UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. BONDED ROOFING SERVICES, INC., Respondent.	OSHRC Docket No. **20-0554**

DECISION AND ORDER

Attorneys and Law firms

Cordelia Renita Hollins, Rachel L. Graeber, Attorneys, Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, for Complainant.

Blake Koch, Owner, Bonded Roofing Services, Inc., Pompano Beach, FL, for Respondent.

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

I. INTRODUCTION

Bonded Roofing Services, Inc. contests a Citation and Notification of Penalty issued by the Secretary of Labor on March 6, 2020, for alleged violations of three construction standards under the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 651-78.[1] The Citation resulted from an inspection conducted by the United States Department of Labor, through its Occupational Safety and Health Administration (OSHA), on January 30, 2020, in Hollywood, Florida. On that date, an OSHA Compliance Safety and Health Officer[2] (CSHO) observed three men working on the roof of a one-story commercial building. The CSHO conducted an inspection of the worksite, and the Secretary subsequently issued the Citation that gave rise to this proceeding.

[1] 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.

[2] 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).

Item 1 of the Citation alleges a serious[3] violation of 29 C.F.R. § 1926.102(a)(1) for failing to ensure that an employee using a pneumatic nail gun wore protective eye and face equipment, with a proposed penalty of $3,084. Item 2 alleges a serious violation of 29 C.F.R. § 1926.501(b)(10) for failing to provide fall protection for employees exposed to fall hazards 6 feet or higher from a roof, with a proposed penalty of $3,856 f. Item 3 alleges a serious violation of 29 C.F.R. § 1926.1053(b)(1) for failing to ensure the side rails of a ladder extended at least 3 feet above the roof that the ladder was used to access, with a proposed penalty of $3,084.

Bonded contested the Citation, and the case was designated for Simplified Proceedings by the Chief Judge.[4] The parties stipulate the Commission has jurisdiction over this action, Bonded is a covered employer under the Act, and Bonded's principal place of business is in Pompano Beach, Florida (Trial Stipulations, p. 1, ¶¶ i-iii). 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 Bonded is a covered employer under section 3(5) of the Act. 29 U.S.C. §§ 659(c), 652(5).

The Court held a bench trial in this proceeding on October 5, 2021. Although the Secretary filed a post-trial brief on November 24, 2021, Bonded did not file a brief. Pursuant to Commission Rules 90 and 209, 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. 29 U.S.C. § 661(j).[5] 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** penalties of $3,084, $3,856, and $3,084 for Items 1, 2, and 3, respectively.

---

[3] 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.

[4] "The purpose of the Simplified Proceedings subpart is to provide simplified procedures for resolving contests under the [Act], so that parties before the Commission may reduce the time and expense of litigation while being assured due process and a hearing that meets the requirements of the Administrative Procedure Act[.]" 29 C.F.R. § 2200.200(a). Procedures under this subpart are simplified in a number of ways, including that pleadings generally are not required and discovery is not permitted except as ordered by the Judge. § 2200.200(b).

[5] 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.

II. BACKGROUND

On January 30, 2020, a CSHO observed three men atop the roof of a one-story commercial building in Hollywood, California. He did not see any method of fall protection in use. The CSHO called OSHA's Fort Lauderdale area office and received authorization to inspect the worksite under the agency's regional emphasis program for falls in construction (Tr. 29-30). The CSHO met with Bonded owner Blake Koch (one of the three men he observed on the roof) and obtained photos, measurements, and signed interview statements from the workers (Tr. 32, 35). The CSHO transcribed the workers' oral responses to his questions for the interview statements (Tr. 34-35).

According to his interview statement, Koch declared,

> I am the owner of the company. I direct the work of the employees. I can stop unsafe work. We are doing roof repair. I was onsite when OSHA arrived.
> The ladder was not 3 feet above the roof. I will correct the ladder. The ladder was tied off.
> My fall protection plan is roof anchors, ropes, fall harnesses, and rope grabs. The fall protection plan was not in effect upon my arrival at approximately 10:15 a.m. Josh was using a Bosch nail gun approximately 2 feet from the roof's edge.
> I do not know why the employees did not have the fall protection plan in effect because they arrived at approximately 8:30. The fall protection plan went into effect after OSHA's arrival. The employees are trained in the recognition of fall hazards in construction.
> If an employee were to fall approximately 15 feet to the ground and land on his head he could die or sustain serious injuries. The glasses Josh was wearing while operating the nail [gun] are not the proper safety certified glasses. He could sustain an eye scratch if not wearing the proper glasses. I am going to buy the proper glasses today. The roof to ground where Josh was working is 14 feet, 8 inches.

(Exh. C-5, pp. 1-2.)

The signed interview statement of Joshua Tharp says,

> I was near the roof's edge without fall protection. I did not have the proper eye protection on when using a nail gun. The ladder did not extend 3 feet above the roof. The owner Blake was onsite.

(Exh. C-7, p. 1.)

Juan Torres was an assistant area director for OSHA in its Fort Lauderdale office at the time of the inspection and supervised the CSHO (Tr. 21-23, 28).[6] Torres reviewed the Bonded case file and recommended the Citation be issued (Tr. 30-35, 46). The Secretary issued the Citation to Bonded on March 6, 2020.

[6] At the time of the trial, Torres was an assistant area director in OSHA's Orlando area office (Tr. 21).

Conduct of the OSHA Inspection

Only two witnesses testified at trial: Assistant area director Torres and Bonded' owner Koch. The Secretary called assistant area director Torres as a witness primarily to identify proffered exhibits as documents from OSHA's case file on Bonded (Tr. 26-27). Torres was not onsite the day of the inspection and could not testify regarding the CSHO's interaction with Bonded's employees (Tr. 25-26, 28). The lack of the CSHO's testimony created gaps in the record and left some of Bonded's allegations about the conduct of the inspection unanswered.

In his opening statement, Koch questioned the propriety of the OSHA inspection.

> [A]ll the citation[items] should be vacated because . . . an inspection was never performed. The inspector never got out of the vehicle. He never inspected anything. He was at the 7-Eleven across the street having coffee, looked over to my jobsite and told me he decided to come over there and see what's going on.

(Tr. 17.)[7]

Koch also claims that as the CSHO sat in his vehicle, he would beep the horn at Koch and his employees to summon them. The CSHO would then instruct the employee to take photos of specified areas with his camera and to take certain measurements (Tr. 138).[8] Koch argues this is contrary to the guidelines set out in OSHA's Field Operations Manual (FOM), which is designed to be used as "a reference document for field personnel, providing enforcement policies and procedures in conducting OSHA investigations." United States Department of Labor, Field Operations Manual, https://www.osha.gov/enforcement/directives/cpl-02-00-164/chapter-1.

Because the CSHO did not attend the trial, he was not available to confirm or refute Koch's allegations. His alleged failure to follow the procedures set out in the FOM would not, however, invalidate the legitimacy of the inspection.

---

[7] Koch also argued in his opening statement that the Secretary had withdrawn Items 1 and 2 of the Citation. He stated, "I'm kind of confused because . . . [the Secretary] vacated those first two citation[items] for safety eyewear and for the ladder. And now we're arguing them again. . . . So that leaves one citation [item] to argue." (Tr. 15.) The Secretary clarified that his offer to vacate Items 1 and 2 of the Citation was made during an informal conference when the parties were attempting to settle the Citation. Koch declined to accept the offer (Tr. 16-18). Koch confirmed no agreement was reached between the parties (The Court: "Mr. Koch, you never accepted that offer; is that correct?" Koch: "No, your Honor. I didn't have time to accept it." (Tr. 19)). The Court concludes the Secretary did not withdraw Items 1, 2, and 3 of the Citation, which remain at issue in this proceeding.

[8] Several of the photographic exhibits show Koch and the two other Bonded employees on the roof of the building, demonstrating that Bonded employees did not take all of the photos submitted in the casefile (Exhs. C-10, C-12, C-14).

> [T]he guidelines provided by the manual are plainly for internal application to promote efficiency and not to create an administrative straightjacket. They do not have the force and effect of law, nor do they accord important procedural or substantive rights to individuals. *See Brennan v. Ace Hardware Corp*., 495 F.2d 368, 376 (8th Cir. 1974) (Labor Department field operations handbook for Employment Standard Administration compliance officers)[.]

FMC Corp., No. 13155, 1977 WL 7715, at *4 (OSHRC Aug. 4, 1977). "[T]he *FOM* does not ordinarily create rights or defenses for employers . . .inasmuch as OSHA compiled the *FOM* as a guide for OSHA compliance personnel." *Johnson Controls, Inc.*, No. 89-2614, 1993 WL 35627, *13, n. 8 (OSHRC Feb. 3, 1993). While the CSHO's inspection of Bonded's worksite, if conducted as Koch alleges, was not exemplary, it does not provide grounds for vacating the cited items. The Court concludes Bonded's argument that the CSHO's failure to follow the FOM's policies and procedures invalidates the inspection is without merit.

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 and 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*. Meanwhile, the Commission is assigned to carry out 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). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I Steel Corp*., 499 U.S. at 151.

"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).[9] "They also

[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 Hollywood, Florida, in the Eleventh Circuit, and Bonded's principal place of business is located in

have a 'special duty' to comply with all mandatory health and safety standards." (*Id*.) 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.

Under the law of the Eleventh Circuit where this case arose, a violation of an OSHA standard is established 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 Grp., Inc.*, 722 F.3d at 1307.

A. Item 1: Alleged Serious Violation of § 1926.102(a)(1)

Item 1 alleges that on or about January 30, 2020, a Bonded employee "was exposed to an eye injury while using a pneumatic nail gun without the proper eye protection." (Exh. C-1, p. 1.) The cited standard mandates that 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." 29 C.F.R. §1926.102(a)(1).

(1) The Cited Standard Applies

The cited standard is found in *Subpart X—Personal Protective and Life Saving Equipment* of the construction standards, which mandates "[p]rotective equipment, including personal protective equipment for eyes ... shall be provided ... wherever it is necessary by reason of hazards of processes ... encountered in a manner capable of causing injury or impairment in the function of any part of the body through ... physical contact." 29 C.F.R. § 1926.95(a).

Generally, an OSHA standard presumes a hazard and the Secretary is not required to establish one exists as part of his burden of proof. However, when a standard specifies it applies only when a hazard is present, such as a personal protective equipment (PPE) standard like the cited standard, the Secretary's burden also includes "demonstrating that there is a significant risk

---

Pompano Beach, Florida, also in the Eleventh Circuit. *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.

of harm" and that "the employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE." *Wal-Mart Distribution Ctr. # 6016*, No. 08-1292, 2015 WL 2066206, at *4 (OSHRC April 27, 2015), *aff'd in pertinent part, rev'd in part on other grounds*, 819 F.3d 200 (5th Cir. 2016).

Here, Tharp was using a pneumatic nail gun, potentially creating projectiles from ricocheted nails and wood chips. Torres testified that when an employee uses a nail gun, "the nail could . . . hit something, strike a piece of metal . . . or it could actually chip a piece of whatever it's being protruded into [,] . . . causing a laceration on a person's face or potentially the eyes." (Tr. 48-49.) The Commission has recognized "the eye is an especially delicate organ and … any foreign material in the eye presents the potential for injury." *Vanco Constr. Inc.,* No. 79-4945, 1982 WL 22670, at *2 (OSHRC Dec. 22, 1982), (citing *Sterns– Roger, Inc*., No. 76-2326), 1979 WL 8520, at *2 (OSHRC Oct. 31, 1979), *aff'd*, 723 F.2d 410 (5th Cir. 1984).

A reasonable person familiar with the construction industry would recognize that using a pneumatic nail gun creates a hazard of flying particles to the eyes of the employee. A reasonable person would be aware protective eyewear is required in this circumstance. The Secretary has established the cited standard applied to the cited conditions.

(2) Bonded Violated the Cited Standard

It is undisputed that on January 30, 2020, Joshua Tharp was using a pneumatic nail gun at Bonded's worksite, and he was wearing glasses. The issue is whether the eyewear was protective against flying particles, including nails and wood chips. In the Violation Worksheet for Item 1, the CSHO wrote that Tharp "was wearing sunglasses," rather than approved safety eyewear, while using a pneumatic gun (Exh. C-2, p. 2).

Koch disputed the CSHO's description at trial. He provided an alternative version of his employees' use of eyewear. Koch stated the CSHO honked the horn as he sat in his vehicle and asked Koch to bring him "those goggles those guys have on." (Tr. 179.) Koch complied and the CSHO then told him the goggles had too much tar on them so he could not determine if they were safety goggles. Koch later went to his office and took photos of the new goggles he had on hand and emailed them to the CSHO (Tr. 179-80).

Koch's trial testimony conflicts with his interview statement, which states, "The glasses Josh was wearing while operating the nail [gun] are not the proper safety certified glasses. He could sustain an eye scratch if not wearing the proper glasses. I am going to buy the proper glasses today" (Exh. C-5, p. 2). When presented with his interview statement, Koch agreed he had signed it and initialed each page, but he denied the written statement reflected his responses to the CSHO. He contends he did not read the statement before initialing and signing it (Tr. 69-70). The Secretary's counsel examined Koch at length regarding signing the written statement prepared by the CSHO that Koch asserts he did not read (Tr. 128-37). Koch's excuse is that he was busy. "I was in a rush. I was in the middle of a jobsite. I was on the roof working with the men. He beeped his horn and asked me to come down, sign some documentation. I signed it and went back up on the roof." (Tr. 138.) Further, in Joshua Tharp's interview statement, he admits says, "I did not have the proper eye protection on when using a nail gun." (Exh. C-7, p. 1.) [10]

Koch started Bonded in 2007 (Tr. 133). As the owner and operator of a roofing business, Koch is required to negotiate and execute contracts, meet payroll, and file employment paperwork. It is expected that an experienced businessperson would understand the significance of his or her signature or initials on business or government documents, especially one that states, as does Koch's witness statement,

> I declare under penalty of perjury under the laws of the United States of America that this statement is true and correct to the best of my knowledge. I understand it is a felony under 18 U.S.C. § 1001 to knowingly and willfully make a false statement or omit material facts in relation to a federal investigation.

[10] Koch objected to the Secretary's motion to admit Tharp's statement, claiming Tharp "did not know what he was signing." (Tr. 116). Koch confirmed, however, that Tharp signed the interview statement. "I do verify his signature. I've seen that signature before. That's definitely his signature." (Tr 116.) The Court overruled Koch's objection. Koch introduced another statement from Tharp, written at his request and signed on July 7, 2020. It states in pertinent part, "I had eye protection on the whole time I was working." (Exh. R-2, p. 2.) The Court finds Tharp's signed interview statement taken by the CSHO the day of the inspection to be more credible than the statement submitted by Tharp to Koch, his employer, five months later. Koch takes particular issue with two sentences in his interview statement: "The fall protection plan was not in effect upon my arrival at approx.. 10:15 a.m.," (Exh. C-5, p. 1) and "[Employees Tharp and Webb] arrived at approximately 8:30" (Exh. C-5, p. 2). Koch argues he was on the worksite before 8:30 and his employees "followed me to the job. . . . I was there from the get-go of the job to meet the inspectors to shut down the gas pumps." (Tr. 67.) One possible reason for the discrepancy is that the CSHO's Inspection Report shows he arrived at Bonded's worksite at 10:00 a.m. and held the opening conference at 10:15 a.m." (Exh. C-17, p. 1.) He may have mixed up his timeline with Koch's when writing the responses. However, this potential error does not aid Koch's case. If Koch's claim is accepted, it extends the time he was onsite and had actual knowledge of the violative conditions.

(Exh. C-3, p. 3.) (initialed by Koch.) The Court finds Koch's original signed interview statement taken by the CSHO the day of the inspection to be more credible than Koch's trial testimony. The Court concludes Tharp was not wearing appropriate protective eyewear while using a pneumatic nail gun at Bonded's worksite on January 30, 2020. Bonded violated § 1926.102(a)(1).

(3) Bonded Employees Were Exposed to a Hazard

Failure to wear appropriate protective eyewear exposed Tharp to the hazard of "scratches and lacerations" to his eyes (Tr. 48). Exposure is established.

(4) Bonded 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. Based on Koch's presence on worksite at the time of the inspection and his signed interview statement, the Court concludes Koch had actual knowledge of the violative condition. The Secretary has established Bonded knew Tharp was not wearing appropriate protective eyewear. Bonded was in violation of § 1926.103(a)(1) on January 30, 2020, at its worksite in Hollywood, Florida.

Characterization of the Violation

The Secretary characterized the violation as "serious." A violation is a "serious" one "if there is a substantial probability that death or serious physical harm could result from" the violative condition. 29 U.S.C. § 666(k). "This means that the Secretary must show that death or serious physical harm is a probable consequence *if* an accident results from the violative condition—he is not required to show that an accident is itself likely." *Home Rubber Co., LP,* No. 17-0138, 2021 WL 3929735, at *5 (OSHRC Aug. 26, 2021) (emphasis in original) (citations omitted). Here, Tharp's use of a nail gun without appropriate protective eyewear establishes "a potential for eye injury, given the considerable vulnerability of the eye*." Vanco Constr., Inc.* 1982 WL 22670, at *3. Item 1 is appropriately characterized as serious.

B. Item 2: Alleged Serious Violation of § 1926.501(b)(10)

Item 2 alleges that on or about January 30, 2020, Bonded employees "were exposed to an approximate 14.8 feet fall hazard while in the process of performing roofing work." (Exh. C-1.) The cited standard mandates in pertinent part that each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet 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." 29 C.F.R. § 1926.501(b)(10).

(1) 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. Section 1926.500(b) states, "*Low-slope roof* means a roof having a slope less than or equal to 4 in 12 (vertical to horizontal)."

Bonded does not dispute the roof at issue was low-sloped, and the photographic exhibits support the Secretary's allegation (Exhs. C-8, C-14, C-15, C-16). The distance between the eave of the roof and the ground is approximately 14.8 feet, measured with a steel tape (Exh. C-3, p. 2). The Court concludes § 1926.501(b)(10) applies to the cited condition.

(2) Bonded Violated the Cited Standard

The three Bonded employees on the roof, including Koch, were not using fall protection in the form of guardrails, safety nets, or personal fall arrest systems (Exhs. C-8, C-10, C-11, C-14, C-15). Tharp stated, "I was near the roof's edge without fall protection. . . . The owner Blake was onsite." (Exh. C-7, p. 1.)

Koch stated,

> My fall protection plan is roof anchors, ropes, fall harnesses, and rope grabs. The fall protection plan was not in effect upon my arrival at approximately 10:15 a.m. . . . I do not know why the employees did not have the fall protection plan in effect because they arrived at approximately 8:30. The fall protection plan went into effect after OSHA's arrival.

(Exh. C-5.)

The Secretary has established Bonded failed to ensure its employees used fall protection while working on a low-sloped roof more than 6 feet above the lower level. Bonded violated § 1926.501(b)(10).

(3) Bonded Employees Were Exposed to a Hazard

The three Bonded employees working on the roof at issue were exposed to falls of approximately 14.8 feet, as documented in numerous photographs (Exhs. C-10 through C-15). The Secretary has established Bonded's employees were exposed to fall hazards.

(4) Bonded Knew of the Violative Condition

In his interview statement, Bonded owner Koch admits he observed his employees were not using fall protection (Exh. C-5). Instead of instructing his employees to stop work and implement fall protection procedures, Koch himself accessed the roof and walked around while talking to his employees (Exhs. C-10 through C-15). The Secretary has established Koch, as owner of the company, had actual knowledge of the failure to use fall protection.

Characterization of the Violation

The Secretary characterized the violation as serious. The Court agrees with Koch's statement: "If an employee were to fall approximately 15 feet to the ground and land on his head he could die or sustain serious injuries." (Exh. C-5.) Item 2 is properly characterized as serious.

C. Item 3: Alleged Serious Violation of § 1926.1053(b)(1)

Item 3 alleges that on or about January 30, 2020, a Bonded employees "were exposed to an 11 feet fall hazard when using an extension ladder which did not extend at least 3 feet above the upper landing surface while gaining access to the roof." (Exh. C-1.) The cited standard mandates in pertinent part that 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." 29 C.F.R. § 1926.1053(b)(1).

(1) The Cited Standard Applies

The cited standard is found in *Subpart X—Stairways and Ladders* of the construction standards, which "applies to all stairways and ladders used in construction, alteration, repair (including painting and decorating), and demolition workplaces covered under 29 C.F.R. part

1926[.]" 29 C.F.R. § 1926.1050(a). Bonded was under contract to install a roof on a building, a construction activity. The Secretary has established the cited standard applied to the cited conditions.

(2) Bonded Violated the Cited Standard

Exhibit C-16 is a photograph of Bonded's portable ladder leaning against the sloped roof of the building. Due to the roof's slope, the side rail on the left side of the ladder extends above the roofline a few inches more than does the side rail on the right. Assistant area director Torres testified the rungs on standard ladders are spaced one foot apart, and the side rails extend past the top rung "basically about 4 inches to 6 inches." (Tr. 105.) Looking at Exhibit C-16, Torres stated, "[I]t's only one rung above the surface and another 6 inches, so it's estimated to be—an estimated maximum of 12, plus 8, a total of 20 inches." (Tr. 105.) Torres agreed with the Court that the side rail on the left could possible extend as much as 24 inches above the roof (Tr. 105). Both estimations fall below the required 3 feet mandated by the cited standard. Both Koch and Tharp admitted in their interview statements that the ladder was not 3 feet above the roof (Exhs. C-5, C-7).[11] The Court concludes the Secretary established Bonded violated § 1926.1053(b)(1).

(3) Bonded Employees Were Exposed to a Hazard

The portable ladder was the only means the three employees used to access and descend from the roof, and they did so multiple times. Each time, the employees were exposed to the hazard of falling while mounting or dismounting the ladder. Exposure to the cited hazard is established.

(4) Bonded Knew of the Violative Condition

Koch was onsite and climbed up and down the ladder numerous times. The Secretary has established Koch had actual knowledge of the violative condition, and Koch's knowledge is imputed to Bonded. The Secretary has established Bonded violated the cited standard.

Characterization of the Violation

The Secretary characterized the violation as serious. Torres explained that a fall hazard is created when the siderails of a ladder to not extend 3 feet or more above the landing surface.

[11] At trial, Koch argued the white trim (from which Torres was estimating the extension of the ladder) was not the upper landing surface, but a "super gutter" that was raised 5 or 6 inches above the roof (Tr. 107). Koch stated he measured the distance between the top of the left side rail and the roof to be 38 inches, in compliance with the cited standard (Tr. 107). Koch did not mention this fact until trial and he presented no photographic evidence in support of his contention. The Court concludes Koch's signed interview statement, given the day of the inspection, in which he states the siderails of the ladder did not extend 3 feet or more above the upper landing surface, is more credible than his statement at trial.

> [T]he ladder could become displaced moving from one section to the other, or the employee might not have the right grasp of the ladder . . . during the interchange, so the employee could actually fall. . . . It makes it more difficult for the employee to grasp when doing the transfer. And if a person [were] to fall anywhere [from] 6 feet, it is reasonably expected or anticipated that he or she could receive serious injuries.

(Tr. 102.) Item 3 is properly characterized 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).

As to each of Citation's items, Bonded had 15 employees at the time of the inspection (Tr. 51, 124). The Secretary proposed a 60% reduction in the penalty amount based upon the company's size for each of the Citation's items (Exhs. C-2, C-3, C-4; Tr. 51), which the Court finds appropriate. No reduction for history or good faith was proposed since there was no history or evidence of good faith, which the Court agrees with.

For Item 1, Tharp was exposed for approximately 30 minutes when using a pneumatic nail gun while not wearing appropriate protective eyewear. He was wearing sunglasses, which is a precautionary measure. Tharp was exposed to scratches and lacerations caused by nails and wood chips (Exh. C-2, p. 2). The gravity of the violation is moderate. 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, for Item 1, the Court finds a penalty of $3,084 is appropriate.

For Item 2, the three Bonded employees were exposed to falls of 14.8 feet from the roof. Koch stated he, Tharp, and Webb had arrived at approximately 8:30 a.m. The likelihood of injury in the event of a fall was high and potentially fatal. Bonded had taken no precautions against injury.

The gravity of the violation is high. 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, for Item 2, the Court finds a penalty of $3,856 is appropriate.

For Item 3, the three Bonded employees ascended and descended the portable ladder multiple times over approximately an hour and 45 minutes. The likelihood of injury was moderate if one of them fell. The ladder was secured, indicating a precautionary measure was taken. The gravity of the violation is moderate. 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, for Item 3, the Court finds a penalty of $3,084 is appropriate. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Items 1, 2, and 3 of the Citation are **AFFIRMED,** with penalty **ASSESSEMENTS** of $3,084 each for Items 1 and 3, and of $3,856 for Item 2.

SO ORDERED.

/s/ John B. Gatto
JOHN B. GATTO, Judge

Dated: December 14, 2021
Atlanta, GA