

*THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING
COMMISSION REVIEW*



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor,

Complainant,

v.

StormForce of Jacksonville, LLC,

Respondent.

OSHRC Docket No. **19-0593**

Appearances:

Dane L. Steffenson, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia,
for Complainant

Andrew M. Fredrickson, Esq. and Anthony D. Tilton, Esq., Cotney Construction Law, LLP, for
Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

After receiving an anonymous complaint about hazardous working conditions, the Jacksonville Area Office of the Occupational Safety and Health Administration initiated an inspection of a roofing job at a house in West Jacksonville, Florida. Compliance Safety and Health Officer Nolan Houser conducted the inspection. At the worksite, he found five roofers on a 13 ½ foot high, low-sloped, residential roof, none of whom appeared to be using any form of fall protection. The crew consisted of employees of Florida Roofing Experts, Inc. (FRE). From information he obtained on the site, CSHO Houser discovered StormForce of Jacksonville, LLC, (StormForce) was the general contractor for the job. Based upon these findings, the Secretary issued StormForce a single item citation alleging a serious violation of 29 C.F.R. § 1926.501(b)(13) for failure to provide fall protection. The Secretary issued the citation to

StormForce under the multi-employer worksite doctrine. The Secretary proposes a penalty of \$10,210.00 for the citation.

There is little doubt the roofing crew observed by CSHO Houser was not protected from a fall hazard. The question is: Was StormForce properly cited for the exposure of FRE's roofing crew? To answer that question, the court must interpret and apply the Commission's multi-employer worksite doctrine to the unique facts of this case.

The undersigned held a hearing in this matter on December 9 and 10, 2019, in Jacksonville, Florida. The parties filed post-hearing briefs on March 13, 2020.¹

For the reasons discussed below, the citation is affirmed and a penalty of \$10,210.00 is assessed.

JURISDICTION

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651. The parties also stipulated at the hearing that at all times relevant to this action, StormForce was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Tr. 12). Based on the parties' stipulations and the facts presented, StormForce is an employer covered under the Act and the Commission has jurisdiction over this proceeding.

BACKGROUND

Stipulated Facts

The parties stipulated to the following facts:

Respondent retained Florida Roofing Experts, Inc., as a subcontractor at a work site located at 3502 Lenczyk Drive, West Jacksonville, Florida 32277.

Respondent's employees were not exposed to any alleged hazard at the inspection site.

The citation at issue is not based on any alleged exposure of Respondent's foreman, which is the only employee it had at the inspection site.

OSHA's compliance safety and health officer entered the inspection site on September 28, 2018.

Respondent's employees were not present at the inspection site on September 28, 2018, during OSHA's inspection.

And OSHA issued one serious citation to the Respondent for an alleged violation of 29 CFR 1926.501(b)(13) as a result of this inspection.

¹ To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned.

(Tr. 11-12)

During the course of the hearing, the parties further stipulated the pitch of roof at the worksite was less than 4 in 12 and met the definition of a low-slope roof found at 29 C.F.R. § 1926.500(b) (Tr. 321-22). The parties agreed the width of the roof was less than 50 feet (Tr. 321). The Secretary also stipulated he did not contend StormForce was the correcting employer as that term is used in his multi-employer worksite policy (Tr. 355).

StormForce's Operations

StormForce is a family-owned roofing contractor doing business in Jacksonville, Florida, since 2012 (Tr. 45). It is owned by Rebecca Manderson and her husband (Tr. 219). Thomas Ashley is the company president (Tr. 221-21). For the past seven years, the Manderson's son, Jacob, has been the company's Area Installation Manager (AIM) and holds the company's roofing license for the State of Florida (Tr. 41, 44). StormForce contracts directly with homeowners to perform roofing work on their homes. At the time of the inspection, StormForce had 31 employees (Tr. 46).

None of StormForce's employees perform roofing work. Rather, it subcontracts for all its labor. Since 2017, StormForce exclusively used Florida Roofing Experts (FRE) for its labor needs. Prior to that, StormForce used Great White Construction. Travis Slaughter is the owner of FRE and its predecessor, Great White Construction. In the last three years, AIM Manderson estimated it had completed 600 to 700 roofing jobs using labor supplied by company's owned by Travis Slaughter.

For each of its roofing jobs, StormForce was responsible for scheduling with the homeowner, ordering and coordinating delivery of the materials, overseeing logistics, inspecting the work performed, and obtaining and distributing payment (Tr. 41, 81, 175). AIM Manderson is responsible for oversight of these aspects of the job. StormForce employs roofing inspectors and site foremen who report directly to AIM Manderson (Tr. 42). It assigns a single site foreman for each of its roofing jobs. AIM Manderson trains StormForce's site foremen (Tr. 186).

The Site Foreman

The site foreman's duties are spelled out in StormForce's Job Summary² and training materials (Exhs. C-2 and R-27). According to the Job Summary, the "Site Foreman is responsible for managing the subcontractor's crew while replacement roofs are being installed." (Exh. C-2) He serves as the point of contact with the homeowner, verifies the job is being done according to "technical specifications," manages material needs, and obtains homeowner sign off and payment (Exh. C-2).

The site foreman's procedures for any given worksite are outlined in the training materials (Exh. R-27 pp. 14-15; Tr. 99). The site foreman is assigned his jobs for the week on Sunday evening. He is responsible for putting together the "installation package" which includes various paperwork. The site foreman is to arrive at the worksite by 7:00 a.m., when he is to introduce himself to the homeowner, let the homeowner know he is the point of contact, and place StormForce's sign in the yard. He checks the materials for accuracy. Once the crew arrives, the site foreman holds a "crew huddle." During the crew huddle, the site foreman identifies the subcontractor's crew leader and exchanges contact information; he reminds the crew he is the only point of contact for the homeowner; and he reviews the scope of work, the dress and language codes, and the HVAC and home protection protocols with the subcontractor's crew (Tr. 100-01). The site foreman has responsibility to inspect the work at several stages of the roofing process and is required to take pictures (Tr. 100-03). The site foreman is to take pictures that cover 31 items enumerated in the training materials and upload the pictures to StormForce's customer relations manager (CRM) (Exh. R-17 p. 18; Tr. 121). He conducts the final inspection with the homeowner, completes the final paperwork, and uploads the information to the CRM.

² AIM Manderson testified StormForce had a newer version of the Job Summary for the site foreman position (Tr. 116). He had testified similarly in his deposition (Tr. 113-14). AIM Manderson's testimony appeared heavily coached. Certain responses were repeated nearly verbatim. Although his position with the company involved significant responsibility, he claimed ignorance of basic operations. He repeatedly refused to confirm the authenticity of company documents produced to the Secretary in discovery. In addition to appearing coached, AIM Manderson testified in a halting manner, seeming to consider what answer would be most beneficial, rather than providing candid responses. Based upon his demeanor and manner of testifying, the undersigned did not find AIM Manderson a credible witness. StormForce did not produce the newer version of the job description in discovery. Nor did it submit a different version at hearing. Failure to submit evidence within a party's possession and control raises an inference the evidence does not exist or would be unfavorable to it. *Capeway Roofing Systems, Inc.*, 20 BNA OSHC 1331 (No. 00-1968, 2003) (citations omitted); *see also Regina Contr. Co.*, 15 BNA OSHC 1044, 1049 ((No. 87-1309, 1991).

According to AIM Manderson, a site foreman would typically be assigned five to seven jobs per week or two per day (Tr. 176, 272). At the time of the inspection, StormForce was only contracting with homeowners for residential roofing work (Tr. 292). StormForce's residential roofing jobs take one to two days to complete (Tr. 273). In order to complete his job assignments, the site foreman would need to be on the worksite at least three times (Tr. 104).

To ensure the work of the subcontractor was done properly, according to code, and in conformance with the subcontract, the site foreman did not interact directly with the subcontractor's employees. Rather, the site foreman was to notify the subcontractor's management of any infractions (Tr. 93, 118, 290-91). StormForce had found this the most effective way to address any concerns with the work or conduct of subcontractor employees because they "listen to their own supervisors." (Tr. 118, 270-71) AIM Manderson testified this was an effective method of ensuring compliance with all the terms of the subcontract (Tr. 71-72, 110, 167, 290-91).

The training materials contain a page titled: "Site Foreman Safety and Check Lists and Procedures" delineating the site foreman's responsibilities with regard to safety (Exh. R-27 p. 13) Tr. 107-08). The Site foreman's responsibilities are

- 1) Overseeing job progress and ensuring that work is carried out in conformance with the Subcontract Agreement between StormForce and its Subcontractor;
- 2) Managing, ordering, and attending to the building material needs for the project;
- 3) Maintaining the job schedule and project timelines;
- 4) Performing estimates and cost analysis for the purposes of meeting customer expectations; and
- 5) Examining the installation in order to ensure that work meets or exceeds all applicable building codes.

(Exh. R-27 p. 13) It specified the site foreman was not responsible for training, monitoring, or disciplining the subcontractor's employees for safety and health compliance; for inspecting or monitoring the worksite for subcontractor employee safety and health compliance; or for providing the subcontractor's employees with safety equipment. *Id.* The document contained a caveat which stated:

***Please note that Site Foreman should recognize when a Subcontractor's employee is engaged in work which is dangerous and could result in death or serious injury. It is certainly not StormForce's policy to ignore this type of behavior. If a Site Foreman witnesses a Subcontractor's employee working in

violation of OSHA rules, the Site Foreman will contact Subcontractor's home office and notify the company director of this conduct.***

Id. AIM Manderson testified the expectation is that the site foreman will ensure the subcontractor has fall protection equipment and that they are using it (Tr. 109). If it is not being used, the site foreman is to report it to the subcontractor's foreman. (Tr. 69-72; 110). The checklist addressed this requirement with a space to check whether the site foreman has notified the subcontractor of an observed safety infraction.

The Subcontract for Labor

For the job at issue, StormForce and FRE had a written master subcontractor agreement (Exh. R-26).³ Under the terms of the agreement signed by Travis Slaughter, FRE supplied all "equipment, labor and services" required to complete each roofing job (Exh. R-26 p. 1). The equipment supplied by the subcontractor was the nail guns and compressor, ladders, and fall protection equipment (Tr. 177). FRE was responsible for securing all necessary permits (Exh. R-26 p. 3; Tr. 177). The agreement specifically prohibits FRE from placing any sign on the worksite that shows its name (Exh. R-26 p. 9). Attached to the master agreement is a standard fee agreement specifying the price for services "per square" and the payment terms (Exh. R-26 p. 12-13).

Jobs performed under the master subcontract are done so pursuant to a specific work or labor order. A sample work order is attached to the master agreement with spaces for, among other things, the start and end dates, location, and a description of what was to be provided (Exh. R-26 p. 14).⁴ In the description section, StormForce provided the subcontractor with the size and pitch of the roof, and the number of pre-existing layers to be torn off (Tr. 276; Exh. R-29). Other items the subcontractor might provide, such as a dumpster, would also be included in this section (Exh. R-29). Prior to commencement of a job, StormForce provides FRE with a calendar invite specifying the date the job was to commence, the work order, and the notice of commencement from the homeowner (Tr. 281). FRE selects which of its crews will perform a job without input from StormForce (Tr. 183).

³ Although the effective date of the contract is October 6, 2017, the date at the bottom of each page of the document is March 1, 2013, suggesting the form had been used in the past. This, along with AIM Manderson's testimony StormForce did nothing to change their procedures after receiving a citation in 2016 (Tr. 69) makes suspect StormForce's contention it changed its policy regarding direct supervision of FRE's employees sometime between 2016 and the inspection.

⁴ Exhibit R-29 is the work order for the worksite.

Also attached to the master agreement was a document titled “Subcontractor Expectations.” (Exh. R-26 p. 16-20). Included in this document are guidelines for scheduling, communications, storage of materials, billing, and the procedures on the job beginning with “pulling up to the job site.” (Exh. R-26 pp. 16-20). The first general guideline in the document states

During the performance of your work at the Project, the actions and behavior or (sic) your employees reflect upon the reputation of “**StormForce of Jacksonville LLC (StormForce)**. Do not take any actions or conduct yourself in a way that would be interpreted unfavorably upon StormForce and do not mention any other company names while working.

(Exh. R-26 p. 16, emphasis in the original) Subcontractor crews are prohibited from wearing garments with other contractor’s names, or obscene or vulgar pictures or phrases. The subcontractor must do the job when scheduled and a crew may not begin a new job until the current job is complete. All rescheduling of jobs is to be done by the AIM. The subcontractor must communicate with the StormForce site foreman regarding arrival and departure times. The subcontractor decides when it will begin work, as long as work begins before 9:00 a.m., and sets the lunch and departure schedule for its crew (Tr. 178). It is to communicate any issues with material shortages or other problems related to the work to StormForce’s site foreman. The document contains additional provisions addressing quality of work, protection of the homeowner’s property, housekeeping, and cleanup.

The master subcontract between StormForce and FRE contained provisions addressing safety at the worksite, including StormForce’s obligations to FRE’s employees (Exh. R-26 pp. 7-8). Under the contract, the subcontractor’s employees were “required to follow the safety rules, regulations and procedures instituted by [FRE], StormForce or any other contractor on the project and shall comply with all safety requirements identified in the Occupational Safety and Health Act of 1970” (Exh. R-26 p. 7). The master subcontract specified StormForce had no responsibility for training or disciplining FRE’s employees with regard to safety infractions. It contains an acknowledgement by FRE that it

shall control and implement all required safety procedures, and that StormForce shall only perform site visits for the purposes of determining conformance with the plans and specifications for the project. As a result, StormForce shall not be able to ensure Subcontractor (while working for Subcontractor) adherence to safety standards and the OSHA Act because StormForce cannot reasonably be expected to prevent, detect or abate violative conditions by reason of its limited

role on the project. Therefore, Subcontractor shall be solely responsible for controlling safety on the jobsite as it related to Subcontractor.

Id. Should StormForce observe a safety infraction, the contract states “StormForce’s sole remedy shall be to contact [FRE’s] management personnel and identify the breach of contract.”

Id.

The Worksite and the Inspection

In 2018, StormForce contracted with the homeowner of 3502 Lenczyk Drive, in West Jacksonville, Florida, to replace the home’s roof. FRE provided a five-man crew to perform the work (Tr. 50, 230).⁵ The job took two days to complete (Tr. 128). It began, September 27, 2018, and was completed by September 28, 2018. David Nosal⁶ was StormForce’s site foreman for the job (Tr. 49).

The worksite consisted of a single-story home with a low-slope roof (Exhs. C-13 and C-15). The height of the roof was 9 feet, 6 inches at the eave and 13 feet, 6 inches at the gable (Tr. 235). Photographs of the worksite taken by Site Foreman Nosal show the crew was required to tear off the existing roof and replace it with a new asphalt shingle roof (Exh. C-14).

On September 28, 2018, the Jacksonville Area OSHA Office received a complaint regarding worksite conditions at 3502 Lenczyk Drive. CSHO Houser was assigned to investigate the complaint (Tr. 227). As he drove up to the home, CSHO Houser observed five individuals working on the roof without the use of fall protection (Tr. 230, 233). He took video and photographs from the public street prior to entering the site (Tr. 229-31). Upon CSHO Houser’s entering the worksite and identifying himself, the crew began to pack up their gear (Tr. 235-36). CSHO Houser was able to determine the individual in charge of the worksite was named Alfredo. Alfredo spoke little English. CSHO Houser obtained minimal information from the crew in the short time they remained onsite after he arrived. He observed fall protection equipment in the crew’s van (Tr. 244).

Based upon information he obtained from Alfredo’s phone and the permit posted at the worksite, CSHO Houser identified FRE as the employer of the roofing crew. He unsuccessfully

⁵ FRE also provided, and separately billed for, the dumpster.

⁶ Site Foreman Nosal left StormForce’s employ three months after the inspection (Tr. 49). He was not called to testify by either party. As a former employee, he was equally available to either party via subpoena.

attempted to contact FRE (Tr. 241).⁷ The dumpster on site had a magnetic sign with StormForce's name and number on it and Alfredo identified the job site as belonging to StormForce (Tr. 237-38, 241). CSHO Houser called the number and was able to speak with AIM Manderson (Tr. 242). No one from StormForce was available to come to the worksite. The following Monday, CSHO Houser met with StormForce's company president, AIM Manderson, and Site Foreman Nosal (Tr. 244). During his meeting with StormForce personnel, CSHO Houser requested, and StormForce provided, the photographs maintained in the company's CRM for the worksite (Tr. 245-46). CSHO House interviewed Site Foreman Nosal who could not recall whether FRE employees were using any fall protection (Tr. 246).

Based upon his investigation, CSHO Houser recommended a citation alleging a single serious violation of § 1926.501(b)(13) be issued to StormForce. CSHO Houser based his recommendation on his conclusion StormForce was the controlling employer onsite due to its overall oversight of the job. The Secretary issued StormForce the citation March 25, 2019. StormForce timely filed its notice of contest.

DISCUSSION

The Citation

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.*, No. 05-1907, 2009 WL 2567337 (OSHRC August 11, 2009).

⁷ Travis Slaughter, the owner of FRE and its predecessor company with whom StormForce subcontracted for labor, was well-known to the Jacksonville Area Office having been inspected and cited many times and having a reputation for a "disregard for safety." (Tr. 238-39) The undersigned takes judicial notice the Eleventh Circuit has issued orders of summary enforcement and contempt against Florida Roofing Experts, Great White Construction, and Travis Slaughter for failure to comply with final orders of the Commission. *See Secretary of Labor v. Great White Construction, Inc.*, Docket No. 17-13711-D, Order for Summary Enforcement (11th Cir. October 2, 2017); *Secretary of Labor v. Great White Construction, Inc.*, Docket No. 17-15760-E, Order of Summary Enforcement (11th Cir. June 5, 2018); *Secretary of Labor v. Great White Construction, Inc., Travis Slaughter, and Florida Roofing Experts, Inc.*, Docket No. 19-13261-J, Order of Civil Contempt (11th Cir. September 26, 2019). Photographs of multiple worksites taken by StormForce site foremen and maintained by StormForce show roofing crews exposed to fall hazards (Exhs. C-11 and C-12; Tr. 140-43, 203, 251-52). The undersigned finds AIM Manderson's testimony he was unaware of FRE's history of noncompliance less than credible.

Item 1, Citation 1, alleges a violation of 29 C.F.R. § 1926.501(b)(13). The standard requires

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.

The citation alleges

On or about September [28], 2018,⁸ the employer failed to assure that five subcontracted employees conducting re-roofing work on a 3:12 pitch roof were protected from a 13-foot, 6 inch fall hazards by the use of a personal fall arrest systems, or any alternative fall protection measure.

The Secretary contends StormForce's failure to provide a safe workplace to FRE's employees exposed to fall hazards at the West Jacksonville, Florida, worksite constituted a violation of the cited standard.

Applicability of the Standard

There is no dispute the work being performed at the cited worksite was construction work as that term is defined in 29 C.F.R. § 1910.12(b) and that the construction standards apply. The cited standard more narrowly applies only to residential construction. Residential construction is not defined in the standards. The structure at the worksite was a residence. The Commission and the Secretary have historically applied residential construction standards to residences and other structures built using traditional residential construction techniques. *Capeway Roofing Systems, Inc.*, No. 00-1968, 2003 WL 22020485, at *10 (OSHR August 26, 2003), *aff'd*, *Capeway Roofing Systems, Inc. v. Chao*, 391 F.3d 56 (1st Cir 2004).⁹ The standards applicable to residential construction apply.

In addition to being residential construction, the work being performed was roofing work on a low-slope roof as that term is defined in 29 C.F.R. § 1926.500(b). Fall protection

⁸ Testimony was adduced at hearing the date input by CSHO Houser was inaccurate and should have reflected the date of his inspection or September 28, 2018. StormForce did not argue the citation should be vacated, or that it suffered any prejudice, on the basis of this discrepancy. The undersigned amends the citation to allege a violation on or about September 28, 2018, to conform to the evidence.

⁹ OSHA's directive on residential construction, which the Commission referenced in *Capeway Roofing Systems*, states residential construction is characterized by wood framing and using traditional wood frame construction techniques. OSHA Instruction STD 3-0.1A (June 18, 1999).

requirements for such work is addressed in 29 C.F.R. § 1926.501(b)(10). The residential construction standard limits acceptable forms of fall protection to guardrails, safety nets, or personal fall arrest systems “unless another provision in paragraph (b) of this section provides for an alternative fall protection measure.” Under the unique circumstances of this case § 1926.501(b)(10) is one such “provision of paragraph (b)” that “provides for an alternative fall protection measure.” Consequently, compliance with § 1926.501(b)(13) was not limited to the three forms of traditional fall protection enumerated in that standard, but also included any alternative fall protection permitted in § 1926.501(b)(10).

StormForce’s argument the Secretary should have cited § 1926.501(b)(10) creates a false dichotomy between the two standards. Section 1926.500(b)(10) applies broadly to all roofing work on low-slope roofs, whether commercial or residential. Likewise, § 1926.501(b)(13) applies to all residential construction work, not only roofing work. The overlap of the two standards, where roofing work is being performed on a low-slope residential roof is addressed in the plain language of § 1926.501(b)(13) which allows for alternative protective measures where another provision of paragraph (b) also applies.¹⁰ It is within the Secretary’s prosecutorial discretion to choose which of two equally applicable standards to cite. The issue in dispute is whether StormForce provided any of the permissible forms of fall protection.

Violation of the Standard

The evidence is undisputed, on the day of the inspection, no guardrails or safety nets were in use at the worksite. The documentary evidence establishes the roofing crew was not using any type of personal fall arrest system (Exhs. C-13 and C-15). Under § 1926.501(b)(10), the roofing crew could have used a safety monitoring system as fall protection. The preponderance of the credible evidence establishes they did not.

The requirements of a safety monitoring system are enumerated in 29 C.F.R. § 1926.502(h).¹¹ Important among those requirements is that the safety monitor have no other responsibilities while performing his monitoring functions. CSHO Houser observed all five

¹⁰ There is no dispute the roof was over 6 feet above the lower level necessitating some form of fall protection under either standard.

¹¹ StormForce incorrectly contends a safety monitoring system contains “no tangible, visible components.” A safety monitoring system requires designation of a person to serve as a safety monitor. 29 C.F.R. § 1926.502(h)(1). A person is both tangible and visible.

crew members performing roofing work (Tr. 258-59).¹² CSHO Houser's testimony is corroborated by the video he took of the worksite (Exh. C-15). The video depicts all five crew members engaged in some type of work, none acting solely as a safety monitor. CSHO Houser's testimony is also corroborated by the photographs he took showing working surfaces on which crew members are all performing roofing work and no other individual on that working surface monitoring their work (Exh. C-13). Photographs of the worksite taken by Site Foreman Nosal and maintained by StormForce in its business records show the same (Exh. C-14; Tr. 246). StormForce presented no credible evidence regarding the worksite conditions to contradict the Secretary's evidence.

Section 1926.501(b)(13) provides an exception where "the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems" it may "develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502." It is well settled the party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception *C.J. Hughes Construction, Inc.*, No. 93-3177, 1996 WL 514965, at *4 (OSHRC September 6, 1996). StormForce presented no evidence of infeasibility or greater hazard, nor did not present evidence either it or FRE had a fall protection plan.

The credible evidence establishes the roofing crew was working at heights in excess of 6 feet without the benefit of any form of fall protection. The standard was violated and FRE's employees were exposed to a fall hazard.

Employer Knowledge

[T]he Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer. *See Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir.1979); *New York State Elec. & Gas Corp.*, 88 F.3d at 105; *see also Secretary of Labor v. Access Equip. Sys., Inc.*, 18 O.S.H. Cas. (BNA) 1718, at *9 (1999). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.*, 5 O.S.H. Cas. (BNA) 1202, at *3 (1977) (holding that because the supervisor

¹² CSHO Houser's testimony was candid, straightforward, and consistent. His demeanor was calm and confident. Based on the consistency of his testimony and his demeanor, the undersigned finds him a credible witness and gives his testimony significant weight. StormForce's characterization of CSHO Houser's testimony regarding the use of a safety monitor as opinion testimony is wrong. CSHO Houser testified to his observations.

directly saw the violative conduct without stating any objection, “his knowledge and approval of the work methods employed will be imputed to respondent”).

ComTran Grp., Inc. v. U.S. Dep't of Labor, 722 F.3d 1304, 1307–08 (11th Cir. 2013).

The Secretary has met his burden to establish StormForce had actual knowledge of the violative condition. Under StormForce’s procedures, Site Foreman Nosal would have visited the worksite on at least two occasions prior to the inspection, including an initial meeting with the crew. He visited and took photographs both days of the two-day project. Among StormForce’s business records are photographs of the progress of the roofing job at issue taken by Site Foreman Nosal (Tr. 246). Those photographs show the worksite at various stages of the job. (Exh. C-14). In none is the roofing crew using any type of fall protection. In Exhibit C-14, page 1, all five crew members are performing work on various working levels without anyone serving as safety monitor.¹³ Pages 4 – 11 of Exhibit C-14 show the stage of roofing just prior to the stage at which CSHO Houser arrived on site. Exhibit C-14 at page 5 shows a crew member working at the roof’s edge with no monitor on the same working level. In none of the photographs maintained by StormForce is any crew member using fall protection.

The documentary evidence establishes StormForce’s site foreman observed and photographed the worksite conditions that constituted the violation.¹⁴ Site Foreman Nosal was the sole representative at the worksite for StormForce. He was responsible for contact with the homeowner and ensuring FRE carried out the job in accordance with its contractual obligations. His photographs depicting the violative conditions are maintained by StormForce. Site Foreman Nosal’s actual knowledge of the violative conditions is imputed to StormForce.

StormForce contends the evidence is insufficient to establish actual knowledge because photographs are undated and because Site Foreman Nosal was not called to testify that he took the photographs. AIM Manderson testified the photographs in Exhibit C-14 were of the worksite StormForce produced during the inspection (Tr. 119-20). The photographs were taken from

¹³ The individual in the foreground does not appear to be performing roofing work when the photograph was taken. He is not on the same working surface as at least two other employees engaged in roofing work, nor does he have a clear view of the entire working surface on which one employee is working. Under § 1926.501(h)(1)(iii), a safety monitor must be on the same working surface and within visual sighting distance of the person being monitored.

¹⁴ StormForce trained Site Foreman Nosal on fall protection requirements prior to the inspection (Exh. R-6). In that training, StormForce instructed Site Foreman Nosal about the specific duties of a safety monitor, most of which he could have observed were lacking at the worksite. It further trained Site Foreman Nosal that a safety monitoring system on a low slope roof, less than 50 feet in width, required a safety monitor “in conjunction with a warning line system.” (Exh. R-6 at p. 11; Tr. 145-57). If, as StormForce contends, Site Foreman Nosal might have believed FRE was using a safety monitor system, that belief would have been contrary to his training.

StormForce's CRM system, having been filed under the customer's account number (Tr. 123). AIM Manderson testified Site Foreman Nosal was the representative for StormForce at the worksite. CSHO Houser testified Site Foreman Nosal confirmed the photographs were taken by him (Tr. 246). He testified, based on his experience, the photographs on pages 4 – 11 of Exhibit C-14 show work done at the end of the project, likely the morning before he arrived. All of the crew members are wearing the same shirts, pants, and headgear in both these and CSHO Houser's photographs. A reasonable inference can be drawn that the photographs were all taken the same day as, and at the site of, the inspection.

The Secretary established StormForce had actual knowledge of the worksite conditions constituting the violation.

Employee Exposure and the Multi-employer Worksite Doctrine

The parties stipulated no employees of StormForce were exposed to the fall hazard at the worksite. StormForce's liability for any violations at the worksite is premised on the Commission's multi-employer worksite doctrine. Under the Commission's multi-employer worksite doctrine, "an employer owes a duty under § 5(a)(2) of the Act not only to its own employees but to other employees at the worksite when the employer creates and/or controls the cited condition." *Summit Contractors, Inc.*, No. 05-0839, 2010 WL 3341872, at *8 (OSHRC August 19, 2010). The Commission has also found an employer is liable "for violations of other employers where it could be reasonably expected to prevent or detect and abate the violation due to its supervisory authority and control over the worksite." *Red Lobster Inns of America, Inc.*, No. 76-4754, 1980 WL 10629, at *2 (OSHRC July 18, 1980) *citing Gil Haugan, d/b/a Haugan Construction Co.*, Nos. 76-1512 and 1513, 1979 WL 8537, at *3 (OSHRC December 20, 1979); and *Knutson Construction Co.*, No. 765, 1976 WL 6122 (OSHRC October 12, 1976). In *Red Lobster*, the Commission went on to hold this theory of liability does not require a finding the employer created the hazard or "has the manpower or expertise to itself abate the hazard." 1980 WL 10629, at *2.

Applicability in the Eleventh Circuit

As an initial matter, StormForce argues the Commission may not apply its multi-employer worksite doctrine to cases arising in the Eleventh Circuit. StormForce argues, because the Commission is bound by the law of the circuit to which a case is likely to be appealed, the Commission is bound by Eleventh Circuit precedent. The Eleventh Circuit has adopted the case

law of the former Fifth Circuit that predates the September 30, 1981, split of the circuits. Holdings in those Fifth Circuit cases apply unless and until the Eleventh Circuit overrules them. Prior to issuing its decision in *Acosta v. Hensel Phelps*, 909 F.3d 723, 733 (5th Cir. 2018), overturning its prior case law, the Fifth Circuit had declined to apply the Commission's multi-employer worksite theory of liability. See *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. Unit A 1981). Because the Eleventh Circuit has not specifically overturned the prior Fifth Circuit precedent, StormForce argues, the Commission remains bound by it in cases arising out of the Eleventh Circuit.

StormForce raised this issue for the first time in its post-hearing brief. It did not raise this argument in its Answer or identify it as a legal issue in dispute in the Joint Prehearing Statement. In his opening statement, counsel for StormForce stated StormForce did not seek to overturn Commission precedent with regard to the multi-employer worksite doctrine, but to ensure its proper application to the facts of this case (Tr. 19). In failing to timely raise the defense, StormForce has waived it. Even if not waived, the argument has no merit.

A similar argument was raised and rejected by the Commission in *McDevitt Street Bovis, Inc.*, No. 97-1918, 2000 WL 35559662, at *2-5 (OSHRC September 28, 2000). The undersigned is bound by the holding in *McDevitt*. Neither subsequent Eleventh Circuit unpublished, non-binding, decision cited by StormForce requires a contrary finding. In *Southern Pan Services v. U.S. Department of Labor*, 685 F. App'x 692, 695 (11th Cir. 2017), the Eleventh Circuit found the multi-employer worksite doctrine applicable. In *Calloway v. PPG Industries, Inc.*, 155 F. App'x 450 (11th Cir 2005), the Eleventh Circuit addressed the applicability of the multi-employer worksite doctrine in a negligence case involving a property owner who did not function as a general contractor. Even if binding authority, the holding is inapposite. The Commission's multi-employer worksite doctrine may be the basis for citation in this case.

Applicability to StormForce

The Secretary contends as the general contractor, StormForce owed a duty to FRE's employees to ensure they were protected from fall hazards. StormForce's oversight of the job was sufficient such that it is liable under the multi-employer worksite doctrine as a controlling employer for exposure of FRE's employees. StormForce contends it did not exercise sufficient control over FRE's employees for purposes of ensuring compliance with safety standards such that it can be found liable under the multi-employer worksite doctrine.

The Commission has consistently recognized a general contractor's role on a worksite as a controlling employer by virtue of its overall supervisory capacity for the construction project. *Anning-Johnson Co.*, Nos. 3694 and 4409, 1976 WL 5967, at *6 (OSHRC May 12, 1976) (“we note that typically a general contractor on a multi-employer project possesses sufficient control over the entire worksite to give rise to a duty under section 5(a)(2) of the Act either to comply fully with the standard or to take the necessary steps to assure compliance”); *Grossman Steel & Aluminum Corp.*, No. 12775, 1976 WL 5968, at *4 (OSHRC May 12, 1976) (“The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors... Thus, we will hold the general contractor responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.”); *Red Lobster Inns*, 1980 WL 10629, at *2; and *Centex-Rooney Construction Co.*, No. 92-0851, 1994 WL 682931 (OSHRC December 2, 1994). In so holding, the Commission has created a

presumption that, by virtue of its supervisory capacity over the entire worksite, the general contractor on the site has sufficient control over its subcontractors to require them to comply with occupational safety and health standards to abate violations. The burden of rebutting this presumption is on the general contractor.

Gil Haugan, 1979 WL 8537, at *3.

The Commission has not undertaken to define the term “general contractor.” Black’s Law Dictionary defines a general contractor as

One who contracts for the construction of an entire building or project, rather than a portion of the work. The general contractor hires subcontractors (e.g. plumbing, electrical, etc.), coordinates all work, and is responsible for payment to subcontractors.

StormForce’s role on its roofing jobs is consistent with that definition.

StormForce contracts directly with property owners for completion of roofing projects. It coordinates all scheduling, including rescheduling of work due to weather. StormForce orders aerial views and drawings of the roof (Tr. 279-80). It determines the size and pitch of the roof, as well as the number of layers of old roof to be removed. It determines the amount of materials necessary for the job then orders those materials from a supplier. It coordinates delivery of those materials. It has a subcontract with FRE for supply of labor. It orders a dumpster from FRE the cost of which is separately billed to StormForce (Tr. 278-79). FRE supplies a crew to the

worksite on the day designated by StormForce. StormForce requires FRE to commence the job on the day specified and the supplied crew to complete the job before moving on to another one.

StormForce's site foreman arrives at the job prior to FRE's crew. He meets first with the homeowner and, upon their arrival, with FRE's crew. He checks the materials for accuracy of the delivery and takes photographs of the property before work commences. He ensures FRE's crew is familiar with general rules of behavior and protection of the homeowner's property via a group huddle. Under the master subcontract between StormForce and FRE, FRE must give StormForce access to the worksite (Exh. R-26 p. 8). During the course of work, StormForce's site foreman inspects the worksite at various stages of the job and documents the progress. Site Foreman Nosal told CSHO Houser he met with an FRE representative for the job (Tr. 253-54). He took photographs on both days during which the job at issue was underway (Exh. C-14).¹⁵ FRE is obligated under the master subcontract to perform all clean up to the satisfaction of StormForce's site foreman (Exh. R-26 p. 6). At the completion of the work, StormForce's site foreman conducts the final walkthrough with the homeowner and obtains payment.

At all times, StormForce holds itself out as the company performing the job. It places its own sign at the worksite. It prohibits any other signs or attire depicting any other contractor on the site. FRE reports problems with, or shortages of, materials to StormForce who deals directly with the supplier. FRE reports issues that affect its ability to complete the job, such as problems with the house, to StormForce. FRE reports any problems with the homeowner to StormForce. StormForce is the sole contact with the homeowner. StormForce held itself out as, and acted in the capacity of, the general contractor for the worksite.

The master subcontract requires FRE employees to follow all safety and health related laws, rules, and regulations (Exh. R-16 p. 7). StormForce had no contractual obligation to train, monitor, or discipline FRE's employees with regard to safety. In the absence of contractual obligations, the Commission requires the controlling employer have the ability to require others to correct safety violations or otherwise control matters that might affect safety. AIM Manderson testified the method by which StormForce ensures all aspects of its contract with FRE are met, including proper installation of the roof, is to report issues to FRE management

¹⁵ Exhibit C-14 contains photographs of the worksite produced from StormForce's business records. The photographs show different stages of the project, including tear off of the original roof. In those photographs, the crew is wearing different clothing than in those that show work at later stages. A reasonable inference can be drawn that the photographs were taken on different days.

(Tr. 290-91). StormForce can require FRE to leave a worksite if StormForce discovers a problem (Tr. 89). This has not been necessary, as AIM Manderson testified StormForce's method of addressing quality of work issues and safety issues was effective (Tr. 61, 70-72, 110, 167, 290-91). "From my history, that's always been the case, is we report it and they take care of it." (Tr. 72) StormForce expects its site foremen to report a lack of fall protection equipment or FRE's failure to use fall protection to FRE (Tr. 109-10, 133; Exh. R-27 p. 13). StormForce expects FRE to come into compliance upon such notification. The record as a whole establishes StormForce exercised sufficient supervisory control over the worksite such that it could have directed FRE to correct safety violations.

The D.C. Circuit's decision in *IBP, Inc. v. Herman*, 144 F. 3d 861 (D.C. Cir. 1998), relied upon by StormForce, does not necessitate a different result. *IBP* involved a contract to perform equipment cleaning between a factory owner and an independent contractor which required the D.C. Circuit to expand the multi-employer worksite doctrine to the general industry setting. Applicability of the multi-employer worksite doctrine in the construction context, as in the instant case, is well-settled. *Century Communities, Inc. d/b/a Century Communities of Georgia, LLC v. Secretary of Labor*, 771 F. Appx. 14 (D.C. Cir. 2019). In holding the factory owner was not a controlling employer, the D.C. Circuit relied on the inability of the factory owner's supervisors to obtain compliance. To the contrary here, according to AIM Manderson, addressing quality of work or safety concerns with FRE management resulted in immediate correction or compliance on the part of FRE. The holding in *IBP* is inapposite.

StormForce contends the Secretary must establish its control over the worksite was "consistent and pervasive." See Respondent's Post-Hearing Brief at pp. 17, 19, and 23. This is a criteria formulated by StormForce, as it appears nowhere in Commission precedent. Nor must the Secretary establish, as StormForce contends, direct control over the subcontractor's employees. While evidence of direct supervisory control may be sufficient, it is not necessary and StormForce points to no Commission precedent so holding. To the contrary, the Commission has found liability of a general contractor with no supervisory authority over employees. See *Red Lobster Inns*, 1980 WL 10629, at *2. In *Red Lobster Inns*, the Commission held

Although he did not supervise other employees, [the jobsite superintendent] held a highly responsible position and was invested by Respondent with substantial authority. It was [the jobsite superintendent]'s responsibility as Respondent's

representative on the worksite to see that the construction work was completed successfully. Indeed, it was only through [the jobsite superintendent] that Respondent had knowledge of the status of a major corporate project. Respondent cannot divest itself of such knowledge simply by not assigning [the jobsite superintendent] supervisory status over other employees.

Based on its overall supervisory role on the worksite, including its control over scheduling, logistics, and quality of work, StormForce is liable for exposure of FRE's employees to the fall hazard present at the worksite. Where a controlling employer has actual knowledge of the hazardous condition and its "precautions were inadequate to ensure compliance...[t]he subcontractor employees' access to the violative conditions...[give] rise to [the controlling employer's] liability." *Century Communities*, 771 F.Appx. at 15. The citation issued to StormForce is affirmed.

Characterization

The Secretary has characterized the violation as serious. A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious physical harm would result. As the Third Circuit has explained:

It is well-settled that, pursuant to § 666(k), when the violation of a regulation makes the occurrence of an accident with a substantial probability of death or serious physical harm *possible*, the employer has committed a serious violation of the regulation. The "substantial probability" portion of the statute refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result, even in those cases in which an accident has not occurred or, in fact, is not likely to occur.

Secretary of Labor v. Trinity Industries, 504 F.3d 397, 401 (3d Cir. 2007) (internal quotation marks and citations omitted); *See also, Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Mosser Construction*, No. 08-0631, 2010 WL 711322 (OSHRC February 23, 2010); *Dec-Tam Corp.*, No. 88-0523, 1993 WL 27401 (OSHRC January 19, 1993). The likelihood of an accident goes to the gravity of the violation, which is a factor in determining an appropriate penalty. *J.A. Jones Constr. Co.*, 87-2059, 1993 WL 61950, at *14 (OSHRC February 19, 1993).

There can little dispute a fall from a 9-foot roof could result in serious injury, including death. StormForce's own training materials recognize the serious nature of fall hazards (Exh. C-6). The violation is properly characterized as serious.

Penalty Determination

The Secretary proposes a penalty of \$10,210.00. The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, No. 88-1962, 1994 WL 53780 (OSHRC February 18, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, No. 93-0239, 1995 WL 139505, at *3 (OSHRC March 29, 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). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. *Capform Inc.*, No. 99-0322, 2001 WL 300582 (OSHRC March 26, 2001), *aff'd*, 34 F. App’x 152 (5th Cir. 2002) (unpublished). “Gravity is a principal factor in a penalty determination 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.*, No. 00-1052, 2005 WL 696568, at *3 (OSHRC February 25, 2005).

Five crew members were exposed to a 9-foot fall hazard for the entire two-day project. Photographs show crew members working on the edge of the roof with no fall protection, increasing the likelihood of a fall. Despite having harnesses in FRE’s van, none of the crew used any type of fall protection. The gravity of the violation is high.

StormForce is entitled to a small reduction for size, history, and good faith. StormForce is a small employer and employs no construction laborers. It has received only one citation in the past as the general contractor at a construction worksite in 2016. The record contains little evidence of StormForce’s good faith efforts toward employee safety. The record contains no evidence of StormForce’s safety manual applicable to its own employees. It has taken no steps to obtain its subcontractor’s safety rules (Tr. 217). The Secretary’s proposed penalty of \$10,210.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1, Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.501(b)(13) and a penalty of \$10,210.00 is assessed.

SO ORDERED.

Dated: April 30, 2020
Washington, DC

/s/ _____
Heather A. Joys
Administrative Law Judge, OSHRC