United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
721 Nineteenth Street, Suite 407
Denver, CO 80202-2517

Secretary of Labor, Complainant, v. Lakeside Construction, L.L.C. Respondent,	OSHRC DOCKET NO. 12-0422

Appearances:

Susan Brinkerhoff,, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington
For Complainant

No appearance at trial for Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

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"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Lakeside Construction, L.L.C. ("Lakeside" or "Respondent") worksite located at 3631 Furcula Drive, Coeur d' Alene, Idaho on September 14, 2011. As a result of that inspection, OSHA issued a Notice of Citation and Proposed Penalty ("Citation") to Respondent alleging three serious violations of the Act. Respondent timely contested the Citation. The matter was assigned to Simplified Proceedings, suspending complaint and answer requirements. Commission Rule 203(a), 29 C.F.R. §2200.203(a).

A trial was conducted on July 6, 2012, in Boise, Idaho. Complainant appeared at the trial. Respondent failed to appear after proper notice of the trial. (Tr. 7). Pursuant to the direction of the Court, Complainant proceeded with the presentation of her evidence. (Tr. 7).

Jurisdiction

Jurisdiction over this action is conferred upon the Commission pursuant to Section 10(c) of the Act. Respondent is an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Slinghuff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Legal Standards

To establish a prima facie violation of the Act, Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would occur; she need only show that if an accident occurred, serious physical harm would result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *See, e.g., Mosser Construction*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072, 2087 (No. 88-0523, 1993).

Factual Findings

The Court concludes that the following facts, offered by Complainant, are undisputed. On September 14, 2011, Compliance Officer Catherine Korvig ("CO") observed two men working up to nine feet above the ground while framing a residence at 3631 Furcula Ave. in Coeur d' Alene, Idaho. (Tr. 29). While on a public road, the CO videotaped the worksite to document the fall hazard. (Ex. C-7). After a period of time, the CO then entered the worksite and officially opened the inspection. (Tr. 14).

The three framers present at the worksite identified themselves as Respondent's employees. (Tr. 20). No supervisor was present at the worksite. An employee repeatedly attempted to call the owner. (Tr. 21). The CO testified that the three framers lacked the knowledge to mitigate any potential serious hazards on the jobsite as they had not been trained. (Tr. 27). Specifically, the employees: (i) needed additional information regarding the kind of platforms required; (ii) did not know how to put in the trusses; and (iii) did not know how to safely elevate the gable. The CO also observed that the employees were using a self-supporting ladder that, contrary to manufacturer guidelines, did not have its legs extended. (Tr. 23). The employees told the CO that they liked using the ladder in that manner because it was easier to use. (Tr. 23).

The employees also did not understand that they needed to implement fall protection or know how to mitigate the potential fall hazards on the worksite. (Tr. 21). The employees seemed to be aware that they should have hard hats, but they did not have any at the worksite. (Tr. 22). When the CO pointed out the need for safety glasses, one of the employees retrieved a pair of glasses from his truck. (Tr. 22). Another employee, who was wearing sunglasses, was not sure whether the sunglasses qualified as safety glasses. (Tr. 18-19).

At the request of Respondent's owner, Mr. Hamilton, the superintendent for the general contractor came over to find out what OSHA was doing at the jobsite and represented the Respondent during the inspection. (Tr. 22-24).

Legal Analysis

A. Citation 1, Item 1.

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. §1926.100(a) as an employee was observed working under the roof being framed at a residential structure at the worksite without use of a protective helmet and therefore was exposed to overhead hazards.

The cited standard provides:

> §1926.100 Head protection.
>
> (a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The CO observed an employee working below two employees who were working on a roof being framed using equipment such as pneumatic nail guns and hammers. (Tr. 18). The standard applies.

The employee located on the ground was not wearing any form of head protection, was located within the zone of danger and was therefore exposed to overhead hazards. Respondent was in clear violation of the standard. (Tr. 17-18, 28, Ex. C-4).

To prove knowledge Complainant must show Respondent either knew or, with the exercise of reasonable diligence, could have known of the violative conduct. *See, e.g., Pride Oil Well Svc.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). While "reasonable diligence" does not impose a requirement for full-time monitoring, inadequate supervision constitutes a lack of reasonable diligence. *Stanley Roofing Co., Inc.* 21 BNA OSHC 1462, 1463-1464 (No. 03-0997).

Here, employees were totally unsupervised. (Tr. 21). There is no evidence that the owner, Mr. Hamilton, or any other person provided any form of supervision. Indeed, the employees had difficulty contacting Mr. Hamilton by cell phone. Under these circumstances, Respondent failed to provide adequate supervision and, therefore, was not reasonably diligent. Had Respondent provided adequate supervision, it would have known of the violation as it was in plain view. Accordingly, the undisputed evidence establishes that Respondent had constructive knowledge of the violation. The Complainant has established a violation of the standard. Citation 1, Item 1 will be affirmed.

A violation is properly characterized as serious if Complainant establishes that, if an incident occurs, the result could be death or serious physical harm. *Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 1188 (No. 91-3144, 2000)(Consolidated). If the pneumatic nail guns and/or hammers being used at the worksite had fallen on the employee's head, the result could have been death or serious physical harm. (Tr. 18, 28). The violation was properly characterized as a serious violation.

B. Citation 1, Item 2a.

Citation 1, Item 2a asserts a serious violation of 29 C.F.R. §1926.501(b)(13) alleging that employees installing trusses were observed walking the exterior top plates without any fall protection.

The cited standard provides.

> §1926.501 Duty to have fall protection.
>
> * * *
>
> (b)(13) *Residential construction.* Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these

> systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.

The evidence establishes that employees, engaged in residential construction, were working nine feet above the ground and therefore the standard applies. (Tr. 16, 29). The undisputed evidence also establishes that the employees were not provided with any form of fall protection. (Tr. 16-17, Exs. C-2, C-5). Therefore, the standard was violated and employees were exposed to a fall hazard.

As with Citation 1, Item 1, the violation was in plain view. The Court adopts its reasoning set forth above as to constructive knowledge as also applicable to this citation. Had Respondent provided adequate supervision, it would have known of the violation. Therefore, the record establishes that Respondent had constructive knowledge of the violation. The Complainant has established a violation of the standard. Citation 1, Item 2a will be affirmed.

The record establishes that the framers were working nine feet above the ground. (Tr. 29). Had an employee fallen off the roof, the result could have been death or serious physical harm. (Tr. 16). The violation was properly characterized as a serious citation.

C. Citation 1, Item 2b.

Citation 1, Item 2b alleges a serious violation of 29 C.F.R. §1926.503(a)(1) because employees were unable to recognize the hazards of falling and were not equipped with appropriate instruction in the procedures to be followed to minimize these hazards.

The cited standard provides:

> §1926.503 Training requirements**.**
>
> (a) *Training Program.* (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

As established by Citation 1, Item 2a, Respondent employees were exposed to fall hazards and therefore the standard applies. The undisputed evidence establishes that employees: (i) did not understand either the need to implement fall protection or how to mitigate the fall hazards to which they were exposed (Tr. 21); and (ii) did not understand the proper use of ladders or the type of platforms they were going to require. (Tr. 27, Ex. C-7). The three framers who were working at the worksite were exposed to fall hazards created by the lack of proper training.

As with the previous items, had Respondent properly supervised its employees, it would have known that its employees were inadequately trained. The Court adopts its reasoning set forth above as to constructive knowledge as also applicable to this citation. Had Respondent provided adequate supervision, it would have known of the violation. Therefore, the record establishes that Respondent had constructive knowledge of the violation. The Complainant has established a violation of the standard. Citation 1, Item 2b will be affirmed.

The lack of training increased the likelihood that employees could suffer a fall. A fall from a distance of nine feet could likely cause death or serious physical harm. The violation was properly characterized as a serious violation.

Penalties

Complainant proposed total penalties of $3600 for the three serious violations. Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Court give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the South, Inc*., 14 BNA OSHC 1910 (No. 89-2241, 1990). With respect to these factors, the Commission has

stated:

> These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.

J.A. Jones Constr., 15 BNA OSHC at 2214 (internal citations omitted).

At trial, Complainant demonstrated that it considered these factors when proposing the $3600 penalty. (Tr. 29-30). The Court finds the penalties proposed are appropriate.

Alternative Order for Respondent's Failure to Appear

Despite Respondent receiving proper notice of the trial, neither Respondent nor any representative of Respondent appeared at the trial. (Tr. 37). At the trial, Ms. Brinkerhoff, Complainant's attorney, asserted that she made numerous attempts to call Mr. Hamilton, left many voice mails, and received only one call in return. (Tr. 37-38). Indeed, Respondent has a long history of failure to reply to communications from both the Court and Complainant.

After many attempts to discuss the matter with Respondent, Complainant and Respondent telephonically engaged in settlement negotiations where Mr. Hamilton agreed to settle the case for $1800. On February 28, 2012, Complainant provided the Court an unsigned copy of the agreement and mailed a copy via certified mail to Mr. Hamilton at his residence for his signature. This communication was signed for by an Alec Hamilton on March 1, 2012. (Tr. 38).

On March 16, 2012 the Court issued a Pretrial Conference Order ("Order") establishing a Pretrial Conference for April 6, 2012. The Order was not returned undeliverable. On April 2, 2012, Complainant sent Mr. Hamilton the OSHA safety narrative and violation worksheets pursuant to Commission Rules. The USPS[1] delivered these documents to Mr. Hamilton's door

[1] Alhough the transcript refers to the UPS, these references should be to the USPS.

on April 3, 2012. (Tr. 38-39). Mr. Hamilton did not attend the April 6, 2012, Pretrial Conference. Later that afternoon, however, OSHA received the signed settlement agreement from Mr. Hamilton with the conditions that they provide him with proof of the allegations or else "this contract is null and void." (Tr. 39). On April 9, 2012, Complainant sent a letter by regular mail to Mr. Hamilton rejecting his conditions. While there is no evidence that the letter was received, neither was it returned. (Tr. 39).

The Court sent Respondent a Show Cause Order which directed the Respondent to provide reasons for its failure to appear at the Pretrial Conference. The Show Cause Order was sent by certified mail, return receipt, to the post office box provided by Respondent. It was returned as unclaimed. (Tr. 44). The Court also sent, via United States Mail, a Notice of Trial to Respondent on May 22, 2012, and Notice of Location of Trial on May 30, 2012 to the same post office box. Neither document was returned and Respondent failed to respond to either communication. (Tr. 45).

On June 5, 2012, Complainant sent to Mr. Hamilton copies of the photos and exhibits she intended to use at trial, and reminded Respondent of: (i) the Court's requirement that they exchange exhibits and witness lists; and (ii) the trial date. The letter was delivered by USPS on June 6, 2012. On June 8, 2012, Complainant mailed a copy of a DVD that was to be used as an exhibit (Ex. G-7) to Respondent. (Tr. 39-40). Complainant also informed Respondent that she was attempting to set up a June 11, 2012 conference with the Court. The communication was delivered to Mr. Hamilton on June 9, 2012 but no reply was received. (Tr. 40-41).

On June 12, 2012 Complainant sent a follow-up letter to Respondent setting forth her attempts to contact Mr. Hamilton. The letter also contained the Complainant's witness list. (Tr. 41). The letter was delivered by the USPS on June 13, 2012. (Tr. 41).

All communications were mailed to the address provided by Respondent. (Tr. 43). *See* Commission Rule 6, 29 C.F.R.§2200.6 (failure to notify Commission of change of address shall be deemed to have waived its right to notice and service). Since the trial, Respondent has made no attempt to contact the Court. Complainant established that none of her letters were returned by USPS as either rejected or not delivered. This Court assumes that all communications were received by Respondent who simply elected to ignore them. There is no evidence in the record to show that Respondent has not received any of the previous mailings from the Court on in this matter. Further, in the absence of evidence to the contrary, it is reasonable to presume that the U.S. Postal Service officials have properly discharged their duties. *See Powell v. Commission*, 958 F.2d 53, 54 (4th Cir. 1992).

Under Commission Rule 64, 29 C.F.R. §2200.64, the failure of a party to appear at the trial may result in a judgment being entered against that party. Similarly, under Commission Rule 101, 29 C.F.R. §2200.101(a) a party who fails to proceed as provided by the Commission rules, may be declared in default, after having been afforded an opportunity to show cause why a default should not be entered. Respondent was afforded an opportunity to show cause why it failed to participate in the Pretrial Conference, but chose not to respond. This Court also finds that Respondent had notice of the time, date and place of the trial both from written notices and Orders, which have not been returned as undeliverable by the USPS, and by the placement of phone calls by Complainant, that have not been returned or responded to by Respondent.

Under the Commission's rules, Respondent's failure to show cause why it failed to participate in the Pretrial Conference and its failure to appear at the trial justifies vacating Respondent's Notice of Contest. Commission Rules 64, 101; 29 C.F.R. §§2200.64, 2200.101; *Philadelphia Construction Equipment, Inc.*, 16 BNA OSHC 1128 (No. 92-0899, 1993).

Respondent has demonstrated a pattern of disregard for the procedural requirements and authority of the Court by: (1) failing to appear on the court-ordered Pretrial Conference call, (2) failing to respond to the Show Cause Order, and (3) failing to attend the scheduled trial. Respondent's repeated failure to participate in this proceeding constitutes contumacious conduct justifying sanctions. *Philadelphia Construction Equipment, Inc.*, 16 BNA OSHC 1128, 1993 CCH OSHD ¶30,051 (No. 92-0899, 1993); *Sealtite Corporation*, 15 BNA OSHC 1130, 1991 CCH OSHD ¶29,398 (No. 88-1431, 1991). Accordingly, Respondent's Notice of Contest is hereby VACATED and the violations alleged in the Citation and Notification of Penalty are AFFIRMED.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the Findings of Fact and Conclusions of Law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

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

1. Citation 1 Item for a serious violation of §1926.100 is AFFIRMED and a penalty of $1800.00 is ASSESSED;

2. Citation 1 Item 2a for a serious violation of 29 C.F.R. §1926.501(b)(13) and Item 2b for a serious violation of 29 C.F.R. §1926.503(a)(1) are AFFIRMED and a combined penalty of $1800.00 is ASSESSED;

/s/Patrick B. Augustine

PATRICK B. AUGUSTINE
Judge, OSHRC

Date: September 25, 2012
Denver, Colorado

Respondent has demonstrated a pattern of disregard for the procedural requirements and authority of the Court by: (1) failing to appear on the court-ordered Pretrial Conference call, (2) failing to respond to the Show Cause Order, and (3) failing to attend the scheduled trial. Respondent's repeated failure to participate in this proceeding constitutes contumacious conduct justifying sanctions. *Philadelphia Construction Equipment, Inc.*, 16 BNA OSHC 1128, 1993 CCH OSHD ¶30,051 (No. 92-0899, 1993); *Sealtite Corporation*, 15 BNA OSHC 1130, 1991 CCH OSHD ¶29,398 (No. 88-1431, 1991). Accordingly, Respondent's Notice of Contest is hereby VACATED and the violations alleged in the Citation and Notification of Penalty are AFFIRMED.

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/s/Patrick B. Augustine

PATRICK B. AUGUSTINE
Judge, OSHRC

Date: September 25, 2012
Denver, Colorado