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. DANIEL CROWE ROOF REPAIR AND ITS SUCCESSORS, Respondent.	OSHRC DOCKET NO. 10-2090

APPEARANCES:	Michael P. Doyle, Esquire. U.S. Department of Labor Office of the Solicitor 170 S. Independence Mall West Suite 630E The Curtis Center Philadelphia, PA. 19106 For the Complainant	Daniel Crowe, Owner 640 Noblestown Road Carnegie, PA 15106 *Pro Se* For the Respondent
BEFORE:	Dennis L. Phillips, Administrative Law Judge	

DECISION AND ORDER

Background

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("the Act"). On August 9, 2010, [redacted] ("[redacted]") and Paul Carter ("Carter") were assisting Daniel Crowe, owner of Daniel Crowe Roof Repair ("Respondent" or "Crowe"), with replacing a roof on a residence in Coraopolis, Pennsylvania. [redacted] fell off

the roof when trying to retrieve a radio. A complaint was filed with the United States Occupational Safety and Health Administration ("OSHA") stating that an employee was injured when falling off the roof. (Tr. 19). Subsequently, an investigation of the complaint was conducted by OSHA Compliance Officer Kathleen Clugston ("CO"). As a result of the investigation, OSHA issued a citation to Respondent alleging two serious violations of the Act.[1] Item 1 of the citation alleged a serious violation of 29 C.F.R. § 1926.501(b)(13), on the grounds that Respondent's employees "were not protected from falling by the use of guardrail systems, safety net systems or personal fall arrest systems." Item 2 alleged a serious violation of 29 C.F.R. § 1926.503(a)(1), on the grounds that Respondent "did not implement a program that enabled each employee to recognize fall hazards and the procedures to follow to minimize these hazards." The Secretary proposed a $4,200 penalty for each of the violations. Respondent filed a timely notice of contest, bringing this matter before the Commission. This matter was assigned to Simplified Proceedings on November 5, 2010. On January 14, 2011, the parties filed a Joint PreHearing Statement ("JPHS"). In the JPHS, the parties identified the following issues to be decided at the trial:

1. Whether OSHA has jurisdiction over this case under 29 U.S.C. § 659(c).
2. Whether Respondent was engaged in interstate commerce at the time of the events in question.
3. Whether Respondent was, during the relevant time frame, [redacted] "employer" within the meaning of section 3(5) of the Act.
4. Whether Respondent committed a "serious" violation of 29 C.F.R. § 1926.501(b)(13) by failing to provide conventional or alternative means of fall protection to [redacted]

[1] Originally, the citation contained three alleged serious violations. The third item was withdrawn by the Secretary prior to the hearing and is no longer before the Commission. (Tr. 6, 8).

and another worker as they were performing roofing work at a residential site on August 9, 2010.

5. Whether Respondent committed a "serious" violation of 29 C.F.R. § 1926.503(a)(1) by failing to provide a fall protection training program to each employee who performed roof repair work at 545 Cliff Mine Road residence on August 9, 2010, and by failing to train each such employee in the recognition of fall hazards.
6. Whether the proposed penalties are appropriate under the criteria set forth at 29 U.S.C. § 666(j). (JPHS, at p. 4).

The JPHS also stated that Respondent intended to raise three affirmative defenses:

1. Whether [redacted] was performing work at the time of the accident;
2. Whether [redacted] was intoxicated at the time of the accident; and
3. Whether fall protection was infeasible at the worksite on August 9, 2010.

Of these three affirmative defenses, Respondent never subsequently addressed whether [redacted] was intoxicated at the time of the accident. The Court finds that Respondent has abandoned this defense. *See Manganas Painting Co., Inc.*, 1996 WL 478959, at *13 (Nos. 93-1612 & 93-3362, Aug. 23, 1996) (ALJ), *aff'd on other grounds*, 273 F.3d 1131 (D.C. Cir. 2001) ("Respondent's failure to identify evidence or present any argument furthering its mere statement of an affirmative defense constitutes, for all practical purposes an abandonment of the defense or, at least, a failure to carry its burden. The argument is rejected.").

The hearing in this matter was held in Pittsburgh, Pennsylvania on February 2, 2011. Respondent appeared *pro se*. The Secretary has filed a post-hearing brief. On March 25, 2011, Respondent informed administrative court personnel by telephone that it would not be filing a post hearing brief.

Cited Standards

Item 1 of the citation alleges a serious violation of 29 C.F.R § 1926.501(b)(13) for failure to provide fall protection. The standard provides:

> 1926.501 **Duty to have fall protection.**
> * * *
> (b)(13) Residential construction. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of Sec. 1926.502.
> Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with Sec. 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

Item 2 of the citation alleges a serious violation of 29 C.F.R. § 1926.503(a)(1) on the grounds that Respondent failed to train its employees to recognize the hazards of falling. The standard provides:

> §1926.503 **Training requirements.**
> (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.

Stipulations

In the JPHS, the parties stipulated to the following nine facts:

1. Daniel Crowe is engaged in the business of roof replacement and repair on commercial and residential buildings.

2. Daniel Crowe operates his business as a sole proprietorship under the name Daniel Crowe Roof Repair.

3. Daniel Crowe Roof Repair maintains a website at www. danielcroweroofrepair.com.

4. In July 2010, Daniel Crowe Roof Repair placed an advertisement on Craig's List for a roofer/helper.

5. [redacted] responded to Daniel Crowe Roof Repair's advertisement for a roofer/helper on or about July 28, 2010.

6. On August 9, 2010, Daniel Crowe Roof Repair was performing roof repair work at a residence at 545 Cliff Mine Road, Coraopolis, Pennsylvania ("job site" or "work site").

7. The residence at 545 Cliff Mine Road was a 2-story building.

8. [redacted] was one of the persons who was performing roofing work for Daniel Crowe Roof Repair at 545 Cliff Mine Road on August 9, 2010.

9. On August 9, 2010, [redacted] fell off of the roof of the residence at 545 Cliff Mine Road to the ground below. (JPHS, at pp. 3-4).

During the trial, the parties also stipulated that CO Kathleen Clugston took all of the photographs at Exhibits GX-3 through GX-9. (Tr. 22-23).

Relevant Testimony

1. Kathleen Clugston

Kathleen Clugston testified that she has been an OSHA Compliance Officer for 10 years. During this period she has conducted approximately 150 inspections, of which at least 70 involved roofing related issues. (Tr. 18-19). According to Ms. Clugston, the inspection was initiated when OSHA received a complaint on August 31, 2010 from [redacted] that an employee fell off a roof at 545 Cliff Mine Road, Coraopolis, PA. (Tr. 19-20, 49).

The CO testified that she conducted a face-to-face interview with [redacted] on September 7, 2010, the worker who fell off the roof.[2] [redacted] told the CO that he was taking shingles off a roof and installing a new roof. The CO testified that [redacted] was working with Paul Carter and Daniel Crowe at the job site. (Tr. 24, 38). [redacted] told her that he was paid an hourly wage of $10 per hour and that he had no roofing experience. (Tr. 24-25). He also told her that Daniel Crowe set his working hours to be 8:30 a.m. to 4:30 p.m., with a half hour for lunch. He brought no tools to the job. Rather, Respondent supplied the tools. (Tr. 25-26). Also, according to [redacted], the crew was on the site for four days. (Tr. 30, 48). On the first and second days, they removed shingles from the roof. Also, on the second day, they brought materials up to the roof and staged the shingles. On the third day, they shingled the roof using an air gun and hammer. (Tr. 31). [redacted] told the CO that he would get close to the edge of the roof to remove the shingles. (Tr. 31-32). When they were bringing material up to the roof, he would get close to the edge while operating the ladder. (Tr. 32). This job was the first working relationship between Messrs. Crowe and [redacted]. (Tr. 50).

According to the CO's investigation, on August 9, 2010, [redacted] was trying to grab a radio that was about to slide off the roof. The next thing he knew, he was on the ground. (Tr. 21, 37-39; Ex. GX-4). The CO estimated that [redacted] fell 17 feet. (Tr. 38; Ex. GX-4). He suffered two broken arms that required pins to repair, a broken leg, facial fractures, a concussion and a broken elbow. (Tr. 38). Due to his injuries, he was unable to complete the job. (Tr. 50).

The CO testified that she took photographs of the job site on September 3, 2010 and her investigation established that the roof had a 4/12 pitch. (Tr. 21-23, 26; Exhs. GX-3 through GX-

[2] While at [redacted] residence, CO Clugston was told that Mr. Crowe had left a message for [redacted] family stating that there was some confusion and that [redacted] was not his employee. This led the CO to question [redacted] about the terms of his employment at the job site. (Tr. 24-25).

9). The height of the eave to the ground varied from 17-25 feet above the ground.[3] (Tr. 28-29). The CO also interviewed Daniel Crowe who told her that he was in charge of the job site. He directed the work, bid the jobs, was in charge of setting hours, determined the amount of pay and had the power to hire and fire. (Tr. 29-30, 46). Mr. Crowe also bid for the job with no input from [redacted]. (Tr. 46). Respondent paid [redacted] by check. (Tr. 46, 50).

The CO explained that, at the time of the inspection, OSHA was enforcing fall protection on residential construction under the *OSHA Instruction, Directive No. STD 3-0.1A, Plain Language Revision of OSHA Instruction STD 3.1, Interim Fall Protection Compliance Guidelines for Residential Construction,* effective June 18, 1999 ("STD" or "STD 3-0.1A"). (Tr. 32, 39-40; Ex. GX-11). This was a policy that allowed employers engaged in residential construction activities to use alternative fall protection measures in lieu of conventional fall protection. (Tr. 32). According to the CO, the alternative policy applied to Respondent's site, which fell into Group 4 of the policy. Group 4 applies to the installation, removal and repair of roofing material. (Tr. 33-34). Under Group 4, compliance can be achieved by using slide guards or a safety monitor. Respondent did not use either conventional fall protection or any permissible alternative fall protection. (Tr. 35-36, 46-47; Ex. GX-11, pp. 7-8). CO Clugston determined that Mr. Crowe did not comply with the alternative method because he did not have trained employees or slide guards and a safety monitor system in place at the job site.[4] (Tr. 34-36, 41). Also, neither Messrs. [redacted] nor Carter were trained on the hazards associated with fall protection. (Tr. 41).

The CO next explained how she arrived at her proposed penalties. The CO testified that

[3] The CO testified that the eave of the roof is the side usually alongside the building where the gutters are placed. (Tr. 27-28; Ex. GX-7).

[4] CO Clugston determined that, after interviewing Messrs. [redacted] and Carter, Mr. Crowe had failed to train them on how to recognize fall hazards and what methods to use to protect against falling. The CO testified that Messrs. [redacted] and Carter told her that they had not received any training from Mr. Crowe. (Tr. 35-36).

the violations were considered to be of high severity because of the potential for injury or death. The probability of an accident was considered to be "greater" because an accident occurred. Also, the violations were considered serious because of the likelihood of serious injuries, including fractures. (Tr. 42-44; Ex. GX-2). According to the CO, the "gravity based penalty" is based on a combination of severity and probability. In this case, the unadjusted "gravity based penalty" came to $7,000 per item. A 40% credit was given because Respondent was a small employer. In accord with OSHA policy, no credit was given for good faith because the violation was serious, had a higher severity of injuries and a greater probability of an accident occurring. (Tr. 43-45). Also, no credit was given for history because there had been no OSHA inspections within the past five years. (Tr. 45). Accordingly, a penalty of $4,200 per item was proposed by the Secretary.

2. Daniel Crowe

Daniel Crowe is the proprietor of Daniel Crowe Roof Repair. Mr. Crowe, who is 45 years old, testified that he has been involved in roofing since he was twenty. [5] He started the company in March 2010. (Tr. 55, 103). He testified that his original intent was just to perform roof repairs but, due to demand, he began to install roofs. Currently he does everything on the roof, including chimneys, siding and fascia. Roofing is his specialty and primary business. (Tr. 55-56). Demand for his services was high and he considered hiring an employee. Mr. Crowe testified that in about late July 2010, he was hired by Mike Nu to perform a roofing job at a home owned by Mr. Nu located at 545 Cliff Mine Road at a price of about $7,500-$8,000.[6] (Tr. 59-60). On July 28, 2010, he placed an advertisement ("ad") on Craig's List, an internet website,

[5] Mr. Crowe did not work in the roofing business from 1994 through 2009. (Tr. 61, 103).
[6] Mr. Crowe testified that the job consisted of removing existing roof shingles and gutters and installing new gutters, soffit, fascia and roofs on the main house and a small addition behind the house. Mr. Crowe identified a soffit as the aluminum panels underneath the eave. He described fascia as the aluminum on the face of the wood underneath the gutter. (Tr. 60-61, 75, 78).

asking for a "Roofer/helper," which stated that no experience was necessary.[7] Pay was listed at $10 per hour. (Tr. 62-64, Ex. G-10). He was looking for a roofer/helper to be a full-time hire. The ad did not include the terms "independent contractor" or "subcontractor." (Tr. 64; Ex. GX-10). Mr. Crowe testified that he determined, if he hired roofers as independent contractors rather than employees, he would not have to pay for such matters as Workers' Compensation Insurance and, therefore, could afford to take on two roofers rather than a single employee. (Tr. 55, 62, 109).

Mr. Crowe initially talked to [redacted] on the telephone. [redacted] told him that he was an inexperienced roofer. The subject of whose tools would be used did not come up. (Tr. 65-66, 105). Paul Carter responded to the ad on the same day. His discussion with Mr. Carter led Mr. Crowe to believe that Mr. Carter had some experience as a roofer. (Tr. 62, 66, 93).

Before beginning the job, Mr. Crowe discussed the terms and conditions of the work with the roofers. He testified that he told them that he could not afford to hire people and pay Workers' Compensation premiums. Mr. Crowe also testified that he told Messrs. Carter and [redacted] that they would be subcontractors rather than employees. (Tr. 68, 109, 115-16). He also told them that they would each get $400 for the job which he expected to complete in four to five days. (Tr. 68, 105-06, 114). If the job took longer than planned, they would be compensated for overtime at $10 per hour. (Tr. 114).

According to Mr. Crowe, he told the men that because they were working with him, they

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[7] The ad stated (in part):

> **ROOFER/HELPER, $10 AN HOUR FULL TIME**
> **(Carnegie)**
> Date: 2010-07-28, 2:51PM EDT …
>
> DANIEL CROWE ROOF REPAIR
> Must have transportation
> No experience necessary
> Immediate opening

(Tr. 62-63; Ex. GX-10).

did not need to buy tools or equipment and were free to use his tools free of charge. (Tr. 69, 71-72, 106). Mr. Crowe testified that he did not set the hours for the two men and that he would have allowed them to work whenever they wanted.[8] (Tr. 71). He further testified that Mr. Carter expressed an interest in working on Saturday by himself to make up some time. (Tr. 73). If Messrs. Carter or [redacted] needed to use his tools and equipment, they would have to be on the job with Mr. Crowe. (Tr. 71). Mr. Crowe understood that this made it likely that they would be work the same hours as him so they could use his equipment. (Tr. 111). Mr. Carter had some of his own equipment. [redacted] exclusively borrowed Mr. Crowe's equipment at the job site. (Tr. 71).

Mr. Crowe told the two roofers that he would start at 8:00 a.m., stop at 5:00 p.m., and take a half hour break for lunch. (Tr. 71). He testified that Messrs. Carter and [redacted] took breaks whenever they wanted. (Tr. 118). At the time of the accident, [redacted] was not on a break. (Tr. 118). Mr. Crowe paid for all the materials and took all the risk of financial loss on the job. If the crew finished early and the job yielded a larger profit, Messrs. Carter and [redacted] would not receive any extra money. Mr. Crowe testified that he made a profit on this job. (Tr. 72-73).

Mr. Crowe asserted that he was in charge of the job. (Tr. 74). He had the power to hire and fire, and if one of the two workers was lazy, he could tell him not to come back. (Tr. 74). Although he was not at the job site the entire time, Mr. Crowe came back to check on their progress. He left the work site many times. (Tr. 75, 79). He testified that he could be gone anywhere from one to four hours. During that time, the two crew members continued working on the roof. (Tr. 80).

[8] The Court finds Mr. Crowe's testimony in this regard to be untruthful. Mr. [redacted] told the CO that Mr. Crowe set his work hours. (Tr. 25-26).

Mr. Crowe testified that Messrs. [redacted] and Carter were hired to remove and apply roof shingles. He stated that the process of tearing shingles off the roof required the crew to work within a foot or two from the edge of the roof. (Tr. 76, 93-94). They had to come close to the edge to throw the shingles off the roof. (Tr. 76). He stated that it was "pretty simple" to nail new shingles on. This process went on for two days. (Tr. 76, 94). Mr. Crowe testified that the slope of the roof was 4/12 and that the height was 17 feet above the ground. He considered the roof to be very "walk able," and was surprised that [redacted] fell. The accident occurred early on the fourth day of work, at approximately 9:30 a.m. to 10:00 a.m. (Tr. 76-77, 90).

After two days on the job site, the crew borrowed Mr. Crowe's radio after he obtained batteries for it. He denied knowing that they would bring the radio up onto the roof. (Tr. 83-84). He also testified that he would not have stopped them from bringing the radio to the roof, since he had used a radio on roofs, himself. (Tr. 84). Although he could hear the radio, he believed that he could have shouted over it, if necessary.

[redacted]was not within Mr. Crowe's field of vision when he fell off the roof. Mr. Crowe was putting flashing on the roof's chimney at the time, on the slope opposite to [redacted], and the peak of the roof obstructed his view. Mr. Carter was beside Mr. Crowe. The air gun was running and it was a little noisy. Mr. Crowe testified that he believed that [redacted] was "looping stuff or something." [redacted] was supposed to be working when he fell. (Tr. 86-87, 118; Ex. GX-9). Mr. Carter called to Mr. Crowe that he thought that [redacted] fell off the roof. They found [redacted] lying on the cement beneath the roof. Mr. Crowe testified:

> Q Can I ask, was he – could you determine whether he had fallen face first, or –
> A Well, it appeared he had landed on his chest.
> Q. Okay.
> A. You know, his face and his chest. That's – I mean, that's I've never seen anybody fall like that, that's the worst accident I've ever seen. (Tr. 86-89; Ex. GX-4).

Mr. Crowe further testified that [redacted] fell off the roof, around seventeen feet or higher, while apparently trying to grab the radio, which was slipping off the roof.[9] (Tr. 89, 101, 108). Because [redacted] was trying to retrieve the radio, Mr. Crowe did not consider this to be a work-related accident.[10] (Tr. 101, 108). Sometime after [redacted] was removed by ambulance, Messrs. Crowe and Carter went back to work at the job site later that day. (Tr. 90).

Neither worker signed any contract nor other document with Respondent prior to the accident. (Tr. 96-97). After the job was completed, Mr. Crowe had Mr. Carter sign a document titled "Services" and dated 8/17/2010. The document stated "Paid $800.00 for the removal and installation of shingle at 545 Cliff Mine Road Coraopolis." It was signed by both Messrs. Crowe and Carter.[11] Mr. Crowe identified the document as a "receipt for his [Carter] payment." (Tr. 95-98; Ex. R-B). Mr. Crowe never sent [redacted] a similar document to sign because [redacted] mother had threatened legal action against Respondent. (Tr. 95-96). However, Mr. Crowe mailed [redacted]a $260 check, which represented the balance owed to [redacted] for the work he performed by the hour at the job site. (Tr. 91-92, 96; Ex. R-A).

Mr. Crowe testified that he buys his materials at Modern Builders and Lowe's and bought his ladders from Home Depot.[12] (Tr. 56-58). He agreed that some of the materials used in his business were manufactured outside of Pennsylvania. (Tr. 57). Mr. Crowe drove a Chevy Blazer in his business at the time of the incident. (Tr. 58). Also, about 25% of Mr. Crowe's business comes through a website, where he advertises and has contact with customers. (Tr. 58-59).

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[9] Mr. Crowe found the radio on the ground five feet from [redacted], "all busted in pieces." (Tr. 89).

[10] Mr. Crowe testified:

Q What caused [redacted] fall?

A He chased the radio, he chased the radio he had up on the roof, it wasn't work related, … I feel so bad for him, the pain that he went through, … I never seen a person get hurt that bad. But that wasn't even work related, … him and Paul had that[radio] up there, he chased it, chased a radio and fell. …" (Tr. 111).

[11] The document did not indicate that Mr. Carter was a subcontractor or independent contractor. (Tr. 97; Ex. R-B).

[12] He testified that materials he used included aluminum, tin, shingles, slate, paint, silver coat, tars, sealant, roof vent pipe boots, and nails. (Tr. 56-57).

Mr. Crowe claimed that he never heard of OSHA, and when he received a call from OSHA, he thought it was a joke. He testified:

> I was not even aware that OSHA had any [training on fall protection] – I've been in roofing all my life, I worked for many companies, I had never ever heard of OSHA. When they called me I thought it was a joke. I thought, "Why are you talking to me? I'm a sole proprietor, I've been roofing all my life." I didn't even know, you know, OSHA was – I don't know how to say it, overseeing anything that roof – residential roofing had had, you know. (Tr. 80-81).

He further stated that he thought that OSHA was only for government, military and union contracts. (Tr. 109). He never went to the OSHA website or phoned the agency to determine what the roofing rules might be. (Tr. 117). He testified that, when starting his business, he fulfilled all Pennsylvania state [Commonwealth] requirements. He got roofing insurance, registered, and obtained licenses. (Tr. 104). At no time was he ever told about OSHA, or any of its requirements. (Tr. 104, 108).

Mr. Crowe testified that he did not give the two men any fall hazard training, either before or during the job.[13] (Tr. 80). He admitted that no fall protection was used on the job.[14] Mr. Crowe asserted that he never used fall protection in his life and never saw anybody use it. (Tr. 81). Not only were no slide guards installed, but he did not know what slide guards are. (Tr. 81). Similarly, he had no safety monitor at the job site. (Tr. 82). He testified that he could not afford another employee and he did not act as a safety monitor himself. (Tr. 82). Also, he used

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[13] Mr. Crowe testified:

> Q Okay. Now at the start of this job you did not give Tim and Paul any training on fall protection did you?
> A No.
> Q Okay, and during the course of the job you did not give them any training on fall protection?
> A No. (Tr. 80).

[14] Mr. Crowe testified:

> Q Okay, Did you – during this job did you use any type of fall protection system?
> A No.
> Q Okay.
> A I've never in my life.
> Q Okay.
> A And I've never seen anybody use it. (Tr. 81).

no conventional methods of fall protection, such as guard rails, and did not think that the homeowner would have allowed him to put mounts on the edge of the roof because it would damage the structure. (Tr. 82). Similarly, he did not use nets or equip the crew with a harness or lanyard. (Tr. 83).

Jurisdiction

Under the Act, each employer "shall comply with occupational safety and health standards promulgated under this Act. Section 5(a)(2) of the Act, 29 U.S.C.§ 654(a)(2). The Act defines an employer as "a person engaged in a business affecting commerce who has employees." Section 3(5) of the Act, 29 U.S.C. § 652(5). "Employee" is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." Section 3(6) of the Act, 29 U.S.C. § 652(6). The Act further defines commerce as "trade, traffic, commerce, transportation, or communication among the several States or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside." Section 3(3) of the Act, 29 U.S.C. § 652(3).

Respondent asserts that it was engaged in neither a business affecting commerce, nor an employer of the two roofers.

A. Business Affecting Commerce

In enacting the Occupational Safety and Health Act, Congress intended to exercise the full extent of the authority granted by the Commerce Clause of the Constitution. *Chao v. OSHRC,* 401 F.3d 355, 361-362 (5th Cir. 2005); *Austin Road Company v. OSHRC*, 683 F.2d 905, 907 (5th Cir. 1982). Accordingly, an employer comes under coverage of the Act by merely affecting commerce; it is not necessary that the employer be engaged directly in interstate

commerce. *Chao,* 401 F.3d at 361-362, *Austin Road*, 683 F.2d at 907. In determining whether a business affects commerce, the Commission applies the "aggregation principle." *Slingluff v OSHRC,* 425 F.3d 861, 867 (10th Cir. 2005); *Secretary of Labor v. Ho,* 20 BNA OSHC 1361, 1364 (No. 98-1645 & 1646, 2003), *aff'd* 401 F.3d 355(5th Cir. 2005). Under this principle, even where the contribution of a single business to commerce is small and its activities and purchases purely local, they necessarily have an effect on interstate commerce when aggregated with the similar activities of others. *Wickard v. Filburn,* 317 U.S. 111, 127-128 (1942); *U.S. v. Ho,* 311 F.3d 589, 599 (5th Cir. 2002); *Clarence M. Jones, d/b/a C. Jones Co.,* 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983).

Although the burden is modest, if not light, the Secretary bears the burden of establishing this threshold jurisdictional fact. *Chao,* 401 F.3d at 361-362; *Austin Road*, 683 F.2d at 907. It is undisputed that Respondent is engaged in roof repair. (Stipulation #6). Roof repair qualifies as "construction work" which is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1926.32(g). The construction industry as a whole affects commerce, and even small employers within that industry are engaged in commerce. *Slingluff v. OSHRC,* 425 F.3d at 866-67; *Clarence M. Jones, d/b/a C. Jones Co.,* 11 BNA OSHC at 1531.

Besides the nature of Respondent's activities, there is substantial additional evidence that directly establishes that Respondent was engaged in commerce. Mr. Crowe testified that he purchases shingles, nails and other materials used in his business at major national retail stores, such as Lowe's and Home Depot. (Tr. 57-58). He also speculated that the materials he uses are manufactured outside of Pennsylvania. (Tr. 57). At the time of the job at issue, Mr. Crowe drove a Chevy Blazer in his business. (Tr. 58). Mr. Crowe has a website which generates

approximately 25% of his business. (Tr. 58-59). He also advertised for workers on the internet marketplace, Craig's List, and used the telephone. (Tr. 62-63, 65; Ex. GX-10). There is an interstate market in these materials and services. *Clarence M. Jones d/b/a C. Jones Co.,* 11 BNA OSHC at 1531. Thus, even if Respondent's contribution to this stream of commerce was small and his activity and purchases were purely local, they necessarily had an effect on interstate commerce when aggregated with the similar activities of others. *Id.* Accordingly, the Court finds that the Secretary has met her burden of establishing that Respondent was engaged in commerce within the meaning of Section 3(6) of the Act.

B. Employment Relationship

1. The Darden Test.

Respondent next contends that Messrs. Carter and [redacted] were either independent contractors or subcontractors and not employees. It argues that it was made clear to the two men that they would be independent contractors and that they were not entering an employment relationship with Mr. Crowe. Respondent argues that it was not an "employer" within section 3(5) of the Act and that OSHA had no jurisdiction over its activities.

The burden of proving that Respondent is the employer of the two roofers lies with the Secretary. A*llstate Painting & Contracting Co.,* 21 BNA OSHC 1033, 1035 (No. 97-1631 & 97-1727, 2005). The Act does not define "employee" in a manner helpful in resolving whether Respondent was an employer under the Act. In statutes that do not explicitly define an "employee" and unless the Congress has clearly indicated otherwise, the United States Supreme Court has adopted a common law definition of "employee" based on the common law agency doctrine. *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322 (1992) ("Darden"). In determining whether a worker is an "employee," under the Act, the Commission relies on this

multi factor common law test set forth in *Darden*. *Summit Contractors, Inc.,* 23 BNA OSHC 1196, 1204 (No. 05-0839, 2010), *appeal docketed*, No. 10-1329 (D.C. Cir. Oct. 5, 2010). There is no shorthand formula for determining who is an "employee" under *Darden* or the common law. All incidents of the employment relationship must be assessed and weighed with no one decisive factor. *Darden,* 503 U.S. at 319.

In *Darden*, the Court considered primarily "the hiring party's right to control the manner and means by which the product is accomplished." *Id.* at 323. Other factors relevant to determining whether a person is an employee include "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." *Id.* at 323-24 n.3, c*iting Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989).

2. *Applying The Darden Test Factors.*

a. The hiring party's right to control the manner and means by which the product is accomplished.

Daniel Crowe testified that he was in charge of the job. (Tr. 74). He also told the CO that he was in charge of the job site and directed the work. (Tr. 29-30). Mr. Crowe was not at the job site all of the time. Messrs. [redacted] and Carter continued working on the roof in Mr. Crowe's absence. He periodically came back to check the crew's progress. (Tr. 75). Although Mr. Crowe testified that the roofers could set their own hours, he also testified that he provided the tools for the roofers, and informed them that he would be working 8:00 a.m. to 5:00 p.m.,

with a half an hour off for lunch. (Tr. 30, 69, 71, 106). Mr. Crowe testified that he was aware that, if Messrs. [redacted] and Carter wanted to use his tools the roofers would have to work the same hours as him. Indeed, he expected that the roofers would work the same hours since using his equipment saved them time, money and labor. (Tr. 71, 111). He also testified that the fact that the roofers could use his tools rather than have to purchase their own was a consideration in determining their compensation. (Tr. 69). Therefore, as a practical matter, Mr. Crowe determined the hours that the roofers worked. This is the kind and extent of control indicative of an employee-employer relationship, and not that of an independent contractor. *FM Home Improvement Inc.*, 22 BNA OSHC 1531, 1537 (No. 08-0452, 2009)(ALJ).

The right to discharge a worker is also a factor indicating that the worker is an employee and that the party possessing the right is an employer. One of the ways an employer exercises control over employees is through the threat of dismissal, which helps cause workers to obey the employer's instructions. *Id.* In this regard, the CO testified that Daniel Crowe told her that he had the power to hire and fire. (Tr. 30). This was confirmed by Mr. Crowe who testified that he had the power to fire a worker who was not properly performing his job. (Tr. 75).

The Court finds that this evidence establishes that Respondent directed and controlled the day-to-day work of the roofers at the job site and their schedule, as well as the workers themselves. The control factor weighs significantly in favor of finding that the roofers were employees of Respondent. *Id.*

b. The skill required.

Generally, the less skill a worker has, the more likely it is that the worker is an employee. Those workers with few developed skills are less likely to be in business for themselves. *FM Home Improvement,* 22 BNA at 1538. The evidence establishes that the skill level required to

perform the roofers' tasks was minimal. The ad Respondent ran in Craig's List soliciting for roofers clearly stated "No experience necessary." (Tr. 63; Ex. GX-10). Mr. Crowe testified that he was going to do the more complicated work, like putting on pipe vents and flashing, while the two roofers' only tasks were to tear off and apply shingle, which he considered fairly simple work. (Tr. 94). Indeed, although Mr. Carter had some roofing experience (Tr. 66, 93), [redacted] had none. (Tr. 65). This lack of experience necessarily required that the roofers, especially [redacted], look to Mr. Crowe for instructions on how to accomplish their task, once again indicating that the roofers were employees, not independent contractors.

c. The source of instrumentalities and tools.

As noted, Mr. Crowe made his tools and equipment available for the roofers. These included nail guns, air guns, rippers, ladders and compressors. (Tr. 57). The only things the roofers were expected to provide were their hand tools. (Tr. 107). Also, all materials used for the job were purchased by Mr. Crowe. (Tr. 72). That the tools and materials were provided by Respondent further suggests an employment relationship.

d. The location of the work.

The work was not performed on the hiring party's premises. Rather, Mr. Crowe arranged the job and instructed the roofers to travel to the job site. This suggests control and an employment relationship, and weighs in favor of finding that the roofers were employees of Respondent. *FM Home Improvement*, 22 BNA OSHC at 1538.

e. The duration of the relationship between the parties.

The evidence suggests that the relationship between Respondent and the roofers was intended to be of indefinite duration. Mr. Crowe testified that when the roofers asked him if he had more roofing jobs coming, he replied "Yes, I already have three or four roofs lined up *for us*

in a straight line." (Tr. 69)(emphasis added). The fact that Respondent and the roofers envisioned a long-term relationship further suggests that the roofers were employees of Respondent. *FM Home Improvement*, 22 BNA OSHC at 1538.

f. Whether the hiring party has the right to assign additional projects to the hired party.

Mr. Crowe denied that, if he had two active jobs, he could assign one of the roofers to the other job. (Tr. 74). He explained that the roofers were contracted only for the job they were working on. The Secretary argues that Mr. Crowe's testimony should be discounted because the Craig's List ad did not indicate where the work would be located and there was no indication that the roofers had any interest in where they would be sent to work. Further, [redacted] indicated an interest in doing more jobs, which suggests that he was at Respondent's disposal as long as Respondent had work for him. (Tr. 69). The Court agrees with the Secretary and discounts Mr. Crowe's testimony with regard to this. The Court finds this factor supports the finding that Messrs. [redacted] and Carter were Respondent's employees.

g. The extent of the worker's discretion over when and how long to work.

Mr. Crowe testified that the roofers were free to work whatever hours they wanted and determine their own lunch break. (Tr. 71, 111). The reality of the situation was very different. As noted, Mr. Crowe made it clear to the roofers that they were free to use his tools and equipment. To do so, however, they would have to work the same hours as him and, indeed, Mr. Crowe expected them to do so. (Tr. 111). As a practical matter, Mr. Crowe set the hours the roofers were expected to work. He testified that the roofers were allowed to determine when to take their breaks. (Tr. 118). He also testified that, at the time of the accident, [redacted] was not on a break, but was supposed to be working. (Tr. 118). This suggests that, although they might have had some freedom in determining their breaks, the roofers were, at a minimum, expected to

report to Mr. Crowe when they chose to take those breaks.

Accordingly, the worker's discretion over when and how long to work was minimal, suggesting that they were Respondent's employees.

h. The method of payment; and the hired party's role in hiring and paying assistants.

In *FM Home Improvement*, 22 BNA OSHC at 1539, the Court observed that:

> Payment by the hour, day, week, month or by an annual salary usually reflects payments made to an employee. Payment by the job generally indicates that he worker is an independent contractor. A worker who can realize a profit or suffer a loss as a result of the worker's services is generally an independent contractor, but the worker who cannot is an employee. If the worker is subject to a real risk of economic loss due to significant investments or a *bona fide* liability for expenses. . . . then such factors tend to indicate that the worker is an independent contractor. Also, if the worker invests in facilities that are used by the worker performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair market value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person for whom the services are performed and, accordingly, the existence of an employer/employee relationship.

Although Mr. Crowe testified that he paid the roofers by the job, he also testified that, if the work took longer than four days, he intended to compensate them at an hourly rate of $10 per hour. (Tr. 92). He further testified that the compensation of $400 per roofer was based on a rate of $10 per hour. (Tr. 113-14). Also, when he paid [redacted] for the work he did, he calculated what he was owed by the hours he worked. (Tr. 91; Ex. R-A).[15] While Mr. Crowe asserts that his roofers were ostensibly paid by the job, the reality was more akin to a salary, where they would be paid a certain amount over a set period of time with additional payment for working extra hours.

[15] According to Mr. Crowe, the check he mailed to [redacted] for $260 represented the balance of what he owed the roofer. (Tr. 91; Ex. R-A). Although the evidence demonstrates that the roofers were to be paid $400 for the job, Mr. Crowe testified that he paid [redacted] for the time he worked. (Tr. 91) Mr. Crowe could not remember what he previously paid [redacted]. (Tr. 91). Therefore, it is unclear from the record whether [redacted] was paid the full $400 or a lesser amount, since he did not complete the job.

The evidence also establishes that the roofers could not enjoy a profit or suffer a financial loss as a result of their labor. Mr. Crowe testified that he took all risk of financial loss and that the roofers would not have participated in profit sharing had the job generated a larger profit. (Tr. 72-73). Also, the roofers had little, or no, investment in supplies, tools or equipment. The fact that the roofers' pay was based on an hourly rate, they were unable to enjoy profits or suffer losses, and had no investment in the job, all point to an employer/employee relationship.

i. Whether the work is part of the regular business of the hiring party.

At the hearing, Mr. Crowe testified that he viewed his employment relationship with the roofer the same as the relationship he would have with an electrician who comes in to fix a fan or a painter who is hired to paint something. In these instances, he stated, the relationship would be pay for service. (Tr. 110). Mr. Crowe is neither a painter nor an electrician. Persons hired to perform such services would ostensibly be doing work in areas where Mr. Crowe had no particular expertise. Respondent is exclusively engaged in the roofing business and the persons it hired were expected to work only as roofers and assist him to fulfill his contractual obligation to the home owner. When a party is hiring workers to perform work that is part of its regular business, the implication is that the persons hired are employees rather than independent contractors. *FM Home Improvement, Inc.,* 22 BNA OSHC at 1539. Again, the evidence suggests an employer/employee relationship.

j. Whether the hiring party is in business.

As noted, Respondent was exclusively in the roofing business, and Messrs. [redacted] and Carter were hired exclusively to work in that business. Again, this factor strongly points to an employer/employee relationship.

k. The provision of employee benefits; and tax treatment of the hired party.

Respondent did not provide hospitalization and carry Workers' Compensation Insurance for the roofers. (Tr. 114-116). Mr. Crowe testified that he hired the roofers as "independent contractors" not because of the nature of the work or of the employment, but rather as an attempt to lower his expenses and remain competitive. (Tr. 109, 114-16).[16] Mr. Crowe introduced a document signed by Mr. Carter, after the job was completed, purporting to be a bill for services rendered.[17] (Ex. R-B). However, nothing in the document states that the roofer was an independent contractor. Also, this document was signed by Mr. Carter after completion of the job when he was receiving payment for his work. (Tr. 96). There is nothing in the record to suggest that, by signing the document, Mr. Carter thought that he was confirming his status as an independent contractor. It was just as likely that Mr. Carter thought he was simply signing a receipt for payment, as Mr. Crowe testified it was. Accordingly, the Court gave no weight to this document and find this criterion to be inconclusive.

Conclusion

Considering the *Darden* factors, the Court finds that the evidence overwhelmingly demonstrates that the roofers were Respondent's employees. Mr. Crowe controlled the manner and means by which the roofing job was conducted. He effectively set the hours the employees would work and had the power to hire and fire. The employees had little or no experience in roofing and were dependent upon Mr. Crowe for instruction. Mr. Crowe provided the tools and materials. The roofers were effectively paid on an hourly basis and had no opportunity to benefit by any extra profit or suffer any financial loss. Also, the roofers were hired to assist Mr. Crowe in fulfilling his contractual obligation to the home owner. Accordingly, the Court finds that,

[16] The Commission has emphasized the importance of construing employment relationships in a manner which effectuates the remedial purposes of the Act. *See Avcon, Inc., Vasilios Saites, and Nicholas Saites*, 2000 WL 1466090, * 7 (No. 98-0755 and 98-1168, Aug. 25, 2000)(ALJ).

[17] As noted, *supra,* [redacted] did not sign any such document.

under the *Darden* test, the roofers were Respondent's employees under Section 3(6) of the Act. The Court also finds that Mr. Crowe was not truthful when he testified that he initially hired Messrs. [redacted] and Carter as subcontractors and not employees. The Court finds that Respondent concocted the story that Messrs. [redacted] and Carter were independent or subcontractors after [redacted] fell from the roof on August 9, 2010. The Court rejects this defense and finds that it lacks any merit. Based on the evidence of record, the Court also finds that Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of Sections 3(3) and 3(5) of the Act. Also, by virtue of Respondent's timely filing of its Notice of Contest, the Court finds that jurisdiction of this proceeding is conferred upon the Commission by Section 10(c) of the Act.

The Secretary's Burden of Proof

Having established that OSHA had appropriate jurisdiction over the worksite at issue, the Court turns next to the violations alleged by the Secretary. To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer knew or could have known of the existence of the hazard with the exercise of reasonable diligence. *Atlantic Battery Co.* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Discussion

1. Citation 1, Item 1: 29 C.F.R. §1926.501(b)(13) - Failure to Provide Fall Protection

There is no dispute that the standard applied to the working conditions on the roof that Mr. Crowe and his crew were repairing. The roof had a 4 in 12 slope and was between 17-25 feet above the ground. (Tr. 26, 28, 38, 76). Under the cited standard, an employer in residential

construction is required to provide guardrails, safety nets, or a personal fall arrest system for employees exposed to a fall from a height of six feet or more above the ground.

For several years, OSHA has provided an exception to the standard's requirements through an interim enforcement policy, STD.[18] (Ex. GX-11, p. 3, ¶ I.B.). Under the STD, OSHA permits employers to implement non-conventional fall protection methods for certain residential construction activities without having to establish that conventional fall protection methods are infeasible. The activities are divided into four groups based on such criteria as the nature of the construction, the height of any potential fall, and the nature of the work. Group 4 involves roofing work, including removal, repair, or installation of weatherproofing roofing materials such as shingles. (Ex. GX-11, p. 2). This is the work Respondent was engaged in and, therefore, is applicable here. An employer engaged in Group 4 roofing work may choose between two non-conventional fall protection alternatives if the roof slope is up to 4 in 12 and the fall distance from the eave to the ground is 25 feet or less. The two alternatives are a safety monitoring system that complies with 29 C.F.R. § 1926.502(h) or slide guards. (Ex. GX-11, p. 7, ¶ XII.B).

It is undisputed that Respondent utilized neither conventional fall protection measures nor the alternative measures set forth in the noted STD 3-0.1A. (Tr. 34-36, 81-83; Ex GX-11). Indeed, Mr. Crowe testified that, in his roofing career, he never used fall protection. (Tr. 81). He admitted that he did not install any slide guards on the roof at the job site. Specifically, he never saw or heard of guardrails, and speculated that they were not practical because the home owner would not allow the installation of mounts on the roof. (Tr. 81-82). He also never saw or heard of safety nets until the inspection. (Tr. 83). He further testified that, in his view, wires such as

[18] OSHA cancelled the STD in December 2010. After that date, employers may no longer take advantage of the alternative procedures set forth in the STD. However, the new enforcement policy did not take effect until June 2011. Therefore, at the time of the citation, the STD was still in effect. (Secretary's Brief, p. 14, fn 1).

those that might be used in a fall arrest system were dangerous because they presented a tripping hazard. (Tr. 82). As to the alternative measures, Mr. Crowe did not know what slide guards were. (Tr. 81).

The evidence further demonstrates that Mr. Crowe could not have qualified as a safety monitor. He admitted that he did not have a safety monitor system and that he did not act as a safety monitor at the job site. Mr. Crowe admitted that, at various times, he departed the worksite to pick up materials while the roofers continued with their roofing activities. (Tr. 79-82). This disqualified Mr. Crowe from acting as a safety monitor because, under 29 C.F.R. §1926.502(h)(l)(v), a "safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function." Mr. Crowe also testified that he could not afford to hire an additional person to act as a safety monitor. (Tr. 81-82). Mr. Crowe provided no financial information to support the assertion that he could not afford to hire a safety monitor, and he made no assertion that any of the other conventional or alternative measures were economically infeasible.

Respondent also introduced no evidence regarding the feasibility of slide guards or safety nets and only speculated, without introducing any evidence, as to the feasibility of guardrails or fall arrest systems. The burden is on the employer to demonstrate that compliance with a standard is infeasible. *Ace Sheeting & Repair Co. v. OSHRC*, 555 F.2d 439, 441 (5th Cir. 1977); *State Sheet Metal Co.,* 16 BNA OSHC 1155, 1160 (Nos. 90-1620 & 90-2894, 1993). Having introduced no persuasive evidence on the issue, Respondent has failed to meet its burden of establishing that compliance with the standard by any permissible means was infeasible. Accordingly, the Court finds that the evidence establishes that Crowe failed to provide either conventional or permissible alternative methods of fall protection in violation of the cited

standard.

The evidence also establishes that the roofers were exposed to the hazard of falling off the roof. Mr. Crowe testified that the process of tearing the shingles off the roof required them to come within one or two feet of the edge of the roof. Indeed, the work required them to actually throw the shingles off the roof. (Tr. 76). Mr. Crowe also testified that sometimes the roofers would have to reach over the edge of the roof to reach the material that was being sent up. (Tr. 79).

Respondent argues that [redacted] was not engaged in work at the time of the accident.[19] It is Respondent's contention that because [redacted] was trying to retrieve a radio, rather than actually performing roofing work, he was not working and, therefore, was not covered by the provisions of the cited standard.[20] Respondent's argument is very wide of the mark. Regardless of whether [redacted] was engaged in work at the precise moment of the accident, the relevant fact is that absolutely no form of conventional or alternative fall protection was provided employees at any time during the roofing operations during which time the roofers were clearly exposed to the fall hazard.[21]

Finally, the record establishes that Respondent had actual knowledge of the hazard. Respondent contends that it did not know of the requirements of the standard and had never even heard of providing fall protection to roofers. Mr. Crowe asserted that he was totally unaware of

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[19] In its opening statement at trial, Respondent argued that [redacted] "fell doing something that wasn't work related, chasing a radio, which he chose to have up there. That had nothing to do with me [Mr. Crowe]." (Tr. 101) .

[20] Mr. Crowe testified:

Q Was [redacted] performing work when he fell?

A No, he wasn't, he was – he had a radio on a rope, which he borrowed from me, and he was chasing the radio, he was running on the roof chasing a radio when he fell. … (Tr. 108).

[21] The Court additionally notes that to establish exposure to a hazardous condition, the Secretary is not limited strictly to those times when employees are performing actual work. Rather, exposure is established when "employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976).

OSHA or that it applied to his work. However, to establish knowledge, the Secretary must prove that an employer knew or could have known with the exercise of reasonable diligence of the "physical conditions constituting the violation." *Schuler-Hass Electric Corp.,* 21 BNA OSHC 1489, 1493 (No. 03-0322, 2006); *citing Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). She need not show that the employer understood or acknowledged that the physical conditions were actually hazardous. *Phoenix Roofing,* 17 BNA OSHC at 1079. As discussed, *supra*, Mr. Crowe knew that the work required the roofers to work right up to the edge of the unguarded roof without any form of conventional or alternative fall protection. Respondent clearly knew of the physical conditions constituting the violation. Accordingly, the violation is affirmed.

2. Citation 1, Item 2: 29 C.F.R. §1926.503(a)(1) - Failure to train employees exposed to a fall hazard.

Again, there is no dispute that the standard applied to the roof upon which Mr. Crowe and his crew were working. As noted, *supra,* the roofers were exposed to fall hazards. Under § 1926.503(a)(1) Respondent was obligated to provide a training program for the roofers which would enable the employees to recognize the hazards of falling and would train each employee in the procedures to be followed to minimize the hazards. The employer's obligation to provide training is not altered by STD 3-0.1A. The alternative provisions of STD 3-0.1A require that for Group 4 activities, such as those here, "Only workers who have been trained to be proficient in the alternative methods of fall protection shall be allowed on the roof." (Ex. GX-11, at p 7, ¶ XIIA). The STD further states that "Deficiencies in training required by 1926.20 may also be cited where appropriate." (Ex. GX-11, at p.8, ¶ XIII). The standard at § 1926.20(b)(1) states that "[i]t shall be the responsibility of the employer to initiate and maintain such programs as may be

necessary to comply with this part." That would, of course, include the training program required by the cited standard.

The evidence establishes that Respondent failed to comply with 29 C.F. R. § 1926.503(a)(1). Mr. Crowe testified that he provided no training for the roofers either before or during the job. (Tr. 80). As noted in Item 1, *supra*, the roofers were exposed to the hazard of falling off the roof. Also, as Mr. Crowe testified, he had actual knowledge that he failed to provide any form of training to his roofers. Accordingly, the violation was established.

3. Characterization

The evidence also establishes that Respondent's violations of 29 C.F.R. § 1926.501(b)(13) and 29 C.F.R. § 1926.503(a)(1) were "serious" within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(k).

A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). As the Third Circuit has explained:

> It is well-settled that, pursuant to § 666(k), when the violation of a regulation makes the occurrence of an accident with a substantial probability of death or serious physical harm *possible,* the employer has committed a serious violation of the regulation. The "substantial probability" portion of the statute refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result, even in those cases in which an accident has not occurred or, in fact, is not likely to occur.

Secretary of Labor v. Trinity Industries, 504 F.3d 397, 401 (3d Cir. 2007) (internal quotation marks and citations omitted).

Under these principles, Respondent's violation of 29 C.F.R. § 1926.501(b)(13) was clearly "serious." The CO classified the violations as serious because of the potential for death or serious physical harm, including broken bones. (Tr. 43-44). Messrs. [redacted] and Carter

worked on a roof at least 17 feet above ground level for three full days, and part of the fourth day, without any means of fall protection. The job required them to work within a few feet of the roof's edges. (Tr. 75-77, 81). [redacted] was inexperienced at roofing work and had received no fall protection training. He fell to the ground from the roof on the morning of his fourth day on the job, sustaining serious injuries, including broken bones and a facial fracture. (Tr. 38, 65, 77, 80). These facts establish that there was a substantial probability that serious physical harm would result from Mr. Crowe's decision to allow [redacted] and Carter to do roofing work without any means of fall protection. *See Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1007 (No. 92-424, 1994) (fall from 18 feet was likely to cause serious injuries); *cf. Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977) ("The fact that the activity in question actually caused one death constitutes at least prima facie evidence of likelihood [of death or serious injury])." Respondent's failure to comply with 29 C.F.R. § 1926.501(b)(13) is properly designated as "serious" within the meaning of section 17(k) of the Act.

So too with respect to Respondent's violation of 29 C.F.R. § 1926.503(a)(1). The failure to provide appropriate fall protection training to an inexperienced workman such as [redacted] greatly increased the chance that he would fail to recognize the dangers of working on a roof. That is especially so where, as here, the job required him to work very close to the roof's edges. (Tr. 75-76). [redacted] fall from the roof was an entirely foreseeable result of Respondent's failure to provide fall protection training. Although Mr. Crowe testified that he was surprised [redacted] fell, there should be no surprise that [redacted], a worker with no experience in roofing, fell from the roof on his fourth day on a job where he was provided with no fall protection or fall hazard training whatsoever. The only surprise is that he did not fall sooner.

The Court finds the training violation to be "serious" as well. *See Fabi Constr. Co. v. Secretary of Labor*, 370 F.3d 29, 36-37 (D.C. Cir. 2004) (affirming "serious" violation of 29 C.F.R. § 1926.503(a)(1)).

For the reason stated above, the Court finds that the two violations were properly characterized as serious.

4. Penalties

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the South*, *Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990). In *J. A. Jones Construction Company*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993), the Commission stated:

> These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc*., 15 BNA OSHC 1481, 1483 [citation omitted] (No. 88-2681, 1992); *Astra Pharmaceutical Prods. Inc*., 10 BNA OSHC 2070 (No. 78-6247, 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc*., 10 BNA OSHC 1128, 1132 [citation omitted] (No. 76-2644, 1981).

The Secretary proposed a penalty of $4,200 for each of the items, for a total proposed penalty of $8,400. The CO testified that, as demonstrated by the accident, she considered the violations to be of high severity due to the high potential of injury or death in the event of an accident. (Tr. 42; Ex. GX-2). Also, as demonstrated by [redacted] fall off the roof, she considered the probability of an accident to be greater. (Tr. 43; Ex. GX-2). The CO further testified that gravity, which combines severity and probability, was high, leading to an unadjusted gravity-based penalty of $7,000. (Tr. 43; Ex. GX-2). The CO also testified that no

credit is given for good faith where, as here, the violation is serious with a high severity and greater probability of injury. (Tr. 45; Ex. GX-2). No credit was given for history because there were no inspections within the past five years and, therefore, no history on which to base the credit. (Tr. 45; Ex. GX-2). However, Respondent was given a 40% credit for size because, with only two employees, Respondent was a small employer. (Tr. 45; Ex. GX-2).

The Court agrees with the Secretary that the gravity was high and that Respondent was not entitled to any credit for good faith or history. The gravity here was heightened because at least one of the roofers was totally inexperienced and, as demonstrated by his falling off the roof while chasing a sliding radio, had little or no understanding of the hazards associated with working on a sloped roof. Nonetheless, Respondent provided neither safety precautions nor training. The Commission and the courts have expressed special concern that new hires and inexperienced employees be made aware of hazards on the job. *See, e.g. Georgia Electric Co. v. Marshall,* 595 F.2d 309, 320 (5th Cir. 1979)(inexperienced employees, not ordinarily coming with job familiarity, require more specific guidance from the company); *Nooter Construction Co.,* 16 BNA OSHC 1572, 1578, n.11, (No. 91-237, 1994); *Danco Construction Co*., 5 BNA OSHC 2043, (No. 12847, 1977), *aff'd*, 586 F.2d 1243 (8th Cir. 1978).

Mr. Crowe contends that it did not know about OSHA or its regulations and had never seen employers use the type of fall protection mandated either by the standard or the STD. However, Mr. Crowe is an experienced roofer. As such, he should have known that roofing is an inherently dangerous activity and that the hiring of totally inexperienced workers imposed, at a minimum, an obligation to ensure that they were aware of the significant hazards associated with such work. Respondent's failure to provide its roofers with any form of fall protection or training demonstrates that it is not entitled to any credit for good faith in the penalty assessment.

Mr. Crowe testified that he had just started his business. Although this was his first job with Messrs. [redacted] and Carter, the record does not reveal whether this was Respondent's first job. The CO testified that no credit was given for a good history with OSHA because he had no history with OSHA. (Tr. 45). Here, the record demonstrates a lackadaisical attitude toward safety that militates against granting any credit for a good safety history.

Considering the factors set forth in 29 U.S.C. §666(j), the Court finds the penalties proposed by the Secretary to be appropriate.

Findings of Fact and Conclusions of Law

All findings of facts and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that

1. Citation 1 Item 1 for a serious violation of section 5(a)(2) of the Act for a failure to comply with the standard at 29 C.F.R. § 1926.501(b)(13) is **AFFIRMED** and a penalty of $4,200 is **ASSESSED**; and

2. Citation 1 Item 2 for a serious violation of section 5(a)(2) of the Act for a failure to comply with the standard at 29 C.F.R. § 1926.503(a)(1) is **AFFIRMED** and a penalty of $4,200 is **ASSESSED**

____/s/_____
The Honorable Dennis L. Phillips
US OSHRC Judge

Dated: August 25, 2011

Washington, D.C.