UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,[1] Complainant, v. ENWRIGHT ROOFING LLC, Respondent.	Docket No. **23-0534**

DECISION AND ORDER

Appearances:

Omar Saleem, Attorney, Office of the Solicitor, U.S. Department of Labor, New York, NY, for Complainant

Daniel Enwright, Enwright Roofing, LLC, Oswego, NY, for Respondent

BEFORE: John B. Gatto, United States Administrative Law Judge

I. INTRODUCTION

Respondent Enwright Roofing, LLC ("Enwright Roofing"), a New York-based residential roofing contractor, was performing roofing work on a home in Oswego, New York (the "worksite"), when the United States Department of Labor, through the Occupational Safety and Health Administration ("OSHA"), investigated the worksite and subsequently issued[2] Enwright

[1] On March 10, 2025, Lori Chavez-DeRemer was sworn into office as the Secretary of Labor and is automatically substituted *sub nom.* for the former Acting Secretary. *See* Fed. R. Civ. P. 25(d). "Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure." 29 U.S.C. § 661(g). The Commission has not adopted a different rule regarding substitution of parties.

[2] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated its authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA, and promulgated the occupational safety and health standards at issue. *See* Order No. 8-2020, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020), *superseding* Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The Assistant Secretary has authorized OSHA's Area Directors to issue the citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

Roofing a two-item citation alleging serious repeated violations of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-678, with total proposed penalties of $18,750. Enwright contested the Citation, and the Secretary filed a Complaint[3] with the Occupational Health and Safety Commission ("the Court") seeking an order affirming the Citation and proposed penalties.[4] (Compl. ¶X.) Daniel Enwright[5] answered the complaint, asserting that no employees were exposed to the alleged violative conditions, the alleged violations were not properly characterized as serious under the Act; and the Secretary's proposed penalties were excessive given the small size of the business. (Answer at 1-2.) The Court held a one-day trial and the Secretary subsequently filed a closing brief.[6]

There is no dispute that the Court has jurisdiction over the parties and the subject matter in this case. (Compl. ¶¶I-III; Answer ¶¶I-III.) Pursuant to Commission Rule 90, 29 C.F.R. § 2200.90, after hearing and carefully considering all the evidence and the arguments of the parties, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 12(j) of the Act. 29 U.S.C. § 661(j).[7] For the reasons indicated *infra*, the Court concludes the Secretary has established the violations as alleged. Accordingly, the Court **AFFIRMS** the Citation and **ASSESSES** a penalty of $20,625.00.

II. BACKGROUND

Enwright Roofing is a small roofing contractor that was hired to perform roofing work at the worksite in October 2022. (Stip.[8] ¶¶6, 11, 12.) Enwright, the company's owner, and an

[3] Attached to the Complaint and adopted by reference is the Citation at issue. (Compl., Ex. A.) Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R. §2200.30(d).

[4] Enwright's handwritten letter contesting the Citation indicated Enwright Roofing believed its Notice of Contest was late. However, the Secretary has not challenged the timeliness of Enwright's contest and the record does not establish when Enwright Roofing received the Citation. Therefore, for purposes of jurisdiction, the Court assumes the contest was timely.

[5] The Court's rules provide that any party "may appear in person, through an attorney, or through any non-attorney representative." 29 C.F.R. §2200.22(a). Enwright filed an appearance as non-attorney representative on behalf of Enwright Roofing.

[6] Enwright did not file a post-trial brief.

[7] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so. All arguments not expressly addressed have nevertheless been considered and rejected.

[8] *See* Pretrial Order, Attach. B.

Enwright Roofing employee, Steve Beeschorus,[9] were replacing roof shingles at the worksite on October 11, 2022, when OSHA Compliance Safety and Health Officer[10] Ashley Irwin drove by the home on a nearby street and noticed them working. (Stip. ¶¶10, 23; Tr. 23.) Irwin turned off the thoroughfare at the next street and drove behind the worksite, where she stopped to observe the two men on the roof. (Tr. 23.) From where she stopped approximately 150 to 200 feet behind the worksite, Irwin observed the men working without visible fall protection. (Tr. 24, 32.) She took several photographs showing the workers on the roof alongside packages of roofing materials and then drove to the worksite to conduct an inspection. (Tr. 24-25, 31-32, 34-35; Ex. C-1 at 1-3.)

Enwright and Beeschorus were still working on the roof when Irwin arrived at the worksite. (Tr. 35.) She introduced herself and called the two men down from the roof to discuss the worksite conditions. (Tr. 36.) As Beeschorus and Enwright exited the roof, Irwin took several more photographs of Enwright and Beeschorus and the equipment in use. (Tr. 36; Ex. C-1 at 5, 6.) In one photograph, roofing materials are visibly protruding over the edge of the lower roof. (Ex. C-1 at 5.)

The worksite had a lower roof with a pitch of 4:12 and a middle and upper roofs that both had a pitch of 6:12.[11] (Stip. ¶¶7, 9; Tr. 47; Ex. C-1 at 5.) When Irwin reached the worksite, Beeschorus was on the lower roof and Enwright was on the middle roof but both men had worked on the middle roof that day. (Tr. 32, 35, 48; (Stip. ¶¶14, 15.) The lower roof's surface was eight to 10 feet above the ground. (Stip. ¶9; Tr. 56.) Neither men were wearing personal fall protection equipment and Enwright admitted Enwright Roofing did not have any fall protection at the worksite. (Tr. 39, 69, 102.) Photographs of the worksite also clearly show both men working on the roof without a personal fall arrest system. (Ex. C-1 at 1-3, 5.) Beeschorus and Enwright had to leave the site after the inspection to get fall protection (Tr. 59.) Enwright testified that with a pitch of 4:12, he believed the only required fall protection was a monitor but admitted that although

[9] In the trial transcript and in Irwin's field notes, Enwright Roofing's employee is identified as "Beeschours." (Tr. 30; Ex. C-3.) In the joint stipulations submitted to the Court and the Secretary's post-trial brief, however, the parties spell the employee's name as "Beeschorus." (Pretrial Order, Attach. B p. 1; Sec'y's Post-Trial Br. at 2.) Here, the Court follows the spelling the parties used in their filings to the Commission.

[10] "Compliance Safety and Health Officer" means "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. § 1903.22(d).

[11] Using a roof pitch reference card, Irwin measured the pitch of each roof. (Tr. 43-44, 47.)

Enwright Roofing usually had a third person at the worksite to monitor, that person was not at the worksite the day of the investigation. (Tr. 38-39, 47, 109.)

The two men used portable ladders to access the roof that were leaning against the eaves of the lower roof. (Stip. ¶¶16, 19; Tr. 31, 36-37, 54; Ex. C-1 at 5, 6.) By counting the rungs of the ladders, Irwin estimated that the lower roof's eaves were approximately eight to 8.5 feet above the ground at their lowest point.[12] (Tr. 56; see also Stip. ¶¶17-19.) Although the ladders could extend to 16 feet in length, Enwright Roofing had not extended either ladder to reach three feet above the roof's eaves. (Tr. 57-58; Ex. C-1 at 6.) One ladder in use extended approximately 30 inches above the roof, while the second extended only about one foot above the roof. (Tr. 51, 100; Ex. C-1 at 5, 6.) Beeschorus used the first ladder to get off the roof when Irwin arrived. (Tr. 73-74.)

While discussing with Enwright the potential safety hazards Irwin identified at the worksite, Irwin learned that Enwright had received citations from OSHA in the past. (Tr. 43.) When she returned to her office, Irwin checked OSHA's files and found that Enwright had previously been cited for fall protection and ladder violations. (Tr. 76-78, 83-84; Ex. C-8.) As a result of Irwin's inspection, OSHA issued Enwright Roofing the two-item serious repeated citation.

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. Occupational Safety & Health Rev. Comm'n (CF&I Steel Corp.)*, 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. § 651(b)). "To implement the Act's legislative scheme, Congress imposed two duties on employers." *N.Y. State Elec. & Gas Corp. v. Sec'y of Lab.*, 88 F.3d 98, 104 (2d Cir. 1996).[13] Relevant here, "an employer

[12] One photograph from the worksite depicts a ladder contacting the roof's eave at approximately the tenth rung from the ground. (Ex. C-1 at 5.) The rungs are spaced 12 inches apart, and the ladder's rails extend six inches beyond the final rung on either end. (Pretrial Order, Attach. B p. 2; Tr. 49-50.)

[13] Under the Act, the employer or the Secretary may appeal a final Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case—even

has a duty to comply with the more specific safety and health standards promulgated under the Act." *Id.* (citing 29 U.S.C. § 654(a)(2)).

"Congress provided for the promulgation and enforcement of workplace standards through a comprehensive regulatory scheme. Regulatory responsibilities under the Act are divided between two administrative entities." *Id.* at 103. "[T]he Secretary of Labor exercises rulemaking and enforcement powers, establishing the standards, investigating employers to discover non-complying conduct, issuing citations, and assessing monetary penalties." *Ibid.* (citing 29 U.S.C. §§ 655, 657–59). "[T]he Commission exercises adjudicative powers and serves as the 'neutral arbiter' between the government regulatory body and an employer." *Ibid.* (quoting *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curium)). Congress therefore vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I Steel*, 499 U.S. at 151.

In the Second Circuit where this action arose, "[t]o establish a violation of an OSHA standard, the Secretary must demonstrate by a preponderance of the evidence that: '(1) the cited standard applies; (2) the terms of the standard were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more employees had access to the cited condition.'" *Walsh v. Walmart, Inc.*, 49 F.4th 821, 827, 2022 WL 4842041 (2d Cir. 2022) (quoting *Triumph Constr. Corp. v. Sec'y of Labor*, 885 F.3d 95, 98 n.3 (2d Cir. 2018)).

A. Citation 1, Item 1

The Secretary alleges in Citation 1, Item 1, that Enwright Roofing committed a serious repeated violation of one of OSHA's fall protection standards, 29 C.F.R. §1926.501(b)(13), when it failed to "provide fall protection to workers installing roofing materials on multiple pitch roof (4:12 lower roof and 6:12 mid roof) with ground to eave heights of 8 ft to 8 ½ ft." (Compl., Ex. A at 1.) The cited standard mandates in relevant part that "[e]ach employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system." 29 C.F.R. § 1926.501(b)(13).

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though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, No. 96-1719, 2000 WL 294514, at *4 (OSHRC Mar. 16, 2000). Here, the worksite was in New York, where Enwright Roofing also has its principal office, both in the Second Circuit. Therefore, in deciding this case the Court applies Second Circuit precedent, where it is highly probable that a case would be appealed to.

1. Cited Standard Applied

By its own terms, § 1926.501(b)(13) applies to residential construction activities where employees are working at heights of six feet or greater. The parties stipulated that Enwright Roofing was performing "residential construction roofing activities" on the lower and middle-tier roofs, both of which were at least eight feet above the ground. (Stip. ¶¶4, 10-12, 14, 15, 19.) Irwin's unrebutted testimony and photographs from the scene also confirm that Enwright and Beeschorus were performing construction work on the roof at the worksite at least eight feet above the ground. (Tr. 30, 32, 56; Ex. C-1.) The Court concludes the Secretary has established the cited standard applied to the cited condition.

2. Violation of the Standard

Irwin testified that neither Beeschorus nor Enwright were using any fall protection measures while working at the worksite. Enwright does not dispute that Enwright Roofing had no fall protection onsite and Beeschorus and Enwright had to leave the site after the inspection to get fall protection. Photographs of the worksite also clearly show both men working on the roof without a personal fall arrest system. Enwright testified that with a pitch of 4:12, he believed the only required fall protection was a monitor but admitted that although Enwright Roofing usually had a third person at the worksite to monitor, that person was not at the worksite the day of the investigation. The Court concludes that although a fall monitoring system alone is an alternative means of providing fall protection on low-slope roofs 50-feet or less in width, it was not a permissible fall protection measure on the middle and upper roofs as they were too steep. *See* 29 C.F.R. § 1926.500(b) (defining "low-slope roof" as a roof having a pitch of 4:12 or less). The Court concludes the Secretary has established the cited standard was violated.

3. Enwright Roofing Had Knowledge of the Violation

"An employer's knowledge or constructive knowledge of a violative condition can be 'satisfied by proof either that the employer actually knew,' or 'with the exercise of reasonable diligence, could have known of the presence of the violative condition.'" *Pub. Utilities Maint., Inc. v. Sec'y of Lab.*, 417 F. App'x 58, 62 (2d Cir. 2011) (citation omitted). "Knowledge or constructive knowledge may be imputed to an employer through a supervisory agent." *N.Y. State Elec.*, 88 F.3d at 105

Here, Beeschorus was working without fall protection alongside his supervisor, Enwright, who also was not using fall protection. As indicated *supra*, Enwright and Beeschorus had to leave

the worksite following OSHA's inspection in order to retrieve Enwright Roofing's fall protection equipment. (Tr. 59.) Enwright therefore had knowledge of the violative conditions. As the sole member of Enwright Roofing LLC (Stip. ¶1), and thus its supervisor, Enwright's actual knowledge of the violative conditions is imputable to Enwright Roofing. *N.Y. State Elec.*, 88 F.3d at 105. Therefore, the Court concludes the Secretary has established Enwright Roofing had knowledge of the violation.

4. Employee Exposure to Hazardous Conditions

As to employee exposure, the Secretary "need only show that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking." *Brennan v. Occupational Safety & Health Rev. Comm'n*, 513 F.2d 1032, 1038 (2d Cir. 1975). The parties stipulated that the lower roof, where Beeschorus was working without fall protection when Irwin arrived at the site, was 8 to 10 feet above the ground. Accessing the roof and placing roofing materials necessarily brought Beeschorus to the edge of the roof from which he could fall. The Court concludes the Secretary has established that Beeschorus was exposed to the hazard of falling off the roof to the ground more than eight feet below.

B. Citation 1, Item 2

The Secretary alleges in Citation 1, Item 2, that Enwright Roofing committed a serious repeated violation of OSHA's standard governing the use of ladders, 29 C.F.R. §1926.1053(b)(1) because Enwright Roofing "did not provide ladders for roof access that were 3 feet above the upper landing surface, exposing workers to falls of greater than 8-8 ½ feet." (Compl., Ex. A at 2.) The cited standard mandates in relevant part that "[w]hen portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access[.]" 29 C.F.R. §1926.1053(b)(1).

1. Cited Standard Applied

Subpart X of the Secretary's construction standards where §1926.1053(b)(1) is found, "applies to all stairways and ladders used in construction, alteration, repair (including painting and decorating), and demolition workplaces covered under 29 CFR part 1926, and also sets forth, in specified circumstances, when ladders and stairways are required to be provided." 29 C.F.R. §1926.1050(a). The cited requirements "apply to the use of all ladders, including job-made ladders, except as otherwise indicated." 29 C.F.R. § 1026.1053(b). As noted, *supra*, the parties stipulated

that Enwright Roofing was engaged in construction activities. The parties further stipulated that Beeschorus and Enwright used the portable extension ladders to access the roof. Enwright Roofing has not challenged the applicability of the standard. The Court concludes the standard applied to the cited condition.

2. Violation of the Standard

In one photograph of the worksite, the first ladder appears to contact the roof's eave slightly below the third rung from the top. (Ex. C-1 at 5.) Although the picture does not dispositively demonstrate the ladder's positioning, Irwin testified that the ladder extended only 30 inches above the edge of the roof. (Tr. 51, 73, 100.) Another photograph shows dispositively that the second ladder at the site reaches only about one foot above the roof's edge. (Ex. C-1 at 6.) And the parties stipulated that the side rails of both ladders at the worksite "extended less than 3 feet above the eve [sic] of the lower roof." (Stip. ¶20, 21.) The Court concludes the Secretary has established the cited standard was violated.

3. Enwright Roofing Had Knowledge of the Violation

As noted above, Enwright was working alongside Beeschorus on the roof and had actual knowledge of the positioning of the ladders, which did not extend three feet above the lower roof. Enwright therefore had knowledge of the violative conditions. As a supervisor, Enwright's actual knowledge is imputable to Enwright Roofing. *N.Y. State Elec.*, 88 F.3d at 105. The Court concludes the Secretary has established that Enwright Roofing had knowledge of the violation.

4. Employee Exposure to Hazardous Conditions

Beeschorus and Enwright used the ladders to access the roof, and Beeschorus used the first ladder to get off the roof while Irwin was at the worksite.[14] The Court concludes the Secretary has established that Beeschorus was exposed to the hazard of an eight-foot fall from the top of the ladder while accessing or leaving the roof.

[14] The record does not clearly indicate whether either man used the second ladder as it was positioned when Irwin conducted her inspection. The second ladder appears to have been moved between the photographs Irwin taken at the site. (*Contrast* Ex. C-1 at 6) (showing ladder against side of building) *with id.* at 5) (showing no ladder present on same side of building).

C. Characterizations

1. Serious Characterization

The Secretary asserts that OSHA properly characterized both violations as serious because "there is a substantial probability that a fall from 8-10 feet . . . will result in serious physical harm. (Sec'y's Post-Trial Br. at 11.) At trial, Enwright Roofing challenged the serious characterization of the citations, arguing that it was very unlikely that an employee would die from falling eight feet. (Tr. 108.) The Court agrees with the Secretary.

To demonstrate that a violation of a safety standard is serious under the Act, the Secretary must prove that "there is a substantial probability that death or serious physical harm could result from the violative condition." 29 U.S.C. § 666(k); *D.A. Collins Const. Co. v. Sec'y of Lab.*, 117 F.3d 691, 694 (2d Cir. 1997). This "does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur." *Pete Miller, Inc.*, 19 BNA OSHC 1257, 1258 (No. 99-947, 2000) (citing *Miniature Nut & Screw Corp*., 17 BNA OSHC 1557, 1558 (No. 93-2535, 1996)).

Irwin testified at trial that falling off a roof could result in a broken back or neck or even be fatal. (Tr. 21, 67-68, 102.) Irwin further testified that she had seen workers suffer broken bones and other traumatic injuries. (Tr. 68.) Although Enwright downplayed the likelihood of an eight-foot fall being fatal, he nevertheless conceded that falling from such a height was "more concerning" than a shorter fall and could result in a broken neck or worse. (Tr. 107-08.) The Court concludes the Secretary has established that there is a substantial probability that death or serious physical harm could result from an 8 to 10 fall. *See Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155 (No. 87-1238, 1989) (noting that falling from even a "modest height" could result in serious injury).

2. Repeated Classification

"The Act authorizes an enhanced civil penalty against any employer who 'repeatedly violates ... any standard' promulgated pursuant to the Act." *Triumph Constr. Corp. v. Sec'y of Lab.*, 885 F.3d 95, 99 (2d Cir. 2018) (quoting 29 U.S.C. § 666(a)). "Neither the Act nor OSHA's implementing regulations prescribe any temporal limits for determining whether a violation is repeated." *Ibid.* The Secretary asserts the two violations were repeated violations since "OSHA previously cited Enwright Roofing on July 12, 2021, for the same exact violations, which by their

terms presented substantially similar fall hazards." (Sec'y's Post-Trial Br. at 12-13.) The Court agrees.

The Commission has held that a violation is properly characterized as repeated under the Act "if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979); *Manganas Painting Co.*, 19 BNA OSHC 1102, 1106 (No. 93-1612, 2000), *aff'd*, 273 F.3d 1131 (D.C. Cir. 2001). The Secretary can make a *prima facie* case of substantial similarity by showing "the prior and present violations are for failure to comply with the same standard." *Manganas Painting*, 19 BNA OSHC at 1106.

OSHA issued Enwright Roofing a citation on July 12, 2021, for repeated violations of § 1926.501(b)(13) and § 1926.1053(b)(1) when three employees performed roofing work without any fall protection and using an extension ladder that did not extend at least three feet above the roof. (Stip. ¶29-31; Ex. C-8 at 8-9.) The parties ultimately settled that case, which became a final order of the Commission on March 10, 2022, affirming the citation items as serious repeated violations, which was for violations of the same standards at issue here and in similar circumstances. (Stip. ¶31; Ex. C-9, Ex. C-10.) Enwright has not challenged the repeat characterizations of the violations or attempted to disprove the similarity of the violative conditions here to the citation from the May 2021 inspection. The Court concludes that the violations at issue here were correctly characterized as repeated violations.

IV. PENALTY DETERMINATION

Under the Act, the Secretary has the authority to propose a penalty of not more than $145,027.00.[15] Here, the Secretary initially proposed a penalty of $9,375.00 for each repeated serious violation, for a total of $18,750.00. However, Irwin failed to properly account for Enwright

[15] The Act provides that any employer "who willfully or repeatedly violates the requirements" of any standard, "may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation." 29 U.S.C. § 666(a). However, in 2015 Congress passed the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which requires federal agencies to adjust civil penalties for inflation each year. *See* Bipartisan Budget Act of 2015, Pub. L. 114-74, § 701, 129 Stat. 584, 599 (2015) (codified at 28 U.S.C. § 2461 note). At the time of the proposed penalty assessments, the maximum penalty for a repeated violation was $145,027.00. *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments for 2022, 87 Fed. Reg. 2328, 2336 (Jan. 14, 2022); *see also* 29 C.F.R. § 1903.15(d)(3) (2022).

Roofing's previous history of violations. (Sec'y's Post-Trial Br. at 13-16.) The Secretary has proposed that the total penalty be adjusted to $20,625.00. *Ibid.* Enwright Roofing challenges the Secretary's penalty assessment as excessive given the small size of the business. (Answer ¶VII.)

Congress vested the Commission with the final "authority to assess all civil penalties provided in [the Act]," which it determines *de novo*. 29 U.S.C. § 666(j). Section 17(j) requires that when assessing penalties, the Court must give due consideration "to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." *Ibid.* Of these factors, gravity is the principal factor "and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005); *Trinity Indus., Inc.*, 20 BNA OSHC 1051, 1069 (No. 95-1597, 2003), *aff'd*, 107 F. App'x 387 (5th Cir. 2004) (unpublished).

With respect to the gravity of the violations here, the Secretary determined, and the Court agrees, the severity of the injury or illness which could result from the violations was "high" because an injury from exposing an employee to an 8-10 foot fall hazard could result in serious injury or death. The Secretary also determined, and the Court agrees, the probability that an injury or illness could occur as a result of the violations was "greater" because Enwright Roofing failed to provide *any* fall protection and because the lack of available access space to the upper landing surface could cause an individual to fall from the roof onto the lower surface and suffer injuries up to and including death.

The Court has already found the violations were properly characterized as "serious" because a fall from eight feet or higher would be reasonably likely to result in serious injury or death. The Court similarly concludes the gravity of the violations was severe. *See Mosser Constr.*, 23 BNA OSHC 1044 (No. 08-0631, 2010) (finding gravity moderate to high because potential consequences of accident, even unlikely, would be severe). Beeschorus was continually exposed to a fall hazard while working from the roof without any fall protection, and he was exposed to similar falls every time he used the violative ladders to get on or off the roof. Furthermore, there is no evidence Enwright Roofing took *any* protective measures to prevent exposure to either hazard. The Court therefore concludes the gravity of the violations were severe.

With regard to good faith, it "should be determined by a review of the employer's own occupational safety and health program, its commitment to the objective of assuring safe and

healthful working conditions, and its cooperation with other persons and organizations (including the Department of Labor) seeking to achieve that objective." *Nacirema Operating Co., Inc.*, No. 4, 1972 WL 4040, at *2 (OSHRC Feb. 7, 1972). Here, Enwright was largely dismissive of the need for fall protection, suggesting that anyone working on a roof would have the common sense not to fall off the edge of a roof. (Tr. 108-10.) He was also broadly dismissive of the severity of injuries that could result from such a fall. (Tr. 108.) Enwright Roofing did not have any fall protection available at the worksite or ladders properly extended to the required height despite having received citations for the same violations in the past. (Tr. 39, 69, 102.) The Court concludes Enwright Roofing is not entitled to a reduction for good faith.

The Secretary applied a 70% reduction in the proposed penalty because Enwright Roofing had fewer than 10 employees. (Ex. C-4 at 1, 4; Sec'y's Post-Trial Br. at 14.) The Court concludes that the 70% reduction was appropriate given Enwright Roofing's size. But the Secretary failed to apply a 10% increase in the penalty calculation for Enwright Roofing's history of violations. (Sec'y Post-Trial Br. at 14-15; Tr. 71-72, 75.) The Court has found that the violations were properly characterized as repeated because Enwright Roofing received similar citations just one year before those at issue here. Given the employer's history of violations, the Court concludes that Enwright Roofing should receive a 10% increase in the penalty.

Therefore, giving due consideration to the size of Enwright Roofing's business, the gravity of the violation, and lack of good faith, and Enwright Roofing's prior history of violations, the Court concludes a penalty in the amount of $10,312.50 is appropriate for Citation 1, Item 1 and for Citation 1, Item 2. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Citation 1, Item 1 and Citation 1, Item 2 are **AFFIRMED** and a penalty of $10,312.50 is **ASSESSED** for each item for a total penalty of $20,625.00.

SO ORDERED.

/s/
JOHN B. GATTO, Judge

Dated: June 27, 2025
Atlanta, GA