United States of America
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. ADAM HAM CONSTRUCTION, LLC., Respondent.	OSHRC DOCKET NO. 17-0151

Appearances:

Susan J. Willer, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City Missouri,
For the Complainant

Respondent failed to appear

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

On December 8, 2016, Complainant conducted an inspection of Respondent's worksite after Compliance Safety and Health Officer (CSHO) Kimberly Robinson and Safety and Health Assistant (SHA) Christina Gibbs (the inspectors) observed a person working on the roof of a residential construction site without fall protection. (Tr. 19−20). As a result of this inspection, Complainant issued a two-item Citation and Notification of Penalty alleging Respondent: 1) failed to ensure the use of eye protection; and 2) failed to use adequate fall protection. Complainant proposed a penalty of $5879.00 for these items. The Citation was issued on January 3, 2017. Respondent timely contested the Citation.

Respondent contested the Citations in a timely manner and participated in the litigation through the telephone conference on July 26, 2017, but ceased efforts to contest the citations thereafter. (Tr. 8) Respondent did not file a List of Witnesses or a List of Exhibits in preparation for the trial, although such documents were a prerequisite to presentation of evidence at trial. (Tr. 9). Respondent failed to appear at the scheduled October 23 final pre-trial conference. Status Report and Order, at 1, *Sec'y v. Adam Ham Construction, LLC.*, No. 17-0151 (October 24, 2017). In addition, Respondent reportedly failed to respond to multiple communication attempts made by Complainant, including: (1) two settlement letters, which were dated September 26 and October 6; (2) two emails discussing settlement which were dated October 6 and 11; and (3) and telephone calls which rang to a full mailbox and did not allow counsel for the Secretary to leave a message. Secretary's Motion for Pre-hearing Conference Call, at 2, *Sec'y v. Adam Ham Construction, LLC.*, No. 17-0151 (October 17, 2017).

Trial was held October 31, 2017, in Kansas City, Missouri. Respondent failed to appear, but Complainant presented uncontested evidence in support of its *prima facie* case. Prior to presenting its evidence, Complainant moved to withdraw Citation 1, Item 1, which the Court granted, reducing the total proposed penalty to $3741.00. Based on the evidence submitted by Complainant, which is discussed below, the Court finds Complainant established the elements of its *prima facie* case for Citation 1, Item 2. Alternatively, as will be discussed below, the Court finds Respondent has abandoned its defense. Thus, a default judgment in favor of Complainant is warranted.

II. Jurisdiction

Respondent stipulated to its status as an employer subject to the Act, and to the Court having jurisdiction over this matter. (Tr. 10); Joint Proposed Pre-Trial Schedule, at 1, *Sec'y v.*

Adam Ham Construction, LLC., No. 17-0151 (March 30, 2017). Accordingly, 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).

III. Factual Background

Complainant conducted an inspection of Respondent's jobsite, located at 2516 NE Willow Creek Lane, Lee's Summit, Missouri, after CSHO Robinson and SHA Gibbs drove by the site and observed a person working on the roof of a residential construction site without fall protection. (Tr. 22, 35). The employee observed on the roof, Brian Hornaday, was working on a 6/12 pitch roof approximately 33–35 feet above the ground without any form of fall protection.[1] (Tr. 19−20, 45−46). In addition to the roof having a steep pitch, it was also covered with snow and ice in multiple areas. (Tr. 32; Exs. C-2−C-5). Once they got onsite, the inspectors asked Mr. Hornaday to come down from the roof, at which point SHA Gibbs conducted an interview with him. (Tr. 20).

During Mr. Hornaday's interview, the inspectors discovered there was one fall protection device onsite, but it had been left in the truck. (Tr. 31). They also found there were no anchor points on the roof to which a lanyard could be attached. (Tr. 28). Mr. Hornaday reported Respondent's crew had been working at the site for approximately three weeks, and that Adam Ham was the owner of the company. Mr. Hornaday further stated he had been working on the roof for three to four hours the day of the inspection. (Tr. 22, 37).

Mr. Hornaday informed SHA Gibbs that Mr. Ham, owner of Respondent, had been present at the site at 8:00 a.m. the morning of the inspection, but left the worksite, leaving Mr. Hornaday in charge. (Tr. 26, 33).

Mr. Hornaday reported Respondent did not have any written hazard communication

1. 6/12 means 6 inches of vertical rise for every 12 inches in lateral distance. The standard classifies any roof over a 4/12 pitch as steep. 29 C.F.R. § 1926.500.

program or disciplinary program in place at the time of the inspection. (Tr. 50).

After the inspection, Complainant issued a two-item serious Citation to the Respondent. Citation 1, Item 1 was withdrawn at trial. The only remaining item is Citation 1, Item 2 alleging failure to utilize fall protection while working on a roof more than six feet above the ground.

IV. Discussion

A. Applicable Law

To establish a *prima facie* violation of section 5(a)(2) of the Act, Complainant 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. *See Ormet Corp.*, 14 BNA OSHC 2134, 2135 (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" as a condition precedent to the affirmation of a serious violation. *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.*

B. Citation 1, Item 2

Complainant alleged a serious violation of the Act as follows:

> 29 C.F.R. § 1926.501(b)(13): Each employee[] engaged in residential construction activities 6 feet (1.8m) or more above lower levels were not protected by guardrail systems, safety net system[s], or personal fall arrest system[s][.] [N]or were

> employee(s) provided with an alternative fall protection measure under another provision of [section] 1926.501(b).
>
> The employer is failing to protect employees from fall hazards. This was most recently documented on December 8, 2016 at 2516 NE Willow Creek Lane[,] Lee['s] Summit, Missouri[,] 64086. An employee was observed approximately 35 feet up working on nailing down plywood for the roof[.] [The roof pitch range was] 6/12.
>
> The cited standard provides:
>
> Residential Construction. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net systems, or [a] personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure….

29 C.F.R. § 1926 501(b)(13).

i. The Standard Applies to the Cited Condition and it was Violated

Complainant must prove the standard applies to the cited condition, and that Respondent violated its terms. The uncontested evidence establishes 29 C.F.R. § 1926.501(b)(13) applies to the cited condition. Respondent was working on the roof of a residential construction site at heights of 33−35 feet above the ground. (Tr. 19−20, 45−46). The cited standard dictates that fall protection is required above 6 feet on residential construction sites. 29 C.F.R. § 1926.501(b)(13). Because Mr. Hornaday was engaged in residential construction activities more than 6 feet above the ground without proper fall protection, the Court finds the standard applies and was violated. (Tr. 19−20, 45−46).

ii. One or more of Respondent's employees was exposed to the hazardous condition

Complainant must also prove at least one employee was exposed to the cited condition. "Exposure to a violative condition may be established either by showing actual exposure or that

access to the hazard was reasonably predictable."[2] *Phoenix Roofing, Inc.,* 17 BNA OSHC 1076, 1078 (No. 90-2148, 1995). The undisputed evidence shows Mr. Hornaday was working on the roof without any form of fall protection; thus, there is no question that Mr. Hornaday was exposed to a fall hazard. (Tr. 21, 48) The Court finds Mr. Hornaday was an employee of the Respondent. In fact, Mr. Hornaday identified himself as the onsite supervisor. Accordingly, the Court finds the Complainant has established at least one of Respondent's employees was exposed to a fall hazard.

iii. The Employer Knew or with Reasonable Diligence Could Have Known of the Existence of the Violative Condition.

a. Employer Knowledge

Complainant must prove the employer knew, or with the exercise of reasonable diligence could have known, of the presence of the violative condition. *See Seibel Modern Manufacturing & Welding Corp*., BNA OSHC 1218, 1221 (No. 88-821, 1991). "Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. It need not be shown that the employer understood or acknowledged that the physical conditions were actually hazardous." *L&B Products Corp.*, 18 BNA OSHC 1322, 1324 (No. 95-1722, 1998).

Mr. Ham, owner of the Respondent, was not present at the time of the inspection. The evidence shows he was at the site at 8:00 a.m., then left the site after briefing his employees regarding the work they were to accomplish, leaving one harness and one lanyard behind in the work trailer. (Tr. 33). However, Mr. Ham, would have known of the violative condition if he had exercised reasonable diligence. "In exercising reasonable diligence an employer is required to inspect and perform tests to discover safety-related defects in material and equipment." *Union*

2. "Reasonable predictability, in turn, may be shown by evidence that employees while in the course of assigned work duties, personal comfort activities and normal means of ingress/egress would have access to the zone of danger. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1078 (No. 90-2148, 1995) (citing *Gilles & Cotting Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976).

Boiler Co., 11 BNA OSHC 1241, 1245 (No. 79-232, 1983) (citing *Prestressed Systems Inc.*, BNA OSHC 1864 (No. 16147, 1981)).

Mr. Ham, as owner of Respondent, should have performed an inspection of the site, where he would have observed his employee openly working without fall protection. He also would have found no anchor points had been affixed to the roof, which precluded Mr. Hornaday from securing a lanyard had he attempted to wear one. There is no evidence showing Mr. Ham actually conducted an inspection in the three weeks his employees were onsite. Mr. Hornady testified Mr. Ham left one fall protection device in the trailer on the site for the day. (Tr. 33, 40) He did not make sure his employee on the roof was wearing fall protection before he left the site. Therefore, Mr. Ham either had actual knowledge that his employee was not using fall protection or failed to exercise reasonable diligence to ensure that fall protection would be consistently utilized on the site.

b. Supervisor Knowledge

Alternatively, employer knowledge may be imputed to the employer by a supervisory employee's knowledge of the condition. *See Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (finding the actual or constructive knowledge of a Respondent's supervisory employee can be imputed to the employer). A supervisory employee, for the purpose of imputing knowledge, is, "[a]n employee who has been delegated authority over other employees, even if temporarily…." *Id.* (citing *Tampa Shipyards, Inc.*, 15 BNA OSHC 2004, 2007 (No. 85-369, 1991)).

Because Mr. Ham left Mr. Hornaday in charge of the job in his absence, Mr. Hornaday is properly classified as a supervisory employee for the purpose of imputing knowledge. Also, because Mr. Hornaday was the employee who was working on the roof while unprotected by any

form of fall protection, he had actual knowledge of the condition.[3] Therefore, Mr. Hornaday's actual knowledge of the violative condition, as a supervisory employee, is imputable to Respondent. Moreover, the absence of any anchor points having been installed for securing a lanyard despite the Respondent's employees having been working on the jobsite for approximately 3 weeks supports an assumption that none of Respondent's employees were using fall protection.

c. Conclusion on Knowledge

Mr. Ham, as owner of Respondent, either had actual knowledge of the violative condition or he could have known of the violative condition through exercise of reasonable diligence. Alternatively, Mr. Hornaday's actual knowledge of the condition is imputable to Respondent. Therefore, Respondent had knowledge of the violative condition.

iv. 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). Likewise, in order to be classified as a serious violation, Complainant need only show that *if* a fall occurred, serious physical injury or death *could* occur, not that it *would* occur. *See Mosser Constr. Inc.*, 23 BNA OSHC at 1046. Here, Mr. Hornaday was working at a height of 33−35 feet without the use of fall protection on a steep roof where there was ice and snow in multiple areas. (Tr. 19−20, 32, 45−46). If he were to fall, he would not have been protected by any means of fall protection, and he would have fallen 33−35 feet, which would likely lead to serious injury or death. *See Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1005 (No. 92-424, 1994) (finding a fall of 18 feet is

3. The instant case is in the appealable jurisdiction of the Eighth Circuit. Both Commission and Eighth Circuit case law say a supervisor's knowledge of his own misconduct can still be imputed to the employer. *See Empire Roofing Co.*, 25 BNA OSHC 2221, 2224 (No. 13-1034, 2016); *Deep South Crane and Rigging Co.*, 23 BNA OSHC 2099, 2102 (No. 09-0240, 2012). Eighth Circuit case law differs on this topic than many other circuits, which find if the supervisor's misconduct creates the condition, the supervisor's knowledge of the condition cannot be imputed to the employer unless it is foreseeable to the employer that the supervisor would act in such a way. *See ComTran Group, Inc. v. U.S. Dept. of Labor*, 722 F.3d 1304, 1315-16 (11th Cir. 2013).

substantially likely to cause a serious injury). Thus, the violation is properly classified as serious.

v. The standard was Violated

Based on the foregoing, the Court finds Respondent violated 29 C.F.R. § 1926.501(b)(13) as alleged in Citation 1, Item 2, and the violation was serious. Accordingly, Citation 1, Item 2 shall be AFFIRMED.

C. Default

Alternatively, the Court finds Respondent has abandoned its attempt to contest the citation and is in default. Under Commission Rule 64, the failure of a party to appear at the trial may result in a judgment being entered against that party. *See Sec'y v. Lakeside Construction LLC*, 24 BNA OSHC 1445, 1448 (No. 12-0422, 2012) (citing 29 C.F.R. § 2200.64). A judge has very broad discretion in imposing sanctions for noncompliance with Commission Rules of Procedure or the judge's orders. *See Sealtite Corp*., 15 BNA OSHC 1130, 1134 (No. 88–1431, 1991) (holding the judge had very broad discretion in finding default for a party's failure to follow two of her orders even though that party was still active in the litigation process).

Respondent timely contested the Citation, participated in the litigation up to and including the July 26 pre-trial conference, but then abandoned his contest. (Tr. 8) Respondent failed to communicate and appear at multiple stages of the litigation following the July 26 conference. Respondent failed to follow three orders made by the judge, including: 1) failing to submit Lists of Exhibits and Witnesses, 2) failing to appear at the October 23 pre-trial conference, and 3) failing to appear at the trial itself. *See* Simplified Proceeding Scheduling Order at 1; Status Report and Order at 1; Notice of Location. Respondent had not properly endorsed any evidence to be presented at trial. Moreover, Respondent did not communicate with Complainant, though

Complainant attempted to correspond with Respondent on several occasions. *See* Secretary's Motion for Pre-hearing Conference Call at 2.

Respondent has been given multiple opportunities to present a defense to the citation. Although Respondent participated in the first stages of litigation, it failed to follow through with pursuit of its contest of the citations. For the reasons identified above, the Court finds Respondent is in default. Respondent's Notice of Contest is hereby VACATED, and the violation alleged in the Citation shall be AFFIRMED.

D. Penalty

In determining the appropriate penalty for affirmed violations, 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.A. § 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).

The evidence demonstrates Complainant gave Respondent a 70% reduction of the original $12,471 penalty because of the size of its business.[4] Complainant did not give any other reductions for good faith or prior history. As noted above, the gravity of the violation holds the most weight

4. Respondent had three employees at the time of the inspection. (Tr. 49; Ex. C-9).

in determining the appropriate penalty. While the evidence shows there was only one employee on the roof at the time of the inspection, he was exposed to the condition for at least three to four hours after Mr. Ham left the site. (Tr. 37). Respondent did not take any precautions to avoid the injury, nor did it have a written hazard communication program or disciplinary program in place. (Tr. 50). Additionally, because there was ice and snow on portions of the roof, and the roof was classified as steep, the likelihood of an actual injury was high. Therefore, the Court finds the penalty proposed by Complainant in the amount of $3741.00 is 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 was withdrawn by Complainant at the commencement of this trial. Accordingly, Citation 1, Item 1 is hereby VACATED.
2. Citation 1, Item 2 is AFFIRMED as a serious violation of 29 C.F.R. § 1926.501(b)(13), and a penalty of $3741.00 is ASSESSED.

SO ORDERED.

/s/
Judge Peggy S. Ball
Occupational Safety and Health Review Commission

Dated: September 11, 2018
Denver, Colorado