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

SECRETARY OF LABOR, Complainant, v. Michael Barr dba Barr Construction, Respondent.	A Simplified Proceeding OSHRC Docket No. 19-0258

Appearances: Kate S. O'Scannlain, Solicitor of Labor
Oscar L. Hampton III, Regional Solicitor
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U.S. Department of Labor
170 S. Independence Mall West
Philadelphia, PA 19106-3306
For the Secretary

James Michael Barr, *pro se*
Michael Barr dba Barr Construction
Cogan Station, PA 17728
For Respondent

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

I. BACKGROUND

James Michael Barr is a sole proprietor doing business as Barr Construction (Respondent or Barr Construction). (Tr. 86). On December 13, 2018, the Occupational Safety and Health Administration (OSHA) inspected a worksite where Respondent was re-roofing a residential

house at 819 Park Place, Williamsport, PA 17701 (Worksite). (Tr. 25-26). Upon arriving at the Worksite that morning, OSHA Compliance Officer (CO) Robert Dervin observed workmen on ladder jack scaffolds, approximately 18 feet above ground level, without fall protection. Respondent's employees donned fall protection gear when they realized that OSHA was on site, and CO Dervin left to conduct an inspection elsewhere. He returned later that afternoon, and upon his arrival he observed four of Respondent's employees standing on the house's steep roof,[1] again not wearing fall protection. (Tr. 43). They were exposed to falls exceeding 20 feet. CO Dervin also observed another employee using a ladder that had a damaged bottom rung. Neither Mr. Barr nor anyone else in charge of safety was onsite to correct those unsafe conditions.

On February 5, 2019, OSHA issued to Respondent two citations containing a total of three items. Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.501(b)(13) for the employees working on the roof without fall protection with a proposed penalty of $3,978; Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.451(g)(1)(i) for the employees working on scaffolds without fall protection with a proposed penalty of $2,842; and Citation 2, Item 1 alleges an other-than-serious violation of 29 C.F.R. § 1926.1053(b)(16) for exposure to the damaged ladder with a zero proposed penalty. The total proposed penalty is $6,820. (Tr. 42-49; Exs. C-1 through C-2). Respondent filed a Notice of Contest dated February 21, 2019. On February 26, 2019, the Occupational Safety and Health Review Commission (Commission) docketed the matter as Docket No. 19-0258.

On March 21, 2019, the case was placed on the simplified proceedings calendar. The parties submitted evidence and witness testimony on July 25, 2019 at a trial conducted in

[1] CO Dervin testified that the steep roof had a 43-degree angle. (Tr. 43).

Harrisburg, PA. The Secretary submitted his Post-Hearing Brief (Post-Hr'g Br.) on August 27, 2019.[2] The primary issue is whether Respondent had constructive knowledge of the violative conditions, or whether, instead, the violations were the result of unpreventable employee misconduct.[3]

II. STIPULATED FACTS

The parties agreed to the following stipulated facts in their Joint Prehearing Statement, dated June 21, 2019:

1. Respondent is a sole proprietor doing business under the name Barr Construction.
2. On December 13, 2018, Respondent was performing residential roofing work at a residence at 819 Park Place, Williamsport, PA 17701.
3. In February 2015, OSHA and Respondent entered into an informal settlement agreement to resolve citations and penalties issued under Inspection 100023[3].
4. Under the terms of the informal settlement for Inspection 100023[3], Respondent agreed to accept a repeat violation of 29 C.F.R. § 1926.501(b)(11), based on employees not wearing fall protection on a roof of a building in Danville, PA.

(Tr. 15).

III. STIPULATED MATTERS OF LAW

The parties agreed to the following stipulated matters of law in their Joint Prehearing Statement, dated June 21, 2019:

> Under Commission precedent 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. *Southwestern Bell Tele. Co*., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

(Tr. 15-16).

[2] Respondent did not submit a Post-Hr'g Br.

[3] Respondent has not timely, or otherwise, raised an infeasibility or greater hazard defense. (*See* Joint Prehearing Statement (no mention); Tr. 128-132, 134-35).

IV. 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 Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). (Stipulated Facts (Stip.) ¶¶ 1-2; Tr. 86-87). 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.[4]

V. RELEVANT FACTS

Respondent is a sole proprietor doing business under the name Barr Construction. Respondent has been in business 36 years. Respondent's business handles general construction, "mostly outsides of homes, from the roof down," including roofing, spouting, siding, and windows. Respondent operates primarily in central PA, mostly in Lycoming County. (Tr. 86-87; Stip. 1).

Respondent started working at the Worksite on December 12, 2018. (Tr. 39, 88-89). On that morning, Mr. Barr gave the workers their instructions and held a toolbox talk with them. He then left the site for the day, before the workers set up their equipment to start their work. (Tr. 89).

[4] *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); *Slingluff v. OSHRC*, 425 F.3d 861, 866-67 (10th Cir. 2005) (the economic activity of construction affects interstate commerce). Barr Construction was a 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").

On December 12, 2018, OSHA's Wilkes-Barre Area Office received an online complaint about the lack of fall protection at the Worksite. (Tr. 24-25). The area office assigned CO Dervin to conduct an OSHA inspection. (Tr. 24). CO Dervin has 17 years' experience as a compliance officer, and he has conducted about 600 construction-industry inspections, including over a hundred residential roofing inspections. (Tr. 22-23).

A. *The December 13, 2018 OSHA inspection.*

On December 13, 2018, Respondent continued to perform residential roofing work at the Worksite. (Stip. 2). The job consisted of re-roofing the house. (Tr. 89-90). Respondent had eight employees at the Worksite: Messrs. Ronald Crow, Kevin Denemon, Robert Klopp, Kyle Myers, Randy Payton, Gary Dowdy, Jeremy Hamm, and a worker named Caesar whose last name Mr. Barr did not know. (Tr. 98-101). Of those eight employees, three (Messrs. Caesar [first name only], Dowdy, and Hamm) were hired on December 11, 2018 just for this job. (Tr. 92, 99-101, 106-07; Ex. R-6).

At trial, Mr. Barr testified that he returned to the Worksite early on the morning of December 13, 2018. He said he told the workers to make sure that they were "OSHA-compliant," and again left before work started. (Tr. 90). Mr. Barr further testified that he later returned to the Worksite that day "probably 4:00 [p.m.]" after the job shut down for the day and "[e]verybody was gone."[5] (Tr. 90-91).

[5] Whether Mr. Barr visited the Worksite on the morning of December 13, 2018 is in dispute because CO Dervin noted in his record of a January 3, 2019 telephone conversation with Mr. Barr that Mr. Barr told him that he did not visit the Worksite that day. The Court finds that Mr. Barr was not at the Worksite on the morning of December 13, 2018. No one told CO Dervin during the OSHA inspection that Mr. Barr had been at the Worksite that morning. There is no evidence corroborating that he was there. CO Dervin's record of the January 3, 2019 telephone conversation clearly states Mr. Barr told him that he was not at the Worksite on the day of the OSHA inspection. The Court finds CO Dervin's testimony recounting that Mr. Barr told him that he was not at the Worksite that day entirely credible based upon the Court's observations of his demeanor during his testimony. CO Dervin's testimony was clear, precise and confidently conveyed. His body mannerisms, eye contact, and speech reflected that he was telling the truth when he testified.

Mr. Barr did not designate any employee on either December 12 or December 13, 2018 as a foreman or delegate to any of them the task of ensuring that the employees were using fall protection. (Tr. 39-40, 95-96).

CO Dervin arrived at the Worksite at about 10:45 a.m., December 13, 2018. (Tr. 25, 34). CO Dervin testified that he observed and photographed three workers, including two workers later identified as Messrs. Hamm and Payton, on ladder jack scaffolding. They were not wearing fall protection equipment. (Tr. 27-30, 116-18; Exs. C-2, at 5, C-3, at 1-3). CO Dervin estimated that the employees were working about 18 feet above ground level. (Tr. 30-32, 45; Exs. C-1, at 7, C-3, at 2).

CO Dervin asked one of the workers who was in charge, and he was told that he needed to talk to "the boss, Mike." (Tr. 26). The worker gave CO Dervin a telephone number for the "boss", Mike, and CO Dervin called that number and left a message. (Tr. 26, 50). Around that time, the workers came down from the scaffold, went to the job trailer, and donned personal fall protection equipment. (Tr. 27, 32-33, 52; Exs. C-5 through C-6).

At about 11:45 a.m., CO Dervin left the Worksite to conduct an unrelated inspection elsewhere at the direction, by telephone, of Assistant Area Director (AAD) Sarah Carle. (Tr. 33-34). He returned to this Worksite at about 2:00 p.m. that same afternoon. (Tr. 35). Upon his arrival, CO Dervin observed four workers on the roof with no fall protection equipment. (Tr. 35-36, 53). He took photographs of the four workers,[6] which show them on the roof without fall protection. (Tr. 36-37, 43; Exs. C-2, at 2, C-3, at 9-10). CO Dervin estimated that the distance from the roof's eave[7] to the ground below, based on the number of rungs on a ladder that the

[6] These four workers included Respondent's employees: Messrs. Crow, Payton, and Hamm. The fourth worker is unidentified by name. (Tr. 36-37, 119; Ex. C-3, at 9).
[7] CO Dervin testified that a roof's eave is "the lowest edge of the roof, primarily where you would put the gutters or whatnot." (Tr. 44).

workers had set up against the house, was about 20 feet. (Tr. 44). CO Dervin also observed and photographed an unidentified employee using the ladder in question at a time when the bottom rung was bent. He testified that the OSHA standard required Respondent to take the ladder "out of service until it's been repaired or --." (Tr. 45-47; Exs. C-2, at 6, C-3, at 10-11). He did not see any guardrails or safety net systems in use at the Worksite. (Tr. 44). CO Dervin remained at the Worksite for a few minutes and left after taking some photographs. (Tr. 38; Ex. C-3, at 9-11).

On December 14, 2018, some of Respondent's employees who had worked on the roof the day before admitted to Mr. Barr that they had not worn fall protection on December 13, 2018. Mr. Barr testified that his employees told him: "We weren't harnessed off." (Tr. 92, 115-16).

CO Dervin spoke with Mr. Barr by telephone on January 3, 2019. (Tr. 38-41, 56; Ex. C-4). CO Dervin noted in his handwritten notes of the conversation that Mr. Barr told him "[h]e was not on Job Site Thurs[day] INSPECTION DATE, 12/13-[.]"[8] During that conversation, Mr. Barr told CO Dervin that "all guys on that site were his EEs [employees] (5 + 3 new guys hire for couple days)." He also said no foreman was at the worksite, and that no one was in charge in his absence because "[h]e's had issues with the guys listening to foremen in the past."[9] (Tr. 39-40, 95-96; Exs. C-2, at 2, C-4). Mr. Barr also told him that he "[g]uessed reasons guys not wearing fall protection at time of inspection, they can't stand wearing it." (Tr. 40-41, 96; Exs. C-2, at 2, C-4). At trial, Respondent testified that he "absolutely" knew that workers did not like to wear fall protection. (Tr. 96).

OSHA issued a Citation and Notification of Penalty to Respondent on February 5, 2019. (Tr. 41-42; Exs. C-1 through C-2). Citation 1, Item 1 and Citation 2, Item 1 pertained to

[8] CO Dervin also testified that Mr. Barr told him on January 3, 2019 that he was not at the Worksite on December 13, 2018. (Tr. 39).
[9] Mr. Barr admitted that there was no foreman at the Worksite. (Tr. 95-96).

violations observed by CO Dervin during the afternoon of December 13, 2018. (Tr. 42-43). Citation 1, Item 2 pertained to observations made by CO Dervin during the morning. (Tr. 45).

B. Respondent's enforcement of company safety rules.

At trial, Respondent introduced documents, dated March 13, 2018, and December 11, 2018, to show that he had a work rule requiring that fall protection be worn when work is performed at heights above six feet. (Ex. R-1).

Mr. Barr testified that on March 4, 2019 he suspended three of the employees who had been atop the roof without fall protection, Messrs. Klopp, Payton, and Crow, for the month of March 2019.[10] (Tr. 99; Ex. R-4). He said he would have suspended the others as well, but that they were no longer in his employ at that time. (Tr. 99-100). Mr. Barr also testified that the only previous time he had "probably" suspended anyone was "after the 2014 violation, because I don't believe we had any violations since then." (Tr. 114).

C. Respondent's OSHA violation history.

Prior to the events at issue here, OSHA had cited Respondent at least five times for violating safety standards, dating back to 2011. (Tr. 62, 87-88; Ex. C-6, at 7). CO Russell White testified that he inspected two of Respondent's worksites, once in 2011 at Montoursville, PA and once in 2014 at Danville, PA.[11] Both were commercial roofing jobs. OSHA's Wilkes-Barre Area Office issued to Respondent fall protection citations following each of CO White's two inspections. (Tr. 59-61, 68; Ex. C-6 [pertaining to the Danville, PA inspection conducted by CO White and the past citation underlying its repeat citation that occurred at State College, PA conducted by a CO other than CO White]).

[10] Mr. Barr testified that the last working day for the job at the Worksite was December 14, 2018. He also said Respondent did not perform roofing work during the months of January through February. (Tr. 92-93).
[11] CO White has served as a compliance officer at OSHA's Wilkes-Barre, PA office for more than 18 years. He has conducted more than 800 inspections, with more than one hundred involving residential construction. (Tr. 57-58).

Exhibit C-6 is the Citation and Notification of Penalty for CO White's OSHA Inspection No. 1000233 conducted on October 16, 2014 at 49 Woodbine Lane, Danville, PA 17821. (Tr. 61; Ex. C-6). During that inspection, CO White observed nine workers on a steep roof, not wearing fall protection. (Tr. 62-63). Mr. Barr was at the worksite during the inspection, and he told CO White that the workers were supposed to be using a safety monitor. (Tr. 63-64). Use of a safety monitor, however, was not a compliant form of fall protection, given the roof's steep pitch. (Tr. 64). OSHA cited Respondent for a repeat violation of 29 C.F.R. § 1926.501(b)(11), which requires the use of fall protection when working on steep roofs. The predicate citation for the repeat characterization was issued by the Harrisburg, PA Area Office under OSHA inspection no. 116215658 for a violation of § 1926.501(b)(11) at a worksite in State College, PA. That citation became a final order of the Commission in August 2011. (Tr. 64, 81; Ex. C-6, at 7). Respondent accepted a repeat violation for Inspection 1000233 through an informal settlement agreement with OSHA, dated February 10, 2015. (Tr. 74-75; Ex. C-5; Stips. 3-4).

OSHA's Area Director (AD) for the Wilkes-Barre area office, Mark Lee Stelmack,[12] testified that he had spoken with Mr. Barr about fall protection issues during two or three informal conferences prior to the events at issue here; including an informal conference that occurred in February 2015. (Tr. 73-78). Mr. Stelmack also spoke with Mr. Barr over the telephone on various occasions when Mr. Barr called him with questions about fall protection requirements.[13] (Tr. 77-78). These discussions also dealt with getting employees to comply with fall protection requirements. AD Stelmack told Mr. Barr that he needed to have a competent person on site to do daily inspections of the jobsite to ensure compliance and make sure safety requirements were being communicated, met and enforced. (Tr. 79-84).

[12] AD Stelmack has served as the AD for the Wilkes-Barre, PA area office for about 11 years. (Tr. 72-73).
[13] At the trial, Mr. Barr acknowledged that he and AD Stelmack "have talked a lot." (Tr. 82).

VI. DISCUSSION

Under Commission precedent and as stipulated by the parties, 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 (5th Cir. 2001). The evidence shows that the Secretary has satisfied all these requirements here. Additionally, Respondent's affirmative defense of unpreventable employee misconduct fails because Respondent did not adequately monitor his worksite to ensure compliance with OSHA safety requirements.

A. The cited standards applied to Respondent's Worksite.

The citations' three items allege violations of construction-industry standards. (Ex. C-1). Mr. Barr testified that Respondent is engaged in the general construction business, "from the roof down," and that its work crew at the Worksite was re-roofing a house. (Tr. 87, 90). Residential roofing is a quintessential construction-industry activity. *See* 29 C.F.R. § 1926.32(g) (defining construction work to include work for "alteration and/or repair"); *Daniel Crowe Roof Repair*, 23 BNA OSHC 2001 (No. 10-2090, 2011) (ALJ) (finding that roof repair qualifies as construction work under § 1926.32(g)). Therefore, the cited standards applied to the Worksite at issue. (Sec'y Post-Hr'g Br., at 7).

B. Respondent violated the cited standards.

Most of the facts attested to at trial by CO Dervin that underly the citations' items are not in dispute. During the trial, Mr. Barr stated that he did not "disagree on the record of anything that you [CO Dervin] said [at trial] okay?" (Tr. 51).

1. Respondent violated 29 C.F.R. § 1926.501(b)(13) (Citation 1, Item 1).

Respondent violated 29 C.F.R. § 1926.501(b)(13) by allowing his employees to engage in residential roofing activities more than 6 feet above ground level without the use of appropriate fall protection. (Ex. C-1, at 6). The cited standard provides:

> Residential construction. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

29 C.F.R. § 1926.501(b)(13).

On the afternoon of December 13, 2018, CO Dervin observed four of Respondent's employees on the roof of a residence without any type of fall protection. (Tr. 35-37; Ex. C-3, at 9). Mr. Barr confirmed at trial that the workers were re-roofing the house, which is a "residential construction activity" within the meaning of the standard. (Tr. 89-90). *See* 29 C.F.R. § 1926.500(b) (defining "roofing work"). CO Dervin took photographs of the workers, and the photographs plainly show that the four workers did not have fall protection and were more than 6 feet above and lower level. (Ex. C-3, at 9-10). CO Dervin estimated that the distance from the roof's edge to the ground below was about 20 feet, based on the number of rungs on a ladder that the workers had set up against the house. (Tr. 44). Based upon this evidence, Respondent violated § 1926.501(b)(13) in the manner alleged. (Sec'y Post-Hr'g Br., at 7-8).

2. Respondent violated 29 C.F.R. § 1926.451(g)(1)(i) (Citation 1, Item 2).

29 C.F.R. § 1926.451(g)(1)(i) requires employees to use personal fall arrest systems when working on ladder jack scaffolds more than 10 feet above a lower level. Citation 1, Item 2 alleges that Respondent violated 29 C.F.R. § 1926.451(g)(1)(i) by permitting employees to work

about 18 feet above ground level on two ladder jack scaffolds without personal fall arrest equipment, with a proposed penalty of $2,842. (Ex. C-1, at 7).

The evidence establishes the alleged violation. CO Dervin testified that he observed three workers on ladder jack scaffolding with no personal fall arrest equipment. (Tr. 27-30). He also took photographs of the workers, including Messrs. Payton and Hamm, which show them on the scaffolding without personal fall arrest equipment. (Ex.C-3, at 2-3). Counting the rungs of a nearby ladder, CO Dervin estimated that the employees were about 18 feet above ground level. (Tr. 45). These uncontradicted facts establish a violation of 29 C.F.R. § 1926.451(g)(1)(i). (Sec'y Post-Hr'g Br., at 8-9).

3. Respondent violated 29 C.F.R. § 1926.1053(b)(16) (Citation 2, Item 1).

29 C.F.R. § 1926.1053(b)(16) provides:

> Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired.

Citation 2, Item 1 alleges that Respondent violated this standard by permitting its employees to use a 16-foot extension ladder with a bottom bent rung. (Ex. C-1, at 8). CO Dervin observed and photographed an employee using the ladder in question at a time when the bottom rung was bent. (Tr. 46; Ex. C-3, at 10-11). According to CO Dervin, the damaged rung required that the ladder be taken out of service until it could be repaired. (Tr. 47). These facts prove the physical conditions that establish a violation of 29 C.F.R. § 1926.1053(b)(16). (Sec'y Post-Hr'g Br., at 9).

C. Respondent's Employees were exposed to the cited conditions.

The Secretary has also established employee exposure for all three items. The photographs that CO Dervin took during the inspection confirm his eyewitness testimony that

employees were on the scaffold and roof without any fall protection. (Ex. C-3, at 2-3, 10). The photograph at Exhibit C-3, at 10, shows an employee using the damaged ladder. Therefore, this element of the Secretary's *prima facie* case has been established. *See S & G Packaging Co.*, 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001)(exposure element is established by actual exposure to hazard). (Sec'y Post-Hr'g Br., at 9).

D. Respondent had constructive knowledge of the violative conditions.

The Secretary also established that Respondent had constructive knowledge of the violative conditions.[14] The conditions were in plain view of anyone who was onsite at the Worksite or in the vicinity, as evidenced by the photographs that CO Dervin took during the inspection. Mr. Barr was not at the Worksite at any time while work was being performed on December 13, 2018, and he left no one in charge of safety in his absence. A reasonably diligent employer with Respondent's long history of fall protection violations would have left someone in charge at the Worksite who could have ensured that employees used fall protection, or who could have reported back to Mr. Barr in the event that employees refused to comply with fall protection requirements. By failing to do so, Respondent did not take all reasonable steps to protect its workers from falls. In short, Respondent "may not hide behind [its] lack of knowledge concerning [its employees'] dangerous working practices." *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1247 (8th Cir. 1978).

> To meet [his] burden of establishing employer knowledge, the Secretary must show that the cited employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition. (citations omitted) Reasonable diligence requires the formulation and implementation of adequate work rules and training programs to ensure that work is safe, as well as adequate supervision of employees. (citations omitted) Reasonable diligence also requires an employer to inspect the work

[14] Mr. Barr testified that he had no actual knowledge of the misconduct that occurred at the Worksite on December 13, 2018. (Tr. 110-12). He said he was aware that the bottom rung of Respondent's ladders bend in the middle and "wrecks many of our ladders a year." He noted that the ladder at issue in Citation 2, Item 1 was "out of commission right now." (Tr. 110-11).

> area, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations. (citation omitted).

N & N Contractors, Inc., 18 BNA OSHC 2121, 2122-23 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001). "Effective safety enforcement requires a diligent effort to discover and discourage violations of safety rules by employees." *Paul Betty d/b/a Betty Bros.*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981).

Here, Respondent did not make a diligent effort to discover violations of fall protection requirements. Mr. Barr left the work site on the morning of December 12, 2018 – the morning before the inspection – before the workers set up their equipment for the workday. (Tr. 89). Although he testified that he did the same thing the morning of the inspection, the Court has found otherwise.[15] (Tr. 90). Mr. Barr did not designate any employee as a foreman or delegate to any of them the task of ensuring that the employees were using fall protection at the Worksite. (Tr. 39-40, 95-96, 134). This even though Mr. Barr knew, with absolute certainty from 36 years of experience, that his employees did not like to wear fall protection equipment. (Tr. 87, 96). Under these circumstances, it is hardly surprising that all the workers atop the roof at the Worksite chose to work without fall protection. "Where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule." *GEM Indus., Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996), *aff'd*, 149 F.3d 1183 (6th Cir. 1998). The fact that the workers violated fall protection requirements in the afternoon, even after CO Dervin visited the site in the morning, is further evidence that Respondent's employees were not concerned about compliance and discipline.

[15] See n. 5, above.

This is not to say that every small employer must constantly monitor its employees in order to comply with the OSH Act. Monitoring efforts must be reasonable under the circumstances. If an employer has little or no history of OSHA violations and has an audit system in place that provides for regular safety inspections, that employer might be doing enough under the circumstances to discover violations. *See*, *e.g.*, *Stahl Roofing, Inc.*, 19 BNA OSHC 2179 (Nos. 00-1268 & 00-1637, 2003). But where an employer has an extensive OSHA history, as here, and knows his employees are prone to disregard fall protection safety rules, that employer must redouble its efforts at compliance before those efforts may be deemed reasonable. Increased monitoring by management is a necessity under such circumstances.

Hackensack Steel Corp., 20 BNA OSHC 1387 (No. 97-0755, 2003), illustrates this point. OSHA cited Hackensack Steel Corp. for fall protection and hardhat violations at a construction worksite where a CO observed employees working 43 feet above ground level without the necessary protective equipment. *Id*., at 1389-90. Hackensack Steel Corp. had been cited six previous times for fall protection violations, and eight previous times for hardhat violations. *Id.,* at 1390. The onsite foreman was busy with other tasks and did not see the employees working without the necessary protective equipment. *Id.* at 1389. The Commission found that Hackensack Steel Corp. had constructive knowledge, reasoning in part:

> Under the circumstances and given Hackensack's lengthy history of OSHA citations for failure to use safety belts and hardhats . . . we believe that the foreman should have done more to discover safety violations than he did. This is not to suggest that he had to monitor the [workers] the entire time they were on the steel. However, we find that it is reasonable to expect him to have checked them from time-to-time or to direct another employee – such as the signalman, who was in visual contact with the [workers] – to apprise him of the situation.

Id., at 1390, 1394 ("As we have already noted, given its long history of hardhat violations, Hackensack was sufficiently alerted to the need for increased monitoring of its employees to prevent future violations.").

At least Hackensack Steel Corp. had a foreman at its worksite, which cannot be said of Respondent here. By its own count, Respondent had been cited five previous times for fall protection violations, and Mr. Barr was fully aware that employees did not like to wear fall protection equipment. (Tr. 88, 96). Given its lengthy OSHA violation history, including a repeat citation in 2015, Respondent should have put someone at the Worksite in charge of safety at times when Mr. Barr was absent from the site. (Ex. C-6). This is especially so because three of the workers, including Mr. Hamm photographed on the roof without any fall protection, had just been hired on December 11, 2018 for this roofing job only three days before the OSHA inspection. (Tr. 92, 101; Ex. C-3, at 9). Respondent's lack of reasonable diligence in this regard compels and justifies a Court finding that Respondent had constructive knowledge of all three violations. (Sec'y Post-Hr'g Br., at 10-12).

E. Respondent has not established the employee misconduct defense.

At trial, Respondent asserted the affirmative defense of unpreventable employee misconduct. (Tr. 131-35). An employer who raises that defense must show, among other things, that he has taken steps to discover violations and has enforced its work rules. *See Hackensack Steel Corp.*, 20 BNA OSHC at 1391-92. "Establishing adequate procedures for monitoring employee conduct for compliance with work rules is a critical part of any employer effort to eliminate hazards. It is not enough that an employer has developed an exemplary safety program on paper." *Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2194, 1997). As discussed above, Respondent had constructive knowledge of the violative conditions on December 13,

2018, because it did not make a diligent effort to discover those violations, and thus did not effectively implement its safety program.

At trial, Respondent introduced evidence to show that he suspended, in March 2019, three of the workers who were violating safety rules on December 13, 2018. (Tr. 92-95, 113; Ex. R-4). Mr. Barr testified that the other five workers were no longer in his employ. (Tr. 101). Yet Mr. Barr also testified that the only prior suspension he had "probably" meted out was following the 2014 violation, which strongly suggests that he only suspends employees after OSHA cites Respondent. (Tr. 113-14). *Cf. Niagara Mohawk Power Corp.*, 7 BNA OSHC 1447, 1450 (No. 76-2414, 1979) ("Safety instructions coupled with post-citation disciplinary measures, without more, are not enough to show that the employer adequately supervised its foreman about OSHA safety requirements."). In any event, disciplinary measures of this sort are not an adequate substitute for effective monitoring to ensure that violations do not occur in the first place. *See Am. Sterilizer*, 18 BNA OSHC at 1087 ("[I]n the absence of evidence that the employer has attempted to discover violations of its work rules, we must conclude that the employer could not have enforced its work rules effectively.") (internal quotation marks and citation omitted). Based on Respondent's lack of effective monitoring, it cannot establish unpreventable employee misconduct. (Sec'y Post-Hr'g Br., at 13-14).

Therefore, Respondent's employee misconduct defense fails.

F. Citation 1, Items 1 and 2, are serious.

OSHA properly characterized Respondent's violations of 29 C.F.R.§ 1926.501(b)(13) and 29 C.F.R. § 1926.451(g)(1)(i) as "serious" within the meaning of section 17(k) of the OSH Act. 29 U.S.C. § 666(k) (violation is serious if "there is a substantial probability that death or serious physical harm could result" from hazardous condition or exposure). 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). There is a substantial probability of serious injury or death from a fall of 18 feet or more. *See Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1107 (No. 92-424, 1994). Therefore, the Court affirms these two violations as serious.[16] (Sec'y Post-Hr'g Br., at 14).

G. The Court assesses the proposed penalties.

The Court assesses the proposed penalties of $3,978 for Citation 1, Item 1 and $2,842 for Citation 1, Item 2 given the dangerousness of the fall hazards at issue and Respondent's history of violations.[17] (Tr. 47-49; Ex. C-1).

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). A 70 percent reduction was made to the gravity-based penalty of $13,260 for Citation 1, Item 1 and a 70 percent reduction was made to the gravity-based penalty of $9,472 for Citation 1, Item 2 because of Respondent's small size. (Tr. 48-49; Ex. C-2 at 1, 4).

Here, employees were exposed to fall hazards ranging from 18 feet to over 20 feet. A fall could have easily killed or badly injured one of them. Mr. Barr pointed out that none of his employees has fallen off a roof in 36 years, but as the Commission has noted, "a favorable safety record can be a matter of good fortune rather than an indication of an effectively enforced safety

[16] The Court also finds that the Secretary has properly characterized Citation 2, Item 1 as Other-than-Serious.
[17] No penalty was proposed for the Other-than-Serious Citation 2, Item 1. (Tr. 47; Ex. C-1, at 8).

program." (Tr. 136). *See Stuttgart Machine Works, Inc.*, 9 BNA OSHC 1366, 1369 (No. 77-3021, 1981). That is the case here. Prior to the events at issue, Respondent had already been cited for a repeat fall protection violation. (Ex. C-5). The Court agrees with the Secretary that the proposed penalties are the minimum necessary to bring Respondent into compliance. (Sec'y Post-Hr'g Br., at 14-15).

VII. 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.

VIII. 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)(13) is **AFFIRMED** and a penalty of $3,978 is **ASSESSED**,
2) Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.451(g)(1)(i) is **AFFIRMED** and a penalty of $2,842 is **ASSESSED,** and
3) Citation 2, Item 1, alleging an Other-than-Serious violation of 29 C.F.R. § 1926.1053(b)(16) is **AFFIRMED** and no penalty is **ASSESSED.**

SO ORDERED.

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

Date: November 18, 2019
Washington, D.C.