
SECRETARY OF LABOR,

Complainant,

v.

HORIZON ROOFING & SHEETMETAL,
INC.,

Respondent.

OSHRC Docket No. 96-0064

Appearances:

Esther D. Curtwright
Office of the Solicitor
U.S. Department of Labor
For Complainant

E. Michael Ruberti
Ruberti, Girvin & Ferlazzo, P.C.
Albany, New York
For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

On December 18, 1995, Horizon Roofing & Sheetmetal, Inc. ("Horizon"), was issued a citation stemming from the inspection of a worksite located at a United States Postal Service facility in Albany, New York. At the time of the inspection, Horizon was engaged in the removal and replacement of the postal facility's roof (Tr. 179, 972). The inspection was conducted in response to an accident which occurred at the worksite on September 26, 1995, involving a Horizon employee. The citation alleges that Horizon committed six serious violations of various construction standards, two of which were withdrawn by the Secretary.¹ A total penalty of \$22,400 is proposed by the Secretary.

¹ The fourth item of the citation was withdrawn by the Secretary at the hearing, and the fifth item of the citation was withdrawn in the complaint (Tr. 7, 26; Secretary's Complaint at 2). Also in her complaint, the Secretary amended the date of violation for all but one of the citation items to include the two-week period prior to the September 26, 1995 accident (Tr. 37). Specifically, the citation was amended to read that the violations occurred "on or about 9/12/95" (Secretary's Complaint at 2-3). Having failed to amend the date of violation for the sixth citation item, still in issue, the Secretary has included in her reply brief a motion to amend on the grounds that the issue was implicitly tried (Secretary's Reply Brief at 11-13, 16). For the reasons discussed *infra*, the motion is denied as moot.

THE WORKSITE

Horizon was hired to remove and replace the postal facility's roof, its size estimated to be equivalent to seven football fields (Tr. 179, 1257). The existing roof consisted of three layers, each of which required a different means of removal and, in some cases, disposal. The first layer was composed of round stone or gravel, also known as "ballast"; the second layer was composed of insulation material similar to Styrofoam, known as "Dow board"; and the third layer was composed of "two-ply" asphalt and paper, known as "skins" or "built-up roof" (Tr. 21, 179, 393-94, 507-08, 686-87, 973, 994-95, 1168, 1170-71; Judge's Exhibit A & Exhibit R-7). The removal of these materials was performed by Horizon's "ripping" crew of 8 to 14 employees who worked on the roof about 100 feet ahead of Horizon's reroofing crew (Tr. 91-92, 456-57, 500, 973-74, 1083, 1186-87, 1203, 1387).

At the time of the accident, Horizon was working on the roof at the rear of the postal facility, directly above the loading dock area (Tr. 12, 768-69, 851; Exhibit C-1). In this area, Horizon installed two chutes at the edge of the roof to facilitate the removal of the roofing materials; a metal chute was designated for the disposal of stone, and a debris chute was designated for the disposal of Dow board, skins, and other non-stone debris (Tr. 418, 730, 975-82; Exhibit C-1). All the violations at issue deal solely with the debris-chute work area. The debris chute consisted of a 36-inch diameter, 24-foot-long black pipe chained to three wooden planks which surrounded the pipe's opening at the edge of the roof (Tr. 19-20, 977; Exhibits C-1, C-3 & R-13). Two to four dumpsters were positioned in the area underneath the debris chute, and a rope tied to the end of the chute allowed Horizon to reposition it over any one of the dumpsters as needed (Tr. 352-55, 505-06, 612, 693, 695-97, 898, 918, 1400; Exhibits C-1 & R-13).

Due to the size of the roof, Horizon completed its work in sections (Tr. 456, 1141, 1146). After removing the roof's first layer by shoveling the stone into wheelbarrows, then transporting the wheelbarrows to the metal chute for disposal, the ripping crew removed the Dow board insulation using shovels or a machine known as a "rhino" which lifted the Dow board in varying-sized pieces (Tr. 353, 394, 416, 521, 685-88, 974-75, 1191-92; Exhibit C-6). Pieces of Dow board measuring less than two feet by two feet were placed or swept onto large sheets of plastic ranging in size from

10 feet by 10 feet to 20 feet by 100 feet; once full, each sheet was bundled and tied, then transported to the debris chute for disposal (Tr. 179-80, 482-83, 506, 692-93, 704-07, 985, 1126, 1165, 1195, 1317, 1357-58; Exhibits C-4, C-6 & R-1).² The size of the bundles varied, but the average bag was estimated to be about 12 to 14 feet long, 3 to 4 feet wide, and 4 to 5 feet high (Tr. 1129-30, 1282-83; Exhibit C-4).³

According to the ripping crew supervisor, the bundles of Dow board insulation were sometimes transported to the debris-chute area by a wheeled “balloon” cart or a fork-lift type piece of a equipment known as an “insulation fork” (Tr. 298, 371-72, 712-14, 946-47, 960-61, 966-67, 985-86, 1153-54, 1194; Exhibit C-6). When these methods proved to be inefficient, the bundles were simply dragged along the roof surface to the debris-chute area (Tr. 30, 985-86, 1038-39, 1154, 1282, 1317). Depending upon its size, one to four employees participated in dragging a bundle of Dow board to the debris chute (Tr. 153, 399, 519, 561, 709, 1127, 1155, 1196, 1283, 1288, 1332-33). The final step of the roof’s removal required the ripping crew to use a cutting machine to lift the built-up roof or “skin” in sections measuring two feet by two feet, or larger (Tr. 506, 523, 619, 994-95, 1138, 1151, 1171, 1193). The skins were then placed onto a wheelbarrow and transported to the debris-chute area for disposal (Tr. 521-22, 995-96, 1138, 1151, 1317, 1319-20).

It is undisputed that during the period in question, Horizon assigned one of its employees, Giuseppe Correra, to work inside the dumpsters that were placed under the debris chute for the purpose of leveling the debris inside each dumpster (Tr. 52-54, 73, 405, 408, 449-50, 506, 623, 1027, 1133, 1213-14, 1218).⁴ Whenever debris was to be removed from the roof, he was given a verbal

² Pieces of Dow board measuring two feet by two feet or larger were stockpiled on the roof, then placed on pallets for Northville Supply, a salvaging company which compensated Horizon for the insulation; Horizon removed the pallets of insulation from the roof using a huge forklift known as a “lull” (Tr. 443-44, 622, 766, 1052-54, 1132, 1265, 1358).

³ Estimates of the weight of an average bundle of Dow board insulation varied greatly from 35 to 500 pounds (Tr. 29, 52, 258, 561-64, 1068, 1332; Exhibit R-1). Several witnesses, including the compliance officer, described the Dow board as a lightweight material (Tr. 21, 442, 563, 985, 1057, 1317; Exhibit R-7).

⁴ His other duties included repositioning the debris chute over the dumpsters, directing traffic in the area, and returning the large sheets of plastic, often disposed of along with the Dow board insulation, to the workers on the roof (Tr. 734-35, 1027, 1214-16, 1234, 1317-18).

“heads up” warning by the employee stationed at the top of the debris chute, signaling him to move away from the chute opening (Tr. 508-09, 524, 1028-31, 1133, 1163; Exhibit R-1). On September 26, 1995, Correra was inside one of the dumpsters when he was struck, allegedly without warning, by some roofing materials, sustaining unspecified injuries to his neck, back, and arm (Tr. 34-35, 53, 379-80, 569-70, 652-53, 655, 1378-79). On September 27, 1995, the compliance officer began his inspection of the worksite (Tr. 9).

USE OF THE DEBRIS CHUTE

Under the first item of the citation, the Secretary alleges that Horizon violated 29 CFR § 1926.252(a) by failing to use an enclosed chute where materials were dropped more than 20 feet to points lying outside the exterior walls of the building. The Secretary contends that Horizon employees threw or pushed bundles of roofing debris directly over the edge of the roof instead of using the debris chute. It is undisputed that the roof in this area was 32 feet above the ground (Tr. 20, 119).

Having no personal knowledge of the cited condition, the compliance officer based his testimony on information he learned from Horizon employee Correra (Tr. 39-40, 47-48, 50-52, 63, 69, 108-10; Exhibit R-1).⁵ Given the limited scope of the compliance officer’s testimony, the Secretary relies upon the testimony of Correra, as well as that of Horizon employees Keuten and Rehm, and postal employees Leon Jasinski and Harvey Martel, to establish her claim of violation under this citation item. Resolving the issues presented here, and indeed throughout much of this case, hinges largely upon determining the credibility of these five witnesses, as well as that of the principal witnesses who appeared for Horizon.

⁵ In developing his recommendation regarding the issuance of the subject citation, the compliance officer also apparently relied upon statements he obtained from several postal employees, as well as the statements of two Horizon employees, Gerald Keuten and Ed Rehm, which he received from a representative of the local roofer’s union (Tr. 80, 289-91, 293-94, 296-97, 301-02). However, any references made by the compliance officer to the content of these statements were stricken from the record as hearsay (Tr. 38, 48, 72, 79-80, 96-105, 290-91, 296-97). Keuten and Rehm, as well as two of the postal employees interviewed by the compliance officer, appeared as witnesses for the Secretary and their testimony is considered *infra*.

All three Horizon employees who appeared for the Secretary — Keuten, Correra, and Rehm — testified that bundles of debris were thrown directly from the edge of the roof in the area of the debris chute at the rear of the postal facility; Correra and Rehm admitted to engaging in this practice themselves (Tr. 399-400, 410, 420, 458-60, 506, 520, 565, 640, 714-15). Correra worked for Horizon at the postal facility for about seven weeks prior to his accident; Keuten and Rehm each worked at the postal facility for only three days prior to the accident (Tr. 391-92, 504, 698).⁶

Horizon validly argues that for different reasons, both Keuten and Correra were biased against their former employer. At the hearing, Keuten’s enmity towards Horizon was plain. By his own admission, Keuten quit working for the company after only three days because he felt “harassed” by his co-workers, who apparently considered him unable and unwilling to work as hard as they did on the roof (Tr. 407, 462-67). Horizon’s ripping crew supervisor, Michael Lailer, confirmed that Keuten struggled with his work assignment and was subject to verbal abuse by the other employees who believed Keuten was not “pulling his weight” (Tr. 1014-20). Keuten also admitted that he was directed by his union representative (who informed him about the employment opportunity with Horizon) to attempt to organize Horizon’s employees; his efforts, which were unsuccessful, apparently contributed to the resentment he experienced from his fellow employees (Tr. 414, 421-23, 463-64, 466-67). Upon quitting, Keuten testified that he told Lailer, “I don’t need this crap. I quit. The hell with you guys.” (Tr. 466).

Similarly, Correra was both defiant and evasive at the hearing, his testimony seemed colored by his accident experience, and by the fact that Horizon had openly accused him of fabricating his injuries (Horizon’s Post-Hearing Brief at 16, 31-18).⁷ His failure to respond to basic questions about the accident demonstrated a self-serving unwillingness to be forthcoming:

A (Correra): I felt a heavy object hit.

Q (Mr. Ruberti): Your upper back, middle back, lower back?

⁶ Keuten actually reported for work at the postal facility on September 27, 1995, his fourth day of employment with Horizon, but quit after only a couple of hours (Tr. 407, 418).

⁷ It is noteworthy that Correra did not file a personal injury lawsuit against Horizon, but against Edgewater Services Company, Ltd., which he contends “supervised and directed” his work at the postal facility (Tr. 584-87; Exhibit R-9). It is not clear from the record what services Edgewater may have provided at the worksite or what connection, if any, the company had with Horizon (Tr. 590).

A: My whole entire body.

Q:What position were you in at the point in time you felt this weight?

A: I have no idea what position I was in.

Q: Maybe I confused you. Were you standing erect? Were you bent over? Were you lying down?

A: No, I don't know what position I was in.⁸

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Q (Mr. Ruberti): What happened once you arrived at the Albany Medical Center?

A (Correra): I believe they took some tests.

Q: Did you see a doctor?

A: There was a doctor there, yes.

Q: Okay. Did he or she examine you?

A: Yes.

Q: Was it a male or female?

A: I have no idea who it was.

Q: You don't know if it was a male or a female?

A: Right.

Q: So...the doctor examined you, correct?

A: Yes.

Q: Now, what treatment were you given at the hospital?

A: I have no idea.

⁸ When questioning on this issue was taken up by the judge, Correra's answers became more responsive:

Q (Judge DeBenedetto:) Now, look, I would assume that when you were working in the dumpster, you were standing up on your two feet. Is that correct?

A (Correra): I could have been standing up. I could have been bending over, throwing material around. I don't know what I was doing.

Q: All right. Now, you were either standing up....or you were positioned so that you were spreading material around?

A: Correct.

Q: Trying to make space for the other material that you would expect to be coming down?

A: Correct.

Q: Is that the situation?

A: Yes.

Q: All right. So you weren't lying down, were you?

A: No.

Q: Okay. So if something struck you, it couldn't have come from the floor of the dumpster, could it?

A: No.

Q: It had to come from the above the height of the dumpster.

A: Yes.

(Tr. 654-55).

Q: Did you leave with any medications?

A: I have no idea.

Q: Did you leave with any prescriptions?

A: I don't recall.

Q: When did you leave the hospital?

A: The same day.

Q: How long were you in the hospital?

A: I have no idea.

Q: You don't know if you were in there 23 hours or 1 hour?

A: No.

(Tr. 653-54, 658-59).

The testimony of employees Keuten and Correra regarding Horizon's failure to use the debris chute is troubling for additional reasons. Contrary to Keuten's testimony that he participated in preparing Dow board insulation for disposal on two of the three days he worked for Horizon, ripping crew supervisor Lailer testified that Keuten was assigned to work only in the metal chute area, gathering stone for disposal (Tr. 396-98, 416-17, 1010-13, 1057-58, 1330). This is consistent with Keuten's own personal log of his daily work activities which reflects that on the two days in question, September 25 and 26, 1995, he performed "rock" work, not Dow board insulation removal or disposal (Tr. 426-27, 429-30, 540-43, 545-46, 548-49; Exhibit R-8). His work assignment placed Keuten about 400 feet away from the debris chute, and he was unable to identify or describe any of the employees he claims to have witnessed throwing debris from the roof in that area (Tr. 400, 420-21, 438, 1015).

Although Correra claimed that he both witnessed and participated in throwing bundles of debris from the roof's edge, the record establishes that he was specifically assigned to the area *beneath* the debris chute and, therefore, would have been working on the ground and not on the roof, whenever disposal was taking place (Tr. 1387). When asked to describe his job duties at Horizon, he testified that he was "...in charge of being down in the dumpster...[and] also in charge of taking care of the stones in the dump truck"(Tr. 505, 509). Ripping crew supervisor Lailer confirmed that he specifically assigned Correra to be "the man on the ground", working in the areas beneath both chutes, disbursing materials inside the dumpsters and the dump truck, and repositioning the chutes as necessary (Tr. 1024-28, 1066). In addition, two Horizon employees who worked in the debris chute area during the period in question testified that Correra worked on the roof only at the front

of the postal facility, not at the rear where the violations are alleged to have occurred (Tr. 1322-24, 1374-75, 1387, 1404-05).

If, as Correra claims, he participated at the start of each workday in gathering roofing materials in *preparation* for disposal, it would obviously have been impossible for him to also participate in the actual *disposal* of these materials while performing his assigned duties on the ground (Tr. 506, 513, 516-18, 569). As his own testimony indicates, disposal did not begin until he was “sent down” to the dumpster area (Tr. 518, 568-69). Moreover, the very fact that Correra’s duties included repositioning the debris chute over each dumpster as they became full suggests that the chute was actually being used to dispose of roofing materials (Tr. 612-14).⁹ Like Keuten, Correra was also unable to identify any of the employees he claims to have witnessed throwing debris off the roof (Tr. 524, 629-30, 641). Thus, given their work assignments and manifest disdain for their former employer, neither Keuten nor Correra can be considered a reliable source of information regarding Horizon’s alleged failure to conform with the debris disposal standard.

Though somewhat less problematic, the testimony of Horizon employee Rehm also lacks credibility. According to Rehm, the debris chute was, in fact, used by Horizon to dispose of Dow board insulation on September 25, 1995, his second day of employment (Tr. 698, 741);¹⁰ at some point during that day, however, the ripping crew fell behind in the disposal process and began throwing bundles of Dow board insulation directly off the roof; he maintained that this activity continued on the following day, September 26th, and that he himself participated in this practice at that time (Tr. 714-15, 718-19, 734, 741-44).

⁹ Correra testified that he repositioned the debris chute himself by pulling on the rope attached to it, then tying the rope to one of the metal railings running along the sides of the dumpster area (Tr. 612-13). Horizon claimed, however, that the other end of the rope was tied to a pick-up truck which was parked in this area and moved accordingly (Tr. 926-27, 932-34, 1024, 1076-77, 1336).

¹⁰ On September 22, 1995, his first day of work with Horizon, Rehm testified, and ripping crew supervisor Lailer confirmed, that he was assigned to the metal chute area, gathering and disposing of stone (Tr. 685, 749-50, 1220). Since that day was a Friday, Rehm’s second workday was not until Monday, September 25th (Tr. 685-86). On the 25th, as well as the 26th, Rehm claimed that he worked briefly in the metal chute area, then was assigned to the debris chute area for the rest of the workday (Tr. 686, 699-700, 711, 729).

Horizon claims that Rehm was “invited” to lie about Horizon’s failure to use the debris chute because the Secretary failed to sequester him from the courtroom during employee Correra’s testimony (Tr. 527-30; Horizon’s Post-Hearing Brief at 39-40). It is unreasonable to believe that simply hearing Correra’s testimony provided Rehm with information that prompted him to alter his own testimony. As a designated team leader for Horizon and, apparently, also president of the local roofer’s union, Rehm was no doubt well aware of Correra’s claims prior to the hearing (Tr. 464, 1005-06, 1021, 1185-86). However, any significance to be accorded Rehm’s testimony is diminished not only by his limited employment experience with Horizon during the period in question, but also his senior position with the local roofer’s union.¹¹ It is worth noting that Rehm, who apparently served as the union’s president, and Keuten, who admitted he attempted to organize Horizon’s employees at the behest of his union representative, began working for Horizon at the postal facility on the same day. Alone, this could be construed as nothing more than mere coincidence. But where a representative of the union, subsequent to Correra’s accident, initiated contact with the compliance officer in order to provide him with written statements from none other than Keuten and Rehm, neither of whom the compliance officer had either contacted or spoken to himself, raises questions regarding Rehm’s objectivity (Tr. 79-80, 290-91, 296-97).

Moreover, the record indicates that Rehm was never actually assigned to dispose of Dow board insulation in the debris-chute area; his duties involved only gathering the debris in *preparation* for disposal.¹² Rehm himself testified that on his second and third days of work for Horizon, he participated in bundling pieces of Dow board insulation in plastic sheets and dragging the bundles to the roof edge for disposal (Tr. 686, 692, 700, 704-06, 711, 729). Although, according to Rehm, two Horizon employees tied off at the roof edge near the debris chute were specifically responsible for disposing of the debris bundles down the chute, Rehm claimed that he too placed bundles in the chute, and then, with no direction or order to do so, also participated in rolling bundles off the roof

¹¹ The record is not clear as to Rehm’s employment status with Horizon at the time of the hearing. The Secretary states in her brief that Rehm “continued to work for the company after the accident”, citing as support for her claim vague testimony from ripping crew supervisor Lailer that Rehm “...was [at the worksite] for a great deal of time....” (Tr. 1022; Secretary’s Post-Hearing Brief at 17).

¹² According to ripping crew supervisor Lailer, Rehm was not assigned the additional responsibilities associated with being a team leader until one week into his employment (Tr. 1220).

edge (Tr. 698, 711-12, 714-15, 717-20, 734, 740-45).¹³ Ripping crew supervisor Lailer testified that at this time, Rehm was specifically assigned to gather and transport debris, not participate in the disposal process (Tr. 1005-06, 1021-23, 1070). Jody Schroer, the Horizon employee primarily assigned to the debris chute to dispose of roofing materials, confirmed that most of Rehm's duties were performed in the center of the roof and involved transporting bundles of debris to the chute area (Tr. 1326-28). When shown a photograph of the immediate area surrounding the debris-chute opening, Rehm did not recognize it (Tr. 730-31; Exhibit C-2). Thus, given his work assignment and suspect credibility, Rehm's testimony regarding the use of the debris chute cannot be accorded any weight.

Postal employees Jasinski and Martel testified that they observed employees throwing roofing materials directly off the edge of the roof (Tr. 778-81, 784-87, 831-33, 857, 872, 875). However, their credibility was seriously damaged by their remarkable claim that the debris chute was not installed at the roof's edge until *after* Correra's accident on September 26, 1995 (Tr. 842-43, 858-59, 875-76). This startling assertion was not embraced by the Secretary and in fact, was refuted by every other witness present at the worksite prior to the accident, including Correra himself (Tr. 409-10, 418, 510-12, 521-23, 693, 698, 741, 899-901, 919, 923, 982, 1260-61, 1315-16, 1377-79, 1386-87). Photographs taken by the compliance officer on September 27, 1995, clearly depict the presence of a debris chute (Tr. 113, 188-90; Exhibits C-1 & C-3). Any suggestion that Horizon, in the aftermath of Correra's accident but before the arrival of the compliance officer, went through the trouble of installing a debris chute is simply not plausible. Where Jasinski and Martel, as their testimony indicates, were present in the loading dock area on a daily basis and frequently observed the work being performed on the roof during their breaks, it is incomprehensible that they could have missed seeing the presence of a 24-foot-long chute (Tr. 357, 776-78, 780-82, 798-806, 851-56, 878). If, as the Secretary suggests in her reply brief, these men were unable to discern the black debris chute from the black plastic sheeting draped behind it, they cannot be considered reliable eyewitnesses to the debris removal activities at the rear of the postal facility (Tr. 411; Secretary's Reply Brief at 7).

¹³ Contrary to Rehm's testimony, witnesses for Horizon consistently testified that only one employee at any given time was stationed at the debris chute to perform disposal. See discussion, *supra* at 11-12.

Horizon's witnesses, on the other hand, were credible and knowledgeable about the work performed at the debris chute. Horizon employees Ed Ryan and Jody Schroer, ripping crew supervisor Michael Lailer, and owner Dean Robbins, who visited the worksite daily, all testified that roofing materials were never thrown off the edge of the roof in the debris-chute area (Tr. 1030, 1049, 1071-72, 1255, 1258-59, 1262, 1333-34).¹⁴ According to their testimony, after Dow board insulation and other roofing debris were brought to the debris chute, the actual disposal process typically involved only one employee, usually Schroer, who was tied off to a lanyard and responsible for placing debris into the chute (Tr. 985-88, 1033, 1061, 1115-16, 1125, 1134, 1162, 1261-62, 1316, 1378; Exhibit C-6).¹⁵ This is consistent with what Lailer, Schroer, and Ryan told the compliance officer when he interviewed all three men on September 27, 1995 (Tr. 84, 159-61, 165, 300). Also credible was the testimony of Raymond Bender, an employee of Waste Management of Eastern New York ("Waste Management"), the company hired by Horizon to provide and empty the dumpsters under the debris chute (Tr. 895, 897, 914-15). Bender indicated that he was present at the worksite on a daily basis in September of 1995 and observed roofing materials being thrown through the debris chute, not off the edge of the roof (Tr. 915-24, 945-47, 969).

On the whole, it is difficult to believe that Horizon would conduct the disposal of roofing materials in the manner alleged by the Secretary's witnesses. Throwing large bags of bundled debris directly off the postal facility's roof would have resulted in a considerable mess in and around the dumpster area, which, of course, would then have to be removed with considerable time and effort expended. It is not apparent how this practice, as the Secretary claims, was more efficient or "faster" than using the debris chute (Tr. 252, 511). Horizon's owner testified that throwing debris directly off the roof's edge would have provided no economic benefit to the company since it would have simply created more work for employees (Tr. 1266-68). Furthermore, it is highly unlikely that the

¹⁴ According to the record, Ed Ryan was not a formal member of the ripping crew, but worked primarily with the reroofing crew; on occasion, however, such as the day of the accident, he assisted the ripping crew with removal of the existing roof (Tr. 1088, 1386).

¹⁵ On some occasions, the bags of debris were "snaked" to the chute by Schroer and other employees responsible for gathering and transporting the debris to the chute area; this method of disposal required repositioning the bag of debris to form a long, thin parcel and creating a funnel-like opening at the end which was then placed into the chute opening by Schroer (Tr. 1116-19, 1121-24, 1295-98, 1320-21).

postal employees, or any other individuals who required access to this area, would have tolerated the disarray that such a practice would have created.

The Secretary has failed to provide credible evidence that Horizon did not use the debris chute to dispose of roofing debris, in accordance with § 1926.252(a). Accordingly, this item is vacated.

FALL PROTECTION

Under the second item of the citation, as amended in her complaint, the Secretary alleges that Horizon violated § 1926.501(b)(10) by failing to provide fall protection for each employee engaged in roofing activities on a low-slope roof.¹⁶ As set forth in her amended complaint, the Secretary argues that no fall protection was in place in the area where employees dragged debris to the roof edge where the fall distance was 32 feet (Secretary's Complaint at 3).

The cited standard allows an employer to use a combination of fall protection systems where a warning line system is being used. Horizon maintained that during the alleged violative period, the fall protection provided in the debris-chute area consisted primarily of a warning line system and a personal arrest system (Tr. 125, 1041-42; Exhibits R-14 & C-4). According to Horizon, a 9-foot lanyard was located at the debris chute opening, its use intended for the employee assigned to this area to dispose of roofing materials (Tr. 987-88, 1072-73, 1092-93, 1100-01, 1115; Exhibit R-14).¹⁷ In addition, warning lines were placed six feet away from the roof edge¹⁸, then angled towards the

¹⁶ The postal facility was described at the hearing as having a "flat roof", which falls within the definition of "low-slope roof." 29 C.F.R. § 1926.500(b).

¹⁷ Although the compliance officer claimed that the lanyard he observed in this area on September 27, 1995, was only six feet long, ripping crew supervisor Lailer testified that the lanyard used during the period in question actually consisted of two 6-foot lanyards connected together, with 2 to 3 feet lost due to the fact that the first lanyard was wrapped around a wooden plank (Tr. 25, 60, 63, 165, 988, 1093, 1107-08; Exhibit C-3). In addition, according to Lailer, the location of the lanyard shown in a photograph taken by the compliance officer on September 27, 1995, is not representative of its location during the period in question (Tr. 1100-01, 1148-49; Exhibits C-3 & R-14). See discussion, *supra* at 16-17.

¹⁸ Although Lailer testified on cross-examination that the warning lines were placed about 10 to 12 feet from the roof edge, testimony from Horizon employees Schroer and Ryan confirmed Lailer's testimony on direct examination that the warning lines were placed six feet from the edge (Tr. 1119, 1161, 1326-27, 1352). The six-foot location is consistent with the requirements of § 1926.502(f)(ii), which states that when mechanical equipment is being used, warning lines shall be erected not less than six feet from the roof edge.

(continued...)

debris chute opening and connected to stanchions located at each side of the opening; the warning lines extended about 25 feet along each side of the chute (Tr. 990-93, 1290, 1326-27, 1352, 1359-61; Exhibit R-14 & C-4).¹⁹

According to the compliance officer, his main concern with regard to fall protection was a 21-foot gap in the roof's "perimeter guarding" which he observed at the debris-chute opening on September 27, 1995; he did not witness any employees working in the area at that time (Tr. 27, 55-57, 125-26, 128-29, 134, 157; Exhibits C-1 & C-2). Although throughout his testimony, the compliance officer referred to the fall protection variously as perimeter guarding, warning lines, and guardrails, Horizon maintained that the cabling at the edge of the roof was, in fact, a guardrail system that served as a secondary means of fall protection in the debris-chute area (Tr. 27, 29, 55, 58, 125-26, 166, 309-18, 1326, 1331-32; Horizon's Post-Hearing Brief at 96).

For this citation item, the alleged violative period, as amended, does not extend to the date of the compliance officer's inspection; according to the citation, the final date on which the violation existed was September 26, 1995 (Tr. 136-38, 230-34). Consequently, any observations made on September 27, 1995, cannot serve to establish that the observed conditions existed during the period in question. When confronted with this fact on cross-examination, the compliance officer testified that he believed that the same gap in perimeter guarding existed on September 26, 1995, based on employee Ryan's statement that a bundle of debris had accidentally fallen from the edge of the roof at the time of the accident, an event which the compliance officer assumed would not have occurred had the perimeter guarding been in place (Tr. 128-29, 140-51, 157; Exhibit R-3). But this is a weak assumption based upon tenuous facts relating to the size of the bundle in question and the height of the "perimeter guarding". The compliance officer's conclusion was further undermined by Ryan's

¹⁸(...continued)

Schroer, the employee usually assigned to the debris chute and designated by Lailer to be the "competent" person in charge of this work station, also indicated that with the warning lines at the six-foot location, he was able to reach the bundles of debris placed behind the warning lines without, as Lailer claimed, having to disconnect from the 9-foot lanyard (Tr. 1047-48, 1121, 1161-64, 1329).

¹⁹ The presence of an expansion joint on the roof about 20 feet to the left of the debris chute required Horizon to extend the warning lines on that side only up to the joint, then back towards the center of the roof (Tr. 992-93, 999; Exhibits R-14 & C-2).

testimony at the hearing that he no longer believed a debris bundle had fallen from the roof on that day (Tr. 1378, 1385, 1399).

Moreover, ripping crew supervisor Lailer credibly testified that the photographs taken by the compliance officer of the debris-chute area on September 27, 1995, do not accurately depict the fall protection system used by Horizon during the period in question; according to Lailer, the set-up visible in these photographs was more consistent with that used whenever Horizon had to remove pallets of Dow board insulation from the roof with a lull (Tr. 990-91, 997-98, 1044, 1046-47, 1074-76, 1079-80, 1164, 1176, 1205-06, 1331-32, 1360-61; Exhibits C-1 & C-2). On these occasions, Lailer testified, an “insulation fork” was used to transfer the pallets of insulation to the roof’s edge, and a “verbal warning system”, referred to by the cited standard as a safety monitoring system, was used for fall protection (Tr. 1079-80). Schroer confirmed that the cabling in this area of the debris chute was dropped in order to unload the pallets onto the lull, but was not always reconnected since it was not the primary means of fall protection in this area (Tr. 1331-32).

Given the limitations of the compliance officer’s testimony, the Secretary has focused instead on the testimony of Horizon employees Keuten, Correra, and Rehm, all of whom testified that during the period in question, they worked and/or observed other employees engaged in work in the area beyond the warning lines without any type of fall protection whatsoever (Tr. 398-406, 473, 486-88, 493-95, 519, 566-67, 650-51, 715). The Secretary’s proof of a violation depends largely upon the credibility of these three witnesses.

According to the testimony of Keuten, Correra, and Rehm, the work which they and others performed at the roof’s edge without fall protection included not only disposing of roofing materials directly off the edge of the roof, a claim which was rejected under the previous citation item, but also dragging debris bundles to the chute opening and retrieving the large sheets of plastic sent up to the roof by Correra (Tr. 404-05, 494-95, 566-67, 735, 748). As previously noted, the work assignments of these men were well-defined during the period in question: Keuten worked in the metal chute area removing stone, Correra worked on the ground below both chutes at different times, and Rehm worked at the center of the roof gathering Dow board for disposal. Thus, despite their testimony to the contrary, none of them had reason or cause to enter the area of the debris chute opening beyond the warning lines. Given their suspect credibility, discussed *supra*, any claims on their part to have

done so themselves, or to have observed others engaged in this conduct, must be met with skepticism.²⁰

Of the three Horizon employees who testified for the Secretary, Rehm apparently came the closest to the roof's edge when he dragged bundles of debris to the employee assigned to the debris chute. However, according to ripping crew supervisor Lailer, as well as employees Schroer and Ryan, neither Rehm nor any of the other employees assigned to perform this task were required to travel beyond the warning lines to do so (Tr. 1021, 1023-24, 1070-71, 1073, 1327, 1330). Beyond the warning lines, as previously indicated, a lanyard intended for use by the employee assigned to the debris chute was the primary means of fall protection.²¹ The lanyard's 9-foot length made it possible for that employee to reach the debris bundles placed at or behind the warning lines located six feet from the roof's edge (Tr. 1079, 1112, 1159-60, 1282, 1329, 1339-40, 1385, 1397-98). If the debris bundles were placed farther away, the employees assigned to drag the bundles to this area would assist the employee assigned to the debris chute using the "snaking" method of disposal; in such instances, however, the employees remained in the area behind the warning lines (Tr. 1356, 1117, 1121, 1126-27, 1130, 1356).

As further proof of a violation, the Secretary cites to Lailer's testimony that the lanyard at the debris chute opening was repositioned twice during the period in question (Tr. 1148-49, 1237-38; Exhibit R-14). However, the Secretary has not shown that the employee or employees who repositioned the lanyard were not protected on these occasions by a safety monitoring system (Tr.

²⁰ For similar reasons, Keuten and Corraera's contention that a lanyard was never provided at the debris chute during the period in question is also rejected (Tr. 400-02, 405, 650-51). Regardless of their credibility problems, their respective work assignments would have made it difficult for either one to have obtained reliable knowledge about the use or presence of any fall protection in this area of the roof. Rehm, on the other hand, worked on the roof in the general area of the debris chute, albeit for less than two days during the period in question, and he testified that during the disposal process, he observed two employees tied off to a "safety line" at the debris chute (Tr. 717, 740, 755).

²¹ Although he infrequently worked in the debris-chute area, employee Ryan testified that on the day of the accident, he went beyond the warning lines to dispose of a bundle of Dow board insulation (Tr. 1378). Schroer was apparently not at his post, and no other employee had taken his place. Ryan testified that he performed disposal work in lieu of Schroer only 3 or 4 times during the alleged violative period, and that on each occasion, including the day of the accident, he had tied off to the lanyard located at the debris chute (Tr. 1378, 1388-92, 1397-98). The Secretary has presented no credible evidence to suggest otherwise.

128-29, 259-61). When a Horizon employee had to travel beyond the warning lines and tying off to the lanyard was not an option, the record establishes that a safety monitoring system, one of the options under the cited standard, was employed.²² As noted *supra*, Lailer testified that a safety monitoring system was used whenever pallets of Dow board insulation were removed from the roof by a lull. In addition, a safety monitoring system and a safety monitor are referenced in two of the items on a checklist of daily safety procedures created by Lailer on September 29, 1995, at the compliance officer's request (Tr. 1039; Exhibit C-5). Schroer confirmed that a verbal warning system was used whenever an employee had to travel beyond the warning lines without fall protection, and both he and Lailer indicated that at some point during the roofing project, they had each served as a safety monitor (Tr. 1039, 1334-35).

The Secretary having failed to produce credible evidence that Horizon's fall protection system in the debris-chute area did not satisfy the requirements of § 1926.501(b)(10), this item is vacated.

PROTECTION FROM FALLING OBJECTS

The third item of the citation alleges that Horizon violated § 1926.501(c)(3) by failing to implement specific measures to protect employees exposed to falling objects. Under this standard, when an employee is exposed to falling objects, an employer is required to have each employee wear a hard hat and must also implement one of three safety measures. The employer can erect some type of barrier, such as a guardrail system, to prevent objects from falling; erect a canopy structure and keep potential fall objects far enough from the edge to keep them from falling if accidentally displaced; or:

(3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that may fall far

²² As the compliance officer suggested at the hearing, § 1926.502(h)(2) prohibits the use or storage of mechanical equipment in areas where safety monitoring systems are being used to monitor employees engaged in roofing operations on low-slope roofs (Tr. 273). While mechanical equipment was, as indicated *supra*, used on the roof of the postal facility during the removal process, the compliance officer acknowledged that such equipment was not being used or stored in the immediate area of the debris chute (Tr. 273).

enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced.²³

In both the citation and the complaint the Secretary alleged that “no system” or “barricade” was in place to prevent Horizon’s employees from being struck by roofing debris that was placed at the roof’s edge in the debris-chute area, then thrown or dumped over the edge from a height of 32 feet. With one exception discussed below, during the hearing and in her posthearing brief, the Secretary’s case has been focused solely on Correra as being exposed to the hazard of falling debris (Tr. 68, 89-90; Secretary’s Post-Hearing Brief at 28). It is not disputed that Correra was assigned to the dumpster area and required to physically enter the dumpsters in order to level out the roofing debris.²⁴ Horizon argues that simply being inside the dumpster does not constitute a hazard (Tr. 533). It has already been established that the debris chute was, in fact, used to dispose of roofing materials.²⁵ In addition, the employee on the roof assigned to the debris chute was required to communicate with Correra on the ground, alerting him whenever debris was about to be placed inside the chute. Correra himself testified that upon hearing this verbal warning, he would either exit the dumpster or move as far away as possible from the chute opening (Tr. 508-09, 614, 626-27). Employee Ryan testified that on the day of the accident he yelled down a warning to Correra before placing debris into the chute; although Correra could not recall his position in the dumpster just before being struck by the debris, Ryan indicated that he observed Correra standing on the lip of the dumpster about 15 feet away from the chute opening (Tr. 569-70, 652-55, 1379, 1385-86, 1398, 1401, 1411). Although Correra claimed that on a daily basis, debris was thrown from the roof without warning, his testimony is not credible (Tr. 628-29).

²³ The Secretary misreads the subpart (3) option by claiming in her post-hearing brief that an employer is required to implement only one of the elements contained in this option (Secretary’s Post-Hearing Brief at 27-28). The use of the word “and” clearly indicates that all of the specified measures must be implemented in order to constitute compliance with the third option.

²⁴ According to employee Keuten, spreading out debris inside a dumpster is a common practice in the roofing industry (Tr. 450, 459).

²⁵ Although the Secretary contends, based upon Correra’s less than credible testimony, that sections of the roof’s third layer, the “skins”, were also thrown directly off the roof edge, the record does not support such a claim (Tr. 506-07, 523-24, 618-19). See discussion of skins disposal *infra* at 21-22.

One would expect that when handling roofing materials at a height of 32 feet, an occasional spillover of some debris occurred; however, with the debris chute in place to guide the materials and a dumpster below to contain them, it is reasonable to infer that any errant debris was likely kept to a minimum and limited to the type of smaller and/or lighter-weight materials which constituted more of a housekeeping nuisance than a significant hazard. Thus, given Horizon's procedure for the disposal of roofing materials in the debris-chute area, it is not apparent that Correra was ever exposed to a hazard from falling objects.

The Secretary argues that Horizon was required to "keep Correra out of the [dumpster] area when objects could fall" (Secretary's Post-Hearing Brief at 28). But Correra had to have access to this area in order to perform his work. To that end, Horizon instituted a disposal procedure which confined roofing materials to the debris chute and the dumpsters below. In addition, reasonable precautions were taken to ensure that whenever Correra was working inside the dumpster over which the debris chute was positioned, he was made aware that materials were on their way down the chute whereupon he was to either exit the dumpster or move to the end farthest away from the chute opening. When properly implemented, this system adequately addressed the hazard posed by falling debris.

The issue of other Horizon employees being exposed to the hazard of falling objects was raised by the compliance officer's testimony claiming that Horizon did not adequately barricade the end of each dumpster facing away from the postal facility (Tr. 64, 66-69, 72, 261-63; Exhibit C-1).²⁶ In his view, employees walking near the dumpsters were exposed to the hazard of falling objects. He conceded that the dumpsters were sufficiently barricaded on three sides by the building's loading dock at their back end and the metal railings at their sides (Tr. 261-63). But the dumpsters themselves can be considered barricades in that they served to contain the roofing materials sent down the debris chute and, with the exception of Correra, deterred passage through the area underneath and around the chute opening (Tr. 68-69).

²⁶ Though not defined under Subpart M (Fall Protection), a barricade is defined at § 1926.203(a), under Subpart G (Signs, Signals, and Barricades), as "an obstruction to deter the passage of persons or vehicles".

The record also indicates that Horizon strung yellow caution tape across the front of the dumpsters during part of each workday; the caution tape was strung between the metal railings at the sides of the dumpsters and attached at its center point to a pick-up truck which was parked in this area and used to reposition the debris chute (Tr. 357-60, 1077-79, 1219, 1336-39). According to employee Schroer, the caution tape was taken down only when the ground employee, Correra, was present to monitor the dumpster area for vehicles and individuals (Tr. 1338-39). Under these circumstances, it is not evident that Horizon was required to further barricade the area around the dumpsters.

Finally, relying upon the testimony of employees Keuten, Correra, and Rehm, the Secretary contends that Horizon failed to keep debris bundles far enough away from the roof's edge so that they would not go over the edge if they were accidentally displaced (Tr. 334-36, 398, 487, 493, 519-20, 568, 718, 742; Exhibit R-3).²⁷ In addition to the questionable credibility of all three of these witnesses, it has already been found that debris bundles were dragged only as far as the warning lines, six feet from the roof's edge, until ready for disposal. Even if they were placed in the area beyond the warning lines and along the roof's edge, given the large size and bulky nature of these bundles, it would have been virtually impossible for one to have been "accidentally displaced" (Exhibit C-4). Employee Ryan confirmed that the debris bundles he was handling at the time of the accident were not placed at the immediate edge of the roof, and despite his statement to the compliance officer indicating otherwise, he no longer believed that one of these bundles had accidentally fallen from the roof and onto Correra (Tr. 1385, 1395-99; Exhibits R-3 & R-14).

Having failed to show that any of Horizon's employees, including Correra, were exposed to the hazard of falling objects, the item alleging violation of § 1926.501(c)(3) is not warranted.

CHUTE TOEBOARD OR BUMPER

²⁷ Horizon contends that in making this argument, the Secretary has impermissibly expanded her allegations under this citation item (Horizon's Reply Brief at 12-13). However, the Secretary amended the incident description under this item in her complaint, adding language which raised this very issue: "...no barricade was in place to prevent employees from being struck by roofing debris *that was placed at the roof's edge...*" (Secretary's Complaint at 3).

The sixth item of the citation alleges that Horizon violated § 1926.852(f) by failing to equip the debris chute with a toeboard or bumper. As indicated *supra* n.1, the Secretary filed a motion to amend the citation to reflect that the date of violation for this item was “on or about 9/12/95”, rather than September 27, 1995, as indicated in the citation. The motion is denied as moot for the following reasons.

Section 1926.852 contains seven subsections governing the set-up and use of materials chutes. Two of these subsections, the second of which is in issue here, must be read together since their requirements are related. Section 1926.852(e) sets forth the general protections required for employees dumping debris into a chute opening:

Any chute opening, into which workmen dump debris, shall be protected by a substantial guardrail approximately 42 inches above the floor or other surface on which the men stand to dump the material. Any space between the chute and the edge of openings in the floors through which it passes shall be solidly covered over. (Emphasis added).

Subsection (f), for which Horizon was cited, then adds an additional means of protection for those instances in which mechanical equipment or wheelbarrows are used by the employees to perform the “dumping”:

Where the material is dumped from mechanical equipment or wheelbarrows, a securely attached toeboard or bumper, not less than 4 inches thick and 6 inches high, shall be provided at each chute opening. (Emphasis added)

Thus, a toeboard or bumper is required under subsection (f) only where the material is being dumped into the chute opening from mechanical equipment or wheelbarrows.

Here, Horizon does not deny that wheelbarrows were used on the roof in the debris-chute area to gather the built-up roof or “skins” for disposal (Tr. 995, 1155, 1234-35, 1317, 1319). Although ripping crew supervisor Lailer and employee Schroer each described different methods by which the skins were actually placed into the debris chute, neither method involved dumping the contents of the wheelbarrow directly into the chute opening. According to Lailer, the skins were dumped out of the wheelbarrow at the feet of the employee assigned to the debris chute who placed the skins into the chute by hand (Tr. 995-96, 1155-56, 1235-36). Schroer, on the other hand, testified that due to their heavy weight, the skins were never dumped out of the wheelbarrows onto the roof;

he maintained that the full wheelbarrows were held upright while the employee assigned to the debris chute unloaded the skins by hand and placed them into the chute opening (Tr. 1319-20, 1352-55). In either case, the wheelbarrows were never taken directly to the chute opening, nor were their contents ever dumped directly into the chute. Thus, there was no danger that the forward progress of the wheelbarrows could carry them or their contents over the roof's edge. As the compliance officer himself conceded, a toeboard is not required if nothing is wheeled to the edge (Tr. 113).

Relying upon the testimony of Correra, the Secretary argues that wheelbarrows were also used in the *debris-chute* area to dispose of stone on those occasions when the *metal chute* could not be used because the truck bed below it was full (Tr. 511, 522, 616). Since, according to Correra, the wheelbarrows full of stone were taken to the roof's edge and dumped directly into the debris-chute opening, the Secretary maintains that a toeboard was required in this area. Correra's credibility problems have already been discussed. It is difficult to believe that Horizon would take the time and effort required to set up two separate chute areas complete with separate disposal procedures if, as Correra suggests, the roofing materials could be disposed of through the same chute and mixed without consequence (Tr. 352-55). Horizon made different arrangements for the offsite disposal of the roofing materials, the cost of which was determined in part by weight. Lailier testified that the different types of debris could not be mixed; any stone found amidst the Dow board insulation was sifted out and taken to the metal chute for disposal, while sections of skins were dumped into a dumpster separate from those containing insulation (Tr. 355, 1200-01, 1211, 1225-30, 1242, 1316). According to the Waste Management employee who emptied the dumpsters during this phase of the project, there was never any stone in the dumpsters, only insulation (Tr. 948-499, 967). The record fails to support any claim that wheelbarrows of stone were dumped into the debris chute at any time during the roofing project.

Because the Secretary has failed to prove that Horizon used the wheelbarrows to actually dump roofing materials directly into the debris chute, the requirements of § 1926.852(f) are inapplicable and the Secretary's motion to amend the date of the alleged violation is denied as moot.

Based upon the foregoing findings and conclusions, it is

ORDERED that item 1, alleging serious violation of § 1926.252(a), is vacated. It is further

ORDERED that item 2, alleging serious violation of § 1926.501(b)(10), as amended, is vacated. It is further

ORDERED that item 3, alleging serious violation of § 1926.501(c)(3), is vacated. It is further

ORDERED that items 4 and 5, having been withdrawn by the Secretary, are vacated. It is further

ORDERED that item 6, alleging serious violation of § 1926.852(f), is vacated.

Richard DeBenedetto, OSHRC Judge

Dated: _____

Boston, Massachusetts