

**BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA**

<p>COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA</p>)	<p>DOCKET NO: 2019 - 6105</p>
)	
)	<p>INSPECTION</p>
<p>Complainant,</p>)	<p>NO: 318154754</p>
)	
<p>v.</p>)	<p>CSHO ID: D9370</p>
<p>BAKER ROOFING COMPANY and its successors</p>)	
<p>Respondent.</p>)	

FILED
OCT 15 2020
NC Occupational & Safety
Review Commission

Appearances:

Sage A. Boyd, Assistant Attorney General, North Carolina Department of
Justice, Raleigh, North Carolina
For Complainant

Travis W. Vance, Esq. and David I. Klass, Esq., Fisher & Phillips LLP, Charlotte,
North Carolina
For Respondent

Before: R. Joyce Garrett – North Carolina Administrative Law Judge

DECISION AND ORDER

I. PROCEDURAL HISTORY¹

In 2019, Respondent was the general contractor for a roof replacement project of the Henderson County Genealogical & Historical Society and Lapidary Museum located at 400 North Main Street, Hendersonville, North Carolina (the "Work Site"). Respondent subcontracted with Yako Construction, Inc. ("Yako") to perform the roofing work. (RT 1:01:13) On January 26, 2019, an employee of Yako who was performing roofing work fell (the "Accident") suffering multiple fractures and was hospitalized. (Ex. C-27; RT 25:03) Respondent notified Complainant on January 28, 2019. (Ex. C-27) Complainant dispatched Safety and Health Compliance Officer Robin Ewart (sometimes herein referred to as "CO") to conduct an inspection. The inspection of the Work Site was conducted during the period on and between January 28, 2019 and January 30, 2019. As a result of her inspection of the Work Site and interviews of relevant parties, the CO recommended and Complainant issued a Citation and Notification of Penalty ("Citation 01") alleging as Item 001a a serious violation of 29 CFR 1926.1053(a)(19) pertaining to fixed ladders and as Item 001b a serious violation of 29 CFR 1926.1060(a) pertaining to training; these items were grouped and assessed a proposed penalty of \$7,000.00.

An informal settlement conference was held on April 2, 2019. Respondent timely contested the Citation. Following a request for formal pleadings in Respondent's position statement, Complainant filed a Complaint on May 21, 2019. An Answer was filed on June 5, 2019. Respondent made Requests For Admissions to which Complainant responded. The parties participated in a formal Pre-Hearing Conference on January 8, 2020. The matter was set for an in-person hearing on May 13, 2020, but due to the COVID-19 pandemic the hearing was rescheduled to June 30, 2020 and then continued to September 10, 2020.

Pursuant to a Notice of Hearing dated August 24, 2020, a trial was held on September 10, 2020, at 10:30 a.m., via "LifeSize" video conferencing platform with the agreed upon location being Raleigh, North Carolina.

At the beginning of the hearing, Complainant moved to amend Citation 01 by withdrawing Item 001b and renaming Item 001a as Item 001, with the proposed penalty remaining \$7,000.00 for Item 001. The Court granted Complainant's unopposed motion to amend. (RT 9:08). There were no other preliminary matters to be determined prior to the start of the evidentiary hearing. Both Complainant and Respondent presented opening statements.

No affected employee (or its representative) of Respondent or of Yako attended to have a say in, or participate as a party in, the Hearing. The following witnesses testified: (1) Safety and

¹ The Hearing was conducted via Lifesize video conferencing; the audio and video were recorded through Lifesize and referred to as the "Recording"; the Recording is the official record of the Hearing. No transcript has been prepared. References to testimony at the Hearing are herein noted by referencing the time shown on the Recording: "RT" for "Recording Time" followed by the time designated on the Recording; the Recording shows time to the seconds. The relevant testimony can be heard at +/- the times referenced herein.

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Health Compliance Officer Robin Ewart for Complainant; and (2) Ron Adams, Vice President, Risk Management at Baker Roofing Company, for Respondent.

At the close of Complainant's case, Respondent moved for a directed verdict, which motion was objected to by Complainant. The motion was denied. At the close of its case, Respondent moved for judgment as a matter of law, which motion was denied.

Pursuant to Rule .0601 of the Rules of Procedure of The North Carolina Safety and Health Review Commission (the "Commission Rules"), after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law. As discussed further below, the Court finds Complainant failed to establish a violation of the fixed ladder standard found at 29 CFR 1926.1053(a)(19) because the Complainant failed to produce sufficient evidence that the total length of the climb by employees on the fixed ladder equaled or exceeded 24 feet (7.3 meters). Accordingly, the Citation and Notification of Penalty is VACATED.

II. STIPULATIONS & JURISDICTION

The parties agreed to the Joint Stipulations set forth in Attachment "A" affixed hereto ("Joint Stipulations") which was submitted into evidence on the record at the beginning of the trial. (RT10:32)

This Court has jurisdiction over the parties and subject matter in this case. NCGS §95-135. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the "Act"), including making inspections and issuing citations and other pleadings. NCGS §95-133 et seq.; Stip. No. 1. The Court obtained jurisdiction over this matter upon Respondent's timely filing of a notice of contest. NCGS § 95-137(b)(4); Stip. Nos. 2 and 24. Respondent contested the alleged violations, abatement dates and proposed penalties. Stip. No. 25. Based upon Respondent's Answer to the Complaint and Joint Stipulations Nos. 6,7 and 8, the Court also finds that Respondent is an employer within the meaning of NCGS §95-127(11) and that it maintains employees defined by NCGS §95-127(10).

The North Carolina Occupational Safety and Health Review Commission ("Review Commission") issued a Notice of Hearing ordering that the hearing in this case be conducted via videoconference. The Review Commission provided to counsel for Complainant and for Respondent an e-mail invitation that provided the log-on information for the hearing and set forth the Review Commission's expectations of participants in online hearings ("Remote Hearing Instructions"). Subsequently an Order—Supplement to Review Commission's Remote Hearing Instructions was issued by the undersigned. Respondent objected to having the matter heard by video conferencing. Respondent gave no basis for its objection other than that Respondent preferred an in-person hearing.

The Court finds that conducting the hearing via LifeSize videoconferencing is a reasonable alternative to an in-person hearing in light of the COVID-19 pandemic, stay-at home

advisories, and travel limitations. The Governor of North Carolina has issued various executive orders declaring a state of emergency and enacting protective measures to help prevent the spread of COVID-19. Also, the Chief Justice of the North Carolina Supreme Court has issued emergency directives in response to the public health threat posed by the COVID-19 outbreak. Among other matters, these emergency directives authorized the conduct of judicial proceedings in North Carolina, including matters such as this case, by remote audio and video transmissions during the pandemic. The videoconferencing technology provides the parties a fair and reasonable opportunity to present their case and will allow the hearing to move forward on the date previously scheduled instead of postponing the hearing to a future date. Although not withdrawing its objection to the videoconferencing, Respondent stipulated that it would abide by the Review Commission's Notice of Hearing order. Stip. No. 4.

In addition to the Joint Stipulations, the parties, at the beginning of the trial, also stipulated that

- (i) the Hearing in this matter shall be conducted via the video conferencing platform known as "Lifesize";
- (ii) the presence of a court reporter during the Hearing is waived;
- (iii) the Hearing's audio and video will be recorded through Lifesize (the Recording");
- (iv) the Recording will be the official record of the Hearing;
- (v) the Recording will be made available to all counsel after the Hearing concludes (the Host will send a link to the Recording as soon as is practicable after the Hearing concludes);
- (vi) the Administrative Law Judge shall control when the Hearing is on and off the record; and
- (vii) the Hearing will be deemed to have taken place in Raleigh, North Carolina. (RT 2:03 – 2:56)

III. FACTUAL BACKGROUND

A. The Work Site and Nature of Work Performed

Respondent is a construction contractor that performs roofing services, both commercial and residential, new construction and repairs and/or replacements. Stip. No.7. Respondent was retained to replace the roof of the Henderson County Genealogical & Historical Society and Lapidary Museum at the Work Site. (RT 57:30) Respondent, through a Master Subcontract Agreement and a Project Specific Subcontract subcontracted with Yako Construction, Inc. ("Yako") to perform the required roofing work at the Henderson County Museum (the "Building"). (Stip. No. 9; Ex. R-6; Ex. R-9). The roofing project ("Roofing Project") began on January 15, 2019 and was completed on January 28, 2019. (Stip. No. 20). The Roofing Project was performed by employees of Yako. (RT 1:00:46) Respondent provided no manual labor at the Work Site. (RT 1:00:35) but had one employee, Mr. Tony Dunlap, go to the Work Site. (RT 1:02:54; RT 1:05:36)

B. Complainant's Inspection

During the period of January 28, 2019 and January 30, 2019, the CO conducted an inspection of the Work Site (the "Inspection"). (Stip. No.12). The Inspection was an un-programmed inspection, conducted in tandem with an accident referral inspection of Yako arising from the Accident. (Stip. No. 11; RT 26:25; RT 1:47:40).

On January 28, 2019 the CO went to the Work Site to open the Inspection. (Stip. No. 13). When the CO arrived there was no construction work being performed (RT 25:56; Stip. No. 15) and there were no employees or management personal of Respondent or Yako at the Work Site. (RT 37:37 – 37:50). While at the Work Site, the CO took some photographs of the equipment involved and the nature of the Work Site (RT 27:24; Ex. C-1 through Ex. C-6), and contacted by phone John Mertz ("Mertz") (RT 36:19) who was employed by Respondent. Arrangements were made for the CO to meet at the Work Site with Respondent's representatives on January 30, 2019. (RT 37:59) No measurements of the portable ladder (Stip. No. 29) or the Fixed Ladder were made (Stip. No. 28), and there was no other inspection activity on the 28th. (RT 38:12)

On January 30, 2019, the CO returned to the Work Site to proceed with the inspection ("First Return Visit"). The Roofing Project had been completed on January 28, 2019, (Stip. No. 20) and work at the Work Site was complete at the time of the First Return Visit. (Stip. No. 31) All the equipment associated with the Roofing Project other than the Fixed Ladder had been removed. (Stip.No. 19)

The CO held an opening conference. (RT 38:30) Initially present for the opening conference were Mr. John Mertz (identified by the CO as a safety manager of Respondent); Mr. Troy Johnson (identified by the CO as a general manager for Respondent); and Mr. Sergio Franco (identified by the CO as regional vice president of safety for Respondent). (RT 38:55) Before the opening conference was complete Mr. Tony Dunlap (identified by the CO as a project manager for Respondent) joined the group. (RT 57:10) The CO testified that Mr. Ron Adams also participated in the opening conference (RT 39:00); however, during his testimony Mr. Adams denied that he was present at the opening conference.²

During the First Return Visit the CO conducted multiple interviews, made approximate measurements of the Fixed Ladder, and took photographs.

The CO held a closing conference with Mr. Adams and Mr. Mertz on February 11, 2019; an OSHA 59 form (Ex. C-33) was signed by Mr. Adams at the closing conference.

Based on the information she collected, the CO recommended that Respondent be considered a controlling and exposing employer. (RT 2:12:14 --- 2:13:49) and that Respondent be issued a Citation and Notification of Penalty. (RT 2:03:15) On March 5, 2019 a citation was

² The parties dispute whether Mr. Ron Adams was present at the opening conference. The Court does not find that this discrepancy is material to the ultimate resolution of this case.

issued to Respondent alleging a serious violation of 29 CFR 1926.1053(a)(19) in connection with the use of the Fixed Ladder.³ (Stip. No. 33)

After the issuance of the citation to Respondent, in May 2019 the CO returned to the Work Site (RT 2:43:00); she stated that the purpose of her return visit was ‘to get to measure to ensure that the measures were what I was thinking they were going to be’. (RT 2:43:20 – 2:43:30) This return visit to the Work Site is referred to herein as the “Post Inspection Visit”.

IV. DISCUSSION

A. Applicable Law

To establish a violation of a specific OSHA standard, Complainant must establish: (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *JPC Grp., Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). To establish that the violation was serious the Complainant must also establish that the hazard created the possibility of an accident and that the substantially probable result of an accident could be death or serious bodily injury. *Commissioner of Labor v Liggett Group, Inc.*, OSHANC 94-3175 (1996); *Commissioner of Labor v Yates Construction Company, Inc.*, OSHANC 93-2967 (1995).

Complainant has the burden of establishing each element by a preponderance of the evidence. *Commission Rule .0514(a)*; *See Hartford Roofing Co.*, 17 BNA OSCH 1361 (No. 92-3855, 1995). A preponderance of the evidence is “that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false.” *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2131, n. 17 (No. 78-6247, 1981) *aff’d in relevant part*, 681 F.2d 69 (1st Cir. 1982).

B. Citation 01, Item 001

Complainant alleged a serious violation of the Act in Citation 01, Item 001 as follows:

29 CFR 1926.1053(a)(19): Where the total length of a climb equaled or exceeded 24 feet (7.3 m), a fix ladder was not equipped with either: (i) a ladder safety device; (ii) self-retracting lifelines and rest platforms at intervals not to exceed 150 feet (45.7 m); or (iii)

³ At the beginning of the hearing Complainant moved to withdraw the citation alleging a violation of 29 CFR 1926.1060(a) related to lack of training. For purposes of brevity and clarity, the portion of the citation related to training is not included.

a cage or well, and multiple ladder sections, each ladder section not to exceed 50 feet (15.2 m) in length.

(a) at the jobsite – The fixed ladder used to access the building’s roof was not equipped with a ladder safety device, a self-retracting lifeline, or a cage or well. The fixed ladder was approximately 25 feet in length and the top of the fixed ladder was approximately 40 feet from the ground below.

Proposed Penalty: \$7,000.00

Citation and Notification of Penalty at Page 10 of 12.

1. Application of the Standard

The Standard

29 CFR 1926.1053(a)(19) specifically provides the following:

“Where the total length of a climb equals or exceeds 24 feet (7.3 m), fixed ladders shall be equipped with one of the following:

- (i) Ladder safety devices; or
- (ii) Self-retracting lifelines, and rest platforms at intervals not to exceed 150 feet (45.7 m); or
- (iii) A cage or well, and multiple ladder sections, each ladder section not to exceed 50 feet (15.2 m) in length. Ladder sections shall be offset from adjacent sections, and landing platforms shall be provided at maximum intervals of 50 feet (15.2 m).”

By its express terms, this standard is applicable only when the “total length of a climb” on a “fixed ladder” “equals or exceeds 24 feet (7.3 m)”. A fixed ladder is defined as a ladder that cannot be readily moved or carried because it is an integral part of a building or structure. 29 CFR 1926.1053(b).

Overview of Evidence

A fixed ladder was located on the outside wall of the Building (Stip. 17) (the “Fixed Ladder”). The Fixed Ladder was present at the time of the commencement of the Roofing Project. (Stip. No. 21)

The uncontradicted evidence shows that during the CO’s inspection of the Work Site on January 28, 2019:

- (1) no measurements of the Fixed Ladder were made; (Stip. No. 28)
- (2) no measurements of the affixed portable ladder were made; (Stip. No. 29) and
- (3) no measurements of the height of the Building or the distance from the ground to the roof of the Building were made. (Stip. No. 30)

The Fixed Ladder was used by employees of Yako at the Work Site (RT 3:28:02 – 3:28:35; RT 3:37:09) to access the roof of the Building. The bottom of the Fixed Ladder was some distance above the ground. Employees accessed the roof of the Building by climbing an extension ladder (herein referred to as the “Portable Ladder”) tied off to the left side of the Fixed Ladder; then stepping over from the Portable Ladder to the Fixed Ladder; and then climbing up the Fixed Ladder to the roof. (RT 3:35:00 -- 3:35:21; RT 4:10:03).

When the CO returned to the Work Site on January 30, 2019 during the First Return Visit:

- (1) she measured from the bottom of the Fixed Ladder to the ground below, and she determined that distance to be approximately 13 feet (RT 2:34:09);
- (2) the tape measure she used to make the measurements belonged to her; (RT 2:35:17)
- (3) Mr. Sergio Franco worked with her in making the measurements; (RT 2:35:35) and
- (4) she (RT 2:34:30; RT 2:37:17) and Mr. Franco (RT 2:37:02) both counted the rungs on the Fixed Ladder, and each determined that there were 26 rungs on the Fixed Ladder.

The CO made her calculations of length/distance based on her belief that the distance between rungs on a ladder is typically 12 inches (RT 2:34:24), the standard distance between rungs on most ladders being 12 inches, (RT 2:38:55) and she discussed this with Mr. Franco. (RT 3:39:07)

Using her estimates, the CO calculated the following:

Length of Fixed Ladder: 26 rungs X 1 foot = 26 feet (RT 2:40:09)

Height of portable ladder: approximately 13 feet

(same distance as bottom of Fixed Ladder to the ground)

Height of Building: 26 feet + 13 feet = at least 39 feet. (RT 2:40:13; RT 2:41:46) or 40 feet (RT 2:34:41)

Other than the measurements referenced above the CO made no other measurements at the Work Site on January 30, 2019. (RT 2:42:35) The CO did not know whether the rungs of the fixed ladder were all consistent in width. (RT 4:20:50)

The CO estimated the length of the Fixed Ladder to be greater than 25 feet but could not give a definite answer as to its length. (RT 2:40:53)

After the citation had been issued to Respondent the CO returned to the Work Site (RT 4:42:00) with a trench rod. (RT 2:43:10) At that time she again counted the number of rungs of the Fixed Ladder to be 26 and, using the trench rod and photographs of the trench rod, she determined:

* the distance from the Fixed Ladder to the ground to be 12 feet 8 inches; (RT 2:43:55 – RT 2:44:02; RT 2:47:49) and

* the distance between the bottom rung of the Fixed Ladder and the next rung above the bottom rung to be 12 inches. (RT 2:48:02)

The CO determined the lengths she referenced by looking at photographs she made; the photographs showed the trench rod extended up the side of the building alongside of the Fixed Ladder. (Ex. C-14, Ex. C-15; Ex. C-16) The CO took the photographs by standing back from the Building, on the ground, using a zoom lens (RT 2:58:52)

On cross-examination, the evidence with respect to the Fixed Ladder showed that:

* the Fixed Ladder was made of some sort of metal (RT 4:11:42); the CO did not know how old the Fixed Ladder was (RT 4:11:24) or the manufacturer of the Fixed Ladder; (RT 4:11:53)

* there was a wire mesh portion of the Fixed Ladder as shown Ex. C-15; (RT 4:08:30)

* the wire mesh was part of the Fixed Ladder at the Work Site; (RT 4:08:33)

* employees did not climb on the wire mesh portion of the Fixed Ladder; (RT 4:08:40; RT 4:11:06)

* the CO did not measure how far the wire mesh portion extended on the Fixed Ladder; (RT 4:09:21; 4:10:47) and

* the CO did not measure the climb of the Fixed Ladder from where the employee accessed the Fixed Ladder to go to the roof. (RT 4:10:15)

2. Discussion of Applicability of Standard

29 CFR 1026.1053(a)(19), by its express terms, is applicable only when the total length of a climb on a fixed ladder “equals or exceeds 24 feet (7.3 m)”. 29 CFR 1026.1053(a)(19) is very precise and definitive in its language with respect to the required minimum distance of the climb. Accordingly, if the climb were only 23.99 feet the standard would not be applicable. In fact, there is another standard, 29 CFR 1026.1053(a)(18), which expressly applies when the length of the climb on a Fixed Ladder is less than 24 feet (7.3m).

In this case the Complainant attempts to satisfy its burden of proving the length of the climb by employees on the Fixed Ladder through the testimony of the CO that the Fixed Ladder was approximately 25 feet in length. This testimony is consistent with the Complainant’s description of the violative conditions in Citation 01:

“(a) at the jobsite – The fixed ladder used to access the building’s roof was not equipped with a ladder safety device, a self-retracting lifeline, or a cage or well. The fixed ladder was approximately 25 feet in length and the top of the fixed ladder was approximately 40 feet from the ground below.”

The ‘approximately 25 feet in length’ estimate was calculated based on the Fixed Ladder having 26 rungs and on (i) the assumption that the distance between each of the rungs on the Fixed Ladder was 12 inches (the “Assumption”), and (ii) measurements read from photographs of the scale on a trench rod which was placed alongside the Fixed Ladder (the “Measurements”).

With respect to the Assumption, 29 CFR 1926.1053(3)(i) states in relevant part “Rungs...of...fixed ladders...shall be spaced not less than 10 inches (25 cm) apart nor more than

14 inches (36 cm) apart, as measured between center lines of the rungs....". Accordingly, the assumption of an exact 12-inch distance between the rungs on the Fixed Ladder may not have been correct.

With respect to the Measurements, there was no testimony as to (i) whether the base of the trench rod was parallel to the ground, (ii) whether the trench rod was flat against the wall of the Building or the degree of the angle as it ascended the side of the Building, or (iii) the angle from which the CO was photographing the trench rod. The determination of meaningful precise distance measurements from photographs is dependent on many factors such as whether the measuring scale (in this case, the trench rod) is exactly flat (or the degree of angle being known) over the distance of the measuring scale, whether the measuring scale is exactly perpendicular (or the degree of angle being known), and the perpendicularity of the camera with respect to the orientation of the measuring scale's virtual plane. Without this information there is measurement uncertainty and no means to ensure accuracy.

No witness was called to testify who had personal knowledge of the actual construction operation at the Work Site or who personally climbed, or saw workers climb, the Fixed Ladder. Further there was no evidence as to:

- (1) the specific location on the Fixed Ladder at which the Portable Ladder was tied off;
- (2) the specific location on the Fixed Ladder at which the workers transferred from the Portable Ladder to the Fixed Ladder; or
- (3) the distance of the climb to the roof from where the workers transferred onto the Fixed Ladder from the Portable Ladder.

In fact, the CO specifically testified (i) that she did not measure the climb on the Fixed Ladder from where the workers got onto it to go to the roof. (RT 4:10:17) and (ii) that workers did not climb on the part of the Fixed Ladder with the mesh. (RT 4:08:40; RT 4:11:06)

29 CFR 1926.1053(a)(19) is triggered only by an exact, precise minimum distance of climb (i.e. at least 24 feet). Thus, it is essential to Complainant's case to establish that the climb distance of the workers was at least 24 feet. In this case the estimate of the length of the Fixed Ladder is not sufficient to carry the burden of proof to establish that the length of the climb of the employees on the Fixed Ladder was equal to or more than 24 feet.

Whether estimates of distance/length are sufficient for carrying the burden of proof is dependent on the facts and circumstances of the case. See *Well Solutions*, 15 OSHC BNA 1718 (No. 89-1559, 1992); *Field & Associates, Inc.*, 19 OSHC BNA 1379 (No. 97-1585 OSHRC 2001); *Straight Ahead Construction, Inc.*, 24 OSHC BNA1332 (No 12-0047, 2012); *Globe Energy Services, LLC*, 25 OSHC BNA 1564 (No. 14-0448, 2015); *3-D Builders, LLP*, 27 OSHC BNA 1132 (No 16-0094, 2018); *Sec'y of Labor v. Consol Penn Coal Mining Co., LLC*, 40 FMSHRC Page 429-439 (Mar. 14, 2018).

In Universal Maritime Service Corp, 20 BNA OSHC 1853, 1856 (No. 03-0399, 2004) Federal Review Commission Chief Judge Irving Sommer stated “The Secretary’s obligation to demonstrate the alleged violation by a preponderance of the reliable evidence of record requires more than estimates, assumptions and inferences, especially where, as here, the standard incorporates specific distances as an integral part of its requirements.” In this case, the minimum specific distance of 24 feet is an integral part of the requirements of 29 CFR 1026.1053(a)(19).

The Complainant is required to prove each and every element of a violation by a preponderance of the evidence. In this case, Complainant must prove that the length of the employee’s climb on the Fixed Ladder “equals or exceeds 24 feet (7.3 m)” before 29 CFR 1026.1053(a)(19) is applicable. Based on the foregoing, the Court finds that the Complainant failed to establish by a preponderance of the evidence that employees were climbing a distance of equal to or exceeding 24 feet (7.3 m) on the Fixed Ladder. Ultimately, Complainant’s failure is one of proof of the essential element of the standard itself. Citation 01, Item 001 shall be VACATED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule .0601(a) of the Commission Rules.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 01 Item 001 is VACATED.

SO ORDERED



R. Joyce Garrett
Administrative Law Judge

Date: October 14, 2020

Attachment "A"
Stipulations
Baker Roofing Company 2019-6105

Statement / Event	Complainant Accepts	Respondent Accepts	No.
The Complainant as Commissioner of Labor of the State of North Carolina is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina (hereinafter "the Act"), including making inspections and issuing citations and other pleadings, and beings this action pursuant to N.C.G.S. §95-133 et seq.	X	X	1
Pursuant to N.C.G.S. §95-135, the Review Commission has jurisdiction over the parties and the subject matter to this action.	X	X	2
Complainant has no objection, either procedural or otherwise, to this Hearing and consents to the conduct of this Hearing by Judge Garrett,	X	N/A	3
Respondent formally objects to the Commission's decision to hold this hearing virtually, but will abide by the Commission's Order; Respondent consents to Judge Garrett presiding.	N/A	X	4
Respondent posted the Citation and the Notice of Hearing as required by the Rules.	N/A	X	5
Respondent is a North Carolina corporation, duly organized and existing under the laws of the State of North Carolina, which does business in the State of North Carolina and maintains a place of business in Raleigh, North Carolina.	X	X	6
Respondent is a construction contractor that performs roofing services, both commercial and residential, both new construction and repairs and/or replacements.	X	X	7
Respondent is an "employer" within the meaning of N.C.G.S. Section 95-127(11) and it maintains employees as defined by N.C.G.S. Section 95-127(10).	X	X	8
Respondent subcontracted with Yako Construction, Inc. ("Yako") to perform roofing work at the Henderson County Museum (the "Building") located 400 North Main Street in Hendersonville, North Carolina (the "Work Site")..	X	X	9
Respondent reported to NC OSHA the Accident at the Work Site on January 28, 2019.	X	X	10
With respect to the Inspection			
The Inspection was based on an accident referral.	X	X	11
During the period of January 28, 2019 and January 30, 2019, Robin Ewart, an Occupational Safety and Health Compliance Officer with the North Carolina Department of Labor (the "Inspector"), conducted an inspection of the Work Site (the "Inspection").	X	X	12
On January 28, 2019 CSHO Ewart went to the Work Site to open the Inspection:	X	X	13
* On January 28, 2019 at the time of the Inspection there were cones and flagged warning line located around the perimeter of the roof of the Building;	X	X	14
* On January 28, 2019 at the time of the Inspection there was no	X	X	15

Statement / Event	Complainant Accepts	Respondent Accepts	No.
work activity on the roof of the Building;			
* On January 28, 2019 at the time of the Inspection there was roofing material, a utility trailer, and an all-terrain forklift located at the back of the Building in an area roped off by orange cones and yellow nylon rope;	X	X	16
* On January 28, 2019 at the time of the Inspection there was a fixed ladder attached to the side of the Building (the "Fixed Ladder");	X	X	17
* On January 28, 2019 at the time of the Inspection there was a ladder safety device which had been installed at the top of the Fixed Ladder;	X	X	18
* On January 30, 2019, at the time of the First Return Visit, all the equipment (other than the Fixed Ladder) including the portable ladder affixed to the Fixed Ladder and the ladder safety device were no longer present at the Work Site.	X	X	19
*The Roofing Project began on January 15, 2019 and was completed on January 28, 2019.	X	X	20
With respect to the Fixed Ladder			
The Fixed Ladder was present on the Building at the time of the commencement of the Roofing Project;	X	X	21
An OSHA standard for fixed ladders is expressly set forth in Subpart X captioned "Stairways and Ladders" in 29 CFR 1926.1053;	X	X	22
As a result of the Inspection, on March 5 th , 2019, Complainant issued the following Citation and Notification of Penalty (herein referred to as the "Citation"): CITATION 01 (Serious) Grouped Item No. 001a Standard 29 CFR 1926.1053(a)(19) Abatement Date Corrected During Inspection Penalty \$7,000.00 Item No. 001b Standard 29 CFR 1926.1060(a) Abatement Date Corrected During Inspection Penalty \$0.00	X	X	23
Respondent submitted a timely Notice of Contest dated April 3, 2019 .	X	X	24
Respondent contested the alleged violations, abatement dates and proposed penalties.	X	X	25
Citation 01 Item 001a alleged: a Serious violation of 29 CFR 1926.1053(a)(19) : Where the total length of a climb equaled or exceeded 24 feet (7.3 m), a fixed ladder was not equipped with either: (i) a ladder safety device; (ii) self-retracting lifelines and rest platforms at intervals not to exceed 150 feet (45.7 m); or (iii) a cage or well, and multiple ladder sections, each ladder section not to exceed 50 feet (15.2 m) in	X	X	26

Statement / Event	Complainant Accepts	Respondent Accepts	No.
length: a) at the jobsite – The fixed ladder used to access the building’s roof was not equipped with a ladder safety device, a self-retracting lifeline, or a cage or well. The fixed ladder was approximately 25 feet in length and the top of the fixed ladder was approximately 40 feet from the ground below.			
With respect to Citation 01 Item 001a			
* Daily safety huddles were conducted on the Work Site by Yako that reviewed potential hazards at the Work Site.	X	X	27
* No measurements of the Fixed Ladder were made during the Inspector’s visit to the Work Site on January 28, 2019;	X	X	28
* No measurements of the affixed portable ladder were made during the Inspector’s visit to the Work Site on January 28, 2019;	X	X	29
* No measurements of the height of the building or the distance from the ground to the roof of the building were made during the Inspector’s visit to the Work Site on January 28, 2019;	X	X	30
* On January 30, 2019, the work at the Work Site was complete.	X	X	31
* On January 30, 2019, during the First Return Visit, the portable ladder that the Inspector had observed on January 28, 2019 affixed to the Fixed Ladder was no longer affixed to the Fixed Ladder or otherwise present at the Work Site;	X	X	32
* On March 5, 2019 the Citation was issued.	X	X	33
* Respondent submitted a timely Notice of Contest dated April 3, 2019 .	X	X	34
With respect to the Accident which occurred on January 26, 2019	N/A	N/A	
* The Inspector observed a flagged warning line located around the perimeter of the roof on January 28, 2019 at the time of the Inspector went to the Work Site to begin the Inspection;	X	X	35
* At the time of the Accident there was no supervisor, manager or other person employed by Respondent present at the Work Site;	X	X	36
* Respondent learned about the Accident after the Accident occurred;	X	X	37
Citation 01 Item 001b alleged: a Serious violation of 29 CFR 1926.1060(a): The employer did not provide a training program for each employee using ladders and stairways, as necessary, which would enable each employee to recognize hazards related to ladders and stairways and train each employee in the procedures to be followed to minimize these hazards: a) at the Jobsite – Employees were not trained on the nature of the fall hazards presented by the fixed ladder and how to minimize those hazards. The fixed ladder was approximately 25 feet in length and was not equipped with a cage, well, ladder safety device, or self-retracting lifeline. Abatement Note:	X	X	38

Statement / Event	Complainant Accepts	Respondent Accepts	No.
Ladder Training Requirements as specified in 1926.1060(a)(1): (i) The nature of fall hazards in the work area; (ii) The correct procedures for erecting, maintaining, and disassembling the fall protection systems to be used; (iii) The proper construction, use, placement, and care in handling of all stairways and ladders; (iv) The maximum intended load-carrying capacities of ladders used; and (v) The standards contained in this subpart.			
With respect to Citation 01 Item 001b	N/A	N/A	
* Respondent provided documentation to Complainant showing that employees of Yako participated in an orientation and a training provided by Respondent by providing to Complainant a "Safety Orientation Roster" dated November 9, 2016 and a "Training Log" dated September 18, 2018;	X	X	39
* On January 25, 2019 at approximately 8:30 A.M. Victor Hugo Rosado Solis, an employee of Yako, led a daily safety huddle discussion for employees of Yako at the Work Site (the "January 25 Daily Safety Huddle");	X	X	40
* The January 25 Daily Safety Huddle appears to be signed by 5 Yako employees in addition to Victor Hugo Rosado Solis;	X	X	41
* A signature of the name of the Yako employee who was injured in the Fall is included in the "Signature" section of the January 25 Daily Safety Huddle;	X	X	42
* In connection with the January 25 Daily Safety Huddle Mr. Rosado Solis marked in Spanish Peligros potenciales on a "Daily Safety Huddle (Commercial)" report dated 01/25/19; the peligros potenciales included (but were not limited to) "Caidas" and "Escaleras";	X	X	43
* On the "Daily Safety Huddle (Commercial)" report dated 01/25/19 the required Proteccion personal y practicas checked off included (but was not limited to) "Arnes"; "Agujeros cubiertos"; "Agarre del lazo"; "Escalera 3 pies de mas"; "Escalera ,arrada"; and it did include "Lazo" checked off;	X	X	44
* The "Daily Safety Huddle (Commercial)" report dated 01/25/19 contained a section at the bottom of the report which was to be completed daily while the work is ongoing and then turned in to the supervisor (the "01/25/19 Report Bottom Section");	X	X	45
* The 01/25/19 Report Bottom Section was in Spanish, was unsigned and not dated.	X	X	46
* The 01/25/19 Report Bottom Section had checked "Yes" beside numerous "Requisitos" including "Ames/Lanyard/Agarra lazo/lazo" and "Utilizando proteccion de caidas con las escaleras";	X	X	47
* On January 26, 2019 at approximately 8:00 A.M. Orlando Coronado, Job Foreman for Yako, led a daily safety huddle discussion with employees of Yako at the Work Site (the "January 26 Daily Safety Huddle");	X	X	48
* The January 26 Daily Safety Huddle appears to be signed by 7 Yako employees in addition to Orlando Coronado;	X	X	49

Statement / Event	Complainant Accepts	Respondent Accepts	No.
* A signature of the name of the Yako employee who was injured in the Fall is included in the "Signature" section of the January 26 Daily Safety Huddle;	X	X	50
* In connection with the January 26 Daily Safety Huddle Mr. Coronado marked in English potential hazards on a "Daily Safety Huddle (Commercial)" report dated 01/26/19; the potential hazards included (but were not limited to) "Fall from elevations" and "Ladder Hazards";	X	X	51
* On the "Daily Safety Huddle (Commercial)" report dated 01/26/19 the Required PPE and Practices checked off included (but was not limited to) "Harness"; "Lanyard"; "Rope grab"; "Ladder extend 3 feet"; "Ladder tied off"; but it did not include "Lifeline" checked off;	X	X	52
* The "Daily Safety Huddle (Commercial)" report dated 01/26/19 contained a section at the bottom of the report which was to be completed daily " <u>while the work is ongoing</u> " and then turned in to the supervisor (the "01/26/19 Report Bottom Section");	X	X	53
* The 01/26/19 Report Bottom Section was in English, appears to have been signed by Orlando Coronado, and was dated 01/26/19;	X	X	54
* The 01/26/19 Report Bottom Section had checked "Yes" beside numerous "Requirements" including "Harness/Lanyard/Rope grab/Lifeline" and "Using Fall Protection off ladders";	X	X	55

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this date served a copy of the foregoing ORDER upon:

TRAVIS W. VANCE
FISHER & PHILLIPS, LLP
227 W. TRADE ST., STE 2020
CHARLOTTE, NC 28202

by depositing same in the United States Mail, First Class postage prepaid at Raleigh, North Carolina, and upon:

SAGE BOYD
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

by depositing a copy of the same in the United States Mail, First Class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

By depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 23 DAY OF October 2020.



Karissa B. Sluss
Docket and Office Administrator
NC OSH Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
FAX: (919) 733-3020