United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor, Complainant, v. North Shore Strapping Company, Respondent.	OSHRC Docket No. **18-1529**

Attorneys and Law Firms:

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David M. Leneghan, Esq., Law Offices of David M. Leneghan, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

The relevant facts of this case are not complex. North Shore Strapping Company (North Shore) owns a manufacturing facility in Brooklyn Heights, Ohio, that was in need of roof replacement after a fire several years ago. Rather than hire a construction contractor to replace the roof, North Shore hired workers and used its own management to supervise the work. During the course of the roof replacement project, Compliance Safety and Health Officer (CSHO) Brian Gang of the Cleveland Area Office of the Occupational Safety and Health Administration observed and documented North Shore's employees and management performing the roofing work without, CSHO Gang believed, being protected from falling. He also observed an employee riding an aerial lift without using a fall arrest harness. North Shore does not dispute its employees and management personnel were working on the roof at a height in excess of 6 feet and that fall protection was required. It does not dispute it was not using a personal fall arrest

system, guardrails, or safety nets. CSHO Gang's photographs show no warning line in place for at least part of his inspection and an employee in the aerial lift without a fall arrest harness.

Based on his observations, CSHO Gang recommended North Shore be issued a citation alleging four serious violations of OSHA's fall protection standards. One citation item addresses the employee riding the aerial lift without a fall arrest harness, the other three address the fall hazard to which employees were exposed on the roof. The Secretary proposes a total penalty of $36,216.00 for the citations. North Shore 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 (the Act). North Shore contends it had a safety monitor in place during the entire project; contends the citations are duplicative; and raises the affirmative defenses of isolated employee misconduct and infeasibility of compliance.

I held a hearing in this matter on May 14, 2019, in Cleveland, Ohio. The parties filed post-hearing briefs on July 3, 2019.[1]

For the reasons discussed below, Items 1, 2, 3, and 4, Citation 1, are affirmed and a total penalty of $20,000.00 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. 7). The parties also stipulated at the hearing that at all times relevant to this action, North Shore was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Tr. 7). Based on the parties' stipulations and the facts presented, I find North Shore is an employer covered under the Act and the Commission has jurisdiction over this proceeding.

BACKGROUND

North Shore is a family-owned business located in Brooklyn Heights, Ohio (Tr. 65). North Shore's worksite that was the subject of the inspection is a manufacturing facility at which it produces strapping and other packaging materials (Tr. 7). The building is a large warehouse type building covering several acres, approximately 25 feet in height with a flat roof (Tr. 19, 87; Exh. C-14 p. 6).

[1] To the extent either party failed to raise any arguments in its post-hearing brief, such arguments are deemed abandoned. At the hearing, the Secretary moved to amend the citation to add an additional alleged violation. North Shore objected. I did not rule on the motion but gave the Secretary the opportunity to brief the issue should he intend to pursue the amendment. He did not brief the issue. Accordingly, the motion is moot.

In 2018, North Shore was replacing the roof to the Brooklyn Heights facility (Tr. 7). David Leneghan testified regarding the circumstances leading up to the roof replacement project.[2] In 2015, a fire had destroyed the building (Tr. 66). North Shore chose to rebuild the building themselves using hired labor and family members. Mr. Leneghan and his brother, Kevin Leneghan supervised the work (Tr. 70-71). Mr. Leneghan testified labor for the roof replacement project was composed of factory workers, nieces, nephews, and some new hires (Tr. 71).[3] In addition to renovating the interior of the building, North Shore replaced the damaged roof in a two-phase process. Half of the roof replacement was completed in 2016 (Tr. 70). In 2018, North Shore began the work to replace the second half of the roof (Tr. 71). The work began on the second phase of the project in July of 2018. Because they were the only supervisors on the job, Mr. Leneghan testified if he or his brother Kevin were not available, no roofing work would be performed on that day (Tr. 73-74). Mr. Leneghan testified he was responsible for employee safety at North Shore (Tr. 66). North Shore provided workers with safety glasses and gloves (Tr. 74). Mr. Leneghan chose to use a warning line system with a safety monitor as fall protection for the roofing project.

The work involved removal of the old tar roof and replacement with a three-layer roof (Tr. 87; Exh. C-14 at p. 6). Two layers of poly-iso and one layer of rubber EPDM comprised the three layers. *Id.* The poly-iso boards, which together formed a 3-inch layer, are the light material depicted in Exhibit R-4 (Tr. 86, 88). The darker material depicted in Exhibit R-4 is the rubber EPDM (Tr. 88). The EPDM sheets measure 30 x 100 feet (Tr. 102).

On the day of the inspection, Mr. Leneghan testified he and the employees had been working for 4 or 5 hours when it came time to place the EPDM sheets at the roof's edge (Tr. 77).

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[2] North Shore called only one witness – its attorney David Leneghan. I allowed Mr. Leneghan to testify over the objection of the Secretary. The Secretary objected on the ground the Ohio Code of Professional Responsibility prohibits an attorney from testifying as a fact witness in a matter in which he is also counsel of record. Commission Rule 22(a) allows a party to "appear in person, through an attorney, or through any non-attorney representative" and it is not uncommon in Commission proceedings for company management to serve as both representative and fact witness. As a management official of North Shore supervising the roofing work, Mr. Leneghan had relevant factual testimony to provide. Fundamental fairness requires Mr. Leneghan be treated in the same manner as a lay representative who also chooses to testify. David Leneghan is referred to throughout as "Mr. Leneghan." Any other family member with the same last name is referred to by their first and last name.

[3] On this issue, Mr. Leneghan's testimony was muddy. He testified some of the workers had construction experience and were hired for earlier phases of the reconstruction, but then given factory jobs. Presumably, these were the individuals he later described as "shop employees who came up." (Tr. 91-92, 114) Others were hired in 2018 with the promise of a future factory job. Mr. Leneghan identified three factory workers who were hired for previous construction and now working in the factory as Mike, Manny, and Dave (Tr. 114). These individuals appear in the majority of the photographs depicting roofing work. None were called to testify.

At that time, the warning lines Mr. Leneghan testified had been in place throughout the project were taken down and only a safety monitor was used (Tr. 77-78). The designated safety monitor throughout the entire project was Mr. Leneghan's son, David Leneghan, Jr. (Tr. 78). The EPDM sheet was pulled by four workers in a line running south to north, walking backwards toward the east side of the building (Tr. 110; Exh. C-7). At some point, the sheet was pulled back so adhesive could be rolled on it (Tr. 99-104). The sheet was ultimately placed in such a fashion it hung over the edge of the roof (Tr. 104-05; Exhs. R-28, R-29, and R-30). Mr. Leneghan testified the work required at the roof's edge was performed from the aerial lift (Tr. 76).[4] Once the sheets were in place, the warning lines were to be replaced.

On August 13, 2018, the OSHA Cleveland Area Office received an anonymous complaint about work at the North Shore facility (Tr. 16). A compliance safety and health officer (CSHO) from that office was assigned to conduct an inspection and went to the worksite to observe the roofing work on two occasions (Tr. 16). According to CSHO Gang, the practice in the Cleveland Area Office is to go to the worksite to inspect and if, after three attempts, no work is observed, the complaint file is closed (Tr. 16). The original CSHO went to the worksite twice, observing no work on either occasion. He was then called away and the complaint was reassigned to CSHO Gang (Tr. 17). CSHO Gang went to the worksite on August 20th. On that day, he observed the North Shore employees engaged in roofing work. (Tr. 19).

CSHO Gang began his inspection by observing and taking photographs from a position across the street from North Shore's facility (Tr. 19). CSHO Gang observed employees working on the roof and, he believed, exposed to a fall hazard (Tr. 19). He did not observe any type of fall protection in use (Tr. 20). He observed one of the workers lower himself to the ground via an aerial lift without first donning a safety harness (Tr. 21-22). He took photographs of this conduct (Exh. C-2 and C-3). CSHO Gang observed one of the workers at the roof's edge stepping around the roofing material and placing part of his body over the edge (Tr. 21). Because CSHO Gang believed this was an unsafe act, he decided to make entry onto North Shore's property.

[4] Mr. Leneghan did not explain how or what work was performed from the aerial lift with any specificity or clarity. None of the photographic evidence submitted by North Shore shows work being performed on the roofing materials by an individual in the aerial lift. The record fails to illustrate what, when, or how work was performed from the aerial lift.

When CSHO Gang arrived at the property, he approached the employee who had been in the aerial lift, presented his credential and asked who was "in charge." (Tr. 22) He asked the employee to go get whomever was in charge and alert them OSHA was at the worksite. The employee went into the building to retrieve a supervisor. While CSHO Gang waited, he saw the workers on the roof placing warning lines at the roof's edge (Tr. 22). To CSHO Gang's observation, the warning lines were placed less than 6 feet from the edge of the roof.

Eventually, Mr. Leneghan came out to meet CSHO Gang (Tr. 23-24). The two had what both men described as an unproductive conversation during which Mr. Leneghan insisted fall protection was in use, while CSHO Gang insisted otherwise (Tr. 24-26, 79-84). [5] Mr. Leneghan invited CSHO Gang to go onto the roof and see the conditions for himself, but CSHO Gang declined due to his belief doing so would expose him to a fall hazard (Tr. 24, 81). Mr. Leneghan pointed out the warning lines and safety monitor to CSHO Gang from the ground. CSHO Gang believed neither the warning lines nor safety monitor were adequate and took photographs (Tr. 25). Ultimately, Mr. Leneghan became frustrated and returned to work, pointing out to CSHO Gang the address of the business was printed on the building (Tr. 25). CSHO Gang left the worksite and did not return. He did not speak with any of the workers onsite. He held a closing conference with Mr. Leneghan via telephone during which he gathered no additional information (Tr. 46).

Based upon his inspection, CSHO Gang recommended citations be issued to North Shore. He recommended a citation be issued for the employee's failure to wear a safety harness while riding in the aerial lift in violation of 29 C.F.R. § 1926.453(b)(2)(v). He recommended this be classified as a serious violation due to the potential for a fall from the basket of the lift. He recommended a citation be issued for not providing employees on the roof with fall protection in violation of 29 C.F.R. § 1926.501(b)(10). He recommended the violation be classified as serious due to the potential for a 25-foot fall to the concrete below. Based on his observation of the location of the warning lines, CSHO Gang recommended a citation for a violation of 29 C.F.R. § 1926.503(f)(1)(i). He recommended that violation be classified as serious because the improper

[5] Mr. Leneghan testified CSHO Gang was agitated and threatened to have him arrested. CSHO Gang testified Mr. Leneghan was resistant to having the inspection conducted and told him "I can get a warrant and come back with the marshals, and I'm going to do the inspection. We have a complaint and I have jurisdiction to be here." (Tr. 25). CSHO Gang's testimony was consistent and his demeanor straightforward and calm. I found him credible. I did not find Mr. Leneghan a credible witness, as will be discussed *infra*. I found CSHO Gang's version of the encounter between the two more believable.

placement of the lines rendered them ineffective to warn employees (Tr. 45). CSHO Gang recommended a citation for a violation of 29 C.F.R. § 1926.502(h)(1)(iv) be issued based on his observations of the position of the safety monitor and because the safety monitor had not warned workers of their proximity to the roof's edge (Tr. 21, 46-47). He recommended this violation be classified as serious as well due to the fall hazard. Based upon CSHO Gang's recommendation, the Secretary issued the citations. North Shore timely contested.

DISCUSSION

The Citation

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).

Item 1, Citation 1: Alleged violation of 29 C.F.R. § 1926.453.(b)(2)(v)

In Item 1, Citation 1, the Secretary alleges a violation of § 1926.453(b)(2)(v) which requires use of a body belt and lanyard attached to the boom or basket when an employee is working from an aerial lift. The Secretary alleges North Shore allowed employees to use "an aerial lift to access the roof" but did not "ensure that they were using fall protection" on or about August 20, 2018.

North Shore does not dispute an aerial lift was being used by employees during the course of the roofing work. Nor can it dispute one of its employees utilized the aerial lift to lower himself from the roof to the ground without first ensuring he was tied off to the boom or basket (Exh. C-2). The Secretary has established the first three elements of the violation. The only disputed element of the violation alleged in Item 1 is employer knowledge of the violation.

Employer Knowledge 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 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 BNA 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).

Where conduct was "readily apparent to anyone who looked," employers have been found to have constructive knowledge. *Hamilton Fixture*, 16 BNA OSHC 1073, 1091 (No. 88-1720,1993), *aff'd on other grounds*, No. 93-3615 (6th Cir. 1994). North Shore's employee entered the aerial lift and rode it to the ground in plain view of Kevin Leneghan. Kevin Leneghan is a vice president of North Shore and designated supervisor for the roofing work. His constructive knowledge of the violative condition is imputed to North Shore. In order to get into the lift, the employee would necessarily have had to walk to the roof's edge. A conscientious safety monitor would have been aware an employee was walking to the edge of the roof and noticed his failure to don his fall arrest harness.[6] The Secretary has established North Shore had constructive knowledge of the violative conditions.

Unpreventable Employee Misconduct

North Shore does not dispute its employee operated the aerial lift without first donning a fall arrest harness. North Shore provided a fall arrest harness for use in the aerial lift (Exhs. R-19, R-20, R-21, R-22, R-23, and R-24). It contends the employees failure to use it was an isolated incident of employee misconduct. 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.

[6] Failure to warn the employee of his unsafe act controverts 29 C.F.R. § 1926.501(h)(1)(ii) which requires the safety monitor to warn employees "when it appears the employee is unaware of a fall hazard or is acting in an unsafe manner." Mr. Leneghan's protestations to the contrary are rejected (Tr. 146).

09-0004 and 09-0005, 2014), *citing Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007).[7] North Shore has not met that burden.

To meet its burden, North Shore relied on the uncorroborated testimony of Mr. Leneghan North Shore had a rule addressing the requirement to wear a fall arrest harness when in the aerial lift, trained its employees on that rule, took measures to ensure its safety rules were followed, and administered discipline for violations of its safety rules. North Shore presented no documentary evidence of its purported safety policy or rules, safety training, or disciplinary policy and practices. North Shore conceded it did not have a written safety and health program or written safety rules (Tr. 69). It had no written fall protection program (Tr. 166; see also Exh. C-15 at p. 4). None of its training or safety meetings was documented (Exh. C-15 p. 6). To the extent documents related to the roofing project ever existed, Mr. Leneghan testified those documents were lost (Tr. 169). He testified to having a legal pad in which his notes regarding a hazard assessment and inspections of the worksite were documented but that that legal pad had been misplaced (Tr. 170-71). North Shore presented no documentation of a disciplinary policy or having ever taken a disciplinary action. North Shore presented no corroborating witness testimony of the existence of company safety rules on which employees had received training, employees were aware they could be disciplined for violations of those rules, or employees had observed any note taking, or were otherwise aware, of worksite assessments or inspections. Nothing prevented North Shore from calling its own employees or management personnel. Because such witnesses were under North Shore's control, its failure to call them raises an inference their testimony would not be favorable.[8] *Capeway Roofing Systems, Inc*., 20 BNA OSHC 1331 (No. 00-1968, 2003) (citations omitted); *see also Regina Contr. Co.*, 15 BNA OSHC 1044, 1049 ((No. 87-1309, 1991).

Under the circumstances, North Shore could meet its burden if Mr. Leneghan's testimony was credible and convincing. It was neither. I observed Mr. Leneghan to be easily agitated

[7] "In the Sixth Circuit, [the circuit in which this case arose,] in order to successfully assert this defense, an employer must show that it has a thorough safety program, it has communicated and fully enforced the program, the conduct of the employee was unforeseeable, and the safety program was effective in theory and practice." *Danis-Shook Joint Venture, XXV v. Secretary of Labor*, 319 F.3d 805, 812 (6th Cir. 2003) *citing CMC Elec. Inc. v. OSHA*, 221 F.3d 861, 866 (6th Cir. 2000).

[8] Among others, North Shore failed to call David Leneghan, Jr., Mr. Leneghan's son, who purportedly served as safety monitor. It also chose not to call Kevin Leneghan who sat through the entirety of the hearing. Mr. Leneghan's statement such testimony would have been duplicative is speculative and given no weight.

during his testimony (see, e.g., Tr. 177). He was rambling, unfocused, and evasive when providing his narrative testimony. He appeared irritated and became argumentative during cross examination (Tr. 154-57, 167-69). This led him to equivocate, contradict himself, or provide intentionally nonresponsive answers as in the lengthy exchange in which Mr. Leneghan could not provide a definitive answer to a simple question regarding the number of individuals North Shore employs (Tr. 158-65).

Mr. Leneghan's testimony given in support of North Shore's employee misconduct affirmative defense was inconsistent. With regard to its disciplinary policy and practices, Mr. Leneghan testified the company has what is essentially a zero-tolerance policy under which no warnings are given (Tr. 69). Any safety related violation results in immediate termination - "It's this. You're caught, you're fired. That's it." (Tr. 99, 134). Despite this policy, North Shore gave a warning to the employee observed in the lift (Tr. 99). Mr. Leneghan testified as a result, the employee quit. He attempted to explain this discrepancy as follows: "Manny quit, yes. He was not terminated. Well, I mean, you're terminated but he—we didn't terminate him." (Tr. 173-74)[9]

In addition to lacking veracity, Mr. Leneghan's testimony lacked specificity. Although he testified he hired experienced construction workers, he provided no other information as to the nature or extent of that experience. He provided no dates or times for his training of employees. His testimony regarding the content of the training lacked detail. North Shore's intentional decision to have no written rules, no written safety program, and no written disciplinary policy leaves to speculation what the content of those rules and policies might be. The record is wanting regarding the content of the hazard assessment and worksite inspections.[10] Without these specifics, North Shore cannot meet its burden.

North Shore makes much of the fact Mr. Leneghan's testimony was unrebutted. As the D.C. Circuit recognized,

> [a] trial judge may disregard the testimony of a particular witness "even in the absence of any direct conflicting testimony. He (the witness) may be contradicted

[9] Mr. Leneghan then went off on a tangent regarding the employee's personal life (Tr. 174). This manner of testifying, which occurred on more than one occasion, left the impression Mr. Leneghan was trying to divert attention from the material facts of the case.

[10] North Shore's response to Interrogatory No. 6 appears an attempt to provide some of this information (Exh. C-14 at pp. 5-6). Like much of Mr. Leneghan's testimony, the written response is unfocused and confusing. It does little to bolster North Shore's defense.

> by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced"' *Quock Ting v. United States*, 140 U.S. 417, 420-421, 11 S.Ct. 733, 734, 35 L.Ed. 501 (1891).

Wynne v. Boone, 191 F.2d 220, 222 (D.C. Cir. 1951). Based upon my observations of Mr. Leneghan's demeanor and manner of testifying, as well as the lack of foundation, the inconsistencies, and the vagueness of it, Mr. Leneghan's testimony is given no weight.

Having presented no credible evidence in support, North Shore's affirmative defense of employee misconduct is rejected.

Classification

The Secretary alleges the violation was serious. A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious physical harm would result. When the employee entered the aerial lift he was approximately 25 feet above the concrete below. It is undisputed a fall of that distance to the ground below could result in serious injury including death. The violation is serious.

Item 2, Citation 1: Alleged Violation of 29 C.F.R. § 1926.501(b)(10)

Item 2, Citation 1, alleges a violation of § 1926.501(b)(10) which requires employees working on low-slope roofs 6 or more feet high to be protected from falls by

> guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system.

The Secretary alleges on August 20, 2018, North Shore's employees were "exposed to a fall of approximately 25 feet while installing roofing material on a commercial building" and that North Shore did not "ensure they were using fall protection."

There is no dispute North Shore employees were working at a height in excess of 6 feet on a low-slope roof.[11] The photographic evidence unequivocally shows North Shore had not erected guardrails, safety nets, or warning lines at the time CSHO Gang was performing his inspection (Exhs. C-1 through C-13). The photographs contained in Exhibits C-4, C-6, and C-7 show North Shore's employees working close to the edge of the roof were not using a personal fall arrest system. North Shore contends it was using a safety monitor at the time CSHO Gang was taking his photographs and throughout the project. Even if true,[12] North Shore would still be out of compliance with the cited standard because the standard requires the simultaneous use of a warning line and safety monitoring systems.

The photographic evidence shows Kevin Leneghan working with those employees on the roof without the use of any of the forms of fall protection enumerated in the cited standard. Mr. Leneghan testified he had been on the roof working immediately prior to his encounter with CSHO Gang. The evidence establishes employer knowledge of the violative conduct.

The Secretary has established applicability of the standard, failure to comply with the terms of the standard, and employer knowledge of the conditions composing the violation. The only issue in dispute is whether employees were exposed to a fall hazard.

Employee Exposure

> The Secretary establishes employee exposure to a violative condition "either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079, 1993-95 CCH OSHD ¶ 30,698, p. 42, 605 (No. 90-2148, 1995), aff'd 79 F.3d 1146 (5th Cir. 1996)(unpublished). In determining whether the Secretary has proven access to the hazard, the "inquiry is not simply into whether exposure is theoretically possible," but whether it is reasonably predictable "either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074, 1995-97 CCH OSHD ¶ 31,463, p. 44, 506 (No. 93-1853, 1997).

Nuprecon LP, 23 BNA OSHC 1817, 1819 (No. 08-1037, 2012); *see also Calpine Corp.*, 27 BNA OSHC 1014, 1016 (No. 11-1734, 2018).

The photographic evidence establishes employees worked in proximity to the roof's edge when installing the roofing material at the edge. Exhibits C-7 and C-8 show the process of

[11] A low-slope roof is one with a slope less than or equal to 4 in 12. 29 C.F.R. § 1926.500(b). North Shore does not dispute the slope of the roof of its facility was less than 4 in 12.

[12] The veracity of North Shore's claim it was properly using a safety monitor throughout the project is addressed infra.

pulling the rubber EDPM sheet. Mr. Leneghan estimated the individual working along the south side of the roof was 6 feet from the edge (Tr. 144). The workers in the photographs are seen pulling a sheet of roofing material while walking backwards, not facing the direction of travel. Should an employee lose his grip on the material, he could lose his balance and fall (Tr. 36-37). North Shore's photograph also depicts an employee applying adhesive while in proximity to the roof's edge without a warning line in place (Exh. R-24; Tr. 100). It is reasonably predictable employees walking backward toward an unprotected edge and along an unprotected edge, with their attention focused on the material they were pulling or other work, would be exposed to a fall hazard. *See Dic-Underhill*, 8 BNA OSHC 2223, 2229 (No. 10798, 1980) (finding exposure to a fall hazard working 25 feet from unguarded edge but working toward that edge).

The Secretary has met his burden to show North Shore violated § 1926.501(b)(10).

Infeasibility of Compliance

North Shore contends it was using a warning line system and safety monitoring system in combination. It contends none of the other alternatives for fall protection enumerated in the standard were feasible. At the time of the inspection, the warning line system had been taken down in order to perform the work at the edge of the roof. For that reason, North Shore contends compliance with the standard was infeasible.

To establish the affirmative defense of infeasibility of compliance, an employer must show (1) literal compliance with the terms of the standard is infeasible under the existing circumstances and (2) alternative protective measures were used or no feasible alternative measures are available. *Otis Elevator Co*., 24 BNA OSHC 1081, 1087 (No. 09-1278, 2013), *citing, Westvaco Corp*., 16 BNA OSHC 1374, 1380 (No. 90-1341, 1993). North Shore has failed to meet that burden.

To establish compliance with § 1926.501(b)(1) was not feasible, North Shore must establish it could not comply with any of the alternative methods specified in the standard. North Shore contends guardrails could not be used because the sheets of roofing material extended over the side (Tr. 103-05, 175; Exh. C-14 at p. 8; Exhs. R-28-29).[13] Safety nets could not be used because it would impede use of the aerial lift (Tr. 175). North Shore contends a

[13] North Shore's contention guardrails could not be used because they could not be nailed into the siding of the building is contradicted by Mr. Leneghan's testimony guardrails were used when materials were delivered to the roof (Tr. 72; see also Exh. C-14 at p. 6).

personal fall arrest system could not be used because workers would be "crisscrossing each other all the time and tripping on each other." (Tr. 176) The process of placing the roofing material at the edge prevented continuous use of the warning lines. North Shore presented no evidence in support of these contentions other than the unsupported assertions of Mr. Leneghan. Mr. Leneghan is not in the construction business and has limited experience in construction (Tr. 64).[14] He has no educational background related to construction or construction safety. He has participated in no construction apprenticeship or other training program. He has no training in construction safety generally or fall protection specifically. As previously noted, although not rebutted by the Secretary, Mr. Leneghan's testimony is insufficient to meet North Shore's burden of proof because it is not reliable. Mr. Leneghan's assertions were conclusory and largely based on speculation. He has insufficient relevant qualifications to testify regarding infeasibility of compliance. I give his testimony on this issue no weight.

North Shore failed to present evidence it met the second element of its burden – that it implemented an alternative protective measure. North Shore concedes no fall protection was provided to employees working on the roof when warning lines could not be erected save the safety monitor. North Shore failed to establish this safety monitor provided any protection to employees exposed to a fall hazard. CSHO Gang testified he did not observe anyone on the roof in a position to serve as safety monitor. No one serving in that capacity can be seen in the photographs depicting the installation of the EPDM sheet. Mr. Leneghan testified his son, David Leneghan, Jr., was the safety monitor on site; his son's sole duty was to serve as safety monitor; and that he did so throughout the entire roofing project. North Shore did not call David Leneghan, Jr. to testify. Whether David Leneghan, Jr., met the competency requirements of § 1926.502(h)(1)(i) is not established on this record. Mr. Leneghan testified he trained his son over the course of three hours (Tr. 152-53). Mr. Leneghan has no particular qualifications to give this training and the record is thin regarding the substance of it.

Mr. Leneghan pointed out his son in Exhibits C-10 and R-26 as the seated individual. That individual is nowhere to be seen in Exhibits C-1 through C-8 nor any of North Shore's

[14] Mr. Leneghan testified he worked construction when he was an undergraduate and law student but did not specify the nature of that work; built his own home; and supervised the reconstruction of North Shore's facility (Tr. 66). I do not find this sufficient experience to base the opinions to which Mr. Leneghan testified. Nor do I accept Mr. Leneghan's suggestion his experience as an attorney representing clients that perform construction work qualifies him to provide substantive testimony regarding construction processes or construction safety.

other photographs of the worksite. When explaining the safety monitor's whereabouts in these other photographs, Mr. Leneghan pointed to an area conveniently off-camera (Tr. 109-10, 124, 127, 143). He admitted this location was 90 feet away from the employees working (Tr. 142). More problematic for North Shore, the safety monitor Mr. Leneghan pointed out to CSHO Gang is at least 100 feet away from, and does not appear to be facing, the employees working near the roof's edge.[15] In Exhibit R-26, he is looking down at something in his hands while another employee is present. In Exhibit C-10 it is not clear he is looking in the direction of the other workers depicted in the photograph.[16] The evidence presented does not meet North Shore's burden to establish it provided a safety monitor that afforded protection to employees from falls.

Having failed to present reliable, credible, convincing evidence in support of it, North Shore's affirmative defense of infeasibility of compliance is rejected.

Classification

The Secretary alleges the violation was properly classified as serious. It is undisputed a fall of 25 feet to concrete could result in serious injuries. The violation of § 1926.501(b)(10) is serious.

Item 3, Citation 1: Alleged Violation of 29 C.F.R. § 1926.502(f)(1)(i)

Item 3, Citation 1, alleges a violation of the standard addressing the specific criteria for a compliant warning line system at § 1926.502(f)(1)(i). The standard requires warning lines be erected around all sides of the work area and be "not less than 6 feet (1.8 m) from the roof edge." 29 C.F.R. § 1926.502(f)(1)(i). The Secretary alleges on August 20, 2018, the warning lines installed by North Shore after CSHO Gang entered the worksite were less than 6 feet from the edge of the roof. North Shore does not dispute the applicability of the requirements of the standard to its worksite.

The photographic evidence establishes North Shore's warning line system was not compliant with the cited standard (Exhs. R-27, C-9, C-10, C-11, C-12). The photograph in

[15] The safety monitor is sitting at one end of the 100-foot EPDM sheet while the employees are at the other.

[16] In testifying about the photograph contained in Exhibit C-10, Mr. Leneghan stated it depicts the safety monitor "looking down the line." (Tr. 113) To my eyes, the individual identified as the safety monitor is not looking at the warning lines nor toward the other workers, but at a 45-degree angle. He is also in the same position as in Exhibit R-26, where he is seen looking down at his hands. Mr. Leneghan's son would have been the best, and only, witness able to provide a first-hand account of where he was located at all times throughout the project and where he was looking at the time the photographs were taken. North Shore chose not to present this evidence that was available to it. An adverse inference can be drawn that testimony would not have been favorable to North Shore.

Exhibit C-11 shows the cones to which the lines are tied abutting the roof's east edge. North Shore's photograph taken on the day of the inspection shows the warning lines placed along the very edge of the roof's southern edge and, by Mr. Leneghan's own admission, less than 6 feet from that edge (Exh. R-27; Tr. 103-04). North Shore's employees continued to work on the roof without the necessary notice of the 6-foot distance from the roof's edge provided by properly placed warning lines (Exh. C-13). The lines were also sagging to the ground, posing a potential tripping hazard (Tr. 43-44; Exhs. C-10, C-11, C-12, and C-13). Both Mr. Leneghan and his brother Kevin Leneghan were in a position to be, and should have been, aware of the placement of the warning lines. The Secretary has established a violation of § 1926.502(f)(1)(i).

Classification

The Secretary alleges the violation was properly classified as serious. It is undisputed a fall of 25 feet to concrete could result in serious injuries. The violation of § 1926.502(f)(1)(i) is serious.

Item 4, Citation 1: Alleged Violation of 29 C.F.R. § 1926.502(h)(1)(iv)

In Item 4, Citation 1, the Secretary alleges North Shore violated the standard at § 1926.502(h)(1)(iv). The cited standard falls under the subsection of the fall protection standard addressing the requirements for safety monitors. It requires the safety monitor "be close enough to communicate orally with the employee" he is monitoring. The Secretary alleges North Shore did not have a safety monitor "close enough to observe hazards and communicate orally with all employees." North Shore does not contest the applicability of the requirements of the standard to its worksite.

As discussed herein, the off-camera safety monitor was 90 feet away from the employees working near the roof's edge. In the photographs in which he appears, the safety monitor is at least 100 feet away from the workers he is supposed to be monitoring. He was not in a position to see how close to the roof's edge the employees were working or to warn them should they engage in an unsafe act.

Employees working on the roof were exposed to a fall hazard resulting from inadequate compliance with the safety monitor requirements. The location of the safety monitor, or the lack thereof, would have been known to the supervisors on the roof at the time of the violation. The Secretary has established North Shore was in violation of § 1926.502(h)(1)(iv).

Classification

The Secretary has alleged a serious violation of § 1926.502(h)(iv) due to the fall hazard of 25 feet. For the reasons previously discussed, the violation is properly classified as serious.

Duplicativeness

North Shore contends the violations alleged in Items 1, 2, 3, and 4 cannot be sustained because they are duplicative.[17] In its most recent decision addressing duplicativeness, the Commission vacated one of two established willful citations issued to an employer finding the violations duplicative because each violation could have been, and was, abated by the same action. *North Eastern Precast LLC; and Masonry Services, Inc. dba MSI*, 26 BNA OSHC 2275, 2280-82 (No. 13-1169 & 13-1170, 2018) *aff'd Acosta v. North Eastern Precast LLC*, 2019 WL 3061196 (2d Cir. 2019) (summary order). In that case, the Commission held, although the violations were of different standards[18] and alleged different conduct on different days, a single act could have abated both. North Shore contends because use of a full body harness could have abated all four alleged violations, they are duplicative.

I find Item 1 not duplicative of the other alleged violations because they require substantially different forms of abatement. "Abatement is defined as 'action by an employer to comply with a cited standard.'" *North Eastern Precast*, 26 BNA OSHC at 2280, *citing* 29 C.F.R. § 1903.19(b)(1). Item 1 alleges a violation of § 1926.453(b)(2)(v). The standard applies only to the employee working from the aerial lift. It specifically requires the employee be tied off to the "boom or basket" of the lift. Abatement of the violation, accordingly, would require the employee in the aerial lift to tie off to the lift. The violation would not be abated even if a fall protection harness as part of a fall arrest system was provided to each employee working on the roof. Any personal fall arrest system for those employees would have to comply with 29 C.F.R.

[17] The Secretary did not address this issue in his brief. Nor did North Shore raise it in its Answer. The Commission has not definitively stated whether duplicativeness is an affirmative defense an employer must raise in its Answer else it is waived or which party bears the burden to establish whether violations are or are not duplicative. As such, I find no basis to penalize either North Shore for its failure to raise the defense in its Answer or the Secretary for his failure to brief the issue.

[18] One citation alleged a violation of 29 C.F.R. § 1926.416(a)(1) for allowing work in proximity to a live electric power circuit. The other alleged a violation of 29 C.F.R. § 1926.1408(a)(2) for failure to determine if any part of a crane was within 20 feet of an overhead power line. *North East Precast*, 26 BNA OSHC at 2279.

§ 1926.502(d). As such, those employees could not be tied off to the aerial lift. Item 1 is not duplicative of the other alleged violations.

North Shore's contention the remaining items are duplicative of one another is a closer question. Section 1926.501(b)(10) contains the general obligation of an employer working on a low-slope roof to protect its employees from falls. It allows employers to choose from several alternative methods of fall protection and requires that method chosen to be implemented. Proper implementation of the chosen fall protection method requires compliance with the applicable subsections of 29 C.F.R. § 1926.502. Because North Shore chose a warning line system in conjunction with a safety monitor, abatement of a violation of § 1926.501(b)(10) would only be achieved by compliance with all of the requirements of §§ 1926.502(f) and 1926.502(h). On the other hand, because it is the more general standard, correcting the non-compliant warning line alone would not fully abate the violation of § 1926.501(b)(10). Similarly, correcting the safety monitor violation alone would not bring North Shore into compliance with § 1926.501(b)(10). Simultaneous abatement of the alleged violations alleged in Items 3 and 4 requires distinctly different conduct.

Under Commission precedent citations are not duplicative simply because compliance with a general standard could abate a more narrow or specific standard. *See H.H. Hall Construction Company*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1982); *Burkes Mechanical, Inc*., 21 BNA OSHC 2136, 2142 (No.04-475, 2007); and *General Motors Corp*., 22 BNA OSHC 1019, 1024 (No. 91-2834E, 2007).

> Section 5(a)(2) of the Act requires an employer to comply with all standards applicable to a hazardous condition even though the abatement requirements of two applicable standards may be satisfied by compliance with the more comprehensive standard. Thus, there is no unfair burden imposed on an employer when the same or closely related conditions are the subject of more than one citation item and a single action may bring an employer into compliance with the cited standards.

H.H. Hall, 10 BNA OSHC at 1046. [19] In *Burkes Mechanical*, for example, the Commission found citations alleging violations of the requirement to develop, document, and utilize procedures for locking out machinery was not duplicative of a violation for failure to lock out the specific machine at issue even though compliance with the broader standard encompassed

[19] The Commission did not overturn this precedent and relied upon *H.H. Hall* in its most recent decision addressing duplicative citations. *North Eastern Precast*, 26 BNA OSHC at 2279.

compliance with the specific standard. 21 BNA OSHC at 2142. In the instant case, the standard cited in Item 2 contains the broad requirement an employer implement one of several alternative forms of fall protection. The standards cited in Items 3 and 4, in contrast, specify the means of compliance once the employer has opted for the safety monitor and warning line system and undertaken to implement it. Items 2, 3, and 4 are not duplicative.

PENALTY

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 1135, 1138 (No. 93-0239, 1995) ("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."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). 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. *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).

For each of the citation items, the Secretary proposes a penalty of $9,054.00. CSHO Gang testified he considered the severity of the violations to be high due to the possible outcome should an employee fall the 25 feet to the concrete below (Tr. 50). He testified he reduced the proposed penalty only for North Shore's size. He gave no reductions for good faith or history. The record reflects North Shore is a small company. The Secretary presented no evidence North Shore has any history of inspections or prior citations under the Act. North Shore is entitled to consideration for both penalty factors.

North Shore's conduct in undertaking the roofing project evidences a lack of good faith.[20] By its own admission, North Shore has no written safety and health program with general applicability to its worksite, or anything specific to the work being performed on the roofing

[20] Although CSHO Gang and Mr. Leneghan had an unpleasant interaction, I do not find Mr. Leneghan's conduct egregious and did not factor it into my analysis of good faith.

project such as a fall protection program. There is no evidence showing that before beginning the project, the two individuals identified as having supervisory authority on the site had any prior experience in commercial construction generally or roof installation specifically. There is no evidence any of the workers on the roof, including Mr. Leneghan's son, nieces, and nephews, had relevant prior experience or that North Shore provided adequate safety training to them. After the inspection, North Shore continued to work in the same manner it had prior to and during the inspection. North Shore's photographs depicting the worksite before and after the inspection show a variety of potentially unsafe conditions such as missing or sagging warning lines (Exhs. R-16, R-27, R-29, and R-30) and unprotected skylights (Exhs. R-6, R-12, R-13, R-14, R-15, and R-17). Although it provided employees with safety glasses and gloves, its own photographs show North Shore did not require their use (Exhs. R-23 and R-24; see also Exhs. C-6 and C-7). The penalty reflects North Shore's lack of good faith.

Regarding Item 1, the record establishes one employee exposed for a limited period of time. Although the potential injury is grave, the likelihood of injury is moderate. A moderate gravity-based penalty reduced for size and history of $8,000.00 is appropriate for Item 1.

Although not duplicative, Items 2, 3, and 4 are related. In recognition of its broad discretion in assessing penalties, the Commission has held it appropriate to assess a single penalty where, as here, there is some overlap in violations. *H.H. Hall*, 10 BNA OSHC at 1046; *Burkes Mechanical Inc*., 21 BNA OSHC at 2142. Under the circumstances of this case, a single penalty for Items 2, 3, and 4 is appropriate. Each violation involves exposure of approximately 10 employees to a fall of 25 feet during the process of placing the roofing material near the roof's edge. North Shore's chosen fall protection method was a warning line and safety monitor system, but it failed to properly implement that system. Given the nature of the work, the lack of any effective fall protection, and the height of the roof, the potential for injury is high. A high gravity-based penalty reduced for size and history of $12,000.00 is appropriate for Items 2, 3, and 4.

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, alleging a serious violation of § 1926.453(b)(2)(v), is **AFFIRMED**, and a penalty of $8,000.00 is assessed;

2. Item 2, alleging a serious violation of § 1926.501(b)(10), is **AFFIRMED**;

3. Item 3, alleging a serious violation of § 1926.502(f)(1)(i), is **AFFIRMED**;

4. Item 4, alleging a serious violation of § 1926.502(h)(1)(iv), is **AFFIRMED;**

5. A total penalty of $12,000.00 is assessed for Items 2, 3, and 4.

SO ORDERED.

/s/

Dated: August 8, 2019

Administrative Law Judge
Atlanta, Georgia