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

SECRETARY OF LABOR, Complainant, v. MURRAY ROOFING COMPANY, INC., Respondent.	OSHRC DOCKET No. 98-0333

APPEARANCES:

For the Complainant:
Susan B. Jacobs, Esq., Office of the Regional Solicitor, U.S. Department of Labor
New York, New York

For the Respondent:
Robert G. Walsh, Esq., Walsh, Fleming & Chiacchia, P.C., Blasdell, New York

Before: Administrative Law Judge Ann Z. Cook

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The citations at issue in this proceeding allege one serious and one repeat violation arising from an Occupational Safety and Health Administration ("OSHA") inspection on November 19, 1997. Respondent Murray Roofing Company, Inc. ("Murray") timely contested the citations, and the trial of this matter was held on March 18, 1999. Both parties have filed post-hearing and rebuttal briefs. Murray does not contest that it is an employer engaged in a business affecting interstate commerce and that it is subject to the requirements of the Act. (Answer ¶ I).

Introduction

On November 19, 1997, OSHA compliance officer ("CO") Michael Scime inspected the Riverfront Medical Center in North Tonawanda, New York, where Murray was the roofing contractor on the new, single-story building. During his inspection, Scime saw two roofers without fall protection working at the edge of the roof. Scime accessed the roof using the only visible means, which was, by climbing the ladder to the canopy and then climbing the remaining 3 feet without a ladder. Murray's foreman, Charles Weaver, told Scime that safety monitoring and warning lines were being used, but that the lines had been moved to roll out the roofing material. (Tr. 7-14, 38). OSHA cited Murray for failing to provide safe access to the roof in violation of 29 CFR 1926.1051(a) and for failing to provide fall protection in violation of 29 CFR 1926.501(b)(10).

The Secretary's Burden of Proof

To establish a violation of a standard, the Secretary has the burden of proving, by a preponderance of the evidence:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Serious Citation 1

Citation 1 alleges a violation of 29 CFR 1926.1051(a), which provides as follows:

> A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

The citation alleges as follows:

> (A) Front of the building. Employees were climbing the 3 feet from the metal canopy roof onto the main roof without safe access being provided by a ladder, ramp, or runway.

CO Scime testified that the only means of accessing the roof that day was to climb a ladder to the metal canopy on the east side of the building and to then climb the remaining 3 feet to the roof without a ladder. Weaver, the foreman, and the six employees working on the roof, confirmed this. The CO further testified that this means of access subjected the employees to the hazard of falling

backward onto the canopy, which could have caused serious injuries. He said safe access to the roof could have been provided by a ladder from the canopy to the roof or by a ladder from the ground to the roof. (Tr. 9-10, 13, 16, 19-20, 59).

Murray argues that using a ladder from the canopy to the roof was more dangerous than climbing to the roof without one and that newly-erected scaffolding surrounded the building and prevented the use of a ladder directly from the ground to the roof. (R. Brief pp. 3-4). Weaver and Michael Spangler, one of the roofers, testified in support of Murray's position. (Tr. 74-75, 92-93). However, the CO testified that scaffolding did not surround all sides of the building. (Tr. 47-51). In any event, the record shows that Murray was able to remove a section of scaffolding so that a ground-to-roof ladder could be installed. (Tr. 20, 80). Murray's argument is therefore rejected.

The record establishes the alleged violation, and, because the roofers were exposed to falls that could have caused serious injuries, the violation was serious. The proposed penalty for this item is $750.00. In determining penalties, the Commission is to give due consideration to the gravity of the violation and the employer's size, history and good faith. The gravity of the violation, generally the most significant factor, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). Considering that six employees were exposed to falls onto and from the canopy of the one-story building, I find the gravity of the violation to be moderate. I also find that no reductions for size, history or good faith are warranted. The proposed penalty of $750.00 is appropriate and is accordingly assessed.

Repeat Citation 2

Citation 2 alleges a violation of 29 CFR 1926.501(b)(10), which states as follows:

> 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, 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 ... the use of a safety monitoring system alone ... is permitted.

The citation alleges as follows:

(A) Roof at the Riverfront Medical Center. Warning lines were not erected along the North and East sides of the flat roof. Employees were exposed to a fall of 15'6" to the ground.

The CO testified that from the ground, he saw two roofers working without fall protection near the edge of the northeast corner of the building. The roof was more than 50 feet wide and was 15.5 feet above the ground. When he arrived on the roof, the roofers were some distance from the edge, seaming together the last-laid sheets of membrane. The CO said that at the northeast corner where the roofers had been working, membrane was laid out to the edge and no warning lines were up. (Tr. 13-14, 16-17, 36, 60, 75, 89-90). The CO also said that Weaver, the foreman, told him that warning lines and safety monitors were being used as fall protection. Weaver told him that the warning lines had been moved out of the way when material was laid out, and had not yet been put back. CO Scime testified that neither of the two roofers he observed near the edge could have monitored the other because while they worked, they were often bending, kneeling and/or working back to back. (Tr. 14, 36, 50).

Murray contends that scaffolding surrounded the building and thus there was no unprotected edge and no fall danger. However, the CO testified credibly that only parts of the building were scaffolded and only parts of the scaffolding were guarded. He further testified that scaffolding provided fall protection only if it were tarped, planked or otherwise guarded. The record shows that at the northeast corner, where the roofers worked near the edge, the scaffolding was unguarded and afforded no protection. (Tr. 47-51; C-1). Murray's contention is rejected.

Murray also contends that safety monitors and warning lines were used at the site but that the lines had to be removed to accomplish the membrane work. Weaver and Spangler testified the warning lines had been moved away because laying out and sealing the membrane could not be done properly with them in place. (Tr. 68-70, 80-81, 90-91). Under this reasoning, safety lines would seldom be in place to protect roofers working near the edge. The CO's more credible view was that Murray should have followed the general industry practice of moving safety lines only temporarily to roll out the membrane. (Tr. 61). Regarding safety monitors, Weaver testified that he had not appointed a monitor but that employees usually did so among themselves when working near the edge. He also testified he watched the employees as well, although his attention could be diverted. (Tr. 84-86). This testimony does not show that a monitoring system meeting the requirements of

Subpart M was used; specifically, the employer cannot designate as monitor an employee with other job responsibilities that might take his attention away from his monitoring function. *See* 29 CFR 1926.502(h)(1)(v). The evidence demonstrates that neither safety monitors nor warning lines were in use in the cited area. The Secretary has therefore established the alleged violation, and, in light of the 15-foot fall hazard, the violation was serious.

As to the repeated characterization, a violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The record shows that Murray was cited for violating the same standard on December 4, 1995, that the citation was affirmed on January 26, 1996, by way of settlement, and that the citation became a final order on March 4, 1996. (Tr. 22; C-2). Murray has not disputed the repeated classification of the citation. This citation item is therefore affirmed as repeated.

The Secretary has proposed a $2,400.00 penalty for this citation item. I find the gravity of the violation to be moderately severe, given that two employees were exposed to falls of 15 feet for a short time and that no fall protection was provided. I also find that no reductions for size, history or good faith are warranted. The proposed penalty of $2,400.00 is appropriate and is accordingly assessed.

Findings of Fact

The foregoing constitutes my findings of fact in accordance with Federal Rule of Civil Procedure 52(a). Any proposed findings of fact inconsistent with this decision are hereby denied.

Conclusions of Law

1. Murray is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and the subject matter of the proceeding.

2. Murray was in serious violation of section 5(a)(2) of the Act as alleged in Citation 1, and a penalty of $750.00 is appropriate for this item.

3. Murray was in repeat violation of section 5(a)(2) of the Act as alleged in Citation 2, and a penalty of $2,400.00 if appropriate for this item.

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Citation 1 is affirmed as a serious violation, and a penalty of $750.00 is assessed.

2. Citation 2 is affirmed as a repeated violation, and a penalty of $2,400.00 is assessed.

Ann Z. Cook
Judge, OSHRC

Dated:

Washington, D.C.