UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. AFFORDABLE ROOFING AND EXTERIORS, INC., Respondent.	OSHRC DOCKET NO. 13-1689

Marla J. Haley, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Respondent failed to appear

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of an Affordable Roofing and Exteriors, Inc. ("Respondent") worksite in Trenton, Illinois commencing on March 7, 2013 and ending on August 9, 2013. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging one serious and three repeat violations of the Act with penalties totaling $31,570.00. The Citation was issued on August 23, 2013. Respondent timely contested the citation items.

At the outset of this case, Respondent was represented by Julie O'Keefe, Esq. Ms. O'Keefe participated in the preliminary stages of litigation, including filing an Answer and reaching a settlement in principle with Complainant. Upon being notified of the settlement, the Court vacated the trial set for April 22, 2014, and granted the parties 30 days to submit a

settlement agreement. During that period of time, Complainant's counsel contracted pneumonia and had to take extended medical leave. The Court granted an extension of time to submit the settlement agreement. On December 30, 2014, Ms. O'Keefe filed a motion to withdraw as Respondent's counsel, citing Respondent's failure to appear at multiple depositions and uncertainty about Respondent's future plans. The Court granted the motion on December 31, 2014, placed the case back on the trial docket, and set the matter for trial on May 27–28, 2015.[1]

On January 16, 2015, Complainant sent Respondent interrogatories, requests for production, and requests for admissions. Notwithstanding repeated attempts to contact Respondent's owners—Jason Bliven and Joe Kehrer—Respondent failed to respond to the discovery requests. In response, Complainant filed his *Motion to Compel Answers to Interrogatories and Requests for Production and to Deem Admitted the Complainant's Requests for Admission by Operation of Law*. On March 1, 2015, having received no response to the *Motion*, the Court ordered Respondent to produce the requested documents and respond to the interrogatories and deemed admitted the unanswered requests for admissions. Respondent failed to comply with the Court's order.

In light of Respondent's noncompliance, Complainant sought to confer with Respondent's owners in an attempt to resolve the dispute but was unable to get in touch with Respondent. Due to Respondent's repeated failure to comply or even communicate, Complainant filed a *Motion for Sanctions*, to which Respondent failed to respond. The Court deemed the motion confessed and imposed sanctions preventing Respondent from introducing witness testimony and exhibits and striking an affirmative defense. The Court declined to

1. An Order Establishing Trial Date and Entry of Scheduling Order dated December 31, 2014 was not returned as "Undeliverable" by the U. S. Postal Service. *See* fn. 6, *infra* (discussing Commission Rule 6, which requires a party to promptly communicate changes in contact information).

dismiss the case, as it did not have enough time to resolve the matter prior to the trial, which was scheduled for one week later.

The trial was held on May 28, 2015, in St. Louis, Missouri. Respondent failed to appear, so Complainant put forth uncontroverted evidence in support of his *prima facie* case.[2] Prior to presenting his evidence, however, Complainant motioned the Court to withdraw Citation 2, Item 1, which the Court granted. Based on the evidence submitted by Complainant, which is recounted below, the Court finds that Complainant established its *prima facie* case for each of the remaining citations and penalties. Further, as will also be discussed below, the Court finds, alternatively, that Respondent has abandoned its case and that a default judgment in favor of Complainant is proper.

II. Jurisdiction

The Court has jurisdiction over this proceeding pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c), by the issuance of the Complaint and the Respondent's filing of a Notice of Contest and an Answer. The record illustrates that Respondent is engaged in a business affecting interstate commerce and has employees. (Tr. 25, 29–30; *Answer* at ¶ 3). *See* 29 U.S.C. § 652(c).

III. Factual Background

On March 7, 2013, the Fairview Heights District Office received an anonymous call about fall protection hazards at Respondent's worksite, located at the corner of S.R. 160 and U.S. 50 in Trenton, Illinois. (Tr. 21–24). CSHO Frank Fuchs III was sent to the worksite approximately one hour after the call was received. (Tr. 24). When he arrived at the worksite, he observed eleven of Respondent's employees, including one foreman, on the roof of a gas station

2. In addition to the witness testimony, the Court admitted Exhibits C1 to C4 and C6 to C-16 into evidence.

without any fall protection. (Tr. 25). Fuchs also observed an extension ladder that was not extended three feet above the roof line, as required by 29 C.F.R. § 1926.1053(b)(1).

After making his observations at a distance, CSHO Fuchs conferred with Ed Pendergraft, who was identified as Respondent's on-site foreman. (Tr. 28). During this conversation with Fuchs, Pendergraft stated that he believed the one-foot tall parapet wall on the edge of the roof served as an adequate slide guard and that they were complying with the regulations. (Tr. 37). According to Fuchs, Pendergraft stated that he did not know the current fall protection requirements for this particular worksite. (Tr. 44).

Fuchs also interviewed one of Respondent's employees, Chris Williams. (Tr. 45–46). According to Williams, Respondent had, in the past, conducted safety inspections and audits of its worksite; however, recently, it had stopped conducting such inspections. (Tr. 46). Accordingly, Fuchs determined that Respondent violated 29 C.F.R. § 1926.20(b)(2).

The roof of the gas station was approximately 12–13 feet high to the eave and an additional 12–18 inches to the top of the parapet. (Tr. 38–39, 66; Ex. C-12). Fuchs testified that the parapet wall was insufficient as fall protection because the slope of the roof was "8-in-12", which means that the roof rises 8 inches vertically for every 12 inches of lateral distance. (Tr. 34). Accordingly, he concluded that conventional fall protection—personal fall arrest systems, guardrails, or safety nets—was required. (Tr. 37). Thus, he recommended that Respondent be cited pursuant to 29 C.F.R. § 1926.501(b)(11).

IV. Discussion

a. Applicable Law

To establish a *prima facie* violation of section 5(a)(2) of the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew,

or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

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). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *Id.*

"A violation is repeated under section 17(a) of the Act if, at the time of the alleged violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch*, 7 BNA OSHC 1061 (No. 16183, 1979). One of the ways in which Complainant can establish substantial similarity is by showing that the prior and present violations are for failure to comply with the same standard under section 5(a)(2) of the Act. *Id.* A *prima facie* showing of substantial similarity can be rebutted by evidence that the conditions and hazards associated with the violations are different. *Id.*

b. Citation 1, Item 1

Complainant alleged a serious violation of the Act as follows:

> 29 CFR 1926.1053(b)(1): Where portable ladders were used for access to an upper landing surface and the ladder's length allows, the ladder side rails did not extend at least 3 feet (.9m) above the upper landing surface being accessed:
>
> Eleven employees were exposed to an approximately 13 foot fall due to the use of an extension ladder which did not have the ladder's side rails extend at least 3 feet about [sic] the upper landing surface being accessed.

The cited standard provides:

> When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to

> which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

29 C.F.R. § 1926.1053(b)(1).

The uncontroverted evidence establishes that the standard applies and was violated. Respondent used a portable, 24-foot extension ladder to access the roof of the gas station. (Tr. 70; Ex. C-9). According to Fuchs' observations and measurements, the side rails of the ladder did not extend at least three feet above the surface being accessed, even though the roof was only thirteen-feet tall. (Tr. 26). There was no indication that the ladder was secured to the structure, nor was there any evidence that Respondent installed a grabrail to assist employees in mounting or dismounting the ladder.

The Court finds that Respondent's employees were exposed to the condition. Fuchs testified that he observed eleven of Respondent's employees on the roof of the gas station. (Tr. 25; Ex. C-8, C-9, C-10). Fuchs observed employees accessing and exiting the roof via the ladder, and there was no testimony to suggest that there were alternative means of doing so. (Tr. 27–28). Because the ladder was the only means of ingress and egress, the Court finds that each of the eleven employees was exposed to the hazard of falling from the roof.

Respondent also knew about the condition. According to Fuchs, Mr. Pendergraft was the onsite foreman. Mr. Pendergraft was working on the roof and, thus, had to use the ladder in order to access it. (Tr. 28). This constitutes direct knowledge of the violation. Further, since Mr. Pendergraft was a management employee, his knowledge is imputable to Respondent. *See 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).

The violation was serious. The point of ingress and egress for the ladder was located approximately 12–13 feet above the ground. If an employee were fall from that height onto the concrete surface below, he could suffer serious physical injury, up to and including death. *See Mosser Constr., Inc.*, 23 BNA OSHC at 1046

Based on the foregoing, the Court finds that Respondent violated 29 C.F.R. § 1926.1053(b)(1) as alleged in Citation 1, Item 1, and that the violation was serious. Accordingly, Citation 1, Item 1 shall be AFFIRMED.

c. Citation 2, Item 2

Complainant alleged a repeat violation of the Act as follows:

> 29 CFR 1926.20(b)(2): The employer did not initiate and maintain a safety program which provides for frequent and regular inspections of jobsites, materials, and equipment to be made by competent person (i.e., a person who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has the authority to take prompt corrective measures to eliminate them):
>
> Eleven employees were working on an approximately 13 foot high 8 in 12 pitch roof without fall protection to the lower level and the employer did not initiate and maintain an accident prevention program to control and eliminate the hazards present at the jobsite in accordance with the OSHA regulations.
>
> AFFORDABLE ROOFING AND EXTERIORS INC WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD (29 CFR 1926.20(B)(2)), WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER 313012999, CITATION UMBER [SIC] 01, ITEM NUMBER 001b, ISSUED ON 8-31-2009, AND WAS AFFIRMED AS A FINAL ORDER N [SIC] 9-24-09 WITH RESPECTS [SIC] TO A WORKPLACE LOCATED AT WEATTHERBY ROAD & HUNTERS TRAIL IN MASCOUTAH, ILLINOIS.
>
> The cited standard provides:
>
> 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.

29 C.F.R. § 1926.20(b)(2).

The evidence presented by Complainant establishes that the standard applies and was violated. Respondent is engaged in construction and, pursuant to this regulation, is required to designate a competent person to conduct inspections of the worksite, materials, and equipment. According to Fuchs, he interviewed an employee who stated that inspections and audits had occurred in the past; however, he also indicated that such inspections had not occurred recently. (Tr. 46). When coupled with the fact that Pendergraft was unable to identify the necessary protections to be implemented at the worksite, Fuchs concluded that the required inspections by competent persons were not occurring, and the Court agrees.

With respect to the issues of exposure and knowledge, the Court hereby incorporates its findings described above in Section IV.b, *supra*. Thus, the Court finds that Complainant has proved his *prima facie* case.

Complainant has also alleged that the violation was repeated. On August 31, 2009, Respondent was cited pursuant to 1926.20(b)(2)—the same standard cited in the present case—for failing to have an inspection program. (Ex. C-6 at 6). That citation was settled by the parties through an informal settlement agreement on September 11, 2009. As part of the agreement, Respondent agreed to waive its rights to contest the citation, thereby rendering it a final disposition of the case. The facts of the 2009 case were nearly identical to those in the present case: employees working on a steep-pitch roof without proper fall protection. In both cases, proper inspections likely would have uncovered the violations. Because the underlying violation was issued pursuant to the same standard and involved an almost-identical set of facts as the violation at issue, the Court finds that the violations were substantially similar. Because the violations were substantially similar, the Court finds that the citation item was properly characterized as "repeat".

Based on the foregoing, the Court finds that Respondent violated 29 C.F.R. § 1926.20(b)(2) as alleged in Citation 2, Item 2, and that the violation was repeated. Accordingly, Citation 2, Item 2 shall be AFFIRMED.

d. Citation 2, Item 3

Complainant alleged a repeat violation of the Act as follows:

> 29 CFR 1926.501(b)(11): Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels was not protected from falling by guardrail systems with toe boards, safety net systems, or personal fall arrest systems:
>
> Eleven employees were working on an approximately 8 in 12 pitch roof which was approximately 11 feet from a lower level was exposed to fall hazards while conducting work without guardrail systems, safety net systems, or personal fall arrest systems.
>
> AFFORDABLE ROOFING AND EXTERIORS INC WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD (29 CFR 1926.20(B)(13)), WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER 423703, CITATION UMBER [SIC] 02, ITEM NUMBER 001, ISSUED ON 6-15-2012, AND WAS AFFIRMED AS A FINAL ORDER ON 6-03-13 WITH RESPECTS [SIC] TO A WORKPLACE LOCATED AT 200 E CEDAR STREET IN NEW BADEN, ILLINOIS.[3]
>
> The cited standard provides:
>
> "Steep roofs." Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

29 C.F.R. § 1926.501(b)(11).

In order to establish that the standard applies, the roof of the gas station must be classified as a "steep roof". A steep roof, according to the regulations, is "a roof having a slope greater than 4 in 12 (vertical to horizontal)." 29 C.F.R. § 1926.500(b)(2). According to Fuchs,

3. The citation to 29 C.F.R. § 1926.20(b)(13) is a typographical error. As noted in the June 15, 2012 Citation and Notification of Penalty, and in CSHO Fuchs' testimony, the underlying citation was issued pursuant to 29 C.F.R. § 1926.501(b)(13). Accordingly, the Court shall base its "repeat" determination on this standard.

the roof of the gas station was 8 in 12, which is a steeper pitch than the minimum required by the standard. (Tr. 34). Thus, the standard applies.

The Court also finds that the terms of the standard were violated. Respondent's employees were on a steep roof, which was 12–13 feet above the ground. None of the employees were wearing personal fall arrest systems, nor was the roof equipped with a guardrail or safety net system. (Ex. C-8, C-9, C-10). Pendergraft told Fuchs that he believed the parapet wall around the perimeter of the roof constituted a slide guard, which he believed was sufficient to comply with the standard. (Tr. 37). Fuchs testified that the parapet wall was insufficient as a means of fall protection because it did not qualify as one of the listed forms of fall protection. (Tr. 37–39). Further, he testified that the only way in which the parapet wall would qualify is if it met the requirements for a standard guardrail, including a 42-inch height, midrail, and toeboard. (Tr. 38–39). Since the parapet was only 12–18 inches high, it did not qualify. (*Id.*).

The Court agrees with Complainant. The cited standard lists three, and only three, acceptable methods of fall protection, none of which include the use of slide guards. Respondent was not available to provide countervailing evidence or to establish an affirmative defense such as greater hazard. Thus, the Court finds that the terms of the standard were violated.

As with Citation 2, Item 2, the Court hereby incorporates its findings described above in Section IV.b, *supra*. Thus, the Court finds that Complainant has proved his *prima facie* case.

Complainant has also alleged that the violation was repeated. On June 15, 2012, Respondent was cited pursuant to 1926.501(b)(13). This was not the exact standard cited in the present case; however, the language of the two standards is nearly identical. (Ex. C-7 at 7). *Compare* 29 C.F.R. § 1926.501(b)(11) *with* 29 C.F.R. § 1926.501(b)(13). The differences between the two are minor. Specifically, (b)(11) is entitled "Steep roofs" and (b)(13) is entitled "Residential construction". The only other notable difference is that (b)(13) has exceptions for

greater hazard and the possibility of alternative fall protection measures, whereas (b)(11) does not. The 2012 citation was settled by the parties and became a final order of the Commission on June 3, 2013. (Ex. C-7). The facts of the 2012 case were nearly identical to those in the present case: employees working on an 8-in-12 pitch roof, over 12 feet off the ground, without proper fall protection, and exposed to fall hazards. Because the underlying violation was issued pursuant to a standard with near-identical language and involved an almost-identical set of facts as the violation at issue, the Court finds that the violations were substantially similar. Because the violations were substantially similar, the Court finds that the citation item was properly characterized as "repeat".

Based on the foregoing, the Court finds that Respondent violated 29 C.F.R. § 1926.501(b)(11) as alleged in Citation 2, Item 3, and that the violation was repeated. Accordingly, Citation 2, Item 2 shall be AFFIRMED.

e. Default.

As an alternative to the foregoing, the Court also finds that Respondent is in default. According to Commission Rule 101(a):

> When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or Judge, he may be declared to be in default either on the initiative of the Commission or the Judge, after having been afforded an opportunity to show cause why he should not be declared in default . . . . Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party . . . .

29 C.F.R. § 2200.101(a). As recounted in Section I, *supra*, Respondent has demonstrated a pattern of disregard for the procedural requirements and authority of the Commission by: (1) failing to respond to motions filed by Complainant; (2) failing to comply with orders issued by this Court, and (3) failing to appear at trial. With the exception of one letter, none of the Court's correspondence was return as undeliverable, and the Court used the address provided by Respondent at the outset of this case. Thus, the Court has no reason to believe that Respondent

has not received the filings and notifications in this case.[4] Further, Respondent has been given multiple opportunities to engage in the litigation process and has failed at nearly every opportunity. Respondent's repeated failure to participate in this proceeding constitutes contumacious conduct justifying sanctions. *Philadelphia Construction Equipment, Inc*., 16 BNA OSHC 1128, 1993 CCH OSHD ¶30,051 (No. 92-0899, 1993); *Sealtite Corporation*, 15 BNA OSHC 1130, 1991 CCH OSHD ¶29,398 (No. 88-1431, 1991). Accordingly, with respect to the above-referenced docket, the Court finds Respondent in default. Respondent's Notice of Contest is hereby VACATED, and the violations and penalties alleged in the Citation and Notification of Penalty are AFFIRMED.

V. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g., Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995).

4. The Court received one Order that was returned as undeliverable. However, given that Respondent represented to Complainant that it was considering liquidating the company, and considering that follow-up calls to Respondent's office were met with a message that the phone line has been disconnected, the Court finds that any failure of notice is Respondent's. *See* 29 C.F.R. § 2200.6 ("Any change in [contact] information shall be communicated promptly in writing to the Judge, or the Executive Secretary if no Judge has been assigned, and to all other parties and intervenors. A party or intervenor who fails to furnish such information shall be deemed to have waived his right to notice and service under these rules.").

Based on the testimony of CSHO Fuchs, the Court finds that the proposed penalties are appropriate. Respondent is a small employer, which Complainant accounted for in applying a 40% reduction in penalty. However, Respondent has received multiple citations regarding fall protection over the course of the last several years, and thus the Court agrees that the penalty should account for repeated misconduct. Further, the violations themselves exposed eleven employees to the potential for falls of over 12 feet onto concrete, which can cause serious physical injury and possibly death. In light of these facts, the Court finds that the penalties proposed by Complainant are appropriate.

ORDER

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. 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. § 1926.1053(b)(1), and a penalty of $5,390.00 is ASSESSED.
2. Citation 2, Item 1 was withdrawn by Complainant at the commencement of the hearing. Accordingly, Citation 2, Item1 is hereby VACATED.
3. Citation 2, Item 2 is AFFIRMED as a repeat violation of 29 C.F.R. § 1926.20(b)(2), and a penalty of $7,700.00 is ASSESSED.
4. Citation 2, Item 3 is AFFIRMED as a repeat violation of 29 C.F.R. § 1926.501(b)(11), and a penalty of $10,780.00 is ASSESSED.

SO ORDERED.

/s/ Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Date: July 27, 2015
Denver, Colorado