

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,

Complainant

v.

Heff's Tuckpointing,

Respondent.

OSHRC Docket No. **10-1793**

Appearances:

Evert Van Wijk, Esquire, Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri
For Complainant

Gary J. Hefferman, Owner, *pro se*, Heff's Tuckpointing, St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Heff's Tuckpointing (Heff's) is engaged in repairing and tuckpointing brick chimneys and walls at private residences in the St. Louis, Missouri area. On April 15, 2010, while an employee, the owner's nephew, was removing bricks from a chimney from a single-family home, the jobsite was inspected by a safety compliance officer with the Occupational Safety and Health Administration (OSHA). As a result of OSHA's inspection, Heff's received a serious citation on July 19, 2010, Heff's timely contested the citation.

The serious citation alleges Heff's violated 29 C. F. R. § 1910.1200(e)(1) (item 1a) by failing to develop and implement a written Hazard Communication Program; 29 C. F. R. § 1910.1200(e)(1)(i) (item 1b) by failing to have an inventory list of the chemicals/products used at the jobsite; 29 C. F. R. § 1926.100(a) (item 2) by failing to provide head protection for the employee engaged in tuckpointing; and, 29 C. F. R. § 1926.501(b)(13) (item 3) by failing to provide a personal fall arrest system for the employee engaged in brick removal work on a steep roof. The citation

proposes a total penalty of \$3,600 for the alleged violations.

The hearing, designated for simplified proceedings pursuant to 29 C. F. R. § 2200.200 *et. Seq.*, was held on December 10, 2010, in St. Louis, Missouri. Heff's is represented *pro se* by its owner Gary Heffernan. The parties stipulated jurisdiction and coverage (Tr. 10). The Secretary withdrew item 2, alleged violation of § 1926.100(a) (Tr. 5-6). At the conclusion of the hearing, Mr. Heffernan made a closing statement. He also filed a written position statement on December 30, 2010. On January 7, 2011, OSHA's counsel filed a post hearing brief.

Heff's argues the employee was not exposed to a hazard. As a small employer, Heff's claims OSHA's proposed penalties were excessive (Tr. 11). Heff's does not dispute that it failed to comply with the terms of the cited OSHA standards. It also does not assert an affirmative defense.

For the reasons discussed, the violations alleged are affirmed and total penalties of \$900.00 are assessed. The violations of 29 C. F. R. § 1910.1200(e)(1) (item 1a) and § 1910.1200(e)(1)(i) (item 1b) are reclassified as other than serious.

BACKGROUND

Heff's is engaged in repairing and tuckpointing brick chimneys and walls at private residences throughout the St. Louis, Missouri area.¹ In business for approximately twenty years, Heff's, a sole proprietorship, is owned by Gary Heffernan. Mr. Heffernan personally performs most of the repair and tuckpointing work. He has performed such work for thirty-five years. Heff's has never had more than one employee. Currently, its only employee is Mr. Heffernan's nephew who works as a helper involved in mixing mortar, hauling bricks and other assigned activities (Tr. 11, 100-101, 117-118).

On April 12, 2010, Heff's began repair work on a brick chimney at a single family home. The work required Heff's to tear down a portion of the chimney and replace the bricks. Heff's work was completed on April 15, 2010, after the OSHA inspection (Tr. 102, 105-106).²

The brick chimney, located in front of the house, was 45 inches wide and stood higher than the roof's peak. The slope of the roof was approximately 10 in 12 (vertical to horizontal). To access the chimney, Heff's erected a two tier tubular scaffold in front of the chimney. Each section of

¹Tuckpointing is defined as "to finish (the mortar joint between bricks or stones) with a narrow ridge of putty or fine line mortar."

²During the inspection, OSHA was told the job would take a couple more days (Tr. 29).

scaffold was approximately 7 feet long and 6 feet high. Planking was placed on the first and second levels of the scaffold. The scaffold extended beyond the right side of the chimney, approximately 24 inches. A plank was placed from the top level of the scaffold to the roof along the right side of the chimney (Exhs. C-1 - C-5; Tr. 21-22, 36, 110).

On April 15, 2010, OSHA safety compliance officer (CO) Marilyn Alston, after receiving a referral from the OSHA Assistant Area Director, arrived at the jobsite at approximately 11:30 a.m.³ Upon arrival, CO Alston observed the employee/nephew getting on and off the roof and sitting on the roof, removing and replacing bricks from the right of the chimney. He was 11 feet above the ground and not utilizing any designated fall protection systems including personal fall arrest, guardrails or safety nets (Exhs. C-6, C-7; Tr. 14-15, 18, 63, 105, 108-109).⁴

Upon entering the property, CO Alston asked the employee who was in charge. Mr. Heffernan was notified and arrived at the jobsite by approximately 12 noon. Mr. Heffernan, who had been working on the job since it started, had left mid-morning to bid on another project. Before leaving the job, he had instructed his nephew to remove the damaged bricks on the right side of the chimney (Tr. 28, 32, 102, 105).

Mr. Heffernan told CO Alston that he did not believe his nephew was exposed to a hazard. Also, although cement, sand and other products were on the jobsite for the chimney repair work, Mr. Heffernan acknowledged that Heff's did not have a written hazard communication program and a written inventory list of the products. He identified the products to the CO Alston and immediately sent her copies of their material safety data sheets (MSDS) from his office (Exhs. C-10 - C-13, Tr. 53-55).

Based upon the inspection by CO Alston, the serious citation, alleging the violations at issued, was issued to Heff's on July 19, 2010.

DISCUSSION

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,

³The referral by the Assistant Area Director complained the scaffold was unsafe and not plumb (Tr. 14). OSHA's inspection found no problems with the scaffold (Tr. 33, 67).

⁴Mr. Heffernan measured the height (Tr. 72).

(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).

Heff's does not dispute the application of the cited standards to its jobsite, its non compliance with the standards, and Mr. Heffernan's knowledge of the employee's work on the chimney. Mr. Heffernan testified to knowing the conditions at the jobsite and the work of his nephew on the roof without fall protection (Tr. 111). He had assigned the work to his nephew before leaving the jobsite (Tr. 105). Mr. Heffernan does not dispute that Heff's did not have a written hazard communication program and a written list of the products used on the job (Tr. 57).

Heff's disputes whether the employee/ nephew was exposed to a hazard and claims the proposed penalties are excessive.

Serious Citation No. 1

Item 1a: Alleged Violation of § 1910.1200(e)(1)

The citation alleges, in part, that at the jobsite, "the employer had not developed/implemented a Hazard Communication Program for employee(s) engaged in tuckpointing operations using such products as, but not limited to, Portland Cement, Sand, Solomon Colors Concentrated Mortar, and Miracle Morta-LOK Type "S" Masons Lime."

Section 1910.1200(e)(1) provides:

Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

The purpose of a hazard communication program is to require "all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training." 29 C. F. R. § 1910.1200(b)(1). A list of hazardous chemicals present at the jobsite is required as part of a written hazard communication program. 29 C. F. R. §

1910.1200(e)(1)(i) and (ii). The requirement to have a written hazard communication program applies to employers such as Heff's engaged in construction activities pursuant to 29 C. F. R. § 1926.59.

There is no dispute that Portland Cement, Sand, Solomon Colors Concentrated Mortar and Miracle Morta-LOK were present at Heff's jobsite at the time of OSHA's inspection (Tr. 106). Mr. Heffernan acknowledged using the products and sent copies of their MSDSs to OSHA (Tr. 53-54). A review of the MSDS for each product shows that such products contain chemicals which are considered a "hazardous chemical" within the standard. A "hazardous chemical" is defined as "any chemical which is a physical hazard or a health hazard." 29 C. F. R. § 1910.1200(c). Mr. Heffernan agreed the products were hazardous (Tr. 115-116).

According to the MSDSs, sand can cause a particle irritation, cement presents a chemical hazard, Solomon Colors can cause chemical reactions, and Miracle Morta presents chemical problems (Exhs. C-10 - C-13). CO Alston described the potential chemical hazards as causing skin irritation, dermatitis, eye irritation and skin burns (Tr. 58). Portland cement can cause severe skin irritation and caustic burns. It also has an allergic effect (Tr. 88). Sand can cause silicosis. It is also labeled as a Class 1 carcinogenic (Tr. 89). These products were frequently handled by the employee (Tr. 59).

Mr. Heffernan testified that he stressed the safe handling of the products and trained his nephew on the products. However, his program, even if considered adequate, was not written. A written hazard communication program is required under 29 C. F. R. § 1910.1200(e)(1).

A violation is established.

Item 1b: Alleged Violation of § 1910.1200(e)(1)(i)

The citation, in part, alleges that at the jobsite, "the employer did not have an inventory list that accurately reflected the chemicals/products that was being used in the various operations throughout the facility."

Section 1910.1200(e)(1)(i) provides:

A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas);

There is no dispute that Heff's did not have an inventory list for the products considered

hazardous chemicals used at the jobsite (Tr. 57, 129). Mr. Heffernan identified the products on the jobsite as Portland Cement, Solomon Colors Concentrated Mortar, and Miracle Morta-LOK Type “S” Masons Lime. He verbally identified the products to CO Alston and sent copies of their MSDS (Tr. 53-54). There was no written list of the hazardous chemicals as required by 29 C. F. R. § 1910.1200(e)(1)(i).

A violation is established.

Item 3: Alleged Violation of § 1926.501(b)(13)

The citation alleges, in part, that at the jobsite, “employee(s) engaged in tuckpointing operations form a roof over 13’ from the ground, was not provided a personal fall arrest system, exposing him to fall hazards.”

Section 1926.501(b)(13) provides:

Residential construction. Each employee engaged in residential construction activities 6 feet (1.8m) 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.

Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with § 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

There is no dispute that Heff’s jobsite involved a single family home. Heff’s chimney repair work was residential construction. Mr. Heffernan acknowledges his employee/nephew was on the roof, 11 feet above the ground level. The roof’s slope was approximately 10 in 12 (vertical to horizontal) which is considered a “steep roof.” *See* 29 C. F. R. § 1926.500(b) (*Definitions*).

The requirements of § 1926.501(b)(13) were not complied with in that there is no dispute the employee was not utilizing a personal fall arrest system and was not protected while sitting on the roof from a fall hazard by a guardrail system or safety net system (Exh. C-1; Tr. 35).

Heff's does not assert and the record fails to show that utilizing fall protective systems, such as a personal arrest system or guardrail system, were infeasible or presented a greater hazard. The standard presumes that conventional fall protection is feasible and not a greater hazard. CO Alston testified to observing the use of anchors on similar projects to tie off a personal arrest system (Tr. 37-38). The manufacturers represent their inexpensive anchors can be used on any sloped roof (Exhs. C-8, C-9). CO Alston also testified to the use of guardrails (Tr. 43).

Heff's has never used anchors or other fall protection on roofs at similar heights in the past. His objections to the feasibility of such protective systems lack foundation (Tr. 122-123). There is no showing that the homeowner on January Avenue was asked or would object to the use of anchors. Heff's argument that the chimney was higher than the roof's peak does not establish that the use of anchors presents a greater hazard. The employee's work on the side of the chimney was below the roof's peak.

Heff's claim that the nephew was not exposed to a hazard is rejected. A "hazard" is defined in terms of conditions deemed unsafe over which an employer can reasonably be expected to exercise control. *Morrisson-Knudson Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121-1122 (No. 88-572, 1993). "There is no requirement that there be a 'significant risk' of the hazard coming to fruition, only that if the hazardous event occurs, it would create a 'significant risk' to employees." *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993).

In this case, the employee was sitting on a steep roof, 11 feet above the ground. The standard presumes a hazard to employees on a steep roof above 6 feet, performing residential construction work such as removing bricks without utilizing fall protection. The employee was exposed to a fall hazard if he slipped off the roof. *Kokosing Construction Co.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996) (the test for determining whether an employee is exposed to a hazard is whether it is "reasonably predictable" the employee would be in the zone of danger created by a noncomplying condition).

Although the scaffold extended beyond the right side of the chimney, there is showing the scaffold would have prevented the employee's fall from the roof. OSHA's photographs shows the employee's body beyond edge of the scaffold. The employee's right foot (the inside leg in relation to the right side of the chimney) is placed on the scaffold's leg which would have placed his body

outside the scaffold's edge. There also appears to be a gap between the roof and the scaffold and the inside cross-braces on the scaffold had been removed (Exhs. C-6, C-7).

A violation of 29 C. F. R. § 1926.501(b)(13) is established.

Serious Classification

In order to establish that a violation is "serious," OSHA must show there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violation. Section 17(k) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. §666(k). "Substantial probability" is established if an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

The violations of § 1910.1200(e) and § 1910.1200(e)(1) (items 1a and 1b) are not properly classified as serious. Although Heff's lacked a written hazard communication program and an inventory list of the products considered hazardous chemicals, there is no showing the employee/nephew did not receive training or was exposed to hazardous chemicals at the jobsite. Mr. Heffernan testified that he performed all the brick work on the jobsite (Tr. 101). His employee/nephew performed the helper work (Tr. 117). Mr. Heffernan told OSHA that his nephew was aware of the hazards associated with the products used on site. He knew not to get the cement on his skin because of the potential for burns (Tr. 55). The employee/nephew was not shown to lack understanding of the hazards or failed to practice safe handling when mixing the products (Tr. 113-114). Mr. Heffernan testified that he trained his nephew on the hazardous chemicals and the proper precautions to avoid exposure. Also, the record shows Heff's kept copies of all the appropriate MSDSs at its office in St. Louis, Missouri. Mr. Heffernan knew the products at the jobsite.

Heff's failure was not having a hazardous communication program in writing and a product inventory list at the jobsite. The violations of § 1910.1200(e) and § 1910.1200(e)(1) (items 1a and 1b) are reclassified as other than serious.

The violation of § 1926.501(b)(13) (item 3) is properly classified as serious. The employee was exposed to a fall hazard of 11 feet. He was not protected from the fall hazard by any of the designated fall protection systems. CO Alston testified to a previous investigation where an employee

died from falling from a similar height without utilizing fall protection (Tr. 44). The OSHA Area Director also testified to similar fatality investigations (Tr. 86-88). Also, as discussed, there is no showing the scaffold would have prevented the employee from falling to the ground if he slipped. The cross braces against the chimney had been removed to gain access to the chimney (Tr. 66, 107-108). The testimony indicated the scaffold was not fully braced or planked (Tr. 90). The nephew was on a steep roof. If he had fallen to the ground, he would likely have been seriously injured or possibly died.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Review Commission is required to consider 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.

Heff's is entitled to credit for size with only one employee. As owner of a sole proprietorship, Mr. Heffernan is not considered an employee (Tr. 95). Heff's is also entitled to credit for history. According to OSHA, Heff's has not previously been inspected (Tr. 46, 51, 75). Heff's is given credit for good faith based on its basic safety program, although not written. Mr. Heffernan testified the company has never had a serious injury (Tr. 72, 127). Heff's only employee is family, the owner's nephew.

A grouped penalty of \$100.00 is reasonable for other than serious violations of § 1910.1200(e)(1) and § 1910.1200(e)(1)(i) (items 1a and 1b). Although Heff's failed to have a written hazard communication program and an inventory list of the hazardous chemicals used on the jobsite, there is no showing the employee was not trained in the safe handling of the products and did not understand the hazards associated with the products (Tr. 55). According to Mr. Heffernan, the employee/nephew was instructed to use a mask when mixing products and not use his hands (Tr. 72). The employee wore gloves (Tr. 73). Heff's also has a respirator and glasses to use when mixing cement (Tr. 114). Mr. Heffernan was readily able to identify the chemicals present on the jobsite and provide OSHA copies of all relevant MSDSs.

A penalty of \$800.00 is reasonable for violation of § 1926.501(b)(13). One employee, the owner's nephew, was not utilizing a personal fall arrest system. He was exposed to a fall of 11 feet

to the ground. A scaffold was installed in the front of the chimney to perform most of the repair work. The employee's exposure was estimated to be few minutes (Tr. 22).⁵ While sitting on the roof, the employee placed his right foot against the scaffold's leg for support (Tr. 109). Although not preventing a fall, the scaffold leg or back rail could stop a fall if the employee was able to grab it (Tr. 109).

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. Items 1a and 1b of Citation no. 1, alleging serious violations of 29 C.F.R. § 1910.1200(e)(1) and § 1910.1200(e)(1), are affirmed and a grouped penalty of \$100.00 is assessed.
2. Item 2 of Citation no. 1, alleging a serious violation of 29 C.F.R. § 1926.100(a), was withdrawn by the Secretary.
3. Item 3 of Citation no. 1, alleging a serious violation of § 1926.501(b)(13), is affirmed and a penalty of \$800.00 is assessed.

Date: January 24, 2011

/s/
KEN S. WELSCH
Judge

⁵Although the employees' exposure may have been comparatively brief, it is sufficient to support the finding of a violation. *Walker Towing Corp.*, 14 BNA OSHC 2072 (No. 87-1359, 1991).