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

Secretary of Labor, Complainant v. Preferred Roofing, LLC, Respondent.	OSHRC Docket No. **23-1752**

Representatives:

Matthew K. McClung, Esq.
U.S. Department of Labor, Office of the Solicitor, Nashville, TN, for Complainant

Brian Flynn and Heather L. Pobicki
Superior Safety Solutions, LLC, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

While driving past a home in Jacksonville, Florida, Compliance Safety and Health Officer (CSHO) Dianne Cuyler of the Jacksonville Area Office of the Occupational Safety and Health Administration (OSHA) saw several men working on the roof without fall protection. Based on her observations, CSHO Cuyler initiated an inspection of the roofing job. Her inspection revealed three roofers on a 10 to 25-foot high, 5:12 pitched residential roof, none of whom appeared to be using any form of fall protection. From information she obtained on the site, CSHO Cuyler discovered employees of Valor Roofing Company (Valor) comprised the crew and Preferred Roofing, LLC (Preferred Roofing) was the general contractor for the job. Based upon these findings, the Secretary issued Preferred Roofing a two-item citation alleging serious violations of 29 C.F.R. §§ 1926.501(b)(13) and 1926.1053(b)(1) for failure to provide fall protection and failure to properly extend the side rails of a portable ladder used on site,

respectively. The Secretary issued the citation to Preferred Roofing under the Secretary's multi-employer worksite policy. The Secretary proposes a total penalty of $8,037.00 for the citation.

There is little doubt the roofing crew observed by CSHO Cuyler was not protected from a fall hazard and that the ladder in use was not compliant with the cited standard. The question is: Was Preferred Roofing properly cited for the exposure of Valor's roofing crew? To answer that question, the court must interpret and apply the multi-employer worksite doctrine to the unique facts of this case.

The undersigned held a hearing under the Commission's Simplified Proceedings on May 13, 2024, in Jacksonville, Florida. The parties filed post-hearing briefs on June 13, 2024.[1]

For the reasons discussed below, Items 1 and 2, Citation 1, are vacated.

JURSIDICTION

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 651. The parties also stipulated that at all times relevant to this action Preferred Roofing was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act. Based on the parties' stipulations and the facts presented, Preferred Roofing is an employer covered under the Act and the Commission has jurisdiction over this proceeding.

BACKGROUND

Stipulated Facts

The parties stipulated to the following facts:

1. Jurisdiction is conferred on the Commission by § 10(c) of the Occupational Safety and Health Act.
2. Respondent is an employer engaged in business affecting commerce within the meaning of § 3(5) of the Act.
3. The presiding Administrative Law Judge has authority to hear the case and issue a decision.
4. The cited standard, 29 C.F.R. § 1926.501(b)(13), applies to Respondent.
5. An inspection of Respondent's worksite at [redacted], Jacksonville, Florida 32208 (the "worksite") was conducted by OSHA on July 18, 2023.

[1] To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned.

6. As a result of the inspection by CSHO Dianne Cuyler, authorized representative of the Secretary, Respondent was timely issued a Citation and Notification of Penalty.
7. Respondent timely contested the Citation and Notification of Penalty.
8. Respondent is a Florida limited liability company with a principal address of 2332 Dunn Avenue, Jacksonville, Florida 32218.
9. Respondent was engaged in residential roofing construction on the date of the alleged violations.
10. Respondent engaged a subcontractor, Valor Roofing, Co., to perform the roofing work at the worksite at the time of the inspection on July 18, 2023.
11. On July 18, 2023, four workers who were employees of the subcontractor Valor Roofing, Co., were working at the worksite.
12. On July 18, 2023, the workers performing the roofing work at the worksite deployed a portable ladder as a means of accessing the roof being worked on at the worksite.
13. While on top of the roof at the worksite, the four workers were exposed to falling a distance of more than 6 feet.
14. The roof at the worksite did not have any guardrail or safety net systems.
15. The four workers on the roof at the job site did not have any fall arrest system while on top of the roof at the worksite.

(Tr. 8; Joint Pre-hr'g Statement).

Findings of Fact

Preferred Roofing's Operations

Preferred Roofing is a construction company. It performs residential, commercial, and specialty roofing and employs between six and seven people (Tr. 92, 97). Among those employees are two repair technicians, who perform warranty and repair work, and administrative staff. Preferred Roofing uses subcontractors to perform all other roofing and reroofing jobs (Tr. 92-93, 98).

James Snead, Preferred Roofing's vice president, testified the company vets its subcontractors prior to hiring (Tr. 92-93). Once it contracts with a subcontractor for a particular job, Preferred Roofing does not directly supervise the work of the subcontractor as long as the subcontractor has its own onsite supervision (Tr. 93). Snead visits worksites to ensure subcontractors are in compliance with the terms of the contract with Preferred Roofing, including complying with safety and quality standards (Tr. 94). If he had a concern with the work of the subcontractor, Snead would "swing in a little bit more often and spot check their jobs." (Tr. 93-

94). Snead testified he has the authority to stop work and correct any unsafe condition he observes on a worksite (Tr. 93). He either does so directly with the crew on site or raises the issue with the subcontractor's site supervision. In addition to having corrected unsafe conditions in the past, Snead testified Preferred Roofing has stopped using subcontractors who do not comply with safety and quality standards (Tr. 94).

The Subcontract with Valor

In June of 2023, Preferred Roofing entered into a subcontract agreement with Valor (Ex. C-11). Prior to entering into the subcontract agreement, Snead and Preferred Roofing's chief of operations met with Rebekah Stevens, the owner of Valor (Tr. 95). As well as discussing the subcontract agreement terms, Snead explained to Rebekah Stevens that they had had issues with prior subcontractors complying "with safety standards, cleanups, etc." (Tr. 94) He did so to ensure Valor was willing to "alleviate those issues." (Tr. 95)

The subcontract agreement (the contract) spelled out the obligations and rights of Preferred Roofing and Valor. It required Valor to supply "equipment, labor and services" and to perform the work in accordance with the contract between Preferred Roofing and the homeowner (Ex. C-11 ¶1). It also required Valor to provide Preferred Roofing with proof of insurance (Ex. C-11 ¶¶5 and 6). Regarding safety, the contract required Valor to comply with all "statutory and contractual safety requirements," provide Preferred Roofing with notice of any on-the-job injury, provide its employees with all safety training, and provide all safety equipment to its employees (Ex. C-11 ¶11).

Under the contract, Preferred Roofing retained oversite of the job. The contract directed Preferred Roofing to obtain all permits and arrange all necessary inspections, as well as provide all plans and designs (Ex. C-11 ¶¶3, 18). The contract required Valor to provide Preferred Roofing access to the job site at all times and provide written progress reports "if necessary" (Ex. C-11 ¶12). It also prohibited Valor from undertaking change orders without written approval from Preferred Roofing and from erecting any signs showing its name on the job (Ex. C-11 ¶¶7, 18).

At the time of the inspection, Preferred Roofing had been working with Valor for approximately two weeks (Tr. 99). Snead had checked on the first job with Valor and found one person without fall protection (Tr. 95). He spoke with Jarren Stevens, part owner and onsite supervisor, who corrected the issue (Tr. 96). Snead checked on the next job with Valor, which

was within the same week, and found all safety procedures being followed (Tr. 96). Ultimately, Preferred Roofing stopped using Valor as a subcontractor because of the quality of the work and, as Snead put it, "an OSHA violation within week two wasn't a huge mark in their favor." (Tr. 96)

The Worksite and the Inspection

Preferred Roofing had contracted with a homeowner in Jacksonville, Florida, to reroof her single-story home. Preferred Roofing assigned Valor to perform the work. The job was to take one day. According to the permit obtained by Preferred Roofing from the City of Jacksonville, the roof pitch was 5:12 (Ex. C-10; Tr. 5). The lower eave of the home was nine feet above the ground (Tr. 29). On the backside of the house was an empty swimming pool (Tr. 21).

CSHO Cuyler was driving past the home when she saw the Valor employees working on the roof. She noticed they were not utilizing any form of fall protection and determined she needed to initiate an inspection which she did after getting confirmation from her office (Tr. 15, 46). She drove to an area where she could take photographs of the workers on the roof (Tr. 15-16; Exs. C-1, C-2, C-3, C-5). She noted a ladder in use and photographed it (Tr. 27; Ex. C-7). She eventually parked her car at the property and approached an employee who was descending the ladder (Tr. 32). She asked who was in charge at which point the employee pointed at a white truck parked behind the house (Tr. 32).

CSHO Cuyler walked over to the white truck and spoke with the individual inside, who was James Taylor, an employee of Preferred Roofing (Tr. 33). CSHO Cuyler testified Taylor told her he was a supervisor (Tr. 33). CSHO Cuyler explained her reason for being there at which point Taylor called his supervisor, James Snead (Tr. 34). Eventually, Jarren Stevens arrived and informed her he had just left the worksite and had left Taylor in charge (Tr. 34).

CSHO Cuyler later met with Snead and Taylor together, at which time Taylor denied being a supervisor on the job. She also met with Jarren Stevens at a later date. During that meeting, Stevens argued he should not be cited and claimed to have hired a third-party to perform the roofing work (Tr. 55-56). CSHO Cuyler's attempts to contact the alleged third-party contractor were unsuccessful (Tr. 56-57).

Following the inspection and based upon her observations at the worksite, CSHO Cuyler recommended Preferred Roofing be cited for failure to provide fall protection and failure to properly secure a portable ladder. The Secretary issued the two recommended citations to

Preferred Roofing as the controlling employer on the worksite. Preferred Roofing timely contested.

DISCUSSION

Multi-employer Worksite Doctrine

It is undisputed no employees of Preferred Roofing were exposed to either fall hazard at the worksite. The Secretary contends Preferred Roofing is liable for the two cited violations at the worksite as the controlling employer under the Commission's multi-employer worksite doctrine. Under the Commission's multi-employer worksite doctrine, "an employer owes a duty under § 5(a)(2) of the Act not only to its own employees but to other employees at the worksite when the employer creates and/or controls the cited condition." *Summit Contractors, Inc*., No. 05-0839, 2010 WL 3341872, at *8 (OSHRC Aug. 19, 2010), *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011). The Commission has also found an employer is liable "for violations of other employers where it could be reasonably expected to prevent or detect and abate the violation due to its supervisory authority and control over the worksite." *Red Lobster Inns of Am., Inc*., No. 76-4754, 1980 WL 10629, at *2 (OSHRC Jul. 18, 1980) (citing *Gil Haugan*, Nos. 76-1512 and 1513, 1979 WL 8537, at *3 (OSHRC Dec. 20, 1979) and *Knutson Constr. Co.*, No. 765, 1976 WL 6122 (OSHRC Oct. 12, 1976)). In *Red Lobster*, the Commission went on to hold this theory of liability does not require a finding the employer created the hazard or "has the manpower or expertise to itself abate the hazard." 1980 WL 10629, at *2.

The Commission has consistently recognized a general contractor's role on a worksite as a controlling employer by virtue of its overall supervisory capacity for the construction project. *See Anning-Johnson Co*., Nos. 3694 and 4409, 1976 WL 5967, at *6 (OSHRC May 12, 1976) ("we note that typically a general contractor on a multi-employer project possesses sufficient control over the entire worksite to give rise to a duty under section 5(a)(2) of the Act either to comply fully with the standard or to take the necessary steps to assure compliance"); *Grossman Steel & Aluminum Corp.*, No. 12775, 1976 WL 5968, at *4 (OSHRC May 12, 1976) ("The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors . . . . Thus, we will hold the general contractor responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity."); *Red Lobster*, 1980 WL 10629, at *2; *Centex-Rooney Constr. Co.*, No. 92-0851, 1994 WL 682931 (OSHRC Dec. 2, 1994).

Nevertheless, in *Stormforce of Jacksonville, LLC*, No. 19-0593, 2021 WL 2582530, at *3 n. 5 (OSHRC Mar. 8, 2021), the Commission rejected the proposition that this precedent creates a rebuttal presumption that a general contractor is a controlling employer and placed the burden on the Secretary to establish a sufficient level of control such that the general contractor could have required the subcontractor to correct a violation. The court finds the Secretary has met her burden to establish sufficient control over the worksite such that Preferred Roofing could be found liable for the violations as a controlling employer.

Preferred Roofing contracted directly with the property owner for completion of the reroofing project. It entered into a subcontract agreement with Valor to supply the roofing crew and perform the labor. Under this subcontract, Valor provided the equipment and labor necessary to perform the job (Ex. C-11). Preferred Roofing provided and delivered the materials required to complete the work. The contract contains other indicia of Preferred Roofing's control over the work. As noted above, Preferred Roofing was responsible for obtaining all necessary permits and for arranging inspections and supplying all plans and designs (Ex. C-11 ¶¶ 3, 18). Preferred Roofing retained the right to inspect and approve the work of Valor and, under the contract terms, could retain 10% of the agreed price until Preferred Roofing's standards were met (Ex. C-11 ¶ 2). The contract prohibited Valor from making change orders to the project and required it provide written progress reports upon request (Ex. C-11 ¶¶ 7, 9, 10, and 12). The contract terms prohibited Valor from erecting signs showing its name at the worksite (Ex. C-11 ¶ 18).

The contract required Valor to comply with all "statutory and contractual safety requirements applying to its work, including those requirements that may be initiated by Preferred Roofing" and placed responsibility on Valor "for the safety, training and OSHA compliance on every job" and "the use of safety equipment and fall protection." (Ex. C-11 ¶ 11) Although the contract terms placed responsibility on Valor for supplying safety equipment and training to its own employees, Snead testified he had the authority to require Valor comply with these safety obligations and that he had done so in the past (Tr. 93-94).

Preferred Roofing did not supply onsite supervision for this worksite because Valor had its own onsite supervision. Preferred Roofing points to this lack of direct supervisory control of the worksite as support for its position it was not a controlling employer. While evidence of direct supervisory control may be sufficient, it is not necessary. To the contrary, the Commission

has found liability of a general contractor with no supervisory authority over employees. *See Red Lobster*, 1980 WL 10629, at *2. In *Red Lobster*, the Commission held

> Although he did not supervise other employees, [the jobsite superintendent] held a highly responsible position and was invested by Respondent with substantial authority. It was [the jobsite superintendent]'s responsibility as Respondent's representative on the worksite to see that the construction work was completed successfully. Indeed, it was only through [the jobsite superintendent] that Respondent had knowledge of the status of a major corporate project. Respondent cannot divest itself of such knowledge simply by not assigning [the jobsite superintendent] supervisory status over other employees.

Id.

Based on its overall control over the work being performed and its authority to require compliance with safety requirements, Preferred Roofing was the controlling employer on the worksite.

The Alleged Violations

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Grp., Inc.*, No. 05-1907, 2009 WL 2567337 (OSHRC Aug. 11, 2009).

Item 1, Citation 1

Item 1, Citation 1, alleges a violation of § 1926.501(b)(13). The standard requires

> 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 1926.502.

The citation alleges:

> On a 5:12 pitched roof of a temporary residential worksite located at [redacted] in Jacksonville, Florida 32208: On or about July 18, 2023, the employer exposed subcontracted employees to fall hazards ranging from 10 to 25-foot, in that fall protection was not utilized by subcontracted employees while performing roofing work.

The Secretary contends Preferred Roofing's failure to provide a safe workplace for Valor's employees exposed to fall hazards at the Jacksonville, Florida, worksite constituted a violation of the cited standard.

Applicability of the Standard

There is no dispute the work being performed at the cited worksite was construction work as that term is defined in § 1910.12(b) and that the construction standards apply. The cited standard more narrowly applies only to residential construction. Residential construction is not defined in the standards. The structure at the worksite was a residence. The Commission and the Secretary have historically applied residential construction standards to residences and other structures built using traditional residential construction techniques. C*apeway Roofing Sys., Inc*., No. 00-1968, 2003 WL 22020485, at *10 (OSHRC Aug. 26, 2003), *aff'd*, 391 F.3d 56 (1st Cir. 2004).[2] The standards applicable to residential construction apply (see Stipulation of Fact 9).

The specific requirements of § 1926.501(b)(13) for the use of a guardrail systems, safety net system or personal fall arrest system also apply to the worksite. The credible evidence establishes the roof on which Valor's employees were working was more than six feet above the lower level (Stipulation of Fact 13). The pitch of the roof was 5:12 such that it did not meet the regulatory definition of a low-sloped roof. *See* 29 C.F.R. § 1926.500(b). The requirements of § 1926.501(b)(13) apply.

Violation of the Standard and Employee Exposure to the Hazard

The evidence is undisputed. On the day of the inspection, no guardrails or safety nets were in use at the worksite (Stipulation of Fact 14). The documentary evidence establishes the roofing crew was not using any type of personal fall arrest system (Stipulation of Fact 15; Exs. C-1, C-2, C-3, C-5, C-6 C-11).

Section 1926.501(b)(13) provides an exception where "the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems" it may "develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502." It is well settled the party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception *C.J. Hughes Constr., Inc.*, No. 93-3177, 1996

[2] OSHA's directive on residential construction, which the Commission referenced in *Capeway Roofing Systems*, states residential construction is characterized by wood framing and using traditional wood frame construction techniques. OSHA Instruction STD 3-0.1A (June 18, 1999).

WL 514965, at *4 (OSHRC Sept. 6, 1996). Preferred Roofing presented no evidence of infeasibility or greater hazard, nor did it present evidence either it or Valor had a fall protection plan.

The credible evidence establishes the roofing crew was working at heights in excess of six feet without the benefit of any form of fall protection. The standard was violated, and Valor's employees were exposed to a fall hazard.

Item 2, Citation 1

Item 2, Citation 1, alleges a violation of § 1926.1053(b)(1). The standard requires:

> When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

The alleged violative description in the citation reads:

> At the front elevation of a home, near front door of a temporary residential work site located at [redacted] in Jacksonville, Florida 32208: On or about July 18, 2023, the employer exposed subcontracted employees to fall hazards ranging from 6 to 11-foot, in that the side rails of a portable ladder used by subcontracted employees to access the roof were not extended 3 feet above the roof eve.

The Secretary contends Preferred Roofing failed to ensure Valor employees used a compliant ladder in violation of the cited standard. As a result, Preferred Roofing failed to ensure a safe workplace for Valor employees exposed to a fall hazard.

Applicability of the Standard

For the reasons addressed previously, the construction standards apply to the worksite and the work performed at the worksite. The credible evidence also establishes a portable ladder was in use at the worksite to access the roof (Tr. 23-25; Ex. C-6 and C-7). The standard applies.

Violation of the Standard and Employee Exposure to the Hazard

CSHO Cuyler testified she observed the ladder in use and that the rails of the ladder did not extend the required three feet above the landing surface of the roof (Tr. 27-28). The documentary evidence shows the ladder at the eave of the roof with the rails extended the length of approximately two ladder rungs. CSHO Cuyler testified standard ladder rungs are 12 inches apart such that the rungs of the ladder at the worksite were extended approximately two feet (Tr.

28). She testified the lower eave of the home was nine feet such that the landing surface for the ladder was in excess of nine feet (Tr. 29). CSHO Cuyler's testimony on this matter was straightforward and unrebutted. The undersigned found it credible. Conditions at the worksite were not in compliance with § 1926.1053(b)(1).

CSHO testified she observed four employees descend from the roof using the ladder (Tr. 28). She testified the condition of the ladder exposed those employees to a fall hazard because of the possibility of the ladder falling as the employees used it. Preferred Roofing presented no evidence in rebuttal to this testimony. The standard was violated, and Valor's employees were exposed to a fall hazard.

Employer Knowledge

"On a multi-employer worksite, a controlling employer is liable for a contractor's violations if the Secretary shows that [the controlling employer] has not taken reasonable measures to 'prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'" *Suncor Energy (U.S.A.) Inc.*, No. 13-0900, 2019 WL 654129, at *4 (OSHRC Feb. 1, 2019) (quoting *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994)). "If a controlling employer has actual knowledge of a subcontractor's violation, the controlling employer has a duty to take *reasonable measures* to obtain abatement of that violation." *Stormforce*, 2021 WL 2582530, at *6. Where the employer does not have actual knowledge of the violation, a controlling employer can be found liable only where the Secretary establishes it failed to "exercise reasonable care" to prevent or detect violative conditions. *Id*. at *8. Because the controlling employer acts in a "secondary safety role," its "duty to exercise reasonable care 'is *less than* what is required of an employer with respect to protecting its own employees.'" *Suncor*, 2019 WL 654129, at *6 (quoting *Summit Contractors, Inc.*, No. 03-1622, 2009 WL 2857148, at *4 (OSHRC July 27, 2009)). In determining whether an employer's procedures meet its "secondary role" as a controlling employer, the Commission considers "the nature of the work, the scale of the project, and the safety history and experience of the contractors involved." *Id.* at *7.

Actual Knowledge

The Secretary contends the violations were open and obvious and in plain view of Taylor. The Secretary further asserts that Taylor had a supervisory role on the worksite such that his actual knowledge of the hazard should be imputed to Preferred Roofing. Preferred Roofing

contends Taylor had no supervisory authority on this or any other worksite of Preferred Roofing, was only at the worksite for a brief period of time and was not in a position to see the workers on the roof. The court agrees, the Secretary has failed to meet her burden to establish Taylor had sufficient supervisory authority on the worksite such that his knowledge of any violation could be imputed to Preferred Roofing.

To determine whether an employee has supervisory authority such that his or her knowledge of a hazardous condition can be imputed to the employer, the Commission focuses on "whether the employee directed other employees' *work activities*." *USPS*, No. 08-1547, 2014 WL 5025978, at *5 (OSHRC Sept. 29, 2014) (emphasis added) (finding FMLA coordinator not a supervisor where he had no "direct employees" and made "no decisions about other employees' work."). The Secretary must establish by a preponderance of the evidence that an employee has supervisory authority over other employees' work. *Stanley Roofing Co.*, No. 03-0997, 2006 WL 741750, at *2 (OSHRC Mar. 3, 2006) (finding evidence, which consisted of CSHO testimony employee represented himself to her as foreman and company official's testimony that employee was not a foreman, was in equipoise such that Secretary could not meet her burden).

In support of her position Taylor was a supervisory employee onsite, the Secretary relies on three statements made to CSHO Cuyler during the inspection. CSHO Cuyler testified that when she arrived, she asked the employee who was coming down from the roof who was "in charge." The employee "pointed to a truck" (Tr. 32). At the time, Taylor was in the truck and CSHO Cuyler walked over to speak with him. CSHO Cuyler testified to the encounter as follows:

> He got out and we started talking. And I asked him who did the employees work for? And he said that his – well, at his first said his name was James. So then I asked, was these employees of his? And first he said yes. And then he said that his name was – actually he was a supervisor.

(Tr. 33). She then told Taylor she was there because the employees on the roof were not using fall protection at which point Taylor called his supervisor, Snead (Tr. 33).

Later, Jarren Stevens returned to the worksite and spoke with CSHO Cuyler. CSHO Cuyler testified Stevens told her he had just left the worksite and that Taylor was the supervisor in his absence. Stevens' statements provide little support for the Secretary's position. Stevens did

not testify.[3] In her report, CSHO Cuyler characterized Stevens as "very uncooperative." (Ex. C-4) Stevens' statements to CSHO Cuyler were obvious self-serving attempts to avoid liability. *See State Sheet Metal Co.*, Nos. 90–1620 and 90–2894, 1993 WL 132972, at *6 (OSHRC Apr. 27, 1993) (consolidated) (court declined to accept company owner's conclusory statements without a factual basis when he was "hardly a disinterested witness"). In addition to attempting to shift blame to Taylor, Stevens told CSHO Cuyler that Valor had subcontracted the work to a third party (Tr. 56). CSHO Cuyler's attempts to find the alleged third-party subcontractor were unsuccessful (Tr. 56-58). The court finds Stevens' statement that he left Taylor to supervise the jobsite unreliable and gives it no weight.

The fact a roofer gestured to Taylor's truck when asked who was in charge is similarly unreliable evidence (Tr. 32). The individual was never identified in the record. None of the Valor employees testified. To rely on this evidence as proof of Taylor's supervisory status, the court would have to infer the employee to whom CSHO Cuyler spoke understood what she was asking and knew to whom the truck belonged. The record does not contain sufficient evidence to support such inferences. The court gives this evidence little weight.

The Secretary's evidence supporting a finding Taylor had a supervisory role comes down to the Taylor's admission to CSHO Cuyler that he was a supervisor and CSHO Cuyler's testimony she observed Taylor direct the employees to come down from the roof (Tr. 64). According to CSHO Cuyler, although she saw Taylor tell employees to come down from the roof, it was Jarren Stevens, not Taylor, who directed the employees to don fall protection equipment (Tr. 60-61). She also conceded, at a subsequent meeting at which Snead was present, Taylor told her he was a repair technician, only at the worksite to check on whether supplies were needed (Tr. 59).

At the hearing, Taylor testified he never told CSHO Cuyler he was a supervisor (Tr. 84). He reiterated he was a repair technician with no supervisory role at the company (Tr. 82). Prior to stopping at the job, Taylor testified he knew little about it (Tr. 84). Taylor testified Snead directed him to stop at the job for the purpose of checking to see whether more wood was needed (Tr. 83, 90). He stated his role, should he see any hazardous conditions, was to call Snead (Tr. 82). Snead testified Preferred Roofing did not provide any direct site supervision on this job (Tr.

[3] Stevens' hearsay statements were admitted pursuant to the Commission's Simplified Proceedings rules under which the Federal Rules of Evidence do not apply. 29 C.F.R. 2200.209(c).

93). The Secretary presented little rebuttal to this testimony.[4] Nothing in Taylor's demeanor when testifying suggested a lack of veracity. The court finds Taylor's testimony that he was not a supervisor for Preferred Roofing at the worksite credible.

The Secretary has the burden to establish Taylor was a supervisor whose knowledge of any hazardous conditions at the worksite can be imputed to Preferred Roofing. The only credible evidence presented by the Secretary was the testimony of CSHO Cuyler.[5] This testimony was rebutted by the credible testimony of Taylor. The evidence being in equipoise, the Secretary has failed to meet her burden.

Reasonable Care

Having failed to establish Preferred Roofing had actual knowledge of the violations, the Secretary can nevertheless establish liability by establishing Preferred Roofing failed to exercise reasonable care. Considering the record as a whole, the court finds the Secretary has not met her burden to establish Preferred Roofing's procedures were insufficient to meet its "secondary" obligation as a controlling employer.

The job at issue involved the reroofing of what appeared to be a modest-sized home. According to Preferred Roofing, the job was to take one day using a four-man crew (Tr. 61). Nothing in the record suggests the job was more complex or required more time or manpower. Given the routine nature and short duration of the project, Preferred Roofing's practice of spot-checking subcontractors met its obligation to exercise reasonable care. *See Suncor*, 2019 WL 654129, at *8 (finding employer's "safety efforts were more than commensurate with the size, complexity, and short time frame associated with this project").

Nor was evidence presented that suggests Preferred Roofing had reason for concern about Valor's compliance with safety requirements such that reliance on Valor's onsite supervision was unreasonable. Preferred Roofing had undergone its usual vetting process for subcontractors when hiring Valor, ensuring Valor understood its safety obligations and the consequences of

[4] The Secretary notes an additional inconsistency between Taylor's and CSHO Cuyler's testimony. CSHO Cuyler stated the homeowner told her Taylor's truck had been at the house "all day" while Taylor stated he had only been at the house five to ten minutes when CSHO Cuyler arrived (Tr. 84). The homeowner did not testify; nor does the record contain a written statement from the homeowner. Based on the lack of context or corroboration, the undersigned gives the homeowner's statement no weight.

[5] Based upon observations of CSHO Cuyler's demeanor at the hearing, the court found her a credible witness. She testified in a straightforward manner without exaggeration or evasiveness. Nevertheless, she was not entirely clear or concise when reciting the events surrounding the inspection suggesting an imperfect recollection rather than a lack of veracity.

non-compliance. It had only contracted with Valor for three prior jobs within a brief period prior to the Jacksonville job. Snead had visited two prior jobs (Tr. 95). On the first, he observed a Valor employee not using fall protection (Tr. 95-96). Valor immediately corrected the deficiency. Snead then visited the second worksite and observed Valor employees using proper fall protection (Tr. 96). Under the circumstances, it was reasonable for Preferred Roofing to assume its practice of periodic spot checks of Valor worksites was sufficient. *See Suncor*, 2019 WL 654129, at *9 (finding "it was reasonable for the company to rely on its contractors to perform their work safely" based upon evidence in the record).

The evidence was insufficient to establish Preferred Roofing failed to meet its obligation as a controlling employer on the worksite and is liable for exposure of Valor's employees to the cited fall hazards. The Secretary has failed to meet her burden to establish Preferred Roofing had either actual or constructive knowledge of the violation conditions. The citation is, therefore, vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing decision, it is ORDERED that:

Items 1 and 2, Citation 1 are vacated.

SO ORDERED.

/s/_____
Heather A. Joys
Administrative Law Judge, OSHRC

Dated: July 25, 2024
Atlanta, GA