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. ALL-PRO CONSTRUCTION SERVICES, INC., Respondent.	OSHRC Docket No. 18-0827 OSHRC Docket No. 18-0828

DECISION AND ORDER

COUNSEL: Jeremy K. Fisher, Trial Attorney, Atlanta, GA, for Complainant.

Paul S. Elliott, Trial Attorney, Tampa, FL, for Respondent.

JUDGE: John B. Gatto.

I. INTRODUCTION

All-Pro Construction Services, Inc. (All-Pro) performs roofing work on new residences being built by home builders spread over 15 counties in central Florida. On January 31, 2018, and February 2, 2018, the United States Department of Labor's Occupational Safety and Health Administration (OSHA) initiated inspections of two of All-Pro's worksites in Odessa, Florida. As a result of the inspections, the Tampa, Florida OSHA Area Director issued[1] two Citations and Notifications of Penalty to All-Pro on April 20, 2018, pursuant to section 9(a) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§ 658(a), 651-678, and the standards promulgated thereunder. Each citation alleged a serious[2] violation of 29 C.F.R. § 1926.501(b)(13) (the Fall Protection standard), and each proposed a penalty of $9,054.

[1] The Secretary of Labor assigned responsibility to OSHA for enforcement and delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA, and authorized the Assistant Secretary to redelegate his authority. *See* 65 FR 50017, 50018 (2000). The Assistant Secretary promulgated regulations authorizing OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§1903.14(a) and 1903.15(a).

[2] The Act defines a "serious" violation as one that carries "a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). "The gravamen of a serious violation is the presence of a 'substantial probability' that a particular violation could result in death or serious physical harm." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 318 (5th Cir. 1979).

All-Pro timely contested the citations[3] and the Secretary of Labor initiated the above-styled actions with the Commission by filing a Complaint against All-Pro pursuant to Commission Rule 34(a), 29 C.F.R. § 2200.34(a), seeking to affirm the citations. All-Pro filed an Answer denying the allegations and pleaded the affirmative defense of "unpreventable employee misconduct." A trial was held on December 4-5, 2018, in Tampa, Florida, the Secretary filed his brief on January 22, 2019, and All Pro filed its brief on February 26, 2019. All-Pro stipulated to jurisdiction and coverage.

After hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order pursuant to Commission Rule 90, 29 C.F.R. § 2200.90, which constitutes its final disposition of the proceedings. If any finding is in truth a conclusion of law, or if any conclusion stated is in truth a finding of fact, it shall be deemed so. For the reasons indicated *infra*, the Court **AFFIRMS** both citations, and **ASSESSES** a penalty of $8,149 for each citation.

II. BACKGROUND[4]

On January 31, 2018, employees of All-Pro were installing a tile roof at a residential housing construction project at Starkey Ranch in Odessa, Florida. The roof had a 5/12 slope. Three employees performing roofing activities were not wearing fall protection and were exposed to a fall of approximately 18 feet, 2 inches. On February 2, 2018, employees of All-Pro were installing a tile roof at a residential housing construction project at Starkey Ranch in Odessa, Florida. The roof had an 8/12 slope. Three employees performing roofing activities were not wearing fall protection and were exposed to a fall of approximately 9 feet, 4 inches. (Statement of Stipulated Facts.)

On Wednesday, January 31, 2018, OSHA Compliance Safety and Health Officers Richard Andree and Lara Blanchard were conducting an inspection at Starkey Ranch, a large residential housing development in Odessa, Florida (Tr. at 20:6-25; Tr. at 32:2-4). At the time, Starkey Ranch was still under development, with about half of the approximately 1,000 homes on site already built and others under construction (Tr. at 21:12-16). While engaged in an

[3] The inspections and resulting citations were consolidated for trial and final disposition on June 20, 2018, following a joint motion filed by the parties.

[4] The Court relies on the citations to the record in the Secretary's post-trial brief since All-Pro's post-trial brief did not contain any citations to the record.

inspection of a carpentry company, Andree and Blanchard noticed a group of workers installing tiles on a house approximately 100 yards away (Tr. at 21:17-22:4; Tr. at 23:5-10).

Upon noticing the workers, Andree aimed his video camera at the crew and zoomed in to find that "it was obvious that they were not using fall protection" (Tr. at 22:5-11; Ex. C-1). Andree began recording video of the scene, observing one worker – who was wearing a harness but without a lanyard connected – walking to about a foot from the edge of the roof (Tr. at 23:11-17; Exs. C-1 & C-2). Another video taken by Andree shows another crewmember, again without fall protection, walking within a foot of the roof's edge (Tr. at 25:4-9; Ex. C-3). In total, Andree observed three employees working on the roof and "making no attempt to use the fall protection" (Tr. at 25:1-12). Andree testified that he observed the employees working without fall protection for a period of 15 to 20 minutes (Tr. at 32:19-25).

After recording the videos, Andree proceeded to the worksite and called the crewmembers down from the roof (Tr. at 26:6-12; Tr. at 29:15-19). Although lanyards were present at the worksite, none were being worn, and no other form of fall protection was in place (Tr. at 33:11-20). Andree spoke with one of the workers, Jaime Hernandez, who identified himself as the crew's foreman (Tr. at 27:11-17). Hernandez told Andree the crew had not been wearing their fall protection because they did not want to trip on the lanyards (Tr. at 28:15-23; C-4). Hernandez informed Andree that the roof was sloped at 5/12 with a height of 18 feet, 2 inches from the edge (Tr. at 26:23-27:5; Ex. C-4). Hernandez also told Andree he was employed by All-Pro and had worked for the company for a period of five years (Tr. at 28:24-29:2; Ex. C-4).

James "Jim" Coston, a General Manager for Hugh McDonald Construction, the parent company of All-Pro, was summoned to the worksite by the builder and arrived about 30 minutes after the inspection was opened (Tr. at 30:1-5; Tr. at 141:24-142:4; Tr. at 30:24-31:1).[5] Andree held an opening conference with Mr. Coston and explained OSHA's presence at the site (Tr. at 30-7-23). Coston told Andree that the three employees on the worksite were paid by All-Pro, and that the company had 47 employees (Tr. at 30:18-23; Tr. at 48:17-21).

Two days later, on Friday, February 2, 2018, Andree and Blanchard were once again at Starkey Ranch when Andree observed three employees "on a very, very steep roof not wearing

[5] Andree was familiar with both Coston and All-Pro, having inspected the company in August 2017 (Tr. at 31:8-22). During that inspection, Andree had observed three employees – one from All-Pro, and two from Nova Carpentry (another company controlled by Hugh McDonald Construction) – working on a roof without fall protection, and citations were issued (Tr. at 30:7-14; 31:13-22).

fall protection" and recorded video of the scene (Tr. at 32:5-10; 32:5-18; 33:21-25; *see also* Ex. C-5). At the time, Andree was approximately 50 to 75 yards away from the roof (Tr. at 47:9-12). Two of the workers appeared to be nailing shingles on the roof, with one of them one to two feet from the edge (Tr. at 35:7-36:3; Ex. C-5). One of the workers tied off his lanyard while being videotaped, a maneuver Andree described as typical for roofers who notice an OSHA inspector nearby (Tr. at 37:2-6; Ex. C-6). However, Andree testified he did not see anchor points for the lanyards on the roof and testified that the roof's near-complete status likely meant that none were present (Tr. at 37:13-20). No other form of fall protection was present (Tr. at 43:4-7). The roof was sloped at 8/12, with a fall hazard of nine feet, four inches (Tr. at 38:21-39:4). Due to the steep slope of the roof, Andree considered all three employees to be exposed since "if [the employees] fall, they could roll down" the side (Tr. at 35:7-14). Andree observed the employees working without fall protection for a period of about ten minutes (Tr. at 46:11-19).

Andree called the crew down from the roof (Tr. at 38:1-2). Two of the workers complied, but when Andree asked about the third, one worker held up two fingers, apparently to suggest that only two employees had been on the roof (Tr. at 38:1-8). Eventually the third worker was located (Tr. at 38:4-7). None of the workers spoke English and Andree was unable to communicate with them (Tr. at 39:15-20). Andree instead spoke to Brian Lamb, the Construction Manager for MI Homes, the General Contractor (Tr. at 43:25-7; Ex. C-9). In his sworn statement, Lamb told Andree the roofers' failure to wear fall protection was "a constant issue," and that he had "seen them and told them on a number of occasions" (Ex. C-9). Lamb also indicated this project fell within the territory of another Hugh McDonald Construction manager, Gary Choron and that Lamb had discussed fall protection with Choron the previous day (Tr. at 3-13; *see also* Ex. C-9). Choron, however, was away during the time of the inspection (Tr. at 40:3-8). Since no supervisor from All-Pro or Hugh McDonald Construction was present, Coston was again summoned to the worksite (Tr. at 39:15-20; Tr. at 40:22-41:4). Upon arrival, Coston telephoned Hugh McDonald Construction's corporate office to determine whom the roofing crew worked for (Tr. at 41:22-42:6). Coston confirmed that all three roofers were employees of All-Pro, and that one of them – Jose Morales – had only started working for the company two days prior (Tr. at 42:7-14; Ex. C-8). Coston indicated that the workers were not wearing fall protection because they were finishing up (Tr. at 42:11-21; Ex. C-8).

III. ANALYSIS

As indicated *supra*, both citations allege a violation of the Fall Protection standard, which mandates in relevant part "[e]ach employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system[.]" 29 C.F.R. § 1926.501(b)(13). The citation involving Inspection Number 1293155 alleges "three employees were exposed to a fall of 18 feet 2 inches while installing a tile roof. The roof had a 5/12 slope, on or about 1/31/18." The citation involving Inspection Number 1293158 alleges "three employees were exposed to a fall of 9 feet 4 inches while installing a tile roof. The roof had an 8/12 slope, on or about 2/2/18." All-Pro does not dispute these facts, which are fully supported by the record.

In the Eleventh Circuit, the jurisdiction in which this case arose,[6] "[t]o make a *prima facie* showing that an employer violated an OSHA standard, the Secretary must show: "(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." *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor,* 567 F. App'x 801, 803 (11th Cir. 2014) (citation omitted). 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." *Id.*, 567 F. App'x at 803 (citation omitted).

The parties stipulated the standard cited in the citations was applicable to the work being performed by All-Pro at the worksites and that All-Pro's employees were exposed to a fall of greater than six feet, and the citation were properly classified as serious (Statement of Stipulated Facts). The parties also stipulated the roofers were not wearing fall protection at the time of either inspection. (*Id.*) Therefore, there is no dispute the cited standard was violated. Further, in its post-trial brief, All-Pro does not dispute the Secretary has established a *prima facie* case with respect to the first three elements but only argues the Secretary failed to establish All-Pro "had

[6] All-Pro's worksites involved in these actions were in Florida, where it also has its principal place of business. Both parties may appeal the final order in this case to the Eleventh Circuit Court of Appeals, and in addition, All-Pro 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). Therefore, the Court applies Eleventh Circuit precedent in deciding this case.

either actual, direct knowledge of the violation or should have known of the violations with the exercise of reasonable diligence." (Resp't's Br. at 2.) Therefore, the Court concludes the Secretary has established a *prima facie* case with respect to the first three elements and will restrict its analysis *infra* to the fourth "knowledge" element of the Secretary's *prima facie* case.

As indicated *supra*, under Section 17(k) of the Act, 29 U.S.C. § 666(k), a serious violation exists "if there is a substantial probability that death or serious physical harm could result from a violation unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation" (emphasis added). The knowledge element of the *prima facie* case can be shown in one of two ways. *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir.2013). "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.* at 1307–08. However, a "supervisor's 'rogue conduct' generally 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].'" *Id.* at 1316 (citation omitted).

"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 1308 (citation omitted). "An employer's safety program may be deemed inadequate if it is not adequately communicated to employees." *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 804 (11th Cir. 2014) (*citing PSP Monotech Indus.*, 22 BNA OSHC 1303, 1306 (No. 06–1201, 2008). *See also Daniel Int'l Corp. v. OSHRC*, 683 F.2d 361, 364 (11th Cir.1982) ("[W]e have little doubt that Daniel has a work rule requiring employees to tie off ... which is communicated effectively to all of its employees." (emphasis added)); *H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 820 (5th Cir. Unit A Mar.1981)[7] (finding, in the context of establishing a defense of negligent employee misconduct, substantial evidence in the record supported a finding that a company failed to communicate and enforce its work rules needed to comply with OSHA standards).

[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

During the inspection of January 31, 2018, Hernandez identified himself to Andree as the foreman of the crew (Tr. at 27:11-17). At trial, however, All-Pro's President, Hugh MacDonald, Jr., testified "[h]e may call himself that, we don't call him a foreman," he was not part of management, was paid the same as the rest of the crew, and did not have any hiring or firing authority (Tr. at 96:8-13; Tr. at 97:12-17). MacDonald testified that, as the crew's "best English speaker," he would have been the worker "that we try to communicate through" and he could "bring somebody to us" and "vet him and see if he can work with us" (Tr. at Tr. at 97:2-11; Tr. at 97:20-98:5).

The Court concludes the Secretary has not established Hernandez was a supervisor. *See Daniel Int'l Corp. v. Occupational Safety & Health Review Comm'n,* 683 F.2d 361, 365 (11th Cir. 1982) ("Rule's position as leadman did not place him in a supervisory role. Rule did not have the power to hire or fire, he did not earn more than the other crewmembers, he did not wear a white hat (indication of a supervisory position), and his fellow crewmembers did not consider him to be a supervisor. Rule was not directly responsible for enforcement of the safety rules[.]"). Therefore, Hernandez's actual or constructive knowledge of the violation is not imputed to All-Pro.

However, the Commission deems an employer to have constructive knowledge of a violation that is in plain view. *Kokosing Constr. Co.,* 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996). Here, both crews were in plain sight; on January 31, 2018, Andree and Blanchard noticed the crew working from around 100 yards away (Tr. at 21:17-22:4; Tr. at 23:5-10). Prior to the second inspection, on February 2, 2018, Andree and Blanchard observed the crew working without fall protection while 50 to 75 yards away (Tr. at 47:9-12). Both situations were in plain view and would have been easily observable by All-Pro's supervisors, as the Secretary notes, had All-Pro "felt that it bore any responsibility to supervise its workers." (Sec'y's Br. at 14.) Therefore, the Secretary has established the knowledge element of his *prima facie* case as to both citations.

Employee Misconduct Defense

To establish the unpreventable employee misconduct defense, an employer must show "that it: (1) created a work rule to prevent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover noncompliance; and (4) enforced the rule against employees when violations were discovered. *ComTran Grp.,* 722 F.3d

at 1308. As to the first factor, All-Pro asserted in its brief, *without any citation to the record*, it "presented evidence of its established written work rules in its SAFETY PROGRAM manual (in both English and Spanish) along with evidence that it had been delivered, explained and signed for by each employee. Additionally, each employee agreed, in writing, to abide by all ALL-PRO OSHA and company safety work rules." (Resp't's Br. at 2.)

However, the only evidence of All-Pro's alleged work rule addressing fall protection was contained in a safety manual for Hugh McDonald Construction, with the manual also listing various companies – including All-Pro – that fall under the corporate umbrella (Ex. R-1). However, the version of the safety manual proffered by All-Pro was an April 2018 version, which after the two OSHA inspections that precipitated the citations (Ex. R-2). However, All-Pro's President could not confirm that the fall protection provisions in the manual had been in existence in January and February 2018; instead, he stated that he did not think the provisions had changed but admitted that "I don't know exactly what change that might have been. It could have been anything" (Tr. at 106:14-107:2). The Court concludes All-Pro failed to establish it had a fall protection rule in place at the time of the inspections. On that basis alone, All-Pro's employee misconduct defense fails.

As to adequate communication of its alleged rule to its employees, All-Pro again simply argues in its brief, without any citation to the record, that it presented "evidence that it had been delivered, explained and signed for by each employee" and "each employee agreed, in writing, to abide by all ALL-PRO OSHA and company safety work rules." (Resp't's Br. at 2.) The President of All-Pro admitted employees are "left to themselves," but asserted "they have had training" (Tr. at 109:14-18). All-Pro produced records at trial indicating that the three workers involved in the January 31st incident had received a safety manual and had taken a "safety pledge" (Ex. R-4), was unable to produce any evidence that the employees – several who had worked for Respondent for years – had received any training since their hire dates (Ex. R-2; Tr. at 92:20-93:23). The Court also concludes All-Pro failed to establish it had adequately communicated its alleged rule to its employees. On that basis alone, All-Pro's employee misconduct defense also fails.

As to whether All-Pro took all reasonable steps to discover noncompliance, it admitted it did not have a supervisor at either worksite, and All-Pro's President admitted, employees are "left to themselves." The Court also concludes All-Pro failed to establish it took all reasonable

steps to discover noncompliance. On that basis alone, All-Pro's employee misconduct defense also fails.

As to whether All-Pro enforced the rule against employees when violations were discovered, Andree testified, both inspections – conducted two days apart – revealed entire, multi-employee work crews without fall protection (Tr. at 49:5-20). However, All-Pro produced no evidence that any steps had been taken to shore up the fall protection measures at Starkey Ranch following the inspection on January 31st, with the same dangerous conditions on another roof two days later. ALL-Pro's President testified that employees had been suspended and terminated for violating OSHA regulations in the previous five years but provided no specific examples or dates of any such occurrences and could not provide records of such occurrences despite the company's record retention rules (Tr. at 104:13-15; Tr. at 130:132:2). The Court also concludes All-Pro failed to establish it enforced the rule against employees when violations were discovered. On that basis alone, All-Pro's employee misconduct defense also fails.

IV. PENALTY DETERMINATION

The Commission has wide discretion in penalty assessment and is the final arbiter of penalties in all contested cases. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994). The Act requires the Court to "giv[e] due consideration to the appropriateness of the penalty with respect to [1] the size of the business of the employer being charged, [2] the gravity of the violation, [3] the good faith of the employer, and [4] the history of previous violations." 29 U.S.C. § 666(j). "These factors are not necessarily accorded equal weight...." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 22016 (No. 87-2059, 1993). "Gravity of violation is the key factor." *See id.*

As to the gravity of the violations, Andree classified both as high gravity, indicating "if you fall nine feet, ten feet or greater you're most likely going to sustain a very serious injury" (Tr. at 48:7-11; Tr. at 48:2-6). The Court agrees the gravity for both violations was high. Andree calculated a 30% reduction for size based on the information he received that All-Pro had 47 employees, which the Court finds appropriate. He did not offer any good faith reduction, which the Court agrees with given All-Pro's lax safety program. As to history, Andree did not provide a reduction. However, since the Secretary offered no evidence of a history of previous violations in the past five years,[8] the Court finds a 10% reduction is appropriate. Accordingly,

[8] Andree issued a fall protection citation against All-Pro several months earlier, but the citation was ultimately

V. ORDER

IT IS HEREBY ORDERED THAT both citations are **AFFIRMED** and a civil penalty of $8,149 is imposed on each citation.

SO ORDERED.

/s/ *John B. Gatto*
First Judge John B. Gatto

Dated: April 9, 2019
Atlanta, GA

deleted (Tr. at 50:6-9).