UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Complainant,	
v.	Docket No. **15-0613**
KIRTLEY ROOFING & SHEET METAL, LLC, and its Successors, Respondent.	

DECISION AND ORDER

COUNSEL: M. Patricia Smith, Solicitor of Labor, James E. Culp, Regional Solicitor, Madeleine T. Le, Counsel for Occupational Safety & Health, Navin Jani, Trial Attorney, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for Complainant.

Wayne Duncan, Lay Representative, Safety By Design, Inc., Houston, Texas, for Respondent.

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

I. INTRODUCTION

Kirtley Roofing & Sheet Metal, LLC (Kirtley Roofing) was cited by the United States Department of Labor's Occupational Safety and Health Administration (OSHA)[1] for repeatedly[2] violating the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§ 651–678. Specifically, OSHA asserts Kirtley Roofing's employees were working on a roof without complying with 29 C.F.R. § 1926.501(b)(10), OSHA's fall protection standard applicable to low-slope roofs. The citation proposed a penalty of $24,500.00. After Kirtley Roofing timely contested the citation, the Secretary filed a formal complaint with the Commission charging Kirtley Roofing with repeatedly violating the Act and seeking an order affirming the citation. (*See* Compl. at 2). In its Answer, Kirtley Roofing denied the allegations and further asserted it

[1] The Secretary of Labor (the Secretary) delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health, who heads OSHA, and assigned responsibility for enforcement of the Act to OSHA. *See* 65 Fed.Reg. 50017 (2000). The Assistant Secretary has promulgated occupational safety and health standards, *see e.g.*, 29 C.F.R. Parts 1910 and 1926, and has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties to enforce the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[2] *See infra*, the "Classification" section of this decision, for the definition and analysis of a "repeated" violation.

was engaged in "steel erection" work and was therefore covered by 29 C.F.R. § 1926.760, the fall protection regulation applicable to steel protection activities. (Answer at 1).

The parties stipulated that the Commission has jurisdiction of this action under section 10(c) of the Act, 29 U.S.C. § 659(c). (Ex. J-1 ¶ 1). The parties also stipulated that Kirtley Roofing is an employer engaged in a business affecting commerce within the meaning of section (5) of the Act, 29 U.S.C. § 652(5). (Ex. J-1 ¶ 2). *See also*, *Clarence M. Jones d/b/a Jones Co.*, 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983) (holding there is an interstate market in construction materials and services and therefore construction work affects interstate commerce). A bench trial was held in Houston, Texas. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law. 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. For the reasons indicated *infra*, the Court concludes all the elements necessary to prove a repeated violation have been satisfactorily established by the Secretary. Accordingly, the citation is **AFFIRMED** and Kirtley Roofing is assessed a civil penalty of $24,500.00.

II. BACKGROUND

Rosenberg Construction was hired to construct a four-story medical plaza for Hermann Memorial Surgical Center in Katy, Texas, and subcontracted with Kirtley Roofing to install a waterproof sealant on the canopy roof in front of the Center. (Tr. 44, 72-73, 92). Kirtley Roofing performs primarily roofing work in the greater Houston area. (Ex. J-1 ¶ 5). The roofing system being installed was a "TPO" (thermoplastic olefin) system, which is a white, reflective, vinyl-type roof system. (Tr. 44, 72-73, 92). The roof structure itself had been erected ten days prior. (Tr. 72-73). On the day before the OSHA inspection, Anita Schiflett, OSHA's Compliance Safety and Health Officer, drove by the Center on her way home from work and noticed people working on the canopy roof. (Tr. 24). Since Schiflett could not tell whether proper fall protection was being used, she returned to the worksite on January 30, 2015, and conducted an inspection. During the course of her inspection, Schiflett observed four of Kirtley Roofing's workers on the roof for 30 to 45 minutes. (Tr. 36; Ex. J-1 ¶ 12).

Isaiah Boettcher, Rosenberg's Assistant Superintendent, was present on site the day of the inspection and testified normally Kirtley Roofing's crew would start work "somewhere

between 9 to 10:30 or 11:00, depending on how much sunlight you had to dry the roof off." (Tr. 81). This testimony is corroborated by the testimony of Javier Martinez, one of Kirtley Roofing's workers, that the crew began working that day around ten o'clock in the morning. (Tr. 125). Although Boettcher also testified Kirtley Roofing's crew did not start work until "after lunch because there was an OSHA inspection this morning, that morning" (Tr. 81), the Court does not find this portion of Boettcher's testimony plausible since it is inconsistent with Martinez's testimony. Further, Jesus Salvador Paredes, Kirtley Roofing's foreman, admitted when he climbed the ladder shortly before Schiflett's arrival, the other three workers were already on the roof "moving a lot of bundles." (Tr. 94). The Court finds the preponderance of evidence establishes that even before Schiflett arrived at the worksite, Kirtley Roofing's crew had been working for more than an hour on the roof. As indicated *supra*, Schiflett personally observed Kirtley Roofing's employees on the roof for 30 to 45 minutes.

The parties stipulated the size of the canopy roof was approximately 65 feet by 36 feet. (*See* Ex. J-1 ¶ 13). Schiflett also determined the canopy roof was approximately 16 feet off the ground by using "the ladder system and counting the rungs of the ladder." (Tr. 25, 27, 73). As Schiflett explained, ladders "are pretty standard in their size. From each rung is 12 inches, which would be a foot, and from that you can count and see that that was approximately 16 feet." (Tr. 27). Boettcher corroborated Schiflett's testimony that the canopy roof was approximately 16 feet off the ground. (Tr. 72, 73, 27). Using the same "ladder system," Schiflett also determined the scaffolding directly below the roof was "approximately 9 feet" off the ground. After reviewing the photographs of the work site, the Court agrees with Schiflett's approximations. (*See* Ex. S-8, S-8a). Therefore, the Court finds the distance from the canopy roof to the scaffolding directly below it was at least 6 feet or more.

Schiflett testified that she was told by Boettcher the slope of the canopy roof was "4 in 12," meaning every "foot or 12 inches, you might have a little bit of a rise, which would be 4 inches, and that would be the height of any type of an elevation rise." (Tr. 32-33). Although the Court does not rely on this out-of-court statement, it appears not to be disputed since Kirtley Roofing did not ask Boettcher any questions related to this issue on cross-examination, which occurred *after* Schiflett testified. However, this statement is consistent with and corroborated by the photographs taken by Schiflett of the work site, which clearly established the roof slope was 4 in 12. (*See* Ex. S-6, Ex. S-7, Ex. S-8, Ex. S-8a, Ex. J-2, Ex. J-2a, Ex. J-3).

The parties stipulated Paredes was Kirtley Roofing's foreman onsite supervising its other three employees on the day of the inspection. (*See* Ex. J-1 ¶ 14; *see also* Tr. 98, 125, 157). Paredes admitted the roof's sides were not all protected since the scaffolding did not extend past the canopy roof on the south and west sides. (Tr. 100-01). His admission was corroborated by Schiflett's observation and photographs showing that the scaffolding did not extend past the canopy on the south and west sides. (Tr. 28, 35; *see also* Ex. J-2, Ex. J-3, Ex. S-8). Thus, if a worker fell off the roof on the southern or western side, they would not land on scaffolding but would fall the entire distance of approximately 16 feet to the ground. (Tr. 28).

One of Paredes's responsibilities was to ensure that the company's safety policies were followed. (Tr. 88). Paredes testified he had assigned Arturo Espino to be the safety monitor on the roof. (Tr. 96). As Paredes explained it, "When I'm going up, I see the -- I see all this stuff in the way. I tell him to just . . . don't do nothing and stay only looking. Then after they move everything, you can take that stuff out and you can start helping." (Tr. 96). Paredes admitted, however, that Schiflett's photographs shows Espino bent over "picking something up." (Tr. 104; *see also*; Ex. J-2; Ex. J-2A). Martinez also testified that in the photographs Espino was "leaned over to pick something up or -- because he wasn't working like we were. He was just watching." (Tr. 122).

Significantly, Paredes admitted that when he climbed the ladder shortly before Schiflett's arrival, saw the debris, and then assigned Espino to be the safety monitor on the roof, the workers were already on the roof "moving a lot of bundles, the Isobar," even though they were not "tied off" to the safety line, which was rolled up and lying on the roof unanchored. (Tr. 29, 31, 33, 94, 95, 895). When asked about the lanyards not being connected to the harnesses, Paredes admitted "because it's a bother. It -- when you walk around, it hits you on your legs. It's -- it's uncomfortable." (Tr. 105-06). Paredes admitted he was required to be tied off even while setting up to work on the roof, but asserted, "not when everything is in the way." (Tr. 106, 107).

III. ANALYSIS

Under both Commission precedent and the law of the Fifth Circuit, the jurisdiction in which this case arises,[3] in order to prove a violation of a cited standard, the Secretary "must

[3] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Texas, which is in the Fifth Circuit. In

show by a preponderance of the evidence: (1) that the cited standard applies; (2) noncompliance with the cited standard; (3) access or exposure to the violative conditions; and (4) that the employer had actual or constructive knowledge of the conditions through the exercise of reasonable due diligence." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016) (*citing Jesse Remodeling, LLC*, 22 BNA OSHC 1340 (No. 08–0348, 2006); *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90–1747, 1994)). Further, "hazard is generally presumed in safety standards unless the regulation requires the Secretary to prove it." *Id.* at 735. Therefore, where a standard presumes a hazard, "the Secretary need only show the employer violated the terms of the standard." *Id.* (*citing Kaspar Electroplating Corp.*, 16 BNA OSHC 1517 (No. 90–2866, 1993)).

Alleged Violation

The citation alleges a repeated violation by Kirtley Roofing of the Secretary's fall protection standard related to low-slope roofs, 29 C.F.R. § 1926.501(b)(10), for failing to provide a fall protection system at the worksite. That standard mandates that "each employee engaged in roofing work on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above a lower level shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems," or a combination of one of those systems and a warning line system, "or a warning line system and safety monitoring system." 29 C.F.R. § 1926.501(b)(10). In addition, "on roofs 50-feet (15.25 m) or less in width," the "use of a safety monitoring system alone [i.e. without the warning line system] is permitted." *Id.*

Applicability of Standard

As indicated *supra*, the cited standard applies to "each employee engaged in roofing work on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above a lower level." 29 C.F.R. § 1926.501(b)(10). "Roofing work" is defined as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck." 29 C.F.R. § 1926.500(b). Since Kirtley Roofing's employees were installing a sealant on the canopy roof, they were engaged in roofing work. A "low-slope roof" is "a roof having a slope less than or

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general, where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission 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).

equal to 4 in 12 (vertical to horizontal)." 29 C.F.R. § 1926.500(b). The slope of the canopy roof was less than or equal to 4 in 12.

Kirtley Roofing argues "[t]he Secretary offered no evidence and [Schiflett] offered no testimony as to the manufacturer of the ladder nor the actual measurement of the rungs on the specific ladder(s) she used to make her 'approximate' measurements" and "[t]his element plays a key role in determining compliance." (Resp't's Br. at 6). The Court finds no merit in Kirtley Roofing's argument. Schiflett's photographs of the worksite established by a preponderance of evidence that the canopy roof was approximately 16 feet off the ground and 6 feet or more above the lower level. Therefore, the canopy roof was "6 feet (1.8 m) or more above a lower level."

Further, the standard only applies to roofs with "unprotected sides and edges," which means "any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway *where there is no wall or guardrail system at least 39 inches (1.0 m) high*." 29 C.F.R. § 1926.500(b) (emphasis added). Paredes admitted at trial that no guard rails were setup. (Tr. 95). Although Schiflett also admitted the roof had a parapet wall enclosing the roof, Boettcher testified it was only 12 to 16 inches tall. (Tr. 56, 73-74). Thus, by definition, the canopy roof had "unprotected sides and edges." 29 C.F.R. § 1926.500(b). Kirtley Roofing also argues the Secretary "made no claim that [the parapet wall] was not sufficient." (Resp't's Br. ¶ 23). The Court finds no merit in this argument. A parapet wall is not one of the fall protection systems enumerated in 29 C.F.R. § 1926.501(b)(10). Rather, it is relevant only to establish whether the roof had "unprotected sides and edges."

Kirtley Roofing also asserts it was engaged in "steel erection work" and was not subject to the cited standard, but rather, was subject to the fall protection requirements of 29 C.F.R. § 1926.760, which applies to employees engaged in a steel erection activity. (*See* Answer at 1). The Court does not agree. "[T]he test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations...." *Sanderson Farms*, 811 F.3d at 736 (*citing Unarco Commercial Products*, 16 BNA OSHC 1499 (No. 89–1555, 1993)). "Steel erection" means "the construction, alteration or repair of steel buildings, bridges and other structures, including the installation of metal decking and all planking used during the process of erection." 29 C.F.R. § 1926.751.

Kirtley Roofing was *not* constructing, altering or repairing a steel building since the roof structure itself had been erected ten days prior to the OSHA inspection. Rather, as Kirtley

Roofing admits its workers "were on top of a canopy to install PTO roofing material." (Resp't's Br. ¶ 9). Thus, the Court concludes Kirtley Roofing was *not* engaged in steel erection activity and therefore, section 1926.760 was not applicable. Therefore, the cited standard, 29 C.F.R. § 1926.501(b)(10), was applicable to the cited condition.

Whether Standard Was Violated

Under the cited standard, employers are required to provide fall protection systems, except "when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed."29 C.F.R. § 1926.501(a)(1). *See also*, *Seyforth Roofing Co.*, 16 BNA OSHC 2031 (No. 90-0086, 1994) (holding under prior, but substantially similar, regulation, the fall protection requirements do not apply "where employees are on the roof only to inspect, investigate, or estimate roof level conditions"). However, the cited standard does not indicate the acceptable durational limits of such exposure to fall hazards under the exception.

When the language of the standard fails to provide an unambiguous meaning, we look to the standard's legislative history. *Oberdorfer Industries, Inc.*, 20 BNA OSHC 1321, 1328-29 (Nos. 97-0469 & 97-0470, 2003) (consolidated). The preamble to a standard is the most authoritative evidence of the meaning of the standard. *Wal-Mart Distribution Ctr. # 6016*, 25 BNA OSHC 1396, 1398 (No. 08-1292, 2015). According to the preamble to the *Safety Standards for Fall Protection in the Construction Industry*, "OSHA has set this exception because employees engaged in [pre or post construction] inspecting, investigating and assessing workplace conditions . . . are exposed to fall hazards *for very short durations, if at all*, since they most likely would be able to accomplish their work without going near the danger zone." 59 Fed. Reg. 40675 (1994) (emphasis added). As indicated *supra*, the preponderance of evidence establishes that Kirtley Roofing's employees were working for at least an hour before Schiflett arrived and Schiflett personally observed them on the roof for 30 to 45 minutes. Therefore, even if the activities Kirtley Roofing's employees were engaged in were exempted activities under the standard at the time of the inspection, they were not working "for very short durations" as contemplated in the preamble.

As to the applicability of the exception, when a standard contains an exception to its general requirement, the burden of proving the exception applies lies with the party claiming the benefit of the exception. *Williams Insulation v. Occupational, Safety & Health Review Comm'n*,

183 F. App'x 450, 451 (5th Cir. 2006) (*citing ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1823 (No. 88-2572, 1992)); *see also Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). Kirtley Roofing failed to meet its burden. The only evidence offered by Kirtley Roofing in support of an exception was Boettcher's testimony that there was "a possibility" the employees were assessing the jobsite in order to set up the fall protection to begin work. (Tr. 84). However, the preponderance of evidence does not support Kirtley Roofing's hypothetical "possibility."

At the time of the inspection, Kirtley Roofing's crew had returned to the worksite to finish applying the sealant, which had not been completed the previous day. The application of the sealant was "the roofing work" and clearly was not part of an "inspection, investigation, or assessment of workplace conditions . . . after all construction work has been completed." 29 C.F.R. § 1926.500(a). Nonetheless, Kirtley Roofing argues its employees "were engaged in the activity of setting up the 'life line,'" which required the crew "to move material that had been placed on the roof the prior day, so they could attach the life line ends to the anchorage point." (Resp't's Br. at 4). However, moving material in order to set up the lifeline was also not an exempted activity involving the "inspection, investigation, or assessment of workplace conditions . . . after all construction work has been completed." 29 C.F.R. § 1926.500(a). Therefore, the exception did not apply and Kirtley Roofing was required to provide fall protection systems that conform to the criteria set forth in 29 C.F.R. § 1926.502.

At the time of Schiflett's inspection, four of Kirtley Roofing's employees were working on the canopy roof, which was approximately 16 feet off the ground. The cited standard lists eight alternative ways for an employer to meet the standard: "guardrail systems, safety net systems, personal fall arrest systems," or any combination thereof with a "warning line system," or a "warning line system and safety monitoring system," and in addition, "on roofs 50-feet (15.25 m) or less in width," the "use of a safety monitoring system alone." 29 C.F.R. § 1926.501(b)(10). Kirtley Roofing does not argue it used a "guardrail system," a "safety net system," or a "warning line system," for fall protection for this roofing job. Rather, Kirtley Roofing asserts a personal fall arrest system "is one of the methods of fall protection that [it] had put into use for its workers at all sites." (Resp't's Br. at 9-10). In addition, Kirtley Roofing asserts "the method being employed by Mr. Paredes was the use of a Safety Monitoring System[.]" (Resp't's Br. at 10).

Personal Fall Arrest System

A "personal fall arrest system" is "a system used to arrest an employee in a fall from a working level. It consists of an anchorage,[4] connectors,[5] a body belt or body harness[6] and may include a lanyard,[7] deceleration device,[8] lifeline,[9] or suitable combinations of these." 29 C.F.R. § 1926.500(b). "As of January 1, 1998, the use of a body belt for fall arrest is prohibited." (*Id.*) It is undisputed that Kirtley Roofing's four employees were not tied off when Schiflett arrived at the worksite. Although all four employees were wearing personal fall protection harnesses, none of them were connected to any other components of the personal fall arrest system. Further, although there was a lifeline rolled up lying on the roof, it was not anchored at both ends, and even if it had been, none of the workers were attached to it. Therefore, contrary to Kirtley Roofing's assertion, a personal fall arrest system was not in use at the time of the inspection.

Safety-Monitoring System Alone

A "safety-monitoring system" is "a safety system in which a competent person is responsible for recognizing and warning employees of fall hazards." 29 C.F.R. § 1926.500(b). A "competent person" is "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. § 1926.32(f). Here, the safety monitor was identified as Espino. (Tr. 103-04). But

[4] "Anchorage" is "a secure point of attachment for lifelines, lanyards or deceleration devices." 29 C.F.R. § 1926.500(b).

[5] "Connectors" are "a device used to connect parts of the personal fall arrest system and positioning device systems together." *Id.*

[6] A "body harness" is "straps which may be secured about the employee in a manner to distribute the fall arrest forces over at least the thighs, pelvis, waist, chest and shoulders, with means for attaching it to other components of a personal fall arrest system." *Id.*

[7] A "lanyard" is "a flexible line of rope, wire rope, or strap which generally has a connector at each end for connecting the body belt or body harness to a deceleration device, lifeline, or anchorage." *Id.*

[8] A "deceleration device" is "any mechanism, such as a rope grab, rip-stitch lanyard, specially-woven lanyard, tearing or deforming lanyards, automatic self-retracting lifelines/lanyards, etc., which serves to dissipate a substantial amount of energy during a fall arrest, or otherwise limit the energy imposed on an employee during fall arrest." *Id.*

[9] A "lifeline" is "a component consisting of a flexible line for connection to an anchorage at one end to hang vertically (vertical lifeline), or for connection to anchorages at both ends to stretch horizontally (horizontal lifeline), and which serves as a means for connecting other components of a personal fall arrest system to the anchorage." *Id.*

according to the Secretary, "his appointment is problematic" since "a safety monitor is required to be a 'competent person,' and there is no record evidence proving that Mr. Espino was competent for this function." (Sec'y's Br. at 7-8) (*citing* 29 C.F.R. § 1926.502(h)). However, it is the Secretary who has the burden of proving a violation, including proving Espino was *not* a "competent person," as that term is defined in 29 C.F.R. § 1926.32(f). The Secretary's brief failed to cite to any such evidence and the Court has found none in the record.

As part of the "safety-monitoring system," the employer must ensure that the safety monitor does "not have other responsibilities which could take the monitor's attention from the monitoring function."[10] 29 C.F.R. § 1926.502(h)(1)(v). The Secretary argues in his brief that "[e]ven if Mr. Espino had been directed to act as a safety monitor and cease other activities, he disregarded this instruction and worked alongside the other three in installing the roofing membrane." (Sec'y's Br. at 8) (*citing* Tr. 30, 104; Ex. J-2a). Therefore, the Secretary asserts "no safety systems were in place to protect the employees from falling, and Kirtley Roofing was thus not in compliance with 29 C.F.R. 1926.501(b)(10)." (*See id.*)

However, it is clear that a safety monitor is not completely prohibited from having other responsibilities. The standard "sets forth performance criteria for determining the effectiveness of the safety monitoring." *Beta Constr. Co.*, 16 BNA OSHC 1435, 1444 (No. 91-102, 1993) (decided under prior, but substantially similar, regulation). He may not, however, be so busy with other responsibilities that the monitoring function is encumbered. As the Secretary acknowledges in the preamble to the standard, the "monitor may have additional supervisory or non-supervisory responsibilities, provided that the monitor's other responsibilities do not interfere with the monitoring function." 59 Fed.Reg. 40714 (1994).

[10] As part of the "safety-monitoring system" requirements of 29 C.F.R. § 1926.502(h)(1), the employer must also designate a competent person to monitor the safety of other employees and must ensure that the safety monitor complies with the following requirements:

(i) The safety monitor shall be competent to recognize fall hazards;

(ii) The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner;

(iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored;

(iv) The safety monitor shall be close enough to communicate orally with the employee; and

(v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

Neither Schiflett nor any of the other witnesses testified that Espino's activity interfered with his monitoring function. Espino was the obvious person that could have testified regarding that dispositive issue. Although the Secretary did not list Espino on his witness list, he did reserve the right to call any witness listed by Kirtley Roofing, and Kirtley Roofing did list Espino as a witness. (Agreed Prehearing Statement, p. 5). Notwithstanding this reservation, the Secretary did not call Espino as a witness.

Kirtley Roofing argues that testimony "has been established" that "a safety monitor was being used" and that the "Secretary provided no evidence to contradict this evidence." (Resp't's Br. at 15). The Court does not agree, since, as indicated *supra*, Paredes admitted the other three workers were already on the roof "moving a lot of bundles" when he climbed the ladder shortly before Schiflett's arrival, saw the debris, and then assigned a safety monitor. Therefore, Kirtley Roofing did not have a safety-monitoring system" in place before Paredes assigned Espino to be the safety monitor. Thus, the Secretary has established that Kirtley Roofing did not provide a fall protection system in compliance with 29 C.F.R. 1926.501(b)(10).

Exposure to Hazard

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). Kirtley Roofing argues that "so long as they're not working within six feet of the leading edge, then fall protection would not be required." (Tr. 58). The Court does not agree. To establish exposure, "the Secretary ... must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd*., 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)). The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)).

As the Commission noted in *Gilles & Cotting*, 3 BNA OSHC 2002, 2003 (No. 504, 1976), the scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue. Here, the zone of danger presented was the unprotected sides and edges of the roof. "Our inquiry then is whether the employees' proximity" to the unprotected sides and edges of the roof "makes it reasonably predictable that they will enter these zones of danger by

slipping or falling." *Fabricated Metal*, 18 BNA OSHC at 1076. The photographs taken by Schiflett, and corroborated by her testimony, clearly establish the proximity of some of Kirtley Roofing's employees to the unprotected sides and edges of the roof, which "makes it reasonably predictable that they will enter these zones of danger by slipping or falling." Further, since the workers were installing a sealant on the entire surface of the canopy roof, the employees were required to work on all parts of the roof, including near its edges. (Tr. 35; Ex. J-2, Ex. J-2a, Ex. J-3; Ex. S-9). Thus, the Court concludes the Secretary has shown "that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger" without proper fall protection. *Delek Ref., Ltd*., 25 BNA OSHC at 1376. Therefore, the Secretary has established employee exposure to the cited conditions.

Actual or Constructive Knowledge of Violation

To prove knowledge, "the Secretary must show that the employer knew of, or with exercise of reasonable diligence could have known of the noncomplying condition." *Sanderson Farms*, 811 F.3d at 736 (*citing Trinity Industries v. Occupational Safety & Health Review Comm'n*, 206 F.3d 539, 542 (5th Cir. 2000)). *See also*, *Cleveland Wrecking Co.*, 24 BNA OSHC 1103, 1113 (No. 07-0437, 2013) (same). "[W]hen a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge[,] actual or constructive [,] of non-complying conduct of a subordinate." *W.G. Yates & Sons Construction Co., Inc. v. Occupational Safety & Health Review Comm'n*, 459 F.3d 604, 607 (5th Cir.2006) (*quoting Mountain States Telephone & Telegraph Co. v. Occupational Safety & Health Review Comm'n*, 623 F.2d 155, 158 (10th Cir.1980)). An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *American Engineering & Development Corp.*, 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Diamond Installations, Inc.*, 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992).

The parties stipulated that Paredes was one of the four Kirtley Roofing employees working at the inspection site and that he was acting as a Kirtley Roofing's foreman supervising the other three employees on the day of the OSHA inspection and that one of his responsibilities was to ensure that the company's safety policies were followed. Paredes was aware that neither

he nor the other crew members were tied off. He also admitted Espino was bent over engaging in an activity other than monitoring the workers.

In the Fifth Circuit, "a supervisor's knowledge of his own malfeasance is not imputable to the employer" unless the Secretary demonstrates that the employer should have foreseen the unsafe conduct. *Yates*, 459 F.3d at 608-609 (emphasis added). Since this case involves misconduct on the part of Paredes, it is imputable to Kirtley Roofing under *Yates* only if it was foreseeable. The Secretary failed to establish Paredes' conduct was foreseeable. Nonetheless, this case also involves Paredes's actual knowledge of the misconduct of his three subordinates, which is still imputed to Kirtley Roofing under the "ordinary case." *Yates*, 459 F.3d at 609 n. 7. *See also, e.g.*, *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832 (11th Cir. 2016) ("there is little or no difference between this case and the classic case in 'which everyone agrees [knowledge] is imputable to the employer.'") (Citation omitted).

Kirtley Roofing raised the affirmative defense of "lack of employer knowledge" for the first time in its opening statement and in its post-trial brief. (*See* Tr. at 20; Resp't's Post-Trial Br. at 10-11). The Court finds Kirtley Roofing is prohibited from raising this defense since it failed to assert this defense "as soon as practicable" as required by Commission Rule 34. *See* 29 C.F.R. 2200.34(b)(4) ("The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable."). Therefore, the Court concludes the Secretary established that Kirtley Roofing possessed knowledge of the violative conditions.

Serious Violation

The Court finds "the violation serious within the meaning of Section 17(k) of the Act." *S. Pan Services*, 21 BNA 1462 (No. 99-0933, 2006). A serious violation exists "if there is a substantial probability that death or serious physical harm could result from [the] condition[s]." *Sanderson Farms*, 811 F.3d at 737 (*citations omitted*). "The gravamen of a serious violation is the presence of a 'substantial probability' that a particular violation could result in death or serious physical harm." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 318 (5th Cir. 1979). The employer's intent to violate an Act standard is irrelevant to find a serious violation. *Id.* Here, the four exposed employees were exposed to a fall of approximately 16 feet to the ground below on two sides of the roof and were exposed to a fall of approximately 7 feet on the other two sides of

the roof. Such falls "could result in death or serious physical harm." Therefore, the Court concludes the violation was a "serious" one.

Classification

Under Fifth Circuit and Commission precedent, a violation is repeated if, at the time it occurred, "there was a Commission final order against the same employer for a substantially similar violation." *Deep S. Crane & Rigging Co. v. Harris*, 535 F. App'x 386, 390 (5th Cir. 2013) (*citing Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 837 (5th Cir.1981)) (quotation marks and citation omitted); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary characterized the violation as a "repeated" violation, since according to the Secretary, Kirtley Roofing's "predecessor," Kirtley Sheet Metal, Inc. (Kirtley Sheet Metal), was issued a repeated citation for violating the same standard on October 5, 2012, which became a final order of the Commission on July 8, 2013. (Ex. J-1; *see also* Ex. S-1, Ex. S-2, Ex. S-3, Ex. S-4).

Kirtley Sheet Metal was incorporated on March 14, 1996, and its two directors, Phillip Kirtley Sr. and his wife Connie Kirtley, were also respectively its president and vice-president. (Tr. 185; *see* also Ex. B-1, Ex. B-3d, Ex. G-4). On February 2, 2004, Kirtley Sheet Metal filed an assumed name certificate with the Texas Secretary of State under the name "Kirtley Roofing & Sheet." (Ex. B-3f). As Phillip Kirtley Sr. explained it, since he had two cousins also in the roofing business who "were primarily in residential" and "were migrating towards commercial," both also having the last name "Kirtley," he thought it prudent to "d/b/a this name to make sure that they couldn't encroach on [his] reputational business." (Tr. 180-81). However, he did not obtain the d/b/a to make it a part of a corporation, only to keep a competitor from using the same name and encroaching on his reputation. (Tr. 181). The Court credits this testimony since there is no evidence in the record Kirtley Sheet Metal actually operated under that assumed name. The assumed name certificate expired on February 2, 2014.[11] (Tr. 181; *see also* Ex. B-3e). On October 23, 2012, Kirtley Roofing was organized as a limited liability company with Phillip Kirtley Sr.'s son, Phillip Kirtley Jr. (PJ), and PJ's wife Karen Kirtley, as its managers. (Ex. B-4a). Kirtley Sheet Metal began winding down its operations and essentially ceased operating in March 2013. (Tr. 176-177).

Successor Liability

[11] Under Texas law, an assumed name certificate "is effective for a term not to exceed 10 years from the date the certificate is filed" and is void at the end of the term "unless within six months preceding the certificate's expiration date the registrant files" a renewal certificate. Tex. Bus. & Com. Code Ann. § 71.151.

The Commission first considered the issue of a successor entity's liability under the Act for violations committed by a predecessor in *Sharon & Walter Constr. Co.*, 23 BNA OSHC 1286 (No. 00-1402, 2010). In that case, the Commission adopted a long-standing multi-factor test used by the National Labor Relations Board (NLRB) and the courts to determine when a successor entity must satisfy the obligations of a predecessor under the National Labor Relations Act (NLRA). 23 BNA OSHC at 1295. As the Supreme Court has observed, the focus of the NLRB test is whether there is "substantial continuity" between the two enterprises. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). Though originating under the NLRA, this test has also been applied to successor-related issues arising under a number of other federal employment statutes. *See, e.g.*, *EEOC v. MacMillan Bloedel Containers*, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974) (applying substantial continuity test to dispute under Title VII of the Civil Right Act of 1964 ("Title VII")); *Prince v. Kids Ark Learning Ctr., LLC*, No. 09-2365, 2010 WL 3767554 (8th Cir. Sept. 29, 2010) (same); *Sec'y v. Mullins*, 888 F.3d 1448 (D.C. Cir. 1989) (upholding application of the substantial continuity test to discriminatory discharge case arising under the Mine Safety and Health Act); *Terco v. FMSHRC*, 839 F.2d 236 (6th Cir. 1987) (same); *Cobb v. Contract Transport, Inc.*, 452 F.3d 543 (6th Cir. 2006) (applying substantial continuity multi-factor test under Family and Medical Leave Act).

In adopting the "substantial continuity" test, the Commission noted that "this test enables us to fully assess the nature and extent of the distinctions and similarities between a successor and predecessor based on criteria that are well-suited to the OSH Act and the facts of each case before us." 23 BNA OSHC at 1295. Thus, in *Sharon & Walter*, the factors the Commission considered to determine "substantial continuity" under a successorship theory were: (1) "the nature of the business;" (2) "the jobs and working conditions;" and (3) "[c]ontinuity of the personnel who specifically control decisions related to safety and health." 23 BNA OSHC at 1296. As to the first factor, the Commission found the business of both employers to be the same since they both did the "same type of work," namely "roofing and general construction services," and the successor "began operation only six weeks after [the predecessor] ceased operations." 23 BNA OSHC at 1296. Further, the successor served "customers in the same geographic area" and "continued to occupy the [predecessor's] office and use its telephone number." 23 BNA OSHC at 1296. The Commission also found the second factor to be the same,

the work and working conditions, since employees in the two companies worked on the same type of job sites, used the same tools, and "faced the same attendant fall hazards." *Id.*

Here, as to the first two factors of the substantial continuity test, Kirtley Sheet Metal and Kirtley Roofing have the same similarities as did the two companies in *Sharon & Walter*. There is no dispute that both Kirtley Roofing and Kirtley Sheet Metal performed primarily roofing work in the greater Houston area and their customer bases overlapped. (Tr. 215-216; Ex. J-1 ¶¶ 5, 7). The parties also stipulated that the two entities used the same office space, although not simultaneously, in a building that is owned by the Kirtley Group, a corporation for whom father and son, Philip Kirtley Sr. and PJ, served as the primary stockholders and officers. (Tr. 171, 176-177, 178; Ex. G-2, Ex. G-3, Ex. J-1 ¶¶ 5, 7, 10; Ex. S-1, Ex. S-5). Likewise, as in *Sharon & Walter*, Kirtley Roofing also continued to use Kirtley Sheet Metal's telephone number. (*See* Ex. B-5, Ex. G-4, p. 2).

Additionally, the types of job sites and tools used by the two entities have also remained the same. (Tr. 89, 91, 139-40). Further, two of the three employees who testified were hired by Kirtley Sheet Metal before continuing on with Kirtley Roofing. (Tr. 87, 118-19, 138-39). From the employee perspective, the process of receiving job assignments, the actual work performed at job sites, and even the tools used have all remained the same from the days they were working for Kirtley Sheet Metal to their current work for Kirtley Roofing. (Tr. 89, 91, 139-40). Philip Kirtley Sr. and PJ both confirmed that the transition between the two entities was so smooth and seamless that no employee would have even noticed there had been a change. (Tr. 176, 182, 213). Applying these first two factors, the Court finds there is "substantial continuity."

As to the third factor, whether there was a continuity of personnel who specifically controlled decisions related to safety and health, the Court finds there has been such continuity. In *Sharon & Walter*, the Commission found "Jensen was in charge of both companies and ran their operations on a daily basis. He was the sole owner and supervisor of [the predecessor], and [was] the president, sole shareholder, and supervisor of [the successor]." 23 BNA OSHC at 1296. "Accordingly, Jensen's control over decision-making in both companies, including that related to employee safety and health, weighs heavily in favor of attributing [the predecessor's] citation history to [the successor]." *Id.*

Likewise, in the present case, prior to starting Kirtley Roofing, PJ worked for Kirtley Sheet Metal where he held himself as "vice president." (Tr. 170-71, 197, 211). Philip Kirtley Sr.

also admitted PJ was "the next level" in management under him at Kirtley Sheet Metal with duties that included "estimating, purchasing, supervision, [and] scheduling." (Tr. 178-80). Although PJ asserted he was not a decision-maker in Kirtley Sheet Metal (Tr. 185), he admitted he was the superintendent for Kirtley Sheet Metal for at least all of 2012, and was the superintendent on the project inspection that led to the relevant citation issued to Kirtley Sheet Metal in 2012. (Tr. 212). As such, PJ had safety responsibilities for that 2012 project and participated in the opening and closing conferences with OSHA related to the previous citation. (Tr. 212; Ex. J-1 ¶ 8). Accordingly, PJ's control over decision-making in both companies, including that related to employee safety and health, weighs heavily in favor of attributing Kirtley Sheet Metal's citation history to Kirtley Roofing.

Considering the totality of the circumstances regarding these two entities, the Court finds the nature and extent of their similarities are sufficient to support the Secretary's conclusion that the violation history of Kirtley Sheet Metal is attributable to Kirtley Roofing under a successorship theory since there was "substantial continuity" between the two entities. *See Fall River*, 482 U.S. at 43 (determining successor liability is "primarily factual in nature and is based upon the totality of circumstances in a given situation").

Substantially Similar Violation

"[T]he principal factor to be considered in determining whether a violation is repeated is whether the prior and instant violations resulted in substantially similar hazards." *Deep S. Crane & Rigging Co. v. Harris*, 535 F. App'x at 390 (*citing Stone Container Corp.*, 14 BNA OSHC 1757 (1990)). Evidence on whether the two violations involve similar hazards is relevant to a determination of substantial similarity. *Potlatch Corp*., 7 BNA OSHC at 1063. Here, the prior and instant violations resulted in "substantially similar hazards" since they both involved violations of 29 CFR 1926.501(b)(10) for failing to provide a fall protection system at the respective worksites. (Ex. J-1; *see also* Ex. S-1, Ex. S-2, Ex. S-3, Ex. S-4, Ex. S-5). The Court finds the Secretary has met his burden of showing of "substantial similarity," particularly since both citations involve the same standard and the same hazard, a fall that could result in death or serious physical harm.

"The employer in a case like this would then have the burden of disproving the substantial similarity of the conditions, or proving any affirmative defenses[.]" *Bunge Corp.*, 638 F.2d at 838. *See also Monitor Construction Co.,* 16 BNA OSHC 1589, 1594 (No. 911807,

1994) ("Secretary may establish a prima facie case of similarity by showing that the prior and present violations are for failure to comply with the same standard, at which point the burden shifts to the employer to rebut that showing."). Kirtley Roofing has made no such showing. Instead, it simply argues that there was "not enough evidence in the record to determine whether the employees in the previous citation had any component of fall protection. Absent that proof the [Kirtley Roofing] finds it difficult to be able to make a rebuttal to the alleged repeat violation." (Resp't's Br. at 20). The Court finds no merit in this argument since, after the burden shifted to Kirtley Roofing, it had the obligation to come forward with evidence to rebut by a preponderance the Secretary's showing of substantial similarity.

Kirtley Roofing also argues that "[i]f the only way to rebut the presumption of a 'repeat' violation were to prove that a different hazard resulted, there would be no way to rebut the presumption. The rule of law would be meaningless." (Resp't's Br. ¶ 41). However, as the Fifth Circuit has noted, "[f]or violations of the same specific standard, 'rebuttal may be difficult since the two violations almost have to be substantially similar in nature in order to constitute violations of the specific standard.'" *Id.* (*citing Bunge Corp.*, 638 F.2d at 837). Nonetheless, Kirtley Roofing had such a burden, which it failed to carry. Therefore, the Court concludes this violation was properly characterized as repeated.

Affirmative Defense

The employer may escape liability by establishing an affirmative defense. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). However, under Commission Rule 34(b), "[t]he failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable." 29 C.F.R. 2200.34(b)(4). The employer bears the burden of establishing an affirmative defense by a preponderance of the evidence. *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

Employee Misconduct Defense

Under the affirmative defense of unpreventable employee misconduct, the employer may not be penalized "for the unforeseeable, implausible, and therefore unpreventable acts of his employees." *Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 564, 571 (5th Cir. 1976). Although Kirtley Roofing did not plead this affirmative

defense in its answer, it did raise it in the parties' Agreed Prehearing Statement, which was adopted as the Court's Pretrial Order superseding the pleadings. The Court finds it was asserted "as soon as practicable" as required by Commission Rule 34(b).

Under Fifth Circuit and Commission precedent, the affirmative defense of unpreventable employee misconduct "requires the employer to show (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Sanderson Farms, Inc. v. Occupational Safety & Health Review Comm'n*, 348 F. App'x 53, 57 (5th Cir. 2009) (*citing W.G. Yates & Sons Const. Co. v. Occupational Safety & Health Review Comm'n,* 459 F.3d 604, 609 (5th Cir. 2006). *See also*, *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2097 (No. 10-0359, 2012) (*citing Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003)). For the reasons indicated *infra*, the Court concludes Kirtley Roofing has not established this defense.

Kirtley Roofing asserts in its brief "[t]he Secretary admits that all of the elements of the Employee misconduct defense were present and even requested the documentation to support such claim." (Resp't's Br. ¶ 15 (*citing* Ex. S-3 p. 004)). Kirtley Roofing also asserts in its brief that "[b]efore the citation was even issued the Secretary had documented the fact that employee misconduct, if a violation even exists, was a direct cause of the alleged violation of the standard." (*Id.*) The Court does not agree. The referenced exhibit is not an admission by the Secretary, but rather, merely documents the questions asked by Schiflett and the responses given by PJ.

Kirtley Roofing has a "firm rule that all employees must utilize regulatory–required fall protection methods at all times, which means using a personal fall arrest system (i.e., body harness, lanyard) and being 'tied–off' by connecting to an attachment point." (Resp't's Br. ¶ 4). "Kirtley's Safety Program requires all employees to follow [this] Rule." (*Id.* at ¶ 5) (*citing* Ex. A-1). The Court notes Kirtley Roofing proffered as evidence its fall protection policy, revised on April 13, 2015, which was *after* the OSHA inspection at issue in this case. (*See* Ex. A-1). Nonetheless, the Secretary does not argue that the revised policy was different than the policy in effect at the time of the inspection.

Under Kirtley Roofing's fall protection policy, fall protection is required "whenever employees are potentially exposed to falls from heights that exceed regulatory thresholds." (Ex.

A-1, p. 2). "When the use of conventional fall protection equipment is deemed infeasible or the use of the equipment creates a greater hazard a Fall Protection Plan which includes a safety monitoring system shall be implemented by the supervisor." (Ex. A-1, p. 6). "Supervisors shall designate a competent person to monitor the safety of other employees." (*Id.*) "The competent person shall be assigned to: Recognize fall hazards; warn employees if they are unaware of fall hazard .... , be on the same working surface and in visual contact..... , stay close enough for verbal communication; and not have any other assignments that would take his/her attention from the monitoring function." (*Id.*)

During the course of the OSHA inspection related to the citation at issue, Schiflett evaluated Kirtley Roofing's overall safety and health program and concluded its written safety and health policy, program, and communication thereof to employees, was "average," but as to enforcement, it was "inadequate." (Ex. S-2 at 6). The Court agrees with Schiflett's assessment, except as to communication, which the Court finds was not "average." It is true employees received training and that the policies and regulations were communicated to the employees. (*See* Ex. A-6, which demonstrates that no fewer than 18 monthly safety meetings in a two-year period; Ex. A-2, which shows sign in sheets where the employees involved in this inspection had signed in for safety meetings conducted on Fall Protection prior to the instant inspection). However, both PJ and Paredes believed Kirtley Roofing's policy required employees to be tied off at all times while on a roof, even during setup. (Tr. 106-07, 200-02).

On the other hand, Martinez understood Kirtley Roofing's policy to allow employees more than six feet from the roof's edge to be untied. (Tr. 135-36). A third employee, Lisaldo Ayala, believed that an employee performing work must always be tied off, but that others could remain untied as long as they remained more than six feet from the roof's edge and were not actively performing work. (Tr. 160-161). The Court concludes Kirtley Roofing's policy was not adequately communicated to its employees, and therefore, Kirtley Roofing failed to prove this element of its employee misconduct defense.

Kirtley Roofing did take steps to discover non-compliance of its safety policies both before and after the relevant inspection, as evidenced by its safety consultant's log showing dates and locations that observations were made. (*See* Ex. A-7). However, as to specific steps Kirtley Roofing took to discover non-compliance with its fall protection policy, the only evidence presented was post-inspection monitoring that occurred on July 16, 2015, almost six months after

the OSHA inspection. (*See* Ex. A-7a). Contrary to Kirtley Roofing's assertion, Exhibit A-7A does not show "an actual inspection that occurred [sp] prior to the date of the instant case which demonstrates that Kirtley has the requisite procedures in place." (Resp't's Br. at 9). Kirtley Roofing failed to prove that it has taken steps to discover non-compliance with its fall protection policy *prior* to the citation. The Court therefore concludes Kirtley Roofing failed to prove this element of the employee misconduct defense.

Likewise, although Kirtley Roofing enforced its fall protection policy as a result of the citation at issue, as evidenced by its post-inspection discipline of Espino and Salvador (Resp't's Br. at 9; *see also* Ex. A-3), there is no evidence in the record that Kirtley Roofing enforced this policy *prior* to the citation. As the Commission observed in *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC at 2097, "post-inspection discipline alone is not necessarily determinative of the adequacy of an employer's enforcement efforts." The Commission's precedent "does not rule out consideration of *post*-inspection discipline, provided that it is viewed *in conjunction* with pre-inspection discipline." *Thomas Industrial Coatings, Inc.*, 23 BNA OSHC 2082, 2090 (No. 06-1542, 2012) (emphasis added). *See also*, *S. J. Louis Constr. of Texas*, 25 BNA OSHC 1892, 1900 (No. 12-1045, 2016) (*citing Am. Eng'g & Dev. Corp.*, 23 BNA OSHC at 2097) (holding discipline was adequate where the employer had a progressive disciplinary program and had imposed extensive discipline for safety violations in the year *prior* to incident). Kirtley Roofing's post-inspection discipline did not establish the adequacy of its enforcement efforts. Therefore, the Court concludes Kirtley Roofing also failed to prove this element of the employee misconduct defense.

IV. PENALTY DETERMINATION

The Secretary proposed a penalty of $24,500.00 for the repeated violation. Under the Act, any employer who "repeatedly" violates the requirements of section 5(a) of the Act may be assessed a civil penalty of not more than $70,000 for each violation. 29 U.S.C. § 666(a). The Commission is empowered to "assess all civil penalties" provided in this section, "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." 29 U.S.C. § 666(j). "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citing Trinity*

Indus., Inc., 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992)). "Moreover, while gravity is normally the primary factor in assessing appropriate penalties, an employer's substantial history of prior violations may skew the importance of gravity in the final penalty determination." *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994).

Schiflett testified that the citation merited a "high" gravity rating since a 16-foot fall from the roof would likely have been fatal. (Tr. 38). She also assigned a "greater probability" rating because the employees were working near the edges of the roof and were very likely to fall. *Id.* The Court agrees with Schiflett's assessment. With respect to the size of the business, the parties stipulated Kirtley Roofing had approximately 40 employees. (Ex. J-1 ¶ 11). In accordance with its internal policies and procedures, OSHA gave Kirtley Roofing a 30% penalty adjustment for its size. (Tr. 38-39). The Court finds this adjustment was appropriate. Further, given the repeated violation, the Court agrees with the Secretary that Kirtley Roofing is not entitled to a reduction for lack of history of previous violations or for good faith.

Since this was a "double" repeated violation, meaning the previous citation had itself been a repeated violation, OSHA also applied a "multiplier of five" to the proposed penalty. (Tr. 40). The Court finds that this "double" repeated violation of the same standard supports this multiplier as a deterrent effect, which is necessary to cause Kirtley Roofing to appreciate the vital importance of complying with OSHA regulations. "The purpose of a penalty is to achieve a safe workplace, and penalty assessments, if they are not to become simply another cost of doing business, are keyed to the amount an employer appears to require before it will comply." *Quality Stamping Prods. Co.*, 16 BNA OSHC at 1930 (*citing D & S Grading Co. v. Secretary*, 899 F.2d 1145 (11th Cir.1990); *George Hyman Constr. Co. v. Occupational, Safety & Health Review Comm'n*, 582 F.2d 834, 841 (4th Cir.1978)). *See also*, *E.L. Davis Contrac. Co.*, 16 BNA OSHC 2046, 2053 (No. 92-35, 1994) (where the Commission assessed a penalty of $60,000 to cause the company to appreciate "the vital importance of complying with OSHA regulations"); *Atlas Roofing Co. v. Occupational, Safety & Health Review Comm'n*, 518 F.2d 990, 1001 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977) (OSH Act penalties are meant to "inflict pocket-book deterrence" and to provide a significant weapon in the Secretary's arsenal of enforcement tools). Therefore, giving due consideration to the size of the business, the gravity of the violation, good faith, and history, the Court finds the appropriate civil penalty is $24,500.00. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT the citation is **AFFIRMED** as a repeated violation and Kirtley Roofing is assessed and directed to pay to the Secretary a civil penalty of $24,500.00.

SO ORDERED THIS 5th day of **April, 2015**.

/s/

JOHN B. GATTO, Judge