United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. Mauricio Diaz Construction, Respondent.	OSHRC Docket No. **15-0202**

Appearances:

Paul Spanos, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For the Secretary

J. Miles Gibson, Esquire, Isaac Wiles Burkholder & Teetor, LLC, Columbus, Ohio
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678) (the Act). Mauricio Diaz Construction (hereinafter Mauricio Diaz) is a construction contractor. On November 12, 2014, Occupational Safety and Health Administration Compliance Officer (CSHO) Dustin Schnipke conducted an inspection of Mauricio Diaz at 2445 West Dublin-Granville Road, in Worthington, Ohio. Based upon CSHO Schnipke's inspection, the Secretary of Labor, on January 7, 2015, issued a Citation and Notification of Penalty to Mauricio Diaz alleging a repeat violation of 29 C.F.R. § 1926.501(b)(13) for failing to use fall protection while performing framing work on a residential duplex. The Secretary proposed a penalty of $6,160.00 for the Citation. Mauricio Diaz timely contested the Citation. Both the alleged violation and the penalty are at issue.

I held a hearing in this matter on October 15, 2015, in Columbus, Ohio. Following the close of testimony, I ordered Respondent to submit a photograph of an object used for

demonstrative purposes during the hearing. Respondent did so. The photograph was marked as Exhibit J-1 and admitted into the record without objection. The parties were given the opportunity to file post-hearing briefs or written closings, but opted not to do so.

For the reasons discussed below, the citation is affirmed and a penalty of $6,160.00 is assessed.

JURISDICTION

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 7). The parties also stipulated at the hearing that at all times relevant to this action, Mauricio Diaz was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Tr. 7). Based upon the evidence of record and the stipulation of the parties, I find the Commission has jurisdiction of this action and Mauricio Diaz is an employer covered under the Act.

BACKGROUND

Respondent is a construction contractor owned and operated by Mr. Mauricio Diaz (Tr. 25). It has approximately six employees at any given time (Tr. 26). Mr. Diaz testified he has been in the construction business for more than 21 years (Tr. 26).

On the afternoon of November 12, 2014, while driving on West Dublin-Granville Road, CSHO Schnipke[1] observed three individuals working at the peak of the roof of a two story residential duplex (Tr. 12-13). He stopped his vehicle and spent 10 to 15 minutes observing and photographing the workers from across the street (Tr. 13). He saw two of the workers were wearing harnesses, but those harnesses were not connected to any lifelines or anchor points (Tr. 15 – 18; Exh. C-1 pp. 3, 6, 7, 9, 10, 11, 12). He noted the third individual was not wearing a harness (Tr. 15-16). He estimated the workers were 24 feet above the ground while working at the roof's peak (Tr. 19).

CSHO Schnipke entered the worksite via an access road (Tr. 18). Upon entering the worksite, CSHO Schnipke asked the first worker he saw who was "in charge." The worker found Mr. Diaz and brought him to CSHO Schnipke (Tr. 19). Mr. Diaz told CSHO Schnipke he

[1] CSHO Schnipke has been a CSHO for three years and, in that time, has conducted approximately 150 inspections. He has experience prior to working for OSHA in the communications tower industry (Tr. 10-11).

and his employees had been working most of the day on the roof (Tr. 18-19). Mr. Diaz showed CSHO Schnipke the fall protection equipment he had available at the worksite for his employees, including harnesses and lifelines (Tr. 17; Exh. C-1 pp. 13-14). According to CSHO Schnipke Mr. Diaz never claimed his employees were tied off (Tr. 43).

Mr. Diaz and one of the employees on site, Osvaldo Rafael Lebron, testified, contrary to CSHO Schnipke observations, they were tied off the entire day with the exception of when they were climbing up to or down from the roof (Tr. 26-27). Mr. Diaz identified the individual depicted in Exhibit C-1 pp. 2, 3, 5, and 7, as his employee David (Tr. 27). The photographs show Employee David from the back, working at the peak of the roof, wearing a yellow harness with a D-ring on the back. Nothing is attached to the D-ring. Mr. Diaz testified Employee David was tied off on the front of the harness to a rope he also identified as depicted in Exhibit C-1 pp. 3 and 5 (Tr. 27). Employee David was not called to testify.

Based upon his observations, CSHO Schnipke recommended a citation be issued to Mauricio Diaz for a violation of 29 C.F.R. § 1926.501(b)(13) for failure of Mauricio Diaz's employees to use fall protection while working on the roof of the residential duplex at the worksite. He recommended the citation be classified as a repeat violation. Mauricio Diaz timely contested the Citation.

DISCUSSION

The Citation

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The Secretary alleges Mauricio Diaz violated the standard at 29 C.F.R. § 1926.501(b)(13). That standard states:

> "Residential construction." Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure.

> Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

The Citation states:

> At the construction site located at 2445 W. Dublin Granville Road, Worthington, Ohio, Unit 42, employees were performing framing work on a new two story residential duplex without the use of fall protection, thereby exposing the employees to a fall hazard at a height of approximately 24 feet.

The Secretary alleges Mauricio Diaz's failure to ensure employees were tied off while working at the peak of the roof violated the cited standard.

Applicability of the Standard

There is no dispute Mauricio Diaz employees were engaged in residential construction activities more than 6 feet above a lower level. The parties stipulated Mauricio Diaz employees were working more than 6 feet above the ground and that fall protection was required at that height (Tr. 7).[2] CSHO Schnipke testified the project on which the exposed employees were working was a residual duplex, which is considered residential construction (Tr. 20). This is not in dispute. The standard applies and Mauricio Diaz employees were required to be protected from falls.

Failure to Comply with the Standard

The parties' central dispute is whether Mauricio Diaz was in compliance with the standard. Because there is no dispute there was no guardrail or safety net system in use, the specific issue for resolution is whether Mauricio Diaz employees were utilizing a personal fall arrest system.[3] I find the preponderance of the creditable evidence establishes they were not.

In determining whether the preponderance of the evidence establishes failure to comply with the standard, I must assess the credibility of the witness's testimony. I listened carefully to the testimony and assessed each witness's demeanor. The differences were subtle, but important.

[2] In the Joint Prehearing Statement filed by both parties as well as at the hearing, the parties also stipulated that certain photographs depicted Mr. Diaz and one of his employees working at the worksite that was the subject of the inspection on January 6, 2015. Because the photographs to which this stipulation refers were not identified and the date does not correspond to the date of the inspection, I have not relied on this stipulation, but rather on the testimony presented at trial.

[3] Mauricio Diaz did not allege the exception applies.

CSHO Schnipke was a straightforward witness whose testimony regarding what he observed was corroborated by photographic evidence. In contrast, the testimony of Mauricio Diaz's witnesses appeared rehearsed, and was cursory and evasive in the face of photographic evidence.

CSHO Schnipke testified he observed three individuals working without fall protection at the peak of the roof of one of the duplexes at the worksite. CSHO Schnipke's demeanor was calm and lacked any indicia of evasiveness. His testimony was unwavering. There was no evidence of bias. Therefore, I find CSHO Schnipke to be a credible witness. He took photographs of the conditions he observed. Although these observations and photographs are from some distance, CSHO Schnipke was able to enlarge and zoom in on the workers. The photographs unequivocally corroborate CSHO Schnipke's testimony that Mauricio Diaz's employees, although wearing harnesses, were not tied off. The majority of these photographs show Employee David working on the roof's peak, wearing a harness, without a lifeline attached to the D-ring on the back of the harness (Exh. C-1 pp. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12). Mr. Lebron is similarly depicted in Exh. C-1 p. 5. A third individual, who was not identified for the record depicted in Exh. C-1 p. 1 appears not to be wearing a harness. The Secretary has met his burden to establish a prima facie case of Mauricio Diaz's failure to comply with the terms of the standard.

The inquiry does not end here, however, because there remains the possibility CSHO Schnipke was mistaken in his observations. In other words, although he sincerely believed he saw workers not tied off, he was simply too far away to make an accurate observation. In order to make that finding, I would have to believe the testimony of Mauricio Diaz's witnesses that they were tied off. Put simply, I do not.

Mr. Diaz testified he and his employees were wearing fall protection harnesses and were tied off (Tr. 26). His attempt to discredit the photographic evidence by explaining Employee David was tied off in the front, rather than the back, lacks crucial detail (Tr. 27). On the photographs, he pointed out a "rope" to which he alleged Employee David was tied off. The photographs show no anchorage point for this rope and Mr. Diaz did not adequately explain where that rope was to have been anchored. Nor did he explain how any other employee was to have been tied off, as there was only one such rope in the photographs. None of the photographs depict a rope reaching to the front of Employee David's harness. Although the photographs only

show Employee David's back, the rope should have been partially visible in at least one of the photographs. Mr. Diaz provided no explanation for the missing rope. Mr. Diaz's testimony was simply lacking the degree of detail one would expect of an eye witness attempting to explain why photographic evidence does not show what the witness claimed he observed. Therefore, I find Mr. Diaz's testimony insufficient to rebut the Secretary's prima facie case.

Even more problematic for Mauricio Diaz is the fact the "rope" to which Employee David was allegedly tied off was not a rope at all. In his testimony, Mr. Diaz pointed out the "rope" in Exh. C-1 p. 3. However, in Exh. C-1 p. 2, this same "rope" is attached to the pneumatic nail gun being used by Employee David. Mr. Diaz admitted this was actually the air hose to the nail gun (Tr. 30). All of the photographs of Employee David contain only this single air hose; he is in the same location in all the photographs; and the photographs were taken within a 15 minute time period. The air hose in the photographs is a different color and texture than the rope which is depicted in Exh. C-1 p. 13. When confronted with this discrepancy on cross examination, Mr. Diaz became evasive. He testified,

> Q: The rope and the air hose, they don't look anything alike do they?
> A: Say that again?
> Q: Look at 13.
> A: I'm looking at it.
> Q: It's a rope, right?
> A: Um-hmm.
> Q: Look at five. It's an air hose. They don't look anything alike, do they?
> A: There is some different stuff too.
> Judge Joys: I'm sorry, I didn't understand.
> The Witness: I got something else, like cables, beside the ropes too. I got one of them.
> Judge Joys: A cable?
> The Witness: It's not a cable, it's like a strap, like a little – it's fall protection. You can get it too.
> By Mr. Spanos:
> Q: Take a look at page three. It's an air hose, right? It doesn't look anything like 13 does it?
> A: Okay.

Given the totality of the evidence, the only valid conclusion is that there was no rope to which Employee David was tied off.

Mauricio Diaz's other witness, Mr. Lebron, similarly did not provide convincing testimony sufficient to rebut the Secretary's prima facie evidence. I find Mr. Lebron's testimony

to be rehearsed and lacking in specificity. Mr. Lebron did not testify Employee David was tied off; rather, Mr. Lebron testified Mr. Lebron was tied off (Tr. 39-40). Thus, his testimony, even if credible, does not rebut the Secretary's evidence that at least one Mauricio Diaz employee was not protected from falling.

Based upon the totality of the evidence, I find the Secretary has met his burden to establish Mauricio Diaz was in violation of the cited standard.

Employee Exposure

For the reasons discussed above, I also find the Secretary has established Mauricio Diaz's employees were exposed to the hazard addressed in the standard. There is no dispute employees were working at a height in excess of 6 feet. The standard presumes a hazard when employees are working at such heights. At least one employee was working at that height without any fall protection. Therefore, the Secretary has established employee exposure to a fall hazard.

Employer Knowledge

To establish employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving a supervisory employee knew of or was responsible for the violation. *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984); *see also Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986) (the actual or constructive knowledge of an employer's foreman can be imputed to the employer). Actual knowledge refers to an awareness of the existence of the conditions allegedly in noncompliance. *Omaha Paper Stock Co.*, 19 OSHC 2039 (No. 01-3968, 2002). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994).

It is undisputed Mr. Diaz was working at the worksite on the day of the inspection. The employees on the roof were in plain view. The photographs taken by CSHO Schnipke from across the road show the fact those employees were not tied off is observable from some

distance. There is no evidence of anchorage points to which employees could tie off, or of sufficient lifelines for the three employees on the roof. The evidence establishes Mauricio Diaz was aware, or should have been aware, employees were not using fall protection at a height in excess of 6 feet.

Classification

The Secretary alleges the violation was serious. A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious physical harm would result. It is undisputed a fall of 6 feet could result in serious injury such as broken bones or even death. A fall from 24 feet could undeniably result in death.[4] The Secretary has established the violation was serious.

The Secretary further asserts the violation is properly classified as a repeat violation. A violation is considered a repeat violation "if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). "A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard." *Superior Electric Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597, 1996).

Mauricio Diaz stipulated at the hearing it had received a prior citation alleging a violation of the same standard (Tr. 7). The record establishes on July 3, 2012, Mauricio Diaz received a serious citation alleging a violation of the same standard (Tr. 20-21; Exh. C-2). Mauricio Diaz did not contest the Citation, but entered into an informal settlement agreement on July 26, 2012, and the citation became a final order of the Commission (Tr. 22; Exh. C-3). Mauricio Diaz presented no evidence to rebut the Secretary's prima facie case. I find the violation was properly classified as a repeat violation.

[4] Mr. Diaz testified that rather than a 24 foot fall, his employees were exposed to an 8 foot fall because the next lower level was 8 feet below the roof from which they were working (Tr. 27). I find it unnecessary to resolve this dispute because an 8 foot fall could result in serious injury.

Penalty Determination

The Secretary proposed a penalty of $6,160.00 in this case. The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history, and good faith of the employer. *See* § 17(j) of the Act. The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

I find the gravity of the violation to be high. At least three individuals were exposed to a fall of at least 8 feet to the next lower level and 24 feet to the ground. CSHO Schnipke noted obstructions on the roof making the likelihood of falling greater (Tr. 23). Employees had been working on the roof for several hours on the day of the inspection. Given the lack of evidence of an anchorage point or sufficient equipment for all employees to be properly protected, I find the preponderance of the evidence establishes employees were exposed for several hours. I also find because it had the necessary equipment to protect its employees, but chose not to ensure its use, Mauricio Diaz is not entitled to credit for good faith. I find a high gravity based penalty is warranted in this case. Mauricio Diaz is a very small employer and is given some reduction in penalty in recognition of that fact. I find a penalty of $6,160.00 appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of Citation 1, alleging a violation of 29 C.F.R. § 1926.501(b)(13) is affirmed as a repeat violation, and a penalty of $6,160.00 is assessed.

SO ORDERED.

/s/

Date: November 27, 2015

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia