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

SECRETARY OF LABOR,
Complainant,
v.
JK PROCTOR, LLC,
Respondent.

Docket No. 22-0568

DECISION AND ORDER

APPEARANCES:

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

For the Respondent:
Ms. Kellilyn Proctor, Owner
Stanley, New York

BEFORE: William S. Coleman
Administrative Law Judge

INTRODUCTION

The Respondent, JK Proctor, LLC, (JKP), is a roofing contractor based in Stanley, New York. On November 9, 2021, a JKP crew started a job to remove and replace the shingles on a single-story house located on U.S. Route 20 in Canandaigua, New York. A Compliance Safety and Health Officer (CO) from the U.S. Occupational Safety and Health Administration (OSHA) was driving to another destination when he noticed the workers on the roof and discerned no fall protection in use. The CO stopped driving and observed the workers from the opposite side of the

highway for a while longer before he approached the house and initiated an OSHA inspection and investigation.

OSHA thereafter issued to JKP a citation that alleged one "willful–serious" violation of the standard pertaining to the use of fall protection in residential construction [29 C.F.R. § 1926.501(b)(13)] and one "willful–serious" violation of the standard pertaining to the use of portable ladders in construction [§ 1926.1053(b)(1)]. The citation proposed penalties that totaled $177,759. The citation indicated that both alleged violative conditions had been corrected during the inspection.

JKP timely contested the citation and its proposed penalties, thereby bringing the matter before the independent Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (Act). 29 U.S.C. § 659(c). The matter was then assigned to the undersigned Commission judge for adjudication.

JKP was self-represented throughout these proceedings by its owner and operator, Ms. Kellilyn Proctor.[1] Ms. Proctor filed a written response to the Secretary's complaint that had been

[1] In prehearing telephone conferences, Ms. Proctor stated that she had access to the Commission's electronic case file through a designated "active contact" for that electronic case file, identified as "Jerry Proctor," to whom Ms. Proctor is married. (T. 182-83). Ms. Proctor also indicated that she had access to automated emails that the electronic filing system generated and sent to the email addresses of all the "active contacts" associated with the electronic case file. (These automated emails alert "active contacts" when a document that a party has filed has been accepted for filing or when the Commission has filed a document.)

Even though Ms. Proctor has access to the Commission's electronic case file, she has not used the Commission's electronic filing system to make any filings on behalf of JKP—her failure to use the electronic filing system to do so is contrary to the Commission Rule 8(c) (requiring self-represented employers to utilize the electronic filing system unless a request to be exempt from that requirement is granted). Despite multiple oral and written reminders from the undersigned, Ms. Proctor never utilized the electronic filing system to make filings, and she never requested that JKP be exempted from the mandatory use of the Commission's electronic filing system to do

served and filed pursuant to Commission Rule 34(a). That response, dated August 5, 2022, was treated as JKP's answer to the complaint and was deemed to constitute a general denial to the allegations of the complaint.[2]

An evidentiary hearing on the merits was conducted in Syracuse, New York, on September 6, 2023. The parties filed principal and then responsive post-hearing briefs, with briefing completed on November 17, 2023.

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so. (*See* orders and notices dated 11/29/2022, 12/19/2022, 1/4/2023, and 1/31/2023, that reminded JKP of the requirement to use the Commission's electronic filing system unless granted an exemption from that requirement.) Nevertheless, the undersigned let pass JKP's persistent failures to file documents through the Commission's electronic filing system, and instead accepted for filing all JKP's filings that were transmitted by means other than the electronic filing system. *Cf. Imageries*, 15 BNA OSHC 1545, 1545, 1547 (No. 90-0378, 1992) (noting that while self-represented parties may "require additional consideration of their circumstances," they "are not exempt from following Commission rules and procedures that require all litigants to take some action or suffer a penalty"). All orders and notices that the undersigned has issued in this matter, in addition to being filed electronically and being available to Ms. Proctor by virtue of her access to the electronic case file, have been served on JKP by regular mail, and some electronic copies of those filings have also been emailed as a courtesy to the email address associated with "Jerry Proctor" as described above.

[2] Paragraph 7.a. of the notice of hearing dated December 21, 2022, stated that JKP's filing dated August 5, 2022, would be deemed JKP's answer to the allegations of the complaint pursuant to Commission Rule 34(b) and was deemed to constitute a general denial to the allegations of the complaint. That same paragraph of the notice of hearing noted that this written response was not in the form that Rule 34(b) prescribes for an answer to a complaint, and further suggested that JKP could move to file an amended answer that met the form requirements of Rule 34(b). JKP never moved to file an amended answer. (*See also* T. 10-11). With JKP's filing dated August 5, 2022, regarded to be a general denial to the allegations of the complaint, the Secretary bore the burden of proving by a preponderance of the evidence all elements of the alleged violations and presenting evidence to support the asserted "willful-serious" classifications.

The issues for decision are:

- Did the Secretary prove by a preponderance of the evidence that the roof was not a low-slope roof (i.e., its slope was greater than 4 in 12), so that the OSHA fall protection standard for roofing work on low-slope roofs [§ 1926.501(b)(10)] was not available to JKP as a means of complying with the cited standard, § 1926.501(b)(13)?

  Decision: Yes. The Secretary proved the slope of the roof was greater than 4 in 12.

- Did the Secretary prove by a preponderance of the evidence all elements of the alleged violation of the fall protection in residential construction standard, § 1926.501(b)(13)?

  Decision: Yes.

- Did the Secretary prove by a preponderance of the evidence all elements of the alleged violation of § 1926.1053(b)(1), which requires the side rails of a portable ladder to extend at least 3 feet above the upper landing surface?

  Decision: Yes.

- Did the Secretary prove by a preponderance of the evidence that the proven violations were "serious" within the meaning of section 17(k) of the OSH Act?

  Decision: Yes.

- Did the Secretary prove by a preponderance of the evidence that either of the proven violations had been done "willfully" within the meaning of section 17(a) of the OSH Act?

  Decision: No. The evidence is not preponderant that any individual acted either in conscious disregard of, or with plain indifference to, the cited standards or employee safety.

- What are appropriate penalties for each of the proven serious violations?

  Decision: Penalties totaling $23,000 are assessed for the two serious violations.

For the reasons set forth below, the alleged violations are AFFIRMED as serious violations, and penalties totaling $23,000 are ASSESSED.

FINDINGS OF FACT

Except where the following findings declare that evidence about a particular fact was either not presented or was not sufficient to prove a particular fact, the following facts were proven by at least a preponderance of the evidence:

1. JK Proctor LLC (JKP) is a roofing contractor based in Stanley, New York. (T. 181-82). JKP was formed in 2018 and is operated by its majority owner, Ms. Kellilyn Proctor (Ms. Proctor). (T. 181-82). JKP employs employees and uses materials and supplies that originated or were shipped from outside the state of New York. (T. 17-18).

2. On November 9, 2021, Ms. Proctor dispatched a nine-person JKP crew to install asphalt shingles on a one-story house located along U.S. Route 20 in Canandaigua, New York. (T. 58, 189). The project was expected to be completed in less than a day. (T. 34, 60, 221).

3. The house had a rectangular gable roof with a center ridge. (Exs. C-2 & C-7). The roof eaves were more than nine-feet higher than the next lower lever, which was ground level. The roof slope on both sides of the center ridge was greater than 4 in 12 (vertical to horizontal).[3]

[3] In the course of the OSHA inspection and investigation on November 9, 2021, the CO accurately determined that the slope of the roof was greater than 4 in 12. The CO accurately measured a vertical distance of 9 feet 4 inches from the eave on the house's south side to the paved driveway. (T. 142; Ex. C-19). The CO accurately measured the horizontal distance from the center ridge to the eave (the "run") to be 14 feet (and so the roof's width from eave to eave was twice that distance—28 feet). (T. 152). The CO accurately measured the roof's elevation from ground level on the west side of the house to the top of the roof's center ridge to be 15 feet. (T. 142, 150-57; Exs. C-17, C-18). Using the accurately measured elevations from ground level of both the eave (9 feet and 4 inches) and to the center ridge (15 feet), the CO accurately calculated the vertical elevation from the roof eave to the center ridge (the "rise") to be 68 inches. (T. 154). Using these accurately determined distances of the roof's "rise" and "run," the CO reliably calculated the slope of the roof to be greater than 4 in 12 (vertical to horizontal). Specifically, the CO's reliable

4. The nine-person JKP crew that Ms. Proctor dispatched to do the job specialized in working on shingled roofs. (T. 189). Two members of the nine-person work crew—Mr. Dennis Roussell and Mr. Joshua Cascio—were JKP foremen.

5. Roussell has worked for roofing companies owned and operated by Ms. Proctor and/or her spouse, Mr. Jerry Proctor, for about 20 years. (T. 29-31, 48-50). Roussell has been working as a foreman for JKP since about 2019. (T. 185-88).

6. Cascio has worked for companies owned by Ms. Proctor and/or her spouse for about seven years, and he has worked as a foreman for JKP since about 2020. (T. 188).

7. Ms. Proctor assigned Roussell to serve as the lead foreman for the job, but everyone understood that Cascio would assume the role of lead foreman if Roussell were to depart the worksite. (T. 47, 62, 185, 189).

8. Upon arriving at the house, the JKP crew began to set up the job under Roussell's supervision as lead foreman. After only about 20-30 minutes at the house, and before the crew had finished setting up the job, Roussell had to leave the worksite to go to a personal appointment, which resulted in Cascio taking over as the lead foreman. (T. 35-36, 47). Roussell alerted Cascio that he was departing so that Cascio knew that he was then "in charge." (T. 50-51). Roussell did

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measurements of the roof's rise and run yielded the reliable calculation that the roof pitch was at least 4.85 in 12 (vertical to horizontal). (T. 152-53; Ex. C-18).

The ground surrounding the house was relatively level, but not perfectly so. (*See* Exs. C-2 & C-7; T. 156-57). The CO accurately determined that the ground level on the west gable side of the house, where he measured the elevation of the center ridge, was about two inches higher than the ground level at the driveway, where he measured the height of the eave. The CO utilized the lesser elevation for the roof ridge (15 feet, rather than 15 feet and 2 inches) in calculating the rise to be 68 inches (rather than 70 inches), which yielded a calculated roof slope of 4.85 in 12 (vertical to horizontal). (T. 155-56). The CO reliably testified that if he had used the 70-inch figure for the rise to calculate the roof slope, the calculated roof slope would have been steeper than 4.85 in 12. (T. 154-57).

not convey any further information or instructions to Cascio because he regards Cascio to "know[] what he is doing." (T. 36, 48, 50-51).

9. Mr. Roussell testified that before he departed, he measured the roof pitch at the roof's surface by using a tape measure and a level. He testified that he determined that the slope was 4 in 12 (horizontal to vertical). (T. 35-37, 45, 51-52). This measurement was erroneous; the slope of the roof was greater than 4 in 12. (*See* Findings of Fact at footnote 3). If Roussell had exercised reasonable diligence in determining the slope, he would have determined that it exceeded 4 in 12, and he would have known to direct the employees to use a personal fall arrest system (PFAS), which is the means of fall protection that JKP has chosen to use to meet OSHA's fall protection requirement for roofing work that is performed on roofs sloped greater than 4 in 12.

10. Both Roussell and Cascio knew that implementation of the JKP work rule that employees use PFAS when working on a roof sloped greater than 4 in 12 would ensure that JKP complied with OSHA fall protection requirements. (T. 41-43, 59, 63-64).

11. As a result of Roussell's erroneous roof slope determination, both Roussell and Cascio erroneously believed that a safety monitoring system alone could be used for fall protection under both JKP policy and OSHA fall protection requirements. (T 41-42, 58-59).

12. Sometime after Cascio took over as lead foreman, the crew members mounted the roof using a portable ladder whose side rails extended less than three feet above the roof. (T. 17, 62, 131-33, 148; Exs. C-4 & C-10).

13. After using the ladder to access the roof, all the employees worked on the roof without a guardrail system, safety net system, or PFAS for fall protection. (T. 17-18, 133-34, 141; Exs. C-5, C-7).

14. For as long as the CO observed the workers on the roof before announcing his presence, no employee was acting as a safety monitor in a manner that would meet the requirements prescribed by 29 C.F.R. § 1926.502(h) for the use of a safety monitoring system as a form of fall protection. (T. 130-31, 136-37, 141; Exs. C-3, C-7).

15. Cascio identified himself to the CO as the foreman. (T. 145). In response to the CO's questions, Cascio said that he believed that the roof's slope was no more than 4 in 12, but when the CO asked Cascio what the exact roof slope was, Cascio could not say. (T. 143-44, 175). Rather, in apparent attempt to explain why he did not know the exact roof slope, Cascio told the CO that Roussell had "set the project up." (T. 144-45).

16. After Cascio told the CO that the roof slope was 4 in 12, the CO asked Cascio to identify the employee(s) who had been designated to act safety monitor(s) for fall protection, but Cascio could not identify any employee. Rather, Cascio again explained that Roussell had set up the job. (T. 144-45).

17. The CO also pointed out to Cascio that the side rails of the sole portable ladder leaning against the house, which the employees had used to access the roof, did not extend at least three feet above the roof. (T. 17-18, 132-33, 147-48; Exs. C-4, C-10). The ladder's left side rail extended about two feet above the roof surface and its right side rail extended slightly more than two feet above the roof surface. (T. 17-18, 132-33, 147-48; Exs. C-4, C-10). Cascio acknowledged this condition, saying that he knew that the side rails were required to extend at least three feet beyond the roof, but he remarked again that he had not set up the job. (T. 144-45).

18. The portable extension ladder leaning against the house when the CO arrived could have been set up with its side rails extending more than three feet above the roof surface by simply extending the extension ladder two rungs more than it had been extended. (T. 163; Exs. C-4 & C-

11). At the suggestion of the CO, Cascio extended the ladder further so that its side rails were more than three feet above the roof before the other employees used the ladder to dismount the roof. (T. 147-49; Ex. C-11).

19. Both Roussell and Cascio, as well every member of the JKP crew, knew that JKP requires that the side rails of portable ladders extend at least three feet higher than the landing surface, and they knew further that JKP requires this in order to comply with an OSHA standard respecting the use of portable ladders. (T. 45, 63-64, 193, 220).

20. After speaking with the CO for a while, Cascio telephoned Ms. Proctor to tell her about the OSHA inspection. While Cascio was speaking with Ms. Proctor by phone, the CO began to take the reliable measurements described *supra* in footnote 3. The CO took the measurements from positions on the ground at the house's perimeter by using a reliable measuring rod; the CO did not access the roof. (T. 101, 142, 150).

21. Both Roussell and Cascio knew that the use of a safety monitoring system alone for fall protection would comply with the OSHA fall protection standard for roofs sloped no greater than 4 in 12 and that are no wider than fifty feet. Both Roussell and Cascio further knew that JKP permitted the use of a safety monitoring system alone to provide fall protection for roofing work performed on roofs with those characteristics. (T. 43, 63-64).

22. Customarily, before a JKP crew starts to work on a roof, the crew will measure the roof slope unless the roof is obviously steeper than 4 in 12 (vertical to horizontal). (T. 66, 190). For the JKP work crew involved here, Roussell is the individual who typically determines the slope before work starts. (T. 190).

23. Ms. Proctor and the two foremen on the job (Roussell and Cascio) each possessed a heightened awareness of the requirements of both cited standards [§§ 1926.501(b)(13) & 1926.1053(b)(1)]. (T. 36, 38- 39, 41-43, 61, 63-66, 183-85, 190-93, 220-21, 223).

24. Both Roussell and Cascio knew that to ensure compliance with OSHA fall protection requirements, JKP required employees engaged in roofing work on roofs with a slope greater than 4 in 12 (vertical to horizontal) to use PFAS. The evidence that either Roussell or Cascio consciously disregarded this requirement is not preponderant.

25. The evidence that either Roussell or Cascio was plainly indifferent to OSHA requirements or employee safety with respect to protection from fall hazards is not preponderant.

26. Both Roussell and Cascio knew that in order to comply with OSHA requirements on using portable ladders, JKP required the side rails of those ladders to extend at least three above the upper landing surface to which the ladder is used to gain access. The evidence to establish that either Roussell or Cascio consciously disregarded this requirement is not preponderant.

27. The evidence to establish that either Roussell or Cascio was plainly indifferent to OSHA requirements or to employee safety with respect to protection from fall hazards associated with dismounting or mounting at the top of portable ladders is not preponderant.

28. Ms. Proctor, JKP's owner and operator, was not present at the worksite before the CO initiated the inspection. There is no evidence that Ms. Proctor consciously disregarded applicable OSHA standards on the use of fall protection or the use of portable ladders at the worksite on the day of the inspection and investigation. (T. 191-92). The evidence is insufficient to establish that Ms. Proctor was plainly indifferent to OSHA requirements or employee safety with regard to the use of fall protection or the use of portable ladders at the worksite on the day of the inspection and investigation.

29. Any worker who fell from the roof of the house on which the JKP crew was working without all protection could suffer a serious injury or death in the fall. (T. 169).

30. Any worker who fell while dismounting or mounting the top of the ladder that the JKP crew used to access the roof, and whose side rails did not extend at least three feet above the roof surface, could have suffered serious injury or death in the fall while dismounting or mounting the ladder. (T. 169-70).

DISCUSSION

The Commission obtained jurisdiction under section 10(c) of the Act upon the Secretary's forwarding to the Commission JKP's timely filed notice of intent to contest. (T. 15). 29 U.S.C. § 659(c); 29 C.F.R. §§ 1903.17(a) & 2200.33.

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

[4] The Commission generally regards the source of controlling precedent for any given case to be the court of appeals to which the Commission decision is most likely to be appealed. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). If this decision were

to become a final order of the Commission, JKP could petition for judicial review in either the Second Circuit or the D.C. Circuit; the Secretary could petition for judicial review only in the Second Circuit. 29 U.S.C. §§ 660(a) and (b).

Alleged § 1926.501(b)(13) Violation

Citation item 1 alleges that JKP violated the fall protection in residential construction standard codified at 29 C.F.R. § 1926.501(b)(13), which provides in pertinent part as follows:

> (13) *Residential construction.* Each employee engaged in residential construction activities 6 feet … or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. …

The citation item alleges that JKP violated this standard at the worksite on the day of the inspection in the following manner: "Employees were tearing off old roofing material and preparing to install new roofing material onto an estimated 4.5:12 pitch roof with a ground to eave height in excess of 9 [feet] without fall protection of any kind."

Standard Applies

Section 1926.501(b)(13) applies because the JKP crew was "engaged in residential construction activities" (removing and replacing the asphalt shingles of a ranch style house) more than six feet above the next lower level (ground level).

Noncompliance with Standard

While the parties stipulated that the JKP crew was not utilizing any of the three forms of fall protection that § 1926.501(b)(13) specifies (i.e., guardrail system, safety net system, or PFAS), the standard also permits certain alternatives to these three specified systems. (T. 17). Section 1926.501(b)(13) allows an employer to meet its requirements by complying with some other provision of § 1926.501(b) "that provides for an alternative fall protection measure." JKP contends that it met the requirements of § 1926.501(b)(13) by using a safety monitoring system alone pursuant to § 1926.501(b)(10), which applies only to roofing work on low-slope roofs. *See StormForce of Jacksonville, LLC*, No. 19-0593, 2021 WL 2582530, at *2 (OSHRC, March 8,

2021) (noting that the "fall protection measures available for use on a low-slope roof under [§ 1926.501(b)(10)] can also be used under [§ 1926.501(b)(13)] when residential construction includes roofing work performed on a such a roof"). Section 1926.501(b)(10) provides:

> *Roofing work on Low-slope roofs.* … each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet … or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet … or less in width …, the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

The term "roofing work" is defined as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work," and the term "low-slope roof" is defined as "a roof having a slope less than or equal to 4 in 12 (vertical to horizontal)." § 1926.500(b).

The JKP employees here were engaged in "roofing work," and so if the roof here had been a low-slope roof, § 1926.501(b)(10) would have provided JKP with five alternatives for complying with § 1926.501(b)(13) that would be in addition to the three fall protection measures specified by § 1926.501(b)(13).

JKP contends that its crew was utilizing the option specified in § 1926.501(b)(10) for the use of a "safety monitoring system alone" because the crew was engaged in roofing work on a "low slope roof" that was less than fifty feet wide. JKP is correct that the roof was less than 50

feet wide, but it is incorrect in claiming that the roof was a low-slope roof.[5] As described in Findings of Fact ¶ 3, the Secretary has established that the slope of the roof was greater than 4 in 12, and so § 1926.501(b)(10) simply does not apply.[6] So, even if the JKP crew had implemented

[5] JKP offered in evidence a written report dated August 30, 2023, that JKP had obtained the week prior to the hearing from a business that uses aerial or satellite photography (T. 215) to calculate a building's dimensions. (Ex. R-3). This report stated that the slope of the roof here was 4 in 12. [It is noted, however, that a different calculation from the same business and that was dated eight months before the hearing (January 4, 2023) provided a steeper slope (4.14 in 12). (Ex. R-2 at 2; T. 207).] Ms. Proctor testified that roofing contractors commonly use services like this one to determine the quantity of materials that would be required for a roofing project. (T. 214-15). She notably did *not* testify that it is customary in the industry to rely on this service to provide an accurate measurement of roof pitch as a substitute for determining the slope onsite.

The three exhibits generated by this business (R-1, R-2 & R-3) were admitted in evidence over the Secretary's hearsay objection. (T. 216-19). Even though the exhibits were received in evidence, the undersigned sustained the Secretary's hearsay objection and ruled the documents were not probative for the truth of the matters asserted within them, but rather were admitted in evidence for other purposes. (T. 216-19). In accordance with that ruling at the hearing, the exhibits are not regarded to constitute competent evidence to establish the roof's slope. The undersigned notes further that even if the exhibits had been admitted as competent evidence for establishing the slope, the undersigned would conclude that they are insufficiently weighty to overcome to reliable measurements of the building taken by the CO as described in the Findings of Fact set forth in footnote 3 *supra*. As noted, the CO's reliable measurements mathematically establish the roof's slope to have been greater than 4 in 12, and so the roof was not a "low-slope roof" as defined by § 1926.500(b). The CO's reliable measurements and his calculation of the roof slope were by far the most reliable and probative evidence presented respecting the slope of the roof. (T. 36-37, 51-52). Because the roof was not a low-slope roof, § 1926.501(b)(10) was not available to JKP for providing "an alternative fall protection measure" for compliance with § 1926.501(b)(13).

[6] Both Roussell and Ms. Proctor testified that in a meeting that Ms. Proctor conducted immediately before the JKP crew departed for the job, Ms. Proctor informed Roussell that the roof slope was 4 in 12. (T. 45-46, 194). But Ms. Proctor testified further that Roussell is required to measure the roof slope at the job site "to verify what it is" and thus to determine whether to require the employees to use PFAS. (T. 190, 193, 223-24). And Roussell testified that he did in fact determine the slope before he departed for his personal appointment. (T. 35-37, 45, 51-52). It is thus abundantly clear that neither Ms. Proctor nor Roussell regarded the slope information that Ms. Proctor testified that she conveyed in the meeting before the crew departed for the worksite to

a safety monitoring system alone to provide fall protection for the employees working on the roof, that fall protection system would not have satisfied the requirements of § 1926.501(b)(13).

Moreover, even though the use of a safety monitoring system alone was not an available means for complying with § 1926.501(b)(13), a preponderance of the evidence established that JKP was not utilizing a safety monitoring system that met the criteria specified in § 1926.502(h) for a safety monitoring system.[7] Section 1926.502(h) provides in pertinent part as follows:

> (h) *Safety-monitoring systems.* Safety monitoring systems [See §§ 1926.501(b)(10) and 1926.502(k)] and their use shall comply with the following provisions:
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> (1) The employer shall designate a competent person to monitor the safety of other employees and the employer shall ensure that the safety monitor complies with the following requirements:
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> (i) The safety monitor shall be competent to recognize fall hazards;
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> (ii) The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner;
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> (iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being

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constitute a definitive determination of the roof slope. Rather, Ms. Proctor expected Roussell to measure the slope before work on the roof began, and Roussell testified that he did exactly that.

After Ms. Proctor arrived at the worksite and spoke with the inspecting CO, she neither challenged the CO's calculation that the slope was greater than 4 in 12 nor claimed that JKP could comply with fall protection requirements by using a safety monitoring system alone. Rather, before the CO departed the site, the JKP employees had begun to install anchors on the roof and Ms. Proctor "made sure" that the crew members had PFAS equipment. (T. 165-66). If Ms. Proctor had truly believed that the house had a low-slope roof so that the use of a safety monitoring system alone would have been permissible pursuant to § 1926.501(b)(10), she likely would have at least expressed some doubt about the CO's determination that it was not a low-slope roof. The absence of any apparent surprise or skepticism from JKP about the CO's slope measurement over the course of the CO's inspection is corroborative of the reliability of his determination that the roof was not a low-slope roof.

[7] In the 1994 preamble to the fall protection in construction standard, OSHA commented that it considered a safety monitoring system "to be the least acceptable option for protecting employees from falls." Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672, 40715 (Aug. 9, 1994) (codified at 29 C.F.R. pt. 1926, subpt. M).

> monitored;
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> (iv) The safety monitor shall be close enough to communicate orally with the employee; and
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> (v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

Cascio testified to having no recollection about the crew's use of a safety monitoring system before the CO commenced the inspection, testifying rather that he "would assume" a safety monitor was being used "because we had one on every job." (T. 64-65). But in response to the CO's questions at the outset of the inspection, Cascio was unable to identify which employee(s) had been designated to be safety monitor, and he suggested to the CO instead that Roussell would have designated a safety monitor before departing for his personal appointment. (T. 144-45). In contrast, Roussell testified that he did not recall having designated a safety monitor, and further that no employee was acting as a safety monitor when he departed because the crew was still setting up the job. (T. 46-47).

The overwhelming preponderance of the evidence is that even if an employee had been designated to act as safety monitor, that from the time the CO first observed the JKP work crew on the roof to the time that he announced his presence, no employees were functioning as a safety monitor in a manner that met all the requirements of § 1926.502(h)(1). (T. 130). The video recording of the eight JKP employees on the roof that the CO made before he announced his presence corroborates the CO's reliable testimony that none of the employees were meeting all the requirements for a safety monitor specified in § 1926.502(h)(1). (Ex. C-3).[8] Rather, the video

[8] Exhibit C-3 is a 49-second video of eight JKP employees on the roof that the CO recorded from the opposite side of Route 20 before he announced his presence to the JKP crew. (T. 126). At the video's beginning, an employee wearing a "safety green" colored shirt is standing near the

shows that all the JKP employees, including the employee wearing a "safety green" shirt, were engaged in work activities that could take their attention from the essential monitoring functions to "recognize fall hazards" and "warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner." § 1926.502(h)(1)(i) & (ii); *Beta Constr. Co.* 16 BNA OSHC 1435, 1444 (No. 91-102, 1993) ("The facts here demonstrate that the monitor's ability to issue the required warning depends on a fortuity that he will be looking up at the other employee at the requisite times"); Findings of Fact ¶ 14. Accordingly, even if the slope of the roof had been no more than 4 in 12 as JKP erroneously contends, JKP would still would have failed to comply with § 1926.501(b)(13) because the Secretary proved by a preponderance of the evidence the absence of any compliant alternative fall protection that would be permitted for roofing work on a low-slope roof under § 1926.501(b)(10).

The great weight of the evidence establishes that JKP failed to comply with § 1926.501(b)(13) as alleged and that there was not any fall protection system in use at the worksite, not even a safety monitoring system alone (which even if implemented, would not have

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center ridge and about three feet from roof's west edge. For the first 38 seconds of the video, this employee is shown simply standing and facing to the north, and so he was faced away from the camera and faced away from employees who were walking and working on the south side of the roof. In the final ten seconds of the video, this employee begins to bend forward at the waist and use a hand tool in motions that look as if he may be tearing off existing shingles from the roof's north side, in the process of which he comes within a foot or so of the edge, about fifteen feet above ground level. (The surface of the north side is lower than the center ridge and is thus not visible in the video). The photograph at Exhibit C-2, which was also taken before the CO announced his presence to the crew, shows the same employee positioned in the middle part of the roof near the roof ridge and handling something while bent over slightly at the waist and facing away from most of the other crew members on the roof. (T. 128-29). If it were assumed that this employee had been a designated safety monitor, the video evidence shows conclusively that he was engaging in activities that took his attention from the monitoring function and thus not in conformance with § 1926.502(h)(1)(v).

constituted a compliant form of fall protection).

Employee Exposure and JKP Knowledge of Non-compliance

All eight JKP employees working on the roof were working without the benefit of any form of fall protection and were thus exposed to the violative condition.

"Employer knowledge [of non-compliance] is established by a showing of employer awareness of the physical conditions constituting the violation." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). To prove the employer knowledge element of the alleged violation, the Secretary was *not* required to establish that JKP understood or acknowledged that the condition was violative. *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1199 (No. 90-2304, 1993) ("The knowledge element of a violation does not require a showing that the employer was actually aware that it was in violation of an OSHA standard; rather it is established if the record shows that the employer knew . . . of the conditions constituting a violation"), *aff'd*, 36 F.3d 573 (5th Cir. 1994). JKP, through its foreman Cascio, had actual knowledge of the violative condition of all employees working on a roof with a slope greater than 4 in 12 having no form of fall protection permitted by § 1926.501(b)(13). The actual knowledge of JKP's foreman of these conditions, which constituted a violation of § 1926.501(b)(13), is imputed to JKP and establishes the employer knowledge element of the violation. *See N.Y. State Elec. & Gas Corp v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996) ("Knowledge or constructive knowledge may be imputed to an employer through a supervisory agent"); *accord Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012).

Alleged § 1926.1053(b)(1) Violation

Section 1926.1053(b)(1) provides in pertinent part as follows: "When portable ladders are

used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet … above the upper landing surface to which the ladder is used to gain access." The citation alleges that JKP violated this standard in the following manner at the jobsite on the day of the inspection: "Employees were using a … ladder to carry tools and access the roof of the residential house and that ladder was not extended 3 feet above that roof."

The parties have stipulated that the JKP employees were using a ladder whose side rails were not extended three feet above the roof edge and that this created a potential fall hazard. (T. 17). Cascio, as well as the other seven crew members, accessed the roof by climbing the ladder when its side rails did not extend three feet above the roof edge. Cascio had actual or constructive knowledge of the violative condition, to which he and the other members of the JKP had been exposed. Cascio's knowledge is imputed to JKP. The alleged violation of 1926.1053(b)(1) has been proven.

Violation Classifications – Serious & Willful

The Secretary alleges that each violation was both "serious" and "willful." (Complaint, ¶¶ VI & VII).

Serious Classifications

Under section 17(k) of the Act, a violation is serious if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). To prove that a violation is serious, "the Secretary need not establish that an accident is likely to occur," but rather "must show that an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *Flintco, Inc.*, 16 BNA OSHC 1404, 1405 (No. 92-1396, 1993).

Ms. Proctor testified to believing that the violations are "not even upward of serious, harmful to cause death," stating further that "it's literally so low sloped roof" that "I could put my

five-year-old grandson on this roof and he would be fine." (T. 224). This sentiment is rejected as contrary to common sense and the provisions of the two cited specification standards, noncompliance with which is presumed to entail a hazard. *See Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2150 (No. 08-1656, 2016). There is substantial probability that an employee who fell to the ground from a height of nine to fifteen feet after having tripped, slipped, stumbled or otherwise losing footing could be seriously injured or even killed in the fall. *See* Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672, 40673 (Aug. 9, 1994) (codified at 29 C.F.R. pt. 1926, subpt. M) ("OSHA estimates that there are at least 68,000 injuries due to falls from elevations covered under subpart M occur every year, and 95 fatalities"). The same can be said for a fall a similar distance while dismounting or mounting a portable ladder whose rails did not extend at least three feet above the landing surface. See Findings of Fact ¶¶ 30. Both violations have been established as serious violations within the meaning of section 17(k) of the Act.

Willful Classifications

For a violation that is done "willfully," section 17(a) of the Act allows a penalty of up to ten times the maximum penalty for a "serious" or an "other-than-serious" violation. 29 U.S.C. § 666(a); 29 C.F.R. § 1903.15(d).

"A violation is willful if the employer's state of mind at the time of the violation reflects either: (1) 'an intentional, knowing, or voluntary disregard for the requirements of the Act' or employee safety; or (2) 'plain indifference' to either the cited OSHA requirements or employee safety." *Home Rubber Co., LP*, No. 17-0138, 2021 WL 3929735, *2 (OSHRC, Aug. 26, 2021); *see also A.E. Staley Mfg. Co. v. Sec'y of Labor*, 295 F.3d 1341, 1351 (D.C. Cir. 2002) (stating that "conscious disregard" of the Act and "plain indifference" to the Act are alternative forms of

willfulness). "An employer's motive for failing to comply with the Act's requirements … need not be evil or malicious in order to find a violation willful." *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

"The hallmark of a willful violation is the employer's state of mind at the time of the violation." *Id.* The Secretary bears the "burden of proof to show the requisite state of mind for willfulness." *Stanley Roofing Co.*, 21 BNA OSHC 1462, 1466 (No. 03-0997, 2006). "Where the requisite state of mind is manifested through the actions of supervisory employees, it is imputed to the employer to the same extent as would be a supervisor's knowledge of violative conditions." *Cont'l Roof Sys., Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997); *see also Dayton Tire*, 23 BNA OSHC 1247, 1266 (No. 94–1374, 2010) (imputing plant safety manager's state of mind to the employer), *rev'd on other grounds,* 671 F.3d 1249 (D.C. Cir. 2012).

Whether a violation is "willful" presents a question of fact. *Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 208 (3d Cir. 2005); *Dayton Tire v. Sec'y of Labor*, 671 F.3d 1249, 1254 (D.C. Cir. 2012) (determining that the Commission's finding of willfulness lacked "substantial supporting evidence").

Conscious Disregard

A willful classification on a "conscious disregard" theory (sometimes described as "intentional disregard") may be established by showing the employer "(1) had a heightened awareness of the applicable standard or provision prohibiting the conduct or condition and (2) consciously disregarded the standard." *Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1111 (No. 11-2559, 2016); *accord A. Schonbek & Co. v. Donovan*, 646 F.2d 799, 800 (2d Cir. 1981). "The fact that a company has heightened awareness of an OSHA requirement, however, does not by itself establish that it acted with a willful state of mind at the time it violated that requirement."

Home Rubber Co., 2021 WL 3929735, *4. To prove conscious disregard requires showing that the employer "was actually aware, at the time of the violative act, that the act was unlawful." *Propellex Corp.,* 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999). The requisite state of mind must exist "*with regard to the specific circumstances of the violation in issue.*" *Eric K. Ho*, 20 BNA OSHC 1361, 1378 (No. 98-1645, 2003) (consolidated), *aff'd* 401 F.3d 355 (5th Cir. 2005), *partially overruled on other grounds, E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553, 1580-81 (No. 94-1979, 2009).

The evidence is not preponderant that the fall protection violation was willful on a "conscious disregard" theory. This is so even though there is substantial evidence in the record that would support the Secretary's stated theory that JKP "undertook this relatively simple re-shingling project without outfitting its employees with fall protection to save time because the roof slope seemed shallow enough." (Sec'y Brief at 2, 9-15). Even though this view of the evidence has support in the record, an alternate inference that is equally plausible is that Roussell was negligent in erroneously determining the roof slope was 4 in 12, and as a consequence neither he nor Cascio "was actually aware, at the time of the violative act, that the act was unlawful." *Propellex Corp.*, 18 BNA OSHC at 1684. Thus, neither Roussell nor Cascio could be deemed to have consciously disregarded the requirements of the cited standard by not requiring employees to use PFAS in view of their erroneous (and objectively unreasonable) beliefs that JKP would meet the requirements of the cited standard by implementing an alternative to the use of PFAS. *See Envision Waste Serv., LLC*, No. 12-1600, 2018 WL 1735661, at *11-12 (OSHRC, Apr. 4, 2018) (employer's heightened awareness of OSHA training requirements did not establish a willful violation where it was unclear the safety manager responsible for providing the training was aware of his failure to do so); *Stark Excavating, Inc.*, 24 BNA OSHC 2218, 2224 (No. 09-0004, 2014)

(consolidated) (supervisor's heightened awareness of OSHA trench protection requirements did not establish willful violation where there was insufficient evidence that his failure to comply "was anything more than negligence"), *aff'd*, 811 F.3d 922 (7th Cir. 2016).

Similarly with respect to the ladder violation, given that Cascio had accessed the roof by climbing the ladder whose side rails did not extend three feet above the roof, there is substantial evidence that would support the reasonable inference that Cascio consciously disregarded the cited ladder standard. The undersigned, however, does not regard that evidence to be preponderant in view of (1) Cascio's stated presumption that Roussell had set up the ladder properly before Roussell departed the worksite, and (2) the inspecting CO's assessment at the time of the inspection that while both violations were serious, the state of mind of the only JKP supervisory person on site at the time of the violations (Cascio) was not such that justified classifying either the ladder violation or the fall protection violation as willful.[9] (T. 158-61).

[9] The CO's originally set out to recommend classifying both violations as "serious," but in making this original assessment the CO did not know about, and thus was not taking into account, the fact that Ms. Proctor had had prior involvement in resolving citations that OSHA had issued to a company named Proctor Enterprises, Inc., which her spouse owned and operated and in which Ms. Proctor took an active role as an officer. *See* Ex. C-1 (July 2021 settlement agreement, signed by Ms. Proctor as vice-president of Proctor Enterprises, Inc., wherein the Secretary and Proctor Enterprises, Inc., agreed to a compromise total penalty of about $120,000 for proposed penalties that had totaled about $215,000 from four separate OSHA inspections). The OSHA area director subsequently determined to heighten the violation classifications to "willful-serious" because he regarded Ms. Proctor to have "knowledge of the standard beyond just cursory knowledge" based on her "prior history, education, training, and other interactions with OSHA." (T. 108-09). Notwithstanding Ms. Proctor's prior experience and awareness of the cited standards, there is no evidence that Ms. Proctor knew that the JKP crew here was violating either cited standard before the CO started the inspection. There is thus no evidence that Ms. Proctor's state of mind could

Plain Indifference

In the absence of "conscious disregard," a state of mind sufficient to prove that a violation was willful may be established alternatively by a showing that the employer was plainly indifferent to OSHA requirements or to employee safety in general. "Plain indifference" may be established by showing that the employer possessed a state of mind such that if the employer had known of an OSHA requirement, "the employer would not have cared that the conduct or conditions violated it." *Williams Enters. Inc.*, 13 BNA OSHC 1249, 1257 (No. 85-355, 1987).

Cascio erroneously and unreasonably believed that the use of safety monitoring system alone would meet OSHA fall protection requirements. There is evidence that Cascio assumed that Roussell had set up a compliant safety monitoring system before Roussell departed for an appointment. (T. 144-45). Cascio's failure to verify that a safety monitoring system that conformed to the requirements of § 1926.502(h) was in operation was not shown by a preponderance of the evidence to have been in plain indifference to the requirement that employees be protected employees from fall hazards. Cascio's lack of diligence or carelessness does not

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support a finding of willfulness as to either violation on a "conscious disregard" rationale.

It is notable further that the OSHA violation worksheets that the CO prepared for each of the two violations identify "repeat offender" as a justification for the penalties that were proposed for the alleged "willful-serious" violations. (Ex. C-20; T. 171). However, the Secretary did not allege as an alternative or additional violation classification that either violation constituted a repeated violation. This is so even though the Secretary presented evidence that might have supported a repeated classification on the theory that there was "substantial continuity" between JKP and Proctor Enterprises, Inc., which had violated the same standards that JKP violated here. *See Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1293 (No. 00-1402, 2010) (stating that "in appropriate circumstances, [the Secretary may apply] a 'repeat' characterization to cases where the cited employer has altered its legal identity from that of the predecessor employer whose citation history forms the basis of that characterization"). Notwithstanding evidence that would have been relevant to the "substantial continuity" test, the Secretary did not undertake to allege or prove that the violations here should be classified as repeated violations (which would permit the same maximum penalty that is permitted for a willful violation).

amount to plain indifference to employee safety. *See id.* ("It is … not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation" to prove willfulness). Moreover, the evidence does not show Ms. Proctor, who is responsible for the implementation of JKP's safety program, to have been plainly indifferent to OSHA requirements of employee safety. Ms. Proctor, Roussell, and Cascio all testified that Ms. Proctor regularly reminds the employees of the JKP rules that are designed to comply with the OSHA fall protection standard and ladder standard cited here, and the evidence shows further than both JKP foremen knew and understood those requirements. (T. 45, 58, 61-63, 193, 195-96).

Likewise, the evidence that Cascio was plainly indifferent to employee safety with respect to compliance with the cited ladder standard was not preponderant, it being equally plausible that he did not discern the violative condition (the ladder extending only about two feet rather than at least three feet above the roof) due to inattentiveness and carelessness.

Penalties

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits"), *aff'd*, 73 F.3d 1466 (8th Cir. 1996).

"OSHA penalties are meant to inflict pocket-book deterrence." *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001).

Section 17(j) of the Act requires the Commission, in assessing an appropriate penalty, to give "due consideration" to the "gravity of the violation," the "size of the business of the employer," the "good faith of the employer," and the employer's "history of previous violations."

29 U.S.C. § 666(j). Of these factors, gravity is the principal factor "and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005). "[T]he Commission has the authority to ensure that a penalty is not unduly burdensome or excessive by evaluating the penalty assessment criteria set forth in the Act and determining a reasonable and appropriate penalty based on that evaluation." *S.A. Healy Co.*, 17 BNA OSHC 1145, 1151 (No. 89-1508, 1995), *aff'd on other grounds*, 138 F.3d 686 (7th Cir. 1998).

The maximum penalty for the serious violations proven here is $14,502. 29 C.F.R. § 1903.15(d)(3) (2022).

With respect to the fall protection violation, all eight crew members were exposed to working at height with no fall protection whatsoever. The JKP crew here may have been accustomed to working on low-slope roofs with the use of a safety monitoring system alone, but the work here was neither on a low-slope roof nor was there any safety monitoring system in operation that met the requirements of § 1926.501(h)(1). A slip, trip, or stumble resulting in a fall to the ground from an elevation of up to fifteen feet could have resulted in serious injury or death. The undersigned concurs in the Secretary's characterization that the severity of the violation was "high." (T. 170; Ex. C-20 at 1).

With respect to the ladder violation, all eight crew members accessed the roof using a portable ladder whose side rails extended about two feet, rather than the minimum three feet, above the landing surface. While the likelihood of such a fall was appropriately assessed to have been of "lesser" probability, the possibility of there being an injurious landing in any such fall is substantial. The undersigned concurs in the Secretary's characterization of the severity of the violation being "medium." (T. 114-15, Ex. C-20 at 5).

Even though JKP had no prior history of violations, JKP had not been previously inspected and so there is no compliance history to take into account with respect to the "history of violations" factor. Accordingly, no enhancement or reduction of penalties is accorded under the "history of previous violations" factor for penalty assessments.

The inattentiveness, carelessness, and lack of reasonable diligence displayed by the two JKP foremen weighs heavily against according JKP any benefit for claimed "good faith of the employer" in the penalty calculus.

"Adjustment of the penalty for the employer's size is primarily an attempt to avoid destructive penalties," keeping in sight that the "primary objective of the Act is to secure a safe and healthful work place." *Colonial Craft Reproductions*, 1 BNA OSHC 1063, 1065 (No. 881, 1972). JKP has between eleven and twenty-five employees, which is a size that typically results in a significant reduction in the gravity-based penalty that the Secretary proposes in a citation. (T. 116). The undersigned determines that providing JKP substantial reductions for its relatively small size would be inappropriate because to do so would unduly dilute the deterrent effect of the penalties. Both JKP foremen were deeply familiar with both cited standards, yet both failed to exercise reasonable diligence towards compliance. One experienced foreman (Roussell) failed miserably in exercising reasonable diligence in determining the slope of the roof, with the consequence that the employees worked on the roof without any form of fall protection. The other experienced foreman (Cascio) failed to exercise reasonable diligence in either implementing or in overseeing the operation of even a non-compliant form of fall protection (i.e., the use of a safety monitoring system alone), and further in failing to discern that the portable ladder that he and the other employees used to access the roof was not sufficiently extended above the landing surface. Considering that these two experienced foremen were, at best, haphazard in their implementation

and oversight of safety measures that JKP crews must implement for most JKP projects, it is reasonable to conclude that JKP's safety program is woefully inadequate in motivating supervisory and non-supervisory employees to comply with safety standards to which JKP must routinely conform. While Ms. Proctor has regularly emphasized to the JKP foremen and non-supervisory employees that they must comply with the two standards that were cited here, the fact that JKP's two foremen failed so colossally in discharging their routine responsibilities respecting employee safety indicates that JKP's safety program has serious shortcomings that JKP's leadership must act to substantially improve. Accordingly, no significant reduction of the penalties is in order to account for JKP's relatively small size. Rather, substantial penalties are necessary and appropriate to incentivize future compliance and deter future violations. Accordingly, a penalty of $13,500 is assessed for high severity violation of § 1926.501(b)(13), and a penalty of $9,500 is assessed for the medium severity violation of § 1926.1053(b)(1).

ORDER

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

1. Citation 1, Item 1, alleging a willful-serious violation of 29 C.F.R. § 1926.501(b)(13) is AFFIRMED as a serious violation, and a penalty of $13,500 is ASSESSED.

2. Citation 2, Item 2, alleging a willful-serious violation of 29 C.F.R. § 1926.1053(b)(1) is

AFFIRMED as a serious violation, and a penalty of $9,500 is ASSESSED.

SO ORDERED.

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

Dated: April 16, 2024