United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. DAVID DZENUTIS d/b/a ROYAL CONSTRUCTION COMPANY, Respondent.	OSHRC DOCKET No. 14-1384

Appearances:
Mark A. Pedulla, Esq., Office of Regional Solicitor, U.S. Department of Labor, Boston, Massachusetts.
For the Complainant.

David Dzenutis, *pro se,* Royal Construction Company, Canton, Connecticut
For the Respondent.

Before: Administrative Law Judge Keith E. Bell

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act or the Act). Following an inspection of a worksite located in Farmington, Connecticut, the Occupational Safety and Health Administration (OSHA) issued two citations to David Dzenutis DBA Royal Construction Company (Respondent or Royal Construction), alleging seven violations of the OSH Act, and proposing a total of $20,240 in penalties.

Specifically, Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.59, for failing to have to have a written hazard communication program and proposes a $2,200 penalty. Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.150(c)(1)(vi), for failing to have a fire extinguisher and proposes a $2,200 penalty. Citation 1, Item 3 alleges a serious

violation of 29 C.F.R. § 1926.502(b)(1), for failing to use fall protection and proposes a $2,200 penalty. Citation 1, Item 4 alleges a serious violation of 29 C.F.R. § 1926.1051(a), for failing to provide a ladder at a point of access and proposes a $3,080 penalty. Citation 1, Item 5 alleges a serious violation of 29 C.F.R. § 1926.1053(b)(1), for failing to properly extend a ladder and proposes a penalty of $3,080. Citation 1, Item 6 alleges a serious violation of 29 C.F.R. § 1926.1053(b)(22), for improperly carrying a load on a ladder and proposes a penalty of $3,080. Finally, Citation 2, Item 1 alleges a repeat violation of 29 C.F.R. § 1053(b)(21), for failing to grasp a ladder with at least one hand and proposes a penalty of $4,400.

Respondent filed a timely notice of contest, bringing this matter before the Commission. A hearing was held on August 12, 2015, with the Respondent appearing *pro se.* Afterwards, both parties filed post-hearing briefs. For the reasons set forth below, I affirm all of the Items in Citation 1 and Citation 2.

JURISDICTION

Based upon the record, I find that at all relevant times Royal Construction was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. (Compl. at ¶¶ II, III; Answer), I conclude that the Commission has jurisdiction over the parties and subject matter in this case.

BACKGROUND

Compliance Office Gagnon (CO) observed several individuals working on the roof of a building (the Farmington Inn) without any apparent fall protection. (Tr. 39-40). He commenced his investigation by approaching a worker that was coming down a ladder from the roof to the upper level of a parking structure and asked the worker to speak to the boss or foreman of the site. (Tr. 41). The worker yelled up to the roof and Mr. Dzenutis came down the ladder to meet the CO. *Id.* The CO asked if he was "the boss of the site" and Mr. Dzenutis said that he was. (Tr. 42). Next, the CO asked if the workers were his employees. *Id.* Mr. Dzenutis asserted that two of the workers were subcontractors but indicated that the others were his employees. (Tr. 42, 44).

The CO continued his investigation by interviewing the workers identified by Mr. Dzenutis as his employees. (Tr. 42-44, 46). Each stated that they were hourly employees paid by Royal Construction. (Tr. 44-45). They indicated that Mr. Dzenutis gave them orders regarding

the work to be done and provided all the materials and equipment needed for the job. (Tr. 44-45, 47, 50. 120-21, 153, 155-56).

The CO then interviewed the two workers who Mr. Dzenutis identified as subcontractors-Jerimiah Dillion and Alexandro Diaz.[1] (Tr. 47; Ex. C-38). Mr. Dillion stated that he was not a licensed contractor and that he did not carry workers' compensation insurance. (Tr. 48-50). He told the CO that he was paid by the hour and followed Mr. Dzenutis' orders. *Id.* Like the other workers, Mr. Dillion indicated that Royal Construction provided all of the tools, equipment, and materials. (Tr. 48-50). Alexandro Diaz responded similarly, indicating that he did not have a contractor's license and was being paid by the hour.[2] (Tr. 48-50).

After the worker interviews, the CO and Mr. Dzenutis proceeded up to the roof of the building to continue the inspection. The CO and Mr. Dzenutis discussed various issues, including fall protection, the chemicals being used at the worksite, whether there was a hazard communication program, how to properly extend a ladder, and whether there was a fire extinguisher. (Tr. 53-56). The two also discussed abatement. (Tr. 55-56). Mr. Dzenutis directed the workers to immediately abate two of the hazards—the lack of fall protection and the insufficient extension of the ladder. (Tr. 54-56, 156, 186).

DISCUSSION

Coverage

At the onset, it must be determined whether Royal Construction had any employees at the worksite on April 18, 2014, the date of the inspection. Only employers may be cited for a violation of the OSH Act, but a single employee satisfies this requirement. *See* 29 C.F.R. §§ 1975.3(d)(5); 1975.4(a); *Elmer Vath, Painting Contractor*, 2 BNA OSHC 1091, 1093 (No. 773, 1974) (noting that employer has only one regular employee does not exempt employer from coverage of the OSH Act); *Poughkeepsie Yacht Club, Inc.*, 7 BNA OSHC 1725, 1727 (No. 76-

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[1] At the hearing, the CO referred to these two individuals as Alexandro and Dillion. (Tr. 47). In his discovery responses, Mr. Dzenutis appears to refer to them as Jerimiah Dillion and Alex Diaz. (Ex. C-38).

[2] The CO also attempted to interview an additional person he saw at the site. (Tr. 202). However, that person left the site before the CO could obtain sufficient information to determine his role. (Tr. 202-3). I find that the Secretary did not establish that this individual was an employee, and as a consequence I have not considered him to be one for coverage or penalty purposes.

4026, 1979) (finding single employee sufficient to invoke coverage under the Act). To assess whether an employer/employee relationship exists, the Commission looks to the hiring party's right to control the manner and means by which the work is accomplished. *See e.g., Allstate Painting & Contracting Co., Inc*., 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated) (discussing *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992) (*Darden*)); *Barbosa Group*, *Inc.*, 21 BNA OSHC 1865, 1867 (No. 02-0865, 2007) (noting Commission uses common law agency test expressed in *Darden*), *aff'd,* 296 Fed. Appx. 211 (2d Cir. 2008) (unpublished); Restatement (Second) of Agency § 220(1) (defining servant as "employed to perform services…subject to the other's control"). The factors relevant to this inquiry include:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-24, *quoting Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

The Secretary argues that not only did Mr. Dzenutis concede that he had employees on the day of the inspection, other evidence mandates finding that there was an employer/employee relationship between Royal Construction and the workers the CO interviewed at the site. (Sec'y Br. at 16-19). Royal Construction responds that all of the workers at the site were subcontractors who were under their own supervision, supplied their own tools, and made their own hours. (Resp't Br. at 1-2). He does not dispute the Secretary's other contentions. *Id.*

After review, I find that the Secretary established that Royal Construction had employees at the worksite. Mr. Dzenutis does not deny that he himself was working on the project and this alone subjects Royal Construction to the Act. *See Poughkeepsie Yacht,* 7 BNA OSHC at 1727. (Tr. 101, 103, 149; Jt. Ex. 15). Further, I also find that all of the individuals the CO interviewed at the worksite were employees of Royal Construction. During the inspection, Mr. Dzenutis did not claim that any of the workers on the roof were unaffiliated with Royal Construction and all

of the workers identified Royal Construction as their employer.[3] (Tr. 42, 44-45, 170). Mr. Dzenutis had the right to control their work and actually demonstrated this ability before the CO. (Tr. 42-5, 108, 121, 153, 155-56, 186). For example, Mr. Dzenutis called to workers to come down to speak with the CO and they did. (Tr. 43-44). In addition, after the CO explained that a ladder was not extended appropriately, Mr. Dzenutis directed a worker to extend the ladder and the worker complied. (Tr. 55, 108, 186). Workers also followed Mr. Dzenutis' request to get safety equipment from the worksite trailer. (Tr. 56, 156, 164). Respondent points to no evidence indicating that it lacked the authority to control the work being done at the site.[4] (Tr. 43, 50). Accordingly, I find that Respondent had the authority to control the workers and safety at the worksite and that Mr. Dzenutis actually exercised that control. *See* Restatement (Second) of Agency § 220, comment 1(d) (right to control as element articulated in definition of servant).

In addition to the most important control factor weighing in favor of finding an employer relationship, other *Darden* factors also support that conclusion. *See Allstate,* 21 BNA OSHC at 1035. Royal Construction provided the materials, tools, trailer, and equipment needed for the project. (Tr. 45, 47, 50, 136; Jt. Exs. 33-34 (inspection sticker indicating Royal Construction as the trailer's owner)). It determined when the individuals would work and for how long. (Tr. 45, 48-49). Mr. Dzenutis had worked with some of the individuals on other projects. (Tr. 18, 25; Ex. C-45). And the work being done was part of the regular business of Royal Construction.[5] (Tr. 39; Ex. C-40). Finally, Royal Construction paid hourly wages to the individuals the CO

[3] I note that in his Response to Complainant's First Set of Interrogatories, Mr. Dzenutis lists six individuals as working on his behalf on the date of the inspection. (Exs. C-37, C-38).

[4] I note that in his discovery responses, Mr. Dzenutis appears to deny various aspects of the employment relationship. (Exs. C-38, C-42, C-43). I find the CO's testimony about how the workers themselves described the relationship is more convincing and entitled to more weight than Mr. Dzenutis' unsworn discovery responses. (Tr. 44-45, 47, 50, 120-21, 153, 155-56). *See* 29 C.F.R. §§ 2200.55 (requiring interrogatories to be answered under oath or affirmation), 2200.59 (requiring witness testimony to be given under oath or affirmation), Fed. R. Evid. 603, 802.

[5] In his Complaint, the Secretary alleged that Respondent was a business engaged in commercial construction. (Compl. ¶ II). As this was not challenged by Respondent in his Answer, it is deemed admitted. Commission Rule 34(b)(2), 29 C.F.R. § 2200.34(b)(2) (any "allegation not denied" in the Answer is deemed admitted).

observed working at the site.[6] (Tr. 44-45, 48-49). *See All Star Realty Co., D/B/A All Star Realty & Constr. Co.,* 24 BNA OSHC 1356, 1359 (No. 12-1597, 2014) (finding payment by time suggests a master-servant relationship). Although Respondent raises some contrary assertions in its Post-Hearing Brief, namely, that one worker had no affiliation with the company and it denies paying hourly wages, it points to no evidence supporting its unsworn contentions.[7] (Tr. 42, 44).

The Secretary has shown that Mr. Dzenutis had the authority to control the workers and safety issues and offered other evidence that an employer/employee relationship existed. Mr. Dzenutis admitted on the day of the inspection that he had employees working on the roof of the Farmington Inn, and has offered no evidence to the contrary. (Tr. 42, 170). Therefore, I find that the Secretary has met his burden of establishing an employment relationship between Royal Construction and the workers interviewed by the CO. Accordingly, I find that Respondent is covered by the Act.

Merits of the Citation Items

Turning to the citation themselves, to establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681

[6] Even the two workers Mr. Dzenutis identified as independent contractors (Dillion and Alexandro) were paid hourly. (Tr. 44-45, 48-49). They did not carry workers' compensation insurance and were not licensed. (Tr. 44-45, 48-49). As a result, I find no support in the record for the contention that they were independent subcontractors.

[7] As noted above, in his Response to Complainant's First Set of Interrogatories, Mr. Dzenutis identified six individuals as working on his behalf at the site. (Exs. C-37 at 5, C-38 at 1-2). Respondent claims that all of these workers signed agreements indicating that they were subcontractors. (Resp't Br. at 2). No subcontractor agreements were offered into evidence and Respondent has not sought to re-open the record for their submission. *See e.g., Baker Tank Co.*, 17 BNA OSHC 1177, 1181 (No. 90-1786-S, 1995). I note that even if the agreements had been offered into evidence, such documentation does not automatically establish that there is no employment relationship. *See Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1289-90 (No. 00-1402, 2010) (finding existence of a subcontractor disclaimer form and fact that company was paid as a subcontractor did not mean there was not an employer/employee relationship for purposes of the OSH Act).

F.2d 69 (1st Cir. 1982). The Secretary has the burden of proving his case by a preponderance of the evidence. *Id*.

All of the alleged violations arise under the construction standards. An employer must comply with the construction standards if its employees are "engaged in construction work," an activity defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b). Respondent does not dispute that it was engaged in construction and I find that the roofing repair work Royal Construction was performing fits within the standard's definition of construction.[8]

1. Citation 1, Item 1 – Hazard Communication - 29 C.F.R. § 1926.59

Section 1926.59 requires compliance with the general industry standard found in 29 C.F.R. § 1910.1200(e)(1), which compels employers to "develop, implement and maintain at each workplace, a written hazard communication program." The program must include "a list of hazardous chemicals known to be present" as well as the "methods the employer will use to inform employees of the hazards of non-routine tasks … ." 29 C.F.R. § 1910.1200(e)(1)(i)-(ii). The standard defines a "hazardous chemical" as "any chemical which is classified as a physical hazard or a health hazard, simple asphyixiant, combustible dust, pyrophoric gas, or hazard not otherwise classified." 29 C.F.R. § 1910.1200(c). The standard's purpose is to ensure that employers transmit information concerning the hazards is to employees. 29 C.F.R. § 1910.1200(a).

I find that the standard applies. The CO observed bonding adhesive, cleaner, and other hazardous materials at the worksite and determined that employees had applied the bonding adhesive the same day as the inspection. (Tr. 57, 59-62, 64, 72, 159; Jt. Exs. 19-21, 44). I also find that Respondent violated the standard. Mr. Dzenutis admitted that he did not have a hazard communication program and the CO did not see such a program during his inspection. (Tr. 54-55, 62). I note that in his unsworn Second Supplemental Response to Discovery, Mr. Dzenutis indicated that subcontractors "had a file/folder with safety information in their trailer" and that

[8] In its Answer, Respondent failed to challenge the Secretary's allegation that it was a business engaged in commercial construction. (Compl. ¶ II). As such, this fact is deemed admitted. Commission Rule 34(b)(2), 29 C.F.R. § 2200.34(b)(2).

they had access to "most MSDS of the materials they use on their phones."[9] (Ex. C-45 at 1-2; Tr. 209). Attached to this Second Supplemental Response to Discovery were MSDS forms for various hazardous substances. (Ex. C-45 at 2). However, Mr. Dzenutis does not claim that all of these forms were available in the trailer or on the workers phones (or even that the workers all had phones). Nor does he indicate whether any hazardous materials besides the ones for which he provided MSDS were used at the worksite. (Ex. C-45 at 1-2). Moreover, although Mr. Dzenutis alleges that "the elements and component part of the hazard communication program would be a subject that has been previously discussed with subcontractors," he provides no evidence as to what the discussions covered, whom was included in the discussions, when they occurred, or what written documentation he provided to employees. *Id.* Specifically, he does not claim that the safety information he allegedly provided included, as required by the standard, "a list of the hazardous chemicals known to be present" or that the program specified "methods the employer will use to inform employees of the hazards of non-routine tasks." 29 C.F.R. § 1910.1200(e)(1)(i)-(ii). At the hearing, Respondent did not present any evidence of a hazard communication program or otherwise dispute the CO's testimony. Consequently, I find that there is no credible evidence of a hazard communication program that complies with the cited standard. *See Austin Indus. Specialty Servs., L.P.,* 765 F.3d 434, 444-45 (5th Cir. 2014) (considering mere availability of MSDS forms insufficient).

As for exposure to the violative condition, all of the employees present at the worksite, including Mr. Dzenutis, were exposed to the lack of a hazard communication program because they were all working in close proximity to the materials. (Tr. 59-60; Jt. Ex. 15). Finally, in terms of knowledge, as noted above, Mr. Dzenutis admitted to the CO that he did not have a program and did not provide the CO with any relevant documentation. (Tr. 54-55, 62). He was at the worksite and in close proximity to the hazardous materials, including those plainly labeled as dangerous or flammable. (Tr. 62, 121, 204; Jt. Exs. 15, 19-21, 44). Thus, I find that the Secretary has met his burden of establishing a violation of 29 C.F.R. § 1926.59.

[9] In his response to the Secretary's Request for Admission, Mr. Dzenutis indicated that he did not see anyone using any hazardous or flammable products. (Exs. C-39, C-40). However, in his Supplemental Response to Request for Production and Responses, he appeared to acknowledge that hazardous materials were being used but alleges that workers had "proper protection." (Ex. C-43).

2. Serious Citation 1, Item 2 – Fire Extinguisher- 29 C.F.R. § 1926.150(c)(1)(vi)

Employers must provide a fire extinguisher "within 50 feet of wherever more than 5 gallons of flammable or combustible liquids or 5 pounds of flammable gas are being used on the jobsite." 29 C.F.R. § 1926.150(c)(1)(vi). The CO observed flammable materials on the roof that employees were using on the day of the investigation. (Tr. 59-60, 62, 72; Jt. Exs. 19-21, 44). Some of the observed materials include labels stating that the products are "flammable" or "extremely flammable" (Jt. Exs. 19-21, 44). The photographic evidence shows bucket type containers that the CO identified as being five gallon cans. (Tr. 62; Jt. Exs. 19-21, 44). Respondent does not dispute either the presence or the quantity of the flammable materials at the worksite. (Resp't Br. 1-2).

During the inspection, Mr. Dzenutis acknowledged that he did not have a fire extinguisher and the CO did not see one. (Tr. 55, 72-73). Through his cross-examination at the hearing, Respondent suggested that there might have been a fire extinguisher located inside the Farmington Inn. (Tr. 55, 174). The CO denied seeing one and re-iterated that he looked around the worksite for a fire extinguisher without success. (Tr. 73, 174; Jt. Ex. 22). Respondent offered no testimony or other evidence of a fire extinguisher being present anywhere at the site, including within fifty feet of the flammable materials, as the standard requires. *See* 29 C.F.R. § 1926.150(c)(1)(vi).

I find that the Secretary established applicability by showing the presence of flammable materials in excess of five gallons. Mr. Dzenutis' admission that he did not have a fire extinguisher and the CO's inability to find one shows that Respondent violated the standard. (Tr. 55, 72-73). Mr. Dzenutis' admission also shows that he knew there was no fire extinguisher on the roof. (Tr. 55, 120-21). The flammable materials also were boldly labeled as hazardous and located in an open area of the worksite. (Jt. Exs. 19-21, 44). Considering these facts, I find that the Secretary met his burden of showing Respondent's knowledge of the violative condition. Finally, in terms of exposure, I find that the Secretary established that Royal Construction employees, including Mr. Dzenutis, were working on the roof near flammable materials and were exposed to the hazard associated with not having a fire extinguisher within fifty feet. (Jt. Exs. 15, 19-22, 23, 25, 44). As a result, the Secretary has met his burden and established a violation of 29 C.F.R. § 1926.150(c)(1)(vi).

3. Serious Citation 1, Item 3 – Fall Protection - 29 C.F.R. § 1926.502(b)(1)

Under the construction standards, "[e]ach employee on a walking/working surface … with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." 29 C.F.R. § 1926.501(b)(1). As used in this standard, a "walking/working surface" is any surface "on which an employee walks or works, including, but not limited to, … roofs." 29 C.F.R § 1926.500(b). Also, the standard defines "unprotected side or edge" as "any side or edge …of a ... roof … where there is no wall or guardrail system at least 39 inches (1.0 m) high." *Id*.

I find that the standard applies. The roof of the Farmington Inn was at least 10 feet high. (Tr. 86-87). Although a parapet wall ran along the sides of the roof, this wall was only 27 inches tall. (Tr. 80, 81-84, 203; Jt. Exs. 3-4). As the roof height exceeded six feet and the wall along the edges was a full foot shorter than then 39 inches the cited standard requires, it constitutes a working surface with an unprotected edge and the employees needed fall protection. 29 C.F.R. §§ 1926.501(b)(1); 1926.502(b)(1).

I also find that Respondent violated the standard. The CO did not observe guardrails, safety nets, or employees wearing personal fall arrest systems. (Tr. 39-40, 123, Jt. Exs. 7, 35). When asked what employees were using for fall protection, Mr. Dzenutis expressed his belief that the parapet wall provided protection. (Tr. 53; Ex. C-43). However, as explained above, the wall was not high enough to serve as sufficient protection under the standard. 29 C.F.R. §§ 1926.501(b)(1); 1926.502(b)(1).

Finally, I find that there was exposure and knowledge of the violative condition. The CO observed employees working on the roof near the parapet wall without sufficient fall protection. (Tr. 39-40, 123, 203; Jt. Exs. 7, 23, 25, 27, 35). Mr. Dzenutis himself was on the roof and acknowledged that only the low parapet wall was serving as protection. (Tr. 53; Ex. C-40; Jt. Ex. 15). Therefore, the Secretary met his burden of proving a violation.

4. Serious Citation 1, Item 4 – Ladders - 29 C.F.R. § 1926.1051(a)

As discussed above, the parapet wall at the edge of the roof was 27 inches high. Employees accessed the roof via a ladder that extended to the top of parapet wall, and then jumped down to roof deck itself. (Tr. 44, 90, 94-95, 97-98; Jt. Exs. 5, 13).

Section 1926.1051(a) requires that: "[a] stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personal hoist is provided." There was a 27-inch break in elevation between the top of the parapet wall and the roof deck. (Tr. 90, 92; Jt. Exs. 3-4). Considering these undisputed facts, I find that the standard applies and that the Respondent had to provide an additional stairway or ladder, so that there would not be break in elevation of more than 19 inches between the ladder and the roof deck. 29 C.F.R. § 1926.1051(a).

By failing to provide steps or a stepladder inside the roof area to lessen the break in elevation between the parapet wall and roof deck, Respondent violated the standard. (Tr. 90, 92, 97-98; Jt. Ex. 22). I also find that there was actual exposure to and knowledge of the violative condition. The CO observed employees stepping down from the parapet wall onto the roof as well as stepping up from the roof to the top of the parapet wall before descending the ladder, thereby being exposed to the hazard. (Tr. 44, 90, 94-95, 100; Jt. Exs. 5, 13, 22). In terms of knowledge, Mr. Dzenutis was present at the roof when the CO observed the employees accessing the roof deck from the ladder and he himself used the ladder.[10] (Tr. 43-44, 100-101, 120-21; Ex. C-45 at 3; Jt. Ex. 15). This is sufficient to show his knowledge of the cited condition. Accordingly, the Secretary met his burden of establishing a violation of 29 C.F.R. § 1926.1051(a).

5. Serious Citation 1, Item 5 – Ladder Extension - 29 C.F.R. § 1926.1053(b)(1)

When portable ladders[11] are used to access an upper landing surface, the ladder's side rails must extend at least three feet above the surface to which the ladder is used to gain access. 29 C.F.R. § 1926.1053(b)(1). There is no dispute that Respondent was using at least one portable ladder at the jobsite, and therefore the standard applies. (Tr. 41, 44, 55, 99-100, 108-9,

[10] In his brief, Respondent denies that the people the CO observed using the ladder were his employees, but does not dispute that there was only a single ladder for workers to use to access the roof deck. (Resp't Br. at 1-2). As indicated above, Respondent's claim that these workers were all subcontractors rather than employees has not been proven and is therefore rejected. Further, Mr. Dzenutis does not deny that he himself used the ladder. (Ex. C-45 at 2).

[11] The standard defines a portable ladder as "a ladder that can be readily moved or carried." 29 C.F.R. § 1926.1050(b).

116, 161-62, 165, 200; Jt. Exs. 5, 8, 9, 11, 13, 15, 17; Ex. C-45). Respondent violated this standard by not extending the ladder at least three feet above the upper landing surface. (Tr. 84, 101-3; 106-7; Jt. Exs. 4, 11, 13, 15, 17). In terms of exposure, the CO saw employees, including Mr. Dzenutis, using the insufficiently extended ladder. (Tr. 39, 41, 44, 99-100, 108-9, 112-13, 124; Jt. Exs. 5, 8-9, 15, 17, 23; Ex. C-45 at 2). Although employees could access the roof by going through the building, the ladder was the main access point to the roof deck for the workers carrying tools, materials, and debris. (Tr. 44, 51, 170). Finally, there is no dispute that Mr. Dzenutis had knowledge of the violative condition. The ladder was in plain sight and Mr. Dzenutis himself used it during the inspection. (Tr. 41, 43-44, 55, 101-3; Jt. Exs. 5, 9, 15, 17; Ex. C-45 at 2). Accordingly, the Secretary proved a violation of 29 C.F.R. § 1926.1053(b)(1).

6. Serious Citation 1, Item 6- Carrying a load on a ladder - 29 C.F.R. § 1926.1053(b)(22)

The cited standard prohibits employees from carrying "any object or load that could cause the employee to lose balance and fall." 29 C.F.R. § 1926.1053(b)(22). The CO observed an employee carrying a garbage can while going down a ladder. (Tr. 100, 109-10,112, 116; Jt. Exs. 5, 8-9, 15, 17).

I find that the standard applies and that Respondent violated it. According to the CO, carrying the garbage can in the manner he witnessed could have caused the employee to fall because he had to let go of the ladder completely to move his hand from one rung to another. (Tr. 112, 119; Jt. Exs. 5, 15, 17). The CO's testimony regarding the employee descending the ladder in a manner that violates the cited standard satisfies the Secretary's burden of showing exposure. (Tr. 101-3, 109-10, 112, 116; Jt. Exs. 5, 8-9, 15, 17). In terms of knowledge, I find that Secretary established actual knowledge of the hazard because Mr. Dzenutis was present on the worksite and saw the employee carrying the garbage can on the ladder. (Tr. 101-3, 112-113, 120-1; Jt. Exs. 8, 15). In fact, the CO observed Mr. Dzenutis attempt to steady the load as the worker descended the ladder. (Tr. 101-3; Jt. Ex. 15).

In his brief, Respondent does not dispute that the standard applies, was violated, or that he had knowledge of it. Instead, he appears to argue that the individual the CO observed was not performing roofing work and was unaffiliated with Royal Construction. (Resp't Br. at 1; Tr. 183). There is no testimony or other evidence to support this claim. The CO testified that he saw the same person carrying a garbage can while descending the ladder also performing roofing

work during his inspection. (Tr. 112-113; 124-134; Jt. Exs. 5, 8, 9, 17, 23, 25, 27). Hence, I find that there is insufficient evidence to support Respondent's claim and that the Secretary has carried his burden of proving a violation of 29 C.F.R. § 1926.1053(b)(22).

7. Repeat Citation 2, Item 1 – Grasping the ladder- 29 C.F.R. § 1926.1053(b)(21)

The cited standard requires employee to "use at least one hand to grasp the ladder when progressing up and/or down the ladder." 29 C.F.R. § 1926.1053(b)(21). As discussed above, Respondent's employees were using a ladder at the worksite, and I find that the cited standard applies to that ladder. (Tr. 112, 116; Jt. Exs. 5, 8, 9, 15, 17). I also find that the Secretary established a violation through the CO's testimony that he saw an employee failing to grasp the ladder with at least one hand when traveling down it. (Tr. 112, 118-19; Jt. Exs. 8, 15, 17).

I note that Respondent does not dispute that the standard was violated or that he had knowledge of it. (Resp't Br. at 1-2). Instead, as with Citation 1, Item 6, his only contention is that the person observed by the CO to be descending the ladder with only one free hand is not a Royal Construction employee. (Resp't Br. at 1). In contrast to Respondent's unsubstantiated claim, the Secretary presented evidence that the person photographed carrying a garbage can down the ladder was also seen performing roofing work. (Tr. 112-113, 116, 119; 124-134; Jt. Exs. 5, 8, 9, 15, 17, 23, 25, 27). I find that this is sufficient evidence of employee exposure. I also find that Secretary established actual knowledge of the hazard because Mr. Dzenutis was present at the worksite and saw the employee carrying the garbage can on the ladder. (Tr. 101-3, 120-1; Jt. Exs. 8, 15). Thus, the Secretary has carried his burden of proving a violation of 29 C.F.R. § 1926.1053(b)(21).

Characterization and Penalty Determination

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14.

With respect to all of the violations, I find that the Secretary established that Royal Construction had six employees. (Tr. 42, 165-6; Ex. C-38 at 1). I find that the Respondent exhibited some evidence of good faith by abating two of the hazards during the inspection and have taken that into account in determining the appropriate amount of the penalty for each affirmed Item.

With respect to Serious Citation 1, Item 1, I affirm the characterization as serious because Respondent's employees worked with chemicals that, according to the CO's testimony, presented serious health hazards, without a hazard communication program. (Tr. 68-71). Respondent and his employees were present in close proximity to the hazardous materials and Respondent admitted that he did not have a hazard communication program. (Tr. 54-55, 68-70, 159). Taking into account the seriousness of the hazard, the probability of harm, Royal Construction's violation history, the number of employees exposed, the company's size, and the evidence of good faith, I assess a penalty of $2,200.

For Serious Citation 1, Item 2, I find that this violation was properly characterized as serious because of the amount of flammable liquid on the roof and the CO's testimony about how serious fires are when they occur at heights. (Tr. 78). As the CO stated, while all fires represent serious hazards, had a fire occurred on the roof, there would have been limited means of egress and it could also create a panic, which could create more hazards. *Id.* I have considered the penalty factors and find that a penalty of $2,200 adequately takes into account the seriousness of the hazard, the probability of harm, Royal Construction's violation history, the number of employees exposed, the company's size, and the evidence of good faith.

Turning to Serious Citation 1, Item 3, I find that the violation was properly characterized as serious based on the CO's testimony concerning the seriousness of all fall hazards and the effect of the height of the roof, the lack of any fall protection, and the nature of the work being done. (Tr. 86-89, 109). I have considered the penalty factors and find that a penalty of $2,200 adequately takes into account the seriousness of the hazard, the probability of harm, Royal

Construction's violation history, the number of employees exposed, the company's size and the evidence of good faith.[12]

As for Serious Citation 1, Item 4, I find that the violation was properly characterized as serious given the CO's testimony that stepping down from the parapet wall to the roof and going from the roof to the wall could result in a fall and serious injury, such as a broken neck. (Tr. 99, 109). I have considered the penalty factors and find that a penalty of $3,080 adequately takes into account the seriousness of the hazard, the probability of harm, Royal Construction's violation history, the number of employees exposed, the company's size, and the evidence of good faith.

In terms of Serious Citation 1, Item 5, I find that the violation was properly characterized as serious, because, as the CO discussed, this hazard could result in serious injuries such as broken necks, spines, and bones. (Tr. 109). I have considered the penalty factors and find that a penalty of $3,080 adequately takes into account the seriousness of the hazard, the probability of harm, Royal Construction's violation history, the number of employees exposed, the company's size, and the evidence of good faith.

With regard to Serious Citation 1, Item 6, I find that the violation was properly characterized as serious considering the CO's testimony that all falls are serious and having employees use only one hand to descend a ladder could result in a fall each time the employee failed to maintain contact with the ladder. (Tr. 109, 117-18). I have considered the penalty factors and find that a penalty of $3,080 adequately takes into account the seriousness of the hazard, the probability of harm, Royal Construction's violation history, the number of employees exposed, the company's size, and the evidence of good faith.

Finally, the Secretary characterizes Citation 2, Item 1 as repeat. "A violation is repeated under section 17(a) of the 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). The Secretary establishes a *prima*

[12] Although there was testimony that Royal Construction had been cited for a lack of fall protection at another worksite, the Secretary does not allege that Citation 1, Item 3 should be characterized as repeat and has not offered evidence in support of such a characterization. (Tr. 16, 18, 26-27).

facie case of similarity by showing that both violations are of the same standard. *Capform*, *Inc.*, 16 BNA OSHC 2040, 2045 (No. 91-1613, 1994).

In 2011, Royal Construction was cited for a violation of the same standard at issue in the present matter (29 C.F.R. § 1926.1053(b)). (Tr. 120). Royal Construction never contested the citation because it reached an informal settlement agreement with OSHA, conceding the violation, on August 17, 2011.[13] (Tr. 120). Because a citation was issued and Respondent did not contest it, the citation became a final order of the Commission under section 10(a) of the Act, 29 U.S.C. § 659(a). *Potlatch*, 7 BNA OSHC at 1062. Thus, there was a previous final order for a violation of the same standard at issue in the present matter. This satisfies the Secretary's burden to show that the violation should be characterized as repeat. *Capform*, 16 BNA OSHC at 2045. Respondent presented no evidence to rebut the Secretary's showing. Consequently, I find that Citation 2, Item 1 should be characterized as repeat.

Although, as a repeat citation, the statutory maximum is $70,000, I find that a penalty of $4,400 sufficiently addresses the nature of the hazard, which the CO described as serious based on the risk presented by falling, the probability of harm, the number of employees exposed, the company's size, its characterization as repeat, and the evidence of good faith. (Tr. 109, 120).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Item 1 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.1200(e)(1) is AFFIRMED, and a penalty of $2,200 is assessed.
2. Item 2 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.150(c)(1)(vi) is AFFIRMED, and a penalty of $2,200 is assessed.
3. Item 3 of Citation No. 1, alleging a serious violation 29 C.F.R. § 1926.502(b)(1) is AFFIRMED, and a penalty of $2,200 is assessed.
4. Item 4 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.1051(a) is AFFIRMED, and a penalty of $3,080 is assessed.

[13] The Secretary did not submit the actual citation from the 2011 inspection. According to the OSHA Inspection database, publicly available at https://www.osha.gov/pls/imis/establishment.html, Royal Construction was cited on July 21, 2011 and an informal settlement was reached on August 17, 2011. *See* https://www.osha.gov/pls/imis/establishment.violation_detail?id=314405168&citation_id=01001 visited January 20, 2016).

5. Item 5 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(1) is AFFIRMED, and a penalty of $3,080 is assessed.
6. Item 6 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(22) is AFFIRMED, and a penalty of $3,080 is assessed.
7. Item 1 of Citation No. 2, alleging a repeat violation of 29 C.F.R. § 1926.1053(b)(21) is AFFIRMED, and a penalty of $4,400 is assessed.

SO ORDERED.

Dated: February 12, 2016

/s/
Keith E. Bell
OSHRC Judge