United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. TKO, INC. d/b/a TKO CUSTOM HOMES, Respondent.	OSHRC Docket No. 14-0813

Appearances:

Norman Garcia, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California
For Complainant

James Reid, Esq. & Jennifer Reid Mahoney, Esq., Kaufman Reid, PLLC, Boise, Idaho
For Respondent

Before: Administrative Law John H. Schumacher

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). In response to a report of a fall resulting in injury, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite. The inspection took place on November 15, 2013, at Respondent's worksite located at the Evergreen Apartments in Twin Falls, Idaho. (Ex. C-1). As a result of the inspection, on April 30, 2014, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent, alleging

three serious and two willful violations with a total proposed penalty of $16,600.00.[1] The trial took place on May 4–5, 2015 in Boise, Idaho. Both parties timely submitted post-trial briefs.

II. Stipulations and Jurisdiction

On September 5, 2014, the parties submitted a "Joint Stipulation Statement" to the Court. (Ex. J-1). The Statement is identified in the record as Complainant's Exhibit No. 1. (Ex. C-1). In lieu of reproducing the entire set of stipulations, the Court shall refer to Exhibit No. C-1 as necessary. As part of those stipulations, the parties agreed that Respondent is "an employer engaged in business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970" and that the "Occupational Safety and Health Review Commission has jurisdiction over this matter." (Ex. C-1 at 1–2).

In addition, Respondent has also stipulated that it violated each of the cited standards indicated in Citation 1, Items 1, 2, and 3, as well as Citation 2, Items 1a and 1b. (*Id.* at 3–7). As such, the Court's discussion will be limited to whether the penalties associated with the items in Citation 1 are appropriate and whether Citation 2 is properly characterized as willful.[2]

III. Factual Background

Four witnesses testified at trial: (1) Joan Behrend, Compliance Safety and Health Officer ("CSHO"); (2) Jared Hunt, Respondent's General Manager; (3) David Kearns, OSHA Area Director; and (4) Chris Bailey, Respondent's on-site foreman.

a. Respondent's Operations

Respondent is a general contractor in Twin Falls, Idaho. (Ex. C-1). The company employs nine employees, consisting mainly of the general manager, a couple of foreman, and

1. The penalty for the two-part willful citation item was originally assessed at $22,000.00. The total penalty for the willful citation item was supposed to be $11,000.00. Counsel for Complainant filed a motion to amend, requesting the penalty of the willful citation item be reduced to $11,000.00, which was granted by the Court. *See Motion for Leave to Amend Complaint and the Assessed Penalty for One Citation Item*.
2. Respondent has also contested the propriety of the penalty with respect to the items listed in Citation 2.

administrative staff. (Tr. 216). Other than the foremen, Respondent does not employ construction laborers; instead, Respondent relies almost exclusively on subcontractors to perform construction services. (Tr. 217). Although the project at issue in this case involved the construction of multi-family apartment buildings, the lion's share of Respondent's business is the construction of single-family residences. (Tr. 80).

b. The Accident

The Evergreen project involved the construction of four multi-family buildings, which commenced in the spring of 2013. (Tr. 288). Each of these buildings is two stories tall, with two separate stairways attached to the front of the building. The stairs provide access to the upper apartment units. (Ex. C-3). At their highest point, the stairways reach a landing that is nine feet above the ground. (Tr. 50; Ex. C-3 at 26). None of the stairways or landings, however, were equipped with stairrails[3] or handrails. (Tr. 46; Ex. C-3). On Tuesday, November 12, 2013, a subcontractor employee from Magic Plumbing, who was doing work on the second floor of building 4 or 5,[4] fell from the stairs. As a result of the fall, the employee broke his nose and bones in his back. (Tr. 103, 296). Although other people were on the worksite at the time, nobody observed the accident.

After the accident, Magic Plumbing pulled its employees from the Evergreen worksite due to "obvious safety violations and concerns" and told Respondent that the plumbers would not return to the worksite until handrails were placed on the stairways. (Ex. R-1 at 2). A report was filed with Complainant, who conducted an inspection on Friday, November 15, 2013.

3. As a point of clarity, the cited standard uses the term "stairrail" as a singular word.
4. Mr. Bailey could not recall which building it was. (Tr. 296).

c. The Inspection

1. CSHO Behrend's Observations

When CSHO Behrend arrived at the Evergreen worksite, she quickly identified stairways without rails on three out of the four buildings under construction—the stair rail on building 4 was just being installed. (Tr. 46–47; Ex. C-3 at 30). The unguarded stairways led to second-floor landings that were also missing appropriate guardrails. (Tr. 46; Ex. Ex. C-3). As she approached the worksite, CSHO Behrend observed subcontractor employees using the unprotected stairs. (Tr. 57). Upon closer examination, CSHO Behrend found that Respondent allowed construction debris and building materials to accumulate in walkways and working areas, including at the bottom of the stairways on buildings 3 and 5. (Tr. 50). This hazard was exacerbated by the fact that, in buildings 3 through 6, the stairways were missing the bottom tread.[5] (Tr. 50; Ex. C-3 at 25, 27, 31, 34). According to CSHO Behrend's measurements, this exposed subcontractor employees to a 21-inch break in elevation from the last tread on the stairway to the ground. (Tr. 108; Ex. C-3 at 27).

During the course of her inspection, CSHO Behrend met with Chris Bailey, who identified himself as the project foreman. (Tr. 47, 66; Ex. C-1). At the request of CSHO Behrend, Bailey consented to a recorded interview,[6] portions of which were played at trial. (Tr. 65). In his post-trial brief, Complainant asserts that Bailey's trial testimony was not credible because it conflicted with the statements he gave during the recorded interview. Because Respondent has already conceded the fact of the violations alleged by Complainant, the recorded statements and trial testimony of Bailey (and to a certain extent, Jared Hunt) are crucial to the

5. The "tread" is the horizontal part of each stair or, more simply, where a person actually sets her foot. *See, e.g.*, 29 C.F.R. 1926. 1050 ("*Tread depth* means the horizontal distance from front to back of a tread . . . .").
6. The interview was recorded with a video camera; however, the camera was not pointed at Mr. Bailey and was used as an audio recording device. (Exhibit 1 to Complainant's Ex. C-1).

Court's determination of Bailey's credibility and, subsequently, whether Complainant properly characterized Citation 2, Items 1a and 1b as willful. As such, the Court will address Bailey's and Hunt's interview statements and trial testimony.

2. Chris Bailey's Interview[7]

As noted above, Bailey introduced himself to CSHO Behrend as the foreman/superintendent and proceeded to provide details about the construction project as a whole, as well as the specific details regarding the missing stairrails. (Tr. 66).

One of Bailey's explanations for the missing stairrails was that the support posts had been wrapped with a metal finish and that the framers were concerned they would ruin the finish if they installed temporary rails. (Tr. 69; Ex. C-3 at 26, 28–29, 33). So, he stated, "[T]hey just didn't get put on. We didn't temp them. And that's just the truth." (Tr. 69). Bailey told CSHO Behrend that, at the time of the inspection, the stairs had been installed for approximately three weeks, and, during that time, he "absolutely" had people working in the upper levels of the buildings. (Tr. 70). This list of contractors included plumbers, heating contractors, electricians, insulators, sheetrockers, and painters. (Tr. 70).

After discussing some of the time and scheduling constraints, Bailey, without prompting, told CSHO Behrend, "Obviously, I'm well aware that we're in violation of—handrailwise, for sure." (Tr. 72). He noted that when the plumber fell, he contacted his boss and said, "George got hurt. OSHA's probably going to show." (Tr. 74). Bailey then relayed that he told Hunt that the permanent handrails were going to be onsite in one day, and inquired how he should handle the situation. (Tr. 74). In response, Hunt told Bailey to "[j]ust put the permanent ones on when they

7. Chris Bailey's interview is contained on a compact disc, which is attached as an exhibit to the parties' *Joint Stipulations*. (Ex. C-1). The portions of the interview played at trial were transcribed by the court reporter. Thus, the Court will refer to the pages of the trial transcript when citing Bailey's and Hunt's interview statements.

get there." (Tr. 74). CSHO Behrend followed up and asked whether there were any discussions regarding the hazards posed by the missing handrails, to which Bailey responded that no such discussions took place. (Tr. 74). He then reiterated that he "absolutely" knew it was a hazard to have an unprotected stairway and landing. (Tr. 74–75). This, Bailey explained, was due to the fact that he had recently attended the OSHA 10-hour class. (Tr. 75, 79). Nevertheless, Bailey told CSHO Behrend that he could not give a good answer as to why rails were not put up. (Tr. 75). He also admitted that he did not put up warning signs, caution tape, or barriers to prevent entry onto the stairways, though he admitted "it probably would have helped." (Tr. 77).

Perhaps the most concerning portion of the interview, however, came after CSHO Behrend asked whether Bailey was simply disregarding the OSHA standards. (Tr. 78). In response, Bailey stated, "Well, we've never really, honestly, [sic] followed OSHA that much. We went to the 10-hour training course . . . they just never enforced us to do it."[8] (Tr. 79). Bailey further stated that the OSHA training has "never been a priority" and that he did not have a good answer as to why the standards were not enforced, especially after he was sent to the OSHA 10-hour course. (Tr. 79). Towards the end of the interview, Bailey reiterated that he was aware that a fall hazard existed before the accident and that his company "never had a safety meeting" and "there's very, very little talk of safety ever." (Tr. 85–86)

Further along in the interview, Bailey stated that the Evergreen project was the first multi-family project for Respondent, which typically constructs single-family residences. (Tr. 80–81). Bailey stated that, at some point during the construction, the owner placed pressure on him to get the project done by December 1, 2013. (Tr. 82). This, he believed, contributed to the missing handrails—he did not have enough time to so install them. (Tr. 82). Again, however, he

8. Bailey clarified that "they" meant "our office". (Tr. 79).

reiterated that the rails "absolutely" should have been put on. (Tr. 82). Bailey even mentioned that one of the subcontractor employees "jokingly" mentioned that he hoped he would never fall off of the stairs and that he had seen the employee hop over the side or jump off the side of the stairs "many times". (Tr. 83–84).

3. Jared Hunt Interview

CSHO Behrend also interviewed Respondent's General Manager, Jared Hunt. (Tr. 90). During the course of that interview, Hunt stated that he was an accountant by trade and that he relied on Bailey—whom he referred to as his foreman—to be in charge of what is going on at the worksite. (Tr. 93). In that respect, Hunt told CSHO Behrend that he does not go to the job site very often. (Tr. 92). Hunt also told CSHO Behrend that neither he nor Bailey prevented workers from accessing the second floor during the period between the accident and the inspection, even though they had received notice from the plumbing contractor that it would not be returning to the worksite until the hazards were abated. (Tr. 95–97). In one of the last clips of Hunt's interview, Hunt stated that he relied on Bailey to be "my eyes out in the field" based on his extensive framing experience and recent OSHA-10 training. (Tr. 99–100).

d. Trial Testimony

1. Chris Bailey

At trial, Bailey told a much different story than the one he relayed in his interview with CSHO Behrend. Though there were certainly consistencies—he was the foreman in charge of day-to-day operations and scheduling, he recalled the subcontractor employee jumping off the stairs, and that scheduling presented a challenge—much of the testimony was either inconsistent with or flatly contradicted the information Bailey provided to CSHO Behrend during their onsite

interview. These inconsistencies are important because the facts they relate to form the basis of Complainant's characterization of Citation 2, Items 1a and 1b as willful.

During his interview with CSHO Behrend, Bailey expressed that the project initially languished due to lack of motivation by the owner and difficulty in procuring and scheduling subcontractors. (Tr. 82). Later on, however, Bailey said he felt "the pressure of it, all of a sudden" to be finished by the December 1, 2013 deadline. (Tr. 81–82). He claimed that the deadline pressure "leads into part of it too. We're short-handed. I don't have time to put the handrails on." (Tr. 82). At trial, however, Bailey testified that he did not feel the pressure of the December 1, 2013 deadline, stating "I know what pressure to finish a project feels like, and that was not it." (Tr. 291).

In addition to not having time to install the rails, Bailey also told CSHO Behrend that the stairway posts had been wrapped in finishing material and that they did not want to damage it by installing temporary railing systems. During his testimony, though Bailey recognized the issue with the finished posts, he instead claimed that the temporary handrails were not installed because "it was not on our radar. I mean, like I said, I never had any formal training for safety, so I was doing the best I could." (Tr. 308). In other words, Bailey went from claiming (multiple times) that he "absolutely" knew that the missing handrails were a violation to asserting that he only learned it was a violation after his framer, Karl, told him on Wednesday—the day after the accident—that they were in trouble. (Tr. 352, 360). While this inconsistency could be explained by the fact that Bailey spoke with Karl before his interview with CSHO Behrend, the Court is unconvinced.

First, during his interview with CSHO Behrend, Bailey stated that "when—when George got hurt I went 'Oh, shit,' basically. I called my boss and said: George got hurt. OSHA's

probably going to show. And I said that: The permanent handrails are going to be here in one day, so what do you want me to do?" (Tr. 73–74). In other words, Bailey recognized that there was a violation before Karl told him on Wednesday, which is what he told his boss the day of the accident. Second, this finding is supported by the fact that, when asked by CSHO Behrend whether he knew that it's a hazard to have an unprotected stairway and landing, he responded, "Oh, I've taken an OSHA training class. Yes, I'm aware." (Tr. 75).

At trial, Bailey testified that he had not scheduled, nor was he aware of, subcontractors at the Evergreen project during the three weeks prior to, and the three days after, the accident. (Tr. 319). He stated that he received a call from the plumbing subcontractor after the accident and asked, "I am sorry, but what in the hell were you even doing there? I didn't have any one scheduled to be there this week at all." (Tr. 296). Contrariwise, during his interview with CSHO Behrend, Bailey was able to recall a litany of subcontractors that had not only been on site, but had "absolutely" performed work on the upper floors, such as electricians, painters, and heating/cooling technicians. (Tr. 70). Further, as regards the scheduling, Bailey admitted that it was "very, very loose" and that they did not use the scheduling software they normally used for their residential building projects. (Tr. 320). In that respect, the Court is confused as to how Bailey would know when anyone was supposed to be at his worksite, let alone be able to recall three years later that no one was scheduled to be at work during the three weeks that the stairs had been installed. Just three days after the accident, Bailey was able to recall numerous contractors that had performed work on the second floors of the Evergreen buildings. Additionally, the Court cannot reconcile the fact that both Bailey and Hunt testified that they had a December 1, 2013 deadline—whether reasonable or not—and that Bailey did not have a single contractor scheduled to work at Evergreen during the first three weeks of November.

Finally, perhaps one of the few consistent elements of Bailey's interview and testimony was that safety was not high on the list of priorities for Respondent. In addition to explicitly saying as much during his interview, Bailey repeatedly testified that he was not a safety expert and that he had received very little training—other than the OSHA 10-Hour course. (Tr. 304, 307, 330, 373). Notwithstanding his lack of safety expertise, Bailey recognized he was ultimately responsible for ensuring that subcontractors complied with applicable safety regulations and Hunt entrusted him in that role. (Tr. 99–100, 332). Even though he recognized this responsibility, Bailey testified, "I still to this day have never reviewed [the OSHA regulations for residential construction]." (Tr. 384).

IV. Discussion

As noted above, Respondent stipulated that it violated the cited standards. Thus, the only remaining issues are whether the items contained in Citation 2 were willful and whether the penalties assessed for the items contained in Citation 1 were appropriate. This section addresses the characterization of Citation 2.[9] As discussed above in Section III, there is a significant discrepancy between the statements Bailey made during the course of his interview with CSHO Behrend and his testimony at trial. Thus, the Court's determination of willfulness will depend on whether it finds the testimony of Bailey credible and, if not, whether the prior statements he gave—in addition to other record evidence—illustrate plain indifference to or intentional disregard of the Act's requirements. *See Kaspar Wire Works, Inc.,* 18 BNA OSHC 2181 (No. 90-2775, 2000). Based on its review of the record evidence, the Court is unconvinced by Bailey's trial testimony and finds that Respondent's failure to install handrails on the stairs and landings was a willful violation of the Act.

9. The discussion of proper penalties will be discussed later in this opinion. *See* Section V, *infra*.

a. Citation 2, Item 1a

Complainant alleged a willful violation of the Act as follows:

29 CFR 1926.1052(c)(1)(ii): Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, were not equipped with a stair rail system along each unprotected side or edge:

a) Buildings 3 through 6: On November 15, 2013 and at times prior thereto a stair rails system was not in place along each open sided stairway, exposing sub-contractors of TKO Custom Homes to 9 foot fall hazards while using the open sided stairways for access to the second floor levels.

The cited standard provides:

Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with . . . One stairrail system along each unprotected side or edge.

29 C.F.R. § 1926.1052(c)(1)(ii).

b. Citation 2, Item 1b

Complainant alleged a willful violation of the Act as follows:

29 CFR 1926.1052(c)(12): Unprotected sides and edges of stairway landings were not provided with guardrail systems that meet the criteria contained in Subpart M of 29 CFR 1926:

a) Buildings 3 through 6: On November 15, 2013 and at times prior thereto a guardrail system was not in place along each stairway landing, exposing sub-contractors of TKO Custom Homes to 9 foot fall hazards from the open sided stairway landings to the concrete below.

The cited standard provides:

Unprotected sides and edges of stairway landings shall be provided with guardrail systems. Guardrail system criteria are contained in subpart M of this part.

29 C.F.R. § 1926.1052(c)(12).

As a preliminary matter, the Court would like to address the credibility of Bailey's trial testimony vis-à-vis his recorded interview. Based on the facts described above, the Court accords Bailey's trial testimony very little weight. In significant respects, Bailey's trial

testimony was either inconsistent with or flatly contradictory of the statements he gave to CSHO Behrend just three days after the accident occurred. During his interview, he repeatedly stressed that he "absolutely" knew that missing handrails was a violation and a hazard, stating, "Oh, I've taken an OSHA training class. Yes, I'm aware." (Tr. 75). Yet, at trial, Bailey would have the Court believe that a foreman with nearly 20 years of experience as a framer and recent attendee at a 10-hour OSHA training course did not recognize the hazard of unprotected stairs and landings.[10] The Court declines this invitation. During his interview, not only did Bailey tell CSHO Behrend that he was aware of the hazard, he also gave the reasons why it was not abated—shortage of labor, late delivery of materials, and a lack of emphasis on safety, none of which have anything to do with ignorance of the violation or hazard. Respondent simply did not do anything. At trial, Bailey was at first convinced that no subcontractors were scheduled or present on the second floor of the buildings and then testified on cross-examination that there were subcontractors on the second floor, but that he "didn't realize we were in said violation till [sic] after he got hurt." (Tr. 334). When interviewed, Bailey was able to recall a litany of different contractors that had been on the second floor.

Based on the foregoing, the Court finds that the statements Bailey gave to CSHO Behrend during her inspection on November 15, 2013, more accurately represent the events that transpired in this case. The statements Bailey gave only three days after the accident were confident and definitive. By contrast, his testimony wavered, was inconsistent at times, and, in some instances, was contradicted under cross-examination. Further, the interview statements occurred closer in time to the accident and are thus less susceptible to lapses in memory or

10. This is particularly incredible considering that Hunt, a self-professed accountant-by-trade who relied extensively on Bailey's construction experience, recognized that the need for handrails on stairs was common sense. (Tr. 171)

reinterpretation. Based on that characterization, the Court accords Bailey's trial testimony little to no weight. Thus, in terms of the events that transpired in this case, the Court will place significant weight on the statements Bailey gave to CSHO Behrend during the inspection.[11]

1. Was the Violation Properly Classified as Willful?

"A willful violation is one committed with either intentional disregard of or plain indifference to the requirements of the Act or a standard." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). "[I]t is not enough for the Secretary to show than an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation . . . . A willful violation is differentiated by a heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference." *Hern Iron Works*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). In other words, Complainant must show that, at the time of the violative act, the employer was either actually aware that the act was unlawful or "that it possessed a state of mind such that if it were informed of the standard, it would not care." *Propellex Corp.*, 18 BNA OSHC 1677 (No. 96-0265, 1999). Thus, it is not enough to show that Respondent was merely careless or displayed a lack of diligence. *Beta Constr. Co.*, 16 BNA OSHC 1435 (No. 91-102, 1993).

Good faith efforts to correct a particular hazard can negate a claim of willfulness; however, the Commission applies a test of objective reasonableness to determine whether an employer acted in good faith. *J.A. Jones*, 15 BNA OSHC 2201 (citing *A.P. O'Horo*, 14 BNA OSHC 2004, 2013 (No. 85-369, 1991); *Calang Corp.*, 14 BNA OSHC 1789 (No. 85-319, 1990).

11. In an attempt to mitigate the effect of his interview statements, Bailey testified that he was nervous during his interview. (Tr. 303–304). After reviewing the recording of the interview, the Court does not discern anything in Bailey's demeanor that would indicate he was overly anxious or in CSHO Behrend's questioning that would cause such a reaction.

Thus, an employer "is not necessarily spared from a finding of willfulness by taking any measure, regardless how minimal, to enhance employee safety." *Id.* (citing *Coleco Indus.*, 14 BNA OSHC 1961 (No. 87-2007, 1992). *See Thomas Industrial Coatings, Inc.*, 23 BNA OSHC 1521 (No. 06-1974 *et al.*, 2010) (ALJ) (holding that entrusting supervision over the construction of a scaffold to a foreman with minimal knowledge of scaffolding standards demonstrates an intentional disregard for the requirements of the Act); *Rawson Contractors, Inc.*, 20 BNA OSHC at 1082 (holding that even a good safety program is insufficient to negate willfulness where there is an absence of any evidence that the employer enforced its safety rules).

It is well established that the state of mind of a supervisory employee—the supervisor's knowledge and conduct—may appropriately be imputed to the employer for purposes of finding that the violation was willful. *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). Willful conduct by an employee in a supervisory capacity constitutes a *prima facie* case of willfulness against the employer. *V.I.P. Structures,* 16 BNA OSHC 1873, 1875, 1993-95 CCH OSHD ¶ 30,485, p. 42,109 (No. 91-1167, 1994). Whether a supervisor's conduct and knowledge should be imputed to the employer depends on the whether the employer has exercised good faith efforts to implement an effective safety program designed to prevent the kind of violation that occurred. *See Branham Sign Co.*, 2000 WL 675530 at *6 (No. 98-752, 2000).

First off, the Court would like to address Respondent's contention that Bailey's knowledge and conduct should not be imputed to Respondent. Respondent argues that Bailey was not, in fact, a supervisor according to the Act, because Jared Hunt was the individual in charge of the Evergreen worksite. While Hunt may have been the GM of Respondent, that does not mean that Bailey was not a supervisor. Respondent contends that Bailey was not a

supervisor because he could not hire or fire subcontractors, but the Commission has repeatedly held that the ability to hire or fire is not the *sine qua non* of a supervisory relationship; rather, it is the substance of an employer's delegation of authority that is of primary importance when determining whether knowledge should be imputed. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078 (No. 99-0018, 2003) (citing *Dover Elevator Co., Inc.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993)). In this case, Hunt testified that he was an accountant by degree and that he relied on Bailey to be his "eyes out in the field." (Tr. 100). Because he did not regularly travel to the worksite, Hunt placed Bailey in charge of the day-to-day operations of the worksite, including scheduling, stopping work for safety reasons, and inspecting subcontractors' work to ensure compliance with the contract. (Tr. 161–65). Ultimately, the Court finds that the substance of Respondent's delegation of authority to Bailey was such that he was properly considered a supervisor pursuant to the Act. As such, his knowledge and conduct is properly imputable to Respondent.

Complainant must show that, at the time of the violative act, the employer was either actually aware that the act was unlawful or "that it possessed a state of mind such that if it were informed of the standard, it would not care." *Propellex Corp.*, 18 BNA OSHC 1677 (No. 96-0265, 1999). During his interview with CSHO Behrend, Bailey reiterated no fewer than three times that he was "absolutely" aware that Respondent violated the Act by failing to install handrails on the stairs and landings—he even cited his attendance at an OSHA 10-hour course as the basis for that knowledge. (Tr. 74, 75, 82). When asked why the rails were not installed, Bailey told CSHO Behrend that he could not "give [her] a good answer" as to why neither a handrail nor a barrier or warning of some type was installed. (Tr. 75). At various points in the

interview, Bailey pointed towards problems with scheduling, labor shortages, and the shifting priorities of the project owner as contributing factors. (Tr. 81–82).

This, of course, is problematic for a number of reasons. First, Bailey knew that the missing handrails were both a hazard and a violation before the accident occurred—not only did he specifically say as much to CSHO Behrend, but he also observed an employee jump off the side of an unprotected stairway multiple times. That same employee expressed concern about the possibility of injury. (Tr. 83–84). Whether this interaction occurred in a joking manner or not, Bailey was still presented with concrete information to suggest that the missing guardrails were a hazard—someone jumping off the side of the stairs. Second, there appeared to be more concern with damaging the finish on the stairway posts and complying with a deadline than ensuring employees were protected from falling. In lieu of installing temporary rails, or even a barricade or warning tape, Hunt told Bailey to wait to fix the problem until the permanent rails arrived on Friday, which was three days after the accident occurred. During that time, additional subcontractors worked on the upper floors of the Evergreen worksite without proper protection.[12]

Third, and perhaps most concerning, was Bailey's state of mind with respect to the governing standards. Bailey was the individual in charge of ensuring safety at the Evergreen worksite. Towards the end of his testimony, however, Bailey stated, "I still to this day have never reviewed [the OSHA regulations for residential construction]." (Tr. 384). In and of itself, this statement is damning—Bailey readily admitted that, even though he is in charge of safety, he has not bothered to take the time to review even the basic standards governing safety and health in

12. Although there is some dispute as to when Hunt learned of the accident—the weight of the evidence suggests he was informed on the evening the accident occurred—there is no question that he received an email from the plumbing subcontractor the day after the accident indicating they would not return to the worksite until the hazard was remedied. (Tr. 129, Ex. R-1). In the face of this information, neither Hunt nor Bailey took additional action to prevent access to the upper floors—they waited until the framing subcontractor arrived three days later, during which time other contractors accessed the upper floors. It should be noted that the material supplier was "literally 300 yards from that job site." (Tr. 360).

construction. *See, e.g.*, *Thomas Industrial Coatings, Inc.*, 23 BNA OSHC 1521 (holding that entrusting supervision over the construction of a scaffold to a foreman with minimal knowledge of scaffolding standards demonstrates an intentional disregard for the requirements of the Act). This is particularly troubling in light of the fact that Hunt testified that he relied almost exclusively on Bailey to be his "eyes in the field to make sure that things are going okay." (Tr. 99–100).

Although troubling, Bailey's attitude towards safety is not particularly surprising. On multiple occasions during his interview with CSHO Behrend, Bailey stated that safety had "never been a priority" for Respondent and that Respondent "never had a safety meeting . . . . I mean, really there's very, very little talk of safety ever." (Tr. 74, 78–79, 85–86). Coincidentally, Bailey's trial testimony on this topic was fairly consistent—he took great pains to point out that he received very little training on safety and repeatedly stated that he was "no safety expert." (Tr. 307). Instead, Bailey relied on his subcontractor employees to inform him whether they felt safe. (Tr. 332). Similarly, Hunt relied on Bailey to inform him of any problems at the worksite.

It appears as if the only indications of a safety program are Hunt's word that he is concerned about the safety of his workers and a claim that he does not hire subcontractors with a history of OSHA violations. Aside from expressing a desire to keep employees safe, however, Respondent did not proffer any evidence of a safety program. *See Rawson Contractors, Inc.*, 20 BNA OSHC at 1082 (holding that even a good safety program is insufficient to negate willfulness where there is an absence of any evidence that the employer enforced its safety rules). In *Rawson*, the Commission upheld a willful characterization even though the respondent "had a good safety program for the construction industry" as well as "rules governing the conditions cited" and a system to "communicate[] the rules to its employees." *Id.* In the view of

the Commission, however, even a safety program characterized as "good" was insufficient to mount a good faith challenge to a willful characterization in the absence of any attempt to monitor or enforce safety rules. Considering the lack of any semblance of a safety program, let alone a means to monitor or enforce it, the Court sees no reason to depart from precedent in this case. Accordingly, Respondent's good faith claim is rejected.

The Court finds that Respondent committed a willful violation of the Act. Bailey repeatedly affirmed that he was "absolutely" aware of the violation and hazard prior to the accident, and stated that his awareness of the standard was based on his 10-hour OSHA training. This was a patently obvious hazard—Hunt testified that, even though he was an accountant-by-trade, he nonetheless recognized the missing handrails as a hazard. Notwithstanding the obviousness of the hazard, the rails were not installed after Bailey observed an employee jumping off of the stairs and expressing concern about possible injury; nor were they installed (or access restricted) until nearly three days after the same plumbing employee fell off the stairs. This constitutes heightened awareness of the violative conditions. *See, e.g.*, *Hern Iron Works*, 16 BNA OSHC at 1214. Further, the fact that Bailey readily admitted that, even after the accident, he had never reviewed the OSHA construction standards reflects an attitude of plain indifference to the standards' requirements. This state of mind was shared equally by Respondent, as an organization, to the extent that Hunt relied almost exclusively on Bailey and exercised little to no oversight of the working conditions. (Tr. 167–70). In addition, Bailey told CSHO Behrend, without contradiction, that safety was never discussed nor made a priority by Respondent, which explains why Respondent's safety program was largely dependent upon employees reporting problems, as opposed to taking affirmative steps to prevent hazards in the first instance.

Accordingly, Citation 2, Items 1a and 1b are hereby AFFIRMED as willful violations of the Act.

V. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995).

a. Citation 1, Items 1, 2, and 3

As noted above, Respondent stipulated to the fact of the violation for each of the items contained in Citation 1. The sole, remaining dispute is the propriety of the penalties associated with each item.

In Citation 1, Item 1, Respondent was cited pursuant to the housekeeping standard based on its failure to maintain working areas clear of debris. Complainant determined that the violation was of low severity and low probability, that Respondent was entitled to a 60% reduction due to its size, and proposed a $1,200 penalty. Respondent contends that the penalty was out of proportion considering the nature of the violation, the fact that it had not previously

been cited, and the fact that Respondent had no prior injuries. In particular, Respondent takes issue with Complainant's decision to issue the maximum penalty—pursuant to the Field Operations Manual—for a low severity, low probability violation. (Tr. 264). The housekeeping issues identified by CSHO Behrend were located at the bottom of two of the stairwells, which, as previously discussed, were missing the bottom tread and handrails. (Ex. C-3 at 25, 34). While the materials shown at the bottom of the stairs in building 3 clearly impede traffic and exacerbate an already hazardous condition, the photo of building 5 shows a singular block of wood underneath the stairs. (*Id.*). Given its position relative to the stairs, the Court does not find that the block of wood at building 5—independent of the missing bottom tread—presents a significant hazard. Accordingly, the Court finds that a penalty of $1,000 is appropriate.

In Citation 1, Item 2, Respondent was cited for failing to install a bottom tread on the stairs in buildings 4–6. This resulted in a 21-inch drop from the bottom tread, which is two inches higher than the maximum allowed 19 inches. Complainant characterized this citation item as a medium severity, lesser probability violation, and assessed a penalty of $2,400. As with Item 1, Respondent contends that the starting point for the penalty, not including the reduction for size, was too high. The Court disagrees. In addition to already missing handrails and, in at least one case, construction debris at the bottom of the stairs, the bottom tread was missing on three separate buildings. In other words, the missing bottom tread made an already hazardous situation even worse. The Court sees no reason to depart from the recommendation of Complainant. Accordingly, the Court finds that a penalty of $2,400 is appropriate.

In Citation 1, Item 3, Respondent was cited pursuant to 29 C.F.R. § 1926.1052(c)(1)(i) for failing to have handrails along the stairways of each building under construction at the Evergreen worksite. The Court references the specific standard to point out that Respondent was

also cited pursuant to 1926.1052(c)(1)(ii) (Citation 2, Item 1a) and 1926.1052(c)(12) (Citation 2, Item 1b). While Citation 2, Item 1b deals with a distinct working surface—stairway landings—Citation 1, Item 3 and Citation 2, Item 1a are virtually identical in that they are both sub-requirements of the same standard—1926.1052(c)(1), which requires a handrail *and* a stairrail system. Clearly, Respondent did not have either a stairrail system or a handrail. In order to comply with 1926.1052(c)(1), Respondent was required to have both. *See* 29 C.F.R. § 1926.1052(c)(1). In fact, the definition of stairrail system indicates that "[t]he top surface of a stairrail system may also be a handrail." *Id.* § 1926.1050. In other words, all three items address nearly the same issue—the utter lack of rails of any type along the stairways at the Evergreen worksite.

"The Commission has wide discretion in the assessment of penalties for distinct but overlapping violations and we have held that it is appropriate to assess a single penalty for such related violations." *L. E. Myers Co.*, 16 BNA OSHC 1037 (No. 90-945, 1993) (citations omitted). Due to the overlap of Citation 1, Item 3 and Citation 2, Item 1a, the Court finds that a single penalty should be applicable to all three items. Because Citation 2, Items 1a and 1b are already grouped, the Court will group all three items together for penalty purposes. The penalty for those citation items will be discussed further below.

b. Citation 2, Items 1a and 1b

The Court has already addressed the particulars of this violation at length: (1) Respondent failed to install railings on any of the stairways or landings; (2) Respondent knew that the failure to do so not only presented a hazard but was also a violation of the Act; (3) not only were subcontractor employees repeatedly exposed to the hazard, but one of those employees actually fell and suffered serious injuries; and (4) Respondent had no discernible safety program, written

or otherwise. Based on these facts, the Court finds that the violation was of high gravity and that the penalty assessed was proper. *See J.A. Jones Constr. Co.*, 15 BNA OSHC at 2214, *supra*. Accordingly, a penalty of $11,000 will be assessed for Citation 1, Item 3 and Citation 2, Items 1a and 1b.

ORDER

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

1. Citation 1, Item 1 is hereby AFFIRMED as a serious violation of the Act, and a $1,000.00 penalty is ASSESSED.
2. Citation 1, Item 2 is hereby AFFIRMED as a serious violation of the Act, and a $2,400.00 penalty is ASSESSED.
3. Citation 1, Item 3 is hereby AFFIRMED as a serious violation of the Act.
4. Citation 2, Items 1a and 1b are hereby AFFIRMED as willful violations of the Act.
5. The Court ASSESSES a grouped penalty of $11,000.00 for Citation 1, Item 3, and Citation 2, Items 1a and 1b.

SO ORDERED

/s/
John H. Schumacher
Judge, OSHRC

Date: May 16, 2016
Denver, Colorado