United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. AUCHLY ROOFING, INC., Respondent.	OSHRC Docket No. 16-1925

Appearances:

Laura M. O'Reilly, Department of Labor, Office of Solicitor, Kansas City, Missouri
For Complainant

Tony Auchly and Brent Auchly, appearing *pro se*, Auchly Roofing, Inc., Wentzville, Missouri
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

On October 6, 2016, Respondent was inspected by the St. Louis Area Office of the Occupational Safety and Health Administration ("OSHA"). During his inspection, Compliance Safety and Health Officer ("CSHO") Robert Robles observed employees working on a roof located at 5417 Gareth Drive, Weldon Spring, Missouri without fall protection. On October 15, 2016, Complainant issued a Citation and Notice of Penalty ("Citation"), alleging two serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("Act") and proposed penalties of $7,482.00.

Respondent filed a *Notice of Contest*. In response to the Citation, Respondent argues: (1) violations, if they did exist, were *de minimis* in nature; and (2) compliance with the fall protection standards cited by Complainant presented a greater hazard to his employees. (Tr. 10). This case was designated for Simplified Proceedings on December 16, 2016.

The trial was held on July 7, 2017, in St. Louis, Missouri. The following witnesses testified: (1) CSHO Robert Robles; (2) Area Director ("AD") William McDonald; (3) Brent Auchly, co-owner/operator of Respondent; and (4) Tony Auchly, co-owner/operator of Respondent. Both parties timely submitted post-trial briefs.

II. Stipulations & Jurisdiction

The parties reached the following stipulations, which are also reproduced in the parties' Joint Stipulation Statement:

1. At all relevant times, Respondent, Auchly Roofing, Inc., was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act.

2. Auchly Roofing, Inc. uses goods, equipment, and materials shipped from outside the state of Missouri.

3. The Occupational Safety and Health Administration ("OSHA") issued a citation to Auchly Roofing, Inc. alleging violation of 29 C.F.R. § 1926.501(b)(13) and a violation of 29 C.F.R. § 1926.1053(b)(1).

4. Auchly Roofing, Inc. filed a timely notice of contest.

5. Auchly Roofing, Inc. was engaged in residential construction work at a workplace located at 5417 Gareth Drive, Weldon Spring, Missouri 63304 on October 6, 2016.

(Tr. 12; Ex. 1).

Based on the parties' stipulations, the Court finds the Occupational Safety and Health Review Commission ("Commission") has jurisdiction over this action pursuant to § 10(c) of the Act. Further, the Court finds Respondent was an employer engaged in a business and

industry affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005) (holding economic activity of construction, as an aggregate, affects interstate commerce).

III. Factual Background

On October 6, 2016, in response to the "XFALLELEC" program, CSHO Robert Robles observed men working on the roof of a home at 5417 Gareth Drive, Weldon Spring, Missouri (the "worksite"). (Tr. 36–37; Exs. C-2, C-22). From his vantage point in the street, CHSO Robles did not see employees using fall protection. (Tr. 36–37; Ex. C-22). After taking videos and photographs, CSHO Robles and CHSO Mark Cherry entered the worksite. (Tr. 38–39). At the time, CHSO Cherry was training under CSHO Robles. (Tr. 39–40). CHSO Robles introduced himself to Tony and Brent Auchly, brothers and co-owners of Respondent. (Tr. 38–39). He presented his credentials and requested permission to conduct an inspection of the worksite. *Id*.

During his inspection, CSHO Robles observed five employees of Respondent, including Tony and Brent Auchly, working on the roof. (Tr. 39–41, 52; Exs. C-7, C-24). The height of the roof ranged from 11 to 18 feet with an 8 in 12 pitch. (Tr. 44–46; Ex. C-5). The height of the roof was measured by CSHO Mark Cherry using a Disto Meter. (Tr. 44–45) The pitch was measured by CSHO Robles with a plastic roof calculator. (Tr. 46–47). Upon closer inspection, CSHO Robles confirmed his earlier observation – the employees were not using any form of fall protection while on the roof. (Tr. 43–44; Ex. C-24).

The employees used portable ladders to access the roof. (Tr. 66). The ladders were the only way to access the roof. (Tr. 66–67). Although it was possible, the ladders, as situated, did not extend three feet beyond the gutter. (Tr. 66–69). CSHO Robles concluded

the employees were exposed to the fall hazard each time the employees got on and off the roof in the four-hour time span. (Tr. 76).

Respondent does not dispute it's employees were not wearing fall protection or the ladder did not extend to the proper height. (Tr. 184; Ex. C-26). Instead, Respondent contends the cited standards presented a greater hazard. (Tr. 26–27). In lieu of the required fall protection, Respondent' used a system of toe boards, pick boards/ladder jacks, and kneepads as fall protection while working on the roof. (Tr. 62, 157–158; Exs. R-3, R-4, C-18). Respondent believes extending the ladder as required by the cited standard presents a greater hazard than going up and over the ladder. (Tr. 150). As such, Respondent used a 2x3 wooden board as a grabrail at the top of the ladders to stabilize and assist employees in climbing on and off the roof. (Tr.152–153; Ex. R-9). CSHO Robles learned Respondent does not normally use a personal arrest system. (Tr. 55–56; Ex. C-4). In evaluating a worksite, Respondent considers a number of factors when determining the fall protection to be used, including pitch or height of the roof and the ability to set up the ladders and pick board system. (Tr. 55–56, 163). CHSO Robles was made aware Respondent is familiar with OSHA standards generally and specifically the fall protection and ladder standards. (Tr. 56).

Before leaving the worksite, CSHO Robles and CSHO Cherry held a closing conference where CSHO Robles explained Respondent would receive citations for fall protection hazard and the use of the ladder. (Tr. 41–42). Based on the information contained in the inspection file, CSHO Robles proposed and AD McDonald approved of the issuance of a Citation and Notification of Penalty for the worksite discussed above. (Tr. 106). The citation items contained therein will be discussed at length below.

IV. Discussion

1. Applicable Law

To establish a violation of an OSHA standard pursuant to section 5(a)(2), Complainant must establish: (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

2. Citations

1. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.501(b)(13): Each employee(s) engaged in residential construction activities above 6 feet (1.8 m) or more above lower levels were not protected by guardrail systems, safety net system, or personal fall arrest system:
>
> JOB SITE: 5417 Gareth Drive, Weldon Spring, MO 63304, on or about 10/6/2016, workers were observed on top of a 8:12 pitch roof, approximately 18'8" eave to ground level, actively removing old roofing material and installing black felt paper. The workers were not protected by guardrail systems, safety net system, or personal fall arrest system. The workers were exposed to fall hazard.

See Citation and Notification of Penalty at 6.

The cited standard provides:

> 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. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

29 C.F.R. § 1926.501(b)(13).[1]

a. The Standard Applies

Respondent is a roofing contractor engaged in residential construction activities on the date of the inspection. (Stip. No. 5). Respondent's employees were working on the roof at heights of 11 to 18 feet above ground level. (Tr. 44; Ex. C-5).

Thus, by its terms, the standard applies.

b. The Terms of the Standard Were Violated

The cited standard requires one of three forms of fall protection—personal fall arrest systems, safety nets, or guardrails—none of which were used by Respondent's employees. Indeed, Respondent concedes that none of these three forms of fall protection were being used. (Tr. 184; Ex. C-26). Thus, on the face of it, Respondent violated the terms of the standard.

The cited standard, however, provides Respondent with an opportunity to show that using the listed forms of fall protection would create a greater hazard or would be infeasible to implement. If Respondent can establish that using conventional fall protection would

1. The cited standard also includes the following Note: "There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with § 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

create a greater hazard or would otherwise be infeasible, the standard requires the employer to "develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502." 29 C.F.R. § 1926.501(b)(13). The requirements of paragraph (k) are extensive, and Respondent must first overcome the presumption that the listed fall protection systems in § 1926.501(b)(13) are both feasible and will not create a greater hazard in the context of residential construction activities. Respondent attempted, but failed, to meet that burden.

Respondent failed to prove the use of conventional fall protection was infeasible. In order to establish the defense of infeasibility, Respondent must show: "(1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection." *Gregory & Cook, Inc.*, 17 BNA OSHC 1189 (No. 92-1891, 1995).

Although Respondent pointed out problems with the implementation of conventional fall protection systems, such as tripping hazards, the Court finds these do not rise to the level of infeasibility. (Tr. 147). The Commission has stated it "cannot accept unsubstantiated conclusions as proof" of infeasibility. *Avcon, Inc.*, 23 BNA OSHC 1440 (No. 98-0755 *et al.*, 2011) (citing *Peterson Bros. Erection Co.*, 16 BNA OSHC 1196, 1204 (No. 90-2304, 1993), *aff'd* 26 F.3d 573 (5th Cir. 1994)). In *Avcon*, the Commission noted the employees who gave testimony on feasibility were "unfamiliar with OSHA's fall protection standards" and their "opinions were offered without any supporting scientific or professional data or tests." *Id.* Such a quantum of proof makes sense when one considers the scientific or professional data

and tests used to establish the need for the regulation in the first place. *See generally* Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672 (August 9, 1994). Respondent's conclusions regarding conventional fall protection do not rely on data or tests illustrating their infeasibility; instead, they appear to be based on little more than a belief that using conventional fall protection would present unique difficulties. Further, Respondent owns three retractable yo-yo harnesses. (Tr. 147). Therefore, the conventional fall protection system would be economically feasible. Respondent has utilized these personal fall arrest systems on other jobs. (Tr. 163). As Complainant points out, the use of the required fall protection would have been feasible at this worksite. (Tr. 62–63). CHSO Robles has seen the required fall protection used by other companies at similar sites where the employees are working on the roof. *Id*. According to the Commission, "It is not enough to show that compliance is difficult, expensive, or would require changes to operations." *Manson Constr. Co.*, 2017 WL 1788442 (No. 14-0816, 2017).

Respondent also failed to prove compliance with the standard created a greater hazard. In order to establish the defense of greater hazard, Respondent must show: "(1) the hazards created by complying with the standard are greater than those of noncompliance; (2) other methods of protecting its employees from the hazards are not available; and (3) a variance is not available or that application for a variance is inappropriate." *Spancrete Ne., Inc.*, 15 BNA OSHC 1020 (No. 86-521, 1991) (citing *Walker Towing Corp.*, 14 BNA OSHC 2072, 2078 (No. 87-1359. 1991)). Respondent failed to show it has met these requirements.

First, as argued by Complainant, Respondent failed to show the fall protection systems required by the standard actually created a greater hazard; instead, Respondent merely pointed out a potential tripping hazard associated with the use of a fall arrest system

and the related ropes. (Tr. 146–147). The Court fails to see how tripping when attached to a fall arrest system, which is designed to prevent a fall to the ground below, creates a greater hazard than not wearing a harness at all. As Complainant's case highlights, even if an employee was to trip on one of the lines, he would be caught by the arrest system instead of falling all the way to the ground. (Tr. 63–64, 109).

Secondly, if Respondent's concern was tripping on the traditional personal fall arrest system, there were other methods of compliance available to protect employees from the fall hazard. If there are other methods of compliance with the standard, respondent must try to use the alternatives or show they are unavailable. *Modern Drop Forge Co. C. Sec'y of Labor*, 683 F.2d 1105,1116 (7th Circ. 1982). CSHO Robles testified it would be possible to use the guardrail system at the worksite. He also testified that he has seen safety nets used in residential roofing. (Tr. 64, 110). Therefore, there were other methods available to protect its employees from the fall hazard.

Finally, Respondent has never applied for a variance, nor shown that application for a variance would have been inappropriate. (Tr. 159). Respondent was not even aware a variance could be applied for. *Id*. According to the Commission, that failure is sufficient in and of itself to reject the defense. *See Spancrete*, 15 BNA OSHC 1020 (rejecting greater hazard defense when employer failed to seek variance and noting that this element has been recognized and endorsed by several courts of appeal).[2] Accordingly, Respondent's greater hazard defense is rejected.

Even if Respondent managed to establish the *prima facie* elements of infeasibility or the greater hazard defense, Respondent failed to comply with the requirements of 29 C.F.R. §

2. *See, e.g.*, *Dole v. Williams Enters., Inc.*, 876 F.2d 186, 188 (D.C. Cir. 1989); *RSR Corp. v. Donovan*, 747 F.2d 294, 303 (5th Cir. 1984); *Diebold v. Marshall*, 585 F.2d 1327, 1339 (6th Cir. 1978).

1926.502(k) which requires a written site-specific fall protection plan with several requirements. 29 C.F.R. § 1926.502(k). Here, it is not necessary to discuss each of the requirements as Respondent did not have any written fall protection plan, let alone a site-specific fall protection plan. (Tr. 64–65, 161). Therefore, Respondent failed to comply with the requirements of 29 C.F.R. § 1926.502(k).

Based on the foregoing, the Court finds the terms of the standard were violated.

c. Respondent's Employees Were Exposed to the Hazard

As noted above, CSHO Robles observed five of Respondent's employees working on the roof at the worksite. (Tr. 58). They were walking around on the roof and using tools. *Id*. These employees were not protected from a fall hazard by guardrails or safety nets, nor were they wearing personal fall arrest systems. (Tr. 56). Although Respondent argues the toe boards were part of the fall protection system, AD McDonald described these boards as speed bumps that would not stop an employee from falling off of the roof. (Tr. 108). Further, Respondent admits the employees were working on the roof without the fall protection required by the standard. (Tr. 184; Ex. C-26). CSHO Robles believes they were exposed to the hazard for about four hours. (Tr. 58). Accordingly, the Court finds Respondent's employees were exposed to a fall hazard.

d. Respondent Had Knowledge of the Conditions

"To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Central Florida Equip. Rentals, Inc.*, 25 BNA OSHC 2147 (No. 08-1656, 2016). To satisfy this burden, Complainant must show "knowledge of the *conditions* that form the

basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard." *Id.*

When an owner is present onsite and observes employees working without fall protection, and admits knowledge of this activity, respondent has actual knowledge of violative condition. *Levvintre Constr*., *LLC*, 24 BNA OSHC 2279, *5 (No. 13-1268, 2014).

Co-owners Tony and Brent Auchly worked side-by-side with their employees on the roof. (Tr. 53; Exs. C-7, C-24). Neither of them wore personal fall protection and freely admit their employees were working on the roof without fall protection. (Tr. 56, 184; Exs. C-7, C-24). Thus, Respondent, through its principal owners, was directly aware of the violative conditions.

e. The Violation Was Serious[3]

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). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the

[3] Respondent asserts any violation of the standards is a *de minimus* violation. A violation is *de minimis* "when a deviation from the standard has no 'direct or immediate' relationship to employee safety." *Star Brite Constr. Co*., 19 BNA OSHC 1687, 1691 (No. 95-0343, 2001) (citation omitted); 29 U.S.C. § 658(a) (noting that *de minimis* violations are those 'which have no direct or immediate relationship to safety or health')." *See also Otis Elevator Co.,* 24 BNA OSHC 1081, 1088 (No. 09-1278, 2013). That classification "is limited to situations in which the hazard is so trifling that an abatement order would not significantly promote the objectives of the Act." *Dover Elevator Co*., 15 BNA OSHC 1378, 1382 (No. 88–1642, 1991). The violation of the standards set forth above have a direct and immediate relationship to employee safety. Abatement by Respondent would significantly promote the objectives of the Act. For these reasons, the Court rejects Respondent's argument the violations which the Court has found to exist are *de minimis* in nature.

regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

Based on his experience conducting residential construction inspections, CSHO Robles testified that an employee could suffer broken bones, permanent disabling injuries, or death if they fell off of the roof onto the grass, dirt or cement below. (Tr. 57). CSHO Robles added the 8 in 12 pitch increased the risk of falls because the slope decreased the employees' ability to balance. *Id*. Due to the injuries that an employee could suffer if he fell from the roof, the Court finds Respondent's failure to require the use of required fall protection was a serious violation of the Act.

Accordingly, the Court finds Complainant has established a violation of 29 C.F.R. § 1926.501(b)(13). Citation 1, Item 1 shall be AFFIRMED.

2. Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> 29 CFR 1926.1053(b)(1): Where portable ladders were used for access to an upper landing surface and the ladder's length allows, the ladder side rails did not extend at least 3 feet (.9m) above the upper landing surface being accessed:
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> JOB SITE: 5417 Gareth Drive, Weldon Spring, MO 63304, on or about 10/6/2016, workers were observed using an aluminum extension ladder to climb down from the roof and its ladder side rails did not extend at least 3 feet above the upper landing surface being accessed. The workers were exposed to fall hazard.

See Citation and Notification of Penalty at 7.

The cited standard provides:

> When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be

such that ladder deflection under a load would, by itself case the ladder to slip off its support.

29 C.F.R. § 1926.1053(b)(1).

a. The Standard Applies

The standard applies when portable ladders are used to access an upper landing surface. Respondent's employees used portable ladders to access an upper landing surface, namely the roof. (Tr. 66–67, 162). The standard applies.

b. The Terms of the Standard Were Violated

The standard requires either all portable ladders extend at least 3 feet above the upper landing surface or, if such extension is not possible, the ladder to be secured to a rigid support and a grasping device be installed. Respondent did not comply with either. First, the ladders at the worksite did not extend at least 3 feet past the landing surface, even though such extension was possible. (Tr. 67–69; Exs. C-21, R-8). Additionally, Respondent admits the ladders did not extend three feet past the roofline. (Tr. 184; Ex. C-26). Second, although Respondent installed a two by three to be used as a grabrail, the ladder was not secured by any means. (Tr. 69). Thus, on the face of it, Respondent violated the terms of the standard.

On this point, Respondent again raises the greater hazard defense. Respondent has failed to prove the three elements necessary for the defense. Respondent has not shown (1) the hazards created by compliance with the standard are greater than those of noncompliance, (2) other methods of protecting its employees from the hazard were not available, and (3) a variance is not available or application for a variance is inappropriate. First, Respondent merely contends the fall hazard created by compliance is greater than those of noncompliance, but presents no evidence to support this contention. Respondent relies solely on the owners own opinions that it is safer to go up and over the ladder because "you're

never pushing against the ladder" and that Respondent has done it this way for years. (Tr. 153). In fact, Respondent's own video shows an employee can access the roof without falling when the ladder is set up in compliance with the standard. (Ex. R-13). Secondly, the other method for protecting the employee, namely the alternative of securing the ladder to a rigid surface and providing a grabrail was available. Respondent was halfway there as they did provide a grabrail for the employees to use while getting on and off of the roof; however, the ladder was not secured. (Tr. 152–153). Finally, Respondent has never applied for a variance, nor shown that application for a variance would have been inappropriate. (Tr. 159). *See* p. 9, para 2 supra (IV (2)(1)(b)).

Based on the foregoing, the Court finds the terms of the standard were violated.

c. Respondent's Employees Were Exposed to the Hazard

At the time of inspection five employees were working on the roof. (Tr. 40). Employees used the ladders. (Exs. C-17, R-6, R-8, R-9, R-10). Further, as the portable ladders were the only means to access the roof, the employees must have used the ladders. (Tr. 67). The employees were exposed to the hazard each time they got onto and off of the roof over the four hour time span. (Tr. 76). Accordingly, the Court finds Respondent's employees were exposed to the hazard.

d. Respondent Had Knowledge of the Conditions

Brent Auchly set up and used the ladders himself. (Tr. 148, 172; Ex. R-10). Additionally, Respondent concedes the ladder did not extend three feet past the roofline. (Tr. 184; Ex. C-26). Thus, Respondent was directly aware of the violative conditions.

e. The Violation Was Serious[4]

CSHO Robles testified as to the nature of the injuries an employee could suffer as a result of a fall from the roof of the residential construction site onto the grass, dirt or cement below. (Tr. 57). CSHO Robles testified an employee attempting to use the ladder could lose his balance bending down to grab the ladder. (Tr. 75). After losing balance, the employees could fall from a height of at least 11 feet and broken bones, obtained permanent debilitating injuries or died. (Tr. 91–92). Due to the injuries an employee could suffer if he fell off of the ladder, the Court finds Respondent's failure to require the use of required fall protection was a serious violation of the Act.

Accordingly, the Court finds Complainant has established a violation of 29 C.F.R. § 1926.501(b)(13). Citation 1, Item 2 shall be AFFIRMED.

V. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business; (2) the gravity of the violation; (3) the good faith of the employer; and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975);

[4] See Fn. 3, *supra*, for a discussion on rejection of Respondent's claim the violation was *de minimus*.

Valdak Corp., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995). The Court reviews of these criteria in turn.

As to size, at the time of the inspection, Respondent had five employees, including the co-owners, Tony and Brent Auchly. Thus, Complainant assessed a 70% reduction to all gravity-based penalties, and the Court agrees with this assessment. Complainant has only assessed a reduction for size. However, the Court finds that penalty reductions for Respondent's good faith and prior history are appropriate. As to good faith, although Respondent did not comply with the standards, they did have processes in place for fall protection both from the roof and while using the ladders. First, Respondent utilized a system of pick boards, knee pads, and ladder jacks as fall protection while employees worked on the roof. Second, Respondent installed "grabrails" at the top of the access ladders to assist employees in getting onto the roof. Therefore, the Court assesses a 10% reduction for good faith on all gravity-based penalties. As to history, Respondent has not had any violations in 20 years. As such, the Court finds a 10% percent reduction for history on all gravity-based penalties is appropriate.

As to gravity of the violations, Complainant determined both items to be high gravity. (Tr. 112, 119). The Court agrees with these determinations. The number of employees exposed was five. The duration of the exposure was approximately four hours while the employees worked on the roof and utilized the ladders to access the roof with minimal precautions taken against injury. Further, the likelihood of an actual injury was high. Specifically, CHSO Robles noted an employee who fell from the roof while working or using the ladder could suffer death or serious injury. (Tr. 113, 119). The steepness of the roof increased the likelihood of an injury occurring.

Accordingly, a penalty of $1247.00 shall be ASSESSED for Citation 1, Item 1 and a penalty of $1247.00 shall be ASSESSED for Citation 1, Item 2.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

a. Citation 1, Item 1 is AFFIRMED as serious, and a penalty of $1247.00 is ASSESSED.

b. Citation 1, Item 2 is AFFIRMED as serious, and a penalty of $1247.00 is ASSESSED.

SO ORDERED

/s/
Patrick B. Augustine
Judge - OSHRC

Date: November 2, 2017
Denver, Colorado