United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR, Complainant, v. CHRIS WELCH, Respondent.	OSHRC Docket No. 16-0687

Appearances: M. Patricia Smith, Solicitor of Labor
Christine Z. Heri, Regional Solicitor
Christine Eskilson, Attorney
U.S. Department of Labor, Office of the Solicitor, Boston, Massachusetts
For the Secretary

Nancy C. Flahive
Law Office of Nancy C. Flahive, Springfield, Massachusetts
For the Respondent

Before: Dennis L. Phillips
Administrative Law Judge

SIMPLIFIED PROCEEDING

DECISION AND ORDER

Background

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to sections 2-33 of the Occupational Safety and Health Act of 1970, 29

U.S.C. §§ 651-678 (OSH Act). On March 9, 2016, the Occupational Safety and Health Administration (OSHA) inspected Respondent Chris Welch's (Respondent or Chris Welch) worksite located at 740 Bradley Road, Springfield, Massachusetts 01109. As a result, OSHA issued to Respondent a serious citation containing two items alleging violations of OSHA's construction standards and proposing a total penalty of $4,000. Respondent filed a timely notice of contest pursuant to section 10(c) of the OSH Act, bringing this matter before the Commission.

Citation 1, Item 1 alleges that Respondent violated 29 C.F.R. § 1926.501(b)(13). The item asserts that on March 9, 2016, an employee of Respondent "was roofing this residence without any fall protection, more than 10 feet above the ground below." (Citation at 6). The proposed penalty for Citation 1, Item 1 is $2,000. The standard provides:

§ 1926.501 Duty to have fall protection.

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> (b)(13) *Residential construction*. Each employee engaged in residential construction activities 6 feet or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protraction measure[…]."

29 C.F.R. § 1926.501(b)(13).

Citation 1, Item 2 alleges Respondent violated 29 C.F.R. § 1926.1053(b)(1). The citation asserts that on March 9, 2016, an employee of Respondent "was using an orange fiberglass extension ladder to access the roof top work location that did not extend the required 3 feet past the upper landing surface." (Citation at 7). The proposed penalty for Citation 1, Item 2 is $2,000. The standard provides:

§ 1926.1053 Ladders.

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> (b)(1) *Use*. The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated: (1) 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 as 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).

On May 25, 2016, pursuant to Commission Rule 203(a), 29 C.F.R. § 2200.203(a), this case was assigned to Simplified Proceedings where pleadings were not required and the Federal Rules of Evidence did not apply at the hearing. (Tr. 9). Based on the evidence in the record, and for the following reasons, the citation items are affirmed.

The Hearing

On May 26, 2016, the Notice of Pre-Hearing Scheduling Conference and Order was sent out – and the Order was not returned by the U.S. Post Office to the Commission – notifying the parties of an upcoming June 17, 2016 Conference Call. Respondent's counsel did not participate in the June 17, 2016, Conference Call.

Later on June 17, 2016, the Notice of Hearing & Scheduling Order was sent out – and this Notice & Order (Scheduling Order) was also not returned by the U.S. Post Office to the Commission. The Scheduling Order: 1) directed the parties to file pre-hearing statements no later than September 1, 2016,[1] 2) set the final pre-hearing conference call for September 2,

[1] The Scheduling Order required the joint pre-trial statement contain:

> [A]n agreed statement of facts and issues, the Respondent shall set forth the factual basis of each affirmative defense as it relates to each specific item, a list of all lay witnesses who may be called at hearing, including a brief summary of testimony to be elicited [The factual substance of the lay testimony

2016, 3) directed the parties to file their trial exhibits with the Court by September 19, 2016, and 4) scheduled the trial to commence on September 26, 2016 at Boston, Massachusetts. Footnote 1of the Scheduling Order also noted that Respondent failed to participate in the June 17, 2016 Conference Call and issued a warning that future non-participation could result in sanctions including dismissal of the case.[2]

The Secretary timely filed a pre-hearing statement on September 1, 2016. Respondent did not file a pre-hearing statement. During the September 2, 2016 Conference Call, the Court notified Respondent's counsel, who was in attendance, about the untimely pre-hearing statement. (Tr. 6). During the Conference Call, Respondent's counsel indicated to the Court that she would submit a final pre-hearing statement by the end of that day, September 2, 2016. (Tr. 6). To date, the Court has not received Respondent's pre-hearing statement.

The hearing for this case was held on September 26, 2016 at Boston, Massachusetts. Respondent was not in attendance.[3] (Tr. 5-6). Respondent's counsel notified the Court's

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must be briefly summarized and a mere list of topics will not meet the requirement.]; a list of all expert witnesses including, as to each expert witness, a statement of subject matter and a summary of the substance of the testimony with respect to each item [Each expert opinion shall be numbered and separately set forth.]; a list of exhibits to be offered into evidence with notations of all objections thereto[footnote here required that 'All documents or physical evidence intended for introduction at the hearing must be exchanged by the parties no later than 30 days before the commencement of the hearing.'], a list of all motions or other matters which require action by the Judge, an estimate of time each counsel anticipates will be needed to present its case, and the signatures, telephone numbers, and email addresses of counsel for all parties.

[2] As there is no evidence in this record that the U.S. Postal Service failed to properly fulfill its duties, it is presumed that Respondent, via its counsel, received all mailings from the Court and the Court holds Respondent responsible for its mail handling procedures, as well as other actions or omissions, as noted below, during this proceeding. *Byrd Produce Co.,* 16 BNA OSHC 1268, 1269 (No. 91-0823, 1993) (consolidated) (parties are generally bound by the actions of their hired representatives); *Powell v. Commissioner*, 958 F.2d 53, 54 (4th Cir. 1992) (holding that, in the absence of evidence to the contrary, it is reasonable to presume that the United States Postal Service officials have properly discharged their duties); *La.-Pac. Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (holding that the Commission expects employers to maintain orderly procedures for handling important documents).

[3] Respondent's counsel's business address in the record was the Law Office of Nancy C. Flahive, 73 Chestnut Street, Springfield, MA 01104. The citations were issued to Chris Welch at 365 North Road, Broad Brook, CT 06016.

Legal Assistant located at Washington, D.C. via electronic mail on the morning of the hearing, at about 8:28 a.m., that she will not be in attendance due to illness.[4] (Tr. 6). In her notice to the Court, Respondent's counsel did not request a trial continuance. Instead, she stated "If need be, I will assume responsibility for my client's assessed fine in this matter by OSHA; however, I had absolutely no control over the present circumstances." The hearing was held as scheduled.[5] (Tr. 6; *see also* 29 C.F.R. §§ 2200.62(c) (requests to postpone trials to be submitted within seven days of the trial date or they will most likely be denied); 64(a) (failure to appear at the hearing may result in a decision against a party)). Before proceeding with the trial, the Court noted that Respondent had violated the Court's scheduling order by not filing its pre-hearing statement by September 1, 2016 or trial exhibits with the Court by September 19, 2016. (Tr. 6-7).

The Secretary's attorney, Ms. Eskilson, presented her case. She offered several exhibits that were admitted into evidence at the hearing. (Tr. 9-10; Exs. 1-4). No joint exhibits or stipulations between the parties were entered into the record. (Tr. 10-11). The Court denied the Secretary's request for a ruling from the bench, citing Commission Rule 64, Failure to Appear, which gives five days to the party who failed to attend the hearing to show good cause as to why the hearing should be continued. (Tr. 36; 29 C.F.R. § 2200.64(b)). Respondent has made no such request. The evidence produced by the Secretary is uncontested since Respondent failed to appear at the hearing or proffer any trial exhibits. *Byrd Produce Co.,* 16 BNA OSHC at 1269 (parties are generally bound by the actions of their hired representatives). As this case was designated for Simplified Proceedings, no post-hearing briefs were filed. (Tr.

[4] The Court received notice of Respondent's counsel's intended absence at trial at about 9:30 a.m., September 26, 2016. The Court promptly instructed its legal assistant to advise Respondent's counsel that the trial would proceed as scheduled and commence at 10:30 a.m.
[5] The trial commenced at 10:31 a.m., September 26, 2016. (Tr. 4).

36; 29 C.F.R. § 2200.200(b)(6)(For simplified proceedings, "[i]nstead of briefs, the parties will argue their case orally before the Judge at the conclusion of the hearing.").

Jurisdiction

The evidence establishes that, at the time of the OSHA inspection, Respondent was performing roofing work on a residential construction site in Springfield, Massachusetts. (Tr. 17-18, 22, 24-25). Roof repair qualifies as "construction work" which is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1926.32(g). The construction industry as a whole affects commerce, and even small employers within that industry are engaged in commerce. *Slingluff v. OSHRC*, 425 F.3d 861, 866-67 (10th Cir. 2005); *Clarence M. Jones, d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). The record also establishes that Respondent had at least one employee who was working as a roofer on Respondent's worksite. (Tr. 18-22, 25; Exs. 1-3). Additionally, Respondent filed a timely notice of contest pursuant to section 10(c) of the OSH Act.

Based upon the record, the Court finds that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case, and Respondent is covered under the OSH Act.

The Secretary's Burden of Proof

To establish a violation of a safety or health standard, the Secretary must prove by a preponderance of the evidence: "(1) that the cited standard applies; (2) that there was a failure to comply with the standard; (3) that employees had access to the violative condition; and (4) that the employer had actual or constructive knowledge of the violation." *P. Gioioso & Sons,*

Inc. v. Occupational Safety and Health Review Comm'n, 675 F.3d 66, 72 (1st Cir. 2012) (citation omitted); *see also Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).[6]

Discussion

On March 9, 2016, at 12:41 p.m., OSHA Compliance Officer (CO) Daniel Lynaugh was driving down Bradley Road in Springfield, Massachusetts, on his way back to the OSHA area office from another OSHA inspection, when he observed a rooftop worker on a low-slope residential roof without fall protection. He pulled over on a side street, called the OSHA Area Director (AD), and received permission from the AD to open a local emphasis program inspection. (Tr. 13, 17-18, 22).

CO Lynaugh walked up the driveway to the residence and took pictures. The eave of the roof was 10.5 feet high from the ground. The roof itself was low-sloped. On the rooftop, a single worker was stripping the roof using "a big rake," and on the side of the house, another worker was picking up shingles and debris off the ground. There was a large greenish dumpster on the driveway that is typically used to remove the roofing debris. (Tr. 18-19, 23, 26; Exs. 1-4).

The roofer's name was Keith Sarno. CO Lynaugh called up to Mr. Sarno on the roof, showed him his credentials, and asked Mr. Sarno if he could come down from the roof so that they could discuss fall protection. Mr. Sarno descended from the rooftop using a ladder. The ladder's top rung was the only rung that extended past the top of the rooftop, and that was how CO Lynaugh determined that the rails of the ladder did not extend at least three feet from the upper landing surface. CO Lynaugh asked Mr. Sarno about fall protection, and Mr. Sarno told

[6] The Court finds that the Secretary has proven all of the elements of a violation of each of the cited standards, and no defense was either offered by Respondent or found by the Court.

him that "he didn't have any." CO Lynaugh then explained to Mr. Sarno the hazard of falling off a roof. Mr. Sarno told CO Lynaugh that he worked for Chris Welch, who paid Mr. Sarno to work, and then directed CO Lynaugh to Mr. Welch, who was sitting in the shade in a breezeway between the house and the attached garage.[7] (Tr. 19-24, 30; Exs. 1-4).

CO Lynaugh approached Mr. Welch and showed him his OSHA credentials. Mr. Welch did not say anything to CO Lynaugh, who described the interaction as "kind of strange." He told Mr. Welch about his observations regarding the lack of fall protection and asked him whether he had any fall protection. According to CO Lynaugh, Mr. Welch said he did not have any fall protection. CO Lynaugh collected Mr. Welch's name, address and telephone number, and then explained to him "what happens further down the line" for this OSHA inspection. (Tr. 25-27).

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.501(b)(13). This standard requires that employees engaged in residential construction, working more than six feet above the lower level, be provided with appropriate fall protection. The evidence establishes that Respondent's employee was working on repairing a residential roof that was at least 10.5 feet above the ground. (Tr. 18-19, 26). Respondent was obligated to provide its employee with an appropriate form of fall protection. The cited standard, 29 C.F.R. § 1926.501(b)(13), applies.

Mr. Sarno was photographed working on the rooftop. He was not provided with any form of fall protection. There was no fall arrest system, safety net system, guardrails, or other method of fall protection at the site. (Tr. 20, 22, 26). The cited standard was violated. Mr. Sarno was working on the roof, over six feet above the ground, and was clearly exposed to the

[7] CO Lynaugh did not talk to the other worker because that worker was not up on the roof. (Tr. 23-24).

hazard. The evidence also establishes that Mr. Sarno was paid by Mr. Welch to perform work. (Tr. 22-23). Mr. Welch was sitting in the shade on the worksite while Mr. Sarno was on the roof. (Tr. 24). Mr. Welch knew that he had no fall protection on the worksite. Knowledge of the hazard has been established. *P. Gioioso*, 675 F.3d at 73 ("an employer can be charged with constructive knowledge of a safety violation that supervisory employees know or should reasonably know about.").

The undisputed evidence establishes that: (1) the standard applies, (2) its terms were violated, (3) an employee was exposed to the hazard addressed by the standard and (4) Respondent knew or with the exercise of reasonable diligence should have known of the violative condition. This citation item is affirmed.

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). To successfully characterize a violation as "serious," the Secretary need only show that " 'an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident.' " *Flintco, Inc.*, 16 BNA OSHC 1404, 1405-06 (No. 92-1396, 1993) (citation omitted). The record establishes that a fall from the roof could have caused serious physical harm. CO Lynaugh testified that if a worker fell from 10 feet, "the probability that you're going to break something is high." (Tr. 28). Roofing is an inherently dangerous activity. *See Daniel Crowe Roof Repair*, 23 BNA OSHC 2001, 2017 (No. 10-2090, 2011) (ALJ) (roofing an inherently dangerous activity). A fall of over six feet to the ground is likely to result in death or serious physical injury. (Tr. 31). This citation item is properly characterized as serious.

Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.1053(b)(1). This standard requires that portable ladders used to access an upper landing surface must extend at least three feet past the upper landing. The evidence shows that the ladder was portable and that Mr. Sarno accessed it to enter and exit the rooftop. (Tr. 21; Ex. 3). The cited standard applies. Photographic evidence shows that only the top rung of the ladder extended past the edge of the rooftop. (Ex. 3). CO Lynaugh testified that "ninety-nine percent of the ladders manufactured in America, the rungs are 12 inches apart, so it was a quick, you know, visual clue, and there's only one rung past the top. It doesn't extend three feet." (Tr. 30). The cited standard was violated. Mr. Sarno used the ladder to access and exit from the rooftop, and was therefore exposed to the hazard.

As with Item 1, the evidence establishes that Mr. Sarno was paid by Mr. Welch to perform work. Mr. Welch was sitting in the shade on the worksite while Mr. Sarno was on the roof, and when Mr. Sarno used the ladder to come down from the roof to talk to CO Lynaugh. (Tr. 24). Based on the photographic evidence, the ladder was in plain view and was the only means of accessing the rooftop on the worksite. (Ex. 3). Mr. Welch had the obligation to adequately supervise his employees, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations. *S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016). Mr. Welch knew or with the exercise of reasonable diligence should have known that the ladder did not extend past three feet of the upper landing. Knowledge of the hazard has been established. *Id.,* at 1894; *P. Gioioso*, 675 F.3d at 73 ("an employer can be charged with constructive knowledge of a safety violation that supervisory employees know or should reasonably know about.").

The undisputed evidence establishes that: (1) the standard applies, (2) its terms were violated, (3) an employee was exposed to the hazard addressed by the standard and (4) Respondent knew or with the exercise of reasonable diligence should have known of the violative condition. This citation item is affirmed.

As noted above, the record establishes that a fall from the roof could have caused serious physical harm. *Daniel Crowe Roof Repair*, 23 BNA OSHC at 2017 (roofing an inherently dangerous activity). A fall of over six feet to the ground is likely to result in death or serious physical injury. (Tr. 31). This citation item is properly characterized as serious. 29 U.S.C. § 666(k); *Flintco, Inc.*, 16 BNA OSHC at 1405-06.

Penalties

"Section 17(j) of the [OSH] Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give 'due consideration' to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations." *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994). When determining gravity, typically the most important factor, the Commission considers the number of exposed employees, the duration of their exposure, whether precautions could have been taken against injury, and the likelihood of injury. *Id.* When evaluating good faith:

> [T]he Commission focuses on a number of factors relating to the employer's actions, 'including the employer's safety and health program and its commitment to assuring safe and healthful working conditions[,]' in determining whether an employer's overall efforts to comply with the OSH Act and minimize any harm from the violations merit a penalty reduction.

Monroe Drywall Constr., Inc., 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013) (citations omitted). The Commission is the "final arbiter" of penalties. *Hern Iron Works,* 16 BNA OSHC at 1622 (citation omitted).

For serious Citation 1, Item 1, the fall protection violation, the Secretary proposed a penalty of $2,000. For serious Citation 1, Item 2, the ladder violation, the Secretary proposed a penalty of $2,000. For each of these penalty calculations, the Secretary applied a discount for the small size of the employer (2 employees). The Secretary gave no credit for good faith because Respondent had no fall protection on site. The Secretary also determined that, for both violations, the severity was high but the probability was low. The probability was low because, due to the weather conditions, it was not icy or slippery, "in all likelihood, he probably wasn't going to fall." (Tr. 28-32, 37-40, 49-51, 55-56, 68-70, 78-79, 83-86).

The Court agrees with the Secretary's approach to these factors. Respondent is a small employer and has no OSHA history of violations. One employee was exposed to the fall hazards for at least as long as it took him to rake up the roof. Respondent did not have any fall protection, which could have readily been used as a precaution, on the worksite. *See Daniel Crowe Roof Repair*, 23 BNA OSHC at 2017 (a company's failure to provide its roofers with any form of fall protection or training demonstrates that it is not entitled to any credit for good faith in the penalty assessment.). Considering the Section 17(j) factors, the Court finds that the proposed penalties are appropriate for these affirmed citation items.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that:

1) Item 1 of Citation 1 for a serious violation of Section 5(a)(2) of the OSH Act for a failure to comply with the standard at 29 C.F.R. § 1926.501(b)(13) is **AFFIRMED** and a penalty of $2,000 is **ASSESSED**; and

2) Item 2 of Citation 1 for a serious violation of Section 5(a)(2) of the OSH Act for a failure to comply with the standard at 29 C.F.R. § 1926.1053(b)(1) is **AFFIRMED** and a penalty of $2,000 is **ASSESSED**.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: June 12, 2017
Washington, D.C.