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

SECRETARY OF LABOR, Complainant, v. ELMER W. DAVIS, INC., Respondent.	Docket No. 20-1417

DECISION AND ORDER

APPEARANCES:

For the Complainant:
Rolando Valdez, Esquire
Senior Trial Attorney
U.S. Department of Labor
New York, New York

For the Respondent:
Mr. Tim Crumb
Corporate Safety Director
Elmer W. Davis, Inc.
Rochester, New York

BEFORE: William S. Coleman
Administrative Law Judge

INTRODUCTION

The Respondent, Elmer W. Davis, Inc. (EWD), is a commercial roofing company based in Rochester, New York. On September 17, 2020, an EWD crew started a project to remove and replace the roof system of a warehouse's flat roof. An unsafe depression in the warehouse's roof deck was revealed after a portion of the existing roof's five-inch-thick roof membrane was cut and removed. EWD's project superintendent decided to mitigate the hazard of the unsafe depression by covering it with a 4x8-foot sheet of plywood. But sometime after the plywood had been put

over the depression, someone moved it off. An EWD employee then trod on the uncovered depression, and the roof deck beneath him gave way. The employee fell through the roof deck to the warehouse floor fourteen feet below and suffered serious injuries for which he was hospitalized. (T. 7, 19).

EWD reported the employee's work-related hospitalization to the U.S. Occupational Safety and Health Administration (OSHA), and the next day an OSHA compliance safety and health officer (CO) commenced an inspection and investigation, which he concluded in ten days.

Immediately after concluding the investigation, OSHA issued a one-item Citation to EWD that alleged a serious violation of a fall protection standard codified 29 C.F.R. § 1926.501(a)(2), which provides:

> The employer shall determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.

When OSHA issued the Citation, it did not know about the depression. Specifically, OSHA had no inkling of the following: that EWD had discovered the unsafe depression prior to the employee's injurious fall; that EWD had covered the depression with a sheet of plywood; that the plywood had been moved off the depression; that the employee had fallen through the roof at the location of the exposed depression.

EWD timely contested the alleged violation and proposed penalty and thereby brought the matter before the independent Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (Act). 29 U.S.C. § 659(c). The matter was then assigned to the undersigned Commission judge for adjudication. The Secretary then filed her formal complaint in these Commission proceedings. At the time of

filing that pleading, the Secretary still knew nothing about the depression on the warehouse's roof. Nevertheless, through the vehicle of the complaint and as permitted by Commission Rule 34(a)(3), the Secretary amended the description of the alleged violation of § 1926.501(a)(2) that had been set forth in the Citation. Both the Citation's original and the complaint's amended descriptions of the alleged violation are reflected in the quotation below—the amendment's deletion of the Citation's original language is indicated by ~~strikethrough~~ and the amendment's additions to the original language are indicated by underline:

> 29 CFR 1926.501(a)(2): The employer did not determine if the walking/working surfaces on which its employees were to work had the strength and structural integrity to support employees safely. Employees were permitted to work on surfaces that did not have the requisite strength and structural integrity:
>
> a) On or about 9/17/20, during a commercial roof replacement project at [worksite], an employee fell ~~was not protected from falling~~ through the roof deck 14 feet to ground level. The employer did not determine if the existing roof deck had the strength and structural integrity to support employees working on the roof to remove roof membrane by conducting detailed inspections from inside [the building] to find if there was deterioration, damage, rust, corrosion, or any unsafe conditions of the roof deck; and the roof deck lacked the requisite strength and structural integrity**.**

The Secretary proposed a penalty of $8,848 for the alleged violation.

The evidentiary hearing was conducted in Syracuse, New York, on September 22 & 23, 2021. Post-hearing briefing was completed on January 28, 2022.

The principal issues for decision are:

- Did the Secretary prove by a preponderance of the evidence that *before* EWD allowed employees to begin work on the roof on September 17, EWD failed to exercise reasonable diligence in determining that the roof had the strength and structural integrity to support employees safely?

  Decision: No. The evidence is not preponderant that EWD failed to exercise reasonable diligence in determining that the

roof had the requisite strength and structural integrity *before* allowing employees to begin working on the roof.

- Did the Secretary prove by a preponderance of the evidence that *after* EWD covered an unsafe depression in the roof deck with an unmarked and unsecured 4x8-foot sheet of plywood, EWD failed to exercise reasonable diligence in determining that the roof had the strength and structural integrity to support employees safely and allowing employees to continue to work on the roof?

  Decision: Yes. A preponderance of the evidence establishes that EWD failed to exercise reasonable diligence when it determined the roof had the requisite strength and structural integrity *after* EWD had covered the unsafe depression with an unmarked and unsecured sheet of plywood and allowed employees to continue working on the roof.

For the reasons set forth below, the alleged violation as amended by the Secretary's complaint is AFFIRMED, and a penalty of $8,848 is ASSESSED.

FINDINGS OF FACT

Except where the following numbered paragraphs indicate that the evidence was insufficient to establish a certain fact or indicate that there was no evidence bearing on a matter of fact, the following facts were established by at least a preponderance of the evidence:

1. Elmer W. Davis, Inc. (EWD), is a commercial roofing company based in Rochester, New York. (T. 6-7). EWD employs employees and uses materials that originate from outside the state of New York. (T. 6-7). EWD is engaged in a business affecting interstate commerce. (T. 6-7).

Events Prior to September 17, 2020

2. EWD was contracted to remove and replace the roof systems of twenty-one roof surfaces in a commercial building complex in Rochester, New York. (Ex. C-18). The contract amount is not of record, but in preparing its bid EWD had estimated the project cost at about $1.3

million. (Ex. C-18; T. 105-06). The contract's scope of the work did *not* include the repair or replacement of any existing roof decking. (T. 108-09).

3. The flat roof through which the EWD employee fell on September 17 was the roof for "Building 8," whose surface area is 9,239 square feet (about twice the area of a basketball court). (T. 68; Ex. C-18).

4. Building 8's existing flat roof system was a two-ply built-up roof comprised of two layers of 2.6-inch-thick ISO foam board that was covered with a layer of gravel. (Ex. C-11 at 5; C-13; T. 55, 92, 108).

5. Underlying the approximately five-inch-thick foam board roof membrane was wooden sheathing, upon whose upper surface appears to have been adhered an asphalt-like roofing felt. (Exs. C-4, C-15, C-13, C-16).

6. Underneath the wooden sheathing was the corrugated metal roof deck. (Exs. C-4, C-15, C-13, C-16).

7. Building 8's interior ceiling was the underside of the corrugated metal roof deck. The ceiling was about fourteen feet above the warehouse floor and was painted white. (Exs. C-11 at 5, C-15, C-16, C-18). There were areas of peeling paint and rust on the ceiling that were plainly visible from vantage points on the warehouse floor. (Exs. C-8, C-15 & C-16; T. 78, 202).

8. In June 2020, several months before work began, EWD took "test cuts" from each of the twenty-one roof surfaces involved in the project. These test cuts were taken for the purpose of formulating EWD's bid proposal. It is not the custom or practice in the roofing industry to rely on such test cuts to assess whether a roof deck possesses the requisite strength and structural integrity to support workers safely. (T. 50, 52-53, 73, 159-60, 198). Consistent with that industry custom, EWD neither obtained nor evaluated the test cuts for the purpose of determining whether any of

the existing twenty-one roof systems had the requisite strength and structural integrity to support workers safely. (T. 113).

9. The test cut from Building 8's roof was taken on June 18, 2020. (T. 106). The size of the test cut was about 4x4-inches square and was between three to five inches deep. EWD noted that the ISO foam board in the test cut was wet. (Ex. C-11 at 5; C-13).

10. The test cut on Building 8's roof was made at or very near the location where, about three months later, EWD would discover the depression in the roof deck that the EWD employee would fall through. (Ex. C-13; T. 56). The location of the test cut was about three feet away from an approximately 3x4-foot rectangular penetration in the roof. The roof penetration accommodated some sort of rooftop utility, possibly an HVAC unit. (T. 24-25, 154-55). [At the hearing some witnesses referred to the roof penetration as an "opening" or a "roof curb." (T. 24, 56, 97, 158-60).]

11. In preparing its bid for the project, EWD rated the condition of each of the twenty-one roof surfaces using five categories ranging from "excellent" to "bad." EWD rated Building 8's roof system as "bad." (Ex. C-18; T. 105). The "bad" condition rating constituted EWD's assessment of the condition of the building's existing roof system only; the rating did *not* constitute an assessment of the condition of the underlying roof deck that supported that existing roof system. (T. 113).

12. EWD's project manager for the entire project was Steve Muhs. Muhs prepared EWD's bid for the project. As part of formulating the bid, sometime in May or July 2020 Muhs went inside Building 8 and went onto its roof. (T. 101, 105-06, 115). Nothing that Muhs observed caused him to develop concern about the roof's strength and structural integrity to support employees safely. (T. 113-17).

13. EWD's project superintendent for the entire project was Damon Runyon. (T. 201). On September 14, 2020, three days before the employee fell through the roof, Runyon visited the warehouse complex. Runyon was accompanied by one Dan Sirianni, who was the building owner's representative. Runyon spent about 10 to 15 minutes inside Building 8, and while inside he examined the warehouse ceiling (i.e., the underside of the corrugated metal roof deck) by simply looking up from the warehouse floor. (T. 202-03). The ceiling is about fourteen feet high, so the ceiling was eight to nine feet overhead of Runyon. From that vantage point Runyon saw that some areas of the ceiling showed some rust. Runyon did not perceive those rusted areas to portend a problem with the roof's strength and structural integrity to support employees who would be working on the roof. (T. 194-95, 201).

14. Runyon did not make any contemporaneous written record on September 14, 2020, to document his activities or observations inside Building 8 on that day. (T. 201). However, in the aftermath of the employee's injurious fall on September 17, but before the Citation was issued on September 28, Runyon wrote the following note about his observations and activities while inside Building 8 on September 14 with the property owner's representative (Dan Sirianni):

> —Dan and I walked interior space and I observed the roof deck underneath. Some rust was noted but deck showed no sign of structural instability. There was no bowing, sagging, loose, hanging or broken deck panels. Dan and I spoke to the tenant who was also present and witnessed my observation. I informed the tenant that he should cover his merchandise with plastic sheeting that we would supply to protect from miscellaneous debris that would be generated from the roof removal. The tenant declined the plastic as looking at the roof deck from the underside it looked intact & and [sic] the perceived impact would be minimal.

(Ex. C-8; T. 124). Runyon prepared this note at the request of EWD's safety director, who told Runyon that he should prepare something in writing. (T. 123-24).

15. Prior to the EWD employee falling through the roof deck on September 17, Runyon had been unaware that the condition of Building 8's roof had been rated "bad" in connection with EWD's formulation of its bid for the project. (T. 106-08, 198).

16. There is no evidence that Runyon lacked the knowledge, experience, or qualifications to competently determine whether Building 8's roof possessed the strength and structural integrity to support employees safely. (E.g., T. 136).

Events of September 17, 2020

17. The removal of Building 8's existing roof system commenced on September 17, 2020. [The gravel layer that had covered the existing roof membrane had been removed prior to September 17, but there is no evidence of when that had been done or even whether EWD had done it. (T. 55 & 92)].

18. EWD's foreman for the roof system replacement on Building 8 was Donald Savage. Savage arrived at the worksite on September 17 at around 7:00 a.m. and met up with Runyon, the project superintendent. Savage and Runyon went onto Building 8's roof together. (T. 91-92). This was the first time that Savage had been on Building 8's roof. (T. 90). Runyon briefly oriented Savage about the scope of the work ("roof replacement, … tear off and installation of a new roof"). Runyon's brief description gave Savage sufficient information to understand what the project entailed. (T. 92).

19. Within ten minutes after Savage and Runyon went onto the roof, the foreman Savage gave out work assignments, and the EWD crew started working. (T. 92). There is no evidence of the number of employees working on the roof.

20. Some employees began to cut and remove the existing roof membrane, which was approximately five inches thick. Underneath the membrane was wooden sheathing (which had a

thin layer of asphalt-like material adhered to its upper surface), and underneath the wooden sheathing was the corrugated metal roof deck. (T. 92; Ex. C-4).

21. Within 20 minutes after the employees started to cut and remove the existing roof membrane, a depression in the underlying the wooden sheathing/roof deck was revealed and recognized. (The depression was sometimes referred to at the hearing also as a "belly" and a "valley." [T. 38, 68-69, 203, 211, 222]).

22. Runyon, the project superintendent, was near the location of the depression when it was revealed. Runyon recognized immediately that the depression was an unsafe condition. (T. 195-96, 203-04).

23. The foreman (Savage) was on the roof when the depression was recognized, but he was about 150 feet away from both Runyon and the location of the depression. (T. 94-95).

24. Runyon directed employees to cover the depression with a 4x8-foot sheet of three-quarter-inch thick plywood. (T. 195). The employee who did so was Jodi Watson. (T. 203, 206, 151, 180, 170; Ex. C-4). Runyon testified that he also instructed employees to "put some cones around" the plywood, but no one complied with any such instruction before the injurious fall. (T. 195-96, 206-07, 211).

25. EWD customarily brings plywood sheets to all its roofing jobs, and so the plywood that was put over the depression was on-hand at the worksite. (T. 96-99).

26. EWD's standard practice is to cover "questionable deck" with plywood to provide a sound working surface that "will span from barn joist to barn joist" over the suspect area of the roof deck. (T. 96, 196).

27. Runyon testified that as soon as he saw the depression, "I told everybody to stop for a minute while" the process of covering the depression with plywood was being completed. (T.

195-96). Runyon testified further that employees were "scattered about the roof" cutting and tearing off the existing roof membrane and that "[t]o get [the depression] covered, I had to stop the noise, stop the work so that everybody knew" about the depression. (T. 196).

28. Other than the unsafe depression, there is no evidence that other portions of Building 8's roof deck lacked the strength and structural integrity to support employees safely. (T. 82).

29. Upon the placement of the plywood over the unsafe depression, Runyon regarded the unsafe depression to have been sufficiently mitigated to allow employees to resume cutting and tearing off the existing roof membrane. (T. 196-97, 208, 210, 214-15).

30. After the plywood was placed over the depression, EWD allowed employees to resume working on the roof. (T. 208).

31. Not all the employees on the roof who continued to work on the roof after the plywood had been placed over the depression were informed of the precise location of the depression. (T. 222-23). Because it is EWD's standard practice to cover "questionable" areas on a roof deck with plywood to make such areas safe to work on, employees who continued working on the roof after the depression had been covered with plywood could have reasonably believed that any area of the roof surface that was *not* covered by plywood had the requisite strength and structural integrity to support them safely.

32. Less than an hour after the discovery of the unsafe depression, Runyon communicated with the project manager (Muhs), who was off-site at the time, to inform him about the depression. Muhs then sent an email at 8:09 a.m. to the property owner's representative to alert him that "significant structural deck deterioration" had been discovered that would entail additional costs. (Ex. C-9).

33. About 30 minutes after the crew first started to work on the roof, Runyon departed the worksite to go retrieve some materials that were needed to repair the depression in the roof deck. (T. 93, 205-06). Before departing, Runyon saw that the plywood sheet remained over the depression but that it had not been demarcated by cones (as he testified that he had instructed employees to do), flags, marking, or any other indicator. (T. 206-07, 210). Runyon recognized also that the plywood was not secured to prevent or to constrain it from being moved or removed. (T. 210).

34. Sometime after Runyon departed the worksite, the depression was re-exposed when someone removed the plywood from over it. (T. 206-07). (There is no evidence identifying the individual(s) who moved the plywood or the reason for doing so.) And then sometime after that, an EWD crew member trod over the exposed depression. The roof deck gave way under his body weight, and he fell through a resulting hole in the roof deck to the warehouse floor fourteen feet below. (T. 208; Exs. C-4 & C-15). There is no evidence of the time that had elapsed between the removal of the plywood off the depression and the employee's fall through the roof deck. There is similarly no evidence of the precise time of day on September 17 that the fall occurred.

35. The employee was seriously injured and hospitalized. (T. 7, 19). He testified that he had no memory of anything that had happened on September 17 before the injury, and so he provided no testimony about his actions or observations beforehand. (T. 227). There is no evidence that anyone had observed what the injured employee had been doing before he fell through the roof deck.

OSHA Investigation and the Issuance of Citation

36. The day after the injurious fall, a compliance safety and health officer (CO) from OSHA's area office in Buffalo, New York, initiated an inspection and investigation. The CO completed the investigation ten days later, on September 28, 2020. (T. 157). During the ten-day

investigation the CO interviewed EWD's safety director and some other EWD employees, but he did not interview either Runyon (the project superintendent) or Savage (the foreman). (T. 162, 169-70). The CO conducted a closing conference with EWD's safety director on the final day of the investigation. (T. 157, 162).

37. On the same day that OSHA concluded the investigation, OSHA issued the one-item Citation that alleged a single violation of 29 C.F.R. § 1926.501(a)(2). The description of the alleged violation set forth in the Citation was grounded on the information the CO had gleaned during the ten-day investigation. (T. 162-63).

38. Over the course of his investigation, the CO was not informed about, or provided a copy of, the note that Runyon had written after the injurious fall, quoted supra at ¶ 14. (T. 68, 124).

39. Over the course of his investigation, the CO did not discover and was not informed that (a) EWD had discovered a depression in the roof deck on September 17, (b) the project superintendent had directed employees to cover the depression with plywood, (c) that this plywood was later moved, and (d) that the injured employee had fallen through the roof deck at the location of that depression. The CO (and OSHA) first learned about the depression nearly a year later, about a month before the Commission conducted a hearing on the merits of the alleged violation. (T. 69, 153, 163).

40. The Secretary's complaint in these Commission proceedings, wherein the Secretary amended the original Citation's description of the alleged violation, was prepared and filed before the Secretary learned that EWD had discovered a depression in the roof deck on September 17, 2020, through which an employee fell later that same day. (T. 69, 153, 163).

DISCUSSION

The Commission obtained jurisdiction under section 10(c) of the Act upon the Secretary's forwarding to the Commission the notice of contest that EWD had timely filed. (T. 15). 29 U.S.C. § 659(c); 29 C.F.R. § 1903.17(a).

EWD is an "employer" as defined in section 3(5) of the Act and is thus subject to the compliance provisions of section 5(a). 29 U.S.C. §§ 654(a), 652(5). (Findings of Fact ¶ 1). Section 5(a)(2) of the Act requires employers to "comply with occupational safety and health standards promulgated" under section 6 of the Act, such as the standard cited here. 29 U.S.C. §§ 654(a)(2). A violation of such a standard is established when the preponderant evidence shows: (1) the standard applies; (2) there was noncompliance with its terms; (3) employees were exposed to, or had access to, the violative condition; and (4) the cited employer had actual or constructive knowledge of the violative condition. *Donahue Indus. Inc.,* 20 BNA OSHC 1346, 1348 (No. 99-0191, 2003); *D.A. Collins Constr. Co. v. Sec'y of Labor*, 117 F.3d 691, 694 (2d Cir. 1997).[1]

1. The Cited Standard Applies

The cited standard, § 1926.501(a)(2), is contained in Subpart M of 29 C.F.R. Part 1926, which "sets forth requirements and criteria for fall protection in construction workplaces covered under" Part 1926. § 1926.500(a)(1). Section 1926.501(a)(2) itself applies to "walking/working surfaces on which … employees are to work." 29 C.F.R. §§ 1926.500–503.

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[1] An employer may seek judicial review of a final order of the Commission in the court of appeals for the D.C. Circuit. Both the employer and the Secretary may seek judicial review in the circuit in which the violation is alleged to have occurred or the circuit where the employer has its principal office. 29 U.S.C. §§ 660(a) and (b). Here, the alleged violation occurred in New York, in the Second Circuit, where EWD's principal office is also located. *See* 29 U.S.C. § 660(b). If this decision becomes a final order of the Commission, the Secretary would be the prevailing party, and EWD could seek judicial review in either the Second Circuit or the D.C. Circuit. The Commission generally regards the source of controlling precedent for any given case to be the court of appeals to which the Commission decision is most likely to be appealed. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

The worksite here was a construction workplace to which Subpart M applies, and the flat roof on which the EWD employees were required to be located to perform their job duties was a "walking/working surface" as that term is defined in Subpart M.[2]

The cited standard applies to EWD's work on the roof on September 17, 2020. EWD does not contend otherwise.

2. EWD Did Not Comply with the Standard's Terms

The cited standard, quoted in full at the outset, provides that prior to allowing employees to work on a walking/working surface an employer must determine that the surface has "the strength and structural integrity to support employees safely." § 1926.501(a)(2); *Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066 (No. 98-0866, 2000) (noting that "the standard's first sentence requires an employer to determine in advance whether a surface is safe to work on").

After an employer has made its initial determination under § 1926.501(a)(2) and allowed employees to start work on a walking/working surface, the standard further requires that the employer allow employees to continue working on the surface only so long as the surface continues to possess the requisite strength and structural integrity. *Id.* (noting that "the employer's duty [under § 1926.501(a)(2)] does not end after the initial inspection," and quoting the standard's text in observing that the "plain language of the second sentence clearly permits employees 'to work on those surfaces only when the surfaces have the requisite strength and structural integrity'"); *Fabi Constr. Co., Inc. v. Sec'y of Labor*, 370 F.3d 29, 37 (D.C. Cir. 2004) (upholding Commission's conclusion that the second sentence of § 1926.501(a)(2) "require[s] that the surface

[2] Section 1926.500(b) defines the term "walking/working surface" in relevant part as follows: "*Walking/working surface* means any surface … on which an employee walks or works, including, but not limited to … roofs … on which employees must be located in order to perform their job duties."

be sound whenever workers are present," and rejecting the employer's argument that the standard imposes "a duty to ensure a safe working surface only at the start of a project").

Because § 1926.501(a)(2) does not prescribe any criteria for the employer to follow in making the determinations that the standard requires, it is a performance-oriented standard. *See CentiMark Corp.*, 24 BNA OSHC 1903, 1912 (No. 12-0920, 2013) (ALJ) (describing § 1926.501(a)(2) as a "performance-oriented standard"); *cf.* § 1926.850(a) (specifying that prior to demolition operations "an engineering survey shall be made, by a competent person, of the structure to determine the … possibility of unplanned collapse of any portion of the structure").

Broad performance-oriented standards such as § 1926.501(a)(2) "may be given meaning in particular situations by reference to objective criteria, including the knowledge of reasonable persons familiar with the industry." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2198 (No. 00-1052, 2005); *see also Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007) ("because performance standards ... do not identify specific obligations, they are interpreted in light of what is reasonable"); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205-06 (No. 87-2059, 1993) (stating that a broadly worded standard "must be interpreted in the light of the conduct to which it is being applied, and external, objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation"); *CentiMark Corp.*, 24 BNA OSHC at 1912 (observing that as a performance-oriented standard § 1926.501(a)(2) "allows the employer some discretion in its method of compliance" and that "[c]ompliance is evaluated according to what would be reasonable for a particular situation").

Thus, an employer's compliance with a performance standard such as § 1926.501(a)(2) is measured by what a "reasonably prudent employer" would do under the same circumstances.

Associated Underwater Servs., 24 BNA OSHC 1248, 1250 (No. 07-1851, 2012) (discussing a performance standard applicable to diving operations that require a pre-dive "assessment of the safety and health aspects of … [s]urface and underwater conditions and hazards"). "A reasonably prudent employer is a reasonable person familiar with the situation, including any facts unique to the particular industry." *Id.* "[I]ndustry practice is relevant to [the 'reasonably prudent employer'] analysis, but it is not dispositive." *Id.*, citing *W.G. Fairfield*, 19 BNA OSHC 1233, 1235-36 (No. 99-0344, 2000), *aff'd*, 285 F.3d 499 (6th Cir. 2002).

EWD's Initial Determination
of the Roof's Strength and Structural Integrity

EWD is alleged to have violated § 1926.501(a)(2) by failing to "conduct[] detailed inspections from inside [the building] to find if there was deterioration, damage, rust, corrosion, or any unsafe conditions of the roof deck." In his testimony in the Secretary's case-in-chief, the CO testified to the effect that the rust on the ceiling that was visible from the warehouse floor should have prompted EWD to conduct a closer-up inspection of the rusted areas, to include physically probing those areas with some sort of instrument to discern any deterioration. (T. 31-32, 81).

The CO testified further that the proximity of the approximately 3x4-foot rectangular roof penetration to the rusted area on the ceiling where the depression was later discovered was an additional condition that ought to have prompted EWD to conduct a closer inspection of the rusted ceiling—the CO's theory being that the utility associated with the penetration could have been a source of additional moisture that might have resulted in greater pooling in low spots on the flat roof. (T. 24-25).

The CO additionally testified that the presence of moisture in the test cut of the roof membrane that had been taken three months earlier was another circumstance that should have

prompted EWD to take a closer look at the rusted areas on the ceiling/roof deck (notwithstanding that the CO testified also that he understood it was *not* the custom or practice in the roofing industry to rely on such test cuts in assessing the strength or structural integrity of a roof system). (T. 50, 52-53, 67-68, 73, 113).

The CO testified that during his investigation he "researched documents and publications from the National Roofing Contractors Association," which he described as a trade association for professional roofers that provides "consensus guidance for the roofing industry." (T. 47-48). In the segment of the CO's testimony that occurred as part of the Secretary's case-in-chief, the CO did not speak to whether the trade association publications he had consulted contained any recommendations about what a roofing contractor ought to do to assess the strength and structural integrity of a roof to support employees. And the Secretary did not attempt to present in evidence the publications that the CO testified he had consulted. Nor did the Secretary offer any other industry publications or reputed industry "consensus guidance."

When the CO was called to testify a second time in the hearing in the presentation of EWD's case-in-chief, he testified that one trade association publication he had consulted during the investigation "recommend[s] if rust is visible that the issue should be noted, that close examination would be required, and, you know, that's what I recall." (T. 138). However, there remained no offer into evidence of that publication (or any excerpt thereof) that the CO was testifying about from his memory alone.

The CO has seventeen years of experience as an OSHA compliance safety and health officer, and he has conducted over 1,100 inspections and investigations, the majority of which have involved investigations into fall hazards. (T. 18). The CO certainly has some familiarity with roofing industry practices by virtue of that OSHA experience, but there is no evidence that

he has any experience working in the roofing industry itself. The CO's consultation of publications issued by roofing industry trade associations suggests that at least some of his familiarity and knowledge about roofing industry practices is grounded in the content of those publications. Considering that his only testimony regarding the content of roofing industry publications was based on his uncorroborated recollection of what the publications stated, the reliability of that testimony is subject to doubt. The far more reliable evidence of what the publications stated would have been the publications themselves.

The evidence is insufficient to establish that a reasonably prudent commercial roofing contractor would have done more than what Runyon described he had done in determining that the roof possessed the requisite strength and structural integrity before EWD allowed employees to begin working on it on September 17, 2020. Indeed, there is no evidence that any part of the roof, not even the part where the depression was later discovered, lacked the requisite strength to support employees safely when the employees commenced work on the roof on September 17, when the approximately five-inch-thick foam board roof membrane remained intact over the location where the depression in the underlying roof deck was later discovered. To the contrary, the foreman Savage testified credibly that the roof membrane "could be a solid surface and appears to be solid" and "you wouldn't know it until you cut the built-up roof that there was a depression" underneath it. (T. 94).

Neither party presented any expert witness testimony. (Joint Prehr'g Statement 4). The presentation of appropriate expert testimony might well have provided a basis for assigning greater weight to the CO's assessment that EWD's initial determination was deficient. *See H.C. Nutting Co. v. OSHRC*, 615 F.2d 1360 [8 BNA OSHC 1241, 1241-42] (6th Cir. 1980) (unpublished) (ruling that the alleged violation of a performance standard [specifically, § 1926.21(b)(2), which requires

employers to instruct employees in the recognition and avoidance of unsafe conditions] "against a backdrop of reasonable industry practice" was not established where there was "no evidence ... as to industry practices," the CO "was not presented as an expert witness in the area," "no specific OSHA standards require that the steps suggested by the CO be taken," and the Secretary did not contend that the Act's general duty clause required such steps); *Gen. Motors Corp., Delco Prods. Div.*, 11 BNA OSHC 1482, 1484 (No. 78-5476, 1983) (observing that "had the Secretary met his *prima facie* burden, it is questionable whether, without expert testimony, the Secretary's case would have been capable of withstanding rebuttal" from the respondent); *Consol. Constr., Inc.*, 16 BNA OSHC 1001, 1006 n. 6 (No. 89-2839, 1993) (noting that the Secretary was not required to present expert testimony to prove his case, but that "when the Secretary chooses not to produce an expert witness, he risks the possibility, as here, of not being able to refute the employer's evidence").

For these reasons, the evidence supporting the Secretary's claim that EWD's initial determination respecting the roof's strength and structural integrity failed to meet the requirements of the cited standard is not preponderant. This is so even though that evidence may have been sufficient to present a prima facie case in support of the alleged violation. *Cf. Falcon Steel Co.*, 16 BNA OSHC 1179, 1191 (No. 89-2883, 1993) (consolidated) (noting that an "experienced compliance officer's reasonable suggestion" on a technical matter may be sufficient for the Secretary to make out a prima facie case without having to present expert testimony on the matter).

EWD's Determination of the Roof's Strength and Structural Integrity After Covering the Depression

The depression was discovered after the approximately five-inch-thick roof membrane that had covered the depression was cut and removed. The project superintendent (Runyon) was nearby when the depression was discovered, and he recognized immediately that it was an unsafe

condition. (Findings of Fact ¶ 22). Runyon stopped work and he directed that the depression be covered with a 4x8-foot sheet of three-quarter-inch thick plywood, which EWD had on-hand at the worksite. (T. 98-99, 195-97). In his testimony, Runyon made passing reference that in addition to instructing employees to cover the depression with plywood, he also instructed employees to "put some cones around it." (T. 195-97). This is the only evidence that Runyon or any other EWD supervisor gave such an instruction. The foreman, Savage, confirmed in his testimony that the depression had been covered with plywood at Runyon's direction, but he made no mention of anyone directing that the area be marked with cones, or that it be marked in any way at all. (T. 90-99). Even though Runyon testified to having instructed that cones be put around the area, he acknowledged that when he exited the roof to go retrieve materials to repair the roof deck, there were no cones or any other demarcation around the sheet of plywood covering the depression. (T. 207, 210). Runyon acknowledged also that the unmarked plywood was not secured in any manner. (T. 210). Nonetheless, Runyon regarded the unmarked and unsecured sheet of plywood to have made the roof sufficiently safe to allow employees to resume working on it, testifying that "[o]nce the plywood was down, it was good," because the "plywood is a good work surface" and "a sound working surface" that "takes the immediate fall hazard away." (T. 196). Both Runyon and the foreman Savage testified that it was EWD's standard practice/procedure to cover suspect areas of roof deck with plywood sheets. (T. 96, 196). All the EWD employees resumed working on the roof after the depression had been covered with the unmarked and unsecured sheet of plywood.

Although the employee who later fell through the roof at the very spot of the depression testified to having no recollection of events before his injury, the only reasonable inference from the circumstantial evidence is that the plywood sheet was no longer covering the depression when

the employee fell through the roof. (T. 95). The project superintendent (Runyon) testified that his "best guess" was that either the injured employee "or one of the other workers on the roof evidently moved the plywood." (T. 207). The foreman (Savage) testified that while he did not know why the plywood had been moved, he suspected that employees "probably slid the plywood out of the way to lift up the built-up" foam board roof membrane that had been cut. (T. 95).

A preponderance of the circumstantial evidence supports the reasonable inference that the injured employee, even assuming he was within earshot of Runyon when Runyon instructed employees to stop work while the depression was being covered with plywood,[3] had not been adequately informed of the precise location of the depression, and so he later unwittingly trod upon the uncovered depression.[4]

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[3] Runyon testified that he "told everybody to stop for a minute while" the plywood was put down over the depression. (T. 195-96). He testified further that "to get [the depression] covered I had to stop the noise, stop the work so that everybody knew," and so he instructed employees to "stop tearing off" and "listen to me for a minute, there's a hole in the roof." (T. 196). No witnesses provided any corroboration of Runyon's testimony that he "told everybody to stop for a minute," but neither did any witnesses controvert that testimony. The foreman, Savage, did not address that factual issue in his testimony that the Secretary presented as part of her case in chief. Savage testified credibly that he was not near Runyon when the depression was discovered (which is when Runyon testified that he instructed employees to stop work while plywood was being placed over it), and that he (Savage) did not observe the plywood being put down over the depression because he "was at the other end of the roof" about 150 feet away. (T. 94-95). Runyon's contrary recollection that Savage was standing next to him when Runyon first saw the depression is less reliable and credible than Savage's testimony. (T. 205). Savage is far more competent than Runyon to accurately recall where he (Savage) had been positioned when Runyon was engaged in instructing employees to cover the depression with plywood. Savage's forthright testimony at the hearing was delivered without any discernable guile in substance or in his demeanor. Savage's testimony about where he had been positioned when Runyon first saw the depression and then ordered that it be covered with plywood is more reliable than Runyon's differing testimony.

[4] The CO testified that during his ten-day investigation he spoke to both the injured employee and to another non-supervisory employee who had been present on the roof, and that both employees had said that no plywood or flags had been placed over or around the depression before the injurious fall through the roof deck. (T. 37-38). That testimony of the CO is not

Even if the circumstantial evidence was regarded to be insufficient to support the reasonable inference that the injured employee had not been adequately informed of the precise location of the depression, testimony from another employee establishes that not all employees on the roof had been adequately informed precisely where on the roof the depression was located. That employee testified that "we knew that there was" a "spot" on the roof "but I didn't know there was one specific area" on the 9,239 square-foot flat roof. (T. 222-23). (That employee did not recall precisely how she came to know that there was an unsafe depression on the roof (T. 222-23).) Considering that it was standard practice for EWD to use plywood sheets to cover suspect areas of roof decking, the absence of any plywood covering the depression could have reasonably led any employee who did not know precisely where on the roof the depression was located to conclude that the area of the exposed depression was safe to walk or work on.

The second sentence of § 1926.501(a)(2) required that EWD exercise reasonable diligence before allowing employees to continue working on the roof after the depression had been covered with an unmarked and unsecured 4x8-foot sheet of plywood. The totality of the evidence establishes that EWD failed to exercise such reasonable diligence by inadequately informing employees of the precise location of the unsafe depression on the roof while nevertheless determining that the roof possessed the requisite strength and structural integrity to allow the

credited. The CO had not learned of the existence of the depression until months after he had concluded his ten-day investigation, and so he would not have known to query any employee about any depression during the investigation. (T. 35, 69, 183). It is more likely that in so testifying the CO was recalling subsequent separate telephone conversations that he had with those employees in the days prior to the Commission's hearing in the matter, which was almost a year after the CO had concluded the investigation. (T. 152, 219, 227). However, both those employees testified at the hearing, and neither of them corroborated the CO's account of what they had said to him either during the CO's investigation or in their more recent telephone conversations. The CO's account of what those two employees said to him is deemed insufficiently reliable to establish by a preponderance of the evidence the truth of what he recalled them having said.

employees to resume working on the roof after covering the depression with the unmarked and unsecured sheet of plywood. *See Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1022 (No. 94-200, 1997) (assessing the "totality of the evidence," including the circumstances of the particular worksite, in concluding that the employer's inspection of worksite failed to meet construction industry standard that requires frequent and regular inspections of job sites, § 1926.20(b)(2)), *aff'd*, 158 F.3d 583 (5th Cir. 1998). To render the area of the roof on and around the depression safe for employees to work on, reasonable diligence required more—measures that would have had the effect of clearly and unambiguously informing all employees then on the roof, as well as any employees who might later access the roof, that the plywood sheet was covering a unsafe area, and taking measures to inhibit the plywood sheet's inadvertent or accidental movement off the depression until such time as the infirm roof deck had been repaired. Absent such measures being taken, and given the ubiquity of 4x8-foot plywood sheets at EWD worksites generally (Finding of Fact ¶ 25), simply laying an unsecured and unmarked 4x8-foot sheet of plywood over the unsafe roof deck and then allowing all work on the roof to resume was insufficient to endow the roof with the quality of possessing the strength and structural integrity to support employees safely.[5] EWD's determination that placing the plywood sheet over the

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[5] Contrary to the notion that EWD raises in its post-hearing brief (Resp't Br. 10-11), this decision does not rule that EWD violated the unpleaded standard that prescribes criteria for the use of "[c]overs for holes in …roofs" that is codified at § 1926.502(i). This is so even though it is likely that EWD would have been deemed to have made a compliant determination under § 1926.501(a)(2) if EWD had covered the depression with a cover that met the criteria of § 1926.502(i). Nevertheless, this decision does not rule that this could be the sole manner that EWD could have complied with § 1926.501(a)(2). For example, as the CO testified, EWD could have complied by removing the employees from the roof until such time as the depression had

depression rendered the strength and structural integrity of the roof sufficient to support employees safely did not meet the requirements of the second sentence of § 1926.501(a)(2).[6] *Agra Erectors,*

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been repaired and the strength and structural integrity of the walking/working surface restored. (T. 69).

Further, even if the Secretary had amended the alleged violation to have alleged instead, or in the alternative, a violation of § 1926.502(i), it is uncertain that § 1926.502(i) would have been deemed to apply. The depression was valley-like and might not have constituted either a "gap or void" in the roof of at least two inches in size, which is how the standard defines the term "hole" in § 1926.500(b): "*Hole* means a gap or void 2 inches … or more in its least dimension, in a floor, roof, or other walking/working surface." The words "gap" and "void" are not defined in the standard and thus they would be assigned their ordinary meanings in determining whether the depression constituted a "hole" that would thereby render § 1926.502(i) applicable to the plywood sheet used to cover the depression.

[6] The alleged violation, as was amended by the Secretary's complaint to add the allegations that "[e]mployees were permitted to work on surfaces that did not have the requisite strength and structural integrity," and that "the roof deck lacked the requisite strength and structural integrity," objectively capture this theory of EWD's violative conduct grounded in the second sentence of § 1926.501(a)(2). *See Agra Erectors, Inc.*, 19 BNA OSHC 1063 (finding employer did not comply with second sentence of § 1926.501(a)(2) after work had commenced and the walking/working surface that was implicated lacked the requisite strength and structural integrity). This is so even though the Secretary did not learn until long after the complaint was prepared and filed, and only about one month before the hearing, that EWD had discovered the depression and had covered it with plywood.

Even if this theory of the alleged violation had not been captured by the allegations of the complaint, the parties squarely recognized that they were trying that theory, and they consented to doing so. *See McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) (amendment of pleadings after trial under Fed. R. Civ. P. 15(b)(2) "is proper only if two findings can be made—that the parties *tried* an unpleaded issue and that they *consented* to do so," and stating further that "[t]rial by consent may be found only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue").

In the Joint Prehearing Statement dated September 13, 2021, EWD identified the following facts to be litigated: "[EWD] identifying the area of suspect roof deck on 9/17, covering the area with plywood and barricading with cones and flags met the continuing obligation to ensure the work surface was sound." In that same joint prehearing statement, EWD described one of its affirmative defenses in part as follows: "When [EWD] became aware of the change in the condition [of the roof's strength and structural integrity], [EWD] took immediate steps to prevent employee exposure." EWD's identification of these matters as articulated in the joint prehearing statement foreshadowed the evidence presented at the hearing addressing those matters, which is indicative that the parties having consented to litigating the adequacy of EWD's determination that

Inc., 19 BNA OSHC 1063 (finding employer did not comply with second sentence of § 1926.501(a)(2) after work had commenced where the working surface involved lacked the requisite strength and structural integrity); *Fabi Constr. Co.,* 370 F.3d 29 (affirming Commission's determination that employer violated second sentence of § 1926.501(a)(2) after work commenced when subsequent demolition operations compromised the strength and structural integrity of working surface); *CentiMark Corp.*, 24 BNA OSHC at 1911 (finding employer "did not take reasonable actions to assess the structural integrity of the roof" either before work started or after work started and "damage … was revealed"); *Peterson Constr. Co.*, No. 95-1275, 1996 WL 606661, *4 (OSHRC ALJ, Oct. 15, 1996) (finding violation of § 1926.501(a)(2) where plywood decking on which employee worked had been loosened during work and not re-secured, so that by "not ensuring that the piece of decking was secured, its structural integrity was not maintained" and "[i]t was no longer suitable as a walking/working surface" because it "could easily move, slide, lift up, or otherwise become unstable").

EWD argues that the cited standard is unconstitutionally vague, but that argument is directed to the Secretary's other theory of the violation that EWD's *initial* determination of structural integrity had failed to comply with the cited standard. (Resp't Br. 16-18). Because the Secretary failed to establish that theory of the violation, the Respondent's argument became moot and was not addressed. EWD makes no corresponding constitutional argument respecting EWD's

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the roof had the requisite strength and structural integrity to allow employees to resume working on it after the plywood had been placed over the depression. (*See, e.g.*, T. 15, 68-69, 183, 195-96).

For these reasons, if it had been necessary, the undersigned would have *sua sponte* amended the complaint post-hearing to allege this theory of the violation grounded in the second sentence of § 1926.501(a)(2). *See Avcon, Inc.*, 23 BNA OSHC 1440, 1451-52 (No. 98-0755, 2011) (consolidated) (on discretionary review of a Commission judge's decision, the Commission *sua sponte* amends multiple citation items after considering whether the respondent "had a fair opportunity to defend and … could have offered any additional evidence if the case was retried").

determination that the roof had the requisite strength and structural integrity after the depression was covered with the unmarked and unsecured plywood sheet. Nor could such an argument have succeeded if it had been advanced, because EWD had actual notice that it could have complied with the standard at that point by at least marking the area around the plywood in some manner to alert employees to the danger that lay beneath it. In the joint prehearing statement EWD claimed to have "met the continuing obligation to ensure the work surface was sound" after the depression had been discovered by "barricading [it] with cones and flags." *See Cotter & Co. v. OSHRC*, 598 F.2d 911, 914 (5th Cir. 1979) (stating that "'the problem of fair notice does not exist'" where an employer is shown to have actual knowledge of what is required); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205-06 (No. 87-2059, 1993) (rejecting fair notice argument in finding that the employer "manifested actual notice of what it must do" to comply with the cited broadly-worded standard).

3. Employees Were Exposed to the Violative Condition

Employees were allowed to resume working on the roof after EWD had failed to exercise reasonable diligence in determining that the roof possessed the requisite strength and structural integrity to support employees safely after the depression had been covered with an unmarked and unsecured sheet of plywood. Employees were thereby exposed to the violative condition.

4. EWD Had Actual Knowledge of the Violative Condition

After the depression was covered with plywood, the project superintendent (Runyon) determined that the roof possessed the requisite strength and structural integrity to allow employees to continue working on it. He departed the worksite sometime later with actual knowledge that the plywood covering the depression was unmarked and unsecured and that his instruction to mark the area off with cones had not been executed. *See Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) (an employer's knowledge is directed to the

physical condition that constitutes a violation) *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Runyon's actual knowledge of the violative condition is imputed to EWD. *See N.Y. State Elec. & Gas Corp v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996) ("Knowledge or constructive knowledge may be imputed to an employer through a supervisory agent"); *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (knowledge may be imputed to the employer through its supervisory employee).

5. "Serious" Classification

Under section 17(k) of the Act, a violation is serious if "there is substantial probability that death or serious physical harm could result ...." 29 U.S.C. § 666(k); *see also Pete Miller, Inc.*, 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000) (a violation is serious if "a serious injury is the likely result should an accident occur").

In deciding to promulgate § 1926.501(a)(2), OSHA considered studies that had identified construction workplace fatalities that had resulting from employees falling through ceilings and from roofs where "the employees were working on surfaces with insufficient structural strength to support their weight." Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672, 40681 (Aug. 9, 1994) (codified at 29 C.F.R. pt. 1926, subpt. M).

The employee who fell through the roof was hospitalized with serious injuries that he sustained in the fall through a walking/working surface that lacked sufficient strength and structural integrity to support him safely. (T. 7, 71). The violation of the cited standard is properly classified as serious.

6. Penalty

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the

Commission's authority to raise or lower penalties within those limits"), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). "[T]he Commission has the authority to ensure that a penalty is not unduly burdensome or excessive by evaluating the penalty assessment criteria set forth in the Act and determining a reasonable and appropriate penalty based on that evaluation." *S.A. Healy Co.*, 17 BNA OSHC 1145, 1151 (No. 89-1508, 1995), *aff'd on other grounds*, 138 F.3d 686 (7th Cir. 1998).

Section 17(j) of the Act requires the Commission, in assessing an appropriate penalty, to give "due consideration" to the "gravity of the violation," the "size of the business of the employer," the "good faith of the employer," and the employer's "history of previous violations." 29 U.S.C. § 666(j). Of these factors, gravity is the principal factor "and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005). The maximum penalty for the serious violation proven here is $13,494. 29 C.F.R. § 1903.15(d)(3) (2020).

The undersigned concurs in OSHA's calculus in arriving at the proposed penalty as described by the CO in his testimony. (T. 69-71). The undersigned thus concurs in and adopts OSHA's proposed penalty amount of $8,848.

ORDER

The foregoing decision constitutes findings of fact and conclusions of law on all material issues of fact, law, or discretion in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1).

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that amended Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.501(a)(2) is

AFFIRMED, and that a penalty of $8,848 is ASSESSED.

s/ *William S. Coleman*
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: July 24, 2023