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.

R&S ROOFING, LLC,

Respondent.

OSHRC Docket No. 12-2427

Appearances: Paul Spanos, Esquire
U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For the Secretary

Laurie J. Pangle, Esquire
Spengler Nathanson P.L.L., Toledo, Ohio
For the Respondent

Before: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

On August 30, 2012, the Occupational Safety and Health Administration (OSHA) inspected a worksite in Toledo, Ohio, where the Respondent, R&S Roofing, LLC (R&S) was replacing a rubber roof on a one-story commercial building. On October 31, 2012, OSHA issued a Citation and Notification of Penalty (Citation) to R&S that alleged one serious violation of OSHA's standard for fall protection in construction workplaces. 29 C.F.R. Part 1926, Subpart M (§§ 1926.500 to .503).

R&S timely filed a notice of intention to contest the Citation, and OSHA duly forwarded the contest to the Occupational Safety and Health Review Commission (Commission). The Commission has jurisdiction pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq*. (Act). The contest was assigned to the undersigned Commission administrative law judge for hearing, which was conducted in Toledo, Ohio, on

June 11, 2013. Both parties timely filed post-hearing briefs.

The broad issues for decision are whether R&S is covered by the Act, and if so, whether R&S violated the cited standard as alleged. R&S asserts that it is not covered because it is not an "employer" as defined in section 3(5) of the Act. Alternatively, it denies that it violated the cited standard.

As described below, the Secretary has carried his burden to prove by a preponderance of the evidence that R&S (1) was covered by the Act because it was an "employer" as defined in section 3(5), and (2) violated 29 C.F.R. § 1926.501(b)(10) by exposing its employees to fall hazards of over 12 feet without providing adequate fall protection. Moreover, R&S has failed to prove either of the asserted affirmative defenses of "infeasibility" or "greater hazard." The Citation is affirmed, and a penalty of $2,800 is assessed.

Background

On August 30, 2012, at about 11:30 a.m., OSHA Compliance Safety and Health Officer (CO) James McManus was driving by a worksite in Holland, Ohio, when he saw four persons working on the flat roof of a one-story commercial building without any apparent fall protection. (Tr. 21-24). The CO stopped and watched the workers from ground level. After spending about 30 minutes watching and taking some photographs of the workers, the CO approached the workers and asked to speak to the person in charge. (Tr. 75-76; Ex. 1). Mr. Rob Tipping then descended from the roof, and the CO introduced himself. Mr. Tipping consented to being interviewed and responded to the CO's questions. The CO then interviewed two of the other workers -- Mr. Robert Smith and Ms. Sabrina Tipping (who is the daughter of Mr. Tipping). The remaining worker chose not to be interviewed. (Tr. 149; Ex. P, pp. 27-31; Ex. S).

OSHA later issued the Citation alleging that R&S had violated the fall protection standard of 29 C.F.R. § 1926.501(b)(10) in that "no acceptable form of fall protection was being utilized to protect employees from falling approximately 12.1 feet to the paved ground below."

Whether the Respondent was an "Employer"

Only an "employer" may be cited for a violation of the Act. Section 9(a) of the Act; 29 U.S.C. § 658(a); *Allstate Painting & Contracting*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated). The Secretary bears the burden of proving by a preponderance of the evidence that a cited entity is an "employer." *See Lake County Sewer Co., Inc.*, 22 BNA OSHC 1522, 1523 (No. 07-1786, 2009). Whether a cited entity is an "employer" is an issue of the Act's

coverage (*not* an issue of subject matter jurisdiction). *StarTran, Inc.*, 21 BNA OSHC 1730, 1732 (No. 02-1140, 2006) *aff'd in relevant part,* 290 Fed. Appx. 656 (5th Cir. 2008) (unpublished).

In section 3(5) of the Act, the term "employer" is defined as "a person engaged in a business affecting commerce who has employees."[1] 29 U.S.C. § 652(5).

R&S denies that it is "engaged in a business affecting commerce." R&S denies further that it "has employees" and argues that it has never had employees, but rather than all persons who work for R&S do so as independent contractors. (Resp. Br. 1-7).

As described below, the Secretary has met his burden to establish that at the time of the inspection R&S was covered by the Act because it was an "employer" as defined in section 3(5).

"Person Engaged in a Business Affecting Commerce"

R&S is an Ohio limited liability corporation that was formed in June 2010. Mr. Rob Tipping and his wife, Stacey Tipping, are the founding members, and they remain the only members of R&S. (Resp. Exs. A, B and C). R&S is a "person" as defined in section 3(4) of the Act, 29 U.S.C. § 652(4).

R&S is in the business of residential and commercial roofing. (Tr. 124-25). The particular project that resulted in the issuance of the Citation was installation of rubber roofing material on an existing commercial building in Toledo, Ohio. (Ex. F). Such roofing work constitutes "construction work," which is defined in 29 C.F.R. § 1926.32(g) as "work for construction, alteration, and/or repair, including painting and decorating." The construction industry as a whole affects "commerce," and even a small business within that industry is "engaged in a business affecting commerce" within the meaning of section 3(5). *Slingluff v. OSHRC*, 425 F.3d 861, 865 (10th Cir. 2005) (holding that a small commercial stuccoing business was subject to the requirements of the Act because the "economic activity of stuccoing/construction, as an aggregate, affects interstate commerce"); *Clarence M. Jones*, 11

[1] The terms "commerce," "person," and "employees" used in this definition are themselves defined terms in section 3, 29 U.S.C. § 652, as follows:

> (3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, . . . or between points in the same State but through a point outside thereof.
>
> (4) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons, ...
>
> (6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

BNA OSHC 1529, 1531 (No. 77-3676, 1983) (holding that construction work is within the class of activities Congress intended to regulate). The Secretary has proven that R&S was "engaged in a business affecting commerce" within the meaning of section 3(5).

"Has Employees"

In determining whether a cited entity "has employees" within the meaning of section 3(5), the Commission relies upon the common law test adopted by the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (*Darden*). *See Sharon & Walter Constr., Inc.,* 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010); *Allstate Painting & Contracting*, 21 BNA OSHC at 1035; *see also Weary v. Cochran*, 377 F.3d 522 (6th Cir. 2004) (applying *Darden* in context of ADEA claim). The Court in *Darden* listed the following factors to be considered in determining whether a worker is an employee or an independent contractor:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the 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.

Darden at 323-324 (quoting *Cmty. for Creative Non–Violence v. Reid*, 490 U.S. 730, 751-52 (1989)). The *Darden* Court noted that this "common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" *Id.* at 324 (ellipsis in original), quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968). The Commission has observed that the *Darden* Court focused primarily on the first stated factor: the extent of the hiring party's right to control the manner and means by which the product is accomplished. *Sharon & Walter Const., Inc.*, 23 BNA OSHC at 1289.

The Commission has noted that the "primary focus" of the *Darden* common law test "is whether the putative employer controls the workers." *Allstate Painting & Contracting*, 21 BNA OSHC at 1035. The Commission has also noted that the central inquiry of the *Darden* test "is the question of whether the alleged employer controls the workplace." *Don Davis*, 19 BNA

OSHC 1477, 1480 (No. 96-1378, 2001) (discussing commonality of the factors in the *Darden* test and the "economic realities" test that the Commission had used before *Darden*) (quoting *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1638 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994)).

R&S is an Ohio limited liability corporation (LLC) that was formed in June 2010 with Rob Tipping and Stacey Tipping as its founding members.[2] (Tr. 126; Resp. Exs. A & B). Both Rob Tipping and Stacey Tipping testified that R&S has no employees and operates solely through independent contractors, with whom R&S has entered into agreements that are titled "Independent Subcontractor Agreement," and which Mr. Tipping describes as "self-employment contracts." (Tr. 126-27, 181-82; e.g., Ex. D). Both Rob Tipping and Stacey Tipping have entered into such agreements with R&S. (Exs. D and E). Provisions in the identical agreements signed by all of the workers include the following (emphasis in originals):

> 1. This Independent Subcontractor Agreement establishes the lack of employer-employee relationship between the parties . . . .
>
> 4. Independent Subcontractor works under his own name when performing services for R&S Roofing LLC.
>
> 5. R&S Roofing LLC shall not cover Independent Subcontractor under any of its insurance policies or be liable for injuries incurred in performing its services . . . .
>
> 6. Independent Subcontractor may do similar work for others any time it wishes. R&S Roofing LLC shall not have priority on subcontractor time. The Independent Contractor shall not work during any set hours.
>
> 7. Independent Subcontractor performs services for an indefinite period on various jobs of his choosing, or until his services are no longer needed by R&S Roofing LLC or until Independent Contractor decides to no longer provide his services to R&S Roofing LLC.
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> 8. R&S Roofing LLC shall pay Independent Subcontractor at the end of each job, of which his services were provided and will issue a 1099 at the end of the year.
>
> 9. R&S Roofing LLC shall not supervise Independent Subcontractor, though it may inspect work completed. Independent Subcontractor will work in a professional manner, having represented that it has the necessary skills to do this.
>
> 10. Independent Subcontractor shall redo defective work and replace damaged material at its own expense . . . .
>
> 11. R&S Roofing LLC shall advise the Independent Subcontractor about when it

[2] Before the LLC was created in June 2010, Mr. Tipping was engaged in the same business as "R&S Roofing," apparently either as a sole proprietorship or in a partnership with Stacey Tipping. *See* Tr. 124-126; Ex H, p. 3 ("R&S Roofing Subcontractor Agreement" with Robert Smith, dated 3/24/02); Ex. I (IRS forms 1099 for tax years 2002 and 2010 for Robert Smith, with the "Payer" being "Stacey Tipping").

can begin work and the job details.

12. R&S Roofing LLC shall pay the Independent Subcontractor by an hourly rate for the type and quality of services performed pursuant to the job on which they are performed.

13. R&S Roofing LLC shall not provide for draws or advances.

14. R&S Roofing LLC shall not withhold any taxes from Independent Subcontractor, who shall be liable for its own withholding, Social Security, self-employment and other applicable taxes.

15. R&S Roofing LLC shall not provide Independent Subcontractor with, or reimburse for, hospital, medical, business liability or Worker's Comp. Insurance, sick or vacation pay, a work vehicle, bonuses, gas allowances, special clothing, tools, etc. . . . .

17. Independent subcontractor shall provide and maintain his own tools for its services that are being provided. It is solely liable for loss, damage or theft of its property at R&S Roofing LLC job locations. This includes storage at such locations or in route to or from them.

18. R&S Roofing LLC may lend equipment or specific tools, pertinent to the job, to Independent Subcontractor, at its discretion, with the understanding that any damage, loss, or theft of said lent equipment . . . will be the sole responsibility of the subcontractor . . . .

Nothing in the agreements identifies the worker's rate of hourly pay. There is no provision that describes what kind of work the worker is agreeing to do "in a professional manner, having represented that it has the necessary skills to do this." The word "roof" does not appear in the agreement, and the word "roofing" appears only when used as part of R&S's proper name.

The analysis of the *Darden* factors that follows is limited to the determining whether the three workers at the worksite other than Mr. Tipping were employees of R&S at the time of the inspection. In view of the conclusion that these three workers were employees of R&S, it unnecessary to determine whether Mr. Tipping's status was that of "employee" or "independent contractor."

Hiring Party's Right to Control the Manner and Means by which the Product is Accomplished

Rob Tipping, as the agent of R&S, entered into the contract for the roofing job and scheduled the other roofers to work on that project. (Tr. 128, 133-34; Ex. F).

When the CO made his presence known at the worksite and told one of the workers that he wanted to speak to the "person in charge," the worker notified Mr. Tipping, who then descended from the roof to speak to the CO. (Ex. S, p. 1; Tr. 14-15, 22, 26-27, 30, 177).

In response to the CO's questions regarding the status of the workers, Mr. Tipping repeatedly told the CO that "everybody is a sub." (Tr. 178; Ex. 2; Ex. S). Mr. Tipping also told the CO: "I tell the guys what to do;" "[i]f I am not on the roof, they know to come down;" and "I want to them to know I am watching."[3] (Ex. 2). Mr. Tipping testified that the workers sometimes refer to him as the "head grunt," and that "[e]verybody knows if it goes wrong, it's all on me." (Tr. 166, 168).

Both of the other workers the CO interviewed identified Mr. Tipping to be "the boss."[4] (Ex. P, pp. 29 & 31; Tr. 104-06). One of the workers told the CO that Mr. Tipping was in charge of the overall site, told them when to start and stop work, and "would fix safety and job issues." (Ex. P, pp. 29-30; Tr. 104-105).

In response to the CO's questions regarding safety training, one of the workers stated that Mr. Tipping "shows two movies a week," and that "[w]e watched a tape on fall protection this morning." (Ex. P, p. 29; Tr. 88-89). The other worker told the CO that Mr. Tipping provides safety training.[5] (Tr. 105; Ex. P, p. 31).

Mr. Tipping told the CO that during part of the roofing job the workers had been using a personal fall arrest system (which included body harnesses and ropes) that he had brought to the worksite and that he had made available to the workers. Mr. Tipping told the CO that he did not

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[3] The CO testified that he took contemporaneous notes during his interview with Mr. Tipping. (Tr. 83). These notes were received in evidence as Exhibit 2. Mr. Tipping testified that he did not see the CO taking notes during the interview. (Tr. 148). The CO's testimony that his notes of the interview were taken contemporaneously is more probative than Mr. Tipping's recollection that he did not notice the CO taking notes. In his testimony, Mr. Tipping corroborated many of the entries contained in the CO's contemporaneous notes (e.g., that "everybody is a sub," that the roof has "Tectum" decks, that the "lines are down right now and [Sabrina Tipping] is the monitor," that "I had anchor points I had installed in [purlins]," that "we were using harnesses with the ropes"). This corroboration supports a finding that the CO's notes are a generally reliable record of what Mr. Tipping told the CO in the interview.

[4] The CO interviewed Robert Smith and Sabrina Tipping after Mr. Tipping had returned to the roof and was no longer in the CO's presence. (Tr. 88). The CO's notes of those interviews were received in evidence as part of R&S's Ex. P, pages 29-31. Mr. Tipping's testimony that he did not see the CO taking notes while interviewing these two individuals is not probative, inasmuch as Mr. Tipping explained further that he had returned to the roof during those interviews and that, "I don't know what they [the workers] did; I'm assuming they talked." (Tr. 149, lines 24-25). The CO's notes provide a reliable record of the workers' responses to the CO's questions.

[5] In his testimony, Mr. Tipping denied having provided safety training to R&S's "independent subcontractors" at any time, and denied further that he had shown the workers a training video earlier on the day of the inspection. (Tr. 166-168). Assuming this to be accurate, the workers' statements to the contrary would support an inference that they believed that R&S had the right to require them to submit to such training.

require that the workers use this equipment because of their status as independent contractors (Ex. S, p. 1; Tr. 35), but that he "thought it would be a good idea for everybody to wear a body harness if they then so chose." (Ex. S, p. 1). He testified, "I did not force anybody to do it: if you want to use it here they are." (Tr. 130). One reasonable inference from this testimony is that if Mr. Tipping had directed the workers to use certain fall protection equipment, they would have felt compelled to do so.

The evidence supports the finding that R&S, through Mr. Tipping, substantially controlled or had the right to control both the workplace and the workers (i.e., the "right to control the manner and means by which the product is accomplished"). This being the most important of the *Darden* factors, this evidence weighs heavily in favor of finding that the workers were employees of R&S.

Skill Required

The evidence suggests that the workers that R&S uses provide skilled labor, which tilts in favor of finding an independent contractor relationship.

Source of the Instrumentalities and Tools

Mr. Tipping purchased the materials for the job on behalf of R&S. (Tr. 131). Mr. Tipping coordinated the delivery and staging of the roofing materials at the work site. (Tr. 130-31).

Mr. Tipping testified that the workers bring and use their own hand tools, although they sometimes use hand tools that he brings to the worksite as well as larger equipment when the project calls for such equipment (such as a "compressor" for air guns). (Tr. 165). The other two workers told the CO that Mr. Tipping supplied tools, with the exception of small hand tools. (Ex. P, pp. 29-31). The roofing job here required mostly only hand tools. (Tr. 165). Mr. Tipping supplied the workers with safety harnesses that they had used as part of a personal fall arrest system during part of the roofing job. (Tr. 130; Ex. S).

The evidence establishes that R&S provided some instrumentalities and tools required for its projects, and weighs in support of finding an employment relationship.

Location of the Work

All the roofing work takes place at the various construction sites where R&S has contracted to do the work. This *Darden* factor has no weight here because the roofing work

would be done at those various locations regardless of the status of the workers as employees or independent contractors.

Duration of the Relationship between the Parties.

R&S does not enter into a separate "Independent Subcontractor Agreement" for every job on which a worker provides labor, but rather maintains a standing agreement with each worker. The agreements establish a continuing relationship between R&S and the worker for an indefinite period that is terminable at the will of either party. (Exs. D, E, F-2, H). One roofer had worked for R&S (or its predecessor entity) since 2008. (Ex. G). Another roofer had worked for R&S (or its predecessor entity) since 2002, and told the CO, "I don't work for anybody else." (Tr. 187; Ex. H; Ex. P, p. 29).

While the written agreements expressly provide that a worker may work for others at any time (Ex. D, ¶ 6), such other work would not preclude the existence of an employment relationship with R&S.

The evidence relevant to this factor tilts in favor of finding an employment relationship.

Hiring Party's Right to Assign Additional Projects

The written agreements provide that the worker will "perform services … on various jobs of his choosing." (Ex. D, ¶ 7). Mr. Tipping's practice is to contact individual workers to form a crew for a particular job or part of a job. (Tr. 132-34). While one of the workers told the CO that he works only for R&S (Ex. P, p. 29-30), there is no evidence respecting whether this worker believed he could refuse to do a job that Mr. Tipping would call him about. The whole of the evidence on this factor weighs against the finding of an employment relationship.

Extent of the Hired Party's Discretion over When and How Long to Work

After R&S obtains a contract for a roofing job, Mr. Tipping's practice is to telephone a worker about being part of a crew for that job. But sometimes a worker will telephone Tipping to find out if there is "any work for the day, two days, three days, a week, that type of situation." (Tr. 133).

One of the workers told the CO that Mr. Tipping determined when the work began and ended each day. (Ex. P, p. 30). Mr. Tipping told the CO that "I tell the guys what to do" and "if I am not on the roof they know to come down." (Tr. 37; Ex. 2). Mr. Tipping also told the CO that he wanted the workers to know that he is watching them. (Tr. 37; Ex. 2; *see also* Tr. 165, "I

see them doing the part that they do"). The weight of the evidence establishes that Mr. Tipping sets the hours of work and expects the roofing crew to work only while he is present on a roof and under his oversight. This factor supports finding an employment relationship.

Method of Payment

The written agreements provide that a worker is paid on an "hourly rate for the type and quality of services performed." (Ex. D, ¶ 12). Payment is made at the end of a project, usually in cash. (Tr. 109, 183; Ex. 2). Paying a skilled laborer by the hour, versus being paid by the job, weighs in favor of finding an employment relationship.

Stacey Tipping testified that she has advanced payment to workers before the end of a project (which was contrary to ¶ 13 of the written agreements). (Tr. 187-88; Ex. I, p. 2). An advance on payment is more indicative of a traditional employer-employee relationship than of an independent contractor.

Hired Party's Role in Hiring and Paying Assistants

Mr. Tipping assembles roofing crews based upon the skills and number of workers needed for a particular job. (Tr. 132-34). There is no evidence that R&S uses "assistants" for the workers for any projects that it undertakes. This factor has no bearing on the analysis here.

Work as Part of the Hiring Party's Regular Business, and Whether the Hiring Party is in Business

R&S is in the roofing business (residential and commercial). (Tr. 125-26). The work performed by the workers is integral to R&S's regular business.

Mr. Tipping told the CO that "I carry insurance" and that the other workers "are covered under mine," (Ex. 2) (which is contrary to ¶ 5 of the written agreements). The evidence on these factors weighs in favor of finding an employment relationship.

Provision of Employee Benefits and the Tax Treatment of the Hired Party

R&S provides no benefits and deducts no taxes from the payments it makes to the workers. (Tr. 127; Ex. P, p. 31). The provision of employee benefits and withholding of taxes from a paycheck is generally indicative of an employment relationship. The evidence here on these factors weighs against finding an employment relationship, but like all the *Darden* factors, these factors in isolation are not determinative of the issue. *Cf. Sharon & Walter Const., Inc.*, 23

BNA OSHC at 1290 (finding "failure to withhold federal income and social security taxes was … not a bona fide reflection of an authentic independent contractor relationship").

Conclusions Based on the Darden *Factors*

The agreements on which R&S relies to establish "the lack of an employer-employee relationship" (Ex. D, ¶ 1 [emphasis in original]), while a factor, are not determinative on the issue. The agreements do not relate to a particular project, do not specify the rate of hourly pay, do not identify the nature of the work to be provided, and establish a relationship of indefinite duration that is terminable at will. (*Id.*¶ 7). And while the agreements declared that R&S "shall not supervise" the worker (*Id.* ¶ 9), the great weight of the evidence established that R&S, through its agent Mr. Tipping, had the right to control the workers and the workplace.

Based on the foregoing and in particular the key factor (right to control of the manner and means of the work), the evidence weighs in favor of the conclusion that the three workers at the worksite other than Mr. Tipping were "employees" of R&S as defined in section 3(5) of the Act.

The Secretary has met his burden to establish that at the time of the inspection R&S was an "employer" under the Act, so that the Act covered R&S's activities at the construction site on August 30, 2012.

Alleged Violation of § 1926.501(b)(10)

The Work Area

The roof of the one-story commercial building was divided into three discernable rectangular sections, with the larger middle section being sandwiched between two smaller end sections. The roofing project involved R&S installing 20-foot wide sheets of rubber roofing material over only the roof's middle section (Work Area). (Tr. 22, 49, 136, 141). The Work Area was flat, was about 78 feet wide and 90 feet long, and its surface was approximately 12.1 feet above ground level. (Ex. 1, pp. 25 & 30, Tr. 33).

The north side of the Work Area was about 78 feet long and was defined by a parapet wall where it abutted the roof's north section. The south side of the Work Area was the same length as the north side and was defined by a drop in elevation to the roof's south section. The roof's south section had a low slope, and was about two feet below the level of the Work Area where the two sections abutted. (Tr. 201).

The Work Area's east and west edges were both about 90 feet long and were not abutted by any other part of the roof. The east and west edges had no wall, guardrail, or other structure that extended higher than the Work Area's surface level.[6] (Tr. 48-50; Ex. P, p. 34).

The CO arrived at the worksite about 11:30 a.m. (Tr. 21). Mr. Tipping testified that there had been a warning line system in place on the Work Area until about 10 a.m. that day, when it had been taken down to complete work on the final roof seam. (Tr. 160). Mr. Tipping's testimony in this regard is consistent with what the two other workers told the CO in separate interviews. (Ex. P, p. 29 and 31). Mr. Tipping's testimony is also consistent with the CO's testimony and photographs that the CO took that show no indication that a warning line system was in place.[7] (Tr. 41; Ex. 1).

Mr. Tipping indicated in his testimony that no personal fall arrest system (PFAS) was being used at the time of the inspection: "No harnesses, no safety line, nothing." (Tr. 163). Mr. Tipping showed the CO a body harness that was part of a PFAS that the workers had been using earlier during the job. (Tr. 34, 54-55; Ex. 2; Ex. P, p. 29). Mr. Tipping told the CO that the use of the PFAS equipment had been discontinued because the anchorage points that R&S had been using were not accessible during the completion of the final seam work. (Tr. 37-38, 129-130; Ex. P, p. 23). Mr. Tipping told the CO that when the use of the PFAS was discontinued "one of

[6] The description of the roof is based on the composite testimony of the CO (Tr. 48-52), Mr. Tipping (Tr. 134, 136-37, 139-41, 144-46, 156-60), and another witness for R&S (Mr. Kip Reiher) (Tr. 200-201). The CO did not ascend the roof and thus he never saw the surface of the Work Area. Rather, he observed the workers on the roof and took photographs from various positions on the surface pavement. While interviewing Mr. Tipping, the CO drew a diagram of the roof based on information that Mr. Tipping provided him. (Tr. 48; Ex. P, p. 34). In his testimony Mr. Tipping did not challenge the accuracy of the basic information reflected on the diagram, although he testified that he did not observe the CO preparing a diagram or taking notes during the interview. (Tr. 148-49). In any event, Mr. Tipping's testimonial description of the Work Area corroborated the CO's testimony with respect to both the east and west edges of the Work Area having no structure that extended higher than the roof's surface level, and that the width of the roof was greater than 50 feet (Tr. 158-160, 162). Photographs of the Work Area that Mr. Tipping took are consistent with the configuration he described. (Ex. R, pp. 3, 5 & 6).

[7] The CO concluded that when Mr. Tipping and the other two workers had referred to the removal of "warning lines," that they had been referring to a rope that had been used as part of a personal fall arrest system, and not a line that had been used as part of a warning line system. (Tr. 100-104; Ex. P, p. 24). It is not necessary to sort out the precise nature of the misunderstanding, since Mr. Tipping acknowledged in his testimony that at the time of the inspection, no one was using a personal fall arrest system, and no warning line system was in place.

the subs was implemented as a roof monitor."[8] (Ex. P, p. 1; Tr. 38-39, 54-55; Ex. 2; Ex. P, p. 34; Ex. S, p. 1).

The Work Area was approximately 12.1 feet above ground level along the unprotected west edge of the Work Area. (Tr. 23-24, 28-29, 40, 62-63; Ex. 1, pp. 16, 25, 30). Before making his presence known at the worksite, the CO observed and photographed a male worker other than Mr. Tipping near the unprotected west edge. The worker was bent over at the waist, such that his head was almost directly above the edge itself, as depicted in the photograph at page 8 of Exhibit 1. The CO took numerous other photographs of the workers engaged in roofing work on the Work Area. (Ex. 1). Some of the photographs showed workers (other than Mr. Tipping) engaged in roofing work six feet or closer to the unprotected west edge (*e.g.* Ex. 1, photographs 8, 12, 15, 19, 23, 26).[9]

The Citation

The Citation alleges that R&S violated 29 C.F.R. § 1926.501(b)(10) on August 30, 2012, when it "did not ensure that each employee engaged in roofing activities on a commercial structure with a flat roof were protected from falls" in that "no acceptable form of fall protection was being utilized to protect employees from falling approximately 12.1 feet to the paved ground below, which could result in permanent disability or death."

The cited standard, 29 C.F.R. § 1926.501(b)(10), provides:

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[8] At the hearing, Mr. Tipping explained that the body harnesses had been used to prevent the workers from falling *through* the roof in the event that part of the roof collapsed, and not specifically to prevent workers from falling off the edge (although it would seem that the equipment would have protected against that hazard as well). (Tr. 129-30). Mr. Tipping indicated at the hearing that he did not believe that a PFAS or warning line system was necessary at the time of the inspection because there was no longer any risk of the roof collapsing, no worker got closer than 40 feet to the unprotected east and west edges, and a safety monitor system was in place. (Tr. 162-64).

[9] Mr. Tipping testified that he believed the photographs that the CO took in Exhibit 1 were taken over the course of four different days of work on the project, and not all on August 30, 2012. (Tr. 175). He testified that he had reached this conclusion based upon the configuration of material depicted in the various photographs, and also because some of the photographs show one of the workers wearing different clothing. The evidence does not support Mr. Tipping's belief. First, the CO testified reliably and credibly that he took all the photographs contained in Exhibit 1 on August 30, 2012. There is simply no reason to believe that the CO surreptitiously took photographs of the work site over the course of four days, or that the CO testified falsely in stating that he took all the photographs on August 30, 2012. Secondly, Mr. Tipping is simply incorrect in his belief that certain of the photographs show some of the workers wearing different clothing than in other photographs. (Tr. 175). The photographs he cites do not support his perception. The clothing worn by the workers appears to be the same in all the photographs. (Ex. 1).

> *Roofing work on Low-slope roofs.* 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.

The standard contains a number of defined terms. Moreover, some of the terms used in the defined terms are themselves defined terms. Some of these defined terms in § 1926.500(b) are as follows:

> *Lifeline* means a component consisting of a flexible line for connection to an anchorage at one end to hang vertically (vertical lifeline), or for connection to anchorages at both ends to stretch horizontally (horizontal lifeline), and which serves as a means for connecting other components of a personal fall arrest system to the anchorage.
>
> *Low-slope roof* means a roof having a slope less than or equal to 4 in 12 (vertical to horizontal).
>
> *Lower levels* means those areas or surfaces to which an employee can fall. Such areas or surfaces include, but are not limited to, ground levels, floors, platforms, ramps, runways, excavations, pits, tanks, material, water, equipment, structures, or portions thereof.
>
> *Personal fall arrest system* means a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body belt or body harness and may include a lanyard, deceleration device, lifeline, or suitable combinations of these. As of January 1, 1998, the use of a body belt for fall arrest is prohibited.
>
> *Roofing work* means 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.
>
> *Safety-monitoring system* means a safety system in which a competent person is responsible for recognizing and warning employees of fall hazards.
>
> *Unprotected sides and edges* means any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or guardrail system at least 39 inches (1.0 m) high.
>
> *Walking/working surface* means any surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties.

> *Warning line system* means a barrier erected on a roof to warn employees that they are approaching an unprotected roof side or edge, and which designates an area in which roofing work may take place without the use of guardrail, body belt, or safety net systems to protect employees in the area.
>
> *Work area* means that portion of a walking/working surface where job duties are being performed.

Other provisions of Subpart M prescribe the requirements for "personal fall arrest systems" [§ 1926.502(d)], "warning line systems" [§ 1926.502(f)], and "safety monitoring systems" [§ 1926.502(h)].

Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prod., Inc.,* 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

Subpart M of 29 C.F.R. Part 1926 "sets forth the requirements and criteria for fall protection in construction workplaces covered under" Part 1926. 29 C.F.R. § 1926.500(a)(1). Subpart M applies because R&S was engaged in roofing work at a "construction workplace." (Tr. 131). *See* 29 C.F.R. §§ 1926.32(g) (defining "construction work") and 1926.13(a) (discussing terms "construction, alteration, and repair"). The cited standard within Subpart M, § 1926.501(b)(10), applies to the Work Area because R&S was engaged in "roofing work" on a "low-slope roof," and the east and west edges of the Work Area constituted "unprotected sides and edges" that were more than six feet above "lower levels," as those terms are defined in § 1926.500(b). The Secretary established that the cited standard applies.

R&S suggests in its brief (Resp. Br. p. 15) that it appropriately discontinued the use of certain fall protection systems because the "job was finished" and the workers were "withdrawing … equipment and coming off the roof." (Testimony of Mr. Reiher, Tr. 205). This contention appears to be based on a regulatory exception to Subpart M contained in 29 C.F.R. § 1926.500(a) that provides as follows: "Exception: The provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed."

As the party seeking the benefit of an exception to a standard, R&S had the burden to show that the exception was applicable. *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). R&S failed to meet its burden. Mr. Tipping testified that at the time of the inspection, the crew was sealing the "final seam" of the rubber roofing material. (Tr. 160). He testified further that the crew did not finish the roofing job on the day of inspection, but rather had to return on another day to do so. (Tr. 144). It is apparent that the "seam work" that the crew was doing at the time of the inspection was an essential part of the roofing work itself, and was not part of "an inspection, investigation, or assessment of workplace conditions … after all construction work has been completed." 29 C.F.R. § 1926.500(a). The exception does not apply.

Section 1926.501(b)(10) lists seven alternative ways for an employer to meet the standard: "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."

R&S does not contend that it used a "guardrail system" or a "safety net system" for fall protection for this roofing job. Further, it is undisputed that at the time of the inspection, R&S had discontinued the use of personal fall arrest systems and had taken down the warning line system. According to Mr. Tipping, the only fall protection being used at the time of the inspection was a safety monitoring system. The use of a safety monitoring system alone was insufficient to meet the standard because the Work Area was more than 50 feet wide.[10]

The CO's photographs and supporting testimony described above establish that workers other than Mr. Tipping were engaged in roofing work on the Work Area and thus had access to the violative condition.

To prove the element of knowledge, the Secretary must show that the employer either knew, or with the exercise of reasonable diligence, should have known of the violative condition. *Dun-Par Engineered Form Co.,* 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The knowledge

[10] The Secretary argues that even if a safety monitoring system alone had been sufficient to meet the standard, the evidence showed that the safety monitoring system implemented by R&S did not meet the requirements for such a system specified by 29 C.F.R. § 1926.502(h). (Sec'y Br. p. 9). In view of the conclusion that R&S did not comply with cited standard, it is unnecessary to make findings on whether R&S's safety monitoring system met requirements.

element is directed to the physical conditions that constitute a violation. The Secretary need not show that an employer understood or acknowledged that the physical conditions were actually hazardous. *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).

The actual or constructive knowledge of an employer's supervisory personnel can be imputed to an employer, unless the employer establishes substantial grounds for not imputing it. *Ormet Corp*, 14 BNA OSHC 2134, 2137 (No. 85-531, 1991); *Danis Shook Joint Venture XXV*, 319 F.3d 805 (6th Cir. 2003). Regardless of whether Mr. Tipping's status was that of an employee or an independent contractor, he was acting as R&S's managing agent for the roofing job. He signed the contract (Ex. F), he purchased the materials and was present for their delivery at the worksite (Tr. 130-31), he arranged for the other workers to be present (Tr. 132-33), and he acted as the functional equivalent of a foreman at the worksite. (Tr. 147, 166, 168; Ex. P, pp. 27-31; Ex. S).

As both the on-site supervisor and managing agent of R&S at the worksite, Mr. Tipping's actual knowledge of the violative condition is imputed to R&S. The Secretary has proven the element of knowledge.

The Secretary has met his burden and proved that R&S violated 29 C.F.R. § 1926.501(b)(10) in the manner alleged.

Affirmative Defenses

R&S asserted the affirmative defenses of "infeasibility" and "greater hazard." (Tr. 9-11). The burden to prove the affirmative defenses falls on the employer. *See Pitt-Des Moines, Inc.*, 16 BNA OSHC 1429, 1433 (No. 90-1349, 1993).

To prove the defense of infeasibility, an employer must show that the means of compliance set forth in the standard were infeasible and that there were no feasible alternative means of protection. *V.I.P. Structures, Inc.,* 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994). Infeasibility can be either economic or technological. *Id.*

R&S makes the conclusory assertion that fall protection was not feasible because the anchorage points for a PFAS had to be removed in order to seal the final seam of the rubber roofing material. (Resp. Br. 13). The cited standard provides for five alternative means of compliance that do not involve the use of a PFAS. R&S did not show why these alternative

forms of fall protection were not feasible. The Respondent has failed to establish the affirmative defense of infeasibility.

To establish the affirmative defense of "greater hazard," an employer must show (1) the hazards created by complying with the standard are greater than those of noncompliance; (2) alternative means of protecting employees were either used or were not available; and (3) a variance under section 6(d) of the Act is unavailable or that application for a variance is inappropriate. *Altor, Inc.,* 23 BNA OSHC 1458, 1470 (No. 99-0958, 2011); *Walker Towing Corp.,* 14 BNA OSHC 2072, 2078 (No. 87-1359, 1991). Each element of the three-part test must be satisfied to establish this defense. *See Dole v. Williams Enters., Inc.,* 876 F.2d 186, 190 n.7 (D.C. Cir. 1989).

R&S has failed to establish any of the three elements of the greater hazard defense. As to the first element, there is simply no evidence that any hazard would have resulted from compliance with the standard. As to the second element, R&S's proof fails for the same reason that the infeasibility defense failed. As to the third element, R&S acknowledges that it had not applied for a variance, and it presented no evidence to explain why a variance was not available or was inappropriate. (Resp. Br. 14). *Altor, Inc.,* 23 BNA OSHC at 1470 (rejecting greater hazard defense where employer did not explain why it did not apply for a variance). The Respondent has failed to establish the affirmative defense of greater hazard.

Characterization and Penalty Assessment

The Secretary classified the violation as "serious" and proposed a penalty of $2,800. A violation is "serious" under section 17(k) of the Act if "there is substantial probability that death or serious physical harm could result." "That provision does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur." *Pete Miller, Inc.,* 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000). A fall of over 12 feet could have resulted in serious injury or death. (Tr. 43). The violation was aptly characterized as "serious."

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. Gravity is generally the primary factor in the penalty assessment. *See J. A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary rated the violation as being of high gravity. (Tr. 78). The Secretary reduced the statutory maximum penalty of $7,000 by 60% due to the employer's small size. *See* § 17(b) of the Act, 29 U.S.C. § 650. There was no adjustment for good faith and, because there was no prior inspection history, there was no adjustment for history. (Ex. P, p. 18). The Secretary's proposed penalty of $2,800 was appropriate and is assessed.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(10) is AFFIRMED and a penalty of $2,800 is assessed.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

Date: January 28, 2014
Washington, D.C.