UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. AAA Roofing, Respondent.	DOCKET NO. 15-0586

Appearances:

Sheryl Vieyra, Esq., Office of the Solicitor, U.S. Dept. of Labor, Dallas, Texas
For Complainant

Pete Perez, Bracketville, Texas
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the United States Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On October 8, 2014, the Occupational Safety and Health Administration ("OSHA") inspected a worksite located at 5701 Starboard, in Midland, Texas. (Tr. 23, 27; Exs. C-1, C-2). As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent. The Citation alleges one serious violation of the Act, with a proposed penalty of $1,600.00. Respondent timely contested the Citation. A trial was conducted in San Antonio, Texas on December 15, 2015. The parties each submitted post-trial briefs for consideration.

Two witnesses testified at trial: (1) Dan Hobelman, OSHA Compliance Safety and Health Officer ("CSHO"); and (2) Pete Perez, Respondent's owner;

Jurisdiction

No stipulations were agreed upon prior to trial. The Court finds that Respondent was engaged in commercial construction, as the jobsite involved the construction of a small shopping mall, and that Respondent employed at least three individuals involved in the project. (Tr. 37-38, 43-44, 54). Accordingly, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5), and the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act. *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Background

On October 8, 2014, OSHA CSHO Daniel Hobelman initiated an inspection of a commercial construction worksite in Midland, Texas because he observed suspected safety violations from a nearby public road. (Tr. 23-24). As CSHO Hobelman approached the General Contractor's trailer to begin his inspection, he observed and photographed two workers sitting and working on an incomplete steel beam awning sticking out from a wall, several feet above a scaffold. (Tr. 24-27; Ex. C-3). CSHO Hobelman stopped to ask the two workers to come down from the awning, and requested their names and employer's name. (Tr. 25). They complied and stated their names were Francisco Maltos and Orlando Esquival, and that they were employed by AAA Roofing (Respondent). (Tr. 25-26). CSHO Hobelman then proceeded to the General Contractor's trailer to identify himself and explain the purposes for his visit to the site. He then inspected the work area of two other subcontractors at the location.[1] (Tr. 29).

[1] The safety concerns which CSHO Hobelman observed from the road involved two *different* subcontractors at this location, not the Respondent. (Tr. 24, 29).

When CSHO Hobelman returned to Mr. Maltos' and Mr. Esquival's work location, a third person was there, who identified himself as Ricky Flores, a AAA Roofing supervisor. (Tr. 30-31). Mr. Flores told CSHO Hobelman that Respondent employed 8 individuals, 5 of which were working on this project, and also provided AAA Roofing's address and telephone information. (Tr. 30-31, 43-44, 54). During OSHA's discussion with these three individuals, Mr. Esquival acknowledged that he had been sitting on a board laid across the elevated steel awning while working on flashing, that Ricky Flores was his supervisor, that he had been employed by AAA Roofing for approximately 1 month as a Laborer, and that he was paid weekly in cash. (Tr. 32-33, 59-60; Exs. C-3, C-6). Mr. Malto told CSHO Hobelman that he was a Helper with AAA Roofing, that Ricky Flores was his supervisor, and that he did not have a safety harness for fall protection. (Tr. 35-36; Ex. C-7).

As a result of his investigation at this location of the worksite, CSHO Hobelman recommended the issuance of one serious violation of the Act.

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 C.F.R. § 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge which was 6 feet (1.8m) or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:
>
> On or about October 8, 2014 at the jobsite employees were exposed to fall hazards in excess of 6 ft. while working from the awning on the west side of the structure.
>
> The cited standard provides:
>
> 29 C.F.R. § 1926.501(b)(1) Unprotected sides and edges. Each employee on walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Applicable Law

To prove a violation of an OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

Discussion

The Cited Standard Applies

The cited standard applies to walking or working surfaces six feet or more above a lower level. CSHO Hobelman testified, without contradiction, that Mr. Esquival and Mr. Malto were working on flashing approximately 13 feet above the ground. (Tr. 39-40, 44). Mr. Esquival, who

was photographed sitting on top of a board on the steel awning, was 7 feet above the top level of scaffolding. (Tr. 39-40, 59). [2] Accordingly, the cited standard applies.

The Terms of the Standard were Violated

Mr. Esquival was sitting on the steel awning, 13 feet above the ground and 7 feet above the top level of the scaffold, with no guardrail system, safety net system, or personal fall arrest system to protect him. (Tr. 26-27, 33, 38-44, 59; Exs. C-3, C-6). The terms of the cited standard were violated.

Respondent's Employee was Exposed to the Hazard

The primary disputed issue in this case is whether Mr. Esquival and Mr. Malto were employed by Respondent. "[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005).

The Court focuses its analysis on Mr. Esquival, since he was clearly more than 6 feet above both the ground *and* the top level of the scaffold, while not using fall protection, and therefore exposed to the hazardous condition. The preponderance of the evidence presented at trial established that Mr. Esquival was employed by Respondent. Mr. Esquival and Mr. Malto told CSHO Hobelman when he first approached them that they were employed by Respondent. When CSHO Hobelman returned to the work location after inspecting two other contractors, Supervisor Ricky Flores confirmed their employment with Respondent, and provided detailed information about how to contact Respondent. During this return visit to the work location, Mr. Esquival and Mr. Malto reiterated their employment with Respondent, including their job titles

[2] Although not determinative here since Mr. Esquival was more than 6 feet above the top level of the scaffold, it should be noted that scaffolding may, or may not, be considered "the next lower level" pursuant to the standard, depending on the configuration and condition of the scaffolding. See *Midwest Roofing & Custom Metals*, 21 BNA OSHC 1854 (No. 06-0617, 2006)(OSHRC ALJ); *Ranch Masonry*, 19 BNA OSHC 1931 (No. 01-0742, 2002)(OSHRC ALJ).

and employment duration, while providing statements to CSHO Hobelman. No other employer was ever mentioned or discussed during the three workers' conversations with CSHO Hobelman. (Tr. 30). No evidence was presented at trial to controvert the employee's assertions to CSHO Hobelman at the jobsite. The only contradiction at trial to Mr. Flores', Mr. Esquival's, and Mr. Malto's statements that they were employed by AAA Roofing were: (1) a question posed to CSHO Hobelman about whether it was possible the three were employed by someone else; and (2) Mr. Perez's testimony that he "never heard of" Mr. Esquival and Mr. Malto. (Tr. 56, 67).

At trial, Respondent's owner and sole trial witness, alluded to an unidentified insurance document and unidentified 1099 tax forms during his testimony, which he asserted would support his defense. However, the documents were not listed in Respondent's *Pre-Trial Statement*, and were not offered or admitted into evidence. (Tr. 67-70). Two months after the trial was concluded, Respondent inappropriately attached the referenced documents to *AAA Roofing's Closing Statement*. Upon review, the newly attached exhibits consist of an insurance form, various 1099 tax forms, and an Affidavit by Roger Perez (Respondent's owner's father). All of the newly offered exhibits attached to Respondent's *Closing Statement* are rejected as untimely, prejudicial to Respondent, and otherwise unreliable.

Pursuant to the Court's July 6, 2015 *Notice of Trial in Simplified Proceeding*, both parties were required to file a *Pre-Trial Statement* ten calendar days before trial, identifying each party's proposed witnesses and exhibits. Respondent's *Pre-Trial Statement*, which was untimely, identified no proposed exhibits, and only one witness: Peter Perez.[3] In addition, the three newly submitted documents' admission into evidence two months after the conclusion of the trial

[3] The parties' pre-trial statements were due on or before December 5, 2015 (ten days before trial). Respondent's *Pre-Trial Statement* was filed late, on December 10, 2015. However, the Court still permitted testimony from Respondent's sole listed witness. Similarly, the Court rejects Respondent's assertions that Complainant's post-trial brief was untimely. All of the parties' post-trial argument filings (excluding Respondent's new purported exhibits) were considered prior to issuing this *Decision and Order*.

would be prejudicial to Complainant because: (1) the documents were not disclosed to Complainant as potential trial exhibits as previously ordered, and (2) there was no opportunity for Complainant to question witnesses about any of the documents.

Even, for the sake of argument, if the Court did consider the three new purported evidentiary exhibits attached to Respondent's *Closing Statement*, the Court's decision in this case would be the same. First, the affidavit by Roger Perez is an inadmissible, self-serving, post-trial hearsay statement. Roger Perez, the affiant, was actually at the trial, assisting Pete Perez in his presentation of evidence, and could have testified as a witness had he been identified in Respondent's pre-trial witness list. This would also have enabled Complainant an opportunity to cross-examine Roger Perez on his assertions. Second, Roger Perez's assertion in the affidavit that Mr. Malto and Mr. Esquival were actually employed by him (not Respondent) is unreliable. It is inconsistent with the employees' and their supervisor's own statements to the CSHO at the time of the inspection. Third, Roger Perez's post-trial assertion in the affidavit that the two employees worked for him is very suspect considering his status as Respondent's owner's father, and the fact that this statement was made after the trial and far beyond the six month statute of limitations for Complainant to cite an alternative employer. Fourth, the Texas Mutual Audit Statement exhibit, with no discussion or testimony, provides no reliable information on the employer of the exposed employees one way or the other. Fifth, the sampling of IRS 1099 forms attached to Respondent's *Closing Statement* do not provide reliable information about the employment status of the exposed employees. If anything, the fact that Ricky Flores is listed on several of the 1099 forms corroborates his statement to CSHO Hobelman on site that he was employed by Respondent. Sixth, Mr. Esquival's statement to OSHA at the time of the inspection indicated he was paid in cash each week, further diminishing any significance in his name not

appearing on the 1099 forms Respondent chose to submit after the trial. (Ex. C-6). As noted by Complainant, the Commission has found that the absence of federal income tax documentation is not dispositive as to a worker's status as employee or independent contractor. *See Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286 (00-1402, 2010) ("[F]ailure to withhold federal income and social security taxes was simply an attempt to hide [the worker's] true status, not a bona fide reflection of an authentic independent contractor relationship . . . .").

In conclusion and to reiterate, the preponderance of the evidence established that Mr. Esquival and Mr. Malto were employed by Respondent at the time of the violation. Respondent's purported Exhibits A, B, and C, attached to Respondent's *Closing Statement* are rejected. Even if those exhibits were considered, the Court's decision in this case would be the same.

Respondent Knew or Could Have Known of the Hazard

Respondent, with the exercise of reasonable diligence, could have known of the violative condition. The evidence established that Respondent's supervisor, Ricky Flores was on-site, that the employees had been working on the steel awning above the scaffold for about 20 minutes, and that the condition was open and obvious to anyone passing by the area.

"The actual or constructive knowledge of an employer's foreman can be imputed to the employer." *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82–928, 1986); *Austin Building Co. v. OSHRC*, 647 F.2d 1063 (10th Cir. 1981). While reasonable diligence does not require full-time monitoring, inadequate supervision of employees constitutes a lack of reasonable diligence. See *Stanley Roofing Co., Inc.*, 21 BNA OSHC 1462, 1463–64 (No. 03-0997); see also *Lakeside Construction, L.L.C.*, 24 BNA OSHC 1445 (No. 12-0422, 2012) (ALJ)

(finding that failure to provide supervision over employees constituted a lack of reasonable diligence and that Respondent could have known of the violation because it was in plain view).

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Respondent is a very small employer, with only eight employees. The violation exposed Respondent's employees, particularly Mr. Esquival, to the possibility of a fall of approximately 7 feet to the scaffold, or possibly 13 feet to the ground. CSHO Hobelman testified, without contradiction, that a fall from that height would likely result in death or serious injury. The Court agrees with CSHO Hobelman's determination that the probability of an accident actually occurring was relatively low. (Tr. 44-45). OSHA provided no penalty deductions for history or good faith. (Tr. 47-48). Considering the totality of the record, the Court finds that Complainant established the *prima facie* elements necessary to prove the violation, and that the proposed penalty of $1,600.00 is appropriate.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1 is AFFIRMED and a penalty of $1,600 is ASSESSED.

SO ORDERED.

/s/ *Brian A. Duncan*

Date: May 10, 2016
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission