United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. JAMES RUTLEDGE d/b/a RUTLEDGE ROOFING, Respondent.	OSHRC Docket No. 14-1665

Appearances:

Norman Garcia, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California
For Complainant

James Rutledge, Owner, James Rutledge d/b/a Rutledge Roofing, Nampa, Idaho
For Respondent

Before: Administrative Law John H. Schumacher

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). In response to an anonymous complaint that workers were working on a roof without fall protection, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite. The inspection took place on September 3, 2014, at Respondent's worksite located at 140 Cleveland Boulevard, Nampa, Idaho. (Ex. C-1). As a result of the inspection, on September 19, 2014, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent, alleging one serious violation with a total proposed penalty

of $2,400.00. The trial took place on Thursday, October 15, 2015 in Boise, Idaho. Both parties timely submitted post-trial briefs.

II. Stipulations and Jurisdiction

On December 29, 2014, the parties submitted a "Joint Stipulation Statement" to the Court. The Statement is identified in the record as Complainant's Exhibit No. 1. (Ex. C-1). In lieu of reproducing the entire set of stipulations, the Court shall refer to Exhibit No. C-1 as necessary. As part of those stipulations, the parties agreed that "the Secretary has jurisdiction to bring this action before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Occupational safety and Health Act (29 U.S.C. § 651 *et seq.*)." (Ex. C-1 at ¶ 1). Presumably, the parties intended to relate that Respondent is an employer "engaged in a business affecting commerce" within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970 and that the Occupational Safety and Health Review Commission has jurisdiction over this matter. The Court so finds. Respondent did not contest jurisdiction and, based on Commission precedent, is subject to the Act's coverage because it is involved in construction. *See Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529 (No. 77-3676, 1983) (finding that interstate market for construction materials and services places employer's business within a "class of activity that as a whole affects commerce" (citing *Usery v. Franklin R. Lacy*, 628 F.2d 1226 (9th Cir. 1980)).

III. Factual Background

Three witnesses testified at trial: (1) James Rutledge, owner of Respondent; (2) Jason Kraft, Compliance Safety and Health Officer ("CSHO"); and (3) David Kearns, OSHA Area Director for Boise, Idaho.

As indicated by the parties' stipulations and the testimony provided, the facts of this case are largely undisputed. (Ex. C-1). Complainant received an anonymous complaint indicating that construction workers were working on a roof without any form of fall protection. (Tr. 37, 67). Complainant responded to the complaint by opening an inspection of Respondent's worksite, located at 140 Cleveland Boulevard, Nampa, Idaho. When CSHO Kraft arrived at the worksite, he recorded video of Mr. Rutledge and Brandon Thompson working on the roof of an unoccupied Pizza Hut building. (Tr. 19, 35–36; Ex. C-2, C-5). After recording from an adjacent parking lot, CSHO Kraft approached the worksite and introduced himself to Mr. Rutledge. (Tr. 36).

The roof in question was two-tiered and required a ladder to climb to the first tier and yet another ladder to climb to the second tier. (Tr. 22–23, 40–42; Ex. C-2, C-5). Neither Rutledge nor Thompson was wearing personal fall arrest systems, nor was there any indication that fall protection was being used. (Tr. 39; Ex. C-2, C-5). The eave of the roof measured approximately 8.5 feet above the ground and was surrounded on all sides by concrete, asphalt, and shrubs. (Tr. 43, 50–52; Ex. C-2, C-5). CSHO Kraft also measured the slope of the roof and found that it was 2/12 (also referred to as "2 in 12"), which means that it rises 2 feet vertically for every 12 feet of length. (Tr. 38). Even though 2/12 is considered a "low-slope" roof, the roof was made of metal, and CSHO Kraft observed materials slide down the roof during the course of his inspection.[1] (Tr. 45–46; Ex. C-2). The entire roof was less than 50 feet across.[2]

During the course of the work observed by CSHO Kraft, Rutledge and Thompson often worked in fairly close proximity to one another. (Tr. 64–66). However, there were times when

1. The anonymous complainant reported that Thompson had repeatedly slipped on the roof. (Tr. 57). Respondent stipulated that this, in fact, occurred. (Ex. C-1 at ¶ 8).
2. Although no one explicitly stated "this roof is less than 50 feet", no one disputed the characterization proffered by Mr. Rutledge, and CSHO Kraft conceded as much when he agreed that, in this instance, a safety monitoring system would be sufficient assuming it was properly implemented. (Tr. 64).

Rutledge would have to get off of the roof to gather materials or take a break, during which time Thompson was on the roof alone. (Tr. 27). Even when they were on the roof together, both Rutledge and Thompson were engaged in separate (albeit related) work activities. (Tr. 40–42, 46–47; Ex. C-2, C-5). There were also times when Rutledge was working on a different tier of the roof than Thompson. (Tr. 40, 89–90).

During the course of his testimony, Rutledge stated that he considered himself to be a safety monitor for the purposes of satisfying the fall protection requirement. (Tr. 30). He based this opinion on the fact that he had previously been inspected by OSHA in 2011. Rutledge testified that, during the 2011 inspection, the CSHO ("Fred") characterized him as a safety monitor for the purposes of the fall protection standard. (Tr. 30). According to the colloquy between Mr. Rutledge and counsel for Complainant, it appears that Respondent was cited in 2011 for not protecting exposed holes in a roof. (Tr. 118–19). In addition, Rutledge testified that the CSHO requested that he construct a line around the perimeter of the roof to indicate that an employee was 6 feet away from the edge of the roof. (Tr. 121). Ultimately, the 2011 citation was settled informally as an other-than-serious violation of the Act, and no penalty was issued. (Tr. 119–120).

Based on his observations at Respondent's worksite, CSHO Kraft recommended that a single-item, serious citation be issued for Respondent's failure to have a fall protection system in place. The Citation was issued on September 19, 2014. Respondent filed a notice of contest and the case was later designated for Simplified Proceedings on November 14, 2014.

IV. Discussion

As noted above, the basic facts of this case are largely undisputed—Respondent and his employee were working on a roof that measured approximately 8.5 feet above the ground; the

roof was metal but was considered "low-slope"; and Respondent did not implement personal fall arrest systems, guardrail systems, safety net systems, or any combination thereof. The real dispute in this case is the application of the cited standard to those facts; specifically, whether Mr. Rutledge was serving as a safety monitor such that other fall protection systems were not required. Based on the following discussion, the Court finds that Mr. Rutledge was not a safety monitor, as that term is defined by the Act and relevant case law. Accordingly, the Court finds that Respondent violated the cited standard.

a. Citation 1, Item 1

Complainant alleged a willful violation of the Act as follows:

> 29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels, was not protected from falling by guardrail systems, safety net systems, personal fall arr [sic][3]
>
> (a) On the roof: On September 3, 2014, employees installing a metal roof were working on a 2/12 pitched roof at heights above 8.5 feet without fall protection.

The cited standard provides:

> *Roofing work on Low-slope roofs.* Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail systems, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

29 C.F.R. § 1926.501(b)(10).

3. It appears that the text of the standard has been cut and pasted onto the Citation, which resulted in a portion of the standard's language being cut off.

To establish a *prima facie* violation of section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the 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. *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-0531, 1991). Elements (1), (3), and (4) are easily satisfied under this set of facts.

First, Respondent was cited pursuant to 29 C.F.R. 1926.501(b)(10), which requires fall protection (of the type defined by the standard) when "employee[s] [are] engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels . . . ." A low-slope roof is defined as "a roof having a slope less than or equal to 4 in 12 (vertical to horizontal)." *Id.* § 1926.500. The roof in question measured approximately 8.5 feet above the ground and had a slope of 2/12. Thus, the standard applies.

Second, it was clear that Respondent and his employee were exposed to the cited condition. Both Rutledge and Thompson were observed working on the roof at the time CSHO Kraft arrived at the worksite, and neither were outfitted with personal fall protection nor were any other fall protection systems in place.[4] In that respect, Respondent had direct knowledge of the condition, as Rutledge was performing work on the roof alongside Thompson. (Tr. 65–66; Ex. C-2, C-5).

Finally, with respect to element (2), Respondent offers two primary reasons as to why he did not violate the standard: (a) the chimney stack on the roof would prevent Thompson from falling off the roof, thereby serving as *de facto* fall protection; and (b) he (Rutledge) was serving as safety monitor. The Court rejects these arguments.

4. See *infra* for further discussion regarding the failure to institute fall protection.

Although it is hypothetically possible that a fall could be prevented by the chimney stack, that does not constitute "fall protection" as defined by the cited standard. The cited standard lists the acceptable forms of fall protection on low-slope roofs, and § 1926.502 indicates what is required for the implementation of a particular fall protection regime. Neither the cited standard nor the standard that defines specific requirements for fall protection indicate that reliance on existing structural implements, such as a chimney stack, are acceptable. *See* 29 C.F.R. §§ 1926.501(h)(10), 1926.502. Further, the chimney stack only prevented falling to the ground in a very limited area of the roof. (Tr. 72; Ex. C-4). To the extent that work was performed outside of the "catch" radius of the chimney, it could not provide adequate protection against falls.

With respect to Respondent's argument that § 1926.501(h)(10) merely requires a safety monitor, the Court notes that § 1926.501 states that "[a]ll fall protection required by this section shall conform to the criteria set forth in § 1926.502 of this subpart." 29 C.F.R. § 1926.501(a). Safety monitoring systems, as referenced in § 1926.501(b)(1)(10), require the employer to appoint a competent person to serve as safety monitor, who, in turn, must meet the following criteria:

> (i) The safety monitor shall be competent to recognize fall hazards;
> (ii) The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner;
> (iii) The safety monitor *shall be on the same walking/working surface* and within visual sighting distance of the employee being monitored;
> (iv) The safety monitor shall be close enough to communicate orally with the employee; and
> (v) The safety monitor *shall not have other responsibilities which could take the monitor's attention from the monitoring function*.

29 C.F.R. § 1926.502(h)(1) (emphasis added).

In one respect, Respondent is correct. The roof in question is both low-sloped and less than 50 feet in width. As such, "the use of a safety monitoring system alone [i.e. without the

warning line system] is permitted." *Id.* § 1926.501(h)(10).[5] In order for a safety monitoring system to be sufficient, however, Respondent must comply with the requirements of 29 C.F.R. § 1926.502(h)(1). "The Commission has found that when the Secretary demonstrates a monitor has his back to other roofers, leaves employees to perform other duties, or is focused on other non-monitoring activities in lieu of monitoring activities, the monitor is unable to monitor effectively and an employer violates the monitoring standard." *Latite Roofing & Sheet Metal LLC, the Successor to Latite Roofing & Sheet Metal Co., Inc.*, 23 BNA OSHC 1368 (No. 09-1074, 2010) (ALJ Phillips) (citing *Holland Roofing of Columbus, Inc.*, 19 BNA OSHC at 2127 (finding a violation of the standard when the monitor had his back turned to other roofers for several minutes); *Upstate Roofing, Inc.*, 19 BNA OSHC 2084 (No. 01-0336, 2002) (finding that a safety monitor who turned his back on employees and focused on retrieving roofing insulation had responsibilities that took his attention away from monitoring)). It should be noted, however, that safety monitors are permitted to have other job duties so long as they do not impede the monitoring function. *See Beta Constr. Co.*, 16 BNA OSHC 1435, 1444 (citing 45 Fed. Reg. 75,618, 75,621 (1980)).

By his own admission, Rutledge occasionally performed work on a different level from Thompson, including times when he had to retrieve tools or materials from ground level, take a break, or even guide work from the ground. (Tr. 20, 25–27). As shown in the video exhibits presented to the Court, even when Thompson and Rutledge were on the same level, there were multiple occasions during the inspection wherein Rutledge was "focused on doing roofing work, cutting the pieces and maneuvering them into place" but not monitoring Thompson. (Tr. 44–48; Exs. C-2). *See Beta Constr. Co.*, 16 BNA OSHC 1435 (finding employer's practice, under which

5. This distinction might also explain why the CSHO in the 2011 inspection had Respondent install a warning line.

one employee moves backwards toward the edge of the roof while his monitor is engaged in smoothing out the roofing material, does not comply with the standard because it allows the monitor to be distracted). In fact, according to CSHO Kraft, during those periods of time "Mr. Rutledge was distracted, he [couldn't] perceive that Mr. Thompson [was] in danger, and whether or not there's environmental issues that come up or if he needed to warn him." (Tr. 46).

In *Beta Construction*, the Commission held that the facts of that case demonstrated "the monitor's ability to issue the required warning depends on a fortuity that he will be looking up at the other employee at the requisite times." *Id.* In other words, the monitor's other job duties so impeded his monitoring function that it was only by dint of luck that he would be looking in the right direction at the right time. This is not an adequate method of fall protection. The Court finds that is also the case in the matter at bar. The video evidence shows that there were times that Rutledge was not capable of monitoring Thompson, because he was fully engaged in cutting metal to be installed on the roof. (Ex. C-2). By his own admission, there was at least one time when Rutledge worked from the ground while directing Thompson to adjust a piece of metal that was being installed on the roof, which is also contrary to the requirements of a safety monitoring system. (Tr. 20–21). *See* 29 C.F.R. § 1926.502(h)(1)(iii).

Supplementing the foregoing, the Court would also note that the conditions on the roof were slippery. The video exhibits illustrate tools and material sliding down the metal roof, and Respondent stipulated to the fact that Thompson had slipped "several times, but did not fall, while performing roofing activities . . . ." (Ex. C-1 at ¶ 8).[6] Given those conditions, the facts described above, and in consideration of the fact that it was windy that day, the Court finds that

6. Respondent attempted to dispute the fact that Thompson was slipping on the roof based on the fact that there is no video or photographic record of him slipping. However, Respondent stipulated to the fact that Thompson had slipped at some point during the roofing project. Further, even if the Court were to assume that Respondent did not fully appreciate or understand the stipulation, determining whether Thompson slipped while performing his roofing duties is not necessary for determining whether a violation occurred in this case.

Respondent's safety monitoring system was inadequate. Whether he was on the ground directing work or on the roof but otherwise engaged in other duties, Rutledge did not fulfill his obligations as a safety monitor. *See* 29 C.F.R. § 1926.502(h)(1)(iii) (monitor shall be on same working surface as employee being monitored); *id.* § 1926.502(h)(1)(v) (monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function). Accordingly, the Court finds that Complainant has proved its *prima facie* case and that Respondent violated the standard.

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

Respondent requests that the violation be characterized as *de minimis* and that no penalty be issued. According to the Commission, "[C]ertain violations of the Act are *de minimis* because the hazards presented are too trifling to warrant the imposition of an abatement requirement or the assessment of a penalty." *Southwestern Electric Power Co.*, 8 BNA OSHC 1974 (No. 77-3391 *et al.*) (citations omitted); *see also General Elec. Co.*, 3 BNA OSHC 1031 (No. 2739, 1975) (holding de minimis violation can be found "where there is a direct relationship to safety and health, but that relationship is so remote as to be nearly negligible"). In this case, the hazard presented is neither trifling nor is its relationship to safety and health negligible. Instead,

Respondent's employees were exposed to a fall of more than 8 feet onto concrete, asphalt, and impalement hazards.

See Kulka Constr. Mgmt. Corp., 15 BNA OSHC 1970 (No. 88-1167, 1992) (finding that the possibility of a fall of up to 8 feet onto concrete was sufficient to establish that the violation was serious in nature). CSHO Kraft credibly testified that serious physical harm, including broken bones, concussion, and possibly hospitalization could result from a fall from the Pizza Hut roof. (Tr. 50–51). Based on the foregoing, the Court finds that the violation was serious. Accordingly, Citation 1, Item 1 shall be AFFIRMED as a serious violation of the Act.

V. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission 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. 1995).

Complainant proposed a penalty of $2,400 for this violation. As noted above, Kraft determined that there was a potential for broken bones and concussions, which led him to characterize the violation as being moderately severe; however, due to the fact that Thompson

was observed slipping on the roof, and due to the wind that day, Kraft determined that there was a greater probability of an accident. (Tr. 54–55). Complainant reduced the initial penalty by 60% due to the fact that Respondent was a small employer; however, he did not apply any additional reductions for good faith or history.

The Court generally agrees with Complainant's assessment of the violation—a fall from this roof exposed Respondent's employees to serious injuries. Further, given the condition of the roof, the presence of wind that day, and the fact that Thompson had been observed slipping on the roof, the Court also finds that the probability of an accident was significant. The Court is confused, however, as to why Respondent was not given credit for its violation history. The parties stipulated that Respondent received a citation in 2011 because his employees were not protected from tripping or stepping into or through holes in the surface of a roof deck. (Ex. C-1 at ¶ 13). According to Rutledge's testimony, that citation was eventually settled and characterized as *de minimis*. (Tr. 104). Although there was some confusion regarding whether the citation was characterized as *de minimis* or as other-than-serious, there was no evidence to indicate that the violation was characterized as serious or otherwise had a penalty associated with it. (Tr. 119–20). That being the case, Complainant appears to have disregarded its own Field Operations Manual, which states, "A reduction of 10 percent shall be given to employees who have been inspected by OSHA nationwide, or by any State Plan State and the employers were found to be in compliance or were not issued serious violations in the previous five years." Field Operations Manual, Directive No. CPL 02-00-159 at 6-7 (October 1, 2015). The inspection in this case occurred in 2014, or three years after the 2011 inspection, which is well within the five-year timeframe provided in the FOM. As such, pursuant to its own directive, Complainant should have applied a reduction for Respondent's violation history.

Based on the foregoing, the Court finds that a penalty of $2,000.00 is appropriate.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is hereby AFFIRMED as a serious violation of the Act, and a $2,000.00 penalty is ASSESSED.

SO ORDERED

/s/
John H. Schumacher
Judge, OSHRC

Date: May 27, 2016
Denver, Colorado