United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. A.C. Castle Construction Co., Inc./Daryl J. Provencher, d/b/a Provencher Home Improvement, Respondent.	OSHRC Docket No. **15-0706**

Appearances:

James Glickman, Esquire, U.S. Department of Labor, Office of the Solicitor, Boston, Massachusetts
For the Secretary

James F. Laboe, Esquire, Orr & Reno, P.A., Concord, New Hampshire
For the Respondent

Daryl J. Provencher, *pro se*, Provencher Home Improvement, Beverly, Massachusetts
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

On October 2, 2014, at least two members of a roofing crew were injured after falling approximately 20 feet from a wooden plank that snapped as they were standing on it while working on a house in Wenham, Massachusetts. The Occupational Safety and Health Administration (OSHA) inspected the worksite that same day. As a result of the inspection, OSHA issued a citation and notification of penalty on March 30, 2015, alleging serious, willful, and repeat violations of construction standards issued under § 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act).

OSHA cited two employers with the same citation—A.C. Castle Construction Company, Inc. (A.C. Castle) and Daryl J. Provencher d/b/a Provencher Home Improvements (PHI).[1]

[1] To differentiate between the business entity and the person, the Court will refer to the business entity as PHI and to Daryl Provencher by name.

OSHA did so because it believes the two companies are a single employer. Alternatively, OSHA contends the two companies should be held liable as joint employers or as a controlling employer (A.C. Castle) and an exposing employer (PHI).

A.C. Castle and PHI disputed these characterizations of their relationship, asserting A.C. Castle acted as a general contractor in securing contracts with homeowners to replace the roofs on their houses, which A.C. Castle then subcontracted to various roofing companies, including PHI. A.C. Castle also argues, through counsel, it had no personnel on the site and therefore lacks knowledge of any alleged OSHA violations. PHI, represented by Daryl Provencher *pro se*, agreed that A.C. Castle and PHI were two separate companies and had a traditional contractor/subcontractor relationship.

The Court held a three-day hearing in this matter in Boston, Massachusetts, from June 21 to June 23, 2016. The Secretary and A.C. Castle filed post-hearing briefs on September 9, 2016. PHI did not file a post-hearing brief. On January 4, 2017, counsel for the Secretary informed the Court Mr. Provencher had passed away on December 29, 2016.[2]

For the reasons that follow, the Court finds A.C. Castle and PHI were a single employer at the time of the October 2, 2014, OSHA inspection at the Parsons Hill Road worksite.

ALLEGED VIOLATIONS

In Citation No. 1, OSHA alleges serious violations of the following construction standards and proposes the following penalties:

> Item 1: 29 C.F.R. § 1926.451(b)(2)(i) (required minimum width of scaffold) --$5,500.00;
>
> Item 3: 29 C.F.R. § 1926.452(k)(5) (prohibition of bridging scaffold platforms) --$7,000.00;[3]
>
> Item 4a: 29 C.F.R. § 1926.454(a) (training of employees working on scaffolds)--$7,000.00;

[2] On January 11, 2017, the Court initiated a conference call with counsel for the Secretary and A.C. Castle to discuss the impact of Mr. Provencher's untimely death on this proceeding. In accordance with the conference call, the Court issued a briefing notice to the parties directing them to submit briefs, due January 31, 2017, addressing what effect, if any, Mr. Provencher's death has on the Court's jurisdiction over PHI and whether either party should move for substitution of a proper party under Fed. R. Civ. P. 25(a). The Secretary and A.C. Castle timely filed the requested briefs.

[3] The Secretary withdrew Item 2, alleging a violation of 29 C.F.R. § 1926.451(f)(4), prior to the hearing (Tr. 7-9).

Item 4b: 29 C.F.R. § 1926.454(b) (training of employees involved in erecting, disassembling, etc., of scaffolds)—penalty grouped with Item 4a;

Item 5: 29 C.F.R. § 1926.502(d)(15) (installation of anchorages used for attachment of personal fall arrest equipment) --$7,000.00.

In Citation No. 2, OSHA alleges willful violations of the following construction standards and proposes the following penalties:

Item 1: 29 C.F.R. § 1926.451(a)(1) (weight capacity of scaffold components) --$70,000.00;

Item 2: 29 C.F.R. § 1926.452(k)(1) (platforms shall not exceed height of 20 feet) --$60,500.00;

Item 3: 29 C.F.R. § 1926.1053(b)(1) (extension of portable ladders above upper landing surface) --$60,500.00.

In Item 1 of Citation No. 3, OSHA alleges a repeat violation of 29 C.F.R. § 1926.451(g)(1)(i) for failure to ensure employees on scaffolds used personal fall arrest systems. OSHA proposes a penalty of $70,000.00 for this item.

Having reviewed the record, the Court affirms Items 1, 3, and 5 of Citation No. 1 and assesses penalties totaling $19,500.00 for those three items. The Court vacates Items 4a and 4b of Citation No. 1 and assesses no penalty for the grouped items. The Court affirms Items 1 through 3 of Citation No. 2, reclassifies Items 2 and 3 as serious, and assesses penalties totaling $84,000.00 for those three items. The Court affirms Item 1 of Citation No. 3 as a repeat violation and assesses a penalty of $70,000.00 for that item.

BACKGROUND

On October 2, 2014, a roofing crew consisting of at least five workers was engaged in a roofing job on a house on Parsons Hill Road in Wenham, Massachusetts. Work had started late that day because of rainy weather. Before driving to the worksite, the supervisor of the crew, Daryl J. Provencher, had gone to Moynihan Lumber, a lumber yard and hardware store, to buy four rough spruce planks. The invoice for the planks is time-stamped 11:15 a.m. (Exh. C-18). Once Mr. Provencher arrived at the worksite, the crew set up a ladder jack scaffold (consisting of a two-plank platform resting on brackets attached to two ladders). The crew used one of the rough spruce planks and an aluminum plank (pick) for the platform, with the left edge of the

rough spruce plank resting atop the right edge of the aluminum pick (Exh. C-1). After observing the ongoing work and noting the continuing drizzle, Mr. Provencher decided to return to Moynihan Lumber for a rain tarp (Tr. 656).

At approximately 1:15 p.m., the rough spruce plank snapped while at least two workers were standing on it. The workers, who were not tied off to an anchor point, fell to the ground. Two of the workers were seriously injured (Exh. C-1; Tr. 177). Roofer S.C., who was on the roof ripping off shingles when the board snapped, called 911. Mr. Provencher received a phone call from someone who informed him of the accident as he was on his way back after purchasing the tarp. He estimated the accident happened an hour after he left the worksite (Tr. 656).

Emergency medical technicians and officers from the Wenham Police Department arrived at the site. The emergency medical technicians transported two of the injured workers to the hospital. A police officer called OSHA and informed it of the accident. OSHA compliance safety and health officer (CSHO) Thomas Braile arrived at the site at approximately 2:40 p.m.[4] CSHO Braile spoke with the police officers, took photographs and measurements, and interviewed workers at the site (Tr. 47-48; 96-97). He held an opening conference attended by Mr. Provencher and three members of the roofing crew (Tr. 99).

Mr. Provencher told CSHO Braile he had purchased the rough spruce planks that day and "they shouldn't have broke." (Tr. 195) Mr. Provencher showed him the invoice for the rough spruce planks. CSHO Braile pointed out to Mr. Provencher that the invoice stated the planks he bought were "NOT FOR STAGING." (Exh. C-18; Tr. 194-196). Mr. Provencher told the CSHO that "these are the planks that they have been using for 20 years." (Tr. 196-197) CSHO Braile also interviewed the three workers on the site individually (Tr. 177).

On December 1, 2014, Mr. Provencher met with CSHO Braile and Assistant Area Director (AAD) Robert Carbone at OSHA's Andover Area Office in response to a subpoena issued to PHI for documents. While there, according to CSHO Braile, Mr. Provencher "began speaking freely about his business model with Mr. LeBlanc." (Tr. 302) AAD Carbone took handwritten notes of the meeting, which were "not verbatim." (Tr. 423) Mr. Provencher did not

[4] CSHO Braile had worked as an OSHA compliance officer for three and a half years at the time of the hearing (Tr. 90). Prior to becoming a compliance officer, CSHO Braile had worked as an environmental health and safety manager and as a safety consultant (Tr. 93-94). He had inspected approximately 100 worksites at the time he conducted the inspection at the Parsons Hill Road worksite. Approximately three fourths of those inspections involved construction (Tr. 92).

sign the statement (Tr. 549). Based on the information provided by Mr. Provencher, the Secretary developed the theory A.C. Castle and PHI were operating as a single employer at the time of the inspection at the Parsons Hill Road worksite. The Secretary decided to issue one citation and notification of penalty naming both A.C. Castle and PHI as the employer.[5]

Testimony of Employee Witnesses

Three roofing crew members who were at the Parsons Hill Road worksite at the time of the accident testified at the hearing (Mr. Provencher had been at the worksite earlier that day, but he was making a return trip to Moynihan Lumber when the accident occurred). The witnesses, referred to as Roofer S.C, Roofer S.H., and Roofer P.C, were reluctant to testify and did so grudgingly. Their respective memories of the events of the day often did not match up. As representatives of the cited respondents, both Mr. LeBlanc and Mr. Provencher were seated in the hearing room during the testimony. Their presence appeared to have a dampening effect on the witnesses. The Court, who observed the witnesses closely, was left with the impression Roofers S.C. and P.C were attempting to provide testimony that would find favor with Mr. LeBlanc. On the other hand, Roofer S.H., who was one of the employees who sustained serious injuries after falling from the scaffold and who was suing both A.C. Castle and PHI, appeared to be intent on doing the opposite.

The employee witnesses seemed evasive and ill at ease. They often replied they could not recall information when asked questions. Establishing the timeline of the day of the accident

[5] The Secretary adduced a copy of the notes of Mr. Provencher's statement at the hearing as Exhibit C-28. A.C. Castle objected to Exhibit C-28 on hearsay grounds (Tr. 424-428). The Secretary argued the statement was not hearsay under Fed. R. Civ. P. 801(d)(2(A) (not hearsay if "[t]he statement is offered against an opposing party and . . .was made by the party in an individual or representative capacity,") and 801(d)(2)(D) (statement not hearsay if made by "party's agent or employee on a matter within the scope of that relationship and while it existed.") (Tr. 427). The Court admitted Exhibit C-28 "contingent upon the Secretary being able to establish the employment relationship with respect to both alleged employers in this case." (Tr. 428) (At the time, the Secretary indicated he would supplement the record with a typed copy of the notes, to be designated as Exhibit C-28A, for easier reading. By letter to the Court dated June 29, 2016, the Secretary advised he would not be submitting the proposed exhibit C-28A.) The Court has now determined A.C. Castle and PHI operated as a single employer at the Parsons Hill Road worksite, but gives no weight to Exhibit C-28. AAD Carbone's notes do not indicate whether Mr. Provencher's statements were in response to questions (including leading questions) posed by OSHA representatives or were volunteered. Mr. Provencher's remarks are not verbatim and he did not sign the written statement. Mr. Provencher testified at the hearing and in a deposition. The Court finds this transcribed testimony, given under oath, to be more reliable. The Court also gives no weight to Exhibit R-29, an affidavit signed by Mr. Provencher on November 20, 2015, and admitted over the Secretary's objection (Tr. 19-21). Counsel for the Secretary correctly characterized the affidavit as "down the line, in the interest of A.C. Castle." (Tr. 552) The affidavit, drafted by counsel for A.C. Castle and not read by Mr. Provencher prior to signing it, has no probative value (Tr. 698-703).

presented difficulty for each of them. Their collective narrative seemed to be they had only recently arrived at the worksite and were waiting for the roof anchors to be installed so they could secure their lanyards to them. The evidence establishes, however, some of the crew members were on the roof ripping off shingles at the time of the accident, without waiting for the installation of the roof anchors (if, in fact, they were actually being installed) and without tying off. The Court does not find the testimony of the witness employees, summarized below, credible for the most part. The Court does credit, however, the statement made by Roofer P.C., identifying himself as "foreman on the roofing crew." (Tr. 593) Neither party raised the issue with him on cross-examination or otherwise disputed his statement. Mr. Provencher testified he left Roofer P.C. in charge when he was not at a worksite (Tr. 633).

Roofer S.C.

Roofer S.C. had worked for Mr. Provencher for two years (Tr. 39). He could not remember the time the roofing crew arrived at the Parsons Hill Road worksite on October 2, 2014, but thought it was in the morning (Tr. 41). He believed the day of the accident was also the roofing crew's first day on the job (Tr. 57).[6] He did not recall the number of employees in the crew (Tr. 45). He stated all the roofing projects he worked on for Mr. Provencher were "A.C. Castle jobs." (Tr. 53)

Upon arrival, the crew unloaded equipment and set up the scaffold (Tr. 42). At the time of the accident, Roofer S.C. was on the left side of the roof ripping off old shingles. He thought the other employees were "ripping as well." (Tr. 47) Roofer S.C. learned the board had broken and the workers had fallen when "[s]omeone said that they had fallen and to call the ambulance." (Tr. 47) Roofer S. C. believed two employees had fallen (Tr. 48).[7] He had "no idea" how long the workers had been on the wooden board before it had snapped (Tr. 50).

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[6] Roofer S.H. also believed the day of the accident was the first day on the Parsons Hill Road worksite (Tr. 380). Mr. Provencher and Roofer P.C. testified the day of the accident was the second day on the job (Tr. 594, 651). CSHO Braile estimated "close to 90 percent" of the shingles on the back side of the roof had been removed when he arrived the day of the accident (Tr. 99). The Court determines the weight of the evidence supports a finding that October 2, 2014, was the second day of the job at the Parsons Hill Road worksite.

[7] There is a discrepancy in the record as to whether two or three employees were on the wooden plank when it snapped (Tr. 177). The reporting officer of the Wenham Police Department stated in his report that he and the other responding officers found two seriously injured workers when they arrived at the worksite. Roofer S.C. told them two workers had been on the wooden board when it snapped and Roofer P.C. told them there may have been three

Roofer S.H.

Roofer S.H. has been in the roofing business for approximately 17 years. Most of that time he worked for A.C. Castle. Around 2011, Roofer S.H. started working for PHI (Tr. 371-372). He was one of the workers who was seriously injured in the fall from scaffold platform.

Roofer S.H. testified that the morning of October 2, 2014, he went to Mr. Provencher's garage. From there, Mr. Provencher drove him and another worker to Moynihan Lumber and picked up the wooden planks (Tr. 373). They then drove to the Parsons Hill Road worksite, where they proceeded to set up (Tr. 375). At some point, Roofer S.H. and several other crew members used the scaffold to access the roof to rip off shingles (Tr. 377). When asked to describe the accident, Roofer S.H. responded, "I believe that I was up on the roof, to my knowledge, and the next thing I knew, I was on the ground." (Tr. 379) He acknowledged he was not tied off while on the roof (Tr. 379). He did not believe the other crew members were tied off that day. He stated the roofing crew members tied off on most jobs, but sometimes did not (Tr. 380-381). On cross-examination, counsel for A.C. Castle played an excerpt of a recording of a meeting between Roofer S.H. and an insurance representative. Roofer S.H. states on the recording he is always tied off with a harness when working on a roof (Tr. 403). In response to the playing of the recording, Roofer S.H. stated,

> Most of the conversation I had with that gentleman, as you can tell with me slurring and everything that I was quite whacked out on pills. Most of the conversation that I had with that gentleman I do not remember. . . . Obviously, I did say that, but once again, I wasn't in the right frame of mind at that point.

(Tr. 404)

Roofer S.H. testified Mr. Provencher ran the "[d]ay-to-day operation" on the worksite and Mr. LeBlanc made the overall decisions about how the job was to be done (Tr. 384). He stated Mr. LeBlanc considered Mr. Provencher "to be his foreman." (Tr. 386) Roofer S.H. stated, "Overall, I was working for Brian." (Tr. 389) He testified most of the roofing jobs Mr. Provencher's crew worked on were A.C. Castle jobs, but Mr. Provencher did some small jobs on his own (Tr. 396, 407).

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workers on the board. The reporting officer states the third injured employee "may have been hit in the head by the board and was driven to Beverly Hospital by another worker." (Exh. R-33, p.2)

Roofer S.H. testified Mr. LeBlanc complained to Mr. Provencher about the size of his work crew, wanting him to hire more workers to increase production (Tr. 393-394). Sometimes Mr. LeBlanc wanted the crew to work an extra day, such as Sunday (Tr. 395). If Mr. LeBlanc did not like a certain worker on the crew, "[t]hat person would go home." (Tr. 396)

After his accident, Roofer S.H. filed a workers' compensation claim under Mr. Provencher's workers' compensation policy, as he had done following an ankle injury on a worksite in 2013 (Tr. 398).

Roofer P.C.

Roofer P.C. had worked for Mr. Provencher for approximately three and a half years at the time of the accident (Tr. 592). He stated his position was "foreman on the roofing crew." (Tr. 593) He saw Mr. LeBlanc once a week or every two weeks. He considered Mr. Provencher his supervisor (Tr. 593). He did not consider A.C. Castle his employer, but listed A.C. Castle under "Company Name" on the OSHA *Employee Contact Sheet* he completed during the inspection and listed Mr. Provencher as his "Supervisor/Foreman" (Exh. C-35; Tr. 597, 610).

Roofer P.C. stated the crew had begun work on the Parsons Hill Road worksite the day before the accident, when they began work at 8:30 or 9:00 a.m. He and the other crew members wore fall protection that day and had installed five roof anchors (Tr. 594-595). He testified the day of the accident the roofing crew arrived at the worksite "late that day because it was raining in the morning. So we probably go there at noontime, I would say." (Tr. 596) "The day before we had set up the equipment and tore the roof off, and we got rained on so we had to tarp the roof off the day before." (Tr. 595) On October 2, 2014, Roofer P.C. "had to reinstall [the roof anchors] because the day before we had to take them off to tarp the roof down." (Tr. 595) He stated he was in the middle of installing the first roof anchor when the accident occurred so "I dropped what I was doing to go down to see what happened to the guys that fell." (Tr. 596) He was not tied off to the anchor point as he installed it. Roofer #1 was also on the roof with him. Roofer #1 was not tied off (Tr. 608). During the inspection, Roofer P. C. told CSHO Braile he was stripping the roof at the time of the accident and was anchored at the ridge (Tr. 615).

Roofer P.C believed three crew members were on the board when it snapped (Tr. (Tr. 605). He estimated the crew may have been at the worksite 30 minutes to an hour when before the accident occurred. He stated he and the crew members were wearing harnesses (Tr. 595-

596). He told the other crew members "to double up the bottom plank on the ladders," which was PHI's standard practice (Tr. 597).

JURISDICTION

A.C. Castle's Notice of Contest

Section 10(a) of the Act requires an employer, upon receipt of an OSHA citation and proposed penalty, to notify the Secretary within fifteen working days if it wishes to contest the citation or the penalty, or both. 29 U.S.C. § 659(a). If the employer fails to notify the Secretary, the citation and proposed penalty assessment are deemed a final order of the Commission and not subject to review by any court or agency:

> Any employer to whom a citation or notice of proposed penalty has been issued may, under section 10(a) of the Act, notify the Area Director in writing that he intends to contest such citation or proposed penalty before the Review Commission. Such notice of intention to contest shall be postmarked within 15 working days of the receipt by the employer of the notice of proposed penalty. Every notice of intention to contest shall specify whether it is directed to the citation or to the proposed penalty, or both.

29 C.F.R. § 1903.17(a).

In a letter dated April 15, 2015, requesting an informal conference with OSHA, counsel for A.C. Castle expressed puzzlement over the form of the citation.

> I am a little perplexed by the citation, however. A.C. Castle is a stand-alone entity that contracted with Daryl Provencher d/b/a Provencher Home Improvements (Provencher) to complete the work in Wenham, MA. As I understand it, the only employees onsite on October 2, 2014, were employees of Provencher—not A.C. Castle. I also understand that OSHA has inspected A.C. Castle worksites in the past under the exact same circumstances (*e.g.* Inspection No. 931043) and acknowledged the separation between A.C. Castle and its subcontractor Provencher. My client is confused as to why OSHA considers A.C. Castle and Provencher to be one in the same. Any information you can share on this point would be greatly appreciated.

(April 15, 2015, Letter of James F. Laboe.)

A.C. Castle filed a timely notice of contest (NOC) on April 20, 2015.

PHI's Notice of Contest

Based on A.C. Castle's NOC, the Commission issued a *Notice of Docketing* on April 29, 2015, stating, "Notice is given that the above-captioned case contesting the citations issued from

the above-cited inspection was received by the Commission on 4/28/2015, and assigned the docket number listed above." The *Notice of Docketing* lists both company names in the caption and assigns one docket number to the action. A.C. Castle's name appears first on the citation and on all the documents filed in this proceeding, separated from PHI's name only by a forward slash (/).

Judge Carol Baumerich presided over the Mandatory Settlement Proceedings in this case. On July 9, 2015, (more than three months after OSHA issued the citation) counsel for A.C. Castle faxed a copy of an NOC written by Daryl Provencher to Judge Baumerich. The handwritten notice states, "I Daryl J. Provencher doing work as Provencher Home Improvement contest any or all violations on inspection number # 997999."

Also on July 9, 2015, the Secretary filed a *Complaint* listing both A.C. Castle and PHI as respondents. Paragraph IV of the *Complaint* states:

> A.C. Castle and Provencher at all relevant times constitute a single employer for the purposes of the Act with respect to the violations alleged herein. Provencher operates as a *de facto* foreman for A.C. Castle, and/or is controlled by A.C. Castle to such an extent that A.C. Castle's operations and Provencher's operations are closely interrelated and integrated. A.C. Castle and Provencher share common construction worksites and a common labor policy. A.C. Castle and Provencher have common supervision and management by virtue of their relationship, method of operation and the control exercised by A.C. Castle over Provencher.[8]

A.C. Castle filed an *Answer* to the Secretary's *Complaint* on July 15, 2015, in which it denied it and PHI were a single employer. PHI did not file an answer. This case was reassigned to the Court on November 25, 2015, for conventional proceedings.

On May 12, 2016, the Court issued to PHI an *Order to Show Cause* why its July 9, 2015, NOC "should not be dismissed for its failure to file an Answer to the Complaint served on July 9, 2015."[9] In a conference call that same day, the Court questioned whether PHI's NOC, sent

[8] The Secretary argues in the alternative respondents are joint employers (*Complaint,* ¶ V). Also in the alternative, the Secretary argues if the Court determines A.C. Castle is not an employer under the Act with respect to the alleged violations, "Provencher is the employer for purposes of the Act with respect to the violations alleged herein." (*Complaint,* ¶ VI.)

[9] On June 1, 2016, Mr. Provencher faxed a handwritten letter to the Court in response to the *Order to Show Cause.* Mr. Provencher states in his letter, "I agree with people got hurt on my job site but disagree with the amount OSHA is trying to fine me and can't afford it. I'm now out of business." By an order issued June 2, 2016, the Court

three months after the Secretary issued the citation and notification of penalty and approximately two and a half months after A.C. Castle's NOC, was timely. The Secretary and A.C. Castle informed the Court they were not taking issue with the timeliness of PHI's NOC. The Court advised the parties the Commission lacks jurisdiction over the proceeding unless the employer files a timely NOC and ordered the parties to brief the issue.[10]

The Court held another conference call with the parties on June 2, 2016. Mr. Provencher acknowledged he had received the citation and notification of penalty, but did not state on what date he received it. The Court, upon consideration of Mr. Provencher's statement during the June 2, 2016, conference call and the arguments put forth by the Secretary and A.C. Castle in their memoranda on the issue, construed PHI's NOC as a request for relief under Fed. R. Civ. P. 60(b)(1).[11] The Court concluded,

> [I]t is not clear on the Citation issued in this matter that [PHI] was identified as a separate employer and thus required to file a notice of contest. Further, the Court finds [Mr.] Provencher's statements to the Court during the June 2, 2016, conference call that he was confused and did not know if he should take action to be credible. Accordingly, the Court finds [PHI's] failure to file a timely notice of contest was due to excusable neglect.

(*Order Vacating Final Order on Respondent Daryl J. Provencher d/b/a Provencher Home Improvement's Notice of Contest,* pp. 3-4)

Upon reflection, the Court now concludes that PHI's NOC was timely. Section 10(a) of the Act requires the Secretary to "notify the employer by certified mail of the penalty" once the Secretary determines a citation is warranted. In *Complainant's Memorandum on Party Status and Late Notice of Contest of Daryl Provencher,* the Secretary states,

> The citations were served on both entities, consistent with the Secretary's primary single employer theory, by service on A.C. Castle by certified mail on March 30, 2015. To provide additional notice to Provencher, OSHA also mailed the citations via regular mail to Provencher at his home address on March 31, 2015.

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construed this letter as PHI's answer to the *Complaint* and determined PHI had shown good cause as to why its NOC should not be dismissed.

[10] "[A]n untimely NOC deprives the Commission of jurisdiction. 29 U.S.C. § 659(a)." *GT Tile Loading*, 25 BNA OSHC 1470, n. 1 (No. 15-0190, 2015).

[11] Fed. R. Civ. P. 60(b)(1) provides, "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: **(1)** mistake, inadvertence, surprise, or excusable neglect[.]"

Section 10(a) of the Act requires the Secretary to notify the employer of the penalty by certified mail. The Commission subsequently held personal service is also acceptable as proper service.[12]

> Personal service is recognized as a superior form of service of process in federal civil proceedings generally. *E.g.*, Fed.R.Civ.P. 4(d). The Secretary's regulation interpreting the Act's provision for service by certified mail expressly authorizes personal service as an alternative. 29 C.F.R. § 1903.15(a). A citation and notification of proposed penalties are not the same as court process, *e.g., P & Z*, 7 BNA OSHC [1589,] 1591 [No. 14822, 1979)]. However, we believe that the Secretary has reasonably construed the Act to permit personal service of citations and penalty notices in lieu of certified mail.

Gen. Dynamics Corp., 15 BNA OSHD 2122, 2126 (No. 87-1195, 1993).

Here, the Secretary concedes he did not notify PHI of the penalty by certified mail, nor did the CSHO personally serve PHI. The Secretary used regular mail as the method for notification to PHI of the penalty. The Secretary failed to use either of the two authorized methods of service to notify PHI of the penalty. During the June 2, 2016, conference call, Mr. Provencher acknowledged he had received the citation and notification of penalty notice, but he did not state the date of the receipt.[13]

Section 10(a) requires the employer to file its NOC "within fifteen working days from the *receipt* of the" notice of penalty (emphasis added). The Secretary must establish when PHI received the citation and penalty notice in order to establish the date from which the fifteen working days period should be calculated. Mr. Provencher's statement during the June 2, 2016, conference call established he did, in fact, receive the citation and notification of penalty. ("[I]f an employer receives actual notice of a citation, it is immaterial to the exercise of the Commission's jurisdiction that the manner in which the citation was sent was not technically

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[12] Section 1903.15(a) provides in pertinent part, "After, or concurrent with, the issuance of a citation, and within a reasonable time after the termination of the inspection, the Area Director shall notify the employer by certified mail or by personal service by the Compliance Safety and Health Officer of the proposed penalty in accordance with paragraph (d) of this section, or that no penalty is being proposed."

[13] In *Complainant's Memorandum on Party Status and Late Notice of Contest of Daryl Provencher,* the Secretary refers to statements Mr. Provencher made in June 2015 during the mandatory settlement proceedings in this case. Mr. Provencher's statements are not part of the record in this matter. "All statements made and all information presented during the course of settlement proceedings under this section shall be regarded as confidential and shall not be divulged outside of these proceedings except with the consent of the parties." 29 CFR 2200.120(d)(3).

perfect." *P & Z*, 7 BNA OSHC at 159. The Secretary has failed, however, to establish the actual date of the receipt. Without a specific date, it is not possible to determine from which day to begin the calculation of fifteen working days. Because the record is silent regarding the actual date PHI received the notification of penalty, the Court determines July 9, 2015, (the date A. C. Castle's counsel sent a copy of PHI's NOC to Judge Baumerich) is the constructive date of PHI's receipt of the notification of penalty and concludes PHI's NOC is timely.

Based on the record, the Court finds the Commission has jurisdiction over this proceeding regarding A.C. Castle. The Commission had jurisdiction over this proceeding with regard to PHI as of July 9, 2015.

Effect of Mr. Provencher's Death on Jurisdiction

On January 31, 2017, the Secretary and A.C. Castle filed briefs in response to the Court's briefing notice directing the parties to address what effect Mr. Provencher's untimely death has on this proceeding. In a reversal of their initial positions taken during the conference call, the Secretary "concedes that the claim against Mr. Provencher likely does not survive his death," (Secretary's January 31, 2017, brief, p.1), while A.C. Castle argues, "Mr. Provencher's death does not extinguish the claim." (A.C. Castle's January 31, 2017, brief, p.1) Both parties agree the Commission retains jurisdiction over this matter with regard to A.C. Castle.

Apparently the Commission has never issued a ruling addressing jurisdiction in the event a *pro se* litigant dies. The Commission's Rules of Procedure do not address the issue. The Federal Rules of Civil Procedure, which apply in the absence of a Commission Rule (*see* § 2200.2(b)), does address the situation. Fed.R.Civ.Proc 25 provides:

> (a) **DEATH**.
>
> (1) *Substitution if the Claim Is Not Extinguished.* If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.
>
> (2) *Continuation Among the Remaining Parties.* After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

A.C. Castle declines to move for substitution of a proper party on the grounds "there would be no proper party for substitution purposes as Daryl Provencher, d/b/a Provencher Home Improvements was a sole proprietor." (A.C. Castle's January 17, 2017, brief). A.C. Castle argues, however, the Secretary's claim against Mr. Provencher is not extinguished, based on the Commission's holding in *Yandell,* 19 BNA OSHC 1623 (No. 94-3080, 1999).

In *Yandell,* the Commission held an employer who has ceased doing business may be liable for OSHA violations because the critical time for determining whether an entity is an "employer" is at the time the violation is alleged to have taken place.

> [We] hold that the Secretary has the authority under section 9(a) of the Act to issue a citation to an individual or entity that was an "employer" at the time it allegedly violated the Act, even if it is no longer engaged in business and no longer has employees at the time the citation is issued. In other words, we hold that "the critical time for taking the jurisdictional snapshot" in order to determine whether the Secretary has statutory jurisdiction to initiate a civil enforcement action under the OSH Act "is when the violation is alleged to have taken place." *See Taynton* (dissenting opinion), 17 BNA OSHC [1205,] 1208 [No. 92-0498, 1995)].

Yandell, 18 BNA OSHC at 1626.

In analyzing this decision, the Commission quoted with approval an opinion from the Court of Appeals for the Eleventh Circuit in which the court discussed the potential adverse effects of dismissing Commission proceedings against employers who cease doing business subsequent to receiving an OSHA citation.

> To let the cessation of business by an employer render a civil penalty proceeding moot might greatly diminish the effectiveness of money penalties as a deterrence. Employers in violation of OSHA could become complacent in the knowledge that future civil penalties could be avoided by ceasing operations on the eve of the Commission hearing. Violators would be encouraged "to delay litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial." *Tyson,* 897 F.2d at 1137. We worry about creating an economic incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name.
>
> More important, employers who were going out of business for ordinary commercial reasons would have little incentive to comply with safety regulations to the end if monetary penalties could be evaded once the business quit altogether. As long as a business operates, it should feel itself to be effectively under the

> applicable laws and regulations—even on the last day. And, the continuing potential of penalties—more so than injunctive relief—makes these feelings real.

Reich v. Occupational Safety & Health Review Comm'n, 102 F.3d 1200, 1203 (11th Cir. 1997).

The concerns expressed by the Eleventh Circuit and echoed by the Commission in *Yandell* clearly are not present with respect to the death of a sole proprietor. The death of a sole proprietor creates a separate issue from the dissolution of a business entity, whether it is a corporation, a sole proprietorship, or some other business organization. The Court concludes the Commission's analysis in *Yandell* is not the analysis that should be applied in this situation, where the issue is survival of an action after the death of a party.

The first step is to determine whether the Secretary's claim against PHI is extinguished by the death of Mr. Provencher. The Court of Appeals for the First Circuit discussed this issue in the context of a tax fraud case, finding the determining factor is whether a statutory claim is remedial or penal in nature.

> The federal courts over the years have given a great deal of study to the general problem of survival . . . We see no occasion here to canvass the general problem again or to trace its gradual development. It will suffice for present purposes to say that it was authoritatively established many years ago in *Schreiber v. Sharpless*, [110 U.S. 76, 80 (1884)] that 'At common law, actions on penal statutes do not survive * * *', and that 'The right to proceed against the representatives of a deceased person depends, not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought', in other words 'Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it.' . . . Our basic question is whether the fraud addition is a money penalty, however it may be enforceable, and this, of course, poses a question of Congressional intent, for if Congress intended the addition as a penalty, it is clear from the authorities that liability therefore does not survive.

Kirk v. C.I.R., 179 F.2d 619, 620 (1st Cir. 1950).

The Court of Appeals for the Sixth Circuit found a bankrupt's cause of action under the Truth in Lending Act passed to the trustee in bankruptcy because the recovery provisions of the Truth in Lending Act were not penal in nature. The court outlined three factors for determining whether a statutory action is remedial or penal.

> Three factors in particular deserve attention: 1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; 2) whether recovery under the statute runs to the harmed individual or to the public;

> and 3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.

Murphy v. Household Finance Corp., 560 F.2d 206, 209 (6th Cir.1977) (citing *Huntington v. Attrill,* 146 U.S. 657, 666–69 (1892)).

While the Supreme Court has stated the OSH Act has a "remedial orientation," *Whirlpool Corp. v. Marshall,* 445 U.S. 1, 12 (1980), the Secretary persuasively argues "the statutory claims at issue in this proceeding appear to be penal and not remedial in nature under Federal Rule of Civil Procedure 25(a)(1), and therefore likely does not survive." (Secretary's January 31, 2017, brief, p. 4). Applying the three-factor analysis for determining whether a statutory action is remedial or penal to this proceeding, the Secretary argues:

> First, this enforcement proceeding does not seek to redress individual harm done to the affected employees. . . .Second, recovery (penalties) runs to the public, not any individual. . . . Third, OSHA penalties are not set in proportion to the harm suffered by an individual, but rather are set pursuant to statute and regulations. . . . Therefore, the claim against Provencher likely does not survive his death. Accordingly, the Secretary will not be seeking to move for substitution of a proper party in Provencher's place under Federal Rule of Civil Procedure 25(a)(1).

(*Id.*)

The Court agrees with the Secretary's analysis. The Secretary's claim against Daryl J. Provencher d/b/a Provencher Home Improvements is extinguished by the death of Mr. Provencher. The case against Mr. Provencher is moot.

Under Fed. R. Civ. Proc. 25(a)(2), "After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties." Accordingly, the Secretary's citation and complaint survives against A.C. Castle. This action is not abated, but proceeds against A.C. Castle.

COVERAGE

A.C. Castle and PHI stipulated at the hearing they are employers engaged in a business affecting commerce under § 3(5) of the Act (Tr. 17-18).).[14] The central issue of this proceeding,

[14] A. C. Castle and PHI were under contract to remove and replace roof shingles, a construction activity. Commission precedent has long held that construction work necessarily is covered by the Act. *Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529 (No. 77-3676, 1983) (finding construction work affects interstate commerce because there is an interstate market in construction materials and services). The Court finds A.C. Castle and PHI were engaged in a business affecting commerce.

however, is whether A.C. Castle was the employer of the workers at the cited worksite in Wenham, Massachusetts, on October 2, 2014. "Only an 'employer' may be cited for a violation of the Act, see 29 U.S.C. § 658(a), and the Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." *Allstate Painting & Contracting Co.,* 21 BNA OSHC 1033, 1035 (Nos. 97-1631 & 97-1727, 2005) (consolidated)).

The Secretary contends A.C. Castle and PHI "maintained a highly integrated and interdependent business relationship, compelling the conclusion that they are both liable for the cited OSHA violations as a single entity." (*Secretary's brief,* p. 1) A.C. Castle argues the Secretary has not proven that A.C. Castle and PHI are a single employer and "the citations should be vacated—at least as to A.C. Castle." (*A.C. Castle's brief,* p. 45)

Even though PHI is no longer a party to this proceeding, the Court must determine whether A.C. Castle and PHI operated as a single employer, as alleged by the Secretary.

SINGLE EMPLOYER

> Under Commission precedent, separate entities have been regarded as a single employer when three elements are present: (1) a common worksite; (2) interrelated and integrated operations; and (3) a common president, management, supervision, or ownership.

Altor, Inc., 23 BNA OSHC 1458, (No. 99-0958, 2011).

It is the Secretary's burden to establish the existence of the single employer relationship. *Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356 (No. 02-1164, 2011) (consolidated).

History of A.C. Castle and PHI

Brian LeBlanc, who owns A.C. Castle Construction Co., Inc., has been in the roofing business since 1988. He incorporated his business in 1999 (Tr. 742). A.C. Castle works predominately on the North Shore of Boston, Massachusetts. The *Business Entity Summary* for A.C. Castle on file with the Secretary of the Commonwealth of Massachusetts lists Mr. LeBlanc as the president, treasurer, secretary, and director of the corporation. The *Business Entity Summary* states A.C. Castle's principal office is in Beverly, Massachusetts (Exh. R-34). Mr. LeBlanc testified, however, A.C. Castle's principal office is in Danvers, Massachusetts, at his home address (Tr. 744).

Daryl Provencher performed subcontracting work under the name Provencher Home Improvements. Mr. Provencher had been in the roofing business for approximately 30 years. He had worked under other business names over the years and he performed other construction work, including painting and siding. PHI's business address was the same as Mr. Provencher's home address, located in Beverly, Massachusetts (Tr. 620). Mr. LeBlanc and Mr. Provencher had known each other since the mid-1980s (Tr. 748).

Mr. LeBlanc contends that since 2011, A.C. Castle has not employed any workers performing physical labor on a roofing worksite. He explained,

> I started my company in 1993. And I had all my own employees. And leading up to, like, 1999, I've gotten—I kind of, like, got really big as far as there's just too many guys who—and all the, you know, all the headaches that go with it, you know, so I didn't want employees anymore because of all the headaches.
>
> So I talked to a really good lawyer, and, you know he told me I should get incorporated and how to be a general and then start subcontracting. . . . So I started subcontracting shortly after I became incorporated in 1999, and I subcontracted for 10 years. . . . [B]ut the real estate market crashed in 2008, 2009, and everybody was out of work. . . . I got back up on the roof with a pitchfork and I started ripping roofs again . . . for a brief period of time, for a year, year and a half, as an employer/employees until the latter part of 2010. And then as soon as work started picking back up where I could survive as a general/subcontractor . . . I went back to being a general contractor into 2011. Somewhere towards the end of 2010 into 2011, I went back to subcontracting until the present day.

(Tr. 784-785.)

Mr. LeBlanc testified A.C. Castle has worked with "around eight to ten subcontractors within that time frame" between 2011 to the time of the accident (Tr. 746). A.C. Castle requires subcontractors "to have adequate workmen's comp, adequate general liability policy, and . . . OSHA training." (Tr. 747) On September 1, 2011, A.C. Castle and PHI entered into a *Master Contractor Agreement* (Exh. C-25). After that, A.C. Castle and PHI executed a separate *Project Specific Agreement* for each roofing job (Exh. C-26; Tr. 623).

(1) Common Worksite

The business addresses of A.C. Castle and PHI were the same as the home addresses of Mr. LeBlanc and Mr. Provencher, respectively. The actual worksite on any job they completed

in accordance with a *Project Specific Agreement* was the building being reroofed. In this case, the worksite was the house located on Parsons Hill Road in Wenham, Massachusetts.

Mr. LeBlanc described the work he does for A.C. Castle on projects his company secures.

> I get a phone call from a potential customer. I go out and set an appointment with that potential customer. Then I go out and measure the job, figure out a fair price. I fill out a job proposal, three-ply job proposal. And, you know, if I do get the job, they call me up. They send me the contract with the down payment in the mail. I receive that. And then, you know, I call up, you know, one or two of my subcontractors to see if they're available to do the job.

(Tr. 745)

Mr. LeBlanc performed work (meeting with the potential customer and measuring the house) at the same site PHI was working at the time of the accident. The Court determines A.C. Castle and PHI shared a common worksite, the Parsons Hill Road house, at the time of the accident.

(2) Interrelated and Integrated Operations

Mr. Provencher stated "the bulk of" PHI's business came from A.C. Castle, which he estimated to be 75 percent of his projects (Tr. 644). However, the only year for which PHI offered documentation of PHI's income (adducing two IRS 1099 forms for 2015), shows PHI earned $15,553.00 from Laughlin Homes and $290,910.00 from A.C. Castle. Thus, in 2015, approximately 95 percent of PHI's income came from A.C. Castle, indicating a high level of economic dependence (Exh. R-19).

Exhibit C-25 is a copy of a contract between "Distributor" (A.C. Castle) and "Contractor" (PHI). Paragraph 17.6 of the contract states, "Contractor represents and warrants that Contractor holds all necessary licenses for each project including lead removal/lead-safe renovation licenses." Mr. Provencher held no business licenses, which prevented him from bidding on jobs (Tr. 358, 706). Mr. Provencher had no credit accounts or money on hand necessary to buy materials or equipment for jobs (Tr. 707). Mr. LeBlanc provided PHI with interest-free loans to buy equipment (Tr. 704). Mr. LeBlanc placed newspaper advertisements on behalf of Mr. Provencher when he needed to hire new workers (Tr. 713-714, 825-826).

Kenneth Lord is the yard manager for Moynihan Lumber in Beverly, Massachusetts, where A.C. Castle bought its lumber and other supplies. He had worked for Moynihan Lumber

for approximately 35 years at the time of the hearing and had worked as yard manager for approximately 25 years (Tr. 64-65). A.C. Castle had an account with Moynihan Lumber for 10 to 15 years at the time of the hearing (Mr. Provencher did not have an account there). Mr. Lord testified A.C. Castle had an arrangement with Moynihan Lumber regarding purchases Mr. Provencher made for materials to be used on A.C. Castle projects. Mr. Provencher would select the materials needed and charge them to A.C. Castle's account. The sales clerk would then call Mr. LeBlanc to get his approval for the purchase. Mr. Lord testified this procedure occurred for every transaction where Mr. Provencher charged items to A.C. Castle's account (Tr. 76-78). If Mr. LeBlanc could not be contacted immediately, Mr. Lord stated, "We would wait or the gentleman would wait at the front sales counter till we got ahold of him or he'd call back." (Tr. 79) Mr. LeBlanc would be sent a copy of the receipts for Mr. Provencher's purchases (Tr. 717, 831). Mr. Lord testified no other contractors had this arrangement with their subcontractors at Moynihan Lumber (Tr. 80).[15]

Mr. LeBlanc told CSHO Braile that Mr. Provencher had his permission to charge his account for tools and materials and Mr. LeBlanc would "charge Mr. Provencher back at a rate of $500 a week until the debt is paid." (Tr. 208-209) Mr. Provencher submitted weekly worksheets to Mr. LeBlanc, who wrote checks to him based on the worksheets, minus $500 a week (Tr. 209).

> Mr. Provencher testified regarding A.C. Castle's assignment of projects to PHI.
> Brian goes out and sells the jobs. And then usually he'll give me a call . . . and he'll give me addresses to the jobs. And usually he'll give me, like anywhere from three to six addresses for jobs and he'll say, "Them are your next jobs," and he'll list them, one through three or one through—up to six. And he'll say, "Do number one, two, three, four, five, six, as you can."

(Tr. 659)

[15] Mr. LeBlanc and Mr. Provencher disputed this account of the arrangement with Moynihan Lumber (Tr. 654, 793). The Court finds Mr. Lord is more credible on this issue than either Mr. LeBlanc or Mr. Provencher. Mr. Lord was straightforward and confident in his demeanor on the stand. He had no motive to testify untruthfully. Mr. LeBlanc's testimony, on the other hand, was self-serving and combative regarding Mr. Lord's testimony (Tr. 802-803). Mr. Provencher was defensive (Tr. 654-655). The invoice for the four rough spruce planks picked up by Mr. Provencher and paid for with Mr. LeBlanc's account on October 2, 2014, states, under "Customer Instructions," "NO NOT UNLESS PROVENTURE [sic] CHG A: MUST CALL BRIAN." (Exh. C-18)

Mr. Provencher could tell Mr. LeBlanc if he was not able to complete all the assigned jobs and Mr. LeBlanc would "give it to another crew." (Tr. 659) CSHO Braile stated A.C. Castle's arrangement with PHI demonstrated Mr. Provencher's dependence on A.C. Castle.

> Mr. Provencher did not have the means to purchase materials. . . . Mr. LeBlanc dictated the schedule of this business model, when materials would be delivered, and he would not have them delivered a week early. He'd have them delivered right when the job needed to be done and then tell Mr. Provencher where to go and when to be there. What it means was that Mr. Provencher did not have the means to go out and buy materials to act as an independent contractor, and it also spoke to the scheduling component as well.

(Tr. 343-344)

A.C. Castle supplied the dump truck PHI used on all its worksites, on which A.C. Castle's business sign was attached. A.C. Castle did not charge Mr. Provencher for the use of the dump truck. Mr. Provencher also placed an A.C. Castle sign on his personal truck he drove to the worksites. The signs placed in the yards of the homes on which PHI worked advertised A.C. Castle, not PHI. A.C. Castle provided tee-shirts and sweatshirts to PHI's work crew which displayed A.C. Castle's name (Tr. 53-54, 647-649). At one point Mr. LeBlanc noticed the tires on Mr. Provencher's truck "were really bald" and he paid for four new tires for the truck (Tr. 648). Mr. Provencher would have to wait until Mr. LeBlanc paid him on Fridays before he could pay his crew for the work done that week (Tr. 55-56, 730-731). Mr. LeBlanc created the form Mr. Provencher used for PHI's invoices (Tr. 808-809). He also required Mr. Provencher to open a checking account in the name of PHI before A.C. Castle would do business with him (Tr. 836).

Although Mr. Provencher and Mr. LeBlanc testified A.C. Castle provided no supervision over PHI at the purported subcontracted worksites between 2011 and the date of the accident, their subsequent testimony undermined this position. Mr. LeBlanc told Mr. Provencher when he needed to buy new equipment. "He'd say, 'You probably need new ladders, Daryl. They're getting a little beat up.'" (Tr. 704) A.C. Castle loaned money to Mr. Provencher so he could buy a ladder after Mr. LeBlanc instructed him to do so. "[H]e had a couple of busted ladders in his driveway when I pulled up into his driveway, and I says, 'You know, those really need to be, you know, dismantled and thrown away or replaced.'" (Tr. 792) Mr. LeBlanc would instruct Mr. Provencher to hire more employees. "He'd say, 'You might need—you know, you need to have a good amount of guys because these are big jobs.'" (Tr. 714) Mr. LeBlanc testified once every

week or every other week, he would visit an A.C. Castle worksite where Mr. Provencher's crew was working. "[M]ostly because of safety, to make sure they had their harnesses and their hard hats on, you know. But sometimes it was like, you know, how much rotted wood did you put on or how many fascia boards or how many feet of fascia board or something like that. . . . But a lot of it was to stop by to see if they were, you know, doing their safety thing." (Tr. 801) Mr. LeBlanc stated, "I primarily pay attention to the harnesses and, you know, the anchors, the ropes, the harnesses, safety glasses and hard hats, is like the first things that I look for when I go to his jobs. I'll call up Daryl and say, you know, 'You've got to get this—they don't have their hard hats on the ground crew. Better make sure you're clipped in.'" (Tr. 833)

Mr. LeBlanc testified Mr. Provencher would inform him when crew members failed to show up for a job.

> [Mr. Provencher] had guys that did everything, and he always had twelve to fifteen guys. And then sometimes three would show up, you know. And he'd call me up and, you know, complain and be in a bad mood and "I only had three guys show up today" And you know, we're having conversation of like, you know, "You can't go to the job with three guys and try to open up a house." . . . [W]hen [Mr. Provencher] was bummed out and he had only three guys sitting there out of his twelve or fifteen guys, then he would say, you know, "*You need to get rid of this guy.* This guy ripped me off. This guy never shows up." . . . And I say, you know, "Why don't you put an ad in the paper?" And he goes, "You know I don't have a credit card, so I offered to put an ad in the paper probably two or three times in the past six or eight years.

(Tr. 796-797) (emphasis added) Mr. LeBlanc's own testimony indicates Mr. Provencher looked to him to fire problem employees and assist with hiring new ones.

Mr. Provencher conceded PHI had no safety program. "I never had a safety course or anything through my company for my men." (Tr. 717) Due to an OSHA citation issued to PHI following an inspection of a worksite for a purported A.C. Castle subcontract, "A.C. Castle required Provencher Home Improvement and its crew to attend OSHA safety training with Logan Leary." (Tr. 721) Each crew member paid for his own training with Logan Leary, which was held at Mr. LeBlanc's house. Mr. LeBlanc arranged for a second safety training session for Mr. Provencher's work crew at his house, taught by Ralph Hamel. Mr. LeBlanc paid for this safety training (Tr. 721-723). Mr. LeBlanc told Mr. Provencher he expected the work crew to abide by OSHA's safety standards and he would remind Mr. Provencher in their daily phone

conversations to make sure the crew members were working safely (Tr. 723). Mr. LeBlanc acknowledged A.C. Castle provided safety training for Mr. Provencher's crew. "I asked Daryl and his crew to come on in and get retrained for—that would be like, what the second time or third time, something like that. . . I just felt like it was the right thing to do. I wanted to, you know, keep, you know, people safe." (Tr. 763) Mr. LeBlanc gave Mr. Provencher a white binder containing a copy of A.C. Castle's safety policy and instructed him to read it and follow it (Tr. 837-838).

In *C.T. Taylor Co., Inc., and Esprit Constructors, Inc.,* 20 BNA OSHC 1083 (Nos. 94-3241 & 94-3327, 2003), the Commission upheld the ALJ's conclusion that C.T. Taylor Co., Inc., and Esprit Constructors, Inc. were a single business entity. The Commission found "treating these two companies as one is an effective way of addressing the fact that, on this particular worksite, Taylor and Esprit handled safety matters as one company. . . In other words, Taylor assumed the responsibility for employee safety on the job." *Id.* The same reasoning applies in this case. A.C. Castle assumed the responsibility for employee safety on all the worksites where PHI engaged in roofing work contracted by A.C. Castle. A.C. Castle arranged for OSHA training for the crew members and provided a copy of a written safety program to Mr. Provencher. Mr. LeBlanc performed spot inspections of the worksites and regularly reminded Mr. Provencher to ensure the crew members worked safely.

The record establishes the operations of A.C. Castle and PHI were highly integrated and interrelated. Mr. LeBlanc exercised an unusual amount of control over Mr. Provencher's actions, atypical of a traditional contractor/subcontractor relationship. Mr. LeBlanc arranged and paid for safety training for Mr. Provencher's work crew at his house. He told Mr. Provencher when he needed to replace his ladders and he gave him an interest-free loan to do so. Mr. LeBlanc told Mr. Provencher when he needed to hire more employees for a project and he placed advertisements for employees on behalf of Mr. Provencher. He scheduled the roofing projects and told Mr. Provencher what order to do them in. The only advertising done at the worksites, in the form of yard signs, clothing, and truck signs, was for A.C. Castle and not PHI. When Mr. Provencher was asked if Mr. LeBlanc charged him interest, he responded, "No. He's my friend. Why would he charge me interest?" and then acknowledged they had known each other 30 years

(Tr. 704). These practices indicate a lack of arm's length dealing and are evidence A.C. Castle and PHI are a single employer.

(3) Common President, Management, Supervision, or Ownership

A.C. Castle held itself out as the sole employer of the workers engaged in the roofing projects to its customers and on workers' compensation insurance affidavits submitted to the Commonwealth of Massachusetts. Mr. LeBlanc and Mr. Provencher kept PHI's purported subcontractor status hidden so customers believed A.C. Castle was the only business entity employing the crew members roofing their houses. Exhibit C-24 is a copy of the contract between the homeowner at the Parsons Hill Road worksite and A.C. Castle. There is no mention of a subcontractor in the document (Tr. 221-222). Mr. LeBlanc explained "subcontractor" is "a dirty word in my business. . . . [W]hen you're dealing with a homeowner, a subcontractor is like a taboo word that, you know, people don't want to hear." (Tr.779-780) Mr. Provencher conceded he held himself and his crew out as employees of A.C. Castle.

> Q.: Brian [LeBlanc] didn't allow you to talk to the customers and let them know that you had your own business, Provencher Home Improvements, isn't that right?
>
> Provencher: Not initially. It's not in good—you know, when I first show up, I don't just come out and say that, "I'm the subcontractor." That wouldn't look good to people.
>
> Q.: Brian doesn't allow you to tell them that a subcontractor at all is doing the roofing, isn't that right?
>
> Provencher: I do toward the end. A lot of times, I'll tell them. If I want to get work off of them, yes, that I have my own company. Sometimes I end up getting side jobs off the customers. If it's to do with other than roofing.
>
> Q.: Other than roofing?
>
> Provencher: Yes.
>
> Q.: You wouldn't be able to do roofing jobs for customers?
>
> Provencher: Not for Brian's customers, no.
>
> Q.: And the customer doesn't know that a subcontractor is doing roofing jobs for Brian.

> Provencher: Not at the initial start, no. If a contractor were to go sell a job and said, "Hi, I'm A.C. Castle, and I want to sell you a roof job. But I'm going to have a subcontractor come in and do it," he would never get the work.

(Tr. 687-688)

As further evidence A.C. Castle represented Mr. Provencher's crew as its own employees, the Secretary points out the contract provides a warranty to the homeowner and states, "The warranty shall be limited to the work *performed by A.C. Castle Construction Company, Inc., and limited to either repair or replacement by A.C. Castle Construction Company, Inc.,* at its sole discretion." (Exh. C-24; Tr. 827-828) (emphasis added)

Exhibit C-34 comprises copies of two affidavits Mr. LeBlanc completed for projects ostensibly subcontracted to PHI. The name of the form is *Workers' Compensation Insurance Affidavit: Builders/Contractors/Electricians/Plumbers* and the Commonwealth of Massachusetts requires employers to file it to obtain building permits. Employers filling out the form must check a box indicating whether they are the employer of the employees working on the project or the general contractor. Box No. 1 states, "I am an employer with __ employees (full and/or part-time)." Box No. 4 states, "I am a general contractor and I have hired the sub-contractors listed on the attached sheet. These sub-contractors have employees and have workers' comp. insurance." A footnote to Box No. 4 states,

> Contractors that check this box must attach an additional sheet showing the name of the sub-contractors and state whether or not those entities have employees. If the sub-contractors have employees, they must provide their workers' comp. policy numbers.

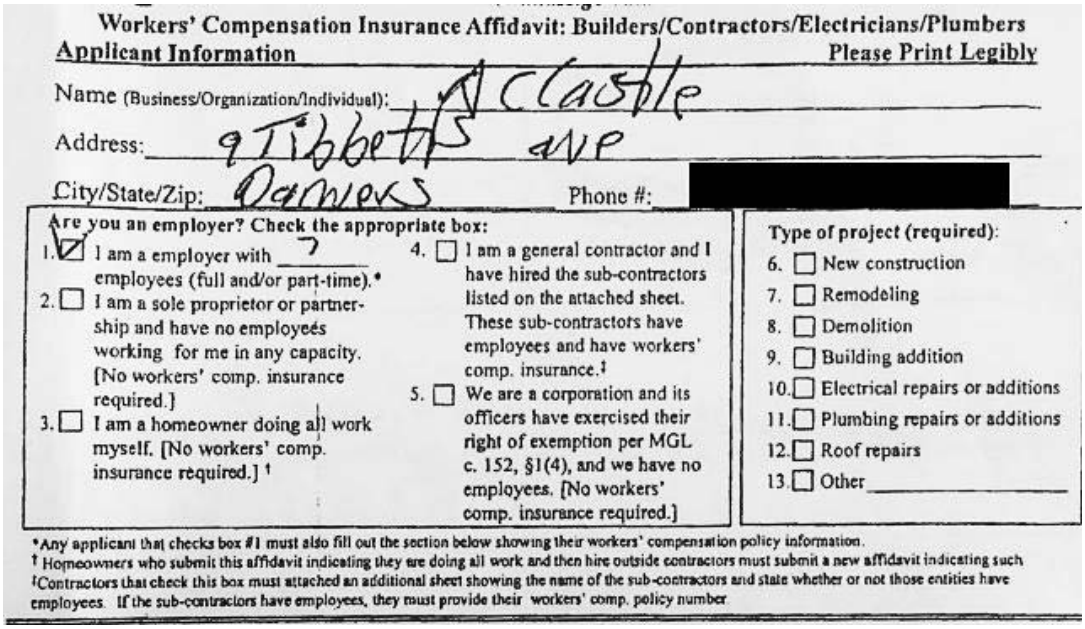
Above the signature line on the affidavit, the form states, "I do hereby certify under the pains and penalties of perjury that the information provided above is true and correct." For both projects, Mr. LeBlanc checked the Box No. 1, indicating A.C. Castle was the employer and filled in the blanks for the number of employees expected for each project. He did not check Box No. 4 indicating he is a general contractor and he did not attach an additional sheet stating PHI was a subcontractor with employees. Mr. LeBlanc signed each form beneath the language certifying "under the pains and penalties of perjury" that the information he provided on the form was correct.

Mr. LeBlanc's testimony regarding the inconsistencies between the signed affidavits and his position that he subcontracted the projects to PHI is not credible.

> LeBlanc: I didn't really read the fine print . . . [A]fter doing it for like, you know, 3,000 times in 27, 28 years, it's a very quick-quick thing. I mean, that's the fastest writing that I can do.
>
> Q.: You know from using the form for all those years, this is a form you sign under the pains and penalties of perjury?
>
> LeBlanc: Again, I didn't even read that part of it. It's just something that I filled out like, as you say, three times a day.
>
> Q.: And these forms are given to the towns and the towns base the issuance of a building permit on these forms?
>
> LeBlanc: Yes. It's to make sure that you have workmen's compensation policy, and I know for a fact that I have workmen's compensation policy for these subcontractors. . . . So I'm not really perjuring myself. I'm just signing it's all, you know, as part of the permit.
>
> Q.: You know there are different boxes here, don't you?
>
> LeBlanc: I—you know, now that you guys brought it to my attention like five or six months ago, I started to read the other boxes again after all these years, to be perfectly honest with you.
>
> Q.: You didn't just sign your name. You checked certain boxes on this form.
>
> LeBlanc: I've been checking that same box for 27 years.
>
> Q. And you didn't just check a box. You put a number of –
>
> LeBlanc: That's a scribble mark. That is really just a scribble mark. . . . It's really just a scribble mark. I don't think "number 3." That is just kind of like a scribble mark.
>
> Q.: Well, on the other one you wrote "7" for seven employees.
>
> LeBlanc: That's not a "7." I seen it. It's not a "7." It looks more like a "1" to me. . . . That's a very fast scribble.

(Tr. 811-813)

The "scribble marks" appear only over the blank spaces (__) provided for the written number of employees. The "scribble marks" are also unequivocally a "3" and a "7," as is evident from the scanned copies of Exhibit C-34:



Workers' Compensation Insurance Affidavit: Builders/Contractors/Electricians/Plumbers

Applicant Information — Please Print Legibly

Name (Business/Organization/Individual): A C castle

Address: 9 Tibbetts ave

City/State/Zip: Danvers Phone #: [redacted]

Are you an employer? Check the appropriate box:

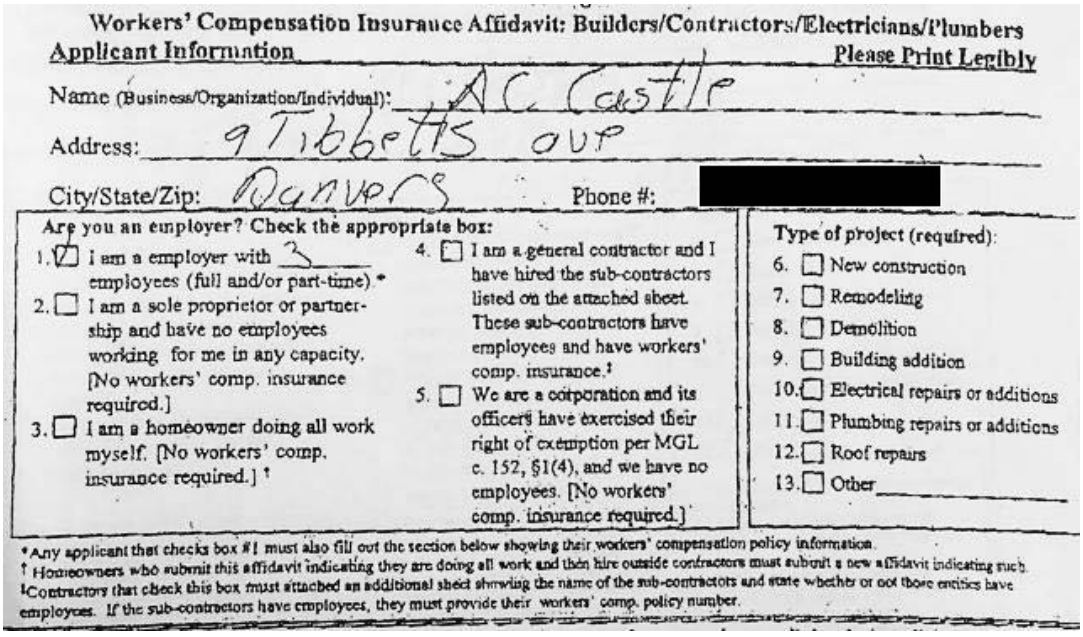
1. ☑ I am a employer with 7 employees (full and/or part-time).*
2. ☐ I am a sole proprietor or partnership and have no employees working for me in any capacity. [No workers' comp. insurance required.]
3. ☐ I am a homeowner doing all work myself. [No workers' comp. insurance required.] †
4. ☐ I am a general contractor and I have hired the sub-contractors listed on the attached sheet. These sub-contractors have employees and have workers' comp. insurance.‡
5. ☐ We are a corporation and its officers have exercised their right of exemption per MGL c. 152, §1(4), and we have no employees. [No workers' comp. insurance required.]

Type of project (required):

6. ☐ New construction
7. ☐ Remodeling
8. ☐ Demolition
9. ☐ Building addition
10. ☐ Electrical repairs or additions
11. ☐ Plumbing repairs or additions
12. ☐ Roof repairs
13. ☐ Other _____

*Any applicant that checks box #1 must also fill out the section below showing their workers' compensation policy information.
† Homeowners who submit this affidavit indicating they are doing all work and then hire outside contractors must submit a new affidavit indicating such.
‡Contractors that check this box must attached an additional sheet showing the name of the sub-contractors and state whether or not those entities have employees. If the sub-contractors have employees, they must provide their workers' comp. policy number.

(Exh.C-34 p. 1) [Exhibit redacted in Decision only]



Workers' Compensation Insurance Affidavit: Builders/Contractors/Electricians/Plumbers

Applicant Information — Please Print Legibly

Name (Business/Organization/Individual): A C Castle

Address: 9 Tibbetts ave

City/State/Zip: Danvers Phone #: [redacted]

Are you an employer? Check the appropriate box:

1. ☑ I am a employer with 3 employees (full and/or part-time).*
2. ☐ I am a sole proprietor or partnership and have no employees working for me in any capacity. [No workers' comp. insurance required.]
3. ☐ I am a homeowner doing all work myself. [No workers' comp. insurance required.] †
4. ☐ I am a general contractor and I have hired the sub-contractors listed on the attached sheet. These sub-contractors have employees and have workers' comp. insurance.‡
5. ☐ We are a corporation and its officers have exercised their right of exemption per MGL c. 152, §1(4), and we have no employees. [No workers' comp. insurance required.]

Type of project (required):

6. ☐ New construction
7. ☐ Remodeling
8. ☐ Demolition
9. ☐ Building addition
10. ☐ Electrical repairs or additions
11. ☐ Plumbing repairs or additions
12. ☐ Roof repairs
13. ☐ Other _____

*Any applicant that checks box #1 must also fill out the section below showing their workers' compensation policy information.
† Homeowners who submit this affidavit indicating they are doing all work and then hire outside contractors must submit a new affidavit indicating such.
‡Contractors that check this box must attached an additional sheet showing the name of the sub-contractors and state whether or not those entities have employees. If the sub-contractors have employees, they must provide their workers' comp. policy number.

(Exh.C-34 p. 3) [Exhibit redacted in Decision only]

The Court finds Mr. LeBlanc's testimony regarding the affidavits unworthy of belief. The Secretary has established A.C. Castle submitted signed affidavits to the Commonwealth of Massachusetts averring it was the employer with employees, and not a general contractor with a subcontractor, on the designated roofing projects. Along with the representations made to its customers that A.C. Castle was the sole business entity engaged in the contracted roofing projects and performing the work under warranty, the Court determines A.C. Castle represented itself as the owner and manager exercising authority over Mr. Provencher and the work crew who performed the roofing labor.[16]

The Secretary contends Mr. Provencher was, "as a matter of economic and legal reality, a supervisory employee of A.C. Castle, and not an independent business entity" and urges the Court to find Mr. Provencher "to be an employee of A.C. Castle under the common law agency test set forth by the Supreme Court's *Darden* analysis, which determines whether an employment relationship exists." (Secretary's brief, p. 19)[17]

> [T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site. . . . In determining whether the Secretary has satisfied that burden, the Commission relies upon the test set forth in *Nationwide Mutual Insurance Company v. Darden,* 503 U.S. 316 (1992) ("*Darden*"). *Don Davis*, 19 BNA OSHC 1477, 2001 CCH OSHD ¶ 32,402 (No. 96-1378, 2001); *Vergona Crane Co*., 15 BNA OSHC 1782, 1991-1993 CCH OSHD ¶ 29,775 (No. 88- 1745, 1992) ("Vergona").

Allstate Painting & Contracting Co., 21 BNA OSHC 1033, 1035 (Nos. 97-1631 & 97-1727, 2005) (consolidated)).

To decide whether the party in question was an employer under common law, the *Darden* Court looked primarily to "the hiring party's right to control the manner and means by which the product [was] accomplished." *Darden*, 503 U.S. at 323. Factors pertinent to that issue include:

> the skill required for the job, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether

[16] Although the Court finds A.C. Castle's representations are evidence it considered itself and PHI to be a single employer, it is not an element of the Secretary's burden to prove the employer's intent to deceive under the single employer doctrine. "Unlawful motive or intent are critical inquiries in an alter ego analysis, inquiries which are wholly absent in a single employer analysis." *Penntech Papers, Inc. v. N.L.R.B.,* 706 F.2d 18, 24 (1st Cir. 1983).

[17] The Secretary considers its theory Mr. Provencher is an employee of A.C. Castle to be separate from his theory A.C. Castle and PHI operate as a single employer. The Court's view is Mr. Provencher's employee status is part of the single employer theory. Mr. Provencher provides the "common supervision" and Mr. LeBlanc provides the "common management."

> the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits and the tax treatment of the hired party.

Id. at 323-24 (citing *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)).

"[T]he Court has emphasized that all of these factors must be considered and no one factor is decisive. *Id*. at 324. Yet, as reflected in the Supreme Court's most recent analysis of the common law meaning of 'employee' in the context of a federal labor statute, the control exercised over a worker remains a 'principal guidepost.' *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S.Ct. 1673, 1679 (2003). . . . Further, *Clackamas* teaches that the relational context in which the issue arises has a bearing on how the multiple factors derived from the common law are to be applied and weighed." *Froedtert Memorial Lutheran Hospital, Inc.,* 20 BNA OSHC 1500, 1508 (No. 97-1839, 2004).

Mr. LeBlanc and Mr. Provencher had a thirty-year working relationship. Mr. LeBlanc scheduled the roofing projects and told Mr. Provencher in what order they were to be done, which necessarily determined the location of the work. Mr. LeBlanc arranged for the building materials to be delivered to the worksites and provided the dump truck (Tr. 54-55). He also arranged for the only safety training provided to the roofing crew and provided Mr. Provencher with a copy of A.C. Castle's safety program and instructed him to implement it. Mr. LeBlanc told Mr. Provencher when he needed to hire more employees to complete the contracted roofing projects on time. Mr. Provencher paid the roofing crew members on Fridays, after he received payment from Mr. LeBlanc. Mr. Provencher did not have a business license and could not bid on projects; he was dependent on A.C. Castle for the great majority of his work. Mr. LeBlanc conducted spot inspections on Mr. Provencher's worksites and instructed him to abate specific safety infractions.

Based on the totality of the evidence, the Court determines Mr. Provencher was a supervisory employee working for A.C. Castle under Mr. LeBlanc's management. Thus A.C. Castle shared common management (Mr. LeBlanc) and a common supervisor (Mr. Provencher). Along with A.C. Castle's representations to its customers and to the Commonwealth of

Massachusetts in its signed affidavits that it did not subcontract its projects to another employer, the Court concludes A.C. Castle and PHI acted as a single employer in the worksite.[18]

FAIR NOTICE

A.C. Castle contends the Secretary did not provide it with fair notice it could be cited with one of its purported subcontractors under the single employer theory.

> Prior to issuing citations in this case, OSHA inspected six A.C. Castle jobsites. In each of those six OSHA inspections the relationships between A.C. Castle and its subcontractors (including Daryl Provencher) were identical. The contracts were the same. The level of supervision (or lack thereof) by A.C. Castle was the same. Each jobsite displayed A.C. Castle signage. The subcontractors paid their respective employees – not A.C. Castle. The subcontractors were all responsible for worker's compensation and general liability insurance. Specifically, on two different A.C. Castle jobsites OSHA concluded that Provencher – not A.C. Castle – was the employer. Each of these six citations became a final order of the Review Commission. In other words, there are six final orders of the Review Commission holding that A.C. Castle subcontractors are "employers" under the OSH Act – including Provencher. The first and only time OSHA took the position that A.C. Castle was the "employer" for a subcontractor was on March 30, 2015 when the citations were issued. These citations were issued in error - because A.C. Castle was entitled to fair notice from OSHA that it would be considered an "employer" for Provencher prior to October 2, 2014.

(A.C. Castle's brief, p. 28)

The Secretary argues that A.C. Castle had fair notice it could be held liable for OSHA violations occurring at a worksite where its purported subcontractor was working. OSHA cited both A.C. Castle and subcontractor CJK on March 15, 2011 (Exh. C-31; Tr. 466-467, 544). "A.C. Castle was, therefore, no stranger to OSHA looking to hold it responsible even where a claimed subcontractor is present on the job." (Secretary's brief, p. 29) The Secretary also contends A.C. Castle cannot claim lack of fair notice with respect to the OSHA's interpretation of *employer*, because the citation was not the initial means of announcing this interpretation. The Secretary has previously cited two or more purported employers under the single employer theory.

[18] The record also establishes the Secretary's alternative theories that A.C. Castle and PHI were joint employers and A.C. Castle was a controlling employer and PHI was an exposing employer. It is undisputed, however, Mr. LeBlanc was not at the Parsons Hill Road worksite the day of the accident and had no actual knowledge of how the worksite was set up (Tr. 800). The knowledge of PHI's supervisory personnel cannot be imputed to A.C. Castle under the Secretary's alternative theories for the affirmed items.

The Court agrees with the Secretary that A.C. Castle had fair notice it could be cited as a single employer along with its purported subcontractor.

> [A]pplication of the single employer doctrine is well established. *See e.g.*, *C.T. Taylor Co.*, 20 BNA OSHC 1083, 1086-88, 2002-04 CCH OSHD If 32,659, pp. 51,340-41 (No. 94-3241, 2003) (consolidated), *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783, 1991-93 CCH OSHD If 29,775, p. 40,496 (No. 88-1745, 1992); *Trinity Indus.*, *9* BNA OSHC 1515, 1518-19, 1981 CCH OSHD If 25,297, pp. 31,322-23 (No. 77-3909, 1981), *overruled in part on other grounds by Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356, 2011 CCH OSHD If 33,113 (No. 02-1164, 2011) (consolidated).

Altor, Inc., 23 BNA OSHC 1458, n. 11(No. 99-0958, 2011).

The Court determines A.C. Castle had fair notice the Secretary could cite it and PHI as a single employer. The Secretary applied a settled legal doctrine to an appropriate factual situation. The Secretary's decision not to apply the doctrine in previous inspections does not estop him from doing so in the present case.

> [U]nless Congress has indicated otherwise, agencies charged with enforcing the law retain discretion not to prosecute every violation that comes to their attention. This broad discretion would be considerably constrained if declining to prosecute an offender in one instance by itself prevented an agency from ever demanding that the offender come into compliance.

Millard Refrigerated Service, Inc. v. Secretary of Labor, 718 F.3d 892, 898 (D.C. Cir. 2013).

The Court determines A.C. Castle did not lack fair notice the Secretary could cite it as a single employer with PHI.

RIGHT TO ACCOMPANY

CSHO Braile stated he did not afford Mr. LeBlanc the opportunity to accompany him on the walkaround inspection on October 2, 2014 (Tr. 328). At the time of the inspection, the Secretary was not proceeding on the theory A.C. Castle and PHI operated as a single employer.

A.C. Castle contends it was denied its right to accompany the CSHO on his walkaround inspection under § 8(e) of the Act. Section 8(e) provides:

> Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

The Court has determined Mr. Provencher was a supervisory employee of A.C. Castle. As such, he was "a representative of the employer" in accordance with § 8(e). A.C. Castle's right to accompany CSHO Braile on his inspection was not violated.

CITATION NO. 1

The Secretary's Burden of Proof

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

Item 1: Alleged Serious Violation of § 1926.451(b)(2)(i)

Item 1 of Citation No. 1 alleges, "On or about 10/2/2014, employees were exposed to a damaged (split) roof bracket scaffold board."

Section 1926.451(b)(2)(i) provides:

> 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.

1. Applicability of the Cited Standard

Section 1926.451(b)(2)(i) is found in *Subpart L-Scaffolds. Subpart L* "applies to all scaffolds used in workplaces covered by" Part 1926, *Safety and Health Regulations for Construction.* A. C. Castle and PHI were under contract to remove and replace roof shingles, a construction activity. Section 1926.450(b) defines *scaffold* as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." A *ladder jack scaffold* is "a supported scaffold consisting of a platform resting on brackets attached to ladders." *Id.* The scaffold in use on October 2, 2014, at the Parsons Hill Road worksite was a ladder jack scaffold (Tr. 44).

The Secretary has established § 1926.451(b)(2)(i) applies to the cited conditions.

2. Violation of the Standard's Terms

CSHO Braile measured the width of the broken board used as the platform plank on the ladder jack scaffold (Exhs. C-8 & C-9; Tr. 129-130). Exhibit C-10 is a copy of a photograph

showing a tape measure across the width of the plank. The tape measure shows the plank is 10 1/8 inches wide (Tr. 130). This measurement is consistent with the invoice from Moynihan Lumber for the four boards selected by Mr. Provencher and paid for by A.C. Castle at 11:15 the morning of the accident. The invoice is for four "2x10 16 RGH SP [rough spruce]." (Exh. C-18) The notation signifies the boards were each "[t]wo inches by ten inches wide [and] . . . sixteen feet long." (Tr. 71)

The plank used as the platform for the ladder jack scaffold did not meet the minimum width of 12 inches as required by § 1926.451(b)(2)(i). A.C. Castle failed to comply with the terms of the cited standard.

3. Employee Exposure to the Violative Condition

At least two employees were standing on the 10 1/8 inch-wide board when it snapped, exposing the workers to a fall of approximately 20 feet. Two employees were hospitalized as a result of the fall (Tr. 46-47, 379-380, 605). The employees were exposed to a fall hazard.

4. Employer Knowledge

"Commission precedent holds[s] that a supervisor's knowledge is imputable to the employer." *Empire Roofing Co. Se., LLC, Respondent.*, 25 BNA OSHC 2221, 2222 (No. 13-1034, 2016). The Court of Appeals for the First Circuit also holds a supervisor's knowledge is imputed to the employer.

> [A]n employer can be charged with constructive knowledge of a safety violation that supervisory employees know or should reasonably know about. *See Cent. Soya de P.R., Inc. v. Sec'y of Labor,* 653 F.2d 38, 40 (1st Cir.1981) (where two supervisors in charge of facility knew of hazard, "the knowledge of these supervisory employees [was] properly imputed to the employer"); *Simplex Time Recorder Co. v. Sec'y of Labor,* 766 F.2d 575, 589 (D.C.Cir.1985) (finding employer had constructive knowledge of a "readily apparent" safety violation that "indisputably should have been known to management").

P. Gioioso & Sons, Inc. v. Occupational Safety & Health Review Comm'n, 675 F.3d 66, 73 (1st Cir. 2012).

As foreman, it was incumbent on Mr. Provencher to make certain any board he selected for use as a scaffold platform met the requirements of the scaffolding standards. He had actual knowledge the boards he selected were less than the required 12-inch minimum. The invoice for the boards, which Mr. Provencher had in his truck the day of the accident (and which he

provided to CSHO Braile) states the dimensions of the boards in the item description, including the substandard width (Exh. C-18). As foreman, Mr. Provencher's knowledge is imputed to A.C. Castle.

A.C. Castle knew of the violative conditions. The Secretary has established A.C. Castle committed a violation of § 1926.451(b)(2)(i).

Classification of the Violation

The Secretary classified the violation of § 1926.451(b)(2)(i) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). The Court finds that serious physical harm is the likely result if an employee falls 20 feet to the ground from an inadequate scaffold platform, as evidenced by the injuries of the two employees who were hospitalized as a result of the platform collapse. The violation is serious.

Item 3: Alleged Serious Violation of § 1926.452(k)(5)

Item 3 of Citation No. 1 alleges, "On or about 10/2/2014, the employer erected a ladder jack scaffold with the boards bridged on to each other."

Section 1926.452(k)(5) provides:

Scaffold platforms shall not be bridged one to another.

1. Applicability of the Cited Standard

Section 1926.452(k)(5) is found in *Subpart L-Scaffolds. Subpart L* "applies to all scaffolds used in workplaces covered by" Part 1926, *Safety and Health Regulations for Construction.* A. C. Castle and PHI were under contract to remove and replace roof shingles, a construction activity. Section 1926.450(b) defines *scaffold* as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." A *ladder jack scaffold* is "a supported scaffold consisting of a platform resting on brackets attached to ladders." *Id.* The scaffold in use on October 2, 2014, at the Parsons Hill Road worksite was a ladder jack scaffold (Tr. 44).

The Secretary has established § 1926.452(k)(5) applies to the cited conditions.

2. Violation of the Standard's Terms

Bridging occurs "when one plank is on top of or underneath another. It's being supported by another plank." (Tr. 158) Roofer P.C. testified the wooden plank was bridged across the aluminum pick located on the left side of the ladder jack scaffold, rather than being secured in place (Exh. C-1; Tr. 614-615). Roofer S.C. told CSHO Braile the wooden board was bridged to form a platform with the aluminum pick (Tr. 187). CSHO Braile stated that when he arrived at the worksite, the wooden plank "was on the ground because it broke. And there just is no other way to put a board up in midair unless it is on something. It needed to rest on that bracket." (Tr. 159)

The Secretary has established A.C. Castle bridged the scaffold planks, in violation of § 1926.452(k)(5).

3. Employee Exposure to the Violative Condition

At least two employees were standing on the unsecured wooden plank resting on the aluminum pick of the scaffold platform when the wooden plank snapped, exposing the workers to a fall of approximately 20 feet. Two employees were hospitalized as a result of the fall (Tr. 46-47, 378-380, 605). The employees were exposed to a fall hazard.

4. Employer Knowledge

Mr. Provencher had constructive knowledge of the violative condition. He observed the workers setting up the lumber jack scaffold the morning of the accident (Tr. 173). He selected the wooden plank used to bridge to the aluminum pick. As supervisor, he was aware of the configuration used by his crew when erecting a ladder jack scaffold. Mr. Provencher's constructive knowledge of the bridged platform planks is imputed to A.C. Castle.

Furthermore, Roofer P.C. identified himself as "a foreman of the crew. I [oversaw] like everything on the job that was going on." (Tr. 598) Mr. Provencher testified he left Roofer P.C. in charge when he was not at a worksite (Tr. 633).

> The Commission has long recognized that "an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor" for the purpose of establishing knowledge. *Access Equip. Sys.*, 18 BNA OSHC at 1726, 1999 CCH OSHD at p. 46,782. In deciding whether an employee qualifies as a supervisor, "[i]t is the substance of the delegation of authority that is controlling, not the formal title of the employee having this

authority." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993).

Am. Eng'g & Dev. Corp., 23 BNA OSHC 2093, 2095 (No. 10-0395, 2012).

Roofer P.C. testified the wooden plank was bridged across the aluminum pick located on the left side of the ladder jack scaffold, rather than being secured in place. He informed CSHO Braile of this fact the day of the inspection (Tr. 614-615). As foreman, Roofer P.C.'s actual knowledge is imputed to A.C. Castle. Knowledge is established.

Classification of the Violation

The Secretary classified the violation of § 1926.452(k)(5) as serious. The violative condition created an unstable scaffold platform due to the unsecured bridged planks, resulting in a fall hazard. The Court finds that serious physical harm is the likely result if an employee falls 20 feet to the ground, as evidenced by the injuries of the two employees who were hospitalized as a result of the platform collapse. The violation is serious.

Items 4a and 4b: Alleged Serious Violations of §§ 1926.454(a) and (b)

Items 4a and 4b of Citation No. 1 allege, "On or about 10/2/2014, the employer allowed employees to work on scaffolding without adequate training by a competent person to recognize hazards [and] . . . the employer did not ensure that employees were trained to erect and dismantle scaffold systems by a competent person."

Sections 1926.454(a) and (b) provide:

> (a) The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. The training shall include the following areas, as applicable:
>
> (1) The nature of any electrical hazards, fall hazards and falling object hazards in the work area;
>
> (2) The correct procedures for dealing with electrical hazards and for erecting, maintaining, and disassembling the fall protection systems and falling object protection systems being used;
>
> (3)The proper use of the scaffold, and the proper handling of materials on the scaffold;
>
> (4)The maximum intended load and the load-carrying capacities of the scaffolds used; and

(5) Any other pertinent requirements of this subpart.

(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;

(2) The correct procedures for erecting, disassembling, moving, operating, repairing, inspecting, and maintaining the type of scaffold in question;

(3) The design criteria, maximum intended load-carrying capacity and intended use of the scaffold;

(4) Any other pertinent requirements of this subpart.

1. Applicability of the Cited Standard

Sections 1926.454(a) and (b) are found in *Subpart L-Scaffolds. Subpart L* "applies to all scaffolds used in workplaces covered by" Part 1926, *Safety and Health Regulations for Construction.* A. C. Castle and PHI were under contract to remove and replace roof shingles, a construction activity. Section 1926.450(b) defines *scaffold* as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." A *ladder jack scaffold* is "a supported scaffold consisting of a platform resting on brackets attached to ladders." *Id.* The scaffold in use on October 2, 2014, at the Parsons Hill Road worksite was a ladder jack scaffold (Tr. 44).

The Secretary has established § 1926.454(a) and (b) apply to the cited conditions.

2. Violation of the Standard's Terms

The Secretary contends A.C. Castle "did not offer scaffolding training that was sufficiently comprehensive, and scaffold erection and dismantling was not covered." (*Secretary's brief,* p. 41) The Secretary concedes A.C. Castle provided OSHA 10-hour construction courses to its employees in the basement of Mr. LeBlanc's house. Exhibit C-21 comprises copies of documents establishing training sessions were held at Mr. LeBlanc's house, including copies of OSHA 10-hour cards for Mr. Provencher and Roofer P.C. Roofer S.C. testified he attended a training session at Mr. LeBlanc's house and Roofer #1 informed CSHO Braile he had attended a similar session (Tr. 51-52, 205).

The Secretary argues, however, this training did not adequately address scaffold safety as required by §§ 1926.454(a) and (b). The Secretary relies on the interview statements of the roofers and their testimony at the hearing. Roofer P.C. stated, "I didn't have any scaffold training. I had just the OSHA 10 card. That was it. I don't believe it covered scaffolding." (Tr. 604) He also stated the OSHA 10-hour course did not cover the erection and dismantling of scaffolding (Tr. 607). Roofer #1 told CSHO Braile "that he had not received any fall protection training, nor had he received any training with regard to scaffolds. Working on scaffolds, erecting scaffolds, moving scaffolds, anything of that nature." (Tr. 205) Mr. Provencher told CSHO Braile he had taken the OSHA 10-hour course. When the CSHO asked Mr. Provencher if the training covered scaffolding safety, including erecting and dismantling scaffolds, Mr. Provencher "couldn't answer the question. He couldn't tell me that the training actually covered the information." (Tr. 175) Roofer S.H. testified he received training through A.C. Castle at Mr. LeBlanc's house. He recalled the training included discussion of "harnesses, the ropes, the anchors, ridge hooks." (Tr. 382) When prompted, he recalled a discussion addressing erecting and dismantling scaffolds and the requirement of a competent person (Tr. 383).

The record establishes A.C. Castle required roofers on its roofing projects to have OSHA 10-hour cards certifying they had taken the OSHA 10-hour construction course (Tr. 836-837). Mr. LeBlanc arranged for at least two sessions of the OSHA 10-hour construction course to be presented to Mr. Provencher's crew. In a letter dated August 29, 2013, OSHA 10-hour course instructor Ralph Hamel sent copies of a letter to roofers who worked on A.C. Castle jobs, including members of Mr. Provencher's crew. The letter states,

> A.C. Castle Construction Co., Inc. has invited select employees and management from its current subcontractors to attend a review of the OSHA laws pertaining to fall protection, ladders and *scaffolding* as they relate to the roofing trades.
> This review is intended to be a reminder and to reiterate and review the above subjects covered in the attendees recently completed OSHA 10-Hour Construction Safety course.

(Exh. C-21, p. 12) (emphasis added) A.C. Castle's safety manual was developed by Mr. Hamel (Tr. 838). It has a page devoted to *Scaffold Safety Rules* (Exh. C-22, p. 24).

It is the Secretary's burden to establish A.C. Castle failed to comply with the terms of §§ 1926.454(a) and (b). A.C. Castle has proven it provided 10-hour construction courses in OSHA

safety. The company has produced documentation the courses addressed scaffold safety. The Secretary contends this training was not "sufficiently comprehensive and scaffold erection and dismantling was not covered," but offers no documentation of this assertion. The Secretary did not adduce the course materials or call instructors Hamel or Logan as witnesses. Instead, the Secretary relied on witness statements taken by CSHO Braile and the testimony of Roofers S.C., S.H., and P.C. As previously noted, the employee witnesses appeared uncomfortable and evasive when testifying. They had difficulty recalling events and their stories often contradicted each other.

The Court finds the documentation of the OSHA 10-hour construction courses and A.C. Castle's safety manual to be more reliable than the testimony of the employee witnesses or CSHO Braile's interview statements. The Secretary has failed to establish A.C. Castle did not provide competent persons to train its employees in scaffold safety, including erecting and dismantling scaffolds.

The Court vacates Items 4a and 4b.

Item 5: Alleged Serious Violation of § 1926.502(d)(15)

Item 5 of Citation No. 1 alleges, "On or about 10/2/2014, a fall protection anchor was not secured properly to the peak of the roof, and employees were not protected from falling when using a PFAS system which did not have an anchor point of supporting at least 5000 pounds.

Section 1926.502(d)(15) provides:

> 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.

1. Applicability of the Cited Standard

Section 1926.502(d)(15) is found in *Subpart M—Fall Protection.* Section 1926.500(a)(1) provides in pertinent part: "This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926." A. C. Castle and PHI were under contract to remove and replace roof shingles, a construction activity. Section 1926.502(d)

provides: "Personal fall arrest systems and their use shall comply with the provisions set forth below[,]" which includes § 1926.502(d)(15).

Section 1926.502(d)(15) applies to the cited conditions at the Parsons Hill Road worksite.

2. Violation of the Standard's Terms

Section 1926.500(b) defines *anchorage* as "a secure point of attachment for lifelines, lanyards or deceleration devices." CSHO Braile observed one roof anchor located at the peak of the roof, which he viewed from the back side of the house. He noted there was only one nail in one of the holes provided in the roof anchor. He did not observe the roof anchor from the front side of the house. One lanyard was attached to the anchor point. CSHO Braile also observed two lanyards on the roof bracket scaffold system and another lanyard on the ground. He observed three stripping tools on the roof used to rip off shingles (Exhs. C-1, C-2, and C-12; Tr. 106-109, 134-136).

CSHO Braile testified Roofer P.C. told him during his interview he was stripping roof shingles when the accident occurred and "he was attached to the anchor point with the rope lanyard, and then further along—further down on the rope lanyard he had [Roofer #1] also hooked to it while standing on the metal scaffold platform." (Tr. 361) Roofer P.C. testified at the hearing, however, he was in the process of installing the roof anchor at the time of the accident. He stated there had been five roof anchors the day before. "I had to reinstall them because the day before we had to take them off to tarp the roof off." (Tr. 595) Roofer P.C. explained why there was only one nail in the roof anchor at the time of the OSHA inspection. "I had installed the other side and when I was nailing off this side here, that's when the accident happened. So I dropped what I was doing to go down to see what happened to the guys that fell." (Tr. 596) When confronted with his statement to CSHO Braile that he was stripping the roof at the time of the accident and was anchored at the ridge, Roofer P.C. responded, "I don't recall saying anything like that." (Tr. 615) He also contradicted his statement to CSHO Braile that he was attached by a lanyard to the (inadequate) roof anchor the day of the accident. "No, I wasn't tied off to it because I was on the peak of the roof facing the other direction." (Tr. 608) He stated Roofer #1 was on the roof with him and not tied off to the roof anchor. "No, he wasn't secured yet. I was in the process of securing it." (Tr. 608).

The Court determines it is more likely than not that none of the workers was attempting to install the roof anchor at the time of the accident. Roofer S.C. stated he was on the roof ripping shingles at the time the accident occurred and Roofer P.C. told CSHO Braile he and Roofer #1 were ripping shingles at the same time (Tr. 46-47, 361, 608, 615). This finding is supported by Exhibits C-1 and C-2, copies of photographs in which various tools, including stripping bars, are visible spread out along the roof's surface. The evidence establishes it is more likely at least three workers (Roofers S.C., P.C., and #1) were ripping shingles on the roof and none of them was tied off at the time of the accident.

CSHO Braile did not know the manufacturer of the roof anchor. He examined the manufacturer's instructions for four common brands of roof anchors. Exhibit C-20 is a copy of a manufacturer's instructions for a roof anchor. Paragraph II.f.1 provides:

> Use only 3" #12 hex head stainless steel screws to install the anchor (5 per leg into the rafters and sheathing). Install all 10 screws.
> Warning:
> The A210300 roof anchor must be positioned on top of previously secured roof sheathing (do not attach directly to rafter or truss member). All 10 screws must be installed. If the roof anchor is not installed properly, it will not hold the rated loads and serious injury or death could occur.

CSHO Braile stated, "I don't know which manufacturer manufactured this particular roof anchor. . . . They're all fairly consistent in what they say. And the instructions will talk about using the same amount of screws or nails on both sides." (Tr. 138)

The Court determines the Secretary has established the roof anchor was not "capable of supporting at least 5,000 pounds (22.2 kN) per employee attached." CSHO Braile testified the anchorage point must be secured using all the intended screws or nails. "These nails are going into a structural board or beam. So it's catching at various points. With only one [nail] in the board, if it breaks free, there are no others to hold it in place. That's why there are—there are five or, you know, six on each side to ensure that you're grabbing that board and have full strength." (Tr. 148) Even without the manufacturer's instructions for the specific roof anchor used at the Parsons Hill Road worksite, it is logical to conclude a roof anchor unsecured on one side (the one nail visible in the roof anchor was protruding) was not capable of supporting the intended weight. "[T]he Commission may draw reasonable inferences from the evidence[.]" *Fluor Daniel*, 19 BNA OSHC 1529, 1531 (Nos. 96-1729 & 96- 1730, 2001) (citing *Atlantic*

Battery Co., 16 BNA OSHC 2131, 2159 (No. 90-1747, 1994)). The Secretary has established A.C. Castle was not in compliance with § 1926.502(d)(15).

3. Employee Exposure to the Violative Condition

Roofer P.C. contradicted himself regarding whether or not he was tied off to the unsecured roof anchor. He told CSHO Braile he was tied off to the roof anchor even as he was installing it, but he testified at the hearing, "I wasn't tied off to [the roof anchor] because I was on the peak of the roof facing the other direction." (Tr. 608) The five workers on the worksite had access to the roof anchor and were exposed to the hazard of falling created by the faulty roof anchor. *See Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1993-95 CCH OSHD ¶ 30,303, p. 41,757 (No. 90-2866, 1993) ("The Secretary may prove that employees had access to a hazard by showing that employees ... while in the course of their assigned working duties ... have been in a zone of danger.") (internal quotation marks and citation omitted)." *Custom Built Marine Constr., Inc.,* 23 BNA OSHC 2237 (No. 11-0977, 2012). The Secretary has established five employees were exposed to a fall from at least 20 feet.

4. Employer Knowledge

Mr. Provencher was not at the worksite at the time of the accident. It is not clear if he observed the inadequately installed roof anchor. The record does not establish Mr. Provencher had actual knowledge of the violative condition. However, Roofer P.C. was a foreman and Mr. Provencher left him in charge when he was not at the worksite (Tr. 598, 633). Roofer P.C.'s actual knowledge the roof anchor was not adequately installed, and so was not capable of supporting at least 5000 pounds, is imputed to A.C. Castle. The Secretary has established a violation of § 1926.502(d)(15).

Classification of the Violation

The Secretary classified the violation of § 1926.502(d)(15) as serious. The violative condition created an unsafe anchorage point, resulting in a fall hazard. The Court finds that serious physical harm is the likely result if an employee falls 20 feet or more to the ground, as evidenced by the injuries of the two employees who were hospitalized as a result of the platform collapse. The violation is serious.

CITATION NO. 2

Item 1: Alleged Willful Violation of § 1926.451(a)(1)

Item 1 of Citation No. 2 alleges, "On or about 10/2/2014, the employer did not ensure that the erected scaffold was capable of supporting the intended load." Section 1926.451(a)(1) provides:

> Except as provided in paragraphs (a)(2), (a)(3), (a)(4), (a)(5) and (g) of this section, each scaffold and scaffold component shall be capable of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted to it.

1. Applicability of the Cited Standard

Section 1926.451(a)(1) is found in *Subpart L-Scaffolds. Subpart L* "applies to all scaffolds used in workplaces covered by" Part 1926, *Safety and Health Regulations for Construction.* A. C. Castle and PHI were under contract to remove and replace roof shingles, a construction activity. Section 1926.450(b) defines *scaffold* as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." A *ladder jack scaffold* is "a supported scaffold consisting of a platform resting on brackets attached to ladders." *Id.* The scaffold in use on October 2, 2014, at the Parsons Hill Road worksite was a ladder jack scaffold (Tr. 44).

The Secretary has established § 1926.451(a)(1) applies to the cited conditions.

2. Violation of the Standard's Terms

CSHO Braile examined the wooden board that had snapped while the workers were standing on it. It was stained with blood. CSHO Braile looked for the grade stamp on the board and did not find one (Exh. C-9; 119-121). He described the board.

> The wood itself was characteristic of a board that was full of knots, large knots, potentially loose knots, not sealed in any way. It was certainly rough-sawn in nature. . . . Rough-sawn is a method in which lumber is milled. So when a mill cuts lumber, cuts trees and then mills it to some certain dimensions, they may leave some as rough-sawn, meaning that they don't trim it to an exact size.

(Tr. 120)

> [T]his type of plank . . . was not of a graded type of lumber, and certainly not something that would be used as a scaffold system. It was not even a grade that would be used for dimensional lumber in a structural property. . . . Based on the actual dimension of the board, its texture and the size and amount of knots that

> were on this board, the grain of the board, all are characteristics of a board that is not used in a scaffold grade system.

(Tr. 122-123)

CSHO Braile pointed out a knot visible in Exhibit C-9, a photograph of the broken board. "When the grain comes in contact with the knot, it becomes wide and wavy, which becomes a weak point, a defect if you will, in a board that's used for some sort of structural capacity."(Tr. 124)

Mr. Provencher gave this account of how he acquired the wooden planks, one of which he used for the scaffold platform:

> When I pulled in, I stopped at the guard shack where the guy stands, and I asked him where the planks were, because they move them around quite a bit and I couldn't see them. Where they normally would be, they weren't there. So I asked him, 'Where are the staging planks?' and he pointed them out to me. . . They're the ones I've used for 20 years now. Up until this day.

(Tr. 652-653)

Kenneth Lord, yard manager of Moynihan Lumber, testified the lumber yard "is located centrally in the middle," between an outbuilding on the left and the showroom and hardware store on the right. When customers come to pick up lumber, "[t]hey drive right into the yard." (Tr. 66) Moynihan Lumber keeps its rough spruce planks "[p]retty much in the middle of the yard, kind of to the left." (Tr. 66) It has kept the rough spruce planks in that spot for 25 to 35 years (Tr. 67).

Roofer S.H. rode along with the Mr. Provencher to Moynihan Lumber the day of the accident. He testified they drove into the yard and "went over to the pile of planks and proceeded to pick up some planks." (Tr. 373) He stated the crew knew where to go to get the planks because "[t]hey keep them in the same spot." (Tr. 374)

On cross-examination, counsel for A.C. Castle played and excerpt of a recording of an interview of Roofer S.H. by an insurance representative, during which Roofer S.H. stated Mr. Provencher asked a sales clerk at Moynihan Lumber where the staging wood was kept and was directed to a certain location. The insurance representative then states, "And the wood, curiously, is stamped on the side of each board that it is certified staging wood," to which Roofer S.H. answers, "Yes." (Tr. 410)

The Court credits Roofer S.H.'s account on direct examination stating the roofing crew went directly to the rough spruce planks, where they have been kept for at least a quarter of a century. This account comports with that of Mr. Lord, who has been the yard manager for at least a quarter of a century and whose testimony is given great weight. As established by CSHO Braile and by the photographs admitted as Exhibits C-8 and C-9, there was no stamp on the rough spruce plank certifying it as staging wood. Mr. Lord stated Moynihan Lumber has never carried scaffold grade planks. Moynihan Lumber stamps all of its invoices for rough spruce planks with the phrase, "NOT FOR STAGING" and has done so for 25 to 30 years (Exh. C-18; Tr. 71-72).

Mr. Lord described the rough spruce planks.

> The rough spruce is a non-graded lumber. It has no lumber grades at all on it. . . . It's not normal like your typical building materials. . . . It's a full two inch. Your building materials that you build houses and what not with, they call it normal. It's an inch and a half. It's thinner stuff than, you know, the rough spruce, [which is] made for concrete form work and footing work. . . . [Rough spruce planks] have no grading at all on them. They're not meant—building inspectors won't allow you to use them for anything on the building side because they aren't graded, you know, or certified from an engineer—you know, to any structure at all.

(Tr. 67-68)

CSHO Braile testified the plank that snapped with the workers standing on it on October 2, 2014, was not capable of supporting its own weight plus four times the intended load. "[B]ased on the characteristics of the wood itself, it was never designed to be used in that capacity and that application. . . . It wasn't rated for anything." (Tr. 210) "[T]he scaffolding grading system is what tells us what the capacity of the board actually is, whether it's designed, structured for the purpose or application of a scaffold system. Without the grading stamp, it has no capacity whatsoever." (Tr. 332)

The Secretary has established the rough spruce plank, a scaffold component, was not capable of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted to it, as evidenced by its snapping while at least two workers stood on it.

3. Employee Exposure to the Violative Condition

The rough spruce plank was used as one half of the scaffold platform. All five workers on the worksite were exposed to a fall hazard created by the inadequate plank.

4. Employer Knowledge

Mr. Provencher himself selected the rough spruce planks to be used for scaffold staging. Furthermore, Mr. LeBlanc received a copy of the receipts from Moynihan Lumber. The receipts for the rough spruce planks, which Mr. Provencher testified he had been using for twenty years, were stamped, "NOT FOR STAGING." (Exh. C-18) Although Mr. LeBlanc testified he was unaware Mr. Provencher used the rough spruce planks for scaffold staging, he was impeached with his deposition testimony, in which he acknowledged he did know (Tr. 835). In addition, during the inspection Mr. LeBlanc told CSHO Braile Mr. Provencher was "supposed to double up those planks." (Tr. 207)[19]

Mr. Provencher and Mr. LeBlanc claimed they were unaware use of the rough spruce planks violated § 1926.451(a)(1). It is not the Secretary's burden to establish an employer was aware of the requirements of a specific OSHA standard. "The constitution does not require that employers be actually aware that the regulation is applicable to their conduct.*' Willson III*, 773 F.2d [1377,] 1387 [D.C. Cir. 1985)] (quoting *Faultless Div., Bliss & Laughlin Indus. v. Secretary of Labor,* 674 F.2d 1177, 1185 (7th Cir.1982) (emphasis in original))." *Brock v. Williams Enterprises of Georgia, Inc.*, 832 F.2d 567, 572 (11th Cir. 1987).

The Court determines Mr. Provencher had actual knowledge his workers used the rough spruce planks as a component of the scaffold platforms. In addition, Mr. LeBlanc had constructive knowledge of how the rough spruce planks were used.

A.C. Castle argues rough spruce planks had been used as part of the scaffold staging at its worksites (both A.C. Castle and PHI sites) during previous OSHA inspections and OSHA had not cited them for violations of § 1926.451(a)(1). AAD Carbone had conducted inspections of PHI worksites prior to the one at issue. Neither he nor any other OSHA CSHO ever told Mr.

[19] Doubling the rough spruce planks for use as a scaffold platform is not compliant with OSHA's scaffolding standards (Tr. 208).

Provencher the wooden planks he was using were not in compliance with § 1926.451(a)(1) (Tr. 735).[20]

It is well established that "an employer cannot rely on the failure of the Secretary to issue a citation for a particular condition during an earlier inspection as the basis for later arguing lack of knowledge of the same hazardous condition." *Wheeling-Pittsburgh Steel Corp*., 16 BNA OSHC 1780, 1782 (No. 91-2524, 1994). "In essence, the mere fact of prior inspections does not give rise to an inference that OSHA made an earlier decision that there was no hazard, and does not preclude the Secretary from pursuing a later citation." *Seibel Modern Mfg. & Welding Corp*., 15 BNA 1218, 1224 (No. 88-821, 1991). In *Seibel,* the Commission noted it had previously "cautioned employers against freely drawing such inferences from uneventful inspections" since "an employer is required to comply with a standard regardless of whether it has previously been informed that a violation exists." Id. at 1223-1224 (citing *Simplex Time Recorder Co*., 12 BNA OSHC 1591, 1596 (No. 82-12, 1985); *Columbian Art Works, Inc*., 10 BNA OSHC 1132, 1133 (No. 78-29, 1981); *GAF Corp*., 9 BNA OSHC 1451, 1457 (No. 77-1811, 1981). "These cases implicitly rule against deducing from uneventful prior inspections that particular operations are nonhazardous." *Id*. *See also International Harvester Co. v. OSHRC,* 628 F.2d 982, 985 n. 3 (7th Cir.1980) (earlier failure to cite for violation of a particular standard is not a decision that the employer was complying). *Cf. Cedar Construction Co. v. OSHRC*, 587 F.2d 1303, 1306 (D.C.Cir.1978) ("[w]e believe that recognizing such a right [to rely on uneventful prior inspections] would discourage self-enforcement of the Act by businessmen who have far greater knowledge about conditions at their workplaces than do OSHA inspectors").

A.C. Castle knew of the violative condition. The Secretary has established A.C. Castle violated § 1926.451(a)(1).

Willful Classification

The Secretary classified Item 1 Citation No. 2 as willful.

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[20] The Court rejects as implausible and not credible Mr. Provencher's story that, during a prior inspection of a PHI worksite, AAD Carbone climbed a ladder, stepped out onto the roof "and sat right on the first plank on the roof and was writing something down[,]" and AAD Carbone repeated this behavior on a subsequent inspection: "Exact same thing. When I pulled up, I looked up and he was sitting right there and [the foreman] was standing right next to him. And he was on the same planks as the one that broke, same exact type plank." (Tr. 686) The Court credits AAD Carbone's statement neither of these events happened (Tr. 843).

> The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or ... plain indifference to employee safety.'" *Kaspar Wire Works, Inc*., 18 BNA OSHC at 2181, 2000 CCH OSHD at p. 48,406 (citation omitted). [I]t is not enough for the Secretary to show that 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 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, Inc.*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, pp. 41,256 57 (No. 89-433, 1993). This state of mind is evident where "the employer was actually aware, at the time of the violative act, 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." *AJP Constr. Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (emphasis and citation omitted).

Thomas Indus. Coatings, Inc., 23 BNA OSHC 2082, 2091 (No. 06-1542, 2012).

The Secretary argues A.C. Castle demonstrated the heightened awareness of the illegality of its conduct with regard to Item 1:

> Especially indicative of Provencher's willful mindset is his deposition testimony that even with the notation "NOT FOR STAGING" on the plank receipts, he still might have used the planks for scaffolding anyway. Tr. 708-09. Provencher claimed he simply discarded the receipts, even though they contained information that could affect the safety of the workers. Tr. 710. These statements are unsurprising given Provencher's statements to Compliance Officer Braile on October 2, 2014 that he was not going to spend more money on a pump jack scaffold system, and that "[w]e are men. We know how to work, and we don't need you to tell us how to do all these things." Tr. 199. . . . Moreover, AC. Castle knew that the planks purchased from Moynihan Lumber which were listed in the receipts were used for scaffold planks, Tr. 834-36 LeBlanc received and went through copies of receipts from his account. Tr. 717, 83 1-32, on which the "NOT FOR STAGING" warning is evident. He knew what Provencher purchasing for the job when Provencher was going to Moynihan Lumber. Tr. 852. LeBlanc's statement to Compliance Officer Braile that the planks should have been doubled up, Tr. 207, also shows his knowledge of the planks were used for. There is ample evidence that Respondents knowingly disregarded or were plainly indifferent to the violation.

(Secretary's brief, pp. 34-35)

A.C. Castle contends the Secretary has failed to establish it had the state of mind characterized as willful:

> Provencher has been using the same wooden spruce planks for over 20 years leading up to the accident. Provencher's standing rule was to double up the planks. Provencher was inspected by OSHA in 2011 and in 2013 with the same types of planks in plain sight. The OSHA inspection records confirm that planks were onsite. *See e.g.* R-22, p. 1. . . . Neither the Tremont Street Inspection nor the Oakland Street Inspection did OSHA mention, or otherwise hint, that Provencher should not be using wooden spruce planks. . . . Provencher believed, in good faith, that the use of wooden spruce planks was safe.

(A.C. Castle's brief, p. 36)

The Court determines the violation of § 1926.451(a)(1) is willful. Mr. Provencher stated he had been using rough spruce planks for scaffold staging for twenty years. Mr. LeBlanc admitted he was aware Mr. Provencher used the rough wood planks for staging (Tr. 835). As the Secretary notes, the invoices for the rough spruce planks, which both Mr. Provencher and Mr. LeBlanc received, were stamped, "NOT FOR STAGING." Yet Mr. Provencher, with Mr. LeBlanc's approval, used the planks for staging at every A.C. Castle worksite that Mr. Provencher supervised from 2011 to October 2, 2014. As with the workers' compensation affidavits, Mr. LeBlanc's excuse is he does not pay attention to the words on any paperwork he receives.

> Q.: And so you can see on the receipts, if rough spruce planks are purchased, you would see the wording, "Not for staging"?
>
> LeBlanc: Again, you know, I'm skipping through it. You know, I do my mail every two or three weeks and it's like about this deep and I'll have like that many Moynihan slips, envelopes, and then I have a notepad. Then I take the yellow invoices out and I just skip through them. *I don't read them*. I just look at the very beginning and the very—you know, the very beginning of the left and the amount on the right. Okay?
>
> I don't sit there reading the details of the project—product. I already know, you know, flat bar or a plank, a tarp, barrel, a hammer, a belt, water, Gatorade, you know, safety glasses.
>
> I don't read—again, after been doing it for 27 years, I've been doing it for so long, it's like clockwork. It's like—you know, I don't sit there and say, "Oh." *I just don't read that stuff, to be honest with you.*

(Tr. 831-832) (emphasis added)

Mr. LeBlanc has been in the roofing business since 1988. As the owner and president of a roofing business, Mr. LeBlanc has been required to deal with numerous customers,

subcontractors, and government agencies. He has negotiated and executed contracts, met payroll, and filed employment paperwork. He has neither claimed nor demonstrated at the hearing any impairment that would affect his ability to process routine mail and paperwork in a conscientious, businesslike manner. Claiming he simply does not read important documents, such as the inaccurate affidavits he signed under "the pains and penalties of perjury," or the invoices for materials and equipment charged to his account, reveals a "state of mind of conscious disregard or plain indifference" to issues directly related to worker safety.

Mr. LeBlanc and Mr. Provencher have manifested plain indifference to employee safety in their dismissiveness of the clear, repeated, warning on the invoices that the rough spruce planks were not for staging. Mr. Provencher stated that, even if he had paid attention to the warning, he "might have" still used the planks for staging: "I've been using these same planks for twenty years. No one's ever told me they weren't staging planks." (Tr. 709) With this statement, Mr. Provencher demonstrated he "possessed a state of mind such that if [he] were informed of the standard, [he] would not care." *AJP Constr. Inc. v. Sec'y of Labor*, 357 F.3d at 74.

The Secretary has established A.C. Castle's violation of § 1926.451(a)(1) is willful.

Item 2: Alleged Willful Violation of § 1926.452(k)(1)

Item 2 of Citation No. 2 alleges, "On or about 10/2/2014, a ladder jack scaffold platform exceeded a height of twenty feet."

Section 1926.452(k)(l) provides:

Platforms shall not exceed a height of 20 feet (6.1 m).

1. Applicability of the Cited Standard

Section 1926.452(k) is found in *Subpart L-Scaffolds. Subpart L* "applies to all scaffolds used in workplaces covered by" Part 1926, *Safety and Health Regulations for Construction.* A. C. Castle and PHI were under contract to remove and replace roof shingles, a construction activity. Section 1926.450(b) defines *scaffold* as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." A *ladder jack scaffold* is "a supported scaffold consisting of a platform resting on brackets attached to ladders." *Id.* The scaffold in use on October 2, 2014, at the Parsons Hill Road worksite was a ladder jack scaffold (Tr. 44).

The Secretary has established § 1926.452(k) applies to the cited conditions.

2. Violation of the Standard's Terms

CSHO Braile stated he measured the height of the ladder jack scaffold platform at the Parsons Hill Road worksite. "I measured one end of that platform at just under 22 feet. I believe it was 21 [feet], 11 inches." (Tr. 150) Exhibit C-13 is a copy of a photograph showing the trench rod of CSHO Braile against the far left ladder at the top of the platform. The trench rod measures approximately 21 feet, 11 inches at that point. (Tr. 151-152). Mr. Provencher stated he measured the height of the scaffold platform as 18 feet (Tr. 725).

In CSHO Braile's investigation report, he refers to the height of the scaffold platform as 18 feet at one point and as 20 feet at another (Exh. R-9, pp. 7, 10). When asked about the different measurements for the height of the scaffold platform, CSHO Braile responded, "It was somewhere between. The grade of the land sloped down, so depending on where you were standing it would get higher." (Tr. 334)

The photographic evidence establishes that at least a portion of the scaffold platform was higher than 20 feet (Exh. C-13). The workers used the scaffold to access the roof. The Secretary has established the scaffold was not in compliance with § 1926.452(k).

3. Employee Exposure to the Violative Condition

As noted in the previous section, the workers had access to the entire scaffold platform and used it to step onto the roof. The workers had access to the violative condition.

4. Employer Knowledge

The scaffold was in plain view at the worksite. Mr. Provencher stated he measured the scaffold (Tr. 725). In addition, Roofer P.C., who was acting supervisor in Mr. Provencher's absence, was present at the worksite and used the scaffold to access the roof. A.C. Castle's supervisory personnel had actual knowledge of the violative condition.

The Secretary has established A.C. Castle violated section 1926.452(k).

Willful Classification

The Secretary classified Item 2 Citation No. 2 as willful. The Court determines this violation does not rise to the level of willfulness. Mr. Provencher stated he measured the scaffold platform as being 18 feet high. CSHO Braile acknowledged the height of the platform varied due to the slope of the yard. CSHO Braile did not provide a measurement indicating how

much of the platform exceeded 20 feet. The Secretary has not established a "heightened awareness of the illegality" of the height of the scaffold.

The Court finds that serious physical harm is the likely result if an employee falls 20 feet or more to the ground, as evidenced by the injuries of the two employees who were hospitalized as a result of the platform collapse. Item 2 of Citation No. 2 is properly classified as serious.

Item 3: Alleged Willful Violation of § 1926.1053(b)(1)

Item 3 of Citation No. 2 alleges, "On or about 10/2/2014, employees were not protected from falling while using a ladder that did not extend at least three feet above the upper landing surface."

Section 1926.1053(b)(1) provides:

> When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

1. Applicability of the Cited Standard

Section 1926.1053(b)(1) is found in *Subpart X—Stairways and Ladders.* Section 1926.1050(a) provides in pertinent part, "This subpart applies to all stairways and ladders used in construction, alteration, repair (including painting and decorating), and demolition workplaces covered under 29 CFR part 1926[.]" A. C. Castle and PHI were under contract to remove and replace roof shingles, a construction activity. The Secretary has established § 1926.1053(b)(1) applies to the cited conditions.

2. Violation of the Standard's Terms

Exhibit C-15 is a copy of a photograph taken by CSHO Braile showing the second ladder from the left of the house at Parsons Hill Road. CSHO Braile estimated the length of the ladder's extension above the upper landing surface by calculating the standard measurement of 1 foot between ladder rungs. He testified,

> I concluded that the distance from the upper landing, the scaffold platform, to the top of the ladder was at best 2 feet, maybe even just under. . . [L]ooking at the platform, the top of the platform itself, in conjunction with the ladder, looking at

> where it basically lands, which is in the center of two rungs, I took that distance and go to the center of the next rung, I got 1 foot. And from there, I'd have to go to the very top of the ladder, which could possibly be one more foot.

(Tr. 156-157)

The Secretary has established the ladder at issue did not extend at least 3 feet above the upper landing surface.

3. Employee Exposure to the Violative Condition

All workers present at the worksite had access to the noncompliant ladder. Employee exposure is established.

4. Employer Knowledge

The ladder at issue was in plain view at the worksite. Both Mr. Provencher and foreman Roofer P.C. were present at the worksite. They had at least constructive knowledge of the violative condition.

Willful Classification

The Secretary classified Item 3 Citation No. 2 as willful. The record does not establish which of the five workers was responsible for setting up the violative ladder. Mr. Provencher was absent from the worksite for most of the time the roofing crew was working. The acting foreman, Roofer P.C., was not questioned regarding the placement of the ladder. Without more evidence, the Court cannot determine the violation was done with intentional, knowing, or voluntary disregard for the requirements of the Act or plain indifference to employee safety.

The Court finds that serious physical harm is the likely result if an employee falls 20 feet or more to the ground, as evidenced by the injuries of the two employees who were hospitalized as a result of the platform collapse. Item 3 of Citation No. 2 is properly classified as serious.

CITATION NO. 3

Item 1: Alleged Repeat Violation of § 1926.451(g)(1)(i)

Item 1 of Citation No. 3 alleges, "On or about 10/2/2014, employees working from a scaffold greater than ten feet above a lower level were not protected from falling."

Section 1926.451(g)(l)(i) provides:

> Each employee on a boatswains' chair, catenary scaffold, float scaffold, needle beam scaffold, or ladder jack scaffold shall be protected by a personal fall arrest system[.]

A.C. Castle Construction Co., Inc., Daryl J. Provencher, dba Provencher Home Improvement was previously cited for a violation of this occupational and safety and health standard or its equivalent standard 29 CFR 1926.451(g)(1)(i), which was contained in OSHA inspection number 314963240, 931043, citation number 01, item number 011 & 003b and was affirmed as a final order on (4/6/2011 & 10/15/2013), with respect to a workplace located at 5 Collins Street, Danvers MA, 01923 & 103 Tremont Street Peabody MA, 01960.

1. Applicability of the Cited Standard

Section 1926.451(g)(1)(i) is found in *Subpart L-Scaffolds. Subpart L* "applies to all scaffolds used in workplaces covered by" Part 1926, *Safety and Health Regulations for Construction.* A. C. Castle and PHI were under contract to remove and replace roof shingles, a construction activity. Section 1926.450(b) defines *scaffold* as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." A *ladder jack scaffold* is "a supported scaffold consisting of a platform resting on brackets attached to ladders." *Id.* The scaffold in use on October 2, 2014, at the Parsons Hill Road worksite was a ladder jack scaffold (Tr. 44).

The Secretary has established § 1926.451(g)(1)(i) applies to the cited conditions.

2. Violation of the Standard's Terms

At least two workers who were standing on the wooden plank used as part of the scaffold platform were not using personal fall arrest systems. This is self-evident considering they fell to the ground when the wooden plank snapped; it is also established by the testimony of the workers who were at the worksite at the time of the accident. Roofer S.C. stated the workers were wearing harnesses but did not say they were tied off (Tr. 57).[21] Roofer S.H. acknowledged he was not tied off (Tr. 379-380). Roofer P.C. testified none of the workers were tied off because the roof anchor "wasn't actually ready yet." (Tr. 609)

The Secretary has established A.C. Castle failed to comply with the terms of § 1926.451(g)(1)(i).

[21] The incident report filed by the reporting officer of the Wenham Police Department states, "The injured workers did not have harnesses when we made contact with them." (Exh. C-33)

3. Employee Exposure to the Violative Condition

At least two employees were seriously injured and hospitalized when they fell approximately 20 feet to the ground. The Secretary has established the workers were exposed to a fall hazard created by A.C. Castle's failure to ensure they used personal fall arrest systems.

4. Employer Knowledge

Roofer P.C. was the acting foreman while Mr. Provencher was away from the worksite. Roofer P.C. testified he was responsible for installing the roof anchor(s), but admitted no one was secured to the roof anchor "because it wasn't actually ready yet." (Tr. 609) Nevertheless, Roofer P.C. knew the workers were using the scaffold to access the roof, and he and Roofer S.C. and Roofer #1 were already on the roof stripping shingles.

The actual knowledge of Roofer P.C., as foreman, is imputed to A.C. Castle. The Secretary has established A.C. Castle knew of the violative conduct. A violation of § 1926.451(g)(1)(i) is established.

Repeat Classification

The Secretary classified Item 1 of Citation No. 3 as a repeat violation. Under § 17(a), 29 U.S.C. § 666(a), a violation may be characterized as repeat where there is a "Commission final order against the same employer for a substantially similar violation." *See Potlatch Corp.,* 7 BNA OSHC 1061, 1063, (No. 16183, 1979).

OSHA cited A.C. Castle for a violation of the same standard, § 1926.451(g)(1)(i), in 2011. Exhibit C-31 is a copy of a citation and notification of penalty issued to A.C. Castle on March 15, 2011. Item 11 of Citation No. 1 alleges a violation of § 1926.451(g)(1)(i): "On or about 9/24/10, employees were exposed to fall hazards when working from metal ladder jack scaffolds while not using any personal fall arrest system." Mr. LeBlanc signed an informal settlement agreement in which Item 11 was retained with a penalty reduction and became a final order of the Commission (Exh. C-31, pp. 20-22).[22]

[22] OSHA also cited PHI for a violation of the same standard on September 17, 2013, for failing to ensure "employees working from a ladder jack scaffold were protected from falling." (Exh. C-33, p. 8). Mr. Provencher never signed the informal settlement agreement, so the citations became a final order of the Commission (Tr. 477-78).

The Secretary has established Item 1 of Citation No. 3 is a repeat violation.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc*., 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc*., 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

A.C. Castle and PHI, as a single employer, employed approximately six employees at the Parsons Hill Road worksite (the record establishes the number of workers in PHI's roofing crew fluctuated constantly and Mr. Provencher had problems with crew members failing to show up for work). Both A.C. Castle and PHI had an extensive history of OSHA violations (Exhs. C-30 through C-33). Based on the history of OSHA violations, the Court determines A.C. Castle is not entitled to a reduction in penalty based on good faith.

The five workers present on the Parsons Hill Road worksite had access to all the hazards created by the violative conditions of the affirmed items. The record does not establish a precise timeline for the day of the accident, but Mr. Provencher stated the scaffold was set up when he left the worksite to go to Moynihan Lumber and he was notified of the accident approximately an hour after he left. The hazard created by all the violations was falling approximately 20 feet or more to the ground. The likelihood of injury, with employees working standing a pitched roof and a faulty scaffold and ladder, with no fall protection, was high. A.C. Castle and PHI, as a single employer, failed to take precautions against injury. The Court determines the gravity of the cited violations is high and assesses the penalties proposed by the Secretary for the affirmed items, except for Items 2 and 3 of Citation No. 2. The Court reclassifies the alleged willful violations cited in Items 2 and 3 of Citation No. 2 as serious. The Court assesses a penalty of $7,000.00 each for those items.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is hereby ORDERED:

1. Item 1 of Citation No. 1, alleging a serious violation of § 1926.451(b)(2)(i), is affirmed and a penalty of $5,500.00 is assessed;
2. Item 3 of Citation No. 1, alleging a serious violation of § 1926.452(5)(5), is affirmed and a penalty of $7,000.00 is assessed;
3. Items 4a and 4b of Citation No. 1, alleging serious violations of §§ 1926.454(a) and (b), are vacated and no penalty is assessed;
4. Item 5 of Citation No. 1, alleging a serious violation of § 1926.502(d)(15), is affirmed and a penalty of $7,000.00 is assessed;
5. Item 1 of Citation No. 2, alleging a willful violation of § 1926.451(a)(1), is affirmed and a penalty of $70,000.00 is assessed;
6. Item 2 of Citation No. 2, alleging a willful violation of § 1926.452(k)(1), is affirmed, reclassified as serious, and a penalty of $7,000.00 is assessed;
7. Item 3 of Citation No. 2, alleging a willful violation of § 1926.1053(b)(1), is affirmed, reclassified as serious, and a penalty of $7,000 is assessed; and
8. Item 1 of Citation No. 3, alleging a repeat violation of § 1926.451(g)(1)(i), is affirmed and a penalty of $70,000.00 is assessed.

SO ORDERED.

/s/

Date: March 13, 2017

SHARON D. CALHOUN
Administrative Law Judge
Atlanta, Georgia