



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building – Room 2R90, 100 Alabama Street, S.W.  
Atlanta, Georgia 30303-3104

Secretary of Labor,  
Complainant  
v.  
Know Thyself Contracting<sup>1</sup>,  
Respondent.

OSHRC Docket No. **12-0488**  
Simplified Proceedings

Appearances:

Lydia Jones Chastain, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia  
For Complainant

Dion Hollings, owner, *pro se*, Know Thyself Contracting, Mobile, Alabama  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

Know Thyself Contracting (KTC) is a general construction contractor for commercial and residential projects in Mobile, Alabama. On December 23, 2011, a compliance officer with the Occupation Safety and Health Administration (OSHA) observed employees, without fall protection, installing decking at an unprotected edge on the top floor of a new townhome/apartment complex. As a result of the OSHA inspection, KTC received a serious citation on January 30, 2012. KTC timely contested the citation.

The serious citation alleges KTC violated 29 C.F.R. § 1926.501(b)(13) (item 1) by failing to provide fall protection to employees engaged in residential construction and 29 C.F.R. § 1926.503(a)(1) (item 2) by failing to provide a training program to each employee exposed to a fall hazard. The citation proposes a penalty of \$ 4,200.00 for each alleged violation.

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<sup>1</sup>The correct name of the employer is amended from “Know Thyself Consulting” to “Know Thyself Contracting” in the citation and all pleadings (Tr. 227-228).

The hearing, pursuant to the Commission's Simplified Proceedings rules at 29 C.F.R § 2200.200 *et. Seq.*, was held on May 10, 2012, in Mobile, Alabama. KTC is represented *pro se* by its owner, Dion Hollings. The Secretary's counsel filed a post hearing brief on June 11, 2012.

KTC does not dispute the alleged violations. KTC denies coverage and asserts that it was not an employer at the townhome complex. KTC claims that Mr. Hollings was hired to oversee the work of the framing contractor's employees.

For the reasons discussed, KTC is the properly cited employer and the alleged violations are affirmed. A total penalty of \$ 4,500.00 is assessed.

### ***The Inspection***

KTC, a sole proprietorship owned by Dion Hollings, performs all types of construction tasks including installing roofs, decking, sheetrock and tile on commercial and residential construction projects in Mobile, Alabama. KTC has been in business for 10 years. The company employs seven employees who Mr. Hollings refers to as "independent contractors" (Tr. 10, 229, 240, 242).

On December 22, 2011, an OSHA compliance officer, pursuant to a local emphasis referral on fall hazards, attempted to inspect a townhome/apartment complex under construction in Mobile, Alabama (Exh. C-9; Tr. 34, 39, 63, 167). When he arrived at the complex, he observed employees installing trusses and decking on the top floor of a building without utilizing a fall protection system. However, because of a tornado warning in the area, he left the site (Tr. 35, 168).

The compliance officer returned to the complex on December 23, 2011 at approximately 8:15 a.m. (Tr. 60). As he approached the site, he observed and photographed two crews of employees on top of two buildings (Building 1 and Building 2) installing plywood decking over trusses (Exhs. C-3 through C-6; Tr. 52). A crew of five employees was working on Building 1 (Tr. 100). He saw the employees working within one foot of the unprotected edge; exposed to a fall hazard. The employees were not utilizing any system of fall protection (Tr. 51-53, 55, 75, 115-116).

After entering the worksite, the compliance officer met with the superintendent for the general contractor (Tr. 62-63). He asked and received a list of the contractors working at the complex (Exh. C-8; Tr. 64-65). The list identified KTC and another contractor as subcontractors

of the framing contractor (Tr. 66). The supervisor for the framing contractor also identified KTC and the other contractor as its subcontractors for the installation of trusses and decking.

The compliance officer concluded that the five employees observed on Building 1 were employed by KTC and the four employees on Building 2 were employed by the other subcontractor (Exh. C-2; Tr. 100). After being informed of the OSHA inspection, Mr. Hollings removed the employees from the top of Building 1 (Tr. 78). The height of Building 1 where the employees were laying decking was 24 feet above the ground, as measured by the compliance officer (Tr. 75-76). Before leaving the project, the compliance officer obtained written interview statements from Mr. Hollings and three of the employees working on top of Building 1 (Exhs. C-12, C-13, C14; Tr. 80-81).

### **Joint Stipulations**

The parties submitted the following stipulations of fact at the hearing (Exh. J-1):

1. Respondent is an unincorporated sole proprietorship owned by Dion Hollings.
2. Respondent's principal place of business is in Mobile, Alabama.
3. The worksite at issue in this case is located at 5089 Government Blvd, Mobile Alabama (the "worksite").
4. On December 23, 2011, Dennis Branum, Jason Fortenberry, and Jimmy Shirley (hereinafter "the Crew") were framers performing construction services covered by Section 1926 of the Act at the worksite.
5. Mr. Hollings claims that he was employed by American Framing as a foreman on the worksite, responsible for supervising the Crew.
6. The Secretary contends that Mr. Hollings was a subcontractor to American Framing, and that the Crew was employed by Mr. Hollings.
7. It is uncontested that on December 23, 2011, Dion Hollings was at the worksite supervising the work of the Crew.
8. On December 23, 2011, the Crew was engaged in residential construction activities 6 feet or more above the lower levels.
9. On December 23, 2011, at Building 1 of the work site, the Crew was installing decking on floor joists and sheaths that were 24 feet in height without the use of fall protection.
10. On December 23, 2011, at Building 1 of the work site, the Crew was working on the edge installing floor joists and sheaths that were 24 feet in height without the use of fall protection.
11. On December 23, 2011, while working on Buildings 1 and 2, the three members of

the Crew were exposed to a 24-foot fall hazard.

12. On December 23, 2011, Mr. Hollings was aware that the Crew was engaged in residential construction activities 6 feet or more above lower levels with being protected by fall protection.
13. Mr. Hollings did not provide a training program to the Crew which would enable the Crew to recognize the hazards of falling and to train each employee in the procedure to be followed in order to minimize these hazards.
14. On December 23, 2011, Mr. Hollings was aware that he had not provided a training program to the Crew which would enable the Crew to recognize the hazards of falling and to train each employee in the procedures to be followed in order to minimize these hazards.

As a result of the OSHA inspection, KTC was issued the serious citation at issue on January 30, 2012.<sup>2</sup>

## **DISCUSSION**

### **KTC's Business Affects Commerce**

The Occupational Safety and Health Act (Act) applies to an employer engaged in a business affecting commerce. 29 USC § 652(5). “Accordingly, an employer comes under the aegis of the OSH Act by merely affecting commerce; it is not necessary that the employer be engaged directly in interstate commerce.” *Austin Road Co. v. OSHRC*, 683 F.2d. 905, 907 (5<sup>th</sup> Cir. 1982). The Secretary bears the burden to show that the employer’s activities affect commerce. However, the Secretary’s burden is considered as “modest, if indeed not light.” *Id* at 907.

KTC performs general construction activities including installing roofing, decking, sheetrock, and tile which sufficiently affect commerce. Commission precedent has long held that construction work necessarily is covered by the Act. *Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529 (No. 77-3676, 1983) (construction work affects interstate commerce because there is an interstate market in construction materials and services). The nature of KTC’s construction projects is that contractors and equipment move in interstate commerce and affect commerce.

The tools and equipment used by KTC such as a “T-rex” were not manufactured in State of Alabama (Tr. 214-215). The framing contractor who allegedly contracted KTC is a Georgia

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<sup>2</sup>The general contractor and the other subcontractor also received citations (Tr. 112-113).

corporation with its principal office in Dacula, Georgia (Exh. C-8; Tr. 217). Also, Mr. Hollings drives a Chevrolet Tahoe as a business vehicle, which according to the Secretary, was assembled outside the State of Alabama (Secretary's Brief, p.17; Tr. 209-210).

The record, therefore, establishes that KTC is in a business that affects commerce and is covered by the Act.

### ***The Alleged Violations***

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, (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).

Based on the record and joint stipulations, KTC does not dispute that the cited standards, § 1926.501(b)(13) and § 1926.503(a)(1), applied to the construction work performed at the townhome/apartment complex; that the standards cited were violated as alleged in the OSHA citation; that the employees on Building 1 were exposed to a fall hazard of 24 feet without fall protection; and that Mr. Hollings knew or should have known of the violative conditions.

### **SERIOUS CITATION NO. 1**

#### **Item 1 - Alleged Serious Violation of § 1926.501(b)(13)**

The citation alleges that "(a) Bldg 1 – Woodside Apartments 5089 Government Blvd Mobile, AL: On or about December 23, 2011 and at times prior thereto, the employer exposed his employees to a fall hazards in that employees were allowed to work on floor joists and sheaths that were 24 ft. in height while working installing decking without the use of fall protection, such as but not limited to, personal fall arrest or guardrail systems, and safety nets." and "(b) Bldg 1 – Woodside Apartments 5089 Government Blvd Mobile, AL: On or about December 23, 2011 and at times prior thereto, the employer exposed his employees to a 23 ft. fall hazard while working on the edge installing floor joists and sheaths without the use of fall protection, such as but not limited, to personal fall arrest or guardrail systems, and safety nets."

Section 1926.501(b)(13) provides:

*Residential construction.* Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrails

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. 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.

As stipulated by the parties, the deck installation work performed at the townhome complex on December 23, 2011 was residential construction within the meaning of the standard. The townhomes/apartments are residence for families and individuals (Tr. 39). There is no dispute that the employees working on the top floor of Building 1, within one foot of the unprotected edge, were exposed to a fall hazard of 24 feet. Mr. Hollings was present at the site and was in a position that he knew or should have known the employees were exposed to a fall hazard and were not utilizing any means of fall protection (Tr. 79).

A violation of § 1926.501(b)(13) is established.

**Item 2 - Alleged Serious Violation of § 1926.503(a)(1)**

The citation alleges that at “Woodside Apartments 5089 Government Blvd Mobile, AL: On or about December 23, 2011 and at times prior thereto, the employer exposed his employees to workplace hazards in that the employer failed to instruct his employees in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to fall protection to control or eliminate any hazard(s) or other exposure to illness or injury.”

Section 1926.503(a)(1) provides:

*Training Program.* (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

There is no dispute that each employee on Building 1 had not received training by KTC in the recognition and avoidance of fall hazards on the project. The employees were exposed to a fall hazard of 24 feet. Mr. Hollings knew the employees were not properly trained.

The violation of § 1926.503(a)(1) is established.

### **KTC Was the Employer**

Section 3(4) of the Act defines “employer” as a person who is “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.” Only an employer may be cited for a violation of the Act. *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992). KTC acknowledges that it employs 7 employees. As evidence, it produced a certificate of liability insurance and bank account documents in KTC’s name (Exhs. R-1, R-2).

KTC argues that it was not an employer at the townhome complex. KTC claims that Mr. Hollings was hired as a consultant by the framing contractor to supervise the contractor’s employees (Tr. 204). Mr. Hollings produced a check from the framing contractor to “Dion Hollins” dated December 23, 2011 in the amount of \$ 4,464.00.

The Review Commission evaluates questions of employment status utilizing common law agency principles. The Commission in *Don Davis*, 19 BNA OSHC at 1479, citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 326 (1992) articulated the following factors for determining whether an employment relationship exists:

In determining whether a hired party is an employer under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

The record establishes that KTC through Mr. Hollings was an employer on the townhome complex. Both the general contractor and the framing contractor identified KTC as a subcontractor hired to install the trusses and decking (Tr. 170, 172). The other subcontractor working on Building 2 identified KTC as an employer (Tr. 80). Also, the employees working on Building 1 identified Mr. Hollings as their employer, not a “foreman” (Tr. 81).

Mr. Hollings oversaw the work of the crew. He supervised and directed their work on Building 1. He hired the employees and could fire them (Tr. 254, 262, 264). He provided them

hoses and other equipment. In his signed interview statement, Mr. Hollings identified KTC as the employer and admitted hiring the employees and supervising them (Exh. C-14). He stated that he had no immediate supervisor other than himself. He described his job at the time of the OSHA inspection as “supervisor, loading floor joists and gathering materials.”

An employee who worked as a framer testified that he came to the project looking for work and was instructed by Mr. Hollings to get a nail gun and return (Tr. 181-182). After he purchased the nail gun, he was hired and supervised by Mr. Hollings (Tr. 184). He answered to no other supervisor (Tr. 189). Mr. Hollings had the authority to fire or discipline him. The employee worked three days and after the OSHA inspection was told by Mr. Hollings not return to work (Tr. 192). He testified that he was never paid for his three days of work and the framing contractor denied that it had any record of him working (Tr. 193).

The signed interview statements of two other employees are consistent and support the testimony of the employee. They also identified Mr. Hollings as their employer. He supervised and directed their work. Mr. Hollings provided safety equipment for their use (Exhs. C-12, C-13). They considered Mr. Hollings as their employer, not the framing contractor.

With regard to the check from the framing contractor, it is handwritten and states to “Please fill out W-9, 1099 & send copy of ID. Fax back to office at 678.963.5633 Thank You.” Such written instruction shows that the framing contractor considered Mr. Hollings an independent contractor, not its employee. As a sole proprietorship, Mr. Hollings and his company are interchangeable. In his interview statement, Mr. Hollings identified KTC as the employer (Exh. C-14).

Mr. Hollings’ claim that his written contract with the framing contractor identified him to “be a consultant in a supervisory capacity to oversee the work” is not supported by the record. The contract was not produced at the hearing despite having been advised by the court during the prehearing telephone conference on May 1, 2012 to bring any documents which supported his claim. Also, it is noted that Mr. Hollings’s testimony during the hearing was inconsistent and lacked reliability. For example, he first denied hiring any employees for the townhome complex and then, after the employee testified, admitted he hired the employee and other employees (Tr. 259, 262).

KTC was properly cited as the employer.



### **Serious Classification**

In order to classify a violation as serious under § 17(k) of the Act, the Secretary must establish that 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 of reasonable diligence of the presence of the condition. In determining substantial probability, the likelihood of an accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020,1024 (No. 86-521, 1991).

The violations of § 1926.501(B)(13) and § 1926.503(a)(1) are properly classified as serious. The employees were exposed to a fall hazard of 24 feet without fall protection and recognition of hazard training. A fall of 24 feet could clearly cause an employee serious injury or death (Tr. 116). Mr. Hollings was present on the project and knew the employees were not utilizing fall protection and had not received proper training.

### **Penalty Consideration**

The Review Commission is the final arbiter of penalties in contested cases. In determining an appropriate penalty, the Commission is required, pursuant to § 17(j) of the Act, 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 consider.

KTC is given credit for size and history because it has less than a 10 employees and has never received an OSHA citation. KTC is not entitled to credit for good faith because there is no showing of a safety program or a commitment to employees' safety.

A penalty of \$ 2,500.00 is reasonable for KTC's violation of § 1926.501(B)(13) (item 1). There were five employees exposed to a 24-foot fall hazard. The duration of employees' exposure was less than two hours. The employees indicated that there was fall protection previously available (Tr. 84-85). Mr. Hollings had issued them some fall protection.

A penalty of \$ 2,000.00 is reasonable for KTC's violation of § 1926.503(a)(1) (item 2). There is no record of employee's training in the recognition and avoidance of fall hazards. The five employees were exposed to a 24-foot fall hazard.

**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 serious Citation:

1. Citation No. 1, Item 1, alleged serious violation of § 1926.501(b)(13), is affirmed and a penalty of \$ 2,500.00 is assessed.
  
2. Citation No. 1, Item 2, alleged serious violation of § 1926.503(a)(1), is affirmed and a penalty of \$ 2,000.00 is assessed.

SO ORDERED.

**Date: July 25, 2012**

*/s/ Ken S. Welsch*  
**KEN S. WELSCH**  
Administrative Law Judge