



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
721 19<sup>th</sup> Street, Room 407  
Denver, CO 80202-2517

SECRETARY OF LABOR,

Complainant,

v.

WEATHERGUARD CONSTRUCTION CO.,  
INC.,

Respondent.

Docket No. 10-2061

**APPEARANCES:**

Oscar L. Hampton, III, Esquire, U.S. Department of Labor, Office of the Solicitor  
Kansas City, Missouri  
For the Complainant.

Matthew Sutton MacDonald, Vice-President  
Stillwater, Minnesota  
For the Respondent, *pro se*.

BEFORE: James R. Rucker, Jr.  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, Weatherguard Construction Company, Inc. ("Respondent" or "Weatherguard"), on June 4, 2010. The site was located in Thornton, Colorado. The inspection resulted in Respondent being issued one two-item serious citation. Respondent contested the citation and the proposed penalties. After being docketed with the Commission, this matter was designated for

Simplified Proceedings, pursuant to Subpart M of the Commission's Rules of Procedure, 29 C.F.R. § 2200.200 *et seq.* The hearing in this matter was held in Denver, Colorado, on June 7, 2011. No post-hearing filings have been submitted.

### *The OSHA Inspection*

The Denver OSHA office received a complaint about the work site on the morning of June 4, 2010. OSHA Compliance Officer ("CO") Patrick O'Dea went to the site that same morning, and another CO, Brian Oberbeck, accompanied him. As they neared the intersection where they needed to turn to reach the site, the COs saw a pickup truck stopped at a stop sign at that intersection.<sup>1</sup> The person sitting in the truck appeared to be reading or doing paperwork. The truck had a company logo on its side that read "Weatherguard." The COs continued on to the job site, which was in a residential area, where they observed several workers on the roof of a house. They parked their vehicle and began videotaping the workers on the roof. (Tr. 7-17, 50-51).

CX-2 through CX-4 are photographs from the videotape the OSHA COs took.<sup>2</sup> CX-2 shows a worker on the roof who appears to be very close to the roof's edge. CX-3 is another view of the same worker with his back to the edge of the roof. CX-4 depicts three workers on the roof. Two are standing on a sloped portion of the roof, and one is standing on a higher, flat part of the roof. All three appear to be very close to the roof's edge. At the hearing, CO O'Dea testified that none of the workers on the roof wore any fall protection. He further testified that all of the workers were exposed to falls of over 6 feet. The CO said that during the inspection, he measured the height of the ladder shown in CX-4; CX-4 depicts the top of the ladder up against the edge of the roof.<sup>3</sup> The CO noted that the ladder, which he measured to be 9 feet 3 inches long, went from the driveway up to the front eave over the garage. He also noted that no parts of the roof were lower than where the ladder was. (Tr. 17-20, 56-57, 65-68).

After videotaping the employees on the roof, the COs walked to the site and met with Cecilio Mendosa-Ramos. Mendosa-Ramos said he was the lead worker for Leo

---

<sup>1</sup> The address of the site was 4101 East 106<sup>th</sup> Court in Thornton, Colorado. CX-1 is an aerial view of that area which CO O'Dea obtained from "bing.com/maps." The CO drew a line on CX-1 to show the route he and the other CO took to reach the site. The job site is indicated on CX-1 with an orange dot. (Tr. 11-16).

<sup>2</sup> CO O'Dea testified that he and the other CO arrived at the site at about 9:22 a.m. CX-2 through CX-4 indicate that the site was videotaped from 9:22 a.m. to 9:27 a.m.

<sup>3</sup> "The CO" will hereafter refer to Patrick O'Dea, who headed up the inspection. (Tr. 9-11, 100-02).

Roofing, which was owned by Leo Ramirez. CO O'Dea asked Mendosa-Ramos to put him in contact with Ramirez, and Mendosa-Ramos called Ramirez. CO O'Dea spoke to Ramirez about the inspection, and Ramirez told him that Weatherguard was the general contractor. The CO then asked for a representative of Weatherguard to come to the site, and Mendosa-Ramos called Tom Ponath, who arrived shortly. When Ponath arrived, the CO noted he was driving a light-colored truck with "Weatherguard" on the side. Ponath told the CO that he was the person the COs had seen 20 to 30 minutes earlier when they were on the way to the site. Ponath also told the CO that he was a field supervisor for Weatherguard.<sup>4</sup> When the CO asked if he recognized that the workers on the roof were not wearing fall protection and were unprotected from falls, Ponath said "yes." Ponath went on to say that he was well aware that the workers were not wearing fall protection, that Weatherguard had used the same subcontractor on a recent job, and that nobody on that job had worn fall protection either. Ponath stated that he had been at the site earlier that morning, just before the COs arrived, and that the employees had been working on the roof then. He also stated that when he had been there earlier, he had told Mendosa-Ramos to remove a defective ladder from the site. Mendosa-Ramos verified the ladder belonged to Leo Roofing. The ladder, however, was still being used when the COs videotaped the site. (Tr. 21-42, 45, 61-64, 70-73).

#### **Jurisdiction**

The record shows that Weatherguard is an employer with employees and that at least one of its employees was overseeing the roofing work of its subcontractor at the subject work site. (Tr. 44-48). The Commission has long held that construction work *per se* affects interstate commerce because there is an interstate market in construction materials and services. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). I find that Weatherguard is an employer with employees under the Act and that the Commission has jurisdiction of the parties and subject matter of this proceeding.

#### **Whether Respondent was the Controlling Employer at the Site**

Both of the citation items in this case allege that Weatherguard was the controlling employer at the site. Under the multi-employer work site doctrine, an employer "is responsible for violations of other employers where it could reasonably be

---

<sup>4</sup> Mendosa-Ramos also indicated that Ponath was the field supervisor for the work done at the site. (Tr. 32).

expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.” *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994). The Secretary contends that, based on CO O’Dea’s testimony, she has shown Weatherguard was the controlling employer at the site. Respondent contends that the Secretary has not shown it was the controlling employer. (Tr. 103-10).

CO O’Dea’s testimony is summarized above. According to his testimony, the CO asked Mendosa-Ramos, the lead worker for Leo Roofing, to put him in contact with Leo Ramirez, the owner of Leo Roofing. (Tr. 21-22, 34, 71-72). When the CO spoke to him, Ramirez stated that Weatherguard was the general contractor. (Tr. 22, 31). And when the CO asked for a representative of Weatherguard, Mendosa-Ramos called Tom Ponath. (Tr. 22-23, 31-32, 39-40, 72-73). After arriving, Ponath told the CO that he was a field supervisor for Weatherguard and that he had supervisory responsibilities in regard to the work site. He also told the CO he had been at the site earlier that day and had seen the workers up on the roof.<sup>5</sup> (Tr. 24-25, 28, 31-33, 38-41, 45). Ponath informed the CO that he was well aware that the workers on the roof were not wearing fall protection, that Weatherguard had used the same subcontractor on a recent job, and that no one on that job had worn fall protection either. (Tr. 33, 44). Ponath further informed the CO that when he had been there earlier that day, he had told Mendosa-Ramos to remove a defective ladder from the site. (Tr. 28, 34, 38-39, 61-64). Mendosa-Ramos verified that the ladder belonged to Leo Roofing. (Tr. 34). Mendosa-Ramos also indicated to the CO that Ponath was the field supervisor for the work being done at the site. (Tr. 32).

Brian Oberbeck, the CO who accompanied CO O’Dea, testified that he was there when CO O’Dea interviewed Ponath. CO Oberbeck recalled Ponath stating that he was employed by Weatherguard, but he did not recall Ponath stating he was a field supervisor. CO Oberbeck noted, however, that CO O’Dea was the person who was “leading the questioning” during the inspection. (Tr. 100-02).

---

<sup>5</sup> Respondent objected to the CO testifying about what Ponath told him, claiming that it was hearsay. As the Secretary indicated, however, statements of an opponent made by the party’s agent or employee on a matter within the scope of that relationship and while it existed are not hearsay, under Federal Rule of Evidence (“FRE”) 801(d)(2)(D). The statements Ponath made to the CO were admitted. (Tr. 24-34). *See also Regina Constr. Co.*, 15 BNA OSHC 1044, 1047-48 (No. 87-1309, 1991) (holding that statements meeting the requirements of FRE 801(d)(2)(D) are admissible and that the weight given to such statements depends upon factors such as the reliability of the CO and the trustworthiness of the statements made to the CO).

After careful consideration of the record, I conclude that the testimony of CO O'Dea establishes that Weatherguard was the general contractor at the work site. His testimony also establishes that Ponath was a field supervisor for Weatherguard and that Ponath had supervisory responsibilities with respect to the work being done at the site. Despite CO Oberbeck's testimony that he did not recall Ponath stating that he was a field supervisor, he said that CO O'Dea was leading the questioning at the site. (Tr. 101-02). And O'Dea indicated that he was the CO who had headed up the inspection, in that he had asked for the assignment, and that Oberbeck was the accompanying CO. (Tr. 9-11). CO O'Dea also referred to his field notes from the inspection at the hearing, and at one point he testified that his notes reflected Ponath's statement that he was a field supervisor for Weatherguard. (Tr. 34-35, 38). CO O'Dea further testified that, on the basis of his understanding of the situation, the Leo Roofing employees believed Ponath had control over their work site and Ponath believed he could instruct those employees and they would follow his instructions regarding safety matters. (Tr. 69). Finally, I observed the demeanor of CO O'Dea as he testified. I found him to be a credible and convincing witness.<sup>6</sup> I thus credit his testimony and find that it shows that Weatherguard was the general contractor, and the controlling employer, at the site.

At the hearing, Respondent asserted that the Secretary had not shown that Weatherguard was the controlling employer at the site. (Tr. 103-10). I agree with the Secretary's counsel that the Secretary presented sufficient evidence to meet her burden in that regard. I also agree that, after the Secretary presented her case, it was incumbent upon Respondent to present evidence to rebut the Secretary's evidence. (Tr. 104-09). Respondent, however, declined to present any evidence in this matter. (Tr. 103-04). For that reason, and based on the record as a whole, I conclude that Weatherguard was the controlling employer at the work site.

#### **The Secretary's Burden of Proof**

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) its terms were not met; (3) employees had access to the violative condition; and (4) the employer either knew, or could have known with the

---

<sup>6</sup> I also found the statements Ramirez and Ponath gave to the CO trustworthy. *See Regina Constr., supra.*

exercise of reasonable diligence, of the violative condition. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

**Serious Citation 1, Item 1**

This item alleges a violation of 29 C.F.R. 1926.20(b)(2), which states:

Such [safety and health] programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

The citation describes the violation as follows:

On or before 6/4/10, the controlling employer did not ensure a safety program was developed and implemented for the work environment to include regular inspections of the job-site, materials, and equipment; conducted by a competent person. Approximately seven subcontractor employees were installing tar paper on a two story home without the use of a fall protection system. This condition exposed the subcontractor employees to fall hazards of up to 20 feet.

CO O'Dea testified that he determined that Weatherguard did not ensure that a safety program was developed and implemented for the work site. His determination was based on the fact that he asked Leo Ramirez for his company's safety program and never received one. He did not know if Weatherguard had a safety program for the site, and Ponath did not produce a safety program for his company at any time. (Tr. 43-44, 65, 71).

As I read the standard, it requires the cited employer to have a safety program providing for frequent and regular inspections of the job site, materials, and equipment to be made by a competent person designated by the employer. Here, the CO asked Leo Roofing for its safety program and never received one. There was no evidence he asked Ponath for such a program, but, in any case, Ponath never produced one. Weatherguard, as noted above, chose to not provide any evidence in this matter. In my view, without at least some testimony from an individual from Weatherguard with knowledge to speak about the company's safety program, the Secretary cannot meet her burden of showing the alleged violation. For this reason, Item 1 of the citation is VACATED.

**Serious Citation 1, Item 2**

This item alleges a violation of 29 C.F.R. 1926.501(b)(13), which states, in relevant part, that:

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 unless another provision in paragraph (b) of this section provides for an alternative fall protection measure.

The citation describes the alleged violation as follows:

On or before 6/4/10, the controlling employer did not ensure that each subcontractor employee engaged in residential construction activities 6 feet or more above lower levels was protected by guardrail systems, safety net systems, personal fall arrest systems or alternative fall protection measures. Approximately seven subcontractor employees were installing tar paper on a two story home without the use of a fall protection system. This condition exposed the subcontractor employees to fall hazards of up to 20 feet.

The testimony of CO O'Dea, together with photographs CX-2 through CX-4, establishes that employees of Leo Roofing were working up on the roof of a residence without any fall protection. The CO specifically testified that he measured the height of the ladder (the top of which is shown up against the edge of the roof in CX-4) to be 9 feet 3 inches long; he noted that the ladder went from the driveway up to the front eave over the garage. The CO further testified that no parts of the roof were lower than where the ladder was and that all the employees were over 6 feet above the ground. He estimated the employees in CX-4 were close to 20 feet from the ground. (Tr. 17-20, 56-57, 65-68).

Based on the foregoing, the Secretary has shown that the standard applies, that its terms were not met, and that employees were exposed to the violative condition. She has also shown that Weatherguard, the controlling employer at the site, had knowledge of the condition. Ponath, the field supervisor for Weatherguard who had safety responsibilities at the site, told the CO he had been at the site earlier that day and had seen the employees working on the roof. He also told the CO that he was well aware that the employees were not wearing fall protection, that Weatherguard had used Leo Roofing on a recent job, and that no one on that job had worn fall protection either. (Tr. 28, 31-34, 38-41, 45). The CO testified that Ponath did not tell the employees to use fall protection. (Tr. 46). The Secretary has met her burden of proving the alleged violation.

This item has been classified as a serious violation. A violation is properly classified as serious "if there is a substantial probability that death or serious physical harm could result from a condition which exists" at a place of employment. *See* section 17(k) of the Act. CO O'Dea testified that the violation was serious because a fall of 20

feet or more to the ground could result in serious injury or death. (Tr. 47). This item is AFFIRMED as serious.

The Secretary has proposed a penalty of \$750.00 for this item. In assessing penalties, the Commission is required to give due consideration to the gravity of the violation and to the employer's size, history and good faith. See section 17(j) of the Act. The CO testified that a 60 percent reduction was applied to the gravity-based penalty, due to the employer's small size, and that a 10 percent reduction was also applied, due to the lack of history of previous violations. The resulting proposed penalty was \$750.00. (Tr. 47-48). I find the proposed penalty appropriate. A penalty of \$750.00 is assessed.

**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.20(b)(2), is VACATED.

2. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.501(b)(13), is AFFIRMED, and a penalty of \$750.00 is assessed.

/s/

James R. Rucker, Jr.  
Judge, OSHRC

Dated: February 2, 2012  
Denver, Colorado