



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

SECRETARY OF LABOR,

Complainant,

v.

TRINITY SOLAR LLC, as successor to
TRINITY SOLAR INC.,

Respondent.

OSHR DOCKET NO. 23-0712

Appearances: Seema Nanda, Solicitor of Labor
Jeffrey S. Rogoff, Regional Solicitor
Daniel Henefeld, Counsel for Occupational Safety and Health
Jordan Laris Cohen, Trial Attorney
Nicole A. Steinberg, Law Clerk
U.S. Department of Labor, Office of the Solicitor, New York, NY

For the Complainant

Richard B. Stone, General Counsel
John English, Assistant General Counsel
Joshua S. Fischer, Assistant General Counsel
Christina V. Acker, Associate General Counsel
Trinity Solar LLC

For the Respondent

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act).

BACKGROUND

Trinity Solar LLC (Respondent or Trinity) is engaged in residential solar panel installation work. (Tr. 637-638; J-1 ¶ (d)(1)). On October 4, 2022, one of Respondent's workers fell during solar panel installation work at a residence located in South Orange, New Jersey. The worker died as a result of the fall. No one saw where the worker was or what he was doing immediately before he fell. (J-1 ¶¶ (c)(5), (8) – (12)). The worker was wearing a harness at the time of the fall and Respondent had previously installed rope lines and anchors/anchor points on portions of the residential roof planes on which solar panels were being installed. (J-1 ¶¶ (c)(13), (14)).

After being notified of the fall, the Occupational Safety and Health Administration (OSHA) commenced an inspection of the South Orange worksite. (J-1 ¶ (c)(6)). As a result of the inspection, OSHA issued to Respondent a Citation and Notification of Penalty (Citation) on April 3, 2023. The Citation alleges a repeat-serious¹ violation of one of OSHA's construction standards found at 29 C.F.R. § 1926.501(b)(13) and proposes a penalty of \$85,938. The citation as amended² alleges that "employees working on a residential roof, 22-feet above the ground, and 12-feet above the ground, did not utilize any means of fall protection during the process of entry upon and exit from the roof. Violation occurred 10/04/2022." First Amended Complaint ¶ V. Respondent filed a timely notice of contest, bringing this matter before the Commission.

A four-day hearing for this matter was held in Newark, New Jersey, on May 6 through May 9, 2024. Five witnesses testified: Angel Camacho, Trinity Crew Lead; Jose Juarez, Trinity Crew Lead; Austin Tyler, Trinity Senior Installer; Kenneth Rucki, Trinity Director of Safety; and OSHA Compliance Safety and Health Officer (CSHO) Michael Ajayi. An interpreter was utilized during the testimony of Camacho and Juarez. (Tr. 8-12).

¹ The repeat characterization of the Citation is based on an August 8, 2022 final order and a September 6, 2019 final order for violations of 29 C.F.R. § 1926.501(b)(13) in New York (2022) and Massachusetts (2019). (Ex. C-13).

² The undersigned granted the Secretary's opposed Motion to Amend Complaint and Citation on April 19, 2024. *See* Order Granting The Secretary's Motion To Amend Complaint And Citation (Apr. 19, 2024) (order with summary analysis); *see also* Order Granting The Secretary's Motion To Amend Complaint And Citation, With Analysis (Apr. 24, 2024) (order with in depth analysis).

The parties set forth sixteen stipulations.³ (Tr. 17-19; J-1). Both parties filed post-hearing briefs.

The key issues in dispute are whether the Secretary established by the preponderance of the evidence that 29 C.F.R. § 1926.501(b)(13) applied to the facts of this case and whether Respondent did not comply with 29 C.F.R. § 1926.501(b)(13) on October 4, 2022.

For the reasons set forth below Citation 1 Item 1 is VACATED. Any argument set forth by the parties that is not specifically addressed below has been considered and determined to have no merit.

JURISDICTION

Based on the record, the undersigned finds 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, 29 U.S.C. §§ 652(3) and (5). (J-1 ¶¶ (c)(1), (c)(2), (d)(1), (d)(2)). The undersigned finds the Commission has jurisdiction over the parties and subject matter of this case.

FINDINGS OF FACT

The Company & Project

Trinity installs solar panels on residences, and operates in New Jersey, Maryland, Pennsylvania, New York, Connecticut, Massachusetts, Rhode Island, and Florida. (Tr. 637-638; J-1 ¶¶ (c)(1), (3)). Over 30 years, Trinity has grown from a five-employee heating and air conditioning company serving commercial and residential customers to a residential-only solar panel installation company employing 3,236 workers. (Tr. 637-638; J-1 ¶ (c)(3)). Trinity's revenue exceeded \$10 million dollars in 2022. (J-1 ¶ (c)(4)). Trinity averages 40-70 jobsites on a given day. (Tr. 435).

In October 2022, Trinity was engaged in solar panel installation on a two-story single-family home in South Orange, New Jersey. *See, e.g.*, Ex. C-1, C-3 (photographs of the worksite); (Tr. 65, 80). As relevant to this case, the multi-day project entailed installing solar panels on two separate roofs of the residence – the upper roof which was at 22 feet height and the lower roof which was at 12 feet height. (Tr. 66, 72, 603, 798).

³ The parties stipulated to facts and principles of law as set forth in J-1. These will be referenced through this Decision as J-1 ¶# for the stipulation.

Two teams of Trinity workers are at issue in this case – the team that worked on the upper roof and the team that worked on the lower roof. (Tr. 80, 239-240). Angel Camacho and Jose Juarez were crew team leads.⁴ (Tr. 66, 287). Camacho⁵ was the team lead for the “main crew” of the project and Juarez’s⁶ crew joined Camacho’s crew on the third day of the project, October 4, 2022. (Tr. 157, 365).

Four workers worked on the upper roof – two on one side of the ridge line (as shown on pictures of the roof at issue) and two on the opposite side of the ridge line (not shown on pictures of the roof at issue). (Tr. 233-234, 238-240; Ex. C-1 at 21A). Two workers worked on the lower roof. (Tr. 80; Ex. C-3). The workers accessed each roof using two designated ladders – one “large” ladder to the upper roof and another ladder to the lower roof. (Tr. 252). While working on the roofs, Trinity workers all wore personal fall arrest systems (PFAS) for fall protection. (Tr. 688-689).

Each PFAS, as relevant to this case, consists of several critical parts – a body harness, a lanyard (or rope-line or lifeline⁷), clips (or connectors⁸), and, in some cases, a “shock pack.” (Tr. 688). The body harness is what the worker wears. The lanyard is the length of rope that connects the body harness to an anchorage point on the roof.⁹ The clip

⁴ At Trinity, a crew lead is the same thing as a foreman. (Tr. 435). The crew lead is in charge of the crew, runs the job from start to finish, gives everybody their work orders, supervises the other crew members, makes sure the crew members are following safety rules, stops work if safety rules are not being followed, and reports to management if someone is refusing to follow orders. (Tr. 435-436).

⁵ Angel Camacho has worked for Trinity for approximately nine or ten years. (Tr. 167, 235). During that time, Camacho was promoted from helper to installer to crew lead. (Tr. 167, 235-237). As he moved up in the ranks, Camacho attended multiple safety classes, including fall protection, and testified that he had been retrained in safety “all the time,” and that the training and training manuals are provided in Spanish to those who only speak Spanish. (Tr. 169-172).

⁶ Jose Juarez began working for Trinity in 2009. (Tr. 328). During his time at Trinity, he was promoted from helper to installer to crew leader. (Tr. 328). As of the time of the hearing, Juarez had been a crew lead for six years. (Tr. 247). Juarez testified to the multiple training classes he took and that those classes were provided in Spanish. (Tr. 329-330, 333, 337, 340-341).

⁷ These terms seemed to be used interchangeably in this case. (Tr. 519, 584, 693-694, 771; Ex. R-3 at 18). Based on the evidence in the record, the undersigned finds that terms “lifeline,” “rope-line” and “lanyard” all indicate the connecting length of rope between the harness and the anchor.

⁸ As relevant in this case, the term clip is the same thing as the term connector. (Tr. 773).

⁹ Two types of lanyards are relevant in this case. According to Safety Director Rucki, “You have the Y-lanyard (a work positioning device) and then you also have the shock absorbing lanyard which would be on the dorsal D-ring.” (Tr. 693-694). The Y-lanyard is attached to the front of the body

is the metal piece that connects the rope to the harness. (Tr. 45, 772-75; Ex. R-22 at 1). A “shock pack is used as a fall arrest device. ... What it does is in the event an employee should [free] fall within six feet ... it’s going to absorb the impact of the fall and help break that fall so that the employee does not feel the full impact of the fall.” (Tr. 681-82).

The most critical aspect of the PFAS is that it must be connected to an anchor on the roof to provide protection from falling. *See* Ex. R-3 at 18 (“The ABCs of Personal Fall Arrest Systems: Anchorage, Body Harness, Connector”). On the first day of the South Orange project, in accordance with Trinity’s fall protection policy, Camacho “and another person” installed anchors on the upper roof and lower roof for use by Trinity workers for their PFASs. (Tr. 80-81). Per Trinity policy, and as relevant in this case, the anchors on each roof were not moved or removed until the entire project was finished (about a week and half after the incident). (Tr. 44, 135, 251, 363, 788).

At the beginning of each subsequent workday, Camacho, as the team lead, connected all the personal rope lines¹⁰ to an anchor on the roof.¹¹ (Tr. 344). Those rope lines remained on the roof all day, but according to Trinity policy, Camacho, as the team lead, took down

harness, at the waist, whereas the dorsal D-ring is attached to the back of the body harness. (Tr. 660-662; 772-75; Ex. R-22 at 1). On the South Orange job, it was necessary to use both the D-ring lanyard and the Y-lanyard. (Tr. 361; 661-62, 772-75).

¹⁰ Rucki testified that each worker had their own PFAS, which included their own personal rope line with which they were comfortable. (Tr. 582).

¹¹ The “first man up technique” is a process used by Trinity to install the anchoring aspect for the PFASs of the workers on the project. (Tr. 343-344; Ex. R-22 at 1). “The first person that’s up is the one in charge of putting down all the anchors and connect all the lines so the other employees could go up.” (Tr. 344, 467-468, 659). As the first man up, Camacho also hooked each worker’s personal lifeline to an anchor on the roof. (Tr. 582, 785-789). Safety Director Rucki’s testimony suggests that Camacho may not have been protected by a PFAS when he installed the first anchor on the roof, two days prior to the incident, and connected the lifelines on the subsequent mornings. “Unless they’re the first man up for the start of the job, Your Honor, they’re the first person to go up the roof, the roof is not equipped with anchors and lifelines there. So, the first person has to go up there and install those anchors.” (Tr. 468, 659). However, Rucki also testified that Trinity employs a “Ridge Pro” device designed to protect the first-man up on a roof with a greater than 26.5 slope, or a “ball and line” approach to protect the first-man up. (Tr. 659-660; Ex. R-22 at 1). Camacho agreed that the upper roof was a “high-pitched” roof. (Tr. 79). The Secretary has not developed the record regarding Camacho’s accessing the roof in the morning to place the lifelines onto the anchor as the “first man up” on the morning of October 4, 2022. Rather, the Secretary has instead focused this case on Trinity’s other workers accessing the roof using the lifelines that had already been attached to the anchors. The undersigned also notes that Camacho installed these anchors two days prior to the incident and the Secretary has not alleged in any way whether Camacho’s installation of the anchors was a violation of OSHA’s standard.

each of the personal rope lines at the end of the day and gave each back to the worker to whom it belonged. (Tr. 786). And the process began again the next morning. No rope lines are left overnight on a worksite (but, as noted above, the anchors remained until the entire project was completed). Safety Director Rucki explained:

Q: If they come to a job site they had been working on, on a previous day, their ropes would still be on the roof, correct?

A: Normally, no, because, normally, at the end of the day, they still remove the lifelines even though the job is not done. They don't normally leave them hanging there. They take them down at the end of each day. That's what I was trying to explain . . . about yesterday, because the incident that we were talking about, it was roped off with a police rope, we weren't allowed to go there. We were shut down, so the ropes were left there.

Q: Okay. So, under Trinity practice, if workers are coming to an existing job site they haven't been on, they would change out the ropes for their own ropes. Let me then go back to that situation. And that's correct?

A: Yeah. The anchors would be there, but there would be no ropes there. They would be using their own personal issued ropes.

Q: Okay. And so, they would do that by going on the roof and changing out their rope lines?

A: You keep saying changing out the rope lines. The rope lines are taken down at the end of the day. If they came back to a job that they were never at, in most cases, the anchors are up there, but their ropes are not because the employees that were there previously took their ropes down at the end of the job that day.

(Tr. 780-781).

Importantly, attached to each of these anchored lifelines, is a clip. This clip is intended to attach to the worker's harness. On the upper roof, two anchored lifelines with clips are at issue: one that is to the left of the pictured ladder and one that is to the right of the pictured ladder.¹² (Ex. C-1 at 21, 22). The anchored lanyard clip to the left of the ladder

¹² A third anchor on the upper roof is noteworthy. This anchor is located up near the ridge line of the upper roof near the chimney. See Photographs marked R3 on Ex. C-1 at 21A (Camacho); marked Y3 on Ex. C-1 at 22A (Juarez) . This anchor held a rope line that was located too far to be "reachable" from a worker on the ladder. (Tr. 89, 295). However, as noted later, Juarez and Rucki

was “a shock pack for the dorsal D-ring.” (Tr. 694-95, 774-75; Ex. C-1 at 22B).¹³ The anchored lanyard clip to the right of the ladder is a Y-lanyard for a work-positioning device. (Tr. 662-65, 774-75; marked G-2 on Ex. C-1 at 22B (Rucki); marked C2 on Ex. C-1 at 21A (Camacho); marked X2 on Ex. C-1 at 22A (Juarez)). On the lower roof, two anchored lifelines with clips are also at issue: one to the left of the pictured ladder (marked C3 on Ex. C-3 at 2A (Camacho)) and one to the right of the pictured ladder (marked C4 on Ex. C-3 at 2A (Camacho)). (Tr. 212-213).

The Incident

On October 4, 2022, beginning at 8 a.m., workers climbed the ladders and worked on the two roofs without incident. (Tr. 66, 70-71, 238, 366). The decedent¹⁴ worked on the upper roof. (Tr. 72-73). At one point in the day, the workers all took lunch at the same time. (Tr. 68). At some point after lunch, the decedent fell. It is unknown where the decedent was when he fell – no one saw him on any surface right before he fell but it is stipulated that a Trinity worker saw the decedent “in the air” as he was falling. (Ex. J-1 ¶¶ 5, 8, 9, 10, 11, 12). The decedent died as a result of the fall. The decedent was wearing his harness, but it was not connected to an anchored rope line. (Ex. J-1 ¶ 14; Tr. 151).

OSHA Inspection

After receiving a call regarding the incident, the OSHA Parsippany Area Office dispatched CSHO Ajayi¹⁵ who arrived at the South Orange worksite approximately 40 minutes after the fall. (Tr. 797, 813). CSHO Ajayi did not observe any Trinity employee

testified that the practice of changing/switching/trading rope lines while workers were on the rooftop was implemented by Trinity. (Tr. 295, 784).

¹³ Safety Director Rucki was not present at the inspected worksite. At the hearing, Rucki reviewed the worksite photos taken by the CSHO. Based on his photo review, Rucki testified that two fall arresting device clips / connectors are shown to the left of the upper roof ladder (marked G1 and G3 on Ex. C-1 at 22B; Tr. 759-63, 772-78). Worksite Crew Leaders Camacho and Juarez identified one anchored lanyard clip / connector to the left of the upper roof ladder (marked C1 on Ex. C-1 at 21A, Tr. 102,113-15, 120-21 (Camacho), and marked X1 on Ex. C1 at 22A, Tr. 288, 295-98, 301, 361-62 (Juarez). Greater weight is given to the worksite crew leaders regarding the number of upper roof anchored lanyard clips / connectors to the left of the ladder.

¹⁴ Camacho testified that the decedent had worked for Trinity for six years. (Tr. 173). Camacho was asked, “When he was on your crew, would he be on your crew for every job that you were assigned to?” Camacho agreed. (Tr. 173). During those jobs, Camacho never saw the decedent without proper safety equipment and always saw him with his fall protection harness on. (Tr. 174).

¹⁵ CSHO Ajayi is a Safety Engineer and has worked for OSHA for six to seven years. (Tr. 796).

working on the roof or working on the ground while he was at the worksite. (J-1 ¶ (c)(7)). During his investigation, CSHO Ajayi took several pictures of the worksite from street level, but did not ascend any ladder to take pictures. (Tr. 798, 815; Ex. C-1). CSHO Ajayi also did not take any measurements of distances between the top of any ladder and rooftop fall protection items, such as anchors, during his inspection. (Tr. 814-815).

Respondent's Safety Program

Trinity is no stranger to OSHA fall protection regulatory requirements. Respondent has a fall protection safety program, including training and a robust self-audit monitoring program of worksites. Exs. C-8, C-10, C-11, C-12, R-3, R-4, R-5, R-18, R-19, R-22 at 1, R-22 at 8, R-34 to R-43, R-45. Trinity also has two prior Commission final orders of fall protection violations of the cited standard, section 1926.501(b)(13) – one from September 2019 and the other from August 2022. (Sec'y Br. 36; Resp't Br. 25-26; Ex. C-13; Tr. 557). The record supports a finding that Trinity was aware of fall protection requirements on its worksites and provided training and PPE to its workers and communicated fall protection safety rules and monitored its jobsites, to facilitate a safe working environment.

However, the record is replete with evidence that Respondent *intentionally* did not discipline its workers for fall protection violations during the COVID timeframe, importantly during the timeframe of this citation item.¹⁶ *See, e.g.*, Resp't Br. 4 (“It is axiomatic that there exists a delicate balance between enforcement of disciplinary measures and maintaining a workforce, especially in light of and during the unprecedented events of the COVID-19 pandemic”); *see also* (Tr. 379-419 (testimony of Austin Tyler¹⁷), 434, 444-446); Exs. C-10 (examples of Trinity audit-based violations without associated discipline), C-11, C-12, R-34 to R-43; Sec'y Br. 30-32 nn. 18-30 (reciting specific instances of Trinity worker safety violations from Ex. C-10). During its safety audits, Trinity noted many crew leads and workers had repeated fall protection infractions and yet those workers were not

¹⁶ While relevant to the knowledge element of an alleged violation analysis, and the unpreventable employee misconduct defense to an established violation, this evidence does not help the Secretary establish whether the cited standard was applicable or violated in this case.

¹⁷ Austin Tyler has been with Trinity since April 2021. (Tr. 382). He is currently a senior installer but previously worked as a crew lead. (Tr. 380-381). During his time as a crew lead, members of Tyler's crew at times worked without fall protection and were not “terminated,” although Tyler was disciplined by Trinity by removing his title as a result of those safety infractions. (Tr. 282, 390-391, 398, 401, 403, 412.)

demoted or terminated, despite Trinity’s safety program disciplinary policies. (Sec’y Br. 30-32). In one instance, when the Trinity safety auditor observed a crew lead and team incorrectly using a ladder, the crew lead told the Trinity safety auditor, “I don’t care [I’m] just trying to get the job done[.] And refuse[d] to take any corrective action.” (Tr. 490; Ex. C-10 at 60).

Returning to fall protection methods, Trinity Director of Safety Kenneth Rucki¹⁸ testified in this matter. (Tr. 432-794). Rucki testified to the specific forms of fall protection that Trinity uses on all its worksites. Rucki testified that two forms of fall protection were used on the South Orange worksite – a fall arrester and a work-positioning device – based on pictures taken from the worksite. Rucki explained:

[A] fall arrester protects the employee in the event he or she should fall, helps absorb the impact of the fall... A work-positioning device prevents the employee from falling. It does not allow them to fall. It holds them in position while working. They can only move left and right. They can't move up and down.

(Tr. 774).

Notably, Rucki testified that sometimes workers switch from fall arresters to a work positioning device while they are on the roof.

Looking at [the picture of the upper roof], what it looks like, again, I don’t know because I wasn’t there. But in a lot of cases, what they do is the worker starts off with the positioning device first. Once they get the rails and they feed it and they’re ready to start moving around the rails to prep the panels, they then switch to the fall arrest, and they take that and toss it to the side.

(Tr. 665-666 referring to Ex. C-1 at 22B). Rucki explained that the work positioning device is also known as a “Y-lanyard” and the “fall arrester” is also known as a “shock pack,” and that both are used “in the ordinary course of its installation,” including at the South Orange worksite. (Tr. 617, 692-695; Ex. C-1 at 22B; Ex. R-3 at 17-18).

CITATIONS

¹⁸ Kenneth Rucki has been employed by Trinity for 30 years and has been the Director of Safety since May 2021. (Tr. 433). As the Safety Director, Rucki reports to Trinity’s vice president of operations and, “from time to time,” the company owners. (Tr. 434). Rucki’s staff consists of Trinity’s safety officers and safety administrators who cover all of Trinity’s operations across eight states. (Tr. 434).

To prove a violation of an OSHA standard, the Secretary must establish by the preponderance of the evidence: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Donahue Indus., Inc.*, 20 BNA OSHC 1346, 1348 (No. 99-0191, 1994); *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Citation 1, Item 1

Citation 1, Item 1 alleges a repeat-serious violation of 29 C.F.R. § 1926.501(b)(13), which provides that:

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.

29 C.F.R. § 1926.501(b)(13). The Secretary alleges that Respondent violated 29 C.F.R. § 1926.501(b)(13) when:

a. [South Orange, NJ]

Employees working on a residential roof, 22-feet above the ground and 12-feet above the ground, did not utilize any means of fall protection during the process of entry upon and exit from the roof. Violation occurred 10/04/2022.

(First Amended Complaint ¶ V). The Secretary proposed an \$85,938 penalty for this alleged repeat-serious citation item.

Applicability

The undersigned finds that OSHA's construction standards generally apply to Respondent's worksite. The project in South Orange, New Jersey entailed installing solar panels to a residential rooftop. This task fits into the plain definition of construction work as defined by OSHA. *See* 29 C.F.R. § 1910.12(a) (construction industry standards prescribed in Part 1926 apply to "every employment and place of employment of every employee engaged in construction work."); 29 C.F.R. § 1910.12(b) ("construction work" as used in section 1910.12(a) "means work for construction, alteration, and/or repair, including

painting and decorating.”) Respondent also does not claim that OSHA’s residential construction standards do not generally apply to its worksite for this citation item.

The cited fall protection standard also applies to Respondent’s workers but only to the extent that another standard does not apply.¹⁹ Even the Secretary states “OSHA standards do not require the use of a fall arrest system while ascending a ladder.” (Sec’y Br. 14); *see also* 29 C.F.R. § 1926.500(a)(2)(vii) (“requirements relating to fall protection for employees working on stairways and ladders are provided in Subpart X[.]”); SOL Interpretive Letter, “Ladders; fall protection; working on top of equipment,” (May 21, 2003), <https://www.osha.gov/laws-regs/standardinterpretations/2003-05-21-1> (accessed October 27, 2024) (“Subpart X (29 CFR 1920.1050 *et seq.*) does not require fall protection for a worker on a portable ladder”). Because the Secretary alleges a rooftop fall protection violation in the citation, the Secretary also bears the burden of establishing that workers were unprotected *while on a roof*. (First Amended Complaint ¶ V) (“Employees *working on a residential roof*, 22-feet above the ground and 12-feet above the ground, did not utilize any means of fall *protection during the process of entry upon and exit from the roof.*”)

Facts Surrounding the Decedent’s Fall

The Secretary argues that the preponderance of the evidence establishes that the decedent “fell while stepping onto the roof,” rendering the standard applicable. (Sec’y Br. 5-6). The Secretary claims that the pictures from before and after the incident establish that the decedent “caused a dent in the gutter during his fall.” (Sec’y Br. 5, 13-14). The Secretary also claims that it is “more likely than not” that the decedent fell from the roof than the ladder based on previous incident reports held by Respondent. (Sec’y Br. 6, 14-15). Respondent argues the record does not establish that the decedent was accessing the roof or on the roof at the time of the fall. (Resp’t Br. 9). The undersigned agrees with Respondent.

The Secretary relies on an alleged statement taken from a Trinity post-accident interview of Werling Calderon, one of the four workers on the South Orange worksite who worked on the upper roof. (Sec’y Br. 5, 13-14; Tr. 79). According to the Secretary, Calderon told Trinity that he saw the decedent fall from “up around the gutter area of the roof.” (Tr.

¹⁹ 29 C.F.R. § 1910.5(c)(1) provides: “If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.”

578-579). Calderon's vague statement does not answer the fact question regarding where the decedent was at the time he fell, whether it was from the ladder, while entering the rooftop, or from the rooftop itself.

Additionally, this statement involves several layers of hearsay. (Tr. 763-769). Rucki testified regarding an out of court statement made to him by an employee. Calderon was on both parties' witness lists and attended the hearing. (Tr. 12). He was not called by either party to testify. This statement is therefore given little weight – and – alone does not resolve the fact issue. Even with this statement, it is possible that the decedent was around the gutter area – and – on the ladder. The Secretary also relies on previous Trinity injury records to show “the generally accepted view that falls are less likely while ascending a ladder.” (Sec’y Br. 14). The undersigned rejects this attempt at buttressing the Secretary’s speculative argument that “it is more likely than not that [the decedent] was on the roof or stepping onto the roof at the time of his fall[.]” (Sec’y Br. 15).

Furthermore, the photographs cited by the Secretary in her brief are taken from different vantage points – the status photograph from the rooftop, the inspection photo from the ground 22 feet below. They do not clearly show a changed / damaged gutter. The anticipated change to a rooftop gutter from the fall weight of an adult male is not depicted. Furthermore, the suggestion of the photographs depicting a change is introduced into the record via leading questions to workers, testifying through two levels of Spanish/English translation - translation at a deposition, which deposition testimony was again translated at the hearing. (Tr. 134, 152-155, 161-162, 322-323).

The Secretary notes that Respondent did not make a damage report of a damaged gutter regarding this job site. (Sec’y Br. 6, 13-14). As the record reveals Respondent’s practice of noting damage to the home worksite during installation projects, the absence of a damage report here supports the finding that the gutter does not reveal gutter damage – or a change in the gutter’s appearance – based on this worksite solar installation or the work or conduct of the installers during this job. This is consistent with the photographs that do not reveal a notable change in the appearance of the gutter.

Therefore, the facts surrounding the decedent’s fall do not establish applicability in this matter.

Facts Surrounding the Practices on the Worksite

Other facts in the record, however, establish applicability of this standard. On the South Orange worksite, on October 4, 2022, four workers worked on the upper roof and two workers worked on the lower roof before lunch. The locations of their work were photographed and marked by witnesses during the hearing. All those workers were entering and exiting the rooftops from two ladders. As Juarez testified, “[t]he employee goes up the ladder, he reaches a certain point, and then he takes the point of the connector to connect himself.” (Tr. 346). The undersigned finds that the cited residential fall protection standard applies to Respondent’s general practice of ascending a ladder, accessing a roof, and working from a residential rooftop at 22-feet and 12-feet, all of which occurred on October 4, 2022.

The cited standard applies.

Non-Compliance

There is no evidence that Trinity employees worked on the rooftop on October 4, 2022, without fall protection on the South Orange worksite. The decedent’s fatal fall alone does not establish noncompliance with the cited standard. If the decedent fell from the ladder, the cited standard did not apply and could not be violated. As found above, the record evidence does not establish the location from which the decedent fell and so therefore, the undersigned finds that the Secretary did not establish noncompliance with the cited standard based on the facts surrounding the decedent’s fatal fall.

The rest of the Secretary’s case is built on the photographs that CSHO Ajayi took after the fatal fall. The Secretary argues that Respondent *must have* violated the cited standard because “[t]he placement of the rope lines shows [the decedent] and other employees were not tied off when entering and exiting the upper and lower roof.” (Sec’y Br. 16). The Secretary claims that the rope lines connected to the anchors that workers were supposed to reach from the ladder to connect to their PFAS before leaving the ladder to get onto the roof were too far away and therefore Respondent’s workers *must have been* climbing onto the roofs from the ladder without being protected by a PFAS. (Sec’y Br. 16-23). Respondent claims that the record establishes no such thing – all witnesses testified that the rope lines were reachable from the ladder, the pictures taken by CSHO Ajayi do not reflect an accurate view of the worksite during the installation, and CSHO Ajayi took no

measurements to determine the distances that the Secretary sought to establish. The undersigned agrees with Respondent.

The Lower Roof

Photographs in the record show the upper roof and lower roof and were discussed by Camacho, Juarez and Rucki. *See* Ex. C-1 at 21A (upper roof Camacho markup); Ex. C-1 at 22A (upper roof Juarez markup) (Tr. 317, 327); and Ex. C-1 at 22B (upper roof Rucki markup). *See* Ex. C-3 at 1A) (lower roof Rucki markup) (Tr. 626, 751); Ex. C-3 at 2A) (lower roof Camacho markup) (Tr. 141-42, 164, 206); Ex. C-3 at 2B (lower roof Camacho markup) (Tr. 208-09, 213); Ex. C-3 at 2C (lower roof Juarez markup) (Tr. 317-21 327). These pictures depict the upper and lower roofs at the time CSHO Ajayi arrived at the worksite after the incident occurred.²⁰

This evidence in the record regarding the lower roof does not support a finding of noncompliance with the cited standard because the pictured ladder to the lower roof had been moved *after the fall* from the entrance way to the house (where it had been stationed before the fall) to the right side of the house.²¹ (*Compare* Tr. 206-10; Ex. C-3 at 2B; *with* Tr. 352-55; Ex. C-3 at 2C). Additionally, the rope lines on the roof are positioned such that they reflect the fact that “when the police got there, they told the guys to move down, get out of the roof because the police were there” and they got off the roof “swiftly.” (Tr. 357). Therefore, where exactly the ladder was prior to the move, and whether the employees were able to reach the anchored clips, is not able to be discerned from the photographs in

²⁰ Other pictures in the record depict the worksite before the accident occurred. These pictures were taken for the purpose of establishing progress of the project. (Exs. C-2, C-5; C-6; Tr. 127-128, 154-157, 626-627).

²¹ The Secretary’s Post-Hearing Brief contains many misconceptions of the matter at hand. *See, e.g.*, Sec’y Br. 23, n.15. For example, the Secretary first mistakenly states that the ladder was moved “immediately before the fall.” This is a misunderstanding of the testimony. (Tr. 206-10, 352-55). Second, the Secretary relies on alleged facts outside the citation timeframe – it is irrelevant in this matter what Respondent’s workers did a week and half after the incident because the Citation alleges that the violation occurred only on the day of the incident, October 4, 2022. Finally, the Secretary claims that the alleged fact that the ladder was moved is inconsistent with Camacho’s and Juarez’s testimony that ladders are not typically moved during the project. (Tr. 45). The decedent’s fall, however, was not a typical event of a project, so the undersigned does not find that the fact the ladder was moved after the fall is inconsistent with such testimony.

evidence. Furthermore, Camacho, Juarez and Rucki²² all testified that the rope line connectors as depicted in the post-accident photographs of the lower roof in the record were “reachable” to Trinity workers such that they could hook their harnesses to the rope lines before leaving the ladder on October 4, 2022. (Tr. 213, 359, 682-683).

The Upper Roof: Was the standard violated when one employee entered the rooftop from the ladder?

The Secretary claims that the rope lines on October 4, 2022, were too far away from Trinity’s workers for them to connect without leaving the ladder and therefore they must have been accessing the upper roof and lower roof without being connected and therefore unprotected from a fall hazard. (Sec’y Br. 18-20, 22). The Secretary bases her argument on an alleged rule that Trinity follows – that a connector to a rope line must be 12 inches or less away from a ladder. (Sec’y Br. 6). The Secretary claims:

A rope line located more than one foot away from an access ladder is too far to be reached from the ladder, thus exposing an employee to a fall hazard to reach the rope. Tr. 54:21-24, 55:18-22 (Camacho); Tr. 280:18-281:2 (Juarez) (a rope line located more than six inches away from a ladder is too far to be reached); *see also* Tr. 280:7-17 (Juarez) (one foot away would not comply with Trinity policy because it could not be reached safely at that distance); *see also* Tr. 522:15-19, 520:22-25 (Rucki) (a rope line must be “within hand’s reach of the access ladder,” which is “right here at your hands to where you’re not extending your arm to get it” and “right in front of you.”)

(Sec’y Br. 6-7).

First, this alleged “12 inches” rule is not an OSHA regulation. The undersigned hesitates to hold Respondent to its own work rule that could be more restrictive than what is required by the cited OSHA standard. Further, the Secretary introduced this alleged “12 inches” rule through the Secretary’s own questioning. (Sec’y Br. 6-7). There are no exhibits in evidence supporting the 12-inch distance limitation for the anchored clip from the worker standing on the ladder. This is not a distance stated in Respondent’s PPE/fall protection rules. Rucki testified that Trinity policy requires rope lines to be “within hand’s reach” as

²² Although Rucki was not on the worksite on October 4, 2022, his testimony is corroborative because he is familiar with Trinity’s fall protection safety program, and he reviewed the inspection photographs during his testimony.

opposed to “arm’s reach²³” from the ladder. (Tr. 520-530). In its Job-Site Observation Form, there is a prompt asking, “Are the ropes extended properly or leading to the exit ladder?” (Ex. C-10 at 1); *see also* Tr. 757-763 (tying Ex. C-10 prompt to relevant distance on upper roof of South Orange worksite). Rucki testified that it is a violation of Trinity policy if a rope line is not “at the ladder.” (Tr. 518-519 citing Ex. C-10). However, Rucki also testified to the following:

Q And if any installer were on either of the two ladders, if the lines were in reach, would that have satisfied Trinity's policy?

A Yes.

Q And would that have satisfied OSHA's requirements?

A Yes.

(Tr. 749-750). The questioning itself – through two levels of translation and via leading questions – of the crew leads during the hearing led to attempted impeachment by deposition for each witness who ultimately maintained that rope lines must be “reachable” by the worker from the ladder. *See, e.g.*, Tr. 54 – 56 (Camacho), 279-281 (Juarez). For these reasons, on balance, the testimony regarding whether violating the alleged “12 inches” rule is potentially unsafe is assigned lesser weight.

Second, the consistent thread within the testimony is that each witness stated that the rope lines must be “reachable” by the worker from the ladder to comply with Trinity’s safety policy. (Tr. 56, 271, 749-750). The Secretary does not address the multiple instances in the record that establish that the South Orange workers could in fact reach the rope lines during the installation process from the ladder. Camacho, Juarez, and Rucki all testified that the rope line connectors on the South Orange worksite as depicted in the post-accident photographs in the record were “reachable” to Trinity workers such that they could hook their harnesses to the rope lines before leaving the ladder on October 4, 2022. (Tr. 205

²³ Rucki explained that “arm’s reach” is:

if you’re standing on the ladder and you're reaching out to the left, lean over, extend your arm and reach. So, depending on the person's height, that reach could be anywhere from 36 inches to 30 inches. Depending on the size of the person, it could be 28 inches. So, it's within their arm's length to be able to reach it without stepping on the ladder. It's within arm’s reach. It could be either left or right.

(Tr. 520).

(upper roof), 213 (lower roof), 358-59 (lower roof), 361-62 (upper roof), 671 (upper roof), 676-77 (upper roof), 682-683 (lower roof)). This testimony rebuts the claim in the alleged violation description within the Citation stating that Trinity “did not utilize any means of fall protection during the process of entry upon and exit from the roof.” (First Amended Complaint ¶ V). For these reasons, this testimony regarding whether the rope lines were “reachable” from the ladder by Trinity workers is assigned greater weight.

Finally, regarding the upper roof, both Camacho and Juarez testified that they estimated the distance from the closest anchored clip to the ladder to be “two inches.” (Tr. 115-16, 120-21, marked C1 on Ex. C-1 at 21A (Camacho). Tr. 361-62, marked X1 on Ex. C-1 at 22A (Juarez)). The Secretary, however, relies on Rucki estimating from a photograph to establish a distance of “approximately 18 inches” between “the connector for the rope line to the left of the solar panels” to “the edge of the gutter.”²⁴ (Sec’y Br. 19-20); *see also* Tr. 608-612, marked G1 in Ex. C-1 at 22B (Rucki). As the Secretary noted, however, Rucki had no firsthand knowledge of the job site.²⁵ (Sec’y Br. 18 n.7). The undersigned credits the testimonies of both Camacho and Juarez, who were both on the worksite on October 4, 2022, as the location of the closest anchored clip to the ladder on the upper roof and that the distance was 2 inches.

The preponderance of credible and persuasive evidence establishes that an anchored rope line was reachable by a Trinity worker from the ladder before he began entering the roof. Therefore, the Secretary’s claim – that the rope lines on October 4, 2022, were too far away from Trinity’s workers for them to connect without leaving the ladder and therefore they *must have been* accessing the upper roof without being connected and therefore unprotected from a fall hazard – fails. The Secretary did not carry her burden to establish non-compliance with the cited standard when one employee entered the rooftop from the ladder or exited the rooftop to the ladder.

²⁴ This end point of “the edge of the gutter” seems arbitrary since the Secretary compares it to testimony in the record referring to the relevant distance as between the anchored clip and the “ladder.” (Sec’y Br. 17).

²⁵ The Secretary points out that Rucki’s testimony stating that there were four available anchored rope lines on the upper roof is inconsistent with Camacho’s testimony stating that there were only three available anchored rope lines on the upper roof. (Sec’y Br. 18 n.7 comparing Tr. 673-674 with 109-113).

The Upper Roof: Was the standard violated when the subsequent employee entered the rooftop from the ladder?

The Secretary next claims that “at least one worker on the upper roof was entering and exiting the roof without fall protection,” assuming one anchor per worker and only one anchor was reachable from the ladder.²⁶ (Sec’y Br. 20-21). It is undisputed that each anchored clip was limited to one worker due to weight constraints. The Secretary argues that the anchor to the right of the ladder was too far away to be reachable by a worker on the ladder and the record evidence supports this argument. (Tr. 290-294, marked X2 on Ex. C-1 at 22A. Tr. 607, 665; marked G2 on Ex. C-1 at 22B). The Secretary then claims that:

even if the rope line to the left of the solar panels was accessible from the ladder, the evidence still establishes that at least one employee working on the upper roof – *the employee using the rope line to the right of the solar panels* – entered and exited the roof without being tied off.

(Sec’y Br. 21) (emphasis added).

But the Secretary fails to address the possibility that one worker ascends onto the roof using one anchored rope line and then switches over to another anchored rope line on the roof, leaving the initial anchored rope line available for the next worker. Juarez testified to the following:

Q: And you’d agree that the rope line that’s connected to Y-3 is way too far to be safely reached from the ladder?

A: (Through Interpreter) Yes, because, when they’re like this, the last one who’s there, he’s going to have to change to – the change is up there so he can come back down. They change their rope.

(Tr. 295). Rucki explained:

If they’re changing, they’re required to hook. So, for example, like I was explaining to the Judge, they have their work-positioning device on. That device stays on while they take the secondary rope, which is the fall arrest, hook to the dorsal D ring, adjust the slack, and then they disconnect the other rope and put it off to the side, the other rope, which is the work-positioning device. But they’re not allowed to be up there disconnected.

²⁶ Camacho and Juarez testified that there was only one anchored rope line immediately to the left of the ladder to the upper roof, but Rucki testified that there were actually two anchored rope lines immediately to the left of the ladder, and the one extra anchored rope line was connected to an anchor on the rear of the house (not pictured). (Tr. 759-63, 772-78; marked G1 and G3 on Ex. C-1 at 22B). Rucki, however, was not speaking from personal experience of having been on the South Orange worksite. See note 13 above.

They have to connect to the other one before disconnecting the positioning device.

(Tr. 784). Juarez and Rucki testified that a “Y-lanyard,” which is a work-positioning device, is pictured in marked photographs of the upper roof. (Tr. 361-63, marked X2 on Ex. C-1 at 22A. Tr. 661-666, 669, 693-695, 772-78; marked G2 on Ex. C-1 at 22B). The Secretary attempted to elicit adequate contrary evidence at the hearing regarding switching – but Camacho²⁷ and Juarez²⁸ never fully agreed with the Secretary’s leading questions regarding

²⁷ Camacho testified:

Q And, Mr. Camacho, the rope lines have to -- excuse me. Both rope lines have to be able to reach the ladder because you don't want the workers having to switch lines every time one goes up and down?

A (Through Interpreter) Can you please repeat again?

MR. COHEN: Could the court reporter read that back, please?

(Whereupon, the question was read back.)

THE INTERPRETER: The court interpreter wants clarification.

THE WITNESS: (Through Interpreter) Yes.

(Tr. 59).

²⁸ Juarez testified:

Q Under Trinity policy, if there are two employees working on the same side of the roof, each of the rope lines have to reach the ladder, is that correct?

A (Through Interpreter) Yes.

Q If one rope reached the ladder and the other did not, you'd have to have the workers changing ropes all the time to get onto the roof, is that correct?

A (Through Interpreter) Yes.

Q You'd have to constantly switch between the ropes when someone's getting on the roof, is that correct?

A (Through Interpreter) Not constantly because sometimes there's only two working in the roof.

Q So, if two employees are working on the same side of the roof and each of the rope lines don't reach the ladder, you'd have to switch between the rope lines when someone's getting onto the roof, correct?

this issue. *See Lanzo Constr. Co.*, 20 BNA OSHC 1641, 1647 n.7 (No. 97-1821, 2004) (limited weight given to answers to leading questions, where the leading question suggests the answer for the witness that assumed the truth of a controverted fact.) *aff'd*, 150 F. App'x 983 (11th Cir. 2005) (unpublished).

This testimony by Rucki and Juarez and the photographic evidence provide sufficient evidence to establish that Respondent's workers utilized the possibility of line-switching while working on the upper roof of this worksite. Indeed, the Secretary failed to set forth any affirmative evidence of the practices and procedures Respondent's workers utilized to traverse the rooftop once on the rooftop. The Secretary requests that the undersigned draw the inference that based on the hardware and position of the ladder alone – the subsequent employee to enter the roof *must* have done so without fall protection.²⁹ (Sec'y Br. 20-21). This requested inference is rejected.

The Secretary has failed to establish non-compliance with the cited standard. This citation item is vacated. As the Secretary has failed to meet her burden of proof regarding noncompliance with the standard, the remaining elements of the Secretary's burden of proof – exposure, knowledge, classification, and penalty – and Respondent's affirmative defense of unpreventable employee misconduct are not addressed.

Q Yes.

A (Through Interpreter) And Trinity doesn't do that, is that correct?

A (Through Interpreter) What, like interchangeable, change them?

Q I'll move on[.]

(Tr. 281-82).

²⁹ As noted earlier, four employees worked on the upper roof, two on the side of the upper roof that is depicted in the photographs marked by the witnesses (Ex. C-1 at 21A, 22A, and 22B), and two on the other side of the upper roof that is not depicted in any photograph marked by the witnesses. While the record is somewhat developed with regard to the two workers who worked on the side of the upper roof in the photographs marked by the witnesses, the record is underdeveloped with regard to the two employees who worked on the upper roof that is not depicted in the photographs (i.e., on the opposite side of the roof over the ridge line). It is unknown how, when and even whether those two workers accessed and traversed the upper roof on October 4, 2022. In her Post-Hearing Brief, the Secretary does not even specifically allege that those two particular workers were unprotected, instead focusing on the two employees who worked on the pictured portion of the upper roof. (Sec'y Br. 20-21).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

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

Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.501(b)(13), is VACATED.

SO ORDERED.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC

DATE: December 26, 2024
Washington, D.C.