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. DeMouy General Contracting, Inc., Respondent.	OSHRC Docket No. **14-0465**

Appearances:

Jean C. Abreu, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Clifford C. Brady, Esquire, Brady, Radcliff & Brown, LLP, Mobile, Alabama
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act). DeMouy General Contracting, Inc., (hereinafter Respondent) is a construction company located in Mobile, Alabama. On December 12, 2013, Occupational Safety and Health Administration Compliance Officer (CSHO) Steven Yeend conducted an inspection of Respondent at a jobsite located at 1916 Airport Boulevard in Mobile, Alabama, where Respondent was performing construction work on a commercial building. Based upon CSHO Yeend's inspection, the Secretary of Labor on March 6, 2014, issued a Citation and Notification of Penalty with two items to Respondent alleging serious violations of 29 C. F. R. §§ 1926.451(g)(1) and 1926.452(j)(1), for failing to provide fall protection for employees working on scaffolds and failing to properly brace the scaffold on which employees were working. The Secretary proposed a total penalty of $4,800.00 for the Citation. Respondent timely contested the Citation and proposed penalty. Prior to the hearing on this matter, the Secretary vacated Item

2 of the Citation alleging a violation of § 1926.452(j)(1) with a proposed penalty of $2,000.00. Therefore, the only violation at issue is the alleged violation of § 1926.451(g)(1) and the proposed penalty of $2,800.00.

A hearing was held in this matter on September 25, 2014, in Mobile, Alabama. The proceedings were conducted pursuant to the Commission's Simplified Proceedings. 29 CFR §§ 2200.200-211. At the close of testimony, the parties gave oral closing arguments.

For the reasons that follow, Item 1 of Citation 1 is affirmed, and a penalty in the amount of $2,100.00 is assessed, as set forth herein.

Jurisdiction

At the hearing, the parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act (Tr. 8). Respondent also admits that at all times relevant to this action, it was an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 8).

Background

Respondent is an Alabama corporation engaged in commercial and residential construction activities (Tr. 8). The company is owned and operated by Robert "Bobby" DeMouy who, along with his wife, own 100% of the business (Tr. 8, 31). Mr. DeMouy has been in the construction business for over 30 years (Tr. 31-32). The company operates as both a prime contractor and as a subcontractor with other, larger, construction companies. Due to the area in which Respondent performs work, Mr. DeMouy has considerable experience with working at heights in excess of 10 feet (Tr. 44, 49-50).

On December 12, 2013, while in route to his office after an "OSHA physical," Assistant Area Director (AAD) Jeff Stawowy observed four individuals installing fascia on a commercial building exposed to what he believed to be fall hazards at a construction site on Airport Boulevard in Mobile, Alabama (Tr. 15). He observed two of those individuals working on a pump jack scaffold who did not appear to be protected from falling (Tr. 20-24). With his cell phone, he took one photograph while stopped at a red light and then pulled his vehicle into a nearby parking lot and took another photograph of the employees working on the scaffold (Tr. 15, 25; Exhs. C-1A, 1B and 2). AAD Stawowy then called his office and asked that an inspection be opened and a CSHO be assigned to conduct it (Tr. 15).

CSHO Yeend was assigned to perform the inspection. He arrived at the worksite mid-afternoon, as the workers were wrapping up for the day and preparing to leave (Tr. 66). CSHO Yeend spoke with Mr. DeMouy and showed him the photographs taken by AAD Stawowy (Tr. 67). At that time, Mr. DeMouy identified himself as owner of Respondent and also as one of the individuals in the photograph (Tr. 67-68). Mr. DeMouy identified the second individual in the photograph was Phillip Wells, a long-time employee of Respondent (Tr. 33-34). Mr. DeMouy informed CSHO Yeend that Respondent owned the scaffolds (Tr. 69). Mr. DeMouy also explained Respondent provided its employees working on the scaffold with a personal fall arrest system which included a harness worn by the employees attached to an "OSHA approved" rope (Tr. 35-37, 69).

As can be seen in the photographs taken by AAD Stawowy, which are in the record at Exhibits C-1A, 1B and 2, Mr. Wells was wearing a harness as part of a personal fall arrest system. Mr. DeMouy, on the other hand, had no such equipment (Tr. 34). When CSHO Yeend inquired about this, Mr. DeMouy stated he believed he, as the business owner, was not required to use fall protection (Tr. 59; Exh. C- 7). Mr. DeMouy admitted in his testimony he told CSHO Yeend, "I could jump off the roof, who cares." (Tr. 59).

Mr. DeMouy later informed CSHO Yeend he was the competent person on site with regard to scaffold safety (Tr. 44, 90). Mr. DeMouy conceded he had no formal, classroom training on scaffold safety, but testified he had extensive experience and training from his many years in the construction business and working with other, large, commercial contractors that provided instruction and whose safety meetings he regularly attended (Tr. 32, 56-57). Respondent had no written safety program, but Mr. DeMouy testified Respondent's policy was to have employees use a personal fall arrest system when working on scaffolds (Tr. 53, 93). He also testified he communicated with his employees every day about safety (Tr. 33). In a statement to CSHO Yeend, Mr. Wells stated he had been corrected by Mr. DeMouy for not using fall protection (Tr. 103).

Mr. DeMouy testified he believed Mr. Wells had been tied off the entire day of the inspection, including at the time the photograph contained in Exhibits C-1B and C-2[1] was taken (Tr. 35). He could not state for certain whether Mr. Wells was tied off at the time the photograph in Exhibit C-1A was taken (Tr. 35). AAD Stawowy testified only four to six minutes passed

[1] AAD Stawowy testified Exhibit C-2 is an enlarged version of the photograph in Exhibit C-1B (Tr. 21).

between taking the two photographs (Tr. 23, 28). AAD Stawowy also testified Mr. Wells was not tied off when he observed him on the scaffold (Tr. 27, 29). Several months after the onsite portion of the inspection, CSHO Yeend interviewed Mr. Wells by telephone (Tr. 103). CSHO Yeend testified Mr. Wells informed him he was not tied off during the afternoon on the day of the inspection (Tr. 102, 111).

According to AAD Stawowy and CSHO Yeend, even if Mr. Wells had been tied off, the system in place did not comply with the requirements of a personal fall arrest system (Tr. 27, 77-78). CSHO Yeend testified a personal fall arrest system is an acceptable form of fall protection for the type of scaffold in use (Tr. 73). However, such a system requires the employee be tied off to an appropriate anchorage point, which was not the case here (Tr. 27, 78). The rope in use was neither substantial enough, nor properly attached (Tr. 27, 78-79; Exhs. C-4A, 4B, and 4C). CSHO Yeend conceded the rope used as an anchor point for Mr. Wells' harness was part of a commercially available kit, as Mr. DeMouy had testified (Tr. 76). However, CSHO Yeend explained the rope is designed to serve as a "lifeline" not as an anchorage point (Tr. 80). According to CSHO Yeend, a proper anchorage point should be a stable point, such as on the building itself, and should be located above the employee's head, not, as in this case, at waist level (Tr. 79, 95-96). Finally, CSHO Yeend testified he had always seen guardrails used with the type of scaffold at the worksite and the scaffold came with end rails and a safety net (Tr. 71, 74, 96).

Mr. DeMouy testified Respondent provided its employees with a personal fall arrest system because he felt it was the best method of fall protection (Tr. 48). He disagreed that a guardrail system was a preferable form of fall protection on the type of scaffold in use. He testified a safety net would not protect employees from falls to the exterior of the scaffold (Tr. 115). Finally, Mr. DeMouy testified he was unaware of a requirement that anchor points be located above the employee's head when working on scaffolds (Tr. 43).

During the course of his inspection of the worksite, CSHO Yeend measured the height at the point Mr. DeMouy and Mr. Wells were working using a trench rod (Tr. 84-85). He also compared the measurement to the elevation drawings for the project (see Exhs. C-5A and 5B). He found the scaffold to be approximately 20 feet above the ground (Tr. 85; Exh. C-6A). CSHO Yeend testified falls from such heights could result in severe injuries such as broken bones or head trauma (Tr. 83).

The Citation

The Secretary has the burden of establishing the employer violated the cited standard. 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) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The Secretary alleges Respondent violated the standard at 29 CFR § 1926.451(g)(1). The standard requires "[e]ach employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to the lower level." 29 CFR §1926.451(g)(1). The Citation alleges two conditions violated that standard. In instance A, the Secretary alleges "[o]n or about December 12, 2013, the employer did not *require* the use of the provided fall protection which exposed an employee to falls up to 20-feet to the ground below." (emphasis added). In instance B, the Secretary alleges "[o]n or about December 12, 2013, the employer did not *ensure* the use of the provided fall protection which exposed an employee to falls up to 20-feet to the ground below." (emphasis added). CSHO Yeend testified instance A referred to Mr. DeMouy's failure to use any type of fall protection while working on the scaffold and instance B referred to Mr. Wells' failure to tie off while working on the scaffold (Tr. 97).

Applicability of the Standard

Respondent does not dispute it was required to provide fall protection to its employees working on the pump jack scaffold at the worksite at issue under the cited standard. Thus, I find the standard applies to the cited conditions and Respondent was obligated to provide fall protection to Mr. Wells. However, Respondent disputes it was obligated under the Act to provide fall protection to Mr. DeMouy, arguing Mr. DeMouy, as the company owner, is not an employee of Respondent.

Corporate officers, including presidents, who are exposed to workplace hazards while performing their duties are considered employees under the Act. Although the Review Commission has not directly addressed the issue, over the years, a number of administrative law judges have found that corporate officers are employees of their companies. *Dri-Mix Products Corporation*, 3 BNA OSHC 1191 (No. 9810, 1975); *Magnus Firearms*, 3 BNA OSHC 1214 (No. 9342, 1975); and *Hydraform Products Corporation*, 7 BNA OSHC 1995 (No. 78-5274, 1979).

As these decisions demonstrate, the question of whether an individual is an employee should be resolved in favor of employment in order to accomplish the remedial purposes of the legislation involved.

Here the facts establish Mr. DeMouy performed construction work alongside Respondent's other employees. Thus, he performed functions on behalf of the corporation, in this case installing siding, which constituted services outside of his functions as the sole shareholder of the corporation. I find Mr. DeMouy was an employee of Respondent within the meaning of section 3 (6) of the Act for whom Respondent was required to provide fall protection under the sited standard.

Failure to Comply with the Standard

Having found Mr. DeMouy an employee of Respondent for whom Respondent was required to provide fall protection under the Act and the cited standard, there is no evidentiary dispute Respondent was in violation of the standard as alleged in instance A of the Citation. The scaffold platform was more than 10 feet above the lower level and Mr. DeMouy was not protected in any way from a fall of that distance. In dispute, however, is whether Respondent was in violation of the standard as alleged in instance B for failing to ensure Mr. Wells was protected from the fall hazard.

AAD Stawowy testified he observed both Mr. DeMouy and Mr. Wells on the scaffold without any fall protection as he drove past the worksite. He then stopped and photographed the condition. His photographs are in the record at Exhibits C-1A, 1B, and 2. These photographs are not of sufficient clarity for me to determine whether Mr. Wells' harness was attached to any anchorage point. However, AAD Stawowy's testimony that Mr. Wells was not tied off when he took the photograph in Exhibit C-1A is uncontroverted on the record. Therefore, I find Respondent failed to comply with the standard as alleged in instance B of the Citation as well as instance A.[2]

Employee Exposure to the Hazard

[2] The Secretary presented testimony at the hearing about the adequacy of the personal fall arrest system used by Respondent, much of it hearsay. Because the evidence establishes Mr. DeMouy was unprotected from falls by any system and Mr. Wells was unprotected at the time he was observed by AAD Stawowy, I find it unnecessary to address the issue of whether the personal fall arrest system used by Respondent met the requirements of any other part of the subpart L to find the Respondent in violation of the cited standard.

Respondent does not dispute the only fall protection provided to its employees was the personal fall arrest system. It is also uncontroverted on the record Mr. DeMouy was not using the personal fall arrest system while working on the scaffold and, therefore, was exposed to a serious fall hazard. Equally uncontroverted is the fact Mr. Wells was exposed to a serious hazard during the time he was not tied off while working on the scaffold. CSHO Yeend testified, and there can be no dispute, falls from such a height could result in serious injuries such as broken bones or head trauma. Therefore, I find Respondent's employees were exposed to a serious hazard.

Mr. DeMouy testified he believed, based upon his review of the photographs, Mr. Wells was tied off when the photographs in Exhibits C-1B and C-2 were taken. Other evidence, including the testimony of AAD Stawowy about his observations and CSHO Yeend's testimony about his review of the photographs and his recollection of a conversation several months later with Mr. Wells support a contrary finding. As previously noted, the photographs are not of sufficient clarity to determine definitively whether or not Mr. Wells' harness is attached to the rope. Given it is uncontroverted Mr. Wells is not tied off in Exhibit C-1A, I take Respondent's position to be that the short duration of exposure, i.e., the few minutes between which AAD Stawowy took the two photographs, defeats the Secretary's proof of employee exposure to a hazard. I disagree.

First, I give the greater weight to the testimony of AAD Stawowy about his observations at the time the photographs were taken than to the testimony of Mr. DeMouy of what he believes the photographs show. Thus, the duration of Mr. Wells' exposure was greater than the four to six minutes that passed between AAD Stawowy's taking of the two photographs. Moreover, duration of exposure is a factor taken into consideration when assessing the penalty, not in determining whether employees are exposed to the hazard. *Frank Swidzinski Co*., 9 BNA OSHC 1230 (No. 76-4627, 1981); *see also Brock v. L.R. Wilson & Sons, Inc.,* 773 F.2d 1377, 1386 (D.C. Cir. 1985); and *Walker Towing Corp*., 14 BNA OSHC 2072 (No. 87-1359, 1981). Thus, I find the Secretary has met his burden to establish employee exposure to a serious hazard.

Employer Knowledge

Finally, the Secretary has the burden to establish Respondent was aware of the violative conduct. To establish 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).

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 a supervisory employee knew of or was responsible for the violation. *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984); *see also Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986) (the actual or constructive knowledge of an employer's foreman can be imputed to the employer). Actual knowledge refers to an awareness of the existence of the conditions allegedly in noncompliance. *Omaha Paper Stock Co.*, 19 OSHC 2039 (No. 01-3968, 2002). 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). Along with his wife, Mr. DeMouy is 100% owner of Respondent and directed the work of his employee on the worksite. As such, his knowledge of the conditions at the worksite on the day of the inspection can be imputed to Respondent.

The evidence establishes Mr. DeMouy was aware of his own non-compliance, believing he was not under an obligation to use any type of fall protection himself. Mr. DeMouy's mistaken belief about his obligation, however, does not defeat the undisputed evidence establishing he knowingly exposed himself to a fall hazard. *Peterson Brothers Steel Erection Co.*, 16 BNA OSHC 1196 (No. 90-2304, 1993, *aff'd* 26 F.3d 573 (5th Cir. 1994); *N & N Contractors, Inc*., 18 BNA OSHC 2121 (No. 96-0606, 2000). In addition, Mr. DeMouy had constructive knowledge of Mr. Wells's noncompliance, being only a few feet away from Mr. Wells at the time he was not tied off. *See ComTran Group, Inc., v. U.S. Department of Labor*, 722 F.3d 1304, 1308 (11th Cir., 2013) *citing Hamilton Fixture*, 16 BNA OSHC 1073 (No. 88-1720, 1993).

Even if Mr. DeMouy had not noticed Mr. Wells had failed to attach his harness to the rope, Respondent failed to exercise reasonable diligence to ensure its employee complied with the standard. Respondent had no written safety program; there is no evidence Respondent provided any employees with safety training, other than some unspecified verbal instructions; nor is there any evidence in the record of Respondent's enforcement of its requirement for use of

personal fall arrest system, other than some occasional verbal warnings. Therefore, I find Respondent had constructive knowledge of the violative condition.

Affirmative Defenses

Respondent initially raised the affirmative defense of infeasibility of compliance. In order to establish this defense, an employer must prove that compliance with the standard is functionally impossible or would preclude performance of required work, and that alternative means of employee protection are unavailable or in use. *M. J. Lee Construction Co.*, 7 BNA OSHC 1140 (No. 15094, 1979). First, no such defense can apply to Mr. DeMouy's failure to use any form of fall protection as alleged in Instance A of the citation. With regard to Instance B, although Respondent made the assertion there were times when the employee would have to unhook and move around (Tr. 54), such that he could not be in compliance with the standard, Mr. DeMouy's testimony is vague as to when or why those instances would occur. More significantly, Respondent failed to establish the unavailability of other means of protection during those periods. CSHO Yeend testified the scaffold system in use came with a safety net (Tr. 71) and he had seen similar pump jack scaffolds with guardrail systems (Tr. 74). Mr. DeMouy conceded he had seen pictures of pump jack scaffolds with guardrails (Tr. 114). He testified only that he did not believe either a safety net or guardrails would provide the same protection. This is insufficient to meet Respondent's burden.

Finally, although Respondent did not formally raise the defense of unpreventable employee misconduct at the prehearing conference, Respondent did raise it at the hearing. To establish the defense of unpreventable employee misconduct, an employer must meet a four-part test. The employer must prove (1) it established work rules designed to prevent the violation; (2) is had adequately communicated these rules to its employees; (3) it had taken steps to discover violations; and (4) it had effectively enforced the rules when violations were discovered. *Asplundh Tree Expert Co.,* 6 BNA OSHC 1951 (No. 16162, 1978). I find Respondent failed to meet this burden. Although Respondent did provide its employees with a personal fall arrest system, there is little evidence to establish Respondent had a specific rule designed to prevent the violation that was both communicated and consistently or effectively enforced. The only evidence is Mr. DeMouy's bare statement that he spoke with is employees daily about safety and required them to wear the harness he provided. I find Respondent failed to meet its burden.

Penalty Determination

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005). Section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

Respondent is a very small employer with only a few employees, including Mr. DeMouy. Due to its small size, CSHO Yeend applied a 60% reduction to the proposed penalty. In the past five years, Respondent has received only one serious citation which was reduced, pursuant to an informal settlement agreement, to an other-than-serious citation (Exh. C-9).[3] Therefore, a 10% reduction for history should have been applied (Tr. 94). CSHO Yeend did not apply a reduction in the penalty for good faith because Respondent did not have a comprehensive safety and health program, did not train its employees, and had an ineffective method of monitoring or enforcing compliance with its safety policies (Tr. 93). As to the gravity of the violations, CSHO Yeend testified the violations were rated as high in severity because falling from the scaffold could cause serious injuries or death (Tr. 92). The violations were rated as greater probability because one employee had no protection from falling at any time and another was not using what protection had been provided (Tr. 92). I agree the gravity of the violation is high, taking into consideration the potential for injury and the duration of both the exposure of Mr. DeMouy and Mr. Wells. I also agree no reduction in penalty for good faith is appropriate. Although

[3] The record does contain evidence of a prior serious citation, but that citation was issued more than five years ago (Exh. C-8).

Respondent provided its employees with a personal fall arrest system, there is no evidence of consistent, effective enforcement of its use (Tr. 93). Moreover, although I believe Mr. DeMouy sincerely thought he had no legal obligation to use fall protection himself, his failure to do so voluntarily set a poor example for his subordinates. Considering all of the statutory factors, it is determined that a penalty of $2100.00 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. Item 1, Citation 1, alleging a violation of § 1926.451(g)(1) is affirmed, and a penalty of $2,100.00 is assessed; and

2. Item 2, Citation 1, alleging a violation of § 1926.451(j)(1) is vacated.

/s/

Date: October 20, 2014

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia