Secretary of Labor, Complainant, v. Designs Unlimited Contractors, Respondent.	OSHRC Docket No. 03-0095 **EZ**

Appearances:

Patrick L. DePace, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio
For Complainant

Mr. Bret A. Anderson, General Manager, Designs Unlimited Contractors, Greenfield, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Designs Unlimited Contractors (DUC), a small home improvement company, was completing a re-roofing job on a private home in Wilmington, Ohio, on November 13, 2002, when the Occupational Safety and Health Administration (OSHA) inspected the site under a local emphasis fall protection program. As a result of OSHA's inspection, DUC received a serious citation on December 12, 2002. DUC timely contested the citation.

The serious citation alleges that DUC violated 29 C.F.R. § 1926.20(b)(2) (item 1) by failing to have a competent person inspect the worksite to identify existing and predictable hazards; 29 C.F.R. § 1926.501(b)(13) (item 2) by failing to provide fall protection to employees engaged in residential roofing activities; and 29 C.F.R. § 1926.503(a)(1) (item 3) by failing to train employees to recognize fall hazards and the procedures to minimize the hazards. The serious citation proposes a penalty of $1,500 for each alleged violation.

The case was designated for EZ trial proceedings pursuant to 29 C.F.R. § 2200.200, *et seq.* The hearing was held in Dayton, Ohio, on April 25, 2003. DUC was represented *pro se* by its owner and general manager Bret Anderson. The Secretary filed a post-hearing brief.

DUC was a covered employer at the time of the citation and the Commission has jurisdiction. DUC was an employer engaged in a business affecting commerce by working with roofing shingles manufactured in Missouri (Tr. 93). Also *see Clarence M. Jones, d/b/a C. Jones Company,* 11 BNA

OSHC 1529, 1531 (No. 77-3676, 1983) (construction work is within the class of activities Congress intended to regulate and thus is an employer engaged in construction activities in a business affecting commerce).

DUC denies the violations. DUC also asserts that the standards apply only if an employer has 10 or more employees. It is undisputed that DUC had only 3 employees. With regard to the lack of fall protection violation, DUC argues that it had nearly completed its re-roofing work on this portion of the roof and had removed the fall protection. DUC also states that it is no longer in business and is unable to pay any penalty.

For the reasons discussed, the violations are affirmed and total penalty of $1,500 is assessed.

. *The Inspection*

DUC was a small home improvement contractor in Greenfield, Ohio. Approximately 80 percent of its work involved residential roofing (Tr. 78). DUC also did room additions, windows, and vinyl siding (Tr. 81). DUC was owned by Bret Anderson. Anderson had 14 years of construction work experience and had worked 2 years as project coordinator for Midwest Energy, Inc., a general contractor (Tr. 81-82, 93).

DUC started in business in August 2002 and went out of business in December 2002[1] (Tr. 78). While in business, DUC had two full time employees (David Mossbarger, Andrew Storer) and one part-time employee (William Wariekis[2]) (Exh. C-3; Tr. 80). DUC's work was limited to two Ohio counties, Fayette and Clinton (Tr. 81).

In October 2002 Midwest Energy, Inc., as general contractor, contracted DUC to re-roof a private residence at 81 Columbus Street, Wilmington, Ohio (Tr. 28, 55, 79, 86). DUC was hired to remove the existing roof and install an architectural shingle roof system[3] (Tr. 79). At the time of OSHA's inspection, DUC's employees had worked approximately 3 weeks on the re-roofing project (Tr. 80, 86). Anderson was supervising the work.

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[1]An employer's cessation of business after the OSHA citation is issued does not entitle it to dismissal of the citation. *Joel Yandell, d/b/a Triple L Tower*, 18 BNA OSHC 1623 (No. 94-3080, 1999).

[2]Compliance officer Barbour mistakenly identified William Wariekis as William Walsh (Tr. 65).

[3]An "architectural shingle roofing system" was described as more elaborate and more eye appealing than a typical shingle roofing system and requires custom fabricated copper flashing. The manufacturer is Certainteed (Tr. 80).

The roof where the employees were working at the time of OSHA's inspection was 25 feet high to the eaves and 31.7 feet high to the roof's peak (Tr. 17, 63). The roof"s slope was 7 in 12 (Tr. 85). To assist the employees to access the roof, DUC erected an 8-foot long handrail on the roof in the rear of the house where the ladder was placed (Exh. C-1; Tr. 18, 66). Also, DUC used a pump jack scaffold system for employees to stand on while placing the flashing around the eaves and the first 2 or 3 rows of shingles (Tr. 56-57, 87). While on the roof, the employees worked from a roof slide guard system (Tr. 88).

On November 13, 2002, OSHA safety compliance officer (CO) Robert Barbour[4] initiated an inspection of the DUC's re-roofing work under an OSHA local emphasis program which targeted fall hazards in construction when he observed an employee sweeping on the roof of a house without fall protection. The employee was working in excess of 25 feet above the ground (Exh. C-1; Tr. 9-11). Barbour also observed 3 other employees, including Bret Anderson, installing copper flashing around a brick belfry[5] (Tr. 12, 64). Only 1 of the employees (William Wariekis) was wearing a secured safety harness. Barbour interviewed Anderson and the 3 employees (Exhs. C-2, C-3). He returned to the site on November 14 and met with the superintendent for Midwest Energy, Inc., who provided him a copy of his inspection notes (Exh. C-4; Tr. 29). As a result of OSHA's inspection, a serious citation was issued to DUC.

Discussion

The Secretary has the burden of proving a violation.

> 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).

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[4]Barbour has been employed by OSHA since January 2001 (Tr. 8).

[5]CO Barbour mistakenly believed it was a brick chimney (Tr. 12).

There is no dispute that where the employees were working at the time of the inspection was in excess of 25 feet above the ground. DUC also does not dispute that the employee sweeping and the 2 employees, including Anderson, installing the flashing at the belfry were not utilizing safety harnesses or any fall protection.

The record establishes that DUC knew the conditions on site. Anderson as owner and general manager of DUC was present at the time of OSHA's inspection and directed the work of the employees. He was on the roof with the employees. Anderson's knowledge of the conditions is imputed to DUC. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

DUC's argument that the citation must be dismissed because it had less than 10 employees is rejected. Generally, any employer with 1 or more employees is covered under the Occupational Safety and Health Act (Act). *See* 29 C.F.R. § 1975.4(a). Also *see Poughkeepsie Yacht Club,* 7 BNA OSHC 1725, 1726 (No. 76-4026, 1979). However, since 1977 Congress, through appropriations acts, has exempted from OSHA programmed safety inspections all employers of 10 or fewer employees in low hazard industries with a low lost workday injury rate. This exemption applies to places of employment, including farms and establishments identified in Office of Management and Budget's *Standard Industrial Classification Manual* (SIC). Appendix A to OSHA CPL 2-0.51J, "*Enforcement Exemptions and Limitations under the Appropriations Act,*" identifies by SIC number those low hazard industries exempt from safety programmed inspections because of size (BNA OSHC "Reference File," p. 21:9493. Also *see* CCH Employment Safety and Health Guide, ¶ 518, p.786).

As an affirmative defense, DUC has the burden of proof to show that it is exempt from OSHA's application. Other than showing it only had 3 employees, DUC made no showing that it was exempt from OSHA application. *Armstrong Steel Erect., Inc.*, 17 BNA OSHC 1385, 1389 (No. 92-262, 1995)(the party claiming an exception has the burden to prove it comes within the exception). Also, official notice is taken that DUC as a home improvement company which specializes in residential roofing is not considered a low hazard industry and is not in an SIC number[6] identified by the Secretary as exempt application. Appendix A of CPL 2-0.51J. Also, it

[6]The SIC number for roofing work is 1761 and for residential construction is 1521. Neither SIC number is listed in Appendix A of CPL 2-0.51J.

is noted that the inspection was the result of the CO's personal observations of unsafe conditions on site.

DUC's additional arguments raised at hearing involving videotaping the site prior to the opening conference, failing to give prior notice of the inspection, and failing to obtain an inspection warrant are also rejected (Tr. 37, 39).

CO Barbour observed the DUC employees without fall protection on the roof while driving by the house in Wilmington, Ohio. He immediately started to videotape his observations from his automobile prior to initiating an opening conference (Tr. 9-10, 37). DUC's employees were working on the roof of a private residence adjacent to a public street. The employees were in plain view and the videotaping was done from the street (Exh. C-1; Tr. 71). The Commission has determined that there is no constitutional violation when an inspector makes observations from areas on premises that are out of doors and not closed off to the public. *Gem Industrial, Inc.*, 17 BNA OSHC 1184, 1186 (No. 93-1122, 1995).

With regard to unannounced inspections, § 8(a) of the Act authorizes the compliance officer "to enter without delay and at reasonable times any" construction site. Section 17(f) of the Act provides sanctions to "any person who gives advance notice of any inspection to be conducted under this Act." OSHA is prohibited from giving advance notice of its inspection of the DUC worksite.

Also, DUC's claim that the CO failed to seek a warrant is rejected. The record indicates that DUC permitted the OSHA inspection without objection. There is no showing that DUC at any time refused the inspection. *Kropp Forge Co. v. Secretary of Labor*, 657 F.2d 119, 122 (7th Cir. 1981) (where an employer grants OSHA permission to enter its premises to conduct an inspection and the employer's representative was present throughout the inspection and did not raise any objections, any Fourth Amendment objection requiring a warrant is waived). Anderson did not object to the inspection at the time and he participated in CO Barbour's inspection throughout. Any right DUC had to demand a search warrant was waived.

Alleged Violations

Item 1 - Alleged Serious Violation of § 1926.20(b)(2)

The citation alleges that employees were exposed to hazards because DUC failed to conduct an inspection of the worksite by a competent person to identify existing and predictable hazards. Section 1926.20(b)(2) provides that an accident prevention program:

> shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

DUC does not dispute that inspections by a competent person of the worksite were not conducted. Anderson told the CO that no inspection by a competent person was conducted (Exh. C-2; Tr. 23-24, 31, 68). He did not refute the statement at hearing or offer any evidence of inspections by a competent person. Also, neither Anderson nor any other person was not shown qualified to perform the responsibilities of a competent person. A competent person is defined as:

> one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

Although Anderson testified to 14 years of construction experience, he did not identify the nature and extent of any safety training or safety-related experience. He stated that he had received some training 6 years ago in ladders, tie offs, and installing decking (Exh. C-2). Also, the record fails to show, based on the lack of fall protection for the employees sweeping or working at the belfry, that the site was inspected to identify the predictable fall hazard. The fact that the OSHA inspection occurred near the end of the job and DUC had already removed the fall protection is not an excuse (Tr. 82). DUC was still performing work on the roof and the employees were exposed to a fall hazard. DUC made no showing that an inspection had been conducted.

A violation of § 1926.20(b)(2) is established.

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

The citation alleges that DUC failed to provide fall protection for employees engaged in re-roofing work and exposed to a fall in excess of 25 feet. Section 1926.501(b)(13) provides:

> 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.

There is no dispute that the employee sweeping (David Mossbarger) and the 2 employees (Andrew Storer, Bret Anderson) installing flashing around the belfry were not utilizing any fall protection. Only 1 employee (William Wariekis) was wearing a harness and attached lanyard. According to Anderson, it was Wariekis's personal choice to wear the harness, but it was not required by DUC (Tr. 89-90, 95). Also, Anderson agreed that Mossbarger was "taking a little bit of a risk" sweeping the roof without fall protection (Tr. 84). The employees were exposed to a fall in excess of 25 feet, and the roof's slope was 7 in 12.

DUC did not assert, and the record does not demonstrate, that fall protection was infeasible or created a greater hazard. According to Anderson, this portion of the roof was almost finished and DUC had already removed the fall protection when OSHA arrived. However, the employees still had to do some odd jobs, such as sweeping and installing flashing at the belfry (Tr. 82-83). DUC made no showing that fall protection could not have been used while the employees were performing these finishing jobs. In fact, one employee at the belfry was adequately protected from falls by wearing a safety harness and secured lanyard. Also, CO Barbour testified that conventional fall protection was feasible (Tr. 43-46). Further, there is no showing that DUC was utilizing an alternate fall protection plan which met the requirements of § 1926.502(k).

Anderson argues that the employee sweeping was 8 feet from the eaves and the 3 other employees were behind the brick belfry wall, not exposed to a fall hazard (Exh. R-1; Tr. 83, 90-91). These arguments are rejected.

Without fall protection, the employee sweeping was exposed to a fall hazard. He was sweeping to remove loose granules which could cause an employee to slip (Tr. 83). *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) (access to fall hazard reasonably predictable where employees delivered materials to location within 12 feet of unguarded skylights and where employees might reasonably believe they were permitted in unguarded area) *aff'd. without published opinion*, 79 F.3d 1146 (5th Cir. 1996). Also, the roof in this case, with a 7 in 12 slope, is

considered steep. *See* § 1926.500(b).[7] The employees were not utilizing any fall protection system (Tr. 100).

Anderson's testimony that the 3 employees did not need fall protection because they were behind the brick wall installing copper flashing, with no exposure to a fall hazard, is contrary to the videotape taken during the OSHA inspection (Exh. R-1; Tr. 90-91, 95). The videotape clearly shows the 3 employees on the side of the belfry were exposed to a fall hazard (Exh. C-1). Only 1 employee (Wariekis) was using fall protection (Tr. 100).

Also, it is noted that Midwest Energy's superintendent observed on November 6 (a week before the OSHA inspection) 2 employees on the roof wearing safety harnesses, but the harnesses were not connected to the lifeline. The employees abated the problem, and its appears that Anderson was not on site at the time (Exh. C-4).

A violation of § 1926.501(b)(13) is established.

Item 3 - Alleged Serious Violation of § 1926.503(a)(1)

The citation alleges that employees exposed to a fall in excess of 25 feet were not trained to recognize the hazards of falling and the procedures to minimize the hazards. 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.

An employer's safety training must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *El Paso Crane and Rigging Co.,* 16 BNA OSHC 1419, 1425, nn. 6 & 7 (No. 90-1106, 1993). This requires more than "weak admonitions" or "vague advice" for safety training and hazard recognition to be effective and give employees the opportunity to protect themselves. *Anderson Excavating and Wrecking Co.,* 17 BNA OSHC 1890, 1892 (No. 92-3684, 1997).

[7]Section 1926.500(b) defines a steep roof as having a slope greater than 4 in 12 (vertical to horizontal). DUC agrees that the roof in this case was 7 in 12 (Tr. 85).

Although not in use at the time of OSHA's inspection, Anderson testified, and the record indicates, that DUC had utilized fall protection on this roof, including sliding guards and pump jack scaffolding (Tr. 87, 89). Based on the Midwest Energy superintendent notes from an inspection on November 6, the employees also used safety harnesses and lifelines (Exh. C-4). Anderson testified that he had spent "several thousand dollars in fall protection equipment" and "I have not had any injuries" (Tr. 82).

In terms of training, Anderson stated that he got on the roof with his employees and showed "them how to properly install the safety equipment as far as setting up ladders, tying them off" (Tr. 82). He provided the employees with on-the-job training, including how to use the fall protection.

DUC's fall protection training was deficient. Anderson's training dealt with using fall protection equipment. There is no showing that the training involved the recognition of a fall hazard and the need for fall protection. The employees' statements indicate that they had not received training in fall hazards and fall protection (Exh. C-3). Sweeper David Mossbarger stated that he received "no training on fall protection" and "no safety meetings" (Tr. 27-28). Employee Andrew Storer also stated that he had received no training on fall protection and no safety meetings. Only employee William Wariekis stated that he had received fall protection training, but it was 6 months earlier at another worksite (Exh. C-3). In his statement to OSHA, even Anderson indicated that he had received some safety training (ladder, tie off, installing decks) from another employer approximately 6 years before the OSHA inspection (Exh. C-2). Also, the training standard at § 1926.503 requires that the training be performed by a competent person and that the employer certify that the employees were trained, which was not shown in this case.

A violation of § 1926.503(a)(1) is established.

Serious Classification for Citation No. 1

OSHA classified the violations as serious. A violation is serious under § 17(k) of the Act, if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be

death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

The violations involving the lack of competent person inspections, fall protection, and training were properly classified as serious. Three employees, including owner Anderson, were exposed to fall hazards in excess of 25 feet. A fall from that height clearly would cause a serious injury or possibly death. Fall distances greater than 15 feet have been shown to present a significant fall hazard. *A. J. McNulty & Company*, 2000 CCH OSHD ¶ 32,209, p. 48,822 (No. 99-1341, 2000). Anderson was present on site at the time and his knowledge is imputed to DUC.

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 be considered.

DUC was a small employer with only 3 employees. In his closing statement, Anderson stated that DUC is out of business; he has no money for penalties; and he has suffered several personal problems. The Review Commission has on occasion considered the dollar volume of the business, the total number of employees, and the employer's financial condition. *Specialists of the South, Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990). In this case, DUC offered no evidence to support its claim of poor financial condition. However, the court is not unsympathetic to Anderson's plight. OSHA does not dispute that DUC is out of business. Although the penalty is reduced because of the size of the employer and it is out of business, a penalty has to be assessed because of the serious classification of the violations. An assessment of a monetary penalty for a serious violation is mandatory under § 17(b) of Act. *New Age, Inc.*, 18 BNA OSHC 1742 (No. 98-0415, 1999) (ALJ erred in failing to assess penalty despite affirming serious citation).

In addition to a penalty adjustment for size, DUC is entitled to credit for history and good faith. There is no evidence that DUC had received a citation in the preceding 3 years (Tr. 34). It was in business for 4 months. Despite the lack of inspection by a competent person, fall protection and training, the record shows that DUC did have fall protection on site and the fall protection was being

used, including safety harnesses and lanyards. Anderson testified that he had spent several thousand dollars on safety equipment.

A penalty of $500 is reasonable for violation of § 1926.20(b)(2) (item 1). At the time of OSHA's inspection, 3 employees were on the roof exposed to a fall hazard in excess of 25 feet without fall protection. Although not shown to be a competent person, Anderson has 14 years of construction experience, purchased and used fall protection on the site, and showed employees how to install the fall protection. This was at the end of the job and the fall protection had been removed when DUC employees had to do some odd jobs in finishing.

A penalty of $500 is reasonable for violation of § 1926.501(b)(13) (item 2). On the day of OSHA's inspection, 3 employees were not utilizing fall protection. One employee was sweeping at the roof's peak and remained approximately 8 feet from the roof's edge. The other employees were sitting down on the roof next to a brick wall and 1 employee was adequately tied off. The record does not indicate that exposure was more than 3 hours (Tr. 54). DUC had essentially completed this portion of the roof utilizing fall protection. The lack of fall protection occurred during the finishing phase of the job after the fall protection system had been removed.

A penalty of $500 is reasonable for violation of § 1926.503(a)(1) (item 3). Two employees were not trained in all aspects of fall protection. However, Anderson testified that he had shown the employees how to install the fall protection (Tr. 82).

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 no. 1, item 1, serious violation of § 1926.20(b)(2), is affirmed and a penalty of $500 is assessed.

2. Citation no. 1, item 2, serious violation of § 1926.501(b)(13), is affirmed and a penalty of $500 is assessed.

3. Citation no. 1, item 3, serious violation of § 1926.503(a)(1), is affirmed and a penalty of $500 is assessed.

/s/
KEN S. WELSCH
Judge

Date: May 21, 2003