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. FRAMING SPECIALIST, INC., Respondent.	OSHRC DOCKET Nos. 20-0330 & 20-0626

Appearances:

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For the Complainant

Simeon Morales, *pro se*
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For the Respondent

Before: Keith E. Bell, 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 (the Act). The two case docket numbers in the caption refer to separate inspection

events at different worksites, both of which cite Respondent, Framing Specialist, Inc. as the employer.

A hearing for these cases was held on August 24, 2021, virtually using the WebEx online platform as provided and operated by the court reporter (Heritage Reporting Corporation).[1] Respondent/owner, Simeon Morales speaks Spanish and alerted the Court, in advance, that he needed the assistance of an interpreter for the hearing. A Spanish interpreter was provided for Mr. Morales at the Commission's expense.[2] The parties were given an opportunity to file post-hearing briefs; however, only the Secretary filed a brief. For the reasons that follow, the Citations in both cases are **AFFIRMED,** and the proposed penalties are assessed.

Jurisdiction

The record reveals that Respondent was engaged in residential construction work and the Court finds that such activities are considered "business affecting commerce". *See Clarence M. Jones d/b/a C. Jones Co.,* 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983) (holding that there is an interstate market in construction materials and services and therefore construction work affects interstate commerce).[3]

At the hearing, Respondent attempted to dispute coverage under the Act with an unsupported claim that he was not an employer because he had no employees at the worksites at issue in these cases.[4] It is established, by regulation, that an "employer" is covered by the Act if

[1] The hearing was held remotely on motion of the Secretary and with the consent of Respondent, Simeon Morales.
[2] To ensure access for persons with limited English proficiency, the Commission follows its language access plan. This plan was developed and implemented in compliance with Executive Order 13166 and provides language interpretation and translation services.
[3] The Court concludes that admissions nos. 1-4 in the Secretary's exhibit marked CX-1 must have been cut and pasted from another document/case because they attempt to establish that Respondent was engaged in interstate commerce outside of New York; however, it is important to note that, according to the evidence of record, Respondent is a company headquartered in New Jersey (not New York) that did business locally in New Jersey.
[4] It is important to note that Respondent did not raise this "coverage" defense in his answer, nor did he raise it at any time prior to the hearing. Also, the Secretary did not have an opportunity to explore this defense in discovery because Respondent did not participate in discovery.

it employs one or more employees. 29 C.F.R. § 1975.4(a).

The evidence adduced at the hearing establishes that Respondent employed at least one or more employees at each of the cited workplaces. For the December 10, 2019, inspection conducted at 240 Wayne Ave. in Cliffside, New Jersey (Wayne Ave. worksite) cited in case docket no. 20-0330, the Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) determined that a gentleman named Mr. Gomez was the foreman in charge of the worksite and that he worked for Respondent, Simeon Morales. Tr. 54, 56. Mr. Gomez called Mr. Morales on the phone whereupon he gave the CO permission to proceed with an inspection of the worksite.[5] Tr. 61.

For the inspection conducted on February 20, 2020, at 467 9th St. in Palisades Park, New Jersey (9th St. worksite) cited in case docket no. 20-0626, the CO determined that Mr. Gomez was the foreman in charge of this worksite and Mr. Morales was his employer. Tr. 128-29. During the opening conference, Mr. Gomez called Mr. Morales on the phone so the latter could speak directly to the CO.[6] Tr. 132. The CO spoke again to Mr. Morales by phone for the closing conference. Tr. 133.

Importantly, even assuming the Secretary had not adduced evidence that Respondent had employees at each worksite, the Court's Order Granting the Secretary's Motion for Sanctions foreclosed Respondent's ability to raise a "coverage" defense. The Secretary's Requests for Admissions deemed admitted by the Court's Order explicitly establish that, at all relevant times, Respondent had employees. CX-1[7].

The record establishes that at all times relevant to this case, Respondent was an "employer"

[5] The CO spoke to Mr. Morales in Spanish because it is Mr. Morales' primary language. Tr. 57.
[6] CO Zapata is fluent in Spanish ,which is Mr. Morales' primary language. Tr. 126.
[7] CX denotes Complainant's exhibit.

engaged in a "business affecting commerce" within the meaning of section 3(5) of the Act, 29 U.S.C. § 625(5).

Factual Background

Respondent, Framing Specialist, Inc., is a company that operates in New Jersey and is engaged in framing for residential construction. Tr. 28, 59, 127.

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On December 19, 2019, CO Stuart Sydenstricker inspected the worksite located at 240 Wayne Ave. in Clifford, New Jersey. Tr. 53-54. He was driving by the worksite and stopped to see if there were any fall hazards present as part of OSHA's local emphasis program. Tr. 54. He observed that Respondent was performing framework at this residential construction worksite. Tr. 54-55. It is admitted that on December 10, 2019, the Wayne Ave. worksite included a structure with two levels that were located higher than ground level. The first floor of the Wayne Ave. worksite structure was located approximately eight feet above the ground. The second floor was located approximately twenty feet above the ground. CX-1, CX-6a (photo).

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On February 20, 2020, CO Yimy Zapata came into contact with Respondent at its worksite located at 467 9th Street in Palisades Park, New Jersey. Tr. 126. CO Zapata conducted an inspection of the worksite because he observed that workers framing a roof on this residential construction project were exposed to a fall hazard. Tr. 127. It is admitted that on February 20, 2020, the 9th Street worksite included a structure with a roof that was located approximately twenty-five feet above ground. CX-1, CX-14 (photo).

Admitted Facts (CX-1)[8]

1. During the year 2019, Respondent owned and used equipment manufactured outside of the State of New York.

2. During the year 2020, Respondent owned and used equipment manufactured outside of the State of New York.

3. During the year 2019, Respondent received goods, materials merchandise, and/or equipment that were manufactured outside of the State of New York.

4. During the year 2020 Respondent received goods, materials, merchandise, and/or equipment that were manufactured outside of the State of New York.

5. On December 10, 2019, at least one of Respondent's employees at the Wayne Avenue Worksite did not wear eye protection while cutting wood with a saw or using a nail gun.

6. On December 10, 2019, at the Wayne Avenue Worksite, at least one of Respondent's employees used a portable ladder to access an upper landing surface.

7. On December 10, 2019, at the Wayne Avenue Worksite, the portable ladder that Respondent's employees used to access an upper landing surface extended approximately two feet above the upper landing surface.

8. On December 10, 2019, at the Wayne Avenue Worksite, the portable ladder that Respondent's employees used to access an upper landing surface was not secured at its top to a rigid support.

9. On December 10, 2019, at the Wayne Avenue Worksite, Respondent did not provide a grasping device to assist employees in mounting and dismounting the portable ladder that Respondent's employees used to access an upper landing surface.

10. On December 10, 2019, at the Wayne Avenue Worksite, at least one of Respondent's employees used the top step or top of a stepladder as a step.

11. On December 10, 2019, the Wayne Avenue Worksite included a structure with two levels that were located higher than ground level.

12. On December 10, 2019, one level of the structure at the Wayne Avenue Worksite was located approximately eight feet above the ground (the "first floor").

13. On December 10, 2019, the other level of the structure at the Wayne Avenue Worksite was located approximately twenty feet above the ground (the "second floor").

[8] These facts were deemed admitted by Order of the Court on July 13, 2021, in an Order that granted the Secretary's Motion for Sanctions. The Motion for Sanctions was filed and granted based on Respondent's failure to comply with the Court's Order that granted the Secretary's Motion to Compel.

14. On December 10, 2019, at the Wayne Avenue Worksite, Respondent's employees did not wear personal fall arrest systems while performing work on the first or second floors of the structure.

15. On December 10, 2019, Respondent did not provide any type of fall protection at the Wayne Avenue Worksite.

16. On February 20, 2020, the 9th Street Worksite included a structure with a roof that was located approximately twenty-five feet above the ground.

17. On February 20, 2020, at the 9th Street Worksite, Respondent's employees who were working on the roof of the structure did not connect the harnesses of the personal fall arrest systems they were wearing to an anchorage.

18. On February 20, 2020, Respondent did not provide any type of fall protection aside from the harnesses which employees were wearing.

19. During the two years prior to February 20, 2020, Respondent did not have any written fall protection plan.

20. Respondent did not submit a notice of contest in response to the citations which were issued to Respondent on December 6, 2018, as a result of OSHA inspection number 1330224.

Secretary's Burden of Proof

The Secretary has the burden of establishing that the employer violated the cited standard. To prove a violation of an OSHA safety or health standard promulgated under § 5(a)(2) of the Act, the Secretary must establish, by a preponderance of the evidence, that: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharm. Prods*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 691 (1st Cir. 1982). A preponderance of the evidence is "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Astra Pharm*., 9 BNA OSHC at 2131, n. 17.

Discussion

Docket No. 20-0330

Citation 1; Item 1(Serious)

The Secretary alleges a violation of 29 C.F.R. § 1926.102(a)(1), which provides:

> 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.

Specifically, the Secretary alleges that:

> (a) Interior of Building – Street Level Basement: Employees were exposed to eye injury while engaged in framing activities without the use of eye or face protection, on or about 12/10/19.

Applicability

The CO recommended this citation because he observed workers cutting wood with circular saws and nailing with pneumatic nail guns all without face or eye protection. Tr. 81. Part 1926, where the standard is codified within Title 29 of the Code of Federal Regulations, is titled, "Safety and Health Regulations for Construction". Here, Respondent was engaged in framing for residential housing construction. Tr. 28. Also, the plain language of the cited standard requires the use of face or eye protection from, among other things, hazards from flying particles. 29 C.F.R. § 1926.102(a)(1). The standard applies.

Standard Violated

It is admitted that on December 10, 2019, at least one of Respondent's employees at the Wayne Ave. worksite did not wear eye protection while cutting wood with a saw or using a nail gun. CX-1. The CO testified that wood cutting with circular saws produces particles that fly around and can get into your eye and cause injury. He further testified that a nail gun can ricochet on a hard surface, fly into your face, and possibly injure your face or eye. Tr. 82.

Regarding employee access, the Commission has recognized that exposure may be established by showing "that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012). The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *KS Energy Servs., Inc*., 22 BNA OSHC 1261, 1264-65 (No. 06-1416, 2008) (citing *RGM Constr. Co*., 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). Here, the employees were within the "zone of danger" as they were performing the work in a manner that created the hazardous condition. The evidence establishes that an employee had access to the hazard and the standard was violated.

Employer Knowledge

The knowledge requirement may be satisfied by proof either that the employer actually knew, or had constructive knowledge because "with the exercise of reasonable diligence, [it] could have known of the presence of the violative condition." *Pride Oil Well Serv.,* 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). The Commission has also held that an employer is chargeable with knowledge of conditions, which are plainly visible to its supervisory personnel. *A.L. Baumgartner Constr. Inc.,* 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994).

Here, the CO testified that the foreman, Mr. Gomez, not only directed the employees, but he was also working alongside three of them as they were all exposed to the hazard created by the failure to use eye protection. Tr. 83. Foreman Gomez's knowledge of the cited conditions is imputed to Respondent and employer knowledge is established.

Classification

To demonstrate that a violation was "serious" under section 17(d) of the Act, the Secretary must show a substantial probability of death or serious physical harm that could result from the cited condition and that the employer knew or should have known of the violation. The Secretary need not show the likelihood of an accident occurring. *Spancrete Ne., Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

According to the CO, this citation item was classified as "serious" because an eye injury under these conditions could be severe or result in impairment that would require medical attention. Tr. 84. This citation item is properly classified as "serious".

Citation 1; Item 2

The Secretary alleges a violation of 29 C.F.R. § 1926.1053(b)(1) which states:

> 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.

Specifically, the Secretary alleges that:

> (a) Interior of Building – Garage: Employees were exposed to approximately 9 feet fall hazard while utilizing an extension ladder that only extend approximately 2 feet over the working surface, on or about 12/10/19.

Applicability

The plain language of the cited standard requires that a ladder used to access an upper landing either extend 3 feet above the upper landing or be secured to a rigid support along with a grabbing device for mount and dismount. 29 C.F.R. § 1926.1053(b)(1). The CO testified that a

ladder was used at this worksite to access the 1st floor from the basement. Tr. 63. The standard applies.

Standard Violated

It is admitted that on December 10, 2019, at the Wayne Ave. worksite, at least one of Respondent's employees used a portable ladder to access an upper landing surface and the ladder only extended 2 feet above the upper landing. CX-1, CX-7 (photo). It is also admitted that the ladder was not secured at its top to a rigid support, neither did Respondent provide a grasping device to assist employees in mounting and dismounting the portable ladder. CX-1. The evidence establishes that an employee had access to the hazard and the standard was violated.

Employer Knowledge

Based on his discussion with Mr. Gomez, the CO concluded that he was aware of the cited conditions. Tr. 89. Among other things, Mr. Gomez told the CO that they were using the ladder to access the upper floor, they did not have another ladder, and there was no other way to access the first floor. Tr. 63, 87-88. Foreman Gomez's knowledge of the cited conditions is imputed to Respondent and employer knowledge is established.

Classification

The CO concluded that a fall from the ladder, which was 8-9 feet tall, could have caused serious injuries or fractures because the exposed employee would have fallen to the gravel floor below. Tr. 90. This citation item is properly classified as "serious".

Citation 1; Item 3

The Secretary alleges a violation of 29 C.F.R. § 1926.1053(b)(13), which states: The top or top step of a stepladder shall not be used as a step.

Specifically, the Secretary alleges that:

> (a) Interior of Building – 1st floor: Employee was exposed to a 4 [foot] fall hazard while engaged in framing activities and utilizing the top step and top of a step ladder, on or about 12/10/19.[9]

Applicability

The plain language of the cited standard prohibits the use of the top of a step ladder as a step. The CO testified that he observed an employee doing framing activity using a step ladder with one foot on the top step and the other on the top of the ladder. Tr. 95. The standard applies.

Standard Violated

It is admitted that on December 10, 2019, at the Wayne Ave. worksite, at least one of Respondent's employees used the top step or top of a stepladder as a step. The evidence establishes that an employee had access to the hazard and the standard was violated.

Employer Knowledge

The CO testified that Mr. Gomez knew about the cited conditions because he was there on site and fully aware of the height of each floor which could not easily be reached with a 4-foot step ladder without using the top as a step. Tr. 96-97. Foreman Gomez's knowledge of the cited conditions is imputed to Respondent and employer knowledge is established.

Classification

The CO classified this citation item as "serious" because the exposed employee could lose balance, fall, and the resulting injury could include a fracture. Tr. 98. This citation item is properly classified as "serious".

Citation 2; Item 1 (Repeat)

The Secretary alleges three (3) instances (designated as instance a, b, and c) of a violation of 29 C.F.R. § 1926.501(b)(13) which states:

[9] During the hearing, the Secretary made a motion to amend the narrative of this citation to replace the word "set" with "step". The motion was granted. Tr. 94.

> 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. Exception: When 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.

Specifically, the Secretary alleges that:

> [] employees engaged in residential construction activities 6 feet (1.8 m) or more above lower levels were not protected by guardrail systems, safety net system, or personal fall arrest system, nor were employee(s) provided with an alternative fall protection measure under another provision of paragraph 1926.501(b):
>
> (a) Exterior of Building – Second Floor: Employees without any means of fall protection were exposed to fall hazards of approximately 20 feet while engaged in framing activities loading materials, on or about 12/10/19;
>
> (b) Exterior of Building – First Floor: Employees without any means of fall protection were exposed to fall hazards of approximately 8 feet while engaged in framing activities, on or about 12/10/19;
>
> (c) Exterior of Building – Second Floor: Employee[s] without any means of fall protection were exposed to fall hazards of approximately 20 feet while retrieving a ladder, on or about 12/10/19.

Applicability

The plain language of the cited standard requires the use of fall protection when engaged in construction activities more than six (6) feet above a lower level. 29 C.F.R. § 1926.501(b)(13). It is admitted that the worksite included a structure with two levels higher than ground level. CX-1. It is further admitted that one level of the structure was approximately eight (8) feet above the ground, and the other was approximately twenty feet above ground. *Id*. The cited standard applies.

Standard Violated

It is admitted that on December 10, 2019, at the Wayne Ave. worksite, Respondent's employees did not wear personal fall arrest systems while performing work on the first or second

floors of the structure, nor did Respondent provide any type of fall protection at this worksite. *Id*. The evidence establishes that an employee had access to the hazard and the standard was violated.

Employer Knowledge

Regarding instance A, Mr. Gomez told the CO that they worked up there (second floor) earlier stacking wood and doing some framing work. They stopped due to the rain. Tr. 102.

Regarding instance B, Mr. Gomez was one of the employees working on the first floor and had a full view of the openings. Tr. 107, CX-7a (photo).

Regarding instance C, the CO observed an employee retrieve a ladder from the second floor. The employee who used the ladder to come down was on the second floor. He was not wearing fall protection. Tr. 108. Mr. Gomez was with the CO during his inspection and, based on the CO's testimony, the hazardous condition was in plain sight.

Foreman Gomez's knowledge of the cited conditions is imputed to Respondent and employer knowledge is established.

Classification

This citation item is an alleged "repeat" of a substantially similar violation previously cited. A violation is repeated if the employer was previously cited for a substantially similar violation and the citation became a final order before the occurrence of the alleged repeated violation. *Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2105 (No. 09-0240, 2012) *aff'd*, 535 F. App'x. 386 (5th Cir. 2013)(unpublished); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). "[T]he principal factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards." *Amerisig Se., Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996), *aff'd without published opinion*, 117 F.3d 1433 (11th Cir. 1997).

Predicate Citation

On July 10, 2018, CO Joseph Murrin conducted an inspection of a worksite located at 439 Ottawa Ave. in Hasbrouck Heights, New Jersey (Ottawa Ave. worksite). Tr. 25, 28. As he was driving by the worksite, the CO observed fall hazards. Respondent, Framing Specialist, was doing framing work for residential house construction. Tr. 28. The CO conducted an opening conference with a man who identified himself as the owner of the company, Simeon Morales.[10] Tr. 30-31. The CO took a photograph that showed an employee at the edge of the structure with no fall protection. CX-20 (photo), Tr. 35. During the closing conference, the CO discussed the need for fall protection (some type of harness) with Mr. Morales and his employees. Tr. 43. As a result, a citation was issued to Respondent because an employee was leaning over the edge of a structure approximately 13 feet above the ground without fall protection. CX-17 (referencing inspection number 1330224, which included 1 serious; 2 item citation). The citation was mailed to Respondent via first-class mail. Tr. 39. It is admitted that Respondent did not submit a notice of contest to the citations issued to his company on or about December 6, 2018, as a result of inspection number 1330224.[11] The 2018 citation the Secretary relies on in the present matter to support a "repeat" classification was issued for an alleged violation of 29 C.F.R. § 1926.501(b)(1). This standard states:

> **Unprotected sides and edges.** Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

[10] Notably, Mr. Morales admitted that he had an employee at this worksite; however, he complained that his employee was not depicted in the photograph marked CX-20.

[11] The Act provides that:

> If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency. 29 U.S.C. 659 § 10(b).

Specifically, the previous citation alleged:

> A) Exterior, on top of the structure. Employees were exposed to fall hazards of approximately 13 feet (front) and 18 feet (back) while engaged in framing work on the upper level of a structure without a means of fall protection in place, on or about July 10, 2018.

The CO testified that 29 C.F.R. § 1926.501(b)(13) could have been cited for this violation instead of 29 C.F.R. § 1926.501(b)(1), which was actually cited. Tr. 41. However, his supervisor suggested that 1926.501(b)(1) was the better citation because of the "leading sides and edges" and because the structure of the roof was flat rather than pitched. Tr. 42. Regardless of the standard ultimately selected, the CO testified that he cited Respondent for a "fall hazard". Tr. 43. The plain language of both 1926.501(b)(1) and 1926.501(b)(13) clearly seek to protect workers from fall hazards. Accordingly, the Court finds that the hazards noted in the citation at issue here, which cites a violation of 1926.501(b)(13), are the same or substantially similar to the hazard cited during the 2018 inspection. The violation is properly characterized as "repeat".

Docket No. 20-0626

Citation 1; Item 1 (Willful/Repeat) [12]

The Secretary alleges a violation of 29 C.F.R. § 1926.501(b)(13) which states:

> 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. Exception: When 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.

[12] In his Complaint, the Secretary amended the Citation to allege a "willful" violation of the Act and pled, in the alternative, that the alleged violation was a "repeat" violation of the Act. The Occupational Safety and Health Review Commission Procedural Rules permit parties to plead alternative claims or defenses. 29 C.F.R. § 2200.30(e).

Specifically, the Secretary alleges that:

> (a) Roof frame: Employees were exposed to fall hazards of approximately 25 feet while framing the roof of a residential home without any means of fall protection in place, on or about 2/20/2020.

Applicability

The plain language of the cited standard requires the use of fall protection when engaged in construction activities more than six (6) feet above a lower level. It is admitted that the structure on the 9th St. worksite included a structure with a roof that was located approximately twenty-five feet above the ground and Respondent's employees were working on the roof. CX-1. The cited standard applies.

Standard Violated

It is admitted that Respondent did not provide any type of fall protection aside from the harness the exposed employees were wearing. CX-1. It is admitted that on February 20, 2020, at the 9th Street worksite, Respondent's employees who were working on the roof of the structure did not connect the harnesses of the personal fall arrest systems they were wearing to an anchorage. *Id*. The evidence establishes that an employee had access to the hazard and the standard was violated.

Employer Knowledge

Mr. Gomez was the foreman on site. Tr. 128. The CO testified that Mr. Gomez had knowledge of the cited condition because "he was in plain view of the employees being exposed to a fall hazard." Tr. 138. Mr. Gomez's knowledge of the cited condition is imputed to Respondent and employer knowledge is established.

Classification

"The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or ... plain indifference to employee safety.' " *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

> [I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation .... A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference ....

Hern Iron Works, Inc., 16 BNA OSHC 1206, 1214 (No. 89-433, 1993); *see also Bianchi Trison Corp. v. Chao,* 409 F.3d 196, 208 (3d Cir. 2005) (A willful violation of the OSH Act "constitutes an act done voluntarily with either an intentional disregard of, or plain indifference to, the OSH Act's requirements" quoting *Ensign-Bickford co. v. OSHRC*, 717 F.2d 1419, 1421 (D.C. Cir. 1983).

> There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it.

Williams Enters. Inc., 13 BNA OSHC 1249, 1257 (No. 85-355, 1987).

"The state of mind of a supervisory employee ... may be imputed to the employer for purposes of finding that the violation was willful." *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000); *Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2116-17 (No. 07-1578, 2012) (finding plain indifference when supervisor knew from prior experience and the day of the accident that carbon monoxide would be present and yet failed to monitor for it); *Adrian Constr. Co.*, 7

BNA OSHC 1172, 1175 (No. 15414, 1979) ("A violation is willful if the evidence shows that the employer ignored an obvious and grave danger . . . ").

Heightened Awareness

The Court finds that the Secretary has established that Respondent had a heightened awareness of the requirement to provide and ensure the use of fall protection by its employees. *See Hern Iron Works, Inc.*, 16 BNA OSHC at 1214 ("A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions…").

CO Joseph Murrin testified that, during his 2018 inspection of the Ottawa Ave. worksite, he discussed the need for fall protection (some type of harness) with Mr. Morales and his employees. Tr. 43. CO Stuart Sydenstricker testified that, during his 2019 inspection of the Wayne Ave. worksite, he told Foreman Gomez and all of the employees that working without fall protection is dangerous. CO Sydenstricker further testified that in response they replied, "you got us". Tr. 111. Although Mr. Morales was not at the worksite for the 2019 inspection, knowledge of the hazard and the CO's warning are imputed to Respondent because his foreman, Mr. Gomez, was present. *Branham Sign Co.*, 18 BNA OSHC at 2134 ("state of mind of a supervisory employee ... may be imputed to the employer for purposes of finding that the violation was willful.")

Plain Indifference

The Court finds that Respondent acted with plain indifference. *Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890, 1892-94 (No. 92-3684, 1997) (plain indifference found based in part on failure to provide safety program, training, and protective equipment, combined with supervisory involvement and failure to act after notification of violations of the same standard at other sites) *aff'd*, 131 F.3d 1254 (8th Cir. 1997). It is admitted, and the record also reflects that Respondent did not have a written fall protection plan during the two years prior to the February

20, 2020, inspection. CX-1. Respondent's attitude of "plain indifference" is also revealed in the fact that although at least one employee wore a harness during the 2020 inspection at the 9th Ave. worksite, he wasn't tied off with a lifeline or lanyard to an anchorage point. Tr. 135. In fact, the lifeline on site looked new and never used. Tr. 139. When the CO asked Mr. Gomez why employees were not tied off with the lifeline, he replied that the line gets in the way. Tr. 140. In this instance, unlike the previous inspections, Respondent had the necessary fall protection equipment on-site and still refused to have employees use it --- that is the very definition of "plain indifference".

This citation is properly characterized as willful.

Penalty Determination

The testimony regarding the proposed penalties for each of the alleged violations is undisputed in that Respondent did not address them in his brief testimony, nor did he offer any documentary evidence to dispute the penalty criteria or amounts. The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history, and good faith. *J.A. Jones Constr. Co*., 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14.

For Citation 1, Item 1 in case docket no. 20-0330, the CO testified that penalty adjustments were made for company size and history. A 70% penalty reduction was applied for size, and a 10% increase was applied based on citation history. No reduction was given for good faith because

there was no evidence that Respondent had a health and safety program. Tr. 85. The severity was rated "medium" because of the possibility that impact could result in eye injury. Tr. 84. The CO's testimony regarding the penalty criteria for Citation 1, Item 2 and in case docket no. 20-0330 was exactly the same. For Citation 1, Item 3 in case docket 20-0330, the CO's testimony regarding penalty was the same for "size, history, and good faith". With regard to severity, he testified that it was rated "lesser/lower" based on the possibility of serious injury. Tr. 98. For Citation 2, Item 1 in case docket no. 20-0330, the CO's testimony was nearly the same; however, he added that he also considered Respondent's failure to provide fall protection when he made his determination that no reduction should be given for "good faith". Tr. 114-15.

For Citation 1, Item 1 in case docket no. 20-0626, the CO testified that the severity and probability were rated high because there could have been a death. Also, there was a 70% reduction for company size. Tr. 143. There were no adjustments made for history or good faith. Tr. 144.

The evidence supports a finding that the penalties proposed for the citations in each docket (20-0330 & 20-0626) are appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of Citation 1 in case docket no. 20-0330, alleging a violation of 29 C.F.R. § 1926.102(a)(1), is AFFIRMED as Serious, and a penalty in the amount of $2,545.00 is assessed.
2. Item 2 of Citation 1 in case docket no. 20-0330, alleging a violation of 29 C.F.R. § 1926.1053(b)(1), is AFFIRMED as Serious, and a penalty in the amount of $2,545.00 is assessed.

3. Item 3 of Citation 1 in case docket no. 20-0330, alleging a violation of 20 C.F.R. § 1926.1053(b)(13), is AFFIRMED as Serious, and a penalty in the amount of $1,908.00 is assessed.
4. Item 1 of Citation 2 in case docket no. 20-0330, alleging a violation of 29 C.F.R. § 1926.501(b)(13), is AFFIRMED as Repeat, and a penalty in the amount of $ 8,906.00 is assessed.
5. Item 1 of Citation 1 in case docket no. 20-0626, alleging a violation of 29 C.F.R. § 1926.501(b)(13) is AFFIRMED as Willful, and a penalty in the amount of $29,686.00 is assessed.

DATED: January 31, 2022
Washington, D.C.

/s/Keith E. Bell
KEITH E. BELL
Judge, OSHRC