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. 3-D BUILDERS, LLP, Respondent.	OSHRC DOCKET NO. 16-0094

Appearances:

Oscar L. Hampton III, Esq., Regional Solicitor, Judson H. Dean, Esq., Office of the Regional Solicitor, Philadelphia, PA
For the Complainant

Shawn Davis, *pro se*
3-D Builders, LLP, Morgantown, WV 26508
For the Respondent

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

Respondent 3-D Builders, LLP (Respondent or 3-D Builders) is a business engaged in construction activities. Following an anonymous complaint, the Occupational Safety and Health Administration (OSHA) inspected Respondent's residential construction worksite in Morgantown, West Virginia. The result of the inspection was a one-item serious citation, with subparts, a one-item willful citation, and a notification of penalty (citation), alleging violations of the OSHA's construction standards regarding ladders, 29 C.F.R. § 1926.1053(b)(1), and fall protection required for employees engaged in residential construction activities, 29 C.F.R. § 1926.501(b)(13).

Respondent 3-D Builders timely contested the citation, bringing the matter before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of

the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act). A hearing[1] was held in Pittsburgh, PA on January 25, 2017.[2] The Secretary was represented by counsel at the hearing. No Respondent representative attended or participated in the hearing. (Tr. 4-6). The Secretary filed a post-hearing brief. Respondent did not file a post-hearing brief.

For the following reasons, the serious citation 1, item 1(a)[3] and willful citation 2, item 1 are affirmed and a total penalty of $16,000 is assessed.

BACKGROUND

The OSHA Inspection.

On Wednesday, November 18, 2015, the OSHA Charleston, West Virginia, Area Office received an anonymous complaint about possible hazardous conditions at a worksite in Morgantown, West Virginia. OSHA Compliance Safety and Health Officer (CO) Anthony Milam was assigned to travel to the worksite and conduct an inspection. The CO arrived at the worksite, located at 709 McKinley Avenue, Morgantown, West Virginia, around 12:00 p.m. (noon). Upon arrival, before leaving his vehicle, the CO took several photographs of the construction worksite, a two-story house, and the two workers located on the front porch roof. The residential construction job in progress was the removal of an old shingle roof and installation of a new roof, on the porch and main house. (Tr. 22-23, 25-33, 46-48, 61-62, 75-76; Exs. C-2, C-3, C-4, C-5).

After parking his vehicle, the CO approached a man standing on the worksite grounds. The CO presented his credentials and explained that OSHA had received a complaint regarding possible hazards at the worksite. The man identified himself as Shawn Davis, the company owner.[4] Mr. Davis said the company's name was 3-D Builders. A copy of the complaint OSHA received was provided to Mr. Davis. The CO took additional photographs, including a photo of two workers on the house back roof. (Tr. 34-38, 40-41; Exs. C-1, C-6, C-7, C-8).

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[1] The transcript is amended to reflect the corrections listed on the attached errata sheet.

[2] Several prehearing Notices and Orders, issued in this proceeding, were received in evidence as hearing exhibits. In this decision, they are designated Ex. ALJ-1 though Ex. ALJ-7(a). (Tr. 7-9).

[3] At the hearing, the Secretary withdrew serious citation 1, item 1(b), alleging a violation of 29 C.F.R. § 1926.1060(a), training requirements for employees using ladders. (Tr. 61). Accordingly, serious citation 1, item 1(b) is vacated.

[4] Shawn Davis is identified in the decision as Mr. Davis, Respondent owner, 3-D Builders' owner, or Respondent's representative.

The CO asked Mr. Davis to have his employees come down off the roof, so he could speak with them. At approximately 12:45 – 1:00 p.m., the CO observed three workers use the ladder, located at the right front corner of the house, to come down from the roof.[5] (Tr. 34-35, 65, 79-80). Two of the workers who came down from the roof were the workers the CO had photographed on the back roof. (Tr. 41). The CO briefly spoke to the three workers: Jacob Davis, Timothy Dalton, and Casey Barnett. (Tr. 38-39).

The CO interviewed 3-D Builders' owner while they stood on the residence driveway. During the interview, the CO recorded the information Mr. Davis provided on a witness statement form.[6]

During the interview Mr. Davis stated that the job began on Monday. The job involved removing the shingle roof from the residence. They worked Monday, all day Tuesday, and that day, Wednesday, beginning at 7:00 a.m. They finished the main roof on Tuesday. Respondent owner Davis estimated that the "porch roof is about 3/12 and the main roof is about 10/12."[7] Mr. Davis said the "porch roof is 11-13 feet high and the main roof is about 20-22 feet high." Mr. Davis told the CO that 3-D Builders was subbing for Lynn Wood Company; and that Mr. Lynn Wood didn't say anything about fall protection. Mr. Davis said he had never been inspected by OSHA. Mr. Davis said that he knows that fall protection is required for any work over six feet. He stated that they were not wearing fall protection on this worksite. Mr. Davis confirmed that the only way to access the roof was to use the extension ladder, which was located at the right front corner of the house. (Tr. 39, 44-45, 48, 57, 65, 78-79; Ex. C-1).

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[5] The Secretary contends that the evidence supports a finding that on the day of the inspection, Respondent's owner Mr. Davis also worked on the roof. And further, that the evidence discloses that there were four 3-D Builders workers on the inspected worksite, including Mr. Davis, exposed to the hazards alleged. (Sec'y Br. at 2-3). I agree. Photographs taken during the inspection, within a short time-frame, disclose four workers on the roof. (Tr. 80).

[6] Great weight is given to the admissions recorded in Mr. Davis' signed OSHA interview statement. *See* Fed.R.Evid. 801(d)(2)(D). While interviewing Mr. Davis at the inspection worksite, the CO recorded his statements contemporaneously. Mr. Davis reviewed, signed, and dated the statement. (Tr. 41-44, 79; Ex. C-1). The accuracy of the statement is unrebutted.

[7] The CO testified that Mr. Davis' statement that the "porch roof is about 3/12 and the main roof is about 10/12," was an estimate of the roof slope. In comparison, a 12/12 sloped roof would be almost vertical, a 1/12 sloped roof would be flat. On this residential worksite, the main roof of the house had a steeper slope. (Tr. 45-46; Ex. C-4). The slope of the back roof, where employees were photographed using the scraper, was approximately 3/12. (Tr. 67).

During the inspection, the CO measured the height of the porch roof to the ground to be approximately ten feet high. He measured the height of the main roof, from the roof peak to the ground, to be approximately twenty to twenty-two (20 to 22) feet high. (Tr. 52-53, 63; Ex. C-4).

Prehearing Pleadings and Discovery

The Secretary filed the complaint in this case, attaching as exhibits the citation and Respondent's January 5, 2016 notice of contest. Respondent's answer, filed on May 27, 2016, was a copy of Respondent's notice of contest, with several attached exhibits. As instructed by the undersigned judge, Respondent's representative Mr. Davis filed a more specific answer on July 12, 2016. [8]

Respondent's notice of contest generally contests the violations alleged in the citation and the penalties proposed. Respondent's notice of contest and answers specifically contend that 3-D Builders is not an LLP, rather it is a general partnership with no employees.[9] (Tr. 13). In Respondent's more specific answer, Mr. Davis added that 3-D Builders Partnership was a subcontractor of Lynn Wood Company of Morgantown, on this worksite.[10]

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[8] Respondent's notice of contest, answer, and more specific answer are set forth in the October 26, 2016 Order granting the Secretary's Motion to Compel discovery responses (Order compelling discovery). (Ex. ALJ-5). The Order compelling discovery, at pages 2 – 4, describes the exhibits attached to Respondent's answer.

The exhibits attached to Respondent's answer are a part of the answer for all purposes. *See* Commission Rule 30(d); 29 C.F.R. § 2200.30(d). While a part of the Respondent's answer, setting forth Respondent's defenses, these exhibits have not been considered in this decision. These pleading exhibits are accorded no weight. As stated in the Order compelling discovery, at page 4, many questions are raised by Respondent's notice of contest, answers, and attached exhibits. (Ex. ALJ-5). As Respondent did not comply with the Order compelling discovery, the questions raised remain unanswered.

[9] Respondent contends in its notice of contest and answers that Shawn Davis, Jacob Davis, Timothy Dalton, and Casey Barnett have a written partnership agreement, they are registered through the State of West Virginia as a general partnership, they are exempt from workers' compensation because they are a partnership with no employees, and they file a general partnership tax return. In Respondent's more specific answer, Mr. Davis reiterated Respondent's contention that 3-D Builders Partnership is not an LLP. Respondent contends that OSHA has no regulations on a partnership. Respondent contends that every 3-D Builders partner is self-employed and that 3-D Builders has no employees.

[10] *See* Order compelling discovery. (Ex. ALJ-5).

Throughout this proceeding, Respondent owner Mr. Davis has self-represented Respondent.[11] During prehearing conference calls and in prehearing Notices and Orders, Mr. Davis was reminded that, as Respondent's representative, he must comply with all requirements relating to these proceedings, including participating in telephone conference calls, filing and serving appropriate papers, and timely responding to discovery requests. The importance of active participation in the prehearing discovery process, including the importance of timely serving and responding to discovery requests, was emphasized. Mr. Davis was advised that if Respondent did not respond to the Secretary's discovery requests by either answering each request, providing the document(s) requested, or stating an objection to each request or document, the Commission Rules provide that discovery sanctions may be ordered. Mr. Davis was firmly cautioned that Respondent's failure to cooperate in the prehearing discovery process may result in Respondent being sanctioned. [12] (Tr. 13-14).

In August 2016, counsel for the Secretary served two discovery requests on Respondent: Complainant's first set of Requests for Admissions and Complainant's first set of Requests for Production of Documents. Respondent answered the requests with handwritten discovery responses that were summary, incomplete, and without affirmation. Respondent provided no documents in response to the Secretary's request for documents.[13] Following receipt of

[11] *See* July 29, 2016 Notice of Hearing, Scheduling Order and Special Notices (Ex. ALJ-1) (Tr. 12-13). During prehearing conference calls and in prehearing Notices and Orders, Mr. Davis was advised that the Commission Rules provide that in proceedings before the Commission any party may appear in person (self-represented), through an attorney, or through another representative who is not an attorney. *See* Commission Rule 22; 29 C.F.R. § 2200.22. (Tr. 14).

[12] *See* July 29, 2016 Notice of Hearing, Scheduling Order and Special Notices (Ex. ALJ-1); September 22, 2016 Order (Ex. ALJ-2); October 26, 2016 Order compelling discovery (Ex. ALJ-5); November 14, 2016 Notice of Rescheduled Hearing, and Notice of Prehearing Conference Calls, and Revised Scheduling Order (Ex. ALJ-4); and November 17, 2016 Notice of Rescheduled Hearing and Order (Ex. ALJ-3).

[13] Respondent's handwritten responses to the Secretary's Requests for Admissions were without affirmation and incomplete. Respondent's handwritten, summary, responses to the Secretary's Requests for the Production of Documents were also incomplete. Respondent provided no documents in response to the Secretary's discovery request. Respondent referenced the documents Respondent attached to its answer. Respondent did not state a legal objection to providing the documents requested. Respondent specifically stated its refusal to provide certain documents, including bank account statements, complete federal and state tax returns, and documents regarding vehicle ownership. *See* Order compelling discovery, pp. 6-12 (Ex. ALJ-5). (Tr. 16-17).

Respondent's incomplete discovery responses, counsel for the Secretary filed a Motion to Compel. (Tr. 14-15).

On October 26, 2016, an Order issued granting the Secretary's Motion to Compel (Order compelling discovery). (Ex. ALJ-5). Respondent was directed to provide the responsive documents requested by the Secretary and supplement Respondent's answers and responses to the Secretary's discovery requests. The actions Mr. Davis needed to take, as Respondent's representative, to comply with the Order compelling discovery, were outlined in specific detail.

A conference call was held on November 16, 2016, during which the actions Respondent needed to take to comply with the Order compelling discovery were explained to Mr. Davis. Respondent was granted an extension of time to provide the discovery documents and responses to counsel for the Secretary as ordered. During the call, the parties agreed to the rescheduled January 2017 hearing dates.[14] (Tr. 15).

Thereafter, Respondent failed to comply with the Order compelling discovery. Respondent did not provide the supplemental discovery responses as ordered. Respondent did not provide the requested discovery documents as ordered.[15] (Tr. 15).

Discovery Sanctions Motion and Order to Show Cause

Pursuant to Commission Rule 52(f), on December 1, 2016, the Secretary filed a Motion requesting discovery sanctions as Respondent failed to comply with the Order compelling discovery (Motion for sanctions). The Secretary's Motion requested narrowly tailored sanctions directed to Respondent's failure to comply. Respondent did not file a written response to the Secretary's Motion.

An Order to show cause issued, directing Respondent to file a written Response to the Secretary's Motion for sanctions, on or before January 6, 2017.[16] Respondent did not file a written Response. (Tr. 10-11).

Discovery Sanctions Discussion

Well established Commission policy is to decide cases based on their merits, rather than on procedural flaws. The Commission consistently has held that dismissal of a party's case is too

[14] *See* November 17, 2016 Notice of Rescheduled Hearing and Order. (Ex. ALJ-3).

[15] *See* Order to show cause. (Ex. ALJ–5).

[16] *See* December 19, 2016 Order to show cause. (Exs. ALJ-5, 5(a)).

harsh a sanction for failure to comply with certain prehearing orders, absent evidence of prejudice to the opposing party, contumacious conduct by the noncomplying party, and/or a pattern of disregard for Commission Rules by the noncompliant party. *See Stone & Webster Constr.*, Inc., 23 BNA OSHC 1939, 1943-44 (No. 10-0130, 2012)(consolidated); *Sealtite Corp*., 15 BNA OSHC 1130, 1133 (No. 88-1431, 1991); *Duquesne Light Co*., 8 BNA OSHC 1218, 1222-23 (No. 78-5034, 1980)(consolidated).

The Commission Rules provide for prehearing discovery by the parties, including requests for document production and requests for admissions. *See* Commission Rules 52, 53 and 54; 29 C.F.R. §§ 2200.52, 2200.53, 2200.54. Cooperation by the parties during the prehearing discovery process is anticipated. Commission Rule 52(f) provides for the imposition of sanctions when a party refuses or obstructs discovery.[17]

A Commission hearing judge may impose any sanction stated in Fed.R.Civ.P. 37 for failing to comply with a discovery order; however, the sanction imposed must not be "too harsh under the circumstances of the case." *St. Lawrence Food Corp*., 21 BNA OSHC 1467, 1472 (No. 04-1734, 2006)(consolidated).

The Commission has held that the "extreme sanction" of the "exclusion of critical evidence" to a party's case, may be appropriate where a party has "willfully deceived" the

[17] Commission Rule 52(f), 29 C.F.R. § 2200.52(f), states:

> *Failure to cooperate; Sanctions*. A party may apply for an order compelling discovery when another party refuses or obstructs discovery. For purposes of this paragraph, an evasive or incomplete answer is to be treated as a failure to answer. If a Judge enters an order compelling discovery and there is a failure to comply with that order, the Judge may make such orders with regard to the failure as are just. The orders may issue upon the initiative of a Judge, after affording an opportunity to show cause why the order should not be entered, or upon the motion of a party. The orders may include any sanction stated in Federal Rule of Civil Procedure 37, including the following:
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> (1) An order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining that order;
> (2) An order refusing to permit the disobedient party to support or to oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence;
> (3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed; and
> (4) An order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Commission or "flagrantly disregarded" a Commission order. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1166 (No. 90-1307, 1993). *See Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001). When reviewing a sanction order regarding the exclusion of evidence, the Commission considers whether the party against whom the evidence is being offered has been prejudiced in preparing or presenting its case by the conduct of the noncomplying party and whether the noncomplying party's conduct was contumacious. *Jersey Steel Erectors*, 16 BNA OSHC at 1166-67. *See also Duquesne Light Co.*, 8 BNA OSHC at 1222-23; *Sealtite Corp.,* 15 BNA OSHC at 1134 (A consistent pattern of failure to comply with Commission Rules and with judge's orders, delaying a proceeding, constitutes contumacious conduct.).

The Commission has an obligation to provide all parties to a case with an opportunity to for a "full, fair, and equal opportunity to be heard." *Choice Elec. Corp*., 14 BNA OSHC 1899, 1900-01 (No. 88-1393, 1990). The Commission recognizes that employers who participate in proceedings before the Commission self-represented, without an attorney, may require additional consideration as they may not be knowledgeable about the Commission's procedural requirements and legal procedures. *Id.*; *Sealtite Corp*., 15 BNA OSHC at 1133-34.

The Commission hearing judge has broad discretion to decide whether sanctions should be ordered. *See Architectural Glass & Metal Co.*, 19 BNA OSHC at 1547 *Jersey Steel Erectors*, 16 BNA OSHC at 1165; *Sealtite Corp.,* 15 BNA OSHC at 1134; *Duquesne Light Co.,* 8 BNA OSHC at 1222.

The Commission Rules and Federal Rules of Civil Procedure provide an opportunity for all parties to engage in prehearing discovery. Prehearing discovery enables the parties to a proceeding to gather the information and evidence on which the Secretary's citations and Respondent's defenses are based. With the information received in discovery each party's understanding of the case increases, enabling each party to evaluate the relative strengths and challenges of their case and of their opponent's case. In many cases, this increased understanding facilitates settlements. Unfortunately, in this case, the opportunity for prehearing discovery to increase the Secretary's understanding of Respondent's defenses was lost. Respondent failed to fully respond to the Secretary's discovery requests in a meaningful manner and Respondent refused to comply with the undersigned judge's Order compelling discovery.

In this case, I find Respondent's consistent pattern of failing to comply with the undersigned's Orders constitutes contumacious conduct. These Orders include the Order

compelling discovery, the Order to show cause, the Notice of Rescheduled Hearing and Order directing the parties to file a prehearing statement, participate in a prehearing conference call, and attend the scheduled hearing.[18] (Tr. 19-21).

A party is prejudiced if the opposing party's failure to fully respond to discovery requests impairs the requesting party's ability to determine the facts and merits of the opposing party's claims or defenses. I find that Respondent's conduct, in refusing to comply with the Order compelling discovery, prejudiced the Secretary in the preparation of the Secretary's case to address and rebut the defenses raised by Respondent.

Respondent contends that it is a partnership in which every partner is self-employed, that Respondent has no employees, and that OSHA has no regulations on a partnership.[19] These defenses are raised by Respondent in its notice of contest and answers. Therefore, an issue in this proceeding is the employment status of the individuals working with Respondent at the inspected worksite. As stated in the Order compelling discovery, several of the documents requested by the Secretary are relevant to the employment status of the individuals working with Respondent, including bank account statements, completed federal and state tax returns, documents regarding vehicle ownership, training programs, payroll records, and work hours, among others. Respondent refused to produce to the Secretary documents regarding the employment indicia of the individuals working with Respondent at the time of the OSHA inspection. (Tr. 16-17). Respondent has not articulated a legal basis for its refusal to produce the documents.[20]

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[18] Respondent's representative Mr. Davis participated in prehearing conference calls on July 1, July 25, August 26, September 20, and November 16, 2016. During these calls, Mr. Davis' questions were answered. The importance of participation and cooperation with the prehearing discovery process was explained to Mr. Davis. Mr. Davis was advised that sanctions may be ordered, if Respondent did not comply with the Order compelling discovery. (Tr. 14).

Importantly, despite receiving courtesy reminders, no one from Respondent joined scheduled conference calls on November 8 and 10, 2016 and on January 13, 2017. If Respondent's representative Mr. Davis had unanswered questions regarding Commission procedures, the undersigned judge's Orders, or the upcoming hearing, his failure to participate in the scheduled conference calls were missed opportunities. (Tr. 20).

[19] *See* Note 9 above.

[20] *See* Order to show cause, Order compelling discovery (Ex. ALJ 5, 5(a)).

Whether an individual is an employee is a case specific, fact-based analysis. All incidents of the employment relationship are considered. One employment factor alone is not decisive. *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448-451 (2003). As the Supreme Court stated in *Clackamas*, "[t]he mere fact that a person has a particular title – such as partner . . . should not necessarily be used to determine whether he or she is an employee or a proprietor." *Id* at 450. *See generally, Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

Respondent's refusal to comply with the Order compelling discovery, despite having been granted time extensions and second chances to comply, prejudiced the Secretary in the preparation of the Secretary's case. In this case, I find the narrowly tailored sanctions requested by the Secretary in the Motion for sanctions warranted and appropriate.

Discovery Sanctions Order

As stated on the record, at the beginning of the hearing, the Secretary's Motion for sanctions was granted as follows.

> It is Ordered that the following designated facts shall be taken to be established for purposes of the case in accordance with the claims of the Secretary.
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> a. First, as alleged in the complaint and in the citations issued in this case, that Respondent's workers at the worksite inspected by OSHA, 709 McKinley Avenue, Morgantown, WV 26506, on or about November 18, 2015, were "employees" of Respondent 3-D Builders, LLP, within the meaning of section 3(6) of the Act. "Employee" means an "employee of an employer who is employed in a business of his employer which affects commerce."
> b. Second, as alleged in the complaint and in the citations issued in this case, that Respondent 3-D Builders, LLP, is an "employer" within the meaning of section 3(5) of the Act. "Employer" means a "person engaged in a business affecting commerce[21] who has employees …."
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> It is further Ordered, that Respondent not be permitted to dispute the facts designated above, in paragraphs (a) and (b), that the workers were employees of Respondent 3-D Builders and that Respondent 3-D Builders is an employer. It is Ordered that Respondent not be permitted to dispute these issues or present any evidence at the hearing, through witness testimony, documents, or exhibits, to dispute these designated facts.

[21] Section 3(3) of the Act defines commerce as "trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points in the same State but through a point outside thereof."

(Tr. 11-12, 21). *See* Commission Rule 52(f) *Failure to cooperate; Sanctions*. 29 C.F.R. § 2200.52(f).

The Hearing

Respondent had full knowledge of the hearing date, time, and location. A Notice of Rescheduled Hearing and Order issued in this case.[22] This Notice and Order set forth the agreed hearing dates, the final prehearing conference call date and time, and the due date for the parties to file a joint prehearing statement.[23] A Notice of Hearing Location issued stating the specific courthouse location, in Pittsburgh, Pennsylvania, for the hearing scheduled to begin on January 25, 2017.[24] Prior to the final prehearing conference call, the judge's legal assistant called and spoke to Respondent's representative Mr. Davis to remind him of the scheduled call and to remind him to file Respondent's prehearing statement. Mr. Davis did not join the scheduled call. No prehearing statement was received from Respondent. (Tr. 6-9, 11).

During the final prehearing conference call, counsel for the Secretary was advised that the Secretary's Motion for sanctions would be granted, with the decision granting the Motion stated on the record when the hearing opened. Notice that the Secretary's Motion for sanctions would be granted also was stated prior to the hearing, in an email exchange between the judge's legal assistant and the parties. (Tr. 9-10).

Approximately one week before the hearing and again early on the morning of the hearing, counsel for the Secretary spoke to Respondent's representative Mr. Davis. During both conversations, Mr. Davis stated his intention to attend the scheduled hearing. Counsel for the Secretary attended the hearing and presented evidence through witness testimony and exhibits. Respondent did not attend the hearing or present a defense. (Tr. 4-6). At the beginning of the

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[22] The hearing in this case originally was scheduled to begin on December 6, 2016. *See* July 29, 2016 Notice of Hearing, Scheduling Order and Special Notices. (Ex. ALJ-1).

[23] *See* November 17, 2016 Notice of Rescheduled Hearing and Order. (Exs. ALJ-3, 3(a); ALJ-4). The parties were reminded that the scheduled January 2017 hearing was not an informal conference. Rather the hearing would be a formal hearing on the record transcribed by a court reporter. At the hearing, both parties must have their necessary witnesses present to give sworn testimony and the documents and exhibits that they intend to offer into evidence to support their positions. The parties were specifically cautioned that failure to be present at the hearing when the case was called may result in summary dismissal of claims or defenses.

[24] (Tr. 4). *See* January 4, 2017 Notice of Hearing Location. (Exs. ALJ-6, 6(a)); January 13, 2017 Notice of Hearing Location. (Exs. ALJ-7, 7(a)).

hearing, the decision granting the Secretary's Motion for sanctions was stated on the record. (Tr. 10-21).

Counsel for the Secretary's post-hearing brief was filed with the undersigned Commission judge and served on Respondent. Respondent did not file a post-hearing brief. Respondent has not offered any explanation for Respondent's failure to participate in the hearing.[25]

JURISDICTION

As discussed above, designated facts are taken to be established, for purposes of the case, as alleged in the complaint and in the citation, (a) that Respondent's workers at the worksite inspected by OSHA, in Morgantown, West Virginia, on or about November 18, 2015, were "employees" of Respondent 3-D Builders, LLP, within the meaning of section 3(6) of the Act, and (b) that Respondent 3-D Builders, LLP, is an "employer" engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

Further, the evidence establishes, at the time of the OSHA inspection, Respondent's employees were engaged in roofing activities, at a construction worksite, located in Morgantown, West Virginia. The roofing work performed was the removal of an old shingle roof and the installation of a new roof, on the porch roof and main roof of a two-story house. The construction industry affects commerce. Even a small employer, whose activities and purchases are purely local, when aggregated with others engaged in similar activities, has a substantial effect on interstate commerce. *See Slingluff v. OSHRC*, 425 F.3d 861, 867 (10th Cir. 2005); *Clarence M. Jones,* 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983) ("There is an interstate market in construction materials and services and therefore construction work affects interstate commerce.").

Based on the record evidence, I find that Respondent 3-D Builders, LLP, at all relevant times, was in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. Accordingly, the Commission has jurisdiction over the parties and the subject matter.

[25] Commission Rule 64 states that "failure of a party to appear at a hearing may result in a decision against that party." Upon a showing of good cause, the Commission or the Judge may excuse the failure to appear. However, absent extraordinary circumstances, requests to reinstate the hearing must be made within five days after the scheduled hearing date. 29 C.F.R. § 2200.64. Respondent did not request reinstatement of the hearing.

DISCUSSION REGARDING CITATION

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition and (4) the employer knew of could have known with the exercise of reasonable diligence of the violative condition. *See Astra Pharm. Prods. Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982)

Respondent does not contest the applicability of the cited standards, violation of the standards' terms, employee exposure to the hazardous, violative, conditions, or Respondent owner's actual knowledge of the violative conditions. Respondent contends that Respondent is a partnership in which every partner is self-employed, that Respondent had no employees, and that OSHA has no regulations on a partnership.[26] In other words, Respondent contends that OSHA and the Commission do not have jurisdiction over Respondent. Respondent's assertions have been considered and rejected above.

Alleged Violations

a. *Serious citation 1, item 1(a) – alleged ladder violation.*

The Secretary alleges that 3-D Builders violated 29 C.F.R. § 1926.1053(b)(1),[27] on or about November 18, 2015, when the portable extension ladder,[28] used by the workers to access the roof above the front porch, was not extended at least three feet above the landing surface.

The CO testified that when employees, at this worksite, used the portable extension ladder to access the roof, the standard requires that the side rails of the extension ladder extend at least three feet above the landing surface. When the side rails are properly extended an employee can

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[26] *See* Note 9 above.

[27] Section 1926.1053(b)(1) states:

> When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

[28] A portable ladder is defined as "a ladder that can be readily moved or carried." 29 C.F.R. § 1926.1050(b), *Definitions*.

easily step on and off the roof holding onto the top of the ladder side rail. If the ladder is not properly extended when an employee steps on or off the ladder they may become off balance and fall. (Tr. 53-54).

The CO, upon arrival at the worksite, observed and photographed a ladder placed at the front right corner of the house.[29] It was a portable, aluminum, extension ladder, manufactured by Werner. He also photographed two men working on the front porch roof. (Tr. 30-33, 38, 54-55; Ex. C-2, C-3, C-4, C-5).

When the CO approached the worksite, he spoke to the 3-D Builders' owner Mr. Davis and asked that the employees come down from the roof to speak with him. The CO observed three workers use the ladder located at the right front corner of the house to come down from the roof. (Tr. 34-35, 55). The CO took additional photographs that show the house front, the porch roof where the employees worked, and the ladder the employees used to access the roof. (Tr. 35-38; Ex. C-6, C-7). He also photographed employees working on the house back roof using a scraper to remove the old shingle roof. (Tr. 40-41; Ex. C-8).

Regarding the portable extension ladder, used by the employees to access the roof, the CO determined that the side rails extended approximately two feet, six inches, above the roof surface. The CO reached this conclusion by confirming that the distance between Werner ladder rungs is twelve inches and the length of the side rails that extend above the top ladder rung is six inches. The CO counted the number of ladder rungs above the roof surface. At the time of the inspection, the third rung down from the top of the cited ladder was even with the roof surface. The CO's calculation that the side rails extended approximately two feet, six inches, above the roof surface, was less than the three feet extension required by the cited standard. (Tr. 55-57; Ex. C-7). Respondent owner Mr. Davis' interview statement reads, in part:

> I know the OSHA requirement from studying for my contractor's test. The extension ladder is the only way to access the roof. I used a ladder stabilizer to secure it. . . . . I don't think it needs to be extended with the stabilizer.[30]

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[29] The photographs taken by the CO during the inspection also show a second ladder at the worksite, located at the back, left corner, of the house. (Tr. 32, 73-74; C-4). This second ladder was not cited. (Sec'y Br. at 2 n.4, 5-6 n.8). There is no evidence that this second ladder was used by employees, in the position or location, where it was photographed. There is no evidence of employee exposure regarding this second ladder.

[30] The CO understood Mr. Davis' mention of a "ladder stabilizer" to reference the "bracket," attached to the extension ladder used by the workers to access the roof. The CO testified that this "bracket" allows the ladder to be placed against the house, without putting weight and pressure on

(Tr. 45; Ex. C-1).

Citation Evidence Summary and Findings

The evidence establishes that the cited construction standard regarding portable ladders applied to this construction worksite, where 3-D Builders' workers were engaged in roofing activities. The CO's testimony and inspection photographs reveal that the cited standard was violated, as the side rails of the extension ladder did not extend at least three feet above the roof landing surface.

The evidence must also show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *See e.g., Revoli Constr. Co.,* 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). The hazards identified in this ladder citation were plainly visible to Respondent owner Mr. Davis, who was present on the worksite. This is sufficient to show actual or constructive knowledge of the violative condition. *See A.L. Baumgartner Constr., Inc.,* 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) (finding employer had constructive knowledge when the cited condition was plainly visible to employer's foreman); *Clarence M. Jones,* 11 BNA OSHC at 1531 (constructive knowledge found where the ladders were in plain view and the foreman was present at the worksite at all times); *MCC of Fla., Inc.*, 9 BNA OSHC 1895, 1898 (No. 15757, 1981) (finding constructive knowledge when the violative condition was in plain view and foremen were in the area).

The Secretary does not need to show that the employer was aware that a condition violates the cited standard. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-80 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). Awareness of the condition itself satisfies the test. *Id*.

Respondent's owner Mr. Davis had actual knowledge of the violative condition, as he was present at the worksite when he, along with 3-D Builders' workers, used the noncompliant ladder to access the roof.[31] In his signed, inspection statement, Mr. Davis acknowledged that the cited extension ladder was the only way to access the roof.

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the gutters, so workers climbing up and down the ladder will not damage the gutters. The primary purpose of this "bracket" is to protect the gutters from damage, not to stabilize the ladder. (Tr. 48-50, 57-58). The inspection photograph of the ladder does not show a grasping device such as a grabrail. (Ex. C-7).

[31] *See* Note 5 above. (Tr. 80).

Further, the evidence establishes that Respondent's workers were exposed to the violative condition created by the noncompliant extension ladder. The CO observed the workers descend from the roof to speak with him during the inspection using the cited ladder.

Classification and Penalty Amount

Serious

The Secretary characterizes this citation item as 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). The CO testified that there was a likelihood of serious harm and that four workers, including Mr. Davis, were exposed to the violative condition. If an employee were to fall ten feet, the CO testified that likely injuries could include permanent disability or death. The cited extension ladder, located at the right front corner of the house, was positioned on the residence driveway. An employee falling from the cited ladder would land on the hard surface of the driveway, made of concrete or asphalt. (Tr. 58; Ex. C-3). The citation is properly classified as serious.

Penalty

Section 17(j) of the Act provides that the Commission shall have the authority to assess all civil penalties. When determining the appropriateness of a penalty, the Commission must give due consideration to four criteria: (1) the size of the employer's business, (1) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations.

The gravity of the violation is the most important factor in the penalty assessment. Determination of the gravity of a violation requires a consideration of the number of exposed employees, the precautions taken to protect employees, the duration of employee exposure, and the probability that an accident will occur. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993), and cases cited therein.

The CO determined the severity of the ladder violation to be high based on the fall risk from ten feet to the ground. He determined the probability to be lesser based on the duration of employee exposure to the hazard created by the noncompliant ladder.[32] The time of employee

[32] The record does not specifically disclose the length of time the cited ladder, located at the right front corner of the house, was positioned at this location, with side rails extended less than three feet above the roof surface. The Secretary infers that Mr. Davis' reference to a ladder "stabilizer," is a broad reference to the way the ladder was set up at the worksite for several days. (Tr. 57-58). The inspection photographs disclose that ladders were moved and repositioned during this roofing

exposure climbing on and off the ladder typically would be short. Concluding that the severity is high, and the probability is lesser, the gravity-based penalty would be calculated as $5,000. 3-D Builders has no OSHA history. T*here is no evidence of past inspections. Therefore, Respondent's history warrants neither an increase nor a decrease in the penalty amount. See M.V.P. Piping Co., Inc., 24 BNA OSHC 1350, 1352 (No. 12-1233, 2014) (finding that history factor did not support a low penalty when the employer had not been inspected within the past five years).* OSHA did not consider a good faith penalty reduction, as the citation includes a willful violation. As 3-D Builders is a small employer, the Secretary proposed a sixty percent penalty reduction for size. Therefore, the Secretary proposed a penalty for this citation item of $2,000. (Tr. 58-60; Sec'y Br. at 8). I agree.

Therefore, a *penalty of $ 2,000 is assessed for the serious violation of § 1926.1053(b)(1) set forth in citation 1, item 1(a).*

b. Serious, willful citation 2, item 1 – alleged fall protection violation.

The Secretary alleges that 3-D Builders violated 29 C.F.R. § 1926.501(b)(13),[33] on or about November 18, 2015, as employees were exposed to a fall of approximately ten to twenty feet to the ground while installing shingles to a residential roof. Respondent's workers were not protected by guardrail systems, safety net system, personal fall arrest system, or any alternative fall protection measure under another provision of paragraph § 1926.501(b).[34] (Tr. 65, 72).

The CO testified that OSHA standard 1926.501(b)(13) applies to residential construction roofing work, the work performed by 3-D Builders at the inspected worksite. The standard

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job. *Compare* Ex. C-4 *with* Ex. C-5. I decline to draw the broad inference that the cited right front corner ladder, noncompliant at the time of the OSHA inspection, was positioned and used in a noncompliant manner during the workdays prior to the Wednesday OSHA inspection.

[33] Section 1926.501(b)(13), in pertinent part, states: Duty to have fall protection. *Residential construction*. "Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure."

[34] The Note to Section 1926.501(b)(13) provides that "[t]here is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems." Therefore, it is the employer's burden to establish that it is infeasible or creates a greater hazard to use conventional fall protection equipment. In this case, Respondent failed to present a defense and clearly did not meet this burden.

requires that when employees are working six feet or greater above the ground, they shall be provided with fall protection. (Tr. 61).

During the inspection, the CO measured the height of the porch roof to the ground to be approximately ten feet high. He measured the height of the main roof, from the roof peak to the ground, to be approximately twenty to twenty-two (20 to 22) feet high. Therefore, employees working on any area of this house roof were required by the standard to be protected from falling. (Tr. 52-53, 63; Ex. C-4).

During the inspection, the CO photographed two workers on the front porch roof and two workers on the house back roof using a scraper to remove the old shingle roof.[35] Had the workers on the back roof fallen they would have fallen to onto the hard surface driveway, made of concrete or asphalt. On this worksite, 3-D Builders' workers were not protected from falling by using a personal fall arrest system. On this worksite, there was no evidence of a guardrail system or safety net system. (Tr. 33, 38, 40-41, 62-64; Ex. C-5, C-8).

Respondent owner Mr. Davis' interview statement reads, in part:

> We started the roof on Monday. We are removing the shingle roof. The porch roof is about 3/12 and the main roof is about 10/12. We have been on the roof since 7:00 a.m. this morning. We have two harnesses.[36] We have worn them before on the beauty college downtown. I have been doing construction for 20 some years. I know fall protection is required. I know the requirement anything over six feet need to have fall protection. We weren't wearing it because it's a pain in the ass. The ropes get tangled around hoses and feet. If I was doing this job by the book I would have had fall protection. I have fallen off roofs before, so I know the hazard. We do a lot of roofs. Most of the jobs we don't wear fall protection. I have never been inspected by OSHA. We are subbing for Lynn Wood Company. He didn't say anything about fall protection. I know the OSHA requirement from studying for my contractor's test. . . . The porch roof is 11-13 feet high and the main roof is about 20-22 feet high. The guys finished the main roof yesterday.[37] We didn't wear fall protection for that roof either.

[35] The old shingles were nailed to the roof. The workers slide the scraper under the shingle and jostle the shingle, to remove the nail and pry the shingle off the roof. The scraper was used like a crowbar. (Tr. 66-67).

[36] The CO did not know if Mr. Davis meant that 3-D Builders had two harnesses on this jobsite or, generally, that the company had two harnesses at the shop. (Tr. 69, 75).

[37] Mr. Davis specifically admits knowledge that the employees did not wear fall protection on Tuesday when working on the main roof of the house. (Tr. 78-79; Ex. C-1).

(Tr. 44-45; Ex. C-1).

The CO understood Mr. Davis' statement that "[t]he ropes get tangled around hoses and feet," to reference "rope vests" used in fall protection systems, [38] and air "hoses" used in roofing to connect pneumatic nail guns to air compressors. He testified that most employers use pneumatic nail guns to secure shingles to the roof. Air hoses were used on this roofing worksite. They are visible in the inspection photographs. (Tr. 47-48, 68, 75; Exs. C-6, C-8).

Citation Evidence Summary and Findings

The evidence establishes that the cited construction standard applied to this residential construction worksite, where 3-D Builders' workers were engaged in roofing activities on a two-story house. The CO's testimony, Respondent owner Mr. Davis' admissions, and the inspection photographs reveal that the cited fall protection standard was violated. On this worksite, Respondent's workers were not protected by guardrail systems, safety net system, personal fall arrest system, or any alternative fall protection measure.

As discussed in greater detail above, the record evidence must establish that the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *See e.g., Revoli Constr. Co.,* 19 BNA OSHC at 1684.

In this case, Respondent owner Mr. Davis had actual knowledge of the OSHA fall protection requirement, the violative condition at this worksite, and the fall hazard. Mr. Davis was present working on this jobsite.[39] The fall protection violation was obvious, in plain view. This is sufficient to show actual or constructive knowledge of the violative condition. In fact, when interviewed, Respondent owner Mr. Davis boldly admitted that, during this entire roofing job, 3-D Builders' workers had not used fall protection. Mr. Davis stated he thought using fall protection was "a pain in the ass." The evidence establishes that Mr. Davis had knowledge of the OSHA fall protection standard cited. Mr. Davis acknowledged knowing that fall protection is required for any work performed "over six feet." He told the CO if he "was doing this job by the book [he] would have had fall protection." Mr. Davis told the CO he knew the OSHA requirement

[38] Based on the record, I find the CO's statement regarding "rope vests used in fall protection systems," to reference lanyards and body harnesses, components of a personal fall arrest system. 29 C.F.R. §§ 1926.502(d)(Personal fall arrest systems); 1926.500(b)(Definitions: Lanyard). When interviewed by the CO, Mr. Davis mentioned fall protection "harnesses." (Ex. C-1).

[39] *See* Note 5 above.

from studying for his contractor's test. In addition, Mr. Davis stated that he had personal knowledge of the fall hazards roofing presented, as he had fallen off roofs before. (Tr. 45, 64; Ex. C-1).

The evidence establishes that Respondent's workers were exposed to the violative condition created by Respondent's failure to protect the workers from the fall hazard. The CO observed and photographed four workers at this worksite without fall protection: two workers on the front porch roof and two workers on the house back roof.

Characterization and Penalty Amount

Serious

The Secretary characterizes this citation item as serious and willful. See Complaint ¶ 6. 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). The CO testified that there was a likelihood of serious harm and that four workers, including Mr. Davis, were exposed to the violative condition. The fall protection violation exposed employees to a fall risk from ten feet to the ground from the front porch roof and a fall risk from approximately twenty feet to the ground from the main roof. The CO testified that a fall injury from those heights could result in permanent disability or death. (Tr. 65, 72). The citation is properly classified as serious.

Willful

"The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or ... plain indifference to employee safety.'" *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

> [I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation .... A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference ....

Hern Iron Works, Inc., 16 BNA OSHC 1206, 1214 (No. 89-433, 1993*); see also Bianchi Trison Corp. v. Chao,* 409 F.3d 196, 208 (3d Cir. 2005) (A willful violation of the OSH Act "constitutes an act done voluntarily with either an intentional disregard of, or plain indifference to, the OSH Act's requirements.").

> There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it.

Williams Enterps., Inc., 13 BNA OSHC 1249, 1257 (No. 85-355, 1987). *See MJP Constr. Co., Inc.*, 19 BNA OSHC 1638, 1648 (No. 98-0502, 2001),*aff'd*, 56 F. App'x 1 (D.C. Cir. 2003) (unpublished) (an employer with knowledge of the standards' requirements and knowledge of the conditions that violate the standard, who fails to correct the violation, demonstrates knowing, conscious disregard of the standard).

At the time of the inspection, 3-D Builder's owner Mr. Davis had a heightened awareness of the OSHA fall protection requirements. Mr. Davis also had a heightened awareness of roofing work hazards when fall protection is not used. (Sec'y Br. at 10).

Several statements made by Mr. Davis, during his OSHA inspection interview, disclose his heightened awareness. Mr. Davis stated that he had been in business for over twenty years, he knew that OSHA required fall protection for any work over six feet, and that OSHA required fall protection when working on a roof. He knew of OSHA's fall protection requirement from studying for his contractor's test. Also, Mr. Davis said that the company had two harnesses, they just didn't wear them. Mr. Davis knew of the fall hazard, as he had fallen off roofs in the past. Mr. Davis said that they weren't wearing fall protection on this worksite because it was "a pain in the ass," and the ropes get tangled around hoses and feet. Mr. Davis admitted that on most jobs they do not wear fall protection. In fact, the day before the OSHA inspection, when the employees were working on the very steep main roof of this house, the employees did not wear fall protection. Mr. Davis had actual knowledge that he and the other 3-D Builders' roofers, on this jobsite, worked without fall protection. (Tr. 68-71; Ex. C-1). Mr. Davis' bold admissions in his OSHA interview statement are unrebutted.

Respondent owner Mr. Davis consciously disregarded the OSHA fall protection requirements. Recklessly, Mr. Davis had the 3-D Builders' roofers work at heights, without any fall protection, exposing them to disabling injuries and potentially death from falls. Mr. Davis' interview statements disclose plain indifference to the fall hazards to which the roofers were exposed. The citation is properly classified as willful.

Penalty

The Secretary contends that the willful fall protection violation warrants a finding of high severity and greater probability. (Tr. 76; Sec'y Br. at 11). The CO determined the severity of the fall protection violation to be high based on the fall risk from ten feet to the ground from the front porch roof and the fall risk from approximately twenty feet to the ground from the main roof. A fall injury from those heights could result in permanent disability or death. (Tr. 65, 72).

At the hearing and in its post-hearing brief, the Secretary contends that this violation warrants a finding of greater probability. [40] The record evidence establishes that there were four employees on the roof, they had been on this roofing worksite for two and a half days at the time of the inspection, there was no fall protection system used, and the work task the CO observed of employees using a scraper to remove the shingles, potentially could have resulted in an employee losing his balance and falling. When using the scraper to remove the shingles, the workers leaned forward toward the back-roof edge and exerted bodily force. (Tr. 64-68, 71-72, 80; Ex. C-8). Further, the presence of air hoses on the roof increased the probability of an employee tripping on an air hose and falling to the ground. (Tr. 68). The roofers worked for approximately six hours on the inspection day.[41] Mr. Davis admitted that the workers had not used fall protection, on the day before the inspection, when working on the very steep main roof. [42] The record establishes that employees were exposed to a fall hazard for approximately two days. (Tr. 71; Exs. C-1; C-4).

The gravity-based penalty for a willful violation of high severity and greater probability would be calculated as $ 70,000. 3-D Builders has no OSHA history. OSHA did not consider a good faith penalty reduction, as the citation classification is willful. 3-D Builders is a small employer, with fewer than ten employees; therefore, the Secretary proposed an eighty percent size reduction regarding the willful violation penalty. Therefore, at the hearing and in its post hearing

[40] Initially, at the time the citation issued, the CO determined the probability to be lesser. Therefore, as issued, the proposed penalty for the willful violation was $11,000. (Tr. 65, 76).

[41] On Wednesday, the day of the OSHA inspection, the employees started work at approximately 7:00 a.m. and came down from the roof at approximately 12:45 – 1:00 p.m. (Tr. 65; Ex. C-1).

[42] "We didn't wear fall protection for that roof either." (Tr. 45; Ex. C-1). I find that Mr. Davis' use of the pronoun "we," during his statement to the CO, reveals that on Tuesday more than one employee worked on the main roof without fall protection.

brief, the Secretary proposed a penalty of $14,000 for this willful citation item. (Tr. 72-73, 76; Sec'y Br. at 11). I agree.

Therefore, a *penalty of $ 14,000 is assessed for the willful violation of § 1926.501(b)(13) set forth in citation 2, item 1*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is hereby ORDERED:

Item 1(a) of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(1) is AFFIRMED, and a penalty of $ 2,000 is assessed.

Item 1(b) of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.1060(a) is VACATED; the request to withdraw this citation item is approved.

Item 1 of Citation No. 2, alleging a willful violation of 29 C.F.R. § 1926.501(b)(13) is AFFIRMED, and a penalty of $14,000 is assessed.

/s/
Carol A. Baumerich
Judge, OSHRC

Dated: February 23, 2018

Transcript Errata Sheet. – 3-D Builders, LLC #16-0094

The transcript is amended to reflect the following corrections.

Page	Line(s)	Stated in transcript	As corrected
10	16	54(f)	52(f)
15	15	compliance	compliant
18	12	credible	critical
19	1	ordered	offered
45	11	Lynnwood	Lynn Wood
48	8, 11, 19	Lynnwood	Lynn Wood
57	7	that being six inches?	that being two feet six inches?
60	24	unless	issued
64	8	works	workers
68	12	probably	probability