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

SECRETARY OF LABOR, Complainant, v. ROY'S CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 11-0892

APPEARANCES:

Darren Cohen, Esquire, U.S. Department of Labor, New York, New York
For the Complainant.

Peter Najawicz, St. Thomas, Virgin Islands
For the Respondent.

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under 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") inspected a worksite of Roy's Construction, Inc. ("Respondent" or "Roy's") on November 16, 2010. The site was located on St. Thomas, in the Virgin Islands, and the inspection resulted in Respondent being issued a "serious"

citation, a "repeat" citation, and an "other" citation.[1] Respondent contested the citations and the proposed penalties resulting from the inspection. The hearing in this matter took place on St. Thomas, Virgin Islands, on January 25 and 26, 2012.[2] Only the Secretary has filed a post-hearing brief.

Jurisdiction

In its answer, Respondent admits that it is a corporation with its principal office and place of business in the United States Virgin Islands. It also admits that at all relevant times it was operating as a construction company and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and 652(5). It further admits that the Commission has jurisdiction in this matter. *See* Answer, ¶¶ I, II and III. The Court finds that the Commission has jurisdiction over the parties and the subject matter in this case.

The Secretary's Motion for Sanctions and the Court's Order

On October 21, 2011, the Secretary filed a motion for sanctions in this case. In support of the motion, the Secretary noted that after Respondent had not responded to her First Set of Interrogatories and Document Requests, she filed a motion to compel on September 15, 2011. She also noted that Respondent had likewise not responded to her additional discovery requests, served on August 26, 2011, which included Requests for Admissions. On October 5, 2011, the Court granted the motion to compel and ordered Respondent to file responses to the Secretary's First Set of Interrogatories and Document Requests by October 14, 2011. Following the October 14, 2011 due date, the Secretary attempted to contact Respondent regarding the discovery requests, leaving messages for

[1] The Secretary withdrew the "other" citation in her complaint.
[2] Respondent offered no exhibits at the trial. (Tr. 15-16). All page references to the trial record are to Volume 1, January 25, 2012, unless otherwise indicated.

both Peter Najawicz, the company's representative, and Gerald Roy, the company's president. The Secretary also sent Mr. Roy an e-mail as to the discovery requests. The Secretary received no response to the messages left or the e-mail. On October 19, 2011, the Secretary faxed a letter to Mr. Najawicz, advising that Respondent had not responded to the discovery requests or the Court's order and that a motion for sanctions would be filed if no response was received by close of business the next day. Respondent's facsimile machine did not accept the letter. In her motion for sanctions, the Secretary requested that Respondent's notice of contest be dismissed and that an order of default be issued. In the alternative, the Secretary requested that Respondent's affirmative defenses be stricken, that it not be allowed to offer evidence on the defenses at the hearing, and that the Requests for Admissions be deemed admitted under Commission Rule 54(b).

On November 30, 2011, the Court issued an order granting the sanctions requested in the alternative. The Court noted that Respondent, in addition to its previous lapses, had not responded to the Secretary's motion. The Court found that the Secretary had been prejudiced by Respondent's obstruction of discovery and had forced her to seek court intervention in order to compel Respondent to meet its discovery obligations. The Court also found that under Commission Rule 52(e) and Federal Rule of Civil Procedure 37, an award of expenses and fees as to the Secretary's motion to compel and motion for sanctions was appropriate.[3] The Court therefore ordered that all of Respondent's defenses set out in its answer were stricken and that Respondent would not be allowed to

[3] In the order, the Court directed the Secretary to submit, by December 23, 2011, a declaration setting out her total reasonable expenses and attorney fees with respect to the motion to compel and the motion for sanctions. The Court also directed Respondent to file a response within 14 days of the Secretary's filing explaining why reasonable expenses and attorney fees should not be awarded. The Secretary filed her declaration as required; Respondent, however, has filed no response. The declaration and the award of expenses and attorney fees are addressed at the end of this decision.

offer any evidence on any of the defenses at the hearing or in any post-hearing brief filed. The Court also ordered that Respondent would not be allowed to: 1) offer into evidence any documentary material the Secretary had sought in her discovery requests, 2) object to any offer of proof the Secretary made as to expected testimony of witnesses the Secretary had been unable to locate due to Respondent's failure to respond to the discovery requests, and 3) object to the admissibility of any document the Secretary offered into evidence at the hearing. The Court further ordered that the Secretary's First Requests for Admissions were deemed admitted. Finally, the Court ordered that Respondent's failure to comply with all parts of the order could result in further sanctions, including the dismissal of the notice of contest and the assessment of costs and expenses incurred by the Commission and other parties.[4]

Other Preliminary Matters

On January 19, 2012, Respondent filed a letter requesting a postponement of the hearing, which was to begin January 25, 2012. During a conference call addressing the request the next day, Respondent's representative indicated that more time was needed to discuss the case with Mr. Roy, in preparation of the hearing. Mr. Najawicz said that Mr. Roy had left the Virgin Islands the preceding Saturday to travel to the United States in order to obtain medical treatment for an unspecified period.[5] Mr. Najawicz requested that the hearing be delayed for at least three months until Mr. Roy was able to return to the Virgin Islands. Mr. Najawicz indicated that he and Mr. Roy had not had the financial resources to prepare for the hearing until shortly before its commencement. The

[4] Respondent was also ordered to comply with Commission Rule 35, 29 C.F.R. § 2200.35, and to file a proper notice of appearance, by December 15, 2011. Respondent complied with these orders on January 9, 2012.

[5] Mr. Roy was not hospitalized.

Secretary objected to the request, noting that Mr. Najawicz had many months to talk to Mr. Roy prior to the hearing, that Respondent had been inattentive to the case during that time, that Mr. Najawicz had waited at least six days to request the postponement, and that Mr. Roy had not been identified as a witness for Respondent.

In an order dated January 20, 2012, the Court agreed with the Secretary and denied Respondent's request. The Court noted that Commission Rule 62, 29 C.F.R. § 2200.62, requires a motion for postponement of a hearing to be received at least seven days before the hearing; otherwise, the motion "will generally be denied unless good cause is shown for late filing." *Id.* In denying the request, the Court found that the request had not been timely filed and that no good cause had been shown for the late filing.

At the hearing, Mr. Najawicz requested that Mr. Roy be added as a witness, and he renewed his request to postpone the hearing in view of Mr. Roy's absence from St. Thomas. The Secretary's counsel objected to any postponement of the hearing and to adding Mr. Roy as a witness. He noted that when Respondent filed its witness list on January 8, 2012, Mr. Roy was not on the list and the list was untimely in any case. He also noted that to the extent Mr. Roy would be called to testify as to any of Respondent's affirmative defenses, such testimony would be prohibited by the Court's order that sanctioned Respondent. (Tr. 16-26). The Court determined the Secretary's objections were well founded, and Mr. Roy's testimony was excluded. The Court did allow Mr. Najawicz to make an offer of proof as to what he believed Mr. Roy's testimony would have been, for purposes of any appeal of this matter. (Tr. 26-31).

The Court next addressed the eight individuals on Respondent's January 8, 2012 witness list.[6] The Secretary's counsel objected to the witnesses testifying, noting that the witness list was untimely filed, that no summary of the expected testimony was provided, and that if any of the witnesses were to testify as to Respondent's affirmative defenses, that testimony would be prohibited by the Court's order sanctioning Respondent. The Court determined the Secretary's objections were well founded and excluded the testimony of the witnesses. The Court nonetheless allowed Respondent to call three particular witnesses in order to make an offer of proof as to each witness's testimony for purposes of any appeal of this matter; Respondent was able to produce only two of the witnesses, and it presented the testimony of each as an offer of proof.[7] (Tr. 31-52).

Admissions

As noted above, the Secretary's Requests for Admissions ("Admissions") were deemed admitted. The Admissions were received in evidence as CX-1. Admissions 1 through 14 are summarized below.[8] All of the Admissions refer to November 16, 2010.

Respondent was working as a contractor for roof repairs at the Legislature Building, located at #1 Old Barracks Yard, Charlotte Amalie, St. Thomas, United States Virgin Islands. Jacques Rogers, an employee of Roy's, was supervising work for Respondent at the Legislature Building, and Respondent's employees were performing roof repairs on the building. The employees were located at least 6 feet above the ground

[6] In an order dated January 17, 2012, the Court noted that it would rule on the Secretary's objections to Respondent's witness list at the beginning of the hearing. At the hearing, Respondent withdrew Kenny Rubino and Shauntal DeGraff as witnesses. (Tr. 32).

[7] *See* 29 C.F.R. § 2200.72(b), Offer of Proof. At the hearing, Respondent agreed that Senator Louis Patrick Hill's testimony would be duplicative and cumulative with that of Louis Willis. (Tr. 38-39). Respondent also agreed that the expected testimony of Dr. John A. Verstraaten and Charise Woodley would be similar and cumulative to Maxcess Armantraving's testimony. (Tr. 40-43). Jacques Rogers was Respondent's supervisor at the site. (Tr. 74). Mr. Najawicz did not locate Mr. Rogers and thus did not offer his testimony at the hearing. (Tr. 199, 224, 260, Tr. Vol. 2, January 26, 2012, p. 4).

[8] Admissions 15 through 17 are addressed *infra*, in the discussion relating to the repeat violation.

while they were working on the building, and the roof of the building was sloped at a rate of 6 in 12 (vertical to horizontal). One or more of the employees working on the roof of the building were not wearing a fall protection system. One or more of the employees working at the Legislature Building were wearing respirators. Mr. Rogers himself was wearing a respirator. Respondent had supplied its employees with the respirators being worn at the Legislature Building, as the employees working on the roof were exposed to asbestos fibers. The employees had not received medical evaluations to determine their ability to use respirators, and they were not fit tested prior to using the respirators. Respondent did not have a written respirator protection program, and it did not provide training to the employees using respirators at the building.

The OSHA Inspection[9]

On November 16, 2010, OSHA COs Ortiz[10] and Lopez were driving by the Legislature Building when they saw two employees working on the roof without fall protection. CX-12 is a photograph of the front side of the building and what they saw. The COs went to the site, met with Mr. Rogers and told him why they were there.[11] Mr. Rogers was not able to reach Mr. Roy, but he allowed the inspection.[12] Mr. Rogers went with the COs as they walked around the site, and the COs spoke to some of Roy's employees. Only Roy's employees were at the work site at the time of OSHA's

[9] The summary below is based on the testimony of Carlos Ortiz, one of the two OSHA Compliance Officers ("COs") who conducted the inspection. (Tr. 71). The other CO, Axel Lopez, was presented solely as a rebuttal witness. The testimony of CO Lopez will not be considered in this decision.

[10] CO Ortiz testified that he has been an OSHA Compliance Safety Officer for 10 years. He graduated from the University of Puerto Rico. He is a chemical and environmental engineer. He has a Master's degree in engineering management. (Tr. 67, 141).

[11] Mr. Rogers believed OSHA was there because of an article and photograph relating to the site that was in that day's local paper. *See* CX-16. CO Ortiz testified this was not so; the two COs were on St. Thomas to inspect other sites and to serve a warrant on a contractor other than Roy's. CO Ortiz had not seen the article before being at the site. (Tr. 71, 78-81; 166-70).

[12] CO Ortiz had met Mr. Rogers before when inspecting other Roy's sites. According to CO Ortiz, he had inspected the company three times before, all three of those inspections involved roofing work, and all three resulted in citations. (Tr. 75-76).

inspection. The building had two floors and appeared to be about 24 feet high. Mr. Rogers told the COs that the roof was actually 36 feet high with a steep sloop. He also told them that Roy's had been at the site for about two weeks and that the employees were performing the roof repair work, installing wood panels and caulking. He said the employees had been working for about two hours that day. The COs saw the front and back of the building. CX-14 shows the back side of the building and five employees (including Messrs. Glen Paul, Ashton Swift, and Stevens) working on the roof.[13] CO Ortiz testified the employees were working without fall protection; they should have had on harnesses with lanyards that were attached to safety lines. He further testified that he saw that "They [Roy's employees] were not attached to anything and walking all around over the roof." CO Ortiz stated that: 1) Roy's employees were not wearing full fall protection equipment, 2) there were no safety net or guard rail systems on the roof, and 3) there were no toe boards. Photograph CX-16 shows workers performing roofing work without fall protection on a roof that was over 6 feet high. (Tr. 71-99, 154, 166, 195-96; CX 13, CX-14, CX-16).

The OSHA COs saw other violations at the site. One involved a portable ladder on the sea side of the building employees were using to access the roof. The ladder, shown in CX-4 and CX-7, did not extend 3 feet above the landing surface, which was a fall hazard. It also had a bent foot hinge and was sitting on a plank that had broken areas. These conditions, shown in CX-8 and CX-9, caused ladder instability.[14] Mr. Rogers said the ladder had not been inspected on November 16, 2010 before it was used. He also acknowledged that he was aware that an employee had broken the ladder. He stated,

[13] All five employees told CO Ortiz that they were Roy's employees. (Tr. 78, 108-11).
[14] CO Ortiz testified that he saw Messrs. Swift, Paul and Stevens using the ladder located at the sea side of the building. (Tr. 114-17, 119-20, 127-28).

when asked why he had a respirator around his neck, as shown in CX-2, that another company named Environmental Concepts was removing asbestos from the roof of the building. Mr. Rogers told CO Ortiz that he was using a respirator because he was working so close to the asbestos removal and all Roy's employees were required to use respirators.[15] Mr. Rogers was wearing a half mask respirator around his neck, that covers the mouth and nose, which is a piece of equipment that helps a person to breathe clean air. Mr. Rogers stated that Roy's had supplied the respirators. He also stated that the employees had not been fit tested or medically evaluated for wearing respirators; further, Roy's had no written respirator program, and the employees had no training in using respirators. CO Ortiz also saw Messrs. Paul, Swift and Stevens wearing respirators. After the inspection, the COs had a closing conference with Mr. Rogers.[16] CO Ortiz later tried to speak to Gerald Roy by calling his office, but there was no answer. (Tr. 82-86, 111-31, 134, 138-52, 163-65, 231, 235; CX-2).

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary must show that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the cited condition, and (4) the employer either knew of the condition or could have known of it in the exercise of reasonable diligence. *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Repeat Citation 2, Item 1

This item alleges a violation of 29 C.F.R. § 1926.501(b)(11), which states that:

[15] CO Ortiz talked with other Roy's employees who verified that this was so. (Tr. 86).
[16] After completing the subject inspection, CO Ortiz met with Maxcess Armantraving of Environmental Concepts. He then conducted an inspection of that company that same day. (Tr. 84-85, 190-91).

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

The standard defines a "steep roof" as a roof having a slope greater than 4 in 12 (vertical to horizontal). *See* 29 C.F.R. § 1926.500(b). The Admissions in this case show that the standard applies, that its terms were not met, and that Respondent's employees were exposed to the cited condition. *See* CX-1, p. 2, Nos. 3-6. CO Ortiz's testimony and photographs confirm these elements. According to CO Ortiz, Mr. Rogers stated that the roof was 36 feet high, that its slope was 6 to 12, and that the employees had been working for about two hours that day. (Tr. 93-97). In addition, CX-12 depicts the front side of the building and two employees working on the roof, and CX-14 depicts the back side of the building and five employees working on the roof. None of the employees was using fall protection.[17] (Tr. 72-73, 86-88, 98-99). The record also shows Respondent knew of the cited condition. The COs saw the condition as they were driving by, and Mr. Rogers told them he was supervising the employees and working alongside them.[18] (Tr. 71-74, 154, 166). Mr. Rogers' knowledge is also shown by his belief that OSHA was there due to the article and photograph about the site in that day's local paper. CO Ortiz testified Mr. Rogers showed him the photograph in CX-16, which portrays employees working on the roof on the front of the building without fall protection the day before the inspection. CO Ortiz noted that CX-16 was very similar to what was depicted in CX-12. (Tr. 78-80).

[17] CO Ortiz identified three of the employees in CX-14 as Messrs. Paul, Swift and Stevens. He spoke to all three during his inspection. (Tr. 92-93, 108-11).

[18] A supervisor's knowledge of a violation is imputable to the employer. *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986) (Actual or constructive knowledge of an employer's foreman is imputed to employer).

Based on the above, the Secretary has proved the alleged violation. She has also shown that the violation was repeated. A violation is repeated if, at the time of the alleged violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063-64 (No. 16183, 1979). The Admissions in this case show that Respondent was cited for a violation of 29 C.F.R. § 1926.501(b)(11) on October 14, 2009, that Respondent and the Secretary entered into a stipulated settlement to resolve that citation on March 2, 2010, and that citation became a final order on April 12, 2010. *See* CX-1, p. 4, Nos. 15-17; CX-17-20. Item 1 of Repeat Citation 2 is affirmed. The violation was also serious, in that falls from the roof, which was 36 feet high, could have resulted in serious injury or death. (Tr. 99, 103, 228-30). *See Sec'y of Labor v. Trinity Indus.*, 504 F.3d 397, 401 (3d Cir. 2007); *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1007 (No. 92-424, 1994) (Fall from 18 feet was likely to cause serious injuries).

The proposed penalty for this item, as amended by the complaint, is $9,800.00. In assessing penalties, the Commission must give due consideration to the gravity of the violation, and to the size, history and good faith of the employer. *See* section 17(j) of the Act.[19] The CO testified that the severity of the violation was high, because a fall from the roof could have caused death or serious injury. The probability was greater, in that there were over five employees working on the roof without fall protection. A reduction was applied to the penalty, due to the employer's small size, but an increase was also applied, due to the company's prior history of OSHA violations. (Tr. 102-07, 225-30).

[19] *See also Revoli Constr. Co., Inc.*, 19 BNA OSHC 1682, 1686, (No. 00-0315, 2001) ("[T]he Commission must 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." (internal quotes omitted)).

At the hearing, there was a detailed discussion about how the proposed penalty was determined. CO Ortiz testified the gravity-based penalty was $7,000.00. That amount was multiplied by two because of the repeat classification. The resulting $14,000.00 was reduced by 40 percent for the employer's size, and a 10 percent increase for history was then applied.[20] (Tr.105-07, 228, 239-43, 247-58). In her brief, the Secretary states that the proposed penalty of $9,800.00 is incorrect, due to a mathematical error, and that the correct penalty is $9,240.00. S. Brief, pp. 39-40. The Court finds that the Secretary's proposed penalty of $9,240.00 is appropriate. That penalty is assessed.

Serious Citation 1, Items 1 and 2

Item 1 alleges a violation of 29 C.F.R. § 1910.134(e)(1), which states that:

> The employer shall provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace….

Items 2(a), 2(b) and 2(c) allege violations of 29 C.F.R. §§ 1910.134(c)(1), 1910.134(f)(2), and 1910.134(k)(3), respectively. Those standards provide:

> (c)(1) In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with required worksite-specific procedures....
>
> (f)(2) The employer shall ensure that an employee using a tight-fitting facepiece respirator is fit tested prior to initial use of the respirator, whenever a different respirator facepiece (size, style, model or make) is used, and at least annually thereafter.
>
> (k)(3) The employer shall provide the [respirator] training prior to requiring the employee to use a respirator in the workplace.

As the Secretary notes, the respirator standard is a general industry standard that also applies to construction workplaces, pursuant to 29 C.F.R. § 1910.134 (preface)

[20] *See* OSHA's Administrative Penalty Information Bulletin. S. Brief at 39, Exhibit A.

("This section applies to General Industry (part 1910) … and Construction (part 1926)"). *See also* 29 C.F.R. § 1926.103 ("[t]he requirements applicable to construction work under this section are identical to those set forth at 29 CFR 1910.134…."). S. Brief at 31.

The Admissions in this case establish that on the day of the inspection, one or more of Respondent's employees were wearing respirators. Respondent had supplied the respirators, as the employees on the roof were exposed to asbestos fibers, and Mr. Rogers himself was wearing a respirator. The employees had not had medical evaluations to determine their ability to use respirators, and they had not been fit tested before using the respirators. Respondent had not provided training to its employees who were using respirators, and it did not have a written respiratory protection program. (CX-1, ¶¶ 7-14).

The testimony of CO Ortiz supports the above Admissions. According to his testimony, employees on the roof had on respirators; Mr. Rogers had one hanging around his neck, and his was a half-mask respirator with a cartridge. Mr. Rogers said another company was removing asbestos from the roof, that Roy's had supplied the respirators, and that all the employees had to wear them. A sign posted at the work site indicated that "RESPIRATORS AND PROTECTIVE CLOTHING ARE REQUIRED IN THIS AREA." (CX-16). He also said that none of the employees had been medically evaluated, fit tested or trained before wearing the respirators; further, Roy's did not have a written respiratory protection program.[21] (Tr. 138-65, 187-88; CX-2, CX-3).

Based on the foregoing, the Secretary has shown that the cited standards apply, that the terms of those standards were not met, and that employees were exposed to the cited conditions. She has also shown that Respondent had knowledge of the conditions.

[21] Messrs. Paul, Swift and Stevens also told CO Ortiz that they were required to wear respirators. They also told him that they were unaware of any written respiratory programs or the need for any medical evaluations, fit tests, or respiratory training.

Mr. Rogers, the supervisor at the site, clearly knew that all the employees at the site had to wear the respirators and that none of the cited standards' requirements had been met.[22]

CO Ortiz testified as to the serious nature of the violations. A medical evaluation is necessary to ensure the employee has the pulmonary capacity to wear a respirator. Wearing a respirator affects pulmonary capacity, and the weather the employees were working in was hot and humid. An employee without the proper pulmonary capacity could become dizzy or faint and fall from the roof.[23] (Tr. 144-45, 153-55). Fit testing is necessary to ensure the respirator fits the face properly and the seal between the nose and mouth is sufficiently tight so that no outside air can get through. (Tr. 147-49, 159-60). Training is necessary as employees need to know what they are being exposed to, the hazards of working with respirators, how to do a fit check, the cartridges to use, and how to clean and maintain the respirators. A written program with these elements is necessary so that employees can review the program and know what is required. (Tr. 145-51, 157).

The Secretary has proposed a penalty of $1,800.00 each for Items 1 and 2, Citation 1. CO Ortiz testified that the violations in Items 1 and 2 had low severity and lesser probability, in that the employees had been wearing the respirators for about two weeks and evidently had no problems with them. The only adjustment made to the gravity-based penalty was a 40 percent reduction for size, resulting in the proposed penalty of $1,800.00 each for Items 1 and 2. (Tr. 155-63). The Court finds a penalty of

[22] During his cross-examination of CO Ortiz, Mr. Najawicz attempted to elicit testimony that would show, for example, that the asbestos abatement was complete by the day of the inspection, such that respirators were not required, and that Mr. Armantraving had trained Respondent's employees in respirator use. (Tr. 189-98). CO Ortiz specifically testified the asbestos abatement was not completed and that the training Mr. Armantraving had provided to Roy's employees was asbestos awareness training. (Tr. 194, 230-32). In any case, in light of the above-noted Admissions and what Mr. Rogers told the CO, the Secretary has demonstrated the alleged violations relating to respirator use.

[23] S*ee Active Oil Serv., Inc. d/b/a Active Tank & Envtl. Servs.*, No. 00-0553, 2005 WL 3934874, at *6 (O.S.H.R.C.A.L.J. Feb. 4, 2005) (failure to provide medical evaluation before employees use respirators is serious violation because of risk of cardiac arrest).

$1,800.00 each for Items 1 and 2, Citation 1, appropriate. That penalty is assessed for each item.

Serious Citation 1, Items 3 and 4

Item 3 alleges a violation of 29 C.F.R. § 1926.1053(b)(1), which states in relevant part as follows:

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

Items 4(a) and 4(b) allege violations of 29 C.F.R. §§ 1926.1053(b)(15) and 1926.1053(b)(16), respectively, which provide as follows:

> (15) Ladders shall be inspected by a competent person for visible defects on a periodic basis and after any occurrence that could affect their safe use.
>
> (16) Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired.

As the Secretary points out, Respondent's answer denies Citation 1, Items 1 and 2, and Citation 2, Item 1, but does not mention Citation 1, Items 3 and 4. *See* Answer, ¶ IV. As she also points out, Respondent states in its answer that it corrected Items 3 and 4 of Citation 1. *See* Answer, ¶ X. The Secretary notes that pursuant to Commission Rule 34(b)(2), 29 C.F.R. § 2200.34(b)(2), any allegation not denied in the answer "shall be deemed admitted."[24] She further notes that at the hearing, when her counsel stated that Respondent had not denied Items 3 and 4, Respondent's representative conceded that was so. (Tr. 48, 51). S. Brief at 24-25.

[24] *See Fuellgraf Electric Company*, No. 92-1065,1993 WL 85427, at *1 (O.S.H.R.C.A.L.J. Mar. 10, 1993) (allegations not denied in answer are deemed admitted).

In view of the above, the Court finds that Items 3 and 4 are deemed admitted. In so finding, the Court notes CO Ortiz's testimony and photographs, which are summarized above, show the alleged violations. Specifically, CO Ortiz's testimony and photographs show that the cited standards apply, that their terms were not met, and that employees were exposed to the cited hazards. The record also shows knowledge, in that Mr. Rogers, Roy's supervisor at the site, knew or could have known of the conditions with the exercise of reasonable diligence. (Tr. 85-86, 111-31). While Mr. Najawicz attempted to elicit testimony from CO Ortiz on cross-examination to rebut the foregoing, the attempt was not successful. (Tr. 172-75). Items 3 and 4 are affirmed as serious violations. The CO testified the conditions could have resulted in falls from the ladder, which could have caused serious injury or death. (Tr. 131, 134-37).

The Secretary has proposed a penalty of $3,300.00 each for Items 3 and 4, Citation 1. The CO testified that these items had high gravity, in view of the fall hazard they presented, but that their probability was lesser.[25] The gravity-based penalty for each of these items was $5,000.00. That amount was reduced 40 percent for size and increased 10 percent for history, resulting in a proposed penalty of $3,300.00 for each item. (Tr. 131-38, 243-47). The Court finds the proposed penalties appropriate. A penalty of $3,300.00 each for Items 3 and 4, Citation 1, is assessed.

The Secretary's Declaration in regard to Attorney Fees

As set out in footnote 3 above, the Court directed the Secretary to submit a declaration setting out her total reasonable expenses and attorney fees with respect to the motion to compel and the motion for sanctions. The Secretary's counsel filed a timely

[25] The probability was lesser because there were two ladders employees were using to access the building. There were no problems with the ladder that was set up on the front side of the building. (Tr. 111-14, 132).

declaration which explains the basis of the attorney fees claimed for preparing the motions. Although Respondent was directed to file a response to the declaration, it did not do so. In the declaration, the Secretary's counsel sets out each date and the time expended for his work on the two motions, for a total of six hours. He also sets out his annual salary and his hourly salary rate; benefits and overhead are added to the salary rate for a total hourly rate of $154.76. The total amount of fees claimed is $928.56. In support of his declaration, the Secretary's counsel has attached a memorandum from the U.S. Department of Justice dated June 29, 2007, entitled "Attorneys Fees Calculations."

Based on the foregoing, the Court finds the total amount of attorney fees claimed in the declaration appropriate. An award in the amount of $928.56 is therefore assessed against Respondent with respect to the Secretary's motion to compel and motion for sanctions.[26]

Findings of Fact and Conclusions of Law

[26] Under Rule 37, of the Federal Rules of Civil Procedure, the movant is entitled to reasonable costs and attorneys' fees, where, as here, Respondent's conduct compelled the Secretary to file a Motion to Compel discovery; as well as a Motion for Sanctions. Rule 37(a)(5)(A) states that a court must require the party or its attorney, or both, to pay any reasonable expenses incurred in making a motion for an order compelling discovery, unless the noncompliance was "substantially justified" or other circumstances make an award of expenses unjust. *See Waters Edge Living, LLC v. RSUI Indem. Co.*, 4:06CV334-RH\WCS, 2008 WL 1816418 (N.D. Fla. April 22, 2008). Respondent offered no explanation regarding its failure to timely respond to the Secretary's discovery requests and the Court found that Respondent's noncompliance was not substantially justified. *See* Order Granting Secretary's Motion for Sanctions in this case. Commission judges have the authority to impose monetary sanctions against a private litigant for failure to comply with Commission Rules or the Federal Rules of Civil Procedure. *See Samsons Mfg. Co.*, 14 BNA OSHC 1914 (No. 89-1406, 1990) (consol.). In *Samsons*, the judge issued an order under Commission Rule 52(e) and Fed. R. Civ. P. 37 requiring an employer to pay attorneys' fees and expenses to a union with party status because the employer failed to comply with the judge's order granting the union expert access to its plant during discovery. The judge correctly noted that Commission Rule 52(e) authorized any sanction specified in Rule 37, and concluded that "[a] litigant in a commission proceeding is entitled to the same interpretation of Rule 37 as litigants in federal district courts." *Id.* at 1915. *See also Tower Painting Co.*, 22 BNA OSHC 1368, 1371 (No. 07-0585, 2008) (Judge awarded expenses and fees, including attorney's fees, associated with the Secretary's motion to compel as a sanction against Respondent permitted under Fed. R. Civ. P. 37(a)(5)(A)). If the court determines to award expenses and fees, it is for the court to decide what amount is proper. *See Addington v. Mid-Am. Lines*, 77 F.R.D. 750, 751 (W.D. Mo. 1978), *Disabled Patriots of Am. v. Niagara Group Hotels*, No. 07CV2845,2008 WL 941712 (W.D.N.Y. April 4, 2008). The party seeking reimbursement has the burden of proving the reasonableness of the hours spent and the hourly rate of recovery. *Id.* The Secretary has met her burden in this regard and the Court has decided the proper amount herein.

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

ORDER

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1910.134(e)(1), is AFFIRMED, and a penalty of $1,800.00 is assessed

2. Item 2 of Serious Citation 1, alleging violations of 29 C.F.R. §§ 1910.134(c)(1), 1910.134(f)(2) and 1910.134(k)(3), is AFFIRMED, and a penalty of $1,800.00 is assessed.

3. Item 3 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.1053(b)(1), is AFFIRMED, and a penalty of $3,300.00 is assessed.

4. Item 4 of Serious Citation 1, alleging violations of 29 C.F.R. §§ 1926.1053(b)(15) and 1926.1053(b)(16), is AFFIRMED, and a penalty of $3,300.00 is assessed.

5. Item 1 of Repeat Citation 2, alleging a violation of 29 C.F.R. § 1926.501(b)(11), is AFFIRMED, and a penalty of $9,240.00 is assessed.

6. An AWARD of attorney fees is ASSESSED against Respondent, in the amount of $928.56, with respect to the Secretary's motion to compel and motion for sanctions.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: June 29, 2012
Washington, D.C.