Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama St. S.W
Building 1924 Room 2R90
Atlanta, GA 30303

SECRETARY OF LABOR, Complainant, v. JODY WILSON CONSTRUCTION, INC., Respondent.	OSHRC Docket No. **16-1223**

DECISION AND ORDER

Attorneys and Law firms

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JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

The United States Department of Labor, through its Occupational Safety and Health Administration ("OSHA"), investigated an accident involving a foreman of Jody Wilson Construction, Inc. ("Respondent") who fell off the roof of a home. OSHA subsequently issued two citations to Respondent under the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651-678.[1] Citation 1 alleged a "willful" violation of 29 C.F.R. § 1926.501(b)(13), OSHA's fall protection standard related to residential construction activities, with a proposed

[1] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. See Order No. 4–2010 (75 FR 55355), as superseded in relevant part by 1–2012 (77 FR 3912). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

penalty of $49,000. Citation 2 alleged an "other-than-serious" violation of 29 C.F.R. § 1926.503(a)(1), OSHA's fall protection training standard, with no proposed penalty.[2] After Respondent contested the citations, the Complainant, Secretary of Labor (the "Secretary"), filed a formal complaint with the Commission seeking an order affirming the citations and proposed penalty.[3] A bench trial was held in Tampa, Florida.

Based upon the record, the Court finds that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. (Am. Pretrial Order, Ex. C, p. 13.) Further, the Court concludes the Commission has jurisdiction over the parties and subject matter in this case. (*Id.*) Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law.[4] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

For the reasons indicated *infra*, the Court concludes all the elements necessary to prove the alleged violations have been established by the Secretary but the proper characterization of Citation 1 is a "serious" violation and the appropriate penalty assessment is $2,800.

II. BACKGROUND

Respondent is an employer engaged in the installation of vinyl siding and screen enclosures. (Am. Pretrial Order, Ex. C; Tr. 135.) Jody Wilson ("Wilson") is the sole owner and Director of Respondent, which employs approximately 20 employees. (Tr. 79, 134-135.) Wilson is a licensed Certified Residential Contractor in Florida. (Tr. 134.) Wilson and his company are not licensed roofers and the company has never performed any roofing installations or roofing construction activities. (Tr. 163.) Respondent was hired by Fabian Construction, LLC ("Fabian Construction") to install siding and a screen enclosure on a residence in Ocklawaha, Florida (the

[2] The Act contemplates various grades of violations of the statute and its attendant regulations— "willful"; "repeated"; "serious"; and those "determined not to be of a serious nature" (the Commission refers to the latter as "other-than-serious"). 29 U.S.C. § 666. A serious violation is defined in the Act; the other grades are not. *See* 29 U.S.C. § 666(k).

[3] Attached to the Complaint and adopted by reference were the two citations at issue. (Compl., Ex. A, Ex. B.) Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[4] The issuance of this decision and order was delayed until the court reporter filed the certified electronic copies of the trial exhibits on February 5, 2018.

"Worksite"). This work included the installation of screen lanai walls at the back of the Worksite, the construction of a sliding screen door, vinyl siding installation to the new addition, and a vinyl ceiling. (Tr. 141.)

On March 23, 2016, Wilson and his employees, [redacted], the foreman on the Worksite, and crew workers John Alderman and Wayne West, arrived at the worksite to install the vinyl siding on the screen addition. (Tr. 142.) At or around the same time, a roofing company installed a metal roof and damaged some of the vinyl siding near the chimney. (Tr. 142; Ex. C-4; Ex. C-5.) The metal roof, which was approximately 8 feet, 4 inches from the ground, had a slope of 4 feet to 12 feet (vertical to horizontal), and a width of less than 50 feet.[5] (Tr. 21, 182, 183, 184; *see also* Ex. C-7; Ex. C-8.) After the roofing crew left with all of their equipment, John Eric Fabian, the owner of Fabian Construction, asked Wilson to have his crew repair the siding on the roof in lieu of having the roofing crew return. (Tr. 143, 145.) This work was not within Respondent's original scope of work and represented an addition to the original contract between Respondent and Fabian Construction (Tr. 174.)

Wilson initially told Fabian that his crew would not make the repair because it was dangerous and was basically "a slide" and that the roofing company should return and make the repair. (Tr. 145, 46.) [redacted] also expressed his concern, to both Fabian and Wilson, because there was pollen on the roof that made it slick. (Tr. 208.) To convince [redacted] and Wilson that the work was safe, Fabian, who was in his sixties, got on the roof and walked around. (Tr. 146, 208.) Wilson told [redacted] to "do what you can." (Tr. 209.) After Wilson left the job site, he spoke with [redacted] on the phone three times, and during the first phone call, [redacted] asked Wilson, "What, are you trying to kill me?" (Tr. 155.) During the second and third calls Wilson discussed the repair again with [redacted]. (Tr. 156.) However, during either the second or third call, Wilson told [redacted] "don't do it if you think you can't stick." (*Id.*)

Nonetheless, [redacted] and Alderman accessed the roof via a ladder.[6] (Tr. 21.) West was assigned to act as a "safety monitor" on the ground for [redacted] as he replaced the damaged siding. It was Wilson's belief that a "safety monitor," operating from the ground, would allow [redacted] to perform the repair safely and the monitor would serve to notify [redacted] if he got

[5] The 6/12 steep sloped roof on this one-story home was limited to the gable. Mr. [redacted] and Mr. Alderman did not access or walk on the 6/12 roof, and this area of the roof was clearly delineated. (Tr. 37, 40.)

[6] The Secretary asserts [redacted] made the repair because he "didn't want to lose his job." (Compl't's Proposed Findings at ¶ 30) (*citing* Tr. 47:18-19, 222:10-25 -23:1). However, the cited testimony does not support this assertion.

too close to the edge.[7] (Tr. 167.) [redacted] slipped and fell feet first from the top of the roof to the ground resulting in a compound fracture to his right leg and was airlifted to the Ocala Medical Center where he received treatment. (Tr. 43, 211.)

Neither [redacted] nor Alderman wore personal fall arrest systems. There was no safety monitor on the roof at the same level as [redacted]. West was standing on the ground acting as a safety monitor while handing pieces of siding to Alderman, who was also on the roof.[8] (Tr. 149.) There were no guardrail systems or safety nets being utilized by Respondent at the worksite. The width of the roof was less than 50 feet. The slope of the roof at issue is 4 feet to 12 feet (vertical to horizontal). The eave to ground height of the roof at issue is 8 feet 4 inches. (Am. Pretrial Order, Ex. C.)

The Secretary admits Respondent does not, and never has, performed roofing work or specialized or engaged in the installation of vinyl siding from walking surfaces above six (6) feet. (Tr. 87-88.) Respondent's construction work requires employees to work on ceilings, fascia, and/or screen enclosures which reach only eight (8) to nine (9) feet in height. (Tr. 164.) As such, the walk-boards, scaffolds, and A-Frame ladders used by Respondent do not require employees to work from elevated surfaces at a level of six (6) feet or more above a lower level. (Tr. 164.) Respondent's employees had not entered the roof at any time prior to the day of the accident and the roofing work was completed by another subcontractor of Fabian Construction. (Tr. 142.)

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). To achieve this purpose, the Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1); and a specific duty to

[7] Wilson and [redacted] believed a "safety monitor" could perform the function from a stationary position on the ground and still comply with OSHA's rules. (Tr. 181.) [redacted] referred to the monitoring position as a "ground guy" and believed a monitor assigned to the position was responsible for breaking one's fall. (Tr. 245.)

[8] The parties stipulated in the amended pretrial order that Alderman was standing on the ground acting as a safety monitor while handing pieces of siding to West, who was on the roof. (Am. Pretrial Order, Ex. C., p. 13.) The testimony shows that West was the safety monitor and Alderman was on the roof. (*See* Tr. 149.) Nonetheless, the Court's analysis and disposition of this case would be the same regardless of which employee was the safety monitor on the ground and which employee, in addition to [redacted], was on the roof.

comply with all applicable occupational safety and health standards promulgated under the Act. *Id.* § 654(a)(2). Pursuant to that authority, the standard at issue in this case was promulgated.[9]

Under the law of the Eleventh Circuit, the jurisdiction in which this case arose,[10] "[t]o make a prima facie showing that an employer violated an OSHA standard, the Secretary must show the following four elements: '(1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the [Occupational Safety and Health] Act's requirements.'" *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014) (quoting *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013)). "If the Secretary establishes a prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Id.* (citing *id.* at 1308). However, "[a]s has often been said, OSHA does not impose strict liability on an employer but rather focuses liability where the harm can in fact be prevented." *Central of Ga. R.R. Co. v. Occupational Safety & Health Review Comm'n*, 576 F.2d 620, 623 (5th Cir.1978).[11]

A. Citation 1

Citation 1 charges a willful violation of section 1926.501(b)(13), OSHA's fall protection standard applicable to residential construction activities, alleging "[e]ach employee(s) engaged in residential construction activities 6 feet (1.8 m) or more above lower levels were not protected by guardrail systems, safety net system, or personal fall arrest system, nor were employee(s) provided with an alternative fall protection measure under another provision of paragraph 1926.501(b)[.]"

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[9] As indicated *supra*, the Secretary of Labor delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health. The Assistant Secretary has promulgated occupational safety and health standards, *see e.g.*, 29 C.F.R. Parts 1910 and 1926.

[10] This case arose in Ocklawaha, Florida, and according to the Florida Division of Corporation's online records, the company's principal address is in Ocala, Florida, both in the Eleventh Circuit. Both parties may appeal the final order in this case to the Eleventh Circuit Court of Appeals, and Jody Wilson may also appeal to the District of Columbia Circuit. *See* 29 U.S.C. §660(a) & (b). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Court applies the precedent of the Eleventh Circuit in deciding the case.

[11] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. Immediately after the split, the Eleventh Circuit stated in *Bonner v. City of Prichard, Alabama*, 661 F. 2d 1206 (11th Cir. 1981), that any opinion issued by the Fifth Circuit before the close of business on September 30, 1981 is binding precedent on the Eleventh Circuit.

(Compl., Ex. A.) More specifically, the citation asserts "[o]n or about March 29, 2016, on a 4:12 pitch roof, two employees performing siding repairs were not protected from an 8-foot 4-inch fall hazard by use of a guardrail system, safety net system, personal fall arrest system or any alternative fall protection, resulting in an employee falling to the surface sustaining severe leg injuries." (*Id.*)

1. Cited Standard Applied

Paragraph (b)(13) mandates in relevant part that "[e]ach 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*." 29 C.F.R. § 1926.501(b)(13) (emphasis added). The record establishes that Respondent's employees were working engaged in residential construction on a roof approximately 8 feet, 4 inches from the ground. (Ex. C-7; Ex. C-8.) However, Respondent argues paragraph 1926.501(b)(13) did not apply because "[a]nother provision in paragraph (b) of the cited standard did provide for an alternative fall protection measure." (Resp't's Br. 7.)

The Secretary interprets paragraph (b)(13) to mean "workers engaged in residential construction six (6) feet or more above lower levels must be protected by conventional fall protection … *or other fall protection measures allowed elsewhere in 1926.501(b)*." OSHA Instruction STD 03-11-002, Compliance Guidance for Residential Construction (June 16, 2011) (emphasis added). Therefore, the Secretary argues paragraph "(b)(13) does not mandate the exclusive use of a personal fall arrest system – it also provides for 'alternative fall protection measures.'" (Sec'y's Br. 23) (citation omitted).

The Secretary's reasonable interpretations of his own regulations are entitled to deference in enforcement proceedings. *Martin v. Occupational Safety & Health Review Comm'n* ("*C.F. & I. Steel Corp.*"), 111 S.Ct. 1171, 1179 (1991). The Secretary's interpretation of section 1926.501(b)(13) is reasonable and is not inconsistent with either the terms or the purpose of the regulation. Moreover, the interpretation of a standard by the promulgating agency is controlling unless "clearly erroneous or inconsistent with the regulation itself." *Udall v. Tallman*, 87 S.Ct. 792, 801 (1965). The Secretary's interpretation is not clearly erroneous or inconsistent with the regulation itself and is therefore controlling. Thus, the Court concludes paragraph (b)(13) applied to the cited condition.

2. Cited Standard Was Violated

Paragraph (b)(10) provides that with low-slope roofs that are 50-feet or less in width, "the use of a safety monitoring system alone [i.e. without the warning line system] is permitted." 29 C.F.R. § 1926.501(b)(10). A low-slope roof is "a roof having a slope less than or equal to 4 in 12 (vertical to horizontal)." 29 C.F.R. § 1926.500(b). Lightner admitted the roof was a 4 in 12 pitch. (Tr. 21.) Lightner also admitted and the Secretary stipulated the roof at issue was less than 50 feet wide. (Tr. 182-184.) Therefore, Respondent was permitted to comply with paragraph (b)(13) by providing "other fall protection" under paragraph (b)(10) using a safety monitoring system alone.

A "safety-monitoring system" is "a safety system in which a competent person is responsible for recognizing and warning employees of fall hazards."[12] 29 C.F.R. § 1926.500(b). Respondent argues it "attempted to utilize this [alternative] protective measure in the form of a safety monitor," by designating West to be the safety monitor for [redacted] and Alderman. (Resp't's Br. 4, 8; Tr. 56.) However, a safety monitor is required to "be on the same walking/working surface and within visual sighting distance of the employee being monitored[.]" 29 C.F.R. § 1926.502(h)(1)(iii). Here, West was on the ground and was not "on the same walking/working surface and within visual sighting distance of the employee being monitored." Therefore, Respondent did not properly provide an alternative fall protection measure.

As the Secretary notes in his Compliance Guidance, "[i]f an employer is engaged in residential construction, but does not provide guardrail systems, safety net systems, personal fall

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[12] Safety monitoring systems and their use shall comply with the following provisions:

(1) The employer shall designate a competent person to monitor the safety of other employees and the employer shall ensure that the safety monitor complies with the following requirements:

(i) The safety monitor shall be competent to recognize fall hazards;

(ii) The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner;

(iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored;

(iv) The safety monitor shall be close enough to communicate orally with the employee; and

(v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

(2) Mechanical equipment shall not be used or stored in areas where safety monitoring systems are being used to monitor employees engaged in roofing operations on low-slope roofs.

(3) No employee, other than an employee engaged in roofing work [on low-sloped roofs] or an employee covered by a fall protection plan, shall be allowed in an area where an employee is being protected by a safety monitoring system.

(4) Each employee working in a controlled access zone shall be directed to comply promptly with fall hazard warnings from safety monitors.

29 C.F.R. §1926.502 (h).

arrest systems, or other fall protection allowed under 1926.501(b), a citation for violating 1926.501(b)(13) should be issued[.]"[13] OSHA Instruction STD 03-11-002, Compliance Guidance for Residential Construction (June 16, 2011) (emphasis added). (emphasis added). The fact that an employer has taken a required step to reduce injury in the event of an accident does not mean that there has been no violation of a mandatory safety standard. *Mineral Indus. & Heavy Constr. Grp. v. Occupational Safety & Health Review Comm'n*, 639 F.2d 1289, 1294 (5th Cir. 1981). The Secretary has established a violation of paragraph (b)(13).

3. Employee Exposure to Hazard

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). The Commission's longstanding "reasonably predictable" test for hazard exposure requires the Secretary to "show that 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." *Delek Ref., Ltd.*, 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing id.*). *See also Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980); *Gilles & Cotting*, 3 BNA OSHC 2002 (No. 504, 1976).

The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr*. Co., LLC, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). Here, the zone of danger presented was the unprotected sides and edges of the roof. "Our inquiry then is whether the employees' proximity" to the unprotected sides and edges of the roof "makes it reasonably predictable that they will enter these zones of danger by slipping or falling." *Fabricated Metal*, 18 BNA OSHC at 1076. Here, both [redacted]'s and Alderman's proximity to the unprotected sides and edges of the roof made it reasonably predictable that they would enter these zones of danger by slipping or falling. The Secretary has established exposure to the hazardous condition.

4. Employer Knowledge

[13] An exception under paragraph (b)(13) exists if Jody Wilson can demonstrate the infeasibility of these protective measures or the existence of a greater hazard. However, the Commission has repeatedly held that the party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim. *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001); *Westvaco Corp.*, 16 BNA OSHC 1374, 1377-78 (No. 90-1341, 1993). Here, Jody Wilson offered no evidence to establish the infeasibility of these protective measures or the existence of a greater hazard.

"The knowledge element of the prima facie case can be shown in one of two ways." *Eller-Ito Stevedoring*, 567 F. App'x at 803 (*citing ComTran* at 1307). "First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer." *Id.* (*citing ComTran* at 1307–08). "In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable." *Id.* at 803-04 (*citing ComTran* at 1308). However, in the Eleventh Circuit, a "supervisor's 'rogue conduct' generally cannot be imputed to the employer in that situation. Rather, 'employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards].'" *ComTran* at 1316 (citation omitted).

Here, although [redacted] was Respondent's supervisory foreman at the worksite, and his conduct cannot generally be imputed to the company, Wilson was aware of and affirmed [redacted]'s rogue conduct. Therefore, Respondent had actual knowledge of the violative conduct. Further, [redacted] had either actual or constructive knowledge that a subordinate employee was on the roof with him and was aware that neither of them were using any personal fall arrest systems. Under these circumstances, the employer also had constructive knowledge since the employer could, under the circumstances of the case, foresee the unsafe employee conduct. Therefore, the Secretary has established the knowledge element.

Characterization

In the Eleventh Circuit, a willful violation is, "in its simplest form, 'an intentional disregard of, or plain indifference to, OSHA requirements.'" S. *Pan Servs. v. U.S. Dep't of Labor*, 685 F. App'x 692, 696 (11th Cir. 2017) (*quoting Fluor Daniel v. Occupational Safety & Health Review Comm'n*, 295 F.3d 1232, 1239 (11th Cir. 2002)). "This generally requires that a party possessed a 'heightened awareness' of the applicable OSHA regulation," which has been found when a company has been previously cited for the same violation. *Lanzo Const. Co. v. Occupational Safety & Health Review Comm'n.*, 150 F. App'x 983, 986 (11th Cir. 2005) (citing *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1685-86 (No. 00-0315, 2001)).

"[A]n employer may defend against a showing of willfulness by producing evidence tending to show that it acted in good faith *with respect to the requirements of the standard at issue*." *K.M. Davis Contracting, Inc.*, 26 BNA OSHC 1633 (No. 12-0643, 2017) (quoting *Lanzo Constr. Co.*, 20 BNA OSHC 1641, 1648 (No. 97-1821, 2004), *aff'd*, 150 F. App'x 983 (11th Cir. 2005) (unpublished) (emphasis in original)). "'The [employer's] good faith effort' must ... have been made in an 'effort to comply with the cited provision." *Id.* (quoting *Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1112 (No. 11-2559, 2016)).

Here, although there is evidence Respondent knew of an applicable standard or provision prohibiting the conduct or condition, there is no evidence it consciously disregarded the standard or had a "heightened awareness" of that standard. Rather, Respondent attempted to comply with the standard, *albeit* incorrectly, by providing a safety monitor. Therefore, Respondent made a good faith effort to comply with the cited provision. Thus, the Court concludes the violation was not a willful one.

While not willful, the violation was certainly serious within the meaning of section 17(k) of the Act. Under the Act, "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists … unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). 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 1044, 1047 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA 2072, 2077 (No. 88-523, 1993).

The Secretary need not show that there was a substantial probability that an accident *would* occur; he need only show that if an accident occurred, serious physical harm *could* result. *See Sec'y of Labor v. Phelps Dodge Corp. v. Occupational Safety & Health Review Comm'n*, 725 F.2d 1237, 1240 (9th Cir. 1984). However, the Act imposes liability "only if the employer knew, or 'with the exercise of reasonable diligence, [should have known] of the presence of the violation.'" *Florida Lemark Corp. v. Sec'y, U.S. Dep't of Labor*, 634 F. App'x 681, 687 (11th Cir. 2015) (*quotation omitted*).

Here, there was a substantial probability that death or serious physical harm could result from falling off the roof and [redacted] did suffer such harm. As indicated *supra*, Respondent also

had both actual and constructive knowledge of the presence of the violation. Therefore, Citation 1 was a serious violation.

B. Citation 2

Citation 2 alleged an "other-than-serious" violation of 29 C.F.R. § 1926.503(a)(1), OSHA's standard on fall protection training requirements, with no proposed penalty. The citation asserts Respondent "did not provide a training program for each employee potentially exposed to fall hazards to enable each employee to recognize the hazards of falling and the procedures to be followed in order to minimize these hazards[.]" (Compl., Ex. B.) More specifically, the citation asserts "[o]n or about March 29, 2016, employees performing roofing operations were not trained to recognize, control or minimize fall hazards while working from elevation." (*Id.*)

1. Cited Standard Applies

Section 1926.503(a)(1) mandates that the employer "shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards." 29 C.F.R. § 1926.503(a)(1). Respondent's employees were exposed to a fall hazard when they climbed onto the 8'4" residential roof and attempted to repair a piece of siding. The cited standard applies.

2. Cited Standard Was Violated

To prove a violation of a training standard, the Secretary "must show that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2122 (No. 96-0606, 2000). Respondent can rebut the allegation "by showing it has provided the type of training at issue ...." *Id.* at 2126 (*quoting AMSCO*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997) *aff'd*, 255 F.3d 133 (4th Cir. 2001)). When rebutted, "the burden shifts to the Secretary to show some deficiency in the training provided." *Id.*

[redacted] and Alderman were engaged in residential construction more than 6 feet above a lower level. Thus, the cited standard required those employees be trained to "recognize the hazards of falling" and "the procedures to be followed to minimize these hazards." Wilson admitted his company did not provide training on fall protection to his employees at the worksite. (Tr. 137-138.) Therefore, Respondent violated the cited standard.

3. Employee Exposure to Hazard

The existence of a hazard is not always an element of the Secretary's burden of proof for showing violation of an OSHA standard. *Bunge Corp. v. Sec'y of Labor,* 638 F.2d 831, 835 (5th Cir. 1981). It is only "[w]hen the standard incorporates hazard as an element of the violation [that] the Secretary must show hazard in addition to condition or practice the standard keys the violation to hazard[.]" *Id.* As to exposure, it is established because Respondent's employees engaged in roofing work without first receiving required training. *Bardav, Inc.*, 24 BNA OSHC 2105, 2115 (No. 10-1055, 2014). *See also Compass Envtl.*, 23 BNA OSHC 1132, 1136 n.5 (No. 06-1036, 2010) ("[The employer] incorrectly focused on the unforeseeability of the events that occurred on the day of the accident rather than the ... lack of training about a known hazard."); *Gen. Motors Corp.*, 22 BNA OSHC 1019, 1030 (No. 91-2834E, 2007)(consolidated) (finding it unreasonable to require that employee be exposed to a hazard before requiring that he be trained to recognize and avoid that hazard). Accordingly, the Secretary has established exposure.

4. Employer Knowledge

Wilson knew that his employees were going to walk onto the roof without fall protection and without training on the procedures to be followed to minimize the hazard. (Tr. 150, 137-138.) Therefore, "knowledge is established, especially as [Respondent] does not dispute that it provided no training to the exposed employees." *Bardav*, 24 BNA at 2115. *See generally Pressure Concrete Constr.*, 15 BNA OSHC 2011, 2018 (No. 90-2668, 1992) ("[t]he fact that [the company] failed to train [employees] in the recognition and avoidance of dangerous conditions establishes that it had at least constructive knowledge of the inadequacy of its training program."). Knowledge has been established.

IV. PENALTY DETERMINATION

"Regarding penalty, the Act requires that "due consideration" be given to the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations." *Briones Util. Co.*, 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (*citing* 29 U.S.C. § 666(j); *Jim Boyd*, 26 BNA OSHC at 1117; *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished)). Under the Act, any employer may be assessed up to $7,000 per violation for serious and other-than-serious violations. 29 U.S.C. §§ 666(a), (c), (d).[14]

[14] In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act, which directs agencies to adjust their penalties for inflation each year and requires agencies to publish "catch up" rules to make up

The Commission is empowered to "assess all civil penalties" provided in this section, "giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight[. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citation omitted*). "The gravity of the violation is the 'principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury. '" *Jim Boyd*, 26 BNA OSHC at 1114 (quoting *Siemens Energy & Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005)).

Lightner testified that Citation 1 merited a "high" gravity rating based on the probability of an injury. (Tr. 77). The Court agrees with Lightner's assessment. He also assigned a "greater probability" rating because of the duration of the exposure. (Tr. 78.) The Court agrees with Lightner's "greater probability" assessment. It is true there were only two employees on the roof exposed to the hazard of falling, and the duration of the exposure was limited since Respondent was not hired to do roofing work and engaged in the roofing activity incident to a request from Fabian Construction at the end of the project. "However, an employer will not be credited for the fact that only one employee was exposed to a hazard where only one employee is required to perform the work and the size of the work area itself limits the opportunity for employee exposure." *Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066 (No. 98-0866, 2000) (citation omitted). As to the precautions taken against injury, the only precaution Respondent took was to have a monitor on the ground. As to the likelihood that any injury would result, it was high based on the probability of an injury. Based upon these factors, the Court finds an appropriate gravity-based penalty is $7,000.

Given there was no evidence of any previous inspections of Respondent's worksites prior to the citations at issue, the Court agrees with the Secretary that Respondent was not entitled to a reduction based upon history. At trial Respondent appeared to argue it was entitled to a good faith reduction because according to Respondent, it had repeated interactions with OSHA at an "On Top

for lost time since the last adjustments. The Secretary has increased the relevant penalties annually. *See* 83 FR 7 (2018); 82 FR 5373 (2017); 81 FR 43430, 43432 (2016). However, the adjusted civil penalty amounts are applicable only to civil penalties assessed *after* August 1, 2016, whose associated violations occurred after November 2, 2015, the date of enactment of the Inflation Adjustment Act. (81 FR at 43431.) Here, the penalties were assessed on June 16, 2016. Therefore, the increased penalties do not apply.

of the World Communities" housing development in Ocala, Florida, and had never received a citation or been the subject of an investigation there. (Tr. 177.) However, Respondent's admission it had not been the subject of an inspection at the On Top of the World development supports the Court's conclusion it is not entitled to a reduction based upon history.[15]

With respect to good faith, Lightner testified he did not recommend any reduction for good faith since the violation was willful. Even though the Court has concluded the proper classification is a serious violation, rather than a willful one, the Court agrees with Lightner that Respondent is not entitled to a good faith reduction since it did not implement an effective fall protection safety system.[16] *See e.g. Daniel Crowe Roof Repair*, 23 BNA OSHC 2001, 2017 (No. 10-2090, 2011) (where Commission Judge Dennis Phillips held a company's failure to provide its roofers with any form of fall protection or training demonstrates that it is not entitled to any credit for good faith in the penalty assessment.). Although not binding precedent,[17] the Court agrees with Judge Phillips and concludes Respondent's failure to provide its roofers with any form of fall protection or training demonstrates that it is not entitled to any credit for good faith.

With respect to the size of the business, which had approximately 20 employees, Lightner initially[18] recommended a 60% reduction for size, which was reduced to 30% by the Area Director to create a "deterrent effect." (Sec'y's Br. 30.) Based upon the evidence, the Court concludes a

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[15] To perfect the record, and "to be fair to the company about whether or not there were any previous inspections within the last five years," the Court ordered the record to stay open after trial and directed the Secretary to submit any evidence regarding investigations OSHA may have conducted at the On Top of the World worksite. (Tr. 265.) Subsequently, OSHA's Jacksonville Area Director, Brian Sturtecky, submitted a declaration stating that Ocala, Florida, is part of the Jacksonville Area Office's territory, that he had been the Area Director since 2011, and that he had never heard of the On Top of the World development and was not aware of any OSHA inspections of that development since he has been the Area Director. (*Id.* ¶¶ 2, 5, 6.)

[16] *See Aviation Constructors*, 18 BNA OSHC at 1922 ("While we find that [the employer] did not make good faith efforts to comply with respect to the particular provision of the standard at issue here, we nevertheless conclude that [the] overall circumstances should be taken into consideration in assessment of an appropriate penalty [for a willful violation]."); *Manganas Painting Co., Inc.*, 21 BNA OSHC 2043, 2055 (Nos. 95-0103, 2007) (consolidated) (good faith can be mitigating factor in determining penalty for willful violation), *rev'd in part on other grounds*, 540 F.3d 519 (6th Cir. 2008).

[17] Although they may be persuasive, unreviewed administrative law judge decisions do not constitute binding precedent. *KS Energy Serv. Inc.*, 23 BNA OSHC 1483 (No. 09-1272, 2011); *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976).

[18] Lightner testified he made a mistake in his initial recommendation and should have applied a 30% reduction based upon Respondent's size. (Tr. 78-79.) However, under OSHA's 2012 Interim Administrative Penalty Policy in effect at the time of the penalty assessment (https://www.osha.gov/dep/enforcement/admin_penalty_mar2012.html), a 60% reduction applied for an employer with 1-25 employees. The Court takes judicial notice of this policy. *See* Fed. R. Evid. 201.

deterrent effect was neither proper nor justified and finds a 60% reduction for size is appropriate.

Giving due consideration to the size of the business, the gravity of the violation, good faith, and history, the Court finds, based upon the record, the appropriate civil penalty for Citation 1 is $2,800. The Court agrees with the Secretary's proposal not to asses a civil penalty for Citation 2's "other-than-serious" violation. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Citation 1 is **AFFIRMED** as a serious violation and Respondent is assessed and directed to pay to the Secretary a civil penalty of $2,800, and Citation 2 is **AFFIRMED** as an other-than-serious violation without a penalty assessment.

SO ORDERED.

/s/

JOHN B. GATTO, Judge

Dated: February 28, 2018
Atlanta, GA