

Secretary of Labor,	:	
Complainant,	:	
v.	:	OSHRC Docket No. <b>00-1655</b>
M & M Roofing, Inc.,	:	<b>EZ</b>
Respondent.	:	

Appearances:

Patrick L. Depace, Esquire  
Office of the Solicitor  
U. S. Department of Labor  
Cleveland, Ohio  
For Complainant

Mr. Michael Stewart  
M & M Roofing  
Hamilton, Ohio  
For Respondent Pro Se

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

**DECISION AND ORDER**

M & M Roofing is engaged in the business of roofing construction. On August 3, 2000, respondent was engaged in construction work at a jobsite in Mason, Ohio. The Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's jobsite on August 3, 2000. As a result of this inspection, respondent was issued two citations.

Respondent filed a timely notice contesting the citations and proposed penalties.

Citation No. 1, item 1, alleges a serious violation of 29 C.F.R. § 1926.20(b)(2) as follows:

The employer's accident prevention program did not provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employer.

(a) The employer's accident prevention program did not provide for frequent and regular inspections of the jobsite and equipment to be made by a competent person in that such a person would have addressed the need to utilize recognized safety procedures and practices while installing roofing material on a residential construction project with working heights greater than 29.7 feet from ground level surfaces.

Citation No. 2, item 1, alleges a willful violation of 29 C.F.R. § 1926.501(b)(13) as follows:

(a) In lieu of conventional fall protection, the employer did not utilize an alternative fall protection plan nor comply with Appendix E, Subpart M, Fall Protection while engaged in roofing operations for residential construction activities:

- (1) Each employee was not trained in the procedures detailed in Appendix E;
- (2) A Controlled Access Zone (CAZ) was not established;
- (3) Slide Guards were not in place along the eaves of the roof;
- (4) Enforcement and use of full body harness, lanyard, and fall arrest was available but not utilized.

A hearing was held pursuant to the EZ trial procedures in Cincinnati, Ohio, on March 14, 2001. At the conclusion of the hearing, a bench decision was entered affirming Citation No. 1, item 1, as a serious violation and assessing a penalty of \$700 for that item. Citation No. 2, item 1, was reclassified to a serious violation, affirmed as serious, and a penalty of \$1,000 was assessed for that item.

Excerpts of relevant transcript pages and paragraphs, including findings of fact and conclusions of law, are attached hereto in accordance with 29 C.F.R. § 2200.209(f).

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The foregoing decision constitutes the 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 ORDERED:

1. Citation No. 1, item 1, is affirmed as a serious violation and a penalty of \$700 is hereby assessed.

2. Citation No. 2, item 1, is affirmed as a serious violation and a penalty of \$1,000 is hereby assessed.

/s/  
STEPHEN J. SIMKO, JR.  
Judge

Date: March 30, 2001

1 JUDGE SIMKO: Any other witnesses?  
2 MR. STEWART: That's it.  
3 JUDGE SIMKO: Did you want to testify?  
4 MR. STEWART: No, I've pretty much told you  
5 everything it is, Your Honor. I mean, you can find us  
6 guilty or not guilty. That's the way it is.  
7 JUDGE SIMKO: Are we at the end of the day on  
8 this part?  
9 MR. DEPACE: I believe so.  
10 JUDGE SIMKO: Let's take 15 minutes, and if you  
11 will come back in 15 minutes, I will give you a  
12 decision.  
13 (Whereupon, a short recess  
14 was taken off the record)  
15 JUDGE SIMKO: Is there anything either side  
16 would like to say at this time before I issue a  
17 decision?  
18 MR. DEPACE: No, Your Honor.  
19 MR. STEWART: No, Your Honor.  
20 JUDGE SIMKO: Okay, a written decision will  
21 follow. It will consist of a very short decision, a few  
22 pages attached, the applicable transcript pages which I  
23 relate would to during this decision.  
24 The threshold issue that I have to decide here is  
25 whether the employer is, in fact, or the Respondent is,

1 in fact, employer with employees.  
2 Now, that term is a term which is broadly construed  
3 under the Occupational Safety and Health Act, in light  
4 of the remedial statutory purpose to provide safe work  
5 places for all individuals and the economic realities of  
6 the relationship between the Company and the individuals  
7 working for that Company. So, it's a broadly construed  
8 term.  
9 Here, the Respondent sets the rates of pay for the  
10 two individuals who were testifying here today and  
11 controls the work of those individuals. He sends them  
12 home if needed if they don't perform the work properly  
13 or don't comply with his instructions, and he tells the  
14 employees when to start the various jobs.  
15 So, in light of the applicable case law in this  
16 matter, I am ruling that the Company is the employer, in  
17 fact, of these two individuals who have testified here  
18 today; therefore, is an employer with employees under  
19 the Act.  
20 To prove any violation of the Act, the Secretary  
21 must prove four elements of a violation: One is the  
22 applicability of the standard -- that is, the  
23 construction standard -- whether they apply to your work  
24 site or not; whether the Company failed to meet the  
25 requirements of the standard; whether employees were

1 exposed to the hazard; and whether the Company had  
2 knowledge of the violative conditions, not of the law  
3 but of the actual conditions.

4 So, keeping that in mind, I'm going to talk about  
5 each individual item separately.

6 The first alleged violation is an alleged violation  
7 of 29 CFR Section 1926.20(b)(2), that's 20(b)(2).

8 Specifically, it is alleged the employer's accident  
9 prevention program did not provide for frequent and  
10 regular inspections of the job sites, materials and  
11 equipment to be made by a competent person designated by  
12 the employer.

13 Specifically, it's alleged that the employerts  
14 accident prevention program did not provide for frequent  
15 regular inspections of the work site and equipment to be  
16 made by a competent person, and that such person would  
17 have addressed the need to utilize, recognize safety  
18 procedures and practices while installing roofing  
19 material on residential construction projects with  
20 working heights greater than 29.7 feet from the ground  
21 level surfaces.

22 Here, the Respondent admitted -- Mr. Stewart  
23 admitted on the stand -- that they had no fall  
24 protection program. There was some testimony by Mr.  
25 Stewart that an inspection was made prior to the start

1 of the work on this day. However, he made a statement  
2 to the compliance officer at the time of the inspection  
3 that no such inspection was made.

4 Given this conflict in testimony, I have to  
5 conclude that no complete inspection was made. While  
6 there may have been a viewing of the roof area, there  
7 was no inspection made on that day, and there were no  
8 regular inspections made of that job site by a competent  
9 person as designated by OSHA, in that such person might  
10 have addressed the need to utilize various recognized  
11 safety procedures and practices while installing the  
12 roofing materials, specifically a fall protection  
13 system.

14 The standard is clearly applicable to this job. It  
15 is a roofing job; it is in construction. There was a  
16 violation of the standard. The elements of the standard  
17 were violated, and the employees were working on this  
18 roof, at least one of the employees was working on the  
19 roof without fall protection. That would be Mr. Swope.  
20 The knowledge of the employer was admitted in an  
21 admission to the compliance officer that no such  
22 inspection was done, and the testimony here today that  
23 there was no fall protection program in place.

24 With regard to Citation 2, Item Number 2, there was  
25 testimony by Mr. Swope that he was on the roof beating

1 down boards and removing scrap materials and getting the  
2 roof ready at the beginning of the day of the day of the  
3 inspection and that he was not wearing safety equipment.

4 There were the boards that were up there, these slide  
5 boards or guide boards, that were nailed up there; but  
6 he was up there without a harness, and it was a 10/12  
7 pitch roof.

8 Now, there was also testimony by Mr. Swope that Mr.  
9 Stewart does tell him -- hollers at him from time to  
10 time to get safety equipment on, but he makes up his own  
11 mind. And, he also testified that he finds that the  
12 harnesses and the ropes can be dangerous.

13 In the past he has used the boards and not the  
14 harnesses and Mr. Stewart, the representative of M & M,  
15 has seen this. Mr. Swope testified that he uses his own  
16 judgment on what equipment to use, and his response also  
17 was that, "Time is money. The most important thing is  
18 getting the job done quickly.

19 Mr. Dryden testified that OSHA requirements are  
20 known by all roofers; requirements for fall protection  
21 system. Also, there was at least one employee on the  
22 roof, Mr. Swope, without any fall protection. He was  
23 observed getting off the ladder without a harness. This  
24 was a 10/12 pitch roof.

25 The general contractor requires fall protection,



1 and the Respondent has told his employees to use fall  
2 protection but says the employees don't listen.  
3 Now, one employee, Mr. Dryden, assessing all the  
4 testimony, I have to conclude that Mr. Dryden -- it was  
5 not proven that Mr. Dryden did not have on adequate fall  
6 protection. The reverse of that has not been proven  
7 that he actually did; it's just the Government has not  
8 proven that he did not. However, Mr. Swope did not have  
9 on adequate fall protection for this job.  
10 Here, the standard is clearly applicable. The  
11 terms of the standard were violated by not having  
12 sufficient guardrails or other fall protection system.  
13 This was an alleged violation of 29 CFR Section  
14 1926.501(b)(13) that says generally that each employee  
15 engaged in residential construction activity at six or  
16 more feet above the lower levels was not protected by  
17 guardrail system, safety net system, or personal fall  
18 arrest system, and it gives alternative means of  
19 protection in the citation.  
20 In lieu of the conventional fall protection, the  
21 employer did not utilize an alternative fall protection  
22 plan or comply with Appendix E, Subpart (m), fall  
23 protection, while engaged in roofing operations for  
24 residential construction activities:  
25 (1) each employee was not trained in the procedures

1 detailed in Appendix (e). Mr. Swope testified that he  
2 was not trained. A controlled access zone was not  
3 established. Mr. Stewart testified that this was not a  
4 controlled access zone job. Slide guards were not in  
5 place along the eaves of the roof.

6 There was some testimony that at least part of the  
7 time, there were slide guards in place along the eaves  
8 of the roof. Enforcement of a full body harness and  
9 lanyard and fall arrest system was available but not  
10 utilized. And, the proof has gone that Mr. Swope did  
11 not utilize that.

12 So, the terms of the standard were not met. At  
13 least one employee was exposed to the hazard. And,  
14 these individuals were working anywhere from 10 to 30  
15 feet above the ground without said protection.

16 That brings us to the question of willfulness.

17 Now, while this employer did not comply with the terms  
18 of the standard, he did take some steps in attempt to  
19 protect his employees. There were harnesses on the job  
20 site. There were some -- I don't remember the names of  
21 these things -- slide guards in place, but this being a  
22 10/12 pitch roof, a very steep roof, there was some  
23 evidence that one employee might have had such a harness  
24 on but the other one definitely did not.

25 So, this falls short of proving an intentional

1       disregard of the requirements of the OSHA standard or  
2       plain indifference to the safety of employees. This  
3       does not mean that the Company was without knowledge of  
4       the violations. It just means it does not rise to the  
5       level of willfulness for this case.

6       So, I'm going to affirm Citation 1, Item 1, as a  
7       serious violation. I'm going to affirm Citation 2, Item  
8       1, also as a serious violation. On Item 1 of Citation  
9       1, I'm assessing a total penalty of \$700.00. Item 1 of  
10      Citation Number 2, I'm assessing a total penalty of  
11      \$1,000.00. So the total penalty is \$1,700.00.

12     Anything further, gentlemen? Mr. Stewart?

13     MR. STEWART:     No.

14     JUDGE SIMKO:     Mr. Depace?

15     MR. DEPACE:     No, Your Honor.

16     JUDGE SIMKO:     All right, are we concluded today?

17     MR. DEPACE:     Yes.

18     JUDGE SIMKO:     All right, thank you.

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20                                 (Whereupon, the proceeding  
21                                 was concluded at 1:35 p.m.)

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