United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. BRYAN MARTIN, d/b/a TERRA RECLAMATION, and its successors, Respondent.	OSHRC DOCKET No. 12-0554

Appearances:

John Nocito, Esquire, U.S. Department of Labor, Office of the Solicitor, Philadelphia, PA
For the Complainant

Bryan Martin, *Pro Se*, Respondent

Before: Keith E. Bell, Administrative Law Judge

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 *et seq.* ("the Act"). On August 23, 2011, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of a worksite located at 153 East Main Street in New Holland, Pennsylvania based on a complaint received the same day.[1] As a result, OSHA issued a Citation and Notification of Penalty ("Citation") to Bryan Martin, d/b/a Terra Reclamation, and its successors ("Respondent") alleging violations of the Act. Respondent filed

[1] OSHA's inspection continued through August 24, 2011.

a timely Notice of Contest ("NOC"), bringing this matter before the Commission.

Citation 1, Item 1 is classified as "Serious" and alleges that Respondent violated 29 C.F.R. § 1926.453(b)(2)(v), based on employees observed in the basket of an aerial lift without wearing a lanyard or harness. A penalty of $3,000.00 is proposed for this item. Citation 1, Item 2 is also classified as "Serious" and alleges that Respondent violated 29 C.F.R. § 1926.501(b)(1), based on observations of employees working on a surface elevated six feet or more above a lower level without protection from fall hazards. A penalty of $4,200.00 is proposed for this item. Citation 2, Item 1 alleges that Respondent violated 29 C.F.R. § 1926.850(a), for failure to have an engineering survey conducted by a competent person prior to permitting employees to begin demolition. This item was classified as "Other than Serious" and no penalty was proposed.

A hearing in this case was held on October 16, 2012 in Philadelphia, Pennsylvania. The parties each filed a post-hearing brief.[2] For the reasons that follow, the Citation items are **AFFIRMED,** and the proposed penalties, totaling $7,200.00, are assessed.

Jurisdiction

The record establishes that at all times relevant to this case, Respondent was an "employer" engaged in a "business affecting commerce" within the meaning of section 3(5) of the Act, 29 U.S.C. § 625(5).[3]

Factual Background

On August 23, 2011, the OSHA Area Office in Harrisburg, Pennsylvania received a phone complaint indicating that employees were working from a 50-foot elevation without fall

[2] Although Respondent's post-hearing brief was received after the deadline, it was given due consideration.
[3] In addition to the evidence adduced at trial, jurisdiction in this case was established by the Secretary's request for admissions which were deemed admitted by my Order of September 28, 2012, imposing sanctions. *See* GX-5. In his Answer to the Secretary's Complaint, Respondent denies coverage under the Act; however, all defenses were stricken as part of my Order imposing sanctions.

protection.[4] The complaint referenced a site located at 153 East Main Street in New Holland, Pennsylvania, where the demolition of a historic three-story building was ongoing. The building was approximately 20 to 28 feet high. There was no work in progress when the OSHA Compliance Officer ("CO") first arrived on August 23, 2011, around 5 p.m. However, demolition was in progress when he returned on August 24th around 8 a.m. The CO observed about seven people working.[5] Some of the workers were using pry bars to remove the front brick facing of the building. Two workers were in a JLG aerial lift, and one of them was using a tunneling iron to remove brick. Another was working towards the back of the building in coordination with the backhoe operator, who was using a chain to pull debris off of the building. Respondent, Bryan Martin, was the backhoe operator. (Tr. 37-43, 46-48).

Secretary's Motion for Sanctions

On July 18, 2012, the Secretary of Labor ("Secretary") filed a Motion to Compel Discovery in this matter. As the basis for her motion, the Secretary noted Respondent's refusal to answer her First Set of Interrogatories and her Requests for Production of Documents and Admissions. On July 27, 2012, I issued an Order to Show Cause requiring Respondent to provide an explanation for his refusal to respond to the Secretary's discovery. On August 13, 2012, I held a conference call with the parties to discuss the discovery dispute in an attempt to resolve it without the need for an Order to Compel. During that conference call, Respondent, Bryan Martin, stated that he received the Order to Show Cause and had no intention of responding to any pretrial discovery, motions or orders. I explained the sanctions that could result if he failed to file discovery responses. Based upon Respondent's representations during the conference call, I issued an Order on August 21, 2012, granting the Secretary's Motion to Compel and giving Respondent

[4] Based on the information provided in the complaint, OSHA treated the matter as an "imminent danger." (Tr. 38).
[5] GX-7 contains a series of video clips showing what the CO saw, *i.e.*, employees exposed to the conditions cited.

until August 31, 2012 to comply. Respondent failed to provide the Secretary with her requested discovery.[6] On September 5, 2012, the Secretary filed a Motion for Default, asking the court to find Respondent in default due to its repeated failure to obey the court's orders to provide discovery responses. In her motion, the Secretary claimed prejudice because Respondent's failure to provide discovery responses "obstructed [her] ability to determine the factual merits of [Respondent's] defenses that he is not an 'employer' under the Act and that he did not engage in interstate commerce under the Act." In an Order dated September 28, 2012, I held the Secretary's Motion for Default in abeyance and imposed sanctions in the alternative.

The Commission has held that prehearing procedures that aid in the early formulation of issues benefit all parties during trial preparation and result in the more efficient use of Commission resources at both the hearing and review stages. *Architectural Glass & Metal Co., Inc*., 19 BNA OSHC 1546 (No. 00-0389, 2001). The Commission has also held that the imposition of appropriate sanctions is important to ensure compliance with prehearing procedures and to adjudicate cases fairly and efficiently. *Duquesne Light Co*., 8 BNA OSHC 1218, 1221 (No. 78-5034, 1980). Although a judge has very broad discretion in imposing sanctions for noncompliance with the Commission's Rules of Procedure or his own orders, the judge must not impose a sanction that is too harsh under the circumstances of the case. "Reviewing courts universally recognize the harshness of dismissal with prejudice and generally require that lesser sanctions first be considered." *Id*. at 1222. However, the Commission has stated that a default order may be appropriate where a party displays a "pattern of disregard" for

[6] Respondent did not provide responses to the Secretary's discovery requests at any time before the hearing. However, in early September 2012, Respondent filed, in response to the Order to Compel, what I construed to be a request for an extension of time of the hearing date. During a conference call with the parties on October 3, 2012, Respondent indicated that he would in fact be attending the hearing set for October 16, 2012. I determined that Respondent had not shown good cause for requesting an extension of time. Subsequently, an Order denying this request was issued on October 9, 2012.

Commission proceedings. *Philadelphia Constr. Equip. Inc*., 16 BNA OSHC 1128, 1131 (No. 92-899, 1993). In addition, the Commission has indicated that the "extreme sanction" of exclusion of evidence critical to a party's case may be appropriate, but only where a party has willfully deceived the Commission or flagrantly disregarded a Commission order. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1166 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994).

Here, Respondent's failure to comply with the Order to Show Cause and the Order to Compel was defiant and flagrant. Clearly, not even the possibility of sanctions, as explained to Respondent, was enough to persuade him to change his mind about filing responses to the Secretary's discovery requests. Additionally, the Secretary's claims of prejudice are found to be legitimate, in that she was deprived of evidence that could have been used to either prove or disprove the factual merits of Respondent's defenses. Nevertheless, I recognize the need for sanctions proportionate to the misconduct for which they are imposed. Given Respondent's participation in two prehearing conference calls and the hearing itself, I find that default is not an appropriate sanction. Accordingly, the Secretary's Motion for Default is hereby **DENIED**.

However, the following sanctions were imposed, in my Order of September 28, 2012, in light of Respondent's conduct:

1. All of the defenses (affirmative or otherwise) raised in Respondent's answer shall be and are hereby STRICKEN and Respondent shall not be allowed to offer any evidence on any of these defenses at the hearing, either through witnesses, documents or otherwise; or in any post-hearing briefs filed by Respondent;
2. Respondent shall not be allowed to offer into evidence at the hearing in this case any documentary material, including photographs, statements, etc., sought by the Secretary in

any of her discovery requests;

3. Respondent shall not be able to object to the admissibility into evidence of any offer of proof made at the hearing by the Secretary as to the expected testimony of any witness that the Secretary has been unable to locate prior to the hearing due to Respondent's failure to respond to the Secretary's discovery requests;
4. Respondent shall not be able to object to the admissibility into evidence of any document offered by the Secretary at the hearing;
5. Secretary's First Requests for Admissions are deemed admitted.[7] (GX-5).

Secretary's Burden of Proof

The Secretary has the burden of establishing that 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 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).

To demonstrate that a violation was "serious" under section 17(d) of the Act, the Secretary must show that there is a substantial probability of death or serious physical harm that could result from the cited condition and that the employer knew or should have known of the violation. The Secretary need not show the likelihood of an accident occurring. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

[7] My Order also stated that Respondent's continued failure to comply with the Commission's Rules could result in further sanctions, including the dismissal of the NOC and the assessment of costs and expenses incurred by the Commission and the other parties.

Discussion

The overarching theme in this case is Respondent's view towards safety in general, which is best reflected in his own words:

Q. [D]o you feel that you were doing right by those workers as far as safety is concerned?

A. Yes. The reason is, **their freedoms are more important to me than their safety**, and their freedom to work like that, and I choose to work like that cause [sic] I was up there with them, that's what I --- I'll die for my freedoms before I live under that kind of oppression where the government comes in and tell [sic] me how to operate and work. (Tr. 241-242). [Emphasis supplied].

Alleged Violation of 29 C.F.R. § 1926.453(b)(2)(v)

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.453(b)(2)(v), as follows:

> A body belt with a lanyard attached to the boom or basket was not worn when working from an aerial lift:
>
> (a) 153 East Main Street, New Holland, PA – Employee(s) were performing work activities from a JLG 4005 aerial lift approximately 28 feet high. The employee(s) were not protected/restrained from falling by the use of a body belt/harness and attached lanyard, thereby exposing employee(s) to possible fall hazards and injuries, on or about August 24, 2011.

The CO testified that the standard requires an employee working in an aerial lift to "have a fall restraint (sic) on them."[8] The CO further testified that this standard is immediately triggered when workers get into the lift because it can bounce when moved. (Tr. 57). I find that the facts giving rise to this violation fall squarely within the protective purpose of the standard cited.

Respondent has admitted that two men were working from an aerial lift and exposed to a fall hazard of approximately 28 feet. (GX-5, p. 4). Respondent also admitted that the employees referenced in this citation were not protected from fall hazards. (Tr. 81-83; GX-5, p. 4). Respondent stipulated that there was no fall protection on this worksite other than the guardrail on the aerial lift. (Tr. 81-83). The CO testified that, based on his experience, the danger posed by this hazard included death. He also testified that Respondent was in a position to see the

[8] I find that this interpretation is supported by the plain language of 29 C.F.R. § 1926.453(b)(2)(v).

individuals working in the aerial lift. (Tr. 59).

Based on the foregoing, I find that the Secretary has met her burden of establishing all of the elements necessary to show a violation of 29 C.F.R. § 1926.453(b)(2). I also find that the violation is correctly classified as serious.

Alleged Violation of 29 C.F.R. § 1926.501(b)(1)

Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.501(b)(1), as follows:

> Employee(s) were on a walking/working surface with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level and were not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:
>
> (a) 153 East Main Street, New Holland, PA – Employee(s) were performing demolition work activities on the third floor, without the use of a fall protection system, thereby exposing employee(s) to a fall hazard of approximately 28 feet, on or about August 24, 2011.

The CO testified that the purpose of this standard is that "[i]t requires that the employer provide some type of fall protection system."[9] (Tr. 60). I find that this standard applies to the facts that gave rise to this violation.

Respondent has admitted that the employees referenced in this citation were "exposed to a fall of approximately 28 feet while performing demolition operations on a walking/working surface with an unprotected edge and were not protected from falling by a guardrail system, safety net system or personal fall arrest system."[10] (Tr. 81-83; GX-5, p. 5). Exhibit GX-8 shows two of the employees working on top of the building near the edge without fall protection. The CO testified that Respondent was "in direct view and was communicating with these individuals and employees working on the second floor…." (Tr. 60). The CO testified that the danger to the exposed employees included death. (Tr. 63).

[9] I find this interpretation of 29 § 1926.501(b)(1) is supported by the plain language of the standard, once it is shown that employee(s) were working from a surface with an unprotected side or edge 6 feet or more above a lower level.
[10] During the hearing, Respondent stipulated that there was no fall protection on this worksite other than the guardrail on the aerial lift. (Tr. 81-83).

In view of the above, I find that the Secretary has established all of the elements necessary to prove a violation of 29 C.F.R. § 1926.501(b)(1). Further, the violation is correctly classified as serious.

Alleged Violation of 29 C.F.R. § 1926.850(a)

Citation 2, Item 1 alleges an other-than-serious violation of 29 C.F.R. § 1926.850(a), as set out below:

> Evidence in writing was not available that an engineering survey performed by a competent person had been performed prior to permitting employee(s) to start demolition operations:
>
> (a) 153 East Main Street, New Holland, PA – An engineering survey was not performed by a competent person prior to employee(s) entering the building to ensure the structure could sustain the weight and operating forces imposed from the demolition to the other floors/walls, on or about August 24, 2011.

The CO testified the standard requires that "a competent person … have a demolition survey conducted for the site to know what wall needs to come down at a given time." (Tr. 64). I find that this standard applies to the facts that gave rise to this violation. The CO further testified that a subpoena was issued to obtain a copy of the engineering survey for this project; however, none was provided. (Tr. 65). Respondent admitted that he did not perform a demolition survey before permitting workers to start demolition operations. (Tr. 241; GX-5, p. 5).

Based on the foregoing, I find that the Secretary has met her burden of showing a violation of 29 C.F.R. § 1926.850(a). I also find the violation is properly classified as "other than serious." No penalty was proposed for this item, and none is assessed.

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.

In this case, I find that OSHA appropriately evaluated the severity of the violations alleged in Citation 1, Items 1 and 2, as "high." (Tr. 217, 223). In regard to Item 1, the OSHA Assistant Area Director ("AAD") testified that the exposed employees in the aerial lift were 20 to 28 feet up in the air. (Tr. 217). The CO testified that, based on his experience, a fall from that height could include death. (Tr. 59). With respect to Item 2, the CO and the AAD both testified that the likely injury could include death. (Tr. 63, 223).

I find that OSHA correctly evaluated the gravity for Item 1 to be "lesser," based on the guardrail system in place on the aerial lift. (Tr. 218). I further find that OSHA correctly evaluated the gravity for Item 2 to be "greater," in light of how close the exposed employee was working to the edge and the duration of the exposure. (Tr. 224).[11]

Respondent, Bryan Martin, had fewer than 25 employees at the time of the inspection. He was consequently given a 40% reduction of the originally-proposed penalty amounts. This reduction resulted in proposed penalties of $3,000 and $4,200, respectively, for Items 1 and 2 of Citation 1. (Tr. 223-224). I find that the proposed penalties as reduced are appropriate. Accordingly, a penalty of $3,000 for Citation 1, Item 1, is assessed, and a penalty of $4,200 for Citation 1, Item 2, is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

[11] The parties stipulated that no fall protection was provided for the employees cited in Citation 1, Item 2. (Tr. 83).

ORDER

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

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.453(b)(2), is AFFIRMED, and a penalty of $3,000.00 is assessed.
2. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.501(b)(1), is AFFIRMED, and a penalty of $4,200.00 is assessed.
3. Item 1 of Other-than-Serious Citation 2, alleging a violation of 29 C.F.R. § 1926.850(a), is AFFIRMED, and no penalty is assessed.

DATED: January 7, 2013
Washington, D.C.

/s/Keith E. Bell
KEITH E. BELL
Judge, OSHRC