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

SECRETARY OF LABOR, Complainant, v. CENTIMARK CORP., Respondent.	OSHRC Docket No. 20-0762

ON BRIEFS:

Julia C. Malette, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor for Occupational Safety and Health; Seema Nanda, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Mark J. Golen II, Esq., Justin M. Michitsch, Esq.; Gordon Rees Scully Mansukhani, LLP, Pittsburgh, PA
For the Respondent

DECISION

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

CentiMark Corporation, a large commercial roofing company, was working on a roof replacement project in Pittsburgh, Pennsylvania, when a compliance officer from the Occupational Safety and Health Administration observed a CentiMark employee on the roof without fall protection. After conducting an inspection, OSHA issued CentiMark a one-item citation alleging a repeat violation of 29 C.F.R. § 1926.501(b)(10), which requires employees "engaged in roofing activities on low-slope roofs" to be protected from falling by one of several enumerated methods.

Following a two-day hearing, Chief Administrative Law Judge Covette Rooney affirmed the violation as repeat and assessed the $48,195 proposed penalty.[1]

At issue on review is whether: (1) the Secretary has established that the exposed employee was "engaged in roofing activities" such that § 1926.501(b)(10) applies; and (2) CentiMark has established the exception set forth at 29 C.F.R. § 1926.500(a)(1), which states that the fall protection standard does not apply "when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work . . . ."[2] For the following reasons, we conclude that § 1926.501(b)(10) applies and that CentiMark has failed to establish the § 1926.500(a)(1) exception. Therefore, we affirm the citation.

BACKGROUND

CentiMark was hired to replace parts of a manufacturing facility's roof, which consisted of four interconnected sections, each of which is referred to in the record as a separate roof with a corresponding number (e.g., Roof 1). On the first day of the project, an OSHA compliance officer was driving by the facility when he saw an individual standing at the edge of the roof without fall protection. The CO pulled over and photographed the individual on the roof, as well as five other individuals on the ground, one of whom was at the controls of a crane that was to be used in hoisting materials onto the roof, while another was on the crane bed rigging a load. After the individual on the roof walked away from the edge, the CO saw the crane begin to hoist several items to the roof.

During his inspection, the CO learned that the individual he observed on the roof was CentiMark foreman Stanley Harmon, who was standing on Roof 4, a low-slope section 40 feet above the ground. Harmon had arrived at the worksite earlier that morning, met with the other CentiMark employees to go over the fall protection plan, and then went up on the roof to establish a point from which he or another signaler would direct the crane. Harmon explained at the hearing that he "walked over to the edge of Roof 4 to see if I could see the crane driver and do my assessment," "looked everywhere, just scanning with my eyes," and then "turned around[,] walked back, . . . [and] climbed down." He was on the roof for one to three minutes, during which time

[1] The judge vacated a second citation OSHA issued to CentiMark, alleging a serious violation of another provision of the fall protection standard. That citation is not at issue on review.

[2] On review, CentiMark does not dispute the judge's repeat characterization, or the $48,195 penalty she assessed.

he came within 2 feet of the edge, so that he could see the crane operator. Harmon also explained that the first day of any CentiMark roofing project (referred to as the "load day") is when materials and tools are hoisted to the roof, but "[we] actually do not lay roofs that day."

DISCUSSION

The citation alleges a violation of § 1926.501(b)(10) based on foreman Harmon having been "engaged in roofing activities" on a low-slope roof with unprotected sides and no fall protection on the day of the OSHA inspection.[3] "In order to prove a violation . . . , the Secretary must show . . . that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982). Of these four elements of the Secretary's burden, only the first—the cited standard's applicability—is in dispute on review. Specifically, CentiMark contends that the judge erred in finding that Harmon was "engaged in roofing activities" as required for the cited provision to apply. In addition, CentiMark contends that the judge erred in rejecting its argument that Harmon's actions on the roof fell within the exception at § 1926.500(a)(1), which states that the fall protection requirements do not apply "when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work . . . ."

In concluding that § 1926.501(b)(10) applies, the judge focused on what she found to be CentiMark's failure to establish the § 1926.500(a)(1) exception. Specifically, the judge found that CentiMark had begun "preparatory" construction work more than an hour before Harmon went on

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[3] The provision states, in full, as follows:

> 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.

29 C.F.R. § 1926.501(b)(10). There is no dispute that Harmon was on a low-slope roof without fall protection at the time of the alleged violation.

the roof. The applicability inquiry, however, must begin with whether the Secretary has met his burden of establishing that Harmon was "engaged in roofing activities." 29 C.F.R. § 1926.501(b)(10).

I. Applicability

CentiMark contends that when the CO saw Harmon on Roof 4, Harmon was not performing "roofing activities," a phrase the fall protection standard does not define. In support, the company points to the fall protection standard's definition of "roofing work," which is "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck." 29 C.F.R. § 1926.500(b). CentiMark states in its review brief that it "understands 'roofing work' and 'roofing activities' [to] share the same definition," and the company therefore asserts that because Harmon was not engaged in any of the definition's listed tasks on the day in question, he was not "engaged in roofing activities" as required for § 1926.501(b)(10) to apply. CentiMark's position on review is that "the applicability of § 1926.501(b)(10) must be determined based on the employee at-issue's *activities* on the roof, with other employees/their activities at a worksite generally hav[ing] no bearing on this analysis."

The Secretary also relies on the fall protection standard's definition of "roofing work," but he takes a broader view of § 1926.501(b)(10). In his review brief, the Secretary contends that CentiMark's employees spent the day in question "preparing for and then hoisting equipment for their roofing repair job," and that this "hoisting process . . . could not have been accomplished without [Harmon going] to the unprotected roof's edge to make sure he could see the crane operator." Thus, according to the Secretary, all of CentiMark's employees at the worksite, including Harmon, were engaged in both "roofing work," 29 C.F.R. § 1926.500(b), and "roofing activities," 29 C.F.R. § 1926.501(b)(10). In short, the Secretary asserts that the cited provision applies "[s]o long as the employee's activities while on the roof are for the purpose of a 'roofing work' project, as opposed to some other construction project like installing skylights or an HVAC system."

While we agree with the Secretary that the cited standard's applicability has been proven here, we take issue with two aspects of the parties' arguments. First, the reliance of both parties on the fall protection standard's definition of "roofing work" in interpreting "roofing activities" under § 1926.501(b)(10) is erroneous. "It is a 'normal rule of statutory construction that identical

words used in different parts of the same act are intended to have the same meaning.' " *In re Hechinger Inv. Co. of Del.*, 335 F.3d 243, 253 (3d Cir. 2003) (quoting *Sorenson v. Sec'y of Treasury,* 475 U.S. 851, 860 (1986)). A corollary to this rule, then, is that courts "refrain from concluding . . . that . . . differing language in . . . [various] subsections has the same meaning in each." *Riccio v. Sentry Credit, Inc.*, 954 F.3d 582, 587 (3d Cir. 2020) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (noting the "usual rule" that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended") (citation omitted). Here, the fall protection standard specifically defines the term "roofing work" in § 1926.500(b) and then uses a different, undefined term—"roofing activities"—in § 1926.501(b)(10). If the Secretary meant to limit § 1926.501(b)(10) to employees engaged in "roofing work," he would have used the term he specifically defined in the standard.[4]

Moreover, two cases CentiMark cites in support of its position do not, in fact, hold that "roofing activities" and "roofing work" share the same definition. Although the Commission in *Field & Associates, Inc.*, 19 BNA OSHC 1379 (No. 97-1585, 2001), stated that "the Secretary expressly limited § 1926.501(b)(10) to employees engaged in roofing work," *id.* at 1380, this statement is dicta, given that the decision does not address the applicability of § 1926.501(b)(10), let alone the specific question of whether "roofing activities" under that provision is equivalent to "roofing work" as defined under § 1926.500(b). The Commission merely noted that § 1926.501(b)(10) contains a limitation that § 1926.501(b)(11) lacks, and thus held that the latter provision—the one cited in that case—"is applicable regardless of whether Field's employees were engaged in roofing work." 19 BNA OSHC at 1380. Similarly, while the court in *Bergelectric Corp.*, 925 F.3d 1167 (9th Cir. 2019), applied § 1926.500(b)'s "roofing work" definition in interpreting "roofing activities" under § 1926.501(b)(10), it did not address the question before us here because the meaning of "roofing activities" was not in dispute.[5] *Id.* at 1171 n.2 ("Neither

[4] While the section heading for § 1926.501(b)(10) is "Roofing work on Low-slope roofs," the "plain meaning of the text of a provision cannot be 'undone' or limited by its section headings." *Nat'l Indus. Constructors, Inc.*, 10 BNA OSHC 1081, 1093 n.29 (No. 76-4507, 1981) (citing *Wray Elec. Contracting, Inc.*, 6 BNA OSHC 1981, 1984 (No. 76-0119, 1978)).

[5] The Ninth Circuit's decision in *Bergelectric* is also not controlling, as CentiMark's headquarters and the cited worksite are in Pennsylvania, which is part of the Third Circuit. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) ("Where it is highly probable that a

party discusse[d] this distinction, and both parties cite the ['roofing work'] definition . . . as dispositive.").

Second, we find problematic the Secretary's notion that § 1926.501(b)(10) applies "[s]o long as the employee's activities while on the roof are for the purpose of a 'roofing work' project." By its terms, the fall protection requirements of § 1926.501(b)(10) apply to "each employee engaged in roofing activities." *Cf. Tampa Elec. Co.*, No. 17-2144, 2021 WL 2582535, at *3 (OSHRC, Mar. 19, 2021) (finding that the cited hazardous response provision, which requires "[e]mployees engaged in an emergency response" to "wear positive pressure self-contained breathing apparatus," did not apply because the employees at issue were not engaged in such a response), *aff'd*, 38 F.4th 99 (11th Cir. 2022). The provision's applicability, therefore, rests on the conduct of each employee, not necessarily the nature of the employer's overall project.[6] The question before us, then, is neither whether Harmon was engaged in the "hoisting, storage, application, and removal of roofing materials and equipment," 29 C.F.R. § 1926.500(b), nor whether CentiMark was engaged in a "roofing work" project. Rather, the issue is, as the cited

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Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case."). And while the administrative law judge's decision that the court reviewed in *Bergelectric* (the Commission did not direct review in the case) stated that § 1926.501(b)(10) "is limited to 'roofing work,' " as defined in § 1926.500(b), that decision is also not binding on the Commission. *Bergelectric Corp.*, 26 BNA OSHC 2030, 2033 (No. 16-0728, 2017) (ALJ). *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) ("[A] Judge's opinion . . . lacking full Commission review does not constitute precedent binding upon us.").

[6] The Secretary cites three OSHA interpretation letters that, in his view, show that § 1926.501(b)(10)'s applicability depends on whether the overall work related to a roof repair or application as opposed to some other type of work that involves being on a roof. At the outset, interpretation letters are not determinative of a provision's plain meaning, which governs here as discussed below. *See Blount Int'l, Ltd.*, 15 BNA OSHC 1897, 1902 (No. 89-1394, 1992) (plain language of the standard will govern, even if the Secretary posits a different interpretation). Additionally, two of these letters do not address the specific issue here. One simply points out that § 1926.501(b)(10) "allows roofers working on low-sloped roofs to have several additional fall protection options"—it does not address the meaning of "roofing activities." Letter from Director of Construction Russell B. Swanson to Anthony O'Dea (Dec. 15, 2003). The other appears to state that the installation of HVAC equipment on a roof is not covered by § 1926.501(b)(10), but it does not address the type of activity Harmon was engaged in here. Letter from Director of Construction Russell B. Swanson to Keith Harkins (Nov. 15, 2002). And while the third letter does appear to equate "roofing activities" with "roofing work," it also points out that "[t]he activity and not the trade *of the worker* determines which requirements apply." OSHA Interpretation letter from Director of Construction Russell B. Swanson to Joseph J. Novak (May 3, 2001) (emphasis added).

provision states, whether Harmon was "engaged in roofing activities" at the time the CO observed him on the roof. 29 C.F.R. § 1926.501(b)(10).

"When determining the meaning of a standard, the Commission first looks to its text and structure," and "[i]f the wording is unambiguous, the plain language of the standard will govern." *JESCO, Inc.*, 24 BNA OSHC 1076, 1078 (No. 10-0265, 2013). An undefined term's meaning can be determined by consulting a contemporaneous dictionary. *See, e.g., Fla. Gas Contractors, Inc.*, No. 14-0948, 2019 WL 995716, at *3 (OSHRC, Feb. 21, 2019) (determining term's meaning by first turning to dictionary in absence of definition in standard). "Roof"—when used as a verb—means "to cover or provide (a structure) with a roof," or "to provide (a roof) with a protective or weatherproof exterior." Webster's Third New International Dictionary 1971 (1993). "Roofing" means "a material used or suitable for the construction of a roof," or "a material designed for application to a roof as protection from the weather." *Id.* "Activity" means "physical motion or exercise of force," or "an occupation, pursuit, or recreation in which a person is active—often used in pl[ural] <business *activities*> <social *activities*>." *Id.* at 22.

Based on the plain meaning of these terms, we agree with the Secretary that Harmon's tasks on the day in question constitute "roofing activities."[7] 29 C.F.R. § 1926.501(b)(10). Indeed, CentiMark could not have accomplished the hoisting of roofing materials without Harmon being on the roof and standing at its edge. It is undisputed that Harmon had to determine where he or another employee would stand when directing the crane during the hoisting process. To be sure, no materials would be applied to the roof during that time, but Harmon's actions were clearly critical to ensuring that the necessary materials would be successfully hoisted and delivered to the

[7] We note that our conclusion here is not inconsistent with *Capeway Roofing Systems, Inc.*, 20 BNA OSHC 1331 (No. 00-1968, 2003), *aff'd*, 391 F.3d 56 (1st Cir. 2004), a case cited by both parties on review. In *Capeway*, the Commission concluded that, despite no work having been done on the low-slope portion of a roof under construction on the day at issue, § 1926.501(b)(10) nevertheless applied because "employees were traversing the [low-slope] roof areas in question on their way to [other] work areas," and work had been performed on the low-slope portion the day prior. 20 BNA OSHC at 1343 & n.17. Thus, while the Commission in *Capeway* surprisingly did not address the meaning of "roofing activities" under § 1926.501(b)(10), it did in effect find that employees walking across the low-slope roof areas of an active roofing job to reach other work areas was sufficient for the provision to apply. As such, we agree with the Secretary that if traversing a low-slope roof to get to and from a work area qualifies as "roofing activities" under § 1926.501(b)(10), then so does standing at the edge of a low-slope roof to establish a point from which to signal a crane operator.

work area by the crane. Harmon himself stated that a crane cannot hoist materials absent "some type of assessment as to a proper location to signal that crane," because "you need to see the crane operator to give him hand signals because the hand signals [are] how you direct him to set the materials on the roof." In short, Harmon's conduct was integral to providing the facility with a new roof because the roofing project could not have been completed without it.

Accordingly, we find that the Secretary has shown Harmon was "engaged in roofing activities" such that § 1926.501(b)(10) applies.

II. Exception at § 1926.500(a)(1)

CentiMark contends that even if § 1926.501(b)(10) applies, the citation should be vacated because the company has proven that the cited conditions fall within an exception to the fall protection standard's requirements, which states that "[t]he provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed." 29 C.F.R. § 1926.500(a)(1). *See Ford Dev. Corp.*, 15 BNA OSHC 2003, 2010 (No. 90-1505, 1992) ("[T]he party claiming the benefit of an exception bears the burden of proving that its case falls within that exception."). Before the judge, CentiMark asserted that Harmon's actions on the day of OSHA's inspection constituted an "assessment of workplace conditions," given that he was determining the best location on the roof from which the crane operator could be signaled for hoisting purposes, and that no construction work had begun before that assessment was completed. The judge rejected this contention, deeming the company's assessment of the roof complete when Harmon, as well as another CentiMark foreman, conducted separate inspections on the roof about a month and a week before the day in question, respectively.[8] In addition, the judge found that on the day of OSHA's inspection, CentiMark's work at the site had been in progress for more than an hour before Harmon went up on the roof, given that several of the company's employees were on the ground and engaged in "preparatory work," which the judge found "is 'work' within the meaning of the construction standard."

[8] Harmon testified that about a month before the OSHA inspection, he stood on the steep portion of the facility's roof for 10-15 minutes to look at the gutter system. The other foreman conducted a pre-job inspection on the roof about a week before the OSHA inspection. While neither of them used fall protection during their time on the roof, it is undisputed that neither of them went near the roof's edge on those occasions.

To prove the exception, CentiMark must show that Harmon, when he was on the roof on the project's first day, was as the company claims "making an . . . assessment of workplace conditions" and that his assessment occurred "prior to the actual start of construction work." 29 C.F.R. § 1926.500(a)(1). As previously noted, the Commission "first looks to [a provision's] text and structure," and "[i]f the wording is unambiguous, the plain language . . . will govern." *JESCO*, 24 BNA OSHC at 1078. When conducting a plain language analysis of an exception, the Commission applies the maxim that "exceptions are to be narrowly construed." *Brooks Well Servicing, Inc.*, 20 BNA OSHC 1286, 1288-89 (No. 99-0849, 2003); *see also Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989) ("In construing [statutes] in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision."); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend an exemption [provision] to other than those [circumstances] plainly and unmistakably within its terms and spirit is to abuse the interpretative process . . . ."); *Maracich v. Spears*, 570 U.S. 48, 60 (2013) ("Unless commanded by the text, . . . exceptions ought not operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design."); *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999) ("Our first task is to consider the plain meaning of the statute, heeding the Supreme Court's direction that exceptions to the antitrust laws must be narrowly construed.").

As to the first part of the exception, we agree with CentiMark that Harmon's activities on the roof that day constituted an "assessment of workplace conditions."[9] 29 C.F.R. § 1926.500(a)(1). "Inspect" means "to view closely in critical appraisal," "look over," and "examine officially." Merriam Webster's Collegiate Dictionary 605 (10th ed. 1993). "Investigate" means "to observe or study by close examination and systematic inquiry" and "to make a systematic examination." *Id.* at 616. "Assess" means "to determine the importance, size,

[9] As noted, the judge rejected CentiMark's arguments regarding the exception in part because she found that any such assessment had already been conducted by Harmon and the other foreman during their prior inspections of the roof. According to the judge, "Mr. Harmon's activities on [the day of the OSHA inspection] should not also be considered pre-work inspection[s] or assessments." But as the company points out, the plain language of § 1926.500(a)(1) contains no limitation on the number of assessments an employer can conduct, which means its employees can assess workplace conditions on any number of occasions without the use of fall protection so long as that assessment takes place before construction work has started or after such work has been completed.

or value of." *Id.* at 69. *See Fla. Gas Contractors*, 2019 WL 995716, at *3 (looking to contemporaneous dictionary definition of undefined term in standard). Although the Secretary accurately points out that Harmon was on the roof not to assess what work was to be done or to inspect the roof itself, those facts are not, given the definitions of the relevant terms, determinative here. It is undisputed that Harmon performed no physical labor while on the roof, nor modified the roof in any way, as he did not even have any tools, equipment, or materials with him. Indeed, his sole purpose in being at the roof's edge was to determine an optimal location from which to signal the crane operator. As such, Harmon's conduct fits within the plain meaning of this portion of the exception's language.

As noted, however, the exception also requires CentiMark to establish that Harmon's assessment on the project's first day occurred "prior to the actual start of construction work." 29 C.F.R. § 1926.500(a)(1). CentiMark asserts in its review brief that its employees were not engaged in any construction work before Harmon went up on the roof, claiming its employees on the ground were "simply waiting around to start the hoisting process" with one employee "engaged in non-alteration or repair work by directing traffic [adjacent to the worksite]." In response, the Secretary contends that before Harmon ascended to the roof, CentiMark's employees had in fact begun construction work because they arrived at the worksite with a crane and tools, completed a workplace safety assessment, positioned the crane, lifted the boom, loaded tools onto the crane bed, and began directing traffic. CentiMark does not refute that these activities occurred before Harmon went to the roof, but the company contends that none of these activities qualify as "construction work" as defined under OSHA's standards and as contemplated by the exception's language.

We disagree. The construction standards define "construction work" as "work for construction, alteration, and/or repair, including painting or decorating." 29 C.F.R. § 1926.32(g). Given that CentiMark has invoked the § 1926.500(a)(1) exception, the company has necessarily conceded that its roofing project was being done at a "construction workplace[] covered under 29 C.F.R. part 1926." 29 C.F.R. § 1926.500(a)(1). Thus, there can be little dispute that the ground crew's work activities—or "preparatory work," as the judge characterized it—constituted "construction work" subject to the applicable requirements of Part 1926. *See also* 29 C.F.R. § 1910.12(a) ("The standards prescribed in part 1926 . . . shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction

work."); 29 C.F.R. § 1910.12(b) (defining "construction work" as "work for construction, alteration, and/or repair"). The question, then, which CentiMark asks us to answer in the affirmative, is whether the exception's inclusion of the word "actual" before the phrase "start of construction work" limits the type of construction work that informs whether the exception applies, such that the company's "preparatory work" occurred "prior to the *actual start* of construction work." 29 C.F.R. § 1926.500(a)(1) (emphasis added).

Heeding the maxim—as we must—that exceptions are to be narrowly construed, we find that "actual start" cannot be read as limiting the type of work that may be considered "construction work" under § 1926.500(a)(1). *See Pennsuco Cement & Aggregates, Inc.*, 8 BNA OSHC 1378, 1383 (No. 15462, 1980) ("[R]emedial legislation must be liberally construed and exemptions from its sweep should be narrowed and limited to effect the remedy intended.") (citation omitted) (Cottine, Comm'r, concurring); *Richards v. Gov't of Virgin Islands*, 579 F.2d 830, 833 (3d Cir. 1978) ("Remedial legislation is traditionally construed broadly, with exceptions construed narrowly."). Rather, the inclusion of this phrase simply acknowledges that an "inspection, investigation, or assessment" is itself "construction work" under Part 1926, so "actual start" serves to distinguish between the beginning of such an "inspection, investigation, or assessment" and the beginning of other "construction work" at the site, the latter triggering the fall protection requirements. This reading comports with the exception's description of the other time period when fall protection is not required: "after *all* construction work has been completed." 29 C.F.R. § 1926.500(a)(1) (emphasis added). In other words, "actual start" does not mean that only certain types of "construction work" mark the end of the exception's applicability; the exception is instead meant to allow certain employees to be at a roof's edge without fall protection before any "construction work" begins and after all "construction work" has ended.[10]

[10] Indeed, CentiMark does not explain what construction work could be performed at a worksite, under its view of the exception, while still falling within the time period before the "actual start of construction work." Additionally, construing the exception with such vague contours would not serve its purpose, which is to provide notice to employers about the conditions under which fall protection is not required. *See* Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672, 40,675 (Aug. 9, 1994) (final rule) ("[I]t [is] unreasonable . . . to require the installation of fall protection systems either prior to the start of construction work or after such work has been completed," because it "would impose an unreasonable burden on employers without demonstrable benefits.").

This reading is consistent with the fall protection standard's preamble. *See Maxim Crane Works*, No. 17-1894, 2021 WL 2311880, at *6 (OSHRC, May 20, 2021) (consulting regulatory history to ensure that there is no express intent contrary to provision's plain language); *see also Arcadian Corp.*, 17 BNA OSHC 1345, 1348 (No. 93-3270, 1995) (noting that statutory plain language is consistent with statute's preamble). Indeed, the preamble emphasizes "that the exclusion only applies . . . *prior to the actual start of work or after the work has been completed*[,] . . . not during the period when construction work is being performed." Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672, 40,675 (Aug. 9, 1994) (final rule) (emphasis in original). As examples, the preamble states that "the exception would apply where an employee goes onto a roof in need of repair to inspect the roof and to estimate what work is needed," and when "building inspectors . . . inspect the work" that has been done "after all work has been completed, and workers have left the area." *Id.*

Based on the record before us, we find that CentiMark has failed to show Harmon's assessment on the roof took place before "construction work," as defined in 29 C.F.R. § 1926.32(g), began. Specifically, the evidence shows that CentiMark had begun "construction work" before Harmon went up to the roof—(1) the crane had been delivered and positioned to load materials, including tools, onto the roof; (2) employees had placed those materials onto the crane bed; (3) the operator was at the crane's controls; (4) another employee was on the crane bed to rig it so that the crane could then be used throughout the rest of the day; and (5) yet another employee was directing traffic adjacent to the worksite.[11] *See, e.g., A.A. Will Sand & Gravel Corp.*, 4 BNA OSHC 1442, (No. 5139, 1976) ("While mere delivery [of materials] to a construction site may not constitute construction work . . . [,] Respondent's employee unloaded the gravel into the conveyor hopper only as it was needed on the roof [and] made adjustments to the conveyor itself."). Because this construction work had already taken place, employees were able to begin hoisting materials and equipment (including fall protection equipment) to the roof almost immediately after Harmon

[11] Commissioner Laihow notes that timing is everything—had Harmon showed up to conduct his assessment a few hours earlier that morning or even the evening prior, the outcome here might have been different. Based, however, on well-established precedent addressing what constitutes "construction work," and in light of case law establishing the narrow interpretation of regulatory exceptions, Commissioner Laihow finds her hands tied in concluding that the § 1926.500(a)(1) exception has not been proven here.

stepped back from the edge. As such, his assessment did not occur during the pre-construction work period contemplated by § 1926.500(a)(1), when fall protection is not required.

For all these reasons, we conclude that § 1926.501(b)(10) applies here and that the § 1926.500(a)(1) exception to the fall protection standard's requirements has not been proven. Accordingly, we affirm Citation 2, Item 1, as a repeat violation and assess the proposed penalty of $48,195.[12]

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: March 29, 2023

[12] As noted, CentiMark contests neither the penalty amount assessed by the judge nor her characterization of the violation as repeat. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (assessing proposed penalty when issue not in dispute).