United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. LEVVINTRE CONSTRUCTION, LLC, Respondent.	OSHRC Docket No. 13-1268

Appearances:

Evert Van Wijk, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri,
For Complainant

Matt Levvintre, Owner, Levvintre Construction, Londell, Missouri,
For Respondent

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Levvintre Construction, LLC ("Respondent") on March 7, 2013, at Respondent's worksite in Webster Groves, Missouri. As a result, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging two serious violations with a proposed penalty of $3,400.00. Respondent timely contested the Citation.

The trial took place on February 11, 2014, in St. Louis, Missouri. Three witnesses testified at trial: (1) George Daniel, OSHA Compliance Safety and Health Officer ("CSHO"); (2) William McDonald, OSHA Area Director; and (3) Matt Levvintre, owner of Respondent. In lieu of filing post-trial briefs, the parties chose to present their closing arguments on the record. After reviewing the parties' arguments and the record, the Court issues the following Decision and Order.

II. Stipulations[1]

The parties stipulated to the following:

1. At the time of the OSHA inspection of Respondent's workplace, Respondent was engaged in residential roofing activities; and

2. At the time of the issuance of the Citation in this matter, Respondent had no prior history of OSHA citations or OSHA inspection of any other workplace.

III. Jurisdiction

Section 3(5) of the Act defines an employer as "a person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). Section 3(3) of the Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof." 29 U.S.C. § 652(3).

"By enacting the OSH Act, Congress intended to exercise the full extent of the authority granted by the Commerce Clause." *Chao v. OSHRC*, 401 F.3d 355, 361–362 (5th Cir. 2005) (citing *Austin Road Company v. OSHRC*, 683 F.2d 905, 907 (5th Cir. 1982)). "Accordingly, an

1. The parties' stipulations can be found in the parties' *Joint Stipulation Statement*, which was filed with the Court on January 31, 2014.

employer comes under aegis of the [OSH] Act by merely affecting commerce; it is not necessary that the employer be engaged directly in interstate commerce." *Id.* The government does not need to show that individual instances of regulated activity substantially affect commerce to pass constitutional muster; rather, the Supreme Court has noted that if a federal statute regulates an activity that, in the aggregate, has a substantial effect on interstate commerce, then "the *de minimis* character of individual instances arising under that statute is of no consequence." *United States v. Lopez*, 514 U.S. 549, 558 (1995); *see also Slingluff v OSHRC*, 425 F.3d 861, 867 (10th Cir. 2005). Thus, even if the contribution of a single business to commerce is small and its activities and purchases are purely local, the combination of multiple, similarly situated businesses clearly affects interstate commerce. *U.S. v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002) (citing *Wickard v. Filburn*, 317 U.S. 111, 127–128 (1942)); *see also Clarence M. Jones, d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). Complainant bears the burden of establishing this threshold jurisdictional fact. *Chao*, 401 F.3d at 361–362.

It is undisputed that Respondent was engaged in residential roofing activities at the time of the inspection. Roofing qualifies as "construction work" which is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1926.32(g). The construction industry as a whole affects commerce, and even small employers within that industry are engaged in commerce. *Slingluff v. OSHRC*, 425 F.3d at 866–67; *Clarence M. Jones, d/b/a C. Jones Co.*, 11 BNA OSHC at 1531. Furthermore, the record establishes that Respondent has purchased and utilizes: (i) Werner ladders manufactured in Kentucky; and (ii) a Dodge pick-up truck. (Tr. 35, 76). Respondent's purchase and use of these products supports a finding that it is engaged in commerce for the purposes of establishing jurisdiction under the Act. *See Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC at 1531.

Based on the foregoing, the Court finds Complainant has met his burden of establishing Respondent was engaged in commerce within the meaning of Sections 3(5) of the Act. 29 U.S.C. § 652(5).

IV. Factual Background

On the day of the inspection, CSHO Daniel was driving along Blossom Avenue in Webster Grove, Missouri, when he observed an individual working on a residential roof without fall protection. (Tr. 51; Ex. C-1). While he was stopped in front of the worksite, CSHO Daniel also observed two other workers on the roof without fall protection. (Tr. 17). Based on these observations, CSHO Daniel decided to conduct an inspection of the worksite.

Before the inspection began, CSHO Daniel spoke with Matt Levvintre, who consented to the inspection after a brief opening conference. (Tr. 18–19). After speaking with Levvintre, CSHO Daniel observed two additional employees on the roof whom he had not seen before. (Tr. 20). The employees were removing sheeting from the roof to prepare it for new sheeting and shingles.[2] (Tr. 20). None of the five employees was equipped with fall protection. (Tr. 22).

According to CSHO Daniel's measurements, the height of the roof, measured from the concrete to the gutter, where CSHO Daniel observed an employee standing, was 11 feet.[3] (Tr. 21–22; Ex. C-1). The slope of this roof was, as CSHO Daniel referred to it, 8 and 12, which means that for every 12 feet of horizontal, the roof rose 8 feet vertically. (Tr. 31–32). In order to access the roof, Respondent's employees used a Werner ladder that was placed on the side of the house adjacent to the gutter. (Tr. 33–34; Ex. C-1). Based on his knowledge of the standard distance between ladder rungs, CSHO Daniel determined that the ladder only extended 1.5 feet

2. According to Levvintre, the sheeting and shingles that were located on the roof were placed there by the shingle company. (Tr. 73–74).

3. Levvintre testified that he believed the eave of the roof was only 9 feet above the ground. (Tr. 71). As will be discussed later, the slight discrepancy in height is of little consequence, because the standard requires fall protection at heights above 6 feet. 29 C.F.R. § 1926.503(b)(13).

above the roof. (Tr. 34–35). Levvintre admitted that the ladder did not extend 3 feet above the roof line. (Tr. 75).

CSHO Daniel asked Levvintre about the lack of fall protection, and Levvintre responded with a shrug. (Tr. 22–23). CSHO Daniel then asked an employee named Beckett, who came down from the roof, why the employees were not wearing fall protection. (Tr. 23, 26). Beckett looked at Levvintre, but did not answer. (Tr. 24). CSHO Daniel then inquired as to any training that Beckett may have received, and Beckett told him that he had received training from a Mr. Taliafero, who provides consulting and safety training to roofing contractors. (Tr. 24–25). Beckett also told CSHO Daniel that he had a harness in his van. (Tr. 26). Levvintre also told CSHO Daniel he had an additional 5–6 harnesses in his truck. (Tr. 48). According to Levvintre, however, he never required his employees to use the harnesses. (Tr. 70). Instead, he merely provided them and left it up to the individual employees to decide whether they would wear them. (Tr. 70–71). Levvintre also admitted that he did not have an alternative plan for fall protection. (Tr. 28).

Prior to the conclusion of the inspection, CSHO Daniel asked for the name of the company. (Tr. 25). Levvintre responded that the name of the company was Robinson Construction. (Tr. 26). CSHO Daniel later found out that this was untrue—the only Robinson Construction of record was located in Perryville, Missouri, and the owner told CSHO Daniel that they did not have any projects in Webster Groves. (Tr. 37–38). CSHO Daniel then asked Mr. Taliafero, who said that he had no records of a Robinson Construction. (*Id.*). Fortunately for CSHO Daniel, he had taken a photo of the truck, including its license plate, and found out that the truck was registered to Levvintre Construction (Respondent). (Tr. 39). Once Complainant was able to determine the name of the company, he issued two serious citations to Respondent

alleging violations of 29 C.F.R. § 1926.503(b)(13) and 29 C.F.R. § 1926.1053. Based on what follows, the Court finds that Respondent violated the Act as alleged by Complainant.

V. Applicable Law

To establish a violation of an OSHA standard, Complainant must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e. the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *Id.*

VI. Discussion

A. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 C.F.R. 1926.501(b)(13): Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels was not protected by guardrail systems, safety net system, or personal fall arrest system, nor was the employee provided with an alternative fall protection measure under another provision of paragraph 1926.501(b).

> 904 Blossom Lane,[4] Rock Hill: Employees conducted residential roofing activities without fall protection systems where the fall distance was measured at approximately 11 feet from eaves to ground level. The employer did not develop or implement an alternative fall protection measure.

The cited standard 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.
>
> Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

29 C.F.R. § 1926.501(b)(13).

The Court finds the cited standard applies. The scope and application paragraph of Subpart M—Fall Protection states, "This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926." 29 C.F.R. § 1926.500. The cited provision specifically refers to "residential construction activities 6 feet or more above lower levels . . . ." *Id.* § 1926.501(b)(13). Regardless of whether the eave/gutter line of the house was 11 feet above the ground, as measured by CSHO Daniel, or 9 feet above the ground, as argued by Levvintre, Respondent was clearly engaged in residential construction activities more than 6 feet above the ground, which triggers the fall protection requirement.[5]

4. The Court identified a discrepancy in the Citation, wherein the location of the inspection was listed as Blossom Avenue in one section and Blossom Lane in another. (Tr. 65–66). Complainant clarified that the actual address is Blossom Avenue. (Tr. 67–68).

5. With respect to the actual measurement, though it has little bearing on the outcome of this case, the Court credits CSHO Daniel, who used a laser meter to determine the height of the roof. (Tr. 21). Levvintre, on the other hand, estimated the height based on the standard height for garage doors. (Tr. 48–49, 71).

The Court also finds that Respondent failed to comply with the terms of the standard. The standard requires that fall protection, such as guardrails, safety nets, or personal fall arrest systems, is required when employees are engaged in construction activities 6 feet or more above the ground. *Id.* CSHO Daniel observed and Levvintre readily admitted that Respondent's employees did not wear, nor were they required to wear, personal fall arrest systems. Further, there was no evidence of guardrails, safety nets, or other alternative fall protection measures. Respondent argued that, under the exception to the standard, the presence of multiple ropes on the roof would cause a greater hazard. The problem, however, is that Respondent failed to proffer any evidence showing that the use of personal fall arrest systems, or any other fall protection measure, would be infeasible or creates a greater hazard. *See Hurlock Roofing Co.*, 7 BNA OSHC 1108 (No. 76-357, 1979) ("In general, we will not credit an opinion that providing the means of protection required by a standard will be hazardous when no basis for the opinion or explanation of the hazard purportedly involved is offered."); *see also Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178 (No. 90-2775, 2000) (holding that party seeking benefit of exception has burden to show its applicability). Further, merely providing access to fall protection without actually implementing it, as Respondent did here, is insufficient for the purposes of the standard. The standard specifically states that "[e]ach 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 . . . ." 29 C.F.R. § 1926.501(b)(13) (emphasis added). Thus, the Court finds Complainant established that Respondent failed to comply with the standard.

To prove employee exposure, Complainant 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." *Id.* In this instance, CSHO Daniel clearly identified five employees working on the roof without any form of fall protection. (Exs. C-1, C-2, C-3). The lack of fall protection exposed the employees to a fall hazard of at least 11 feet. According to Levvintre, they had been at the worksite for approximately 2 hours that morning, and most of the employees were on the roof during that time. (Tr. 73). The foregoing establishes that Respondent's employees were exposed to a fall hazard.

Respondent also had actual knowledge of the violative condition. Matt Levvintre is the owner of Respondent. (Tr. 5). As noted above, he and his employees were at the worksite for at least two hours prior to the inspection. Not only was Levvintre present to observe his employees working without fall protection, he admitted that he knew they were working without fall protection. (Tr. 73). According to Levvintre, he merely provided the harnesses and allowed his employees to decide whether they would actually wear them. (*Id.*). This is insufficient to comply with the standard and clearly shows that Respondent knew that his employees were exposed to a fall hazard without proper fall protection. Thus, the Court finds that Complainant has proved its *prima facie* case that Respondent violated 29 C.F.R. § 1926.501(b)(13).

The violation was also serious. As discussed above, Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *Sec'y of Labor v. Trinity Industries, Inc.*, 504 F.3d 397 (3d Cir. 2007). According to CSHO Daniel, if one of Respondent's employees were to fall from an 11-foot roof onto the concrete located below the roof, that employee could suffer from broken bones, dislocations, brain trauma, and potentially death. (Tr. 36, 58). To further underscore the hazard, Area Director William McDonald testified that he has

dealt with a case wherein an employee died from a four-foot fall. (Tr. 59). Accordingly, the Court finds that the violation was serious.

B. Citation 1, Item 2.

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> 29 C.F.R. 1926.1053(b)(1): Where portable ladders were used for access to an upper landing surface and the ladder length allowed, the ladder side rails did not extend at least 3 feet (.9 m) above the upper landing surface being accessed:
>
> 904 Blossom Lane, Rock Hill: Employees used a ladder which did not extend 3 feet above the landing surface of the residential roof.

The cited standard 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.

29 C.F.R. § 1926.1053(b)(1).

With respect to Item 2, the Court finds that the standard applies and its terms were violated. Respondent used a portable extension ladder as the sole means of access to the roof of the residence. (Tr. 34; Ex. C-1). Accordingly, Respondent was obliged to ensure that either: (1) the ladder extended 3 feet above the roof, or (2) the ladder was secured to the roof and a grabrail was provided. 29 C.F.R. § 1926.1053(b)(1). Both CSHO Daniel and Levvintre testified that the ladder did not extend 3 feet above the surface of the roof, and there was no evidence to suggest that the ladder was secured or that a grabrail was provided. (Tr. 34–35, 75; Ex. C-1). Thus, the Court finds that the standard applies and that Respondent failed to comply with its terms.

The Court also finds that Respondent's employees were exposed to the hazard. The ladder was the sole means of access to the roof, which means that each of the five employees identified by CSHO Daniel had to use the ladder. (Tr. 34; Ex. C-3). Thus, each time the employees got onto or off of the roof, they were exposed to a potential fall hazard.

Further, the Court finds that Respondent had actual knowledge of the violative condition. As noted above, Levvintre was present during the entire morning of the inspection and observed his employees using the ladder to access the roof. Levvintre admitted that, based on the pictures taken by CSHO Daniel, the ladder did not extend the full 3 feet above the surface of the roof. Accordingly, the Court finds that Complainant has proved its *prima facie* case that Respondent violated 29 C.F.R. § 1926.1053(b)(1).

For the same reasons discussed above, the Court also finds that the violation was serious. Respondent's employees were working on an elevated surface 11 feet or more above the ground. If one of the employees were to fall from the ladder, that employee could suffer from broken bones, dislocation, brain trauma, or death.

C. Affirmative Defenses

Other than an off-hand remark about the danger posed by ropes crisscrossing the roof, Respondent did not proffer any affirmative defenses. Even if Respondent had alleged unpreventable employee misconduct, it failed to provide any evidence in support of that theory. Levvintre testified that he did not require the use of fall protection. Thus, if wearing fall protection was not a requirement, then failing to wear said protection would not constitute misconduct. To the extent that such an allegation can be discerned from Respondent's arguments, the Court rejects it. Accordingly, the Court finds that Complainant has proved violations of both 29 C.F.R. § 1926.501(b)(13) and 1926.1053(b)(1).

VII. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (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 Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g., Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1995).

Complainant determined that, in terms of gravity, there was a low probability that an accident would occur, but, as noted above, if an accident did occur, it would be severe. (Tr. 44, 56). In light of the evidence, the Court agrees with this assessment. In addition, the Court also agrees that Respondent is entitled to a significant reduction in light of the fact that it is a fairly small employer, totaling less than 25 employees. (Tr. 55). Complainant also credited Respondent for good faith in light of the fact that, though they were not worn, it supplied harnesses to its employees and, according to Beckett, it appeared that they had been trained. (Tr. 24–25, 55). Finally, the Court agrees with AD McDonald that Respondent should be entitled to an additional reduction due to a lack of citation history. (Tr. 57). Based on the foregoing, the Court finds that a penalty of $1,530.00 for each violation is appropriate.

ORDER

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. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED and a penalty of $1,530.00 is ASSESSED.
2. Citation 1, Item 2 is AFFIRMED and a penalty of $1,530.00 is ASSESSED.

SO ORDERED

/s/

Date: May 2, 2014
Denver, Colorado

Peggy S. Ball
Judge, OSHRC