United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104
atlantaoshrcjudges@oshrc.gov

Secretary of Labor, Complainant, v. Tim Graboski Roofing, Inc., Respondent.	OSHRC Docket No. **14-0263**

Appearances: Uche N. Egemonye, Esquire, U.S. Department of Labor, Atlanta, Georgia, For the Complainant
Angelo M. Filippi, and Ilanit Sisso, Esquire, Kelley Kronenberg, Fort Lauderdale, Florida, For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Tim Graboski Roofing, Inc. (Graboski), is a roofing contractor whose principal office is in Delray Beach, Florida. On June 27, 2013, one of Graboski's work crews was reroofing a two-story residence in Boca Raton, Florida, when one of its workers was electrocuted. The Boca Raton Police Department referred the fatality to the Occupational Safety and Health Administration (OSHA), who conducted an inspection of the worksite that same day. As a result of the inspection, the Secretary issued a Citation and Notification of Penalty to Graboski on December 12, 2013.[1]

Item 1a of Citation No. 1 alleges a serious violation of 29 C.F.R. § 1926.416(a)(1) for permitting employees to work in proximity to energized electric power circuits. Item 1b of Citation No. 1 alleges a serious violation of 29 C.F.R. § 1926.416(a)(3) for failing to ascertain before work began whether any part of an energized power circuit was located such that employees or equipment could come in contact with it. The Secretary proposes a grouped penalty of $7,000.00 for Items 1a and 1b.

[1] The Secretary also issued a separate Citation and Notification of Penalty to Graboski on December 12, 2013, for an alleged OSHA violation at a different worksite. The Court held a hearing in that matter (Docket No. 14-0264) immediately following the close of the hearing in the instant proceeding on October 30, 2014. A separate Decision and Order is being issued in that case.

Item 2 of Citation No. 1 alleges a serious violation of 29 C.F.R. § 1926.1053(b)(12) for permitting employees to use a ladder with conductive side rails in proximity to an energized electric power circuit. The Secretary proposes a penalty of $7,000.00 for Item 2.

Item 1 of Citation No. 2 alleges a willful violation of 29 C.F.R. § 1926.501(b)(13) for failing to provide fall protection to employees working at a height 6 feet or more above the lower level. The Secretary proposes a penalty of $70,000.00 for this item.

The parties stipulate the Commission has jurisdiction over this proceeding under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (2014) (Act), and that Graboski is a covered business under § 3(5) of the Act (Tr. 10-11). The Court held a hearing in this matter on October 29 and 30, 2014, in Fort Lauderdale, Florida. The parties filed simultaneous post-hearing briefs on December 8, 2014.

Graboski contends the Secretary failed to meet his burden of proof for each of the cited items. Graboski also argues that, in the event the Court finds the Secretary established a violation of Item 1 of Citation No. 2, the Secretary failed to prove the violation is willful. Should the Court find the Secretary established violations for Item 2 of Citation No. 1 and Item 1 of Citation No. 2, Graboski contends the violations were the result of unpreventable employee misconduct.

For the reasons that follow, the Court AFFIRMS Items 1a, 1b, and 2 of Citation No. 1. The Court assesses a grouped penalty of $7,000.00 for Items 1a and 1b and a penalty of $7,000.00 for Item 2. The Court AFFIRMS Item 1 of Citation No. 2 and assesses a penalty of $70,000.00 for this item.

BACKGROUND

Graboski is a roofing company that provides reroofing and new roofing services for residential and commercial properties. Graboski's reroof department replaces old or damaged roofs. The reroofing process occurs in several stages, with a different crew working each stage. Reroofing requires a tear-off crew (to remove the old roof), a dry-in crew, a hot mop crew, and a tile crew (Tr. 291).

The tile crew members install the roof tiles, starting at the edges of the eaves and working their way to the peak of the roof. Once the crew members have placed the tiles, they attach caps on the ridges (also called "hips"). The crew members then cement the hip caps and detail the cement (Tr. 328-331).

On June 27, 2013, one of Graboski's tile crews was finishing a roof on a two-story residence on Spanish River Road in Boca Raton, Florida. The crew consisted of six members—the Crew Chief and five workers. The Crew Chief and four of the workers were on either the upper level or the lower level of the roof of the structure. One worker (who was the son of the Crew Chief) remained on the ground, mixing cement. At some point, the Crew Chief called down to his son to reposition a metal extension ladder, one of two ladders the crew members had been using to access the roof. The crew members on the roof heard the Crew Chief's son cry out and the sound of the ladder falling. When they looked over the side of the roof, they saw the worker lying on the ground with the ladder fallen beside him. The crew members called 911 and attempted to administer first aid to the Crew Chief's son. He was taken by ambulance to the hospital, where he was pronounced dead (Exhs. G-18, G-19, G-20, G-21; Tr. 58).

The Boca Raton Police Department (BRPD) also responded to the 911 call and began an investigation of the accident. The BRPD notified the local OSHA Area Office of the fatality. OSHA's acting area director assigned compliance safety and health officer (CSHO) David Tiesi to inspect the worksite. CSHO Tiesi drove to the Spanish River Road residence, where he met with members of the BRPD who briefed him on their accident investigation. CSHO Tiesi also spoke with another CSHO who had arrived before him. The ladder the decedent was repositioning at the time of his death had been moved to the street. CSHO Tiesi observed forensic examiners at the scene and met with a representative from Florida Power and Light (FPL) (Tr. 30-33). The FPL representative determined that power lines running parallel to the edge of the roof upon which the extension ladder was resting were energized with a voltage of 7,062 volts (7.6 kilowatts) (Tr. 45-46). CSHO Tiesi conducted interviews and took measurements and photographs at the worksite. Based on his inspection, CSHO Tiesi concluded that when the decedent moved the metal extension ladder, the ladder either came into contact with the energized line closest to the roof, or that electricity arced from the energized power line to the metal ladder, resulting in the electrocution of the decedent (Tr. 59). As a result of CSHO Tiesi's inspection, the Secretary issued the instant Citation and Notification of Penalty to Graboski on December 12, 2013.

CITATION NO. 1

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Applicability of §§ 1926.416(a)(1), 416(a)(3), and 1053(b)(12)

Items 1a, 1b, and 2 each allege Graboski violated subsections of the Construction Standards that require the employer to protect its employees from exposure to energized electric power circuits or energized electrical equipment. Graboski contends the Secretary failed to meet his burden of establishing a prima facie case with regard to these items because he adduced "no evidence" supporting his contention "that individuals were working in close proximity to the power lines, or that any individual accessed the roof from the side of the house near the power lines. No employee testified and no evidence was presented to support the contention that work was done in close proximity to the power lines." (Graboski's brief, pp. 28-29.) The Court construes this argument as a challenge to the applicability of the cited subsections involving exposure to energized electric circuits and equipment.

Sections 1926.416(a)(1) and (3) are found in Subpart K—*Electrical* of the § 1926 Construction Standards. Section 1926.400(b) provides:

> This subpart addresses electrical safety requirements that are necessary for the practical safeguarding of employees involved in construction work and is divided into four major divisions and applicable definitions as follows:
>
> * * *
>
> (b) *Safety-related work practices*. Safety-related work practices are contained in 1926.416 and 1926.417. In addition to covering the hazards arising from the use of electricity at jobsites, these regulations also cover the hazards arising from the accidental contact, direct or indirect, by employees with all energized lines, above or below ground, passing through or near the jobsite.

In order to establish the subsections cited in Items 1a and 1b apply, therefore, the Secretary must prove Graboski's employees were exposed to accidental contact with energized lines "passing through or near the jobsite." In order to establish § 1926.1053(b)(12) (cited in Item 2) applies, the Secretary must prove Graboski's employees were using a ladder with conductive siderails where the employees or the ladder could contact "exposed electrical

equipment."[2] Graboski contends the Secretary failed to demonstrate the cited subsections apply to the Spanish River Road worksite because he "cannot meet his burden to prove that [the decedent] was electrocuted because the ladder made physical or electrical contact with the power lines." (Graboski's brief, p. 30.) Graboski argues that because no one witnessed the accident, CSHO Tiesi's testimony "regarding how [the decedent] supposedly repositioned the ladder and whether the ladder came into contact with the power lines is based on mere speculation." (Graboski's brief, p. 29.) Graboski notes the ladder at issue had been moved by the time CSHO Tiesi arrived at the site, CSHO Tiesi found no markings on the ladder to indicate contact was made with an energized power line, and the Secretary failed to adduce a copy of the autopsy report that purportedly attributed the decedent's death to electrocution (Tr. 260).

Graboski's argument on this issue is misguided. It is not the Secretary's burden to prove the decedent's death was caused by electrocution when the ladder he was moving made contact with the power lines. Rather, it is the Secretary's burden to prove contact with energized lines was possible by employees working at the site. The Commission has "many times held" that "the cause of the accident is not necessarily relevant to whether a standard was violated." *Williams Enterprises Inc.,* 13 BNA OSHC 1249, 1252-1253 (No. 85-355, 1987). Hypothetically, the decedent could have died of a heart attack or other natural causes while repositioning the ladder and Graboski would still be in violation of the cited standards provided the Secretary established the elements of the violations.

Graboski is also mistaken in arguing that there is no evidence employees accessed the roof from the side of the house nearest the power lines. Exhibit G-19 is a copy of a statement given by the Crew Chief on July 17, 2013. CSHO Miguel Leorza (who had retired by the time of the hearing) testified he questioned the Crew Chief in Spanish, the Crew Chief's first language. CSHO Leorza wrote down the Crew Chief's answers in Spanish. He stated he read the answers written in Spanish back to the Crew Chief and gave him an opportunity to make any corrections. The Crew Chief signed the statement written in Spanish. CSHO Leorza then translated the statement from Spanish to English (Exh. G-19; Tr. 184-185).

[2] Section 1926.1053(b)(12) is found in Subpart X—*Stairways and Ladders* of the § 1926 Construction Standards. Section 1926.1050 provides in pertinent part, "This subpart applies to all stairways and ladders used in construction, alteration, repair (including painting and decorating), and demolition workplaces covered under 29 CFR part 1926[.]" Section 1926.1053(a) provides, "The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated[.]"

The Crew Chief was on site the day of the accident and instructed his son to move the ladder. He heard his son cry out and he observed the location where his son was found lying on the ground near the ladder. His statement regarding the circumstances surrounding the tragic death of his son is deemed highly credible and is accorded great weight.

Attached to the statement is a drawing of the worksite made by the Crew Chief (Exh. G-19, ¶ 1, drawing). The Crew Chief labeled the power lines near the left side of the house and marked the location of the ladder at the back corner of the left side of the house next to the power lines (Exh. G-19, drawing). The drawing made by the Crew Chief corresponds with the markings made during the hearing by CSHO Tiesi on a photograph of the area at issue (Exh. G-1A). The Crew Chief stated that prior to the accident, he "was working from the ladder. The same ladder that came in contact with the cables." (Exh. G-19 ¶ 5.) He then climbed onto the roof and directed his son to "move the ladder towards the front." (*Id.*, ¶ 7.) The Crew Chief stated his son knew "that the ladder must be retracted but I don't know why he moved it extended," and "since [my son] is tall he must had lifted the ladder about 4 feet." (Exh. G-19, ¶¶ 38, 39.) The statement and drawing by the Crew Chief acknowledging the location of the ladder in relation to the power lines is sufficient to establish the decedent was working in such proximity to an energized power circuit so that he could contact it in the course of moving the ladder, an assignment that was within his scope of work.

Moreover, CSHO Tiesi testified that George Marino, Graboski's safety supervisor, and Thomas Potter, Graboski's general manager, accompanied him during his walkaround inspection. They were with CSHO Tiesi when he took measurements near the back corner on the left side of the house, where the power lines are located. This is also the location where FPL's representative and the forensic examiners were working. At no time did either of Graboski's management employees indicate that this area was not the area in which the decedent had attempted to reposition the ladder. CSHO Tiesi testified,

> After the opening conference, I went back to the, what we call the walkaround phase or the investigation phase, the middle phase of the investigation. So, I proceeded back to the left-hand side of the house, left-hand as you're standing, facing the home from the street which was where the power lines were and where the accident occurred.
>
> * * *
>
> [O]n the left side of the home under the wires, I observed high power lines running overhead, a total of three. I observed a, [sic] for which I took measurements, of the roof eave heights for the first and second story. I also took

> measurements of the ladder distances from the roof eave to each of the three wires. While this was going on, the FP&L representative was also there taking measurements, so I kind of gave way to that as she was measuring the actual line heights. And the forensic or the crime scene team was still doing their investigation, so I had to give way to that a little bit as well.

(Tr. 35.)

The Court finds it highly unlikely that Graboski's management personnel would observe the CSHO, the FPL representative, and the forensic examiners all taking measurements and photographing the same area at the rear corner of the left side of the house without protesting if they believed that location was not where the decedent was when he died. Graboski does not contend the decedent was not working in proximity to the power lines or posit a different location where it believes he was working; rather, Graboski argues the Secretary has failed to prove affirmatively the decedent was working in the location identified by CSHO Tiesi. The record, however, demonstrates Graboski is incorrect.[3]

CSHO Tiesi took several measurements at the rear corner of the left side of the residence. The distance from the ground to the bottom of the second story roof edge upon which the ladder was resting is 19 feet, 4 inches (Exh. G-2; Tr. 37). The horizontal distance from the outside edge of the roof edge to the closest power line (marked as "C" in Exhibit G-1A) is 5 feet, 6 inches, and the height of the C power line is 22 feet, 8 inches. The voltage of each line was 7,620 volts and each line was energized (Tr. 38-39, 46, 59). CSHO Tiesi measured the length of the ladder as it lay in the street where it had been placed. It was extended to 26 feet 7 inches (Exhs. G-3, G-4; Tr. 54).

According to CSHO Tiesi, the most plausible scenario for the June 27, 2013, incident, given the measurements he took and the statements of the employees who were on site at the time of the decedent's death, is that when the decedent raised the ladder to an upright position in order to reposition it, the 26 foot, 7 inch, ladder made either physical contact or, through arcing, electrical contact with the C power line at its height of 22 feet, 8 inches.

---

[3] Indeed, Graboski's own Safety Committee Minutes from its July 30, 2013, safety meeting, held approximately one month after the decedent's death, show that Graboski is in agreement with the Secretary's conclusion regarding the accident. The minutes state:

> On 6/27/13, [the decedent] was electrocuted, resulting in death. He was instructed to move the ladder to another location of the roof by his crew leader, and the ladder made contact with high tension wires.

(Exh. R-12, p. 25).

> Based on the investigation and what I observed was that the ladder, being a metal extension ladder, being extended to 26 feet 6 inches, and the phase C being 22 feet 8 inches, and assuming that the ladder itself is at a 4 to 1 pitch, it would have put the ladder base at 5 feet off the eave which means if the ladder was extended vertically to move it, it would have been within 6 inches of the wire. And it would have extended approximately 2 feet 8 inches above the wire, the ladder.

(Tr. 59.)

The measurements taken by CSHO Tiesi, the photograph showing the power lines in proximity to the roof of the Spanish River Road residence, the drawing made by the Crew Chief, and the statements of the employees establish Graboski's employees were working in proximity to energized power lines. The Secretary has proven §§ 1926.416(a)(1), 416(a)(3), and 1053(b)(12) apply to the conditions existing at the Spanish River Road worksite on June 27, 2013. The first element of the violations alleged in Items 1a, 1b, and 2 is established.

Item 1a: Alleged Serious Violation of § 1926.416(a)(1)

Alleged Violation Description

Item 1a of Citation No. 1 states,

> 29 CFR 1926.416(a)(1): Employees were permitted to work in proximity to electric power circuits and were not protected against electric shock by de-energizing and grounding the circuits or effectively guarding the circuits by insulation or other means:
>
> a. On or about June 27, 2013, at the above addressed jobsite, and employee was exposed to an electrocution hazard when directed by the employer to use a metal extension ladder to gain access to a rooftop, for which the ladder/rooftop and employee were both in close proximity to high voltage electrical power lines that were not de-energized, grounded or guarded.

§ 1926.416(a)(1)

Section 1926.416(a)(1) provides:

> No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

Compliance with the Terms of the Standard

The Commission has addressed the meaning of *proximity* as it was used in the subsection formerly found at § 1926.400(c)(1), which also required the employer to ensure its employee not "work in such proximity to any part of an electric power circuit that [the employee] may contact the same in the course of [the employee's] work[.]"

> The standard speaks not of an employee working in "proximity" to an electric power circuit, but "in such proximity to any part of an electric power circuit that he may contact [it] in the course of his work...." The clear meaning and evident purpose of the standard is therefore that an employee shall not work so close to an energized power circuit that he may inadvertently contact it in the course of his work. Thus, the standard, when read in its entirety, prescribes a specific and ascertainable standard of conduct, for an employer can determine by objective means whether employees are within reach of, and therefore may contact, an energized power circuit while they work.

Cleveland Consolidated, Inc., 13 BNA OSHC 1114, 1117 (No. 84-696, 1987).

Here, employees climbed the ladder to access the roof of the residence that they were reroofing. As they reached the roof, the employees came within 5 feet of the energized power lines. When the decedent stood the ladder upright, the ladder moved even closer to the energized power line, possibly contacting it. In arguing against proximity, Graboski states the decedent was at least 16 feet from the nearest power line as he stood on the ground. Graboski's argument ignores the fact that the decedent was assigned to move a metal ladder that could easily contact the energized power line. Thus, the employees were working in such proximity to the energized power line that they could contact it in the course of work.

If employees are required to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit, § 1926.416(a)(1) requires the employer to protect the employees either by deenergizing and grounding the circuit or by guarding it effectively by insulation or other means. It is undisputed Graboski did neither.

FPL confirmed the power lines running next to the left side of the house were energized at the time of the fatality (Tr. 46). Ray Guilbert, Graboski's supervisor in charge of the Spanish River Road worksite, told CSHO Tiesi on June 28, 2013, "I did not inquire from FPL as to the voltage of the lines at the side of the house because I was unaware of the lines until after the accident occurred yesterday." (Exh. G-5. P. 3.) Graboski also failed to use insulation or any other means of guarding the energized power lines.

The Court determines Graboski failed to comply with the terms of § 1926.416(a)(1). Graboski permitted its employees to work in such proximity to the energized power lines that they could contact the power lines in the course of their work.

Employee Access to Violative Condition

The Secretary established Graboski's employees had access to the violative condition. The Crew Chief directed the decedent to reposition the metal extension ladder, which brought it

into proximity of the energized power line. Graboski's employees climbed the ladder to access the roof, which brought them within 5 feet of the energized power line.

Employer Knowledge

In their statements, the employees working at the Spanish River Road worksite indicated they were unaware of the existence of the energized power lines ran parallel to the left side of the house (Exhs. G-5, G-6, G-18, G-20). When asked why he did not see them, the Crew Chief stated, "Well, there are many trees." (Exh. G-18, p. 1.) One of the crew members, who stated he had worked on the site for four days at the time of the fatality, was asked if he was aware of the power lines. He stated, "No, because I was concentrated in my work." (Exh. G-20, p. 1.) Another crew member responded to the same question, "No, I go and do my work." (Exh. G-21, p. 1.) A third crew member stated he did not see the power lines because "[t]he trees were there," (Exh. G-22, p. 1) and a fourth stated he was unaware of the power lines "because there were trees and I did not look." (Exh. G-23, p. 1.)

Despite the employees' statements regarding the visibility of the power lines, it is evident from looking at the photograph taken by CSHO Tiesi showing the area where the ladder was located that the power lines are clearly visible from the ground (Exh. G-1A). Trees are visible in the photograph, but so is a large treeless area (spanning the length of at least three separate windows under the roof's edge) where the power lines are in plain sight. Anyone standing next to the house and looking up would see the power lines.

Even if the Court accepts Graboski's argument it did not have actual knowledge of the energized power lines' proximity the employees in the course of their work, the Secretary has established constructive knowledge of the proximity. Constructive knowledge means the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions "An inquiry into whether an employer was reasonably diligent involves several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Stahl Roofing Inc*., 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003).

Here, it is apparent Graboski fell far short of meeting its obligation "to anticipate hazards to which employees may be exposed." Graboski is a *roofing* company. Reasonable diligence for a roofing company would include checking for power lines in proximity to the structure being

roofed. A reasonable person would expect this precaution to be performed routinely and before any workers access the roof. The employee statements, including the statements of the supervisor and the Crew Chief of the Spanish River Road worksite, convey the sense that it never occurred to them to simply walk around the structure before work began on the site to look for nearby power lines. Had they done so, the energized power lines at issue would have been immediately apparent, as evidenced by looking at Exhibit G-1A.

> [T]he conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area warrant a finding of constructive knowledge." *Kokosing Constr. Co*., 17 BNA OSHC 1869, 1871, 1993-95 CCH OSHD ¶ 31,207, p.43,723 (No. 92-2596, 1996). Additionally, constructive knowledge may be found where a supervisory employee was in close proximity to a readily apparent violation. *Hamilton Fixture,* 16 BNA OSHC1073, 1089, 1993-95CCH OSHD ¶ 30,034, p.41,184 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) (unpublished).

KS Energy Services, Inc., 22 BNA OSHC 1261, 1265-1266 (No. 06-1416, 2008).

The Court determines Graboski had constructive knowledge of the proximity of the power lines to the area of the structure where its employees were working. The Secretary has established all of the elements of a violation of § 1926.416(a)(1). Item 1a is AFFIRMED.

Item 1b: Alleged Serious Violation of § 1926.416(a)(3)

Alleged Violation Description

Item 1b of Citation No. 1 states,

> 29 CFR 1926.416(a)(3): Before work began, the employer did not ascertain by inquiry, direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, was so located that the performance of the work could bring any person, tool or machine into physical or electrical contact with the electric power circuit:
>
> a. On or about June 27, 2013, at the above addressed jobsite, an employee was exposed to an electrocution hazard while using a metal extension ladder to gain access to a rooftop, for which the employer did not make certain that the ladder and the employee would not make physical or electrical contact with the energized power lines.
>
> b. On or about June 27, 2013, at the above addressed jobsite, an employee was using a metal extension ladder to gain access to a roof top, which was located in close proximity to electrical power lines, and for which the employer did not instruct each employee in the recognition and avoidance of the unsafe condition.

§ 1926.416(a)(3)

Section 1926.416(a)(3) provides:

> Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken.

Compliance with the Terms of the Standard

The Secretary alleges Graboski did not check before work began to see whether an energized line was so located that the performance of work may bring a "person, tool, or machine" into contact with it. The language of the standard requires the employer to "ascertain by inquiry or direct observation or by instruments" whether an energized circuit is so located that an employee might contact it. Graboski did none of these things. The record establishes that no one from Graboski checked the worksite for energized electric power circuits or inquired of FPL whether there were such circuits at the worksite. Supervisor Guilbert stated, "I did not inquire from FPL as to the voltage of the lines at the side of the house because I was unaware of the lines until after the accident occurred yesterday." (Exh. G-5, p. 3.) Because it failed in its initial duty to ascertain whether an energized electric power circuit existed, Graboski also failed to post and maintain proper warning signs in the area of the power lines and failed to advise its employees of the lines. The Secretary has established Graboski failed to comply with the terms of § 1926.416(a)(3).

Employee Access to Violative Condition

The Secretary established Graboski's employees had access to the violative condition. The Crew Chief directed his son to reposition the metal extension ladder, which brought it into proximity of the energized power line. Thus, the decedent was exposed to an electrocution hazard as alleged in Instance (a). Graboski's employees climbed the ladder to access the roof, which brought them closer than 5 feet to the energized power line. These employees were exposed to the hazard of electrocution or electrical shock as alleged in Instance (b). Employee access to the violative condition is established for both instances.

Employer Knowledge

As discussed under Item 1a, Graboski had constructive knowledge of the violative condition. Reasonable diligence required that Graboski ascertain whether energized lines were present on the worksite and where its employees were going to be working in relation to those lines. The Secretary has established that Graboski violated § 1926.416(a)(3). Item 1b is AFFIRMED.

The Secretary classified Items 1a and 1b as serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition." Graboski's failure to ascertain the existence of the energized power lines at the worksite resulted in its employees working in proximity to the power lines, exposing them to the substantial probability of electrocution should they come in contact with the power lines. Items 1a and 1b are properly classified as serious.

Item 2: Alleged Serious Violation of § 1926.1053(b)(12)

Alleged Violation Description

Item 2 of Citation No. 1 states,

> 29 CFR 1926.1053(b)(12): Ladders used where the employee or the ladder could contact exposed energized electrical equipment did not have nonconductive siderails:
>
> a. On or about June 27, 2013, at the above addressed jobsite, an employee was exposed to an electrocution hazard while using a portable metal extension ladder that did not have nonconductive side-rails to gain access to a rooftop which was in close proximity to high voltage power lines.

§ 1926.1053(b)(12)

Section 1926.1053(b)(12) provides:

> Ladders shall have nonconductive siderails if they are used where the employee or the ladder could contact exposed energized electrical equipment, except as provided in § 1926.955(b) and (c) of this part.[4]

[4] Sections 1926.955(b) and (c), which are not at issue here, provide in pertinent part:

(b) Portable ladders used on structures or conductors in conjunction with overhead line work need not meet § 1926.1053(b)(5)(i) and (b)(12).

* * *

(c) Portable metal ladders and other portable conductive ladders may not be used near exposed energized lines or equipment. However, in specialized high-voltage work, conductive ladders shall be used when the employer demonstrates that nonconductive ladders would present a greater hazard to employees than conductive ladders.

Compliance with the Terms of the Standard

CSHO Tiesi examined the ladder the decedent was using at the time of his death. He determined it is a metal extension ladder with conductive siderails (Exh. G-3; Tr. 53-54). Graboski does not dispute the ladder had conductive siderails but argues, as it did with regard to the violations cited in Items 1a and 1b, that the Secretary failed to establish the decedent actually made contact with the energized power line or that he died of electrocution. As noted above, it is not the Secretary's burden to prove the cause of the decedent's death—it is his burden to prove the terms of cited standard were not met. Here, Graboski's employees were using a ladder "where the employee or the ladder *could* contact exposed energized electrical equipment." The ladder was resting on the edge of the roof within 5 feet of the nearest energized power line. Employees climbing up and down the ladder could contact the power line and employees repositioning the ladder could contact the power line with the ladder. The Secretary has established Graboski failed to comply with the terms of § 1926.1053(b)(2).

Employee Access to Violative Condition

The Secretary established Graboski's employees had access to the violative condition. The Crew Chief directed his son to reposition the metal extension ladder, which brought it into proximity of the energized power line. Graboski's employees climbed the ladder to access the roof, which brought them closer than 5 feet to the energized power line.

Employer Knowledge

In his statement, the Crew Chief said he and his crew had been using the two ladders on the site for four days at the time of the decedent's death. Supervisor Guilbert acknowledged (in a negative fashion) that he was aware the ladder had conductive siderails: "Not to my knowledge do these ladders have nonconductive type siderails." (Exh. G-6, p. 1.)

"An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor" for the purpose of establishing knowledge. *Access Equip. Sys.,* 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). "The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000) (citation omitted). The Crew Chief and the Supervisor are supervisory personnel whose knowledge is imputed to Graboski.

The Secretary has established Graboski was in violation of § 1926.1053(b)(12). Graboski argues that any violation of § 1926.1053(b)(12) is the result of unpreventable employee misconduct.

Unpreventable Employee Misconduct Defense

"To establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule." *Schuler-Haas Electric Corp*., 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006). Graboski argues it had "well-established workplace policies regarding ladder safety" in place at the time of the fatality (Graboski's brief, p. 30). That training, Graboski asserts, consisted of requiring "employees using ladders to keep them away from power lines and to seek help when carrying heavy ladders." *Id.*

The first element of the defense Graboski must show is that it established a work rule designed to prevent the violation. Here, the violation is using a ladder with conductive siderails where the employee or the ladder could contact exposed energized electrical equipment. Graboski has not shown that it has a work rule specifically requiring its employees to use a ladder with nonconductive siderails in such circumstances. Graboski presented regular Toolbox Talks to its employees in English and Spanish. On February 8, 2013, Graboski presented a Toolbox Talk on ladder safety, which devoted one sentence to using ladders near power lines: "Keep ladders, especially metal ones, away from overhead power lines." (Exh. R-4, pp. 42-43.) No mention is made of using ladders with nonconductive siderails or how far "away from overhead power lines" employees should keep the ladder.

Graboski also has failed to show it adequately communicated whatever general rules of ladder safety it had to its employees. The employees unanimously stated they had received no training regarding working safely near electricity and they were not trained in the safe distance to keep from energized power lines (Exhs. G-20, G-21, G-22, G-23). The Crew Chief was asked what distance his employees are supposed to maintain from energized power lines. He replied, "I don't know, we have not received training about electricity." (Exh. G-18, p.1.) When asked specifically what training he had received in ladder safety, the Crew Chief replied, "The ladder must be in good condition, try to know how long it has to be extending, ¼ inclination to distance,

to have 3 feet over the edge of the roof to use the ladder." (Exh. G-19, ¶ 20,) He stated he knew of no rule that would "limit the use of metal ladders." (*Id.,* ¶ 22.)

Graboski does not have a work rule specifically prohibiting employees from using ladders with conductive siderails when working in proximity to energized electrical equipment. Although Graboski claims it has more general work rules requiring employees using ladders to keep them away from power lines, none of its employees were aware of these rules, including its Crew Chief. The Crew Chief himself ordered his son to reposition the metal ladder from its location 5 feet away from the energized power line. "Where a supervisory employee is involved the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of his employees under his supervision . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors, Ltd.,* 15 BNA OSHC 1013, 1017 (No. 87-1076, 1991).

The Court determines Graboski has failed to establish the violation of § 1926.1015(b)(12) was the result of unpreventable employee misconduct. Item 2 is AFFIRMED. The Secretary properly classified Item 2 as serious.

Citation No. 2

Item 1: Alleged Willful Violation of § 1926.501(b)(13)

Alleged Violation Description

Item 1 of Citation No. 2 states,

> 29 CFR 1926.501(b)(13): Each employee(s) engaged in residential construction activities 6 feet (1.8 m) or more above lower levels were not protected by guardrail systems, safety net system, or personal fall arrest system, nor were employee(s) provided with an alternative fall protection measure under another provision of paragraph 1926.501(b):
>
> a. On or about June 15, 2013, at the above addressed jobsite, two employees were applying coal tar (hot mopping) onto a two-story residential steep slope (6:12) roof, without the use of conventional fall protection, therefore exposing the employees to a fall hazard of approximately 19 feet-4 inches.[5]
>
> b. On or about June 27, 2013, at the above addressed jobsite, six employees were applying cement to roof tiles on a two-story residential steep slope (6:12) roof, without the use of conventional fall protection, therefore exposing the employees to a fall hazard of approximately 19 feet-4 inches.

[5] In his post-hearing brief, the Secretary withdraws Instance (a) "due to insufficient evidence establishing the date." (Secretary's brief, p. 11.) Instance (b) is, therefore, the only instance at issue.

§ 1926.501(b)(13)

Section 1926.501(b)(13) 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.
>
> 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.

Applicability of the Cited Standard

It is undisputed that Graboski's tiling crew was engaged in residential construction activities at the Spanish River Road worksite on June 27, 2013. The distance from the ground to the bottom of the second story roof edge is 19 feet, 4 inches (Exh. G-2; Tr. 37). Thus, fall protection was required for the crew members working on the roof at the worksite. Section 1926.1053(b)(13) applies to the cited conditions.

Compliance with the Terms of the Standard

Graboski does not contend compliance with § 1926.501(b)(13) was either infeasible or presented a greater hazard. Graboski asserts its employees were tied off at all times as required by the standard. Thomas Potter, Graboski's general manager, testified the crew members were all wearing personal fall arrest (PFA) systems consisting of harnesses with attached lanyards that were each tied to individual anchors. Graboski contends CSHO Tiesi "inferred that employees were exposed to fall hazards based on a mistaken determination that the crew did not have sufficient equipment for all members of the crew, and that the equipment that was on-site was comprised of 'mix-match' components." (Graboski's brief, p. 21.)[6]

Potter explained that all crew members are tied off with lanyards to individual anchors as they begin the tiling process. As the process nears completion, each anchor must be covered up

[6] The day of the fatality, CSHO Tiesi asked to see all the personal fall arrest equipment on the site. Potter directed the employees to retrieve the equipment from the work trailer. CSHO Tiesi photographed the equipment (Exh. G-16.) CSHO Tiesi found fault with the fall arrest equipment because it "appears to be components from different systems that are put together to make a system." (Tr. 145.) On cross-examination, it became clear that CSHO Tiesi found the fall protection equipment lacking because he only observed one anchor available for use by five employees working on the roof. Graboski established, however, that the anchors it uses are covered over during the tiling process and remain on the roof. CSHO Tiesi's testimony regarding what he considered to be inadequate fall protection equipment is not given any weight.

one by one. According to Potter, every time a crew member's anchor is covered up, the worker descends from the roof, leaving only tied-off workers there. "It's a process of elimination as to who gets on the roof and who stays off the roof because again there's less and less work activity because there's less and less work to do." (Tr. 330.) Potter stated that when the last cap is placed, "there is one person up there, and that's when he does the cement." (Tr. 333.) This process, Potter testified, takes "one minute" and then the last employee descends from the roof (Tr. 333).

Potter's testimony is at odds with the signed statement he gave to CSHO Tiesi on July 17, 2013. CSHO Tiesi wrote down Potter's statement and gave it to him to review. Potter then initialed the first page of the statement and signed the last page (Exh. G-9). Less than one month after the fatality at the Spanish River Road worksite, Potter told CSHO Tiesi,

> On this job, and most if not all of the residential roofing jobs, the crew will have to roof over (cover) the anchors with roofing material. From this point on, the crew has nothing to tie this life-line to. On this job, as with others, there is about a day to a day and a half, that the crews are working to finish the job and they do not have anchors to tie off to.

(Exh. G-9, p. 1.)

At the hearing, Potter attempted to explain away his signed statement: "It was either I didn't make myself clear or I didn't read it properly." (Tr. 334.) When cross-examined about the discrepancies between his signed statement and his testimony at the hearing, Potter became evasive and appeared ill at ease, twice answering, "If you say so," and stating he couldn't remember the details of his statement (Tr. 350-353). Having closely observed Potter's demeanor, the Court determines that his testimony contradicting his signed statement that the crew members worked on the roof while not tied off is not credible.

Furthermore, Potter's signed statement is congruent with the signed statements of the crew members working at the Spanish River Road worksite. The Crew Chief stated he and the members of his crew who were on the roof were not tied off the day of the accident, in his replies to CSHO Leorza's questions:

> (15) Were you tied off when you were on the roof?
> No, we had already finished the roof.
> (16) You had told me that the company rule is for when you are working on the roof you must wear a harness and must be tied off but now you told me that you were not tied off?
> We had finished the roof and were detailing and cleaning the roof.

(17) When the boys in the group were cleaning the roof were they using the harness and tied off?
They were using the harness but they were not tied off.

* * *

(29) With the knowledge that the company's safety rules that you must be tied off when working on the roof, do you think you were following the company rules?
Yes, we're following the company rules because the roof was already finished and sealed and there is no place to tie off.
(30) Does the company have an alternative rule and procedures to protect employees working on the roof than can't be tied off?
I don't know.

(Exh. G-19.)

A crew member stated, "We were finishing and once we cement we cannot tie off because there are no anchors." When asked what fall protection they used, he replied, "By walking carefully and away from the border." (Exh. C-20). Another crew member was asked, "When you cannot tie off and have to work on the roof, what type of protection do you all use to protect yourself against falls?" He responded, "Work carefully." (Exh. G-22).

It is not surprising Graboski's employees stated they do not tie off once they have covered up the anchors. This policy was formalized in Graboski's written *Fall Protection Plan for Residential Roofing Construction*, effective September 16, 2011, and issued to its employees in English and Spanish. The plan states in pertinent part:

> Effective September 16, 2011, all Tim Graboski Roofing employees working on a roof must use a personal fall arrest system. An employee engaged in the following are [sic] exempt from the PFA mandate:
>
> * * *
>
> 5. At the end of the tile installation process, the anchors must be removed and the resulting space be covered with the tile installation. The remaining work including tile pointing, blowing off debris and wet sponging the cement joints, of necessity, will be performed unattached to the PFA system.

(Exh. R-2.)

Potter testified Graboski modified the plan after the fatality at issue occurred to strike Item 5 "because it was not clear." (Tr. 327.) Potter conceded the plan was in effect at the time its crew was working at the Spanish River Road worksite (Tr. 358). Potter denied Item 5 instructed its employees they did not have to tie off while tile pointing, blowing off debris, and wet sponging the cement joints. "[T]he intent of that, what it meant was not during the whole process, it was at the end of the process. And most of it involved weep holes which is on the

eave edge which is done, like I said before at some point, by a ladder. You're not, so that's what was meant by it. And as I said before, we changed it and we struck it. Our current policy doesn't have 5 on it." (Tr. 359.) Potter also denied that its crew was following its plan the day of the fatality.

> Q. So, based upon this company policy, the Tim Graboski crews that were working at 1400 Spanish River Road could have understood that they were allowed to be tied off or that they didn't have to be tied off while they were tile pointing, blowing off debris, and wet sponging the cement joints, correct?
>
> Potter: Of a practical nature, they didn't do it that way. They did it the way I have explained they did it.
>
> Q. How do you know that? Did you ever go to the, you never went to the work site until after the accident, correct?
>
> Potter: That particular site, I was not there, you're correct.
>
> Q. So, you don't know from personal knowledge what you just testified to, that they would not have been untied?
>
> Potter: Correct.
>
> Q. But you've testified that the crew had this work policy, this fall protection plan policy that was in effect, correct?
>
> Potter: I don't understand the question.

(Tr. 360-361.)

Potter, the Crew Chief, and the crew members all gave signed statements to OSHA less than a month after the Spanish River Road worksite fatality stating that tiling crews routinely worked while not being tied off once the tiles were installed. The Crew Chief and the crew members stated they were not tied off while on the roof at the time the fatality occurred. Graboski's written fall protection plan in effect at that time plainly stated the tiling crew is permitted to work on the roof while unattached to anchors once the tiles are installed. Based on the evidence, the Court determines Graboski failed to comply with the terms of § 1926.501(b)(13).

Employee Access to Violative Condition

The crew members working on the roof at the Spanish River Road worksite were exposed to the hazard of falling 19 feet, 4 inches. Their access to the violative condition is established.

Employer Knowledge

The Crew Chief had actual knowledge that he and his crew members were not tied off while working on the roof. As a supervisor, the Crew Chief's actual knowledge is imputed to

Graboski. In addition, Graboski had constructive knowledge its tiling crews did not tie off once the tiling installation was completed. Graboski had formalized this policy in its written *Fall Protection Plan for Residential Roofing Construction.* Employer knowledge is proven.

The Secretary has established Graboski was in violation of § 1926.501(b)(13).

Unpreventable Employee Misconduct Defense

Graboski contends any violation of § 1926.501(b)(13) is the result of unpreventable employee misconduct. To reiterate, "To establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule." *Schuler-Haas Electric Corp*., 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006).

As discussed above, Graboski's established work rule regarding the use of fall protection for tiling crews was not designed to prevent the violation—in fact it encouraged the violation of § 1926.501(b)(13) by exempting tiling crews from the requirement to tie off once the tiling installation was completed. This exemption was communicated to the employees by dissemination of its *Fall Protection Plan for Residential Roofing Construction* to Graboski's employees in English and Spanish. The Crew Chief cited this policy to OSHA in his signed statement as his excuse for not requiring his crew members to tie off. Rather than establishing employee misconduct, the record demonstrates the tiling crew was following Graboski's written fall protection plan that was in effect at the time of June 27, 2013, inspection.

Graboski's affirmative defense of unpreventable employee misconduct is not established. Item 1 of Citation No. 2 is AFFIRMED.

Willful Classification

The Secretary classifies the violation of Item 1 of Citation No. 2 as willful.

> A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.,* 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993) (consolidated*); A.P. O'Horo Co.,* 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct

> or conditions and by a state of mind, i.e., conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.,* 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated).

A.E. Staley Manufacturing Co., 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

Graboski is a roofing company, with crews working at heights that require fall protection on a daily basis. Graboski is well aware of OSHA's requirement to provide fall protection to employees working at heights of 6 feet and higher. In his statement to OSHA taken on July 17, 2013, Potter stated:

> The employees do not want to wear fall protection, so are apt to quit if we take enforcement of them. Also we have a shortage of qualified workers in this area, due to the increase in construction, we are losing jobs, because we don't have enough qualified employees to do the work, after we are awarded the bid. . . . The main reason that we are not able to enforce fall protection use, is not due to economics or loss of the bid, but because the employees will quit and just go work for another roofing company the next day that does not enforce fall protection or use safety standards.

(Exh. G-9.)

On June 27, 2013, members of Graboski's tiling crew, including its Crew Chief, were working at a height of 19 feet, 4 inches, and were not tied off. In their statements to the CSHO, the crew members did not attempt to excuse or minimize this conduct because they were following the training Graboski had put into effect as of September 16, 2011. Graboski's written *Fall Protection Plan for Residential Roofing Construction* states the tiling crew is exempt from tying off once the tiles are installed ("The remaining work including tile pointing, blowing off debris and wet sponging the cement joints, of necessity, will be performed unattached to the PFA system." (Exh. R-2.)).

It is unclear if this exemption was incorporated into Graboski's fall protection plan as a concession to the tiling crew's preference for working unattached to anchors because, in Potter's words, the employees "are apt to quit if we take enforcement of them." (Exh. G-9.) If this is the reason Graboski implemented the exemption, then Graboski has demonstrated an intentional, knowing, and voluntary disregard for the requirements of the Act. If the written exemption is the result of a mistake or oversight by Graboski, then Graboski has demonstrated plain indifference to employee safety. In either case, Graboski has committed a willful violation of § 1926.501(b)(13).

Potter testified that sometime in October of 2013, approximately three months after OSHA's June 27, 2013, inspection, Graboski eliminated Item 5 of the exemption "because it was not clear." (Tr. 327.) The wording of Item 5 is not, however, ambiguous. It appears to be quite clear in its intent. If the exemption had inadvertently slipped through the editing process or had been the result of a misunderstanding, one would expect Item 5 to be changed quickly and Graboski's employees to be notified of the mistake. Instead, the exemption, which became effective September 16, 2011, was Graboski's official written policy, permitting its tiling crews to work without fall protection, for over two years. It was in effect on June 27, 2013, the day of the instant OSHA inspection, a year and nine months after its implementation. The crew members referred to the exemption in their statements to the CSHOs. The Crew Chief was asked if he thought he was following Graboski's safety policy as he and his crew members worked unattached on the roof. He replied, "Yes, we're following the company rules because the roof was already finished and sealed and there is no place to tie off." (Exh. G-19.)

As a roofing company, the most obvious hazard Graboski must guard against on a daily basis is an employee falling off a roof. Training in the requirements of § 1926.501(b)(13) should be paramount. Yet Graboski implemented an official exemption in its written fall protection plan that allowed its employees to work in direct contravention of the requirements of that standard. Graboski has an obligation to review the applicable OSHA standards and to train its employees in their requirements. Graboski has a safety director and a safety committee that meets once a month (Tr. 288). Graboski provides weekly safety training to its employees in the form of Toolbox Talks. Upon hiring, employees must watch safety videos and a demonstration on how to properly wear PFA equipment (Tr. 292). Graboski invites outside vendors to conduct presentation on fall protection safety (Tr. 295-296). Graboski also conducts annual company-wide training during which it shuts down field work for the day and presents various safety demonstrations (Tr. 310-313). Despite Graboski's awareness of fall hazards and its familiarity with safety training, Graboski gave its tile crews license to engage in a highly dangerous activity on a regular basis. Whether this was done to accommodate the crews' reluctance to use fall protection or through carelessness in understanding the requirements of § 1926.501(b)(13), Graboski has manifested plain indifference to the safety of its employees.

The Secretary has established that Graboski's violation of Item 1 of Citation No. 2 is willful.

PENALTY DETERMINATION

Under § 17(j) of the Act, the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The number of Graboski's employees was not adduced. CSHO Tiesi stated only that Graboski did not receive a reduction for size "at the area director's discretion." (Tr. 153.) Graboski has a history of OSHA inspections (Tr. 154). The Secretary did not adduce evidence establishing Graboski demonstrated less than good faith.

The gravity of each of the violations is high. The six crew members were on the site for four days, during which time Graboski never ascertained whether the power lines approximately 5 feet away from the edge of the roof on which the employees were working were energized. The power lines were, in fact, energized and were the likely cause of the death of one of the crew members as he repositioned the metal ladder with conductive siderails in proximity to the power lines. Five of the crew members were working on the roof while unattached to anchors, exposing themselves to a fall of 19 feet, 4 inches. The failure of the crew members to tie off was condoned by the written fall protection plan disseminated to the employees.

Upon due consideration of the statutory factors under § 17(j) of the Act, the Court assesses a grouped penalty of $7,000.00 for Items 1a and 1b and a penalty of $7,000.00 for Item 2 of Citation No. 1. The Court assesses a penalty of $70,000.00 for Item No. 1 of Citation No. 2.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Item 1a of Citation No. 1, alleging a serious violation of § 1926.416(a)1) is AFFIRMED;

2. Item 1b of Citation No. 1, alleging a serious violation of § 1926.416(a)(3) is AFFIRMED. A grouped penalty of $7,000.00 is assessed for Items 1a and 1b.

3. Item 2 of Citation No. 1, alleging a serious violation of § 1926.1053(b)(12) is AFFIRMED and a penalty of $7,000.00 is assessed; and

4. Item 1 of Citation No. 2, alleging a willful violation of § 1926.501(b)(13), is AFFIRMED and a penalty of $70,000.00 is assessed.

/s/ Sharon D. Calhoun

Date: March 2, 2015

Sharon D. Calhoun
Judge