United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama St. S.W
Building 1924 Room 2R90
Atlanta, GA 30303-3104

SECRETARY OF LABOR, Complainant, v. PAYTON ROOFING, INC., Respondent.	OSHRC Docket No. 16-1163

DECISION AND ORDER

COUNSEL: Patricia J. Craft, Attorney, U.S. Department of Labor, Office of the Solicitor, Atlanta, GA, for Complainant.

Timothy D. Payton, Pro se, Coral Springs, FL, for Respondent.

JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

Payton Roofing, Inc. was cited by the United States Department of Labor's Occupational Safety and Health Administration (OSHA)[1] on July 1, 2016, for an alleged serious[2] violation of the Occupational Safety and Health Act of 1970 (Act)[3] and the standards promulgated thereunder.[4] Specifically, OSHA asserted Payton Roofing's employees were engaged in roofing repair work on January 19, 2016, without complying with OSHA's fall protection standard applicable to safety monitoring systems.[5] The citation proposed a penalty of $2,400.00, which Payton Roofing timely contested.

[1] OSHA's Area Directors have the authority to issue citations and proposed penalties to enforce the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[2] *See infra*, the "Classification" section for the definition and analysis of a "serious" violation.

[3] *See* 29 U.S.C. §§ 651–678.

[4] *See* 29 U.S.C. § 654(a)(2) (each employer shall comply with occupational safety and health standards promulgated under the Act).

[5] *See* 29 C.F.R. § 1926.502(h)(1)(iii).

The Court finds the Commission has jurisdiction of this action under section 10(c) of the Act, 29 U.S.C. § 659(c) and that Payton Roofing is an employer within the meaning of section (5) of the Act, 29 U.S.C. § 652(5). Although Timothy Payton served as the registered agent of Payton Roofing, was one of its corporate officers, and filed Payton Roofing's notice of contest contesting the "fine," he failed to appear at the pretrial conference and failed to appear at trial, both after having been properly noticed at his mailing address of record and at his email address of record. At trial, the Secretary of Labor moved for a default judgment, which the Court denied, since the Secretary has the burden of proof.

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, after carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law.[6] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so. For the reasons indicated *infra*, the citation is **AFFIRMED** and Payton Roofing is assessed a civil penalty of $2,800.00.

II. BACKGROUND

On January 19, 2016, on his way to work, Eduardo Vivas-Vendrell (Vivas), an OSHA Compliance Safety and Health Officer, passed a commercial roofing project in Pembroke Pines, Florida, and observed employees working on top of a roof about 9 feet off the ground. Vivas noticed the employees appeared to be working without any fall protection. After Vivas opened an inspection of the worksite, Vivas initially noticed the workers on the front side of the roof, and upon walking around the building, also noticed employees working on the backside of the roof, which he was unable to see while he was standing in front of the building. Vivas personally observed that none of the employees had any fall protection.

Timothy Payton, an officer of the company,[7] was on the ground on the front side of the building when Vivas arrived on the worksite. Timothy Payton admitted to Vivas that the employees on the roof were Payton Roofing employees. When asked by Vivas why none of the

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[6] This case was designated for Simplified Proceedings where the complaint and answer requirements were suspended, the Federal Rules of Evidence are inapplicable, and within 45 days of the hearing a written decision must be issued. *See* 29 C.F.R. §§ 2200.200-211.

[7] It is not clear whether Timothy Payton is the company's President or its Secretary. On February 8, 2010, Timothy Payton filed an amendment with the Florida Secretary of State's Division of Corporations removing himself as President and installing himself as Secretary. However, since then Timothy Payton has continued to file the company's annual reports listing himself as President. *See* the online corporate records of the Florida Secretary of State's Division of Corporations at http://dos.myflorida.com/sunbiz/search/.

workers had any fall protection, Timothy Payton stated, "I'm the monitor." Sometime in June, Vivas called Timothy Payton to obtain information about Payton Roofing's safety program. Payton could not talk and told Vivas to call him later, which Vivas did. Vivas "called and called and he never returned the call back again." Thus, Payton Roofing did not provide any information to Vivas regarding any company safety program it had in effect.

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). To achieve this purpose, the Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1); and a specific duty to comply with all applicable occupational safety and health standards promulgated under the Act. *Id.* § 654(a)(2). Pursuant to that authority the standard at issue in this case was promulgated.[8]

In the Eleventh Circuit, the jurisdiction in which this case arose,[9] "the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer "knowingly disregarded" the Act's requirements. *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013). "If the Secretary establishes a prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *ComTran*, 722 F.3d at 1308.

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[8] The Secretary of Labor delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health, who heads OSHA, and assigned responsibility for enforcement of the Act to OSHA. *See* 65 Fed.Reg. 50017 (2000). The Assistant Secretary has promulgated occupational safety and health standards, *see e.g.*, 29 C.F.R. Parts 1910 and 1926.

[9] The worksite was in Pembroke Pines, Florida, and the Florida Secretary of State's online records indicate Payton Roofing's principal address is in Coral Springs, Florida. Therefore, both parties may appeal the final order in this case to the Eleventh Circuit Court of Appeals, and in addition, Payton Roofing may also appeal to the District of Columbia Circuit. *See* 29 U.S.C. §660(a) & (b). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, the Court applies the precedent of the Eleventh Circuit in deciding the case where it is highly probable that any appeal in this case will be taken.

Alleged Violation

The citation alleges Payton Roofing committed a serious violation of the Secretary's fall protection standard related to fall protection systems criteria and practices, when the "safety monitor was not on the same walking/working surface and within visual sighting distance of the employee being monitored." The Secretary's fall protection standard specifically mandates that the employer "shall designate a competent person to monitor the safety of other employees and the employer shall ensure that the safety monitor . . . shall be on the same walking/working surface and within visual sighting distance of the employee being monitored[.]" 29 C.F.R. § 1926.502(h)(1)(iii).

Applicability of Standard

The Secretary's fall protection standard applies to "each employee engaged in roofing work on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above a lower level."[10] 29 C.F.R. § 1926.501(b)(10). "Roofing work" is defined as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck." 29 C.F.R. § 1926.500(b). A "low-slope roof" means "a roof having a slope less than or equal to 4 in 12 (vertical to horizontal)." *Id.* Here, Payton Roofing's employees were engaged in roofing work since they were involved in the application and removal of roofing materials. Payton Roofing's employees were working on a roof with unprotected sides and edges approximately 9 feet above the lower level. Vivas measured the roof and determined it was a "low slope" roof since it measured 3 in 12. Therefore, the Secretary's fall protection standard was applicable to the cited condition.

Standard Violation

Timothy Payton admitted to Vivas that he was the company's safety monitor on site. As indicated *supra*, under the Secretary's cited standard, Payton Roofing was required to "ensure that the safety monitor . . . shall be on the same walking/working surface and within visual sighting distance of the employee being monitored[.]" 29 C.F.R. § 1926.502(h)(1)(iii). Here, when Vivas arrived on the worksite and observed Payton Roofing's employees working on the roof without fall protection, Timothy Payton was on the ground and therefore was not on the

[10] "*Lower levels* means those areas or surfaces to which an employee can fall. Such areas or surfaces include, but are not limited to, ground levels, floors, platforms, ramps, runways, excavations, pits, tanks, material, water, equipment, structures, or portions thereof." 29 C.F.R. § 1926.500(b).

same walking/working surface of the employees he was monitoring. Further, since Vivas observed employees working on both the front side and backside of the roof and when he arrived Timothy Payton was on the ground in the front of the building, Timothy Payton was not within visual sighting distance of the employees he was monitoring that were working on the backside of the roof. Thus, the Secretary has established that Payton Roofing violated the cited standard.

Exposure to Hazard

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). The Commission's longstanding "reasonably predictable" test for hazard exposure requires the Secretary to "show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd*., 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)). See also *Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980); *Gilles & Cotting*, 3 BNA OSHC 2002 (No. 504, 1976).

The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). As the Commission noted in *Gilles & Cotting*, 3 BNA OSHC at 2003, the scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue. Here, the zone of danger presented was the unprotected sides and edges of the roof. "Our inquiry then is whether the employees' proximity" to the unprotected sides and edges of the roof "makes it reasonably predictable that they will enter these zones of danger by slipping or falling." *Fabricated Metal*, 18 BNA OSHC at 1076.

The photographs taken by Vivas, and corroborated by his testimony, clearly establish the proximity of some of Payton Roofing's employees to the unprotected sides and edges of the roof, which "makes it reasonably predictable that they will enter these zones of danger by slipping or falling." Thus, the Court concludes the Secretary has shown "that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger" without proper fall protection. *Delek Ref., Ltd*., 25 BNA OSHC at 1376. Therefore, the Secretary has established employee exposure to the cited conditions.

Knowledge of Violation

"The knowledge element of the prima facie case can be shown in one of two ways." *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014) (citing *ComTran* at 1307). "First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer." *Id.* (citing *ComTran* at 1307–08). "In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable." *Id.* at 803-04 (citing *ComTran* at 1308).

However, in the Eleventh Circuit, a "supervisor's 'rogue conduct' cannot be imputed to the employer in that situation. Rather, 'employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards].'" *ComTran* at 1316 (citation omitted). Here, Timothy Payton was not just a supervisor; he was a corporate officer of Payton Roofing. Therefore, not only did Timothy Payton have actual knowledge of his violative conduct but so did Payton Roofing, since a corporation "cannot act other than through its officers, employees, and agents." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1271 (11th Cir. 2009); *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir.1985). Therefore, the Secretary has established Payton Roofing's actual knowledge.

Classification

A "serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). Thus, "[w]hether the employer intended to violate an OSHA standard is irrelevant. The only question relevant to the employer's state of mind is whether he knew or with the exercise of reasonable diligence could have known of the violation." *Georgia Elec. Co. v. Marshall*, 595

F.2d 309, 318–19 (5th Cir. 1979).[11] Here, the employees were exposed to a fall of approximately 9 feet to the ground. Such falls "could result in death or serious physical harm." Therefore, the Court concludes the violation was a serious violation.

IV. PENALTY DETERMINATION

The Secretary proposed a penalty of $2,400.00 for the violation. Under the Act, an employer who commits a "serious" violation may be assessed a civil penalty of up to $7,000 for each such violation.[12] 29 U.S.C. § 666(b). The Commission is empowered to "assess all civil penalties" provided in this section, "giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citing Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992)).

The gravity of the violation includes the number of exposed employees, the duration of exposure, the precautions taken to prevent injury, and the degree of probability that an injury would occur. *Merchant's Masonry, Inc.*, 17 BNA OSHA 1005, 1006-07 (No. 92-424, 1994). With respect to the gravity of this violation, the Court finds the severity of the violation was high since a 9-foot fall from the roof would likely result in death or serious physical harm and the probability was greater since there were 9 or 10 employees working on the roof.

With respect to the size of the business, Payton Roofing was small, with only 9 or 10 employees. OSHA gave Payton Roofing a 60% penalty adjustment for its size, which the Court finds appropriate. As to history, since there is no evidence Payton Roofing has been previously inspected, the Court concludes Payton Roofing should receive neither a reduction, nor an

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[11] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. Immediately after the split, the Eleventh Circuit stated in *Bonner v. City of Prichard, Alabama*, 661 F. 2d 1206 (11th Cir. 1981), that any opinion issued by the Fifth Circuit before the close of business on September 30, 1981 is binding precedent on the Eleventh Circuit.

[12] In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act, directs agencies to adjust their penalties for inflation each year and requires agencies to publish "catch up" rules to make up for lost time since the last adjustments. As a result of OSHA's "catch up" rules, OSHA's maximum penalties, which had not been raised since 1990, increased by 78%. Thus, an employer who commits a serious violation after November 2, 2015, may be assessed a civil penalty of up to $12,471 for each such penalty assessed after August 1, 2016.

increase based on their OSHA inspection history. Payton is also not entitled to a reduction for good faith since there is no evidence in the record establishing Payton Roofing's effort to implement an effective workplace safety and health management system. Therefore, giving due consideration to the size of the business, the gravity of the violation, good faith, and history, the Court finds the appropriate civil penalty is $2,800.00.[13] Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT the citation is **AFFIRMED** and Payton Roofing is assessed and directed to pay to the Secretary a civil penalty of $2,800.00.

SO ORDERED.

/s/ John B. Gatto
John B. Gatto
Administrative Law Judge

Dated: December 2, 2016
Atlanta, GA

[13] It appears OSHA provided its 60% penalty reduction for size to a gravity-based penalty determination of $6,000, which is a severity level of "medium" rather than "high." However, as indicated *supra*, the Court found the severity was high.