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

SECRETARY OF LABOR, Complainant, v. PECK BROTHERS, LLC, Respondent.	OSHRC Docket No. 12-2299

Appearances: David M. Jaklevic, Esquire
U.S. Department of Labor, Office of the Solicitor, New York, New York
For the Secretary

James F. Sassaman, Esquire
Sassaman, LLC, Conshohocken, Pennsylvania
For the Respondent

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. Following an inspection of a worksite in Mahwah, New Jersey, the Occupational Safety and Health Administration ("OSHA") issued two citations, one serious and one repeat[1], to Peck

[1] Serious Citation 1, Item 1 alleged a violation of 29 C.F.R. § 1926.403(b)(2), an electrical standard which states that "listed, labeled, or certified equipment shall be installed and used in accordance with instructions included in the listing, labeling, or certification." 29 C.F.R. § 1926.403(b)(2).

Repeat Citation 2, Item 1 alleged a violation of 29 C.F.R. § 1926.501(b)(1), a fall protection standard which states: "*Unprotected sides and edges*. Each employee on a walking/working

Brothers, LLC ("Peck"), alleging violations of OSHA's construction standards. Peck filed a timely notice of contest, bringing this matter before the Commission.

During the pre-hearing phase of this proceeding, the Secretary withdrew serious Citation 1, Item 1[2], and amended repeat Citation 2, Item 1 to allege in the alternative a repeat violation of a different standard.[3] A hearing was held in New York, New York on November 14, 2013. Both parties stipulated that, should a violation be affirmed, the proposed penalty of $6,100 for repeat Citation 2, Item 1 is reasonable. Both parties filed post-hearing briefs. For the reasons set forth below, I vacate Citation 2, Item 1.

JURISDICTION

Based upon the record, I find that at all relevant times Peck was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. (Tr. at 8; Sec'y Br. at 1; Resp't Br. at 2.) I also find that the Commission has jurisdiction over the parties and subject matter in this case.

BACKGROUND

Peck is a commercial roofing company that has roofing contracts with The Home Depot, Inc. ("Home Depot") in New Jersey, New York and Connecticut. (Tr. at 124, 126.) In this tri-state area, Peck is the "sole roofing contractor for Home Depot" for roof maintenance and roof repairs, according to Bryan Peck, Respondent's managing partner. (Tr. at 123, 126-127.) In June 2012, Peck had a contract with a Home Depot store in Mahwah, New Jersey to replace a gutter that was "rotting and falling off the building from the previous storms." (Tr. at 129.) In

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surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." 29 C.F.R. § 1926.501(b)(1).

[2] The Secretary withdrew Citation 1, Item 1 on November 5, 2013.

[3] Repeat Citation 2, Item 1 was amended on September 30, 2013 to allege in the alternative a repeat violation of 29 C.F.R. § 1926.501(b)(10), a different fall protection standard which states:

> *Roofing work on Low-slope roofs*. Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8m) 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 (15.25m) 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.

preparing to replace the gutter, Peck fabricated a new one out of aluminum and rented an aerial lift. (Tr. at 130.) On June 26, Peck began the gutter replacement work on the back side of the Home Depot building. (Tr. at 138-139.) Peck's foreman spoke to Peck's managing partner, Bryan Peck, by phone as the lift arrived at the Home Depot. (Tr. at 138.) Mr. Peck told the foreman to make sure all safety precautions, including fall protection safety harnesses, safety lines and safety monitors, were in effect. (Tr. at 141-142). Mr. Peck then travelled to the Home Depot worksite. (Tr. at 140-141.)

That same day, OSHA initiated an inspection of the Home Depot worksite based on a complaint that alleged that Peck's workers were on the Home Depot roof without fall protection. (Tr. at 37-38.) An OSHA compliance officer ("CO") arrived at the Home Depot store, drove around to the back where Peck's workers were, and took two photographs of the working conditions that he could observe from his car. (Tr. at 39-41, 46, 49; Ex. C-1, C-2.) The photographs show one worker in the basket of an articulating boom lift at roof level and one worker on the roof adjacent to the lift basket. (Tr. at 40-41; 46-47; Ex. C-1, C-2.) The CO estimated that the roof was twenty feet above the ground. (Tr. at 48-49.) The CO testified that the worker in the basket was "installing hangers, doing the gutter work that eventually was discussed further with me," and that the worker on the roof was "helping the individual on the lift keep working with the hangers." (Tr. at 41, 46; Ex. C-1, C-2.) The CO testified that the workers "were in the process of installing these hangers for the gutter that would be installed." (Tr. at 47.) Mr. Peck, on the other hand, testified that the CO was mistaken about what his workers were doing at that point in the job. He testified:

> [t]here's less than 150 removed. Existing condition the gutter is actually falling off the building, that's the whole point of the service call from Home Depot, and the hangers in the picture are not from our new installation, they're actually the hangers from the existing gutter. And the hangers are the metal brackets that are spaced two feet apart on the edge of the roof.

(Tr. at 162-163; Ex. C-1.)

After observing the workers and taking the photographs, the CO exited the car and conducted an opening conference with Mr. Peck, who had just arrived at the worksite, in the area between the CO's car and the Home Depot building. (Tr. at 49-51; 146-147.) The CO and Mr. Peck then walked into the Home Depot building to a ladder that led up to the roof. (Tr. at 54, 148.) The CO spoke with three other Peck employees at the base of the ladder. (Tr. at 147-148.) A fourth Peck employee was inside the Home Depot store purchasing material at that time. (Tr.

at 147.) After speaking to the three employees, the CO went up to the roof with Mr. Peck and one Peck employee (employee "A") followed shortly by the employee who was purchasing items inside the Home Depot. (Tr. at 56, 148-149.) The CO interviewed the fourth employee on the roof by the roof hatch. (Tr. at 149-150.) Then, the CO, Mr. Peck, and employee A, walked over to the work area to discuss the scope of the work on the roof. (Tr. at 150.)

Mr. Peck explained that the project itself was initiated because the existing gutter on the roof was failing due to previous storms, and entailed removing the existing rotten gutter, fabricating a new aluminum gutter, and installing the new gutter onto the roof. (Tr. at 130.) As it was the first day of the job, the articulating boom lift would be used to load material, equipment and tools to the roof. (Tr. at 54; 58; 134.) Two of Peck's workers, who were on the roof, would remove the rotten gutter from the edge of the roof, in 10 foot sections, and "walk it backwards and subsequently you would actually [*sic*.] a 10 foot piece of new gutter and install it." (Tr. at 151.) Mr. Peck told the CO that a personal fall arrest system would create a trip hazard while the employees were walking backwards, and that is why Mr. Peck did not implement a personal fall arrest protection system at this worksite. (Tr. at 151.) Mr. Peck stated that, as it was "standard roofing practice," this particular "gutter work" project required Peck to "cut the existing roofing back and it also has to be reflashed." (Tr. at 170.)

According to the CO's observations from the rooftop, there was nothing physically present, such as a parapet wall, that marked the edge of the roof where they were working to signal the drop 20 feet below.[4] (Tr. 57, 59-60; Ex. C-4 (picture taken months after the alleged violations noting only the condition and shape of the roof).) The roof was flat and measured "way more than 100 feet in each direction."[5] (Tr. at 54, 56.) Nothing on the roof obscured the rooftop view of the CO inspector, except for air conditioning units, around which he could easily see. (Tr. at 55.) The CO testified that he saw no evidence of a fall protection warning system, no railings, no lanyard anchor hooks, and no safety net system. (Tr. at 54-57.) In stark contrast, Mr. Peck testified that there was in fact a fall protection flag warning system 6 feet from the roof edge, and 5 feet from where the group of them were standing, spanning a 100-foot length of the

[4] Pictures from the worksite show a parapet wall that ran perpendicular to the roof edge, but, according to the CO, there was no gutter being installed on the edge of or the other side of the parapet wall. (Tr. at 72-73; Ex. C-3, C-4.)

[5] Mr. Peck testified that the dimensions of the roof were 412 feet by 252 feet. (Tr. at 177-178.)

edge of the roof and consisting of three four-legged metal stanchions (25 feet apart) and 75 yellow flags. (Tr. at 152, 162-164.) The record does not contain a photograph of the rooftop as it appeared on the day of the inspection.

Adding to this discrepancy, the testimonial accounts of the CO and Mr. Peck paint slightly different pictures of how the rooftop discussion proceeded. The CO testified that he saw no fall protection systems on the roof, and he saw no lanyards on the roof. (Tr. at 55; 61.) He did see an individual on the roof with a harness on, although it was not connected to anything. (Tr. at 54-55.) The CO testified that he asked Mr. Peck why there was no fall protection on the roof, and that Mr. Peck replied that he was "contemplating" using a "mobile anchor point" for a fall protection system, but had not implemented any kind of fall protection yet. (Tr. at 62.) After that, the CO testified that Mr. Peck told him that he had a safety line system in his truck, and enough workers to designate one as a safety monitor. (Tr. at 66-67.) Although the CO did not examine the safety line system that was in Mr. Peck's truck, he testified that "[i]t probably would do the job." (Tr. at 66.) The CO then testified that he told Mr. Peck that he thought the warning line system would be an acceptable means of abatement. (Tr. at 66.) After discussing the inspection with "his peers" back at the office, however, the CO determined that a warning line system would not be adequate. (Tr. at 67-69.) He then called Mr. Peck to tell him that only "safety netting, guardrail, [or a] personal fall arrest system" would be adequate on the Home Depot roof, and they "could not have men on the roof with a monitor warning them of the hazard like we had discussed as a possible abatement." (Tr. at 70-71.)

According to Mr. Peck, on the other hand, the safety line warning system was 5 feet in front of them during their entire rooftop discussion. (Tr. at 152.) He testified that the CO noticed that the workers had harnesses on and that there was a bucket with a fall protection safety line in it, and questioned why they were not using a personal fall arrest system on the roof. (Tr. at 152-153.) Mr. Peck explained that the safety line would be a "trip hazard," but it was an option if "[a] small repair [] has to be done and a single person has to go outside the safety monitor's view they can go back and use the actual 50 foot safety line and the harness they have." (Tr. at 153.) When the CO allegedly asked how the personal safety line would be anchored, Mr. Peck answered that they would use the HVAC unit. (Tr. at 154.) According to Mr. Peck, the CO told him, as they were walking back to the CO's car, that he would probably

get a citation for the electrical surge protector.[6] (Tr. at 157.) The portion of the conversation as they walked to the CO's car regarding the electrical citation that would issue was not rebutted by the CO. The CO then called Mr. Peck about an hour later and told him that he would be "most likely getting a citation for the roofing work as well as the electrical." (Tr. at 158.)

DISCUSSION

I. Burden of Proof

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) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

a. Applicability

The construction standards set forth in 29 C.F.R. Part 1926 apply to Respondent's work at the inspected worksite. The Secretary claims that 29 C.F.R. § 1926.501(b)(1), fall protection on walking/working surfaces, applied to the conditions at the Mahwah Home Depot worksite, or in the alternative, 29 C.F.R. § 1926.501(b)(10), fall protection on a low-slope roof. Peck claims that only section 1926.501(b)(10) applies because its workers were doing "roofing work" on the Home Depot low-slope roof.

In a situation such as presented in this case, where two standards could apply to a particular work condition, the Secretary has issued a standard that regulates which standard should apply. *See* 29 C.F.R. § 1926.20(d). Section 1926.20(d) states that the more specific standard applies in a situation "if [the] particular standard is specifically applicable to a condition, practice, means, method, operation, or process."[7] 29 C.F.R. § 1926.20(d)(1). The Commission has analyzed section 1926.20(d)'s general industry counterpart, 29

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[6] As noted above, the citation item for the surge protector was issued, but later withdrawn.

[7] Section 1926.20(d) provides in pertinent part:

(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.

(2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry to the extent that none of such particular standards applies.

C.F.R. § 1910.5(c), in construction cases. *See Nuprecon LP dba Nuprecon Acquisition LP*, 22 BNA OSHC 1937 (No. 08-1037, 2009) (analyzing construction demolition standards). Section 1910.5(c) "implements the well-established principle of statutory construction that the specific takes precedence over the general … by modifying the employer's unqualified statutory duty to comply with all OSHA standards." *Lowe Constr. Co.*, 13 BNA OSHC 2182, 2183 (No. 85-1388, 1989).

Both regulations at issue here could apply to the "condition, practice, means, method, operation, or process" in this case, which is workers on a low-slope roof that is 20 feet above the ground.[8] Section 1926.501(b)(10), however, specifically addresses a subset of section 1926.501(b)(1)'s conditions, those in which workers are "engaged in roofing activities." 29 C.F.R. § 1926.501(b)(10). Therefore, when it comes to these two fall protection regulations, section 1926.501(b)(10) is the more specific standard, and it applies here only if Peck's employees were "engaged in roofing activities." This potential result has a substantial effect on the requirements imposed on Peck in terms of fall protection. If Peck's workers were "engaged in roofing activities," then section 1926.501(b)(10) applies, and Peck would have been able to choose from an assortment of fall protection systems, including a combination "warning line system and safety monitoring system," which it claims to have done. If Peck's workers were not "engaged in roofing activities," then section 1926.501(b)(1) applies, and Peck would have been required to undertake a more stringent approach to fall protection and utilize "guardrail systems, safety net systems, or personal fall arrest systems," which it is undisputed that Peck did not do. (Ex. C-10 at 6, 8; admitting Peck had no guardrail system, safety net system, or personal fall arrest system in place at the worksite).

Were Peck's employees engaged in roofing activities? The preponderance of the evidence establishes that they were.

As defined in the standards, "[r]oofing work means the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work." 29 C.F.R. § 1926.500(b). The Secretary argues that Peck's "gutter repair work" did not constitute "roofing work." (Sec'y Br. at 12-14; 16-17.) Citing an interpretation letter devoted to "roof blocking," the Secretary claims that the question to be answered here is

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[8] A roof is a type of walking/working surface. *See* 29 C.F.R. § 1926.500(b) (defining a walking/working surface as any surface [including] roofs.)

whether Peck's work was " 'done as an *integral* part of the installation of the … material for the roof.' " (Sec'y Br. at 15-16) (emphasis added).[9] According to the CO, "gutter work is not an integral part of the roof, it's a separate structure…You do the roof and then you do the gutter, it's done normally after the roof." (Tr. at 68.) The Secretary then points to the National Roofing Contractors Association (NRCA) website and glossary of technical terms as support. (Sec'y Br. at 14 n7.) He argues that the definition of "gutter" found in the glossary shows that a gutter system is separate from the roof.[10] (Sec'y Br. at 14 n7.)

I disagree with the Secretary. First, Mr. Peck testified more specifically about the work performed on the Home Depot worksite than did the CO. Mr. Peck's testimony suggests that Peck's Home Depot work, at the inspected job site, included removing and applying "flashing," *i.e.*, roofing materials, to the Home Depot roof. "Flashing," according to the NRCA glossary, is defined as "[c]omponents used to weatherproof or seal roof system edges at perimeters, penetrations, walls, expansion joints, valleys, drains and other places where the roof covering is interrupted or terminated." Mr. Peck stated that his employees "…were not doing just gutter work, it was gutter and roofing work we were doing up there. You have to cut the existing roofing back and it also has to be re-flashed. The work we were doing was roofing work…that's standard in the roofing practice." (Tr. at 170.) The CO also testified that "metal flashing" is associated with roofing work. (Tr. at 102.) Although the CO testified, under notably leading questioning, that he did not see any employees or materials to indicate that Peck Brothers had been, were currently, or were going to replace/repair the surface, weatherproofing, insulation, or vapor barrier of the roof, he failed to testify about Peck's re-flashing. (Tr. at 63-65.) Yet the citation itself mentions that Peck's workers were re-flashing the roof. *See* Citation and Notification of Penalty ("Back of property: Employees without any means of fall protection were

[9] The Secretary cites to OSHA Std. Interp. Ltr., "Fall protection requirements for workers engaged in 'roof blocking' " (May 3, 2001). In this letter, the term "Roof blocking" was understood to be "framing that is added around a hole (used for ventilation, hearing, air conditioning, or other equipment) in a low sloped roof which provides support for equipment and aids in sealing the roof." OSHA stated that if a "worker installs roofing material up to the roof hole, installs the blocking, and then continues installing the roofing material (including up and around the blocking)," then the roof blocking was "an integral part of installing the weatherproofing material," and is considered "roofing work."

[10] According to the NRCA, "gutter" is defined as "[a] channeled component installed along the downslope perimeter of a roof to convey runoff water from the roof to the drain leaders or downspouts."

replacing metal gutters and fla[s]hing on a flat roof approximately 20 feet above a paved driveway, on or about 6/26/1012.").

Second, the Secretary has introduced little evidence of the type of "gutter work" being done on the roof in this case to be able to meaningfully compare it to "roof blocking," as described in OSHA's standard interpretation letter. The case proffered by the Secretary, *Prime Roofing Corp.*, 21 BNA OSHC 2290, 2007 WL 4724130 (No. 07-0252, 2007) (ALJ Rooney), serves to show how important it is to have in the record the details of the work being performed. (Sec'y Br. at 16.) In *Prime*, Judge Rooney was able to determine that the work being done was "completing the waterproofing of the roof system" by analyzing the record evidence. *Prime*, 2007 WL 4724130 *5. Here, there is very little record evidence of what exactly was being done on the roof. Even though the Secretary carries this burden, no employee working on the job site on the day of the inspection was called to testify regarding the work being performed.[11]

Third, the record shows that Mr. Peck has more roofing experience than the CO. Mr. Peck has been "managing projects" in the roofing business for over ten years. (Tr. at 123-125.) For almost all of those ten years, he has done Home Depot's "roof maintenance and roof repairs" in Connecticut, New Jersey and New York City. (Tr. at 126-127.) He estimated that he had 3500-4000 service calls, and of those, 300-400 were gutter related. During his first two-three years, he "did the actual work" of those gutter related calls, which totaled about 60-70 projects. (Tr. at 128.) On the other hand, the record does not establish that the CO has any specific experience with roofing work. The CO has a degree in civil engineering from 1984, and has been an OSHA CO for three years. (Tr. at 26-27.) During those three years, he has conducted 160 OSHA inspections, of which more than half have involved fall hazards. (Tr. at 36.) It is notable that the CO testified that he "learned" upon his return to the office after the inspection that OSHA does not consider "gutter work" to be "roofing work," suggesting that he did not know during the inspection to be cognizant of the type of work Peck was engaged in on the Home Depot roof. (Tr. at 68-69.) Additionally, the record does not establish what the CO

[11] The Secretary claims that Peck admitted to a previous violation of section 1926.501(b)(1) for "the exact same violative conduct that is at issue here." (Sec'y Br. at 18; Ex. C-6, C-9.) The 2010 citation and settlement stipulation, however, do not provide a detailed description of the work performed at that Copaigue, New York, worksite. Absent a detailed description of the work performed, it is not possible to determine whether the work performed by the employees during the 2010 inspection was "roofing work."

conveyed to his OSHA colleagues for them to make the determination that Peck was not doing "roofing work." Instead, the CO testified that OSHA was concerned about the fact that Peck's workers focused on the edge of the roof. (Tr. at 67-68); *see also* Tr. at 100 admitting Ex. R-11; Ex. R-11 at 46-47. But the inquiry here is not the location of the work on the roof, but rather the nature of the work and whether it is "integral" to the roof.

The undersigned also observed the demeanor of both witnesses as they testified. With regard to the nature of the work done on the roof, I found Mr. Peck to be confident, direct and knowledgeable in his testimony. The CO, on the other hand, I found to be hesitant in his testimony. I also noted the line of extremely precise questioning posed to him on direct examination with regard to the nature of the work he observed.

For these reasons, I find that the preponderance of the evidence establishes that Peck was engaged in roofing activities on the Mahwah Home Depot roof. Therefore, only section 1926.501(b)(10) applies to the facts of this case.

Applying section 1926.501(b)(1) to the working situation here would also "defeat a rulemaking decision made by the Secretary in promulgating" section 1926.501(b)(10). *Lowe Constr. Co.*, 13 BNA OSHC at 2183. In promulgating this rule, the Secretary decided, with regard to fall protection, to "allow[] roofing contractors some flexibility without sacrificing the safety of workers." Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672-01, 40691 (Aug. 9, 1994). In the preamble to section 1926.501(b)(10), the Secretary stated that, along with guardrails, "other conventional guarding systems were not appropriate." Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672-01, 40689 (Aug. 9, 1994). The regulatory history accordingly shows that the Secretary explicitly decided to forego the most protective fall protection systems for lesser protective fall protection systems for workers on low-sloped roofs performing "all roofing operations" so as to "allow[] roofing contractors some flexibility without sacrificing the safety of workers." Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672-01, 40691. Mr. Peck testified that he did not implement personal fall protection systems due to a tripping hazard. (Tr. a 151, 153.) The Secretary argues that safety monitoring systems are a "last resort" and are "the least protective of all the systems." (Sec'y Br. at 17.) That may be true, but, the Secretary has already considered that issue during the rule-making process for roofing work on low-sloped

roofs, and decided to allow the lesser protective fall protection systems in these types of situations.[12]

b. **Compliance**

While there is no question that Peck did not use guardrail systems, safety net systems, or personal fall arrest systems for the workers on the Home Depot roof, it remains to be determined whether Peck utilized a combination "warning line system and safety monitoring system" in compliance with 29 C.F.R. § 1926.501(b)(10). According to the CO, he saw no evidence of a combination safety monitor/warning line system on the Home Depot roof. (Tr. at 57, 61.) He also testified that no employee identified himself as a Peck safety monitor, and that "Mr. Peck did not inform me that any of those employees were [*sic*.] a safety monitor when I arrived at the site." (Tr. at 63.) Mr. Peck, on the other hand, testified that the warning line system was within mere feet of where he, the CO, and employee A talked on the roof. (Tr. at 152.) Mr. Peck also testified that he identified employee A as the safety monitor to the CO "at that time." (Tr. at 152.) This conflicting testimony must be resolved.

The Commission has stated that a credibility finding "should identify the oral testimony that is conflicting, and reasons must be given for crediting the testimony of one witness over that of another or for failing to credit a witness whose testimony is neither contradicted nor impeached." *P&Z Co., Inc.*, 6 BNA OSHC 1189, 1192 (No. 76-431, 1977). Here, the CO testified that Peck had no warning line system and safety monitoring system while Mr. Peck testified that he did. I credit Mr. Peck's testimony over the CO's.

I reach this conclusion based on several factors. The record suggests that the CO, during the inspection, understood that a safety line and safety monitor provided adequate fall protection pursuant to section 1926.501(b)(10) on a low-slope roof. It was not until he returned to the OSHA office that he changed his mind and understood that section 1926.501(b)(1) applied to

[12] The Secretary also argues that section 1926.501(b)(10) applies "except as otherwise provided in [Section 1926.501(b)(1)]," claiming that section 1926.501(b)(10)'s introductory clause would limit section 1926.501(b)(10)'s applicability in this case. (Sec'y Br. at 17.) The regulatory history of section 1926.501(b)(10), however, does not support his argument. The preamble to section 1926.501(b)(10) shows that the introductory clause, at the time of promulgation, referred to the "provisions of paragraph (b) which cover hoisting areas, holes, ramps and runways, and dangerous equipment[,]" and did not refer to the provisions for walking/working surfaces. Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672-01, 40688-89 (Aug. 9, 1994).

this case. In fact, the CO did not photograph the roof area that day, even though he took other photographs.[13] Mr. Peck also testified that at the end of the inspection, as they walked to their vehicles, the CO advised him that the company would likely receive a citation for the electrical violation. This conversation is undisputed. There was no mention of a fall protection violation. It was not until later that the CO called Mr. Peck to advise him that the CO had been mistaken and that the warning line/safety monitor system would not be adequate and, therefore, the employer would receive a fall protection citation.

I also observed the demeanor of both witnesses as they testified. With regard to the conditions on the roof during the OSHA inspection, I found Mr. Peck to be confident, direct, knowledgeable and unhesitant.[14] The CO, however, was very hesitant during his testimony, as if his memory had faded since the OSHA inspection. Also, the CO's testimony regarding his conversation with Mr. Peck during the inspection was prompted by leading questions, such as, "did you discuss abatement," rather than an open ended inquiry regarding what the parties discussed. For these reasons, I credit Mr. Peck's testimony over the CO's, and find that Peck did have a warning line and safety monitoring system on the Home Depot roof at the time of the inspection.

With regard to the specifications of Peck's warning line system, the Secretary does not question its sufficiency in terms of OSHA's requirements at section 1926.502(f) ("Warning line systems"). Peck testified that the warning line system on the Home Depot roof was 6 feet from

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[13] The Secretary claims that an "adverse inference" should be made against Peck because "the Secretary learned for the first time through Bryan Peck's testimony that he took photographs of the worksite during OSHA's inspection, that he retains copies of the photographs, and that Peck Brothers did not produce any of the photographs to the Secretary during discovery." (Sec'y Br. at 24.) Mr. Peck testified that he took "one or two" photographs during the inspection, but they were not of the conditions on the roof itself." (Tr. at 176.) Respondent filed a motion on November 19, 2013, post-hearing, to reopen the record to admit the documents alleged to be Respondent's discovery response to the Secretary's discovery request. As stated in the scheduling order dated August 30, 2013, all discovery was to be completed, including the resolution of any discovery disputes, on or before September 20, 2013. Any discovery dispute raised during the hearing or post-hearing is untimely. No adverse inference has been made. Respondent's motion to reopen the record post-hearing is denied. Furthermore, in reaching my decision in this case, I have not considered the discovery documents attached to the Secretary's post-hearing brief, as they are outside the record (attachments B and C).

[14] I am not discrediting the CO based on alleged inaccurate discovery responses. (Resp't Br. at 8-10.) Regarding the limited section of the CO's deposition testimony received in evidence, the CO's affirmed deposition testimony was consistent with his testimony at the hearing.

the roof edge, spanning a 100-foot length of the edge of the roof and consisting of three four-legged metal stanchions (25 feet apart) and 75 yellow flags. (Tr. at 152, 162-164.) This description suggests that the warning line system was "readily visible to the naked eye," with yellow flags spaced at less than 2 feet apart (assuming equal spacing of the 75 flags along the 100 foot length), and was "not less than 6 feet from the edge of the roof." (Sec'y Br. at 21-22 citing 29 C.F.R. § 1926.502(f).)

At the time of the inspection, Mr. Peck identified Peck's safety monitor to the CO. With regard to Peck's safety monitoring system, however, the Secretary argues that it was noncompliant with OSHA's requirements due to the articulated boom lift located on the ground next to the Home Depot. (Sec'y Br. at 24-25.) The Secretary states that section 1926.502(h) ("Safety monitoring systems") prohibits the use of mechanical equipment "in areas where safety monitoring systems are being used to monitor employees engaged in roofing operations on low-slope roofs." 29 C.F.R. § 1926.502(h)(2). The evidence, however, shows that, when the CO arrived to the worksite, the base of the lift was located on the ground, 20 feet below the roof, while the basket was adjacent to the roof. (Ex. C-1, C-2.) Consequently, neither the base of the lift nor the basket itself was located within the perimeter of the roof, *i.e.*, the area where the safety monitoring system was being used. OSHA has also issued a standard interpretation letter addressing mechanical equipment and safety monitoring systems. *See* OSHA Std. Interp. Ltr., "Clarification of when mechanical equipment can be used on sloped roofs," Oct. 17, 2000. In this letter, OSHA explained that the purpose of the standard was to protect a roofer from being distracted while using the mechanical equipment on the roof. The record here does not establish that any rooftop worker operated or even had the ability to operate the lift in any manner. I therefore find that Peck's safety monitoring system was adequate.[15]

Accordingly, the Secretary has not shown that Peck failed to comply with the applicable cited standard.

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.

[15] The Secretary does not question the sufficiency of any other aspect of Peck's safety monitoring system.

ORDER

Based on these findings of fact and conclusions of law, it is ordered that:

Item 1 of Citation 1, alleging a violation of 29 C.F.R. § 1926.403(b)(2), is VACATED.

Item 1 of Citation 2, alleging a violation of 29 C.F.R. § 1926.501(b)(1) or alternatively of 29 C.F.R. § 1926.501(b)(10), is VACATED.

Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC

Date: May 12, 2014
Washington, D.C.