

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

Saul Ramirez,

Respondent.

OSHRC Docket No. **11-0412**

Appearances:

Kim Prichard Flores, Esquire, Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri
For Complainant

Saul Ramirez, *Pro Se*, Wichita, Kansas
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Saul Ramirez is engaged in roofing work in Wichita, Kansas. On November 8, 2010, a worker in Mr. Ramirez's crew was injured when he fell from the flat roof of a single-story family home in Wichita, Kansas, while laying tar paper. After receiving a complaint regarding the accident, the Occupational Safety and Health Administration (OSHA) initiated an inspection on November 18, 2010 and issued to Mr. Ramirez a citation on December 27, 2010. Mr. Ramirez timely contested the citation.

The citation alleges a repeat violation of 29 C.F.R. § 1926.501(b)(13) for failing to protect with appropriate fall protection a worker performing roofing work on a low sloped roof approximately eight feet above the ground. The citation proposes a penalty of \$9,240.00. The repeat classification is based on two earlier citations issued to Mr. Ramirez in 2008 for serious violations of § 1926.501(b)(13) which were informally settled.

The hearing was held on June 24, 2011, in Wichita, Kansas. Mr. Ramirez represented himself *pro se*. A Spanish speaking interpreter was needed during the hearing to translate for Mr. Ramirez. The parties filed written post-statements of position on or before August 8, 2010.

Mr. Ramirez also gave a closing statement at the hearing.

Mr. Ramirez denies that he was the employer. He claims that he was a foreman for Frederick Roofing, the company who contracted with the homeowner for the roofing work. Although not admitting the violation of § 1926.501(b)(13), Mr. Ramirez does not dispute the worker was not utilizing fall protection when he fell.

For the reasons discussed, the court finds that Mr. Ramirez was the employer of the worker who fell. The repeat violation of § 1926.501(b)(13) is affirmed, and a penalty of \$3,000.00 is assessed.

The Inspection

Mr. Ramirez performs roofing work on residential projects in Wichita, Kansas. He has engaged in such work since 1992. Mr. Ramirez claims that he has never owned a roofing company and, at the time of the accident, he was “like a foreman” (Tr. 53). He currently works for a sprinkler company (Tr. 60).

On or about November 6, 2010, Mr. Ramirez began re-roofing work on a ranch home on East Glen Oaks, Wichita, Kansas. Frederick Roofing was hired by the homeowner to replace the flat portion of the roof (Exh. C-1; Tr. 20-21, 47).

On Monday, November 8, 2010, Mr. Ramirez and the three workers were rolling tar paper over the flat portion of the roof when one worker fell from the roof (Tr. 19-20). The worker fell eight feet to the ground (Tr. 31). According to the worker, he broke ribs, fractured his knee and arm, and his lung collapsed. He was in the hospital for sixteen days (Tr. 23).

After receiving a complaint alleging Saul Ramirez, as the employer, failed to provide fall protection for the worker, OSHA Compliance Officer (CO) Todd Underwood initiated an inspection into the accident on November 18, 2010 (Tr. 29). CO Underwood interviewed Mr. Ramirez, the homeowner, the worker who fell, and Mr. Frederick of the Frederick Roofing.

The homeowner told CO Underwood that he hired Frederick Roofing to replace the flat roof. He believed Mr. Ramirez was a subcontractor (Tr. 47). Mr. Frederick denied Mr. Ramirez was an employee of Frederick Roofing and gave OSHA a copy of purported 2009 subcontract agreement (Exh. R-1; Tr. 46).¹ The worker who fell identified Mr. Ramirez as his employer (Tr.

¹ The subcontract does not appear valid and is not considered in finding an employment relationship. Mr. Ramirez

24). Mr. Ramirez insisted that he was not the employer but a foreman with Frederick Roofing (Tr. 45).

After concluding that he was the employer, OSHA issued the repeat citation for the lack of fall protection to Mr. Ramirez on December 27, 2010.

Discussion

Mr. Ramirez denies that he was an employer under the Occupational Safety and Health Act, 29 U.S.C § 651 *et seq.* (Act). He claims that he was a foreman for Frederick Roofing (Tr. 53).

The Employer

Only an “employer” is subject to the safety and health requirements of OSHA and to receiving a citation for violations under the Act. *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992). Section 3(5) of the Act defines an “employer” as a person engaged in a business affecting commerce who has employees. 29 U.S.C. §§ 652(5).

1. Mr. Ramirez Was The Employer

denies signing the subcontract agreement with Frederick Roofing (Tr. 57). The signature on the subcontract compared to the signatures on the two informal settlement agreements with OSHA does not appear to be the same (Exh. C-2; Tr. 64).

In determining whether Mr. Ramirez was the employer, the Review Commission in *Don Davis*, 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001), citing *Nationwide Mutual Ins., Co. v. Darden*, 503 U.S. 326 (1992), articulated the following factors for determining whether an employment relationship exists:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

The "economic realities test" also utilized by the Commission requires a similar analysis as the *Darden* test. *Loomis Cabinet Co.*, 15 BNA OSHC 1635 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994). The key factor in finding an employment relationship is the right to control the work. *Abbonizio Contractors, Inc.*, 16 BNA OSHC 2125, 2126 (No. 91-2929, 1994).

Mr. Ramirez has been in the roofing business since 1992. It was his regular work prior to the accident. As the employer, he resolved the two 2008 citations with OSHA (Exh. C-2). The worker who fell has worked sporadically for Mr. Ramirez on various roofing jobs since 2000. Mr. Ramirez obtained the roofing jobs because he could speak a little English. The worker depended on Mr. Ramirez to find the work. He only worked for Mr. Ramirez in 2010. If Mr. Ramirez did not work, "we wouldn't work" (Tr. 15). When Mr. Ramirez left the job site, "he would give orders to do what we had to do." To travel to the job, Mr. Ramirez regularly transported the worker (Tr. 14). In 2009, Mr. Ramirez drove him to Oklahoma for roofing work and paid his hotel room for two weeks (Tr. 9, 11, 14, 23, 53).

While on the job, Mr. Ramirez provided the worker with the necessary tools and equipment for the roofing work including a nail remover, shovel, compressor, and hammer. Mr. Ramirez furnished the tar paper and shingles. The worker was paid by Mr. Ramirez who set the

wage. He had no ability to increase his income. He was paid a daily rate. He did not work for any other roofing companies. Mr. Ramirez directed and oversaw his work on the roof. The worker considered Mr. Ramirez to be his employer (Tr. 12, 17, 19, 24).

The worker was not an employee of Frederick Roofing. He had no contract with Frederick Roofing and received no payments from Frederick Roofing. He had no dealings with Frederick Roofing. He never spoke with anyone from Frederick Roofing. When Mr. Frederick came to the job, he dealt only with Mr. Ramirez. No one from Frederick Roofing was present at the job on the day of the accident (Tr. 11, 18, 23).

As the employer, Mr. Ramirez located the roofing jobs and hired the workers. He directed the roofing work, furnished the workers for the job, provided the tools and equipment used on the job, and paid the workers. Mr. Ramirez was the only person at the job who had the power to control the worker and the only person who exercised control over the worker's work.

Mr. Ramirez's argument that he was a foreman for Frederick Roofing is not supported by the record. No one from Frederick Roofing was called to testify. Other than his contradictory testimony, there is no evidence that Mr. Ramirez was hired as an employee of Frederick Roofing. He presented no employment contract, employment application, or payroll information. In fact, Mr. Ramirez testified that Frederick Roofing asked him to obtain workers compensation and liability insurance and sign a subcontractor agreement. When asked if he had workers, Mr. Ramirez told Frederick Roofing that he could find workers. Mr. Ramirez only roofed two other houses for Frederick Roofing prior to the one at issue. He was paid in cash without apparent payroll deductions. It is clear Frederick Roofing considered Mr. Ramirez an independent contractor (Tr. 11-12, 18-19, 33, 54-55).

The record lacks any evidence showing that Mr. Ramirez was a foreman/employee of Frederick Roofing. On the contrary, the record establishes that Mr. Ramirez was the employer. Mr. Ramirez did not dispute any of the worker's testimony regarding the specifics of their relationship. He was Mr. Ramirez's employee.

2. Mr. Ramirez's Roofing Work Affected Commerce

There is no dispute that Mr. Ramirez's roofing work affected commerce within the meaning of the Act. It is not necessary that the employer is engaged directly in interstate

commerce. *Austin Road Co. v. OSHRC*, 683 F.2d. 905, 907 (5th Cir. 1982). The Secretary's burden that the employer's activities affect commerce is "modest, if indeed not light." *Id* at 907.

The nature of Mr. Ramirez's roofing work and the use of materials /equipment in the stream of commerce establish his business affected commerce. Mr. Ramirez's construction activity in re-roofing homes by its nature affects commerce. *Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983) (construction work is within the class of activities Congress intended to regulate). The record shows that Mr. Ramirez traveled to Oklahoma to perform roofing work in 2009. He transported another worker, paid his living expense at a hotel for fifteen days, and furnished the necessary tools and equipment including the roofing shingles, tar paper, hammers, compressors, and nails which travelled in commerce (Tr. 11, 12).

Mr. Ramirez was an employer with employees engaged in business affecting commerce within § 3(5) of the Act. The minimum of one employee is sufficient to invoke coverage under the Act. *See* 29 C.F.R. § 1975.4(a).² At the time of the accident, there were at last three employees. Mr. Ramirez was subject to the OSHA requirements at Subpart M, *Fall Protection*, as an employer.

REPEAT CITATION

The Secretary has the burden of proof.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

² The congressional exemption to an employer with less than 10 employees does not apply. This was a complaint inspection as a result of an employee's fall. Mr. Ramirez has not claimed that he was exempt from OSHA's application. *See* OSHA CPL 2-0.51J *Enforcement Exemptions and Limitations under the Appropriations Act*.

Alleged Violation of § 1926.501(b)(13)

The citation issued to Mr. Ramirez alleges that “[O]n or about 8 November 2010, at a jobsite located at 1939 E. Glen Oaks, Wichita, Kansas, an employee performing roofing work from a low-sloped roof at a height of approximately 8 feet was exposed to a fall hazard in that the employee was not wearing fall protection, resulting in internal injuries as a result of a fall from the roof.”

Section 1926.501(b)(13) 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 personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.

The roofing work in this case was performed on a single-story family home in Wichita, Kansas. At the time of the accident, the workers were laying tar paper. Section 1926.501(b)(13) applied to Mr. Ramirez’s roofing work on November 8, 2010.

Also, there is no dispute that Mr. Ramirez did not comply with the requirements of Section 1926.501(b)(13). The standard requires that one of the identified fall protection precautions be fully implemented before an employee is exposed to the fall hazard. See *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No 90-2148, 1995), *aff’d, without published opinion*, 79 F.3d 1146 (5thCir. 1996). There is a presumption that conventional fall protection is feasible and not a greater hazard.³ On the day of the accident, there was no fall protection utilized by the workers on the flat roof laying tar paper (Tr. 21, 26, 65). Mr. Ramirez does not claim and the record does show that conventional fall protection was infeasible or a greater hazard. The worker fell from the flat roof at least eight feet to the ground (Exh. C-1; Tr. 38).

³ In the *Note* following ¶1926.501(b)(13), there is a presumption that it is feasible and will not create a greater hazard to implement one of the identified fall protection systems and the employer has the burden of showing that it is appropriate to implement a fall protection plan which complies with ¶1926.502(k) for the particular workplace, in lieu of the identified fall protection systems.

Also, under § 1926.502(k), Mr. Ramirez failed to show that he created or implemented a fall protection plan in the manner required by the standard. There was no fall protection plan prepared by a qualified person, implemented under the supervision of a competent person, documented as to why conventional fall protection systems were not used, and there was no designated controlled access zone in compliance with § 1926.502(g).

Mr. Ramirez knew the worker was not utilizing fall protection before he fell. He was on the roof assisting the worker in laying the tar paper (Tr. 21-22). He saw the worker take a “step backwards and falls off” the roof (Tr. 65). They had been working on the roof for approximately two hours without fall protection (Tr. 35).

The worker was exposed to a fall hazard without a fall protection system. Mr. Ramirez does not dispute that the worker fell eight feet from the flat roof to the ground (Tr. 31). The worker’s injuries included a collapsed lung, broken ribs, and a fractured knee and arm (Tr. 23).

Mr. Ramirez’s violation of § 1926.501(b)(13) is established.

Repeat Classification

The citation issued to Mr. Ramirez for violation of § 1926.501(b)(13) is classified as repeat. In order to establish a repeat violation under § 17(a) of the Act, 29 U.S.C. § 666(a), the record must show that at the time of the alleged repeated violation there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). Substantial similarity is established in several ways including showing the violations are of the same standard. *Monitor Construction Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

Within the past three years, Mr. Ramirez received two separate serious citations for violations of § 1926.501(b)(13) at worksites in Wichita, Kansas on June 10, 2008 and April 3, 2008. As in this case, Mr. Ramirez was cited for failing to provide fall protection to employees while performing roofing work at heights in excess of twelve feet. Mr. Ramirez settled both citations by entering into informal settlement agreements which affirmed the violations of § 1926.501(b)(13) and reduced the proposed penalties. Both citations, as settled, became final orders on June 18, 2008 (Exh. C-2).

Mr. Ramirez’s violation of § 1926.501(b)(13) in this case is properly classified as repeat.

Penalty Consideration

The Review Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission considers the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

At the time of the accident, Mr. Ramirez, as a small employer with less than three employees, is entitled to credit for size. He is not entitled for credit for history and good faith. As discussed, Mr. Ramirez received two prior OSHA citations for violating the same standard, § 1926.501(b)(13) in 2008. There is no showing Mr. Ramirez maintained a safety program. Since the accident, he apparently is no longer in the roofing business (Exh. R-2; Tr. 60).

A penalty of \$ 3,000.00 is reasonable for the violation of § 1926.501(b)(13). One employee was exposed to a fall hazard of approximately eight feet. He received serious injuries from his fall. The employee was not using any fall protection, although he testified a safety harness was in Mr. Ramirez's truck (Tr. 26).

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

Serious Citation No. 1:

1. Item 1, alleged repeat violation of § 1926.501(b)(13), is affirmed and a penalty of \$3,000.00 is assessed.

/s/ Ken S. Welsh

KEN S. WELSCH
Administrative Law Judge

Date: September 13, 2011