United States of America
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. TERRANCE MCKITRRICK, d/b/a GREAT WHITE CONSTRUCTION, Respondent.	OSHRC DOCKET NO. 16-1719

Appearances:

Jennifer A. Casey, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado,
For Complainant

Jock B. West, Esq., West Law Firm, P.C., Billings, Montana,
For Respondent

Before: Administrative Law Judge Peggy S. Ball

Decision and Order

I. Procedural History

On April 13, 2016, Complainant conducted an inspection of Respondent after Compliance Safety and Health Officers (CSHOs) James Messer and Ryan Morton drove by Respondent's jobsite, located at 304 East Lake Circle, Billings, Montana, and observed four employees engaged in residential roofing activity without the use of fall protection. (Tr. 31; Ex. 3 at 4). As a result of this inspection, Complainant issued a single-item Citation and Notification of Penalty, alleging Respondent failed to use adequate fall protection. Complainant proposed a penalty of $27,436 for the Citation, which was issued on September 16, 2016. Respondent timely contested the Citation.

Prior to the current Citation, Respondent had been issued four other Citations for violating the same standard, 29 C.F.R. § 1926.501(b)(13). (Tr. 113). One of the previous Citations was dismissed by Complainant for inadequate service. *Id*. The other three Citations were adjudicated and became final orders of the Occupational Safety and Health Review Commission prior to the April 13, 2016 inspection. (Tr. 113−14).

Trial was held on November 2, 2017, in Billings, Montana, and both parties submitted post-trial briefs in lieu of closing on the record. As discussed below, the Court finds Complainant proved Respondent violated 29 C.F.R. § 1926.501(b)(13), and that the citation was properly characterized as "repeat" and "serious". The Court also finds Respondent failed to meet its burden of proving the elements of its unpreventable employee misconduct affirmative defense. Therefore Citation 1, Item 1 is herein AFFIRMED.

II. Jurisdiction

Respondent agreed that it is an "employer" subject to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act), and that the Court has jurisdiction over this matter.[1] Accordingly, the Court has jurisdiction over this proceeding pursuant to § 10(c) of the Act.

III. Factual Background

Complainant conducted an inspection of Respondent's worksite after CSHOs Messer and Morton drove by the worksite and observed four workers engaged in residential roofing activities without using fall protection. (Tr. 33). Upon seeing this, the CSHOs stopped their vehicle and videotaped the scene. *Id*. The CSHOs noticed a work trailer in front of the jobsite, which was labeled "Great White Construction." (Tr. 34). Because CSHO Morton had previously inspected Great White Construction worksites, he called his OSHA Area Director, Arthur Hazen, to inform

1. Joint Stipulation Statement at 1. Hereinafter, the Court will cite the parties' joint stipulations as "JS".

him of what they had observed. *Id*. AD Hazen directed the CSHOs to open an inspection. (Tr. 35).

The CSHOs proceeded to the jobsite where they displayed their credentials and asked to speak with the person in charge. *Id.* Drew Stevens, an employee of Respondent, identified himself as the site foreman. *Id.* Mr. Stevens identified the other three employees as Tony Plant, Joshua Joyce, and James Birkett. (Tr. 33−34). Mr. Stevens informed the CSHOs Respondent was under contract to re-roof the residential property, a job which consisted of tearing off the old shingles, drying the roof in with an underlayment, and installing new shingles. (Tr. 44). Respondent had already completed the tear-off and dry-in portion of the project and was installing the new shingles when the CSHOs arrived. *Id*. Mr. Stevens testified he and the other employees had been working on the roof without fall protection for approximately two hours that day. (Tr. 43−44, 51). The CSHOs measured the height of the roof to be eleven feet from the edge to the ground. (Tr. 263; Ex. C-3, at 10). They also classified the roof as "steep" according to a transparent pitch gauge measurement. (Tr. 69).[2]

Terrance McKittrick, the owner of Respondent, had been onsite for 15−30 minutes the morning of the inspection. (Tr. 275). He dropped off the equipment trailer, distributed fall protection equipment, and instructed his employees on the day's activities. (Tr. 182, 275, 277−78). Mr. McKittrick testified he held safety meetings by the equipment trailer every day before starting work, including the morning of the inspection. (Tr. 250, 332, 370, 418, 455). At these meetings, he instructed his crew to work safe and wear fall protection. *Id.* Mr. McKittrick was regularly present at jobsites when employees were working. (Tr. 267−68). If he was not working with them, he routinely stopped by the sites to check on progress and monitor quality of

2. Complainant claims the pitch of the roof was 8/12 which means the roof has 8 inches of vertical rise for every 12 inches in lateral distance. (Tr. 263). Respondent claims the pitch of the roof was 6/12. (Tr. 270). The standard classifies any roof over a 4/12 pitch as steep. 29 C.F.R. § 1926.500.

work. (Tr. 275). According to Respondent's employees, before Mr. McKittrick left the jobsite on the day of the inspection, he instructed them to wear fall protection. (Tr. 418). He did not inspect fall protection equipment for defects, inspect the roof for properly secured anchor points, or ensure his employees put on fall protection equipment. (Tr. 278−80). However, the evidence shows it was likely that anchor points were secured to the roof. (Tr. 269, 279, 334−35, 358−60; Ex. C-9). Soon after Mr. McKittrick left, Mr. Stevens and the other three employees accessed the roof and began working without fall protection. (Tr. 89, 189−90). Mr. Stevens testified he knew Mr. McKittrick would return at some undefined point in time. (Tr. 343, 442). Mr. Stevens was the only supervisor onsite, and as foreman, he was responsible for overseeing worker safety. (Tr. 350).

Respondent provided training to its employees prior to the April 13, 2016 inspection. Mr. Joyce, Mr. Plant, and Mr. Birkett all observed a twenty-two minute training video which briefly covered the topics of fall protection and ladder safety. (Tr. 475). Mr. Stevens accompanied Mr. McKittrick to a half-day fall protection seminar, which covered various OSHA standards, including fall protection. (Tr. 322). Respondent did not have a written safety and health plan in place, nor did it have any written work rules. (Tr. 242−43). Instead, Mr. McKittrick defined the company's safety program as the jobsite discussions he had with employees. (Tr. 243, 247). McKittrick testified he does not discuss safety with every employee right off the bat. (Tr. 248−50). According to his testimony, his practice is to wait to see if an employee makes it through their first day; and if they do, he will discuss safety on their second day. *Id.*

Although Respondent did not have a written safety program or written work rules, it did have a written discipline plan, which listed three levels of discipline for non-compliance with work rules, including: (1) first offense equals a verbal warning, (2) second offense equals one

day leave from work without pay, and (3) third offense equals termination. (Ex. C-11). The discipline plan was implemented in late 2015. (Tr. 253). Notwithstanding the existence of such a plan, the only time Respondent had ever recorded enforcing it was after this April 13, 2016 inspection, despite having received multiple citations prior to the inspection. (Tr. 252, 344, 349−50; Ex. C-12). Notably, after the April 13, 2016 inspection, Respondent observed Mr. Stevens working again without fall protection, and did not follow through with the next level of discipline from its plan. (Tr. 433). Respondent has never terminated an employee for failing to use fall protection, nor has it ever docked the pay of an employee who failed to use fall protection. (Tr. 252). In fact, Mr. McKittrick told his employees if they did not wear fall protection, they would have to pay the OSHA penalty themselves. (Tr. 181). He has also worked alongside employees, without using fall protection himself, in the past. (Tr. 206; Ex. C-7).

OSHA has a Regional Emphasis Program (REP) in place to provide inspection authority to CSHOs if they observe fall hazards. (Ex. C-4). In the REP, it lists data for fatal falls from 2013. *Id.* In 2013, there were 466 fatal falls where the height of the fall was reported. *Id.* at 5. Of those falls, one in four fatalities occurred at heights less than ten feet. *Id.*

IV. Findings and Conclusions

A. Citation 1, Item 1

Complainant alleged a serious-repeat violation of the act as follows:

> 29 C.F.R. 1926.501(b)(13): Each 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.
>
> a) Construction Site: On April 13, 2016 and at time prior, employees were exposed to a fall of approximately eleven feet to the concrete below while installing asphalt shingles on an 8:12 pitch residential roof.
>
> Great White Construction was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 C.F.R. 1926.501(b)(13),

> which was contained in OSHA inspection number 1063604, citation number 01, item number 001 and was affirmed as a final order on August 12, 2015, with respect to a workplace located at Pa Hollow Trail, Billings, Montana 59106.

Citation and Notification of Penalty at 6.

The cited standard provides:

> 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 systems, or [a] 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).

i. Respondent Violated 29 C.F.R. § 1926.501(b)(13)

To establish a *prima facie* violation of section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. *See Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-0531, 1991).

a. The Standard Applies to the Cited Condition and it was Violated.

Complainant must prove the standard applies to the cited condition, and that Respondent violated its terms. *See Ormet Corp.* 14 BNA OSHC at 2135. The evidence establishes 29 C.F.R. § 1926.501(b)(13) applies to the cited condition. Respondent was working on the roof of a residential construction site at a height of eleven feet above the ground. (Tr. 263; Ex. C-3, at 10). The cited standard requires fall protection at heights above six feet on residential construction sites. 29 C.F.R. § 1926.501(b)(13). Because Mr. Stevens and Respondent's three other employees were engaged in residential construction activities more than six feet above the

ground without proper fall protection, the Court finds the standard applies and was violated. (Tr. 263; Ex. C-3, at 10).

b. Employees Had Access to the Cited Condition.

Complainant must prove there was at least one employee exposed to the cited condition. "Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1078 (No. 90-2148, 1995) ("Reasonable predictability, in turn, may be shown by evidence that employees while in the course of assigned work duties, personal comfort activities and normal means of ingress/egress would have access to the zone of danger."). Respondent admitted its four employees were working at heights above six feet without the use of fall protection, and the evidence presented at trial shows the same. (Tr. 51; Ex. C-1, JS at 2−3). Thus, there is no question Respondent's four employees were exposed to a fall hazard. Additionally, Respondent stipulated the exposed individuals were employees at the time of the inspection. (JS at 2). As such, the Court finds four of Respondent's employees were exposed to the cited condition.

c. Respondent Knew or with Reasonable Diligence Could Have Known of the Existence of the Violative Condition.

Complainant must prove the employer knew, or with the exercise of reasonable diligence could have known of the existence of the violative condition. *See Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, 1991). "Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. It need not be shown that the employer understood or acknowledged that the physical conditions were actually hazardous." *L&B Products Corp.*, 18 BNA OSHC 1322, 1324 (No. 95-1722, 1998). Knowledge can be established by showing Respondent had either actual or

constructive knowledge of the existence of the violative condition. *See E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1562 (No. 94-1979, 2009).

Respondent was cited on four other occasions for violating the same standard. (Tr. 113). After those Citations, Respondent took minimal steps to ensure its employees were adequately protected. Respondent provided brief training in late 2015 and implemented a disciplinary plan, which it only started to enforce after the present inspection. (Tr. 246, 256). Respondent's foreman was caught without fall protection multiple times after the previous four OSHA inspections, and he was among the employees working without fall protection at the April 13, 2016 inspection. (Tr. 43−44, 51, 349).

Respondent's first Citation was in 2013. (Ex. C-7). As a condition of settlement in that matter, Respondent was required to consult a safety and health consultant and develop a safety and health management plan. *Id*. Respondent failed to follow those steps. (Tr. 242). Respondent's onsite supervisor testified it was his customary practice not to wear fall protection on roofs with a pitch less than 8-12, and that he left it up to the employees to make individual choices about whether they were comfortable without fall protection. (Tr. 342, 343) Mr. McKittrick's practice was to stop by the worksites intermittently, and to verbally chastise employees not wearing fall protection but take no further action. (Tr. 243, 432, 442). Respondent has received four Citations for violating the same standard prior to the instant case, but has not adequately addressed the hazard. The Court finds Respondent had actual knowledge of the existence of the violative condition.

Alternatively, constructive knowledge may be established by showing Respondent could have known of the existence of the violative condition by exercising reasonable diligence. *See Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 86-692, 1992). "In exercising

reasonable diligence an employer is required to inspect and perform tests to discover safety-related defects in material and equipment." *Union Boiler Co.*, 11 BNA OSHC 1241, 1245 (No. 79-232, 1983) (citing *Prestressed Systems Inc.*, BNA OSHC 1864 (No. 16147, 1981)).

Here, McKittrick, as owner of Respondent, could have discovered his employees were not using fall protection by performing an inspection of the jobsite. He had been at the site the morning of the inspection, but he did not inspect the equipment, make sure employees were roped up before he left, nor did he inspect the roof to ensure anchors were properly installed. (Tr. 279). He testified to knowing the anchors were installed by his foreman, but he acknowledged different employees handle anchors differently between the various stages of roof construction. *Id.* Mr. McKittrick admitted he could not be certain of how they were installed at the time of the inspection. *Id.* If he performed an inspection of the jobsite during roof installation, he would have found his employees working without fall protection. (Tr. 279). Because Respondent failed to perform any inspections of the jobsite, the Court finds it failed to exercise reasonable diligence to discover the violative condition. As such, Respondent had constructive knowledge of the existence of the violative condition.

In addition to the foregoing, knowledge may also be established by imputing the actual or constructive knowledge of a supervisor. *See Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (finding the actual or constructive knowledge of a Respondent's supervisory employee can be imputed to the employer).[3] A supervisory employee, for the purpose of imputing knowledge, is, "[a]n employee who has been delegated authority over other employees,

3. The instant case is in the appealable jurisdiction of the Ninth Circuit. Both Commission and Ninth Circuit case law say a supervisor's knowledge of his own misconduct may still be imputed to the employer. *See Empire Roofing Co.*, 25 BNA OSHC 2221, 2224 (No. 13-1034, 2016); *Deep South Crane and Rigging Co.*, 23 BNA OSHC 2099, 2102 (No. 09-0240, 2012). Ninth Circuit case law differs on this topic than other circuits, which have held that if the supervisor's misconduct creates the condition, the supervisor's knowledge of the condition cannot be imputed to the employer unless it is foreseeable to the employer that the supervisor would act in such a way. *See ComTran Group, Inc. v. U.S. Dept. of Labor*, 722 F.3d 1304, 1315–16 (11th Cir. 2013).

even if temporarily…." *Id.* (citing *Tampa Shipyards, Inc.*, 15 BNA OSHC 2004, 2007 (No. 85-369, 1991)).

Mr. Stevens identified himself to the CSHOs as the foreman in charge and Respondent stipulated as such. (Tr. 35; JS at 2). Therefore, he is properly classified as a supervisory employee for the purpose of imputing knowledge. Because Mr. Stevens was working on the roof while unprotected by any form of fall protection, and because he was working alongside the other employees who failed to use fall protection, he had actual knowledge of the condition. (JS at 2−3). Therefore, Mr. Stevens' actual knowledge of the violative condition is imputable to Respondent.

Based on the foregoing evidence, the Court finds Respondent either had actual or constructive knowledge of the existence of the violative condition. Alternatively, the Court finds Mr. Stevens' knowledge of the violative condition is imputable to Respondent.

ii. The Violation was Serious

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur" as a condition precedent in affirming a serious violation. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); see *Omaha Paper Stock Co.*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability an accident would occur, it need only show if an accident did occur, serious physical harm could result. *See id.* Likewise, Complainant need only show that *if* a fall occurred, serious physical injury or death *could* occur, not that it *would* occur. *See id* at 1046.

Here, Respondent's employees were working on a steep roof at a height of eleven feet without the use of fall protection. (Tr. 263; Ex. C-3, at 10). If any employee were to fall, he would have fallen eleven feet, which would likely lead to serious injury or death. *See The Austin Company, Inc.*, 2 BNA OSHC 1036, 1041 (No. 899, 1974) (holding although there was testimony showing isolated instances where a twenty foot fall did not cause serious injury, a fall from twelve feet is, "quite likely to result in serious physical injury"); *see also Welltech, Inc.*, 12 BNA OSHC 1333, 1339 (No. 84-0919, 1985) (holding a fall from twelve feet is likely to cause injury or death). In addition to the extensive Commission case law classifying falls of this height as serious, Mr. Stevens also acknowledged a fall from eleven feet could cause an injury ranging from a "bruised tailbone to death." (Tr. 354). The Court finds the violation is properly classified as serious.

iii. The Violation was Repeated

For a violation to be classified as a repeat violation, Complainant must prove that, at the time Respondent was given the present Citation, there was a Commission final order against the "same employer for a substantially similar violation." *Murton Roofing, Inc.*, 23 BNA OSHC 1343, 1344 (No. 1924, 2010). Similarity of the violation may be established by showing the prior and present violations were failures to comply with the same standard. *Id.* (citing *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979)). In other words, a violation is classified as repeat if the "same employer was cited at least once before and a final order was issued for a substantially similar violation." *Murton Roofing*, BNA OSHC 1343 at 1344.

Here, Respondent had been issued four previous Citations for violating 29 C.F.R. §1926.501(b)(13). (Tr. 113). Three of those Citations became final orders of the Commission prior to the present Citation. (Tr. 113−14). Respondent failed to provide any evidence to rebut

the allegation of substantial similarity between the previous and current citations, or to distinguish them in any significant way. Therefore, the violation is properly classified as repeat.

iv. Unpreventable Employee Misconduct Defense

To establish the affirmative defense of unpreventable employee misconduct, Respondent is required to prove: (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations of its work rules; and (4) it has effectively enforced its work rules when violations have been discovered in the past. *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1951 (No. 07-1899, 2010).

a. Respondent Had an Established Work Rule

A work rule is a rule which: (1) is adequate in providing supervisory personnel a standard of how employees should act; and (2) would prevent the type of accident it is designed to prevent. *See Abbott Contractors, Inc.*, 16 BNA OSHC 1251, 1256 (No. 91-3177, 1993) (finding respondent's unpreventable employee misconduct defense fails because its rules are so outdated and vague as to provide no guidance to supervisors); *see also Westar Energy*, 20 BNA OSHC 1736, 1743 (No. 03-0752, 2004) (holding respondent's work rules were adequate because both parties stipulated if the employees complied with them, the accident would not have occurred). In other words, to be sufficient a a work rule must provide adequate guidance on how to follow OSHA standards. *See id.* Here, an accident did not occur. However, if an accident had occurred, using some form of fall protection as provided in 29 C.F.R. §1926.501(b)(13) would likely have prevented serious injury. Even though Respondent's work rule regarding the use of fall

protection was not recorded in writing, Mr. Stevens, Mr. Joyce, and Mr. McKittrick all testified the work rule existed (Tr. 246, 256, 417−19). Respondent's work rule clearly indicated employees were to use fall protection while working on any roof. Therefore, the rule provided adequate guidance of how employees were supposed to act, and if the rule were followed, it would have prevented injury had an accident occurred. The Court finds Respondent had an established work rule.

b. Respondent Did Not Adequately Communicate its Work Rule

Adequate communication is established when employees are trained to recognize the situations in which they should follow the rule; and more importantly, how to comply with the rule. *See S & E Contractors, Inc.*, 14 BNA OSHC 2150, 2153 (No. 89-3317, 1991) (finding Respondent's work rule regarding fall protection was not effectively communicated because the supervisor was working without fall protection, and the other three employees did not object to him doing so); *see also Betty Brothers*, 9 BNA OSHC 1379, 1384 (No. 76-4271, 1981) (holding Respondent "must do more than issue safety instructions or hold safety meetings" in order to adequately communicate its work rules).

Respondent provided training to its employees by showing them a twenty-two minute training video at some point after their first day of work. (Tr. 475). It trained its supervisor, Mr. Stevens, by having him attend a half-day training seminar, which covered various OSHA regulations. (Tr. 322). Additionally, Mr. McKittrick, as owner of Respondent, held daily safety meetings before the commencement of work where he highlighted the requirement that employees wear fall protection. (Tr. 250, 332, 370, 418, 455). However, the evidence shows there were several instances where the same employees were caught without fall protection, prior to and following the April 13, 2016 inspection. (Tr. 344, 349−50, 433). On the day of the

inspection, all four of Respondent's employees were working without fall protection, and none of them objected. (JS at 3). Additionally, Mr. Stevens knew Mr. McKittrick would customarily return to the jobsite at unpredictable points in time. (Tr. 343, 442). However, the fact that four employees were working on the roof in violation of Respondent's work rule, knowing the company's owner would be returning at any moment, shows the importance of following the work rule had not been clearly communicated or adequately enforced. (Tr. 343).

c. Respondent Took Steps to Discover Violations

In order to establish the defense of unpreventable employee misconduct, Respondent must show it has taken steps to discover violations of the rule in the past. "Although an employer is not required to provide constant surveillance, it is expected to take reasonable steps to monitor for unsafe conditions." *Westar Energy*, 20 BNA OSHC at 1744 (quoting *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999). Reasonable steps analysis includes: (1) the amount of job-training received by supervisors; (2) employee competency and experience; (3) safety records; (4) practicality of supervision; and (5) the degree of dangerous and hazardous work. *New York State Electric & Gas Corp.*, 1993 WL 330019 (No. 91-2897), *aff'd in part*, 19 BNA OSHC 1227 (No. 91-2897, 2000).

Mr. McKittrick was intermittently present at jobsites when employees were working. (Tr. 267−68). If he was not working with them, he routinely stopped by the sites to check on progress and monitor quality of work. (Tr. 275). When he was present at various sites, he frequently discovered employees working without fall protection. (Tr. 252, 344, 349−50). The Court finds Respondent has taken reasonable steps to discover violations of its rule.

d. Respondent Did Not Effectively Enforce its Work Rule When Violations Were Discovered

Respondent must show it has effectively enforced its rule when it has discovered violations prior to the instant citation. *See Frank Lill & Son, Inc.*, 362 F.3d 840, 845, 20 BNA OSHC 1673 (D.C. Cir. 2004). If Respondent has discovered violations but not effectively disciplined the employee(s) involved, it cannot come back in response to subsequent violations and claim the misconduct was unpreventable. *See id.*; *see also Abbott Contractors, Inc.*, 16 BNA OSHC 1251, 1256 (No. 91-3177, 1993) (finding Respondent did not adequately enforce its work rules, because although it relied on management to "disseminate and enforce rules during tool box meetings and on the job, it is clear that supervisory personnel did not take those rules seriously"). Perfunctory but unenforced rules are not adequate.

Here, Respondent discovered several violations both before and after the April 13, 2016 inspection. (Tr. 252, 344, 349−50, 433). The only documented evidence showing Respondent disciplined non-compliant employees came as a result of this inspection. (Tr. 344−45; Ex. C-12). Despite having three clear levels of discipline in its discipline plan, those levels were not followed when violations were discovered. (Ex. C-11); *see Westar Energy*, 20 BNA OSHC at 1746 (holding "an employer must have evidence of having actually administered the discipline outlined in its policy and procedures," and the discipline administered must be consistent with the policy). Though Respondent had suspended an employee for tardiness, it had never suspended or terminated an employee for failing to use fall protection, despite its four previous fall protection Citations. (Tr. 348−49). This is true even for Mr. Stevens, who testified McKittrick had caught him without fall protection six to twelve times. (Tr. 349). Yet he still was the supervisor in charge of safety at the site when the inspection was conducted. The Court finds Respondent has not effectively enforced its work rule. Therefore, Respondent's unpreventable employee misconduct defense must fail.

v. Conclusion

Based on the foregoing, the Court finds Respondent violated 29 C.F.R. § 1926.501(b)(13), and the violation was serious and repeated. Additionally, the Court finds Respondent failed to meet its burden in proving the defense of unpreventable employee misconduct. Accordingly, Citation 1, Item 1 is AFFIRMED.

V. Penalty

In determining the appropriate penalty for affirmed violations, the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business; (2) the gravity of the violation; (3) the good faith of the employer; and (4) the employer's prior history of violations. 29 U.S.C.A. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct de novo penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995).

OSHA issued Respondent a base penalty of $12,471. (Ex. C-2 at 2). Complainant multiplied the penalty by a factor of five because of Respondent's previous violations. Respondent was given an additional 10% increase in penalty because of its repeat history, but was granted a 60% overall reduction because of its small size. *Id.* The resulting penalty proposed by Complainant is $27,436.

Gravity of the violation is the primary consideration in penalty assessment. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2214. On the day of the April 13, 2016 inspection, four of Respondent's employees were exposed to a fall of eleven feet for approximately two hours. (Tr. 43−44, 51, 263; Ex. C-3 at 10). Respondent took some precautions to prevent injury. The evidence shows fall protection was available onsite to the employees, and anchor points were likely installed on the roof. (Tr. 262, 269, 279, 334−35, 358−60; Ex. C-9). Additionally, Respondent had provided some training for its employees. (Tr. 322, 475). Notwithstanding the foregoing, Complainant contends the likelihood of an actual injury was classified as "greater" because: (1) the 8/12 pitch of the roof increased the likelihood of a fall; and (2) the materials and equipment lying on the roof created a tripping hazard. (Ex. C-2 at 4). He acknowledged the greater the pitch of the roof, the more likely an actual injury is to occur. (Tr. 96). CSHO Messer calculated the pitch to be 8/12, but Respondent contends the pitch was 6/12. (Tr. 263, 270).

The Court finds Complainant's assessment of the roof pitch to be excessive. Based on the photos and testimony, the Court finds the roof pitch is closer to 6/12, as testified to by Respondent and adjusts the probability of injury accordingly. In light of this and the other factors discussed above, the Court finds a penalty of $22,000 is appropriate.

ORDER

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

1. Citation 1, Item 1 is AFFIRMED as a serious repeat violation of 29 C.F.R. § 1926.501(b)(13), and a penalty of $22,000 is ASSESSED.

SO ORDERED.

/s/
Judge Peggy S. Ball
Occupational Safety and Health Review Commission

Dated: September 19, 2018
Denver, Colorado