United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Nyffeler Construction, Inc., Respondent.	OSHRC Docket No. 11-0947

Appearances:

Andrea Christensen Luby, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri
For the Complainant

Greg Nyffeler, *Pro Se*, Omaha, Nebraska
For the 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 § 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 at the Omaha, Nebraska worksite of Nyffeler Construction, Inc. ("Nyffeler" or "Respondent") on February 24, 2011. As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging serious violations of the Act with proposed penalties of $8,400. Respondent timely contested the Citation. A one-day trial was conducted in Omaha, Nebraska on September 23, 2011. Both parties submitted timely

post-trial briefs.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act. The record establishes that at all times relevant to this action, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5).[1] (Tr. 24-25); *Slingluff v. OSHRC*, 425 F.3d 861, 866-67 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of the Act, Complainant must prove by a preponderance of the evidence: (1) the cited standard applies to the cited condition; (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. Prod. Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) (citations omitted), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

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

[1] The Commission has held that construction activity, even a small project, affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983).

Findings of Fact

Three witnesses testified at trial: (1) Steven Jordan, OSHA Compliance Officer ("CO"); (2) Matthew Thurlby, OSHA CO; and (3) Greg Nyffeler, an owner of Respondent. (Tr. 24, 48, 72). Based on their testimony and discussion of evidentiary exhibits, the Court makes the following additional findings.

Respondent, a residential construction contractor in Omaha, Nebraska, is a corporation owned by three individuals – Greg Nyffeler, Josh Farris, and Derek Pierce. On February 24, 2011, while inspecting a nearby worksite, OSHA inspectors saw two individuals without fall protection on a roof at Respondent's worksite. After the inspectors phoned in a referral, CO Matthew Thurlby and CO Michael Connett went to Respondent's worksite to investigate. When CO Thurlby arrived at the worksite, he observed and photographed two people installing roof sheathing. CO Thurlby testified that the roof's slope was greater than 4 in 12 (vertical to horizontal). CO Thurlby further testified that the distance from the eave of the roof to the ground was 10 feet 9 inches. The CO testified that he did not see any lanyards in use.[2] CO Thurlby opened the inspection with Mr. Nyffeler and asked to interview the employees on the roof, Troy Poledna and Ryan Coleman. (Tr. 24-25, 34, 50-51, 75-82, 86-91, 98; CX-4, CX-5, CX-6, CX-8, CX-9).

Citation 1, Item 1

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

> 29 C.F.R. § 1926.501(b)(13): *Each employee engaged in residential construction activities 6 feet or more above lower levels was not protected by guardrail systems, safety net systems, or personal fall arrest systems, nor was an alternative fall protection plan which meets the requirements of 1926.502(k) developed and implemented.*
>
> *Jobsite located at 1210 S. 199th Street, Omaha, NE: Two employees were*

[2] A lanyard is part of a personal fall arrest system.

observed installing roof sheathing without fall protection. The employees were exposed to falls of greater than 10 feet.

The cited standard provides:

29 C.F.R. § 1926.501(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 systems, 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.*

Complainant must demonstrate that employees had access to the cited condition. Complainant may show employee access either through actual employee exposure or by showing that "while in the course of their assigned working duties . . . [employees] will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). Finally, Complainant must prove Respondent either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). Respondent's knowledge is established by showing that Respondent is aware of the physical conditions that constitute a violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) (citations omitted), *aff'd without published opinion*, 1996 WL 97547 (5th Cir. 1996). Moreover, Complainant is not required to show that an "employer understood or acknowledged that the physical conditions were actually hazardous." *Id.*

The Court finds the cited standard applies because the Respondent's employees were installing roof sheathing and were exposed to falls more than six feet above the ground. Mr. Nyffeler admitted that: (i) he could observe the employees working on the roof; (ii) no "roof

kicks" were in place on the east side of the house where the employees were working;[3] and (iii) the only fall protection being used that day was "the training and knowledge they've had from years and years of experience." (Tr. 43-45; CX-4). The Court finds Respondent did not utilize the required fall protection.

Next, the cited standard provides an exception that allows the use of an alternate fall protection method when an employer can show it is infeasible or would create a greater hazard to use conventional fall protection (guardrails, safety nets, or a personal fall arrest system). The Commission has held that "the party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim." *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000) (citations omitted). Respondent did not present evidence that conventional fall protection would be infeasible or present a greater hazard. Instead, the CO testified that it was feasible to use conventional fall protection. (Tr. 108-10). The Court finds Respondent did not meet the terms of the standard's exception.

Further, an OSHA directive which allowed the use of alternate procedures for certain residential construction activities ("Directive") was in effect at the time of the inspection.[4] CO Thurlby testified that if an employer followed the requirements of the Directive for roof sheathing, roof kicks (slide guards) must be installed correctly and used along with the implementation of other requirements, such as a controlled access zone.[5] (Tr. 99-108; CX-11). Here, one roof kick was installed incorrectly and there was no roof kick in the area where the

[3] A "roof kick" is another term for a slide guard. Both Mr. Nyffeler and CO Thurlby testified that a slide guard is a piece of lumber that is a nominal "2 x 4" installed on a roof for the purpose of stopping a person's slide down the roof. (Tr. 34, 106.)

[4] Roof sheathing is one of the activities that qualifies for alternative fall protection procedures under OSHA's STD 3-0.1A, *Plain Language Revision of OSHA Instruction STD 3.1, Interim Fall Protection Compliance Guidelines for Residential Construction*, rescinded effective June 16, 2011. (Tr. 101; CX-11.)

[5] CO Thurlby testified the directive requires implementation of the following for roof sheathing work: site-specific training, designation of a crew foreman, a controlled access zone, materials staging, falling object protection, and properly installed slide guards. (Tr. 99-108; CX-11.)

employees were working.[6] This fact, coupled with Respondent's failure to implement any of the other measures specified in the Directive, means Respondent did not comply with the Directive's requirements. Respondent did not meet the requirements of the standard, its exception, or the Directive.

As to the third element of the Complainant's burden, the record clearly establishes that Respondent's employees were exposed to the violative condition. As to the fourth element, the record also establishes knowledge. Mr. Nyffeler, one of Respondent's owners, testified that he could see the employees working on the roof, and he admitted that the employees were not using any fall protection. (Tr. 43-45). Respondent therefore knew, or with the exercise of reasonable diligence could have known, of the violative condition. Finally, the violation was properly characterized as serious because an employee could have been seriously injured, or killed, in a fall from the roof. (Tr. 124-25). Accordingly, the Court finds that the Complainant established all of the elements necessary to prove the serious violation alleged in Citation 1, Item 1. Citation 1, Item 1 will be AFFIRMED.

Citation 1, Item 2

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

> 29 C.F.R. § 1926.503(a)(1): *The employer did not provide a training program for each employee potentially exposed to fall hazards to enable each employee to recognize the hazards of falling and the procedures to be followed in order to minimize these hazards:*

[6] CO Thurlby testified that there were no roof kicks where the employees worked. Additionally, on another part of the roof where a roof kick was attached, it was installed incorrectly. (Tr. 105-108; CX-1). It was nailed flat so that it extended 1.5 inches above the roof's surface. Mr. Nyffeler described the installation of a roof kick as nailing a nominal 2" x 4" board flat against the roof; he further indicated the actual measurement of the board would be 1.5 inches x 3.5 inches. Therefore, when nailed to the roof, the board would extend about 1.5 inches above the surface of the roof. The OSHA directive required a roof kick to extend, at a minimum, a nominal 4 inches above the roof's surface. (Tr. 36, 105-108; CX-1).

Throughout the Company: The employer failed to train employees that were potentially exposed to fall hazards to enable each employee to recognize the hazards associated with the type of work being conducted. This should include training on mitigating those hazards through an acceptable method of fall protection. Training should also include the requirements for fall protection systems and when it is appropriate to utilize those systems.

The cited standard provides:

29 C.F.R. § 1926.503(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.*

It is undisputed that Respondent did not provide training to its employees regarding fall hazards. At the trial, Mr. Nyffeler testified he had: (i) not trained employees on the use of personal fall protection (harness and lanyard); (ii) only trained employees to use a "roof kick"; and (iii) not instructed employees on when to use a roof kick or how to properly install a roof kick. (Tr. 33-37).

The Commission has held that an employer must "provide the instructions that a reasonably prudent employer would have given in the same circumstances" to be compliant with a training requirement. *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2126 (No. 96-0606, 2000) (citations omitted). Additionally, the training provided must be "specific enough to advise employees of the hazards of their work and the ways to avoid them." *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1021 (No. 94-200, 1997) (citations omitted), *aff'd without published opinion*, 1998 WL 648507 (5th Cir. 1998). Mr. Nyffeler, by his own admission, did not train the employees on the methods of fall protection required by the standard. (Tr. 33-37). He testified that he told them to use roof kicks, but he provided no guidance on using them properly.

The Complainant has established: (i) the cited standard applies; (ii) its terms were violated; and (iii) the Respondent's employees were exposed to the violative condition. Through

Mr. Nyffeler[7], the Respondent knew, or with the exercise of reasonable diligence could have known, of the condition.

The violation was properly characterized as serious because an employee could have been seriously injured, or killed, in a fall from the roof. (Tr. 124-25). Accordingly, the Court finds Complainant established all of the elements necessary to prove the serious violation alleged in Citation 1, Item 2. Citation 1, Item 2 will be AFFIRMED.

Respondent's Other Claims

Respondent generally admitted to the lack of required fall protection and training for its employees. However, Respondent set forth several claims regarding why the citations should not be affirmed. These claims are discussed below. Before the Court undertakes a discussion of these claims, Respondent should note that the Commission is judicial in nature; therefore, it has no regulatory functions in regards to implementing the Act through adoption of regulations or directives. 29 U.S.C. § 659(c). *See also In re Perry*, 882 F.2d 534 (1st Cir. 1989). Many of the arguments advanced by Respondent to support its position that the Citation should not be affirmed fall outside the jurisdiction of this Court to address or change.

Change in OSHA's fall protection requirements. Respondent argued that OSHA's new fall protection requirements were vague and should not be enforced.[8] (Tr. 189-191; RX-1). The Commission can review a claim that a standard is unenforceably vague; however, because the change to the fall protection directive occurred after the inspection, it is not relevant to the citations at issue in this case.[9] Respondent's argument is REJECTED.

---

[7] The actions and knowledge of supervisory personnel are generally imputed to their employers. Revoli Const. Co., 19 OSHC 1682 (No. 00-0315, 2001). Mr. Nyffeler, in addition to being the supervisor on the day of the inspection, is also an owner of Respondent. Therefore, his knowledge is imputed to Respondent.

[8] As discussed earlier in this decision, OSHA rescinded its alternative fall protection compliance directive on June 16, 2011. (CX-11). The Court is not addressing the nature or the merits of this rescission.

[9] The Commission has held that a claim of unconstitutional vagueness is evaluated through the application of the

Inadequate OSHA outreach and training. Respondent asserted that OSHA provided inadequate outreach and training regarding the change to the fall protection requirements. (Tr. 170-74). The method OSHA chooses for its outreach and training reflects OSHA's regulatory and enforcement strategy; as such, it is not within the judicial purview of the Court as an adjudicator. 29 U.S.C. § 651(b)(3); *Sec'y v. Int'l Union Allied Indus. Workers of Am. & its Local 370 (Whirlpool),* 722 F.2d 1415, 1419-20 (8th Cir. 1983) (citations omitted). Accordingly, Respondent's assertion is REJECTED.

Selective or Vindictive Prosecution. Respondent argued that OSHA unfairly targeted residential construction employers in Nebraska, and Omaha in particular, with enforcement actions and citations.[10] (Tr. 176-182). The Commission has held that the Complainant has "discretion in deciding whom to prosecute for violations of the Act." *Vergona Crane Co.*, 15 BNA OSHC 1782, 1788 (No. 88-1745, 1992) (citations omitted). However, this Court has jurisdiction to determine if those prosecuted were so prosecuted based upon selective or vindictive prosecution,[11] which is considered an affirmative defense. A prosecution may be considered vindictive if it is done to "deter or punish the exercise of a protected statutory or constitutional right." *Nat'l Engineering & Contracting Co.*, 18 BNA OSHC 1075, 1077 (No. 94-2787, 1997) (citation omitted), *aff'd,* 181 F.3d 715 (6th Cir. 1999). To prevail on a claim of vindictive prosecution, Respondent must show, at a minimum, that "the government action was taken in response to an exercise of a protected right." *Id*. Respondent presented no evidence to

---

standard to the facts of the case, rather than from the face of the standard. *N&N Contractors, Inc.*, 18 BNA OSHC at 2129 (citations omitted).

[10] Respondent provided a notice from OSHA's Region VII office to illustrate this point. (Tr. 179; RX-5). The notice is Directive # CPL 98-02M, *Region-wide Problem Solving Initiative on Falls, Scaffolds, and Electrocutions from Overhead Power Lines in Construction*, effective April 8, 2011. Because the notice was effective after the date of the inspection, the Court will not consider this document in light of Respondent's claims.

[11] Commission Rule 207, 29 C.F.R. § 2200.207 requires affirmative defenses to be pled. Respondent did not plead this as an affirmative defense and raised it for the first time at trial. However, based upon the Court's ruling above it is not necessary to address the untimeliness of the affirmative defense.

establish that the Citation was issued in response to the Respondent's exercise of a protected right. Respondent's argument is therefore REJECTED.

Constitutionality of the OSH Act. Respondent claimed that the Act is unconstitutional because the Act does not apply to certain industries and activities. (Tr. 181-82; RX-1; R. Br. 5). The Court does not have the authority or the jurisdiction to rule on questions of the constitutionality of its authorizing statute. *See, e.g., Adams Steel Erection,* 13 BNA OSHC 1073, 1075 (No. 77-3804, 1987) (citations omitted); *see generally, Caribtow v. OSHRC*, 493 F.2d 1064 (1st Cir. 1974)(Finding that employers in the Commonwealth of Puerto Rico are governed by the Act*).* Respondent's claim is REJECTED.

The American Recovery and Reinvestment Act of 2009 ("ARRA"). Respondent argued that ARRA was enacted to create jobs, spur economic activity, and foster unprecedented levels of government accountability. The Respondent claims the citations issued to Respondent do not support the goal of job creation and run afoul of the goals of ARRA. (Tr. 168-69; RX-1). The purpose of the OSH Act is "[t]o assure safe and healthful working conditions . . . by authorizing enforcement of the standards developed under the Act . . . ." While ARRA may promote job creation, it does not relieve the employer of its duty to comply with the OSH Act and the standards promulgated by OSHA. Respondent's assertion is REJECTED.

Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Court to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the

precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g., Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1996). In calculating the proposed penalties, CO Thurlby determined the gravity was high due to the potential for serious injury from a 10-foot fall. CO Thurlby then applied a 40 percent penalty reduction based on the Respondent's small size. [12] There was no adjustment for history because the Respondent had not been inspected by OSHA in the previous five years. (Tr. 128-132).

Regarding both citation items, the Court has considered the totality of the circumstances, including the testimony that Respondent is a very small business and that it had no prior negative inspection history. The Court finds it appropriate to provide a reduction to both items because the employer has no negative inspection history. As to Citation 1, Item 2, the Court finds the Complainant's gravity assessment was too high. For these reasons, the Court will assess a penalty of $2,000.00 for Citation, Item 1 and $1,400.00 for Citation 1, Item 2.

ORDER

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

1. Serious Citation 1, Item 1 is AFFIRMED, and a penalty of $2,000.00 is ASSESSED.

[12] Mr. Nyfeller testified that there were five employees at the time of the inspection. (Tr. 29-30).

2. Serious Citation 1, Item 2 is AFFIRMED, and a penalty of $1,400,00 is ASSESSED.

__/s/_____
Date: March 29, 2012 PATRICK B. AUGUSTINE
Denver, Colorado Judge, OSHRC