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

SECRETARY OF LABOR, Complainant, v. R. K. WALLACE CONSTRUCTION. INC. d/b/a WALLACE STEEL ERECTORS, Respondent.	OSHRC Docket No. 18-0644

DECISION AND ORDER

COUNSEL:

Karen E. Mock, Jana J. Edmondson-Cooper, Attorneys, Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, for Complainant.

Robert Wallace, *Pro se*, Jayess, MS, for Respondent.

BEFORE: Gatto, J., Judge.

I. INTRODUCTION

R. K. Wallace Construction. Inc. d/b/a Wallace Steel Erectors (Wallace) was a subcontractor working on a project in Flowood, Mississippi, when the Secretary of Labor, through the Department of Labor's Occupational Safety and Health Administration (OSHA), conducted an inspection on January 19, 2018, which resulted in the issuance[1] of two citations to Wallace on March 23, 2018, pursuant to the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 651-678. One citation alleged a "serious" violation of OSHA's eye protection standard and the second citation alleged a "repeated" violation of OSHA's fall protection standard, with proposed

[1] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order No. 4–2010 (75 FR 55355). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein. The bringing of legal proceedings and the determination of whether such proceedings are appropriate in a given case are delegated exclusively to the Solicitor of Labor. *See* Order No. 4–2010 (75 FR 55355).

penalties totaling $56,910.00.[2] After Wallace contested the citations, the Secretary filed a formal complaint with the Commission seeking an order affirming the citations and proposed penalties.[3] The parties stipulated jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 659(c) and that Wallace is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). (*Pretrial Order* ¶ 4; Attach. C ¶ 1).

The Court held a bench trial in Jackson, Mississippi. After hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings.[4] For the reasons indicated *infra*, the Court **AFFIRMS** both citations and **ASSESSES** civil penalties in the amount of $7,114.00 for the serious violation and $49,796.00 for the repeated violation.

II. BACKGROUND

Wallace was a subcontractor for Copeland and Johns, Inc. on Copeland's Performance Sports Building - MS Sports Medicine project (worksite) in Flowood, Mississippi. (*See* Ex. C-1.) On January 19, 2018, OSHA Jackson Area Office Compliance Safety and Health Officer Gervase McCoy conducted an inspection of the worksite, and during the inspection, observed one of Wallace's employees, Cory Reichwald, operating a Hitachi G12SS2 hand angle grinder to cut metal without wearing appropriate eye or face protection. (Tr. 10:15-25, 11:1-19, 17:20-22, 18:1-13; *see also* Ex. C-8, p. 6 of 9). Reichwald admitted to McCoy during the inspection and again admitted at trial that he was not wearing appropriate eye protection on January 19, 2018, when he was operating the angle grinder. (Tr. 119:1-25, 120:1-12; *see also* Ex. C-2 at DSC09021, DSC09025, DSC09032; Ex. C-5). Reichwald was exposed to potential permanent eye injuries and burns to the skin/eye tissue as well other predictable serious injuries, including blindness. (Tr. 35: 9-24).

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[2] Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§ 666(a), (b), (c). A "serious" violation is defined in the Act; the other two degrees are not. *Id.* § 666(k).

[3] Attached to the complaint and adopted by reference were the citations at issue. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[4] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so. Although the Secretary filed a post-trial brief, Wallace did not.

During the inspection McCoy also observed five (5) of Wallace's employees – Clifton Cossen, Seth Prescott, Cory Reichwald, David McKee, and David Rollins – working without being tied-off (without fall protection) fifteen (15) feet, seven (7) inches above a concrete lower level. (Ex. C-8, p. 7 of 9; *see also*, Tr. 13:16-19, 37:5-25, 38:1-4, 84:24-25, 85:1-7). Although McCoy observed several employees on the roof structure wearing safety harnesses, none of them had lanyards or ropes connecting the harness to an anchorage point on the roof structure. (Tr. 13:16-19, 37:5-25, 38:1-4). McCoy also observed no other fall protection systems in place during his inspection. (Tr. 84:24-25, 85:1-7).

The roof on which Wallace's employees were working had unprotected edges/sides at both the exterior (perimeter of the roof) and the interior. (Ex. C-2 at Photos 9022, 9024 through 9027, 9032). Wallace's employees were exposed to serious/permanent injuries, such as broken bones, paralysis, and death. (Tr. 40:13-23; *see also* Ex. C-11 at Photo #40). At least one of Wallace's employees can be seen at the edge of the roof, standing over a pile of roof panels. (Tr. 76: 9-22; *see also* Ex. C-2 at Photo 9022).

Failure to ensure the employees were tied off exposed them to the hazard of falling off the roof through holes and spaces (to which they worked closer than six feet) and off the roof edge (where they also worked closer than six feet). (Tr. 13:16-19, 37:5-25, 38:1-4). Wallace proffered no evidence that employees were prevented or warned from accessing an unprotected edge or side or that it had marked-off or blocked-off areas (to include providing warnings six feet from the edge) to prevent employees from falling 15 feet, 7 inches to the ground below from inadvertent missteps, slips or trips. (*Id.*)

III. ANALYSIS

The Court of Appeals for the Fifth Circuit, where this case arose,[5] has held the Secretary "must show by a preponderance of the evidence: (1) that the cited standard applies; (2) noncompliance with the cited standard; (3) access or exposure to the violative conditions; and (4)

[5] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). "Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.") *Manua's, Inc.*, 2018 WL 4861362, at *6 n. 2 (No. 17-1208, 2018) (citation omitted). Therefore, the Court applies the precedent of the Fifth Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

that the employer had actual or constructive knowledge of the conditions through the exercise of reasonable due diligence." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016). For the reasons indicated *infra*, the Court concludes the Secretary has established a prima facie case for each cited violation.

A. Citation 1

Alleged Serious Violation of 29 C.F.R. § 1926.102(a)

In Citation 1, the Secretary alleges Wallace violated 29 C.F.R. § 1926.102(a)(1), the eye and face protection standard, when "an employee was exposed to potential permanent eye injuries while cutting metal" when the employee was operating a "Hitachi G 12SS2 grinder without wearing eye protection." The cited standard mandates in relevant part "[t]he employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation." 29 C.F.R. § 1926.102(a)(1).

1. The Cited Standard Applied

The cited standard is found in *Subpart X—Personal Protective and Life Saving Equipment* of the construction standards, which mandates "[p]rotective equipment, including personal protective equipment for eyes … shall be provided … wherever it is necessary by reason of hazards of processes … encountered in a manner capable of causing injury or impairment in the function of any part of the body through … physical contact." 29 C.F.R. § 1926.95(a). Generally, an OSHA standard presumes a hazard and the Secretary is not required to establish one exists as part of his burden of proof. However, when a standard specifies it applies only when a hazard is present, such as a personal protective equipment (PPE) standard like the cited standard, the Secretary's burden also includes "demonstrating that there is a significant risk of harm" and that "the employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE." *Wal-Mart Distribution Ctr. # 6016*, 25 BNA OSHC 1396, 1400-1401 (No. 08-1292, 2015), *aff'd in pertinent part, rev'd in part on other grounds*, 819 F.3d 200 (5th Cir. 2016).

Here, Wallace was a steel erection subcontractor and its employees were cutting metal and operating a hand angle grinder causing molten metal sparks. The Commission has recognized "the eye is an especially delicate organ and … any foreign material in the eye presents the potential for

injury." *Vanco Constr. Inc.,* 11 BNA OSHC 1058, 1060 (No. 79-4945, 1982) (*citing Sterns–Roger, Inc*., 7 BNA OSHC 1919, 1921 (No. 76-2326, 1979)), *aff'd*, 723 F.2d 410 (5th Cir. 1984). A reasonable person familiar with the construction industry would recognize a significant risk of harm to an employee cutting metal using a hand angle grinder. Further, a reasonable person familiar with the circumstances surrounding the hazardous condition would recognize a hazard requiring the use of protective eyewear. The Secretary has established the cited standard applied to the cited conditions.

2. The Cited Standard Was Violated

McCoy observed one of Wallace's employees, Reichwald, exposed to potential permanent eye injuries while cutting metal when he was observed operating a grinder without wearing appropriate eye or face protection. Reichwald admitted to McCoy during the inspection and again admitted at trial that he was not wearing appropriate eye protection when he was operating the angle grinder. The Secretary has established the cited standard was violated.

3. Wallace's Employee Was Exposed to the Violative Condition

Reichwald was exposed to molten metal sparks when he operated the angle grinder without wearing eye protection. The Secretary has established employee exposure.

4. Employer Knowledge

"Knowledge is a fundamental element of the Secretary of Labor's burden of proof for establishing a violation of OSHA regulations." *Trinity Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 206 F.3d 539, 542 (5th Cir. 2000). "To prove knowledge, 'the Secretary must show that the employer knew of, or with exercise of reasonable diligence could have known of the non-complying condition.'" *Sanderson Farms*, 811 F.3d at 736 (*quoting Trinity*, 206 F.3d at 542). Further, "when a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge[,] actual or constructive [,] of non-complying conduct of a subordinate." *Id.*, 811 F.3d at 737 (*quoting W.G. Yates & Sons Construction Co., Inc. v. Occupational Safety & Health Review Comm'n*, 459 F.3d 604, 607 (5th Cir. 2006)).

Here, Michael Dewitt, Wallace's superintendent, was present at the worksite. (Tr. 16:7-9, 98:1-2, 12-16, 100:4-8, 104:2-9; *see also* Proposed Joint Pretrial Order, Attach. C ¶¶4, 5). At trial DeWitt admitted he was aware of the eye-protection requirements and that he attended the Safety Orientation Training provided by Copeland to Wallace's employees, on November 7, 2018, which

informed them that face shields were required when grinding or cutting metal. (Tr. 101:1-7, 108:8-25, 109:9-25, 110:125, 111:1, 112:15-24, 113:1-22; *see also* Ex. C-6). DeWitt had over twenty years' experience in construction, nine of which have been metal construction for Wallace, (Tr. 97:25-25; 98:1Tr. 98:2-4.) Therefore, Dewitt should have known of the violative conduct, if he had exercised due diligence, because he was present and walking around the worksite while the employee was exposed. This knowledge is imputed to the company. Therefore, the Secretary has established Wallace possessed knowledge of the violative condition.

Characterization of the Violation

The Secretary characterized the violation as "serious." A "serious" violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). "The "substantial probability" requirement is key in an analysis of whether a violation is serious." *Byrd Telcom, Inc. v. Occupational Safety & Health Review Comm'n*, 657 F. App'x 312, 315 (5th Cir. 2016). "Further, 'employer knowledge is a required element of a § 666(k) violation.' " *Id.* (*quoting* W.G. Yates, 459 F.3d at 607).

Here, Reichwald was exposed to potential permanent eye injuries while cutting metal, as well as potential exposure to burns to the skin/eye tissue as well other predictable serious injuries, including blindness. Therefore, the "substantial probability" requirement has been met by the Secretary. Further, as indicated *supra*, Wallace had knowledge of the violative conditions. The Court concludes the Secretary properly characterized the violation as a serious one.

B. Citation 2

Alleged Repeated Violation of 29 C.F.R. § 1926.760(a)(1)

In Citation 2, the Secretary alleges a repeated violation of 29 C.F.R. § 1926.760(a)(1), the fall protection standard, when "five employees were exposed to a fall hazard without fall protection 15 feet 7 inches above concrete." The cited standard provides in relevant part "each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems." 29 C.F.R. § 1926.760(a)(1).

1. The Cited Standard Applied

The cited standard applies "to employers engaged in steel erection." 29 C.F.R. § 1926.750(a). "Steel erection" means "the construction, alteration or repair of steel buildings, bridges and other structures, including the installation of metal decking and all planking used during the process of erection." 29 C.F.R. § 1926.751. McCoy testified he observed Wallace's employees engaging in "cutting and grinding" activity. (Tr. 84:21-22).[6] Therefore, Wallace's employees were engaged in "steel erection" within the meaning of the cite standard. Wallace's employees were also walking/working on a surface with an unprotected side or edge more than 15 feet above a lower level. The cited standard applied.

2. The Cited Standard Was Violated

McCoy observed five of Wallace's employees working without fall protection fifteen (15) feet, seven (7) inches above a concrete lower level. Although several employees on the roof structure were wearing safety harnesses, none of them had lanyards or ropes connected to harnesses or to an anchorage point on the roof structure. (Tr. 13:16-19, 37:5-25, 38:1-4). McCoy did not see, and Wallace offered no evidence of, any other fall protection systems in place during the inspection. (Tr. 84:24-25, 85:1-7). The Secretary has established Wallace violated the cited standard.

3. Wallace's Employees Were Exposed to the Violative Condition

Wallace's employees were exposed to falling 15 feet, 7 inches to a lower level, which exposed them to serious/permanent injuries such as broken bones, paralysis, and/or death. The Secretary has established employee exposure.

4. Employer Knowledge

As indicated *supra*, Dewitt, was at the worksite on the date of the inspection walking around the worksite while the employees were exposed, and should have known of the violative conduct, if he had exercised due diligence. This knowledge is imputed to the company. Therefore, the Secretary has established Wallace possessed knowledge of the violative conditions.

Characterization of the Violation

[6] Wallace has not disputed it was engaged in steel erection at the worksite. (*See* Answer; Ex. C-1; *see also* Wallace's web page at http://www.rkwallace.com indicating it is "a design/build steel building contractor and erector serving general contractors and building manufactures throughout Mississippi, Louisiana, and Alabama, since 1985."

The Secretary characterized the violation as a "repeated" one. "A violation is properly characterized as repeated under section 17(a) of the Act, 29 U.S.C. § 666(a), 'if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.' " *Angelica Textile Servs., Inc.*, 2018 WL 3655794, at *11 (No. 08-1774, 2018) (*quoting Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979)). "The Secretary establishes 'a prima facie case of [substantial] similarity by showing that the prior and present violations are for failure to comply with the same standard. " *Id.* (*quoting id.*).

Wallace was previously cited for a violation of this same standard contained in OSHA inspection number 1155469, citation number 1, item number 1, and OSHA inspection number 314772153, citation number 1, item number 2, which were affirmed as final orders on November 7, 2016, and June 4, 2012 respectively. (Tr. 51:12-25, 52:1-7; Ex. C-12, 9, 13, 10; *see also* Proposed Joint Pretrial Order Attach. C ¶¶7-9). The Court concludes the cited violations were substantially similar violations. "This prima facie showing of substantial similarity may be rebutted 'by evidence of the disparate conditions and hazards associated with these violations of the same standard.' " *Angelica*, 2018 WL 3655794, at *11 (*quoting Potlatch*, 7 BNA OSHC at 1063). Wallace offered no evidence to rebut the Secretary's prima facie showing of substantial similarity. Therefore, the Court concludes the Secretary properly characterized the violation as a repeated one.

IV. PENALTY DETERMINATION

"In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), 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 Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00- 1052, 2005) (citation omitted). "The other factors are concerned with the employer generally and are considered as modifying factors."' *Natkin & Co. Mech. Contractors*, 1 BNA OSHC 1204, 1205 n.3 (No. 401, 1973). At the time of the inspections, Wallace was subject to a maximum penalty of $12,934.00 for the serious violation, and up to $129,336 for each repeated violation. (*See* 83 FR 14).

For Citation 1, OSHA calculated the gravity as "high" because an injury from exposing the employees' face and eyes to molten metal sparks could result in a serious or permanent injury, including burns and blindness. The probability determination was "lesser" because the employees were exposed to the hazard for only forty-five minutes over two days. (Tr. 53:2-25, 54:1-25, 55:1-25, 56:1-25, 57:1-21, 58:5-25, 59:1-8). The Court agrees with both determinations. OSHA reduced the penalty by 30% based on Wallace's size of less than fifty employees, which the Court finds appropriate. (Tr. 62:20-22.) OSHA also applied a 10% increase to the penalty due to Wallace's significant inspection history, which the Court also finds appropriate. (*Id.*) The Court also agrees with OSHA's decision not to apply a good faith reduction because of Wallace's inspection history. (*Id.*) Considering the gravity of the violation, size of the company, history, and lack of good faith, the Court concludes the penalty proposed by the Secretary of $7,114.00 for Wallace's violation of 29 C.F.R. § 1926.102(a)(1) is reasonable and appropriate.

As to Citation 2, OSHA calculated the gravity as "high" because a serious injury could result from the employees' exposure to a fall hazard from 15 feet, 7 inches. The probability determination was "greater" because the employees were exposed to the hazard for one full week, for eight hours each day. (Tr. 59:9-25, 60:1-25, 61:1-25, 62:1-19). The Court agrees with these determinations. OSHA reduced the base penalty by 30% in consideration of Wallace's size of having less than fifty employees, which the Court finds appropriate. (Tr. 62:20-22). A 10% increase was applied due to Wallace's significant inspection history, which the Court also finds appropriate. (Tr. 62:25, 63:1-25, 64:1-25, 65:1-24). As indicated *supra*, the Court also agrees with OSHA's decision not to apply a good faith reduction since Wallace has been cited for violating the exact standard eight times in the past ten years. (Tr. 51:12-25, 52:1-7; Ex. C-12, 9, 13, 10; Ex. C-12; Ex. C-9; Ex. C-13; Ex. C-10). Considering the gravity of the violation, size of the company, history, and lack of good faith, the Court concludes the penalty proposed by the Secretary of $49,796.00 for Wallace's violation of 29 C.F.R. § 1926.760(a)(1) is reasonable and appropriate. Accordingly,

VII. ORDER

IT IS HEREBY ORDERED THAT Item 1 of Citation Number1 is **AFFIRMED** and a penalty of $7,114.00 is **ASSESSED**, and Item, 1 of Citation 2 is **AFFIRMED** and a penalty of $49,796.00 is **ASSESSED**.

SO ORDERED.

/s/ *John B. Gatto*
First Judge John B. Gatto

Dated: June 14, 2019
Atlanta, GA