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. CentiMark Corporation, Respondent.	OSHRC Docket No. 12-0920

APPEARANCES:

Elizabeth L. Ashley, Esquire
Matt Scheff, Esquire
U.S. Department of Labor, Cleveland, Ohio
For the Secretary

Kent D. Riesen, Esquire
Anspach Meeks Ellenberger LLP, Toledo, Ohio
For the Respondent

BEFORE: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Health and Safety Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act). On October 12, 2011, the Occupational Safety and Health Administration (OSHA) began an inspection of CentiMark Corporation (Respondent or CentiMark) in response to a reported fatality. CentiMark's employees were performing roofing work at Superior Forge & Steel Corporation's (Superior) facility in Lima, Ohio (worksite). OSHA issued a three-item serious citation to CentiMark on March 13, 2012, with a total

proposed penalty of $14,000.00. CentiMark filed a timely notice of contest, bringing this matter before the Commission. (JX-1, Stip. 17).

A hearing was held in Cleveland, Ohio on January 3 and 4, 2013. At the hearing, the parties submitted a Partial Settlement and Stipulation Agreement in which the parties agreed to proceed to trial on Citation 1, Item 1a, with a proposed penalty of $7,000.00. The other two citation items were vacated. (Tr. 9-10; JX-2, Stip. 18; JX-2). Both parties filed post-hearing briefs.[1] For the reasons set forth below, I affirm Citation 1, Item 1a, and assess a penalty of $7,000.00.

Jurisdiction

Based upon the record, I find that at all relevant times CentiMark was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. I also find that the Commission has jurisdiction over the parties and subject matter in this case. (Tr. 11; JX-1, Stips. 1, 4).

Stipulated Facts

The parties' joint pre-hearing statement includes the following stipulated facts. (JX-1).

. . .

2. At all times material, Respondent CentiMark was a corporation with an office and place of business at 12 Grandview Circle, Canonsburg, PA 15317.

3. At all times material, Respondent CentiMark was engaged in work at Superior Forge & Steel Corporation . . . at 1820 McClain Road in Lima, Ohio (hereinafter "work site"), and had employees at said work site.

. . .

5. James Keith was the foreman for Respondent CentiMark on the Superior Forge job in Lima, Ohio. Mr. Keith was a longtime coworker of Frank Cousey who was also assigned to the Superior Forge job.

6. Peterson Construction (Peterson) was engaged by Superior Forge to install ventilation units on the roof at Superior's facility. Respondent CentiMark's crew removed the gravel from the area where each unit was to be installed, cut and removed the rubber membrane covering the

[1] In its Answer, CentiMark raised several affirmative defenses which it did not pursue at the hearing or in its post-hearing brief. I deem these affirmative defenses to be abandoned. *See Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

roof and then removed the underlying insulation. Once the Peterson crew installed the ventilation unit, Respondent CentiMark's crew flashed the membrane to the curb.

7. While Respondent CentiMark was on-site, Superior identified a damaged concrete roof panel and asked CentiMark to replace the panel. CentiMark had replaced panels previously for Superior Forge.

8. The roof of Superior's building was constructed, in part, from concrete panels, each approximately 2 feet by 8 feet and weighing approximately 225 pounds. The short end of each concrete panel was set on the building's structural I-beams. Each roof panel had a piece of steel or rebar within the long end of each concrete panel.

9. At the location [where] the damaged concrete panel had been identified, Messrs. Keith and Cousey cut the rubber roof membrane, folded it back and removed the roof insulation.

10. Messrs. Keith and Cousey cut two small holes into the concrete panel, one on each end. They each inserted rope and an attached two foot long (estimated) 2 by 4 board into the holes for removal of the panel. The 2 by 4 board was fed through the hole lengthwise with the rope attached to the middle of the board. Once through the hole the 2 by 4 would act like a toggle on a toggle bolt. The rope attached to the 2 by 4 was used to raise the panel which then was lifted out in one piece. Mr. Keith and Mr. Cousey were standing on opposite sides of the damaged panel.

11. The Peterson crew assisted with the removal of the damaged panel. While Messrs. Cousey and Keith raised one end of the panel, an employee of Peterson Construction slid a piece of wood under the end of the panel to raise it up and support it in a propped up position. The other end of the panel was lifted in the same manner.

12. The damaged panel was lifted, moved and placed on the adjacent panel to the south. It was this southern panel that later collapsed.

13. The CentiMark crew used personal fall protection while removing the damaged concrete panel; their retractable lanyards were attached to the rail for the retractable roof.

14. The CentiMark crew replaced one panel with metal decking. After the metal deck was secured in place, Mr. Keith unhooked from his retractable lifeline. Mr. Keith gathered some of the debris and moved it to the west side of the roof.

15. Mr. Cousey was left with the task of installing the insulation and the rubber membrane on the new metal decking. Shortly thereafter, Mr. Cousey fell through an opening that was created at the southern panel. No one witnessed the fall.

16. Compliance Officer Joseph Margetiak investigated the accident and conducted a closing conference with Rob Wilson, representative of CentiMark.

Background and Additional Facts

At the time of the inspection, CentiMark and Peterson were engaged in a project to install several new ventilation units on Superior's roof. Superior makes iron rolls for the steel industry. Its Lima plant has a very large roof that is over 60 feet[2] above the factory floor. This ventilation unit project had been ongoing for approximately a year. (Tr. 25, 267, 369, 372; Stip. 6).

Superior's concrete roof deck panels were of original construction and at least 50 years old. The roof was generally composed of concrete panels which were covered with a layer of insulation, a layer of rubber membrane, and a cover of gravel. CentiMark had performed roofing work for Superior for many years; an August 3, 1999 scope of work proposal shows CentiMark performed an inspection of Superior's roof at that time. (Tr. 188, 264-65, 272, 370, 379; CX-8). Mr. Keith, the foreman, had worked for CentiMark for over 16 years; he and Mr. Cousey had been to Superior's facility at least 50 times over the years to perform roof repairs and replace concrete panels. Mr. Keith estimated that he had replaced between 12 and 20 roof panels at the Superior facility over the years. Mr. Keith verified work authorization forms for work he had completed at Superior on 6 occasions between March and September 2011. (Tr. 365-66, 370-71, 410-13; RX-A9).

The year-long project required the installation of four ventilation units. To install a ventilation unit, CentiMark would cut out the rubber membrane over the roof panels and remove the insulation. Peterson would then remove the concrete[3] roof panels to install a new ventilation unit (approximately six to eight panels per unit). A ventilation unit consisted of two exhaust fans, weighing about 750 pounds. After the unit was welded to the building's structural steel, Peterson would resize and replace the concrete roof panels. CentiMark would then re-install the insulation, rubber membrane, and flash the curbs of the ventilation unit to prevent leakage. The ventilation units were installed on the northern portion of the roof. (Tr. 41-46, 141-42, 158-62, 193-94, 372-73; CX-9; Stip. 6).

[2] The record shows various estimates of the distance from the factory floor to the roof, ranging from 60 to 65 feet. (Tr. 43, 229, 419). I find the difference of 5 feet is not significant here. This decision will refer to the distance as "over 60 feet."

[3] In the record, the "concrete" roof panels are sometimes referred to as "cement" roof panels. This decision uses the term "concrete" throughout.

On the day of the inspection, two CentiMark employees were on the roof, Frank Cousey and James P. Keith II. Peterson's crew included Amelia Sterner, William "Casey" Conover, and Robb Rea. They were finishing the installation of the final ventilation unit. Earlier in the project, Superior asked CentiMark to replace, after the last ventilation unit was installed, a single damaged roof panel located in the southern portion of the roof. Looking up from the factory floor, someone from Superior noticed the panel and requested that CentiMark replace it. Superior provided the steel decking used to replace the damaged concrete panel. Mr. Keith testified that he had walked through the factory previously and found that it was a "little rough to see" the roof from inside the factory because it was dark. However, he testified that if you knew the general area of the damaged panel, you could then see, from the factory floor, that it was sagging lower than other panels. (Tr. 35, 50, 112, 151, 222, 250-51, 307, 310-12, 334, 357, 377, 422, 443-44; Stips. 5, 7).

Mr. Keith and Mr. Cousey went to the south end of the roof to locate the damaged panel. Mr. Keith saw a depression where water had accumulated and located the damaged panel. Mr. Cousey then went inside the factory to flag off the area under the roof panel. According to Mr. Keith, Mr. Cousey would have also checked the underside of the roof to determine if there were any pipes, conduits or "anything that you could damage while you're removing the panel."[4] This was a visual assessment from the factory floor over 60 feet away. There is no record evidence that Mr. Cousey or Mr. Keith performed a detailed inspection of the panels adjacent to the panel to be replaced. (Tr. 256, 261, 358, 377-78, 419-20, 443-44; CX-1).

Mr. Cousey returned to the roof where he and Mr. Keith proceeded with the replacement of the damaged concrete panel. The gravel was removed, the roof membrane cut back, and insulation removed to reveal the damaged concrete roof panel. The membrane was cut out just slightly bigger than the size of the concrete panel being removed. After the membrane and insulation were removed, the "busted" top of the damaged concrete panel was visible. Mr. Keith testified that the panel was difficult to pry out; it was one of the more difficult panels he had

[4] Mr. Keith testified:

> Q: Okay. And why did he flag off that area?
> A: If any debris would fall, it would keep workers out of the area.
> Q: Okay. And is that part of your training why you flagged it off?
> A: Yes.
> Q: And what does your training require?
> A: You flag the work area off so nothing -- that's when you perform your under deck inspection. To check for, like I said, conduits, drain lines, water lines, anything that can be in the way.

(Tr. 400-401).

removed from Superior's roof. Peterson's employees noticed the difficulty that Mr. Keith and Mr. Cousey were having with the panel and walked to that area of the roof to assist. (Tr. 165-66, 193, 199, 258, 378-80, 382, 420-21; CX-14).

While working to remove the panel, Peterson and CentiMark employees were standing on the panels adjacent to the damaged panel, including the adjacent panels to the north and south.[5] After the panel was loosened and ready for removal, Mr. Cousey told the Peterson employees to step back because they were not wearing fall arrest systems. After the damaged panel was removed, the long edges (8-foot) of the adjacent north and south concrete panels were visible. The adjacent panel to the south is the panel that Mr. Cousey fell through to his death. (Tr. 55, 60-61, 97, 109, 168-71, 172, 198, 202-03, 314-16, 379-85, 396; CX-9, -10; Stips. 11, 15).

Once the damaged panel was removed and set aside, Ms. Sterner saw that about 6 inches of concrete was missing from the observable side edge of the southern panel and rebar was visible. Further, Ms. Sterner testified that the southern panel looked "way worse" than the other panels Peterson had removed during the year-long project. She testified that the southern panel had "obviously flaked apart" and was "crumbling." Mr. Conover testified that he saw 2-3 inches of missing concrete from the southern panel. (Tr. 62-64, 97, 107, 130-34, 138-39, 172-78, 185, 189-90, 203-04, 210-11, 385, 394, 421; CX-2; RX-A1; RX-5).

As they were standing there, both Ms. Sterner and Mr. Conover mentioned to Mr. Keith and Mr. Cousey that the southern panel didn't look good. Ms. Sterner recalled stating that the southern panel looked "just as bad" as the panel they had just removed and the southern panel should also be replaced. Mr. Keith did not recall Ms. Sterner's comment; however, he did recall that Mr. Conover made a comment about the damage to the southern panel: that the concrete was flaked and rebar exposed. Ms. Sterner and Mr. Conover both testified that Mr. Keith mentioned there was only enough steel decking to replace the one concrete panel. That day, both Mr. Sterner and Mr. Conover also mentioned that the adjacent panel to the north looked damaged and should be replaced. (Tr. 62-65, 94, 107-08, 134, 142, 172-73, 177-78, 185, 251-52, 385, 394, 421-22; CX-2, -3, -4; RX-A1).

[5] The record reveals that the CentiMark and Peterson employees used a chop saw, long pry bar, steel bar, 2 x 4s, 4 x 4s, and a rope to remove the damaged roof panel. (Tr. 58-59, 71-72, 103-04, 166-71, 178, 197-99, 312-15, 380-81, 392, 424-25, 437-38, CX-1, -2, -4; and Stip. 10).

Mr. Keith told them that he would let Superior know about the condition of the southern panel later.[6] Mr. Keith confirmed there was only enough steel decking that day to replace one concrete panel. The Peterson employees then left the area and returned to the north section of the roof. Mr. Keith and Mr. Cousey moved the damaged panel to the south, and then onto a cart on the south section of the roof, where the panel fell apart. (Tr. 32, 200, 315, 386, 390-91, 422-24, 428-29; RX-D1; Stip. 12).

To attach the steel decking, Mr. Keith worked from the west end of the steel roof decking and Mr. Cousey worked from the east end. Mr. Keith testified that while he was on his knees installing the new steel decking he could closely view the southern panel. He stated that he saw no splits "going up the side." He did observe that the concrete had "flaked" off the bottom and exposed rebar. Mr. Keith testified that he did not notice any deflection or bowing of the panel. He did not think the panel needed to be replaced. While Mr. Keith testified that the damage to the southern panel was not different from damage he noticed on other concrete roof panels, he did concede that on the other roof panels he had not seen exposed rebar. (Tr. 74, 384-88, 418-19, 429).

After the new decking was attached, Mr. Keith left to take the debris to another area of the roof while Mr. Cousey finished replacing the insulation and rubber membrane over the new decking. Mr. Keith did not see Mr. Cousey unhook or remove his personal fall arrest system. A short time later, Mr. Cousey fell over 60 feet through the southern panel. No one saw Mr. Cousey fall. The employees on the roof only became aware of the accident after they heard sirens and were told to leave the roof. (Tr. 80, 120, 182, 289, 387; CX-1, -2, -4; Stips. 14, 15).

OSHA Compliance Officer (CO) Joseph Margetiak was assigned to investigate the accident. On the day of the accident, he took photographs of the top side of the roof from the aerial basket of the fire truck. He also took photographs of the underside of the roof from the floor of the factory. From the floor, he could see the opening in the roof that Mr. Cousey fell through; however, he wanted to be closer to the roof to evaluate and photograph that area. The following day Superior arranged to have an aerial lift available so that CO Margetiak could get close enough to see the roof panels. As a part of his investigation, CO Margetiak interviewed,

[6] After the Peterson employees pointed out the damage to the southern panel, neither Mr. Keith nor Mr. Cousey went to the factory floor to check the underside of the southern panel or any other panel adjacent to the roof panel they had just removed. (Tr. 422). Mr. Keith testified that he did not see a reason for an inspection, at that time, as the southern panel was not cracked and it had not bowed or flexed when the damaged panel was lifted. (Tr. 433-34).

and obtained signed statements from, Mr. Keith, Ms. Sterner, and Mr. Conover. (Tr. 220, 222-24, 226-29, 317, 336; CX-1, -2, -4, -9, -10, -11; Stip. 16).

I credit the testimony of both Ms. Sterner and Mr. Conover regarding the visible damage to the adjacent roof panels. Ms. Sterner's testimony that the southern panel appeared "way worse" than other panels she had seen during the year-long project is credible. Both she and Mr. Conover remember expressing their concern about the condition of the adjacent panels and Mr. Keith's comment that he had only enough steel decking to replace the one panel. I observed their demeanor on the stand and found them to be honest, well-meaning, straightforward witnesses. Their testimony is consistent with the written, signed statements in evidence. Further, they have no interest in the outcome of this proceeding.

Ms. Sterner's testimony that the southern panel appeared "way worse" than the other roof panels, is consistent with Mr. Keith's recollection that no other roof panels had revealed exposed rebar. Mr. Keith's testimony that the damage to the southern panel was not different from other roof deck panels is not credited. (Tr. 374-76, 418-19).

DISCUSSION

The Secretary's Burden of Proof

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. Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Citation 1, Item 1a

This item alleges a serious violation of 29 C.F.R. § 1926.501(a)(2), which states:

> The employer shall determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.

For the following reasons, I find the Secretary has met his burden and established that CentiMark did not make an adequate determination that the walking/working surface was structurally sound both prior to its work to replace a damaged panel on the roof and after removal of that panel revealed damage to the adjacent panels. As demonstrated through testimony and Mr. Cousey's unfortunate fall through the roof, it is clear that CentiMark's

employees were exposed to a fall hazard. However, CentiMark asserts that the standard is not applicable, that it complied with the requirements of the standard, and further, that it could not have known that the roof panel was not structurally sound.

The Standard is Applicable

First, CentiMark argues that the standard does not apply because at the time of Mr. Cousey's accident, they had completed the construction project. (R. Br. 15). 29 C.F.R. § 1926.500(a)(1) states that "[t]he provisions of this subpart do not apply . . . prior to the actual start of construction work or after all construction work has been completed." CentiMark asserts that as soon as the steel deck panel was installed, the work was completed. (R. Br. 15, 21). This argument is unpersuasive. Evidence shows that Mr. Cousey had not finished the work necessary to the replacement of a roof panel. He was replacing the insulation and sealing the rubber membrane to complete the roofing work. CentiMark's argument is rejected. I conclude that the standard is applicable.

Knowledge is Established

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). "The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000) (citation omitted), *petition for review denied*, 255 F.3d 122 (4th Cir. 2001).

Knowledge is directed to the physical conditions that constitute a violation. The Secretary need not show that an employer understood or acknowledged that the physical conditions were hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996).

CentiMark argues that it did not know and could not have known that the roof panel could collapse. (R. Br. 21-22). However, the violation here is the lack of assessment to determine the roof's structural integrity before employees began work to replace the damaged panel. I find CentiMark had actual knowledge through its foreman, Mr. Keith, that the roof was not assessed for its structural integrity as a walking/working surface.

The standard requires the assessment of an employee's walking/working surface prior to allowing an employee to work from that area. As evidenced by Mr. Keith's testimony, this was not an emergent problem; the damaged panel was scheduled to be replaced after the last ventilation unit was installed. Because Superior had previously identified the area of the

damaged panel, CentiMark knew the nature of the work to be done and its general location on the roof. Further, CentiMark's foreman knew that Mr. Cousey did only a visual appraisal of the underside of the roof from over 60 feet away.

CentiMark, through its foreman, knew the area immediately surrounding the damaged panel would be a walking/working surface for its employees replacing the panel. CentiMark knew the roof was over 50 years old; it had performed repairs and replaced other panels over many years. Further, CentiMark was familiar with this building and aware that the factory floor was over 60 feet below. A reasonable assessment, at a minimum, would require an examination of the underside of the roof at a distance much closer than 60 feet. Therefore, I conclude that CentiMark knew it had not assessed the walking/working surface for its structural integrity.

Also, even if CentiMark had not had a foreman onsite who knew that an assessment for structural integrity was not done, it could have known this through the exercise of reasonable diligence. As discussed above, this was a scheduled replacement of a damaged concrete roof panel. CentiMark had a long work history at this factory, knew the age of the roof, and knew that an aerial lift or similar equipment was needed to adequately assess the roof's structural stability as a walking/working surface.

CentiMark did not comply with the standard

CentiMark argues that it did an appropriate inspection. (R. Br. 20). However, it provided no evidence of the method it uses to generally assess the structural integrity of a walking/working surface. CentiMark is a roofing company and, thus, is aware that its employees frequently use the surface of a roof as a walking/working surface. CentiMark generally asserts that it did an inspection of the roof prior to its employees' work to replace the damaged panel. (R. Br. 7). CentiMark does not explain how its cursory visual assessment qualifies as an appropriate inspection to determine the roof's structural integrity as a walking/working surface.

CentiMark asserts that Mr. Cousey, when he went into the building to flag off the floor area inside, also assessed the roof's underside to determine its structural integrity. (R. Br. 7). CentiMark's only evidence of a pre-work assessment is a cursory, visual inspection to determine if there were any pipes or other obstructions attached to the panel. As demonstrated during the CO's inspection, Superior could make an aerial lift available to conduct a closer assessment of the underside of the roof. (Tr. 226-27). The purported assessment by Mr. Cousey was, at best, a visual assessment with the naked eye performed from over 60 feet away in a darkly lit building.

(Tr. 443-44). CO Margetiak testified that he had not learned of any additional inspections. (Tr. 357).

Further, there was no additional assessment when the removal of the damaged panel revealed damage to the adjacent panels. CentiMark argues that there was no indication of collapse while the employees were standing on the panel or when the damaged panel was placed on top of the southern panel. (R. Br. 10). The record does not include any information about whether there was any observation of the other surrounding panels that the employees had been standing on.

CentiMark asserts that its training includes the inspection of a roof's underside. However, it provided no evidence regarding how it trains its employees to assess the roof as a walking/working surface. Further, CentiMark states that because Mr. Keith is fully trained and a competent person for fall protection, an adequate assessment of the roof deck must have been done.[7] (R. Br. 20). However, Mr. Keith simply testified that he was trained to do an under-deck inspection.[8] (Tr. 368). No evidence was adduced to show CentiMark's guidelines or expectations when assessing the structural integrity of a walking/working surface. Further, evidence shows that on the day of the accident, the visual inspection was focused on whether there was anything under or attached to the damaged panel. The record shows CentiMark inspected Superior's roof in 1999.[9] (Tr. 264-65; CX-8).

CentiMark's expert, Mr. Vaughan, testified that an employer needs to do a visual inspection of the top and the underside of the roof. If no problems are found, a further inspection is not necessary. However, he also testified that if an additional problem or hazard is found, an employer would need to expand the inspection and address that problem. Mr. Vaughan stated that the amount of time that passed between an inspection and the work is relevant – for example, an inspection a year-and-a-half earlier would not be adequate. (Tr. 475-82, 507).

Mr. Vaughan admitted that he based his opinion on photographs and other documents CentiMark provided; he had never visited Superior's facility. Further, he did not evaluate the strength and integrity of the concrete panels and did not have an opinion about the strength of

[7] Mr. Keith testified he took annual fall protection training and his foreman's training included where to tie off and inspection of the decking. Mr. Keith testified that Mr. Cousey would have received the same training. (Tr. 367-68, 434. See Tr. 402-410; RX-A5, RX-A10, RX-A11).

[8] The issue of whether Mr. Keith was a competent person or properly trained under OSHA's fall protection standard was not tried.

[9] On cross-examination, CO Margetiak confirmed that one of OSHA's suggestions to prevent future accidents was to conduct an engineering review of Superior's roof. (Tr. 350-51).

Superior's roof. Mr. Vaughan testified that he would not be able to determine a panel's strength based simply on a description of a panel. (Tr. 463, 492-94; RX-C1).

CentiMark asserts that it was Superior's responsibility to determine the structural stability of the roof and relies upon the conditions included on the back of its Work Authorization invoice form (work form) as evidence.[10] (Tr. 284-86, 496; RX-A12). Mr. Vaughan, Superior's expert, testified that it was his belief, based on the work form, that CentiMark had no obligation to comply with 29 C.F.R. § 1926.501(a)(2) because it was Superior's contractual responsibility to do so. (Tr. 496; RX-A12).

The evidence is silent about whether the work being done the day of the accident would have been subject to the condition on the work form.[11] The work form essentially outlines the nature of the work completed and the materials and time required for the repair. (RX-A9). CentiMark presented evidence of both "warranty" and "billable" work previously done by CentiMark on Superior's roof for six dates between March and September 2011. Only two of the six work forms had a signature by a Superior employee.[12] (RX-A9). Mr. Keith testified that he completed the work form and that occasionally a Superior employee signed the form. He testified that a copy of the back of the work form was included. (Tr. 413, 415, 442: RX-A12). I find this evidence demonstrates that Superior, at best, did a minimal review of these work forms.

There was no evidence provided to show the intent of this particular condition on CentiMark's work form. No evidence was provided to show that it was a condition about which both parties (Superior and CentiMark) shared a common agreement and understanding. Further, the condition appears to be boilerplate and not specific to Superior or this roof. Nonetheless, it is not pertinent to CentiMark's responsibility for its worksite.

I qualified Mr. Vaughan as an expert in fall protection safety; however, I do not recognize him as an expert in the non-specific, generally-phrased "related OSHA standards." (Tr. 448, 460, 479; RX-C1). I have considered his testimony about the cited standard at issue in this proceeding. His opinion that CentiMark need not comply with 29 C.F.R. § 1926.501(1)(2)

[10] The second paragraph of CentiMark's standard, "Work Authorization Form" includes as a condition: "Purchaser acknowledges that CentiMark has not performed any engineering, architectural or other such analysis of the structure upon which the roofing services are performed, and that CentiMark has not and will not perform any consulting services, or in any way represent itself as a consultant. Moreover, Purchaser acknowledges that it is responsible for obtaining any structural, engineering, or other architectural analysis of the building(s) on which the work is to be performed." (RX-A12).

[11] No work form for the October 12, 2011 damaged roof panel replacement work was offered into evidence. (RX-A9; RX-A12).

[12] Mr. Keith testified that the two work authorizations that had been signed were signed by Superior employee, Jerry Chilcote. (Tr. 442; RX-A9).

due to its contract with Superior is not credited. Likewise, his opinion that CentiMark did not violate the cited standard is not credited. (Tr. 480, 490-91, 496; RX-C1).

Case law is clear; an employer cannot relinquish its responsibility for employee safety. If an employer neither creates nor controls the hazardous condition at a multi-employer worksite, it may defend against a citation by showing that it protected its employees by taking reasonable alternative measures or that it could not reasonably have known of the hazardous condition. *Capform, Inc.*, 16 BNA OSHC 2040, 2041-42 (No. 91-1613, 1994) (citations omitted). Commission precedent states that the employer's conduct is viewed in its totality and "whether a reasonable employer would have done more." *Capform*, 16 BNA OSHC at 2041-42. I find that CentiMark did not take reasonable alternative measures to ensure the walking/working surface for its employees was structurally adequate.

Commission precedent holds that an employer must make a reasonable effort to assess an employee's work area to determine the likely hazards and then provide adequate instructions or equipment to prevent exposure to an unsafe condition. *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980) (employer "must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work"). Here the standard clearly specifies that the employer needs to verify the structural adequacy of a walking/working surface before an employee begins work.

The Commission decision in *Agra Erectors* is instructive in evaluating the requirements of this standard:

> [T]he phrase 'are to work' in the standard's first sentence requires an employer to determine in advance whether a surface is safe to work on, the employer's duty does not end after the initial inspection. The plain language of the second sentence clearly permits employees "to work on those surfaces only when the surfaces have the requisite strength and structural integrity."

Agra Erectors, Inc., 19 BNA OSHC 1063, 1066 (No. 98-0866, 2000) (footnotes omitted) (citations omitted).

I find that CentiMark did not adequately assess the roof deck to determine if it was structurally sound. A simple visual assessment from over 60 feet below the underside of the roof deck in a dark building is not a reasonable assessment of the roof's structural integrity as a walking/working surface and does not meet the standard. Further, the cursory visual assessment while replacing a roof panel does not constitute an assessment of the strength of the roof as a walking/working surface. Finally, no evidence was provided to show that CentiMark made any

inquiries to Superior or anyone else to determine if the roof was structurally adequate for the work being done.

CentiMark argues that because Mr. Keith did not see any deflection in the adjacent south panel and had never replaced more than one panel at a time, he did not believe a closer inspection was needed. (R. Br. 10, 15). However, Mr. Keith's general observation and prior experience is not a substitute for the assessment the standard requires. Further, CentiMark did not provide evidence about its policy or training for evaluating the structural integrity of a walking/working surface. The standard requires the employer to determine the structural integrity of a walking/working surface before allowing its employees to work on that surface.

Testimony shows that the roof panels were covered with insulation and a rubber membrane, so the surface of the concrete panel itself was not visible until those materials were removed. CentiMark cut the membrane just a bit larger than the actual damaged panel it removed; it did not cut out a larger area to look at the surface of any of the surrounding panels. The visible damage to the surrounding panels put CentiMark on notice that a closer assessment of the roof's structural integrity was warranted. CentiMark took no additional action when the damage to the adjacent panels was revealed. CentiMark's own expert acknowledged that using an aerial lift to get a closer look at a roof's underside is better than a visual assessment from over 60 feet away with the naked eye, because "you may not be able to catch everything from the ground."[13] (Tr. 506).

I find that CentiMark did not take reasonable actions to assess the structural integrity of the roof as a walking/working surface as required by the standard. They did not conduct a proper assessment either before they started the work to remove the damaged panel or when the damage to the adjacent panels was revealed. I conclude the terms of the standard were violated.

Other Arguments

CentiMark asserts that because the CO is not a competent person with respect to fall protection, he could not inspect Superior's roof for structural integrity as a walking/working surface. (R. Br. 13). This argument is irrelevant. The standard requires the employer to assess

[13] CentiMark hired Mr. Vaughan to review documents to provide an opinion about the validity of the citations. (Tr. 448, 461, 491). He did not visit the worksite. On cross-examination, he acknowledged that even though he heard testimony that differed from the information he had received before the hearing, the differing testimony had no effect on his opinion. (Tr. 492, 501). He also admitted on cross that a simple viewing from the ground without binoculars or some other device would be insufficient. (Tr. 506).

the walking/working surface prior to allowing employees to work – it does not require a CO to be a competent person under the fall protection standard.

CentiMark also asserts it made a determination that only one panel needed to be replaced. (R. Br.14). The evidence does not support this assertion. Superior identified the concrete panel that it wanted CentiMark to replace with steel decking. Mr. Keith testified he could tell the panel was sagging after Superior requested its replacement. CentiMark employees then located the panel from the top side of the roof because water was collecting in a depression. There is no indication CentiMark did a general assessment of the roof panels and then concluded there was only one panel that was damaged. At best, after the panel's location was determined, CentiMark did a cursory visual "inspection" of the underside of the roof from over 60 feet below.

CentiMark further asserts that the Secretary's case is flawed because he did not provide specific guidelines as to an employer's obligations to assess a roof's structural stability. (R. Br. 18). This assertion is irrelevant. This performance-oriented standard allows the employer some discretion in its method of compliance. Compliance is evaluated according to what would be reasonable for a particular situation. *See Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2198 (No. 00-1052, 2005) (citations omitted). Also, a review of the rulemaking history for this particular standard shows that OSHA added this requirement to its fall protection rule so that an employer would be required to take a specific action, beyond its normal duties to assess hazards, to determine if the surface could support the "weight of workers, equipment and materials." 59 Fed. Reg. 40672, 40681 (Aug. 9, 1994) (codified at 29 C.F.R. pt. 1926). Here, CentiMark did not demonstrate that it took action to ensure the roof would support the scheduled work activity.

I conclude that the Secretary has met his burden of proving the alleged violation of the cited standard. This item is therefore affirmed.

Penalty

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. Gravity is generally the primary factor in the penalty assessment. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary classified the violation as serious and proposed a penalty of $7,000.00. A violation is properly classified as serious if "there is substantial probability that death or serious

physical harm could result" if an accident occurs. *See Compass Environmental, Inc.*, 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010). Here, an employee died after falling over 60 feet; therefore, the classification of serious is appropriate.

CO Margetiak testified that to calculate the recommended penalty amount, he determined that the severity was high and the probability was great. The gravity was high and, therefore, CentiMark was not eligible for a good faith discount. Further, there was no reduction for size, as the company had over 250 employees, or for history, due to the employer's history of prior serious citations. (Tr. 268-71, 359-60). Respondent does not dispute the testimony regarding CentiMark's history of prior serious citations.

I conclude the proposed penalty is appropriate. A penalty of $7,000.00 is assessed.

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.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1a, alleging a serious violation of 29 C.F.R. § 1926.501(a)(2), is AFFIRMED, and a penalty of $7,000.00 is ASSESSED.

2. Citation 1, Item 1b, alleging a violation of 29 C.F.R. § 1926.850(a), is VACATED.

3. Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1926.501(b)(4)(i), is VACATED.

/s/
Carol A. Baumerich
Judge, OSHRC

Date: August 26, 2013
Washington, D.C.