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. JUAN GUILLEN, and its successors, Respondent.	OSHRC Docket No. 16-1214

Attorneys and Law firms

Matthew P. Sallusti, Attorney, Office of the Solicitor, U.S. Department of Labor, Dallas, TX, GA, for Complainant.

Juan Guillen, Pro se, Corpus Christi, TX, for Respondent.

MEMORANDUM OPINION AND ORDER

Honorable John B. Gatto, United States Administrative Law Judge.

I. BACKGROUND

Respondent Juan Guillen (Guillen) was issued a citation with a proposed penalty of $2,800.00 under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act) by the United States Department of Labor's Occupational Safety and Health Administration (OSHA)[1] for an alleged serious[2] violation of 29 C.F.R. § 1926.454(a), OSHA's training requirements standard related to scaffolds. After Guillen contested the citation, Complainant

[1] The Secretary of Labor (Secretary) 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, and has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties to enforce the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[2] Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§ 666(a), (b), (c).

Secretary of Labor (Secretary) filed a formal complaint[3] with the Commission seeking an order affirming the citation and proposed penalty. The Secretary subsequently filed a "re-formatted" motion and a second "re-formatted" motion seeking an order granting summary judgment in his favor.[4] Guillen did not file a response to the motion.

The Secretary asserts, and the Court agrees, in light of Guillen's failure to answer and or respond to the Secretary's complaint and his requests for admission, the allegations and requests contained therein are deemed admitted. Since Guillen failed to answer or respond to the complaint, the allegations in the complaint that jurisdiction of this action is conferred upon the Commission by § 10(c) of the Act, 29 U.S.C. § 659(c), and that Guillen is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5), are deemed admitted. (Court's Oct. 7, 2016 Order at 2; Compl. ¶¶ 1, 2). The Court concludes the Commission has jurisdiction of this action pursuant to section 10(c) of the Act. Pursuant to Commission Rule 90(a), after carefully considering all the evidence and the arguments of counsel, the Court issues this Memorandum Opinion and Order, which constitutes its final disposition of the proceedings. For the reasons indicated *infra*, the Secretary's summary judgment motion is **GRANTED**.

II. LEGAL STANDARDS

A. Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure,[5] "[a] party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought." Fed. R. Civ. P. 56(a). "A party is entitled to summary judgment if there is 'no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Young v. United Parcel Serv., Inc.*, ––– U.S. –––, 135 S. Ct. 1338,

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[3] Attached to the complaint and also adopted by reference was the citation at issue. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R §2200.30(d). Therefore, any reference to the complaint in this memorandum also includes the citation.

[4] The Court denied the Secretary's initial summary judgment motion for failing to comply with the summary judgment requirements outlined in the Court's Standing Order. Since the previously filed summary judgment motions are moot, this memorandum only addresses the second "re-formatted'" motion.

[5] Under the Act, "[u]nless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure." 29 U.S.C. § 661(g). Commission Rule 61 provides that "[m]otions for summary judgment are covered by Federal Rule of Civil Procedure 56." 29 C.F.R §2200.61.

1355 (2015) (*citing* Fed. Rule Civ. Proc. 56(a)). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Tolan v. Cotton*, ––– U.S. –––, 134 S. Ct. 1861, 1866 (2014) (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970)); see also *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). Further, the Supreme Court has reminded us of the axiom that "in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan*, 134 S. Ct. at 1863 (citing *Anderson, supra)*.

"Of course, a party seeking summary judgment always bears the initial responsibility" of informing the Court "of the basis for its motion, and identifying those portions of" the depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials, "which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Commission Rule 34(b) mandates that "[w]ithin 20 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Commission" which "shall contain a short and plain statement denying those allegations in the complaint which the party intends to contest. Any allegation not denied shall be deemed admitted." 29 C.F.R §2200. 34(b)(1), (2). Since Guillen failed to file an answer, all allegations in the complaint, and the citation incorporated therein, are deemed admitted.

Likewise, where requests for admissions have been served on a party, "[e]ach matter is deemed admitted unless, within 30 days after service of the requests . . . the party to whom the requests are directed serves upon the requesting party a written answer specifically admitting or denying the matter involved in whole or in part, or asserting that it cannot be truthfully admitted or denied and setting forth in detail the reasons why this is so, or an objection, stating in detail the reasons therefor." 29 CFR § 2200.54(b). Again, since Guillen failed to file an answer to the Secretary's requests for admissions, all allegations in the requests are also deemed admitted.

Thus, to the extent the complaint, the citation, and the Secretary's requests for admissions contain material facts, by virtue of Guillen's deemed admissions, there are no genuine disputes as to any of those material facts.

B. Violation of a Cited Standard

Under the law of the Fifth Circuit, the jurisdiction in which this case arose, to make out a prima facie case for the violation of this standard, the Secretary "must show by a preponderance of evidence: (1) that the cited standard applies; (2) noncompliance with the cited standard; (3) access or exposure to the violative conditions; and (4) that the employer had actual or constructive knowledge of the conditions through the exercise of reasonable due diligence." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016) (*citing Jesse Remodeling, LLC*, 22 BNA OSHC 1340 (2006); *Atlantic Battery Co.*, 16 BNA OSHC 2131 (1994)). Therefore, as the movant, in order to be entitled to summary judgment, the Secretary must show that, viewing the evidence in the light most favorable to Guillen, there is no genuine dispute as to any material fact related to each element of the Secretary's prima facie. For the reasons indicated *infra*, the Court concludes the Secretary has carried his burden.

C. 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).

Here, since Guillen failed to answer or respond to the Secretary's requests for admissions, viewing the evidence in the light most favorable to Guillen, there is no genuine dispute that Guillen's employee died as a result of injuries he sustained after he fell off of the scaffolding or that the citation was properly classified as a serious violation. (Sec'y's Statement Undisputed Material Facts ¶¶ 9, 15; Sec'y's Req. Admis. ¶¶ 6, 14).

III. ANALYSIS

The citation in this case alleges Guillen violated 29 C.F.R § 1926.454(a), OSHA's standard on training requirements related to scaffolds, which mandates "[t]he employer shall have each employee who performs work while on a scaffold trained by a person qualified in the

subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards" in that "[o]n or about January 19, 2016, at store #1524, an employee was exposed to a fall hazard while working from a mobile scaffold without being trained on the hazards associated with working from a mobile scaffold."

A. Applicability of Standard

The scaffold standard "applies to all scaffolds used in workplaces covered by" the Safety and Health Regulations for Construction. 29 C.F.R § 1926.450(a). Viewing the evidence in the light most favorable to Guillen, since he failed to answer or respond to the Secretary's requests for admissions, there is no genuine dispute that his employee was working on a scaffold. (Sec'y's Statement Undisputed Material Facts ¶¶ 19-24; Sec'y's Req. Admis. ¶¶ 1-3). Therefore, there is no genuine dispute that the cited standard applied.

B. Violation of Standard

Viewing the evidence in the light most favorable to Guillen, there is no genuine dispute that Guillen did not have each employee who performed work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazard. (Court's Oct. 7, 2016 Order at 2; Compl. at Ex. A p. 6; Sec'y's Statement Undisputed Material Facts ¶¶ 1, 3, 19-24; Sec'y's Req. Admis. ¶¶ 4, 8). Therefore, there is no genuine dispute that the cited standard was violated.

C. Exposure to Hazard

Since Guillen failed to answer or respond to the Secretary's complaint or requests for admissions, there is no genuine dispute that Guillen employed Enrique Perez and that on or about January 19, 2016, at store #1524, Perez was exposed to a fall hazard while working from a mobile scaffold and died as a result of injuries sustained when he fell off of the scaffolding. (Court's Oct. 7, 2016 Order at 2; Compl. at Ex. A p. 6; Sec'y's Statement Undisputed Material Facts ¶¶ 19-24; Sec'y's Req. Admis. ¶¶ 5-6). Therefore, there is no genuine dispute that Guillen's employee was exposed to a fall hazard.

D. Knowledge of Violation

The Secretary must show there is no genuine dispute that Guillen "had actual or constructive knowledge of the conditions through the exercise of reasonable due diligence." *Sanderson Farms*, 811 F.3d at 735. To prove knowledge, "the Secretary must show that the

employer knew of, or with exercise of reasonable diligence could have known of the non-complying condition." *Id.*, 811 F.3d at 736 (*citing Trinity Industries v. OSHRC*, 206 F.3d 539, 542 (5th Cir. 2000)).

Since Guillen failed to answer or respond to the Secretary's requests for admissions, there is no genuine dispute that Guillen knew he had failed to inquire with Perez concerning the amount of training received in relation to scaffolding erection, and further, that Guillen knew he had not provided his employees, including Perez, with training on the hazards associated with working from a scaffold. (Sec'y's Statement Undisputed Material Facts ¶¶ 19-24; Sec'y's Req. Admis. ¶¶4, 8, 9). Thus, there is no genuine dispute that Guillen had both actual and constructive knowledge of the violative conditions since he failed to exercise reasonable due diligence.

Since the Secretary has shown there is no genuine dispute as to any material fact related to each element of his prima facie case, and since Guillen waived his right to present any affirmative defenses after having failed to file an answer to the complaint, the Court concludes the Secretary is entitled to judgment as a matter of law. *Young v. United Parcel Serv., Inc.*, —— U.S. ——, 135 S. Ct. 1338, 1355 (2015) (*citing* Fed. Rule Civ. Proc. 56(a)).

IV. PENALTY

The Secretary proposed a penalty of $2,800.00 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).

Since Guillen failed to answer or respond to the complaint, there is no genuine dispute that the penalty proposed for the violation "is appropriate within the meaning of § 17(j) of the Act, giving due consideration to the size of the business, the gravity of the violation, the good faith of Guillen, and the history of previous violations." (Court's Oct. 7, 2016 Order at 2; Compl. ¶ 6; Compl. at Ex. A p. 6.) Thus, the Court finds the appropriate civil penalty is $2,800.00. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT the Secretary is entitled to judgment as a matter of law and therefore his motion for summary judgment is **GRANTED** and the trial in this action is **CANCELLED**, the citation is **AFFIRMED**, and Guillen is assessed and directed to pay to the Secretary a civil penalty of $2,800.00.

SO ORDERED.

Dated: March 6, 2017
Atlanta, GA

/s/______________________
JOHN B. GATTO, Judge