THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. All Star Realty Company, Incorporated d/b/a All Star Realty & Construction, Co.[1] Respondent.	OSHRC Docket No. **12-1597** Simplified Proceedings

Appearances:

Brian D. Mauk, Esquire, U. S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For Complainant

Richard Aldridge, President, All Star Realty & Construction, Co., Clay, Alabama
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

All Star Realty Company, Incorporated d/b/a All Star Realty & Construction, Co. (All Star) contests a four-item citation issued to it by the Secretary on July 9, 2012. The citation alleges serious violations related to the Occupational Safety and Health's (OSHA) fall protection, ladders and training standards. Occupational Safety and Health Compliance Officer (CSHO) Phyllis Battle recommended the citation based on her inspection of a jobsite at Roebuck Parkway[2] in Birmingham, Alabama, where the Secretary alleges All Star was working on May 4,

[1] At the hearing, Richard Aldridge, owner and president of Respondent testified that the proper name of the business is All Star Realty Company, Incorporated (Tr. 48). According to Aldridge, business cards for the company include the word "Construction" to inform others they are also in the construction business (Tr. 48). Therefore, the style of this matter is hereby amended to specify the correct legal entity cited.

[2] The inspection site is identified as Roebuck Parkway, Birmingham, AL on the Citation and Notification of Penalty; however the descriptions of the violations refer to the inspection site as Center Point Parkway, Birmingham, AL (See Citation and Notification of Penalty). The testimony at the hearing identified the inspection site as Roebuck Parkway. Based on the hearing testimony and exhibits, the undersigned concludes that Roebuck

2012. OSHA proposes a penalty of $2,000.00 for grouped items 1(a) and 1(b) alleging violations of 29 C.F.R. § 1926.501(b)(11) for failing to protect employees from falling from a steep roof, and 29 C.F.R. § 1926.503(a)(1) for failing to train employees regarding fall hazards. Additionally a penalty of $2,000.00 is proposed for grouped items 2(a) and 2(b) alleging violations of 29 C.F.R. § 1926.1053(b)(1) for a ladder not extending at least 3 feet above the landing, and 29 C.F.R. § 1926.1060(a) for not training employees on fall hazards associated with work being performed using ladders. The Secretary proposes total penalties of $4,000.00 for these alleged violations.

All Star timely contested the citation. This case was designated for Simplified Proceedings under Subpart M (§§ 2200.200-211) of the Commission's Rules of Procedure. The undersigned held a hearing in this matter on Thursday, December 6, 2012, in Birmingham, Alabama. For the reasons discussed below, the undersigned vacates Citation No. 1, Items 1(a), 1(b), 2(a) and 2(b).

Jurisdiction

At the hearing, Respondent disputed that jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act (Tr. 9-10). The parties stipulated, however, that at all times relevant to this action, All Star was an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 8, 10).

All Star was established by Richard Aldridge and was incorporated in the state of Alabama in 1978 (Tr. 49). Aldridge is the owner and President of All Star (Tr. 49). Other officers of the corporation include Aldridge's brother, who is the vice president, and Aldridge's sister, who is the secretary-treasurer (Tr. 49). All Star initially was engaged in real estate construction of homes and commercial buildings (Tr. 50). It currently engages in remodeling and demolition work (Tr. 50). Aldridge hires subcontractors to perform work for the business (Tr. 54). Subcontractors were hired by Aldridge to perform the demolition work at the cited location (Tr. 54).

The Act applies to a "person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5), *see Don Davis,* 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001). Section 3(4) defines "person" as "one or more individuals, partnerships, associations,

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Parkway and Center Point Parkway refer to the same inspection site.

corporations, business trusts, legal representatives, or any organized group of persons." All employees are covered under the Act, including a company's president and vice president when they are performing work for the employer. *D & H Pump Service, Inc.*, 5 BNA OSHC 1485 (No. 16246, 1977); *Hydraform Products Corp*., 7 BNA OSHC 1995 (No. 78-527, 1979). All Star is a corporation. Its president performed work for the company as evidenced by the hiring of contractors to perform work on behalf of the business. The undersigned finds All Star is an employer with employees in a business affecting interstate commerce. Therefore, jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act.

Background

CSHO Battle was driving on Roebuck Parkway in Birmingham, Alabama, on May 4, 2012, when she observed a fall hazard at what appeared to her to be a jobsite (Tr. 15). As a result, she stopped to conduct an inspection pursuant to the Local Emphasis Program on falls (Tr. 14, 43-44). The site was a strip mall which had been damaged by a recent tornado in the area (Tr. 19, 29). Battle concluded the strip mall was in the process of being torn down to be rebuilt (Tr. 29). She initiated her inspection at approximately 11:30 a.m. that day. There were only two people at the jobsite when Battle began her inspection.

When Battle arrived at the jobsite, she observed one individual without fall protection, on a 6/12 pitch roof which was 22 feet from eve to ground (Tr. 15, 23). This person was identified as Filipe Marquez (Tr. 16). He identified the person working on the ground as his brother (Tr. 17, 45). Marquez appeared to be removing material from the roof using a tool (Tr. 15). Battle also observed a ladder on the site that did not extend three feet above the upper landing surface (Tr. 34). Battle spoke with both individuals at the site. They told her they had begun working that morning (Tr. 25). Battle asked Marquez whom he worked for, he responded Aldridge, and that he worked for Aldridge Construction for two years (Tr. 17, 45). Marquez told Battle he had no fall protection on the site (Tr. 17). She also was informed that the ladder onsite was used by both individuals to access the roof (Tr. 21, 22). Battle inquired of the men whether they had received any fall protection and ladder training. They had not (Tr. 33, 35).

Marquez called Aldridge by telephone while Battle was onsite. Aldridge arrived at the site shortly thereafter. When Aldridge arrived, he told Battle the two individuals at the site did not work for him, although they had worked for him in the past (Tr. 27-28, 29). Aldridge also

explained to Battle that the two men asked him if they could have some metal, and that they had come over to get the metal off the roof (Tr. 27-28).

As a result of Battle's inspection, OSHA issued the citation at issue in this matter.

Discussion

The issuance of the citation at issue in this matter is based on the two-prong premise that (1) All Star was engaged in work activity at the cited location and (2) that the two individuals at the site were employees of All Star. For the reasons that follow, the undersigned finds that All Star was engaged in work activity at the cited location. Further, the undersigned finds that the two individuals at the site were employees of All Star.

All Star was Engaged in Work Activity at the Cited Location

All Star secured a contract to remove the building at the cited location (Tr. 51). However, Aldridge contends All Star had not begun work at the jobsite at the time of the inspection as evidenced by the fact that it had no equipment onsite (Tr. 56-57). The undersigned disagrees. Although All Star may not have had its subcontractors on the jobsite pursuant to the contract, removal of the metal from the roof was authorized by Aldridge and had begun. Aldridge admits he authorized the Marquez brothers to get the metal so they could work on his father's shed (Tr. 57). He claims however, the men were to obtain the metal after the building was torn down (Tr. 57). There is insufficient credible evidence to substantiate this claim. Marquez told Battle he was working for Aldridge at the time of the inspection (Tr. 17). Work activity involving the removal of the metal from the roof was occurring at the jobsite. Battle testified confidently regarding what she was told by Marquez. The undersigned finds Battle's testimony regarding what Marquez told her to be reliable and credits it over Aldridge's testimony and Marquez's Affidavit to the contrary (Tr. 17, 26-27; Exh. R-1). The credible evidence supports a finding that All Star was engaged in work activity at the cited location at the time of the OSHA inspection.

The Two Individuals at the Site were Employees of All Star

All Star contends that the two individuals on the jobsite were not its employees. Section 652(6) of the Act provides the term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce." The Commission utilizes the "economic realities test" as described in *Loomis Cabinet Co*., 15 BNA OSHC 1635, 1637 (No. 88-2012, 1992) to determine whether an employer/employee relationship exists. The relevant

factors for determining employer/employee status under the applicable "economic realities test" are: (1) whom the workers consider to be their employer; (2) who pays the workers' wages; (3) who is responsible for controlling the workers' activities; (4) who has the power (as opposed to the responsibility) to control the workers; (5) who has the power to fire, hire, or modify the employment condition; (6) does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight; and (7) how are the workers' wages established. *Loomis Cabinet Co., id.*, citing *Van Buren-Madawaska*, 13 BNA OSHC, 2157, 2158 (Nos. 87-214, 87-217, 87-450 thru 459, 1989) quoting *Griffin & Brand*, 6 BNA OSHC, 1702, 1703 (No. 14801, 1978). The "economic realities test" focuses on control. A slightly more specific analysis of control in determining the employment issue was set forth by the Commission in *Don Davis*, 19 BNA OSHC 1477, 1482 (No. 96-1378, 2001): control over the "manner and means of accomplishing the work" must include control over the workers and not just the results of their work. One who cannot hire, discipline, or fire a worker, cannot assign him additional projects, and does not set the worker's pay or work hours cannot be said to control the worker.

In the instant case the answers to each of these questions is All Star. The Marquez brothers considered All Star to be their employer. Their compensation was through All Star. The work activities were controlled by All Star. All Star had the power to control the workers, as well as their employment condition. All Star established the wages paid. Although Aldridge testified the Marquez brothers were at the jobsite without his knowledge, he admits that he authorized them to take the metal which was on the roof (Tr. 52). It is unclear as to the exact payment for their work; however some form of compensation was agreed upon whether in cash or "in kind". Workers being compensated "in kind" rather than in cash have been held to be employees. *Arlie R. Hawk General Contractor*, 4 BNA OSHC 1248 (No. 6688, 1976). Aldridge testified the metal was to be used for repairing a shed on his father's property, and he told the brothers about the metal on the building because they were looking for work (Tr. 52). According to Aldridge he was trying to help them get a small job for some gas money (Tr. 58). He told them to use the metal to repair his father's roof on his shed, and they could charge the father only for their labor (Tr. 52). Application of the "economic realities test" here shows the Marquez brothers were employees of All Star.

The Citation

The Secretary contends that All Star violated the following standards as follows:

Item 1a: Alleged Serious Violation of 29 C. F. R. § 1926.501(b)(11), alleges "On or about 05/04/12- Center Point Parkway, Birmingham, AL, employees removing metal roofing were not protected from falls of more than 20 feet".

Item 1b: Alleged Serious Violation of 29 C. F. R. § 1926.503(a)(1), alleges "On or about 05/04/12- Center Point Parkway, Birmingham, AL, employees had not been trained to recognize, control, minimize or eliminate fall hazards associated with the work being performed."

Item 2a: Alleged Serious Violation of 29 C. F. R. § 1926.1053(b)(1), alleges "On or about 05/04/12- Center Point Parkway, Birmingham, AL, the side rails of the extension ladder used by employees for accessing the roof did not extend at least 3 feet above the landing."

Item 2b: Alleged Serious Violation of 29 C. F. R. § 1926.1060(a), alleges "On or about 05/04/12- Center Point Parkway, Birmingham, AL, employees had not been trained to recognize, control, minimize or eliminate fall hazards associated with the work being performed using ladders."

The Secretary has the burden of establishing the employer violated the cited standards.

> 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 first three elements of the Secretary's burden are essentially undisputed.

Applicability of the Standards

It is not disputed that the employees were engaged in removing metal roofing from the roof of the building, and that they used a ladder to access the building. This activity constitutes construction activity covered by Part 1926. The standards are applicable.

Noncompliance with the Terms of the Standards

It also is not disputed that the employees were not protected by fall protection while working on a 6/12 pitch roof, 22 feet from the lower level. Photographs taken by CSHO Battle depict an employee on the roof without fall protection in violation of § 1926.501(b)(11) (Exhs. C-2, C-3, C-4, C-6). All Star also does not dispute that the ladder used by the employees to

access the roof did not extend three feet above the upper landing surface, or that the ladder was not secured, in violation of § 1926.1053(b)(1). Battle observed and took photographs of the ladder. She testified that it neither was three feet above the upper landing surface, nor secured in any way (Tr. 22 ; Exh. C-3). Lastly, All Star does not challenge the Secretary's contention that the employees received no fall protection and ladder training. The employees told Battle they had received no such training as required by §§ 1926.503(a)(1) and 1926.1060(a) (Tr. 33). The Secretary has established the cited standards were violated.

Employee Access to the Violative Conditions

Access to the violative conditions is uncontroverted. Battle observed an employee working without fall protection and the employees told her they used the ladder to access the roof and that they had not been trained. The Secretary has established employee exposure.

Employer Knowledge

The only disputed element of the Secretary's case is whether All Star knew or could have known with the exercise of reasonable diligence of the violative conditions. The Secretary must establish actual or constructive knowledge of the violative conditions by All Star in order to meet her burden. In order to show employer knowledge of a violation the Secretary must show 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). The Secretary contends "Respondent was well aware of these regulations and the need to protect employees on roofs. In fact, Mr. Aldridge testified that in the past, his business hired someone to conduct safety meetings. Though he expressly authorized these employees to remove the metal from the roof of this building, he did absolutely nothing to train or protect these employees while working on this roof." (Secretary's Brief, p. 6, citations and references omitted). The undersigned finds that this is insufficient to establish knowledge here. Aldridge, owner and president of All Star was not at the jobsite on the day of the inspection until after Battle had begun her inspection. Although he authorized the employees to remove the metal from the roof, according to Aldridge, he did not know the two men were at the jobsite on the day of the OSHA inspection. The undersigned finds Aldridge's testimony on this point to be credible.

The only employees of Aldridge onsite on the day of the OSHA inspection were the Marquez brothers. No evidence was presented at the hearing to indicate that either of the two was a foreman or even a lead man, from which either actual or constructive knowledge could be

imputed to All Star. An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). "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 that 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). The Secretary has not established actual knowledge through either of the Marquez brothers. No other employees were onsite from whom actual knowledge can be established.

When actual knowledge cannot be established, the Secretary can meet this element of her case by showing constructive knowledge. Here, however, there is insufficient evidence to establish even constructive knowledge. No one from management was at the jobsite. Further, Aldridge did not know the employees were at the jobsite. There is no basis for establishing constructive knowledge. The evidence is insufficient to establish that All Star had actual or constructive knowledge of the violative conditions. It is the Secretary's burden to adduce sufficient evidence to establish this element of her case. The Secretary has not met her burden of establishing a violation of the cited standards. The citation alleging violations of §§ 1926.501(b)(11), 1926.503(a)(1), 1926.1053(b)(1) and 1926.1060(a) is vacated.

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 1a of the Citation, alleging a serious violation of 29 C.F.R. § 1926.501(b)(11) is vacated and no penalty is assessed;

2. Item 1b of the Citation, alleging a serious violation of 29 C.F.R. § 1926. 503(a)(1) is vacated and no penalty is assessed;

3. Item 1b of the Citation, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(1) is vacated and no penalty is assessed;

4. Item 2a of the Citation, alleging a serious violation of 29 C.F.R. § 1926.1060(a) is vacated and no penalty is assessed.

SO ORDERED.

/s/
SHARON D. CALHOUN
Judge

Date: February 4, 2013
Atlanta, Georgia