



DIVISION OF LABOR & INDUSTRY
Office of the Commissioner
10946 Golden West Drive, Suite 160
Hunt Valley, MD 21031

March 18, 2026

Via Electronic and First Class Mail

sbrown@mdswlaw.com
Steven Brown, Esquire¹
McAllister, DeTar, Showalter, & Walker, LLC
706 Giddings Avenue
Annapolis, Maryland 21401

hilary.baker@maryland.gov
Hilary Baker, Assistant Attorney General
100 South Charles Street
Tower One, Suite 9200
Baltimore, Maryland 21201

**Re: Ruff Roofing and Sheet Metal, Inc.
OAH Case No. DLR-MOSH-41-43-31766**

Dear Mr. Brown and Ms. Baker:

Enclosed is the Final Decision and Order of the Commissioner of Labor and Industry issued today in the above-captioned matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Christina Schaefer", is written over a light blue horizontal line.

Christina Schaefer
Executive Assistant to the Commissioner
Division of Labor and Industry

cc: Catherine Bellinger, Assistant Attorney General
Sarah Harlan, Assistant Attorney General
Office of Administrative Hearings

¹ The matter was argued by Christopher Mincher. However, Mr. Mincher is no longer with the firm, and Mr. Brown has retained the matter.

devki.virk@maryland.gov | 410-767-2992 | www.labor.maryland.gov

BEFORE THE COMMISSIONER OF LABOR AND INDUSTRY

IN THE MATTER OF

MOSH CASE NO. H8624-019-23

RUFF ROOFING AND SHEET METAL,
AND SHEET METAL, INC.

OAH NO. MOSH-41-23-31766

FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. On October 6, 2023 the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry (“MOSH”) issued six citations to Ruff Roofing and Sheet Metal, Inc. (“Employer” or “Ruff Roofing”). The citations were as follows: Citation 1, Item 1 was for failure to ensure that employees used appropriate eye protection in violation of 29 CFR 1926.102(a)(1); Citation 1, Item 2a was for failure to ensure that each affected employee was protected from falling on a low slope roof in violation of 29 CFR 1926.501(b)(10); Citation 1, Item 2b was for failure to erect warning lines around all sides of the roof work area in violation of 29 CFR 1926.502(f)(1); Citation 1, Item 2c was for failure to erect a warning line at least six feet from the roof edge when mechanical equipment was not being used in violation of 29 CFR 1926.502(f)(1)(i); Citation 1, Item 2d was for permitting the safety monitor to perform duties other than monitoring in violation of 29 CFR 1926.502(h)(i)(v); and Citation 1, Item 3 was for allowing employees to be within the fall zone of a suspended load in violation of 29 CFR 1926.1425(b). The total proposed penalties were \$2,362.00

Ruff Roofing contested the citations and a hearing was held on January 11, 2024 at the Office of Administrative Hearings in Hunt Valley Maryland before Administrative Law Judge Tracee N. Hackett (“ALJ”) sitting as the Hearing Examiner. On April 10, 2024, the ALJ issued a proposed decision that included findings of fact and conclusions of law. The ALJ recommended that Citation 1, Item 1, Citation 1, Item 2(d) and Citation 1, Item 3 be upheld and that Citation 1, Items 2(a), 2(b) and 2(c) be vacated. On May 1, 2024, the Commissioner ordered review of the proposed decision pursuant to Md. Lab. & Emp. Code Ann. §5-214(e)(2). A review hearing was held before the Commissioner of Labor and Industry on September 11, 2024 at the Division of Labor and Industry’s Offices in Hunt Valley, Maryland. Based upon a thorough review of the record, the relevant law and the arguments made by both parties, the Commissioner affirms the citations.

FINDINGS OF FACT

On June 13, 2023, Compliance Officer Nicholas Reynolds opened an unscheduled inspection at a mixed use building after he observed employees of Ruff Roofing exposed to fall and other hazards. The project was a commercial construction site located at 102 East Patrick Street in Frederick, Maryland. The employer was installing new roofing on a preexisting mixed use building. The mixed use building had a lower building that was used for commercial purposes and an upper building for residential use. The lower roof was 25 feet wide and 15 feet above the ground. The upper roof of the residential building was less than 50 feet in width and approximately 40 feet above the ground. Both were low sloped roofs. The employer had nine employees working on the project. These

employees included seven workers as well as Ricardo Sanchez, the foreman, and Bruno Ortiz-Sanchez, the project manager. Both the foreman and the project manager were designated as competent persons and safety monitors for the project.

Following the inspection, MOSH issued six (6) serious citations. Citation 1, Item 1 was for failure to ensure that employees used appropriate eye protection (29 CFR 1926.102(a)(1)); Citation 1, Item 2a was for failure to ensure that each affected employee was protected from falling on a low slope roof (29 CFR 1926.501(b)(10)); Citation 1, Item 2b was for failure to erect warning lines around all sides of the roof work area (29 CFR 1926.502(f)(1)); Citation 1, Item 2c was for failure to erect a warning line at least six feet from the roof edge when mechanical equipment was not being used (29 CFR 1926.502(f)(1)(i)); Citation 1, Item 2d was for permitting the safety monitor to perform duties other than monitoring (29 CFR 1926.502(h)(i)(v)); and Citation 1, Item 3 was for allowing employees to be within the fall zone of a suspended load (29 CFR 1926.1425(b)). The total proposed penalties were \$2,362.00

REVIEW BEFORE THE COMMISSIONER

As a preliminary matter, counsel for Ruff Roofing questioned the authority of MOSH to request review before the Commissioner. (Tr.2 24.)¹ The statute provides that the ALJ's proposed decision shall become a final order of the Commissioner unless, within 15 work days, "(i) the Commissioner orders a review of the proceeding; or (ii) an employee, representative of an employee, or employer whom the report affects submits to

¹ For purposes of this decision, "Tr.1" refers to the transcript of the January 11, 2024 hearing before the ALJ and "Tr.2" refers to the transcript of the September 11, 2024 review hearing before the Commissioner,

the Commissioner a written request for a review of the proceeding.” Md. Lab. & Emp. Code Ann. §5-214(e)(2). In this case, counsel for MOSH sent a letter to the Commissioner requesting that she exercise her authority to order review of the proceedings and, on May 1, 2024, the Commissioner issued an Order for Review. The Order for Review was issued 15 work days from the date of the ALJ’s proposed decision. While MOSH is not one of the enumerated parties automatically entitled to review under §5-214(e)(2)(ii), there is nothing preventing MOSH from requesting that the Commissioner exercise her authority to order review pursuant to §5-214(e)(2)(i). The Commissioner exercised this authority, accordingly, the matter is properly before the Commissioner for review.

STANDARD OF PROOF

In order to establish a violation of the Act, MOSH must demonstrate by a preponderance of the evidence that (1) the standard at issue applies; (2) the employer failed to comply with the standard; (3) employees were exposed to the violative condition; and (4) the employer knew or with the exercise of reasonable diligence should have known of the condition. *Maryland Com’r of Labor & Indus. v. Cole Roofing Co.*, 368 Md. 459 (2002); *N & N Contractors, Inc. v. Occupational Safety and Health Review Commission*, 255 F.3d 122, 125-126 (4th Cir. 2001).

THE ALJ’S PROPOSED DECISION

In her proposed decision, the ALJ concluded that MOSH met its burden of proof with respect to three of the six citations. She concluded that MOSH failed to establish that the employer committed the violations set forth in the other three citations.

Additionally, the ALJ proposed to modify the total proposed penalty amount from \$2,362.00 to \$4,212.50. Before addressing each individual citation, the Commissioner will address the issue of the penalty increase as well as the employer's argument that all of the citations should be vacated on the basis of unforeseeable employee misconduct.

Penalty Increase

During the hearing before the ALJ, the Compliance Officer acknowledged that he made an error in some of his calculations. Specifically, he gave the employer a greater discount than was warranted. However, MOSH did not argue at the hearing that the penalties should have been increased beyond those that were cited. Nevertheless, in her decision, the ALJ increased the penalties. For Citation 1, Item, 1, the penalty imposed by MOSH was \$437.00 but the ALJ increased it to \$687.50. With regard to Citation 1, Items 2(a)-(d), MOSH grouped the citations together for penalty purposes. Since the ALJ found that MOSH had not met its burden with respect to Citation 1, Items 2(a)-(c), she took MOSH's initial penalty calculation for Item 2(d) (\$1,050.00) but adjusted it to \$1,650.00 to account for the Compliance Officer's discount error. The same was true for Citation 1, Item 3, the ALJ adjusted the penalty from \$875.00 to \$1,875.00. At the review hearing, MOSH argued that the ALJ's increase in penalties was legal error and raised due process concerns because MOSH did not ask for the increase and Ruff Roofing was not on notice that the penalties could be increased. (Tr. 6-7.) Counsel for Ruff Roofing concurred. Accordingly, consistent with this decision, the Commissioner will not adopt any of the ALJ's proposed penalty increases.

Affirmative Defense

At the hearing before the ALJ, the employer made a global argument that all citations should be vacated because they were the result of unforeseeable employee misconduct. The employer argued that it had a very robust safety program that included training as well as independent third party safety audits. The employer offered into evidence its competent persons policies, third party audits and disciplinary logs. In her proposed decision, the ALJ found that the employer provided sufficient evidence of its work rule and that it was adequately communicated to employees. (ALJD 30)² However, the ALJ found that the employer failed to prove that it “effectively enforced the rule whenever employees transgressed it.” (ALJD 31 quoting *Maryland Comm’r of Lab. & Indus. v. Cole Roofing Co.*, 368 Md. 459, 478 (2002)) In support, the ALJ relied on evidence that Mr. Sanchez, the foreman, had been involved in a disciplinary incident several years prior where employees were found to be working “without safety monitors, and a few employees working without safety glasses, or vests, and a ladder extension being used by itself.” While Mr. Sanchez was issued a warning and immediately abated the violations, the ALJ found it “concerning” that the earlier violations involved “similar conduct.” (ALJD 31). The ALJ further noted that several fall protection violations resulted in pay deductions or a three day suspension but, with respect to PPE violations, non-compliant employees received only “minor pay deductions or verbal warnings.” (ALJD 32) The employer argued that requiring Mr. Sanchez to attend the administrative

² “ALJD” refers to the April 10, 2024 proposed decision of the ALJ.

hearing was a disciplinary consequence, however, the ALJ rejected this argument because attending an administrative hearing was not specifically referenced as a consequence in the employer's work rule policy. On review, the employer argued that it met all of the elements of the affirmative defense of unforeseeable employee misconduct and the ALJ erred in not dismissing the citations on that basis. The employer went further, however, and argued that the ALJ erred in finding that the employer had imputed knowledge of the violations for purposes finding that MOSH had established its prima facie case. The employer argued that the ALJ improperly relied on *Danis-Shook Jt. Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003) for the proposition that a supervisor's knowledge of its own violation can be imputed to the employer. Ruff Roofing argued that the appropriate test is instead the one set forth by the Fourth Circuit in *New River Electrical Corporation v. Occupational Safety and Health Review Commission*, 25 F.4th 213 (4th Cir. 2022). In *New River*, the court addressed the "often-overlapping doctrines of constructive knowledge and unpreventable employee misconduct." *New River*, 25 F.4th at 222. Under *New River*, if MOSH had relied on the inadequacy of the employer's safety program to prove that the violations were reasonably foreseeable and, therefore, the employer had constructive knowledge, then the burden of proof would have been on MOSH. In this instance, MOSH did not argue that the employer's safety program was inadequate for the purpose of establishing constructive knowledge. Rather, MOSH argued that the employer had direct knowledge because both the project manager, Mr. Bruno Sanchez Ortiz, and the foreman, Mr. Ricardo Sanchez, were working onsite and were

both designated as safety monitors and competent persons. The Compliance Officer testified to this on multiple occasions. (Tr.1 1 82, 87, 91)

If the adequacy of the employer's safety program is not at issue as part of MOSH's case in chief, the employer bears the burden of asserting the affirmative defense of unforeseeable employee misconduct. To prevail, an employer must prove that it: (1) established a work rule to prevent the reckless behavior and/or unsafe condition; (2) adequately communicated the rule to its employees; (3) took steps to discover noncompliance; (4) effectively enforced the rule wherever employees transgressed it. *New River*, 25 F.4th at 223 quoting *Frank Lill & Son*, 362 F.3d at 845. In *New River*, the court addressed the issue of what it considered "unfairly imposing liability on an employer for a rogue supervisor" because "when the supervisory employee commits the violation, the employer loses its 'eyes and ears' to detect and prevent misconduct."

While the Commissioner agrees with the ALJ's analysis, there is no need to evaluate the employer's safety program for purposes of establishing foreseeability because the employer had *both* Mr. Sanchez and Mr. Sanchez-Ortiz on the jobsite. While the employer argued that any violations within the scope of Mr. Ricardo Sanchez's responsibilities were unforeseeable, the uncontroverted evidence established that the project manager, Mr. Bruno Sanchez-Ortiz, was also on the jobsite at all relevant times, and was also a competent person with "eyes and ears" – and, indeed, the obligation – to detect and prevent misconduct. Preventing these violations lay within the scope of his responsibilities as well as Mr. Sanchez's. On this record, the employer's claim of "unforeseeable misconduct" is unavailing.

THE CITATIONS

Citation 1, Item 1

Citation 1, Item 1 was for a violation of 29 CFR 1926.102(a)(1) for failing to use proper eye protection. Specifically, the Compliance Officer testified that he observed the foreman, Mr. Sanchez, wearing sunglasses rather than impact resistant eye protection while operating a pneumatic nail gun. The Compliance Officer testified that he “saw [the foreman] apply the nail gun to wood on the roof, and then from hearing it I [could] tell it was fired.” (Tr.1 p. 123). The foreman testified that while he was holding the nail gun he did not use it. He testified that he picked it up to avoid a tripping hazard. The ALJ upheld the citation finding that “it is undisputed that Mr. Sanchez did not have the appropriate eye protection while monitoring the use of or holding the pneumatic nail gun, regardless of whether or not he actually used it.” (ALJD 15)

On review, the employer argued that the ALJ erred in concluding that “holding a nail gun creates an eye protection hazard.” (Tr.2 p. 64). The ALJ did not in fact find that the mere act of holding a pneumatic nail gun created an eye protection hazard. She credited the Compliance Officer’s testimony that “he saw Mr. Sanchez using it and heard the sound of the pneumatic gun being used.” (ALJD 15) She also noted that “other workers were using the gun in Mr. Sanchez’s vicinity” and “the use of [a] compressed air nail gun to install wood can result in flying particles during its use by the operator or by others in a worker’s vicinity.” (ALJD 15) The standard requires protection when an employee is “exposed” to eye hazards from flying particulate matter. In upholding the citation, the ALJ considered both the Compliance Officer’s testimony that he observed

Mr. Sanchez personally using the nail gun as well as evidence that Mr. Sanchez was exposed to flying particles from pneumatic nail guns being used by other workers. The Commissioner affirms the citation.

Citation 1, Item 2(a)

Citation 1, Item 2(a) was for failing to protect employees from falling while engaging in roofing activities on a low slope roof in violation of 29 CFR 1926.501(b)(10). The evidence demonstrated that employees were required to walk across the lower roof in order to access the upper roof where they were working. The employees had placed a tarp over the lower roof. The ALJ found that “the act of merely traversing (sic) a roof” did not constitute roofing work within the meaning of 29 C.F.R. 1926.501(b)(10). (ALJD 18.) The ALJ concluded that 29 C.F.R. 1926.501(b)(1) which requires fall protection on a “walking/working surface...with an unprotected edge which is 6 feet ..or more above a lower level” was the applicable standard covering the employee activity and, accordingly, recommended dismissing the citation. In reaching this conclusion, the ALJ relied on the definition of “roofing work” found in 29 C.F.R. 1926.500(b).

On review, MOSH argued that the ALJ erred when she equated “roofing work” as defined in 29 C.F.R. 1926.500(b) with “roofing activities” in 29 C.F.R. 1926.501(b)(10). MOSH further argued that the ALJ’s reliance on *Bergelectric Corporation v. Secretary of Labor*, 925 F.3d 1167 (9th Cir. 2019) was misplaced. MOSH argued that the appropriate analysis of what constitutes “roofing activities” is the Occupational Safety and Health Review Commission (“OSRC”) decision in *Secretary of Labor v. CentiMark Corporation*, 2023 WL 2783505. MOSH contends that under the OSRC’s analysis in the

Centimark case, the actions of Ruff's employees in placing the tarp over the lower roof and traversing it to access the upper roof constituted "roofing activities" within the meaning of 29 C.F.R. 1926.501(b)(10).

The Commissioner agrees with MOSH. In *Centimark*, the OSRC expressly found that relying on the fall protection standard's definition of "roofing work" in interpreting "roofing activities" 1926.501(b)(10) was "erroneous." Rather, the OSRC concluded that the appropriate analysis was whether the employee activities while on the roof were for the purpose of a roofing work project (as opposed to another type of project as was the case in *Bergelectric*). The Commissioner finds that the employees tarped and traversed the lower roof because it was the means by which the employees accessed the upper roof where they were performing roofing work. Tarping and traversing the lower roof was integral to and for the purpose of performing "roofing work" and, therefore, constituted "roofing activities" within the meaning of 1926.501(b)(10). The Commissioner rejects the ALJ's proposed findings of fact and conclusions of law with respect to Citation 1, Item 2(a) and affirms the citation.

Citation 1, Items 2(b) and (c)

Citation 1 Items 2(b) and (c) were for failure to erect warning lines around all sides of the upper roof area. The cited standard, 1926.502(f)(1), provides that a warning line system "shall be erected around all sides of the roof area." 1926.502(f)(1)(i) further provides that "[w]hen mechanical equipment is not being used, the warning line shall be erected not less than 6 feet ... from the roof edge." The Compliance Officer testified that the upper roof had warning lines on one and half sides and the lower roof had none. (Tr. 1

79-80). He further testified that the warning lines were as close as two feet from the edge of the roof. The ALJ found that “[b]ased upon the photos taken by [the Compliance Officer] and his undisputed testimony, the warning line system was not installed on all sides of the upper roof and the warning lines which were being used were inadequate in their length.” (ALJD 21). In some areas, the warning line was as close as 2 feet from the edge of the roof. (ALJD 21)

While the evidence established that the warning line system did not comply with the requirements of 29 CFR 1926.502(f)(1), the ALJ recommended dismissing the citation because the roof in question is less than 50 feet in width and, for a roof that is less than 50 feet in width, the use of a safety monitor (without warning lines) is a permissible method of fall protection. 29 CFR 1926.501(b)(10). Because the roof was less than 50 feet in width, the ALJ found that the standard was not applicable.

On appeal, MOSH argued that while the standard provides that an employer may use a safety monitor as a permissible means of fall protection, the fact that the employer chose to employ a warning line system, but did not do so properly, makes the standard applicable. Additionally, MOSH argued that because the safety monitor was performing other tasks and not doing his job properly, it was proper for MOSH to examine the warning line system. The employer does not dispute that the warning line system was inadequate. Rather, the employer argued that MOSH citing for both the safety monitor and the warning line system was tantamount to “double dipping” and, as a matter of public policy, would deter employers from providing any additional safety measures beyond the bare minimum required. (Tr.2 38-40.)

The Commissioner agrees with MOSH. In this case, the employer set up two fall arrest systems—warning lines and a safety monitor—but both were inadequate.³ While the regulations only required the employer to have one system, by establishing two systems but not executing them properly, the employer did not create a redundancy but instead created a potentially greater hazard. Workers who were accustomed to a warning line system would rely on it to “warn” them when they were too close to the edge but because the system was not properly set up, they would not be adequately warned of their proximity to the roof edge.

The Commissioner rejects the ALJ’s proposed findings of fact and conclusions of law with respect to Citation 1 Items 2(b) and (c) and affirms the citations.

Citation 1, Item 2(d)

Citation 1, Item 2(d) was for a violation of the fall protection standard because the safety monitor, Mr. Ricardo Sanchez, was performing other duties while acting as safety monitor. The Compliance Officer testified that he observed the safety monitor giving crane signals, talking on his phone and performing roofing work. Mr. Sanchez testified that he stopped the roofing work to call the project manager because someone was walking in the path of the crane. He also testified that he only directed the crane when roofing work had stopped. The ALJ expressly found the Compliance Officer’s testimony

³ On review, the employer suggested that there can only be one violation of 1926.501(b)(10) and that by “breaking it up” into two violations, the employer could be cited for an inadequate safety monitor even if the warning line system was fully compliant and vice versa. That is not the case here. MOSH made it clear that the employer was issued separate citations because *both* systems were inadequate and potentially created a greater hazard. MOSH grouped the citations for penalty purposes.

“to be more credible than Mr. Sanchez’s testimony.” (ALJD 24). She noted that the Compliance Officer’s testimony “was consistent with the observations noted in his report, and he corroborated his observations by taking photographs, taking measurements, and conducting interviews.” (ALJD 24). The Commissioner agrees with the ALJ’s analysis and upholds the citation.

Citation 1, Item 3

Citation 1, Item 3 was for allowing employees to be within the fall zone of a suspended load. The Compliance Officer testified that he observed two employees stacking sheets of wood in the fall zone of a crane’s boom and load. He observed the crane carrying a box of material which was removed from the roof and dumped into a dumpster onsite. Based on interviews, the Compliance Officer determined that there were eight lifts made on the day in question and, when full, the load weighed 1,800 pounds. Two employees advised the Compliance Officer that they had been working under the boom of the crane for approximately five and a half hours to stack materials and gather trash. At the hearing before the ALJ, the parties disagreed about whether the employees were actually under the crane’s load. In particular, the employer took issue with a photograph of two employees that the employer contended did not demonstrate that the employees were actually under the crane’s boom. The ALJ agreed that it was difficult to discern the employees’ precise location from the photograph, but noted that “the photograph only corroborates Mr. Reynold’s observations during the inspection and is not the sole evidence of the violation. Mr. Reynolds testified credibly that he observed the employees walking and working under the crane’s boom and load. Furthermore, the employees

admitted to doing so during their interviews.” (ALJD 28) The Commissioner agrees with the ALJ’s analysis and upholds the citation.

ORDER

The Commissioner hereby ORDERS:

1. Citation 1, Item 1 for failure to ensure that employees used appropriate eye protection in violation of 29 CFR 1926.102(a)(1) with an assessed penalty of \$437.00 is AFFIRMED;

2. Citation 1, Item 2a for failure to ensure that each affected employee was protected from falling on a low slope roof in violation of 29 CFR 1926.501(b)(10) with an assessed penalty of \$1050.00 is AFFIRMED;

3. Citation 1, Item 2b for failure to erect warning lines around all sides of the roof work area in violation of 29 CFR 1926.502(f)(1) with an assessed penalty of \$0.00 is AFFIRMED;

4. Citation 1, Item 2c for failure to erect a warning line at least six feet from the roof edge when mechanical equipment was not being used in violation of 29 CFR 1926.502(f)(1)(i) with an assessed penalty of \$0.00 is AFFIRMED;

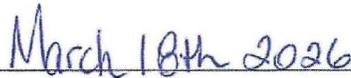
5. Citation 1, Item 2d for permitting the safety monitor to perform duties other than monitoring in violation of 29 CFR 1926.502(h)(i)(v) with an assessed penalty of \$0.00 is AFFIRMED; and

6. Citation 1, Item 3 for allowing employees to be within the fall zone of a suspended load in violation of 29 CFR 1926.1425(b) with an assessed penalty of \$875.00 is AFFIRMED.

This Order becomes final 15 days after issuance. Judicial review may be requested by filing a petition for review in the appropriate Circuit Court, as provided in Labor and Employment Article, § 5-215, *Annotated Code of Maryland*, and the Maryland Rules, Title 7, Chapter 200.



Devki K. Virk,
Commissioner of Labor and Industry



Date