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

SECRETARY OF LABOR, **Complainant,** **v.** **ABSOLUTE ROOFING & CONSTRUCTION, INC.,** **Respondent.**	**OSHRC DOCKET NO. 11-2919**

Appearances:

Patrick L. DePace, Attorney
U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For the Complainant.

Gene M. Lim, Attorney
Gene M. Lim, Attorney at Law, LLC, Cleveland, Ohio
For the Respondent.

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. (Act). On September 13, 2011, the Occupational Safety and Health Administration (OSHA) inspected a worksite in Brooklyn, Ohio, where roof repair work was being performed on a church. As a result of the inspection, OSHA issued citations to Absolute Roofing and Construction, Inc. (Absolute Roofing or Respondent) on October 11, 2011. Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1926.451(c)(2), for not ensuring the scaffold at the site rested on base plates. Citation 1, Item 2, alleges a serious violation of 29 C.F.R. §

1926.451(g)(1), for not ensuring the employee using the scaffold was protected from falls by use of fall protection systems/devices. Citation 2, Item 1, alleges a repeat-serious violation of 29 C.F.R. § 1926.451(a)(1), for not ensuring that the scaffold positioned below an employee on a steep-pitched roof was able to support the intended load that could have been applied to it. Citation 2, Item 2, alleges a repeat-serious violation of 29 C.F.R. § 1926.501(b)(11), for not ensuring that the employee working on the roof was protected from a fall of approximately 13.3 feet by use of fall protection systems/devices. The total proposed penalties are $21,120.00.

Chris Kamis, president of Respondent and of Absolute Exteriors, Inc. (Absolute Exteriors) filed a timely notice of contest in this matter. The undersigned held a hearing in this case on August 23, 2012, in Cleveland, Ohio. The parties stipulated to jurisdiction and coverage. (Tr. 7-8). Both parties filed post-hearing briefs.

For the reasons discussed below, the citation items are affirmed and a penalty of $21,120.00 is assessed.

Background

Absolute Roofing is a roofing contractor with an office at 5295 West 130th Street, Parma, Ohio 44142. On September 13, 2011, at about 2 p.m., OSHA Compliance Officers (COs) Scott McNulte and Janelle Zindroski inspected a church worksite located at 4470 Ridge Road, Brooklyn, Ohio, after observing fall hazards as they drove by the site.[1] The COs parked on site and photographed the church where roofing work was being done. They observed an individual, later identified as Michael Koran, working on the roof without fall protection. The roofing work involved removing and reinstalling clay tile and replacing the copper valley. (Tr. 22-25, 29, 70, 93-94, 98, 106, 112-13, 138; RX-10).

The COs introduced themselves to Mr. Koran, the only person on site at that time. They told him why they had stopped and that they would inspect the site and identify any hazards they saw. In CO McNulte's presence, CO Zindroski interviewed Mr. Koran. Mr. Koran said he had been there that day since about 10:00 a.m.; he also said he was an employee of Absolute Roofing and that Michael Kamis owned the company. (Tr. 23-27, 93-99, 102, 106, 112; RX-9, RX-10).[2]

[1] The COs initiated the inspection pursuant to OSHA's local emphasis program regarding fall hazards. (Tr. 23; RX-7).

[2] Through an inadvertent error at the hearing, three of Respondent's exhibits were initially marked and appear in the transcript as RX-1, RX-2 and RX-3, respectively. The exhibits were renumbered as RX-7, RX-8 and RX-9, to facilitate the presentation of Respondent's evidence. (Tr. 82-83).

After speaking with Mr. Koran, the COs walked around the building. They observed a man coming and going at the site, whom they did not interview. The man's truck displayed an Absolute Roofing logo. This individual was identified at the hearing as Mike Delk, an employee of Absolute Exteriors. At the hearing, Mr. Koran testified that he had wanted to remedy the fall protection problem immediately, so he called Michael Kamis.[3] Thereafter, while the COs were still at the site, Mr. Delk brought fall protection to the site for Mr. Koran. After that point, Mr. Koran used the harness for the rest of the day. (Tr. 27-30, 64, 165-66; CX-1, RX-9).

During the telephonic closing conference held after the inspection, Mr. Kamis told CO McNulte that the company's name was Absolute Roofing and Construction, Inc. Further, in researching Respondent's citation history, CO McNulte learned Mr. Kamis had previously signed settlement agreements with OSHA; one agreement showed the named employer as "Absolute Exteriors, Inc. d/b/a Absolute Roofing and Construction," and the other showed the named employer as "Absolute Roofing." (Tr. 31-32, 39-48, 60-61; CX-4 through CX-7).

Positions of the Parties

The Secretary contends that Absolute Roofing was correctly named as the Respondent in this matter. He further contends that Michael Koran, the individual working at the site, was an employee of Absolute Roofing. In addition, the Secretary contends that Respondent was properly cited for repeat-serious violations, as Absolute Roofing and Absolute Exteriors are a single entity or employer. *See* Secretary's Brief.

Absolute Roofing contends that it is not the proper Respondent to this proceeding. It asserts that the Complaint fails to name two indispensable parties to this proceeding: Michael Koran d/b/a Koran Construction, Inc. and Absolute Exteriors, Inc. It also asserts that Absolute Exteriors had subcontracted the work to be done at the church worksite to Michael Koran d/b/a Koran Construction, Inc., an independent roofing contractor and a proper party in this matter. Respondent argues that Mr. Koran was in control of the worksite, not Absolute Roofing. It further argues that Mr. Koran, as a subcontractor, was not an employee of Absolute Roofing or Absolute Exteriors. Finally, Respondent argues that Absolute Roofing was not properly cited for a repeat-serious violation based on citations previously issued to Absolute Exteriors. *See* Answer, Affirmative Defenses; Respondent's Brief; Tr. 13-17, 204-06.

[3] Michael Kamis, vice-president of Respondent and Absolute Exteriors, testified and was the company's representative at the hearing. Chris Kamis, Michael Kamis' brother, is president of both companies; he did not testify. (Tr. 6, 176-77, 199-203). Michael Kamis will be referred to as Mr. Kamis in this case.

Additional Relevant Evidence

As noted above, Mr. Kamis informed CO McNulte during the telephonic closing conference that the company's name at the site was Absolute Roofing and Construction, Inc. Mr. Kamis gave the CO the company's tax I.D. number, which correlated to a previous OSHA inspection in which the named employer was Absolute Exteriors, Inc. d/b/a Absolute Roofing and Construction. CO McNulte knew Mr. Kamis from a previous OSHA inspection.[4] (Tr. 28-32, 54-55, 60-61, 75-78; *see* RX-7, pg. 1).

The record shows that within five years of the instant inspection, Respondent had been cited for violations of the same standards classified as repeat violations here. The companies cited in the prior citations had the same address as Respondent. In the case Absolute Exteriors, Inc. d/b/a Absolute Roofing & Construction, No. 314844515, an Informal Settlement Agreement was signed by Mr. Kamis on October 5, 2010; there, the relevant item alleged a violation of 29 C.F.R. § 1926.451(a)(1). In the case Absolute Roofing, No. 311474373, an Informal Settlement Agreement was signed by Mr. Kamis on January 29, 2008; there, the relevant item alleged a violation of 29 C.F.R. § 1926.501(b)(11). (Tr. 31-32, 39-48; CX-4 through CX-7).

CO McNulte testified that during his post-inspection investigation, the companies Absolute Roofing and Absolute Exteriors were "criss-crossed" and interchanged with each other. Both company names appeared on the same documents, both companies were located at the same business address, and both were owned by Mr. Kamis. (Tr. 32, 58-63, 85; CX-7, RX-8).

Mr. Kamis testified that Absolute Roofing and Absolute Exteriors operate out of the same office and have the same owners and managers. Mr. Kamis is vice-president of both companies, and his brother, Chris Kamis, is president of both companies. Absolute Roofing employs about eight employees, including a salesman, staff, and outside workers. Absolute Exteriors employs only two individuals, a sales employee and a production employee. At times, Absolute Exteriors

[4] That inspection had involved an individual named Nick Rogaski; Mr. Rogaski had subcontracted with Absolute Exteriors and was cited as the employer at that site. That case, however, is not before me, and the facts there are unexplored and irrelevant to an analysis of Mr. Koran's working relationship with Respondent at the subject site. (Tr. 28-31, 58, 76-78, 180; RX-8, RX-9; R. Brief, pg. 7). *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992). Thus, despite Respondent's reference to it, the Rogaski subcontract is accorded no weight in this matter. In any case, the subcontract between Nick Rogaski and Absolute Exteriors is an example of the two companies' public presentation as a single entity, *i.e.*, the subcontract heading reads "Absolute Roofing and Construction, Inc." *See* RX-8.

uses employees of Absolute Roofing to perform work. Mr. Kamis testified that Absolute Exteriors also uses subcontractors. (Tr. 176-77, 186, 198-203).

According to Mr. Kamis, both companies perform the same work. Absolute Exteriors is in the business of home improvement and remodeling, including commercial projects. Absolute Roofing was formed in 2011 in order to concentrate on both the commercial and residential markets.[5] Work performed by Absolute Roofing includes roof tile repair, shingled roof replacement, and church steeple renovation and restoration. The subject church project was a commercial project. (Tr. 178-80, 196-201).

The record reveals that Mr. Kamis handles safety matters for both companies. After the COs observed that Mr. Koran was working on a steep roof without fall protection, Mr. Koran called Mr. Kamis. Mr. Kamis, in turn, had Mr. Delk, an employee of Absolute Exteriors, deliver a fall protection harness to Mr. Koran. (Tr. 30, 64-65, 165-66). The truck Mr. Delk drove to the site had an Absolute Roofing logo on it. (Tr. 28-30; RX-9). As discussed above, Mr. Kamis signed the settlement agreements relating to the prior OSHA citations that form the basis of the repeat citation items in this case. (CX-4, CX-7).

The record also reveals that the companies hold themselves out to the public as the same entity. As noted in footnote 4 above, the subcontract between Nick Rogaski and Absolute Exteriors contains the heading "Absolute Roofing and Construction, Inc." (Tr. 186-87; RX-8). Mr. Kamis could not explain why Absolute Roofing appeared on the heading if it was not a party to the subcontract. (Tr. 186-87). Further, while the citations were issued to Absolute Roofing, the notice of contest Chris Kamis filed was on Absolute Exteriors' letterhead; in addition, the notice of contest stated that "Absolute Exteriors, Inc. intends to contest the violation and penalties proposed on the OSHA Citation…."

As set out *supra*, when interviewed by OSHA on the day of the inspection, Mr. Koran stated that he was an employee of Absolute Roofing. (Tr. 23, 26, 95-98, 102; RX-9, RX-10). And, during his testimony, Mr. Koran freely used both company names, Absolute Roofing and Absolute Exteriors, when describing his work at the subject jobsite. (Tr. 111-168).

[5] The record shows that Absolute Exteriors and Absolute Roofing were incorporated in April 1999 and February 2011, respectively. Mr. Kamis conceded that, despite its incorporation date, Absolute Roofing received an award as one of the top 50 contractors in the United States in 2009. He noted that before the two companies were incorporated, his brother operated the business as a sole proprietorship. (Tr. 85-87, 177-78, 185, 192-95, 208; RX-1, pgs. 12, 18).

Mr. Koran had signed a subcontract agreement, Exhibit RX-3, with Absolute Exteriors in June 2011. Mr. Kamis testified that the church on Ridge Road had contracted with Absolute Exteriors for the roof repair work being done at the time of the OSHA inspection. (Tr. 182). Mr. Koran testified that before he began work at the subject site, he received a verbal scope of work from Absolute. (Tr. 137-38). In contrast, Mr. Kamis testified that the scope of work provided to Mr. Koran was in a document maintained in Respondent's files. (Tr. 188). The scope of work described what needed to be done on the job. (Tr. 117-18, 136-38). Mr. Koran testified that, upon completion of the church roof repair project, he submitted an invoice and was paid by Absolute Exteriors. (Tr. 116, 123, 140, 167; *see also* Tr. 188).

Mr. Koran's subcontract agreement with Absolute Exteriors was received in evidence. (RX-3). Respondent did not introduce any other contract documents to support Mr. Kamis' testimony that the subject site was an Absolute Exteriors worksite and not an Absolute Roofing worksite. (Tr. 182). Mr. Kamis testified that the scope of work provided to Mr. Koran regarding the church project and Mr. Koran's invoice for the work he did on that project were maintained in the company's files. (Tr. 188). Mr. Kamis admitted that production of the invoice would have supported Respondent's contentions in this case. (Tr. 188-89). Respondent, however, did not offer the invoice or the scope of work into evidence at the hearing. (Tr. 183, 187-89; *see also* Tr. 116-17, 138).

Credibility Determination

As set out above, CO Zindroski interviewed Mr. Koran at the site in the presence of CO McNulte; CO Zindroski recorded Mr. Koran's answers as he gave them on Exhibit RX-10. Mr. Koran told the COs he was an employee of Absolute Roofing; he was not an independent contractor and did not have his own business, although he did have his own liability and worker compensation (WC) insurance, and Mr. Kamis owned Absolute and was in control of the work site. He also told the COs he had been working for Absolute for about four months; he had answered an ad in a local paper, after which he was interviewed, and he had done about 12 jobs for Absolute.[6] Mr. Koran said he was working at another site the day of the inspection when Mr. Kamis took him off that job to work at the subject site. He also said that while the tools on his tool belt were his, the other equipment at the site, including a ladder, a slide cutter and the

[6] Mr. Koran noted that Mr. Kamis usually visited his jobsites once a day. (Tr. 97).

scaffold, belonged to Absolute. Mr. Koran informed the COs that Absolute set his wages, paid him hourly, and gave him a Form 1099 for his work. (Tr. 23-27, 64-66, 70-72, 94-107).

At the hearing, Mr. Koran testified he has been a carpenter contractor for over 30 years. The ad he answered was for subcontract work for Absolute Exteriors; it was for skilled labor but no specific project, and the church job was not discussed. Mr. Koran signed a subcontract agreement, Exhibit RX-3, with Absolute Exteriors on June 3, 2011, after which he did several projects that year for Absolute; the subcontract indicated an addendum was to be attached to it, but no addendum was attached. Mr. Koran submitted no bids for any of the projects, including the church project, and he received only a verbal scope of work for that project.[7] Mr. Koran said that on the day of the inspection, he worked at the church jobsite the entire day. He also said that Absolute had the contract for the church job and that Mr. Kamis had called him two to three weeks before and asked him to do that job. Mr. Koran stated he had all the tools and supplied the ladder and scaffold at the site; he owned the scaffold, and he set it up at the jobsite. He further stated that he submitted an invoice to Absolute when the church project was completed. The invoice did not indicate the hours worked; it was a "time and materials" project, and Absolute did not know beforehand how much he would be paid. Mr. Koran indicated all of his jobs with Absolute were on that basis. (Tr. 112-20, 123-32, 138-43, 166-67).

Mr. Koran further testified he controlled the site and was responsible for the completion of the church project; he was also responsible for the scaffold and for not having fall protection at the site. He said he could have hired other workers for the job but had not needed to; he was unsure if he had WC insurance then, and he obtained no permits or licenses for the church job. Mr. Koran signed another subcontract agreement with Absolute in 2012; he had done 15 to 20 jobs for Absolute in the past year and had been paid $20,000 to $30,000 for those jobs. Over the past year, Mr. Koran had not done work for any other contractors, but he had performed some work for homeowners and had been paid $5,000 to $7,000 for that work; when he worked for homeowners it was as "Mike Koran" and "Koran Construction." Mr. Koran noted that he had incorporated Koran Construction in 1999, and he discussed a number of jobs he had done as Koran Construction. However, his subcontract with Absolute Exteriors was with Michael Koran, not Koran Construction, and the Form 1099 he received for his work for Absolute was consistent with his subcontract agreement. (Tr. 120-35, 140-64, 167-68; RX-3, pg. 8).

[7] Other testimony of Mr. Koran indicates he saw a scope of work for the project. (Tr. 117-18, 126).

The foregoing demonstrates that Mr. Koran's testimony differed in several important respects from the information provided to the COs on the day of the inspection. I observed the demeanor of the two COs as they testified and found them both to be credible witnesses. I also observed the demeanor of Mr. Koran as he testified. Mr. Koran's admitted poor memory at the hearing regarding a number of facts colors his testimony as unreliable. *See, e.g.*, Tr. 114, 122, 167. Further, the record reveals that Respondent was a significant source of income for Mr. Koran at the time of the hearing and in the preceding year. (Tr. 72-73, 80, 95-96, 99, 130-31, 141, 167; RX-9). Mr. Koran's substantial and ongoing work relationship with Respondent appears to have influenced his testimony. On this basis, and in view of the contemporaneously recorded notes of CO Zindroski, I credit the testimony of the COs over that of Mr. Koran.

Whether Indispensable Parties Were Omitted from the Complaint

As noted above, Respondent contends that it is not a proper party to this proceeding and that the Complaint fails to name two indispensable parties, *i.e.*, Michael Koran d/b/a Koran Construction, Inc. and Absolute Exteriors, Inc. I disagree. First, CO McNulte testified that when he asked for the name of the company during the telephonic closing conference, Mr. Kamis told him the company name was Absolute Roofing and Contracting, Inc. (Tr. 60-61). Mr. Kamis did not deny or rebut the CO's testimony when he testified at the hearing. I give great weight to this admission, and find that Respondent was properly cited.

Second, paragraph V of the Complaint states that the citations are attached as Exhibit A and specifically adopted by reference. Commission Rule 34(a)(2) sets out the pleading requirements for complaints filed with the Commission, and there is no question that attached citations are fully incorporated components of a complaint. *See* Commission Rule 30(d); FRCP 10(c); *Sun Shipbuilding & Dry Dock Co*., 3 BNA OSHC 1413, 1975 WL 5002, *4-5 (No. 3235, 1975). The citation must provide "sufficient particularity to inform the employer of what he did wrong, i.e., to apprise reasonably the employer of the issues in controversy." *Mead Coated Board, Inc.*, 20 BNA OSHC 1001, 2003 WL 271955, *11 (No. 01-0551, 2003), citing *Brock v. Dow Chem.*, 801 F.2d 926, 930 (7th Cir. 1986).

The citations attached to the Complaint reference the prior citations relied upon to support the repeat-serious classifications of two items. Specifically, Item 1 of Citation 2 states that Respondent was previously cited for a violation of 29 C.F.R. 1926.451(a)(1), in Inspection No. 314844515, Citation 1, Item 1a, which was affirmed as a final order on October 5, 2010.

Item 2 of Citation 2 states that Respondent was previously cited for a violation of 29 C.F.R. 1926.501(b)(11), in Inspection No. 311474373, Citation 2, Item 1, which was affirmed as a final order on January 29, 2008. Mr. Kamis signed the informal settlement agreements relating to both of these prior citation items, as shown by Exhibits CX-4 through CX-7, which were received in evidence. These exhibits also show that the company involved in Inspection No. 31484415 was Absolute Exteriors, Inc. d/b/a Absolute Roofing & Construction, and that the company involved in Inspection No. 311474373 was Absolute Roofing. In view of the specific information set out in Citation 2, Items 1 and 2, and because Mr. Kamis, Respondent's vice-president, signed the informal settlement agreements relating to the prior violations, I find that the citations in this case "apprise[d] reasonably the employer of the issues in controversy." Stated another way, I find that Respondent had fair notice that the Secretary considered Absolute Roofing and Absolute Exteriors to be one and the same. I further find that Absolute Exteriors was not an indispensable party omitted from the Complaint.

Respondent further argues that the Complaint must be dismissed not only because it fails to name Absolute Exteriors but also because it fails to allege that Respondent is a successor to Absolute Exteriors. In support of this argument, Respondent urges that Absolute Exteriors is an indispensable party to this litigation under the test outlined by the Supreme Court of Ohio to determine when the corporate form may be disregarded and individual shareholders held liable for the actions or "misdeeds" of the corporation. *See Belvedere Condo. Unit Owners' Ass'n v. R.E. Roark Cos., Inc.*, 67 Ohio St. 3d 274, 287-89, 617 N.E.2d 1075 (1993) (*Belvedere*). In other words, the *Belvedere* test provides the analytic framework for deciding when the "corporate veil" may be "pierced" to reach individual corporate liability.[8] *Id.* at 1090-91. The *Belvedere* test also has been applied by courts when determining whether a corporate entity may be disregarded and the parent corporation and its subsidiary held to be a single entity. *See Starner v. Guardian Indus.*, 143 Ohio App. 3d 461, 468, 758 N.E. 2d 270, 275-76 (2001); *Wallace v. Shelly and Sands, Inc.*, 2005 WL 678526, pgs. 7, 9 (Ohio App. 7 Dist., 2005).

[8] The corporate form may be disregarded and individual shareholders held liable for corporate wrongdoing when: (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Id.*

I find that Respondent's reliance on *Belvedere* is misplaced. The issue in this case is not whether Respondent is a successor to Absolute Exteriors; rather it is whether the companies are a "single entity" or "single employer," such that Citation 2, Items 1 and 2, were properly classified as repeat-serious violations. Further, there is no issue in this case in regard to piercing the corporate veil in order to hold individuals liable. And, while the *Belvedere* test has been used by Ohio courts to determine whether a parent corporation and its subsidiary may be held to be a single entity, again, that is not the precise issue in this case. Finally, as set out *infra*, the Commission has its own precedent that it follows to determine whether two companies may be found to be a single entity or a single employer. Respondent's arguments with respect to the *Belvedere* test are rejected.[9]

Third, Respondent's contention that the Complaint failed to name Michael Koran d/b/a Koran Construction, Inc. is also misplaced. For one thing, Mr. Koran told the COs during the inspection that he was working at the site as an employee of Absolute Roofing. (Tr. 23, 26, 95, 98, 102; RX-9, RX-10). However, even disregarding that evidence, the record does not show that the entity performing the work at the site was Michael Koran d/b/a Koran Construction, Inc. Mr. Koran testified that he signed the subcontract agreement with Absolute Exteriors and worked at the church jobsite as Michael Koran, a subcontractor, and not on behalf of Koran Construction, Inc. (Tr. 163-64, 168; RX-3). Also, for the year 2011, Absolute Exteriors provided a Form 1099 to Michael Koran for compensation totaling $30,789.15. (Tr. 135, 167-68; RX-3, pg. 8). The Form 1099 was not issued to Koran Construction, Inc. (Tr. 168). On the basis of the evidence of record, Respondent's assertion that the Complaint should have named Michael Koran d/b/a Koran Construction, Inc. is rejected.[10]

Whether Absolute Roofing and Absolute Exteriors are a Single Entity

Pursuant to long-standing Commission precedent, two related employers will be regarded as a single entity or a single employer where they share a common worksite and common

[9] I note that even if the *Belvedere* test were applied here, the evidence of record would satisfy that test, in that Absolute Roofing and Absolute Exteriors were operating as a single employer and were "fundamentally indistinguishable." *See generally*, Starner, 143 Ohio App. 3d at 276.

[10] Numerous exhibits were received in evidence regarding Koran Construction, Inc., including documents reflecting its corporation status, tax identification, insurance, license and permit bond. Also received in evidence were documents as to other projects Koran Construction, Inc. had performed, such as written proposals and invoices. (Tr. 132-35, 143-54. 160-65; RX-3 through RX-6). However, business records with respect to Koran Construction, Inc. have little relevance in this case and are accorded little weight.

ownership, management or supervision, and where they have interrelated and integrated operations. *See C.T. Taylor Co.*, 20 BNA OSHC 1083, 1086-87 (Nos. 94-3241, 94-3327, 2003); *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783 (No. 88-1745, 1993). *See generally, Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946) (to effectuate a clear legislative purpose, technical distinctions between related corporations will be disregarded). The Secretary bears the burden of showing that the cited employer is part of a single-employer relationship. *Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356, 1358 n.4 (Nos. 02-1164 & 02-1174, 2011), *aff'd*, 692 F.3d 65, (2d Cir. 2012), *overruling in part Trinity Indus., Inc.*, 9 BNA OSHC 1515, 1518-19 (No. 77-3909, 1981) (overruling the *Trinity* holding that the employer has the burden of persuasion when the Secretary alleges a single-employer relationship).

The record shows that Absolute Roofing and Absolute Exteriors have the same business address and share the same office; they also have the same owners and managers, with Mr. Kamis and his brother, Chris Kamis, being vice-president and president, respectively of both companies. (Tr. 32, 61-62, 186, 199-200). Mr. Kamis testified that the two companies do the same work; he further testified that the companies at times share employees, *i.e.*, employees of Absolute Roofing sometimes work for Absolute Exteriors. (Tr. 178-80, 198-99).

The record further shows that Absolute Roofing and Absolute Exteriors have interrelated and integrated operations and hold themselves out to the public as the same entity. As noted in footnote 5, *supra*, while it was not incorporated until 2011, Absolute Roofing received an award in 2009 as one of the top 50 contractors in the country. And as discussed in footnote 4 above, the subcontract Nick Rogaski signed in 2010 had Absolute Roofing's heading on it; however, the first line of the subcontract stated it was between Mr. Rogaski and Absolute Exteriors. (RX-8). Mr. Kamis could not explain this discrepancy. (Tr. 186-87). Also, the subcontract Mr. Koran signed was with Absolute Exteriors, but his employer at the subject site was Absolute Roofing. (Tr. 23, 26, 60-61, 98, 102; RX-3). In addition, while the citations in this case were issued to Absolute Roofing, the notice of contest Chris Kamis filed was on Absolute Exteriors' letterhead; moreover the notice of contest stated that "Absolute Exteriors, Inc. intends to contest the violation and penalties proposed on the OSHA Citation…." Finally, the prior citations issued to the companies are further evidence of their interrelation and holding themselves out as the same entity. *See* discussion on pages 8-9, *supra*.

For all of the foregoing reasons, I find that the Secretary has met his burden of proving, under the Commission's precedent set out above, that Absolute Roofing and Absolute Exteriors operate as a single entity.

Whether Mr. Koran was the Employee of Respondent at the Site

Only an "employer" may be cited for a violation of the Act. *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992). It is the Secretary's burden to prove that the cited entity was in fact an employer under the Act. *Taj Mahal Contracting*, 20 BNA OSHC 2020, 2023 (No. 03-1088, 2004). Where this determination must be made, the Commission has used either the "economic realities" test or the *Darden* "common law agency" or "right of control" test. *Don Davis*, 19 BNA OSHC 1477, 1480 (No. 96-1378, 2001). (citations omitted). Both of these tests involve essentially similar factors. *Id*. Under *Darden*, the court must analyze "the hiring party's right to control the manner and means by which the product is accomplished." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992). Such analysis must include control over the workers and not just the results of their work. *Don Davis*, 19 BNA OSHC at 1482. Thus, one who cannot hire, discipline, or fire a worker, cannot assign him additional projects, and does not set his pay or work hours cannot be said to control the worker. *Id*. Under the economic realities test, the factors to consider include who pays the employees, who directs and controls them, who provides the safety training and instructions, and who the employees consider to be their employer. *Griffin & Brand*, 6 BNA OSHC 1702, 1703 (No. 14801, 1978); *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158 (No. 87-214, 1989). *See also Loomis Cabinet Co.*, 15 BNA OSHC 1635 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994).

Mr. Koran's Subcontract with Absolute Exteriors

Before addressing the economic realities and *Darden* factors set out above, it is necessary to determine whether Mr. Koran's subcontract governed his work at the subject worksite. The record shows that Mr. Koran signed a subcontract agreement with Absolute Exteriors on June 3, 2011. *See* RX-3. However, he told the COs during the OSHA inspection that he did not have a subcontract agreement and that he was not an independent contractor. (Tr. 102; RX-10). Mr. Koran explained this discrepancy at the hearing when he testified that he did not have a specific written subcontract agreement for the church project; he also explained that Exhibit RX-3 represented an ongoing relationship with Absolute Exteriors, which allowed him to work for that company as a subcontractor no matter what the work might be. (Tr. 119-20, 157-60). Mr. Koran

also told the COs he did not have his own business, yet it is clear from the documents received in evidence that he did; the documents relating to Koran Construction are described in footnote 10, *supra*. (RX-10). Mr. Koran's hearing testimony clarified that while he had an incorporated business, *i.e.*, Koran Construction, Inc., that business was not involved with his work at the church jobsite. (Tr. 163-64, 167-68).

Mr. Koran and Mr. Kamis both testified that Mr. Koran's work at the site was done as a subcontractor for Absolute Exteriors.[11] (Tr. 115, 157-60, 163, 167-68, 187). However, the record does not support a conclusion that the work at the site was done pursuant to Exhibit RX-3. First, such a conclusion is contrary to Mr. Koran's statement to the COs that his employer at the site was Absolute Roofing; it is also contrary to Mr. Kamis' statement to CO McNulte that the name of the company at the site was Absolute Roofing. Second, many of the provisions in RX-3 were not met. For example, the subcontract specifies an addendum was to be attached to it, but Mr. Koran testified he never saw an addendum for any of the projects he did for Absolute in 2011.[12] (Tr. 125-30; RX-3, ¶ 1). The subcontract also states that "[s]ubcontractor shall be paid the consideration established by the Addendum." (Tr. 129-30; RX-3,¶ 5). Again, Mr. Koran never saw an addendum to the subcontract. (Tr. 130). Further, the subcontract states that the subcontractor "shall procure, pay for and deliver to the Contractor all the necessary licenses, permits and certificates ... and shall arrange for all tests, inspections and approvals as may be necessary or required." (RX-3, ¶ 2). Mr. Koran obtained no licenses or permits for the work he performed for Absolute, and he arranged for no tests, inspections or approvals. (Tr. 122, 128-29). Additionally, before signing the subcontract, Mr. Koran neither provided a copy of his WC insurance to Absolute nor visited any jobsite, as set out in Exhibit RX-3. (Tr. 125, 129, 187; RX-3, ¶¶ 2, 3). Third, a review of RX-3 indicates the subcontract is intended to apply to a single project, as described in an addendum to the subcontract, and not, as Mr. Koran and Mr. Kamis testified, to any and all work Mr. Koran might do for Absolute. (Tr. 119-20, 157-60, 187). I find that the subcontract agreement did not govern Mr. Koran's work at the subject site.

The Economic Realities Test

[11] Mr. Kamis specifically testified that RX-3 applied to all the work Mr. Koran did for Absolute Exteriors. (Tr. 187).

[12] While Mr. Kamis testified the scope of work was the addendum, this testimony is given no weight, as Respondent did not provide the document to OSHA or offer it in evidence at the hearing. (Tr. 187-89).

Under the economic realities test, the first factor to consider is who pays the employees. The record establishes that Mr. Koran received a Form 1099 from Absolute Exteriors for his work during 2011, including his work at the church jobsite. (Tr. 135, 167-68; RX-3, pg. 8). The name on the Form 1099 is shown as "Michael Koran," and the amount he was paid is shown as $30,789.15.[13] Respondent's argument that the work at the site was done by Michael Koran d/b/a Koran Construction, Inc. was considered and rejected *supra*. The record demonstrates, therefore, that Absolute Exteriors paid Mr. Koran for his work at the subject worksite.

The second factor is who directs and controls the employees. As discussed above, CO Zindroski interviewed Mr. Koran during the inspection, in the presence of CO McNulte, and she took notes of his responses, which are set out in Exhibit RX-10. The following is a summary of those responses. Absolute Roofing was Mr. Koran's employer at the site, and Mr. Kamis was the owner of the company and in charge of the worksite; Mr. Koran had been working for Absolute for almost four months and had worked at 12 sites during that time. Mr. Kamis was the person who sent Mr. Koran out on jobs, and earlier that day he had been working at another site when Mr. Kamis had called him and told him to go to the church jobsite; Mr. Koran had been at the church jobsite since about 10 a.m., and he was to do the work at the site in two days. Mr. Kamis generally visited Mr. Koran's jobsites once a day, although he had not been to the church worksite the day of the inspection, and Absolute Roofing was responsible for completing the church project; further, Mr. Kamis set Mr. Koran's work schedule and wages, and he was paid per hour.[14] Mr. Koran did not have the right to hire or fire anyone, and the only equipment he owned at the site were the tools on his tool belt. (Tr. 95-109; RX-10).

Based on my credibility determination on page 8, *supra*, the testimony of the COs has been credited over that of Mr. Koran. The foregoing evidence from Exhibit RX-10 is therefore found as fact, and any testimony of Mr. Koran contrary to that evidence is found not credible.[15] In view of the above evidence, I conclude that Respondent, in the person of Mr. Kamis, directed and controlled the work of Mr. Koran at the subject jobsite.

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[13] Mr. Koran was paid by check from Absolute for the church project. (Tr. 116).

[14] Mr. Koran reported to the company shop at 7:00 a.m. for work assignments, but he could set his own quitting time as long as he worked over eight hours a day. *See* RX-9, RX-10, Nos. 6, 30.

[15] I also find not credible any testimony of Mr. Kamis that is inconsistent with that of the COs, based on my observing his demeanor, his interest in this matter, his inability to explain certain discrepancies (*see, e.g.*, pg. 6, ¶ 2), and his statement to CO McNulte that Respondent was the employer at the site.

The third factor is who provides safety training and instructions. The record shows that Respondent had no work rules and gave Mr. Koran no safety training. (Tr. 29, 49; RX-10, Nos. 32. 35). The record also shows, however, that Mr. Kamis pulled Mr. Koran off of another job the morning of the inspection and instructed him to go to the subject site. (Tr. 27, 96-97, 105; RX-9, RX-10, No. 3). In addition, the record shows that Absolute had the contract for the church project and that Mr. Koran never spoke to the church's owner about the project. (Tr. 115, 122, 182). The verbal instructions he received were from Mr. Kamis. (Tr. 122, 138). Finally, after the COs spoke to Mr. Koran about his lack of fall protection, Mr. Koran called Mr. Kamis, who sent Mr. Delk to the site with a harness for Mr. Koran to use. (Tr. 30, 165-66). Thus, while Respondent gave Mr. Koran no safety training, it did instruct him in regard to the church project; it also provided him with fall protection after Mr. Koran called Mr. Kamis.

The final factor is who the employees consider to be their employer. Mr. Koran told the COs that Absolute Roofing was his employer at the site. (Tr. 26, 95, 102; RX-10, No. 31).

The Darden Test

Under *Darden*, as indicated above, the court must analyze the hiring party's right to control the manner and means by which the product is accomplished. *Darden*, 503 U.S. at 323-24. *Darden* provides further guidance as to other factors to consider, as follows:

> [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Id*.

The record establishes that Mr. Koran has been a carpenter contractor for over 30 years and that Mr. Kamis considered him a skilled craftsman with the requisite experience to do the work at the church jobsite himself. (Tr. 88, 120, 142-43, 183-84; RX-10). The record also establishes that while Mr. Koran owned the tools on his tool belt, the other equipment at the site, including the ladder, scaffold and slide cutter, belonged to Absolute. (Tr. 96; RX-10). The church jobsite was located in Brooklyn, Ohio, and Mr. Koran had been doing work for Absolute for almost four months at the time of the inspection; he continued his work with the company and was still working for Absolute nearly a year later. (Tr. 96, 130-31; RX-10).

The record shows that Respondent had the right to assign additional projects to Mr. Koran. On the morning of the inspection, when Mr. Koran was working at a different site, Mr. Kamis pulled him off of that job and told him to go to the church site to work on that project; Mr. Koran was given two days to complete the project. (Tr. 96-97, 105; RX-10). Mr. Koran reported to Respondent's shop at 7:00 a.m. each morning for work assignments, but he could set his own quitting time as long as he worked over eight hours a day. (Tr. 97; RX-9, RX-10). Absolute paid Mr. Koran on an hourly basis, with Mr. Kamis setting the hourly wage, and Absolute paid Mr. Koran by check for his work at the church jobsite. (Tr. 96, 116, 167; RX-10). Mr. Koran did not have the right to hire anyone to help him with the church project. (Tr. 95; RX-9, RX-10). The record clearly shows that Absolute is in business and that the church project was part of its regular business. (Tr. 178-80, 196-97, 200-01). Finally, the record shows that other than an hourly wage, Absolute did not provide any employee benefits to Mr. Koran; for his work during 2011, Absolute provided Mr. Koran with a Form 1099. (RX-3, pg. 8, RX-10).

In view of the foregoing, and the economic realities factors set out *supra*, I find that Mr. Koran was an employee of Respondent at the church jobsite. While the *Darden* and economic realities factors are sufficient to make this finding, I have also given great weight to Mr. Koran's statement to the COs that his employer was Absolute Roofing and to Mr. Kamis' admission to CO McNulte that the company at the site was Absolute Roofing. (Tr. 23, 26, 60-61, 95, 102; RX-10). In reaching my conclusion that Mr. Koran was Respondent's employee at the site, I have fully considered RX-3, the subcontract agreement, and Respondent's arguments that Mr. Koran was a subcontractor. However, as found above, many of the terms of the subcontract were not met. As also found above, the language of RX-3 indicates the subcontract was intended to apply to a single project, as described in an addendum to be attached to the document; no such addendum was attached, and the testimony of Mr. Koran and Mr. Kamis to the effect that the subcontract was meant to apply to any and all work Mr. Koran might perform for Respondent is neither credible, under the circumstances of this case, nor compliant with RX-3. For the reasons set out on page 13 above, the subcontract did not govern Mr. Koran's work at the church jobsite. Respondent's arguments to the contrary are rejected.

The Secretary's Burden of Proof with respect to the Citation Items

To demonstrate a violation of an OSHA standard, the Secretary has the burden of proving that: (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited

standard; (3) employees had access to the violative condition; and (4) the employer either knew or could have known of the violation with the exercise of reasonable diligence. *See Atlantic Battery,* 16 BNA OSHC 2131, 2137 (No. 90-1747, 1994); *Astra Pharm. Prod., Inc*., 9 BNA OSHC 2126, 2130-31 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Respondent does not dispute elements (1) through (3) in regard to the alleged violations; rather, its contention in this case has been that OSHA cited the wrong entity. (Tr. 11-16; R. Brief, pgs. 3, 16). Respondent's assertions in this regard, however, have been considered and rejected *supra*. Respondent does dispute that it had knowledge of the alleged violations, and it contends that the Secretary has failed to prove that it had either actual or constructive knowledge of the cited conditions. (R. Brief, pgs. 15-16). The knowledge element is addressed *infra*, in the discussion relating to the merits of the citation items.

Citation 1 – Item 1: Alleged Serious Violation of 29 C.F.R. § 1926.451(c)(2)

This item alleges that the employer, during roofing repair activities, did not ensure that the fabricated frame scaffold an employee was using at the site rested on base plates. The cited standard provides as follows:

> Supported scaffold poles, legs, posts, frames, and uprights shall bear on base plates and mud sills or other adequate firm foundation.

During the inspection, the COs saw Mr. Koran working on the steep roof of the church without fall protection; the COs measured the distance from the eave of the roof to the ground and found it to be 13.3 feet. There was a scaffold set up immediately below where Mr. Koran was working; it had cross-braces but was missing base plates and guardrails. Further, the COs determined the scaffold was not rated for the impact that would have resulted if Mr. Koran had fallen off the roof and onto the scaffold; the scaffold could have collapsed. (Tr. 24-29, 33-38, 51, 94-95; CX-1, CX-2, CX-3). CO McNulte testified that base plates placed over the mud sills add to the scaffold's stability; he additionally testified that the base plates come with the scaffold, are recommended by the manufacturer, and are required by the standard. (Tr. 34).

CO McNulte's testimony and inspection photographs show Mr. Koran working on the steep roof of the church without fall protection and the scaffold set up below him. *See* CX-2, CX-3. His testimony and photograph CX-1 show that the scaffold legs were not sitting on base plates, as required. Respondent rebutted none of this evidence. The Secretary has demonstrated

that the standard applies, that its terms were not met, and that Mr. Koran was exposed to the hazard of the scaffold's reduced stability due to its not having the required base plates.

In regard to knowledge, the Commission has held that where the employer fails to exercise reasonable diligence to discover the presence of the violative condition, the employer will be found to have constructive knowledge of the violation. "Factors relevant in the reasonable diligence inquiry include the duty to inspect the work area and anticipate hazards, the duty to adequately supervise employees, and the duty to implement a proper training program and work rules." *N&N Contractors, Inc. v.* OSHRC, 255 F.3d 122, 127 (4th Cir. 2001). *See also Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992); *Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1056 (No. 86-1087, 1991). The Commission has also held that where the nature of the violative condition is readily observable, a finding of constructive knowledge is warranted. Where the violation is in plain view, in a relatively conspicuous location, and readily observable to someone passing by, the Commission will find that the employer could have known of the violative condition with the exercise of reasonable diligence. *See Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996).

I find that Respondent, with the exercise of reasonable diligence, could have discovered that the scaffold legs were not resting on base plates as required. The condition was readily observable, and the COs saw it during their inspection. (Tr. 25-26, 33-34, 94-95; CX-1). Further, the record shows that Mr. Kamis generally visited Mr. Koran's jobsites once a day to check on the status of the work. (Tr. 97, 104-05; RX-9, RX-10). But at the time of the OSHA inspection, which took place at about 2:00 p.m., Mr. Kamis had not visited the church jobsite that day. (Tr. 24, 104-05; RX-9, RX-10). The record also shows that when the COs asked about work rules regarding the hazards they had seen, including the lack of fall protection and the unsafely constructed scaffold, Mr. Koran told them he was unaware of any; he also told them he had received no safety training from the company. In addition, Mr. Koran told the COs that the worksite he had come from that morning, in order to work at the church jobsite, had no fall protection either. (Tr. 27-29, 96-97, 104-05, 108; RX-10). Based on the evidence of record, and the quote set out *supra* from *N&N Contractors*, I conclude that Respondent had constructive knowledge that the scaffold was missing its base plates.

CO McNulte testified that a fall from the roof or the scaffold if it had collapsed could have resulted in broken bones. (Tr. 51). This item is affirmed as a serious violation.

Citation 1 – Item 2: Alleged Serious Violation of 29 C.F.R. § 1926.451(g)(1)

This item alleges that the employer, during roofing activities, did not ensure that an employee using a fabricated frame scaffold was protected from a fall of approximately 13.3 feet by using fall protection systems/devices. The cited standard provides in relevant part that:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold.

The COs observed Mr. Koran working on the steep roof of the church without any fall protection; a scaffold was set up just below where Mr. Koran was working, and while it had cross-braces it did not have any guardrails in place. The COs measured the distance from the eave of the roof to the ground to be 13.3 feet. (Tr. 24-28, 35-38, 94). Exhibits CX-2 and CX-3 depict these conditions. CO McNulte testified that the scaffold was not rated for use as a catch platform and that, if Mr. Koran had fallen onto it, it could have collapsed; he also could have simply rolled off of the scaffold and fallen 13.3 feet to the ground. (Tr. 51). Further, while the CO did not testify in this regard, CX-2 and CX-3 show tiles stacked on the top of the scaffold. It is reasonable to infer that Mr. Koran would have had to access the scaffold to obtain the tiles he needed as he worked; as there were no guardrails or other fall protection on the scaffold, he would have been exposed to a fall hazard when obtaining the tiles from the top of the scaffold.

Respondent did not rebut any of the foregoing evidence, which establishes that the standard applies, that its terms were not met, and that Mr. Koran was exposed to the hazard of falls from the top of the scaffold. As to knowledge, the discussion set out in Item 1, *supra*, applies equally to this discussion, and I find that Respondent could have discovered the violative condition with the exercise of reasonable diligence. This item is affirmed as serious, in light of CO McNulte's testimony that a fall to the ground from the scaffold could have resulted in broken bones. (Tr. 51).

Citation 2 – Item 1: Alleged Repeat-Serious Violation of 29 C.F.R. § 1926.451(a)(1)

This item alleges that the employer, during a roofing repair, did not ensure that a fabricated frame scaffold that was positioned below an employee on a steep roof was able to

support without failure the intended load that could have been applied to it. The cited standard provides in pertinent part as follows:

> [E]ach scaffold and scaffold component shall be capable of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted to it.

The discussion regarding Items 1 and 2 above shows that the scaffold set up next to the church building was positioned directly underneath the area on the roof where Mr. Koran was working. It also shows that Mr. Koran was not using any fall protection, that the scaffold was not rated to be used as a catch platform, and that if he had fallen from the roof and onto the scaffold, the scaffold could have collapsed; the fall distance to the ground was 13.3 feet, and such a fall could have resulted in broken bones. (Tr. 24-25, 28-29, 35-38, 51; CX-2, CX-3). Respondent has not rebutted any of this evidence. The Secretary, therefore, has established that the standard applies, that its terms were not met, and that Mr. Koran was exposed to the hazard of the scaffold collapsing if he had fallen onto it. The discussion relating to knowledge, *supra*, applies equally to this citation item, and I find that the Secretary has demonstrated that Respondent, with the exercise of reasonable diligence, could have discovered the violation. This item is affirmed as serious, in view of CO McNulte's testimony that broken bones could have been the result if Mr. Koran had fallen onto the scaffold and it had collapsed. (Tr. 51).

This item has been classified as a repeat-serious violation. The discussion set out above in this decision, at the bottom of page 8 and the top of page 9, shows that Respondent was previously cited for a violation of 29 C.F.R. § 1926.451(a)(1) and that the prior violation became a final order of the Commission before the issuance of the subject citation item in this case. The Secretary has proven that Item 1 of Citation 2 in this case was properly classified as repeat. *See* section 17(c) of the Act; *see also Potlatch Corp.*, 7 BNA (SHC 1061, 1063-64 (No. 16183, 1979). Item 1 of Citation 2 is therefore affirmed as a repeat-serious violation.

Citation 2 – Item 2: Alleged Repeat-Serious Violation of 29 C.F.R. § 1926.501(b)(11)

This item alleges that the employer, during roofing activities, did not ensure an employee was protected from a fall of approximately 13.3 feet by using fall protection systems/devices while working from a steep pitched roof. The cited standard states that:

> 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 toe boards, safety net systems, or personal fall arrest systems.

The evidence set out above, in the discussions relating to the other citation items in this case, establishes that Mr. Koran was working on a steep-pitched roof without using any fall protection; the pitch of the roof was 9/12, and the distance to the ground from the eave of the roof was 13.3 feet. (Tr. 24-29, 35-36; CX-2, CX-3). CO McNulte testified that a fall of that distance could have resulted in broken bones. (Tr. 51). Respondent rebutted none of this evidence. The Secretary has demonstrated that the standard applies, that its terms were not met, and that Mr. Koran was exposed to the hazard of falling from the roof and sustaining serious injuries. The knowledge discussion *supra* applies equally to this citation item, and I find the Secretary has shown constructive knowledge of the violation. This item is affirmed as serious.

This item has also been classified as a repeat-serious violation. The discussion set out above in this decision, at the bottom of page 8 and the top of page 9, shows that Respondent was previously cited for a violation of 29 C.F.R. § 1926.501(b)(11) and that the prior violation became a final order of the Commission before the issuance of the subject citation item in this case. The Secretary has proved that Item 2 of Citation 2 in this case was properly classified as repeat. This item is accordingly affirmed as a repeat-serious violation.

Penalty Determination

Section 17(j) of the Act provides that the Commission shall have the authority to assess all civil penalties. When determining the appropriateness of a penalty, the Commission must give due consideration to four criteria: (1) the size of the employer's business, (1) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations.

The gravity of the violation is the most important factor in the penalty assessment. Determination of the gravity of a particular violation requires a consideration of the number of exposed employees, the precautions taken to protect employees, the duration of employee exposure, and the probability that an accident will occur. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993), and cases cited therein.

The record shows that one employee, Mr. Koran, was exposed to the cited hazards. The duration of his exposure was four hours, on the day of the OSHA inspection, and, based on the record, no precautions were taken to protect Mr. Koran from the hazards at the site. The record also shows that if he had fallen off the roof or the scaffold, or if the scaffold had collapsed, Mr. Koran likely would have suffered broken bones. (Tr. 51). In agreement with OSHA, I find that

an injury caused by the cited hazards would have medium severity; I also find the probability of injury was greater, except for the violation relating to the base plates, particularly in view of the employee's working on a steep-pitched roof without any fall protection. As to the base plates violation, I find that the probability of an injury was lesser. I conclude that the gravity of the violations was moderate. (RX-7).

In regard to size, Respondent is a small employer. (Tr. 49, 198, 202-03). OSHA gave the employer a 40 percent reduction in the penalty for size, which I find appropriate. (Tr. 49; RX-7, pg. 3). Respondent is not entitled to any reduction for history; it had been cited within the previous five years for fall protection and scaffold violations, and OSHA's 10 percent increase to the penalty for that reason was proper. (Tr. 49-50; CX-4 through CX-7, RX-7, pg. 3). Also, Respondent is not entitled to a good faith credit; the record shows that it did not have a safety program or provide safety training for its employee working at the subject site. (Tr. 49).

Accordingly, I find the Secretary's proposed penalty of $21,120.00 for the violations in this case appropriate, and that penalty is assessed

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.451(c)(2), is AFFIRMED, and a penalty of $2,640.00 is assessed.

Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.451(g)(1), is AFFIRMED, and a penalty of $2,640.00 is assessed.

Citation 2, Item 1, alleging a repeat-serious violation of 29 C.F.R. § 1926.451(a)(1), is AFFIRMED, and a penalty of $7,920.00 is assessed.

Citation 2, Item 2, alleging a repeat-serious violation of 29 C.F.R. § 1926.501(b)(11), is AFFIRMED, and a penalty of $7,920.00 is assessed.

/s/ Carol A Baumerich

Carol A. Baumerich
Judge, OSHRC

Dated: August 20, 2013
Washington, D.C.