and down the scaffold. (Tr. 176; Ex. C-62 at 2; Ex. C-47). As noted previously the CSHO's testimony directly contradicts the written statement signed by Mr. Hernandez. Mr. Hernandez explained in his written statement he climbed the "side braces" because there was no ladder. (Ex. C-54). The CSHO testified he wrote the information given by Mr. Hernandez on the statement form, and then Mr. Hernandez reviewed and signed it. (Tr. 148-149, 257). Since the CSHO is the author of the signed statement and he wrote the term "side braces," he would have known the side braces were different than the cross braces of the scaffold. The Court provides the written statement more weight as to what Mr. Hernandez used to climb to the top of the scaffold then the conflicting verbal testimony of the CSHO. The statement written and affirmed by Mr. Hernandez states he climbed the side braces—not the cross braces—which means to the Court he used the

vertical rungs on the side of the scaffold to climb to the top. The pictures clearly show what is the front side of the scaffold where the cross braces are located and the sides of the scaffold where the vertical rungs are located. (Ex. C-44; C-47(a)).

RNV Construction contends the standard was not violated and advances two arguments to support its position. In its post-trial brief, RNV Construction maintains workers climbed an A-frame ladder to access it. (Resp't Post-Trial Br. 2). But there is nothing in the record establishing the presence of an A-frame ladder, and none of the photographs depict an A-frame ladder next to the east scaffold.

At trial, Mr. Tagle also testified the east scaffold had an integrated end frame ladder, and he pointed to a photograph depicting what appear to be rungs along both sides of the scaffold. (Tr. 314; Ex. C-44). Pictures clearly denote there are rungs vertical above one another from the bottom of the scaffold to the top of the scaffold on both sides of the scaffold. The evidence, which was not rebutted by the Secretary, is sufficient for the Court to conclude this permanent arrangement which is part of the scaffold is an "integral prefabricated scaffold" access. "Integral prefabricated scaffold access" is listed as an acceptable means of access under the cited standard, and § 1926.451(e)(6) provides specific guidance for such access. The Secretary did not present evidence to contradict RNV Construction's argument that its scaffolding complied with the standards. Instead, the Secretary characterizes RNV Construction's position as an affirmative defense and argues RNV Construction failed to present sufficient evidence of that defense. (Sec'y Post-Trial Br. 47). In essence, what the Secretary is attempting to do is the shift the burden of proof to RNV Construction to prove the vertical rungs were an integral prefabricated scaffold access means when she bears the burden of proof to establish that those vertical were not a compliant integral prefabricated scaffold access means under her regulation.

Affirmative defenses under Commission Rule 34(b)(3) must be raised in the Respondent's Answer and assert arguments or new facts that, if proven, defeat the Secretary's claim, even if the allegations in the complaint are true. *United States Postal Service*, No. 08-1547, 2014 WL 5025978, at *2 (OSHRC, Sept. 29, 2014). "[I]f the defense involved is one that merely negates an element of the plaintiff's *prima facia* case it is not truly an affirmative defense." *Id.* (internal citation omitted).

Here, RNV Construction has asserted facts and offered evidence that may negate one of the Secretary's *prima facia* elements: violation of the cited standard, which is not an affirmative defense. Mr. Tagle's testimony and the photographs of the scaffold certainly call into question whether the scaffolding did in fact comply with the standards, which allow an integrated end frame ladder for access. (*See* Tr. 314; Ex. C-44, C-47B). Also, Mr. Hernandez in his signed written statement stated he used the side braces to access the top of the scaffold. It is the Secretary's burden to prove all of the elements of her case and, in this instance, show the scaffolding did not have a compliant integrated end frame ladder. In addition, the Secretary bears the burden to prove Mr. Hernandez used the cross braces and not the side braces to access the top of the scaffold. The Secretary has failed to meet her burden on both elements. While the Secretary did offer evidence from the CSHO as to what Mr. Hernandez used to climb to the top of the scaffold, which the Court has discounted, she did not offer any testimony on the point the vertical rungs running from the bottom to the top of the scaffold on both sides of the scaffold are not an integral prefabricated scaffold access method. The record is devoid of any other evidence refuting RNV Construction's claim of compliance. Accordingly, Citation 1, Item 2 is vacated.

4. Citation 2, Item 1 (COTA Building)

Lastly, the CSHO cited RNV Construction for an other-than-serious violation of 29 C.F.R. § 1926.416(e)(2), which provides that "Extension cords shall not be fastened with staples, hung from nails, or suspended by wire." The Secretary described the violation as follows: "East wall: Extension cords used to power tools were suspended by wire from the wall, exposing employees to electrical hazards." COTA Building Citation at 9. The Secretary proposed a zero penalty.

The cited standard is set forth in Part 1926, Subpart K of the regulations. This Subpart addresses electrical safety requirements necessary for the practical safeguarding of employees doing construction work which involves electrical work. The parties stipulated (J. Stip. B6), and the Court concludes, the standard applied. It is undisputed that during his inspection, the CSHO observed extension cords suspended by wire from the wall used to power to power tools. (J. Stip. 64; Tr. 180-82; Ex. C-65). Thus, the standard applied and was violated.

The Secretary established exposure to a hazard. The extension cords were live, meaning they posed an electrocution or shock hazard in the event they fell or were pulled by employees using them while working. (Tr. 180-81). The CSHO testified the suspended extension cords were located in a busy hallway with workers in the area. (Tr. 182).

The Secretary established actual and constructive knowledge. The foreman was working about 40 feet away and could see the suspended extension cords from across the large hall. (Tr. 183-84). The Secretary established that the foreman, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co*., No. 82-928, 1986 WL 53522, at *4 (OSHRC, July 30, 1986). And this knowledge is imputed to RNV Construction utilizing the criteria discussed in Section VII(A)(1).

The CSHO testified the severity of the violation was minimal because any injuries

sustained would be minimal. (Tr. 184). He concluded the probability was lesser due to the short duration of exposure when plugging or unplugging equipment. (Ex. C-63 at 2). These ratings support the Secretary's classification of the violation as other-than-serious. Accordingly, the Court affirms Citation 2, Item 1 as an other-than-serious violation. *See Crescent Wharf & Warehouse Co*., No. 1, 1973 WL 4327, at *3 (OSHRC, Apr. 27, 1973) ("Accordingly, a non-serious violation is one in which there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm.").

The Secretary did not impose a monetary penalty for this violation. Based on the classification and the totality of the evidence, the Court will assess a zero penalty.

ORDER

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

1. Capitol Hill Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.403(b)(2) is AFFIRMED in PART as an Other-than-Serious violation, and assesses a zero penalty.
2. Capitol Hill Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1926.405(j)(1)(i) is AFFIRMED in PART as an Other-than-Serious violation, and assesses a zero penalty,
3. Capitol Hill Citation 1, Item 3, alleging a violation of 29 C.F.R. § 1926.405(j)(l)(iii) is AFFIRMED in PART as an Other-than-Serious violation, and assesses a zero penalty.
4. Capitol Hill Citation 1, Item 4, alleging a Serious violation of 29 C.F.R. § 1926.451(e)(1) is AFFIRMED, and a penalty of $9,324 is ASSESSED.

5. Capitol Hill Citation 2, Item 1, alleging an Other-than-Serious violation of 29 C.F.R. § 1926.405(a)(2)(ii)(E) is AFFIRMED with a zero-penalty assessed.
6. Capitol Hill Citation 2, Item 2, alleging an Other-than-Serious violation of 29 C.F.R. § 1926.405(a)(2)(ii)(F) is AFFIRMED with a zero-penalty assessed.
7. Capitol Hill Citation 2, Item 3, alleging an Other-than-Serious violation of 29 C.F.R. § 1926.405(g)(2)(iii) is AFFIRMED with a zero-penalty assessed.
8. Capitol Hill Citation 2, Item 4, alleging an Other-than-Serious violation of 29 C.F.R. § 1926.405(g)(2)(iv) is AFFIRMED with a zero-penalty assessed.
9. COTA Building Citation 1, Item 1a, alleging a Serious violation of 29 C.F.R. § 1926.451(b)(1) is AFFIRMED, and a penalty of $9,324 is ASSESSED.
10. COTA Building Citation 1, Item 1b, alleging a Serious violation of 29 C.F.R. § 1926.502(d)(15) is VACATED.
11. COTA Building Citation 1, Item 2, alleging a Serious violation of 29 C.F.R. § 1926.451(e)(1) is VACATED.
12. COTA Building Citation 2, Item 1, alleging an Other-than-Serious violation of 29 C.F.R. § 1926.416(e)(2) is AFFIRMED with no penalty assessed.

SO ORDERED.

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

Date: November 21, 2023
Denver, Colorado