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. EDWIN TAYLOR CORPORATION, Respondent.	OSHRC DOCKET NO. 17-0819

Appearances:
Kate S. O'Scannlain, Solicitor of Labor
Stanley E. Keen, Regional Solicitor
Karen E. Mock, Counsel
Lydia Chastain, Senior Trial Attorney
U.S. Department of Labor, Atlanta, GA

For the Complainant

Robert Bleakley, Esq.
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For the Respondent

Before: Chief Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to sections 2-33 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act). After the Occupational Safety and Health Administration (OSHA) completed an investigation, the Secretary issued a Citation, alleging that Edwin Taylor Construction Corporation (Edwin Taylor) willfully violated 29 C.F.R. § 1926.501(b)(13) and

proposes a $126,749 penalty. Edwin Taylor filed a timely notice of contest, bringing this matter before the Commission. For the reasons that follow, the Citation is AFFIRMED as a willful violation of the Act and a penalty of $101,399.20 is assessed.

JURISDICTION

Edwin Taylor admits that, as of the date of the alleged violation, it was an employer engaged in business affecting commerce within the meaning of section 3(5) of the Act.[1] (Ans. at 1; Stips. A, B.) Based upon the record, the undersigned finds that at all relevant times Edwin Taylor was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. The undersigned concludes the Commission has jurisdiction over the parties and subject matter in this case.

BACKGROUND

A laborer fell twenty-two feet through an unguarded opening at residential construction site and died as a result on November 3, 2016. (Stip. O.) After learning of the death, OSHA commenced an investigation at 349 7th Street S, Saint Petersburg, Florida (the Worksite). This investigation led to a Citation alleging Respondent willfully violated 29 C.F.R. § 1926.501(b)(13), a construction standard that requires fall protection.

Edwin Taylor was responsible for constructing the shell for multiple condominium homes. It had "general supervisory authority over the [Worksite]." (Stips. C, F, G, H, K.) The project called for the construction of five three stories homes. (Tr. 53-54.) As part of its work, Edwin Taylor retained a subcontractor Adelo & Fernanda Construction Inc. (Adelo) to perform block and

[1] The parties stipulated that: "Respondent is an employer engaged in business affecting interstate commerce within the meaning of § 3(5) of the Occupational Safety and Health Act (the "Act"). (Stip. A.) In addition, they stipulated that: "Jurisdiction is conferred on the Commission by § 10(c) of the [Act]. … Subject to [Commission] and judicial review the presiding Administrative Law Judge has the authority to hear the case and issue a decision as prescribed by the [Act] and the Administrative Procedures Act." (Jt. Pre-Hr'g at 11.)

framing work.[2] (Stip. E; Tr. 196.) Adelo, in turn, retained another subcontractor, Francisco Sanchez Hernandez (FSH), to assist with the framing aspect of the work.[3] (Stip. I, J; Tr. 126-27, 196.) The laborer who died was working directly with FSH.[4] (Stips. J, O.)

Three of Respondent's employees—Paul Barros, Jay Zimmerman, and Bronson Ostrander—directed and oversaw Adelo and FSH's work.[5] (Stips. C, F, G, K; Tr. 152.) Barros and Ostrander were superintendents. (Tr. 365, 407; Exs. C-24, C-25.) Zimmerman is the Vice President of Operations for Edwin Taylor's shell construction business and manages the superintendents. (Tr. 407; Ex. C-26.) David Patton, one of Respondent's owners, was also regularly sent photographs of and messages about the work occurring through the company's Buildertrend app and through conversations with the direct supervisors. (Tr. 240, 338-39, 423, 425-26; Ex. C-1.) Respondent's supervisors had the responsibility to enforce safety policy and the authority to require sub-contractors, including FSH and his workers, "to correct safety and health violations on the [W]orksite." (Tr. 169, 423; Stip. K.)

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[2] The parties stipulated: "Respondent subcontracted with [Adelo]. to perform block and framing work at the [W]orksite." (Stip. E.)

[3] The parties stipulated: "[Adelo] hired [FSH] and his crew of framers to perform the framing work at the [W]orksite." (Stip. I.)

[4] The parties stipulated:

> J. [FSH] and his framing crew were performing framing work at the [Worksite] on November 3, 2016. …
>
> O. On November 3, 2016 [laborer], an employee of [FSH], fell through an unprotected floor opening on the third floor of the townhome unit; [laborer] ultimately died from the injuries he sustained from the fall.

(Stips. J, O.)

[5] The parties stipulated:

> C. Respondent's employee Paul Barros was capable of identifying existing and predictable hazards at the [W]orksite. …
> F. As of at least November 2, 2016, Respondent's employee Paul Barros had authorization to take prompt corrective measures to eliminate existing hazards at the [Worksite].

(Stips. C, F.)

The project started in early October 2016 and by October 18, 2016 the workers completed the block exterior of the first floor of the townhomes and decking for the second floor. (Tr. 132, 335; Ex. C-1.) Workers continued to engage in tasks at a height in excess of six feet over the next two weeks without any guardrails. (Tr. 39-40, 95, 169-70: Exs. C-2 thru C-9.) On the afternoon of November 3, 2016, a worker fell twenty-two feet and was killed. (Tr. 172, 255; Ex. C-1.) Only then were guardrails were installed in most areas of the Worksite. (Tr. 61.) However, even a week later, on November 10, 2016, the Compliance Officer (CO) again identified a lack of appropriate fall protection. (Tr. 199-200.)

At the close of OSHA's investigation, the Secretary issued one willful Citation for violating 26 C.F.R. § 1926.501(b)(13) and proposing a penalty of $126,749. The Citation refers to three instances when workers were not protected by adequate fall protection:

> a) … employees were exposed to a 22 foot fall hazard through the unguarded stairwell openings … and a 22 foot, 7 inch fall hazard from the open sided floors when performing floor decking of the townhome units; on or about November 3, 2016.
>
> b) … employees were exposed to an 11 foot fall hazard through the unguarded stairwell openings … and an 11-foot, 7 inch fall hazard from open sided floors when performing floor decking and other carpentry work on the decks of the townhome units, on or about November 3, 2016.
>
> c) … an employee was exposed to an 11 foot fall hazard through the unguarded stairwell openings … and an 11 foot, 7 inch fall hazard from the open sided floors when taking photographs of the work in progress, on or about October 22, 2016.

Thus, the Secretary alleges that an employee was exposed to fall hazards of eleven feet or more on October 22, 2016, and that employees were exposed to fall hazards of approximately 11 and 22 feet on November 3, 2016. The Secretary does not propose separate penalties for each instance.

DISCUSSION

I. Item 1 – Failure to ensure that employees were protected from fall hazards as required by 29 C.F.R. § 1926.501(b)(13)

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

A. Applicability & Violation

The Citation alleges that Respondent failed to ensure its employees were protected from fall hazards in violation of 29 C.F.R. § 1926.501(b)(13). This standard addresses residential construction and requires fall protection for each employee working at a height of greater than six feet: "Each employee engaged in residential construction activities 6 feet (1.8 m) 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 … ." 29 C.F.R. § 1926.501(b)(13)

Respondent stipulated that it "performs residential construction services and admits that OSHA's construction standards, 29 C.F.R. § 1926, *et seq*., apply to its operations at the [W]orksite." (Stip. B.) It also stipulated that on October 28, 2016, and November 3, 2016, neither

guardrails nor other appropriate fall protection had been installed where required.[6] (Jt. Pre-Hr'g at 9.) However, guardrails were missing as early as October 19, 2016, when two supervisors visited the site. (Tr. 333, 335, 367.) The second floor deck of the townhome was complete, but there were no guardrails around any of the five stairwell openings or the open edges of the second floor. (Tr. 40, 100-1.)

Three days later, on October 22, 2016, one of the site superintendents, Barros, returned to the Worksite. (Tr. 215, 335-6, 338; Ex. C-1.) He climbed a ladder through a stairwell opening to the second floor to photograph the work being done. (Tr. 337-38; Ex. C-2.) He sent the photographs in real time to other senior employees, including Patton, Zimmerman, and Bronson, though the Buildertrend app. (Tr. 336-39; Exs. C-1, C-23 at 3.) These photographs show that none of the workers on the upper level were wearing personal fall protection and there were no guardrails. (Tr. 338; Exs. C-1, C-2.) At the time, Barros was new to Edwin Taylor, having started work on October 19, 2106.[7] (Tr. 333.) Still, his supervisor expected him to correct safety violations he saw, even on his first days of the job. (Tr. 408-9; Ex. C-24.) Barros' October 22,

[6] Specifically, Respondent stipulated:

> M. On October 28, 2016, Mr. Barros knew that guardrails or other appropriate fall protection had not been installed on the sides and edges of the walking/working surfaces of the second level of the townhome unit under construction.
>
> N. On November 3, 2016, employees of [FSH] working on the third level of the townhome units were not protected from falling off the unprotected sides and edges of the walking/working surfaces by guardrails or other appropriate fall protection.

(Stips. M, N.) The Secretary also showed that appropriate fall protection was not in use at the Worksite through the testimony of employees and photographs. (Ex. C-1.)

[7] Respondent argues that Barros did not sign an employment contract until October 24, 2016. (Resp't Br. at 3, 16, Resp't Reply at 5; Ex. R-7; Tr. 372.) It does not allege that Barros was unpaid or had not been hired as of October 19, 2016. (Resp't Br. at 3.) He was an employee as of the time of his first visit to the Worksite and remained an employee through the end of OSHA's investigation.

2016 visit to the Worksite was for Respondent's benefit—while there, he checked on the progress of Adelo and his workers and spoke with the builder. (Tr. 339-40; Ex. C-1.)

Barros again took photographs showing no guardrails or anchor points at the Worksite on October 28, 2016 and November 3, 2016.[8] (Tr. 342-43, 381; Exs C-1, C-3, C-5 thru C-9, R-14.) Like the photographs from October 22nd, the November 3rd photographs also show workers on an upper deck without harnesses. (Exs. C-5, C-9.) FSH and another worker also confirmed that the Worksite lacked guardrails and that they and others failed to use appropriate fall protection as required by the cited standard. (Tr. 40, 100, 197-98, 248.)

The Secretary established that the cited standard applies, and Respondent violated it.

B. Exposure

The Secretary cites three instances when Respondent violated 29 C.F.R. § 1926.501(b)(13). One instance relates to Barros' October 22, 2016 visit to the Worksite. The other two instances relate to fall hazards from the second and third levels of the structure on November 3, 2016, the day the laborer fell.

Barros admitted that he stood next to an unguarded stairwell without wearing fall protection on at least two occasions referred to in the Citation, October 22 and November 3, 2016. (Tr. 219, 256, 338, 356; Exs. C-2, C-9, C-23.) Respondent does not dispute that Barros was present at the Worksite on October 22, 2016, that he went near unguarded edges without fall protection, and that he took photographs of the violative conditions. (Ex. C-1.) Its argument is that other supervisors did not know Barros would be at Worksite on October 22, 2016. (Resp't Br. at 16-17; Resp't Reply at 14.)

[8] A second supervisor, Ostrander, was also on site on October 28, 2016. (Tr. 134, 341; Ex. C-1.)

It does not appear that Barros was specifically directed to work on that day (which was a Saturday). But the converse is also true, no one told him not to go nor was he disciplined for going. (Tr. 405-6.) While at Worksite, Barros engaged in activities on Respondent's behalf and informed multiple senior employees about his activities. (Tr. 218, 256-57, 336-40; Exs. C-1, C-21, C-23.) He was a salaried supervisor and was never precluded from going to the Worksite on October 22, 2016, and other workers were also there working for Edwin Taylor. (Tr. 256-57, 335-36; Exs. C-1, C-23 at 2.) The Secretary established Respondent's own employee was exposed to the cited condition, which was created by its subcontractor and over which Respondent had control, on or about October 22, 2016, as alleged. (Stips. C, E, G, H.)

The Secretary also alleges that workers were exposed to the cited hazard on November 3, 2016. Respondent does not dispute this. It stipulated that employees of its subcontractor were working three stories up on November 3, 2016, and "were not protected from falling off the unprotected sides and edges of the walking/working surfaces by guardrails or other appropriate fall protection." (Stip. N.) Besides those workers, Barros also went to the third level of the structure on November 3rd without fall protection. (Tr. 216-17, 350-51; Exs. C-1, C-5.) He photographed other workers on the upper level not wearing fall protection.[9] (Exs. C-8.) FSH and another worker (AM) also confirmed that they and others worked on the second and third stories of the townhome on November 3rd without fall protection. (Tr. 40, 52-53, 59-60, 70-71, 95, 100, 113, 132; Exs. C-12, C-15.) The Secretary showed exposure to the violative condition on the dates referenced in the Citation, October 22, 2016, and November 3, 2016.

[9] At the hearing, Barros claimed that workers depicted were not working on November 3, 2016, when he took the photographs. (Tr. 356-57.) In one picture, a worker is bent leaning over a partially decked structure and appears to be measuring something. (Ex. C-5.) A second worker stands nearby looking in the same direction as the worker who is bent over. *Id.* While the exact nature of the activity is unclear, they do not appear to be "getting all the equipment and leaving the site," as Barros claims. (Tr. 356; Exs. C-5, C-9.)

C. Knowledge

Respondent stipulated that its supervisor knew of the violative condition: "On October 28, 2016, Mr. Barros knew that guardrails or other appropriate fall protection had not been installed on the sides and edges of the walking/working surfaces of the second level of the townhome unit under construction." (Stip. L.) A foreman or supervisor's actual or constructive knowledge of a violative condition satisfies the Secretary's burden. *See e.g., N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000) (citation omitted), *aff'd*, 255 F.3d 122 (4th Cir. 2001). Respondent does not allege, nor would the record support, that Barros, who served as a site superintendent was not a supervisor whose knowledge can be imputed to Respondent. (Tr. 42, 103, 150-51, 169, 331.)

Despite the stipulation, Respondent argues there were guardrails and workers wore fall protection. (Resp't Br. at 3-4.) The Secretary presented ample evidence of Respondent's knowledge about the lack of fall protection at the Worksite. As noted above, two supervisors visited the site on October 19, 2016. (Tr. 333-34, 367.) Although the decking for the second floor was complete by that time, there were no guardrails.[10] (Tr. 196.) A few days later, on October 22, 2016, Barros returned to the Worksite. (Tr. 215, 336, 338; Ex. C-1.) He climbed up to the third level of the building without wearing fall protection even though he knew it was required for activity at a height over six feet. (Tr. 331, 335, 337-38; Ex. C-2, C-23; Stip. C.)

Barros was not the only one on the Worksite not using fall protection on October 22, 2016. Several people working with Adelo were also there. (Tr. 256-57; Exs. C-1, C-2, C-23.) Barros photographed workers on top of the structure without fall protection and sent the photographs to

[10] The Secretary does not allege any workers were exposed to a hazard on October 19, 2016.

Patton and two other supervisors through Buildertrend. (Ex. C-1; Tr. 339.) Patton reviewed the photographs and noticed the unprotected floor openings. (Exs. C-23 at 3, C-26, R-14; Tr. 426-27.)

As discussed above, Respondent argues that Barros was not told to go to Worksite on October 22, 2016. (Resp't Br. at 16-17.) Barros had supervisory responsibility for this Worksite. (Tr. 405.) On October 22nd, he took notes and photographs of Worksite conditions and sent them to the other supervisors. (Exs. C-1, C-2, C-23, C-26.) The fact that it was a Saturday does not permit him and the others from learning about the violative condition. (Tr. 425-26, 456; Ex. C-26.) Nor does it provide an excuse to not use fall protection when going above six feet. (Tr. 233-34.) The lack of a specific instruction to visit the Worksite does not erase the knowledge of the conditions observed and his own behavior. (Exs. C-1, C-2, C-23.)

After October 22, 2016, supervisors continued to routinely visit the Worksite.[11] (Tr. 102-105, 132, 351; Stip. Q; Exs. C-1, C-5, C-23 at 2, C-27.) FSH saw either Ostrander or Barros almost every day, including on the upper levels of the structure. (Tr. 102-5, 341; Ex. C-1.) Barros confirmed this, explaining that on October 28, 2016, he climbed a ladder to go through an opening to take a photograph of the second level of the structure.[12] (Tr. 342-43.) Barros then sent the photograph showing unprotected openings and no guardrails or anchor points to other supervisors. (Tr. 221, 234, 342; Exs. C-3, C-26.) No one ordered the installation of guardrails or other appropriate fall protection and no one precluded the supervisors or others from working above six feet even after receiving the photograph.

Barros indicated that during his site visit on November 2, 2016, he phoned Zimmerman and told him about the lack of fall protection. (Tr. 347-48.) He claims that on the same day, he

[11] Ostrander was at the Worksite approximately five times between October 22 and November 3, 2016. (Ex. C-1.)

[12] The Citation does not specifically refer to October 28, 2016.

and FSH discussed the need to install guardrails. (Tr. 348-49.) He testified that he did not order FSH to build the guardrails on November 2nd because the workers were already packing up for the day. (Tr. 349-50.) When he arrived back at the Worksite in the afternoon on the next day, there were still no guardrails. (Tr. 168-69; Exs. C-5, C-8, C-9; Stips. N, O, P.)

Witnesses differ as to whether FSH and Barros discussed guardrails on November 1st or 2nd. FSH first worked at the site between October 11th and the 18th. (Tr. 99.) He explained that when he left, the decking for the second level was complete. *Id.* No one instructed him to install guardrails after he completed the decking. (Tr. 101.) In his experience, his crew finishes the decking and then another company adds the guardrails. *Id.* However, when he returned to the Worksite on Friday, October 28th, there were still no guardrails. (Tr. 102; Ex. C-3; Stip. M.) FSH thought that Edwin Taylor would have installed them in the time since the second level was complete. (Tr. 102.) FSH said he discussed the lack of fall protection with Barros on November 1, 2016.[13] (Tr. 107, 131, 136-37.) He told Barros guardrails were needed, but Barros did not direct him to install them or agree to pay him for such work. (Tr. 107, 109-10.)

At the hearing, Barros did not recall going to the site on November 1st but did remember going on November 2nd. (Tr. 346-47, 382.) When asked by Respondent's counsel whether he instructed FSH to build the guardrails on that day Barros said "Yes." (Tr. 383.) This testimony differs somewhat from the statement he gave to the CO on November 10, 2016. (Tr. 205; Ex. C-22.) At that time, Barros could not remember whether he and FSH discussed the guardrails on November 1st or 2nd. *Id.* He indicated that FSH "mentioned that he needed rails somewhere" and he told FSH he could "go ahead." (Ex. C-22; Tr. 204-7.) He recalled that FSH "complained"

[13] In his interview with the CO, Patton also indicated that the guardrails were discussed on this date, as well as on October 31, 2016 and November 2, 2016. (Tr. 169, 188-89; Ex. C-26.)

about not getting paid for the work. (Exs. C-22, R-14; Tr. 206.) His statement does not indicate that he ordered FSH to install fall protection before the accident or say when he expected the guardrails to be in place. (Tr. 206-7; Ex. C-22.)

Whether FSH and Barros discussed the guardrails on November 1st, or 2nd, 2016, does not impact Respondent's knowledge of the violative condition. Respondent stipulated that it knew about the lack of guardrails on October 28, 2016, and that on November 3, 2016, it knew or could have known that employees working on the third level of the townhome units were not protected from falling off the unprotected sites and edges. (Stips. M, P.) Regardless of whether the conversation about building the guardrails occurred on November 1st or 2nd the project lacked guardrails until two weeks after the second level of the structure was complete. (Tr. 196, 346-47.) Respondent argues that it had no reason to know that FSH would not build the guardrails after the discussion on November 2, 2016. (Resp't Br. at 13.) However, neither Barros, nor any other supervisor, undertook any effort to confirm there were guardrails or other appropriate forms of fall protection in place at any point between October 19, 2016 and when the worker fell on November 3, 2016.[14] *See Caterpillar, Inc.,* 17 BNA OSHC 1731, 1732 (No. 93-373, 1996) (one supervisor's knowledge of hazardous condition is sufficient), *aff'd*, 122 F.3d 437 (7th Cir. 1997); *Calpine Corp.*, 27 BNA OSHC 1014, 1019 (No. 11-1734, 2018) (actual knowledge of violative condition remained with employer even after supervisors left the worksite), *appeal docketed*, No. 18-60413 (5th Cir. June 4, 2018). Supervisors visited the site at least six times between October 19 and November 2, 2016, and there continued to be no fall protection even though work was being done

[14] Again, Barros also had actual knowledge of the lack of guardrails from his visit to the Worksite on October 22, 2016. (Tr. 218-19, 232; Exs. C-1, C-23.) And he knew there were still no guardrails on October 28, 2016. (Stip. M.) Respondent also knew that workers were at the Worksite at least on October 28, October 31, and November 2, 2016. (Exs. C-1, C-26; Tr. 410.)

at a height greater than six feet.[15] (Exs. C-1; C-24.) Further, even when he arrived at the Worksite after a person fell, Barros went to an upper level without fall protection and photographed other workers still on the upper level without fall protection. (Exs. C-5 thru C-9.)

Respondent also argues (again despite its stipulations) that the workers "sometimes" wore fall protection. (Resp't Br. at 4.) At the hearing, Respondent's counsel asked Barros if "at some point" he saw "a member of the framing crew wearing fall protection."[16] (Tr. 386.) He replied that some were "wearing harnesses at some point" and said that this probably occurred on October 28, 2016, which is not one of the dates referred to in the Citation.[17] *Id.* While one member of the framing crew, AM, said on cross-examination that there were times "before the accident" when workers put on harnesses, he also acknowledged that he and others worked without fall protection on the decking and framing for the second and third levels of the townhomes. (Tr. 40, 66.) He explained that there were no guardrails at the Worksite and that the stairwells also lacked protection. *Id.* His supervisor disputed the claim that he or any of the workers ever wore harnesses. (Tr. 66, 127-28.) Even fully crediting AM's statement that sometimes harnesses were worn, he specifically denied wearing a fall protection harness on November 3, 2016 and he was not at the

[15] Supervisors logged entries about the Worksite on ten different days between October 22 and November 3, 2016. (Ex. C-1.) Barros also indicated that he did not create a log entry every time he went to the Worksite. (Tr. 337.) FSH saw Barros or another Edwin Taylor representative "almost every day" between October 18, 2016 and November 3, 2016. (Tr. 102, 104.)

[16] At the hearing, Barros was not asked whether he ever saw anyone on Adelo's crew use fall protection. It is undisputed that none of this crew was using fall protection on October 22, 2016. (Exs. C-2, C-23 at 2.)

[17] At the hearing, counsel stated that October 28, 2016 was "the only time" that Barros and FSH were at the site at the same time before November 2, 2016. (Tr. 366.) The record is more ambiguous. FSH said that Barros was on site "almost every day" and believed he was there on October 31 and November 1. (Tr. 102.) Barros indicated that in addition to the days in which he sent information through Buildertrend (October 22, October 28, November 2, November 3) he also made other site visits. (Tr. 337, 346.) Patton also suggested to the CO that Barros was at the Worksite on November 1, 2016. (Ex. C-26.) Thus, the record lacks sufficient evidence to conclude there was only one time when Barros and FSH were at the Worksite together during that timeframe.

Worksite on October 22, 2016, the other date alleged in the Citation. (Tr. 66,102.) Further, neither AM nor Barros claimed that the workers ever attached themselves to anchor points. (Ex. C-24.)

Accordingly, the Secretary established that Respondent had knowledge of the violative condition by October 22, 2016, when Barros visited the site, exposed himself to the violative condition, and sent a photograph of it to other supervisors. (Ex. C-1; Tr. 335-6, 339.) Respondent continued to know that the violation existed, stipulating that Barros knew there was no appropriate fall protection on October 28, 2016, and that it either knew or could have known there was still no fall protection as of the date of worker's fatal fall, November 3, 2016. (Stips. M, P.) Barros also had actual knowledge of the cited hazard on November 3rd when he went to the upper level of the structure without wearing fall protection and saw at least two other workers unprotected by guardrails or other appropriate fall protection. (Exs. C-5, C-9; Tr. 351-52.) Respondent's knowledge about the lack of appropriate fall protection was gained at least by October 22, 2016 and remained with it through November 3, 2016.[18] (Stips. M, P.) *See Calpine*, 27 BNA OSHC at 1019 (changing conditions did not erase actual knowledge of violative condition).

D. Affirmative Defense of Unpreventable Employee Misconduct

Respondent made no claims that any of its employees engaged in unpreventable employee misconduct (UEM) at the hearing or in its opening brief. Yet, in its Reply Brief, Respondent attempts to raise the affirmative defense. (Resp't Reply at 25-26.) The UEM defense requires the employer to establish that it has: (1) work rules designed to prevent the violation, (2) adequately communicated these work rules to its employees, including supervisors, (3) taken steps to discover

[18] The undersigned notes that Respondent raises some arguments applicable to assessing whether a finding of constructive knowledge is appropriate. (Resp't Reply at 16-17.) The point of engaging in reasonable diligence is to discover hazardous conditions, which Respondent did, and to correct them, which Respondent did not. *See Calpine*, 27 BNA OSHC at 1019. Engaging in reasonable diligence does not provide a defense against actual knowledge and the requirement to correct the hazards identified through such efforts.

violations, and effectively enforced rules when violations are discovered. *See e.g., Fla. Gas Contractors,* 27 BNA OSHC 1799, 1807 (No. 14-0948, 2019).

Whatever rules Respondent had about fall protection, it certainly failed to enforce them effectively. As discussed above, its superintendent failed on multiple occasions to use fail protection. Neither he, nor any other supervisors, took adequate steps to require its use or discipline workers for failing to do so.[19] *Id.* at 1809 (UEM defense not established when employer failed to present adequate evidence of enforcement); *L.E. Myers Co*., 16 BNA OSHC 1037, 1041 (No. 90-945, 1993) (concluding "where a supervisory employee is involved, the proof of [UEM] is more rigorous and the defense is more difficult to establish").

E. Characterization

Having found that the Secretary proved a violation, we turn to whether it should be characterized as serious or willful. The Secretary alleges that Respondent's conduct was willful because a supervisor knowingly violated fall protection standards and multiple supervisory employees allowed workers to continue to be exposed to fall hazards. (Sec'y Br. at 33.)

Respondent acknowledges it "should have done more than it did to prevent and detect the fall protection violations on the [W]orksite." (Stip. R.) Still, in its view, the violation should not be characterized as willful because it was not previously cited for violating the Act and it took actions which show it did not intentionally disregard the fall protection requirements and was not plainly indifferent to safety. (Resp't Br. at 10, 12-15; Resp't Reply at 18-21.)

With respect to Respondent's history, while a prior citation is necessary to characterize a violation as "Repeat," a lack of previous citations does not preclude a finding of willfulness. 29

[19] FSH was neither fined nor asked to leave the Worksite for failing to put up guardrails. (Tr. 361-2, 428.)

U.S.C. § 666(a); *Woolston Constr. Co*., 15 BNA OSHC 1114, 1119 (No. 88-1877, 1991) ("a prior citation is not a necessary condition to finding willfulness"), *aff'd without published opinion*, 1992 WL 117669 (D.C. Cir. May 22, 1992); *Pepperidge Farm, Inc*., 17 BNA OSHC 1993, 2000 (No. 89-265, 1997) (prior inspection's lack of recordkeeping citations did not mean violation could not be willful); *Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 209 (3d Cir. 2005) (affirming willful characterization despite no prior citations when management had experience with regulations and worked regularly with lead-based paint). A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirement of the Act or with plain indifference to employee safety." *A.E. Staley Mfg. Co*., 19 BNA OSHC 1199, 1202 (No. 91-0637, 2000) (consolidated), *aff'd*, 295 F.3d 1341 (D.C. Cir. 2002). *See also Williams Enters. Inc.,* 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987) (finding a heightened awareness based on experience with steel erection standards).

In this matter, the Secretary relies on admissions that Respondent knew fall protection was required and its supervisors knew it was not being used. (Sec'y Br. at 32-34.) While OSHA had not previously inspected Respondent, Patton, Zimmerman, and Barros all acknowledged that, before the dates alleged in the Citation, they knew fall protection was required for activities done at a height greater than six feet. (Tr. 331, 411; Exs. C-21 at 2, C-24, C-25, C-26; Stip. L.) *See Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2083, 2091 (No. 06-1542, 2012) (heightened awareness established by evidence that safety manager discussed the requirement and the superintendent's was familiar with it from a prior project); *L.E. Myers*, 16 BNA OSHC at 1041 (finding violation willful where foreman knew requirements but instead "gambled" that it could work safely without insulating power lines). Respondent's enforcement of its hard hat rule does not undermine the finding that its supervisors knew fall protection was required and that it was not

being used on October 22 and November 3, 2016. (Tr. 250-51; Exs. R-4, C-1, C-22 at 2, C-23 at 1-2, C-24 at 1, C-26 at 2; Stips. L, P, R.) There is no evidence of discipline related to fall protection. (Tr. 361-2, 428.)

Respondent tries to counter the evidence of its actual knowledge of standard and the lack of fall protection at the Worksite by arguing that its superintendent was a new employee. (Resp't Br. at 3, 14; Resp't Reply at 20-21.) While true, Barros had worked in the industry for nearly twenty years and acknowledged knowing OSHA required fall protection at six feet for a long time.[20] (Tr. 330-31, 408, 430; Exs. C-22, C-23, C-24.) *See Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1240-41 (11th Cir. 2002) (upholding willful characterization when supervisor knew of requirement for respirators); *MJP Constr. Co.*, 19 BNA OSHC 1638, 1648 (No. 98-0502, 2001) (finding supervisors are chargeable with knowledge of the standard's requirements based on their prior work experience, wherever that experience occurred), *aff'd without published opinion*, 56 F. App'x 1 (D.C. Cir. 2003). He also knew that working without guardrails was risky. (Tr. 348-49.) He had authority to correct violations, and the other supervisors expected he would.[21] (Tr. 360, 408-9; Exs. C-21, C-23, C-24.) FSH and Zimmerman both viewed him as in charge of the Worksite and he was immediately responsible for correcting violations at the Worksite. (Tr. 114, 409; Ex. C-24.)

Further, as noted above, Barros was not the only supervisor who knew fall protection was necessary. (Tr. 170, 411; Ex. C-26.) And Respondent stipulated to knowing "OSHA requires

[20] Respondent argued that Barros was in training for the first two weeks or so of his employment. (Tr. 416.) However, when asked by Respondent's counsel what he was being trained on, his supervisor does not cite safety or fall protection. (Tr. 417.) Indeed, Barros already knew OSHA required fall protection for work done over six feet above a lower level. (Tr. 330-31.) Respondent also stipulated that Barros "was capable of identifying existing and predictable hazards … ." (Stip. C.)

[21] "As of at least November 2, 2016, Respondent's employee [Barros] had authorization to take prompt corrective measures to eliminate existing hazards at the [W]orksite." (Stip. F.)

employees on walking/working surface with an unprotected edge which is six feet or more above a lower level" must be protected by guardrails, safety nets, or fall arrest systems. (Stip. L.)

Turning to knowing that the standard was being violated, multiple managers visited the Worksite and could see there were no guardrails or other evidence of the use of fall protection. (Tr. 338-39, 341, 426-27; Stip. M; Exs. C-1, C-2, C-3, C-24, C-26.) Barros certainly realized he himself was not wearing a harness and could see there were no nets or guardrails when he went to the upper levels of the structure on October 22 and November 3, 2016. (Tr. 338, 344, 352; Ex. C-1.) *See Altor, Inc.,* 23 BNA OSHC 1458, 1465, 1467 (No. 99-0958, 2011) (finding violation willful when supervisors had actual knowledge of the cited standard and their own noncompliance), *aff'd*, 498 F. App'x. 145 (3d Cir. 2012). His own photographs show what was in his view, including workers without fall protection. (Exs. C-2, C-5.) Patton acknowledged noticing the unprotected floor openings in the photographs Barros took on October 22 and 28th, and he assumed Zimmerman did as well.[22] (Tr. 240, 425-27, 430-31; Ex. C-1, C-26 at 2, R-14.)

Respondent argues it thought FSH would build the guardrails on November 3, 2016. (Resp't Br. at 13.) The record does not provide a sufficient basis for this belief. Barros does not say FSH agreed to build guardrails. (Tr. 358, 389; Exs. C-21, C-22 at 2, C-23.) For his part, FSH emphatically denied that he was told to build guardrails before the worker fell. (Tr. 109-11, 117, 127.) He said that he raised the lack of guardrails with Barros on November 1, 2016 (two days

[22] Patton and Zimmerman received the daily log entries for the Worksite via email and reviewed them, including any attached photographs. (Tr. 220, 234, 240, 425-26; Ex. C-23 at 1, 3.) Patton indicated that he did not view the photographs from October 22, 2016 on the day they were sent but does not deny that he received them and reviewed them at some point. (Tr. 425-27, 430-31; Ex. C-26 at 1-2.) Nor does he assert that he did not review the photograph and log entry from October 28, 2016 on the day it was sent. (Tr. 426.) Moreover, he does not dispute that he noticed the unprotected floor openings shown in the photographs. (Tr. 240, 426-27, 431; Exs. C-1, C-26, R-14.) *See Conie Constr., Inc.*, 16 BNA OSHC 1870, 1872 (No. 92-264, 1994), *aff'd*,73 F.3d 382 (D.C. Cir. 1995) (finding that the knowledge of the foreman and owner about the cited standard is imputable to company when assessing willfulness).

before the worker's death) but was not ordered to install any fall protection and was not told he would be paid for such work. (Tr. 106, 131, 136-37.)

Barros acknowledged that FSH complained he was not being paid to install guardrails. (Tr. 389; Ex. C-22 at 2, C-23 at 3.) He also said, in his first two interviews with the CO, that workers had harnesses and it had not been necessary for him to tell workers to put up guardrails. (Exs. C-21, C-22; Tr. 189.) Only in a follow up interview when he was confronted with his own photographs of the Worksite, did Barros indicate he and FSH discussed guardrails. (Tr. 233-34, 237-38; Ex. C-23.) During that third interview, Barros said the conversation occurred two days before the accident (i.e., on November 1, 2016).[23] (Ex. C-23.)

Leaving aside these discrepancies, there is no explanation about why Respondent failed to take any action to correct fall hazards that existed as early as October 18, 2016 before November 2, 2016. Decking for the second floor of the units, which was over six feet above the ground, was completed on October 18, 2016. (Tr. 335.) There is no evidence that anyone ordered workers not to go above six feet until guardrails were in place. (Tr. 349-50; Ex. C-22 at 2.) The day after decking for the second floor, Barros and his supervisor, Zimmerman, visited the site and could have learned about the lack of guardrails. (Tr. 333, 335, 367, 407.) Even if they missed the lack of guardrails on October 19th, Barros returned to the Worksite three days later and saw workers on the upper level of the structure without any fall protection. (Exs. C-1, C-2.) He photographed this and sent it to the other supervisors on the same day. (Tr. 339, 431; Ex. C-2.) And he knew

[23] In his first interview with the CO, Barros said that he was "probably" last at the Worksite on November 1, 2016. (Ex. C-21.) In his second interview; on November 10, 2016, he said he spoke with FSH about guardrails on November 1st or 2nd. (Ex. C-22 at 2.) Similarly, in his third interview, he said the conversation occurred about two days before the accident. (Ex. C-23.) At the hearing, he said he spoke with FSH one day before the accident, on November 2, 2016, and expected him to put them up the next day (November 3, 2016). (Tr. 346-47.)

that "guardrails or other appropriate fall protection had not been installed on the sides and edges of the walking/working surfaces" as of October 28, 2016. (Stip. M.)

So, Barros knew fall protection was required, observed workers at heights above six feet not using fall protection, went above six feet without fall protection himself, and distributed photographs of such activity to multiple other supervisors. (Tr. 331, 337-39; Exs. C-1, C-23.) And yet there is no credible claim that anyone required appropriate fall protection until after a worker fell from the third floor. (Tr. 101, 105-6, 109-11, 345; Stip. O.) Zimmerman did not check to see if guardrails had been installed or if the framing crew was using fall protection when he visited the Worksite on October 31, 2016.[24] (Tr. 409-10; Ex. C-1.) Nor did anyone else take steps at any point before the accident to ensure that workers would not be above six feet before the guardrails were installed. (Tr. 350, Stip. O, R.) *See Sal Masonry Contractors, Inc.,* 15 BNA OSHC 1609, 1613-14 (No. 87-2007, 1992) (characterizing a violation as willful when employer knew guardrails had not been installed); *Fluor Daniel*, 295 F.3d at 1240 (conscious disregard found when employer knew of OSHA requirement and consciously and voluntarily choose to violate it).

Respondent makes no claim of any attempt to address the lack of fall protection until late in the day on November 2, 2016. Even if Respondent believed that guardrails were going to be installed on November 3, 2016, it does not explain why Barros went above six feet without fall protection when he arrived at the Worksite after the worker fell. (Tr. 117, 354; Stips. P, Q.) Nor does any belief about what Respondent expected would happen mitigate its failure to say anything to the workers who remained exposed to the hazard after the accident. (Tr. 117, 216, 350, 352, 354; Exs. C-5, C-9.) *See Sal Masonry,* 15 BNA OSHC at 1613 (foreman's conscious decision to

[24] In his statement to the CO on November 10, 2016, Zimmerman indicated that he did not see fall protection when he was at the Worksite on October 31, 2018. (Ex. C-24.) At the hearing, he said he did not recall going into the structure on that day. (Tr. 411.) Ostrander was also at the Worksite but neither he nor Zimmerman directed FSH to build guardrails on October 31, 2016. (Tr. 111, 411.)

continue work without guardrails establishes willfulness). *See V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994) (affirming violation for failure to use safety nets as willful and noting: "It makes no difference that the superintendent left it up to the employees to choose to do the unsafe work, instead of flatly ordering them to do it."). The supervisors' knowledge of the hazard and their failure to address it are imputable to Respondent. *See Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000) (knowledge and conduct of supervisory employee may be imputed for the purpose of finding a violation willful); *Altor,* 23 BNA OSHC at 1465, 1467 (supervisor's failure to use personal protective equipment is imputable).

Respondent also argues that its actions were not willful because the general contractors, SunQuest Energy, LLC (SunQuest), did not remove it from Worksite for safety violations. (Resp't Br. at 2, 13.) Respondent's contract with SunQuest specifies that Respondent will be "solely responsible for protecting its employees, subcontractors, laborers, suppliers" and that Respondent is "solely responsible for ensuring full compliance with all governmental safety and OSHA rules and regulations." (Ex. C-10.) Even if SunQuest attempted to contractually assume some responsibility for Respondent's compliance with the Act, which it did not, the Commission has long held that employers cannot contract away such responsibilities. *See e.g., Bianchi,* 490 F.3d at 209; *Baker Tank Co.*, 17 BNA OSHC 1177, 1180 (No. 90-1786, 1995) (employer's contract with another party did not affect its liability for the violation). Respondent oversaw the creation of the hazard and was cited for exposing its own employees and those of its subcontractors to it.[25] *S. Pan Servs.*, 685 F. App'x. 692, 696-97 (11th Cir. 2017) (unpublished) (employer has a duty to

[25] This case does not involve a situation where the hazardous condition was created by some unaffiliated third party or where the cited employer lacked control to address the hazard. Adelo and FSH worked on Edwin Taylor's behalf to build the structure up to the point that fall protection was needed. Respondent retained general supervisory authority over the Worksite, including the authority to correct health and safety violations. (Stips. G, H.) *See McDevitt Street Bovis, Inc.,* 19 BNA OSHC 1108, 1109-10 (No. 97-1918, 2000) (an employer who creates or controls a cited hazard must protect its own employees and those of others "engaged in the common undertaking").

comply with a standard when its own employees are exposed to the hazard). As the Commission stated in *Jim Boyd Constr., Inc.,* 26 BNA OSHC 1109 (No. 11-2559, 2016), "it is not 'objectively reasonable' for an employer to ignore a known requirement on the basis that third-party safety personnel did not object." *Id.* at 1114.

For the same reasons, Respondent's 2013 contract with Adelo does not alter Respondent's responsibilities for safety at this Worksite.[26] (Ex. R-2; Tr. 324.) *See V.I.P.*, 16 BNA OSHC at 1875 ("[r]esponsibility under the Act ... rests ultimately upon each employer"). Respondent retained Adelo to assist with the work it agreed to do for Sunquest. (Stip. E; Resp't Br. at 14.) Adelo, in turn, brought in FSH to assist with this work. (Stip. I.) FSH did not have a written contract with Respondent. Edwin Taylor had the authority to correct safety violations, including those related to fall protection at the Worksite, regardless of whether Respondent or a subcontractor directly employed the exposed workers. (Stip. G, H.) Further, neither Adelo nor FSH agreed to relieve Respondent of its obligation to provide a safe workplace for its own employees. (Ex. R-2.)

Finally, Respondent points to actions it took after the worker fell as evidence that the violation should be serious rather than willful. (Resp't Br. at 15; Ex. C-26.) This evidence does not preclude a willful characterization. *Anderson Excavating & Wrecking Co*., 17 BNA OSHC 1890, 1891, n.3 (92-3684, 1997), *aff'd*, 131 F.3d 1254 (8th Cir. 1997). On the day the worker fell, Barros went to the upper level and took photographs without wearing fall protection and did not direct the workers he observed on the upper level who were also unprotected to leave the structure. (Tr. 337-38, 350-51; Exs. C-2, C-5.) *See V.I.P.*, 16 BNA OSHC at 1875 (employers have a

[26] The contract does not refer to the Worksite. (Ex. R-2; Tr. 464-65.) Patton explained that each project was handled with separate purchase orders. (Tr. 464-65.) Respondent did not introduce the purchase order related to the Worksite into evidence or give it to the CO during her investigation. (Tr. 465.)

responsibility to ensure workers do not put themselves in unsafe positions). While Barros says he directed FSH to build guardrails with the available materials on November 3rd after the worker fell, the CO still observed fall protection hazards on her second site visit on November 10.[27] (Tr. 175, 178-79, 199-201; Exs. C-12, C-15, C-17, C-19.) *See A. Schonbek & Co., Inc.,* 9 BNA OSHC 1189, 1191 (76-3890, 1980), *aff'd,* 646 F.2d 799 (2d Cir. 1981) (finding a violation of guarding standard willful when the machine was used after an amputation). So, Respondent's post-injury actions are not sufficient to characterize the violation as serious instead of willful. *See Caterpillar,* 17 BNA OSHC at 1733 (willfulness finding not obviated by inadequate abatement efforts).

An employer need not act with malice or specific intent to violate the Act. *Anderson,* 17 BNA OSHC at 1894. The Secretary can show willfulness by proving an employer is aware of the cited standard but allows work to continue over some period without the requirement being met. *Sal Masonry*, 15 BNA OSHC at 1614. In *Sal Masonry*, the employer argued that its violation was not willful because it specifically tasked someone with building guardrails. *Id*. The Commission concluded that this argument lacked merit because although the supervisor knew guardrails were required, he failed to ensure the guardrails were actually put in place. *Id*. Likewise, in the present matter, Respondent knew the requirement, knew it was not being complied with, could have corrected it, but repeatedly failed to do so. *See Caterpillar, Inc. v. Herman*, 154 F.3d 400, 402 (7th Cir. 1998); *Jim Boyd,* 26 BNA OSHC at 1111 (affirming a violation of trenching standard as willful when employer knew the requirements and choose not to follow them).

[27] FSH indicated that another component of the guardrail system was not available at that time and never arrived. (Tr. 138-39.)

II. Penalty

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010), *aff'd*, 664 F.3d 1164 (10th Cir. 2011). When the Citation was issued, the maximum statutory penalty for a willful citation was $126,749.

The Secretary argues that the maximum penalty should be imposed for the violation. (Sec'y Br. at 40; Sec'y Reply at 6.) *See Eric K. Ho,* 20 BNA OSHC 1361, 1379 (No. 98-1645, 2003) (consolidated) (an extreme lack of good faith may warrant the assessment of the statutory maximum penalty), *aff'd sub nom*., *Chao v. OSHRC,* 401 F.3d 355 (5th Cir. 2005). He argues that the gravity of the violation is high and the hazard was both capable of, and did, result in a worker's death. (Sec'y Br. at 40.) Respondent counters that it should receive reductions for: (1) having fewer than twenty employees; (2) having an effective safety and health management system, and (3) its safety history. (Resp't Br. at 11-12, 17-19.)

First, as to gravity, the undersigned agrees with the CO's assessment that the violation was of "high" gravity with a greater probability of an accident considering the number of people at the Worksite and the amount of time the Worksite lacked guardrails or other appropriate fall protection. (Tr. 258-59.)

Turning next to the size factor, Respondent had between fourteen and sixteen employees at the start of OSHA's investigation.[28] (Tr. 259, 437; Stip. D.) However, the Secretary argues that no reduction is appropriate, because the violation was so willful and severe. (Tr. 259-60.) Even when a proposed penalty is appropriate for the gravity of an offense, size may still be taken into

[28] The parties stipulated that: "Respondent had fewer than 25 total employees at the time of the incident." (Stip. D.)

consideration to avoid destructive penalties for small employers that make significant efforts to come into and remain in compliance. *Colonial Craft Reproductions, Inc.,* 1 BNA OSHC 1063, 1064-65 (No. 881, 1972); *Bardav, Inc., d/b/a Martha's Vineyard Mobile Home Park,* 24 BNA OSHC 2105, 2109 (No. 10-1055, 2014) (affirming violation as willful and giving reduction for size); *Jim Boyd*, 26 BNA OSHC at 1115 (same). After the accident, Respondent recognized its failings and took steps to prioritize safety despite its small size. (Ex. C-26; Stip. R.) For example, a dedicated person starting to specifically focus on safety violations in the photographs routinely sent to supervisors through Buildertrend. (Tr. 457.) Respondent also required additional training and inspections. (Tr. 241, 457; Exs. C-22, C-26.) Accordingly, the gravity-based penalty should be reduced by 20% to $101,399.20.

As for the other penalty factors, the undersigned finds that no reduction is warranted. While Respondent had elements of a safety program and showed some evidence of enforcing aspects of it, in the context of fall protection, it cannot be considered an effective program. Supervisors knew the requirements but failed to address hazards. (Tr. 172; Ex. C-11.) Multiple supervisors knew or could have known of the hazard and yet failed to act. *See Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2119 (No. 07-1578, 2012) (finding, in connection with a willful violation, that cooperation during the inspection and other efforts were insufficient to support a penalty reduction for good faith).

In terms of Respondent's history, there were no records of OSHA inspecting Respondent prior to November 3, 2016. (Tr. 241, 260.) As Respondent had not previously been inspected, its history is neither positive nor negative. (Tr. 260.) So, neither an increase nor a decrease in the penalty is warranted for Respondent's history.

Accordingly, in consideration of the factors set forth in Section 17(j) of the Act, a penalty of $101,399.20 is appropriate. 29 U.S.C. § 666(j).

ORDER

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

Citation 1, Item 1 for a willful violation of 29 C.F.R. § 1926.501(b)(13) of the Act is AFFIRMED, and a penalty of $101,299.20 is ASSESSED.

SO ORDERED.

/s/Covette Rooney
Covette Rooney,
Chief Judge, OSHRC

Dated: June 3, 2019
Washington, D.C.