Secretary of Labor,
Complainant,

v. OSHRC Docket No. **99-1224**

General Property Services, Inc.,
a/k/a GPS Roofing Services,
Respondent.

Appearances:

Melisa Anderson, Esquire
Rafael Batine, Esquire
U. S. Department of Labor
Office of the Solicitor
Atlanta, Georgia
For Complainant

Mr. Lloyd H. Black
Occupational Safety and Health Associates
Lilburn, Georgia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

General Property Services, Inc. (GPS), contests a citation issued by the Secretary on July 2, 1999, following an employee accident at a warehouse in Forest Park, Georgia.[1]

The citation alleges that GPS violated the hazard communication requirements of § 1910.1200(e)(1) (item 1a); the hazardous chemical training requirements of § 1910.1200(h) (item 1b); the fall protection requirements of § 1926.502(a)(2) (item 2a); and the fall protection training requirements of § 1926.503(a)(1) (item 2b).

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1 The Secretary cited GPS under the name "GPS Roofing Services." At the hearing, GPS president David Mullininx stated (Tr. 70-71):

> The legal name is General Service Properties [sic], Inc. We just kind of use "GPS Roofing" just because--we have never incorporated or made it a business or anything like that. We just started using that name for one area. The type of work we do, we do different things for property management companies.

The caption and all related pleadings are hereby amended to reflect that the correct name of the employer corporation is General Property Services, Inc., and that it was also known as GPS Roofing Services at the time of the OSHA inspection.

GPS admits jurisdiction and coverage in its answer. GPS argues that it was not the employer of the exposed employees at the time of the accident or inspection. GPS also argues that the Secretary failed to meet her burden of proof for each of the four alleged violations.

A hearing on these issues was held in Atlanta, Georgia, on November 8, 1999. The parties have filed post-hearing briefs. GPS has also filed several post-hearing motions.

For the reasons discussed below, the Secretary has proven that GPS has safety responsibility for the exposed employees and has established violations of items 1a, 1b, and 2b. The Secretary failed to establish a violation of item 2a.

Background

On March 10, 1999, a work crew was removing damaged sections from the roof of a large warehouse on Kennedy Road in Forest Park, Georgia. One of the crew, David Bagley, fell through the roof 30 feet to the concrete floor below (Tr. 40-45, 114). He sustained serious injuries and was using a wheelchair at the time of the hearing, eight months after his accident. Bagley was not wearing fall protection at the time of his fall (Tr. 42).

Subsequent to his accident, Bagley filed a written complaint with the Occupational Safety and Health Administration (OSHA) requesting the agency investigate the worksite conditions at the warehouse. OSHA responded to the complaint by sending compliance officer Pamela Evatt to the warehouse to conduct an inspection on May 11, 1999 (Tr. 103).

GPS's Post-hearing Motions

1. Motions to Dismiss. At the hearing GPS moved to dismiss the Secretary's case based on the Secretary's failure to establish a prima facie case, and moved further to dismiss the case on grounds of res judicata and collateral estoppel. The undersigned denied these motions (Tr. 209, 215-217). GPS then entered into the record a document entitled "Respondent's Motion to Dismiss or in the Alternative, Motion for Summary Judgment" (Exh. R-2) and a document entitled "Respondent's Motion to Dismiss Because of Res Judicata and Collateral Estoppel" (Exh R-3). The undersigned again noted that the motions were denied (Tr. 217-218).

On February 24, 2000, GPS filed another motion to dismiss which appears to be based on the same res judicata and collateral estoppel grounds raised at the hearing. Specifically, GPS argues that the Secretary also cited Ace Roofing for violations arising from the same inspection

conducted by Evatt on May 11, 1999, that gave rise to the present case. GPS contends that if the case is not dismissed, "it will result in multiple charging and results in an innocent party being prosecuted for a violation."

The doctrines of res judicata and collateral estoppel may be invoked only in situations where the same two parties are involved in more than one proceeding. The centerpiece of GPS's defense is that GPS and Ace Roofing are two separate and unrelated companies. Unlike the instant case, res judicata and collateral estoppel apply in proceedings where the parties are identical and where a final adjudication has been made. GPS's renewal of its motion to dismiss is denied.

2. Motion to Make an Offer of Proof. On February 24, 2000, GPS filed a motion to make an offer of proof. The document that GPS seeks to include in the record is a Workers' Compensation form that GPS attempted to enter into evidence at the hearing (Tr. 257). GPS's intent in entering the document is to show that GPS was not the employer of the injured employee (Tr. 258). The undersigned excluded the Workers' Compensation form along with several other documents because GPS had not provided the Secretary with copies during the prehearing exchange of documents and proposed exhibits. The undersigned stated that the documents (Tr. 259):

> weren't on the list and this is just too important an issue for me to say, "All right, you can bring in a surprise exhibit at this point." The problem is that it could be prejudicial surprise, and for that reason, I can't allow it. If it were some minor point, that might be different, but this goes to the heart of what this case is about.

This was the point in the proceeding when GPS could have made an offer of proof if it so desired. Commission Rule of Procedure § 2200.72(b) provides:

> Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record of the proceeding.

GPS admits in its reply to the Secretary's response to GPS's motion to make an offer of proof that the Workers' Compensation "form was never proffered as an 'Offer of Proof' during the hearing" (Exh. J-31, ¶ 6). There is no provision for making an offer of proof after the record has been closed. GPS's motion to make an offer of proof is denied.

3. Motion to Correct. On February 28, 2000, GPS filed a motion to correct the transcript at pages 183 and 184. Omitted from the transcript were questions from GPS's representative put to compliance officer Evatt and her answers concerning an access ladder. When asked, Evatt stated that four rungs of the ladder were visible in Exhibit C-9 equal to the height of the parapet wall. She added that the ladder was at an angle and that the height of the parapet wall was actually equal to three and a half rungs of the ladder. Having conferred with the court reporter and based upon the undersigned's memory of the testimony, it is determined that the purported testimony was elicited. GPS's motion is granted, and the record is hereby corrected to reflect the above stated testimony.

Was GPS the Employer of the Exposed Employees?

The Secretary contends that GPS was the employer of the work crew on the warehouse roof at the time of the inspection, or, alternatively, that GPS controlled the work crew's employment under the multi-employer worksite doctrine. GPS counters that it was not the employer of the work crew, Ace Roofing was. GPS also denies having control over the work crew sufficient to make GPS liable under the multi-employer worksite doctrine.

GPS performed roofing work in the past and contracted with Selig Enterprises, Inc., to reroof badly deteriorated areas of the Kennedy Road warehouse designated in the contract as areas "A" and "B." The contract required GPS to notify Selig in writing of the names of any subcontractors it intended to hire to complete any of the contract work (Exh. C-6). GPS never gave any such notification on the project (Tr. 78-79). GPS now claims that it subcontracted the reroofing out to Ace Roofing. As the evidence establishes, GPS and Ace Roofing did not have a mere contractor-subcontractor relationship.

Gary Presley was supervising the work crew when compliance officer Evatt arrived at the job. When Evatt introduced herself to Presley, he stated, "[T]his isn't an Ace job, . . . this is a GPS Roofing job" (Tr. 104). Presley then told Evatt that he had his own roofing business "on the side" (Tr. 105). Presley is the owner and president of Ace Roofing. He is also a vice-president of GPS (Tr. 80).

GPS president David Mullininx testified that GPS verbally subcontracted with Ace Roofing because GPS "just didn't have the experience to do a roof like that, so that's why we

used Gary Presley because he had the experience and the men and equipment to do it" (Tr. 84). As Mullininx acknowledged, about 6 months before any contract was signed with Selig, GPS made Presley its vice-president (Exh. C-6; Tr. 239). Mullininx argues, however, that Presley had been put in the vice-president's position only for the Selig job and only as a nominal position for the purpose of waiving Workers' Compensation for Presley and gaining it for "his" crew members (Tr. 80-81):

> It's a form that my insurance agent sent me to waive Workman's Compensation who didn't--I had called her and said, "I've got a contractor that I want to use but he doesn't have insurance and I can't afford to pay it on him. What can I do?"
>
> She goes, "Well, get him to fill out this form waiving Workman's Comp and you can use it." So, she said, "Label him as a VP and put it on there" but that's the extent of that. It was used just to waive Workmen's Compensation on him.

GPS did not provide a copy of this form to the Secretary. According to Mullininx, Presley "never had any responsibilities, he's never been to our office. He has just been a contractor" (Tr. 82). Nevertheless, GPS held out Presley and the crew as its employees to various agencies and to Selig. Presley acted as GPS's representative at the opening conference (Tr. 106, 109), and GPS made checks payable to "Gary Presley" and not "Ace Roofing" (Tr. 245-245).

GPS's acknowledged vice-president Jeff Gillner arrived at the worksite shortly after Evatt. Gillner admitted at the hearing that he told Evatt the employees on the site were working for GPS (Tr. 272-273). Consistent with this admission, Gillner gave Evatt one of his business cards which shows the scope of GPS's work (Exh. C-8):

GPS
Roofing
Services
Roof Maintenance * Repair & Reroof * Management

David Bagley, the injured employee who was medicated for pain at the time of the hearing (Tr. 14), first asserted that he worked for Ace Roofing (Tr. 16). Bagley testified that he was paid an hourly wage and that his paychecks were signed by Presley, president of Ace and a vice-president of GPS (Tr. 16-17). Later Bagley explained that he was also working for GPS at the time of his accident (Tr. 23). Bagley stated that Presley told the employees assembled in his van

on the first day of the project that GPS was the employer on the project (Tr. 18).

GPS's Gillner testified that he would visit the site once or twice a week and would go up on the roof. Gillner denied that he was inspecting the work (Tr. 269-271). Gillner stated that he went up on the roof and "just walked around the roof, looked at the men working; just looked at materials, exploring" (Tr. 270). Although Gillner denied that he inspected the roofing work for the purposes of submitting draws, GPS's answer to the Secretary's interrogatory regarding Gillner's duties states that his job was "[c]hecking production for expense draws" (Exh. C-16). Mullininx testified that he also went up on the roof at least once a week to inspect the work "in order to turn in a draw request for payment" (Tr. 82, 227).

Admitted GPS employee Brian Liscinsky worked full-time at the warehouse project as the "project safety officer" (Exh. C-16; Tr. 95-96). GPS president Mullininx testified that this was also a nominal position. He stated that he "put that in a letter to CTI [the tenant in the warehouse]" to "appease" CTI regarding its safety concerns (Tr. 231). Mullininx testified that he assigned Liscinsky inside the warehouse "just to clean up and sweep" (Tr. 92). Mullininx stated that Liscinsky did not really have a title, but conceded that he told CTI that Liscinsky was the safety officer because, "We're a little company. We might have tried to make ourselves sound bigger" (Tr. 92).

If GPS is to be believed, it was its policy to create paper positions and make misleading statements whenever it suited its business purposes. If Selig wanted GPS workers to have Worker's Compensation coverage and GPS did not want to pay for insurance for Ace Roofing, Mullininx would claim that Gary Presley was a vice-president of GPS. GPS did not want CTI to bother it with CTI's safety concerns, so Mullininx told CTI that Brian Liscinsky was its project safety officer. Now, GPS does not want to be held responsible for the safety violations with which it is charged, so it says Presley was not one of its vice-presidents, Liscinsky was not its safety officer, and Gillner was just "exploring" up on the roof, and not inspecting for the draw purposes. GPS's credibility has been seriously eroded.

Unfortunately for GPS, an employer cannot shift its responsibility for the health and safety of its employees. *Pride Oil Well Service*, 15 BNA OSHA 1809 (No. 87-692, 1992). The key factor in determining whether a party is an employer is whether it has the right to control the

work involved. Bagley convincingly described one instance where Mullininx directed Presley to mark the sagging roof areas with spray paint (Tr. 39-40, 58-59). (Although Mullininx does not recall "the specifics," he believes that Presley suggested marking an indentation and that either he or Presley sprayed it with paint (Tr. 89-90)). Of more importance was GPS's authority on the job as the only contractual employer.

Primarily through its vice-president Presley, but also through Mullininx and Gillner, the Secretary has shown that GPS controlled the work of the employees on the warehouse project. While it is undisputed that Presley is the owner and president of Ace Roofing, the record establishes that Presley also acted in the capacity of a supervisor and an corporate officer for GPS. Representations made in a legal document for purposes of Workers' Compensation cannot be retracted on a situational basis for the convenience of the employer. Presley and Gillner both told Evatt that GPS, and not Ace Roofing, was the employer of the work crew. Furthermore, despite its denials at the hearing, GPS admitted that Liscinsky was in charge of safety on the project and that Gillner inspected the work for draw purposes (Exh. C-16).

The standard of proof is a preponderance of the evidence. The evidence, although sometimes conflicting, establishes the employment relationship. GPS was the employer of the crew performing roofing work on the Kennedy Road warehouse at the time of Evatt's inspection.

Citation No. 1

> 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) employees access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation.

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1741, 1994).

Items 1a and 1b: §§ 1910.1200(e)(1) and (h)

The Secretary asserts that GPS did not have a hazard communication program (item 1a) and did not train its employees on the hazardous chemical in their work environment (item 1b). Section 1910.1200(e)(1) requires:

> Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the [the

> requirements] 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:
> (1) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet. . .

Section 1910.1200(h) requires:

> Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. . . . Chemical-specific information must always be available through labels and material safety data sheets.

The work crew was using hot asphalt to reroof the warehouse (Tr. 253). Evatt asked Presley, Gillner, and Mullininx for a copy of GPS's written hazard communication program. She never received one (Tr. 117-118, 136). GPS failed to supply Evatt with the material safety data sheet (MSDS) for asphalt (Tr. 126-126). Evatt interviewed three of GPS's employees, who told her that they were never given hazard communication training in the use of asphalt (Tr. 116-117).

The asphalt (Bur Coating) was heated to a liquid form at the time of Evatt's inspection. The MSDS for Bur Coating describes the potential results of exposure (Exh. C-17):

> May cause toxic effects if inhaled or absorbed through skin. Inhalation or contact with material may irritate or burn skin and eyes. Fire will produce irritating, corrosive and/or toxic gases. Vapors may cause dizziness or suffocation.

Evatt testified that the hazards associated with the use of asphalt are (Tr. 128): "Irritation of the eyes, of the sinuses, of your respiratory, contact dermatitis, exposure to burns, inhalation of vapors."

The Secretary demonstrated that GPS's employees were exposed to hot asphalt, a hazardous substance. GPS had not trained employees on the use of hot asphalt, and GPS did not have a MSDS for asphalt or any element of a written hazard communication program on the site. GPS violated §§ 1926.1200(e)(1) and (h). It would have been obvious to Mullininx, Presley, and Gillner that employees were not trained or provided with the required documents on hazardous chemicals.

Violations of the cited standards could result in serious physical injury to the skin and the

respiratory system. The violations cited in items 1a and 1b are serious.

Item 2a: § 1926.502(a)(2)

The Secretary alleges that GPS did not utilize appropriate fall protection for its employees working on a flat roof in violation of § 1926.502(a)(2). The standard requires:

> Employers shall provide and install all fall protection systems required by this subpart for an employee, and shall comply with all other pertinent requirements of this subpart before that employee begins the work that necessitates the fall protection.

The citation for item 2a states vaguely, "Employer did not provide fall protection systems for employees working on warehouse roof." No dates are given.

Bagley fell through the warehouse roof on March 10, 1999. Evatt did not inspect the site until May 11, 1999, two months after the accident. The site conditions had changed in the two month period. Bagley's accident cannot be used as the basis of the instant citation.

Evatt's inspection consisted of interviewing employees in the parking lot after they had climbed down from the roof. Evatt did not go on the roof (Tr. 118-119). She did not observe any employees working at the edge of the roof (Tr. 176). The employees told her they were not provided with fall protection, but there is no evidence to show that they were working in an area of the large roof where they were exposed to a fall hazard (Tr. 114-115). The portion of the roof that proved so hazardous to Mr. Bagley was being completed at the time of the inspection (Tr. 253-254).

The Secretary argues that the employees descended the ladder without fall protection when called down for questioning. The cited standard appears in subpart M ("Fall Protection") of the construction standards. Section 1926.500(a)(2(vi) provides:

> Section 1926.501 sets forth those workplaces, conditions, operations, and circumstances for which fall protection shall be provided except as follows:
> . . .
> (vi) Requirements relating to fall protection for employees working on stairways and ladders are provided in subpart X of this part.

The Secretary has failed to establish employee exposure as the third element of her burden of proof. No evidence was adduced to show the distance employees were working from the edge of the roof. Item 2a is vacated.

Item 2b: § 1926.503(a)(1)

The Secretary alleges that GPS committed a serious violation of § 1926.503(a)(1), which provides:

> 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.

It is undisputed that the employees were working at heights of at least 30 feet on the Kennedy Road warehouse project. Employees "who might be exposed" to fall hazards must receive fall protection training. Even the acknowledged GPS employees Mullininx and Gillner testified that they regularly went up on the roof to inspect the work. GPS admitted in its answer to the Secretary's interrogatory regarding fall protection that neither Mullininx not Gillner were trained in fall protection (Exh. C-16).

The roof was deteriorated and was opened in a number of places during the ongoing project. Mullininx told Presley to mark the sagging areas with spray paint (Tr. 39-40, 58-59). GPS's employees were working on a roof whose structure was badly compromised and from which they were tearing off and replacing sections. Certainly, these employees might be exposed to falls. The employees told Evatt that they had received no fall protection training to do the work they were completing for one section of the deteriorated roof (Tr. 137, 139). A failure to train enhanced the hazardous nature of roof work occurring 30 feet above the ground floor. The Secretary has established a serious violation of § 1926.503(a)(1).

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

GPS employed 12 or 13 employees at the time of the OSHA inspection, in addition to those working on the roof (Tr. 231). GPS is a very small employer and is afforded a full credit for size. The Secretary adduced no evidence of GPS's history of previous violations (Tr. 141-

142). GPS demonstrated a lack of good faith in its failure to have a viable safety program.

The gravity of the violations of §§ 1910.1200(e)(1) and (h) (items 1a and 1b) is moderate. GPS did not have a written hazard communication program or a MSDS for asphalt, but Evatt noted that the asphalt was in the open air and that employees were wearing long sleeves and gloves. The employees' exposure to the hazardous effects of the asphalt was minimized. A penalty of $750.00 is assessed.

The gravity of the violation of § 1926.503(a)(1) is high. Employees working as roofers, an occupation where they are routinely exposed to fall hazards, were not trained in the use of fall protection and the recognition of fall hazards. A penalty of $1000.00 is assessed.

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), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

Item	**Standard**	**Disposition**	**Penalty**
1a	§ 1020.1200(e)(1)	Affirmed	)
			) $750.00
1b	§ 1910.1200(h)	Affirmed	)
2a	§ 1926.502(a)(2)	Vacated	
2b	§ 1926.503(a)(1)	Affirmed	$1,000.00
Total			$1,750.00

NANCY J. SPIES
Judge

Date: May 1, 2000