

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant,

v.

SRS Roofing & Sheet Metal, Inc.,

Respondent.

OSHRC Docket No. 09-0055

Appearances:

Margaret Sewell, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Michael L. Hurst, President, SRS Roofing & Sheet Metal, Inc., Waterford, Wisconsin
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to 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") conducted an inspection of an SRS Roofing & Sheet Metal, Inc. ("Respondent") worksite in Milwaukee, Wisconsin on November 4, 2008. As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging two serious violations of the Act. The Secretary voluntarily withdrew Citation 1 Item 2. Therefore, only Citation 1 Item 1 remained in dispute. Citation 1 Item 1 alleges a serious violation of 29 C.F.R. 1926.502(h)(1)(v) with a proposed penalty of \$875.00. Respondent timely contested the citation and a trial was conducted on September 9, 2009, in Milwaukee, Wisconsin. Both parties submitted timely filed post-trial briefs.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. At all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5).

Joint Pretrial Submissions; Slinghuff v. OSHRC, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of the Act, the 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 employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Respondent asserts "unpreventable employee misconduct" as an affirmative defense. To establish the affirmative defense of "unpreventable employee misconduct", the Respondent must show that: (i) it had a thorough safety program; (ii) the safety program was adequately enforced; (iii) the safety program was adequately communicated; and (iv) the violative conduct was idiosyncratic and unforeseeable.¹ The Respondent must present evidence concerning the manner in which it enforces its safety rules. *L.E. Myers Co.*, 16 BNA OSHC 1037, 1993 CCH OSHD ¶30,016 (No. 90-945, 1993). When the alleged misconduct is that of a supervisor², the proof of "unpreventable employee misconduct" is more rigorous and more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. *Archer-Western Contractors Ltd.*, 15 BNA OSHC

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A violation is foreseeable where the employer's safety program, or the training or supervision of its employees is inadequate. *Interstate Brands Corp.*, 20 BNA OSHC 1102, 2002 CCH OSHD ¶32,656 (No. 00-1077, 2003).

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The Respondent argued that Mr. Flintrop was not a supervisor. The evidence indicates that Mr. Flintrop was the foreman on the jobsite responsible for seeing that the work was done safely. Mr. Flintrop, while he had no authority to discipline, was empowered with the authority to direct Mr. Lynch to take corrective measures. Mr. Hoffman testified that he considered Mr. Flintrop the competent person on the job site. The court determines that Mr. Flintrop was a supervisor for the purposes of the application of the affirmative defense. *Globe Contractors, Inc.*, 132 F.3d 367, 373 (7th Cir. 1997).

1013, 1991 CCH OSHD ¶29,317 (No. 87-

1067, 1991). In such an instance, the Respondent must also establish that it took all feasible steps to prevent the incident, including adequate instruction and supervision of its supervisory employee. *Id.*

Stipulations of Fact

In their *Joint Pretrial Submissions*, the parties stipulated to the following facts: Respondent has an office and place of business at 818 Bakke Avenue, Waterford, Wisconsin, 53185 and is engaged in the installation of roofing, siding and sheet metal. On November 4, 2008, Respondent was working at the location of 540 S. 1st Street, Milwaukee, Wisconsin 53215, where it was in the process of installing sheet metal on a roof approximately 14 feet, 10 inches in height. On that date, Matthew Flintrop was the foreman on the site, and was designated as the safety monitor. Jared Lynch was the laborer on the jobsite being monitored by Mr. Flintrop. Mr. Flintrop was aware [*sic*] his duties as a safety monitor, and he was wearing a bright yellow shirt which identified him as such. No other form of fall protection was being used on this roof. This was the first day that Respondent was on this jobsite, and the duration of the job was only expected to last a few hours.

At approximately 1:40 p.m. on November 4, 2008, Compliance Safety and Health Officer (CSHO) Rachel Banks arrived on site and conducted an inspection. From her vehicle, Ms. Banks noticed there were two individuals working on the roof with no visible form of fall protection. Ms. Banks took pictures of the two individuals on the roof, both of whom appear[*sic*] to be laying sheet metal and conducting roofing work. A video recording of two individuals performing work on the roof with no fall protection in place was also taken by Ms. Banks. The photos and video demonstrate that Mr. Flintrop and Mr. Lynch were working on their knees and occasionally were leaning over the edge. Ms. Banks conducted an opening conference by showing her credentials and explaining the purposes and scope of the inspection. Mr. Flintrop identified himself as the foreman on the project, and informed Ms. Banks that he was also acting as the safety monitor. Mr. Flintrop admitted that he

was performing other duties while he was acting as a safety monitor. He stated that as a safety monitor, he is to be within 25 feet of the employee that he is monitoring and is to warn that employee when he gets to the edge. At the time of the inspection, Mr. Flintrop admitted that he failed to act as a safety monitor because he was “bored” and wanted the job done more quickly. Respondent later provided to Ms. Banks its safety policy regarding the use of fall protection, and also provided a one page sheet regarding “OSHA’s safety monitor training” which discusses the requirements of the safety monitor standard.

Additional Findings of Fact

Prior to the inspection which gave rise to the present case, in October 2007, CSHO Banks conducted an inspection of another of Respondent’s worksites. (Tr. 24). She observed one of Respondent’s employees using an aerial lift more than 10 feet above the ground while not tied-off. (Tr. 25, 47). In September 2008, on another of Respondent’s jobsites, Foreman Flintrop (the Safety Monitor at issue in the present case), was observed working on a roof without using fall protection. (Tr.174-176, 225). While the court makes no determination of whether those instances constituted violations of any OSHA regulations, Respondent acknowledged that the previous employee’s failure to tie-off on the aerial lift at one site, and Foreman Flintrop’s failure to use fall protection on a roof at another site, violated Respondent’s own internal safety policies. (Tr. 175-176, 223-226). Both of these prior instances provide the Respondent with knowledge that its supervisors and employees were violating company policy in the past.

Respondent employs a Safety Officer, Todd Hoffman, who conducts employee safety training and monitors employees for compliance with safety rules. (Tr. 83, 103, 109-116). He inspects three to four jobsites daily for safety compliance. (Tr. 84). Mr. Hoffman testified that Respondent has approximately fifty employees and typically operates on five to seven different jobsites at any given time. (Tr. 84). Mr. Hoffman randomly inspects Respondent’s jobsites and does not provide any

advance warnings of his visits. (Tr. 85). He acknowledged that smaller jobs of short duration are difficult for him to inspect. (Tr. 87). Mr. Hoffman did not inspect the jobsite at issue on the day of the alleged violation. (Tr. 87-88). Mr. Hoffman testified that safety monitoring is “the most boring job in the world, and you’ve got to constantly remind the guys you can’t be doing this, you can’t be doing anything...” (Tr. 93).

At the time of the present inspection, Foreman Flintrop had received written warnings for past safety violations and acknowledged that he “gets chewed out once a month” by the Safety Officer for various safety violations.³ (Tr. 125, 176, 198-199). Despite these repeated past occurrences, Foreman Flintrop was again serving as the person designated to supervise and monitor the safety of another employee on the present jobsite. (Tr. 178-179). Foreman Flintrop conceded that, while performing roofing work himself, he was not watching Mr. Lynch at all. (Tr. 197). Foreman Flintrop testified that at the time of the inspection, he was not afraid of getting caught working while he was supposed to be performing the duties of a Safety Monitor. (Tr. 191). Mr. Flintrop testified that everyone cuts corners on smaller jobs because they know they will not get inspected by Respondent’s Safety Officer and no one wanted to spend an hour setting up safety equipment for a job that could be completed in a short period of time. (Tr. 190).

Mike Hurst, Respondent’s President, co-owner, and representative during these proceedings, revealed his belief that the safety monitor regulation was pointless: “Matt standing on the roof watching Jared doesn’t really make Jared any safer than if Matt wasn’t standing on that roof watching Jared.” (Tr. 212).

In calculating the proposed penalty of \$875.00, the CSHO testified that the Respondent was

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Based on the testimony of Mr. Hoffman and Mr. Hurst, the Respondent had a progressive disciplinary policy. From the testimony it appears that its provisions were not followed in the discipline of Mr. Flintrop. Repeated written warnings would have subjected Mr. Flintrop to suspension and/or termination. No testimony was received that Mr. Flintrop was suspended without pay or terminated after his past written warnings or monthly verbal warnings.

provided with a 40% penalty reduction for its small size, a 15% penalty reduction for its good faith during the inspection, and a 10% penalty reduction for its lack of violation history. (Tr. 41).

Citation 1 Item 1

The Complainant alleges that the Respondent violated the following regulatory section:

29 CFR 1926.502(h)(1)(v): The safety monitor had other responsibilities which could take the monitor's attention from the monitoring function: (a) The jobsite located at 540 S. 1st St., Milwaukee; the safety monitor was performing roofing type activities when installing sheet metal on the exterior of a rubber roof.

The cited regulation provides:

29 CFR 1926.502(h): Safety monitoring systems. Safety monitoring systems [See §§1926.501(b)(10) and 1926.502(k)] and their use shall comply with the following provisions:

** * **

(2) The employer shall designate a competent person to monitor the safety of other employees and the employer shall ensure that the safety monitor complies with the following requirements:

** * **

(v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

The factual stipulations entered into by the parties and outlined above, as well as Complainant's Exhibits C-1 through C-6, establish all of the elements necessary to establish a *prima facie* violation of the cited standard. Respondent's employees were performing low-slope roofing work at heights exceeding fourteen feet. Therefore, an acceptable method of fall protection was required. *29 C.F.R. §501(b)(10)*. Respondent's chosen method of fall protection at this location was a safety monitoring system. This standard prohibits a safety monitor from having other responsibilities

which would distract him from his safety monitor duties.⁴ The standard clearly applies. The foreman on site, Matthew Flintrop, acknowledged his failure to adequately perform the safety monitor function because he was “bored” and wanted to finish the job more quickly. Investigative photographs and video clearly demonstrate that Foreman Flintrop was performing other work that distracted him from his safety monitor responsibilities. Specifically, Mr. Flintrop was performing duties which required him to be at the edge of the roof while Mr. Lynch was behind him. In this circumstance alone, Mr. Flintrop could not see, or assess, whether Mr. Lynch was unaware of a hazard or was acting in an unsafe manner. The standard was violated. The employee whose safety was supposed to be monitored by Foreman Flintrop, laborer Jared Lynch, was exposed to the violative condition. *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶131,463 (No. 93-1853, 1997). Knowledge of this condition is imputed to Respondent through Foreman Flintrop’s presence and participation in the violation.⁵ *Globe Contractors, Inc. v. Herman*, 132 F.3d 367 (7th Cir. 1997); *A.P. O’Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶129,223 (No. 85-0369, 1991). A supervisor’s participation in a violation is strong evidence that an employer’s safety program is lax. *Archer-Western Contractors Ltd.*, *supra*. Finally, the court agrees with CSHO Banks, that a fall from a roof over fourteen feet high could result in broken bones or death. (Tr. 38). Therefore, the citation was properly characterized as a serious violation. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1989 CCH OSHD ¶128,501 (No. 87-1238, 1989).

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The court notes that the safety monitor policy of the Respondent is more stringent than the regulation. The Respondent’s policy completely prohibits the safety monitor from performing other duties. (Ex. D, p.3). The regulation does not expressly require that a safety monitor perform that duty exclusively. Rather the standard sets forth performance criteria for determining the effectiveness of the safety monitoring. Specifically, the monitor must provide warnings whenever employees either (a) appear to be unaware of a hazard; or (b) are acting in an unsafe manner and the monitor must be close enough to see the employee and to be heard by them. The safety monitor may have other duties but not be so busy with other responsibilities that the monitoring function is encumbered. *Secretary of Labor v. Beta Construction Company*, 16 BNA OSHC 1435 (1993)(decided under prior, but substantially similar, regulation).

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As a foreman and competent person, Mr. Flintrop was the person responsible for enforcing OSHA standards. Mr. Flintrop was aware of the requirements and ignored them. His knowledge is attributable to the Respondent.

Affirmative Defense

Respondent alleges that Foreman Flintrop committed supervisory misconduct in this instance. Respondent had a work rule regarding the duties of designated safety monitors which closely mirrored the language found in the OSHA regulation. (Tr. 39). Respondent's Safety Officer also frequently visited jobsites to ensure compliance with Respondent's rules and policies. (Tr. 83-84). When violations of safety rules were discovered, Respondent maintains that they were corrected through the application of a progressive discipline policy which ranged from oral warnings to termination. (Tr. 100, 172). The court is satisfied that Respondent established a safety monitor work rule and has taken steps, through Safety Officer site visits, to discover violations of this rule.

However, the court is not convinced that Respondent's safety monitor rule is adequately communicated or effectively enforced. "Rules are more likely to be observed if their rationale is understood and it is made clear that they are not just arbitrary pronouncements but are grounded in practical reasons." *Brennan v. Butler Lime and Cement Co.*, 520 F.2d 1011, 1018 (7th Cir. 1975). Based on this record, it does not appear that Respondent's safety program adequately conveyed to employees the rationale and intent behind its rules regarding safety monitors. On the contrary, Mr. Hurst, who is President and part owner of the Respondent and represented them during the hearing, indicated a fundamental disagreement with the safety monitor concept. He asked Respondent's Safety Officer the following question on direct:

Mr. Hurst: Is there -- Is there any additional safety provided in your opinion, again, here, I'm not asking about the OSHA standard in particular, but in your opinion is there any additional safety provided by having one man on the edge of the roof doing the work that you saw being performed on that video while being watched by another man, or is that other man standing there watching him offering him no additional safety?

(Tr. 97-98).

Little can be deduced from the mere question asked, unless later considered in combination with Mr. Hurst's own testimony on the issue:

Matt standing on the roof watching Jared doesn't really make Jared any safer than if Matt wasn't standing on that roof watching Jared. (Tr. 212).

Clearly, if the President and co-owner of Respondent openly expresses his belief that the safety monitor regulation has no effect on safety, then the adequacy of the rule's communication to employees and enforcement of the rule are suspect. Not surprisingly, given President Hurst's attitude toward the safety monitor concept, Foreman Flintrop testified that at the time of the inspection, he was not afraid of getting caught working rather than performing his duties as Safety Monitor. (Tr. 191). Mr. Flintrop's testimony that everyone cuts corners on smaller jobs because they knew they would not be inspected by Respondent's Safety Officer, his self-professed monthly "chewing out" for safety violations, and his open resistance to using proper safety equipment on small jobs, all indicate a serious deficiency in Respondent's safety program.

Despite a history of safety violations, Foreman Flintrop was repeatedly sent out with other employees to supervise and direct work, with no more monitoring or oversight than was afforded him before his repeated safety violations. (Tr. 125-126). These facts, combined with the testimony of corporate representatives clearly indicating a lax attitude toward the safety monitoring function, which undoubtedly trickled down to first-line supervisors, convince the court that the Respondent's safety rules were not adequately communicated or effectively enforced when violations were discovered. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 2002 CCH OSHD ¶32,657 (No. 99-0018, 2003). Based on this record, Foreman Flintrop's failure to properly execute his duties as Safety Monitor was foreseeable. *Brennan v. Butler Lime and Cement Co.*, supra. Accordingly, Respondent failed to

establish the affirmative defense of unpreventable employee misconduct.

Penalty

In calculating the appropriate penalty for the violation, 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 Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶129,964 (No. 87-2059, 1993). One employee was exposed for less than an hour and Respondent did attempt to implement a safety monitoring system, even though the function was not adequately executed. Considering the totality of the circumstances, the proposed penalty of \$875.00 is appropriate.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1 is AFFIRMED and a penalty of \$875.00 is ASSESSED.

/s/
PATRICK B. AUGUSTINE
Judge, OSHRC

Date: February 2, 2010
Denver, Colorado