United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. GP Roofing & Construction, LLC,[1] Respondent.	OSHRC Docket No. **13-0374**

Appearances:

Uche N. Egemonye, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For the Secretary

Douglas A. Orr, Esquire, Orr Law Firm, P.L., Cape Coral, Florida
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

GP Roofing & Construction, LLC, (GP Roofing) is a company which engages in roofing work. On November 20, 2012, the Occupational Safety and Health Administration (OSHA) inspected a worksite located at 13350 Ocean Mist Drive, Jacksonville, Florida, where GP Roofing was installing shingles on townhomes in the Berano Townhome Subdivision (Berano Project). As a result of the inspection, on January 31, 2013, the Secretary issued a one-item Citation and Notification of Penalty (Citation) to GP Roofing & Construction USA, Inc. (amended herein to GP Roofing & Construction, LLC), alleging a willful violation of fall protection standard 29 C.F.R. § 1926.501(b)(13). The Secretary proposed a penalty in the amount of $24,200.00 for the alleged willful violation. GP Roofing timely contested the Citation.

[1] The Citation and Notification of Penalty issued in this matter identifies "GP Roofing & Construction USA, Inc." as the cited employer. Two weeks before the hearing, the Secretary filed a Motion to Amend to substitute GP Roofing & Construction, LLC, as the employer. For the reasons set forth herein, the undersigned grants the Secretary's motion. The Complaint and underlying Citation are hereby amended to substitute GP Roofing & Construction, LLC, as the employer in this matter.

A hearing was held in Orlando, Florida, on September 6, 2013. The parties filed post-hearing briefs on November 18, 2013. For the reasons set forth below, the undersigned affirms the Citation as willful and assesses a penalty of $24,200.00.

Jurisdiction

GP Roofing stipulates that it was an employer engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act (Tr. 8). The parties stipulate that the Commission has jurisdiction pursuant to section 10(c) of the Act (Tr. 7).

Background

Inspection

GP Roofing engages in roofing work and is owned by partners Guillermo Perez and Elma Maldonado, who are also officers of the company (Tr. 117, 122, 190). Perez founded the company; the "GP" in the company name stands for Guillermo Perez (Tr. 190-191). GP Roofing entered into a contract with Fidus Roofing & Construction, LLC, to install shingles on townhomes under construction at the Berano Project (Tr. 23, 36, 42, 124-127, 142; Exh. C-11). A four man crew of GP Roofing, including crew leader Edgar Lopez-Hernandez, was in the process of installing shingles on the townhome located at Lot 29 of the Berano Project on November 20, 2012, the day of the OSHA inspection (Tr. 119, 142).

The inspection of the worksite was conducted by OSHA Compliance and Safety Officer (CSHO) Jeffery Lincoln. Lincoln was assisted at the worksite by CSHO Idalie Aponte who provided Spanish language translation (Tr. 31, 84-85). Lincoln verified the address of the worksite by talking with the general contractor's representative, by looking at the City of Jacksonville's permitting web site, and also by reviewing the permitting board at the worksite (Tr. 22). As Lincoln was driving by the worksite, he observed a townhouse under construction with roofing employees on the roof wearing harnesses, but who did not appear to be tied off (Tr. 23). He drove into the subdivision and observed four employees working without appropriate fall protection from the roof of the townhome located at Lot 29 (Tr. 23-24). Although wearing fall protection harnesses, the employees were not tied off while working from either the 7:12 pitch portion of the roof or the 5:12 pitch portion of the roof which was 19.5 feet above ground (Tr. 31, 33-35, 36-37; Exhs. C-1A and 1B). Therefore, the Secretary issued a Citation for violation of the fall protection standard found at 29 C.F.R. § 1926.501(b)(13) .

Motion to Amend

The Secretary issued the Citation to GP Roofing & Construction, USA, Inc. (GP Roofing USA). By motion filed August 22, 2013, the Secretary moved to amend the Citation to identify GP Roofing as the correct employer, alleging in support only that his discovery confirmed that GP Roofing was the company at the jobsite on the day of the inspection (Secretary's motion). GP Roofing USA filed an opposition on August 30, 2013, stating therein that it would be prejudiced by the amendment, that there is no factual basis for asserting that GP Roofing was the employer at the jobsite, and that the two companies do not share an identity of interest to allow relation back under Rule 15(c) of the Federal Rules of Civil Procedure (Fed.R.Civ.P.) (GP Roofing USA's opposition). Because of the lack of evidence regarding the Secretary's motion, the undersigned deferred ruling on the motion and allowed the presentation of evidence and further arguments on the motion at the September 6, 2013, hearing. Both parties presented arguments and evidence at the hearing.

The evidence adduced at the hearing demonstrates that in addition to similar names, both GP Roofing and GP Roofing USA are owned by Perez and Maldonado, who are officers for both companies. Prior to the date of the hearing, both companies shared the same business address (Tr. 122-23). Perez testified that his accountant advised him to create GP Roofing USA as a corporation for tax purposes because the LLC status of GP Roofing would cause problems for him (Tr. 190-191). Therefore, he created GP Roofing USA the year before. It has no insurance, has no employees and performs no work (Tr.191). All the roofing work is done through GP Roofing (Tr. 192). Perez further testified that only GP Roofing had employees and contracted for roofing work (Tr. 191-92).

Six days after the Citation was issued, Maldonado contacted OSHA to advise that the wrong employer was identified on the citation and that it should have been issued to GP Roofing (Tr. 131). Once the matter was referred to the Secretary's counsel, Interrogatories were sent to GP Roofing USA. Upon receipt of the Response to Interrogatory No. 1, the Secretary moved to amend the Citation to change the party to GP Roofing. The Response to Interrogatory No.1 provides:

> The roofing company doing work at the location was, upon information and belief, an unrelated yet similarly named company called GP Roofing & Construction, LLC. Persons with knowledge include Guillermo Perez and Elma

> Maldonado . . . . A roofing contract identifying GP Roofing & Construction, LLC as the entity at issue is being located. This contract was with Fidus Group . . . .

(Exh. C-13, p.4).

The Review Commission has freely granted leave to amend pleadings. *See e.g.*, *Miller Brewing Co.,* 7 OSHC 2155 (No. 78-3216, 1980); *Lovell Clay Products Co*., 2 OSHC 1121 (No. 683, 1974). Further, the Commission has held that Fed.R.Civ.P. 15(c) allows the Secretary to amend her complaint more than six months after the occurrence of an alleged violation. *See Avcon Inc.*, 22 BNA OSHC 1440 at 1443 (Docket Nos. 98-0755 and 98-1168, 2011). It is well established that administrative pleadings are liberally construed and easily amended. *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902 (2d Cir. 1977); *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).

The undersigned finds no support in the record for GP Roofing USA's argument that it would be prejudiced by the proposed amendment. Perez and Maldonado were principals of both companies, they were aware upon receipt of the Citation that it should have been issued to GP Roofing, and they reasonably should have understood that GP Roofing was the subject of the Citation. Both principals knew that GP Roofing was the only company that contracted for roofing work and that it was the only company with employees (Tr. 122-124, 131, 191-192). They also knew that GP Roofing was their only company working at the Berano Project. They were aware that, but for the error on the citation, GP Roofing would have been cited. At all times, GP Roofing was on notice which company the citation should have been issued to. No evidence was adduced at the hearing substantiating any prejudice because the Secretary sought the amendment six months after the issuance of the Citation. Further, no evidence was adduced at the hearing regarding how amendment would adversely impact the presentation of any defenses. The undersigned finds granting the motion would not result in prejudice. The undersigned also finds GP Roofing's argument that there is no factual basis to assert it was the employer on the jobsite to be without merit. Its principals testified that it had a crew working at the Berano Project (Tr. 142, 227-228).

The undersigned also is not persuaded by GP Roofing USA's argument that there is no "identity of interest" between the two companies to establish that the amendment relates back as required under Fed.R.Civ.P. 15(c).

Fed.R.Civ.P. 15(c) provides:

> (c) Relation Back of Amendments. (1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when: (A) the law that provides the applicable statute of limitations allows relation back; (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out -- in the original pleading; or (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m)[2] for serving the summons and complaint, the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c) (2014).

Here, the two companies are closely related and have the requisite "identity of interest" needed to qualify for relation back under Fed.R.Civ.P. 15(c). In *Avcon, supra,* the Commission relied on the Supreme Court's decision in *B. Krupski v. Costa Crociere S.P.A.*, 560 U.S. 538 (2010) (*Krupski*) to determine if relation back was warranted. *Avcon,* 23 BNA OSHC at 1444. In *Krupski*, the Supreme Court held that the applicable question is whether within the Rule 4(m) period the "prospective defendant knew or should have known that it would have been named as a defendant but for an error." *B. Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 548 (2010); *see also Lindley v. City of Birmingham, Ala.*, 515 Fed. Appx. 813, 816 (11th Cir. 2013)(unpublished). Specifically, the question is whether the Respondent "reasonably should have understood" the Secretary's intent when it named the party incorrectly. *See Id.* at 554. The undersigned finds that the evidence adduced at the hearing shows that GP Roofing should have understood the Secretary's intent.

As in the instant case, in *CMH Co., Inc.*, 9 BNA OSHC 1048 (No. 78-5954, 1980), the Secretary moved to change the name of the employer when it became apparent that he had named the incorrect employer. *Id.* at 1050.[3] In *CMH Co, Inc.*, the two companies at issue had the same two owners who served as president and vice-president of both companies, one company purchased construction materials for the other company's use, and the vice-president of

[2] Fed. R. Civ. P. 4(m) states, in pertinent part: "If a defendant is not served within 120 days after the complaint is filed, the court . . . must dismiss the action without prejudice . . . .But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." Fed. R. Civ. P. Rule 4(m).

[3] The only difference was that the motion to amend was made at the hearing in *CMH Co., Inc., Id*.

the two companies was served with the citation within the statute of limitations. *Id.* at 1053-54. The Commission found that even though the two companies had separate business offices, the party to be named and the party incorrectly named had such an "identity of interest that relation back would not be prejudicial" and an action filed against one company provided notice to the other company. *Id.* at 1054.

As set forth above, the evidence establishes that GP Roofing USA and GP Roofing share an identity of interest. The party name change proposed by the Secretary relates to the same claim set out in the original pleading and GP Roofing would not be prejudiced by the amendment. GP Roofing received notice of the action since its principals are the same as those of GP Roofing USA, and it knew that the Secretary's mistake was the only reason it was not cited. Further, confirmation as to the identity of the proper employer was set forth in the interrogatory response from GP Roofing USA, at which time, the Secretary moved to amend. The undersigned finds that good cause required by Rule 4(m) of the Fed.R.Civ.P. is therefore established. The Citation is hereby amended to name GP Roofing as the employer.

DISCUSSION

Citation No. 1, Item 1

Item 1 of the Citation alleges a willful violation of 29 C.F.R. § 1926.501(b)(13) as follows:

> Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels were not protected by guardrail systems, safety net system, or personal fall arrest system, nor were employee(s) provided with an alternative fall protection measure under another provision of paragraph 1926.501(b):
>
> a. On or about November 20, 2012, on the 5:12 pitch roof and 7:12 pitch roof, employees performing roofing work were not protected from a 9 feet and 19 feet fall hazard by the use of a fall protection system.

The standard found at 29 C.F.R. § 1926.501(b)(13) provides:

> *Residential Construction.* Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net systems, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and

> implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.
>
> **Elements of the Secretary's Burden of Proof**
>
> The Secretary has the burden of establishing the employer violated the cited standards.
>
> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence 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 cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009) (citations omitted).

GP Roofing contends that the Secretary cannot meet his burden by a preponderance of the evidence because he failed to cite the correct employer. It also raises greater hazard and infeasibility which if demonstrated, are exceptions set forth in the standard. In addition, GP Roofing contends that even if the Secretary were to meet his burden, the Secretary cannot prevail because GP Roofing can establish the defense of unpreventable employee misconduct, thereby rebutting the Secretary's prima facie case (GP Roofing's brief, pp. 2-6).

GP Roofing's argument that the correct employer was not cited was addressed above in the discussion on the Secretary's Motion to Amend. Although the Secretary's Motion to Amend the Citation was not granted prior to the issuance of this Decision, for the reasons discussed above, GP Roofing was not prejudiced in its ability to defend this matter. Regardless of the proper name for its company, GP Roofing contends that the Secretary has not established it was the employer of the employees observed during the inspection at the worksite (GP Roofing's brief, p. 4).

"[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005). In determining whether the Secretary has satisfied this burden, the Commission applies the common law agency doctrine enunciated in *Nationwide Mutual Insurance Co v. Darden*, 503 U.S. 318 (1992) which focuses on "the hiring party's right to control the manner and means by which the product is accomplished." Id. at 323 (internal quotation marks and citation omitted). *See Sharon & Walter Constr. Co.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010)(applying *Darden).* Many factors are relevant to this inquiry, including the work location, who sets the work hours, who provided the tools being used, the duration of the relationship between the parties, and the method of payment. *Darden*, 503 U.S.

at 323-24. But "the primary focus is whether the putative employer controls the workers." *Allstate Painting & Contracting Co., supra*.

Despite GP Roofing's argument that the Secretary has not established that it was the employer at the jobsite, the admissions of its principals at the hearing conclusively establish that it was the employer of the employees on the jobsite. On direct examination, Maldonado testified as follows:

> Q. Was GP roofing & Construction, LLC the company that hired Edgar Lopez-Hernandez and his crew to do work at the Berano Subdivision on November 20, 2012?
>
> A. Yes

(Tr. 142). Perez testified on cross examination as follows:

> Q. So who was in charge? For example, while they were working on the house and somebody committed a safety violation, who would be the one to say, "You have a problem"?
>
> A. Most of the time because it's always one of the guys who speak better English than the other ones or understands English better than the other ones. He would be the guy to always, you know, be the front of the crew. I cannot say, you know, "I give you the title of crew leader." That's something we give--
>
> Q. And, for this particular crew at the Berano Project, that would have been Edgar Lopez-Hernandez?
>
> A. Yes. That was the person I communicate.
>
> Q. Was Alfredo Hernandez who was also a member of the crew an employee of GP Roofing?
>
> A. Yes.
>
> Q. What about Eddie Lopez-Hernandez? Was he an employee of GP Roofing?
>
> A. Yes.
>
> Q. What about Ranaldo Castillo"? Was he an employee of GP Roofing & Construction, LLC?
>
> A. Yes.
>
> Q. So, all of these, the entire crew were employees—

A. Employees, yes.

Q. –of GP Roofing & Construction, LLC?

A. Yes

.

(Tr. 227-228). The evidence also reveals that the work was provided and supervised by GP Roofing and that the employees were informed of the work by GP Roofing through Lopez-Hernandez. Employees were paid by GP Roofing and received training by GP Roofing. Perez also testified that they are employees of GP Roofing for workers compensation insurance coverage (Tr. 192). The Secretary has established the control factor required by *Darden.* The undersigned finds that GP Roofing was the employer of the crew working on the jobsite at the time of the OSHA inspection.

Other than asserting the Secretary cited the wrong employer, GP Roofing does not dispute the elements of the Secretary's burden. It does not dispute that at the time of the inspection, GP Roofing was installing shingles on the roof of a townhome which was under construction at the Berano Project. Such work is considered residential construction. Applicability of the standard is established. GP Roofing admits that its employees were not tied-off or otherwise protected from falls at the time of the inspection while working on a roof 19.5 feet from the ground. Therefore, the terms of the standard were violated. GP Roofing also does not dispute that its employees were working without fall protection from a 7:12 pitch roof, 19.5 feet above ground (Tr. 33-35, 36-37; Exhs. C-1A, C-1B). Exposure is established. The final element of the Secretary's prima facie case as to whether GP Roofing knew or should have known that the employees were working unprotected from fall hazards also is not disputed.

Employer Knowledge

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). GP Roofing's crew leader on the Berano Project, Lopez-Hernandez, told the CSHO that neither he nor the other three employees were tied off while they were working on the roof (Exh. C-3D). GP Roofing admits that Lopez-Hernandez was in charge of the crew (Tr. 142, 227-228). He worked alongside the other three crew members and was aware they, as well as himself, were not protected from falling (Tr. 227; Exh. C-3D). As crew leader, Lopez-Hernandez's knowledge is imputed to GP Roofing. "An employee who has been

delegated authority over other employees, even if only temporarily, is considered to be a supervisor" for the purpose of establishing knowledge. *Access Equip. Sys.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). "The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000) (citation omitted), *petition for review denied*, 255 F.3d 122 (4th Cir. 2001). It is not disputed that Lopez-Hernandez was a supervisor in charge of the employees at the Berano Project. His knowledge that the crew was not tied-off or otherwise protected from falling is imputed to GP Roofing. A supervisor's knowledge of his subordinant's misconduct may be imputed to the employer. *ComTran Group, Inc.*, 722 F.3d 1304 (11th Cir. 2013). Actual knowledge is established.

Exception to the Standard

GP Roofing's arguments as to greater hazard and infeasibility are not established as exceptions to the standard. As provided in the standard, when the employer can demonstrate that it is infeasible or creates a greater hazard to use the fall protection systems set forth in the standard, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 29 C.F.R. § 1926.502. GP Roofing did not adduce evidence of a fall protection plan which meets the requirements set forth in the exception of the standard. Section 1926.502 requires that the fall protection plan be developed specifically for the site where the work is being performed. Also required is documentation explaining why conventional fall protection systems cannot be used and why their use would create a greater hazard. In addition, the fall protection plan must identify areas in which conventional fall protection systems cannot be used, and those areas are to be classified as controlled access zones for which the requirements of paragraph (g) of the standard must be met. GP Roofing's fall protection plan does not meet these and other requirements of the standard. Instead, its fall protection plan consists of essentially three pages in its safety program, addressing fall protection generally, and requiring the use of slide guards, anchors, or alternative safe work practices when guardrail systems cannot be used (Exh. R-1, pp. 28-29).

The only support GP Roofing adduced regarding greater hazard was testimony that employees move more slowly when wearing personal fall arrest systems to avoid tripping while carrying materials on the roof (GP Roofing's brief, p.7). 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) other methods of protecting its employees from the hazards are not available; and (3) a variance is not available or is inappropriate. *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 (D.C. Cir. 1989). The Commission has held that when an employer does not explain why it did not apply for a variance, the greater hazard defense fails and there is no need to address the other two elements of the test. *Altor, Inc.*, 23 BNA OSHC 1458, 1470 (No. 99-0958, 2011) (citations omitted) *aff'd*, 498 Fed. Appx. 145 (3rd Cir. 2012). GP Roofing adduced no evidence to explain why it did not apply for a variance. It has not established the greater hazard exception or defense.

In addition to not establishing greater hazard, GP Roofing has not proven infeasibility. To prove the defense of infeasibility the employer must show that the means of compliance set forth in the standard was infeasible under the circumstances and that either an alternative means of protection was used or there was no feasible alternative means of protection available. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994). Infeasibility can be either economic or technological. *Id.*

In support of its infeasibility argument, GP Roofing asserts that employees move more slowly when wearing personal fall arrest systems to avoid tripping while carrying materials on the roof (GP Roofing's brief, p.7). In this regard, Perez testified that the employees want to move faster to earn more money, essentially arguing that the employees are encumbered by being tied off (Tr. 209-210). GP Roofing also contends that employees are uncomfortable wearing the personal fall arrest equipment. Yet, GP Roofing produced no evidence of an alternative method for fall protection. Nor did it provide any specific information about the purported economic loss associated with wearing personal fall arrest systems, other than Perez's testimony that GP Roofing made only $300 on this job, and finishing a job more quickly allowed them to start another job (Tr. 233).

The Commission has held that specific evidence is needed to show that an "employer's existence as a company would have been adversely affected" by the cost of compliance. *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1191 (No. 92-1891, 1995). GP Roofing has not adduced evidence to demonstrate whether the company experienced an adverse economic impact through the use of required fall protection. GP Roofing also has not established that compliance

with the standard is technologically infeasible. The exception and affirmative defense of infeasibility fails.

The Secretary has established his prima facie case.

Unpreventable Employee Misconduct

In an effort to rebut the Secretary's prima facie case, GP Roofing contends that if there was a violation, it was due to unpreventable employee misconduct (GP Roofing's brief, pp. 5-6).[4] Unpreventable employee misconduct is an affirmative defense that must be proven by the employer. *American Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2097 n.4 (No. 10-0359, 2012). To prove this defense, "an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule." *Schuler-Haas Electric Corp*., 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006) (citations omitted). GP Roofing has a work rule to prevent fall violations. However, it failed to adequately communicate that work rule to employees; it failed to take reasonable steps to discover violations of that rule; and its enforcement of the rule was inadequate.

Work Rule

GP Roofing has a general provision included in its safety program addressing the need for fall protection for employees working at six feet or higher (Exh. R-1, pp 1, 28-29). Although vague in its requirements, the undersigned construes this to be GP Roofing's work rule on fall protection.

Communication

Evidence adduced at the hearing reveals that GP Roofing's fall protection rule was included in its written safety program[5]. It held quarterly safety meetings and provided employee training in 2011 and 2012. Perez testified that employees were shown a 30-minute fall protection video, in Spanish, which illustrates the proper way to use fall protection equipment (Tr. 204-205; Exhs. R-1 through R-4). In addition, Perez testified that he reviewed the safety

[4] GP Roofing did not pursue the other affirmative defenses listed in its Answer at the hearing or in the post-hearing brief and are deemed abandoned. *See Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991). In the briefing order issued in this case, the parties were advised that failure to brief issues would result in them being deemed abandoned (Notice of Receipt of Transcript issued October 13, 2013).

[5] GP Roofing's safety program consists of a compilation of materials from various sources including Archer Exteriors, Inc., Allied Insurance, The Safeguard Group, Inc., and OSHA (Exh. R-1).

rules with each employee when they were hired (Tr. 158, 200). Robert (Bob) Russell, Sales Manager for GP Roofing, testified that he conducted daily safety meetings, although this was disputed by Perez (Tr. 179, 186, 224-25). Employee interviews reveal, however, that two of the four crew members had not received safety training on GP Roofing's fall protection rules (Exhs. C-3A through C-3D). Perez's testimony regarding safety training is not believable, considering that two of the four member crew had not received any training. Adequate communication of the work rule is not established.

Steps to Discover Violations

Perez testified that he conducted daily spot safety inspections (Tr. 208-209). He, or another supervisor, goes to a job site and then, "in secret," observes the employees to see if they are tied-off while working (Tr. 208). Perez acknowledged it is done in secret because when the employees see him, they will immediately tie-off (Tr. 208). If someone is not properly using safety equipment, they are reported (Tr. 208). In addition, either daily spot inspections or daily safety meetings were conducted by Russell (Tr. 29, 179, 186, 224-225). Perez testified that "[e]verybody has safety covered every day. They have a daily safety spot inspection. It's something that every supervisor going to a job does." (Tr. 214). He further testified that he did a spot inspection at the beginning of the Berano job and there were no problems (Tr. 220). Although he testified that his spot inspection was documented, Perez did not introduce a record of the inspection (Tr. 222). Crew leader Lopez-Hernandez stated that he had seen Perez at other work sites and that Perez reminds them "all the time" to tie-off. However, the crew leader did not see Perez at the Berano worksite (Exh. C-3D). Russell testified that he had not conducted a safety inspection at the Berano site (Tr. 180). The undersigned finds Perez's testimony regarding the spot inspections unconvincing. There is no reliable evidence substantiating the assertion that Perez conducted spot inspections for fall protection infractions, or that he did so at the Berano Project worksite. The record evidence is insufficient for the undersigned to find that GP Roofing's steps to discover safety violations were reasonable. This element of the defense is not established.

Enforcement

Perez asserts that GP Roofing has a progressive disciplinary policy. Perez testified that the first safety violation results in a warning, the second results in a suspension and the third in termination of employment (Tr. 214-15). Further, he testified that he fired three employees in

the past year for safety violations (Tr. 215). He conceded, however, that instead of formally firing an employee, he simply did not call that employee for future work. One employee simply left after the first warning and never returned (Tr. 217-18). Maldonado testified that after a couple of warnings an employee is fired for not being tied-off (Tr. 145-46). Russell testified that he never issued a warning for non-compliance. According to him, if an employee refused to tie-off, he sent him home for the day (Tr. 188-89). When asked whether or not GP Roofing disciplined its employees for safety violations, Russell responded: "Yes. I would imagine so, yes." (Tr. 182).

A preponderance of the evidence shows that GP Roofing has a disciplinary policy. However, the evidence shows that the enforcement was not effective. Employees, including the crew leader routinely failed to tie off when working on roofs. It appears they would tie off only when Perez was in sight. Not even the crew leader was impressed by GP Roofing's disciplinary policy, as he routinely did not tie off. His statement reveals that he did not know of anyone being fired or suspended for not using safety equipment (Exh. C-3D). The undersigned finds that GP Roofing did not effectively or consistently discipline its employees for safety infractions. GP Roofing has not established the defense of unpreventable employee misconduct, and, therefore, has not rebutted the Secretary's *prima facie* case.

Willfulness

The Secretary contends GP Roofing's violation of the standard is willful. A willful violation is done "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2140 (No. 04-0475, 2007) (citations omitted). A willful violation differs from a serious violation by a heightened awareness and either conscious disregard or plain indifference. *Williams Enter., Inc.,* 13 OSHC BNA 1249, 1256-57 (No. 85-355, 1987). A cavalier attitude toward employee safety and a conscious disregard for OSHA requirements constitutes a willful violation. *See J.A.M. Builder, Inc. v. Herman*, 233 F.3d 1350, 1357 (11th Cir. 2000).

The evidence shows that the Secretary issued seven citations to GP Roofing between July 17, 2011, and June 19, 2012. All citations were for violations of 29 C.F.R. § 1926.501(b)(13), the same standard at issue here. (Secretary's brief, p.16; Exhs. C-4A through C-10A). These prior citations alone establish that GP Roofing had a heighted awareness of the standard. The Commission has consistently held that prior violations of the same standard by an employer

establish a heightened awareness of the standard. *Capeway Roofing Sys.*, 20 BNA OSHC 1331, 1341 (No. 00-1986, 2003); *Revoli Const. Co.*, 19 BNA OSHC 1682, 1685 (No. 00-315, 2001); *see also, Altor*, 23 BNA OSHC at 1475-76. Heightened awareness is also established by Perez's testimony that he had been saved by his personal fall arrest system and was well aware of the need to use fall protection (Tr. 196). Further, GP Roofing included the use of fall protection in its safety rules and training.

"The hallmark of a willful violation is the employer's state of mind at the time of the violation–an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety." *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff'd* 268 F.3d 1123 (D.C. Cir. 2001). This state of mind is evident where "the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care." *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004). The evidence adduced in this case shows that GP Roofing made a conscious decision to disregard the fall protection requirements as evidenced by its crew leader's knowingly permitting employees to work at a fall distance of 19.5 feet without any fall protection. The crew leader's attitude about safety can best be described as cavalier. The day of the inspection was not an anomaly. Employees, including the crew leader, routinely chose to not tie-off when they felt the roof was not that steep, or they felt it was safe (Exhs. C-3A through C-3D). GP Roofing has a culture of violating safety rules. Its extensive history with OSHA violations demonstrates that it routinely ignores its obligation to follow the OSHA standards.

The evidence also shows that Perez was aware that his employees routinely chose to not tie-off because they wanted to move as quickly as possible in order to earn more money. Perez appeared to support this expediency, not only so that the employees could make more money, but so that GP Roofing could move on to the next job, thereby making more money as well. The fact that the crew leader working alongside the employees condoned their unsafe practices by not requiring them to use fall protection establishes both plain indifference to employee safety and a disregard for the requirements of the Act. "The state of mind of a supervisory employee, his or her knowledge and conduct, may be imputed to the employer for purposes of finding that the violation was willful." *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000). The undersigned affirms the citation as willful.

Penalty Determination

In assessing penalties, the Commission is required to give due consideration to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *See* § 17(j) of the Act. 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). Gravity is based on "the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Id.* The maximum penalty for a willful violation is $70,000.00. *See* 29 U.S.C. § 666(a).

The Secretary proposed a penalty of $24,200.00. The Secretary based the penalty on the exposure of four employees for several hours and the potential for broken bones, head trauma or death from a fall of 19.5 feet (Tr. 49-50). A sixty percent penalty reduction was applied based on the size of the company, which is approximately 45 employees, although only 10-15 employees work at any given time (Tr. 51, 192-193). Because of the recent history of citations, no reduction for good faith was applied (Tr. 52). A ten percent increase was applied because the company had high severity citations within the past five years (Tr. 51). Based on these factors, the proposed penalty of $24,200.00 is appropriate. Therefore, a penalty in the amount of $24,200.00 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 findings of fact and conclusions of law, it is hereby **ORDERED** that:

Item 1 of Citation No. 1, alleging a willful violation of 29 C.F.R. § 1926.501(b)(13), is **AFFIRMED** as willful, and a penalty of $24,200.00 is assessed.

/s/

SHARON D. CALHOUN
Judge, Atlanta, Georgia

Date: April 11, 2014
Atlanta, Georgia