United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. ELITE BUILDERS, INC., Respondent.	OSHRC Docket Nos. 15-1645 16-0119

Appearances:

Evert H. Van Wijk, Esq., Department of Labor, Office of Solicitor, Kansas City, Missouri
For Complainant

Mark Bratetic, appearing *pro se*, Elite Builders, Inc., Papillion, Nebraska
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

Over the course of roughly two months in the summer of 2015, Respondent, a residential roofing contractor, was inspected twice by the Omaha Area Office of the Occupational Safety and Health Administration (OSHA). The first inspection involved a worksite located at 207th and Shirley Street, Omaha, Nebraska (First Inspection). The second inspection took place at a worksite located at 10518 S. 125th Avenue, Papillion, Nebraska (Second Inspection). In both inspections, Compliance Safety and Health Officers (CSHO) observed multiple violations of the fall protection standards. Upon being approached for the Second Inspection, Mark Bratetic, the owner of Respondent, denied entry and requested Complainant procure a warrant. Complainant

served Respondent with both the warrant and the Citation and Notification of Penalty for the First Inspection in the early morning of September 3, 2015. (Tr. 285; Ex. R-8). By the time the warrant was served, however, Respondent had completed the work on the worksite of the Second Inspection and had moved to another project. Nonetheless, CSHO Connett went to the worksite involved in the Second Inspection and took photos to supplement the photographs CSHO Peacock had taken of the worksite before he was rebuffed in his attempt to conduct the Second Inspection. The Citation and Notification of Penalty for the Second Inspection was issued on December 15, 2015.

The First Inspection, which has been labeled Docket No. 15-1645, consists of two serious citation items with associated penalties of $5,600. The Second Inspection, labeled Docket No. 16-0119, consists of four serious and two repeat citation items with associated penalties of $20,800. Before the hearing began, Complainant moved to modify the citation items in Docket 16-0119 labeled as "Repeat", to change them to "Serious", and reduce the penalty of those items to $2,000 each, which brought the total proposed penalty of Docket No. 16-0119 to $16,800. The Court granted Complainant's unopposed motion to amend the citation classifications. (Tr. 11–12).

Respondent filed a Notice of Contest with respect to both Citations. Regarding the Second Inspection, Respondent contends the warrant was improperly executed and that Complainant engaged in vindictive prosecution. In both instances, though, Respondent argues that compliance with the fall protection standards cited by Complainant presented a greater hazard to his employees. By filing the Notice of Contest, Respondent brought this case before

the Occupational Safety and Health Review Commission pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c).[1]

The hearing took place on January 24, 2017, in Council Bluffs, Iowa. The following witnesses testified: (1) CSHO Michael Connett; (2) CSHO Ricardo Peacock; (3) Area Director Jeffery Funke; and (4) Mark Bratetic, owner of Respondent. Both parties timely submitted post-hearing briefs.

II. Stipulations & Jurisdiction

The parties reached the following stipulations, which are also reproduced in Complainant's pre-trial statement:

A. Elite Builders, Inc. uses goods, equipment and materials shipped from outside the state of Nebraska.

B. Elite Builders, Inc. is engaged in a business affecting commerce.[2]

C. The Occupational Safety and Health Review Commission has jurisdiction over this matter.

D. Elite Builders, Inc. is a residential framing contractor.

(Tr. 26–31). The Court read through the foregoing with Respondent to ensure that he, in fact, understood the nature of the stipulations. Convinced that he agreed to such stipulations knowingly, the Court entered them into the record. (*Id.*). Based on the parties' stipulations, the Court finds that Commission has jurisdiction over the action pursuant to section 10(c) of the Act. Further, the Court finds Respondent was an employer engaged in a business and industry

1. From this point forward, the Court shall simply refer to the foregoing as "the Commission" and "the Act".

2. Following the Ninth Circuit in *Usery v. Franklin R. Lacy*, 628 F.2d 1226, 1226 (9th Cir. 1980) commerce is established where it "is in a class of activity that as a whole affects commerce." *Clarence M. Jones d/b/a Jones Co.,* 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983). In that case, the Commission went on to find "[t]here is an interstate market in construction materials and services and therefore construction work affects interstate commerce." *Id.*, citing *NLRB v. Int'l Union of Operating Engineers, Local 571*, 317 F.2d 638, 643 n. 5 (8th Cir. 1963) (judicial notice taken that construction industry affects interstate commerce). Because Respondent is engaged in construction work, the undersigned finds it is engaged in a business affecting interstate commerce

affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005).

III. Factual Background

A. First Inspection

On June 19, 2015, CSHO Michael Connett was driving around a residential neighborhood in Omaha, Nebraska. Pursuant to Complainant's Local Emphasis Program (LEP) on fall protection, CSHO Connett was on the lookout for fall protection hazards. (Tr. 55). As he was driving around, he observed two roofers working on the roof of a residential construction project, located at 207th and Shirley Street, Omaha, Nebraska without any apparent fall protection system in place. (Tr. 56; Ex. C-1 to C-4). After taking photos from a public street, CSHO Connett entered onto the worksite, identified himself, and requested to speak with the person in charge. (Tr. 59). After meeting with Mark Bratetic, Respondent's owner, CSHO Connett held an opening conference and then proceeded to conduct an inspection. (Tr. 59).

At the time of the First Inspection, Respondent's employees were installing floor joists on the second floor of the construction project, placing them between 13 and 14 feet above the lower level.[3] (Ex. C-5 to C-7). The joists, once installed, were spaced approximately 18 inches apart, which Respondent's employees had to maneuver across as more joists were installed.[4] (Tr. 74, C-5, C-6). In some cases, Respondent's employees were supported by plywood, which was suspended between the joists, but no specific work platform appeared to be available. (Tr. 67). In addition to the potential fall hazard into the building, Respondent's employees were also

3. The distance to the floor inside of the building was 13 feet, 2 inches, whereas the floor to the ground on the outside of the building was 13 feet, 8 inches. (Tr. 62–64).

4. CSHO Connett testified that he did not specifically measure the space between the joists, but noted that the standard for such an installation is 18-inches wide. (Tr. 74). CSHO Connett's testimony was more or less confirmed by Bratetic, who stated that installed joists left 16 inches of space in between. (Tr. 249).

working within two feet of the roof's edge, where they were exposed to a fall of nearly 14 feet. (Tr. 73; Ex. C-2, C-4).

Though they were purportedly available on-site, none of Respondent's employees were wearing a personal fall arrest system; nor, for that matter, did Respondent install guardrails or a safety net system. (Tr. 69–71). Instead, when asked by CSHO Connett, Bratetic stated that his employees were uncomfortable using harnesses and tether lines because they presented a tripping hazard. Accordingly, Respondent developed a fall protection plan, which assessed the use of conventional fall protection systems (guardrails, personal fall arrest systems, and safety net systems) and determined that such systems presented a greater hazard or were otherwise infeasible. (Ex. R-13). No alternative forms of fall protection, nor any sort of system to abate the fall hazard, were implemented as an alternative. (Ex. R-13).

During the course of his inspection, CSHO Connett also conducted interviews of the employees, asking in particular about whether they had received training. (Tr. 68–69, 76). According to Connett, the employees said they were basically told to "work safe". (Tr. 76). Bratetic countered, providing documentation of the training he provided and pointing out that CSHO Connett's own notes indicated that Bratetic's employees told him they discussed fall protection/harnesses on a daily basis. (Tr. 261–62; Ex. R-9 at 20).

B. Second Inspection

A few months later, CSHO Ricardo Peacock was driving around Omaha neighborhoods looking for fall hazards pursuant to the LEP he referred to as "Stormcon". (Tr. 160). According to Peacock, construction work spikes after a severe weather event, which activates the Stormcon program. (Tr. 161). As he was driving around, CSHO Peacock came upon a residential construction worksite located at 10518 S. 125th Avenue in Papillion, Nebraska, where he

observed two of Respondent's employees working on a roof over six feet in height.[5] (Tr. 160). Peacock proceeded to take video and photographs of the worksite from a distance of approximately 30–40 feet, and contacted his Area Director to inform him he was proceeding under the Stormcon LEP. (Tr. 163).

When Peacock entered the worksite, he showed his identification, asked the employees to come down from the roof, and asked to speak to the supervisor. (Tr. 173). The employees exited the roof via a forklift with an attached platform. (Tr. 173). Before they could do so, however, one of the employees asked the forklift operator to pull the platform closer to the roof, which Peacock estimated to be approximately three feet away from the edge. (Tr. 173). Once they came down, the employees went inside the building, and when they came out they were preparing to leave the worksite. (Tr. 174). Before they left, however, they identified Bratetic as the person to whom Peacock should speak. (Tr. 174). Bratetic told Peacock to get a warrant and refused to provide any additional information. (*Id.*). As Bratetic was leaving, Peacock took photographs of Bratetic's vehicle for later identification, but he also noticed Respondent's trailer, which displayed the name "Elite Builders". (*Id.*). After he returned to the office, Peacock filled out the warrant application and compiled his photographs from his pre-inspection observations, which ended his involvement with the case. (Tr. 175).

The warrant application was filed with the United States District Court for the District of Nebraska on August 31, 2015, and was approved the same day. (Tr. 283–84; Ex. R-11). According to the warrant, the document needed to be served on Respondent within ten days. (Ex. R-11). CSHO Connett, who was re-assigned to the case, served Bratetic with both the warrant and the Citation and Notification of Penalty from the First Inspection at the Shirley location at 6

5. Although he did not get the chance to take measurements of the roof height, CSHO Peacock estimated the height based on the panels on the side of the house, which have a standard measurement of 8 feet. (Tr. 168).

a.m. on September 3, 2015. (Tr. 78–79, 217–18). Although Respondent was no longer performing work at the worksite identified in the warrant, CSHO Connett proceeded to the worksite, where he took measurements of the roof based on the photographs CSHO Peacock had taken when he attempted to conduct an inspection the first time. (Tr. 79–80).

Based on the information contained in the inspection files, CSHO Connett proposed, and Area Director Funke approved of, the issuance of a Citation and Notification of Penalty for each of the two worksites discussed above. The Citations will be discussed at length below and are separated by inspection number.

IV. Analysis of Affirmative Defenses

A. The Warrant Was Properly Served

Respondent contends the warrant issued for the Papillion worksite was not served within the timeframe set forth in the document and should therefore be voided, along with any evidence stemming therefrom. The Court has reviewed the contents of the warrant application and found the following: (1) the warrant was issued on August 31, 2015; (2) the warrant required that it be served within ten days; and (3) the warrant was served on Respondent on September 3, 2015. Based on the foregoing facts, the Court finds Complainant complied with the requirements of the warrant, and that Respondent was properly served. Accordingly, Respondent's arguments regarding the validity of the warrant are rejected.

B. Respondent Failed to Establish Vindictive Prosecution by Complainant

Respondent carries the burden of proof for an affirmative defense. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993) *aff'd*, 28 F.3d 1213 (6th Cir. 1994). Premised in part on the fact he was inspected twice in as many months and that he was served with a warrant and the Citation from the First Inspection at an unusually early time in the morning, Respondent

has claimed that—as it relates to the Second Inspection—he is the victim of vindictive prosecution. Vindictive prosecution "is a prosecution to deter or punish the exercise of a protected statutory or constitutional right." *Nat'l Eng'g and Contracting Co.*, 18 BNA OSHC 1075, 1077 (No. 94-2787, 1997) (citing *U.S. v. Goodwin*, 457 U.S. 368, 372 (1982)) *aff'd*, 181 F3d 715 (6th Cir. 1999). The Commission noted, "Although there is no uniform test for proving that a prosecution was vindictive, a threshold showing common to all tests is evidence that the government action was taken in response to an exercise of a protected right." *Id.* (noting the two circuit courts—D.C. and Sixth Circuits—to which the particular action could be appealed formulated the test differently). A showing of such misconduct warrants dismissing "the vindictively motivated charge or the entire action." *Id.* (citing *U.S. v. Meyer*, 810 F.2d 1242, 1249 (D.C. Cir. 1987).

In *National Engineering and Contracting Co*., the respondent asserted the defense of vindictive prosecution, claiming OSHA had (1) privately labeled respondent a "bad actor" and stated its intent to "get them"; (2) withdrew citations in an unrelated case based on information respondent had purportedly learned during the CSHO's deposition; and (3) taken action based on respondent's previous request for a warrant; amongst other claims. 18 BNA OSHC at 1079. The Commission held that National failed to make even the threshold showing. Specifically, it found National, though receiving a fair deal of attention from OSHA, did not identify any specific right it had exercised that caused OSHA to initiate the inspection or characterize the citation item in a particular way. *Id* at 1078. In fact, even though National had technically exercised a procedural right by demanding a warrant during a previous inspection, the Commission, quoting the Ninth Circuit, stated, " "The mere fact that this prosecution followed the exercise of certain procedural rights in other, unrelated cases is insufficient to raise the appearance of vindictiveness." *Id.*

(citing *United States v. Robison*, 644 F.2d 1270 (9th Cir. 1981)). Further, the Commission noted that the alleged statements by OSHA officials, even if true, were insufficient to establish the defense, because National needed to prove "that it would not have been cited absent that motive." *Id.* (citing *U.S. v. Benson*, 941 F.2d 598, 612 (7th Cir. 1991)).

In this case, the Court finds Respondent did not exercise a statutory or constitutional right prior to the initiation of the Second Inspection, which is the basis of the vindictive prosecution claim. To clarify, Respondent did exercise two very important rights in this case: his right to contest the Citation, and his right to request a warrant. The problem, however, is Respondent did not (or could not) exercise those rights until the Second Inspection. Indeed, the Second Inspection could not be the result of his decision to contest the Citation from the First Inspection, because he had not received that Citation yet.[6] Likewise, Bratetic demanded a warrant during CSHO Peacock's attempt to conduct the Second Inspection, not before. Respondent's exercise of these rights cannot serve as the basis of a claim for vindictive prosecution—there was no prosecutorial action taken in response to Respondent's action, save for procuring the warrant that Bratetic requested.

The Court cannot discern any misconduct on Complainant's behalf. Although CSHO Connett, who performed the First Inspection, was eventually assigned to the Second Inspection, the decision to inspect the Papillion worksite was initiated by CSHO Peacock because he saw two workers on a roof without fall protection. In fact, both CSHO Peacock and CSHO Connett had an objectively reasonable basis upon which to initiate an inspection—they saw workers on the roof of a residential construction site with no apparent form of fall protection. Further, the CSHOs were acting pursuant to a LEP targeting fall hazards.

6. As previously noted in Section I, *supra*, the warrant for the Second Inspection and the Citation resulting from the First Inspection were simultaneously served on Respondent.

Respondent was inspected a second time because he allowed his employees to work on an elevated surface without fall protection. (Ex. C-8; Tr. 168–73). CSHO Peacock's attempt to initiate an inspection, and the subsequent decision to issue citations, was based on this simple fact. Respondent's affirmative defense of vindictive prosecution is rejected.

C. **Applicable Law**

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

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361, 1365-66 (No. 92-3855, 1995). *Preponderance of the evidence* has been defined as:

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

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

D. **Docket No. 15-1645**

1. Citation 1, Item 1

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

> 29 CFR 1926.501(b)(13): Each employee(s) engaged in residential construction activities above 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 employees provided with an alternative fall protection measure under another provision of paragraph 1926.501(b):

> The employer is failing to protect the employees from fall hazards greater than 6 feet. Employees performing residential construction activities were expose to falls on the exterior and interior of the building being constructed. The workers were exposed to falls of over 13 feet to the ground below.

See Citation and Notification of Penalty at 6.

The cited standard provides:

> 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. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

29 C.F.R. § 1926.501(b)(13).[7]

a. The Standard Applies

Respondent is a roofing contractor that was engaged in residential construction activities on the date of the inspection. (Stip. No. 4). According to CSHO Connett's measurements, the distance from the roof, where Respondent's employees were installing joists, to the ground below was at least 13 feet. (Tr. 64; Ex. C-7). Thus, by its terms, the standard applies.

b. The Standard was Violated

The standard requires one of three forms of fall protection – personal fall arrest systems, safety nets, or guardrails – none of which were being used by Respondent's employees. Thus, on the face of the evidence, Respondent violated the terms of the standard.

7. The cited standard also includes the following Note:

> There 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. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with § 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

c. Respondent's Employees Were Exposed to the Hazard

As noted above, CSHO Connett observed two of Respondent's employees working on the roof of the house on Shirley street. Neither of those employees were wearing fall protection nor protected by guardrails or safety nets. (Tr. 60). One employee was working close to the edge of the roof, which exposed him to a fall of nearly 14 feet. (Ex. C-3, C-4, C-6). Another employee, who was working toward the center of the roof, was exposed to a fall of nearly 13 feet to the floor inside of the home. (Tr. 62–63; Ex. C-5). Respondent argued that the joists, when laid flat, would mitigate the fall hazard and serve as a sort of platform; however, at the time of the inspection, the joists were upright, which exposed gaps of over a foot in width. (Tr. 63; Ex. C-6). Further, joists are not designed as platforms, nor, when laid flat, are they secured to the roof, which makes them a poor substitute for conventional fall protection. Accordingly, the Court finds Respondent's employees were exposed to a fall hazard.

d. Respondent Had Knowledge of the Conditions

"To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2155 (No. 08-1656, 2016). To satisfy this burden, Complainant must show "knowledge of the *conditions* that form the basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard." *Id.* "When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of noncomplying conduct of a subordinate." *Mountain States Tel. & Tel. Co. v. Occupational Safety & Health Review Comm'n*, 623 F.2d 155, 158 (10th Cir. 1980). *See also Revoli Constr. Co.,* 19 BNA OSHC 1682, 1685 (No. 00-0315, 2001) (actions

and knowledge of supervisory personnel can be imputed to their employers under the general rule when both a supervisor and an employee were engaged in the misconduct).[8]

Bratetic told CSHO Connett that he was fully aware of the fact that his employees were working on the roof without fall protection and provided reasons as to why. Thus, Respondent, through its principal, had actual knowledge of the violative conditions.

e. The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Constr.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

CSHO Connett testified as to the nature of the injuries that an employee could suffer as a result of a fall from the roof of the residential construction site onto the dirt or wood floor below. (Tr. 73). Based on his experience conducting construction inspections, CSHO Connett testified that an employee could suffer sprained ankles, bruises, and could potentially die if he/she fell from 13–14 feet onto the ground below. (Tr. 73). Due to the injuries that an employee could

8. These cases arise in the Eighth Circuit. The Commission will apply the law of the circuit court of appeals to which this Decision can be appealed in terms of imputation of knowledge. Thus, this Decision can be either appealed to the Eighth Circuit Court of Appeals or the D.C. Circuit Court of Appeals, which have issued no opinion on whether constructive knowledge can be imputed to the employer without first analyzing whether the conduct is foreseeable. Thus, the Court will follow established Commission case law. In addition, when actual knowledge is present, as found here, foreseeability is not an issue. In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission 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) (citation omitted).

suffer if he fell from the roof, the Court finds Respondent's failure to require the use of fall protection was a serious violation of the Act.

Accordingly, the Court finds Complainant has established a violation of 29 C.F.R. § 1926.501(b)(13). However, Respondent has asserted the affirmative defenses of greater hazard and infeasibility as defenses to compliance and a finding that a violation of the Act has occurred.

f. Affirmative Defenses of Greater Hazard and Infeasibility

The cited standard provides Respondent with an opportunity to show that the use of the listed forms of fall protection would create a greater hazard or would be infeasible to implement. If Respondent can establish that using conventional fall protection would create a hazard or would otherwise be infeasible, the standard requires the employer to "develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502." 29 C.F.R. § 1926.501(b)(13). The requirements of paragraph (k) are extensive, and Respondent must first overcome the presumption that the listed fall protection systems in 1926.501(b)(13) are both feasible and will not create a greater hazard in the context of residential construction activities. Respondent attempted, but failed, to meet that burden.

In order to establish the defense of greater hazard, Respondent must show: "(1) the hazards created by complying with the standard are greater than those of noncompliance; (2) other methods of protecting its employees from the hazards are not available; and (3) a variance is not available or that application for a variance is inappropriate." *Spancrete Ne., Inc.*, 15 BNA OSHC 1020, 1022 (No. 86-521, 1991) (citing *Walker Towing Corp.*, 14 BNA OSHC 2072, 2078 (No. 87-1359. 1991)). As argued by Complainant, Respondent failed to show that conventional fall protection systems actually created a greater hazard; instead, Respondent merely pointed out a potential tripping hazard associated with the use of lanyards and safety lines. (Tr. 70–71).

While that is certainly a concern, the Court fails to see how tripping when attached to a fall arrest system, which is designed to prevent a fall to the ground below, creates a greater hazard than not wearing a harness at all. In addition to whatever tripping hazard is presented by safety lines, the installation of joists requires Respondent's employees to maneuver around upright and flat wood planks, each with gaps and holes that go straight to the ground. (Ex. C-5 to C-7). The Court does not perceive any greater tripping hazard than already exists at the worksite.

More fatal to Respondent's case, however, is the fact that he never applied for a variance, nor has he shown that application for a variance would have been inappropriate. According to the Commission, that failure is sufficient in and of itself to reject the defense. *See Spancrete*, 15 BNA OSHC at 1020 (rejecting greater hazard defense when employer failed to seek variance and noting that this element has been recognized and endorsed by several courts of appeal)[9]. Accordingly, Respondent's greater hazard defense is rejected.

Even if Respondent managed to establish the prima facie elements of the greater hazard defense, Respondent failed to comply with the requirements of 29 C.F.R. § 1926.502(k). Amongst other things, paragraph 502(k) requires: (1) a qualified person to prepare the plan for the specific worksite/job; (2) a list of reasons why conventional fall protection is infeasible or creates a greater hazard; (3) a written discussion of "other measures that will be taken to reduce or eliminate the fall hazard", such as scaffolds, ladders, or work platforms; and (4) the designation of controlled access zones and safety monitors. 29 C.F.R. § 1926.502(k). Respondent has a fall protection plan, but the plan does not meet the requirements of 1926.502(k), nor has Respondent established a sufficient reason for its implementation as an alternative to the forms of protection listed in the standard. (Ex. R-13).

9. See, e.g., Dole v. Williams Enters., Inc., 876 F.2d 186, 188 (D.C. Cir. 1989); *RSR Corp.v. Donovan,* 747 F.2d 294, 303 (5th Cir. 1984); *Diebold v. Marshall,* 585 F.2d 1327, 1339 (6th Cir. 1978).

First, Respondent's plan is not specific to any site; instead, by its own terms, it is "specific for residential framing". (Ex. R-13). In other words, Respondent seeks to except all of its residential framing activities from the requirements of the residential construction standard. Second, and perhaps even more problematic, is that Respondent's fall protection plan does not provide for an alternative means of fall protection; rather, it appears to justify not utilizing fall protection at all[10]. (Ex. R-13). Instead, Respondent appears to rely almost exclusively on the relative experience and training of the employees engaged in a particular framing activity and a general admonition to work slowly and carefully. (Tr. 254, 257–58).

Respondent also failed to prove that the use of conventional fall protection was infeasible. In order to establish the defense of infeasibility, Respondent must show:

> (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection.
>
> *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1190 (No. 92-1891, 1995).

Although Respondent pointed out problems with the implementation of conventional fall protection systems, such as tripping hazards, the Court finds that these do not rise to the level of infeasibility. The Commission has stated that it "cannot accept unsubstantiated conclusions as proof" of infeasibility. *Avcon, Inc*., 23 BNA OSHC 1440, 1454 (No. 98-0755, 2011) (consolidated) (citing *Peterson Bros. Erection Co.,* 16 BNA OSHC 1196, 1204 (No. 90-2304, 1993), *aff'd* 26 F.3d 573 (5th Cir. 1994)). In *Avcon*, the Commission noted that the employees who gave testimony on feasibility were "unfamiliar with OSHA's fall protection standards" and their "opinions were offered without any supporting scientific or professional data or tests."

10. There does appear to be a limited exception for the use of "sawhorse" scaffolds when installing trusses on the interior. (Ex. R-13 at 2).

Avcon, 23 BNA OSHC at 1454. Such a quantum of proof makes sense when one considers the scientific or professional data and tests used to establish the need for the regulation in the first place. *See generally* Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672 (August 9, 1994) (to be codified at 29 C.F.R. Parts 1910 and 1926). Respondent's conclusions regarding conventional fall protection do not rely on data or tests illustrating their infeasibility; instead, they appear to be based on little more than a belief that using conventional fall protection would present unique difficulties. According to the Commission, "It is not enough to show that compliance is difficult, expensive, or would require changes to operations." *Manson Constr. Co.*, 26 BNA OSHC 1569, 1576 (No. 14-0816, 2017) (ALJ). The affirmative defenses of greater hazard and infeasibility are rejected. Therefore, based upon the foregoing, the Court finds the terms of the standard were violated. The violation will be AFFIRMED as a serious citation.

2. Citation 1, Item 2

> Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:
>
> 29 CFR 1926.503(a)(1): The employer 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 those hazards:
>
> The employer is failing to provide employees with adequate and effective fall training prior to allowing them to work on the second story deck of a residential style site. This training would allow each employee to recognize the hazards of falling and allow them to understand the proper procedures to be followed in order to minimize those hazards.

See Citation and Notification of Penalty at 7.

> The cited standard provides:
>
> 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).

a. The Standard Applies

Respondent employees install roofing materials on unenclosed, elevated surfaces, which exposes them to fall hazards. The standard applies.

b. Complainant Failed to Prove the Standard Was Violated

In order to prove a violation of a training standard, Complainant "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)). In that case, "the burden shifts to the Secretary to show some deficiency in the training provided." *Id.*

Complainant focuses on the following facts in support of its claim that Respondent violated the training standard: (1) During the inspection, Bratetic told CSHO Connett that he conducted fall protection training but apparently did not sufficiently elaborate on the specifics of that program; (2) In response to questions about their training, employees told CSHO Connett they had been told to "basically work safe"; (3) Respondent's employees were not using fall protection; and (4) Respondent did not possess a proper written certification of the training. The Court finds these facts insufficient to establish a violation of the training standard.

First, Complainant did not establish what sort of training a reasonably prudent employer would have provided under these circumstances. CSHO Connett testified that he had received fall protection training, which included seminars on "harnesses, lanyards, anchorage points", but

there was no specific testimony as to what Respondent's fall protection training program should have included. (Tr. 54). The fact that Connett testified Bratetic did not elaborate on the type of training provided is of dubious value, because the testimony does not make clear whether Connett even asked Bratetic about the contents of the program. (Tr. 75). It is difficult to evaluate the contents of a training program if there is no standard by which to measure that program.

Second, while the employees' statements that they were told to "basically work safe" should have given CSHO Connett pause, that was not the only statement given by Respondent's employees. (Tr. 76; Ex. R-9). According to CSHO Connett's own notes, Respondent's employees also told him that Bratetic "talks about harness[es] every morning." (Ex. R-9 at 020). Further, as the trial proceeded, Bratetic testified as to the contents of the fall protection training he provides, including: (1) anchor points, lanyards, and harnesses; (2) communicating hazards; (3) handrails on open stairwells; (4) morning safety discussions; and (5) recognizing the need for fall protection over six feet. (Tr. 264, 281, 295–299). The only specific training deficiencies elicited during Bratetic's testimony was his apparent failure to understand the concept of shock loading and, perhaps, not specifically discussing the maximum load per anchor point. (Tr. 298–99). According to Bratetic, however, these concerns were minimal because he testified that none of his employees weighed nearly that much. (Tr. 299).

Third, even though Respondent's employees were not wearing fall protection, this does not, of itself, establish a training violation. According to the Commission, "The failure to enforce compliance with work rules on the job does not establish a failure to train or instruct . . . . *N & N*, 18 BNA OSHC at 2128 (citing *Dravo Eng'rs. and Constructors*, 11 BNA OSHC 2010, 2012 (No. 81-748, 1984) (evidence of failure to enforce a safety rule does not prove a training violation)). According to the testimony of both CSHO Connett and Bratetic, there appeared to

be a *laissez-faire* attitude towards actual enforcement of the fall protection rules, with Respondent permitting employees to use/not use fall protection based on their own, individual safety assessment. (Tr. 70, 257). *See Tim Graboski Roofing, Inc.,* 25 BNA OSHC 1441, 1456 (ALJ) (No. 14-0263, 2015) (noncompliance to accommodate the crews' reluctance to use fall protection is plain indifference to the safety of its employees). While rampant disregard for the rules *may* indicate a lack of training, it is not sufficient to establish a training violation in and of itself. In this case, the Court finds that training took place, notwithstanding Respondent's failure to enforce the principles taught therein.

Finally, Respondent had written verification of the training provided. Though it may not have been technically correct in its specifics, the intent of the document is clear: Respondent and his employees certified that training occurred and documented that fact. While a lack of some sort of documentation may have been good evidence of a failure to train, Respondent had documentation of the training, which preceded the inspection in this case. (Ex. R-7). Additionally, the requirement to certify training is separate and apart from the issue of whether training occurred in the first instance and Respondent was not cited for lack of documentation.

Based on the foregoing, the Court finds that Complainant failed to establish a violation of the fall protection training standard. Complainant did not establish what a reasonably prudent employer would have done under similar circumstances, which sets the standard by which Respondent's training program should be measured. Further, when presented with evidence that some fall protection training had taken place, Complainant failed to show the manner in which the training received was deficient, other than to point to the existence of violations at Respondent's worksite. In addition, CSHO Connett's testimony focused on Respondent's employee's statements that their training basically consisted of "being safe", notwithstanding the

presence of additional statements in his own notebook indicating the employees also told him that they discussed harnesses "every day". (Ex. R-9). Ultimately, Complainant's failure is one of proof. Accordingly, Citation 1, Item 2 of this docket shall be VACATED.

E. **Docket No. 16-0119**

1. Citation 1, Item 1

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

> 29 CFR 1910.178(l)(1)(ii): The employer did not ensure each operator had successfully completed the training required by paragraph (l), except as permitted by (l)(5), prior to permitting an employee to operate a powered industrial truck:
>
> The employer failed to ensure that the employees received the training required prior to operating a powered industrial truck. In this case, a Lull Model 944E All Terrain Fork truck was being used to elevate a personnel platform and move materials.

See Citation and Notification of Penalty at 6.

The cited standard provides:

> Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this paragraph (l), except as permitted by paragraph (l)(5).

29 C.F.R. § 1910.178(l)(1)(ii).

a. The Standard Applies

According to 29 C.F.R. § 1926.602(d), entitled *Powered industrial truck operator training,* "The requirements applicable to construction work under this paragraph are *identical* to those set forth at § 1910.178(l) of this chapter." As such, the Court finds that issuing a citation pursuant to 1910.178(l) is appropriate. Paragraph 1910.178(a) states that "this section contains safety requirements relating to fire protection, design, maintenance, and use of *fork trucks* . . . ."

29 C.F.R. § 1910.178(a). The vehicle at issue was a gas-powered, all-terrain forklift. Thus, the standard applies.

b. The Terms of the Standard Were Violated

The Court finds the terms of the standard were violated. According to CSHO Connett, the employees told him that at least two people operated the forklift: Bratetic and an employee named Ted.[11] (Tr. 102–103). Respondent only produced one training certificate—for Bratetic—which indicated that he completed a forklift safety training course on September 7, 2015, after the inspection took place. (Tr. 101–102; Ex. R-12). Because none of the employees who operated the forklift were properly trained before operating it, the Court finds Respondent violated the terms of the standard.

Notwithstanding the above, Respondent contends that the training he eventually received was focused on the use of forklifts in an industrial setting and did not address the hazards associated with residential construction. There is an entire cottage industry of OSHA training programs, and the Court is not in a position to determine the quality of the course Bratetic selected and whether its content was directly applicable to the residential construction industry. Nor was there any testimony to suggest that the particular course Bratetic took was specifically required by OSHA; rather, the onus is on Respondent to assess whether the course selected is adequate for the type of work performed and the vehicle selected to perform that job. *See* 29 C.F.R. § 1910.178(l)(3) (discussing training program content). More to the point, however, the content of what Bratetic learned in the particular training course he attended is irrelevant to the question of whether he, or any of his employee-operators, received adequate training on the operation of the forklift *prior to* operating it. They did not.

11. Bratetic later clarified that the employee's name was "Ed". (Tr. 102).

Respondent also points out that the same forklift and platform were present at the Shirley worksite during the First Inspection, and notes that he did not receive any citations relating the platform, the forklift, or any associated training. In other words, Respondent appears to suggest that the government should be prevented from pursuing a violation in the Second Inspection that it clearly did not pursue in the first, because he did not have fair notice.

There could be a number of reasons why CSHO Connett did not cite Respondent for the platform and forklift, and none of them support dismissal of this citation item. In the First Inspection, CSHO Connett may not have seen the forklift and platform, or, since it was not in use, it may not have caught his attention. Perhaps the platform was not attached, in which case there was no reason to suspect that the forklift and platform were being used as a personnel lift. For reasons such as these, the Commission has held that "an employer cannot deny the existence of or its knowledge of a cited hazard by relying on the Secretary's earlier failure to cite the condition." *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218 (No. 88-821, 1991). A condition does not cease to be hazardous simply because it was not observed in a previous inspection, nor does it cease to be a violation because of that fact. Respondent did not have the training required by the standard prior to operating the rough terrain forklift. Accordingly, the terms of the standard were violated.

c. Respondent's Employees Were Exposed to the Hazard

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1078 (No. 90-2148, 1995). Regarding access, "the 'inquiry is not simply into whether exposure is theoretically possible,' but whether it is reasonably predictable 'either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the

zone of danger." *Nuprecon LP dba Nuprecon Acquisition LP*, 23 BNA OSHC 1817, 1819 (No. 08-1037, 2012) (quoting *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)).

The forklift was equipped with a personnel platform, which was used to lift employees from the ground level up to the roof. CSHO Peacock observed the employees being lowered from the roof when he first approached the worksite, and Bratetic said that he lifted employees to the roof during the course of the project. (Tr. 189; Ex. C-8). As will be discussed later, the personnel platform was both too wide for the forklift and lacked guardrails. *See* Section IV.E.2.b, *infra*. As such, both the operators, who were not properly trained, and the employee-roofers, who were being lifted on the platform, were exposed to fall hazards, tip-over hazards and potential struck-by hazards stemming from an improperly operated forklift. (Tr. 197–98). *See, e.g.*, *Dierzen-Kewanee Heavy Indus., LTD*, 22 BNA OSHC 1656, 1663 (No. 07-0675, 2009) (consolidated) (ALJ) (holding that untrained operators exposed themselves and other employees to potential broken bones, up to and including death, "when untrained operators can strike employees with the forklift or cause material to fall on the operator or others").

d. Respondent Had Knowledge of the Conditions

Bratetic admitted to operating the forklift and using the platform to raise his employees onto the roof. He also admitted that he had not taken the training course until after the inspection had occurred. Thus, Respondent was directly aware that neither he, nor any of his employees, had the training required by the cited standard.

e. The Violation Was Serious

The forklift in question was being operated by untrained operators, who were lifting employees on a non-compliant platform onto an elevated surface. Based on these conditions,

CSHO Connett testified that "[i]f an individual is . . . struck by a large piece of equipment such as a forklift or they fall from an elevation, the most likely injury can be death or permanent disability." (Tr. 197). The violation was serious. Accordingly, Citation 1, Item 1 shall be AFFIRMED as serious.

2. Citation 1, Item 2a

Complainant alleged a serious violation of the Act in Citation 1, Item 2a as follows:

> OSH Act of 1970 Section 5(a)(1): The employer did not furnish employment and a place of employment which was free from recognized hazards that were causing or likely to cause serious physical harm to employees.
>
> The employer is failing to protect employees from fall hazards while performing residential style framing and roofing operations. Employees are being elevated on the JG/Lull 944E-42 rough terrain forklift to a height of approximately 15'7" to perform work. These employees are exposed to fall hazards from the platform. The platform being used was 16 [sic] wide extending outside the vehicles [sic] axel [sic] base 46" on each side of the vehicle. The platform itself has no form of fall protection (i.e. harness/lanyard, guardrails, etc.).
>
> Among other methods, feasible and acceptable means of abatement are:
>
> 1) Ensure that all employees involved in the operation are trained and briefed prior to working with this equipment of the hazards involving elevating employees and stability issues involving this piece of equipment.
>
> 2) Ensure that all employees of the company follow both the manufacturers [sic] recommendations in the operators [sic] manual and follow the ASME/ANSI B56.6 2002 Safety Standards for Rough Terrain Forklift Trucks Sec. 8.24.1 limitations as to size of platforms to be used.
>
> 3) Ensure the platform being used by the company meets the requirements of both the manufacturers [sic] requirements and the above listed ANSI standard.

See Citation and Notification of Penalty at 8.

The cited standard provides:

> Each employer shall furnish 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).

a. Applicable Law

To establish a *prima facie* violation of section 5(a)(1) of the Act, also known as the general duty clause, Complainant must prove by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996). The evidence must also show that the employer knew or, with the exercise of reasonable diligence, should have known of the hazardous condition. *Otis Elevator Co.*, 21 BNA OSHC 2204, 2206 (No. 03-1344, 2007).

b. The Personnel Platform Presented a Hazard

According to the citation, the personnel platform that was attached to the forklift and used to elevate employees to the roof of the residential construction site was too wide relative to the width of the forklift—as measured between the right and left tires—and lacked the requisite fall protection. CSHO Connett testified that an over-wide platform created a tip-over hazard if the load being elevated was placed too far outside of the forklift's center of gravity. (Tr. 115). This conclusion is supported by both the Forklift Operator's Manual and the ANSI B56.6 2002 Safety Standards for Rough Terrain Forklift Trucks Sec. 8.24.1 Standard, which both indicate that personnel platforms shall not "have a width greater than the overall width of the truck [measured across the load bearing tires plus 10 in. (250 mm) on either side]." (Ex. C-15 at 28).

Respondent's platform measured 192 inches from end-to-end, whereas the width of the forklift, measured from side-to-side, was only 101 inches across.[12] (Tr. 109). This means that the

12. At hearing, Bratetic argued that the calculations were incorrect because the wheel base is 131 inches, meaning

platform extended just a little over 45 inches past both sides of the forklift and roughly 35 inches beyond the maximum allowable width. (Tr. 111; Ex. C-22). Further, both the operator's manual and the ANSI standard indicate that "restraining means such as a guardrail or a means for securing personnel such as a body belt or lanyard" are required elements for a platform used to elevate personnel. (*Id.*). Implicit in these requirements are the concerns expressed by CSHO Connett: an improperly sized, equipped, and loaded platform presents both a tip-over and fall hazard. (Tr. 115).

c. The Hazard Was Recognized

Complainant can establish that the hazard was recognized by "either the actual knowledge of the employer or the standard of knowledge in the employer's industry—an objective test." *Kokosing Constr.*, 17 BNA OSHC 1873 (citing *Continental Oil Co. v. OSHRC*, 630 F.2d 446, 448 (6th Cir. 1980)). Industry standards and guidelines such as those published by ANSI are evidence of industry recognition. *See generally, Cargill, Inc.,* 10 BNA OSHC 1398, 1402 (No. 78–5707, 1982). Whether such standards have the force and effect of law does not impact whether the relevant industry recognized a workplace hazard. *Id.* Proper caution must be taken, however, to distinguish between mere directions for a product's use and explicit safety warnings about a product. *See K.E.R. Enters., Inc.*, 23 BNA OSHC 2241, 2243 (No. 08-1225, 2013).

By its very title, the ANSI Safety Standard for Rough Terrain Forklifts is not a mere set of directions, but, in fact, lays out specific safety warnings for the use of personnel platforms on

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that the overhang is less than that claimed by Complainant. (Tr. 139–143). The Court disagrees. According to the vehicle specifications, the wheel base is measured from the front axle to the rear axle; whereas the width of the vehicle is measured between the outside of the left and right tires. (Ex. C-22). Discussing the width of the platform relative to the wheel base does not make sense given that the platform extends perpendicular to the wheel base, which has little impact on lateral stability. Regardless of which measurement one uses, however, Respondent would still be in violation of the standard.

rough terrain forklifts. Thus, the ANSI Safety Standard cited by Complainant can serve as evidence of industry recognition. Although the ANSI Safety Standard does not specifically state that it applies to any particular industry, e.g., residential construction, the Court finds the applicable industry in this case to be much larger; namely, those that use powered industrial trucks. In support of this, the Fifth Circuit has held that "where a practice is plainly recognized as hazardous in one industry, the Commission may infer recognition in the industry in question. *See Kelly Springfield Tire Co., Inc.*, 729 F.2d 317, 321 (5th Cir. 1984); *see also St. Joe Minerals Corp.*, 647 F.2d 840, 845 (8th Cir. 1981) (finding elevator industry's recognition of freight elevator hazard applies with equal weight to lead smelting plant).[13]

The use of powered industrial trucks, and rough terrain forklifts in particular, is not limited to any particular industry. There are, nonetheless, safety standards that apply to their use, regardless of where they are operated. Those standards have been memorialized in ANSI document governing the operation of "Powered and Nonpowered Industrial Trucks." This documents, coupled with the repetition of nearly identical language in the forklift Operator's Manual, indicates that the powered industrial truck industry recognizes a hazard stemming from an oversized platform that is also devoid of any form of fall protection. Accordingly, the Court finds the hazard was recognized.

d. The Hazard Was Likely to Cause Death or Serious Physical Harm

As discussed earlier in Section IV.E.1.e, *supra*, CSHO Connett testified that both the operators of the forklift and the occupants of the lift platform were exposed to potential tip-over,

13. The Eighth Circuit also noted that the employer was "free to offer contrary evidence regarding elevator standards in the lead smelting industry and to suggest, as it did, that the Secretary's evidence lacked probative value." *St. Joe Minerals*, 647 F.2d at 845. Similar to the employer in *St. Joe's*, Respondent has not offered any countervailing evidence regarding the residential construction industry.

struck-by, and fall hazards when operators have not been trained in the proper use of the forklift. The Court finds that similar hazards are present here, where an oversized platform with no form of fall protection had the potential to tip over the forklift. This not only exposed the occupants of the personnel platform to potential fall hazards, but also exposed the operator to potential crushing/struck-by hazards. Given the height at which the platform was elevated—roughly 14 feet above the ground—and the size of the forklift, the Court finds that an employee could suffer serious injury, up to and including death, if one of those hazards were to come to fruition. For these reasons, the violation is also properly characterized as serious.

e. A Feasible and Effective Means Existed to Eliminate or Materially Reduce the Hazard

The means proposed by Complainant to eliminate or materially reduce the hazard are fairly straightforward and simple: (1) training regarding the use of personnel platforms on forklifts; (2) following the operator's manual and ANSI standard; and (3) ensuring the personnel platform meets the requirements of both the manufacturer and the ANSI standard. Indeed, if Respondent merely followed the directions within the operator's manual, which indicates the maximum dimensions of any personnel platform and fall protection requirements, the fall and/or tipping hazard would have been materially reduced. (Ex. C-10). Further, the platform itself, though inappropriate for the particular forklift Respondent was using, had post inserts at the corners, which were presumably designed for the insertion of guardrails. (Tr. 119; Ex. C-9). The guardrail (or equivalent "restraining means") requirement is also included in the referenced ANSI standard and the operator's manual.

The proposed forms of abatement are pulled directly from the operator's manual and related ANSI standard, lending further credence to their effectiveness at eliminating or materially reducing the hazard. Respondent did not proffer any counterargument as to whether

implementing the proposed forms of abatement would be feasible or effective. As such, the Court finds that Complainant proved a serious violation of the general duty clause. Accordingly, Citation 1, Item 2a shall be AFFIRMED.

3. Citation 1, Item 2b

Complainant alleged a serious violation of the Act in Citation 1, Item 2b as follows:

> 29 CFR 1926.451(a)(6): Scaffolds were not constructed in accordance with the design by a qualified person:
>
> The employer is failing to protect employees from fall and platform stability hazards while performing residential style framing and roofing operations. Employees are being elevated on the JLG/Lull 944E-42 rough terrain forkilift to a height of approximately 157 [sic] to perform work. The platform being used was 16 [sic] wide extending outside the vehicles [sic] axel [sic] base 46 [sic] on each side of the vehicle. The operators [sic] manual states specifically Width of the platform shall not be wider than the width of the vehicle measured across the load bearing tires plus 10 inches (250 mm) on each side.

See Citation and Notification of Penalty at 9.

The cited standard provides:

> Scaffolds shall be designed by a qualified person and shall be constructed and loaded in accordance with that design. Non-mandatory appendix A to this subpart contains examples of criteria that will enable an employer to comply with paragraph (a) of this section.

29 C.F.R. § 1926.451(a)(6).

a. The Standard Applies

The initial inquiry in this citation item is whether the personnel platform attached to the forklift is properly characterized as a scaffold. A "scaffold" is defined as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." *Id.* § 1926.450(b). A "platform" is "a work surface elevated above lower levels. Platforms can be constructed using individual wood planks, fabricated planks, fabricated decks, and fabricated platforms." *Id.* Given

the broad scope of the definitions of platform and scaffold, the Court finds that the standard applies.

b. Complainant failed to prove a violation of the standard

Complainant did not introduce any evidence regarding how this particular scaffold was designed or constructed, and the discussion of this violation encapsulated a sum total of two pages of trial transcript. (Tr. 116–17). Similar to his assertion that no training took place, there was merely speculation on behalf of Complainant based on the oversize nature of the platform relative to the forklift in use. The only concrete evidence Complainant relied on was the fact that, contrary to paragraph 8.5.6 of the ANSI standard, Respondent's platform did not have a placard or sticker its capacity or other vital specifications. (Tr. 117). When asked whether he was able to determine whether a qualified person had designed the platform, CSHO Connett said "No." (Tr. 118).

There are a number of problems with Complainant's evidence. First, it may very well be the case that the platform was designed and constructed by a qualified person, but there was no evidence tending in either direction. CSHO Connett did not testify that he was able to definitively determine that the platform was not designed by a qualified person; rather, his testimony was more equivocal: he could not determine *whether* that was the case. This is a failure of proof; the question of whether the platform was properly designed and constructed is a question separate and apart from whether the platform itself was compliant. The fact that the platform was not appropriate for this particular forklift has nothing to do with whether the platform itself was designed or constructed by a qualified person. Further, the presence of a sticker or placard to indicate capacity pursuant to an ANSI standard may indicate that the platform was designed by a qualified person, but the lack thereof does not establish that it was

not. The Court has already concluded that the platform was noncompliant; however, without additional evidence, it is not clear whether that is a result of design, construction, or simply implementation.

Based on the foregoing, the Court finds Complainant failed to establish a violation of the cited standard. Accordingly, Citation 1, Item 2b shall be VACATED.

4. Citation 1, Item 3

Complainant alleged a serious violation of the Act in Citation 1, Item 3 as follows:

> 29 CFR 1926.501(b)(13): Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels was not protected by guardrail systems, safety net systems, or personal fall arrest systems:
>
> The employer is failing to protect the employees from fall hazards greater than 6 feet. Employees are working from the roof deck of a house being constructed without wearing harnesses or lanyards. The workers were exposed to falls of over 16 feet to dirt below.

See Citation and Notification of Penalty at 10.

The cited standard provides:

> 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. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

29 C.F.R. § 1926.501(b)(13)

a. The Standard Applies

At the Papillion location, CSHO Peacock observed two employees working on the roof of a residential construction project without any form of fall protection. Based on observations made by CSHO Peacock and subsequent measurements taken by CSHO Connett, Complainant

determined that the employees were working roughly 14 feet above the ground. Thus, the standard applies.

Respondent contends, however, that the roof was "low-slope" and that 29 C.F.R. § 1926.501(b)(10) is the more applicable standard. That standard states:

> *Roofing work on Low-slope roofs.* Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system.

29 C.F.R. § 1926.501(b)(10). Bratetic testified that he believed the roof pitch was no more than "4 in 12", which describes a roof that rises four feet for every twelve feet of horizontal distance. (Tr. 303–304). *See also id.* § 1926.500 (defining low-slope roof as a roof having a slope of less than 4 in 12). According to both CSHOs Peacock and Connett, however, the roof slope was at least 5 in 12, if not steeper. (Tr. 136).

Based on the Court's review of the photographs, and the collective testimony of both CSHOs, who have significant experience in performing residential construction inspections, the Court finds that the roof slope was greater than 4 in 12 and, thus, does not qualify for the low-slope roof exception. In addition, the Court finds that the cited standard is the more directly applicable standard in that it directly applies to "residential construction". This is bolstered by the fact that there was no attempt by Respondent to comply with either the conventional or alternative forms of fall protection listed in § 1926.501(b)(10). Respondent's arguments regarding the applicability of the standard are rejected.

b. The Terms of the Standard Were Violated

Respondent did not attempt to argue that it complied with the standard; instead, he claims (akin to his argument with respect to Citation 1, 1 in the First Inspection) that the amount

of time to perform the specific task (re-fastening previously applied plywood) was minimal and that taking the time to re-install an anchor point would only expose the affected employees to fall hazards for longer than was necessary. *See* Resp't Br. at 2. The Court disagrees.

Irrespective of how long Respondent's employees were scheduled to be on the roof, the standard does not make an exception to the fall protection requirements based on how long Respondent's employees were exposed to the hazard.[14] In that respect, Respondent's employees were on the roof for a more than negligible amount of time—according to CSHO Peacock the employees were on the roof for at least 10 minutes. (Tr. 185). This is more than enough time for an employee to slip, trip, or fall off of the roof. The standard's requirements are clear—if an employee is working six feet above the lower level, the employer is required to implement one of the conventional forms of fall protection unless the employer can establish that those forms are either infeasible or create a greater hazard. As the Court previously found, Respondent has not proffered sufficient evidence to establish either defense. *See* Section IV.D.1.b, *supra*. Thus, the standard was violated.

c. Respondent's Employees Were Exposed to the Hazard

The photographs taken by CSHO Peacock clearly show two of Respondent's employees on the roof of the Papillion construction project without fall protection. According to CSHO Connett's measurements, the roof was over 14 feet above the ground. One employee can be observed standing within feet of the roof's edge. (Ex. C-8). The other employee, who was working adjacent to the work platform, was also exposed to the fall hazard, because the platform was parked too far from the eave of the roof to serve as an effective catch platform and was

14. Length of exposure is relevant, however, to the question of the violation's gravity and subsequent penalty determination. *See* Section V, *infra*.

missing guardrails or other restraining devices that would serve to arrest the falling employee. (Tr. 85–88; Ex. C-8). The Court finds Respondent's employees were exposed to a fall hazard.

d. Respondent Had Knowledge of the Conditions

Bratetic testified that he was aware that his employees were working on the roof at the Papillion site without fall protection. (Tr. 288). In fact, he also admitted that, at one point or another, he operated the forklift to lift his employees onto the roof. (Tr. 292). These admissions constitute direct knowledge of the violative conditions.

e. The Violation Was Serious

For the same reasons discussed above with respect to Citation 1, Item 1 of Docket No. 15-1645, the Court finds the violation was serious. Respondent's employees were working 14 feet above the ground without fall protection. A fall from that height could cause serious injuries up to, and including, death. Accordingly, Citation 1, Item 3 shall be AFFIRMED as serious.

5. Citation 2, Item 1[15]

Complainant alleged a serious violation of the Act in Citation 2, Item 1 as follows:

> 29 CFR 1926.451(g)(4)(i): Guardrail systems were not installed along all open sides and ends of platforms:
>
> The employer is failing to protect employees from fall hazards in the workplace. Employees were elevated on a platform in the air approximately 157" feet [sic] without any form of fall protection including but not limited to, guard rail systems, safety nets or personal fall arrest systems on all exposed areas of the platform. . . .

See Citation and Notification of Penalty at 11.

The cited standard provides:

15. Prior to hearing, Complainant moved to recharacterize Citation 2, Item 1 and Citation 2, Item 2 from "Repeat" to "Serious". The Court granted the motion. For the purposes of brevity and clarity, the Court's reproduction of the violation narratives has been abridged to remove the extensive explanation for the Repeat characterization.

> Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews.

29 C.F.R. § 1926.451(g)(4)(i).

a. The Citation is Duplicative

The Commission has held the standard applicable when an employee is being transported by an aerial lift to and from a work level. *Salah & Pecci Constr. Co., Inc.,* 6 BNA OSHC 1688, 1689 (No. 15769, 1978).[16] Even though the standard applies to the forklift-operated platform, and the terms of the standard were violated, the Court finds that this citation item is duplicative of Citation 1, Item 2a. According to the Commission, violations are considered duplicative "where the standards cited require the same abatement measures, *or where abatement of one citation will necessarily result in the abatement of the other item as well*." *Rawson Contractors*, 20 BNA OSHC 1078, 1082 n.5 (No. 99-0018, 2003) (emphasis added) (citing *Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2056–57 (No. 90-2783, 1992)).

Citation 1, Item 2a alleges a violation of the general duty clause based on Respondent's failure to properly size and equip the personnel platform attached to the forklift. In addition to alleging the personnel platform was too wide for the forklift, Complainant also alleged Respondent failed to include guardrails or other forms of fall protection on the platform. Included in the citation narrative, Complainant cited to three separate forms of abatement: (1) training regarding the use of personnel platforms on forklifts; (2) following the operator's manual and ANSI B56.6 2002 Safety Standard for Rough Terrain Forklift Trucks Sec. 8.24.1 limitations as to platform size; and (3) ensuring the personnel platform meets the requirements of

16. The fact it is an older case does not negate or diminish its precedential value. "Judicial decisions, however, are not spoilable like milk. They do not have an expiration date and go bad merely with passage of time." *Comtran Grp., Inc. v. DOL*, 722 F.3d 1304, 1314 (11th Cir. 2013).

both the manufacturer and the above-listed ANSI standard. The Court is concerned, in particular, with the third proposed form of abatement.

Although the second proposed abatement measure focuses on the ANSI standard's "limitations as to size of platforms to be used", the third measure enlarges the scope of the abatement by calling on Respondent to adhere to the entire ANSI standard found in Section 8.24.1. In addition to setting size restrictions on attached personnel platforms, Section 8.24.1 (and the operator's manual) requires the attached platform to include "restraining means such as a guardrail or a means for securing personnel such as a body belt or lanyard." (Ex. C-15 at 28). Thus, both Citation 1, Item 2a and Citation 2, Item 1 call for the exact same method of abatement—the installation of fall protection devices on the personnel platform. As such, the citation items run afoul of the restriction against duplicative citations. Accordingly, Citation 2, Item 1 shall be VACATED.

6. Citation 2, Item 2

Complainant alleged a serious violation of the Act in Citation 2, Item 2 as follows:

> 29 CFR 1926.454(a): The employer did not have each employee who performs work while on a scaffold(s) trained by a person qualified in the subject matter to recognize those hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards:
>
> The employer is failing to protect employees from fall hazards. Employees working from scaffold platforms are not trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. Employees were elevated from the ground to the roof on a platform attached to a rough terrain forklift without any form of fall protection….

See Citation and Notification of Penalty at 12.

> The cited standard provides:
>
> The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards

> associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. The training shall include the following areas, as applicable . . . .

29 C.F.R. § 1926.454(a).

a. Complainant Failed to Prove a Violation of the Standard

Based on the Court's previous conclusion that the scaffolding standards apply to Respondent's personnel platform, the Court also finds that the standard cited in Citation 2, Item 2 applies; however, based on the scant record produced with respect to this particular violation, the Court finds that Complainant failed to prove a violation of the standard.

Complainant's evidence with respect to this item is similar in type and quantity to his allegation of a fall protection training violation in Docket No. 15-1645. First, the CSHO observed employees using the personnel platform without fall protection. (Tr. 124). Second, during an interview with employees, CSHO Connett asked what sort of training they had received. (Tr. 126). One employee, named Moises, stated that Bratetic "basically" told him, "We're not here to break any records; take your time; do things safely." (Tr. 126). He could not recall what the other employee said about the training. (Tr. 126). Other than establishing that the employees were, in fact, exposed to the hazard by riding on the platform, this represents the sum total of the evidence Complainant presented on this citation item.

As previously noted, in order to prove a violation of a training standard, Complainant "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*, 18 BNA OSHC at 2122.

Just as the Court found in Citation 1, Item 2 of Docket No. 15-1645, Complainant failed to put forth proof sufficient to establish a violation of the standard. To be sure, riding an unprotected, overloaded personnel platform is a violation, but not of the training standard.

Moises' statement that he had only been told to "take your time" is evidence of a training violation; however, given that Respondent's employees made similar statements in response to questions about their fall protection training, only to have Respondent provide evidence of such training, the Court questions the thoroughness of their answers and, perhaps, the diligence with which CSHO Connett pursued any follow-up investigation. The fact that CSHO Connett could not recall what the other employee said—indeed, the only other employee he interviewed on this topic—also calls into question the sufficiency of his investigation on this citation item.[17] Nowhere in the record does it show that Bratetic, the person in the best position to discuss the content of any of Respondent's training programs, was asked about the platform/scaffold training program; indeed, the purpose of his "informal meeting" with OSHA was to respond to a subpoena for documents and testimony related to the first inspection, which occurred at 207th & Shirley, and did not involve the platform. (Tr. 90–91, 224–25; Ex. R-10).

The Court finds Complainant failed to produce evidence sufficient to establish a violation of the standard. As with Citation 1, Item 2 in Docket 15-1645, Complainant rested its case almost entirely on the CSHOs' respective observations of fall protection violations. While such observations may indicate a lack of training, it is incumbent upon Complainant to do more than show the existence of violations at a worksite. *See N & N*, 18 BNA OSHC 2121 (citing *Dravo Eng'rs and Constructors*, 11 BNA OSHC 2010, 2012 (No. 81-748, 1984) (evidence of failure to enforce a safety rule does not prove a training violation)). And, although the statement regarding scaffold training attributed to Moises is a possible indication that training was deficient, it could

17. The case file itself is not a model of clarity and thoroughness. The alleged violation description contained in the OSHA Violation Worksheet contains a narrative from an entirely different inspection; the citation item narratives contain multiple errors (as indicated by the multiple 'sic' notations in the Court's reproduction); and CSHO Connett testified that the employees told him they were only told to work safely, but was contradicted by his own notes, which documented that they also told him they spoke about harnesses every day.

just as easily mean that Moises was a man of few words. There is no indication in the record indicating that either Area Director Funke or CSHO Connett followed up with additional requests for Moises to clarify, nor does it appear that any requests or questions were directed at Bratetic regarding the training program at issue in this citation item.

In addition, Complainant presented no evidence that the person who conducted the training was not qualified. This is a requirement of the plain reading of the regulation to which absolutely no proof was offered.

Finally, Complainant failed to establish what sort of training Respondent should have provided. There was no testimony regarding what a reasonable employer, in Bratetic's position, should have instructed his employees to do when using a personnel lift. It is unclear whether the fall protection training Respondent provided would encapsulate the training at issue here, or whether Complainant contends that full-blown scaffold training is necessary for the use of a platform that raises employees and materials roughly 14 feet above the ground onto a residential roof. The Court cannot discern whether training is deficient unless a standard is defined. Since the standard at issue is a performance standard, it is incumbent upon Complainant to show that Respondent's training regime falls below what is reasonable. *See N & N*, 18 BNA OSHC at 2127-28 No such evidence was introduced.

Based on the foregoing, Citation 2, Item 2 shall be VACATED.

V. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of 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. § 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).

At the time of the inspection, Respondent had five employees, including himself. Thus, based on his size, Complainant proposed a 60% reduction on all gravity-based penalties, and the Court agrees with this assessment. Further, given that Respondent was found to have violated the same or similar standards by exposing his employees to fall hazards in consecutive inspections, the Court also agrees that no discount should be given for good faith or history.

With respect to Citation 1, Item 1 of Docket 15-1645, Complainant determined that the violation was high gravity. (Tr. 192). In particular, Complainant determined that an employee who fell from a height of over 12 feet could suffer broken bones, concussion, and potentially death. Further, Complainant also assessed the probability of an accident occurring to be high due to the complete lack of any fall protection measures and how close Respondent's employees were to the fall hazard. (Tr. 192–93). The Court agrees with Complainant's evaluations. Accordingly, a penalty of $2,800 shall be ASSESSED.

With respect to Citation 1, Item 1 of Docket 16-0119, Complainant also determined the violation was high gravity. (Tr. 197–98). Area Director Funke testified that the forklift training violation exposed employees to the potential for an untrained operator to either run into employees on the worksite, or to potentially cause them to fall from the personnel platform. (Tr.

197). Given the size of the machine, and the fact that it was being used to transport/lift employees, Complainant determined that the likelihood of injury was high, and the Court agrees. Accordingly, a penalty of $2,800 shall be ASSESSED.

With respect to Citation 1, Item 2a of Docket 16-0119, Complainant determined that the potential for serious injury was high due to the height that employees were lifted to without fall protection; however, Complainant also determined that the probability of an accident was lower due to the short duration of exposure. Respondent's employees were only on the platform for as long as it took to be elevated to the roof and brought back down again. (Tr. 200). The Court agrees with this assessment. Accordingly, a penalty of $2,000 shall be ASSESSED.

With respect to Citation 1, Item 3 of Docket 16-0119, Complainant provided virtually the same assessment as it did regarding Citation 1, Item 1 in Docket 15-1645. The only difference was the probability of an accident occurring, which Complainant determined to be lesser under the circumstances observed at the Papillion worksite. According to Bratetic and the employees, they only went onto the roof to secure a few plywood panels that were previously misapplied. (Tr. 202). Based on that, Complainant proposed a slightly smaller penalty. The Court agrees with this assessment. Accordingly, a penalty of $2,000 shall be ASSESSED.

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. Docket No. 15-1645
    a. Citation 1, Item 1 is AFFIRMED as serious, and a penalty of $2,800 is ASSESSED.

b. Citation 1, Item 2 is VACATED.

2. Docket No. 16-0119

a. Citation 1, Item 1 is AFFIRMED as serious, and a penalty of $2,800 is ASSESSED.

b. Citation 1, Item 2a is AFFIRMED as serious, and a penalty of $2,000 is ASSESSED.

c. Citation 1, Item 2b is VACATED.

d. Citation 1, Item 3 is AFFIRMED as serious, and a penalty of $2,000 is ASSESSED.

e. Citation 2, Item 1 is VACATED.

f. Citation 2, Item 2 is VACATED.

SO ORDERED.

/s Patrick B. Augustine

Patrick B. Augustine
Judge, OSHRC

Date: August 2, 2017
Denver, Colorado