United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. FAR FROM BROKEN AUTO SALES, INC. d/b/a SMART CHOICE AUTO SALES, INC., Respondent.	OSHRC Docket No. **20-0415**

CORRECTED DECISION AND ORDER[1]

Attorneys and Law firms

Jana J. Edmondson-Cooper, Nicholas C. Hall, Attorneys, Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, for Complainant.

Jon Carlson, Pro se, Smart Choice Auto Sales, Fort Pierce, FL, for Respondent.

JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

Far From Broken Auto Sales, d/b/a Smart Choice Auto Sales, Inc., (FFB) contests a Citation and Notification of Penalty issued by the Secretary of Labor on July 1, 2019, for alleged violations of four construction standards under the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 651-78. The Citation resulted from an inspection conducted by the United States Department of Labor, through its Occupational Safety and Health Administration ("OSHA"), on June 4, 2019, in Fort Pierce, Florida.[2] On that date, Henry Shpiruk, a Compliance

[1] Pursuant to Commission Rule 90(b)(4)(i), 29 C.F.R. § 2200.90(b)(4)(i), an errata order was issued to replace "First Marine" with "FFB" in the last sentence of page 2.

[2] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order No. 1–2012, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 77 Fed. Reg. 3912 (Jan. 25, 2012). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

Safety and Health Officer[3] with OSHA had observed a man standing on the roof of a one-story building owned by FFB as he drove by. The CSHO stopped and conducted an inspection of FFB's worksite because he did not see the man using any form of fall protection as he stood on the roof.

Item 1a of the Citation alleges a serious[4] violation 29 C.F.R. § 1926.501(b)(10) for failing to provide fall protection for an employee working on a low-sloped roof. Item 1b alleges a serious violation of 29 C.F.R. § 1926.503(a)(1) for failing to provide fall protection training to an employee who was exposed to a fall hazard. The Secretary proposes a grouped penalty of $3,410 for Items 1a and 1b. Item 2a of the Citation alleges a serious violation of 29 C.F.R. § 1926.1053(b)(8) for failing to secure a ladder that could be displaced by workplace activities. Item 2b alleges a serious violation of 29 C.F.R. § 1926.1060(a) for failing to provide ladder safety training to an employee who used a ladder at the worksite. The Secretary proposes a grouped penalty of $2,273 for Items 2a and 2b.

FFB timely contested the Citation and the Secretary filed a formal complaint[5] with the Commission seeking an order affirming the Citation and proposed penalties, to which FFB filed an answer. The Court held a bench trial in this proceeding via videoconference on March 9, 2021.[6] The Secretary filed a post-trial brief. FFB did not. The parties stipulate the Commission has jurisdiction over this action, FFB is a covered employer under the Act, and FFB's principal place of business is in Fort Pierce, Florida (Compl. ¶¶ I-III) (*see* Commission Rule 34(b)(2) ("Any allegation [in the complaint] not denied shall be deemed admitted"). Based on the stipulations and the record evidence, the Court concludes the Commission has jurisdiction over this proceeding under section 10(c) of the Act, and FFB is a covered employer under section 3(5) of the Act. 29 U.S.C. §§ 659(c), 652(5).[7]

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[3] A "Compliance Safety and Health Officer" is "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. §1903.22(d).

[4] The Act contemplates various grades of violations of the statute and its attendant regulations—"willful"; "repeated"; "serious"; and those "determined not to be of a serious nature" (the Commission refers to the latter as "other-than-serious"). 29 U.S.C. § 666.

[5] Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R §2200.30(d). Attached to the complaint and also adopted by reference was the citation, which was "a part thereof for all purposes."

[6] FFB owner Jon Carlson participated in the video trial via telephone.

[7] FFB claimed for the first time at trial that the man whom Shpiruk saw on the roof of FFB's building on June 4, 2019, was not its employee (Tr. 44-45). Carlson stated the man was a friend of his who was doing him a favor by checking on the work of a roofing contractor (Tr. 9, 47). This claim is contradicted by the signed witness statements of both Carlson and Chris Gosse (the man on the roof) taken by Shpiruk on June

Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 12(j) of the Act.[8] 29 U.S.C. § 661(j). For the reasons indicated *infra*, the court holds the Secretary has proven his prima facie case with regard to the cited items and therefore, the court **AFFIRMS** all items and **ASSESSES** grouped penalty of $3,410 for Items 1a and 1b, and $2,273 for Items 2a and 2b respectively.

II. BACKGROUND

On June 4, 2019, Shpiruk was driving on U.S. Highway 1 in Fort Pierce, Florida, when he noticed a one-story building (described as a shed) next to a parking lot to the right of the highway. A man was standing 2 or 3 feet from the edge of the low-sloped roof of the shed. Shpiruk did not see any form of fall protection in use (Ex. C-9, Ex. C-11; Tr. 9, 15–17). Deciding to inspect the premises, he parked his vehicle, took photographs, and approached the shed. Shpiruk noticed an unsecured ladder leaning against the roof eave on one side of the shed. The ladder was in front of a door to the shed (Ex. C-16).

Shpiruk met with Jon Carlson and Chris Gosse and learned that Carlson was the owner of FFB, a business that buys and repairs used vehicles, and then sells them (Ex. C-24; Tr. 27). Shpiruk held an opening conference with Carlson and took interview statements from Carlson and Gosse. Both men signed the statements Shpiruk transcribed during the interviews (Ex. C-23, Ex. C-24).

Gosse told Shpiruk he had worked for FFB for one year. He normally worked daily from 9:00 a.m. to 4:00 p.m., performing handy man work "not needing a permit" around the establishment (Ex. C-23). He had worked on the shed roof the day before the inspection (Monday, June 3) from 10:00 a.m. to 3:00 p.m. On the day of the OSHA inspection (on Tuesday, June 4), Gosse had been on the roof for approximately one hour. He stated he had not been wearing fall protection. He had not secured the ladder and had used it five to seven times that day. He stated that Mr. Carlson "has not provided me with training for the hazards associated with falls and ladders, and he never confirmed I had received any training." (Ex. C-23.)

4, 2019 (Ex. C-23. Ex. C-24). Carlson also contradicted this claim under oath at the trial. When reminded that he had informed Shpiruk during the inspection that Gosse was his employee, Carlson replied, "Well, I would consider anybody that I hire an employee. I'm paying them. . . . When I hire a contractor, he is my employee." (Tr. 52.) The court does not credit Carlson's claim that FFB was not the employer of Gosse.

[8] All arguments not expressly addressed have nevertheless been considered and rejected. If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

Carlson stated the asphalt shingles had been removed from the roof of the shed so that the damaged plywood underneath could be replaced. He stated Gosse "was on the roof performing the work while not protected from falling." (Ex. C-24.) Gosse had worked on Sunday, June 2, for half a day; from 10:00 a.m. to 3:00 p.m. on Monday, June 3; and for one hour the day of the inspection. The ladder was unsecured. Carlson claimed Gosse had worked for FFB "less than one month," and stated, "I provided training to Chris to the best of my ability for hazards associated with falls and ladders." (Ex. C-24.) FFB abated both violations by securing the ladder and submitting evidence to the Secretary that it had provided a harness for Gosse's future use when on the roof. (Tr. 36, 38).

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.' " *Martin v. Occupational Safety & Health Review Comm'n (CF & I Steel Corp.),* 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. § 651(b)). "The Act charges the Secretary with responsibility for setting and enforcing workplace health and safety standards." *Id*. "To implement its statutory purpose, Congress imposed dual obligations on employers. They must first comply with the 'general duty' to free the workplace of all recognized hazards." *ComTran Grp., Inc. v. U.S. Dep't of Labor,* 722 F.3d 1304, 1307 (11th Cir. 2013). "They also have a 'special duty' to comply with all mandatory health and safety standards." (*Id*. citing id. at § 654(a)(2)).

"With respect to the latter, Congress provided for the promulgation and enforcement of the mandatory standards through a regulatory scheme that divides responsibilities between two federal agencies." (*Id*.) "The Secretary establishes these standards through the exercise of rulemaking powers." *CF & I Steel Corp*., 499 U.S. at 147. See 29 U.S.C. § 665. Pursuant to that authority, the standards at issue in this case were promulgated. Meanwhile, the Commission is assigned to conduct adjudicatory functions under the Act and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam).

Under the law of the Eleventh Circuit where this case arose,[9] the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer "knowingly disregarded" the Act's requirements. *ComTran,* 722 F.3d at 1307; *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014).

Item 1a: Alleged Serious Violation of § 1926.501(b)(10)

Item 1a alleges that on or about June 4, 2019, an FFB employee "was exposed to a fall hazard of approximately 9 feet when performing roof work on a low slope roof while not being protected from falling to the lower level." The cited standard provides:

> Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e., without the warning line system] is permitted.

29 29 C.F.R. § 1926.501(b)(10).

The Cited Standard Applies

Subpart M of the construction standards is titled *Fall Protection.* Section 1926.501 of Subpart M is titled *Duty to have fall protection.* Section 1926.501(a)(1) provides the section "sets forth requirements for employers to provide fall protection systems." The cited standard requires the use of fall protection for any employee engaged in roofing activity on a low-sloped roof with unprotected sides and edges 6 feet or more above lower levels.

[9] The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Fort Pierce, Florida, in the Eleventh Circuit, which is also the location of FFB's principal place of business. *See* 29 U.S.C. § 660(b). The Commission has held that where it is highly probable that a case will be appealed to a particular circuit, it generally has applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000). The court therefore applies the precedent of the Eleventh Circuit in deciding the case where it is highly probable the case would be appealed.

Shpiruk testified the shed roof is low-sloped, and Carlson agreed (Ex. C-24; Tr. 32-33, 51-52). Shpiruk estimated the distance from the ground to the eaves of the shed is 9 feet, based on the spacing of the ladder rungs in the photograph admitted as Exhibit C-17 (Tr. 25). Carlson testified the roof is 8 feet, 4 inches, "from the concrete to the fascia where the fascia meets the roof." (Tr. 47.) It is undisputed the shed roof is more than 6 feet above the lower level. Gosse, FFB's employee, stood on the shed roof, which is low-sloped and higher than 6 feet, as he performed work on the roof. The Court concludes § 1926.501(b)(10) applies to the cited condition.

FFB Violated the Terms of the Cited Standard

As Shpiruk approached the shed, he saw Gosse working with a saw 2 to 3 feet from the edge of the roof (Tr. 17, 21). Exhibit C-10 is a photograph of Gosse standing near the edge of the low-sloped shed roof looking down. No fall protection is visible in the photograph. Shpiruk testified there was no form of fall protection being used on the shed roof (Tr. 18-19). Gosse also admitted he was not using fall protection while working on the shed roof in his signed witness statement (Ex. C-23).

At trial, FFB argued it used a safety monitoring system, as permitted by § 1926.501(b)(10) for roofs 50 feet or less in width. The shed roof is approximately 23 feet wide (Ex. C-24). Carlson testified Gosse "was working in the back while I was watching him from the ground. . . . I was 6 to 8 feet away looking up. He could've [fallen] on top of me." (Tr. 48-49.)

However, § 1926.500(b) defines a *safety monitoring system* as "a safety system in which a competent person is responsible for recognizing and warning employees of fall hazards." Section 1926.502(h) sets out the requirements the employer must meet to comply with the use of a safety monitoring system, including § 1926.502(h)(1)(iii), which states, "The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored[.]"

Carlson stated he was standing on the ground as he looked up and watched Gosse work on the roof. Section 1926.502(h)(1)(iii) requires the safety monitor to be on the *same* surface as the employee being monitored. The Commission applies a literal interpretation to this standard and "has previously held that section 1926.502(h)(1)(iii)'s unambiguous requirement must be met even in a case where the cited employer argued that positioning the safety monitor six feet above the employee being monitored gave the monitor a better vantage point." *Capeway Roofing Sys., Inc.*, No. 00-1968, 2003 WL 22020485, at *9 (OSHRC Aug. 26, 2003) (citation omitted). FFB did not

comply with the requirements of § 1926.502(h)(1)(iii) on June 4, 2019, because Carlson was not on the same walking/working surface (the roof) as he watched Gosse. FFB was not using a safety monitoring system within the meaning of the standard. Therefore, the court concludes the Secretary has established FFB failed to provide fall protection for its employee working on its shed roof. FFB failed to comply with the requirements of § 1926.501(b)(10).

The FFB Employee Was Exposed to the Cited Hazard

It is undisputed Gosse was working on the shed roof without fall protection. Therefore, the court concludes the Secretary has established Gosse was exposed to a fall hazard.

FFB Knew of the Violative Condition

"The Secretary may prove that an employer had knowledge of a violation in one of two ways—(1) by imputing the actual or constructive knowledge of a supervisor or (2) by demonstrating constructive knowledge based on the employer's failure to implement an adequate safety program." *ComTran,* 722 F.3d at 1311. An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct." *ComTran,* 722 F.3d at 1307–08. "An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have." *ComTran,* 722 F.3d at 1308.

Carlson is the owner of FFB. He hired Gosse and supervised his work. He had actual knowledge that Gosse was not using fall protection while working on the shed roof. Therefore, the court concludes the Secretary has established FFB had actual knowledge of the violative condition. Thus, the court concludes the Secretary has established FFB violated § 1926.501(b)(10).

Characterization of the Violation

The Secretary characterized the violations as "serious." A "serious" violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). "That provision does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur." *Miniature Nut & Screw Corp*., 17 BNA OSHC 1557, 1558 (No. 93- 2535, 1996). Here, Shpiruk testified the employee could have sustained serious injuries had he fallen from the roof (Ex. C-5; Tr. 35). The court credits his testimony and concludes the violation is properly characterized as serious.

Items 1b and 2b: Alleged Serious Violation of § 1926.503(a)(1)

Item 1b alleges that on or about June 4, 2019, the FFB employee "was exposed to fall hazards when performing roof work on a low slope roof prior to being provided with a training program that would enable him to recognize the hazards associated with fall." Item 2b alleges that on or about June 4, 2019, the FFB employee "was exposed to fall hazards when using a portable ladder to gain access to and from a roof prior to being provided with a training program that would enable him to recognize the hazards associated with ladders." The cited standard are:

Section 1926.503(a)(1), which provides:

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

And

Section 1926.1060(a)(1), which provides:

> The employer shall provide a training program for each employee using ladders and stairways, as necessary. The program shall enable each employee to recognize hazards related to ladders and stairways and shall train each employee in the procedures to be followed to minimize these hazards.

The Cited Standards Apply

Section 1926.503(a)(1) applies to any employer who has an employee or employees who might be exposed to fall hazards on the worksite. Section 1926.1030(a)(1) applies to any employer who has an employee or employees who use ladders on the worksite. FFB's employee used a ladder to access the roof of the shed. The court concludes the Secretary has established both cited standards apply.

FFB Violated the Cited Standards

Carlson told Shpiruk, "I provided training to Chris to the best of my ability for hazards associated with falls and ladders." (Ex. C-24.) At trial, Carlson did not elaborate on this statement, and he conceded, "I did not train the man how to use—how to climb a ladder." (Tr. 48.) Gosse told Shpiruk, "Jon Carlson has not provided me with training for the hazards associated with falls and ladders, and he never confirmed I had received training." (Ex. C-24.) The court concludes the Secretary has established FFB violated the terms of the cited standards.

The FFB Employee Was Exposed to the Cited Hazards

FFB's employee used a ladder to access a low-sloped roof that is approximately 9 feet high. His lack of knowledge regarding proper procedures to ensure fall protection and ladder safety exposed him to potential serious physical harm. The court concludes the Secretary has established FFB's employee was exposed to the cited hazards.

FFB Knew of the Violative Condition

Since it is the employer's duty to provide training to its employees, the employer will almost invariably have actual knowledge regarding whether it trained the employees as required. To establish noncompliance with a training standard, the Secretary must show the cited employer "failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *N & N Contractors Inc.,* 18 BNA OSHC 2121, 2125 (No. 96-0606, 2000).

Here, the Secretary established FFB provided its employee with no safety training regarding fall hazards and hazards associated with ladders, and it did not confirm with the employee that he had previous training in those areas. The court concludes the Secretary has established FFB had actual knowledge of the violative condition. Thus, the court concludes the Secretary established that FFB violated §§ 1926.503(a)(1) and 1060(a)(1).

Characterization of the Violations

The Secretary characterized the violations of the cited standards as serious, which, as noted, means the cited hazards presented "substantial probability that death or serious physical harm" could result from the violative conditions. FFB's employee had received no training in fall hazards or hazards associated with ladders. He did not have the necessary information to evaluate and protect against these hazards, which include falling approximately 9 feet from the roof or ladder to the ground. Falls from that height could result in serious physical harm (Ex. C-5). The court concludes the Secretary properly characterized the violations as serious.

Item 2a: Alleged Serious Violation of § 1926.1053(b)(8)

Item 2a alleges that on or about June 4, 2019, the FFB employee "was exposed to a fall hazard when using [a] ladder [that was] set up in an active car lot to gain access to and from a roof while the ladder was not secured to prevent accidental displacement and/or barricaded."

Section 1926.1053(b)(8) provides:

> Ladders placed in any location where they can be displaced by workplace activities or traffic, such as in passageways, doorways, or driveways, shall be secured to

> prevent accidental displacement, or a barricade shall be used to keep the activities or traffic away from the ladder.

The Cited Standard Applies

Subpart M is titled *Stairways and Ladders.* Section 1926.1053 is titled *Ladders* and applies to "all ladders as indicated, including job-made ladders." The court concludes the Secretary established the cited standard applies to the cited conditions.

FFB Violated the Cited Standard

Exhibit C-17 is a photograph of Gosse descending the ladder at issue. The ladder is directly in front of a door to the shed and surrounding area is paved. Immediately to the right of the shed is a stairway and to its right is a garage with open overhead doors. The ladder is in a location where it can be displaced by traffic—it is in front of doorway and in a driveway that is open to public traffic. The ladder is not secured (Tr. 22).

In Exhibit C-17, no one is holding the ladder for Gosse as he climbs down. FFB argues Carlson was available to assist with the ladder when Gosse was working. On cross-examination, Carlson asked Shpiruk, "Is it okay for another individual to hold the back of the ladder while an individual climbs up the ladder[?]" and Shpiruk replied, "Yes, yes." (Tr. 40.) Carlson later testified he personally secured the ladder when Gosse climbed up or down it. "I can put my bottom two feet at the bottom of the ladder like everybody else. . . . I held the ladder for Chris while he got up there and then I walked around the back of the building and proceeded to watch him and to tell him what to do." (Tr. 51.) He stated he had been outside watching Gosse the entire time he was working on the shed (Tr. 53).

Earlier in his testimony, however, Carlson stated he was not outside the entire time Gosse was working.

> Q.: Mr. Carlson, when Mr. Shpiruk arrived, you weren't outside, correct?
> Mr. Carlson: Yes, sir. I wasn't feeling good. Yes, I can't move as quick as you can.

(Tr. 50.)

The court does not credit Carlson's testimony that he was available to hold the ladder every time Gosse used it. The ladder was not physically secured to prevent displacement and Gosse was working alone at times on the roof when no one was available to hold the ladder steady for him as he climbed up or down. Exhibit C-17 shows Gosse descending the unsecured ladder with no one

holding it for him. The court concludes the Secretary established FFB violated the terms of the cited standard.

The FFB Employee Was Exposed to the Cited Hazard

> The Secretary can establish employee exposure to a violative condition by showing either "'actual exposure or that access to the hazard was reasonably predictable."' *Nuprecon, LP*, 23 BNA OSHC 1817, 1818 (No. 08-1307, 2012) (citing *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996)). In determining employee access to the hazard, "the "inquiry is not simply into whether exposure is theoretically possible,' but whether 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."' *Id.* at 1818-19. "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, 1265 (No. 06-1416, 2008) (citing *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)).

Gate Precast Co., No. 15-1347, 2020 WL 2141954, at *2 (OSHRC Apr. 28, 2020).

In Gosse's written statement he admitted he had used the ladder five to seven times that day (Tr. 23). He was on the roof of the shed for half a day the previous Sunday, for five hours Monday, and for one hour the day of the inspection (Ex. C-23, Ex. C-24). He was in the zone of danger and had access to the unsecured ladder the entire time he was at the worksite over those three days. The Court finds the employee was exposed to the violative condition of the unsecured ladder.

FFB Knew of the Violative Condition

Carlson was onsite and at times held the unsecured ladder for Gosse. The court concludes the Secretary established FFB had actual knowledge of the violative condition.

Characterization of the Violations

The Secretary characterized the violation of the cited standard as serious. FFB's employee had used the unsecured ladder five to seven times the day of the inspection and had used it over several hours the previous two days. Had he fallen from the ladder, he could have sustained serious physical harm (Ex. C-5). The court concludes the Secretary properly characterized the violation as serious.

IV. PENALTY DETERMINATION

"In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mech., Inc*., 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc*., 20 BNA OSHC 2196, 2201 (No. 00- 1052, 2005) (citation omitted). "The other factors are concerned with the employer generally and are considered as modifying factors.'" *Natkin & Co. Mech. Contractors,* 1 BNA OSHC 1204, 1205 n.3 (No. 401, 1973).

The total number of FFB employees is not found in the record, but the Secretary adjusted the penalty to the maximum extent (seventy percent) due to the company's small size, resulting in a total penalty of $5,683 (Exs. C-5, Ex. C-6; Tr. 35-36). The Secretary adduced no evidence of FFB's history with OSHA or evidence of bad faith. The gravity of the violations is moderate. One employee was exposed for approximately 10 hours (from June 2 to June 4) to the cited hazards. FFB took no precautions against the hazards, except for Mr. Carlson possibly holding the ladder sometimes when Gosse climbed up or down it.

Shpiruk testified that a fall from the roof without fall protection would result in severe injuries or death (Tr. 35). He determined that the severity of the hazard was high because of the expected injuries of a fall including fractures and lacerations, and a greater probability due to the length of time (more than 7 hours) that the employee was exposed to the hazard (Tr. 35). For the ladder violation, Shpiruk testified that he recommended a medium severity based on the risk of falling and sustaining injuries from climbing up in down the ladder or the ladder being removed. He provided a lower probability rating because it was unlikely that the employee would be using the ladder constantly while working on the roof (Tr. 37). Because the training violations were grouped, the Secretary did not issue additional penalties. (Tr. 36–37).

Giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations, the court concludes a grouped penalty of $3,410 for Items 1a and 1b of the Citation and a grouped penalty of $2,273 for Items 2a and 2b of the Citation are appropriate. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT all items in the citation are **AFFIRMED** with grouped penalty **ASSESSEMENTS** of $3,410 for Items 1a and 1b, and $2,273 for Items 2a and 2b respectively.

SO ORDERED.

/s/

First Judge John B. Gatto

Dated: May 25, 2021
Atlanta, GA