United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR, Complainant, v. WILLIAM TRAHANT, JR., CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 15-0489

Appearances: M. Patricia Smith, Solicitor of Labor
Michael D. Felsen, Regional Solicitor
James L. Polianites, Attorney
U.S. Department of Labor, Office of the Solicitor, Boston, Massachusetts
For the Secretary

William Trahant, Jr.
William Trahant, Jr. Construction, Inc., Lynn, Massachusetts
For the Respondent

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to sections 2-33 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). Following Inspection Number 1003916, an Occupational Safety and Health Administration (OSHA) inspection of a worksite at 86 Congress Street,

Salem, Massachusetts, 01970 (worksite), OSHA issued three citations to William Trahant, Jr. Construction, Inc. (Trahant or Respondent), alleging violations of OSHA's construction standards and proposing a total penalty of $43,560. (Tr. 21; Ex. 1). Respondent filed a timely notice of contest, bringing this matter before the Commission. The parties filed pre-hearing pleadings and a hearing was held in Boston, Massachusetts on January 6, 2016. Respondent did not appear at the hearing. The Secretary filed a post-hearing brief. Respondent did not file a post-hearing brief. For the reasons set forth below, the Court affirms all citations and proposed penalties.

JURISDICTION

The evidence establishes that, at the time of the OSHA inspection, Respondent was performing roofing work on a residential construction site in Salem, Massachusetts. (Tr. 18,58). Roof repair qualifies as "construction work" which is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1926.32(g). The construction industry as a whole affects commerce, and even small employers within that industry are engaged in commerce. *Slingluff v. OSHRC*, 425 F.3d 861, 866-67 (10th Cir. 2005); *Clarence M. Jones, d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). The record also establishes that Respondent had at least one employee who was working as a roofer on Respondent's worksite. (Tr. 16; Exs. 3, 4 at pp. 1-2). Additionally, Respondent admits in its pre-hearing pleading that, as of the date of the alleged violations, it was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act. (Answer at ¶¶ 3-4).

Based upon the record, the Court finds that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections

3(3) and 3(5) of the OSH Act. The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case, and Respondent is covered under the OSH Act. (Answer at ¶ 2, where Respondent admits jurisdiction).

BACKGROUND

OSHA Inspection

On October 27, 2014, an anonymous caller reported to OSHA alleged fall protection violations on Respondent's worksite in Salem, Massachusetts. OSHA registered the complaint and dispatched Compliance Officer (CO) Donald Naim to inspect the worksite that same day.[1] Upon arrival to the parking lot of the worksite in the early afternoon, CO Naim observed employees working on the roof of a residential building and some workers on the ground cleaning up debris that the roofers were throwing from the roof. The building was two and half stories high and the workers were repairing the top of a dormer on the roof. The roofers were at least 28 feet high from the ground. (Tr. 18-21, 28, 58, 88-89; Exs. 1-11, 17).

Respondent had been working on this worksite for "an hour or two hours" by the time CO Naim had arrived. There were six roofers: some of the roofers were secured from fall hazards because they were wearing fall protection harnesses with lanyards attached to an anchor, and some were unsecured because their fall protection device was not attached to an anchor, or, allegedly, in some instances their fall protection device was attached to an inadequate anchor. CO Naim noted that, in one instance, one employee did not appear to have a harness on at all. There were no guardrails on the roof. There were at least four workers on the ground, directly beneath the roofers, clearing the debris that the roofers were throwing from the roof. These workers were not wearing hard hats. (Tr. 24, 32-33, 58-59, 60-62, 83, 90-95).

[1] CO Naim has been familiar with OSHA's construction safety regulations for more than 25 years, initially as a safety manager and later as an OSHA CO for the preceding 8 years. He has performed about 500 OSHA investigations of fall hazards in roof construction. (Tr. 17-18).

From the parking lot, CO Naim took photographs of the worksite and the workers. Ken Richards, Respondent's sales foreman, walked over to CO Naim, who showed Mr. Richards his OSHA credentials as they met. CO Naim testified that he had met Mr. Richards on previous OSHA inspections. Mr. Richards listed himself as a Trahant employee working on the ground of the worksite that day, and later also filled out CO Naim's "contact sheet."[2] CO Naim asked Mr. Richards to get William Trahant's attention because CO Naim noted that Mr. Trahant was working on the roof while not being tied off and he wanted to talk with him.[3] CO Naim noted that Mr. Trahant was wearing a fall protection harness, but with no lanyard on it. (Tr. 22-23, 75, 80-84; Ex. 4, p.2).

Mr. Trahant came down from the roof and met with CO Naim. Mr. Trahant told CO Naim that all of the workers on the worksite were his employees, and none of them were subcontractors. CO Naim testified that Mr. Trahant told him that he did not have enough anchors for the roofers working on the rooftop. CO Naim also testified that Mr. Trahant did not have enough hard hats for the workers gathering debris on the ground. CO Naim asked Mr. Trahant why some of Respondent's workers had no fall protection despite the working conditions on the worksite. He also asked Mr. Trahant to explain how these fall protection violations were not a "willful disregard" of the fall protection standard. Mr. Trahant told CO Naim that the project was a small job and he "just wanted to get it done with." He also told CO Naim that the harness lanyard got in his way and he trips over it. According to CO Naim, Mr. Trahant could not explain why it was not willful, and agreed that it was willful.[4] With

[2] CO Naim explained that during this inspection, he asked Mr. Richards to write down the names of the employees pointed out by CO Naim, as well as Respondent's total number of employees. (Tr. 82-84).
[3] Mr. Trahant was Respondent's owner. Mr. Richards agreed with CO Naim that Mr. Trahant was not tied off. (Tr. 23, 26).
[4] CO Naim testified that Mr. Trahant admitted he could not explain why this was not a willful disregard of the fall protection standard; and instead said: "You're right, it is willful." (Tr. 24-25; Ex. 3, p. 6).

regard to training, CO Naim testified that Mr. Trahant "indicated that he talked to" his workers, but he could not produce written documentation of any training. (Tr. 23-26, 32, 68, 71-72, 83, 86).

CO Naim then got the names of the workers on the site with the help of Mr. Richards. CO Naim testified that the workers correctly tied off continued to work after Mr. Richards called those who were not tied off down to the ground. One of these roofers who descended from the roof was Jim Eager, a relative of Mr. Trahant. CO Naim interviewed Mr. Eager, who was not wearing any sort of fall protection harness and "did not indicate that he had any sort of training related to the work he was doing and the fall hazards and the gravity of what a fall could do to him from working the way he was working." CO Naim did not interview any of the other workers.[5] (Tr. 25-27, 62, 70-71, 81).

CO Naim then walked around the worksite. He started to ascend the only ladder on the worksite leading to the roof. As he continued up the ladder, CO Naim noted that some rungs on the ladder were damaged and that there were splits in the rails. From the top of the ladder, CO Naim looked over the roof and noted the fall protection used by the roofers.[6] He particularly noticed that some of the anchorages for the fall protection lanyards were not adequately installed, and that more than one worker was tied off to a single anchor. (Tr. 28-32, 51-52, 54-55, 91-92).

CO Naim descended the ladder and talked with Messrs. Trahant and Richards. He told them about his observations about the ladder, hard hats, and anchorages. Respondent took the ladder out of service and removed the workers without hard hats from the hazard area. CO

[5] CO Naim testified that not all of the employees "spoke English very well. So – and a lot of the employees were reluctant to speak to me." (Tr. 81).

[6] CO Naim testified that he stood four feet from roofers at this point. CO Naim had no fall protection so he did not leave the ladder. (Tr. 22, 28, 46).

Naim then told Mr. Trahant that, with Respondent's history of OSHA violations, these current violations were "not going to be good." CO Naim asked Mr. Trahant if he had any questions, and Mr. Trahant "said no." CO Naim was at the worksite a total of about 1 or 2 hours. (Tr. 32-35).

OSHA Citations

OSHA issued Respondent three citations: (1) a three-item serious citation proposing a penalty of $8,360, (2) a one-item willful citation proposing a $30,800 penalty, and (3) a one-item repeat citation proposing a penalty of $4,400, for a total proposed penalty of $43,560. (Ex. 1).

Citation 1, Item 1, the alleged hardhat violation, alleged a serious violation of 29 C.F.R. § 1926.100(a) and proposed a penalty of $3,080. Section 1926.100(a) states: "Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objections, or from electrical shock and burns, shall be protected by protective helmets." 29 C.F.R. § 1926.100(a). The Secretary alleged that Respondent's "employees were not protected from over head hazards while working below roofers." (Ex. 1 at p. 6).

Citation 1, Item 2, alleged the anchorage violation, a serious violation of 29 C.F.R. § 1926.502(d)(15) and proposed a penalty of $3,080. Section § 1926.502(d)(15) states:

> Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kN) per employee attached, or shall be designed, installed, and used as follows: (i) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and (ii) under the supervision of a qualified person.
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> 29 C.F.R. § 1926.502(d)(15).

The Secretary alleged that Respondent's employees were not protected from falling when using a personal fall arrest system which used anchorages for attachment that did not have an anchor point capable of supporting at least 5000 pounds.[7] (Exs. 1 at p. 7, 6).

Citation 1, Item 3, the alleged ladder violation, alleged a serious violation of 29 C.F.R. § 1926.1053(b)(16) and proposed a penalty of $2,200. Section § 1926.1053(b)(16) states:

> (b) *Use*. The following requirements apply to the use of all ladders, except as otherwise indicated: (16) Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with 'Do Not Use' or similar language, and shall be withdrawn from service until repaired.
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> 29 C.F.R. § 1926.1053(b)(16).

The Secretary alleged that "a portable ladder that was damaged was not withdrawn from service" on Respondent's worksite. (Ex. 1 at p. 8).

Citation 2, Item 1, the alleged fall protection violation, alleged a willful violation of 29 C.F.R. § 1926.501(b)(13) and proposed a penalty of $30,800. Section 1926.501(b)(13) states: "*Residential construction*. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure[…]." 29 C.F.R. § 1926.501(b)(13). The Secretary alleged that Respondent's "employees were not protected from falling while working on a roof greater than six feet above a lower level." (Ex. 1 at p. 9).

Citation 3, Item 1, alleged a repeat violation of 29 C.F.R. § 1926.503(a)(1), and proposed a penalty of $4,400. Section 1926.503(a)(1) states: "Training Program. (1) The employer shall provide a training program for each employee who might be exposed to fall

[7] PFAS is an acronym for "personal fall arrest systems." *See* 29 C.F.R. § 1926.500(b). (Sec'y Br. at 8-9).

hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards." 29 C.F.R. § 1926.503(a)(1). The Secretary alleged that Respondent "did not provide training for the employees who were exposed to fall hazards."[8] (Ex. 1 at p. 10).

Respondent's Previous OSHA Violations

Respondent has a history of OSHA violations. On July 29, 2014, three months before the inspection for the case at issue here, OSHA inspected a different Trahant worksite and issued citations alleging repeat violations of 29 C.F.R. §§ 1926.501(b)(13) and 1926.1053(b)(1), and an other-than-serious violation of 29 C.F.R. § 1926.503(a)(1), on August 12, 2014. *See* OSHA Inspection No. 987538 Citation. Trahant did not file a timely notice of contest, and that citation was deemed a final order of the Commission on September 16, 2014. 29 U.S.C. § 659(a). On March 2, 2015, Respondent submitted to the Commission a handwritten letter. The Secretary construed Respondent's letter as a late notice of contest and submitted a motion to dismiss. The Court granted the Secretary's motion under Federal Rule of Civil Procedure 60(b) and did not reopen the September 16, 2014 final order. *William*

[8] Neither the citation nor the complaint specifically mentions the previous violation on which this repeat characterization was based. (Tr. 98-99). The Secretary, however, included in his pre-hearing statement the proposed facts that Respondent had previously been cited for violations of §§ 1926.501(b)(13) in 2011, 2012 and 2014 and "1926.501(a)(1)" in 2014. *See* Sec'y Pre-Hr'g Statement at 5. The affirmed 2014 violation reflects that Respondent did violate, in September 2014, §§ 1926.501(b)(13), 1926.1503(b)(1), and 1926.503(a)(1). *See William Trahant, Jr., Construction, Inc.*, "Order Granting Complainant's Motion to Dismiss Untimely Notice of Contest," (Docket No. 15-0384, June 29, 2015); OSHA Citation (Inspection No. 987538). The Court finds that the "1926.501(a)(1)" in the Secretary's pre-hearing statement at p. 5 is a typographical error; i.e. should have referred to § 1926.503(a)(1), as a § 1926.501(a)(1) standard was not included in the September 2014 final order of the citation for Inspection Number 987538. Additionally, CO Naim clarified at trial that the previous violation he used for the repeat classification was the § 1926.503(a)(1) violation that went final on September 16, 2014 from Inspection Number 987538. (Tr. 98-99; Ex. 19); *see also* Sec'y Br. at 17 (suggesting that the repeat classification was based on the September 16, 2014 final order.).

Trahant, Jr., Construction, Inc., "Order Granting Complainant's Motion to Dismiss Untimely Notice of Contest," (Docket No. 15-0384, June 29, 2015).[9]

Previously, on July 19, 2012, OSHA inspected another Respondent worksite and issued a citation alleging a repeat violation of 29 C.F.R. § 1926.501(b)(13). *See* OSHA Inspection No. 528579 Citation. Respondent and OSHA formally settled this citation (amending only the penalty amount) with a final order date of January 14, 2013.[10] (Ex. 16).

Pre-Hearing Pleadings and the Trial

During the pre-hearing phase of this proceeding, Respondent filed an Answer to the Secretary's Complaint on August 5, 2015. The Answer included seven affirmative defenses:

1) The Complaint fails to state a claim upon which relief can be granted;

2) The claims set forth in the Complaint are barred in whole, or in part, because the Respondent lacked fair notice;

3) The claims set forth in the Complaint are barred in whole, or in part, because the Respondent lacked knowledge of any violation conditions;

4) The claims set forth in the Complaint are barred in whole, or in part, under the doctrines of waiver and estoppel;

5) The claims set forth in the Complaint are barred in whole, or in part, because the cited standards are impermissibly vague;

6) The claims set forth in the Complaint are barred in whole, or in part, due to unpreventable employee misconduct;

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[9] As discussed herein, this deemed final violation of 29 C.F.R. § 1926.503(a)(1) is the basis of the alleged repeat citation item of the same standard in the case at hand.

[10] OSHA's data website indicates that OSHA conducted another previous inspection of a Peabody, Massachusetts worksite of Trahant Roofing, Jr. Construction, Inc. of 215 Verona Street, Lynn, Massachusetts (Respondent's record address) - Inspection Number 315556548. According to OSHA's website, this inspection was opened on May 24, 2011 and closed on August 8, 2012. As this inspection resulted in an informal settlement agreement, according to OSHA's website, there are no records at the Commission regarding this inspection number.

See https://www.osha.gov/pls/imis/establishment.inspection_detail?id=315556548 (OSHA's Data "Inspection Search by Establishment" website, using search term, "Trahant.")

7) Since the parties have yet to engage in formal discovery, Respondent reserves the right to supplement its affirmative defenses as discovery warrants.

(Answer at 3, ¶¶ 1-7).

On August 12, 2015, the Notice of Pre-Hearing Scheduling Conference and Order was sent out – and the Order was not returned by the U.S. Post Office to the Commission – notifying the parties of an upcoming September 8, 2015 Conference Call. Respondent did not show up to the Conference Call.[11] On September 9, 2015, the Notice of Hearing & Scheduling Order was sent out – and this Notice & Order was also not returned by the U.S. Post Office to the Commission. In this Order, footnote 1 noted that Respondent failed to participate in the September 8, 2015 Conference Call and issued a warning that future non-participation could result in sanctions including dismissal of the case.

On December 11, 2015, the Secretary filed the Secretary's Pre-Hearing Statement. In this statement, the Secretary stated that attempts to contact Respondent by telephone have been "unavailing." (Sec'y Pre-Hearing Statement at 1). On December 29, 2015, an Order of Notice and Hearing Location was sent by first-class mail and by facsimile to the parties. The first-class mail was not returned, and the facsimile transmission was successful. On December 30, 2015, the Court's office telephoned Respondent to confirm receipt of the December 29 Order and Notice of Hearing Location and to inquire about submission of trial exhibits, and left a voicemail. Respondent did not return the voicemail.

On December 31, 2015, an Order to Respondent to Comply with Commission Rule 35 was sent to Respondent by first-class mail and facsimile. Respondent was ordered to file a declaration listing all of its parents, subsidiaries, and affiliates, or state that it has none by

[11] It is noted that the Court attempted to contact Respondent by telephone during the conference call, but was not successful in reaching Respondent.

January 6, 2016 (declaration).[12] Similarly, the first-class mailing was not returned, and the facsimile transmission was successful. As there is no evidence in this record that the U.S. Postal Service failed to properly fulfill its duties, it is presumed that Respondent received all mailings from the Court and the Court holds Respondent responsible for its mail handling procedures. *Powell v. Commissioner*, 958 F.2d 53, 54 (4th Cir. 1992) (holding that, in the absence of evidence to the contrary, it is reasonable to presume that the United States Postal Service officials have properly discharged their duties); *La.-Pac. Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (holding that the Commission expects employers to maintain orderly procedures for handling important documents).

The trial for this case was held on January 6, 2016. Respondent was not in attendance. (Tr. 5-6). The Secretary's attorney, Mr. Polianites, presented his case.[13] He offered several exhibits that were admitted into evidence at the hearing. (Tr. 9-10; Exs. 1-20). No joint exhibits or stipulations between the parties were entered into the record. (Tr. 10-11). The Secretary served a copy of his post-hearing brief upon Respondent on February 24, 2016. Respondent neither offered any exhibits into the record nor filed a post-hearing brief. Commission Rule 64 states that the failure of a party to appear at a hearing "may result in a decision against that party." 29 C.F.R. § 2200.64(a). A failure to appear may be excused where good cause is shown, but a request for reinstatement must be made within five days of the hearing. 29 C.F.R. § 2200.64(b). Respondent has made no such request. The evidence

[12] Respondent failed to submit any declaration.

[13] Before making his opening statement, the Secretary moved for the Court to find Respondent in default "in light of the complete abandonment of any obligation imposed by the Court on Mr. Trahant, and Mr. Trahant's failure to participate in the pre-hearing process, to participate in the telephone conference, and to appear here today …." The Court reserved judgment on Respondent's motion. (Tr. 11-12). In light of the Court affirming all of the citation items at issue, including their proposed characterizations and penalties, after conducting a trial on the merits, the Secretary's motion for default is denied as moot.

produced by the Secretary is uncontested since Respondent failed to appear at the hearing, proffer any trial exhibits, or file any post-hearing brief.[14]

DISCUSSION

To establish a violation of a safety or health standard, the Secretary must prove by a preponderance of the evidence: "(1) that the cited standard applies; (2) that there was a failure to comply with the standard; (3) that employees had access to the violative condition; and (4) that the employer had actual or constructive knowledge of the violation." *P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Comm'n*, 675 F.3d 66, 72 (1st Cir. 2012) (citation omitted); *see also Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

I. Alleged Violations

a. Serious Citation 1, Item 1 – Alleged Hard Hat Violation

The Secretary claims that Respondent violated 29 C.F.R. § 1926.100(a)[15] when its "employees working below roofers who were discarding roofing materials into dumpster were not protected by using hard hats." (Sec'y Br. at 5).

The evidence establishes that Respondent's workers were working beneath flying roof debris and thus exposed to a possible danger of head injury from the impact of the roof

[14] Additionally, Respondent has not further raised or discussed the defenses it asserted in its answer. Accordingly, the Court finds that Respondent has abandoned these defenses. *See Manganas Painting Co., Inc.,* 1996 WL 478959, at *13 (No. 93-1612, Aug. 23, 1996) (Consolidated) (ALJ), *aff'd on other grounds,* 273 F.3d 1131 (D.C. Cir. 2001) ("Respondent's failure to identify evidence or present any argument furthering its mere statement of an affirmative defense constitutes, for all practical purposes an abandonment of the defense or, at least, a failure to carry its burden. The argument is rejected."); *Daniel Crowe Roof Repair and his Successors*, 23 BNA OSHC 2001, 2003 (No. 10-2090, 2011) (ALJ) (same).

[15] Section 1926.100(a) states: "Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objections, or from electrical shock and burns, shall be protected by protective helmets." 29 C.F.R. § 1926.100(a).

debris.[16] At least one of the employees was working in full view of the sales foreman, Mr. Richards, who had authority to correct employees. (Ex. 4, p. 2). The cited standard applies. The record also establishes that none of these workers wore a protective helmet, such as a hard hat, to protect them from injury. At least one employee wore a "hoodie;" another a baseball cap. (Tr. 40-42; Ex. 5b, 5d). The standard was violated. CO Naim testified that he himself observed these workers, without hardhats, "in the hazard zone" near the dumpster where the roofers were throwing debris from the above rooftop. These workers were therefore exposed to an impact of flying roof debris. CO Naim observed directly and documented these workers without hardhats working directly beneath the roofers throwing roof debris. CO Naim also testified that Mr. Trahant knew that his workers did not wear hard hats. The record also supports a determination that Mr. Trahant knew that he did not have enough hard hats to give out to his workers, and this knowledge can be imputed to Respondent. *P. Gioioso*, 675 F.3d at 73 ("an employer can be charged with constructive knowledge of a safety violation that supervisory employees know or should reasonably know about."). Knowledge of the violation has been established. (Tr. 32-33, 40-41, 49; Exs. 3-5).

This citation item is affirmed.

The Secretary characterized this citation item as "serious." (Sec'y Br. at 7). A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). To successfully characterize a violation as "serious," the Secretary need only show that " 'an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident.' " *Flintco, Inc.*, 16 BNA OSHC 1404, 1405-06 (No. 92-1396, 1993)

[16] Exposed employees working at the worksite without wearing a hard hat included Julio, Biron, Mark, and Mr. Richards. (Tr. 82-83; Ex. 4, p. 2).

(citation omitted). The record establishes that the unprotected workers were located beneath falling roofing debris. CO Naim also testified that the probability of a severe head injury was "greater" given the proximity of these unprotected workers to the dumpster and the falling roof debris.[17] (Tr. 41). Based on this evidence, the Court finds that it is possible on this worksite that roofing debris could fall on a worker's unprotected head. The Court further finds that it is substantially probable that serious physical harm could result from the head injury.

This citation item is properly characterized as serious.

b. Serious Citation 1, Item 2 – Alleged Faulty Personal Fall Protection Systems Violation

The Secretary claims that Respondent violated 29 C.F.R. § 1926.502(d)(15)[18] when its "employees working on the roof were not protected from falling since their personal fall arrest systems did not have an anchor point capable of supporting at least five thousand pounds per employee." (Sec'y Br. at 8).

The record establishes that some of Respondent's workers wore harnesses with lanyards designed to attach to an anchorage with the purpose of protecting the worker from falling at least 20 feet to the ground below. CO Naim observed and photographed the anchorage that the workers used or were supposed to use on Respondent's worksite. (Tr. 29-33; Exs. 6-7). The cited standard applies.

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[17] In this context, CO Naim was answering questions on how he determined the penalty amount. Nonetheless, the Court finds his testimony here helpful in determining whether an accident was possible on this worksite. *Flintco, Inc.*, 16 BNA OSHC at 1405-1406.

[18] Section 1926.502(d)(15) states:

> Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kN) per employee attached, or shall be designed, installed, and used as follows: (i) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and (ii) under the supervision of a qualified person.
>
> 29 C.F.R. § 1926.502(d)(15).

CO Naim testified that Respondent had not adequately attached the anchorage to the roof because some of the attachment points had not been fully nailed in or screwed in. CO Naim testified that anchorages are designed such that all of the securing locations of the anchors should be used – and if all not used, the anchorage does not have the tensile strength it was designed to hold to fully protect a worker attached to it. CO Naim said not all of the holes in the anchors were used for the screws or the nails to hold the anchor in place were filled. (Tr. 30). CO Naim also testified that he observed multiple lanyards clipped to a single anchorage – meaning that more than one person was using a single anchorage. CO Naim testified that this was an improper usage of the anchorage because "the manufacturer of anchors would be specific in saying that each anchorage point is intended for one person to secure to." (Tr. 29-31, 43-48; Exs. 6-7). The Court finds that, here, this evidence supports a finding that Respondent violated the standard because the anchorage that CO Naim observed was not "installed" and "used" as "designed." 29 C.F.R. § 1926.502(d)(15).

CO Naim testified that he observed that workers attached their harness to the inadequately installed anchorage, and that more than one person was attached to a single anchorage.[19] CO Naim testified that an inadequately installed anchorage, or an improperly used anchorage, could cause the anchorage to fail and the worker "would fall over 20 feet to the ground."[20] (Tr. 28-31, 49). Exposure to the hazard has been established.

With regard to knowledge, CO Naim testified that Respondent owned these anchorages, and they came with the manufacturer's instructions on how to install and use them when they were purchased. (Tr. 48-49). The record also establishes that Mr. Trahant, who was wearing a harness but was not tied off, was on the roof working next to the workers who were tied off to

[19] Messrs. Steve Wise, Josh Wise, Mario Deleone, and Jenna Matios and other roofers were exposed to the inadequately installed anchorage, or an improperly used anchorage. (Tr. 89-91; Ex. 6).
[20] CO Naim testified that the roofers were working in an area at least 28 feet from the ground. (Tr. 28).

the improperly installed anchorage that was in plain view, and he knew that he did not have enough anchors for everyone on the roof.[21] (Tr. 32, 49, 73). The Court finds that, with reasonable diligence, Respondent would have known about the manufacturer's instructions and would have seen how his workers did not follow the instructions. *S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016) (considering employer's obligations to have adequate work rules and training programs, adequate supervision, anticipation of hazards, and taking measures to prevent the occurrence of violations to determine constructive knowledge). Furthermore, the fact that Mr. Trahant himself was not tied off, although he wore a harness, suggests a less than stringent approach to fall protection. *P. Gioioso*, 675 F.3d at 73. Knowledge has been established.

This citation item is affirmed.

The Secretary characterized this citation item as "serious." (Sec'y Br. at 10). A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). To successfully characterize a violation as "serious," the Secretary need only show that " 'an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident.' " *Flintco, Inc.*, 16 BNA OSHC at 1405-06. CO Naim testified that the anchorage used at Respondent's worksite could fail because it was installed incorrectly. (Tr. 50). He agreed that the probability that the anchorage could fail was "greater" due to being "overloaded to twice its capacity."[22] (Tr. 49-50). The Court finds based on the record that an accident of an anchorage failing was possible on Respondent's worksite. The Court further

[21] Mr. Trahant admitted to CO Naim that he knew that he did not have enough anchors for the employees who were actually working on the roof. (Tr. 32).

[22] Again, CO Naim was answering questions here on how he determined the penalty amount for this citation item. Nonetheless, the Court finds his testimony here helpful in determining whether an accident was possible on this worksite. *Flintco, Inc.*, 16 BNA OSHC at 1405-1406.

finds that the result of this failure, a fall of over 20 feet, could result in serious injury or death. *See Daniel Crowe Roof Repair*, 23 BNA OSHC at 2017 (roofing an inherently dangerous activity).

This citation item is properly characterized as serious.

c. Serious Citation 1, Item 3 – Alleged Defective Ladder Violation

The Secretary claims that Respondent violated 29 C.F.R. § 1926.1053(b)(16)[23] when it "failed to remove defective ladders from usage until repaired." (Sec'y Br. at 10).

The record establishes that the only ladder on the worksite that led to the rooftop had a "crack in it", split rails and bent rungs. CO Naim testified that he observed Mr. Trahant and at least three other workers use this ladder to come down from the roof during his inspection. The ladder was portable, had structural defects of a split rail and bent rungs, and was used by workers on the worksite. The cited standard applies. CO Naim testified that when he pointed out the defective ladder to Respondent, Respondent removed the ladder from service. Before CO Naim pointed out the defective ladder to Respondent, instead of immediately being removed from service, the workers used it ascend up to and descend down from the roof. The cited standard was violated. CO Naim testified that the workers used the defective ladder and were therefore exposed to hazards such as ladder collapse, falls and consequent injury.[24] (Tr. 29, 32, 51-55; Exs. 8-9). Employee exposure to a hazardous condition has been established.

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[23] Section 1926.1053(b)(16) states:

> (b) *Use*. The following requirements apply to the use of all ladders, except as otherwise indicated: (16) Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with 'Do Not Use' or similar language, and shall be withdrawn from service until repaired.

29 C.F.R. § 1926.1053(b)(16).

[24] Messrs. Eager, Steve Wise, Josh Wise, and Deleone were exposed to using the defective ladder. (Tr. 54; Ex. 8).

With regard to knowledge, CO Naim testified that Mr. Trahant himself used the defective ladder, and that when CO Naim used it, the defects were readily visible to him. CO Naim also testified that it looked to him that one of the ladder rungs was replaced, modifying the ladder not in accordance with the manufacturer's written permission, because he observed aftermarket bolts instead of rivets at one of the rungs. This condition was also plainly visible to CO Naim. (Tr. 50-54; Ex. 9). When assessing constructive knowledge, the Commission considers the employer's obligations to have adequate work rules and training programs, adequately supervise employees, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations. *S.J. Louis Constr. of Tex.*, 25 BNA OSHC at 1894. The Court finds either Respondent had actual knowledge of the ladder's condition or should have had knowledge of the ladder's condition if Respondent had been reasonably diligent in adequately supervising the use of the ladder by its workers. Knowledge has been established. *P. Gioioso*, 675 F.3d at 73 (knowledge of supervisor can be imputed).

This citation item is affirmed.

The Secretary characterized this citation item as "serious." (Sec'y Br. at 12). A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). CO Naim testified that the probability of ladder failure was "lesser" given the nature of the defects, but the Court finds that this testimony is enough to establish that ladder failure was possible. *Flintco, Inc.*, 16 BNA OSHC at 1405-06. CO Naim also testified that a fall of up to 20 feet could result as a consequence of ladder failure. (Tr. 55). The Court finds that a fall of up to 20 feet as a result of a ladder failure could lead to serious injury or death.

This citation item is properly characterized as serious.

d. Willful Citation 2, Item 1 – Alleged Lack of Fall Protection Violation

The Secretary claims that Respondent violated 29 C.F.R. § 1926.501(b)(13)[25] when it did not protect "its employees from falling while working on a roof greater than six feet above a lower level." (Sec'y Br. at 13).

The record establishes that Respondent's workers were on the roof of a residential construction site that was at least twenty feet above the ground. The cited standard applies. The record establishes that some of Respondent's workers were wearing personal fall arrest systems, but were not tied off. The record also establishes that at least one worker was not even wearing a personal fall arrest system at all. CO Naim observed Mr. Eager with no fall protection on at all in close proximity to Mr. Trahant on the roof.[26] CO Naim also saw two other roofers who were not secure with lanyards while working on the roof. (Tr. 61-62, 92-93; Exs. 10, p.2, 11b, d-e). The record also establishes that there were no guardrails or safety nets on the worksite. CO Naim testified that the roof was not a "low-sloped" roof and that the workers focused their work on one of the dormers of the roof. The Court finds that those workers lacking fall protection or who were not tied off were exposed to falls of at least 20 feet. (Tr. 28, 58-62, 92-97; Exs. 10-11). The standard was violated and exposure has been established.

With regard to knowledge, as discussed above, the record establishes that Mr. Trahant himself, while wearing a harness, was not tied off. The workers had been working on this worksite for "an hour or two hours" by the time CO Naim had arrived. Mr. Eager was a "last-

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[25] Section 1926.501(b)(13) states: "*Residential construction*. Each employee engaged in residential construction activities 6 feet or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protraction measure[…]." 29 C.F.R. § 1926.501(b)(13).

[26] This same worker indicated to CO Naim that he had not received fall protection training from Respondent before working on the roof. (Tr. 25-26, 62, 70-71).

minute" hire who was not issued a harness by Respondent before he started working on the roof. Mr. Trahant was working on the roof alongside these employees. It would have been obvious to Mr. Trahant that employees were not properly tied off or lacked fall protection. (Tr. 24, 61-64, 71-73). This evidence supports a finding of actual knowledge by Mr. Trahant and therefore by Respondent, by imputation. *P. Gioioso*, 675 F.3d at 73.

The Secretary claims that this citation item is properly characterized as willful. (Sec'y Br. at 14-15). "The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or ... plain indifference to employee safety.' " *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

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

Hern Iron Works, Inc., 16 BNA OSHC 1206, 1214 (No. 89-433, 1993); *see also Brock v. Morello Bros. Constr.*, 809 F.2d 161, 163–64 (1st Cir. 1987) ("Although the meaning of this word varies in different statutory contexts, courts have consistently held that it refers to a state of mind that differs from 'intentional' in that it implies some form of awareness, not simply of the forbidden conduct, but also of the statute or rule that forbids it.").

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

Williams Enters. Inc., 13 BNA OSHC 1249, 1257 (No. 85-355, 1987). "[A]n employer's prior history of violations, its awareness of the requirements of the standards, and its knowledge of the existence of violative conditions are all relevant considerations in determining whether a violation is willful in nature." *MJP Constr. Co.*, 19 BNA OSHC 1638, 1648 (No. 98-0502, 2001). "The state of mind of a supervisory employee ... may be imputed to the employer for purposes of finding that the violation was willful." *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000).

As the Secretary argues, the record "establishes Mr. Trahant knew that fall protection was required on the worksite, that he allowed employees to be either inadequately protected or not protected at all (as in the case of himself and Mr. Eager), and that he made these decisions while in sight of, and indeed working alongside his unprotected employees." (Sec'y Br. at 15). The record establishes that Respondent has been cited for this same standard twice before - Inspection No. 987538 in August 2014 and Inspection 528579 in July 2012 – supporting a finding that Respondent had a heightened awareness of the requirements of this standard. *MJP Constr. Co.*, 19 BNA OSHC at 1648. (Tr. 64-65; Exs. 12, 14).

The record also establishes that, despite this heightened awareness, Mr. Trahant consciously disregarded the requirements of the standard and acted with plain indifference to his workers' safety. CO Naim testified that Mr. Trahant told him that he knew that fall protection was required, but that this project was "a small job" and he "just wanted to get it done with." Mr. Trahant also told CO Naim that the harness lanyard got in his way and he trips over it. According to CO Naim, Mr. Trahant could not explain why his company's lack of fall protection was not willful, and agreed that it was willful. The Court also notes that Mr. Trahant initially told CO Naim that his workers had just started the job, but then admitted, after

CO Naim's doubtful questioning, that they had been working for at least an hour or two before CO Naim arrived. The Court also views Mr. Eager's lack of a harness altogether, all the while working in close proximity to Mr. Trahant for at least an hour, as supporting a willful state of mind – especially because he was Mr. Trahant's relative and a "last minute" hire. (Tr. 24-26, 64-71; Ex. 10). Mr. Trahant's willful state of mind regarding lack of fall protection on Respondent's worksite is imputed to Respondent. *Branham Sign Co.*, 18 BNA OSHC at 2134.

This citation item is properly characterized as willful.

e. Repeat Citation 3, Item 1 – Alleged Training Violation

The Secretary claims that Respondent violated 29 C.F.R. § 1926.503(a)(1)[27] failed "to train employees who were exposed to fall hazards." (Sec'y Br. at 16; Ex. 17)

The record establishes that Respondent's workers on the roof were exposed to a fall hazard of at least 20 feet. These workers, including Mr. Eager, were therefore all required to have fall protection training provided by Respondent. The cited standard applies. CO Naim testified that Mr. Eager did not indicate that Respondent had given him fall protection. (Tr. 70-71; Ex. 10). Although Mr. Trahant told CO Naim that he had "talked" to his workers about fall protection, he did not produce any documentation that showed the subject matter of his talk and whether it included "the hazards of falling" and "the procedures to be followed in order to minimize these hazards." 29 C.F.R. § 1926.503(a)(1). The Court finds, based on Mr. Eager's response to CO Naim's questioning and the absence of training records, that Respondent did not comply with the cited standard. (Tr. 70-72; Ex. 10). *Well Solutions, Inc., Rig No. 30*, 17 BNA OSHC 1211, 1214-15 (No. 91-340, 1995)(holding that the Secretary can rely on "*best*

[27] Section 1926.503(a)(1) states: "Training Program. (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards." 29 C.F.R. § 1926.503(a)(1).

available evidence" to establish decedents' lack of training and that slim showing of *prima facie* case is sufficient absent rebuttal by party who has "full possession of all the facts.") (Emphasis in original); *see also* 29 C.F.R. § 1926.503(b)(1) (requiring written certification of training); *S. Scrap Materials Co.,* 23 BNA OSHC 1596, 1608 (No. 94-3393, 2011) (noting that standards should be read " ' as a harmonious whole,' " with all parts construed together) (citation omitted).

With regard to exposure, the evidence establishes that at least Mr. Eager was sent up to the rooftop without receiving fall protection training and a harness. The uncontested record further shows that Respondent did not provide Messrs. Steve Wise, Josh Wise, Deleone and Matios, all employees potentially or actually exposed to fall hazards, with training to recognize the hazards of falling and the procedures to be followed in order to minimize these hazards. (Tr. 72; Ex. 17; Sec'y Br. at 16). Exposure has been established. *Bardav, Inc.*, 24 BNA OSHC 2105, 2112 (No. 10-1055, 2014) (concluding that exposure is established for training citation item when worker "engaged in excavation work without first receiving required training") citing *Gen. Motors Corp*., 22 BNA OSHC 1019, 1030 (No. 91-2834E, 2007)(consolidated) ("finding it unreasonable to require that employee be exposed to a hazard before requiring that he be trained to recognize and avoid that hazard.").

With regard to knowledge, the Court finds based on Mr. Eager's statement to CO Naim that Respondent knew that Mr. Eager was not trained before going atop the roof at this worksite. (Tr. 70-71). Mr. Trahant did not produce any evidence to rebut Mr. Eager's statement to CO Naim. *Well Solutions, Inc., Rig No. 30*, 17 BNA OSHC at 1214-15. Respondent is in charge of its training program and so it is in the best position to know who is trained and who is not. *Pressure Concrete Constr*., 15 BNA OSHC 2011, 2018 (No. 90-2668,

1992) ("[t]he fact that [the company] failed to train [employees] in the recognition and avoidance of dangerous conditions establishes that it had at least constructive knowledge of the inadequacy of its training program."). Knowledge has been established.

This citation item is affirmed.

The Secretary argues that this citation item is properly classified as repeat. "[A] violation is repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Capform*, 16 BNA OSHC 2040, 2045 (No. 91-1613, 1994). In discussing this further at the trial level, Judge Salyers noted that "Under this doctrine, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard." *Capform*, No. 91-1613, 1992 WL 394732 at *9 (O.S.H.R.C.A.L.J. Dec. 24, 1992). The employer then has the burden of rebutting the evidence of similarity.[28] *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990). "[T]he principal factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards." *Amerisig Se., Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996). " '[S]ubstantially similar' must be defined sufficiently narrowly that the citation for the first violation placed the employer on notice of the need to take steps to prevent the second violation." *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 403 (7th Cir. 1998).

As noted above, Respondent was cited for this same standard, 29 C.F.R. § 1926.503(a)(1), in a citation issued three months prior on another one of Respondent's

[28] Respondent has not attempted to show any dissimilarity between the cited violation at issue and the previous violation that was not contested and had become a final order on September 16, 2014. Respondent failed to rebut any of the Secretary's evidence since it failed to appear at the trial, proffer any trial exhibits, or file any post-hearing brief. *See Woodmansee,* 24 BNA OSHC 1422, 1424 (No. 11-1851, 2012) (ALJ) (evidence produced by the Secretary is uncontested where the employer failed to appear at the hearing, proffer any trial exhibits, or file any post-hearing brief.).

worksites located in Revere, Massachusetts. (Tr. 72-77; 98-99; Exs. 3, 19-20). Because Respondent did not file a timely notice of contest for that citation, the citation of the same standard became a final order of the Commission on September 16, 2014, over a month before the inspection at issue in this case. (Tr. 75). *See* OSHA Inspection No. 987538 Citation; *see also* 29 U.S.C. § 659(a). The Secretary has established a *prima facie* case of similarity between the violation here and the violation on the previous worksite.[29] *Capform*, 16 BNA OSHC at 2045. The Court finds that the violation is properly characterized as repeat.

II. Penalties

"Section 17(j) of the [OSH] Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give 'due consideration' to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations." *Hern Iron Works, Inc.*, 16 BNA OSHC at 1624. When determining gravity, typically the most important factor, the Commission considers the number of exposed employees, the duration of their exposure, whether precautions could have been taken against injury, and the likelihood of injury. *Id.* When evaluating good faith:

> [T]he Commission focuses on a number of factors relating to the employer's actions, 'including the employer's safety and health program and its commitment to assuring safe and healthful working conditions[,]' in determining whether an employer's overall efforts to comply with the

[29] The Court finds that the final order date of the predicate violation upon which this repeat characterization is based is still September 16, 2014, despite Respondent's March 2, 2015 "late notice of contest" filing. This is so because this same Court analyzed the March 2, 2015 filing under Federal Rule of Civil Procedure 60(b), which is aptly entitled "Grounds for Relief from a Final Judgement, Order, or Proceeding." *William Trahant, Jr., Construction, Inc.*, "Order Granting Complainant's Motion to Dismiss Untimely Notice of Contest," (Docket No. 15-0384, June 29, 2015). The Court also makes this finding based on guidance from *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 403 (7th Cir. 1998), in which the purpose of a repeat was explained to show that the employer must have notice of the need to take steps to prevent a subsequent violation. The Court finds that Respondent was on notice, a full month before the inspection at issue here, of the exact same standard that it violated, and therefore Respondent knew, after September 16, 2014 and on or before October 27, 2014, that it had to train its employees in fall protection before sending them up to a rooftop to work. This finding is exacerbated by the fact that Mr. Eager was a "last minute" hire and was not even wearing a harness while working on the rooftop at least 20 feet off the ground in close proximity to Mr. Trahant without first receiving adequate training. (Tr. 71).

> OSH Act and minimize any harm from the violations merit a penalty reduction.

Monroe Drywall Constr., Inc., 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013) (citations omitted). The Commission is the "final arbiter" of penalties. *Hern Iron Works,* 16 BNA OSHC at 1622 (citation omitted).

For serious Citation 1, Item 1, the hardhat violation, the Secretary proposed a penalty of $3,080. For serious Citation 1, Item 2, the anchorage violation, the Secretary proposed a penalty of $3,080. For serious Citation 1, Item 3, the ladder violation, the Secretary proposed a penalty of $2,200. For willful Citation 2, Item 1, the fall protection violation, the Secretary proposed a penalty of $30,800. For repeat Citation 3, Item 1, the training violation, the Secretary proposed a penalty of $4,400.

For each of these penalty calculations, the Secretary applied a 60% reduction to account for Respondent's small size, a 10% increase due to Respondent's prior history of OSHA violations, and no reduction for good faith. CO Naim testified that Respondent has approximately 10-12 employees, and was not aware of any other employees.[30] CO Naim did not recommend a good faith reduction because "Mr. Trahant did not have a safety and health program." (Tr. 37-40, 49-51, 55-56, 68-70, 78-79, 83-86, 94-96; Sec'y Br. at 1).

The Court agrees with the Secretary's approach to these factors. *See Daniel Crowe Roof Repair*, 23 BNA OSHC at 2017 (a company's failure to provide its roofers with any form of fall protection or training demonstrates that it is not entitled to any credit for good faith in the penalty assessment.). The Court also finds that the gravity of these violations is high. All of the safety hazards here had a high likelihood of injury and could have been readily

[30] Mr. Trahant told CO Naim that all of the workers at the worksite worked for Respondent. (Tr. 83).

mitigated, but Respondent chose not to use simple precautions in the interest of getting the job done.

Considering the section 17(j) factors, the Court finds that the proposed penalties are appropriate for these affirmed citation items.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based on these findings of fact and conclusions of law, it is **ORDERED** that:

1) Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.100(a), is **AFFIRMED** and a penalty of $3,080 is **ASSESSED**.

2) Item 2 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.502(d)(15), is **AFFIRMED** and a penalty of $3,080 is **ASSESSED**.

3) Item 3 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(16), is **AFFIRMED** and a penalty of $2,200 is **ASSESSED**.

4) Item 1 of Citation 2, alleging a willful violation of 29 C.F.R. § 1926.501(b)(13), is **AFFIRMED** and a penalty of $30,800 is **ASSESSED**.

5) Item 1 of Citation 3, alleging a repeat violation of 29 C.F.R. § 1926.503(a)(1), is **AFFIRMED** and a penalty of $4,400 is **ASSESSED**.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: June 26, 2017
Washington, D.C.