United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. J and M Miller Construction, LLC, Respondent.	OSHRC Docket Nos. 14-1765 & 14-1860

APPEARANCES:

Paul Spanos, Esquire,
U.S. Department of Labor, Office of the Solicitor,
Region V, Cleveland, Ohio
For the Secretary

Galen D. Maust, CPA
J & M Miller Construction, LLC
Fort Wayne, Indiana
For Respondent

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 *et seq.* (the Act). On June 9, 2014, a compliance safety and health officer (CSHO) for the Occupational Safety and Health Administration (OSHA) inspected a residential construction worksite in Sylvania, Ohio. As a result of his inspection, OSHA issued a Citation and Notification of Penalty to J&M Miller Construction, LLC, (J&M) alleging serious violations of 29 C.F.R. § 1926.501(b)(13) (Item 1a), for failure to ensure employees working six feet or

more above a lower level were using fall protection, and § 1926.503(a)(1) (Item 1b), for failure to provide a training program for employees who might be exposed to fall hazards. OSHA proposes a grouped penalty of $2,800 for Items 1a and 1b. OSHA identified this inspection as Inspection No. 980011 and the Commission docketed this case under Docket No. 14-1765.

On November 4, 2014, another OSHA CSHO inspected a residential construction worksite in Maumee, Ohio. As a result of his inspection, OSHA issued a two-citation Citation and Notification of Penalty to J&M on November 6, 2014. Citation No. 1 alleges serious violations of 29 C.F.R. § 1926.95(a) (Item 1), for failure to ensure employees used proper eye protection while operating pneumatic nail guns, and § 1926.451(b)(2) (Item 2), for failure to ensure each scaffold and walkway was at least 18 inches wide. OSHA proposes a penalty of $1,760 for Item 1 and a penalty of $3,080 for Item 2. Citation No. 2 alleges a repeat violation of 29 C.F.R. § 1926.501(b)(13), for which OSHA proposes a penalty of $6,160. OSHA identified this inspection as Inspection No. 1006503 and the Commission docketed this case under Docket No. 14-1860.

On June 5, 2015, the Court consolidated the two cases for the purposes of discovery and hearing. (Tr. 4). The Court held a one-day hearing in this matter on December 8, 2015 in Fort Wayne, Indiana. The Secretary called two witnesses: CSHO Daniel Steffen and CSHO Darin Von Lehmden. Galen D. Maust, who identified himself as a CPA and "tax preparer and accountant for J&M," represented J&M at the hearing. (Tr. 5). Mr. Maust did not call any other witnesses, but wished to testify himself. The Court sustained the Secretary's objection to Mr. Maust's testimony on the basis that Mr. Maust was not identified as a witness for J&M in the

mandatory pre-hearing statement exchange. J&M failed to file a pre-hearing statement.[1] (Tr. 122, 124). The Court permitted Mr. Maust to make an offer of proof of his expected testimony under oath.[2] (Tr. 123). The Court also permitted Mr. Maust during the trial to make an offer of testimony of what he believed Messrs. Jonas Miller and Hirschy would testify to if they were present at the trial. (Tr. 82-86, 149-150).

There are no stipulated facts or points of law in this proceeding. (Tr. 20). J&M does not dispute it failed to comply with the cited standards. J&M's primary argument in both cases is that it is not an employer within the meaning of the Act. J&M claims the workers observed by the CSHOs at the Sylvania and Maumee worksites were all self-employed and that J&M has no employees.[3]

For the reasons that follow, the Court AFFIRMS Items 1a and 1b of the Citation and Notification of Penalty issued under Docket No. 14-1765 and assesses a grouped penalty of $2,800. With regard to the Citation and Notification of Penalty issued under Docket No. 14-1860, the Court AFFIRMS Items 1 and 2 of Citation No. 1 and assesses penalties of $1,760 and

[1] On June 5, 2015, the Court issued an order directing the parties, among other instructions, to "[p]repare a Joint Pre-hearing Statement which shall contain . . . a list of all lay witnesses who may be called at the hearing, including a brief summary of testimony to be elicited . . . . Witnesses will not be permitted to testify and exhibits will not be accepted in evidence unless they have been identified in a timely pre-hearing exchange." J&M was warned of the possibility that it could be sanctioned for failing to follow the Court's orders. The order also stated "[f]ailure to comply with all parts of this order may result in sanctions, including the dismissal of claim(s), notice of contest, or defense(s), as well as the assessment of costs and expenses incurred by the Commission and the other parties." (Order of Consolidation, Notice of Hearing, and Scheduling Order, pp. 3-5).

[2] *See* 29 C.F.R. § 2200.72(b) "*Offer of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record of the proceeding." Mr. Maust's offer of proof regarding his testimony, as well as his offers of proof regarding what he believed Messrs. Jonas Miller and Hirschy would testify to at the hearing, were excluded from the record as evidence because Respondent violated the Court's Order dated June 5, 2015, and failed to timely identify the names of its witnesses and provide a brief summary of their expected testimony in advance of the trial. (Tr. 82-86, 122-150). The Court notes that its affirmation of all of the citations and proposed penalties would not change if it were to consider J&M's offers of proof, as well as Exhibit R-A marked for identification purposes only, as evidence in this case.

[3] At the hearing, J&M apparently abandoned its earlier argument that all of the workers at the worksites were co-owners of J&M. *See Pennrock Constr., LLC*, 25 BNA OSHC 2021, 2038 (No. 13-1662, 2015) (ALJ) (noting three 1% owners of an LLC working as roofers found to be employees for the purpose of coverage by the Act).

$3,080, respectively. The Court also AFFIRMS Item 1 of Citation No. 2 and assesses a penalty of $6,160.

Background: Docket No. 14-1765

Relevant Testimony of CSHO Daniel Steffen

On June 9, 2014, CSHO Daniel Steffen[4] was driving by a residential construction worksite at 4953 Yosemite Parkway, Sylvania, Ohio, when he observed two men working on the roof of a two-story structure. (Tr. 25-26). CSHO Steffen explained OSHA's Toledo area office has "a local emphasis program on fall protection. And so if we're to and from another site or if we're out in the area and we recognize individuals working from an elevated surface, we're obligated to stop and check it out, to verify that such employees are protected." (Tr. 26). It appeared to CSHO Steffen the two men were not using any form of fall protection. He parked his car near the worksite and approached the structure on foot. He visually confirmed the workers were not using fall protection and took photographs of the worksite. (Exh. C-1). CSHO Steffen then asked to speak to "the boss on site." (Tr. 26).

A man at ground level identified himself as the boss and gave his name as "Daniel Graber." CSHO Steffen asked him to instruct the men on the roof to come down. (Tr. 27). CSHO Steffen interviewed the man who identified himself as Daniel Graber, as well as the two men who had been on the roof, Messrs. Dan Miller and Guerrero. (Tr. 31, 48-50; Exh. C-1, p. 3). CSHO Steffen determined the height of the roof where he observed the men working was 19 feet. (Tr. 31).

[4] CSHO Steffen has worked for OSHA's Toledo area office since 2007. He has conducted over 600 safety inspections in construction and general industry. (Tr. 24-25).

CSHO Steffen returned to his office and began working on the Citation and Notification of Penalty he planned to recommend OSHA issue to "Daniel Graber." He recommended OSHA cite the employer for serious violations of § 1926.501(b)(13) and § 1926.503(a)(1). As he researched the information provided to him at the worksite, CSHO Steffen realized there were "some inconsistencies in the address that was provided and the company name and the name of the employer. So I used a basic internet search and dug a little more and discovered that the address was not valid and the name did not appear to be valid." (Tr. 31-32).

The following day, June 10, OSHA issued a Citation and Notification of Penalty based on CSHO Steffen's recommendation. The Citation referred to Inspection No. 980011, named the employer as "Daniel Graber," and gave the employer's address as "13112 Grabill Rd, Grabill, Indiana 46741." (Exh. C-2, p.1). That same day, CSHO Steffen returned to the Sylvania worksite to hand-deliver the Citation and Notification of Penalty to the man who had held himself out to be Daniel Graber. The man acknowledged he received the Citation and Notification of Penalty by signing "Dan Graber" on the receipt of delivery CSHO Steffen had prepared. (Exh. C-2, p. 1). CSHO Steffen then confronted the man regarding the inconsistencies found in the information he had provided the previous day. CSHO Steffen testified he asked the man "once again if the information he provided me was correct. After some discussion he acknowledged that it was not correct, the initial information that he provided. And that's when it was discovered that his name was Jonas Miller and his company J&M Miller Construction, with an accurate address." (Tr. 28-34). Jonas Miller provided CSHO Steffen with J&M's mailing address as 8703 Milan Center Rd., New Haven, Indiana 46774. (Exh. C-2, p. 1).

CSHO Steffen returned to his office and drafted an Amended Citation and Notification of Penalty, captioned "AMENDED to change company name and address," and naming the employer as "J and M Miller Construction LLC and its successors" and listing the company address as "8703 Milan Center Rd., New Haven, IN 46774." (Exh. C-4, p. 1). The alleged violation descriptions (AVDs) of Items 1a and 1b of the Amended Citation remained the same except for the name change. (Tr. 34). CSHO Steffen testified that he believed that "Carter Building Supply or Carter Lumber" was the "builder" at the Sylvania worksite. (Tr. 54).

Late Notice of Contest

OSHA sent a copy of the Amended Citation and Notification of Penalty along with a cover letter to Jonas Miller on June 11, 2014, by certified mail addressed to Mr. Jonas Miller, J&M Miller Construction, LLC, 8703 Milan Center Rd., New Haven, IN 46774. (Tr. 34; Exh. C-2, p. 2). The cover letter states in pertinent part:

> Dear Mr. Miller:
>
> Attached you will find an Amendment to the Citation that was issued on June 10, 2014. It was determined after your conversation with the compliance officer that the correct company name is J and M Miller Construction, LLC, not Daniel Graber. The Citation and Notification of Penalty has been amended to the correct company name and mailing address.

(Exh. C-2, p. 2).

The Commission has held the Secretary's amendment to a citation relates back to the date of the original citation under Fed. R. Civ. P. 15(c). *See CMH Co., Inc.,* 9 BNA OSHC 1048, 1053-1054 (No. 78-5954, 1980); *Vergona Crane Co., Inc.,* 15 BNA OSHC 1782, 1783 n.3 (No. 88-1745, 1992). Rule 15(c) provides in pertinent part:

> An amendment to a pleading relates back to the date of the original pleading when:

* * *

> **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or
> **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
> **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and
> **(ii)** knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Constructive notice is sufficient. *Berndt v. State of Tenn.*, 796 F.2d 879, 884 (6th Cir. 1986); *Miles v. Dept. of Army,* 881 F.2d 777, 783 (9th Cir. 1989) ("[I]nformal notice may satisfy Rule 15(c)'s general notice provisions requirements."). The Court finds the Amended Citation issued by OSHA on June 11, 2014, meets the requirements of Rule 15(c). The Court determines June 10, 2014, the date CSHO Steffen hand-delivered the original Citation and Notification of Penalty to Jonas Miller, is the date from which the 15-day period to file the NOC should be calculated. Under long-standing Commission precedent, a citation is properly served where "the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest." *Baker Support Servs., Inc.,* 18 BNA OSHC 2200, 2202 (No. 99-1095, 2000) (citations omitted).

The Court determines OSHA properly served J&M on June 10, 2014. Both the Citation made out to Daniel Graber and the Amended Citation include the standard paragraph by which OSHA informs the employer of its right to contest the Citation and Notification of Penalty. The paragraph provides:

> **Right to Contest** – You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the

> underlying violations. **Unless you inform the Area Director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.**

(Exh. C-4, p. 2) (emphasis in original).

Based on the Citation and Notification of Penalty hand-delivered to Jonas Miller on June 10, 2014, J&M had until July 1, 2014, to file a timely notice of contest (NOC).[5] J&M failed to do so.[6] (Tr. 45). On November 17, 2014, OSHA's Division of Debt Collections, Office of Financial Management, sent an email to Gordon Hirschy,[7] who is associated with J&M. This email presumably was sent in response to a telephone inquiry by Mr. Hirschy made on November 17, 2014 following J&M's receipt of a notice of debt collection for the penalty assessed under Docket No. 14-1765. The email states in pertinent part:

> Mr. Hirschy,
> Thank you for your call. As mention[ed], the citations became a final order on 07/01/2014. However, you are entitled to a hearing.
> If you still want to dispute the charges, you will need to reopen the case and file a late notice of contest with the Occupational Safety & Health Review Commission.

(Docket No. 14-1765, Attachment to Late NOC).

Mr. Hirschy responded to this email with a facsimile transmission to the Commission on November 19, 2014. Mr. Hirschy's facsimile cover page stated, in part, "I believe seriously, by

[5] Item 1 of Citation No. 2, issued under Docket No. 14-1860, alleges a repeat violation of § 1926.501(b)(13) based on Item 1a of the Citation issued under Docket No. 14-1765. The AVD of the alleged repeat violation states Item 1a of the Citation for Docket No. 14-1765 "was affirmed as a final order on June 25, 2014, with respect to a workplace located at Sylvania, Ohio." The date in the AVD has been incorrectly calculated using 15 days rather than 15 working days. The correct date Item 1a of the Citation issued under Docket No. 14-1765 became a final order is July 1, 2014. *See* Commission Rule 1(l) ("*Working day* means all days except Saturdays, Sundays, or Federal holidays.").

[6] CSHO Steffen testified that his office did not receive any notice of contest from Respondent before the date to timely file a notice of contest passed; i.e. July 1, 2014. (Tr. 45-47).

[7] Mr. Hirschy's relationship with J&M was never fully explained during this proceeding. The cover sheets for the facsimile transmissions Mr. Hirschy sent to the Commission bear the letterhead: "Gordon Hirschy, Hirschy Auctions & Realty."

Tax laws that we all are Self-Employed. That is the direction that our CPA stated." His facsimile transmission also included a copy of a printed email Mr. Hirschy sent to himself with the subject line "LATE NOTICE OF CONTEST TO OSH REVIEW COMMISSION."[8] The body of the email states in pertinent part:

> WE ARE A LLC. WE ARE ARE [sic] ALL OWNERS OF THE LLC. SOME OF US OWN MORE OF THE LLC THAN OTHERS. WE WORK ALL TOGETHER AND AT THE END OF OUR FISCAL YEAR WE ARE ISSUED A K-1 TAX FORM STATEMENT SHOWING THE EARNINGS THAT WE EARNED FROM THE LLC. ACCORDING TO THE TAX CODES, WE ARE ALL SELF-EMPLOYED.
>
> ACCORDING TO THE OHIO OSHA REGUALTIONS THAT IS [sic] PUBLISHED IN THEIR INTERNET PUBLICATION IT STATES AND SAIDS [sic] THAT OSHA DOES NOT COVER A FEW CATEGORIES OF WORKERS IN OHIO. THOSE CATEGORIES INCLUDE ANYONE THAT IS SELF-EMPLOYED, …. WE ARE ALL SELF-EMPLOYED AT ARE [sic] WORK; SO THEREFORE, OSHA IS OVERSTEPPING THEIR BOUNDARIES OF OUR CONTROL.

(Docket No. 14-1765, Late NOC).

On November 19, 2014, the Commission docketed J&M's notice of contest as OSHRC Docket No. 14-1765.

In response to J&M's late NOC, on January 22, 2015,[9] the Secretary filed a complaint under Docket No. 14-1765. Under the Commission Rules, J&M was required to file an answer with the Commission by February 11, 2015.[10] J&M failed to file an answer within that time period. On April 7, 2015, Chief Judge Rooney issued two orders, one under Docket No. 14-1765

[8] All of Mr. Hirschy's typed communications to the Commission cited in this decision were in uppercase.
[9] The complaint is due "no later than 20 days after receipt of the notice of contest." *See* Commission Rule 34(a)(1). Chief Judge Rooney granted the Secretary's motion for an extension of time to file the complaint through January 22, 2015.
[10] *See* Commission Rule 34(b):

> (1) Within 20 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Commission.
> (2) The answer shall contain a short and plain statement denying those allegations in the complaint which the party intends to contest. Any allegation not denied shall be deemed admitted.

and the other under Docket No. 14-1860, to show cause why J&M "should not be declared in default and the citation(s) and penalties should not be affirmed due to its failure to file an answer to the complaint within the time permitted under the Commission Rules of Procedure."

Background: Docket No. 14-1860

Relevant Testimony of CSHO Darin Von Lehmden

On November 4, 2014, OSHA CSHO Darin Von Lehmden,[11] also from OSHA's Toledo area office, was driving on the Ohio Turnpike in Maumee, Ohio, when he "observed some construction off to the south side of the Turnpike and it appeared that there were individuals working on the structure with no apparent fall protection." (Tr. 61). CSHO Von Lehmden exited the Turnpike and headed back to the worksite, "a fairly large residential subdivision with quite a few new homes that were being built in the area and/or under construction at the time."[12] (Tr. 61).

CSHO Von Lehmden parked and took several photographs from his car. (Tr. 61-62; Exh. C-3). He then exited the car and approached the site on foot. It appeared to CSHO Von Lehmden the workers were not using fall protection and two workers were using pneumatic nail guns, but were not wearing eye protection. (Tr. 61).

The CSHO conducted his opening conference at about 10:55 a.m., November 4, 2014. (Tr. 104-05). One of the workers, who identified himself as Peter Martinez, told CSHO Von Lehmden he "was somewhat in charge and also drove the rest of the crew to the site." (Tr. 63, 65, 88, 98-99). The three other workers gathered in front of the structure under construction. CSHO Von Lehmden asked Mr. Martinez and the workers who their employer was. The

[11] CSHO Von Lehmden has been with OSHA for almost a decade. He estimated he has conducted "seven hundred to a thousand" inspections during his time with OSHA. (Tr. 59-60).
[12] The worksite was at 2759 Longview Drive, Maumee, Ohio 43537.

workers identified themselves as Messrs. Menno Miller, Martin Miller, and Jason Eicher.[13] (Tr. 90-92). Mr. Martinez then made a telephone call. (Tr. 63-64). After he completed the call, Mr. Martinez informed CSHO Von Lehmden he had called Jonas Miller and he worked for J&M.[14] (Tr. 115). Mr. Martinez "indicated that he was paid by J&M Construction, as were the other individuals that were on the crew that day." (Tr. 64). Mr. Martinez stated he had worked for J&M for three or four months and "a couple" of the other workers stated they had a work relationship with J&M. (Tr. 64). Mr. Martinez told CSHO Von Lehmden that when Jonas Miller was not present, Mr. Martinez "was in charge of the site." (Tr. 65). CSHO Von Lehmden observed the building under construction "was a two-story residential structure" that "was approximately 19 feet" high. (Tr. 65). CSHO departed the work site at about 11:35 a.m. (Tr. 104-05).

CSHO Von Lehmden testified that the development company, Carter Lumber, provided documents to him that indicated J&M had signed an Independent Contractor Agreement effective January 28, 2014 to perform work as a subcontractor at 2759 Longview Drive, Maumee, Ohio 43537.[15] (Tr. 111, 114-15; Exh. C-5).

CSHO Von Lehmden recommended OSHA cite J&M for serious violations of § 1926.95(a) and § 1926.451(b)(2). He also recommended OSHA cite J&M for a repeat violation

[13] None of these three workers told CSHO Von Lehmden that they were self-employed or co-owners of J&M. (Tr. 105).
[14] CSHO Von Lehmden testified that after Mr. Martinez spoke with Jonas Miller, either Menno or Martin Miller told the CSHO that they could not provide any additional information. (Tr. 104).
[15] The Notice to Proceed, dated January 17, 2014, signed by both Carter Lumber and J&M representatives, calls for J&M to provide the labor to complete framing, including top plates, rafter or roof truss system with associated temporary and permanent bracing, and roof sheathing at 2759 Long View Drive. Carter Lumber's prime contractor is identified as Doug Howard Builders. (Exh. C-5, pp. 1-2).

of § 1926.501(b)(13). On November 6, 2014, OSHA issued a Citation and Notification of Penalty to J&M based on the CSHO's recommendation.

Timely Notice of Contest

On December 1, 2014, J&M filed a timely NOC to the Citation.[16] On January 5, 2015, Chief Judge Rooney granted the Secretary's motion for extension of time to file the complaint by February 2, 2015. On February 4, 2015, the Secretary filed his complaint under Docket No. 14-1860 in response to J&M's NOC. Under the Commission Rules, J&M was required to file an answer with the Commission by February 24, 2015. J&M failed to file an answer within that time period. As noted in the background section for Docket No. 14-1765, on April 7, 2015, Chief Judge Rooney issued separate orders in each case to show cause why J&M "should not be declared in default and the citation(s) and penalties should not be affirmed due to its failure to file an answer to the complaint within the time permitted under the Commission Rules of Procedure."

J&M's Answer and Subsequent Proceedings

On April 20, 2015, Gordon Hirschy faxed a 20-page "RESPONSE" to the Show Cause Order which appears to conflate the two cases. The cover page refers to Docket No. 14-1860. J&M attached documents from both cases as well as copies of the documents it had sent by facsimile as part of J&M's late NOC under Docket No. 14-1765. The second page of the

[16] In its NOC, submitted by facsimile on December 1, 2014, J&M asserted OSHA has no jurisdiction over self-employed workers in Ohio. Mr. Hirschy stated in J&M's NOC: "ACCORDING TO OUR LLC, ALL OF US WORKERS ARE SELF-EMPLOYED…. THE ATTACHED INFORMATION SHOULD MAKE THIS CITATON NULL AND VOID." (NOC, p. 1). In his opening and closing statements at trial, the Secretary argued the NOC was "insufficient" since it did not specifically contest the citations, classifications, or penalties. (Tr. 22, 153-54). In his post-hearing brief, the Secretary asserted J&M had failed to contest the proposed penalties. (Sec. Post-Hrg. Br., at p. 16). The Court rejects these arguments by the Secretary and finds J&M's NOC adequately contested the citations, classifications and proposed penalties in Docket No. 14-1860. *See Prime Roofing Corp.,* 22 BNA OSHC 1892, 1897 (No. 07-1409, 2009) (construing language of employer's letter liberally to determine whether it exhibits a clear intent to dispute the citation).

facsimile transmission, addressed to Chief Judge Rooney, claims OSHA is harassing J&M and states in pertinent part:

> WE ARE ABIDING BY THE LAWS WITH OUR LIMITED LIABILITY COMPANY OF INDIANA AND THE LAWS OF THE IRS. . . . THEREFORE, ACCORDING TO THE ORDER THAT WE ARE RESPONDING TO AND ALL OF OUR OTHER PAPERWORK THAT WE HAVE PROVIDED TO OSHA, OUR CITATIONS SHOULD BE NULLED AND VOIDED [sic].

(Answer, p. 2).

Chief Judge Rooney construed this facsimile transmission as an answer to the complaints in both Docket Nos. 14-1765 and 14-1860. On April 23, 2015, she assigned Docket No. 14-1860 to the undersigned. On June 5, 2015, she also assigned Docket No. 14-1765 to the undersigned.

On June 5, 2015, during a pre-hearing conference call with the parties, the Court ordered, without objection, Docket Nos. 14-1765 and 14-1860 to be consolidated for purposes of discovery and hearing. *See* Commission Rule 9. The Court set the location of the hearing, at J&M's request, in Fort Wayne, Indiana, to commence on December 8, 2015. Subsequently, J&M failed to participate in the final pre-hearing conference scheduled for November 13, 2015, and failed to file a Pre-Hearing Statement as instructed in the Court's June 5, 2015 order.

On December 4, 2015, Mr. Hirschy sent a hand-written note by facsimile to the Court referring to Docket Nos. 14-1765 and 14-1860, and stating, "We are needing an extension of the above cases on December 08, 2015, due to that I, Gordon Hirschy, have had surgery and am in a rehab [illegible] for 6-8 weeks." Attached to the note is a copy of Mr. Hirschy's admission record to a rehabilitation center on November 24, 2015. On December 4, the Court issued an order denying J&M's motion for a continuance. The Court noted J&M failed to comply with

several of the Commission's requirements for a motion for postponement of hearing. Commission Rule 62 provides:

> (a) *Motion to postpone*. A hearing may be postponed by the Judge on his own initiative or for good cause shown upon the motion of a party. A motion for postponement shall state the position of the other parties, either by a joint motion or by a representation of the moving party. The filing of a motion for postponement does not automatically postpone a hearing.
>
> (b) *Grounds for postponement*. A motion for postponement grounded on conflicting engagements of counsel or employment of new counsel shall be filed promptly after notice is given of the hearing, or as soon as the conflict is learned of or the engagement occurs.
>
> (c) *When motion must be received*. A motion to postpone a hearing must be received at least 7 days prior to the hearing. A motion for postponement received less than 7 days prior to the hearing will generally be denied unless good cause is shown for late filing.

J&M did not state the position of the Secretary with regard to the motion. J&M did not move for postponement as soon as Mr. Hirschy's unavailability became known. Mr. Hirschy was admitted to the rehabilitation center on November 24, 2015 and he did not send a facsimile to the Court regarding the situation until December 4, 2015, a week and a half after his admission. J&M's motion was not received seven or more days prior to the hearing. In addition, J&M had repeatedly failed to comply with the Court's orders and J&M failed to offer an explanation as to why someone other than Mr. Hirschy could not represent the company at the December 8, 2015 hearing.

On December 8, 2015, the Court convened the hearing in this matter at the United States Bankruptcy Court in Fort Wayne, Indiana. Appearing in this proceeding for the first time, Mr. Maust, J&M's accountant, announced he would be representing J&M. Mr. Maust stated Jonas Miller, J&M's owner, "is older Amish and he did not have a photo ID and so was not able to be

here today, was not able to get into this building." (Tr. 6). Shortly after the hearing began, Ms. Cheryl Johnson joined Mr. Maust on behalf of J&M.[17] Ms. Johnson stated she is "associated with J&M Miller Construction" and she acts as an advisor to Mr. Miller, who "couldn't come in today because [he] doesn't have a photo ID, so they wouldn't allow him in." (Tr. 15). Upon further questioning of Mr. Maust and Ms. Johnson by the Court, it emerged Mr. Miller had not actually shown up at the courthouse, but had assumed he would be unable to enter the building without photo identification. (Tr. 6, 15-16). The Court told Mr. Maust and Ms. Johnson it believed Mr. Miller likely would have been able to enter the building upon the Court's intervention, to which Ms. Johnson replied, "[w]ell, it's too late now." (Tr. 16).

Initially Ms. Johnson stated Mr. Miller was at a construction site "[p]robably 20 miles" from the courthouse. (Tr. 16). Later, Mr. Maust stated he had learned Mr. Miller was at a job site in Toledo, Ohio, which CSHO Von Lehmden estimated to be an hour and 40 minutes away from the hearing location. The Court stated, "I don't understand why [Mr. Miller] could not be here. It's 12:10. You're telling me you need an hour and 40 minutes and he could be here by 2:00 o'clock." (Tr. 117-18). The Court afforded Mr. Maust and Ms. Johnson multiple opportunities to contact Mr. Miller and to make arrangements for his transportation to the hearing, even offering to continue the hearing until the following day. (Tr. 74-81, 84, 117-18). Near the close of the hearing, the Court offered a final opportunity for Mr. Miller to appear as a witness: "I'm willing to consider holding the case open until tomorrow at nine o'clock." (Tr. 150). After conferring with Ms. Johnson, Mr. Maust demurred, stating Mr. Miller "would be very uncomfortable about coming here to testify[.]" (Tr. 151).

[17] Ms. Johnson stated J&M had retained an attorney named Mr. Watkins to represent the company, but he fell ill and could not be present at the hearing. (Tr. 75-76). The Court noted Mr. Watkins had never entered an appearance in this proceeding. (Tr. 76).

At the close of the hearing, the Court stated, "I would like the parties to pay particular attention to these instructions." (Tr. 158). The Court then gave detailed instructions regarding the filing of post-hearing briefs and reply briefs, and allowed the parties 33 days after notification of receipt of the transcript in which to file their briefs. (Tr. 158-59). The Court concluded by saying, "Now my instruction is that post hearing briefs, not the reply briefs because I said those were optional, post hearing briefs are not optional. I expect to receive a post hearing brief from both sides on this case. If you don't file on[e], you're in violation of my ruling." (Tr. 159). The Secretary filed a timely post-hearing brief on January 19, 2016. J&M did not file a post-hearing brief.

Coverage

The central issue in both cases before the Court is whether J&M was an employer at the time of the June 9, 2014 inspection in Sylvania, Ohio, and the November 4, 2014 inspection in Maumee, Ohio. The Secretary has the burden of proving the company was an employer within the meaning of the Act. *See All Star Realty Co., Inc.*, 24 BNA OSHC 1356, 1358 (No. 12-1597, 2014) ('"[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site.'" (citing *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated)).

The Act defines *employer* as "a person engaged in a business affecting commerce who has employees[.]" 29 U.S.C. § 652(5). *Employee* is defined as "an employee of an employer who is employed in a business of his employer which affects commerce."[18] 29 U.S.C. § 652(6).

[18] The Secretary must also establish J&M engaged in a business affecting commerce. J&M does not dispute this element. Here, J&M was under contract to provide framing for residential structures, a construction activity. (Exh. C-5). Commission precedent has long held that construction work necessarily is covered by the Act. *Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529 (No. 77-3676, 1983) (finding construction work affects interstate

As the Commission noted in *Don Davis*, 19 BNA OSHC 1477, 1480 (No. 96-1378, 2001), this definition is "unhelpfully circular." The Commission in *Don Davis* adopted standards for determining who is an employee under the Act that are consistent with the doctrine set forth in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 316 (1992) (holding the term *employee* in a federal statute should be interpreted under common law principles unless the particular statute specifically indicates otherwise); *Don Davis*, 19 BNA OSHC at 1480.

Darden Analysis

CSHO Steffen testified that, using the "*Darden* factors," OSHA determined that the individuals that he saw working at the Sylvania, Ohio worksite on June 9, 2014 worked for J&M.[19] (Tr. 29). To decide whether the party in question was an employer under common law, the *Darden* Court looked primarily to "the hiring party's right to control the manner and means by which the product [was] accomplished." *Darden*, 503 U.S. at 323. Factors pertinent to that issue include:

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

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commerce because there is an interstate market in construction materials and services). J&M's business address is in Indiana, while both worksites at issue are in Ohio. The Court determines J&M's construction projects affect interstate commerce.

[19] CSHO Steffen testified that "[s]ome of the [Darden] factors include a direction of work, who's directing the employees work tasks, individual work tasks. Who provides tools and equipment to said employees. Who establishes the work times and who provides transportation. Are the individuals in the same line of work as the employer himself." (Tr. 29).

Id. at 323-24 (citing *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)). "While no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers. *Allstate,* 21 BNA OSHC at 1035. The *Darden* factors can roughly be divided between: (1) conditions that existed at the actual worksite and (2) the putative employer's procedures relating to payment, benefits, and taxes.

As previously noted, Jonas Miller provided CSHO Steffen with false information when he inspected the Sylvania, Ohio, worksite on June 9, 2014. Regarding the November 4, 2014, inspection in Maumee, Ohio, CSHO Von Lehmden testified, "[t]he entire course of the inspection changed relatively quickly when Mr. Martinez contacted Jonas Miller via phone," during which "something was said" indicating the workers should "not talk to OSHA or not to perform or participate in the inspection." (Tr. 103).

Worksite Conditions

CSHO Steffen testified, based on his interviews with Jonas Miller[20] and the other workers, including Messrs. Guerrero and Dan Miller, at the Sylvania, Ohio worksite on June 9, 2014, that:

1. Jonas Miller, owner of J&M, directed the work on the site;
2. Jonas Miller established the work time at the site and paid the employees;
3. Jonas Miller supervised Messrs. Guerrero and Dan Miller (brother of Jonas Miller), the workers on the roof;

[20] At the time of the interviews, CSHO Steffen was under the impression Jonas Miller was "Daniel Graber."

4. The workers owned "some of their own hand tools. But larger tools, tools that are required to perform framing activities such as ladders, scaffolds, things like that, were provided by J&M Construction[;]" and
5. Jonas Miller provided the vehicle used to transport the work crew to the worksite, which Mr. Guerrero drove. (Tr. 30-31, 36, 50, 52).

CSHO Von Lehmden testified, based on his interviews with Mr. Martinez and the other workers at the Maumee, Ohio worksite on November 4, 2014, that:

1. Mr. Martinez and the workers; i.e. Martin Miller, Menno Miller, and Jason Eicher, worked for J&M;
2. Mr. Martinez had worked for "three or four months" for J&M;
3. When Jonas Miller was not present on the site, Mr. Martinez was in charge;
4. The crew arrived at the worksite in a truck driven by Mr. Martinez;
5. Mr. Martinez owned the trailer parked at the worksite. The trailer contained ladders and hand tools. Jonas Miller owned some of the tools and Mr. Martinez owned the others; and
6. Jonas Miller: a) directs the work of his crews, b) obtains the contract, and c) provides his crew members with the site information to enable them to perform work for him at the work site.

(Tr. 64-65, 98, 100-01, 108; Exh. C-3, p. 9).

Result of the *Darden* Analysis

Among the factors for which evidence exists, the evidence weighs in favor of an employment relationship between J&M and the workers at the two worksites. Jonas Miller identified himself as the boss at the Sylvania worksite and Mr. Martinez stated he was in charge

at the Maumee worksite when Jonas Miller was not present. J&M provided transportation for the crew, which essentially removed any discretion the crew members had over when and how long they worked. The only evidence that could be viewed as favorable to a determination the workers were self-employed is that some of the hand tools were owned by the workers and not J&M. Standing alone, this fact is insufficient to counter the weight of the other factors, which establishes the indicia of a traditional employer/employee relationship between J&M and the workers present at the Sylvania and Maumee worksites.

The factors relating to compensation and tax treatment include "the method of payment," as well as "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 324. The Independent Contractor Agreement between Carter Lumber and J&M for the work to be performed by J&M at 2759 Long View Drive, Maumee, Ohio, stated the Subcontractor (J&M) has "exclusive responsibility to pay its employees their wages and any benefits, and to withhold any taxes. Subcontractor has exclusive responsibility to ensure its employees are fully covered by and compliant with compensation laws of the state where the Project is located." (Exh. C-5).

Employee interviews by CSHO Steffen established J&M paid the workers on the Sylvania worksite. (Tr. 30-31). Employee interviews by CSHO Von Lehmden established J&M paid Mr. Martinez and the workers on the Maumee worksite. (Tr. 64, 101). The method of payment (*e.g.* hourly, flat fee, salary) was not addressed at the hearing.

J&M is in business as a limited liability company. (Exhs. C-2, p. 4, R-B). In J&M's NOC to the Citation and Notification of Penalty issued under Docket No. 14-1860, Mr. Hirschy attached a copy of a document he stated was J&M's "LEGAL LLC CERTIFICATE FROM THE

SECRETARY OF STATE OF INDIANA." (Exh. C-2, p. 3). The attached document lists "J AND M MILLER CONSTRUCTION (LLC)" as an active domestic limited liability company, created on November 2, 2012. Its registered agent is listed as Jonas Miller. Under "Principals," the document states, "This Limited Liability Company Does Not Have Managers." No other person is named in the document. (Exh. C-2, p. 4). Mr. Hirschy also attached a copy of an undated email message to himself. The subject line states, "J AND M MILLER CONSTRUCTION LLC WORKERS WILL BE SHARE HOLDERS AS OF JANUARY 1, 2014." The body of the email states:

> LET IT BE KNOWN TO THE WORKERS OF J AND M MILLER CONSTRUCTION LLC THAT EFFECTIVE AS OF JANUARY 1, 2014, THAT ALL WORKERS WITH J AND M MILLER CONSTRUCTION LLC WILL BE CONSIDERED STOCKHOLDERS. EACH WORKER, AS LONG AS THEY WORK WITH J AND M MILLER CONSTRUCTION LLC, WILL HAVE A 1% VESTED INTEREST IN THE LLC WITHOUT ANY RETURN SHARING OF THE SAID PROFITS OF THE LLC.
>
> THIS DECISION WAS MADE BY THE REGISTERED OWNERS, BOARD MEMBERS, AND MEMBERS OF SAID LLC. EACH WORKER WILL BE CONSIDERED SELF-EMPLOYED BY THEIR VESTED INTEREST IN SAID LLC. EACH OWNER, AT THE END OF THE FISCAL YEAR OF THE LLC WILL BE GIVEN A K-1 TAX FORM BY THE LLC'S ACCOUNTANT. THIS ACTION WAS TAKEN BY THE NECESSARY PEOPLE TO ENABLE THE WORKERS TO FEEL THAT THIS IS THEIR BUSINESS.

The undated document bears the signature of "Martha Miller," apparently the wife of Jonas Miller and co-owner of J&M. (Tr. 18, 128-29; Exh. C-2, p. 5).

Mr. Maust brought copies of Forms 1099-MISC[21] for 2014 to the hearing, which were admitted over the Secretary's objection as Exhibit R-B. (Tr. 147). Mr. Maust argued J&M considered the fifteen employees listed in the Forms 1099-MISC to be self-employed

[21] Form 1099-MISC records 2014 Miscellaneous Income.

subcontractors. (Tr. 156). The only names from the Forms 1099-MISC that match the names of workers at the inspected worksites are Messrs. Martin Miller and Menno Miller. (Exh. R-B, pp. 4-5). The workers at the Sylvania worksite, Messrs. Guerrero and Daniel Miller, do not have a matching Forms 1099-MISC in Exhibit R-B. Neither do Peter Martinez or Jason Eicher from the Maumee worksite.[22] J&M adduced no copies of Schedule K-1 showing disbursements of partnership earnings to the workers present at the Sylvania and Maumee worksites. The Court finds the documents submitted as Exhibit R-B do not support J&M's contention the workers at the Ohio worksites were subcontractors. Only two of the six workers had matching forms and there is no documentation or testimony establishing the amounts paid ($35,024 to Martin Miller and $16,498 to Menno Miller) were for work performed at the Maumee worksite.

At the trial, Mr. Maust argued the workers at the Maumee worksite had only "a very little" connection with J&M. (Tr. 157). Mr. Maust's argument ignores the testimony of CSHO Von Lehmden, who stated Mr. Martinez told him he was in charge when Jonas Miller was not present and that he worked for J&M. The Court closely observed the demeanors of both CSHOs during their respective testimony. They each testified in a straightforward, believable manner. The Court finds the CSHOs to be credible witnesses.

Mr. Maust's argument is also undercut by evidence of a contract entered into by J&M. The Secretary introduced a copy of a subcontract between Carter Lumber, the contractor for the buildings under construction at the Sylvania and Maumee worksites, and J&M. (Exh. C-5). The subcontract is for the Maumee, Ohio worksite, located at 2759 Long View Drive, the address listed as the inspection site in the Citation and Notification of Penalty issued under Docket 14-

[22] CSHO Steffen testified that Messrs. Guerrero and Dan Miller may have given him incorrect names. (Tr. 53). There are Forms 1099-MISC in Exhibit R-B that pertain to Messrs. Juan Carlos Recinos Martinez, Melvin Martinez and Christy Eicher. (Exh. R-B, pp. 1, 3-4).

1860. The subcontract names Jonas Miller as the subcontractor's authorized representative and states,

> Subcontractor shall not assign or subcontract this agreement or any portion of the work without Carter's prior expressed written consent. This means subcontractor shall perform the work with its own employees and shall not further subcontract any portion of the work unless Carter first consents in writing. Any subcontractor who is discovered subcontracting labor may be immediately terminated at Carter's sole discretion.

(Tr. 142-43; Exh. C-5, p. 3, ¶ 2; Sec. Post-Hrg. Br., p. 3). There is no evidence J&M requested permission to subcontract the Maumee project or that Carter provided written consent for J&M to do so.

The evidence presented by the Secretary relating to the *Darden* factors was unrebutted.

> While the Secretary had the burden of proving its case by substantial evidence, what constitutes substantial evidence varies with the circumstances. The "evidence a reasonable mind might accept as adequate to support a conclusion" is surely less in a case like this where it stands entirely unrebutted in the record by a party having full possession of all the facts, than in a case where there is contrary evidence to detract from its weight. *See, e.g., Noranda Aluminum, Inc. v. OSHRC,* 593 F.2d 811, 814 & n.5 (8th Cir. 1979) (decision to leave Secretary's case unrebutted "a legitimate but always dangerous defense tactic in litigation"); *Stephenson Enterprises, Inc. v. Marshall*, 578 F.2d 1021, 1026 (5th Cir. 1978). Thus, thin as the underlying evidence was, we find it sufficient in these circumstances.

Astra Pharm. Prods., Inc. v. Occupational Safety & Health Review Comm'n, 681 F.2d 69, 74 (1st Cir. 1982).

The Court allowed J&M considerable latitude to present and preserve expected testimony at the hearing, affording numerous opportunities for Mr. Maust and Ms. Johnson to arrange for the transportation of Jonas Miller to the hearing location. The Court also offered to continue the hearing until the next day. Prior to the hearing, J&M had the opportunity to list witnesses familiar with the business procedures of J&M or witnesses who had personal knowledge of the

cited worksites, including the workers at the two worksites. In each instance, J&M refused the opportunity to present a witness or witnesses who could corroborate its claim it has no employees.

> It is well established that when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party. *Graves v. United States*, 150 U.S. 118, 121 (1893). The Commission has also noted that when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party's case. *CCI, Inc.*, 9 BNA 1169, 1174, 1981 CCH OSHD ¶ 25,091, pp. 30,994-95 (No. 76-1228, 1980), *aff'd*, 688 F.2d 88 (10th Cir. 1982); *see also Woolston Constr. Co.*, 15 BNA OSHC 1114, 1122 n.9, 1991-93 CCH OSHD ¶ 29,394, p. 39,573 n.9 (No. 88-1877, 1991) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 316-18 (1976)), *aff'd without published opinion*, No. 91-1413 (D.C. Cir. May 22, 1992).

Capeway Roofing Sys., Inc., 20 BNA OSHC 1331, 1342-1343 (No. 00-1968, 2003).

Overall, the Court's analysis of the *Darden* factors indicates the relationship between J&M and the workers at the Sylvania and Maumee worksites on the relevant dates was more like that of a traditional employer\employee relationship than of self-employed independent contractors. The Court considers the following to be significant factors: Jonas Miller identified himself as the boss; Mr. Martinez stated he was in charge when Jonas Miller was not present; Jonas Miller directed the workers; Jonas Miller provided the vehicle for transportation of the crew at the Sylvania worksite; Mr. Martinez provided the vehicle for the transportation of the crew at the Maumee worksite; and Jonas Miller paid the workers and owned the ladders and scaffolds used at the sites. Based on its analysis of the *Darden* factors and the evidence in the case, the Court determines the workers at the Sylvania and Maumee worksites were employees of J&M as defined in section 3(5) of the Act.

The Secretary has met his burden to establish that at the time of the June 9, 2014 inspection at the Sylvania, Ohio worksite and of the November 4, 2014 inspection at the Maumee, Ohio worksite, J&M was an employer under the Act. The Act covered J&M's activities and workers at the cited construction worksites.

DOCKET NO. 14-1765

Jurisdiction

Under section 10(a) of the Act, if an employer fails to notify the Secretary within fifteen working days of receipt of a Citation and Notification of Penalty that it wishes to contest the citation or proposed penalty, "the citation and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency." At the hearing and in his post-hearing brief, counsel for the Secretary asserts J&M never contested the Citation and Notification of Penalty issued under Docket No. 14-1765. (Tr. 21, 153; Sec. Post-Hrg. Br., p. 3). Counsel for the Secretary is mistaken. As noted previously, on November 19, 2014, Mr. Hirschy faxed to the Commission a copy of an email he sent to himself captioned "LATE NOTICE OF CONTEST TO OSH REVIEW COMMISSION." The cover sheet for the facsimile transmission referred to the Inspection No. 980011, the number assigned to the Sylvania, Ohio worksite inspection. On November 19, 2014, Commission Executive Secretary John X. Cerveny sent copies of a document captioned "Notice of Docketing and Instructions to Employer" to Mr. Hirschy and the Secretary. The document refers to OSHA Inspection No. 980011 and states in pertinent part, "Notice is given that the above-captioned case contesting the citations issued from the above-cited inspection was received by the Commission on 11/19/2014, and assigned the docket number listed above." (Docket No. 14-1765 Notice of Docketing).

Upon receipt of a case in which a late NOC has been filed, the general practice of the Secretary is to file a motion to dismiss the late NOC. *Taj Mahal Contracting/Gen. Constr. Co.,* 20 BNA OSHC 2020, 2022 (No. 03-1088, 2004) ("[W]here an untimely NOC is docketed, under Commission practice it is incumbent upon the Secretary to file a motion to dismiss the NOC as untimely[.]"). Here, rather than file a motion to dismiss the late NOC, the Secretary filed a complaint.[23] Before finding it has jurisdiction under section 10(a) of the Act over the merits of the case as set out in the complaint, the Court must first determine whether J&M is entitled to relief under Fed. R. Civ. P. 60(b). If J&M is not entitled to relief, the Citation and Notification of Penalty, as amended, issued to J&M on June 10, 2014, remains a final order of the Commission and the Court has no jurisdiction to reach the merits of the case.

Relief Under Rule 60(b)

A judge may grant relief under Rule 60(b)(1) from a final order that is due to a late-filed NOC.[24]

> Under longstanding Commission precedent, relief may be granted under Rule 60(b) for noncompliance with the fifteen-day contest period set forth under § 10(a) of the Act. *See, e.g., Nw. Conduit Corp.*, 18 BNA OSHC 1948, 1999 CCH OSHD ¶ 31,949 (No. 97-851, 1999); *Jackson Assocs. of Nassau*, 16 BNA OSHC 1261, 1993-95 CCH OSHD ¶ 30,140 (No. 91-438, 1993); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 1981 CCH OSHD ¶ 25,591 (No. 80-1920, 1981).

Villa Marina Yacht Harbor, Inc., 19 BNA OSHC at 2186 n.2.

Rule 60(b)(1) provides in relevant part:

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[23] At the trial and in his Post-Hrg Br., the Secretary argued the Court "has no jurisdiction in this matter [Docket No. 14-1765] because J&M never contested the citation." (Sec. Post-Hrg. Br., p. 7).

[24] *But see Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 227-28 (2d Cir. 2002) (Commission lacks jurisdiction to grant an employer relief under Rule 60(b) for failing to file a timely notice of contest). *Le Frois* is the only circuit court decision holding the Commission lacks jurisdiction to do so. *Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185, 2186 n.3 (No. 01-0830, 2003).

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]

The burden of showing that Rule 60(b) relief should be granted under these circumstances is on the party seeking relief. *Craig Mech. Inc.*, 16 BNA OSHC 1763 (No. 92-0372-S, 1994), *aff'd without opinion*, 55 F.3d 633 (5th Cir. 1995).

> In determining excusable neglect, the Commission takes into account "all relevant circumstances surrounding the party's omission," including: "the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

Elan Lawn & Landscape Serv., Inc., 22 BNA OSHC 1337, 1339 (No. 08-0700, 2008). The Commission will not find excusable neglect in a case where the employer failed to present evidence on the reason for delay. *NYNEX*, 18 OSHC 1944, 1947 (No. 95-1671, 1999). In order to be eligible for relief under Rule 60(b)(1), J&M must also allege a meritorious defense to the underlying citation(s). *Marshall v. Monroe & Sons, Inc.,* 615 F.2d 1156, 1160 (6th Cir. 1980).

Here, J&M has provided no excusable basis for its failure to file a timely NOC. It does not deny CSHO Steffen hand-delivered the original Citation and Notification of Penalty to Jonas Miller on June10, 2014, or that it received the Amended Citation and Notification of Penalty issued June 11, 2014, sent by certified mail. J&M has remained silent on the late NOC issue throughout these proceedings. J&M has not demonstrated any sort of mistake, inadvertence, surprise or excusable neglect that justifies grounds for relief from the Commission's final order under Rule 60(b). J&M has been given ample opportunity at the hearing and in its post-hearing briefs to present, preserve, or argue evidence as to the timeliness of its NOC, respond to the

Secretary's position that it did not file any NOC, and allege a meritorious defense to the underlying citations.

The Court finds it was within J&M's reasonable control to submit its NOC on time. J&M failed to file a timely NOC and the Court determines no relief is justified under Rule 60(b). The Court has no further jurisdiction over Docket No. 14-1765.

Assuming Arguendo J&M Established Grounds for Rule 60(b) Relief, the Secretary Established J&M Violated the Standards Cited Under Docket No. 14-1765

Assuming the Court granted J&M relief under Rule 60(b), the Court would affirm the Citation and Notification of Penalty issued under Docket No. 14-1765 in all respects. Other than claiming it is not an employer under the Act, J&M did not dispute the merits of the cited items. With regard to Items 1a and 1b of the Citation issued under Docket No. 14-1765, Mr. Maust stated J&M:

> recognizes that there [were] some, what they would call violations of the code, but the Respondent and the workers were all there on their own self-will and were willing to take those chances and they knew that. . . . I guess I've conceded the facts [the Secretary has gone] through here and taken a lot of time to determine that there was some violations in their eyes. And I think we've already conceded that [.]

(Tr. 40).[25]

[25] An employer's assertion its employees were working in violation of OSHA standards of "their own self-will and were willing to take those chances and they knew that" is not a viable defense before the Commission.

> [A]lterations to OSHA's safety standards cannot, however, be obtained in adjudicatory proceedings before the Commission, which only concerns itself with the employer's alleged violation of an existing standard. In these proceedings, employers cannot question a standard's wisdom. See *Austin Eng'g. Co*., 12 BNA OSHC 1187, 1188, 1984–85 CCH OSHD ¶ 27,189, p. 35,099 (No. 81–168, 1985), citing *Van Raalte Co*. 4 BNA OSHC 1151, 1152, 1975–76 CCH OSHD ¶ 20,633, p. 24,698 (No. 5007, 1976) (the Commission lacks power to question the wisdom of a standard). *See also Secretary of Labor v. OSHRC (CF & I Steel Corp.),* 941 F.2d 1051, 1059 n.10 (10th Cir.1991) ("[a]n employer may not simply substitute its judgment for that of OSHA ... despite its subjective belief that an agency interpretation is invalid"); *Phoenix Roofing, Inc. v. Secretary of Labor,* 874 F.2d 1027, 1031 (5th Cir.1989) ("[i]t would also be improvident for us to ... send employers the message that they [can] ignore the obvious mandates of the safety

Cited Standards

The Secretary's Burden of Proof

To establish a violation of a specific OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

Item 1a: Alleged Serious violation of § 1926.501(b)(13)

Item 1a alleges a serious violation of § 1926.501(b)(13), which provides:

> Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.
> Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

Item 1a alleges J&M "did not ensure employees were adequately protected from falls while performing wood framing activities atop a residential structure. During this work, employees were exposed to falls of approximately 19 ft. to the ground below."

Applicability of the Standard

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regulations and independently determine what, if any, measures should be undertaken in a given situation").

Carabetta Enters. Inc., 15 BNA OSHC 1429, 1432 (No. 89-2007, 1991).

J&M's crew, consisting of supervisor Jonas Miller,[26] Dan Miller, and Mr. Guerrero, was engaged in residential construction activities at the Sylvania, Ohio worksite on June 9, 2014. Messrs. Dan Miller and Guerrero were working on the roof of the residential building under construction. The distance from the second story roof edge to the ground was approximately 19 feet. (Tr. 31). Fall protection was required for the crew members working on the roof at the worksite. Section 1926.501(b)(13) applies to the cited conditions.

Terms of the Standard Not Met

CSHO Steffen photographed Messrs. Guerrero and Dan Miller working on the roof without fall protection. (Tr. 35-36; Exh. C-1). CSHO Steffen testified that J&M did not provide these two employees with any method of fall protection, including a personal fall arrest, guardrail or scaffolding system. CSHO Steffen testified J&M had no fall protection equipment available on site for the employees on June 9, 2014. (Tr. 36). The Court finds J&M did not ensure its employees used fall protection as required by the standard.

Employees Exposed to the Violative Condition

Exposure is established through evidence the employees have access to the zone of danger during assigned work duties. *Phoenix Roofing, Inc*., 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). The Court finds, based on the photographs taken by the CSHO and his eyewitness testimony, two J&M employees were exposed to a fall hazard of 19 feet. (Exh. C-1, pp. 3-14).

Employer Knowledge

[26] CSHO Steffen testified that he saw Jonas Miller on the ground cutting materials for the two roofers. (Tr. 36).

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Revoli Constr. Co*., 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix Roofing, Inc*., 17 BNA OSHC at 1079-80. Knowledge is imputed to an employer "through its supervisory employee." *Am. Eng'g & Dev. Corp*., 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012). At the worksite, Jonas Miller identified himself as the boss. (Tr. 27). As owner and supervisor, Mr. Miller was aware he had not provided his employees with fall protection equipment. The employees were working in plain view 19 feet above the ground without fall protection. CSHO Steffen had observed their lack of fall protection from the street as he drove by. The Court determines Jonas Miller had actual knowledge his employees were not using fall protection as required by § 1926.501(b)(13).

The Court finds the Secretary proved his prima facie case for Item 1a.

Classification of the Violation

The Secretary classified the violation of § 1926.501(b)(13) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result unless the employer did not, and could not with the exercise of "reasonable diligence," know of the presence of the violation. 29 U.S.C. § 666(k). The Court finds that serious physical harm is the likely result if an employee falls 19 feet to the ground. The violation is serious.

Item 1b: Alleged Serious Violation of § 1926.503(a)(1)

Item 1b alleges a serious violation of § 1926.503(a)(1), which provides:

> The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the

> hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

Item 1b alleges J&M "did not ensure that employees had been trained in the appropriate use of fall protection such as but not limited to the use of personal fall arrest systems or alternative measures while performing various wood framing operations from elevated surfaces."

Applicability of the Standard

J&M's crew was engaged in residential construction activities at the Sylvania, Ohio worksite on June 9, 2014. Messrs. Dan Miller and Guerrero were exposed to fall hazards while working on the roof of the building under construction. The distance from the second story roof edge to the ground was approximately 19 feet. (Tr. 31). A training program was required for the crew members working on the roof at the worksite. Section 1926.503(a)(1) applies to the cited conditions.

Terms of the Standard Not Met

CSHO Steffen testified,

> I asked the employer/employees straight up, have they been trained on methods and means of fall protection. And there was overwhelming evidence to say that they hadn't. Or they stated they had not. To follow up that question I usually ask some basic fall protection questions as far as set up, methods, means, so on and so forth, and if I don't get adequate answers necessarily or answers that aren't covered under the standard, we can kind of try and confirm that there's a training deficiency anyway.

(Tr. 37).

Mr. Guerrero told CSHO Steffen J&M had not trained him in fall protection safety. (Tr. 37, 48). Dan Miller told the CSHO he had received on the job training, but no training "specific to the scope of work that they were performing on site." (Tr. 51).

The Court finds J&M did not provide a training program in fall protection as required by the standard.

Employees Exposed to the Violative Condition

J&M's failure to provide an adequate training program compromised Messrs. Dan Miller and Guerrero's ability to recognize fall hazards and to follow procedures that would minimize the hazards. The Court finds two J&M employees were exposed to a fall hazard of 19 feet. (Exh. C-1, pp. 3-14).

Employer Knowledge

Section 1926.503(a)(2) requires the employer to provide a training program for each employee who might be exposed to a fall hazard. J&M necessarily knew it had failed to provide a training program for its employees. CSHO Steffen testified that the "employer" [Jonas Miller] told him during his inspection of the Sylvania worksite that the employees were not trained on the methods and means of fall protection. (Tr. 37). Knowledge is established, especially as J&M does not dispute that it provided no training to the exposed employees. (Tr. 40; Sec. Post-Hrg. Br., p. 12). *See generally Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2018 (No. 90-2668, 1992) ("The fact that [the company] had failed to train [employees] in the recognition and avoidance of dangerous conditions establishes that it had at least constructive knowledge of the inadequacy of its training program"); *Bardav, Inc.,* 24 BNA OSHC 2105, 2112 (No. 10-1055, 2014).

The Court finds the Secretary proved his prima facie case for Item 1b.

Classification of the Violation

The Secretary classified the violation of § 1926.503 (a)(1) as serious. The Court finds that serious physical harm is the likely result of failure to provide adequate training in fall protection if an employee falls 19 feet to the ground. The violation is serious.

Penalty Determination

Under section 17(j) of the Act, the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The Secretary grouped Items 1a and 1b "because they involve similar or related hazards that may increase the potential for injury or illness." (Amended Citation and Notification of Penalty, p. 6). CSHO Steffen stated OSHA allowed J&M, as a small employer, a sixty percent reduction off the statutory maximum penalty. (Tr. 38). The Secretary did not present evidence of OSHA inspections prior to the instant June 9, 2014, inspection. The Court gives J&M no credit for good faith based on the awareness of the supervisor that the employees routinely worked without fall protection. *Gen. Motors Corp., CPCG Okla. City Plant*, 22 BNA OSHC 1019, 1048 (No. 91-2834E, 2007) (consolidated) (giving no credit for good faith when management tolerated and encouraged hazardous work practices).[27]

The gravity of the violations is high. Two employees were exposed for the duration of their work shift to falls of 19 feet.[28] J&M took no precautions against the fall hazards. The

[27] The assessment of the factors for size, history, and good faith for the items cited under Docket No. 14-1765 also apply to the penalty determinations for the items cited under Docket No. 14-1860.
[28] CSHO Steffen testified that "a 19 foot fall from elevation would likely result in death, which carries a high gravity, or at a bare minimum disabilities." (Tr. 38).

likelihood of injuries should an employee fall is high. The Court assesses a grouped penalty of $2,800.

DOCKET NO. 14-1860

Jurisdiction

Based on J&M's timely NOC filed in this case, the Court determines the Commission has jurisdiction under section 10(a) of the Act for Docket No. 14-1860.

Cited Standards

Citation No. 1

As with the items cited under Docket No. 14-1765, Mr. Maust stated J&M does not dispute the items cited under Docket No. 14-1860. "[The Secretary has] evidence as far as the citations, we're not going to argue about that. It has to do with these guys were self-employed and they were taking that risk and knew what they were there for and OSHA and their code does not apply to them." (Tr. 82).

Item 1: Alleged Serious Violation of § 1926.95(a)

Item 1 of Citation No. 1 alleges a serious violation of § 1926.95(a), which provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Item 1 of Citation No. 1 alleges J&M "did not ensure an employee was wearing proper eye protection while operating a pneumatic nail gun to secure sheets of plywood to a residential

structure. The employee was exposed to potential flying object hazards while operating the pneumatic fastener."

Applicability of the Standard

> To establish the applicability of a PPE standard that, by its terms, applies only where a hazard is present, the Secretary's burden includes demonstrating that there is a significant risk of harm and that the employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE. *Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2065, 1984-85 CCH OSHD ¶ 26,961, p. 34,611 (No. 78-1443, 1984) (consolidated) (citation omitted), *aff'd*, 764 F.2d 32 (1st Cir. 1985); *Armour Food Co.*, 14 BNA OSHC 1817, 1820, 1987-90 CCH OSHD ¶ 29,088, p. 38,881 (No. 86-247, 1990); *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1140, 1993-95 CCH OSHD ¶ 30,045, p. 41,233 (No. 88-1250, 1993).

Wal-Mart Distribution Ctr. # 6016, 25 BNA OSHC 1396, 1400-1401 (No. 08-1292, 2015), *aff'd in pertinent part, rev'd in part on other grounds,* 819 F.3d 200 (5th Cir. 2016).

The construction industry recognizes the hazard of eye injuries created by the use of pneumatic nail guns. "When a nail hits a hard surface, it has to change direction and it can bounce off the surface, becoming a projectile. Wood knots and metal framing hardware are common causes of ricochets. Problems have also been noted with ricochets when nailing into dense laminated beams. Ricochet nails can strike the worker or a co-worker to cause an injury." *Nail Gun Safety: A Guide for Construction Contractors*, OSHA Publication No. 3459-8-11, p. 5.[29] To prevent eye injuries, "employers should provide, at no cost to employees, the following protective equipment for workers using nail guns: . . . High Impact eye protection – safety

[29] *Nail Gun Safety: A Guide for Construction Contractors*, OSHA Publication No. 3459-8-11, is available publicly on OSHA's website at https://www.osha.gov. The Court takes judicial notice of *Nail Gun Safety: A Guide for Construction Contractors* as an accurate source of information regarding hazards created by the use of nail guns. The Court concludes the hazard of eye injuries created by ricocheting nails, as set out in OSHA's publication, is not subject to reasonable dispute.

glasses or goggles marked ANSI Z87.1." *Id.* at p. 9. The Commission has recognized "the eye is an especially delicate organ and … any foreign material in the eye presents the potential for injury." *Vanco Constr. Inc*., 11 BNA OSHC 1058, 1060 (No. 79-4945, 1982) (citing *Sterns–Roger, Inc*., 7 BNA OSHC 1919, 1921 (No. 76-2326, 1979)), *aff'd,* 723 F.2d 410 (5th Cir. 1984). A reasonable person familiar with the construction industry would recognize a hazard to an employee using a pneumatic nail gun requiring the use of protective eyewear. Section 1926.95(a) applies to the cited condition.

Terms of the Standard Not Met

CSHO Von Lehmden testified he observed employees using pneumatic nail guns while not wearing eye protection. (Tr. 65). He pointed out an employee, Peter Martinez, using a pneumatic nail gun visible in a photograph taken at the Maumee worksite. (Tr. 90-91; Exh. C-3, p. 5). CSHO Von Lehmden stated, "[w]hen he exited the roof he did not have eye protection on." (Tr. 66). The CSHO also identified Martin Miller as "a fellow standing on the 2x8 walkway who was also using a pneumatic nailer installing fascia board without eye protection." (Tr. 66-67; Exh. C-3, p. 9). No eye protection was available on the worksite. (Tr. 67).

The Court finds J&M did not provide a protective eyewear to employees using pneumatic nail guns.

Employees Exposed to the Violative Condition

J&M's failure to provide protective eyewear exposed employees to the hazard of flying debris striking the employees' eyes. The Court finds two J&M employees, who identified themselves to CSHO Von Lehmden as Messrs. Martinez and Martin Miller, were exposed to eye injuries. (Tr. 90-91; Exh. 3, p. 5).

Employer Knowledge

Mr. Martinez was the supervisor on the worksite in the absence of Jonas Miller. The formal title of an employee is not controlling for imputation of knowledge to the company. The Commission has imputed the knowledge of crew leaders and foremen. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2069 (No. 96-1719, 2000). No eye protection was available at the worksite. The Court determines Mr. Martinez had actual knowledge of the violative condition. His knowledge is imputed to J&M.

The Court finds the Secretary proved his prima facie case for Citation No. 1, Item 1.

Classification of the Violation

The Secretary classified the violation of § 1926.95(a) as serious. The Court finds that serious physical harm is the likely result of failure to provide protective eyewear for employees required to use pneumatic nail guns. The violation is serious.

Penalty Determination

The gravity of the violations is high. Two employees were exposed to the hazard of flying debris while using pneumatic nail guns at the worksite. The lack of protective eyewear could result in a serious eye injury or the loss of an eye. (Tr. 71). The Court assesses a penalty of $1,760.

Item 2: Alleged Serious Violation of § 1926.451(b)(2)

Item 2 of Citation No. 1 alleges a serious violation of § 1926.451(b)(2), which provides:

> Except as provided in paragraphs (b)(2)(i) and (b)(2)(ii) of this section, each scaffold platform and walkway shall be at least 18 inches (46 cm) wide.

Item 2 of Citation No. 1 alleges J&M "failed to ensure the dimensional 2x8 inch working platform in which an employee was working on was of sufficient width[,] exposing the employee to a fall distance of approximately 9 feet."

Applicability of the Standard

Section 1926.451(b)(2) appears in *Subpart L—Scaffolds* of the Construction Standards. Section 1926.450(a) provides, "[t]his subpart applies to all scaffolds used in workplaces covered by this part." J&M had erected scaffolding at the Maumee worksite. The cited standard applies to the conditions at the worksite.

Terms of the Standard Not Met

CSHO Von Lehmden observed Martin Miller standing on a scaffold erected at the worksite. J&M used a piece of lumber that measured 8 inches wide for the platform of the scaffold. The CSHO testified the platform "did not meet the minimum of 18 inches" as required for scaffold platforms by § 1926.451(b)(2). (Tr. 68-70; Exh. C-3, pp. 9-10).

The Court finds J&M failed to comply with the terms of the cited standard.

Employees Exposed to the Violative Condition

The scaffold platform was approximately 9 feet high. The 8-inch platform created "an increased probability that an employee may step off or inadvertently step in a location where there is not a walkway sufficient for his travel." (Tr. 71). The Secretary has established Martin Miller was exposed to a fall hazard of 9 feet.

Employer Knowledge

Mr. Martinez was the supervisor on the worksite in the absence of Jonas Miller. Martin Miller was in plain view as he worked on the scaffold platform erected by J&M.

> The Commission has held that "the conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area warrant a finding of constructive knowledge." *Kokosing Constr. Co*., 17 BNA OSHC1869, 1871, 1993-95 CCH OSHD ¶ 31,207, p.43,723 (No. 92-2596, 1996). Additionally, constructive knowledge may be found where a supervisory employee was in close proximity to a readily apparent violation. *Hamilton Fixture*, 16 BNA OSHC 1073, 1089, 1993-95CCH OSHD ¶ 30,034, p.41,184 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) (unpublished).

KS Energy Serv., Inc., 22 BNA OSHC 1261, 1265-1266 (No. 06-1416, 2008).

The Court determines Mr. Martinez had constructive knowledge of the violative condition. His knowledge is imputed to J&M.

The Court finds the Secretary proved his prima facie case for Citation No. 1, Item 2.

Classification of the Violation

The Secretary classified the violation of § 1926.95(a) as serious. The Court finds that serious physical harm is the likely result of a fall from a height of 9 feet. The violation is serious.

Penalty Determination

The gravity of the violations is high. CSHO Von Lehmden testified, "[A] fall of approximately 9 feet could result in death or permanent disability." (Tr. 71-73). The Court assesses a penalty of $3,080.

Citation No. 2

Item 1: Alleged Repeat Violation of § 1926.501(b)(13)

Citation No. 2, Item 1 alleges a repeat violation of § 1926.501(b)(13) for failure to ensure employees working 6 feet or higher above lower levels at a residential construction site were using fall protection. Item 1 alleges J&M "did not ensure employees were protected from falls

while installing plywood sheathing on the roof of the two story residential structure. The employee was exposed to a fall distance of approximately 19.00 feet."

Applicability of the Standard

J&M's crew, consisting of supervisor Peter Martinez, Martin Miller, Menno Miller, and Jason Eicher,[30] was engaged in residential construction activities at the Maumee, Ohio worksite on November 4, 2014. Mr. Martinez was working on the roof of a two-story structure. (Tr. 70, 91-92; Exh 3, pp. 4-7). The distance from the second story roof edge to the ground was approximately 19 feet. (Tr. 72). Fall protection was required for the crew members working on the roof at the worksite. Section 1926.501(b)(13) applies to the cited conditions.

Terms of the Standard Not Met

CSHO Von Lehmden testified that he saw and photographed Mr. Martinez working on the roof without any fall protection shortly after he arrived at the worksite. (Tr. 62; Exh. C-3, pp. 4-7). CSHO Von Lehmden stated,

> [T]here was . . . no guardrail observed, no safety net system. In the specific application what we typically see is the employee or individual wearing personal fall arrest system, which would include a harness and secured to the structure itself. And in this case the employee had none of that.

(Tr. 69).

The Court finds J&M did not ensure its employee used fall protection as required by the standard.

Employees Exposed to the Violative Condition

[30] CSHO Von Lehmden testified that Messrs. Eicher and Menno Miller were carpenters. He did not observe either of these two workers on the roof during the OSHA inspection. (Tr. 91-92).

The Court finds, based on the photographs taken by the CSHO and his eyewitness testimony, Mr. Martinez was exposed to a fall hazard of 19 feet (Exh. C-3, pp. 4-7).

Employer Knowledge

Mr. Martinez was the supervisor on the site. He had actual knowledge of his own failure to use fall protection. His knowledge is imputed to J&M. *Danis-Shook Joint Venture XXV v. Sec'y of Labor,* 319 F.3d 805, 812 (6th Cir. 2003) (citing to *Donovan v. Capital City Excavating Co., Inc.,* 712 F.2d 1008, 1010 (6th Cir.1983)) ("Because Wagner was a foreman and knew of his own failure to wear personal protective equipment, this failure may be imputed to Danis–Shook.").[31]

The Court determines J&M had actual knowledge his employees were not using fall protection as required by § 1926.501(b)(13).

The Court finds the Secretary proved his prima facie case for Citation No. 2, Item 1.

Classification of the Violation

The Secretary classified Citation No. 2, Item 1 as a repeat violation.

> A violation is repeated if the employer was previously cited for a substantially similar violation and that citation became a final order before the occurrence of the alleged repeated violation. *Bunge Corp.*, 638 F.2d 831, 837 (5th Cir. 1981); *Potlatch Corp.*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979). The Secretary establishes a prima facie case of substantial similarity by showing that the prior and present violations are for failure to comply with the same standard. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-1995 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994).

Deep S. Crane & Rigging Co., 23 BNA OSHC 2099, 2105 (No. 09-0240, 2012).

[31] The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv*., 18 BNA OSHC at 2067. J&M has its principle office in New Haven, Indiana (in the Seventh Circuit). The violations occurred in Ohio (in the Sixth Circuit). J&M may appeal the final order in this consolidated case to the Sixth or Seventh Circuit Court of Appeals, or to the District of Columbia Circuit. *See* 29 U.S.C. § 660(a) & (b).

J&M does not dispute OSHA previously cited it for a substantially similar violation. OSHA previously cited J&M for a violation of § 1926.501(b)(13) as a result of the June 9, 2014 inspection at J&M's Sylvania, Ohio worksite conducted by CSHO Steffen. The Court agrees with the Secretary that the serious violation of 29 C.F.R. § 1926.501(b)(13) found through OSHA Inspection No. 980011 at Sylvania, Ohio set forth in Citation 1, Item 1a issued on June 10, 2014 became a final order of the Commission on July 1, 2014. (Tr. 23, 70-71). J&M's subsequent violation of § 1926.501(b)(13) occurred on November 4, 2014, at the Maumee, Ohio worksite. Because J&M failed to comply with the same standard in both instances, the Secretary has established OSHA cited J&M for a substantially similar violation that became a final order before the occurrence of the November 4, 2014 violation.

The Secretary has met his burden for establishing a repeat violation. The Court finds Citation No. 2, Item 1 to be a repeat violation.

Penalty Determination

The gravity of the violation is high. Mr. Martinez was exposed to a fall of 19 feet, which would likely result in "permanent disability and/or death." (Tr. 72-74). The Court assesses a penalty of $6,160.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Under Docket No. 14-1765, Items 1a and 1b, alleging serious violations of 29 C.F.R § 1926.501(b)(13) and § 1926.503(a)(1), respectively, are AFFIRMED and a grouped penalty of $2,800 is assessed;

2. Under Docket No. 14-1860, Item 1 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.95(a), is AFFIRMED and a penalty of $1,760 is assessed;

3. Under Docket No. 14-1860, Item 2 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.451(b)(2), is AFFIRMED and a penalty of $3,080 is assessed; and

4. Under Docket No. 14-1860, Item 1 of Citation No. 2, alleging a repeat violation of 29 C.F.R. § 1926.501(b)(13), is AFFIRMED and a penalty of $6,160 is assessed.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: August 1, 2016
Washington, D.C.