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

Secretary of Labor,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket Nos. 16-1161 and
	)	16-1162
Payton Roofing, Inc.,	)	
	)	CONSOLIDATED FOR TRIAL
	)	AND DISCOVERY PURPOSES
Respondent.	)	
	)	

Appearances: Melanie Stratton, Attorney
Melanie Paul, Associate Counsel
U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Tim Payton
Payton Roofing, Inc., Coral Springs, Florida
For the Respondent

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). This proceeding arises from two separate investigations, Nos. 1128469 and 1128473, conducted by the Occupational Safety and Health Administration (OSHA). From March 2, 2016 through May 11, 2016, OSHA conducted inspection No. 1128469 of Payton Roofing, Inc.'s (Respondent or Payton Roofing) worksite at 4160 NW 21st St., Building B,

Lauderhill, Florida 33313 (Building B). On May 11, 2016, OSHA issued a one item repeat citation and a two item serious citation to Respondent alleging a violation of OSHA's construction standards and proposing a total penalty of $21,560 for the two citations. (Tr. 12-15; Exs. 18-20). Respondent filed a notice of contest (NOC). The Commission docketed the case as Docket No. 16-1161 on July 22, 2016. The Secretary filed his complaint in Docket No. 16-1161 on July 15, 2016.

From February 29, 2016 through May 11, 2016, OSHA conducted inspection No. 1128473 of Respondent's worksite at 4160 NW 21st St., Building D, Lauderhill, Florida 33313 (Building D). On May 11, 2016, OSHA issued a two item repeat citation and a two item serious citation to Respondent alleging a violation of OSHA's construction standards and proposing a total penalty of $32,340 for the two citations. (Tr. 12-15; Exs. 1-3). Respondent filed a NOC. The Commission docketed the case as Docket No. 16-1162 on July 22, 2016. The Secretary filed his complaint in Docket No. 16-1162 on July 15, 2016.

Respondent then failed to file a timely answer to the Secretary's complaints for either case leading to the Chief Judge issuing Orders of Default in Docket No. 16-1161 on May 12, 2017 and in Docket No. 16-1162 on May 16, 2017. Shortly thereafter, Respondent filed a letter disputing all the allegations. The Chief Judge construed Respondent's letter as answers and Motions to Set Aside Sanctions of Default in both cases. On May 22, 2017, the Chief Judge granted Respondent's Motions to Set Aside Sanctions and rescinded her Orders of Default in both cases. On May 23, 2017, the two cases were assigned to the Court for trial.

On June 8, 2017, during the pre-trial scheduling conference, the Court ordered, without objection, Docket Nos. 16-1161 and 16-1162 to be consolidated for discovery and trial purposes.[1]

On July 6, 2017, Complainant filed its Motion to Withdraw Citation 1, Items 1a, 1b, 1d, Citation 2, Items 1 and 2, [in Docket No. 16-1162]; Citation 1, Items 2b, 2c, and Citation 2, Item 1 [in Docket No. 16-1161][Motion to Withdraw Citation Items].[2] The Court granted Complainant's Motion to Withdraw Citation Items at the start of the trial, without objection. (Tr. 12). A trial was held in Fort Lauderdale, Florida on July 13, 2017. At the start of the trial, Complainant also withdrew Citation 1, Item 2, without objection in Docket No. 16-1162 with the Court's permission.[3] (Tr. 11-12).

Respondent did not appear at the trial.[4] (Tr. 9). The Secretary filed a post-trial brief. Respondent did not file a post-trial brief. For the reasons set forth below, the Court affirms Citation 1, Item 1, which alleged a serious violation of 29 C.F.R. § 1926.501(b)(4)(i) and assesses a penalty of $4,900; Citation 1, Item 2a, which alleged a serious violation of 29 C.F.R. § 1926.502(d)(15) and assesses a penalty of $4,900 in Docket No. 16-1161; and Citation 1, Item 1c, which alleged a serious violation of 29 C.F.R. § 1926.502(d)(21), and assesses a penalty of $4,900 in Docket No. 16-1162.

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[1] Respondent failed to participate in the June 8, 2017 telephone conference. Respondent also did not participate in the final pre-trial conference conducted on July 6, 2017.

[2] The remaining citation items in Docket No. 16-1161 for trial were Citation 1, Item 1, which alleged a serious violation of 29 C.F.R. § 1926.501(b)(4)(i) with a proposed penalty of $5,390 and Citation 1, Item 2a, which alleged a serious violation of 29 C.F.R. § 1926.502(d)(15) with a proposed penalty of 5,390. Both alleged violations occurred at Building B on March 2, 2016. (Tr. 13-14).

[3] The remaining citation item in Docket No. 16-1162 for trial was Citation 1, Item 1c, which alleged a serious violation of 29 C.F.R. § 1926.502(d)(21) with a proposed penalty of $5,390. The alleged violation occurred at Building D on February 29, 2016. (Tr. 11-15).

[4] Commission Rule 64 states that the failure of a party to appear at a trial "may result in a decision against that party." 29 C.F.R. § 2200.64(a). A failure to appear may be excused where good cause is shown, but a request for reinstatement must be made within five days of the trial. 29 C.F.R. § 2200.64(b). Respondent has made no such request. The evidence produced by the Secretary is uncontested since Respondent failed to appear at the trial, proffer any trial exhibits, or file any post-trial brief.

JURISDICTION

The evidence establishes that, at the time of the OSHA inspections, Respondent was performing roofing work on two residential construction sites in Lauderhill, Florida. (Tr. 13). Roof repair qualifies as "construction work" which is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1926.32(g). The construction industry affects commerce, and even small employers within that industry are engaged in commerce. *Slingluff v. OSHRC*, 425 F.3d 861, 866-67 (10th Cir. 2005); *Clarence M. Jones, d/b/a C. Jones Co*., 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). The record also establishes that Respondent had at least one employee who was working as a roofer on each of Respondent's worksites. (Tr. 31; Exs. 1 at p. 2, 2 at pp. 2-3).

Based upon the record, the Court finds that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case, and Respondent is covered under the OSH Act.

BACKGROUND

OSHA Inspections

1. Docket No. 16-1162, Inspection No. 1128473, Building D

On February 29, 2016, an anonymous caller reported to OSHA an alleged fall protection violation at Respondent's worksite at Building D in Lauderhill, Florida. OSHA registered the complaint and dispatched Compliance Officer (CO) Gregory Rodgers to inspect the worksite located at Building D.[5] Upon arrival, CO Rodgers observed employees working

[5] CO Rodgers has been familiar with OSHA's construction safety regulations for more than 20 years, initially as a safety manager and later as an OSHA CO beginning in 2009. He has performed approximately 200 OSHA investigations, a third of which involved fall protection. He has an Associate of Science degree in environmental

on the roof of a multi-residential building appearing to be without any form of fall protection. The building was two stories high and the roofers were about 18 - 22 feet above the ground.[6] (Tr. 17-19, 27-31; Ex. 11). CO Rodgers also took photographs of the worksite. He then presented his credentials to Respondent's employees and motioned for those employees on the roof to descend. CO Rodgers spoke briefly with Max Rodriguez who said he was the supervisor (foreman) at that time. Mr. Rodriguez was in charge of directing the employees and their activities while the supervisor of record, Ronald Brown, was away from the job site. Following the brief discussion, CO Rodgers continued his investigation. He went up to the roof and took additional photographs. He also took the names of employees and interviewed them for basic information. (Tr. 34-40; Exs. 1, 3, 9-10, 18 at p. 2).

Respondent's employees, including Mr. Rodriguez, returned to their work on the roof. (Tr. 25, 31-35). CO Rodgers observed Respondent's employee, Jose Ocana, in a personal fall arrest system with two lifelines joined by a knot that was undersized and frayed with various knots and abrasions. After completing his inspection, CO Rodgers discussed his findings with Mr. Rodriguez. CO Rodgers testified that Mr. Rodriguez signed a statement claiming he knew the lifeline was defective and that Mr. Ocana had used it for the past two days. Regarding training, CO Rodgers testified that both Mr. Rodriguez and Respondent's employees stated they had received a video training, at company offices, on fall arrest systems. (Tr. 44-49; Exs. 1, at p. 3, 40).

2. Docket No. 16-1161, Inspection No. 1128469, Building B

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hazardous materials management. (Tr. 20-26). The Court had the opportunity to observe CO Rodgers' demeanor while testifying at trial. The Court found CO Rodgers to be entirely credible and truthful in his testimony.

[6] CO Rodgers used an electrical rod to make the measurements. He measured the height of the roof to be approximately 18 feet. (Tr. 29-31; Ex. 11).

On March 2, 2016, CO Rodgers returned to Respondent's worksite at Lauderhill, Florida in order to conclude his investigation of inspection no. 1128473 that he had started three days earlier. (Tr. 53). Upon arriving at Building B of the worksite, CO Rodgers observed Respondent's employees working on the roof. They appeared to be using harnesses and lifelines while placing a tape barrier around the perimeter of the roof. Buildings B and D had the same architecture, design, style, structure and dimensions as to size and height. (Tr. 53, 82).

CO Rodgers went up to Building B's roof and photographed the area while Messrs. Rodriguez and Brown were present. CO Rodgers observed two areas with holes in the roof. The first was a large hole, approximately 16 feet by 8 feet. The hole was created by Respondent's employees when they removed the roof's old plywood sheathing. The second area was a deteriorated portion that was caving in, which according to CO Rodgers, "constituted a hole." Neither of the areas surrounding the holes had been covered or surrounded by guardrails. CO Rodgers saw workers using shovels to strip the old layered roof. He also saw one of Respondent's employees, Carlos Montes, standing within 6 feet of the large hole without using any fall protection. The two areas exposed employees to a fall of 12 feet as they moved debris near the open and unguarded holes. (Tr. 53-60; Exs. 18, 28-29, 33).

While Mr. Montes failed to use any fall protection system, CO Rodgers observed two other employees, Messrs. Ocana and Hipolitan Tobia, use a fall protection system that was non-compliant with OSHA standards while working on the perimeter of the roof. CO Rodgers testified that their fall protection system was faulty because Messrs. Ocana and Tobia had

improperly attached their two lifelines to a single anchorage.[7] The single anchorage was only intended to be used by one person. (Tr. 14, 75-79, 103; Exs. 18, 25-26).

Following the investigation, CO Rodgers discussed his findings with supervisor Brown. CO Rodgers testified that Mr. Brown acknowledged the existence of the holes, that they had been there for a few days, and employees had worked around the holes without any form of fall protection. Additionally, the user's manual was on the roof which set out the permitted uses of harnesses and anchorages. The anchor used by Respondent's employees was designed and approved for only a single user. Furthermore, CO Rodgers testified that Mr. Brown's 30 years of roofing experience should have made him aware that his employees' use of two lifelines attached to a single anchor was against OSHA standards. (Tr. 68-76, 84-89; Exs. 29, 34, 36).

Based on both of these inspections, OSHA issued the citations in these two cases to Payton Roofing on May 11, 2016.

OSHA Citations

OSHA issued Respondent two citations: under Docket No. 16-1162, a one-item serious citation proposing a penalty of $5,390; under Docket No. 16-1161, a two-item serious citation proposing a penalty of $10,780 for a total proposed penalty of $16,170. (Exs. 44-45, 47).

1. Docket No. 16-1162

Citation 1, Item 1c, the uninspected fall arrest system violation, alleged a serious violation of 29 C.F.R. § 1926.502(d)(21) and proposed a penalty of $5,390. Section 1926.502(d)(21) states:

> Personal fall arrest systems were not inspected prior to each use for wear, damage, and other deterioration, and/or defective components were not removed from service.

29 C.F.R. § 1926.502(d)(21).

[7] Messrs. Brown and Rodriguez were still on the roof at this point. (Tr. 84).

The Secretary alleged that an employee was "exposed to a fall hazard of approximately 18 feet while using a defective undersized lifeline that had knots and abrasions" while conducting roof repairs. (Ex. 44; Sec'y Br. at 5).

2. Docket No. 16-1161

Citation 1, Item 1, the unguarded floor hole violation, alleged a serious violation of 29 C.F.R. § 1926.501(b)(4)(i) and proposed a penalty of $5,390. Section 1926.501(b)(4)(i) states:

> Each employee on walking/working surfaces was not protected from falling through holes (including skylights) more than 6 feet (1.8m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

29 C.F.R. § 1926.501(b)(4)(i).

The Secretary alleged that Respondent's "employees were exposed to a fall hazard of approximately 12 feet while exposed to unguarded holes in the roof sheathing while performing roof repairs without means of conventional fall protection." (Ex. 45; Sec'y Br. at 5).

Citation 1, Item 2a, the anchorage violation, alleged a serious violation of 29 C.F.R. § 1926.502(d)(15) and proposed a penalty of $5,390. Section § 1926.502(d)(15) states:

> Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kN) per employee attached, or shall be designed, installed, and used as follows: (i) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and (ii) under the supervision of a qualified person.

29 C.F.R. § 1926.502(d)(15).

The Secretary alleged that two of Respondent's employees, Messrs. Ocana and Tobia, were "exposed to a fall hazard of approximately 18 feet while both being attached to the same anchorage that was intended for one person." (Ex. 47; Sec'y Br. at 6).

DISCUSSION

To establish a violation of an OSH Act standard, the Secretary must prove by a preponderance of the evidence that: "(1) the cited standard applies; (2) the employer failed to comply with the standard; (3) the employees had access to the hazardous condition; and (4) the employer had actual or constructive knowledge of the violation." *P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Comm'n*, 675 F.3d 66, 72 (1st Cir. 2012) (citation omitted); *see also Astra Pharm. Prods*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Exposure to the hazard requires the Secretary to show whether it is "reasonably predictable" that employees, during the course of their duties, "will be, are or have been in a 'zone of danger'." *Con Agra Flour Milling Co.*, 16 BNA OSHC 1137, 1150 (No. 88-1250, 1993), *rev'd. in irrelevant part,* 25 F.3d 653 (8th Cir. 1994).

To establish employer knowledge of a violation, the Secretary is required to show that the employer knew, or could have known, of a hazardous condition. Knowledge can be proven through actual knowledge of the hazard or constructive knowledge. Constructive knowledge requires the hazard to be "readily apparent" at the time of the violation. *Hamilton Fixture*, 16 BNA OSHC 1073, 1091 (No. 88-1720, 1993). Further, constructive knowledge can be imputed to an employer through the employer's supervisor. *Id.* at 109*; see also P. Gioioso & Sons, Inc.*, 675 F.3d at 72. If the supervisor was in close proximity to the hazard at the time the violation occurred, constructive knowledge can be imputed. *NY State Elec. & Gas Corp.*, No. 91-2897, 2000 WL 35301892, at *12 (O.S.H.R.C.A.L.J., Oct. 17, 2000). Even if an employee has been temporarily designated as a supervisor, the employee may still be a supervisor for the

purpose of imputing knowledge. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (No. 86-360, 1992) (consolidated).

1. Alleged Violations

a. Serious Citation 1, Item 1c – uninspected fall arrest system (No. 16-1162)

The Secretary claims that Respondent violated 29 C.F.R. § 1926.502(d)(21) when its employee failed to remove a defective lifeline from use. (Sec'y Br. at 7; Ex. 44).

The record establishes that Respondent's employee, Mr. Ocana, was using a defective fall arrest system while performing roofing work on Building D. Such use exposed him to the possible danger of falling 18 feet to the ground. Mr. Ocana was using the lifeline as interim foreman, Max Rodriguez, was present on the roof. (Tr. 42-48; Ex. 44). The cited standard applies.

The record establishes that the lifeline was damaged and therefore defective for several reasons. First, the lifeline had various visible abrasions. According to CO Rodgers, these abrasions could impact the "tensile strength" of the ropes and cause the lifeline to fail. (Tr. 38-43; Exs. 1, 9). Second, the lifeline was comprised of two pieces of rope tied together by a knot. CO Rodgers testified that the knot compromises the lifeline by reducing the strength of the rope by 50% in the event of a fall. (Tr. 34-43; Exs.1, 9). Third, one of the lifeline ropes was undersized. CO Rodgers said, "a regulation compliant lifeline should be five-eighths in diameter, and this line clearly was under five-eighths." CO Rodgers believed that the lifeline was only a half-inch in diameter. He testified that any competent, qualified person would have determined that the anchorage was not capable of supporting at least 5,000 pounds per employee attached. CO Rodgers said the lifeline should have been a single, continuous lifeline that was neither damaged nor frayed and affixed to an anchorage rated at 5,000 pounds with

either a snap hook or a termination plate. (Tr. 34-40; Exs. 1, 9-10, 18 at p. 2). These portions of the lifelines were defective, but they were not removed from service as Mr. Ocana had used the lifelines for two days. (Tr. 45-48; Ex. 1, at p. 3). CO Rodgers testified that 29 C.F.R. § 1926.502(d)(21) required "that personal fall arrest systems be inspected prior to each use for wear, damage, deterioration, and those items identified as defective be removed from service." (Tr. 42). This was not done. The standard was violated.

With regards to knowledge, CO Rodgers testified that Foreman Rodriguez told him on February 29, 2016 that he knew Mr. Ocana's lifelines were defective and "faulty." Mr. Rodriguez also told CO Rodgers that he had observed Mr. Ocana use the faulty lifelines on the roof for two days, *i.e*. February 28 and February 29, 2016. (Tr. 45-48; Exs.1, 40). As stated in the Secretary's post-trial brief, "[w]here a cited condition is "readily apparent to anyone who looked" employers have been found to have constructive knowledge." *Hamilton Fixture*, 16 BNA OSHC at 1091. Constructive knowledge has been found where the hazard is in plain view. *See Kokosing Constr. Co., Inc.,* 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996) ("The conspicuous location, the readily observable nature of the violative condition and the presence of the [employer's] crews in the area warrant a finding of constructive knowledge."). *See also MCC of Fla., Inc.*, 9 BNA OSHC 1895, 1898 (No. 15757, 1981) (finding constructive knowledge when the hazard is in plain view). (Sec'y Br. at 8).

Here, Respondent had actual and constructive knowledge that its employee, Mr. Ocana, was using a defective personal fall arrest system. First, Respondent had actual knowledge of the hazard because acting foreman Max Rodriguez identified the lifeline as "faulty." (Ex. 40, p. 4). Next, Respondent had constructive knowledge of the violative condition given the obvious defects of the lifeline. Mr. Rodriguez was on the roof with Mr. Ocana, and the fact

that the defective lifeline was in use and plain view for two days demonstrates constructive knowledge. (Tr. 48). *See Kokosing Constr. Co., Inc.,* 17 BNA OSHC at 1871.

Knowledge has been established.

The citation is affirmed.

The Secretary characterized this citation as serious. A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the hazardous condition. 29 U.S.C. § 666(k). The Secretary is only required to show that "'an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident.'" *Flintco, Inc.*, 16 BNA OSHC 1404, 1405-06 (No. 92-1396, 1993) (citation omitted).

CO Rodgers also testified that the defective lifeline used at the worksite could fail and expose the employee to a fall hazard of 18 - 20 feet to the mostly concrete surface below, resulting in injury.[8] (Tr. 42-44). He further testified that the probability of a failure was greater because the employee had been using the defective equipment for two days. (Tr. 49-50; Ex. 1).

Based on the record, the court finds that a fall due to defective lifelines was possible on Respondent's worksite. The court further finds that a fall from a height of 18 feet could result in a fatality, severe injuries, or disability. (Tr. 26, 49).

The citation item is properly characterized as serious.

b. Serious Citation 1, Item 1 – alleged hole violation (No. 16-1161)

[8] Specifically, CO Rodgers testified:
Q. Okay. And so when you say that the equipment could fail, what do you mean?
A. Well, when we examine the exhibit [9], we see that this lifeline is compromised with knots and abrasions and being undersized. [Extraneous material omitted] And – if that system had been used to arrest a fall, it is questionable that it would be -- have been effective in preventing a fall, in arresting a fall and being exposed to the anticipated forces of a fall. It could have very well failed and resulted in a fatality. (Tr. 43).

The Secretary alleges Respondent violated 29 C.F.R. § 1926.501(b)(4)(i) when its employees were working in "close proximity to unguarded hole[s]," without the means of conventional fall protection, as they "removed debris from the roof of Building B."[9] (Tr. 68-69; Ex. 45; Sec'y Br. at 11).

The evidence establishes that Respondent's employees had created a large hole on the roof of Building B by removing the roof's sheathing. CO Rodgers photographed the large hole (Ex. 33, at "A")[10], and the deteriorated portion of the roof (Ex. 28, at "A"),[11] which were uncovered and without guardrails erected around them to protect the employees from falling through. Further, CO Rodgers photographed employees within close proximity to the holes without proper fall protection systems. The cited standard applies. (Tr. 54-61; Exs. 28, 33, 45).

CO Rodgers testified that during his investigation seven employees were on the roof, including Messrs. Rodriguez and Brown, working around the large hole without wearing any fall protection.[12] The photograph at Ex. 33 shows five of the seven employees pictured on the roof not wearing any personal fall arrest systems. CO Rodgers also testified that he observed Respondent's employee, Mr. Montes, only about six feet away from the unguarded "hole" at Ex. 28, at "A", without wearing any form of personal fall arrest system. Two other employees, Messrs. Ocana and Tobia, were also observed near the "hole" at Ex. 28, at "A", using personal fall arrest systems. But the use of such systems was faulty because they had improperly

[9] CO Rodgers testified that 29 C.F.R. § 1926.501(b)(4)(i) required "[t]hat each employee on a walking/working surface be protected from falling through holes, including skylights, when there's a fall of more than six feet be protected with either a personal fall arrest system, covers or guardrail system around each hole." (Tr. 69-70).
[10] CO Rodgers testified that the large hole could also be considered separate holes because the roof joists actually separated the hole into multiple holes. (Tr. 95; Exs. 28, 3-34).
[11] CO Rodgers testified that the diameter of the "hole" at Ex. 28, at "A", was roughly 4 feet. He said the plywood there was "[d]ecayed and its structural integrity is such that it would not support the weight of an employee." He also said that the area "appears to be deteriorated and caving in in the roof sheeting area, which would constitute the hole." (Tr. 61-62, 96-97; Ex. 28, at "A").
[12] Other employees seen on the roof included Messrs. Tobias, Ocana, Montes, and Tobia. (Tr. 92-93; Ex. 18).

attached their two lifelines to a single anchorage. (Tr. 59-68; Exs. 28-29, 33, 40; Sec'y Br. at 11). Respondent violated the standard.

The Court finds that employees were exposed to the hazard. Employees working and walking on the roof had access to the unguarded holes. First, CO Rodgers testified that he personally observed an employee walking by an unguarded hole. (Tr. 60). Second, Mr. Montes was standing approximately six feet away from an unguarded section of the deteriorated roof without wearing fall protection. (Tr. 62-65; Ex. 28). He was working within the "zone of danger" of the hazardous condition. *Con Agra Flour Milling Co.,* 16 BNA OSHC at 1150. Third, the employees on the roof had access to the unguarded holes because they were working directly beside and around the unguarded hole and deteriorated roof section. CO Rodgers testified that the workers were walking around the roof as they removed portions of old roof, including the plywood sheathing and roof membrane, and piling the debris on the roof. (Tr. 56–58). He also said that he observed portions of the removed roof piled beside the unguarded hole. (Ex. 33, at "C" and "D"). The Court finds that it is "reasonably predictable" that the workers walked past the unguarded hole and deteriorated roof section to have placed the debris and trash directly beside the unguarded hole. *Id.* (Sec'y Br. at 12).

Respondent's failure to use proper personal fall arrest systems near uncovered and unguarded holes exposed employees to a fall of 12 feet to the floor below. The decayed portion of the roof had a diameter of at least 4 feet, with two openings estimated to be one to two feet long by four to six inches wide and two feet long by two to three inches wide. Together, the Court finds that the decayed portion of the roof and the two openings constituted a hole,[13] or holes, within the meaning of 29 C.F.R. § 1926.501(b)(4)(i). The Court further

[13] 29 C.F.R. § 1926.500(b) defines a "hole" and says "it means a gap or void 2 inches (5.1 cm) or more in its least dimension, in a floor, roof, or other walking/working surface."

finds that the hole at Ex. 28, at "A", constituted a hole that was required to be guarded and protected from falling under the OSHA standard at 29 C.F.R. § 1926.501(b)(4)(i). The Court also finds that one of Respondent's employees could have fallen through these holes. These holes presented a hazard to Respondent's employees. Respondent's employees were exposed to the hazard. In *Monahan & Loughlin, Inc.,* 15 BNA OSHC 1086 (No. 89-1524, 1991), a serious violation of 29 C.F.R. § 1926.500(b)(1) was established when an employee was injured after falling through a hole that was "estimated to be 1 ½ feet by 1 ½ feet." *Id.* Similarly, in *Ultra Commercial Interiors, Inc.,* 23 BNA OSHC 1826 (No. 10-1645, 2011), serious violations of 29 C.F.R. §§ 1926.502(i)(3) and 502(i)(4) were affirmed when an employee fell 16 feet through a hole approximately 2 feet wide by 6 feet long. *Id.,* at 1827-30. (Tr. 59-64, 96-98; Ex. 28).

With regards to knowledge, CO Rodgers testified that Supervisor Brown had been on the roof while employees moved debris near the large hole. CO Rodgers testified that Mr. Brown admitted that the "workers worked around the holes" for the past two days, "without any form of fall protection." Mr. Brown also told CO Rodgers that both he (Mr. Brown) and Mr. Rodriguez had observed Respondent's employees on the roof working around and in close proximity to the holes without any means of fall protection. The larger hole was approximately 16 feet by 8 feet meaning it was large enough where Mr. Brown should have been aware of the hazard it presented. Knowledge has been established. (Tr. 67-74; Exs. 18, 29).

The citation is affirmed.

The Secretary characterized this citation as serious. A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the

hazardous condition. 29 U.S.C. § 666(k). The Secretary is only required to show that " 'an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident.' " *Flintco, Inc.*, 16 BNA OSHC at 1405-06.

Based on the record, the Court finds that a fall through holes, that were not covered or guarded, was possible on Respondent's worksite. The court further finds that an unprotected fall through a hole, 12 feet above the ground, could result in severe injuries, temporary or permanent disability, or death.[14]

The citation item is properly characterized as serious.

c. Serious Citation 1, Item 2a– alleged anchorage violation (No. 16-1161)

The Secretary claims the Respondent violated 29 C.F.R. § 1926.502(d)(15) when two of Respondent's employees, wearing personal fall arrest systems, had improperly attached two lifelines to a single anchorage.[15] (Tr. 88; Ex. 47; Sec'y Br., at 13).

The evidence shows that Respondent's employees implemented a personal fall arrest system with an anchor. The system was used under the supervision of a qualified person, supervisor Brown. The cited standard applies.

CO Rodgers testified that he observed two of Respondent's employees, Messrs. Ocana and Tobia, using two lifelines attached to a single anchorage.[16] According to CO Rodgers, the employees had been using this method for two days. CO Rodgers further observed a user manual entitled "Full Body Harness User Instructions" at Respondent's worksite. The manual

[14] CO Rodgers testified that "fatalities, disabling injuries, [and] permanent disability" often occur as a result of unguarded holes. (Tr. 27, 70).

[15] CO Rodgers testified that the standard at 29 C.F.R. § 1926.502(d)(15) "requires that anchorages that are used for attachment for fall arrest systems be capable of supporting at least 5,000 pounds per employee attached and designed and installed with a safety factor of at least 2." He further said that the standard "protects against falls that an employee could experience if the anchorage is not rated and approved and used in accordance with manufacturer's instructions and the application of the standard. In the event of a failed anchorage, it would not arrest the fall of the employee and could result in a death." (Tr. 88).

[16] The photographs at Exs. 25 and 26 show a nail-on type anchorage with two snap hooks and lifelines running from Messrs. Ocana and Tobia attached to one anchor point. (Tr. 75-79; Ex. 25-26).

specified the appropriate usages of body harnesses and anchorages for personal fall arrest systems. The manual permitted only one user per anchorage; otherwise the anchor would not comply with the OSHA standard.[17] The "Performance" section of the manual also required the maintenance of a safety factor of two.[18] Because two lifelines were improperly attached to a single anchor, the anchorage was not " 'installed' and 'used' as 'designed.' "[19] *William Trahant, Jr., Constr., Inc.*, No. 15-0489, 2017 WL 3399778, at *8 (O.S.H.R.C.A.L.J. June 26, 2017) (finding that the employer violated 29 C.F.R. § 1926.502(d)(15) where the CO observed that the roof anchorage "was not 'installed' and 'used' as 'designed.' "). The standard was violated. (Tr. 75-81, 89-90, 103; Exs. 25-26, 34-35, 47).

CO Rodgers testified that Respondent's employees "were exposed to a hazard of a fall of up to 22 feet from that edge of the roof, and if they indeed had fallen, naturally the possibility of a fatality, of a death, if they had used that anchorage and exceeded its limitations and capability and it had failed and did not arrest their fall." He said that the improper use of an anchorage could cause the anchorage to fail and the employees to fall about 18-22 feet to the ground. Exposure to the hazard has been established. (Tr. 81-82, 88).

Both Messrs. Brown and Rodriguez were on the roof while Messrs. Ocana and Tobia were attached to a single anchorage. Further CO Rodgers testified that, upon request, he was given a copy of the manufacturer's manual for the body harnesses and anchorage use. The manual was present on the roof when the two employees were using the lone anchor point.

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[17] The "Use Limitations" section of the manual stated:

> 1. Permanent Roof Anchors are designed for a single user (including clothing, tools, etc.) with a capacity up to 310 pounds (140 kg).

(Tr.79-80; Ex. 36).

[18] CO Rodgers testified that the anchorage could not maintain a safety factor of two and comply with the manual and OSHA standard if two employees were attached to the anchor point. (Tr. 89).

[19] CO Rodgers testified that most roof anchorages are not designed to carry a capacity of two individual loads per employee. (Tr. 83-84). He testified that "in order for that anchorage to be used in compliance with the OSHA standard, it cannot have more than one user attached to it." (Tr. 84).

Respondent should have known, through the manufacturer's instructions, the employees' use of the anchorage was improper. CO Rodgers further testified Respondent's employees, including Mr. Rodriguez, had been trained in fall arrest systems. CO Rodgers concluded that based on Mr. Brown's 30 years of experience in roofing, Mr. Rodriguez's training in fall arrest systems and the manual that was on the roof of the worksite, Respondent should have been informed on how to properly use the anchor. Knowledge has been established. (Tr. 49, 71, 82-85, 107).

The citation is affirmed.

The Secretary characterized this citation as serious. A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the hazardous condition. 29 U.S.C. § 666(k). The Secretary is only required to show that " 'an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident.' " *Flintco, Inc.*, 16 BNA OSHC at 1405-06.

The Court finds, based on the record, that an anchorage failure was possible on Respondent's worksite. The Court further finds that a fall of 18 feet, due to a failed anchorage, could result in severe injuries, including broken bones, or death. (Tr. 82, 88). *See Daniel Crowe Roof Repair*, 23 BNA OSHC 2001, 2017 (No. 10-2090, 2011) (roofing an inherently dangerous activity).

The citation item is properly characterized as serious.

2. Penalties

"Section 17(j) of the [OSH] Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give 'due consideration' to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations." *Hern*

Iron Works, Inc., 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994). When determining gravity, typically the most important factor, the Commission considers the number of exposed employees, the duration of their exposure, whether precautions could have been taken against injury, and the likelihood of injury. *Id.* When evaluating good faith:

> [T]he Commission focuses on a number of factors relating to the employer's actions, 'including the employer's safety and health program and its commitment to assuring safe and healthful working conditions[,]' in determining whether an employer's overall efforts to comply with the OSH Act and minimize any harm from the violations merit a penalty reduction.

Monroe Drywall Constr., Inc., 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013) (citations omitted). The Commission is the "final arbiter" of penalties. *Hern Iron Works,* 16 BNA OSHC at 1622 (citation omitted).

Regarding Docket No. 16-1162, serious Citation 1, Item 1c, the uninspected fall arrest system violation, the Secretary proposed a penalty of $5,390. For Docket No. 16-1161, serious Citation 1, Item 1, the unguarded hole violation, the Secretary proposed a penalty of $5,390. For serious Citation 1, Item 2a, the anchorage violation, the Secretary proposed a penalty of $5,390.

For each of these penalty calculations, the Secretary initially issued a penalty amount of $7,000. But the Secretary applied a 30% reduction to account for Respondent's small business size, a 10% increase due to Respondent's prior history of an OSHA violation,[20] and no reduction for good faith. (Tr. 50).

[20] On January 19, 2016, less than two months before the inspections at issue here, OSHA inspected a different Payton Roofing Inc. worksite and issued a citation alleging a serious violation of 29 C.F.R. § 1926.502(h)(1)(iii). Respondent filed a timely notice of contest, but failed to appear at the trial. After hearing the Secretary's case and viewing the evidence put forth, the judge affirmed the citation and assessed a civil penalty against Payton Roofing Inc. in the amount of $2,800. The judge's decision became the final order of the Commission on January 4, 2017, well after the inspections were conducted and the citations issued in this matter. *Payton Roofing, Inc.,* 26 BNA OSHC 1445, 1449 (No. 16-1163, 2017)(ALJ).

CO Rodgers did not recommend a good faith reduction for Citation 1, Item 1c, in Docket No. 16-1162 because the severity of the item was deemed to be high because a failure of the lifeline could result in a fatality. The assigned probability for the item was greater because Mr. Ocana had been using the defective lifeline for two days, about 8 hours each day. (Tr. 37-40, 49-51, 55-56, 68-70, 78-79, 83-86, 94-96; Sec'y Br. at 1). CO Rodgers also testified that the severity of the Citation 1, Item 1, in Docket No. 16-1161, was deemed to be high because a fall of 12 feet could result in a disabling, permanent injury or death. The assigned probability for the item was greater because employees had been working around the holes for two days. (Tr. 70-72; Ex. 18, at p. 4). He further said that the severity of the Citation 1, Item 2a, in Docket No. 16-1161, was deemed to be high because a fall could result in injuries ranging from temporary to permanent disability, broken bones and death. The assigned probability for the item was greater because employees had been using this anchorage for the past two days, about eight hours a day. (Tr. 90). The Court also agrees that the gravity of these violations is high. All of the safety hazards here had a high likelihood of injury and could have been readily mitigated, but Respondent chose not to take simple precautions in order to complete the job.

The Court agrees with the Secretary's approach to these factors with one exception. The Court disagrees with the Secretary's imposition of a 10% increase for Respondent's prior history. The Court is unwilling to consider, for the purpose of imposing a 10% increase in the penalty, a prior citation that became a final order of the Commission well after the inspections were conducted and the citations issued in this matter.

The Commission is not bound by the Secretary's proposed penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC at 1621-22. Once a citation is contested, the Secretary's proposed

penalties become advisory and the penalty amount is left to the discretion of the Commission. *Id.* at 1622; *see also Brennan v. OSHRC*, 487 F.2d 438, 442 (8th Cir. 1973) ("Congress gave the OSHRC the authority to assess penalties.... The Secretary's proposed penalty is effective only if not contested; once contested, the OSHRC can affirm the proposed penalty, modify it, vacate it, or direct other appropriate relief."). Further, when considering an employer's history of previous violations when determining the appropriate penalty amount, the history of prior violations should not include a judge's decision that, at the time of the inspections and issuance of citations at issue, was pending before the Commission. *Gen. Steel Fabricators, Inc.*, 5 BNA OSHC 1837, 1838 (No. 76-710, 1977) (Inasmuch as the earlier penalty order was not final, the Judge erred by taking cognizance of it in determining the penalty.).

The Court finds that because the previous citation was not final order at the time the citations here were issued, it cannot be used by the Secretary to impose a 10% increase for the penalty amount. The 10% increase for history is therefore excluded, reducing the penalties for each citation as follows: regarding Docket No. 16-1162, the penalty in Citation 1, item 1c is reduced to $4,900; for Docket No. 16-1161, the penalty for Citation 1, item 1 is reduced to $4,900 and the penalty in Citation 1, item 2a, is reduced to $4,900. The total Court assessed penalty for these affirmed citation items is $14,700.

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

1) For Docket No. 16-1162: Item 1c of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.502(d)(21), is **AFFIRMED** and a penalty of $4,900 is **ASSESSED**.

2) For Docket No. 16-1161: Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(4)(i), is **AFFIRMED** and a penalty of $4,900 is **ASSESSED,** and

   Item 2a of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.502(d)(15), is **AFFIRMED** and a penalty of $4,900 is **ASSESSED**.

SO ORDERED.

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

Date: October 30, 2017
Washington, D.C.