Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. ONTARIO EXTERIORS, INC., Respondent.	OSHRC Docket Nos. 17-1299 Simplified Proceedings

APPEARANCES:
Rosemary Almonte, Law Clerk
Andrew Karonis, Esquire
U.S. Department of Labor, New York City, New York
For the Secretary

Christopher Davis, pro se
Fairport, New York
For the Respondent

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission or OSHRC) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act). Ontario Exteriors, Inc. (Respondent or Ontario) was replacing the shingle roof of a two-story residence at 6712 Song Hill Lane, Victor, New York 14564 (worksite)

on May 3, 2017, when an employee fell from the roof and was injured. OSHA Compliance Officer (CO) Scott Schrilla investigated the worksite that same day.

This case arises from an Ontario policy that directed its employees to traverse a steep second-story roof without fall protection at the beginning and end of each work day. On June 21, 2017, OSHA issued a Citation and Notification of Penalty (Citation) for one serious violation of OSHA's fall protection standard, 29 C.F.R. § 1926.501(b)(13), with a proposed penalty of $3,622. (Ex. 3). Specifically, the Citation alleged that, on or about May 3, 2017, employees were accessing and egressing the peak of a steep roof without utilizing fall protection at the worksite. Respondent timely filed a notice of contest, bringing this matter before the Commission. This matter was designated for Simplified Proceedings in accordance with Subpart M of the Commission Rules on August 8, 2017. 29 C.F.R. §§ 2200.200, *et seq*.

A one-day hearing was held in Rochester, New York on November 28, 2017. Two witnesses testified at the hearing: Christopher Davis, Ontario's President and Chief Executive Officer (CEO), and CO Schrilla.[1] The Secretary filed his post-hearing brief on February 5, 2018. Respondent did not file a post-hearing brief.

The facts are largely undisputed. The parties agreed that employees had not used fall protection when they traversed the roof between eave and peak at the beginning and end of each workday. Ontario asserts that its employees were not required to use fall protection while moving between the roof's eave and peak at the beginning and end of each workday. The Secretary asserts employees were required to use fall protection on the roof at all times.

For the following reasons, the serious citation item is affirmed and a penalty of $1,811 is

[1] On January 3, 2018, Respondent was ordered to file its declaration listing its parents, subsidiaries, and affiliates, or state that it has none by January 31, 2018. 29 C.F.R. § 2200.35(a). Respondent failed to comply with this court order.

assessed.

Jurisdiction

Based upon the record, the Court finds Ontario, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of §§ 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5). (SF 1-5). The Court finds the Commission has jurisdiction over the parties and subject matter in this case.

Stipulated Facts and Principles of Law

The Secretary and Respondent stipulated in their Joint Pre-Hearing Statement that the following facts and principles of law were agreed upon and required no proof at the hearing:[2]

> 1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the OSH Act ("the Act").
>
> 2. Respondent is organized under the State of New York and doing business in the State of New York.
>
> 3. Respondent's business affects commerce within the meaning of the Act.
>
> 4. Respondent is an employer within the meaning of the Act.
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> 5. Some of the materials and supplies used by Respondent during the relevant times originated and/or were shipped from outside New York State.
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> 6. Respondent performed work at 6712 Song Hill Lane, Victor, New York, 14564 ("the Worksite").
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> 7. The Worksite is a structure built as a residential home.
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> 8. The Worksite was constructed using traditional wood frame construction materials and methods.
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> 9. Kellin Zuhlk[e] worked as a foreman for Respondent at the Worksite on May 3, 2017.
>
> 10. Stan Jenks worked as a roofer for Respondent at the Worksite on May 3,

[2] Exhibits within this decision will be referenced by numbers for the Secretary's exhibits and letters for Respondent's exhibits. The stipulated facts will be referenced as Stipulated Fact (SF) ___.

2017.

11. Stan Jenks worked as a backup foreman for Respondent prior to May 3, 2017 when Kellin Zuhlk[e] was away.

12. Nick Griffin worked as a roofer for Respondent at the Worksite on May 3, 2017.

13. Tim Smith worked as a roofer for Respondent at the Worksite on May 3, 2017.

14. Luke Wisecup worked as a roofer for Respondent at the Worksite on May 3, 2017.

15. [redacted] worked as a roofer for Respondent at the Worksite on May 3, 2017.

16. The roof at issue and referenced in the Citation, located at the Worksite ("the Roof"), has a slope of 9 in 12 (vertical to horizontal).

17. The Roof was more than 6 feet in height above the lower level.

18. The Roof had unprotected sides.

19. The Roof did not have guardrails.

20. There was no safety net at or below the Roof.

21. Employees used a personal fall arrest system while working on the Roof.

22. Prior to employees working on the Roof, they ascended from the top of the ladder to the peak of the Roof without engaging the personal fall arrest system.

23. When employees ended their work on the Roof, they descended from the peak of the Roof to the top of the ladder without engaging the personal fall arrest system on a staircase of planks and brackets.

24. When employees ended their work on the Roof of the Worksite, they stored the ropes attached to the fall arrest system at the peak of the Roof before descending from the peak.

25. Respondent was aware of the facts numbered 22-24.

(Ex. 4).

Findings of Fact

Christopher Davis has been the president and CEO of Ontario, a roofing contractor, since it was founded in 1995. (Tr. 20, 29, 141). Mr. Davis routinely visited the company's worksites; however, he generally did not act as foreman at a worksite. (Tr. 142).

On May 3, 2017, six Ontario employees were engaged in replacing the roof shingles on a two-story residential home at 6712 Song Hill Lane, Victor, New York. (Tr. 20-21; SF 6-7). The six employees were Messrs. Zuhlke, Jenks, Griffin, Smith, Wisecup, and [redacted]. (Tr. 21; Ex. 3; SF 9-15). Mr. Zuhlke was the foreman at this worksite. (SF 9). CO Schrilla inspected the worksite on May 3,[3] after OSHA received a phone call from the Ontario County Sheriff that an employee had fallen off a roof at the worksite, suffered serious injuries and had been transported to a local trauma center. (Tr. 40, 49).

Ontario began roofing the home four days before the May 3 accident. (Tr. 26). The eave of the roof was about 18 feet from the ground and the pitch of the roof was 9 in 12 (vertical to horizontal). (Tr. 22, 41-43, 51; SF 16; Exs. 1 at "B", 3). Ontario had attached a series of D-rings to the roof's peak to serve as anchorage[4] points for the employees' personal fall arrest systems.[5] (Tr. 22-23, 29). A rope that served as a fall arrest lifeline[6] hooked onto a D-ring anchorage point at one end and hooked onto an employee's personal fall arrest harness at the other end. (Tr. 24,

[3] All references to May 3 mean May 3, 2017.

[4] "*Anchorage* means a secure point of attachment for lifelines, lanyards or decelerations devices." 29 C.F.R § 1926.500(b). The anchor points were located at about 8-10 points across the roof's ridge. The D-rings are installed using plates that go to either side of the roof's ridge that are fastened into the plywood sheathing or the rafters. (Tr. 22-23, 31).

[5] "*Personal fall arrest system* means a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body belt or body harness and may include a lanyard, deceleration device, lifeline, or suitable combinations of these. As of January 1, 1998, the use of a body belt for fall arrest is prohibited." 29 C.F.R § 1926.500(b).

[6] "*Lifeline* means a component consisting of a flexible line for connection to an anchorage at one end to hang vertically (vertical lifeline), or for connection to anchorages at both ends to stretch horizontally (horizontal lifeline), and which serves as a means for connecting other components of a personal fall arrest system to the anchorage." 29 C.F.R § 1926.500(b).

44-47). At the end of every work day, the employees stored their fall arrest rope system, consisting of the rope itself with a 6-foot shock cord and the clasp that hooks onto a roofer's personal fall harness, at the roof's peak. (Tr. 24, 29; SF 24).

Employees, including Mr. [redacted], were stripping shingles near the roof's peak on May 3. (Tr. 48). Mr. [redacted] had been an Ontario employee for about two weeks. (Tr. 94). While working on the roof, Mr. [redacted] moved his rope from one D-ring anchorage point to another. (Tr. 47-48; Ex. 2 at "F"). Apparently, he had not adequately attached to the next anchorage point because as he worked, he slipped and began to fall. (Tr. 93-94, 98). He slid down the roof and then fell approximately 18 feet to the ground where he blacked out. (Tr. 49, 94). There was no roof bracket or ladder below where he was working when he fell. (Tr. 48). Mr. [redacted] was transported to the local trauma center. (Tr. 40). Mr. [redacted] incurred compression fractures of the thoracic spine[7] and was unable to return to work as a roofer for Ontario. (Tr. 49, 94).

CO Schrilla arrived at Ontario's worksite early in the afternoon (about 12:50 pm) on May 3 and conducted a 3-hour onsite inspection. (Tr. 40, 102-03). Mr. Davis was at the worksite twice on May 3—first when Mr. [redacted] was placed into the ambulance and then again when CO Schrilla was onsite. (Tr. 140). The CO interviewed the employees, including foreman Zuhlke[8] and Mr. Davis, that day. (Tr. 103-08).

[7] The Citation issued to Respondent was related to general fall protection practices used at the worksite and not Mr. [redacted]'s use of fall protection in particular. (Tr. 94, 111).

[8] Foreman Zuhlke and Mr. Jenks told CO Schrilla that Ontario's employees were going from the top of the ladder to the peak without being hooked up to anything at the start of each morning's work. (Tr. 102-06). Mr. [redacted] also told the CO that he had moved from the top of the ladder to the roof's peak without being properly tied off. (Tr. 110-11). The CO later verified that this was Ontario's standard practice with Mr. Davis. (Tr. 106-08). CO Schrilla testified that all six employees, including Messrs. Zuhlke, Jenks, Griffin, Smith, Wisecup, and [redacted], were exposed to the same hazard. (Tr. 114).

CO Schrilla had been an OSHA CO since 1991. He has a Bachelor of Science in Construction Engineering. (Tr. 37-38). He had performed over 1,250 inspections, most of which included fall hazards. (Tr. 39). Over forty of those inspections had been at residential construction sites. (Tr. 38). He served as the fall protection coordinator for OSHA's Syracuse area office, which meant CO Schrilla maintained the office's fall protection equipment, ensured the compliance officers were trained in use of fall protection equipment, and stayed up-to-date on OSHA fall protection standards and enforcement. (Tr. 38).

CO Schrilla testified that at most sites employees had their fall arrest harness, lanyard,[9] and the rope grab[10] attached to the end of the lanyard, on and ready before climbing a ladder from the ground to the roof's eave. (Tr. 63-65). When the employee reached the top of the ladder at these sites, the worker attached his rope, that should be attached to an adequate anchorage point, to his body harness as soon as he stepped off from the ladder onto the roof. (Tr. 46, 64-65). CO Schrilla stated that at most worksites the fall protection ropes were left at the roof's "eave or hanging over the eave" at the end of the day. (Tr. 46). He said there was neither employee exposure to a greater hazard nor additional costs when ropes were stored at the eave, as is done at most sites. (Tr. 46).

Ontario's employees did not follow the general practice described by CO Schrilla at Ontario's worksite. Ontario's management directed its employees to use a different method. Instead, as described more fully below, Ontario's employees stored their ropes at the roof's peak

[9] "*Lanyard* means a flexible line of rope, wire rope, or strap which generally has a connector at each end for connecting the body belt or body harness to a deceleration device, lifeline, or anchorage." 29 C.F.R § 1926.500(b).
[10] "*Rope grab* means a deceleration device which travels on a lifeline and automatically, by friction, engages the lifeline and locks so as to arrest the fall of an employee. A rope grab usually employs the principle of inertial locking, cam/level locking, or both." 29 C.F.R § 1926.500(b). A rope grab at the worksite is shown from a distance at Exhibit 2, at "E". (Tr. 45; Ex. 2 at "E"). The Court notes that there are no letters marked "A" or "B" shown on Exhibit 2. A close up of a rope grab is also shown at Exhibit C at "3". (Tr. 76-78; Ex. C at "3").

at the end of each day.[11] They then took a minute to walk from the roof's peak to its eave without using any fall protection. (Tr. 24-27, 42-43, 47, 51, 105-06; SF 22-25; Exs. 1, "A"–"B", 3). Mr. Davis admitted that management; including himself, the safety manager, and/or the site supervisor, directed Ontario's employees to store their ropes this way. (Tr. 25-26; SF 24). He further admitted the ropes on the roof at the worksite were 25 footers, long enough to have been coiled at the eave of the roof for storage. (Tr. 27, 30, 34, 43, 51; Ex. 1 at "B"). Because Ontario stored its ropes at the roof's peak, its employees could not connect their fall arrest systems when they were at the top of the ladder at the beginning of each work day.[12] (Tr. 24, 47; Ex. 3; SF 24).

From the top of the ladder, CO Schrilla visually inspected the anchorage points at the roof's peak and saw the nails (used to secure the anchorage points) were in place and not protruding upward. (Tr. 69). The CO testified that Ontario's employees used personal fall arrest systems most, but not all, of the time while on the roof. (Tr. 22, 42, 58-59). The personal fall arrest equipment used at Ontario's site was similar to the systems that CO Schiller had seen at many worksites. (Tr. 45). No other fall protection systems, such as guardrails, were used at Ontario's worksite. (Tr. 22, 41-42; SF 19-20).

Employees used their personal fall arrest systems during most of their work shift; however, employees did not use fall protection when they crossed the roof at the beginning or end of each day. (Ex. 3; SF 21-23). To access the roof at the beginning of each workday, employees climbed the ladder to the roof's eave. From the eave, employees walked directly to

[11] Foreman Zuhlke told CO Schrilla on May 3 that Ontario's employees left their ropes at the peak of the roof at the end of the day. (Tr. 104).
[12] CO Schrilla testified that while climbing the ladder an employee was not required by Ontario to use fall protection. (Tr. 97).

the roof's peak; an effort that took a minute.[13] (Tr. 24-27, 43, 51; Ex. 1, "A"–"B"). Employees did not use any fall protection equipment between the roof's eave and its peak. (Tr. 24; Ex. 3; SF 22). Upon reaching the roof's peak, each employee attached a rope to the D-ring on the back of his fall arrest harness. (Tr. 23-29, 44-45). At the end of the work shift, the employees reversed the process—they detached the rope from their fall arrest harness and "coiled up or zigzagged across the roof at the ridge" the ropes for storage at the peak of the roof. They then crossed the roof from the peak to the ladder at the roof's eave. (Tr. 25, 30; SF 23-24, 43, 51; Ex. 1, "A"–"B"). Both Messrs. Davis and Jenks told the CO on May 3 that it was standard practice to not tie-off until they reached the roof's peak. (Tr. 104). This was Ontario's standard method for the use of fall protection equipment on a roof. (Tr. 25-26, 32, 42, 107).

Mr. Davis instructed his employees to leave the ropes stored at the roof's peak at the end of each work day. And he instructed employees to not use fall protection when moving between the eave and peak at the start and end of each work day. (Tr. 25-26, 32, 43, 51; Ex. 1, "A"–"B"). Mr. Davis testified that it was company policy to move directly from the ladder up and across the roof and then attach to a fall protection anchorage point at the roof's peak. (Tr. 25-26, 32). Mr. Davis specifically instructed employees to climb the ladder to the eave, step off the ladder onto the roof, walk to the roof's peak, straddle the roof ridge, find their appropriate safety line and then hook the rope into the safety harness. (Tr. 32, 43, 51, 126-27, 131; Ex. 1, "A"–"B"). Employees were instructed to not do any roofing work when moving from eave to peak. (Tr. 33, 127). Mr. Davis expected each employee to inspect the anchorage point and the rope at the time the rope was hooked into the safety harness at the roof's peak. (Tr. 127). He believed the

[13] CO Schrilla testified that an employee could lose his footing in "[m]ere seconds. Less than a second." (Tr. 49). Mr. Davis admitted that an employee could lose his or her footing in a second or so on a roof, fall, and get seriously injured. (Tr. 27).

anchorage point and its attached rope could not be inspected from the top of the ladder. (Tr. 157-58). Four to six employees were generally on the roof at the end of the work day. These employees "were instructed to straddle the roof and take off their fall arrest system." After unhooking, they stored their four to six ropes at the peak before they descended, probably one at a time at the foreman's discretion, from the roof's peak to its eave using a "staircase of planks and brackets."[14] (Tr. 24-25, 28-30, 57-58; SF 23-24). Ontario did not have a policy requiring its roofers to descend from the peak using the "staircase" in single-file, one at a time. (Tr. 28).

Mr. Davis believed that Ontario's method was safer than using fall protection while crossing the roof at the beginning and end of each workday. He believed it was easier to get on and off the roof when an employee was not hooked into the fall arrest system. (Tr. 126-27, 143-45). Mr. Davis believed it was difficult to hook the rope to the harness's D-ring with just one hand while standing on a ladder. He testified that only one hand was available because the employee's other hand was holding onto the ladder. (Tr. 128-29). Mr. Davis also found it was too difficult to hook onto the fall arrest equipment before climbing the ladder to the roof. (Tr. 129-30, 134).

CO Schrilla understood, from employee interviews, the ropes were stored at the peak, so that they would not be "unsightly" to the client or damage the home's siding. (Tr. 47; Ex. 3 at 3). The CO stated he had not seen synthetic ropes, such as those used at this worksite, damage a home's siding. (Tr. 47).

[14] A roof bracket "is a structure that is placed on the roof to assist the roofers with performing their work." A roof bracket is shown at Exhibit 2 at "G". (Tr. 48-49). CO Schrilla testified that a "slide guard" was shown at Exhibit 1, at "D". There were also two horizontal roof brackets in-place along the slope of the upper roof between the peak and the eave at the time of the OSHA inspection. (Tr. 49-52; Ex. 1 at C-E). CO Schrilla testified that the one slide guard and two roof brackets shown in the photograph at Exhibit 1 at "C"–"E" did not constitute fall protection. He said that since about 2012 roof brackets did not comply with the fall protection standard, were never allowed on a roof pitch over 8 and 12, did not arrest a fall, and did "not prevent the employees from coming off of the roof." (Tr. 51-52; Sec'y Br. at 21-23).

CO Schrilla stated that when he used a personal fall arrest system, he attached the rope to his harness while at the top of the ladder. He said that this took a matter of seconds. (Tr. 65, 100). Alternatively, if he hooked onto the fall arrest system before he started to climb up the ladder, he just moved the rope grab up with his left hand as he climbed the ladder. (Tr. 80). CO Schrilla stated that he had not seen another employer use Ontario's policy of waiting to reach the roof's peak to attach to fall protection. (Tr. 108). Further, the CO stated that if employees had difficulty hooking onto the system from the ladder, other configurations of harness and rope systems, that were easier to use, were available for purchase. (Tr. 86, 99, 134-36).

CO Schrilla also testified that "[i]t's very easy" to keep three points of contact while repeatedly sliding the rope grab up providing fall protection while climbing a ladder. (Tr. 79-80, 153). He said doing this was less of an accident hazard than going straight up a ladder, stepping onto a roof, walking to a roof's ridge, straddling the ridge and then hooking into a harness, as Ontario requires. (Tr. 80-81).

CO Schrilla further testified that the fall protection system used at Ontario's worksite did not fall under any exemption to the cited standard that may be available where work on a roof has been completed, all fall protection equipment has been removed, and an employee was unable to tie off because there the fall protection anchorage points have been removed. Here, he said such an exemption would not be available to Ontario's May 3 work because "they're actively performing the roofing work and there's fall protection available and functional." He said Ontario's employees were engaged in construction activity when moving from the roof's eave to its peak. (Tr. 53-54, 60-61, 66-67).

Secretary's Burden of Proof

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

ANALYSIS

Citation 1, Item 1

Citation 1, Item 1, alleged a serious violation of 29 C.F.R. § 1926.501(b)(13), which states:

> (b)(13) *Residential construction*. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. 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.
>
> 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.

The Secretary asserts that fall protection was not used at all times when an employee was on the roof at the beginning and end of each workday. Respondent asserts that while moving from the roof's eave to the roof's peak, the "inspection" exception to the requirement for fall protection at 29 C.F.R. § 1926.500(a)(1) applied and employees were not required to use fall

protection.[15] Respondent also asserts the affirmative defenses of infeasibility and greater hazard. (Ex. 4 at 4).

Applicability & Employee Exposure

Employees were working on the roof of a residential structure that was more than 6 feet above the next lower level. (SF 7, 17). The cited standard applies.

With respect to exposure, Respondent argues that its employees were not engaged in any roofing activity while they moved from the eave to the peak of the roof—they engaged in roofing work after tying off to the fall protection system at the peak. (Tr. 127, 131). Respondent also seems to suggest that its employees were not at work when they moved from the ladder to the roof's peak and not subject to OSHA's fall protection requirements.[16] (Tr. 157-58). The Court rejects Respondent's argument.

Employee exposure is established where an employee was or could be exposed to the hazard "while in the course of assigned working duties, personal comfort activities while on the job or their normal means of ingress-egress to their assigned workplaces." *Calpine Corp.,*

[15] The scope and application provision of Subpart M, Fall Protection, states:

> (1) This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926. Exception: The provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed. 29 C.F.R. § 1926.500(a)(1).

Subpart M is found at 29 C.F.R. §§ 1926.500-503.

[16] Respondent asserts that, at SF 22, the Secretary has agreed that employees were not at work when moving across the roof prior to being tied off. (Tr. 159). However, Respondent misconstrues the nature of SF 22 which simply sets forth the agreed-to fact that while moving from eave to peak employees did not wear fall protection and they did not engage in roofing activities prior to being tied off at the peak. The stipulation is not a legal conclusion as to whether employees were required to wear fall protection while crossing to and from the roof's peak at the beginning and end of each workday.

27 BNA OSHC 1014, 1016-17 (No. 11-1734, 2018) (citations omitted). Here, it is undisputed that six of Respondent's employees were working on the roof on May 3.[17] (Ex. 3; SF 9-15).

Ontario's employees were subject to fall protection requirements at all locations on the worksite where they were exposed to a fall over 6 feet. Exposure is not limited to the time an employee was engaged in a specific roofing activity. The assigned workplace for these employees was the entire roof. The roof's peak was simply the starting point for the roofing work.[18] Exposure does not hinge on whether an employee was engaged in a specific roofing activity while crossing the roof. Respondent's argument that employees were not yet at work prior to hooking into the fall arrest system at the roof's peak is rejected. While employees crossed the roof, they were engaged in their assigned work duties, were exposed to a fall from a height over 6 feet, and thus, required to use fall protection.

Exposure is not neutralized when employees are in the ingress-egress area. In *Stevers Roof Side Remodel, Ltd.*, 24 BNA OSHC 1962, 1966 (No. 13-0039, 2013) (ALJ), the court found roofers were exposed to fall hazards in violation of the standard at 29 C.F.R. § 1926.501(b)(13), where the roofers walked to a ladder without using fall protection, which was their normal means roof egress. Because "[i]t is not the activity being performed but the workers' exposure to the fall hazard that requires fall protection," here the six Ontario employees were exposed to falls during their normal routes of ingress and egress each day. *See Stevers Roof Side Remodel, Ltd.*, 24 BNA OSHC at 1966. Furthermore, "even if . . . employees are exposed to a hazardous condition only briefly, brief duration does not negate the violation or its seriousness." *Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2873, 1992). It took Ontario's

[17] The employees were Messrs. Zuhlke, Jenks, Griffin, Smith, Wisecup, and [redacted]. (Ex. 3 at 2-3).
[18] Even if the assigned workplace was limited to the roof's peak, the path to the peak was the ingress-egress area to the roof's peak where employees were also exposed to the hazard.

employees approximately one minute to climb up from the eave to the peak and approximately one minute to climb down from the peak to the eave each workday. That it takes only a second for an employee to lose his footing and fall pointedly illustrates the rationale behind the Commission's refusal to negate a violation because of the brevity of employee exposure. *Id.*

The Court finds all six employees were exposed to the cited hazard on May 3. (Ex. 3 at 2-3).

Knowledge

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) *aff'd*, 79 F.3d 1146 (5th Cir. 1996). It is not necessary to show the employer knew or understood the condition was hazardous. *Id.* Knowledge is imputed through an employer's management and supervisory employees. *See Calpine Corp.,* 27 BNA OSHC at 1018.

Mr. Davis instructed his employees to walk to and from the roof peak at the start and end of the day without the use of fall protection. (Tr. 32, 126-27). He knew employees left the ropes for attachment coiled at the roof peak at the end of each day. (Tr. 29). Foreman Zuhlke also knew Ontario's employees were going from the top of the ladder to the peak without being hooked up to anything at the start of each morning's work. Foreman Zuhlke, himself, engaged in the practice. (Tr. 102-06; Ex. 3). Further, both parties stipulated that Ontario had knowledge its employees were not connected to a fall arrest system when ascending and descending the roof at

the beginning and end of the work shift. (SF 22-25). Knowledge is established through CEO Davis's and Foreman Zuhlke's actual knowledge that employees did not use any fall protection while crossing the roof to begin and end the work shift.[19]

Violation of the Cited Standard

The standard requires the use of fall protection when an employee is six feet above the next lower level. There was no guardrail or safety net system in use at this worksite. (SF 19-20). Here, Ontario's selected fall protection method was a personal fall arrest system for each employee. (SF 21). However, at least twice a day Ontario's employees did not use their personal fall arrest systems. Both parties agreed that when moving from eave to peak at the start and end of the work shift, employees had not used their fall arrest systems. (SF 22-24). The Court finds that Respondent was not in compliance with the standard's requirement to use fall protection on the roof and thus violated the cited standard.

Even so, Respondent asserts it was not required to comply with the standard's fall protection requirements. First, Respondent asserts it qualified for 29 C.F.R. § 1926.500(a)(1)'s exemption from fall protection use. Secondly, Respondent asserts it qualified for the exception provided within the cited standard of 29 C.F.R. § 1926.501(b)(13). Finally, Respondent asserts the affirmative defenses of greater hazard and infeasibility.

29 C.F.R. § 1926.500(a)(1)'s fall protection exemption for inspection, investigation or assessment

29 C.F.R. § 1926.500(a)(1) states:

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[19] *See Elite Builders, Inc.*, 26 BNA OSHC 2038 (No. 15-1645, 2017) (consolidated) (ALJ), where, as here, "Bratetic [owner] told [the CO] 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", and an Administrative Law Judge concluded that the Respondent, "through its principal, had actual knowledge of the violative conditions." *Id.* at 2045. A foreman's actual knowledge can also be imputed to the employer. *Wayne J. Griffin Elec., Inc.*, 26 BNA OSHC 1786, 1796 (No. 15-0858, 2017) (ALJ) (citing *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001)).

> (a)(1) This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926. Exception: The provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed.

Respondent argues it qualified for this exception because its employees were engaged in an "inspection" activity that occurred prior to the beginning and after the completion of construction work. For the reasons set forth below, the Court rejects this argument.

As the party seeking the benefit of an exception to a standard, Ontario has the burden to show the exception applies. *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). Further, Commission precedent requires that "exceptions are to be narrowly construed." *Brooks Well Servicing Inc.*, 20 BNA OSHC 1286, 1288-89 (No. 99-0849, 2003) (citations omitted). The Court finds that Ontario failed to show the exception at 29 C.F.R. § 1926.500(a)(1) applies at its worksite.

OSHA's construction fall protection standards were updated through rulemaking that became effective February 6, 1995. *Safety Standards for Fall Protection in the Construction Industry, Final Rule Preamble,* 59 FR 40672 (Aug. 9, 1994) (*Preamble*). "[T]he preamble to a standard is the most authoritative evidence of the meaning of the standard." *Superior Rigging & Erecting Co*., 18 BNA OSHC 2089, 2091 (No. 96-0126, 2000).

The preamble stated the purpose of the exception at 1926.500(a)(1) as follows.

> Paragraph (a)(1) . . . states that the provisions of subpart M do not apply when the employer establishes that employees are <u>only</u> *inspecting, investigating, or assessing workplace conditions prior to the actual start of the work or after work has been completed*. OSHA has set this exception because employees engaged in inspecting, investigating and assessing workplace conditions before the actual work begins or after work has been completed are exposed to fall hazards for very short durations, if at all, since they most likely would be able to accomplish their work without going near the danger zone. Also, the Agency's experience is that such individuals who are not continually or routinely exposed to fall hazards tend to be very focused on their footing, ever alert and aware of the hazards associated

> with falling. These practical considerations would make it unreasonable, the Agency believes, to require the installation of fall protection systems either prior to the start of construction work or after such work has been completed. Such requirements would impose an unreasonable burden on employers without demonstrable benefits.

(emphasis added). *Preamble,* 59 FR at 40675.

The preamble emphasized the exemption was limited, in that it only applied for a particular activity (inspecting, investigating, or assessing) performed at a particular time (before the actual work begins or after work has been completed). In response to public comments, OSHA also explained—

> OSHA has decided . . . to make it clear that *the exclusion only applies* when the employer establishes that employees are inspecting, investigating, or assessing workplace conditions prior to the actual start of work or after the work has been completed. It was OSHA's intent when it proposed this provision that the exclusion would *only apply at the two times stated above*, not during the period when construction work is being performed. As explained in the preamble to the proposed rule, the exception would apply where an employee goes onto a roof in need of repair to inspect the roof and to estimate what work is needed. During such an inspection, guardrails, body belts, body harnesses, safety nets, or other safety systems would not be required. However, *if inspections are made while construction operations are underway*, *all employees who are exposed to fall hazards while performing these inspections must be protected* as required by subpart M. The intent of the provision is also to recognize that after all work has been completed, and workers have left the area, there may be a need for building inspectors, owners, etc. to inspect the work. OSHA recognizes that in these situations, all fall protection equipment, such as perimeter guardrail systems, may have been removed. OSHA is not requiring the installation of the systems for a second time for inspectors, because the Agency recognizes it would be unreasonably burdensome to require the reinstallation of fall protection equipment after all the work has been completed.

(emphasis added). *Preamble,* 59 FR at 40675.

This preamble excerpt demonstrates that OSHA intended the exemption to be narrowly applied. The premise for the "inspection" exemption is the practical issue of whether a fall protection system would be in place prior to the beginning of construction work or after the construction work had been completed. During the construction project, fall protection systems

are in place. Therefore, the exemption does not apply during the construction project itself; it applies at two discrete times—just before and after the construction process.

Here, Respondent asserts that when employees entered and exited the roof during each day's work shift, it qualified for this exemption. The plain language of the standard and the preamble explanation do not support Respondent's assertion. Both state the exemption is limited to two discrete times outside the construction project and does not apply on a daily basis during the construction project. The preamble clarified that "while construction operations are underway, all employees who are exposed to fall hazards . . . must be protected." *Id.*

Here, the construction project was the re-roofing of a residential home. Ontario had neither started nor completed the construction project on May 3. Ontario employees had been engaged in roofing work for at least four days. Employee exposure on May 3 occurred while construction operations were underway. Thus, the timing of the employees' exposure does not fall within the confines of the exemption.

Respondent also asserts employees were engaged in the type of activity that qualified for the exemption when they inspected the anchorage points each morning as they hooked onto the fall arrest system. Inspecting fall protection equipment at the beginning or end of each work shift is not the type of activity included within the fall protection exemption. The preamble makes clear the exemption was premised on the fact that fall protection equipment was not in place either because it had not yet been installed or had already been removed after the construction was completed. Here, the fall arrest system, including the necessary anchorage points, was already in place when employees started work on May 3. (Tr. 118). Thus, inspection of the fall protection anchorage points installed on the roof a few days before would not be an activity included in the exemption.

Additionally, Mr. Davis acknowledged employees were not primarily on the roof to inspect anchorage points. He stated that "the sole reason that they are getting on the roof is to tie off." (Tr. 158). By his own words, Mr. Davis indicated employees were not engaged in assessing, investigating, or inspecting work during the time they crossed the roof from the eave to peak. Being unprotected for the sole purpose of crossing the roof to the anchorage point is not an activity included within the exemption.

Respondent's employees were not engaged in an activity that fell within the confines of the standard's exception. Nor did the activity fall within the two discrete times that would qualify for the exception. According to both the preamble and text of the standard, the exception at 29 C.F.R. § 1926.500(a)(1) does not apply here.

Respondent also asserts that two OSHA interpretation letters, Exhibits A-B, support its assertion the exception at 29 C.F.R. § 1926.500(a)(1) applied. (Exs. A-B). The Court finds neither letter supports Respondent's assertion.

In a March 2, 2010 letter at Exhibit A, OSHA set forth an interpretation of 29 C.F.R. § 1926.500(a)(1) based on a hypothetical work scenario. In the scenario, prior to the start of construction, an engineer would be inspecting a roof for a three-hour period during which the engineer would be near, and leaning over, the edge of a roof that was 40 feet above the next lower level. (Ex. A). OSHA stated that the inspection exemption at 29 C.F.R. § 1926.500(a)(1) presumed that an inspector would *not* be working so close to the unprotected side or edge of a roof. (Ex. A). OSHA concluded that in this work scenario, the exception would not apply because the intent behind the standard's exception for inspection work was not consistent with an inspector working near the roof's edge for three hours. *Id.* OSHA stated that in situations that kept "employees in close proximity to a fall hazard" the exemption would not apply. *Id.* The

OSHA letter at Exhibit A demonstrates that even in a scenario where the activity is limited to a pre-construction inspection, the fall protection exemption will not always apply. Depending on the circumstances, fall protection may still be required for an employee, even when it is an inspection only activity. *Id.*

Exhibit A is not comparable to the facts at issue here. At Ontario's worksite, the employees were not engineers, were not engaged in roof inspections, and the work was not prior to the start of construction. Instead, Ontario's employees were engaged in roofing work during an ongoing construction project. The scenario in Exhibit A is not informative to Ontario's worksite.

OSHA's March 12, 2004 letter at Exhibit B also provided an interpretation of the exception at 29 C.F.R. § 1926.500(a)(1). In this hypothetical work scenario, employees were inspecting a roof to determine whether repairs were needed. (Ex. B). If a needed repair took less time than the installation of fall protection, the employees would make the repair during the inspection process. *Id.*

OSHA stated that pre-work inspection of the roof generally qualified for the fall protection exemption. *Id.* However, if repairs were made while the employees were inspecting the roof, the exemption no longer applied and fall protection equipment was required. *Id.* OSHA cited to preamble text that stated "[I]f inspections are made while construction operations are underway, all employees who are exposed to fall hazards while performing inspections must be protected as required by Subpart M." *Id.* Thus, when the scope of the work went beyond inspection and included repair work (construction) the exemption no longer applied.

The letter at Exhibit B demonstrates that even where the primary activity is inspection, any construction activity negates the exemption. *Id.* Making repairs to the roof changes the nature of the work and fall protection must be used. *Id.*

At Ontario's worksite here, the primary activity was roofing work. Any inspection of equipment was secondary to the construction work. Further, as Ontario's employees traversed the roof, they were not engaged in inspection work. Exhibit B does not support Respondent's assertion that it qualified for the exception at 29 C.F.R. § 1926.500(a)(1). Rather, Exhibit B reiterates that the work at Respondent's worksite on May 3 required the use of fall protection and did not qualify for an exemption.

As both Exhibits A and B demonstrate, the exception within 29 C.F.R. § 1926.500(a)(1) was promulgated for a narrow exemption from Subpart M's requirement for fall protection in construction. Exhibit A provided an example of a work scenario where inspection-only activity would not qualify for the exemption. Exhibit B provided an example where even when inspection was the primary activity, small roofing repairs nullified the exemption.

OSHA's interpretations at Exhibits A and B do not support Respondent's position that it qualified for the fall protection exemption. Based on these two letters, the preamble, and the plain text of the cited standard, the Court concludes the Respondent does not qualify for the exception at 29 C.F.R. § 1926.500(a)(1).

Exception for an alternate fall protection plan that complies with § 1926.502(k)

The cited standard, 29 C.F.R. § 1926.501(b)(13), allows an employer to implement an alternate fall protection plan if the employer can demonstrate it was either infeasible[20] or a

[20] "Infeasible means that it is impossible to perform the construction work using a conventional fall protection system (i.e., guardrail system, safety net system, or personal fall arrest system) or that it is technologically impossible to use any one of these systems to provide fall protection." 29 C.F.R. § 1926.500(b).

greater hazard to implement one of the conventional fall protection systems (guardrails, safety net, or personal fall arrest) required by the standard. 29 C.F.R § 1926.501(b)(13). The alternate plan must satisfy ten requirements set forth at 29 C.F.R. § 1926.502(k).[21] *Id.*

Ontario's only evidence of a possible alternate fall protection plan was a description of the work procedure provided by Mr. Davis.

> When they step off the ladder, they are instructed by company policy to go straight to the ridge, straddle the ridge, and hook into their safety harness system. There is no work commencing . . . . [t]hey are not pounding a nail. They are not pulling a shingle. They are performing no trade whatsoever pertaining to roofing until they are all clipped in safely per our company policy.

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[21] The standard states:

> (k) Fall protection plan. This option is available only to employees engaged in leading edge work, precast concrete erection work, or residential construction work (See § 1926.501(b)(2), (b)(12), and (b)(13)) who can demonstrate that it is infeasible or it creates a greater hazard to use conventional fall protection equipment. The fall protection plan must conform to the following provisions.
> (1) The fall protection plan shall be prepared by a qualified person and developed specifically for the site where the leading edge work, precast concrete work, or residential construction work is being performed and the plan must be maintained up to date.
> (2) Any changes to the fall protection plan shall be approved by a qualified person.
> (3) A copy of the fall protection plan with all approved changes shall be maintained at the job site.
> (4) The implementation of the fall protection plan shall be under the supervision of a competent person.
> (5) The fall protection plan shall document the reasons why the use of conventional fall protection systems (guardrail systems, personal fall arrest systems, or safety nets systems) are infeasible or why their use would create a greater hazard.
> (6) The fall protection plan shall include a written discussion of other measures that will be taken to reduce or eliminate the fall hazard for workers who cannot be provided with protection from the conventional fall protection systems. For example, the employer shall discuss the extent to which scaffolds, ladders, or vehicle mounted work platforms can be used to provide a safer working surface and thereby reduce the hazard of falling.
> (7) The fall protection plan shall identify each location where conventional fall protection methods cannot be used. These locations shall then be classified as controlled access zones and the employer must comply with the criteria in paragraph (g) of this section.
> (8) Where no other alternative measure has been implemented, the employer shall implement a safety monitoring system in conformance with § 1926.502(h).
> (9) The fall protection plan must include a statement which provides the name or other method of identification for each employee who is designated to work in controlled access zones. No other employees may enter controlled access zones.
> (10) In the event an employee falls, or some other related, serious incident occurs, (e.g., a near miss) the employer shall investigate the circumstances of the fall or other incident to determine if the fall protection plan needs to be changed (e.g. new practices, procedures, or training) and shall implement those changes to prevent similar types of falls or incidents. 29 C.F.R. § 1926.502(k).

(Tr. 131). Ontario's work procedure does not satisfy the requirements for an alternate fall protection plan set forth at 29 C.F.R. § 1926.502(k). Because Ontario did not have an alternate plan that meets the requirements of 29 C.F.R. § 1926.502(k), it does not qualify for the exception at 29 C.F.R. § 1926.501(b)(13).

Affirmative Defenses – Greater Hazard and Infeasibility

Respondent also sets forth arguments that implicate the affirmative defenses of greater hazard and infeasibility. Respondent bears the burden of proof for these defenses. *See Briones Util. Co.*, 26 BNA OSHC 1218, 1220 (No. 10-1372, 2016).

With respect to greater hazard, Respondent asserts an employee needs two hands to attach the rope to the D-ring on the back of an employee's personal fall arrest harness. (Tr. 156-57). When an employee is on a ladder, the employee must keep at least one hand on the ladder to maintain safety. Ontario argues that if an employee is on the ladder and using both hands to connect to the D-ring, he is more likely to fall. Respondent asserts this hazard is greater than moving across the roof without fall protection twice a day. (Tr. 156-57).

To prove the affirmative defense of greater hazard, the Commission requires a Respondent to 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 is inappropriate. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2078 (No. 87-1359, 1991). Respondent must prove each element of this three-part test to establish the defense. *See Dole v. Williams Enters., Inc.*, 876 F.2d 186, 188 (D.C. Cir. 1989) (citations omitted). When an employer does not explain why it did not apply for a variance, the greater hazard defense fails and there is no need to address the other two elements of the test. *Altor, Inc.*, 23 BNA OSHC 1458, 1470 (No. 99-0958, 2011) (citations omitted)

aff'd, 498 F. App'x. 145 (3d Cir. 2012) (unpublished).

Here, Respondent presented no evidence of whether it had applied for a variance. Because there is no proof for this element, the Court finds the affirmative defense of greater hazard fails.

To prove the affirmative defense of infeasibility, an employer must show that: (1) literal compliance with the terms of the cited standard was infeasible; and (2) an alternative protective measure was used or there was no alternative measure available. *Otis Elevator Co.*, 24 BNA OSHC 1081, 1087 (No. 09-1278, 2013), *aff'd*, 762 F.3d 116 (D.C. Cir. 2014). Infeasibility can be either economic or technological. *See V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994).

With respect to the first element, Respondent has not proved that literal compliance with the cited standard was infeasible. Respondent asserts that it is difficult to climb a ladder with fall protection connected because it is difficult to adjust the rope grab and maintain the necessary three points of contact on the ladder. However, as pointed out by the CO, employees are not required to use fall protection while climbing a ladder unless traversing more than 23 feet.[22] (Tr. 97, 151). Thus, Respondent's argument is moot.

Respondent also asserts it is infeasible to hook the rope to the D-ring on the fall arrest harness and maintain three points of contact on the ladder. (Tr. 69-70, 156-57). At the hearing, Mr. Davis used a single component of a personal fall arrest lanyard system—the rope, one end of which would attach to an anchorage point on the roof and the other end which would attach to the D-ring on the back of a fall arrest harness—as a demonstrative exhibit. A photograph of the

[22] Respondent asserted it was too difficult to be tied off while climbing the ladder; however, CO Schrilla explained OSHA does not require fall protection while climbing the ladder to reach the roof. Further, the Secretary did not allege that employees are required to use fall protection on the ladder. Thus, Respondent's assertions related to fall protection while climbing the ladder from the ground to the roof are moot.

demonstrative exhibit was taken at the trial by Mr. Davis and submitted by Respondent into the record after the trial. Exhibit C is admitted is admitted as a photograph of the demonstrative exhibit without objection. (Tr. 72-82, 146-47; Ex. C). Using only the rope, Mr. Davis attempted to show that it was very difficult to attach a rope to the D-ring on the back of the harness. (Tr. 126-30). Mr. Davis did not wear a fall arrest harness during the demonstration. Further, the rope was not attached to anything. The Court finds that Mr. Davis did not demonstrate at trial the difficulty of using only one hand to hook a rope to the D-ring on the back of a fall arrest harness. The Court finds Mr. Davis's courtroom demonstration unpersuasive.

Respondent's claim of infeasibility is also undercut by the fact that it had implemented a fall arrest system at the worksite. (Tr. 42; Ex. 4; SF 22-24). The ropes used by Ontario for its fall arrest system were approximately 25 feet in length. Each rope started at an anchorage point at the peak of the roof and reached past the eave of the roof. (Tr. 27, 30, 34; Ex. 2 at "C"-"D"). Employees could engage their fall protection systems while either on a ladder or at the eave. (Tr. 98, 112-13). Respondent's claim that it was infeasible to have employees engage their personal fall protection system at the eave is also undermined by CO Schrilla observing an employee, during his inspection, walk down to the eave to disengage his fall protection system and leave every component of the fall arrest system, except his personal harness, at the eave in order to engage it once he returned back up to the roof. (Tr. 105-06). Compliance to the cited standard is not infeasible where a change in operations as simple as storing ropes at the eave and requiring employees to engage their fall arrest systems there, or on a ladder, would have protected employees at all times.

CO Schrilla also credibly testified that if employees found the particular fall arrest system configuration used by Respondent to be difficult to hook onto using one hand, there were other

styles of personal fall arrest systems available for purchase and use. (Tr. 85-86). The Court finds Respondent did not show it was technologically infeasible to comply with the standard.

To show economic infeasibility an employer must present specific evidence to show that an "employer's existence as a company would have been adversely affected" by the cost of compliance. *Gregory & Cook, Inc*., 17 BNA OSHC 1189, 1191 (No. 92-1891, 1995) (citations omitted). Respondent did not provide evidence that it would be adversely affected by purchasing a style of personal fall arrest equipment that would be easier for an employee to use. Moreover, the fall arrest system provided by Respondent was capable of providing fall protection to its employees at all times, including during ingress and egress at the worksite at the beginning and end of each workday. (Tr. 27, 30, 34, 79-80, 83, 86, 105-06, 112-13; Sec'y Br. at 7). The Court finds that Respondent did not prove that it was infeasible to attach to a fall arrest system while standing at the top of the ladder prior to entering the roof.

Respondent also asserts it cannot inspect the fall arrest equipment anchorage points that are installed at the roof's peak from the ground or from the ladder. (Tr. 68-69, 157-58). However, the CO stated that an anchorage point could be visually inspected each day while standing at the top of the ladder at the roof's eave. (Tr. 68-69). At Respondent's worksite, the CO did a visual inspection of the anchorage points from the ladder. He was able to see the anchorage points were there and that the nails securing the anchorage points were in place. (Tr. 68-69). Respondent did not adequately explain why a visual inspection from the ladder was insufficient or not feasible.

Respondent has not proved that compliance with the cited standard was technologically or economically infeasible. Further, with respect to the second element, Respondent did not

present evidence that an alternative protective measure had been used or that no alternative protective measure was available. The Court finds the affirmative defense of infeasibility fails.

The Secretary proved the elements of applicability, knowledge, and employee exposure. Further, the Secretary proved Respondent did not comply with the requirements of the standard. Citation 1, Item 1 is affirmed.

Characterization

Citation 1, Item 1 was classified as a serious violation. (Tr. 55; Ex. 3). Under section 17(k) of the Act a violation is serious if "there is substantial probability that death or serious physical harm could result." Commission precedent requires a finding that "a serious injury is the likely result should an accident occur." *Pete Miller Inc.,* 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000).

The hazard in this case was a fall from a roof. Roofing has been recognized as an inherently dangerous activity which can cause serious physical harm. *Chris Welch*, 26 BNA OSHC 1846, 1850 (No. 16-0687, 2017) (ALJ) (citing *Daniel Crowe Roof Repair*, 23 BNA OSHC 2001, 2017 (No. 10-2090, 2011) (ALJ)). As demonstrated by Mr. [redacted]'s fall, serious injury can result from a fall of 18 feet. The Court finds the violation was serious in nature.

Penalty

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) *aff'd,* 664 F.3d 1164 (10th Cir. 2011). The gravity of the

violation is generally accorded greater weight. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993).

The maximum statutory penalty for a serious citation is $12,675.[23] 82 FR 5373 (Jan. 13, 2017). OSHA determined the hazard was of high severity due to the serious nature of injury and low probability due to the short duration of the exposure resulting in a gravity-based penalty of $9,054. (Tr. 55-56; Ex. 3). Then, because Respondent had twenty employees, a sixty percent reduction was applied resulting in the proposed penalty of $3,622.[24] (Tr. 55-56; Ex. 3).

The Commission and its judges conduct de novo penalty determinations. *See Dana Container, Inc.*, 25 BNA OSHC 1776, 1791 (No. 09-1184, 2015) (citations omitted) *aff'd*, 847 F.3d 495 (7th Cir. 2017). "The Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits." *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996).

Based on the record as a whole, the Court finds an additional reduction to the proposed penalty is merited. Here, the Respondent provided fall protection equipment to its employees and required its employees to use it, except when traversing between the eave and the peak at the beginning and end of each workday. Employees actively used fall arrest equipment at this worksite; except for these two one-minute unprotected movements. (Tr. 58-59, 105-06). Ontario's employees were adequately trained, and its fall protection equipment was in good working order. (Tr. 67, 134). The CO also testified that he found Ontario's safety culture was generally strong. He said Ontario made a good effort to comply with OSHA standards. (Tr. 88-89). Ontario also cooperated and was "up front" with OSHA's investigation. (Tr. 60, 66). Based

[23] OSHA's statutory maximum penalties were increased pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). The violation in the instant case was assessed on June 21, 2017, thus a statutory maximum of $12,675 applies. 82 FR 5373, 5382 (Jan. 18, 2017).
[24] No penalty reduction was given for history, good faith, or quick fix. (Tr. 56-57, 87; Ex. 3 at 1).

on Mr. Davis's comments, the Court believes Ontario will no longer allow its employees to traverse between the eave and the peak without adequate all protection at the beginning and end of each workday and will purchase any necessary equipment for compliance.[25] (Tr. 135-37). Accordingly, the Court reduces the penalty an additional fifty percent to $1,811.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(13) is AFFIRMED, and a penalty of $1,811 is assessed.

_____
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated:
Washington, D.C.

[25] During the redirect examination of Mr. Davis, he testified: "I have actually talked with Mr. Schrilla at the break and he said that there are systems that would be better suited and the same cost. And I said to him after this court appearance we can talk and look at that because I, by all means, am interested in what an OSHA compliance officer has to say as far as an opinion for a successful system." (Tr. 135-36).