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

SECRETARY OF LABOR,

Complainant,

v.

LM SANDERSON CONSTRUCTION, INC.,

Respondent.

OSHRC DOCKET No. 16-1321

Appearances: Attorney Molly J. Theobald
U.S. Department of Labor, Office of the Solicitor
New York, New York
For the Complainant

Mr. David Sanderson
Vice-President, LM Sanderson Construction, Inc.
Webster, New York
For the Respondent

Before: William S. Coleman
Administrative Law Judge

## DECISION AND ORDER

The Respondent, LM Sanderson Construction, Inc., (LMS) is a construction company whose business includes framing buildings and other related activities. (Stip. No. 2). In the spring of 2016, LMS was working on a residential construction project in Rochester, New York, known as Ivy Bridge Townhomes. (Stip. No. 2; T. 129).

On the morning of April 7, 2016, a Compliance Safety and Health Officer (CO) assigned to the Rochester area office of the Occupational Safety and Health Administration (OSHA) drove past the Ivy Bridge Townhomes construction site while on his way to another worksite, when he observed what he suspected to be a violation of fall

protection standards. The CO stopped his car, took some photographs from the roadside, and then sought his supervisor's permission to open an investigation. He received the requested permission later that same day and formally commenced an investigation that afternoon. That investigation resulted in OSHA issuing a two-item serious citation to LMS on July 6, 2016, with a proposed penalty of $2,800 for each citation item, for a total proposed penalty of $5,600.

LMS timely contested the citation and proposed penalties, and the Executive Secretary of the Occupational Safety and Health Review Commission (Commission) docketed the matter on August 17, 2016. The Commission's Chief Judge thereafter designated the matter for disposition under the Commission's rule for "Simplified Proceedings," 29 C.F.R. pt. 2200, subpt. M, and assigned the matter to the undersigned Commission Judge for hearing and decision.

Citation item 1 alleged a violation of the construction industry fall protection standard at 29 C.F.R. § 1926.501(b)(1), which requires that "[e]ach employee on a walking/working surface … with an unprotected side or edge which is 6 feet ... or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems." Item 1 alleged that LMS had violated this standard on April 7, 2016 in that "an employee was unloading roof sheathing from an articulating boom of a Caterpillar Telehandler -- 20 feet above ground level; with unprotected sides, and were not using fall protection."

Prior to the hearing, the Secretary filed a written motion to amend item 1. LMS

did not object to the motion, and the motion was granted.[1] (T. 10-11).

As amended, item 1 alleged two instances (instances "a" and "b") of a violation of § 1926.501(b)(1), with instance "a" being the originally described alleged violative condition quoted above. As to instance "a," the Secretary pleaded in the alternative that if § 1926.501(b)(1) was not the applicable standard, then either one of two other standards was. *See* Commission Rule 30(e) (allowing for alternative pleading), 29 C.F.R. § 2200.30(e). Those two alternatively cited standards are contained in 29 C.F.R. Part 1926, subpart L, "Scaffolds." The first alternative cited standard was § 1926.451(g)(1), which provides that "[e]ach employee on a scaffold more than 10 feet … above a lower level shall be protected from falling to that lower level" by certain means described within that section. The other alternative cited standard was § 1926.453(b)(2)(v), which pertains to aerial lifts used to elevate personnel.

In his post-hearing brief, the Secretary took the position that the standard applicable to instance "a" was § 1926.451(g)(1) of the scaffolds standard. (Secretary's Post-Hearing Brief, p. 2). Accordingly, instance "a" will be adjudicated only as an alleged violation of § 1926.451(g)(1).

Instance "b" of amended item 1 alleged another violation of the fall protection

[1] Because this matter has been designated for disposition under the Commission's procedure for "simplified proceedings," no complaint or answer has been filed. *See* 29 C.F.R. § 2200.205(a) (providing that "the complaint and answer requirements are suspended" in simplified proceedings). The original citation thus served as the functional equivalent of the Secretary's complaint, so the motion to amend served to amend the original citation items. Pursuant to a scheduling order, LMS filed a statement of affirmative defenses dated October 21, 2016. After the Secretary's amendment to the citation was granted, LMS's affirmative defenses to the amended citation items were further described at the outset of the hearing. (T. 16, 31).

standard at § 1926.501(b)(1), in that on April 7, 2016 "an employee was working without fall protection on surface below the partially constructed roof that was unprotected and 20 feet above ground level."

Citation item 2 alleged a violation of the fall protection standard at § 1926.501(b)(11), which requires that "[e]ach employee on a steep roof with unprotected sides and edges 6 feet …. or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems." The Secretary alleged in item 2 that LMS violated this standard at the Ivy Bridge Townhomes construction site on April 7, 2016, in that "employees were installing roof sheathing on surfaces 20 feet above ground level; with unprotected sides, and were not using fall protection."

The undersigned conducted an evidentiary hearing in Rochester, New York on December 15, 2016. The Secretary filed his post-hearing brief, to which LMS thereafter filed a brief in response. Post-hearing briefing was completed on May 16, 2017, when the Secretary filed a statement that he would not file a brief in reply.

The salient issues for decision are:

- Did the Secretary prove by a preponderance of the evidence that LMS violated the scaffolds standard at § 1926.451(g)(1) when employees were atop a stack of roof sheathing material that was supported on the elevated fork of a telehandler? (Item 1, instance "a").
- Did LMS prove by a preponderance of the evidence that compliance with the scaffolds standard at § 1926.451(g)(1) was infeasible? (Item 1, instance "a").

- Would LMS be prejudiced by the Commission Judge ordering *sua sponte*, after post-hearing briefing was completed, that citation item 1, instance "b," and citation item 2, be amended to change the standards that the Secretary alleged were applicable [respectively, subparagraphs (1) and (11) of § 1926.501(b)] to the fall protection standard for residential construction [subparagraph (13) of § 1926.501(b)]?
- Did the Secretary prove by a preponderance of the evidence that LMS violated the residential construction fall protection standard at § 1926.501(b)(13) when its foreman was working without fall protection while standing on the top plate of an exterior wall while adjusting roof trusses? (Item 1, instance "b").
- Did LMS prove by a preponderance of the evidence that the foreman's violation of the fall protection standard alleged in item 1, instance "b", constituted unpreventable employee misconduct? (Item 1, instance "b").
- Did the Secretary prove by a preponderance of the evidence that LMS violated the residential construction fall protection standard at § 1926.501(b)(13) when employees installed roof sheathing without using any conventional fall protection system? (Item 2).
- Did LMS demonstrate by a preponderance of the evidence that it met the exception contained in § 1926.501(b)(13) for utilizing certain conventional fall protection systems in residential construction by demonstrating both (1) the use of such conventional fall protection systems was infeasible, and (2) that it had developed and implemented a fall protection plan that complied with the provisions of § 1926.502(k)? (Item 2).

For the reasons described below, the three alleged violations are affirmed, and a penalty of $2,800 is assessed for each citation item, for a total penalty of $5,600.

## Findings of Fact

The following facts were proven by at least a preponderance of the evidence:

1. The Respondent, LM Sanderson Construction, Inc. (LMS) is a construction company based in Webster, New York, whose business includes framing buildings and other related construction activities. (Stip. No. 2). The number of workers that LMS employs is variable, but LMS generally employs fewer than ten workers at any given time. (T. 65; Stip. Nos. 3 & 4).

2. Beginning in February 2016, LMS began working on a residential construction project in Rochester, New York, known as Ivy Bridge Townhomes. (T. 129).

3. On April 7, 2016, the LMS personnel at the Ivy Bridge Townhomes construction site included the foreman, Timothy Lenz, and three workers who Lenz supervised. Lenz's supervisory responsibilities included oversight of safe work practices. (Stip. No. 8; T. 128-30). The vice-president of LMS, David Sanderson, was also present at the construction site that day, and he personally participated in some construction activities. When Sanderson was present, both he and Lenz were involved in supervising the other three LMS employees. (Stip. 8; T. 128).

4. The building under construction on which LMS employees were working on April 7, 2016 was a two-story structure that was intended to be used as a home or dwelling. (T. 57-58). The building was being constructed using traditional wood frame construction materials and methods.

5. On the morning of April 7, 2016, LMS employees were completing the installation of roof trusses on the building. By the afternoon, they had begun to sheath the roof with 4-ft x 8-ft plywood sheets to create a roof that would have a slope greater than 4 in 12 (vertical to horizontal). (Stip. Nos. 7 & 9; T. 53-55, 117). The roof eave was not protected by a wall or guardrail system. The eave was about 18 to 20 feet above ground level and about eight feet above the interior floor of the second story. (Stip. No. 10; T. 41, 131).

6. The first floor of the building was wider than the second floor—it projected outward about six to eight feet from the exterior wall of the second story and had a flat roof that had been fully sheathed. (T. 76, 90). The edge of this flat roof was not protected by a wall or guardrail system, and was at least eight feet below the roof eave and was at least ten feet above ground level. (Stip. No. 10; T. 131).

7. The photographs at Exhibits C-13, C-14 and C-18 depict the building's first floor projecting out from the second floor's exterior wall. The 2x4's that are depicted rising vertically from the first floor flat roof are set flush against the second floor exterior wall, and were *not* set on the outside edge of the first floor roof as the CO had mistakenly recalled in his testimony. (T. 79-80, 93).

*Citation Item 1, Instance "a"*

8. LMS employees placed a stack of 4-ft x 8-ft plywood roof sheathing material on the fork of a Caterpillar-brand rough terrain forklift truck known as a "telehandler," and elevated the sheathing materials to the roof by means of the telehandler's extensible boom on which the fork was attached. The fork was elevated about one to two feet above

the eave of the roof and was positioned in a manner so that about half the stack of plywood was suspended directly over the second floor roof, and the other half was suspended directly over the flat roof of the first floor projection. (Ex. C-6). The stack of plywood was about four feet high, so the top of the stack was about four feet higher than the telehandler's fork, about 12 feet higher than the flat roof of the first floor projection, and about 22 to 24 feet higher than ground level. After the stack of plywood had been elevated to that position, at different times two LMS employees stepped from the building onto the stack to transfer individual plywood sheets onto the building and to cut plywood. Only one worker was atop the stack at any given time—one of those workers was the foreman Lenz and the other was a worker who Lenz was responsible for supervising. Neither Lenz nor the other worker was protected from falling while atop the elevated stack by either a personal fall arrest system or guardrail system.

9. The elevated stack of plywood on which Lenz and the other employee were working as depicted in the photographs at Exhibits C-6, C-7, C-8, C-10, C-13, C-14, C-18, and C-19, constituted a work surface that was elevated above lower levels. This work surface constituted a "platform" as defined in § 1926.450(b) (defining "platform" as "a work surface elevated above lower levels"), so that the makeshift platform and the telehandler constituted a "scaffold" as defined in § 1926.450(b) (defining "scaffold" as "any temporary elevated platform … and its supporting structure … used for supporting employees or materials or both").

10. The photograph at Exhibit C-6 accurately depicts foreman Lenz kneeling on the makeshift elevated platform without any fall protection. (T. 104-105, 116-117).

11. The photographs at Exhibits C-7, C-8, C-10, C-13, C-14, C-18, and C-19, accurately depict the other LMS worker in various postures (crouching, stooping, standing) while positioned on the makeshift elevated platform. Those photographs also accurately depict vice-president Sanderson standing on or near the top plate of the second floor exterior wall, within arm's reach of the makeshift elevated platform. Sanderson was supervising workers and was intending to act as a safety monitor for the worker on the stack of plywood as well as for LMS workers on the roof installing sheathing, who were also not using any conventional fall protection system. (Stip. No. 11; T. 116-18, 141-142).

12. If either of the employees who had been atop the makeshift elevated platform had fallen, there is a substantial probability that the employee would have sustained serious physical harm or even death. (T. 60-64).

13. It was not necessary for Lenz or the other worker to have been atop the stack of plywood as depicted in the photographs at Exhibits C-6, C-7, C-8, C-10, C-13, C-14, C-18, and C-19, in order for LMS to transfer the plywood from the telehandler to the roof, or to cut the plywood. (T. 104-107).

*Citation Item 1, Instance "b"*

14. On the morning of April 7, 2016, before the workers had begun to install the plywood sheathing material to the roof frame, the foreman Timothy Lenz was moving roof trusses while standing on or near the top plate of the exterior wall of the building in between two roof trusses. (Stip. No. 7; T. 89-90). His position at that time is accurately depicted in the photographs set forth in Exhibits C-2, C-3, C-4 and C-5. The top plate of

the exterior wall constituted an unprotected edge and was about (a) twenty feet above ground level, (b) eight feet above the flat roof of the first-floor projection, and (c) eight feet above the next lower level in the building's interior. (Stip. No. 10; T. 55, 90, 131). Lenz was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems. (T. 42-43, 54, 132).

15. If Lenz had fallen, there is a substantial probability that serious physical harm could have resulted. (T. 60-64).

16. The vice-president of LMS, Dave Sanderson, was at the construction site at the time that Lenz was standing on the top plate of the exterior wall without fall protection, but Sanderson did not see or know that Lenz was in that position. Sanderson did not learn that Lenz had been in that position until later that day, when Lenz told Sanderson that he had seen someone (the CO) taking photographs of him while in he had been in that position. (T. 100, 132).

17. LMS's standard procedure for setting roof trusses is for workers to do so while standing on a ladder. Lenz was aware of this standard procedure and he consciously did not follow it while engaged in the activity depicted in the photographs at Exhibits C-2, C-3, C-4 and C-5. (T. 90, 133).

18. LMS disciplined Lenz for standing on the top plate of the wall without using any fall protection. The written record of this discipline indicated that the discipline imposed was a "verbal warning" and that it was a "First Notice." (Ex. R-6). At the time Lenz received this discipline, he had been employed by LMS for about six years and had been a supervisor for about three to four years. (T. 99, 128). LMS had never before

disciplined Lenz for failing to use fall protection. (T. 100, 134). Except for this discipline of Lenz, there was no evidence of any other instance of LMS disciplining an employee for violating a safety rule.

19. LMS had a written "Company Safety Plan" in place on April 7, 2016, that included a section titled "Installing and Spreading Roof Trusses." (Ex. R-1, p. 4). This section provided that "on a site-specific basis," LMS would "develop a plan for the protection of workers from falls in regard to the installation of roof trusses," and that "[a]ll employees involved in this job-specific task will be instructed to utilize 100% fall protection CONTROLS utilizing PFAS [personal fall arrest system] to solid anchorage point with possibly the exception of receiving and spreading the roof trusses." (*Id.*) LMS did not follow this section of the Company Safety Plan in that it did not establish a site-specific plan for the Ivy Bridge Townhomes construction site for the protection of workers installing roof trusses. (T. 143).

20. The "Installing and Spreading Roof Trusses" section of the Company Safety Plan further provided that "[a]fter careful consideration [LMS] has assessed that it would cause a greater hazard to personnel to utilize conventional fall protection during the spreading of the roof trusses," so that while spreading roof trusses "an employee may be exposed to a short duration fall hazard that cannot be addressed through the use of PFAS and/or the setting of the scaffold." (Ex. R-1, p. 4). This section goes on to describe measures to be taken to minimize the duration of exposure to a fall hazard during truss spreading activities, and includes the provision that "[l]adders will be used to secure and

brace trusses when possible." (Ex. R-1, p. 5). LMS did not raise the affirmative defense of "greater hazard" to the violation alleged in instance "b" of item 1. (T. 16, 31).

*Citation Item 2*

21. The photographs at Exhibits C-6, C-7, C-8, C-10, C-13, C-14, C-18, and C-19 accurately depict LMS workers installing the plywood roof sheathing material to the roof trusses at the Ivy Bridge Townhomes construction site on April 7, 2016. The LMS workers shown in the photographs installing the roof sheathing were not protected by a conventional fall protection system (i.e., guardrail system, safety net system, or personal fall arrest system). Those photographs also accurately depict vice-president Sanderson standing on or near the top plate of the second floor exterior wall, also without using any conventional fall protection system. Sanderson was supervising workers and was intending to serve as a safety monitor for the workers who were sheathing the roof, none of whom was using any conventional fall protection system. (Stip. No. 12; T. 116-18, 141-142).

22. LMS's written Company Safety Plan in effect on April 7, 2016, has a section titled "Installing Roof Sheathing," which provides as follows (Ex. R-1, p. 7):

> There are serious fall hazards associated with the installation of roof sheathing and [LMS] will eliminate the potential hazards associated with this task through the use of lines of demarcation, PFAS and solid anchorage points as described in the fall protection controls aspect of the written plan. Retractable lifeline stands may also be utilized by workers installing roof sheathing. All fall protection controls will be established under the guidance of the competent person, along with safety rails around perimeter.

LMS was not employing any of the fall protection systems described in this section of the Company Safety Plan during the roof sheathing activities depicted in the photographs at Exhibits C-6, C-7, C-8, C-10, C-13, C-14, C-18, and C-19. (LMS did intend to install roof anchors and to begin to use the personal fall arrest systems that it had onsite, but only after having first partially sheathed the roof [T. 138, 150-51].)

23. If any of the employees installing roof sheathing without fall protection had fallen, there is a substantial probability that the employee would have sustained serious physical harm or even death. (T. 60-64).

24. The evidence is insufficient to establish that it was technologically impossible to use a conventional fall protection system (i.e., guardrail system, safety net system, or personal fall arrest system) to perform the roof sheathing activities depicted in the photographs at Exhibits C-6, C-7, C-8, C-10, C-13, C-14, C-18, and C-19. (T. 135-140).

25. LMS did not develop or implement a fall protection plan for the roof sheathing activities depicted in the photographs at Exhibits C-6, C-7, C-8, C-10, C-13, C-14, C-18, and C-19 that: (a) was developed specifically for the Ivy Bridge Townhomes construction site; (b) documented the reasons why the use of conventional fall protection systems were infeasible; (c) included a discussion of other measures that would be taken to reduce or eliminate the fall hazard for workers who could not be provided with protection from the conventional fall protection systems; or (d) identified each location where conventional fall protection methods could not be used, classified those locations

as controlled access zones, and identified employees authorized to work in such controlled access zones. (T. 142-144; Ex. R-1).

## Discussion

The Commission obtained jurisdiction of this matter under section 10(c) of the Occupational Safety and Health Act (Act) upon LMS's timely contest of the citation and proposed penalties. 29 U.S.C. § 659(c). At all relevant times, LMS was an employer covered by the Act because it met the Act's definition of "employer." 29 U.S.C. § 652(5).

To prove a violation of an OSHA standard, the Secretary must establish 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 employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 691 (D.C. Cir. 1980).

### Citation Item 1, instance "a"— (workers atop the elevated stack of plywood)

Although the Secretary pleaded three alternative safety standards as applicable to instance "a" of item 1, in his post-hearing brief the Secretary settled on § 1926.451(g)(1) as being the applicable standard among the three. Section 1926.451(g)(1) requires that "[e]ach employee on a scaffold more than 10 feet … above a lower level shall be protected from falling to that lower level" by certain means described within that section.

*Applicability of § 1926.451(g)(1)*

Section 1926.45l(g)(l) is included in the construction industry standards at subpart L, "Scaffolds." Subpart L applies to "all scaffolds used in workplaces covered by" the construction industry standards codified in 29 C.F.R. Part 1926. 29 C.F.R § 1926.450(a). The term "scaffold" is defined as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." 29 C.F.R. § 1926.450(b). The preamble to subpart L shows that the Secretary intended to allow equipment such as rough terrain forklifts (like the telehandler involved here) to be used to support scaffold platforms, and that if so used the platforms "must comply with the applicable requirements of § 1926.451 for capacity, construction, access, use, and *fall protection*." Safety Standards for Scaffolds Used in the Construction Industry, 61 Fed. Reg. 46026, 46044 (August 30, 1996) (to be codified at 29 C.F.R. pt. 1926) (emphasis supplied). This stated intent is manifest in provisions of subpart L that impose specific requirements on the design and use of forklifts and "similar pieces of equipment" when used to support scaffold platforms. *See, e.g.,* §§ 1926.451(c)(2)(iv) & (v).[2] The meaning of subpart L is plain—some of its provisions unambiguously apply to elevated platforms supported by forklifts and other similar equipment, such as telehandlers. *See Exelon Generating Corp.*, 21 BNA OSHC 1087, 1090 (No. 00-1198, 2005) (upholding unambiguous reading of cited standard that was consistent with structure of whole standard and its preamble); *accord*,

[2] There was no evidence that the telehandler here met the requirements of § 1926.451(c)(2)(iv) or (v), but whether LMS complied with those standards was not put in issue by the Secretary.

OSHA Interpretation letter dated November 27, 2001, "Applicable Standards to Lifting Personnel on a Platform Supported by a Rough-Terrain Forklift;" *Salco Constr., Inc.*, No. 05-1145, 2006 WL 1719697, at * 11-12 (O.S.H.R.C.A.L.J., Apr. 24, 2006) (concluding that a personnel platform that had guardrails on three sides and was elevated on the fork of a telehandler constituted a "scaffold" as defined in subpart L).

Because the LMS employees were working from a scaffold platform, the general fall protection standard that was originally cited does not apply. *See* 29 C.F.R. § l926.500(a)(2)(i) (specifying that the general fall protection standards for construction workplaces set forth in subpart M of Part 1926 do not apply to scaffolds, but rather that fall protection requirements for employees working on scaffolds are provided by the scaffold standard at subpart L); *see also* OSHA Directive STD 03-11-002, "Compliance Guidance for Residential Construction" published December 16, 2010, at page 2 (noting "that fall protection requirements for residential construction work performed on scaffolds … are in Subpart L … not 29 CFR 1926.501(b)(13)").

*Compliance with § 1926.451(g)(1)*

Section 1926.451(g)(1) requires that "[e]ach employee on a scaffold more than 10 feet … above a lower level shall be protected from falling to that lower level" by certain prescribed means depending on the type of scaffold involved. For the makeshift scaffold platform involved here, subparagraph (vii) of § 1926.451(g)(1) specifies the types of fall protection that would meet the standard, and requires that each worker on the platform "be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of [§ 1926.451(g)(4)]." § 1926.451(g)(1)(vii).

The work surface of the makeshift scaffold platform was more than 10 feet higher than all three levels to which a worker who was atop the platform could fall—the ground level, the flat rooftop of the first floor projection, and the interior second floor of the building under construction. Neither of the workers on the platform as depicted in the photographs at Exhibits C-6, C-7, C-8, C-10, C-13, C-14, C-18, and C-19 was protected by the use of personal fall arrest system or guardrail systems. LMS did not comply with the standard.

*Employee Exposure, and Employer Knowledge*

Foreman Lenz and one other LMS employee were exposed to the violative condition as depicted in the photographs at Exhibits C-6, C-7, C-8, C-10, C-13, C-14, C-18, and C-19, and this evidence establishes the "employee access" element of the Secretary's burden of proof.

The vice-president of LMS, Dave Sanderson, was standing within arm's reach of the platform when each of the employees was atop the platform. His actual knowledge of the violative condition is imputable to LMS, and establishes the "employer knowledge" element of the Secretary's burden of proof.

The Secretary has met his burden to establish by a preponderance of the evidence that LMS violated § 1926.451(g)(1) in the manner alleged in instance "a" of item 1.

*Infeasibility Defense to Violation of § 1926.451(g)(1)*

LMS interposed the affirmative defense of infeasibility to citation item 1, instance "a." An employer who raises the affirmative defense of infeasibility has the burden to prove that "(1) literal compliance with the requirements of the standard was infeasible

under the circumstances and (2) *either* an alternative method of protection was used *or* no alternative means of protection was feasible." *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160 (No. 90-1620, 1993) (consolidated) (emphasis in original).

LMS's foreman, who was one of the two LMS employees exposed to the hazardous condition, acknowledged in his testimony that it had not been necessary for anyone to step onto the makeshift elevated platform on the telehandler. (T. 104-107). The foreman's forthright testimony on this point was reliable and credible, and it vitiates the claim that it was impossible to perform required work without violating § 1926.451(g)(1). LMS has failed to establish the affirmative defense of infeasibility as to instance "a" of item 1.

*Classification of Violation of § 1926.451(g)(1)*

The Act provides that a violation is "serious" if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). "[Section 666(k)] 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. 99-0947, 2000).

If either of the workers had fallen from the makeshift platform onto any of the three levels below it (the ground level, the flat rooftop of the first floor projection, or the interior floor for the second story) serious injury, and possibly even a fatal injury, could result. (T. 61). The violation is correctly classified as "serious."

Citation Item 1, instance "b" –
Foreman Lenz standing on top plate of wall

Instance "b" of citation item 1 alleges that LMS violated § 1926.501(b)(1) when "an employee was working without fall protection on surface below the partially constructed roof that was unprotected and 20 feet above ground level." At the outset of the hearing, the parties expressed their common understanding that instance "b" pertained to the foreman, Lenz, having been standing on the top plate of the wall without fall protection while adjusting roof trusses, as is depicted in the photographs at Exhibits C-2, C-3, C-4 and C-5. The parties also expressed their common understanding that as to the violation alleged in instance "b", that LMS was interposing the affirmative defense of unpreventable employee misconduct. (T. 16-17).

*Applicability of § 1926.501*

The cited standard is contained in § 1926.501, which by its terms "sets forth requirements for employers to provide fall protection systems." § 1926.501(a)(1). The Secretary cited subparagraph (b)(1) of § 1926.501 to be applicable standard. That subparagraph provides:

> (b)(1) *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

While paragraph (b) of § 1926.501 *does* indeed apply to the alleged violative condition, its subparagraph (1) does not. Rather, because the Ivy Bridge Townhomes construction site involved residential construction, subparagraph (13) of paragraph (b)

applies. Subparagraph (b)(13) is applicable to "residential construction," and provides as follows:

> (13) *Residential construction.* Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.
>
> **Note:** There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with § 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

Subparagraph (b)(13) was specifically promulgated to address the "unique work conditions" involved in residential construction work and to be the standard that applies to that unique work environment. Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672, 40695 (Aug. 9, 1994); OSHA Directive STD 03-11-002, "Compliance Guidance for Residential Construction," published Dec. 16, 2010, at page 14 (stating that "a citation for violating 1926.501(b)(13) should be issued" for an employer that is engaged in residential construction and that "does not provide guardrail systems, safety net systems, personal fall arrest systems, or other fall protection allowed under 1926.501(b)").

The purpose of the conditional clause in subparagraph (13) ("unless another

provision in paragraph (b) of this section provides for an alternative fall protection measure") is not for any such alternative measure to supplant subparagraph (13) as the applicable standard for the residential construction environment. Rather, the implementation of any such alternative measure in a residential construction worksite would establish compliance with subparagraph (13). *See* Safety Standards for Fall Protection in the Construction Industry, *supra*, 59 Fed. Reg. at 40693 (noting that as to compliance with subparagraph (b)(13), "if another provision in paragraph (b) allows an alternative fall protection measure, such as covers over holes, those alternatives measures are also acceptable and do not need to be documented in a fall protection plan in order to be used"); *see also* OSHA Instruction STD 3.1, "Interim Fall Protection Compliance Guidelines for Residential Construction," issued December 8, 1995 (providing that "[f]ailure to provide fall protection in accordance with any part of this directive shall be cited as a violation of 1926.501(b)(13)"), superseded by OSHA Instruction STD 03-00-001, "Plain Language Revision of OSHA Instruction STD 3.1," dated June 18, 1999, which in turn was cancelled by OSHA Directive STD 03-11-002, *supra*.

For purposes of determining the applicability of subparagraph (13) of § 1926.501(b), the Secretary interprets the term "residential construction" "as covering construction work that satisfies the following two elements: (1) the end-use of the structure being built must be as a home, i.e., a dwelling; and (2) the structure being built must be constructed using traditional wood frame construction materials and methods." OSHA Directive STD 03-11-002, *supra*, at page 11. The Ivy Bridge Townhomes construction site plainly meets this definition of the term "residential construction," and

thus the applicable standard is subparagraph (13) of § 1926.501(b), and not subparagraph (1) as originally alleged in the citation.

Because the Secretary did not cite § 1926.501(b)(13) as the applicable standard, either the violation as alleged must be vacated because the standard that was cited is not applicable to the alleged violative condition, or the alleged violation must be amended *sua sponte* by the Commission to allege the standard that is applicable.

"The Commission has recognized that amendments, including those made *sua sponte*, are routinely permissible where they merely add an alternative legal theory, but do not alter the essential factual allegations contained in the citation." *Avcon, Inc.*, 23 BNA OSHC 1440, 1451 (No. 98-0755, 2011) (consolidated), quoting *N.Y. State Elec. & Gas Corp.*, 17 BNA OSHC 1129, 1132 (No. 91-2897, 1995) (internal quotes omitted). Such a *sua sponte* amendment is not appropriate if the respondent would be prejudiced thereby. "In determining whether a party has been prejudiced, the Commission looks 'at whether the party had a fair opportunity to defend and whether it could have offered any additional evidence if the case was retried.'" *Id.* at 1451-52 quoting *Nuprecon LP*, 22 BNA OSHC 1937, 1939 (No. 08-1037, 2009).

Amending the alleged violation described in instance "b" of item 1 to allege a violation of subparagraph (13) of § 1926.501(b) rather than subparagraph (1) would not prejudice LMS. *Id.* (reflecting the Commission's *sua sponte* amendment of a citation to allege the applicable standard to be subparagraph (2)(i) of § 1926.501(b), rather than the originally cited subparagraph (1) of 1926.501(b)). LMS had a fair opportunity to defend the allegation that it lacked fall protection required by § 1926.501(b). LMS does not

dispute that Lenz was not utilizing any fall protection system, and it seeks to avoid responsibility for the violation by establishing the affirmative defense of unpreventable employee misconduct. Instance "b" of item 1 is therefore ordered amended *sua sponte* to allege a violation of § 1926.501(b)(13).

*Violation of § 1926.501(b)(13)*

The Findings of Fact at ¶¶ 4–6 & 14 *supra* establish that while foreman Lenz was positioned on the top plate of the wall to adjust roof trusses (as depicted in the photographs at Exhibits C-2, C-3, C-4 and C-5), he was engaged in residential construction and was exposed to a fall of more than six feet above lower levels without utilizing any fall protection system prescribed by § 1926.502(b)(13). Lenz was a supervisor and his awareness of his own violative conduct is sufficient for the Secretary to meet his burden to prove that LMS had knowledge of the violative condition, without having to demonstrate any inadequacy or defect in LMS's safety program.[3] *Dover*

[3] Imputing Lenz's knowledge of his own misconduct to LMS is consistent with Commission precedent and the precedent of the two circuit courts of appeal to which judicial review may be sought here pursuant to 29 U.S.C. § 660(a) (i.e., either the D.C. Circuit or the Second Circuit). *See N. Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 107 (2d Cir. 1996) (discussing the analytic framework that some circuit courts of appeal apply on the "employer knowledge" element of the Secretary's burden of proof where the alleged violative conduct is that of a supervisor). Imputation of Lenz's knowledge of his own misconduct to LMS would be appropriate even if the analytic framework adopted by some other circuit courts of appeal were operative here. *See, e.g., W.G. Yates & Sons Constr. Co., Inc. v. Occupational Safety & Health Review Comm'n,* 459 F.3d 604, 609 n. 8 (5th Cir. 2006) (holding that where a supervisor has failed to comply with a safety standard, "employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with

*Elevator*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

*Affirmative Defense of Unpreventable Employee Misconduct to Citation Item 1, instance "b"*

To establish the affirmative defense of unpreventable employee misconduct, LMS must show that it "(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered." *Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). An employer's burden to establish this defense is "more rigorous" where, as here, a violation involves the misconduct of a supervisor, since a supervisor's duties include "protect[ing] the safety of employees under his supervision" and the supervisor's misconduct is "strong evidence that the employer's safety program is lax." *Stark Excavating, Inc.*, 24 BNA OSHC 2218, 2220 (No. 09-0004, 2014) (consolidated) *aff'd,* 811 F.3d 922 (7th Cir. 2016), quoting *CBI Servs., Inc.*, 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001), *aff'd per curiam*, 53 F. App'x 122 (D.C. Cir. 2002) (unpublished).

Here, LMS had an established work rule designed to prevent the violative condition—the Company Safety Plan required "100% fall protection CONTROLS

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evidence of lax safety standards]"); *accord Comtran Grp., Inc. v. Department of Labor,* 722 F.3d 1304 (11th Cir. 2013). Here, as discussed *infra* in connection with the defense of unpreventable employee misconduct, on the record as a whole, the Secretary would have met his burden to establish employer knowledge of the supervisory misconduct by virtue of LMS having maintained an inadequate safety program. *Cf. Spirit Aerosystems, Inc.*, 25 BNA OSHC 1093, 1095 (No. 10-1697, 2014) (deciding that "[u]nless … evidence clearly preponderates against complainant, the Judge must either deny [a FRCP Rule 52] motion or defer disposition until the conclusion of respondent's case") (citing *Morgan & Culpepper, Inc.*, 5 BNA OSHC 1123, 1124-25 (No. 9850, 1977), *aff'd in relevant part*, 676 F.2d 1065 (5th Cir. 1982)).

utilizing" personal fall arrest systems (PFAS) during installation of roof trusses, subject to exception.[4] LMS adequately communicated this rule to its employees, as demonstrated by Lenz's knowledge of that rule. LMS also took steps to discover violations of that rule by having a supervisor on construction sites whose responsibilities included assuring employee compliance with company safety rules.

The evidence is insufficient to establish the fourth enumerated element of the defense, however—that LMS effectively enforced the rule when a violation was discovered. The photographs that show Lenz in violation of § 1926.501(b)(13) at Exhibits C-1 and C-3 also depict another LMS employee standing on the center chord of one of the roof trusses about 10 to 15 feet away from Lenz. Lenz and the other employee were plainly visible to each other, and the other employee was violating the same work rule that Lenz was violating in his plain view. (T. 96-98). Unlike Lenz, however, that employee was not disciplined for violating the work rule. (T. 100).

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[4] The Company Safety Plan established a blanket exception to the use of PFAS during the spreading of roof trusses based upon a predetermination that use of PFAS during that operation would create a greater hazard under all circumstances. (*See* Findings of Fact ¶¶ 19–20). The standard at § 1926.501(b)(13) allows an employer to make a site-specific determination that a certain activity would create a greater hazard, but it does not allow an employer to predetermine that the use of conventional fall protection would create a greater hazard for a certain activity in all residential construction environments. *See* § 1926.502(k) (providing that where use of conventional fall protection systems in residential construction is infeasible or would create a greater hazard, the employer must create a fall protection plan "developed specifically for the site where the … residential construction work is being performed and the plan must be maintained up to date"). Nevertheless, since LMS is not claiming the benefit of this exception to providing conventional fall protection that is otherwise required by § 1926.501(b)(13), this deficiency in the Company Safety Plan does not bear directly on the adequacy of LMS's general work rule calling for 100% use of PFAS during installation of roof trusses.

The only evidence presented describing LMS's disciplinary policy is the following broad policy statement contained in the Company Safety Plan: "Management will take disciplinary action against an employee who willfully and repeatedly violates workplace safety rules." (Ex. R-1, p. 1). There was no evidence that LMS had developed or had implemented any formal disciplinary program or procedure. *Cf. Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2088-89 (No. 06-1542, 2012) (noting instances of employee discipline that were meted out prior to OSHA inspection pursuant to a disciplinary program). The only evidence of any LMS employee having ever been disciplined for failure to comply with any safety rule was the reprimand that Lenz received for the conduct described in instance "b"—and this was the only time over Lenz's six years' employment that LMS had disciplined him for not utilizing required fall protection. This evidence of a single instance of either pre- or post-inspection discipline does not suffice to establish that LMS had been effectively enforcing its work rules prior to the inspection. *See Jersey Steel Erectors*, 16 BNA OSHC 1162, 1165 n.3 (No. 90-1307, 1993) (finding the employer's discipline of a foreman after the foreman's violative conduct was identified during an OSHA inspection did not reflect the existence of a "coherent and integrated policy designed to increase employee compliance with" company work rules), *aff'd* 19 F.3d 643 (3d Cir. 1994) (unpublished).

LMS has failed to carry its burden to establish the defense of unpreventable employee misconduct.

*Classification of Violation of Citation Item 1, Instance "b"*

Lenz was exposed to a fall of about eight feet to the interior of the building, eight feet to the flat roof of the first floor projection, and potentially about 18 to 20 feet to the ground level. Lenz's testimony that he was "very comfortable" working without fall protection and that he did not consider working without fall protection to have been a "serious" or "deadly" infraction was seemingly based on his confidence in his skills and his belief that he was not at serious risk of actually falling. (T. 93-94). As noted previously, it is not the probability of an accident occurring that renders a violation "serious" or not, but rather whether "a serious injury is the likely result should an accident occur." *Pete Miller, Inc., supra.* The violation described in instance "b" of citation item 1 is correctly classified as "serious." *See* Finding of Fact ¶ 15, *supra*.

Citation Item 2 –
Workers Installing Roof Sheathing

Citation item 2 alleged that LMS violated § 1926.501(b)(11) when LMS employees were installing roof sheathing without using fall protection on surfaces with unprotected sides, 20 feet above ground level. Section 1926.501(b)(11) is captioned "Steep roofs" and requires that "[e]ach employee on a steep roof with unprotected sides and edges 6 feet …. or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems." At the outset of the hearing, the parties expressed their common understanding that LMS was asserting the affirmative defense of infeasibility to this alleged violation. (T. 31).

For the same reasons that were described *supra* in connection with instance "b" of item 1, the applicable standard is subparagraph (13) of § 1926.501(b), and not the

originally cited subparagraph (11).[5] And also for the same reasons described *supra* in connection with instance "b" of item 1, citation item 2 is amended *sua sponte* to allege that subparagraph (13) of § 1926.501(b) is the standard that is applicable to the alleged violative condition. Similarly, LMS will not be prejudiced by the amendment because it had a fair opportunity to defend and could not have offered any additional evidence pertinent to the alleged violation if the case were retried.

The Findings of Fact at ¶¶ 4–5 & 21 *supra* establish the elements of the Secretary's burden of proof that LMS violated § 1926.501(b)(13) in the manner alleged in item 2. LMS seeks to avoid responsibility for the violation by establishing the affirmative defense of infeasibility.

The infeasibility defense is expressly integrated into subparagraph (b)(13). Subpart M defines the term "infeasible" as follows: "*Infeasible* means that it is impossible to perform the construction work using a conventional fall protection system (i.e., guardrail system, safety net system, or personal fall arrest system) or that it is technologically impossible to use any one of these systems to provide fall protection."[6]

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[5] The parties stipulated that the roof in question was a "steep roof" as defined in subpart M at §1926.500(b). (Stip. No. 9). If LMS had been utilizing a fall protection system that had been compliant with subparagraph (11) of § 1926.501(b), LMS would have been deemed to have been compliant with § 1926.501(b)(13). *See* Safety Standards for Fall Protection in the Construction Industry, *supra*, 59 Fed. Reg. at 40693 (noting that as to compliance with subparagraph (b)(13), "if another provision in paragraph (b) allows an alternative fall protection measure, such as covers over holes, those alternatives measures are also acceptable and do not need to be documented in a fall protection plan in order to be used").

[6]Absent from this definition of "infeasible" is the concept of "economic infeasibility." *Cf. Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1986-87 (No.

§ 1926.500(b). The preamble to subpart M indicates that this definition was informed by case law involving the infeasibility defense. "Safety Standards for Fall Protection in the Construction Industry," 59 Fed. Reg. 40672, 40678 (August 9, 1994) (stating that the definition of the term "infeasible" "has evolved from litigation involving contested citations where employers have asserted that compliance with an OSHA requirement was 'infeasible' or 'impossible'").

As set forth in Finding of Fact ¶ 24, *supra*, LMS did not carry its burden to demonstrate that use of conventional fall protection systems was technologically impossible for the workers who were installing sheathing as depicted in the photographs at Exhibits C-6, C-7, C-8, C-10, C-13, C-14, C-18, and C-19. Nevertheless, even if the scant and conclusory testimony that the use of conventional fall protection systems was

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82-928, 1986) (recognizing economic factors in rejecting infeasibility defense because employer had not shown that the costs were unreasonable in light of the protection afforded and had not shown what effect the added costs would have on its contract or on its business as a whole). The preamble to subpart M expressly states that "infeasibility" of compliance within subpart M does not encompass claims of "economic infeasibility." Safety Standards for Fall Protection in the Construction Industry, *supra*, 59 Fed. Reg. at 40685 (stating that OSHA "does not consider 'economic infeasibility' to be a basis for failing to provide conventional fall protection for employees … performing residential construction work," and that OSHA "has consistently maintained, and the record for this rulemaking shows, that the industry can either absorb the costs of compliance with revised subpart M or pass those costs along to its customers").

In any event, LMS's position here appears to be that providing fall protection was technologically impossible, not that compliance may have been technologically possible, but nonetheless economically infeasible. But even if LMS had intended to assert "economic infeasibility" of compliance, and assuming that such a defense is cognizable against a violation of § 1926.501(b)(13), LMS failed to present sufficient evidence to prove that defense under *Dun-Par*.

not technologically possible was accepted at face value (T. 135-140), the infeasibility defense fails.

Under § 1926.501(b)(13), once an employer establishes that utilizing conventional fall protection systems is infeasible for any aspect of residential construction, the standard allows an employer to perform the construction work without using a conventional fall protection system, but only if the employer has "develop[ed] and implement[ed] a fall protection plan which meets the requirements of paragraph (k) of § 1926.502." Paragraph (k) of § 1926.502 provides as follows:

> (k) *Fall protection plan.* This option is available only to employees engaged in leading edge work, precast concrete erection work, or residential construction work (See § 1926.501(b)(2), (b)(12), and (b)(13)) who can demonstrate that it is infeasible or it creates a greater hazard to use conventional fall protection equipment. The fall protection plan must conform to the following provisions.
>
> (1) The fall protection plan shall be prepared by a qualified person and developed specifically for the site where the leading edge work, precast concrete work, or residential construction work is being performed and the plan must be maintained up to date.
>
> (2) Any changes to the fall protection plan shall be approved by a qualified person.
>
> (3) A copy of the fall protection plan with all approved changes shall be maintained at the job site.
>
> (4) The implementation of the fall protection plan shall be under the supervision of a competent person;
>
> (5) The fall protection plan shall document the reasons why the use of conventional fall protection systems (guardrail systems, personal fall arrest systems, or safety nets systems) are infeasible or why their use would create a greater hazard.
>
> (6) The fall protection plan shall include a written discussion of other measures that will be taken to reduce or eliminate the fall hazard for workers who cannot be provided with protection from the conventional fall protection systems. For example, the employer shall discuss the

> extent to which scaffolds, ladders, or vehicle mounted work platforms can be used to provide a safer working surface and thereby reduce the hazard of falling.
>
> (7) The fall protection plan shall identify each location where conventional fall protection methods cannot be used. These locations shall then be classified as controlled access zones and the employer must comply with the criteria in paragraph (g) of this section.
>
> (8) Where no other alternative measure has been implemented, the employer shall implement a safety monitoring system in conformance with § 1926.502(h).
>
> (9) The fall protection plan must include a statement which provides the name or other method of identification for each employee who is designated to work in controlled access zones. No other employees may enter controlled access zones.
>
> (10) In the event an employee falls, or some other related, serious incident occurs, (e.g., a near miss) the employer shall investigate the circumstances of the fall or other incident to determine if the fall protection plan needs to be changed (e.g. new practices, procedures, or training) and shall implement those changes to prevent similar types of falls or incidents.

As described in Finding of Fact ¶ 25, *supra*, LMS did not have a fall protection plan in place that met the requirements of subparagraphs (1), (3), (5), (6), (7) or (9) of § 1926.502(k). LMS thus failed to meet the second prong of the exception set forth in § 1926.501(b)(13) to the general mandate that conventional fall protection systems must be used in residential construction. Because LMS failed to take the measures required by § 1926.501(b)(13) to mitigate the fall hazard to which employees were exposed while not using conventional fall protection systems, LMS's defense of infeasibility as to citation item 2 fails.

The violation described in citation item 2 is appropriately classified as a serious violation for the same reasons that the other two violations constitute serious violations.

Penalty Assessment

The permissible range of penalties for a serious violation that was in effect when the proposed penalty was assessed was from no penalty to $7,000. (29 U.S.C. § 666(b); T 62). The Commission and its judges conduct *de novo* penalty determinations and have discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) *aff'd*, 73 F.3d 1466 (8th Cir. 1996); *Allied Structural Steel*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975).

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the S.*, *Inc.*, 14 BNA OSHC 1910, 1910 (No. 89-2241, 1990). "Gravity" is the primary consideration among these four statutory criteria, and is determined by "such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary seeks a penalty of $2,800.00 for each citation item, for a total proposed penalty of $5,600.00. The Secretary determined that a resulting injury from each of the violative conditions would have been of "higher" severity, and that the probability of an injury resulting from each of the violations was "greater" (as opposed to "lesser"). The Secretary accorded a 60% reduction in penalty for LMS's small size, and accorded no reductions for good faith or prior history. (T. 63-68).

LMS asserts that the violations should not be regarded as having been "high gravity" on the argument that none of the employees were exposed to a fall to ground level. Rather, LMS argues that no employee could have fallen further than the floor of the second story on the inside of the building, or the flat roof of the first floor projection. LMS believes that any fall towards the exterior of the building would have been arrested by the flat roof of the first floor projection.

This argument is rejected. First, a landing after an unintended fall is likely to be an awkward landing, and an awkward landing from an eight-foot fall is likely to result in serious injury and possibly even a fatal injury. Second, the edge of the first floor's flat roof was unprotected, and nothing would have prevented an employee who had fallen and landed on that flat roof from falling further from that level to the ground level and sustaining a second impact in the fall. For these reasons, all three violations were reasonably classified to have been high gravity violations.

The record supports the substantial reduction of the penalty to account for LMS's relatively small size, and such a substantial reduction was provided in the penalties originally proposed. (T. 65-66).

While there was no evidence that LMS had been previously cited for violations of safety or health standards, considering that the Company Safety Plan allowed for exceptions to the use of fall protection that would have resulted in violations of applicable fall protection standards, no penalty reduction is in order on account of LMS's compliance history.

As for adjusting the penalty for "good faith," this entails assessing an employer's health and safety program, its commitment to job safety and health, its cooperation with OSHA, and its efforts to minimize any harm from the violation. *Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013); *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1002 (No. 4, 1972). The inadequacies in LMS's safety program that existed at the time of the violations weigh heavily against any reduction for good faith. While LMS's post-inspection expenditures and measures taken to improve its safety program are appropriate and commendable (Exs. R-3, R-4, R-5, R-7, R-8, R-9 and R-10; T. 119–127), they do not bear on whether LMS had made good faith efforts to comply with applicable standards and minimize harm from the violations at the time they occurred.

Considering these factors, a penalty of $2,800.00 for each violation for a total penalty of $5,600.00 is appropriate

**ORDER**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a). If any finding is in actuality a conclusion of law or any legal conclusion stated is in actuality a finding of fact, it shall be deemed so, any label to the contrary notwithstanding. Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1, item 1, instance "a" for a serious violation of 29 C.F.R. § 1926.451(g)(1) is AFFIRMED.

2. Citation 1, item 1, instance "b", is amended to allege a violation of 29 C.F.R. § 1926.501(b)(13), and as amended the violation § 1926.501(b)(13) is AFFIRMED.

3. Citation 1, item 2, is amended to allege a violation of 29 C.F.R. § 1926.501(b)(13), and as amended the violation of § 1926.501(b)(13) is AFFIRMED.

4. A penalty of $2,800.00 is ASSESSED for citation 1, item 1, instances "a" and "b".

5. A penalty of $2,800.00 is ASSESSED for citation 1, item 2.

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: September 11, 2017