United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. CHENAL VALLEY CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 11-1351

FINAL ORDER

Administrative Law Judge Sharon D. Calhoun issued a Decision and Order in this case affirming all of the citation items at issue, and that decision was directed for review on October 20, 2011. On May 8, 2012, the Secretary notified the Commission by letter of her decision to withdraw all of the citation items affirmed by the judge. This withdrawal resolves all remaining issues in this case. *Cuyohoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985) (holding that Secretary's discretion to withdraw citation is unreviewable). Because the Secretary has withdrawn all citation items in this case, the Commission vacates the Administrative Law Judge's Decision and Order.

SO ORDERED.

BY DIRECTION OF THE COMMISSION

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Dated: June 7, 2012

_____
John X. Cerveny
Deputy Executive Secretary

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. Chenal Valley Construction, Inc., Respondent.	OSHRC Docket No. 11-1351

Appearances:

Lindsay Wofford, Esq., Office of the Solicitor, U. S. Department of Labor,
Dallas, Texas
For the Complainant

W. D. Walker, Walker Companies
Little Rock, Arkansas
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Chenal Valley Construction, Inc. (Chenal Valley) is a construction company which engages exclusively in residential construction activities. It functions as a general contractor on residential construction sites. On February 17, 2010, Chenal Valley was engaged as a general contractor at a construction site located at 13900 Fern Valley, Little Rock, Arkansas, in a residential area known as the Woodlands Edge subdivision, when Occupational Safety and Health Administration (OSHA) Compliance Officer Michelle Martin initiated an inspection of the construction site. As a result of Martin's inspection, on April 12, 2011, the Secretary issued a Citation and Notification of Penalty to Chenal Valley for five serious items alleging violations of the Occupational Safety and Health Act of 1970 (Act), and proposing penalties in the amount of $18,600.00. Chenal Valley denies it violated the cited standards and contests the citation and proposed penalties.

Thereafter, this case was designated for the Commission's Simplified Proceedings. A hearing was held before the undersigned on August 1, 2011. Prior to the hearing, the Secretary withdrew items 1 and 4 and the proposed penalties for those items. At issue are items 2, 3 and 5 and proposed penalties in the total amount of $12,600.00

For the reasons that follow, items 2, 3 and 5 of the citation are affirmed and a penalty of $1,500.00 is assessed for each item.

Stipulations

At the hearing, the parties announced the following stipulations:

1. The inspection which led to the issuance of the citations was conducted pursuant to the Regional Emphasis Program for Region 6 (Tr. 9-10).
2. Carlos Reynolds will appear as Chenal Valley's witness without the necessity of a subpoena (Tr. 9).
3. Chenal Valley requires its subcontractors to carry liability insurance on their vehicles, liability insurance in the workplace, and workers' compensation insurance (Tr. 259-260).

Jurisdiction

Chenal Valley denies that at all times relevant to this action it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). The evidence shows Chenal Valley engages in construction work and has three employees who are officers of the corporation (Tr. 295). It uses vehicles which were not made in the state of Arkansas, as there are no truck manufacturers in the state of Arkansas (Tr. 29. 32). It also has a web page on the internet (Tr. 29-30; Exh. C-2). These facts show that Chenal Valley is in a business affecting interstate commerce. Moreover, 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. *Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529 (No. 77-3676, 1983). Construction work *per se* affects interstate commerce because there is an interstate market in construction materials and services. *Clarence M.*

Jones d/b/a C. Jones Co., id. Also see Eric Ho, 20 BNA OSHC 1361 (Nos. 98-1645, 98-1646, 2003).

The Act applies to a "person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5), *see Don Davis,* 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001). Section 3(4) defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." Chenal Valley is a corporation. All employees are covered under the Act, including a company's president and vice president when they are performing work for the employer. *D & H Pump Service, Inc.*, 5 BNA OSHC 1485 (No. 16246, 1977); *Hydraform Products Corp*., 7 BNA OSHC 1995 (No. 78-527, 1979). Chenal Valley's president and vice president both performed work for the company as evidenced by their site visits. The undersigned finds Chenal Valley is an employer with employees in a business affecting interstate commerce. Therefore, jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act.

Background

Employer

Chenal Valley is a family-owned corporation and has been in existence since 1991, engaging exclusively in residential construction activities. "Their goal is to build high quality, energy-efficient homes that are both beautiful and livable." (Exh. C-2). Jim Miles is the owner and President of the company, which has two other officers, (Vice President and Secretary). Miles contends, however, there are no employees of the company (Tr. 246; Exh. C-2). Chenal Valley functions as a general contractor, hiring subcontractors, such as Daniels Framing, which was hired to perform roofing work on the jobsite at issue located at 13900 Fern Valley Road, Little Rock, Arkansas (Tr. 287).

Chenal Valley owned the site located at 13900 Fern Valley Road (Tr. 283). It paid for the materials used on the jobsite and provided instruction to Daniels Framing regarding the materials installed on the property, (Tr. 283, 284). All communications with the intended homeowner of the property came through Chenal Valley to Daniels

Framing (Tr. 285). Owner Miles would ensure that any safety problems on the jobsite were corrected (Tr. 289). Joe Miles, Project Manager of Chenal Valley, was responsible for visiting the job sites on a daily basis to check on the progress of the work (Tr. 286, 287; Exh. C -2). Owner Miles also went to the jobsites approximately three times per week (Tr. 287).

Inspection

OSHA Assistant Area Director William "Monty" Cole and Compliance Officer Michelle Martin initiated an inspection of the construction site located at 13900 Fern Valley Road, Little Rock, Arkansas on February 17, 2010, as a result of fall hazards they observed while driving by the site (Tr. 135). The inspection site was in the Woodlands Edge subdivision and was selected for inspection as a result of plain view hazards which were observed on a site where construction activity was occurring (Tr. 15, 17-19). OSHA's Compliance Directive for Construction instructs OSHA to conduct inspections when plain view hazards in construction are observed (Tr. 81).

On the day of the inspection, subcontractor Daniels Framing was performing roofing work at the jobsite (Tr. 24-25, 28, 54, 149). According to Owner Miles, Daniels Framing was not scheduled to conduct roofing work on the day of the OSHA inspection (Tr. 253). While at the jobsite, Cole and Martin observed employees working on a steep slope roof without any type of fall protection, exposed to a fall of over 8 feet (Tr. 20-21, 25, 35, 39-40, 135; Exhs. C-3, C-4). They also observed two ladders which did not extend the appropriate distance above the edge of the roof (Tr. 35, 38; Exhs. C-3, C-4). Ladder 1 did not extend far enough over the roof line and ladder 2 extended approximately ½ of a rung above the roof edge (Tr. 42; Exh. C-7). Cole observed employees accessing the roof by using ladder 1 (Tr. 59). An employee also was observed carrying a bag of shingles which weighed approximately 40 pounds onto the roof by utilizing one of the ladders (Tr. 48-49, 147). The employee climbing the ladder with the bag of shingles did not maintain three-point contact with the ladder (Tr. 165).

As a result of the violations observed, citations were issued to Chenal Valley as the controlling employer, pursuant to OSHA's Multi-Employer Citation Policy (Tr. 61). Chenal Valley was determined by OSHA to be the controlling employer because it had

control over the work site, it owned the property upon which the houses were being built, it made periodic visits to the work site, it provided the materials used on the jobsite, and because it had the authority to either correct the hazards or have its subcontractors correct the hazards (Tr. 62).

Based upon the inspection, the Secretary issued the Citation and Notification of Penalty to Chenal Valley on April 12, 2011.

The Citation

The Secretary alleges that Chenal Valley violated OSHA's standards found in Subpart M-Fall Protection and Subpart X-Stairways and Ladders.

Secretary's Burden

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) there was noncompliance with its terms; (3) employees had access to the violative conditions; and (4) the cited employer had actual or constructive knowledge of those conditions. *Southwestern Bell Telephone Co.*, 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Controlling Employer

The Citation was issued to Chenal Valley pursuant to OSHA's Multi-Employer Citation Policy (Tr. 62). The Secretary contends Chenal Valley was the general contractor on the jobsite and it was responsible for the violations due to its capacity as controlling employer. Chenal Valley asserts that it was not a controlling employer.[1] The Commission has recently reversed its previous position, holding that the Secretary may cite a non-exposing, controlling employer under this policy. In *Summit Contractors*, 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010), the Commission held:

> "[A]n employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act . . . to protect not only its own employees but those of other employers engaged in a common undertaking." *McDevitt Street Bovis, 19* BNA OSHC at 1109, 2000 CCH OSHD at p. 48,780 (citation omitted). With respect to controlling employer liability "an employer may be held responsible for the violations of other employers

[1] Chenal Valley also argues the Secretary failed to follow her own administrative procedures in selecting Chenal Valley for inspection and in conducting the inspection in this case, in violation of the Administrative Procedures Act. The undersigned has considered Chenal Valley's arguments and finds they have no merit and are not supported by a preponderance of the evidence.

> where it could be reasonably expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Id.* (citation omitted); *Grossman Steel,* 4 BNA OSHC 1188, 1975-1976 CCH OSHD at p. 24,791.

Chenal Valley does not dispute that it hires subcontractors to perform work on residential construction sites or that it hired Daniels Framing to conduct roofing work for the jobsite at issue (Tr. 285).[2] Chenal Valley paid for the shingles and materials put on the house by Daniels Framing (Tr. 140, 284). Daniels Framing received its instruction about what shingles to put on the house from Chenal Framing (Tr. 283). All communications with the purchaser of the property came through Chenal Valley which, in turn, communicated it to Daniels Framing (Tr. 285). Chenal Valley could instruct Daniels Framing to change what they were doing if the homeowner was not happy (Tr. 286). As a part of his responsibilities, Miles's son, Joe Miles, Project Manager for Chenal Valley, visited the job site on a daily basis to check on the progress of the work (Tr. 286, 287). Owner Miles would go to the jobsite approximately three times per week (Tr. 287). Chenal Valley tries to have a representative onsite approximately three times per week (Tr. 140, 187).

In order to ensure safety on the jobsite, owner Miles, at the beginning of the year, renews the subcontract agreements, asks the subcontractors to provide all of their insurance information, and discusses the subcontractors' safety and training records (Tr. 258). Although Chenal Valley did not get involved in training Daniels Framing's employees, it required Daniels Framing to provide Chenal Valley with its training plans (Tr. 260-261). Further, if an employee of Daniels Framing violated any safety laws, Chenal would contact Daniels Framing to get the problem resolved (Tr. 262). If owner Miles was aware of a violation, he would point it out to Daniels Framing, and owner Miles testified he probably would ensure that the safety problem was corrected (Tr. 289).

[2] Chenal Valley asserts the *Sasser* defense in its brief arguing "[a] general contractor may rely on the assurances of a subcontractor, as long as it has no reason to believe that the work is being performed in an unsafe manner. *Sasser Elecric and Manufacturing Co.,* 11 BNA OSHC 2133 (No. 82-178, 1984)." (Chenal Valley Brief, p. 5). For the reasons set forth below, this argument fails, as Chenal Valley had reason to believe that Daniels Framing was performing work in an unsafe manner.

The undersigned finds Chenal Valley had supervisory authority and control over the jobsite. Accordingly, the Secretary properly issued the instant citation pursuant to OSHA's Multi-Employer Citation Policy.

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

The Secretary charges Chenal Valley with violating § 1926.501(b)(13), alleging that employees of Daniels Framing, a subcontractor of Chenal Valley, failed to use fall protection when performing roofing work. Specifically, the citation alleges "[o]n or about February 17, 2011, at the worksite located at 13900 Fern Valley in Little Rock Arkansas, employee straddled across the peak of an approximately 8:12 pitched roof installing vents was not protected from falling. Employee was exposed to an approximately 12 ft. fall from elevation." (Citation and Notification of Penalty).

The standard found at § 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 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.

Applicability

There is no dispute that employees of Daniels Framing were engaged in roofing work at the time of the inspection. Employees were observed carrying shingles to the roof and were photographed conducting work activity on the roof (Tr. 147; Exhs. C-3, C-4, C-5, C-7). Tar paper and shingles were being put on the roof. Daniels Framing was installing a roof on the residence located at the inspection site. It was engaged in residential construction. Subpart M defines roofing work as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work . . . " (§ 1926.500(b)). The cited standard is applicable.

Noncompliance with the Terms of the Standard

Martin observed employees working on a roof without fall protection (Tr. 20-21, 25, 35, 39-40, 135; Exhs. C-3, C-4, C-5, C-7). The fall distance from the eve of the roof to the ground was determined to be 8 feet (Tr. 20-21, 25, 35, 39-40, 135). As reflected in the photographs admitted into evidence, no guardrail systems, safety net system, or personal fall arrest system was in place (Exhs. C-3, C-4, C-5, C-7). In addition, no one was observed functioning as a monitor for employees working on the roof (Tr.146).

Chenal Valley contends the employee shown in exhibit C-4 was tied off with the cord depicted in the photograph and, therefore, protected from falling. The undersigned disagrees. Martin and Cole testified the cord depicted in exhibit C-4 is a pneumatic nailer extension line which was not attached to anything to prevent the employee from falling (Tr. 143, 145). Both Martin and Cole testified consistently and with assurance regarding the extension line, and are found to be reliable. Although Martin testified on cross examination that she did not know if there was a fall-safe device on the opposite side of the house (Tr. 160), a preponderance of the evidence supports a finding that the employees working on the front side of the house were not protected from falling.

The fall protection measures set forth in § 1926.501(b)(13) must be utilized unless any other provisions in paragraph (b) provide for an alternative fall protection measure. Cole and Martin testified the employees were working on a steep slope roof without any

type of fall protection, being exposed to a fall of over 8 feet (Tr. 20-21, 25, 35, 39-40, 135; Exhs. C-3, C-4). Paragraph (b)(11) provides for guardrail systems with toeboards as an additional fall protection measure for steep roofs. Even assuming guardrail systems with toeboards could have been used, the evidence adduced at the hearing shows that no fall protection at all was used at the time of the inspection.

The standard found at § 1926.501(b)(13) also provides an exception for situations where the employer demonstrates infeasibility or greater hazard. Chenal Valley adduced no evidence and advanced no arguments regarding infeasibility or greater hazard. Therefore, the exception to the standard is not at issue. The Secretary has demonstrated the terms of the standard were violated.

Employee Access to the Violative Conditions

As an element of the Secretary's burden of proof, the record must show that employees were exposed or had access to the violative condition. *Walker Towing Corp*., 14 BNA OSHC 2072 (No. 87-1359, 1991). Martin and Cole observed employees working on a roof without fall protection (Tr. 20-21, 25, 35, 39-40, 135; Exhs. C-3, C-4, C-5, C-7). The fall distance from the eve of the roof to the ground was determined to be 8 feet (Tr. 20-21, 25, 35, 39-40, 135). Chenal Valley does not dispute that employees of Daniels Framing were working on the roof at the inspection site. A preponderance of the evidence shows Daniels Framing's employees were exposed to fall hazards while working unprotected from the roof of the house. Martin testified the violation was characterized as serious because a fall from a roof could result in serious injury such as broken bones, fractures, head concussions, contusions and possibly death (Tr. 149-150). The undersigned agrees. The Secretary has met her burden of establishing exposure or access to the violative condition.

Employer Knowledge

It is the Secretary's burden to adduce sufficient evidence to establish this element of her case. The Secretary must establish actual or constructive knowledge of the violative conditions by Chenal Valley in order to prove a violation of the standard. In order to show employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous

condition. *Dun Par Engineered Form Co*.,12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of, or was responsible for, the violation." *Todd Shipyards Corp*. 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

Chenal Valley contends it had no knowledge of the violative conditions because it had no employees on the site. Further, Chenal Valley contends it did not know Daniels Framing was working on the jobsite, since they were not scheduled to be on the site.

Chenal Valley was not at the jobsite on the day of the inspection; therefore, it did not have actual knowledge of the violative conditions. Since Chenal Valley did not have actual knowledge of the violations, the Secretary must demonstrate constructive knowledge. The Secretary points out in her brief that OSHA had conducted an inspection of another jobsite in the Woodlands Edge subdivision earlier in the morning, and that Daniels Framing was the subcontractor and Chenal Valley was the general contractor on that site as well.[3] According to the Secretary, the earlier inspection of Daniels Framing put Chenal Valley on notice that Daniels Framing was working unsafely and therefore, Chenal Valley should have exercised reasonable diligence to determine whether Daniels Framing was working unsafely on the inspection site at issue in this case (Secretary's Brief, p. 14-15). The undersigned agrees.

The time between the morning inspection and the afternoon inspection was approximately 1½ hours, and the inspection sites were in close proximity of each other (Tr. 119; Exh. C-1). As in the instant case, fall protection violations were found by OSHA during the earlier inspection of Daniels Framing (Tr. 54). Project Manager Miles came to the site and was present during OSHA's initial inspection of Daniels Framing (Tr. 22). OSHA left the Woodlands Edge subdivision around noon after the earlier

[3] The earlier inspection was conducted at Hoggard's Ridge in the Woodlands Edge subdivision (Tr. 119).

inspection was conducted and did not return until 1:30 p.m. to conduct the inspection at issue here (Tr. 118-119). The undersigned finds that Chenal Valley had sufficient time to discover whether Daniels Framing was working safely at the jobsite at issue in this case. The undersigned also finds that the Project Manager's presence at the earlier inspection, put Chenal Valley on notice that Daniels Framing was working, despite not being scheduled to work on that day. The violations were in plain view and could be seen from the street (Tr. 23, 27, 59, 60, 61, 138). With reasonable diligence Chenal Valley could have discovered the violations. The undersigned discredits Chenal Valley's arguments that Daniels Framing did not begin working until after noon, as being inconsistent with a preponderance of the evidence. The Secretary has established knowledge. The undersigned finds the Secretary has met her burden and has proven a violation of § 1926.501(b)(13), by a preponderance of the evidence. Item 2 is affirmed.

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

The Secretary cited Chenal Valley for serious violations of § 1926.1053(b)(1), alleging two instances in which portable ladders used to access the roof of the home under construction by subcontractor Daniels Framing did not extend at least 3 feet above the upper landing surface.

The cited standard, § 1926.1053(b)(1), provides:

> (b) *Use*. The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:
> (1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9m) 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.

The citation alleges in item 1:

> (a) On or about February 17, 2011, at the front of the house being constructed at 13900 Fern Valley in Little Rock, Arkansas, the portable extension ladder used by employees to access the roof extended approximately 6 inches above the edge of the roof. This condition exposed employees to the hazard of falls

from elevation

.

(b) On or about February 17, 2011 on the south side of the house being constructed at 13900 Fern Valley in Little Rock, Arkansas, the portable extension ladder used by employees to access the roof extended approximately 14-16 inches above the edge of the roof. This condition exposed employees to the hazard of falls from elevation.

(Citation and Notification of Penalty). In her brief, the Secretary states that she is withdrawing instance (a) of the citation (Secretary's Brief, p. 18, footnote 2). Instance (a) therefore, is not at issue.

Applicability of the Standard

Employees of Daniels Framing, subcontractor to Chenal Valley, used portable ladders to install the roof on the house under construction at the inspection site. Two portable ladders were in use at the jobsite. The standard is applicable.

Noncompliance with the Terms of the Standard

Instance b: Chenal Valley was cited for a ladder on the south side of the house which extended approximately 14-16 inches above the roof. As reflected by the photographs, the ladder did not extend at least 3 feet above the roof, which was the upper landing surface (Exhs. C-3, C-6, C-7). Further, Cole and Martin testified the ladder was not secured (Tr. 45-46, 153). Owner Miles contends the ladder used by employees extended at least 3 feet above the roof (Tr. 270-271). The undersigned disagrees. The testimony of Martin and Cole, supported by the photographic evidence, supports Cole's and Martin's testimony that the ladders failed to extend the required distance. The undersigned finds the Secretary has established that Chenal Valley violated the specific terms of the standard with respect to instance (b).

Employee Access to the Violative Conditions

The testimony reveals that ladders were the only way to access the roof on the jobsite (Tr. 75). Photographs show Daniels Framing employees working on the roof (Exhs. C-3, C-4, C-5). Martin testified she observed a Daniels Framing employee using a ladder to access the roof, while carrying a bag of shingles (Tr. 147). As evidenced by tar paper on the roof, Cole concluded employees of Daniels Framing accessed the roof and were exposed (Tr. 57-58). The undersigned finds Cole and Martin credible as to the conditions they observed on the jobsite. Their testimony was supported by the photographic evidence and was consistent. Owner Miles was not at the jobsite on the day of the inspection. His testimony as to conditions at the jobsite is not persuasive. According to Martin, a fall could result in serious injury such as broken bones, fractures, head concussions, contusions and the possibly death (Tr. 149-150). The undersigned agrees. The Secretary has established exposure.

Employer Knowledge

Constructive knowledge is established as set forth above in the knowledge discussion for Item 2. The ladder violations were in plain view and with reasonable diligence could have been detected. The Secretary has established a prima facie case as to Item 3 instance (b). Item 3 instance (b) is affirmed.

Item 5: Alleged Serious Violation of § 1926.1053(b)(22)

Chenal Valley was charged as controlling employer for a violation of § 1926.1053(b)(22) which provides "[a]n employee shall not carry any object or load that could cause the employee to lose balance and fall." The citation alleges:

> On or about February 17, 2011, on the south side of the house being constructed at 13900 Fern Valley in Little Rock, Arkansas, employee climbed a portable extension ladder to access the roof while carrying an approximately 40 lb. bag of roof shingles. This condition exposed employee to the hazard of falls from ladder elevations.

(Citation and Notification of Penalty).

Applicability of the Standard

As set forth above, employees of Daniels Framing, subcontractor to Chenal Valley, used portable ladders to install the roof on the house under construction at the inspection site. The standard is applicable.

Noncompliance with the Terms of the Standard

The standard is clear, while using a ladder, employees are precluded from carrying items which could cause the employee to lose balance and fall. Martin testified she observed an employee of Daniels Framing carrying a bag of shingles up a ladder to the roof (Tr. 147). Martin testified the bags of shingles weighed 40 pounds, as reflected by the weights listed on the discarded shingles bags and bags of shingles she observed on the ground (Tr. 148). A Daniels employee is depicted in exhibit C-7 in proximity to the ladder on the south side of the house carrying a bag of shingles. The undersigned finds that carrying a bag of shingles up a ladder could cause an employee to lose balance and fall. Chenal Valley failed to comply with the terms of the standard.

Employee Access to the Violative Conditions

Daniels Framing employees were working on the roof and used the ladders to access the roof. Further, Martin observed an employee carrying a bag of shingles up the

ladder to the roof (Tr. 147). Her testimony is supported by exhibit C-7 which shows a Daniels employee carrying a bag of shingles in proximity to the ladder on the south side of the house. Exposure is established.

Employer Knowledge

The violation was in plain view. As set forth above in the discussion for Item 2, Chenal Valley, with reasonable diligence, could have known of the violative condition. Constructive knowledge is established. The Secretary has met her burden as to Item 5. Item 5 is affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). The Commission must determine a reasonable and appropriate penalty in light of § 17(j) of the Act and may arrive at a different formulation than the Secretary in assessing the statutory factors. Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria when assessing penalties: (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. *29 U.S.C. § 666(j)*. 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).

Chenal Valley employed only three employees at the time of the inspection. Due to its small size, Martin reduced the penalty by 40%; however, no good faith reduction was given because Chenal Valley did not make sure the site was in safe condition (Tr. 151, 153). No history reduction was given because Chenal Valley had not been inspected previously for OSHA violations (Tr. 151-152, 155, 157, 158).

The undersigned finds that a high gravity is appropriate here because if employees were to fall from the roof of the house under construction or from ladders to access the roof, they could sustain serious injuries or death. Chenal Valley, however, is a small employer and has had no history of prior violations. These factors weigh in favor of a small penalty. Further, there is no evidence that Chenal Valley failed to cooperate with the investigation and it demonstrated good faith during these proceedings. These good faith factors weigh against a large penalty. Considering these facts and the statutory elements, a total penalty of $4,500.00 is 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. Citation 1, Item 1, alleging a violation of § 1926.25(a) and a proposed penalty of $1,800.00 is withdrawn;
2. Citation 1, Item 2, alleging a violation of § 1926.501(b)(13) is affirmed and a penalty of $1,500.00 is assessed;
3. Citation 1, Item 3 instance (a), alleging a violation of § 1926.1053(b)(1) is withdrawn;
4. Citation 1, Item 3 instance (b), alleging a violation of § 1926.1053(b)(1) is affirmed and a penalty of $1,500.00 is assessed;
5. Citation 1, Item 4, alleging a violation of § 1926.1053(b)(9) and a proposed penalty of $4,200.00 is withdrawn; and
6. Citation 1, Item 5, alleging a violation of § 1926.1053(b)(22) is affirmed and a penalty of $1,500.00 is assessed.

SO ORDERED.

/s/ Sharon D. Calhoun

SHARON D. CALHOUN
Judge

Date: September 16, 2011
Atlanta, Georgia