United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor,

Complainant

v. OSHRC Docket No.: **18-0953**

New Finish Construction, LLC,

Respondent.

Appearances:

John M. Strawn, Esq.
Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania
For Complainant

Vincent J. Roskovensky, II, Esq.
Vincent J. Roskovensky, II, Attorney at Law, Uniontown, Pennsylvania
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

## DECISION AND ORDER

New Finish Construction, LLC (NFC) performed residential construction services in Pennsylvania.[1] On December 19, 2017, an NFC employee was electrocuted while working on a residential reroofing project in Uniontown, Pennsylvania. A compliance safety and health officer (CSHO) of the Occupational Safety and Health Administration investigated the fatality and recommended the Secretary cite NFC for safety violations. On May 18, 2018, the Secretary issued a Citation and Notification of Penalty to NFC, alleging five serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act).

Item 1 alleges a serious violation of 29 C.F.R. § 1926.20(b)(2) for failing to initiate and maintain safety programs which provided for frequent and regular inspections of the worksite. The Secretary proposes a penalty of $1,663 for this item.

Item 2 alleges a serious violation of 29 C.F.R. § 1926.416(a)(1) for permitting an employee to work in proximity to electric power circuits while not protected against electric shock by

[1] At the time of the hearing, NFC was no longer in business (Tr. 157).

deenergizing and grounding the circuits or effectively guarding the circuits by insulation or other means. The Secretary proposes a penalty of $12,934 for this item.

Item 3 alleges a serious violation of 29 C.F.R. § 1926.503(a)(1) for failing to provide a training program for each employee potentially exposed to fall hazards to recognize the hazards of falling and the procedures to be followed in order to minimize the hazards. The Secretary proposes a penalty of $2,772 for this item.

Item 4 alleges a serious violation of 29 C.F.R. § 1926.1060(a)(1)(iii) for failing to ensure that each employee using ladders had been trained by a competent person in the proper construction, use, placement, and care in handling the ladders. The Secretary proposes a penalty of $1,663 for this item.

Item 5 alleges a serious violation of 29 C.F.R. § 1926.1053(b)(12) for failing to ensure a ladder used where the employee or the ladder could contact exposed energized electrical equipment was not equipped with nonconductive siderails. The Secretary proposes a penalty of $12,934 for this item.

The Court held a hearing in this matter on February 5, 2019, in Pittsburgh, Pennsylvania. The parties have filed briefs.

For the reasons that follow, the Court **VACATES** Items 1, 3, and 4 of the Citation. The Court **AFFIRMS** Items 2 and 5 of the Citation and assesses a penalty of $12,934 for each item.

## JURISDICTION AND COVERAGE

NFC timely contested the Citation on June 12, 2018. The parties stipulate the Commission has jurisdiction over this action and NFC is a covered employer under the Act (*Joint Prehearing Statement*, ¶¶ V.1-2; Tr. 10-12).[2] Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and NFC is a covered employer under § 3(5) of the Act.

## BACKGROUND

On December 19, 2017, NFC owner Dustin Reynolds and two NFC employees, roofer D.D. and laborer R.A., were nearly done with the installation of new metal roofs for a house in

[2] The parties stipulate, "Respondent asserts that it does not have any employees and only utilizes individuals as independent contractors in its business activities but for purposes of this OSHA proceeding admits that its workers were employees and that it is an employer for purposes of the Act." (*Joint Prehearing Statement*, ¶¶ V.2) Despite NFC's equivocation in the first half of the stipulation, the second half establishes NFC was an employer, and an employer/employee relationship existed between NFC and each of the two workers at the Uniontown worksite on December 19, 2017.

Uniontown, Pennsylvania.[3] NFC had been working on the project for approximately a month, with some interruptions (Tr. 121-22). At the beginning of the project, NFC had installed a roof anchor (also referred to as an anchor plate) (consisting of hinged metal plates with attached D-rings to which workers could tie off their personal fall arrest systems) on a flat section of the house roof behind a dormer (Exh. C-4D; Tr. 41, 123-26). Reynolds explained, "[T]he anchor was in the middle of the roof so it could be utilized on all four sides without ever moving it." (Tr. 124)

By 2:00 p.m. on December 19, NFC had finished the main roof and needed to order a roof cap for the porch before it could complete the project. Reynolds decided to clean up and move to another worksite. Because the main roof was completed, NFC no longer needed the roof anchor. Reynolds detached it and tossed it from the roof, intending it to land in the yard (Tr. 126-27, 150-51). He did not use a bucket or other container to raise and lower equipment to and from the roof "for risk of scratching the new roof." (Tr. 127) Tossing a roof anchor off the roof to the ground below when he was done with it was his standard practice. This time, however, the roof anchor fell on the top line of a set of electrical power lines running parallel to the side of the house where NFC had set up its metal extension ladder. Reynolds saw the roof anchor catch on the highest power line.[4] He finished installing a ridge cap on the roof and climbed down the ladder (Exh. C-4D; Tr. 127-128).

The power line on which the roof anchor was caught was approximately 7 feet, 9 inches, from the side of the house. The distance directly across from the power line to the ladder leaning against the roof was approximately 7 feet, 4 inches (Tr. 78, 92). Reynolds began "cleaning up pieces of metal and screws" and other debris in the yard resulting from the roof work (Tr. 138). He was working within 3 to 5 feet of the foot of the ladder. Laborer R.A. was working on the side of the house, out of sight of Reynolds and D.D. After 30 to 45 minutes, D.D., carrying a metal pole, climbed the 30-foot metal ladder to approximately the roof line and reached out with the pole

[3] NFC was contracted to install new roofs on the house, porch, and detached garage. The work at issue in this proceeding concerns the main house roof (Tr. 122, 150-51).

[4] CSHO Blashich explained the sequencing of lines strung between utility poles. "Typically you'll find the higher voltage line higher on the pole, at the highest parts of the pole. And utilities such as cable TV, telephones are [run] at the lowest parts of the pole." (Tr. 47) "Secondary is the power line that goes down to the house. It's typically 120 or 240 volt." (Tr. 46) "An indicator of whether a line is live or not can be ascertained by looking at where they're at on the pole. Again, if it's a line that is very high on the pole it's a good chance that that line is in fact energized. Where a line located lower on the pole, at the lowest parts of the pole, are typically utility wires." (Tr. 48)

in an attempt to dislodge the metal roof anchor from the electrical line. Upon contact, D.D. was electrocuted. He fell to ground, near where Reynolds was standing (Exh. C-3,p. 5; Tr. 138, 143).

The electrical contact resulted in a loud "Boom," causing the husband and wife homeowners to run out of the house.[5] A neighbor who is a nurse also rushed out of her house. While the husband called 911, the wife assisted the nurse as she performed CPR on D.D. Reynolds called D.D.'s sister and told her what had happened. Paramedics arrived at the worksite and treated D.D. They transported him to the Uniontown Hospital, where he was pronounced deceased (Exh. C-3 (Pennsylvania State Police *Death Investigation Report*), pp. 3-11).

Reynolds notified OSHA of D.D.'s death. CSHO Brian Blashich contacted Reynolds the next day and began the fatality investigation that gave rise to this proceeding.

## PARTIES' JOINT STATEMENT OF AGREED UPON FACTS

The parties submitted a statement of agreed facts as a joint exhibit:

1. Respondent, New Finish Construction, LLC, has a principal place of business at 6 Laurel Street, Fairchance, Pennsylvania 15436.

2. Respondent is involved in roofing, siding, and other residential contracting work.

3. Respondent is owned by Dustin Reynolds.

4. On December 19, 2017, Respondent was engaged in a job installing a new metal roof and other work on a residence at 460 Mount Vernon Avenue Extension, Uniontown, Pennsylvania 15401.

5. Mr. Reynolds had two workers with him, [R.A. and D.D.], performing the work.

6. At approximately 2:00 p.m., Respondent began cleaning up the jobsite after concluding the day's work.

7. Prior to climbing down the ladder from the roof, Mr. Reynolds attempted to throw a steel roof anchor to the ground.

8. The roof anchor did not reach the ground, however, and became entangled in an overhead power line carrying 12kV single phase.

9. Mr. Reynolds believed the power line was a telephone line.[6]

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[5] The electrical current arced through the metal roof next to the ladder (Exh. C-4E and C-4F). It was shortly discovered the current had traveled through the house and resulted in a small fire in the basement (Exh. C-3, p. 10). Reynolds stated, "The electricity traveled down through the chimney liner and caught the hot water tank on fire. . . . The homeowner, the husband, he had come out the door and said the house was on fire." (Tr. 156) Reynolds was able to extinguish the fire with garden hose (Tr. 157). Further damage was caused when the primary line snapped during the incident and one side of it "swung down to near the intersection . . . and it caused a fire in some shrubs. Also, it burned the pole, or the street sign had some signs of damage." (Tr. 38)

[6] Reynolds disputed this stipulation at the hearing. The police officer who interviewed Reynolds wrote in her report, "[Reynolds] told me that he thought it was a telephone wire. . . . REYNOLDS said that he feels so bad because he

10. [D.D.] and Mr. Reynolds had been using a metal ladder to access the roof.

11. [D.D.] climbed the ladder with a metal broom handle approximately eight feet and three inches long and attempted to dislodge the roof anchor from the power line.[7]

12. [D.D.] contacted the power line and was fatally electrocuted.

13. Mr. Reynolds was standing near the base of the ladder when the accident occurred, approximately three to five feet from where [D.D.] fell.

14. [R.A.] does ground level work and did not work on the roof.

15. [R.A.] was working in the front yard cleaning up at the time of the accident and did not see it occur.

16. Respondent did not have a written safety and health program at the time of the accident.

17. Brian Blashich, an authorized representative of the Secretary of Labor, inspected Respondent's worksite.

18. On May 18, 2018, the Secretary issued to Respondent the Citation and Notification of Penalty pursuant to Sections 9 and 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 658-59 (the "Act").

19. On June 12, 2018 the Area Director received Respondent's Notice of Contest.

20. The total penalty for the contested citation is $31,966.

(Exh. J-1.)

## THE CITATION

*The Secretary 's Burden of Proof*

To establish a violation, "the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition

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didn't think it was a power line." (Exh. C-3, pp. 8-9) Reynolds testified the police officer misunderstood him. "[The police officer] asked me if [D.D.] had thought it was a [telephone] line and I told her that he must have. That's the only thing that I said about telephone line. . . . She had asked me if [D.D.] had thought it was a telephone line, like meaning like why would he touch it? Did he think it was a telephone line? And I said he must. . . . I don't know why he would touch a power line." (Tr. 129-30) Reynolds contends he did not know what kind of line the roof anchor had fallen on (Tr. 134). He had decided to contact the power company (West Penn Power/FirstEnergy) to deenergize the line, so he could retrieve the roof anchor (Exh. C-3, p. 10). He did not communicate this decision to D.D. and R.A. "There was no reason to have a discussion about it. I mean it was on there, it was stuck. I never thought that he would go up on his own and try to take it down." (Tr. 136) NFC does not address the discrepancy between Stipulation No. 9 and Reynolds's testimony in its brief.

[7] The provenance of the metal broom handle is unclear. Reynolds kept it in his trailer for use in cleaning up worksites (Tr. 154). He clarified the handle was attached to a broom head, but he did not think it "was original to the broom. I believe it was a painter's pole or something." (Tr. 132) Used as a broom handle, the pole was about 5 feet long. Extended, the pole was over 8 feet. Reynolds "had no idea that it did extend until it was laying there and the broom head was in the trailer. . . . I don't know where it had come from. I assumed that it was original." (Tr. 132)

with the exercise of reasonable diligence." *Astra Pharma. Prods*., No. 78-6247, 1981 WL 18810, at *4 (OSHRC July 30, 1981), *aff'd in relevant part*, 681 F.2d 169 (1st Cir. 1982).

**Item 1: Alleged Serious Violation of § 1926.20(b)(2)**

*Alleged Violation Description*

Item 1 alleges:

> Jobsite, 460 South Mount Vernon Avenue Extension, Uniontown, PA 15401: On or about December 19, 2017, the employer did not initiate and maintain written safety and health programs to provide for frequent and regular inspections of the job site, materials, and equipment to be made by competent person(s).

*Section 1926.20(b)(2)*

Section 1926.20(b)(2) provides:

> Such programs [as may be necessary to comply with this part] shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

*1. Applicability of the Cited Standard*

Section 1926.20(b)(2) is found in *Subpart C-General Safety and Health Provisions* of the construction standards. Section 1926.20(a)(1) provides the subpart applies to "construction, alteration, and/or repair, including painting and decorating," and requires "that no contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety." NFC was engaged in residential roof installation the day of the fatality. Roof installation is a construction activity. The cited standard applies to the cited conditions.

*2. Failure to Comply with the Cited Standard*

Section 1926.20(b)(2) must be read with (b)(1) to understand what OSHA does and does not require for the safety programs:

> (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.
>
> (2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

Nowhere in §§ 1926.20(b)(1) or (2) does OSHA require the safety programs be written. Yet the alleged violation description (AVD) for Item 1 states, "[T]he employer did not initiate and

maintain *written* safety and health programs[.]" (emphasis added) The CSHO and counsel for the Secretary continued at the hearing to assume compliance with the cited standard requires a written program. Counsel for the Secretary asked the CSHO, "How do you determine whether or not there were written safety -- written safety and health programs?" (Tr. 63) When asked why he characterized the alleged violation as serious, CSHO Blashich replied, "Because of the potential for there to be injuries as a result of a lack of a written safety and health program." (Tr. 66-67) There was also this exchange:

> CSHO Blashich: [T]here would be deficiencies in their safety and health programs.
>
> Q.: Okay. And specifically with regard to what in their program?
>
> CSHO Blashich: Well they didn't have anything written, any written safety or health programs.

(Tr. 65)

NFC did not acquiesce with the Secretary's interpretation of § 1926.20(b)(2). Counsel for NFC brought this directly to the CSHO's attention:

> Q.: On that particular regulation it doesn't require a written training program according to the statute; does it?
>
> CSHO Blashich: It does not have to be written, I believe you're correct, sir.

(Tr. 100)

Despite this recognition, the Secretary did not move to amend the AVD of Item 1 of the Citation. The AVD does not accurately describe the nature of the alleged violation.

> The Secretary must draft a citation "with sufficient particularity to inform the employer of what he did wrong, i.e., to apprise reasonably the employer of the issues in controversy.' *Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256, 261 (3d Cir. 2002) (quoted case omitted); see 29 U.S.C. § 658(a) (requiring that citations "describe with particularity the nature of the violation").

*L & L Painting Co., Inc.,* No. 05-0050, 2008 WL 4542427, at *4 (OSHRC September 29, 2008).

By framing the alleged violation as a failure to have a written safety program, the Secretary impermissibly imposed an additional requirement not found in the cited standard. The Court concludes NFC may not be found in violation of a standard for not possessing a written document the cited standard does not require.

Even if the Secretary had not improperly imposed a requirement in Item 1 that NFC's program be written, he would have fallen short of establishing NFC failed to comply with the terms

of § 1926.20(b)(2). Reynolds testified he and his employees inspected the worksite, materials, and equipment every day before starting work.

> Q.: Although you didn't have a written program, when you got to the job, whatever job it was, did you do anything?
>
> Reynolds: We looked around at the ladders we had to use, the tools we had.
>
> Q.: What was the purpose of looking around?
>
> Reynolds: Just to make sure everything was in working order, make sure we had enough equipment, enough material.
>
> Q.: Was there any discussion about how to use various equipment?
>
> Reynolds: Yeah, we talked about how to use ladders, how to step them up right, how to put on the harness, the roof plate, the roof anchor, how to fasten into it.

(Tr. 147)

> Q.: And did you examine that equipment daily?
>
> Reynolds: Yes.
>
> Q.: What was the purpose of examining that equipment daily?
>
> Reynolds: Just to make sure it was still in working order.

(Tr. 149)

In his focus on NFC's lack of a written program, CSHO Blashich neglected to question Reynolds about whether he was a competent person or if he conducted frequent and regular inspections of the job sites, materials, and equipment. He indicated the daily inspections, as described by Reynolds in his undisputed testimony, were sufficient to meet the requirements of the cited standard.

> Q.: Did you ask Mr. Reynolds at any time during your conversation with him if he had a daily review of what was going on at his work site?
>
> Blashich: No, sir.
>
> Q.: So if a person who's doing a job reviews how they're going to approach a job, daily, and go over the safety procedures, would that be sufficient?
>
> Blashich: Can you ask it again, please?
>
> Q.: Yes. If you go to the job every day and you review the job with your employees or whoever is on the job and decide how you're going to approach it, make sure everything is in order, and that you're going to use, in this case, harnesses off of the safety mechanism on the roof; is that a practical safety program?
>
> Blashich: I believe it could be, sir.
>
> Q.: Okay. Now if that had been done in this particular case, if Mr. Reynolds had been doing that on a regular basis, would that satisfy the regulation?

Blashich: Likely, yes, sir.

(Tr. 100-01)

> Q.: If Mr. Reynolds, daily when they were working at a job site, had discussions with the people that were working for him about how to handle installation of a roof anchor and how to attach the harnesses and the tie-backs, would that be sufficient?
>
> Blashich: It could be if they're going over that material and the employee have all the knowledge they would need, all the training they would need, to do the job safely, yes.

(Tr. 107)

The Court determines the Secretary failed to establish NFC was not in compliance with the terms of § 1926.20(b)(2). Item 1 is vacated.

**Item 2: Alleged Serious Violation of § 1926.416(a)(1)**

*Alleged Violation Description*

Item 2 alleges:

> Jobsite, 460 South Mount Vernon Avenue Extension, Uniontown, PA 15401: On or about December 19, 2017, an employee was permitted to work in close proximity to overhead power lines while attempting to remove a roof anchor from an overhead 12,000 volt power line.

*Section 1926.416(a)(1)*

Section 1926.416(a)(1) provides:

> No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

*1. Applicability of the Cited Standard*

Section 1926.416(a)(1) is found in Subpart K—*Electrical* of the construction standards. Section 1926.400 provides:

> This subpart addresses electrical safety requirements that are necessary for the practical safeguarding of employees involved in construction work and is divided into four major divisions and applicable definitions as follows:
>
> * * *
>
> (b) *Safety-related work practices*. Safety-related work practices are contained in §§ 1926.416 and 1926.417. In addition to covering the hazards arising from the use

> of electricity at jobsites, these regulations also cover the hazards arising from the accidental contact, direct or indirect, by employees with all energized lines, above or below ground, passing through or near the jobsite.

The record establishes there was a hazard arising from accidental contact by an employee with energized lines passing near the jobsite. The cited standard applies.

*2. Failure to Comply with the Cited Standard*

Due to the wording of § 1926.416(a)(1), NFC conflates the element of compliance with the element of employer knowledge (as well as the affirmative defense of employee misconduct). It argues the employer did not "permit" its employee to work in such proximity to an energized line that he could contact it in the course of his work, but that D.D. undertook the task of dislodging the roof anchor without NFC's knowledge or authorization. The Court construes NFC's argument as a denial of employer knowledge and an assertion of D.D.'s employee misconduct and will address those arguments in turn.

The top power line was at the approximate height of the main roof upon which Reynolds and D.D. had been working (Exhs. C-4B through C-4F). The horizontal distance from the ladder to the top power line was 7 feet, 4 inches (Tr. 78, 92). NFC contends, "A person on the ladder almost eight feet away was not in any immediate danger of electrocution. (NFC's brief, p. 7)." NFC appears to argue working 8 feet from an energized power line is not working "in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work."[8]

The standard does not define *proximity*. The Commission has analyzed its meaning when addressing a vagueness challenge to former § 1926.400(c)(1), the earlier version of the standard at issue here.[9]

> [The standard] is not vague because the context in which it uses the word "proximity" explains and narrows the word's meaning. The standard speaks not of an employee working in "proximity" to an electric power circuit, but "in such proximity to any part of an electric power circuit that he may contact [it] in the course of his work...." The clear meaning and evident purpose of the standard is

[8] Section 1926.416(a)(a) applies when an employee could contact an electric power circuit "in the course of work." The phrase "*in the course of* is often wordy for *during* or *while*[.]" Bryan A. Garner, Garner's Modern American Usage 477 (Jeff Newman & Tiger Jackson eds., 3rd ed. 2009).

[9] Section 1926.400(c)(1) provided: "No employer shall permit an employee to work in such proximity to any part of an electric power circuit that he may contact the same in the course of his work unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it by effective insulation or other means."

> therefore that an employee shall not work so close to an energized power circuit that he may inadvertently contact it in the course of his work. Thus, the standard, when read in its entirety, prescribes a specific and ascertainable standard of conduct, for an employer can determine by objective means whether employees are within reach of, and therefore may contact, an energized power circuit while they work.

*Cleveland Consol. Inc.,* No. 84-696, 1987 WL 89048, at *3 (OSHRC February 13, 1987).

The AVD for Item 2 makes clear the Secretary is not alleging NFC violated § 1926.416(a)(1) at the times when Reynolds and D.D. used the ladder to access the roof. It specifically states an employee was permitted to work in proximity to an electric power circuit "while attempting to remove a roof anchor from an overhead 12,000-volt power line." When Reynolds tossed the roof anchor and it caught on the power line, a new hazard was created. D.D. knew the roof anchor had snagged on the top line. In the course of his work with NFC, he attempted to dislodge and retrieve his employer's piece of equipment using the metal pole. It is unknown whether D.D. used the metal pole to contact the energized line or only the roof anchor, or if an arc flash occurred before any physical contact was made. If, as Reynolds stated, D.D. believed the power line to be a telephone line, then contact with the energized line was accidental because he did not expect the line to be energized. The record establishes D.D., while employed by NFC, worked "in such proximity to [a] part of an electric power circuit that" he "could contact the electric power circuit in the course of work." D.D.'s death by electrocution demonstrates NFC failed to prevent direct contact with energized lines passing near the jobsite. The Secretary has established NFC failed to comply with § 1926.416(a)(1).

*3. Access to the Violative Condition*

D.D. had actual access to the hazard of working in proximity to energized lines passing near the jobsite. D.D. contacted an energized line as he attempted to use a metal pole to dislodge the roof anchor caught on the line. He was not using insulation or any other means of protection against electrical shock. The Secretary has proven the element of access to the violative condition.

*4. Employer Knowledge*

Reynolds denies he was aware of D.D.'s plan to dislodge the roof anchor with the metal pole when he climbed the ladder. He testified D.D. told him he had forgotten to put screws in the dormer near where the ladder was placed, and Reynolds believed that was the reason D.D. climbed back up the ladder as they were cleaning up (Tr. 153).

> Q.: Did you instruct [D.D.] to climb up the ladder to take a pole and reach into the power line?
>
> Reynolds: I did not.
>
> Q.: If he had said something to you that he intended to do that would you have stopped him?
>
> Reynolds: I would have stopped him.
>
> Q.: Did you know that he had taken that pole up the ladder?
>
> Reynolds: I did not.
>
> Q.: Did you believe he was doing the screws into the dormer?
>
> Reynolds: Yes.

(Tr. 154-55)

The Secretary finds this testimony implausible.

> [D.D.] obtained the metal pole that he used to attempt to knock the anchor plate off the power line from Respondent's supply trailer. . . . [D.D.] had to walk by Mr. Reynolds to get to the ladder and to take the eight feet three-inch pole up to the roof. . . . It is not credible that Mr. Reynolds, while in such close proximity to the ladder and the power line was not aware that [D.D.] was attempting to knock down the anchor plate. . . . Indeed, the State Police recorded in their official report that Mr. Reynolds said that he felt so bad about the accident because he thought the power line was a telephone line.

(Secretary's brief, p. 9) (citations to record omitted)

Reynold's purported statement that he believed the power line to be a telephone line and his comment that he felt bad about it do not contradict his testimony that he had decided to call West Penn Power/FirstEnergy to deenergize the line and he was unaware of D.D.'s actions. The police report is silent regarding whether D.D. informed Reynolds in advance of his plan to dislodge the roof anchor or if Reynolds observed him as he made the attempt. It states, "REYNOLDS said that the victim was at the top of the ladder and used a metal broom handle with it extended in an attempt to get the safety anchor off of the line. He said that he heard a loud boom and saw the victim coming down backwards and hit the ground." (Exh. C-3, p. 8) It is possible to infer from this statement Reynolds observed D.D. on the ladder attempting to dislodge the roof anchor, but it also possible to infer Reynolds deduced the sequence of events based on hearing the boom and observing D.D. fall from the ladder with the metal pole (there were also burn marks on the metal roof directly behind the ladder (Exh. C-4F; Tr. 141)). Reynolds testified he "actually saw [D.D.] fall after the boom and the electricity. When the electricity was done I had looked up and seen him falling down from the ladder." (Tr. 131) Had the police officer who interviewed Reynolds

testified at the hearing, she may have been able to clarify whether Reynolds stated he had observed D.D. on the ladder before the boom occurred. As the record stands, Reynolds testified without contradiction that he believed D.D. had climbed the ladder to place screws in the dormer, and he was unaware D.D. had the metal pole with him when he climbed the ladder and was using it in an attempt to dislodge the roof anchor. The record does not establish Reynolds had actual knowledge of the violative conduct.

These facts do, however, establish constructive knowledge. Reynolds was aware the roof anchor was caught on the top line, and he knew D.D. was also aware of it. He decided he would eventually call West Penn Power/FirstEnergy to deenergize the line, but he did not share this decision with D.D. or the laborer. He did not caution D.D. not to attempt to dislodge the roof anchor. "Reasonable diligence involves several factors, including an employer's 'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.' *Frank Swidzinski Co.,* 9 BNA OSHC 1230, 1233, 1981 CCH OSHD ¶ 25,129, p. 31,032 (No. 76–4627, 1981)." *Pride Oil Well Serv.,* No. 87-692, 1992 WL 215112, at *6 (OSHRC August 17, 1992).

The ladder was located across from the power lines, and Reynolds knew D.D. was going to climb it. Reynolds estimated that 30 to 45 minutes had elapsed since he had tossed the roof anchor onto the top line, and he had declined to inform D.D. and R.A. of his intention to contact West Penn Power/FirstEnergy at some point to deenergize the line. The presence of the roof anchor on the power line created a hazard. Reynolds had a responsibility to expressly prohibit D.D. from attempting to retrieve the roof anchor. "Employer knowledge is established by a showing of employee awareness of the physical conditions constituting the violation." *Phoenix Roofing, Inc.,* No. 90-2148, 1995 WL 82313, at *3 (OSHRC February 24, 1995), *aff'd., Phoenix Roofing v. OSHRC*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). With the exercise of reasonable diligence, Reynolds would have anticipated an attempt by D.D. to dislodge the roof anchor once he was at the top of the ladder. He could have taken measures to prevent this attempt by either informing D.D. he intended to call West Penn Power/FirstEnergy to deenergize the line or warning D.D. not to try to dislodge the roof anchor, or both.

Reynolds was working within 3 to 5 feet of the base of the ladder when D.D. climbed it while carrying an 8-foot metal pole. D.D. then turned or twisted at the top of the ladder and extended the metal pole toward the power line. This was done in daylight almost directly above

Reynolds's head. "The conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area warrant a finding of constructive knowledge." *Kokosing Constr. Co., Inc.,* No. 92-2596, 1996 WL 749961, at *2 (OSHRC December 20, 1996). "Constructive knowledge may be found where a supervisory employee was in close proximity to a readily apparent violation." *KS Energy Servs., Inc.*, No. 06-1416, 2008 WL 2846151, at *5 (OSHRC July 14, 2008). Given the proximity of Reynolds to the readily apparent violation, the Court determines his constructive knowledge is established. "Under both Commission precedent and the law of the Third Circuit . . . knowledge may be imputed to an employer through a supervisory employee." *Otis Elevator Co.,* No. 03-1344, 2007 WL 3088263, at * 5 (OSHRC September 27, 2007).[10] As owner of the company, Reynolds was a supervisor and his constructive knowledge is imputed to NFC.[11]

The Secretary has established NFC violated § 1926.416(a)(16).

**Characterization of the Violation**

The Secretary characterized the violation of § 1926.416(a)(1) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k).

D.D. died as a result of the violation of the cited standard. The Secretary properly characterized the violation as serious.

**Unpreventable Employee Misconduct Defense**

NFC contends the violation of § 1926.416(a)(1) resulted from D.D.'s unpreventable misconduct. "The instant issue is whether an employer is responsible for the rogue action of a

[10]Under the OSH Act, an employer may seek review in the court of appeals in one of potentially three circuits: the circuit in which the violation occurred; the circuit in which the employer's principal office is located; and 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). "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.*, No. 96-1719, 2000 WL 294514, at *4 (OSHRC March 16, 2000). In this proceeding, the violation occurred in Pennsylvania, where NFC's principal office was located. Pennsylvania is in the Third Circuit.

[11]Third Circuit precedent holds that where employer knowledge is based on supervisory misconduct, the Secretary bears the burden of proving that the supervisor's conduct could have been foreseen and prevented by the employer with the exercise of reasonable diligence and care. *Kerns,* 2000 WL 294514, at *4. Supervisory misconduct is not at issue here and the Secretary is not required to establish foreseeability of the violative conduct.

worker who was not instructed to take any action to recover a piece of equipment that was inadvertently lodged in a power line." (NFC's brief, p. 7).

> To prove the unpreventable employee misconduct defense in cases not involving supervisor misconduct, the employer must show that it "'[1)] has established workrules designed to prevent the violation[; 2)] has adequately communicated these rules to its employees[; 3)] has taken steps to discover violations and[;4)] has effectively enforced the rules when violations have been discovered.'" *Pa. Power & Light Co. v. Occupational Safety & Health Review Comm'n,* 737 F.2d 350, 358 (3d Cir.1984) (emphasis omitted) (quoting *Marson Corp.,* 10 BNA OSHC 1660, *3 (No. 78–3491, 1982)). An employer can be "held answerable for a violation resulting from [employee] misconduct ... when demonstrably feasible measures existed for materially reducing" the incidence of misconduct but were not taken. *Atl. & Gulf Stevedores, Inc. v. Occupational Safety and Health Review Comm'n,* 534 F.2d 541, 547 (3d Cir.1976) (internal quotation marks omitted).

*Western World, Inc. v. Secretary of Labor*, 604 Fed Appx. 188, 191 (3rd Cir. 2015) (unpublished).

NFC does not address any of the four elements of the affirmative defense in its brief. There is no evidence in the record that NFC had an established workrule designed to prevent the violation of § 1926.416(a)(1). The Court finds NFC failed to establish the defense of unpreventable employee misconduct.

**Item 3: Alleged Serious Violation of § 1926.503(a)(1)**

*Alleged Violation Description*

Item 3 alleges:

> Jobsite, 460 South Mount Vernon Avenue Extension, Uniontown, PA 15401: On or about December 19, 2017, the employer did not provide fall protection training for each employee required to work at heights.

*Section 1926.503(a)(1)*

Section 1926.503(a)(1) provides:

> The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

*1. Applicability of the Cited Standard*

Section 1926.503(a)(1) requires the employer to "provide a training program for each employee who might be exposed to fall hazards." D.D., an employee of NFC, was exposed to a fall hazard when working on the main roof of the house at the worksite on December 19, 2017. The roof was 20 feet high (Tr. 85). The cited standard applies.

*2. Failure to Comply with the Cited Standard*

CSHO Blashich explained his rationale for determining NFC violated § 1926.503(a)(1).

> Well we asked [Reynolds] if fall protection training was provided and his indication was that since they were not considered employees that they did not provide fall protection training. . . . [D.D.] has worked on this roof and he's done work on previous jobs where he's worked at heights. So we wanted to know, you know, what fall protection training was provided to [D.D.].

(Tr. 83) CSHO Blashich acknowledged NFC was using appropriate fall protection at the worksite, including the roof anchor, lanyards, and harnesses (Tr. 84).

> Q.: [D]uring your investigation did you see any evidence that there was no training, adequate training program, for each employee potentially exposed to fall hazards?
>
> Blashich: What we saw was that a roof anchor was being used on the roof, which indicates that fall protection was being used. We saw that Mr. Reynolds had harnesses on site. They were I believe in the trailer. Again, I was there on the 20th and the job site was done. So it wouldn't be uncommon to have the harnesses there. So, you know, we believed that fall protection was being used. Also, in [R.A's] statement, if I recall correctly, he did say that they were wearing harnesses on the job site, on the roof.

(Tr. 117) Blashich testified, however, the use of fall protection equipment alone was not sufficient to meet the requirements of the cited standard.

> Training is an important component of fall protection because you want to ensure that employees know when fall protection is required, how to wear the fall protection. Sometimes the harnesses are a little bit tricky to put on. To be on the lookout for worn or tears in the harness or in the lanyard. So we consider training an important component of fall protection safety.

(Tr. 84)

Reynolds testified that, although NFC did not have a written safety program, he and his crew started every workday checking equipment and discussing work safety.[12] Reynolds stated he and the crew looked at the equipment "[j]ust to make sure everything was in working order, make sure we had enough equipment, enough material. . . . "[W]e talked about how to use ladders, how to step them up right, *how to put on the harness*, the roof plate, the roof anchor, how to fasten into it." (Tr. 147)

The specific inadequacies CSHO Blashich referred to regarding NFC's safety training for fall hazards were inspecting the fall protection equipment and instructing employees how to wear

[12] In his brief, the Secretary states, "Indeed, an employer must have a certified copy of fall protection training to document the training, which Respondent does not have. . . . *See* 29C.F.R. § 1926.403(b)(1)." (Secretary's brief, p. 11) The Secretary did not cite NFC for the violation of that standard.

the harnesses because "[s]ometimes the harnesses are a little bit tricky to put on." (Tr. 84) The Secretary also highlighted these alleged inadequacies in his brief. "Training is important in fall protection so that employees know how to put on a safety harness correctly and to inspect their harness." (Secretary's brief, p. 11) Reynolds stated, however, that he and the crew members inspected their equipment and discussed "how to put on the harness" at the start of each workday (Tr. 147).

The Commission has held an employer can rebut the Secretary's allegation it failed to train employees by showing it has provided the type of training at issue.

> When, as here, the Secretary alleges a violation of a broadly-worded training standard and the employer defends by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided. For instance, in *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2176–77, 1993–95 CCH OSHD ¶ 30,636, p. 42,493 (No. 90–1747, 1994), the Commission vacated a citation alleging a violation of section 1910.1200(h), relating to training on particular hazardous chemicals, where the employer presented evidence that employees had been warned about the relevant hazards and the Secretary's industrial hygienist was unable to specify the basis on which she concluded that the requisite training had not been given. In this case, the Secretary made no effort at the hearing either to rebut the testimony given by [two employees] or to challenge the adequacy of the training that they described. Indeed, the Secretary presented no evidence to show that [the deceased employee] lacked the knowledge and expertise necessary for the job.

*Am. Sterilizer Co.,* No. 91-2494, 1997 WL 694094, at *4 (OSHRC November 5, 1997).

In this proceeding, Reynolds rebutted the Secretary's allegation that NFC failed to provide fall protection training with regard to inspecting lanyards and harnesses and wearing harnesses properly. The burden shifted to the Secretary to show some deficiency in this training. The Secretary did not rebut Reynolds's testimony or challenge the adequacy of the training. Reynolds testified D.D. was an experienced roofer.

> Q.: [W]hat kind of experience did [D.D.] have?
>
> Reynolds: He had more experience than me.
>
> Q.: And how much experience have you had?
>
> Reynolds: Roughly 12 years . . . [of roof] construction.
>
> . . .
>
> Q.: With regard to [D.D], what experience did he have?
>
> Reynolds: He had told me that he started as a laborer when he was a teenager and that he had worked for several roofing companies. And I can't remember his exact date but he was almost 50 years old.

(Tr. 130) As in the *American Sterilizer* case, the Secretary has presented no evidence that D.D. lacked the knowledge and expertise necessary for roofing work.

The Court determines the Secretary has failed to establish NFC did not comply with the terms of § 1926.503(a)(1). Item 3 is vacated.

**Item 4: Alleged Serious Violation of § 1926.1060(a)(1)(iii)**

*Alleged Violation Description*

Item 4 alleges:

> Jobsite, 460 South Mount Vernon Avenue Extension, Uniontown, PA 15401: On or about December 19, 2017, the employer did not ensure that each employee using a Werner brand aluminum extension ladder (model number D-1236-2) was trained by a competent person in the proper construction, use, placement, and care in handling the ladders and/or stairways.

*Section 1926.1060(a)(1)(iii)*

Section 1926.1060(a)(1)(iii) provides:

> (a) The employer shall provide a training program for each employee using ladders and stairways, as necessary. The program shall enable each employee to recognize hazards related to ladders and stairways, and shall train each employee in the procedures to be followed to minimize these hazards.
>
> (1) The employer shall ensure that each employee has been trained by a competent person in the following areas, as applicable:
> . . .
> (iii) The proper construction, use, placement, and care in handling of all stairways and ladders[.]

*1. Applicability of the Cited Standard*

Section 1926.1060(a)(1)(iii) is found in *Subpart X—Stairways and Ladders* of the construction standards. Section 1926.1050 provides in pertinent part, "This subpart applies to all stairways and ladders used in construction, alteration, repair (including painting and decorating), and demolition workplaces covered under 29 CFR part 1926[.]"

NFC was using a 30-foot ladder to access the main roof of the house at the worksite in order to install a new roof. NFC's ladder was used in a construction activity. The cited standard applies.

*2. Failure to Comply with the Cited Standard*

The Secretary contends the placement of the ladder in proximity to the power lines demonstrates NFC failed to train its employees in the proper placement of ladders.

> Mr. Reynolds demonstrated that he was not aware of the safe use of ladders because he used the aluminum ladder within seven feet of the power line himself and allowed his employee to use it as well. . . . Employees were exposed to serious and even fatal injuries by using the ladder where it was placed, and Mr. Reynolds was aware of the proximity of the power lines. . . . Respondent's own worksite demonstrated that it did not have an effective ladder program. . . . Therefore, the evidence establishes that the standard was violated, and the Citation item should be sustained.

(Secretary's brief, p. 12) (citations to record omitted)

CSHO Blashich concluded NFC violated § 1926.1060(a)(1)(iii) based on the placement of the ladder. "The ladder was used in close proximity to the overhead power line. The ladder was conductive, made of conductive material, aluminum, which was not a proper choice for that location." (Tr. 86-87)

The cited standard requires the training to be done by a competent person. The Secretary adduced no evidence indicating whether or not Reynolds was a competent person. As noted in the previous section addressing Item 3, Reynolds testified he and his crew "talked about how to use ladders, how to step them up right," at the start of each workday (Tr. 147). This undisputed testimony rebuts the Secretary's allegation NFC failed to provide training in proper ladder placement.

Both the Secretary and Blashich focus on the actual placement of the ladder as evidence NFC failed to train its employees in the proper placement of ladders. As a result, the Secretary failed to establish NFC's training in ladder safety, as opposed to its actual practice the day of the fatality, was inadequate. The Secretary has failed to establish NFC did not comply with the terms of § 1926.1060(a)(1)(iii). Item 4 is vacated.

**Item 5: Alleged Serious Violation of § 1926.1053(b)(12)**

*Alleged Violation Description*

Item 5 alleges:

> Jobsite, 460 South Mount Vernon Avenue Extension, Uniontown, PA 15401: On or about December 19, 2017, a Werner brand aluminum extension ladder (model number: D-1236-2) that was located in close proximity to overhead power lines was not equipped with nonconductive siderails.

*Section 1926.1053(b)(12)*

Section 1926.1053(b)(12) provides:

> Ladders shall have nonconductive siderails if they are used where the employee or the ladder could contact exposed energized electrical equipment[.]

*1. Applicability of the Cited Standard*

To establish § 1926.1053(b)(12) applies, the Secretary must prove NFC's employees were using a ladder with conductive siderails where the employees or the ladder could contact "exposed electrical equipment." NFC argues, "[T]he ladder did not come into contact with any exposed energized electrical equipment. Neither did the employee come into contact with any exposed energized equipment. . . . Both sides agree that a nonconductive ladder would have made no difference in the unfortunate electrocution of this individual." (NFC's brief, p. 12) NFC's reliance on the cause of the fatality is misplaced. The Commission has "many times held" that "the cause of the accident is not necessarily relevant to whether a standard was violated. . . . The circumstances of an accident may provide probative evidence of whether a standard was violated." *Williams Enterprises Inc.,* No. 85-355, 1987 WL 89134, at *4 (OSHRC April 27, 1987). NFC also misconstrues the requirements of the cited standard. The Secretary is not required to prove the ladder or the employee actually came into contact with energized electrical equipment, but that it *could* do so.

The Court determines § 1926.1053(b)(12) applies to the cited condition.

*2. Failure to Comply with the Cited Standard*

The 30-foot ladder at issue was made of aluminum and was not equipped with nonconductive siderails (Tr. 90). NFC placed the ladder on the side of the house at the worksite where the overhead power lines were located. At the roofline, the ladder was 7 feet, 4 inches, from the top power line. The power line was approximately 20 feet high (even with the roofline) (Tr. 104). The ladder extended above the roofline (Exhs. C-4B through C-4F).

In *Tim Graboski Roofing, Inc.,* (No. 14-0263), 2015 WL 1643413 (OSHRC March 2, 2015) (ALJ), a roofing company employee standing on the ground was electrocuted as he attempted to reposition a metal ladder. The ladder contacted an energized overhead line located approximately 5 feet from the roof of the house on which the company was working. The roof was 19 feet, 4 inches, high and the ladder was extended to 26 feet, 7 inches, at the time it contacted the powerline. *Id.* at *5. Here, NFC was using a 30-foot ladder to access a 20-foot roof. The ladder was located 7 feet, 4 inches, from the energized overhead lines. It is evident that in placing, repositioning, or removing the ladder, employees *could* inadvertently cause the ladder to contact the energized lines.

The Secretary has established NFC failed to comply with the terms of § 1926.1053(b)(12).

*3. Access to the Violative Condition*

Both Reynolds and D.D. used the ladder to get on the roof. The Secretary has established NFC's employees had access to the violative condition.

*4. Employer Knowledge*

Reynolds was onsite the day of the fatality and had used the ladder to get on and off the roof. He had actual knowledge of the violative condition. His knowledge is imputed to NFC.

The Secretary has established NFC violated § 1926.1053(b)(12).

**Characterization of the Violation**

The Secretary characterized the violation of § 1926.416(a)(1) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k).

Contacting energized power lines with an aluminum ladder creates a substantial possibility of death or serious physical harm. The Secretary properly characterized the violation as serious.

**PENALTY DETERMINATION**

"In assessing penalties, section 17(j) of the Act requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith. 29 U.S.C. § 666(j). Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc*., No. 00-1052, 2005 WL 696568, at *3 (OSHRC February 25, 2005) (citation omitted). "Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors." *Natkin & Co. Mech. Contractors*, No. 401, 1973 WL 4007, at *9, n. 3 (OSHRC April 27, 1973).

CSHO Blashich testified NFC had two employees the day of the fatality (Tr. 70). OSHA had not previously inspected NFC. Blashich stated he did not credit NFC with good faith because the company did not have a written safety program (Tr. 71). The Court credits NFC with good faith based on Reynolds's cooperation with the Pennsylvania State Police and with OSHA during their respective fatality investigations (Tr. 98, 156).

The gravity of the violations cited in Items 2 and 5 is high. The AVD for Item 2 refers only to the time during which D.D. was "attempting to remove a roof anchor from an overhead 12,000-volt power line." The duration of this exposure was short. For Item 5, the noncompliant ladder was located in proximity to the energized power lines from approximately 8:00 a.m. until the time of the accident, at approximately 2:50 p.m. (Exh. C-3, p. 1; Tr. 26). The likelihood of injury was high. NFC took no precautions against injury with regard to the two cited conditions.

Upon consideration of these factors, the Court assesses a penalty of $12,934 for Item 2 and of $12,934 for Item 5.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

## ORDER

Based on the foregoing decision, it is hereby **ORDERED:**

1. Item 1, alleging a serious violation of § 1926.20(b)(2), is **VACATED**, and no penalty is assessed;

2. Item 2, alleging a serious violation of § 1926.416(a)(1), is **AFFIRMED**, and a penalty of $12, 934 is assessed;

3. Item 3, alleging a serious violation of § 1926.503(a)(1), is **VACATED**, and no penalty is assessed;

4. Item 4, alleging a serious violation of § 1926.1060(a)(1)(iii), is **VACATED** and no penalty is assessed; and

5. Item 5, alleging a serious violation of § 1926.1053(b)(12), is **AFFIRMED**, and a penalty of $12,934 is assessed.

SO ORDERED.

/s/

**Dated: July 5, 2019**

Administrative Law Judge
Atlanta, Georgia