United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama St. S.W
Building 1924 Room 2R90
Atlanta, GA 30303-314

SECRETARY OF LABOR, Complainant, v. ELMER COOK CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 16-0817

CORRECTED DECISION AND ORDER[1]

COUNSEL: Jonathan Hoffmeister, Trial Attorney, U.S. Department of Labor, Office of the Solicitor, Dallas, Atlanta, GA, for Complainant.

Elmer Cook, *pro se*, Fort Walton Beach, FL, for Respondent.[2]

JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

Elmer Cook Construction, Inc. (Elmer) was cited by the United States Department of Labor's Occupational Safety and Health Administration (OSHA)[3] on April 22, 2016, for two alleged serious[4] violations of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§ 651–678 with $9,100 in proposed penalties. Specifically, OSHA asserts two of Elmer's

[1] The original Decision and Order indicated it was entered on September 6, 2017. It was not.

[2] At a pretrial conference, Elmer requested a postponement until after the presidential elections are held, which was denied. Elmer subsequently elected not to appear at trial, and therefore waived its right to present any evidence.

[3] The Secretary of Labor (the Secretary) delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health, who heads OSHA, and assigned responsibility for enforcement of the Act to OSHA. *See* 65 Fed.Reg. 50017 (2000). The Assistant Secretary has promulgated occupational safety and health standards, *see e.g.*, 29 C.F.R. Parts 1910 and 1926, and has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties to enforce the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[4] Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§666(a), (b), (c). A "serious" violation is defined in the statute as one that carries "a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). "The gravamen of a serious violation is the presence of a 'substantial probability' that a particular violation could result in death or serious physical harm." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 318 (5th Cir. 1979).

employees installing waterproofing material to the roof were wearing personal fall protection systems incorrectly and were not protected from a 30 feet fall hazard by the use of a personal fall protection system in violation of 29 C.F.R. § 1926.502(d)(17), OSHA's fall protection standard applicable to personal arrest systems. OSHA also asserts the ladder used to access the top of the structure did not extend 3 feet above the upper landing surface, exposing employees to a 12 foot fall hazard in violation of 29 C.F.R. § 1926.1053(b)(1), OSHA's ladders standard. The citation proposed a total penalty of $9,100.00. After Elmer timely contested the citation, the Secretary filed a formal complaint with the Commission charging Elmer with violating the Act and seeking an order affirming the citation and the $9,100 proposed penalties. Since this case was assigned to simplified proceedings, Elmer was not required to file an answer. *See* 29 C.F.R. § 2200.205(a).

The Commission has jurisdiction of this action under section 10(c) of the Act, 29 U.S.C. § 659(c). Elmer is an employer engaged in a business affecting commerce within the meaning of section (5) of the Act, 29 U.S.C. § 652(5). *See also*, *Clarence M. Jones d/b/a Jones Co.*, 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983) (holding there is an interstate market in construction materials and services and therefore construction work affects interstate commerce). A one day bench trial was held in Panama City, Florida. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, 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. If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so. For the reasons indicated *infra*, the Court concludes all the elements necessary to prove the violations have been satisfactorily established by the Secretary. Accordingly, the citation is **AFFIRMED** and Elmer is **ASSESSED** a total civil penalty of $4,200.00.

II. BACKGROUND

Elmer is a contractor for roofing, home construction, and remodeling, and on March 15, 2016, was a sub-contractor providing roofing work at a commercial construction project off Front Beach Road in Panama City, Florida ("the worksite"). Precision Construction and Concrete, LLC (Precision) was also a subcontractor, and Optimum Contractors, Inc. was the general contractor of the worksite. This matter arose when Esley Chester Jr., an OSHA Compliance Safety and Health Officer, opened an inspection of the worksite after observing two aerial lifts in use, each with two workers, working on the aerial lifts. Although the workers were wearing H harnesses or body harnesses for fall protection, they did not appear to be tied off. Chester stopped on the south side of Front Beach Road and monitored the worksite for about forty minutes to see if he could tell if

the workers were tied off onto the aerial lift. During this time, Chester drove around the building on different roads for 15-20 minutes to try to get a better positioning for the workers in the aerial lift.

When Chester returned to the front of the building, he noticed two other workers on the west side of the building that had just gone up onto the roof, which was approximately 12 feet from the ground, without proper fall protection. Chester monitored the two workers for 15-20 minutes before entering the worksite. (Ex. C-1 through C-8). Upon entering the site, Chester spoke with the general contractor and the superintendent and learned that the two workers he saw going onto the roof were Elmer's workers, Rigoberto Padilla and Juan M. Amaya, and that they were installing waterproofing material to the roof. The superintendent contacted the owner of Elmer and Elmer Cook subsequently arrived at the worksite 3-5 minutes later. When Cook arrived he greeted Chester with hostility. Cook initially demanded Chester get a warrant, but then continued to engage Chester as Chester tried to interview other employers at the worksite. Cook admitted to Chester that Amaya and Padilla were his employees. Cook later signed a witness statement and allowed Chester to speak with Amaya. Cook admitted to Chester that Amaya served as a foreman and was in charge when Cook was not on premises.

According to Cook and the Florida Department of State, Division of Corporations, both of Elmer's workers were officers of the company; Amaya was the Vice President and Padilla was the Secretary. (Ex. C-9.) When asked why Amaya and Padilla were not tied off, Cook stated, "they were tied off, they were tied off to the front." (Tr. 22.) Cook admitted to Chester "that's the way they do, that's the way they always do it." (Tr. 64.) Aside from Amaya attaching his lifeline in the wrong place, the anchor to which Amaya's lifeline was connected was not attached to the roof. (Ex. C-2 and C-6). Chester also concluded Amaya's lifeline was too long to protect him from harm, even had it been properly anchored. Although wearing a harness, Padilla was not attached to a lifeline at all. Neither employees was utilizing a warning line system, a safety net system, or a safety monitor. According to Chester, if either employee had fallen from the roof, they would certainly have hit the ground.

Chester determined that Amaya and Padilla's failure to properly wear fall protection posed a serious hazard to their safety. Although on a low slope roof, the employees were working approximately 30 feet above the ground. According to Chester, the relatively small area of the roof, along with the rope, waterproofing materials, and tools in the employees' workspace, increased the risk of an employee tripping. Based on these conditions, Chester determined that

the probability of an accident was greater and the severity of a resultant injury—potentially death or broken bones—was high.

To access the roof and bring up the waterproofing materials, Amaya and Padilla utilized a portable aluminum ladder which they had placed on a lower platform. Chester estimated the ladder's length to be 12 feet by counting 12 rungs on the ladder, which are a standard 12 inches apart. Through visual observation, Chester determined that the ladder's side rails did not extend 3 feet beyond the roof's edge as the standard requires. (Ex. C-2 through C-7). The ladder was not attached at the top to any support and no grab rail was available for employee use. (*Id.*) Elmer admitted to Chester that he knew the ladder was required to be longer but decided that since his employees were short, it was more dangerous and harder for the workers to use a longer one. Cook admitted to Chester that "when they work on residential houses with a 6 on 12 pitch, that's when they will use a ladder at three feet above. So he had knowledge that you're supposed to use a ladder at three feet or above." (Tr. 64-65.)

Chester determined that the circumstances of the ladder's use posed a serious hazard. According to Chester, the insufficient extension of the ladder rails beyond the roof's edge limited employees' ability to steady themselves as they moved between the roof and the ladder. Cook told the compliance officer that the waterproof materials that employees carried up the ladder weighed approximately 80 pounds, which Chester concluded would limit a person's ability to maintain three-points of contact and could cause the ladder to deflect. Based on the ladder's set up and the risk of a 12 foot fall, Chester testified that there was a greater probability of an accident and the potential for a highly severe resultant injury.

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). As the Eleventh Circuit has noted, the jurisdiction in which this case arose,[5] the Act "sought to assure that 'every working man and woman in the Nation [had] safe and healthful working conditions.'" *ComTran Grp., Inc. v. U.S.*

[5] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Florida, which is in the Eleventh Circuit. In general, where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has applied the precedent of that circuit in deciding the case, "even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

Dep't of Labor, 722 F.3d 1304, 1306 (11th Cir. 2013) (citations omitted). "To implement its statutory purpose, Congress imposed dual obligations on employers. They must first comply with the 'general duty' to free the workplace of all recognized hazards. 29 U.S.C. § 654(a)(1). They also have a 'special duty' to comply with all mandatory health and safety standards." *ComTran*, 722 F.3d at 1307.

"With respect to the latter, Congress provided for the promulgation and enforcement of the mandatory standards through a regulatory scheme" where the "Secretary has rulemaking power and establishes the safety standards; investigates the employers to ensure compliance; and issues citations and assesses monetary penalties for violations." *ComTran*, 722 F.3d at 1307. "The language of section 654 is mandatory. . . . The Act 'unambiguously forecloses such discretion' on the part of employers to decline compliance and proceed with an alternative program without justification or approval." *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1154 (11th Cir. 1994) (citations omitted).

Thus, under the law of the Eleventh Circuit, "the Secretary will make out a prima facie for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *ComTran*, 722 F.3d at 1307 (citation omitted).

A. Citation 1, Item 1

Alleged Violation

Under OSHA's fall protection standard, a "personal fall arrest system" is "a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body belt or body harness and may include a lanyard, deceleration device, lifeline, or suitable combinations of these." 29 C.F.R. § 1926.500(b). When a body harness is used, the standard further mandates that the attachment point of the body harness "shall be located in the center of the wearer's back near shoulder level, or above the wearer's head." 29 C.F.R. § 1926.502(d)(17). Item 1 as amended asserts two of Elmer's employees installing waterproofing material to the roof were not protected from a fall hazard by the use of a personal fall protection system since "[t]he attachment point of the body harness was not located in the center of the wearer's back near shoulder level, or above the wearer's head[.]"

Under the fall protection standard, "each employee engaged in roofing work on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above a lower level" shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems," or a combination of one of those systems and a warning line system, "or a warning line system and safety monitoring system." 29 C.F.R. § 1926.501(b)(10). "Roofing work" is defined as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck." 29 C.F.R. § 1926.500(b). A *low-slope* roof "means a roof having a slope less than or equal to 4 in 12 (vertical to horizontal)." 29 C.F.R. § 1926.500(b).

Here, two of Elmer's employees were applying waterproofing material to the roof. Therefore, Elmer was engaged in roofing work. Further, since the roof had a 2 in 12 pitch slope, it was a low-slope roof. Thus, the fall protection standard applied. Further, since Elmer was using a personal arrest system to protect its employees from falling, it was required to comply with the provisions of OSHA"s personal fall arrest systems standard, including the cited portion of the standard related to the attachment point of the body harness. Therefore, the cited standard applied to the cited condition.

Violation of Cited Standard

Cook admitted his workers "were tied off to the front." Therefore, the record establishes Elmer violated the cited standard, since the attachment point of the body harness worn by its two employees was not "located in the center of the wearer's back near shoulder level, or above the wearer's head." 29 C.F.R. § 1926.502(d)(17).

Exposure to Hazard

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). To establish exposure, "the Secretary ... must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd*., 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)). The zone of danger is the "area surrounding the violative condition that presents

the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)).

As the Commission noted in *Gilles & Cotting*, 3 BNA OSHC 2002, 2003 (No. 504, 1976), the scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue. Here, the zone of danger presented was the unprotected sides and edges of the roof. "Our inquiry then is whether the employees' proximity" to the unprotected sides and edges of the roof "makes it reasonably predictable that they will enter these zones of danger by slipping or falling." *Fabricated Metal*, 18 BNA OSHC at 1076. The photographs taken by the compliance officer, and corroborated by his testimony, clearly establish the proximity of some of Elmer's employees to the unprotected sides and edges of the roof, which "makes it reasonably predictable that they will enter these zones of danger by slipping or falling." Further, since the workers were installing a sealant on the entire surface of the canopy roof, the employees were required to work on all parts of the roof, including near its edges. Thus, the Court concludes the Secretary has shown "that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that Elmer's employees have been, are, or will be in the zone of danger" without proper fall protection. *Delek Ref., Ltd*., 25 BNA OSHC at 1376. Therefore, the Secretary has established employee exposure to the cited condition.

Knowledge of Violation

"[W]here the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer." *ComTran*, 722 F.3d at 1307-08 (*citing Georgia Elec. Co. v. Marshall,* 595 F.2d 309, 321 (5th Cir. 1979); *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 105 (2d Cir.1996); *Secretary of Labor v. Access Equip. Sys., Inc.,* 18 BNA OSHC 1718, 1727 (No. 95-1449, 1999)).[2] Here, Cook admitted to Chester that Amaya and Padilla were tied off to the front and "that's the way they do, that's the way they always do it." Further, since Amaya served as a foreman and was in charge when Cook was not on premises, and was supervising Padilla, Amaya knew or should have known Padilla was was not tied off correctly since they were working in close proximity to each other. Amaya's knowledge of the violative condition is imputed to the company.

B. Citation 1, Item 2

Alleged Violation

Item 2 of the citation asserts the ladder used to access the top of the structure did not extend 3 feet above the upper landing surface, exposing employees to a 12 foot fall hazard. Under OSHA's stairways and ladders standard, "[w]hen 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." 29 C.F.R. § 1926.1053(b)(1).

Application of Fall Protection Standard

OSHA's stairways and Ladders standards apply "to all stairways and ladders used in construction, alteration, repair (including painting and decorating), and demolition workplaces" covered under the safety and health regulations for construction." 29 C.F.R. § 1926.1050(a). Therefore, the cited standard applies to the cited condition.

Violation of Cited Standard

The record shows Elmer violated the cited standard, since the ladder used to access the top of the structure did not extend 3 feet above the upper landing surface, exposing employees to a 12 foot fall hazard. There is no evidence in the record such an extension was not possible because of the ladder's length, and even if that were so, there is no evidence the ladder was secured at its top to a rigid support that will not deflect, or that a grasping device, such as a grabrail, was provided to assist employees in mounting and dismounting the ladder.

Exposure to Hazard

The Court concludes the Secretary has shown "that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that Elmer's employees have been, are, or will be in the zone of danger" since they were exposes to a 12 foot fall hazard. Therefore, the Secretary has established employee exposure to the cited condition.

Knowledge of Violation

As for the knowledge element, Elmer admitted to Chester that he knew the ladder was required to be longer but decided that since his employees were short, it was more dangerous and

harder for the workers to use a longer one. Therefore, the Secretary has established knowledge on the part of Elmer.

C. Classification

Finally, the Secretary classified the violations as serious. As indicated *supra*, a serious violation is one that carries a substantial probability that death or serious physical harm could result. Here, employees were exposed to a fall hazard due to Elmer's failure to properly implement a personal fall arrest system and its failure to use a ladder that extended 3 feet above the upper landing surface. Clearly, there was a substantial probability that death or serious physical harm could result from both violations. Therefore, the violations were properly classified as serious.

IV. PENALTY DETERMINATION

Under the law in effect at the time of the citation, Elmer was subject to a civil penalty of up to $7,000.00 for each serious violation. 29 U.S.C. §666(b).[6] The Secretary proposed a $2,800.00 penalty for item 1 of the citation and $6,300.00 for item 2 of the citation. However, the Commission "consider[s] the amount of the Secretary's penalty de novo," *ComTran Grp.*, 722 F.3d at 1307, and "the appropriate amount is for the Commission to set." *Reich v. Occupational Safety & Health Review Comm'n*, 102 F.3d 1200, 1203 n. 4 (11th Cir. 1997). Thus, the "Commission has the exclusive authority to assess penalties once a proposed penalty is contested." *Chao v. OSHRC*, 401 F.3d 355, 376 (5th Cir. 2005) (citation omitted).

The Commission is to "giv[e] due consideration to the appropriateness of the penalty with respect to [1] the size of the business of the employer being charged, [2] the gravity of the violation, [3] the good faith of the employer, and [4] the history of previous violations." 29 U.S.C. § 666(j). "These factors are not necessarily accorded equal weight...." *Chao v. OSHRC*, 401 F.3d at 376 (*citing J.A. Jones Constr.*, 15 BNA OSHC at 22016). "Gravity of violation is the key factor." *See id.* Given the high probable extent of physical injuries should future accidents occur, the Court finds the gravity of the fall hazard high.

As for the size of the business, Chester determined that the company had only four employees. The Court concludes a reduction in the penalty amount is warranted based upon the

[6] In November 2015, Congress enacted legislation requiring federal agencies to adjust their civil penalties to account for inflation. The Department of Labor has adjusted penalties for its agencies, including the Occupational Safety and Health Administration (OSHA). The new penalties took effect August 2, 2016. Any citations issued by OSHA on or after this date is subject to the new penalties if the related violations occurred after November 2, 2015. Under the new penalty structure, the maximum penalty for a serious violation is $12,471 per violation.

size. Further, since there is no evidence in the record of a history of violations, the Court concludes an additional reduction in the penalty amount is warranted based upon a lack of history of violations. However, since Elmer did not present any evidence of a fall protection program or plan or an enforcement program, it is not entitled to a good faith reduction. Therefore, giving due consideration to the required statutory factors, the Court finds a civil penalty of $2,100 for each violation is appropriate. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Citation 1, Items 1 and 2 are **AFFIRMED** and a civil penalty of $2,100 for each violation is **ASSESSED**.

SO ORDERED.

/s/ John B. Gatto
John B. Gatto
Administrative Law Judge

Dated: December 29, 2017
Atlanta, GA