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| Secretary of Labor,<br>Complainant,<br><br>v.<br><br>Guam Top Builders, Inc.,<br>Respondent. | OSHRC Docket No. **98-0973** |

Appearances:

Matthew Vadnal, Esquire
U. S. Department of Labor
Office of the Solicitor
Seattle, Washington
For Complainant

Jae Park, President
Guam Top Builders
Agaña, Guam
For Respondent

Before: Administrative Law Judge Nancy J. Spies

## DECISION AND ORDER

Guam Top Builders, Inc. (GTB), contests a three-item citation issued by the Secretary on April 27, 1998. Item 1 of the citation alleges a serious violation of § 1926.501(b)(10) for failing to provide fall protection to employees engaged in roofing work on low-slope roofs. In the alternative, item 1 alleges a serious violation of § 1926.501(b)(13) for failing to provide fall protection for employees engaged in residential construction. Item 2 alleges a serious violation of § 1926.1053(b)(1) for failing to ensure that the ladder rails of a portable ladder extended at least 3 feet above the upper landing surface. Item 3 alleges a serious violation of § 1926.1053(b)(6) for failing to secure a ladder on a surface that was not level.

GTB's president, Jae Park, represented the company *pro se* at the March 23, 1999, hearing. GTB does not dispute jurisdiction. The Secretary established that GTB was a covered employer within the meaning of the Occupational Safety and Health Act of 1970 (Tr. 59-60). GTB argues that the Secretary failed to establish that its employees were exposed to a fall hazard (item 1) and that the ladder on the roof was not secured (item 3). GTB does not appear to dispute that the tops of the ladder rails were less than 3 feet above the upper level (item 2). The parties presented closing arguments and no post-hearing briefs were filed.

For the reasons set out below, items 1 and 2 are affirmed, and item 3 is vacated.

*Background*

On January 26, 1998, Johnny Cruz conducted an inspection on behalf of the Occupational Safety and Health Administration (OSHA) of GTB's worksite at the Flora Gardens Condominiums in Chalan Pago, Guam (Tr. 10).[1] Cruz conducted the inspection based on a referral by his supervisor, Leonard Limtiaco, who had observed GTB's construction activity at the site he drove along a public roadway (Tr. 16-17).

As Cruz approached GTB's worksite, he noted that there were approximately 20 two-story condominiums in the area, each approximately 18 feet high. Many of the roofs had been damaged by Typhoon Paka, which had struck in December 1997. GTB was repairing the roofs, whose ceramic shingles had become loosened in the storm (Tr. 22-23).

While Cruz was still in his car, he observed an employee carry a 2 foot by 6 foot piece of foam along the roof (Tr. 19):

> [W]hen the wind was blowing, he was, you know, going with the direction of the wind, but he had, he was smart enough to let it go, and he was able to catch his balance, and he was right at the edge. Had he not let that foam go, he would have fallen to the ground. And then I observed other employees up at the, on the rooftop.

Cruz noticed a portable ladder set up on the lower sloped roof of one of the buildings. He observed several employees using the ladder to gain access to the upper roof (Exh. C-3; Tr. 45-46). Cruz asked to speak to the supervisor, and an employee directed him to Mr. Chung,[2] whom he earlier observed operating a forklift moving materials on the other side of the road (Tr. 22). Chung notified Park that Cruz was at the site. After approximately 30 minutes, Park showed up and Cruz held opening and closing conferences with him (Tr. 41, 82).

The Citation

[1] Cruz is employed by the government of Guam. He is permitted to make inspections on behalf of OSHA as part of OSHA's 7(c)(1) enforcement program (Tr. 10).

[2] Cruz identified the supervisor as Mr. Sung. Park was insistent that his supervisor's name was Mr. Chung (Tr. 68-69). Cruz stated that the supervisor told Cruz his name was Sung and that he spelled it for him (Tr. 71). Nevertheless, because of language differences and because of Mr. Park's personal knowledge, this decision will refer to the supervisor as "Chung."

The Secretary has the burden of proving her case by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

In order to establish that a violation is "serious" under § 17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHA 1020, 1024 (No. 86-521, 1991).

Item 1: Alleged Serious Violation of § 1926.501(b)(10), or in the Alternative, of § 1926.501(b)(13)

The Secretary alleges a serious violation of § 1926.501(b)(10), which alleges:

> *Roofing work on low-slope roofs.* Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of [protective systems] . . . . Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [*i.e.* without the warning line system] is permitted.

GTB claimed in the pre-hearing pleadings that § 1926.501(b)(10) did not apply to the work its employees were doing at Flora Gardens Condominiums because that work was done on residential buildings. Prior to the hearing, the Secretary moved to amend item 1 to allege in the alternative that GTB committed a serious violation of § 1926.501(b)(13), which provides:

> *Residential construction*. Each 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 unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.
>
> Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

The undersigned allowed the amendment (Tr. 9). OSHA Directive STD 3.1 ("Interim Fall Protection Compliance Guidelines for Residential Construction") relates to § 1926.501(b)(13) and states (Exh. C-5):

> Subpart M does not define "residential construction." For the purposes of interim compliance guidance under this directive, the term "residential construction" applies to structures where the working environment, and the construction materials, methods, and procedures employed are essentially the same as those used for typical house (single-family dwelling) and townhouse construction.

The record establishes that GTB was engaged in roofing work on townhouses at the Flora Gardens Condominiums. Thus, the alternative standard, § 1926.501(b)(13) is more specific to the cited conditions. The original standard cited in item 1, § 1926.501(b)(10), will not be considered.

Section 1926.501(b)(13) applies to GTB's work at the site. It is undisputed that GTB's employees were working 6 feet or more above the lower levels. The employees were working 18 feet above the ground (Exhs. C-1 and C-2; Tr. 33-34). GTB was not using a guardrail system, a safety net system, or a personal fall arrest system (Tr. 25). GTB did not attempt to demonstrate that the use of such fall protection systems were infeasible or created a greater hazard, and the

company does not argue that it developed a fall protection plan that met the requirements of § 1926.502(k).

GTB argues that it had a safety monitoring system in place which complied with § 1926.502(h)(1). That standard provides:

> *Safety monitoring systems.* Safety monitoring systems [See 1926.501(b)(10) and 1926.502(k)] and their use shall comply with the following provisions:
> (1) The employer shall designate a competent person to monitor the safety of other employees and the employer shall ensure that the safety monitor complies with the following requirements:
> (i) The safety monitor shall be competent to recognize fall hazards;
> (ii) The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner;
> (iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored;
> (iv) The safety monitor shall be close enough to communicate orally with the employee; and
> (v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

GTB states that it designated supervisor Chung as the competent person to monitor the safety of the employees. Section 1926.502(h)(1)(iii) and (iv) required the safety monitor to be on the same walking/working surface and within visual sighting and hearing distance of the employees being monitored. When Cruz arrived on the site, he observed seven GTB employees on the roofs of the complex. Supervisor Chung was across the street from the employees operating a forklift (Tr. 22). Section 1926.502(h)(1)(v) requires that the monitor not have other responsibilities that could divert his attention from the monitoring function. Chung's location and activity during the time the GTB employees were on the roof clearly violate the requirements for safety monitors mandated in § 1926.502(h)(1).

GTB argues, through Park, that the employees were working in the center of the roof at the time of Cruz's inspection and were not exposed to a fall hazard because they were away from the edge (Tr. 117-118). This argument is rejected. Park was not at the site at the time of Cruz's

inspection, so he cannot testify to the location of the employees. Furthermore, the purpose of having a safety monitor is to warn employees when they are unaware of fall hazards and are acting in an unsafe manner. It is not adequate for a safety monitor to instruct employees to stay away from the edge of the roof and then to leave them to perform other duties.

GTB claims that the Secretary failed to establish employee exposure. Cruz testified that as he approached the worksite, he observed an employee carrying foam "right at the edge" of the roof (Tr. 19). Park testified that he instructed employees to drop the foam insulation over the edge of the roof, and that employees were required to come "about four feet from the edge" in order to do that (Tr. 119). By Park's own admission, his employees were required to come at least within 4 feet of the roof's edge. The Secretary has established that GTB's employees were exposed to a fall hazard and that GTB was aware of this exposure, which took place in plain sight. Both Cruz and his supervisor observed the employees' exposure from a public roadway.

The Secretary has established that GTB violated § 1926.501(b)(13). The employees were exposed to the hazard of falling, which could result in death or broken bones (Tr. 35). The violation is serious.

Item 2: Alleged Serious Violation of § 1926.1053(b)(1)

The Secretary alleges that GTB committed a serious violation of § 1926.1053(b)(1), which provides:

> *Use*. The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated: When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) 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 ladder's 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.

Exhibit C-3 is a copy of a photograph that shows a portable ladder placed with its feet on a sloped roof, and its upper part resting against the edge of the upper roof. The top of the ladder is not secured to anything.

Cruz did not measure the ladder, but he testified that it is standard for the rungs of a ladder to be 1 foot apart (Tr. 45). Exhibit C-3 shows that the left hand rail of the ladder extends approximately 2½ feet above the upper roof's edge, and the right hand rail extends approximately 2 feet above the edge.

Cruz observed three or four employees using the ladder to come down from the upper roof (Tr. 46-47). The ladder was in plain view of a public roadway and GTB's supervisor was on the site (Tr. 48). GTB did not present any real defense with regard to this item (Tr. 126).

The Secretary has established a violation of § 1926.1053(b)(1). The hazard created by this violation was that the employee, having a short handhold as he exits onto the roof, could trip or fall, causing bruises and broken bones (Tr. 50). The violation is serious.

Item 3: Alleged Serious Violation of § 1926.1053(b)(6)

The Secretary alleges that GTB committed a serious violation of § 1926.1053(b)(6), which provides:

> Ladders shall be used only on stable and level surfaces unless secured to prevent accidental displacement.

Item 3 concerns the same ladder that is the subject of item 2 and that is depicted in Exhibit C-3.

The roof on which the ladder rested was not level. It was sloped at 2 to 12 inches (Tr. 53). Cruz stated that the ladder was resting on the lower roof, and that the feet of the ladder were "secured" by 1 by 2 inch pieces of wood nailed to the concrete of the roof with 1½-inch nails. Cruz believed the weight of an employee using the ladder could cause the wood to "give way" (Tr. 51-52). Cruz observed three or four employees use the ladder (Tr. 54-54). Cruz noted that the ladder shook as employees climbed down (Tr. 55). The ladder was in plain view (Tr. 48).

Cruz testified that the best way to secure the ladder was to put 2 by 4-inch boards in front of the legs of the ladders and to tie the top of the ladder to the edge against which the ladder was

leaning (Tr. 58). The Secretary argues only that GTB's means of compliance was inadequate. GTB argues that the 1 by 2 boards nailed in front of the ladder legs was sufficient to secure the ladder (Tr. 98).

It is determined that the Secretary has failed to show by a preponderance of the evidence that the 1 by 2-inch wood nailed to the roof in front of the ladder was insufficient to secure it. Cruz testified that this was inadequate and Park testified that is was. No other evidence was presented to establish whether GTB's method of securing the ladder would prevent accidental displacement. Cruz's opinion is not supported by any other information that would make it markedly more credible than Park's.

The Secretary has failed to establish a violation of § 1926.1053(b)(6).

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.

GTB employed 35 employees at the time of the inspection and is considered to be a small employer (Tr. 139). The Secretary had previously cited GTB for serious violations (Tr. 51). GTB is not entitled to any credit for good faith. GTB was unaware of its employee's experience (Tr. 124). Its implementation of the safety monitoring system was abysmal. The gravity of the violation for item 1 was high. Employees were working on a windy day, were required to go the edge of the roof, and were exposed to falls from a height of 18 feet. A penalty of $2,000.00 is assessed for item 1. The gravity of the violation for item 2 is moderate. The ladder had some extension above the roof level, but not enough. Employees falling from the ladder would most likely fall to the lower roof, suffering "probably bruises" (Tr. 50). A penalty of $450.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Item 1 of the citation, alleging in the alternative, a serious violation of § 1926.501(b)(13) is affirmed, and a penalty of $2,000.00 is assessed;
2. Item 2 of the citation, alleging a serious violation of § 1926.1053(b)(1) is affirmed, and a penalty of $450.00 is assessed; and
3. Item 3 of the citation, alleging a serious violation of § 1926.1053(b), is vacated, and no penalty is assessed.

NANCY J. SPIES
Judge

Date: August 16, 1999