Some personal identifiers have been redacted for privacy purposes.

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

SECRETARY OF LABOR, Complainant, v. Eagle Cornice Company, Incorporated, Respondent.	OSHRC Docket No. 18-1101

Appearances: Kate S. O'Scannlain, Solicitor of Labor
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Before: The Honorable Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

I. BACKGROUND

On May 22, 2018, the Occupational Safety and Health Administration (OSHA) Area Office in Providence, Rhode Island received a telephone call shortly after 9:00 a.m. from the

Johnston, Rhode Island Fire Department about a fall at an Eagle Cornice Company, Inc. (Respondent or Eagle Cornice) job site at CSL Plasma Center at 1540 Hartford Avenue, Johnston, Rhode Island 02919 (Worksite), an empty one-story building that was being finished on the inside, where an Eagle Cornice employee, [Redacted], age 45, had been injured. (Tr. 42-43, 49-50, 160, 165; Exs. C-1, C-2, at 1, C-3, at 1, C-6, at 4). On that same day, OSHA directed Compliance Safety and Health Officer (CO) Patrick Owens to respond to the referral and to conduct an inspection of the Worksite. (Tr. 42-43).

CO Owens conducted an inspection (No. 1317407) of the Worksite.[1] (Ex. C-1). Among other things, he took photographs, interviewed people working there, and took field notes. (Tr. 51; Ex. C-8). He also conducted a closing conference. (Ex. C-2, at 1). As a result of CO Owens' inspection, on June 4, 2018 the Providence OSHA Area Office issued Respondent a single-item Citation alleging a Serious violation of 29 C.F.R. § 1926.501(b)(10) and proposed a penalty of $9,054.

Respondent filed a timely notice of contest, and a trial was held on April 4, 2019 at Providence, Rhode Island. (Tr. 7; Resp't Answer, ¶ 11). Three witnesses testified at the trial: (1) CO Owens; (2) Mike Brazeau, age 46, Respondent's foreman at the Worksite when the injury occurred; and (3) Matt Hogberg, the son of John (also referred to as "Jon") Hogberg, one of Respondent's three owners,[2] and its manager responsible for service and safety. (Tr. 39, 115, 155, 194; Exs. C-5 through C-6). [Redacted]'s deposition testimony and various documents were also introduced into evidence. (Tr. 32-34). There were no stipulations. (Tr. 32).

[1] CO Owens has served as an OSHA CO for more than six years. His "job is to go out and inspect not only accidents and injuries, but inspect complaints and observe hazards and do an investigation and/or inspection and document facts and possibly issue citations." (Tr. 103). He does about 20 to 30 OSHA inspections annually that relate to falls. (Tr. 39-42).

[2] Respondent is owned by Messrs. Jon Hogberg, David Soccio and Joe Brillon. (Tr. 194).

II. JURISDICTION

The Court finds that, as of the date of the alleged violation, Respondent was an employer engaged in business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). (Tr. 194; Exs. A, C-3, at 1; Resp't Answer, ¶¶ 1-3). Based upon the record, the Court finds that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case, and Respondent is covered under the OSH Act.[3]

III. FACTS RELATING TO TESTIMONY AND DOCUMENTS

A. CO Owens' Testimony

CO Owens arrived at the Worksite at about 9:40 a.m., about forty minutes after receiving the referral. (Tr. 44-45; Ex. C-2, at 1). He conducted an opening conference and met with John (also referred to as "Jon") Roberts, a Superintendent for the general contractor, Barker Construction, at the Worksite, and with Matt Hogberg.[4] (Tr. 45-49; Exs. C-2, at 1, C-3, at 1). Matt Hogberg told CO Owens that [Redacted] had fallen through the roof. (Tr. 47). CO Owens then met with Foreman Brazeau, who had been working on the roof with [Redacted]

[3] *See Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983) (even small construction projects that involve only local purchases affect interstate commerce); *Slingluff v. OSHRC*, 425 F.3d 861, 866-67 (10th Cir. 2005) (the economic activity of construction affects interstate commerce). Respondent was a covered employer under the OSH Act. 29 U.S.C. § 652(5) (defining "employer" as a "person engaged in a business affecting commerce who has employees").

[4] Eagle Cornice was a sub-contractor to Barker Construction at the Worksite. (Tr. 45-46).

when he fell. (Tr. 48).

CO Owens and Mr. Brazeau entered the building and CO Owens took three photographs of the interior of the building, two of which depict the opening in the roof through which [Redacted] fell, and showed where [Redacted] landed on the ground floor. (Tr. 50-51; C-8). Mr. Roberts told Mr. Brazeau during the morning before the incident that Messrs. Brazeau and [Redacted] were required to cut the roof opening.[5] By about 7:15 a.m., Messrs. Brazeau and [Redacted] had moved their equipment up to the roof, cut some rubber sheeting back, and got down to cutting the opening in the roof. (Tr. 52-57; Ex. C-5, at 2). Mr. Brazeau was the "head of the [roofing] patch crew" and directed [Redacted]'s work.[6] Mr. Brazeau directed [Redacted] to go down to the first floor to keep people away from the area below where Mr. Brazeau was cutting the roof. (Tr. 53-57; Exs. C-4, at 2, C-5). Mr. Brazeau cut three sides of the decking and was preparing to cut the fourth side. He left a small section so [Redacted] could hold the piece of decking from above. Mr. Brazeau stated that he asked [Redacted] to come back up to the roof so that he could finish cutting the hole in the deck. [Redacted] was going to pull one side of the decking back to prevent it from falling to the floor below while Mr. Brazeau cut the fourth side. While preparing to pull the piece of decking back, [Redacted] put his foot on another piece of decking and fell through the roof opening at about 8:30 a.m. (Tr. 53-57, 108-09; Exs. C-3, at 1-2, C-5, at 1-2, C-8, at 1, at "A" [photograph depicting opening in roof where [Redacted] fell through]). The size of the hole was estimated by Mr. Brazeau to be 40

[5] Mr. Brazeau initially believed that somebody else was supposed to cut the opening in the roof and that work was not in Respondent's scope of work. (Tr. 52-57, 105; Ex. C-6, at 5). Mr. Brazeau's statement, as handwritten by CO Owen, stated that "the G.C. [Mr. Roberts] told him to cut the decking & that he would be back-charged for it." He further said that Mr. Roberts told him [Mr. Brazeau] that his instructions [from Jon and Matt Hogberg not to cut the steel decking] were wrong." Mr. Brazeau cut the steel decking expecting to have it "back-charged" by Barker Construction to Respondent. (Tr. 116-17; Ex. C-5, at 2).

[6] CO Owens testified that Mr. Brazeau admitted during his interview that he was in charge of the work at the Worksite. (Tr. 85).

inches by 40 inches. (Ex. C-1, at 2).

At the trial, CO Owens read aloud his handwritten field notes of his conversation with Mr. Brazeau that he made on May 22, 2018 which state: "Once he [Mr. Brazeau] was done cutting, he left a small section so they could hold the decking from above to prevent it from falling to the floor. As [Redacted] [[Redacted]] was preparing to pull that one piece of decking, when he put his foot on the other piece of decking, he fell 19' [feet], 7" [inches] to the concrete floor below." (Tr. 53-57; Exs. C-5, at 1, C-8, at 1, at "A"). CO Owens continued to read the bottom paragraph of page 1 of Exhibit C-5: "Both had fall protection on the roof. Mike [Brazeau] claims he had his on, [Redacted] did not. He [Mr. Brazeau] claims [Redacted] took his off when he went down the floor."[7] (Tr. 51-57; Ex. C-5).

Mr. Brazeau reviewed and read CO Owens' handwritten May 22 field notes of Mr. Brazeau's statement at the Worksite about "an hour, hour and a half" after [Redacted] fell through the hole in the roof. Mr. Brazeau signed and dated them "5/22/18" in two separate places. (Tr. 57, 107; Ex. C-5, at 2).

On May 22, 2018, CO Owens also spoke with Matt Hogberg about fall protection training and whether a job hazard analysis (JHA) had been performed by either Messrs. Brazeau or [Redacted]. Matt Hogberg stated that no JHA had been performed and gave no reasons as to why. When queried by CO Owens, Matt Hogberg stated that there were no Eagle Cornice written procedures about how cutting a hole in the roof was to be done. (Tr. 58-59, 90-91; Ex. C-6, at 5). Matt Hogberg told CO Owens that "[t]here are contracts where the[y](sic) do cut the

[7] Mr. Brazeau said he "tied off to the curb A/C (installed)"; i.e. "the frame of the AC unit." His lanyard was fifty feet long. The distance from the anchor point on the AC unit to the hole was about twenty feet. He tightened the line using a slider so that he "wouldn't fall in." Although his fall protection was on the roof, [Redacted] "never put his fall protection harness on." (Tr. 55-57, 123-26, 135-37, 165; Exs. C-5, at 2, C-9, at 1).

decking." He also told CO Owens that there had been "50-100 jobs like this where they place curbs. 'Sometimes they cut the decking, sometimes they don't.' " (Ex. C-6, at 5).

CO Owens also briefly spoke with Mr. Roberts on May 22, 2018. Mr. Roberts said he "controls the jobsite" and instructed Messrs. Brazeau and [Redacted] to cut the opening in the roof. He said the job started on April 21, 2018, was about twenty percent done, and was scheduled to be completed the end of July 2018. (Tr. 59, 90-91, 105; Ex. C-6, at 6). CO Owens conducted his closing conference at about 11:30 a.m. with Messrs. Matt Hogberg and Roberts. (Tr. 59-63; Ex. C-2, at 1).

On May 25, 2018, CO Owens created Exhibit C-2, the OSHA Inspection report. On May 29, 2018, CO Owens met and spoke with [Redacted] at the Rhode Island Hospital. He was seriously injured by the fall. His injuries included a ruptured disk, several cracked vertebrae in his lower back, a broken right wrist, a strained right knee, a minimal ability to move his right foot, and a cracked pelvis. (Exs C-3 at 2, C-6, at 2). At the trial, CO Owens read into the record the entirety of his interview with [Redacted]. [Redacted] stated that he remembered the accident clearly and admitted that he never put on his fall protection while working on the roof.[8] (Tr. 64-66; Ex. C-3, at 2). Further, [Redacted] stated to CO Owens that he was instructed by Mr. Brazeau to pull the decking back, and that while he [[Redacted]] was bent over trying to pull the cut decking back, he took a small step with his foot hitting the edge of the cut panel, putting a small amount of pressure on the panel, when it "trap-doored" on him. (Tr. 66; Ex. C-3, at 2).

On about May 31, 2018, CO Owens finished preparing a Safety Narrative and a Violation Worksheet for a single Serious Citation item alleging a violation of 29 C.F.R. §

[8] [Redacted] stated that he "sees the short time it takes to put on his safety harness as time lost not working towards getting the job done. He admitted that "he made a mistake by not wearing his fall protection…." (Tr. 65-67; Ex. C-1, at 2).

1926.501(b)(10) for Respondent's failure to protect [Redacted] from the hazard of falling through a hole in the roof without being protected from falling by use of a personal fall arrest system.[9] (Tr. 79; Exs. C-3 through C-4).

In June 2018, CO Owens and his supervisor, OSHA Assistant Area Director (AAD) Robert Sestito, Providence, Rhode Island, spoke with [Redacted] by telephone. [Redacted] told them that Mr. Brazeau was his supervisor and that he had authority to direct [Redacted]'s work at the Worksite. (Tr. 69-74, 102).

CO Owens concluded his direct examination by testifying that the proposed penalty was based upon the severity being high,[10] the probability being greater,[11] and gravity being high.[12] (Tr. 85-86). He said Respondent was given an appropriate reduction for size of thirty percent. (Tr. 86-87; Ex. C-4, at 1). During cross-examination, CO Owens testified that Respondent was not given a good faith or history reduction. (Tr. 93-95; Exs. C-2, at 3, C-4, at 1). He said that the proposed penalty of "$9,054 is not only based on exposure and the type of exposure, but it's also based on the time of exposure." (Tr. 99-100).

.B. [Redacted]'s Deposition Testimony

The Court permitted the deposition sworn testimony of [Redacted] to be admitted into evidence as Joint Exhibit I. (Tr. 4, 32; Jt. Ex. I). [Redacted]'s deposition was taken on behalf of Respondent on March 28, 2019 at his home at Lincoln, Rhode Island. ([Redacted] Deposition Transcript (SDT) 1-3, Jt. Ex. I). He said that he was still an Eagle Cornice employee and that he

[9] There also were no guardrail or safety net systems at the Worksite. (Ex. C-4, at 1).
[10] CO Owens said that the severity was high because any worker falling 19-foot, seven-inches "could most likely suffer disabling injuries, if not death." (Tr. 85-86; Ex. C-4, at 1).
[11] CO Owens testified that the probability was greater because [Redacted] never wore fall protection on May 22, 2018 at the Worksite. He said the longer a worker is exposed to the hazard, the greater the potential for an accident to occur. (Tr. 86; Ex. C-4, at 1).
[12] The gravity designation is based upon the possible outcome if an accident were to occur. And here, CO Owens said "disabling injury and death are possible." (Tr. 86; Ex. C-4, at 1).

had worked there as a laborer for 15 years. (SDT 3-4, Jt. Ex. I).

[Redacted] stated that Mr. Brazeau was his "supervisor" who directed his activities at the Worksite on the day of his injury. May 22, 2018 was their first day at the Worksite. (SDT 10, Jt. Ex. I) . He said that in the morning, Mr. Brazeau asked a Barker Construction "guy",[13] "Do you want us to cut it open?" The guy told Mr. Brazeau: "I want you to cut open the roof." Their job at the Worksite was "to prep the roof for" at least three to five air conditioning (AC) units. (SDT 8-10, Jt. Ex. I). He said Mr. Brazeau spray painted the area where they were to put the boxes that the AC units were going to sit on. They were working on preparing the first site of the AC units. (SDT 9, 26, 28, Ex. M-1; Jt. Ex. I). [Redacted] said he went downstairs from the roof to the first floor to ensure no one was underneath the area where Mr. Brazeau was cutting the hole in the roof. (SDT 11-12, Jt. Ex. I). Mr. Brazeau then said to [Redacted]: "Hey, can you give me a hand getting this up, it's wedged in there." [Redacted] identified SDT's Exhibit C-1 as a photograph of the hole that was being cut in the roof. (SDT 20-21; Ex. C-1, Jt. Ex. I). Using initials written on the exhibit, [Redacted] designated where he ("J.S.") and Mr. Brazeau ("M.B.") were when [Redacted] returned to the roof, as Mr. Brazeau directed, from the ground floor level using a ladder. (SDT 12, 20-21; Ex. C-1 at "J.S.", "M.B.", Jt. Ex. I). [Redacted] indicated on Exhibit C-1 where Mr. Brazeau was kneeling at one end of the hole in the roof when [Redacted] arrived at the hole.[14] (SDT 20-21; Ex. C-1, at "M.B.", Jt. Ex. I). [Redacted] also testified that, as he approached the hole, he saw Mr. Brazeau on his hands and knees wearing his sunglasses. (SDT 13, Jt. Ex. I). [Redacted] further testified that he thought

[13] The Court finds the "guy" was Jon Roberts. (Exs. C-1, at 2, 6, at 6).
[14] [Redacted] stated it took him between about seven to ten seconds to walk from the top of the ladder about thirty to forty feet to the opposite side of the hole where Mr. Brazeau was. (SDT 12-13, 20-21; Ex. C-1 at the point marked "J.S."; Jt. Ex. I).

that Mr. Brazeau saw him. (SDT 13-14, 20-22, 29, Jt. Ex. I). [Redacted] also testified that he was about five feet away from Mr. Brazeau when he, [Redacted], standing up stepped on the wooden planks remaining at the decking area being cut by Mr. Brazeau "to test it, and gone." (SDT 13-17, 20; Exs. M-4, M-6, Jt. Ex. I).

[Redacted] confirmed that he was not wearing his personal fall protection when he approached the hole in the roof and further testified that there was "no legitimate reason" why he did not have any safety equipment, including his harness, on; except for his hard hat. (SDT 14, 19, Jt. Ex. I). [Redacted] also stated that he could not recall if he ever put his fall protection on at all that day. (SDT 19, Jt. Ex. I). He further stated that when he went up the ladder to the roof, Mr. Brazeau was dead ahead of him. He said Mr. Brazeau was not behind one of the AC units. He said if Mr. Brazeau had looked up, he could have seen him [[Redacted]]. (SDT 29, Ex. M-1, Jt. Ex. I).

C. Foreman Brazeau's Testimony.

1. During Complainant's Case-in-Chief.

Michael Brazeau was employed at Eagle Cornice for twenty-two years. He was a patch crew foreman. Patch crews, comprised of a foreman and one or two guys, "do a little service work, roof leaks, install stuff, inspections." (Tr. 115). Mr. Brazeau testified that his duties included the requirement that "he/she will be responsible for locating anchor points and use all safety equipment provided by Eagle Cornice Co., Inc." (Tr. 116-17; Ex. C-7). Mr. Brazeau was trained to be a competent person with regard to fall protection. (Tr. 117). He testified that he had been designated as a competent person for over twenty years and described himself as "responsible for fall protection." (Tr. 118).

After arriving at the Worksite, Mr. Brazeau testified that he spoke with a Barker

Construction employee named "John".[15] Material, including a Sawzall and Skilsaw, needed to do the job of installing new curbs[16] for the AC units, as well as fall protection equipment for both Messrs. Brazeau and [Redacted], was then raised to the roof by a crane owned by Respondent. (Tr. 118-20, 124-25). Mr. Brazeau stated that he put on his fall protection as soon as the crane lifted the materials to the roof. (Tr. 119-24). When Mr. Brazeau was asked if [Redacted] was likewise tied off, the answer was negative because at that time [Redacted] was placing material in the working area and further that since the hole had not yet been cut, there was no hazard. (Tr. 125-26, 163-64). Mr. Brazeau never saw [Redacted] put on his fall protection that day and he did not ask him to. (Tr. 126-28). He never instructed [Redacted] to wear his fall protection on May 22, 2018 at the Worksite. (Ex. C-3, at 1).

The process of how the roof was to be cut so that the curbs could be installed was to measure and mark the area of the curb,[17] cut the rubber roof membrane, cut out the insulation and get down to the steel decking which is the final layer of the roof to be cut. Mr. Brazeau said it took about 30-45 minutes to prepare the hole. (Tr. 120-23). Mr. Brazeau stated that he directed [Redacted] to go down to the ground floor and be sure people were safe downstairs while he, Mr. Brazeau, was cutting the first hole in the roof using a Sawzall that can cut through metal and wood. (Tr. 119, 127, 138-39). Mr. Brazeau stopped cutting and called down to [Redacted] to return to the roof to help him lift a piece of cut steel decking out of the hole. Mr.

[15] The Court finds that Mr. Brazeau spoke with Jon Roberts. (Ex. C-1, at 2, 6, at 6).

[16] Mr. Brazeau testified that:

> HVAC contractors have a steel curb that goes on top of the roof. What you normally do is you mark out the inside of it, move that curb. You cut the rubber membrane, cut the installation, take that all out so now you just got the steel decking, put layers of wood in, cut the deck, and then obviously put that curb back over that hole. (Tr. 120). He identified a "curb" atop the photograph at Exhibit C-1, Jt. Ex. I. (Tr. 191; Ex. C-1, Jt. Ex. I).

[17] Mr. Brazeau said his Patch Crew had five curbs to do, where they were to cut five new holes in the roof and put curbs around them for the installation of new rooftop AC units. (Tr. 118-19).

Brazeau did not see [Redacted] put fall protection on and stated that [Redacted] should have had his fall protection on while working next to Mr. Brazeau before the hole in the roof. (Tr. 127-28). He also did not check to see whether [Redacted] put on his fall protection when he returned to the roof. (Tr. 187).

When asked if Mr. Brazeau had filled out the Small/Repair Crew Safety Program, JHA Worksheet for the Worksite, Mr. Brazeau answered in the negative and stated that as there was nothing out of the ordinary on this job, a verbal safety discussion with his two bosses Messrs. Matt Hogberg and John Hogberg, was sufficient since it was obvious he and [Redacted] were going to be harnessed off. (Tr. 128-29, 132-35; Ex. C-11). He could not recall the last time he filled out a JHA.[18] (Tr. 133).

When asked his understanding of the FALL PROTECTION provision that states that a Small/Repair CREW: "Must recognize hazards and implement safety 'on the fly' ", Mr. Brazeau admitted that he was required to be alert to safety while work was being done:

> Question: What does safety on the fly mean?
> Answer: Oh, I'd say you go to a job, and if there is something -- you know, whatever you have to do for safety-wise, if you have to have harnesses, you have to have lines and --
> Question: So on the fly suggests that you have to be alert to using safety properly while you're doing the work, correct?
> Answer: Yes.

(Tr. 130-32; Ex. C-10, at 2).

Mr. Brazeau testified that [Redacted] stepped onto six channels of steel decking when he fell, and at least pieces of two channels fell through the hole with him. (Tr. 140-42; Ex. C-9, at 2, at "A", "B"). Mr. Brazeau was not aware of any reason why [Redacted] stepped onto the six

[18] During his March 21, 2019 deposition, Mr. Brazeau said his practice was to fill out a JHA before starting patch work. (Tr. 135).

or so steel channels when falling through the hole. (Tr. 142-43; Ex. C-9, at 2).

2. During Respondent's Case-in-Chief.

Mr. Brazeau started working on patch crews at Eagle Cornice in about 2000/2001. (Tr. 155-56). He typically reviews any scope of work and plans and specifications with any assigned laborer before starting work. (Tr. 158-59). He testified that he does not have the authority to sign change orders, hire or fire employees, or discipline employees. He reports to Matt Hogberg, a service manager and supervisor who also runs a Patch Crew. (Tr. 159-60).

Mr. Brazeau testified that he met with Messrs. Jon and Matt Hogberg at Matt Hogberg's Eagle Cornice office in Cranston, RI before leaving for the Worksite on the morning of May 22, 2018. (Tr. 161). They discussed the scope of work, which was the installation of five or six AC units. They were to "cut the roof out, install them, and flash them with rubber membrane."[19] He said steel decking was the next layer under that and the scope of work was not to cut the steel decking. (Tr. 162). He also said that he had no authority from Respondent to agree to cut the steel decking at the Worksite. (Tr. 173). Mr. Brazeau said he cut the steel decking because he was told to by general contractor supervisor Roberts and he figured the bill for cutting the steel decking would be paid by Barker Construction. (Tr. 174; Ex. C-3, at 1). He also said that the HVAC contractor did the layouts for the curbs, as was customary. (Tr. 163).

Mr. Brazeau testified that [Redacted] was near him when he cut the membrane open; but not near him when he cut any steel decking. (Tr. 166). He guessed that he cut 30 to 40 percent of the hole through the steel decking. He said that the he lifted the steel decking because it was vibrating. He told [Redacted] to come to the roof because he was almost done cutting the steel

[19] Mr. Brazeau testified that when he said, "cut the roof out" he was referring only to "cut[ting] the rubber in the insulation." (Tr. 162).

decking, and [Redacted] could help him finish cutting and lift the steel decking out. (Tr. 168). He testified that he could not see [Redacted] come across the roof toward him because there was an AC unit in front, and he was bending over, looking down. (Tr. 169-70; Ex. M-6). Mr. Brazeau saw [Redacted]'s "foot hit the piece of wood, and then that's when I looked up, and his right foot hit the decking, and it just instantly just dropped." (Tr. 169-73).

Mr. Brazeau testified that he did not read the statement handwritten by CO Owens before he [Mr. Brazeau] signed and dated the statement "5/22/18" twice. He further said that he disagreed with that part of his statement that said: "as [Redacted] was preparing to pull the one piece of decking, when he put his foot on the other piece of decking, he fell 19' 7" to the concrete floor below[.]" because [Redacted] was not next to him when he [Mr. Brazeau] was cutting the steel decking.[20] He also disagreed with that part of his statement that said [Redacted] was "preparing to pull the one piece of decking" because he did not see that. (Tr. 176-79; Ex. C-5, at 1). Mr. Brazeau said the saw shown at the top left of the photograph at Exhibit C-9, at 2, was a "Skilsaw" used to cut wood and not steel decking. (Tr. 184; Ex. C-9, at 2). He also said that he was unable to identify whose harness or work belt is shown at the top right of the photograph at Exhibit C-9, at 2, because "there was so much chaos there" and he did not "know when all these pictures were taken." (Tr. 184-85; Ex. C-9, at 2).

During cross examination by government counsel, Mr. Brazeau testified that neither he nor [Redacted] were disciplined for any activities they performed at the Worksite on May 22, 2018. (Tr. 186). When asked if he, Mr. Brazeau, could have waited for [Redacted] to come back up to the roof and be sure that [Redacted] was tied off before he approached the hole before

[20] Mr. Brazeau's disagreement with this part of his statement is a *non sequitur* since that part of his statement does not say that the [Redacted] was cutting the steel decking. (Tr. 177-78; Ex. C-5, at 1).

doing the final phase of cutting, Mr. Brazeau acknowledged that he could have done so. (Tr. 187). When Mr. Brazeau was asked why he did not do so, he said, "I was just too busy working, and I never noticed he [[Redacted]] was on the roof. If I was up and saw him, I would have, but unfortunately, I was on my knees working, and the [AC] unit was in front of me. I never knew he was on the roof." (Tr. 187, 191; SBT 29, Ex. M-2, Jt. Ex. I). He admitted, however, that at that time he knew [Redacted] was on his way back to where he [Mr. Brazeau] was. (Tr. 187).

During re-direct examination by Respondent's counsel, Mr. Brazeau said the ladder used to access the roof was placed along the white line that appears on photograph M-1, Joint Exhibit I. (Tr. 188; M-1, Jt. Ex. I). He also identified the hole opening on the photograph looking down on the top of the roof from above at Exhibit M-1, Joint Exhibit I, at location "A". He said that he was kneeling to the left of the location he marked as "A", and [Redacted] came from the right of "A". (Tr. 190-91; Ex. M-1, Jt. Ex. I).

D. Matt Hogberg's Testimony.

Matt Hogberg was Respondent's service manager and safety manager. He has worked full-time for Eagle Cornice since about 2006/2007. He said Eagle Cornice primarily does residential and commerical roofing, new construction, reroofing, demolition of roofs, and sheet metal. (Tr. 194). He said that, to his knowledge, Respondent did not have any safety violations that were not dismissed in the past ten years. He said that Respondent joined Captive Insurance in 2008, which is now North American Roofing Insurance (NARI). (Tr. 196, 209).

Matt Hogberg testified about Respondent's auditing procedure and training for OSHA compliance that was provided to each of its new employees and continuing with its existing employees, including an annual NARI Standard Safety Operating Procedures Compliance Audit done by Hettrick, Cyr and Associates. (Tr. 196-201; Ex. B). He also said either he, Jon Hogberg

or a foreman conduct weekly toolbox talks at the job sites and upload the topic discussed, the duration of the talk, and note who attended into a software program called Dataforma. (Tr. 198-99). He also said Respondent has yearly seminars to train its employees and renew their knowledge of fall protection and OSHA compliance.[21] (Tr. 196-205, 208, 213-14; Exs. F, I). He further stated that each new hire is given an Eagle Cornice New Hire Safety Orientation booklet[22] on fall protection and safety compliance, as well as a Safety Checklist[23] and a Small/Repair Crew Safety booklet[24] and administered a test on these materials. (Tr. 209-12, Exs. G-H, C-10).

Mr. Brazeau testified that Exhibit J is the Job Description for Roofer/Service Foreman under which Mr. Brazeau had no authority to issue change orders or hire, fire or reprimand any employees.[25] (Tr. 214; Ex. J). He said Mr. Brazeau should have refused to cut the steel

[21] Matt Homberg testified that "1926.501 Fall Protection" was a four-hour Power Point presentation given by Hettrick, Cyr, and Associates in March 2018 to Respondent's employees. (Tr. 213-14; Ex. I). The presentation stated that, "[t]he competent person must HAVE AUTHORITY TO TAKE CORRECTIVE ACTIONS!" [sentence in red and emphasis in original]. (Ex. I, at 7). It further defines "Holes" as any hole greater than 2 inches by 2 inches and states, "Roof Opening must be protected by a guardrail system or personal fall arrest system." (Ex. I, at 40).

[22] The New Hire Safety Orientation booklet states "[f]alls from elevation is (sic) the leading cause of fatality in the construction industry!!" (Ex. G, at 12).

[23] Matt Homberg testified that he primarily fills out a safety checklist when the scope of work seems to be extraordinary. (Tr. 211-12; Ex. H, at 1-4).

[24] The Small/Repair Crew Safety booklet states that "• Fall Protection system must be determined by competent person onsite." (Ex. H, at 35).

[25] Matt Homberg testified that under the contract between the Contractor, Barker Construction, and Respondent, dated April 19, 2018 (Contract), Eagle Cornice had "no duty to cut the decking." (Tr. 218; Ex. K). He said Respondent's proposal to Barker Construction, dated "4/4/18", was attached to the back of the contract; and included a NOTE that stated: "All decking is to be cut by others." (Ex. K, at 1). Barker Construction's acceptance of Respondent's proposal is unsigned by the Owner/Customer, CPL Plasma, or Barker Construction. (Ex. K). ARTICLE 5, CHANGES IN THE WORK, Section 5.2, of the contract states:

> The Subcontractor [Respondent] may be ordered in writing by the Contractor [Barker Construction], without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, …. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subconstruct Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract documents. (Ex. K, at 8).

decking.[26] He also testified about Respondent's policy on Safety Infractions under which employees are penalized for enumerated violations. He noted that both Messrs. Brazeau and [Redacted] had signed Respondent's Safety Infraction document. (Tr. 201-02; Exs. C-D). He testified that [Redacted] was not disciplined for the May 22, 2018 incident, either by reprimand or by being fired. (Tr. 202). Matt Hogberg stated that he had not had a chance yet, as of April 4, 2019, to discipline [Redacted] because [Redacted] had been hospitalized and remains out of work on worker's compensation. (Tr. 202-03).

After Mr. Brazeau informed Jon Homberg by telephone of [Redacted] falling through the hole, Matt and Jon Homberg rushed to the Worksite. They arrived there before CO Owens. Matt Homberg testified that he took some photographs and was instructed by someone; perhaps a firefighter or GC superintendent, "to get off the roof." (Tr. 221-22).

When asked during cross examination whether Mr. Brazeau was disciplined for permitting [Redacted] to approach the hole without wearing fall protection, Matt Hogberg admitted that Mr. Brazeau was not disciplined for his May 22, 2018 actions at the Worksite.[27] Matt Hogberg explained that Respondent wanted to make sure to take the right action regarding Mr. Brazeau's discipline. (Tr. 225-26). Matt Hogberg recalled telling Mr. Brazeau after the incident "that the number one thing you do is you put your harness on first thing in the morning, and tie off before you do anything." (Tr. 225). He admitted that Mr. Brazeau acted in a complacent manner because [Redacted] did not use his personal fall arrest system.[28] He also

[26] Matt Homberg testified that he and Jon Homberg specifically told Mr. Brazeau during the early morning meeting not to cut the steel decking, also referred to as the substrate. He said, "through experience we know a lot of contractors try to get something different up" and if someone tried to do so Mr. Brazeau was to call him or Jon Homberg. (Tr. 219-22).

[27] Matt Homberg stated that about two to four years before a whole Patch crew was given corrective counseling once for working outside the safety lines, the perimeter edge/line without fall protection. (Tr. 226-27).

[28] Matt Hogberg initially testified that he believed that Mr. Brazeau was "possibly complacent" on the job site on May 22, 2018. (Tr. 229). When asked a second time if Mr. Brazeau was complacent, Matt Hogberg stated, "I could

said Mr. Brazeau "should have been more aware of his surroundings." (Tr. 229-31).

Matt Homberg stated that he did not fill out a Small Repair Crews Safety Checklist for the job at the Worksite because "there were no extraordinary circumstances. There was not to be any hole cut." He also did not complete a JHA because "there was no great hazard." (Tr. 227-28; Ex. H, at 1-4).

On redirect examination, Matt Hogberg again admitted that Mr. Brazeau should have been more aware of [Redacted] coming up to the roof. He also said [Redacted] should have been more aware of the circumstances when he returned to the roof. (Tr. 232-33).

IV. DISCUSSION

In order to prove a violation of a standard promulgated under Section (a)(2) of the OSH Act, the Secretary must show that the: 1) standard applies to the facts, 2) employer failed to comply with its terms, 3) employee(s) had access to the hazards, and 4) employer could have known of the hazards in the exercise of reasonable diligence. *Hackney, Inc.*, 16 BNA OSHC 1806, 1809 (No. 91-2490, 1994); *Sw. Bell Tele. Co*., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000), *aff'd*, 277 F.3d 1374 (5th Cir. 2001). To prove that the violation at issue was Serious, the Secretary also must prove that the hazard posed the risk of serious bodily harm or death. The evidence shows that the Secretary has satisfied all these requirements here.

A. The cited standard applies at Respondent's Worksite.

The cited standard at issue, 29 C.F.R. § 1926.501(b)(10), states that each employee engaged in roofing activities on low slope roofs, with unprotected sides and edges six (6) feet (l .8m.) or more above lower levels, must be protected from falling hazards by a guard rail

say so, even though he was tied off." (Tr. 230).

system, safety net systems or a personal fall arrest system. The violation specifies that, on the flat roof of the building at Respondent's Worksite, on May 22, 2018, Respondent did not ensure that all of its employees who were engaged in roofing activity nineteen feet, seven inches above the lower working level were protected by a guard rail system, safety net system or personal fall arrest systems. The charging language in the Citation at issue sufficiently tracks the standard at issue.

When [Redacted]'s injury occurred at about 8:30 a.m., both he and his Foreman, Mr. Brazeau, were working at a height above nineteen feet. There was no guard rail system or safety net system in place. [Redacted] was following Mr. Brazeau's instructions to return to the roof. Although Mr. Brazeau was wearing a personal fall arrest system, [Redacted] was not. When [Redacted] stepped into the sizeable cut hole, he fell more than 19 feet to the ground below. (Tr. 53-57, 109; Exs. C-4, at 2, C-8, at 1, at "A"). 29 C.F.R. § 1926.501(b)(10) was properly cited by OSHA as the operative safety regulation. (Sec'y Post-Hr'g Br. 13-14).

B. Respondent failed to comply with the cited standard.

There were no guard rail or safety net systems in place at the Worksite on May 22, 2018. The remaining option under the cited standard was for [Redacted] to have worn a personal fall arrest system secured to an anchor point. Respondent failed to comply with the fall protection standard when [Redacted] stepped into the hole in the roof that his Foreman cut open without wearing his personal fall arrest system and securing it to an anchor point. Had [Redacted] been wearing such a secured system, he would not have fallen more than nineteen feet to the ground below.[29] (Sec'y Post-Hr'g Br. 14).

[29] *See* "1926.501 Fall Protection", "Causes of Fall in Construction … • No personal fall arrest system worn … Sixty percent (60%) of all falls were preventable by fall protection " [Last sentence in red in original] (Ex. I, at 5).

C. [Redacted] was exposed to the violative condition on May 22, 2018 at the Worksite.

Evidence of [Redacted]'s exposure to a fall through the hole in the roof at the Worksite is clear. Photographic evidence depicts the fall hazard that [Redacted] encountered on the roof while the hole was being cut open. (Tr. 53-57, 109; Exs. C-4, at 2, C-8, at 1, at "A", L, at 2, M, at 4). Therefore, this element of the Secretary's *prima facie* case has been established. *See S & G Packaging Co.*, 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001)(exposure element is established by actual exposure to hazard).

D. Respondent had both actual and constructive knowledge of the violative condition.

The Secretary has established that Respondent had actual knowledge of the violative condition. The Secretary establishes the knowledge element by showing that the employer knew or should have known of the physical conditions that constituted the violation. *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015). The Secretary need not show that the employer was aware that the conditions were, in fact, hazardous. *Phoenix Roofing Inc.,* 17 BNA OSHC 1076, 1079-80 (No. 90-2148, 1995), *aff'd,* 79 F.3d 1146 (5th Cir. 1996).

Here, Respondent knew that [Redacted] was working on the roof without a fall protection system after the hole was cut open. Mr. Brazeau was the foreman and designated competent person of the two-person patch crew at the Worksite on May 22, 2018. (Tr. 116-17, Exs. C-7, I, at 7). [Redacted] worked under the direction of Foreman Brazeau at the Worksite at all times on May 22, 2018. (Tr. 70, 73-74). He directed [Redacted] in what needed to be done. (Exs. C-3, at 1, C-5, at 1). Mr. Brazeau had tied off to an anchor point as he cut the perimeter of the roof hole. (Tr. 123; Ex. C-1, at 2). [Redacted] failed to put his fall protection harness on when he returned to the roof from the floor below. Mr. Brazeau never instructed [Redacted] to wear his fall protection on May 22, 2018 at the Worksite, including when [Redacted] was on the

roof after the hole was cut open. (Ex. C-3, at 1, C-5, at 2). Mr. Brazeau had the authority and obligation to require [Redacted] to wear his personal fall arrest system. (Tr. 116-17, Exs. C-7, I, at 7).

Mr. Brazeau knew [Redacted] had not put on his fall protection at the Worksite and he did not ask him to. (Tr. 126-28). "[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program." *Dover Elevator Co*., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993), *accord*, *Dana Container, Inc*., 25 BNA OSHC 1776, 1779 (No. 09-1184, 2015). The Court finds that Mr. Brazeau was a supervisory employee at the Worksite at the time of the injury for the purposes of applying this rule.[30] *Dover Elevator Co*., 16 BNA OSHC at 1286 ("An employee who has been delegated authority over other employees, even if temporary, is

[30] Respondent's contention that Mr. Brazeau was "merely a co-worker and not a supervisor" is rejected. (Resp't Post-Hr'g Br. 14, Resp't Response to Complainant's Sec'y Post-Hr'g Br. 3). Likewise, Respondent's contention that Mr. Brazeau had "no duty" to make sure [Redacted] was tied off when he returned to the roof from the floor below or "no duty watching over [Redacted] … to insure he had safety protection on" is also rejected. (Resp't Response to Complainant's Sec'y Post-Hr'g Br. 6). These rejections are for the reasons stated above. Respondent points to several circuit court cases that supposedly support its arguments. (Resp't Post-Hr'g Br. 14-15). They do not. In *Quinlan v. Sec'y of Labor*, 812 F.3d 832 (11th Cir. 2016), the 11th Circuit reaffirmed the well-established, classic agency principle where the "knowledge of a supervisor is imputed to an employer … when the supervisor …, sees the subordinate employee violating a safety rule, knows there is such a violation, but nonetheless allows it to continue." This is precisely the case here. The Circuit distinguishes its holding in *Quinlan* from its earlier holding in *Comtran Grp., Inc. v. U.S. Dept. of Labor*, where it held that '"employer knowledge must be established … 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 evidence of lax safety standards].' " Here, Respondent asserts, "[t]he evidence is uncontradicted that the violation charge result exclusively from the misconduct of [Redacted]" and there is no evidence of any misconduct by Mr. Brazeau. (Resp't Post-Hr'g Br. 17). In *Brock v. L.E. Myers Co., High Voltage Div*., 818 F.2d 1270 (6th Cir. 1987), the Sixth Circuit held, when reversing the Commission's conclusion and upholding the judge's ruling, that the negligent behavior of a foreman, which results in dangerous risks to employees under his supervision, raises an inference of lax enforcement and/or communication of the employer's safety policy. (*Id*., at 1277). The Sixth Circuit cited to *Nat'l. Realty and Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, (D.C. Cir. 1973), where the D.C. Circuit stated "'[A]n instance of hazardous employee conduct, may be considered preventable even if no employer could have detected the conduct, or its hazardous character, at the moment of its occurrence. Conceivably, such conduct might have been precluded through feasible precautions concerning the hiring training, and sanctioning of employees." (*Id*., at 1266-67 n. 37).

considered to be a supervisor for the purposes of imputed knowledge to an employer"); *accord Am. Eng'g & Dev. Corp*., 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012). An employee, such as Foreman Brazeau, who is empowered to direct that corrective measures be taken at a Worksite is a supervisory employee. (*Id.*) (Ex. I, at 7). Mr. Brazeau had the authority and obligation to require [Redacted] to wear his personal fall arrest system. (Tr. 116-17, Ex. C-7). This Foreman Brazeau failed to do. (Tr. 126-28; Ex. C-3, at 1).

When [Redacted] returned to the roof, as Mr. Brazeau directed, from the ground floor level, [Redacted] saw Mr. Brazeau kneeling on his hands and knees wearing his sunglasses at one end of the hole in the roof. (SDT 12-13, 20-21; Ex. C-1, at "M.B.", Jt. Ex. I). [Redacted] further testified that he thought that Mr. Brazeau saw him. (SDT 13-14, 20-22, 29, Jt. Ex. I). [Redacted] stated it took him between about seven to ten seconds to walk from the top of the ladder about thirty to forty feet to the opposite side of the hole where Mr. Brazeau was at the center portion of the building's rooftop. (SDT 12-13, 20-21; Exs. C-1 at the point marked "J.S."; Jt. Ex. I, C-1, at 2, C-6, at 3, C-8, M-1). Foreman Brazeau knew [Redacted] was coming soon to join him at the hole, as he had ordered. Mr. Brazeau should have been expecting him to be there momentarily. [Redacted] was about five feet away from Mr. Brazeau just before he stepped on to the cut portion of the roof. (SDT, at 14, 29, Jt. Ex. I). For at least a moment, he had a sufficient opportunity to see that [Redacted] was still not wearing any fall protection and had not tied off to an anchor point. [Redacted]'s failure to tie off was readily observable, and the fall hazard that [Redacted] was exposed to on the roof was conspicuous to Foreman Brazeau, who had himself made the hole in the roof. When Mr. Brazeau was interviewed by CO Owens on the day of the injury, he never stated that he was

unable to see [Redacted] on the roof immediately prior to the fall. (Exs. C-3, at 1, C-4, at 2, C-5). Mr. Brazeau did not make this contention until trial. The Secretary asserts that "Mr. Brazeau's testimony that he could not see [Redacted] before [Redacted] fell, strains credulity." (Sec'y Post-Hr'g Br. 7). The Court agrees and finds that Mr. Brazeau saw that [Redacted] was not wearing any fall protection with sufficient time to instruct him to put it on and tie off.[31]

Mr. Brazeau testified that he did not ensure that [Redacted] put on his fall protection when he came back to the roof because he claimed that he was "just too busy working." (Tr. 187). If so, Foreman Brazeau did not exercise reasonable diligence to discover the fall protection safety violation. Respondent's safety manager, Matt Hogberg, testified that Mr. Brazeau "should have been more aware of his surroundings" and "should have been aware of [[Redacted]] coming up [to the roof]." There is sufficient evidence to establish that Respondent had at least constructive knowledge of [Redacted]'s failure to wear fall protection and tie off.

The Commission has held that the Secretary is not required to show that Respondent actually knew that its employee was not wearing fall protection. *See Hackney, Inc.*, 16 BNA OSHC at 1810 ("[T]he Secretary need not show that a supervisor actually saw an employee exposed to the hazards while not [wearing the required equipment]."). The Secretary need only show that "the employer could have discovered the violative conditions *with the exercise of reasonable diligence.*" (emphasis in the original) (*Id.*). Foreman Brazeau failed to exercise reasonable diligence to inspect the area of the roof where the hole was cut and take appropriate protective measures. *See N & N Contractors,* 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001). ("Reasonable diligence also requires an employer to inspect

[31] The Court finds Mr. Brazeau's testimony to the contrary to not be credible based upon its observation of the courtroom demeanor of the witness while testifying.

the work area, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations.").[32]

The Secretary has established that Respondent had actual or constructive knowledge that [Redacted] was working on the roof without a fall protection system at the time of his injury.

E. The hazard posed a risk of serious bodily harm or death.

The more than nineteen feet fall hazard posed a risk of serious bodily harm or worse as evident by the injuries sustained by [Redacted] at the Worksite on May 22, 2018. The violation was properly cited as a Serious violation.

F. The Court Assesses a Penalty of $8,148.60.

Section 17(j) of the OSH Act directs the Commission to assess penalties "giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). Gravity is usually the "principal factor." *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1003 (No. 4, 1972).

A gravity-based penalty of $12,934 was initially considered by the Secretary. Respondent was given an appropriate reduction for size of thirty percent resulting in a proposed penalty of $9,054. (Ex. C-4). No further reduction was made by the Secretary for

[32] Respondent's argument, excluding Foreman Brazeau's knowledge, that it did not expect its employees at the Worksite to cut the steel decking because of a supposed contract limitation and the foreman's lack of authority likewise fails. It is unclear whether any such limitation in Respondent's proposal actually was incorporated into the contract between Barker Construction and Respondent. Foreman Brazeau brought to the roof not only a Skilsaw able to cut wood, but also a Sawzall capable of cutting both wood and steel decking. It was Foreman Brazeau who asked Barker Construction's superintendent in the morning if he wanted him [Mr. Brazeau] to cut the steel decking, and the superintendent said yes. The contract between Barker Construction and Respondent allowed for change orders to be made. Foreman Brazeau fully expected that Respondent would be paid for his work cutting the steel decking. Indeed, Matt and Jon Homberg knew that general contractors and owners often sought to get Respondent to do work beyond what it anticipated in its scope of work. Accordingly, it was foreseeable that Foreman Brazeau would be cutting the steel decking in the roof at the Worksite.

good faith and history. There is no history of prior OSHA violations by Respondent in the record. (Tr. 196). The Court agrees with the Secretary that no reduction for good faith is warranted. Respondent's safety program was deficient to the extent that Respondent failed to take appropriate steps to discover safety rule violations and to effectively enforce its disciplinary program when safety violations were identified. *See George Campbell Painting Corp*., 18 BNA OSHC 1929, 1935 (No. 94-3121, 1999) (no good faith reduction given where inspection and enforcement inadequate).

Respondent argues that the proposed penalty is "inappropriate."[33] (Answer ¶ 8). The Court agrees to the extent that a further ten percent reduction of $905.40 is appropriate for lack of prior OSHA violations.[34] Based upon the facts that support the Citation, a penalty of $8,148.60 is accessed by the Court. The Citation and its one item are affirmed.

G. The Company failed to establish unpreventable employee misconduct or any other Defense.

Respondent's unpreventable employee misconduct defense requires proof of each of four elements, that the employer: 1) had established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, 2) adequately communicated the rule to its employees, 3) took steps to discover incidents of non-compliance, and 4) effectively enforced the rule whenever employees transgressed it. *P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Comm'n*, 115 F.3d 100, 109 (lst Cir. 1997). Here, Respondent did not establish the third or fourth elements of the defense because the Respondent failed to establish at

[33] At the trial, Respondent argued that "the penalty should be voided as a matter of law" because "no consideration was given whatsoever to the good faith of the company, the history of the company, any company violations." (Tr. 148).

[34] *See Wynnewood Refining Co.*, 22 BNA OSHC 1410, 1424 (No. 07-609, 2008) (C.A.L.J.) (noting ten percent reduction given for history of no prior violations).

trial that its foreman took sufficient steps to discover the noncompliance of [Redacted], or that it effectively enforced its safety rules.[35]

1. The Company did not take sufficient steps to discover open and obvious non-compliance.

Respondent did not make a diligent effort to discover violations of fall protection requirements, and thus did not effectively implement its safety program. An employer who raises the unpreventable employee misconduct defense must show, among other things, that it has taken steps to discover violations and has enforced its work rules. *See Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1391-92 (No. 97-0755, 2003). "Establishing adequate procedures for monitoring employee conduct for compliance with work rules is a critical part of any employer effort to eliminate hazards. It is not enough that an employer has developed an exemplary safety program on paper." *Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2194, 1997). The violative hole condition was in plain view of anyone who was at the center of the roof at the Worksite, as evidenced by the photographs taken atop the roof following the incident. (Exs. C-8 through C-9, L-2, M-4). Messrs. Jon and Matt Homberg were not at the Worksite prior to the incident on May 22, 2018. Assuming Mr. Brazeau was not occupying a position sufficient for knowledge to be imputed to Respondent, neither Jon Homberg nor Matt Homberg designated anyone to be in charge of safety at the Worksite. A reasonably diligent employer would have someone in charge at the Worksite who could have ensured that employees used fall protection, or who could have reported back to Respondent in the event that employees refused to comply with fall protection requirements. By failing to do so, Respondent would not have taken all reasonable steps to protect all its workers on the roof from falls. Respondent "may

[35] The Court finds Respondent has submitted evidence sufficient to establish the first and second elements of its unpreventable employee misconduct defense.

not hide behind [its] lack of knowledge concerning [its employees'] dangerous working practices." *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1247 (8th Cir. 1978).

> To meet [his] burden of establishing employer knowledge, the Secretary must show that the cited employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition. (citations omitted) Reasonable diligence requires the formulation and implementation of adequate work rules and training programs to ensure that work is safe, as well as adequate supervision of employees. (citations omitted) Reasonable diligence also requires an employer to inspect the work area, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations. (citation omitted).

N & N Contractors, Inc., 18 BNA OSHC at 2122-23. "Effective safety enforcement requires a diligent effort to discover and discourage violations of safety rules by employees." *Paul Betty d/b/a Betty Bros.*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981**).**

If Mr. Brazeau did not see [Redacted] approach the opening when he returned to the rooftop, Mr. Brazeau did not take sufficient steps to discover open and obvious non-compliance with Respondent's fall protection work rule. While cutting the hole in the steel decking, Respondent's foreman, Mr. Brazeau directed [Redacted] to come back up onto the roof to assist saying: "Hey, can you give me a hand getting this up, it's wedged in there." [Redacted], who was not wearing his fall protection, went over to where he was to help Mr. Brazeau try to "wedge it out." (SDT 12, Jt. Ex. I). While preparing to pull the piece of decking back, [Redacted] put his foot on another piece of decking and fell through the roof opening at about 8:30 a.m.[36] (Tr. 53-57, 108-09; Exs. C-3, at 1-2, C-5, at 1-2, C-8, at 1, at "A" [photograph depicting opening in roof where [Redacted] fell through]). Mr. Brazeau was on his hands and knees and [Redacted] thought that Mr. Brazeau, who was five feet away, had seen him.

[36] Respondent's assertion "that [Redacted] was not trying to help Mr. Brazeau out to wedge anything out" when he fell through the hole is contradicted by the evidence cited. (Resp't Response to Complainant's Sec'y Post-Hr'g Br. 6-7).

Exhibits L-2 and M-4 show the roof hole, and the clear proximity between Messrs. [Redacted] and Brazeau before [Redacted] fell through the hole. The Court has rejected Mr. Brazeau's testimony that he could not see [Redacted] before he fell. It was clearly within Mr. Brazeau's scope of responsibilities as foreman and competent person to look for [Redacted], whom he had summoned, to ensure that [Redacted], like Mr. Brazeau, was tied off while working at the edge of the hole. [Redacted]'s safety dereliction in not wearing any fall protection and not being tied off was readily observable by Mr. Brazeau.

Accordingly, Respondent has not proven the third element of the unpreventable employee misconduct defense due to Mr. Brazeau's failure to effectively monitor Respondent's work rules. Based on Respondent's lack of effective monitoring, it cannot establish unpreventable employee misconduct. (Sec'y Post-Hr'g Br. 13-14).

2. To the extent there was any, Respondent's Enforcement of its Disciplinary Program was Inconsistent and Ineffective.

Matt Hogberg testified that [Redacted], who failed to wear any personal fall arrest protection, was not disciplined for his safety dereliction. (Tr. 202). Matt Hogberg also testified that he had not disciplined Mr. Brazeau either, during the ten-month interval, ambiguously stating that he wanted to make sure to take the right action against Mr. Brazeau. (Tr. 225-26). Although Matt Hogberg testified that he believed Mr. Brazeau was "possibly complacent" on the job site, and further that Mr. Brazeau "should have been more aware of his surroundings," no discipline was imposed on Mr. Brazeau. When asked about whether Mr. Brazeau did anything wrong, Matt Hogberg's response was that Mr. Brazeau "should have been more aware of [Redacted] ([Redacted]) coming up."

At trial, Respondent introduced sketchy evidence through Matt Homberg's testimony

that once, about two to four years before, a Patch crew was given corrective counseling for working outside the safety lines, the perimeter edge/line without fall protection. (Tr. 226-27). A lone counseling measure of this sort does not, by itself, prove that Respondent effectively enforced it's fall protection work rules. Nor is it an adequate substitute for effective monitoring to ensure that violations do not occur in the first place. *See Am. Sterilizer*, 18 BNA OSHC at 1087 ("[I]n the absence of evidence that the employer has attempted to discover violations of its work rules, we must conclude that the employer could not have enforced its work rules effectively."). (internal citation omitted).

Respondent's disciplinary program is inconsistent in its enforcement of safety rules when employees transgress those rules. Accordingly, Respondent has not proven the fourth element of the unpreventable employee misconduct defense due to its failure to effectively enforced its fall protection work rules whenever employees transgressed them.

Respondent has failed to prove its employee misconduct defense.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

VI. ORDER

Based on these findings of fact and conclusions of law, it is **ORDERED** that Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(10) is **AFFIRMED** and a penalty of $8,148.60 is **ASSESSED.**

SO ORDERED.

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

Date: December 16, 2019
Washington, D.C.