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

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>ALL WALL BUILDERS, LLC,<br>Respondent. | A SIMPLIFIED PROCEEDING<br>OSHRC DOCKET NO. 17-1697 |

Appearances:

Kate S. O'Scannlain, Solicitor of Labor
Jeffrey S. Rogoff, Regional Solicitor
Alexander M. Kondo, Attorney
U.S. Department of Labor, New York, New York

For the Complainant

Laurel J. Eveleigh
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For Respondent

Before: Administrative Law Judge Dennis L. Phillips

## DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to sections 2-33 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). At the conclusion of an investigation, the Occupational Safety and Health Administration (OSHA) issued a serious Citation, with two separate items to All Wall Builders, LLC (All Wall). The Citation alleges that All Wall violated 29 C.F.R. §§

1926.501(b)(1), 1926.1053(b)(1), and proposes a total of $7,244 in penalties. All Wall filed a timely notice of contest, bringing this matter before the Commission.

This matter was assigned to the Simplified Proceedings docket, pursuant to Commission Rules of Procedure Rules 201-203, 29 C.F.R. §§ 2200.201-203. (Tr. 10-11.) As such, neither a complaint nor an answer was required, and none was filed. A Joint Pretrial Statement (Jt. Pre-Hr'g) was filed on April 2, 2018. A hearing was held in Syracuse, New York on April 27, 2018. Both parties filed post-hearing briefs and post-hearing reply briefs. For the reasons set forth below, the Court affirms both items in the Citation.

## JURISDICTION

All Wall admits that, as of the date of the alleged violations, it was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act.[1] (Jt. Pre-Hr'g at ¶¶ 1-4.) Based upon the record, the Court finds that at all relevant times All Wall was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and

[1] The parties stipulated that:

> 1. Jurisdiction of this action, OSHRC Docket No. 17-1697, is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C.§ 651, *et seq*.) (the Act).
>
> 2. The Respondent, All Wall Builders LLC, a limited liability company organized under the laws of the State of New York and doing business in the State of New York, maintaining its principal office and place of business at 8 Adler Drive, Suite #2, East Syracuse NY 13057, is and at all time hereinafter mentioned was engaged in the business of commercial construction, and related activities.
>
> 3. The Respondent was and is engaged in business that affects commerce within sections 3(3) and 3(5) of the Act, and is an employer within the meaning of section 3(5) of the Act.
>
> 4. Some of the materials and supplies used by Respondent during the relevant times originated and/or were shipped from outside the State of New York.

(Jt. Pre-Hr'g at ¶¶ 1-4.)

3(5) of the OSH Act. The Court concludes the Commission has jurisdiction over the parties and subject matter in this case. *Id.*

## BACKGROUND

All Wall, along with at least one other contractor, Mulvey Construction, was retained for a construction project at 95 Beaver Street, Cooperstown, NY 13326 (the Worksite).[2] (Tr. 56, 152.) At the time of the inspection, five All Wall employees were present at the site, including the President and a foreman. (Tr. 95, 153-54.) The employees were installing metal trusses on the building roof.[3] (Tr. 22; Ex. 4.)

On August 29, 2017, at about 11:20 a.m., an OSHA Safety Compliance Officer, Dominick DeSimone Jr. (CO), was traveling by the Worksite in a car when he observed a potential violation of the OSH Act.[4] (Tr. 19-21, 39, 49; Ex. L at 1.) He first parked his car at a store's parking lot across the street from the Worksite. (Tr. 21, 40.) He took a few photographs from that location. (Tr. 29-30, 40-41; Exs. 4-5.) He also took photographs from a parking lot located at the north side of the Worksite. (Tr. 29-30; Ex. 10.) After entering the Worksite, the CO spoke with both All Wall's foreman, Chis Kovack, and the President of All Wall, Carl Westcott. (Tr. 32-34, 168, 172; Jt. Pre-Hr'g at ¶ 5.) Both were performing tasks on the ground level at that time. (Tr. 169-70; Ex. 4 at "H" [Kovack].) Three All Wall carpenter employees were working on the roof; Messrs.

[2] The parties stipulated that: "Respondent performed work at CVS, 95 Beaver Street, Cooperstown NY 13326 (the "Worksite"), on, among other dates, August 29, 2017." (Jt. Pre-Hr'g at ¶ 6.) The project entailed the construction of a new CVS Pharmacy with All Wall performing metal truss installation, metal framing, and siding portions of the project as a sub-contractor to Mulvey Construction. The start date for the trusses/framing portion of the project was August 28, 2017. (Tr. 145, 152-53; Ex. L, at 4.) CO DeSimone testified that the citations issued to Mulvey Construction as a result of his August 29, 2017 inspection were identical to those issued to All Wall. (Tr. 56-57, 61.)

[3] The roof was about one hundred feet deep and 85 feet wide. (Tr. 147.)

[4] CO DeSimone has worked for OSHA since December 2000. (Tr. 19.)

Humberto and Roman Vixtha and Rigoberto Juarez. (Tr. 22, 32, 147, 153-54, 169, 207; Exs. 4, 10.) Mr. Westcott told the CO that Foreman Kovack was normally the person that monitors worksite safety, but since he (Mr. Westcott) was operating the lift, he (Mr. Westcott) was in charge that day at the Worksite.[5] (Tr. 34.) CO Desimone then conducted interviews of All Wall employees, who were asked to come down from the roof. (Tr. 34.) He took one last photograph of trusses atop the building just before leaving the Worksite. (Tr. 55-56; Ex. 12.) The CO departed the Worksite at about 12:35 p.m. (Tr. 35; Ex. L at 1.)

## DISCUSSION

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

### I. Item 1 – Failure to ensure that employees were protected from fall hazards as required by 29 C.F.R. § 1926.501(b)(1)

#### A. Applicability, Violation & Exposure

Citation 1, Item 1 alleges that Respondent failed to ensure that employees were protected from fall hazards as required by 29 C.F.R. § 1926.501(b)(1). That standard requires fall protection for each employee working at a height of greater than six feet:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level

[5] Mr. Westcott testified that this was the first job where he worked with Foreman Kovack. Mr. Kovack had not yet "taken all the classes for safety" and Mr. Westcott was still "teaching him at that point." (Tr. 172-73.)

> shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

The parties do not dispute the applicability of the cited standard or its violation. Specifically, they stipulated that the roof upon which Respondent's employees were working on August 29, 2017 was more than six feet above a lower level and that employees were not properly using fall protection.[6] (Jt. Pre-Hr'g at ¶¶ 10-11; Exs. 5, 7, 10; Sec'y Reply Br. at 2, n. 1.)

These stipulations are consistent with the exhibits, photographic evidence and the testimony of the witnesses. The CO described seeing All Wall employees install metal trusses on the building's roof without wearing fall protection. (Tr. 22, 157; Ex. 4.) The work began with a stack of roof trusses on top of a truck at ground level. (Tr. 154.) The foreman prepared and rigged the trusses before the President of All Wall lifted them to the roof level with a forklift. (Jt. Pre-Hr'g at ¶ 9; Tr. 154-55.) As each truss was lifted, the foreman helped guide it and keep it straight by holding a tag line attached to it. (Tr. 170-71.) An employee on the roof would then come to the immediate edge of the roof to receive the truss. (Tr. 22-25, 166; Ex. 4 at "B" and "C".) From there, the employees would walk the truss to the correct place before fastening it to the roof. (Tr. 22-24, 158, 161-62, 166, 175; Ex. 4.)

There was no guardrail or safety net system in place but there was evidence of equipment for a personal fall arrest system. (Tr. 30, 203.) Personal fall arrest systems require employees to

[6] The parties' stipulations include:

> 10. On August 29, 2017, the roof at issue in Citation 1, Item 1, located at the worksite was more than 6 feet above a lower level.
>
> 11. On August 29, 2017, at least at the time when observed and photographed by OSHA, Respondent's employees were working on the roof at issue in Citation 1, Item 1, performing metal truss installation without properly using fall protection.

(Jt. Pre-Hr'g at ¶¶ 10-11.)

wear a harness and then attach the harness to anchor points. (Tr. 146-47.) The employees on the roof assisting with the truss installation process were wearing harnesses. (Tr. 30, 72; Ex. 10.) However, the CO observed that at least two were not tied off to anything, even when they came directly to the roof's edge to receive a truss. (Tr. 27-30, 75; Exs. 5, 7, 10.) The CO also testified that he saw two unconnected employees wearing orange shirts on the roof walking through the trusses toward the north side of the building over the course of an estimated couple of minutes.[7] (Tr. 75). Besides the CO's observations, Humberto Vixtha admitted that there were times that he "probably did" not hook himself back up when he came back to set another truss to the roof's edge, which could be for a matter of minutes.[8] He acknowledged that there "probably" was a time when he forgot to attach his lanyard to the fall protection system.[9] (Tr. 210-11; Resp't Br. at 5-6.)

The same evidence of the standard's violation also shows that at least two All Wall employees, including Messrs. Humberto Vixtha and Roman Vixtha,[10] were exposed to fall hazards. Respondent does not contest this.[11] (Resp't Br. at 9-12; Exs. 5, 7, 10, L at 10; Tr. 66-69.) Under Commission precedent, the Secretary may show either actual exposure or that it was reasonably

[7] Mr. Humberto Vixtha testified that he did not think he needed to be tied off while walking between the trusses as long as he was not closer than 6 feet from the roof's edge. (Tr. 209.)

[8] Mr. Westcott testified that picking up a truss and delivering it to the roof took anywhere from fifteen to thirty minutes, depending on what was going on down on the ground. (Tr. 163.)

[9] Absent a legitimate unpreventable employee misconduct defense, which is not present here, a worker forgetting to hook up his lanyard where a supervisor has actual or constructive knowledge of the violation is not a credible defense to the cited standard.

[10] Humberto Vixtha was a carpenter, who also worked on roofs. He worked at All Wall for about five years. Roman Vixtha, Humberto's brother, was a laborer and carpenter, who also worked on roofs. He worked at All Wall for about two and a half years. (Tr. 126-28, 195-96.)

[11] The photographs at Exhibits 5 and 7 show All Wall employee Humberto Vixtha wearing an orange shirt atop the roof. (Tr. 185, 194; Exs. 5, 7.) Exhibit 10 shows Messrs. Humberto and Roman Vixtha wearing orange shirts atop the roof. (Tr. 185; Ex. 10.) Mr. Juarez is shown wearing a greenish shirt atop the roof in the photograph at exhibit 4, at "B". (Tr. 184; Ex. 4.) Mulvey Construction Superintendent Bruce Neamon wore a brown shirt at the time of the OSHA inspection. (Tr. 31, 39, 93-94, 100-01; Exs. 1-2, 8-9, 11.)

foreseeable employees would have access to the violative condition. *Kaspar Wire Works*, 18 BNA OSHC 2178, 2194-95 (No. 90-2775, 2000) (finding exposure when unguarded equipment was available for use). The CO saw two employees come to the edge of the roof to receive a truss the President was lifting up to them without being tied off or using any other form of fall protection. (Tr. 27-30; Exs. 5, 7, 10.) The record also shows that the third employee working on the roof was, at least at times, not attached to the fall protection system. (Tr. 25, 95-96; Exs. 1, 4 at "C"; Jt. Pre-Hr'g at ¶ 11.) Thus, employees were exposed to the cited condition.

### B. Knowledge

Having found that the standard applies, was violated, and that employees were exposed to the hazard, we turn to whether the Secretary showed Respondent's actual or constructive knowledge of the cited condition. Two individuals with supervisory responsibility, Messrs. Westcott and Kovack, were at the Worksite when the CO observed employees working without fall protection. (Tr. 34, 137, 153, 168.) The President was responsible for overseeing all work performed by employees. (Jt. Pre-Hr'g at ¶ 8; Ex. A at 2.) On the day of the inspection, he was operating a rough terrain forklift and directing the work of raising up and then setting the metal trusses on the roof.[12] (Jt. Pre-Hr'g at ¶¶ 5, 7-9; Tr. 154-63.) While he generally stayed in the vehicle, he did get out to assist Foreman Kovack a few times. (Tr. 173-74, 190.) The foreman

[12] The parties stipulated:

> 5. Carl Westcott ("Westcott") is and at all relevant times was the owner and president of Respondent.
> 7. Employees of Respondent performed metal truss installation, metal framing, and siding work at the Worksite on, among other dates, August 29, 2017.
> 8. On August 29, 2017, Westcott was responsible for overseeing the work performed by Respondent at the Worksite.
> 9. On August 29, 2017, Westcott was, among other things, operating a rough terrain forklift and directing the work of raising and setting metal trusses.

(Jt. Pre-Hr'g at ¶¶ 5, 7-9.)

assisted with rigging the trusses and helped guide the trusses to the employees on the roof. (Tr. 171.) As noted above, the work required at least one employee on the roof to come to the edge of the roof to receive each truss. (Tr. 36-37, 160-61, 207; Exs. 10, 12.)

A foreman or supervisor's actual or constructive knowledge of a violative condition satisfies the Secretary's burden. *See e.g., N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000) (citation omitted), *aff'd*, 255 F.3d 122 (4th Cir. 2001). Knowledge may be established where the violative condition is in a conspicuous location or otherwise readily observable. *Kokosing Constr., Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996); *accord Kilby & Gannon Constr. Servs., LLC*, 24 BNA OSHC 1212, 1225 (No. 10-0755, 2012) (O.S.H.R.C.A.L.J.). In addition, an employer can be charged with constructive knowledge when it fails to engage in reasonable diligence to identify violative conditions. *Hamilton Fixture*, 16 BNA OSHC 1073, 1089, 1094, 1098 (No. 88-1720, 1993) (finding constructive knowledge because the physical condition was readily observable if someone familiar with the site looked), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) (unpublished). An employer has an obligation to inspect the workplace for hazards and this obligation requires "a careful and critical examination." *Hamilton Fixture*, 16 BNA OSHC at 1087, quoting *Austin Commercial v. OSHRC*, 610 F.2d 200, 202 (5th Cir. 1979).

With respect to the visibility of the violative condition at the Worksite, the roof was approximately 16 feet, 8 inches high. (Tr. 36, 83.) Both supervisors knew the employees were on the roof, knew they had to come to the roof's edge to receive each truss, and both were at times capable of seeing the employees near the edge. Mr. Westcott admitted that he could see one of his employees "when they were out towards the edge at any time." (Tr. 35-36, 79, 97-99, 161-63, 166, 174-75; Exs. 4-5, 7-10.) At least during part of the process, a supervisor faced the employees

directly. (Tr. 157, 161, 190.) In addition, the supervisors on the ground communicated with the workers on the roof by using hand signals. (Tr. 162, 166, 207.) An employee acknowledged that the President could see the workers on the roof and the President agreed this was the case. (Tr. 78, 163, 207.) The CO testified that All Wall employees were working on the roof with their lanyards unconnected to their fall protection harnesses or with no fall protection at all in plain view of Mr. Wescott. (Tr. 35-36, 39, 77-79, 97-99, 160-63. 174-75; Exs. 10, 12; Sec'y Br. at 5-6.) Thus, there should be no debate that the supervisors could see the workers on the roof. *See Kokosing,* 17 BNA OSHC at 1871; *Simplex Time Recorder Co. v. Brock,* 766 F.2d 575, 589 (D.C. Cir. 1985) (finding knowledge where the violations cited were "based on physical conditions and on practices ... readily apparent to anyone who looked and indisputably should have been known to management.").

Still, the President argued that he did not know the employees were not using fall protection. He said he did not "recall" seeing any of his employees unconnected on the roof. (Tr. 78, 164-65, 186.) He explained how during parts of the task, he was not focused on the employees on the roof. He said, much of the time, he was "not paying attention" to his employees on the roof, or "what they're doing up there." (Tr. 160.) He does not explain how he could understand the hand signals, but not see that their harnesses were unattached. (Tr. 162.) Nor does he explain why the foreman could not recognize that employees' harnesses were not attached to the fall protection system.

At best, the President's testimony can be understood as indicating that he did not realize the employees were not tied off. The Secretary does not allege that Respondent willfully ignored the fall protection requirements. Rather, he argues that Respondent had knowledge of the violative condition because it was in plain view of the supervisors. (Tr. 36; Sec'y Br. at 11-12.) Further,

even if for some reason the President and foreman's views were obscured, the Secretary asserts that Respondent still should be charged with constructive knowledge because it failed to engage in reasonable diligence. (Sec'y Br. at 7-9, 12-13.)

The Court agrees. No supervisor was assigned to work with employees on the roof and the supervisors on the ground did not take reasonable steps to monitor safety. (Tr. 153-54, 160-64.) The President even argued that he was not directing his employees work. (Tr. 165.) He performed one part of the task and expected them to do the next part. *Id.* On the day of the inspection, he did not instruct them to use the fall protection and did not check for its use himself or by asking someone else to do so. (Tr. 163-64, 215.) Nor did he notice when employees failed to attach their harnesses. (Tr. 164-65.) And he acknowledged that neither he nor the foreman would check in the middle of the day to make sure employees were using fall protection. (Tr. 178.) Humberto Vixtha concurred that no supervisor came to the roof or checked on the fall protection on the day of the inspection. (Tr. 214-15.)

The President was working directly with the employees on the roof and yet failed to realize they were not using fall protection. (Tr. 164-65.) He did not undertake "a careful and critical examination" of the worksite. *See Hamilton Fixture*, 16 BNA OSHC at 1087. Reasonable diligence requires an effective overall safety program, including the implementation of work rules and training programs, adequate supervision of employees, the anticipation of potential hazards, and measures taken to prevent the occurrence of violations.[13] *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). Respondent had some elements of a safety program—fall

[13] CO DeSimone testified that communication, training and enforcement of All Wall's Safety and Health Program was inadequate. (Tr. 70-71; Ex. L at 7-8.)

protection equipment was present and there was some training.[14] (Tr. 128-29, 178, 181-82; Exs. A-C.) However, the steps it took to investigate for violative conditions and discipline employees for infractions was inadequate. The President acknowledged that he did not go out specifically to look for safety violations.[15] (Tr. 178, 181-82.) Employees worked directly with two supervisors in full view of them without attaching their harnesses, even when the work required them to come directly to the roof's edge. (Tr. 78, 163-65; Ex. 4.)

As for discipline, Respondent's safety program directed management to "document all violations that are observed and discipline any employee disregarding [the safety policy]." (Ex. A at 3, 51-52.) First-time verbal warnings were to be documented in a log with subsequent violations documented using a specific form. (Ex. A at 51.) Although the President indicated he repeatedly verbally reprimanded employees, including those at the Worksite at the time of the inspection for not being properly connected, he never documented any safety violations and was unaware of any other manager doing so.[16] (Tr. 136-37, 140, 176-78, 181-83, 211.) He did not know if the company had the Safety Violation Form referenced in its safety manual and the record lacks any evidence of safety issues being documented. (Tr. 177, 182-84; Ex. A at 51-52.) When shown All

[14] Messrs. Westcott and Humberto Vixtha testified that fall protection was a subject that would be covered by toolbox talks conducted by foremen. (Tr. 130-31, 197-98; Ex. B.)

[15] Respondent's safety program states that: "Superintendents will follow-up on inspections performed by Safety or Loss Prevention Personnel to ensure proper corrective actions are taken." (Ex. A at 3.) However, the President admitted that at the time of the inspection, All Wall did not have any "Safety or Loss Prevention Personnel." (Tr. 180.)

[16] Humberto Vixtha testified that Mr. Westcott reprimanded him for not being properly connected at the time of CO DeSimone's inspection. (Tr. 211-12.) Mr. Westcott also did track tardiness and fill out reports regarding lateness. (Tr. 177.)

Wall's "Safety Violation Form" in the courtroom, Mr. Westcott testified that "it's probably the first time I've seen it."[17] (Tr. 183; Ex. A at 52.)

Consistent with this, Humberto Vixtha testified that although employees sometimes forgot to use safety equipment, such as fall protection, he never heard of any employee receiving any form of discipline beyond a verbal instruction or reprimand. (Tr. 215-16.)

Although neither supervisor admitted to seeing employees on the roof work without fall protection, both were in a position to observe the violative condition.[18] *See Simplex,* 766 F.2d at 589 (knowledge established when physical condition was readily apparent). In addition, either could have discovered the violation if he had engaged in reasonable diligence. *Hamilton Fixture,* 16 BNA OSHC at 1087. Respondent failed to fully implement and enforce its safety program. The Secretary met his burden of establishing knowledge of the violative condition.

### C. Affirmative Defense of Unpreventable Employee Misconduct

Respondent alleges that the failure to use fall protection was the result of unpreventable employee misconduct (UEM). (Resp't Br. at 13-14.) The Secretary argues that this affirmative defense is time-barred under Commission Rule 207(b), 29 C.F.R. § 2200.207(b), because Respondent failed to raise it during the pre-hearing conference and failed to present evidence of extraordinary circumstances.[19] (Sec'y Br. at 15.) Under the Commission rules for simplified proceedings, "[e]xcept under extraordinary circumstances, any affirmative defenses not raised at

[17] The Safety Violation Form states it "is to be completed each time an employee violates a corporate safety rule." (Ex. A at 52.)

[18] CO DeSimone told Mr. Westcott during his inspection that he (the CO) had seen Messrs. Humberto and Roman Vixtha disconnected. (Tr. 186-87.)

[19] *See* Jt. Pre-Hr'g at 3, n. 1 (Secretary's objection to All Wall raising this affirmative defense late). While Respondent did not raise the affirmative defense during the February 1, 2018 pre-hearing conference, it did raise it in the Jt. Pre-Hr'g, and counsel noted it during his opening statement to the Court at the hearing. (Jt. Pre-Hr'g at 4-6; Tr. 17.)

the pre-hearing conference may not be raised later." 29 C.F.R. § 2200.207(b); *See Fed. Constr. Grp.*, 24 BNA OSHC 1602, 1604 (No. 12-0097, 2012) (O.S.H.R.C.A.L.J.) (barring late affirmative defense). All Wall did not raise any affirmative defenses during the February 1, 2018 pre-hearing conference and has not presented evidence of extraordinary circumstances. For these reasons alone, Respondent's unpreventable employee misconduct affirmative defense to both citation Items 1 and 2 is rejected as untimely raised.

Even if the affirmative defense had been timely and properly raised, the Court finds that Respondent failed to meet its burden for the same reasons a finding of constructive of knowledge is appropriate. To establish the defense, Respondent need to show that: (1) it has an applicable work rule, (2) it adequately communicated the work rule, (3) it has taken sufficient steps to discover violations, and (4) it has effectively enforced the rules when violations have been discovered. *Manganas Painting Co.*, 21 BNA OSHC 1964, 1967 (No. 94-0588, 2007).

As for the first two elements of the UEM defense, Respondent had a written safety manual that addressed the duty to have, and train for, fall protection. There was fall protection equipment at the Worksite provided by All Wall. Mr. Westcott testified that his employees had to wear personal protective gear whenever working at levels above six feet. (Tr. 64-65, 147, 150, 163, 166-67, 203; Exs. A at 28-30, L at 12.) Mr. Westcott testified that toolbox talks about fall protection and the use of personal fall arrest systems have been done. The President also indicated that he instructed employees to use it in the past but did not give any specific instructions regarding its use on the day of the inspection. (Tr. 151-52, 163.) One of the employees who was working on the roof, Humberto Vixtha, testified that he was trained to use fall protection and explained that

"mostly you have to have it all the time."[20] (Tr. 198, 202.) It is not clear what training the other employees received. Nor is it clear that the instructions in the written safety manual about fall protection were communicated to all employees. (Ex. A at 29.) The President indicated that employees were given a more general safety document rather than the safety manual itself. (Tr. 129.) Respondent did not explain what information that document had about fall protection. *See Propellex Corp.*, 18 BNA OSHC 1677, 1682-83 (No. 96-0265, 1999) (rejecting UEM defense when there was insufficient evidence of work rule being communicated to all employees).

Even assuming that a work rule was effectively communicated to all employees, the record lacks sufficient support for the other two elements of the defense. Respondent did not go out to inspect for safety violations—he only addressed them if he happened to come across them. (Tr. 178, 182, 215.) When infractions were found, there were no consequences beyond verbal statements. (Tr. 215-17.) It is a "rare case" where verbal reprimands alone constitute effective enforcement. *Gem Indus., Inc.*, 17 BNA OSHC 1861, 1864 (No. 93-1122, 1996) (rejecting UEM defense when three employees were not using fall protection), *aff'd*, 149 F.3d 1183 (6th Cir. 1998) (unpublished). Here, two employees, Messrs. Humberto and Roman Vixtha, failed to attach themselves to fall protection even though the task at hand required them to go the roof's edge and work directly with two supervisors on the ground. (Tr. 65, 194; Exs. 4-5, 7, 10; Sec'y Br. at 5.) This was not a momentary lapse of a single employee that was missed by an otherwise diligent supervisor. The Secretary showed that two employees failed to use fall protection for at least several minutes and were not corrected by either their co-workers or supervisors. *See Gem*, 17

[20] This employee, along with Roman Vixtha, signed a safety checklist that included the phrase "fall protection" at a different job site a few months before the inspection that lead to the Citation at issue. (Tr. 133-34; Exs. B-C.) The President indicated that the instructions given related at this other jobsite would have covered fall protection, but he himself did not provide the training or knew how long it took. (Tr. 134.)

BNA OSHC at 1865; *Fla. Gas Contractors, Inc.*, 27 BNA OSHC 1799, 1809 (No. 14-0948, 2019) (concluding that Respondent's evidence of enforcement was insufficient).

Respondent failed to show that the violation was the result of UEM, so, Item 1 of Citation 1 is affirmed.

### D. Characterization and Penalty

Respondent does not challenge that violation being characterized as serious. A violation is "serious" "if there is a substantial probability that death or serious physical harm could result from" the cited conditions. 29 U.S.C. § 666(k). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur." *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1824 (No. 88-2572, 1992). The hazard was a potential fall of approximately 16 feet 8 inches, for which there would be a substantial probability of death or serious injury.[21] (Tr. 36-38.) So, the violation was serious.

As for the penalty amount, Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Compass Envtl., Inc*., 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010), *aff'd*, 664 F.3d 1164 (10th Cir. 2011). When the Citation was issued, the maximum statutory penalty for a serious citation was $12,675. Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 82 Fed. Reg. 5373 (Jan. 13, 2017) (to be codified at 29 C.F.R. Part 1903). The Secretary proposes less than the

[21] The President also indicated that aspects of the work being engaged in on the day of the inspection were "dangerous." (Tr. 162.)

maximum, $3,622, to account for the gravity of the violation and Respondent's size. (Tr. 9, 36-38.)

According to the CO, OSHA evaluated both the severity of harm that could come to employees and the probability of any injury for the failure to use fall protection. It determined that the severity was high because a fall from the height of where the employees were working would result in severe injury or death. However, the probability of a fall was determined to be "lesser instead of greater" because employees were not continuously at the edge of the roof. As for size, OSHA determined that Respondent was entitled to a 60% reduction to account for the low number of employees it had.[22] Neither an increase nor a decrease was given for Respondent's history, as it had not received any high gravity serious citations in the past five years. Nor were adjustments made on the basis of good faith. (Tr. 36-38; Ex. L at 10.)

Respondent does not make any specific challenges to the penalty amount. The Court agrees with the Secretary's proposal. Employees did not attach themselves to the fall protection system even when the work required them to come to the roof edge to receive materials directly from two supervisors. (Tr. 36-37; Ex. 4.) While Respondent had a safety program, it failed to effectively inspect the Worksite and enforce the requirement to use fall protection. (Tr. 63, 65, 128, 178, 181-82.) This violation's gravity outweighs the evidence of Respondent's post-inspection efforts at additional training on the use of fall protection. (Tr. 36, 138-39.) *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993) (when weighing the penalty factors, the gravity of the violation is generally accorded greater weight). The Secretary's proposal accounts for the

[22] The CO testified that All Wall had no more than 25 employees. (Tr. 37.) Mr. Westcott testified that he started All Wall in 2007 and it employs around 15, 16 employees. (Tr. 125-26.)

violation's gravity and Respondent's size. Additional adjustments for history and good faith are not warranted. Accordingly, a penalty of $3,622 is appropriate.

## II. Item 2 - Failure to appropriately extend ladder as required by 29 C.F.R. § 1926.1053(b)(1)

### A. Applicability, Violation & Exposure

Citation 1, Item 2, alleges that a ladder used for access to the roof of the worksite was not extended at least 3 feet above the upper landing surface, as 29 C.F.R. § 1926.1053 (b)(1) requires.[23] There is no dispute as to the applicability of the cited standard or its violation. (Tr. 14, 26-27; Exs. 3-4.) The parties stipulated that the ladder at issue was not sufficiently extended:

> On August 29, 2017, at least at the time when observed and photographed by OSHA, the ladder at issue in Citation 1, Item 2, located at the worksite, was extended less than 3 feet above the upper landing surface.

(Jt. Pre-Hr'g at ¶ 12; Tr. 142.) There was only one ladder on the site for access to the roof.[24] (Tr. 32, 86.)

[23] This standard specifies: "where portable ladders were used for access to an upper landing surface and the ladder's length allows, the ladder side rails did not extend at least 3 feet (.9 m) above the upper landing surface being accessed." 29 C.F.R. § 1926.1053 (b)(1). The President admitted to the CO that the ladder could have been extended further and it was adjusted during the OSHA inspection. (Tr. 85-89; Ex. L at 15.) Mr. Westcott testified that he did not know who owned the ladder. (Tr. 141; Exs. 3, 11.)

[24] Mr. Humberto Vixtha testified that he used a boom lift to get on the roof on the morning of August 29, 2017 because he had to take his personal tools, including his drill, impact drive and other stuff that he needed for the job up to the roof. (Tr. 207.)

As for exposure, the President acknowledged that Messrs. Humberto and Roman Vixtha used the ladder during the inspection.[25] Initially, Mr. Westcott testified that he thought he told them to use the ladder, but later said he "just told them to come down." (Tr. 149, 185-87.) In addition, the ladder was available for use and there was no work rule or other hindrance preventing All Wall employees from using it. (Tr. 175-76, 218.) It was located on the same side of the building where the All Wall employees were working.[26] (Tr. 25-27, 185-86; Exs. 4 at "D," 11.) The photograph at exhibit 11 shows Mulvey Construction Superintendent Bruce Neamon exiting the roof on the ladder in an un-extended position.[27] (Tr. 31-32; Ex. 11.)

In *Phoenix Roofing*, 17 BNA OSHC 1076 (No. 90-2148, 1995), the work activities did not require employees to come in direct contact with a violative condition. *Id.* at 1079, *aff'd,* 79 F.3d 1146 (5th Cir. 1996). Still, the Commission found that exposure was reasonably predictable because the roofing activities the employees were engaged in brought them within twelve feet of a violative condition.[28] *Id*. Employee access is established where the Secretary shows either actual exposure, or "that it was reasonably foreseeable that [employees] would have access to the

[25] The CO testified that employees working on the roof used the ladder to come down during the inspection. (Tr. 34.) He did not see this personally but was told by an employee that the workers on the roof used the ladder to exit the area during the inspection. (Tr. 89-90.) At the hearing, only one employee, Humberto Vixtha, testified. Mr. Humberto Vixtha admitted to using the ladder to come down during the inspection. He did not recall using the ladder to access the roof on the morning of August 29, 2017. He also testified that he did not recall using the ladder during a break that morning. The ladder was extended during the course of the OSHA inspection, thereby eliminating the hazard. It is unclear whether or not the ladder was in a proper, non-hazardous, extended position when Messrs. Humberto and Roman Vixtha came down it during the OSHA inspection or when Humberto Vixtha again used it after lunch to gain access to the roof. (Tr. 89-90, 212-14, 219; Ex. L at 15.)

[26] The ladder was located about 50 feet from where Mr. Juarez was working when the photograph at Exhibit 4 was taken. (Tr. 187; Ex. 4 at "B" and "D".)

[27] Mr. Westcott testified that Mr. Neamon was up on the roof "sliding insulation board underneath our trusses." (Tr. 164.)

[28] The Secretary need only show that the ladder was "available for use," not that it was actually "in use" at the time of the inspection. *See Barnard Constr. Co. v. U.S. Dep't of Labor*, 726 F. App'x. 616 (9th Cir. 2018) (citations omitted) (unpublished) (citations omitted); (Sec'y Reply Br. at 3, n. 2.)

violative conditions." *Miniature Nut and Screw Corp.*, 17 BNA OSHC 1557, 1560 (No. 93-2535 1996); *accord Kaspar Wire Works*, 18 BNA OSHC at 2195; *accord Kilby & Gannon Constr. Servs.*, 24 BNA OSHC 1212, 1225 (No. 10-0755, 2012) (O.S.H.R.C.A.L.J.). In the present matter, no part of the roof was off-limits. (Tr. 175-76.) It was reasonably foreseeable that All Wall employees could and would use the ladder in an un-extended position to access and exit the roof. The Court finds that Messrs. Humberto and Roman Vixtha and Juarez had access to the ladder while it was in an un-extended position and were exposed to the cited condition.

Respondent argues that there was also a boom lift on the site and that the men could use fall protection when stepping onto the ladder. (Tr. 185, 204-5.) However, these arguments go to the gravity of the offense, not whether the ladder was improperly configured and available for the use by employees. Unlike the boom lifts, the ladder was the only way up and down from the north or west sides of the building, nearest to where the All Wall employees were working. (Tr. 204; Ex. 4.) The President did not consider moving the boom lift when the CO asked to speak with the employees working on the roof and the employees used the ladder instead. (Tr. 34, 149, 186-88, 212, 219.) So, the Secretary established that the cited standard applied, was violated, and that at least three employees, including Messrs. Humberto and Roman Vixtha and Mr. Juarez, were exposed to the cited hazard. (Ex. L at 13-14.)

**B. Knowledge**

Respondent alleges it lacked actual or constructive knowledge of the violative condition. The Secretary argues that the ladder was in plain view and even if Respondent lacked actual knowledge, it could have ascertained the violative condition if it engaged in reasonable diligence. (Sec'y Br. at 14-15.) Indeed, the CO saw that the ladder was not properly extended from across the street. (Tr. 26-27, 37; Exs. 3-4 at "D".) He also testified that the ladder that was leaning on

the west wall was in plain view of Mr. Westcott while he was operating a lift and maneuvering trusses; also on the west side of the building. (Tr. 37, 78; Ex. 4.)

As with Item 1, Respondent does not admit that a supervisor saw the ladder and knew that it was not properly extended. However, establishing that is not the Secretary's burden. *Phoenix Roofing*, 17 BNA OSHC at 1079 (finding that the Secretary did not have to show that "the employer understood or acknowledged that the physical conditions were actually hazardous"). The ladder was in plain view and capable of being discovered. (Tr. 25-27; Exs. 3, 4 at "D".) Both the violative condition (the improperly configured ladder) and the employees were in a conspicuous location. (Exs. 3- 4.) And the President and the foreman were working directly with the employees on the roof near the ladder. (Tr. 22-25, 27-28, 30, 36; Exs. 3-5, 7, 10.) Mr. Westcott admitted that there was nothing stopping his employees from using the ladder and he said that he was "not sure if they were using it or not, …." (Tr. 176.) Further, as discussed above, Respondent did not engage in safety inspections and took insufficient steps to address violations supervisors happened to discover. (Tr. 176, 182.) Thus, the record shows that the Secretary established knowledge of the violative condition. *See Simplex*, 766 F.2d at 589*; Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983) (finding knowledge when ladders were in plain view and a foreman was present at the worksite); *A.L. Baumgartner Constr. Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) (obviousness of the condition sufficient for constructive knowledge).

### C. Affirmative Defense of UEM

As with Item 1, Respondent also alleges that the violation of 29 C.F.R. § 1926.1053 (b)(1) was the result of UEM.[29] (Resp't Br. at 13-14.) It argues that it had a safety manual which addressed the use of ladders and provided training on the topic. (Resp't Br. at 13-14; Exs. A-D, G, J; Tr. 151, 198-99.) Even if the affirmative defense had been timely and properly raised to Item 2, the Court finds that Respondent failed to meet its burden for the reasons stated below.

No specific instructions were given about ladders at this Worksite. (Tr. 218.) However, Messrs. Humberto Vixtha and Roman Vixtha attended a toolbox talk on portable ladder safety given by a different foreman at another job site on April 25, 2017, a few months before the inspection. (Tr. 130-31, 135-36, 153, 198-99; Ex. D.) On the same day at the other jobsite, these two employees also attended a toolbox talk on the "OSHA pocket guide."[30] (Tr. 136, 199; Ex. E.) Mr. Westcott also testified that Messrs. Humberto and Roman Vixtha received training on fall protection, including ladders and roof safety, on May 10, 2017 at another job site. (Tr. 133-35; Exs. B-C.) The one employee who testified did not detail any other instructions he had been given about ladders, but he recognized that the ladder at the Worksite was not set up properly. (Tr. 213; Ex. 11.) It is unclear whether the two employees who did not attend the toolbox talks received training or instruction about portable ladders. The President indicated that Foreman Kovack had not completed all of the safety classes and was still being trained at the time of the inspection. (Tr. 172.)

[29] As stated earlier, All Wall did not raise any affirmative defenses during the February 1, 2018 pre-hearing conference and has not presented evidence of extraordinary circumstances. For these reasons alone, its UEM affirmative defense to Item 2 is rejected as untimely raised.

[30] The employee who testified did not indicate whether the presentation on the OSHA pocket guide covered portable ladders. (Tr. 199.) Respondent introduced a copy of the OSHA pocket guide and it addresses ladders generally but does not specifically discuss setting up or extending ladders. (Ex. E. at 5.) Mr. Westcott testified that he thought the use of a portable ladder would be included in the OSHA pocket guide. (Tr. 136.)

Besides the toolbox talks, Respondent also cites its written safety manual, which explains that ladders should extend three feet above a landing surface. (Tr. 131-32, 144; Ex. A at 20.) However, it is unclear how the safety manual was shared with employees, if at all. (Tr. 129.) The President testified that employees were given a subset of a more general employee manual that they were expected to read and sign off on. (Tr. 129.) The extent to which that subset document addressed ladders is unclear. (Tr. 129.) The employee who testified was not asked whether he had ever seen or reviewed the safety manual that addresses the extension of ladders. (Tr. 198-99.) Thus, Respondent failed to establish that a specific work-rule on properly extended ladders was conveyed to all employees. *See Propellex,* 18 BNA OSHC at 1682 (finding insufficient evidence of work rule being communicated to all employees).

Beyond the issues with how well Respondent communicated the rule to employees, is the limited investigations and lack of discipline when violations of work rules happened to be discovered. *See Propellex,* 18 BNA OSHC at 1682-83 (concluding that effective implementation of a safety rule requires appropriate steps to prevent and discover violations). As discussed above, the President indicated that if he sees something wrong, he addresses it, but did not affirmatively look for violations. (Tr. 178, 181-82, 214.) Neither he nor the foreman checked for violations on the day of the inspection. (Tr. 178, 214-15.)

As for discipline, it was always limited to verbal reprimands.[31] (Tr. 176-78, 192-93, 215-16.) The President did not write anything down about discipline for safety rules and never fired

[31] Mr. Westcott testified that if he started giving employees "days off or start deducting their paycheck, like I've heard of some companies trying to do, you won't have any employees." (Tr. 192-93; Resp't Reply Br. at 19.) Fear of losing employees by taking disciplinary action beyond verbal reprimands is not a valid excuse for an ineffective enforcement of rules when violations have been discovered. *See Atl. & Gulf Stevedores v. OSHRC*, 534 F.2d 541, 555 (3rd Cir. 1976) ("entire thrust of the [OSH] Act is to place primary responsibility for safety in the work place upon the employer."). Even in the face of resistance by the employees, the employer "must take all available legal steps to secure compliance" with the OSH Act. *Id.* (Sec'y Reply Br. at 3.)

or wrote an employee up for not having fall protection. (Tr. 176-78.) He suggested that it was possible someone else might write down a safety issue, but he did not review the daily reports where this information might have been noted. (Tr. 177.)

Respondent did not provide any examples for written discipline for any employee. *See Capeway Roofing Sys., Inc*., 20 BNA OSHC 1331, 1342-43 (No. 00-1986, 2003) (party would have produced evidence if it had been favorable); *Jensen Constr. Co*., 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979) (employer bears the burden of proving all elements of the defense). Employees were told how violating work rules could lead to injuries but were not told that the employer would take any action for violating safety rules. (Tr. 216-17.) *Fla. Gas*, 27 BNA OSHC at 1808 (giving less weight to unsupported claims of verbal discipline); *Stark Excavating, Inc.*, 24 BNA OSHC 2218, 2200 (No. 09-0004, 2014) (consolidated) (defense not established when enforcement evidence was limited to verbal warnings). Accordingly, Respondent failed to establish that the violation was the result of UEM.

**D. Characterization and Penalty**

As with Item 1, the hazard at issue for this Item is a fall of approximately 16 feet 8 inches. (Tr. 37-38.) A fall from such a height would likely result in serious injury or death. Thus, the violation was appropriately characterized as "serious."[32] 29 U.S.C. § 666(k) (requiring a serious characterization when "there is a substantial probability that death or serious physical harm could result from" the cited conditions.").

Turning to the penalty amount, as discussed in connection with Item 1, the Act specifies that the Commission must give due consideration to the violation's gravity, the employer's size,

[32] Respondent does not challenge the characterization of the violation as serious.

history of violation, and good faith. 29 U.S.C. § 666(j). These factors need not be accorded equal weight, and gravity is usually the principle factor. *See e.g., Siemens Energy & Automation Inc.*, 20 BNA OSHC 2196, 2199 (No. 00-0152, 2005).

Consistent with Item 1, the CO indicated that the severity of an injury resulting from falling off the ladder would be the same as a fall from the roof because of a lack of fall protection. (Tr. 38.) As for the probability of an injury, he explained that OSHA viewed it as "lesser" because employees use the ladder only a few times a day. *Id.* The Secretary also reduced the penalty on the basis of Respondent's small size. *Id.* No increases or decreases were given for Respondent's history and good faith.[33] (Tr. 37-38.) Based on these factors, the Secretary proposes a penalty of $3,622 for Item 2. (Tr. 9, 36-38.)

Although the Court agrees that Respondent's history does not warrant a change in the penalty amount, a further reduction to the proposed penalty is merited because of the violation's gravity and good faith. *See Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits"), *aff'd*, 73 F.3d 1466 (8th Cir. 1996); *Dana Container, Inc.*, 25 BNA OSHC 1776, 1792 (No. 09-1184, 2015) (departing from Secretary's proposed penalty amount based on the Commission's assessment of gravity), *aff'd*, 847 F.3d 495 (7th Cir. 2017). Assessing a violation's gravity involves considering: (1) the number of employees exposed to the hazard; (2) the duration of exposure; (3) whether any precautions have been taken against injury; (4) the degree of probability that an accident would occur; and (5) the likelihood of injury. *See e.g., Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x. 152

[33] It appears that the Secretary calculated the gravity-based penalty as approximately 70% of the statutory maximum, and then applied an additional 60% reduction to account for Respondent's size. (Tr. 37-38.)

(5th Cir. 2002) (unpublished); *Ernest F. Donley's Son, Inc*., 1 BNA OSHC 1186, 1187 (No. 43, 1973) (viewing gravity as the probability of an accident's occurrence and the extent of exposure). The ladder was not the only way to exit or leave the roof—two boom lifts were also present. (Tr. 144, 185.) Although the ladder was used to exit the roof during the inspection and after lunch by Humberto Vixtha, the CO did not see any All Wall employee use the ladder when it was in an improperly configured position at any time.[34] (Tr. 82, 86, 144-45, 148, 213.) The employee who testified indicated that the ladder was not used in the morning when employees had to bring tools to the roof. (Tr. 148, 204.) Further, the CO believed the ladder was promptly extended to address the violation after he raised the issue during the inspection. (Tr. 89.)

As to good faith, Respondent presented evidence of training and instructions about ladders it provided to two employees.[35] (Tr. 198-99; Exs. A, D-E.) In addition, after the inspection, Respondent sought out additional training for all employees, including an OSHA ten-hour course that would cover ladders and other hazards. (Tr. 137-39.) After the OSHA inspection, it elected to participate in a voluntary state site inspection program and was following up with recommendations for further training provided through that program. (Tr. 138-40.) Accordingly, the Court reduces the proposed penalty of $3,622 by $1,622 to a Court assessed penalty of $2,000.

[34] In addition, Humbert Vixtha used fall protection when he got onto the ladder during the inspection. (Tr. 212, 217-18.) This evidence does not undermine the finding of the violation as the standard does not provide exceptions to the requirement for ladders to be properly extended if fall protection is used. 29 C.F.R. § 1926.1053(b)(1). However, it does relate to the gravity of the violation. *See Capform*, 19 BNA OSHC at 1378 (considering precautions taken). The CO indicated that the fall hazard mainly related to exiting the roof and agreed that if a person was connected to fall protection when on a ladder, this would somewhat reduce the hazard. (Tr. 87-88.)

[35] As noted above, Respondent failed to sufficiently communicate and enforce its rules about ladders. Still, Respondent's safety program is relevant to the assessment of the violation's gravity. *See Capform*, 19 BNA OSHC at 1378 (considering precautions taken against injury when assessing a violation's gravity).

## Findings of Fact and Conclusions of Law

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

## ORDER

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

1. Item 1 of Citation 1 for a serious violation of section 5(a)(2) of the OSH Act for failure to comply with the standard at 29 C.F.R. § 1926.501(b)(1) is AFFIRMED and a penalty of $3,622 is ASSESSED; and

2. Item 2 of Citation 1 for a serious violation of section 5(a)(2) of the OSH Act for failure to comply with the standard at 29 C.F.R. § 1926.1053(b)(1) is AFFIRMED and a penalty of $2,000 is ASSESSED.

SO ORDERED.

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

Date: April 8, 2019
Washington, D.C.