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.	:	OSHRC DOCKET NO. 08-1562
	:	
DAN SULLIVAN, d/b/a D&A SULLIVAN,	:	
	:	
Respondent.	:	

APPEARANCES:

Christine T. Eskilson, Esquire U.S. Department of Labor Boston, Massachusetts For the Complainant.	Roger B. Phillips, Esquire Phillips Law Office, P.L.L.C. Concord, New Hampshire For the Respondent.

BEFORE: John H. Schumacher
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On June 11, 2008, the Occupational Safety and Health Administration ("OSHA") inspected a work site of Dan Sullivan, d/b/a D&A Sullivan ("Respondent"), located in Hopkinton, New Hampshire. As a result, OSHA issued to Respondent a one-item willful citation alleging a violation of 29 C.F.R. 1926.501(b)(13). Respondent contested the citation, and the hearing in this matter took place in Manchester, New Hampshire, on March 24, 2009.

The OSHA Inspection

On June 11, 2008, Lonna Blais, a compliance officer ("CO") with OSHA, was driving to her office at about 7:45 a.m. when she saw a two-story house with three workers on the roof; the workers were engaged in removing shingles, and they had no fall protection. There were several

vehicles near the house, and one was a white pickup truck. CO Blais photographed the house with the workers on the roof and then went to her office, where she referred the matter to her supervisor. Andrew Palhof and Richard LeVinus, two other CO's in the office, were assigned to inspect the site, and they arrived at the job site around 8:30 a.m. The white pickup was just leaving as they arrived. The CO's saw three workers on the roof who were stripping shingles from the roof; they were working along the eaves and the gables, and one employee was pushing roofing material off with his feet at the edge of the roof. The workers had no fall protection and were exposed to falls of up to 14 feet; further, the pitch of the roof was about 45 degrees. CO Palhof photographed what he saw and then called up to the workers to come down. They did so after a few minutes, one made a telephone call, and, about ten minutes later, Dan Sullivan drove up in the white pickup truck; CO Palhof recognized Mr. Sullivan from a prior inspection in 2006. After speaking to the CO's, Mr. Sullivan made a telephone call, and, shortly thereafter, an individual named Doug Davis, of D. Davis & Sons ("Davis"), arrived. The CO's learned Mr. Sullivan was a subcontractor to Davis at the site and that the employees on the roof were those of Mr. Sullivan.[1] CO Palhof spoke to the employees and learned that their names were Bill Allen, Mike Daley and Sean Stevens. (Tr. 16-21, 26-44, 51; CX-1A-1B; CX-2A-2E).

CO Palhof discussed the lack of fall protection on the job with Mr. Sullivan. Mr. Sullivan responded that he had all the fall protection equipment that was needed, and he showed the CO the equipment he had in another vehicle at the site. CO Palhof asked Mr. Sullivan why the employees were not using the equipment, and he replied it had been used on the last job but was not being used at this site. CO Palhof held a closing conference with Mr. Sullivan, addressing with him the fall protection measures an employer can take as well as the rights of an employer after an OSHA inspection and what to do if a citation was issued. While the CO's were still at the site, Mr. Sullivan began setting up some of the fall protection. CO Palhof telephoned Mr. Sullivan on or about June 26, 2008, to ask if he could interview the employees, since Mr. Sullivan had not allowed him to do so at the site. Mr. Sullivan said that he did not know the names of the employees and that he had gotten them from LaborReady, a temporary labor agency. (Tr. 40-48).

[1]Mr. Sullivan initially told the CO's that he was no longer in business for himself and was working for Davis. (Tr. 38).

CO Palhof recommended the issuance of the citation due to the fact that employees were working on the roof without fall protection. He recommended the violation be classified as willful because the prior inspection, in 2006, involved the same circumstances, that is, employees working on the roof of a two-story residence without any fall protection. (Tr. 34-35, 48-50). The subject citation, issued on August 27, 2008, alleged a violation of 29 C.F.R. 1926.501(b)(13), which provides, in relevant part, as follows:

> 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 system, or personal fall arrest system....

The Secretary's Burden of Proof

To prove a violation of a standard, the Secretary must show that (1) the standard applies, (2) the employer did not comply with the standard's terms, (3) employees had access to the cited hazard, and (4) the employer knew or could have known of the cited hazard in the exercise of reasonable diligence. *See, e.g., Hackney, Inc.*, 16 BNA OSHC 1806, 1809 (No. 91-2490, 1994).

Discussion

As the Secretary points out in her post-hearing brief, the record in this case clearly establishes the first three elements of her burden of proof; that is, employees of Mr. Sullivan were working on the roof of a residence, that they were exposed falls of up to 14 feet, and the employees were not using any fall protection on the roof.[2] As the Secretary also points out, the crux of Respondent's defense at the hearing was that it did not have knowledge of the cited condition. (Tr. 76).

Mr. Sullivan appeared and testified at the hearing. According to his testimony, he arrived at the site between 7:00 a.m. and 7:15 a.m. on June 11, 2008; with him were two laborers he had picked up at LaborReady, as well as his brother, Sean Sullivan, who was the third worker at the site.[3] The white pickup shown on the left side of CX-1A was his, and he said it "could have been" the truck he was driving that day. He explained that June 11 had been a "confusing day," with people

[2]Only the Secretary has filed a brief in this matter.

[3]Mr. Sullivan said he and his brother were both experienced roofers, having come from a family with a construction business; he also said the two workers from Labor Ready told him they had done roofing work before. (Tr. 62-63, 66-69).

and trucks coming and going. He drove one truck to the site and his wife drove another; in addition, Davis was supplying materials to the site, and the blue truck shown in the photos belonged to Davis. Mr. Sullivan said he had a "lot of things to do that day" and that he was "in and out of that job site quite a bit that day."[4] He did not know if the white pickup in the photos was there the whole time from 7:45 a.m. to 8:30 a.m., and he did not know if he was driving it when the CO's saw it leaving at 8:30 a.m. Mr. Sullivan also said he did not see anyone on the roof without fall protection that day; in fact, he did not recall seeing anybody on the roof that day. He stated that he instructed his brother to use the harnesses and other equipment and that his brother "knew what he was doing." He further stated he "absolutely" did not tell anyone that he knew there was no fall protection being used. (Tr. 64-74).

The Secretary contends that Mr. Sullivan's testimony, indicating he was not at the site when the white pickup truck was there, was not credible. She notes that his testimony was vague and that he never directly contradicted the testimony of CO Palhof in that regard. She asserts, and I agree, that the more reasonable inference is that Mr. Sullivan was at the site when CO Blais saw the workers at 7:45 a.m. and that he was just leaving at 8:30 a.m., when the two other CO's arrived. The Secretary further contends that Mr. Sullivan's testimony about his brother being the third worker at the site was likewise not credible.[5] She points out that while Mr. Sullivan's counsel suggested CO Palhof was mistaken about the name of one of the workers, CO Palhof testified that he was "100 percent" certain that the person identified himself as Sean Stevens because he wrote it down. (Tr. 44, 57-58). In addition, I observed the demeanor of Mr. Palhof and Mr. Sullivan as they testified, including their facial expressions and body language, and I found Mr. Palhof to be the more reliable witness. Accordingly, I do not credit Mr. Sullivan's testimony that his brother was at the site and that he instructed his brother to use the harnesses and other equipment. (Tr. 69). Furthermore, I credit CO Palhof's testimony that Mr. Sullivan told him that, while fall protection had been used on

[4]Mr. Sullivan indicated that he had a doctor's appointment that day, that he had to take his wife home, and that he also had to pick up some materials. (Tr. 71).

[5]As to his credibility generally, the Secretary points out that Mr. Sullivan at first told the CO's that he was no longer in business for himself and was working for Davis. (Tr. 38).

his last job, it was not being used at this site. (Tr. 41). Finally, Mr. Sullivan admitted that he gave no instructions to the workers about using fall protection. (Tr. 73).

Based on the foregoing, I conclude that Mr. Sullivan knew the workers on the roof were not wearing fall protection because he was at the site from at least 7:45 a.m. until about 8:30 a.m.[6] In light of this conclusion, the Secretary has established the fourth element of her burden of proof, that of knowledge. In particular, she has shown that Mr. Sullivan had actual knowledge that the workers were removing shingles from the roof without using any fall protection.

Turning to the violation's classification, I conclude it was properly classified as willful. A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003), and cases cited therein. Mr. Sullivan admitted he was familiar with fall protection requirements. (Tr. 63). Further, Respondent has stipulated that it received a prior willful citation, alleging a violation of the same standard cited here, after an inspection in September 2006; the citation was not contested, and it became a final order of the Commission. (Tr. 36-37; CX-3). As CO Palhof testified, that situation was basically the same as this one, in that employees were working on the roof of a two-story residence without any fall protection. (Tr. 34-35, 48-50). Respondent contends the violation was not willful because Mr. Sullivan had fall protection equipment at the site and told his brother to use it; it also contends Mr. Sullivan did not realize the equipment was not being used until he received the phone call about OSHA being at the site. (Tr. 75-76). This contention is rejected, as it is clear from the record, as set out above, that Mr. Sullivan knew that employees were working on the roof without fall protection because he was there at the time. Based on the evidence of record, Item 1 of Willful Citation 1 is affirmed.

The Secretary has proposed a penalty of $14,000.00 for this item. CO Palhof testified that all willful violations begin at $70,000.00 and that reductions may be made for size, history and good faith. He further testified that while a reduction was given for the employer's small size, no other reductions were given due to its previous OSHA history and its failure to comply with OSHA

[6]This conclusion is supported by the testimony of CO Blais that she thought she saw a fourth person on the other side of the roof, whose head is just barely visible above the top of the roof in C-1A, in addition to the three other workers. (Tr. 18-20). As the Secretary notes, it is possible that this fourth person was Mr. Sullivan himself.

standards at the site. The CO also noted that a fall from the 14-foot roof could have resulted in serious injury or death and that the probability of a fall occurring was exacerbated by the amount of time the employees had been on the roof that day without fall protection and the fact that they had been working along the edge of the roof. (Tr. 50-52). In view of the CO's testimony, I find the proposed penalty appropriate. The proposed penalty of $14,000.00 is accordingly assessed.[7]

ORDER

Based upon the foregoing findings of fact and conclusion of law, it is ordered that:

1. Item 1 of Willful Citation 1, alleging a violation of 29 C.F.R. 1926.501(b)(13), is AFFIRMED, and a penalty of $14,000.00 is assessed.

/s/

John H. Schumacher
Judge, OSHRC

Date: 6/9/2009
Washington, D.C.

[7]In assessing the proposed penalty, I have considered Mr. Sullivan's testimony that in all of his years in business, no one had ever fallen from a roof. (Tr. 72). I have also considered the income that Mr. Sullivan has made from his business in the past three years. (Tr. 6-8). However, as the Secretary points out, she considered the appropriate factors in determining her proposed penalty, and the size of the employer refers to the number of employees and not the employer's income from its business. (Tr. 6-8). *See also* Secretary's post-hearing brief.