UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

Secretary of Labor, Complainant, v. Latite Roofing and Sheet Metal LLC, the Successor to Latite Roofing and Sheet Metal Co., Inc., Respondent.	)	OSHRC Docket No. 09-1074

APPEARANCES:

For the Complainant:

Charna C. Hollingsworth-Malone, Esq.
Amy Walker, Esq.
U. S. Department of Labor
Office of the Solicitor
61 Forsyth Street SW
Atlanta, Georgia 30303

For the Respondent:

William F. Kaspers, Esq.
Kaspers and Associates
Law Offices, LLC
Suite 2130
75 14th Street
Atlanta, Georgia 30309

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et seq.*; hereafter call "the Act") to review a citation issued by the Secretary of Labor pursuant to § 9 (a) of the Act and a proposed assessment of the penalty thereon issued pursuant to §10 (c) of the Act. By citation issued June 23, 2009 pursuant to an inspection of Respondent's worksite located at 201 N W 133 Road, Plantation, Florida on May 14, 2009,[1] the Secretary

[1] The citation asserts that the inspection occurred on May 15, 2009. The parties, however, agreed that the inspection

cited Respondent for one serious violation of the standard set forth at 29 C.F.R. § 1926.501(b)(13)(2009) and proposed a penalty of $5,000 for the alleged violation. Respondent filed a timely notice of contest and Complainant filed a complaint with the Review Commission.[2] Respondent filed a timely answer to the Complaint wherein Respondent admits the jurisdictional allegations of the complaint and generally denies the remaining allegations. Respondent also asserts five affirmative defenses which are discussed *infra*. Pursuant to the Court's order dated January 13, 2010, Complainant filed an amended complaint wherein the original alleged violation of 29 C.F.R. § 1926.501(b)(13)(2009) was withdrawn and replaced by an alleged violation of 29 C.F.R. § 1926.502(h)(l)(iii)(2009), with alternative alleged violations of 29 C.F.R. § 1926.502(h)(l)(iv)(2009) or 29 C.F.R. § 1926.502(h)(i)(v)(2009). The proposed penalty remains the same. Respondent filed a timely answer to the amended complaint. A three-day hearing was conducted during the period of February 23 through 25, 2010 and the parties have submitted post-hearing and reply briefs. The matter is now ripe for decision.

Background

Respondent, headquartered in Pompano Beach, Florida, is a large roofing contractor with its business activities concentrated primarily in the South Florida area. (Tr. 529, 531). It performs both commercial and residential roofing work and employed approximately 500 employees. Respondent was working on the roof of a three-story building on May 14, 2009. (Tr. 179). The roof is 222 feet long and 74 feet wide with a 4:12 pitch. (Tr. 38; C-18). The roof has an eave to ground height of about 28 feet. (*Id.*) The roof's ridge, the peak of the building, spans the complete length and center of the building, oriented in a North/South direction. There

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occurred on May 14, 2009.

[2] Respondent's motion to remove this matter from simplified proceedings was granted by order dated August 25,

are also numerous "hips" on the roof creating additional peaks and valleys. (Tr. 402; C-18, at p. 3). The roof is generally rectangular in shape. Its edges are uneven because some portions are indented and cut back into the roof's edge by six to eight feet. These indentations have parapet-like constructions attached to them. (C-7, C-9, C-18, at pp. 2-3).

Also, before the Court is the disposition of the assertion of a government privilege at trial.

Deliberative Process Privilege

During pretrial discovery, Respondent requested copies of the written inspection file compiled by Complainant in this matter, as well as the written inspection file compiled by Complainant as a result of the March 12, 2009 inspection underlying a prior case at Docket No. 09-0816. Complainant produced the requested documents; however, materials that Complainant considered to be protected from disclosure pursuant to the deliberative process privilege were redacted from the produced documents. (Tr. 45). The Secretary's counsel continued to assert the deliberative process privilege at the hearing for redactions appearing on exhibit R-2, at p. 4 and exhibit R-3, at pp. 2-3. (Tr. 45-46, 144-49, 157-61, 315-18, 330, 334-35, 370-72). Upon the Court's request, Complainant produced the unredacted materials at the hearing for an *in camera* inspection by the Court.[3] (R-2, at p. 4, R-3, at pp. 2-3; Tr. 327-30). During the course

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2009.

[3] The Court stated that it found no exculpatory information in the redacted material at R-2, p. 2. (Tr. 332, 334; R-2 at p. 2). The Court did not make a similar statement at trial with regard to the redacted material at R-3 as there was a pending relevancy objection by Complainant to R-3 that may have resolved the issue. (Tr. 334-35). The Court also finds that there is no exculpatory information in the redacted material at R-3, pp. 2-3. *See Frazee Construction Co.* (*Frazee*), 1 BNA OSHC 1270, 1274 (No. 1343, 1973) ("In administrative hearings exculpatory information in an agency's possession or file data which may aid respondent's presentation of his case must be disclosed by the agency."). The Court further finds that Respondent could not have made any meaningful use of the redacted diary sheet entries at R-2, p. 4, made more than a month after the inspection at issue or at R-3, pp. 2-3, that pertained to an earlier inspection, had it had the complete entries at trial. *See Pratt & Whitney Aircraft*, 9 BNA OSHC 1653, 1657 (No. 13401, 1981). Likewise, the Court's consideration of the redacted material as evidence would not alter the Court's decision in this case.

of the trial, the Court denied Respondent's oral motion to dismiss the citation based upon the Secretary's refusal to produce an unredacted page 4 of exhibit R-2 after CO Campos completed his direct examination.[4] (Tr. 371-72). After reviewing the documents, the Court directed Complainant to file a formal written motion with an appropriate supporting affidavit required by Commission Rule 52(d)(l). On March 10, 2010, Complainant filed her Motion to Uphold Deliberative Process Privilege (Motion to Uphold DPP), with the supporting affidavits of David Michaels, Assistant Secretary of Labor, Occupational Safety and Health Administration (OSHA), and a memorandum of law. On March 12, 2010, Respondent filed Latite's Response in Opposition to Complainant's Motion to Uphold Deliberative Process Privilege (Opposition). Complainant asserts that the redacted materials represent the written record of pre decisional discussions between agency personnel including analysis and evaluation of facts, recommendations, opinions, and legal advice on policy matters and are protected from disclosure by the deliberative process privilege. Respondent concedes that the redacted material at issue qualifies as material that is protected from disclosure by the deliberative process privilege that has been properly asserted by the Secretary.[5] (Opposition, at pp. 2-3). Respondent argues that

[4] The Court found Respondent's oral motion untimely because a motion seeking the redacted material should have been made by Respondent 25 days before the start of the trial in accordance with the Court's Scheduling Order. On September 1, 2009, the Secretary provided Respondent with a copy of exhibit R-2, at p. 2, with its redaction, along with a privilege log that asserted the deliberative process privilege. (R-2, at pp. 1-2, 4; Tr. 45, 49). Respondent was also provided a privilege log for exhibit R-3 during the prior litigation relating to the March 12, 2009 inspection. (Motion to Uphold DPP, at p. 2, n. 1). Under the Court's Scheduling Order, the parties were required to submit motions, including motions to compel discovery, to the Court by January 29, 2010. Respondent did not timely seek to compel the production of the redacted material. *See Frazee*, 1 BNA OSHC at 1273 (request to reveal memoranda immediately upon discovery of its existence found timely). The Court also stated that Respondent's motion was denied because no exculpatory information appeared in the redacted material at R-2, at p. 4. The Court allowed the Secretary the opportunity to assert the deliberative process privilege through proper authority and found that the Secretary had not waived the opportunity to do so. (Tr. 374-75). Respondent's subsequent oral expansion of its motion to also encompass the two redactions appearing on the Inspection Case File Diary Sheets R-3, at pp. 2-3, was similarly denied. (Tr. 374-75).

[5] In its Opposition, Respondent stated: "Latite has consistently maintained that the Secretary's redactions were appropriate until the Secretary called and completed her direct examination of Compliance Officer Campos at which point the redacted portions of the case file diary sheets should have been produced upon Latite's request to review

the privilege is lost, without exception, when Complainant's compliance officer testified on direct examination at the hearing and, citing *Frazee*, 1 BNA OSHC at 1272, the redacted materials should have been produced at that time. Respondent asserts that *Frazee* requires the disclosure of any document, in its entirety, that was prepared or written by the compliance officer subsequent to his testimony, regardless of whether it contained any material protected by a validly asserted deliberative process privilege.[6] (Opposition, at p. 6). Respondent argues that the Secretary's continued assertion of the deliberative process privilege regarding the redactions after CO Campos completed his direct testimony deprived Respondent of its fundamental constitutional right to a fair trial. (Opposition, at p. 5).

The redacted material appearing at R-2, Inspection Case File Diary Sheet, pertaining to OSHA Inspection No. 313102303 by CO Campos of Latite that occurred on May 14, 2009 at 201 NW 133 Road, Plantation, FL 33325, includes redactions under columns entitled "Date", "Action", and "Initials" on page 4 only.[7] (Tr. 370; R-2, at p. 4).

The redacted material appearing at R-3, Inspection Case File Diary Sheet, pertaining to a prior OSHA Inspection No. 312154636 by CO Campos of Latite that occurred on March 12, 2009 at 201 NW 133 Road, Plantation, FL 33325, includes a redaction under the column entitled "Action" for entries dated "4/13/09" initialed by former OSHA Assistant Area Director Ramona Morris, "4/27/09" with the first of two entries consisting of no more than two lines initialed by CO Campos and the second entry most likely initialed by Ms. Morris, one line entry for "4/28/09" initialed by CO Campos, and "4/29/09"with the first line only of two entries initialed

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them, pursuant to *Frazee* and its progeny." (Opposition, at p. 3).

[6] Respondent points to no relevant authority to support this argument.

[7] The redacted entry appears between two other entries dated "6/16/09" and "6/23/09".

by Ms. Morris,[8] and "5/20/09" initialed by Ms. Morris. (Tr. 338-39, 633-34; R-3, at pp. 2-3). CO Campos did not review the redacted material appearing at R-2 and R-3 to refresh his memory prior to testifying in this case. (Tr. 338).[9]

The deliberative process privilege protects government materials that comprise or reflect the process by which governmental decisions and policies are made. *National Labor Relations Board v. Sears, Roebuck & Co.* (*NLRB v. Sears*), 421 U.S. 132, 150 (1975); *Dudman Commc'n Corp. v. Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987).[10] The deliberative process privilege is unique to the Government and releases it from discovery obligations otherwise imposed on private litigants. *See, e.g., Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (deliberative process privilege is "unique to the government").

The Government has the initial burden of demonstrating that the requested materials are within the deliberative process privilege. Once such a showing is made, the requesting party must make a showing of substantial need to overcome the privilege in civil litigation. *See NLRB v. Sears*, 421 U.S. at 149, n. 16. Respondent has made no such showing in this case.

The deliberative process privilege has three purposes. First, it protects "creative debate and candid consideration of alternatives within an agency and, thereby, improves the quality of agency policy decisions." *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir.

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[8] The second one line entry for "4/29/09" has initials that are unidentified in the record that were not made by CO Campos or Ms. Morris.

[9] Federal Rule of Evidence 612 authorizes the disclosure of an otherwise privileged document if it is used by a witness to refresh his memory for the purpose of testifying. Respondent states whether or not CO Campos reviewed the redacted material to refresh his memory is "totally irrelevant" to the requirement to disclose the redacted material. (Opposition, at p. 10). *See U.S. Equal Employment Opportunity Comm's v. Cont'l Airlines, Inc.*, 395 F. Supp. 2d 738, 744 (N.D. Ill. 2005)(Disclosure of a document protected from disclosure by the deliberative process privilege and relied upon by a testifying government investigator to refresh his memory is not mandatory).

[10] *See Equal Employment Opportunity Comm'n v. Albertson's LLC, f/k/a Albertson's, Inc.*, Civ. No. 06-01273-CMA-BNB, 2008 WL 4877046 at *1 (D. Col. Nov. 12, 2008)("Federal common law recognizes the deliberative process privilege.")

1982).[11] The privilege generally protects "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears*, 421 U.S. at 150, *quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena* (*Carl Zeiss*), 40 F.R.D. 318, 324 (D.D.C. 1966). It is premised upon the notion that "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." *NLRB v. Sears*, 421 U.S. at 150-151, *quoting U. S. v. Nixon*, 418 U.S. 683, 705 (1974); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 882 (5th Cir. 1981) ("Government officials would hesitate to offer their candid and conscientious opinions to superiors or co-workers if they knew that their opinions of the moment might be made a matter of public record at some future date").[12]

Second, the deliberative process privilege protects the public from confusion that would result from disclosure of internal agency discussions or statements that have not in fact been adopted as the agency's position. *Russell*, 682 F.2d at 1048 (citing *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978)(en banc). The principal concern here is that the public might treat tentative, early-on, unofficial statements of agency employees as the agency's

[11] Congress was concerned that if agencies were "forced to 'operate in a fish bowl,' S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965), the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." *Dudman*, 815 F.2d at 1567.

[12] Many of the cases discussing the scope of the deliberative process privilege have arisen in the context of claims that certain documents are exempt from the disclosure requirements of the Freedom of Information Act (FOIA) under Exemption 5 which permits nondisclosure of "inter-agency or intra-agency memoranda which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5)(2009). While the FOIA itself does not create "evidentiary privileges for civil discovery," *Kerr v. United States District Court for the North. Dist. of Calif.*, 511 F.2d 192, 197 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976), cases construing Exemption 5 of the FOIA are relevant precedent for purposes of defining the scope of the privilege because Exemption 5 exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears*, 421 U.S. at 149. The key difference between the scope of Exemption 5 of the FOIA and the scope of the deliberative process privilege in the context of civil discovery is that, in the latter case, the courts may override a claim of a privilege depending on "the extent of the litigant's need in the context of the facts of his particular case; or on the nature of the case." *Id*. at 149, n. 16; *Environmental Protection Agency v. Mink*, 410 U.S. 73, 86 (1973).

official position. *See Russell,* 682 F.2d at 1048-49. Third, the privilege protects "the integrity of the [government's] decision-making process" by ensuring that "officials should be judged by what they decided, not for matters considered before making up their minds." *Id.* at 1048 (citing *Jordan,* 591 F.2d at 773).

To determine whether particular materials fall under the privilege, courts look to (1) whether the material is "predecisional" — whether it was generated before the adoption of an agency policy or position in order to assist in arriving at that final decision — and, (2) whether it is "deliberative" — "whether it reflects the give-and-take of the consultative process." *Coastal States Gas Corp.*, 617 F.2d at 866. The exemption generally covers "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id., Renegotiation Board v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975), *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Analysis and evaluation of facts are within the scope of the privilege. *See Skelton v. U.S. Postal Service,* 678 F.2d 35, 38 (5th Cir 1982).

The deliberative process privilege is not absolute; it is a qualified privilege. *Carl Zeiss,* 40 F.R.D. 318, *In re Sunrise Sec. Litig.*, 109 B.R. 658, 665-67 (E. D. Pa. 1990). After concluding that the privilege is properly invoked, the courts must balance the public interest in non disclosure with the individual need for the information as evidence. *Committee for Nuclear Responsibility v. Seaberg*, 463 F.2d 788, 791 (D.C. Cir. 1971), *Carl Zeiss*, 40 F.R.D. at 327. The factors to be weighed include the (1) degree to which the proffered evidence is relevant, (2) extent to which it may be cumulative, and (3) opportunity of the party seeking disclosure to prove the particular facts by other means. *U. S. v. AT&T Company*, 524 F. Supp. 1381 (D.D.C. 1981), *In re Franklin Nat'l Bank Sec. Litig.,* 478 F. Supp. 577 (E.D. N.Y. 1979). To compel

disclosure, the Respondent must make "a showing of necessity sufficient to outweigh the adverse effects the production would engender." *Carl Zeiss,* 40 F.R.D. at 328-29.

Claims of privilege are addressed at Rule 52(d)(1) of the Commission Rules of Procedure.[13] During the pretrial discovery period and during pretrial discussions between the parties and the undersigned, Complainant has consistently taken the position that the redacted materials in Exhibits R-2 and R-3 are protected from disclosure by the deliberative process privilege. Respondent did not file a motion to compel disclosure of the redacted material until it orally sought disclosure after the testimony of the compliance officer at the hearing. Complainant was directed at the hearing to formally claim the deliberative process privilege, if she was so inclined, in response to Respondent's oral motion to disclose.

Complainant has complied with the provisions of Commission Rule 52(d)(1) and relevant case law providing guidance as to how to assert the deliberative process privilege.[14] In this instance, Complainant identified the specific portions of the inspection files that should be protected from disclosure on the ground that the information was predecisional and deliberative in nature. She redacted OSHA's notes reflecting pre-citation deliberations in each of the two

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[13] Commission Rule 52(d)(1) reads: (1) *Claims of privilege*. The initial claim of privilege shall specify the privilege claimed and the general nature of the material for which the privilege is claimed. In response to an order from the Judge or the Commission, or in response to a motion to compel, the claim shall: Identify the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged. The claim shall be supported by affidavits, depositions, or testimony and shall specify the relief sought. The claim may be accompanied by a motion for a protective order or by a motion that the allegedly privileged information be received and the claim ruled upon in camera, that is, with the record and hearing room closed to the public, or *ex parte*, that is without the participation of parties and their representatives. The judge may enter an order and impose terms and conditions on his or her examination of the claim as justice may require, including an order designed to ensure that the allegedly privileged information not be disclosed until after the examination is completed. *See* 29 C.F.R. § 2200.52d(1)(2009).

[14] The "head of the department" having control over the requested information must (1) make a formal claim; (2) provide a detailed specification of the information for which the agency is claiming the privilege; and (3) base this assertion of the privilege on his or her actual personal consideration. *See Landry v. FDIC,* 204 F.3d 1125, 1135 (D.C. Cir. 2000)(citing *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984)).

inspection files disclosed to Respondent.[15] Complainant claimed the deliberative process privilege on privilege logs. With regard to the May 14, 2009 inspection underlying this case, she redacted a portion of an Area Office Diary Sheet that included notes reflecting the office's internal discussions and considerations. With regard to the March 12, 2009 inspection, she redacted two portions in two Area Office Diary Sheets that included Area Office notes reflecting mental impressions and notes relating back to precitation discussion, office interaction and recommendations of Area Office personnel pertaining to the matter in Docket No. 09-0816.[16]

Complainant has formally asserted the deliberative process privilege and has provided supporting affidavits by an appropriate official. The Secretary of Labor's designee, Assistant Secretary of Labor for OSHA David Michaels, personally reviewed Exhibits R-2 and R-3. He determined that a formal assertion of the deliberative process privilege was appropriate and identified the precise information for which the privilege was asserted.[17] The Court finds Mr. Michaels to be an appropriate "head of the department" entitled to assert the deliberative process privilege before the Court. The Court also finds that Mr. Michaels' assertion that the redacted material is shielded from disclosure by the deliberative process privilege is well reasoned and supported by sufficient explanation.[18] Evidence regarding the basis or strategy of prosecutorial

[15] The Commission has found redactions appropriate where only portions of requested documents are protected against disclosure due to the assertion of a privilege. *See Frazee*, 1 BNA OSHC at 1273-74.
[16] Docket No. 09-1816 did not proceed to a hearing as it was withdrawn by Complainant. (Motion to Uphold DPP, p. 2, at n. 1).
[17] Specifically, Mr. Michaels asserted that the information in the redacted portions at issue "would reveal the internal deliberations of OSHA prior to the decision to issue a citation to Respondent, including: the pre-decision intra-agency deliberations of OSHA; recommendations, opinions and advice on legal or policy matters; and written summaries of factual evidence that reflect a deliberative process." Michaels Affidavits, dated March 8, 2010.
[18] *See Miller v. Mehltretter*, 478 F. Supp. 2d 415, 430 (W.D.N.Y. 2007)(documents and evidence that tended to show how or why a decision was made by agent or office to use a grand jury subpoena were subject to deliberative process privilege); *Startzell v. City of Philadelphia*, Civ. No. 05-05287, 2006 WL 2945226 at *2 -*3 (E.D.Pa. Oct. 13, 2006)("testimony regarding how 'the D.A.'s Office works with the Department of Police to bring criminal charges' was subject to the deliberative process privilege"); *Thompson v. Lynbrook Police Dep't.*, 172 F.R.D. 23, 26-27 (E.D.N.Y. 1997)(memoranda referring to steps taken by attorneys in completing their investigation not discoverable under the deliberative process privilege.).

decisions or investigations is rarely subject to disclosure.

The Commission decision in *Frazee* provides no relief to Respondent.[19] In *Frazee*, the Secretary of Labor refused to disclose notes made by the compliance officer during his inspection that were in addition to the entries made in the investigation file. These notes were described as "raw data" of observations made at the work site.[20] Notwithstanding the strong urging of the Administrative Law Judge (ALJ) to do so, the Secretary's counsel refused to provide the documents for an *in camera* inspection. Based upon the Secretary's obstinate refusal to disclose the materials or provide it for *in camera* inspection or, indeed, to provide a basis for non disclosure other than the information was non-disclosable, the ALJ disregarded the testimony of the compliance officer and vacated the citation.[21] A critical difference in this case is that the undersigned viewed the contested material *in camera* and concluded that the material is covered by deliberative process privilege and not subject to disclosure.[22]

Having viewed the redacted materials on Exhibit R-2 and R-3 *in camera* and reviewing the Secretary's Motion to Uphold DPP and Respondent's opposition, the Court finds that the Secretary has established the basis for her assertion of the deliberative process privilege. The redacted materials are protected from disclosure to Respondent since they are pre-decisional in

[19] *In Frazee*, the Commission recognized that the Government's withholding of information from an opposing litigant "must be predicated upon specific claim of some privilege based upon considerations peculiar to operation of government …. " *Frazee*, 1 BNA OSHC at 1272. The Commission goes on to say that "all evidence *not privileged*" that is relevant should be made available to the other side. *Id.* (emphasis added).

[20] Unlike *Frazee*, the material at issue here is not raw material collected during the inspection. The redacted portions of Exhibits R-2 and R-3 are diary note entries and not material compiled during inspections. In contrast to the testimony in *Frazee*, CO Campos did not use the redactions at Exhibits R-2 and R-3 as a basis for his direct testimony. (Tr. 338). Complainant's position throughout the proceeding was that R-3 was totally irrelevant since it pertained to an earlier inspection that was not at issue before this Court. (Tr. 49, 957).

[21] The *Frazee* decision addressed executive privileges in general without addressing the specific requirements or purpose of the deliberative process privilege at issue in this case.

[22] Unlike *Frazee*, the Secretary fully cooperated in the Court's *in camera* inspection of the redacted material.

nature and deliberative.[23] Respondent has failed to establish that the disclosure of the redacted material at R-2 and R-3 are critical to its defense of this matter and that the need for disclosure of the information is greater that the public interest in non-disclosure. *See NLRB v. Sears Roebuck,* 421 U.S. 168; *EPA v. Mink,* 410 U.S. 73. Respondent has also failed in meeting its burden of showing a particularized need for access to the redacted material following the Secretary's showing that the deliberative process privilege protects the material from disclosure.[24] The Court finds that Respondent does not need access to the redacted material at exhibits R-2 and R-3 to understand or defend the claims pending against it.[25] Nor has the Secretary waived the deliberative process privilege applicable to the redacted material by calling CO Campos to testify at trial. *See Albertson's LLC,* 2008 WL 4877046, at *6; *Cont'l Airlines, Inc.*, 395 F. Supp. at 743 (holding no wholesale waiver of deliberative process privilege based solely on deposition testimony of investigator). Accordingly, Respondent's oral motion made at trial to compel the production of the redacted material at Exhibits R-2 and R-3 is denied as untimely and for the reasons stated above.[26]

Cited Standard

Complainant cited Respondent for violating the following standard in the alternative;

[23] It is the Court that ultimately determines the validity of a claim of privilege to documents. *Frazee,* 1 BNA OSHC at 1273.
[24] *See Cont'l Airlines, Inc.*, 395 F. Supp. 2d at 741-42.
[25] *See Cont'l Airlines, Inc.*, 395 F. Supp. 2d at 745 (Equal Employment Opportunity Commission's internal decisionmaking process not relevant to enforcement action.).
[26] Respondent had everything it needed to make a timely pre-trial motion before the Court to compel the production of the redacted materials. Respondent had the documents with the redactions by September, 2009. It had privilege logs that asserted the deliberative process privilege. On December 28, 2009, the Secretary identified CO Campos as a trial witness. *See Complainant's Response to Respondent's First Set of Interrogatories,* at pp. 2-3. (R-10, at pp. 7-8). *See also The Secretary's Joint Pre-Hearing Statement,* dated January 29, 2010, where CO Campos is identified a testifying witness. It would have been a more efficient for Respondent to have timely filed a pre-trial motion to compel with the Court that sought the production of the redacted materials. Complainant is directed to maintain Exhibits R-2 and R-3 in an unredacted form and be prepared to provide said documents to the Commission, if so ordered, in the event that this issue becomes the subject of an appeal.

29 C.F.R. § 1926.502(h)(l) (iii)(2009), or § 1926.502(h)(l)(iv)(2009), or § 1926.502(h)(l)(v)(2009). This standard reads as follows:

> (h) Safety monitoring systems. Safety monitoring systems [See §§ 1926.501(b)(10) and 1926.502(k)] and their use shall comply with the following provisions:
>
> (1) The employer shall designate a competent person to monitor the safety of other employees and the employer shall ensure that the safety monitor complies with the following requirements:
> …
> (iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored;
> (iv) The safety monitor shall be close enough to communicate orally with the employee; and
> (v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

Jurisdiction

Based on the parties' stipulations, agreements, admissions, and the trial record, I find that Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of Sections 3(3) and 3(5) of the Act. I also find that jurisdiction of this proceeding is conferred upon the Commission by Section 10(c) of the Act. I conclude, therefore, that the Commission has jurisdiction over the parties and subject matter in this case.

Secretary's Burden of Proof

To establish a *prima facie* violation of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more of the 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 Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No.

78-6247, 1981), *aff'd,* 681 F.2d 69 (1st Cir. 1982).[27]

Facts

The parties have submitted the following stipulations of facts:

1. The inspection in this case was conducted by Compliance Officer Campos (hereinafter "CO Campos") at Alexan Plantation (hereinafter "worksite") on May 14, 2009.
2. Inocensio[28] Urieta was the crew chief and the safety monitor at the time of the inspection.
3. Respondent had a written, site specific, alternative fall protection plan for the worksite that was inspected on May 14, 2009.
4. Respondent provided a copy of its alternative fall protection plan to the CO Campos on or around the date of the inspection.
5. The roof at Respondent's worksite was 74 feet wide and 222 feet long with a 4:12 pitch and ground to eave heights around 28 feet 9 inches plus or minus a few feet.

(Tr. 22-23)(The above stipulations of fact are referred to individually as SF Nos. 1-5).

The parties have also agreed that Latite Roofing and Sheet Metal LLC was and is the employer of the employees involved in the inspection, which led to the citation, which is the subject of this litigation. (Order Amending the Case Caption and Citation, dated February 24, 2010; Tr. 313-14).

Respondent also admits that:

[27] Preponderance of the evidence is defined as "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by the proponent are more probably true than false." *Ultimate Distribution Systems, Inc.*, 10 OSHC 1568, 1570 (No. 79-1269, 1982).

[28] The trial transcript also refers to "Inocencio." (Tr. 699).

1. Latite Roofing and Sheet Metal LLC was at the time of the May 14, 2009 inspection an employer engaged in a business affecting commerce within the meaning of section 3 (5) of the Act.
2. The Occupational Safety and Health Administration has jurisdiction over Respondent as the employer of employees on the roof of the site inspected on May 14, 2009.
3. Respondent was subject to OSHA's safety monitoring regulations at the time of the May 14, 2009 inspection including 29 C. F. R. § 1926.502(h)(l).

(Tr. 23-24; Respondent's brief, at p. 17)

The parties have also stipulated that photograph R-4, at p. 5 (photo # 1190), has a caption that states "no painted lines", photograph R-4, at p. 7 (photo # 1192), has a caption that states "tin caps at edge, no line", [29] photograph R-4, at p. 14 (photo # 1198) [C-7], has a caption that states "no painted lines", and photograph R-4, at p. 24 (photo # 1208), has a caption that states "no monitoring". (Tr. 441-43; R-4, at pp. 5, 7, 14, 24, R-5).

The Relevant Testimony

1. Anthony Campos

Anthony Campos has been an OSHA Compliance Officer ("CO") for about eight and a half years.[30] Over that period, he has conducted approximately 270 inspections, of which about 90% involved construction sites. More than half of these involved fall protection systems and a couple inspections related to safety monitoring. (Tr. 174-75).

While driving westbound on State Road 84 by the worksite at Alexan Plantation in his automobile on May 14, 2009, CO Campos observed three employees working on the roof of one

[29] CO Campos testified that "no line" was referring to the section of the roof behind the roofer. (Tr. 446-47, 451; R-4, at p. 7, Letter B).
[30] Prior to working for OSHA, CO Campos was employed as a Captain with the New York City Fire Department.

of the buildings under construction without fall protection. The worksite was the size of a baseball field where two and three-story buildings were under various stages of construction. (Tr. 175-77, 394-95; R-5). After taking two photographs at 11:09 a.m. of employees on the one building where a roof was being put on, building 45, at the western perimeter, CO Campos entered the worksite.[31] His focus when taking the two photographs was on the roofer up on the ridge. He believed that the roofer was conducting himself in an unsafe manner because he was working on a slope, with his back toward the eave, with multiple tripping hazards behind him. He was concerned that should the roofer take just a couple of steps back that he would be on the material and off the roof.[32] The building was a three-story building about 30 feet above the ground. Expressway 595 runs parallel to the south end of the building. He identified himself to Mr. Allen Buffer, the representative of general contractor Trammel Crow Residential. CO Campos asked Mr. Buffer to go outside and CO Campos showed him where the employees were working on the roof and explained that they were at risk of falling. (Tr. 177-78, 182-83, 216, 231, 267-68, 396-99, 404, 408, 410; C-1 through C-2, C-12, R-1, at p. 1, R-4, R-5). CO Campos also asked Mr. Buffer to contact Latite's representative. After Respondent's safety director, Ray Padron, arrived at the worksite, CO Campos conducted an opening and closing conference with him. CO Campos told Mr. Padron that he had seen Latite employees at risk of injury from a fall and requested that Mr. Padron bring the roofers down from the roof to minimize their hazards.

[31] CO Campos observed one employee, wearing an orange vest, on the roof's west side at the south end of the building leaning over and using a pneumatic nailer to nail down tarpaper, moving towards the bottom of the roof. The tarpaper went from the ridge pole to the eave. It is rolled on horizontally parallel to the ridge and eave. He observed another employee diagonally across on the east side of the roof, and a third employee further up toward the north end of the east side of the roof who went down to the eave a couple of times. The third employee was "remote from" the other two employees. The two employees on the east side were working "right to the edge" of the roof. The employees used pneumatic nailers on hoses and moved from the roof ridge to the eaves. The employee wearing the orange vest was putting down strips of felt paper that were a couple of feet wide and the other two employees were putting down silver tabs to hold down the roofing felt. (Tr. 179-82, 184, 256, 274-75, 297-98, 515-16, 558; C-1 through C-2, R-2, at pp. 20, 24, R-4, at p. 9 (photo ID 6)).

He told Mr. Padron that he would interview the roofers and take photographs.[33] (Tr. 216-17).

CO Campos testified that the employee wearing the orange vest, Mr. Urieta, was assigned to be the "monitor." He observed Mr. Urieta working on the west side, about six from the roof edge, focused on the work he was doing which was holding down strips of felt paper (also referred to as "felt", "roofing felt", or "roofing paper") and tacking them down. He stated that Mr. Urieta's entire focus was on using the nail gun to tack the paper down.[34] He observed Mr. Urieta's back to the roof's incline and edge with nothing to stop him if he were to lose his balance. He testified that photograph C-4 that he took showed Mr. Urieta tacking down paper less than six feet from the roof edge, the eave, with loose paper that constituted a tripping hazard behind him. (Tr. 182-84, 186-89; C-1 through C-4).[35] CO Campos testified that the three employees were at risk of a fall because they were working on a pitched roof surrounded by tripping hazards. (Tr. 183, 206; C-8). He testified that photograph C-5 that he took showed the third employee working his way up and down the roof using an air line that created a tripping hazard with nothing to stop him from falling off the roof. He stated that this employee was working remotely from Mr. Urieta, who was on the roof's west side, and not within his visual sighting distance. (Tr. 194-95, 200, 466-67; C-5, R-4, at p. 12).

CO Campos also testified that he took a photograph that shows two employees putting down tin tabs on the east side of the three-story building near air lines, aluminum sheets, and other

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[32] CO Campos testified that he was aware of a lot of people falling off roofs, getting maimed, or killed. (Tr. 399).
[33] During a preliminary closing conference with Mr. Padron, CO Campos informed him that due to the fact that the safety monitor was engaged in other activities that prevented him from monitoring the employees, there was a violation of OSHA standards. (Tr. 514-15; R-2, at p. 21).
[34] CO Campos testified that Mr. Urieta really needed to concentrate when working with a nail gun to avoid putting a nail through his hand. (Tr. 424).
[35] He stated that photograph R-4, at p. 4 also showed that Mr. Urieta did not have the two other roofers on the other side of the roof within visual sighting and oral communication because Mr. Urieta was bent over, putting down tarpaper, and focusing solely upon his own work. (Tr. 415, 432-33; R-4, at pp. 6-7). He also testified that Mr. Urieta could not see anybody else when he was focused and concentrating on the work that he was doing himself.

materials that constituted tripping hazards.[36] (Tr. 197-99, 416, 474; C-6 through C-7). He testified when he took photograph C-6 he could not see Mr. Urieta because he was on the west side of the roof. (Tr. 201, 479-80; C-6). When he took photograph C-7 showing two employees working on the east side of the roof, Mr. Urieta was not present on the east side of the roof. Mr.Urieta was toward the south end of the building on the roof's west side. CO Campos observed one of the roofers working toward the roof's north end "go all the way to the edge, to within a few feet." He testified that the two roofers working on the roof's east side were close to 100 feet apart. (Tr. 208-09, 483, 486-88, 504; C-7, R-4, at pp. 14, 27).

CO Campos also stated that he observed Mr. Urieta and another roofer work near "pretty slick" plywood. He stated that once someone started to slide on plywood "it's going to be like a slide at an amusement park." (Tr. 206-07; C-8). CO Campos testified that photographs C-9 through C-11 showed Mr. Urieta bent over focused on his work at the southern end of the building, with his back to one of the other roofers and remote from the roofer located at the north side of the roof. CO Campos stated that there were a "lot of hazards" present on the roof. (Tr. 209-11, 214-15; C-9 through C-11).

CO Campos also interviewed the three employees observed working on the roof.[37] Mr. Urieta told CO Campos in Spanish that he was the "crew chief" which he likened to "foreman."[38] (Tr. 218). Mr. Urieta told CO Campos that the roofers were using a monitoring

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(Tr. 434; R-4, at p. 7).

[36] CO Campos stated that he observed a potential hazard when a roofer pulled on his pneumatic air line that could get snagged and pull him off balance. That happened in another case where someone was knocked off balance, fell off a roof, and died. (Tr. 475; R-4, at p. 13 (C-6)). He stated that photograph R-4, at p. 13 (C-6) showed a roofer working in an unsafe manner with an air line by his feet and material directly behind him. (Tr. 475-76; R-4, at p. 13 (C-6)).

[37] CO Campos state that the noise at the work site was so loud that he conducted the interviews of the roofers inside the building. (Tr. 405).

[38] Both CO Campos and Mr. Urieta speak Spanish and Mr. Urieta was more comfortable speaking with CO Campos in Spanish. (Tr. 219). CO Campos identified Mr. Urieta as "Foreman" in his Inspection Narrative, OSHA-1A

system as fall protection and that he was the monitor. Mr. Urieta also told CO Campos that he could do different jobs while being the monitor. He stated that his job included ensuring that the roofers did not cross the warning line. Mr. Urieta admitted to CO Campos that there were times that he could not see the two other roofers, who he identified as Roberto [Valasquez Lopez] (Lopez)[39] and [Jose] Luis [Martines] (Martines). He also admitted that Messrs. Lopez and Martines were working from above to below [from the ridge pole to the eave, or "from the top to the bottom"].[40] Mr. Urieta admitted to CO Campos that he was bending down using a nailing gun to install roofing paper on the west side of the roof while acting as the monitor. He also admitted that while he was on the west side of the roof, the two other roofers were installing tin caps on the east side of the roof (Tr. 229-34, 267, 273, 276, 408; C-12).

CO Campos also testified that Respondent was cited for exposing roofers to safety monitoring system deficiencies because there were times that the monitor could not observe or communicate with the other two roofers, who were also a distance away working on the other side of the roof. Mr. Urieta's ability to communicate with the two other roofers was affected by distance and the loud noise of nearby vehicles, air traffic and construction activities, including those related to the operation of a noisy crane. CO Campos testified that there was "a lot of noise at this site" and it was "just very, very noisy." He stated that there is typically more noise on a roof than on the ground because buildings are not there to block the noise. He stated that "there was absolutely no way that they [roofers] could hear that the monitor would be calling to

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Form, dated June 16, 2010. (R-2, at p. 19).

[39] Mr, Lopez is also identified as "Roberto Vellasquez Lopez" or "Roberto Velasques Lopez." (R-2, at p. 23, R-17, at p. 3).

[40] Mr. Urieta signed and dated a statement May 14, 2009 that was written in Spanish by CO Campos that was consistent with CO Campos' testimony. Mr. Urieta's statement also included two diagrams that showed a figure of Mr. Urieta bending down installing paper on the west side of the roof while the other two roofers were working on the east side of the roof. The lower diagram shows the roof ridge blocking Mr. Urieta's view of the two other

them." CO Campos testified that there was "no fall protection" at the worksite that had "multiple tripping hazards." He stated that all three roofers were exposed to the hazard of having inadequate fall protection and not being monitored while working on the roof. He testified that the citation was characterized as serious because the possibility of injury would result in death or serious, severe fractures from a fall from thirty feet. He also considered severity and probability. CO Campos testified that he determined the $5,000 penalty based upon a gravity of ten, high severity, and greater probability due to the exposure of three employees over a period of time. He stated that there was no reduction due to company size, good faith, or history. (Tr. 263-71, 346, 405-07, 520, 525, 739-41; R-13, at p. 2).

CO Campos testified that a monitor is required to observe the employees to let them know if they are acting in an unsafe manner, exposed to any kind of hazard, or going to fall. (Tr. 278-79). He stated that it was his understanding prior to May 14, 2009 that 29 C.F.R. § 1926.502(h)(1)(v) allows a monitor to perform work as long as that work does not distract from the monitoring process. (Tr. 285-86, 300, 489; R-1, at p. 4). He also stated that he is now aware that a monitor has to be aware of what the employees are doing. He testified that "The monitor has to not be involved in an activity that's going to take away from his monitoring ability." CO Campos testified that it was impossible for Mr. Urieta to monitor the other employees since he had his back to the employees for a period of time. He stated that the monitoring system "just falls apart" if the monitor has his back toward the other employees and is focused on what he is doing. He also stated that the monitor does not really know what other roofers are doing, if the monitor is on another side of the roof. He agreed that it was generally safer for a roofer to have his back to the edge of the roof directing most of his weight toward the roof's ridge, as long as

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roofers on the east side of the roof. (Tr. 258; C-12).

there were no tripping hazards such as air lines or material stacked on the roof. (Tr. 286-87, 301, 304, 494-95).

After CO Campos completing interviewing the three roofers, Mr. Padron told him about the "painted line" and admitted that there were deficiencies in Latite's monitoring system. Mr. Padron explained that the painted line is a marking line to let roofers know that they are getting near the edge of the roof. Mr. Padron stated that Latite's roofers painted the lines near the roof's edge as they go. CO Campos testified that there were areas that did not have any painted lines on May 14, 2009. He saw painted lines that were "fairly close to the edge." CO Campos stated that photograph C-8 showed an instance where roofers were working in an area of the roof where there were no markings or yellow lines. (Tr. 305, 392-93; C-8).

CO Campos also testified that the difference between the last line of the "Safety Monitoring as an Alternative System" section of Latite's Fall Protection Plan and 29 C.F.R. § 1926.502(h)(1)(v) is that if a monitor is "doing a job, he can't be focused on this job and not be monitoring employees." He stated that Latite's provision addresses "ability" and the OSHA standard addresses "attention." (Tr. 352-54; R-2, at p. 39, R-3, at p. 33). He further testified that a roof with multiple tripping hazards constitutes a "danger zone." He stated that the worksite's "entire roof was a danger zone due to all the tripping hazards and the time of exposure and the proximity to the edge of the roof." He testified that he observed that all three roofers were close to and within six feet of the edge (or eave) of the roof. He stated that they were "going from the ridge right to the edge of the roof." CO Campos testified that photograph R-4, at p. 19 showed Mr. Urieta and another roofer unsafe with their backs close to the roof's edge, where there was a sheet of plywood that could be "pretty slippery." He also stated that photograph R-4, at p. 20

showed Mr. Urieta (wearing the orange vest) within six feet of the roof's edge and another roofer working near a wall that was less than four feet high that provided inadequate fall protection.[41] He stated that Mr. Urieta had "no idea what this guy's [other roofer] doing, or what hazards he's exposed to. The guy could slide back or lose his balance and go right off the edge of that roof where that plywood is." He stated that Mr. Urieta did not have the other two roofers, one located on the roof's north side, in virtual sighting distance. (Tr. 362, 365-68, 470-71, 492-93, 496-97; C-20, at p. 4, R-4, at pp. 19 through 21). CO Campos testified that photograph R-4, at p. 22, shows Mr. Urieta working and that he did not have the roofer at the roof's north side within his virtual sighting distance. It also shows the foreman monitor working on the roof and not monitoring, or performing his monitoring functions. He also stated that photograph R-4, at p. 24, showed Mr. Urieta within six feet of the roof's edge. (Tr. 498-501; R-4, at pp. 22-24). CO Campos testified that photograph R-4, at p. 26 shows two roofers unaware of existing safety hazards. He stated that the photograph shows both roofers working and dragging air powered tool lines at the edge of the roof where there are no yellow lines. (Tr. 502; R-4, at p. 26). He testified that when he took photograph R-4, at p. 26, the third employee not shown in the photograph was near the edge of the roof approximately 40 feet from Mr. Urieta.[42] (Tr. 504; R-4, at pp. 26-27). CO Campos testified that photographs R-4, at pp. 20-22, 24, 26, show Latite employees within six feet of the roof's edge. (Tr. 518; R-4, at pp. 20-22, 24, 26).

On rebuttal, CO Campos testified that he passed the work site "a minimum two times a day" because it is on the roadway that he takes from his house to the office. He sometimes passes the

[41] *See* Latite's Fall Protection Plan that defines "Unprotected sides and edges" as "any side or edge … of a walking/working surface, e.g. floor, roof, … where there is no wall or guardrail system at least 39 inches (1.0 m) high." (R-2, at p. 43).

[42] CO Campos prepared a label for photograph R-4, at p. 26, that stated "The other employee is near the edge of the roof approximately 40 feet away." (Tr. 504, 510; R-4, at pp. 27-28).

work site four to six times a day. He was driving by the work site while performing local emphasis program inspections when he observed the hazard. When he observes a problem, he conducts an investigation and an inspection ensues. He testified that the May 13, 2009 informal conference had nothing to do with his return to the work site on May 14, 2009. (Tr. 978).

2. Steven J. Struve

Mr. Struve has worked at Latite for 23 years and currently is its President. (Tr. 530). He performed dry-in work as a crew chief for National Roofing prior to working at Latite from about 1980 through 1985. He has been responsible for more than three hundred million square feet of roofing. He has served as the Chairman of the Safety Committee, Associated Builders and Contractors for Southeast Florida Region.[43] (Tr. 553-54, 557). Latite is a fully integrated roofer that provides both new commercial and residential construction, as well as full re-roofing services. At peak, Latite runs with 850 to 1,000 field mechanics. Latite uses no subcontractors for roofing. Mr. Struve testified that "time exposure is one of our biggest enemies in roofing. So we want to do things quicker." (Tr. 531-34). Latite installed roofing on all 41 buildings at the Alexan Plantation development without any loss time work related injury. Building 45's roof had more than 16,000 tin caps (tags or fasteners).[44] Mr. Urieta's crew probably produced 16,500 fasteners each day.[45] (Tr. 534, 565-66; R-13, at p. 6). Mr. Struve stated that on May 14, 2009 Mr. Urieta's dry-in crew was working on the initial dry-in phase of installing a tile roof that included the installation of 30-pound, asphalt impregnated felt and related metal flashings. (Tr. 536-38, 544). He stated that the 30-pound felt starts at the roof's very edge and that Latite

[43] Without objection, the Court found Mr. Struve qualified to present expert testimony as an expert in residential roofing in South Florida and residential roofing safety. (Tr. 558).
[44] Tin tags are an inch and 7/8ths circular metal disks. (Tr. 583).
[45] A roofer takes a stack of tin tags in his hands, and like dealing cards, shuffles the tin tags off the top and hits them with a nail gun. (Tr. 583).

roofers work from bottom to top in succeeding rows of 36 inches wide, overlapping felt. (Tr. 539-40). Mr. Struve prefers that his roofers do ten minutes of roof edge work and fifty minutes working on the body of the roof. The first roll of paper applied to the roof acts as a warning strip. After rolls of paper are continuously applied to the roof from bottom (eave) to the top (ridge), the crew chief will generally paint a line for that completed section.[46] (Tr. 541-42). Mr. Struve testified that photographs at R-13, at p. 4, and R-4, at p. 14, show a portion of the roof without any line painted on the edge of the plywood roof. The painted line marks the roof edge- painted zone, and the leading three feet is the red zone. There is a big hazard issue with roofers working back and forth, criss-crossing each other, and considering just the nature of the work. There is a fall hazard every day that you roof. When roofing, you always have a fall hazard. There are almost always tripping hazards. (Tr. 542-45, 565, 586; R-2, at pp. 37-38, R-4, at p. 14, R-13, at p. 4). Mr. Struve testified that he believes that there was no duty to monitor employees if the employees were out of the red zone, defined as the area within 3 feet of the roof's edge. Latite's Fall Protection Plan for the work site included a safety monitoring plan that was designated as an alternative to the Fall Arrest System.[47] (Tr. 551-52; R-2, at pp. 37, 39). Latite's Fall Protection Plan included OSHA's Occupational Safety and Health Interpretations,

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[46] Latite's Fall Protection Plan includes a section entitled "Controlled Access Zones" which states, in part, that:

> This "warning line" is preferred over signs, wires, tapes, ropes or chains because the focus of roofing employees is consistently down at the roof deck.
>
> The warning line functions as a constant reminder of the approaching leading edge and heightens safety consciousness of employees while working on the roof deck. …
>
> The competent person shall ensure that all protective elements of the CAZ be implemented before the beginning of work.

(R-2, at p. 40).

[47] The Fall Protection Plan included a section entitled "Safety Monitoring as an Alternative System" that stated, in part:

> The safety monitor's primary responsibility is to warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner. The safety monitor will be so positioned as to be in visual sighting distance of the monitored employee(s) and close enough to communicate orally. … The safety monitor may be engaged in other activities as long as he/she maintains his/her ability to monitor.

(R-2, at p. 39).

Interpretations and Clarifications Subpart M-- Fall Protection (29 C.F.R. [§§] 1926.500-503) - Interpretation M-6 (Feb. 1995)(Interp. M-6), at Appendix 1.[48]

Mr. Struve testified that the noise levels on a residential roof two or three stories high and on the ground depend on the site. (Tr. 555). He also stated that material disbursed atop a roof exponentially grows a tripping hazard. (Tr. 562). He stated that a roofer always faces the roof's ridge when driving tin caps, except when working sideways when installing the first course of paper in the area three feet from the edge of the roof. (Tr. 567-68). Mr. Struve testified that an OSHA representative told him that he was looking to "ensure that a safety monitor is always warning an employee of an unsafe condition, or hazard, or an unsafe action." (Tr. 568-69). He admitted that air lines can be tripping hazards. (Tr. 573). He stated that Latite trains its roofers to allow airlines to come over the roof's ridge, go down behind the employee, and then up to the gun. (Tr. 574). Mr. Struve testified that Latite's employees shown in photographs R-4, at pp. 1-2, 4-8, 10-14, 16, 18-19, 24, 26, and 28, were not positioned in Latite's controlled access zone. (Tr. 570-92; R-4, at pp. 1-2, 4-8, 10-14, 16, 18-19, 22, 24, 26, 28).[49] He also testified that, in his opinion, Latite employees shown in photographs R-4, at pp. 1-2, 7, 10-12, 16, 18-21, 28,

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[48] Interp. M-6 stated, in part:

> Any member of the crew could serve as the safety monitor as long as that person … is not given duties that would prevent him or her from fulfilling their assignment as a safety monitor." …
>
> Also, the monitor must be on the same level and be able to see and talk with the person(s) being monitored. The monitor must be able to see and communicate with "all" the employees being monitored. … The monitor need only monitor employees while the employees are in the danger zone, on a flat roof, the danger zone is the area outside the warning line. For leading edge work, the danger zone is the entire controlled access zone. A monitor does not necessarily have a continuous function of monitoring. A member of the crew could be designated as the monitor and be called upon when needed, enabling the monitor to be fully engaged in other work when no monitoring function is needed.

(R-2, at p. 47).

[49] Mr. Struve also testified that he guessed that an employee was shown a minimum of six feet back from the roof's eave in the photograph at R-4, at p. 20. He also guessed that an employee was shown six feet from the roof's edge in photograph R-4, at p. 21. (Tr. 589-90; R-4, at pp. 20-21).

were not conducting themselves in an unsafe manner. (Tr. 570-92; R-4, at pp. 1-2, 7, 10-12, 16, 18-21, 28).

On July 16, 2009, Mr. Struve told Ms. Fossum in a telephone call that OSHA was inconsistent, making it impossible for Latite to comply. He further told her that he believed that the safety monitor was doing his job and that the employees were too far back to need a safety monitor. He recalls Ms. Fossum telling him that she did not accept the painted warning lines. (Tr. 595-97; R-2, at p. 5B).

Mr. Struve admitted that a painted line was not present in photographs C-2 and C-3, where Mr. Urieta was shown installing tin tags on a portion of the roof covered with felt. (Tr. 598; C-2 through C-3). He also testified that there was not a painted line on the plywood roof shown at photograph C-8 because it was Latite's policy not to paint lines on plywood. (Tr. 599; C-8). He admitted that he was not present at the worksite on May 14, 2009 and that he did not know what Latite's employees knew at the time they were on the roof. (Tr. 599-600).

He further testified that Respondent's safety manual stated that when using a nail gun it was important for employees to keep their eyes on what they were nailing to avoid shooting a nail through your hand. The safety manual also states that employees are not to become distracted or look away when using a nail gun. (Tr. 601-05; C-22, at p. 9). He also stated that the safety manual includes a provision that stated that the use of a warning line is preferred. (Tr. 606; C-22, at p. 14).

3. Ramona Evette Morris

Ms. Morris has worked for OSHA since April 20, 1990. She has been an Assistant Area Director since December, 1999. From May, 2002 through October, 2009, she served as the Assistant Area Director for OSHA's Fort Lauderdale, Florida Area Office. (Tr. 628-30). She

testified that she recalled talking with CO Campos about the monitor being required to do monitoring when their employees were close to the edge because he had to be at a position where he could warn them to move back. (Tr. 640-41). She recalled being told by Area Directors Darlene Fossum and Luis Santiago that compliance officers were to ask to see the alternative fall protection plan for the work site if they saw no traditional or conventional fall protection being used at a Latite work site. Compliance officers were then supposed to see whether or not Latite was complying with its plan. (Tr. 645-46). She testified that CO Campos was required to take pictures when he thought he saw a violation. (Tr. 651). She stated that CO Campos took photographs because Latite's "employees were exposed to a fall hazard." (Tr. 654). When shown photographs at R-4, at p. 28, she stated that the monitor should have been monitoring the other employees on the roof, and not working, to make sure that they did not get close to the roof's edge. (Tr. 653-55; R-4, at p. 28).

4. Darlene Fossum

Ms. Fossum has served as the Area Director in Fort Lauderdale, Florida for about three years since 2007. Before that, she served as an Assistant Area Director in Cleveland, Ohio and Parsippany, New Jersey. She has also served as an OSHA compliance officer, as well as a Safety Director for numerous private construction companies. (Tr. 659-61). She testified that she has had disagreements with Latite on how Latite interprets the law. (Tr. 664). She testified that on July 16, 2009 Mr. Struve told her that he would "go to straight conventional protection" after she told him that she had checked with Mike Shea at OSHA's Regional Office and sprayed on warning lines were not authorized. (Tr. 669; R-2, at p. 5B). She agreed that the monitor needs only monitor employees while the employees are in the danger zone and that there was no duty to monitor outside the controlled access zone. (Tr. 673; R-2, at p. 50). She also agreed that

"flat roof" is included within the standard's definition for "low sloped roof." She identified the citation that was originally issued by OSHA to Latite on June 23, 2009. (Tr. 674; R-2, at p. 15). She testified that exposures to hazards "are very, very limited" and by the time a compliance officer gets into a position to safely take photographs, the exposure may no longer be present. (Tr. 678).

She admitted telling Mr. and Mrs. Struve on July 16, 2009 that based on only the pictures that were in the inspection file, the employees seemed far enough back from the edge with regard to the six-feet authorized distance to work. She also recalled telling Mr. Struve that six-feet is the required distance from the edge/eave of the roof for a warning line and not three-feet. (Tr. 680-82; R-10, at p. 4). She never told Mr. Struve that Latite's monitoring was in compliance with the standards. (Tr. 687).

She agreed that although the monitor does not have to look at the monitored employee at all times, he has to have a visual of all the crews that are working. That's the reason why the safety monitor should have limited duties. Where a two-member crew is working on different sides of a roof, she stated that there should be two safety monitors. She testified that crews, including the safety monitor, need to be aware when a roofer goes within six feet of an edge and is within a controlled access zone. She stated that the monitor has responsibility for ensuring that employees are outside of the danger zone. She testified that the monitor's "responsibility is to ensure that the employees, during the work practice, do not overstep or go into an area where they could be exposed to the danger of a fall. That has to be done through monitoring. They have to watch them, look at them, make sure that they are aware of where that employee is in relationship to that line." She also agreed that the monitor has to have the ability to communicate with employees being monitored. (Tr. 684-86, 689-90). She testified that Latite

did not comply with the monitoring standard requirements. (Tr. 689).

5. Inocencio Urieta-Robles (Urieta)

Mr. Urieta has worked for Latite periodically for nine years. He is currently a Crew Supervisor or Crew Chief and has been for seven years. He gets paid by the piece so that the more work he completes each day the more money he earns. He testified that he has never been a foreman at Latite and is not part of Latite's management team. (Tr. 700, 734). On May 14, 2009, he was the crew chief. He was also the safety monitor and wore an orange vest and blue hat at the work site. (Tr. 701-02, 708; R-13, at p. 3, R-29, at p. 3). As the safety monitor, he was responsible for warning any person who was within the red zone. (Tr. 709). May 14, 2009 was a windy day. (Tr. 707). He admitted that his crew was working close to the red zone at the time of CO Campos' inspection. Mr. Urieta testified that he received a call on his radio from the Project Manager Ponchy to bring his crew down from the roof. CO Campos told him that he and his crew were working too far apart and that he, as safety monitor, could not watch the crew all of the time. (Tr. 708-09).

Mr. Urieta agreed that a warning line was painted after the first two rows of felt were rolled horizontally across the east side of the roof. His crew applied the tin tags from right to left, horizontally after the felt was secured to the plywood. (Tr. 709-11; R-4, at p. 13). Mr. Urieta applied from 15 to 20 tin tags each time when bending over for 20 to 30 seconds on the west side of the roof to secure felt that looked like it was about to fly away. He agreed with Respondent's counsel that whenever he raised back up when wearing the safety monitor [vest] he looked around to see where the other crew members were. He also agreed with Respondent's counsel that there was never a time on May 14, 2009 that he did not know where his crew was or that he was too far away to communicate with his crew. He also agreed with Respondent's counsel that

he was not pressured to work fast. (Tr. 712-13). When shown some of the photographs that were taken by CO Campos on May 14, 2009, Mr. Urieta agreed with Respondent's counsel that he could either see both other crew members whether they appeared in the photographs or not, or he knew where they were. He further agreed with Respondent's counsel that the employees in these photographs appeared to him to be neither unaware of any hazard nor working in an unsafe manner. (Tr. 715-23, 725-29; R-4, at pp. 1-2, 5-8, 10-11, 14, 16, 18-20, 22, 24, 26, 28). Mr. Urieta testified that he painted the yellow line shown on photograph R-4, at p. 12. (Tr. 723; R-4, at p. 12). Mr. Urieta also agreed with Respondent's counsel that he worked with his crew whenever they were in or close to the danger zone. He also agreed with Respondent's counsel that he always knew where his and his crew members' air lines were. (Tr. 724-75). Mr. Urieta admitted that CO Campos was not wrong when CO Campos told him when preparing the diagrams at C-12 on May 14, 2009 that when Mr. Urieta was on the other side of the roof he could not see the other crew members. (Tr. 730; C-12).

6. Michael A. Shea

Mr. Shea testified that he graduated from the Georgia Institute of Technology in 1987 with a major in mechanical engineering. He is a certified safety professional. He was a Safety and Health Compliance Officer with OSHA for nine years, where he conducted about 400 inspections before 1997. About half of these inspections related to construction. He is currently a safety engineer with OSHA's Atlanta regional office, where he assists the area office's investigations of accidents, including those involving fatalities and building collapses. He also writes interpretation letters and answers queries about the interpretation of standards, including issues relating to fall protection. As a safety engineer in the Atlanta Regional Office he was involved in an additional 600 inspections. He has testified three times as an expert witness. He

has worked for OSHA for 22 years. (Tr. 746-48, 792, 827; C-16, at p. 2).[50]

Mr. Shea testified that he reviewed the OSHA inspection case file, including photographs, architectural drawings, and other illustrative notes that denoted the approximate locations of the employees and the safety monitor on the roof. He also personally visited the work site. (Tr. 750-52; C-18, at pp. 2-3). Mr. Shea testified that, in his opinion, when Mr. Urieta was on the roof's west side he was not within visual sighting distance of the employees on the roof's east side. He confirmed his opinion through the application of calculations, geometry, and trigonometry. He testified that his expert opinion report that he compiled was at exhibit C-16. He stated that his expert report contains his conclusions that the safety monitor was not within visual sighting distance of the employees being monitored on the opposite side of the roof. He testified that it was his opinion that the safety monitor lost visual sighting of the other employees about 16 feet down from the roof's ridge line or peak. (Tr. 752-58; C-16). He further testified that it was his opinion that the safety monitor and another roofer were each located about halfway down away from the roof ridge line on opposite sides of the roof and, consequently, were not within visual sight of each other.[51] Mr. Urieta's visual sight of the roofer on the opposite side of the roof was blocked by the roof's peak. (Tr. 758-59, 767-69; C-4, C-6 through C-7, C-16, C-18, at p. 3).[52] Mr. Shea stated that the building where the roofer's were working

[50] By Order dated February 17, 2010, the Court found Mr. Shea qualified as an expert in: (1) whether a safety monitor(s) was in a position to view employees in accordance with OSHA standards, and (2) the application of trigonometry and geometry to consider the safety monitor's viewing and sighting distances as referenced in applicable OSHA standards. (Tr. 749-50).

[51] Mr. Shea referred to Photographs C-4 and C-6 through C-7 for illustrations, which were taken at around 11:12 a.m. through 11:18 a.m., May 14, 2009 in support of his opinion. (Tr. 799, 802; C-4, C-6 through C-7, R-5). He also testified in rebuttal that photographs C-23 through C-25 provided additional evidence to support his position that the monitor was below 16 feet down away from the peak. (Tr. 827-28; C-23 through C-25).

[52] He also later testified that photograph C-3 showed Mr. Urieta in a position on the roof's west side more than 16 feet down away from the ridge line where he could not see the other roofers located on the roof's east side because his view was blocked by the roof's ridge. (Tr. 805-06, 810; C-3).

was 222 feet long. He testified that the two roofers shown in photograph C-7 were about 55 feet apart. (Tr. 775, 776-77; C-7).

Mr. Shea also testified that the statement in OSHA's Interp. M-6 that "The monitor need only monitor employees while the employees are in the danger zone, on a flat roof, the danger zone is the area outside the warning line" did not apply since "this job was not a flat roof." He stated that it did not "tell anything about the slope of roofs above a flat roof up to a 4 and 12 roof." (Tr. 819-20; R-2, at p. 47). He also testified that he did not view OSHA interpretation letters as constituting an alternative fall protection plan. (Tr. 821; R-2, at p. 50). He stated that regardless of roof size, Latite's monitoring system was deficient since Mr. Urieta could not see over the roof's peak. (Tr. 832-33).

7. Ray Padron

Mr. Padron testified that since June 6, 2006 he has served as the Safety Director at Latite. Before that, he worked various jobs at Roof Tile Administration (RTA). He has been directly involved in the roofing industry since 1993. From 1999 through June, 2006, he was a Field Operations Auditor at RTA, where he audited jobs for safety, quality, and production. Before that, he worked as a Field Operations Manager at RTA, where he oversaw field supervisors and monitored production, safety, and quality. (Tr. 880-81). As Latite's Safety Director, he administers its safety program. He conducts job site inspections almost every day, chairs the Safety Committee, and performs hazard analyses. (Tr. 882-83, 885). Mr. Padron testified about the employee class history training records of Mr. Urieta, and the two other roofers in his crew, Messrs. Lopez and Martines. (Tr. 886-88; R-17).

Mr. Padron testified the safety monitor's duties are to warn any employee that he may see acting in an unsafe manner. He testified that the red zone is the warning line and Latite's

controlled access zone. (Tr. 890). He testified that he had an impression from participating in a telephone call with Ms. Morris and CO Campos on May 13, 2009 that CO Campos would be at the work site on May 14, 2009. He went to the work site on May 14, 2009 and took some photographs starting at about 9:16 a.m. while on the roof that was later inspected by CO Campos (Tr. 891-98; R-3, at p. 5, R-13). He stated that, in his opinion, there is not as much traffic noise on the roof as at ground level. (Tr. 893-94). He also agreed with Respondent's counsel that Latite's employees appeared to be conducting the dry-in in accordance with the way they had been trained to safely perform that operation. (Tr. 899-900).

Mr. Padron testified that during a meeting with Ms. Morris on July 7, 2009, he and Ms. Struve told Ms. Morris that the employees pictured in some of the photographs taken by CO Campos were out of the zone. (Tr. 902-03; R-2, at p. 7). Mr. Padron testified that during the preliminary closing conference with CO Campos on May 14, 2009, CO Campos told him that safety monitors could not be performing any work while they were monitoring. Mr. Padron did not recall CO Campos mention anything about painted lines. (Tr. 904-05; R-2, at p. 21). Mr. Padron testified that Latite's crew was working on the roof of building 45 on May 14, 2009. (Tr. 906-07). Mr. Padron acknowledged that he was not present at the work site when CO Campos was observing conditions during his May 14, 2009 inspection. (Tr. 908).

Mr. Padron acknowledged that he took the photograph at R-13, at p. 7, that did not show a [warning] line painted at the roof's edge that was before him.[53] He denied that he was standing at the roof's edge when he took the photograph and acknowledged that Mr. Urieta did not provide him with any warning.[54] (Tr. 909-14; C-13, at p. 7). Mr. Padron testified that he was

[53] Later, during cross examination, Mr. Padron agreed with Respondent's counsel that a painted line did not make it into the photograph. (Tr. 925; R-13, at p. 7).

[54] During cross examination, Mr. Padron marked where he took the photograph on a diagram of the roof. His mark

familiar with and recognized a set of flash cards labeled "NRCA/OSHA Safety Training Program" and "National Roofing Contractors Association." He further testified that he was not familiar with one of the green flash cards within the set entitled "Warning-line and Safety-Monitor Systems for Low-Slope Roofs." (Tr. 915-19).

Mr. Padron admitted that Latite's Safety Manual stated (in part):

Warning line systems (Low Slope Roof):

> The warning line system can be used to provide fall protection on roofs with slopes of 4/12 pitch or less. Warning line systems must consist of stanchion posts and rope or cable, flagged with highly visible bits of material handing from the warning lines at no more than six foot intervals and be installed no less than 34 inches about the roof surface and its highest point no more than 39 inches to warn employees that they are approaching the edge of the roof. …
>
> Safety Monitoring System (Low Slope Roof)
>
> … When employees are working between the warning line and the exposed roof edge the safety monitor will be so positioned as to be in visual sighting distance of the monitored employee(s) and close enough to communicate orally. The safety monitor may be engaged in other activities as long as they maintain the ability to monitor.
> …
> Low Slope Roof Safety Guidelines:
>
> * Employees are not allowed to enter the area between the warning line and the roof edge unless performing work in that area and safety monitor is present. …

(Tr. 920-21, 925; C-22, at pp. 15-17).

Mr. Padron testified that Latite's Safety Manual calls for employees to keep their eyes on what they are doing when using a nail gun to nail. He also admitted that Latite's Safety Manual states that when using a nail gun employees are not to become distracted from what they are doing or look away for whatever reason. (Tr. 921-22; C-22, at p. 9).

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was adjacent to the roof's edge. (Tr. 923-24, 928; C-14, at p. 2).

8. Barbara Struve

Ms. Struve testified that she has worked at Latite since 1992 and is currently the Loss Control Manager. She is Latite's founder's daughter-in-law. She supervises and support's Ray Padron. She has been involved with Latite's safety training programs and procedures for monitoring compliance with Latite's safety programs and procedures since about 1995. (Tr. 930). She identified receipts that employees sign indicating they have received Latite's safety manual. (Tr. 931; C-19). Following a May 13, 2009 informal conference that she participated in with Ms. Morris and CO Campos, Ms. Struve was certain that she would see CO Campos at the work site later either that day, or May 14, 2009. She told Mr. Padron that she wanted him at the work site on the morning of May 14, 2009. (Tr. 936-37; C-3, at p. 5). She also participated in an informal conference that occurred on July 7, 2009, where she and Mr. Padron told Ms. Morris that photographs showed Latite's employees were out of the zone. (Tr. 937; R-2, at p. 7). She further testified that she also participated in a telephone call with Ms. Fossum that occurred on July 16, 2009, where Ms. Fossum said her issue was the painted warning lines. She testified that Ms. Fossum stated that Latite should have stanchions with ropes and flags. (Tr. 938-42; C-2, at p. 5B).

Discussion

Respondent's roofing activities on May 14, 2009 included installing 30-pound, asphalt impregnated roofing paper to weatherproof the roof's plywood decking. (Tr. 536-38, 886-87; R-2, at p. 23, R-17). There is no dispute between the parties that Respondent's employees, Messrs. Urieta, Lopez and Martines, were engaged in placing roofing felt paper on the roof without fall protection in the form of safety belts or nets, personal arrest systems, lanyards, or guardrails. Respondent used a safety monitoring system and a warning line as its method of fall protection.[55] Mr. Urieta had additional responsibilities as crew chief and safety monitor. (SF No. 2).[56] As the safety monitor, Mr. Urieta monitored the work activities of his co-workers and was responsible for warning them when they were in danger of falling off the roof, or of tripping on items on the roof.[57] As safety monitor, he was required to wear an orange vest. Mr. Urieta was the only safety monitor identified on the roof. (C-12).

The issue in this case is whether Mr. Urieta was, under the circumstances present at the worksite, able to provide the protection contemplated by the standard to himself and his co-workers. Respondent maintains that it complied with the standard by assigning monitor duties to Mr. Urieta and, therefore, its employees were not exposed to the hazard of falling off the roof. Respondent argues that the Secretary has failed to establish that its employees were

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[55] Respondent is permitted to use a safety monitoring system and warning line pursuant to 29 C.F.R. § 501(b)(10)(2009). A warning line system is required where roofs are greater than 50-feet wide. (*Id.*)

[56] He also served as the crew's "foreman." (Tr. 218).

[57] After placing paper along the edge, Mr. Urieta was also supposed to spray-paint a yellow line three-feet from the roof's edge to provide a visual warning to the roof workers if they approached the roof's edge per Respondent's procedures. (Tr. 541-42; R-2, at p. 40).

exposed to a falling hazard at the time of the inspection. (Respondent's post-hearing brief, at pp. 31-38). On the basis of the evidence, the Secretary has met her burden in proving that Respondent violated the OSHA standard at issue.

A. The standard, 29 C.F.R. § 1926.502(h)(1)(iii)(iv) and (v)(2009), requiring adequate safety monitoring of employees applies.

Respondent was engaged in roofing activities on a low-sloped roof.[58] (Tr. 175). Respondent concedes that it used a safety monitoring system with a painted warning line in lieu of any other form of fall protection and it designated Mr. Urieta to be the safety monitor for the other employees on the roof. (Tr. 22; C-12). The Act's safety monitoring systems standard for fall protection applies. *See Holland Roofing of Columbus, Inc.,* 19 BNA OSHC 2125, 2126-27 (No. 01-1629, 2002).

B. Respondent violated the safety monitoring standard at 29 C.F.R. § 1926.502(h)(1)(iii)(iv) and (v)(2009).

The Secretary proves a violation of § 1926.502(h)(1)(iii)(2009) by demonstrating either that the safety monitor was not on the same surface as the employees being monitored or that the safety monitor was not within visual sighting distance of the employees being monitored. *Pete Miller, Inc.*, 19 BNA OSHC 1257 (No. 99-0947, 2000), *aff'g, Peter Miller, Inc.,* 2000 WL 675527, at * 3 (O.S.H.R.C.A.L.J., 99-0947, May 22, 2000). The only element at issue here is whether the safety monitor could see the employees he was supposed to monitor. The term "visual sighting distance" has been interpreted to mean the ability to see the employees being monitored. *Id*. (holding, in part, that because the safety monitor could not always watch

[58] A "low-slope" roof is a roof having a slope less than or equal to 4 in 12 (vertical to horizontal). 29 C.F.R. § 1926.500(2009).

the employees, the employer violated the standard); *see also* Interp. M-6 (stating "[T]he monitor must ... be able to see ... the person(s) being monitored. The monitor must be able to see ... 'all' the employees being monitored."). (R-2, at pp. 45-50).

The Secretary demonstrates a violation of § 1926.502(h)(1)(iv)(2009) if she proves that the monitor was too far away to talk with the employees that are being monitored. The Commission has held that even forty feet between the monitor and the other workers is too far away to comply with the standard. *See Beta Constr. Co.,* 1992 WL 196570, at * 4 (O.S.H.R.C.A.L.J., No. 91-102, July 31, 1992)(holding that a monitor who turned his back on employees and went to get materials 40 feet away was not close enough to verbally communicate with the employees), *aff'd*, 16 BNA OSHC 1435 (No. 91-102, 1993). *See also* Interp. M-6 (stating "[T]he monitor must ... be able to ... talk with the person(s) being monitored."). (R-2, at p. 50).

With regard to § 1926.502(h)(1)(v)(2009), the Commission has found that when the Secretary demonstrates a monitor has his back to other roofers, leaves employees to perform other duties, or is focused on other non-monitoring activities in lieu of monitoring activities, the monitor is unable to monitor effectively and an employer violates the monitoring standard. *Holland Roofing of Columbus, Inc.,* 19 BNA OSHC at 2127 (finding a violation of the standard when the monitor had his back turned to other roofers for several minutes); *Upstate Roofing, Inc.,* 19 BNA OSHC 2084 (No. 01-0336, 2002)(finding that a safety monitor who turned his back on employees and focused on retrieving roofing insulation had responsibilities that took his attention away from monitoring); *New England Roofing and Sheet Metal Co.,* 16 BNA OSHC 2061 (No. 93-1833, 1994)(holding that the monitor's behavior did not meet the requirements of

the regulations where the purported monitor was at times "busy working, smoking, and standing at the roof edge[]" or "sometimes had his back to the other workers [he was supposed to be monitoring]"). The Secretary does not prove a violation under 29 C.F.R. § 1926.502(h)(1)(v)(2009) simply by showing that a safety monitor is engaged in non-monitoring activities. Safety monitors are permitted to have other job duties. Their other duties may not impede the monitoring function, as it did here. *Beta Constr. Co.,* 16 BNA OSHC at 1444 (monitoring requires more than the "fortuity" that the monitor is looking up at the requisite time). Where the Secretary demonstrates that the safety monitor's other duties impeded his ability to monitor, she has demonstrated the violation.

In this instant matter, Respondent failed to comply with standard, 29 C.F.R. § 1926.502(h)(1)(iii)(iv) and (v)(2009) for the reasons discussed below.

> 1. Respondent violated 29 C.F.R. § 1926.502(h)(1)(iii)(2009) because Mr. Urieta, at times, could not see the employees he was supposed to monitor and no monitor was assigned to monitor Mr. Urieta.

Respondent did not comply with the standard because its safety monitor did not maintain visual contact with the employees he was supposed to monitor.[59] At times, Mr. Urieta worked alone on the opposite side of the roof's ridge from the employees he was responsible for monitoring. (Tr. 179-81, 716, 718; C-1 through C-3, C-7 through C-8, C-12). CO Campos testified that he repeatedly observed on May 14, 2009 that Mr. Urieta did not have one, or both, of the two other roofers within his visual sighting.[60] (Tr. 179-82, 194-95, 197-200, 362, 365-68,

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[59] The Secretary concedes that the safety monitor was working on the same walking/working surface. The issue is whether the safety monitor was within visual sighting distance of the employees being monitored on May 14, 2009.

[60] The Court finds CO Campos' testimony in ths regard to be entirely credible.

410, 415, 424, 432-34, 466-67, 470-71, 474, 492-93, 496-97; C-5 through C-7, R-4, at pp. 6-7, 12). CO Campos observed at least one employee working at least 40 feet from the monitor, Mr. Urieta. (Tr. 504; R-2, at p. 24, R-4, at pp. 26-27). The compliance officer observed the monitor on the opposite side of the roof from his co-workers, and at other times with his head down or not facing his co-workers while working. (Tr. 182-87). CO Campos saw the employees who were on the east side of the building working a notable distance apart. CO Campos observed the employees working near the roof's edge. (Tr. 180).

The photographs that CO Campos took on May 14, 2009 confirm his testimony. (C-1 through C-2, C-5 through C-7, R4, at pp. 6-7, 9 at photo ID 6, 12, 19-22). CO Campos photographed the employees working 55 feet from each other while the safety monitor was on the opposite side of the roof's ridge. (Tr. 775-77; C-7). Respondent also admits that, at times, employees worked at least 115-120 feet apart from each other.[61] (C-26, Respondent's Supplemental Response to Complainant's Interrogatory No. 3, at pp. 1-2). CO Campos photographed employees on the east side of the building while Mr. Urieta was on the west side of the building. CO Campos did not observe Mr. Urieta monitoring these employees. (Tr. 201, 208; C-6 through C-7). Neither Mr. Urieta nor his blue hard hat was visible from the east side of the building. (Tr. 201, 208; C-6).

Mr. Urieta admitted that although he was crew chief and safety monitor, "[t]here were times when I could not see Roberto [Lopez] or Luis [Martines]." (Tr. 230; C-12). Mr. Urieta also agreed that he could not see the other workers while on the opposite side of the building from them. (Tr. 230-31). While working in the middle of the west side of the roof, he admitted

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[61] *See also* Respondent's post-hearing brief, at p. 64, which concedes that CO Campos' photographs "reveal[] monitor Urieta may have been as far as 100-120 feet away from the other members of the crew ...."

that his view of the employees who were working on the east side of the ridge was blocked. (Tr. 229-34, 258, 267, 273, 276, 408, 730-31; C-12).[62] Mr. Urieta further admitted that there were times he had to guess where the employees were located on the roof, stating that it is only through the sound of the nail gun that he could "... guess the distance where they are at." (Tr. 727, 731). Mr. Urieta's admissions regarding his inability to see the other employees remained consistent at the hearing when he admitted the following during direct-examination by Respondent's counsel:

> Q: And did he say but you're still on the other side of the roof, or words to that effect?
>
> A: He told me it didn't matter where, that I was on the other side of the roof and I couldn't see them.
>
> Q: Was he wrong about that?
>
> A: No, he wasn't wrong. No."

(Tr. 730).

CO Campos observed Mr. Urieta working "close to the edge" on the west side of the building with his eyes focused on the roofing paper and the roof deck.[63] (Tr. 424). Frequently, his back was turned toward the other two roofers while at the roof's edge. (C-12). CO Campos

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[62] Mr. Urieta's statements regarding his inability to see the other employees are properly imputed to Respondent as admissions against Respondent. (Tr. 220-21; 227). Mr. Urieta works for Respondent and was the crew chief for the roofing workers. (Tr. 22, 700). He agreed that the crew-chief was "like a foreman." (Tr. 218; C-12). Respondent's Employee Safety Manual instructs employees that "Your crew chief ... will help you determine which fall protection measures are appropriate for your work assignment." (C- 22, at p. 13). These statements were made to CO Campos while Mr. Urieta was employed by Respondent and his statements concerned work activities which are within the scope of his employment. *See* Fed. R. Evid. 801(d)(2)(D). *See also Regina Constr. Co.*, 15 BNA OSHC 1044 (No. 87-1309, 1991)(explaining that both the employee and his foreman's statements are admissions and not hearsay); *but cf.* Guarding of Low-Pitched-Roof Perimeters During the Performance of Built-Up Roofing Work, 45 Fed. Reg. 75,618 (November, 14, 1980); R-28)(Supervisory or non-supervisory employee may be designated to be the safety monitor). (*Id.* at 75,620; R-28, at p. 3).

[63] Mr. Urieta admitted that he sometimes worked on the west side of the roof within seven to eight feet from the west eave where he could not see any employees working on the east side of the roof. (Tr. 726).

observed Mr. Urieta with his back to an employee who he was supposed to monitor. (C-8 through C-11). CO Campos testified that when the monitor's back is turned and he is focused on other roofing activities, it was "impossible to know what they're [employees] doing ... the monitoring system just falls apart." (Tr. 301, 434, 921-22; C-22, at p. 9, R-4, at p. 7). CO Campos rightfully concluded that Mr. Urieta could not adequately monitor the employees.

CO Campos' conclusion was bolstered by Mr. Shea's testimony. Mr. Shea testified that given the roof pitch and Mr. Urieta's height and position on the roof, Mr. Urieta could not see the employees that he was supposedly monitoring.[64] (Tr. 752-58, 799, 802; C-4, C-6 through C-7, C-16, R-5). Mr. Shea used trigonometry and geometry to calculate the point at which Mr. Urieta and the employees would lose sight of each other on opposite sides of the ridge. Mr. Shea's math-based assertions provide a clear foundation for his expert testimony that Mr. Urieta could not see the employees. Mr. Shea concluded that based on the case file, photographs, the measurements stipulated to by Respondent and his onsite view of the job site, that Mr. Urieta "was not within visual sighting distance of the employees on the east side of the roof." (Tr. 752). Mr. Shea determined that Mr. Urieta would lose sight of the employees if he moved about 16 feet down from the ridge. Employees working at least the same distance down from the other side of the ridge could not been seen by the safety monitor. The ridge impeded Mr. Urieta's view. Mr. Shea determined that Mr. Urieta worked 19.5 feet and more than halfway down away from the roof's ridge. (Tr. 754-55, 758-59, 767-69, 827-28; C-3 through C-4, C-6 through C-7, C-16, at p. 4, ¶ 3, and at Exhibit C, C-18, at p. 3, C-23 through C-25).[65] At more than 19 feet from the roof's

[64] Mr. Shea assumed that the distance from Mr. Urieta's feet to his eyes was 5 feet. (Tr. 757-58).

[65] Mr. Shea also concluded that even if positioned at 16 feet from the ridge, Mr. Urieta was not able to see the other employees when he bent over to install roofing paper as he did on numerous occasions during the inspection. (Tr.

ridge, "even if the monitor is looking up, when he's not bent over [and] looking up, he still can't see over the peak or the ridge line, and his view is blocked." (Tr. 759-60). Respondent did not provide any expert testimony to rebut Mr. Shea's calculations.

Mr. Urieta corroborated Mr. Shea's assessment and CO Campos' observations by testifying that he worked in the middle of the roof near roof vents.[66] (Tr. 718). Mr. Urieta testified:

> Q: Were you working close to those vent painted areas when you were on the west side of the roof?
>
> A: Yes.
>
> Q: And were those vent-painted areas on the upper third of the roof on the west side? I'm going from the ridge down. Were they in the upper third?
>
> A: They were in the middle [of the roof].

(Tr. 718; C-23 through C-25).

See Pete Miller Inc., 19 BNA OSHC at 1258 (employer violated the safety standard at 29 C.F.R. § 1926.502(h)(1)(iii) where the foreman admitted that, at times, he could not see the employee), *aff'g*, *Peter Miller, Inc.*, 2000 WL 675527; Interp. M-6 (stating "[t]he monitor must ... be able to see ... the person(s) being monitored.").

The standard requires safety monitoring for all employees on the roof. No safety monitor was assigned to monitor Mr. Urieta while he worked on the roof. (Tr. 685). He worked alone on the opposite side of the roof from the other workers outside of the visual sighting distance of anyone. A monitor, working alone without monitoring, is evidence of ineffective safety

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757-58).

[66] CO Campos also testified that Messrs. Lopez and Martines worked and approached the edge of the roof well below the 16 feet line. (Tr. 180).

monitoring. Nothing prohibited Respondent from designating more than one safety monitor for its roofing activities on May 14, 2009. Respondent had an affirmative duty to make sure that Mr. Urieta was also monitored, a duty that Respondent failed to meet. Respondent admits it only designated one safety monitor, Mr. Urieta. Respondent failed to keep Mr. Urieta within visual sighting distance of a safety monitor when Mr. Urieta installed roofing paper.

In its defense, Respondent argues that the safety monitor is only required to monitor the employees while they are in the Controlled Access Zone (CAZ).[67] Respondent points to Interp. M-6 which states that on a flat roof only [not low-slope roofs, such as the roof at issue here], the danger zone is the area outside the warning line.[68] Respondent's argument is rejected. The safety standards require Respondent to monitor the danger zone. The precise language of the standard does not limit the monitoring area of the roof to any specific area. The monitor must monitor the zone of danger, which in this instance is the entire surface of the roof where the three employees were working.[69]

There was also no properly configured CAZ that conformed to the standards on the roof at the time of the inspection. Pursuant to the standard, a CAZ is a place to which access is strictly controlled and extends the length of an unprotected edge, a minimum of 6 feet from the

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[67] The standards define a CAZ to mean "an area in which certain work (e.g., overhand bricklaying) may take place without the use of guardrail systems, personal fall arrest systems, or safety net systems and access to the zone is controlled. *See* 29 C.F.R. § 1926.500(2009). The standard also specifies that when a CAZ is used, it must conform to 29 C.F.R. § 1926.502(g)(1)(i)(2009) which states, in part, "[w]hen control lines are used, they shall be erected not less than 6 feet (1.8 m) nor more than 25 feet (7.7 m) from the unprotected or leading edge.. .." The standard also requires "the control line to extend along the entire length of the unprotected or leading edge." 29 C.F.R. § 1926.502(g)(1)(iii)(2009).

[68] The construction standard at 29 C.F.R. § 1926.500 (2009) provides a definition for low-slope roofs and steep roofs, not flat roofs.

[69] CO Campos testified that "[t]he entire roof was a danger zone due to all the tripping hazards and the time of exposure and the [employees'] proximity to the edge of the roof." (Tr. 365).

eave of the roof. 29 C.F.R. § 1926.502(g)(1)(i) and (iii)(2009). Respondent's definition of a CAZ does not comply with OSHA's definition of a CAZ.[70] Respondent's "red zone" does not control access, is only 3 feet from the edge, and does not extend the length of the eave.[71] (*See* 29 C.F.R. §§ 1926.500, 502(g)(1)(i) and (iii)(2009)). Respondent did not have a CAZ on the roof that complied with OSHA standards to monitor its employees at the time of the inspection.[72]

> 2. Respondent violated § 1926.502(h)(1)(iv)(2009) because, at times, Mr. Urieta was too far away and there was too much noise on the roof for him to adequately communicate with the employees that he was supposed to monitor.

Respondent's employees were frequently beyond a reasonable distance or location by which its safety monitor could adequately communicate with the employees. At times, Mr. Urieta worked on the west side of the roof's ridge while the other employees worked on the east side of the roof's ridge. Mr. Urieta was not visible while the employees worked on the east side of the

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[70] Respondent's fall protection plan calls a CAZ the "R.E.D. ZONE." Respondent defines the CAZ or R.E.D. ZONE, as follows:

> ...a controlled access zone (CAZ) should be clearly defined by the competent person as an area where a recognized hazard exists. The demarcation of the CAZ shall be communicated by the competent person in a recognized manner, either through signs, wires, tapes, highly visible paint, ropes or chains. At Latite, a painted warning line is applied before any work begins on the roof. The warning line must be painted on the roof approximately 3 ft. from the leading edge. That 3 ft. area is regarded as the "R.E.D. ZONE" (Roof Edge Danger Zone). (R-2, p. 40).

[71] Respondent's argument that Mr. Urieta "went above and beyond what his statutory duty to monitor was" because "the other members of his crew spent all of their time working outside the danger/controlled access/r.e.d. zone" is disingenuous and without merit. (Respondent's post-hearing brief, Attachment A: Respondent Latite's Proposed Findings of Fact and Conclusions of Law, at pp. 76-77).

[72] CO Campos documented intermittent warning lines on the roof and, frequently, no warning lines where the employees were working. (Tr. 599; C-2 through C-4, C-8 through C-11). None of the unpapered roof deck had a painted yellow line. (Tr. 599; C-8 through C-11). No yellow lines were on the roof in the photographs depicting Mr. Urieta working on the west side of the building. (C-2 through C-4). Respondent's President, Steve Struve, also admitted that no yellow line was behind Mr. Urieta as he worked on the west side of the building. (Tr. 598-99; C-2 through C-3).

roof's ridge until he came to join them on the east side of the roof. (C-6 through C-7). The distance separating Mr. Urieta from the monitored employees, and his location on the opposite side of the roof from the employees, substantiates that he was not close enough to adequately communicate orally with these employees.

When Mr. Urieta was on the west side of the building, the other employees worked at least 55 feet from each other. (Tr. 775-77; C-7). Respondent admits in response to the Secretary's interrogatories that "[the employees] were never farther than 115-120 feet apart."[73] (C-26 - Respondent's Supplemental Response to Complainant's Interrogatory No. 3, at pp. 1-2). These distances, coupled with the loud noise atop the roof, were of such a length that Mr. Urieta was unable to continuously and adequately communicate with the employees he was entrusted to monitor on May 14, 2009.[74] (Tr. 405). When that far apart, under these circumstances, Mr. Urieta was unable to adequately communicate with the other roofers by talking to them.[75] A safety monitor needs to be within a reasonable distance of all of the persons being monitored in order to be able to talk with them. (Tr. 552; C-22, at pp. 15-17, R-2, at p. 47). A reasonable distance takes into account the level of background noise in the area.

In *Beta Constr. Co.,* one of the employer's safety monitors "turned his back to [the

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[73] CO Campos testified that he observed that the two roofers working on the roof's east side were close to 100 feet apart. (Tr. 504).

[74] Interp. M-6 states that the safety monitor "must be able to ... talk with the person(s) being monitored." (R-2, at p. 50.).

[75] Neither Messrs. Lopez or Martines provided any testimony that they could orally communicate with Mr. Urieta while working on the roof on May 14, 2009. The Court finds CO Campos' testimony that there were times when the roofers could not hear the monitor calling them to be credible. (Tr. 267). Conversely, the Court finds Mr. Urieta's one word response to a leading question from Respondent's counsel that there never was a time on May 14, 2009 that he was too far away to communicate with his crew not to be credible. The employee distances apart, noise, and peak obstructions belie any such blanket assertion. (Tr. 712-13).

employees being monitored], and went to get materials approximately 40 feet away." *Beta Constr. Co.,* 1992 WL 196570, at *2. The Administrative Law Judge (ALJ) held, and the Commission affirmed, that the safety monitor "could not have been carrying out his duties as a safety monitor which required him to be 'within visual sighting distance of the employees, and ... close enough to verbally communicate with the employees.'" (*Id*. at *4). Respondent's employees worked at a much greater distance from Mr. Urieta than the employees in *Beta Constr. Co.* worked from their monitor. CO Campos testified that the distance between the employees and the monitor, combined with noise, made it difficult for the monitor to communicate with them. CO Campos testified that the construction site was noisy due to work underway at the site, highway noise and adjacent roadway noise. He had to go inside the building on which the employees had been working in order to talk with the employees due to the noise. CO Campos testified that there was "no way [for employees] to hear that the monitor would be calling them."[76] (Tr. 265-68).

3. Respondent violated 29 C.F.R. § 1926.502(h)(1)(v)(2009) because Mr. Urieta on May 14, 2009 had other primary responsibilities, *i.e.*, installing roofing paper, that took his attention from monitoring employees.

Respondent argues that the Complainant is seeking to force it to assign employees to perform the monitoring function without any other assigned duties. This is not so.[77] *See Beta Constr. Co.*, 16 BNA OSHC at 1443 (1993)(monitors do not have to exclusively perform

[76] Respondent failed to refute CO Campos' testimony in this regard. Mr. Struve was not at the construction site during the time of the inspection. (Tr. 599-600). Mr. Padron acknowledged that he was not present at the work site when CO Campos was observing conditions during CO Campos' May 14, 2009 inspection. (Tr. 908). Mr. Urieta also never testified about the impact of the noise atop building 45 on his ability to hear during CO Campos' inspection on May 14, 2009.

[77] In her reply brief, the Secretary agrees that "[t]he standard permits working monitors as long as their monitoring duties are not encumbered." (Complainant's reply brief, at p. 11, n. 6).

monitoring duties in order to be compliant with 29 C.F.R. § 1926.500(g)(1)(iii)).[78] Interp. M-6 states, *inter alia*, "[a]ny member of the crew could serve as the safety monitor as long as that person is a 'competent person' and is not given duties that would prevent him or her from fulfilling their assignment as a safety monitor." (R-3, at p. 41).

On May 14, 2009, Mr. Urieta had other responsibilities that took his attention from monitoring the other employees working on Building 45's roof. His primary attention was on personally installing roofing paper, not monitoring. Mr. Urieta's roofing activities required him to use a pneumatic nail gun while bent down focused on holding the roofing paper and looking at the roofing deck. (Tr. 424). Roofers must keep their eyes focused on what they are nailing. The employees' roofing activities required looking down at the roofing paper and roof deck constantly, approximately 95% of the time. (Tr. 305; C-22, at p. 9). Indeed, due to hazards inherent in using a pneumatic nail gun, roofers could not look away from their work without risk of nailing their hand. (C-22, at p. 9). Mr. Struve, Respondent's President and expert witness, agrees with his company's safety manual which warns employees and reads:

Hammers and Nail Guns:

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[78] Referencing the standard, the Commission stated:

> Specifically, the monitor must provide warnings whenever employees either (1) appear to be unaware of a hazard or (2) are acting in an unsafe manner, and the monitor must be close enough to see the employees (what the definition provision refers to as "within visual sighting distance") and to be heard by them. In promulgating the standard, the Secretary conceded that the phrase "visual sighting distance" does not require that the employees be under the actual visual observation of the monitor at all times. In the preamble to the standard, the Secretary further stated:
> 'The monitor may have supervisory or nonsupervisory responsibilities as there are no restrictions on the performance of other duties. (It is obvious, however, that the monitor must not be so busy with other responsibilities that the monitoring function is encumbered.)' 45 Fed. Reg. 75,618, 75,621 (1980).

Beta Constr. Co., 16 BNA OSHC at 1443; Guarding of Low-Pitched-Roof Perimeters During the Performance of Built-Up Roofing Work, 45 Fed. Reg. at 75,621; R-28, at p. 4).

> 1. When using nail guns and hammers, to hammer nails, tin tags, etc. be careful not to hit or nail your idle hand. Again, your idle hand is the hand that stabilizes the object being nailed.
>
> 2. Do not nail too quickly. Doing so may cause you to be injured.
>
> 3. **Always** keep your eyes on what you are nailing. Do not become distracted or look way. Pay attention!!!!!!!!!!!!!

(Tr. 604-05; C-22 [emphasis in the original]). Each employee received a copy of the handbook, including the safety monitor. (Tr. 921; R-19). Mr. Ray Padron, Respondent's Safety Director, admitted that employees engaged in nailing roofing paper must not "look away for whatever reason ... from what they are doing." (Tr. 922). He agreed that the handbook is graphic so that employees understand not to look away from their work. (*Id.*) Mr. Urieta had his eyes trained on the roof deck most of the time. CO Campos testified about Mr. Urieta's intense focus on his roofing activity:

> Q: And when you say he's focused on his work, what is he doing precisely?
>
> A: He's nailing down this paper and he's using this nail gun. And I don't know if you've ever used a nail gun, but ... it takes a lot of concentration. And if you take your concentration away from this, there's a good chance you're going to nail your fingers to the roof. So his entire focus is on the work that he's doing, aside from the fact he's got his back to the [edge of] the roof.

(Tr. 187; C-3).

CO Campos observed and photographed Mr. Urieta at a time in which Mr. Urieta was ostensibly acting as a "safety monitor," yet working on the east side of the roof, directly at the roofs edge, bent over, with his eyes on the roof deck engaged in nailing roofing paper. (C-8 through C-9.) Many photographs document Mr. Urieta bending over with his eyes training on the roofing deck while moving along the west side of the building and working his way down to the eave. (Tr. 186-87; C-2 through C-4).

Mr. Urieta's personal roofing activities related to the installation of roofing paper also took him to the opposite side of the roof from the employees he was to monitor. (Tr. 286-87, 301, 494-95; C-8 through C-11). While it was possible for him to engage in other roofing activities while serving as a safety monitor, his specific activities on May 14, 2009 relating to his installation of roofing paper prevented him from adequately performing his safety monitoring job.[79] Mr. Urieta was understandably unable to keep his eyes trained on personally nailing roofing paper while at the same time sufficiently monitoring the employees who were either to his back or on the opposite side of the roof's ridge.[80] In *Holland Roofing of Columbus, Inc.*, 19 BNA OSHC at 2127, the ALJ held that the employer violated safety monitoring standard § 1926.502(h)(1)(v) because the "activity clearly interfered with his ability to effectively monitor the other workers on the roof" and that the employees were "working on an insufficiently-guarded roof 20 feet above the ground and [the monitor] was not paying attention to what they were doing." (*Id.*) In *Upstate Roofing, Inc.*, 19 BNA OSHC at 2084, the ALJ affirmed the citation alleging a violation of § 1926.502(h)(1)(v) and similarly held that the employer's monitor was inattentive to his monitoring duties where his other job responsibilities caused him to turn his back on employees and focus on retrieving roofing insulation. The monitor would turn his back on an employee, walk to a pile of insulation material 20 feet away and then walk back —an activity that took 40 seconds each time he did it. (*Id.* at 2085).

The Commission reached a similar result in *Beta Constr. Co.,* 16 BNA OSHC at 1435. In

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[79] The Court finds Mr. Urieta's affirmative answer to Respondent's counsel's assertion that Mr. Urieta always looked around to see where the other crew members were when he raised from a bent over position every 20 to 30 seconds to not be credible. (Tr. 712).

[80] *See Elgin Roofing, Co.,* 19 BNA OSHC 1394 (No. 99-1477, 2001)(violaton of the standard upheld where "none of the photographs of the area depicted safety monitors on the unprotected roof side,"). Here, Mr. Urieta could not see employees working on the opposite side of the roof and no one was present to monitor Mr. Urieta.

Beta Constr. Co., an employer's safety monitor was working with another employee by smoothing out roofing material. The monitor conceded "that his head would be up and sometimes down when he had to look at the work he was doing." (*Id.* at 1439). The Commission held that it is inadequate to have a "monitor's ability to issue the required warning depend[] on a fortuity that he will be looking up at the other employee at the requisite times." (*Id.* at 1444).

Here, Mr. Urieta's inattentiveness is no less than that attributed to the monitors in *Holland Roofing*, *Upstate Roofing* and *Beta Constr.*[81] In each instance, the safety monitors' non-monitoring activities significantly distracted them from their monitoring duties. All three employees had an incentive to work as quickly as possible to maximize their earnings and to complete their work without regard to their co-workers. Mr. Urieta's roofing paper installation activities, likewise, took a much higher priority over the monitoring function.[82] Respondent pays Mr. Urieta based on the amount of roofing paper he installs, and not on the effectiveness of his performing a safety monitoring function.[83] (Tr. 700, 733-34). Mr. Urieta testified that the speed of his work installing roofing paper determines his pay. *(Id.)* Mr. Urieta, understandably, focused on installing roofing paper as his primary job. His safety monitoring duty was secondary, at best.

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[81] *See also Stevens Constr. Corp*., 19 BNA OSHC 1420, 1422 (No. 00-1827, 2001)(safety monitoring must be fully attentive and effective).

[82] Respondent's Safety Director admitted that employees engaged in nailing roofing paper must not "look away for whatever reason ... from what they are doing." (Tr. 922). Mr. Urieta knew, or should have known, that his activity interfered with his ability to safety monitor the other two roofers, and his knowledge is imputed to Respondent. *See Holland Roofing of Columbus, Inc*., 19 OSHC at 2127.

[83] Respondent's President, Steven Struve, when asked on direct examination, how many fasteners Mr. Urieta's crew installed per year, replied: "it's a big number. 165 fasteners per square on average. ... Mr. Urieta's crew probably produces a hundred squares a day on average, 10,000 square feet, ... 16,500 a day, five days a week, ... I can't do the math that fast, but it's certainly several million. (Tr. 534).

Mr. Urieta was not paying sufficient attention to what the other two roofers were doing. Any additional duties assigned to the monitor must not interfere with the employee's monitoring duties. In this case, a roofer was assigned the additional duty to act as monitor without any reduction of the tasks to be performed as a roofer. The facts of the case support the conclusion that Mr. Urieta could not effectively perform both tasks simultaneously.

C. Respondent's employees were exposed to hazardous conditions because of ineffective safety monitoring.

The Secretary must also prove that employees will be, are, or have been, in a zone of danger. *See Fabricated Metal Prods., Inc.,* 18 BNA OSHC 1072, 1073 (No. 93-1853, 1997), citing *Gilles & Cotting, Inc.,* 3 BNA OSHC 2002 (No. 504, 1976), *ConAgra Flour Milling Co.,* 16 BNA OSHC 1137, 1147 (No. 88-1250, 1993), *rev'd on other grounds,* 25 F.3d 653 (8th Cir. 1994). The Secretary needs to only show that the area in which a hazard exists was accessible to employees. *See Donovan v. Adams Steel Erection,* 766 F.2d 804, 812 (3rd Cir. 1985)(It is not necessary to establish actual exposure; it is only necessary to establish that at some point during their work activities the employees are reasonably expected to have access to an area where they are exposed to a falling hazard.); *Brennan v. Underhill Constr. Corp*., 513 F.2d 1032 (2nd Cir. 1975).

With regard to safety monitoring, the Commission has found exposure to the zone of danger when employees come within eight (8) feet of the edge of the roof. *Pete Miller, Inc.,* 19 BNA OSHC at 1258. The facts elicited at the hearing in this matter establish that there was a reasonable expectation that the work activities of the employees, including the monitor, would cause them to work in close proximity to the edge of the roof when installing the roofing paper. CO Campos testified that he saw the employees go near the edge of the roof when Mr. Urieta was

not present to monitor them. (Tr. 180). Mr. Urieta admitted that during the inspection, employees worked near the "R.E.D. zone" —which is 3 feet from the edge according to Respondent's fall protection plan. (R-2, at p. 40.) CO Campos also photographed Mr. Urieta working at the edge of the roof, just behind a short parapet-like fixture on the east side of the building. (C-8). Mr. Urieta also admitted working within seven to eight feet of the cave on the west side of the building. There were a number of tripping hazards to which the employees were exposed, including numerous boxes, strips of building materials, numerous unidentifiable piled items, air lines either clumped in mounds or going across the top of the ridge, a cylindrical length of material, vent holes and the peaks and valleys in the rooftop. (Tr. 189, 203-04, 206, 212-15, 402; C-7 through C-8; C-11; C-18, at p. 3). Some of the materials were in a concentrated area laying in a roof valley; other materials were scattered intermittently across the roof. (Tr. 214; C-11). All three employees, including Mr. Urieta, were exposed to fall hazards while not properly monitored per the standard. Respondent's employees were exposed to the hazard either because they came near the edge of the roof or because of the tripping hazards associated with the work that they were doing on May 14, 2009. The Secretary has satisfied the exposure element of the violation.

D. Respondent had knowledge of the violative conditions.

Since the roofers were utilizing Latite's safety monitoring system, Respondent had at least constructive knowledge of the conditions that existed at the worksite on May 14, 2009. *See Latite Roofing & Sheet Metal LLC*, 23 OSHC 1146, 1150 (No. 09-0816, 2010). Respondent was also aware of the violative conditions because of Messrs. Urieta's and Padron's awareness of the conditions are imputed to Respondent, their employer. Commission precedence establishes that the actual or constructive knowledge of a foreman or other supervisory employee can be imputed to the employer. *Tampa Shipyards, Inc.*,15 BNA OSHC 1533, 1537 (Nos. 86-360 &

86-469, 1992)(consolidated); *see also generally Beta Constr. Co.,* 16 BNA OSHC at 1442. Even where an employee has been delegated authority over other employees, albeit temporary, the employee is considered a supervisor for the purpose of imputing knowledge to an employer. *(Id.)* Mr. Padron was Latite's Safety Director. He observed the conditions at the worksite shortly before CO Campos' inspection on May 14, 2009. (Tr. 891-98). Mr. Urieta was the designated safety monitor and crew chief. He also told CO Campos on May 14, 2009 that he was the "foreman." (Tr. 218; R-2, at p. 19). Mr. Urieta knew of the hazardous conditions.[84] He had the authority to enforce safety rules and reprimand any employees who violate the rules. (R-18; C-22, at p. 13). Respondent knew of the hazards based on the knowledge of Messrs. Urieta and Padron; as well as its constructive knowledge of the conditions at the worksite.

E. Respondent Failed to Prove Its Affirmative Defenses.

Respondent asserts five affirmative defenses: (1) denial of procedural and substantive due process; (2) collateral estoppel; (3) equitable estoppel; (4) prosecutorial abuse; and (5) employee misconduct. (*See* Answer and Affirmative Defenses to Complainant's Amended Complaint ("Answer to Amended Complaint"), at pp. 6-9). The Court finds that all of the Respondent's affirmative defenses are without merit.

In its Answer to Amended Complaint, Respondent argues that its rights to procedural and substantive due process were denied because the Secretary has attempted to recast and recreate this instant matter after the citation was issued on June 23, 2009. *See* Answer to

[84] Here, Mr. Urieta admitted that he could not see the employees. During the inspection, he agreed with CO Campos that being on the opposite side of the roof's ridge from the other employees prevented him from seeing them. (Tr. 716, 726, 729). He never disavowed the admissions that he made during his inspection interview with CO Campos.

Amended Complaint, at p.6. The Secretary filed her Complaint on September 11, 2009. On December 24, 2009, the Secretary filed Complainant's Motion to Amend Complaint and Citation and Errata to Complainant's Complaint and Amended Citation. Respondent opposed the Secretary's amendments to its citation throughout the litigation.[85] The Court denied Respondent's opposition motions finding that the Secretary's amendments were timely filed, the amendments were permissible, and that Respondent's procedural and substantive due process rights were not violated by Complainant's amendments.[86] In its reply brief, Respondent acknowledged that the Court's allowance of those amendments appeared to put an end to this particular affirmative defense. (Respondent's reply brief, at p. 25). The Court finds that Respondent has not provided sufficient evidence or legal support to substantiate its First Affirmative Defense.

In its Second Affirmative Defense, Respondent's asserts that the Secretary is collaterally estopped from litigating the instant matter due to prior litigation of *Latite Roofing and Sheet Metal, Co., Inc.,* 19 BNA OSHC 1287 (No. 99-1292, 2000), 2000 WL 1511523 (Oct. 10, 2000)(*Latite I).*[87] *See* Answer to Amended Complaint, at p. 6. Specifically, Respondent avers in its Answer to Amended Complaint that *Latite I* resolved whether: (1) an employer is

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[85] *See* Respondent Latite's Response to Complainant's 2nd Motion to Amend the Complaint and Citation, dated Jan. 11, 2010; Respondent Latite's Opposition to Complainant's Motion to Amend and Motion to Dismiss Complaint for Prosecutorial Abuse or For Summary Judgment, dated Sept. 24, 2009.

[86] *See* Order Granting Complainant's Motion to Amend Citation In Complaint And Denying Respondent's Motions to Dismiss Complaint for Prosecutorial Abuse and for Summary Judgment, dated Oct. 28, 2009; *see also* Order Granting Complainant's Motion to Amend Complaint and Citation and Errata to Complainant's Complaint and Amended Citation and Denying without Prejudice Respondent's Motion to Transfer the Instant Case to Administrative Law Judge Ken S. Welsch, dated Jan. 13, 2010.

[87] Respondent did not discuss its affirmative defense of collateral estoppel in either of its post-hearing briefs.

permitted to have a working monitor whose work responsibilities do not interfere with his safety monitoring responsibility, and (2) a compliance officer, who observes Latite's work activities from the ground and does not go up on the roof where the safety monitor and roofing crew are working, can determine whether Latite's safety monitor was fulfilling monitoring duties as required under 29 C.F.R. §§ 1926.502(h)(1)(iii)-(v)(2009).[88]

Collateral estoppel requires: (1) an action between the same parties who litigated a prior matter; (2) the same factual or legal issue in the prior litigation; (3) a final adjudication on all issues by a fact-finder; and (4) the matter was essential to the decision in the prior adjudication. *See Cont'l Can Co., U.S.A. v. Marshall,* 603 F.2d 590, 593-96 (7th Cir. 1979)(outlining the requirements of res judicata and collateral estoppel). The purpose of collateral estoppel is to prevent the relitigation of issues already decided. *ConAgra Flour Milling Co.,* 16 BNA OSHC at 1154.

Section 1926.502(h)(1)(v) states that a monitor "shall not have other responsibilities which could take the monitor's attention from the monitoring function." 29 C.F.R. §1926.502(h)(1)(v)(2009). The issue before us now is whether Respondent complied with the standard's direction in this regard on May 14, 2009 at Building 45. (Tr. 907). This controversy was not before the Court in *Latite I*.[89] The instant matter does not turn on any controversy as to

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[88] *Latite I* was not reviewed by the Commission and has no binding Commission precedent, *e.g.*, *Lauhoff Grain Co.,* 13 BNA OSHC 1084, 1087 (No. 81-984, 1987).

[89] The specific matter at issue in *Latite I* was whether, under 29 C.F.R. § 1926.501(b)(13), Latite could use an alternative fall protection plan and whether Latite demonstrated infeasibility or greater hazard such that it could use an alternative fall protection plan. The ALJ in *Latite I* held that Respondent could use an alternative system as conventional fall protection would have created a greater hazard. *Latite I*, 2000 WL 1511523, at *8. The alternative fall protection system Latite wanted to use was a safety monitoring system. (*Id.*)

whether Respondent is permitted to use an alternative fall protection plan involving safety monitors as was the case in *Latite I.* The issue here is whether Respondent performed monitoring duties in the manner required under 29 C.F.R. §§ 1926.502(h)(1)(iii)-(v)(2009). The case before this Court litigates the adequacy of Respondent's monitoring system, not the permissibility of its use. The Secretary is not estopped from citing an employer for its failure to meet the requirements of the OSHA standards. Indeed, to prohibit OSHA from citing an employer for violating safety standards would thwart the intent of the Act. *See Emery Mining Corp.,* 744 F.2d 1411, 1416 (10th Cir. 1984)(estoppel justified only where it does not unduly undermine the correct enforcement of a particular law or regulation).

Respondent claims that, from the ground, the compliance officer cannot evaluate a safety monitor's activities. Respondent argues that whether a compliance officer must climb on a roof to check the monitor's ability to monitor is a matter already litigated between the parties and was necessary to the prior adjudication in *Latite I.* The court does not find that the ALJ's decision in *Latite I* means that a compliance officer is required to climb on a roof for the Secretary to prove her *prima facie* case for a violation of 29 C.F.R. § 1926.502(h)(1)(iii)-(v)(2009).[90] The position of the compliance officer was not a matter necessary to the resolution of the matter in *Latite I.* The precise issue before the court in *Latite I* was related to whether it could use an alternate fall protection plan. Respondent mistakenly asserts that *Latite I* determined whether a safety monitor could have other job duties or whether a compliance officer had to conduct an inspection by going on the roof. Although CO Campos made his observations of Building 45's roof from the

[90] *See Latite Roofing & Sheet Metal LLC*, 23 OSHC at 1152 ("Campos' observations are not rendered unreasonable *per se* because he was on the ground.").

ground in the instant matter, he looked at Mr. Urieta's activities from various distances, perspectives and sides of the building. Mr. Urieta, also admitted he could not see the employees he was assigned to monitor. Thus, the factual circumstances and evidence between *Latite I* and the instant matter differ significantly. CO Campos was not precluded from making his observations from the ground to Building 45's roof due to the ALJ's holding in *Latite I.* The court finds that Respondent has failed to present sufficient evidence to substantiate that all of the requirements of collateral estoppel have been satisfied in this case.

In its Third Affirmative Defense, Respondent's asserts that "the Secretary is equitably estopped from accusing Latite of a safety violation where the practice and procedure utilized by Latite has been approved and endorsed by the Secretary for the past fifteen (15) years." Respondent's Answer to Amended Complaint, at pp. 7-8. Respondent argues that it incorporated Interp. M-6 into its site-specific alternate fall protection plan based upon discussions that occurred and an agreement that was allegedly reached on March 1, 2001, more than eight years before the date of the inspection.[91] It asserts that Interpretation M-6 requires safety monitoring only when crew members are entering, or in, the CAZ.[92] (Respondent's post-hearing brief, at pp. 42-65; Respondent's Reply brief, at pp. 1-11)

Equitable estoppel requires a showing that one party intended or reasonably believed that

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[91] The meeting took place in the OSHA regional office located at Atlanta, Georgia. Ben Ross and Mike Shea represented OSHA and Respondent was represented by its president, Steve Struve. (Tr. 550).

[92] As previously discussed, Interp. M-6 does not provide relief to Respondent. Interp. M-6 addresses flat roofs, and not low-slope roofs such as at issue here. (*See* Respondent's Brief, at p. 18, "low-sloped roof at issue in the case at bar."). Under the standard, the safety monitor must monitor the entire roof, and not just the CAZ. Respondent's definition of a CAZ, or R.E.D. zone, does not comply with OSHA's definition of a CAZ since it does not control access, is only 3 feet from the roof's edge, and does not extend the length of the eave.

its conduct or actions would be acted upon by the party claiming estoppel. *See Watkins v. U. S. Army*, 875 F.2d 699, 709 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990). Actions by the Government's agents, even if reasonably relied upon, cannot alter an employer's legal obligation under the law, unless the Government's wrongful conduct will result in an injustice to the party claiming estoppel and imposition of the estoppel would not unduly damage the public interest. S*ee Emery Mining Corp.,* 744 F.2d at 1416; *Watkins*, 875 F.2d at 708 (explaining that estoppel involving the Government is different from that between private parties and requires affirmative misconduct by the Government.).[93]

There is sparse evidence on this record as to what agreement, if any, was actually made at the March 1, 2001 meeting. Neither party presented a written agreement, thus, it is presumed that no such written agreement exists. Mr. Steven Struve, Respondent's president, attended the meeting and testified in pertinent part on direct examination as follows:

> Q. And describe in more detail what that discussion involved?
>
> A. Well, one of the big issues was when, in fact, was there a duty to monitor. ... [i]t was myself, Ben and Mike, and we sat down and drew a series of roof plans from an aerial view, looking down at a roof and actually, you know, much like an offensive coordinator would to x's and o's, I was doing x location for people.
> I'd draw a roof plan. I'd do the controlled access zone and then I'd say, okay, guys, I've got a guy here, here, here. Compliant, not compliant? You know, two-story house where you have upper working surface, lower working surface. I'd put an x on the lower, two on the upper. Compliant? No, not same walking/working surface.
> We went through a whole series of different layouts so that I was clear, as the manager of the company, with what the expectation was as far as OSHA was concerned.
> And one of the biggest take-aways that I got from that meeting was that I needed to go back and work with my crew on figuring out how to get them out of that zone as fast as I could because once I was out of the zone, there was no longer a duty to monitor. (Tr. 550-51).

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[93] Any belief by CO Campos that a monitor could not have other work duties had no bearing on the hazardous conditions he observed at the worksite and can not serve as a basis for equitable estoppel against the Secretary.

Mr. Benjamin Ross did not testify at the hearing in this case and Michael Shea had no memory of the substance of the March 1, 2001 meeting. He could not recall discussing safety monitoring at the meeting. (Tr. 838).

A similar equitable estoppel argument was raised by Latite in *Latite Roofing & Sheet Metal Co., Inc.*, 2003 WL 21355482 (O.S.H.R.C.A.L.J.,No. 02-0656, June 4, 2003)(*Latite II*), wherein Respondent argued that the Secretary should be estopped from enforcing the requirements of the standard set forth at § 1926.501(b)(13) because of representations allegedly made by OSHA officials at meetings, including the March 1, 2001 meeting in Atlanta. (*Id.* at *2). In *Latite II*, ALJ Welsh discussed the Atlanta meeting and found that:

> [T]here is no showing that OSHA representatives, at any time, made specific representations that conventional fall protection was infeasible or a greater hazard on wood truss roofs with an eave height in excess of 25 feet. There was never any consensus reached. OSHA made suggestions of various fall protection equipment and Latite discussed the reasons it would not be feasible. Also, the record fails to show that Latite's alternate fall protection plan was accepted by OSHA on all projects when employees were working at heights in excess of 25 feet. OSHA did agree to review Latite's alternative fall protection plan if it was on site. One of Latite's attorneys who had arranged and participated in the Atlanta and Washington meetings testified that "[T]here was no sort of explicit statement by the Agency, your plan is appropriate above or beneath 25 feet," although it was implied by the parties. His understanding was based on the lack of objection by the OSHA's officials as opposed to any affirmative statements. OSHA's failure to object to topics or statements made by Latite does not mean or imply that OSHA agreed. In the footnote to the standard, OSHA specifically states that conventional fall protection is presumed to be feasible and not a greater hazard.
>
> No written agreements rose from the meetings. Latite consultant Edwin Granberry testified that an OSHA technical support engineer during the Atlanta meeting even offered several "solutions" for conventional fall protection which he did not review and reject until sometime after the meeting. The lack of any agreement from the Atlanta meeting is also demonstrated by Latite's need to meet with OSHA officials in Washington, D.C. Reflective of the lack of any agreement is also shown in a memo to OSHA dated May 10, 2001, (two months after the Atlanta meeting) by Latite's attorney, who writes that Latite is being told by OSHA "that conventional fall protection must be used by Latite employees whenever they are working on a residential roof with an eave

> height in excess of 25' (feet)". In another letter dated May 3, 2001, Latite's president identifies employee training as the only agreement reached at the March meeting in Atlanta. Neither writer referred to any agreement by the parties that conventional fall protection was not required on roofs with eave heights in excess of 25 feet. The result of the Atlanta meeting was the production of a training video, settlement of four citations, and each party was able to discuss their positions. Similarly, the record does not reflect, nor does Latite specifically assert, any representations from the Fort Lauderdale or Washington[,] D.C. meetings.
>
> Also, there is no evidence that Latite reasonably relied upon an agreement with OSHA not to require conventional fall protection or the Latite could use its alternate fall protection plan in all situations when the eave height exceeded 25 feet. Otherwise, Latite would not have written the letters or pursued the meetings. These facts fail to show Latite's reliance upon any representations made by OSHA. Latite's position has been long standing, and it has not changed its position to its detriment. It has always maintained that conventional fall protection was a greater hazard on wooden truss roofs because of anchorage problems and costs.
>
> Latite's estoppel defense is rejected.

(*Id*. at * 8-9)(footnotes omitted).

There is nothing in this record, or in the previous Latite discussions with OSHA, which support Respondent's assertion that it was told by OSHA at the March 1, 2001 meeting that monitoring need only be performed at certain areas designated as controlled access zones. Indeed, the record in this case and the *Latite II* decision support the conclusion that no agreement was reached between the parties regarding fall protection or monitoring at the Atlanta meeting.[94] In the absence of any agreement or misrepresentations by representatives of the Secretary of Labor and Respondent's reliance thereon, the equitable estoppel defense is rejected. *See Erie Coke Corp.,* 15 BNA OSHC 1561 (No. 88-611, 1992).

In its Fourth Affirmative Defense, Respondent's asserts that the Secretary has committed

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[94] The Court finds Mr. Struve's testimony agreeing with Respondent's counsel's representations concerning where and when employees were to be monitored based upon March 1, 2001 discussions with OSHA representatives to not be credible. (Tr. 552). The discussions predated his testimony by nine years and no contemporaneously prepared document or notes about the meeting were presented to support his testimony.

"prosecutorial abuse" because Respondent did not have "fair notice" of what was expected of its crew to comply with the standards because the compliance officer admitted he misunderstood the standard, or because the OSHA Area Director stated that her main concern was the lack of painted warning lines. Respondent also argues that the case has been litigated in a "stubbornly litigious manner" which constitutes prosecutorial abuse.[95] Answer to Amended Complaint, at pp. 8-9.

Vindictive prosecution in this case would require Respondent to show: (1) an exercise of a protected right; (2) OSHA's stake in the exercise of that right; (3) the unreasonableness of OSHA's conduct; and (4) that the prosecution was initiated with the intent to punish the Respondent for the exercise of the protected right. *Nat'l Eng'g & Contracting Co.,* 18 BNA OSHC 1075, 1077 (No. 94-2787, 1997), *aff'd, Nat'l Eng'g and Contracting Co. v. Herman,* 18 BNA OSHC 2114, 2119-20 (No. 97-4362, 1999)(6th Cir. 1999), *cert. denied*, 528 U.S. 1045 (1999). Likewise, Respondent "must produce evidence tending to show that it would not have been cited absent that motive." (*Nat'l Eng'g & Contracting Co.,* 18 BNA OSHC at 1078).

To establish its defense of vindictive prosecution, Respondent argues in its post-hearing brief that: (1) CO Campos was "agitated" during a May 13, 2009 informal conference relating to his March 12, 2009 inspection of Latite, (2) Respondent had the statutorily-protected right to contest any OSHA citation arising from the March 12, 2009 inspection, (3) CO Campos attempted to infringe upon Latite's statutory rights by revisiting Respondent's work site on May 14, 2009, and (4) CO Campos cited Latite for a virtually identical violation with the intent to

[95] In its post-hearing brief, Respondent alternatively refers to this as its defense of "vindictive prosecution." Respondent's post-hearing brief, at pp. 65-68.

punish Latite for challenging CO Campos during the May 13, 2009 informal conference and/or pressuring Latite to settle the March 12, 2009 case. Respondent's post-hearing brief, at pp. 67-68. In its reply brief, Respondent further argued that Mr. Alan Buffer, the general contractor's representative, believed that CO Campos visited the worksite on May 14, 2009 "as a follow-up to the March 12 [2009] inspection" since Mr. Buffer allegedly provided CO Campos with a diagram of the roof of the building that CO Campos had inspected on March 12, 2009.[96] Respondent also argues that the Secretary's vindictive prosecution is shown by the photographs CO Campos took or did not take at the work site on May 14, 2009. Lastly, Respondent argues that CO Campos' inability to recall his participation in the May 13, 2009 informal conference, or "who informed him that his belief that working monitors were not allowed was wrong and when, further corroborates the inappropriate way in which the Secretary and her agents have prosecuted this matter from the get-go." Respondent's reply brief, at p. 27.

There is nothing on this record to support the conclusion that the Secretary's conduct at the May 13, 2009 meeting, or thereafter, was unreasonable or an attempt to prevent Respondent from exercising a protected right, or to punish Respondent for exercising any such rights.[97] Respondent's has not met the standard required by the vindictive prosecution affirmative defense. It produced no credible evidence at the hearing that OSHA violated its rights by

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[96] Mr. Buffer was not called to testify at the hearing.

[97] *See U.S. v. Ulysses-Salazar,* 28 F.3d 932 (9th Cir., 1994), *cert. denied* , 514 U.S. 1020 (1995), *rev'd on other grounds*, *U.S. v. Gomez-Rodriguez*. 96 F.3d 1262 (9th Cir. 1996), wherein the court stated that the party asserting the estoppel defense must also establish that "not applying estoppel would result in a serious injustice and that the public will not be unduly burdened by the imposition of estoppel." (*Id.* at 937). In this case, Respondent has failed to establish that any government officials engaged in any misconduct. To the contrary, the actions of OSHA personnel have been in support of the public interest to ensure employee safety. *Fluor Daniel,* 19 BNA OSHC 1529, 1533 (Nos. 96-1729 & 96-1730, 2001)(consolidated), *aff'd*, 295 F.3d 1232 (11th Cir. 2002).

conducting an inspection of Respondent's work site on May 14, 2009, or that OSHA's May 14, 2009 inspection was unreasonable. Respondent casts a May 13, 2009 informal conference between the parties regarding a citation unrelated to the instant matter as one in which CO Campos was agitated. (Tr. 936). Neither CO Campos nor Ms. Morris recall CO Campos participating in the May 13, 2009 meeting, in person or by phone.[98] (Tr. 291, 636-39).

Respondent has not demonstrated that OSHA acted with any retaliatory motive in citing Respondent for violations observed by CO Campos on May 14, 2009. The Court finds that no such motive existed. None of the hearing witnesses testified that CO Campos was directed to cite Respondent. (Tr. 656-657). The Secretary has demonstrated the hazardous conditions that existed at Latite's work site on May 14, 2009. CO Campos' understanding of the standard did not result in the hazardous conditions he observed during his May 14, 2009 inspection. It was entirely proper for the Secretary to cite Respondent for violations that CO Campos observed on May 14, 2009. Respondent has not demonstrated vindictive prosecution. Accordingly, the affirmative defense of vindictive prosecution is rejected.[99]

F. CHARACTERIZATION

Complainant asserts that the violation was a "serious" violation within the meaning of section 17 (k) of the Act. Under Section 17(a) of the Act, a "serious" violation exists if there is a "substantial probability that death or serious physical harm could result - from the condition and

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[98] The Court finds their testimony in this regard to be entirely credible. A written record of the May 13, 2009 meeting identifies only Ms. Morris as participating in the meeting as OSHA's lone representative. The written record's "MINUTES, COMMENTS AND DISPOSITION" section does not reflect CO Campos' participation in the May 13, 2009 meeting. (R-3, at p. 5).

[99] Respondent has withdrawn its Fifth affirmative defense of unforeseeable employee misconduct. *See* Respondent's post-hearing brief, at p. 69, n. 17.

the employer knew, or with reasonable diligence could have known, of the presence of the violation. *See E. Tex. Motor Freight, Inc. v. OSHRC*, 671 F.2d 845, 849 (5th Cir. 1982); *Pete Miller Inc.*, 19 OSHC at 1258-59; *Flintco Inc.*, 16 BNA OSHC 1404, 1405-06 (No. 92-1396, 1993). CO Campos testified that the citation item was classified as "serious" due to the probability of death or serious injuries or permanent disabilities that an employee may encounter. (Tr. 270). *See Holland Roofing of Columbus, Inc.,* 19 BNA OSHC at 2127 (there is a substantial probability of serious physical harm or death if an employee falls over 20 feet to the ground).[100] Respondent failed to rebut these claims. Indeed, an employee falling from the roof in the instant matter would receive serious, if not fatal injuries. Here, the "serious" classification is appropriate. The violation is affirmed as a serious violation.

G. PENALTY

Section 17(j) of the Act requires that due consideration must be given to four criteria in assessing penalties: the size of the employers business, gravity of the violation, good faith and prior history of violations. In *J. A. Jones Construction Company*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993), the Commission stated:

> These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 [citation omitted] (No. 88-2681, 1992); *Astra Pharmaceutical Prods. Inc.*, 10 BNA OSHC 2070 (No. 78-6247, 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 [citation

[100] *See also* Guarding of Low-Pitched-Roof Perimeters During the Performance of Built-Up Roofing Work, 45 Fed. Reg. at 75,618-19 ("the roofing industry has one of the highest lost-time-injury-accident rates of any industry in the United States, exceeding even that for the coal mining industry ... of these employees, approximately 40,000 are exposed to the hazard of falling off low-pitched-roofs and that, on an annual basis, approximately 82 of these employees will fall, resulting in one to three fatalities, six to eleven permanent disabilities, and the loss of 3,600 workdays."). (*Id.*; R-28, at pp. 1-2).

omitted] (No. 76-2644, 1981).

OSHA proposed a gravity-based penalty of $5,000 for the cited item. (Tr. 271; *see* Citation and Notification of Penalty).[101] OSHA assessed severity as "high," because the most serious injury that an employee could receive for the violative conditions cited could be death. *(Id.)*. OSHA determined that probability was "greater" due to the high likelihood that an injury or illness would result from falling off a three-story building. *(Id.)* OSHA designated gravity as "high."[102] *(See* Citation and Notification of Penalty). Respondent did not receive any reduction for size as Respondent due to the number of employees it employs. *(Id.)* Respondent did not receive a reduction for good faith due to its citation history. (Tr. 271). CO Campos testified that the penalty was based on the above-noted penalty criteria. Based on the criteria for penalty calculations, the Court finds that the proposed penalty of $5,000 is appropriate and is assessed for the violation.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

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[101] In determining the penalty, OSHA considered the severity, probability and gravity of the violation, as well as Respondent's size, history of violations, and good faith. (Tr. 271).

[102] Gravity of the violation is the most important factor in penalty assessment. *See Caterpillar, Inc.*, 17 BNA OSHC 1731 (No. 93-373, 1996), *aff'd*, 122 F.3d 437 (7th Cir. 1997). Gravity is determined by the number of exposed employees, the precautions taken to protect employees, the duration of exposure, and finally the probability that an actual accident will occur. *See Dayton Tire, Bridgestone/Firestone*, 23 BNA OSHC 1441 (No. 94-1374, 2010). The record shows that three employees were exposed to the hazard through about noon, May 14, 2009, the precautions taken to protect the employees were ineffective, and there was a high likelihood that an actual accident would occur.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that citation 1, item 1, for a serious violation of Section 5(a)(2) of the Act for a failure to comply with the standard at 29 C.F.R. § 1926.502(h)(1)(iii)(iv) and (v)(2009) is **AFFIRMED** as a serious violation and a penalty in the amount of $5,000.00 is **ASSESSED** thereto.

_/s/_____
The Honorable Dennis L. Phillips
U. S. OSHRC Judge

Dated: November 3, 2010
Washington, D.C.