**United States of America**
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>BERGELECTRIC CORP.,<br><br>Respondent. | OSHRC Docket No. 16-0728 |

Appearances:

Nancy Steffan, Esq. & Luis A. Garcia, Department of Labor, Office of Solicitor, Los Angeles, California
For Complainant

Robert Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, California
For Respondent

Before: Administrative Law Judge Peggy S. Ball

## DECISION AND ORDER

### I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). Beginning on February 24, 2016, Compliance Safety and Health Officer ("CSHO") Eric Christensen conducted a two-day inspection of the Hangar 5 renovation project, located at Marine Corps Air Station Miramar ("MCAS Miramar") in San Diego, California. (Tr. 25–26). Respondent had been hired to install photovoltaic panels on the roof of Hangar 5. (Tr. 26–27; Ex. C-15). Due to the scope of the project and the number of contractors

involved, CSHO Christensen did not open an inspection of Respondent until his second day at the worksite, February 25, 2016. (Tr. 27).

During his inspection of Respondent, CSHO Christensen observed Respondent's employees working on the hangar roof without safety nets, personal fall arrest systems (PFAS), or guardrails. Instead, Respondent informed CSHO Christensen that they were relying on the combination of a 6-foot warning line and a safety monitor in order to comply with its fall protection obligations. (Tr. 42–43; Ex. C-8, C-14, C-15). Based on his observations and additional research, CSHO Christensen determined that Respondent had committed multiple violations of the fall protection standards found in Subpart M of the Act. Based on CSHO Christensen's findings, Complainant issued a *Citation and Notification of Penalty* ("Citation") to Respondent, alleging three serious violations of the Act, with a total proposed penalty of $4,500.00. Respondent timely contested the Citation.

The trial took place on October 13, 2016. The following witnesses testified: (1) CSHO Eric Christensen; (2) Calvin King, Respondent's Safety Manager; (3) John Hernandez, Respondent's crew supervisor; and (4) Minh (Mike) Phung, a subordinate employee of Respondent. Both parties timely submitted post-trial briefs.

## II. Stipulations

On October 5, 2016, the parties submitted an *Amended Joint Stipulation Statement*, which included agreements on a number of basic jurisdictional and violation-related facts. In lieu of reproducing all twenty-one stipulations in their entirety, the Court shall refer to individual stipulations as necessary, and in the following form: ("Stip. No. __").

## III. Jurisdiction

The parties' *Amended Joint Stipulation Statement* acknowledges Respondent is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act and the Occupational Safety and Health Review Commission has jurisdiction of this proceeding pursuant to Section 10(c) of the Act. (Stip. Nos. 1 & 2).

## IV. Factual Background

The basic facts of this case are largely undisputed. On the morning of February 25, 2016, Respondent's employees were installing photovoltaic panels on the upper roof of Hangar 5. (Tr. 26–27; Ex. C-15). In order to access the upper roof, Respondent's employees climbed a fixed ladder to the lower roof, walked across a portion of the lower roof, and then climbed another fixed ladder to the upper roof. (Stip. No. 10). The lower roof was approximately 43 feet above the ground level, and the upper roof was an additional 17 feet above the lower roof. (Stip. Nos. 11 & 12).

CSHO Christensen began his inspection by conducting an opening conference with Brian Andreasen, Respondent's site foreman. (Tr. 28). During the opening conference, CSHO Christensen had Andreasen fill out a worksheet with basic company information and the nature of the work occurring at the worksite. (Tr. 29). From there, CSHO Christensen and Andreasen traveled up the first fixed ladder to access the lower roof. (Tr. 33). When they arrived on the first level, CHSO Christensen observed a warning line staged on the perimeter of the roof, which was attached to the cage of the lower roof fixed ladder. (Tr. 35; Ex. C-6, C-8). Just to the right of the ladder cage, the warning line was sagging just inches above the walking surface. (Tr. 33). CSHO Christensen measured the distance from the warning line to the edge of the lower roof and found that it was 96 inches. (Tr. 37).

After he completed his measurements and inspection of the lower roof, CSHO Christensen proceeded to the upper roof, where he observed four employees installing photovoltaic panels. (Tr. 41; Ex. C-15). The four employees were John Hernandez, Minh Phung, Zachary Ledbetter, and Rodolfo Chaparro. (Stip. No. 7). The employees were working in two sets of two, with Hernandez and Phung working towards the middle of the roof and Ledbetter and Chaparro working towards the far end, roughly 50 feet[1] away from Hernandez and Phung. (Tr. 42; Ex. C-15). Hernandez was serving in the role of supervisor and safety monitor. (Stip. Nos. 8 & 9).

As with the lower roof, Respondent utilized a warning line system, wherein cables and stanchions were installed around the perimeter of the upper roof at a distance of roughly 6 to 7 feet from the edge. (Stip. Nos. 14 & 15). Hernandez was charged with observing the employees on the upper roof and notifying them if they strayed too close to the warning lines or edge. (Tr. 138). None of the employees were wearing PFAS, there were no guardrails, and there was no safety net. (Tr. 42; Stip. No. 13). CSHO Christensen testified that, during the roughly 7–10 minutes that he was on the upper roof, Hernandez had his back to Ledbetter and Chaparro the entire time. (Tr. 44–45, 49, 55; Ex. C-21, C-22, C-38). According to Hernandez, he was helping Phung install panels and quality-check the installation, but he was "constantly" looking over to check on Chaparro and Ledbetter. (Tr. 140). Christensen testified that Chaparro and Ledbetter were approximately 8–9 feet from the edge of the upper roof. (Tr. 55–56; Ex. C-22).

After he completed his inspection of the upper roof, CSHO Christensen asked the employees to come down to ground level so that he could conduct interviews. (Tr. 63). Once the interviews were complete, CSHO Christensen held a brief closing conference with King and

1. CSHO Christensen testified that he had been told the "runs", or grouping of panels, were roughly 55 feet long. Based on his observation, Ledbetter and Chaparro were roughly one "run" away from Phung and Hernandez. (Tr. 53; Ex. C-22).

discussed his concerns regarding the distance of the warning lines from the roof's edge and Hernandez's job duties interfering with his responsibility as safety monitor. Based on his observations and research, CSHO Christensen recommended the following Citation items, which were issued by Complainant on March 29, 2016.

## V. Discussion

The primary issue in this case is whether Respondent must comply with the principal fall protection standard—29 C.F.R. § 1926.501(b)(1)—or whether it can instead fulfill its obligations through the use of a warning line-safety monitor combination, as provided in 29 C.F.R. § 1926.501(b)(10). As will be discussed in detail below, the alternatives to the principal fall protection standard, such as 1926.501(b)(10), do not apply to Respondent's work. Thus, Respondent was obligated to provide PFAS, safety nets, or guardrails, which it did not do. Accordingly, Respondent violated 1926.501(b)(1) as alleged in Citation 1, Item 1a.

With respect to the remaining Citation items, however, the Court finds Complainant failed to establish the cited standards apply to Respondent. Items 1b and 1c allege Respondent failed to comply with the criteria governing the use of safety monitors and warning lines. However, as noted above the Court finds Respondent was obligated to comply with 1926.501(b)(1) and cannot avail itself of alternatives such as warning lines and safety monitors which are found in 1926.501(b)(10). As such, Respondent cannot be cited for failure to comply with criteria which are contingent upon the application of a standard that does not apply to the work performed by Respondent. Accordingly, Items 1b and 1c are vacated.

### A. Applicable Law

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

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

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

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

**B. Citation 1, Item 1a**

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

> 29 CFR 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.
>
> (a) On or about February 24, 2016, at the MCAS Miramar worksite, employees installing photo voltaic panels on the roof of Hangar 5 were exposed to falls 17 feet to the lower level.

*See Citation and Notification of Penalty* at 6.

The cited standard provides:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected for falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

29 C.F.R. § 1926.501(b)(1).

**1. The Standard Applies**

The cited standard has four prerequisites: (1) an employee on (2) a walking/working surface, which (3) has an unprotected edge and (4) is six feet above a lower level. According to 29 C.F.R. § 1926.500, a "walking/working surface" is defined as "any surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, *roofs*, ramps, bridges . . . ." An "unprotected edge" is "any side or edge of a walking/working surface . . . where there is no wall or guardrail system at least 39 inches (1.0 m) high." 29 C.F.R. § 1926.500. Respondent's employees traversed and worked on the lower and upper roofs, respectively. (Stip. Nos. 7, 8, 10). By definition, those areas are walking/working surfaces; they were both more than 6 feet above the level below, and neither of the roof levels was protected by a guardrail or wall. Thus, on the face of it, the standard applies.

Respondent contends, however, that 29 C.F.R. § 1926.501(b)(10) is the more applicable standard. That standard states:

> *Roofing work on Low-slope roofs.* Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) 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.

29 C.F.R. § 1926.501(b)(10). On the face of it, Respondent's argument carries some cachet: its employees were performing work on a flat roof. The problem for Respondent, as Complainant points out, is the standard is limited to "roofing work". 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, but not including the construction of the roof

deck." *Id.* § 1926.500. While photovoltaic panels are typically installed on roofs, they do not fall under the rubric of "related insulation, sheet metal, and vapor barrier work". *Id.*

The reason for the low slope roofing standard's limited applicability is elucidated in the regulatory history of the standard. Under the initial formulation of the standard,[2] OSHA "intends that this final standard cover only *built-up roofing work* performed on low pitch roofs." *Guarding of Low-Pitched-Roof Perimeters During the Performance of Built-Up Roofing Work*, 45 Fed. Reg. 75618, 75619 (Nov. 14, 1980) (emphasis added). "Built-up roofing work", according to OSHA involved the "application of water membranes (usually felt and tar) and related insulation and sheet metal work." *Id.* Based on comments and analysis, OSHA determined that the application of such materials involved "unique difficulties" and that "the provisions of this standard are directed at these special circumstances." *Id.* (discussing the problems associated with conventional guarding systems that will be avoided "by allowing the use of a warning line and/or safety monitoring system"). Clarifying the limited scope of the standard, OSHA noted "[t]he standard does not apply to other types of roofing work such as shingle application and removal." *Id.* at 75620.

Along with the rest of Subpart M, the current version of the standard was revised in 1994. *See Safety Standards for Fall Protection in the Construction Industry*, 59 Fed. Reg. 40672 (August 9, 1994). According to the preamble of the revised Subpart M, the standard no longer refers to 'built-up roofing work', "because the Agency has determined . . . that there is no need to provide for different fall protection requirements for low-slope roofs based on the type of work (e.g., built-up roofing) being performed." *Id.* at 40677. While this deletion would appear to

2. The Court references the "initial formulation", because the version of the standard discussed above was previously found at 29 C.F.R. § 1926.500(g)(1) and applied to heights over 16 feet. *See* 45 Fed. Reg. at 75620. The standard was renumbered and changed in 1994. *See Safety Standards for Fall Protection in the Construction Industry*, 59 Fed. Reg. 40672 (August 9, 1994).

provide an opening for Respondent's more expansive interpretation, the preamble to the revised standard and subsequent interpretations indicate the scope of 1926.501(b)(10) is still limited in its application.

OSHA originally proposed to redefine the activity 'built-up roofing' to mean "the hoisting, storage, application and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck." *Id.* at 40679; *see also* 29 C.F.R. § 1926.500(a). However, in response to comments that the foregoing definition described roofing generally and did not mirror the industry's use of the term, OSHA deleted 'built-up roofing' along with its previous definition,[3] and supplanted it with the more general term, 'roofing work'. When discussing (b)(10) specifically, OSHA noted that the final rule was vastly different than the proposed rule due, in part, to the issues noted in defining 'built-up roofing'. The earlier proposed rule effectively created a distinction between roofers applying hot tar on low-pitched roofs, who would be subject to the existing 1926.500(g), and every other roofer on low-pitched roofs, who would be subject to current paragraph (b)(1). *See* 59 Fed. Reg. at 40689. To avoid a meaningless distinction, OSHA used the general term 'roofing work' in the revised (b)(10), stating, "OSHA also agrees with commenters who stated there is *no need to distinguish between the application of hot and cold materials* to determine the appropriate fall protection measures, hence the final provision will apply to all roofing operations on low-slope roofs and not just 'built- up' roofing activities." *Id.* at 40691 (emphasis added). Thus, while the scope of the low-pitched roof provision was arguably broadened, this was done to resolve an otherwise unnecessary distinction (insofar as fall protection was concerned) between the types of work associated with different roofing materials, *e.g.*, hot and cold. OSHA's resolution of that

3. *See* 59 Fed. Reg. at 40676–77.

distinction makes clear that, although the language of the standard seems to indicate an exception based solely on location, *i.e.*, a flat roof, the application of the standard is also contingent, in part, upon the *type* of work performed - roofing. The final rule in 29 C.F.R. § 1926.501(b) makes this clear.

The structure and language of paragraph (b), as a whole, indicates that the default provision is (b)(1), which requires PFAS, safety nets, or guardrails. 29 C.F.R. § 1926.501(b)(1). Each subsequent provision describes a discrete set of circumstances in response to which particular forms of protection are required or are considered to be alternatives to the primary set found in (b)(1).. *See, e.g.*, *id.* § 1926.501(b)(2) (allowing exceptions upon proof of infeasibility while constructing leading edges); *id.* § 1926.501(b)(3) (discussing the interplay of guardrails and PFAS when performing hoist work); *id.* § 1926.501(b)(9) (discussing requirements for bricklaying work). Paragraph (b)(10) is merely another set of discrete circumstances which OSHA has determined justifies a departure from the principal requirement found in (b)(1). There is no indication that installation of ancillary building systems, such as photovoltaic panels or HVAC systems, qualifies under any of the alternatives to (b)(1). As such, the default standard (b)(1) applies.

Complainant's interpretations of (b)(10) have reiterated the same position for years: it is specifically applicable to the work of installing, removing, or repairing the roof of a building; all other work not specifically mentioned in paragraph (b)(10) is subject to the requirements of (b)(1). *See* OSHA Letter of Interpretation, Russell B. Swanson, Director of Directorate of Construction to Mark Troxell, Re: 29 CFR 1926.501(b)(10) Roofing work and other trades working on low slope roofs (August 1, 2000).[4] In the letter to Mr. Troxell, the Directorate of Construction stated

4. *See* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=23873.

that there are limited sets of circumstances warranting departure from (b)(1) and concluded that "other trades", as indicated by Mr. Troxell, were nonetheless subject to the primary requirement found in (b)(1). *Id.* In one such circumstance OSHA created a *de minimis* exception to the guardrail standard wherein an employer, such as the "other trades" mentioned by Mr. Troxell (or Respondent in this case), substituted warning lines set fifteen feet back from the unprotected edge. *Id.* Such exception created a *de minimis* violation of (b)(1), insofar as the warning line constitutes a poorly substituted guardrail that would warn an employee he was too close to an unprotected edge long before he could tumble over it. *Id.* Strictly limiting the (b)(10) exception to roofing activity has been Complainant's position since the revision of Subpart M, and the Court sees no reason to depart from it in this case. *See* Compl't Ex. No. 36, OSHA Letter of Interpretation, Russell B. Swanson, Director of Directorate of Construction to Anthony O'Dea, Re: Fall protection requirements for construction workers doing work while on a roof (December 15, 2003).[5]

The Court rejects Respondent's argument that (b)(10) is the applicable standard. The language, structure, regulatory history, and subsequent interpretations all support Complainant's citation pursuant to 29 C.F.R. § 1926.501(b)(1). Accordingly, the Court finds the standard applies.

**2. The Terms of the Standard Were Violated**

Because the standard applies to Respondent's work, it is easy to conclude that the terms of (b)(1) were violated. The only acceptable methods of compliance were PFAS, safety nets, or guardrails. The parties stipulated that no safety nets were present, and the evidence is clear that the employees were not using fall arrest systems. (Ex. 42; Ex. C-22; Stip. No. 13). Though

5. *See* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24682.

Complainant maintains a policy permitting *de minimis* violations of the guardrail standard when warning lines are placed at a distance of 15 feet (amongst the other criteria for warning lines found at 29 C.F.R. § 1926.502(f)), CSHO Christensen's measurements show that Respondent's warning line was no more than 96 inches from the edge at its farthest. (Tr. 37; Ex. C-10). Thus, the terms of the standard were violated.

**3. Respondent's Employees Were Exposed to the Hazard**

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076 (No. 90-2148, 1995). Regarding access, "the 'inquiry is not simply into whether exposure is theoretically possible,' but whether it is reasonably predictable 'either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Nuprecon LP dba Nuprecon Acquisition LP*, 23 BNA OSHC 1817 (No. 08-1037, 2012) (quoting *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)). The Commission has found exposure and/or access to a fall hazard in a number of different situations. *See Dic-Underhill*, 8 BNA OSHC 2223 (No. 10798, 1980) (finding access to fall hazard where employees grinding ceiling seams more than 25 feet away from unguarded edge had to move closer to edge to sand seems extending to side of building); *N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000) (stumbling near unprotected edge resulted in employee falling to his death); *Lancaster Enters.*, 19 BNA OSHC 1033 (No. 97-0771, 2000) (finding exposure where employees used a hatchway and ladder "closely adjacent" to a fall hazard); *Phoenix Roofing*, 17 BNA OSHC at 1079 (finding exposure where employees were "about 12 feet" from unguarded skylights).

The photographs and testimony illustrate that, at the very least, Ledbetter and Chaparro were exposed to a fall hazard. At the time of the inspection, both Chaparro and Ledbetter were

working within 8 or 9 feet of an unprotected edge. (Tr. 56–57; Ex. C-22, C-23). According to CSHO Christensen, it would only have taken a matter of seconds for either Ledbetter or Chaparro to approach the unprotected edge, which was 17 feet above the lower roof level. (Tr. 57). In terms of distance, Ledbetter and Chaparro were closer to the unprotected edge than the employees in the cases mentioned above and well within the 15-foot buffer zone, which Complainant has repeatedly determined represents the distance at which a warning line would prove effective at preventing a fall. *See* OSHA Letters of Interpretation, *supra* Section V.B.1. Further, though not specifically testified to by CSHO Christensen, the photographs of the upper roof surface show raised seams running the entire length of the roof. (Ex. C-15, C-17). In addition, the pictures show conduit and a wire cable running adjacent to the warning line. (Ex. C-15, C-17, C-18, C-19). Thus, in addition to mere proximity, the structure of the roof presented the potential for inadvertent tripping, stumbling, or falling over the unprotected edge. *See N&N Contractors*, *supra*. Accordingly, the Court finds Complainant established that Respondent's employees were exposed to a fall hazard. *See Nuprecon LP*, 23 BNA OSHC 1817, *supra*.

**4. Respondent Had Knowledge of the Conditions**

"To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Central Florida Equip. Rentals, Inc.*, 25 BNA OSHC 2147 (No. 08-1656, 2016). To satisfy this burden, Complainant must show "knowledge of the *conditions* that form the basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard." *Id.* "When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of noncomplying conduct of a subordinate." *Mountain States*

*Tel. & Tel. Co. v. Occupational Safety & Health Review Comm'n*, 623 F.2d 155, 158 (10th Cir. 1980); *see also Hamilton Fixture*, 16 BNA OSHC 1073 (No. 88-1720, 1993) (holding that where a supervisor is in close proximity to an apparent safety violation, the supervisor may be charged with constructive knowledge of the violation).

Multiple members of Respondent's management team were aware of the non-complying conditions on the roof of Hangar 5. Hernandez was the supervisor for the crew on the roof, and was specifically designated to be the safety monitor, whose job it was to monitor the employees and the conditions on the roof. (Tr. 137–38). King, Respondent's safety manager, established the site-specific fall protection plan based on his determination that warning lines six feet from the edge were compliant with the standard. (Tr. 132–34; Ex. C-3, C-37). Through its supervisors, Respondent was aware of both the non-complying conditions and the site-specific plan calling for their implementation.

**5. The Violation Was Serious**

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

The upper roof, where the work took place, was located 17 feet above the lower roof. According to CSHO Christensen, falls from that height could result in contusions, lacerations,

head/neck/back injuries, and possibly death. (Tr. 76). Respondent did not counter this conclusion. Complainant's characterization of this citation comports with Commission precedent. *See, e.g.*, *Kulka Constr. Mgmt. Corp.*, 15 BNA OSHC 1870 (No. 88-1167, 1992) (finding falls of 10 to 20 feet present possibility of serious injury); *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155 (87-1238, 1989) ("Here, there was testimony that the second floor of each building was twelve feet above the ground. A fall from even that modest height could result in a serious injury . . . ."). Citation 1, Item 1a shall be affirmed as serious.

**C. The Cited Standards in Citation 1, Item 1b & Item 1c Do Not Apply**

Subpart M has four primary sections. *See* 29 C.F.R. §§ 1926.500–.503. The first section lays out the applicable definitions for fall protection in the construction industry. *Id.* § 1926.500. The second section establishes the principal duty to have fall protection and, as discussed above, establishes the required and/or alternative forms of fall protection based on the work being performed. *Id.* § 1926.501. The third section establishes the minimum criteria and standard practices for the fall protection systems discussed in 1926.501. *Id.* § 1926.502. Finally, the brief fourth section discuses training requirements. *Id.* § 1926.503.

Citation 1, Item 1a was issued pursuant to 1926.501(b)(1), which requires the use of PFAS, safety nets, or guardrails. Thus, full compliance requires the chosen form of fall protection to comport with the criteria laid out in 1926.502. *See id.* § 1926.502(b) (guardrail requirements); *id.* § 1926.502(c) (safety net systems); *id.* § 1926.502(d) (personal fall arrest systems). Similarly, a warning line-safety monitor fall protection system implemented pursuant to 1926.501(b)(10) requires compliance with 1926.502(f) and 1926.502(h). *Id*. § 1926.502(f) (criteria for warning line systems); *id.* § 1926.502(h) (criteria for safety monitors). Complainant successfully argued for the application of 1926.501(b)(1) to Respondent and further established that 1926.501(b)(10), which allows for the use of safety monitors and warning lines, was inapplicable to Respondent.

Citing Respondent pursuant to 1926.501(b)(1), 1926.502(f)(2)(ii), and 1926.502(h)(1)(v), as Complainant has done here, is duplicative. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207 (No. 87-2059, 1993) (holding violations may be found duplicative where they require the same abatement measures); *Capform, Inc.*, 13 BNA OSHC 2219, 2224 (No. 84-556, 1989) (finding violation duplicative where abatement of one citation item will necessarily result in abatement of the other item as well). Because (b)(10) is not applicable to Respondent's work activities, Respondent cannot be required to comply with the criteria for its implementation. The standard, preamble, and subsequent letters of interpretation make it clear that non-roofing contractors are required to comply with 1926.501(b)(1) and cannot rely on the provisions of (b)(10), even if the roof could be characterized as "low-slope". *See* Section V.B.1, *supra*. Again, as noted above, 1926.501(b)(1) is the primary obligation to provide fall protection; whereas the remaining subsections of 1926.501(b) describe particular situations wherein departure from the primary obligation is warranted or allowed. No such situation was present here, as established by Complainant. Thus, the only applicable fall protection criteria are those related to PFAS, safety nets, or guardrails. *See* 29 C.F.R. § 1926.502(b)–(d). Abatement of the hazard through application of 1926.501(b)(1) would necessarily abate the other items related to safety monitors and warning lines, because they would not be necessary if Respondent used guardrails, PFAS, or safety nets. Accordingly, sub-items 1b and 1c are duplicative.

The foregoing is true even taking into consideration the *de minimis* exception described in the aforementioned letters of interpretation. According to each of those letters, Complainant stated he would "consider the use of certain physical barriers that fail to meet the criteria for a guardrail a de minimis violation *of the guardrail criteria* in § 1926.502(b)" insofar as the warning line is 15 feet from the edge and meets or exceeds the requirements of 1926.502(f)(2), there is no work

occurring in between the warning line and the unprotected edge, and a work rule is in place to prevent employees from going outside the warning line. *See* OSHA Letter of Interpretation, Russell B. Swanson, Director of Directorate of Construction to Mark Troxell, Re: 29 CFR 1926.501(b)(10) Roofing work and other trades working on low slope roofs (August 1, 2000) (emphasis added). In other words, under the terms of the "exception" laid out in the various letters of interpretation, the warning line is considered a non-complying guardrail. Insofar as the noncompliant "guardrail" meets the requirements laid out in the letters of interpretation, it will be considered a *de minimis* violation of the guardrail standard, 1926.502(b). There is no additional requirement for a safety monitor under this "exception" as in 1926.501(b). Further, though the *de minimis* policy enunciated in the letters of interpretation reference 1926.502(f) as part of the criteria for determining whether a violation of the guardrail standard occurred, it is merely a condition precedent for compliance with 1926.502(b). Thus, under the terms of this *de minimis* exception, the failure to ensure the warning line's compliance with 1926.502(f) is still a violation of 1926.502(b).

Respondent's failure in this case was singular—it failed to provide PFAS, guardrails, or safety nets as required by 1926.501(b)(1). Its noncompliance with the guidelines for warning lines and safety monitors is irrelevant because Respondent could not have used those implements to comply with its primary obligation. Accordingly, Citation 1, Items 1b and 1c shall be vacated.

## VI. Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's

business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Complainant determined that Citation 1, Item 1 should be classified as high severity and low probability. (Tr. 78). At least two of Respondent's employees were exposed to falls of up to 17 feet or more, which could be deadly, but its attempts to comply with the standard, coupled with training and education, mitigated the likelihood that an accident would occur. (Tr. 78). Further, Respondent has over 2000 employees, which means Complainant did not provide a discount based upon its size; however, because previous OSHA inspections did not result in a citation, Complainant proposed a 10 percent penalty reduction. Complainant did not, however, assess any credit for good faith due to the deficiencies noted during the inspection.

With the exception of good faith, the Court generally agrees with Complainant's assessments. CSHO Christensen determined that Respondent was not eligible for a good faith discount because of the deficiencies noted during the inspection; however, he also noted that Respondent "did make some attempts to comply with the standard, provide training and education to their employees. They had attempted to be in compliance, so there were some factors that helped keep those employees safe." (Tr. 78–79). For the most part, Respondent attempted to develop a fall protection plan based on a good faith, albeit mistaken, interpretation of the fall

protection standard. The moment that its deficiencies were pointed out, Respondent quickly implemented changes both at the site and within the site-specific fall plan. (Tr. 67; Ex. C-25 to C-30). Accordingly, the Court finds that a penalty of $3,000.00 is appropriate for this violation.

## ORDER

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

1. Citation 1, Item 1 is AFFIRMED as serious, and a penalty of $3,000.00 is ASSESSED.
2. Citation 1, Item 1b is VACATED.
3. Citation 1, Item 1c is VACATED.

SO ORDERED

/s/
Peggy S. Ball
Judge, OSHRC

Date: July 17, 2017
Denver, Colorado