UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor,
Complainant,
v.
T & F Systems, Inc.,
Respondent.

Region 105
OSHRC Docket No. 10-0431
OSHA Inspection No. 313780603

Notice Of Docketing
Of Administrative Law Judge's Decision

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on 8/19/2011. The decision of the Judge will become a final order of the Commission on 9/19/2011 unless a Commission member directs review of the decision on or before that date.

Any party desiring review of the judge's decision by the Commission must file a petition for discretionary review. Any such petition shall be received by the Executive Secretary on or before 9/8/2011 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91. All further pleadings or communications regarding this case shall be addressed to the Executive Secretary with a copy to the DOL Solicitor at the address below.

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If Directed for Review by the Commission, then the Counsel for Appellate Litigation will represent the Department of Labor. If you have questions, please call me at (202) 606-5400.

Ray H Darling Jr DA

Date: August 19, 2011

Ray H. Darling, Jr.
Executive Secretary

This notice has been sent to:

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SECRETARY OF LABOR, Complainant, v. T&F SYSTEMS, INC., Respondent.	OSHRC Docket No. 10-0431

APPEARANCES:

Paul Spanos, Esquire, U.S. Department of Labor, Cleveland, Ohio
For the Secretary

John P. O'Neil, Esquire, Cleveland, Ohio
John J. Lasko, Jr., Esquire, Cleveland, Ohio
For the Respondent

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Health and Safety Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a work site of T&F Systems, Inc. ("Respondent" or "T&F") in Elyria, Ohio in November 2009. As a result, OSHA cited T&F for a willful violation of 29 C.F.R. § 1926.501(b)(10) and proposed a penalty of $35,000. T&F filed a timely notice of contest,

bringing this matter before the Commission. In its answer to the Secretary's complaint, T&F admitted the jurisdictional allegations and generally denied the remaining allegations. T&F asserted eight affirmative defenses in its answer.[1] A one-day hearing was held in Cleveland, Ohio on December 8, 2010. Both parties have submitted post-hearing briefs.

Background

T&F's primary place of business is in Cleveland, Ohio. T&F was a roofing contractor at the Elyria High School work site. It was hired to install roofing membrane, a vapor barrier, on approximately 106,000 square feet of low-slope (also "low-sloped") roof and approximately 30,000 square feet of flat roof. On November 10, 2009, T&F was installing a vapor barrier over metal decking on the low-slope roof. OSHA Compliance Officer ("CO") Daniel Steffen was driving by the site that day when he saw what appeared to be employees working on the roof without fall protection. He stopped and met with Rick Collins, a representative of Regency Construction Services ("Regency"), the construction management company at the site.[2] (Tr. 22-25, 78-79, 85; S. Br., p. 8).

Mr. Collins identified all of the individuals on the roof as employees of T&F. The CO took photographs of the T&F employees on the roof. He saw that some of the employees wore

[1] T&F listed eight affirmative defenses, numbered 1 through 8, in its answer; *i.e.* 1) statute of limitations, 2) joint and several liability, 3) no injuries, 4) citation not qualified as a willful violation, 5) excessive proposed fine, 6) safe work practices, 7) the Secretary of Labor exceeded its authority, and 8) unforeseen conduct of an employee or supervisors. It did not argue or brief defenses numbered 1 through 2 and 7 through 8 at the hearing or in its post-hearing brief. The Court finds that Respondent has abandoned the four defenses that it did not argue. *Manganas Painting Co., Inc.*, 1996 WL 478959, *13 (Nos. 93-1612 & 93-3362, Aug. 23, 1996) (ALJ) ("Respondent's failure to identify evidence or present any argument furthering its mere statement of an affirmative defense constitutes, for all practical purposes an abandonment of the defense or, at least, a failure to carry its burden. The argument is rejected."), *aff'd on other grounds*, 273 F.3d 1131 (D.C. Cir. 2001).

[2] Mr. Collins was Regency's job superintendent at the site. His job included general oversight of all subcontractors on the project. His oversight included safety matters. (Tr. 22-25).

harnesses.[3] None of the employees, however, were tied off or attached to anything. The CO saw no apparent fall protection system in use for any of the employees. (Tr. 79-80, 83).

CO Steffen held an opening conference with Christopher Frank, T&F's foreman at the site,[4] and Adam Keller, a T&F project manager.[5] The CO then began his "walk-around" with Mr. Frank. T&F's overall roofing superintendent for T&F's roofing department, David Pipenger, arrived at the site after the inspection had started. During his inspection, CO Steffen asked what fall protection method was in use. Messrs. Pipenger and Frank both indicated that a PFAS was being used for fall protection. (Tr. 80-81, 134-35).

T&F had both a general safety program and a Site-Specific Safety Program ("Site-Specific Safety Program" or "Elyria plan"). The Elyria plan noted that fall protection would be provided through a guardrail system and a PFAS with roof brackets for tying off. T&F's general safety program included several methods for fall protection on a low-slope roof. These included guardrails, a PFAS, safety net systems, or a combination of one of these with a warning line system. The general safety program specified that a safety monitoring system alone would be allowed for a low-slope roof less than 50 feet in width. (Tr. 86-89; Exhs. 3, 5).

On the day of the inspection, Foreman Frank was working on the roof along with the other T&F employees. The roof was approximately 25 feet from the ground. (Tr. 25; Exh. 1, p. 1). The roof was rectangular in shape and roughly 40 feet wide on each side of the roof peak, when measured from peak to eave. (Tr. 91; Exh. D).

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[3] Mr. Collins testified that a harness is part of a personal fall arrest system ("PFAS"). (Tr. 60).
[4] In his testimony, Mr. Pipenger referred to Mr. Frank as T&F's site superintendent and foreman at the Elyria High School project. (Tr. 134, 151).
[5] Mr. Frank testified that the project manager is the "salesman" who sold the job and did payrolls. The salesman did not get on the roof and perform any work there. He was not involved in fall protection at the job site. (Tr. 213-14, 217-18).

Cited Standard

The Secretary cited T&F for violating 29 C.F.R. § 1926.501(b)(10), which states that:

> (10) *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.

Jurisdiction

Based upon the record, the Court finds that T&F, 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. The Court also finds the Commission has jurisdiction of this proceeding under section 10(c) of the Act. *See* pleadings. The Court concludes the Commission has jurisdiction over the parties and subject matter in this case.

Secretary's Burden of Proof

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

Relevant Testimony

Daniel Steffen

Daniel Steffen has been an OSHA CO for about three years. He has conducted around 300 inspections. Most of these involved construction sites, and at least half of the construction

inspections involved fall hazards. CO Steffen testified he met with Rick Collins at the site. Mr. Collins identified all of the workers on the roof as T&F employees. He also identified Mr. Frank, T&F's foreman, as one of the workers on the roof. (Tr. 77-79, 82-84, 92; Exh. 1, pp. 3, 12-13).

CO Steffen also testified that when he discussed the fall hazards he had seen, Messrs. Frank and Pipenger both indicated that a PFAS was being used to protect the employees from falls.[6] They further indicated they chose the PFAS because the metal decking was slippery and they were concerned about traction.[7] The CO recalled describing to Messrs. Pipenger and Frank the various methods available to protect employees, including safety monitoring systems, horizontal safety lines[8], and guardrails. The CO said that neither individual stated that a safety monitoring system was being utilized as a means of fall protection at the site.[9] Mr. Pipenger told CO Steffen that T&F did not have a horizontal safety line installed on the roof at the site. CO Steffen did not see any of the fall protection systems, including a safety monitoring system, detailed in either T&F's Safety Program or its Site-Specific Safety Program being properly used at the site on November 10, 2009. In a follow-up meeting the CO held with Messrs. Frank and Pipenger, both acknowledged they were aware of the fall-related death of a T&F employee the prior year. When discussing the harm that could occur if a T&F employee fell off the roof at the

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[6] CO Steffen stated that he observed no fall protection in place at the job site and that the photographs that he took on November 10, 2009 show this. He testified:

> Q Again, page through and tell me what your concern is about what we see in the photographs.
> A My concern is there's no fall protection in place. And this is kind of throughout – throughout the timeframe before I entered the site, you know, that duration of time, I had employees – employees were seen kind of all over the roofline and no form of fall protection was in place. I did see some that had harnesses on, but they – they weren't attached to anything. And then no other form of fall protection was apparent to me. And this was pretty much consistent through the photographs. (Tr. 83; Exh. 1).

[7] CO Steffen testified that "typically a low-sloped roof ... maxes out at 4:12 pitch. After that, it's considered a steep slope roof. So they were on the upper echelon of being a low-sloped roof."

[8] Also referred to as a "horizontal lifeline." (Tr. 140).

[9] CO Steffen testified that Mr. Frank appeared not to be a safety monitor because he was engaged in roofing activities beyond safety monitoring and that other T&F employees on the roof were too far away from Mr. Frank for him to communicate with them orally. (Tr. 118-122, 128-29; Exhs. 1, pp. 20, 35, C, pp. 27, 37).

site, Messrs. Frank and Pipenger told CO Steffen that the T&F employee would be "squashed" and "likely die." (Tr. 80-89, 98, 101-02, 117; Exhs. 3, 5).

On the day of the inspection, CO Steffen took photographs of the T&F employees working on the roof. He testified that several of his photographs showed T&F employees, including Mr. Frank, exposed to fall hazards. He stated that one photograph showed a T&F employee carrying material across the roof's ridge without any apparent fall protection in place. The CO testified that the low-slope roof where the T&F employees were working was greater than 50 feet in width. He based this on the measurement over the peak of the roof, including both sides of the low-slope roof. CO Steffen also testified that he recommended that the violation be classified as willful because T&F had a recent history of violating the same standard, heightened awareness by management officials to recognize general fall hazards, and T&F employees' exposure to fall hazards after his initial visit to the site. He further testified when calculating penalties he considered that the severity of the hazard was likely to result in death and that the probability of that happening was greater, as well as gravity and company size. (Tr. 83-84, 89-94, 96-99,101, 109, 112-13; Exhs. 1, 7-8, D).

Rick Collins

Rick Collins, Regency's project superintendent, has been in the construction business for about nineteen years. He stated that the Elyria High School construction project ("project") began in June, 2008. Regency was hired by the state of Ohio to regulate the project's costs, safety and overall project detail. He testified that one of his project's duties was working with T&F.[10] He explained that all contractors on the site were required to submit site-specific safety plans to Regency for approval. The plan that T&F submitted called for the use of guardrails on

[10] Mr. Collins testified that his general duties included conducting coordination and progress meetings with client contractors and making sure that jobs are quoted correctly and the correct materials are installed. (Tr. 22-23).

low-slope roofs and PFAS on steep roofs.[11] Mr. Collins testified that Regency did not get the material that it needed to fully install the guardrail system. He testified that T&F would have been able to install guardrails atop the entire building and that it was not impractical to do so. Mr. Collins stated that he was not aware of T&F using a safety monitoring system alone and that a safety monitoring system was not in their Site-Specific Safety Program.[12] He testified that since the use of a safety monitoring system alone was not in their Site-Specific Safety Program, T&F still needed a guardrail system in place when using a safety monitoring system on low-sloped roofs. (Tr. 22-26, 28-29, 48-50; Exhs. 3, C at pp. 6-9).

Mr. Collins further testified that the height of the roof was about 25 feet from the bearing points on the roof trusses. On several occasions before the OSHA inspection, he had observed T&F employees not using fall protection while on the roof. When this happened, Mr. Collins would "call Chris Frank down" to discuss the issue. Typically, he and Mr. Frank would then call Mr. Pipenger.[13] After being told of his concerns, Messrs. Frank and Pipenger assured Mr. Collins that the problem would be taken care of.[14] The employees would tie off for a day or two,

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[11] Regency's Elyria High School Site-Specific Safety Program stated:

FALL PROTECTION

- T&F SYSTEMS, INC. WILL USE THE GUARDRAIL SYSTEM IN CONJUNCTION WITH "ROOF BRACKETS" AND PERSONAL FALL ARREST SYSTEMS (PFAS). A 2X4 SYSTEM WILL BE USED ALONG THE EXPOSED ROOF EDGES WHERE FEESABLE.
- **ON LOW-SLOPES-**POSTS ARE CLAMPED AT 8' INTERVALS TO EXISITNG(sic) ROOF EDGE AND TWO ROWS OF 2X4'S RUN THROUGH THE POSTS, INCLUDING TOE BOARDS AT THE BOTTOM, TO FORM A GUARDRAIL SYSTEM ON SLOPES LOWER THAN 4:12
- **ON STEEP SLOPES-**ANSI APPROVED ROOF BRACKETS, ROPES OR RETRACTABLES, GRABBES, AND PFAS WILL BE USED ON ALL SLOPES GREATER THAN 4:12[.] (Tr. 28, 87-88; Exh. 3, p. 4).

[12] Mr. Collins testified that T&F installed a horizontal safety line along the roof, but that T&F employees did not tie off their PFAS on that line. (Tr. 50-52).

[13] Mr. Collins identified Messrs. Pipenger and Alan Pellicker as TF's project managers. (Tr. 30, 67).

[14] Mr. Collins testified as follows:

> Q And what did they say in response to your concerns with the fall issues?
> A They always told me they would take care of it.
> Q Did they –
> A They – they never did. (Tr. 30-31).

but would then go back to not using fall protection. He testified that "every day they were there, we had an issue with fall protection." Mr. Collins said he addressed the issue of fall protection for T&F employees at several of his contractor coordination meetings attended by site superintendents or foremen. The notes from meetings on October 19, November 2, November 9, and November 16, 2009, all indicated he directed or reminded T&F of the need for employees to tie off. Specifically, his notes from the October 19 meeting stated: "T&F to use 100% fall protection on roof." His notes from the November 2 meeting stated: "T&F advised to stay tied off." He also said that after the inspection, he saw T&F employees on the roof without fall protection on "numerous" occasions. Mr. Collins testified that T&F's employees "weren't staying tied off with harnesses, lanyards. They still hadn't put up their guardrail system on the low-sloped roof." He stated that, as before the OSHA inspection, T&F "would fix the issue for a couple of days and then they'd go back" to "no fall protection." (Tr. 25-26, 30-35; Exhs. 2, 4).

Mr. Collins stated that the fall distance from the areas shown in Exhibit 1, the CO's photographs, ranged from 12 to 25 feet. He confirmed that the roof where at least four T&F employees were working was a low-slope roof with a pitch of about 3.91:12. He said the width of the north side of the roof was approximately 40 feet. Mr. Collins identified Mr. Frank as one of the T&F employees in one of the CO's photographs. He said that Mr. Frank was not wearing a harness in the CO's photographs. Upon reviewing the CO' photographs, Mr. Collins stated that there were several places where T&F employees could have fallen off the eave onto the ground, or the edge of the decking or roof to the interior floor below. (Tr. 35-43, 61-64; Exh. 1, pp. 1-13, 15, 20-25).

Mr. Collins testified that, early in the project, T&F installed some guardrails on one of the roof areas.[15] He was unsure when T&F installed a horizontal safety line along the roof, but he believed it was after the OSHA inspection. In one of the CO's photographs taken on November 10, 2009, a T&F employee on the roof was wearing a harness, but did not appear to be tied off.[16] Mr. Collins said he did not know that Mr. Frank was a safety monitor on the day of the inspection. In another photograph the CO took, Mr. Collins stated that Mr. Frank did not appear to be a safety monitor.[17] (Tr. 49-51, 56-59, 66, 68-70, 78-80; Exh. C, p. 2; Exh. 1, pp. 4, 15).

David Pipenger

David Pipenger, T&F's overall roofing superintendent, has worked for T&F since May 2008. He has completed the OSHA 10, 30, 500 and 510 courses. He was responsible for coordination between T&F and other employers on the subject site. Mr. Pipenger testified that he was at the site "every other day, if not every day." He also testified that he was familiar with both the T&F corporate general safety program and the Site-Specific Safety Program developed for the Elyria project. He helped develop T&F's general safety program. Mr. Pipenger said the Elyria plan called for the use of a PFAS tied off to roof brackets. He acknowledged the Elyria plan did not include a safety monitoring system or the use of a horizontal lifeline for fall protection even though T&F's general safety program does. Mr. Pipenger stated this was done so that other methods would be considered and ruled out prior to use of a safety monitoring system for fall protection. (Tr. 132-40, 173; Exhs. 3, 5).

[15] This was not in the area where T&F's employees were working on the day of the OSHA inspection.
[16] Mr. Collins testified that the T&F's employee's lanyard, wrapped around his waist, was not attached to a safety rope. (Tr. 68-69, 79-80; Exh. 1, p. 15).
[17] Mr. Collins testified that safety monitors typically wear a vest. Mr. Frank was not wearing a vest in photographs taken by the CO. (Tr. 70; Exh. 1, p. 4).

According to Mr. Pipenger, a horizontal safety line for the PFAS was installed prior to T&F's installation of the vapor barrier.[18] T&F started to install a horizontal safety line for the roof about the week of October 20, 2009. The safety line's installation continued along the roof's peak, as the work progressed. Mr. Pipenger testified that a horizontal safety line was eventually installed on top of all of the roofs' peaks. (Tr. 140-142, 173; Exh. D).

Mr. Pipenger stated that T&F was using a PFAS at the beginning of the Elyria project. T&F later switched to a safety monitoring system because the PFAS "just didn't work properly."[19] He said that safety monitoring was an important part of T&F's fall protection plan at the site. He explained that a decision had been made to use a safety monitoring system instead of a PFAS, prior to work on the north slope area. He also explained that he and Mr. Frank believed the PFAS interfered with the flow of work and was a tripping hazard. Mr. Pipenger believed a safety monitoring system alone was permitted as the width of the roof was about 40 feet. He stated he and Mr. Frank told the T&F employees that a safety monitoring system was going to be utilized for fall protection. He further stated that "in most cases, the employees wore them [harnesses] even when they weren't using them" so they could tie off whenever they felt uncomfortable. Mr. Pipenger confirmed that T&F employees were working on the north slope of the roof on the day of the inspection. (Tr. 148-54, 175, 179).

Mr. Pipenger stated he did not notify Regency that T&F was using a safety monitoring system in lieu of the fall protection method specified in the Elyria plan. Further, he stated that he only spoke with Mr. Collins about production and the flow of work, not about safety. He said he

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[18] Mr. Pipenger testified that a horizontal lifeline was a "section of cable strewn between roof anchors that tied them off individually, allowing two guys to tie off between the widths approximately 25 feet to 40 feet in length, so their line can continue on with them as they go." (Tr. 140).

[19] Mr. Pipenger testified that T&F was "using many safety systems all over the job site. On some of the flat roofs, we were using the warning lines; on the Washington building, we were using slide guards in conjunction with guardrails. We had some guardrails set up on the east side of the Washington building and we were also using the safety monitoring system on several locations about the building." (Tr. 148-49).

never had a personal conversation with Mr. Collins about fall protection, but he acknowledged that he did participate in the weekly contractor coordination meetings. He also said that at these meetings the contractors met to discuss the project with Mr. Collins. Mr. Pipenger testified that Mr. Collins "read through" safety, but never specifically to him.[20] He further testified that Mr. Collins did discuss safety in the contractor meetings after the OSHA inspection, but it was not specific to T&F. (Tr. 139, 155-57, 167-69, 179; Exh. 2).

Mr. Pipenger testified that prior to the OSHA inspection, T&F employees "were working in multiple locations all over the low-sloped, sloped roofing section.[21]" He admitted that T&F had its employees working on the north side of the Elyria High School's low-sloped roof on November 10, 2009. He further admitted that no other entities' workers were performing roofing work or up on the roof while T&F's employees were on the roof at the time of the OSHA inspection on November 10, 2009. Mr. Pipenger was not at the Elyria site when the OSHA inspection began. He arrived later, after the CO had completed some of the interviews. Mr. Pipenger did speak with CO Steffen that day. Mr. Pipenger stated that the CO did not ask if T&F was using a safety monitoring system or ask what type of safety system was used on the roof's north slope. He also stated that the conversation with the CO included a discussion of "different types of fall protection." He further stated that, if asked, he would have told the CO that T&F was using "multiple sets of safety in conjunction with the safety monitoring system." Mr. Pipenger admitted that although he knew the CO was concerned about fall protection at the site he did not mention the use of a safety monitor to the CO. He said that on the day of the inspection, Mr. Frank was the safety monitor for the T&F employees. Mr. Pipenger thought that

[20] Mr. Pipenger recalled an instance where a project manager said at one of the weekly meetings that "everyone was to be 100 percent tied off, if not using guardrails." (Tr. 169-70).
[21] Mr. Pipenger testified that the low-sloped roof area encompassed all of the roof areas since there was no defining line. (Tr. 147).

Stony Webb, another employee, was also a safety monitor on November 10, 2009.[22] (Tr. 143, 147, 153, 157-61, 166, 170-71, 182; Exh. D).

Mr. Pipenger did not know who was acting as a safety monitor for a particular area of the roof. He admitted he would need to ask the employees to learn who acted as the safety monitor for any particular location. He admitted that he was unable to identify a safety monitor in the CO's photograph at Exhibit 1, p. 20, that showed two workers walking across the roof on the south side, with another worker standing alone in the distance beyond ten feet. He said that in three photographs taken on the day of the inspection, Mr. Frank was performing the duties of a safety monitor. Mr. Pipenger testified that he was aware of a T&F fall fatality in 2008. He was also aware that, in 2008, OSHA had cited T&F for a fall protection violation. (Tr. 165-67, 175-77, 179-80, 195; Exh. 1, pp. 1-3, 20).

Christopher Frank

Christopher Frank has worked for T&F since 1999. He's "the foreman" and his "job duties are to run the crew." He was the "site superintendent" at the Elyria site and his duties included overseeing "the overall job safety and production of the job." Mr. Frank testified that a horizontal safety line was installed on the roof on the first day of the job, October 21, 2009. This was done so that employees could get from the materials staging point on the roof to any other part of the roof. Mr. Frank said that Mr. Pipenger helped him install part of the safety line. He also said that T&F's initial plan for fall protection at the site required safety harnesses with lanyards and ropes. After a couple of days on the project they determined that using the PFAS was a tripping hazard.[23] He and Mr. Pipenger decided to use a safety monitoring system instead.

[22] Mr. Pipenger testified that any one of T&F's employees at the job site could qualify as a safety monitor. (Tr. 174-75).

[23] Mr. Frank offered contradictory testimony as to when the decision to use a safety monitoring system was made. He testified:

Mr. Frank stated that he and Mr. Pipenger decided together to deviate from the Elyria plan. They determined that the pitch of the project's low-slope roof was less than 4:12. According to Mr. Frank, he informed T&F employees of the plan to use the safety monitoring system for fall protection at a "job box talk."[24] Mr. Frank confirmed that employees were still allowed to use a harness and lanyard after he and Mr. Pipenger had determined that this could be a tripping hazard. (Tr. 185-90, 195, 201, 209, 217).

Mr. Frank testified that a horizontal safety line was on the peak of the roof on the day of the inspection. He admitted that in Exhibit 1, the CO's photographs, a horizontal safety line was not visible. He surmised that no one could see a "quarter inch cable . . . in a photograph from the ground." Given the opportunity at trial to review each of the 38 photographs taken by the CO at the job site on November 10, 2009, Mr. Frank admitted that "not one shows the horizontal lifeline."[25] Frank stated that on the day of the OSHA inspection, T&F employees were installing a vapor barrier over metal decking on the roof. He testified that the employees were working on the roof's north side, which he stated was less than 50 feet wide. He confirmed that he was on the roof with other T&F employees.[26] Mr. Frank also stated that he was the safety monitor that

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Q When was the decision made to implement safety monitoring?
A Approximately two to three days after the sooner bath (sic) [Sarnaf] was started.
Q When was that?
A October, November? I can't pinpoint a date for you. Before the sonner bath (sic)[Sarnaf] was started. (Tr. 203-04). He then admitted that a photograph dated October 21, 2009, T&F's first day at the job site, showed "Sarnaf" material in the lower left hand corner and him working on the roof, not as a safety monitor, with other workers with lanyards and harnesses. (Tr. 204-05; Exh. C, p. 2).

[24] Mr. Frank initially testified during Respondent's direct examination that he did not advise Regency or anyone else that T&F was implementing a safety monitoring system at the job site. (Tr. 192). Later, during cross examination, he stated that "We did notify them [Regency]" of the plan deviation from the site specific plan. (Tr. 209).

[25] Mr. Frank testified that he could clearly see the cable at the ridge line in an area away from the north slope with everybody hooked to it in a photograph taken on November 15, 2009. (Tr, 223-24; Exh. C, p. 3). Later, he admitted that there was no horizontal lifeline shown at the roof's ridge in a photograph taken at the job site on November 20, 2009. (Tr. 225; Exh. C, p. 4). He further testified that he could see barricades that were actually installed at the job site in photographs taken on November 23, 2009. (Tr. 224-25; Exh. C, pp. 5-8).

[26] He testified that the three workers shown standing on the roof with him in a photograph taken by the CO on November 10, 2009 were all T&F employees. (Exh. 1, p. 1). He also stated that T&F employees are shown standing on the roof in the CO's photographs at Exhibit 1, pp. 16-17, and 19. (Tr. 218-19; Exh. 1, pp. 16-17, 19).

day, and not the foreman.[27] He testified that he would designate another safety monitor only if he left the roof. There were not multiple safety monitors when he was on the roof. He believed that it was possible that someone might have been using a PFAS on the day of inspection. (Tr. 190-92, 200-01, 203, 211, 222; Exhs. 1, pp. 1-38, D).

Mr. Frank agreed that he discussed fall safety with CO Steffen on November 10, 2009. Even though he knew the CO was concerned with fall protection on the site, he never mentioned T&F's use of a safety monitoring system to the CO. According to Mr. Frank, he did not mention the use of a safety monitoring system as the CO did not ask. He also did not inform the CO of T&F's fall protection plan as he felt "some panic." He testified that he "just felt uncomfortable, nervous." He also stated that he "was very caught off guard." (Tr. 196-97, 206-07).

Mr. Frank testified that the safety monitoring system was being used on days other than the day of the inspection. In one photograph where he was the safety monitor, his back was turned to the employees. He insisted he could see the employees working even though he was "quite side turned." (Tr. 199-200; Exh. 1, p. 16). He admitted that in some of the CO's photographs that he was not with the other T&F employees. (Tr. 199; Exh. 1, pp. 15, 17-19). He said that in these photographs, another T&F employee was "watching the workers." (Tr. 218-19).

Mr. Frank confirmed that a photograph dated October 21, 2009, was the first day of the job. T&F employees were using a PFAS as a safety monitoring system was not yet in place. (Tr. 204-05; Exh. C, p. 2). In another photograph dated November 15, 2009, he stated that he could tell there was a horizontal safety line on the ridge and that he could "clearly see at the ridge line, the cable and everybody hooked to it." He admitted the area shown in this photograph

[27] He testified that all of his crew members were qualified to serve as a safety monitor. (Tr. 196).

was not the north slope area where T&F employees were working on the day of the OSHA inspection. (Tr. 224-25; Exh. C, p. 3). In other photographs taken by the CO on November 10, 2009, Mr. Frank conceded he could not see a horizontal lifeline; nonetheless, he "[knew] it was there." (Tr. 203, 221; Exh. 1, pp. 25-27). He said that in a photograph dated November 20, 2009, there was not a horizontal safety line for tie-off; instead, roof bracket mounts were used. (Tr. 225; Exh. C, p. 4).

Mr. Frank stated that he never discussed safety issues with Mr. Collins. He confirmed, though, that Regency was in charge of the Elyria work site. He also agreed that meetings with the contractors and Mr. Collins were held at the Elyria site.[28] He said that he and Mr. Pipenger did participate in the weekly contractor meetings. Mr. Frank attended several meetings, but not all of them. Mr. Frank could not remember if he was at the October 19, November 2, November 9 or November 16 contractor meetings. Mr. Frank testified that he was aware of OSHA's investigation of T&F's 2008 fall fatality. (Tr. 205-06, 211-216; Exh. 2, pp.1-4).

Discussion

Whether the Secretary Has Established the Alleged Violation

T&F's work on November 10, 2009 involved installing a vapor barrier over decking on a low-slope roof. (Tr. 25; R. Br. 3). There is no dispute that 29 C.F.R. § 1926.501(b)(10) applies to T&F's work at the site. (S. Br. 10; R. Br. 2). There is also no dispute that T&F's employees were working on a low-slope roof with unprotected sides and edges 6 feet or more above the lower level.[29] (Tr. 37; S. Br. 8; R. Br. 3). On the basis of the record, the Court finds that the cited standard applies to T&F's work at the site.

[28] Mr. Frank testified that he did not know Mr. Collins' position or job function. (Tr. 206).
[29] A "low-slope roof" is a roof having a slope less than or equal to 4 in 12 (vertical to horizontal). *See* 29 C.F.R. § 1926.500(b).

Turning to the terms of the cited standard, the standard specifies several methods to protect employees from fall hazards, as set out *supra*. The parties do not dispute that T&F's employees were working on the roof's north slope without fall protection in the form of guardrails, safety net systems, or a warning line system on the day of the inspection. (S. Br. 10; R. Br. 2). However, they do dispute whether any fall protection method was utilized that day. (S. Br. 10; R. Br. 2). They also dispute whether the roof's width was 50 feet or less. (S. Br. 12; R. Br. 10).

T&F contends that the width of the roof was approximately 40 feet, so that the use of a safety monitoring system alone was permissible. (R. Br. 10-11). The Secretary contends that the width was approximately 80 feet and that the use of a safety monitoring system alone was not permissible. (S. Br. 12). The parties agree that the width of the north slope, on one side of the peak of the roof, was approximately 40 feet. (Tr. 62, 91; S. Br. 6; R. Br. 3). The plans for the project show the width of the slope, on each side of the peak, were roughly equal. (Tr. 91; Exh. D). The Secretary calculated the width of the roof as set forth in Appendix A of Subpart M. The Court finds that the roof in this case was approximately 80 feet wide.[30]

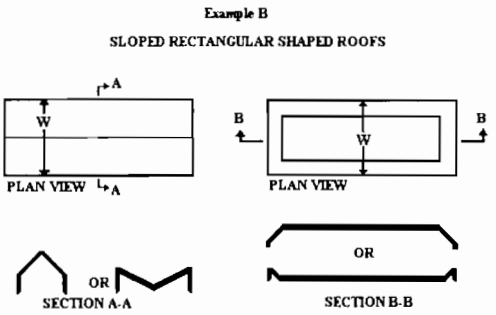
The cited standard refers to Appendix A of Subpart M ("Appendix A") in its description of roof width. "Appendix A . . . Determining Roof Widths" is a Non-mandatory Guideline "to assist employers [i]n complying with the requirements of §1926.501(b)(10)." Appendix A states that "[e]ach example in the appendix shows a roof plan or plans and indicates where each roof or

[30] The Court further finds Mr. Pipenger's testimony regarding the size of the roof to be unpersuasive and contradictory. During Respondent's direct examination he testified:

> Q In the area of the roof where the workers were working, was the width of the roof less than 40 feet?
> A Yes. No, let me take that back. I believe the width of the roof was just over 40 feet.
> Q Just over 40 feet?
> A Yeah.
> Q Less than 40 feet?
> A Yes. (Tr. 154).

roof area is to be measured to determine its width." Appendix A has two examples, Example B and Example E, which are instructive in determining the roof width in this case.

Example B, "Sloped Rectangular Shaped Roofs," is the most similar to the cited roof. In the illustrations for this example, the width is shown as the distance from eave to an opposite eave, crossing over the peak of the roof. Appendix A states that "[i]n all examples, the dimension selected to be the width of an area is the lesser of the two primary dimensions of the area, as viewed from above. Example A shows that, on a simple rectangular roof, width is the lesser of the two primary overall dimensions. This is also the case with roofs which are sloping toward or away from the roof center, as shown in Example B." Example B follows.

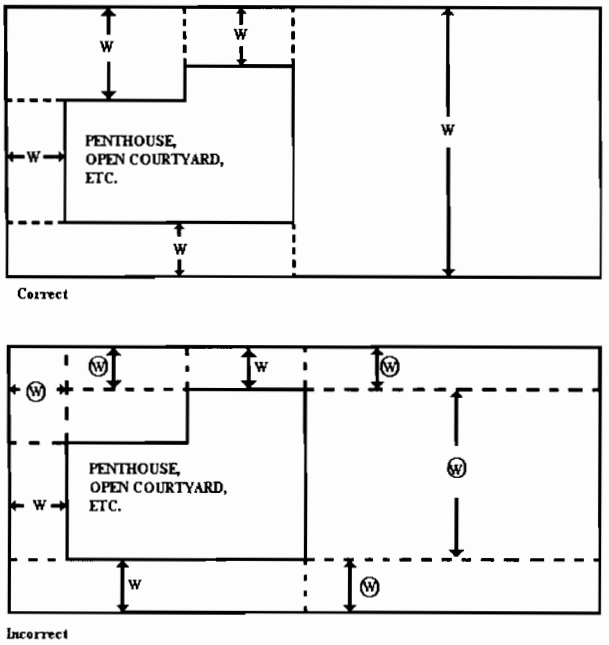


Example E, "Roofs with Penthouses, Open Courtyards, Additional Floors, Etc.," is an illustration of a rectangular roof with an opening in the center for a courtyard or penthouse.[31] This is comparable to the roof in this case, as a part of the overall roof had a courtyard area. Of particular interest is the text following Example E: "Such roofs are to be divided into sub-areas by using dividing lines of minimum length to minimize the size and number of the areas which are potentially less than or equal to 50 feet (15.25 meters) in width, in order to limit the size of

[31] Example E includes two illustrations. The first shows the correct way to calculate roof width. The second shows the incorrect way to calculate roof width.

the roof areas where the safety monitoring system alone can be used [1926.502(b)(10)]."

Example E follows.



The illustrations in Example B show that the measurement for width extends from eave to an opposite eave, over the peak of the roof. Example E shows that a roof can only be subdivided into smaller areas to the extent that it will result in the fewest number of 50-foot areas. In other words, Appendix A, through Examples B and E, plainly indicates that dividing a roof into a 50-foot or smaller area cannot be done in order to justify the use of a safety monitoring system alone.

T&F argues that only the north slope of the roof where employees were working should be considered in determining the roof's width. (R. Br. 10-11). The plain language of Appendix A refutes this argument. T&F also argues that Appendix A is simply "a guide with some examples, but is not exhaustive as to when a safety monitoring system alone is permitted." (R. Br. 11). While it is true that Appendix A does not have an illustration of every possible roof

configuration, the roof in this case is not unique and compares easily to both Examples B and E. Also, as indicated above, Appendix A makes it clear that an employer cannot simply subdivide the roof into the area in which it is working.

T&F's contention that the width of the roof was 40 feet is incorrect. The roof's width, for all the reasons noted above, was approximately 80 feet. Because the roof's width was more than 50 feet, T&F's use of a safety monitoring system alone was not permissible under the standard. Consequently, T&F was in violation of 29 C.F.R. § 1926.501(b)(10).

Even if T&F had prevailed in its position that the roof was 40 feet in width, the facts in this case do not show that a compliant safety monitoring system was in use on the day of the inspection. In order to be able to warn an employee, the safety monitor must, among other things, be able to see the employee being monitored and be close enough to orally communicate.[32] The Court finds that these requirements were not met.

The record does not support a finding that T&F was using a safety monitoring system on the day of the inspection. Messrs. Pipenger and Frank both testified that T&F was using a safety monitoring system the day of the inspection. (Tr. 161, 182, 196-97). Mr. Pipenger testified that it had been in use for "quite a long time" before the inspection. Mr. Frank offered contradictory testimony as to when the decision was made to implement safety monitoring. (Tr. 149, 204-05). It is undisputed that both Messrs. Frank and Pipenger spoke to the CO on the day of the inspection, and neither told the CO of T&F's safety monitoring system. (Tr. 81-82, 160-61, 170, 206-07). Each testified that he knew the CO was concerned about fall protection, but neither mentioned the safety monitoring system. (Tr. 161, 170, 206-07). In contrast, CO Steffen

[32] 29 C.F.R. § 1926.502(h) sets out the requirements for a safety monitoring system. Two of these are that the monitor must be within visual sighting distance of the employee being monitored and close enough to communicate orally with the employee. *See* 29 C.F.R. § 1926.502(h)(1)(iii) and (iv); *Latite Roofing and Sheet Metal LLC*, 23 BNA OSHC 1368, 1386-91 (No. 09-1074, 2010).

testified that both Messrs. Frank and Pipenger told him that a PFAS was in use for fall protection.[33] (Tr. 81).

Mr. Pipenger testified that he developed T&F's Elyria plan. That plan required the use of guardrails and a PFAS. (Tr. 136; Exh. 3). Yet, Messrs. Pipenger and Frank testified that, in lieu of those systems, a safety monitoring system was being used. (Tr. 149, 190). The Court finds that no fall protection safety system was effectively being utilized by T&F's employees, including Mr. Frank, on the roof on November 10, 2009 at the time of OSHA's inspection.

Mr. Pipenger said he attended the weekly contractor meetings, but had no recollection of fall protection specific to T&F being addressed. (Tr. 157, 167-69). He also said he had never directly talked to Mr. Collins about safety. (Tr. 156, 169). The notes from Regency's weekly contractor meetings indicate that T&F was informed that fall protection should be implemented on several occasions. (Tr. 32-35; Exh. 2). Mr. Collins testified that he had spoken to both Messrs. Frank and Pipenger about using fall protection.[34] (Tr. 30). Mr. Collins further testified that T&F did not consistently use fall protection at the site. (Tr. 26). The Court credits Mr. Collins' testimony and notes and finds that T&F was repeatedly warned before and after the OSHA inspection to adequately implement fall protection at the job site.

Both Messrs. Frank and Pipenger knew that in the year prior to the inspection at Elyria a T&F employee had died after falling from a roof. (Tr. 179, 211). Additionally, Mr. Pipenger

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[33] The Court observed the demeanor of CO Steffen as he testified. The Court found him to be a forthright and reliable witness. Where his testimony is in conflict with that of another witness, the CO's testimony is credited.

[34] Mr. Collins' testimony was consistent with his notes from the work site. The Court observed his demeanor on the stand and found him a sincere and believable witness. Mr. Collins does not have an interest in the outcome of this proceeding. Therefore, where his testimony is in conflict with the testimony of another witness, the Court credits Mr. Collins. Furthermore, contemporaneous documentary evidence should generally be accorded greater weight than self-serving statements or the statements of interested parties based on recollections of events that happened more than a year before. *See Torres v. Sec'y of Health, Educ. and Welfare,* 337 F. Supp. 1322, 1324 (D. Puerto Rico 1971).

testified that he knew T&F had received an OSHA citation related to fall protection the previous year. (Tr. 179-80). Given this prior inspection history, Messrs. Frank and Pipenger may be expected to have understood the importance of accurately informing the CO of the type of fall protection that was in place on the inspection date. CO Steffen stated that Messrs. Frank and Pipenger told him that a PFAS was in use during the inspection.

Mr. Pipenger developed the written corporate general safety program and knew of the prior OSHA citation. He was a superintendent at the Elyria work site, and he purportedly made the decision to use a safety monitoring system at the site. These circumstances are difficult to reconcile with his testimony that he simply did not inform the CO of the fall protection method in use. The Court finds the testimony of Messrs. Pipenger and Frank regarding the implementation of the safety monitoring system at the work site to not be credible.[35] Instead, the Court credits the testimony of CO Steffen that on the day of the inspection Messrs. Pipenger and Frank told him that they were using a PFAS.

Taking into consideration the testimony and other evidence of record in its totality, along with the noted credibility findings in this matter, the Court concludes that T&F was not in fact using a safety monitoring system on the day of the inspection. Even if such a system had been in use, the record does not support a finding that it was properly implemented on November 10, 2009. Messrs. Pipenger and Mr. Frank both testified that Mr. Frank was the safety monitor on the day of the inspection. (Tr. 153, 165-66, 182, 191). However, Mr. Pipenger was not at the work site when the CO started his inspection. (Tr. 143, 160). Some of the photographs the CO took show Mr. Frank in proximity to T&F employees; in other photographs, he is not visible.

[35] Based on my observations at the hearing, I find both Messrs. Pipenger and Frank to be less than credible. Their lack of recollection of any conversations with Mr. Collins contrasted with Mr. Collins' written notes and recollection of discussions of fall protection with T&F staff. No other T&F employee who worked on the roof at the site on November 10, 2009 was called as a witness to support T&F's contention that fall protection was in use.

(Tr. 198-99; Exh. 1, pp. 1-3, 15, 17, 19). Messrs. Pipenger and Frank both testified that one of the other employees on the roof was the safety monitor when Mr. Frank was not present. Neither identified which person in the photographs not showing Mr. Frank was the safety monitor and Mr. Frank testified that he would designate another safety monitor only if he left the roof. Mr. Frank was on the roof at the time of the OSHA inspection and he did not testify that he designated another as a safety monitor at that time. (Tr. 175-77, 211, 218-19; Exh 1, pp. 15, 17-19). One photograph shows Mr. Frank on the roof near other employees with his back toward those employees. Mr. Frank insisted that he was still able to see the employees working, even though he was "quite side turned." (Tr. 199-200; Exh. 1, p. 16).

On the basis of the record, the Court finds that T&F did not have a safety monitoring system that complied with the requirements of 29 C.F.R. § 1926.502(h) at the time of the OSHA inspection. Mr. Frank was the only person identified as a monitor. He was not present in several photographs, and in another, his location was ineffective to warn employees about fall hazards.

The Court now turns to whether the Secretary has demonstrated that employees had access to the cited condition. The Secretary may show employee access through either actual employee exposure, or by showing that "while in the course of their assigned working duties . . . [employees] will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). The test of whether an employee would have access to the "zone of danger" is "based on reasonable predictability." *Id. See also Kokosing Constr. Co., Inc.,* 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996) (citing *Capform, Inc.,* 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994)). Here, it is undisputed that T&F employees, including Foreman Frank, worked on the roof in an area where there was a hazard of falls greater than 6 feet. (Tr. 37-39; Exh. 1). The Court finds that the Secretary has met her burden of establishing

the element of employee access to the cited condition and finds that T&F employees were exposed to fall hazards while working on the roof on November 10, 2009.

Finally, the Secretary must prove the employer either knew, or with the exercise of reasonable diligence, should have known of the violative condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The employer's knowledge is directed to the physical conditions that constitute a violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). The Secretary need not show that an employer understood or acknowledged that the physical conditions were actually hazardous. *Id.*

The actual or constructive knowledge of an employer's supervisory personnel can be imputed to an employer, unless the employer establishes substantial grounds for not imputing it. *Ormet Corp.*, 14 BNA OSHC 2134, 2137 (No. 85-531, 1991), citing *Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983). The Sixth Circuit, where this case arises, continues to follow Commission precedent that knowledge of a supervisor will be imputed to the employer to establish knowledge of the violation. *Danis Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805 (6th Cir. 2003), *aff'g* 19 BNA OSHC 1497 (No. 98-1192, 2001).

Here, the record shows that Mr. Frank was T&F's foreman at the work site and that he was aware of the conditions at the site. (Tr. 134, 151, 186-90). On the day of the OSHA inspection, Mr. Frank was working with other T&F employees on the roof. (Tr. 190-93; Exh. 1). Additionally, Mr. Pipenger, the site superintendent for T&F, testified that he was on the site at least every other day. He also testified that when he was not on the site, he was in regular phone contact with Mr. Frank throughout the day. (Tr. 145-47). The Court finds that through its foreman, Mr. Frank, T&F knew of the fall hazards at the site and the lack of fall protection.

Whether the Violation is Willful

The Secretary has characterized the violation as willful.[36] (Tr. 13; S. Br. 15-18). Courts have held that "a willful violation of the Act constitutes an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements." *Conie Constr., Inc. v. Reich*, 73 F.3d 382, 384 (D.C. Cir. 1995), citing *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422 (D.C. Cir. 1983). A willful violation is done "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2140 (No. 04-0475, 2007) (quoted cases omitted). An employer that consciously disregards an OSHA standard acts willfully even though it, in good faith, believes that its violation is not hazardous to employees. *Capital City Excavating Co., Inc.*, 712 F.2d at 1010. A willful violation differs from a serious violation by a heightened awareness and either conscious disregard or plain indifference. *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987).

The Commission has held that a foreman who knowingly allows employees to work without the necessary protective equipment has acted with intentional disregard. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081-82 (No. 99-0018, 2003); *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994). The Commission has further held that an employer is "responsible for the willful nature of its supervisors' actions to the same extent that the employer is responsible for their knowledge of violative conditions." *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (Nos. 86-360 & 86-469, 1992) (citations omitted).

T&F knowingly violated the standard with intentional disregard of the Act's requirements. T&F's knowledge of the standard's requirements is imputed from both Messrs.

[36] The Secretary sets forth the following in support of the willful classification: (1) a history of prior fall protection violations, (2) warnings from the construction manager, (3) the presence of the foreman, (4) the express recognition of fall hazards in T&F's safety manual, and (5) continuing violations after the OSHA inspection.

Pipenger and Frank. Both knew of the requirement to provide fall protection for employees at the Elyria site. (Tr. 135, 210). Mr. Frank, the foreman, worked alongside the other T&F employees on the roof's north slope. (Tr. 36-37; Exh. 1, p. 13). Further, Mr. Collins, Regency's job superintendent at the site, informed both Messrs. Frank and Pipenger of the need to have employees on the roof tied off. (Tr. 30-34; Exh. 2). Both Messrs. Frank and Pipenger knew of the fall-related fatality at a T&F work site the prior year. (Tr. 179, 211). Mr. Pipenger also knew T&F had received a citation the prior year for lack of fall protection. (Tr. 179-80; Exhs. 7-9). The previous citation was for the same standard cited in this case. (Exhs. 7-9). Mr. Pipenger participated in the development of T&F's corporate general safety program. (Tr. 138). That program and the plan for the Elyria site both required the use of fall protection systems consistent with the requirements of the cited standard. (Exhs. 3, 5).

The Court finds that T&F possessed a heightened awareness of the cited standard, which supports a willful characterization. "[P]rior citations for identical or similar violations may sustain a violation's classification as willful." *A.J. McNulty & Co. v. Sec'y of Labor*, 283 F.3d 328, 338 (D.C. Cir. 2002). The Commission has consistently held that prior violations of the same standard by an employer establish a heightened awareness of the standard. *Capeway Roofing Sys.,* 20 BNA OSHC 1331,1341 (No. 00-1968, 2003); *Revoli Const. Co.,* 19 BNA OSHC 1682, 1685-86 (No. 00-0315, 2001)(four prior citations for violating the same standard gave an employer heightened awareness of requirements of standard establishing plain indifference to employee safety.). T&F has received citations from OSHA three other times between 1998 and 2008 for violations of 29 C.F.R. § 1926.501(b)(10); in 1998, 2000 and the citation T&F received in 2008 involving a fatality. (Tr. 94; Exhs. 7-9). The president of T&F, Brian Stenger, signed the settlement agreement which resolved the 2008 violation of § 1926.501(b)(10). (Tr. 6-8; Exh. 6).

Mr. Pipenger testified that he knew that T&F was cited for a fall protection violation in 2008. (Tr. 179-180). This history of prior violations of the same standard demonstrates that T&F had a heightened awareness of illegality of not using a fall protection system.

A company's own rule requiring guardrails demonstrates its heightened awareness of the need for fall protection. *A.J. McNulty & Co.*, 283 F.3d at 338. Here, T&F listed several fall protection methods in both its general safety program and Site-Specific Safety Program. The fact that T&F had rules meeting the requirements of the standard, and yet failed to follow its own rules at the site, provides additional support for a finding of a willful violation.

T&F relies on the Commission's decision in *Hartford* to support its position that the violation was not willful. *Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). In that case, the employer hired a safety consultant and a full-time in-house safety manager to enhance its safety program. The safety manager conducted many inspections of Hartford work sites as a part of the safety program. The consultant viewed the work at the subject site and told the foreman to erect safety lines on the roof. Safety lines were properly erected in some areas, but not in others. The Commission found that the lack of appropriate warning lines in certain roof areas, when considered with the other facts of the case, was a result of "negligence and misunderstanding" of the standard, rather than "intentional disregard or plain indifference to the Act." The Commission found that more than an employer's prior violation was needed for a willful characterization. Accordingly, it affirmed the A.L.J.'s decision that a citation was properly characterized as repeat and not willful.[37] *Id.* at 1363-64.

[37] T&F also cites to *Brock v. Morello Bros. Constr., Inc.*, 809 F.2d 161 (1st Cir. 1987), to support its assertion that the violation was not willful. (R. Br. 13). The facts in this case are also distinguishable from those in *Morello Bros. Constr., Inc.* Here, the Court has found that T&F was not using a safety monitoring system on the day of the inspection. The Court has also found herein that T&F was not acting in good faith.

The circumstances in this case are distinguishable from those in *Hartford*. T&F did have a general safety program and a Site-Specific Safety Program. However, there is no evidence of a consistent, genuine attempt to implement the requirements of those plans. The evidence shows that T&F sometimes required its employees to tie off. Mr. Collins reminded T&F of the need for fall protection a number of times. After these reminders, T&F would use fall protection for a day or two, but then no longer required the employees to tie off. Even after the OSHA inspection, Mr. Collins continued to observe T&F employees on the roof without fall protection.

T&F asserts that it "had a good faith belief that they provided their employees with the appropriate safety devices." T&F contends that this negates the willful characterization. (R. Br. 14). The Court disagrees. An employer's subjective belief that it was in compliance with an OSHA standard is not sufficient to overcome a finding of willfulness. The test of good faith is an objective one – whether the employer's belief concerning a factual matter was reasonable under the circumstances. *Williams Enterp., Inc.*, 13 BNA OSHC at 1259. Given the circumstances of this case, the Court concludes that there is no basis for finding that T&F had an objective good faith belief that its actions were in compliance with the cited standard.

In support of its "good faith" argument, T&F asserts that it had both a general and Site-Specific Safety Program. It also asserts that it had installed a safety line on the roof for a PFAS and that it used a safety monitoring system on the day of the inspection. (R. Br. 13). These assertions are rejected. First, as found above, despite its safety plans, T&F was not following the requirements of those plans at the site. Second, as found above, T&F was not in fact using a safety monitoring system at the time of the inspection. Third, T&F's contention that it had installed a horizontal safety line and provided a PFAS for fall protection is not supported by the record. The evidence shows that, when the CO inspected the site, the T&F employees were on

the roof and were not using a PFAS. (Tr. 87-89). The evidence further shows that this failure to use a PFAS also occurred before and after the OSHA inspection.[38] (Tr. 34). Mr. Collins, Regency's superintendent at the site, reminded T&F management a number of times to have its employees use fall protection. (Tr. 30-34; Exh. 2).

Regarding the purported safety line, T&F did not establish that there was in fact a safety line for employee tie-off on the north slope of the roof on November 10, 2009. T&F did present photographic evidence of employees being tied off before and after the OSHA inspection. (Tr. 66, 223-225; Exh. C, pp. 2-4). However, testimony shows that the area in these photographs was not the area where the employees were working on the day of the inspection. (Tr. 224). Also, in one photograph dated after the inspection, the tie-off was to a roof bracket, not a safety line. (Tr. 225; Exh. C, p. 4). On the day of the inspection, both Messrs. Frank and Pipenger told the CO that a PFAS was in use, but the CO's photographs show that no one was tied off. (Tr. 81-83; Exh. 1). CO Steffen specifically testified he saw no one tied off when he observed and photographed the employees. (Tr. 83-84). He further testified that during the inspection, Mr. Pipenger told him there was no horizontal safety line erected. (Tr. 102). Mr. Collins testified that it was his belief that T&F erected the horizontal safety line after the OSHA inspection. (Tr. 50-51). The CO and Mr. Collins have been found to be credible witnesses. Messrs. Pipenger and Frank, on the other hand, have been found to be unreliable witnesses. The Court credits the testimony of the CO and Mr. Collins and finds that no safety line was installed for use on the north slope on the day of the inspection. The Court further finds that T&F employees on the roof were not using a horizontal safety line at the time of the OSHA inspection. (Tr. 50-52, 101-02; Exh. 1).

For all of the foregoing reasons, the Secretary appropriately characterized the violation in

[38] *See Morello Bros. Constr., Inc.*, 809 F.2d at 166 (A.L.J. may consider "post-violation" conduct).

this case as willful. Item 1 of Citation 1 is affirmed as a willful violation.

Penalty

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. In *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993), the Commission stated:

> These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 [citation omitted] (No. 88-2691, 1992); *Astra Pharmaceutical Prods., Inc.*, 10 BNA OSHC 2070 (No. 78-6247, 1982). The gravity of a particular violation, moreover, 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. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 [citation omitted] (No. 76-2644, 1981).

The Secretary has proposed a penalty of $35,000 in this case.[39] CO Steffen indicated that the gravity of the violation was high, based on the fact that a 25-foot fall could result in death. He also indicated that the probability of an accident occurring was "greater."[40] (Tr. 99). The Court has given due consideration to CO's testimony regarding gravity. The Court has also given due consideration to the criteria of size, history, and good faith. T&F is a small employer, but it has a significant history of prior OSHA citations for a lack of fall protection. In light of the willful characterization and the circumstances of this case, no credit for good faith is due. Thus, the only justified penalty reduction is for size. OSHA has already taken this factor into account in proposing a penalty of $35,000. Also, a substantial penalty must be assessed in this matter to

[39] In her post-hearing brief, the Secretary asserts that a $70,000 penalty, the statutory maximum for a willful violation, is appropriate in this case. She notes that the determination of an appropriate penalty is within the Commission's discretion. Regardless, for the reasons that follow, the Court finds that a penalty of $35,000 is appropriate and not excessive.

[40] In determining the penalty, the CO considered the severity, probability and gravity of the violation, as well as the employer's size, history of violations and good faith. (Tr. 99).

motivate the employer to comply with the cited standard in the future. The Court finds the proposed penalty of $35,000 is appropriate; it is assessed for the violation.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that: Item 1 of Citation 1, alleging a willful violation of 29 C.F.R. § 1926.501(b)(10), is AFFIRMED, and a penalty of $35,000 is assessed.

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

Dated: 29 AUG 2013
Washington, D.C.