



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3419

Phone: (202) 606-5400  
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SECRETARY OF LABOR  
Complainant,  
v.  
M & W ROOFING CO., INC.  
Respondent.

OSHRC DOCKET  
NO. 94-2179

**NOTICE OF DOCKETING  
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 4, 1995. The decision of the Judge will become a final order of the Commission on September 5, 1995 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before August 24, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary  
Occupational Safety and Health  
Review Commission  
1120 20th St. N.W., Suite 980  
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

*Ray H. Darling, Jr. / SKA*

Date: August 4, 1995

Ray H. Darling, Jr.  
Executive Secretary

DOCKET NO. 94-2179

NOTICE IS GIVEN TO THE FOLLOWING:

Richard J. Fiore, Esq.  
Regional Solicitor  
Office of the Solicitor, U.S. DOL  
230 South Dearborn St.  
Chicago, IL 60604

Mark Bourgeois, President  
M & W Roofing Co., Inc.  
PO Box 1389  
Waukesha, WI 53187

Sidney J. Goldstein  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
Room 250  
1244 North Speer Boulevard  
Denver, CO 80204 3584

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SECRETARY OF LABOR,  
Complainant,

v.

M & W ROOFING CO., INC.,

Respondent.

OSHRC DOCKET  
NO. 94-2179

**APPEARANCES:**

Leonard Borden, Esq., Office of the Solicitor, U.S. Department of Labor,  
Chicago, Illinois

Marc Bourgeois, President, M & W Roofing Co., Inc., Waukesha, Wisconsin

Before: Administrative Law Judge Sidney J. Goldstein

**DECISION AND ORDER**

This is an action by the Secretary of Labor to affirm two items of a serious citation and one item of a repeat citation, alleging violations of safety regulations adopted under the Occupational Safety and Health Act of 1970. The matter arose after a compliance officer inspected a workplace of the Respondent, concluded that it was in violation of the regulations in question, and recommended that the citations be issued. The Respondent disagreed with these citations and filed a notice of contest. After a Complaint and Answer were filed with this Commission, a hearing was held in Milwaukee, Wisconsin.

Item 1 of citation No. 1 alleged that:

An access ladder or equivalent safe access to scaffold(s) was not provided:

(a) Walgreen store under construction: Bricklayer scaffold consisting of three 6'-0" sections in height (approximately 18'-0" above ground level) was not provided with a ladder for safe access. Employees egressed and accessed scaffold by climbing up/down cross members.

in violation of the regulation found at 29 CFR 1926.451(a)(13) which provides:

An access ladder or equivalent safe access shall be provided.

At the hearing the compliance officer testified that he observed an employee of the Respondent working on a scaffolding at least twelve feet above ground level. He checked the frontal construction area but noted no access ladder or other safe access to scaffolding. He asked the employee how he got to the platform and was told he ascended up the side of the platform. A photograph of the area disclosed no ladder or substitute safe access to the platform. This item of the citation is affirmed.

Item 2 of citation No. 1 stated:

Standard guardrails and toeboards were not installed at all open sides and ends on tubular welded frame scaffolds more than 10 feet above the ground or floor:

(a) Walgreen store under construction: T.W.F. bricklayers scaffold consisting of three 6'-0" sections in height (approximately 18'-0" + above ground level) spanning estimated distance of 90'-0", did not have guardrails and toeboards installed.

in violation of the regulation at 29 CFR 1926.451(d)(10) which reads:

Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1x6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section.

The compliance officer testified that an employee of the Respondent worked on two platforms. One was twelve feet above ground level, and the other was eighteen feet above the ground. There were no standard guardrails or toeboards on either level, thus subjecting its employee to a fall of ten feet or more. These platforms were fully planked, about six feet wide, and immediately adjacent to the building under construction. The compliance officer

considered the lack of guardrails and toeboards a violation of the regulation, and took photographs of this infraction. This item of the citation is therefore affirmed.

Item 2 of citation No. 2 alleged that:

Employees were not protected by protective helmets while working in areas where there was a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns:

(a) Walgreen store under construction: Employees entering and leaving building at Northwest corner not wearing head protection in area where overhead work was in progress.

M & W Roofing Co. was previously cited for a violation of 29 CFR 1926.100(a) which was contained in OSHA Inspection No. 103521555, Citation (sic) No. 1, Item 1 issued 6/29/94.

in violation of the regulation at 29 CFR 1926.100(a) reading as follows:

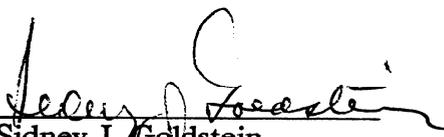
Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

With respect to this item of the citation, the compliance officer noted an employee of the Respondent working on the platform without a hard hat. A photograph of the incident confirms the officer's observation. Nor was a hard hat worn while this worker ascended and descended the platform area. This portion of the citation is also affirmed.

Summarized, the compliance officer's testimony was to the effect that the Respondent was in violation of the three items of the citations, all of which infractions were confirmed by photographs taken at the time of the inspection. The citations are therefore affirmed.

There will be adjustments to the suggested penalties. With respect to item 1 of citation 1 only one employee of the Respondent was involved. With respect to item 2 of citation 1 only one employee was involved, and he worked immediately adjacent to the building and about six feet from the edge of the planking, thus reducing the chances of falling. With respect to the repeat citation, again, only one employee was involved and subject to harm only while ascending or descending from the platform on the crossbars of the scaffolding. While working on the platforms there was no overhead construction in progress.

Accordingly, citation No. 1, item 1, is affirmed with a penalty of \$400.00. Citation No. 1, item 2 is affirmed with a penalty of \$400.00. Citation No. 2, item 2 is affirmed with a penalty of \$300.00.

  
Sidney J. Goldstein  
Judge, OSHRC

Dated: July 28, 1995