



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant

v.

Extendicare Health Care Services, Inc., d/b/a  
Arbors at Delaware,

Respondent.

OSHRC Docket No. **08-1013**

Appearances:

Linda M. Hastings, Esquire, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio  
For the Complainant.

Jeffrey J. Lauderdale, Esquire, Calfee, Halter and Griswold, LLP, Cleveland, Ohio  
For the Respondent.

Before: Administrative Law Judge Stephen J. Simko, Jr.

**DECISION AND ORDER**

On April 22, 2008, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's facility, Arbors at Delaware (Arbors), located in Delaware, Ohio. OSHA initiated the inspection after learning of an accident involving one of Arbor's employees. As a result of the inspection, Arbors was issued a Citation and Notification of Penalty. Item 1 alleged a serious violation of the general duty clause. Items 2 and 3 alleged violations of 29 CFR § 1910.332(b)(1) and 29 CFR § 1910.335(a)(1)(i). Arbors contested the citation. A hearing in this matter was held in Columbus, Ohio, on March 3, 2009. At the hearing, the parties announced they had settled Items 2 and 3. On May 18, 2009, the parties submitted a signed Stipulation and Settlement Agreement resolving Items 2 and 3. On May 19, 2009, the Court approved the agreement. At the hearing, the parties addressed Item 1, the remaining item. Following the hearing,

the parties filed post-hearing briefs. For the reasons that follow, Item 1 of Serious Citation 1 is vacated.

## **BACKGROUND**

Arbors, a skilled nursing facility with about 105 employees, is one of approximately 400 facilities operated by Extencicare Health Care Services. Arbors has eight departments, including, among others, nursing, maintenance and activities. Each department has a director who reports to Amber Downey, the Director of Operations. Ms. Downey is responsible for the entire facility. She is also responsible for ensuring the facility follows state and federal regulations (Tr. 9-10, 112-14).

Joseph Foggin had been the Maintenance Director at Arbors since April 2007. Before then, Mr. Foggin had held the same position at another facility, and he had 17 years of experience of working in maintenance in nursing homes before joining Arbors. On April 21, 2008, a contractor called Fire Protection Specialists (FPS) was at Arbors working on the sprinkler system. Before noon, Mr. Foggin and his assistant, Michael Hensen, had been installing a flat-screen television on the dining room wall. In so doing, they had been using the ladder FPS had brought with it. Around noon, the FPS workers went to lunch, leaving their ladder there. Ardella Layne, Arbors' Activities Director, thought she smelled smoke and told Mr. Foggin. Mr. Foggin could not smell anything, but he decided to climb up into the attic to see if there was a problem. To do so, he used the FPS ladder. After about two minutes, Mr. Foggin descended from the attic and reached for the ladder with his right foot. He put that foot on the ladder, and, as he tried to bring his left foot down, the ladder tilted. Mr. Foggin then grabbed onto the metal grid of the drop ceiling to keep from falling. However, the grid broke loose and Mr. Foggin fell, breaking his wrist and hitting his head on a handrail that ran along the lobby wall. Mr. Foggin was taken to a hospital, where he went into a coma. He was still in a coma at the time of the hearing (Tr. 11, 126, 162-64, 172-75; Exhs. C-13, C-15).

Larry Johnson is the OSHA Compliance Officer (CO) who investigated the accident. He examined the ladder Mr. Foggin had used, and he photographed it and the area where the accident had taken place. He also interviewed witnesses and requested documents. The CO measured the floor to the drop ceiling, in the area where Mr. Foggin fell, to be 93 inches. He also measured the plenum, the space in between the drop ceiling and the actual ceiling, to be 13 inches. Mr. Foggin

had accessed the attic, which was above the plenum. He was thus 106 to 108 inches, or about 9 feet, above the floor. The CO learned from Ms. Layne that she was watching as Mr. Foggin went up into the attic and then fell. He also learned that right before he fell, Mr. Foggin's right foot was touching the cap, or the very top, of the ladder (Tr. 9-21, 26-33, 38-39, 41-42, 45; Exhs. C-1 through 9, C-13).

In examining the ladder, the CO noted it was about 6 feet high. He also noted that on the first rung of the ladder, there was a label. The label read: "DANGER. Do Not Stand On Or Above This Step. YOU CAN LOSE YOUR BALANCE." He further noted that another label on the ladder stated that its highest standing level was 3 feet and 9 inches. The second label also referenced the ANSI standard for portable reinforced plastic ladders. In researching that standard, the CO determined the applicable provision was section 9.3.2. That provision stated as follows:

The user shall not step or stand higher than the step or rung indicated on the label marking the highest standing level of a ladder.

(Tr. 15-19, 37-38, Exhs. C-1 through C-4, C-12, p. 57).

The CO received various Extencicare documents during his inspection. One was entitled "Ladder Safety." That document stated: "Never use the top two rungs of a ladder for work purpose." A second document covered "Safety Rules and Regulations." That document stated: "Do not stand on top step of stepladder." (Tr. 34-36; Exhs. C-10, p. 1, no. 7, C-11, p. 2, no. 9).

The CO recommended the citation item alleging a violation of the general duty clause as there was no specific standard that applied in this situation. He believed Arbors violated the general duty clause because Mr. Foggin's use of the ladder presented a fall hazard. In addition, Arbors supervisors, such as Ms. Layne and Mr. Foggin himself, knew he had been using the ladder earlier that day. Also, Ms. Layne was watching as Mr. Foggin accessed the attic, and Arbors' own safety program recognized that using the ladder as Mr. Foggin had was a hazard. As to abating the hazard, the citation recommended following the manufacturer's safety labeling on the ladder and enforcing the portable ladder safety requirements set out in the ANSI standard (Tr. 45-51).

## **DISCUSSION**

Serious Citation 1, Item 1, alleges a violation as follows:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to falls from portable ladders:

- a. At the facility, the employer did not ensure that all portable step ladders in the workplace and available for employee use were utilized in a safe manner.

On or about April 21, 2008 an employee sustained serious injuries when he fell from the top of a six foot fiberglass reinforced portable ladder while investigating a (sic) odor in a (sic) overhead space.

Among other methods, one feasible and acceptable abatement of this hazard is to follow the ladder manufacturer's safety labeling on the first rung below the cap which states, DANGER – Do Not Stand On Or Above This Step. You Can lose Your Balance. Additionally, enforcement of portable ladder safety requirements when in use which includes observance of ladder safety labeling as set forth in ANSI A14.5 2007 Ladder-Portable Reinforced Plastic – Safety Requirements.

To prove a violation of the general duty clause, section 5(a)(1) of the Act, the Secretary must show that (1) an activity or condition in the employer's workplace presented a hazard to employees; (2) the cited employer or its industry recognized that the condition or activity was hazardous; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) there were feasible means to eliminate or materially reduce the hazard. *See Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996) (citation omitted). In addition, the evidence must show that the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition. *Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1186 (No. 00-0553, 2005). The knowledge of a supervisor may be imputed to the employer. *See, e.g., Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003).

Respondent contends that, according to certain Commission and Circuit Court precedent, when the violative conduct was committed by a supervisor, the Secretary has the burden of showing the supervisor's conduct was foreseeable (pp. 11-13, Respondent's brief). *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067-68 (No. 96-1719, 2000), citing to *Pennsylvania Power and Light v. OSHRC*, 737 F.2d 350, 3057-58 (3d Cir. 1984). *See also Mountain States Tel. and Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10<sup>th</sup> Cir. 1980). However, as the Secretary indicates, the Sixth Circuit, which has jurisdiction over the site of the accident, has held that unforeseeable employee misconduct is an affirmative defense the employer must plead and prove, whether a supervisory or non-supervisory employee committed the conduct (p. 8, Secretary's brief). *Brock v. L.E. Myers Co.*,

818 F.2d 1270, 1276-77 (6<sup>th</sup> Cir. 1987). Although Respondent did not plead an employee misconduct defense, this issue was litigated by implied consent. Therefore, if the Secretary prevails on all elements of her burden of proof, then the burden shifts to Respondent to prove the alleged violation was caused by unforeseeable or unpreventable employee misconduct. *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276-77 (6<sup>th</sup> Cir. 1987).

As to the first element, that is, whether Mr. Foggin's use of the ladder was a hazard, I find that it was. The CO testified that Ms. Layne told him she was 4 feet away and was watching as Mr. Foggin ascended and then descended the ladder. She also told him that Mr. Foggin's right foot was touching the cap of the ladder right before he fell (Tr. 45). This statement is consistent with Exhibit C-13, Arbor's incident report dated April 21, 2008. In that report, Ms. Layne recounted that Mr. Foggin "was at the top of the ladder holding onto the metal grid around the ceiling when it broke loose." Exhibit C-15, a June 2008 affidavit of Ms. Layne, states on page 2 that "Mr. Foggin reached down with his right foot onto the ladder." At the hearing, Ms. Layne testified that Mr. Foggin, in descending, "put his foot on the second rung of the ladder." She also put a "B" on C-1 to show which rung she meant. She then stated that he tried to move his right foot over to make room for his left foot and that that was when the ladder started to tilt (Tr. 174-75). Ms. Downey testified that her investigation of the accident revealed no evidence Mr. Foggin was on the top two rungs of the ladder. She said that Ms. Layne's statement in C-15 was not specific as to where Mr. Foggin had placed his right foot (Tr. 138-40). However, the CO testified that Mr. Hensen, who was 20 to 25 feet away from the accident scene, told him he saw one of Mr. Foggin's feet on the cap of the ladder right before he fell (Tr. 41-42). I find, based on the evidence as a whole, that Mr. Foggin placed his right foot on the cap of the ladder just before he fell, in violation of the label on the ladder and Arbors' work rules (Exhs. C-2, C-10, C-11). I further find that, even if he stepped on the rung Ms. Layne indicated with a "B" on C-1, doing so was also a violation of the same label and work rules. This is so because the rung indicated with a "B" on C-1 was the rung just below the cap of the ladder.

As to the second element, it is clear that Respondent and its industry recognized that the cited activity was hazardous. The label on the ladder shown in C-2 prohibits standing on or above the first rung of the ladder. Respondent's ladder safety rules prohibit using the top two rungs of a ladder (Exh. C-10). Another portion of Respondent's safety rules and regulations, prohibits standing on

the top step of a stepladder (Exh. C-11). Further, the ANSI standard noted above, prohibits stepping or standing “higher than the step or rung indicated on the label marking the highest standing level of a ladder” (Exh. C-12). Arbors had 8-foot ladders at the facility for its employees to use (Tr. 48-49, 61-62).

As to the third element, the record plainly shows that the cited activity was causing or was likely to cause death or serious physical harm. The accident itself, and the circumstances in which it occurred, establish this element. As to the fourth element, the Secretary has shown that there were feasible means of eliminating or materially reducing the hazard, that is, following the safety labeling on the ladder and enforcing the ANSI standard for portable reinforced plastic ladders.

The final element the Secretary must prove is that the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition. According to the Sixth Circuit, the Secretary may meet this burden by demonstrating that the employer did not provide adequate safety equipment or instruct employees properly on necessary safety precautions. Stated another way, an employer may not “fail to properly train and supervise its employees and then hide behind its lack of knowledge concerning their dangerous working practices.” *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276-77 (6<sup>th</sup> Cir. 1987) (citations omitted).

Ms. Downey testified she ensures all employees at Arbors are properly trained. All new employees go through a general orientation at the facility. The orientation covers general safety policies and procedures and training in blood-borne pathogens and tuberculosis. Depending on their positions, new employees may also attend training at other facilities. Maintenance employees attend training at Extendicare’s Dublin, Ohio facility. Extendicare’s Area Director of Maintenance conducts that training. Ms. Downey identified Exhibit R-6 as a training session Mr. Foggin attended on June 6, 2007. She noted Mr. Foggin’s name was on R-6, the topics covered were attached to R-6, and one topic addressed was ladder safety. She also noted she had received R-6 for her records and had provided it to OSHA during the inspection (Tr. 117-20).

Ms. Downey further testified that she also ensures employees follow Arbors’ policies and procedures and disciplines those who failed to comply. The disciplinary system, outlined in the employee handbook, sets out the three classes of offenses and the number of such offenses allowed before termination. Class I is for minor infractions, such as not attending a mandatory meeting. Class II is for major infractions, such as failing to perform a job duty. Class III is for severe

infractions for which immediate termination results. Ms. Downey identified Exhibit R-2 as various disciplinary reports. One involved a maintenance assistant being disciplined for cleaning up cigarette butts and leaving them in a shed rather than disposing of them properly, creating a safety issue. Mr. Foggin, the employee's supervisor, signed the report, as did Ms. Downey. Ms. Downey said all department directors report directly to her. She also said that Mr. Foggin had an assistant that reported to him and that Ms. Layne had an assistant that reported to her. However, no other employees reported to Ms. Layne. Ms. Downey noted that Jodi Mains, respondent's loss control specialist, performs quarterly safety audits at Arbors. In addition, Arbors performs monthly safety checks. These involve department directors checking departments other than their own by utilizing checklists devised by the facility's safety committee. The purpose of the checks is to ensure the departments are following the safety rules on the checklists (Tr. 114-25, 150-53, 156).

Ms. Downey described Mr. Foggin's 17 years of experience before he joined Arbors. She had no concerns about his competence and believed he was adequately trained, including in ladder safety. She said he was in charge of all maintenance at the facility, including the physical plant, electrical systems and plumbing. She also said although Mr. Foggin reported to her, she did not direct how maintenance did its work. Rather, any employee needing maintenance work done would put a work order in a box for that purpose, and maintenance would pick up the orders and prioritize the work. Ms. Downey knew Mr. Foggin and Mr. Hensen were hanging a television on the dining room wall on the morning of April 21, 2008. She was attending to various matters that morning and did not observe that work. Mr. Foggin went to her office to talk to her around noon that day. He told her the FPS employees had gone to lunch and that he himself was going to lunch. The next time she saw Mr. Foggin was shortly after that, when she saw him right as the accident occurred. At that time, she did not know what Mr. Foggin was doing or why he was on the ladder (Tr. 119, 126-33, 144-45).

Ms. Layne testified that as Activities Director, she is responsible for providing activities for the residents. She and her assistant play games with the residents, take them on outings and arrange for on-site entertainment. Ms. Layne further testified that she has no maintenance duties, that she supervises no one in maintenance, and that no one but her assistant reports to her. Her only interaction with maintenance is when she needs something fixed and fills out a work order. Ms. Layne further testified that she had put in the request for maintenance to hang the television on the

dining room wall. Her only involvement with that work was to tell maintenance where she wanted it put on the wall. She knew Mr. Foggin and Mr. Hensen had to use a ladder to access a cable in the ceiling. However, when she saw them, they were hooking up the cable to the back of the television, which did not require a ladder. When she told Mr. Foggin she smelled smoke, he got the ladder from the dining room and used it to climb into the attic above the lobby. Ms. Layne did not direct Mr. Foggin in this regard, and she did not believe she had the ability to tell him how to do his job. Ms. Layne believed Mr. Foggin was competent, experienced, and very knowledgeable about maintenance issues. She had no reason to believe he did not know how to use a ladder, and, as far as she knew, he did nothing wrong in how he utilized the ladder that day (Tr. 157-70).

As noted above, Ms. Downey testified she did not know what Mr. Foggin was doing at the time of the accident (Tr. 132-33). Her testimony is supported by the CO, who conceded that, under the circumstances, Ms. Downey did not have the ability to correct Mr. Foggin (Tr. 80). The CO also conceded Ms. Layne's duties had nothing to do with maintenance and that she did not supervise any maintenance employees (Tr. 81-83). Ms. Layne's testimony makes this clear, and she specifically stated she had no reason to believe Mr. Foggin was doing anything wrong in using the ladder as he did (Tr. 166). The Secretary has not established that either Ms. Downey or Ms. Layne had any awareness of the violative condition such that knowledge may be imputed to the employer.

The Secretary has established Mr. Foggin's knowledge of the violation, in view of his experience and training and the label on the ladder itself. However, I conclude his knowledge may not be imputed to the employer. The record shows Arbors had explicit rules that prohibited standing on the cap or first rung of a ladder (Exhs. C-10, C-11). The CO testified the rules were inconsistent (Tr. 188-90).<sup>1</sup> I have compared the rules, as set out above, and do not find them inconsistent. I find, therefore, that Arbors had work rules prohibiting the cited condition. I further find that employees at Arbors were adequately trained, including Mr. Foggin. Exhibit R-6 shows that Mr. Foggin attended a maintenance training session on June 6, 2007. The exhibit also shows that one of the topics was ladder safety. Specifically, the training session covered C-10, the facility's ladder safety

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<sup>1</sup>The CO also testified that Ms. Downey did not know the facility's rules about ladders, in that she did not know where to stand properly on the ladder in issue (Tr. 141-44, 188). I find that it would be unrealistic to expect a person in Ms. Downey's position at the facility to be aware of every single rule relating to maintenance matters. I also find that Ms. Downey had good reason to believe that Mr. Foggin would perform his job competently and safely, in light of his experience and training. In any case, as already noted, Ms. Downey did not observe Mr. Foggin's use of the ladder on the day of the accident (Tr. 132-33, 144-45).



rules. The CO himself conceded that Mr. Foggin was adequately trained in ladder use (Tr. 68, 195). Finally, I find that Arbors had a progressive disciplinary system that was implemented at the facility and that Arbor's rules, policies and procedures were enforced through that system. In addition, quarterly safety audits and monthly safety checks were performed to ensure that safety rules were followed. I observed Ms. Downey as she testified in this regard (Tr. 120-25, 152-53, 156). I found her credible and convincing and have no reason to doubt her testimony.

Based on the record as a whole, I conclude Mr. Foggin's use of the ladder on the day of the accident was so idiosyncratic and unforeseeable that his knowledge of the violative condition may not be imputed to the employer. This is particularly so since Mr. Foggin clearly was aware of Arbor's ladder safety rules. In addition, the facility had 8-foot ladders he could have used on the day of the accident. It would appear Mr. Foggin used the FPS ladder simply as a convenience. Regardless, the Secretary has not met her burden of proving that Arbors knew or with the exercise of reasonable diligence could have known of the cited condition. Item 1 of Serious Citation 1 is vacated.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

#### **ORDER**

Based upon the foregoing decision, it is hereby ORDERED:

Citation 1, Item 1, alleging a violation of the general duty clause, is hereby **VACATED**.

**\s\ Stephen J. Simko, Jr.**

STEPHEN J. SIMKO, JR.  
Judge

**Date: June 22, 2009**