

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speed Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409

Fax: (303) 844-3759

SECRETARY OF LABOR,

Complainant,

v.

JAMES EDDY, d/b/a EDDY ROOFING, INC.,

Respondent.

OSHR DOCKET NO. 98-0125

APPEARANCES:

For the Complainant:

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

For the Respondent:

Daniel J. Rice, Esq., Oak Park, Illinois

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, James Eddy, d/b/a Eddy Roofing, Inc. (Eddy), at all times relevant to this action maintained a place of business at 2531 Oakton Street, Arlington Heights, Illinois where it was engaged in roofing. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 27, 1997 following a reported fatality, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Eddy's Arlington Heights work site. As a result of that inspection, Eddy was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Eddy brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 19, 1998, a hearing was held in Chicago, Illinois. At that time Eddy withdrew its notice of contest to the cited violations; the appropriateness of the proposed penalties remains at issue. No briefs are to be submitted, and this matter is ready for disposition.

Serious Violations

Citation 1, item a alleges a violation of:

29 CFR 1926.20(b)(1): Programs(s) were not initiated and/or maintained to comply with applicable safety and health provisions:

- a) James Eddy dba Eddy Roofing, Inc., did not maintain a safety and health program to control or minimize the hazards associated with their work and provide compliance with the Act.

Citation 1 Item 1b alleges a violation of:

29 CFR 1926.503(a)(1): The employer did not provide a training program for each employee who might be exposed to fall hazards, to enable each employee to recognize fall hazards and the procedures to be followed in order to minimize these hazards:

- a) James Eddy dba Eddy Roofing, Inc., did not provide training to enable each employee to recognize the hazards of falling and the procedures to be followed to eliminate or control such hazards at the worksite located at 2531 Oakton Street, Arlington Heights, Illinois.

Citation 1, Item 2 alleges violation of:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge which is 6 feet or more above a lower level were not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:

- a) 2531 Oakton Street, Arlington Heights, Illinois - Employees were not protected from the hazard of falling approximately 40 feet where fall protection was not provided for use at the modified bitumen pipe.

Citation 1, Item 3 alleges violation of:

29 CFR 1926.501(b)(4)(i): Each employee on walking/working surfaces was not protected from falling through holes (including skylights) more than 6 feet above lower levels by personal fall arrest systems, covers, or guardrail systems erected around such holes:

- a) 2531 Oakton Street, Arlington Heights, Illinois - Employees were exposed to the hazard of falling approximately 40 feet through skylights while engaged in built-up-roofing operations.

Citation 1, Item 4 alleges violation of:

29 CFR 1926.502(b)(3): Guardrail systems were not capable of withstanding, without failure a force of at least 200 pounds (890 N) applied within two inches (5.1 cm) of the top edge, in any outward or downward direction, at any point along the top edge:

- a) 2531 Oakton Street, Arlington Heights, Illinois - A guardrail system installed around the manually operated hoist/beam was not adequately anchored to prevent deflection and provide support for at least 200 pounds.
- b) 2531 Oakton Street, Arlington Heights, Illinois - A guardrail system installed around the trash shoot was not adequately anchored to prevent deflection and provide support for at least 200 pounds.
- c) 2531 Oakton Street, Arlington Heights, Illinois - A guardrail system installed around a personnel hatch was not adequately anchored to prevent deflection and provide support for at least 200 pounds.

Citation 1, Item 5a alleges violation of:

29 CFR 1926.502(f)(1)(ii): When mechanical equipment is being used, the warning line for fall protection was not erected less than six (6) feet from the roof edge parallel to the direction of mechanical equipment operation; and not less than ten (10) feet from the roof edge perpendicular to the direction of mechanical equipment operation.

- a) 2531 Oakton Street, Arlington Heights, Illinois - Employees were not protected from the hazard of falling approximately 40 feet while engaged in built-up-roofing operations where warning lines were not adequately established.

Citation 1, Item 5b alleges violation of:

29 CFR 1926.502(f)(1)(iii): Points of access, materials handling areas, storage areas, and hoisting areas were not connected to the work area by an access path formed by two warning lines:

- a) 2531 Oakton Street, Arlington Heights, Illinois - Warning lines were not used to create a clear access path connecting the material handling areas and personnel access zones to the work area.

Citation 1, Item 6 alleges violation of:

29 CFR 1926.1051(a): Stairways or ladders were not provided at all personnel points of access where there was a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist was provided:

- a) 2531 Oakton Street, Arlington Heights, Illinois - Employees were required to climb onto roof joists and a personnel hatch to ascend and descend the roof deck without the use of a ladder or stairway.

Facts

As noted above, Respondent does not contest the existence of the cited violations (Tr. 4).

A penalty of \$4,500.00 was proposed for each of the six citation items. OSHA Compliance Officer (CO) Gary Weil testified that the severity of the cited violations was rated as high, because the roof cited was 40 feet above the ground and the absence of fall protection could and did result in serious physical harm, up to and including death (Tr. 13-16). Weil stated that the probability of an accident was high because Eddy had no safety and health program and provided no training in fall protection (Tr. 13). Five employees were exposed to the fall hazards cited at items 1 through 5 throughout the work shift as they worked near the edge of the 200 x 80 foot roof, the material hoist and trash chute, or any of the skylights (Tr. 16-18). Weil believed that the hazard was exacerbated by the presence of skylight covers which appeared to provide fall protection, but were not, in fact, weight bearing, and by the presence of guardrails on the roof edge which were not adequately secured so as to provide fall protection (Tr. 24-26, 32). The same employees were exposed to the fall hazard posed by Eddy's failure to provide ladder access to the roof; Weil stated that employees had to climb a crane, and pull themselves up through the roof bar joists (Tr. 20). CO Weil stated that the employees worked in the hot sun, which might lead to missteps (Tr. 17). The accident which led to the above captioned citations involved an inexperienced employee with less than a week on the job (Tr. 14).

The proposed gravity based penalty for each item was \$5,000.00. A 10% credit was provided for history; Eddy had not received any OSHA citations within the past three years (Tr. 13).

In mitigation, Eddy argues that most of its roofers were experienced (Tr. 39, 54-55), and were hired to complete the roofing job on a piecework basis (Tr. 56). The decedent was hired on the recommendation of one of the experienced roofers (Tr. 57). Because the roofers were experienced, Eddy believed it was sufficient to instruct the roofers to put up some area barriers, warning flags and any other guardrails that they needed (Tr. 68). Eddy admits that it made no effort to determine whether OSHA required precautions were taken (Tr. 69) Eddy argues that the proposed \$27,000.00 penalty will put it out of business (Tr. 79). James Eddy testified that his net profit this year will only amount to around \$15,000 to 20,000.

Discussion

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*,

1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). The factors to be considered in determining the gravity of a violation include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

The OSHA CO properly assessed the cited violations as high gravity. All of Eddy's employees were exposed to the cited hazard for the duration of the roofing job. It is unquestioned that the fall hazard could and did result in a fatality. The record shows that Eddy made no effort to ensure its employees' safety on the job. Eddy introduced no evidence mitigating any of the pertinent risk factors.

Nonetheless, this judge finds that the proposed penalties are excessive. The OSHA Field Inspection Reference Manual, Section 8, Chapter IV.C.2.i.(1) provides for a 60% reduction in penalty for employers with 25 employees or less, with the caveat that the CO may recommend that only a partial reduction in penalty be permitted where an employer has one or more serious violation of high gravity. In this case the CO did not recommend any reduction for size. The unrebutted testimony of James Eddy establishes that the proposed penalties will exceed Eddy Roofing's net income for 1998, and put him out of business.

The Commission has held that the purposes of the Act are not served by the assessment of destructive penalties. *Colonial Craft Reproductions*, 1 BNA OSHC 1063 (No. 881, 1972). Though its guidelines allow the Secretary to adjust its penalty structure where an employee demonstrates a lack of concern for employee health and safety, this judge believes that a complete denial of any reduction for size is unwarranted here, where the desired deterrent effect may be obtained with a smaller penalty. Taking Eddy's small size into account, I find that a 40% reduction for size is appropriate and will be taken in addition to the 10% reduction for history recommended by the CO.

Other than Serious Violations

Citation 2, Item a alleges violation of:

29 CFR 1926.59(e)(1): The employer did not maintain at the workplace a written hazard communication which describes how the criteria specified in 29 CFR 1926.59(f),(g) and (h) will be met.

a) The employer did not maintain a written hazard communication program at the work site where hazardous chemicals such as, but not limited to: modified bitumen, propane, and gasoline were in use.

Citation 2, Item 1b alleges violation of:

29 CFR 1926.59(g)(1): The employer did not have a material safety data sheet for each hazardous chemical which they used:

a) The employer did not have material safety sheets available at the work site where hazardous chemicals such as, but not limited to: modified bitumen, propane, and gasoline were in use.

ORDER

1. Citations 1, items a and 1b, alleging violations of §1926.20(b)(1) and §1926.503(a)(1) are AFFIRMED, and a penalty of \$2,500.00 will be assessed.
2. Citation 1, item 2, alleging violation of §1926.501(b)(1) is AFFIRMED, and a penalty of \$2,500.00 will be assessed.
3. Citation 1, item 3, alleging violation of §1926.501(b)(4)(i) is AFFIRMED, and a penalty of \$2,500.00 will be assessed.
4. Citation 1, item 4, alleging violation of §1926.502(b)(3) is AFFIRMED, and a penalty of \$2,500.00 will be assessed.
5. Citation 1, items 5a and 5b, alleging violation of §1926.502(f)(1)(ii) and §1926.502(f)(1)(iii) are AFFIRMED, and a penalty of \$2,500.00 will be assessed.
6. Citation 1, item 6, alleging violation of §1926.1051(a) is AFFIRMED, and a penalty of \$2,500.00 will be assessed.
7. Citation 2, items 1a and 1b, alleging violation of §§1926.59(e)(1) and 1926.59(g)(1) are AFFIRMED without penalty.

Benjamin R. Loye
Judge, OSHRC

Dated: