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

SECRETARY OF LABOR, Complainant, v. ALL STEEL CONSULTANTS, INC., Respondent.	OSHRC Docket No. 10-2010

APPEARANCES:

Carla M. Casas, Esquire
Karen E. Mock, Esquire
U.S. Department of Labor
Atlanta, Georgia
For the Complainant.

Ralph George, President
All Steel Consultants, Inc.
Palmetto, Florida
For the Respondent, *pro se*.

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a work site of All Steel Consultants, Inc. ("All Steel" or "Respondent") on August 12, 2010. The site was located in St. Petersburg, Florida, and Respondent's employees were engaged in roofing work. After the inspection, Respondent was issued a four-Item serious citation. Respondent contested

the citation and the proposed penalties, and this matter was assigned to the Commission's simplified proceedings pursuant to Commission Rule 203, 29 C.F.R. § 2200.203. The hearing in this matter was held in Tampa, Florida, on July 14 and 15, 2011.[1] The parties have filed post-hearing briefs and reply briefs.[2]

Background

On August 12, 2010, All Steel was installing metal roofing on the building at the site. All Steel had been at the site for about a month. The upper roof had a 4-12 slope, meaning it rose 4 inches in height for every 12 horizontal inches. The upper roof's eave was 28 feet from the ground, and the lower roof's top elevation was 21 feet 8 inches from the ground. The distance from the upper roof's eave to the lower roof was thus 6 feet 4 inches. All Steel had a crew working on an area of the upper roof on August 12, 2010.[3] (Tr. 65-71; CX-1, CX-11).

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[1] Prior to the hearing, the Secretary filed a motion to amend the citation and complaint. Respondent did not oppose the motion, and the motion was granted. As amended, the citation withdrew Item 1. The remaining items allege as follows: Item 2 – a serious violation of 29 C.F.R. § 1926.501(b)(10); Item 3 – a serious violation of 29 C.F.R. § 1926.502(d)(16)(iii); and Item 4 – an "other" violation of 29 C.F.R. § 1926.503(b)(1).

[2] In its reply brief, All Steel claims prejudice, noting that it e-mailed its post-hearing brief early in the morning on the due date, while the Secretary e-mailed her post-hearing brief late that afternoon. It also notes that her mailing her hard copy that day was contrary to the Court's directions. All Steel's e-mail copy and its hard copy arrived at the Court on the due date. All Steel asserts that the Secretary's filing was improper and asks the Court to reject it. R. Reply Brief, p. 9. The request is denied. The Court told the parties to file their briefs, in hard copy and by e-mail, by 5:00 p.m. E.D.T., on the due date. (Tr. 538-41). Both parties timely filed their e-mail copies before 5:00 p.m., E.D.T., on October 5, 2011, the due date. The Secretary's e-mail copy was sent later in the day than All Steel's. By doing so, the Secretary did not violate the Court's instruction. Further, All Steel was not prejudiced because the Secretary mailed her hard copy on October 5, 2011, as she sent Respondent a copy of her brief via e-mail that day as well. Her filing by U.S. mail also does not contravene the Commission's Rules. Those Rules allow filings to be made by "first class mail, personal delivery, or electronic transmission or facsimile transmission." The filing date, if by mail, is "effective upon mailing." *See* Rules 8(c) and (e)(1), 29 C.F.R. §§ 2200.8(c) and (e)(1).

[3] Gregory Hodge, the project manager for the general contractor at the site, testified about the distances noted above. He said that CX-11, one of the architectural drawings for the building, showed where All Steel's employees were working on August 12. He indicated that area with an "A." He indicated the upper roof's eave, the lower roof and the lower roof's eave with "B," "C" and "D," respectively. He stated that the eave of the lower roof, which was also sloped, was 12 feet from the ground. (Tr. 64-71). Mr. Hodge provided the CO with the relevant information and the blueprints for the project. (Tr. 101).

OSHA Compliance Officer ("CO") Gerardo Ortiz was driving by the site on August 12, 2010, and he saw what looked like fall hazards.[4] He parked his car about 300 feet from the site and took photographs and a video of what he saw.[5] He saw six employees on the roof. Three were laying down metal roof panels and affixing the panels to the roof. The other three were taking panels from a stack on the roof and carrying them to the employees doing the installing. All the employees wore harnesses and lanyards.[6] Two had their lanyards tied off to lifelines; however their lifelines were not properly adjusted, were too long, and, in the event of falls, the lifelines would not have kept the employees from hitting the lower roof below. The other four employees were not tied off to anything, and at least one had his lanyard dragging behind him. The two employees who were tied off were working right on the edge of the roof. Another employee who was not tied off was also working near the edge.[7] (Tr. 91-101, 105-06, 280).

The CO discussed his photographs and what they depicted.[8] CX-2 shows Mr. Gonzalez at the edge of the roof, Mr. Rodriguez standing farther back on the left side of the roof, and Mr. Clawson kneeling on the roof. CX-3 shows Messrs. Gonzalez and

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[4] CO Ortiz has over 25 years of experience in the area of occupational health and safety, and 8 years of experience with OSHA. (Tr. 88, 90).

[5] The CO's photographs are CX-1 through CX-8. His video is CX-9.

[6] The CO testified the personal fall arrest system equipment supplied by All Steel to its employees*; i.e.*, body harnesses, connectors/lanyards, and shock-absorbing deceleration devices, was in good condition and he did not observe any deficiencies in the equipment. He said a lanyard is a connecting device that connects the harness to an anchor point. (Tr. 145-50; RX-M). OSHA's Training Guide for the Construction Industry (2007) states that "A lanyard is a specially designed flexible line of rope, wire rope, or strap with a snap hook at each end. One snap hook connects to the body harness and the other to a decleration device, lifeline, or anchorage." (RX-F, p. 31). "Snap hooks" are hook-shaped devices with a keeper that opens to receive a connecting component and automatically closes when released. (RX-F, p. 30).

[7] The CO later learned the identities of some of the employees. Eusebio Gonzalez, All Steel's foreman at the site, was one of the employees who was tied off and working on the roof's edge. James Clawson was the employee who he saw near the edge without being tied off. Dalington Rodriguez was another employee who was not tied off. Mr. Rodriguez was employed as a helper at All Steel. (Tr. 96-105, 211; CX-2). Based on the record, the other All Steel employees who were on the roof were Alvin Ramanand, Carlos Ochoa and Julio Mencia. (Tr. 99, 280, 355, 399-400; RX-J, RX-L).

[8] CO Ortiz also discussed his video, CX-9, which showed the same hazards as his photographs; *e.g.*, four employees shown not tied off walking freely on the roof with their lanyards dragging behind them. (Tr. 121-27, 286-87; CX-9).

Clawson near the edge of the roof, Mr. Rodriguez and another employee standing farther back on the left, and another employee kneeling and working right at the edge of the roof; this employee is tied off but his lifeline is too long.[9] CX-4 portrays an employee walking on the roof without being tied off, indicated with a "C," and the anchor point where the two lifelines in use were attached, indicated with an "A." CX-5 shows Mr. Gonzalez, at the bottom of the photograph, and Mr. Clawson in the middle with his lanyard clipped to his body and not attached to any lifeline. CX-6 also shows Mr. Clawson not tied off at the roof's peak and another employee with his lanyard attached to a lifeline.[10] CX-7 depicts Mr. Gonzalez with his lanyard attached to a lifeline, which is slack. CX-8 depicts two employees carrying a panel in front of them, which restricts their view. Mr. Rodriguez,[11] indicated with an "A," has his lanyard dragging behind him, and the other employee has excessive length on his lifeline. The CO noted that there were numerous tripping hazards on the roof, such as tools and other items, which exacerbated the fall hazard.[12] The CO further noted that a fall from the upper roof to the lower roof, which was also sloped, could have resulted in an employee going all the way to the ground. (Tr. 95-99, 101-15;

[9] Mr. Rodriguez identified this employee as Mr. Ramanand. (Tr. 242; CX-3).
[10] According to Mr. Rodriguez, this other employee was Mr. Ramanand. (Tr. 242-43; CX-6).
[11] Mr. Rodriguez started working at All Steel at age 20 around August 7, 2010, about five days before OSHA's inspection. It was his first construction job since arriving in the United States. He had never before worked on a roof as a roofer's helper. Mr. Rodriguez testified that the first time that he "heard English" was at the job site after arriving in the United States. He was hired at All Steel through his association with his stepsister's husband, Mr. Ramanand. He was up on the roof at the job site on either his first or second day of work at All Steel after receiving about 15 to 20 minutes of training from either Mr. Gonzalez or Mr. Ramanand. He did not recall receiving any written training materials while employed at All Steel. (Tr. 230-31, 234, 236-41, 245-47, 253; RX-N).
[12] These items included power tools, drills, hand tools, caulking guns, electrical cords and brooms. (Tr. 101-02, 172). Mr. Gonzalez testified that he agreed that standing seam panels, 10-foot long clips, lifelines and power tool cords were trip hazards. (Tr. 405-06). OSHA's Training Guide for the Construction Industry (2007) states that "A lifeline is a cable or rope that connects to a body harness, lanyard, or deceleration device and at least one anchorage." (RX-F, p. 31).

CX-2 through CX-8, CX-14). Mr. George himself admitted there were tripping hazards "all over the place" on the roof.[13] (Tr. 516).

CO Ortiz proceeded to the site and met with Mr. Hodge, the project manager for Holland Construction, the general contractor at the job site. Mr. Hodge called up to Mr. Gonzalez, who came down, and the CO held an opening conference with him. Mr. Gonzalez said he was the foreman, the "competent person" and the "person in charge" for All Steel at the site. He had no explanation for why employees were not tied off, and he shrugged his shoulders and seemed unaware of the hazards. The CO also interviewed Messrs. Rodriguez and Clawson.[14] Mr. Rodriguez's unsigned interview statement prepared by the CO indicates that Mr. Rodriguez told the CO on August 12, 2010 that the anchor point was too far and it was easier to remove his harness from the rope grab.[15] (Tr. 164; RX-N). Mr. Clawson admitted he had not been using fall protection and had no good answer as to why. Mr. Gonzalez told the CO that he had been trained in the past by Mike Price, who had safety responsibilities at All Steel. Mr. Price was no longer working in that capacity. The CO held a closing conference with Mr. Hodge and Ray Petitpren, All Steel's project manager, who had arrived at the site.[16] The CO expressed his concerns

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[13] Mr. George testified about the tripping hazard being a "greater hazard." The Court agrees with the Secretary that Respondent did not actually assert the greater hazard defense at trial, and presented no evidence on the issue of whether the hazards of compliance were greater than the hazards of noncompliance. S. Brief, p. 36, fn. 11. Any greater hazard defense is deemed waived or abandoned based on Respondent's failure to present any evidence supporting this defense at the hearing. *See Nat'l Eng'g & Contracting Co*., 16 BNA OSHC 1778, 1779 (No. 92-73, 1994)("F&A's greater hazard defense is waived because it was not pled or raised prior to or at the hearing. If not raised by a party, fairness directs that the affirmative defense should not be considered."). In any event, the Court finds any greater hazard defense to be without merit in this case.

[14] The CO testified that he was fluent in Spanish and that he interviewed the employees in Spanish and English. (Tr. 132-33).

[15] At the trial, Mr. Rodriguez described his work on top of the roof as cutting panels; as well as taking panels and handing tools to co-workers. He said he had on-the-job training and that his co-workers had been working with him to make sure he was safe. He indicated he had not been tied off as it was easier for him to work that way. (Tr. 213).

[16] Mr. Petitpren was Mr. Gonzalez's supervisor for the project. (Tr. 333-34, 373).

about the lack of proper fall protection at the site. Messrs. Hodge and Petitpren told him they would make sure that everyone was tied off "100 percent of the time." CO Ortiz asked about training records, and Mr. Petitpren called All Steel's office. Mr. Petitpren was told that if the CO wanted training records, he would have to subpoena them. CO Ortiz never received any training records. (Tr. 64, 101, 127-34, 197, 212, 280, 349).

Jurisdiction

There is no dispute that the work site was a construction project and that the employees performing the roofing work on the building on August 12, 2010 were All Steel employees. The Court finds that Respondent is an employer with employees that is engaged in a business affecting interstate commerce.[17] *See* sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and 655(5). The Court further finds the Commission has jurisdiction over the subject matter and the parties in this case.

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary must demonstrate that: (1) the standard applies, (2) its terms were not met, (3) employees were exposed to the violative condition, and (4) the employer either knew of the condition or could have known of it with the exercise of reasonable diligence. *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Citation 1 – Item 2

This item alleges a serious violation of 29 C.F.R. § 1926.501(b)(10), which provides, in relevant part, as follows:

[17] In addition, the CO testified that he saw equipment that was manufactured outside of the State of Florida. He noted, for example, that some of the fall protection equipment he saw was manufactured by 3M Company in Minnesota. (Tr. 136-37).

> *Roofing work on Low-slope roofs*. Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system.

The citation alleges that on August 12, 2010,[18] while installing metal roofing on a low-slope roof at the site, employees were observed not attached to their personal fall arrest systems, exposing them to serious falls.[19] For the cited standard to apply, the roof at the site had to be a "low-slope roof." A low-slope roof is "a roof having a slope less than or equal to 4 in 12 (vertical to horizontal)." *See* 29 C.F.R. § 1926.500(b). Mr. Hodge testified that CX-10, one of the architectural drawings for the building, showed that the roof on which All Steel was working was a 4-12 roof. He explained that meant the roof rose 4 inches in height for every 12 horizontal inches. (Tr. 66). Mr. Hodge's testimony, together with CX-10, establishes the roof was in fact a low-slope roof.

For the standard to apply, the Secretary must also prove that the lower level to which employees could have fallen was at least 6 feet. Mr. Hodge testified that CX-11, another architectural drawing for the building, showed that the eave of the roof on which the employees were working was 28 feet from the ground. He further testified that CX-11 also showed the top elevation of the lower roof to be 21 feet 8 inches from the ground, making the fall distance 6 feet 4 inches. (Tr. 67-71). Mr. Hodge's testimony and CX-11

[18] The citation as issued alleged that the violations were observed "on or about August 8," even though the citation showed the inspection date as August 12. The CO testified that his inspection was on August 12 and that, to the extent the citation read "August 8," it was a typographical error. (Tr. 258-64). The Secretary moved to amend her citation and complaint to show August 12. The motion was granted. (Tr. 256-64).

[19] A "personal fall arrest system" is used by a single individual. It works to stop a fall that has already occurred while minimizing the stopping force exerted on the body. It is made up of an anchorage, connectors, full-body harness, and sometimes, a lanyard, deceleration device, or lifeline. (RX-F, p. 27).

establish that the fall distance from the upper roof to the lower roof was 6 feet 4 inches.[20] The Court finds that the Secretary has demonstrated that the cited standard applies.

The record further shows that the terms of the standard were not met and that employees were exposed to the cited hazard. The CO's testimony set out above, along with CX-2 through CX-9, shows that four employees on the roof, although they were wearing harnesses and lanyards, were not tied off to anything.[21] Mr. Clawson was one of those employees. The CO observed him near the edge, standing next to Mr. Gonzalez, as depicted in CX-3. Four employees working on the roof without being tied off establishes that the terms of the standard were violated. All of these employees were exposed to the cited hazard, as any of them could have tripped or slipped in the course of their work and fallen off the edge of the roof.[22] This is especially illustrated by Mr. Clawson, who was photographed standing near the roof's edge. The Court finds that the Secretary has shown the second and third elements of her burden of proof. (Tr. 137).

To prove knowledge, the Secretary must show that the employer knew of the violation or could have known of it with the exercise of reasonable diligence. The actual or constructive knowledge of a supervisory employee is imputable to the employer. *See, e.g.*, *Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1197), *citing Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-0692, 1992).

Mr. Gonzalez was All Steel's foreman at the site on August 12, 2010. He testified that he was a "competent person," that he was responsible for supervising the other

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[20] All Steel asserts that the Secretary did not prove the alleged fall distance, noting that the CO took no measurements and that Mr. Hodge testified about changes to the plans for the project. R. Brief, p. 1; R. Reply Brief, p. 7. Mr. Hodge, however, specifically testified that the roof heights set out in CX-11 did not change. (Tr. 86). All Steel's assertion is rejected.

[21] The two employees working at the edge of the roof, whose lifelines were not adjusted properly and were too long, are addressed in Item 3, *infra*.

[22] Mr. George admitted that an employee tripping over a sheet metal panel "Absolutely could have fallen off the roof." (Tr. 517).

employees and making sure they worked safely, and that he had the authority to correct workplace hazards.[23] He also testified that the company rule is for employees to tie off whenever they are over 6 feet above a lower level. Mr. Gonzalez admitted he broke the rule on August 12, 2010, by allowing some employees to not tie off. He started off telling them they were to be "100 percent tied off." The employees were walking and carrying materials on the roof, and their lines were getting tangled up. Mr. Gonzalez thought the employees were endangering themselves more by tying off. He told them they could work without tying off as long as they stayed on the upper part of the roof and did not work near the edge.[24] He believed it was safer for them to not tie off if they stayed farther back on the roof. Mr. Gonzalez did not know if any employees had gone near the edge of the roof without tying off. (Tr. 344, 347-50, 355-56, 359-60, 366-71, 405).

Mr. Gonzalez's testimony was not persuasive. First, the CO testified that when he asked why employees were not tied off, Mr. Gonzalez had no explanation and shrugged his shoulders. (Tr. 129-30). Mr. Gonzalez testified that he thought he had told the CO the employees were not tied off because they had been "moving around a lot" and when they were tied off they "had been getting themselves all tangled up." (Tr. 404-05). The Court finds that the CO's testimony about Mr. Gonzalez's response at the time of the inspection is more reliable than Mr. Gonzalez's testimony at the hearing.[25]

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[23] Mr. Gonzalez considers himself "70 to 80 percent" fluent in English, but he chose to testify through an interpreter at the hearing. (Tr. 339).

[24] Mr. Gonzalez admitted he did not implement any alternative fall protection plan to protect those employees who were not tied off. (Tr. 368).

[25] The Court observed the demeanor of CO Ortiz as he testified, including his body language and his facial expressions, and found him to be a forthright and convincing witness. His testimony is thus credited over that of other witnesses found to be less than reliable.

Second, Mr. Gonzalez's testimony about telling the employees they did not have to tie off was vague.[26] He said he did not remember how many employees he told to not tie off. He also said he did not tell them all at once. Rather, he told them individually, and he did not remember specifically what he told them. (Tr. 369-70). Further, his testimony that he did not know if any employees had gone near the edge without tying off is belied by CX-3. CX-3 shows Mr. Clawson right next to Mr. Gonzalez. Both are near the roof's edge. The CO learned that the employees near the edge in CX-3 were Messrs. Clawson and Gonzalez when he interviewed them. Mr. Clawson admitted to the CO that he was not tied off. (Tr. 106-08, 129-31). In addition, Mr. Gonzalez identified himself at the hearing as the person indicated with an "A" in CX-3. (Tr. 364).

Third, when the CO asked Mr. Clawson why he was not tied off, he had no good answer, other than indicating that he "got carried away." (Tr. 131). And Mr. Rodriguez's response, when asked why he was not tied off, was that it was easier for him to not tie off. Mr. Rodriguez, who also testified at the hearing through an interpreter, said he did not think he made such a statement to the CO. While the Court found some of Mr. Rodriguez's testimony believable, other of his testimony was not. For example, he stated he told the CO that there was "one time" that he had not been "hooked up."[27] Based on the CO's photographs and video, and the Court's credibility findings as to the CO set out *supra*, the CO's testimony about what Mr. Rodriguez told him is credited. (Tr. 131, 218; CX-8, RX-N). In the Court's view, if Mr. Gonzalez had told the employees what he

[26] Mr. Gonzalez testified that he thought that he was tied off the entire time he was on the roof. (Tr. 359).
[27] He also testified that "there were some occasions" where he failed to connect to his lifeline while working on the roof. (Tr. 214). He admitted he could not see a lifeline that he was tied into when he was carrying a panel, as shown in photograph CX-8. (Tr. 222; CX-8). He also acknowledged he was disciplined by All Steel on about August 16, 2010 for not utilizing fall arrest systems 100 percent of the time. (Tr. 227-30; CX-18).

testified to at the hearing, it is expected that they would have given that information to the CO. That they did not persuades the Court that Mr. Gonzalez's testimony about what he told the employees as to tying off at the site that day was not reliable. Even if it were, it is clear from the record that Mr. Gonzalez allowed four employees to work on the roof without tying off, as required by the cited standard and by All Steel's own rules.

Based on the foregoing, the Court concludes that Mr. Gonzalez had actual knowledge of the fall protection violations at the work site. This is particularly true in light of CX-3, which shows Messrs. Clawson and Gonzalez right next to each other near the roof's edge. The knowledge of Mr. Gonzalez, a foreman with All Steel, is imputable to Respondent. The Secretary has therefore demonstrated the knowledge element.

All Steel asserts that the alleged violation was due to unpreventable employee misconduct. R. Brief, p. 4; R. Reply Brief, pp. 7-9. To prove this affirmative defense, the employer must show that it had: (1) established work rules designed to prevent the violation; (2) adequately communicated those rules to its employees; (3) taken reasonable steps to discover violations of those rules; and (4) effectively enforced those rules when they were violated. (*Halmar Corp.*, 18 BNA OSHC at 1017-18, *citing Pride Oil Well Serv.*, 15 BNA OSHC at 1814; Tr. 535). As the Secretary notes in her post-hearing brief, it is more difficult for employers to establish the employee misconduct defense when the misconduct is that of a supervisory employee, because "it is generally the supervisor's duty to protect the safety of employees under his supervision." *A & W Constr. Servs., Inc.*, No. 00-1413, 2001 WL 987461, at *7 (O.S.H.R.C.A.L.J., Aug. 15, 2001) (*citing United Geophysical Corp*., 9 BNA OSHC 2117, 2123 (No. 78-6265, 1981)).[28] *See* S.

[28] "[N]egligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision raises an inference of lax enforcement and/or communication of the employer's

Brief at pp. 32-33. Where multiple employees participate in an activity that violates an employer's work rule, the unanimity of such noncomplying conduct also suggests ineffective enforcement of the work rule. *GEM Indus., Inc*., 17 BNA OSHC 1861, 1865 (No 93-1122, 1996) (finding that three employees failing to tie off showed ineffective enforcement of employer's fall protection policy). Mr. Gonzalez's failure to follow the safety rules and involvement in the misconduct is strong evidence that All Steel's safety program was lax.[29] *See Ceco Corp.*, 17 BNA OSHC 1173, 1176 (No. 91-3235, 1995).

All Steel has a safety rule which requires an employee exposed to a fall of 6 feet or greater to wear a full body harness with a lanyard and to tie off.[30] (Tr. 366; RX-H, pp. 5, 17). Mr. Gonzalez knew the rule, but he did not follow it on August 12, 2010. (Tr. 366). Mr. Gonzalez testified that he had been in construction for 11 years, had been doing roofing work for about eight years, and had been a crew leader or foreman with All Steel for about five years. He said Mike Price had trained him and that his training had totaled over 20 days.[31] He himself had trained Mr. Rodriguez, who was a new employee, by showing him "how to use the harness, how to put it on, be tied off." Mr. Gonzalez did

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safety policy." *Danis-Shook Joint Venture XXV*, 19 BNA OSHC 1497 (No. 98-1192, 2001), *aff'd* 319 F. 3d 805, 811 (6th Cir. 2003). *See also D.A. Collins Constr. Co., Inc*., 117 F.3d 691, 695 (2d Cir.1997) (holding that failure of supervisor to abide by employer's safety rules shows lax enforcement and thus employer failed to prove affirmative defense of employee misconduct).

[29] All Steel cites to circuit court cases holding that it is the Secretary's burden to prove unpreventable employee misconduct and that a showing by the employer that it has an adequate and effectively enforced safety program gives rise to an inference that the employer's reliance on employees to comply with applicable safety rules is justifiable. R. Reply Brief, pp. 7-8. These cases were not decided in the 11th Circuit, where this case arose. The 11th Circuit and most of the circuit courts that have considered the question have agreed with the Commission that the employer must prove unpreventable employee misconduct. *Daniel Int'l Corp. v.* OSHRC, 683 F.2d 361, 364 (11th Cir. 1982). Also, for the reasons below, All Steel has not shown it had an adequate and effectively enforced safety program.

[30] A body harness is the part of the fall arrest system that comes into the closest contact with the body. It has straps that distribute the impact of a fall over thighs, waist, chest, shoulders, and pelvis. (RX-F, p. 30).

[31] According to the last page in RX-I, an undated statement of Michael W. Price, Mr. Price began working for All Steel as a crew leader in 2004; he then became All Steel's safety director and project manager. The statement notes the safety training Mr. Price had had, including several OSHA courses. It also notes his training of Mr. Gonzalez in fall protection and other matters. RX-F documents Mr. Price's OSHA training.

this training before Mr. Rodriguez went up on the roof. Mr. Gonzalez stated that he and Alvin Ramanand, another "competent person" who was working on the roof on August 12, 2010, were "constantly training" Mr. Rodriguez. He further stated that after the OSHA inspection, he was disciplined for letting employees work without tying off and for using "100 percent tie-off" for fall protection instead of a warning line. Mr. Gonzalez knew that he was expected to use a warning line on the roof, but he thought tying off was better. (Tr. 341-45, 348-49, 355-57, 367-68, 372-78, 383-84, 390, 396-404).

RX-I shows training Mr. Gonzalez had received in 2005, 2007 and 2009 that addressed, *inter alia*, wearing a harness and tying off. He received "Safety Rules" training on February 18, 2010, which addressed the need to wear a harness and tie off, and, on that same date, All Steel's "Actions for Safety Violations."[32] RX-I also shows safety audits of sites where Mr. Gonzalez was the crew leader in 2006 and 2007. Almost all the audits state the employees had on their personal protective equipment ("PPE") and were tied off.[33] RX-K shows the daily "Job Site Safety Talks" that Mr. Gonzalez gave at his job sites in 2008, 2009 and 2010, and RX-J shows the safety talks he gave at the subject site, from July 12 through September 16, 2010; tying off was generally addressed weekly.[34] On August 13, 2010, the day after the OSHA inspection, Mr. Gonzalez was issued a "Standard Notice Form." It addressed his failure to follow the safety plan and his allowing the crew to not tie off. It also stated his next infraction could result in loss of wages or termination. On December 8, 2010, Mr. Gonzalez received fall protection

[32] Under that policy, a first violation results in a verbal warning. Any further violations are written up and put in the employee's personnel file. Third and fourth violations also result in loss of pay, and the fourth violation may include termination. Severe violations can result in any of the foregoing penalties.
[33] The safety audits show Mr. Gonzalez as "Chewy" or "Chuy," Mr. Gonzalez's nickname. *See* "Safety Rules" training of February 18, 2010. There, Mr. Gonzalez printed his name as "E. Chuy Gonzalez."
[34] There is no record of safety talks at the subject site for the week in which the OSHA inspection took place. *See* RX-J. Mr. Gonzalez indicated he could have lost that particular record. (Tr. 406-07). The Court rejects that speculation as self-serving and without basis.

training from Mr. Price. On December 9, 2010, Mr. Gonzalez was issued another "Standard Notice Form," which also addressed the subject site. It noted Mr. Gonzalez had changed the site safety plan and informed him he should not do so without approval from "the safety director, a qualified person or the main office." (Tr. 313-14, 328-31; RX-D, RX-H, RX-I).

Ralph George, All Steel's president, testified that RX-H was the site-specific plan for the subject site, that it required a warning line to be used, and that Mr. Gonzalez instead used "100 percent tie-off" and then allowed some employees to not be tied off.[35] Mr. Gonzalez received two counseling statements from Mr. Price. He had no loss of pay or other penalty, even though he had been "written up" before.[36] Mr. George noted that there were three "competent persons" on the roof on August 12, 2010, that is, Messrs. Gonzalez, Ramanand and Ochoa, and that none of them was enforcing the tie-off policy. He also noted that Mr. Price disciplined all of the employees who had been up on the roof that day.[37] Mr. George issued CX-20, a discipline notice to Mr. Petitpren, as he did not think Mr. Petitpren was monitoring safety adequately. No penalty was imposed, although this was the third time that OSHA had found violations on a site Mr. Petitpren was

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[35] Mr. George testified that Mr. Gonzalez had changed the safety plan from a warning line system to a hundred percent tie-off plan. Mr. George said that if a warning line is used, employees on the roof working outside the line must tie off. (Tr. 314-15).

[36] Messrs. George and Price testified about Mr. Price's work for All Steel. (Mr. Price was deposed on July 8, 2011. He did not testify at the hearing). Taken together, their testimony was that Mr. Price was a full-time safety director until early 2009. He worked part-time in that capacity for several months in 2009, and did not work at all from August to nearly the end of 2009, due to illness. He was back at work full-time in 2010. That year, however, and including the time of the inspection, Mr. Price worked as both crew leader and safety director, as All Steel could not afford a full-time safety director. About half of his time was spent on safety, and while he still did some training and site audits, he was unable to do as much safety work as before. Mr. Price had not been to the subject site before the inspection, but he learned what had happened from Mr. Petitpren. Since May 2011, Mr. Price has not been able to work at all due to illness. He is still the safety director, but at present he is not on All Steel's payroll. (Tr. 284, 307-10, 315-23; RX-Q, pp. 6-7, 29, 32-36, 51-59). Mr. George testified that he was not sure why, in an e-mail he wrote in this matter on September 20, 2010, he referred to Mr. Price as the "past safety director." (Tr. 338; C-21).

[37] Mr. Gonzalez testified that he thought the other employees on the roof that day should have been disciplined for not following the rules that he himself had told them not to follow. (Tr. 377-78).

supervising. Mr. George agreed that it would be an incentive, when a safety rule was violated, for the employee responsible to have his pay docked. He indicated, however, that it was difficult for him to take such action. (Tr. 280, 283-86, 303-07, 314-15, 328-34, 376,493, 498, 514-15; CX-20).

The Court finds that All Steel did not take adequate steps to detect violations of its rules.[38] When violations were discovered, it did not effectively enforce its rules. All Steel presented no evidence of any site audits conducted for the years 2008, 2009 and 2010. And the record shows that Mr. Price did not visit the subject site before the inspection. Despite Mr. Gonzalez's training and experience, and his knowledge of All Steel's tie-off rule, he failed to enforce the rule at the work site. He also failed to follow All Steel's site-specific plan for the site, which, as he himself testified, was to use a warning line. Mr. Gonzalez received disciplinary notices for these failures. But, no monetary or other penalty was imposed, even though, as Mr. George testified, Mr. Gonzalez had been written up before. Mr. George further testified that he himself had written up Mr. Petitpren after the subject OSHA inspection, for not monitoring safety adequately at his sites. Again, no penalty was imposed, even though this was the third time OSHA had found violations at one of Mr. Petitpren's sites. That supervisory employees were not penalized for their safety failures is evidence of a deficient safety

[38] An "[e]ffective implementation of a safety program requires 'a diligent effort to discover and discourage violations of safety rules by employees.'" *Structural Bldg. Sys., Inc.*, No. 03-0757, 2004 WL 513691, at *6 (O.S.H.R.C.A.L.J. Mar. 8, 2004) (*quoting Am. Sterilizer Co.*, 18 BNA OSHC 1082, 2087 (No. 91-2494, 1997)). An employer must show its safety rule is effectively enforced through supervision adequate to detect failure to comply with its rules. *Tex. A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995) (employer's duty is to take reasonably diligent measures to detect hazardous conditions through inspections of worksites).

program.[39] Further, that Mr. Gonzalez, a foreman, did not enforce the tie-off rule is strong evidence that All Steel's safety program was lax and that the violation was not in fact due to unpreventable employee misconduct.[40] (Tr. 460). *See Ceco Corp.*, 17 BNA OSHC 1173, 1174 (No. 91-3235, 1995) (citation omitted).

In support of its defense in this matter, All Steel has presented evidence of prior citations issued that OSHA later deleted. The record shows that All Steel was cited in September 2008 and in June 2009 for violating fall protection standards. Mr. George submitted records of training, site audits and disciplinary actions for the employees involved in these citations, and OSHA deleted the citations.[41] (Tr. 419-24; RX-A, RX-B). The record also shows that All Steel was cited in September 2010, for a fall protection violation observed on August 4, 2010 concerning All Steel's warning line system at the subject site.[42] This citation was also deleted.[43] (Tr. 295-96, 299-301, 306; RX-C). The deletion of these three prior citations, however, does not avail All Steel. This is especially true in light of the citation issued after a violation was observed at the same site at issue here, on August 4, 2010. Although this citation was deleted, Mr. George agreed that the citation put All Steel on "heightened alert" in regard to safety at the site. (Tr. 307). And,

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[39] To prove an effective disciplinary system, an employer needs to show evidence of having actually administered the discipline outlined in its policy and procedures. *Pace Constr. Corp.*, 14 BNA OSHC 2216 (No, 86-758,1991). Evidence of a variety of punitive measures tends to demonstrate that an effective disciplinary system was in place. *Beta Constr*., 16 BNA OSHC 1435 (No. 91-102, 1993), *aff'd per curiam*, *without reported opinion*, 52 F.3d 1122 (D.C. Cir., 1995).

[40] Kevin Yarbrough, Assistant Area Director ("AAD") in OSHA's Tampa office, testified that when a supervisor is exposed to a hazard, the supervisor is not implementing or enforcing good safety practice based on a company's safety and health program. (Tr. 460).

[41] AAD Yarbrough testified that he was familiar with the 2008 citation and that it was deleted due to the training and other records submitted. He was not familiar with the 2009 citation and did not know why it was deleted. (Tr. 419-24).

[42] Mr. Gonzalez stated that he was not present at the site on August 4, 2010. (Tr. 404).

[43] Mr. George testified that he did not know why this citation was deleted. (Tr. 291-96).

as CO Ortiz testified, after an OSHA inspection at the same site a week before, he would have expected a "flawless" safety system to be in place and no violations. (Tr. 474).

Based on the record, and for all the reasons above, the Court concludes that All Steel has not shown that the alleged violation was due to unpreventable employee misconduct. Its defense is therefore rejected. This Item is affirmed as serious.[44] It is clear that a fall from the upper roof could have caused serious injury or death.[45] As set out above, the CO noted that a fall from the upper to the lower roof, which was also sloped, could have resulted in an employee going all the way to the ground. (Tr. 95, 126-27, 138-39).

A penalty of $3,000.00 has been proposed for this item. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* section 17(j) of the Act, 29 U.S.C. § 666(j). The CO testified that the violation had high severity, in that an employee who fell from the roof could have died, and greater probability, in that the four employees were working atop the roof, and would have continued working, without any fall protection. He also testified that while a reduction for size was given, no reductions for history or good faith were given.[46] He noted that All Steel had a history of violations, that no

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[44] Under Section 17(a) of the Act, 29 U.S.C. § 666(a), a "serious" violation exists if there is a "substantial probability that death or serious physical harm could result" from the condition and the employer knew, or with reasonable diligence could have known, of the presence of the violation. *See E. Tex. Motor Freight, Inc. v. OSHRC*, 671 F.2d 845, 849 (5th Cir. 1982); *Dravo Corp.*, 7 BNA OSHRC 2095, 2101 (No. 16317, 1980), *aff'd without published opinion*, 639 F.2d 772 (3d Cir. 1980). The evidence shows that Citation 1, Items 2 and 3, are both properly classified as serious.

[45] OSHA's Training Guide for the Construction Industry (2007) states:

> Falls are the leading cause of death on the job for construction workers. According to the Bureau of Labor Statistics, falls caused approximately 400 construction worker deaths in 2005, which is approximately one-third of all construction worker fatalities for the year! On average, more than 100,000 workers are injured as a result of construction site falls each year according to OSHA. (RX-F, p. 6).

[46] The CO testified that he could have applied a good faith reduction of up to 15 percent. (Tr. 197).

training records were ever provided, and that while there was a job site safety plan, it was not being followed. He also testified that All Steel did not take safety "very seriously."[47] (Tr. 137-42, 179-81, 189-90, 194-96, 441-43, 471-72, 475).

All Steel urges it should have been given a greater reduction in the penalty for size. (R. Brief, p. 3). The CO testified that he believed that he could have been told by Mr. Petitpren that All Steel had 42 employees at the time of the inspection.[48] Based on that number, he applied a 40 percent reduction to the penalty. He agreed his investigation notes did not show the information.[49] He also said that if All Steel had under 25 employees, the reduction would have been 60 percent.[50] (Tr. 140, 443, 477-82).

Mr. George said that he was not sure how many employees he had at the time of the subject inspection. He also said the number had been very "up and down" for the past two years. He presented RX-R at the hearing. RX-R is a letter dated January 3, 2011 Mr. George sent to the prior judge in this matter that referred to a conference call conducted by the Court on December 7, 2010. Among other things, it states that at that time frame, All Steel had "only 20 employees with only 4 employees working in the field." (Tr. 410-14, 515; RX-R). The Court finds the CO's testimony regarding the size of the company at the time of the inspection to be tentative, at best. His testimony is the only evidence that

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[47] *See MEI Holdings, Inc.*, 18 BNA OSHC 2025 (No. 96-740, 2000), *aff'd* 247 F. 3d 247 (11th Cir. 2001) ("good faith" must be based on genuine good faith, and not mere gestures on the employer's part in the general direction of compliance).

[48] Mr. Ortiz testified as follows in response to the Secretary's counsel's questioning concerning the size of the company:

Q. Mr, Ortiz, what was the source of the information about the number of employees that respondent had that you relied upon?

A. I had a conversation with a management official in the field, could have been Ray Petitpren.

Q. You believe it was, or it could have been?

A. Could have been. (Tr. 477).

[49] The CO made notes of his interviews of Messrs. Dalington and Gonzalez. He had no notes of any discussions with Mr. Petitpren. (Tr. 478-79).

[50] AAD Yarbrough also testified that a small company of less than 20 or 25 employees would receive a 60 percent reduction. (Tr. 443).

All Steel had 42 employees at the time of the inspection.[51] The Secretary has not persuaded the Court that All Steel employed at least 25 employees at the time of the inspection. All Steel is therefore entitled to a 60 percent reduction in the penalty on the basis of size, instead of the 40 percent OSHA applied. (Tr. 482; RX-U).

All Steel also urges it should have received a reduction in penalty for history. (R. Brief, p. 3). The CO testified that he researched All Steel's history, which showed the company had been cited once in 2008, twice in 2009, and twice in 2010. (Tr. 142, 182, 186-87). Three of these citations were deleted, *i.e.*, the 2008 citation, one of the 2009 citations, and the citation resulting from the inspection at the subject site on August 4, 2010.[52] (Tr. 187-89; RX-A through RX-C, RX-S). The other 2009 citation went before a Commission judge, but All Steel and the Secretary ultimately settled the case in March 2011.[53] All Steel urges that since it had a "clear history" at the time of the inspection at issue, it should have received a reduction for history. (Tr. 526-27). AAD Yarbrough testified the policy in August 2010 was that, if a company had been cited before but the citation was deleted, a reduction for history would be given. (Tr. 444-46). In the Court's view, since three of the prior citations were deleted and one was not final until months after the date of the subject citation, All Steel is entitled to a 10 percent reduction for history. (Tr. 460-61; RX-U).

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[51] AAD Yarbrough testified that the CO could do research to determine a company's size. (Tr. 443-44). The CO could not recall if he conducted any independent research to ascertain All Steel's size. (Tr. 482).
[52] *See* Stipulation of Fact that a serious citation alleging a violation of section 1926.1053(b)(13) was deleted from inspection number 313361982 and Exhibit RX-B, except page 1, relates to it. (Tr. 423-24).
[53] The Commission's docket number for the case was 10-0304. The Commission judge who heard the case found that All Steel had not filed a timely notice of contest and affirmed the citation and penalty. (The only standard cited was 29 C.F.R. § 1926.760(a)(1)). All Steel appealed the case to the 11th Circuit, which dismissed the appeal in March 2011. In the settlement agreement, All Steel agreed to pay a reduced penalty with respect to the alleged violation in order to resolve the case.

Finally, All Steel urges it should have received a reduction in penalty for good faith. (R. Brief, p. 4). The Court disagrees. As the CO testified, the violation had high gravity. All Steel had a fall protection plan at the site, but the foreman did not follow it and also allowed four employees to work without tying off. (Tr. 138-41, 330, 474). The site was inspected the week before, and All Steel was cited for fall protection violations. *See* RX-C. Mr. George said that All Steel was on "heightened alert" after that inspection. (Tr. 307). Despite that fact, there were further fall protection violations on August 12, 2010, resulting in the subject citation. And following the inspection, no meaningful discipline occurred. Messrs. Gonzalez and Petitpren were "written up," but neither was penalized with monetary or other sanctions. (Tr. 303-06, 330-31). In the Court's view, the facts of this case show a safety program with significant deficiencies. The Court finds that All Steel failed to take any meaningful efforts to ensure that its safety plan was actually being implemented at the worksite on August 12, 2010.

A final point about this case must be made. Mr. Rodriguez, one of the employees who was up on the roof without being tied off, was a new hire who had been at the site four or five days before the inspection. He was given 15 to 20 minutes of training on the ground his first or second day at the site, right before his first time to go up on the roof.[54] He was 20 years old, new to the United States, and had never worked on a roof before. (Tr. 240-41, 245-46, 399). The Court finds that it is not good faith for a roofing

[54] At his deposition, Mr. Price stated that he personally trained new All Steel employees during their first day's orientation training. He stated that he reviewed a safety manual that he gave to each new employee. He had safety manuals printed in either English or Spanish. (Mr. Price was not fluent in Spanish.) He explained "the proper use of harnesses, tie-off, everything" to the trainee. He then administered a written test and had each new employee sign off on the training. Mr. Price took "approximately two and a half hours" and a little longer for those new to roofing work to conduct fall protection training. He stated that he was the only person who conducted this training. (RX-Q, pp. 38-43). There is no record in evidence showing that Mr. Price gave this fall protection training to Mr. Rodriguez. The Court finds that Mr. Price did not give a safety manual to Mr. Rodriguez or provide him the fall protection training that he described. Mr. Rodriguez's overall lack of proper training is discussed further in Item 4, *infra*.

company's crew chief to provide 15 to 20 minutes of undocumented training on how to wear a harness to such a fledgling worker, before directing the new hire to work up on a roof without any fall protection or appreciation for the fall hazards about him. Allowing such an inexperienced employee to work on a roof without proper training and without tying off is also further evidence of the deficiencies in All Steel's safety program.

In view of the above, and applying an additional 30 percent reduction to the gravity-based penalty (20 percent for size and 10 percent for history), the Court finds that a penalty of $1,500.00 is appropriate for this item. A penalty of $1,500.00 is assessed.[55]

Citation 1 – Item 3

This item alleges a serious violation of 29 C.F.R. § 1926.502(d)(16)(iii), which states as follows:

> Personal fall arrest systems, when stopping a fall, shall: … (iii) be rigged such that an employee can neither free fall more than 6 feet (1.8 m), nor contact any lower level.

The citation alleges that on August 12, 2010, while installing metal roofing on the roof at the site, employees were observed with excessive slack on their vertical lifelines that were used as part of their personal fall arrest systems, exposing them to serious falls. The CO testified that the two employees who were tied off to lifelines did not adjust their lifelines to remove the slack. If one of them had fallen from the roof, the lifeline would have been too long to keep the employee from hitting the lower roof below. One of these employees was Mr. Gonzalez, the foreman; he is shown with an "A" in CX-2 right at the edge of the roof. The other employee, who the CO could not identify, is shown with a "D" in CX-3; he too was right at the roof's edge.[56] (Tr. 95-97, 100, 104, 107, 137-38).

[55] CX-14, the CO's OSHA 1B in this case, shows the gravity-based penalty for this item was $5,000.00.
[56] Mr. Rodriguez identified the employee as Mr. Ramanand, who is also tied off in CX-6. (Tr. 242-43).

According to the CO, the lifelines of both employees were anchored to the roof at the point marked with an "A" in CX-4. Mr. Gonzalez wore a body harness and a 6-foot-long shock-absorbing lanyard; the shock-absorbing component added 2.5 to 3 feet, and the height of the D-ring on his harness added about 5 more feet.[57] There was a "rope grab" that attached the lanyard to the lifeline, but the lifeline was not adjusted.[58] The CO estimated that the system as utilized would not have arrested a fall for 14 feet.[59] He said that Mr. Gonzalez made no adjustments on the rope grab as he moved about the roof. The lifeline of the other employee, shown on the left side in CX-3, went all the way across the roof to the anchor point shown in CX-4. This employee also had on a 6-foot lanyard, and his lifeline was too long. In addition, his lifeline went underneath a metal panel, as depicted in CX-3. This could have abraded the lifeline or, in the event of a fall, the lifeline could have wrapped around the panel and taken the panel off the roof with the employee. The CO saw this employee, as shown in CX-8, carrying a panel with another worker; his visibility was obstructed by the panel, and his lifeline was wrapped around the same panel shown in CX-3. (Tr. 105-15).

Mr. Gonzalez testified that he made sure his lifeline was taut so that if he fell, he would not hit the next level. He said his lanyard was 6 feet long. It would have extended about 3 feet in a fall, and taking that plus 5 more feet, he would have needed 8 feet of clearance to make sure he did not hit the level below.[60] He did not remember what the distance to the level below was, but said it could have been 7 to 8 feet. Mr. Gonzalez

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[57] The CO inspected the lanyards when the employees came down from the roof; they were 6-foot lanyards. He indicated the shock-absorbing component would stretch 2.5 to 3 feet if a fall occurred. (Tr. 105-06, 113, 151). "D-rings" are the attachment points sewn into a full-body harness. (RX-F, p. 30).

[58] A rope grab allows an employee to travel on a vertical lifeline, but it will automatically lock to stop a fall. (RX-F, p. 33).

[59] *See* basic formula for estimating fall distances when using a shock-absorbing lanyard and D-Ring Connector at RX-F, p. 34.

[60] In his testimony, Mr. Gonzalez failed to take into account the 6-foot-length of the lanyard itself.

agreed that the unidentified employee carrying the panel in CX-8 had too much slack on his lifeline.[61] He said that was "not right," that he should have called attention to it, and that he was not paying attention to what the others were doing. He also agreed that the lifeline going under the panel was a hazard. (Tr. 360-66; CX-8).

In view of the record, the Court finds that the standard applies, that its terms were not met, and that employees were exposed to the cited condition. Mr. Gonzalez admitted the employee in CX-8 had too much slack in his line and that this was an unacceptable work practice.[62] (Tr. 365; CX-8). And his testimony shows that, if he himself had fallen off the roof, he would have hit the lower level below.[63] The record also establishes All Steel's knowledge of the cited condition. Mr. Gonzalez, the foreman, was himself in violation of the standard, and he should have been aware of the condition of the other employee's lifeline. This Item is affirmed as serious.

The proposed penalty for this Item is $3,000.00. The CO's testimony about the penalty for Item 2 also applies to this Item. (Tr. 137-42). The Court finds it appropriate to apply the additional 30 percent reduction for size and history to this Item, resulting in a penalty of $1,500.00. That penalty is assessed.

Citation 1 – Item 4

This Item alleges an "other" violation of 29 C.F.R. § 1926.503(b)(1), which provides in relevant part that:

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[61] Mr. Rodriguez, the other employee carrying the panel shown in CX-8, testified that he did not have any idea how long his lifeline could be. Mr. Rodriguez's lanyard was dragging behind him and was not tied off to anything. (Tr. 222-23; CX-8).

[62] Mr. George also initially agreed that the employee in CX-8 had excessive slack in his lifeline, but he later testified that he was not sure. (Tr. 334-37; CX-8).

[63] *See* earlier discussion, *supra*, which shows the fall distance from the upper to the lower roof was 6 feet 4 inches. All Steel asserts in its brief that the CO was "guessing" at the length of the lifelines and that the Secretary did not prove how long they were or that they had excessive slack. R. Brief, p. 1. As set out above, Mr. Gonzalez agreed that the employee in CX-8 had excessive slack in his lifeline. His testimony also shows that he himself would have hit the lower roof if he had fallen. All Steel's assertion is rejected.

> *Certification of training*. (1) The employer shall verify compliance with paragraph (a) of this section by preparing a written certification record. The written certification record shall contain the name or other identity of the employee trained, the date(s) of the training, and the signature of the person who conducted the training or the signature of the employer.[64]

The citation alleges the employer did not prepare a written certification record as required for each employee working on the roof at the subject site. CO Ortiz testified that Mr. Rodriguez told him he had on-the-job training, but no formal training. The CO agreed that in RX-N, the employee's statement, Mr. Rodriguez had indicated that: he had received training from Mr. Gonzalez in the safe use of a harness, lanyard and anchor point; he was also trained in general safety matters, like hard hats and gloves; and his co-workers inspected his harness before he started working. The CO believed Mr. Rodriguez was not trained properly due to his behavior on the roof. He also believed he was not trained by a competent person, as Mr. Gonzalez did not exercise control of the site in terms of safety. The CO learned that Mr. Price, the person who had been training employees, had gone back to being a site foreman.[65] He requested training records from All Steel, but he never received any. There is no record that Mr. Gonzalez made a written

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[64] Paragraph (a) states in pertinent part:

> (a) *Training Program*. (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.
> (2) The employer shall assure that each employee has been trained, as necessary, by a competent person qualified in the following areas:
> (i) The nature of fall hazards in the work area;
> (ii) The correct procedures for erecting, maintaining, disassembling, and inspecting the fall protection systems to be used;
> (iii) The use and operation of …, personal fall arrest systems, … and other protection to be used; …
> (v) The limitations on the use of mechanical equipment during the performance of roofing work on low-sloped roofs;
> (vi) The correct procedures for the handling and storage of equipment and materials …; and (*sic*)
> (vii) The role of employees in fall protection plans;
> (viii) The standards contained in this subpart.
> *See* 29 C.F.R. § 1926.503(a).

[65] The CO testified that Messrs. Gonzalez and Petitpren both told him that Mr. Price was no longer the safety director. (Tr. 197).

certification of training Mr. Rodriguez to recognize the hazards of falling and minimizing these hazards.[66] (Tr. 134, 138, 155-56, 163-65; RX-J, RX-N).

All Steel points to RX-J as containing a record of a "100% Tie-Off Class" held at the subject site on August 21, 2010. It notes that record shows the instructor's initials and the signatures of attending crew members. It also notes the CO's admission that the cited standard does not set out a time line for compliance. (Tr. 170, 326-27). R. Brief, p. 2. RX-J does, in fact, reflect that a safety talk on "100% Tie Off" was held at the site on August 21, 2010. The document shows the initials of the instructor and the signatures of a number of crew members, including Mr. Rodriguez.[67] Mr. George considered the document to be the required certification. (Tr. 327). The Court disagrees. The safety talk was held nine days after the OSHA inspection and thus postdates the time when Mr. Rodriguez first went up on the roof. While the standard does not state when the required training and certification must take place, it is clear that the intent of the standard is for the employer to provide the training and certification before the employee is exposed to fall hazards.[68] *See, e.g.*, 29 C.F.R. § 1926.503(a)(1).[69] In any case, Mr. Rodriguez

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[66] RX-J, All State's Job Site Safety Talk, shows Mr. Rodriguez was provided training by Mr. Gonzalez on five days from August 16, 2010 through August 20, 2010, on topics including C.D.Z. [Controlled Decking Zone], Brackets, Extension cords, and ladders, and by Mr. Petitpren on August 21, 2010 on the topic of 100 percent tie-off. Mr. George admitted that All State had no written certification record of training for Mr. Rodriguez other than the Job Safety Talk form at CX-J, p. 6. (Tr. 327; CX-J, p. 6).

[67] The instructor's initials are not legible. Mr. George testified that Mr. Gonzalez held the training, but Mr. Gonzalez said the initials were not his, he did not remember the class, and he did not know if he attended it. Since it was Mr. Gonzalez's practice to sign the Job Site Safety Talk form when attending a class, the Court finds that Mr. Gonzalez did not participate in the August 21, 2010 safety talk that addressed "100 percent tie-off." (Tr. 326-28, 358, 397-99, 403-04; CX-J, p. 6). Comparing the initials at "A" with those on another document signed by Mr. Petitpren, it would appear that the instructor was Mr. Petitpren. (Tr. 398; *also compare* "A" on *CX-J, p. 6*, with CX-20).

[68] "[O]ne of the purposes of the certification standard was to provide a record of the nature and content of the training given to individual employees..." *Sec'y v. Latite Roofing & Sheet Metal Co., Inc*., 19 BNA OSHC 1287, 1290 (No. 99-1292, 2000). *See also Delta T Constr. Co. Inc.*, 19 BNA OSHC 1040, 1041 (No. 99-1781, 2000)(Certification standard intended to prevent situations where employers may send untrained temporary worker into a hazardous situation); *Int'l Precast & Steel Erectors,* 18 BNA OSHC 1139, 1145 (No. 95-1457, 1997)(*consolidated*)(Company violated standard by not certifying and

testified he did not recall having any training on August 21, 2010, although he agreed his signature was on the training record for that date.[70] (Tr. 235-36). Mr. George admitted he did not attend the training; he also did not know how long it lasted or what was covered. (Tr. 328).

The Court has already indicated that the fall protection training Mr. Rodriguez received before going up on the roof on his first or second day at the site was inadequate, especially in view of his inexperience. The training was 15 to 20 minutes of instruction by Mr. Gonzalez, who described it as showing Mr. Rodriguez "how to use the harness, how to put it on, be tied off." (Tr. 245, 356). Mr. Rodriguez's description of the training was that "they showed me how to put the harness on and how to cinch it up or tighten it." (Tr. 241). Mr. Rodriguez also testified that Messrs. Gonzalez and Ramanand told him not to go up on the roof without them and without being correctly tied off. (Tr. 220). Despite these instructions, the CO saw Mr. Rodriguez working on the roof on August 12, 2010, without being tied off. In fact, the video shows Mr. Rodriguez freely sauntering about the roof without any fall protection, seemingly oblivious to the risks that he was exposed to. Mr. Rodriguez recalled that later on that day, there was a discussion about the

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documenting adequate fall protection training for new hires other than merely pointing out some hazards on the roof and telling them to tie off).

[69] There is no record or written certification of Mr. Rodriguez receiving any training at All State prior to August 16, 2010. Mr. Gonzalez testified that a written record of All State's safety talks was always made. (Tr. 406-07). In the absence of any such written record, the Court finds that All State did not adequately train Mr. Rodriguez to recognize the hazards of falling or the procedures to follow to minimize fall hazards; it also did not prepare a written certification record verifying any such training, as of the date of OSHA's inspection. *See U.S. ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 303 (6th Cir. 1998)(the absence of a record of an event is probative of the fact that the event did not occur); *Wiley v. United States*, 20 F.3d 222, 227 (6th Cir. 1994)(same). *See also Murray Roofing Co., Inc.*, No. 98-0923, 1999 WL 717820, at * 6 (O.S.H.R.C. A.L.J. Sept. 3, 1999)(Company's failure to respond to a subpoena *duces tecum* calling for all fall protection training records reasonable basis for concluding that Murray did not prepare the required written certified record).

[70] Mr. Rodriguez continued to work on the roof following OSHA's inspection until the job was finished, less than about a month thereafter. He was then transferred to All Steel's main shop, where he helped obtain tools. Mr. Rodriguez left All Steel in November 2010 due to a work slowdown. (Tr. 211-35).

need to always be "hooked up" when on the roof. (Tr. 218). He also testified he later got a "paper" from Mr. George. He agreed the "paper" he got was CX-18. He thought it addressed safety, but it was also a disciplinary action. He understood that he could be fired for not tying off again. (Tr. 123-25, 219-20, 226-30; CX-9).

Based on the foregoing, the Court finds that All Steel did not adequately train Mr. Rodriguez in fall protection before he went up on the roof and that the safety talk record set out in RX-J does not meet the requirements of the cited standard.[71] The Court further finds that All Steel knew or should have known that it was not in compliance with the standard. The Secretary has met all of the elements of her burden of proof with respect to the alleged violation. Item 4 of Citation 1 is accordingly affirmed as an "other" violation. No penalty has been proposed for this item, and none is assessed.

Findings of Fact and Conclusions of Law

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

ORDER

Based on the above Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.20(b)(2), is VACATED.

2. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.501(b)(10), is AFFIRMED, and a penalty of $1,500.00 is assessed.

[71] *Int'l Precast & Steel Erectors,* 1997 WL 219107, at *12 (Mentioning hazards in general terms no substitute for specific instruction in correct fall-protection procedures).

3. Item 3 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.502(d)(16)(iii), is AFFIRMED, and a penalty of $1,500.00 is assessed.

4. Item 4 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.503(b)(1), is AFFIRMED as an "other" violation, and no penalty is assessed.

__/s/_____
The Honorable Dennis L. Phillips
U.S. OSHRC JUDGE

Date: December 15, 2011
Washington, D.C.