

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

Secretary of Labor,
Complainant

v.

D. W. Caldwell, Inc.,
Respondent.

OSHRC Docket No. 12-1056

Appearances:

Charna Hollingsworth-Malone, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Andrew N. Gross, Esq., H B Training & Consulting, LLC, Lawrenceville, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsh

DECISION AND ORDER

D. W. Caldwell, Inc. (DWC) is a commercial sheet metal and roofing contractor in Douglasville, Georgia. On March 29, 2012, a DWC crew was installing a new metal roof on the student center building at a college in Selma, Alabama, when an inspection was initiated by the Occupational Safety and Health Administration (OSHA). The OSHA compliance officer had observed employees on the steep roof without tying off their safety harnesses to anchor points. As a result of the OSHA inspection, DWC received a willful citation for the lack of fall protection on March 26, 2012. DWC filed a timely notice of contest.

The citation alleges DWC willfully violated 29 C.F.R. § 1926.501(b)(1) for failing to protect employees on a roof from falling by the use of a guardrail system, safety net system or personal fall arrest system. In the alternative, OSHA alleges a willful violation of 29 C.F.R. § 1926.501(b)(11) for the lack of a fall protection system on a steep roof.¹ The citation proposes a penalty of \$28,000.00.

¹ The Secretary of Labor's unopposed motion to amend the citation to plead in the alternative a violation of 29 C.F.R. § 1926.501(b)(11) was granted on October 2, 2012.

The hearing was held in Atlanta, Georgia, on October 12, 2012. The parties stipulated jurisdiction and coverage (Tr. 4). The parties filed post-hearing briefs on January 17, 2013.

DWC denies the alleged violation, willful classification, and proposed penalty. DWC argues that the company was not aware of the crew's failure to utilize fall protection and it should not be held to the knowledge of the crew foreman. If a violation is found, DWC argues that it was the result of unpreventable employee misconduct.²

For the reasons discussed, a serious violation of 29 C.F.R. § 1926.501(b)(11) is affirmed and a penalty of \$6,000.00 is assessed.

Background

DWC, a corporation, is a roofing and sheet metal company with an office and workshop in Douglasville, Georgia. DWC is owned and operated by Mr. Daniel Caldwell and Mrs. Debra Caldwell. Mr. Caldwell performs the cost estimating and oversees the jobs. His wife, corporate secretary, is the office manager who also conducts safety meetings and training for employees. DWC has been in business for approximately 20 years and performs roofing work in Georgia and Alabama. Since 2008, DWC has almost exclusively performed commercial roof work. At the time of the OSHA inspection, DWC employed approximately 15 employees and operated two field crews supervised by foremen; the sheet metal crew and the low pitch (flat roof) crew (Tr. 66, 111-112, 118-119, 150).

In February 2012, DWC, pursuant to a contract with the general contractor, began installing a metal roof on the new student center at Wallace Community College in Selma, Alabama. The construction of the student center had started in August 2011. The college is located approximately 200 miles from DWC's Douglasville office (Tr. 14-15, 153).

The new student center is a two-story building with a sloped roof. The eave is 32 feet above the ground level and it is 45 feet to the peak. The roof's slope is 5:12. The roof is approximately 200 feet in length and 100 feet in width (Exh. C-1; Tr. 15, 30-31, 76). To install the metal roof, DWC used its sheet metal crew of three employees under the supervision of a foreman, employed by DWC for four years (Tr. 74-75, 84).

² Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991).

On March 29, 2012, an OSHA safety compliance officer, who was assigned a targeted inspection based on the Dodge Report, drove to the community college.³ Upon arriving at the college at approximately 10:15 a.m., he observed the employees on the roof of the student center installing metal panels. He observed them for approximately 20 minutes. Throughout the time, the employees, including the foreman, were observed wearing safety harnesses. Except for one employee working at the eave, the harnesses were not connected to the rope anchor points. The one employee at the eave was properly connected to an anchor but he disconnected from the anchor to talk on a cell phone while remaining near the eave (Exh. C-4; Tr. 35-36). There were no perimeter guardrails or safety nets at the eaves (Exhs. C-5, C-6; Tr. 25, 28-29, 53).

As a result of his observations, the compliance officer initiated an OSHA inspection and took photographs. He met with the general contractor's superintendent who identified DWC as the roofing contractor and who removed the employees from the roof (Tr. 27). The compliance officer held an opening conference with the DWC foreman. In the foreman's interview statement, he admitted the crew was not tied off despite DWC's policy of 100 percent fall protection (Exh. C-8; Tr. 48). The foreman claimed that it was difficult for the crew to tie-off because they had to walk 60-100 feet to pick up material and it slowed production to anchor the harness (Tr. 81-82). After requesting training records and 300 OSHA logs, the compliance officer conducted a closing conference by telephone with Mrs. Caldwell (Tr. 49-50).

The willful citation was issued to DWC on April 26, 2012. The general contractor received an OSHA citation for lack of handrails (Tr. 13).

Discussion

The Secretary has the burden of proving:

- (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise or reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

DWC does not dispute the application of the *Fall Protection* standards at § 1926.500 *et*

³ Dodge Report assists OSHA in selecting projects for inspection on a neutral basis. OSHA Instruction Directive No. CPL 02-00-141 (July 14, 2006), *Inspection Scheduling for Construction*.

seq. to its roofing work at the student center. Also, DWC does not dispute that the crew failed to properly use fall protection on a steep roof and that the crew was exposed to fall hazard of 32 feet while installing the metal roof (DWC Brief, p. 8).

DWC argues that it lacked knowledge of the crew's failure to secure their harnesses because it violated the company's rule for 100 percent fall protection. If a violation is found, DWC asserts unpreventable employee misconduct as to the foreman and crew.

WILLFUL CITATION

Alleged Violation of § 1926.501(b)(1) or § 1926.501(b)(11)

The citation alleges that at "3000 Earl Goodwin Parkway Selma, AL: On or about March 29, 2012, and at times prior to; the employer exposed his employees to a fall hazard in that employees were installing metal panels 32 feet in height on a 5 : 12 sloped roof without the use of fall protection." Section 1926.501(b)(1) provides:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) 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.

In the alternative, the Secretary alleges the same alleged violation description. However, § 1926.501(b)(11) provides:

Steep roofs. Each employee on a steep roof with unprotected sides and edges 6 feet (1.8m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

A steep roof is defined as "a roof having a slope greater than 4 in 12 (vertical to horizontal)" § 1926.500(b) *Definitions*. DWC agrees that the roof was a steep roof (Tr. 152). According to the compliance officer, § 1926.501(b)(11) was not cited because at the time of his inspection, he could not verify that it was a steep roof (Tr. 68).

The more specific standard, § 1926.501(b)(11), is deemed the applicable standard because it applies to steep roofs and roof at issue has a 5 in 12 slope. Since the same hazard is addressed, as in this case, by two standards, the more specific standard preempts the application of the general standard. *McNally Construction & Tunneling Co.*, 16 BNA OSHC 1879, 1880 (No 90-2337, 1994). Also see, § 1910.5(c). The parties agree to the application of § 1926.501(b)(11)

(Secretary Brief, p. 11; DWC Brief, p. 8).

There is no dispute that the DWC crew was installing metal panels on a 32-foot high roof without securing their safety harnesses to anchor points or otherwise being protected from a fall hazard. The record shows that there were no guardrails or safety nets at the unprotected eaves (Exh. C-1; Tr. 29). According to the foreman, the crew was not tied off because it was difficult to carry the metal panels across the roof with two hands while also moving the rope lanyard. He also told the compliance officer that it slowed production (Exh. C-8; Tr. 81-82).

The roof work at issue was hazardous because it was steep and the eave was 32 feet above the ground. There were numerous tripping threats including boxes, plastic containers, metal panels and equipment such as ropes, anchors, drills, sleeves, hammers and a saw (Tr. 40, 76). Employees walked under metal panels carried by other employees. Employees frequently walked 60 to 100 feet across the roof and installed metal panels at the eaves. In the course of the employees' duties, it was clearly "reasonably predictable" that the employees "have been, are, or will be in a zone of danger" without proper fall protection. *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted).

The OSHA compliance officer observed the employees working on the roof for approximately 20 minutes. He observed and photographed them working on the roof at numerous locations, including the roof's eaves, without securing their harnesses to anchor points (Exhs. C-1, C-6; Tr. 32-33). One employee was properly attached to an anchor but he disconnected from the anchor to talk on a cell phone while still near the eave (Exh. C-4; Tr. 35).

Therefore, the record establishes that § 1926.501(b)(11) was applicable to DWC's roofing work at the student center and the terms of § 1926.501(b)(11) were not complied with by the crew's failure to tie off their harnesses to anchor points and the lack of other fall protection systems. Without fall protection, the crew members were exposed to a fall hazard of 32 feet from a steep roof. DWC agrees that the evidence establishes clear improper conduct by the crew (DWC Brief, p. 20).

Despite the foreman's claim that the crew could not use fall protection because they could not transport the panels 60 to 100 feet with the harnesses connected to anchors, DWC does not assert infeasibility as a defense (DWC Brief, p. 21). After the OSHA inspection, DWC provided the crew with retractable lanyards (Tr. 138-139).

The issue remaining, to establish the Secretary's *prima facie* violation § 1926.501(b)(11), is whether DWC had the requisite knowledge of the violative condition.

DWC's Knowledge

DWC argues that it was unaware the crew was not properly using fall protection. DWC claims that the foreman's knowledge of the condition should not be imputed because of its safety program, training and monitoring of employees.

In order to establish knowledge of the hazardous condition, the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No 92-1022, 1994).

There is no dispute that DWC's foreman at the student center project was a supervisor. He was in charge of installing the metal roof, directing and supervising the crew, and overseeing the safety of the crew. He directed the crew's work and had the authority to correct hazards (Exhs. C-13 and C-13A, Nos 18, 21; Tr. 55, 96, 110, 157). The foreman knew that at least three employees including him were not tying off their harnesses (Exh. C-6; Tr. 78-79). He testified that he discussed the use of anchors with one employee, but decided not to require it (Tr. 81). He indicated that he did not use fall protection by stating "I don't use the rope;" referring to the anchor intended for attachment of his harness (Exh. C-8).

On the day prior to the OSHA inspection, the foreman was advised by the general contractor's superintendent that an employee was not tied off. The superintendent had seen the employee working on the roof and wearing a harness that was not tied off (Tr. 11, 15-16). The superintendent informed him that "he's not allowed on the roof without being tied off," according to the general contractor's policy (Tr. 12). The foreman said "Okay" and told the employee to tie off. He admitted that the crew was "caught" (Tr. 83). However, the next day the foreman allowed the crew to continue to not tie off their harnesses.

When a supervisory employee has actual knowledge of the condition as in this case, his knowledge is imputed to the employer and the Secretary satisfies her burden of proving knowledge without having to demonstrate any inadequacy or defect in the employer's safety program. *Dover Elevator Co.* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). An employer is charged with the knowledge of conditions which are plainly visible to supervisory personnel.

DWC's argument that knowledge cannot be established because Mr. Caldwell was

unaware of the crew's failure to tie off is misplaced. The argument ignores that corporations such as DWC obtain knowledge through supervisory personnel. "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.* 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

Based on DWC's imputed knowledge of the crew's failure to tie off, a violation of § 1926.501(b)(11) is established unless DWC can show unpreventable employee misconduct.

Unpreventable Employee Misconduct

DWC argues that if a violation is found, it was the result of employee misconduct. The company has a 100 percent fall protection rule on which the employees were trained. Also, DWC claims the roof projects were monitored and employees were disciplined for violations of the rule.

In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

DWC's Work Rule

As essential element of the misconduct defense, the employer needs to show that it has work rules designed to prevent the unsafe condition or violation of the OSHA standard. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1816 (No. 87-692, 1992). A work rule is defined as "an employer directive that requires or proscribes certain conduct, and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076 (No. 12354, 1977).

DWC has a 100 percent fall protection rule (Tr. 48, 93). The written safety program by the National Roofing Contractors Association contains a *Fall Protection* section which describes the options available for low sloped and steep sloped roofs. It identifies the harness and anchor system to use by employees. The company's written program was at the student center project (Exh. R-3; Tr. 87). Also, DWC kept the manufacturer's instructions for the specific equipment (Exhs. R-4, R-5).

Despite knowing the rule and having the information available, the foreman apparently believed there were exceptions to DWC's 100 percent rule based on the difficulty to remain tied off while carrying the metal panels or that production was slowed. The foreman's conduct shows that DWC's fall protection rule was not presented as mandatory. Also, the record fails to show DWC evaluated the potential problems involved in installing the metal panels while remaining tied off. After the OSHA inspection, DWC purchased retractable lanyards which resolved the problem.

DWC's Communication of its Work Rules

Mrs. Caldwell is primarily responsible for providing the safety training to employees. She conducts 30-minute weekly safety meetings at the company office (Tr. 125, 164). DWC presented five months (January – May, 2012) of safety meetings for the sheet metal crew (Exh. R-6). During the period, the crew received two training sessions prior to the OSHA inspection; January 26, 2012, and March 9, 2012, on fall protection requirements. The general contractor for the student center project also held safety meetings (Tr. 91, 95). The day after the OSHA inspection, Mr. Caldwell at a meeting with the crew "laid down the law to them" (Tr. 129).

DWC's efforts in training employees in its safety program, although important, do not show adequate communication of the fall protection rules as evident by the crew's pattern of non-compliance. The crew, including the foreman, failed to properly tie off the fall protection equipment despite having been warned by the general contractor the day prior to the OSHA inspection. The foreman conceded to never "using the rope" and that the crew did not tie off (Exh. C-8 p. 2; Tr. 82).

It is noted that Mr. and Mrs. Caldwell were not shown to have a safety background or evidence of receiving safety training such as the 10-hour OSHA course (Tr. 154). They learned fall protection requirements from "reading the manuals and whatnot" (Tr. 154). The owners do not speak Spanish despite that the crew was predominantly Spanish speaking (Tr. 156). Although the foreman speaks English, he needed an interpreter present during his trial testimony to provide assistance (Tr. 72-73).

DWC's Steps to Discover Violations

Although an employer is not required to provide constant surveillance, it is expected to take reasonable steps to monitor for unsafe conditions. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937,

1940 (No. 97-1676, 1999). An effective program requires “a diligent effort to discover and discourage violations of safety rules by employees.” *Paul Betty d/b/a Betty Brothers.*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981).

Mr. Caldwell is primarily responsible for visiting the projects on a “regular basis” (Tr. 130). He sometimes makes surprise inspections. However, he does not record his inspections unless he sees a problem and wants it recorded. Mr. Caldwell then calls the office to record the visit (Tr. 120-121, 131). For example, he made an inspection on June 15, 2011, where he decided the site needed more frequent inspections after having been notified by the general contractor of the crew’s failure to tie off (Exh. R-7; Tr. 136).

DWC’s method to discover a crew’s disregard of fall protection was not shown adequate. When Mr. Caldwell visited a project, there is no showing he was performing a complete safety inspection of the crew, following a checklist or other guideline. The frequency of his visits is based on the worksite’s proximity to the Douglasville office and how often DWC needed to deliver materials and check on the progress of the work (Tr. 130-131). The student center at issue was 200 miles from DWC’s office in Douglasville, Georgia. He apparently visited the Selma site three times during a six week period after the crew began the roofing work (Tr. 149). Surprising, he did not discover that the crew was not using fall protection despite its obvious failure to comply and the crew’s need for retractable lanyards. The superintendent of the general contractor and OSHA were able to observe the crew’s failure. Even the year before, March 2011, it was the general contractor that discovered the lack of fall protection by the crew (Tr. 133).

DWC’s Enforcement of Safety Rules

Adequate enforcement is the final element of the misconduct defense. To show that an employer’s disciplinary system is more than a paper program, an employer must have evidence of having actually administering the discipline outlined in its policy. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003). Evidence of a variety of disciplinary measures which progress to higher levels of punishment designed to provide deterrence tends to demonstrate that an effective disciplinary system is in place.

DWC notes that after the OSHA inspection, the crew members were verbally reprimanded and in August 2012 sent to a third party for retraining instruction on fall protection and received certification cards (Tr. 110). As evidence of its discipline program, DWC presented handwritten

entries (Exh. R-7). The entries include: (1) March 24, 2011, when the general contractor had called Mr. Caldwell to complain about the crew's failure to tie off, Mr. Caldwell immediately correcting the problem by phoning the crew and then going to the site to ensure the crew was tied off (Tr. 133); (2) June 7, 2011, where a foreman suspended an employee by sending him home for not following safety rules (Tr. 135); (3) July 14, 2011, where Mr. Caldwell reprimanded the crew for not having warning lines on the roof (Tr. 136); and (4) March 22, 2012 where the employees were reprimanded for failing to have personal protective equipment (Tr. 137, 161-162).

DWC's disciplinary program is not written and fails to provide for progressive discipline (Tr. 154, 158). The foreman and crew at issue had received written reprimands a year before the OSHA inspection for not tying off. No one was suspended (Exh. C-9; Tr. 84-85). Other than verbal warnings or written reprimands, there is no evidence that discipline included loss of pay, days off from work, or termination. As a result of the student center project, the crew received a similar written reprimand as received by the crew the year proceeding and still no escalated discipline (Exh. R-8; Tr. 139).

Where all employees in a crew violate an employer's work rule, the unanimity of their non-compliance shows weak enforcement of the work rule. *Daniel International Corp.*, 9 BNA OSHC 1980, 1983 (No. 15690, 1991). In this case, the four employees including a foreman failed to comply with the rule. As discussed, the same crew had behaved similarly the prior year. Despite the failure to tie off, no one was suspended. The foreman remains a sheet metal foreman and has received no penalty for his several unsafe acts. In the only instance in which a foreman sent an employee home, Mr. Caldwell could not remember why (Tr. 135).

Based on the record, DWC's unpreventable employee misconduct defense is not established. DWC's overall safety program was not shown sufficient to prevent and discover safety violations. The failure to comply by the four employees indicates deficiencies in DWC's safety program. Also, "where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991).

Willful Classification

OSHA classified DWC's violation of § 1926.501(b)(11) as willful. It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

DWC's conduct in this case did not rise to the level of willful. DWC is a small employer with 15 employees. Although inadequate, as discussed, DWC has a written safety program and provides weekly safety meetings. Mr. Caldwell regularly visits projects at least once a week to check on progress and employee safety. When he observes a safety problem, the record shows he immediately corrects the problem. DWC issues verbal warning and files written reprimands on employees, including foreman, as a means to enforce its safety rules. DWC provides employees with the necessary fall protection equipment; harnesses, lanyards, ropes, and anchors. At the student center project, the crew was wearing appropriate safety harnesses and the rope anchors were in place. The foreman was experienced and had attended the 10-hour OSHA safety course (Tr. 90). After the OSHA inspection, the entire crew received formal fall protection training in August 2012 through a third party and obtained certificates (Tr.110).

The OSHA compliance officer agrees that the crew was properly trained in the requirements for fall protection by DWC. He rated the company's safety program, safety training, safety communication, and enforcement of safety program as "average" (Exh. R-2; Tr. 63). DWC maintained the appropriate OSHA 300 logs and safety training documents (Tr. 49). The company demonstrated a good faith effort to comply with all OSHA requirements.

The foreman's conduct demonstrated poor judgment but was not intentional or reckless disregard. Although he was aware of the company's fall protection rule, the foreman unfortunately believed that not using the rope anchors while carrying the metal panels 60 feet, was not a fall hazard because of the size of the roof and that most of the work was being done near the peak (Tr. 81). He was an experienced foreman who had received proper fall protection training. To address the concern of the foreman, DWC purchased retractable lines after the OSHA inspection. The retractable lines allowed the employees to have their hands free to carry the metal

panels (Tr. 138, 139). DWC agrees that the evidence in this case clearly establishes “improper conduct by this crew” (DWC Brief, p. 20). However, such conduct was not established as willful.

DWC had received a prior OSHA citation for lack of fall protection in 2008 for a violation of § 1926.501(b)(10). The citation was resolved by an informal settlement agreement with a reduction in the penalty (Tr. 48, 70). Although the prior citation addresses fall protection on a low sloped roof, the nature of the violative condition differs from this case. In the 2008 citation, the crew had started to survey the roof and determine where to place the warning lines when the OSHA inspection occurred (Tr. 140-141). The crew members at issue were already working on the roof and had the appropriate fall protection equipment available (harnesses, lanyards, and rope anchors) but failed to tie off.

A willful violation of § 1926.501(b)(11) is not established. The violation of § 1926.501(b)(11) is reclassified as “serious” based on the DWC’s knowledge, as discussed, and the potential for death or serious injury from a fall of 32 feet to the ground.⁴

Penalty Assessment

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Review Commission is required to consider the size of the employer’s business, history of previous violations, the employer’s good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

DWC is a small employer with 15 employees (Tr. 66). DWC is not entitled to credit for history because of receiving an OSHA citation in 2008 for violation of § 1926.501(b)(10). It is noted the citation was settled with a reduction in the penalty (Tr. 48, 71-72). DWC is entitled to good faith credit based on having an average safety program with a written safety manual and regularly safety training.

A \$6,000.00 penalty is reasonable for serious violations of § 1926.501(b)(11). The gravity of the violation is considered high because at least four DWC employees, including the foreman, were on a steep roof without tying off their safety harnesses. The employees were exposed to a 32 foot fall hazard.

FINDINGS OF FACT AND

⁴ A “serious” violation under § 17(k) of the Occupational Safety and Health Act is established if there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violative condition.

CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation No. 1, alleged violation of 29 C.F.R. § 1926.501(b)(11) is affirmed as serious and a penalty of \$6,000.00 is assessed. The alleged violation of § 1926.501(b)(1) is vacated as duplicative.

SO ORDERED.

/s/

Judge Ken S. Welsch
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Dated: February 11, 2013
Atlanta, Georgia