

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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Secretary of Labor,

Complainant,

SIMPLIFIED PROCEEDING

v.

OSHRC Docket No. 18-1913

Chambers Construction Co.,

Inspection No.: 1354241

Respondent.

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Appearances:

For the Secretary:

Oscar L. Hampton III, Esq., Regional Solicitor  
Brian A. Broecker, Esq.  
U.S. Department of Labor  
Office of the Solicitor  
200 Constitution Ave., N.W., Room S-4004  
Washington, D.C. 20210

For Respondent:

Paul E. Chambers  
President  
Chambers Construction Corp.  
100 Hillcrest Road  
Pittsburgh, Pennsylvania 15238

Before:

The Honorable Dennis L. Phillips  
Administrative Law Judge

**DECISION AND ORDER**

**I. BACKGROUND**

On October 17, 2018, the Occupational Safety and Health Administration (OSHA)

inspected a Chambers Construction Co. (Chambers Construction or Respondent), worksite at 701 North Point Drive in Pittsburgh, Pennsylvania (Worksite), after OSHA Compliance Safety and Health Officer (CSHO) Walter Visage,<sup>1</sup> who was driving on the West End Bridge, saw two individuals working on the roof of a commercial office building, the Cardello Building, without any apparent fall protection. He saw that the two individuals on the roof, later identified as Messrs. Ford and McCabe, were not adequately protected from falling off the edge of the roof, and, in accordance with OSHA's regional enforcement policy, initiated an inspection of the Worksite. (Stip. ¶ 5; Tr. 34-37, 50; Ex. 2, at 2, Exs. 5, 7). CSHO Visage testified:

Q. And from your inspection were you able to determine if Mr. McCabe or Mr. Ford were using any form of fall protection?

A. No. I did not see any form of fall protection that would have met at least minimum federal safety requirements. The roof and parapet walls were not tall enough to serve as guardrails. They weren't wearing harnesses....

(Tr. 50).

During his inspection, CSHO Visage learned that the two individuals on the roof were employees of Chambers Construction and had been tasked with applying a coating material to the surface of the roof to patch leaks. He also confirmed that the two employees were not using any form of fall protection while working on the roof. Although parapet walls surrounded the perimeter of the work area, CSHO Visage measured the walls in several locations and found that, in each instance, the wall was not tall enough to protect employees from falls. CSHO Visage also learned that one of the employees, Mr. Ford, had not received any training on how to recognize and minimize exposure to fall hazards.

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<sup>1</sup> CSHO Visage is an OSHA safety specialist with about 19 years of experience. He has conducted over one hundred roof inspections. (Tr. 33-34).

On October 30, 2018, the Secretary of Labor (Secretary) issued Chambers Construction a citation and notification of penalty that contained two citation items. Item 1 alleged that Chambers Construction committed a serious violation of 29 C.F.R. § 1926.501(b)(10) by permitting two employees to perform roofing work on a low-slope roof with unprotected sides and edges more than six feet above a lower level without using a fall protection system. Item 2 alleged that Chambers Construction committed a serious violation of 29 C.F.R. § 1926.503(a)(1) by failing to train one of those employees on how to recognize and minimize exposure to fall hazards. OSHA proposed a penalty of \$2,772 for each violation, for a total penalty of \$5,544.

The case was placed on the simplified proceedings calendar, and the parties submitted evidence and witness testimony on June 27, 2019, in Pittsburgh, Pennsylvania. Both parties filed post-hearing briefs. The evidence adduced at the hearing established that Chambers Construction committed the alleged violations, and that the proposed penalties for those violations are appropriate. Chambers Construction effectively admitted that it violated the cited standards but argues that it should not receive a penalty for its conduct because it believed that the parapet walls around the perimeter of the roof would be enough to protect its employees from falls. Respondent argues that it: 1) would not have had any problem with the citation had it been written up as a warning and 2) is ridiculous to identify this as a severe situation. (Tr. 111-13). Additionally, Chambers Construction contends that OSHA's inspection was invalid, presumably under the Fourth Amendment, because CSO Visage lacked sufficient grounds to stop driving his car and initiate an inspection of the Worksite.

As explained below, Respondent's arguments lack merit. Chambers Construction may not disregard the requirements of OSHA's standards and rely instead on its own judgement regarding when fall protection is necessary to protect its employees. The penalties

that OSHA has proposed are appropriate and properly calculated based on the factors articulated in section 17(j) of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 666(j).

Additionally, OSHA's inspection of the Worksite was properly conducted. Chambers Construction had no reasonable expectation of privacy when its employees worked in violation of OSHA's standards in the public's plain view, and CSJO Visage properly initiated an inspection based on his observation of that violative conduct. Chambers Construction also lacks standing to assert that OSHA's inspection violated the Fourth Amendment because OSHA conducted its inspection with the consent of the property manager and part-owner of the building. (Tr. 25-26). Additionally, Chambers Construction's argument fails because Chambers Construction itself consented to the OSHA inspection by not raising any objection to the inspection while it was being conducted. (Tr. 48-49). The citation items are affirmed, and the proposed penalty assessed.

## II. JURISDICTION

Respondent filed a timely Notice of Contest. The Court finds that, as of the date of the alleged violations, it was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act. (Stipulations (Stip.) ¶ 1; Tr. 102-03). Based upon the record, the Court finds that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case, and Respondent is covered under the OSH Act.<sup>2</sup>

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<sup>2</sup> See *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983) (even small construction projects that involve only local purchases affect interstate commerce); *Slingsluff v. OSHRC*, 425 F.3d 861, 866-67 (10th Cir. 2005) (the economic activity of construction affects interstate commerce). Chambers Construction was a

### III. OSHA CITATION

**Citation 1, Item 1** alleges a serious violation of 29 C.F.R. § 1926.501(b)(10) and proposes a \$2,772 penalty. The Secretary claims that Respondent violated the cited standard because:

Each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 M) or more above lower levels was not protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system, or on roofs 50-feet (15.25 m) or less in width, by the use of a safety monitoring system alone:

- a) Job site, 701 North Point Drive, Pittsburgh, PA: On or about October 17, 2018, during roofing work the employer did not ensure that appropriate fall protection systems/devices were in use where employees were exposed to fall hazards of up to approximately 50 feet or greater.

**Citation 1, Item 2** alleges a serious violation of 29 C.F.R. § 1926.503(a)(1) and proposes a \$2,772 penalty. The Secretary claims that Respondent violated the cited standard because:

The employer did not provide a training program for each employee who would be exposed to fall hazards that enabled the employee to recognize the hazards of falling and that trained each employee in the procedures to be followed in order to minimize these hazards:

- a) Job site, 701 North Point Drive, Pittsburgh, PA: On or about October 17, 2018, during roofing work the employer did not ensure that appropriate fall protection training was provided for an employee who was exposed to a fall hazard of up to approximately 50 feet or greater.

### IV. STIPULATIONS

The parties agreed to the following stipulated facts prior to the hearing (Tr. 16-20):

1. Respondent is a corporation organized under Pennsylvania law.

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covered employer under the OSH Act. 29 U.S.C. § 652(5) (defining “employer” as a “person engaged in a business affecting commerce who has employees”).

2. Paul Chambers is, and at all relevant times was, the president of Respondent.
3. Respondent was hired to apply coating to the roof of the building located at 701 North Point Drive to patch leaks.
4. The area of the roof on which Respondent's employees worked was approximately four-to-five stories above the lower level.
5. Two Respondent employees performed the roofing work on October 17, 2018: Ed McCabe and Maltese Ford.
6. Ed McCabe was the supervisor of Maltese Ford.
7. Respondent did not instruct Mr. McCabe or Mr. Ford to use a fall protection system (such as a guardrail system, a safety net system, personal fall arrest systems, a warning line system, or a combination thereof) while working on the roof on October 17, 2018, because Respondent did not believe it was required.

(Joint Pre-hearing Statement, at 5-6; Tr. 15-20).

## **V. RELEVANT FACTS**

Chambers Construction is a construction contractor that works on commercial and industrial jobs in the Pittsburgh area. (Tr. 102-03). The company performs a variety of work, including roofing work. (Tr. 102). Paul Chambers is the company's president, and his wife, Nancy Defazio-Chambers, owns the company. (Stip. ¶ 2; Tr. 99). On behalf of Chambers Construction, Mr. Chambers contracted with Richard Cardello, the property manager and part-owner of the Cardello Building located at the Worksite, to perform construction work at the Cardello Building. (Tr. 25-26, 102). Chambers Construction originally contracted to perform work inside of the building, e.g. working on drywall, ceilings and doors. (Tr. 102-03). While Chambers Construction was working inside the building, Mr. Chambers agreed, at Mr. Cardello's request, that some of Respondent's employees would also apply coating to the surface of the roof to patch leaks. (Stip. ¶ 3; Tr. 26, 30, 103-04).

On the morning of October 17, 2018, at about 9:45 a.m., CSHO Visage saw two individuals working on the roof of the Cardello Building. (Tr. 34-35, 37; Ex. 2, at 4, Ex. 5 at “C”). The two individuals were later identified as Messrs. Ed McCabe<sup>3</sup> and Maltese Ford, both of whom were employees of Chambers Construction. (Stip. ¶ 5; Tr. 39-40, 56, 115; Exs. 8-9). When CSHO Visage observed the work from the West End Bridge, he had an elevated view and was at a height that was almost even with the roof of the Cardello Building. (Tr. 35, 93; Ex. 5 at “B”). CSHO Visage also observed Messrs. McCabe’s and Ford’s work from the parking lot and street adjacent to the Cardello Building. (Tr. 40-43; Ex. 5).

Based on his observations from these locations, CSHO Visage suspected that Messrs. McCabe and Ford were not using any form of fall protection while working on the roof. (Tr. 35-36, 42, 44, 94-95; Exs. 12 [Ford]), 13 [McCabe]. CSHO Visage did not see any harnesses or warning lines being used, nor did it appear that one of the employees was acting as a safety monitor for the other.<sup>4</sup> (Tr. 35-39, 42, 94-96). Although parapet walls surrounded the perimeter of the work area, the walls appeared to be too short to protect the employees from falls. (Tr. 35, 43, 93-96). CSHO Visage testified that, because he could see the top of an employee’s waist, he suspected that the parapet walls were not tall enough to protect the employees. (Tr. 73, 77, 95-96). Based on his observations, CSHO Visage initiated an OSHA

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<sup>3</sup> Mr. McCabe worked for companies associated with Mr. Chambers for about 27 years. (Tr. 114).

<sup>4</sup> CSHO Visage testified:

Q And you have no reason to believe that – do you have reason to doubt the fact that Mr. McCabe was the safety monitor for him and Mr. Maltese?

A Sir, when I entered onto the roof, he [McCabe] was engaged in work. He can’t possibly be a safety monitor under minimal federal safety requirements.

(Tr. 79-80). The Court agrees with CSHO McCabe and finds that Mr. McCabe was not acting as the safety monitor for himself and/or Mr. Ford when CSHO Visage entered onto the roof. Mr. McCabe was atop the roof using a long handle brush performing work applying roofing compound beyond that of a safety monitor and he cannot be his own safety monitor when performing that work. (Tr. 47-58, 80-81, 105, 115-16; Ex. 16).

inspection, as required by OSHA's regional enforcement policy,<sup>5</sup> to determine whether the employees were protected from falls. (Tr. 44-45; Ex. 3, at 1).

When CSHO Visage arrived at the Cardello Building, he asked to meet with the person in charge, and was directed to Mr. Cardello. (Tr. 45). CSHO Visage told Mr. Cardello that he had seen individuals working on the roof without any apparent fall protection and asked for permission to inspect the work area. (Tr. 31-32, 43-45). Mr. Cardello agreed and personally escorted CSHO Visage to the Cardello Building's roof without objection. (Tr. 27, 46). Mr. Cardello was "cooperative and polite throughout" the OSHA inspection. (Tr. 46).

Once on the roof, CSHO Visage focused his inspection on the area where he had seen Messrs. McCabe and Ford working, which was the southeast corner of the roof. Mr. McCabe was still on the roof working without any fall protection. Ford was not on the roof initially when CSHO Visage came atop the roof. Mr. Ford came back up to a roof that was different from where Mr. McCabe was working. (Tr. 38-42, 46-48, 51-52, 79-81; Exs. 5, at "C", 8-9, 12, 15-16 [showing McCabe on roof], 18, at "A" [McCabe], 19). The area of the roof on which Chambers Construction's employees worked was essentially flat, although the surface of the roof tapered slightly upwards as it reached the parapet wall. (Tr. 29-30, 50, 57). CSHO Visage took several measurements of the parapet walls in the work area. (Tr. 46-47; Ex. 6). CSHO Visage measured the parapet wall near the door at the entrance to the roof and found that it was 30 inches high. (Tr. 50-51; Ex. 6). He also measured the parapet wall on

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<sup>5</sup> OSHA Region III has an emphasis program on fall hazards that requires CSHOs to conduct an inspection at all "sites where fall protection for employees on walking/working surfaces 6' or more above a lower level is not apparent." OSHA Directive No. 2019-03 (CPL 04), Regional Emphasis Program for Fall Hazards in the Construction Industry, p. 4 (October 1, 2018), available at: [https://www.osha.gov/sites/default/files/enforcement/directives/1901\\_CPL\\_04-01.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/1901_CPL_04-01.pdf). (Tr. 44-45).



the north side of the work area, a few feet from what appeared to be freshly applied coating on the interior side of the wall and found that the wall was 22 inches high. (Tr. 50-51, 54-55, 85; Ex. 2, at 3, Exs. 6, 17). Additionally, CSHO Visage measured the parapet wall on the east side of the work area, adjacent to where he had seen Mr. McCabe working, and found that it was 36 inches high.<sup>6</sup> (Tr. 42, 50-59, 119; Ex. 2, at 5, Exs. 15-16, 19, at “A”). CSHO Visage also measured the parapet wall on the south side of the work area, near where a can of coating and a brush had been set and found that the wall was 33 inches high. (Tr. 42, 51, 54-59; Ex. 2, at 5, Exs. 6, 20 at “A”).

CSHO Visage’s inspection confirmed that Chambers Construction’s employees were not using any form of fall protection while working on the roof. (Tr. 50, 118). Mr. Chambers did not instruct his employees to use a fall protection system during their work on the roof. (Stip. ¶ 7; Tr. 49, 64, 104-05, 110; Ex. 6). Mr. McCabe did not use fall protection, nor as his supervisor did he instruct Mr. Ford to use fall protection. (Stip. ¶¶ 6-7; Tr. 118). Chambers Construction did not measure the height of the parapet walls in the work area before beginning the roofing work, but assumed that the walls alone would sufficiently protect its employees from falls. (Stip. ¶ 7; Tr. 49, 64, 104-05, 110, 118; Ex. 6).

CSHO Visage also learned from his inspection that Chambers Construction had not provided Mr. Ford, who had only worked for the company for a month or so, with any fall hazard training before he was assigned to work on the roof of the Cardello Building.<sup>7</sup> (Tr. 63-65, 106-07, 118). When CSHO Visage requested copies of the company’s training records, Chambers Construction did not have any to disclose. Mr. Chambers told CSHO

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<sup>6</sup> CSHO Visage testified that “36 inches is not tall enough to meet the minimum safety standards.” (Tr. 74).

<sup>7</sup> It was CSHO Visage’s understanding that October 17, 2018 was the first time Mr. Ford worked atop a roof. (Tr. 63-64). At the time of the OSHA inspection, Mr. Ford had worked for Respondent for “[a] month or two months.” (Tr. 105-06).

Visage during the OSHA inspection that he had “lost or misplaced his S&H records.” (Tr. 63-66, 106-07; Ex. 3, at 5).

At no point during the inspection did Chambers Construction object to CSHO Visage’s inspection or presence on the roof. (Tr. 48-49). When CSHO Visage spoke with Mr. Chambers on the telephone during the inspection, Mr. Chambers told CSHO Visage that the violations were “his fault” and that he had “[n]o arguments here w/ [with] us.”<sup>8</sup> (Tr. 48-49; Ex. 6). Mr. Chambers arrived at the Worksite about 20 to 30 minutes after speaking with CSHO Visage by telephone. (Tr. 48; Ex. 6)

At the hearing, Mr. Chambers confirmed that he did not measure the parapet walls at the Worksite, and that he did not instruct his employees to use any fall protection on the roof.<sup>9</sup> (Stip. ¶ 7; Tr. 48-49, 104-10; Ex. 2, at 3, Ex. 6). He also confirmed that he did not give Mr. Ford any fall hazard training or training materials prior to instructing him to work on the roof. (Tr. 106-07).

After the OSHA inspection, Messrs. McCabe and Ford watched training videos and obtained and used harnesses<sup>10</sup> and ropes to complete their work atop the roof of the Cardello Building.<sup>11</sup> (Tr. 116; Resp’t Post Hr’g Br.).

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<sup>8</sup> CSHO Visage testified that Mr. Chambers told him that he [Chambers] had “[n]o arguments with them [the violations observed by OSHA]. (Tr. 49).

<sup>9</sup> CSHO Visage’s inspection notes indicate Mr. Chambers told him during their telephone conversation that Chambers Construction “didn’t msre (sic) [measure][the parapet walls].” (Tr. 48-49, 104; Ex. 6).

<sup>10</sup> Respondent owned the necessary safety harnesses and equipment to do the job. (Tr. 120).

<sup>11</sup> In its closing argument at the hearing, Respondent seemed to raise for the first time a “Greater Hazard” defense to Citation 1, Item 1, when it argued that there was “more possibility of creating a hazard by ropes than there were – then there was of somebody falling off the roof.” Any such defense was not timely asserted, was abandoned and lacks merit. Respondent did not include a greater hazard defense in the parties’ Joint Pre-Hearing Statement. *Field & Assoc., Inc.*, 19 BNA OSHC 1379 (97-1585, 2001). The defense was not discussed in Respondent’s post hearing brief and the Court finds it has been abandoned. *L & L Painting Co.*, 23 BNA OSHC 1986, 1989 n.5 (No. 05-0055, 2012) (item not addressed in post-hearing briefs deemed abandoned). There is also insufficient evidence to prove that compliance with 29 C.F.R. § 1926.501(b)(10) would create a greater hazard than noncompliance. *See Dole v. Williams Enters., Inc.*, 876 F.2d 186, 1988 (D.C.Cir. 1989).

## VI. DISCUSSION

The Secretary must prove an OSHA violation by showing, through 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 employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *Sw. Bell Tele. Co.*, 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000) (*aff'd*, 277 F.3d 1374 (5<sup>th</sup> Cir. 2001)). The Secretary has proven all those requirements.

Additionally, Chambers Construction's claim that CSHO Visage lacked sufficient grounds to initiate the inspection is found to be without merit. Chambers Construction had no reasonable expectation of privacy while working on the roof of the Cardello Building because the work was conducted in the public's plain view. Moreover, Chambers Construction lacks standing to claim that its Fourth Amendment rights were violated because the property manager and part-owner of the building consented to OSHA's inspection. Finally, Chambers Construction also consented to the inspection when it raised no objection to the inspection while it was taking place. (Tr. 48-49).

### A. *The OSH Act and the cited standards applied to Chambers Construction.*

Chambers Construction was a covered employer under the OSH Act,<sup>12</sup> and OSHA's construction industry standards apply to the work that Chambers Construction performed on the Cardello Building's roof. Chambers Construction is a construction contractor, and on October 17, 2018, two of its employees were repairing the roof of the Cardello Building by applying a coating material to its surface. (Stips. ¶¶ 3, 5; Tr. 26, 30, 103-04; Sec'y Post Hr'g Br. 8-9). Roof repair is a construction activity to which OSHA's construction industry

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<sup>12</sup> See 29 U.S.C. § 652(5) (defining "employer" as a "person engaged in a business affecting commerce who has employees").

standards apply. 29 C.F.R. § 1926.10(a) (standards in Part 1926 apply to “construction, alteration, and/or repair” work); § 1910.12(a) (defining “construction work” to include “work for construction, alteration, and/or repair”); § 1926.32(g) (same); *see also Daniel Crowe Roof Repair*, 23 BNA OSHC 2001, 2009 (No. 10-2090, 2011) (ALJ) (finding that roof repair qualifies as construction work under § 1926.32(g)).

B. *Chambers Construction violated the cited standards.*

1. *Chambers Construction violated 29 C.F.R. § 1926.501(b)(10) (Citation 1, Item 1).*

Chambers Construction violated 29 C.F.R. § 1926.501(b)(10) by allowing two employees to engage in roofing work on a low-slope roof with unprotected sides and edges more than six feet above ground level without any fall protection. The cited standard provides:

Roofing work on Low-slope roofs. Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

29 C.F.R. § 1926.501(b)(10).

There is no dispute that Chambers Construction’s employees did not use fall protection while applying coating to the roof of the Cardello Building. Mr. McCabe confirmed at the hearing that he and Mr. Ford did not use any fall protection while working on the roof. (Stip. ¶ 7; Tr. 118; Sec’y Post Hr’g Br. 9-12). Mr. Chambers also admitted that

he did not instruct his employees to use any fall protection on the roof because he believed that the parapet walls alone would be enough to protect them from falls. (Stip. ¶ 7; Tr. 49, 105, 110; Ex. 6). This testimony is consistent with CSHO Visage’s determination from his inspection that Messrs. McCabe or Ford were not using “any form of fall protection” on the roof. (Tr. 50).

The Court finds Chambers Construction was required to use fall protection under 29 C.F.R. § 1926.501(b)(10). By its terms, the standard requires the use of a fall protection system whenever an employee is: (1) engaged in roofing activities, (2) on a lowslope roof, (3) with unprotected sides and edges, and (4) six feet or more above a lower level. All four of those conditions apply to the work that Chambers Construction performed on October 17, 2018, on the roof of the Cardello Building.

First, Chambers Construction stipulated that two of its employees performed “roofing work” at the Cardello Building. (Stip. ¶ 5). OSHA’s construction industry fall protection standard defines “[r]oofing work” as including the “application ... of roofing materials and equipment.” 29 C.F.R. § 1926.500(b).<sup>13</sup> Here, Messrs. McCabe and Ford were patching leaks on the roof of the Cardello Building by applying a coating material to the surface of the roof. (Stip. ¶ 3; Tr. 26, 30, 103-04). Doing so is an “application ... of [a] roofing material[]” that is intended to repair the waterproofing function of the roof. *See Kirtley Roofing & Sheet Metal, LLC*, 25 BNA OSHC 2250, 2254 (No. 15-0613, 2015) (ALJ) (finding employees applying sealant to a roof were engaged in “roofing work” under § 1926.501(b)(10)); *see also Tire Star, Inc.*, 23 BNA OSHC 1091, 1096 (No. 09-0324, 2009) (ALJ) (affirming violation of

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<sup>13</sup> The full definition of reads: “*Roofing work* means the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck.” 29 C.F.R. § 1926.500(b).

§ 1926.501(b)(10) where employee patched a roof without fall protection); *Bergelectric Corp. v. Sec’y of Labor*, 925 F.3d 1167, 1171 (9th Cir. 2019) (explaining that, to constitute roofing work under § 1926.500(b), “the materials and equipment must be connected to the act of roofing”). Chambers Construction’s employees were performing “roofing work” as defined by OSHA’s fall protection standard.

Second, the roof of the Cardello Building is a “low-slope roof.” Section 1926.500(b) defines a “low-slope roof” as “a roof having a slope less than or equal to 4 in 12 (vertical to horizontal),” 29 C.F.R. § 1926.500(b), *i.e.*, less than four inches of vertical rise for every 12 inches in length. Mr. Chambers argued that the roof was a “flat roof” that had “nowhere near an inch of fall.” (Tr. 17). The photographs show that the roof of the building had little to no visible slope. (Ex. 15). Other testimony at the hearing confirmed that the roof on which Chambers Construction worked was essentially flat. (Tr. 29-30, 50).

Third, the area of the roof where Chambers Construction’s employees worked had “unprotected sides and edges.” Section 1926.500(b)(2) defines “unprotected sides and edges” as “any side or edge (except at entrances to points of access) of a walking/working surface, e.g., ... [a] roof. . . where there is no wall or guardrail system at least 39 inches (1.0 m) high.” 29 C.F.R. § 1926.500(b)(2).<sup>14</sup> Here, the area of the roof on which Chambers Construction’s employees worked had parapet walls around the perimeter, but CSHO Visage took several measurements of the walls in the work area, and, in each instance, found that the wall was less than 39 inches high. (Tr. 95; Ex. 6). First, CSHO Visage measured the parapet wall near the door to the roof and found that it was 30 inches high. (Tr. 51; Ex. 6). He also

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<sup>14</sup> The full definition of reads: “*Unprotected sides and edges* means any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or guardrail system at least 39 inches (1.0 m) high.” 29 C.F.R. § 1926.500(b)(2). (Tr. 95).

measured the parapet wall to the north of the work area, near an area of the wall that had freshly applied coating on it, and found that the wall was 22 inches high. (Tr. 51-55, 85; Ex. 2 at 8, Exs. 6, 17 at “A”). Additionally, CSHO Visage measured the parapet wall to the east of the work area, adjacent to where he had observed Mr. McCabe working, and found that the wall was 36 inches high. (Tr. 42, 51; Ex. 2, at 4, Exs. 6, 19 at “A”). CSHO Visage also measured the wall to the south of the work area, near where a brush and a can of coating material had been left by the wall and found that the wall was 33 inches high. (Tr. 42, 51, 57-58; Ex. 2, at 5, Exs. 6, 20 at “A”). All of the parapet walls that surrounded the area in which Messrs. McCabe and Ford were working were too short to render the sides and edges of the roof “protected” under the OSHA’s fall protection standard.

Fourth, Chambers Construction stipulated that the area of the roof on which Messrs. McCabe and Ford worked was approximately four-to-five stories above lower levels. (Stip. ¶ 4; Ex. 11 (photograph of the south side of the building)). Accordingly, 29 C.F.R. § 1926.501(b)(10) required Chambers Construction to ensure that its employees used at least one of the forms of fall protection listed in the standard while working on the roof of the Cardello Building. It did not do so, and thus violated the standard.

2. *Chambers Construction violated 29 C.F.R. § 1926.503(a)(1) (Citation 1, Item 2).*

Chambers Construction violated 29 C.F.R. § 1926.503(a)(1) by failing to give Mr. Ford any training on the recognition and minimization of fall hazards before he worked on the roof of the Cardello Building. The cited standard provides:

The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

29 C.F.R. § 1926.503(a)(1). To comply with this standard, employers must provide potentially exposed employees with a fall hazard training program that “provide[s] the instructions that a reasonably prudent employer would have given in the same circumstances.” *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2126 (No. No. 96-0606, 2000), *aff’d*, 255 F.3d 122 (4th Cir. 2001) (citations omitted). Such instructions must be “specific enough to advise employees of the hazards associated with their work and the ways to avoid them,” and modeled on the applicable OSHA requirements. *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1425 nn. 6 & 7 (No. 90-1106, 1993). An employer can rebut an “allegation of a training violation by showing that it has provided the type of training at issue,” at which point “the burden shifts to the Secretary to show some deficiency in the training provided.” *N & N Contractors*, 18 BNA OSHC at 2126.

Here, Mr. Ford was exposed to a fall hazard when he worked on the roof of the Cardello Building. Chambers Construction needed to train him on the recognition and minimization of fall hazards before he began the day’s work. Mr. Chambers admitted that he did not provide any fall hazard training to Mr. Ford before Mr. Ford worked on the roof of the Cardello Building. (Tr. 65, 106-07; Ex. 2 at p. 7). *See Daniel Crowe Roof Repair*, 23 BNA OSHC at 2015 (finding a § 1926.503(a) violation found where company’s proprietor admitted that he did not provide fall hazard training to workers). Mr. Chambers also could not produce any documentation indicating that Chambers Construction had trained its employees on recognizing and minimizing fall hazards. (Tr. 64-66, 106-07; Ex. 2, at 8, Ex. 3, at 5). *See William Trahant, Jr., Constr., Inc.*, 26 BNA OSHC 1957, 1966 (No. 15-0489, 2017) (ALJ) (finding § 1926.503(a)(1) violated where company’s owner did not have any documentation indicating that workers had received fall hazard training); *Granite Enters., Inc.*, 26 BNA OSHC 1408, 1415 (No. 15-1231, 2016) (ALJ) (noting employer violated §



1926.503(a)(1) where it did not ensure that its employees used fall protection and did not produce any “evidence or documentation indicating that it had trained its employees”).

Mr. McCabe confirmed at the hearing that he did not give Mr. Ford any fall hazard training, although he stated that he instructed Mr. Ford to “stay away from the edge” of the roof. (Tr. 64-65, 118). Mr. McCabe’s vague warning to Mr. Ford does not satisfy Chambers Construction’s obligation to provide a fall hazard training program to Mr. Ford, as the instruction was neither specific enough to advise Mr. Ford on how to avoid exposure to fall hazards on the roof, nor did it educate him on how to comply with OSHA’s fall protection standard during the work. *See, e.g., Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1892 (No. 92-3684, 1997) (confirming ALJ’s finding that employer violated OSHA training standards by relying on supervisory employees’ “vague advice” and “ cursory instructions” to subordinates, such as warning them to “stay away from the edges” of an elevated surface) *aff’d*, 131 F.3d 1254 (8<sup>th</sup> Cir. 1997). Because he had not received fall hazard training, Mr. Ford may not have known that he was both exposed to a fall hazard and operating in violation of 29 C.F.R. § 1926.501(b)(10) while working on the roof of the Cardello Building without fall protection. *See Bob Anderson Builders, Inc.*, No. 01-0708, 2002 WL 538936, at \*9 (O.S.H.R.C.A.L.J., Apr. 3, 2002) (finding a violation of § 1926.503(a)(1) where the employer’s only relevant instruction to an employee was to “be careful” and “stay above the slide guards,” and noting that the lack of fall hazard training left the employee with no way to “recognize[] the deficient fall protection that had been provided” or “realize[] that more was required under OSHA safety regulations”). In view of the above, the Court finds that Chambers Construction violated 29 C.F.R. § 1926.503(a)(1). (Sec’y Post Hr’g Br. 12-14).

C. *Chambers Construction's employees were exposed to the violative conditions.*

The Secretary has also established employee exposure to the conditions that violated the standards. The Secretary may establish that one or more employees were exposed 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 (No. 90-2148, 1995) *aff'd*, 79 F.3d 1146 (5<sup>th</sup> Cir. 1996). The Secretary establishes employee access to a hazard where 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.” *Kaspar Wire Works Inc.*, 18 BNA OSHC 2178, 2195 (No. 902775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). The zone of danger for a particular standard is “determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.” *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995); *see also Fabricated Metal Prods. Inc.*, 18 BNA OSHC 1072, 1074 n.7 (No. 93-1853, 1997) (zone of danger is “relative to the wording of the standard and the nature of the hazard at issue”).

In this case, compliance with 29 C.F.R. §§ 1926.501(b)(10) and 1926.503(a)(1) is designed to prevent fall hazards. For the fall hazard posed by a roof with unprotected sides and edges, the zone of danger is the entire elevated surface. *See Safety Standards for Fall Protection in the Construction Industry*, 59 Fed. Reg. 40672, 40682 (August 9, 1994) (to be codified at 29 C.F.R. Part 1926) (explanation in preamble to final rule promulgating the fall protection standard that there is no “‘safe’ distance from an unprotected side or edge that would render fall protection unnecessary”); U.S. Dep’t of Labor, Ltr. of Interpretation, Fall Protection Requirements Applicable During the Construction of Retaining Walls, 2014 WL

8664210, at \*2 (May 20, 2014) (confirming that OSHA “continue[s] to believe that distance alone is ineffective to protect workers from unprotected sides or edges”). Both Messrs. McCabe and Ford indisputably worked on the roof of the Cardello Building without fall protection. (Tr. 38-50, 118; Exs. 8, 9, 15). Mr. Ford performed that work without receiving any training on the recognition and minimization of fall hazards. Tr. 65, 106-07, 118; Ex. 2, at 7. Accordingly, both employees were exposed to the fall hazard posed by the roof’s unprotected sides and edges.

The evidence establishes that Messrs. McCabe and Ford performed work within a few feet of the roof’s unprotected sides and edges. Photographs that CSHO Visage took from the West End Bridge and the street and parking lot adjacent to the Cardello Building show Mr. Ford working in close proximity to the parapet walls in the southeast corner of the roof. (Tr. 38-39, 42-43, 70-71; Exs. 7-9, 12). Additional photographs show Mr. McCabe working within a few feet of the parapet wall on the east side of the work area. (Tr. 51-53; Exs. 13, 15-16). Mr. McCabe also confirmed at the hearing that he worked only two or three feet from the edge of the roof. (Tr. 118-19).

Additionally, the materials and equipment that CSHO Visage observed on or near the parapet walls during the inspection further prove that Messrs. McCabe and Ford worked in close proximity to the roof’s unprotected sides and edges.<sup>15</sup> CSHO Visage observed that the parapet wall to the north of the work area had fresh coating applied to it. (Tr. 54-55; Ex. 17, at “B”). He also saw that a roller and a brush, and a can of coating had been left near the parapet wall to the south of the work area. (Tr. 54-58; Ex. 20). Mr. McCabe set a battery charger on top of the parapet wall to the south of the work area, and when Mr. McCabe

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<sup>15</sup> CSHO Visage measured the height of one of the nearby walls at 22 inches. (Tr. 54-55, 85-86; Ex. 17, at “A”).

retrieved it during the inspection, he came within an arm's reach of the edge. (Tr. 54, 59-60, 119; Ex. 2, at 6 [Photo ID No. 5892], Exs. 20-21).

The evidence establishes that both Messrs. McCabe and Ford worked within a few feet of the roof's unprotected sides and edges, which is closer than employees in numerous other cases who were found to be exposed to fall hazards during their work. *See, e.g., Phoenix Roofing Inc.*, 17 BNA OSHC at 1079 (employees that stored materials twelve feet from an unguarded skylight were exposed to a fall hazard); *Cornell & Co.*, 5 BNA OSHC 1736, 1738 (No. 8721, 1977) (employees standing ten feet away from unguarded elevator shaft during a coffee break were within the zone of danger); *Brennan v. OSHRC (Dic-Underhill)*, 513 F.2d 1032, 1039 (2d Cir. 1975) (employees who were ten feet and fifteen feet from unguarded edge were exposed to violative condition). The Secretary has established that Chambers Construction's employees were actually exposed to the fall hazard created by the violative conditions. (Sec'y Post Hr'g Br. 14-17).

D. *Chambers Construction had actual knowledge of the violative conditions.*

The Secretary has established that Chambers Construction had actual knowledge of the violative conditions. The Secretary establishes the knowledge element by showing that the employer knew or should have known of the physical conditions that constituted the violation. The Secretary need not show that the employer was aware that the conditions were, in fact, hazardous. *Phoenix Roofing Inc.*, 17 BNA OSHC at 1079-80. Here, Chambers Construction knew that its employees were working on the roof without a fall protection system, and that Mr. Ford had not received any fall hazard training prior to working on the roof. Mr. Chambers admitted that he did not instruct his employees to use any fall protection while working on the roof. (Stip. ¶ 7; Tr. 105, 110; Ex. 6). He also confirmed that he did not

provide any fall hazard training to Mr. Ford. (Tr. 65, 106-07). Mr. Chambers admitted that Mr. Ford worked “under the direction of Mr. McCabe at all times.” Mr. McCabe was the superintendent on the job atop the Cardello Building on October 17, 2018. (Tr. 108-09, 115-16). Mr. McCabe, whose knowledge as a supervisory employee is imputed to Chambers Construction, admitted that neither he nor Mr. Ford used any fall protection while patching leaks on the roof.<sup>16</sup> (Stip. ¶¶ 6-7; Tr. 118). Mr. McCabe also confirmed that he did not provide fall hazard training to Mr. Ford. (Tr. 119). The Secretary has established that Chambers Construction knew that its employees were working on the roof without a fall protection system, and that it did not provide Mr. Ford with any fall hazard training.<sup>17</sup> (Sec’y Post Hr’g Br. 17-18).

E. *The Secretary’s inspection did not violate the Fourth Amendment.*

Chambers Construction argues that CSHO Visage lacked sufficient grounds to stop his vehicle and initiate an inspection because, based on his observations from the West End Bridge and the street and parking lot adjacent to the building, he did not “know for a fact” that the parapet walls were too short to protect Chambers Construction’s employees from falls. (Tr. 71-72, 128-29; Resp’t Post H’rg Br.). To the extent that Chambers Construction is arguing that OSHA’s inspection violated its Fourth Amendment rights, the argument is meritless. Chambers Construction had no reasonable expectation of privacy while its employees were patching leaks on the Cardello Building’s roof, as the employees were

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<sup>16</sup> See *A.E. Staley Mfg. Co. v. Sec’y of Labor*, 295 F.3d 1341, 1347-48 (D.C. Cir. 2002).

<sup>17</sup> Both Messrs. Chambers and McCabe also had constructive knowledge of the condition that violated 29 C.F.R. § 1926.501(b)(10), as they both assumed that the parapet walls would provide sufficient protection against falls, but neither of them measured the walls to verify that they were tall enough to render a fall protection system unnecessary. (Stip. ¶ 7; Tr. 49, 64, 104-05, 118). Messrs. Chambers and McCabe also failed to exercise reasonable diligence to inspect the area and take appropriate protective measures. See *N & N Contractors*, 18 BNA OSHC at 2122-23 (“Reasonable diligence ... requires an employer to inspect the work area, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations.”).

working in the public's plain view. Additionally, Chambers Construction lacks standing to raise a Fourth Amendment claim because the property manager and part-owner of the building, Mr. Cardello, voluntarily consented to CSHO Visage's inspection of the roof. Moreover, Chambers Construction itself consented to the inspection because it did not raise any objection to the inspection while it was occurring. (Tr. 48-49).

As an initial matter, it is not clear that the exclusionary rule applies in OSHA enforcement proceedings in the Third Circuit, where this case arose. In *Sanders Lead Co.*, 15 BNA OSHC 1640, 1650 (No. 87-260, 1992), the Commission acknowledged prior decisions that applied the rule "in appropriate circumstances." The Third Circuit, however, left the issue open in *Pennsylvania Steel Co. and Machine Foundry v. Sec'y of Labor*, 831 F.2d 1211, 1217-18 & n.9 (3d Cir. 1987), with one judge specifically stating that the exclusionary rule should not apply in the OSHA context. The Fifth and Sixth Circuits have applied the exclusionary rule to actions for the assessment of penalties, but not to actions for the abatement of hazardous conditions. See *Lakeland Enters. of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 743-45 (7th Cir. 2005) (discussing cases). Here, the Secretary seeks both penalties and corrective action (with respect to the training violation, Citation 1, Item 2). The Supreme Court emphasized in *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998), that it has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials." The Court has also acknowledged that the exclusionary rule is a "judicially created remedy of this Court's own making," which "exact[s] a heavy toll on both the judicial system and society at large." *Davis v. United States*, 564 U.S. 229, 237-38 (2011) (internal citation omitted).

Even if the exclusionary rule did apply in this case, there is no Fourth Amendment violation here. An employer operating in a commercial space can only assert a Fourth

Amendment claim if it has a reasonable expectation of privacy. *L.R. Willson and Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1238 (4th Cir. 1998) (citation omitted). “Where an area is outdoors and open to public view, there is no expectation of privacy, and the area is therefore not subject to the Fourth Amendment under the ‘open fields’ doctrine.” *Gem Indus., Inc.*, 17 BNA OSHC 1184, 1186 (No. 93-1122, 1995). An employer has no reasonable expectation of privacy for work performed in a location that is “exposed to public view” and “readily observable to others.” *Marshall v. W. Waterproofing Co.*, 560 F.2d 947, 950 (8th Cir. 1977); *see, e.g., L.R. Willson*, 134 F.3d at 1238 (employer had no reasonable expectation of privacy while working at a construction site that could be observed from the rooftop of a neighboring hotel); *Gem Indus.*, 17 BNA OSHC at 1186-87 (employer had no reasonable expectation of privacy where compliance officer observed violative conditions from a parking lot adjacent to the worksite); *Reg’l Scaffolding & Hoisting Co.*, 17 BNA OSHC 2067, 2069 (No. 93-577, 1997) (employer had no reasonable expectation of privacy while working on the exterior of a city building). Here, as CSHO Visage’s testimony and photographs taken from publicly accessible locations demonstrate, Chambers Construction performed its roofing work (and violated OSHA’s standards) in plain view of anyone who cared to look. (Tr. 35-37, 40-45, 94-95; Exs. 8-9, 12-13). Chambers Construction had no reasonable expectation that its roofing work (and violative conduct) would be kept private.

Additionally, Chambers Construction’s argument fails because it has no standing to assert a Fourth Amendment claim where the building’s property manager and part-owner consented to the inspection. OSHA may conduct an inspection where “a person who exercises control over [the] premises ... consent[s] to a search,” such as “a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.” *W. Waterproofing*, 560 F.2d at 950 (citing *United States v. Matlock*,

415 U.S. 164, 171 (1974)). Individuals with such control and authority include property owners and their agents. *See, e.g., W. Waterproofing*, 560 F.2d at 950 (voluntary consent for inspection given by building manager who provided compliance officers with access to the work area); *Stephenson Enters., Inc. v. Marshall*, 578 F.2d 1021, 1024 (5th Cir. 1978) (plant manager gave consent and accompanied compliance officer on the inspection tour).

Here, when CSHO Visage arrived at the Cardello Building, he asked to meet with the person in charge and was directed to Mr. Cardello, who is the property manager and part-owner of the building, and the individual who hired Chambers Construction to patch leaks on the roof. (Tr. 25-26, 45). CSHO Visage believed that the south wall “was not tall enough to serve as fall protection, because you could see the top of the man’s belt” from the ground level of the Cardello Building. (Tr. 93-96). CSHO Visage presented his credentials, explained that he saw individuals working on the roof without any apparent fall protection system in use, and sought permission to inspect the roof.<sup>18</sup> CSHO Visage had a well-founded suspicion, probable cause, and a good faith belief to stop at the Cardello Building and initiate an OSHA inspection pertaining to employees working atop the building’s roof without any fall protection.<sup>19</sup> CSHO Visage was not engaged in a “fishing expedition” as argued by Respondent.<sup>20</sup> (Tr. 27, 31-32, 43-44, 46, 71-73, 76-77, 82-83, 94-95; Ex. 3, at 2; Resp’t Post

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<sup>18</sup> CSHO Visage testified that he did not work under a quota system and did not have to do a certain number of OSHA inspections each year. (Tr. 83-84).

<sup>19</sup> CSHO Visage stated: “In my experience and in my practice when we can see that something visually to us looks waistline or lower or belt line or lower, we believe it’s not 39 inches, and when we go on site we validate that. That’s normal practice.” (Tr. 72-73).

<sup>20</sup> CSHO Visage testified:

Q So why did you – if you didn’t know it was 39 inches or the parapet wasn’t 39 inches, the why did you go on a fishing expedition?

... [material omitted]

A I don’t believe this is a fishing expedition, sir. I do a lot of these same inspections, and, again, if I can see the top of somebody’s waistline I don’t remember a time when it ever met federal safety requirements for a wall height. So I felt that I had a good faith reason and probable cause to go in and examine this. Now, if it turned out they were of adequate height, we would have bowed out and apologized about it and left the property. In this case, we validated what our belief was. This is normal practice.



Hr'g Br.). OSHA's Safety Narrative's Opening Conference Notes state: "[c]redentials were shown, purpose of visit was discussed and general inspection protocols were covered." (Ex. 3, at 2). Mr. Cardello agreed and personally escorted CSHO Visage to the roof. (Tr. 27). Mr. Cardello was "polite and cooperative throughout" the inspection. (Tr. 46). CSHO Visage received voluntary and freely given consent from an individual with control and authority over the worksite. Consequently, Chambers Construction thus lacks standing to raise Fourth Amendment claims with regard to the OSHA inspection. *See Bloomfield Mech. Contracting, Inc. v. OSHRC*, 519 F.2d 1257, 1263 (3d Cir. 1975) (construction contractor performing work at an apartment building had no standing to raise a Fourth Amendment claim because "any expectation of privacy at the ... site was that of the owner" of the building); *W. Waterproofing*, 560 F.2d at 950-51 (because consent for inspection was given by building manager, construction contractor lacked standing to raise Fourth Amendment claims).

Finally, Chambers Construction's argument also fails because it did not raise any objection during the inspection, and thereby gave its implicit consent. It is well-settled that if an employer does not object to an OSHA inspection or demand a warrant at the scene of an inspection, the employer has impliedly consented to the inspection and waived any Fourth Amendment objections. *See, e.g., Lakeland Enters.*, 402 F.3d at 745 (where employees cooperated in the inspection, affirming that "any Fourth Amendment objection was waived because [employer] did not object to [OSHA's] inspection and request a warrant at the scene"); *Stephenson Enters.*, 578 F.2d at 1023-24 (consent implied where the employer's representative voiced no objection throughout the walk-around inspection during which

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(Tr. 77-78, 94-95).

violations were plain to see); *Lake Butler Apparel Co. v. Sec’y of Labor*, 519 F.2d 84, 88 (5th Cir. 1975) (noting consent implied where president of plant accompanied OSHA officer on inspection of plant and raised no objections). Here, neither Messrs. Chambers nor McCabe raised any objections during CSHO Visage’s inspection. (Tr. 48-49). In his closing argument, Mr. Chambers admitted that “Chambers Construction consented to inspection, because we weren’t in the process of trying to be uncooperative.” (Tr. 128). Chambers Construction’s Fourth Amendment arguments fail. (*See Sec’y Post Hr’g Br. 20-24*).

## VII. CHARACTERIZATION AND PENALTIES

### A. *The Secretary properly classified Citation 1, Items 1 and 2 as serious.*

OSHA properly characterized Chambers Construction’s violations of 29 C.F.R. §§ 1926.501(b)(10) and 1926.503(a)(1) as “serious” within the meaning of section 17(k) of the OSH Act. *See* 29 U.S.C. § 666(k) (violation is serious if “there is a substantial probability that death or serious physical harm could result” from exposure to a hazardous condition). Under section 17(k), “substantial probability” refers to the probability of death or serious injury occurring as a result of an accident or incident, not to the probability of that accident or incident occurring. *See Sec’y of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 401 (3d Cir. 2007). Here, Chambers Construction’s employees were exposed to falls from a roof that was four-to-five stories above the lower level, and if an employee were to fall from that height, it would likely result in death or a serious injury. (Tr. 60-62). *See, e.g., Merchant’s Masonry, Inc.*, 17 BNA OSHC 1005, 1007 (No. 92-424, 1994) (fall from 18 feet would likely result in serious injuries or death). (Sec’y Post Hr’g Br. 18). The violations are affirmed as serious.

### B. *The Court assesses the proposed penalties.*

The Court assesses the total proposed penalty of \$5,544 (\$2,772 for each violation). Section 17(j) of the OSH Act directs the Commission to assess penalties “giving due

consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.” 29 U.S.C. § 666(j). Gravity is usually the “principal factor.” *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1003 (No. 4, 1972).

OSHA considered both violations to be of “moderate” gravity. OSHA reached this conclusion based on its finding that the “severity” of the violations was high, because a fall from the roof would likely result in death, but the probability of an accident occurring was “lesser,” due to the presence of the parapet walls around the perimeter of the work area. (Tr. 60-62). *See Conie Constr., Inc. v. Reich*, 73 F.3d 382, 385 (D.C. Cir. 1995) (“gravity may be based on both the severity of any possible injury and the probability of an accident”) (citations omitted); *Merchant’s Masonry*, 17 BNA OSHC at 1007 (“Although the likelihood of a fall may not have been high, there was substantial likelihood that there would be a serious injury in the event of a fall from a height of 18 feet. On balance, then, we consider this violation to be of moderate gravity.”). OSHA also applied a 70% reduction to the penalty amount to account for the small size of Chambers Construction, which, for this particular roofing job, had only two employees. (Tr. 62-63; Ex. 2, at 1, 7).

OSHA determined that a good faith penalty reduction was not appropriate because Chambers Construction made no attempt to assess the fall hazard posed by the roof, permitted a newly-hired employee to work on the roof without any fall hazard training, and did not have any training records or written safety programs. (Tr. 63-67, 106-07; Ex. 2, at 1, 7, Ex. 3, at 5). Mr. Chambers confirmed that he had no training records to disclose. (Tr. 106-07). *See Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013) (explaining that “the Commission focuses on a number of factors relating to the employer’s actions, including the employer’s safety and health program and its commitment to assuring

safe and healthful working conditions, in determining whether an employer's overall efforts to comply with the OSH Act and minimize any harm from the violations merit a penalty reduction" for good faith) (citations omitted). Chambers Construction admits that it instructed an inexperienced and untrained employee, Mr. Ford, to perform roofing work without any fall protection simply because there were parapet walls around the perimeter, the height of which Chambers Construction did not measure. (Tr. 49, 64-65, 104-06, 118). The Court agrees with the Secretary that such a cavalier attitude toward employee safety does not evince good faith. (Sec'y Post H'rg Br., at 20). *See Monroe Drywall*, 24 BNA OSHC at 1211 (insufficient safety program, training, and instructions negate a claim for a good faith penalty reduction); *MEI Holdings, Inc.*, 18 BNA OSHC 2025, 2028 (No. 96-740, 2000) (failure to train inexperienced employees demonstrates an employer's lack of good faith) *aff'd*, 247 F.3d 347 (11<sup>th</sup> Cir. 2001).

The evidence shows that OSHA calculated the proposed penalties based on a proper consideration of the factors in section 17(j) of the OSH Act. (Sec'y Post Hr'g Br. 18-20). The Court has done the same and assesses penalties totaling \$5,544 for the two serious violations.

### **VIII. 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.

## IX. ORDER

Based on these findings of fact and conclusions of law, it is **ORDERED** that:

- 1) Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(10) is **AFFIRMED** and a penalty of \$2,772 is **ASSESSED**, and
- 2) Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.503(a)(1) is **AFFIRMED** and a penalty of \$2,772 is **ASSESSED**.

**SO ORDERED.**

/s/  
The Honorable Dennis L. Phillips  
U.S. OSHRC Judge

Date: November 1, 2019  
Washington, D.C.