



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

SECRETARY OF LABOR,

Complainant,

v.

TRINITY SOLAR, LLC as successor to
TRINITY SOLAR, INC.,

Respondent.

OSHRC DOCKET NO. 23-0666

APPEARANCES:

Jordan Laris Cohen, Esq.
U.S. Dept. of Labor, Office of the Solicitor
New York, New York
For the Secretary

Richard B. Stone, Esq.
General Counsel, Trinity Solar, LLC
Joshua S. Fischer, Esq.
Associate General Counsel, Trinity Solar, LLC
For Respondent

BEFORE:

Covette Rooney
Chief Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act).

Background

On November 23, 2022, employees of Trinity Solar LLC, as successor to Trinity Solar Inc. (Trinity or Respondent) installed solar panels on a residence at 44 Kimball Terrace, Yonkers, New York (Worksite or Kimball Terrace worksite). An Occupational Safety and Health Administration (OSHA) compliance officer inspected the Worksite that day. Pursuant to the inspection, OSHA issued a Citation and Notification of Penalty on April 13, 2023 (Citation). The Citation alleged two violations of OSHA's construction standard: one serious violation of 29 C.F.R. § 1926.100(a) for lack of head protection while working below solar panel installers, and one repeat violation of 29 C.F.R. § 1926.501(b)(13) for working on a roof 25 feet above ground without fall protection. The Citation included a total penalty of \$98,216 for the two violations. Respondent filed a timely Notice of Contest (NOC) on April 25, 2023

The initial Complaint was filed by the Secretary on May 23, 2023.¹ Respondent filed its Answer on May 31, 2023.

On November 21, 2023, Respondent filed an unopposed Notice of Partial Withdrawal of Notice of Contest (Withdrawal of NOC) in which Respondent withdrew its NOC with respect to all aspects of the alleged violations, except the proposed penalty amount. As set forth in the undersigned's November 22, 2023 Order, the only remaining issue to be litigated at the hearing would be the reasonableness of the Citation's proposed penalties.

On November 27, 2023, the undersigned granted Secretary's Unopposed Motion to Amend Citation and Complaint to correct the Respondent's captioned name.²

¹ On November 27, 2023, the Secretary filed the amended Complaint, which in addition to correcting the captioned name of the Respondent, also modified the violation description for Citation 1, Item 1 to insert the designation of the regulation, "29 CFR § 1926.100(a)," that was inadvertently omitted in the original citation. The Citation was not changed in any other respect. Respondent did not file an amended Answer.

² The Respondent had been previously captioned as "Trinity Heating & Air, Inc., dba Trinity Solar." Also, see Stipulation 1 set forth below.

On January 17, 2024, a one-day hearing was held. Four witnesses testified: Austin Tyler, Crew Leader for Trinity; Peter West, Assistant Area Director, OSHA; Kenneth Rucki, Director of Safety for Trinity, and William Condit, Executive Vice-President of Trinity.

Issue

The sole issue in dispute is the amount of penalty to be assessed for the two citation items. Respondent stipulated to liability for the cited violations in its Withdrawal of NOC. Respondent offers arguments regarding the Secretary's penalty adjustments for gravity, history, and, especially, good faith. Respondent asks the undersigned to lower the \$98,216 total penalty to \$20,000. (R. Br. 20).

For the reasons set forth below, the undersigned agrees with the Secretary's penalty assessments with respect to history, gravity, and size. With respect to good faith, the undersigned finds a small penalty adjustment is merited and assesses a total penalty of \$88,394.

Jurisdiction

Based upon the record, the undersigned finds Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5). (Stips. 1, 2, 7). The undersigned further finds the Commission has jurisdiction over the parties and subject matter in this case.

Stipulations

In their Joint Pre-Hearing Statement, the parties stipulated to the following:

- a. The respondent, Trinity Solar, LLC as successor to Trinity Solar, Inc., a limited liability company organized under laws of the State of New Jersey and doing business in the State of New Jersey, maintaining its principal office and place of business at 2211 Allenwood Road, Wall, New Jersey 07719, is and at all times hereinafter mentioned was engaged in solar panel installation. (Stip. 1).
- b. Many of the materials and supplies used by Respondent originated and/or were shipped from outside the State of New Jersey. (Stip. 2).
- c. The current employee headcount for Trinity Solar, across all offices and territories, is 3,041. (Stip. 3).
- d. For the year 2022, Trinity received in excess of \$10 million dollars in revenue. (Stip. 4).

- e. The pitch of the residential roof at the Trinity job site relevant to this matter was 34 degrees. (Stip. 5).
- f. The Respondent is and at all times relevant was engaged in solar panel installation work. (Stip. 6).
- g. Respondent was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and is an employer within the meaning of section 3(5) of the Act. (Stip. 7).
- h. Respondent is liable for Citation 1, Item 1, as issued, by virtue of Respondent's partial withdrawal of notice of contest and the Court's resulting order of November 22, 2023. (Stip. 8).
- i. Respondent is liable for Citation 2, Item 1, as issued, by virtue of Respondent's partial withdrawal of notice of contest and the Court's resulting order of November 22, 2023. (Stip. 9).
- j. The only question of law to be decided by this court in this matter is whether the penalty proposed by OSHA is reasonable and commensurate under Section 17 of the Act, taking into account: (1) the size of the business of the employer being charged, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's history of previous violations. (Stip. 10).

(Joint Pre-Hearing Statement, 7-8).

Findings Of Fact

The Company

William Condit is the Executive Vice-President for Trinity and has worked for the company since it was incorporated in 1994. (Tr. 216). Kenneth Rucki is the Director of Safety and has worked for Trinity for 30 years. (Tr. 158-59). Mr. Rucki reports directly to Mr. Condit. (Tr. 192).

In its early years Trinity was an HVAC company with about 10 employees; in 2004 it expanded into the installation of residential solar panels, growing to over 3,000 employees. (Tr. 176-77, 218; Stip. 3). In a typical month, across the entire company, between 1,000 and 1,600 solar roof systems are installed. (Tr. 219). Thus, on any given day there are roughly 500-700 installers at work. (Tr. 219). Trinity has multiple locations throughout the northeast, including Pennsylvania, New Jersey, New York, Connecticut, and Massachusetts. (Tr. 179, 182).

At the time of the inspection, Austin Tyler was a Crew Leader for Trinity. (Tr. 27, 35). He had worked for Trinity for about three years. (Tr. 27-28). As a Crew Leader, an employee gets a promotion with increased compensation, a company vehicle, a company phone, and additional

vacation days. (Tr. 196). Mr. Tyler had been a Crew Leader at about 10 worksites and before that, a crew member for more than 50 installations. (Tr. 27-28). A Crew Leader is in control of the worksite with the crew reporting to him and is also responsible for assigning tasks and ensuring safety rules are followed. (Tr. 28-29).

Worksite and Inspection

On November 23, 2022, Austin Tyler was the Crew Leader for Trinity at the Kimball Terrace worksite. (Tr. 27, 35). Including Mr. Tyler, there were seven employees on the crew that day. (Tr. 41-42). The day started at the warehouse at 6:30 a.m., where they loaded the truck with the solar panels and brackets, and then drove to the Kimball Terrace worksite, which was at least an hour away. (Tr. 39-40).

The Kimball Terrace job entailed the installation of 12 solar panels on the roof of a two-story residence. (Tr. 35, 56; CX-2; CX-3; CX-4). The roof's pitch was 34 degrees. (Stip. 5). Three members of the crew worked primarily from the roof's surface; the other three crew members and Mr. Tyler worked from the ground. (Tr. 42-43). At times during the workday, Mr. Tyler worked in the home's basement on electrical tasks. (Tr. 57).

At the beginning of the workday, all employees wore personal fall arrest harnesses. (Tr. 48). At some point, the three assigned to work from the ground took off their personal fall arrest harnesses. (Tr. 48). When Mr. Tyler saw the three ground crew members passing the solar panels up to the roof, prior to the CO's arrival, they were not wearing a harness nor a hardhat. (Tr. 48).

The installation of a solar panel includes preparing the roof by prying shingles, setting the feet for rails, laying the panel's rails, and installing the wiring. (Tr. 43). Tools used in this work included pry bars, hammers, and impact drills. (Tr. 43). The installation of the solar panels onto the roof began roughly halfway through the workday, after lunch. (Tr. 44).

Ladders were used to access the roof from the ground. (Tr 37; CX-3, p. 3). Each solar panel was carried up the ladder by a member of the ground crew and then passed to the worker on the roof. (Tr. 48, 55). Each solar panel weighed about 48 pounds. (Tr. 30). The three ground crew members took turns taking the panels up the ladder to the roof. (Tr. 48). Generally, once at the

roof level, roof crew member, Mr. Rivera, took the roof panel and then passed the panel to another roof crew member, Mr. Predmore, to carry the panel over the roof's peak to be installed on the other side. (Tr. 48-49, 54; Ex. C-3, pp. 5, 10-12). While the panels were being passed up from the ground, Mr. Tyler was often working in the home's basement with the electrical panel. (Tr. 57)

Respondent's safety rules include the requirement to wear a hardhat when there is a danger of falling objects and to use fall protection while on a roof. (Tr. 29-30). Mr. Tyler was aware of times when an employee had slipped on the roof at other worksites. (Tr. 30-31). Mr. Tyler had seen items such as screws, drills or other hand tools fall off the roof. (Tr. 30). Mr. Tyler admitted that the hardhats had not been removed from the truck prior to the CO's arrival, so the ground crew had been working all day without head protection as the roof crew worked above them. (Tr. 58-60).

The type of fall protection Respondent uses when installing solar panels is related to the roof's pitch. (Tr. 32, 95-97). If the pitch is greater than "26" a Y-strap configuration with a fixed-length rope that attaches at the front of the harness is used. (Tr. 31, 95-97). If the pitch is lesser, then a "shock pack"—a fall arrest system that attaches to the back, which decelerates and then stops the fall—is used. (Tr. 94-95).

OSHA's CO took photographs in the afternoon, when the crew had been working on the roof for a while. (Tr. 47). The photographs show three employees on the roof, two wearing fall arrest harnesses and the third employee not wearing a harness. (Tr. 52-53). The third employee in the photo was one of the ground crew, Mr. Cesar. (Tr. 53). The CO photographed Mr. Cesar carry a solar panel up the ladder, step up onto the roof, carry the panel to the roof's peak, and then walk back down the roof to the ladder. (Tr. 53-55, 58; CX-3, pp. 5-7, 10-11).

Mr. Cesar was not wearing a fall arrest harness nor using any other means of fall protection. (Tr. 53-55; CX-3, p. 5). Roof crew members Mr. Predmore and Mr. Rivera wore fall arrest harnesses but were not consistently tied off. (Tr. 59-60; CX-3, pp. 1-6, 9). Photographs show that roof crew member, Mr. Rivera, was not attached to an anchor point. (Tr. 52-53; CX-3, pp. 2-3).

Mr. Tyler could not recall when he had last walked around the house, to verify that everyone on the roof was using fall protection, prior to the CO's arrival. (Tr. 56-59). Mr. Tyler admitted the photographs show employees on the roof without the use of fall protection and employees on the ground working without hardhats. (Tr. 60).

Safety Program

Trinity had a safety program that included a written safety manual, training, onsite audits, and a disciplinary policy.³ (Tr. 180, 189; RX-1 through RX-6; RX-18A, RX-18D). Respondent provided safety equipment stored on its trucks. (Tr. 40, 198, 224). This included special ladders that might be used to move a panel to roof; either by a panel lift rail system or a panel grab system—there is no evidence these were used at the Kimball Terrace worksite. (Tr. 198).

Work Rules and Training

As a part of orientation, employees receive the company's safety manual, which includes the topics of job hazard analysis, fire protection, first aid, bloodborne pathogens, personal protective equipment, hearing conservation, hand and power tools, lockout/tagout, ladders, fall protection, trenching, heavy equipment, driver safety, and forklifts.⁴ (Tr. 189, 203; RX-1; RX-18D, pp. 2-3). A two-page pamphlet is also provided during orientation. (Tr. 197-98; RX-18A). This pamphlet summarizes safety rules for employees that work in the office and in the field. (RX-18A). The pamphlet sets forth basic safety rules with respect to office ergonomics, fall protection, hardhats, ladder safety, arc-fault gloves, driver safety, lifting techniques, and site cleaning. (RX-18A).

Employees are provided training during orientation through videos, PowerPoint presentations, and quizzes. (Tr. 62, 83, 92, 189; RX-1; RX-1D; RX-5; RX-18D). A 49-page slide

³ Respondent received recognition certificates for participating in the "Safe & Sound Week" in 2017 and 2018 (Tr. 203-04; RX-19D) and in the OSHA 2017 "National Safety Stand Down to Prevent Falls" at two Trinity locations. (Tr. 199, 203; RX-18C; RX-19A). The certificates were related to safety videos that Respondent had submitted to OSHA. (Tr. 199).

⁴ Instead of the entire safety manual, this exhibit includes just the manual's cover page and table of contents. (RX-18D, pp. 2-3). The manual is dated 9/30/14 and noted as provided by Safety Service Company. *Id.* In a separate exhibit, a 6-page section of the safety manual entitled, "Company Policy Statement and Program Components" sets forth an overview of the company's safety philosophy. (RX-1A; Tr. 77-78).

presentation on fall protection is included in orientation training. (Tr. 98, 203; RX-18D). A quiz is used to verify that the fall protection training has been understood. (Tr. 191; RX-1D). Additionally, fall protection training is generally refreshed once per quarter with all employees. (Tr. 89, 192; RX-4). Respondent's safety rules require employees to wear a hardhat when someone is working on the roof overhead and to be securely anchored with fall arrest equipment when working on a pitched roof. (CX-5; RX-1B).

The safety policy includes consequences for not following work rules. It states that a first offense results in a mandatory 3-day unpaid suspension and that a second offense results in mandatory employment termination. (Tr.190; CX-5; RX-1B). After the first safety offense, an employee is generally retrained and takes another quiz to ensure the training is understood. (Tr. 192). Mr. Tyler confirmed that the safety training he received at orientation included the information that suspension or termination could result from not complying with the safety policy. (Tr. 63, 75-79, 97-98, 106-07; RX-18D).

Audit Program

Trinity's safety program includes onsite safety observations that are documented on a Job-Site Safety Observation Form (audit form). (Tr. 162-63; CX-8). The safety officer in each region randomly conducts site safety observations at worksites to evaluate compliance with its safety requirements. (Tr. 161-63, 183, 208; CX-8). When a safety infraction is observed, work is stopped and a correction is requested. (Tr. 208-10). The local manager is also notified. (Tr. 183-84, 208-09). That manager then determines the nature of any disciplinary action that will be implemented. (Tr. 183-84). The safety department has no role in determining whether an employee will be disciplined or the nature of that discipline. (Tr. 184). Their role is to audit the worksites, document any violations, and obtain immediate compliance. (Tr. 162-63, 208-09). Mr. Rucki discusses the audits' safety infractions with Mr. Condit. (Tr. 192-93).

Safety Committee

Respondent's safety committee meets monthly and includes Mr. Rucki, a legal team representative, the safety coordinators from all regional offices, the regional vice presidents, and

other departments' representatives. (Tr. 221-24). Mr. Condit is the liaison between the safety committee and the executive team. (Tr. 221). Mr. Rucki leads the meeting during which the committee reviews the results of the prior month's safety audits. (Tr. 223). Additionally, both recordable and non-recordable injuries for the prior month are reviewed. (Tr. 223). The importance of fall protection is discussed at this meeting. (Tr. 223-24). When the committee noted an increase in violations of the hardhat policy, they changed the company's work rule, in November 2022, to require hardhats to always be worn, not just when there was an overhead hazard. (Tr. 225, 231)

Disciplinary Policy

Respondent's safety policy states that a first offense results in a mandatory 3-day unpaid suspension and that a second offense results in mandatory termination of employment. (Tr. 113, 190; CX-5; RX-1B). Crew leaders are notified when one of their crew members are disciplined. (Tr. 108).

However, Mr. Rucki admitted there was a time, between March 2020 and December 2022, when Trinity did not follow its disciplinary policy. (Tr. 190). Mr. Rucki questioned why there were repeat offenders in the safety audits. (Tr. 190). He found that discipline was not being implemented because Respondent thought it contributed to difficulty in hiring or retaining workers. (Tr. 190-91).

Discipline related to the November 23, 2022 Kimball Terrace worksite

After OSHA inspected the Kimball Terrace worksite, Trinity conducted an internal review and issued Mr. Tyler, as the worksite's Crew Leader, a Memorandum of Conversation (MOC) for not "monitoring the safety of the work site."⁵ (Tr. 79-80, 91, 195; RX-6). Mr. Tyler was required to go through refresher training and lost his position as Crew Leader. (Tr. 79-82, 195-97). Mr. Tyler was not eligible for promotion for a significant time thereafter. (Tr. 196). Further, the entire crew from the Worksite was required to take refresher training and the related quizzes. (Tr. 92,

⁵ The MOC is dated January 27, 2023, and signed by Mr. Tyler and Bryan Traver, Manager. The description states: "Receiving MOC for worksite that OSHA inspector showed up to on 11//23/22. Report stated not monitoring the safety of the work site with reported issues of individual on roof unharnessed and lack of head protection on two ground workers." (RX-6).

197). No one from the Kimball Terrace crew received further discipline, such as a suspension. (Tr. 108-11).

Evidence of lax application of disciplinary policy

A sample of Respondent's documented safety audits was submitted into evidence. (CX-8). These audits show certain individuals failed to follow the company's safety policy at multiple worksites. Other than the discipline for the crew at the Kimball Terrace worksite, Respondent provided no evidence of any discipline that had been implemented at previous worksites where the audits revealed safety rule violations.

For example, Tom Diubaldo was in violation of safety rules at multiple worksites. At an October 21, 2021 worksite, Trinity's safety auditor documented that Crew Leader Tom Diubaldo was working on the roof without being attached and was not properly wearing a fall protection harness. (Tr. 171-72; CX-8, p. 111). The audit form noted that when told to make a correction, Mr. Diubaldo responded by partially correcting his harness but continued to work without being attached. *Id.* For a December 8, 2020 worksite, the auditor noted that the same Crew Leader, Mr. Diubaldo, wore a harness but was not attached to a rope. (CX-8, p. 129). The December 8 audit form notes that Mr. Diubaldo was advised that he should never work without being attached to a rope anchored to the roof. *Id.* The form also noted that a formal disciplinary action would be written and shared with the manager. *Id.* There is no evidence in the record that the recommended disciplinary action was implemented. In addition, Mr. Diubaldo, either as Crew Leader or individually, was not following fall protection safety rules at worksites on the following dates: August 6, 2019 (CX-8, p. 142); December 11, 2020 (CX-8, p. 132); December 14, 2020 (CX-8, p. 127); May 18, 2021 (CX-8, p. 123); October 27, 2021 (CX-8, p. 109); August 2, 2022 (CX-8, pp. 85-86); August 12, 2022 (CX-8, pp. 83-84); and August 29, 2022 (CX-8, pp. 87-88). (Tr. 168-75). As of July 2023, Mr. Diubaldo still worked for Trinity. (Tr. 175).

In September 2022, just three months before the Kimball Terrace inspection, a Trinity safety auditor found Mr. Tyler's crew working without any installed fall protection. (Tr. 110). No one was terminated as a result and Mr. Tyler could not recall if anyone had been suspended because of

the September 2022 audit. (Tr. 111). Mr. Tyler stated that Trinity’s disciplinary policy was not enforced as written, it was enforced on a case-by-case basis depending on severity—he believed there was a three-strike rule. (Tr. 109, 113).

Cited Violations

To establish a violation of an OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff’d in relevant part*, 681 F.2d 69 (1st Cir. 1982) (*Astra*). Knowledge may be imputed to the employer “through its supervisory employee.” *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). The Secretary has the burden of proving its case by a preponderance of the evidence. *Astra*, 9 BNA OSHC at 2129.

Citation 1, Item 1

Respondent was cited for a serious violation of 29 C.F.R. § 1926.100(a), which states:

(a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The parties have stipulated that “Respondent is liable for Citation 1, Item 1, as issued, by virtue of Respondent’s partial withdrawal of notice of contest and the Court’s resulting order of November 22, 2023.” (Stip. 8). The undersigned sets forth the undisputed facts that support the prima facie elements for a violation of 29 C.F.R. § 1926.100(a).

Applicability, exposure, non-compliance, and employer knowledge are established.

Three employees worked on the ground below as their co-workers installed solar panels on the roof. (Tr. 57-60; CX-8, p.14). They were exposed to injury from falling items, such as, solar panels and tools. Hardhats were available at the Worksite. (Tr. 58-60). Mr. Tyler admitted the hardhats had not been worn by anyone at the worksite prior to the CO’s arrival. (Tr. 58-60). Mr. Tyler knew the employees were not wearing hardhats and knew it was company policy that

employees working on the ground were required to wear a hardhat as protection from objects falling from the roof overhead. (Tr. 29, 58-60). Thus, applicability, exposure, non-compliance, and employer knowledge are established.

Serious classification

Additionally, the Secretary classified this violation as serious. The Act states that “a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from” the violative condition. Section 17(k) of the Act; 29 U.S.C. § 666(k).

A serious characterization is appropriate when “a serious injury is the likely result should an accident occur.” *Pete Miller, Inc.*, 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000). Here, falling tools and solar panels could result in serious head injury. (Tr. 125).

Citation 1, Item 1 is affirmed as a serious violation. The assessed penalty is discussed below.

Citation 2, Item 1

Respondent was cited for a repeat violation of 29 CFR § 1926.501(b)(13):

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

The parties have stipulated that “Respondent is liable for Citation 2, Item 1, as issued, by virtue of Respondent’s partial withdrawal of notice of contest and the Court’s resulting order of November 22, 2023.” (Stip. 9). The undersigned sets forth the undisputed facts that support the prima facie elements for a violation of 29 C.F.R. § 1926.501(b)(13).

Applicability, exposure, non-compliance, and employer knowledge are established.

Three crew members were assigned to work from the roof of a two-story residence. The roof was about 25 feet above the ground and had a 34-degree pitch. (Tr. 139; Stip. 5). In addition to the three crew members assigned to work on the roof, one of the ground crew, Mr. Cesar, traversed the roof while carrying a 48-pound solar panel without the use of fall protection.

Photographs show two roof crew members wearing fall arrest harnesses; however, at least one member, Mr. Rivera, was not attached to an anchor point at all times. Respondent's onsite Crew Leader knew that ground crew member Mr. Cesar had removed his fall arrest harness earlier that day. Further, Mr. Cesar was in plain view when he was traversing the roof without fall protection.⁶ Thus, applicability, exposure, non-compliance, and employer knowledge are established.

Repeat classification

Citation 2, Item 1 was classified as a repeat violation of serious nature. A fall from 25 feet above ground can result in broken bones or death, thus it is serious in nature. (Tr. 139). *See generally, Pete Miller*, 19 BNA OSHC at 1258 (15-foot fall would likely result in serious injury). A violation may be deemed repeated "if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). A prima facie showing of substantial similarity is established by a final order of the Commission where the employer violated the same standard. *Id.*; *see also, Sec'y v. D.M. Sabia Co.*, 90 F.3d 854, 856 (3d Cir. 1996) (citing *Potlatch*).

The repeat citation issued here is based on a prior citation of 29 CFR § 1926.501(b)(13) from OSHA inspection 1566572, which became a final order on August 8, 2022. (Tr. 125, 129; CX-1, p. 9; CX-9, pp. 1-15). Because the prior citation was for the same standard that was violated here, substantial similarity is established.

Even though Respondent withdrew its notice of contest with respect to the repeat classification, it seems to argue that because the precedent violation was modified from serious to other-than-serious during settlement negotiations, it cannot be considered substantially similar to the current violation that is serious in nature. The undersigned rejects this argument. The basis for

⁶ *See A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) (constructive knowledge found where violative conditions in plain view); *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980) (an employer "must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed" and give "instructions to prevent exposure to unsafe conditions").

determining the validity of the repeated characterization is not based on the gravity or classification of the precedent violation. *See Austin Road Co.*, 8 BNA OSHC 1916, 1918 (No. 79-1158, 1980) (Commission finding that the determination of the precedent citation as nonserious did not preclude a repeat classification for the serious violation at issue). Further, Respondent presented no evidence there were disparate conditions between the current and precedent citation. *Potlatch Corp.*, 7 BNA OSHC at 1063 (employer may rebut prima facie showing of substantial similarity “by evidence of the disparate conditions and hazards associated with these violations of the same standard”).

The undersigned finds the repeat classification of Citation 2, Item 1 is supported.

Penalty Determination

The penalty amount is the sole contested issue. Respondent asserts that it deserves a good faith discount because it takes safety seriously and cooperated with OSHA during the inspection process. (R. Br. 13-17). Respondent also asks the undersigned to modify the penalty adjustments for gravity and history. (R. Br. 9-12).

OSHA’s penalty assessment

For Citation 1, Item 1, OSHA set forth a penalty of \$12,278. The statutory maximum for a serious citation was \$15,625. 88 Fed. Reg. 2210, 2220 (Jan. 13, 2023). In calculating the penalty, OSHA determined the gravity was moderate based upon the high severity of an injury from a falling object (i.e., a falling 48-pound solar panel) with a lesser probability of occurrence.⁷ (Tr. 124-25). In assessing the company’s history, OSHA looked at five years of inspection history and assessed a penalty increase based on two previous citations issued to Respondent. (Tr. 142-43). The first was inspection 1402691, which became a final order on September 5, 2019, through an informal settlement agreement. (CX-9, pp. 21-24). The second was inspection 1566572, which became a

⁷ OSHA uses their Field Operations Manual as a guide for the calculation of penalties. *See Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1392 (No. 97-0755, 2003) (the FOM’s instructions “are only a guide for OSHA personnel to promote efficiency and uniformity, are not binding on OSHA or the Commission, and do not create any substantive rights for employers”)

final order on August 8, 2022, through a stipulated settlement agreement. (CX-9, pp. 1-15). OSHA made no size adjustment as Respondent has over 3,000 employees. (Tr. 125, 142). OSHA provided no discount for good faith due to Respondent's prior citation history. (Tr. 131, 142-47).

With respect to Citation 2, Item 1, OSHA classified the violation as a repeat citation and proposed a penalty of \$85,938. The statutory maximum penalty for a repeat violation is \$156,259. 88 Fed. Reg. at 2220. The fall protection violation was determined to have high gravity based on the severity of the injury from a 25-foot fall and a high probability because of the slope of the roof, proximity of work to the edge, and the fact 12 heavy solar panels were handled throughout the day. (Tr. 139, 147, 150, 153, 155). OSHA made no adjustment to the penalty for size. (Tr. 125, 142). There was no good faith adjustment due to the repeat nature of the violation. (Tr. 130-32, 147). OSHA assessed a penalty increase for the Respondent's citation history, as discussed above. (Tr. 142-43).

Commission is the final arbiter of penalties.

It is well-settled the Commission "is the final arbiter of penalties . . ." *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994); *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH Act] places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits"), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. 29 U.S.C. 666(j). Gravity is generally the primary factor in the penalty assessment. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993) (*J.A. Jones*). An ALJ has the discretion to not provide a discount for good faith or prior history based on the established evidence and may determine the violation's gravity merits the maximum penalty. *See Bush & Burchett, Inc. v. Reich*, 117 F.3d 932, 940 (6th Cir. 1997) (citations omitted).

Employer size

There was no penalty adjustment for either citation item because a company with more than 250 employees does not qualify for a size reduction. (Tr. 125, 142). The undersigned finds it is appropriate to not provide an adjustment to the penalty for a company of over 3,000 employees.

Gravity is the primary factor in penalty assessment.

“The gravity of a particular violation [] depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.” *J. A. Jones*, 15 BNA OSHC at 2214 (citations omitted).

With respect to the gravity for Citation 2, Item 1,⁸ the fall protection violation, Respondent asserts that a high gravity rating is not merited because the evidence showed that only one employee was on the roof without fall protection and the other employees wore their personal fall arrest harnesses. (R. Br. 9-10). Respondent also asserts that a high gravity rating is not merited because of its “precautions against injury”—provision of training, onsite safety auditors, and equipment, such as, hardhats and personal fall arrest systems. (R. Br. 12). The undersigned disagrees.

The two cases cited by Respondent do not support its position. First, *Bandas Industries, Inc.*, a decision by an administrative law judge of the Federal Mine Safety and Health Review Commission (FMSHRC ALJ), addresses compliance requirements under the Federal Mine Safety Act, which are not applicable to a violation of the OSH Act. *See* No. 198-100-M, 1986 WL 221693 (FMSHRC ALJ, Nov. 12, 1986) (decision approving settlement agreement). The second case, *Benise-Dowling, Inc.*, is a decision where the ALJ found the gravity was moderate because a single employee was exposed once per month to a hazardous solution. 2011 WL 1496747, at *1 (No. 10-0449, 2011) (ALJ). Here, the gravity of injury was high, in part, because the employee was walking up a steep roof while carrying a 48-pound solar panel. The facts of *Benise* are not comparable to the facts here and thus the case is not persuasive. Further, decisions of administrative law judges

⁸ Respondent does not assert an argument regarding the gravity of Citation 1, Item 1.

are not precedential. *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (unreviewed portion of a judge's decision does not constitute precedent).

While Respondent's "precautions against injury" are important components of a safety program, they are to no avail if the employees do not utilize the equipment. The Crew Leader at the Kendall Terrace worksite knew that Mr. Cesar had removed his fall protection harness early in the day but took no action. (Tr. 48). The other employees on the roof wore their harnesses, but at least one was not always attached. (Tr. 52-54; CX-3, pp. 2-4). Further, the Crew Leader admitted that he couldn't really observe whether the roof crew was attached when he was working close to the home. (Tr. 69). Finally, carrying a 48-pound solar panel on a 34-degree pitch roof increases the likelihood a fall could occur. *See J. A. Jones*, 15 BNA OSHC at 2214 (citations omitted) (likelihood of injury affects gravity of violation).

Respondent asserts Mr. Cesar was only on the roof a short amount of time so he had minimal fall exposure. (R. Br. 10-11). There is no evidence in the record of the length of time Mr. Cesar was on the roof. Even so, for an evaluation of gravity, the duration of the exposure is considered in the context of all other factors including likelihood of injury. *See generally, Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2873, 1992) (rejecting employer's argument that brief duration made hazard less serious). When considered with the pitch of the roof and the weight of the solar panels, even a short exposure is of high gravity.

The undersigned finds a high gravity assessment for the fall protection violation is appropriate.

Employer's inspection history

OSHA reviewed five years of Respondent's inspection history. A penalty increase for history was applied based on two prior inspections. (Tr. 142-43). Respondent asserts two arguments as to why it was not appropriate to increase its penalty for this prior citation history.

Respondent first asserts that since it had not been previously cited for a violation related to head protection, the penalty should not have been increased for Citation 1, Item 1. Respondent's argument is rejected. For purposes of the penalty, the history adjustment is about the employer's

prior citation history generally, not whether it was repeatedly cited for the same standard. *Orion Constr., Inc.*, 18 BNA OSHC 1867, 1868 (No. 98-2014, 1999) ("penalty factor encompasses *all* of an employer's prior violations, not just those of the same standard") (emphasis in original).

Respondent also asserts that its prior citation history was too minimal to merit a penalty increase. (R. Br. 18). In particular, the 2022 citation item that was changed to other-than-serious during settlement negotiations should not be considered. (CX-9, p. 1). In support of the assertion that its history should be considered minimal, Respondent cites to *L&B Products Corp.*, No. 95-1721, 1998 WL 99285, **7, 50 (OSHR CALJ, Feb. 27, 1998) (*L&B*) and *In re: RJP Framing Inc.*, No. 13-R2D1-3729, 2015 WL 10058937 (Cal OSHA, June 30, 2015) (*RJP*). Respondent contends these cases support its assertion that, when evaluating an employer's inspection history, only prior citations of a serious nature can be considered. Both cases relied upon are inapt.

In *L&B*, the judge simply stated there was no evidence of serious, willful, or repeat violations in that employer's history. *L&B*, 1998 WL 99285, at *50. There was no discussion in that decision of whether an other-than-serious violation could be considered in the penalty adjustment for history. Further, *L&B* is not a precedential Commission decision.⁹

In *RJP*, California's safety regulations—which state that a “good” history rating applies when, in the prior three years, an employer had no serious, repeat or willful violations and less than one regulatory violation per 100 employees—were relied upon by the judge. *See RJP*, 2015 WL 10058937, at *6, n.10. California's safety regulations are not applicable here and there are no comparable federal OSHA regulations that set forth a particular method to establish a penalty adjustment based on an employer's history.

Respondent also asserts that its citation history must be viewed as a percentage of all of its worksites. However, Respondent cites no case law to support its assertion that the number of worksites an employer operates in a year should be considered when evaluating its citation history.

⁹ Decisions of administrative law judges are not precedential. *See Leone*, 3 BNA OSHC at 1981 (unreviewed part of judge's decision is not binding Commission precedent).

The undersigned finds that both prior citations can be considered to determine Respondent's overall citation history. Therefore, an increase in the penalty calculation for history is merited.

Good faith penalty factor

The Commission focuses on factors related to the employer's actions, including the employer's safety and health program and its commitment to assure safe working conditions, to determine whether an employer's overall efforts to comply with the Act and to minimize harm from any violation of the Act merit a good faith penalty discount. *Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013) (citations omitted); *see also, Ed Taylor Constr. Co.*, 15 BNA OSHC 1711, 1718 (No. 88-2463, 1992) (balancing "commendable measures" such as establishing a safety program with the "clearly inadequate" implementation of the program in denying good faith credit).¹⁰

Respondent asserts that a good faith reduction to the assessed penalty is merited because its safety program, commitment to job safety, cooperation during the OSHA inspection, and efforts to minimize harm merit a significant reduction for good faith.¹¹ (R. Br. 13-17; R. Reply Br. 2). Respondent asserts that the total penalty for both citation items should be \$20,000, instead of \$98,216 set forth in the issued Citation. (R. Br. 20).

An employer's written safety program is considered in the context of the employer's general approach to all safety matters and the program's mitigation of harm. For example, the Commission has not provided a good faith penalty reduction when the evidence shows an employer's overall attitude toward safety seems lax. *See Jesco Inc.*, 24 BNA OSHC 1076, 1080 (No. 10-0265, 2013) (finding that steps taken to lessen the probability of harm were insufficient to warrant a credit for

¹⁰ The Secretary cites several decisions of administrative law judges to support its argument for a good faith penalty adjustment. While these cases can be informative, they are not Commission precedent. *See Leone*, 3 BNA OSHC at 1981 (unreviewed part of judge's decision is not binding Commission precedent).

¹¹ Respondent relies heavily in its briefing on *J.C. Stucco & Stone, Inc.*, 26 BNA OSHC 1382 (Nos. 14-1558, 2016) (consolidated) for case law regarding penalty assessments. *J.C. Stucco* is a non-precedential decision of an administrative law judge. *See Leone*, 3 BNA OSHC at 1981. The undersigned finds *J.C. Stucco* informative to the extent that it relies on a significant number of precedential Commission decisions.

good faith); *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-475, 2007) (no good faith penalty reduction where superintendent failed to inspect bark pit and foreman had no knowledge of LOTO procedures); *Propellex Corp.*, 18 BNA OSHC 1677, 1685 (No. 96-0265, 1999) (“because Propellex supervisory personnel tolerated and participated in the violations for several weeks and because Propellex evinced a lax attitude toward the enforcement of safety rules and standards, we do not believe that a reduction for good faith is appropriate”).

In other cases, an employer’s attempts toward safety and compliance—even when imperfectly executed—have merited a good faith penalty reduction. *See Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1922-23 (No. 96-0593, 1999) (overall circumstances show the employer’s intent to be compliant where it requested an engineer’s approval of the shoring plan, even though it ultimately implemented a shoring plan that was not approved by a professional engineer); *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994) (Commission allowed good faith penalty reduction where employer attempted to move safety nets into position).

Further, even where the Commission affirms a violation as repeated or willful, it may still allow a penalty reduction for good faith. *See Pentecost Contracting Corp.*, 17 BNA OSHC 1953, 1956 (No. 92-3788, 1997) (citation omitted) (“Although we have found that Pentecost has not established sufficient good faith to negate a willful characterization, Pentecost’s increased safety efforts after the inspection, including the weekly safety meetings, are relevant indicators of good faith for the purpose of penalty determination.”); *Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890, 1894 (No. 92-3684, 1997), *aff’d per curiam*, 131 F.3d 1254 (8th Cir. 1997) (even though violation was willful, employer’s efforts during the inspection demonstrated good faith for penalty purposes); *C.N. Flagg & Co.*, 2 BNA OSHC 1195, 1197 (No. 1734, 1974), *aff’d*, 538 F.2d 308 (2d Cir. 1976) (unpublished) (distinguishing the general good faith of an employer from the willful actions of particular supervisors at the work site in question).

But in other instances, the Commission has declined to provide a penalty reduction where the violation was repeated or willful in nature. *See Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130-31 (No. 92-851, 1994) (fact that violations were repeated diminishes the effect of a good

safety program); *see also*, *Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2119 (No. 07-1578, 2012) (even though employer cooperated during the inspection, its lax safety attitude and the willful nature of violation negates any penalty reduction for good faith); *Gen. Motors Corp., CPCG Okla. City Plant*, 22 BNA OSHC 1019, 1048 (No. 91-2834E, 2007) (consolidated) (no credit for good faith when management tolerated and encouraged hazardous work practices related to willful violations).

Therefore, to determine whether a good faith penalty reduction is merited here, the Respondent's safety program must be considered as a whole. The undersigned finds the Commission's decision in *Compass Environmental Inc.* instructive for evaluating the Respondent's safety measures. 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) (finding good faith penalty reduction merited) *aff'd*, 663 F.3d 1164 (10th Cir. 2011) (*Compass*).

In *Compass*, a new employee working near an excavator on a construction site was fatally electrocuted when the excavator's boom contacted powerlines at the site. *Compass*, 23 BNA OSHC at 1134. The employer had scheduled the removal of the powerlines at the worksite for three days after the accident—the employer believed the excavator would not be in the area of the powerlines before that time. *Id.* Even though the other employees at the site had received powerline safety training, the new employee had not. *Id.* The employer was cited for a violation of a training standard and the Commission found that the lack of training in powerline hazards was directly related to the employee's death. *Id.*

Despite the lack of training for this employee, the Commission found the employer had “an extensive safety program including (1) a disciplinary program; (2) safety audits; (3) written safety quizzes; (4) daily tailgate safety meetings; and (5) training for all of its other employees who worked at the job site.” *Compass*, 23 BNA OSHC at 1137. The Commission also credited the employer's implementation of a new energy hazards training course after the accident. *Id.* Further, the Commission found the employer's plan to remove the powerline in anticipation of upcoming work showed an intent to protect workers, even though it had not been removed soon enough. *Id.*

Despite the occurrence of a fatality, the Commission applied a good faith discount that reduced the penalty from \$6,300 to \$5,500 (roughly 12%). *Id.*

In *Compass*, the Commission weighed the unsuccessful aspects of the employer's safety program with the employer's efforts to significantly improve their safety program and provided a discount despite the occurrence of the training-related fatality at the worksite. Here, while not fully successful, Respondent had in place several components of an adequate safety policy. Of particular note is the Respondent's in-house auditing program that documents safety compliance at its worksites. Nonetheless, despite having rules, training, and onsite audits in place, the Respondent did not have an effective means to enforce compliance with its rules. The safety department carried out its role in auditing the worksites, yet management did not consistently follow through with the disciplinary consequences set forth in the company's safety policy. Respondent acknowledged that it did not follow its written disciplinary policy. The only evidence of discipline is the discipline of Austin Tyler and retraining of the Kendall Terrace crew after the inspection.

In *Compass*, the Commission found that on balance a limited good faith reduction was merited when all factors were considered. *Compass*, 23 BNA OSHC at 1137 (reducing penalty from \$6,300 to \$5,500). Here, the Respondent's repeat violation of the same fall protection standard is balanced against their overall safety program. When viewed in its totality the Respondent has a good safety program, and in particular, the use of the on-site auditors to improve workplace safety compliance. However, the Respondent did not have a meaningful disciplinary policy to reinforce its safety training. This lack of enforcement of its safety rules allowed employees to continue violating the company's safety policy even after an on-site auditor observed a violation. When viewed as a whole, Respondent has made significant efforts toward its safety program, even if it has not been fully implemented.

Because there was not a consistent application of consequences to employees who were found in violation of Respondent's safety rules despite the efforts of the onsite auditors, Respondent's program does not merit a large discount for good faith. It certainly does not merit a reduction of the penalty by eighty percent as requested by the Respondent. (R. Br. 20). The

undersigned applies a ten percent good faith discount to the proposed penalty for the Respondent's attempts to implement an adequate safety policy, especially its onsite safety audits. The safety program, when considered in concert with the Respondent's generally cooperative attitude during the inspection and its willingness to accept liability for the cited violations, supports a minimal good faith discount. *See Nacirema Operating Co., Inc.*, 1 BNA OSHC 1001, 1002 (No. 4, 1972) ("Good faith should be determined by a review of the employer's own occupational safety and health program, its commitment to the objective of assuring safe and healthful working conditions and its cooperation with other persons and organizations" like OSHA.). Thus, the total penalties assessed are reduced to \$88,394.

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* Commission Rule 90(a). 29 C.F.R. § 2200.90(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing 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 § 1926.100(a) is AFFIRMED and a penalty of \$11,050 is ASSESSED.
2. Citation 2, Item 1, alleging a Repeat violation of 29 C.F.R. § 1926.501(b)(13) is AFFIRMED and a penalty of \$77,344 is ASSESSED.

/s/Covette Rooney
Covette Rooney
Chief Judge

Dated: May 24, 2024
Washington, D.C.