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. Guaranteed Home Improvements, LLC, Respondent.	OSHRC Docket No. **19-0611**

Appearances:

Brooke E. Worden, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for Complainant

Todd Farnham, Guaranteed Home Improvements, LLC for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This case involves an accident in which an employee of Guaranteed Home Improvements, LLC (Guaranteed Home) fell from a ladder and was seriously injured. Following the accident, Compliance Safety and Health Officer (CSHO) Joel Nyenhuis of the Madison Area Office of the Occupational Safety and Health Administration (OSHA) conducted an inspection of Guaranteed Home's worksite and found fault with the manner in which Guaranteed Home had set up the ladder from which the employee fell. As a result of the inspection, the Secretary of Labor issued a Citation and Notification of Penalty to Guaranteed Home alleging two serious violations and one other than serious violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (the Act) and the standards thereunder addressing ladder safety. The Secretary proposes a total penalty of $5684.00 for the Citation. Guaranteed Home filed a timely notice of contest.

A hearing was held in this matter on September 20, 2019, in Milwaukee, Wisconsin. The proceedings were conducted pursuant to the Commission's Simplified Proceedings. 29 CFR

§§2200.200-211. At the outset of the hearing, Guaranteed Home withdrew its notice of contest with regard to Item 1, Citation 2, alleging an other than serious violation of 29 C.F.R. § 1926.503(b)(1).[1] Remaining at issue are Items 1 and 2, Citation 1, alleging violations of the standards at 29 C.F.R. §§ 1926.1052(b)(1) and 1926.1053(b)(7), respectively. The parties gave oral closing statements at the conclusion of the presentation of evidence. The undersigned allowed, and the Secretary filed, post-hearing written arguments.

The parties stipulated that jurisdiction of this action is conferred upon the Commission (Tr. 9). Based upon the record evidence and the stipulations of the parties, the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act.

For the reasons that follow, Item 1, Citation 1, is **VACATED**; and Item 2, Citation 1, is **AFFIRMED** and a penalty of $2,800.00 assessed.

BACKGROUND

Guaranteed Home is a Wisconsin construction company owned by Todd Farnham (Tr. 21, 94). It employs four people (Tr. 22). In at least 2019, Guaranteed Home had a contract with KwikTrip convenience stores to perform construction work on those stores (Tr. 94).

In February 2019, the KwikTrip store at 4402 East Buckeye Road in Madison, Wisconsin, needed repairs to its roof due to ice damage (Tr. 22). Guaranteed Home was dispatched to do the repairs on the 13th of that month (Tr. 94). It was cold that day. The temperature was below freezing and there was snow on the ground, including areas of the KwikTrip parking lot and sidewalk (Tr. 24).

The KwikTrip store has surveillance cameras on the outside of the building. As a result, the accident and the conditions leading to it were caught on tape. Relevant excerpts of that video were presented at the hearing and admitted into the record (*See* Exhs. C-15 and C-16). Much of the factual background herein is based on it.

The Guaranteed Home crew arrived at the KwikTrip with a truck and trailer carrying their equipment. Among the crew members were the injured employee and Mr. Farnham. According to Mr. Farnham, the injured employee was the foreman of the crew (Tr. 23, 94). As with every job, Mr. Farnham worked alongside his crew on the roof (Tr. 98).

[1] Under Commission Rule 102, an employer may withdraw its notice of contest at any time. As a result of Guaranteed Home's withdrawal of its notice of contest and pursuant to § 10(a) of the Act, Citation 2 became a final order of the Commission by operation of law. *See also Weldship Corp*., 8 BNA OSHC 2044, 2045 n. 5 (No. 77-3769, 1980) ("A notice of contest withdrawal constitutes an agreement to affirmance of the citations.").

Upon arrival and after parking the truck, the crew began to set up their equipment. The equipment included an extension ladder and the personal fall arrest system the crew would use while working on the roof. Mr. Farnham set up the ladder to access the roof. He placed the ladder at an angle against the gutter along the edge of the roof and adjusted it (Exh. C-15). In the video, the ground upon which Mr. Farnham placed the foot of the ladder appears snowy and wet (Exhs. C-15 and C-17a).

The crew climbed the ladder and began their work by removing the snow from the roof and throwing it to the ground below. At 11:07 a.m., the injured employee is seen in the video beginning to descend from the roof via the ladder (Exh. C-16). As he does so, the ladder slips forward, falling to the ground. The injured employee falls with it. An excerpt from the surveillance video shows the ladder slide forward as the crew works on the roof, a few minutes before the injured employee's attempt to climb down the ladder. (Tr. 42; Exh. C-16 at min. 0.41).

As a result of his fall, the injured employee sustained multiple injuries. He was rushed to the hospital where he was treated and sedated (Tr. 55). His injuries included a broken femur, ribs, and pelvis (Tr. 55; Exh. C-19). He also sustained a head trauma. He was released from the hospital on February 18, 2019 (Exh. C-20).

The responding police department notified the Madison Area OSHA office of the accident (Tr. 17). CSHO Nyenhuis was dispatched to investigate. CSHO Nyenhuis arrived at the KwikTrip at approximately 12:15 p.m. (Tr. 18). He first checked in with the KwikTrip manager and then spoke to Mr. Farnham (Tr. 18, 21). He took photographs and measurements of the ladder and the distance to the gutter along the roof's edge (Tr. 24, 32). He later obtained the surveillance video from KwikTrip showing the area of the accident prior to and at the time of the accident (Tr. 34).

Based on his investigation, CSHO Nyenhuis concluded the manner in which Mr. Farnham had set up the ladder violated the standards addressing ladder safety. CSHO Nyenhuis recommended the Secretary issue a citation alleging a serious violation of 29 C.F.R. § 1926.1053(b)(1) for failure to extend the side rails of the ladder at least 3 feet above the upper landing surface of the roof. He concluded the ladder was not set up to meet this requirement from calculations based on the height of the ladder and the landing surface of the roof, as well as the angle at which the ladder was placed. His supervisor, Area Director Chad Greenwood,

assisted CSHO Nyenhuis in making these calculations. CSHO Nyenhuis recommended a citation alleging a serious violation of 29 C.F.R. § 1926.1063(b)(7) be issued based on his observation of the snowy condition of the surface on which Mr. Farnham had placed the ladder and because the ladder slipped by itself as the crew worked on the roof and again as the injured employee stepped on it. CSHO Nyenhuis concluded the ladder had not been secured against accidental displacement.

DISCUSSION

COVERAGE

Only an "employer" may be cited for a violation of the Act. *Vergona Crane Co*., 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992). Section 3 of the Act defines an "employer" as "a person engaged in a business affecting commerce who has employees" and defines "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652. Guaranteed Home does not dispute it has employees, but contends it is not engaged in a business affecting interstate commerce because it does not do business outside the State of Wisconsin.

The use of the term "affecting commerce" indicates a congressional intent to "exercise fully its constitutional authority under the commerce clause." *Godwin v. OSHRC*, 540 F.2d 1013 (9th Cir. 1976); *U.S. v. Dye Construction Co*., 510 F.2d 78 (10th Cir. 1975); *Brennan v. OSHRC*, 492 F.2d 1027 (2nd Cir. 1974); *see also Piping of Ohio, Inc*., 16 BNA OSHC 1236 (No. 91-3481, 1993). Commerce, according to § 3(3) of the Act, "means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof...." Following the Ninth Circuit in *Usery v. Franklin R. Lacy*, 628 F.2d 1226 (9th Cir. 1980), the Commission has held a business may be found to engage in interstate commerce where it "is in a class of activity that as a whole affects commerce." *Clarence M. Jones d/b/a Jones Co.*, 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983). In that case, the Commission went on to find "[t]here is an interstate market in construction materials and services and therefore construction work affects interstate commerce*." Id., citing NLRB v. Int'l Union of Operating Engineers, Local 571*, 317 F.2d 638, 643 n. 5 (8th Cir. 1963) (judicial notice taken that construction industry affects interstate commerce). Because Guaranteed Home is engaged in construction work, the undersigned finds it is engaged in a business affecting interstate commerce. Guaranteed Home uses cell phones (Tr. 94). It owns ladders, safety equipment, and

a truck and trailer, all of which would have moved in interstate commerce (Tr. 96). Based upon the record, Guaranteed Home is a business affecting interstate commerce within the meaning of § 3(5) of the Act.

THE CITATIONS

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

The Secretary must prove his case by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact, but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly of all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014).

Item 1, Citation 1: Alleged Violation of 29 C.F.R. § 1926.1053(b)(1)

In Item 1, Citation 1, the Secretary alleges a violation of § 1926.1053(b)(1). The standard requires

> 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 Secretary contends Guaranteed Home violated the standard when it failed to set up the extension ladder such that it extended 3 feet above the landing surface of the roof.

There is no dispute Guaranteed Home employees were using a Vulcan multi-use extension ladder to access the roof of the KwikTrip (Tr. 48). Nor is there any dispute this ladder

was one that could be "readily moved or carried" such that it met the definition of a portable ladder found in 29 C.F.R. § 1926.1050(b). The Secretary has met his burden to establish the standard applied to the cited conditions and Guaranteed Home employees were exposed to the hazard posed by non-compliance with the standard. In dispute is whether the setup of the ladder violated the standard.

Was the Standard Violated?

Guaranteed Home does not contend, nor could it establish, the exception to the strict requirement of the standard applies in this instance.[2] At issue is whether the ladder was set up such that it extended 3 feet above the landing surface of the roof. The Secretary bases his case on calculations made from measurements taken by CSHO Nyenhuis after the accident. Guaranteed Home argues these measurements were not accurate and, given the small margin for error, are insufficient to meet the Secretary's burden of proof.[3]

CSHO Nyenhuis took his measurements using a standard tape measure and trench rod. CSHO Nyenhuis testified the ladder used by the injured employee was in the same condition at the time of the accident as when he measured it. He measured the ladder by placing the tape measure along the side of the ladder as it lay on the ground (Tr. 32; Exhs. C-8 and C-9). He found the ladder to have been extended to 14 feet, 10 inches or 178 inches (Exh. C-9). He measured the height of the roof using a rigid trench rod. Mr. Farnham held the trench rod for CSHO Nyenhuis while he took photographs (Exhs. C-10 and C-11). CSHO Nyenhuis found the distance from the ground to the landing surface of the roof to be 11.8 feet, or 11 feet, 9.6 inches (Exh. C-11).[4]

CSHO Nyenhuis and Area Director Greenwood testified because the difference between the length of the extended ladder and the height of the landing surface is just over 3 feet, the only way the ladder could extend the required 3 feet above the landing surface of the roof is if it was placed nearly vertical (Tr. 49-50, 85). As seen in the surveillance video, Mr. Farnham placed the

[2] Mr. Farnham admitted the ladder could have been extended another 5 feet (Tr. 97).

[3] Mr. Farnham represented his company at the hearing. He is not an attorney. In his closing statement, he stated the Secretary had not proven his case "beyond a reasonable doubt." The undersigned explained to Mr. Farnham the Secretary's burden in this proceeding is to establish his case by a preponderance of the evidence – a lesser burden. Despite this misunderstanding of the burdens of proof, Mr. Farnham's point regarding the importance of the accuracy of CSHO Nyenhuis's measurements has merit.

[4] CSHO Nyenhuis explained trench rods do not indicate inches but divide feet into tenths (Tr. 33).

ladder at a steep angle (Exhs. C-15 and C-16). Area Director Greenwood testified a portable ladder is required to be placed at a slope of four to one or approximately a 15-degree angle (Tr. 85).[5] Based upon the assumption Mr. Farnham had placed the ladder at this required angle, Area Director Greenwood calculated the length the ladder would need to be to extend 3 feet above the landing surface of the roof. He testified if it had been placed at that angle, Guaranteed Home's 178-inch ladder would have been 4.3 inches too short (Tr. 85-86).[6]

It is not possible to tell from the photographs or video at what angle Mr. Farnham placed the ladder or how far above the edge of the roof the rails of the ladder extend. Neither of CSHO Nyenhuis's measurements, taken after the fact, are precise. With regard to the roof height measurement, Mr. Farnham is holding the trench rod at a slight angle (Exh. C-10) and the photograph of the measurement is taken at an angle from below (Tr. 33; Exh. C-11). Both these circumstances would distort the measurement. To make his calculations, Area Director Greenwood had to assume the angle at which the ladder was placed and use CSHO Nyenhuis's imperfect measurements. This is problematic for the Secretary's case.

Despite disagreeing with the rationale for the standard, Mr. Farnham testified he placed the ladder "to the very minimum of what it was required." (Tr. 97) In the video, Mr. Farnham is seen leaning the ladder against the gutter at the roof's edge and adjusting its length (Exh. C-15). Area Director Greenwood testified a standard ladder's rungs are 1 foot apart (Tr. 87). He explained, when placing a ladder, one can use this as a guide to determine whether the 3-foot requirement is met (Tr. 87). This appears to be what Mr. Farnham is doing in the surveillance video (Exh. C-15 at min. 0.48-0.57). After climbing the ladder, Mr. Farnham is seen transferring to the roof while holding the side rail at a point above the landing surface of the roof (Exh. C-15 at min. 3.44-3.51).

Considering the record as a whole, the Secretary has not met his burden. The Secretary's

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[5] The undersigned takes judicial notice placing the bottom of the ladder on the ground and leaning the upper part of it against the gutter creates a right triangle and the sum of the two acute angles of a right triangle must equal 90 degrees. Warnings on the ladder require the angle created by the ladder's placement on the ground to be 75 degrees which would make the opposing angle created by the ladder and the building 15 degrees (Exhs. C-3 and C-4).

[6] The undersigned takes judicial notice the hypotenuse of a right triangle is calculated using the Pythagorean Theorem ($a^2 + b^2 = c^2$, where c=the hypotenuse). The hypotenuse of the triangle created by placing the ladder against the gutter is the length of the ladder from the ground to the top of the gutter. Taking the height of the gutter as 141.6 inches and placing the ladder at a four to one slope, the length of the hypotenuse would be 145.96 inches. The difference between the extended ladder and 145.96 inches is 32.04 inches – approximately 4 inches short of 3 feet.

conclusion the ladder did not extend the required 3 feet above the landing surface of the roof by a matter of inches assumes the angle of the ladder placement and the accuracy of CSHO Nyenhuis's measurements. The record establishes neither. Mr. Farnham testified he placed the ladder at the minimum required distance.[7] It is not implausible he did so. He is seen in the video adjusting the rails of the ladder sufficiently above the landing surface of the roof to create a hand hold. Under the circumstances, the Secretary's evidence is simply not enough.

Because the Secretary failed to establish Guaranteed Home violated the cited standard, Item 1, Citation 1, is vacated.

Item 2, Citation 1: Alleged Violation of 29 C.F.R. § 1926.1053(b)(7)

In Item 2, Citation 1, the Secretary alleges a violation of § 1926.1053(b)(7). This standard prohibits the use of ladders

> on slippery surfaces unless secured or provided with slip-resistant feet to prevent accidental displacement. Slip-resistant feet shall not be used as a substitute for care in placing, lashing, or holding a ladder that is used upon slippery surfaces including, but not limited to, flat metal or concrete surfaces that are constructed so they cannot be prevented from becoming slippery.

29 C.F.R. § 1926.1053(b)(7). The citation alleges on February 13, 2019, Guaranteed Home employees used a ladder to access the roof of the KwikTrip "with the footing of the ladder set up on icy/slippery conditions."

As with Item 1, there is no dispute regarding applicability of the standard and employee exposure to a hazard. The ladder being used by Guaranteed Home was a portable ladder as that term is defined in the standard. Guaranteed Home's employees used that ladder to access the roof. At issue is whether Guaranteed Home violated the requirements of the standard and whether it had knowledge of the violative conditions.

Was the Standard Violated?

The Secretary contends the surface upon which Mr. Farnham placed the ladder was slippery because it was wet, snow-covered, and icy. The Secretary further contends the ladder did not have slip-resistant feet nor was it secured to prevent accidental displacement. As evidence the ground on which the ladder was placed was slippery, the Secretary points to the video showing the ladder slide forward minutes before the injured employee begins his decent

[7] As will be discussed herein, I did not find Mr. Farnham a credible witness. Nevertheless, his testimony on this issue is consistent with video evidence. Even discounting Mr. Farnham's statement, the Secretary's evidence falls short of his burden.

(Exh. C-16 at minute 0.41) as well as when the employee descended, resulting in his fall.

There is little guidance as to what constitutes a "slippery surface" as that term is used in the standard. The Merriam-Webster Dictionary defines "slippery" as "causing or tending to cause something to slide or fall." *https://www.merriam-webster.com/dictionary/slippery*. The documentary evidence consistently shows the parking lot and sidewalk around the KwikTrip was wet with patches of snow and slush. Such conditions would create a surface on which something would tend to slide. Mr. Farnham placed the ladder in an area that appeared in the video to be snow or slush covered. Video showing the bottom of the ladder slide twice under these conditions further supports the conclusion Guaranteed Home set the ladder on a slippery surface in violation of the standard.

Guaranteed Home contends the Secretary cannot meet his burden because photographs upon which the Secretary relies do not depict the conditions at the time the ladder was in use and because the Secretary cannot show the ladder was not secured, either by a bungee cord or with slip resistant feet. With regard to evidence of the worksite conditions while the ladder was in use, Guaranteed Home focuses only on CSHO Nyenhuis's photos and ignores the Secretary's other evidence. The video evidence establishes the conditions while the ladder was in use were slippery

Whether Guaranteed Home secured the ladder is a question of fact.[8] CSHO Nyenhuis testified Mr. Farnham told him during the inspection he had used a bungee cord to secure the ladder to the gutter on the roof's edge (Tr. 23). Mr. Farnham did not affirmatively testify to this fact at the hearing. Mr. Farnham also suggested the ladder had slip resistant feet but did not definitively testify to this at the hearing (Tr. 96). CSHO Nyenhuis testified he observed no bungee cord at the worksite but conceded he did not ask Mr. Farnham to produce the bungee cord. He testified he inspected the ladder and it did not have slip resistant feet (Tr. 53).

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[8] The cited standard was derived from ANSI A14.1-1982. *Safety Standards for Stairways and Ladders Used in the Construction Industry*. 55 FR 47660-01, 47678 (November 14, 1990). The second sentence of the standard was originally an explanatory note. The drafters chose to incorporate that language into the text of the final rule. *Id*. The undersigned finds this explanatory language somewhat contradictory to the language of the first sentence which states a ladder cannot be used on slippery surfaces unless it is **either** secured **or** has slip resistant feet. The explanatory note suggests, to the contrary, slip resistant feet alone cannot be used as a substitute for securing the ladder. In this case, it is not necessary to resolve this conflict because credible evidence establishes the ladder was neither secured nor had slip resistant feet.

The preponderance of the evidence establishes the ladder was neither secured nor did it have slip resistant feet.[9] The undersigned found CSHO Nyenhuis's testimony he inspected the ladder and found it did not have slip resistant feet credible and, importantly, consistent with the photographic evidence. Mr. Farnham's testimony on this issue was noncommittal and lacked credibility.[10]

Nor was the ladder secured. The dictionary defines the verb "secure" as "to relieve from exposure to danger" or "act to make safe against adverse consequences."[11] *https://www.merriam-webster.com/dictionary/secure.* The preponderance of the credible evidence establishes Guaranteed Home did not act to make its ladder safe from the adverse consequence of falling. The most compelling evidence is that the ladder slid from its original placement twice. The only evidence Guaranteed Home made some effort to secure the ladder is Mr. Farnham's out of court statement he attached the ladder to the gutter with a bungee cord (Tr. 23). The record contains no similar in-court testimony or other corroborating evidence. Mr. Farnham is seen in the video positioning the ladder and then climbing it to place equipment on the roof. He is never seen securing it. Mr. Farnham had the entire one-hour video available to him but chose not to show any part that might have substantiated this statement. In the video of the fall, nothing appears to be resisting the ladder's slide. The credible evidence establishes the ladder was not secured.

The Secretary has met his burden to establish Guaranteed Home was in violation of the requirements of the cited standard.

Did Guaranteed Home Have Knowledge of the Violative Conditions?

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[9] The standard can be read such that securing or using slip resistant feet are exceptions to the strict prohibition against ladder use on a slippery surface. If read as exceptions, Guaranteed Home would have the burden to establish the ladder was secured or had slip resistant feet. *C.J. Hughes Construction, Inc.,* 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996) (It is well settled the party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception.). Even if Guaranteed Home did not have the burden of proof on this issue, it did not present sufficient credible evidence to rebut the Secretary's case.

[10] The undersigned found Mr. Farnham's demeanor was not that of a credible witness. He was excitable and argumentative (*see, e.g.*, Tr. 97). His responses were often evasive or cagey. He made several contradictory statements. The most glaring of these was his statement the injured employee had set up the ladder (Tr. 12). Video evidence shows Mr. Farnham setting up the ladder (Exh. C-15 at min. 0.43). His testimony on these issues is given little weight.

[11] Given this definition of the verb "secure", it is not necessary to parse the punctuation of the standard to determine whether the phrase "to prevent accidental displacement" is intended to modify both the securing of the ladder and the quality of the slip resistant feet, or only the latter.

Because the Act does not impose strict liability on employers for violations, it is not enough for the Secretary to establish the existence of the violative conditions. The Secretary must establish the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving a supervisory employee knew of or was responsible for the violation. *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984); *see also Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986) (the actual or constructive knowledge of an employer's foreman can be imputed to the employer).

Constructive knowledge is shown where the Secretary establishes the employer could have known of the cited condition with the exercise of reasonable diligence. *Par Electrical Contractors, Inc*., 20 BNA OSHC 1624, 1627 (No. 99-1520).

> Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.

Id. citing Precision Concrete Constr. 19 BNA OSHC 1404, 1407 (No. 99-707, 2001). Mr. Farnham set up the ladder and was aware of its placement. It was readily apparent to anyone observing the area it was wet and snow covered. Wet, snow-covered pavement has the potential to be slippery. A reasonably diligent employer would have been aware of the conditions and taken some type of precautions to ensure the ladder was secure. Mr. Farnham did not. His actions and knowledge are imputed to Guaranteed Home. The Secretary has established Guaranteed Home had constructive knowledge of the violative condition.

Characterization

A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious physical harm would result. As the Third Circuit has explained:

It is well-settled that, pursuant to § 666(k), when the violation of a regulation

> makes the occurrence of an accident with a substantial probability of death or serious physical harm *possible*, the employer has committed a serious violation of the regulation. The "substantial probability" portion of the statute refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result, even in those cases in which an accident has not occurred or, in fact, is not likely to occur.

Secretary of Labor v. Trinity Industries, 504 F.3d 397, 401 (3d Cir. 2007) (internal quotation marks and citations omitted); *See also, Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Mosser Construction*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2087-2088 (No. 88-0523, 1993). The likelihood of an accident goes to the gravity of the violation, which is a factor in determining an appropriate penalty. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2214.

The hazardous condition at issue is the one realized – a fall from a height. The likelihood of injury from a fall of 12 feet is high. As evidenced by the serious injuries sustained by the injured employee, the potential harm from such a fall is severe. The violation is serious.

PENALTY

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005). 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. *Burkes Mechanical Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

The evidence establishes the gravity of the violation was moderate. Although it was highly likely, should a fall occur, the employee would sustain severe injury, only three employees were exposed to a potential fall, and only for the brief period when they used the

ladder. Other than its placement on the slippery pavement, the ladder was set up in a safe manner. Guaranteed Home supplied its employees with fall protection to be used when working on the roof. Although cited for failing to document its employee safety training, the Secretary did not allege Guaranteed Home failed to train its employees.

The additional statutory penalty factors weigh in favor of a reduced penalty. Guaranteed Home is a small employer with four employees. There was no evidence presented it received citations in the past. As to good faith, the record contains some evidence Mr. Farnham does not agree compliance with certain regulations leads to improved safety. Guaranteed Home's use of fall protection while working on the roof shows concern for employee safety. The record is insufficient to conclude Guaranteed Home displayed a lack of good faith.

Considering these factors, a penalty of $2800.00 for Item 2, Citation 1, is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1, Citation 1, alleging a violation of 29 C.F.R. § 1926.1052(b)(1) is vacated; and Item 2, Citation 1, alleging a violation of 29 C.F.R. § 1926.1053(b)(7) is affirmed and a penalty of $2800.00 assessed.

SO ORDERED.

/s/_____
Heather A. Joys
Administrative Law Judge, OSHRC

Dated: November 13, 2019
Washington, DC