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

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

ON BRIEFS:

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

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

DECISION

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

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

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

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

BACKGROUND

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

I. Applicability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Exception at § 1926.500(a)(1)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: March 29, 2023

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

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

SECRETARY OF LABOR, Complainant, v. CENTIMARK CORPORATION, Respondent.	OSHRC DOCKET NO. 20-0762

Appearances:
For Complainant
Elena S. Goldstein, Acting Solicitor of Labor
Oscaar L. Hampton III, Regional Solicitor
M. del Pilar Castillo, Esq.
For Respondent
Mark J. Golen II
Justin M. Michitsch

Before: Chief Administrative Law Judge Covette Rooney

CentiMark Corporation (Respondent or CentiMark) engages in roofing work on a contractual basis. On January 9, 2020, the Occupational Safety & Health Administration (OSHA) began an inspection of one of its worksites located at 870 Riversea Road in Pittsburgh, PA (the "worksite"). As a result of the inspection, on April 24, 2020, the Secretary issued a two-item Citation and Notification of Penalty (Citation) to CentiMark alleging a serious violation of 29 C.F.R. § 1926.501(b)(11) and a repeat violation of 29 C.F.R. § 1926.501(b)(10). (Ex. J-1.)

A hearing was held on April 13 and 14th, 2021, on a video conference platform. After being granted an extension, the parties filed post-hearing briefs on June 24, 2021, and reply briefs on July 8, 2021.

For the reasons below, the undersigned vacates Citation 1, Item 1 and affirms Citation 1, Item 2 as repeat and assesses a penalty of $48,195.

I. Jurisdiction

The parties stipulated:

1. The Review Commission has jurisdiction in this proceeding pursuant to § 10(c) of the OSH Act, 29 U.S.C. § 651 et seq.

2. Respondent utilizes tools, equipment, machinery, materials, goods and supplies which have originated in whole or in part from locations outside the State of Pennsylvania.

3. Respondent is an employer engaged in a business affecting commerce within the meaning of Sections 3(3) and 3(5) of the OSHA Act, 29 U.S.C. §§ 653(3), (5).

(Tr. 15.) Based upon the record, including the parties' admission to jurisdiction, the undersigned concludes the Commission has jurisdiction over the parties and the subject matter of this case.

I. Background

Respondent is a commercial roofing company. (Tr. 303.) It was retained to install a new roof at WW Paterson's (WW's) facility at 870 Riversea Road in Pittsburgh, Pennsylvania.[1] (Tr. 280; Exs. C-2, C-3.) Rather than a single surface, the facility's top was more akin to four "mini" roofs, with some areas pitched and others having a low slope. (Tr. 44, 212; Exs. J-6, R-1; Stip. 1.)

OSHA Compliance Office Walter Visage (CO) observed a worker on WW's roof who did not appear to have any fall protection at approximately 8:00 am on January 9, 2020.[2] (Tr. 34, 47.) The CO was in his car at the time, so he pulled over to observe the worker and started to take pictures. (Tr. 33, 38 43, 97; Ex. J-10.) In addition to the worker on the roof, he also saw several

[1] The parties stipulated: "On or about November 2019, WW Paterson retained CentiMark to replace portion of four interconnected roofs at 870 Riversea Road, Pittsburgh, A 15212." (Stip. 1.)

[2] The parties stipulated: "On January 9, 2020 CSHO Walter Visage arrived at CentiMark's [worksite]." (Stip. 2.)

workers engaged in various activities at ground level. (Tr. 35-36, 49, 95.) One man was at the control panel for a crane while others were around the base of the crane bed. (Tr. 35, 50.) Workers were rigging the load for the crane to lift to the roof. (Tr. 50, 58-59, Ex. J-10.) To the CO, it appeared that the worker on the roof was communicating with the employees at ground level. (Tr. 166-67; Ex. C-3.)

The CO noticed a second employee on a different section of the roof, also without fall protection. (Tr. 38.) He was approximately 100 to 125 feet away from the workers during this observation period. (Tr. 97.)

After watching and photographing the workers for about 10 to 15 minutes, the CO opened an inspection and conducted an opening conference. (Tr. 37, 39.) He introduced himself and requested that those working on the roof return to the ground. (Tr. 29.) The workers on the roof were foremen.[3] (Tr. 175; Exs. C-4, C-5; Stips. 3-4.) Mr. Kent had been on the steep pitched section of the roof. (Ex. J-10.) He was placing cones for a planned flag line that would demarcate what he considered a safe work area. (Tr. 59-60; Ex. J-10.) Mr. Harmon was on a low-slope roof. (Tr. 60; Exs. J-10, C-3, C-4.) He had gone to the roof to assess locations where he could signal the crane when hoisting materials onto the roof. (Tr. 76; Exs. C-3, C-4.)

The conference was brief, and the CO informed the workers that he would return later to conduct further interviews.[4] (Tr. 40.) When he returned later the same day, he interviewed three employees and concluded the on-site portion of the inspection. (Tr. 40.) After the site visit, he

[3] The parties stipulated, "Greg Kent was a CentiMark employee and foreman on January 9, 2020 and arrived first at 6:30 a m.," and that "Stanley Harmon was a CentiMark employee and foreman on January 9, 2020 and arrived at the [worksite] with CentiMark's remaining crew members at approximately 7:00 a m." (Stips. 3-4.)

[4] The parties stipulated: "On January 9, 2020 CSHO Visage spoke to Mr. Kent and Mr. Harmon at the [worksite]." (Stip. 5.)

had a few conversations with CentiMark employees and reviewed further information. (Tr. 40.) A closing conference was held on April 1, 2020.

II. Discussion

To establish a violation of a specific standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) its terms were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more employees had access to the cited 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).

A. Citation No. 1, Item 1

Citation 1, Item 1 alleges that Respondent violated 29 C.F.R. § 1926.501(b)(11), a construction industry fall protection standard. (Ex. J-1.) This standard addresses the use of fall protection on steep roofs:

> Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

29 C.F.R. § 1926.501(b)(11). It requires guardrails, safety nets or personal fall arrest systems on all steep roofs higher than six feet unless there are not unprotected edges. *Id.* A "steep roof" is a roof with a slope greater than 4 in 12 (vertical to horizontal)." 29 C.F.R. § 1926.500(b)(2). The term "unprotected sides and edges" is defined as "any side or edge … of walking/working surface, e.g., floor, roof, ramp … where there is no wall or guardrail system at least 39 inches (1.0 m) high." 29 C.F.R. § 1926.501(b)(1).

1. Applicability & Violation

Respondent contends that the employees were not engaged in work.[5] (Resp't Br. 14.) Alternatively, if they were, they argue that no employee was exposed to the cited hazard. The Secretary disputes both points.

Respondent's contention that the employees were not engaged in roofing work when the CO arrived is rejected. Approximately two months before the CO arrived, Respondent completed an inspection of the worksite. (Tr. 171.) It had already engaged in the pre-job inspection. *Id.* Employees had been on site for well over an hour when the CO drove by. (Stips. 3-4; Tr. 180, 262.) The employees were being paid at least from the time of their arrival.[6] (Tr. 180-83.) They were not sitting around; the employees were working. Before the CO arrived, employees had placed trucks close to roofs, loaded materials onto the crane bed, and completed a "Fall Protection/Safety Work Plan." (Ex. J-7; Tr. 68, 176, 262-63.) An employee was at the controls for the crane. (Tr. 49-50.) The crane riggers were out, and the boom was elevated. (Tr. 35, 236, 267-68; Ex. J-10.) An employee was directing traffic near the worksite. (Tr. 265-66.) Two employees were also on the roof itself at the time the CO observed the alleged violations. (Exs. J-10; C-4.) Approximately five other employees were working on the ground. (Tr. 36, 49.) As the CO explained, none of the people present were there for "leisure purposes," they appeared to be "working." (Tr. 49.)

Respondent acknowledges that its workers, including Mr. Kent, previously inspected the worksite. Still, it contends that January 9, 2020, was designated as the loading day. (Resp't Br.

[5] Respondent raises this argument primarily in connection Citation 2, Item 1.

[6] One employee indicated that he had first gone to the company's warehouse and was paid from the start of his day rather than the arrival at the worksite. (Tr. 180.)

20-21.) It argues that employees were not expected to commence removing and replacing the roof. *Id.*

Respondent ignores that the work being done on January 9th was integral to the project. The employees were there to engage in tasks necessary to complete the roofing job for which Respondent was retained. (Tr. 167.) As foreman Harmon succinctly explained to the CO on the day of the inspection, "Today we are on site to load our roofing materials so we can roof the building." (Ex. C-4.) Similarly, foreman Kent indicated he "was going to stage materials on [the roof] and later we would be doing the roof." (Ex. C-5 at 2.)

The employees were loading materials and setting up a crane. (Tr. 167.) By the time the CO arrived at the worksite, employees had already completed various tasks that were not tangential to the roofing work but required for the roofing work to be completed. (Tr. 170.) They were not retained to do other types of work. Respondent had already completed a worksite inspection, and the workers were present to address the roof. (Tr. 168, 198, 274-75.)

As for the cited standard's limitation to steep roofs, Respondent acknowledges that Roof 1 falls within the standard's definition of "steep roof." (Resp't Br. 27.) However, unlike many steep roofs, Roof 1 at the worksite only had a single unprotected edge.[7] (Exs. R-1, R-4; Tr. 66, 270-71, 287-90.) Still, there is no dispute that the pitch of the roof and the unprotected edge triggered the requirements of the cited standard. The cited standard applies.

As for whether there was a violation, Mr. Kent was on Roof 1 when the CO arrived at the worksite. (Tr. 44; Resp't Br. 6.) The CO observed and photographed him without any type of fall

[7] Respondents note that the unprotected edge had a parapet wall "of at least a foot in height." (Resp't Br. 6.) Record evidence suggests that the wall was 6-12 inches high. (Exs. C-4 at 1; C-3 at 4; C-2 at 4, C-5 at 2.) Neither Respondent's Corporate Safety Manager, Michael Litzenberger, nor anyone else asserted that the parapet wall constituted fall protection. (Tr. 312.) Respondent does not allege it was sufficient to constitute a "guardrail" or otherwise preclude finding that it was still an unprotected edge.

protection on the morning of January 9, 2020. (Tr. 38, 61; Exs. J-10, C-2.) Mr. Kent acknowledged he was not wearing fall protection as he traversed the roof to place the base plates and cones that would later serve as part of a warning line system. (Tr. 169, 270.) Respondent's Corporate Safety Manager, Michael Litzenberger, also acknowledged that there did not appear to be any fall protection visible in the CO's photograph of Mr. Kent. (Tr. 312.) The undersigned finds that the cited standard applies and was violated.

2. Knowledge

The Secretary must prove the employer either knew or with the exercise of reasonable diligence could have known of the violative condition. *Revoli Constr. Co*., 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix Roofing, Inc*., 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). It is not necessary to show that the employer knew or understood the condition was hazardous. *Id*.

Knowledge is imputed to the employer "through its supervisory employee." *Am. Eng'g & Dev. Corp*., 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012). The formal title of an employee is not controlling. *Id.* The Commission has imputed the knowledge of crew leaders and foremen. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2069 (No. 96-1719, 2000); *Penn. Power & Light Co. v. Sec'y of Labor*, 737 F.2d 350, 357-58 (3d Cir. 1984) (crew leader is a supervisory employee).

Mr. Kent was a foreman at the worksite and indicated that he was "in charge" of the job. (Stip. 4; Tr. 277, 279-80; Ex. C-5.) He knew he was not wearing fall protection and that there were no guardrails. (Tr. 269-79.) He was aware of the unprotected edge. (Tr. 56, 269; Ex. C-5 at 3.) One of Respondent's safety managers was also on the job site. (Tr. 79; Ex. C-5 at 3.)

Respondent had actual knowledge of the violative condition. *See Calpine Corp.,* No. 11-1734, 2018 WL 1778958 (O.S.H.R.C., Apr. 6, 2018) (imputing supervisor's actual knowledge of hazardous condition), *aff'd*, 774 F. App'x 879 (5th Cir. 2019) (unpublished); *Kokosing Constr.*, 21 BNA OSHC 1629, 1631 (No. 04-1665, 2006) (imputing foreman's constructive knowledge to the employer).

3. Exposure to the Cited Condition

To satisfy this element, the Secretary can show actual exposure to the cited condition or that such exposure was "reasonably predictable." *Nuprecon, LP*, 23 BNA OSHC 1817 (No. 08-1037, 2012).) To assess whether exposure was reasonably predictable, the Commission looks at whether, either by operational necessity or otherwise (including inadvertence), the employees would be in the "zone of danger." 23 BNA OSHC at 1818-19. What constitutes the "zone of danger" is determined by the hazard presented by the violative condition. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1265 (No. 06-1416, 2008) (indicating that the zone of danger is "the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent"); 23 BNA OSHC at 1919 (finding it reasonably predictable that employee would need to move about his entire work area).

Respondent maintains that the only employee on Roof 1, Mr. Kent, never got close enough to the unprotected edge to be considered having been exposed to the hazardous condition. (Resp't Br. 27-30.) In its view, Mr. Kent was always far enough away from the unprotected edge, and his work activities could not reasonably be expected to bring him close enough to the unprotected edge to expose him to the hazardous condition. *Id.* at 29-32.

The CO observed and photographed Mr. Kent from approximately 100 feet away. (Tr. 90, 98, 141-52.) A small parapet wall on the roof slightly obscured his view of Mr. Kent. (Tr. 147;

Exs. C-2, C-3 at 4.) "At times," it appeared to the CO that Mr. Kent was less than six feet away from the unprotected edge. (Tr. 62.) However, the Violation Worksheet indicates that Mr. Kent was "6-7 feet from the edge of the roof" for one minute.[8] (Ex. C-2 at 2.)

During the inspection and at the hearing, Mr. Kent maintained that he was always at least six feet away from the unprotected edge. (Tr. 62, 226, 273-74, 292-93; Exs. C-2, C-5.) He explained that when the CO observed him, he was in the process of setting up a flag line to demarcate a safe work area that was six to seven feet from the unprotected edge. (Tr. 226; Ex. C-5.) Mr. Kent understood that the flags were not a form of fall protection. (Tr. 271.) Rather, they were to form a warning line as an additional method of limiting exposure to the zone of danger. (Tr. 62, 152-53, 271.) For fall protection, Respondent's fall protection plan required employees to be attached to a motion-stopping system before their work tasks required entry into the zone of danger by the one unprotected side. (Tr. 281-82, 297; Exs. C-5, R-9.)

To set up the flag warning line, Mr. Kent walked up along one side of the pitched valley on Roof 1, at least six feet from the edge, placed the flag cone, and then walked back down the same side to the bottom of the valley between Roofs 1 and 4. (Tr. 226, 269-70; Ex. C-5.) After completing this task, which took approximately one minute, he moved further away from the unprotected edge. (Tr. 62, 157-58, 227.) The CO acknowledged that he was generally walking straight up and down the pitch to complete his task. (Tr. 153, 155.) He explained that Mr. Kent was not walking on "other areas of the roof" or "going and doing other things." (Tr. 153-54.) The nature of Mr. Kent's task did not require him to come closer than six feet to an unprotected edge. (Tr. 271.) Nor was there any debris, cords, or tripping hazards. (Ex. J-10.) Another employee on

[8] In discussed the proposed penalty for this Citation, the CO indicated that Mr. Kent was "six feet away from the edge." (Tr. 82.)

the roof, Mr. Harmon, corroborated Mr. Kent's statement that he was always at least six feet from the edge.[9] (Tr. 226; Ex. C-4.)

The Secretary failed to establish that Mr. Kent got sufficiently close to the unprotected edge or that his work activities could reasonably be expected to bring him within the zone of danger.[10] *See Shaw Areva Mox Servs., LLC*, 23 BNA OSHC 1821, 1824 (No. 09-1284, 2012) (record did not show that it was reasonably predictable that an adapter would be moved and used in another location). Mr. Kent was to mark a distance sufficiently far enough from the unprotected edge. *Cf. Calpine Corp.*, 774 F. App'x 879, 884-85 (5th Cir. 2019) (unpublished) (assignment made it predictable that worker would access zone of danger). Large other sections of the roof protected the other three sides of Roof 1. (Exs. J-10; R-1.) Respondent's fall protection plan addressed the possibility that employees would go beyond the warning line system later in the project. (Ex. J-7.) If such a situation arose, employees were to utilize the fall protection equipment that was on-site and being loaded to the roof. *Id.* Mr. Kent's activities did not bring him within the zone of danger, nor were they reasonably expected to.

Citation 1, Item 1 is vacated, and no penalty for this item is assessed.

B. Citation 2, Item 1

As mentioned above, the worksite included a series of interconnected roofs. Citation 2 relates to a low sloped area, referred to as Roof 4. (Ex. J-1.) The Secretary alleges that Respondent

[9] Mr. Harmon indicated that he was acting as a "safety monitor" for Mr. Kent. (Exs. C-4, C-5 at 2.) Respondent does not allege, nor does the record establish, that this satisfies the fall protection requirements.

[10] In support of its position, Respondent cites, without identifying the case as being unreviewed, *Consol. Grain & Barge Co.*, 23 BNA OSHC 2055 (No. 10-0756, 2011) (ALJ). (Resp't Br. 29.) In that case the ALJ found that the Secretary failed to establish that employees had been in, or were reasonably predicted to be in, the zone of danger. 23 BNA OSHC at 2065-66. The case is supportive of Respondent's position but because it was not reviewed by the Commission or an appellate court, the undersigned did not rely on the precedent as binding. *See Leone Constr. Co*., 3 BNA OSHC 1979 (No. 4090, 1976) (unreviewed part of judge's decision does not constitute binding Commission precedent); *Home Rubber Co., LP*, No. 17-0138, 2021 WL 3929735, *39 (O.S.H.R.C., Aug. 26, 2021) (unreviewed ALJ decisions have no precedential value).

violated 29 C.F.R. § 1926.501(b)(10), which requires fall protection for roofing work on roofs with a low slope. "Roofing work" is defined at 29 C.F.R. § 1926.500 as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck." The cited standard requires that "each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8) or more above lower levels shall be protected ...." 29 C.F.R. § 1926.501(b)(10).

1. Applicability & Violation

After arriving at the worksite, the CO observed Mr. Harmon working or Roof 4. (Tr. 44.) This roof has a low slope and an unprotected edge that is approximately 35 feet above ground level. (Tr. 32, 34-35, 48, 309; Exs. J-10 at 1-8, C-3.) He was not wearing a personal fall arrest system. (Tr. 38, 48; Ex. C-4 at 2.) Nor do the photographs depict another means of fall protection such as guardrails or safety nets. (Exs. J-10, C-3.) Mr. Harmon acknowledges that he came within two to three feet of an unprotected edge without fall protection. (Ex. C-4 at 2.)

Respondent does not dispute that the cited standard requires the use of fall protection on low-sloped roofs such as Roof 4. Instead, it argues that an exception included within Subpart M - Fall Protection (Subpart M) applies to the activities the CO observed.[11] 29 C.F.R. § 1926.500 addresses the overall scope and applicability of Subpart M. Generally, Subpart M applies to all construction workplaces. 29 C.F.R. § 1926.500(a)(1). However, its provisions do not apply "when employees are making an inspection, investigation or assessment of workplace conditions prior to

[11] While the Secretary bears the burden of establishing applicability in general, the party asserting an exception applies bears the burden on that issue. *See e.g., Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000) ("The Commission has repeatedly held … that 'the party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim'"), *aff'd,* 268 F.3d 1123 (D.C. Cir. 2001).

the actual start of construction work ...." 29 C.F.R. § 1926.500(a)(1). Respondent claims that Mr. Harmon's activities fall within the exception's scope. (Resp't Br. 17-18.)

The Secretary refutes the exception's applicability, arguing that it applies only if the "assessment" occurs before the actual start of construction work. (Sec'y Reply Br. 3-7.) He points to Subpart M's preamble, which specifies that the exception applies only "two times," before the work commences and "after all work has been completed, and the workers have left the area." 59 Fed. Reg. 40672, 40675, Safety Standards for Fall Protection in the Construction Industry, (Aug. 9, 1994) (to be codified at 29 C.F.R. pt. 1926). There is no third exception for when materials are being gathered, *i.e*., there is no "load day" exception to the requirements for fall protection. *Id.* The exception is narrow; limited to a specific subset of activities (inspection, assessment, or investigation) and to specific points in time (before construction starts or after it concludes). (Sec'y Reply Br. 3-7.)

Respondent argues that *Seyforth Roofing Co.*, 16 BNA OSHC 2031 (No. 90-0086, 1994) supports finding that Mr. Harmon was engaged in a pre-work inspection. (Resp't Br. 17-18, 21.) Its reliance on *Seyforth* is misplaced for two reasons. First, the exception the Commission relied upon in *Seyforth* is materially different from the exception at issue in this case. Subpart M was substantially amended in 1995, roughly six months after *Seyforth* was decided. *See* 59 Fed. Reg. 40,672 (discussing the effective date of amended Subpart M). Coincident with the amendment, the exception, which was previously found only in subparagraph (g), was broadened to address fall hazards in construction generally, as opposed to those found on low-pitched roofs during built-up roofing operations. *Compare* 29 C.F.R. § 1926.500(a)(1) (current) with 29 C.F.R. § 1926.500(g) (amended Feb. 6, 1995).

Second, though the exception was broadened in terms of whom it applied to, it was also narrowed to the extent that it only applied at specific points in time: before the actual beginning of construction and after construction has been completed. 29 C.F.R. § 1926.500(a)(1). In *Seyforth*, the application of the old exception was limited to certain activities. 16 BNA OSHC at 2033-34. As amended, the exception applicable here added a restriction as to when those activities can occur. 29 C.F.R. § 1926.500(a)(1). Because the Commission in *Seyforth* did not have to address whether the events occurred before or after construction, its precedential value on the issue of the applicability and scope of 29 C.F.R. § 1926.501(a)(1) limited.[12] *See Capeway Roofing Sys*., 20 BNA OSHC 1331, 1343 n. 14 (No. 00-1968, 2003) (noting that prior decisions did not govern the outcome when there had been revisions to guidelines at issue), *aff'd,* 391 F.3d 56 (1st Cir. 2004).

Further, in the present matter, this was not his first time Respondent's employees were at the worksite. (Tr. 171, 191, 193-94, 230-31, 274-75.) Mr. Kent and his supervisor previously visited the site for 30-60 minutes to conduct a pre-job inspection. (Tr. 274-75.) This work included going onto all four of the mini-roofs that connected to make the whole roof. (Tr. 275.) Mr. Kent acknowledged that he did not wear fall protection during this inspection. *Id.* He agreed that this

[12] Respondent also cites to *Modern Building Solutions, LLC*, 23 BNA OSHC 1787 (No. 10-2559, 2011) (ALJ), *Ovation Plumbing, Inc*., No. 17-0196, 2018 WL 2407483 (O.S.H.R.C.A.L.J., Apr. 17, 2018), and *George Weis Co*., No. 19-1738, 2021 WL 1590307 (O.S.H.R.C.A.L.J., Mar. 16, 2021), without indicating that any of the decisions are unreviewed and therefore not binding. (Resp't Br. 16-18.) In any event, none of these cases support a different conclusion. *Modern Building* held that examining sheeting on a roof did not qualify for the exemption because work had already begun and was not yet completed. 23 BNA OSHC at 1796. Nor is *Ovation* helpful. Respondent's quotation from the ALJ decision leaves out the important limitation on the exception's scope. (Resp't Br. 16 n. 18.) The correct sentence is: "[t]hus, even if the cited standard applies in the most technical sense, the exception in 1926.500(a)(1) prohibits application of the subpart M standards when employees are conducting inspections, investigations, or assessments *prior to the beginning of construction or after it has been completed*." 2018 WL 2407483, at *6 (italics added to indicate portion of the sentence Respondent omitted). Although the worker's activities constituted an inspection, the exception did not apply because the inspection occurred after work had commenced but before it was completed. *Id.* Like *Ovation* and *Modern Building*, *George Weis*, also held that the limited exemption set out in 29 C.F.R. § 1926.500(a)(1) did not apply because work was already underway. 2021 WL 1590307, at *4-5 and n.1.

was because the inspection visit occurred before work began on the project. *Id.* The goal of the inspection was to take some measurements and assess the roofs.[13] (Tr. 275-76.)

In addition, Mr. Harmon, a supervisor and another employee, visited the worksite to inspect the gutter system and to design the work Respondent's employees would be doing. (Tr. 191, 201, 230-31.) Mr. Harmon acknowledged that this constituted a pre-work "inspection." (Tr. 190-92, 194, 198.) He indicated it lasted approximately 10-15 minutes and occurred about a week before the "load day." (Tr. 195, 207.) The Secretary does not allege that the failure to wear fall protection during this inspection supports the Citation. (Sec'y Reply Br. 3-7.) Rather, he argues that this previous site visit was the inspection or assessment that falls within the meaning of the exception. *Id.* Because the pre-work inspection or assessment had already been completed, Mr. Harmon's activities on January 9, 2020 should not also be considered pre-work inspection or assessments. *Id.* Instead, they should be viewed as occurring after the start of work, and therefore fall protection should have been used. *Id.*

With this pre-job assessment of the roof complete, Respondent fully anticipated that workers would be on the roof on the morning of January 9, 2020, to hoist materials. When the CO arrived, at least two individuals were already on the roof and work at the site had started. (Ex. J-10; Tr. 261-62.) As discussed above, the plan was to load the materials and then work on the roof itself. (Ex. C-5 at 2; Tr. 198, 213.) Mr. Harmon's activities on January 9, 2020, did not take place "prior to the actual start of construction work," as is required for the exception to apply. 29 C.F.R.

[13] Mr. Harmon, along with a supervisor and another employee, also visited the worksite before the "load day" to inspect the gutter system and to design the work Respondent's employees would be doing. (Tr. 191, 201, 231.) He acknowledged that this constituted a pre-work "inspection." (Tr. 190-92, 194, 198.) He indicated it lasted approximately 10-15 minutes. (Tr. 195, 207.) The Secretary does not allege that the failure to wear fall protection during this inspection supports the Citation. (Sec'y Reply Br. 3-7.) Rather, he argues that this previous site visit was the inspection or assessment that falls within the meaning of the exception. *Id.* Because the pre-work inspection or assessment had already been completed, Mr. Harmon's activities on January 9, 2020 should not also be considered pre-work inspection or assessments. *Id.* Instead, they should be viewed as occurring after the start of work and therefore fall protection should have been used. *Id.*

§ 1926.500(a)(1). Work at the site had been ongoing for over an hour before he went to the roof to assist with the loading and hoisting of materials.[14] (Tr. 76, 175, 178-79, 185, 233, 261-62.)

Preparatory work is "work" within the meaning of the construction standard. *See Capeway*, 20 BNA OSHC at 1343-44; *Phoenix*, 17 BNA OSHC at 1079 (employees had access to the fall hazard when delivering materials). Preparatory work includes staging materials, traveling to the worksite, and walking through roof areas to other work areas. 20 BNA OSHC at 1343 n.17. Placing materials on the roof constitutes "roofing work."[15] *Id.* at 1344 n. 19.

Multiple employees were engaged in preparatory work on January 9, 2020. Roofing materials and other equipment were already at the worksite and ready to be moved when Mr. Harmon traveled from the ground to the roof to assist with the hoisting process.[16] (Tr. 50, 58-59, 233; Ex. J-10.) *See* 29 C.F.R. § 1926.500 (including "hoisting" and "storage" of materials as part of roofing work); *Capeway Roofing Sys. Inc*., 391 F.3d 56, 61 (1st Cir. 2004) (finding roofing

[14] "Shortly" after Mr. Harmon decided where he would signal the crane from another employee finished rigging the materials that were already on the crane bed so that they could be hoisted to the roof. (Tr. 187.) The preamble to Subpart M expressly states that "if inspections are made while construction operations are underway, all employees who are exposed to fall hazards while performing these inspections must be protected as required by subpart M." As operations were already underway, even if Mr. Harmon's activities could be construed as an inspection, rather than the start of the hoisting of the materials, fall protection was still required. Respondent's assertion that applicability was only supported by speculation is rejected. (Resp't Reply 18, citing without noting it is an ALJ decision*, Bethlehem Steel*, No. 77-3191, 1978 WL 6798 (O.S.H.R.C.A.L.J., Aug. 2, 1978).) The Secretary presented testimony and photographic evidence of the ongoing work at the site. (Tr. 34-38, 47, 49-50, 53-54, 103-5, 167-68, 170, 236, 261-63, 266-71; Ex. J-10.) Besides being non-binding, *Bethlehem* also is inapposite. That case concerned whether there was employee exposure, not the applicability of various standards. 1978 WL 6798, at *3.

[15] Again, Respondent points to an ALJ decision, *Bergelectric Corp*., 26 BNA OSHC 2030 (No. 16-0728, 2017) (ALJ) without noting it is not binding precedent. (Resp't Br. 14-15; Resp't Reply 13-15.) Nevertheless, Respondent's argument does not persuade. First, unlike the present matter, *Bergelectric*, did not involve a roofing contractor retained to engage in roofing work. 26 BNA OSHC at 2030. Second, *Bergelectric* concerned a violation of a different provision than the one at issue here. 26 BNA OSHC at 2033-35 (finding that 29 C.F.R. § 1926.501(b)(10), the provision CentiMark allegedly violated, was not applicable). Third, the decision does not hold that fall protection was not required because of the type of work. *Id.* at 2033-36. The ALJ found that because of the nature of its work, the employer had to provide fall protection that met the requirements of a more restrictive provision of Subpart M. *Id.*

[16] *Field & Associates, Inc.*, 19 BNA OSHC 1379 (No. 97-1585, 2001) concerns violations related to employees working at ground level and the placement of materials on a roof. The Commission found that the cited standards applied regardless of whether the employees were engaged in roofing work during the inspection. 19 BNA OSHC at 1380. The Commission also concluded that the exception for preliminary or post work inspections contained in 29 C.F.R. § 19126.500(a)(1) was not applicable. *Id.* at 1380 n. 6.

work was being performed). It is not the actual application of roofing material that triggers the requirements of the cited standard; it is the start of work.[17] 20 BNA OSHC at 1343-44.

Mr. Harmon was not engaged in a pre-work assessment. His task was a necessary part of the hoisting process. (Tr. 231-33.) The exception set out in 29 C.F.R. § 1926.500(a)(1) does not cover his activities. The Secretary established that the cited standard applies and was violated.

2. Exposure

Unlike Mr. Harmon on Roof 4, Mr. Kent acknowledges coming within two feet of an unprotected edge. (Tr. 187; Ex. C-4 at 2.) The CO observed and photographed him doing so. (Tr. 57; Exs. J-10, C-3.) Mr. Harmon explained that his work necessitated him getting that close to the edge. (Tr. 187, 232; Exs. C-4, J-10.) He needed to be able to see the crane and could not do so

[17] In *Staz-On Roofing, Inc*., No. 02-2229, 2003 WL 22071252, at *3 (O.S.H.R.C.A.L.J., Sept. 5, 2003), the ALJ found that the requirement for fall protection applies for employees performing activities leading up to the roof installation. Many other ALJ decisions cited by Respondent but not identified as unreviewed also concluded that the workers were engaged in roofing work and so fall protection was required. *See Chambers Constr. Co.*, No. 18-1913, 2019 WL 6709450 (O.S.H.R.C.A.L.J., Nov. 1, 2019) (although employer was retained for interior work, when employees went to the roof to address leaks, they were engaged in roofing work and should have had fall protection as required by 29 C.F.R. § 1926.501(b)(10)); *Elmer Cook Constr. Inc.*, No. 16-0817, 2017 WL 8220398 (O.S.H.R.C.A.L.J., Dec. 29, 2017) (applying waterproofing was roofing work), *Kirtley Roofing*, 25 BNA OSHC 2250 (No. 15-0613, 2015) (ALJ) (finding employees who were moving materials to set up a lifeline and applying sealant were not engaged in inspection, investigation, or assessment of workplace conditions); *Peck Bros., LLC*, 25 BNA OSHC 1005 (No. 12-2299, 2014) (roofing company was engaged in roofing work); *R&S Roofing, LLC*, 24 BNA OSHC 2151 (No. 12-2427, 2014) (ALJ) (finding employees engaged in seam work were engaged in "an essential part of the roofing work itself, and not part of 'an inspection, investigation, or assessment of workplace conditions"'); *Prime Roofing Corp.*, 22 BNA OSHC 1307 (No. 07-1829, 2008) (safety monitor's activities fell within the scope of 29 C.F.R. § 1926.501(b)(10) because they were integral to roofing work) ; *M.D. Roofing & Siding, L.L.C.*, 21 BNA OSHC 1496, 1497-8 (No. 05-1070, 2006) (ALJ) (29 C.F.R. § 1926.501(b)(10) applies before the actual application of roofing material); *Cleveland Constr., Inc*., 18 BNA OSHC 1648 (No. 97-1356, 1998) (ALJ) (finding inspection conducted by employee was integral to his primary activity of cutting the mezzanine floor edge, which occurred while construction was ongoing, and, thus, exception did not apply), *aff'd*, 201 F.3d 440 (6th Cir. 1999) (unpublished) (upholding the finding that the exception did not apply). Respondent also inappropriately cites *Bechtel Corp*. 2 BNA OSHC 1336 (No. 1038, 1974). (Resp't Reply 17.) While that is a Commission decision, Respondent quotes the ALJ decision, not the Commission decision. *Id. Bechtel* concerned a multi-employer worksite. 2 BNA OSHC at 1337. The Commission found that the cited employer was not responsible for the creation of the hazards and that its workers were not exposed to them. *Id.* The Commission did not conclude that workers were not engaged in construction work. *Id.* Nor is Respondent, a roofing contractor engaged to perform roofing work, akin to a supplier as was the case in another ALJ case Respondent cites without proper indication of it being unreviewed, *A.A. Will Sand & Gravel Co*., No. 5139, 1974 WL 20941 (O.S.H.R.C.A.L.J., Dec. 18, 1974). More importantly when the Commission reviewed *A.A. Will*, it rejected the ALJ's finding that the employer was not engaged in construction work. *A.A. Will Sand & Gravel Corp*., 4 BNA OSHC 1442 (No. 5139, 1976) ("We disagree with Judge Gold's finding that Respondent was not engaged in construction work").

further away. (Tr. 187; Ex. C-4.) The CO also indicated that unlike the relatively straight up and down path Mr. Kent took, Mr. Harmon was walking around the roof, "standing, moving around, doing different things" when he observed him. (Tr. 56-57, 98.)

Although the CO only saw him close to the unprotected edge for two to three minutes, the brevity "does not negate the violation or its seriousness." *See A.J. McNulty & Co., Inc. v. Sec'y of Labor*, 283 F.3d 328, 335 (D.C. Cir. 2002) (employers do not have any reasonable time for exposing employees to the risk of harm; whatever compliance method a standard requires must be implemented before putting employees to work); *Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2837, 1992) (brief exposure does not preclude finding a violation or its seriousness). It only takes a moment for someone to lose their footing and move beyond the unprotected edge. 15 BNA OSHC at 2056; *Gate Precast Co*., No. 15-1347, 2020 WL 2141954 (No. 15-1347, Apr. 28, 2020) (affirming a violation of the fall protection requirements when it was "reasonably predictable that this employee could have fallen off the roof after being knocked off-balance …, or by inadvertently straying toward the unprotected edge …"). The Secretary established exposure to the violative condition.

3. Knowledge

As for knowledge, Mr. Harmon and Mr. Kent were both supervisors, and both were on the roof without fall protection.[18] (Tr. 85; Exs. C-2, C-4.) A supervisor's awareness of a hazardous condition is sufficient to attribute that knowledge to his or her employer. *Globe Contractors v. Herman*, 132 F.3d 367, 373 (7th Cir. 1997) (foreman's awareness of violations properly attributed

[18] Mr. Harmon went to the roof before Mr. Kent. (Ex. C-4.) He was alone on the roof when he walked to the edge to see if he could signal the crane operator. (Exs. C-4; C-5 at 1.)

to the employer). In addition, the safety manager (Mr. George) was on the ground observing Mr. Harmon when he was on the roof. (Exs. J-10A; C-5 at 3; Tr. 179.)

Mr. Harmon went to the roof without any tools or fall protection equipment. (Ex. C-4.) His lack of fall protection was readily observable. (Exs. J-10, C-3.) While he and others had fall protection equipment and tools at the worksite, Mr. Harmon brought nothing with him to the roof. (Tr. 177.) Instead, he placed his safety materials on the crane bed rather than carry them to the roof. (Tr. 177-78.)

The Secretary made out a prima facie case, establishing the cited standard's applicability, its violation, employee exposure to the hazardous condition, and Respondent's knowledge of the hazardous condition.

4. CentiMark's Affirmative Defenses

CentiMark raises two affirmative defenses: feasibility and greater hazard.[19] (Resp't Br. 21-24.) The Secretary argues that it failed to establish either one. (Sec'y Reply 7-11.) The undersigned agrees.

a) Infeasibility Defense

To establish this defense, the proponent must prove: (1) means of compliance prescribed by the standard are technologically or economically infeasible, and (2) there are no feasible alternative means of protection. *V.I.P. Structures, Inc*., 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994). Respondent failed to establish either element.

Mr. Harmon acknowledged that he could have, and previously had, carried a fall protection harness to a roof, i.e., it was not necessary to have the crane lift such materials. (Tr. 237.) As for installing an anchor point to connect the harness to, Mr. Harmon argued that this would require a

[19] Respondent raised these affirmative defenses in its Answer.

power generator. *Id.* Neither he, nor anyone else explained why a manual screwdriver could not have been used.[20]

Critically, Mr. Kent was able to install an anchor point later during the project (albeit in a different area of the roof) without a power source. (Tr. 272.) Doing so did not require him to make any modifications to the roof. *Id.* He acknowledged that it was possible to install an anchor point on January 20, 2020, when the CO observed him (i.e., before the crane had loaded anything onto the roof). *Id.* His testimony shows that it was possible to "screw a plate into the roof" when Mr. Harmon came to the edge of the roof to view the crane. *Id.* Compliance with the standard was neither technologically nor economically infeasible.

Respondent simply states, without support, that the other methods were not "practical" or technologically possible. (Resp't Br. 22.) This is not enough to satisfy the requirements of the

[20] When asked to confirm whether his testimony was that he was only able to "screw on an anchor plate with a generator," Mr. Harmon clarified that a generator was "the only option we would have had at that point." (Tr. 238.) The fact that other equipment which would have permitted compliance was not at the worksite does not make compliance infeasible. *Williams Enters., Inc*., 13 BNA OSHC 1249, 1253 (No. 85-355, 1987) ("It is the duty of an employer to use equipment that permits him to comply with the Secretary's standard").

affirmative defense.[21] *A.J. McNulty & Co., Inc. v. Sec'y of Labor*, 283 F.3d 328, 334 (D.C. Cir. 2002) (impracticality is not the test; the employer must show that it either "used alternative means of protection or that such means were infeasible"). Respondent failed to show it was infeasible for Mr. Harmon to have carried up screws and installed an anchor point. Nor did it show that any of the other methods permitted by the cited standard were technologically or economically infeasible. *See R.G. Friday Masonry, Inc.*, 17 BNA OSHC 1070, 1072 (No. 91-2027, 1995) (rejecting employer's infeasibility claim because it failed to prove that it could not have used safer alternatives). "Before an employer will be excused from ignoring a standard's requirement and leaving its employees unprotected, it must show that it has explored all alternate forms of protection." *State Sheet Metal Co.*, 16 BNA OSHC 1155 (No. 90-1260, 1993) (finding defense was not met.)

[21] Respondent cites *Southern Pan Servs. Co.*, No. 99-0933, 2005 WL 2697266 (O.S.H.R.C., Sept. 30, 2005) as support of its defense. (Resp't Br. 23.) That case concerned a violation of a different standard, 29 C.F.R. § 1926.501(b)(2)(i), which has a limited exception not applicable in this matter. The cited standard does not permit use of a fall protection plan as an adequate alternative, unlike the situation in *Southern Pan*. Nor has Respondent shown that such an approach could have provided adequate protection. Respondent also cites two unreviewed ALJ decisions without noting that they are not binding precedent in support of its defense. (Resp't Br. n.23.) Regardless, neither case involved fall protection and neither supports Respondent's argument. *B.B. Riverboats, Inc.*, No. 92-3815, 1987 WL 89169 (O.S.H.R.C.A.L.J., June 27, 1987) concerned a violation of a maritime standard. The cited provision required guardrails. 1987 WL 89169, at *6. The employer, relying in part on the testimony of the OSHA compliance officer, showed that guardrails were infeasible. *Id.* The employer was not cited for failing to provide other types of fall protection, unlike the present matter. *Id.* at n. 3. Further, *Riverboats* found that employees should have been protected by personal flotation devices when working near the unguarded edge. 1987 WL 89169, at *7. Thus, *Riverboats* does not hold that the workers should have had no protection. *Id.* The other case, *Thomas Lindstrom Co., Inc.*, No. 92-3815, 1994 WL 27754 (O.S.H.R.C.A.L.J., Dec. 14, 1993), concerned a violation of the steel erection standard. In that case, the employer showed that the only specified method of compliance was infeasible and that using the single method (tag lines) would have created a greater hazard. 1994 WL 27754, at *3. Here, the cited standard permits multiple methods of compliance and Respondent did not show that compliance with the available options was infeasible or that it would create a greater hazard. The undersigned notes that the complete decisions for these two cases was not published by BNA, see 16 BNA OSHC at 1657 and 13 BNA OSHC at 1351, indicating that the text only represents a digest. Both decisions are available on Westlaw and *Thomas Lindstrom Co., Inc.*, No. 92-3815 is also available on the Commission's website (https://www.oshrc.gov/assets/1/6/92-3815.pdf?2582). The undersigned cautions parties to be wary of citing digests of opinions and to note when a case is unreviewed by the Commission.

b) Greater Hazard

Respondent also argues that complying with the cited standard would have created a greater hazard. (Resp't Br. 23-24.) The greater hazard defense has three core elements. The proponent of the defense must show: (1) compliance with the standard would create greater hazards than non-compliance; (2) alternative protective measures were taken or were not available; and (3) a variance application is inappropriate. *E & R Erectors, Inc. v. Sec'y of Labor*, 107 F.3d 157, 163-64 (3d Cir. 1997). Respondent failed to carry its burden.

As discussed, Mr. Harmon claimed he could not have installed an anchor plate or otherwise tied off when he went to the roof. His colleague, fellow foreman, Mr. Kent indicated that it was possible to screw an anchor plate into the roof at that time. (Tr. 272.) Further, at best, Mr. Harmon's statement goes to feasibility, not whether using fall protection would create a greater hazard than non-compliance or the practicality of a variance application.[22] Respondent failed to establish the first element of the defense.

Nor did Respondent show that alternative protective measures were taken or were not available. *State Sheet*, 16 BNA OSHC at 1159-60. Respondent claims, without record support, that compliance would have involved longer periods of time working at the edge. (Resp't Br. 24.) However, it does not explain why an anchor point would have to be installed at the edge or why its use would have necessitated coming within six feet of the edge.

In terms of alternative protection, Respondent alleges another employee, Mr. Glass, was on the roof and argues he was acting as a safety monitor. *Id.* Respondent did not call Mr. Glass

[22] As addressed above, Respondent did not show that use of at least one of the methods of fall protection was infeasible. (Tr. 272.)

to testify.[23] He did not sign Respondent's fall protection plan. (Ex. J-7.) OSHA's violation worksheet indicates that Mr. Harmon was alone, and Mr. Glass does not appear in any of the CO's photographs. (Exs. J-10, C-3 at 2; Tr. 244.) Only Mr. Harmon testified as to his presence at the worksite.[24] (Tr. 214.)

Importantly, on January 20, 2020, neither Mr. Kent nor Mr. Harmon referred to his presence, let alone his alleged role as a safety monitor. (Exs. C-4, C-5; Tr. 243.) At that time, Mr. Harmon told the CO he was alone on the roof.[25] (Tr. 77; Exs. C-3, C-4.) This statement was given closer to the actual events and is supported by photographic evidence. (Exs. C-4; J-10.) The undersigned gives it greater weight than Mr. Harmon's self-serving statement at the hearing that Mr. Glass was acting as a safety monitor. (Tr. 214, 216, 239.) Further, as Mr. Harmon acknowledged, he was not using a "safety monitor" as fall protection.[26] (Tr. 242.)

Finally, Respondent has not shown that a variance was unavailable or inappropriate.[27] *See Altor, Inc.*, 23 BNA OSHC 1458, 1470 (No. 99-0958, 2011) (rejecting greater hazard defense to a

[23] "When one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party." *Capeway*, 20 BNA OSHC at 1342-43 (concluding that failing to present testimony from supervisory employees present suggested that the witnesses would not "have been able to contradict" the Secretary's evidence).

[24] Respondent did not ask the CO, Mr. Kent, or its other witness, Mr. Litzenburger, any questions about Mr. Glass.

[25] Mr. Harmon told the CO he had been alone on the roof and included the same fact in his signed written statement. (Tr. 77; Ex. C-4 at 2.)

[26] Nor did Respondent's Fall Protection Safety Work Plan specify that the use of individuals acting as "safety monitors" was part of the plan. (Ex. J-7; Tr. 242-43.) Even if Mr. Glass was present on the roof, the Respondent failed to show that this was a sufficient alternative protection method.

[27] In its Reply Brief, the Secretary's counsel appears to inaccurately attribute a quote to *Caterpillar Inc. v. Herman*, 131 F.3d 666 (7th Cir. 1997). (Sec'y Reply Br. 9.) Caterpillar holds that an employer "should seek a variance when it can" and that an "unjustified failure to do so defeats a greater hazard defense." 131 F.3d at 669. Here, Respondent does not explain why it failed to seek a variance if it believed after its initial assessment that the signaling work could not be done with fall protection. So, it failed to satisfy this element of the defense. *See True Drilling Co. v. Donovan*, 703 F.2d 1087, 1091 (9th Cir. 1983) (greater hazard defense failed when employer did not show unavailability or inappropriateness of obtaining a variance).

fall protection violation because the employer did not provide an explanation for not seeking a variance), *aff'd,* 498 F. App'x 145 (3d Cir. 2012) (unpublished).

5. Characterization

The Secretary alleges that Citation 2, Item 1, should be characterized as serious and repeat, within the meaning of 29 U.S.C. § 666(k). (Ex. C-3.) Respondent challenges only the repeat characterization.

The CO explained that the hazard involved a 30–40-foot fall from the roof to the concrete surface below. (Tr. 84-85.) Such an occurrence would likely result in permanent disability or possibly death. (Tr. 85; Ex. C-3.) *See Sec'y of Labor v. Trinity Indus.,* 504 F.3d 397, 401 (3d Cir. 2007) (a violation is serious if, were an accident to occur, death or serious injury could result); *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1007 (No. 92-424, 1994) (finding that a fall from 18 feet was likely to cause serious injuries). The undersigned agrees that the violation was serious.

Turning to the repeat characterization, a violation is considered repeat "if, at the time of the alleged violation, there was a Commission final order against the same employer for a substantially similar violation." *Reich v. D.M. Sabia, Co.*, 90 F.3d 854, 856 (3d Cir. 1996). The Secretary may establish substantial similarity by showing that the violations are of the same standard.[28] *Monitor Constr. Co*., 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994). The burden then shifts to the other party to rebut the Secretary's prima facie showing of similarity. *Potlach Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979). "[T]he principle factor in determining

[28] Citing *Continental Electronics Manufacturing. Co.*, No. 79-4558, 1980 WL 10195 (O.S.H.R.C.A.L.J., Apr. 30, 1980), *Affordable Roofing & Exteriors, Inc*., 25 BNA OSHC 1682 (No. 13-1689, 2015) (ALJ), *SJ Louis Construction of Texas LTD*, No. 16-1220, 2019 WL 1571588 (O.S.H.R.A.L.J., Jan. 3, 2019), and *Kirtley*, 25 BNA OSHC at 2260, without noting they are all unreviewed ALJ decisions, Respondent implies that a repeat characterization requires an almost identical set of facts. (Resp't Br. 25; Resp't Reply 19-20.) While such a situation supports characterizing a violation as repeat, it is not a requirement. *See e.g.*, *Potlach Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979) (establishing the "substantial similarity" test).

whether a violation is repeated is whether the two violations resulted in substantially similar hazards." *Id.* at 1065. The seriousness of the hazard involved in the two violations need not be the same. *John R. Jurgensen Co*., 12 BNA OSHC 1889 (No. 83-1224, 1986), *aff'd*, 872 F.2d 1026 (6th Cir. 1989).

To support his classification, the Secretary points to a citation issued to Respondent on January 19, 2018, concerning a violation of the same standard at issue here, 29 C.F.R. § 1926.501(b)(10).[29] (Tr. 308-9.) The violation concerned a failure to provide fall protection to employees working on a low-sloped roof. *Id.* Like the present matter, the prior citation also had the same means of abatement (use of guardrails, safety nets, or personal fall arrest systems). (Tr. 87.) This prior citation became a final order on February 8, 2018, when Respondent executed a settlement agreement on that date. (Stip. 4; Ex. C-3.)

Respondent argues that even though the same standard was cited, the "scenario" was different such that the violation should not be characterized as repeat. As the Secretary points out, the focus is on the similarity of the hazards, not the factual situation that led to the hazard's creation. *See Amerisig Se., Inc*., 17 BNA OSHC 1659, 1661, 1995-97 (No. 93-1429, 1996) (violation repeat because it involved the same standard and the hazard of being caught in unguarded machinery), *aff'd*, 117 F.3d 1433 (11th Cir. 1997). Geographic differences, commonality of supervisory control, or the employer's attitude are not relevant to the characterization assessment. *Midwest Masonry, Inc.*, 19 BNA OSHC 1540, 1542 (No. 00-322, 2001); *J.L. Foti Constr. Co. v. Sec'y of Labor*, 687 F.2d 853, 857 (6th Cir. 1982) ("substantial

[29] This violation was issued after inspection number 1271285. (Ex. C-3.) It occurred at the worksite located at 428 Tolland Turnpike, Manchester, CT. *Id.*

similarity" is determined "with reference to the similarity of the 'violative elements' of the infractions").

Both matters concerned employees working on low sloped roofs without fall protection. (Tr. 308-9.) Respondent attempts to differentiate the two matters by arguing that employees involved in the prior citation had been working at the site for several weeks, while the present matter concerned an employee conducting an inspection. (Tr. 307.)

At best, this distinction goes to the applicability of the cited standard, not whether the violation is appropriately characterized as repeat. Further, as discussed, the undersigned finds that this distinction is without merit. Employees at both sites were engaged in construction work on low-sloped roofs. *See Midwest*, 19 BNA OSHC at 1542 (language of successor standard was substantially similar, and the hazard was the same).

Respondent's reliance on *Wynnewood Refining, Inc*., No. 13-0644, 2019 WL 1466257 (O.S.H.R.C. Mar. 28, 2019), *aff'd*, 978 F.3d 1175 (10th Cir. 2020) is misplaced. (Resp't Br. 25.) *Wynnewood* concerned a successor corporation, not the same corporation being cited for violating the same standard. 2019 WL 1466257, at *2-3, 8-9 (predicate violations were committed by a different entity when it was a subsidiary of a different parent company). Nor do the unreviewed ALJ cases Respondent cites merit a different outcome. (Resp't Br. 26-27.) In both *Nabors Drilling USA, LP*, 25 BNA OSHC 1104 (No. 11-2026, 2014) (ALJ) and *Mondo Constr. Co., LLC*, 25 BNA OSHC 1285 (No. 13-1322, 2014) (ALJ), the ALJs were confronted with citations based on different standards and different hazards. In contrast, the present matter concerns the same hazard and the same standard.

The lack of fall protection while in such a work environment is the "violative element," supporting a finding of substantial similarity between the prior citation for violating 29 C.F.R.

§1926.501(b)(10) and the present Citation for violating the same standard. *See J.L. Foti*, 687 F.2d at 856-57; *Lake Erie Constr. Co., Inc.,* 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005) (affirming a repeat classification because they involved the same standard and fall hazard)*; Monitor Constr. Co*., 16 BNA OSHC 1589, 1598 (No. 91-1807, 1994) (holding that the Secretary can establish substantial similarly to support a repeat classification by showing similar hazard and means of abatement). The violation is appropriately characterized as repeat.

6. Penalty Amount

While it challenged whether there was a violation and the characterization of any violation, Respondent did not raise any specific challenges to the proposed penalty amount itself. To determine the appropriate penalty, the Commission considers: (1) the size of the business, (2) the violation's gravity; (3) the employer's good faith, and (4) the employer's violation history. 29 U.S.C. § 666(j). Gravity is generally the primary factor to be considered. *Orion Constr., Inc.*, 18 BNA OSHC 1867 (No. 98-2014, 1999).

Respondent is a large employer with approximately 3,500 employees. (Tr. 303.) The parties agree that a reduction for size is not appropriate, and the undersigned agrees. *See S&G Packaging Co., LLC*, 19 BNA OSHC 1503, 1508 (No. 98-1107, 2001) (no reduction given for large employer with 279 employees).

Turning to the violation's gravity, the Secretary argues that one person was exposed but acknowledges that the exposure was approximately two minutes.[30] (Ex. C-3.) Mr. Harmon was moving about the roof and sometimes was further away from the exposed edge. (Tr. 57; Ex. C-3.) Despite the brevity of the exposure, a slip or fall could result in severe injury or death because of

[30] In a summary section, the violation worksheet suggests two people were exposed. (Ex. C-3 at 1.) However, in the section focused on employee exposure, it indicates that only Mr. Harmon was exposed. *Id.* at 3. The undersigned finds that there is insufficient support in the record for finding that more than one worker was exposed to this hazard. Thus, in assessing the violation's gravity, the undersigned assumed only one person was exposed.

the building's height. (Tr. 81-83; Ex. C-3.) *See Sec'y of Labor v. Trinity Indus*., 504 F.3d 397, 401 (3d Cir. 2007); *Merchant's*, 17 BNA OSHC at 1007 (finding that a fall from 18 feet was likely to cause serious injuries).

Looking next at history and good faith, the Secretary argues that the evidence does not support a reduction for either of these factors. As discussed, Respondent had previously been cited for violating the same standard less than two years before the inspection that led to the present Citation. (Ex. C-3 at 1.) Respondent had a safety program and safety equipment on site. (Tr. 222, 267, 279, 302; Ex. J-7.)

Upon due consideration of section 17(j) of the Act, with due regard given to the enumerated penalty calculation factors, the undersigned finds a penalty of $48,185 is appropriate.

ORDER

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. Based upon the foregoing Findings of Fact and Conclusions of Law, it is Ordered that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(11) is VACATED and no penalty is assessed.

2. Citation 2, Item 1 alleging a serious and repeat violation of 29 C.F.R. § 1936.501(b)(10) is AFFIRMED and a penalty of $48,195 is ASSESSED.

SO ORDERED.

/s/Covette Rooney
COVETTE ROONEY
Chief Judge, OSHRC

Dated: September 27, 2021
Washington, D.C.