United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PREMIER ROOFING LLC, d/b/a PREMIER ROOFING CO., Respondent.	OSHRC Docket No. 19-1689

Appearances:

Timothy S. Williams, Esq., Department of Labor, Office of the Solicitor, Denver, Colorado
For Complainant

Barry A. Cole, Non-Attorney Representative, Cole Preferred Safety Consulting, Inc.
For Respondent

Before: Judge Peggy S. Ball – U. S. Administrative Law Judge

DECISION AND ORDER

This matter comes before the Court regarding Complainant's *Second Motion for Summary Judgment* (MSJ #2). As indicated in its *Order Regarding Complainant's Motion for Summary Judgment*, the Court found there were two disputes of material fact that remained unresolved after its consideration of the parties' respective briefs and evidence. Complainant has filed the present motion in an attempt to resolve those disputes and has incorporated by reference, but also supplemented, the evidence filed with the previous *Motion for Summary Judgment* (MSJ #1) to address those matters found to be genuinely disputed in the Court's *Order* on MSJ #1. Because the Court found there were disputes of material fact on the issues of exposure and control, it reserved ruling on "ancillary issues such as whether the proposed penalty was excessive and whether Respondent had actual or constructive knowledge of the presence of the hazards." *Order*

Regarding Complainant's Motion for Summary Judgment at 19. Having reviewed the new evidence submitted by Complainant, the related filings submitted by Respondent, and all of the documents associated with the first and second motions for summary judgment, the Court finds there are no longer any disputes as to any material fact and Complainant is entitled to judgment as a matter of law as to each of the violations alleged in the Citation and Notification of Penalty.

I. PROCEDURAL HISTORY

On April 26, 2019, Compliance Safety and Health Officer Aimee L. Stark initiated an inspection of Respondent in response to the filing of a complaint. (Ex. C-1).[1] When she arrived at the worksite, known as the Summerfield Villas, she observed twenty workers on top of multiple residential roofs without any form of fall protection. (Ex. C-1, C-2). Each of these roofs was more than six feet above the ground. (Ex. C-1). CSHO Stark met with Michael Comstock, Respondent's Project Coordinator, and was accompanied on her inspection by Barry Cole, Respondent's non-lawyer representative, and Matthew Byrd, Respondent's Production Manager. (Ex. C-1). Over the next couple of months, CSHO Stark also conducted interviews with multiple employees of Respondent, as well as representatives of M&M Roofing, who was the subcontractor on the project. (Ex. C-1). Complainant served Respondent with a Citation and Notification of Penalty alleging one serious and one repeat violation of the Occupational Safety and Health Act ("the Act") and proposing a total penalty of $148,858. Respondent filed a timely notice of contest, bringing this matter before the Commission.

As noted above, Complainant filed MSJ #1 arguing there were no disputes of material fact and that he was entitled to judgment as a matter of law. Ultimately, the Court found the standards

1. The Court will refer to the exhibits submitted in support of both motions for summary judgment based on the labels applied to them by the parties. Complainant's exhibits are labeled sequentially C-1 through C-19, and Respondent's have been identified by Binder Number.

applied and were violated; however, the Court also determined there were two disputes of material fact that prevented the entry of summary judgment in favor of Complainant. Complainant filed MSJ #2 in an attempt to resolve those lingering disputes of material fact. To ensure all matters addressed in MSJ #1 were included, Complainant has also incorporated MSJ #1 by reference.[2] Respondent has filed responses to both MSJ #1 and MSJ #2. Because Complainant has incorporated by reference his original motion, the Court has also considered all the arguments and supporting documentation Respondent has submitted with respect to both motions. Trial in this matter is currently scheduled for August 10, 2021, in Denver, Colorado. Because the Court finds Complainant established it is entitled to judgment as a matter of law, the trial date is hereby VACATED.

II. JURISDICTION

The Court finds the Commission has jurisdiction over this matter under section 10(c) of the Act. *See* 29 U.S.C. § 659(c). According to section 10(c), the Commission obtained jurisdiction upon Respondent's timely filing of a notice of contest. *Id.* The Court also finds Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act. *See* 29 U.S.C. §§ 652(3), (5). According to CSHO Stark's affidavit and Respondent's own marketing materials, Respondent purchased products in interstate commerce, performs work in several states, and had employees at the Summerfield Villas worksite. (Ex. C-1).[3] Respondent does not dispute any of the facts supporting these conclusions.

III. SUMMARY JUDGMENT STANDARD

2. Again, as noted above, this was necessary because the Court, in addition to finding the aforementioned disputes of material fact, reserved ruling on some elements of the 5(a)(2) violations.
3. According to Respondent's website, Premier Roofing performs work throughout the Midwest and Mountain West. *See* www.premier-roofing.com.

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. A party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion and demonstrating the absence of a genuine issue of material fact as to the issue(s) raised. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material only if it might affect the outcome of the case, and thus precludes the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a motion for summary judgment, the Court is required to resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the nonmoving party. *Id*. at 255. If there is any evidence in the record from which a reasonable inference in favor of the nonmoving party can be drawn as to a material fact, summary judgment is improper. *Celotex*, 477 U.S. 317. Conversely, if a review of the entire record could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial and summary judgment is appropriate. *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). The judge's function in summary judgment cases is to determine whether there are genuine, material, disputed issues for trial; it is not to weigh the evidence. *Anderson*, 477 U.S. at 249.

The rule[4] itself establishes the proper procedure for both supporting and disputing the existence of a "fact", for the purposes of the motion. *See* 29 C.F.R. § 2200.40(j) ("The provisions of Federal Rule of Civil Procedure 56 apply to motions for summary judgment."); Fed. R. Civ. P. 56(c)(1) (entitled "Supporting Factual Positions"). To establish the existence of an undisputed fact,

4. As noted in the Commission's own rules, "The provisions of Federal Rule of Civil Procedure 56 apply to motions for summary judgment." 29 C.F.R. § 2200.40(j).

Complainant must "cit[e] to particular parts of materials in the record including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials . . . ." *Id.* 56(c)(1)(A). In response to Complainant's recitation of undisputed material facts, supported by the material listed in FRCP 56(c)(1)(A), Respondent cannot simply rely on blanket denials. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) ("Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred."). Instead, Respondent must illustrate the existence of a dispute over material facts by either submitting evidence of the kind discussed in Rule 56(c)(1)(A) "showing that the materials cited do not establish the absence [] of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B).

If the Court finds a party has failed to properly support its assertion of facts, or the non-moving party has failed to properly respond to that position, it is empowered to take any action listed under FRCP 56(e), including granting summary judgment if the law and facts show Complainant is entitled to it. *Id.* 56(e).

IV. UNDISPUTED FACTS

With respect to Rule 56 discussed above, Respondent has asserted multiple lines of contention against Complainant's motion for summary judgment, each of which is discussed more fully below. First, Respondent contends Complainant failed to establish several facts asserted to be undisputed. Second, Respondent contends Complainant has failed to submit admissible evidence in support of his motions. Most of Mr. Cole's defense, however, takes the form of a

personal screed against Complainant's counsel, including unfounded and unsupported allegations of misconduct and abusive behavior, for what appears to be nothing more than Complainant's counsel using the tools and resources available to him to pursue his client's interests competently and appropriately, which bears little relation to material facts at issue.

A. Material Facts

Complainant asserts Respondent is a "full-service roofing and general contractor" that handles every step of the process of replacing and/or repairing roofs on single- and multi-family homes. *See* www.premier-roofing.com; *see also* (Ex. C-17). The evidence shows Respondent employs project coordinators, project support managers, and production managers to oversee the work performed by the roofing subcontractors. (Ex. C-14, C-15).

In this case, LCM Management Company hired Respondent to re-roof 34 apartment buildings in Aurora, Colorado, known as the Summerfield Villas. (Ex. C-1, C-17). Respondent, in turn, hired M&M General Construction LLC to perform the roofing work including removing and replacing roofing materials and skylights. (Ex. C-1, C-17). Respondent had three people responsible for the Summerfield project. Mike Thiede and Michael Comstock were Respondent's onsite coordinators, whose responsibilities included: conducting inspections, overseeing project builds daily, and coordinating projects onsite. (Ex. C-14). Thiede and Comstock were overseen by Tosh Maddox, the Project Manager, whose job is to oversee the coordinators and providing "direct support and oversight of roofing crews, and providing them with detailed instructions pertaining to each project . . . ." (Ex. C-15).

As noted above, CSHO Stark was sent to the Summerfield Villas because OSHA received an anonymous complaint that roofers were working without fall protection on April 26, 2019. (Ex. C-1). When CSHO Stark arrived, she saw 20 roofers on the rooftops of the Summerfield Villas

apartments without appropriate fall protection. (Ex. C-1). According to her account, some had harnesses on that were not attached to anything; some had ropes attached to their harness, but not attached to anything else; and some were not wearing harnesses at all. (Ex. C-1, C-2). There were no guardrails, net systems, or line systems with an accompanying safety monitor. (Ex. C-1, C-2 C-5). When CSHO Stark asked who the supervisor was, the roofers pointed in the direction of Michael Comstock, Respondent's project coordinator for the Summerfield project. (Ex. C-1). Comstock identified himself as the supervisor and said he worked for Premier Roofing. (Ex. C-1). Comstock asked CSHO Stark to delay the start of the inspection until Premier's manager, Matthew Byrd, and safety consultant, Mr. Cole could come to the site. Upon his arrival, Mr. Cole said he represented both Respondent and M&M and made various representations to CSHO Stark, including that Respondent and M&M did not have a written contract, and that Respondent provided all supplies, materials, and heavy equipment for the project. (Ex. C-1). During this portion of the inspection, CSHO Stark also spoke with LCM's community association manager, Sara Peck, who told CSHO Stark the owners had hired Respondent to be the general contractor for the roof replacement job at Summerfield. (Ex. C-1).

Respondent, in its marketing literature, its contract, and in its representations to LCM, holds itself out as a general contractor. (Ex. C-1, C-17). Though Respondent protests that such representations are mere puffery for its marketing materials, it is clear Respondent's actions on this worksite and the policies governing such work illustrate it exercises control over both the manner and means of completing the work.[5] Among other things, Respondent determined the scope of work; provided materials and equipment; set the timeframe for completion; provided written guidance on PPE; established minimum safety requirements, including fall protection

5. Though, as will be discussed later, there was a stark difference between what Respondent's paperwork and policies represented and what Respondent actually did at the worksite.

training and plans; required M&M to sign a Safety Acceptance Agreement and an OSHA Safety Orientation Form; established a schedule of fines if Respondent discovered contractors violating safety rules; and required the performance of a job safety analysis and safety toolbox talks. (Ex. C-1, C-3, C-12, C-15, C-16, C-18, C-19). This was echoed by the statements of Mr. Byrd, whom CSHO Stark interviewed later during her inspection. (Ex. C-1 at ¶4). In addition to the foregoing, Mr. Byrd told CSHO Stark that Respondent, through its coordinators and managers, has the responsibility and authority to ensure safety regulations are being followed at its many worksites.[6] *Id.* Indeed, Respondent assumed responsibility for such in its contract with LCM, which states, "All work shall be done in a safe and workmanlike manner. . . . [Respondent] shall provide an onsite project manager to ensure the safety of all workers and residents." (Ex. C-17). Unfortunately, according to Comstock, Thiede, and Maddox, while these may be the stated policies of the Respondent, none of them performed safety-based inspections to assess its subcontractor's compliance with those policies. *Id.* Respondent employs project coordinators, project support managers, and production managers to oversee the work performed by the roofing subcontractors. (Ex. C-14, C-15).

While there is documentation indicating Respondent has safety policies for its subcontractors, there are no documented policies for Respondent's own employees. According to Thiede, Comstock, and Maddox, the only training they had received was the OSHA-10 training class, which briefly touches on multiple safety topics but does not focus specifically on fall protection. Otherwise, Comstock, Thiede, and Maddox all told CSHO Stark Respondent had not provided them with fall protection training or equipment, nor did it require them to wear fall

6. The job descriptions of project managers and project coordinators reflect this understanding of oversight and control. (Ex. C-14, C-15).

protection when performing inspections throughout the construction process.[7] (Ex. C-1, C-4, C-9 at 6-7, C-10 at 8-9). Further, neither Comstock, Thiede, nor Maddox performed safety-based inspections of the subcontractors at the worksite. (Ex. C-1). Indeed, Respondent disclaims it has the responsibility to do so, arguing that duty belonged to M&M Construction alone as subcontractor.

Finally, as part of the Citation and Notification of Penalty, Complainant alleges Citation 2, Item 1 is a repeat violation. According to the documentation submitted by Complainant, Respondent has been cited for the exact same standard three times in the previous eight years. (Ex. C-6). In each of those instances, Respondent was cited for failing to ensure employees on its worksites had adequate fall protection. *Id*. The previous two violations were, themselves, characterized as repeat. Respondent argues there is no "recognizable resemblance" to the prior cases but fails to provide any evidence or specificity contradicting Complainant's allegation of substantial similarity. The definitive nature of Complainant's evidence and the lack of any supporting evidence to the contrary leads the Court to find there is no genuine dispute as to the facts regarding the characterization of Citation 2, Item 1 as repeat.

1. Respondent's Asserted Disputes of Material Fact

Respondent claims many of the facts alleged to be undisputed by Complainant are, in fact, in dispute. Mr. Cole's unorthodox method of disputing particular facts by way of redlining the pleadings of the Complainant and inserting handwritten notes in the margins, has made analysis complicated; however, the Court believes the following represents Respondent's "factual" disputes to the fullest extent they can be deciphered. After a review of these purported disputes of

7. According to Respondent, it did not need to provide fall protection while Thiede, Comstock, and Maddox were performing inspections of the roofs due to the exception provided for in 29 C.F.R. § 1926.500(a)(1). As will be discussed later, this is a misreading of the exception.

material fact, the Court finds Respondent's contrary "facts" are either unsupported by any admissible evidence, are legal conclusions, or are otherwise not material to the outcome of the case.

"To create a question of fact, an adverse party responding to a properly made and supported summary judgment motion must set forth specific facts showing that there is a genuine issue for trial." *See Posey v. Skyline Corp.*, 702 F.2d 102 (7th Cir. 1983) (citing *Macklin v. Butler,* 553 F.2d 525, 528 (7th Cir.1977); Fed. R. Civ. P. 56(e)). "A party may not rest on mere allegations or denials of his pleadings; similarly, a bare contention that an issue of fact exists is insufficient to raise a factual issue." *Id.* (citations omitted). Some alleged factual dispute is not sufficient to prevent the entry of summary judgment; there must be a *genuine* dispute of *material* fact. In other words, "[t]he dispute must be genuine and the facts must be such that if they were proven at trial, a reasonable jury could return a verdict in favor for the nonmoving party. If the disputed evidence 'is merely colorable or is not significantly probative, summary judgment may be granted.'" *Damron v. Norfolk & Western Ry. Co.*, 925 F. Supp. 520, 522 (N.D. Ohio, 1995) (citations omitted).

Respondent contends the slope of the roofs is a genuine dispute of material fact. Specifically, Respondent contends the roof slope was less than 4:12 and therefore exempt from fall protection requirements. Complainant, on the other hand, does not address the specific slope of the roof, instead contending the slope is irrelevant because Respondent failed to provide any form of fall protection whatsoever. While the question of slope is a factual one, the Court finds that (1) it is immaterial; and (2) the conclusion Respondent seeks is legal conclusion. As to (1), the slope of the roof is immaterial because there was simply no fall protection in use by either Respondent's own employees or the subcontractor employees. Respondent contends the slope of

the roof is material because of the exception found at 29 C.F.R. § 1926.501(b)(10).[8] Section 1926.501(b)(10), however, does not provide *carte blanche* authority for employers to eschew fall protection on low-sloped roofs. Instead, it provides alternatives to the traditional forms of fall protection applicable to a limited set of conditions. However, none of the suggested alternative forms of fall protection were in use or provided by Respondent or its subcontractor for this project. (Ex. C-5 at 54). Respondent's arguments are immaterial and were legal conclusions reserved to the finder of fact which do not illustrate a genuine issue of material fact.

Respondent argues the question of knowledge also is a dispute of material fact; however, like the question of whether an exception applies, this is primarily a legal question as presented here. From a factual perspective, there does not appear to be a genuine dispute. Respondent contends neither it nor M&M had a representative or worker at the worksite at the specific moment CSHO Stark arrived and saw the fall protection violations. It argues a "clerk" was the only employee of the Respondent at the worksite at the time of the Inspection, doing inventory and checking work progress.[9] (Resp't Binder 1, Affidavit of Barry Cole). However, Comstock was in the area of the worksite. Respondent has not tendered any evidence to establish Comstock was a "clerk" rather than a roofer or project manager, or that he was employed by anyone other than the Respondent. The dispute asserted is not a genuine dispute of fact so much as disparate characterizations of facts which are not inconsistent with one another.

Further, even if the dispute were genuine, the Court does not find it material. Complainant can prove awareness of the hazard either through actual or constructive knowledge. *See* A.P.

8. Respondent's representative also claims Respondent's representation to CSHO Stark that the roofs were less than 4:12, and CSHO Stark's continued inspection, somehow render CSHO Stark's subsequent inspection invalid. This argument makes no sense, as CSHO Stark is under no obligation to accept Respondent's representations at face value, especially when their safety consultant has improperly interpreted the governing regulation.
9. Presumably, Respondent means Michael Comstock, the project coordinator CSHO Stark was directed to by the roofers, though it never specifically identifies him as such.

O'Horo Co., Inc., 14 BNA OSHC 2004, 2007 (No. 85-369, 1991). This is problematic for Respondent for two reasons. First, it doesn't matter whether Comstock was there in the morning, at the time CSHO Stark arrived, or not until later that day. As shown in explicit detail above, Complainant provided ample evidence to show (discussed in more detail, *infra*) Respondent had constructive knowledge of the violations. Respondent has submitted no contrary evidence, by way of policy, training, or rules, to establish a material, factual dispute justifying the denial of summary judgment on the issue of constructive knowledge either with respect to its own employees or M&M's. Second, there is photographic evidence and sworn statements establishing Respondent's own employees failed to wear fall protection and that Respondent failed to provide training or even a documented fall protection plan. Thus, there are multiple avenues through which Complainant can prove a violation of the standard that do not require the presence of one of Respondent's employees on the worksite at the exact moment of the inspection. Not only is Respondent's representative making a legal argument, but any perceived factual dispute as to Comstock's presence at the worksite is immaterial because it does not prevent the entry of summary judgment.

Respondent also contends the evidence and photographs collected by CSHO Stark are inadmissible because such evidence "was improperly collected by trespassing on private property" prior to conducting an opening conference. *Resp't Response and Objections to Motion for Summary Judgment* at 9. In other words, Respondent suggests summary judgment should be defeated consistently with the procedure indicated in FRCP 56(c)(2). This argument fails for two reasons: (1) most of the photographs taken by CSHO Stark prior to the formal beginning of the inspection were taken, or at least visible, from a public right-of-way; and (2) for any pictures or evidence not acquired from the public right-of-way, the question of improper collection of evidence does not apply. Because most of the images were present from a public sidewalk or street,

their collection falls under the plain view doctrine. *See* Lewis v. United States, 385 US 206, 210 (what a person knowingly exposes to the public, even his own home or office, is not a subject of Fourth Amendment protection). And, more importantly, because the property does not belong to Respondent or M&M, Respondent has no standing to assert a Fourth Amendment claim against Complainant for conducting an inspection on private property. "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Illinois*, 439 U.S. 128, 134, 99 S. Ct. 421, 425, 58 L. Ed. 2d 387 (1978) (citing Alderman v. United States, 394 U.S. 165, 174, 89 S.Ct. 961, 966, 22 L.Ed.2d 176 (1969)). Only the management company or property owner has standing to assert Fourth Amendment rights under this set of facts. Respondent has not provided any evidence to suggest LCM objected to Complainant's inspection of the premises. For that matter, there is no evidence Respondent objected to CSHO Starks' entry onto the premises at the time of the inspection. Thus, the Court finds no dispute of material fact as to admissibility.

Respondent argues many of the roofers identified by CSHO Stark as employees of either Respondent or of M&M were, in fact, "interloper" contractors who struck separate agreements with M&M and/or other subcontractors to split the work in order to complete it faster and move along to more jobs. Respondent argues these interlopers were "impossible to control" and "broke rules", presumably attempting to undercut Complainant's claim Respondent controlled the worksite as the general contractor and was thus responsible for all employees working on the roofs of the Summerfield Villas. This is, perhaps, the closest Respondent comes to identifying a genuine, material dispute of fact; however, it still falls short. As far as the Court can tell, Complainant is unconcerned with who, specifically, these interloper roofers were and with good reason.

Respondent, regardless of how it wishes to characterize itself or M&M,[10] assumed the mantle of general contractor through its puffery, its contract language, its oversight, and its policies, all of which illustrate a substantial level of control assumed and (for the most part) exercised. Simply having the authority to control the worksite, along with the stated and assumed responsibility for "ensur[ing] the safety of all workers and residents", is sufficient to render Respondent liable for the failures occurring on that worksite, unless there was no possible way it could know of them. *See Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129–2130 (No. 92-0851, 1994) (controlling employer liable if it could reasonably be expected to prevent or detect and abate the violative condition by reason of its supervisory capacity and control over the worksite). As illustrated above, the failure to have and/or execute any semblance of a safety policy with respect to its own employees and subcontractors renders that scenario unlikely. In other words, given the level of control asserted by (or at least available to) Respondent, the idea of some group of rogue, uncontrollable roofers overtaking a worksite where Comstock was admittedly present at least three times per day is unlikely. (Ex. C-9 at 5). Further, whether the employees are employed directly by M&M or subcontracted by them, Respondent is obligated to provide a safe workplace for them just as it would its own employees. *See Summit Contractors, Inc.*, 23 BNA OSHC 1196, 2010 WL 3341872 at *7 (No. 05-0839, 2010) (discussing the statutory basis for imposing liability upon a non-exposing, controlling employer).

Along similar lines, Respondent claims the defense of unpreventable employee misconduct is a sufficient defense to the present motion. Alleging a claim of unpreventable employee misconduct, however, is much different than providing facts in support of that claim. Respondent

10. Respondent interchangeably refers to itself and to M&M as the "Prime Contractor", as if such a title carries legal significance. The Court is only concerned with whether Respondent had the authority to control the worksite and whether, in the context of safety, it exercised that control. Whether it is the prime, general, or just plain old contractor, the key question is control.

makes vague claims about an unidentified, singular employee who allegedly committed employee misconduct by failing to wear fall protection and was terminated shortly thereafter. *See Resp't Response to MSJ #1* at 11. This case, however, does not concern the actions of a single employee who failed to put on a harness and tether to an anchor point; rather the Court is confronted with an allegation that (1) 20 roofers were not wearing appropriate fall protection while working on roofs under the supervision of Respondent; and (2) at least three of Respondent's own workers admitted to performing inspections on rooftops under construction without appropriate fall protection. Notwithstanding the undisputed facts showing Respondent lacked any semblance of a fall protection program, even if the Court were to accept an allegation of employee misconduct as to one individual, that dispute is neither material nor genuine given the overwhelming number of people not wearing fall protection on either the day of the inspection or, as discussed next, in any of the photos submitted by Respondent from its project managers' inspections. (Ex. C-4).

Respondent also appears to suggest the fall protection violations were not as widespread as alleged by CSHO Stark. In particular, there are notations on photographs in Respondent's submitted exhibits where Respondent notes "Great Safety!" and "Shows tie-off"; however, when you look closer at many of these photos (as better illustrated in the color versions submitted by Complainant in Exhibit C-4) most of the roofers have the tethers haphazardly tied to the side of the harness as opposed to the D-ring positioned at the center of the wearer's back, rendering them purely for show. (Ex. C-4, Resp't Binder 1). Not only do the photos illustrate a lack of any material dispute, they also highlight the breadth of Respondent's failure in the arena of fall protection, as some were taken by Respondent's own project coordinator just days after the inspection. (Ex. C-1 at ¶9, C-4). No reasonable factfinder could view these photos to support the proposition suggested by Respondent.

Respondent also argues the repeat characterization as to Citation 2, Item 1, as well as the fines associated with each, are both material facts in dispute. First, the determination of whether a citation is repeated is a legal one, not one of material fact. Second, the appropriateness of the fine, while certainly the subject of debate, is nonetheless predicated on the facts of the violation. Insofar as the facts supporting the violation are not in dispute and, considering Respondent has not submitted anything in addition to what the Court has already discussed above, the Court finds Respondent has failed to illustrate a dispute as to any of the facts material to making a penalty determination. As noted above with respect to many of the other purported disputes, simply denying or disputing Complainant's characterization of the facts is insufficient when evidence has been submitted in support of those facts. *See Damron*, 925 F. Supp. at 522 ("Nevertheless, in the face of a summary judgment motion, the nonmoving party cannot rest on its pleadings but must come forward with some probative evidence to support its claim."). Nevertheless, the Court shall consider Respondent's legal arguments regarding the appropriateness of the penalty *based on* these facts when making its determination *de novo*.

Finally, Respondent also attempts to argue the use of personal fall protection constituted a greater hazard; however, Respondent failed to allege the affirmative defense of greater hazard when it filed its Answer and, at no time during the pendency of this litigation, did it ever seek to amend its Answer to plead such a defense. *See* 29 C.F.R. § 2200.34(b). An amendment at this point in time, only a week before trial and long after the close of discovery, would be unduly prejudicial, and the Court will not allow it. Notwithstanding that fact, Respondent, as with many of the foregoing disputes, has failed to introduce any evidence to illustrate the purported dispute is either genuine or material.

2. Respondent's Allegations of Opposing Counsel Misconduct and Mr. Cole's Status as a Professional "Lay" Representative

Although Respondent's lengthy tirade against Complainant's counsel would not ordinarily warrant consideration in a discussion about whether there is a genuine dispute as to any material fact, the Court finds it is important to address the matter in this case. A substantial portion of the 30 pages of argument submitted by Respondent is dedicated to lobbing unprofessional, unfounded *ad hominem* aspersions at the Solicitor for doing his job. Presumably such unfounded allegations are designed to sway the Court with emotional pleas and conspiracy theories in the absence of any legitimate dispute over facts material to the determination of this case, but they fail to do so.

Mr. Cole, who runs his own private safety consulting firm, is not an employee of Respondent, but was instead hired by Respondent to perform safety consulting and represent it in the present proceeding. Indeed, Mr. Cole holds himself out as "a safety and health professional consultant, and *an expert in OSHA matters, law, interpretations,* . . . and preventing OSHA fines for alleged noncompliance, and assisting them in contesting or minimizing through settlements citations that may have been issued to them." (Binder 1, Affidavit of Barry A. Cole) (emphasis added). Mr. Cole attempts to wield his status as a lay representative as both sword and shield. On the one hand, the Court, without any documentation in support, is urged to defer to the judgment and assessment of Mr. Cole as to legal questions upon which he is purportedly an expert. On the other, Mr. Cole claims he is being mistreated and unfairly targeted because he is not a lawyer and thus can be manipulated with legal chicanery only available to classically trained lawyers.

Mr. Cole holds himself out as someone capable of providing representation before the Commission and, as such, should be competent in the procedures and strategies accompanying such a practice. This is not a situation where a *pro se* litigant, with no previous experience in a legal proceeding, is being run roughshod by the Solicitor. Mr. Cole is a paid professional with experience practicing before the Commission. The Court sees no reason why Mr. Cole should be

treated much differently than any other paid professional appearing before this Court. *See* 29 C.F.R. § 2200.32 ("A signature by a party representative constitutes a representation by the representative that the representative understands that the rules and orders of the Commission and its Judges apply equally to attorney and non-attorney representatives"); *see also Imageries*, 15 BNA OSHC 1545 (No. 90-378, 1992) (noting Commission precedent to hold lay people *representing themselves* to the standard of "reasonable diligence"); *see also id.* (citing *Collex, Inc. v. Walsh,* 69 F.R.D. 20, 24 (E.D. Pa.1975) (stating a "litigant may choose to proceed *pro se*, but he does not have the untrammeled right to totally disregard the procedures mandated by the court."). Complainant has proceeded as provided under Commission Rule 40(j), which directs parties to FRCP 56 and its explicit procedure for both seeking and defending against summary judgment. *See* Fed. R. Civ. P. 56(c).

In light of this expectation, the Court notes an additional problem with the current state of Mr. Cole's representation: his insistence on making himself a witness to the case. Again, while this is typical of *pro se* litigants appearing before the Commission, it is unusual for a paid, professional representative to do so. Attorneys are bound by the professional rules of the state in which they are licensed to practice. As it pertains to this case, the Colorado Code of Professional Conduct prohibits an attorney from testifying as a fact witness in a matter in which he is also counsel of record. *See* C.R.P.C Rule 3.7, Lawyer as Witness. In a case entitled *North Shore Strapping Co.*, an employer only called one witness, its attorney. *See N. Shore Strapping Co.*, 2019 WL 4565522 (Docket No. 18-1529, 2019) (ALJ Joys). Over the objections of the Solicitor, the Judge permitted such testimony, noting Commission Rule 22 permits a party to "appear in person, through an attorney, or through any non-attorney representative" and also noted "it is not uncommon in Commission proceedings for company management to serve as both representative

and fact witness." *Id.* The ALJ found fundamental fairness permitted the attorney to testify because he was also a management official with the company. *Id.* This is not one of those situations. Mr. Cole is a paid advocate. Although Mr. Cole was present during CSHO Stark's inspection, the Court notes he was accompanied by a corporate representative who is equally capable of swearing to the facts observed by all parties involved without inserting Mr. Cole. Unbiased roofers, project managers, contract signatories, and others directly involved in the work at issue are much more persuasive witnesses to material facts. Because he is closer to an attorney than a self-represented party, the Court would ordinarily find inadmissible most statements by Mr. Cole as it related to the inspection. Additionally, because the statements and evidence submitted by Mr. Cole in his personal affidavit do not rise to the level of creating a genuine issue of material fact, it is unnecessary to do so.

V. LEGAL ANALYSIS

To establish a *prima facie* violation of a specific standard promulgated under section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq*. ("Act"), the Secretary must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

A. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.20(b)(2): The employer does not initiate and maintain a safety program which provides for frequent and regular inspections of jobsites, materials, and equipment to be made by a competent person.

a) Premier Roofing LLC DBA Premier Roofing Company as a controlling and exposing employer, is failing to ensure that its employees and employees of its subcontractors are protected from jobsite hazards including falls greater than 6 feet during roofing work, lack of the use of eye protection and unsafe ladder use due to 0074he lack of effective frequent and regular inspections being conducted by a competent person. This violation was recently observed on April 26, 2019 at 1310-1326 N. Sable Blvd, Aurora CO 80011 when Premier failed to ensure that frequent and regular inspections took place at this jobsite.

See Citation and Notification of Penalty at 6.

1. The Standard Applied and its Terms Were Violated

The Court has already determined the standard applied to Respondent and that its terms were violated. Indeed, the cited standard requires Respondent to initiate and maintain a program to "provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers." 29 C.F.R. § 1926.20(b)(2). As the undisputed facts recounted above indicate, Respondent had neither a program providing for frequent and regular inspections of the worksite, materials, and equipment, nor did it have a person competent to perform such a job. Comstock, Thiede, and Maddox all told CSHO Stark they only received minimal training on fall protection and only conducted inspections for the purposes of quality control, not safety. Thus, Respondent neither designated nor prepared any employee to serve as a competent person in the arena of fall protection, let alone safety as a general concern, nor did it establish or implement any semblance of a program to ensure the requisite inspections were taking place.

2. Respondent's Employees Were Exposed to the Hazard

The foregoing undisputed facts show Respondent's own employees were exposed to the hazard. Respondent does not have a program of inspection, nor does it have a designated competent person to ensure frequent and effective inspections are taking place. According to the statements they gave to CSHO Stark, Comstock, Thiede, and Maddox all frequently performed inspections

on the roofs of residential construction sites but never wore appropriate fall protection nor were they required to do so, never received adequate training on the topic of fall protection, and were never themselves inspected for anything other than progress to the end goal. Without a competent person capable of performing frequent and effective inspections, hazards, including those identified by CSHO Stark either go uncovered or are left unobserved out in the open. Because Respondent did not perform regular safety inspections, establish a program of inspection, or ensure the assignment of a competent person, its employees were exposed to hazards, including, as is relevant to this case, fall hazards.

i. Respondent Was a Controlling Employer

While Respondent proffered many objections to the facts indicating it is a controlling employer, none were material or genuine disputes. The Commission's test for controlling employer liability held an employer "responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'" *Summit Contractors*, 2010 WL 3341872 at *4 (citing *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000) (citation omitted); *Grossman Steel*, 4 BNA OSHC at 1188 (noting that general contractors are "well situated to obtain abatement of hazards," and thus it is "reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected")). The facts recounted above establish it is reasonable to expect Respondent to prevent or detect and abate violations, based upon its level of supervisory authority and control.

As a general rule, Respondent holds itself out to be a general contractor. Whether in its marketing materials or in the representations it makes to its customers, Respondent claims to be a general contractor. However, Respondent's status is not solely determined by the representations

it makes, but also by the power and control it reserves to itself. LCM hired Respondent to be the general contractor who would, in turn, be authorized to hire additional contractors to perform the work. (Ex. C-17). In its contract with LCM, Respondent agreed to perform all work in a "safe and workmanlike manner" and committed to "provid[ing] an onsite manager to ensure the safety of all workers and all residents." *Id.* As part of this assumed obligation, Respondent set forth safety and health requirements for M&M and its employees or subcontractors, which Respondent required M&M's representative to sign. (Ex. C-3). Of particular note in this set of requirements was Respondent's assumed authority to fine subcontractors for violating OSHA Safety Rules. *Id.* In addition, Respondent also had the authority to remove a contractor from a worksite for safety violations and other reasons.[11] *See McDevitt*, 19 BNA OSHC at 1109-10 (finding evidence of control where general contractor had "overall authority at the worksite," including authority to demand compliance with safety requirements, stop subcontractor's work, and remove subcontractor from site).

Respondent's control was not limited to the authority it reserved to itself regarding safety matters (indeed it was a power not exercised), but also extended to the manner and means by which the work was accomplished. Respondent provided the materials and equipment and ensured the work was being performed according to specifications and the agreed-upon timeline. Respondent not only promised to provide an onsite manager, but actually provided project coordinators like Thiede and Comstock and managers like Maddox to oversee the execution of the project. *See Summit*, 23 BNA OSHC at 1206 (finding evidence of control where respondent's superintendent

11. Though Respondent claims it could not control the interloper contractors, its assumption of authority over worksite safety and the execution of the job indicates otherwise. Further, Respondent's safety documents repeatedly use the work "crews" in the plural, as if to indicate its recognition that multiple subcontractors may participate in the construction of the roof. (Ex. C-3).

"observed the progress of the project and worksite conditions by walking the worksite twice each day" and, during weekly meetings, he "point[ed] out obvious hazards to the subcontractors").

While a written contract between Respondent and M&M was never provided, Irvin Menjivar from M&M testified he had reached an agreement with Respondent. This is not fatal, however, so long as the record evidence establishes authority and control. *See, e.g., StormForce of Jacksonville LLC*, Docket No. 19-0593, slip. op. at 6 (March 8, 2021). Indeed, much like the employer in StormForce, what Respondent represents about its business and how it its actually carried out are two different things. Like StormForce, Respondent argues it provides the limited service of coordination between the customer, the insurance company, and the roofing subcontractors. Also like StormForce, however, what Respondent argues it is responsible for and what it is actually responsible for are two different things. *See id.* (holding disclaimer of supervisor control and liability for unsafe conditions inconsistent with assumption of control over the manner and means of production).

Due to the level of control discussed both in the section on undisputed facts and the foregoing, the Court finds it is reasonable to expect Respondent to prevent or detect and abate the violations due to its supervisory authority over both production- and safety-related matters and its project managers' frequent quality control inspections of the worksite. Accordingly, the Court finds Respondent is a controlling employer with respect to all subcontractors present on the site.

3. Respondent Knew or Could Have Known of the Hazardous Condition

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the

conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of an employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Alternatively, Complainant can show constructive knowledge through a lack of any policy or procedure designed to uncover hazards. "[A]n employer has a general obligation to inspect its workplace for hazards." *Hamilton Fixture*, 16 BNA OSHC 1073, 1993 WL 127949 at *16 (No. 88-1720, 1993) (citing *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980)). The scope of that obligation "requires a *careful and critical examination* and is not satisfied by a mere opportunity to view equipment." *Austin Comm. v. OSHRC*, 610 F.2d 200, 202 (5th Cir. 1979) (emphasis added). Some factors to assess whether an employer has exercised reasonable diligence include an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981).

Respondent had its own employees at the worksite who were exposed to hazards, and, thus, it had an obligation to inspect the work area to anticipate hazards they might be exposed to and take measures to prevent them. *Id.* Due to its authority and control, however, that obligation extended beyond its own employees to the workplace as a whole. *See Summit*, 2010 WL 3341872 at *9-10. Respondent, however, had no identified policy requiring its employees or managers to conduct safety-based inspections of the workplace, no training requirements for its own or subcontractor employees, and no designated competent person, as required by the standard. These issues are squarely within the knowledge of Respondent—while the job descriptions of Comstock, Thiede, and Maddox all indicate some oversight function, there is no policy or set of rules

indicating what that means outside of ensuring the work is performed according to specifications. In practice, none of Respondent's project employees were aware they had safety-related inspection obligations, or at least never practiced them until after the OSHA inspection. (Ex. C-1, C-10, C-11). Although Matt Byrd seemed to indicate an awareness that such safety-related inspections were required, the undisputed evidence shows Respondent should have been aware: (1) it was obligated to perform safety-based inspections; and (2) its employees were not conducting safety-based inspections. Respondent receives reports from its coordinators about the state of its projects at nearly every stage in the process, but never received nor requested reports about the safety of its worksites. Further, there is no evidence the project coordinators and managers were ever required to perform safety-based inspections as required by 29 C.F.R. § 1926.20(b)(2).

Without a policy specifically requiring your employees to conduct safety-based inspections, it is reasonable to expect they will not be done. Without specifically designating a competent person to perform such inspections, Respondent cannot comply with the cited standard. These are all issues that are squarely within the institutional knowledge of Respondent and require no imputation in order to establish such knowledge. Accordingly, the Court finds Complainant established a violation of 29 C.F.R. § 1926.20(b)(2).

The Court also finds the violation was serious. Complainant argues, Respondent does not dispute, and the case law supports the proposition that a fall from over six feet can result in serious injuries or death. Accordingly, the violation shall be affirmed as serious.[12]

B. Citation 2, Item 1

Complainant alleged a serious violation of the Act in Citation 2, Item 1 as follows:

> 29 CFR 1926.501(b)(13): Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels is not protected by guardrail

12. The Court sees no need to re-address Respondent's affirmative defense at this point since the Court dealt with in the section above discussing Respondent's disputes.

systems, safety net system, or personal fall arrest system, nor are employee(s) provided with an alternative fall protection measure under another provision of paragraph 1926.501(b).

b) Premier Roofing LLC DBA Premier Roofing Company as a controlling and exposing employer, is failing to ensure that its employees and employees of its subcontractors are protected from fall hazards during roofing material removal and installation, as well as other residential construction work including removal and installation of wood roof decking and construction of skylights. This violation was recently observed on April 26, 2019 at 1310-1326 N. Sable Blvd, Aurora CO 80011 when employees of M&M General Construction LLC, subcontractor, were reroofing multi-family residential buildings without fall protection at heights greater than 6 feet. Employees of Premier Roofing Company also routinely went on the roofs of this project during active construction work while not being protected from falls.

See Citation and Notification of Penalty at 7.

1. The Standard Applied and its Terms Were Violated

As with Citation 1, Item 1, the Court previously found Complainant established the cited standard applied and was violated. *See Order Regarding Complainant's Motion for Summary Judgment at* 19. The Court incorporates all such findings by reference, as they are part of the record. Nevertheless, the Court would like to revisit the applicability of the exceptions Respondent seeks to apply.

The exception to the requirement of using fall protection while conducting inspections and assessments is limited to two distinct points in time: "prior to the actual start of construction work or after all construction work has been completed." 29 C.F.R. § 1926.500(a)(1). Respondent contends it was not obligated to provide fall protection or mandate its use because of this exception. The problem, however, is the plain language of the exception specifies limited times during which it applies: prior to the start of construction or after construction is complete. As stated by Comstock, Thiede, and Maddox, employees were required to provide frequent and regular inspection reports, including photos of progress, which required gaining access to the roof while construction was ongoing. (Ex. C-4). These same photos show Comstock and Thiede on the roof

during construction work, thus any claim they only accessed the roof at the beginning and end of construction is not a material fact genuinely in dispute and the standard applies. Comstock, Thiede, and Maddox admitted they did not wear fall protection during their inspections, and CSHO Stark presented evidence, without contradiction, of 20 subcontractor employees performing work on the roofs without fall protection.

The exception for low-sloped roofs is not so much an exception as an expansion of available alternatives to the standard guardrail, PFS, and safety net combination of protective options. *See* 29 C.F.R. § 1926.501(b)(10). In those limited instances where the roof qualifies as low-slope, section 1926.501(b)(10) allows an employer to utilize safety lines and safety monitors as an alternative, but it does not permit the utter lack of protective measures suggested by Respondent. There is no evidence to indicate alternatives such as safety monitors or warning lines were installed on any of the roofs of Summerfield Villas. Accordingly, the exception does not apply and the terms of the standard were violated.

2. Respondent's Employees Were Exposed to a Hazard

As has been stated repeatedly throughout this decision and order, Respondent's own employees, as well as the 20 subcontractor employees observed by CSHO Stark, were exposed to falls of six feet or more when they worked on the roofs of the Summerfield Villas without adequate fall protection. The photos not only illustrate a lack of fall protection, but also show roofers standing near the edge of the roof and next to holes in the wood decking underneath. (Ex. C-2, C-4). Respondent's employees and subcontractors were all working on residential roofs more than six feet above the ground with no fall protection. The Court finds they were all exposed to the hazard of falling.

3. Respondent Knew or Could Have Known of the Hazardous Condition

The analysis regarding whether Respondent knew or could have known of the hazardous condition caused by the violation of 29 C.F.R. § 1926.501(b)(13) is similar to the analysis with respect to Citation 1, Item 1. Based on the facts stated above, the Court does not find Respondent had actual knowledge of the violation as it relates to the 20 unprotected roofers observed by CSHO Stark on April 26, 2019. Viewed in a light most favorable to Respondent, Comstock was not directly on site when CSHO Stark saw the unprotected roofers, and there is no evidence to suggest he was aware. Further, for the purposes of this motion only, the Court accepts that neither Comstock nor Thiede were supervisors for the purposes of establishing knowledge.

However, as regards the conduct of Comstock and Thiede, the Court finds Respondent was actually and constructively aware of their failure to wear fall protection. Respondent did not have a fall protection plan or work rule preventing Comstock or Thiede from inspecting a roof under construction without fall protection. Comstock stated he had not been provided with fall protection, and Thiede told CSHO Stark he never wore fall protection. (Ex. C-1 at ¶¶ 6-7). Their supervisor, Maddox, neither wore fall protection herself, nor required Thiede or Comstock to do so. This is because there was no safety rule. (Ex. C-1 at ¶ 7)

Maddox's knowledge (and lack thereof) illustrates how Respondent was both actually and constructively aware of the hazard. Maddox, as Comstock and Thiede's supervisor, was aware her subordinates did not wear fall protection. As supervisor, her knowledge is imputable to Respondent. *See* N & N Contractors., 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001) ("The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer."). Respondent has not provided any indication as to why such imputation would be improper or disputed that Maddox was Comstock and Thiede's supervisor. Relatedly, because there was no rule to enforce, no program of inspections in place, nor a competent person to carry

out such a program, Respondent cannot plausibly claim it was reasonably diligent in attempting to uncover workplace violations. *See Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981) (court's assessment of reasonable diligence includes consideration of an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence"). By virtue of its authority and control, Respondent had an obligation to inspect the worksite for hazards, but it failed to anticipate or even perceive a need to uncover hazards—instead improperly deferring that responsibility to its subcontractor—and it certainly did not take affirmative measures to prevent the occurrence of violations at its worksite.

As regards the 20 subcontractor employees CSHO Stark observed during her inspection, the Court finds Respondent was constructively aware of the violation for much the same reasons it was aware of its failure to have an inspection program carried out by a competent person or to have any semblance of a safety program whatsoever. While Respondent's "safety program" vis-à-vis its subcontractors is arguably safer than its failure to have any safety program at all for its own employees, it is a program in name only. Respondent set forth safety requirements for its subcontractors—and even went so far as to create a penalty scheme for violations of it—but took absolutely no steps to ensure the safety program was followed. It did not train its own employees, whose job description requires "overs[eeing] project builds daily onsite" in fall protection for themselves, let alone for the people the coordinators were charged with overseeing. (Ex. C-14). The only plausible reason Respondent could assert for not having known of the widespread violations was because you cannot find what you do not look for. Reasonable diligence requires, at the very least, taking action. Respondent asserted control over how the work was performed but disclaimed any responsibility for the workplace it controlled. Because Respondent took no action

to identify, anticipate, or address hazards to which its own, as well as subcontractor, employees were exposed, the Court finds it was both actually and constructively aware of the hazard.

4. The Violation Was Properly Characterized as Repeat

To establish a repeat violation, the Secretary must also show that "at the time of the alleged repeated violation, there was a Commission final order . . . for a substantially similar violation." Potlatch Corp., 7 BNA OSHC 1061, 1063 (No. 16183, 1979). "[P]roof that an employer has committed a prior violation of the same standard constitutes a prima facie showing by the Secretary of substantially similar violations." FMC Corp., 7 BNA OSHC 1419, 1421 (No. 12311, 1979). A "prima facie showing . . . may be rebutted by evidence of the disparate conditions and hazards associated with these violations of the same standard." *Angelica Textile Servs., Inc.*, 27 BNA OSHC 1246, 1255 (No. 08-1774, 2018) (emphasis in original) (citations omitted), *appeal dismissed as moot*, No. 18-2831 (2d Cir. Sept. 21, 2018).

Complainant submitted evidence of three prior violations of 1926.501(b)(13), two of which were originally characterized as repeat violations and related to Respondent's failure to ensure subcontractors on residential roofing projects were protecting their employees. The oldest of the three indicates a prior violation of the cited standard, but there is no other information indicating the facts surrounding the violation. The Court will not consider it, nor does it need to, because Respondent had two prior violations of the cited standard for substantially similar conduct that were final orders of the Commission at the time of the alleged violation currently before the Court. (Ex. C-6). Respondent has presented no evidence to rebut Complainant's case of substantial similarity or even present a colorable issue of fact regarding the issue of substantial similarity. Accordingly, the Court finds the undisputed facts establish, and the law compels, a determination that the repeat characterization is proper.

VI. Penalty

Under the Act, the Secretary has the authority to propose a penalty according to Section 17 of the Act. *See* 29 U.S.C. §§ 659(a), 666. The amount proposed, however, merely becomes advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441–42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1686 n. 5 (No. 00-0315, 2001). Ultimately, it is the province of the Commission to "assess all civil penalties provided in [Section 17]", which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995).

"Regarding penalty, the Act requires that "due consideration" be given to the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations." *Briones Util. Co.*, 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (*citing* 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citation omitted*). Rather, the Commission assigns the weight that is reasonable under the circumstances. *Eric K. Ho,* 20 BNA OSHC 1361, 1379 (No. 98-1645, 2003) (Consol.), *aff'd sub nom.*, *Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005). It is the Secretary's burden to introduce evidence bearing on the factors and explain how he arrived at the penalty he proposed. *Valdak Corp*., 17 BNA OSHC at 1138. "The gravity of the violation is the 'principal factor in a penalty determination. Assessing 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. Appx. 152 (5th Cir. 2002) (unpublished).

The evidence introduced by Complainant and, for the most part, uncontested by Respondent, provides the basis for the Court's penalty assessment. Complainant proposed a penalty of $13,260 for item 1, and $132,598 for item 2 based on its assessment of gravity. Although Respondent contends the penalty is excessive, it has provided no evidence to undermine the basis of Complainant's assessment. There were roughly 20 to 23 individuals exposed to a hazard if you take into consideration all the subcontractor employees observed by CSHO Stark, as well as Respondent's own employees, who admitted to never wearing fall protection. Whether with respect to Item 1 or Item 2, employees were exposed to a hazard based on their failure to have fall protection or Respondent's failure to uncover that fact. While there is no definitive evidence on the duration of the exposure, it is sufficient to say Respondent's employees have been repeatedly exposed to a hazard throughout their employment with Respondent. As for the subcontractor employees, the Court cannot say with any degree of certainty how long they went without fall protection; however, given the widespread nature of the violation, photographs taken after the fact illustrating continued failure to properly use fall protection equipment, and Respondent's repeated failure to inspect its workplace to uncover such violations, the only reasonable inference is that people under the employ of Respondent or its subcontractors have been exposed for a long time. Further, because the problem was so widespread during CSHO Stark's visit, the likelihood an accident would occur was substantial. When coupled with the cluttered nature of the roofs under construction and the fact that work occurred near leading edges and holes in the roof, that likelihood only increased. And if, indeed, one of those employees were to fall, the evidence and long line of case law indicates fall from heights over six feet can lead to serious injury and even death.

As with the other elements of Complainant's case, Respondent does not provide much in the way of substantive argument with respect to the issue of penalty. It claims, without evidentiary support that it is a small employer, notwithstanding locations in 9 U.S. states, with plans to open locations in three more. *See* www.premier-roofing.com. Even giving Respondent the benefit of the doubt regarding its size, the Court finds the record, as it stands, is more than sufficient to justify the penalty proposed by the Secretary. With respect to Citation 1, Item 1, though it was not characterized as repeat, Respondent has been cited pursuant to this standard before. Further, as regards both cited standards, Respondent literally made no attempt whatsoever at compliance. Instead, it sought to pass off its responsibility to its subcontractors, but even then it still failed to ensure its subcontractors were complying with their obligations under the safety agreements required by Respondent. With respect to Citation 2, Item 1, Respondent has been cited pursuant to this standard for the same reasons at least three times over the previous 7 to 8 years and appears to have changed nothing in response. Accordingly, the Court finds the undisputed facts establish the penalties proposed by Complainant are appropriate.

VII. Conclusion

It is an unusual matter for a Court to grant a motion for summary judgment as to an entire case; however, when a non-moving party fails to properly illustrate a genuine issue of material fact, the entry of judgment is appropriate if the law compels it. *See, e.g., Manua's, Inc.*, 2018 WL 4861362 (No. 17-1208, 2018). In this case, Respondent appears to have done everything in its power to avoid taking responsibility for the worksites on which it contracted to perform roofing services. Unlike *Stormforce*, which is similar to this case in many ways, Respondent made no attempt whatsoever to comply with its obligations under the Act. *See, e.g., StormForce*, Docket No. 19-0593, slip. op. at 13-15. Indeed, given Respondent's violation history, this appears to be a

recurring theme. Regardless of whether Respondent believes so or not, it is obligated to ensure the safety of both its own employees, as well as the employees of subcontractors on the worksites it controls.

ORDER

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

1. Citation 1, Item 1 is AFFIRMED as serious, and a penalty of $13,260 is ASSESSED.
2. Citation 2, Item 1 is AFFIRMED as repeat, and a penalty of $132,598 is ASSESSED.

SO ORDERED

/s/ Peggy S. Ball

Peggy S. Ball
Judge, OSHRC

Date: August 19, 2021
Denver, Colorado