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

SECRETARY OF LABOR, Complainant, v. FLINTLOCK CONSTRUCTION SERVICES LLC, Respondent.	OSHRC Docket No. 13-2181

APPEARANCES:
Suzanne L. Demitrio, Esquire
U.S. Department of Labor, New York, New York
For the Secretary

Michael R. Strauss, Esquire
Hollander & Strauss, LLP, Great Neck, New York
For the Respondent

BEFORE:
Covette Rooney
Chief Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission or OSHRC) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act). On March 21, 2013, Occupational Safety and Health Administration (OSHA) compliance officer (CO) Victor Pacheco responded to a complaint of fall protection and scaffold violations at 325 West 33rd Street in New York, New York (the

Project or 325 Project). Flintlock Construction Services, LLC (Flintlock or Respondent) was the general contractor for the construction of a new hotel at this location.

As a result of the inspection, Flintlock was cited for four willful and three serious violations of OSHA's scaffold standard. The total penalty proposed for these violations was $249,920. Flintlock filed a timely notice of contest, bringing this matter before the Commission.

A three-day hearing was held in New York, New York on July 14-16, 2015. Ten witnesses testified: CO Pacheco; Mitchel Konca, OSHA Assistant Area Director; Sergio Soto, Alubon representative; George DeCristoforo, Site Safety, LLC; John Harrington, Rockledge Scaffolding Corp.; Andrew Weiss, Flintlock Managing Member; Pitamber (Peter) Outer, Assistant Superintendent for Flintlock; Armando Juarez,[1] Labor Foreman for Flintlock; Andrew Stetler, Project Manager for Flintlock, and Dawn Paralis, Risk Manager for Flintlock.[2] (Tr. 15, 106, 115, 127, 191, 204, 238, 246, 261, 278).

Additionally, excerpts from the depositions of two witnesses were admitted pursuant to Commission Rule 2200.56(f): Jonathan Asch, Flintlock's General Superintendent; and Julio Gomez, Flintlock's Lead Site Superintendent. (Tr. 7, 126; Exs. C-29, C-30, J-1, J-2). On July 10, 2015, the Secretary moved to include designated excerpts from the deposition transcripts for Asch and Gomez. Flintlock did not object and on July 14, 2015, it designated additional excerpts from the Asch and Gomez depositions. The parties' Amended Joint Pretrial Statement noted "[t]he Secretary will designate excerpts from the deposition transcripts of Julio Gomez and Johnathan Asch for admission pursuant to Commission Rule 56(f), and Respondent will counter-designate excerpts from these transcripts, prior to trial. The parties respectfully request leave to make these designations *instanter*, later than the 5-day period required by the Commission Rule, because of the unexpected illness and unavailability of Mr. Gomez." No reason was offered for the use of Mr. Asch's deposition testimony in lieu of testimony at the hearing. Asch and Gomez were still employed by Flintlock when they were deposed on March 3, 2015. (Ex. C-29, pp. 4-5; C-30, pp. 5-6). Joint Exhibit 1 lists the portions of the depositions designated by the Respondent and Joint Exhibit 2 lists the excerpts

[1] Mr. Juarez is also referred to as Armando Juarez Matahuala in the record; for consistency he will be referred to as Armando Juarez or Mr. Juarez in this decision.

[2] Gunnar Hansson, an insurance broker, also testified; however, his testimony was ruled irrelevant and struck from the record. (Tr. 231-37).

designated by the Secretary.

Both parties simultaneously filed post-hearing briefs and reply briefs. For the reasons that follow, all citation items are affirmed and a total penalty of $249,920 is assessed.

Background & Findings of Fact

OSHA cited Flintlock for three conditions at the 325 Project. A scaffold erected at the southeast corner of the building, a scaffold erected at the north side of the building, and a plank walkway used to access a scaffold near the building's front entrance.

Flintlock was the general contractor for the construction of a new hotel at the 325 Project. (Tr. 9-10). Flintlock subcontracted with a number of companies for materials and services at the Project. As general contractor, Flintlock had the authority to stop work and have unsafe conditions corrected at the worksite. (Tr. 217, 269-70).

Dawn Paralis, Flintlock's company-wide safety manager since November 2011, was not involved in the day-to-day construction work at the 325 Project; however, she could instruct a project manager or an onsite superintendent to correct safety issues. (Tr. 217, 278). Ms. Paralis interacted with each project's onsite safety company, coordinated training, conducted job site visits, and reviewed subcontractors' insurance policies. (Tr. 217, 278). Flintlock's training records show Mr. Weiss, Mr. Stetler, Mr. Asch, Mr. Outar, and Mr. Gomez attended a general 4-hour training class on scaffold safety in 2012. (Tr. 242, 249, 303; Ex. C-17; Ex. C-30, pp. 39, 41-42).

Mr. Gomez was the lead superintendent and Mr. Outar was the assistant superintendent for Flintlock at the 325 Project's worksite. (Tr. 238; Ex. C-30, pp. 7-8). Mr. Gomez has been a construction manager for Flintlock for approximately 10 years. (Ex. C-30, pp. 5-6). Mr. Outar has been a site superintendent 2 years and an assistant superintendent for 8 years with Flintlock. (Tr. 238). Armando Juarez was Flintlock's labor foreman at the 325 Project. (Tr. 8, 16-17, 23, 262). In addition, five Flintlock laborers worked at the 325 Project. (Tr. 216, 274).

Mr. Stetler has been a Project Manager at Flintlock for approximately 30 years. (Tr. 262). He was the Project Manager at the 325 Project from its inception. (Tr. 262). He was responsible for oversight of the entire project, buying out contracts, and holding project meetings at the worksite. (Tr. 262). Mr. Stetler was generally on site about 40 hours per week meeting with subcontractors about work progress and scheduling issues. (Tr. 262-63).

As Flintlock's general superintendent, Mr. Asch was responsible for the 325 Project as well as four other Flintlock worksites. (Ex. C-29, pp. 6-7). Mr. Asch attempted to walk each worksite twice a week. (Ex. C-29, pp. 7, 24). Onsite superintendents, Gomez and Outar reported to him. (Ex. C-29, p.7).

Mr. Weiss, managing member, was not generally at the Project's worksite. However, because the owner was anxious to have the job completed and because of a March 18, 2013 New York City Department of Buildings TCO (temporary certificate of occupancy) inspection of the worksite, he was at the worksite a few days before and after the TCO inspection. (Tr. 220, 223).

According to Mr. Weiss and Mr. Stetler, all of scaffolding at the worksite had been removed for the TCO inspection. (Tr. 219-20). The scaffolding materials were moved to a lot on the east of the worksite. (Tr. 220). Mr. Stetler testified that the scaffolding onsite during the OSHA inspection was erected after the TCO inspection. (Tr. 264).

Flintlock and its subcontractors

Flintlock had agreements with several subcontractors at the site, including Alubon Ltd. (Alubon), Maspeth Steel (Maspeth), Rockledge Scaffolding Corp. (Rockledge), and Site Safety, LLC (Site Safety). Flintlock contracted with Alubon for exterior window, metal panel, and related façade work at the Project. (Tr. 205-06; Ex. R-B, p. 29). Flintlock contracted with Maspeth for structural and miscellaneous steel work at the Project.[3] (Tr. 205-06; Ex. R-J, p. 26). Flintlock contracted with Site Safety, LLC (Site Safety) to have a full-time site safety manager at the 325 Project. (Tr. 128-29, 211, 279-80; Ex. R-G; Ex. C-23).

Rockledge

Flintlock contracted with Rockledge to deliver scaffolding components and erect scaffolds, a sidewalk shed, and a dual hoist at the worksite. (Tr. 192; Exs. C-25, C-26, C-27, R-A). Rockledge's controller, John Harrington, verified that Rockledge had installed a sidewalk shed, roof protection, scaffolding, a dual hoist and delivered scaffolding components for Flintlock at the 325 Project's worksite. (Tr. 191-92; Exs. C-25, C-26, C-27). He also confirmed that Rockledge performed no work and made no deliveries to the 325 Project from March 16, 2013 through March 23, 2013. (Tr. 193). Mr. Harrington confirmed that Rockledge

[3] Respondent asserts Maspeth was performing work for Alubon. (Tr. 120; Resp't Findings of Fact #33). However, the record shows the contract was between Maspeth and Flintlock, not Alubon.

installed a scaffold at the north side of the building on March 29, 2013, after the OSHA inspection. (Tr. 193, 195). Mr. Weiss confirmed Rockledge rebuilt the north scaffold after the OSHA inspection. (Tr. 221).

Alubon

Flintlock contracted with Alubon for exterior window, curtain wall, storefront, metal panel, and related façade work at the Project. (Tr. 205-06; Ex. R-B, p. 29). Alubon then subcontracted with V&P Altitude to install exterior curtain walls, exterior cladding, glazing, and other exterior finishes. (Tr. 18-19, 116, 210-11; Ex. R-C). Flintlock did not have a contract with V&P Altitude. Sergio Soto was Alubon's onsite manager and oversaw V&P's work at the 325 Project. (Tr. 115, 117). He testified that Alubon never built scaffolds at a worksite and had no access to build a scaffold at the 325 Project. (Tr. 109, 112). He admitted that on the day of the OSHA inspection, V&P employees were using the scaffold on the southeast corner of the building to install exterior waterproofing. (Tr. 110).

Site Safety & Flintlock

In November 2011, Flintlock subcontracted with Site Safety to provide an onsite safety manager to "make observations and recommendations for compliance with all safety" matters at four of its projects, including the 325 Project. (Tr. 279, 280; Ex. R-G pp. 1, 6).

Risk Manager Paralis and General Superintendent Asch met with Site Safety's owners to establish the protocol to communicate safety problems discovered by Site Safety. (Tr. 280; Ex. R-H). Ms. Paralis's only contact with Site Safety was a weekly email from Leslie Randonovich of Site Safety; she did not directly communicate with the Site Safety's onsite manager. (Tr. 283). The weekly email from Ms. Randonovich to Ms. Paralis was a brief summary that highlighted a few of the safety issues with an attached detailed chart for the safety issues found at each worksite. (Tr. 281; Ex. R-I).

The attached chart for the 325 Project listed the particular safety issues found by Site Safety's onsite safety manager along with a severity rating for each issue, whether the issue was open or closed, and whether the safety manager had attempted to have Flintlock's onsite superintendents correct the issue. (Tr. 281; Ex. R-I). Ms. Paralis stated that she did not immediately review the detailed charts for each project. (Tr. 284-85). She read the general cover email and if one of the items highlighted there caught her attention, she would then review

the relevant attached chart. (Tr. 286). Otherwise, she reviewed the attached charts "as her time allowed." (Tr. 285). For example, for the email summary report dated March 13 (a Wednesday), she stated that she had probably read the attached chart sometime "over the weekend." (Tr. 286).

The onsite safety manager

George DeCristoforo was assigned as Site Safety's onsite safety manager near the end of the 325 Project, just before and during the time of the OSHA inspection; previously other safety managers had been assigned to the 325 Project. (Tr. 129). Mr. DeCristoforo had been certified as a site safety manager for 15 years and worked for Site Safety for 6 years. (Tr. 128). Mr. DeCristoforo's role was to detect any safety issues at the 325 Project. (Tr. 138). He walked the worksite for the entirety of the work day and kept a written daily log of safety issues that was stored in a binder and available at the worksite. (Tr. 129). Mr. Gomez, Mr. Stetler, and Mr. Weiss each admitted that Site Safety's daily log book was onsite and available up to the date of the OSHA inspection. (Tr. 224-25, 266; Ex. C-30, pp. 66-68).

Mr. DeCristoforo's daily logs from seven days in March 2013 all note safety problems on scaffolds at the 325 Project. (Tr. 131-147; Ex. C-21, pp. 3, 4, 52, 56, 57, 63, 66). On March 4, 2013, he called Mr. Outar and left a message about the lack of perimeter protection on a scaffold. (Tr. 131-138; Ex. C-21, p. 52). His March 7, 2013 daily log noted there were no guard rails, no access ladder and not enough planking; he informed Mr. Outar and Mr. Gomez of the problems, yet they continued to work. (Tr. 138-39; Ex. C-21, p. 6). His March 8, 2013 daily log noted that he strongly advised Mr. Gomez and Mr. Outar to bring all the scaffolds up to code before employees used them. (Tr. 139; Ex. C-21, p. 57). His March 12, 2013 daily log noted that three tiers of a scaffold needed to be fully planked and that it was an "ongoing problem." (Tr. 147; Ex. C-21, p. 63). The March 13, 2015 daily log noted the scaffold was in the same condition as the day before and employees were using the scaffold. (Tr. 141; Ex. C-21, p. 66). The March 15, 2013 daily log noted that he advised Mr. Outar of bad planking, no bracing, and no fall protection on a 48 foot high scaffold. (Tr. 145-46; Ex. C-21, p. 4). The March 15, 2013 daily log also noted Superintendent Gomez' response -- he "was in no mood to deal with my concerns and I should leave him alone" -- when Mr. DeCristoforo advised him that the southeast scaffold was not secured, was inadequately planked, and had no fall protection. (Ex. C-21, p.4). His notes for the day before the inspection, March 20, 2013, show there were no toe boards and

guardrails on scaffolds, the prior day's problems had not been fixed, and two more noncompliant scaffolds had been erected by Flintlock's crew. (Tr. 149-152; Ex. C-21, pp. 5, 6, 75).

Each week Mr. DeCristoforo contacted Leslie Radanovich at Site Safety's office to report the safety problems he encountered at the 325 Project. (Tr. 179, 187). While onsite, Mr. DeCristoforo reported safety issues he observed directly to Flintlock superintendents Gomez and Outar as he encountered them. (Tr. 135-38). Scaffolds with no bracing, no fall protection, that were not secured to the building, and not fully planked were photographed by Mr. DeCristoforo. (Tr. 157, 161-65; Ex. C-16, pp. 5-6, 10-11). Mr. DeCristoforo testified that he had seen Flintlock's laborers build scaffolds while the superintendents were on site. (Tr. 151).

OSHA inspection

On March 21, 2013, CO Victor Pacheco[4] inspected the 325 Project worksite based on a complaint of possible fall protection and scaffold safety violations. (Tr. 16). He arrived at the worksite around 11:00 a.m. that day. (Tr. 44). From across the street he observed a scaffold on the southeast corner of the building. (Tr. 17-18). The scaffold was 32 feet high with three platform levels. (Tr. 26-27, 31-33, 86-87).

When he arrived on site, he met Mr. DeCristoforo who was standing at the base of the scaffold with Flintlock superintendents Outar and Gomez. (Tr. 36-37). Mr. Outar was directing three V&P Altitude employees that were working from the scaffold's top platform level without fall protection, about 26 feet above the ground. (Tr. 18, 32-33, 36; Exs. 1-3). The CO could see caulking on the building that showed they had also been working from the first and second levels of the scaffold. (Tr. 27). The CO asked the superintendent to have the employees come down from the scaffold. (Tr. 20). The CO saw the scaffold sway as the employees used the scaffold's frame and crossbraces to climb down. (Tr. 18, 20). The CO photographed the southeast scaffold with and without employees working from it. (Exs. C-1, C-2, C-3).

On the day of the inspection, Mr. Soto told the CO that Flintlock had erected the southeast scaffold for the use of the V&P employees. (Tr. 37-39, 111-12). Mr. Gomez also informed the CO that two laborers, Armando and Jose, had built the southeast scaffold under this direction. (Tr. 38). During his interview with Mr. Soto, Mr. Asch interrupted to tell the CO that

[4] At the time of the hearing, Mr. Pacheco worked for Plaza Construction and had not been an employee of OSHA or the Department of Labor for about two years. (Tr. 14). He was a compliance officer for OSHA for about four years. (Tr. 15).

Flintlock had built the scaffold and they would bring a company in to fix it. (Tr. 39). Mr. Asch stated he knew it was dangerous, but the job had to be finished in two or three weeks. (Tr. 39). Mr. Soto confirmed that during his interview, Mr. Asch told the CO that Flintlock had built the scaffold. (Tr. 112-13).

CO Pacheco also observed, and photographed, an employee of Maspeth Steel using a single plank to access a scaffold near the building's front entrance. (Tr. 59; Ex. C-13). The plank was 9 feet above the ground. (Tr. 59-60).

During the walk-through of worksite with Mr. Gomez, CO Pacheco observed and photographed a scaffold at the north side (rear) of the building. (Tr. 47-48; Ex. C-4). Mr. Gomez admitted that he and other Flintlock employees were erecting the north scaffold. (Tr. 48; Ex. C-29, pp. 23-24, 27). The CO saw ropes coming out of windows and onto the north scaffold. (Tr. 49-53). Mr. Gomez took the CO inside to two hotel rooms to show him what the ropes were attached to. (Tr. 51-52).

In the window of each room was a job-made anchorage device that consisted of two-by-fours attached to a piece of insulation extended horizontally across the window frame. (Tr. 53; Exs. C-8, C-9). The anchorage device was not attached to the window or secured to a structural member of the building. (Tr. 52-54; Exs. C-8, C-9). The ropes the CO had seen hanging out of the windows were tied around the job-made anchorage device. (Exs. C-8, C-9) The CO asked Mr. Gomez who had built the anchorage device and Mr. Gomez replied that he had built it because they needed fall protection while erecting the scaffold. (Tr. 53).

Credibility

The CO testified that, on the day of the inspection, Mr. Gomez told him that the north scaffold and the southeast scaffold were built by two of Flintlock's employees (Armando and Jose) under his direction. (Tr. 37-38, 48-49, 64). Mr. Asch also admitted Flintlock built the scaffolds. (Tr. 38-39, 113). Both Mr. Asch and Mr. Gomez admitted to the CO they did not believe the scaffolds were safe, but they needed to finish the job. (Tr. 39, 47).

During his March 3, 2015 deposition, Mr. Asch claimed that because he was not on the worksite each day he did not know who had rebuilt the scaffolds after the March 18, 2013 TCO inspection. (Ex. C-29, p. 21). He had no memory of seeing anyone work on the scaffold, never saw Flintlock employees assemble a scaffold, nor recalled any conversations with the superintendents about problems with a scaffold. (Ex. C-29, pp. 17, 21, 67).

Likewise, Superintendent Gomez had limited memory of the worksite during his March 3, 2015 deposition. With respect to the north scaffold, he admitted during his deposition that he was involved in erecting the scaffolding but wasn't sure where the anchor point was. (Ex. C-30, pp. 23-24, 27-28). When shown a picture of the job-made anchorage device, he recalled that he had seen it during the inspection, but could not recall who had built it or what the anchor was for. (Ex. C-30, pp. 28-29, 30-32). He admitted the job-made configuration appeared to be an anchorage point for a fall protection safety line. (Ex. C-30, pp. 28-29). Mr. Gomez also stated that the job-made anchorage device in the photograph would not be an adequate anchor point because it would have to support 5,000 pounds and the window it was attached to would have to support the weight. (Ex. C-30, pp. 31-32). He admitted he had seen the job-made anchorage device when he was with CO Pacheco but did not remember if it was used. (Ex. C-30, p. 29-30).

Mr. Gomez's and Mr. Asch's depositions were almost two years after the inspection. Because neither Mr. Gomez nor Mr. Asch appeared at the hearing, I was unable to observe the demeanor of each witness during direct and cross examination. *See Regina Constr. Co.,* 15 BNA OSHC 1044, 1048 (No 87-1309, 1991) (citing to *Cont'l Elec. Co.,* 13 BNA OSHC 2153, 2155 n.6 (No. 83-921, 1989) (finding that an out-of-court statement has less probative value than testimony before the judge). The parties noted that Mr. Gomez was unable to appear due to an unexpected illness; however, the record is silent as to why Mr. Asch did not appear at the hearing.[5] The deposition testimony of Mr. Gomez and Mr. Asch is credited only where it is supported by other credible evidence.

During his testimony, Foreman Juarez only recalled the scaffold at the north side of the building; he admitted he helped erect the north scaffold under the direction of Superintendent Gomez. (Tr. 247). Because he had been working on the north side of the building, he stated that he had not seen who built the southeast scaffold. (Tr. 248). Mr. Juarez did not recall telling the CO during the inspection that he had helped erect the southeast scaffold. (Tr. 250). I find that Mr. Juarez's testimony is generally not credible. His memory of events of the day was limited. He was hesitant and visibly unsettled during this testimony.

Project Manager Stetler testified that Flintlock was not involved in the erection of the southeast scaffold; Alubon and its subcontractor V&P built the scaffold. (Tr. 264-65). Mr.

[5] I note that as Mr. Asch's current employer, Flintlock, was in the best position to make him available for the hearing.

Stetler recalled seeing the southeast scaffold being assembled when he took cigarette breaks the afternoon of March 20, 2013, and saw men working from it the next day. (Tr. 269, 273; Exs. C-1, C-3). He had not noticed if there were missing guardrails or inadequate planking. (Tr. 269). He admitted that he had the power to stop work and have unsafe conditions corrected; however, he did not examine the scaffold. (Tr. 269-70, 275). Mr. Stetler thought Flintlock's laborers had been erecting the north scaffold and completing punch list work in the hotel's rooms during that time; he did not think they were erecting the southeast scaffold. (Tr. 274).

I find Mr. Stetler's testimony that Flintlock employees were only working at the north scaffold disingenuous. He admitted that he had the authority to correct safety issues at the worksite and had seen the southeast scaffold being built, yet did not see that it had significant safety issues. Further, Mr. Stetler's testimony was hesitant and selectively vague.

I find the CO's testimony regarding what occurred during the inspection more credible than the testimony of Flintlock's employees and management. The CO's testimony was straightforward and confident. Further, because he is no longer an employee of OSHA or the Department of Labor, he has no vested interest in the outcome of the case. (Tr. 14-15). To the contrary, all of Flintlock's witnesses were stilled employed by Flintlock and several had been long-time employees of Flintlock, thus they had an interest in the outcome of the case. Further, Mr. Soto's testimony supports the CO's testimony about Mr. Asch's admissions. The CO's testimony is supported by Mr. DeCristoforo's testimony and daily safety logs.

I find that statements made to the CO during the inspection were more credible because they were at the time of the event, spontaneous, and uncensored. Further, a significant period of time elapsed between the March 2013 inspection and depositions in the March 2015 and hearing in July 2015. *See Regina Constr. Co.,* 15 BNA OSHC at 1048 (noting that while not inherently reliable, admissions under Fed. R. Evid. 801(d)(2)(D) have "several factors that make them likely to be trustworthy, including: (1) the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted").

Further, the handwritten daily log of the Mr. DeCristoforo directly contradicts the

recollection of the employees. Two entries in the March 20, 2013 log state that Mr. DeCristoforo observed Flintlock employees building the scaffold at the north side of the building and on the southeast side of the building. (Tr. 152; Ex. C-21, p. 5, 6, 75). Mr. DeCristoforo also notified the superintendents early in the morning of March 20, 2013, of a non-conforming scaffold on the west side of the building. (Tr. 14-51; Ex. C-21, p.75). He notified both Mr. Gomez and Mr. Outar of three non-conforming scaffolds on the worksite on March 20, 2013. (Tr. 152).

The March 20, 2013 log entries are consistent with entries from prior dates in March where Mr. DeCristoforo notified Flintlock's onsite supervisors that scaffolds were not in compliance because of inadequate planking, lack of guardrails, and three to four-tier scaffolds not being secured to the building. (Tr. 131-147; Ex. C-21, pp. 3-4, 52, 56, 57, 66). Log entries from March 7, 2013, March 12, 2013. March 13, 2013, and March 15, 2013, also noted that scaffold safety problems were not fixed by Flintlock. (Ex. Ex. C-21, pp. 4, 56, 66, 63).

I credit the testimony of Mr. DeCristoforo over the assertions of Flintlock employees. He testified in a straightforward manner and without hesitation. Further, Mr. DeCristoforo's testimony is consistent with the daily logs he recorded each day at the worksite. Additionally, the weekly electronic logs of safety issues sent to Flintlock's corporate risk manager, Ms. Paralis, are consistent with the daily log entries and Mr. DeCristoforo's testimony. (Ex. R-I).

I fully credit Mr. DeCristoforo's daily log notes recorded at the time of the events in March 2013. The notes were made when the event was fresh in his mind and he was exclusively assigned to document safety problems at the worksite. His testimony was clear, confident and did not conflict with his notes. *See generally, Parker v. Reda,* 327 F.3d 211, 215 (2d Cir. 2003) (finding the "danger of unreliability" is minimized by the opportunity for the trier of fact to assess the credibility of the report's author). Flintlock did not provide evidence to refute the accuracy of Mr. DeCristoforo's recorded notes.

Because Mr. DeCristoforo was a credible witness, his notes are consistent, accurate, and made concurrently with his observations at the site, I credit Mr. DeCristoforo's notes and testimony over the testimony of Flintlock employees two years later.[6] Further, because neither

[6] The Advisory Committee Notes to the Federal Rules of Evidence at Rule 803(5) are helpful when evaluating the credibility of Mr. DeCristoforo's daily log notes: "The guarantee of trustworthiness [of a recorded recollection] is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them." *See, e.g., Parker v. Reda,* 327 F.3d 211, 215 (2d Cir. 2003).

Mr. DeCristoforo nor Site Safety are parties in this case, I find they have no vested interest in the outcome.

Jurisdiction

Based upon the record, I find Flintlock, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of §§ 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5).[7] I find the Commission has jurisdiction over the parties and subject matter in this case.

Secretary's Burden Of Proof

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

Multi-employer liability

The Secretary asserts that Flintlock was the controlling employer at the worksite and thus responsible for the safety of all employees at the site because of its overall authority and control at the site. (S. Br. 22).

A controlling employer is "an employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them." (Ex. R-R, p. 6). A "controlling employer [is] liable if it could reasonably be expected to prevent or detect and abate the violative condition by reason of its supervisory capacity and control over the worksite." *Summit Contractors, Inc.,* 23 BNA OSHC 1196, 1206 (No. 05-0839, 2010) *aff'd*, 442 F. Appx. 570 (D.C. Cir. 2011) (*Summit*) (citing *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129-30 (No. 92-0851, 1994)).

Flintlock was the general contractor for the 325 Project. Because Flintlock has "supervisory authority and control over the worksite," it is reasonable to expect Flintlock to prevent, detect, or order abatement of hazardous conditions. *See McDevitt Street Bovis, Inc.,* 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000) (citing *Centex-Rooney Constr. Co.*, 16 BNA OSHC at 2130).

The Commission has long recognized that a general contractor, such as Flintlock, is "well

[7] The parties stipulated to jurisdiction and subject matter in the Amended Joint Pretrial Statement. (Tr. 9-10).

situated to obtain abatement of hazards" and thus it is "reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected." *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 12775, 1976). The Commission reiterated this position when it held that a controlling employer without exposed employees on a construction site may be cited for unsafe conditions of other employees. *Summit,* 23 BNA OSHC at 1202-03.[8] In 1975, the Second Circuit recognized that the duty to comply with OSHA standards was not limited to the exposure of an employer's own employees. *Brennan v. OSHRC (Underhill Constr. Corp.*), 513 F.2d 1032, 1038 (2d Cir. 1975) ("duty to comply with the Secretary's standards is in no way limited to situations where a violation of a standard is linked to exposure of his employees to the hazard.")

For Citation 1, Item 1, and Citation 2, Items, 1 through 4, the citation items are based on Flintlock's role as a controlling employer at the worksite.[9] Respondent asserts it was not a controlling employer and because its own employees were not exposed it is not responsible for these cited violations. (R. Br., pp. 5, 7; R. Reply Br., pp. 9, 13). Flintlock asserts it is not the controlling employer because Alubon was the controlling employer for the southeast scaffold and because it contracted its safety duties to Site Safety. For the following reasons, I find Flintlock was the controlling employer at the Project and thus the citation items are applicable.

Flintlock's argument that it is not liable because it contracted its safety duties to Site Safety fails. An employer cannot contract away its duties " 'under the Act by requiring another party to perform them.' " *Summit*, 23 BNA OSHC at 1207 (quoting, e.g., *Froedtert Mem'l Lutheran Hosp. Inc.,* 20 BNA OSHC 1500, 1508 (No. 97-1839, 2004); *see also, Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991). Flintlock hired Site Safety for continual safety oversight at the 325 Project. Site Safety then reported safety problems to Flintlock's onsite supervisors and to Flintlock's corporate risk manager. Site Safety had no authority to have safety problems corrected. I find Flintlock did not relinquish its control or responsibility for safety at the 325 Project.

Respondent also argues Alubon was the responsible controlling employer for this scaffold. (R. Br. 7). This argument also fails.

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[8] In its *Summit* decision, the Commission noted that a majority of circuit courts of appeal had consistently affirmed its imposition of liability on controlling employers. *Summit*, 23 BNA OSHC at 1201.

[9] With respect to the "north" or "rear" scaffold, Flintlock does not dispute that its employees erected the scaffold.

A controlling employer has general authority and oversight for the worksite. (Ex. R-R, p. 6). Alubon installed exterior curtain walls and other façade materials at the Project. (Ex. R-B). Alubon was not responsible for providing or erecting scaffolds at the 325 Project. (Tr. 109, 112; Ex. R-B). Flintlock hired Rockledge to erect scaffolds and provide scaffolding materials. (Ex. C-25, C-26, C-27, R-A). Flintlock admits it was the general contractor at the worksite. Flintlock admits it had the authority to have its subcontractors correct unsafe conditions at the Project. (Tr. 217, 269-270, 276). Therefore, Alubon did not have general authority at the worksite, and in particular, it did not have control with respect to the scaffolds at the worksite. Alubon was not a controlling employer.

Severity of citation to controlling employer

Flintlock also asserts that it cannot be cited for a willful violation if an employer with exposed employees was cited for a serious violation of the same condition. In other words, Flintlock asserts the severity assessment for the controlling employer's citation cannot be at a higher level than for the exposing employer.[10] (R. Br. 6). Flintlock relies on four cases to support this premise: *Aguirre v. Turner Constr. Co.*, 582 F.3d 808 (7th Cir. 2009) (*Aguirre*); *Solis v. Summit Contractors., Inc.*, 558 F.3d 815 (8th Cir. 2009) (*Summit 2009*); *Am. Wrecking Corp. v. Sec'y*, 351 F.3d 1254 (D.C. Cir. 2003) (*AWC*); and *Summit Contractors, Inc. v. Sec'y*, 442 F. Appx 570 (D. C. Cir. 2011) (unpublished) (*Summit 2011*).

The cases relied upon by the Respondent do not support the premise that a controlling employer's citation for a violative condition must be relative to the exposing employer's citation. *Aguirre* is a tort action; it is "not a suit to enforce OSHA regulations" and thus not apt. *Aguirre*, 582 F.3d at 808.

In *AWC*, the DC. Circuit reduced the severity of the subcontractor's citation to serious. *AWC,* 351 F.3d at 1265. The citations OSHA issued to the controlling employer at the worksite, IDM, were not considered in the D.C. Circuit's analysis. *Id.* at 1257. *AWC* is silent on the issue of the relative severity of citations between the controlling employer and an exposing employer at the worksite and thus not apt. *AWC,* 351 F.3d at 1257.

Neither of the two *Summit* cases cited to by the Respondent are on point. The D.C. Circuit did not address whether the severity of a citation to a general contractor is related to that of a subcontractor. *Summit 2011*, 442 F. Appx at 572. The Eighth Circuit held that the Secretary

[10] An exposing employer is one that has its own employees exposed to the hazard. (Ex. R-R, p. 4.)

could cite a controlling employer but did not address the severity of that citation as compared to that for a subcontractor. *Summit 2009,* 558 F.3d at 818-22. Flintlock's argument, that the severity of its citation must be compared to the citations issued to other employers at the worksite, is rejected.[11]

OSHA's multi-employer compliance directive

Flintlock also asserts that OSHA's internal compliance directive for the multi-employer citation policy (Directive) requires a controlling employer's citation to be of equal or lesser severity than the exposing employer's citation. (R. Br. 6; Ex. R-R, pp. 3, 7). This assertion fails for two reasons. First, the Directive is a part of OSHA's Field Operations Manual, which is "only a guide for OSHA personnel" and does not "create any substantive rights for employers." *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1392 (No. 97-0755, 2003) (citing *Hamilton Fixture*, 16 BNA OSHC 1073, 1079 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) (unpublished); *Andrew Catapano Enters.,* 17 BNA OSHC 1776, 1780 (No. 90-50, 1996) (consolidated); *Orion Constr.,* 18 BNA OSHC 1867, 1868 n.3 (No. 98-2014, 1999)).

Second, the Directive sets forth the duty of care for the various types of employers on a worksite, i.e., controlling, creating, correcting, exposing. (Ex. R-R, pp. 3-7). The Directive's statement, that a controlling employer's duty to exercise reasonable care to prevent and detect violations is less than the duty of an exposing employer, relates to an employer's obligations under the Act and not to the determination the severity of an OSHA violation. (Ex. R-R, p. 4).

I find Flintlock had the authority to have its subcontractors correct safety problems and was responsible for the oversight of safe working conditions at the worksite, thus Flintlock was the controlling employer at the 325 Project.

Citations

Applicability – all citation items

The cited condition for Citation 1, Item 1 is a single plank that was used to access a scaffold on the south side of the building. Citation 1, Items 2a and 2b relate to a scaffold on the north side, rear, of the building. Citation 1, Item 3 relates to the lack of training for Flintlock employees involved in scaffold erection. Citation 2, Items 1 through 4 relate to a scaffold at the southeast corner of the building.

[11] Respondent makes several assertions related to OSHA citations issued to other employers at the worksite. Those citations are not at issue in the instant case. Thus, any additional arguments related to another employer's citations will not be addressed.

As discussed above, all citation items are applicable because of Flintlock's role as the controlling employer. In addition, its own employees were exposed to the conditions cited at Citation 1, Items 2a, 2b, and 3. I find all items are applicable to Flintlock.

Knowledge – all citation items

To prove his prima facie case, 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 1076, 1079-1080 (No. 90-2148, 1995). It is not necessary to show that the employer knew or understood the condition was hazardous. *Id.* Reasonable diligence for constructive knowledge includes, among other factors, the " 'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence' " of hazards. *Pub Utils. Maint., Inc. v. Sec'y*, 417 F. Appx 58, 63 (2d Cir. 2011) (unpublished) (citing *North Landing Constr. Co.*, 19 BNA OSHC 1465, 1472 (No. 96-721, 2001)).

Knowledge is imputed to the employer "through its supervisory employee." *American Eng'g & Dev. Corp.,* 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (*AEDC*) (citing *Access Equip. Sys.*, *Inc.,* 18 BNA OSHC at 1726). For imputation of knowledge, the formal title of an employee is not controlling. *Id.* The Commission has imputed the knowledge of crew leaders and foremen. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2069 (No. 96-1719, 2000) (citing *Tampa Shipyards Inc.,* 15 BNA OSHC 1533, 1537-38 (No. 86-630, 1992); *Access Equip. Sys.*, *Inc.,* 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999); *Mercer Well Serv.,* 5 BNA OSHC 1893, 1894 (No. 76-2337, 1977); *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993); *see also, Penn. Power & Light Co.*, 737 F.2d 350 (3rd Cir. 1984) (*PP&L)*). Further, an employer has constructive knowledge of conditions that are plainly visible to its supervisory personnel. *See Hamilton Fixture,* 16 BNA OSHC at 1091.

Knowledge related to each particular citation item is discussed below. Generally, Flintlock had knowledge of the cited hazardous conditions because its superintendents, Gomez and Outar, were on site at all times and the conditions were in plain view. Further, Flintlock acknowledged that its employees, under the supervision of Mr. Gomez, erected the scaffold at the north side of the building. When viewing the photograph of the job-made anchorage device, Mr. Gomez did not believe it would meet the standard's requirements. The plank used to access

the scaffold by the front entrance was clearly visible. The southeast scaffold was at the front of the building and its defects in planking, fall protection, access, and bracing were readily apparent. Additionally, Flintlock had knowledge of non-compliant scaffolds through warnings from the onsite safety manager for Site Safety and weekly safety reports to Flintlock's risk manager, Ms. Paralis.

Citation 1, Item 1

Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1926.451(b)(2), which sets forth:

> (b) Scaffold platform construction.
> (2) 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.
> (i) Each ladder jack scaffold, top plate bracket scaffold, roof bracket scaffold, and pump jack scaffold shall be at least 12 inches (30 cm) wide. There is no minimum width requirement for boatswains' chairs. . . .
> (ii) Where scaffolds must be used in areas that the employer can demonstrate are so narrow that platforms and walkways cannot be at least 18 inches (46 cm) wide, such platforms and walkways shall be as wide as feasible, and employees on those platforms and walkways shall be protected from fall hazards by the use of guardrails and/or personal fall arrest systems.
> (Emphasis added).

The Secretary asserts that on March 21, 2013, the access walkway to a scaffold was not at least 18 inches wide; instead, a single 9-inch-wide plank was used to access the scaffold on the building's south side. (S. Br. 26-27).

Applicability, Violation of the Standard, & Employee Exposure

The scaffold does not qualify for the exceptions listed at subparagraphs (i) and (ii) above. I find the cited standard applies to Flintlock as the controlling employer.

CO Pacheco observed an employee of Maspeth Steel, a Flintlock subcontractor, using a single plank, nine feet above the ground, as a walkway to access the scaffold. (Tr. 58-59; Exs. C-11, C-12, C-13). Flintlock does not refute that Maspeth's employees used this plank to access the scaffold. Mr. Asch, Flintlock's General Superintendent, confirmed the plank was the only means to access the scaffold. (Ex. C-29; p. 31).

The plank and scaffold were to the left of the entrance at the front of the building. (Tr. 57). The CO's photographs show a single plank extending from an unspecified platform area on the left side of the photograph, over a small security booth, and onto a multi-level scaffold on the

right side of the photo. (Exs. C-11, C-12, C-13). The photograph in exhibit C-13 shows an employee working from the scaffold. (Tr. 58-59; Ex. C-13). The plank walkway consisted of a single 9-inch-wide standard size plank typically used on scaffolds. (Tr. 57-58; Ex. C-11). The CO saw there were no guardrails or other means of fall protection for an employee using this narrow plank. (Tr. 59-60). Flintlock took no action to have this violative condition corrected. I find Flintlock violated the standard and employees were exposed.

Knowledge

The narrow plank walkway was in plain view at the front of the building and could be easily observed by anyone at the worksite. (Tr. 57-58, 66). It was apparent it was the only means to access the scaffold. Flintlock's General Superintendent, Mr. Asch, admitted that he had assumed the plank was used to access the scaffold. (Ex. C-29, p. 30). Flintlock had actual knowledge of the violative condition through Mr. Asch. Flintlock had constructive knowledge through its onsite superintendents, Gomez and Outar, who were onsite at all times, were seen at the front of the building when the CO arrived, and could have known of the obvious condition.

I find the cited standard applies, its requirements were violated, employees were exposed, and that Flintlock had knowledge of the condition. The Secretary has proved his prima facie case for Citation 1, Item 1.

Citation 1, Items 2a & 2b

Citation 1, Item 2a, alleges a serious violation of 29 C.F.R. § 1926.451(g)(2), which sets forth:

> (g) Fall protection
> (2) Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

Citation 1, Item 2b, alleges a Serious violation of 29 C.F.R. § 1926.502(d)(15), which sets forth:

> (d) Personal fall arrest systems. Personal fall arrest systems and their use shall comply with the provisions set forth below. Effective January 1, 1998, body belts are not acceptable as part of a personal fall arrest system. Note: The use of a body belt in a positioning device system is acceptable and is regulated under paragraph (e) of this section. . . .

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

The Secretary asserts that during the erection of a scaffold on the north side of the building, on or about March 18-21, 2013, Flintlock used an inadequate anchorage for fall protection. (S. Br. 27-30).

Applicability, Violation of the Standards, Employee Exposure, & Knowledge

The scaffold on the north side consisted of 4 partially planked tiers on two towers that rose about 50 feet above the ground. (Tr. 56). The CO took several photographs to document the condition of the north scaffold. (Exs. C-4 through C-10). Mr. Stetler admitted Flintlock's laborers helped erect the north scaffold. (Tr. 274). Mr. Gomez admitted that he and other Flintlock employees were erecting the north scaffold. (Tr. 48; Ex. C-29, pp. 23-24, 27). Flintlock does not dispute the citation is applicable and that its employees were erecting the scaffold on the north side of the building. I find the cited standards apply to Flintlock.

During the inspection, the CO could see ropes coming through the building's windows and hanging next to the scaffold. (Tr. 49, 51-52). The CO's photographs show three ropes hanging down next to the scaffold. (Exs. C-6, C-10). Mr. Gomez told the CO the ropes were used as fall protection safety lines. (Tr. 51; Exs. C-6, C-10). Mr. Gomez took the CO inside the building to the two rooms where the ropes were anchored. (Tr. 51-52). Exhibits C-8 and C-9 are photographs of the job-made anchorage point the ropes were tied to. (Tr. 52-53). In the window of each room, a job-made anchorage device that consisted of two-by-fours attached to a piece of insulation extended horizontally across the window frame, which the ropes were tied to. (Tr. 53; Exs. C-8, C-9). The anchorage device was not attached to the window or secured to a structural member of the building. (Tr. 52-54; Exs. C-8, C-9). The CO asked Mr. Gomez who had built the anchorage and Mr. Gomez replied that he had built it because they needed fall protection while erecting the scaffold. (Tr. 53). The CO testified that if a person fell while attached to this rope, the job-made anchorage would not sustain the load and would break. (Tr. 54).

During his March 3, 2015 deposition, Mr. Gomez's recollection of the fall protection for the north scaffold was uncertain. Mr. Gomez stated that he and the others were probably

wearing a harness for fall protection and he thought the anchor was on the second floor of the building. (Ex. C-30, p. 27). He stated he could not remember where the "main" anchor for fall protection was. (Ex. C-30, p. 27).

However, when he reviewed the CO's photograph of the job-made anchorage device he stated: "I would say it's the anchoring point of one of my life line . . . the safety line." (Ex. C-30, p. 28; Exs. C-8, C-9). Mr. Gomez admitted that the job-made anchorage device in the photograph would not be an adequate anchor point because it would not support 5,000 pounds and the window it was attached to would also have to support the weight. (Ex. C-30, pp. 31-32; Exs. C-8, C-9). Mr. Gomez stated that he remembered seeing this device inside one of the building's room during the CO's inspection, but didn't know who had built the job-made anchorage device or whether it had been used at the worksite. (Ex. C-30, pp. 28, 30-31; Exs. C-8, C-9).

I find Mr. Gomez's lack of memory regarding who made the device or whether it was used implausible. I fully credit the CO's testimony about what he observed and what Mr. Gomez told him during the inspection. Flintlock provided no evidence to refute that the job-made anchorage device was used as fall protection for its employees erecting the north scaffold.

I find Mr. Gomez built the job-made anchorage device and knew employees were using it as an anchor for fall protection. Further, it was readily apparent the anchorage device was inadequate and would not protect an employee if he fell. Therefore, Flintlock had both actual and constructive knowledge of the inadequate anchorage through its superintendent, Mr. Gomez.

I find Flintlock did not provide adequate fall protection for its employees erecting the north scaffold. Further, I find the job-made anchorage device used as an anchor point for personal fall arrest systems did not meet the standard's requirement to support at least 5,000 pounds per employee.

I find the cited standards apply, Flintlock violated their requirements, Flintlock's employees were exposed, and that Flintlock had knowledge of the obvious condition through its superintendent, Mr. Gomez. The Secretary has proved his prima facie case for Citation 1, Items 2a and 2b.

Citation 1, Item 3

Citation 1, Item 3, alleges a serious violation of 29 C.F.R. § 1926.454(b)(1), which sets forth:

(b) The employer shall have each employee who is involved in erecting, disassembling, moving, operating, repairing, maintaining, or inspecting a scaffold trained by a competent person to recognize any hazards associated with the work in question. The training shall include the following topics, as applicable:
(1) The nature of scaffold hazards;

The Secretary asserts that on or about March 18-21, 2013, Flintlock's employees were not trained to recognize hazards for the erection of the scaffolds on the north side of the building and at the southeast corner of the building. (S. Br. 31).

Applicability & Employee Exposure

Flintlock does not dispute its employees erected the north-side scaffold; Mr. Gomez and Mr. Stetler admitted Flintlock's employees erected the scaffold. (Tr. 48, 274; Ex. C-29, pp. 23-24, 27). I find the standard applies and that Flintlock's employees were exposed to hazards when erecting the north scaffold.

Flintlock asserts its employees did not erect the southeast scaffold. During the inspection, Mr. Gomez informed the CO that Flintlock laborers, Armando and Jose, had built the southeast scaffold under this direction. (Tr. 38). As discussed below for Citation 2, I find that Flintlock's employees also erected the southeast scaffold.

The requirements of the cited standard apply and employees were exposed to hazards while erecting scaffolds on the north side and southeast corner of the building.

Violation of the Standard & Knowledge

Testimony and Flintlock's training records show the employees at the 325 Project were not trained to erect a scaffold or recognize the hazards related to scaffold erection. (Tr. 60-61, 242, 249, 317; Ex. C-17; Ex. C-29, pp. 33, 36; Ex. C-30, pp. 24, 42, 45). Flintlock did not offer evidence to refute the assertion that employees at the 325 Project were not adequately trained.

In his deposition, Mr. Asch stated the general 4-hour scaffold training course does not train someone for scaffold erection; the 32-hour scaffold course is needed to be qualified in scaffold erection. (Ex. C-29, pp. 33-34). The training records show the onsite superintendents, Gomez and Outar, and Foreman Juarez had only a general 4-hour training course on scaffold safety. (Tr. 242; 249, 303; Ex. C-30, pp. 39, 41-42). The records show that the laborers, Armando and Jose, did not have the 4-hour or 32-hour scaffold training. (Tr. 61; Ex. C-17, C-18).

Mr. Outar testified he had no training on scaffold erection. (Tr. 242). Mr. Juarez

admitted he had no training on scaffold erection. (Tr. 249). Mr. Asch admitted that no one at the 325 Project was a competent person trained for scaffold erection. (Ex. C-29, p. 40). Flintlock's training records show that only one employee, Joseph Lomonaco, had the 32-hour scaffold training course and he did not work at the 325 Project. (Ex. C-17, C-18, C-29, p. 36). I find Flintlock employees were involved in the erection of the scaffolds and were not trained to recognize the hazards. (Tr. 60-61, 242, 249, 275, 317; Ex. 17; Ex. 29, pp. 33, 36; Ex. 30, pp. 24, 42, 45).

Further, I find that, through its training records and supervisory employees, Flintlock had actual knowledge no on working at the 325 Project was trained to erect a scaffold or recognize the hazards when erecting a scaffold. (Ex. C-17). Flintlock's records show only one employee, who did not work at the Project, was trained for scaffold erection. (Ex. C-18). Other employees had only completed the general 4-hour supported scaffold user training course. (Tr. 61; Ex. C-17, pp. 3-6). Mr. Outar and Mr. Asch both admitted no one at the 325 Project was trained in scaffold erection and its hazards. As superintendents, their knowledge is imputed to Flintlock.

I find the cited standard applies, that Flintlock violated its requirements, Flintlock's employees were exposed, and Flintlock had knowledge its employees at the Project were not trained in the hazards of scaffold erection. The Secretary has proved his prima facie case for Citation 1, Item 3.

Southeast Scaffold -- Citation 2, Items 1 through 4

All four items of Citation 2 relate to the scaffold at the southeast corner of the building (southeast scaffold). Item 1 asserts the scaffold was not properly planked, item 2 asserts the scaffold was not restrained from tipping, item 3 asserts there was no adequate safe access to the scaffold, and item 4 asserts adequate fall protection was not provided for employees working from the scaffold.

Flintlock asserts that it took reasonable measures to ensure the safety of all employees at the worksite and it had no knowledge of the condition of the southeast scaffold. Discussion of the elements of applicability and knowledge will be combined for the four items of Citation 2. Subsequently, the elements of employee exposure and violation of the cited standard are discussed for each citation item.

Applicability - Citation 2, Items 1 through 4

The Secretary asserts that because Flintlock was the controlling employer at the worksite

it was responsible for the safety of the subcontractors working from the scaffold and thus the cited standards apply. The Secretary also asserts Flintlock erected the southeast scaffold. (S. Br. 5, 31). I agree.

Flintlock asserts these citation items are not applicable because its employees did not erect the southeast scaffold. (R. Br. 16). This argument is rejected; the credible evidence shows that Flintlock erected the southeast scaffold. Further, the items are applicable due to Flintlock's role as the controlling employer at the worksite.

On Monday, March 18, 2013, a few days before the OSHA inspection, the New York City Department of Buildings conducted a TCO inspection of the worksite. (Tr. 173-74, 220). To prepare for the TCO inspection, Flintlock had all the scaffolding on the worksite disassembled and removed. (Tr. 220). The scaffolds present at worksite on March 21, 2013, were erected after the TCO inspection.

Flintlock contracted with Rockledge to provide the scaffolding materials and erect scaffolds at the 325 Project. (Tr. 192; Ex. R-A). Rockledge's invoices show it did not erect any scaffolds at the site between March 16 and March 23, 2013. (Tr. 40-41, 193, 271; Exs. C-25, C-26, C-27). Rockledge's invoices show it rebuilt the scaffold on the building's north side after the OSHA inspection. (Tr. 193, 271; Ex. C-27, p.12).

Based on timeline photographs of the worksite, the southeast scaffold was erected between 11:52 a.m. and 3:30 p.m. on March 20, 2013. (Tr. 273-74; Ex. C-15). Exhibit 15 consists of timeline surveillance photographs of the worksite Flintlock provided to the Secretary. (Tr. 39-40; Ex. C-15). Seven of the photographs range in time from March 20, 2013 at 11:52 a.m. to March 21, 2013 at 9:15 a.m. (Tr. 40-46; Ex. C-15, pp. 5-11). The photograph from 11:52 a.m. on March 20 shows no scaffold was at the southeast corner of the building. (Tr. 40; Ex. C-15, p. 5). The photo from 7:30 a.m. on March 21 shows the top of an employee's hardhat working from a scaffold at the building's southeast corner. (Tr. 44, 71-72; Ex. C-21, p. 10). Thus, the scaffold was erected the afternoon of March 20, 2013. (Tr. 44, 71-72, 273-74). Flintlock did not provide evidence to refute that the southeast scaffold was built sometime the afternoon of March 20, 2013, and the photographs show employees were using the scaffold the morning of March 21, 2013. (Tr. 72; Ex. C-15).

Project Manager Stetler recalled seeing the southeast scaffold being assembled on the afternoon of March 20, 2013, and saw men working from it the next day. (Tr. 269, 273). He

testified that Alubon and its subcontractor V&P built the scaffold, not Flintlock. (Tr. 264-65). Mr. Stetler asserted that during that time Flintlock's laborers were erecting the north scaffold and completing punch list work in the hotel's rooms. (Tr. 274).

On the day of the inspection, Mr. Gomez, Mr. Soto, and Mr. Asch told the CO that Flintlock had erected the southeast scaffold for the use of V&P employees. (Tr. 37-39, 48, 63). Mr. Soto confirmed that he witnessed Mr. Asch admitting to the CO that Flintlock had erected the scaffolds. (Tr. 111-12).

During his deposition, Mr. Gomez stated that he did not remember talking to the CO about the southeast scaffold. (Ex. C-30, p. 32). Mr. Outar testified that Alubon erected the southeast scaffold. (Tr. 240). Mr. Juarez testified that Alubon erected the southeast scaffold; however, he also testified he did not see the scaffold because he had been working at the back of the building (the north side). (Tr. 248). Mr. Juarez testified that he did not recall telling the CO he had helped erect the southeast scaffold. (Tr. 250).

The claims of these Flintlock employees are contradicted by the handwritten daily log of the Mr. DeCristoforo. The entries in his March 20 daily log state that he observed Flintlock employees building the scaffold at the north side of the building and on the southeast side of the building. (Tr. 152; Ex. C-21, p. 5, 75). Additionally, Mr. Soto, Alubon's representative, testified that Alubon and V&P did not have access to build a scaffold at the site. (Tr. 108-09, 112).

As discussed above, I credit the testimony of Mr. DeCristoforo, Mr. Soto, and the CO over the testimony of Flintlock's employees, regarding who erected the southeast scaffold. Mr. DeCristoforo's log entries were recorded at the time of the event and are more credible generally than an individual's recollection many months after the fact.

I credit the statements made to the CO at the time of the inspection over the statements made during testimony and deposition two years later. The employee statements to the CO at the time of the inspection are closer in time to actual events and thus more credible. Further, Flintlock and its employees have an interest in the outcome of this case. I find the credible evidence shows Flintlock erected the southeast scaffold.

I find Citation 2, Items 1 through 4 are applicable because Flintlock was the controlling employer. I also find Flintlock erected the southeast scaffold.

Knowledge -- Citation 2, Items 1 through 4

The Secretary asserts Flintlock had knowledge because it erected the southeast scaffold

and Mr. DeCristoforo told its superintendents that it was not compliant. Further, the Secretary asserts that Flintlock's supervisory personnel watched employees work from the noncompliant scaffold and took no action to correct the scaffold's conditions or protect employees before the CO's arrival at the worksite. (S. Br. 10).

Respondent asserts that it took all reasonable measures to ensure the safety of employees at the worksite and it had no knowledge of the scaffold's condition because Flintlock's corporate principals were not notified. (R. Br. 18-19).

I find Flintlock had actual knowledge of the southeast scaffold's condition. The scaffold was in plain view at the front of the building. (Tr. 17-18; Exs. C-1, C-2, C-3). Mr. Outar was directing the work on the scaffold when the CO arrived at the site March 21, 2013. Mr. Gomez was also standing next to the scaffold watching employees work. (Tr. 36). Mr. DeCristoforo's March 20, 2013 notes show he notified both Mr. Gomez and Mr. Outar of problems with scaffolds on the worksite, including lack of guardrails and tie-back bracing. (Tr. 152; Ex. C-21, p. 5, 75). Flintlock had actual knowledge of the scaffold's condition because it erected the scaffold, its onsite superintendents watched employees work from the scaffold, and it was informed by Mr. DeCristoforo the scaffold was not in compliance. Mr. Stetler admitted that he had seen the scaffold being built and employees working from it. (Tr. 269, 273). Further, Flintlock had constructive knowledge because the southeast scaffold was in plain view at the front of the building and the unsafe conditions from lack of fall protection, bracing, access, and improper planking were readily apparent.

Flintlock asserts the Secretary must show that its corporate principals had knowledge; the knowledge of its onsite supervisory personnel is not sufficient. This assertion fails. Knowledge is imputed through any supervisory employee of the company, it does not require the knowledge be imputed through a company's principals or officers. The formal title of an employee is not controlling; the Commission has imputed the knowledge of crew leaders and foremen. *AEDC,* 23 BNA OSHC at 2095; *Kerns*, 18 BNA OSHC at 2069 (citing *Tampa Shipyards Inc.,* 15 BNA OSHC at 1537-38; *Access Equip. Sys.*, *Inc.,* 18 BNA OSHC at 1726; *Mercer Well Serv.,* 5 BNA OSHC at 1894; *Dover Elevator Co.*, 16 BNA OSHC at 1286; *see also, PP&L*, 737 F.2d at 350.

I find Flintlock had actual and constructive knowledge of the condition of the southeast scaffold through its onsite superintendents.

The Secretary has proved the elements of knowledge and applicability for Citation 2,

Items 1 through 4. The other elements of proof, employee exposure and violation of the standard, are discussed below for each of the citation items.

Citation 2, Item 1

Citation 2, Item 1, alleges a willful violation of 29 C.F.R. § 1926.451(b)(1)(i), which sets forth:

> (b) Scaffold platform construction. (1) Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports as follows:
> (i) Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).

The Secretary asserts employees were working 26 feet above the ground from an inadequately planked scaffold on the southeast corner of the building. (S. Br. 32).

Employee Exposure & Violation of the Standard

When the CO arrived at the worksite he observed and photographed three V&P employees engaged in exterior waterproofing work from the scaffold's top platform. (Tr. 18, 32; Ex. C-1). The southeast scaffold was approximately 32 feet high with three platform levels; the top platform level was 26 feet above the ground. (Tr. 26-27, 31-33, 86-87; Ex. C-3). The CO's photographs, Exhibits C-1 and C-2, clearly show 3 employees working from the top platform level. (Ex. C-1, C-2). I find employees were exposed to the hazard of inadequate planking.

Because the southeast scaffold was four feet wide, four or five standard 9-inch wide scaffold planks were needed to fully plank each platform level. (Tr. 26, 30). The southeast scaffold had three planks installed on each of the platform levels resulting in 27 inches of planking. (Tr. 26-27; Ex. C-3). This left 21 inches of non-planked space on each platform level. (Ex. C-3). In the CO's photograph, one employee is sitting with his legs hanging down in the space where the planking should have been. (Tr. 22; Ex. C-2). The CO's photographs show the obvious, large open space where planking was missing for all three levels of the southeast scaffold. (Ex. C-2, C-3). Flintlock did not refute the evidence that employees were working on the inadequately planked platform.

I find the southeast scaffold was not fully planked as required by the standard and

employees were exposed to the resulting hazard. As discussed above, I find the cited standard applies and Flintlock had knowledge of the condition. The Secretary has proved his prima facie case for Citation 2, Item 1.

Citation 2, Item 2

Citation 2, Item 2, alleges a willful violation of 29 C.F.R. § 1926.451(c)(1), which sets forth:

> (c) Criteria for supported scaffolds. (1) Supported scaffolds with a height to base width (including outrigger supports, if used) ratio of more than four to one (4:1) *shall be restrained from tipping by guying, tying, bracing, or equivalent means*, as follows:
> (i) Guys, ties, and braces shall be installed at locations where horizontal members support both inner and outer legs.
> (ii) Guys, ties, and braces shall be installed according to the scaffold manufacturer's recommendations or at the closest horizontal member to the 4:1 height and be repeated vertically at locations of horizontal members every 20 feet (6.1 m) or less thereafter for scaffolds 3 feet (0.91 m) wide or less, and every 26 feet (7.9 m) or less thereafter for scaffolds greater than 3 feet (0.91 m) wide. The top guy, tie or brace of completed scaffolds shall be placed no further than the 4:1 height from the top. Such guys, ties and braces shall be installed at each end of the scaffold and at horizontal intervals not to exceed 30 feet (9.1 m) (measured from one end [not both] towards the other).
> (iii) Ties, guys, braces, or outriggers shall be used to prevent the tipping of supported scaffolds in all circumstances where an eccentric load, such as a cantilevered work platform, is applied or is transmitted to the scaffold.
> (Emphasis added.)

The Secretary asserts the 32-foot-high scaffold on the southeast side of the building was not restrained from tipping. (S. Br. 33).

Employee Exposure & Violation of the Standard

As discussed above, the CO observed and photographed three V&P employees working from the top level of the southeast scaffold. (Tr. 18, 32; Ex. C-1, C-2). The southeast scaffold was approximately 32 feet high with three platform levels. (Tr. 26-27, 31-33, 86-87; Ex. C-3). The CO could see the scaffold sway as the three employees climbed down. (Tr. 20). I find employees were working from the southeast scaffold and exposed to scaffold tipping or collapse due to inadequate bracing.

The CO testified the scaffold was not braced to prevent it from tipping or collapse. (Tr. 28-29). The southeast scaffold was four feet wide and approximately 32 feet high. (Tr. 31, 86-87). To comply with the standard's 4:1 ratio requirement, the southeast scaffold was required to

be braced at two points – at the sixteen-foot mark and again at the top. (Tr. 31). The hazard was exacerbated by a debris net attached to the scaffold. (Tr. 28-29). The debris net could create a wind load to the scaffold causing it to move back and forth. (Tr. 29). Flintlock provided no evidence to refute the evidence the southeast scaffold was not braced or restrained from tipping.

I find the southeast scaffold was not restrained from tipping as required by the standard and employees were exposed to the resulting hazard. As discussed above, I find the cited standard applies and Flintlock had knowledge of the condition. The Secretary has proved his prima facie case for Citation 2, Item 2.

Citation 2, Item 3

Citation 2, Item 3, alleges a willful violation of 29 C.F.R. § 1926.451(e)(1), which sets forth:

> (e) Access. This paragraph applies to scaffold access for all employees. Access requirements for employees erecting or dismantling supported scaffolds are specifically addressed in paragraph (e)(9) of this section.
> (1) When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

The Secretary asserts that employees used the scaffold's frame and cross braces to access the platforms instead of adequate access as required by the standard. (S. Br. 34-35).

Employee Exposure & Violation of the Standard

When the CO arrived at the worksite, he photographed three V&P employees engaged in exterior waterproofing work from the southeast scaffold's top platform level that was 26 feet above the ground. (Tr. 18, 32; Ex. C-1, C-2). The scaffold was approximately 32 feet high with three platform levels. (Tr. 26-27, 31-33, 86-87; Ex. C-3). The CO saw the three employees using the crossbraces and scaffold structure to climb down. (Tr. 18, 20; Ex. C-1). There was no ladder or stairway. (Tr. 18-20). Employees were subjected to falls up to 26 feet as they climbed up and down the frame. (Tr. 32, 35). I find that employees were exposed to the cited condition.

The standard does not allow the scaffold's frame or crossbraces to be used as the means to access a scaffold platform. Access must be provided through an attached ladder, stair tower, or similar device. (Tr. 33). No adequate means of access was provided to the employees. (Tr.

18-20). The scaffold's frame cannot function as a ladder because it is too narrow, too far apart, and improperly angled to be used as a ladder. (Tr. 34-35). I find employees did not have adequate, safe access to the southeast scaffold as required by the standard and employees were exposed to the resulting hazard. As discussed above, I find the cited standard applies and Flintlock had knowledge of the condition. I find the Secretary has proved his prima facie case for Citation 2, Item 3.

Citation 2, Item 4

Citation 2, Item 4, alleges a willful violation of 29 C.F.R. § 1926.451(g)(1)(vii), which sets forth:

> (g) Fall protection. (1) Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1) (i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.
> Note to paragraph (g)(1): The fall protection requirements for employees installing suspension scaffold support systems on floors, roofs, and other elevated surfaces are set forth in subpart M of this part.
>
> (vii) For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

The Secretary asserts that employees were exposed to a fall of 26 feet to the ground while installing siding from a scaffold at the southeast corner of the building without fall protection. (S. Br. 35-36).

Employee Exposure & Violation of the Standard

The southeast scaffold was approximately 32 feet high, with three platform levels. (Tr. 26-27, 31-33, 86-87; Ex. C-3). The CO saw three employees working from the top platform level 26 feet above the ground when he arrived at the worksite. (Tr. 18, 32; Ex. C-1, C-2). The CO could see caulking on the building that showed they had also been working from the first and second levels of the scaffold. (Tr. 27). I find that employees were exposed to falls when working from the scaffold.

The southeast scaffold had no guardrails installed on the three platform levels. (Tr. 20, 23; Exs. C-1, C-2, C-3). The CO could see three employees working from the top platform

without personal fall arrest systems. (Tr. 23; Ex. C-1, C-2). Thus, there was no fall protection and employees were exposed to falls up to 26 feet. Flintlock did not refute that no fall protection was in place for the employees working from the southeast scaffold.

I find fall protection was not provided for employees working from the southeast scaffold as required by the cited standard. As discussed above, I find the cited standard applies and Flintlock had knowledge of the condition. I find the Secretary has proved his prima facie case for Citation 2, Item 4.

Affirmative Defense – Unpreventable Employee Misconduct

In Flintlock's post-hearing brief it asserts it is entitled to assert the affirmative defense of unforeseeable employee misconduct.[12] (R. Br. 18). The Secretary objects to Flintlock's assertion of the affirmative defense of unpreventable employee misconduct because it did not raise the defense in its Answer and was not asserted in a timely manner. (S. Reply Br. 2).

The unpreventable employee misconduct defense is a substantive defense. To establish the affirmative defense of unpreventable employee misconduct, "the employer must show that it: (1) has established work rules designed to prevent the violation; (2) has adequately communicated the rules to its employees; (3) has taken steps to discover violations of the rules; and (4) has effectively enforced the rules when violations were detected." *D.A. Collins Constr. Co.*, 117 F.3d 691, 695 (2d Cir. 1997); *Rawson Contractors, Inc.,* 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003); *see also, New York State Elec. & Gas Corp. v. Sec'y,* 88 F.3d 98, 106 (2d Cir. 1996) (*NYSEG*) (citing to Commission case law for elements of the unpreventable employee misconduct affirmative defense).

Commission Rule 34(b)(3) states that "The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, 'infeasibility,' 'unpreventable employee misconduct,' and 'greater hazard.' " 29 C.F.R. § 2200.34(b)(3).

Flintlock's Answer, which it filed on February 14, 2014, listed ten affirmative defenses that did not include the defense of unpreventable employee misconduct.[13] The deadline for the

[12] Flintlock made this same assertion in the Trial Brief it presented at the outset of the hearing on July 14. 2015. (Tr. 13, 297).

[13] The ten affirmative defenses asserted in the Answer can be summarized as follows: the scaffolds were owned or erected by someone other than Flintlock; the scaffolds were erected and used without actual or constructive knowledge of Flintlock; all employees involved in erecting a scaffold were trained by a competent person to recognize hazards in scaffold erection; Flintlock's employees were trained to recognize scaffold hazards; Flintlock had limited notice of the scaffolds' inadequacies; Flintlock promptly followed the CO's instructions and abated

completion of general discovery[14] for the instant case was March 4, 2015. Flintlock first raised the unpreventable employee misconduct defense as an issue of law to be litigated in the Joint Pretrial Statement filed June 18, 2015.[15] The hearing for this matter was held July 14-16, 2015. Respondent made no request to amend or modify its Answer at any time during this proceeding.

The Secretary asserts that because it did not receive notice of the affirmative defense in the Answer, or before the close of discovery, it had "no opportunity to conduct (and did not conduct) discovery with respect to the elements of the employee misconduct defense." (S. Reply Br. 2). Flintlock did not provide an explanation for why it did not assert this affirmative defense earlier or why it did not seek to amend its Answer.

Commission Rule 34(b)(4) states that "[t]he failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense *as soon as practicable*." 29 C.F.R. § 2200.34(b)(4) (Emphasis added).

In *L&L Painting*, the Commission held that L&L had waived the affirmative defense of unpreventable employee misconduct because it failed to raise the defense in its answer. *L & L Painting Co., Inc*., 23 BNA OSHC 1986, 1996 (No. 05-0055, 2012); *see also, Nat'l Eng'g & Contracting Co.*, 16 BNA OSHC 1778, 1779 (No. 92-73, 1994) ("we need not consider [Respondent's] argument because it is an affirmative defense that should have been, but was not, raised in its Answer").

I find the Secretary did not have notice to conduct discovery for this defense. I also find that Flintlock did not raise the defense as soon as practicable as required by Rule 34(b)(4). Flintlock's assertion of the affirmative defense of unpreventable employee misconduct was untimely; Flintlock has thus waived its right to raise this defense.[16]

Serious Characterization

Citations 1, Items 1 through 3 are classified as serious violations. (S. Br. 27, 30, 31).

[14] A March 17, 2015 Amended Scheduling Order allowed a limited extension of discovery for two specific items: a response to Respondent's interrogatories and the notice of two previously non-responsive non-party depositions. *See Amended Scheduling Order and Rescheduled Hearing Date* issued March 17, 2015.

[15] "3. Whether the 'unforeseeable employee misconduct' defense is applicable and prohibits the imputation of knowledge of the alleged willful violations by Flintlock's site personnel to Flintlock itself." *Amended Joint Pretrial Statement* at p. 14, ¶ G. 3.

[16] Additionally, the record is devoid of evidence to support the Respondent's burden of proof for the affirmative defense of unpreventable employee misconduct.

Citation 2, Items 1 through 4 are classified as willful and also considered serious. (S. Br. 25). A violation is classified as serious under section 17(k) of the Act if "there is a substantial probability that death or serious physical harm could result." Commission precedent requires a finding that "a serious injury is the likely result should an accident occur." *Pete Miller, Inc.,* 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000). The Secretary has proved that all of the citation items are serious in nature. Employees were subject to injury from scaffold collapse and falls from 9 feet to 50 feet. An accident could result in serious injury or death. (Tr. 35, 57, 59-60). I find all cited items are serious in nature.

Willful Characterization

The Secretary has characterized Citation 2, Items 1 through 4, relating to the hazards of the southeast scaffold, as willful violations. I find the record supports a willful characterization for each of these citation items.

Flintlock allowed the noncompliant southeast scaffold to be used by employees installing exterior building materials even when the defects were in plain view of its supervisory employees and it was warned by the onsite safety manager of safety hazards. The knowledge and conduct of a supervisory employee may be imputed to the employer for the purpose of finding a violation is willful. *Branham Sign Co.,* 18 BNA OSHC 2132, 2134 (No. 98-752, 2000).

A willful violation is done "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Burkes Mech., Inc.,* 21 BNA OSHC 2136, 2140 (No. 04-0475, 2007) (citing *Spirit Homes, Inc.*, 20 BNA OSHC 1629, 1630 (No. 00-1807, 2004) (consolidated). It "is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference when the employer committed the violation." *Hern Iron Works, Inc.,* 16 BNC OSHC 1206, 1214 (No. 89-433, 1993) (citing *Williams Enters.*, 13 BNA OSHC 1249, 1256-57 (No. 85–355, 1987); *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068 (No. 82–630, 1991)).

Violations are willful where an employer exhibits plain indifference with respect to the violative conditions themselves. *A.E. Staley Mfg. Co.,* 295 F.3d 1341, 1350-53 (D.C. Cir. 2002). Plain indifference is established by an employer's failure to take appropriate corrective action despite actual knowledge that a dangerous condition exists. *National Eng'g &*

Contracting Co., 18 BNA OSHC 1075, 1080-81 (No. 94-2787, 1997), *aff'd*, 181 F.3d 715 (6th Cir. 1999).

I find Flintlock demonstrated plain indifference to employee safety. Flintlock ignored the obvious hazardous conditions on the southeast scaffold. Mr. Weiss knew the scaffolding, which had been removed from the worksite in preparation for the TCO inspection, would need to be rebuilt but made no effort to have Rockledge rebuild the scaffolds. (Tr. 220). Mr. Stetler admitted he saw the southeast scaffold before the CO arrived and saw employees working on it but made no attempt to determine if the scaffold was safe. (Tr. 269, 276). Mr. Gomez directed employees in the erection of the non-compliant southeast scaffold. (Tr. 38; Ex. 21, pp. 5, 6, 75). Mr. Outar and Mr. Gomez watched employees working from the southeast scaffold. (Tr. 36-37). Neither superintendent made an effort to have the hazards corrected.

Flintlock's onsite superintendents, project manager, and corporate risk manager, ignored Site Safety's multiple, daily warnings about scaffold safety issues. Mr. DeCristoforo advised Mr. Gomez and Mr. Outar of multiple scaffold violations, including inadequate fall protection, bracing, planking, and scaffold access. Ms. Paralis received weekly reports on outstanding safety problems but made no effort to take action and instead read them "as her time allowed." (Tr. 285-86). Mr. Gomez' March 15, 2013 response, that he "was in no mood to deal with my concerns and I should leave him alone," shows plain indifference to safety problems on the scaffold. (Ex. C-21, p.4). Flintlock showed plain indifference when it repeatedly ignored Mr. DeCristoforo's warnings and made no effort to correct safety defects.

An employer who knows the requirements of the OSH Act and deliberately disregards them has committed a willful violation. *See, e.g.*, *Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1613 (No. 87-2007, 1992) ("To show intentional disregard of a standard, there must be evidence that the employer knew of the applicable standard prohibiting the condition and that it consciously disregarded it.")

A violation is willful where the employer was "aware of the particular duty at issue in the case, if not the particular standard embodying the duty." *V.I.P. Structures, Inc.,* 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994). The Commission has recognized that an employer's failure to follow its own safety program and the recommendations of a safety consultant can establish a willful violation. *Morrison-Knudsen Co., Inc.,* 16 BNA OSHC 1105, 1127 (No. 88-572, 1993).

Flintlock knew of the safety requirements for a scaffold through its past citations, its safety plan, and its training. In 2008, Flintlock received two OSHA citations for inadequate guardrails on a scaffold.[17] (S. Br. 21; Ex. R-Q, p. 6). Flintlock's written safety plan required a scaffold work platform to be "completely decked" and a work platform to be "equipped with standard guard rails, mid-rails and toe boards when 6 or more feet in height." (Tr. 65; Ex. C-20, p. 27). The 2012 general four-hour training class attended by managers and supervisory personnel included the requirement that "[e]ach working level platform must be planked and decked so that space between the platform and uprights are not more than 1-inch wide." (Tr. 4-8; Ex. C-17, C-34, p. 7). Despite the knowledge from its past citations, its safety plan, and employee training, Flintlock allowed employees to work on partially planked scaffold platforms without fall protection.

Further, Flintlock was reminded of scaffold safety requirements through Site Safety's onsite safety manager. Mr. DeCristoforo notified Flintlock's site superintendents of multiple safety issues on the scaffolds on multiple occasions. Despite Mr. DeCristoforo's warnings, Flintlock did not correct scaffolding problems until after the OSHA inspection. I find Flintlock's actions at the 325 Project show intentional disregard.

The Commission has consistently held that a heightened awareness of the standard can be established with prior violations of a similar standard. *See, e.g., Capeway Roofing Sys.,* 20 BNA OSHC 1331, 1341 (No. 00-1986, 2003); *Revoli Constr. Co.,* 19 BNA OSHC 1682, 1685 (No. 00-315, 2001); *see also, A.J. McNulty & Co. v. Sec'y*, 283 F.3d 328, 338 (D.C. Cir. 2002) ("prior citations for identical or similar violations may sustain a violation's classification as willful").

Flintlock's past OSHA citations, its safety plan, training, and daily reminders from the Mr. DeCristoforo provided Flintlock with a heightened awareness of the standard. Weekly emails to Flintlock's risk manager also provided heightened awareness of the scaffold standard's requirements. Flintlock knew it would need the scaffolds rebuilt after the March 18 TCO inspection but chose to not contact Rockledge to have them safely erected.

Flintlock knew employees were working on the scaffold. Flintlock hired Site Safety to report safety problems. Flintlock controlled the scaffolding services contract. Flintlock had the power to stop work and have the hazards corrected. Flintlock's supervisory personnel had actual

[17] Mr. Weiss confirmed that he had been Flintlock's managing member since 1997. (Tr. 204-05, 221-22).

knowledge of the unsafe conditions on the worksite's scaffolds. Nonetheless, Flintlock chose to not correct the deficiencies, demonstrating both intentional disregard and plain indifference. I find the willful characterization is supported by the record.

Good Faith

Flintlock asserts that it made a good faith effort to comply with OSHA standards and therefore, the willful characterization must be reduced to a serious characterization.

The Commission has held that an employer's conduct will not be found willful if it "made a good faith effort to comply with a standard or eliminate a hazard, even though [its] ... efforts were not entirely effective or complete." *Elliot Constr. Corp.,* 23 BNA OSHC 2110, 2117 (No. 07-1578, 2012) (citing *A.E. Staley Mfg. Co.,* 19 BNA OSHC 1199, 1202 (No. 91-0637, 2000) (consolidated), *aff'd*, 295 F.3d 1341 (D.C. Cir. 2002)). A good faith effort to comply must be objectively reasonable to negate willfulness. *Caterpillar, Inc. v. OSHRC,* 122 F.3d 437, 441-42 (7th Cir. 1997) *aff'g*, 17 BNA OSHC 1731 (No. 93-373, 1996).

Flintlock asserts that it acted in good faith when it immediately corrected the hazards on the southeast scaffold after the inspection and when it placed a debris net on a scaffold after being advised by Mr. DeCristoforo that a debris net was needed. (Tr. 43, 167). Flintlock asserts that even partial compliance will support a finding that a citation is not willful. (R. Br. 11, R. Reply, p. 6; citing *Sec'y v. The Barbosa Group, Inc.*, 296 F. Appx 211 (2d Cir. 2008); *Am. Wrecking Corp. v. Sec'y*, 351 F.3d 1254 (D.C. Cir. 2003) (*AWC*); *A. Schonbek & Co., Inc. v. Sec'y*, 646 F.2d 799 (2d Cir. 1981).)

Flintlock's reliance on *Schonbek* is misplaced. In *Schonbek,* the Second Circuit held there was no evidence of good faith where the company had not abated the problem in the month between the accident and OSHA's inspection. *Schonbek,* 646 F.2d at 800 (2d Cir. 1981) (finding the installation of a "dubious barrier" on a press did not militate against a willful violation). Similarly here, Flintlock ignored its training, safety plan, and the warnings of the onsite safety manager and only attempted to correct the problems after the OSHA inspection.

Barbosa is also an inapt comparison to the instant case. In *Barbosa*, the employer violated the bloodborne pathogen standard's requirement to provide follow-up care at no cost to the employee. Barbosa paid for initial post-exposure evaluation and secured the required follow-up treatment; however, it did not pay the copays and charged the employee for time off for the follow-up treatments. *Id.* Barbosa's partial compliance is not comparable to Flintlock's actions.

Here, Flintlock's addition of a debris net to a scaffold did not address the hazards of inadequate planking, bracing, or fall protection and thus was not a good faith attempt at compliance or correction of the underlying hazard. Further, Flintlock's correction of the hazard after the OSHA inspection is not in good faith when compared to Flintlock's lack of attention to Mr. DeCristoforo's repeated warnings prior to the OSHA inspection. Correcting the hazard only when confronted with an OSHA inspection, does not demonstrate a good faith attempt to provide a safe and compliant scaffold for employees.

AWC also does not favorably compare to the instant case. In *AWC,* the D.C. Circuit found the ALJ's underlying credibility findings for a key witness were inconsistent and thus did not support a willful characterization. *AWC,* 351 F.3d at 1263-64. Here, there is ample evidence of repeated warnings to Flintlock of safety problems and recorded daily logs of those warnings.

Flintlock relies on *Dayton* to assert that even a minimal attempt at compliance will negate a willful characterization. (R. Br. 12). *Dayton Tire, Bridgestone/Firestone*, 671 F.3d 1249, 1257 (D.C. Cir. 2012). Flintlock's reliance on *Dayton* is inapt. In *Dayton*, the D.C. Circuit held "an employer is entitled to have a good faith opinion that his conduct conforms to regulatory requirements" and found the employer's attempts to comply demonstrated good faith. *Id*. at 1257, quoting *C.N. Flagg & Co*., *Inc*., *d/b/a Northeastern Contracting Co.*, 2 BNA OSHC 1539, 1541 (No. 1409, 1975). Here, there is no evidence that Flintlock believed it complied with regulatory requirements.

Respondent attempts to distinguish the instant case from *Elzee,* where the Second Circuit upheld a willful violation. *Elzee Constr., Inc. v. Sec'y,* 131 F.3d 130 (2d Cir. 1997) (unpublished) (finding employer could have known of the existence of the violations with reasonable diligence). To the contrary, the instant case compares favorably. In *Elzee,* the employer had prior similar citations, the employer had received notice of violative conditions from an external source, and the employer's agents had made statements demonstrating disregard of the standard's requirements. *Id.* Based on these factors, the Second Circuit found the employer had not made a good faith effort to comply.

Here, Flintlock had a history of similar citations, the onsite safety manager informed Flintlock of multiple scaffold violations, its worksite superintendents made no effort to correct the continuing scaffold problems, and a superintendent asked the onsite safety manager to stop bothering him with the scaffold issues.

I find that Flintlock did not make good faith efforts to comply with safety requirements for the scaffolds at the 325 Project. The willful characterization for Citation 2, Items 1 through 4 is supported by the record.

Penalty

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. In *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993), the Commission stated:

> These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc*., 15 BNA OSHC 1481, 1483 [citation omitted] (No. 88-2691, 1992); *Astra Pharmaceutical Prods., Inc*., 10 BNA OSHC 2070 (No. 78-6247, 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc*., 10 BNA OSHC 1128, 1132 [citation omitted] (No. 76-2644, 1981).

The maximum penalty for a serious citation is $7,000. 29 U.S.C. § 666(b). For Citation 1, Item 1, the Secretary proposed a penalty of $6,160. For Citation 1, Items 2a and 2b, the Secretary proposed a combined penalty of $6,160. For Citation 1, Item 3, the Secretary proposed a penalty of $4,400.

The maximum penalty for a willful citation is $70,000. 29 U.S.C. § 666(a). For Citation 2, Item 1, the Secretary proposed a penalty of $61,600. For Citation 2, Item 2, the Secretary proposed a penalty of $61,600. For Citation 2, Item 3, the Secretary proposed a penalty of $48,400. For Citation 2, Item 4, the Secretary proposed a penalty of $61,600.

All but one of the citations were rated at the highest severity because of the likelihood of death. (Tr. 80-89; S. Br. 39). The probability of injury was rated as high except for one violation. *Id.* Due to Flintlock's size, 70 employees, the penalty was reduced by 20%. (Tr. 80, 81, 83; S. Br. 39). Due to Flintlock's history of serious and repeat violations over the five years prior to the inspection, the penalty was increased by 10%.[18] (Tr. 81; Ex. R-Q; S. Br. 39). There was no penalty reduction for good faith. (Tr. 97-98).

I find the Secretary has given due consideration to all the necessary criteria established by

[18] Flintlock received five citations from OSHA inspections in July 2008 and November 2008. (Tr. 221-22; Ex. R-Q).

the Act; the proposed penalties are appropriate and are assessed.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED**:

1. Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1926.451(b)(2), is AFFIRMED, and a penalty of $6,160 is assessed.

2. Citation 1, Item 2a, alleging a Serious violation of 29 C.F.R. § 1926.451(g)(2), and Citation 1, Item 2b, alleging a Serious violation of 29 C.F.R. § 1926.502(d)(15), are AFFIRMED, and a penalty of $6,160 is assessed.

3. Citation 1, Item 3, alleging a Serious violation of 29 C.F.R. § 1926.454(b)(1), is AFFIRMED, and a penalty of $4,400 is assessed.

4. Citation 2, Item 1, alleging a Willful violation of 29 C.F.R. § 1926.451(b)(1)(i), is AFFIRMED, and a penalty of $61,600 is assessed.

5. Citation 2, Item 2, alleging a Willful violation of 29 C.F.R. § 1926.451(c)(1), is AFFIRMED, and a penalty of $61,600 is assessed.

6. Citation 2, Item 3, alleging a Willful violation of 29 C.F.R. § 1926.451(e)(1), is AFFIRMED, and a penalty of $48,400 is assessed.

7. Citation 2, Item 4, alleging a Willful violation of 29 C.F.R. § 1926.451(g)(1)(vii), is AFFIRMED, and a penalty of $61,600 is assessed.

/s/Covette Rooney
Covette Rooney
Chief Administrative Law Judge

Dated: June 6, 2016
Washington, D.C.