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. RICHARD SNADER INSTALLATION PARTNERS, Respondent.	OSHRC Docket No. 14-1864

Hema Steele, Trial Attorney, U.S. Department of Labor, Cleveland, OH
For the Complainant.

Richard Snader, *pro se,* Richard Snader Installation Partners, Hamilton, OH
For the Respondent.

Before: Administrative Law Judge Keith E. Bell

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act or the Act). Following an inspection of a worksite located at 730 Norland Boulevard, Cincinnati, Ohio (the Worksite) on June 13, 2014, the Occupational Safety and Health Administration (OSHA) issued two citations to Richard Snader Installation Partners (Respondent or RSIP), alleging three violations of the OSH Act, and proposing a total of $33,600 in penalties. (Ex. C-1.)

Specifically, Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.252(a), for failing to use an enclosed chute when materials were dropped and proposes a $2,800 penalty. Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.1053(b)(1), for failing to properly extend a ladder and proposes a $2,800 penalty. Finally, Citation 2, Item 1 alleges a

willful violation of 29 C.F.R. § 1926.1053(b)(13), for failing to require and use fall protection and proposes a penalty of $28,000.

Respondent filed a timely notice of contest, bringing this matter before the Commission. (Stip. T, U, V, W.) A hearing was held on October 20, 2015, with the Respondent appearing *pro se.*[1] (Tr. 4.) Afterwards, both parties filed post-hearing briefs. For the reasons set forth below, I affirm all of the Items in Citation 1 and Citation 2.

JURISDICTION

Based upon the record, I find that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. (Stip. A-D; Tr. 12-16.) I conclude that the Commission has jurisdiction over the parties and subject matter in this case.

BACKGROUND

Richard Snader is the sole owner of RSIP. (Stip. Y; Tr. 23, 31.) He has done business under the names "Richard Snader," "Richard Snader Contractors," "Richard Snader Roofing," and "Richard Snader Installation Partners," which are all variations of the same entity. (Stip. X; Tr. 23.) According to Mr. Snader, RSIP is a partnership that he creates and dissolves for each individual worksite. (Stip. LL, MM.) Mr. Snader is the only person with authority to make business decisions on RSIP's behalf. (Stip. BB; Tr. 23.)

OSHA commenced an investigation of the Worksite after a compliance officer (CO) noticed three individuals working on the roof of an apartment building without any fall protection. (Tr. 62, 93.) The CO drove into the parking lot and photographed the workers. (Tr. 62.) He then approached the workers and asked who was in charge of the job. (Tr. 62, 78, 93-94.) Rather than answer verbally, one of the workers pointed to Mr. Snader's vehicle. (Tr. 78, 87.) Mr. Snader then came over to the CO and told him that OSHA had no jurisdiction at the Worksite. (Tr. 78-79, 87-88.) When the CO questioned this assertion, Mr. Snader refused to clarify his claim. (Tr. 79.) At that point, the CO walked over to leasing office for the apartment building to try to determine who employed the workers, but the office was closed. *Id.* While

[1] Initially, RSIP was represented by legal counsel that was paid for by Mr. Snader. (Stip. KK; Resp't Br. 3.) However, Attorney Carl D. Ferris, Respondent's former counsel, filed a Notice of Withdrawal on October 6, 2015. Accordingly, RSIP was not represented by counsel at the hearing and the post-hearing brief was signed solely by Mr. Snader. (Resp't Br. at 8.)

there, he noticed other workers demolishing an adjacent apartment building. *Id.* The CO asked those workers who was responsible for the workers on the roof. (Tr. 79-80.) The workers indicated that the site superintendent, Terry Reed, was responsible for all of the construction on the buildings. (Tr. 80.) After discussing Mr. Snader's claim that OSHA lacked jurisdiction over the Worksite, Mr. Reed told the CO that OSHA had jurisdiction to be at the site and accompanied him back to the building where the CO had initially observed the workers engaged in roofing work without fall protection. *Id.* At that time, Mr. Snader and the other workers were no longer present. *Id.* The CO specifically asked the superintendent if he could continue his inspection, including taking photographs and measurements, and the site superintendent agreed to allow the CO to complete his inspection. *Id.*

At some point during the CO's inspection, Mr. Snader and the other roofers returned to the site. (Tr. 81.) Mr. Snader ordered the roofers to return to work. (Tr. 81, 83.) He then repeated his claim to the CO that OSHA lacked jurisdiction to inspect the site. (Tr. 81.) The CO explained that the site superintendent had granted permission and suggested that Mr. Snader discuss the matter further with him. *Id.* Mr. Snader did not do so and instead proceeded to videotape the CO conducting the rest of his inspection. (Tr. 81-82.) The CO pointed out that the workers should be using fall protection, but Mr. Snader did nothing in response. *Id.*

DISCUSSION

Coverage

At the onset, it must be determined whether RSIP had any employees at the Worksite on June 13, 2004, the date of the inspection. (Stip. E.) RSIP claims that all the individuals working at the site were partners and that it has no employees. (Resp't Br. at 1.) The Secretary disputes the characterization of the workers as partners because there was no signed partnership agreement at the time of the inspection and because of the level of control exercised by Mr. Snader over the other workers. (Sec'y Br. at 14-15.) The Secretary also argues that even if the workers were partners, the Commission should consider them employees for purposes of compliance with the OSH Act. (Sec'y Br. at 14.)

The fact that the business enterprise is a partnership, joint venture, or sole proprietor does not exempt it from the Act. *See Loomis Cabinet Co*., 15 BNA OSHC 1635, 1639 (No. 88-2012, 1992) (partnership agreement not determinative as to whether business had employees); *aff'd,* 203 F.3d 938 (9th Cir. 1994); *B&K Paving Co*., 2 BNA OSHC 1173, 1174 (No. 59, 1974)

(upholding violations of the Act by a partnership). Under the Act, an employer is a "person engaged in a business affecting commerce who has employees," and a "person" means "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 652(4)-(5). When determining OSH Act jurisdiction, what matters is not the corporate form, but whether there is an employer/employee relationship. *See* 29 C.F.R. §§ 1975.3(d)(5); 1975.4(a); *Elmer Vath, Painting Contractor*, 2 BNA OSHC 1091, 1093 (No. 773, 1979) (fact that employer has only one regular employee does not exempt employer from coverage of the Act); *Poughkeepsie Yacht Club, Inc*., 7 BNA OSHC 1725, 1727 (No. 76-4026, 1979) (single employee sufficient to invoke coverage under the Act).

Rather than focusing on the corporate form, to assess whether an employer/employee relationship exists, the Commission looks to the hiring party's right to control the manner and means for accomplishing the work. *See e.g., Sharon & Walter Constr., Inc.,* 23 BNA OSHC 1286, 1289-90 (No. 00-1402, 2010) (discussing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Barbosa Grp.*, *Inc.*, 21 BNA OSHC 1865, 1867 (No. 02-0865, 2007) (Commission uses common law agency test expressed in *Darden*), *aff'd,* 296 Fed. Appx. 211, (2d Cir. 2008); Restatement (Second) of Agency § 220(1) (definition of servant).

In terms of control, as he did for nearly every other project RSIP was involved in, Mr. Snader secured the contract for job on which the Citations discussed herein arose. (Stip. CC, EE, FF; Tr. 28, 31.) He executed the contract for the work with Malloy Roofing and obtained the trailer used at the Worksite. (Tr. 31; Ex. C-3; Stip. H.) Mr. Snader was responsible for relying the general contractor's instructions and for discussing any problems with the work. (Stip. DD; Tr. 52.) Malloy Roofing understood and expected that Mr. Snader would be responsible for directing the work of the other individuals involved in the project. (Tr. 52-53.) The CO heard Mr. Snader exercise this authority when he ordered the other workers to continue their roofing activities during the inspection. (Tr. 83.) *See* Restatement (Second) of Agency § 220 (control over the workers may be either exercised or reserved). In addition, a worker indicated that Mr. Snader was in charge of the Worksite and Mr. Snader did not deny during the inspection that the workers were employees of RSIP. (Tr. 78, 95.)

The work being done was part of the regular business of RSIP and only workers associated with RSIP were working on the roof of the building that the CO inspected. (Stip. B, D, G.) Mr. Snader is the sole owner of RSIP. (Stip. Y; Tr. 23, 31.) He is the only "partner"

with the authority to make business decisions on RSIP's behalf. (Stip. BB; Tr. 23, 42.) He created the alleged partnership and could dissolve it. (Stip. LL.) On occasion, Mr. Snader has refused to allow a worker at a job site because he was concerned with his ability to work. (Tr. 37-38.)

Thus, I find that Respondent had the authority to control the workers at the Worksite. I also find that Mr. Snader's approach to taxes and paying the workers supports the Secretary's contention that there was an employer/employee relationship. *Darden,* 503 U.S. at 323-24 (including method of payment and tax treatment as relevant factors to consider). In terms of the tax treatment of the business, RSIP stipulated that it is not a limited liability partnership.[2] (Stip. Z.) It has not filed a certificate of limited partnership with any state and did not prepare any of the documents required for doing business as a limited partnership in Ohio. (Stip. AA, OO; Tr. 139.) Nor has it filed partnership tax returns. (Stip. NN.) Instead, Mr. Snader filed tax returns as a sole proprietor and claimed that he had paid more than $100,000 in wages to roofers. (Tr. 33-34; Ex. C-2 (tax returns).)

His tax return is consistent with how RSIP paid the workers at the Worksite. Mr. Snader was responsible for communicating with the general contractor to determine how and when it paid RSIP for the roofing work. (Stip. HH, GG.) The general contractor paid Mr. Snader directly for work done by RSIP on a weekly basis—a contract term required by Mr. Snader. (Stip. GG; Resp't Br. at 3.) Mr. Snader than made the initial determination of what amount he would pay the workers and distributed those payments weekly. (Stip. II, JJ; Tr. 25-27, 41; Resp't Br. at 3.)

Considering the level of control and other evidence presented, I find that the Secretary met his burden of establishing an employment relationship between RSIP and workers engaged in roofing activities at the Worksite at the time of the inspection.

[2] During the inspection, Mr. Snader presented an unsigned document titled "Limited Partnership Agreement." (Tr. 87, 89.) After the inspection, Mr. Snader provided OSHA with a signed document dated July 28, 2014 that was also titled Limited Partnership Agreement. (Tr. 87-9; Ex. C-9.) Because the signed document is dated six weeks after the inspection, I find that it is not probative as to whether there was an employer/employee relationship between RSIP and the workers at the Worksite at the time referenced in the Citations. *Id. See Sharon & Walter*, 23 BNA OSHC at 1290 (signed subcontractor disclaimer form was not determinative).

Fourth Amendment

At the hearing, Mr. Snader appeared to suggest for the first time that OSHA should have obtained a warrant before it conducted the inspection of the Worksite. (Tr. 98-99; Resp't Br. at 4-6.) The Secretary argues that no warrant was necessary because the work RSIP conducted was observable to the public. (Sec'y Br. at 11.)

The Supreme Court has held that the Fourth Amendment to the Constitution requires the Secretary to obtain a warrant in order to conduct an inspection without the consent of the employer whose workplace is being inspected. *Marshall v. Barlow's, Inc*., 436 U.S. 307, 314-15 (1978). However, "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967); *Hester v. U.S.,* 265 U.S. 57, 59 (1924) (finding no fourth amendment protection on open fields). "What is observable by the public is observable without a warrant by the Government inspector as well." *Marshall*, 436 U.S. at 315. The Fourth Amendment protects against intrusions only into areas where an individual has a reasonable expectation of privacy. *L. R. Willson & Sons, Inc.*, 17 BNA OSHC 2059, 2060 (No. 94-1546, 1997) (observation of construction site from roof of adjacent building did not violate Fourth Amendment), *aff'd in pertinent part,* 134 F.3d 1235 (4th Cir. 1998). "Whether there is a reasonable expectation of privacy is not necessarily determined by the location from which the observations are made." *Id.* Further, under the "open fields" doctrine, there is not a legitimate demand for privacy for activities conducted out of doors when there is no societal interest in protecting the privacy of those activities. *Tri-State Steel Constr. Inc.,* 15 BNA OSHC 1904, 1909-10 (No. 89-2611, 1992) (consolidated) (even though violations could not have been observed from land accessible to the public, work was done in the open and thus the Fourth Amendment did not apply), *aff'd,* 26 F.3d 173 (D.C. Cir. 1994); *Ackermann Enters., Inc.,* 10 BNA OSHC 1709, 1712 (No. 80-4971, 1982) ("There is no violation of fourth amendment rights when a government's agent's observations occur in 'the open fields' even if the government agent trespasses on private property to make his observations"); *Well Solutions Inc*., 15 BNA OSHC 1718, 1720-21 (No. 89-1559, 1992) (no reasonable expectation of privacy for a worksite located off a private road because it was still in an open field and not set off by a gate or other obstacle).

The same principle controls the situation in this case. The Worksite here was the roof of a building not owned or operated by Respondent and the Citations relate to activities visible from

outside. (Stip. A, D; Tr. 12-16.) The part of this Worksite where the CO saw the individuals working was open to public view. (Tr. 62; Ex. C-10 at 1, 5, 11, 13.) Indeed, the CO first saw the roofers working without fall protection while traveling by the Worksite. (Tr. 62.) *See Gem Indus.*, 17 BNA OSHC 1184, 1186 (No. 93-1122, 1995) (no expectation of privacy when the CO observed the violative conditions from his car parked in the parking lot next to the employer's worksite), *aff'd without published opinion*, 149 F.3d 1183 (6th Cir. 1998); *Boshear Contractors, Inc*., 16 BNA OSHC 2094, 2095 (No. 91-2125, 1994) (violations seen from a public road), *aff'd*, 81 f.3d 1147 (D.C. Cir. 1196). Therefore, RSIP cannot claim that it had a " 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."[3] *Smith v. Maryland*, 442 U.S. 735, 740 (1979). And so, OSHA's inspection was not unconstitutional.

Merits of the Citation Items

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

[3] I also note that a general contractor may consent to the inspection of a common worksite where a subcontractor is working. *Havens Steel Co.,* 6 BNA OSHC 1740, 1745 (No. 15538, 1978) (the general contractor had at least common authority over the site and therefore could validly consent to the presence of the compliance officers); *Nat'l Eng'g & Contracting Co. v. U.S. Dep't of Labor*, 687 F. Supp. 1219, 1221-22 (S.D. Ohio 1988), *aff'd without published opinion,* 902 F.2d 34 (6th Cir. 1990). The site superintendent for the general contractor at the Worksite gave the CO direct permission to inspect the area and the activities being conducted by RSIP. (Tr. 80.) It is unclear whether Mr. Snader requested a warrant before or after the site superintendent gave this permission. (Tr. 95, 99.) Because of his *pro se* status, Mr. Snader was specifically offered an opportunity to take the stand to clarify when the warrant request was made or to submit his video of the inspection, but he declined to do so. (Tr. 106, 109.) In any event, when, or even if a warrant request was made, is not determinative to my analysis because I find that no warrant was necessary. *See Concrete Constr. Co.,* 15 BNA OSHC 1614, 1617 (No. 89–2019, 1992) (the Fourth Amendment "does not require a warrant for a nonconsensual inspection of a workplace to the extent the workplace is open to the public").

All of the alleged violations arise under the construction standards. An employer must comply with the construction standards if its employees are "engaged in construction work," an activity defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b). Respondent does not dispute that it was engaged in construction and I find that the roofing repair work performed by RSIP fits within the standard's definition of construction. (Stip. B, D.)

1. Serious Citation 1, Item 1 – Disposal of waste materials – 29 C.F.R. § 1926.252(a)

When materials are dropped more than 20 feet to any point outside of the exterior walls of a building, an enclosed chute must be used to carry the materials. 29 C.F.R. § 1926.252(a). The CO observed workers dropping materials from the roof to a trailer without using an enclosed chute. (Stip. F, I; Ex. C-10 at 1, 5, 12; Tr. 68.) He determined that the height from which the workers dropped the materials was twenty-two feet or more. (Tr. 68.) And so, I find that the standard applies and that it was violated. In terms of exposure, the trailer was situated near the ladder, which was the only way to access the roof where the work was being done. (Tr. 64-65, 68-69; Ex. C-10 at 1, 5.) This enhanced the risk that debris coming from the roof could strike employees. *Id.* There were no physical barriers to prevent employees from getting close to the trailer into which the workers on the roof were dumping waste. (Stip. J; Ex. C-10 at 1.) Thus, I find that it was reasonably predictable that an employee might be on or near the ladder while others threw materials down. (Tr. 68-70; Ex. C-10 at 1, 5.) *See e.g., Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) (access to violative condition reasonably predictable), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996); *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012) (finding exposure because it was reasonably predictable that employee would need to move about his entire work area); *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2195 (No. 90-2775, 2000) (finding exposure when hazard was located adjacent to a walkway), *aff'd,* 268 F.3d 1123 (D.C. Cir. 2001). In terms of knowledge, Mr. Snader admitted that the work was being done without a chute. (Stip. I.) The lack of the chute was in plain view and was directly visible to Mr. Snader. (Ex. C-10 at 1, 12, 13; Tr. 81 (Mr. Snader was present when the CO took photographs).) *See Hamilton Fixture,* 16 BNA OSHC 1073, 1089 (No. 88–1720, 1993) (an employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel), *aff'd without published*

opinion, 28 F.3d 1213 (6th Cir.1994); *Am. Airlines, Inc.,* 17 BNA OSHC 1552, 1555 (No. 93-1817, 1996) (consolidated) (finding knowledge when conditions were in plain view and supervisory personnel were present). Accordingly, the Secretary proved a violation of 29 C.F.R. § 1926.252(a).

The Secretary characterizes this Citation item as serious. A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). The CO testified that there was a likelihood of serious harm, such as disability or death from being struck by falling debris. (Tr. 70.) The fact that the only ladder that workers could use to access the roof was near the trailer into which the workers were throwing the debris made this possibility more likely. (Tr. 70; Ex. C-10 at 2.) Therefore, I find that the violation specified in Citation 1, Item 1 should be characterized as serious.

2. Serious Citation 1, Item 2 – Ladders - 29 C.F.R. § 1926.1053(b)(1)

When portable ladders[4] are used to access an upper landing surface, the ladder's side rails must extend at least three feet above the surface to which the ladder is used to gain access. 29 C.F.R. § 1926.1053(b)(1). There is no dispute that Respondent was using at least one portable ladder at the jobsite, so the standard applies. (Stip. K, M; Ex. C-10 at 5; Tr. 72.) Respondent stipulated that the standard was violated. (Stip. K ("The ladder that is the subject of Citation 1, Item 2 extended less than 3 feet past the roof"); Stip. L ("There was no guardrail at the top of the ladder"); Tr. 13.) In terms of exposure, Respondent stipulated that the ladder was the only way for the workers to reach the roof, so there was actual exposure to the hazard. (Stip. M; Tr. 69, 73-74.) *See Phoenix Roofing*, 17 BNA OSHC at 1079. As for knowledge, the ladder was in plain sight and visible to Mr. Snader. (Tr. 63; Ex. C-10 at 5, 13 (showing Mr. Snader within site of the ladder).) He was present at the Worksite when the workers used the ladder to access the roof. (Tr. 81, 83.) *See Ted Wilkerson, Inc.,* 9 BNA OSHC 2012, 2016 (No. 13390, 1981) (a leadman "would have been in a position to observe" the employee in the hazardous situation); *Minnotte Contracting & Erection Corp*., 6 BNA OSHC 1369, 1371-72 (No. 15919, 1978) (employees working without tied-off safety belts were in plain view and within sight of a

[4] The standard defines a portable ladder as "a ladder that can be readily moved or carried." 29 C.F.R. § 1926.1050(b).

foreman). This satisfies the knowledge requirement and, accordingly, the Secretary proved a violation of 29 C.F.R. § 1926.1053(b)(1).

The Secretary characterizes this Citation item as serious. As noted above, a violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). The CO testified that the improper extension of the ladder could result in a fall that would cause serious injuries or death. (Tr. 73-74.) Because the ladder was the only way to reach the roof, employees were necessarily exposed to this possibility. (Stip. M; Tr. 73-74.) Therefore, I find that the violation specified in Citation 1, Item 1 should be characterized as serious. *See Manganas Painting Co., Inc.*, 21 BNA OSHC 2043, 2058-59 (No. 95-0103, 2007) (consolidated) (affirming a violation of § 1926.1053(b)(1) as serious), *partially rev'd on other grounds, Chao v. Manganas Painting, Co., Inc.,* 540 F.3d 519 (6th Cir. 2008).

3. Willful Citation 2, Item 1 – Fall Protection – 29 C.F.R. § 1926.501(b)(13)

When employees engage in residential construction activities six feet or more above lower levels, the employees must be protected by fall protection, which may include guardrail systems, safety net systems, or personal fall arrest systems. 29 C.F.R. § 1926.501(b)(13). I find that the standard applies because the workers were engaged in residential construction and working at a height of over six feet. (Stip. B, D, N, O, P; Tr. 13, 66.) There is no dispute that the standard was violated because Respondent admitted that the workers were not wearing any fall protection devices. (Stip. Q.) Further, Respondent did not require fall protection and there were no guardrail systems, safety net systems, or personal fall arrest systems in place, or even available at the Worksite. (Stip. O, P, R.) In terms of exposure, the CO observed three employees working more than seventeen feet from the ground without fall protection both at the start of his inspection and later in the day. (Stip. Q; Tr. 62, 75-7; Ex. C-10 a p. 2-4, 12.) *See Phoenix Roofing*, 17 BNA OSHC at 1079. Exposure has been shown and is not disputed by Respondent. *See John H. Quinlan, d/b/a Quinlan Enters.,* 17 BNA OSHC 1194, 1196 (No. 92-0756, 1995); *A.L. Baumgartner Constr., Inc*., 16 BNA OSHC 1995, 2001 (No. 92-1022, 1994) (crediting CO's unrebutted observations even when made from a distance). Finally, the Secretary showed knowledge because the violation was in plain view and the CO directly informed Mr. Snader of the need for fall protection. (Tr. 62, 81; Ex. C-10 at 2-4, 13.) *See*

Bardav, Inc. d/b/a Martha's Vineyard Mobile Home Park, 24 BNA OSHC 2105, 2110 (2014) (condition in plain view and supervisor stood nearby); *Minnotte,* 6 BNA OSHC at 1371-72. Therefore, the Secretary established a violation of 29 C.F.R. § 1926.501(b)(13).

The Secretary alleges that this violation was willful. (Sec'y Br. at 18-19.) To establish a willful violation, the Secretary must demonstrate that the employer violated the Act and that the violation was committed voluntarily with intentional disregard or demonstrated plain indifference to the Act. *Kaspar Wire Works*, 18 BNA OSHC at 2181; 29 U.S.C. § 666(a). "[A] willful violation can be found where the employer is aware that violations exist in its workplace and is on notice of the requirements of the standard based on its history of previous citations for noncompliance with the standard in question." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2209 (No. 87-2059, 1983).

The evidence shows that Mr. Snader had a heightened awareness of the fall protection standard and that his business was not in compliance with it. (Tr. 48, 81-82; Exs. C-4, C-5, C-6.) The Citation before me is the fifth time Richard Snader or one of his businesses has been cited for violating 29 C.F.R. § 1926.501(b)(13).[5] (Tr. 85-87; Exs. C-4; C-5; C-6; Resp't Br. at 2.) On May 12, 2006, OSHA issued a repeat citation to "Richard Snader Contractor, and its successors," which Respondent stipulated is the same entity as RSIP, for violating the same fall protection standard at issue here–29 C.F.R. § 1926.501(b)(13). (Tr. 85-86; Ex. C-6; Stip. X.) After that, OSHA issued another repeat violation of the same standard on November 2, 2006. (Ex. C-5.) Yet again, on December 13, 2012, OSHA cited Richard Snader for violating 29 C.F.R. § 1926.501(b)(13), for exposing his employees to fall protection hazards. (Tr. 86-87; Ex. C-4.) I find that this pattern of violations shows Respondent's heightened awareness of OSHA's standards regarding fall protection. *See Avcon Inc.*, 23 BNA OSHC 1440, 1456 (No. 98-0755, 2011) (consolidated) (finding the heightened awareness required for a willfulness characterization based on past interactions with OSHA), *aff'd*, 498 F. App'x 145 (3d Cir. 2012). *J.A. Jones*, 15 BNA OSHC at 2209.

After all of these inspections and despite these repeated citations of the exact same standard, Mr. Snader refused to seek guidance or assistance on how to comply with the standard.

[5] Respondent stipulated that "Richard Snader," "Richard Snader Contractors," "Richard Snader Roofing," and "Richard Snader Installation Partners" are all the same entity. (Stip. X.)

(Stip. R, PP; Tr. 48.) RSIP stipulated that it has never attempted to change its safety practices or otherwise alter its business approach. *Id.* Mr. Snader admitted that when his contract partner, Malloy Roofing, asked him to comply with OSHA, he "lied" to them and said that he would. (Tr. 48; Stip. PP.) He knew that these employees were working without fall protection and he does not even contend that he made any effort to comply with the fall protection standard. (Stip. O, P, Q, R; Tr. 81-82.) No guardrail systems, safety net systems, or personal fall arrest systems were even available at the site. (Stip. P.) Even after the CO specifically notified him about the unsafe conditions and the need for fall protection during the inspection, he did nothing. (Tr. 48, 81-82, 90.) *See Calang Corp*., 14 BNA OSHC 1789, 1791 (No. 85-0319, 1990) (finding that the employer could not in good faith have believed that it complied with the standards after the compliance officer explained the requirements and pointed out deficiencies the employer failed to correct); *Star Brite Constr. Co. Inc.,* 19 BNA OSHC 1687, 1695 (No. 95-0343, 2001) (affirming a violation of the fall protection standard as willful). Therefore, I find that Citation 2, Item 1 is appropriately characterized as willful.

Penalty Determination

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history, and good faith. *J.A. Jones*, 15 BNA OSHC at 2213-14. These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc*., 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14.

With respect to all of the violations, I find that the Secretary established that RSIP was a small business with three employees, and I have given due consideration to its size in assessing the penalties. I also find that a reduction for good faith is not warranted. (Stip. P, PP; Tr. 48, 81-82, 90, 96; Resp't Br. at 2.)

Accordingly, for the violation of 29 C.F.R. § 1926.252(a), I find that a penalty of $2,800 adequately takes into account the seriousness of the hazard, the gravity of the violation, including the lack of precautions taken, Respondent's violation history, the company's size, and the lack of good faith. Turning to the violation of 29 C.F.R. § 1926.1053(b)(1), I note that Respondent was

cited previously for a violation of this standard in 2006.[6] I find that a penalty of $2,800 takes into account the seriousness of the hazard, the gravity of the violation, Respondent's violation history, the company's size, and the lack of good faith. Lastly, for the willful violation of 29 C.F.R. § 1926.501(b)(13), as discussed above, I find that Respondent previously violated the same cited standard several times and that the violation presently before me was committed voluntarily and with demonstrated plain indifference to the Act. Accordingly, I find that a penalty of $28,000 sufficiently addresses the willful nature of the hazard, its gravity, including the lack of precautions taken, Respondent's violation history, the company's size, and the lack of good faith.

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Item 1 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.252(a) is AFFIRMED, and a penalty of $2,800 is assessed.
2. Item 2 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(1) is AFFIRMED, and a penalty of $2,800 is assessed.
3. Item 1 of Citation No. 2, alleging a willful violation of 29 C.F.R. § 1926.501(b)(13) is AFFIRMED, and a penalty of $28,000 is assessed.

SO ORDERED.

/s/

Keith E. Bell
Judge, OSHRC

Date: April 11, 2016
Washington, D.C.

[6] The Secretary has not alleged, and I do not find, that this was a Repeat violation, as specified in 29 U.S.C. § 666(a).