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. Stevers Roof Side Remodel, LTD, Respondent.	OSHRC Docket No. 13-0039

Appearances: Wayne P. Marta, Esq., U. S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For Complainant

Thomas O. Stevers, Owner, *Pro Se,* Mobile, Alabama
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Stevers Roof Side Remodel, LTD (Roof Side) is a small residential and light commercial roofing company in northwestern Ohio. On November 14, 2012, pursuant to a complaint, a compliance officer (CO) with the Occupational Safety and Health Administration (OSHA) conducted an inspection of Roof Side's re-roofing work on a single family home in Northwood, Ohio. As a result of the OSHA inspection, Roof Side received a repeat citation on December 4, 2012. Roof Side timely contested the citation.

The repeat citation alleges that Roof Side violated 29 C.F.R. § 1926.501(b)(13) because three workers on the roof were exposed to a fall hazard of approximately 11 feet without using the available personal fall arrest systems. The citation was classified as a repeat violation based on a serious citation received by Roof Side on May 5, 2008, alleging, among other violations, a violation of 29 C.F.R. § 1926.501(b)(13) (item 2). The 2008 citation was resolved by an informal settlement agreement with OSHA on July 15, 2008, which became a final order of the Commission. A penalty of $3,520.00 is proposed for the repeat citation.

The hearing in this case was held on July 9, 2012, in Toledo, Ohio. Roof Side was represented *pro se* by its owner, Mr. Thomas Stevers. The Secretary filed a post-hearing brief on

August 23, 2013. Roof Side's post-hearing statement of position was received on September 4, 2013.[1]

Roof Side disputes that it is an employer engaged in a business affecting commerce. Roof Side argues that its temporary workers were on break and not engaged in roofing activities at the time of the OSHA inspection. It also claims that the OSHA inspection was unreasonable because it was the result of a competitor's complaint against small roofing companies (Tr. 6, 13-16).

For the reasons discussed, Roof Side's arguments are rejected. Roof Side's repeat violation of § 1926.501(b)(13) is affirmed and a penalty of $2,000.00 is assessed

The Inspection

Roof Side is a small residential and light commercial roofing company. In business since 1994, Roof Side's office is in Maumee, Ohio. Mr. Stevers is Roof Side's owner and only full-time employee. Roof Side hires temporary workers to perform the roofing work after projects are acquired (Tr. 137-138).

In November 2012, Roof Side was verbally contracted by another roofing company to re-roof a single family home in Northwood, Ohio. The roofing job required removing three layers of old roofing shingles and replacing them with new shingles and flashing. The home was described as a two-story farmhouse with converging roofs (Tr. 94, 138-139, 143, 166). The slope or pitch of the roof was 10 in 12 (Tr. 92). The roof's eave was approximately 11 feet above the ground (Exh. C-3; Tr. 28-29). To perform the roofing work, Roof Side hired two journeymen roofers and a grounds man who had worked for Roof Side on various projects during the preceding five years. Mr. Stevers was present during the roofing work and assisted the roofers with tools and materials. The roofing project took three to five days to complete (Tr. 117, 139).

On November 14, 2012, after the OSHA office received a complaint regarding the lack of fall protection at a roofing job in Northwood, Ohio, a CO was assigned to conduct the inspection pursuant to an OSHA local emphasis program on fall hazards (Tr. 20). When the CO arrived at the project at approximately 2:20 p.m., he observed three workers sitting on the roof at the peak (Exh. C-1; Tr. 25, 86). The workers were not observed removing or installing roofing shingles

[1] Although filed late, the court considered Roof Side's statement of position of two pages in this Decision. The company representative is not an attorney and is probably not aware of the strict adherence to a filing deadline. Also, the arguments raised were the same as he raised during the hearing.

and appeared to be on a break (Tr. 93, 100). The worker sitting next to the chimney appeared to be removing grit from between the bricks (Tr. 78, 110). The three workers were not attached to personal fall arrest systems or otherwise protected from a fall hazard. Ropes suitable for personal fall arrest systems were seen on the roof in another location but, at the time of the inspection, were not attached to the workers (Exh. C-6; Tr. 80). The CO also observed two ladders with a pick board across them and slide guards on the roof (Tr. 91-92). The CO never observed the workers using the fall protection equipment even when exiting the roof (Tr. 34, 97).

When the CO entered the property, he asked to speak to the "foreman." The worker, who worked as the grounds man, identified himself as the foreman, exited the roof, and explained that Mr. Stevers had just left the project to purchase supplies (Tr. 30, 134, 141). The worker then telephoned Mr. Stevers. After immediately returning to the project, Mr. Stevers was very upset because of another OSHA inspection and refused to answer the CO's questions. He also prevented the CO from speaking with the workers or taking measurements (Tr. 29, 40, 41-42, 177-178). The CO terminated the inspection and left the project. The OSHA inspection lasted approximately 15 minutes (Tr. 86).

Based on the photographs and the CO's observation made during the inspection, the repeat citation was issued to Roof Side on December 4, 2012.

Discussion

Roof Side was unable to stipulate that it is a covered employer under § 3(5) of the Occupational Safety and Health Act, 29 U. S.C § 652(5) (Act).

Roof Side was an Employer Engaged in Commerce

Section 3(5) of the Act defines a covered employer as a person engaged in a business affecting commerce who has employees. The Act defines a "person" to include individuals, partnerships, associations, corporations and other entities. "Commerce" is defined as trade, traffic, commerce, transportation, or communications among the several States or between a State and any place outside thereof. 29 U.S.C. § 652(3) and (4).

Roof Side is a corporation with limited liability and, as a residential roofing contractor, is an employer engaged in business affecting commerce. Residential roofing activities are the type of work that was intended to be covered by the Act. *Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529 (No. 77-3676, 1983) (construction work is within the class of activities

Congress intended to regulate and thus an employer engaged in construction activities is in a business affecting commerce).

The record shows that at the time of the OSHA inspection, Roof Side owned a 2004 Ford F-150 truck to transport the workers and materials to the Northwood project (Exh. C-2; Tr. 27, 121, 159). The truck with Roof Side's name and telephone number printed on the doors was parked at the site next to piles of old roofing shingles and flashing. According to the internet, the F-150 trucks are assembled in plants in Michigan and Missouri and sold through local dealerships.

Also, Roof Side's business uses roofing shingles and roofing nails. The shingles on the Northwood project were manufactured by Owens Corning Corporation, outside the State of Ohio (Tr. 162). In its advertising, Roof Side identifies itself as a preferred contractor for Owens Corning Corporation (Exh. C-14). Mr. Stevers agrees that Owens Corning shingles were likely manufactured outside the State of Ohio and shipped through interstate commerce to building supply houses in the Toledo area where Roof Side purchases them (Tr. 162-163).

In a letter to OSHA, Mr. Stevers claims that "We are members of the Better Business Bureau and carry an A-plus rating" (Exh. C-12; 160). Roof Side pays $300 a year for the Better Business Bureau listing (Exh. C-13; Tr. 161).

Based on the nature of its business, its use of materials and products which are produced outside the State of Ohio and its advertising through the internet, the record establishes that Roof Side is in a business affecting commerce within the Act.

Roof Side's Temporary Workers were Employees

Section 3(6) of the Act defines an employee as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(6). Mr. Stevers is Roof Side's only full-time employee.

After obtaining roofing projects, Roof Side hires temporary workers to perform the roofing work. Although temporary, the workers hired for the projects are nevertheless considered employees of Roof Side within the meaning of the Act.

For the Northwood project, Mr. Stevers hired and supervised four temporary workers. The workers had worked on previous projects for Roof Side for several years (Tr. 141-142). The workers were paid by the hour. While Mr. Stevers did not micromanage their work by telling them how to perform the specific roofing tasks, he did direct the location of where they were to

work, the time to work, and the overall objectives to be accomplished. Mr. Stevers supervised the workers in that he obtained the work and was generally present on the project to ensure the work was performed in accordance with the owner's requirements (Tr. 115, 117, 169). Mr. Stevers monitored the workers' daily progress to assure it was done safely and on schedule (Tr. 167-170). Mr. Stevers' control over the Northwood project even went so far as to prevent the CO from speaking to the workers (Tr. 177). The truck and equipment located on the project were the property of Roof Side and had been furnished to the workers for their use. The property provided by Roof Side included personal arrest systems, ladders, pick boards, and slide guards (Exhs. C-3, C-6). He paid the workers an hourly rate and provided them the appropriate safety equipment and materials (Tr. 131, 143-144, 156).

The workers were not independent contractors. They did not have a contract with Roof Side and there is no evidence that the workers operated their own roofing businesses (Tr. 118). One worker had worked for Roof Side off and on for seven years (Tr. 119). The other workers had worked off and on four or five years for Roof Side (Tr. 142). Because the workers were experienced roofers, Mr. Stevers did not direct their method of performing the roofing work (Tr. 141). However, he had the authority to hire and fire the workers, set their hours of work, and direct their work on the project. Roof Side, through Mr. Stevers, controlled the work site. *Vergona Crane Co*., 15 BNA OSHC 1782 (No. 88-1745, 1992). During the OSHA inspection, Mr. Stevers never claimed that the workers were independent contractors or assert that they were not employees of Roof Side (Tr. 42). Mr. Stevers hired the workers for the project and previous jobs, set the duration of their relationship with Roof Side, and how they were paid.

The worker who identified himself as the foreman when the CO arrived, referred to Mr. Stevers as his "boss" and had worked for Roof Side on and off for about seven years (Tr. 115, 119). In 2012, he had worked on six projects for Roof Side (Tr. 119). Other than some private work, the worker only performed roof work for Roof Side (Tr. 120).

Roof Side's temporary workers on site were employees within the meaning of the Act. The workers were performing a residential roofing work which is the business engaged in by Roof Side since 1994.

REPEAT CITATION

The Secretary has the burden of proof.

> 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 OSHC 2131, 2138 (No. 90-1747, 1994).

Alleged Violation of § 1926.501(b)(13)

The citation alleges that "[O]n or about November 14, 2012, at the location of 4630 Curtis Rd. in Northwood, OH: the employer did not assure employees were protected from fall hazards while performing work on a residential roof. The employees were exposed to approximately an 11 foot fall to the ground below."

Section 1926.501(b)(13) 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 systems, 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.

Roof Side has not claimed, nor does the record show, that the use of personal fall arrest systems on the Northwood project were infeasible or a greater hazard. On the contrary, Roof Side made available to the workers the use of ropes and harnesses suitable for personal fall arrest systems. The ropes and harnesses were on the roof and according to Mr. Stevers used when the workers were engaged in roofing activities (Tr. 153).

1. Application of § 1926.501(b)(13).

There is no dispute that the fall protection standard for residential construction at § 1926.501(b)(13) was applicable to the Roof Side's Northwood project. The project involved re-roofing work on a two-story single family home. The roof's eave was 11 feet above the ground. Roof Side used personal fall arrest systems to protect workers from the fall hazards (Tr. 29, 41, 79, 102, 122). Section 1926.501(b)(13) is deemed applicable to Roof Side's roofing work.

2. Roof Side Did Not Comply with the Terms of § 1926.501(b)(13).

The workers were engaged in residential roofing activities. They were responsible for removing three levels of old shingles and replacing them with new shingles. At the time of the OSHA inspection, the three workers were on the roof without attaching the personal fall arrest systems. The workers were seated and then stood and exited the roof without using the personal fall arrest systems. The ropes for the system were located in another area on the roof. Also, it is undisputed that there were no guardrails, safety nets, or other fall protection systems in place on the roof. The terms of § 1926.501(b)(13) were not complied with by Roof Side.

3. The Workers were Exposed to Fall Hazards.

Mr. Stevers argues that the workers needed fall protection only while working on the roof but not during rest periods (Tr. 153). A worker testified that fall protection was worn while they were shingling the roof but were taken off during breaks (Tr. 100, 125-126). Roof Side's argument that fall protection was not required because the workers were on break is rejected.

In order to establish employee exposure to a hazard, the Secretary must 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." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). Employees are considered in the "zone of danger" either during their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Kaspar Electroplating Corp.,* 16 BNA OSHC 1517 (No. 90-2866, 1993). Even a brief exposure to a hazardous condition such as break of 10 minutes does not negate the violation or its seriousness. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2873, 1992).

In this case, the Secretary has established employees' exposure. First, the CO observed a worker sitting next to the chimney working on the chimney (Tr. 37). Another worker testified that the worker was removing grit from the bricks (Tr. 110). Second, the other two workers on break are also considered exposed employees. They were in the same zone of danger and exposed to the same fall hazards as if engaged in roofing work (Tr. 38). It is not the activity being performed but the workers' exposure to the fall hazard that requires fall protection. An employer must require employees to use fall protection even if on a break or having lunch if the employees are exposed to a fall hazard. Taking a break on the roof is a personal comfort activity that kept the workers within the zone of danger posed by the roof's steep pitch (10 in 12) and elevation (11 feet) above the ground. Also, the workers stood and walked to the ladder without using fall protection which was their normal means of egress from the roof. The workers remained exposed to fall hazard of at least 11 feet.

During their break period and egress from the roof, the workers were exposed to fall hazards. Roof Side remained responsible to ensure fall protection was used by the workers.

4. Roof Side Knew of the Unsafe Condition.

In order to show employer knowledge of a violative condition, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known, of the hazardous condition. *Dun Par Engd Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer who lacks actual knowledge can nevertheless have constructive knowledge of the condition if the employer fails to exercise reasonable diligence to anticipate and detect the particular hazards to which its employees may be exposed during the course of their scheduled work. *Pride Oil Well Serv*., 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

Mr. Stevers testified that he knew the workers were performing roofing work and needed fall protection. He testified that Roof Side required workers to use fall protection on the roof only while removing or installing the roofing shingles. It did not require them to use fall protection during breaks or other non-working periods even if the workers remained on the roof (Tr. 153). Based on this policy, it was reasonably predictable that the workers during breaks would remain in the zone of danger without fall protection. Roof Side knew, or should have known, that the workers were exposed to fall hazards without using the personal fall arrests systems or other means of fall protection. Roof Side, through Mr. Stevers, had constructive

knowledge of the workers' lack of fall protection during breaks. The record establishes Roof Side's knowledge of the unsafe condition.

Roof Side's violation of § 1926.501(b)(13) is established.

Repeat Classification

A violation is repeated under § 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979).

OSHA classified Roof Side's violation of § 1926.501(b)(13) as a repeat violation. The record shows that Roof Side was cited for a similar violation of § 1926.501(b)(13) while working at a church on April 8, 2008, in Toledo, Ohio. As a result of the inspection, a serious citation was issued to Roof Side on May 5, 2008, which included an alleged violation of § 1926.501(b)(13) (item 2) for failing to ensure "employees were protected from falls while performing roofing activities" (Exh. C-7; Tr. 44, 173). Roof Side resolved the serious citation by entering into an informal settlement agreement with OSHA on July 19, 2008. The settlement agreement affirmed the cited violations including item 2 and only reduced the proposed penalties. The penalty for item 2 was reduced from $2,100.00 to $850.00 (Exh. C-8). As part of the settlement agreement, Roof Side agreed not to contest the serious citation. The 2008 citation became a final order pursuant to § 10 of the Act.

Based on the 2008 citation for a similar violation of § 1926.501(b)(13), Roof Side's citation on December 4, 2012, in this case was properly classified as repeat.

Penalty Consideration

The Commission is the final arbiter of penalties in contested cases. In determining an appropriate penalty for Roof Side's repeat violation of § 1926.501(b)(13), the Commission is required under the Act to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Roof Side is a small employer with one full-time employee and is entitled to credit for size. There were three temporary workers on site during the OSHA inspection (Tr. 88). Roof Side is not entitled to credit for history because of the 2008 citation for the same violation. Roof Side is entitled to credit for good faith. Since the 2008 citation, Roof Side has purchased appropriate fall protection equipment for workers' use and requires their use when engaged in

roofing activities. It has spent "thousands of dollars on safety equipment" such as harnesses, ropes and ladders (Tr. 102). Roof Side has also attempted to institute a safety program including some worker safety training and safety meetings (Exh. R-1; Tr. 101-102, 146). Mr. Stevers testified that Roof Side has not had a worker injury since 2004 when a worker using a grinder to clean around a chimney received six stitches (Tr. 148).

A penalty of $2,000.00 is reasonable for Roof Side's repeat violation of § 1926.501(b)(13). Three workers were exposed to a fall hazard of 11 feet for less than 15 minutes while they were on break on the roof. It was a steep roof with a slope of 10 in 12. Roof Side provided horizontal toeboards (slide guards), ladders and pick scaffold, and personal fall arrest equipment for use by the workers. The CO does not believe Roof Side disregarded OSHA compliance (Tr. 84). However, it is noted that Roof Side has not paid the agreed reduced penalties from the 2008 informal settlement agreement (Exhs. C-9, C-10; Tr. 52).

While the court is sympathetic to Roof Side's concern about competitor complaints, the fact is an unsafe condition which needed to be abated was observed by the CO on the Northwood project (Exh. C-12; Tr. 150). The complaint received by OSHA was verified. There is no evidence of an unreasonable inspection or harassment by OSHA. The CO testified that when he received the assignment from his supervisor, he did not know who made the complaint (Tr. 71). He was assigned the inspection along with another inspection. The OSHA inspection was conducted pursuant to a local emphasis program on fall hazards which the Toledo OSHA office was required to follow. The emphasis program recognizes that construction jobs such as the Northwood project are transient and of limited duration. *See* OSHA Directive Number CPL 04-00, *Fall Hazards in Construction* (October 1, 2012).

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

Citation No. 1, item 1, an alleged repeat violation of § 1926.501(b)(13), is affirmed and a penalty of $2,000.00 is assessed.

SO ORDERED.

/s/ Ken S. Welsch
KEN S. WELSCH
Judge

Dated: September 20, 2013
Atlanta, Georgia