United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. BASIC ENERGY SERVICES, Respondent.	OSHRC Docket No. 14-0542

Appearances:

Mia F. Terrell, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas,
For Complainant

Steven R. McCown, Esq. and L. Mey Ly, Esq., Littler Mendelson PC, Dallas, Texas,
For Respondent

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). On September 23, 2013, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite, which was located at the Hitts Lake Unit #5-1 well near Hawkins, Texas. (Ex. C-1). Respondent was providing well-servicing services to Valence Operating Company, which owned the well. (Tr. 43; Exs. C-1; C-22). OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent

alleging one serious and one repeat violation with a proposed penalty of $44,000.00. Respondent timely contested the Citation.

The trial took place on March 31 and April 1, 2015, in Dallas, Texas. Three witnesses testified at trial: (1) Angel Guerrero, floor hand for Respondent, (2) Jeff Stewart, Respondent's Vice President of Safety and Training; and (3) Ruth Solis-Lewis, Compliance Safety and Health Officer ("CSHO"). Both parties timely submitted post-trial briefs. After reviewing the parties' arguments and the record, the Court issues the following Decision and Order.

II. Stipulations[1]

The parties stipulated to the following:

1. The Commission has jurisdiction over this proceeding under Section 10(c) of the Occupational Safety and Health Act, 29 U.S.C. § 659(c) ("Act").

2. Basic Energy Services, LP is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5).

III. Jurisdiction

The parties have stipulated that the Commission has jurisdiction over this proceeding and that Respondent was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

IV. Factual Background

Respondent is a full-service provider in the oil and gas industry, with approximately 6,000 employees. (Tr. 175, 204). As is relevant to the present case, Respondent provides well-servicing assistance, which is the maintenance and upkeep of an existing, producing oil or gas

1. The parties' stipulations can be found in the parties' *Joint Stipulation Statement*, which was filed with the Court. These stipulations were read in open court and can be found on page 11 of the transcript.

well. (Tr. 175). This work is accomplished through the use of a mobile servicing or workover rig. (Tr. 178).

A well-servicing rig is mobile so it can be driven to the various oil and gas wells that are serviced by Respondent. (Tr. 182; Ex. C-2). It is a complex piece of machinery that includes a telescoping derrick; a series of elevators, tongs, and a break drum to assist in the insertion and removal of pipe from the well; articulating platforms to allow for differences in the respective well sites to which the rig travels; as well as many other implements that aid in the maintenance and upkeep of an existing well. (Tr. 178–87). Once the rig is driven to the site, Respondent's crew positions the rig around the well head. (Tr. 184; Ex. C-2). After the rig is situated around the well head, the "rig-up" process begins, whereby the rig is positioned with jacks, the derrick mast is scoped upwards and secured to a base-beam with guy wires and turnbuckles, and, to the extent needed, work platforms are adjusted to accommodate the height of the blowout preventer, which is located at the mouth of the well head. (Tr. 184–87; Ex. C-2). The rigging-up process also includes installation of guardrails, stairs, and other implements related to ingress/egress and safety.

On September 23, 2013, CSHO Solis-Lewis was returning to the Dallas OSHA area office when she pulled off the highway to refuel her car. (Tr. 259). As she was standing at the gas station, she observed people working on the elevated platform of a well-servicing rig with missing guardrails. (Tr. 259–60). The rig was later identified as Rig No. 1552, which was located at the Hitts Lake Unit #5-1 worksite outside of Hawkins, Texas. (Tr. 43; Exs. C-1, C-22). The worksite and well were owned and operated by Valence Operating Company. (Ex. C-22).

As she refilled her tank, CSHO Solis-Lewis observed the worksite for approximately 5–10 minutes. (Tr. 272). After refueling, CSHO Solis-Lewis drove to a nearby parking lot, from

which she took photographs of the worksite. (Tr. 272; Ex. C-2). The photographs show members of Respondent's work crew working on the elevated platform, which was missing a set of guardrails. The foregoing observations lasted approximately 15–20 minutes.[2] (Tr. 273).

After CSHO Solis-Lewis had taken photographs, she entered the worksite to conduct an inspection pursuant to the OSHA Region VI Regional Emphasis Program for oil and gas. (Tr. 258). According to CSHO Solis-Lewis, she presented her credentials and held an opening conference with Santiago Luna, who identified himself as the Respondent's toolpusher, which is the equivalent of the crew foreman. (Tr. 261–62). As such, Luna was in charge of a four-man crew, which consisted of the rig operator, Tiquio Paredes; two floor hands, Angel Guerrero and Edgar Castillo; and a derrick hand, Carlos Sanchez. (Tr. 35–36, Ex. C-22). During her conversation with Mr. Luna, CSHO Solis-Lewis recognized him as the same man she had previously observed standing in close proximity to the platform (not on it) with the missing guardrail. (Tr. 261–262).

During the opening conference, Mr. Luna told CSHO Solis-Lewis the crew was engaged in pulling pipe to remove and replace a down hole pump.[3] (Tr. 263). The crew had begun the set-up for this particular job on the Friday before the inspection. (Tr. 50). According to

2. Respondent placed a significant amount of emphasis on the fact that CSHO Solis-Lewis' inspection of the worksite only lasted about 15 minutes. However, based on the CSHO's testimony that Mr. Luna had to leave the worksite during the course of her inspection, the Court finds nothing unusual about the length of the inspection as it relates to the quality of CSHO Solis-Lewis' observations. (Tr. 324–27).

3. At trial Respondent objected, on hearsay grounds, to CSHO Solis-Lewis' testimony about what Mr. Luna had said to her. Respondent reiterated this objection in its post-trial brief. Specifically, Respondent contends that because Mr. Luna was deceased at the time of trial, there was no way for Respondent to examine him regarding the statements made to CSHO Solis-Lewis. Respondent's argument attempts to paste F.R.E. 801(d)(1)'s requirement that the declarant be subject to cross-examination onto F.R.E. 801(d)(2). According to F.R.E. 801(d)(2), however, the availability of the declarant is immaterial; rather, all that is required is a statement offered against an opposing party that satisfies one of five conditions. Fed. R. Evid. 801(d)(2). In this instance, Mr. Luna was an agent/employee of Respondent and made a statement to CSHO Solis-Lewis on a matter within the scope of his relationship with Respondent. *See* Fed. R. Evid. 801(d)(2)(D). Thus, the statement is not hearsay. Further, contrary to Respondent's proclamation that hearsay is admissible in administrative proceedings, the Occupational Safety and Health Review Commission Rules of Procedure plainly state the "Federal Rules of Evidence are applicable." 29 C.F.R. § 2200.71.

Respondent's records, Luna and his crew arrived at the worksite around 7:00 a.m. on the following Monday, at which time they held a safety meeting and completed a job safety analysis (JSA). (Ex. C-22). According to CSHO Solis-Lewis, she arrived at the worksite sometime around 10:00 a.m. (Tr. 262).

During her inspection, CSHO Solis-Lewis observed a missing guardrail on the upper rig platform, as well as a missing set of stairs between the lower platform to the upper platform. (Tr. 264; Ex. C-2). CSHO Solis-Lewis testified that Mr. Luna told her the guardrails were incomplete because they were in a hurry and that they had just arrived at the site and had not yet installed all guardrails. (Tr. 264). As to the stairs, Guerrero testified that the set of stairs used for accessing the upper platform was broken. (Tr. 67). In its stead, CSHO Solis-Lewis observed a box that was used as a step.[4] (Tr. 81–84, 104; Ex. C-2a).

According to her measurements, CSHO Solis-Lewis determined that the height of the upper platform was approximately 81 inches, or roughly 6.75 feet, above the ground. (Tr. 265). In addition, she determined that the gap in the railing of the upper platform measured approximately 6 feet across. (Tr. 265). As she was observing Respondent's work crew from the adjacent parking lot, CSHO Solis-Lewis saw Mr. Guerrero guiding pipe approximately 3 feet from the unguarded edge. (Tr. 265). She also observed Mr. Paredes working at the operator's console, which was adjacent to the unguarded opening. (Ex. C-2).

CSHO Solis-Lewis recommended, and Complainant issued, two Citations. The Court shall address each violation, as well as Respondent's affirmative defenses, below in Sections VI and VII. Based on its review of the record and the parties' respective post-trial briefs, the Court

4. The parties dispute whether the box was actually used as a means of access to the top platform. The resolution of this factual dispute can be found in Section VI.A, *infra*.

finds Complainant has established the violations as alleged in the Citation and Notification of Penalty and that Respondent failed to establish an affirmative defense.

V. Applicable Law

To establish a violation of an OSHA standard, Complainant must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of the standard; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

VI. Discussion

A. Citation 1, Item 1

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

> 29 CFR 1910.24(b): Fixed stairs were not provided for access from one structure level to another where operations necessitated regular travel between levels, and for access to operating platforms at any equipment which required attention routinely during operations:
>
> This violation was observed on or about September 23, 2013, where employees on a work-over rig platform were not provided safe access to all working levels.

The cited standard provides:

> "Where fixed stairs are required." Fixed stairs shall be provided for access from one structure level to another where operations necessitate regular travel between levels, and for access to operating platforms at any equipment which requires attention routinely during operations. Fixed stairs shall also be provided where access to elevations is daily or at each shift for such purposes as gauging, inspection, regular maintenance, etc., where such work may expose employees to acids, caustics, gases, or other harmful substances, or for which purposes the carrying of tools or equipment by hand is normally required. (It is not the intent of this section to preclude the use of fixed ladders for access to elevated tanks, towers, and similar structures, overhead traveling cranes, etc., where the use of fixed ladders is common practice.) Spiral stairways shall not be permitted except for special limited usage and secondary access situations where it is not practical

> to provide a conventional stairway. Winding stairways may be installed on tanks and similar round structures where the diameter of the structure is not less than five (5) feet.

29 C.F.R. § 1910.24(b).

i. The Standard Applies

According to 29 C.F.R. § 1910.22, which indicates the general requirements for Subpart D (of which 1910.24(b) is a part), "This section applies to all permanent places of employment, except where domestic, mining, or agriculture work only is performed." 29 C.F.R. 1910.22. The rig is a mobile unit, capable of traveling to different well sites, and the work performed by Respondent's employees is considered well-servicing. (Tr. 233). Even though the specific type of servicing work may be different day-to-day—Stewart testified that well-servicing rigs perform a number of different functions—the work nonetheless always takes place on or about the rig. In this regard, the Court finds persuasive the rationale of ALJ Mitchell in *Signal Oilfield Svc., Inc.* 6 BNA OSHC 1717 (No. 77-0226, 1978) (ALJ). Specifically, ALJ Mitchell found in this context that "the word 'permanent' refers to the place of employment where the men actually do their work. In this instance, Signal's employees obviously perform their duties on the drilling rig—regardless of where the rig might be located geographically." *Id.* This comports with the purpose of the Act, which is to "assure safe and healthful working conditions for working men and women . . . ." 29 U.S.C. § 651. Further, there are a number of other cases at both the Commission and ALJ levels affirming violations cited under Subpart D, Walking-Working Surfaces, on mobile drilling and servicing rigs. *See, e.g.*, *Well Solutions, Inc.*, 15 BNA OSHC 1718 (No. 89-1559, 1992); *Welltech, Inc.*, 12 BNA OSHC 1333 (No. 84-0919, 1985) (ALJ); *Poole Co. Texas Ltd.*, 19 BNA OSHC 1317 (No. 99-0815, 2000) (ALJ). *See also Computer Sciences Raytheon*, 17 BNA OSHC 1057 (No. 93-232, 1995) (ALJ) (holding a mobile launch platform is a permanent place of employment in that it affords employees a fixed workspace).

Accordingly, the Court finds this mobile rig is a permanent place of employment as that term is used in the Act, and that Subpart D applies to Respondent's worksite. The rig is where these workers work, and the fundamental objective of making their place of work safe would not be well-served by applying safety regulations inconsistently based upon where the workplace happens to be geographically situated on a given day or exempting this worksite from safety regulations, which would otherwise apply to the work being performed, simply because their worksite is moved from one well to another

The Court also finds that the specific standard cited by Complainant applies to the cited condition. Respondent contends that in order to be classified as "fixed stairs", the stairs must be permanently attached to the structure. This argument is derived by grafting the definition of "fixed ladder", which is found in 29 C.F.R. § 1910.21, onto the term "fixed stairs", which is not defined by 1910.21. According to Section 1910.21(e)(2), a fixed ladder is "is a ladder permanently attached to a structure, building, or equipment." Thus, Respondent contends a ladder cannot be "fixed" unless it is permanently attached, and therefore "fixed stairs" similarly must be permanently attached. Because the platforms here are adjustable, the rig is mobile, and the stairs are interchangeable, Respondent contends the standard does not apply to this rig.

Complainant, on the other hand, argues the term "fixed" in the context of industrial stairs means "attached in some way to prevent movement". (Tr. 275). In this case, Mr. Stewart testified that the stairs are "constructed of aluminum material. They have hooks on each end or at the top of the stairs that will slide into a pocket." (Tr. 134). Mr. Stewart also admitted that when the stairs are in place, they are sturdy enough to withstand the downward force of someone walking on them. (Tr. 134). Complainant's interpretation squares with the rationale of ALJ Schwartz, who held:

> Though Poole argues that the stairs were not permanently attached to the mobile rig, the stairs were, nonetheless, "fixed" in that they were secured to the platform to prevent their movement while in the configuration. CO Nystel testified that the steps were attached to the rig with flanges that could be inserted into slots on the platform floor, which were apparently intended for that purpose.
>
> Complainant has established that the steps in question were fixed industrial stairs as contemplated by the standard, and that the cited standard is applicable.

Poole, 19 BNA OSHC 1317, 2000 WL 373797 at *3.

The Court agrees with Complainant. Though Respondent's argument that "fixed stairs" should be interpreted similarly to "fixed ladder" carries some cachet, it does not establish that Complainant's interpretation is unreasonable. *See Unarco Comm. Prods.*, 16 BNA OSHC 1499 (No. 89-1555, 1993) (holding that Court may defer to agency's reasonable interpretation of standard when plain meaning and regulatory history do not clarify standard's applicability). A Commission ALJ addressed an employer's interpretation of the term "fixed ladder" in the construction context, which used the same basic definition as 1910.21(e)(2). *See U.S. Steel Corp.*, 7 BNA OSHC 1579 (No. 78-4231, 1979) (ALJ) (discussing ANSI standard for fixed ladders that was adopted by the Secretary as part of code of regulations for construction).[5] In *U.S. Steel*, the ALJ noted the following with respect to the use of the term "permanent":

> In sum, the Secretary upon adopting the ANSI Code for Fixed Ladders into Part 1926, the standards for construction under the Act, did not use the adverb 'permanently' in its literal sense, but in the sense that a ladder is firmly implanted upon a structure, building, or equipment, and used during the entire process in every kind of construction. This interpretation is consonant with the purpose and policy of the Act which is to assure so far as possible every working man and woman in the nation safe and healthful working conditions.

Id. at *3. Similarly, Respondent's restrictive interpretation of the term "fixed" would ostensibly excuse it from installing stairs or ladders, notwithstanding whether such means of access would

5. The standard, previously found at 29 C.F.R. § 1926.450 has since been amended and recodified at 29 C.F.R. § 1926.1050.

be necessary to preclude the existence of a hazard. As such, the Court finds Complainant's interpretation of the term "fixed" sensibly conforms to the purpose and plain meaning of the term. Thus, the standard applies.

ii. The Terms of the Standard were Violated

There is no serious dispute that Respondent failed to install stairs between the upper and lower platforms of the servicing rig.[6] (Ex. C-2). The question, however, is whether the terms of the standard required stairs to be used in this context. According to the standard, fixed stairs are required:

> where operations necessitate regular travel between levels, and for access to operating platforms at any equipment which requires attention routinely during operations. Fixed stairs shall also be provided where access to elevations is daily or at each shift for such purposes as gauging, inspection, regular maintenance, etc., where such work may expose employees to acids, caustics, gases, or other harmful substances, or for which purposes the carrying of tools or equipment by hand is normally required.

29 C.F.R. § 1910.24(b). *See Poole*, 19 BNA OSHC 1317 (holding fixed stairs were required where employees worked on elevated platforms of workover rig on daily basis); *Spirit Homes, Inc.*, 2002 OSHD (CCH) ¶ 32624, 2002 WL 31163770 (Nos. 00-1807 & 00-1808, 2002) (ALJ) (holding that access to work platform twice per day satisfied standard); *Simmons, Inc.*, 6 BNA OSHC 1157 (No. 12862, 1976) (ALJ) (holding access 2–3 times per week sufficient to meet requirements of standard).

6. Respondent attempted to argue, because the stairways were detachable, it was possible the stairs were removed from the lower platform and attached to the upper platform as needed. *See Resp't Br.* at 19. The testimony on this particular point is equivocal at best, especially in light of the fact that Paredes and Guerrero were on the top platform even though the stairs were still attached to the lower platform. (Tr. 274). Further, when confronted with his deposition testimony, during which Guerrero described in detail how he utilized the white box (pictured in C-2) and the handrail to hoist himself onto the platform, he admitted they did not have stairs leading to the upper platform on the day of the inspection and they used the white box and handrail for access. (Tr. 83–84). The Court is more convinced by this testimony than the discussions regarding the interchanging of stairs and ladders, which appeared to be coached.

In this case it is clear, at the very least, Mr. Guerrero accessed the upper platform on a daily basis to perform his regular job tasks—the photographs taken by CSHO Solis-Lewis show both Mr. Guerrero and Mr. Paredes on the upper platform of the rig. (Ex. C-2). The job they were performing—removing pipe from the well to access a submerged pump—required both men to be on the upper platform, either operating the controls or guiding pipe out of, or into, the hole. Mr. Guerrero's testimony shows that he accessed the platform on a daily basis and exited the platform when his shift was over or when he took a break. (Tr. 106–107). The job duties associated with the well-servicing activities performed by Respondent clearly required its employees to access the upper (and lower) platforms on daily basis, and Mr. Guerrero's testimony confirms (regardless of the manner in which the platform was accessed), at the very least, he accessed the upper platform at least one time per day. Accordingly, the Court finds the cited standard required fixed stairs to be in place on Rig 1552 and Respondent failed to comply with its terms.

iii. Respondent Knew or, With the Exercise of Reasonable Diligence, Could have Known of the Violative Condition

Complainant contends that Respondent's supervisor, Mr. Luna, knew, or at the very least could have known, of the violative condition. The conspicuousness of the violation is illustrated by the photos taken by CSHO Solis-Lewis, which show Mr. Luna standing directly in front of the rig. Further, CSHO Solis-Lewis testified that Mr. Luna admitted to her that he knew the stairs were missing. (Tr. 273). This constitutes direct knowledge of the violative condition. Alternatively, the Court finds that Mr. Luna had constructive knowledge of the condition in that he was present at the worksite, had the opportunity to view the rig, the violation was readily apparent, and, as the supervisor of the rig, he had the responsibility to inspect the worksite for

hazards. *See Greenleaf Motor Express, Inc.*, 21 BNA OSHC 1872 (No. 03-1305, 2007) (quoting *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1406 (No. 99-0707, 2001)).

"The actual or constructive knowledge of an employer's foreman can be imputed to the employer." *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82–928, 1986). "An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1381–82 (No. 76–4271, 1981). Mr. Luna was the on-site supervisor for Respondent. (Tr. 261–62). As such, his knowledge of the violation is properly imputable to Respondent. Accordingly, the Court finds that Respondent knew or could have known of the violative condition.

iv. Respondent's Employees were Exposed to the Hazard

CSHO Solis-Lewis testified that Respondent's failure to have fixed stairs between the upper and lower platforms exposed employees to a fall hazard. (Tr. 271). This was the result of the floor hand and the operator accessing the upper platform without a set of fixed stairs. (Tr. 81, 84, 87). Respondent, on the other hand, contends that Complainant's evidence is an assumption, unsupported by direct evidence. Specifically, Respondent argues that, because CSHO Solis-Lewis did not directly observe the employees use the box and handrails to access the upper platform, the conclusion that they were exposed to a hazard is mere speculation. The Court finds otherwise.

As noted above, Mr. Guerrero testified at deposition and trial that he and Mr. Paredes used the box and handrails to access the upper platform. (Tr. 81, 84, 87). This evidence, independent of any direct observation, is sufficient for the purposes of establishing exposure to

the hazard. Further, to the extent that Mr. Guerrero and Mr. Paredes[7] were standing on an elevated platform with no visible means of access other than the box, the Court finds that it is reasonable to infer that they accessed the platform without the use of fixed stairs. *See Okland Constr. Co.*, 3 BNA OSHC 2023 (No. 3395, 1976) (affirming ALJ's conclusion that Secretary established a violation based on inferences drawn from circumstantial evidence). As such, Complainant has established that Respondent's employees were exposed to the hazard, as well as its *prima facie* case.

v. Respondent Failed to Prove an Exception to the Standard

As noted by Respondent, Section 1910.24(a) addresses the applicability of 1910.24(b). Although the Court has already determined the standard applies, there is an exception to the general rule, which states, "This section does not apply to stairs used for fire exit purposes, to construction operations to private residences, or to articulated stairs, such as may be installed on floating roof tanks or on dock facilities, the angle of which changes with the rise and fall of the base support." 29 C.F.R. § 1910.24(a). Respondent contends that, because the rig has multiple, articulating platforms, the exception applies. The Court disagrees.

The exception at issue is clearly directed to stairs which rest on water—*floating* roof tanks and dock facilities. *See Poole*, 19 BNA OSHC 1317 (rejecting defense based on exception to 1910.24(a) and finding that the cited stairs of workover rig rest on solid ground and do not change pitch with the rise and fall of said ground). The rig at issue, like the rig in *Poole*, rests on stable ground. Further, the articulating platforms, though moveable, are generally static during

7. Respondent points out that the operator's platform moves independently from the rest of the rig, which means that Mr. Paredes did not need to use the stairs. *Resp't Br.* at 21. Even if that were the case, it is clear that Mr. Guerrero was exposed. However, given Mr. Guerrero's testimony, the Court finds that both he and Mr. Paredes were exposed to the violative condition.

the course of the well-servicing work; thus, there is no need for the stairs themselves to articulate. (Tr. 282–83).

It is Respondent's burden to establish an exception to the standard. *C.J. Hughes Construction, Inc.*, 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996) (party seeking benefit of exception to legal requirement has burden to show it applies). Respondent did not put forth evidence to suggest that the stairs at issue were capable of articulating with the movement of the platforms; in fact, based on the photographs of the stairs at the worksite, it seems clear that they are rigid. (Ex. C-2). As such, the Court finds that the exception does not apply.

vi. The Violation Was Serious

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *Id.*

CSHO Solis-Lewis testified that the distance between the upper platform and the lower platform was approximately three feet. (Tr. 271). Based on her experience, she testified that serious injury, up to and including death, could result from such a fall. (Tr. 273). This testimony was buttressed by Mr. Stewart, who testified, "It's possible to sustain a serious injury falling just a few inches." (Tr. 139). The photographs taken by CSHO Solis-Lewis show objects and equipment that a worker's head or other body part could strike if he or she fell transitioning between platforms.

Based on the foregoing, the Court finds that Complainant has proved a violation of the standard and that said violation was serious. Accordingly, Citation 1, Item 1 shall be AFFIRMED.

B. Citation 2, Item 1

Complainant alleged a repeat violation of the Act in Citation 2, Item 1 as follows:

> 29 CFR 1910.23(c)(1): Except where there was an entrance to a ramp, stairway, or fixed ladder, every open-sided floor or platform 4 feet or more above adjacent floor or ground level was guarded by a standard railing (or the equivalent as specified in 29 CFR 1910.23(e)(3)) on all open sides:
>
> This violation was observed on or about September 23, 2013, where employees on a work-over rig were not protected from falling more than 6 feet to the ground below.
>
> Basic Energy Services has been cited previously for a violation of this occupational safety and health standard or its equivalent standard 1910.23(c)(1), which was contained in OSHA inspection number 313500241, citation number 1, item number 1 and was affirmed as a final order on October 19, 2011, with respect to a workplace located at Helen Crump-Well #B9, Odessa, Texas 79760.
>
> The cited standard provides:
>
> Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder.

29 C.F.R. § 1910.23(c)(1).

i. The Standard Applies

The Court has previously determined that the standards of Subpart D apply to Respondent's worksite. *See* Section VI.A.i, *supra*. As such, the Court hereby incorporates by reference Section VI.A.i. Further, the Court finds that the specific standard cited also applies—the mobile rig is comprised of multiple, open-sided platforms, which, at the time of the inspection, were four feet or more above the ground level. *See Welltech*, 12 BNA OSHC 1333

(holding 1910.23(c)(1) applicable to well-servicing rig); *Well Solutions, Inc.*, 15 BNA OSHC 1718 (same).

ii. The Terms of the Standard Were Violated

Respondent does not, indeed cannot, argue that the terms of the standard were not violated. CSHO Solis-Lewis took photographs of the work platform clearly illustrating a six-foot gap in the railing. (Ex. C-2). The upper platform was more than six feet above the ground, which is more than the minimum height requirement of four feet. Accordingly, the terms of the standard were violated.

iii. Respondent Knew or, With the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

The Court hereby incorporates by reference Section VI.A.iii, *supra*. Both conditions—the missing stairs and missing guardrail—were either directly observed by Mr. Luna or should have been observed in light of the obvious nature of the violation and Mr. Luna's proximity to the condition. (Ex. C-2). Accordingly, the Court finds that Respondent knew or, with the exercise of reasonable diligence, could have known of the violative condition.

iv. Respondent's Employees Were Exposed to the Hazard

"To establish exposure, 'the Secretary . . . must 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 (08-1386, 2015) (citing *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)). *See also Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976).

Respondent contends that Complainant is attempting to enforce a strict liability standard by merely presuming exposure to the six-foot gap in the railing on the upper platform. In that respect, Respondent points out that: (1) Guerrero testified he did not work near the opening and

that his working area was approximately 4 feet away from the gap; (2) Paredes did not need to go near the gap because his job duties did not take him away from the control panel; and (3) neither of the employees were photographed actually standing in the railing gap. Complainant, however, argues that Guerrero's and Paredes' proximity to the railing gap was sufficiently close to establish exposure to the hazard. *See Compl't Br.* at 23 (citing *Star Circle Wall Sys. Inc.*, 1 BNA OSHC 3052 (No. 1991, 1973) (employees working 3–4 feet from unprotected edge were exposed to hazard)). Additionally, Complainant also points out that: (1) there was nothing to block access to the gap in the railing; and (2) the job of removing and replacing the pump would place employees right at the edge of the unguarded platform edge in order to guide the pump.

The Court agrees with Complainant. The photographs found at Exhibits C-2a, C-2b, and C-2c clearly show Paredes standing no more than a foot away from the gap in the railing. There is no partition to prevent him from moving from the operator's controls. By operational necessity—to wit, his duties at the control panel—he is standing directly adjacent to the gap in the railing. *See Jacobson Son Constr.*, 7 BNA OSHC 1640 (No. 78-3415, 1979) ("Respondent's relief foreman, because of the nearness [10 feet] of his work station to the south opening . . . must be held to have been exposed to the falling hazard contemplated by the cited standard."). Further, as the standard for establishing exposure also countenances inadvertence, the Court finds that it is reasonably likely that a simple mistake or lapse of attention would place Paredes directly in front of the gap. Likewise, though perhaps a bit more attenuated, Guerrero, while operating the tongs at the center of the platform, was a mere three feet away from the gap in the railing. The Commission has held that standing 10 feet away from an unprotected edge is sufficient to establish exposure. *See id.*; *see also Brennan v. OSHRC (Underhill Constr. Co.)*, 513 F.2d 1032, 1035–36 (2d. Cir. 1975) (employer is responsible for requiring fall protection

whenever hazard is accessible to an employee, including, for example, where employees using ceiling sanding machine worked 10 feet from unguarded edge of floor high above ground).[8] Sometimes it is not the gap located close enough to have the worker's attention that results in a fall—it is the one that is out of sight or behind the worker and forgotten during active work.

In light of the foregoing, the Court finds 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. Accordingly, the Court finds that Complainant has established its *prima facie* case.

v. The Violation Was Repeated

"A violation is repeated under section 17(a) of the Act if, at the time of the alleged violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch*, 7 BNA OSHC 1061 (No. 16183, 1979). One of the ways in which Complainant can establish substantial similarity is by showing that the prior and present violations are for failure to comply with the same standard under section 5(a)(2) of the Act. *Id.* A *prima facie* showing of substantial similarity can be rebutted by evidence that the conditions and hazards associated with the violations are different. *Id.*

The evidence shows that, in a previous inspection,[9] Respondent was cited for a violation of 29 C.F.R. § 1910.23(c)(1) under basically the same circumstances as those presented here. (Tr. 149–150, 288–289; Ex. C-7). Both CSHO Solis-Lewis and Mr. Stewart testified that the underlying citation involved missing guardrails on a mobile rig, and the violation exposed

8. In response to arguments similar to those proffered by Respondent in this case, the Second Circuit stated, "One takes it that Dic-Underhill would have us hold that for a citation properly to issue, an employee of the particular employer creating the perimeter hazard must be seen by an inspector teetering on the edge of the floor 150 feet or so up from the ground. No such interpretation of the standards would be reasonable. No such interpretation is consistent with, let alone called for by, the Act."

9. The inspection for the underlying violation was No. 313500241. The citation was issued on September 22, 2011. (Ex. C-7).

employees to a fall hazard. (Tr. 149–150, 288–289). As noted by Complainant, Respondent did not contest the Citation; instead, Respondent submitted a letter indicating abatement had occurred, and, shortly thereafter, Complainant received payment in full for the assessed penalties. (Tr. 296; Exs. C-9, C-25). As such, the Citation became a final order of the Commission by operation of law on October 19, 2011. *See* 29 U.S.C. § 659 (failure to submit notice of contest within fifteen days from receipt of Citation and Notification of Penalty results in citation becoming final order of Commission).

Respondent's only argument with respect to this issue is that Exhibit C-9, which is the letter sent from Respondent to OSHA regarding abatement, should be excluded pursuant to Federal Rule of Evidence 408 because it is the result of an informal settlement. *Resp't Br.* at 12. Federal Rule of Evidence 408 provides:

> Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) Furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) Conduct or a statement made during compromise negotiations about the claim . . . .

Fed. R. Evid. 408.

The Court does not find that the foregoing rule precludes consideration of the disputed exhibit. The letter merely indicates that corrective actions had been taken to abate the citation and notification of penalty. (Ex. C-9). It is not being used here to prove or disprove the validity or amount of a *claim*, nor is it being used for impeachment. *See Cates v. Morgan Portable Bldg. Corp.*, 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove

the fact of settlement as opposed to the validity or amount of the underlying claim); *see also United States v. Austin*, 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with FTC, because it was offered to prove that defendant was on notice that subsequent similar conduct was wrongful). The letter submitted by Complainant is merely being offered to show that Respondent did not submit a notice of contest in the earlier action and, thus, the citation and notification of penalty became a final order of the Commission by operation of law. This is corroborated by Exhibit C-25, which shows that payment of the full penalty amount was received by Complainant on November 9, 2011. (Ex. C-25).

Regardless of whether this letter may or may not have been prompted by settlement negotiations between the parties, such is irrelevant to the determination of whether it is admissible. Just because something is *related* to settlement negotiations, or contemporaneous with negotiations, does not bring it under the protection of the rule. *See* Fed. R. Evid. 408 advisory committee's note (evidence of unqualified factual assertions is admissible). In this instance, the letter is not being used to address the validity of the underlying violation that was at issue during settlement negotiations for the former matter; rather, its purpose was far more mechanical—establishing the existence of an underlying final order of the Commission. Accordingly, Respondent's argument is rejected, and the Court finds that the citation item was properly characterized as "repeat".

vi. Affirmative Defenses

With respect to Citation 2, Item 1, Respondent has claimed the affirmative defenses of infeasibility and greater hazard.[10] The Court shall address each in turn.

10. In reality, Respondent's brief specifically mentions the affirmative defense of infeasibility; however, in light of its use of the term "greater hazard" in its argument, and in its Amended Answer, the Court shall consider it. The Court also notes that Respondent pled the affirmative defense of employee misconduct, but elected not to address

1. Infeasibility

In order to establish the affirmative defense of infeasibility, Respondent must prove that "(1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would be technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection." *AJ McNulty & Co., Inc.*, 19 BNA OSHC 1121 (No. 94-1758, 2000).

Respondent contends full installation of the guardrails would have been infeasible because the gap in the guardrails was necessary to accommodate the removal and installation of a down-hole pump. Essentially, Respondent claims that its employees would be exposed to an even greater hazard if the pump had to be lifted over a guardrail, instead of needing only to clear the floor of the platform, because of a concern regarding equipment falling from overhead.

Respondent's defense of infeasibility is rejected because the arguments it makes in support have nothing to do with whether or not the use of guardrails was infeasible. Instead, many of the arguments it makes are more specifically targeted at the question of whether compliance would have created a greater hazard, which will be addressed below. The installation of guardrails does not implicate feasibility issues—Respondent readily admits that the rig is designed to use a sheave or wheel to lift items off the ground onto the platform. Lifting the pump over a guardrail instead of directly onto the platform was not technologically or economically infeasible, nor would the presence of guardrails render ongoing work infeasible, since the equipment necessary to carry out the job was already part of the workover rig. The rig

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this issue in its post-trial brief or present more than scant evidence at trial on that issue. Accordingly, the Court deems abandoned Respondent's affirmative defense of employee misconduct.

was designed to have handrails in the location where the gap was found; thus, compliance would require neither additional expense nor technological work-arounds. *See Altor, Inc.*, 23 BNA OSHC 1458 (No. 99-0958, 2011) (rejecting infeasibility defense where witness testified that guardrails could have been used throughout the worksite).

Based on the arguments of Respondent, this affirmative defense is rejected. It is clear that Respondent's main point is that compliance with the guardrail standard, under the circumstances presented here, would have created a greater hazard than noncompliance. Accordingly, the Court will address the greater hazard defense.

2. Greater Hazard

To establish the defense of greater hazard, Respondent must prove that: "(1) the hazards of compliance with the standard are greater than noncompliance; (2) alternative means of protecting employees were either used or were not available; and (3) an application for a variance under section 6(d) of the Act would be inappropriate." *Id.* (citing *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1204 (No. 90-2304, 1993)). With respect to the third element, the Commission has held that "[w]e need not inquire whether [the employer] has proved the first two elements of the defense, because it is clear that the company has introduced no evidence on the third." *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1020–23 (No. 86-521, 1991). *See also Donovan v. Williams Enters., Inc.*, 744 F.2d 170, 178 n.12 (D.C. Cir. 1984) (greater hazard defense rejected because company did not apply for variance).

As noted by Complainant, Respondent has put forth no evidence that it attempted to seek a variance or even considered the appropriateness of applying for one. Based on the case law, this failure alone defeats the greater hazard defense. Nevertheless, the Court shall address the remaining two elements, neither of which has been satisfied by Respondent.

Respondent argues that the hazard of having a guardrail in place was greater than leaving an open side on the platform. As discussed above, Respondent is referring to the fact that the pump would have to be raised above the guardrail, thereby exposing employees to overhead struck-by hazards. There are a couple of problems with this assertion: (1) it is not clear to the Court, on the basis of the evidence, that the hazard of suspended equipment is any greater than the fall hazard presented by the missing guardrail or that the presence of a guardrail would have magnified the suspended equipment hazard appreciably; and (2) at the time of the inspection, the pump was not being removed, nor was a new pump being installed.

As to (1), Respondent did not proffer convincing evidence to suggest that the actual reason for the missing guardrail was a good faith determination—based on a comprehensive evaluation of work practices and their associated hazards—that the probability of being struck by falling objects was greater than the probability of falling from an unguarded platform. If that were the case, the Court would expect Respondent to have developed work policies and procedures to provide alternative methods of compliance. Instead, Respondent's safety policies and procedures repeatedly stress that working platforms, elevated more than four feet above the ground, must be equipped with a standard guardrail system or some other form of fall protection. (Ex. R-5 at 5, R-6 at 30, R-7 at § 2, p. 5, R-14). Respondent does not contend that the hoisting of the pump(s) could be avoided by not having the guardrail completed—only that it would have to be hoisted high enough by the sheave to clear the guardrail during the on/off process.

As to (2), the evidence does not establish the section of guardrail was removed contemporaneously with movement of a pump. The work observed by the CSHO did not include hoisting a new pump onto the platform or a used pump off of the platform. Respondent's argument that the workers removed a section of guardrail to facilitate movement of a pump is

inconsistent with the statements of Mr. Luna onsite that the guardrails were incomplete because they were in a hurry, had just arrived at the site, and had not yet installed all guardrails, and also with the observations of ongoing work by the CSHO. (Tr. 264). The inevitability that at some point in time the hoisting of a pump was going to be a necessary part of the job is not sufficient to establish the affirmative defense of greater hazard for the work being performed at the time of the inspection. Respondent has specific procedures for the installation and removal of a submersible pump in its Well Service Field Manual, none of which address the removal of guardrails to accommodate the pump. (Ex. C-18 at 93–96). Even if removal of the guardrails during pump extraction or insertion had been warranted, it does not follow that leaving the platform open while other work was in progress was a safe practice.

Respondent also failed to prove that alternative forms of fall protection were used or were otherwise unavailable. As observed by CSHO Solis-Lewis, none of Respondent's employees used an alternative form of fall protection. (Ex. C-2). Although Mr. Stewart opined that personal fall arrest systems such as lanyards and harnesses could cause a greater hazard due to the potential for getting tangled or being struck during a blowout, Respondent's own policy requires the use of secondary fall protection when work occurs on an elevated surface "where heights are greater than 6 ft. without a guardrail or net." (Ex. R-7 at § 2, p.5). This suggests that alternative methods of fall protection were both available and required when a standard guardrail was not in use.

Rather than putting forth a legitimate claim that compliance with the standard created a greater hazard, the Court finds that Respondent's arguments are little more than *post hoc* justifications for its failure to comply. Accordingly, Respondent's defense of greater hazard is rejected, and Citation 2, Item 1 shall be AFFIRMED.

VII. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (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. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1995).

The Court finds that the gravity of the foregoing violations is somewhat muted by a low probability of significant injury or death. Although the Court has found that the violations exposed both Paredes and Guerrero to the potential for serious injury, the likelihood of either suffering a serious injury from falling off the platform due to the missing guardrail or fixed stairs was relatively low. This is based, in part, on the location of the platform where they performed their work and the length of time they were actually exposed to the hazard. In this regard, the Court agrees with the assessments of Complainant. However, the Court also notes the presence of heavy pipe and equipment increases the hazardous nature of the work environment. Overall, the Court also agrees that due to Respondent's size (over 6,000 employees) and its documented history of noncompliance, the penalties proposed by Complainant are appropriate.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED as serious, and a penalty of $5,500.00 is ASSESSED.
2. Citation 2, Item 1 is AFFIRMED as repeat, and a penalty of $38,500.00 is ASSESSED.

SO ORDERED

/s/
Peggy S. Ball
Judge, OSHRC

Date: September 16, 2015
Denver, Colorado