



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
721 19th Street, Room 407
Denver, Colorado 80202

Secretary of Labor,

Complainant,

v.

Jose Luna Roofing,

Respondent.

OSHRC DOCKET NO. 08-1636

Appearances:

Josh Bernstein, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Jose A. Luna, Jose Luna Roofing, Dallas, Texas
For Respondent

Before: Administrative Law Judge Sidney J. Goldstein

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 a Jose Luna Roofing ("Respondent") worksite in Farmers Branch, Texas on September 8, 2008. As a result of that inspection, OSHA issued one citation to Respondent alleging a serious violation of 29 C.F.R. 1926.501(b)(10). A penalty of \$1,500 was proposed for the violation. Respondent timely contested the citation and an administrative trial, pursuant to the Commission's Simplified Proceedings rules, was conducted on April 6, 2009, in Dallas, Texas. The Secretary appeared at the hearing ready to proceed. Respondent failed to appear. (Tr. 4). After a forty-minute delay to allow for Respondent's possible late arrival, the Secretary proceeded with the presentation of her evidence.

Jurisdiction

I find that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act and that Respondent is 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).

Factual Findings

On September 8, 2008, OSHA Compliance Safety and Health Officer Josh Flesher observed and photographed employees performing roofing activities more than six feet above the ground without using any form of fall protection. (Tr. 5; Ex. C-1 through C-10). CSHO Flesher initiated an inspection of the jobsite pursuant to OSHA's regional emphasis program on falls in the construction industry. (Tr. 5). Jose Luna, the owner of the business, was present during the inspection and confirmed to CSHO Flesher that he employed the individuals working on the roof and knew they were up there. (Tr. 6). CSHO Flesher also learned through conversations with the General Contractor and a review of blueprints for the project, that the roof was approximately 41 feet above the ground. (Tr. 7; Ex. C-1 through C-10). As a result of his inspection, CSHO Flesher recommended the citation at issue in this case.

Discussion

To establish a *prima facie* violation of the Act, the Secretary 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).

Citation 1 Item 1

29 C.F.R. 1926.501(b)(10) provides (in pertinent part):

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 system, warning line system and safety net system, warning line system and personal fall arrest system, or warning line system and safety monitoring system.

The Secretary's undisputed evidence established a *prima facie* violation of 29 C.F.R. 1926.501(b)(10). I find that a fall from an elevation of forty-one feet would undoubtedly result in serious injury or death. Therefore, Citation 1 Item 1 was properly characterized as a serious violation.

Section 17(j) of the Act requires the Commission to give “due consideration” to four criteria when assessing penalties: (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 ¶29,964 (No. 87-2059, 1993). Based on the Secretary's undisputed evidence, I find that the proposed penalty of \$1,500 is appropriate.

Alternatively, pursuant to Commission Rule 64, I find that Respondent's failure to appear at the hearing justifies vacating Respondent's Notice of Contest and affirming the proposed citation as issued. *Philadelphia Construction Equipment, Inc.*, 16 BNA OSHC 1128, 1993 CCH OSHD ¶30,051 (No. 92-0899, 1993).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1 is AFFIRMED as a serious violation of 29 C.F.R. §1926.501(b)(10) and a penalty of one thousand five hundred dollars (\$1,500.00) is ASSESSED.

Date: May 8, 2009
Denver, Colorado

/s/ _____
Sidney J. Goldstein
Judge, OSHRC