United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Martin Mechanical Contractors, Inc., Respondent.	OSHRC Docket No. 16-0641

Appearances:

Charna C. Hollingsworth Malone, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Andrew N. Gross, Esquire, HB Next Corporation
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

On November 30, 2015, an employee of Martin Mechanical Contractors, Inc. (hereinafter Martin Mechanical) fell to his death through a skylight while working on the roof of a warehouse in Athens, Georgia. After Martin Mechanical reported the incident to the OSHA Atlanta North Area Office, Compliance Safety and Health Officer (CSHO) Robin Bennett conducted an inspection of the worksite. Based upon CSHO Bennett's inspection, the Secretary of Labor, on March 21, 2016, issued a Citation and Notification of Penalty with one item to Martin Mechanical alleging a willful violation of 29 C.F.R. § 1926.501(b)(4)(i) for failure to protect its employees from falls through skylights.[1] The Secretary proposed a $49,000.00 penalty for the Citation. Martin Mechanical timely contested the Citation, bringing the matter before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (the Act).

[1] An other-than-serious citation was also issued to Martin Mechanical, but that citation was not contested and is not before me.

I held a hearing in this matter on November 16, 2016, in Decatur, Georgia. The parties filed post-hearing briefs[2] on February 17, 2017.[3] Although it did not address the affirmative defense of employee misconduct in its brief, Martin Mechanical did raise it in its Answer and I will address it herein.

For the reasons discussed below, the citation is affirmed as a willful violation and a penalty of $49,000.00 is assessed.

JURISDICTION

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 11). The parties also stipulated at the hearing that at all times relevant to this action, Martin Mechanical was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Tr. 11). Based upon the parties' stipulations and the facts presented, I find Martin Mechanical is an employer covered under the Act and the Commission has jurisdiction over this proceeding.

BACKGROUND

Martin Mechanical is a construction company located in north Georgia (Tr. 124). The company performs electrical and plumbing work as well as installation of mechanical equipment (Tr. 124). It has been in business for 65 years and currently has 80 employees (Tr. 61, 125). According to Company President Jack Dunagan, the company has approximately 60 projects of various sizes ongoing at any time (Tr. 133).

In 2015, Martin Mechanical had entered into a contract with Driver Construction to perform a portion of the renovation of a warehouse located at a car dealership in Athens, Georgia (Tr. 69-70). This was a small job for the company (Tr. 130). The building to be renovated was

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[2] In his post-hearing brief, the Secretary referred to the transcript of a deposition taken of James Dockery. The Secretary also attached the transcript of the deposition to his brief. Commission Rule 56(f) governs the use of depositions in hearings (other than for impeachment purposes). The Secretary did not comply with that rule. Among other things, the Secretary did not provide notice to Martin Mechanical or the Court five days in advance of the hearing that he intended to submit the transcript into the record. James Dockery testified at the hearing. I find no basis upon which to admit the transcript into the record under the circumstances. I have not considered it, or the Secretary's references thereto in his brief, in reaching my decision in this matter.

[3] On February 17, 2017, Martin Mechanical filed its post-hearing brief using the Commission's old e-filing system. The document was not received by the Commission on the date filed. Upon realizing its error, Martin Mechanical properly filed its brief accompanied by a motion requesting to file its brief late. The Secretary did not oppose. For good cause having been shown, Martin Mechanical's motion is granted. I have considered arguments raised by Martin Mechanical in its brief in reaching my decision.

described as an old metal shell with a 12:1 or low-sloped metal roof (Tr. 10, 25). The height of the structure to the roof was 15 feet (Tr. 29). Martin Mechanical was to remove the old HVAC system and install a new one on the roof of the building (Tr. 26).

The roof of the warehouse is depicted in Exhibits C-6 and C-7. On the roof were eight skylights each approximately 10 feet in length (Tr. 32; Exh. C-2). The skylights were covered in the original plastic sheeting (Tr. 35). As shown in Exhibits C-2; C-3; and C-5, the plastic sheeting covering the skylights had become opaque from dirt and age (Tr. 35, 41-42).[4] Apparently, the roof was in disrepair as it leaked when it rained (Exh. C-13 p. 3).

Martin Mechanical sent a three-man crew to perform the HVAC installation. That crew consisted of Foreman James Dockery, Wayne Dockery (James Dockery's son), and the deceased (Tr. 71). James Dockery is a longtime employee of Martin Mechanical and was a working foreman on the project in that he often worked alongside his crew performing manual labor. Wayne Dockery had worked for Martin Mechanical off and on since he was 17 years old. He had most recently returned to work for the company in May of 2014 (Exh. C-13). The deceased had been with Martin Mechanical for approximately two years (Tr. 140).[5]

Martin Mechanical's work at the site began in late 2015. Prior to beginning work on the site, James Dockery and Donnie Burroughs, a project manager with Martin Mechanical, went to the site to assess what materials were needed (Exh. C-9). James Dockery marked the areas of the roof where the new HVAC equipment was to be installed (Tr. 52). He returned to the site with his crew to begin work in mid-November

Prior to the November 30, 2015, accident, Martin Mechanical employees had been working at the project off and on for two weeks (Tr. 21). After the employees removed the old HVAC system, they were to install roof curbs, which would support the new HVAC system (Tr. 26, 45-46; Exhs. C-6 and C-7). This work placed the employees within two to five feet of the skylights (Tr. 103). James Dockery stated he spent some of his time on the roof with the other crew members (Tr. 92-93; Exh. C-9 p. 2). At no time were the skylights covered or guarded. Nor did any member of the crew wear a personal fall arrest system.

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[4] When CSHO Bennett was on site photographing the roof, the skylights had been covered by wooden boards (Tr. 35-36, 44; Exhs. C-6 and C-7).

[5] In his brief, the Secretary notes a discrepancy in the record regarding the deceased's tenure with Martin Mechanical. I do not find this issue material and, therefore, have not resolved this factual discrepancy.

On the day of the accident, all three members of the crew had begun the day working on the roof. James Dockery warned the crew to be careful of the skylights (Tr. 52). After he descended from the roof, he went to an area inside the building to complete some paperwork and to ensure other workers stayed clear of any debris falling from the roof (Tr. 96). Wayne Dockery and the deceased continued their work on the roof. According to Wayne Dockery's statement, he and the deceased were taking turns using an electric-powered saw to cut "an area above the skylight." (Exh. C-13 p. 4). While the deceased was using it, the saw caught in the metal roofing material, causing the deceased to be knocked off balance and fall through the skylight to the ground below (Exh. C-13 p. 4).

Martin Mechanical originally reported the accident to the OSHA Atlanta North Area Office as a hospitalization (Tr. 40). CSHO Bennett[6] was assigned to conduct the inspection. She first met with Donnie Burroughs at Martin Mechanical's offices (Tr. 21-22). At that time she was informed the deceased had died from his injuries (Tr. 23). CSHO Bennett and Burroughs later traveled to the worksite (Tr. 23-24). While at the worksite, CSHO Bennett took measurements and photographs, met with representatives of the general contractor, and took statements from both James and Wayne Dockery (Tr. 23-27). CSHO Bennett took a photograph of the skylight through which the deceased had fallen, showing that the plastic sheeting had given way (Tr. 43; Exh. C-5).

As a result of her inspection, CSHO Bennett recommended Martin Mechanical receive a citation for failure to protect employees from falls through holes in violation of 29 C.F.R. § 1926.501(b)(4)(i) (Tr. 57). She recommended the citation be classified as willful based on Martin Mechanical's knowledge of the existence of the uncovered skylights on the roof, that work would be performed near the skylights, and its failure to provide any type of fall protection (Tr. 57-59). CSHO Bennett found James Dockery had been trained in OSHA's fall protection standards and was aware of the danger posed by the skylights, but did nothing more than warn employees to be careful (Tr. 58-59).

Martin Mechanical timely contested the citation. It does not deny it failed to protect employees from falls through the skylights. However, Martin Mechanical argues the violation

[6] CSHO Bennett has been employed by OSHA for 20 years (Tr. 16). She holds a Bachelor's degree in environmental health (Tr. 17). Prior to working for OSHA, CSHO Bennett worked as an industrial hygienist with the Army Corps of Engineers (Tr. 17).

was the result of unpreventable employee misconduct and denies it willfully violated the standard.

THE CITATION

The Secretary alleges Martin Mechanical violated the standard at 29 C.F.R. § 1926.501(b)(4)(i) under *Subpart M: The Duty to Have Fall Protection*. The cited standard specifically requires:

> Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

The citation states Martin Mechanical violated the standard when, on November 30, 2015, it "did not ensure employees working on 1 in 12 sloped roofs were protected from 15 ft. falls, including through skylights." The Secretary alleges Martin Mechanical was in willful violation of the cited standard because it knowingly allowed its employees to work on the warehouse roof without providing any type of protection from falling through the skylights.

DISCUSSION

The Secretary's Prima Facie Case

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Applicability of the Standard

The requirement to provide fall protection under the cited standard applies where holes through which an employee could fall, including skylights, are present on a walking or working surface 6 feet or more above the next lower level. Subpart M contains specific definitions for both the terms "hole" and "walking/working surface" contained in the cited standard. A walking/working surface is defined as:

> any surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties.

A hole is defined as "a gap or void 2 inches (5.1 cm) or more in its least dimension, in a floor, roof, or other walking/working surface." There is no dispute the roof on which Martin Mechanical employees were working was a walking/working surface as that term is defined in the standard. The parties stipulated the roof was more than 6 feet above the ground below (Tr. 10). Finally, the dimensions of the skylight through which the deceased employee fell meet the regulatory definition of a hole found in Subpart M (Tr. 32; Exh. C-1 p. 3). The standard applies to the cited conditions.

Violation of the Standard

Martin Mechanical does not dispute it was in violation of the standard. The parties stipulated the skylights were not covered or guarded. Nor were any of Martin Mechanical employees working on the roof using a personal fall arrest system. The Secretary has established Martin Mechanical violated the requirements of § 1926.501(b)(4)(i).

Employee Exposure

There is no dispute Martin Mechanical employees were exposed to a fall in excess of 6 feet through the unprotected skylights.[7] The Secretary has established employee exposure to the hazard addressed in the cited standard.

Employer Knowledge

The Secretary has the burden to establish Martin Mechanical was aware of the violative conduct. To establish employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). Because

[7] The Secretary does not have the burden to establish the crew was working in proximity to the unprotected skylights. As stated in the Preamble to the Fall Protection Standard, "In conclusion, after careful and complete consideration of the entire record, OSHA has determined that there is no 'safe' distance from an unprotected side or edge that would render fall protection unnecessary." *Safety Standards for Fall Protection in the Construction Industry*, 59 Fed. Reg. 40672-01 (August 9, 1994); *see also Phoenix Roofing*, 17 BNA OSHC at 1079 (exposure established where employees were working "about 12 feet" from unguarded skylights); *Cornell & Co*., 5 BNA OSHC 1736, 1738 (No. 8721, 1977) (employees exposed to a fall when working 10 feet from an elevator shaft).

corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving a supervisory employee knew of or was responsible for the violation. *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984); *see also Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986) (the actual or constructive knowledge of an employer's foreman can be imputed to the employer). Actual knowledge refers to an awareness of the existence of the conditions allegedly in noncompliance. *Omaha Paper Stock Co.*, 19 OSHC 2039 (No. 01-3968, 2002). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994).

James Dockery was Martin Mechanical's foreman onsite (Tr. 72). According to his own testimony, as the foreman, he had the authority to direct the work of the crew, correct safety violations, and enforce safety rules on site (Tr. 50, 72).[8] He was aware Wayne Dockery and the deceased were working on the roof without fall protection and that the skylights were not covered (Tr. 93). He began his day on the roof with the two crew members without fall protection himself. He knew the work required the crew to be within a few feet of the skylights (Tr. 94). He warned the crew to be mindful of the skylights (Tr. 94, 112). At no time prior to the day of the accident were the skylights covered or guarded nor had anyone from Martin Mechanical worn any fall protection. James Dockery had actual knowledge of the violation and, under the circumstances, James Dockery's actual knowledge of the violation can be imputed to Martin Mechanical. *Quinlan d/b/a Quinlan Enterprises v. Secretary of Labor*, 812 F.3d 832 (11th Cir. 2016).[9]

The Secretary has established a *prima facie* case of a violation of § 1926.501(b)(4)(i).

[8] Martin Mechanical's safety and health manual states foremen "have the authority to take prompt corrective measures to eliminate or control hazards and correct unsafe behavior" and "are responsible for ensuring all safety rules and regulations are adhered to…" (Exh. C-11 p. 1.4).

[9] To establish employer knowledge, the Secretary need not establish James Dockery was aware of the specific requirements of § 1926.501(b)(4)(i) or its applicability to the conditions; the Secretary must establish the employer was aware of the violative condition. "The constitution does not require that employers be actually aware that the regulation is applicable to their conduct." *Brock v. Williams Enterprises of Georgia, Inc*., 832 F.2d 567, 572 (11th Cir. 1987)(citations omitted).

Unpreventable Employee Misconduct Affirmative Defense

To prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See, e.g., Stark Excavating, Inc.*, 24 BNA OSHC 2218 (Nos. 09-0004 and 09-0005, 2014), *citing Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). Because I find Martin Mechanical did not prove it took adequate steps to ensure its employees understood its rules, discover violations of those rules, or effectively enforce its rules, Martin Mechanical has not met its burden to establish the affirmative defense of employee misconduct.

Martin Mechanical had written rules regarding the use of fall protection (Exh. C-11 p. 2.8). Those rules included a general requirement to use either guardrails, safety nets, or a personal fall arrest system when working at heights over 6 feet. In addition, Martin Mechanical had a specific rule requiring the use of a personal fall arrest system, covers, or guardrails when working "around holes (including skylights) that are more than 6 feet above lower levels [1926.501(b)(4)]." (Exh. C-11 p. 2.8).

Company President Dunagan testified that upon hire employees are provided a packet of materials that include the company safety policies on work at heights (Tr. 126). The employees were expected to read the materials and a division head goes over it with the employee (Tr. 114, 126). Both James and Wayne Dockery confirmed having received those materials (Tr. 83, 114; Exh. R-1). In addition, James Dockery had received the 30-hour OSHA training course that would have covered fall protection requirements (Tr. 49, 77, 81-82). He had received that training more than 12 years prior to the accident and there is no evidence he had received any refresher training in the interim (Tr. 67; Exh. C- 10). Martin Mechanical relied on its general contractors to provide on-the-job safety or "tool box" talks (Tr. 127).[10] The record contains no documentary evidence those talks were conducted after 2014 or that any member of the three-man crew on the worksite had ever attended such a talk (Exh. R-3; Tr. 129, 140). CSHO

[10] The testimony was consistent that Martin Mechanical left this responsibility to the general contractors on its worksites. Its safety and health manual states foremen "are responsible for all weekly safety training. All weekly safety training shall be documented and maintained at each job site or main office." (Exh. C-11, p. 1.4). Other than poor recordkeeping, Martin Mechanical provided no explanation for the failure to follow this aspect of its safety and health program.

Bennett conceded James and Wayne Dockery told her they had attended general contractor conducted tool box talks, but the record contains no information regarding when or where these talks took place or the subject matter discussed.

Although minimal, the training provided by Martin Mechanical may have been sufficient, had the company proved its employees understood its rules. It did not. Upon providing its written policies to new employees, Martin Mechanical did little to ensure employees understood those rules (Tr. 119-19). The testimony of James and Wayne Dockery demonstrate the inadequacy of Martin Mechanical's training.

In his statement to CSHO Bennett only a few days after the accident, James Dockery stated he was only familiar with the use of personal fall arrest systems for fall protection and it was the only type of fall protection he was required to enforce (Exh. C-9). He could not recall whether skylights were addressed in the 30-hour training he had received.[11] He denied having been instructed by anyone from Martin Mechanical on protection against falls through skylights (Exh. C-9, p. 3). At the hearing, he testified that for work on flat or low-sloped roofs he did not require his crew to use fall protection (Tr. 87). He, somewhat inconsistently, testified the company rule to use fall protection was mandatory, but he could use his judgment to determine when it was needed (Tr. 87-88). He testified that was his "interpretation" of the rule (Tr. 88). He later clarified he believed if employees stayed 6 feet from the edge, fall protection was not needed (Tr. 122).

Wayne Dockery testified employees used their professional judgment to determine when fall protection in the form of a personal fall arrest system was necessary (Tr. 105). He went on to explain that he understood "as long as you stay back six foot, you know, you'd be fine without fall protection." (Tr. 108, 110). He conceded he may have "misunderstood the training that [he] had gotten…" (Tr. 108).

Neither James nor Wayne Dockery understood Martin Mechanical's rule as written. Both believed they had some amount of discretion to choose whether to use fall protection. Although reference to a controlled access zone is found nowhere in Martin Mechanical's safety rules, both men believed simply staying back 6 feet from the edge was compliant with company policy. Neither appeared familiar with the company policy regarding protection from falls through holes. Martin Mechanical failed to establish it adequately communicated its rules

[11] At the hearing, James Dockery testified the training had covered protection from falls through holes (Tr. 82).

regarding the use of fall protection to its employees.

Evidence Martin Mechanical took steps to discover violations or take action when such violations were found was equally lacking. Martin Mechanical's safety and health manual gives its foremen authority over its worksites and crews and requires they monitor for and correct safety violations (Exh. C-11, p. 1.4). James Dockery admitted he was aware of this obligation (Tr. 86; Exh. C-9, p. 1-2). He was unaware of project managers performing any type of inspection or oversight of the worksite to ensure he and his crew were following work rules (Tr. 90). He testified the project manager comes to a worksite approximately one time per week but was unclear whether this oversight involved checking for safety violations (Tr. 91).[12]

Martin Mechanical contends project managers routinely visit and have oversight for safety of its worksites. The record contains 2012 "Employee Performance Evaluation" for James and Wayne Dockery (Exh. R-6 and R-7). Dunagan testified these evaluations are performed annually and that compliance with safety rules is taken into consideration (Tr. 135-36). This is the only documentary evidence in the record of any oversight of foremen or crew members by project managers. Given the age of the evaluations and the limited testimony regarding how they were conducted, they provide little support for Martin Mechanical's contention it exercised oversight of its foremen and crews. Burroughs was the project manager on this worksite, but was not called to testify. Dunagan and James Dockery were unable to testify as to what, if any, safety assessment Burroughs made of the worksite (Tr. 90-91, 141). Martin Mechanical's evidence fails to establish it took reasonable steps to ensure compliance with its safety rules.

Nor does the evidence presented by Martin Mechanical persuade me it effectively enforced its safety rules. The company's safety and health manual requires project managers and field superintendents to issue verbal and written warnings for rules violations and to submit reports of such to the "Safety Coordinator." (Exh. C-11). Martin Mechanical presented meager evidence it complied with this aspect of its own safety and health manual. James Dockery testified he was unaware of anyone having received written discipline (Tr. 90). Dunagan testified either the project managers or he would issue discipline to employees found in violation of safety rules, but provided no more detail (Tr. 130-31). Martin Mechanical presented only two records of disciplinary actions taken before the accident. Both were from 2014 and neither site

[12] He testified he believed if the project manager observed an unsafe condition he would "bring it to the attention." (Tr. 91).

to violation of any fall protection rules (Exhs. R-4 and R-5). This limited evidence fails to meet Martin Mechanical's burden to show it took reasonable steps to detect and correct violations of its work rules.[13]

Far from an isolated incident, the failure to use fall protection was a regular practice for James Dockery. Martin Mechanical has failed to establish the violation was the result of unpreventable employee misconduct.

CLASSIFICATION

The Secretary alleged Citation 2 was a willful violation. A violation is "willful" if it was committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983); *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995), *aff'd* 73 F.3d 1146 (8th Cir. 1996). The employer's state of mind is the key issue. *AJP Construction, Inc. v. Secretary of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004). The Secretary must differentiate a willful from a serious violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Valdak Corp.*, 17 BNA OSHC at 1136. The Secretary must show that, at the time of the violative act, the employer was actually aware that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care. *Propellex Corp.*, 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999).

James Dockery and his crew made the decision not to cover or guard the skylights or use any other type of fall protection. To find Martin Mechanical in willful violation of the standard, I may impute to Martin Mechanical the state of mind of James Dockery in making that decision. *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000) ("The state of mind of a supervisory employee ... may be imputed to the employer for purposes of finding that the violation was willful."). The Commission has held "willfulness may depend on 'the totality of the circumstances,' or multiple factors, none of which by themselves would warrant a finding for or against willfulness." *American Wrecking Corp.*, 19 BNA OSHC 1703, 1713 (Nos. 96-1330

[13] Dunagan testified the company performs mock OSHA inspections through an outside consultant (Tr. 134). He provided no more details about these inspections. Without more, this statement does little to bolster Martin Mechanical's defense.

and 1331, 2001), *citing Anderson Excavating*, 17 BNA OSHC 1890, 1893 (No. 92-3684, 1997). The question then is whether the record as a whole shows James Dockery exhibited a plain indifference or careless disregard for the safety of the crew.

Both James and Wayne Dockery testified they anticipated anchorage points for tying off a personal fall arrest system would be installed by the general contractor (Tr. 105-06). Finding no anchorage points had been installed, the crew decided to forego fall protection because installing anchorage points would require they "wrap a rope around the whole building," something they had neither the equipment nor the inclination to do (Tr. 95-96, 106). As Wayne Dockery put it, "We figured we'd go up there, do our job, get it done, and get down." (Tr. 106). They thought as long as they stayed 6 feet from the edge of the roof and remained mindful of the skylights, they would be safe (Tr. 103). Wayne Dockery's candid testimony was the most telling. When asked why the crew did not use fall protection, he testified, "Because it…I didn't think it was… I didn't see useful. It wasn't that high off the ground. We stayed back like we was supposed to." (Tr. 103). He admitted working without fall protection was "just working like I do every day." (Tr. 110). James Dockery stated he decided not to use fall protection because the roof was flat and it was his practice not to use fall protection on flat roofs (Exh. C-9 p. 5). He admitted that decision showed "poor judgment." (Exh. C-9 p. 3).

James Dockery was aware the installation work would place the crew on the roof of the building at a height of approximately 15 feet. He was aware the work placed the crew near the skylights and he knew of the hazard the skylights posed. Yet he took no meaningful steps to ensure the crew was protected from falling either off the edge of the roof or through the skylights. Even if James Dockery believed the crew would be safe if they remained 6 feet from the edge of the roof, he did nothing to ensure the crew did so. Moreover, he knew the work placed the crew less than 6 feet from the unprotected skylights. Knowing this, he offered only cursory warnings to be careful. Despite the availability of fall protection equipment, James Dockery decided to gamble his crew would not fall off the edge of the roof or through the skylights. I need not consider whether James Dockery intended harm to his crew. *Stone & Webster Engineering Corp.*, 8 BNA OSHC 1753, 11756 (No. 15314, 1980). Rather, the Secretary must show Martin Mechanical, through James Dockery, demonstrated a reckless disregard for employee safety. Given the totality of the circumstances, I find James Dockery's

willingness to gamble with the safety of his crew demonstrates such reckless disregard. *See L.E. Myers Co*., 16 BNA OSHC 1037, 1046-48 (No. 90-945, 1993).

In making this finding, I have taken into consideration that only a limited amount of Martin Mechanical's work is performed on roofs or at heights (Tr. 108). The record also reflects the company has little experience with OSHA inspections and has never received an OSHA citation for a violation of the fall protection standards. The Commission has held "[e]ven a single violation of the Act may be found willful, regardless of whether the workplace is otherwise safe." *A.E. Stanley Mfg. Co. v. Secretary of Labor*, 295 F. 3d 1341, 1347 (D.C. Cir. 2002), *citing Kasper Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1128 (D.C. Cir. 2001). Nor is a prior warning a necessary prerequisite to a finding of willfulness. *Id*. Given Martin Mechanical's heightened awareness of the danger to which its employees were exposed, I do not find this evidence sufficient to refute my finding Martin Mechanical acted with reckless disregard of employee safety.

Martin Mechanical argues the fact that James Dockery was unclear as to the requirements for fall protection weighs against a finding of willfulness. Martin Mechanical's safety and health program contains a rule nearly identical in language to, and that specifically references, the cited standard. James Dockery's lack of familiarity with that rule serves to highlight the inadequacies of Martin Mechanical's program rather than to negate willfulness. To hold otherwise would allow Martin Mechanical to rely on its ineffective training as a defense to a charge of willfulness. Nor am I persuaded James Dockery had a good faith belief he was in compliance with either company policy or OSHA standards. The "test of good faith is an objective one." *MJP Construction Co.*, 19 BNA OSHC 1638, 1648 (No. 98-0502, 2001). An employer's belief it is in compliance must be reasonable under the circumstances, in other words it must be "non-frivolous." *Id*. Both James and Wayne Dockery testified they believed staying 6 feet back from the edge or using a controlled access zone would comply with company policy and that they would be safe in doing so. Neither the cited regulation nor Martin Mechanical's safety and health manual make any mention of a controlled access zone or a "6-foot" rule. No reasonable reading of either could lead to the conclusion staying 6 feet from the edge was compliant. Even if he believed staying 6 feet from the skylights was safe, James Dockery knew the work would place the crew inside that 6-foot zone. Any contention James Dockery had a good faith belief he was in compliance is not credible.

Based on the totality of the circumstances, I find the citation was properly classified as a willful violation of the cited standard.

PENALTY DETERMINATION

The Secretary proposed a penalty of $49,000 in this case. The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* § 17(j) of the Act. The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC at 1138 ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The gravity of the violation is high. There can be no dispute a fall from 15 feet could result in serious injury or, as it did here, death. The entire crew was exposed for the entire duration of the work preceding the accident. As previously noted, no reasonable precautions were taken to protect the crew. Rather, only ineffective warnings were issued. Given the number and location of skylights the likelihood of an accident was high. Therefore, a high gravity based penalty is warranted. Martin Mechanical is a small construction employer and is entitled to some penalty reduction on that basis. The company also has no history of receiving OSHA citations and the penalty should be reduced accordingly. I find no basis for decreasing the penalty for good faith. Although not precluded, it is unlikely an employer is entitled to a good faith reduction where, as here, the facts establish the violation was the result of a disregard for employee safety. For the reasons discussed herein, Martin Mechanical's safety and health program was lacking in several respects. Therefore, I find a penalty of $49,000 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1, Citation 1, alleging a violation of 29 C.F.R. § 1926.501(b)(4)(i) is affirmed as a willful violation and penalty of $49,000.00 is assessed.

SO ORDERED.

/s/

Dated: March 14, 2017

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia