

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.

Deer Park Roofing, Inc.,

Respondent.

OSHRC Docket No. **10-1135**

Appearances:

Elizabeth Ashley, Esquire, Cleveland, Ohio
For Complainant

Nick Sabino, Cincinnati, Ohio
For Respondent

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

DECISION AND ORDER

Deer Park Roofing, Inc., is engaged in construction contracting. On March 31, 2010, the Occupational Safety and Health Administration (OSHA) conducted an inspection at the Respondent's jobsite in Cincinnati, Ohio. As a result of this inspection, OSHA issued a citation to respondent on May 18, 2010. Respondent timely filed a notice contesting the citation and proposed penalties. A hearing was held, pursuant to simplified proceedings in Cincinnati, Ohio on August 24, 2010.

At the close of the hearing, the parties made oral arguments in lieu of filing post-hearing briefs. A bench decision was entered following the hearing. For the reasons that follow the alleged violation of 29 C.F.R. §§ 1926.501(b)(10) is vacated.

Excerpts of relevant transcript pages and paragraphs, including the bench decision entered at the hearing, finding of facts and conclusions of law (Tr. 168-179) are included in this decision as follows: As stated earlier today, this case arose as a result of an inspection of Respondent's job site on March 31, 2010, at 6475 Glenway, in Cincinnati, Ohio. Following this inspections, a citation was issued to the respondent and a violation of 29 CFR, Section 1926.501(b)(10).

A hearing was held here in Cincinnati, Ohio, on the 24th of August, 2010. The parties were well represented on both sides, and after due consideration of all the evidence presented today, the citation is vacated and no penalty is assessed.

The following is a discussion as to the reasoning behind that decision.

In any OSHA case, the Government has the burden of proof of a violation. In order to prove that violation, the Government must prove the applicability of the standard. The standard is a construction standard. The Respondent is engaged in a roofing construction business; therefore, the standard does apply to the work performed by the Company.

The next element involves whether the terms of the standard were violated. The Secretary alleges respondent violated 29 CFR 1926.501(b)(10) in that:

“Each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges six feet (1.8 m) or more above lower levels were not 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 systems, or warning line system and personal fall arrest system, or warning line system and safety monitoring system:

"a) Located along the lower perimeter exterior entry way low-sloped roof area of the structure, which was less than 50 feet in its least dimension, there was an employee observed performing roofing work related activities without fall protection systems or methods utilized, exposing the employee to a fall potential in excess of 12 feet."

And, the standard allegedly violated reads follows:

"(10) 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 six 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, 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 a safety monitoring system alone [i.e. without the warning line system] is permitted.”

The terms of the standard were violated to the extent that there was no means of fall protection for the roofing activity that was being performed on unprotected sides six feet or more above the lower level. There was no guardrail system, safety net system, personal fall arrest system or combination of warning line system and guardrail system, or any other monitoring system, or any other fall protection system. Since there was no fall protection being provided in this location, the terms of the standard itself were violated.

There was employee exposure in that an employee of the Respondent, the foreman, Mr. Merz, was working on a roof canopy area without fall protection. He was working at a height of approximately 12 feet, eight inches above the lower level. This was a canopy which was approximately nine feet, nine inches from the building out and approximately ten feet, nine inches wide. It was a wooden structure. The roof was being applied at the time.

The employee was leaning over the edge of the roof of the canopy without any fall protection. He was installing washers and fasteners on the roof deck. Insulation was going to be applied over that. So, this was part of the roofing operation. The deck had a four-inch parapet. He was using a drill or screw gun to install these washers and fasteners. He was approximately two inches from the edge of the platform and was leaning towards the edge. He was clearly exposed to a fall hazard.

The next element is knowledge of the Employer. And, here, the foreman himself was exposed. He clearly knew that he was working at the edge of this platform without fall protection. Another inquiry must be made here as to whether this action by the Employer's foreman was foreseeable by the Company.

This foreman had worked on three previous canopy jobs and had been tied off on all three. The Employer had reason to believe that the employee, who had been instructed prior to this job to tie off or provide fall protection, would do so.

The Company has a hundred percent fall protection program. The foreman here was in violation of that policy.

Exhibit C-2, Respondent's job sheet, requires a hundred percent fall protection for this specific job site. Mr. Merz, the foreman, had all fall protection in his truck, and he should have used this equipment that was available to him. He had been instructed prior to the job to use this fall protection equipment.

A representative of the general contractor, Derek Engineering, had a conversation with Mr. Merz on the requirement for fall protection while working on the canopy.

Mr. Merz at first told the compliance officer who was inspecting this job that he was using a monitor rather than tying off. This is allowed by the standard, but Mr. Merz later said that the employee that he claimed first to be the monitor was really not a monitor but was just watching him.

The employee later went to work at an upper level, out of sight of the foreman, and could not have served as a monitor in this situation. The Respondent does not use monitors in its work but primarily uses a form of tying off.

Here there was no option used under the standard 1926.501(b)(10). No conventional fall protection was used and no monitoring, occurred. It was feasible for the Company to use anchors for fall protection lines and harnesses. Respondent has a policy for a foreman to call the main office or other officials with the Company if there are changes to the fall protection plan that was in place for this job and for all jobs. Here, Merz did not call to make a change to use a monitor or to have no fall protection. He just did this on his own, and this was in direct violation of the Respondent's policy. In this situation the Respondent's audit checklist also includes fall protection.

I find that Merz here was a foreman and was, therefore, part of management. I find that it was not foreseeable that Merz would work at the edge of this platform without any form of fall protection. He had worked, as I stated earlier, on three canopy locations and used the fall protection. It was not foreseeable that he would not in this case.

A foreseeability test was applied by the Fifth Circuit in the W. G. Yates case. We're here in the Sixth Circuit which may or may not have a foreseeability test. Presuming there is no foreseeability test, I'm going to address the Respondent's safety program and the defense of unpreventable supervisory employee misconduct.

In this case, I found it necessary to exercise prerogative of the Administrative Law Judge, and I recalled Mr. Sabino to explain more fully his safety and health program. Mr. Sabino testified -- and I find the testimony to be credible -- that the training provided to employees includes the following: There is initial training of a four-hour session on the first day that employees are hired. It addresses fall hazards, including the fall protection program. Part of this training involves the recognition, the prevention and elimination of fall hazards. As part of his training, there is a video from the Roofing Association which is an in-depth video on fall protection. They also train on overhead crane, forlift, rigging and fall protection, and this is an in-depth, one-hour type training.

Each Monday, there is a training session which can be characterized as a tool box meeting. It's mandatory, it's done in the office. Many times they address two to three weeks in advance upcoming jobs, and these tool box meetings and Monday meetings apply specifically to upcoming jobs. They often read the safety manual, or there are specific topics that are addressed in these meetings.

Managers meet every Tuesday or Thursday. In addition to getting material quotes and manpower needs which are job specific, they have job specific fall protection plans in place for all the jobs prior to starting, and this is discussed at these management meetings.

They also have daily huddle meetings. These are done to assure that crews have adequate equipment on the job and the basics. It's a proactive approach rather than a reactive approach, according to Mr. Sabino.

Additionally, the safety co-op, of which Respondent is a part, consists of four or five roofers in the area. It provides four to five training sessions per year, once every three months approximately on Saturdays to train on specific roofing problems.

The 10-hour and 30-hour OSHA training are provided. Mr. Sabino testified as to respondent's work rules that are designed to prevent the specific violations that are alleged in this case to eliminate employee exposure to those hazards covered by this standard, and that the work rules are designed to prevent violations such as this. This is also addressed in, I believe it's Exhibit C-5, fall protection provisions.

It appears that the Employer has adequately communicated these rules to its employees. There has been some testimony that the foreman in this case has difficulty reading, so these matters are conveyed verbally.

They're also conveyed in writing to other employees as well as verbally. This is done through safety training, written safety manuals, specific work instructions and tool box meetings as we've discussed earlier.

The Employer in this case has taken steps to discover violations through on site visits. There was some testimony there are sometimes once-a-week on site visits, sometimes once every two days, but these are regular and recurring. If employees are found in violation, then action is taken. But, these are the steps that are taken to discover violations, plus discussions at the various tool box meetings managers' meetings and daily huddles.

Now, the question that was discussed greatly during this hearing was whether the Employer has effectively enforced the rules when violations have been discovered, and I'm finding that while the program be a bit vague, it's sufficient. Given the fact that Respondent has 21 employees, he communicates with employees individually. He treats them on an individual basis, based on their work history, the nature of violations as he's going through. He does have a work rule and an enforcement program. While it might not be the Cadillac of all programs, it appears to be sufficient to address the situations that this Company encounters.

It was explained that these disciplinary actions for safety violations in C-3 were primarily addressing minor violations, the progressive nature of it. There is an escape clause for serious offenses where the serious violation of the safety and health program may be considered insubordination and can result in termination. So, that can be done on the first violation.

It appears from testimony that Mr. Merz had long-term knowledge of Respondent's requirements for fall protection and long-term knowledge of the fact that he would be disciplined if he didn't tie off in a hundred percent of the cases or at least provide fall protection in a hundred percent of the cases.

He violated the work rule on his own. He had knowledge of the safety program and disciplinary program, and in light of that, he still went on his own. He did not have a good explanation, but did admit that this was his doing and not his Employer's. He had clear knowledge

that whenever plans were changed on the job, that he was to call other officials of the Company, and he failed to do so here.

An employer is required to do what is reasonable in setting up a safety and health program. While as said earlier, this might not have been the Cadillac of programs, it may have some deficiencies; however, I don't believe these deficiencies were fatal in this situation. I believe that what was done was sufficient to address this particular situation. The fact that Mr. Merz had received two verbal warnings in the past does not dictate that he should not have been allowed to serve as a foreman on this job. The one where he was sent home without pay involved, I believe, the warning lines. A warning line was down and he continued to work. Another one required OSHA training. They did not involve working at the edge of a platform without being tied off.

I don't believe that this was foreseeable by the Company and was, in fact, supervisory employee misconduct. Therefore, the item has been vacated, and there is no penalty assessed.

You will be receiving a written decision, incorporating my thoughts here that are on the record as well as possibly some further treatment of the issue in the written decision. As soon as I get the transcript in from Ms. Carlin, I will incorporate that into the decision and send that out. That should not be too long. Anything further from either side? No, Your Honor.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

Citation No. 1, Item 1 alleging a serious violation of 29 C.F.R. §§ 1926.501(b)(10) is vacated and no penalty is assessed.

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Date: September 20, 2010

Judge Stephen J. Simko, Jr.