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. Tire Star, Inc., Respondent.	OSHRC Docket No. **09-0324**

Appearances:

Uche N. Egemonye, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Lam Phan and Mai Phan, *Pro Se*, Chamblee, Georgia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Lam (Larry) Phan and Mai Phan, husband and wife, own automobile repair and tire facilities in Metro-Atlanta, Georgia, one of which is Tire Star, Inc. (Tire Star). Pursuant to a local emphasis program targeting fall hazards, on November 7, 2008, Occupational Safety and Health Administration (OSHA) compliance officer Paneshia Watkins inspected a roof worksite at a vacant building at 2144 Patmell Road in Smyrna, Georgia. As a result of that inspection, on January 9, 2009, the Secretary issued a six-item serious citation to Tire Star. Item 1a alleges a violation of § 1910.1200(e)(1) for failing to develop and implement a written hazard communication program; item 1b alleges a violation of § 1910.1200(g)(8) for failing to maintain material safety data sheets for hazardous chemicals; item 1c alleges a violation of § 1910.1200(h) for failing to provide employees with information and training on the hazardous chemicals; item 2 alleges a violation of § 1926.501(b)(10) for failing to provide fall protection for employees performing roofing work; item 3 alleges a violation of § 1926.503(a)(1) for failing to train employees on fall hazards; and item 4 alleges a violation of § 1926.1053(b)(1) for utilizing a portable ladder which did not extend 3 feet above the roof's access point.

Tire Star contends it was not the employer of the individuals on the roof and was without knowledge of the conditions the Secretary cites as violations. The parties presented their evidence at an August 13, 2009, hearing in Atlanta, Georgia, and they filed post-hearing briefs. As discussed below, the Secretary established Tire Star was the employer of the exposed employees. She also proved Tire Star violated the cited standards. The Phans, representing Tire Star, stated their position clearly, but the evidence they presented was not credible in several respects.

Background

Lam and Mai Phan own businesses throughout Metro-Atlanta.[1] On June 4, 2008, Automall of Atlanta, Inc., owned by the Phans, leased a vacant Smyrna automotive facility (Resp Brief, Attachment). Tire Star would be the tenant after it completed the renovations.

During the prior year, Howard McGlothin, owner of Construction Design & Builders (CD&B), a small design and repair company, bid repair work for several of the Phans' buildings. In late July 2008, Lam Phan and McGlothin inspected the Symrna building to determine the scope of renovations. McGlothin advised Phan to completely replace the building's rubber membrane roof, but Phan wished to have it patched. On August 25, 2008, Tire Star Properties LLC (also owned by the Phans) contracted with CD&B to make repairs to the building, especially to the roof (Exh C-4; Tr. 67, 69). CD&B repaired a part of the roof and a part of the building's interior. The roof remained in over-all poor repair, with noticeable water leaks into the interior of the building (Tr. 71, 84, 107). In late September or early October 2008, McGlothin approached Phan seeking to be paid for the completed part of the interior work so that CD&B could finance the major roof repairs. Phan refused to pay more until McGlothin completed the roof. McGlothin and Phan reached an impasse on payment, and McGlothin considered the contract at an end. CD&B's last day at the Symrna building was the day of the disagreement (Tr. 74, 78, 86).

On Friday, November 7, 2008, around 12:30 p.m., Watkins was diving along the highway when she observed three men on a roof working without fall protection. Watkins entered the parking lot and approaching the roof, called up asking who was in charge. Hung Le came down from the

[1] The Phans separately incorporate their various business facilities. The names of the corporations often include the words "Tire Star." Prior to the hearing, it appeared the correct name of respondent was Tire Star, Inc. The name of the respondent was amended to reflect that understanding (Tr. 5).

roof via a portable ladder. In response to questions, Hung Le identified himself and, according to Watkins, stated he was a "manager" for Tire Star (Tr. 16, 18-19). Hung Le explained the owner of the business was Larry Phan, who had instructed Le to come to the building to patch the roof. Hung Le told Watkins his usual work was in the automotive shop in Chamblee, Georgia. Le, who had worked for Tire Star for 10 years, advised Watkins he had experience roofing while in his native country (Tr. 61, 100). Watkins also interviewed Tu Le and Danny Oscar, the other individuals on the roof. They told her that for approximately 2 years they worked in the bays as mechanics at Tire Star's Chamblee facility. Since they also had roofing experience, Phan instructed them to help patch the Symrna roof (Tr. 18, 21-22, 42).

Watkins notified Hung Le of apparent safety and health violations. She unsuccessfully sought to contact Phan before OSHA issued the citation. After several attempts, OSHA served the citation, which Tire Star contested (Tr. 30,40, 56).

Discussion

The Employer of the Exposed Employees

The Act covers employers, and under section 3(5) of the OSH Act, "[t]he term 'employer' means a person employed in a business affecting commerce who has employees . . ." Although patching the roof was an unusual activity for Tire Star, those activities fall within a class of activities, "construction work," which has been held to affect commerce *per se*. *Eric K. Ho*, 20 BNA OSHC 1361, 1364 (Docket No. 98-1645, 2003), aff'd, *Chao v. OSHRC & Eric K. Ho* (5th Cir. 2005). Even if the focus is not on the specifically cited activity, but on the activities of the business entity itself, coverage is established. Tire Star sells tires and repairs and maintains automobiles, which have moved in commerce and are uniquely a part of interstate commerce. It also uses technological interstate services such as a computers, telephone, telefax, cellular phone, and postal services for its operations. The Secretary meets her "modest, if indeed not light" burden to show Tire Star's activities "affect commerce." *See Austin Road Co. v. OSHRC,* 683 F.2d 905, 907 (5th Cir. 1982).

Of more import here, the parties dispute whether the individuals on the roof were Tire Star employees. The bare minimum of one single employee is sufficient to invoke coverage under the OSH Act. *Timonthy Victory*, 18 BNA OSHC 1023, 1027 (No. 97-3359, 1997). To resolve such employment issues, the Review Commission applies the common-law agency doctrine set out in

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992). The Secretary points to the admissions in the workers' November 7, 2008, interviews that they were employed by Phan and Tire Star. Tire Star contradicts that evidence.

Credibility Determinations on Employment Status

Phan denies he sent Hung Le, Tu Le, or Danny Oscar to patch the roof. Lam Phan admits Tire Star employs Hung Le but contends he never knew a Tu Le or Danny Oscar (Tr. 111-112). Tire Star states Hung Le was at the site to transfer supplies and electronic equipment from its Marietta, Georgia, store to the vacant Symrna building. The fact the roof leaked badly, with water pooling in the interior of the building, apparently was not a deterrent. At the hearing Hung Le testified Watkins misunderstood almost everything he or the other men told her due to language problems. According to Hung Le, he was on the roof because Tu Le, a man Hung Le had never met, asked him as a "favor" to carry a heavy bucket of material up a 16 foot ladder to the roof (Tr. 98-99, 103, 107). For an unexplained reason, Hung Le remained on the roof. Also unexplained was why he and Tu Le appeared to have roofing material on their hands (Exh. C-3i).

Tire Star speculates Tu Le and Danny Oscar must be employees of CD&B and that McGlothin became confused and "mixed up" as to the exact dates a CD&B crew worked on the Smyrna roof (Tr. 125). This is not credible. McGlothin was clear where his crewmembers worked and who they were. Further, McGlothin knew it was not possible to patch the rubber membrane roof with an asphalt material and would not have purchased that product (Tr. 77-78). Two vehicles were parked at the jobsite. The Toyota Camry was Hung Le's personal car. When Hung Le retrieved his business card for Watkins, he went to the red pick-up truck, the only other vehicle on site. The Secretary served Hung Le with a subpoena for the hearing. Watkins' testimony is credited that when she asked about Tu Le, Hung Le replied, "Tu Le wasn't working there anymore," not that Tu Le never worked there or that he did not know the name (Tr. 55).

Thus, it is not determinative that neither Tu Le nor Danny Oscar appear on Tire Star's Chamblee payroll or that they did not wear a "uniform" shirt while on the roof (Exhs. R-1 & R-2; Tr. 112). The Phans own several different facilities and its employees transfer between them (Tr. 105). Tire Star appears to use the talents of its employees, even to assign them unconventional tasks. Hung Le, Tu Le, and Danny Oscar had roofing experience. It appears Hung Le is a versatile

employee. Tire Star directed Hung Le to perform other non-mechanic's tasks, such as moving computers, printers, and like supplies and equipment between stores, or performing carpentry work for its facility (Tr. 82, 90, 98).

In evaluating credibility, a judge can properly consider whether a witness "exhibited a biased, hostile, or inflexible bent of mind" *Hughes Bros., Inc.*, 6 BNA 1830,1837 (No. 12523, 1978). In this judge's view, Hung Le was chagrined to have provided truthful information to Watkins, which resulted in harmful consequences for his employer. His demeanor during his testimony was notably anxious, and at times loud, hostile, and defensive. Watkins performed a careful inspection. The detail of her testimony, the certitude of her manner, and the sincerity of her demeanor qualify here as a fully credible witness.

The evidence supports that Tire Star was the employer of the three employees.

Tire Star Violated the Cited Standards

The Secretary bears the burden of proving each element of her case by a preponderance of the evidence.

> In order to establish a violation of the standard, the Secretary must establish: (a) the standard applies to the condition cited; (b) the terms of the standard were not met; (c) employees had access to the violative conditions; and (d) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence.

Offshore Shipbuilding, Inc., 18 BNA OSHC 2170, 2171 (No. 990257, 2000). Tire Star does not dispute the applicability of the standards.

Knowledge of the Violations

Tire Star contends it was without knowledge of the violations. The Secretary must establish Tire Star knew, or with the exercise of reasonable diligence, could have known of the violative conditions. One way in which the Secretary may establish constructive knowledge is if a supervisor's knowledge is properly imputable to the company. *E.g., Jersey Steel Erectors,* 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993).

The Secretary asserts Hung Le was such a supervisor. While Tire Star and Hung Le state Hung Le was no more than a mechanic and estimator, the circumstantial evidence indicates otherwise. During the inspection, Hung Le advised Watkins he was a manager and he appeared to

Watkins to be a person in charge. Whenever OSHA attempted to telephone Tire Star seeking a manager, the compliance officers were referred to Hung Le (Tr. 55, 64).

Even if the knowledge of Hung Le is not imputed to Tire Star, Tire Star still had constructive knowledge of the violative conditions. Phan, its highest ranking supervisor, instructed the three employees to patch the roof after CD&B failed in that task. Phan was familiar with the building and would have observed the fall distance from the roof. Phan purchased the asphalt-based patching material and could have seen the composition and warnings on the product label (Exh. C-3n; Tr. 38, 117). He also knew Tire Star did not provide information or training concerning the hazardous chemicals. Phan was aware the employees would have access to the roof through use of a portable ladder. *See Ormet Corp.*, 14 BNA OSHC 2134, 2137 (Docket No. 85-531, 1991) (employer may not have known of the specific instance of violative conduct at the time it occurred, but knew how the work would generally be performed). There is no indication Tire Star had a safety program which covered such safety issues. This is not to say Tire Star or Phan necessarily knew of the existence of the OSHA requirements. However, employers are charged with knowledge and are responsible for compliance with standards, regardless of their actual awareness or understanding. *Cf., e.g., Ed Taylor Constr.*, 938 F.2d 1265, 1272 (11th Cir, 1991).

Employees Exposed to Violative Conditions

Item 1a, 1b, and 1c – §§ 1910.1200(e)(1), – .1200(g)(8), and – .1200(h)

The Secretary asserts Tire Star violated sections of the hazard communication standard. Tire Star purchased three buckets[2] of asphalt-based "fibered liquid roof (asbestos free) coating" to patch the Symrna roof. The compound is combustible and contains mineral spirits and petroleum. Among other dangers, users should avoid prolonged breathing of vapors or ingesting the product (Exh C-3n; Tr. 34). The hazard communication standard applies to the material. Item 1a alleges a violation of § 1910.1200(e)(1)[3] for failing to have and to implement a written hazard communication program

[2] The photographs show two 5-gallon (not 1-gallon) buckets of the CRS roof repair material in the back of the pick-up truck (Exh. C-3a,g,m).

[3] Section 1910.1200(e)(1) provides:

> Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how . . . forms of warning, material safety data sheets, and employee information and training will be met.

related to the hazardous chemicals. Item 1b alleges a violation of § 1910.1200(g)(8)[4] for failing to secure and keep a material safety data sheet (MSDS) for the roofing material. Item 1c alleges a violation of § 1910.1200(h)[5] for failing to provide information and training on the hazardous chemicals.

The employees did not have access to and were not trained to seek the warnings against prolonged inhalation of vapors or smoking or eating (and thus ingesting) the patching material (C-3; Tr. 32-33, 37). The health effects of these grouped violations are mitigated since employees worked out-of-doors, which lessened the potential for breathing the hazardous vapors. Yet, the potential harm is serious when employees use hazardous chemicals without knowing how they can affect their health. The violations are grouped and affirmed as a low gravity serious violation.

Items 2 and 3 – §§ 1926.501(b)(10) and 1926.503(a)(1)

The Secretary asserts Tire Star violated § 1926.501(b)(10)[6] by failing to provide fall protection for employees working on a low-sloped roof. (Flat roofs are classified as "low sloped roofs.") She also asserts that although employees were exposed to fall hazards, Tire Star did not train employees to recognize and avoid the hazards in violation of § 1926.503(a)(1).[7] Watkins measured 16 feet from the roof edge to the ground (Exh. C-3e; Tr. 39). Hung Le explained to Watkins that in his country he could work up to 30 feet above the ground before he needed fall

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[4] Section1910.1200(g)(8) provides:

> The employer shall maintain in the workplace copies of the required material safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

[5] Section 1910.1200(h)(1) specifies, in part:

> Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment . . . . to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals.

[6] Section 1926.501(b)(10) provides:

> Roofing work on low-slope roofs . . . [E]ach 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 [systems] . . . .

[7] 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.

protection. Hung Le, Tu Le, and Danny Oscar worked close to and were exposed to falling from the unprotected edge of the roof. They were afforded no fall protection and received no training on how to recognize or minimize fall hazards. The violations are affirmed as serious.

Item 4 – § 1926.1053(b)(1)

The Secretary asserts Tire Star violated § 1926.1053(b)(1) because the portable ladder the employees used to access the roof did not extend 3 feet above the access point to the roof.[8] Watkins measured the distance the portable aluminum ladder projected beyond the access point of the roof to be as less than 1 foot. The employees used the unsecured ladder to access the roof and carry equipment and supplies (Exh. C-3f, l; Tr. 44). Employees were exposed to a potential fall of 16 feet while using a ladder with an insufficient handhold. The violation is affirmed as a serious.

Penalty

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Act requires the Commission to consider the size of the employer, any history of previous violations, the employer's good faith, and the gravity of the violations. Gravity is weighed as the principal factor in arriving at the penalty.

Tire Star, Inc., as an individual corporation, is a very small employer. It had not been previously cited by OSHA. It did not cooperate with the inspection, and its good faith must be further questioned because it appears to have fabricated testimony.

When Tire Stare directed three employees to patch various areas of a rubber roof, it exposed them to hazardous chemicals and to a potential 16-foot fall. The three men were experienced, but roofing was not their usual employment. Even rarely-assigned tasks can result in grave accidents. Appropriate penalties are assessed of $250.00 for the low gravity violation of the hazard communication standards; of $1,000.00 for failing to utilize fall protection on the roof; of $500.00 for failing to provide fall protection training; and of $350.00 for failing to ensure the ladder extended at least 3 feet above the access point.

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[8] Section 1926.1053(b)(1) provides:

> When portable ladders are used for access to an upper landing surface, the ladder siderails shall extend at least 3 feet (.9 m) above the upper landing surface . . . .

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), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

1. Items 1a, 1b, and 1c (§§ 1910.1200(e)(1), .1200(g)(8), and .1200(h)) are affirmed and a penalty of $250.00 is assessed.
2. Item 2 (§ 1926.501(b)(10)) is affirmed a penalty of $1,000.00 is assessed.
3. Item 3 (§ 1926.503(a)(1)) is affirmed and a penalty of $500.00 is assessed.
4. Item 4 (§ 1926.1053(b)(1)) is affirmed and a penalty of $350.00 is assessed.

/s/
NANCY J. SPIES
Judge

Date: November 24, 2009
Atlanta, Georgia