



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant

v.

Wormley Brothers Enterprises, Inc.,

Respondent.

OSHRC Docket No. **11-3089**

Appearances:

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

Bryan Wormley, Owner and President, *pro se*, Wormley Brothers Enterprises, Inc., Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Wormley Brothers Enterprises, Inc. (WBE)¹ is a commercial roofing contractor with an office in Buford, Georgia. On August 9, 2011, WBE was completing the installation of a flat roof on a bank under construction in Kennesaw, Georgia when the project was inspected by the Occupational Safety and Health Administration (OSHA). As a result of the OSHA inspection, WBE received a repeat citation on September 20, 2011.

The citation alleges WBE violated 29 C.F.R. § 1926.1053(b)(1) for failing to extend the side rails of a portable ladder at least 3 feet above the roof landing. The citation proposes a penalty of \$ 16,500.00. WBE timely contested the citation.

The hearing was held on June 11, 2012 in Atlanta, Georgia. WBE was represented by its owner and president, Mr. Bryan Wormley, *pro se* (Tr. 17). Jurisdiction and coverage were

¹ The Secretary's unopposed motion to amend the name of the cited employer from Wormley Brothers Roofing Inc., to Wormley Brothers Enterprises, Inc., was granted at the hearing on June 11, 2011 (Tr. 8).

stipulated by the parties (Tr. 7). A post-hearing position statement was filed by the Secretary of Labor on August 31, 2012.

WBE denies the alleged violation, repeat classification, and proposed penalty. WBE argues that the Secretary did not meet her burden of proof to establish a violation. WBE does not assert any affirmative defenses.

For the reasons discussed, WBE's repeat violation of § 1926.1053(b)(1) is affirmed and a penalty of \$ 7,000.00 is assessed

The OSHA Inspection

WBE performs commercial roofing activities and metal work in the southeastern United States. WBE has been incorporated for less than five years, but has been performing roofing work for ten years. WBE employs approximately 25 employees (Tr. 18-19).

On May 10, 2011, WBE was contracted by the general contractor to install a flat roof, membrane insulation, on a commercial bank (a small one-story building), under construction, in Kennesaw, Georgia (Exh. C-5; Tr. 28-29, 51, 75-76). WBE contractually agreed to provide its own tools and equipment for the project (Tr. 78). According to the design plans, the height of the roof parapet was 17 feet, 4 inches above the ground (Tr. 58, 73).

On August 9, 2011,² after observing employees working unprotected on the roof, an OSHA compliance officer initiated the inspection of the bank project pursuant to a local emphasis program on fall hazards (Exhs. C-7, C-9; Tr. 44-45, 47). This was the last day of WBE's work on the project and the employees were finishing their work on the roof (Tr. 31). WBE was the only roofing contractor on site (Tr. 77).

After entering the property and meeting the general contractor's superintendent, the compliance officer was informed that the five employees including the foreman on the roof were employed by WBE (Tr. 33-34, 51-52, 76-77, 84). When the employees exited the roof, the compliance officer observed the foreman and four employees climbed down a portable ladder and temporarily leave the project in a WBE truck (Tr. 55, 59, 69, 85). The employees were on the

² The Secretary's motion to change the inspection date from August 10, 2011 to August 9, 2011 was granted at the hearing over the objection of WBE. The compliance officer mistakenly relied upon a personal camera phone which had the wrong date (Tr. 10, 71). WBE is not prejudiced by the amendment because it knew the dates it worked at the project (Tr. 30-31). The court is satisfied that the inspection occurred on August 9, 2011 because WBE did not work on August 10. WBE's GPS tracking system on each company truck identified the location as the bank location on August 9, 2011, as the date worked (Exh. C-8; Tr. 36, 37-38).

ladder for less than 5 minutes (Exh. C-12; Tr. 60, 66-67). After the crew returned to the project, the foreman identified the employees and admitted using the ladder (Tr. 53, 91).

The compliance officer described the portable ladder as an aluminum 24-foot extension ladder (Exhs. C-9, C-12). The roof was 17 feet, 4 inches above the ground and the ladder was extended 18 feet, 10 inches. The ladder's side rails only extended approximately 18 inches above the roof parapet (Tr. 49, 58, 73). According to the general contractor's superintendent, there were no other employees working on the roof and the ladder was the only means to access the roof (Tr. 68). The WBE's project foreman agreed that only WBE's employees were working on the roof during OSHA's inspection (Tr. 86).

Prior to the OSHA inspection in August 2011, WBE had received two previous OSHA citations. On February 16, 2011, WBE received a serious citation after an inspection of a project in Fitzgerald, Georgia on September 15, 2010. The citation alleged seven violations of OSHA standards including an alleged violation of § 1926.1053(b)(1) (item 6) (Exh. C-1; Tr. 19-20). The citation was resolved by informal settlement agreement which affirmed the cited violations and reduced the proposed penalties. The citation, as resolved, became a final order on March 10, 2011 (Exh. C-2; Tr. 22-23).

On May 25, 2007, WBE received a serious citation for two violations including an alleged violation of § 1926.1053(b)(1) (item 2) for work performed on March 27, 2007, in Flowery Branch, Georgia (Exh. C-3; Tr. 24-25). The citation was not contested by WBE and the full penalty was paid (Exh. C-4; Tr. 26-27). The citation became a final order on June 15, 2007.

As a result of the OSHA inspection at issue, the repeat citation was received by WBE on September 20, 2011.

DISCUSSION

The Secretary of Labor has the burden of proof.

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., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

WBE argues the Secretary failed to meet her burden of proof to establish a violation of §1926.1053(b)(1).

REPEAT CITATION NO. 1

Item 1 - Alleged Violation of § 1926.1053(b)(1)³

The citation alleges that on August 9, 2011, at the worksite “the portable ladders used for access and egress to the roof did not extend at least 3 feet (.9 m) above the upper landing, exposing employees to fall hazards.”

Section 1926.1053(b)(1) 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.

1. The cited standard applies.

The project at issue involved the construction of a new bank and therefore, the construction standards at Part 1926 applied. The “*Ladder*” standards at § 1926.1053 apply to “all ladders as indicated including job-made ladders.” 29 C.F.R. §1926.1053(a).

The ladder on site used by WBE was a portable ladder (Exh. C-9). It was described as a 24-foot, two-stage, extension aluminum ladder with a 12-inch span from rung to rung (Tr. 73). WBE does not dispute the ladder was a portable ladder.

Section 1926.1053(b)(1), at issue, applies specifically to “portable ladders.” A portable ladder is defined as “a ladder that can be readily moved or carried.” 29 C.F.R. § 1926.1050(b), *Definitions*.

Under its contract, WBE was to provide all equipment it used on the project. The record indicates the ladder belonged to WBE and was used by the WBE crew to access the roof. WBE admits application of the standard (Exhs. C-6, C-7; Tr. 15).

Section 1926.1053(b)(1) applies to the conditions observed by OSHA.

³ The Secretary’s unopposed motion to amend the alleged standard violated from § 1926.1052(b)(1) to §1926.1053(b)(1) because of a typographical error was granted at the hearing (Tr. 8, 10).

2. The terms of § 1926.1053(b)(1) were not complied.

Based on the compliance officer's observations and his calculation, the ladder's side rails extended only 18 inches above the roof deck (Tr. 18). There is no evidence the ladder was secured at the top to a rigid support. The photograph does not show a grasping device such as a grabrail (Exhs. C-11, C-12). The height of the roof above the ground was 17 feet, 4 inches (Tr. 58, 73).

The record establishes that the ladder's side rails did not extend at least 3 feet above the roof landing. The terms of § 1926.1053(b)(1) were not complied with by WBE.

3. WBE employees were exposed.

In order to establish employees' exposure to a hazard, the Secretary must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997).

While on site, the compliance officer observed five WBE employees including the foreman on the roof and using the ladder to exit the roof. The ladder was the only means to access the roof. The compliance officer testified that the five employees were observed on the ladder for approximately five minutes (Tr. 60). Even a short duration exposure is sufficient to establish employees' exposure. *Walker Towing Corp.*, 14 BNA OSHC 2072 (No. 87-1359, 1991). The compliance officer's observation was not refuted by WBE. The employees were exposed to a fall hazard of approximately 17 feet to the ground.

Actual employees' exposure to a fall hazard is established (Tr. 44).

4. WBE knew or should have known of the hazard.

As the final element of the Secretary's burden of proof, the record must show by a preponderance of the evidence that employer knew or should have known, with the exercise of reasonable diligence, of the unsafe condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986).

WBE's foreman who had the authority to supervise and direct the work of the crew, should have known the portable ladder's side rails did not extend at least 3 feet above the roof landing (Tr. 90). *A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) (an employer is chargeable with knowledge of conditions which are plainly visible to its supervisory

personnel). Where a supervisory employee is in close proximity to a readily apparent safety violation, the employer may be charged with constructive knowledge of the violation. *Hamilton Fixture*, 16 BNA OSHC 1073 (No. 88-1720, 1993), *aff'd* without published opinion, 28 F.3d 1213 (6th Cir. 1994).

The ladder was in plain view and the foreman, personally, used the ladder to exit the roof. He was observed by the compliance officer along with his crew using the ladder to exit the roof. As a corporation, the foreman's knowledge is imputed to WBE. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (actual knowledge of a supervisory employee of a violative condition is imputed to the employer).

The elements of the Secretary's burden of proof are established. WBE's violation of §1926.1053(b)(1) is supported by the record.

REPEAT CLASSIFICATION

WBE's violation of § 1926.1053(b)(1) was properly classified by OSHA as repeat. A violation is considered a repeated violation under § 17(a) of the Occupational Safety and Health Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). Substantial similarity is established by showing the prior violations cited involved same standard at issue in the present case and the prior citations have become a final order. *Monitor Construction Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994). An uncontested citation becomes a final order on the last day of contest. *All Phase Electric & Maintenance, Inc.*, 15 BNA OSHC 1301, 1303 (No. 90-505, 1991).

The record shows that WBE received two prior citations, on February 16, 2011 and May 25, 2007, for violations of § 1926.1053(b)(1) which are the same standard cited in this case. The prior citations were informally resolved or not contested by WBE. The prior citations became final orders, not subject to review, prior to the OSHA inspection at issue (Exhs. C-1, C-2, C-3, C-4; Tr. 21, 23-24, 25).

Penalty Consideration

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 consider.

WBE, as a small employer with 25 employees, is entitled to credit for size (Tr. 62-63). WBE is not entitled to credit for history and good faith. WBE has received prior OSHA citations within the preceding five years. The record fails to show any good faith such a safety program or other demonstration of a commitment to employee safety.

A penalty of \$ 7,000.00 is reasonable for WBE's repeat violation of § 1926.1053(b)(1). Five employees including the foreman were exposed to a fall hazard of 17 feet when exiting the roof on a ladder which side rails did not extend at least 3 feet above the roof landing. The side rails only extended 18 inches above the landing. The total estimated time of employees' exposure was five minutes. WBE has received two prior citations for violations of § 1926.1053(b)(1). The penalties paid for the prior violations of § 1926.1053(b)(1) were \$ 600.00 and \$ 2,100.00.

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

Repeat Citation No. 1:

1. Item 1, alleged repeat violation of § 1926.1053(b)(1), is affirmed and a penalty of \$ 7,000.00 is assessed.

SO ORDERED.

Date: October 1, 2012

/s/
KEN S. WELSCH
Administrative Law Judge