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. Teddy Mosley Painting, Respondent.	OSHRC Docket No. 12-2154

Appearances: Jeremy K. Fisher, Esq., U. S. Department of Labor, Office of the Solicitor
Atlanta, Georgia
For Complainant

J. Burruss "Buzzy" Riis, Esq., and Paul Beckman, Esq., Hand Arendall, LLC
Mobile, Alabama
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Teddy Mosley Painting (TMP) is a sole proprietorship engaged in business as a painting contractor in Mobile, Alabama. While driving by an oyster/crab processing plant under renovation in Bayou La Batre, Alabama, on July 19, 2012, a compliance safety officer with the Occupational Safety and Health Administration (OSHA) observed two TMP employees working on the roof without fall protection. As the result of the OSHA inspection, TMP was issued a serious citation on October 4, 2012, for failing to use fall protection and the improper use of ladders. TMP timely filed its notice of contest.

The serious citation alleges TMP violated 29 C.F.R. § 1926.501(b)(11) (item 1) for failing to provide employees with fall protection on a steep roof; 29 C.F.R. § 1926.1053(b)(1) (item 2) for failing to extend the side rails of a ladder at least 3 feet above the landing; 29 C.F.R. § 1926.1053(b)(20) (item 3a) for allowing an employee to descend a ladder facing away from the ladder; and 29 C.F.R. § 1926.501(b)(13) (item 3b) for allowing employees to use the top step of a ladder. The serious citation proposes total penalties of $6,000.00.

Designated as Simplified Proceedings under 29 C.F.R. § 2200.200 *et seq.*, a hearing was held in Mobile, Alabama, on February 5, 2013. The parties stipulated jurisdiction and coverage (Tr. 7-8). Their post-hearing briefs were filed on March 5, 2013.

TMP argues the alleged violations should be vacated because the OSHA inspection did not comply with § 8 of the Occupational Safety and Health Act (Act) because the compliance safety officer (CSO) took the photographs of the employees from off the plant property before initiating the inspection on the property and he failed to allow TMP's owner to be present during the inspection. Also, TMP alleges that the photographs used to support the alleged violations were not taken on July 19, 2012, because of certain discrepancies and failure to show rain. TMP claims unpreventable employee misconduct in the employee's descent on the ladder.[1]

TMP's arguments of an improper inspection and employee misconduct are rejected. For the reasons discussed, the serious violations alleged are affirmed and a total penalty of $4,000.00 is assessed.

Background

TMP, as a painting contractor in the Mobile, Alabama, occasionally performs roofing and framing work if contracted by an owner or a general contractor. TMP is owned and operated by Mr. Teddy Mosley, who has been in business since 1978. During 2012, TMP had no more than four employees depending on the size of the project (Tr. 144, 178, 180-181).

In approximately May 2012, TMP was contracted by a general contractor to perform framing, roofing and painting work at the Olympic Shellfish Products, Inc.'s processing plant on Shell Belt Road, Bayou La Batre, Alabama. According to Mr. Mosley, the project was completed sometime in August 2012. The roofing and framing work was performed by two TMP employees. One employee who identified himself to the CSO as the foreman (foreman) had worked for TMP for 5 years. The other employee (employee) had worked only three days on the project. Mr. Mosley also performed work on the project and delivered materials. When not on the project, Mr. Mosley was working at other projects or was trying to find new work (Exhs. C-9, C-10; Tr. 42, 182-183).

[1] Any issues not pleaded or briefed are deemed waived. See *Georgia-Pacific Corp*., 15 BNA OSHC 1127 (No. 89-2713, 1991).

On July 19, 2012, at approximately 9:20 a.m., a CSO was driving along Shell Belt Road on his way to inspect another worksite when he observed two employees without fall protection on the roof of the processing plant. Upon observing the employees, the CSO parked his car across the street from the plant and took photographs/video of the two employees on the roof and one of the employees descending a ladder from the roof. He initiated the OSHA inspection pursuant to a local emphasis program on fall protection. According to the CSO, it was raining which he described as at times heavy as "cats and dogs" (Exh. C-1; Tr. 13-14, 36, 86, 111).

The CSO testified that the two employees were laying plywood, installing felt and sweeping debris off the roof. There was no fall protection, such a guardrails or nets at the roof's edge, and the employees were not secured to personal fall arrest systems (Exh. C-5; Tr. 25-26, 79-80). The employees were working within a "couple of inches" of the roof's edge (Tr. 39). The CSO also saw the foreman climbing off the roof onto a step ladder which did not extend 3 feet above the eaves (Exh. C-2; Tr. 19). When the foreman descended the ladder he stepped from the roof down to the top step of the ladder and faced away from the ladder (Exh. C-3). The ladder was approximately 2 feet below the eaves.

After 25 minutes the CSO entered the plant property and requested the two employees off the roof (Tr. 41, 78-79). He interviewed the two employees and discovered that the employer was TMP and the employee observed descending the ladder was the foreman. The CSO held an opening conference with the foreman. He determined that the slope of the roof was 5 in 12 and the height of the roof's eaves was 7 feet, 10 inches above the ground (Exh. C-11; Tr. 55, 62, 105, 117). He only observed two ladders on site; the step ladder used by the foreman to exit the roof, and another ladder which also did not extend at least 3 feet above the eaves (Exhs. C-3, C-8; Tr. 40). He did not observe any permanent ladders or extension ladders (Tr. 58). After conducting the walk around inspection, the CSO held a closing conference with the foreman.

Before leaving the plant, the CSO spoke to the property owner who connected him with Mr. Mosley by telephone. The CSO discussed the nature of the inspection and his observations. Mr. Mosley asked the CSO to remain at the plant for a few minutes until he arrived. The CSO told him that he needed to proceed to another inspection worksite, but he would wait a short time. The CSO left the plant at 12:45 p.m., before Mr. Mosley arrived (Tr. 59-60, 106-107, 190).

Prior to the issuance of the citation, the CSO telephoned Mr. Mosley three times leaving messages to call him. Mr. Mosley did not return the telephone calls (Exh. C-16; Tr. 108, 115). The serious citation was issued to TMP on October 4, 2012.

Discussion

TMP's Improper Inspection Arguments

Section 8 of the Act directs that an OSHA's inspection of an employer's worksite be conducted in a reasonable manner, at reasonable times, and within reasonable limits. 29 U.S.C. § 657. Section 8(a) provides that:

> In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized --
>
> > (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee or an employer; and
> >
> > (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Section 8(e) provides:

> Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

To establish a § 8 affirmative defense, TMP must show unreasonable conduct by the CSO. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993). The record must

establish that the CSO substantially failed to comply with the provisions of § 8 and such noncompliance substantially prejudiced the employer. *Gem Industrial, Inc.*, 17 BNA OSHC 1184, 1187 (No. 93-1122, 1995).

TMP does not assert, nor does the record show, animus or harassment on the part of the CSO. The identity of the employer was not known to the CSO when he initiated the inspection (Tr. 15). The inspection was random and based on a local emphasis program on fall protection.

TMP's argues that the CSO's photographs and video taken before entering the worksite should be excluded because they were made before he showed his credentials and announced the OSHA inspection. He was not authorized by Mr. Mosley to enter the worksite and he refused to wait for Mr. Mosley before leaving the property. Also, TMP appears to argue that if the violations were serious and unsafe, the CSO should have removed the employees from the roof before spending 25 minutes taking photographs from across the street.

The CSO is charged under the Act with the responsibility to inspect workplaces to ensure compliance with OSHA safety and health standards. If he observes violations, he makes a recommendation for the issuance of a citation. TMP remains responsible for maintaining a safe workplace, not OSHA (Tr. 141). The CSO can request, as in this case, the employees to stop an unsafe practice (Tr. 139). However, he lacks authority to close a workplace or require an employer to abate an unsafe condition unless he perceives an imminent danger situation under § 13 of the Act. 29 U.S.C. § 662. If he considers it an imminent danger, the determination to stop unsafe work is made by the United States District Court based on a petition by the Secretary; not the CSO.

In this case, the employees remained off the roof while the CSO was on the worksite. The CSO did not consider it an imminent danger that required a stop work recommendation. He assessed each citation as a "lesser" probability of an accident for penalty purposes (Tr. 63-65).

In terms of the efficacy of photographing from across the street, an employer, under the Fourth Amendment, is entitled to a reasonable expectation of privacy at the worksite. The photographs and video were taken by the CSO from a public road. The plant's roof and the employees on the roof were in the open and in public view; observable from Shell Belt Road (Tr. 38, 78). When an area is outdoor and open to public view, as in this case, TMP had no reasonable expectation of privacy. *GEM Indus. Inc*., 17 BAN OSHC at 1186. The CSO was not

denied entry by TMP or the property owner. There was no objection raised to the inspection. Also, TMP did not own the crab processing plant.

TMP's claim that Mr. Mosley was denied a walk around opportunity and, therefore, the inspection violated § 8(e) is also rejected. Section 8 (e) requires the CSO to afford the employer or representative an opportunity to accompany the CSO during the inspection. The CSO held the opening conference and presented his credentials to the TMP employee who identified himself as the foreman (Tr. 41). The other employee on site also identified him as the foreman (Exh. C-9). As a representative of TMP, the foreman was present throughout the OSHA inspection. Also, while on site, the CSO spoke to Mr. Mosley by telephone. He explained to Mr. Mosley the reason for the inspection, the nature of the inspection, and the violations he observed (Tr. 55, 59). There is no showing that Mr. Mosley, during his telephone conversation with the CSO, objected to the inspection or to the CSO's conduct.

The OSHA inspection at issue did not violate § 8 of the Act and there is no showing of prejudice to TMP. TMP neither argued prejudice and the record does not establish that TMP was prejudiced in its preparation of its case.

Although it is unfortunate the CSO could not wait for Mr. Mosley to arrive at the plant, it is understandable that he felt that he needed to proceed to the inspection worksite that had brought him to Shell Belt Road. The inspection of TMP had taken almost 4 hours. Before the issuance of the citation, the CSO telephoned Mr. Mosley, without success, three times to discuss the inspection.

TMP also argues that the CSO may have returned to the plant on a later date to take his photographs because there is no evidence of rainwater and there are changes in the roof condition. Despite the CSO describing the weather as "raining, thunder and lightning," TMP believes the photographs depict sunshine, shadows, dust, and dry conditions (Tr. 17). Also, in one photograph, it shows bare plywood on a section of the roof (Exh. C-3). After the employees exited the roof, a later photograph, however, shows the roof covered with felt paper (Exh. C-13).

These arguments are rejected as speculative and not supported by evidence. The CSO specifically denied going to the plant or taking any other photographs after July 19, 2012 (Tr. 89). The photographs show the recorded date and his diary inspection sheet confirms that the inspection was conducted on July 19, 2012. There are no other dates recorded. The CSO testified that he did not manipulate the timekeeping software in the digital camera and there was

no reason to do so (Tr. 84). The photographs of the roof may not show the same roof area. Although the CSO described it as a heavy, rainy day, he also testified that when he began taking the photographs, the weather had "actually calmed down a little bit" and the rain was "off and on" (Tr. 18, 86).

Even if some of the photographs had been taken after July 19, which the court rejects, this would only show that TMP's failure to use fall protection and its improper usage of ladders continued for several days, instead of a couple of hours. TMP's attack on the CSO's credibility serves only to distract from the documented evidence of unsafe conduct.[2]

TMP's improper inspection arguments including its § 8 defense are rejected.

Alleged Violations

In order to establish a violation of a safety standard as in this case,

> the Secretary has the burden of proving: (a) the he applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise or reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

TMP does not dispute, and the record supports, the application of the fall protection standards at § 1926.501 and ladder standards at § 1926.1053 to TMP's worksite on Shell Belt Road.

SERIOUS CITATION

Item 1 - Alleged Violation of § 1926.501(b)(11)

The citation alleges that at "13871 Shell Belt Rd Bayou La Batre, AL: On or about July 19, 2012, and at times prior to, the employer exposed his employees to a fall hazard in that employees were installing plywood sheathing 7 feet 10 inches above the ground below on a 5:12 steep sloped roof without the use of fall protection." Section 1926.501(b)(11) provides:

[2] TMP's request that the court take judicial notice of an "establishment search" on the OSHA website of the other company which the CSO claimed he inspected on July19, 2012, is denied. The information contained in the report needs further explanation. Even if it shows what TMP purports it to show, the CSO may have been confused as to the identity of the other company. He estimated that in two years he has made "around 150 inspections" (Tr. 12). Such credibility argument does not negate the evidence shown by the photographs and video of unsafe conduct.

> *Steep roofs.* Each employee on a steep roof with unprotected sides and edges 6 feet (1.8m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

A steep roof is defined as "a roof having a slope greater than 4 in 12 (vertical to horizontal)." Section 1926.500(b) *Definitions*. TMP does not dispute that the roof on the processing plant was a steep roof. The CSO determined the slope of the roof was 5:12 based on information provided by the foreman and his use of a slope card (Exh. C-10; Tr. 105). He measured the height of the eaves above the ground as 7 feet 10 inches (Exh. C-12; Tr. 55).

The photographs taken by the CSO clearly show that the two employees were not using fall protection such as a personal arrest system and there were no guardrails or safety nets at the edge. The employees were observed at various locations on the roof, including within inches of the edge (Exhs. C-1, C-2, C-5, C-7). According to the CSO, the roof was wet from the rain making the conditions on the steep roof slippery (Tr. 63). Mr. Mosley admitted that there was only one lanyard on site. He stopped at a pawn shop to purchase another lanyard after the OSHA inspection (Tr. 164-165).

The terms of § 1926.501(b)(11) were violated and employees' exposure to a fall hazard of almost 8 feet is established. The issue of TMP's knowledge of the violative condition is discussed separately.

Item 2 - Alleged Violation of § 1926.1053(b)(1)

The citation alleges that at "13871 Shell Belt Rd Bayou La Batre, AL: On or about July 19, 2012, and at times prior to, the employer exposed his employees to a fall hazard in that employees were allowed to access a roof 7 feet 10 inches above the ground level with a ladder that did not extend 3 feet above the upper landing surface." Section 1926.1053(b)(1) provides:

> When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9m) 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 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.

TMP does not dispute that the ladders did not extend 3 feet above the eaves. The photographs show the ladders on site below the eaves approximately 2 feet. The ladders were portable step ladders, not permanently affixed and did not have grabber-type bars (Exhs. C-3, C-8; Tr. 58-59, 64). The foreman was seen descending one of the step ladders.

The general contractor testified to the presence of an extension ladder, but there is no showing the employees used the ladder to access the roof. Also, the CSO did not see an extension ladder on site during his walk around inspection of the plant. His photographs of the plant fail to show an extension ladder.

The terms of § 1926.1053(b)(1) were violated and employees' exposure to the unsafe condition is established. The employee stated that the foreman had used the 6-foot ladder to ascend the roof "3-4 times max" that day (Exh. C-9). The issue of TMP's knowledge of the violative condition is discussed separately.

Item 3a - Alleged Violation of § 1926.1053(b)(20)

The citation alleges that at "13871 Shell Belt Rd Bayou La Batre, AL: On or about July 19, 2012, and at times prior to, the employer exposed his employees to a fall hazard while allowing employees to descend an 8-foot ladder while facing away from the ladder." Section 1926.1053(b)(20) provides:

> When ascending or descending a ladder, the user shall face the ladder.

TMP does not dispute that when the foreman descended the ladder, he faced away from the ladder. The photographs clearly show the foreman climbing down the ladder facing away from the ladder (Exh. C-3). He is not holding onto the ladder.

The terms of § 1926.1053(b)(20) were violated and employee exposure to the unsafe condition is established. The issue of TMP's knowledge of the violative condition is discussed separately.

Item 3b - Alleged Violation of § 1926.1053(b)(13)

The citation alleges that at "13871 Shell Belt Rd Bayou La Batre, AL: On or about July 19, 2012, and at times prior to, the employer exposed his employees to a fall hazard while allowing employees to use the top step of a ladder." Section 1926.1053(b)(13) provides:

The top or top step of a stepladder shall not be used as a step.

TMP does not dispute, and the photograph shows, that the foreman used the top step of the stepladder to descend from the steep roof (Exh. C-2). The top step of the ladder was approximately 2 feet below the eaves.

The terms of § 1926.1053(b)(13) were violated and employee exposure to the unsafe condition is established. The issue of TMP's knowledge of the violative condition is discussed next.

TMP's Knowledge of The Violative Conditions

To establish TMP's *prima facie* violations of § 1926.501(b)(11), § 1926.1053(b)(1), § 1926.1053(b)(20), and § 1926.1053(b)(13), the issue remaining is whether TMP had the requisite knowledge of the violative conditions.

TMP argues that Mr. Mosley was not aware of the crew's failure to use fall protection or the improper use of the ladders. According to Mr. Mosley, the crew was laying plastic over the roof to protect it from the rain at the request of the general contractor (Exh. R-2; Tr. 152, 186). Mr. Mosley believed the employees were reframing the attic (Tr. 150-151, 168).

In order to establish employer knowledge, the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of the hazardous condition. *A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). When a supervisory employee has actual knowledge of the condition, his knowledge is imputed to the employer and the Secretary satisfies her burden of proving knowledge without having to demonstrate an inadequacy or defect in the employer's safety program. *Dover Elevator Co*. 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

In this case, TMP's actual knowledge of the lack of fall protection and the use of inadequate ladders is established based on the presence of the foreman. An employer is charged with the knowledge of conditions which are plainly visible to supervisory personnel. Despite Mr. Mosley's claim the employee was not a foreman, he was in charge and his knowledge of the employee's working conditions is imputed to TMP.

The substance of the delegation of authority, not the title of the employee, is controlling in determining whether an employee is a supervisor. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (Nos. 86-360, 86-469, 1992) (a leadman's knowledge imputable to an employer despite his status as bargaining unit employee). An employee who has been delegated authority

over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *A.P. O'Horo*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991) (laborer designated as working foreman) *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHA 1379, 1382 (No. 76-4271, 1981) (plasterer functioned as a supervisor).

During the OSHA inspection the employee identified himself to the CSO as the foreman and in charge of the site (Tr. 42, 105). The other TMP employee also identified him as the foreman (Exh. C-9). The employee stated that the foreman had the authority to stop unsafe acts and had given him the job. Mr. Mosley confirmed that the foreman contacted the employee about working at the project (Tr. 167-168). The foreman's ability to recruit other employees suggests that his role extended beyond that of a framer. Mr. Mosley had known the foreman for 5 years and recognized that he knew what he was doing (Tr. 167). Mr. Mosley agreed that the foreman served as "lead man" if the other employee had any questions (Tr. 171). Mr. Mosley was frequently away from the plant at other projects or "lining up other work" so the foreman was left in charge (Tr. 170). He did not dispute that the foreman was in charge of the site. The foreman's knowledge of the employee's lack of fall protection and the use of the inadequate ladders is imputable to TMP.

It is also noted that the CSO informed Mr. Mosley of his observations on the telephone before leaving the plant (Tr. 59-60). Despite this knowledge, Mr. Mosley gave no instructions to the employees to stay off the roof because the employees returned to the roof after the CSO departed (Tr. 61-62). Mr. Mosley admitted that when he arrived at the plant, the employees were on the roof covering it with plastic without fall protection (Tr. 171-172). He allowed the employees to finish the work. He permitted them to work without fall protection even after being informed of the hazard.

An employer who lacks actual knowledge can nevertheless have constructive knowledge of conditions that could be detected through an inspection of the worksite. There is no showing Mr. Mosley regularly inspected the site for unsafe conditions despite that TMP had worked at the project for an approximately a month. Even though roofing was part of TMP's work, there was only one safety harness available for the two employees (Tr. 164).

If there was rain during the roofing work, it was reasonable to expect that employees would be asked to cover the roof. According to the general contractor, he had told Mr. Mosley the day before the OSHA inspection that the roof needed to be covered (Tr. 195). An employer

must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed during the course of their roofing work. *Automatic Sprinkler Corporation of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980). Such hazards included fall protection and adequate ladders.

The argument that the employees were covering the roof at the time of the inspection with plastic is not supported by record. The CSO's photographs and video show the employees placing felt and sweeping debris off the roof. They are not shown covering the roof with plastic. The foreman told the CSO that the crew had been on the roof for "a couple of hours" and there is no plastic shown covering the roof (Exh. C-10).

The foreman's participation in the unsafe conduct is also imputed to TMP because TMP failed to show that it exercised reasonable diligence. Reasonable diligence includes an employer's adequate supervision, the formulation and implementation of training programs, and developing work rules designed to ensure that the work is performed safely. *The Haskell Company*, 19 BNA OSHC 1268 (No. 99-2191, 2000).

Roofing work was part of TMP's job. TMP was hired in part to replace the roof on the processing plant (Tr. 163-164). The days prior to the inspection, Mr. Mosley conceded that it was "very possible" the crew would have worked on the roof. However, there was only one lanyard available for use by the employees and there was no evidence of guardrails or safety nets (Tr. 165).

The violative conduct by the foreman was in plain view, visible from a public road. TMP was not shown to have made any effort to maintain safety of the worksite. The employee stated that he had not received any training on fall protection by TMP. Mr. Mosley knew that only one lanyard was even present (Exh. C-9; Tr. 165). Mr. Mosley conceded that he had not instructed the foreman to stay off the roof (Tr. 170). He gave no specific instruction on ladder use (Tr. 171). He simply left the project to go to another project or the lumber yard (Tr. 166). He admitted that he never drove back to check on the foreman because the foreman could contact him if problems arose. Mr. Mosley's conduct displayed a lack of due diligence. No training was offered, fall protection and ladders were either inadequate or absent, and TMP made no effort to monitor the work for safety. Mr. Mosley simply allowed the foreman to perform the necessary work because he felt that the employees "knew what they were doing."

The record establishes that TMP had the requisite actual and constructive knowledge of the violative conditions. There was no showing that TMP had work rules regarding fall protection or the use of ladders. TMP identified no safety program, written or verbal, no employee training programs, and no discipline program.

TMP's violations of § 1926.501(b)(11), § 1926.1053(b)(1), § 1926.1053(b)(20), and § 1926.1053(b)(13) are established unless TMP shows unpreventable employee misconduct.

Unpreventable Employee Misconduct

TMP argues that if violations of ladder usage are found, it was the result of the foreman's misconduct. In order to establish the affirmative defense of unpreventable employee misconduct, TMP is required to prove that it has: (1) established work rules designed to prevent the violation; (2) adequately communicated the rules to its employees; (3) taken steps to discover violations of the rules; and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co*., 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

TMP's employee misconduct defense fails. No safety rules involving fall protection or ladder usage were identified. The rules presented by TMP were nothing more than vague statements of being "particular about safety" and its reliance on no prior accidents (Tr. 176). TMP discussed fall protection but "nothing formal" (Exh. C-10). TMP's claim that employees knew what they were doing is also misplaced. As the Commission stated, "employers cannot count on employees' common sense, experience, and training by a former employer or a union to preclude the need for specific instructions." *PAR Electric Contractors, Inc.*, 20 BNA OSHC 1624, 1628 (No. 99-1520, 2004). There is no showing TMP made an effort to communicate work rules regarding safety. TMP failed to show that it monitored employees' work to ensure safe work practices or to show that it had a discipline program.

The unsafe conduct shown by the foreman in stepping on the top step of the ladder and facing away from the ladder indicates that TMP maintained a lax safety program. TMP failed to show that it took feasible steps to prevent the unsafe conduct, including adequate instruction and supervision. In *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991), the Commission noted that "where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. . . . A supervisor's involvement in the misconduct is strong evidence that the

employer's safety program was lax." The "fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax." *United Geophysical Corp.*, 9 BNA OSHC 2117, 2123 (No. 78-6265, 1981), citing *Jensen Construction Co.*,7 BNA OSHC 1477 (No. 76-1538, 1979).

The record fails to show that TMP maintained a safety program other than vague suggestions that employees "do things safely." The employee had not received fall protection or ladder safety training from TMP (Exh. C-9). The foreman stated that TMP "discussed" fall protection but "nothing formal" (Exh. C-10). As for ladder training, the foreman stated that "we try to use safely with the best way of doing it safely." However, he admitted that he had regularly descended ladders facing away from the ladder for 12 years (Exh. C-10). He also admitted that he did not know if the company maintained a fall protection plan.

TMP's employee misconduct defense is not established and therefore TMP's violations of the cited standards are affirmed.

Serious Classification

In order to establish that a violation is serious under § 17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violation. 29 U.S.C. § 666(k). The likelihood of an accident is not at issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

TMP's violations of § 1926.501(b)(11) (item 1), §1926.1053(b)(1) (item 2), § 1926.1053(b)(20), § 1926.1053(b)(20) (item 3a), and § 1926.1053(b)(13) (item 3b) were properly classified as serious. Falling from a roof or ladder in excess of 7 feet can cause serious injury. The CSO identified that a fall of 8 feet could cause lacerations, sprains, bruises, or fractures (Tr. 63). Such falls hazards are part of OSHA's local emphasis program which the Assistant Area Director described are frequently the subject of OSHA inspections (Tr. 131-132).

Penalty Assessment

The Commission is the final arbiter of penalties in contested cases. In determining an appropriate penalty, the Review Commission is required to consider the size of the employer's business, its history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor considered.

TMP as a small employer with no more than 4 employees, is entitled to credit for size. TMP is also entitled to history credit because it has not received an OSHA citation in the preceding three years (Tr. 110-111). TMP is not entitled to good faith credit because there is no evidence that Mr. Mosley had a safety program consisting of safety rules, safety training, monitoring, or employees' discipline.

A penalty of $2,000.00 is reasonable for TMP's serious violation of § 1926.501(b)(11) (item 1). Two TMP employees were on a steep roof, 7 feet 10 inches above the ground without fall protection and in poor weather conditions. Their observed exposure was approximately 25 minutes.

A penalty of $1,000.00 is reasonable for TMP's serious violation of § 1926.1053(b)(1) (item 2). The two ladders observed by the CSO and used by the employees did not extend 3 feet above the eaves. In fact, the ladders did not even extend to the eaves. Such condition exposed the employees to an approximate 8-foot fall hazard.

A grouped penalty of $1,000.00 is reasonable for TMP's serious violations of § 1926.1053(b)(20) and § 1926.1053(b)(13) (items 3a and 3b). By stepping on the top step of the ladder and facing away from the ladder, the foreman was engaged in the unsafe conduct while descending the ladder. He had engaged in such unsafe conduct for 12 years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation No. 1, item 1, alleged violation of 29 C.F.R. § 1926.501(b)(11) is affirmed as serious and a penalty of $2,000.00 is assessed;

2. Citation No 1, item 2, alleged violation of 29 C.F.R. § 1926.1053(b)(1) is affirmed as serious and a penalty of $1,000.00 is assessed; and

3. Citation No. 1, items 3a and 3b, alleged violations of 29 C.F.R. § 1926.1053(b)(20) and 29 C.F.R. § 1926.1053(b)(13) is affirmed as serious and a grouped penalty of $1,000.00 is assessed.

/s/
Ken S. Welsch
Judge

Date: March 21, 2013
Atlanta, Georgia