

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.

Dave's Plumbing, Inc.

Respondent.

OSHRC Docket No. **14-0526**

Appearances:

Leslie Paul Brody, Esquire, U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Complainant

David E. Husnander, *Pro Se*, Dave's Plumbing, Inc., Stuart, Florida
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Dave's Plumbing, Inc., (Dave's Plumbing) contests a four-item Citation and Notification of Penalty issued to it by the Secretary of Labor (Secretary) on February 18, 2014. The Secretary issued the Citation and Notification of Penalty following an inspection conducted by the Occupational Safety and Health Administration (OSHA) on January 22, 2014, at a worksite located at 1960 SE Federal Highway, Stuart, Florida. The Citation and Notification of Penalty (Citation) alleges serious violations of 29 C.F.R. §§ 1926.1053(b)(1), 1926.1053(b)(8), 1926.1053(b)(22), and 1926.1060(a). The Secretary proposed penalties in the total amount of \$8,000.00 for the alleged violations. Dave's Plumbing timely contested the Citation.

A hearing was held in this matter on May 30, 2014, in Port St. Lucie, Florida. The proceedings were conducted pursuant to the Commission's Simplified Proceedings.¹ Dave's

¹ Commission Rule of Procedure, 29 C.F.R. §2200.209(f) provides that decisions in cases designated for Simplified Proceedings are to be issued within 45 days of the date of the hearing. At the hearing, the Court allowed the parties the opportunity, if desired, to file written post-hearing arguments within 20 days of receipt of the transcript by the Court. Due to a clerical error, the Notice of Receipt of Transcript providing the deadline for written post-hearing submissions was not issued to the parties until July 7, 2014. That Notice allowed the parties until July 28, 2014, to file post-hearing written submissions. In accordance with Commission Rule of Procedure 29 C.F.R. §2200.209(f), the Chief Judge was informed of these circumstances, and an extension of the time for issuing the decision in this matter was granted.

Plumbing filed a written post-hearing brief. The Secretary did not, advising the Court on July 30, 2014, that he would not file a post-hearing brief.

For the reasons that follow, Citation 1, Items 1, 2, 3, and 4 are affirmed and a penalty in the total amount of \$3,200.00 is assessed, as set forth herein.

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 (Tr. 11). Dave's Plumbing also admits that at all times relevant to this action, it 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. 10).

Background

Dave's Plumbing is a plumbing company which engages in repair and residential plumbing activities (Tr. 139-141; Prehearing Conference Order, May 22, 2014). It has been in existence for approximately 45 years (Tr. 139). At the time of this proceeding David Husnander was owner of Dave's Plumbing. He testified he is retiring and his sons will be taking over the business (Tr. 142).

While driving his vehicle on the morning of January 22, 2014, an OSHA Safety and Health Compliance Officer (CSHO) observed a ladder leaning against a building. Two employees were standing at the base of the ladder (Tr. 18). The ladder and employees were at a jobsite where Dave's Plumbing was working. The conditions observed prompted the CSHO to initiate an inspection pursuant to OSHA's Local Emphasis Program (LEP) (Tr. 17). At the time of the inspection at the jobsite, Dave's Plumbing was working on converting a BlockBuster Video Store building into an Auto Zone Store (Tr. 18). The CSHO took photographs from the vehicle once he stopped at the jobsite. While on the jobsite, the CSHO observed that the side rails of the portable ladder were approximately 1 to 3 inches above the upper landing surface (Tr. 21-22, 26; Exh. S-1).

After exiting the vehicle, the CSHO walked up to the fence on the jobsite, and observed employee Brian Brower climbing the ladder with an acetylene tank in his hand. Foreman/Lead Plumber Kenneth Black was standing at the base of the ladder with his left foot leaning on the first rung of the ladder (Tr. 23-25; Exh. S-2). There were no barricades protecting the ladder from accidental contact (Tr. 55; Exh. S-5). The CSHO interviewed Black who informed the CSHO he was in charge on the jobsite and supervised Brower (Tr. 19; Exh. S-7). These were the only

employees of Dave's Plumbing at the site (Tr. 18-19). They were on the jobsite to install a hose bib on the roof (Tr. 109, 123; Exh. S-7). The CSHO also interviewed Brower, who told the CSHO he was employed as a helper, had been employed for two months, and had not received any training regarding ladder safety (Tr. 30; Exh. S-7).

In addition to observing the ladder not extending the proper distance above the upper landing surface, the CSHO observed the ladder was set up backwards when the employee climbed the ladder, i.e. the climbing side of the ladder was towards the wall and not towards the outside as it should have been (Tr. 47, 48-49, 50; Exh. S-4). The CSHO testified that after telling Black the ladder was backwards, Black flipped it over (Tr. 50).²

As a result of the CSHO's inspection, on February 18, 2014, the Secretary issued to Dave's Plumbing one serious four-item Citation for alleged violations of the Occupational Safety and Health Act of 1970 (Act), which gave rise to these proceedings.

The Citation

The Secretary alleges Dave's Plumbing violated four of the OSHA standards in Subpart X-Stairways and Ladders, of 29 C.F.R. Part 1926. The Secretary has the burden of establishing the employer violated each cited standard.

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) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group, Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Applicability of the standards, employee exposure, and employer knowledge are not disputed. Dave's Plumbing was onsite to install a hose bib on the roof of the building which was under construction being converted from a Blockbuster Video Store to an Auto Zone Store (Tr. 18, 123; Exh. S-7). The standard applies to the work performed by Dave's Plumbing at the jobsite.

Forman Black and employee Brower were working on the jobsite at the time of the inspection (Tr. 19; Exhs. S-1, S-2, S-5). The CSHO photographed employee Brower climbing the ladder at the time of the inspection (Tr. 25; Exhs. S-2, S-3). Employee exposure is established.

² The CSHO did not propose a citation for the ladder being set up backwards.

To establish 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 Black was the foreman on the jobsite (Tr. 19). As such, his knowledge can be imputed to Dave's Plumbing. 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). Actual knowledge refers to an awareness of the existence of the conditions allegedly in noncompliance. *Omaha Paper Stock Co.*, 19 OSHC 2039 (No. 01-3968, 2002).

Foreman Black was at the jobsite with his foot on the base of the ladder as employee Brower climbed the ladder (Tr. 25; Exh. S-2). Black's knowledge of the violative conditions is imputed to Dave's Plumbing.

The only element left for determination is whether the terms of the cited standards were violated. As set forth below, the undersigned finds that they were.

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

The Secretary cited Dave's Plumbing for a serious violation of § 1926.1053(b)(1), alleging, "On January 22, 2014, at the above addressed site, an employee was exposed to a fall hazard of approximately 20 feet 6 inches while using an extension ladder which was not extended at least 3 feet above the upper landing surface." (Citation). The Citation addresses the protection of employees using a portable ladder on the jobsite. The cited standard, § 1926.1053(b)(1) 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 ladders 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 evidence adduced at the hearing shows that the ladder was a portable ladder (Tr. 22, 23; Exh. S-1, S-4). At the time of the inspection, the ladder was being used to access the roof of the building so that employee Brower could install a hose bib on the roof (Tr. 109, 123; Exh. S-7).

Dave's Plumbing contends the ladder was 3 feet above the upper landing surface which was below the parapet wall at the top of the ladder (Prehearing Conference Order). The CSHO used a measuring tape to measure the height of the ladder as it approached the top of the wall, and determined the ladder was approximately 20 feet, 6 inches in length (Tr. 27). The CSHO estimated that the ladder side rails extended only 1 to 3 inches above the upper landing surface (Tr. 21-22, 26). According to the CSHO, the 8 inch wide top of the parapet wall was the upper landing surface (Tr. 80). Both Foreman Black and Brower told the CSHO the ladder did not extend 3 feet above the upper landing surface (Tr. 31-32; Exh. S-7). Further, photographs of the ladder, confirm that the ladder side rails did not extend at least 3 feet above the upper landing surface as required by the standard (Exhs. S-1, S-2, S-3, S-5).

Black and Brower also testified the ladder was not secured (Tr. 37; Exh. S-7). Dave's Plumbing asserts the ladder was protected from displacement by Black's foot holding it on the bottom rung. Although it appears that Black may have been attempting to prevent the ladder from movement, the standard requires the ladder to be secured at the top. The Secretary has established the terms of the standard were violated in that the side rails of the ladder did not extend at least 3 feet above the upper landing surface, nor was the ladder secured at the top from displacement.

The CSHO testified that failing to place a ladder so it extends at least 3 feet above the upper landing surface or failing to secure it properly is a serious violation because if an employee were to fall from a ladder not properly positioned or secured, the employee could sustain bodily harm such as multiple fractures and or death (Tr. 28). This testimony was uncontroverted. The undersigned finds the Secretary has established Dave's Plumbing violated the specific terms of §1926.1053(b)(1). Therefore, Item 1, alleging a serious violation of § 1926.1053(b)(1) is affirmed.

Item 2: Alleged Serious Violation of § 1926.1053(b)(8)

The Secretary alleges in Item 2, “On January 22, 2014, at the above addressed site, an employee was exposed to a fall hazard of approximately 20 feet 6 inches while using an extension ladder set up in an active construction site that was not secured to prevent accidental displacement.” (Citation). The cited standard, § 1926.1053(b)(8) provides:

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

(8) Ladders placed in any location where they can be displaced by work-place activities or traffic, such as in passageways, doorways, or driveways, shall be secured to prevent accidental displacement, or a barricade shall be used to keep the activities or traffic away from the ladder.

The CSHO observed there was no barricade erected around the ladder, and verified that the ladder was not secured by any means by pushing it (Tr. 34, 36; Exhs. S-1, S-2, S-5, S-7). Dave’s Plumbing contends Black was holding the ladder and watching it (Dave’s Plumbing’s Brief, p. 1; Prehearing Conference Order).

The jobsite was a construction site. A stucco company was on the jobsite engaged in removing a framed scaffold erected on the north side of the building (Tr. 34). The evidence also reveals that a doorway used by employees of the scaffolding company to enter and exit was located approximately two to three feet from the ladder at issue here (Tr. 39; Exh. S-1, S-2, S-5). There was no barricade between the doorway and the ladder to prevent the ladder from being hit or otherwise displaced (Tr. 39; Exh. S-1, S-2, S-5). The CSHO testified the only thing securing the ladder was Black’s left foot which was resting on the first rung of the ladder, with nothing securing the top of the ladder (Tr. 35, 36). Foreman Black, when questioned by the CSHO, admitted the ladder was not secured (Tr. 37; S-7). Although Dave’s Plumbing asserts Black was watching the ladder and had placed his left foot on the bottom rung of the ladder to protect it from accidental displacement, the Court does not find this argument compelling. Black did not testify this was the purpose for his actions.

According to the CSHO, an employee climbing a ladder while it is unsecured could fall 20 feet 6 inches, sustaining bodily harm such as multiple fractures and or death, which would be serious (Tr. 28, 37-38). This testimony was not disputed. The undersigned finds the Secretary has established Dave’s Plumbing violated the specific terms of §1926.1053(b)(8). Therefore, Item 2 alleging a serious violation of §1926.1053(b)(8) is affirmed.

Item 3: Alleged Serious Violation of § 1926.1053(b)(22)

The Secretary alleges in Item 3, “On January 22, 2014, at the above addressed site, an employee was exposed to a fall hazard of approximately 20 feet 6 inches while using an extension ladder and carrying an acetylene tank that could cause him to lose his balance and fall.” (Citation). The cited standard, § 1926.1053(b)(22) provides:

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

(22) An employee shall not carry any object or load that could cause the employee to lose balance and fall.

The CSHO observed employee Brower carrying an acetylene tank up the ladder in his left hand (Tr. 42, 44; Exh. S-3). Brower’s left hand was not holding any part of the ladder (Tr. 42-42; Exh. S-2, S-3). According to the CSHO, an employee carrying something up a ladder could lose his balance and fall. The CSHO testified employees should have three points of contact (i.e. both feet and one hand, or both hands and one foot) with the ladder at all times (Tr. 40, 44). Dave’s Plumbing admits its employee carried the tank up the ladder, but contends the CSHO told the employee to come down the ladder and bring the tank with him (Tr. 143; Dave’s Plumbing’s Brief, p.1). The CSHO denies telling Brower to come down the ladder with the acetylene tank (Tr. 43, 44, 45). Black and Brower each testified the CSHO told Brower to bring the acetylene tank with him down the ladder (Tr. 119, 126). Brower testified the CSHO asked him to bring it down because he wanted to see what was in the tank (Tr. 119). In addition, he testified the ladder was not secured when he came down (Tr. 120).

Regardless of whether the CSHO told Brower to bring the acetylene tank down the ladder, the standard was violated when Brower went up the ladder carrying the acetylene tank which could cause him to lose his balance and fall. It is not necessary for the Court to make a finding on the CSHO’s actions as alleged by Dave’s Plumbing. Because Dave’s Plumbing admits its employee climbed the ladder with the acetylene tank in hand, the Court must find the Secretary has established the terms of the standard were violated. As this was the one remaining element to be proven, the Secretary has established a violation of this standard.

According to the CSHO, an employee climbing a ladder while it is unsecured could fall 20 feet 6 inches, sustaining serious bodily harm such as multiple fractures and or death (Tr. 28, 37-38). The undersigned finds the Secretary has established Dave’s Plumbing violated the

specific terms of §1926.1053(b)(22). Therefore, Item 3 alleging a serious violation of § 1926.1053(b)(22) is affirmed.

Item 4: Alleged Serious Violation of § 1926.1060(a)

The Secretary alleges in Item 4, “On January 22, 2014, at the above addressed site, employees using ladders to perform their work were not provided with a training program for them to recognize the hazards associated with ladders.” (Citation and Notification of Penalty). The standard found at § 1926.1060(a) 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.

The CSHO interviewed both the foreman and the employee who were onsite. Foreman Black told the CSHO he had been trained on ladder safety (Tr. 61; S-7). Brower told the CSHO he had not received ladder training or attended safety meetings (Tr. 61; S-7). At the time of the inspection, Brower had been working for the company only two months (Tr. 61; S-7). He testified he did not understand what he was being asked when asked about safety meetings, and he had never really been to a safety meeting (Tr. 109). Despite Brower’s statement that he had not received ladder training or attended safety meetings, he signed safety meeting attendance forms (Tr. 62; Exh. S-6). According to Brower, he never read the papers and thought he had to sign the papers for his checks (Tr. 111). Having observed Brower’s forthright demeanor during the hearing, the Court finds Brower’s testimony credible.

The CSHO testified that Dave’s Plumbing’s owner, Husnander, told him Dave’s Plumbing employees had received some training, but since Brower was a new employee he had not received all of the training, and no training for ladders specifically (Tr. 64). Husnander did not dispute this at the hearing. However, evidence of what Dave’s Plumbing purports to be its ladder training program was admitted into evidence at the hearing as exhibits R-2, R-3 and S-6. The Court reviewed these exhibits and finds they fail to establish a ladder safety training program for the time period of the inspection, and fail to establish ladder training for Brower. The purported evidence relating to ladder safety consists of Weekly Safety Meetings held on June 14, 2010, April 25, 2011, and March 12, 2012, on Ladder Safety (Exh. R-4); a Weekly Safety Meeting held on January 6, 2014, on Fall Protection which included the safety reminder “Don’t stretch and overreach from a

ladder. Climb down and reposition the ladder so you can reach safely.” (Exhs. R-3, S-6); and a Weekly Safety Meeting on April 14, 2014, on Ladder Safety (Exh. R-3).

The Court finds Brower’s testimony he received no ladder safety and he did not read the sign-in sheets he signed when he received his paychecks to be credible. The Court further finds the CSHO’s uncontroverted testimony that owner Husnander admitted Brower had not received ladder training, also to be credible. Therefore, the Secretary has established Dave’s Plumbing failed to comply with the terms of this standard.

According to the CSHO the failure to train Dave’s Plumbing’s employees regarding ladder safety exposes them to the risk of serious injury or death should an employee fall 20 feet 6 inches from the ladder, and as such is a serious violation (Tr. 55-56). The Court finds the Secretary has established Dave’s Plumbing violated the specific terms of §1926.1060(a). Therefore, Item 4 alleging a serious violation of §1926.1060(a) is affirmed as serious.

Penalty Determination

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff’d*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) (“The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission’s authority to raise or lower penalties within those limits.”), *aff’d*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff’d*, 34 F. App’x 152 (5th Cir. 2002) (unpublished). “Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.” *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005). Section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer’s size, history of violation, and good faith.” *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

Dave’s Plumbing has fewer than 25 employees (Tr. 29). Due to its small size the CSHO applied a 60% reduction to the proposed penalty. Because Dave’s Plumbing had not been inspected within the last five years, no reduction for history was applied (Tr. 29-30). The CSHO

did not apply a reduction in the penalty for good faith because Dave's Plumbing did not have a comprehensive safety and health program, and did not train Brower (Tr. 30). As to the gravity of the violations, the CSHO testified that the violations were rated as high in severity because falling 20 feet 6 inches to the ground could cause serious injuries resulting in multiple fractures and/or death (Tr. 28). The violations were rated as lesser probability because only one employee was exposed for less than one minute (Tr. 28-29). The Court agrees that a high gravity is appropriate. However, the extremely short duration of exposure for only one employee mitigates a high penalty. Considering all of the statutory factors, it is determined that a penalty of \$800.00 each is appropriate for Items 1, 2, 3, and 4. The Court therefore assesses a penalty in the total amount of \$3,200.00 for the Citation issued to Dave's Plumbing.

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. Citation 1, Item 1, alleging a violation of § 1926.1053(b)(1) is affirmed; and a penalty of \$800.00 is assessed;
2. Citation 1, Item 2, alleging a violation of § 1926.1053(b)(8) is affirmed; and a penalty of \$800.00 is assessed;
3. Citation 1, Item 3, alleging a violation of § 1926.1053(b)(22) is affirmed; and a penalty of \$800.00 is assessed; and
4. Citation 1, Item 4, alleging a violation of § 1926.1060(a) is affirmed; and a penalty of \$800.00 is assessed.

SO ORDERED.

/s/

SHARON D. CALHOUN

Judge

Date: August 15, 2014
Atlanta, Georgia