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. Turner Construction Inc. of Naples, Respondent.	OSHRC Docket No.: **19-0768**

Appearances:

Jeremy K. Fisher, Esq.
Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Thomas E. Turner, Jr.
Turner Construction Inc. of Naples, Florida
For Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Turner Constriction Inc. of Naples (Turner Construction), located in Naples, Florida, operates a construction company, which performs concrete and masonry services (Tr. 7, 67). On January 8, 2019, a Turner Construction employee was exposed to a fall hazard while in the process of performing shell work on a new structure at a worksite located at 201 Goodlette Frank Road, Naples, Florida (Tr. 4-5, 21-22). In response to the employee's fall hazard exposure the Occupational Safety and Health Administration (OSHA) conducted an inspection at the worksite on January 8, 2019. The inspection was led by OSHA Compliance Safety and Health Officer (CSHO) Michael Marquez (Tr. 21-24). As a result of OSHA's inspection, the Secretary of Labor (Secretary) issued a Citation and Notification of Penalty (Citation) to Turner Construction on April 26, 2019, alleging a repeat violation of a standard under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act) as follows:

Item 1 alleges a repeat violation of 29 C.F.R. § 1926.501(b)(1) for failing to provide an employee with fall protection while working on a surface more than 6 feet above the next lower level. The Secretary proposes a penalty of $20,420.00 for item 1.

JURISDICTION AND COVERAGE

Turner Construction filed a timely notice of contest bringing this matter before the Occupational Safety and Health Review Commission (Commission). Thereafter, the Court held a hearing on January 28, 2020, in Fort Myers, Florida. Both parties filed post-hearing briefs on March 9, 2020. The parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to §10(c) of the Act (Tr. 9, 14; Joint Prehearing Statement at pp. 2-3). Turner Construction also admits that at all times relevant to this proceeding it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 9, 14-15; Joint Prehearing Statement at pp. 2-3). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Turner Construction is a covered employer under § 3(5) of the Act.

For the reasons that follow, the Court **AFFIRMS** Item 1 of the Citation as repeat and **ASSESSES** a penalty in the amount of $10,210.00.

STIPULATIONS

The parties reached the following stipulations which were read into the record:

1. Turner Construction was previously cited for a Serious violation of 29 C.F.R. § 1926.501(b)(13) following OSHA's inspection of a worksite at 901 10th Ave., Naples, FL 34101. The Citation was issued on July 18, 2017 and became a final order of the Review Commission on August 23, 2017 after Turner Construction agreed to an Expedited Informal Settlement Agreement.
2. Turner Construction, at the time of the OSHA inspection, 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, *et seq*.
3. OSHA has jurisdiction over Turner Construction as the employer of the employees at the worksite.
4. Turner Construction timely contested the Citation and the proposed penalty, pursuant to the provision of Section 10(c) of the Act.
5. The Citation issued to Turner Construction on July 18, 2017 became a final order of the Review Commission on August 23, 2017 after Turner Construction agreed to an Expedited Informal Settlement Agreement.

(Tr. 8-9, 14-15; Joint Prehearing Statement at pp. 2-3).

BACKGROUND

Turner Construction operates as a concrete and masonry construction company (Tr. 7, 67).

It employs approximately 28 employees at its Naples, Florida facility (Tr. 65-66). In January 2019, Turner Construction was engaged in construction and concrete operations regarding a structure on Goodlette Frank Road, Naples, Florida (Tr. 4-5, 21-22). The structure under construction was part of a residential project, with the structure designated as a storage facility for the complex (Tr. 50). Turner Construction utilized various employees at the worksite. Its worksite management consisted of foreman Fernando Moran and project manager Charles Holiday (Tr. 35-37, 40).

On January 8, 2019, CSHO Marquez[1] was driving through the Naples, Florida region as part of OSHA's local emphasis program focusing on falls in construction (Tr. 21-22). As CSHO Marquez was driving, he noticed employees conducting concrete set-up work at a worksite (Tr. 21-22). CSHO Marquez specifically noticed one of the employees was performing concrete work at significant height with no fall protection (Tr. 21-22; Exs. C-1, C-2, C-3, C-4). From Goodlette Frank Road, CSHO Marquez observed and took pictures of a worker moving a concrete hose on top of the structure (Tr. 21-23; Exs. C-1, C-2, C-3, C-4). CSHO Marquez estimated that the worker was four to six feet from the edge of the structure and approximately twenty to twenty-two feet above the ground's surface (Tr. 25).

Following this observation, OSHA initiated its inspection of the worksite (Tr. 24). CSHO Marquez drove to another side of the structure and continued to take photographs of the worker (Tr. 24-26; Ex. C-2). The worker was moving the concrete hose with his knee while only four to six feet from the outer part of the structure (Tr. 27-29; Exs. C-3, C-3A). The surface the worker was moving the hose on consisted of a landing approximately one and a half feet wide (Tr. 34). CSHO Marquez determined that it would be impossible to work on the landing without fall protection and not be exposed to a hazard (55-56). He measured the height between the employee's working area and the next concrete surface to be eleven feet and five inches (Tr. 31; Exs. C-6A, C-7). While the employee was working on the structure's surface, he did not have any form of fall protection, he was not wearing a harness, and there was no guardrail system in place (Tr. 34-35).

[1] Prior to OSHA, CSHO Marquez was a military policeman in the Army for five years and a Kansas City, Missouri police officer for ten years (Tr. 20). CSHO Marquez began working for OSHA in 2009 as a compliance officer in Syracuse, New York (Tr. 21-20). Afterwards, CSHO Marquez worked as an OSHA compliance officer in the Ft. Lauderdale office for nearly a decade (Tr. 20-21). His duties consist of performing various inspections and investigations on behalf of OSHA (Tr. 20-21). He has completed over five hundred inspections on OSHA's behalf (Tr. 21).

During OSHA's inspection, CSHO Marquez met with Fernando Moran, the foreman at the worksite (Tr. 35-37). An opening conference was conducted with Moran who identified himself and the crew as working for Turner Construction (Tr. 36). Moran explained that the workers were preparing for a concrete pour and that he had directed their tasks (Tr. 36-38). He also acknowledged, as the foreman in charge of the worksite and the employees' tasks, the employee with the concrete hose could have fallen and broken bones (Tr. 35-39; Ex. C-8). CSHO Marquez then conducted a conference with Charles Holiday, Turner Construction's project manager, who had arrived at the worksite after being informed OSHA was on-site (Tr. 40-41, 92-93).

Upon further investigation, CSHO Marquez learned Turner Construction had been previously cited for a fall protection violation (Tr. 42-44). On July 18, 2017, OSHA had issued a Citation alleging a serious violation of 29 C.F.R. §1926.501(b)(13) (Ex. C-9). The Citation alleged that on May 13, 2017, an employee of Turner Construction was exposed to a 13-foot fall hazard while working in Naples (Ex. C-9). During the inspection of this 2017 violation, Thomas Turner, Jr., the owner of Turner Construction, was on the worksite and supervising his employees (Ex. C-10). The Citation was ultimately resolved through the execution of an informal settlement agreement, which became a final order of the Commission on August 23, 2017 (Tr. 15; Ex. C-11).

As a result of CSHO Marquez's investigation, OSHA issued Turner Construction one repeat citation alleging a violation of 29 C.F.R. § 1926.501(b)(1) for failure to provide fall protection.

THE CITATION

The Secretary's Burden of Proof

In order to establish a violation of a safety standard under the Act the Secretary must prove by a preponderance of the evidence: (1) the applicability of the cited standard; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

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

Alleged Violation Description

Item 1 alleges:

On or about January 8th, 2019, at Goodlette-Frank Road Naples Florida, 34102, an employee was exposed to an 11 feet 5-inch fall hazard while in the process of performing shell work on a new commercial structure.

Turner Construction, Inc. of Naples was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 C.F.R. 1926.501(b)(13), which was contained in OSHA inspection number 1237261, citation number 1, item number 1 and was affirmed as a final order on August 23, 2017, with respect to a workplace located at 901 10th Ave. Naples, Florida 34101.

Section 1926.501(b)(1)

Section 1926.501(b)(1) provides:

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

(1) Applicability of the Cited Standard

Subpart M of the Occupational Safety and Health Standards in Part 1926 addresses the requirements and criteria for fall protection in construction workplaces. The parties do not dispute the provisions of the standard are applicable. The evidence adduced at trial shows Turner Construction's employee was standing and working on the edge of an upper level surface within the structure under construction (Tr. 28-31; Exs. C-1, C-2, C-3, C-6A, C-7). While working on the edge of the upper level surface, there was no guardrail or safety net system in place (Tr. 34-35, Ex. C-6A). The employee was not wearing a safety harness or utilizing fall protection lanyards (Tr. 34-35; Exs. C-2, C-3, C-4). The record further shows the employee was working four to six feet from the outer edge of the structure and approximately twenty to twenty-two feet above the ground level (Tr. 25; Exs. C-1, C-3). Section 1926.501(b)(1) is therefore applicable to the work being performed by the employee.

(2) Compliance with the Terms of the Cited Standard

The record reveals Turner Construction failed to provide fall protection in violation of § 1926.501(b)(1). The parties do not dispute the employee was working without fall protection in violation of the standard. CSHO Marquez testified the employee was working without any fall protection (Tr. 34-35). He further testified there were no guardrail systems, safety nets, or personal fall arrest systems in place while the employee worked near the edge of the structure (Tr. 34-35). The photographs taken by CSHO Marquez support the employee's lack of any fall protection

whatsoever (Exs. C-2, C-3, C-4). The evidence shows Turner Construction's employee was not utilizing any fall protection while he worked four to six feet from the building's outside edge and twenty to twenty-two feet above the ground level (Tr. 25, 34-35; Exs. C-1, C-3, C-4). Additionally, while the worker was moving the concrete hose, he was working on a landing approximately one and a half feet wide and eleven feet and five inches high from the next lower concrete surface (Tr. 31, 34; Exs. C-6A, C-7). Mr. Turner admits his employee should not have been working near the edge without fall protection (Tr. 79). Mr. Turner also admits "the pictures explain themself… if you fall, there's a great chance that you'll die" (Tr. 85-86).

The record is clear, the terms of the standard were violated.

(3) Access to the Violative Condition

The Secretary bears the burden of proving whether employee exposure to the violative condition exists. *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). The Commission has long held the test for hazard exposure requires the Secretary to "show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd.*, 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing id.*). *See also Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980); *Gilles & Cotting*, 3 BNA OSHC 2002 (No. 504, 1976).[2]

The zone of danger is defined as the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr*. Co., LLC, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). The zone of danger is determined by the hazard presented by the violative condition and is typically the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction*, Co., 17 BNA OSHC at 1234; *Gilles & Cotting, Inc*., 3 BNA OSHC at 2003. The Commission has further held that access to a fall hazard is reasonably predictable where employees are expected to come within twelve feet of an unguarded edge and

[2] In *Gilles & Cotting, Inc*., the Commission rejected the "actual exposure" test, which required evidence that someone observed the violative conduct, in favor of the concept of "access", which focuses on the possibility of exposure under the conditions. *See Gilles & Cotting, Inc*., 3 BNA OSHC at 2002 (holding "that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure").

reasonably believe they are permitted in the unprotected area. *Phoenix Roofing Inc.,* 17 BNA OSHRC 1076, 1079 (No. 90-2148, 1995).

Turner Construction's employee was exposed to the hazardous condition while working on the upper level of the structure on the worksite. The record reveals the worker was within four to six feet of the outside edge of the structure and approximately twenty to twenty-two feet from the ground (Tr. 25; Exs. C-1, C-3). Additionally, the record shows the worker was exposed to a fall hazard from the inner part of the structure. While the worker was moving the concrete hose, he was working on a landing approximately one and a half feet wide and eleven feet and five inches from the next lower surface (Tr. 31, 34; Exs. C-6A, C-7). CSHO Marquez testified it would be impossible to work on the landing without fall protection and not be exposed to a fall hazard (55-56). Turner Construction's foreman, Moran, admitted the exposed employee could "break bones" if he fell (Tr. 39; Ex. C-8).

The record is clear that the employee was working on the structure's surface, without any form of fall protection, safety harness, or guardrail system in place (Tr. 34-35; Exs. C-1, C-2, C-3, C-6A, C-7). By failing to provide fall protection to an employee working near an unprotected edge which was more than six feet above a lower level, it was reasonably predictable the employee would be in the zone of danger. Therefore, access to the violative condition is established.

(4) Knowledge of the Violative Condition

Turner Construction's knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known of the violative condition. 29 U.S.C. § 666(k); *Nat'l Eng'g & Contracting Co. v. Occupational Safety & Health Admin,* 928 F.2d 762, 767 (6th Cir. 1991). An employer's awareness of the violation may be shown through actual or constructive knowledge of the violation. To establish constructive knowledge, an employer must fail to exercise reasonable diligence in discovering the noncomplying condition. *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001). Whether an employer was reasonably diligent rests on a variety of factors, "including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Precision Concrete Constr.*, 19 BNA OSHC at 1407; *See Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

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). The knowledge of a supervisor is imputed to an employer when the supervisor observers an employee violating a safety rule, knows there is a violation, but nevertheless permits the violative conduct to continue. *Quinlan v. Secretary of Labor*, 812 F.3d 832 (11th Cir. 2016). An employee who has been delegated authority over another employee, even if only temporarily, is considered to be 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 record shows Turner Construction had actual knowledge through its foreman, Fernando Moran, who had supervisory authority over every employee on the worksite (Tr. 35-37, 78). Mr. Turner does not dispute Moran's supervisory role. He testified Moran was the worksite's foreman and had supervisory authority and responsibility for the worksite employees (Tr. 78). Moran had directed the employees' tasks and could stop unsafe work (Tr. 35-36; Ex. C-8). Specifically, Moran had directed the employee to perform the work, of using the concrete pump hose on the upper level, that had exposed the employee to the violative condition (Tr. 37-38; Ex. C-8). Mr. Turner corroborated that Moran had instructed the employees to use the concrete hose on the structure's upper level (Tr. 76-77). Mr. Turner further testified that the employees had been instructed to bring the concrete hose through the completed stairwell, but instead moved the hose across the tops of the interior walls (Tr. 75-77). Although the employees failed to perform the job in the manner instructed, Moran, who was observing the work, permitted the violative conduct to continue (Tr. 35-37, 75-78).

The record shows Moran knew the employees were engaged in violative conduct which exposed them to a fall hazard (Tr. 35-37, 75-78; Ex. C-8). Actual knowledge is established when a supervisor directly engages in or sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.,* 5 BNA OSHC 1202, at p. 3 (No. 11015, 1977) (holding because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent").

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

Characterization of the Violation

The Secretary characterized the violation of the standard found at § 1926.501(b)(1) as repeat. A repeat violation is committed where both the same standard has been violated more than once and there is substantial similarity of violative elements between the current and prior violations. 29 U.S.C. § 666(a); *D & S Grading Co. v. Sec'y of Labor*, 899 F.2d 1145 (11th Cir. 1990). Further, the prior citation on which the repeat violation is based must have become a final order of the Commission. *Id.* Once substantial similarity has been proven, the burden shifts to the employer to disprove substantial similarity. *D & S Grading Co. v. Sec'y of Labor*, 899 F.2d 1145 (11th Cir. 1990).

On July 18, 2017, OSHA had issued a Citation alleging a serious violation of 29 C.F.R. §1926.501(b)(13) (Ex. C-9). The Citation alleged that on May 13, 2017, an employee of Turner Construction was exposed to a 13-foot fall hazard while working at a worksite in Naples (Ex. C-9). During the inspection, Thomas Turner, Jr., the owner of Turner Construction, was on the worksite and supervising the tasks of his employees (Ex. C-10). The Citation was ultimately resolved through the execution of an informal settlement agreement, which became a final order of the Commission on August 23, 2017 (Tr. 15; Ex. C-11). The parties stipulated Turner Construction had previously been cited for a serious violation of 29 C.F.R. § 1926.501(b)(13) which became a final order of the Commission (Tr. 15; Ex. C-11).

CSHO Marquez recommended a repeat citation because of the substantially similar violative conditions between the current and prior violation (Tr. 51). Both the current and prior violations involved employee exposure to a fall hazard while performing concrete work (Tr. 51). The prior violation was cited under 29 C.F.R. § 1926.501(b)(13) because the structure was a residence under construction (Tr. 51; Exs. C-9, C-10). The current violation was cited under 29 C.F.R. § 1926.501(b)(1) because the structure itself, while part of a residential housing project, was designated as a storage facility for the complex (Tr. 50-51). The Court finds the differences in the standards are immaterial for purposes of repeat violation characterization. Both standards involve fall hazards and working without fall protection from a structure's unprotected edge.

The violation was properly characterized as repeat.

Employee Misconduct

The burden to prove the elements of employee misconduct rests on Turner Construction. To establish the affirmative defense of unpreventable employee misconduct, the employer must prove: "(1) that it has established work rules designed to prevent the violation; (2) that it adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Comm'n*, 115 F.3d 100 (1st Cir. 1997); *Valdak v. OSHRC*, 73 F.3d 1466 (8th Cir. 1996); *Precast Servs., Inc.*, 17 BNA OSHC 1454, 1455, (No. 93-2971, 1995) *aff'd*, 106 F.3d 401 (6th Cir. 1997); *Hosp. Mgmt., Inc., d/b/a Executive Inn*, No. 96-1478, 1997 WL 185350 (O.S.H.R.C.A.L.J., Apr. 10, 1997), citing *Nooter Constr. Co.*, 16 BNA OSHC 1572, 1578 (No. 91-237, 1996).

The record reveals Turner Construction did not have, enforce, or effectively communicate any specific rule, designed to prevent the alleged violation. While Mr. Turner testified his employees had taken fall protection classes after the prior violation, he provided no evidence of any relevant specific fall protection work rule being communicated to his employees (Tr. 85). Instead, the evidence adduced at trial shows no fall protection systems were available at the worksite (Tr. 25, 34-35; Exs. C-1, C-2, C-3, C-4).

Turner Construction failed to show it effectively enforced any rules or disciplined any employee when the alleged violation occurred. As Turner Construction has not met its burden in establishing any of the elements of the above-mentioned affirmative defense, the Court finds Turner Construction's employee misconduct defense fails.

PENALTY DETERMINATION

Pursuant to Section 666(j) of the Act, the Commission is granted the authority to assess civil penalties for the violation of citations. 29 U.S.C. § 666(j). In assessing penalties, the Act requires due consideration be given to the size of the employer's business, the gravity of the violation, the good faith of the employer, and any prior history of violations. 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citation omitted*). When applying the penalty assessment factors, the Commission need not accord each one equal weight. *See, e.g.*, *Astra Pharm. Prods., Inc.*, 10 BNA OSHC 2070, 2071 (No. 78-6247, 1982); *Orion*, 18 BNA OSHC at 1867 (giving less weight to the

size and history factors). Generally, the gravity of the violation is afforded greater weight in assessing an appropriate penalty. *Trinity Indus.*, 15 OSHC 1481, 1483, (1992). A violation's gravity is determined by weighing the number of employees exposed, the duration of said exposure, preventative measures taken against injury, and the possibility that an injury would occur. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 (No. 76-2644, 1981).

CSHO Marquez testified how the penalty for the citation item was calculated and proposed (Tr. 51-54). He testified a fall from eleven and a half feet onto a concrete surface or a fall from approximately twenty to twenty-two feet high to the ground would result in permanent disability or death (Tr. 51-52) According to the CSHO, he assessed the gravity of the violation as high because of the high likelihood the employee could have sustained severe injuries, multiple broken bones, or death from a fall (Tr. 52-53). Probability was assessed as greater because of the amount of time the employee was exposed to the hazard (Tr. 52-53).

The Commission frequently relies on the number of employees to evaluate the merits of altering a penalty for size. The Commission has viewed the size factor as "an attempt to avoid destructive penalties" that would unjustly ruin a small business. *Colonial Craft Reprod*., 1 BNA OSHC at 1064. *See also Intercounty Constr. Corp.*, 1 BNA OSHC 1437, 1439 (No. 919, 1973), *aff'd,* 522 F.2d 777 (4th Cir. 1975). This concern for small businesses must be tempered with the need to achieve compliance with applicable safety standards. *Atlas Roofing Co. v. OSHRC,* 518 F.2d 990, 1001 (5th Cir.1975) (OSHA penalties are meant to "inflict pocket-book deterrence"), *aff'd,* 430 U.S. 442 (1977). With respect to the size of the business, the CSHO initially recommended a 30% reduction. (Tr. 53-54). The Court concludes considering the small size of this company, further reduction of the penalty based on size is warranted.

The next statutory consideration, history, examines an employer's full prior citation history, not just prior citations of the same standard. *Orion,* 18 BNA OSHC at 1868; *Manganas Painting Co.*, 21 BNA OSHC 2043, 2055 (No. 95-0103, 2007) (Consol.) (history includes prior uncontested citations). The penalty was increased by 10% due to Turner Construction's prior violation history (Tr. 53-54). Additionally, a multiplier was applied to the amount because of the citation's repeat classification (Tr. 53-54).

The final factor, good faith, entails assessing an employer's health and safety program, its

commitment to job safety and health, its cooperation with OSHA, and its efforts to minimize any harm from the violation. *Monroe Drywall Constr., Inc*., 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013); *Nacirema,* 1 BNA OSHC at 1002. There was no reduction for good faith due to the violation's repeat classification (Tr. 53-54).

For repeat Citation 1, Item 1, the Secretary proposed, after adjustments, a penalty of $20,420.00. Upon due consideration of section 666 (j) of the Act, with regard given to the enumerated penalty calculation factors, the Court assesses a penalty in the amount of $10,210.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of the Citation, alleging a repeat violation of § 1926.501(b)(1), is **AFFIRMED** and a penalty in the amount of **$10,210.00** is **ASSESSED**.

SO ORDERED.

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

Dated: September 29, 2020
Washington, DC