United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor,

Complainant

v.

Latite Roofing & Sheet Metal, LLC,

Respondent.

OSHRC Docket No.: **18-1845**

Appearances:

Lydia J. Chastain, Esq. and
Winfield W. Murray, Esq.
Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

William F. Kaspers, Esq.
Kaspers & Associates Law Offices, LLC, Atlanta, Georgia
For Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Latite Roofing & Sheet Metal, LLC., (Latite) contests a one-item Citation and Notification of Penalty (Citation) issued October 24, 2018, by the Secretary of Labor, United States Department of Labor (Secretary), pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act). The Secretary issued the Citation following an inspection of Latite's worksite by the Occupational Safety and Health Administration (OSHA) during the period April 25, 2018, through October 16, 2018. The inspection was conducted by Compliance Safety and Health Officer (CSHO) Stanley Burcham, who observed several of Latite's employees engaged in work activities on the roof of a Tires Plus building, which he believed exposed them to fall hazards.

Item 1 of the Citation alleges, a repeat violation of 29 C.F.R. § 1926.501(b)(10) for failing to use a warning line in conjunction with a monitoring system on a low slope roof, exposing employees working on the roof to a fall hazard of 16 feet. The Secretary proposes a penalty of $71,137.00 for the Citation.

Latite timely contested the Citation. The Court held a hearing in this matter on October 30, 2019, in Miami, Florida. The parties filed briefs on January 14, 2020[1]. Latite argues its employees were adequately protected from falling, and the CSHO's testimony was a complete fabrication.

For the reasons discussed below, the Court **AFFIRMS** the Citation and assesses a penalty of $71,137.00.

JURISDICTION AND COVERAGE

Latite timely contested the Citation and Notification of Penalty on November 15, 2018. Latite admits the Occupational Safety and Health Review Commission (Commission) has jurisdiction over this action and it is a covered business under the Act (Tr. 15). Based on the admissions and record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Latite is a covered employer under § 3(5) of the Act.

STATUTE OF LIMITATIONS

Latite contends the Citation was not issued within the six-month period required by the Act. Section 9(c) of the Act prohibits the issuance of a citation "after the expiration of six months following the occurrence of any violation." The Citation shows an issuance date of October 24, 2018. CSHO Burcham initiated his inspection on April 25, 2018, the date he observed employees without fall protection exposed to a fall hazard of 16 feet. Issuance of the Citation on October 24, 2018 was within the six-month statute period.

Patricia Scott,[2] Safety and Health Clerk for OSHA and part of its administrative team, testified she assembled the Citation at issue for mailing on October 24, 2018. This involved her going into the OIS system which puts an issuance date on the Citation and printing it for the Area Director's signature (Tr. 206-207). She prepared the certified return receipt which is done for any outgoing Citation from the office (Exh. C-14). She mailed the Citation by placing it in the United

[1] In its Answer, Latite asserted five affirmative defenses. In its post-hearing brief, however, it addressed only the affirmative defenses regarding (1) working safely and in compliance with the standards, and (2) the Secretary's failure to meet the statute of limitations. The Court advised the parties at the conclusion of the hearing and again in the briefing notice that any issues not briefed would be waived (Tr. 334-335; Notice of Transcript). Therefore, all other affirmative defenses raised in Latite's Answer and not briefed are deemed waived.

[2] Ms. Scott has been employed as Safety and Health Clerk for OSHA for 3 years in the Plantation Area Office. She has worked in that capacity for more than 10 years for OSHA (Tr. 205). Ms. Scott holds a Bachelor of Science degree in Environmental Health. She has taken training at the OSHA office and online, which included computers, FOIA processing, records management, and other training (Tr. 206)

States Postal Service mail slot in the mailroom of the building for outgoing mail for anyone in the building (Tr. 208-209). Ms. Scott made diary sheet entries on October 24, 2018, reflecting the Citation was assembled and mailed, and placed her initials beside the entries (Tr. 208-209; Exh. C-2). Her testimony also reveals that the return green card reflecting certified receipt, shows the Citation was delivered to Latite on October 29, 2018 (Tr. 210-212; Exh. C-14).

Latite takes issue with the amount of time between the Citation being placed in the United States Postal Service mail slot and its receipt on October 29, 2018, arguing it was received after the six-month statute of limitations deadline. This argument fails. Once the Secretary places the Citation in a United States Postal Service mailbox within the six-month period required by the Act, the statute of limitations is tolled. The Secretary is neither responsible for, nor has control over, the amount of time it takes for the United States Postal Service to deliver mail. *Earth Developers, Inc.*, 2017 CCH OSHD ¶33,642 (Dec. 22, 2017) (holding that "although the actions of the USPS are out of both parties' control," OSHA must have placed the Citation in the mail within the statutory timeframe to satisfy Section 9(c)). Latite has adduced no evidence to show the Citation was not placed in the mail within the statutory period. It merely assumes the Secretary did not timely issue the Citation because it took five days for it to receive the Citation. The Act does not require the Citation be received within the six-month period. It requires that it be *issued* within that time-period. By placing the Citation in the mail on October 24, 2018, the Secretary issued the Citation within the required period.

Latite does not dispute it received the Citation. To the extent Latite argues service of the Citation was improper, the Court finds the Secretary met its obligation under § 10(a) of the Act. Section 10(a) of the Act provides that the Secretary "shall . . . notify the employer by certified mail of the penalty . . ." The Commission has consistently held § 10(a) of the Act governs service of citations. *B.J. Hughes, Inc*., 7 BNA OSHC 1471, 1474 n. 6 (No. 76-2165, 1979). It requires the Secretary to "notify the employer by certified mail of the penalty[.] In *B.J. Hughes*, the Commission addressed the Secretary's obligation under § 10(a), holding,

> The test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest.

7 BNA OSHC at 1474. *See also*, *Secretary of Labor v. NYNEX*, 18 OSHC (BNA) 1944 (No. 95-1671, 1999) and *George Harms Construction Co.*, 20 OSHC (BNA) 1155 (No. 02-0371, 2003)

rev'd (3d Cir. 2004). Here, the Citation was sent by certified mail to Latite and the return receipt shows it was delivered on October 29, 2018. Latite received notice of the Citation, and as evidenced by its notice of contest, had an opportunity to determine whether to abate or contest.

STIPULATIONS

The parties stipulated the following:

1. On April 25, 2018, Respondent had at least three employees at the worksite performing roofing work on the roof of a Tires Plus building located at 1865 N. Flamingo Road, Sunrise, Florida, which had an eave height of approximately sixteen feet, a slope of 4 in 12 (vertical to horizontal), and unprotected sides and edges. The measurements of the roof were as shown in the aerial photograph attached as Exhibit A to the Joint Prehearing Statement.[3]
2. On April 25, 2018, Respondent had a safety monitor on the roof.
3. Respondent is an employer engaged in business affecting commerce within the meaning of Section 3(5) of the OSH Act.

(Amended Joint Prehearing Statement, pp. 19-20; *see also* Tr. 15, 152; Exhs. C-3 – C-8, C-15, C-17)

INSPECTION

CSHO Burcham[4] was having lunch at a Burger King when he observed workers working on the building next door not wearing fall protection (Tr. 30). Burcham took photographs and approached the west end of the building. He called to one of the supervisors who identified himself as Martin[5] (Tr. 31). Burcham then called the OSHA Area Office and apparently received authorization to initiate an inspection. He held a brief opening conference with Martin, who had been acting as the safety monitor. After Martin descended from the roof, he told the CSHO he was the supervisor and was in charge of the workers (Tr. 59, 152). CSHO Burcham asked Martin if there was a safety plan involved. There was nothing at the site at the time (Tr. 61). Martin then

[3] The aerial photograph also is set forth in Exhs. C-17 and C-17a.

[4] CSHO Burcham, an industrial hygienist, received a Bachelor of Science degree in microbiology from the University of Akron. At one time he was a certified industrial hygienist (Tr. 29-30). CSHO Burcham has been employed as a CSHO with OSHA for approximately 14-15 years (Tr. 29). He has taken several courses involving industrial hygiene, fall protection, and workers compensation.

[5] Martin was identified during the hearing by CSHO Burcham as Martin Martinez, although he was uncertain as to his last name. The record contains an OSHA 10-hour Construction Safety and Health Card, for Martin Rodriguez, which is the name counsel for Latite used when referring to Martin during witness examinations (Tr.151; Exh. R-42, p. 15). To avoid confusion, this decision will refer to the safety monitor only as Martin.

contacted Ray Padron,[6] Latite Safety Director. When Padron arrived at the site the opening conference was expanded (Tr. 33). CSHO Burcham learned the day of the inspection was the second day Latite employees had been working on the roof (Tr. 47). He interviewed some of Latite's employees (Tr. 61).

At the time of the inspection, Latite was engaged in roofing tear-off and removal activities on the jobsite (Answer ¶ III). The project involved the removal and replacement of the roof of the Tires Plus building. (Tr. 32, 201) It was a single-floor building with a tiled roof. CSHO Burcham estimated the roof of the building to be 100 feet by 60 feet (Tr. 31). He determined approximately four or five workers were located on the west roof of the building, and one employee was pushing a wheelbarrow at the eastern end of the building. A monitor was located on the western end of the building (Tr. 32). The employees were not tied off and only one, safety monitor Martin, was wearing a harness, which was not tied off to anything (Tr. 32-33). CSHO Burcham testified employees were working right at the edge of the roof and there were no safety nets on the worksite (Tr. 36, 37; Exh. C-3). CSHO Burcham observed the safety monitor had his back to the exposed worker (Tr. 100). He also observed there was no warning line (Tr. 37). CSHO Burcham determined that to dump the tiles from the roof to the dump truck below, the wheelbarrow operator would come within 6 feet of the edge of the roof. CSHO Burcham estimated the employee would be 4 feet from the edge of the roof when he tilted the wheelbarrow to empty it (Tr. 41). The area of the roof from which the tile was transported by wheelbarrow exceeded 50 feet (Tr. 200, Exh. C-17, C-17a).

CSHO Burcham measured the eaves of the roof with a laser which revealed they were 16 feet where he observed the employee pushing the wheelbarrow (Tr. 33). He obtained building plans from the City of Sunrise to determine the slope of the roof (Tr. 61). The roof measured 93 feet at one point, 105 at another and 64 at another point (Tr. 38).

As a result of his inspection, CSHO Burcham recommended the issuance of a citation for a violation of 1926.501(b)(10) (Tr. 100). Based on his recommendation, the Secretary issued the Citation and Notification of Penalty in this case to Latite on October 24, 2018.

[6] Ray Padron has been Safety Director for Latite since June 6, 2006 (Tr. 262). He has worked in the roofing industry since 1992. As Safety director for Latite he oversees the safety program, conducts safety audits, compliance, training, takes corrective action as necessary, oversees and advises managers of changes in the compliance industry.

CREDIBILITY

The Court assessed the credibility of each witness based on their demeanor, consistency, motivation, clarity, and reliability, taking into consideration the understandable nervousness witnesses often present when testifying in judicial proceedings.

CSHO Burcham displayed confidence during his testimony and admitted instances where he was mistaken or lacked knowledge. In its post-hearing brief, Latite asserts CSHO Burcham's testimony stating he observed Latite's employees working 4 to 6 feet from the edge of the roof was a complete fabrication. The Court disagrees with this assessment. CSHO Burcham was forthright in his testimony and demonstrated none of the mannerisms associated with untruthful testimony. The photographs of the worksite taken by CSHO Burcham show employees at the edge of the roof and the individual pushing the wheelbarrow across the roof in proximity to the edge of the roof (Exhs. C-3 and C-4). The Court credits CSHO Burcham's testimony regarding the conditions he observed on Latite's worksite.

Patricia Scott testified confidently and without hesitation regarding preparing the Citation for mailing and placing it in the United States Postal Service mailbox in the building where OSHA's office is located. She had excellent recall of each step she took regarding the Citation, and her testimony regarding those steps was clear and understandable. The Court credits Ms. Scott's testimony that she placed the Citation in the mail on October 24, 2018.

The testimony of Ray Padron, Safety Director for Latite, appeared coached or rehearsed. The Court found his testimony that there was evidence fall protection had been used to be unpersuasive. It was obvious his testimony was self-serving, designed to benefit his employer. The Court also finds unbelievable his testimony that there were photographs taken by Latite's former Safety Coordinator showing employees wearing fall protection. The photos were not produced to the Secretary and there was no attempt to introduce them at the hearing. Had such exculpatory photos existed it would be reasonable to expect that efforts to get them to the Secretary would have been made. The Court finds Padron's testimony to lack credibility.

Likewise, the Court places no weight on Latite's Senior Vice President Steve Struve's testimony regarding the photographs allegedly taken by Latite's former Safety Coordinator. Nor does the Court find persuasive, Struve's testimony that photos he receives every day, updated live, showed the employees wearing fall protection. The Court finds it unbelievable that evidence showing employees wearing fall protection would not have been provided to the Secretary during

the course of the inspection or the litigation. Struve's testimony was not credible and appeared designed to benefit Latite.

The Court found Condell Eastmond, OSHA Area Director, to testify confidently. His testimony was consistent, and he appeared trustworthy. The Court found Eastmond to be a credible witness.

THE CITATION

The Secretary's Burden of Proof

"An employer is liable for violating an OSHA safety standard if the Secretary of Labor can show the following by a preponderance of the evidence: (1) the standard applies to the cited conditions, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or should have known of the hazardous condition with the exercise of reasonable diligence." *R.P. Carbone Const. Co. v. Occupational Safety & Health Review Comm'n*, 166 F.3d 815, 818 (6th Cir. 1998).

Item 1: Alleged Repeat Violation of § 1926.501(b)(10)

Item 1 of the Citation alleges,

> On or about April 25, 2018, at 1865 Flamingo Road, Sunrise, Florida 33323, employees removing terracotta tiles on a low slope roof did not have fall protection exposing them to a fall hazard of up to 16-feet on a roof that measured approximately 93 feet by 62 feet, in that there was no warning line in conjunction [with] the monitoring morning system.

Section 1926.501(b)(10) provides:

> Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

Latite disputes its employees violated this standard. The record evidence, however, supports the Secretary's contention that Latite violated the cited standard.

(1) Applicability of the Cited Standard

The requirements for fall protection are set forth in *Subpart M—Fall Protection,* of the construction standards which provides: "This subpart sets forth requirements and criteria for fall

protection in construction workplaces covered under 29 CFR part 1926. Exception: The provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed." (§ 1926.500(a)(1)) It is undisputed Latite's employees were engaged in construction work activities involving replacing the roof on the Tires Plus building at the worksite. Section 1926.501(b) defines a low sloped roof as a roof having a slope less than or equal to 4 in 12 (vertical to horizontal). The parties agree the slope of the roof of the Tires Plus building at issue was 4 in 12. Section 1926.501(b)(10) applies to the cited condition.

(2) Terms of § 1926.501(b)(10) Were Violated

CSHO Burcham observed four to five employees working on the roof of the Tires Plus building. He also observed an employee near the edge of the roof pushing a wheelbarrow. The parties stipulated Latite had at least three employees performing roofing work on the roof and that the roof had an eave height of sixteen feet, a slope of 4 in 12 (vertical to horizontal), and unprotected sides and edges. At the time of the inspection, the employees were not protected by personal fall arrest systems. The only employee wearing a safety harness was the safety monitor, who was not tied off. CSHO Burcham observed unprotected employees working on a section of the roof which measured more than 50 feet wide, and although a safety monitor was present, the safety monitor was turned away from the employee pushing the wheelbarrow, who was near the edge of the roof, exposed to a 16-foot fall. Even if the safety monitor had been facing the employee, the roof where the employees were working exceeded 50 feet in width, in which case a warning line in addition to a safety monitor is required by the standard. The record reveals there was no warning line present.

Latite argues a warning line was not required, suggesting the employees worked on the area of the roof which was less than 50 feet wide. To the contrary, the CSHO's observations, supported by the photographs of the worksite, show employees on the portion of the roof which measured 93 feet by 62 feet, far exceeding the 50-foot width limitation and triggering the requirement for a warning line in addition to a safety monitor.

The Secretary has established Latite failed to comply with the terms of the cited standard.

(3) Employees Had Access to the Violative Condition

> To establish exposure, the Secretary must show that an employee was actually exposed to the cited condition or that access to the cited condition was reasonably predictable. *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148,

> 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). . . . Reasonably predictable exposure is established by proving that "either by operational necessity or otherwise (including inadvertence) ... employees have been, are, or will be in the zone of danger." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012) (citations omitted). Employees may come within the zone of danger "while in the course of assigned working duties, personal comfort activities while on the job or their normal means of ingress-egress to their assigned workplaces." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976); *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985) ("'access,' not exposure to danger is the proper test"). The Secretary need not show it was certain that employees would be in the zone of danger, but he must show that exposure was more than theoretically possible. *Fabricated Metal Prods., Inc*. 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997); *Phoenix Roofing*, 17 BNA OSHC at 1079; *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2195 (No. 90-2775, 2000) (finding that it was "'reasonably predictable' that an employee would come into contact with the unguarded belt and pulley either while attempting to reposition the fan, or inadvertently while passing nearby"), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

Calpine Corp., & Its Successors, 27 BNA OSHC 1014, 1016-17 (No. 11-1734, 2018), *aff'd. Calpine v. Sec'y of Labor*, 774 Fed. Appx. 879 (5th Cir. 2019).

> The Commission has long recognized that exposure is a fact-intensive inquiry that will vary from case to case. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2004 (No. 504, 1976) ("Lest there be any confusion we would emphasize that the touchstone of our decision is stated by the words 'will be ... in a zone of danger.' We cannot, by this decision, foresee all the possibilities; the question is one of fact to be determined on a case by case basis." (footnote omitted)). Accordingly, the Commission over the years has found the zone of danger to be at varying distances from an unprotected edge, including distances over six feet. *See, e.g., Nuprecon*, 23 BNA OSHC at 1820 (employee engaged in pipe removal was exposed to unprotected edge because, among other things, "the pipes and debris on the floor alongside the wall created a tripping hazard within approximately six feet"); *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2124 (No. 96-0606, 2000) (finding as evidence of exposure that foreman and decedent had "engaged in horseplay ... at a location within 6-8 feet of the unprotected edge, outside the perimeter cables, without using any fall protection"), *aff'd*, 255 F.3d 122 (4th Cir. 2001); *Phoenix Roofing*, 17 BNA OSHC at 1079 (finding violation under 29 C.F.R. § 1926.500(b)(4), where employees deposited materials within 12 feet of unguarded skylight, and noting that "[t]his is not a great distance"); *Cornell & Co.*, 5 BNA OSHC 1736, 1738 (No. 8721, 1977) (as to employees on coffee break, those 10 feet from elevator shaft were "endangered by the hazard of falling," whereas those 20 to 30 feet from floor opening were not); *Dic-Underhill*, 4 BNA OSHC 1051, 1052 (No. 3257, 1976) (employee exposure to fall hazard "clearly established by the fact that two employees were working on this level ten feet from the unguarded edge").

Gate Precast Co., No. 15-1347, 2020 WL 2141954, at *4 (OSHRC Apr. 28, 2020).

Photographs taken by CSHO Burcham show employees on the unguarded roof without personal fall protection or a warning line (Exhs. C-3, 4 and 5). As shown in the photographs, employees were observed moving along the roof. It was reasonably predictable that employees working without fall protection on the roof could come within the zone of danger of the unguarded roof. Although Latite had a safety monitor on the roof, the safety monitor was not effective in protecting the employees. CSHO Burcham observed the safety monitor with his back to the employee who was moving the wheelbarrow across the roof. And the required warning line for the size of the roof and was not in place in conjunction with the safety monitor to warn employees of the fall hazard and that the edge of the roof was near.

The Secretary has established the employees had access to the violative condition.

(4) Employer Knowledge

Actual Knowledge

To prove knowledge, the Secretary can show that a supervisor had either actual or constructive knowledge of the violation and such knowledge is generally imputed to the employer. An employee who has been delegated authority over another employee, even if only temporarily, is considered a supervisor for purposes of imputing knowledge to an employer. *American Engineering & Development Corp*., 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Diamond Installations, Inc*., 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992). The employee's job function rather than title is determinative. Therefore, the Commission has imputed the knowledge of a "working leader," because although not a full-time supervisor he was a supervisor at the time of the alleged violation.

Further, in the Eleventh Circuit, where this case arises, where the Secretary shows a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer." *ComTran Crp., Inc. v. U. S. Dep't of Labor*, 722 F.3d 1304, 1307-08 (11th Cir. 2013). A supervisor's knowledge of a subordinate employee's violative conduct may be imputed to the employer even when the supervisor himself is simultaneously involved in the same violative conduct. *Quinlan v. U. S. Dept. of Labor*, 812 F.3d 832 (11th Cir. 2016). Here, knowledge is imputed through supervisor Martin, safety monitor, who worked on the roof with the employees, was not tied off himself, nor protected by a warning line as required.

Actual knowledge of the violative condition is established.

Constructive knowledge

In addition to actual knowledge being established here, constructive knowledge also is established in this matter.

> An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have. . . . In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, *see New York State Elec. & Gas Corp.,* 88 F.3d at 105–06 (citations omitted), with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable.

ComTran Grp., Inc. v. U.S. Dep't of Labor, 722 F.3d 1304, 1308 (11th Cir. 2013). The Eleventh Circuit has held supervisory failure to monitor compliance with safety rules establishes constructive knowledge in a case involving a construction worksite.

> [S]ubstantial evidence supports the ALJ's determination that Florida Lemark had constructive knowledge of the hazard because it failed to take reasonable steps to monitor compliance with safety requirements. *See id. N.Y. State Elec. & Gas Corp. v. Sec'y of Labor,* 88 F.3d 98, 105–06 (2d Cir.1996) ("[C]onstructive knowledge may be predicated on an employer's failure to establish an adequate program to promote compliance with safety standards."). The record establishes that Florida Lemark knew which elements were being erected each day but that it conducted no routine inspections of the work its employees performed, nor did it kept track of the columns it had grouted or train its employees what to do if a column went ungrouted. Nothing prevented Florida Lemark from taking steps to ensure that grouting was inspected, and therefore completed, before columns were loaded. Consequently, substantial evidence supports the ALJ's determination that Florida Lemark failed to implement an adequate safety program to ensure that grouting was performed before columns were loaded.

Fla. Lemark Corp. v. Sec'y, U.S. Dep't of Labor, 634 F. App'x 681, 688 (11th Cir. 2015) (unpublished).

Here, in addition to the standard requiring fall protection for employees working from a low sloped roof, Latite had its own safety rule requiring employees utilize fall protection when performing the work on the jobsite. Latite's Site Specific Safety Plan for the jobsite provided:

> FALL PROTECTION DEMOLITION: All roofing tasks will require the use of a positive fall protection system that will not allow the roofers to free fall greater than 6ft. Safety straps to be wrapped around steel rafters to provide a rated capacity of 5000lb or designed to maintain a safety factor of at least 2.
>
> ROOFING: Re-nailing of plywood, Dry in, Peel in Stick, Mark out and Tile setting will require full tie off using positive fall protection. In the event of any changes SRL, horizontal lines or other fall protection methods can be used as the competent person decides.

(Exh. C-16) At the time of the inspection, there was no evidence any of the fall protection required by the Site Specific Safety Plan was being utilized. Latite's failure to establish an adequate safety program made it foreseeable employees would engage in the hazardous conduct. Latite offered no evidence at the hearing that it disciplined any of the employees for not following its fall protection work rules. Nor was evidence adduced showing Latite made any other efforts to ensure its employees complied with its work rules on the jobsite. The Court finds the Secretary has established Latite failed to take reasonable steps to monitor compliance with its work rule requiring the use of fall protection by employees on the jobsite. Latite's supervisory failure to monitor compliance with safety rules establishes constructive knowledge.

Knowledge is established. The Secretary has proven all elements of his prima facie case.

CHARACTERIZATION OF THE VIOLATION

The Secretary characterized the Citation as a repeat violation. Under § 17(a), 29 U.S.C. § 666(a), a violation may be characterized as repeat where there is a "Commission final order against the same employer for a substantially similar violation." *See Potlatch Corp*., 7 BNA OSHC 1061, 1063, (No. 16183, 1979).

OSHA cited Latite for a violation of the same standard, § 1926.501(b)(10), resulting from an inspection conducted during the period August 16, 2016 - February 2, 2017, in Fort Lauderdale, Florida, Inspection Number 1169898. There, employees were exposed to a fall hazard of up to 44 feet while working on a roof without fall protection. Exhibit C-18 is a copy of the citation and notification of penalty issued to Latite on February 7, 2017, as a result of the inspection. Pages 3 and 4 of Exhibit C-18 contain the Informal Settlement Agreement executed on February 22, 2017, by Latite. OSHA's Case Summary Report reflects that the Informal Settlement Agreement became a final order on February 22, 2017 (Exh. C-18, p. 1). The evidence shows this was a substantially similar hazard to the instant hazard cited in the Citation at issue in this proceeding.

OSHA also cited Latite for a violation of a similar standard, § 1926.501(b)(1), resulting from an inspection in Plantation, Florida, Inspection Number 1061344, where Latite was cited for exposing employees to a fall hazard of up to approximately 20 feet while working on an unprotected roof without any means of fall protection. (Exh. 19, p. 1-6) In that inspection, Latite was cited for employees who were performing roofing work and who walked between an extension ladder placed against the eave of the overhang and a closed step ladder approximately five feet away. While not wearing fall protection, the employees walked on the sloped roof between the

two ladders, exposed to the 20-foot fall hazard. Safety monitoring was not in use. The crew chief was observed walking on the roof between the two ladders. (Exh. C-19, p.13) The parties entered into a settlement agreement on July 16, 2016, which became a final order of the Commission on August 17, 2016 (Exh. C-19, pp. 16-21). The evidence shows this was a substantially similar hazard to the instant hazard cited in the Citation at issue in this proceeding.

Latite was also cited by OSHA for a violation of a similar standard, § 1926.501(b)(13), resulting from an inspection in Coral Springs, Florida, Inspection Number 996176, on September 18, 2014. In that inspection Latite was issued a repeat citation for employees exposed to a fall hazard of approximately 16 feet while performing roofing activities on the roof of an apartment complex without the use of conventional fall protection (Exh. C-20, p. 6). In that inspection, the foreman stated he "works the guys all day without fall protection. We have fall protection in the work truck. There is nothing to tie off to; we only use harnesses when we are close to the edge" (Exh. C-20, p. 11). The parties entered into a settlement agreement on July 15, 2015, which became a final order of the Commission on August 21, 2015 (Exh. C-20, pp. 13-18, 23). The evidence shows this was a substantially similar hazard to the instant hazard cited in the Citation at issue in this proceeding.

In the three previous actions, Latite exposed its employees to fall hazards from roofs measured at heights of 44, 50, and 16 feet, by failing to comply with the requirements for fall protection. Despite the patent similarity of those fall hazards to the fall hazard in this case, Latite argues the predicate citations are not substantially similar to this case. The Court finds no merit in Latite's argument. The substantial similarity of the hazards is obvious.

The Court finds Latite's violation of § 1926.501(b)(10) is properly characterized as repeat.

PENALTY DETERMINATION

"In assessing penalties, section 17(j) of the Act requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith. 29 U.S.C. § 666(j). Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.,* No. 00-1052, 2005 WL 696568, at *3 (OSHRC February 25, 2005) (citation omitted). "Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are

considered as modifying factors." *Natkin & Co. Mech. Contractors*, No. 401, 1973 WL 4007, at *9, n. 3 (OSHRC April 27, 1973).

Latite employed more than 250 employees, therefore the Secretary allowed no reduction for size (Tr. 106-108). Because of Latite's history of violations, the Secretary increased the penalty for this factor (Tr. 106-109; Exhs. C-18, C-19. C-20). "With regard to good faith, the Commission has given consideration to various factors including the employer's safety and health program and its commitment to assuring safe and healthful working conditions. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972)." *Capform, Inc.,* No. 99-0322, 2001 WL 300582, at *5 (OSHRC March 26, 2001). No reduction for good faith was provided because of Latite's previous history of violations and because it had been cited previously for the same or similar violations (Tr. 106-108).

The severity of the violation was determined to be high-greater because of the type of injury that could result would be death. And the probability was determined to be high because of the length of time, the height and number of people involved (Tr. 104-105). Therefore, in determining the gravity-based penalty, CSHO Burcham assessed gravity of the violation at high severity and assessed the probability as high (Tr. 105-106). The gravity-based penalty was increased by a multiplier of 5 based on the number of times Latite had been cited, resulting in the proposed penalty issued by the Secretary (Tr. 106, 107, 109).

Based on these factors, the Court determines the Secretary's proposed penalty of $71,137.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

Item 1 of Citation No. 1, alleging a repeat violation of § 1926.501(b)(10), is **AFFIRMED,** and a penalty of $71,137.00 is assessed.

SO ORDERED.

/s/_____
Sharon D. Calhoun
Administrative Law Judge, OSHRC

Dated: September 28, 2020
Washington, DC