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. Franciscus Roofing & Siding, Inc., Respondent.	OSHRC Docket No. **06-1551**

Appearances:

Linda Hastings, Esq., U. S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For Complainant

Mr. Lee Franciscus, *Pro Se*, North Ridgeville, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Franciscus Roofing & Siding, Inc. (FRS) is a residential roofing and siding contractor with offices in Ohio and Florida. On August 7, 2006, Occupational Safety and Health Administration (OSHA) compliance officer Joseph Schwarz was driving past a subdivision of single-family houses under construction in Sheffield Lake, Ohio. He observed a worker on the roof of one of the houses. Schwarz stopped and conducted an inspection of the site. As a result of Schwarz's inspection, the Secretary issued a citation to FRS on August 17, 2006. The citation charges FRS with serious violations of four construction standards of the Occupational Safety and Health Act fo 1970 (Act).

Item 1 alleges a violation of § 1926.20(b)(1) for failing to implement an effective safety and health program at the worksite. Item 2a alleges a violation of § 1926.501(b)(13) for failing to provide fall protection to an employee working 6 feet or more above the lower level. Item 2b alleges a violation of § 1926.503(a)(1) for failing to provide a training program for an employee exposed to fall hazards. Item 3 alleges a violation of § 1926.1053(b)(1) for failing to ensure the side rails of a portable ladder extended at least 3 feet above the surface being accessed.

FRS contested all items and proposed penalties of the citation. The Commission assigned this case to the simplified proceedings process. It went to hearing on January 19, 2007, in Cleveland, Ohio. FRS CEO Lee Franciscus represented the company *pro se.* FRS contends it did not violate the terms of the cited standards. It also argues the single worker Schwarz observed at its site was not an employee of FRS. The Secretary has filed a post-hearing brief. FRS presented its evidence on the record.

For the reasons discussed below, items 1, 2a, 2b, and 3 are affirmed.

Facts

FRS has been a roofing and siding contractor for six years, almost exclusively in residential construction. It performs residential work almost exclusively. Over the last three years, FRS worked on over 2,500 houses for developer Ryan Homes (Tr. 60).

Ryan Homes subcontracted FRS to perform roofing work on new houses on Schueller Boulevard in Sheffield Lake, Ohio. Shortly before noon on August 7, 2006, compliance officer Schwarz was driving on Schueller Boulevard, where the new development was under construction. As part of the Local Emphasis Program (LEP) for fall protection, Schwarz stopped to conduct an inspection (Tr. 11-12).

Schwarz took several photographs after stopping. He then approached Kevin Andrews, who was working on the roof of one of the first houses. The roof was approximately 20 feet above the ground (Tr. 19). Schwarz identified himself as an OSHA compliance officer and asked Andrews to stop work and come down (Tr. 13). Schwarz then went up and down the street and identified himself to workers of other contractors working at different houses in the subdivision. He asked them to remove themselves from perceived hazards until he could come around and talk to them (Tr. 53).

Schwarz returned to FRS's site and conducted the inspection that gave rise to the instant case (Tr. 55). Andrews was the only FRS worker present at the site. Schwarz held an opening conference with Andrews, conducted a walk-around inspection, then held a closing conference with Andrews. Andrews called FRS's head salesman Tom Schlund and Schwarz spoke with him over the phone (Tr. 14, 89).

The Citation

The Secretary has the burden of proving each violation 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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

It is undisputed the cited standards apply to the cited conditions.

Was Andrews an Employee of FRS?

At the hearing, FRS asserted that Kevin Andrews was not an employee of FRS at the time of the inspection. FRS CEO Lee Franciscus testified, "Kevin Andrews works for us as a subcontractor. He's not an employee. His duties are to do various inspections when we need them done" (Tr. 68). Franciscus stated Andrews worked for them as a crew member some nine years ago and was a "subcontractor" the last two years (Tr. 86). Andrews was at the site to inspect the roofing work "and install the brick flashing if it wasn't completed by the brick guys" (Tr. 73). Schwarz stated he always asks employees he interviews what their job titles are (Tr. 38). Andrews told him he was a foreman for Franciscus, which Schwarz noted on the OSHA Form 1B, filled out shortly after the inspection (Tr. 41). Andrews told Schwarz he was there to repair the front roof of the house (Tr. 57). He did not say he was inspecting the roof work (Tr. 40). Franciscus acknowledged at the hearing that in the photograph Andrews is working on the roof wearing a shirt with the word "Franciscus" on it (Exh. C-4; Tr. 81). FRS's expeditor sent Andrews to the site to install brick flashing (Tr. 81, 86). FRS pays Andrews per foot to install the brick flashing and per square to install the shingles (Tr. 88). Andrews did not testify at the hearing, although Franciscus indicated at the pre-hearing conference he intended to present Andrews's testimony.

The terminology an employer chooses to attach to a working relationship is not a controlling factor. For example, workers might be considered employees for certain purposes and subcontractors for others. As Franciscus explained (Tr. 87):

A: Our Cleveland office has eight employees, five of which are sales, an expediter, and two girls in the office.

Q: Any employees as a crew?

A: No.

Q: Just subcontractors?

A. Correct. Now, in Florida, which is also part of our Company, it's the exact opposite. They have all employees. There are no subcontractors.

Q: Is there a particular reason why that is?

A: The licensing in Florida is different than Ohio.

Andrews status as an employee under the OSH Act is not dependent upon local distinctions. The record establishes Andrews was an employee for FRS at the time of the inspection. FRS controlled where Andrews worked and what duties he was to perform. FRS paid Andrews as it paid all its other crewmembers. Andrews worked wearing a shirt identifying himself as an FRS employee, and he identified himself to Schwarz as an FRS foreman.

Item 1: Alleged Serious Violation of § 1926.20(b)(1)

The Secretary alleges FRS committed a serious violation of § 1926.20(b)(1), which provides:

> It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

Andrews told Schwarz that FRS did not have a safety and health program (Tr. 21). Schwarz asked for any documents relating to safety and health programs and fall protection training. Andrews told Schwarz he had never seen a safety and health program while at FRS (Tr. 15).

At the pre-hearing conference, Franciscus stated he had a safety program and would introduce it at the hearing. The parties were directed to exchange all exhibits. The Secretary never received any documents pertaining to a safety and health program from FRS. At the hearing, Franciscus insisted FRS did have a written safety and health program and that he had "faxed almost ten binders worth of documentation from our safety program" to the Secretary (Tr. 5). Franciscus stated he did not bring FRS's safety program to the hearing because he was "not going to carry ten binders up the stairs here or up to the elevator" (Tr. 5).

Counsel for the Secretary averred on the record that on December 18, 2006, approximately one month before this case went to hearing, Franciscus called her and told her he would fax his company's safety and health program to her that day. She did not receive any documents. On January 8, 2007, she called Franciscus and left a voice message asking for the documents. FRS did not respond to this message. On January 11, counsel for the Secretary called FRS again and this time left her request for the documents with a woman who works in FRS's office (Tr. 7).

The day of the hearing the undersigned afforded Franciscus the opportunity to fax the documents to the court where the hearing was being held (Tr.8). No safety or training documents were faxed that day. In the month since the hearing, no documents have been received.

It has been approximately six months since the Secretary issued the citation to FRS. Despite repeated opportunities to produce a copy of its purported safety and health program, FRS has failed to do so. FRS has not provided receipts for the purported attempted faxing of the documents to the Secretary.

The only document produced by FRS is a "Certificate of Recognition" issued to FRS "[i]n recognition of active participation in the Safety Sam network of safety-minded contractors" (Exh. R-1). Franciscus explained that Safety Sam (whose offices are located in Arizona) keeps track of any changes in OSHA's regulations and faxes information regarding the changes to companies that subscribe to its service (TR. 65-66). The certificate is evidence of membership in a subscription service and in no way demonstrates that FRS had an effective safety and health program at the time of the inspection.

Andrews's admission to Schwarz that he had never seen a safety and health program for FRS, and the complete absence of any documentation by FRS, despite numerous opportunities to produce it, lead the undersigned to the conclude that FRS failed to comply with the terms of § 1926.20(b)(1). FRS did not implement a safety and health program.

As FRS's sole employee on the site at the time of the inspection, Andrews was exposed to any hazards not identified by an effective safety and health program. If, in fact, FRS had such a program, Andrews and Franciscus knew it was not being implemented at the site. If FRS did not have a safety and health program at all, Andrews and Franciscus knew the company had never

initiated one. Regardless, FRS failed to comply with the terms of the standard. The Secretary has established FRS violated § 1926.20(b)(1).

If FRS's failure to identify hazards present on the site in its safety and health program had caused Andrews to fall from a height of 20 feet, he could have sustained broken bones, "possibly death, depending on how [he] fell" (Tr. 21). The violation was serious.

Item 2a: Alleged Serous Violation of § 1926.501(b)(13)

The Secretary alleges RFS 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.

The citation alleges:

> At the front of the house, an employee was observed working on the roof with a 10:12 pitch without utilizing proper fall protection. The employee was in the process of installing brick flashing and shingles onto the roof approximately 19-20 feet high.

Schwarz observed Andrews working on the front reverse gable of the house at a height of approximately 20 feet. When Schwarz asked Andrews if he was using fall protection, Andrews told him he was not, although he was aware he should be (Tr. 25-26). Andrews was using slide guards (roof jacks) on the roof (Tr. 36). FRS argues slide guards are a form of fall protection.

In 1995, "OSHA published an interim fall protection compliance policy for fall protection for certain residential construction activities, pending further rulemaking on Subpart M." *OSHA Instruction STD 3-0.1A, Plain Language Revision of OSHA Instruction STD 3.1, Interim Fall Protection Compliance Guidelines for Residential Construction, VII.*

The Instruction allows an employer to use alternative procedures to conventional methods of fall protection if it is engaged in residential construction and is doing one of the listed activities. The listed activities are divided into four groups. Group 4 is roofing work, which the Instruction

defines as "removal, repair, or installation of weatherproofing roofing materials such as shingles, tile and tar paper." *Id. at VIII.B.4.*

The Instruction allows for specific alternatives to conventional methods of fall protection with a caveat (*Id. at XII):*

> Restriction on Application for Roofing Work. The alternative procedures in this Instruction may only be used for this work where: (a) the roof slope is 8 in 12 or less **and** (b) the fall distance, measured from the eave to the ground level, is 25 feet or less.

The fall distance was less than 25 feet, satisfying the second element of the application. The Secretary contends, however, that the slope of the roof was 10:12. Paragraph *XII.B.4* states "Over 8 in 12: Alternatives to the requirements of the standard are not available."[1]

Franciscus testified that the slope of the roof was 8:12 on the reverse gable on which Andrews was working (Tr. 61). Schwarz testified he learned the slope of the reverse gable from Andrews, and that a representative of Ryan Homes confirmed the slope in a telephone conversation (Tr. 45). In his OSHA Form 1B, Schwarz wrote that the slope was10:12 (Tr. 49). The citation includes the reference to the 10:12 pitch.

Again, FRS provided no documentation or evidence (other than the self-serving testimony of Franciscus) in support of its position. Franciscus testified the information that the slope is 8:12 is "based on prints for the house," (Tr. 62) yet he did not provide a copy of the prints. The testimony of Schwarz is deemed more credible than that of Franciscus regarding the slope of the roof where Andrews was working. The STD Instruction is not applicable to Andrews's work.

FRS failed to comply with the terms of the standard. Andrews was exposed to a fall of 20 feet. Andrews admitted he knew he should have been using fall protection. As foreman, his knowledge is imputed to FRS. Even were it not, the failure of this roofing company effectively to train on and enforce a fall protection program establishes constructive knowledge of the violation.

The Secretary has established a serious violation of § 1926.501(b)(13).

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[1]The Secretary also argues that, even if FRS could use slide guards as fall protection, Andrews had failed to properly install them (Secretary's brief, p.5)

Item 2b: Alleged Serious Violation of § 1926.503(a)(1)

Section 1926.503(a)(1) provides:

> The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

Andrews told Schwarz he never received fall protection training from FRS (Tr. 28). FRS failed to provide any evidence of a general training program or specific documentation showing that Andrews had been trained. The Secretary has established that FRS failed to comply with the terms of the standard.

Andrews was exposed to a fall of 20 feet. As CEO, Franciscus knew FRS did not provide the required fall protection training. As foreman, Andrews knew he had not received fall protection training. The Secretary has established a serious violation of § 1926.503(a)(1).

Item 3: Alleged Serious Violation of § 1926.1053(b)(1)

The Secretary alleges FRS violated § 1926.1053(b)(1), which provides:

> 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.

Schwarz observed that the ladder used by Andrews leaned up against the brick face of the building (Exh. C-1 (orange ladder in the middle); Tr. 77). Schwarz testified that on standard ladders, the space between the rungs measures 1 foot. Using this as his guide, Schwarz calculated that the sides of the ladder did not extend the required 3 feet. The sides of the ladder extended 1½ to 2 feet beyond the work area accessed (Exh. C-3; Tr. 77). While that particular ladder may have been extended to its full height, taller ladders are readily available.

Andrews was exposed to a fall of 20 feet, potentially causing life threatening injuries. As foreman, he knew that the ladder was not extended 3 feet above the work surface. His knowledge

is imputed to FRS. Having failed to provide related safety training to Andrews, FRS is also shown to have constructive knowledge of the violation.

The Secretary has established a serious violation of § 1926.1053(b)(1).

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required 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.

FRS employed approximately 258 employees at the time of the inspection and is a small- to-medium size company (Tr. 89). The Secretary had no final order citations against FRS in the previous three years and was given credit for that favorable past history (Tr. 22). There was no showing of bad faith by FRS. However, it did not have a functioning safety program.

All of the violations exposed Andrews to the same hazard: a fall of 20 feet. Andrews worked alone, climbing up and down the too-short ladder and moving along the narrow gable of a steep roof to instal brick flashing. The gravity of each of the violations is high. It is determined that the penalties of $600.00 for item 1; $1,200.00 for items 2a and 2b; and $600.00 for item 3 are appropriate.

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:

1. Item 1 of the citation, alleging a violation of § 1926.20(b)(1), is affirmed and a penalty of $600.00 is assessed;
2. Items 2a and 2b of the citation, alleging violations of §§ 1926.501(b)(13) and 503.(a)(1) respectively, are affirmed and a total penalty of $1,200.00 is assessed; and
3. Item 3of the citation, alleging a violation of § 1926.1053(b)(1), is affirmed and a penalty of $600.00 is assessed.

/s/
NANCY J. SPIES
Judge

Date: March 1, 2007