UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. RJCL CORP. d/b/a RNV Construction, Respondent.	DOCKET NO. 20-0456

Appearances:

Rachel Uemoto, Esq., Jeannie Gorman, Esq., U.S. Department of Labor, Office of the Solicitor, Seattle, WA
For Complainant

Moises Tagle, Jr., *Pro Se*, RNV-Construction, Saipan, Northern Mariana Islands
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

On January 21, 2020, Compliance Safety and Health Officer (CSHO) Pologa Setu was driving from an unrelated inspection when he observed someone working on an elevated platform over the entrance to the DFS Saipan Galleria mall in Garapan, Saipan (worksite). (Tr. 16; Ex. C-4). CSHO Setu parked his vehicle and proceeded towards the Galleria entrance, where he took photographs of the worksite. (Ex. C-3). Upon closer observation, CSHO Setu observed one of Respondent's employees working from a ladder on the elevated platform, later identified as Ricky Taraya, who was not tethered to an anchor point, nor were guardrails or a safety net installed. (Tr. 68-71; Ex. C-3). In addition, CSHO Setu observed another of Respondent's employees using a pressure washer to clean a sidewalk while wearing open-toed shoes. (Tr. 81-82; Ex. C-3).

Based on CSHO Setu's observations and subsequent recommendations, Complainant issued a *Citation and Notification of Penalty*, alleging two serious violations of the Act and a proposed penalty of $13,880. Respondent timely contested the *Citation*, which brought the matter before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the OSH Act. The Chief Administrative Law Judge designated this matter for Simplified Proceedings on April 3, 2020.

A trial was held on June 11, 2021, via Zoom online conferencing. The following individuals testified: (1) CSHO Pologa Setu; (2) Area Director Roger Forstner; and (3) Ricky Taraya, Respondent's employee. Complainant timely submitted his post-trial brief to the Court. Respondent submitted a two-page post-trial brief.[1] As discussed in detail below, the Court finds Complainant presented sufficient evidence to prove Respondent violated the standards alleged in the *Citation and Notification of Penalty*.

Jurisdiction & Stipulations

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 16-20; Ex. C-4). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Factual Background

According to the parties' stipulations, Respondent is a "construction company which provides construction services." (Tr. 17-20; Ex. C-4). According to CSHO Setu, Respondent has

1. Respondent's post-trial brief was erroneously submitted to a non-OSHRC email address. Upon discovery of this error and notice from the Court, Respondent re-submitted the brief through OSHRC's electronic filing system. Complainant filed a motion objecting to Respondent's late-filed brief, which was denied.

approximately 100 full-time employees. (Tr. 18; Ex. C-4). At the time of the inspection, Respondent employed approximately 36 individuals at the DFS Galleria mall worksite, specifically. (Tr. 18; Ex. C-4).

As noted previously, CSHO Setu was returning to his hotel from a separate, unrelated inspection when he observed an individual on a ladder, on top of an eave platform which covered the entrance to the DFS Galleria. (Tr. 62; Ex. C-3). The elevated work surface in question was a small, horizontal platform that protruded over doorway entrances to the DFS Galleria mall. (Ex. C-3 at 2). It measured roughly 10-feet deep, and according to CSHO Setu, was about 15 feet above the ground. (Tr. 61-62; Ex. C-3).

CSHO Setu testified the employee was wearing a harness; however, he noticed the harness was not connected to a lanyard or any discernible anchor point. (Tr. 71). Respondent asserts that Mr. Taraya had a lanyard, which was anchored to the mural on the exterior of the building. (Tr. 108). Mr. Taraya testified he had attached a lanyard to the ring on the back of his harness prior to ascending the ladder. (Tr. 110-111). CSHO Setu, on the other hand, provided testimonial and photographic evidence showing Mr. Taraya, though wearing a harness, was not tethered to an anchor point at any point during CSHO Setu's inspection. (Ex. C-3). Further, CSHO Setu testified that Mr. Taraya did not disconnect his harness from anything when he approached him and asked him to come down. (Tr. 64).

Respondent also raised the fact that one of the photographs shows a scaffold along a portion of the leading edge Mr. Taraya was working from. (Ex. C-3). According to Respondent, the scaffolding purportedly could have served as a method of fall protection, presumably serving as both guardrail and safety net in the area where it was located. However, CSHO Setu testified that a nearby scaffold does not qualify as any of the three listed forms of fall protection under

1926.501(b)(1). (Tr. 76-77). CSHO Setu also noted the scaffolding was not present when he first arrived at Respondent's worksite. (Tr. 77; Ex. C-3, p.2).

After CSHO Setu concluded his assessment of the fall protection issue, he noticed a different employee using a gasoline-powered pressure washer on the sidewalk while wearing open-toe shoes. (Tr. 81; Ex. C-3). According to CSHO Setu, the employee was washing the sidewalk in plain view of his supervisor, whose area of supervision was limited to a small area at the front of the DFS Galleria. (Tr. 82).

At the conclusion of the inspection, CSHO Setu recommended, and Complainant issued, the Citation items discussed below.

Discussion

To establish a *prima facie* violation of a specific standard promulgated under section 5(a)(2) of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the standard applied to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> *29 CFR 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge which was 6 feet (1.8 M) or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.*
>
> *Front of the Galleria south side: An employee painting the front of the building from an overhang 11-feet above the ground was not protected from falling to the lower level.*

Citation and Notification of Penalty at 6.

The Standard Applied

The cited standard states, "Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." 29 C.F.R. § 1926.501(b)(1). Mr. Taraya was working on an elevated surface more than 6 feet above the ground, and that elevated surface had an unprotected edge running along its entire length. (Ex. C-3). As illustrated by the photographs submitted into evidence, as well as the testimony of CSHO Setu, the Court finds the standard applied.

The Terms of the Standard Were Violated

The standard requires employees working on an elevated surface with an unprotected edge to be protected from falling by using guardrails, safety nets, or personal fall arrest systems. 29 C.F.R. § 1926.501(b)(1). There is no dispute the unprotected edge did not have a safety net or a guardrail to protect Mr. Taraya from falling; however, the parties disagree over whether he was properly using a personal fall arrest system (PFAS).

First, the Court disposes of the notion that the scaffold Respondent placed next to the elevated surface after CSHO Setu arrived was sufficient fall protection. It was not. The standard requires one of three methods of fall protection, and none of them includes a nearby scaffold, let alone a scaffold adjacent to only a portion of the unguarded edge. *See* 29 C.F.R. § 1926.501(b)(2). The requirements for installing a guardrail are specified in § 1926.502(b), and a scaffold does not qualify. More importantly, the scaffold was moved to the location after CSHO Setu arrived.

Second, the parties seem to agree that Mr. Taraya was wearing a harness, but disagree on whether Mr. Taraya's harness was attached to anything while he was working on the elevated surface. A PFAS "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). In other words, a harness is just a harness; without the lanyard and anchor point, it does not qualify as a PFAS. It also does not qualify if the fall protection equipment was present, but not *connected* to an adequate anchor point. The Court finds the weight of the evidence in this record supports Complainant. CSHO Setu testified that he observed Mr. Taraya working on the ladder on top of an elevated surface above the DFS Galleria entrance from his vantage point across the street. (Tr. 62-63). It is, in fact, the reason CSHO Setu decided to stop and conduct an inspection in the first place. As he walked towards the elevated work surface, CSHO Setu testified Mr. Taraya did not appear to be anchored to anything, nor did he disconnect his harness from anything when he was asked to come down to the ground level to talk to the CSHO. (Tr. 90, 91).

Although Mr. Taraya testified that he connected a lanyard when he went up the ladder, which itself was placed on top of the elevated platform, the Court finds CSHO Setu's testimony to be more credible. (Tr. 108). CSHO Setu pointed to the photographs and his own memory of the inspection and convincingly showed there was no evidence of a lanyard or anchor point at any place on the mural Mr. Taraya was painting. (Ex. C-3). The Court cannot see one, nor could Respondent specify where, if anywhere, the lanyard was anchored. Finally, and perhaps most damaging, the measurements are not consistent with Mr. Taraya's testimony. According to Mr. Taraya, he connected his lanyard to an anchor point on the mural towards the bottom of the ladder. (Tr. 108). Under cross-examination he further testified the lanyard was approximately 5-feet long. (Tr. 115). Although no measurements were made of the ladder Mr. Taraya was on, the Court rejects Mr. Taraya's testimony that a 5-foot lanyard, attached to the middle of Mr. Taraya's back, would have permitted him to ascend the ladder in the photograph to a height nearly double that of his own. (Ex. C-3 at 1). *See Fluor Daniel*, 19 BNA OSHC 1529, 1531 (Nos. 96-1729 & 96-1730,

2001) ("[T]he Commission may draw reasonable inferences from the evidence[.]" (citing *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2159 (No. 90-1747, 1994)). Accordingly, the Court finds Respondent violated the terms of the cited standard.

Respondent's Employees Were Exposed to the Hazard

The investigative photographs clearly show Mr. Taraya standing on the elevated surface, at the top of a ladder, wearing a harness, which the Court has found was not connected to anything. Accordingly, the Court finds Complainant established Respondent's employee was exposed to a fall hazard.

Respondent Knew or Could Have Known of the Violation

The standard for knowledge is whether Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *See Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). If a supervisor is, or should be, aware of a hazardous condition, it is reasonable to charge the employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980).

According to the testimony of both CSHO Setu and Mr. Taraya, Respondent's supervisor was aware Mr. Taraya was working on the elevated surface, and, as illustrated by the photographs taken by CSHO Setu, it is clear Mr. Taraya was working in plain view. (Tr. 71-72; Ex. C-3). Indeed, Mr. Taraya's location and actions were open and obvious enough to stop CSHO Setu while he was driving by in his car. Considering the fact that Mr. Taraya's supervisor directed him to go up on the elevated surface to paint, there is no question he was aware of the condition. (Tr. 72). CSHO Setu was able to see that Mr. Taraya did not have a properly connected PFAS on while he was working on the elevated platform ladder, which was equally visible to Mr. Taraya's supervisor, who was in the immediate vicinity. Because Mr. Taraya's supervisor could have easily

observed the hazardous condition with the exercise of reasonable diligence, the Court finds his knowledge is properly imputable to Respondent. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("Constructive knowledge, just like actual knowledge, can be imputed to the employer through the knowledge of its supervisory employees."). Accordingly, the Court finds Respondent had constructive knowledge of the violative condition.

The Violation Was Serious

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Complainant need not show there was a substantial probability an accident would occur, only that if an accident did occur, serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010). The testimony was clear and unrebutted that a fall from over fifteen feet, factoring in the height of the elevated platform and Mr. Taraya's location on the ladder, could have resulted in serious injuries or death. Accordingly, the Court finds Complainant established that the violation of 29 C.F.R. § 1926.501(b)(1) was properly characterized as serious. Citation 1, Item 1 will be AFFIRMED.

Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> *29 CFR 1926.95(c): The employer did not ensure employees wore proper footwear which meets the requirements and specifications in American National Standard for Men's Safety-Toe Footwear, Z41.1-1967.*
>
> *In front of DFS north side: An employee wearing open toe footwear was water blasting the pavement. The employee was exposed to laceration and crushed-by hazards.*

Citation and Notification of Penalty at 7.[2]

2. Complainant originally alleged a violation of 29 C.F.R. § 1926.96; however, upon filing the Complaint, Complainant amended Citation 1, Item 2 to allege a violation of 29 C.F.R. § 1926.95(c).

Respondent Confessed to the Existence of a Violation

Prior to taking evidence, the Court permitted the parties to present brief opening statements. During his opening statement, and upon clarifying questions from the Court, Mr. Tagle admitted Respondent was not disputing the factual allegations in Citation 1, Item 2. (Tr. 53-55). Upon further questioning, Mr. Tagle stated Respondent was only disputing the penalty, which they viewed as excessive in light of the violation. The Court accepts Mr. Tagle's concession of the violation elements for Citation 1, Item 2.[3] The Court will address the appropriateness of Complainant's proposed penalty below.

Penalty

Under the Act, the Secretary has the authority to propose a penalty according to Section 17 of the Act. *See* 29 U.S.C. §§ 659(a), 666. The amount proposed, however, merely becomes advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441–42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1686 n. 5 (No. 00-0315, 2001). Ultimately, it is the province of the Commission to "assess all civil penalties provided in [Section 17]", which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995). In determining an appropriate penalty, the Court is required to consider "the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations." *Briones Util. Co.*, 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (*citing* 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citation omitted*). Gravity, which is the primary focus of any penalty analysis, is a holistic measure of how hazardous a particular violation is and takes into consideration: (1) how many employees were exposed and for how long; (2) whether

3. Respondent's acceptance of Citation 1, Item 2 negates the need to evaluate its alleged affirmative defense of unpreventable employee misconduct for this item.

Respondent took precautions against injury; (3) the probability an accident will occur; and (4) the likelihood an injury will occur. *See, e.g.*, *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished).

In the case of the fall protection violation alleged in Citation 1, Item 1, Complainant proposed a penalty of $8,675. According to AD Forstner, the penalty was premised on multiple factors, including Respondent's size and the severity of the hazard. Complainant presented evidence of size (100 employees) and the general nature of the hazard; however, there was very little discussion of how long Mr. Taraya was exposed, and Complainant did not engage in the typical recitation of penalty-based assessments, such as "high gravity", "lesser probability", and whether discounts were applied and on what basis. While this information is contained in Complainant's Violation Worksheet, it is devoid of context or explanation. It is Complainant's obligation to support its proposed penalty with evidence bearing on the factors described above. *See Valdak Corp*., 17 BNA OSHC at 1138. Based on the limited facts presented, the Court finds a penalty of $4,200 is appropriate.

As to Citation 1, Item 2, the Court finds the record even less persuasive in support of Complainant's proposed penalty. Neither AD Forstner nor CSHO Setu spent significant time discussing the violation itself, let alone the factors they considered in assessing a penalty of $5,205. While the warning label on the power washer indicated the possibility of severe injury, the Court finds the CSHO Setu's discussion of possible cuts to the feet or debris entry into an existing wound to be quite speculative and extreme. (Tr. 80-81). The Court also notes the disparity between CSHO Setu's trial testimony regarding the seriousness of the violation and his investigative notes, which state, "The most serious injury or illness which could be reasonably expected to result would be injuries not resulting in hospitalization and requiring only minor supportive treatment." (Ex. C-

2 at 11). While the Court is mindful that Respondent confessed the existence of the violation as alleged, based on the facts presented, and the totality of the circumstances, the Court finds a penalty of $800 is appropriate.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED as a serious violation of 29 C.F.R. §1926.501(b)(1), and a penalty of $4,200 is ASSESSED; and
2. Citation 1, Item 2 is AFFIRMED as a serious violation of 29 C.F.R. §1926.95(c), and a penalty of $800 is ASSESSED.

/s/ *Brian A. Duncan*

Date: November 1, 2021
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission