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. SANDY WOODMANSEE d/b/a S.A.W.S. Respondent.	:	SIMPLIFIED PROCEEDING OSHRC DOCKET NO. 11-1851

APPEARANCES:

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For the Complainant

Sandford A. Woodmansee
Sandy Woodmansee d/b/a S.A.W.S.
24 Beede Road
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For the Respondent, *Pro Se*

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

Background

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"). On May 2, 2011, the Occupational Safety and Health Administration ("OSHA") inspected the worksite of Sandy Woodmansee, d/b/a S.A.W.S. ("Respondent" or "S.A.W.S."). As a result of the inspection, on May 6, 2011 OSHA issued to S.A.W.S. a serious

citation containing two items. The total proposed penalty for the citation was $6,000. Respondent contested the citation and proposed penalty pursuant to §10(c) of the Act.

Citation 1, Item 1 alleges that S.A.W.S. violated 29 C.F.R. § 1926.102(a)(1). The item asserts that on May 2, 2011 an employee of S.A.W.S. was using a pneumatic nail gun without proper eye and face protection. The proposed penalty for Citation 1, Item 1 is $3,000. The standard provides:

> **§ 1926.102 Eye and face protection.**
>
> (a) *General* (1) Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

Citation 1, Item 2 alleges a violation of 29 C.F.R. § 1926.501(b)(13). The citation asserts that on May 2, 2011 an employee of Respondent was not protected from falling while working on a roof that was more than six feet above a lower level. The proposed penalty for Citation 1, Item 2 is $3,000. The 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.

On August 11, 2011, pursuant to Commission Rule 203(a), 29 C.F.R. § 2200.203(a), the case was assigned to Simplified Proceedings where pleadings were not required and the Federal Rules of Evidence did not apply at the hearing. (Tr. 8).

The Hearing

On November 22, 2011, Complainant filed the Secretary's Motion for Default and For Dismissal of Respondent's Notice of Contest ("Motion to Dismiss") based upon Respondent's alleged general inattentiveness and unavailability in this matter, including its failure to disclose any affirmative defenses and file its pre-hearing statement.[1] On December 1, 2011, the Secretary filed a request of the Court on behalf of *pro se* Respondent to continue the hearing set for December 12, 2011 at Boston, Massachusetts ("Motion for a Hearing Continuance").[2] On December 7, 2011 the Court granted Respondent's Motion for a Hearing Continuance and rescheduled the trial for February 8, 2012.[3]

By Order dated March 27, 2012, the Court scheduled the hearing to commence at 9:00 a.m., E.D.T., on May 18, 2012 in Boston, Massachusetts. The Court also ordered Respondent to file its pre-hearing statement and disclose its hearing documents by April 18, 2012. On May 8, 2012, the Secretary timely filed an amended pre-hearing statement.[4] In a letter accompanying that pre-hearing statement, the Secretary stated that "[t]o date the undersigned has received no documents, exhibits or other written materials of any sort from Mr. Woodmansee. Telephone messages have been left but not returned." On May 10, 2012, the Court sent a "Notice of Precise Hearing Location and Order" to both parties by Federal Express. This Notice informed the parties that the matter was scheduled for hearing on May 18, 2012 in Boston, Massachusetts.

At the hearing, the Secretary's attorney, Mr. Polianites, stated that he attempted to contact Respondent's owner, Mr. Woodmansee, by telephone three times over the prior two

[1] On December 7, 2011, the Secretary withdrew, without prejudice, her Motion to Dismiss in view of Respondent's representations that it would file a pre-trial statement and disclose to the Secretary, in advance, any documents and photographs Respondent intended to offer at trial, and appear at the hearing.
[2] The Secretary did not object to Respondent's Motion for a Hearing Continuance.
[3] The February 8, 2012 trial date was cancelled because of a reported settlement that never materialized.
[4] Respondent failed to file any pre-hearing statement.

weeks, including twice on the day before the hearing. He left messages, but never received any return call. Mr. Polianites also stated that, the day before the hearing, he made a final call to Mr. Woodmansee and left a message reminding him of the hearing, including the location and the time. (Tr. 34). Respondent failed to appear for the May 18, 2012 hearing in Boston, Massachusetts. The Secretary's attorney appeared at the hearing and presented her case. Through him, she offered several exhibits that were admitted into evidence at the hearing. (Ex. C-1 through Ex. C-5). The Secretary served a copy of her post-hearing brief upon Respondent on July 6, 2012. S.A.W.S. neither offered any exhibits into the record nor filed a post-hearing brief. (Tr. 10). Commission Rule 64 states that the failure of a party to appear at a hearing "may result in a decision against that party." 29 C.F.R. § 2200.64(a). A failure to appear may be excused where good cause is shown, but a request for reinstatement must be made within five days of the hearing. 29 C.F.R. § 2200.64(b). Respondent has made no such request. The evidence produced by the Secretary is uncontested since Respondent failed to appear at the hearing, proffer any trial exhibits, or file any post-hearing brief.

Jurisdiction

Under the Act, each employer "shall comply with occupational safety and health standards promulgated under this chapter [of the Act]." § 5(a)(2) of the Act, 29 U.S.C.§ 654(a)(2). The Act defines an employer as "a person engaged in a business affecting commerce who has employees." § 3(5) of the Act, 29 U.S.C. § 652(5). The Act further defines commerce as "trade, traffic, commerce, transportation, or communication among the several States or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside." § 3(3) of the Act, 29 U.S.C. § 652(3).

The evidence establishes that, at the time of the OSHA inspection, S.A.W.S. was nailing shingles to a roof with a nail gun. (Tr. 10, 22; Ex. C-3). Roof repair qualifies as "construction work" which is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1926.32(g). The construction industry as a whole affects commerce, and even small employers within that industry are engaged in commerce. *Slingluff v. OSHRC,* 425 F.3d 861, 866-67 (10th Cir. 2005); *Clarence M. Jones, d/b/a C. Jones Co.,* 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). The record also establishes that S.A.W.S. had at least one employee who was nailing the shingles to the roof. (Tr. 16; Ex. C-3, Ex. C-4 pp. 1-2).

Based on the evidence of record, the Court finds that Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of §§ 3(3) and 3(5) of the Act. Also, by virtue of Respondent's filing of its Notice of Contest, jurisdiction of this proceeding is conferred upon the Commission by § 10(c) of the Act, 29 U.S.C. § 659(c).

The Secretary's Burden of Proof

Having established that OSHA had appropriate jurisdiction over the worksite at issue, the Court turns next to the violations alleged by the Secretary. To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer knew or could have known of the existence of the hazard with the exercise of reasonable diligence. *Atl. Battery Co.* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).[5]

[5] The Court finds that the Secretary has proved all of the elements of a violation of each of the cited standards, and no defense was either offered at the hearing or found by the Court.

Discussion

Assistant Area Director ("AAD") Robert Carbone, Jr., testified at the hearing for the Secretary.[6] (Tr. 13). AAD Carbone testified that he was the AAD for the construction division of the OSHA Andover Office in Massachusetts. He has been employed at OSHA for six years. He started as an electrician in 1984 and has worked in the heavy construction industry for many years. From about 1999 through 2006, he worked on the "Big Dig" project in Boston, Massachusetts. He also taught at the International Brotherhood of Electrical Workers Apprentice Training School for 14 years. He has been involved in hundreds of cases involving residential fall protection citations. (Tr. 12-14).

On April 29, 2011, OSHA received an anonymous complaint that a roofer was working on a residential home without any fall protection or hard hat at 24 Edgemere Road, in Lynnfield, Massachusetts. (Tr. 15; Ex. C-2). As a result of that complaint, AAD Carbone assigned CO White to conduct an inspection of the site and he was dispatched to do so. Upon his arrival at the site on May 2, 2011, the CO identified himself, presented his credentials and conducted an opening conference with Mr. Woodmansee. (Tr. 10, 15). Mr. Woodmansee was identified as the owner of the company.[7] (Ex. C-1, p. 2). The house was a two-story single family residence with a single story shed and Florida room attached. Respondent had started the roofing job on April 28, 2011 and planned to complete it by May 12, 2011. (Ex. C-1, pp. 2-3).

Mr. White observed and photographed an employee on the roof, working on the single story section of the house, nailing shingles to the roof with a nail gun. The CO measured the height of the roof. The peak of the roof was 13 feet above the ground. The lowest point of the roof off the ground was six feet, ten inches. (Tr. 16, 22, 25-27; Ex. C-3, p. 4). The employee,

[6] Edward White, the Compliance Officer ("CO") who conducted the inspection, was unavailable to testify at the hearing. CO White had served as an OSHA CO for about 6 years at the time of the inspection. (Tr. 13, 15).
[7] Respondent performs small jobs and renovations, including kitchen cabinets.

identified as Jason Merrill, was not provided with any fall protection equipment and was not wearing any form of eye or face protection. (Tr.16, 20-22, 28; Ex. C-4). Mr. Merrill was Respondent's only employee and the only employee at the site. (Ex. C-1, pp.1, 4). The CO asked Mr. Woodmansee to remove the employee from the roof. (Tr. 15, 27).

Citation 1, *Item 1* alleges a serious violation of 29 C.F.R. § 1926.102(a)(1). The standard requires that employees wear appropriate eye and face protection when operating machinery or equipment that present a potential hazard to the eye or face. Respondent was engaged in construction work and was using a pneumatic nail gun to nail shingles to a roof. The nail gun's Operation and Maintenance Manual ("Manual") contains warnings that eye protection be used at all times when operating the nail gun. (Tr. 28; Ex. C-5, p. 3). The cited standard, 29 C.F.R. § 1926.102(a)(1), applies to this case.

The nail gun expels one inch and one-quarter inch nails at pressures ranging from 70-90 pounds per square inch. (Ex. C-3, p.2) The Manual clearly states that eye protection is required to guard against flying fasteners and debris, which could cause severe eye injury. The Manual states that the operator must wear eye protection that provides protection from debris to the sides and front of the eyes. (Tr. 28-29; C-5, p.3). When engaged in this activity the employee was not wearing any form of eye or face protection in plain violation of the standard. While using the nail gun, the employee was exposed to the hazard. (Tr. 29).

The evidence establishes that Mr. Woodmansee assigned and directed all work to be done by the employee, and that the work was in plain view of Mr. Woodmansee. (Ex. C-3, p.2). Mr. Woodmansee knew or should have known with the exercise of reasonable diligence that the employee was operating a nail gun without the appropriate eye or face protection. As the

supervisor at the site, Mr. Woodmansee's knowledge is imputed to S.A.W.S. *See Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3rd Cir. 1994).

Finally, the evidence also establishes that the violation was serious. A violation is properly characterized as serious if the Secretary establishes that, if an incident occurs, the result could be death or serious physical harm. *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1188 (No. 91-3144, 2000)(Consol.). The Manual for the nail gun plainly states that: "[e]ye protection is required to guard against flying fasteners and debris, which could cause severe eye injury." (Tr. 29; Ex. C-5, p.3). The OSHA 1-B also identifies possible results of an accident as "cuts, contusions, eye and face injuries, loss of an eye, death." (Ex. C-3, p.2).

The undisputed evidence establishes that: (1) the standard applies, (2) its terms were violated, (3) an employee was exposed to the hazard addressed by the standard and (4) Respondent knew or with the exercise of reasonable diligence should have known of the violative condition. The evidence also establishes that the violation could have caused serious physical injury. Citation 1, Item 1 is affirmed.

Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.501(b)(13). This standard requires that employees engaged in residential construction, working more than six feet above the lower level, be provided with appropriate fall protection. The evidence establishes that Respondent's employee was working on repairing a residential roof that ranged in height from 6 feet 10 inches to 13 feet above the ground. (Tr. 26-27, 29). Respondent was obligated to provide its employee with an appropriate form of fall protection. The cited standard, 29 C.F.R. § 1926.501(b)(13), applies.

Mr. Merrill was photographed working near the peak of the roof. (Tr. 26; Ex. C-4). He was not provided with any form of fall protection. There was no fall arrest system, safety net

system, guardrails, or other methods of fall protection at the site. (Tr. 19-22, 29-30; Ex. C-3, p.3, C-4, pp. 2-5). Mr. Merrill was working on the roof, over six feet above the ground, and was clearly exposed to the hazard. The cited standard was violated.

As with Item 1, the evidence establishes that Mr. Woodmansee assigned and directed all work to be done by the employee and that the work was in plain view of Mr. Woodmansee. (Ex. C-3, p.2). Mr. Woodmansee knew or, with the exercise of reasonable diligence, should have known that the employee was working on the roof without appropriate fall protection. The record establishes that a fall from the roof, nearly 13 feet high at its peak, could have caused death or serious physical harm. Mr. Carbone testified that the severity, or potential injury, resulting from the violation was high. (Tr. 30; Ex. C-3, p.3). Roofing is an inherently dangerous activity. *See Daniel Crowe Roof Repair,* 23 BNA OSHC 2001, 2017 (No. 10-2090, 2011) (roofing an inherently dangerous activity). A fall of over six feet to the ground is likely to result in death or serious physical injury.

Penalties

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties the Commission 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). The Secretary proposed a $3,000 penalty for each of the two items. When determining the gravity of a violation the Commission considers both the number of employees exposed and the duration of that exposure. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). The record establishes that one employee was exposed to the violative conditions for approximately four hours. (Ex. C-3, pp. 1, 3). On this evidence, the Court finds the Secretary properly rated the violations to be of moderate

gravity. (Ex. C-3, pp. 1, 3). The record also establishes that with only one employee S.A.W.S. is entitled to a 40% discount as a small employer. (Ex. C-1, p. 4). Respondent has no history of prior violations. (Tr. 30). Finally, the record establishes that S.A.W.S. has no written safety program and no training program for its employee. On that basis, the Court finds that it is not entitled to any credit for good-faith.[8] Considering the Section 17(j) factors, the Court finds that a penalty of $3,000 for each violation is appropriate. (Tr. 30-31).

Findings of Fact and Conclusions of Law

All findings of facts and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that

1. Citation 1 Item 1 for a serious violation of Section 5(a)(2) of the Act for a failure to comply with the standard at 29 C.F.R. § 1926.102(a)(1) is **AFFIRMED** and a penalty of $3,000 is **ASSESSED**; and

2. Citation 1 Item 2 for a serious violation of Section 5(a)(2) of the Act for a failure to comply with the standard at 29 C.F.R. § 1926.501(b)(13) is **AFFIRMED** and a penalty of $3,000 is **ASSESSED.**

[8] *See Daniel Crowe Roof Repair*, 23 BNA OSHC at 2017(A company's failure to provide its roofers with any form of fall protection or training demonstrates that it is not entitled to any credit for good faith in the penalty assessment.).

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SO ORDERED.

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

Date: September 25, 2012
Washington, DC