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

Secretary of Labor, Complainant, v. Tim Graboski Roofing, Inc., Respondent.	OSHRC Docket No. **14-0264**

Appearances:

Uche N. Egemonye, Esquire, U.S. Department of Labor, Atlanta, Georgia,
For the Complainant

Angelo M. Filippi, and Ilanit Sisso, Esquire, Kelley Kronenberg, Fort Lauderdale, Florida,
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Tim Graboski Roofing, Inc. (Graboski), is a roofing contractor whose principal office is in Delray Beach, Florida. On July 23, 2013, a compliance safety and health officer (CSHO) from the Occupational Safety and Health Administration (OSHA) inspected a worksite where one of Graboski's crews was working in Cooper City, Florida. As a result of the inspection, the Secretary issued a Citation and Notification of Penalty to Graboski on December 12, 2013.[1]

Item 1 of Citation No. 1 alleges a willful violation of 29 C.F.R. § 1926.501(b)(10) for failing to ensure employees used fall protection when engaged in roofing activities on a low-slope roof with unprotected sides and edges 6 feet or more above the lower level. The Secretary proposes a penalty of $70,000.00 for Item 1.

The parties stipulate the Commission has jurisdiction and that Graboski is a covered employer (Tr. 8-9). Based on the record and the stipulations, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Occupational Safety and Health Act of

[1] The Secretary also issued a separate Citation and Notification of Penalty to Graboski on December 12, 2013, for alleged OSHA violations at a different worksite. The Court held a hearing in that matter (Docket No. 14-0263) on October 29 and 30, 2014, immediately preceding the start of the hearing in the instant proceeding. The Court issued a separate Decision and Order in that case, which became a Final Order on April 3, 2015.

1970, 29 U.S.C. §§ 651--678 (2014) (Act), and that Graboski is a covered employer under § 3(5) of the Act. The Court held a hearing in this matter on October 30, 2014, in Fort Lauderdale, Florida. The parties filed simultaneous post-hearing briefs on December 8, 2014.

Graboski contends the Secretary failed to meet his burden of proof for noncompliance and exposure. Should the Court find the Secretary established a violation, Graboski contends the violations were the result of unpreventable employee misconduct. Graboski also argues that, in the event the Court finds the Secretary established a violation, the Secretary failed to prove the violation is willful.

For the reasons that follow, the Court AFFIRMS Item 1 of Citation No. 1. The Court assesses a penalty of $70,000.00 for Item 1.

BACKGROUND

Graboski is a roofing company that provides reroofing and new roofing services for residential and commercial properties. The roofing process occurs in several stages, with a different crew working each stage. Roofing requires a dry-in crew, a hot mop crew, and a tile crew (Exh. G-11, p. 3).

On July 22, 2013, CSHO Reginald Benson stopped at a gas station on his way home from work. As he was filling the tank of his vehicle, he observed some workers on the roof of a structure approximately half a mile away. It appeared to the CSHO that the workers were not tied off. He took several photographs with his cell phone. Because his office was closed for the day, CSHO Benson took no further action at that time (Tr. 19-20).

The next day, CSHO Benson discussed his observations with the assistant area director for his office, Jaime Lopez, who authorized the CSHO to open an inspection at the worksite. CSHO Benson drove to the worksite, which turned out to be on Solano Avenue in Cooper City, Florida, and parked his car. The worksite was a multi-unit town house. The section of the roof he had observed workers on the day before had been completed and he observed workers on a different section of the roof. CSHO Benson noted that the workers were not tied off (Tr. 21, 23). He took several photographs and approached the site. He saw a Graboski employee on the ground floor whom he recognized from a previous inspection at another Graboski worksite. As CSHO Benson approached, the Graboski employee turned and yelled in Spanish to the workers on the roof. CSHO Benson, who speaks Spanish, understood that the employee had yelled to his co-workers to tie off because “OSHA’s here.” (Tr. 21.)

The CSHO held an opening conference, inspected the worksite, and interviewed the employees present. The workers on the site were members of a hot mop crew. This crew cuts and places 30-pound paper (also called underlayment) and then uses a mop to apply hot tar to the paper to adhere it to the roof. The Crew Chief, who was on the roof when the CSHO arrived, supervised four members of the hot mopping crew, including the Crew Leader, the employee the CSHO recognized from a previous inspection. The hot mop crew consisted of two teams of two workers each and the fifth crew member who carried the tar bucket. The Crew Chief and the Crew Leader cut and placed the paper and also supervised the employees who performed the hot mopping (Tr. 23, 155-156).

The height of the roof at its edge was 29 feet (Tr. 23-24). The slope of the roof was 4:12 (Tr. 23). When CSHO Benson arrived at the site, the hot mop crew members were wearing safety harnesses but were not attached to safety lines or anchor points on the roof (Tr. 24-25, 29). As a result of the CSHO's inspection, the Secretary issued the instant Citation to Graboski on December 12, 2013.

THE CITATION

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

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

Item 1: Alleged Willful Violation of § 1926.501(b)(10)

Alleged Violation Description

Item 1 of Citation No. 1 states,

> 29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low-slope roofs with unprotected sides and edges 6 feet or more above lower levels and 50-feet (15.25 m) wide or less, was not protected from falling by guardrail systems, safety net:
>
> a. On or about 7/23/2013, at the above addressed jobsite, employees installing roofing paper and performing hot mopping on a residential roof with a roof slope of 4:12 were not protected from falling with a means of conventional fall protection system and were exposed to a fall of approximately 30 feet.

§ 1926.501(b)(10)

Section 1926.501(b)(10) provides:

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

Applicability of the Cited Standard

Section 1926.501(b)(10) appears in *Subpart M—Fall Protection* of OSHA's Safety and Health Regulations for Construction. Section 1926.500(a) provides Subpart M sets forth "requirements and criteria for fall prevention in construction workplaces covered under 29 CFR part 1926." The cited subsection is captioned "*Roofing work on Low-sloped roofs*." Section 1926.500(b) defines roofing work as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck." A low-slope roof is defined as "a roof having a slope less than or equal to 4 in 12 (vertical to horizontal)."

Here, Graboski's crew was hoisting and applying roofing material, in the form of 30-pound paper and hot tar, to the roof. The slope of the roof was 4:12. The Court determines (and Graboski does not dispute) § 1926.501(b)(10) applies to the cited conditions.

Noncompliance with the Terms of the Standard

It is undisputed Graboski's employees were not tied off or using any other means of fall protection when CSHO Benson arrived at the worksite. Exhibits G-1, G-2, G-3, and G-4 are copies of photographs taken by CSHO Benson showing the employees working on the roof while unattached to safety lines. The Crew Chief and the other employees admitted to the CSHO that they were not using fall protection.

Graboski contends "the employees unhooked in order to descend from the roof to avoid a weather-related hazard. . . . The Act does not require employees to be attached when descending from the roof. Therefore, it cannot be said that employees were exposed to a hazard." (Graboski's brief, p. 18.) Graboski's argument flies in the face of the record evidence. Graboski's crew members were not descending from the roof when CSHO Benson arrived and

they informed the CSHO, in signed statements, that they routinely work on roofs without fall protection.

First, there are the photographs. Exhibits G-1 through G-4 show the Crew Chief and his crew members working on the roof. Exhibit G-1 is photographed from a distance. Four workers are discernable on the roof near the peak. None of them is descending from the roof. Exhibit G-2 shows the Crew Chief standing and watching his team member hot mop. The crew member doing the mopping is intent on his work, while the Crew Chief is standing in a relaxed posture observing him. Again, neither of them is descending from the roof. Exhibit G-3 shows the Crew Chief bending over as he cuts a sheet of 30-pound paper to size. Exhibit G-4 is another shot of the Crew Chief with his back to the unprotected edge of the roof as he bends over his work. In neither of these photographs is the Crew Chief in the act of descending from the roof. In all of the photographs, the employees appear calmly focused on their work. There is no sense of urgency or frantic activity. These four photographs alone belie Graboski's claim that the employees had "unhooked in order to descend from the roof."[2]

Second, there are the employee statements taken by CSHO Benson. The Crew Chief, who no longer worked for Graboski at the time of the hearing, told the CSHO,

> Yesterday, late afternoon the same crew that's here today. We were not tied off while conducting hot mopping. I have no reason why I allowed them to <u>not</u> use the fall protection. They are grown men and they know they need to wear the PPE [personal protective equipment]. . . . The [employees] don't like wearing the ropes because it gets in the way while they are hot mopping.

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[2] Graboski's claim of a "weather-related hazard" is not credited. Counsel for Graboski stated, "The employees were frantically trying to get rid of some tar which would have, potentially, exploded if the rain hit in windy conditions." (Tr. 13.) CSHO Benson, however, stated that none of the employees told him they failed to tie off because they were concerned about the weather. CSHO Benson testified, "On that day that I did the inspection, it was partly cloudy. And during the operation of the underlayment, there was no rain. Rain came a little bit after I was already there. Probably, probably like an hour after I was there." (Tr. 68.) The Crew Leader was the only other witness who was on site the day of the inspection. The Court found his testimony (translated from Spanish by an interpreter) to be evasive. When asked about his signed statement taken by CSHO Benson, the Crew Leader claimed he did not remember telling him that the crew member he was supervising was not tied off and that he himself did not like to tie off because the lanyard gets in his way (Tr. 157-158, 163.) With regard to the weather, when the Crew Leader was asked if the crew member he was supervising was supposed to be tied off when working on the roof, he replied, "It was going to rain and they wanted to finish because it was with the hot tar." (Tr. 156.) Even if his claim that Graboski's crew believed it was going to rain is credited, it does not establish the crew members were in the process of descending from the roof when CSHO Bensons arrived. The Crew Leader's statement is not that the crew members failed to tie off *because they were descending from the roof,* but because *they wanted to finish*. The Court credits CSHO Benson's testimony that it did not start raining until approximately one hour after his arrival at the worksite. The Court determines the employees were not descending from the roof at the time CSHO observed them working without fall protection.

(Exh. G-5, emphasis in original.) The Crew Chief signed and dated his statement.

George Marino is Graboski's supervisor of safety and quality control. In a statement taken by CSHO Benson on September 25, 2013, regarding the July 23 inspection at issue, Marino stated,

> I think the [employees] were working unsafely because the penalties are not enforced prior to my employment w/Tim Graboski. I've given out violations, but there were no penalties. I tell them about my brother's death from falling off a roof while pressure cleaning and he fell only 8' to the ground. The [employees] get paid by piece work, which the [employees] get paid per roll. I've seen the work orders with the amount of rolls the job is using. This is my opinion. . . . I believe this affects safety because they are going to work fast. . . I don't have the authority to send someone home if they commit unsafe acts, nor does the [supervisor] or crew chief have that authority. The company would not allow it because the job won't get done.

(Exh. G-10.) Marino signed his statement and initialed each of the five pages.

The Crew Chief told CSHO Benson the crew members usually waited until Marino completed his morning visit to a worksite and then unhooked from the safety lines once Marino left. The day of the inspection, Marino left the site at approximately 10:00 a.m. (Tr. 35.). CSHO Benson testified the employees told him "they kind of have a general idea of when Mr. George Marino shows up at the site, which is very early in the morning. And what I also learned is that they do not like to wear fall protection because it gets in the way." (Tr. 40.).

The Crew Leader told the CSHO he does not like to wear fall protection equipment (FPE). He stated "he works faster and quicker and makes more money if he does not use fall protection equipment."(Tr. 57.). The third crew member told the CSHO he was not tied off because "it gets in the way. The line, the safety line gets in the way."(Tr. 68.). The fourth crew member told CSHO Benson he did not use fall protection because the line gets in his way (Tr. 69). The fifth crew member confirmed to CSHO Benson that he did not tie off because he did not like being attached to the safety line (Tr. 71).

The record evidence abundantly establishes all five members of Graboski's work crew failed to use fall protection while engaged in roofing activities at the worksite the day of the CSHO's inspection.

Employee Access to Violative Condition

The record evidence also establishes Graboski's crew members were exposed to a fall of 29 feet (Exhs. G-1 through G-4). All five employees acknowledged to CSHO Benson that they were working on the roof without the use of fall protection.

Employer Knowledge

Graboski does not dispute it had knowledge of its employees' failure to use fall protection. Graboski had two supervisors, the Crew Chief and the Crew Leader, working onsite the day of the OSHA inspection. An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *American Engineering & Development Corp*., 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Diamond Installations, Inc*., 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006); *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992).[3]

The supervisors were aware the crew members were not tied off. They worked side-by-side with the crew members and participated in the violative conduct. The actual knowledge of the Crew Chief and the Crew Leader is imputed to Graboski.

The Secretary has established Graboski violated § 1926.501(b)(10).

Employee Misconduct Defense

Graboski contends that any violation of the cited standard is the result of employee misconduct. "To establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule." *Schuler-Haas Electric Corp*., 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006).

It is evident Graboski met the first two elements of its defense. The company has a written *Fall Protection Plan for Residential Roofing Construction,* issued in both English and Spanish. It states in part, "[A]ll Tim Graboski Roofing employees working on a roof must use a

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[3] In the Fifth Circuit, where this case arises, a supervisor's knowledge of his or her own misconduct is not imputed to the supervisor's employer unless the Secretary establishes such misconduct was foreseeable. "[A] supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." *W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety & Health Review Comm'n,* 459 F.3d 604, 608-09 (5th Cir. 2006) (emphasis in original). This case does not present a *Yates* situation. Here, the supervisors were aware of the violative conduct of the subordinate employees as well as their own misconduct.

personal fall arrest system." (Exh. R-2.). This rule is communicated to the employees through video safety training upon hiring, weekly toolbox talks, and annual company-wide training. The employees were aware they were supposed to tie off when working on a roof.

Graboski adduced some evidence showing it took steps to discover violations of the rule. Safety supervisor Marino hands out safety equipment to the crew chiefs every morning at Graboski's office at 7:00 a.m. He conducts field visits every day. Marino also calls the crew leaders during the day to ask if they are working safely (Exh. G-10). The crew members in the instant case, however, stated they knew approximately when Marino would show up in the morning and they unhooked from the safety line and continued their work unprotected once he left the site. General manager Tom Potter told CSHO Benson that crew leaders are responsible, as supervisors, for the crew members' safety. He stated, "Crew leaders have the authority to 'stop' any work if there is an unsafe condition." (Exh. G-11.) At the worksite at issue, the two supervisors took no steps to discover violations—in fact, they were complicit in them. An employer cannot be said to be taking steps to discover violations when the supervisory employees charged with such a task condone the misconduct. The Court determines the steps Graboski took to discover violations were not reasonable given the well-known, widespread employee reluctance to use fall protection.

Graboski also failed to establish it effectively enforced its fall protection work rule. "Where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule." *Gem Industrial Inc*., 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996) *aff'd*, 149 F.3d 1183 (6th Cir. 1998). Here, Graboski's entire crew at the worksite-- two supervisors and three employees---failed to use fall protection. Although Graboski adduced evidence of some disciplinary notices given to employees, the company failed to follow through with its program.

CSHO Benson testified he reviewed Graboski's employee disciplinary record and "noticed that the same employee was disciplined and it says next time this is what's going to happen to you. Well the next time came and that didn't happen to him. Then a next time came and then a next time came and he was working at that site with no disciplinary action taken against him[.]" (Tr. 149). Graboski's employees told the CSHO that they had not been disciplined for past safety infractions and had not seen anyone else being disciplined. (Tr. 150).

The Crew Leader testified Graboski did not inform its employees about any discipline meted out to other employees for not being tied off and he was not aware that anyone had been disciplined for not following safety rules (Tr. 165). The Crew Leader had been involved in an OSHA inspection in April 2013, a few months before the instant one, which also resulted in a citation for lack of fall protection. The Crew Leader told CSHO Benson that one of Graboski's supervisors informed the Crew Leader that he would be fired if he failed to tie off after the April 2013 inspection. (Tr. 143-144). The Crew Leader admitted he worked at another worksite on June 15, 2013, and was not tied off. (Tr. 159-160). On July 22 and 23, 2013, the Crew Leader again failed to tie off, but Graboski did not fire him. Instead, the Crew Leader received a $25 fine (Exh. R-13, p. 18; Tr. 164).

Graboski's disciplinary program was not uniformly and consistently enforced and Graboski did not discourage violations of its safety rules. *Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999) (holding that effective implementation of a safety program requires "a diligent effort to discover and discourage violations of safety rules by employees."). Safety supervisor Marino and general manger Potter admitted that they and Graboski's supervisors were not authorized to fire employees and that the company was more concerned about losing employees than about safety enforcement. The participation of the Crew Chief and the Crew Leader in the violative conduct underscores the ineffectiveness of Graboski's enforcement program. "Where a supervisory employee is involved the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of his employees under his supervision . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors, Ltd.,* 15 BNA OSHC 1013, 1017 (No. 87-1076, 1991).

Despite having a disciplinary policy in theory, in practice Graboski imposes no actual accountability for violations. Graboski has a responsibility to take steps to overcome its employees' known resistance to using fall protection. When an employer continually overlooks its employees' violative conduct, it emboldens the employees to disregard their safety training. Here, Graboski's Crew Chief and Crew Leader's complicity in failing to tie off signaled to the subordinate employees that Graboski's disciplinary policy could be ignored.

The Court determines Graboski has failed to establish its defense of unpreventable employee misconduct.

Willful Classification

The Secretary classifies the violation of Item 1 of Citation No. 1 as willful.

> A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.,* 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993) (consolidated*); A.P. O'Horo Co.,* 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, i.e., conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.,* 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated).

A.E. Staley Manufacturing Co., 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

The Secretary had previously cited Graboski for OSHA violations, including a repeat violation issued June 26, 2013, (one month prior to the instant inspection) for failing to ensure its employees use fall protection. The June 26, 2013, citation became a final order of the Commission (Exh. G-12; Tr. 86-87). The Commission has held that a history of previous violations may establish a heightened awareness of the requirements of the cited standards. *E.R. Zeiler Excavating, Inc.,* 2014 WL 4745565, at *2 (No. 10-0610, 2014) ("We agree with the Secretary that Zeiler had a heightened awareness of the cited standards' requirements given its prior OSHA citation history.").

Graboski contends the cited violation should not be classified as willful because it "has demonstrated good faith efforts to comply with OSHA regulations by having a comprehensive safety program that is communicated to all employees through continuous training opportunities; establishing control measures which included monitoring and worksite inspections; and enforcing safety rules through a progressive disciplinary policy." (Graboski's brief, pp. 23-24.) Graboski also cites three unreviewed ALJ decisions[4] in which the ALJs declined to classify the affirmed violations as willful. These cases are not Commission precedent and are

[4] Graboski cites *Elgin Roofing Co.,* 19 BNA OSHC 1394 (No. 99-1477, 2001); *M&M Roofing, Inc.,* 19 BNA OSHC (No. 00-1655, 2001); and *D.W. Caldwell,* 24 BNA OSHC 1658 (No. 12-1056, 2013).

distinguishable from the present case. As discussed above in the section addressing Graboski's employee misconduct defense, Graboski failed to enforce its disciplinary policy.

> "[E]ven 'a good safety program' is 'insufficient to negate willfulness' where there is an 'absence of any evidence that [the employer] enforced [its] safety rules.' *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1082, 2002-2004 CCH OSHD ¶ 32,657, p. 51,327 (No. 99-0018, 2003). Here, the record is devoid of evidence that the company ever enforced its rules by disciplining those who violated them.

Elliot Constr. Corp., 23 BNA OSHC (No. 07-1578, 2012). Although Graboski adduced evidence of some verbal warnings and minor fines, the record establishes Graboski avoided enforcing its 100 percent tie-off rule in order to maintain workers (Exh. R-13).

The parties agreed that the exhibits "entered into evidence or referenced during [general manager] Potter's testimony" in Docket No. 14-0263 "will be stipulated to as a part of the record in OSHRC Docket No. 14-0264. And with the same status that they had in the previous case." (Tr. 171.) During the cross-examination of Potter, counsel for the Secretary asked about the written interview statement, signed and initialed by Potter, given by him to CSHO Tiesi. In his statement to OSHA taken on July 17, 2013, Potter stated,

> The employees do not want to wear fall protection, so are apt to quit if we take enforcement of them. Also we have a shortage of qualified workers in this area, due to the increase in construction, we are losing jobs, because we don't have enough qualified employees to do the work, after we are awarded the bid. . . . The main reason that we are not able to enforce fall protection use, is not due to economics or loss of the bid, but because the employees will quit and just go work for another roofing company the next day that does not enforce fall protection or use safety standards.

(Docket No. 14-0264, Exh. G-9.)

Marino stated,

> I don't have the authority to send someone home if they commit unsafe acts, nor does the [supervisor] or crew chief have that authority. The company would not allow it because the job won't get done.

(Exh. G-10.)

These statements, given by Graboski's general manager and safety supervisor, respectively, establish Graboski had the state of mind ("conscious disregard or plain indifference for the safety and health of employees") required for a finding of willfulness. Graboski withheld from its supervisors the authority to effectively discipline employees who refused to use fall protection. The crew's momentary use of fall protection while Marino was onsite was a farce, perpetrated on a routine basis with the acquiescence of not one, but two, supervisors.

The message communicated to the employees was that speed, not safety, was the quality most valued by the company. Graboski overlooked safety infractions and declined to enforce discipline because, in Potter's words, "the employees will quit and just go work for another roofing company the next day that does not enforce fall protection or use safety standards." *See E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1577 (No. 94-1979, 2009) (finding that employer would not have complied with standard "even had it known of its obligations" because of owner's "economic concerns" and "emphasis on productivity over employee safety"). Graboski and its employees had a tacit agreement that the company would not enforce its fall protection rule in exchange for the employees' continued presence at the worksite. Graboski consciously made a business decision to minimally enforce discipline in order to retain workers because, as Potter stated, the employees "are apt to quit if we take enforcement of them." The failure to ensure its employees used fall protection when engaged in roofing activities was committed with intentional, knowing, and voluntary disregard for the requirements of § 1926.501(b)(10).

The Court determines the Secretary has properly classified the violation of § 1926.501(b)(10) as willful.

PENALTY DETERMINATION

Under § 17(j) of the Act, the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The record does not reflect the number of workers Graboski employs (Tr. 85-86). Graboski has a history of previous violations, including a repeat violation issued June 26, 2013, (one month prior to the instant inspection) for failing to ensure its employees use fall protection. The June 26, 2013, citation became a final order of the Commission (Exh. G-12; Tr. 86-87).

The Court does not credit Graboski for good faith based on the awareness of the general manager, the safety supervisor, and the onsite supervisors that the employees routinely worked without fall protection. *Gen. Motors Corp., CPCG Okla. City Plant*, 22 BNA OSHC 1019, 1048

(No. 91-2834E, 2007) (consolidated) (giving no credit for good faith when management tolerated and encouraged hazardous work practices).

The gravity of the violation is high. Graboski's five crew members worked without fall protection at a height of 29 feet over a two day period. Although the Crew Leader minimized the time the employees worked without fall protection at the hearing (Tr. 161-163), the Court credits the CSHO's testimony that the crew members told him they would unhook from the safety lines once Marino left the site.[5] CSHO Benson testified the employees worked at the site for two days and were without fall protection for four to six hours each day (Tr. 84). A fall from a height of 29 feet would likely result in death or serious injuries. Graboski's crew took no other precautions to prevent or minimize injuries. The Court determines the highest penalty is appropriate in this case.

Upon due consideration of the statutory factors under § 17(j) of the Act, the Court assesses a penalty of $70,000.00 for Item 1 of Citation No. 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

Item 1 of Citation No. 1, alleging a willful violation of § 1926.501(b)(10), is AFFIRMED and a penalty of $70,000.00 is assessed.

Date: April 21, 2015

/s/ Sharon D. Calhoun
Sharon D. Calhoun
Judge

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[5] Graboski focused at the hearing and in its brief on a preliminary document CSHO Benson drafted while preparing his file in this case (Exh. R-9). CSHO Benson testified he used a preexisting document to type in some information related to the instant case as a sort of placeholder. ("[D]uring the course of the investigation whenever it's a repeat or whenever it's the same violation, what we do is we go back to a previous inspection or a previous violation of a different inspection and go in our system and, and what we call it is, the OIS allows us to duplicate. So, basically, information from this document came from a previous document which was the repeat document. . . . [S]o we don't have to keep manually typing in, we just take, make a duplicate and it stays in the system until we actually start working on the case." (Tr. 97.)) Graboski seeks to hold the Secretary to the portion of CSHO's document stating, "Employees were on the roof for a short period of time minimizing the probability of having an accident." (Exh. R-15, p. 1). The Court credits the CSHO's testimony that the quoted sentence is a carryover from a previous document and does not refer to the duration of exposure in the instant case. There is sufficient evidence to find all five of Graboski's crew members failed to tie off while on the roof on both July 22 and 23, 2013.