

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.

Southern Solar Systems, Inc.,

Respondent.

OSHRC Docket No. **11-0308**

Appearances:

Jennifer Booth, U. S. Department of Labor, Office of the Solicitor, Nashville, Tennessee  
For Complainant

Larry J. Bradford, *Pro Se*, Huntsville, AL  
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

**DECISION AND ORDER**

Southern Solar Systems, Inc. (Southern Solar), designs and installs solar electric systems. Southern Solar was working at a construction site at 5576 Grove Boulevard, Hoover, Alabama, on December 29, 2010, when Occupational Safety and Health Administration (OSHA) Compliance Officer Jennifer McWilliams initiated an inspection of the construction site. As a result of McWilliams's inspection, on January 7, 2011, the Secretary issued a citation to Southern Solar alleging one serious two-item grouped violation of the Occupational Safety and Health Act of 1970 (Act).<sup>1</sup> Southern Solar denies that it violated the cited standards and contests the citation and proposed penalty. This case was designated for the Commission's Simplified Proceedings.

For the reasons that follow, Citation 1, items 1a and 1b are vacated.

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<sup>1</sup> The Citation and Notification of Penalty issued on January 7, 2011, was amended at the hearing to reflect the correct inspection date in this case as December 29, 2010. Due to a typographical error, an incorrect date was placed on the first page of the Citation and Notification of Penalty (Tr. 69).

## **Jurisdiction**

At the hearing, the parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. The parties also stipulated at the hearing that at all times relevant to this action, Southern Solar 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. 9).

## **Background**

Southern Solar was one of several contractors on a jobsite located at 5576 Grove Boulevard in Hoover, Alabama, where a BBA Compass Bank building was being constructed (Tr. 16). Southern Solar was installing a solar panel system on the roof of the building under construction (Tr. 92). Compliance Officer Jennifer McWilliams initiated an inspection at the jobsite after observing from the road an aerial lift on the jobsite, as she was driving by. Pursuant to OSHA's fall protection emphasis program, McWilliams initiated an inspection to determine whether proper fall protection was being utilized (Tr. 16-17).<sup>2</sup> While on site, McWilliams observed a ladder going to the upper roof and employees working on the roof. She determined the ladder did not meet OSHA's requirements (Tr. 17). The ladder she observed was a step ladder which did not extend 3 feet above the upper landing surface. McWilliams determined the top of the parapet wall was the upper landing surface because it was the first surface that an employee touches when coming off the ladder (Tr. 21, 24-25). An employee who used the step ladder for egress from the roof was exposed to a fall hazard of approximately 12 feet (Tr. 33, 36). The employee using the step ladder at the time of the inspection was Blake Bradford, an employee of Southern Solar (Tr. 82). Southern Solar's lead man, Doug Stevenson, also was observed by McWilliams using an extension ladder which extended at least 3 feet above the upper landing surface (Tr. 22). Stevenson informed McWilliams that he was the competent person on the jobsite (Tr. 97). As a result of her inspection, McWilliams proposed the issuance of a citation for a violation of § 1926.1053(b)(1) for improper use of a ladder on the jobsite.

After the onsite inspection, McWilliams followed up with Southern Solar and spoke with Chris Shearburn about Southern Solar's safety programs relating to portable ladders (Tr. 45).

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<sup>2</sup> The aerial lift observed by McWilliams was associated with another employer on the site and did not involve Southern Solar.

Shearburn asked to have until January 3, 2011, to produce the requested information (Tr. 46). Southern Solar's safety and health manual and available training documentation were e-mailed to McWilliams on January 4, 2011, by John Conger (Tr. 46-47). Conger informed McWilliams that Southern Solar did not have a training program specific to its company and that the information provided to McWilliams was all the information Southern Solar had regarding training (Tr. 47-48). The documents provided included the front page cover of four different pamphlets on fall protection and ladder safety training (Tr. 47). McWilliams determined the information provided was insufficient and proposed the issuance of a citation alleging a violation of § 1926.1060(a) (Tr. 48). As a result of McWilliams's inspection, the Secretary issued the citation that gave rise to the instant case.

### **The Citation**

The Secretary alleges that Southern Solar violated OSHA's standards relating to ladders. 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) there was noncompliance with its terms; (3) employees had access to the violative conditions; and (4) the cited employer had actual or constructive knowledge of those conditions. *Southwestern Bell Telephone Co.*, 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

#### **Item 1a: Alleged Serious Violation of § 1926.1053(b)(1)**

The Secretary cited Southern Solar for a serious violation of § 1926.1053(b)(1), alleging that portable ladders used to access an upper landing surface did not extend at least 3 feet above the upper landing surface. It is the Secretary's burden to establish whether the cited standard applies in this case. Southern Solar was cited for violating a standard involving stairways and ladders. The citation addresses the protection of employees using a portable ladder on the jobsite. Southern Solar was onsite to install a solar panel system on the roof of the building under construction (Tr. 92). Activity at the jobsite involved the construction of a bank building. The standard applies to the work performed by Southern Solar at the jobsite.

The Secretary also must prove there was noncompliance with the terms of cited standard, § 1926.1053(b)(1), which provides:

(b) *Use.* The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:

(1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

The citation alleges in item 1a that “[o]n or about 12/29/2010- at 5576 Grove Boulevard, Hoover, AL, the portable ladder used to access the top roof level did not extend at least 3 feet above the upper landing surface” (Citation and Notification of Penalty). Both the testimony of McWilliams and the photographs admitted into evidence show that the step ladder used to gain access did not extend at least 3 feet above the upper landing surface (Tr. 24; Exhs. C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8). Owner Bradford admitted the step ladder did not extend 3 feet above the parapet wall (Tr. 96). Further, McWilliams testified that the ladder was not secured in any way that she could see (Tr. 41-42 ). This testimony was uncontroverted. Southern Solar contends that the step ladder extended at least 3 feet above the area being accessed, which Southern Solar asserts was the top of the upper roof, not the top of the parapet wall (Tr. 87). Southern Solar also argues that a step ladder was the safest method of accessing the roof (Respondent’s Brief, p. 1). The regulation provides that “the ladder side rails shall extend at least 3 feet (.9m) above the upper landing surface to which the ladder is used to gain access” (§ 1926.1053(b)(1)). The photographs show a Southern Solar employee using the top of the parapet wall as a landing surface (Exhs. C-6, C-7). Accordingly, the undersigned finds the Secretary has established that Southern Solar violated the specific terms of the standard.

As an element of the Secretary’s burden of proof, the record must show that employees were exposed or had access to the violative condition. *Walker Towing Corp.*, 14 BNA OSHC 2072 (No. 87-1359, 1991). Owner Bradford testified that Southern Solar had two employees on the site, Doug Stevenson and Blake Bradford (Tr. 82). Owner Bradford was not at the site during the inspection (Tr. 44). Owner Bradford testified that Blake Bradford was the employee photographed accessing the roof via the step ladder (Tr. 83). Employee Bradford was photographed by

McWilliams utilizing the step ladder for egress (Exhs. C-6, C-7). Accordingly, the Secretary has met her burden of establishing exposure or access to the violative condition.

The Secretary also must establish actual or constructive knowledge of the violative conditions by Southern Solar in order to prove a violation of the standard. 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 testimony reveals that Stevenson was the leadman on the jobsite (Tr. 22). As such, his knowledge can be imputed to Southern Solar. 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).

Here, the Secretary has failed to establish Southern Solar 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. Although it has been established that Stevenson was one of two employees of Southern Solar at the jobsite and that he was the leadman on site for Southern Solar, there is no evidence that Stevenson knew that the step ladder was being used to access the upper roof or that it failed to extend at least 3 feet above the upper landing surface. There is no evidence that Stevenson was in proximity to the step ladder or ever saw the ladder in place to know that it was being used improperly. The photographs admitted into evidence show Stevenson working on the ground level of the building with an extension ladder (Exhs. C-1, C-5). The cited step ladder was on the lower roof level and extended up to the upper roof level (Exhs. C-1, C-2, C-3, C-4, C-5). The testimony elicited at the hearing only shows that Stevenson was aware, in general, that ladders must extend at least 3 feet above the upper landing surface. Actual knowledge has not been 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. The only evidence elicited at the hearing regarding Stevenson was that he was on the jobsite, that he was the leadman, that he was a competent person, and that he was aware of the requirement of the standard. The undersigned determines that this alone is insufficient to establish constructive knowledge. The Secretary has not shown actual or constructive knowledge of the cited condition. Accordingly, the Secretary has not met her burden of establishing a violation of the cited standard. Therefore, the citation alleging a violation of § 1926.1053(b)(1) is vacated.

**Item 1b: Alleged Serious Violation of § 1926.1060(a)**

Southern Solar was issued a citation for a violation of §1926.1060(a) which provides:

The employer shall provide a training program for each employee using ladders and stairways, as necessary. The program shall enable each employee to recognize hazards related to ladders and stairways, and shall train each employee in the procedures to be followed to minimize these hazards.

Specifically, the Secretary cited Southern Solar for a serious violation of § 1926.1060(a), alleging that “[o]n or about 01/04/11- at 5576 Grove Boulevard, Hoover, AL, the employee using the portable ladder to access the upper roof level had not been trained on the proper use of ladders” (Citation and Notification of Penalty). McWilliams spoke with Chris Shearburn of Southern Solar regarding any safety programs the company may have had in place regarding portable ladders (Tr. 45-46). Shearburn requested additional time to provide the requested documents (Tr. 46). The documents were provided on January 4, 2011 (Tr. 48). McWilliams determined that the documents were insufficient and asked for additional information that showed the training had taken place (Tr. 48). Conger of Southern Solar informed her that there were no additional documents and that what had been provided was all they had (Tr. 48). Because Southern Solar failed to produce additional documents showing the training had occurred, McWilliams determined a citation for a violation of § 1926.1060(a) was appropriate. The undersigned finds that the request for records is insufficient to establish that Southern Solar did not have a training program for its employees as required by the standard. There was no testimony that the Secretary ever asked anyone associated with Southern Solar whether they had trained the employees.

Southern Solar contends it provided informal training to its employees (Tr. 88). Owner Bradford testified that employee Blake Bradford was trained extensively and was provided specific ladder regulations and directions for him and for others to look at immediately, and every detail about ladders was verbally explained to him in case he did not understand (Tr. 88). Further, owner Bradford testified that while he could not quote the instructions given to employee Bradford, Southern Solar provided routine safety discussions and talks regarding safety on the roof and how you get on the roof. He admitted these talks were not documented (Tr. 98-99).

The standard cited here does not require the safety program to be in writing. The only evidence adduced at the hearing from the Secretary regarding the ladder training program was that Southern Solar produced no documentation establishing training. This alone falls short of establishing the terms of the standard were violated. Accordingly, the Secretary has not met her burden of establishing a violation of the cited standard. Therefore, the citation alleging a violation of § 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:

Citation 1, Items 1a and 1b, alleging violations of §§ 1926.1053(b)(1) and 1926.1060(a), respectively, is vacated.

SO ORDERED.

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/s/ Sharon D. Calhoun  
**SHARON D. CALHOUN**  
Judge

Date: June 20, 2011  
Atlanta, Georgia