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

Secretary of Labor, Complainant, v. Shawn D. Purvis d/b/a/ Purvis Home Improvement Co., Inc. (an individual) and Purvis Home Improvement Co., Inc. (in the alternative), Respondent.	OSHRC Docket Nos. 19-1054, 19-1056 & 19-1905 (Consolidated)

Appearances:

Susan G. Salzberg, Esquire
Paul Spanos, Esquire
Rachel A. Culley, Esquire
Department of Labor, Office of the Solicitor, Boston, Massachusetts
For the Secretary

Melissa A. Bailey, Esquire
Frank D. Davis, Esquire
J. Davis Jenkins, Esquire
Arthur G. Sapper, Esquire
Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, D.C.
For Respondent

Before:

Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29

U.S.C. § 659(c) (the Act). This decision consolidates Docket Nos. 19-1054, 19-1056, and 19-1905.

At a Respondent worksite in Portland, Maine, on December 13, 2018, a crew of eight roofers worked without fall protection at heights up to thirty-four feet on a steep-pitched roof. In the late morning, one of those roofers, A.L., fell to his death. [1]

A few days later, on December 18, 2018, in response to a complaint, OSHA found five members of the same Respondent roofing crew working without fall protection at heights up to fifteen feet at a residence in Old Orchard Beach, Maine.

A few months later, on May 23, 2019, OSHA received another complaint of Respondent roofers working without fall protection at a residence in Springvale, Maine. The roofers were exposed to falls from heights up to twenty-one feet.

OSHA issued citations for these three inspections on June 11, 2019, and November 19, 2019, for several violations, including lack of fall protection for roofers. For several years before the fatal fall at the December 2018 worksite, Respondent had been cited for violations of the Occupational Safety and Health Administration (OSHA) standard that requires the use of fall protection when a worker is exposed to falls greater than six feet.

I. PROCEDURAL HISTORY

On December 13, 2018, OSHA's Augusta, Maine Area Office opened an inspection at Respondent's worksite located in Portland, Maine (Portland inspection). The Portland inspection was opened due to the fatal fall of a worker performing residential roofing work. On June 11, 2019, OSHA issued a two-item serious, eight-item willful, and one-item repeat citation to Shawn D. Purvis dba Purvis Home Improvement Co., Inc. for a proposed penalty of $1,116,476 (Portland Citation).

The Portland Citation alleged violations of construction standards for a ladder jack scaffolding platform erected closer than the minimum required distance to exposed power lines, failure to provide a training program to recognize fall hazards, failure to provide fall protection, and failure to ensure the correct use of portable ladders. Respondent timely contested the Portland Citation, and the case was docketed as No. 19-1056 with the Commission.

[1] For privacy interests, the deceased worker will be referred to as A.L.

A few days after the Portland inspection, on December 18, 2018, OSHA conducted an inspection of a second Respondent worksite located in Old Orchard Beach, Maine (OOB inspection) in response to a complaint that roofers were working without fall protection. On June 11, 2019, OSHA issued a one-item serious and five-item willful citation to Shawn D. Purvis dba Purvis Home Improvement Co., Inc. with a proposed penalty of $676,250 (OOB Citation).

The OOB Citation alleged violations of construction standards for failure to provide eye protection and failure to provide fall protection. The OOB Citation was timely contested by Respondent and was docketed with the Commission as No. 19-1054.

On May 23, 2019, OSHA conducted an inspection of a third Respondent worksite located in Springvale, Maine (Springvale inspection) in response to a complaint of roofers working at a residence without fall protection. On November 19, 2019, OSHA issued a one-item serious, one-item willful, and a one-item repeat citation to Shawn D. Purvis dba Purvis Home Improvement Co., Inc. with a proposed penalty of $278,456 (Springvale Citation).

The Springvale Citation alleged violations of construction standards for a ladder jack scaffolding platform erected closer than the minimum required distance from exposed power lines, failure to provide fall protection, and failure to ensure the correct use of portable ladders. Respondent timely contested the Springvale Citation, and the case was docketed with the Commission as No. 19-1905.

By agreement of the parties, these three dockets were consolidated for hearing.[2] Collectively, the Secretary alleges a total of fourteen willful, two repeat, and four serious violations. The combined proposed penalty is $2,071,182 for the three citations.

Initially, the Complaints and Citations in these consolidated proceedings named Shawn D. Purvis d/b/a Purvis Home Improvement Co., Inc. as the Respondent. During discovery, the Secretary filed a Motion to Amend Complaints and Citations (Motion) to add Purvis Home Improvement Co., Inc. as an alternative Respondent, in the three dockets. In the Motion, the Secretary explained he did not seek to bring in a new party but to make clear that, in the event

[2] By agreement of the parties, the consolidated hearing originally was scheduled to be held in August 2020. Due to the Covid-19 pandemic restrictions, by agreement of the parties, the in-person hearing was rescheduled to January and February 2021. By November 2020, it became apparent the unforeseen duration of the pandemic precluded an in-person hearing in January and February 2021. The Secretary filed a motion to hold the hearing remotely, which Respondent opposed. The undersigned agreed to reschedule the hearing. By agreement of the parties, the in-person hearing was rescheduled to October and November 2021.

Shawn D. Purvis d/b/a Purvis Home Improvement Co., Inc. (Individual) is not found to be individually liable, then in the alternative, Purvis Home Improvement Co., Inc. (Corporation) is responsible for the violations. On September 1, 2021, the undersigned issued an Order granting the Secretary's Motion (Order).[3]

In that Order, the undersigned found that Respondent knew or should have known the Secretary would have named the Corporation if it, rather than the Individual, was the employer at the worksites where the alleged violative conditions occurred. Further, the undersigned found that the Secretary timely sought to name the Corporation as the Respondent, in the alternative.

An amended consolidated Complaint for all three dockets was filed by the Secretary on September 9, 2021. Each Respondent filed amended Answers to the Secretary's amended consolidated Complaint on September 15, 2021, and September 30, 2021. Respondent Shawn D. Purvis filed a second amended Answer to the Secretary's amended consolidated Complaint on October 15, 2021.[4]

An eight-day hearing[5] for this consolidated matter was held in Portland, Maine from October 27, 2021 through October 29, 2021, and in Manchester, New Hampshire from November 1, 2021 through November 5, 2021.[6]

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[3] In Respondent's post-hearing brief, Respondent continues its objections to the amended Complaints and Citations. (Resp. Br. 7-9). Respondent's arguments were addressed and rejected in the September 1, 2021 Order granting the Motion, and will not be reiterated in this Decision. Respondent Shawn Purvis, an individual, and Respondent Purvis Home Improvement Co., Inc., a corporation, filed a joint post-hearing brief and joint reply brief, referenced herein as Respondent's Brief and Respondent's Reply Brief.

[4] In their amended consolidated Answers, Respondents deny that Shawn D. Purvis d/b/a Purvis Home Improvement Co., Inc., or, in the alternative, Purvis Home Improvement Co., Inc. are employers subject to the OSH Act. Among other defenses, Respondents contend the OSH Act and OSHA standards do not apply to Respondents, that Respondents at all times alleged complied with the OSHA standards promulgated under the OSH Act, that Respondents believed in good faith that Mr. Purvis and the corporation were in compliance with the law and, therefore, no violations were willful. Respondents also contend the citations are duplicative, the proposed penalties are multiplicative, and the alleged per-employee penalties are not authorized by the OSH Act.

[5] Respondent Shawn D. Purvis d/b/a Purvis Home Improvement Co., Inc. (individual) and Purvis Home Improvement Co., Inc. (corporation), in the alternative, were jointly represented at the hearing. (Tr. 6-7).

[6] On November 22, 2021, the undersigned issued an Order Closing Hearing Record and Supplement to Order Granting Secretary's Motion in Limine Regarding September 2020 Deposition of Shawn D. Purvis. In this Order, the Shawn Purvis September 2020 Deposition Transcript, Final Designations, was received in evidence as exhibit GX-165.

Seventeen witnesses testified at the hearing. The witnesses called by the Secretary were: Portland Police Department Evidence Technician Jonathan Reeder; Portland Police Department Detective Jeffery Tully; OSHA Compliance Officer (CO) Gregory Wilson; the Springvale inspection's eyewitness neighbor; Central Maine Power Environmental Health and Safety Manager George M. Shutts; former OSHA CO Kathryn Simmons; OSHA Area Director (AD) David McGuan; Department of Labor (DOL) Office of Inspector General (OIG) Special Agent (SA) Sean Roberts; former Abuse Investigation Unit attorney of the Maine Workers' Compensation Board (MWCB) Shannon Collins; MWCB Deputy General Counsel Seanna Crasnick; fiancé of the deceased worker at the Portland worksite [redacted]; and, the Owner and President of Purvis Home Improvement Co., Inc. Shawn Purvis.

The Respondent called Shawn Purvis, Owner and President of Purvis Home Improvement Co., Inc., and five workers as witnesses: Lennie Dow,[7] Michael Happersett, Anthony Gallant, Forrest Daigle, and Ryver Daigle.[8]

II. ISSUES

The key issues in dispute are (a) whether Shawn D. Purvis d/b/a/ Purvis Home Improvement Co., Inc. (Individual) is responsible for the violations alleged in the Portland Citation, OOB Citation, and Springvale Citation; (b) whether Respondent is an Employer for purposes of the OSH Act; (c) whether the Secretary met the burden of proof for the fourteen willful, two repeat, and four serious violations cited in the three consolidated dockets; (d) whether the Secretary proved the characterization of willfulness for fourteen violations; (e) whether Respondent met its burden to establish a "good faith" defense to the violations characterized as willful; and (f) whether the willful violations at the Portland and OOB worksites may be cited on a per-instance (per-employee) basis.[9]

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[7] As discussed below, the undersigned finds that Lennie Dow functioned as Respondent's crew foreman at all three worksites.

[8] The undersigned granted Respondent's request to virtually present the testimony of its designated expert witness, Tiffany Couch. As agreed at the close of the in-person hearing on November 5, 2021, the hearing record remained open for receipt of the virtual testimony of Respondent's expert witness on Tuesday, November 9, 2021. (Tr. 1851). Late Monday, November 8, 2021, Respondent Counsel notified the undersigned and Counsel for the Secretary that Ms. Couch would not be called to testify virtually the following day. Respondent rested its defense case.

[9] Any defenses not pursued at hearing or in post-hearing briefing are deemed abandoned. *See Ga.-Pac. Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

For the reasons set forth below, the undersigned finds that Shawn D. Purvis d/b/a/ Purvis Home Improvement Co., Inc. (Individual) is responsible for the violations cited at the inspected Portland, OOB, and Springvale worksites, and thus is the appropriately named Respondent. Further, the undersigned finds Respondent is an Employer under the Act.

As described below all citation items are affirmed; however, the proposed penalty has been reduced to a total of $1,572,340 for the three inspections. Any argument not specifically addressed below has been considered and determined to have no merit.

III. JURISDICTION

Based on the record, the undersigned finds Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer[10] within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5). The undersigned further finds the Commission has jurisdiction over the parties and subject matter in this case.

IV. RELEVANT BACKGROUND & FACTS

The following facts are based on a review of the record and testimony as a whole. Any conflicts have been resolved based on the credibility of the source and all related evidence.[11]

History of the business

Shawn Purvis first performed construction work while working for Vanier Construction circa 1999, by doing various carpentry work that included roofing, framing, siding, windows, flooring, and cabinets. (Tr. 1222-23). Mr. Purvis started his own business in 2001, providing, among other services, residential siding, windows, doors, gutters, roofing, and snow plowing. (Tr. 1224-25; GX-165, pp. 29-30). During the first few years, he used various names for his business including Purvis Home Improvement, Purvis Gutters, and Purvis Plowing (Tr. 1229). In 2005, he incorporated the business as Purvis Home Improvement Co., Inc. (Tr. 1233).

Purvis Home Improvement Co., Inc. was incorporated in the State of Maine on December 16, 2005, with Shawn Purvis as the sole stockholder, President, and Treasurer. (Tr. 1375, 1434-

[10] See below for discussion of Respondent's status as an employer.

[11] In general, the testimony of Shawn Purvis and the workers at the hearing appeared to reflect a general desire for Respondent to not be held responsible for employee safety at a worksite. As discussed below, the workers have a long-term relationship with Mr. Purvis and rely on him for employment. The undersigned finds this relationship affected the perspective and testimony of these five workers. Further, as the owner and sole shareholder of Purvis Home Improvement Co., Inc., Mr. Purvis has a vested interest in the outcome of this proceeding, thus his testimony is viewed through this lens.

36; JX-3, RX-6). Neal Stillman has been the Clerk since incorporation. (RX-6). Mr. Purvis has owned 100% of the stock since incorporation. (GX-165, p. 155).

Each year, the corporation's annual reports are filed with the State of Maine. (Tr. 1376-77; JX-6; RX-6, pp. 1, 7-13, 39, 42, and 45). The cursory minutes from the annual stockholder meetings show the sole business conducted each year was the continuation of Shawn Purvis as the sole stockholder, Director, President, and Treasurer of the corporation along with Neal Stillman as the Clerk. (RX-6, pp. 1, 7-13, 39, 42, and 45). Mr. Stillman was responsible for the corporate records, including setting up the initial corporate documents, recording the minutes for the annual meeting, and filing the annual reports with the State of Maine. (GX-165, pp. 153-54; JX-6; RX-6). Mr. Stillman did not testify at the hearing.

The administrative side of the business

Shawn Purvis was responsible for all company operations including sales, advertising, billing, scheduling, estimating project costs, labor acquisition, finances, and tax filings. (Tr. 1373, 1378-79, 1388-89, 1391; GX-165, pp. 29, 33, 154). Mr. Purvis was the sole person authorized to act on behalf of the corporation. (Tr. 1389; GX-165, pp. 152-56). Mr. Stillman had no operational duties: his role was limited to maintaining and filing corporate documents. (GX-165, pp. 153-54; JX-6; RX-6)

Mr. Purvis solely managed the corporation's bank account, Home Depot credit card account, and American Express credit card account. (Tr. 1388-89; GX-165, pp. 156). Mr. Purvis handled the payroll and issuance of tax documents to workers. Mr. Purvis's payroll record consisted of a small notebook that listed who worked at a worksite on a particular date.[12] (Tr. 1447-48, 1455-58; GX-59). This notebook served as the basis to issue the workers' IRS-1099 forms each year. (GX-165, p. 155). The Tax Doctor filed the federal taxes for the sub-S corporation separately from Mr. Purvis's personal taxes based solely on information provided by Mr. Purvis. (Tr. 1379, 1528-29; JX-1, JX-2).

Day-to-day business operations

Around 2011-2012, Mr. Purvis changed his usual practice and chose to no longer routinely perform the labor at his worksites. (Tr. 1229-30, 1287, 1534). Mr. Purvis viewed his role as

[12] A notebook of entries from January 2019 through May 2019 shows that Mr. Purvis recorded the date of a roofing job with the first name (or nickname) of those working at the site that day. (Tr. 1447-48, 1455-58; GX-59).

primarily sales; he solicited business through advertising and word-of-mouth referrals. (Tr. 1204, 1287, 1373; GX-165, p. 29). To provide an estimate for roofing work for a prospective client, Mr. Purvis conducted a preliminary onsite review of the worksite to determine the time, cost, and materials needed. Mr. Purvis provided a written invoice to the homeowner as a bid with the cost estimate for the work. When the bid was accepted, Mr. Purvis scheduled the date of work with the homeowner and ordered the necessary materials. (Tr. 1290, 1294, 1348-50). Mr. Purvis had the sole responsibility of planning a job, including finding the workers to provide the labor.

Each morning Mr. Purvis went to a property he personally owned in Saco, Maine (Saco location), where workers gathered. (Tr. 1310-12; GX-165, pp. 42-43). The Saco location parking lot served as the central meeting place for workers each morning between 6:30 and 7:00 a.m. (Tr. 1311; GX-45, p. 50; GX-46, p. 68). Frequently, workers would call Mr. Purvis looking for work and stating their availability to work. (Tr. 1309). Some of Respondent's regular workers also were notified of work opportunities and the work schedule in advance of the workday morning meeting. [13] (GX-46, p. 69; JX-25, pp. 3, 4, 6). The corporation did not own, lease, or pay for the use of the Saco location. (GX-165, pp. 161-63). If there were not enough workers available for that day's job, Mr. Purvis rescheduled another date with the homeowner. (GX-46, pp. 41, 69).

The three vehicles used at worksites were stored at the Saco location—a 2015 dump truck, 2010 passenger van, and 2017 box truck. (Tr. 1476). The passenger van was used to transport workers to a worksite. (Tr. 1320-21, 1475-76; GX-165, pp. 216-17). Tools and equipment were transported to the worksite in the box truck. (Tr. 1317-18, 1476, 1577-78, 1650, 1795, 1803, GX-45, p. 50). The dump truck was used to transport roofing materials to the worksite and haul the debris to the dump. (Tr. 1320-21, 1475-76, 1578-79). Purvis Home Improvement Co., Inc. owned the box truck; the other two vehicles were owned by Shawn Purvis. (Tr. 1317-18, 1437-38, 1475-76; JX- 4). Workers from Respondent's regular work crew routinely drove the vehicles to the designated worksite each day.[14] (GX-31, p. 3; GX-45, p. 50).

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[13] Text messages between Mr. Purvis and worker A.L. reveal A.L. was notified of upcoming work opportunities, for the following day or week. Text messages also reveal that Respondent's worksite foreman Lennie Dow was assigned work in advance of the workday morning meeting. (Tr. 1098-99; GX-99, pp. 4-5, 8-9, 11-15, 17, 20-21, 23-30, 32-36. *See* Tr. 1173-84).

During an OSHA worksite interview, an employee stated, before the OOB job, he received a text from Mr. Purvis regarding that job. "Shawn sent me a text – roof if interested. Meet @ shop in Seco." (JX-25, p. 4).

[14] "It's always the same guys on the job that [have] my trucks." (GX-31, p. 3).

The roofing process

At all three worksites inspected by OSHA in this consolidated case, the work was removal of the existing roof and installation of a new roof on a residential home. There were two primary roles for workers at a worksite—roofer and groundman. (Tr. 1479-80; GX-165, pp. 139-40). A roofer removed and installed the roof while the groundman stayed on the ground loading the debris into the dump truck. (Tr. 1479-80). Mr. Purvis described the roofing process as four steps—pick up the roofing materials from the supplier, strip off the old roof, install the new roof, and take the old materials to the dump. (Tr. 1290).

On the first day of a roofing job, Mr. Purvis was at each worksite for a few minutes to explain to the workers the scope of the project and the terms agreed to by the homeowner. After describing the terms of the job, Mr. Purvis left the worksite and generally did not return. (Tr. 1301, 1312-13).

The roofing work began with laying out the tarps on the ground, setting up staging, scaffolds, and ladders for roof access. (Tr. 1562). To set up the scaffold staging, ladders were placed against the side of the house with brackets attached to hold a sixteen - or twenty-four-foot plank across them, forming a ladder jack scaffold. (Tr. 1227-29, 1563, 1651). Roof bracket scaffold stages were assembled on the roof by nailing brackets into the roof and placing a plank across the brackets. (Tr. 1227-29, 1764-65). The staging provided a surface to stand on and to place tools when the roof's pitch made it difficult to walk up the surface. (Tr. 1228-29 1563-64, 1764-65).

Proper roof installation required the following steps in a consistent order. (Tr. 1562-63). The old shingles were stripped off and the roof deck was prepared for the new roofing materials. (Tr. 1562, 1655, 1814). The roof was prepped by installing an underlayment paper, ice/water shield material, and an aluminum drip edge. (Tr. 1562-63, 1745-46, 1751). Next, chalk lines were snapped onto the surface to provide a guide for installing shingles in a straight line—the lines were generally marked at five-and-a-half-inches above the top of the row of shingles below. (Tr. 1563, 1763). Shingle installation began at the roof's lower edge. After three feet of shingle rows were installed, a roof bracket scaffold was installed on the roof's surface to enable installation of the next section of shingles. (Tr. 1763-64). Finally, the roof's peak was capped with shingles. (Tr. 1766-67). Once the roof was capped, scaffolding and equipment were removed, and the debris

was placed into the dump truck. (Tr. 1767-68). When the work was complete, payment was collected from the homeowner by one of the workers. (Tr. 1360, 1778-79).

Only Mr. Purvis could authorize the purchase of additional materials during a job. (Tr. 1294; GX-45, pp. 19-21, 48). For example, when rotted wood decking was found on a roof after the shingles were removed, Lennie Dow[15] notified Mr. Purvis. Mr. Purvis contacted the homeowner to discuss the additional work required and cost. (GX-45, p. 18; GX-46, pp. 45-46). Mr. Purvis then authorized the purchase of additional materials from the supply company. (Tr. 1290, 1294; GX-45, pp. 19-21, 48).

The core workers

There was a core group of twelve to fourteen individuals who routinely worked at Respondent's worksites. (Tr. 1476). Nine of these individuals worked on at least one of the three worksites at issue here: Michael Wright, A.L., Anthony Gallant, Michael Happersett, Anthony Purvis, Ryver Daigle, Forrest Daigle, Lennie Dow, and Flavio Campos. Respondent's handwritten payroll notebook confirms the frequent employment of these individuals on Respondent worksites. (Tr. 1455-58, GX-59). [16] Of the core workers, Dow, Happersett, Gallant, Ryver Daigle, and Forrest Daigle testified at the hearing. Transcribed administrative interviews with Mr. Dow and Mr. Campos are also in the record. (GX-45; GX-47).

V. THE RESPONDENT - PIERCING THE CORPORATE VEIL

"Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy." *Bangor Punta Operations, Inc. v. Bangor & A. R. Co*., 417 U.S. 703, 713 (1974).

[15] As discussed below, Lennie Dow was Respondent's foreman at the three worksites. Mr. Dow identified himself as the foreman, person-in-charge, or senior person on several occasions. (Tr. 326-30, 553, 755-56; JX-25, p.1; JX-34, pp. 19-22; GX-45, pp. 62-63). Mr. Dow oversaw the work at a site to ensure it met the customer's expectations. (GX-45, pp. 62-63). Mr. Dow directed the workers to wear fall protection at the Portland site (Tr. 553), at the OOB worksite, and the Springvale worksite. (Tr. 553, 764-65, 972; GX-112, pp. 21-22, 24-26). The crew at the worksites either directly identified Mr. Dow as directing work at a site or described his role in other ways, such as, kind of like the man in charge or lead guy. (Tr. 159, 163, 326-30, 755-56, 966, 971-72; JX-25, p. 1; JX-34).

[16] In the payroll notebook, Michael Happersett is recorded by his nickname "Happy." (Tr. 1455, 1642, 1751; GX-59). Anthony Gallant is recorded by this nickname "Turtle." (Tr. 1456-57; GX-59).

The Secretary asserts Shawn D. Purvis d/b/a Purvis Home Improvement Co., Inc. (Individual) is the Respondent. A veil-piercing analysis is necessary to determine whether Shawn Purvis was doing business in the guise of Purvis Home Improvement Co., Inc. *See Altor, Inc.,* 23 BNA OSHC 1458, 1460-63 (No. 99-0958, 2011) (*Altor*) (Commission has authority to determine whether remedy of veil piercing is appropriate), *aff'd,* 498 F. App'x 145 (3d Cir. 2012) (unpublished). In *Altor*, the Commission held the corporate veil can be pierced not "just as a means to collect defaulted penalties, but also to serve as a predicate for future abatement orders as well as repeat characterizations of future violations."[17] *Id.* (citations omitted). The Commission applied the law of the Third Circuit, where the case arose, to determine whether it was appropriate to pierce the corporate veil. *Id.* This case arises in Maine, so the law of the First Circuit is relevant.[18]

The First Circuit has considered the propriety of veil piercing related to federal regulations, such as ERISA, the Clean Air Act, and the Railway Labor Act. *See Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.,* 210 F.3d 18, 26-27 (1st Cir. 2000) (*Springfield Terminal*) (citations omitted) (the corporate form should not be used to "stymie" the purpose of a federal statute such as the Railway Labor Act), *Crane v. Green & Freedman Baking Co., Inc.,* 134 F.3d 17, 21-22 (1st Cir. 1998) (*Crane*) (evaluating veil piercing related to ERISA), *Alman v. Danin*, 801 F.2d 1, 3 (1st Cir. 1986) (*Alman*) ("deferring too readily to the corporate identity may run contrary to the explicit purposes of [ERISA]"), *PBGC v. Ouimet Corp.,* 711 F.2d 1085, 1093 (1st Cir. 1983) *(Ouimet*) ("concerns for corporate separateness are secondary to what we view as the mandate of ERISA"), and *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981) (*Brookline*) (evaluating veil piercing under the Clean Air Act).

[17] Within the OSH Act's citation framework is the authority to assess a higher penalty to employers that repeatedly violate an OSHA standard. *See* OSH Act section 17(a)-(b) (repeated maximum 10 times higher than for a serious violation).

[18] The Commission has stated that for OSHA litigation the federal common law should be recognized (rather than state law). *See generally, Phillips 66 Co.,* 16 BNA OSHC 1332, 1338 (No. 90-1549, 1993) ("we find that disputes involving settlements of OSHA litigation are to be resolved in accordance with federal common law principles").

The First Circuit[19] adopted the general rule that in federal cases "a corporate entity may be disregarded in the interests of public convenience, fairness and equity. In applying this rule, federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine...." *Springfield Terminal*, 210 F.3d at 26-27 citing *Brookline*, 667 F.2d at 221 (citations omitted). Further,

> There is no litmus test in the federal courts governing when to disregard corporate form. The Supreme Court has, however, provided some guidance, stating that "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co*., 306 U.S. 307, 322, 59 S.Ct. 543, 550, 83 L.Ed. 669 (1939). The Court has further indicated that corporate form may not defeat overriding federal legislative policies. *See First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 630, 103 S.Ct. 2591, 2601, 77 L.Ed.2d 46 (1983); *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co*., 417 U.S. 703, 713, 94 S.Ct. 2578, 2584, 41 L.Ed.2d 418 (1974).

Alman, 801 F.2d at 3.

Respondent asserts that cases related to federal ERISA law cannot be applied to the circumstances of an OSHA citation, because ERISA's mandate to protect against financial losses is more susceptible to veil piercing than OSHA's mandate for worker safety. (Resp. Reply 8). Respondent's position is rejected. The First Circuit is clear that the concept of veil piercing is not so limited. *Brookline*, 667 F.2d at 221 (evaluating veil piercing under the EPA's Clean Air Act). As set forth above, the First Circuit has stated that a federal statute's purpose must be examined to determine whether it is being undermined. The purpose here is the safety and health of workers.[20]

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[19] *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (*Kerns Bros*.) (Commission generally applies law of the circuit where it is probable a case will be appealed). The relevant circuits here are the First Circuit and the D.C. Circuit.

[20] In the D.C. Circuit, veil piercing is an equitable remedy subject to the sound discretion of a trial judge. *U.S. v. Andrews,* 146 F.3d 933, 940 (D.C. Cir. 1998). The D.C. Circuit has long held the corporate entity cannot be used as a bar to prevent justice. *Francis O. Day Co. v. Shapiro*, 267 F.2d 669, 674 (D.C. Cir. 1959) ("To prevent injustice the concept of separate corporate entity cannot here be permitted to stand as a bar"). The D.C. Circuit's veil piercing jurisprudence views the corporation as a separate entity, even when owned by a single person, except where the "corporate entity must be disregarded in the interest of public convenience, fairness and equity." *Quinn v. Butz*, 510 F.2d 743, 758 (D.C. Cir. 1975) (showing of fraud unnecessary, it is sufficient that the corporate fiction "visited an injustice" upon him). Veil piercing is justified where the "corporate fiction would enable the circumvention of a statute." *Id.* at n. 95 (citations omitted). Further, the court acknowledges there is no uniform standard to determine when a corporation is

Purpose of the OSH Act

To determine whether the corporate form should be disregarded, the purpose of the OSH Act must be examined. *See Springfield Terminal,* 210 F.3d at 26-27. The express purpose of the Occupational Safety & Health Act of 1970 (OSH Act) is to "assure safe and healthful conditions for working men and women." 29 U.S.C. § 651. "[T]he statute's broad preventive and remedial intent has been specifically recognized by the Supreme Court. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10-11 (1990). The Court held that the Act 'is to be liberally construed to effectuate the congressional purpose.'" *Sharon & Walter Constr., Inc.,* (*S & W),* 23 BNA OSHC 1286, 1293 (No. 00-1402, 2010), citing *Whirlpool*, 445 U.S. at 13.

The OSH Act states that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards. . ." Section 5 (a) of OSH Act, 29 U.S.C. § 652. An employer is defined as "a person engaged in a business affecting commerce who has employees. . ." Section 3 (5) of OSH Act, 29 U.S.C. § 652(5). A person is defined as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." Section 3 (4) of OSH Act, 29 U.S.C. § 652 (4). The Act makes no distinction among the many ways an employer may be organized, instead it includes every configuration that an employer may have, from the individual to "any organized group of persons," to achieve its goal of employee safety. *Id.*

The OSH Act holds that an employer, which it broadly defines, is accountable for workplace safety. Because the OSH Act places little importance on the organizational nature of an employer, it is appropriate to pierce the corporate veil to achieve the purpose of the OSH Act. *See Springfield Terminal,* 210 F.3d at 26-27 (citations omitted) (the corporate form should not be used to "stymie" the purpose of a federal statute).

Upon consideration of the evidence discussed below, the undersigned finds that Shawn Purvis did not consistently observe the corporate form; instead, the lines were blurred, and the corporation was an extension of the individual rather than a separate entity. Piercing the corporate

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simply an alter ego "given the diversity of corporate structures and the range of factual settings in which unjust or inequitable results are alleged." *Valley Fin., Inc. v. U.S.,* 629 F.2d 162, 172 (D.C. Cir. 1980).

"A court may hold the owner of a corporation responsible for the corporation's conduct when there is a unity of interest between the individual and the entity, and when insulating the owner from liability would lead to inequitable results." *U.S. v. Dynamic Visions Inc*, 971 F.3d 330, 339 (D.C. Cir. 2020) (*Dynamic Visions*) citing *Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982) (*Labadie*).

veil is necessary to avoid injustice and achieve the purpose of the OSH Act. For the worksites at issue here, in light of the mandate of the OSH Act, the undersigned finds that the corporation was a guise for Mr. Purvis in business operations.

Factors considered

To determine whether it is necessary to pierce the corporate veil, the undersigned considered the following factors: routine business practices, corporate accounts, corporate filings, tax filings, applications to the state workers' compensation board, personal and real property ownership, billing invoices, and payroll records. *See generally Springfield Terminal,* 210 F.3d at 26-27 (standard for veil piercing is notably imprecise and fact intensive); *Valley Fin., Inc. v. U.S.,* 629 F.2d 162, 172 (D.C. Cir. 1980) (determination for veil piercing unique to the particular corporate structure and facts at issue).

As discussed below, Mr. Purvis showed respect for the corporate form with the corporate financial accounts, annual state corporate filings, and federal tax filings. However, in routine business operations, including Mr. Purvis's presentation of the company through applications, invoices, and advertising, Mr. Purvis showed a disregard of the corporate form. This disregard is further shown through the use of personal property for routine business activities.

Corporate accounts [21]

The company had accounts that were separate from Mr. Purvis's personal accounts: a bank account, credit cards that were used for advertising and roofing materials, and a corporate account at a local supply company, ABC Supply Co., Inc., for the purchase of construction materials. (Tr. 1388-91; GX-50, GX-51). These accounts show a recognition of the corporation as a separate entity.

State corporate filings

Since Purvis Home Improvement Co., Inc. was incorporated in Scarborough, Maine on December 16, 2005, Neil Stillman has filed the required annual reports with the State of Maine.[22]

[21] There is no evidence in the record whether this business was adequately capitalized. As set forth by the Commission in *Altor*, without evidence of the amount of capital routinely held in a company of this size, in the roofing business, any claim of undercapitalization cannot be assessed. *Altor,* 23 BNA OSHC at 1460-63.

[22] Documentation of the corporation's annual reports to the State of Maine, which are due June 1 of each year, for the years 2006-2019, were placed into evidence and reflect the same officers and director as at the original incorporation. (JX-6). Documentation of each year's "Consent Meeting of Stockholders and

(Tr. 1375, 1434-36; JX-3, RX-6, pp. 1, 7-13, 39, 42, and 45). Minutes of the annual shareholder meeting which maintained the status quo of Shawn Purvis as the sole stockholder, Director, President, and Treasurer of the corporation, along with Neal Stillman as the Clerk, were also recorded. (RX-6, pp. 1, 7-13, 39, 42, and 45). These annual actions reflect a minimum effort to maintain Purvis Home Improvement Co., Inc.'s status as a Maine corporation and are a recognition of the separate corporate entity.

Federal tax filings

Federal tax returns for 2017 and 2018 show that taxes were filed by Purvis Home Improvement Co., Inc. as a sub-S corporation separately from the personal tax returns filed by Mr. Purvis and his spouse. (JX-1, JX-2). Mr. Purvis provided the documentation to an accountant to file these annual tax documents.[23] (Tr. 1379, 1528-29). The tax filings reflect a recognition of the corporation as a separate entity.

Applications to the State of Maine Workers' Compensation Board[24]

Respondent contends its applications[25] for a predetermination letter of independent contractor status from the State of Maine Workers' Compensation Board (MWCB) are proof of adherence to its identity as a separate corporate entity.[26] (Resp. Reply Br. 5-7; RX-11; GX-173). Mr. Purvis testified that he believed receipt of a predetermination letter from the state was proof the business was neither an employee of another contractor nor that it had its own employees. (Tr. 1245). However, Mr. Purvis's belief is incorrect and not supported by the evidence.

Each year an individual or business can apply to the MWCB for a predetermination letter of a rebuttable presumption of independent contractor status with respect to the state's workers'

Directors of Purvis Home Improvement Co., Inc." for the years 2006-2008, 2011, 2014-2020 were placed into evidence. (RX-6, pp. 1, 7-13, 39, 42, and 45).

[23] The 1099 forms issued by Purvis Home Improvement Co., Inc. to many of the individuals who worked at a Purvis worksite for the tax years of 2017, 2018, and 2019 were admitted to the record. (RX-3, RX-4, RX-27; Tr. 1430, 1529, 1444-45, 1471, 1515, 1529, 1863-64).

[24] At the time of the hearing, an action against Purvis Home Improvement and Shawn Purvis filed by the Maine WCB Abuse Investigation Unit alleging lack of payment of compensation for employees under the Maine Workers' Compensation Act was stayed pending the outcome of a criminal case related to the same facts and circumstances. (Tr. 1010-11, 1028; GX-149; GX-152).

[25] The application is titled as "Application for predetermination of independent contractor status to establish a rebuttable presumption." (GX-173).

[26] Mr. Purvis explained that general contractors request a predetermination letter when he subcontracts from them. (Tr. 1243).

compensation system.[27] (Tr. 1045-1052; GX-173). The MWCB's application form states that "predetermination from the Board is not binding on the [Maine] Department of Labor" and that the application only pertains to the applicant. (GX-173, p. 2). If the information on the application meets the minimum criteria, the applicant receives a predetermination of a rebuttable presumption of independent contractor status letter from the MWCB. The predetermination is solely based on the information provided by the applicant; the state does not verify that the information provided is accurate. (Tr. 1049-52; GX-173). Further, as explained by MWCB's Deputy General Counsel Seanna Crasnick, the letter does not apply to anyone who is employed by an applicant. (Tr. 1052-53).

The applications submitted by Shawn Purvis for 2015, 2016, and 2017 were entered into evidence. (Tr. 1243; GX-173). The applications were filled out by hand and signed by Shawn Purvis. *Id.* On the 2015 application, Mr. Purvis listed the applicant's name as "Shawn Purvis dba Purvis Roofing" and "Shawn Purvis doing business as [] Purvis Roofing." (GX-173, pp. 2-8). The applicant's name on the 2016 application was written as "Shawn Purvis/Purvis Home Imp. Inc." and "Shawn Purvis doing business as [] Purvis Home Imp. Inc." (GX-173, pp. 10-16). The applicant's name on the 2017 application was written as "Shawn Purvis doing business as [] Purvis Home Imp. Inc." (GX-173, pp. 18-24).

Respondent argues Mr. Purvis's use of "dba" or "doing business as" on the applications is meaningless because laypersons often use the term inaccurately and that each application clearly noted that he was applying as the corporation. (Resp. Reply 5-7). The undersigned disagrees. In the 2015 application, Mr. Purvis didn't refer to the corporation at all; instead, he referred to Purvis Roofing. For all three years, the application was presented as Shawn Purvis "doing business as" rather than an application solely for the corporation. (GX-173).

Even though Mr. Purvis is a layperson, he has been the sole director and shareholder of the corporation that he formed in 2005. The inclusion of himself as an individual in applications many

[27] According to Seanna Crasnick, the Deputy General Counsel for the Maine WCB, the purpose of the application process was to provide an entity with a predetermination letter from the Maine WCB that stated the applying entity had a rebuttable presumption that it was an independent contractor with respect to Maine's workers' compensation system. (Tr. 1045; GX-164). The rebuttable presumption only applies to the applicant, not to anyone working for the applicant. (Tr. 1052). Finally, the predetermination was not binding on the MWCB; the determination of whether someone was actually an independent contractor under state statute at a particular worksite was made by a MWCB hearing officer or administrative law judge based on a fact-specific inquiry. (Tr. 1058-60).

years later shows a lack of attention to corporate formalities and a blending between the individual and the company. *See Labadie Coal Co. v. Black*, 672 F.2d 92, 98 (D.C. Cir. 1982) (*Labadie*). [28] ("[i]f it is merely a separately named business conduit for defendant's own activities, a "d/b/a" in all practicality, such records would not be as important and therefore might not be carefully maintained"). Further, his use of Purvis Roofing as the business name shows his disregard for the corporate form of Purvis Home Improvement, Inc. The applications submitted to the MWCB are an example of this lack of attention to the separate corporate form and support piercing the veil.

Work Vehicles

The ownership of the vehicles routinely used at worksites also demonstrates there was no meaningful separation between Mr. Purvis, as an individual, from the corporate entity. Three vehicles were used at Purvis worksites, a dump truck, passenger van, and box truck. (Tr. 1476). Two were owned by Mr. Purvis. (Tr. 1317-18, 1475-76).

The passenger van, used to transport workers to a worksite, had "Purvis Roofing" displayed on the side of the van. The name on the van did not accurately reflect the corporate identity. (Tr. 1320-22, 1475-76; GX-165, pp. 216-17; GX-100, pp. 16-17). Mr. Purvis could not secure a loan for the company, so he bought the passenger van in 2017 for cash with his personal funds. (Tr. 1320-22). The ownership of the van remained with Mr. Purvis and was not later transferred to the corporation.[29] (Tr. 1475-76).

The dump truck was used to transport roofing materials to the worksite and haul the refuse to the dump. (Tr. 1320-21, 1475-76). "Purvis Home Improvement" was displayed on the side of the dump truck. (GX-100, pp. 16-17). Mr. Purvis claimed the purchase of the dump truck in 2015

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[28] In *Labadie*, the factors considered by the DC Circuit for veil piercing were:

> (1) is there such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist?; and (2) if the acts are treated as those of the corporation alone, will an inequitable result follow? Relevant to the first question is the issue of the degree to which formalities have been followed to maintain a separate corporate identity. The second question looks to the basic issue of fairness under the facts.

Labadie, 672 F.2d at 96.

[29] Respondent had the opportunity to provide testimony and evidence that Mr. Purvis took some other action, such as transferring the ownership of the van to the corporation, to indicate a separation between himself and the corporation. To the contrary, Mr. Purvis testified that he purchased the van in 2017 with his personal funds and that he still owned both the van and the dump truck that were used at the worksites. (Tr. 1320-22, 1475-76).

was an investment for the company; however, ownership of the vehicle remained with Mr. Purvis. (Tr. 1321, 1476).

Respondent provided no evidence to refute this lack of separation between Mr. Purvis and the corporation. Respondent could have submitted evidence that the company otherwise accounted for these two vehicles. For example, even though the passenger van was owned by and titled to Shawn Purvis, the corporation could have rented, leased, or entered into some other agreement to establish its right to use that property. *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342 (No. 00-1968, 2003) ("when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party's case") (citations omitted); *see also, Labadie,* 672 F.2d at 94-95, 97-98 (failure to produce ordinary corporate records "creates a strong inference that these records do not exist"). The company had no agreement to account for the use of these two vehicles. [30]

On the other hand, the box truck used to bring ladders and tools to a worksite was purchased by the corporation in 2017. (Tr. 1317-18, 1476; GX-185, pp. 13-14). A 2019 property tax receipt confirmed the truck was registered to Purvis Home Improvement Co., Inc. (Tr. 1317-18, 1475-76, 1437-38; JX-4). Of the three vehicles used at a worksite, this was the only one under the control of the corporation.

The lack of any arrangement for the company's use of vehicles owned by Mr. Purvis demonstrates a lack of a separate corporate identity. All three vehicles were routinely used at worksites regardless of ownership. The use of Mr. Purvis's personal vehicles at the worksites demonstrates the blending of the corporation and Mr. Purvis as an individual, which supports piercing the veil of the corporate form.

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[30] Also noteworthy is Mr. Purvis's failure to maintain ordinary business records. For more than one year, Respondent retained no corporate records of work performed or equipment or materials purchased. After filing the corporate taxes, Mr. Purvis did not retain receipts. (GX-165, pp. 133-34). When Respondent worked as the subcontractor for general contractor Risbara, the agreement was oral, with no written subcontract agreement. (GX-40; GX-148; GX-165, pp. 103-04, 110; JX-22, p. 2).

Mr. Purvis claimed the 2015 Pine Point OSHA Inspection incorrectly cited Purvis Home Improvement Co., Inc. simply because Purvis vehicles were at the inspection worksite. Mr. Purvis testified he rented the Purvis trucks to Joe Dalton of Su Casa Home Improvement for $200 a day, per truck. (Tr. 1267-68). There was no written contract to rent the vehicles. Mr. Purvis received cash. *Id.* In Mr. Purvis's Motion to dismiss the debt collection action in U.S. District Court, Mr. Purvis claimed he "loaned two of my trucks to my friend Joe Dalton D.B.A. Su Casa Home Improvement" who was working at the site. (Tr. GX-148). No evidence documenting this loan was produced.

Physical location

Two locations are relevant to the business. The first is the address of the corporation, as listed on its tax filings, its corporate filings, applications to the MWCB, and its customer invoices. This address is Mr. Purvis's home address in Scarborough, Maine. (JX-1, p.19; JX-2, p.1; JX-3; JX-27; RX-6). The second address is 710 Portland Road, Saco, Maine (Saco location). (Tr. 1393-94; GX-165, pp. 11, 157). The Saco location is where Purvis Home Improvement had a sign, the vehicles were stored, workers met at the beginning of the day, and workers received pay. (Tr. 1311; GX-46, p. 64; GX-165, pp. 11, 157). The Saco location is a residential property owned by Mr. Purvis.[31] (Tr. 1393-94, 1607-08; GX-165, p.157).

The corporation did not pay Mr. Purvis for the use of the Saco location. (GX-165, pp. 161-62). Mr. Purvis said that he had considered setting up an arrangement but didn't follow through with the paperwork. (GX-165, pp. 161-62). The routine use of property owned by Mr. Purvis for the business without any payment or other compensation shows a lack of attention to the corporate form and supports piercing the veil. *See generally, United Elec., Radio and Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1095 (1st Cir. 1992) (*163 Pleasant St.*) ("Successful invocation of the alter ego doctrine requires a showing that businesses, although separately incorporated, have been operated in so imbricated a manner as to justify a reasonable perception that they were one and the same.").

Invoices

The customer invoices used also did not reflect fidelity to the corporate form. The invoice was a pre-printed form with "Contractor's Invoice" in the upper right-hand corner and the name "Purvis Roofing, Inc." on the upper left (Purvis Invoice). (JX-27, JX-39, GX-40, RX-25). The address listed was the same used for Purvis Home Improvement Co., Inc.'s annual corporate statements. (Tr. JX-27, JX-39, GX-40, RX-6, RX-25). The phone number listed was the same as that displayed on vehicles used at the worksite. (JX-27, JX-39, GX-40, GX-100, pp. 15, 16, 17, RX-25). The corporate name of Purvis Home Improvement Co., Inc. did not appear on the Purvis Invoice. (JX-27, JX-39, GX-40, RX-25).

[31] The residence at the Saco location was rented from Mr. Purvis by workers at Respondent worksites, Thomas Christopher Sargent, and previously, Lennie Dow. (Tr. 1607-08; GX-59; GX-165, pp. 157-58, 211-12; GX-183, pp. 8-9; GX-184, pp. 14-15)).

Four roofing invoices were submitted into evidence, all of which used the Purvis Invoice form described above.[32] (Tr. 359-60, 1489; JX-27, JX-39, GX-40, RX-25). At the bottom of each invoice, after the description of services and materials for the particular job, Mr. Purvis wrote the words "Thank you, Shawn Purvis." (Tr. 1489; JX-27, JX-39, GX-40, RX-25). Two payment checks from customers were also placed in evidence. Neither of the checks were made out to Purvis Home Improvement Co., Inc. One was written to Purvis Roofing, Inc. and the other to Purvis Roofing. (Tr. 359-60; JX-27, JX-39).

Even though Purvis Home Improvement Co., Inc. was formed in 2005, the pre-printed invoice form used in 2018 did not reflect the corporate name. Mr. Purvis's representation of the company was not true to its corporate identity, as shown by the use of various entity names to conduct business. The invoices and checks show a lack of recognition of the corporate form.

Payroll Methods

Workers were paid in cash, generally at the end of each workday. (Tr. 1335; GX-46, p. 64; GX-165, pp. 139-40). There was no receipt book or other means to record the cash disbursements to the workers. (Tr. 1447; GX-59).

Payroll records consisted of a notebook in which Shawn Purvis simply listed, by first name or nickname, who worked each day.[33] This was the information source for the 1099 forms Mr. Purvis issued at the end of the tax year. (Tr. 1446-48, 1455-58, 1523-25; GX-59). There was no record of hours worked or amount paid, just the date next to a list of names. (Tr. 1455). The notebook was the extent of the records he kept throughout the year to track who had worked for the company. (GX-46, p. 19). Mr. Purvis didn't keep records for any prior year. (Tr. 1525-26, 1534; GX-46, pp. 19, 63). When he used a subcontracting company for work at a site, Mr. Purvis

[32] The invoices were a February 26, 2018 invoice for work that Shawn Purvis had subcontracted with general contractor, Risbara Brothers (Tr. 1489; GX-40); a November 28, 2018 invoice for a roofing job in Springvale, Maine (Springvale worksite) (Tr. 359-60; JX-39); an October 10, 2018 invoice for roofing work at a Birch Lane address (JX-27); and an October 9, 2018 invoice for the Portland worksite. (RX-25; GX-165B(1)).

[33] Notebook pages related to worksites from January 2019 through May 2019 were placed in evidence. (Tr. 1447, 1526; GX-59).

had no written agreement for terms of work and he paid the subcontractor in cash based on an oral agreement.[34] (Tr. 1451-52, 1454).

Further, Mr. Purvis admitted that he did not issue an IRS-1099 form to someone who only worked for a couple of days; he didn't believe the potential tax benefit to him was worth the extra paperwork.[35] (Tr. 1467-1468, 1517; JX-1, p.19).

Mr. Purvis's payment of workers in cash, the informal payroll method used to track who worked on a given day, and the practice of not sending a 1099 form to every individual that worked at a site suggest a casual operation as an individual, rather than the records expected for a corporation and thus, support piercing the veil.

Veil piercing is merited

Mr. Purvis showed respect for the corporate form through annual state corporate filings, separate financial accounts, and annual federal income tax filings. However, in daily business operations and representations to the public there was a disregard of the corporate form.

Mr. Purvis routinely disregarded the corporate form either by identifying himself as *Shawn Purvis dba* Purvis Home Improvement Co., Inc. or by not using the corporate name. His interactions with customers, as shown through his invoices and advertising on the side of the work vehicles, did not reflect the corporate name. Invoices used the name Purvis Roofing instead of Purvis Home Improvement Co., Inc. (JX-27; JX-39; GX-40; RX-25). Checks from customers were made out to Purvis Roofing and not Purvis Home Improvement Co., Inc. (JX-27; JX-39). The applications to the state's workers' compensation board, where the business is listed as a "dba" and as Purvis Roofing, show a lack of separation between the individual and disregard for the name of the corporate entity. (GX-173). The use of the Saco property and two vehicles personally owned by Mr. Purvis for significant business operations demonstrates a lack of attention to the corporate form. His routine activities and public identity demonstrate the business was effectively an extension of the individual rather than a separate corporate entity.

[34] GB Roofing was hired to provide the labor to strip the roof, pick up the materials, install the roof, and take the old roof to the dump. (Tr. 1452). Entries in the handwritten payroll notebook for GB Roofing are referenced as "[Ecuadorians]." (Tr. 1448-55; GX-59). Mr. Purvis claimed to have used this crew for several jobs since 2016; however, the IRS 1099 forms in evidence only include payments to GB Roofing in 2019. (Tr. 1454, 1530; RX-3; RX-4; RX-27).

[35] For example, there is no IRS form 1099 for "Griff" because he only worked a couple of days. (Tr. 1467-1468, 1516-17; GX-59).

There were no owners or shareholders other than Mr. Purvis. Mr. Purvis operated the corporation with little attention to corporate formalities. The company did not own or have an agreement to use critical assets needed to operate the business, such as the dump truck and passenger van. Instead, Mr. Purvis just used his personal property as if it were a business asset. The routine intermingling of Mr. Purvis's assets with those of the corporation shows there was no separation between Mr. Purvis and the corporation. *Labadie,* 672 F.2d at 96 (where there is a unity of interest between the individual and the entity, and respecting the corporate form would insulate the individual from liability, it is proper to pierce the corporate veil to avoid inequitable results).

When balanced against how the business was routinely operated, the annual corporate filings seem to be gestures to meet the minimum requirements to maintain its status as a Maine corporation. Considering all factors, the undersigned finds the day-to-day actions in which Mr. Purvis disregards the corporate form more telling than annual perfunctory filings.

The undersigned finds that Mr. Purvis's representation of the company to the public shows that he viewed the corporation as an extension of himself and not as a separate entity. *See generally, Dynamic Visions*, 971 F. 3d at 339 (finding company the "alter ego or business conduit" of its sole owner and CEO) (citations omitted).

Respondent asserts the First Circuit requires a showing of fraud to support veil piercing. *Crane,* 134 F.3d at 27. (Resp. Reply Br. 9-10). In *Crane*, the court explained that for veil piercing the fraud need not reach the level of a criminal or civil fraud, yet it must be apparent. *Crane,* 134 F.3d at 23. Further, the court in *Crane* clarified, that in the "ERISA milieu" First Circuit precedent requires a showing of some fraudulent intent for veil piercing. *Crane* does not address cases outside the ERISA milieu.

In a more recent case where the federal Railway Labor Act was under consideration, *Springfield Terminal,* the First Circuit refined the focus of its veil piercing analysis. *Springfield Terminal,* 210 F.3d at 25. The court in *Springfield Terminal* set forth that "the veil may be pierced if one corporation is not an independent entity, but rather the mere alter ego of another," and that the standard for veil piercing was "notably imprecise and fact-intensive." *Id.* at 25-26. Relying on its 1981 *Brookline* decision, the court stated that the corporate entity can be "disregarded in the interests of public convenience, fairness, and equity." *Id.*at 26; *see Brookline,* 667 F.2d at 221. There the court emphasized that it was necessary to pierce the veil to manifest the purpose of the Railway Labor Act. *Id.* at 27. Finally, the court specifically stated that it did not accept the

formulation that veil piercing required a showing of "fraudulent intent" or "moral culpability."[36] *Id.* at 32 n.7. Thus, the undersigned rejects Respondent's argument that a showing of fraudulent intent is necessary to pierce the corporate veil.[37]

Nonetheless, fraudulent intent has been demonstrated here. As discussed above, the purpose of the OSH Act is to assure employees are provided "safe and healthful conditions" in the workplace. The enforcement tool provided to OSHA is the issuance of citations with penalties for violations of the Act. *See* sections 9 and 17 of the Act, 29 U.S.C. §§ 658, 666. Further, "[t]he system of penalties contained in [section]17 allows for increased fines when the need arises to provide an employer with added incentive" to comply with the requirements of the Act. *S&W,* 23 BNA OSHC at 1294. (citation omitted). The maximum penalty for a repeated violation is ten times higher than the maximum for a violation that is not repeated. *See* section 17(a)-(b) of the Act, 29 U.S.C. § 666(a)-(b). The assessment of penalties provides an incentive to the employer to comply with the OSHA standard in the future. *See S&W*, 23 BNA OSHC at 1294. ("The threat of a repeat characterization, therefore, was designed to deter an employer from committing violations primarily by creating the potential that a future violation's penalty will be significantly greater.") (citations omitted). Assessment of penalties is integral to the regulatory scheme set forth by Congress.

Mr. Purvis's conduct demonstrates he had no intention of complying with OSHA's requirements or paying penalties related to violations of those requirements. In 2006 Mr. Purvis contested an OSHA citation and then reached an agreement to settle the case in exchange for a lower penalty and onsite training from OSHA, discussed below. Thereafter, Mr. Purvis made operational changes that he intended to shield the corporation from any liability under the OSH Act at his worksites; he testified he believed the workers at his worksites were independent contractors. (GX-165, pp. 96-97, 108). Under this scheme, when Mr. Purvis received a citation

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[36] "Without necessarily accepting that specific formulation of the requirement, there is no question that a manipulation of the corporate form to circumvent a federal regulatory scheme is sufficiently blameworthy to [to constitute fraudulent intent]. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 630, (1983) ("[T]he Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies.")." *Springfield Terminal,* 210 F.3d at 32, n.7.

[37] In the D.C. Circuit a showing of fraud is not necessary to disregard the corporate form. "[F]raud is not a prerequisite in a suit to disregard a corporate fiction. . .. a case must only 'present an element of injustice or fundamental unfairness' to justify the court's piercing the veil." *Labadie*, 672 F.2d at 99, quoting *DeWitt Truck Brokers v. W. Ray Flemming Fruit Co*., 540 F.2d 681, 687 (4th Cir. 1976).

from OSHA, he did not contest it; instead, he chose to ignore all citations from OSHA. *See generally, Springfield Terminal,* 210 F.3d at 38, n. 11 (agreeing with majority that "'manipulation of the corporate form to circumvent a federal regulatory scheme is sufficiently blameworthy' to constitute fraudulent intent") (Stahl, J., dissenting).

During a 2012 inspection, when AD McGuan explained that OSHA regulations applied to his worksite, Mr. Purvis simply stated that he would not pay any penalties and if necessary, would dissolve the corporation or change the name of the company to avoid debt collection. (Tr. 879-80; JX-12). Mr. Purvis did not contest that citation and continued to ignore subsequent OSHA citations. Without individual liability, Mr. Purvis can simply dissolve the corporation—as he threatened to do in 2012—and set up a new corporation.

Respondent asserts Mr. Purvis's threat to dissolve the corporation during his 2012 discussion with AD McGuan was mere "bombast" because he never acted to dissolve the corporation even after he continued receiving citations from OSHA. (Resp. Br. 62). Respondent contends Mr. Purvis's 2012 threat was an "isolated statement." (Resp. Reply Br. 7). The record reveals otherwise. It was not Mr. Purvis's only threat that he would not pay OSHA penalties. In 2015, during the Pine Point inspection, when informed by the OSHA Compliance Officer that citations would issue, Mr. Purvis reiterated that he would not pay OSHA penalties. In anger, Mr. Purvis told the OSHA CO "you can suck a** I'm not paying any penalties. They will end up with the rest of the penalties." (Tr. 670; JX-18; GX-27). Mr. Purvis allowed the rest of the penalties to "end-up" ignored, unpaid.

Here, the facts reveal there was no need for corporate dissolution because Mr. Purvis simply ignored the OSHA citations. Mr. Purvis chose passive inaction. Mr. Purvis knew he had the right to contest each OSHA citation issued, but Mr. Purvis chose not to submit a contest.[38] (Tr.

[38] Respondent has an OSHA citation history. (GX-161). The Citation and Notification of Penalty, in each case, stated Mr. Purvis's right to contest the Citation and Notification of Penalty, by "inform[ing] the Area Director in writing that you intend to contest the citation(s) and / or proposed penalty(ies) within 15 working days after receipt" of the citation and penalty notification. (JX-7, p. 3 (Westbrook, Maine); GX-7, p. 3 (Fieldings Oil Co.); JX-16, p. 3 (Pine Point, Maine); JX-20, p. 2 (Mussey Road).

The OSH Act states the procedure for enforcement of OSHA citations, including the procedure for an employer who wishes to contest an OSHA citation issued or proposed assessment of penalty. Section 10(a). If an employer notifies the Secretary that he intends to contest a citation issued or proposed assessment of

879, GX-165, pp. 96-97, 104, 108). Filing a contest, Mr. Purvis would have an opportunity to challenge OSHA's position that the workers on the inspected Respondent worksites were employees and that the OSHA health and safety standards applied to those worksites. Filing a contest, Mr. Purvis would have an opportunity to confirm the accuracy of his belief that the workers on the inspected Respondent worksites were independent contractors. Mr. Purvis candidly admitted his disincentive to file a contest and confirm his stated belief. During a June 1, 2018, OSHA interview, in connection with the Mussey Road inspection discussed below, Mr. Purvis frankly told Compliance Officers Simmons and McGuan that it was not profitable for him to follow the OSHA regulations, guidelines, on his worksites. [39]

Further, Mr. Purvis took no actions to ensure that he was operating the corporation in such a way that it met its obligations under the OSH Act, either as an employer or a general contractor hiring subcontractors. Mr. Purvis made the choice of inaction. *See generally, Reich v. Sea Sprite Boat Co., Inc.,* 50 F.3d 413, 418 (7th Cir. 1995) (In a contempt action brought by the Secretary of Labor against the employer, the Seventh Circuit Court of Appeals found "indubitable" that Sea Sprite was the alter ego of Smith, president, and sole stockholder of Sea Sprite. The court noted that Smith did not observe corporate formalities, continued the violative conduct, ignored penalties and settlement agreement terms. The court found Respondent Sea Sprite in contempt of court.

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penalty, "the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing. . .." Section 10(c).

The Commission is an independent adjudicatory agency and is not part of the Department of Labor or OSHA. 29 U.S.C. § 661. It was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the OSH Act and has no regulatory functions. 29 U.S.C. § 659(c).

[39]During Mr. Purvis's June 1, 2018, OSHA interview, he frankly told the Compliance Officers:

> Can I be honest with you? If you go to like a big company, like Glidden Roofing or Risbara's or some of these companies that make their guys follow the [OSHA fall protection] guidelines. . .. They're charging double what I'm charging and that's why they can hire me, you know what I mean? Because I'm hiring subs and they're doing it the way they want. But if you were to sit there and run a roofing crew and have employees and do it day to day to day, every day like by the books legit, you wouldn't ever get hired. And you wouldn't make no money. You'd pay [the workers] double. You know what I mean.
>
> I'd love to have guys on the books and all that. I'd love to be a big company. But it can't happen, because nobody wants to work like that. They're [the workers are] going to get paid a quarter of what they're getting paid now, you know what I mean? They don't want that. I haven't found anybody that can hire like that."

(GX-31, p. 28).

The Court granted the Secretary's Motion to amend the contempt pleading to also accuse Smith and Continental, successor in interest to Sea Sprite, of contempt. The court stated that the more comprehensive judgment against Smith was best as "experience teaches . . . Smith may resist collection by a combination of passive and active means").

However, after A.L.'s fatal fall at the Portland worksite in December 2018, Mr. Purvis chose to contest the Portland Citation, OOB Citation, and Springvale Citation at issue here. The contests were filed because Mr. Purvis believed he had no employees and OSHA regulations did not apply to his worksites. (Tr. 1368-69). In 2020, resolving a debt collection action, Mr. Purvis began to pay penalties for two prior OSHA citations, Pine Point (2015) and Mussey Road (2018), discussed below. [40]

Flouting OSHA's assessed penalties impedes OSHA's ability to enforce workplace safety and health regulations, thus, frustrating the purpose of the OSH Act. Allowing Mr. Purvis to avoid liability by hiding behind the corporate shield stymies the goals of the OSH Act. *See Alman*, 801 F.2d at 4 (permitting shareholders to hide behind a "paper corporation" would work an injustice contrary to congressional intent).

Respondent argues the only justification for veil piercing is where there is a diversion of corporate assets for personal use. (Resp. Br. 59-60). Here, that is not an indicator because the profits and losses of a sub-S corporation flow directly to its sole shareholder, Mr. Purvis. *See Cap. Video Corp v. Comm'r,* 311 F.3d 458, 466-67 (1st Cir. 2002) (citing 26 U.S.C. § 1366(a)). The corporation had only one other significant asset, the box truck used to carry equipment to the worksite. (Tr. 1317-18, 1476; GX-165, pp. 163-64). Diversion of assets is not dispositive here.

Respondent asserts the use of Mr. Purvis's personal property for the corporation's business is simply a business investment by Mr. Purvis and not support for piercing the corporate veil, relying on *163 Pleasant St.*, 960 F.2d at 1093. (Resp. Br. 59-60). Review of that case discloses it is not comparable to the case here. At issue in *163 Pleasant St.* was the subsidiary company's financial obligations under ERISA through a collective bargaining agreement. *Id.*

[40] *United States v. Purvis Home Improvement Co., Inc.,* Case No. 2:19-cv-00225-GZS (D. Me. 2020) (complaint seeking administrative enforcement and collection of civil penalties arising from OSHA citations and notifications of penalty following the Pine Point and Mussey Road inspections). On August 5, 2019, Mr. Purvis filed a Motion to dismiss the complaint in this proceeding. (GX-148). (Tr. 1269-72, 1278-80, 1284-85,1493-94, 1496-97; GX-148).

In *163 Pleasant St.,* the parent corporation infused $8,000,000 into a subsidiary over 30 months to revive the subsidiary's manufacturing operations. *Id.* at 1094. The court found there had been no "confused intermingling" or "serious ambiguity" between the two corporate entities to merit veil piercing. *Id.* at 1096. The court stated that to disregard corporate separateness in ERISA matters there must be a showing the parent corporation attempted to avoid statutory responsibilities, loot the subsidiary, or undercapitalize the subsidiary. *Id.* The court found there was no such evidence. *Id.* Further, the court found the primary issue in *163 Pleasant St.* was personal jurisdiction, not veil piercing.[41] Here, the use of Mr. Purvis's personal property does not demonstrate an investment in the corporation; instead, it demonstrates the lack of recognition of the corporation as an identity separate from Mr. Purvis, the individual.

The undersigned finds there was no meaningful distinction between Shawn Purvis and the corporation. The purpose of the OSH Act is to provide a safe workplace for workers—the way an employer's business is organized may not be used to stymie the purpose of the OSH Act. Thus, piercing the corporate veil to hold Mr. Purvis liable in the guise of Shawn D. Purvis d/b/a Purvis Home Improvement Co., Inc. is merited. The undersigned finds the Respondent in this consolidated case is Shawn D. Purvis d/b/a Purvis Home Improvement Co., Inc.

VI. RESPONDENT IS AN EMPLOYER

Respondent asserts it was not an employer because the workers at the three worksites were independent contractors, not employees. (Resp. Br. 26).

Only an "employer" may be cited for a violation of the Act. Section 9(a) of the Act; 29 U.S.C. § 658(a); *Allstate Painting & Contracting*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated). The Secretary bears the burden of proving by a preponderance of the evidence that a cited entity is an "employer." *See Lake County Sewer Co., Inc.*, 22 BNA OSHC 1522, 1523 (No. 07-1786, 2009). Whether a cited entity is an "employer" is an issue related to the Act's coverage (not an issue of subject matter jurisdiction). *StarTran, Inc.*, 21 BNA OSHC 1730, 1732 (No. 02-1140, 2006) *aff'd in relevant part*, 290 F. App'x 656 (5th Cir. 2008) (unpublished).

To determine if an employment relationship exists, the Commission applies the common-law agency doctrine set forth in *Nationwide Mut. Ins. Co. v. Darden*, which focuses on the

[41] *See cf, Mass. Carpenters Cent. Collection Agency v. Belmont Concrete Corp.*, 139 F.3d 304, 308 (1st Cir. 1998) (finding the *163 Pleasant St.* case fundamentally about personal jurisdiction rather than corporate veil-piercing under federal ERISA and the LMRA).

company's "right to control the manner and means by which the product" is accomplished. *Darden,* 503 U.S. 318, 323-24 (1992); *S & W,* 23 BNA OSHC at 1289; *see also, A.C. Castle Constr. Co., Inc. v. Acosta*, 882 F.3d 34, 39 (1st Cir. 2018) (applying *Darden* test to determine employer-employee status). Additional factors relevant to analysis include:

> the skill required [for the job]; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; [and] the provision of employee benefits and the tax treatment of the hired party.

S&W, 23 BNA OSHC at 1289 citing *Darden*, 503 U.S. at 323-24. Here, an evaluation of the *Darden* factors shows the nature of the relationship between Respondent and the workers at its worksites is that of an employer-employee under the Act. In particular, the control of the worksite, work assignments, provision of essential materials and tools, longevity of relationships, and control over the means, manner and results of the work product favor an employer-employee relationship.

Right to control the manner and means by which the product is accomplished

The product at these three worksites was residential roofing. Respondent had the right to control and did control almost every aspect of work to get the desired results. Respondent solicited the project, provided an estimate to the customer, purchased the materials for the job, coordinated the labor for the job, provided the significant tools needed to complete the work, and even provided transportation to the work site.

As Mr. Purvis explained, he solicited work through advertising and word-of-mouth. When contacted by a prospective client, he visited the home, spoke to the homeowner, and did a preliminary review of the worksite to estimate the time, cost, and materials for a job. This estimate for work was provided to the customer, who then contacted Mr. Purvis to accept the bid and schedule the work. Mr. Purvis ordered the materials needed to complete the roofing project, such as the shingles, moisture barrier, and nails, which were charged to Respondent's account. None of the workers at a site had a role in obtaining or preparing for a job. Only Mr. Purvis was authorized to purchase the additional materials needed to complete a job that was in process. (Tr. 1294; GX-45, pp. 19-21, 48).

In addition to the roofing materials, Respondent provided critical tools necessary to do the work. Respondent provided the dump truck that was used to transport the roofing materials to the worksite and transport the debris to the dump at the end of the project. Respondent provided the box truck which had the ladders and brackets needed to set up the scaffolds at a site. The box truck also contained compressors needed to power the nail guns and personal fall arrest equipment. Finally, Respondent's passenger van was used to transport workers to the worksite.

Mr. Purvis coordinated daily for the labor to complete a roofing job. Each morning between 6:30 and 7:00 a.m., Mr. Purvis went to the Saco location to "rendezvous" with the workers for the day. (Tr. 1311-1312). If there were not enough available workers, Mr. Purvis was responsible for rescheduling the job with the homeowner. Mr. Purvis went to each worksite at the beginning of a project to instruct the workers on the scope of the project and the terms of the job agreed to by the homeowner.

Finally, Mr. Purvis reserved the right to control who worked at a site. Mr. Purvis stated that he knew who would be at the site because they all met at the Saco location each morning. Mr. Purvis also retained the right to tell a worker to not show up to work for a while[42] or not accept someone a worker brought to the Saco morning meeting.[43] Mr. Purvis paid in cash at the end of each day, which furthered his control over the workers.

Respondent makes much of the fact that Mr. Purvis was not on site during the workday and the individual workers at the site chose where to work on the roof, when to start work for the day, and when to take breaks. (Resp. Br. 29-31, 39). However, the roofing work had to proceed in a particular series of steps. Before new shingles could be installed, the old shingles had to be removed. Then, the moisture barrier and drip edge had to be installed. Next, chalk lines had to be snapped in place. Only then could the new shingles be installed. The notion that each worker could proceed independently of the others at a worksite is not credible.

Respondent asserts the workers were paid for the result of a roofed house and thus Mr. Purvis had no control over how workers performed the work. (Resp. Br. 28). The undersigned disagrees, short of telling the workers when to hammer a nail or other minute-by-minute

[42] Mr. Purvis told Anthony Gallant not to come in for a few days after Mr. Gallant and Mr. Campos had a disagreement at a worksite the prior day. (Tr. 1486; GX-45, pp. 58-59).

[43] Mr. Purvis said, "I send people home. I've had guys with face tattoos show up and stuff. Time to go home." (GX-46, p. 61).

instruction, Purvis controlled all aspects of the job to achieve the result of a roofed house. Mr. Purvis selected the work, provided the materials and equipment, and set the terms of the work product. The workers provided the labor at the site.

Respondent relies on *Timothy Victory,* 18 BNA OSHC 1023 (No. 93-3359, 1997) to support its assertion that the lack of specific instructions from Mr. Purvis to the workers each day demonstrates a lack of control over the means and manner of the work. (Resp. Br. 30-31). This is an inapt comparison.

In *Timothy Victory*, the Secretary cited the owner/operator of a fishing vessel as the employer of two divers that harvested sea urchins from that vessel. *Id.* The Commission found the operator only had control over the boat and that he had no control over how the divers harvested sea urchins. The Commission found that the divers supplied their own diving and harvesting equipment, their relationship was one of short duration (a single job), and the divers paid the owner/operator forty percent of their catch for use of the boat. *Id.* Based on the combination of these factors, in that instance, the Commission found the boat's operator was not an employer of the divers and the Secretary was not substantially justified in citing the boat's owner/operator as an employer. *Id.*

The facts in *Timothy Victory* are not comparable to those here. In *Timothy Victory*, the divers provided the essential equipment needed to harvest sea urchins and worked individually to harvest them. Completing a roofing project required the coordination of the materials, labor, and scheduling with a homeowner. Here, Respondent provided the essential materials and planning needed to complete the work. Each worker at the Purvis worksite adhered to a roofing process implemented with materials Respondent provided and in coordination with other workers at the site; they could not implement an individual plan. Further, any significant change that affected materials or cost was controlled by Mr. Purvis.

Another example of the extent of Respondent's control over the worksite was demonstrated when Mr. Purvis was away for a week of vacation. Mr. Purvis did not simply hand the control to the workers. Instead, he preordered all the necessary supplies for a week, left the work orders/instructions for the jobs, and scheduled the workers for the week in advance. The workers were paid for their work when Mr. Purvis returned from vacation. (GX-165, pp. 137-38). This further demonstrates Respondent's control over the manner and means to complete a roofing project.

Respondent asserts the Secretary misunderstands its business model: Mr. Purvis is just a salesman who presents an estimate to the homeowner and then passes the project on to independent contractors. (Resp. Br. 29; Tr. 1303, 1309; GX-165, p. 34). The undersigned finds Mr. Purvis was not simply a salesman. Mr. Purvis did not hand the bid to an independent contractor who then planned and completed the job. To the contrary, Mr. Purvis did everything necessary to complete a project except perform the labor at a site.

In conclusion, the undersigned finds that Respondent never relinquished the right to control the manner and means to accomplish the product, which was replacing a roof. *See S&W,* 23 BNA OSHC at 1289 (key factor is the company's "right to control the manner and means by which the product" is accomplished). The workers' control was limited to whether they chose to work on a particular day and at what time they took a break while at the worksite.

This factor weighs in favor of an employer-employee relationship.

Skill required

The skill and experience needed to work at a site varied from no skills to moderate skills and experience. Mr. Purvis admitted the ground clean-up work did not need any particular skill. (Tr. 1484-85). This was evidenced by Mr. Purvis's admission that in the past he hired two men as groundmen when they simply walked up to an active worksite. (Tr. 1478-79; GX-165, pp. 141-42).

On the other hand, roofers need a particular skill set. A roofer had to set up the scaffolds and ladders for roof access, strip off the old roof, and install the new roof. Roofing skills were learned on-the-job; there was no particular training other than doing the work under the guidance of an experienced roofer. (Tr. 1678, 1718-19, 1815; GX-47, p. 16). Mr. Purvis said he got the hang of roofing work after a couple of roofs, but that others don't learn as quickly. (Tr. 1314). The amount of experience present at the worksites varied widely. At least two individuals, who consistently worked for Respondent, had well over a decade of experience installing roofs, worksite foreman Lennie Dow and Flavio Campos. (Tr. 1554; GX-45, p. 53; GX-47, pp. 16, 21; GX-165, pp. 196-97, 209-11). Another roofer at the Portland worksite, Ryver Daigle, had less than a year of roofing experience. (Tr. 1614, 1840-41; GX-45, p. 57).

Respondent asserts that roofers are highly skilled and must exercise independent judgment. (Resp. Br. 37). Mr. Purvis's statements on this point are equivocal. He stated that skill is needed to properly install shingles in a straight line to achieve visual appeal and to avoid leaks and ice

jams. (Tr. 1313-14). However, Mr. Purvis also described roofing work as simply putting four nails in a shingle. (GX-165, pp. 202, 204, 205). Mr. Purvis admitted that he previously told CO Wilson that a monkey could be trained to do roofing work. (Tr. 1484).

A roofer needs particular skills and some experience to perform competently; however, the work does not require an individual to be highly skilled. Once learned, the steps for roofing are a standard process. The room for independent judgement is limited. The undersigned finds that a roofer's work was moderately skilled and a groundman's work required no skill.

Overall, this factor weighs in favor of finding an employer-employee relationship.

Source of tools and instrumentalities

Respondent supplied all the roofing materials, equipment, and vehicles used at a worksite. Respondent placed the order and paid for the roofing materials. (Tr. 1290, 1348-50). If any additional materials were needed during a job, Mr. Purvis ordered and paid for those. (Tr. 1294; GX-46, pp. 45-46).

Respondent provided the vehicles used at the worksite, a dump truck, box truck, and passenger van. (Tr. 1476). The passenger van transported workers to the worksite. (Tr. 1320-22, 1475-76; GX-165, pp. 216-17). The dump truck was used to bring the roofing materials to the worksite and take the debris to the dump. (Tr. 1320-21, 1475-76, 1578-79). The box truck contained equipment and tools necessary to do the roofing work—compressors, tarps, brackets, planks, ladders, and personal fall arrest equipment. (Tr. 1317-18, 1476, 1577-78, 1650, 1795, 1803; GX-45, p. 50; GX-185, pp. 13-14).

Generally, each worker was responsible for bringing the tools on his toolbelt, such as a hammer, tape measure, screwdriver, knife, snips, tack bar, chalk line, and nail guns. (Tr. 1576, 1650, 1652, 1796-98, 1814, 1828). Even so, Forrest Daigle used a nail gun provided by the Respondent at the OOB worksite. (Tr. 1817-18).

Respondent's assertion that the workers provided the tools necessary to complete a job is rejected. The substantial, essential materials, tools, and vehicles contributed by Respondent surpasses the contribution of each worker's hand tools. Respondent provided the essential tools and materials to accomplish the work. This factor weighs strongly in favor of an employer-employee relationship.

Location of the work

Respondent controlled the location where work occurred and of the morning meeting. Respondent had a central meeting place, the Saco location, where the work vehicles were stored, and the workers met each morning between 6:30 and 7:00 a.m. to find work for the day. (Tr. 1311; GX-45, p. 50). The Saco location was essential to the completion of a project. Each morning Mr. Purvis went to the Saco location, which he personally owned, to meet the workers gathered there. (Tr. 1310-12; GX-165, pp. 42-43). (Tr. 1310-12). If the workers agreed to the job, they travelled to the worksite from the Saco location. (GX-45, p. 50). The box truck, dump truck, and passenger van were driven from the Saco location to the worksite by the workers. (Tr. 1321, 1476; GX-45, p. 50).

The location of that day's work was determined by Mr. Purvis when he scheduled the work; the workers were not involved in the selection of the worksite. The extent of a worker's control was choosing whether to work on a particular day. This factor weighs in favor of an employer-employee relationship.

Duration of the relationship between the parties

Long-term, established relationships over several years and multiple projects are indicative of an employment relationship. Many of the workers at Respondent's worksites had worked with Respondent for many years. (Tr. 1610; GX-45, p. 13). Mr. Purvis estimated there was a core group of 12-14 individuals who worked for him on a regular basis during the 2016-2019 period. (Tr. 1476).

For example, Mr. Dow, the foreman at the worksites in these cases, estimated he had worked with Respondent for over fourteen years and during 2018 had worked at between forty and sixty Purvis worksites. (GX-45, p.13). Mr. Campos had worked for Respondent about fifty percent of his time during the past eight to eleven years. (GX-45, p. 53; GX-47, pp. 21, 23). Mr. Happersett spent about fifty percent of his time working with Respondent. (Tr. 1640). Mr. Forrest Daigle had worked with Respondent for about seven years. (Tr. 1815). Mr. Sargent worked for Respondent on and off for over ten years. (GX-165, pp. 211-12). A.L. worked for Respondent at least two years. (RX-3; RX-4). Mr. Gallant and Mr. Wright worked for Respondent for at least three years. (RX-3; RX-4; RX-27). Foreman Dow estimated that workers Gallant, Happersett, Forrest Daigle, and Wright worked for Respondent on about fifty worksites in 2018. (GX-45, p. 52).

Respondent describes the contract between Respondent and workers as per-job with a defined duration. (Resp. Br. 40). To the contrary, even though each worker committed to work one day at a time, they actually had long-term open-ended arrangements with Respondent. Further, because most of the relationships with workers were long-term, Mr. Purvis did not bother to send an IRS-1099 form to individuals who worked only for a couple of days. (GX-165, pp. 46-47).

The duration and open-ended nature of these work relationships is akin to that of a traditional employer-employee relationship. *See Absolute Roofing & Constr., Inc. v. Sec'y of Labor,* 580 F. App'x 357, 362 (6th Cir. 2014) (unpublished) (*Absolute Roofing*) ("indefinite duration favors employee status rather than independent contractor status") (citation omitted)

Extent of the hired party's discretion over when and how long to work

Each worker stated he had control over whether to work, when to go to work, when to leave work, and when to take breaks during the workday. (Tr. 1565-68, 1770-71, 1816). Mr. Purvis stated that he did not control when or how long a worker was at a worksite. (Tr. 1239, 1300-01, 1323-24, 1481). When Mr. Purvis left a worksite, after explaining the scope of the work, the workers could all go to breakfast and start whenever they pleased. (GX-165, pp. 43-44).

The evidence shows the workers controlled whether they would work on a given day. (Tr. 1565-68, 1770-71, 1816). However, they met at the Saco location each morning before 7:00 a.m. to coordinate for the day. (Tr. 1310-12; GX-45, p. 50; GX-165, pp. 42-43). The equipment needed to do the roofing work was on Respondent's vehicles, so they could only do roofing work while the vehicles were on site. Further, the hours worked on a given day were influenced by external factors, such as weather conditions and hours of daylight. (Tr. 1567-68, 1799-1800).

The undersigned finds the workers, within limited parameters, could choose the timing of their work at a worksite, such as when to begin work or take breaks; however, the flexibility was limited to when the equipment and materials were at the worksite and the time of the morning meeting at Saco. This factor weighs in favor of an employer-employee relationship.

Method of payment and rate of pay

A worker's pay was based on a daily rate.[44] For a half day of work, they received half of the daily rate.[45] (GX-47, pp. 23-26). Workers were paid in cash at the end of each day at the Saco location. (Tr. 1335, 1580-83; 1653, 1804, GX-47, p. 23-26; GX-46, pp. 64-65; GX-165, pp.139-40). Occasionally, cash flow required Mr. Purvis to delay payment of the workers until after he cashed the homeowner's check for the job they had just completed. (GX-165, pp. 189-90).

The record is not dispositive on whether the rate of pay was set by Mr. Purvis or whether it was negotiated with each worker. The workers who testified at the hearing stated they each determined their own rate of pay. (Tr. 1580-81, 1653, 1806, 1815-16). Yet, during his September 2, 2020 deposition Mr. Purvis stated the pay rate was based on whether the worker was a roofer or a groundman—roofers received $250 per day and groundmen $150-175 per day. (GX-165, pp. 139-40, 205-06). That Respondent paid a consistent daily pay rate based on the job performed, groundman or roofer, is corroborated by Mr. Purvis's very general handwritten payroll notebook that lists the date worked and the worker's name or nickname, but no specific job rate negotiated. (GX-59). Mr. Purvis also stated that he would rather negotiate the terms of the job rather than the rate of pay. (GX-165, p. 140).

The undersigned finds each worker's payment rate had little room for negotiation. The fact that most workers performing the same job duties received the same rate of pay supports finding that Mr. Purvis controlled the rate of pay for the workers on his worksite and thus, this factor weighs in favor of an employer-employee relationship.

Whether the work is part of the regular business of the hiring party

Respondent is a business, and roofing is a regular part of that business. The work performed at the three worksites was integral to fulfilling the contracts Mr. Purvis had with the

[44] Respondent asserts that workers were paid "per job" not per day. (Resp. Br. 45). However, a careful reading of the transcript pages relied upon by the Respondent show that sometimes workers disagreed on the number of days a job would take and then the pace of work would be negotiated. (Tr. 1309). Further, this point was clarified in Mr. Purvis's deposition testimony where he stated that daily pay was the norm, unless there were cash flow issues that necessitated waiting until the homeowner's check was cashed for a completed job. (GX-165, pp. 189-90).

[45] In addition to the deposition testimony of Flavio Campos, the payment log kept by Mr. Purvis confirms the half-day rate. (Tr. 1447-48; GX-59, p. 1). For example, his notation next to the names for January 5, 2019, and January 11, 2019, is "1/2". *Id.* Further, text messages between A.L. and Shawn Purvis corroborate job assignments and payment for a half-day of work. (GX-99, pp. 3, 4, 11, 29).

homeowners. *See Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1506 (No. 97-1839 2004) (product accomplished by housekeepers was essential to operation of the hospital).

Respondent's assertion that Respondent is in the business of sales only and, therefore, roofing is not integral to the business, is rejected. Respondent is responsible for all aspects of the roofing job including estimating the costs, ordering supplies, providing vehicles and equipment, and securing the laborers to complete the work. This factor favors an employer-employee relationship.

Provision of employee benefits and the tax treatment of the hired party

Respondent did not withhold any taxes from a worker's pay and used the IRS-1099 form to report each worker's annual income. (Tr. 1340-41). *See Absolute Roofing*, 580 F. App'x at 361 (IRS-1099-MISC is a federal tax form used for independent contractors). There were no benefits provided by Respondent to the workers. (Tr. 1340-41).

Here, the tax treatment and benefits are like those of an independent contractor relationship. Even so, tax reporting status is not a controlling factor in a *Darden* analysis. *See S&W*, 23 BNA OSHC at 1290 (the "failure to withhold federal income and social security taxes was ... not a bona fide reflection of an authentic independent contractor relationship"). The undersigned finds the tax treatment and lack of benefits are not dispositive in determining the nature of the employment relationship.

Whether the hiring party has the right to assign additional projects to the hired party

Generally, the workers were assigned to work on a per-project or per-day basis. However, text messages between worker A.L. and Shawn Purvis show that additional projects were assigned to regular Respondent workers.[46] In response to A.L.'s discussion of rain the following day, Mr.

[46] Text messages between Shawn Purvis and A.L. were received in evidence. (Tr. 1173-84, 1867; GX-99). Mr. Purvis confirmed that the phone number listed in the messages was his phone number. (Tr. 1178, 1497-98; GX-100, pp. 15-16; GX-165, p. 213). Mr. Purvis exchanged text messages with A.L. daily. (Tr. 1497-98). A.L.'s fiancé [redacted] testified that before she provided A.L.'s cell phone to the Portland Police Department, she had custody of the phone, and she did not send text messages. (Tr. 1089-90). A.L.'s phone had not been altered. (Tr. 1176). Respondent's suggestion that Ms. [redacted] may have altered the text messages in A.L.'s cell phone before the phone was delivered to the Portland Police Department is rejected. (Resp. Br. 14-16). I observed Ms. [redacted] testify. Ms. [redacted] was a credible witness, who testified candidly, without exaggeration. Detective Tully testified that he took custody of A.L.'s cell phone in evidence at the Portland Police Department. He prepared a search warrant to have A.L.'s cell phone forensically examined, the data extracted, and placed on a flash drive. Detective Tully testified that the extraction and maintenance of text message extracted data is a regular practice of the Portland Police Department's law enforcement activity. The flash drive with the text message extracted data was

Purvis responded, "I was gonna give you and Lenny half day to finish siding job if you want." (GX-99, p. 4). Further offers of additional projects included:

- "Wat is Lenny doing repairs. .. Yeah jobs we f*** up" (GX-99, p. 15);
- "No roofing but you and Lenny can finish siding job if you want" (GX-99, p. 21);
- "Gonna rain this morning, I have stuff we can do till it stops" (GX-99, p. 21);
- "I do have at least one repair you can do after rain stops, I'll probably come up with more" (GX-99, p. 26);
- "I can give you half day if you wanna come in at 9 and finish that job" (GX-99, p. 29); and,
- "would like to show you the only snowblow acc I have for now if you wanna ride to my house." (GX-99, pp. 33-34. *See* Tr. 1111).

These messages indicate that other jobs could be assigned to workers. This is indicative of an employer-employee relationship.

Whether the hired party has a role in hiring and paying assistants

There is no evidence that a worker ever brought an assistant to a worksite. During his February 2019 deposition, Mr. Purvis stated that a worker was free to bring an assistant to a site, but Mr. Purvis would not be responsible for paying that person. (GX-46, pp. 60-61; GX-165, p. 73). During that same deposition, however, Mr. Purvis indicated that because they all met at the Saco location each morning, he was not concerned about having people he didn't know at a particular worksite. (GX-46, pp. 61-62). Because the issue of a worker bringing his own assistant to a worksite is speculative, this factor is not dispositive.

Conclusion of *Darden* analysis

The *Darden* factors show the nature of the relationship between Respondent and that the workers at Respondent's worksites is that of an employer-employee under the Act. As set forth above, the control over the means and manner of the roofing jobs, work assignments, provision of essential materials and tools, method of pay, and longevity of relationships are indicative of an

maintained in Portland Police Department custody. (Tr. 62-67, 87-88, 91-93, 108-10, 1176). As it was A.L.'s cell phone, A.L.'s text messages appear as Local User. (Tr. 87). Detective Tully's detailed testimony is credited. The text messages were received in evidence as authenticated, relevant, non-hearsay admissions, probative of issues before the Commission. (Tr. 1173-84). Shawn Purvis was present at the hearing as Respondent's representative. Shawn Purvis testified on two hearing days. Mr. Purvis had a full opportunity to challenge the accuracy of the text messages he exchanged with A.L. (GX-99). He did not.

employer-employee relationship. The undersigned finds Respondent is an employer for purposes of the OSH Act.[47]

VI. PRIOR HISTORY WITH OSHA

Five Inspections Prior to December 2018

Prior to the December 13, 2018 Portland worksite fatality, Respondent had received citations at five worksites for alleged violations of OSHA's construction standards between 2006 and 2018.[48] (GX-161). The 2006 Citation was resolved with an informal settlement agreement. For the other four inspections, Respondent chose not to contest the citations, therefore each became a final order of the Commission.

1. 2006 Citation, South Portland, Maine

On October 4, 2006, Shawn Purvis signed on behalf of Purvis Home Improvement, Inc., a settlement agreement that resolved citations and penalties issued September 12, 2006, related to inspection no. 310101662 for a worksite in South Portland, Maine. (Tr. 633, 1247; GX-18, p. 6; GX-161; GX-165, p. 80). As part of the settlement's terms, CO Simmons visited Respondent's worksite later in 2006 and presented a two-hour training session on OSHA's fall protection requirements to Shawn Purvis and the workers. (GX-46, pp. 34-36; GX-165, pp. 50-52, 79-80). The penalties agreed to in the settlement are the only OSHA penalties Respondent paid without a debt collection action. (Tr. 1247; GX-165, p. 80).

2. 2012 Westbrook Inspection, Westbrook Maine

On April 18, 2012, CO Kathryn Simmons observed roofers working without fall protection at a worksite in Westbrook, Maine. (Tr. 653; GX-2, p. 1; JX-8; JX-10). Shawn Purvis was working at the site and identified as the person in charge. (Tr. 653-54, 658). At the site, Mr. Purvis told CO Simmons that it was safer to walk on the roof than the ground. When CO Simmons informed Mr. Purvis he would be receiving a citation for lack of fall protection, Mr. Purvis refused to answer questions and refused to provide the names of the workers on the roof or allow them to be interviewed. (Tr. 658; JX-9, p. 2). On July 23, 2012, a serious citation and penalty for lack of fall protection on a roof was issued to Purvis Home Improvement, Inc. (Tr. 660-61; GX-2, p. 1; JX-

[47] The results of the *Darden* analysis would be the same if the undersigned had determined the Corporation was the properly named Respondent.

[48] The Compliance Officers at these five prior inspections were Kathy Simmons and David McGuan (now OSHA Area Director). (GX-161).

8; JX-10). The citation was not contested and became a final order of the Commission. (GX-3; GX-161). Mr. Purvis stated that he never paid the penalty because he believed he had no employees at the worksite. (GX-165, pp. 83-84). In 2016, the debt collection case was recalled and the penalties were ultimately waived. (JX-8).

3. 2012 Fieldings Inspection, Scarborough Maine

On November 2, 2012, AD McGuan, who was a Compliance Officer at the time, observed workers without fall protection on the roof of a Fieldings Oil Co. building in Scarborough, Maine. (Tr. 872-73). Shawn Purvis was at the site and identified as the person in charge. (Tr. 874). AD McGuan asked Mr. Purvis to come down from the roof and Mr. Purvis refused. After AD McGuan restated his request, Mr. Purvis asked if McGuan was deaf, raised his voice, swore at him, and refused to come down off the roof. (Tr. 874). The other workers continued roofing. Mr. Purvis did not allow the workers to speak to AD McGuan. (Tr. 874-75). Mr. Purvis then asked him to leave; instead, AD McGuan took photographs while Mr. Purvis hurled profanity at him. (Tr. 875-76). When Mr. Purvis eventually came down from the roof, AD McGuan checked his surroundings to make sure he had an exit because of Mr. Purvis's angry and hostile demeanor. (Tr. 875). Mr. Purvis eventually calmed down and asked AD McGuan to come to his home to look at documents regarding the workers at the site. (Tr. 876-77, 1250; GX-31, p. 24). AD McGuan photographed the documents, which included an IRS-W-9 form for Thomas Sargent and a copy of the 2006 OSHA settlement agreement. (Tr. 877; GX-18, pp. 5-6). While AD McGuan was there, three of the workers arrived to eat lunch and AD McGuan spoke to them in the presence of Mr. Purvis. (Tr. 878).

Mr. Purvis admitted that AD McGuan explained the requirements of the fall protection standard during this meeting and that OSHA believed Mr. Purvis was required to comply with its requirements at his worksites. (Tr. 1250-52; GX-165, pp. 96-97). When AD McGuan informed Mr. Purvis that he would receive a citation and penalty, Mr. Purvis said that he would not pay the penalty and if necessary, would dissolve the company to avoid debt collection. (Tr. 879-80; JX-12).

A repeat citation for lack of fall protection with a penalty of $5,600 was issued to Purvis Home Improvement Co., Inc. on November 15, 2012, for the Fieldings inspection. (GX-7, pp. 7-8). The citation was not contested and became a final order of the Commission. (GX-7, p. 3). The penalty was not paid. (Tr. 890-94; GX-165, pp. 95-97).

4. 2015 Pine Point Inspection, Pine Point, Maine

On March 17, 2015, CO Kathryn Simmons observed roofers working without fall protection at a worksite where Purvis Home Improvement and Purvis Seamless Gutter vehicles were present, and the workers wore clothing with Purvis Home Improvement emblems. (Tr. 667, 681, 687-88; GX-26, pp. 1-5; GX-28, p. 8). An individual at the site identified himself as the foreman and that he worked for Purvis. (Tr. 682-83; JX-18). However, when CO Simmons informed him there were OSHA violations at the site, this individual stated he worked for another company, not Purvis. (Tr. 683; JX-18). When contacted later by CO Simmons and told there were violations at the worksite, Shawn Purvis responded, "You can suck a** I'm not paying any penalties. They will end up with the rest of the penalties." (Tr. 670; JX-18; GX-27).

OSHA issued a citation to Purvis Home Improvement, Inc. for a serious violation of the ladder standard and a repeat violation of the fall protection standard with a total penalty of $12,200. (Tr. 667-69; JX-16). The citation was not contested and became a final order of the Commission. (GX-25; GX-161).

At the time of the hearing, Respondent was making payments, pursuant to a payment plan, for the OSHA citation and notification of penalty following this 2015 Pine Point inspection. Respondent's payment of the unpaid Pine Point OSHA penalty, pursuant to a payment plan, was the result of a debt collection action initiated on May 20, 2019, by the U.S. Attorney against Purvis Home Improvement Co., Inc., in the U.S. District Court, District of Maine. (Tr. 1269-71, 1494, 1496-97; GX-148).

5. 2018 Mussey Road Inspection, Saco, Maine

On February 21, 2018, CO Kathryn Simmons inspected a worksite on Mussey Road in Saco, Maine and observed roofers working without fall protection and a worker unsecured in an aerial lift. (Tr. 694, 705-06; GX-32, p. 3; GX-41; GX-42; JX-20; JX-21). The worker in the aerial lift stated he was the foreman and provided a false name to the CO. (Tr. 713, 809-10; GX-41). During an onsite interview, this worker admitted he had provided a false name earlier and his name was actually Lennie Dow. (Tr. 793-94; GX-41). Mr. Dow stated that he worked for Purvis Home Improvement. (Tr. 715; JX-22). Mr. Dow directed CO Simmons to the phone number on the truck if she wanted further information. (Tr. 715; JX-22). Purvis Home Improvement was a subcontractor for Risbara Brothers for roof installation on five buildings at the project. (Tr. 1486-87; GX-40).

Assistance from DOL's Office of Solicitor was required during OSHA's investigation to obtain compliance with subpoenas for Shawn Purvis's interview and related documents. (Tr. 722; GX-32; GX-165, pp. 107-08). In response to the subpoena, the workers at the Mussey Road jobsite were identified as Lennie Dow, Flavio Campos, Chris Sargent, A.L., and Patrick Dyer. (GX-32; GX-38). A taped and transcribed interview of Mr. Purvis took place on June 1, 2018. (GX-31).

A citation was issued to Purvis Home Improvement, Inc. on August 28, 2018, alleging a serious violation for not being secured in an aerial lift, and a repeat violation of fall protection requirements with a total penalty of $24,390. (JX-20). Mr. Purvis admitted that OSHA representatives explained the requirements of the cited regulations and that the company was required to follow OSHA regulations. (GX-165, pp. 107-08). The citation was not contested and became a final order on September 24, 2018. (Tr. 897; GX-161). Mr. Purvis did not pay the penalties because he believed the workers at Mussey Road were not his employees. (Tr. 1283-85; GX-165, p. 108).

CO Simmons called Mr. Purvis for abatement documentation related to the Mussey Road Inspection on October 2, 2018. Mr. Purvis told her he was not responsible for the workers' safety, stated she was harassing him, told her to not call again, and told her to leave him "the f*** alone." (Tr. 727; GX-32). On November 7, 2018, CO Wilson[49] contacted Mr. Purvis for the missing abatement documentation—Mr. Purvis again stated the OSHA rules did not apply to him and told Mr. Wilson to "stick his requests up his a**." (Tr. 383-86; GX-32).

At the time of the hearing, Respondent was making payments, pursuant to a payment plan, for the OSHA citation and notification of penalty following this 2018 Mussey Road inspection. Respondent's payment of the unpaid Mussey Road OSHA penalties, pursuant to a payment plan, was the result of a debt collection action initiated on May 20, 2019, by the U.S. Attorney against Purvis Home Improvement Co., Inc., in the U.S. District Court, District of Maine. (Tr. 1269-71, 1494, 1496-97; GX-148). [50]

Pattern of uncooperative behavior

[49] At the time, CO Wilson was the Acting Area Director.

[50] *United States v. Purvis Home Improvement Co., Inc.,* Case No. 2:19-cv-00225-GZS (D. Me. 2020) (complaint seeking administrative enforcement and collection of civil penalties arising from OSHA citations and notifications of penalty following the Pine Point and Mussey Road Inspections). On August 5, 2019, Mr. Purvis filed a Motion to dismiss the complaint in this proceeding. (GX-148).

Shawn Purvis has a long history of uncooperative and hostile conduct toward OSHA personnel. During the 2012 Westbrook inspection in April 2012, Mr. Purvis refused to answer CO Simmons's questions and refused to identify the workers on the roof or allow them to be interviewed. (Tr. 658; JX-9, p. 2). Later that year in November, Mr. Purvis was plainly hostile when AD McGuan inspected the Fieldings Oil site. Mr. Purvis was angry and swore at the CO. (Tr. 875). Due to this hostile behavior, AD McGuan was concerned for his safety. (Tr. 875-76). Mr. Purvis stated if he received a citation that he would not pay the penalties and would dissolve the company if needed. (Tr. 879; JX-12).

After the 2015 Pine Point inspection, Shawn Purvis told CO Simmons that "you can suck a** I'm not paying any penalties. They will end up with the rest of the penalties." (JX-18; GX-27).

During the investigation for the 2018 Mussey Road Inspection, assistance from DOL's Office of Solicitor was needed to get Mr. Purvis to comply with the subpoena for an interview. (Tr. 722; GX-32; GX-39; GX-165, pp. 107-08). When following up for the required abatement documentation following the 2018 Mussey Road inspection, Mr. Purvis told CO Simmons to not call again and to leave him "the f*** alone." (Tr. 727; GX-32). When CO Wilson followed up for the same information a few weeks later, Mr. Purvis stated the OSHA rules did not apply to him and told Mr. Wilson to "stick his requests up his a**." (Tr. 383-86; GX-32). When OSHA requested the abatement documentation, including fall hazard abatement, following the Mussey Road citation, it is noteworthy, that Mr. Purvis's hostile responses to OSHA were stated just weeks before A.L's fatal fall at Respondent's Portland worksite.

At a February 2019 deposition related to the Portland and OOB inspections, discussed below, Mr. Purvis did not bring the documents requested in the subpoena. (Tr. 206-11; GX-46, pp. 11-20; GX-96; JX-31, pp. 5, 7). Documents were received only after the Office of the Solicitor filed a Petition to enforce administrative subpoenas duces tecum in U.S. District Court. (GX-66; JX-31, p.7).

Further, during the February 2019 deposition Mr. Purvis physically threatened CO Wilson. (Tr. 209-10; GX-46, pp. 40-42). The courthouse marshal then counseled Mr. Purvis that outbreaks of that sort cannot occur; after which, the deposition proceeded without incident. (Tr. 209-10; GX-46, pp. 40-42; JX-31, p. 5). In his September 2020 deposition, Mr. Purvis admitted he threatened to assaulting CO Wilson during the February 2019 deposition. (GX-165, p. 222).

Because of the history of hostile and threatening behavior, DOL OIG Special Agent Sean Roberts was asked to accompany the Compliance Officer for the inspection at the Springvale worksite on May 23, 2019, described below. (Tr. 963).

General relationship with workplace safety

During his February 2019 deposition, Shawn Purvis stated there are no training documents for anyone who worked at one of his sites. (GX-46, pp. 17-18). Further, there are no safety rules, publications or safety and health programs for anyone working at one of his sites. (GX-46, pp. 17-18).

Mr. Purvis asserted that he asked the workers to wear fall protection, but also stated that he could not make them wear the equipment. (GX-31, p. 27; GX-46, p. 40; GX-165, pp. 147-48, 151). However, it is not credible that his request to the workers was made with a sincere intent toward compliance. During a June 1, 2018 OSHA administrative interview, Mr. Purvis stated that it was his opinion that wearing a personal fall arrest system was more dangerous than the risk of not using fall protection; he believed that because he had not had an accident in 21 years, he didn't need to use the equipment. (GX-31, pp. 24-27). Mr. Purvis's statements were made six months before A.L. died from the fall at Respondent's Portland worksite.

Mr. Purvis stated that when he is at a worksite, the workers wear the safety equipment. (GX-165, pp. 49-50). He stated that he tells them at the beginning of every job to put it on. When he leaves, he assumes they are going to listen. (GX-165, pp. 50, 61). However, he also stated that he is only at a worksite for a few minutes the first day of a project and leaves "as fast as [he] can." (GX-46, p. 45). Thus, his statement that they wear the equipment when he is around has no merit; the workers would not be working on the roof the first few minutes of the job. Further, during his February 2019 deposition Mr. Purvis stated that he inspected the harnesses, which were in the box truck, and it appeared they had not been used. (GX-46, pp. 39-40). Mr. Purvis's statement that the workers wore equipment while he was at a worksite is not credited.

Mr. Purvis acknowledged he received the two-hour fall protection training from OSHA in 2006. (GX-46, pp. 34-36; GX-165, pp. 79-80). Further, he acknowledged that AD McGuan explained OSHA's fall protection requirements and that OSHA believed he was required to follow OSHA's safety rules at his worksites. (Tr. 1250-53; GX-165, p. 96).

VII. CITATIONS

To establish a violation of an OSHA standard, the Secretary must prove by a preponderance of the evidence: (1) the cited standard applies; (2) there was noncompliance with the terms of the cited standard; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Donahue Indus., Inc.,* 20 BNA OSHC 1346, 1348 (No. 99-0191, 1994); *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

A. PORTLAND INSPECTION & CITATIONS

Facts for Portland Inspection

The first inspection under contest here, the Portland inspection, was opened on December 13, 2018, after OSHA was notified by the Portland Police Department of a workplace accident that resulted in A.L.'s death.[51] (Tr. 129).

Respondent had an agreement to provide a new roof for a residence on Congress Street in Portland, Maine (Portland worksite). (GX-60; GX-183, p. 6). The roofing work at the Portland worksite began on December 12, 2018, and was completed on December 14, 2018. (JX-30; GX-45, pp. 48-49; GX-47, pp. 70-72).

Employees performing work on the roof on December 13, 2018, were A.L., Michael Wright, Anthony Gallant, Michael Happersett, Ryver Daigle, Forrest Daigle, Lennie Dow, and Flavio Campos.[52] (JX-30; GX-105; GX-184 p. 9; GX-45; GX-47). On December 13, 2018, Shawn Purvis was across the street sitting in a vehicle when the accident occurred. The prior day, Mr. Purvis had been at the worksite for about ten minutes at the beginning of the day to provide instructions about the scope and terms of the job. (Tr. 1350-51).

The Accident

A.L. fell while attempting to get off the roof near the center of the house's right side. (Tr. 292-93, 296-97; JX-30, pp. 8, 24; GX-102, p. 38A; GX-105; GX-47, pp. 54-57). At the time A.L. fell off the roof, foreman Dow, and workers Happersett and Wright were each on ridge hook

[51] Mr. Shawn Purvis and A.L. are half-brothers. (Tr. 1088, 1192).

[52] Shayne McDonald, Anthony Purvis, and Kevin Hilsinger were working on the ground that day. (Tr. 1620-21; GX-184, p. 9).

ladders on the right side[53] of the roof, in front of the dormer (which was about halfway between the front and back of the house), getting ready to strip off shingles. (GX-45, pp. 38-39, 84). Mr. Gallant was on the right side of the roof just behind the dormer. (GX-45, pp. 39-40, 84). Mr. Campos was at the back of the roof's right side installing shingles, with his back to the area where A.L. fell. (GX-47, pp. 54-57, 115).

Because of his location on the roof, foreman Dow saw Shawn Purvis in his truck pull up to the corner across the street about fifteen minutes before A.L. fell. (Tr. 1352; GX-45, pp. 36-37, 39). Mr. Purvis had come to the area to provide an estimate for a roof at a nearby home and to have lunch with [redacted], Anthony Purvis, who was working at the Portland worksite. (Tr. 1352, 1456, 1503; GX-59; GX-165, p. 208). Mr. Purvis was sitting in his truck facing away from the worksite making phone calls when he heard loud noises. As Mr. Purvis exited his truck, he saw [redacted] come around the corner of the house and he ran to where A.L. had fallen to the ground. (Tr. 1352-53).

First responders were called at 11:33 a.m. (Tr. 57). Detective Tulley of the Portland Police Department arrived around noon. (Tr. 40-41, 57). Detective Tulley did not see any fall arrest harnesses at the site. He documented the names of the crew members at the site, spoke with some of them, and recorded an interview with Forrest Daigle (Tr. 58-59; GX-105).

Evidence Technician Jonathan Reeder of the Portland Police Department arrived at the site to collect evidence, take photographs, and take measurements. (Tr. 40-42; GX-102, pp. 1-48). A.L. had been transported from the site by emergency personnel prior to Mr. Reeder's arrival. (Tr. 51).

OSHA's inspection of the Portland worksite

After receiving the notice of a worksite fall injury from the Portland Police Department, COs Wilson and Simmons headed to the worksite; on the way, they received a call that A.L. had died from his injuries. (Tr. 129-30, 746; JX-30, pp. 8, 24). At the worksite, the COs met with police department personnel, Detective Tulley and Evidence Technician Reeder. (Tr. 130-31). CO Wilson reviewed the photographs taken by Mr. Reeder and requested copies of police documents. (Tr. 130-31, 747; GX-102).

[53] References are from the perspective of standing on Congress Street facing the front of the residence. (Tr. 134; GX-101, pp. 3, 19; GX-102, p. 2).

There was no one working while the COs were at the site on December 13, 2018. (Tr. 133, 747; GX-100). Shawn Purvis and [redacted] Anthony Purvis had left the site to accompany A.L. to the hospital. (JX-31, p. 3). The COs first spoke with foreman Dow, and then in turn spoke to the other employees; the conversations that day were brief due to the tragic circumstances, and they informed the employees they would return the next day for a more detailed interview. (Tr. 156). Mr. Dow showed CO Wilson the fall arrest equipment stored in the box truck. (JX-31, p. 3). The brief discussions with the employees confirmed that no one had been wearing fall arrest equipment. (Tr. 155-56; JX-31, p. 3). CO Wilson also observed there were no components to erect a guardrail system or a safety net system at the site. (Tr. 302-03).

CO Wilson later learned that Flavio Campos had also been at the worksite on December 13, 2018, but neither the COs nor the police spoke to Mr. Campos that day.[54] (JX-31, p. 3). Mr. Campos had stayed on the roof for 30-45 minutes to compose himself after A.L. fell. (GX-47, p. 65). When Mr. Campos came down from the roof he saw Shawn Purvis, but he stayed away from where A.L. was lying on the ground. (GX-47, pp. 65-68). He then left the worksite without talking to anyone.[55] (GX-47, p. 71). Mr. Campos did not return to the Portland worksite the following day. (GX-47, p. 72).

There were three work vehicles at the site on December 13, 2018—a passenger van, dump truck, and box truck. (Tr. 132, 146-49, 747; GX-100, pp. 11-17; GX-102, pp. 40-41). The box truck at the worksite stored equipment, including the personal fall arrest system anchors, ropes, and harnesses. (Tr. 146-49; GX-100, pp.11-14; GX-47, pp. 81-82, 119). On the side of the dump truck, "Purvis Home Improvement–Fully Insured–Roofing*Siding*Driveways/Seamless Gutters" was displayed. (Tr. 148; GX-100, pp. 15-16). The passenger van at the worksite displayed "Purvis Roofing" on its side. (GX-100, pp. 16-17).

Description of the roof

The worksite was a two-story peaked-roof home with dormers and skylights located in a residential neighborhood. (Tr. 270-72; GX-86, p. 9; JX-30, pp. 11-12; GX-101, p. 20). The

[54] Mr. Campos stated that on the first day, December 12, 2018, he had worn fall arrest equipment, which had taken him about 10 minutes to set up. (GX-47, pp. 79-81). Mr. Campos stated he did not know why he chose to not wear fall protection on December 13, 2018. (GX-47, p. 70).

[55] Mr. Campos typically drove by himself to a worksite. (GX-47, pp. 25, 43).

distance from the ground to the roof's peak was thirty-four feet, five inches and from the ground to the roof's eave, twenty-one feet, eight inches.[56] (Tr. 150-53; JX-30, pp. 7-8, 11; GX-106, p. 7)

The home's roof had a pitch of 10:12 (10 in 12).[57] (Tr. 270-72; GX-86, p. 9; JX-30, pp. 11-12; GX-101, p. 20). Ridge hook ladders lay flat on the roof to help workers walk up the steep pitch to perform work. (Tr. 135; GX-100, p. 2). A ridge hook ladder consists of a hook attached to the ridge of the roof that is then attached to a ladder that lays flat on the roof's surface. (Tr. 135).

A dormer protruded from the roof's right side approximately half-way between the front and back of the house. (GX-86, p. 1; GX-101, p. 3). The ladder to access the roof from the ground was on the right side of the house. (GX-101, p. 3; GX-102, p. 2). The top of the ladder extended less than twelve inches above the roof's landing surface.[58] (Tr. 136-37; GX-100, pp. 3, 5-7). The roof's skylights were near the area of the ladder. (Tr. 291-94).

On the right side of the house, a ladder jack scaffold was set up along the roof's eave with multiple ladders leading from the ground to the scaffold as support ladders. (Tr. 136-37, 245; GX-100, pp. 1, 3; GX-102, pp. 2, 4). This scaffold's platform was approximately twenty-one feet, eight inches from the ground. (JX-30, p. 11). A large tarp for dumping debris from the roof was draped over the scaffolding from roof to ground. (GX-86, p. 4; GX-100, p. 8; GX-102, pp. 5, 39; JX-31, p. 2). CO Wilson photographed the worksite conditions on December 13, 2018. (Tr. 133; GX-100).

CO Wilson observed a power line that attached to the right side of the house just below the eave. (Tr. 137-46; GX-100, pp. 8-10; GX-100, p. 9A). The end of the scaffold's plank was about six inches from where the energized power line attached to the right side of the home. *Id.* The voltage of the power line was the standard residential voltage of 120/240 volts. (Tr. 152, 504-05; GX-106, p. 2). No one requested Central Maine Power (CMP) to either deenergize the lines or cover the lines. (Tr. 251-52, 501-03).

[56] Measurements were taken by the Portland Police Department's evidence technician on December 13, 2018, and CO Wilson took measurements on December 14, 2018, and February 20, 2019. (GX-106).

[57] CO Wilson stated that a 10:12 pitch roof is considered a steep pitched roof. (Tr. 272).

[58] The photographs show that the ladder extended less than one rung above the surface; the distance between rungs is approximately 12 inches. (Tr. 134, 137; GX-100, pp. 3, 5-7).

Portland inspection continues

The following day, December 14, 2018, COs Wilson and Simmons returned to the Portland worksite to take measurements, interview employees, and take additional photographs. (Tr. 153-54, 157-162, 747; GX-101; GX-106; GX-186; JX-34). That day the employees wore personal fall arrest systems while on the roof. (Tr. 748; GX-101). The COs did not observe any obvious violations that day. (Tr. 157, 747-48). They interviewed the employees and obtained signed interview statements.[59] (Tr. 157-58, 162, 747-48; GX-186; JX-34).

When asked who directed the work at the Portland worksite, the employees identified Lennie Dow.[60] (Tr. 159, 163; JX-34, pp. 1, 3, 7, 11, 15, 23, 27; GX-186). On December 14, 2018, Mr. Dow told the employees that day to either wear fall protection or go home, because the prior day's accident was a "wake up call." (Tr. 553; JX-34, pp. 2, 19-22). When asked if he was the competent person at the worksite, Mr. Dow stated that he was considered the competent person because he was the senior person onsite. (JX-34, pp. 2, 19-22). When asked if there was a replacement person for him, Mr. Dow stated there were a couple of other guys that can oversee the crew, but they were not at the site that day, December 14, 2018. (JX-34, pp. 2, 19-22).

On December 17, 2018, CO Wilson contacted Shawn Purvis to notify him of the violations he observed at the site on December 13, 2018, and that Purvis would likely receive a citation for those hazards. (JX-31, p. 4). During this conversation, Mr. Purvis admitted to CO Wilson that he had seen the crew working on the roof without fall protection that day; CO Wilson ended the call when it became apparent Purvis was becoming agitated. (JX-31, p. 4).

Recorded administrative depositions of Mr. Purvis, worksite foreman Dow, and Mr. Campos were conducted in February 2019 and March 2019[61] related to the Portland inspection and OOB inspection, discussed below (GX-45; GX-46; GX-47).

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[59] The names on five signed statements in the record were redacted based on government informant's privilege. (Tr. 160-75; JX-34; JX-186)

[60] Lennie Dow was named as the person directing work in a variety of ways: one worker stated that Dow directs work, kind of like the man in charge (JX-34, pp. 3, 5), a second simply stated it was Dow (JX-34, pp. 11, 13), a third said it was Dow, after saying he was his own boss doing his own thing (JX-34, pp. 15, 17), a fourth simply stated it was Dow (JX-34, pp. 23, 25), and the fifth worker said it was Shawn Purvis when he was at a site, or Dow (JX-34, pp. 27, 29). Employee Michael Happersett stated it was the lead guy with experience, Dow. (JX-34, pp. 7, 9; GX-186).

[61] Mr. Dow's transcribed interview was conducted on February 18, 2019. (GX-45). Mr. Purvis's transcribed interview was conducted on February 18, 2019. (GX-46). Mr. Campos's transcribed interview was conducted on March 22, 2019. (GX-47).

During Mr. Dow's February 2019 deposition, he admitted that Shawn Purvis has the ultimate authority on whether a job is being done according to the agreement with the homeowner. (GX-45, p. 62). However, Mr. Purvis didn't generally get involved during the workday because if a worker had a question, the worker went to either Mr. Dow or Mr. Campos who made "sure it gets done right." (GX-45, p. 63). Even though Mr. Dow could not discipline anyone, if he saw guys get into a fight, he told them to take a walk down the street. (GX-45, p. 60). When this occurred, he let Mr. Purvis know what happened at the site that day. (GX-45, p. 61). If someone new was at a worksite, Mr. Dow asked if the worker had roofing experience, and if not, then he didn't allow that person to go onto the roof. (GX-45, p. 57). Mr. Dow did this because he felt it was not safe to have someone without experience on a roof, even though he did not consider himself a boss. (GX-45, p. 57). Mr. Dow's actions demonstrate that he felt an obligation to make sure things went well at the site.

A Citation and Notification of Penalty related to the Portland inspection (Portland Citation) was issued on June 11, 2019, for a total proposed penalty of $1,116,476. The Portland Citation alleged one serious violation for erecting a ladder jack scaffolding platform closer than the minimum distance to exposed power lines, a serious violation for failure to provide a training program to recognize fall hazards, eight willful violations for failure to provide residential construction fall protection, and one repeat violation for failure to ensure correct use of portable ladders. Respondent timely contested the Portland Citation, and the case was docketed with the Commission as No. 19-1056.

Citations for Portland Inspection

Serious Citation 1, Item 1 (Portland Inspection, Docket 19-1056)

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.451(f)(6), which states:

> (6) The clearance between scaffolds and power lines shall be as follows: Scaffolds shall not be erected, used, dismantled, altered, or moved such that they or any conductive material handled on them might come closer to exposed and energized power lines than as follows:

Insulated lines voltage	**Minimum distance**	**Alternatives**
Less than 300 volts	3 feet (0.9 m)	
300 volts to 50 kv	10 feet (3.1m)	
More than 50 kv	10 feet (3.1 m) plus 0.4 inches (1.0 cm) for each 1 kv over 50 kv	2 times the length of the line insulator, but never

		less than 10 feet (3.1 m).

Uninsulated lines voltage	Minimum distance	Alternatives
Less than 50 kv	10 feet (3.1 m)	
More than 50 kv	10 feet (3.1 m) plus 0.4 inches (1.0 cm) for each 1 kv over 50 kv	2 times the length of the line insulator, but never less than 10 feet (3.1 m).

Exception to paragraph (f)(6): Scaffolds and materials may be closer to power lines than specified above where such clearance is necessary for performance of work, and only after the utility company, or electrical system operator, has been notified of the need to work closer and the utility company, or electrical system operator, has deenergized the lines, relocated the lines, or installed protective coverings to prevent accidental contact with the lines.

The Secretary alleges the ladder jack scaffold was approximately six inches from an energized power line, which is less than the required minimum distance of three feet. Respondent alleges the lines were not energized or uninsulated. (Resp. Br. 64).

Applicability & Employee Exposure

A ladder jack scaffold was used at the worksite with energized powerlines nearby. (Tr. 136-37; GX-100, pp. 8-10). The standard applies.

Employee exposure is established "either by showing actual exposure *or* that access to the hazard was reasonably predictable." *Nuprecon LP*, 23 BNA OSHC 1817, 1818 (No. 08-1037, 2012) (*Nuprecon*) quoting *Phoenix Roofing Inc*., 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) (emphasis in original), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Employees may come within the zone of danger "while in the course of their assigned working duties, their personal comfort activities while on the job or their normal means of ingress-egress to their assigned workplaces." *Gilles & Cotting, Inc*., 3 BNA OSHC 2002, 2003 (No. 504, 1976). "The Secretary need not show it was certain that employees would be in the zone of danger, but he must show that exposure was more than theoretically possible." *Calpine Corp.*, 27 BNA OSHC 1014, 1017 (No. 11-1734, 2018) (finding exposure reasonably predictable where task was on the day's assignment sheet and the likely route for the worker to carry out the task was adjacent to the unguarded opening), *aff'd,* 774 F. App'x 879 (5th Cir. 2019) (unpublished).

As Shawn Purvis confirmed, the ladder jack scaffold serves as a work platform during roofing work. (Tr. 1228-29). Employees working on the roof had access to and used the scaffold. Employees were exposed to the hazard presented by the scaffold's distance to the energized electrical line.

Violation of Standard

The ladder jack scaffold was less than the minimum distance of three feet[62] from the energized line that ran into the house. Photographs and CO Wilson's direct observation show the scaffold's plank was about six inches away from the energized line. (Tr. 245, 248; GX-100, p. 9A; GX-100, pp. 8-10).

Central Maine Power (CMP) provided electricity to the home. (Tr. 250, 501-05). The safety manager from CMP verified that the lines were energized at the standard 120/240 residential voltage and that no request had been made to either cover or deenergize the lines. (Tr. 251, 502-05). Further, Respondent stipulated there was no request to CMP to turn off the power or to cover the power lines. (Tr. 251-52; GX-183, p. 15). Thus, the standard was violated when no attempt was made to have the lines deenergized, moved, or insulated when the scaffold was closer than the three-foot minimum distance.

Knowledge

The Secretary must show that the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition. *Peacock Eng'g, Inc.,* 26 BNA OSHC 1588, 1592 (No. 11-2780, 2017) (citations omitted). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix Roofing,* 17 BNA OSHC at 1079-1080. It is not necessary to show the employer knew or understood the condition was hazardous. *Id*.

"The actual or constructive knowledge of a supervisor is imputable to the employer." *Jacobs Field Servs. N. Am*., 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015) (citations omitted) (*Jacobs Field*). Further, an employer has constructive knowledge of conditions that are plainly visible to its supervisory personnel. *See Hamilton Fixture*, 16 BNA OSHC 1073, 1091 (No. 88-1720, 1993) (*Hamilton*) *aff'd*, 28 F. 3d 1213 (6th Cir. 1994).

[62] There is no evidence in the record whether the lines were insulated or uninsulated where they attached to the house. As set forth above, the minimum clearance distance for an insulated line is three feet; for an uninsulated line, the minimum distance is ten feet.

Shawn Purvis admitted that he had known since 2006 that OSHA required scaffolding be kept at a certain distance from live power lines. (GX-165, p. 78). Purvis admitted that ladder jack scaffolds were routinely used at worksites to provide a work platform. (Tr. 1228-29). Mr. Purvis provided the equipment necessary to assemble the scaffold. (Tr. 1317-18, 1348-50, 1577-78; GX-165, p. 65). Mr. Purvis knew the location of the energized line because he had evaluated the worksite to provide a cost estimate to the homeowner. (Tr. 1317-18, 1348-50, 1577-78; GX-165, p. 65). He knew that no effort had been made to either cover the lines or deenergize them. (Tr. 251-52; GX-165, p. 117). Additionally, because the scaffold and the energized lines were in plain view, Mr. Purvis could have seen the scaffold was closer than the minimum distance of three feet when he was across the street from the worksite on December 13, 2018. (Tr. 1352). With reasonable diligence, Mr. Purvis could have known that the scaffold was erected less than three feet from the energized lines that came into the home. As sole owner and operator, Mr. Purvis's knowledge is the Respondent's knowledge.

Imputation of Lennie Dow's knowledge

Lennie Dow's knowledge can be imputed to Respondent. For imputation of knowledge, the formal title of an employee is not controlling. *Id.* The knowledge of crew leaders and foremen has been imputed to the employer. *Am. Eng'g & Dev. Corp*., 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (*Am. Eng'g*) (The formal title of an employee is not controlling for imputation of knowledge to the company.); *P. Gioioso & Sons, Inc. v. OSHRC*, 675 F.3d 66, 73 (1st Cir. 2012) ("employer can be charged with constructive knowledge of a safety violation that supervisory employees know or should reasonably know about"); *see also, Kerns Bros.*, 18 BNA OSHC at 2069; *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999) (*Access Equip.*); *Mercer Well Serv., Inc.*, 5 BNA OSHC 1893, 1894 (No. 76-2337, 1977); *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Mr. Dow worked on the roof on December 13, 2018, and had actual knowledge of the distance of the scaffold from the energized lines. *See Hamilton*, 16 BNA OSHC at 1091 (employer has constructive knowledge of conditions that are plainly visible to its supervisory personnel).

Respondent asserts that Mr. Dow's knowledge cannot be imputed to Respondent because he was never identified as a foreman or supervisor and there is no evidence that Mr. Purvis delegated any of his authority to Mr. Dow. (Resp. Br. 32; Resp. Reply 11). The title of an employee does not determine whether knowledge can be imputed to the company. *Am. Eng'g*, 23

BNA OSHC at 2095. *See also, Access Equip.*, 18 BNA OSHC at 1726 (knowledge imputed from "a leadman ... in charge of ... two [other] employees, whom the employer's general manager considered ... to be like the lead person for [those two employees]"); *A.P. O'Horo*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991) (laborer designated as working foreman); *Iowa S. Utils. Co.*, 5 BNA OSHC 1138, 1139 (No. 9295, 1977) (knowledge imputed from a "temporary working foreman ... vested with some degree of authority over the other crew members assigned to carry out the specific job involved"); *Mercer Well Serv.,* 5 BNA OSHC at 1894 (imputing knowledge of employee "considered to be in charge of the crew when [his supervisor] was not present").

The undersigned finds that Mr. Dow's actions at Respondent's worksites establish he was functioning as the worksite foreman, which is sufficient to impute knowledge to the Respondent. *Rawson Contractors, Inc.,* 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003) ("the fact that the foreman was not formally designated a supervisor and that he did not have the authority to hire and fire employees does not diminish either his status as the on-site competent person or the other indicia of supervisory authority that he clearly possessed"). Mr. Dow's role as the worksite foreman is demonstrated through his interactions with OSHA personnel, observations of the crew at the Springvale site, discussed below, interviews with employees, Mr. Dow's own words that he oversaw the crew, and his distribution of workers' pay in Mr. Purvis's absence. Further, the assertion there was no foreman or crew leader at any Respondent worksite is not plausible.

On December 14, 2018, at the Portland worksite, Mr. Dow told the CO that he was considered the competent person because he had the most experience and when he was not on site there were other senior guys that could oversee the crew.[63] (JX-34, pp. 21-22). Further, on December 14, 2018, Mr. Dow told the other employees they had the choice to wear fall protection or to leave the site. (Tr. 553; JX-34, pp. 2, 19-22). During worksite interviews, most of the employees identified Mr. Dow as the person who directed work at the worksite or who was in charge. (Tr. 159, 163; JX-34, pp. 1, 3, 7, 11, 15, 23, 27; GX-186). These facts all show Mr. Dow acted as a worksite foreman at the Portland worksite.

[63] However, the most telling response was from Lennie Dow during his December 14, 2018 interview, when asked, "Is there a replacement person for you? Will the work proceed that day in your absence?" (JX-34, p. 2). He responded there were a "Couple other guys / can overview crew / They are not here now." (JX-34, p. 22).

A few days later at the OOB worksite, discussed below, Mr. Dow identified himself as the senior person at the worksite. (Tr. 326-30, 755-56; JX-25, p. 1). Of the five workers interviewed at the site, four named Mr. Dow as the supervisor. [64] (Tr. 330; JX-25, pp. 2-3, 5-6). Mr. Dow also instructed the employees to don fall arrest equipment while OSHA was at the OOB worksite. (Tr. 764-65; GX-45, p. 27; GX-112, pp. 21-22, 24-26).

A few months later, at the May 23, 2019, Springvale worksite, discussed below, DOL OIG Special Agent Roberts observed Mr. Dow directing everyone off the roof when they realized "the feds" were at the worksite. (Tr. 966, 971-72). Mr. Dow then had the employees put on fall arrest equipment while the CO was at the worksite. (Tr. 972).

During his February 2019 deposition, Mr. Dow stated that he and Flavio Campos are the experienced workers at a worksite. (GX-45, p. 53). If a worker had no roofing experience, Mr. Dow did not allow that person to work on the roof. (GX-45, p. 57). If a worker had a question about what needs to be done at a site, Mr. Dow or Mr. Campos made "sure it gets done right." (GX-45, p. 63). Mr. Dow didn't have the authority to discipline anyone, but when two guys fought, he told them to take a walk down the street and later informed Mr. Purvis. (GX-45, pp. 60-61).

Mr. Dow paid workers on behalf of Mr. Purvis. Ms. [redacted] witnessed Mr. Dow paying A.L. for work at a Purvis worksite when Mr. Purvis was not available. (Tr. 1105-06, 1150). A text message from Shawn Purvis to A.L., which states "Pay is at Lenny's," supports this observation. (GX-99, p. 12).

In addition, Mr. Dow had a long-term relationship with Respondent. He had worked for Respondent for over fourteen years and in 2018 worked at 40-60 worksites for Respondent. (Tr. 1609-10; GX-45, p. 13; GX-183, p. 19).

In his hearing testimony Mr. Dow stated that he had never told an OSHA compliance officer at any time that he was a foreman or in charge. (Tr. 1600, 1603). However, the credible record evidence does not support this statement. Mr. Dow identified himself as the person in charge and ordered employees to wear fall protection at the Portland and OOB worksites. (Tr. 553, 756; JX-25, p. 1; JX-34, pp. 2, 21-22). The undersigned finds the statements Mr. Dow made to the COs at the worksites and in his depositions are more credible than his statements at the hearing.

[64] For two of the workers, they identified "myself" as their employer at the site, but "Lennie Dow" as the supervisor. (JX-25, pp. 3, 6).

The prior statements were made closer in time to the actual events. Further, the hearing testimony was expressed in such a way as to attempt to protect Respondent from liability.

Shawn Purvis stated that he spent a few minutes at each worksite at the beginning of a job describing the work to be done, but he made no assignments and generally never returned to a worksite. (Tr. 1301, 1312-13; GX-46, p. 45). Respondent asks the undersigned to believe that several individuals doing whatever task they wanted, whenever it suited them, was how the worksite operated. The assertion that no one was in charge at the worksite is not plausible.

Re-roofing a house required the implementation of a prescribed series of steps. Individuals had to work in concert with each other to accomplish this task. Further, employees stated that when they had questions, they sought the guidance of experienced roofers at the site. The evidence shows that when there was a question or dispute, Lennie Dow took the lead to resolve the issue. The other employees at the worksites acknowledged that Mr. Dow was the person that had the lead role at a worksite.

Further, Mr. Dow demonstrated that he felt obligated to make sure things went according to plan at a worksite. (Tr. 553, 764-65; GX-45, pp. 57, 60-63). Whether this delegation was explicit or not, after fourteen years of working together, it is clear that Mr. Dow was considered a foreman. Additionally, Mr. Dow's payments to employees on behalf of Mr. Purvis are evidence of an explicit delegation of authority. The undersigned finds that Respondent delegated certain duties both implicitly and explicitly to Lennie Dow.

Respondent also asserts that at the hearing the employees testified there was no worksite boss, they were each their own boss. (Resp. Br. 35-36). The undersigned notes that throughout the hearing a pattern emerged from Shawn Purvis and the employee witnesses who worked for him. The employees seemed to be more assured that no one was in charge at a worksite during the hearing than during their onsite interviews with the CO. During the onsite interviews, the employees consistently stated they had no bosses, no one told them what to do, when to arrive at or leave a worksite; however, for the roofing work itself they consistently indicated that Mr. Dow was a leader and someone they relied on for advice and guidance. In contrast, at the hearing the employees seemed to indicate there was no guidance of any kind at any worksite and no one was ever in the lead position. Further insight into this seeming contradiction is found in the answers from two employees at the OOB worksite. When asked who they worked for they answered, "myself," but when asked who was the worksite supervisor, they identified Lennie Dow. (JX-25,

pp. 3, 6). The claim that no one had a lead role at a worksite is not plausible since roofing work required the team to work together to complete tasks in a particular order. While the workers may not have had an individual who required them to work at a particular project, once work was accepted at a project, the nature of the work required someone to be in charge at that worksite.

Based on the evidence, the undersigned finds that Lennie Dow's actions at the worksites establish he was the working foreman at Respondent's worksites. Thus, foreman Dow's actual knowledge that the scaffold was less than the minimum required distance of three feet from the scaffold is imputed to the Respondent. Knowledge of the hazardous condition is proved.

Serious Characterization

The Secretary alleged the violation was serious in nature. A violation is classified as serious under section 17(k) of the Act if "there is a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). "[T]he Secretary must show that death or serious physical harm is a probable consequence *if* an accident results from the violative condition—he is not required to show that an accident is itself likely." *Home Rubber Co., LP*, No. 17-0138, 2021 WL 3929735, at *5, (OSHRC, Aug. 26, 2021) (*Home Rubber*) (emphasis in original).

Here, the scaffold was less than the minimum required distance of three feet from the energized lines. Contact with the energized lines could result in injuries such as electrical shock, electrical burns, or electrocution. (Tr. 264; JX-30, p. 4). Thus, a serious characterization is merited for Citation 1, Item 1.

Penalty

"Once a citation is contested, the Commission has the sole authority to assess penalties." *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) (citation omitted), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). The penalty amount proposed in the citation is given no deference. *See Hern Iron Works*, 16 BNA OSHC 1619, 1621 (No. 88-1962, 1994).

The maximum statutory penalty for a serious violation is $13,260.[65] 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

[65] The citations for the Portland inspection were issued June 11, 2019. For a serious penalty assessed after January 23, 2019, but on or before January 15, 2020, the statutory maximum of $13,260 applies. 84 Fed. Reg. 213, 219 (Jan. 23, 2019).

prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary factor in the penalty assessment. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993) (*J.A. Jones Constr.*).

The proposed penalty is $13,260. (JX-29, p. 6). In calculating the proposed penalty OSHA assessed the severity as high because contact with the power line could result in serious injuries from electrocution and a resulting fall. (Tr. 264). The probability was set as greater due to the close distance of the ladder jack scaffold to the energized power line of six inches. (Tr. 264). No good faith credit was applied because there was no safety program. (Tr. 265). The penalty was increased by 10% due to the history of prior OSHA citations. (Tr. 265-66). The OSHA Area Director exercised his discretion and allowed no reduction to the penalty for employer size. (Tr. 900-01; JX-30, pp. 1-2). The undersigned agrees with the assessment of gravity, good faith, and history.

Respondent asserts that the penalties proposed by the Secretary are not appropriate because there was no consideration for good faith, no credit for size, and penalties cannot be so destructive or so excessive as to cause an undue hardship on Respondent. (Resp. Br. 85).

Respondent's assertion there should be a discount for good faith is rejected. The Respondent has not exhibited behavior to merit a discount for good faith. *See E.L. Davis Contracting Co.,* 16 BNA OSHC 2046, 2049 (No. 92-35, 1994) (holding employer deserved no credit for good faith where the owner "testified that he purposely failed to pay the penalties" from prior citations). Respondent's assertion that the proposed penalties would inflict an undue hardship is also rejected. Undue hardship requires an assessment of Respondent's overall financial health, which is not in evidence here. However, the undersigned finds that a reduction due to the employer's small size is appropriate. "The Commission has viewed the size factor as 'an attempt to avoid destructive penalties' that would unjustly ruin a small business." *A-1 Sewer & Water Contractors, Inc*., No. 21-0562, 2022 WL 2102909, at *12 (OSHRC, June 1, 2022), quoting *Colonial Craft Reprod., Inc.*, 1 BNA OSHC 1063, 1065 (No. 881, 1972) (size is related to financial condition and adjusting for size is an attempt to "avoid destructive penalties").

Based on the small size of this employer, the undersigned applies a 30% reduction to the penalty for the size of the employer. Further, the undersigned applies a 10% increase to this reduced penalty due to Respondent's significant history of OSHA inspections resulting in citations.

Citation 1, Item 1 is affirmed as a serious violation with an assessed penalty of $10,210.

Serious Citation 1, Item 2 (Portland Inspection, Docket 19-1056)

Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.503(a)(1), which sets forth:

> (a) Training program. (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

The Secretary asserts that Respondent did not provide training to its employees that were exposed to fall hazards. Respondent does not dispute that training was not provided. (Resp. Br. 65; GX-183, pp. 18-19; GX-184, pp. 10-11).

Applicability, Exposure, Violation of the Standard, & Knowledge

Employees were engaged in roofing which exposed them to fall hazards from heights of twenty-one to thirty-four feet. (Tr. 150-53; JX-30, pp. 7-8, 11; GX-106, p.7). Both Lennie Dow and Flavio Campos confirmed they had not received any fall hazard safety training. (Tr. 1616-17; GX-45, p. 11; GX-47, pp. 16-18). Thus, exposure and applicability are proved.

Shawn Purvis admitted there was no general safety program. (GX-46, p. 17). Mr. Purvis admitted there was no training program[66] regarding the hazards of falls. (GX-183, p. 18; GX-165, pp. 53-54; GX-31, p. 29). Respondent had actual knowledge that it provided no training about fall hazards to those employees. The cited standard was violated, and Respondent had knowledge of the lack of a training program.

Serious Characterization & Penalty

The Secretary alleged the violation was serious in nature. *Home Rubber,* 2021 WL 3929735, at *5. ("[T[he Secretary must show that death or serious physical harm is a probable consequence *if* an accident results from the violative condition—he is not required to show that an accident is itself likely.") (emphasis in original). The Secretary asserts fall hazard training is necessary to provide employees with information on how to avoid falls that can result in serious injuries. (Tr. 274-76). The undersigned agrees the violation is serious.

The proposed penalty is $13,260. To calculate the proposed penalty the severity was assessed as high because untrained employees could sustain serious injuries from a fall. (Tr. 274-

[66] CO Wilson testified that telling workers to wear a harness was not a fall protection training program. (Tr. 267-68, 273).

75). The probability was set as greater because the work was on a steep pitch roof at heights over twenty feet. (Tr. 275). No good faith credit was applied due to the lack of a safety program. (Tr. 265, 275). The penalty was increased by 10% due to the history of prior OSHA citations. (Tr. 265-66, 275). The OSHA Area Director exercised his discretion and allowed no reduction to the penalty assessed for size. (Tr. 901, 906; JX-30, pp. 5-6). The undersigned agrees with the assessment for gravity, good faith, and history. As discussed above, the undersigned applies a 30% reduction to the proposed penalty due to the size of the employer and applies a 10% increase to this reduced penalty due to Respondent's OSHA history.

Citation 1, Item 2 is affirmed as a serious violation with an assessed penalty of $10,210.

Willful Citation 2, Items 1 through 8 (Portland Inspection, Docket 19-1056)

Citation 2, Items 1 through 8 allege willful violations of 29 C.F.R. § 1926.501(b)(13), which requires:

> (13) Residential construction. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure.[67]

The Secretary asserts that eight employees worked at heights above six feet without fall protection. The Secretary issued the citations on a per-employee (per-instance) basis for employees A.L., Michael Wright, Anthony Gallant, Michael Happersett, Ryver Daigle, Forrest Daigle, Lennie Dow, and Flavio Campos.

Respondent asserts that none of the eight named individuals were employees of the Respondent. For the reasons set forth above, Respondent was the employer of the employees at the Portland worksite.

Applicability

Employees were engaged in residential construction activities, roofing work, at the Portland worksite. Employees were working at heights greater than six feet from the ground; the fall distance ranged from twenty-one to thirty-four feet. The standard applies.

[67] Section 29 C.F.R. § 1926.501(b)(13) includes an exception, "[w]hen the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502." In post hearing briefing, Respondent did not assert either infeasibility or greater hazard. Respondent does not contend compliance was infeasible. (GX-184, pp. 23-24).

Respondent argues the standard is not applicable to Citation 2, Item 1, because A.L. was working from a scaffold at the time of his fall and the cited standard does not apply to falls from scaffolds. (Resp. Br. 66-67). Respondent's argument is rejected. A.L.'s location at the moment of his fall is not the relevant inquiry. A.L. was not exclusively working from the ladder jack scaffold. A.L. worked on the roof without fall protection and was exposed to falls over six feet.

Respondent also argues the standard does not apply to the other seven workers because the distance from the roof's edge to the ladder jack scaffolding plank was not six feet or more.[68] (Resp. Br. 67). This argument is also rejected. Even if a worker could fall in such a way as to land on the plank of a ladder jack scaffold, there were locations on the roof where there was no ladder jack scaffold, such as along the front of the house or on the roof's left side. (GX-100, pp. 17-18).

Thus, the standard applies to the eight exposed employees.

Exposure

The Secretary issued a citation for each exposed worker on the roof, under OSHA's violation-by-violation (per-instance) citation policy, rather than a single citation for all exposed employees.

Item 1 asserts A.L. was exposed to fall hazards. A.L. was engaged in roofing work on December 13, 2018. He was leaving the roof when he fell. (GX-105). Exposure for Citation 2, Item 1 is proved.

Item 2 asserts Michael Wright was exposed to fall hazards. Mr. Wright was working on the right side of the roof in front of the dormer on December 13, 2018. (GX-45, pp. 38, 84). Exposure for Citation 2, Item 2 is proved.

Item 3 asserts Anthony Gallant was exposed to fall hazards. Mr. Gallant was working on the right side of the roof just behind the dormer on December 13, 2018. (Tr. 1775, 1805; GX-45, pp. 38-40, 84). Exposure for Citation 2, Item 3 is proved.

Item 4 asserts Michael Happersett was exposed to fall hazards. Mr. Happersett was working on the right side of the roof in front of the dormer on December 13, 2018. (Tr. 1633; GX-45, pp. 38, 84). Exposure for Citation 2, Item 4 is proved.

[68] Lower level is defined as "those areas or surfaces to which an employee can fall. Such areas or surfaces include, but are not limited to, ground levels, floors, platforms, ramps, runways, excavations, pits, tanks, material, water, equipment, structures, or portions thereof." 29 C.F.R. § 1926.500(b).

Item 5 asserts Ryver Daigle was exposed to fall hazards. Ryver Daigle confirmed he was engaged in roofing work at the Portland worksite on December 13, 2018. (Tr. 1842-43). Exposure for Citation 2, Item 5 is proved.

Item 6 asserts Forrest Daigle was exposed to fall hazards. Forrest Daigle was working on the roof on December 13, 2018, when he saw A.L. fall while attempting to get off the roof. (GX-105). Exposure for Citation 2, Item 6 is proved.

Item 7 asserts Lennie Dow was exposed to fall hazards. Foreman Dow was working on the right side of the roof in front of the dormer on December 13, 2018. (GX-45, pp. 38, 84). Exposure for Citation 2, Item 7 is proved.

Item 8 asserts Flavio Campos was exposed to fall hazards. Mr. Campos was at the back of the roof's right side laying shingles on December 13, 2018. (GX-47, pp. 54-57, 115). Exposure for Citation 2, Item 8 is proved.

All eight named employees were exposed to fall hazards at the Portland worksite.

Violation of Standard

No fall protection was in use at the site on December 13, 2018. Detective Tulley saw no signs that anyone had been wearing personal fall arrest equipment when he arrived at the site and Forrest Daigle told him they were not wearing fall protection. (Tr. 58; GX-105, p. 6). Evidence Technician Reeder saw no fall protection equipment at the site or among A.L.'s clothing at the hospital. (Tr. 48-49). Foreman Dow admitted they were all working in plain view without fall protection. (GX-45, pp. 38-40). Mr. Campos admitted that he was not using fall protection. (GX-47, pp. 53-54, 63). CO Wilson's December 13, 2018 discussions with employees and the December 14, 2018 signed statements from employees confirm they were not wearing personal fall arrest equipment. (Tr. 155-56; JX-34, pp. 1, 3, 8, 23; GX-186). Further, CO Wilson observed there was no safety net system in place or the components to erect a guardrail system at the site. (Tr. 302-03).

Because there was no means of fall protection in use at the site, the requirements of the standard were violated.

Knowledge

Shawn Purvis had actual knowledge that roofers were not using fall protection at the Portland worksite on December 13, 2018. Mr. Purvis was across the street in his truck and could have seen the roofers working without fall arrest systems in plain view. (GX-45, pp. 37-40). In a

December 17, 2018 call with CO Wilson, Mr. Purvis admitted that he could see the workers were not wearing fall protection on December 13, 2018.[69] (Tr. 170; JX-31, p. 4).

Additionally, with reasonable diligence Mr. Purvis could have known that the roofers would not wear personal fall arrest systems at the Portland worksite. Mr. Purvis admitted that he had been aware since 2006 that OSHA required fall protection when working over six feet. (GX-46, pp. 34-36; GX-165, pp. 50-52, 74, 77-80). Mr. Purvis admitted in a June 2018 interview with OSHA that he knew the workers routinely worked without fall protection and that the fall protection equipment he provided appeared to never be used. (GX-31, pp. 19, 20, 25; GX-46, p. 39). Respondent had also been cited for the lack of fall protection at prior worksites. (GX-165, p. 52).

Further, foreman Dow knew no one was wearing fall protection. (GX-45, pp. 38-40, 45). As the foreman at the site, discussed above, his knowledge can be imputed to Respondent. *Jacobs Field*, 25 BNA OSHC 1216, 1218 (citations omitted) ("The actual or constructive knowledge of a supervisor is imputable to the employer."). *Kerns Bros*., 18 BNA OSHC at 2068-69 (knowledge of crew leader, who was responsible for seeing that the work was done safely and properly, was imputed to employer even though crew leader had no authority to actually discipline an employee).

The Secretary proved knowledge of the cited hazardous condition. *See Peacock Eng'g,* 26 BNA OSHC 1588, 1592 (citations omitted) (must show the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition); *Phoenix Roofing,* 17 BNA OSHC at 1079-1080 (citations omitted) (employer's knowledge is directed to physical condition that constitutes a violation).

Willful Characterization[70]

Respondent asserts the violations cannot be willful because Mr. Purvis had a good faith belief that the workers were independent contractors, and he was not responsible for their safety.

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[69] Later, at his February 2019 deposition, Mr. Purvis stated that he could not recall if he had seen anyone using fall protection harnesses. (GX-165, p. 116). The undersigned credits Mr. Purvis's December 17, 2018 statement to CO Wilson as it was closer in time to the event.

[70] The willful citations are serious as well. A violation is classified as serious under section 17(k) of the Act if "there is a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). "The Secretary must show that death or serious physical harm is a probable consequence *if* an accident results from the violative condition—he is not required to show that an accident is itself likely." *Home Rubber*, 2021 WL 3929735, at *5 (emphasis in original). Here, the serious harm is a fall that could result in broken bones or death, as happened when A.L. experienced a fatal fall.

(Resp. Reply Br. 13-16). As set forth above, Respondent is the employer at the Portland worksite for purposes of the OSH Act and thus, responsible for safety at the worksite.

"A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference." *Angel Bros. Enters., Ltd*., No. 16-0940, 2020 WL 4514841, at *8 (OSHRC, July 28, 2020) (*Angel Bros*.) (citations omitted); *see also A.E. Staley Mfg. Co. v. Secy of Labor,* 295 F.3d 1341, 1351 (D.C. Cir. 2002) (upholding Commission's determination that employer's plain indifference justified a willful violation); *Brock v. Morello Bros. Constr*., 809 F.2d 161, 164 (1st Cir. 1987) (*Morello Bros. Constr*.) ("an act may be willful if the offender shows indifference to the rules").

The Secretary is not required to show the employer had a malicious motive in order to prove a willful violation. *Kaspar Wire Works, Inc.,* 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001) (*Kaspar Wire*). ("An employer's motive for failing to comply with the Act's requirements, however, need not be evil or malicious in order to find a violation willful."). "Secretary can establish intentional disregard for the Act's requirements by showing that "the employer was actually aware, at the time of the violative act, that the act was unlawful . . .." *Home Rubber*, 2021 WL 3929735, at *2 citing *AJP Constr., Inc. v. Sec'y*, 357 F.3d 70, 74 (D.C. Cir. 2004) (*AJP Constr*.) (citation omitted).

The Secretary can prove plain indifference by showing that the employer "possessed a state of mind such that if it were informed of the standard, it would not care." *Id*. *See also, Branham Sign Co.*, 18 BNA OSHC 2132, 2134, (No. 98-752, 2000) (a willful violation exists where the employer's state of mind was "such that, if informed of the duty to act, it would not have cared"); *Morello Bros. Constr*., 809 F.2d at 164 (same).

"The Commission has found heightened awareness where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that violative conditions exist." *Propellex Corp*., 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999) (citations omitted); *see also*, *AJP Constr.,* 357 F.3d at 74 (upholding willful violation "because prior citations and warnings coupled with [employer's] failure to act demonstrated that it was aware of the unsafe conditions and yet chose not to correct them").

The Secretary asserts the willful characterization here is supported by i) Respondent's multiple prior citations for the violation of fall protection standards, ii) Shawn Purvis's knowledge of the standard's requirement to use fall protection, iii) Shawn Purvis's knowledge that employees

were not using fall protection, yet he took no significant corrective action, and iv) the lack of a viable good faith defense. (Sec'y Br. 126-27). As set forth below, Respondent's conduct meets the standard for willfulness.

Respondent was aware of the standard's requirement to use fall protection. Prior to the December 13, 2018 accident, Respondent had received citations at five worksites for violations of fall protection requirements.[71] (GX-161). As the sole owner, Shawn Purvis was aware of each of these citations.

In 2006, CO Simmons visited Respondent's worksite and presented a two-hour training on OSHA's fall protection requirements to Mr. Purvis and his workers as part of a settlement for prior citations. (GX-46, pp. 34-36; GX-165, pp. 50-52, 79-80). Mr. Purvis admitted that he had been aware since 2006 that OSHA required fall protection when working over six feet. (GX-165, p. 77).

Mr. Purvis confirmed that he had reviewed the August 2018 citations issued for the Mussey Road inspection that included a citation for a violation of § 1926.501(b)(13), which is the same fall protection standard at issue here. (GX-46, p. 38). About one month before the accident at Respondent's Portland worksite, CO Simmons talked to Mr. Purvis about abatement for the Mussey Road fall protection citation. (Tr. 385-86; GX-32).

During his February 2019 deposition, Purvis admitted that he knew of OSHA's requirements to use fall protection over six feet, in his own words: "Anything over six feet, you have to have guardrails or harnesses." (GX-46, p. 39). He also acknowledged that when he inspected the fall protection equipment stored in the box truck, he could see that it was barely used. (GX-46, pp. 39-40). Purvis claimed that he asked the workers to wear fall protection but could not make them wear the equipment. (GX-46, p. 40; GX-165, pp. 147-48, 151). However, it is not credible that his request to workers to wear fall protection was robust or earnestly conveyed.[72] (GX-165, pp. 50, 61). During a June 1, 2018, OSHA administrative interview, Mr. Purvis stated that it was his opinion that wearing a personal fall arrest system was more dangerous

[71] The OSHA Compliance Officers at the prior inspections were Kathy Simmons and David McGuan (now OSHA Area Director). (GX-161).

[72] Mr. Purvis claimed he told "them [the workers] before I leave [the worksite] to put [safety equipment] on and [he] assume[s] they're going to listen to me." (GX-165, p. 50). Mr. Purvis said Respondent's verbal safety and health program was: "wear your harness on the roof." (GX-165, p. 61)

than the risk of not using fall protection at all. Mr. Purvis believed that because he had not had an accident in 21 years it meant he didn't need to use the equipment. (GX-31, pp. 20, 24-27).

Mr. Purvis was aware of the standard's requirements, knew that employees would necessarily be working at heights over six feet, and knew they generally did not wear fall protection. Yet, Purvis made no effort to ensure the employees used fall protection at Respondent's worksite. Further, the many years Respondent received OSHA citations for fall hazard violations and Mr. Purvis's general attitude that fall protection was not necessary, demonstrate Mr. Purvis was also plainly indifferent to fall hazards at Respondent's worksite. Respondent showed intentional disregard of the standard's requirements, was plainly indifferent to the safety of the employees, and had a heightened awareness based on its own history of citations for fall protection violations. *See Angel Bros.*, 2020 WL 4514841, at *8 ("willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference"). The violations are willful.

Good faith defense not supported

"A willful charge is not justified if an employer has made an objectively reasonable, good faith effort to comply with a standard or to eliminate a hazard even though the employer's efforts are not entirely effective or complete." *Revoli Constr. Co.,* 19 BNA OSHC 1682, 1685 (No. 00-0315, 2001) (citation omitted); *see also, Elliot Constr. Corp*., 23 BNA OSHC 2110, 2117 (No. 07-1578, 2012). The test is "an objective one—whether the employer's belief concerning a factual matter or concerning the interpretation of a standard was reasonable under the circumstances." *Williams Enters., Inc.*, 13 BNA OSHC 1249, 1259 (No. 85-355, 1987) (*Williams Enters*.). "[A]n employer is not necessarily spared from a finding of willfulness by taking *any* measure, regardless of how minimal, to enhance employee safety." *J.A. Jones Constr.,* 15 BNA OSHC at 2209 (emphasis added). "[T]he employer bears the burden of proving that its belief was objectively reasonable under the circumstances or, in other words, nonfrivolous." *Dover High Performance Plastics, Inc.,* No. 14-1268, 2020 WL 5880242, at *4 (OSHRC, Sept. 25, 2020) (citations omitted).

Respondent asserts that a willful characterization is not merited here because Shawn Purvis had a good faith belief the business was operated in such a way that OSHA regulations would not apply. (Resp. Br. 77). Respondent asserts that when Mr. Purvis began issuing IRS-1099 forms to the workers, he thought this meant they were independent contractors. (Tr. 1234-39). Mr. Purvis

claimed that he looked at the state workers' compensation guidelines to determine whether his workers were independent contractors. (Tr. 1234, 1239, 1253-54; GX-148). Mr. Purvis also believed that his annual applications to the State of Maine Workers' Compensation Board for a rebuttable presumption of independent contractor status supported his position that OSH regulations did not apply to his business. (Resp. Br. 77-78). Respondent asserts that Mr. Purvis's good faith belief was further demonstrated when he told the COs at prior inspections that he had no employees. (Resp. Br. 79-80). These arguments are rejected.

As a basis for his good faith belief, Respondent points to the discussion between Mr. Purvis and OSHA AD McGuan during the 2012 Fieldings inspection, discussed above, in which Mr. Purvis thought he had proved to OSHA that he had no employees. Even if Mr. Purvis believed that AD McGuan had agreed with him during the 2012 Fieldings inspection, subsequent citations from OSHA evidenced his belief was incorrect.

Respondent received citations for two inspections after 2012, the Pine Point inspection and Mussey Road inspection. Mr. Purvis made no effort to determine why he was receiving citations after his 2012 discussion with AD McGuan. Mr. Purvis acknowledged OSHA had advised him of his right to contest the citations, [73] yet Mr. Purvis chose to not contest these citations. (GX-7, p. 3; GX-165, pp. 96-97). Purvis did not bring documentation into an OSHA Area Office after receiving these two additional citations to get clarity on OSHA's position regarding the safety of workers at his worksites. Instead, he ignored the citations. These subsequent citations show Mr. Purvis's belief was not objectively reasonable.

Further, Mr. Purvis's reference to or reliance on IRS or workers' compensation guidelines is not a good faith attempt to determine whether Mr. Purvis was responsible for safety at Respondent's worksites. Mr. Purvis cites no reason for his belief that rules of other government agencies would also apply to his duties and responsibilities under the OSH Act. This is especially so, as the OSHA Compliance Officer who inspected Respondent's Mussey worksites informed Mr. Purvis that the OSHA regulations applied to those Respondent worksites. (JX-20; GX-165,

[73] If Mr. Purvis timely notified the OSHA Area Director, in writing, that he intended to contest the disputed citations issued and penalties proposed, he would have been afforded an opportunity for a hearing before the Occupational Safety and Health Review Commission. *See* OSH Act, sections 10(a), (c). The Commission Rules of Procedure permit any party to appear self-represented in Commission proceedings. The Commission Rules of Procedure state, in part, that in proceedings before the Commission "[a]ny party . . . may appear in person [self-represented], through an attorney, or through any non-attorney representative." 29 C.F.R. § 2200.22(a)

pp. 107-08). Mr. Purvis states that he had not consulted with an attorney or government agency for guidance regarding OSHA regulations applicable to the business. (GX-46, pp.70, 82). He had access to advice from Neil Stillman, the corporation's clerk, but did not take advantage of this resource. Instead, Mr. Purvis chose to rely on his own review of information related to other agencies to conclude he had no responsibility for safety at his worksites.

Relying on his applications to the State of Maine was also not an objective good faith belief he had no employees. The application to the State of Maine Workers' Compensation Board had no connection to OSHA. The application form stated a "predetermination from the Board is not binding on the [Maine] Department of Labor" and the application only pertained to the applicant. (Tr. 1034-36; GX-173, p. 2). Therefore, even if the applicant was an independent contractor in Maine's workers' compensation system, it did not mean the applicant's workers at a worksite were independent contractors. (Tr. 1052).

As further support, Respondent points to an October 30, 2018 letter he received from the U.S. Department of Justice regarding the closure of a referral to the Department of Treasury for "certain citations and penalties" issued by OSHA, as proof for his good faith belief he had no employees. (Resp. Br. 81-82). This letter simply stated that a previous referral to the Treasury Department was closed, and the penalties withdrawn; it made no representation that Respondent generally had no OSHA obligations or responsibilities at his worksites. (GX-148, p. 3). This letter does not support Mr. Purvis's belief that his workers were independent contractors.

Respondent's belief that he had no obligation to comply with OSHA regulations is not objectively reasonable and does not support a good faith defense. Respondent took no actions to confirm his belief was accurate even after he received multiple citations from OSHA for violations at his worksites. *See Williams Enters.,* 13 BNA OSHC at 1259 (Employer's belief must be objectively reasonable under the circumstances).

Finally, Respondent asserts that his good faith belief does not need to be reasonable. (Resp. Br. 82-83, citing *Cheek v. U.S.,* 498 US 192, 202 (1991) (at issue were inappropriate jury instructions in a criminal tax case)). In *Cheek,* the Court held the judge had erred when he instructed the jury the defendant's belief was not objectively reasonable and as such, they could not consider it during their deliberation. *Id.* at 203. The Court stated that this jury instruction was outside the judge's role; that "knowledge and belief are characteristically questions for the factfinder." *Id.* The issues in *Cheek* have little relevance to the instant case. The case here does

not concern a criminal charge related to the tax code. Here, the undersigned is the fact finder, not a jury. Further, the Court in *Cheek* was evaluating willfulness under federal tax precedent. *Id.* at 201. *Cheek* is not apt to the issues here. Respondent's argument is rejected.

Respondent's good faith defense against willfulness fails. *See Morrison-Knudsen Co.,* 16 BNA OSHC 1105, 1124 (No. 88-0572, 1993) (citations omitted) (employer bears the burden of proving that its belief was objectively reasonable under the circumstances). The violations are willful.

Violation-by-Violation Penalty Assessment (Per-Instance Policy)

The Secretary issued the eight willful citation items under OSHA's violation-by-violation citation policy (per-instance policy), set forth in CPL 2.80, "Handling of Cases to Be Proposed for Violation-By-Violation Penalties" (Directive) issued October 21, 1990.[74] OSHA utilizes the per-instance policy for its deterrent effect. (Tr. 908-09).

The Directive sets forth policy guidance regarding cases where the Secretary exercises prosecutorial discretion to issue per-instance citations. *See generally, Kaspar Wire Works, Inc., v. Sec'y of Labor, 268* F.3d 1123, 1131 (D.C. Cir. 2001) ("Secretary's decision to assess per instance penalties reflects use of an enforcement tool within her authority"). Three requirements provide guidance for the issuance of per-instance citations: (1) the violation must be willful; (2) the violation must fall within at least one of the seven enumerated categories; and (3) the language of the cited OSHA standard must support citation of discrete violations. Directive, section H (Guidance). The seven enumerated categories include, among others, an employer with extensive history of prior violations, a violation that results in a fatality or large number of injuries, and an employer's overall conduct that amounts to clear bad faith. *Id.*

Here, the Secretary followed the policy guidance stated in the Directive. As discussed above, the violations are willful in nature. Further, Respondent met several of the seven enumerated categories—Respondent had knowledge of the OSHA requirement, the violation resulted in a fatality, Respondent has an extensive history of OSHA violations, and Respondent's conduct overall showed clear bad faith to his duties under the OSH Act. Finally, the cited standard's text sets forth the duty for fall protection to be provided "per employee."

[74]OSHA CPL 02-00-080 (CPL 2.80), Handling of Cases to Be Proposed for Violation-By-Violation Penalties (Oct. 21, 1990) at https://www.osha.gov/enforcement/directives/cpl-02-00-080 (accessed Jan. 30, 2023).

Per-instance citations are supported by Commission precedent. The Commission has long-held the Act supports per-instance penalty assessments. *See Pepperidge Farm, Inc.,* 17 BNA OSHC 1993, 2001 (No. 89-265, 1997) (Section 17(j) of the Act allows for per-instance penalties); *Sanders Lead Co.,* 17 BNA OSHC 1197, 1204-05 (No. 87-260, 1995) (assessing per-instance penalties for violations of lead medical removal protection standard) (*Sanders*); *J.A. Jones Constr.,* 15 BNA OSHC at 2213-14 (instance-by-instance penalties assessed based on failure to provide fall protection guarding); *Caterpillar, Inc.,* 15 BNA OSHC 2153, 2173 (No. 87-0922, 1993) (Commission has authority to assess separate penalties for separate violations of a single standard); *Hoffman Constr. Co.,* 6 BNA OSHC 1274, 1275 (No. 4182, 1978) (allowing per-instance penalty for each improperly guarded scaffold).

As the Commission reiterated in *E. Smalis Painting Co., Inc*., "per-instance violations and penalties are appropriate when the cited regulation or standard clearly prohibits individual acts rather than a single course of action." *Smalis*, No. 94-1979, 2009 WL 1067815, at *31 (OSHRC, April 10, 2009),[75] quoting *Gen. Motors Corp*., *CPCG Okla. City Plant*, No. 91-2834E, 2007 WL 4350896, at *35 (OSHRC, Dec. 4, 2007) (*Gen. Motors*) (citations omitted). "The key . . . [is] the language of the statute or the specific standard or regulation cited." *Id.; see also, Nat'l Ass'n of Home Builders v. OSHA,* 602 F.3d 464, 467 (D.C. Cir. 2010) ("The unit of prosecution is derived from the duty set forth in the Secretary's standard.") (citations omitted), *Kaspar Wire Works, Inc. v, Sec'y,* 268 F.3d at 1130 (instance-by-instance is within statutory mandate of 17(a) allowing a penalty assessment "*for each violation*" and the "Commission has long agreed that per instance citations and penalties are allowed") (emphasis in original).

The determination of an "instance" depends on the action required to meet the requirements of the cited standard. *See Gen. Motors*, 2007 WL 4350896, at *36-38 (duty to provide LOTO training and retraining for each employee); *Andrew Catapano Enters., Inc.,* 17 BNA OSHC 1776, 1778-79 (No. 90-0050, 1996) (consolidated) (violation for each unprotected trench at a worksite); *Sanders,* 17 BNA OSHC at 1200 and 1203 (separate penalties assessed for each violation of medical removal standard and each instance of failure to provide a respirator fit-test); *J.A. Jones Constr.,* 15 BNA OSHC at 2212 (affirmed violations for each instance of unguarded

[75] In *Smalis*, the Commission specifically overruled its prior position on per-employee policies set forth in *Eric K. Ho*, 20 BNA OSHC 1361 (No. 98-1645, 2003) (consolidated), *aff'd* 401 F.3d 355 (5th Cir. 2005). *Smalis*, 2009 WL 1067815, at *31-35.

floor or wall openings at a construction site); *Hoffman Constr.*, 6 BNA OSHC at 127 (affirmed violation for each improperly guarded scaffold).

The text of 29 C.F.R. § 1926.501(b) (13) supports per-instance citations. The duty set forth under the standard— "*each employee* engaged in residential construction activities 6 feet or more above lower levels shall be protected"—is straightforward in its instruction to protect each person. 29 C.F.R. § 1926.501(b) (13) (emphasis added). The means to protect a worker at the Portland worksite was a personal fall arrest system for each exposed employee.[76] The other two methods allowed under the cited standard—guardrails and safety nets—were not available.

Respondent asserts that the cited standard's text does not clearly require actions per person rather than a single course of action.[77] (Resp. Br. 67, 83). Respondent relies on the Commission's decision in *Hartford Roofing Co.,* 17 BNA OSHC 1361, 1366 (No. 92-3855, 1995) asserting that the decision "holds that this kind of standard [a fall protection standard] does not authorize per-employee penalties." (Resp. Br. 68-69).

Hartford holds:

> Some standards implicate the protection . . . of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per-instance basis. However, where a single practice, method or condition affects multiple employees there can be only one violation of the standard.

Hartford, 17 BNA OSHC at 1365. The facts of *Hartford* are not an apt comparison. In *Hartford,* employees worked on a flat, low-pitch roof. There, the judge and Commission found the violation

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[76] The standard says:

> Personal fall arrest system means a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body belt or body harness and may include a lanyard, deceleration device, lifeline, or suitable combinations of these. As of January 1, 1998, the use of a body belt for fall arrest is prohibited.

29 C.F.R. § 1926.500.

[77] Respondent also mentions that with respect to the OSH Act's penalty framework, "if there is any doubt as to the meaning of willfully here, the rule of lenity requires that [] the term be construed narrowly." (Resp. Br. 83-84). "To invoke the rule [of lenity], the Court must conclude that there is a "grievous ambiguity or uncertainty" in the statute." *Muscarello v. U.S.*, 524 U.S. 125, 138-39 (1998). Among other cases, the Respondent cites to a recent concurrence written by Justice Gorsuch to support its argument that the rule of lenity applies to civil penalties in addition to criminal statutes. (Resp. Br. 83-84). The applicability of the rule of lenity in the non-criminal context was discussed in Justice Gorsuch's concurring opinion and Justice Kavanaugh's concurring opinion. The Justices disagreed on when it is proper to apply the rule of lenity during the process of statutory construction for an ambiguous statute. *Wooden v. U. S.*, 142 S.Ct. 1063, 1075 and 1086, n.5 (2022). Here there is no such ambiguity. Respondent's argument the rule of lenity is relevant here is rejected.

at the Hartford site was caused by a "single course of conduct"—a lack of perimeter guarding—that would have resolved the issue for all exposed employees. *Hartford,* 17 BNA OSHC at 1362.

Here, to comply with the cited standard the employer may choose one of three fall protection options—a personal fall arrest system, guardrails, or a safety net system. § 1926.501(b)(13). Due to the proximity of the neighboring homes a safety net system could not be installed at this worksite. (Tr. 302-03, 581). A guardrail system was not available for use at the site; even so, installation of a guardrail would require a worker to use a personal fall arrest system during installation, and a guardrail would have to be moved frequently during the roofing process. (Tr. 302-03). Further, the steep pitch of the roof made installation of an effective guardrail system difficult. (Tr. 302). Finally, no components of a guardrail system were available at the worksite. (Tr. 302). As demonstrated by the use of personal fall arrest systems by the employees the day after the accident, a personal fall arrest system was the means available at the worksite to protect employees.

Respondent asserts CO Wilson's testimony, that personal fall arrest systems were the only viable method of fall protection, cannot be relied upon. (Resp. Reply 17). However, Respondent offers no evidence to rebut CO Wilson's testimony. CO Wilson's opinion was based on his knowledge of the requirements of the fall protection standard and his experience inspecting fall hazards at worksites, which the undersigned credits.[78] *See Morello Bros. Constr.,* 809 F.2d at 166 ("Weighing the evidence, viewing it with a skeptical or friendly eye, is up to the ALJ, in light of [her] observation of the witnesses."); *see also, Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1520 (No. 90-2866, 1993) (judge may rely on compliance officer's non-expert opinion testimony); *Ed Taylor Constr.*, 15 BNA OSHC 1716, 1711 (No. 88-2463, 1992) (unrebutted opinion testimony from the compliance officer may be given dispositive weight). Respondent only provided personal fall arrest systems as a means of fall protection. This was demonstrated when the workers all used a personal fall arrest system to work on the roof at the Portland worksite the day after A.L.'s fall from the roof. Further, the evidence shows that Respondent did not provide equipment to erect a safety net system or guardrail equipment at any of its worksites.

Because a personal fall arrest system was needed to protect each exposed employee, per-instance citations are supported by the cited standard. *See* ***Smalis***, 2009 WL 1067815, at *31 (per-

[78] CO Wilson had been a compliance officer since 2016 and received training at OSHA's Chicago training facility and conducted approximately 140 inspections related to fall protection hazards. (Tr. 124, 126, 397).

instance violations and penalties are appropriate for individual acts); *see generally, J. A. Jones Constr.,* 15 BNA OSHC at 2213 ("we affirm the judge's decision that individual penalties may be assessed for each instance of improper fall protection"). The undersigned affirms the eight cited violations of 29 C.F.R. § 1926.501(b) (13).

Penalty Amount

The maximum penalty for a willful violation is $132,598.[79] 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.[80] *Compass Envtl., Inc*., 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally accorded greater weight. *See J. A. Jones Constr.,* 15 BNA OSHC at 2214.

The proposed penalty for each instance is $132,598 (the total proposed for the eight cited willful items was $1,060,784. (Tr. 908-99; JX-29, p. 25). Severity was assessed as high because roofers were working at heights from twenty-one to thirty-four feet, and a fall from that height can result in death. (Tr. 304-05). Probability was assessed as greater because of the steepness of the roof increasing the likelihood of a fall. (Tr. 305). No reduction was applied for good faith due to the lack of a safety program. The penalty was increased by 10% due to the history of prior OSHA citations. (Tr. 265-66, 281, 305, 909). The OSHA Area Director exercised his discretion and allowed no reduction for size in the proposed penalty. (Tr. 901, 906; JX-30, pp. 10, 16, 23, 29, 35, 41, 47). The undersigned agrees with the assessments for gravity, good faith, and history.

As stated above, the cited standard supports a per-instance penalty. However, the undersigned finds that a 30% reduction to the maximum penalty for the size of the employer is merited. Further, the undersigned applies a 10% increase to this reduced penalty due to Respondent's significant history of OSHA citations. Thus, each cited willful item is assessed a penalty of $102,100, with a total penalty for all eight items of $816,800.

[79] The citations for the Portland inspection were issued June 11, 2019. For a willful penalty assessed after January 23, 2019, but on or before January 15, 2020, the statutory maximum of $132,598 and statutory minimum of $9,472 applies. 84 Fed. Reg. 213, 219 (Jan. 23, 2019).

[80] The Commission is not bound to follow the Secretary's penalty and owes no deference to the Secretary's proposed penalty. *Hern Iron Works, Inc.,* 16 BNA OSHC 1619, 1621-23 (No. 88-1962, 1994).

Citation 2, Items 1 through 8 are each affirmed as willful with penalty of $102,100 assessed for each violation.

Repeat Citation 3, Item 1 (Portland Inspection, Docket 19-1056)

Citation 3, Item 1 alleges a repeat violation of 29 C.F.R. § 1926.1053(b)(1), which requires:

> (b) Use. The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:
>
> (1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

The Secretary asserts that the ladder used to access the roof did not extend at least three feet above the surface. Respondent does not dispute the violation exists but does dispute the repeated characterization. (Resp. Br. 69).

Applicability & Exposure

Employees used the ladder to access the roof at the Portland worksite. (Tr. 136; GX-100, pp. 3, 5-7). The cited standard applies, and employees were exposed. *See Nuprecon*, 23 BNA OSHC at 1818 (either actual exposure or reasonably predictable access to the hazard establishes employee exposure element).

Violation of Standard

The standard requires a ladder to extend at least three feet above the landing that it provides access to. Here, photographs show the top of the ladder was less than twelve inches above the roof's edge, significantly less than three feet. (Tr. 136-37; GX-100, pp. 3, 5-7). The standard was violated.

Knowledge

With reasonable diligence, Shawn Purvis could have known the ladder used to access the roof did not extend three feet above the landing surface. Mr. Purvis was near the worksite and the ladder was in plain view on the right side of the house. Mr. Purvis stated that he had known of OSHA's three-foot ("three rung") requirement since 2006. (Tr. 137; GX-165, p. 78). Further, Mr. Purvis believed OSHA's requirement for a three-foot extension was wrong. (GX-165, pp. 58-59).

Additionally, foreman Lennie Dow used the ladder to access the roof and knew that it did not extend the required three-foot minimum. (GX-45, pp. 39-40). As discussed above, his knowledge is imputed to Respondent through his role as the foreman. *Jacobs Field.*, 25 BNA OSHC at 1218 ("The actual or constructive knowledge of a supervisor is imputable to the employer."). Knowledge of the hazardous condition is proved.

Repeat Characterization

For Citation 3, Item 1, the Secretary characterized the violation as repeat. A violation is repeated under section 17(a) of the Act, 29 U.S.C. § 666(a), if, when it is committed, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.,* 7 BNA OSHC 1061, 1063, (No. 16183, 1979) (*Potlatch*).

> The Secretary may establish a prima facie case of substantial similarity by showing that a citation against the employer for violating the same standard has become a final order, and the burden then shifts to the employer to rebut that showing. "[T]he principle factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards."

Lake Erie Constr., 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005) (citations omitted). Where the prior citation is of the same standard as the citation at issue, the Secretary establishes a prima facie case of a repeat violation. *See, e.g., FMC Corp*., 7 BNA OSHC 1419, 1422 (No. 12311, 1979). An employer may only rebut such a showing "by offering evidence that the violations occurred under disparate conditions or involved different hazards." *Id.* (explaining that "[f]actors such as the employer's attitude, the commonality of supervisory control over the violative conditions, the geographical proximity of the violations, the time lapse between violations, and the number of prior violations are relevant only to determining an appropriate penalty").

The Secretary based the repeated characterization for Citation 3, Item 1 on a citation issued to Respondent for inspection no. 1046978 (Pine Point inspection) for the identical standard, 29 C.F.R. § 1926.1053(b)(1), which became a final order on April 13, 2015. (Tr. 308-09; JX-16, p. 7; JX-29, p. 24; JX-30, p. 58). Here, the repeated characterization is supported because there was a final order of the same standard within five years prior to the Portland Citation.

Respondent asserts the citation cannot be repeated because the employer of the current inspection is not the same as the prior inspection. In particular, Respondent states the Pine Point Citation was issued to "Purvis Home Improvement, Inc."—not to Shawn Purvis. (Resp. Br. 69). Further, Respondent asserts that because the Pine Point Citation was not contested there was no finding that "Shawn Purvis was personally the employer there." (Resp. Br. 69).

This is not an issue here. As discussed above, the undersigned determined there is no separation between Shawn Purvis and the corporation with respect to business activities. Further, even when distinct legal entities exist, a repeated characterization may be merited.

The Commission's holding in *Sharon & Walter Construction, Inc,* speaks to Respondent's position. In that case, the previous citation had been issued to "Walter Jensen d/b/a S&W Construction (S&W I)." The repeated citation was issued to "Sharon & Walter Construction, Inc. (S&W II)." The Commission there held that "although S&W I and S&W II have distinct legal identities, the Secretary's application of a repeat characterization here is permissible based on S&W II's nexus with S&W I's violation history." *S&W,* 23 BNA OSHC at 1292. In making this determination, the Commission utilized a "substantial continuity" test to determine whether the "successor entity was liable for the obligations of a predecessor" entity. *Id.* at 1294. The Commission looked at three factors to determine whether there was a substantial continuity—the nature of the business, the jobs and working conditions, and continuity of the personnel who specifically control decisions related to safety and health—between S&W I and S&W II. *Id.* at 1295-96.

Here, there is clearly both a nexus and substantial continuity of the employer cited for the 2015 Pine Point inspection and the 2018 Portland inspection. The nature of business, the type of jobs, the working conditions, and the person operating the business, including control of decisions related to safety and health, were unchanged. Further, as Mr. Purvis verified, there had been no change to his business operations since 2012. Respondent's argument that a repeat citation cannot be assessed because the employers are not the same is rejected.

The repeat characterization is supported by the evidence.

Penalty

The maximum penalty for a Repeat violation is $132,598.[81] In calculating the proposed penalty, OSHA determined the severity as high because not having the ladder extended properly makes it difficult to safely transition from the ladder to the working surface, which can result in a fall resulting in injury or death. (Tr. 310). Probability was assessed as greater due to the likelihood that not having a solid grasp on the ladder during the transition leads to a fall. (Tr. 310-11). No

[81] The citations for the Portland inspection were issued June 11, 2019. For a repeated penalty assessed after January 23, 2019, but on or before January 15, 2020, the statutory maximum of $132,598 applies. 84 Fed. Reg. 213, 219 (Jan. 23, 2019).

reduction was applied for good faith due to the lack of a safety program. The penalty was increased by 10% due to the history of prior OSHA citations. (Tr. 310-11). The OSHA Area Director used his discretion and allowed no reduction for size of the employer. (Tr. 909; JX-30, pp. 58-59). The undersigned agrees with the assessments for gravity, good faith, and history. However, the undersigned does not agree with the starting point of OSHA's calculation that resulted in the proposed penalty of $29,172.

The undersigned notes that the conditions for the portable ladder violation of Repeat Citation 3, Item 1 for the Portland worksite are virtually the same as for the portable ladder violation for the Springvale worksite, discussed below. Yet, the penalty OSHA proposed for the alleged ladder violations varied significantly—$29,172 for the Portland worksite and $132,598 for the Springvale worksite. Because the conditions did not significantly vary at these two worksites and the repeat characterization for each was based on the single 2015 Pine Point Citation, the undersigned assesses the same penalty for each ladder violation. Because the citation is based on a single prior citation, the maximum penalty of $132,598 for the repeat violation is reduced by 50% to $66,299. To this reduced penalty, the undersigned applies a 30% reduction for Respondent's size, as discussed above. To this further reduced penalty, a 10% increase is added for Respondent's OSHA citation history.

Citation 3, Item 1 is affirmed as repeated with an assessed penalty of $51,050.

B. OLD ORCHARD BEACH (OOB) INSPECTION & CITATIONS

Facts for OOB Inspection

Respondent contracted with the owners of a residence in Old Orchard Beach, Maine (OOB worksite) to strip and re-roof the garage, back porch, and breezeway roofs of the home. (Tr. 1355-58, 1360; JX-27; GX-183, p. 6). The second inspection under contest here (OOB Inspection) was opened at the OOB worksite just five days after A.L.'s death from a fall at the Portland worksite. (Tr. 323-25; JX-26, pp. 1-4).

OSHA received a complaint on December 18, 2018, of roofers without fall protection at the OOB worksite where a Purvis vehicle was parked. (Tr. 323-25, 750; JX-26, pp. 1-4; GX-115). In response, CO Wilson and CO Simmons conducted an inspection of the OOB worksite. (Tr. 326-27; JX-26, pp. 1-4).

When the COs arrived, Lennie Dow was standing in the driveway of the residence and identified himself as the person in charge of the work. (Tr. 326, 341, 344, 756). The COs observed

four workers on the roof when they arrived—Forrest Daigle, Anthony Gallant, Michael Wright, and Michael Happersett.[82] (Tr. 340-41; GX-112, p. 9).

Just five days earlier, the day of A.L.'s fatal fall, foreman Dow and these same four employees had also worked at Respondent's Portland worksite without fall protection. Worksite foreman Dow had been on the garage roof stripping shingles before the COs arrived. (GX-45, p. 49). The crew had removed the prior night's snow from the garage and breezeway roofs before beginning their work. Snow remained on the roof of the rest of the home. (Tr. 326-27; GX-112).

The height from the breezeway roof to the ground was eight feet, seven inches and from the garage's eave to the ground was ten feet, four inches. (Tr. 757, 763; GX-117; GX-112, p. 13; GX-112[11A]; GX-112[17A]). The peak of the garage was fifteen feet, eight inches from the ground. (Tr. 333; GX-118, pp. 4-5). The pitch of the garage roof was 5:12 (5 in 12). (Tr. 611-16; JX-26, pp. 2, 6-7; JX-28, p. 7).

CO Wilson observed vehicles with Respondent's name at the worksite—the dump truck was in the driveway and the box truck was parked on the street in front of the residence. (Tr. GX-112, pp. 11, 20, 25). CO Simmons began taking photographs of the worksite. (Tr. 326; GX-112). The COs obtained signed interview statements from Lennie Dow and five other employees. (Tr. 328-30; JX-25). When asked for the name of their supervisor, four of the five employees responded that Mr. Dow was the supervisor. (Tr. 330; JX-25, pp. 2, 3, 5, 6).

During his interview, worksite foreman Dow stated he had thought it would be okay to proceed that day without fall protection. (JX-25, p. 1). As the COs spoke with Lennie Dow, they requested the employees use the fall arrest equipment that was in Respondent's box truck. (Tr. 764). At foreman Dow's direction, the employees set up the equipment and used the personal fall arrest equipment the remaining time the COs were onsite. (Tr. 764; GX-45, p. 27; GX-112, pp. 21-22, 24-26). Mr. Dow confirmed that as soon as the COs left the worksite, the employees removed the fall protection. (GX-45, p. 27).

A Citation and Notification of Penalty related to the Old Orchard Beach worksite (OOB Citation) was issued on June 11, 2019, for a total proposed penalty of $676,250. (JX-23). The OOB Citation alleged one serious violation for lack of eye protection and five willful violations

[82] Other workers at the site were Shayne McDonald, Anthony Purvis, and Kevin Hilsinger. (GX-184, p. 9).

for failure to provide fall protection to roofers. Respondent timely contested the OOB Citation, and the case was docketed with the Commission as No. 19-1054.

As set forth below, Citation 1, Item 1 and Citation 2, Items 1 through 5 are affirmed.

Citations for OOB Inspection

Serious Citation 1, Item 1 (OOB Inspection, Docket 19-1054)

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.102 (a)(1), which sets forth:

> (a) General. (1) The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

The Secretary alleges that Forrest Daigle was operating a pneumatic nail gun without eye protection. (JX-23, p. 6). Respondent alleges the standard does not apply because the Secretary did not establish there was a hazard that required the use of eye protection. (Resp. Br. 70).

Applicability & Violation of the Standard

When an employer is required to provide personal protective equipment upon the condition of a hazard, the Commission has set forth the following test.

> In determining whether [the employer] should have been aware of the existence of a hazard requiring it to use protective equipment, we apply the well-established principle that a broad regulation must be interpreted in the light of the conduct to which it is being applied, and external, objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation.

Andrew Catapano Enters., 17 BNA OSHC at 1783 (citations omitted). The evidence of a risk of harm from the hazard can be shown a number of ways, including lay opinion testimony. *Id.*

Respondent asserts there is no evidence the use of the nail gun presented a hazard of flying particles into the eye or a misfired nail. (Resp. Br. 70-71). As support, Respondent offers the testimony of the worker Forrest Daigle that a safety nozzle prevented the gun from misfiring and that in seven years he did not know of an instance where particles came out of a nail gun. (Tr. 1819-20).

The Commission has previously recognized that "the eye is an especially delicate organ and . . . any foreign material in the eye presents the potential for injury." *Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1060 (No. 79-4945, 1982) (citation omitted). CO Wilson described the hazards

presented to eyes during pneumatic nail gun use based on observations at worksites he had inspected and his personal use. (Tr. 341-42). CO Wilson explained that a worker can be hit in the eye if a nail gun misfires. A nail can kick back if it contacts an obstruction when attempting to drive the nail through a surface. (Tr. 343). Further, the air expelled when the nail gun is activated can force particles from the surface into the eye.[83] (Tr. 342).

Respondent asserts CO Wilson's testimony does not support the existence of a hazard here. (Resp. Br. 71-72). Further, Respondent asserts that Mr. Daigle's testimony about the use of the nail gun should be given greater weight than the CO's testimony. The cases Respondent relies on for this assertion are inapt here. In *ConAgra Flour Milling Co.,* the Commission found the Secretary's witness did not have a realistic understanding of how the operation in question, filling batteries with fluid, was performed and thus found the testimony of ConAgra's witnesses, who had first-hand experience with the process, merited greater weight. 16 BNA OSHC 1137, 1141 (No. 88-1250, 1993) (generally employees' knowledge of a specific work activity is given greater weight than a witness without first-hand experience of the work operation), *rev'd on other grounds,* 25 F.3d 653 (8th Cir. 1984). Here, the nail gun's use is not disputed, and the Secretary's witness had first-hand experience with its operation.

The other case relied on by Respondent is also inapt. *Donovan v. GMC,* 764 F.2d 32, 37 (1st Cir. 1985). In *Donovan*, the court found that the employer's recommendation to its employees to wear steel-toed shoes was not an adequate basis for an OSHA citation where the Secretary's witness had little first-hand experience with the operations of an automotive parts warehouse. *Donovan,* 764 F.2d at 37 (giving weight to the testimony of employer's witnesses that it was not the custom and practice to wear safety shoes at an automotive warehouse where Secretary's witnesses had no first-hand experience). Here, Respondent's only support is from Mr. Daigle, who had no experience with nail gun safety and was using a borrowed nail gun. (Tr. 1818).

The undersigned gives no weight to the worker's testimony here.[84] The nail gun Mr. Daigle used that day was not his own but borrowed from Respondent. (Tr. 1818). Forrest Daigle was not a safety professional and had no general, or nail gun, safety training. (Tr. 1815). His comment

[83] CO Wilson stated that he knew it was a pneumatic nail gun based on seeing them at prior worksites and his personal use. (Tr. 341).

[84] Judge Phillips' finding that an employee was exposed to eye hazards while using a pneumatic nail gun to install shingles on a roof is informative. *Sandy Woodmansee*, 24 BNA OSHC 1422, 1425 (No. 11-1851, 2012) (ALJ).

that he was not aware of any eye injuries is anecdotal and not indicative of whether a hazard exists. *See Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 588 (D.C. Cir. 1985) ("[t]he fact that the hazard which the regulation protects against" had not occurred at the employer's workplace "is no defense to the violation.").

By contrast, the undersigned gives great weight to the testimony of CO Wilson, an experienced safety professional. *See Kaspar Electroplating*, 16 BNA OSHC at 1520 (judge may rely on compliance officer's non-expert opinion testimony); *see generally, Morello Bros. Constr.,* 809 F.2d at 166 ("Weighing the evidence, viewing it with a skeptical or friendly eye, is up to the ALJ, in light of [her] observation of the witnesses."). CO Wilson has inspected numerous worksites (over 350) since he became an OSHA compliance officer in 2016. CO Wilson received four weeks of training at OSHA's Chicago training facility in various safety hazards including the use of personal protective equipment and received safety training at Maine's Labor Safety Works.[85] (Tr. 124, 126-27, 397-98). Further, CO Wilson has a bachelor's degree in occupational safety and health and held safety positions at two companies prior to joining OSHA. (Tr. 119-121, 123). CO Wilson's background and training provide the basis for finding that a reasonably prudent person believed eye protection was necessary. *See Cape & Vineyard Div. of New Bedford Gas v. OSHRC,* 512 F.2d 1148, 1152 (1st Cir. 1975) (where requirement is conditional based on existence of a hazard, an "appropriate test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against the hazard") (citation omitted).

The pneumatic nail gun was used to install shingles without the use of eye protection. The cited standard applies and was violated.

Exposure & Knowledge

CO Wilson observed and photographed Forrest Daigle using a pneumatic nail gun owned by the Respondent without wearing any kind of eye protection. (Tr. 337-38, 341, 1817-18; JX-24; JX-28; GX-112). Exposure is proved.

Respondent had actual knowledge that Mr. Daigle was not wearing eye protection through worksite foreman Lennie Dow. When CO Wilson arrived, foreman Dow was standing in the driveway with a plain view of Forrest Daigle using the nail gun to install shingles. (Tr. 341; JX-

[85] CO Wilson holds bachelor's and associate's degrees in occupational safety and health from Columbia Southern University. (Tr. 123). Prior to 2016, CO Wilson had been the safety director for a concrete construction company and a safety manager for Harbor Technologies. (Tr. 119-21).

24). As discussed above, as the worksite foreman, Dow's knowledge is imputed to Respondent. The Secretary has proved the cited standard was applicable.

Serious Characterization & Penalty

The Secretary alleged the violation was serious in nature. *Home Rubber*, 2021 WL 3929735, at *5 ("The Secretary must show that death or serious physical harm is a probable consequence *if* an accident results from the violative condition—he is not required to show that an accident is itself likely.") (emphasis in original). The Secretary asserts injury or loss of vision can occur from the lack of eye protection while using a pneumatic nail gun. (Tr. 342-43). The undersigned agrees the violation is serious.

The proposed penalty is $13,260. To calculate the proposed penalty the severity was assessed as high because of the serious injury that can result. The probability was set as greater because it is unknown what lies below the surface being nailed into. No good faith credit was applied due to the lack of a safety program. The penalty was increased by 10% due to the history of prior OSHA citations. (Tr. 342-43). The OSHA Area Director exercised his discretion and allowed no reduction to the penalty assessed for size. (Tr. 910-11; JX-24, pp. 1-2). The undersigned affirms the assessments for gravity, good faith, and history. As discussed above, the undersigned applies a 30% reduction to the proposed penalty due to the size of the employer and applies a 10% increase to this reduced penalty for Respondent's history of OSHA citations.

Citation 1, Item 1 is affirmed as a serious violation with an assessed penalty of $10,210.

Willful Citation 2, Items 1 through 5 (OOB Inspection, Docket 19-1054)

Citation 2, Items 1 through 5 allege a willful violation of 29 C.F.R. § 1926.501(b)(13), which requires, in pertinent part:

> (13) *Residential construction*. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure.

The Secretary issued the citations on a per-employee (per-instance) basis. The Secretary asserts that five employees were roofing at heights above six feet without fall protection. Respondent asserts that it was using a safety monitoring system as an alternative fall protection measure, as set forth at 29 C.F.R. § 1926.510(b)(10). (Resp. Br. 73).

Applicability

Employees were engaged in residential construction activities, roofing work, at the OOB worksite. (Tr. 345-47, 761-64; GX-112; JX-28). The distance from the roof to the ground ranged from eight feet, seven inches to fifteen feet, eight inches. (Tr. 333, 757, 763; JX-28). The standard applies.

Exposure

The Secretary issued five citations, a citation for each exposed worker on the roof at the OOB worksite, under OSHA's violation-by-violation citation policy, rather than a single citation for all exposed employees.

Item 1 asserts Forrest Daigle was exposed. Mr. Daigle was photographed at two areas, the first was the garage roof near where it intersected the breezeway roof and the second was farther up the garage roof. (Tr. 1817-18; JX-24; JX-28, p. 2; GX-112, pp. 5-8, 13). Exposure for Citation 2, Item 1 is proved.

Item 2 asserts Anthony Gallant was exposed. Mr. Gallant was photographed standing on the breezeway roof. (Tr. 348, 1785-87; GX-112, pp. 11-12; JX-24; JX-28, p. 3). He claimed it was his day to "stand around" and make sure no one was too close to the edge. (Tr. 1784). Exposure for Citation 2, Item 2 is proved.

Item 3 asserts Michael Wright was exposed. Mr. Wright was photographed kneeling on the breezeway roof. (Tr. 348; GX-112, pp. 11-12; JX-24; JX-28, p. 4). Exposure for Citation 2, Item 3 is proved.

Item 4 asserts Michael Happersett was exposed. Mr. Happersett was photographed standing on the garage roof. (Tr. 348; GX-112, pp. 13-14; JX-24, p. 22; JX-28, pp. 5-6). Exposure for Citation 2, Item 4 is proved.

Item 5 asserts Lennie Dow was exposed. Foreman Dow had been on the garage roof prior to the CO's arrival, stripping shingles without the use of fall protection. (Tr. 348-49; GX-45, p. 49; JX-25, p.1). Exposure for Citation 2, Item 5 is proved.

Knowledge

Worksite foreman Lennie Dow was at the site and saw the employees without fall protection. Further, during his interview, Mr. Dow admitted that earlier that morning he had been working on the roof without fall protection. The crew had believed it wasn't that dangerous, so no one had worn fall protection. (Tr. 327; GX-45, p. 49; JX-25, p. 2). As discussed above, as the

foreman, Dow's knowledge can be imputed to Respondent. *See Jacobs Field*, 25 BNA OSHC at 1218 (citations omitted) ("The actual or constructive knowledge of a supervisor is imputable to the employer.").

Violation of Standard

The distance of a potential fall ranged from eight feet seven inches to fifteen feet eight inches. (Tr. 332-333, 757, 763; GX-118). None of the three fall protection methods set forth in § 1926.501(b)(13) were in use at the worksite. Personal fall arrest systems were not in use. (Tr. 344-46, 349, 761; JX-25, pp. 1, 2, 5; GX-112, pp. 6-13). There were no guardrails and no safety net system at the site. (JX-26, pp. 6-7).

In his interview, foreman Dow stated he thought it would be okay to proceed without fall protection. (JX-25, p. 1). The employees[86] admitted they were not using fall protection, with the following statements: no fall protection used today . . . was not told to use fall protection (JX-25, p. 2); thought low enough, feel it's safer to not use fall protection (JX-25, p. 4); no fall protection worn on job . . . not sure if Shawn [Purvis] mentioned fall protection for this job, don't think we were told to use it (JX-25, p. 5); and Shawn [Purvis] mentioned fall protection not needed (JX-25, p. 6).

Employees were not using fall protection and were exposed to falls greater than six feet. The standard was violated.

A safety monitoring system was not used as fall protection

Respondent asserts that it was using a safety monitoring system as fall protection at the site with Anthony Gallant as the monitor. This argument fails for several reasons.

First, as set forth in 29 C.F.R. § 1926.501(b)(10)[87] a safety monitoring system alone may only be implemented on a low-slope roof that is less than 50 feet in width. 29 C.F.R.

[86] The identities in the written interview statements, other than Lennie Dow, were redacted for government informant's privilege. (JX-25).

[87] 29 C.F.R. § 1926.501(b)(10) sets forth the following:

> (10) *Roofing work on Low-slope roofs*. Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50–feet (15.25 m) or less in width (see appendix

§ 1926.501(b)(10). The undersigned credits CO Wilson's testimony that the pitch of the roof was 5:12 (5 in 12). A "low-slope roof" is defined as a "roof having a slope less than or equal to 4 in 12 (vertical to horizontal)." 29 C.F.R. §1926.500(b). Thus, the roof does not meet the definition of low-slope roof and a safety monitoring system cannot be used as fall protection.

Shawn Purvis's estimate that the pitch of the garage roof was 4:12 (4 in 12) or less is given less weight than the CO's testimony that the pitch was 5:12 (5 in 12). (Tr. 1356-57). Respondent asserts CO Wilson's use of a "roof pitch guide" template to calculate the slope of the roof was not a reliable means to accurately calculate pitch. (Resp. Br. 73). The template is a transparent plastic guide with pre-printed roof angles at various degrees of pitch. The template is visually aligned with the roofline at the site or laid over a photograph of the roof to match the roof's pitch to the angle on the template. (Tr. 271, 611-13, 615-16; JX-28, p. 7). COs routinely use this template to determine a roof's pitch. (Tr. 616, 845-46).

The undersigned credits CO Wilson's testimony of the roof's pitch. CO Wilson used a tool that is routinely used by OSHA to determine the pitch of a roof. Shawn Purvis described no method or tool he used to calculate the pitch of the roof. CO Wilson used photographs of the roof, whereas Mr. Purvis recalled his visual assessment of the roof when providing a bid to the customer. Further, the lack of any prior assertion that a safety monitoring system was in use leads the undersigned to conclude that Mr. Purvis's estimate of the roof pitch was contrived to meet the definition of a low-slope roof. Mr. Purvis's testimony on the pitch of the roof at the OOB worksite is given no weight.

Second, a safety monitoring system without a warning line system may only be used on a roof that is 50-feet or less in width. 29 C.F.R. § 1926.501(b)(10). There is no evidence in the record regarding the width of the roof at the OOB worksite. Thus, a safety monitoring system alone was not allowed.

Third, at least two of the requirements for a safety monitoring system are not met here.[88] 29 C.F.R. § 1926.502(h). A safety monitor must be on "the same walking/working surface and

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A to subpart M of this part), the use of a safety monitoring system alone [i.e., without the warning line system] is permitted.

[88] The requirements for a safety monitoring system are set forth at 29 C.F.R. § 1926.502(h).

(h) *Safety monitoring systems*. Safety monitoring systems [See § 1926.501(b)(10) and § 1926.502(k)] and their use shall comply with the following provisions: (1) The employer

within visual sighting distance of the employee being monitored." *Id.* Here, Mr. Gallant was standing on the breezeway roof and other workers, including Forrest Daigle and Michael Happersett were working on the garage roof, which was not the same walking/working surface.[89] Further, a safety monitor must be a "competent person . . . competent to recognize fall hazards." *Id.* As discussed above, none of the workers at Respondent's Portland worksite, including Mr. Gallant, had any training in fall protection hazards.[90] Mr. Gallant was not a competent person in the recognition of fall hazards. Respondent does not meet the requirements for a compliant safety monitoring system at the OOB worksite.

Finally, Respondent's assertion that it was a low-slope roof and that a safety monitoring system was being implemented as the selected fall protection method is not credible. Respondent asserts that Mr. Gallant was the safety monitor at the OOB site. (Resp. Br. 73). The sole evidence cited by Respondent to support this assertion is Mr. Gallant's testimony. (Tr. 1783-87). Mr. Gallant testified, "that was my day to stand around—I'll never forget that . . . those are the days I get to watch people work, make sure they're not too close to the edge. . .." (Tr. 1784). No other evidence in the record supports Gallant's claim he was acting as a safety monitor at the site. There was no mention of Mr. Gallant's role as a safety monitor or "spotter"[91] during any of the interviews at the OOB site. There was no mention of Mr. Gallant's role as safety monitor during foreman Dow's hearing testimony nor his February 2019 deposition. There was no mention of Mr. Gallant's role as safety monitor during Shawn Purvis's February 2019 nor his September 2020

> shall designate a competent person to monitor the safety of other employees and the employer shall ensure that the safety monitor complies with the following requirements:
> (i) The safety monitor shall be competent to recognize fall hazards;
> (ii) The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner;
> (iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored;
> (iv) The safety monitor shall be close enough to communicate orally with the employee; and
> (v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

[89] In addition, in two photos Anthony Gallant does not appear to be the safety monitor. In one, he is bent over and not looking at the roofers and in the other he does not appear to be on the roof. (GX-112, pp. 13-14).

[90] Respondent does not dispute that training was not provided. (Resp. Br. 65).

[91] CO Simmons stated that at the 2012 Westbrook inspection, she asked Shawn Purvis whether he was using a safety monitoring system on the flat roof and that he referred to it as having a "spotter." (Tr. 654).

depositions. In fact, Mr. Purvis stated he had no specific conversations with Mr. Gallant regarding fall protection. (GX-165, pp. 206-07).

There was also no mention by Mr. Purvis during his two days of hearing testimony that Anthony Gallant was a safety monitor at the OOB site or that a safety monitoring system had been in use at the OOB site. During direct examination Mr. Purvis identified Anthony Gallant in a photograph standing on the breezeway roof, but there was no testimony adduced about Mr. Gallant's activity on the roof in that photograph. (Tr. 1358; GX-112, p. 10). Because there was no other testimony or other evidence that a safety monitoring system was in use at the OOB worksite, Mr. Gallant's testimony on this point is given no weight. The undersigned finds that a safety monitoring system was not in use at the site.

Respondent's assertion that a safety monitoring system was being implemented at the OOB worksite as fall protection is rejected. This worksite did not meet the criteria for the use of a safety monitoring system alone and further, Respondent did not meet the requirements of such a system.

There was no fall protection in use at the worksite, thus the cited standard was violated.

Willful Characterization[92]

For the same reasons set forth regarding the Portland Citation, discussed above, a willful characterization is supported for the fall protection violations at the OOB worksite.

Shawn Purvis was aware of the standard's requirement, knew the workers would be working at heights over six feet, and knew they generally did not wear fall protection. Mr. Purvis had received citations for fall protection violations from OSHA at prior worksites. His general attitude demonstrated a plain indifference to fall protection safety at the worksite. Just five days before, a worker fell to his death at Respondent's Portland worksite due to a lack of fall protection, yet no efforts were made to have the employees at the OOB worksite use fall protection. As discussed above, Respondent's good faith defense fails.

A willful characterization is supported for the fall protection violations at the OOB worksite.

[92] The willful citations are also considered serious. A violation is classified as serious under section 17(k) of the Act if "there is a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). *See Home Rubber*, 2021 WL 3929735 at *5. Here, the serious harm is a fall that could result in broken bones or death.

Violation-by-Violation Penalty Assessment (Per-Instance)

Rather than issuing one citation item for the violation of 29 C.F.R. § 1926.501(b)(13), the Secretary issued five willful citation items, one for each exposed worker on the roof at the OOB worksite, under OSHA's violation-by-violation citation policy.

The cited standard allows an employer a choice of three options for fall protection: a personal fall arrest system, guardrails, or a safety net system. 29 C.F.R. § 1926.501(b)(13). Due to the configuration of the home and surrounding environment a safety net system could not be installed at this worksite. (JX-26, p. 7; GX-112, pp. 14, 18—displaying proximity of trees and shrubs; *see* Tr. 302-03, 581). Components to assemble a guardrail system were not available at the site. (Tr. JX-26, pp. 6-7). Further, the worksite job was re-roofing. During the initial installation of a guardrail system, use of a personal fall arrest system would be required. During re-roofing, as the old roof was removed and the new roof installed, the guardrail system frequently would have to be repositioned. (Tr. 302-03; JX-26, p. 6). As demonstrated by the donning of the personal fall arrest systems while the COs were at the site, a personal fall arrest system was provided for use at the site. (Tr. 764-65; JX-26, pp. 6-7; GX-112, pp. 21, 22, 24). Respondent did not provide equipment to erect a safety net system or guardrail equipment. (JX-26, p. 7).

As discussed above, the cited standard supports citing on a per-instance basis. The duty set forth under the standard is to provide a fall protection method to protect each employee working at heights above six feet. *See generally, J. A. Jones Constr.,* 15 BNA OSHC at 2213 ("we affirm the judge's decision that individual penalties may be assessed for each instance of improper fall protection"). A per-instance penalty may be assessed here. The undersigned affirms the five cited violations of 29 C.F.R. § 1926.501(b) (13).

Penalty

The maximum penalty for a willful violation is $132,598.[93] The total proposed penalty for the five cited willful items was $662,990 ($132,598 per item). (Tr. 912; JX-23, p. 17; JX-24, pp. 5, 11, 17, 23, 29). Severity was assessed as high because roofers were working at heights between eight to fifteen feet and a fall from that height can result in serious injuries or death. (Tr. 349; JX-24, p. 5). Probability was assessed as greater because the roofers had been on the roof for about 1

[93] The citations for the OOB inspection were issued June 11, 2019. For a willful penalty assessed after January 23, 2019, but on or before January 15, 2020, the statutory maximum of $132,598 and statutory minimum of $9,472 applies. 84 Fed. Reg. 213, 219 (Jan. 23, 2019).

hour and 45 minutes and the roof would have been wet after the snow removal. (Tr. 349-50; JX-24, p. 5). No reduction was applied for good faith due to the lack of a safety program. The penalty was increased by 10% due to the history of prior OSHA citations. (Tr. 350, 911-12). The OSHA Area Director exercised his discretion and allowed no reduction for size in the proposed penalty. (Tr. 911-12; JX-24, pp. 4-5). The undersigned affirms the assessments for gravity, good faith, and history.

As stated above, the cited standard supports a per-instance penalty. However, the undersigned finds that a 30% reduction to the maximum penalty for Respondent's size is merited. Further, the undersigned applies a 10% increase to this reduced penalty due to Respondent's significant history of OSHA citations. Thus, each cited willful item is assessed a penalty of $102,100, with a total for all five items of $510,500.

Citation 2, Items 1 through 5 are each affirmed as willful with penalty of $102,100 for each violation.

C. SPRINGVALE INSPECTION & CITATIONS

Facts for the Springvale Inspection

The third inspection under this consolidated case (Springvale inspection) was opened in response to a complaint received by OSHA of roofers working without fall protection at a residence in Springvale, Maine.[94] (Tr. 350-52; GX-167).

The residence was a two-story home with a one-story sunroom attached on its right side. (GX-130; GX-137; GX-138). Shawn Purvis had visited the Springvale worksite a few weeks before to provide an estimate to the homeowner for the replacement of the home's main roof and attached sunroom roof. (Tr. 1359-60, 1407, 1409, 1419; GX-130).

A neighbor called OSHA on May 23, 2019, with a complaint that she saw workers on a nearby roof without any apparent fall protection. (Tr. 481-82). The neighbor became aware of the roofers because they were talking loudly and there was a lot of cursing. (Tr. 481). She recognized the company's name on the truck from the news and saw that the workers were in the

[94] On April 5, 2019, approximately six weeks before the Springvale inspection, Shawn D. Purvis was indicted on two counts of manslaughter under Maine's criminal code concerning the December 13, 2018 death of A.L. at the Portland worksite. After delays due to the COVID-19 pandemic, the criminal case in Cumberland County Unified Criminal Docket Court, Portland, Maine, *State of Maine v. Shawn D. Purvis*, Docket No. CR-19-1824, was set for trial beginning November 29, 2021. According to Respondent, Mr. Purvis was subsequently acquitted by a jury of all charges. Resp. Br. 26 n.8.

process of re-roofing the house. (Tr. 481-82; GX-130; GX-132). The neighbor saw that the workers were not using fall protection because "most of them didn't even have a shirt on." (Tr. 482-83).

The neighbor observed a man standing on the sunroom roof, which appeared to be almost flat. (Tr. 493-95; GX-129, GX-130, GX-131). She saw two other workers standing on a ladder jack scaffold installing shingles on the right side of the steep-pitched main roof of the house. (Tr. 495; GX-129, GX-130, GX-131). She also observed one individual that appeared to direct the work because workers were asking him questions. (Tr. 484-85).

Prior to going to the worksite on May 23, 2019, OSHA requested an agent from the Department of Labor's Office of the Inspector General (OIG) accompany them during the inspection. (Tr. 963). Special Agent (SA) Sean P. Roberts from the OIG's office attended the inspection due to concern for the safety of the OSHA inspectors. (Tr. 963)

SA Roberts arrived at the Springvale worksite at about 12:45 p.m. on May 23, 2019, and parked across the street. (Tr. 963-64). He observed roofing work in progress and trucks with the Purvis name on the side. (Tr. 963-64). From his vehicle, SA Roberts observed and photographed roofers working without fall protection. (Tr. 964-65; GX-139). SA Roberts then briefly left the site to meet OSHA CO Bill Ferguson and the Springvale police at a location about a mile away; he then returned to the worksite along with CO Ferguson and the police. (Tr. 965-66).

When they arrived at the Springvale site, someone yelled, "the feds are here." (Tr. 966). SA Roberts observed Lennie Dow directing the employees on the roof to come down from the roof. (Tr. 966, 971-72). The neighbor noticed that when the police and OSHA arrived "some of his employees ran" down to the end of the street. (Tr. 488). The neighbor continued observing and taking photographs, which she later provided to OSHA. (Tr. 486-87; GX-129 through GX-136).

SA Roberts walked around with CO Ferguson and was present when Ferguson took photographs and spoke with worksite foreman Dow.[95] (Tr. 966-69; GX-137, pp. 1-6, 8-16). SA Roberts also observed foreman Dow asking the employees to put on the personal fall arrest gear and set up anchor points before they returned to the roof to work as CO Ferguson inspected the

[95] As discussed above, Lennie Dow was the foreman at this worksite.

worksite. (Tr. 972). After the police and OSHA left, the neighbor saw the employees go back onto the roof without fall protection equipment. (Tr. 488).

The pitch of the main roof was 11:12 (11 in 12). (JX-38, pp. 4, 7). The distance from the ground to the roof ranged from just over ten feet at the roof's eaves to twenty-one feet, four inches at the top of the roof's peak.[96] (Tr. 357, 377; GX-138, pp. 7, 9-11, 14-15; JX-38, pp. 4, 7).

Ladder jack scaffolds[97] were erected on both sides of the house. On the home's left side, a ladder jack scaffold was erected along the eave from the back to the front of the home. (Tr. 391, 393-94; GX-137, pp. 9-10). The power lines from the street to the residence were attached on the left side of the house. (Tr. 390-91, 393-94; GX-137, p. 9; GX-138, pp. 3-6). The power lines to the residence were 120/240 volts and were neither deenergized nor covered. (Tr. 358, 504-505; GX-138, p. 18). The Respondent did not contact Central Main Power (CMP) to have the power lines deenergized or covered. (Tr. 370-71, 504-05; GX-183, p. 17).

The power lines were attached on the left side of the house just a few inches below the eave near the left, front corner of the home. (GX-137, p. 9; GX-138, pp. 3-6). The plank of the ladder jack scaffold and the ladder supporting the scaffold were placed near the location where the power lines attach to the home. (GX-137, p. 9; GX-138, pp. 3-6). A worker was standing on the other end of the ladder jack scaffold's plank, near the back of the house.[98] (GX-137, pp. 9-10). OSHA[99] alleged power lines were less than twelve inches from a ladder that supported the ladder jack scaffold's plank. (Tr. 393-94; JX-38, p. 3; GX-138, pp. 3-6). Photographs show the distance between the ladder supporting the scaffold and the power line is less than the distance between the ladder rungs, which is twelve inches. (Tr. 134, 137; GX-137, pp. 9)

On the right side of the house, two roof bracket scaffolds[100] were attached directly to the main roof. (Tr. 1411-12; RX-26; GX-133). One was about a foot above the bottom edge of the

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[96] A few weeks later, on June 28, 2019, CO Wilson returned to the Springvale residence for additional photographs and measurements. (Tr. 354-55; GX-138). CO Wilson took over the investigation after CO Ferguson no longer worked for OSHA. (Tr. 353).

[97] A ladder jack scaffold is defined as a "supported scaffold consisting of a platform resting on brackets attached to ladders." 29 C.F.R. § 1926.450.

[98] The worker was not identified in the record.

[99] CO Ferguson, who was at the worksite on May 23, 2019, did not testify. At the time of the hearing, CO Ferguson no longer worked for OSHA. (Tr. 353).

[100] A roof bracket scaffold is defined as "a rooftop supported scaffold consisting of a platform resting on angular-shaped supports." 29 C.F.R. § 1926.450.

roof and the other was about halfway up to the peak. (Tr. 1411-13; RX-26; GX-133). A ladder jack scaffold created a platform below the bottom edge of the main roof's right side and above the attached sunroom roof. (Tr. 1411-15; RX-26; GX-133).

Three employees were photographed on the main roof's right side working without fall protection. (Tr. 374, 482, 484, 963-64, 1429, 1825-26, 1846-47; GX-129 through GX-136; GX-139; RX-26). Worksite foreman Lennie Dow stood on the ladder jack scaffold. (Tr. 1429; GX-130). Ryver Daigle stood near the edge of the sunroom roof. (Tr. 1846-47; GX-130). In another photo, Forrest Daigle was standing on the sunroom roof, while Ryver Daigle stood on the ladder jack scaffold. (Tr. 1825-26; GX-133). Michael Happersett was photographed working on the ground. (Tr. 1637-38; GX-137, p. 11). On December 13, 2018, the day of A.L.'s fatal fall, foreman Dow and the three named employees, Forrest Daigle, Ryver Daigle, and Michael Happersett, had also worked on Respondent's Portland worksite, without fall protection.

A ladder was used to access the sunroom roof from the ground. (Tr. 381-82; JX-38, p. 14). The top of the ladder extended just a few inches above the surface of the sunroom roof. (GX-137, p. 14). The eave of the sunroom roof was ten feet two inches above the ground. (Tr. 378-79; GX-138, pp. 8-11; JX-38).

A Citation and Notification of Penalty related to the Springvale worksite (Springvale Citation) was issued on November 19, 2019, for a total proposed penalty of $278,456. (JX-35). The Springvale Citation alleged one serious violation for failure to have a scaffold greater than the minimum distance from an energized power line, one willful violation for failure to provide fall protection, and one repeat violation for improper use of a ladder. Respondent timely contested the Springvale Citation, and the case was docketed with the Commission as No. 19-1905.

As set forth below, Citation 1, Item 1, Citation 2, Item 1, and Citation 3, Item 1 are affirmed.

Citations for Springvale Inspection

Serious Citation 1, Item 1 (Springvale Inspection, Docket No. 19-1905)

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.451(f)(6), which requires in pertinent part:

> (6) The clearance between scaffolds and power lines shall be as follows: Scaffolds shall not be erected, used, dismantled, altered, or moved such that they or any conductive material handled on them might come closer to exposed and energized power lines than as follows: . . . Insulated lines voltage, Less than 300 volts.

> Minimum distance, 3 feet. . . . Uninsulated lines voltage, Less than 50 kv, Minimum distance, 10 feet.

29 C.F.R. § 1926.451(f)(6).

The Secretary alleges that the ladder jack scaffolding platform was less than twelve inches away from exposed power lines that were not deenergized or protected. Respondent asserts the Secretary has not proved the lines were energized nor that the distance was less than three feet. (Resp. Br. 74-75).

Applicability & Employee Exposure

A ladder jack scaffold was erected along the roof's eave on the home's left side where energized power lines attached to the home. (GX-137, pp. 9-10). The standard applies.

Employee exposure is established "either by showing actual exposure *or* that access to the hazard was reasonably predictable." *Nuprecon,* 23 BNA OSHC at 1818. Ladder jack scaffolds were used at the Springvale worksite as working platforms for the roofers. (Tr. 1228-29). A ladder jack scaffold was erected front-to-back along the main roof's eave on the left side. (Tr. 391, 393-94; GX-137, pp. 9-10). Energized power lines were attached to the left side of the home, just below the roof's eave near the home's front corner. (Tr. 390; GX-138, pp. 3-6). A ridge hook ladder was on the left side of the roof just above the area where the electrical lines were near the plank of the ladder jack scaffold. The ridge hook ladder above the ladder jack scaffold indicates a worker had been or would be working in the area. Further, a worker was standing near the back of the home on the plank of the ladder jack scaffold. (GX-137, pp. 9-10). Employee exposure is proved.

Knowledge

The Secretary must show that the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition. *See Peacock Eng'g*, 26 BNA OSHC at 1592 (citations omitted). Shawn Purvis had previously visited the worksite to provide an estimate for roofing the main house roof and attached sunroom. (Tr. 1359-60, 1407, 1409, 1419; GX-130). To provide the estimate, Purvis walked around the home and saw that electrical lines attached to the home. (Tr. 1423-24). Further, Purvis knew that ladder jack scaffolds would be erected along the roof's eaves to provide work platforms for employees. (Tr. 1228-29). Thus, with reasonable diligence, Mr. Purvis could have known a scaffold would be erected near the area where the electrical lines attached to the residence. Knowledge is proved.

Violation of Standard

CMP provided electricity to the residence. (Tr. 370). The CMP Health and Safety Manager's testimony that the power lines to the residence were 120/240 volts and were neither deenergized nor covered on May 23, 2019, is given great weight. (Tr. 504-506). Further, Respondent admitted it did not contact CMP to have the power lines de-energized or covered. (Tr. 370-71, 504-06; GX-183, p. 17). Respondent's assertion the lines were covered or de-energized is rejected.

The power lines were attached to the home just below the left side roof eave near the home's front, left corner. (GX-137, p. 9; GX-138, pp. 3-6). The ladder jack scaffold was erected along the home's left side roof eave from front to back. (Tr. 391, 393-94; GX-137, pp. 9-10). The OSHA CO observed and estimated the distance from the ladder jack scaffold to the energized power line was less than twelve inches. (JX-38, p. 3). The distance from the scaffold's support ladder to the power line is less than the distance between ladder rungs, which is twelve inches. (Tr. 134, 137; GX-137, p. 9). The scaffold was closer than the minimum required distance of three feet for insulated lines and thus also less than the distance of ten feet for uninsulated lines.[101] The standard was violated.

Serious Characterization & Penalty

The Secretary alleged the violation was serious in nature. *Home Rubber*, 2021 WL 3929735, at *5 ("The Secretary must show that death or serious physical harm is a probable consequence *if* an accident results from the violative condition—he is not required to show that an accident is itself likely.") (emphasis in original).

Here, the scaffold was less than the minimum required distance of three feet from the energized lines. Contact with the energized lines could result in injuries that include electrical shock, electrical burns, or electrocution. (Tr. 372-73; JX-38, pp. 1-2). Thus, a serious characterization is merited for Citation 1, Item 1.

The proposed penalty is $13,260. In calculating the proposed penalty OSHA assessed the severity as high because contact with the power line could result in serious injuries from electrocution and a resulting fall. The probability was set as greater due to the close distance from the power line to the scaffold. No good faith credit was applied because there was no safety

[101] No evidence was adduced as to whether the lines that attached to the home were insulated or uninsulated.

program. The penalty was increased by 10% due to the history of prior OSHA citations. (Tr. 372-73). The OSHA Area Director exercised his discretion and allowed no reduction to the proposed penalty for employer size. (Tr. 900-01; JX-38, pp. 1-2). The undersigned affirms the assessments for gravity, good faith, and history. As discussed above, the undersigned applies a 30% reduction to the proposed penalty due to the size of the employer and applies a 10% percent increase to this reduced penalty for Respondent's OSHA citation history.

Citation 1, Item 1 is affirmed as a serious violation with an assessed penalty of $10,210.

Willful Citation 2, Item 1 (Springvale Inspection, Docket No. 19-1905)

Citation 2, Item 1 alleges a willful violation of 29 C.F.R. § 1926.501(b)(13), which requires, in pertinent part:

> (13) *Residential construction*. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure.

The Secretary asserts that employees working on a roof with an 11/12 (11 in 12) pitch were not protected from fall hazards. Three employees were exposed to a fall of twenty-one feet, four inches on May 23, 2019. Respondent does not dispute there was no fall protection in use at the Springvale site; however, Respondent asserts a willful characterization is not warranted. (Resp. Br. 75-76).

Applicability, Exposure, Violation of the Standard, & Knowledge

Employees were engaged in residential construction activities, roofing work, at the Springvale worksite. (Tr. 482-83, 964-65; GX-129 through 136; GX-139). The cited standard is applicable.

Both the neighbor and Special Agent Roberts observed employees on the roof without fall protection. (Tr. 482-483; 964-65). Exposure to the cited violation is proved.

The distance of a fall from the roof ranged from ten feet to twenty-one feet. (Tr. 357, 377; GX-138, pp. 7, 9-11, 14-15; JX-38, pp. 4, 7). Respondent concedes there was no fall protection in use at the site. (Resp. Br. 75-76). Violation of the standard is proved.

As discussed above, Lennie Dow was the foreman at the worksite. He was on the roof with the others who were working without fall protection in plain view. Foreman Dow's knowledge is imputed to Respondent. *See Jacobs Field*, 25 BNA OSHC at 1218 (citations omitted) ("The actual or constructive knowledge of a supervisor is imputable to the employer."). Knowledge is proved.

Willful Characterization[102]

For the same reasons set forth in the discussion of the Portland Citation above, a willful characterization is supported for the fall protection violation at the Springvale worksite.

Shawn Purvis was aware of the standard's requirements, knew that employees would be working at heights over six feet, and knew they generally did not wear fall protection. Mr. Purvis had received many citations from OSHA at prior worksites and his general attitude demonstrated a plain indifference to fall protection safety at the worksite. Further, Mr. Purvis knew that just a few months before, a roofer working without fall protection fell to his death at Respondent's Portland worksite, yet Mr. Purvis made no effort to ensure the employees at the Springvale worksite used fall protection. As discussed above, Respondent's assertion of a good faith defense against willfulness fails.

The willful characterization is supported for the fall protection violation at the Springvale worksite.

Penalty

The maximum penalty for a willful violation is $132,598.[103] The proposed penalty was $132,598. Severity was assessed as high because roofers were working at heights between ten feet to twenty-one feet and a fall from that height can result in serious injuries or death. (Tr. 377; JX-38). Probability was assessed as greater because of the steep pitch of the roof. (Tr. 377; JX-38). No reduction was applied for good faith due to the lack of a safety program. The penalty was increased by 10% due to the history of prior OSHA citations for violations of the fall protection standard.–(Tr. 378). The OSHA Area Director exercised his discretion and allowed no reduction to the penalty assessed for size. (Tr. 912-13; JX-38, pp. 1-2, 5, 12-13). The undersigned affirms the assessments for gravity, good faith, and history. However, the undersigned applies a 30% reduction to the proposed maximum penalty due to the size of the employer and applies a 10% percent increase to this reduced penalty because of Respondent's OSHA citation history.

Citation 2, Item 1 is affirmed as a willful violation with a penalty of $102,100.

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[102] The willful citation is also serious. A violation is classified as serious under section 17(k) of the Act if "there is a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k).

[103] The citations for the Springvale inspection were issued November 19, 2019. For a willful penalty assessed after January 23, 2019, but on or before January 15, 2020, the statutory maximum of $132,598 and statutory minimum of $9,472 applies. 84 Fed. Reg. 213, 219 (Jan. 23, 2019).

Repeat Citation 3, Item 1 (Springvale Inspection, Docket No. 19-1905)

Citation 3, Item 1 alleges a repeat violation of 29 C.F.R. § 1926.1053(b)(1), which requires, in pertinent part:

> (1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access . . .

The Secretary asserts that the ladder used to access the roof did not extend at least three feet above the surface, which exposed employees to a fall of ten feet, two inches due to the lack of safe transition from ladder to roof surface. Respondent does not dispute the violation exists but does dispute the repeated characterization. (Resp. Br. 76).

Applicability, Exposure, Violation of the Standard & Knowledge

The employees used the ladder to access the sunroom roof. (GX-137, pp. 1, 5, 13). The cited standard applies, and employees were exposed.

The distance from the sunroom roof to the ground was ten feet, two inches. (Tr. 378-79; GX-138, p. 11). The top of the ladder was just a few inches above the sunroom roof's surface, well below the three-foot (three-rung) requirement. (Tr. 378-79; GX-137, pp. 1, 5, 13). The cited standard was violated.

As discussed above, Lennie Dow was the foreman at the site and knew the ladder did not extend three feet above the roof's edge. Foreman Dow's knowledge is imputed to Respondent. Knowledge is proved.

Repeat Characterization & Penalty

Citation 3, Item 1 of the Springvale inspection is characterized as repeat. As set forth in the discussion above for the Portland Citation, the repeated characterization is based on the prior citation issued to Respondent for inspection no. 1046978 (Pine Point inspection) for the identical standard, 29 C.F.R. § 1926.1053(b)(1), that became a final order on April 13, 2015. (Tr. 308-09; JX-16, p. 7; JX-29, p. 24; JX-30, p. 58). Here, the repeated characterization is supported because there was a final order of the same standard within five years prior to the November 19, 2019 Springvale Citation.

The proposed penalty for this citation item is $132,598. OSHA assessed the severity as high because a fall from ten feet, two inches while transitioning from ladder to roof could result in serious injury. (Tr. 381-82). Probability was assessed as greater because the ladder was the primary access point to the roof. (Tr. 382). No reduction was applied for good faith due to the

lack of a safety program. (Tr. 382). The penalty was increased by 10% due to the history of prior OSHA citations. (Tr. 382). The OSHA Area Director exercised his discretion and allowed no reduction to the penalty assessed for size. (Tr. 912; JX-38, pp. 1-2, 5, 12-13). The undersigned agrees with the assessments for gravity, good faith, and history.

The maximum penalty for a repeated violation is $132,598.[104] As discussed above, the undersigned determined the penalty for this violation should be consistent with the penalty assessed for the repeat violation of 29 C.F.R. § 1926.1053(b)(1) at the Portland worksite. Because the repeated characterization is based on just one prior violation of this standard, the maximum penalty of $132,598 for the repeat violation is reduced by 50% to $66,299. To this reduced penalty, the undersigned applies a 30% reduction for Respondent's size, as discussed above. To this further reduced penalty, a 10% increase is added for Respondent's OSHA citation history. Citation 3, Item 1 is affirmed as repeated with a penalty of $51,050.

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:

Docket No. 19-1056 (Portland Inspection)

1. Citation 1, Item 1 alleging a Serious violation of 29 C.F.R. § 1926.451(f)(6) is affirmed for Docket No. 19-1056 with a penalty of $10,210.

2. Citation 1, Item 2, alleging a Serious violation of 29 C.F.R. § 1926.503(a)(1) is affirmed for Docket No. 19-1056 with a penalty of $10,210.

[104] The citations for the Springvale Inspection were issued November 19, 2019. For a repeated penalty assessed after January 23, 2019, but on or before January 15, 2020, the statutory maximum of $132,598 applies. 84 Fed. Reg. 213, 219 (Jan. 23, 2019).

3. Citation 2, Item 1, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1056 with a penalty of $102,100.

4. Citation 2, Item 2, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1056 with a penalty of $102,100.

5. Citation 2, Item 3, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1056 with a penalty of $102,100.

6. Citation 2, Item 4, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1056 with a penalty of $102,100.

7. Citation 2, Item 5, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1056 with a penalty of $102,100.

8. Citation 2, Item 6, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1056 with a penalty of $102,100.

9. Citation 2, Item 7, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1056 with a penalty of $102,100.

10. Citation 2, Item 8, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1056 with a penalty of $102,100.

11. Citation 3, Item 1, alleging a Repeat violation of 29 C.F.R. § 1926.1053(b)(1) is affirmed for Docket No. 19-1056 with a penalty of $51,050.

Docket No.19-1054 (Old Orchard Beach Inspection)

12. Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1926.102(a)(1) is affirmed for Docket No. 19-1054 with a penalty of $10,210.

13. Citation 2, Item 1, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1054 with a penalty of $102,100.

14. Citation 2, Item 2, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1054 with a penalty of $102,100.

15. Citation 2, Item 3, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1054 with a penalty of $102,100.

16. Citation 2, Item 4, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1054 with a penalty of $102,100.

17. Citation 2, Item 5, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1054 with a penalty of $102,100.

Docket 19-1905 (Springvale Inspection)

18. Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1926.451(f)(6) is affirmed for Docket No. 19-1905 with a penalty of $10,210.

19. Citation 2, Item 1, alleging a Willful violation of 29 C.F.R. § 1926.501(b)(13) is affirmed for Docket No. 19-1905 with a penalty of $102,100.

20. Citation 3, Item 1, alleging a Repeat violation of 29 C.F.R. § 1926.1053(b)(1) is affirmed for Docket No. 19-1905 with a penalty of $51,050.

SO ORDERED.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC

DATE: May 30, 2023

Washington, D.C.