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.	:	OSHRC DOCKET NO. 98-0358
CAPEWAY ROOFING SYSTEMS, INC.,	:	
Respondent.	:	

APPEARANCES:

Ivelisse Berio-LeBeau, Esquire
Office of the Solicitor
U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Barrett A. Metzler
Certified Safety Professional
Columbia, Connecticut

For the Respondent.

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, §§ 651-678 (1970) ("the Act"), to review a three-item serious citation issued by the Secretary of Labor pursuant to § 9(a) of the Act and the penalties proposed pursuant to § 10(a) of the Act.

On January 21,1998, Paul Antone, an employee of Capeway Roofing Systems, Inc., ("Capeway") fell off the roof at a work site located in Attleboro, Massachusetts. As a result

of this incident, Peter Barletta, an OSHA safety engineer, and Eric Jones, an OSHA compliance officer, conducted an inspection of the work site on February 3, 1998. Following the inspection, OSHA cited Capeway for serious violations of 29 C.F.R. §§ 1926.21(b)(2), 1926.501(b)(10), and 1926.502(j)(7)(i).

Jurisdiction

The parties agree that Capeway is an employer engaged in interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that the Occupational Safety and Health Review Commission ("the Commission") has jurisdiction over this case.

Stipulated Facts

The parties stipulated that during the period of time in issue, Capeway had 14 employees engaged in roofing activities at a work site located at 7 James Street in Attleboro, Massachusetts; two of the employees, Luis Cabral and Mario Araujo, were Capeway's job site supervisors or foremen. The parties further stipulated that the elementary school under construction had a low-slope roof, that Capeway's employees were installing a hot tar roof on the school, and that the cited standards are applicable to the conditions at the site. Finally, the parties stipulated that Capeway did not use a guardrail system, a safety net system or a personal fall arrest system, or a warning line in conjunction with a guardrail system, a safety net system or a personal fall arrest system, to protect its employees at the site from falling off of the edge of the roof. (Tr. 11-13).

Testimony of Paul Barletta

According to Paul Barletta, the OSHA engineer who inspected the site, and GX-1, his diagram, the roof was 25 feet high and measured 400 feet east to west, 75 feet north to south on the west end, and 63 feet north to south on the east end.[1] A 75-foot-long "block house" was on the south side of the roof; the distance from the east side of the block house to the east side of the roof was 230 feet, and the distance from the west side of the block house to the west side of the building was 95 feet. A 25-foot-long "supply hut" was on the west side; the hut was 46 feet from the southwest corner and 4 feet from the northwest corner of the roof, and the drop from the roof to the top of the hut was 5 feet, 11 inches. There was 6-inch-high, 10-inch-wide "curbing" along the west side and the western part of the north side that was 12 inches from the edge of the roof. On February 12, 1998, Capeway had two crews on the roof, one on the western side and one on the eastern side, that were monitored by Luis Cabral and Mario Araujo, respectively, and employees in both crews were working near the open edges of the roof. There was a warning line along the northeast part of the roof, but there were no guardrails or other fall protection on the roof. (Tr. 21-36; 68; GX-1).

The Secretary's Burden of Proof

[1]Exhibits are as follows: GX (Government's Exhibit); RX (Respondent's Exhibit). GX-1 is Appendix A to this decision.

In order to establish a violation of a specific standard, the Secretary must show by a preponderance of the evidence that: (a) the standard applies to the cited condition; (b) there was a failure to meet the terms of the standard; (c) the employees had access to the violative condition; and (d) the employer had actual or constructive knowledge of the conditions (*i.e.*, the employer either knew or could have known of the conditions with the exercise of reasonable diligence. *Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Serious Citation 1, item 1 - Proposed Penalty: $3,000.00

> 29 C.F.R. 1926.21(b)(2): The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The Commission has stated that this regulation "requires employers to instruct employees concerning safety hazards which would be known to a reasonably prudent employer or which are addressed by specific OSHA regulations." *A.P. O'Horo Co.*, 14 BNA OSHA 2004, 2009 (No. 85-369, 1991). Capeway asserts that it met the standard in light of the evidence showing employee training in and knowledge of fall hazards and fall protection.

Capeway introduced RX-2 into the evidence to establish "a record of people that attended a hazard communication training and job safety meeting training." (Tr. 128). However, given that the OSHA inspection occurred in 1998 and RX-2 covers the years 1993 and 1994, this evidence does not persuade me that Capeway complied with the standard.

Capeway also references the testimony of William Kirby, a Capeway employee. Capeway asserts that Mr. Kirby related his knowledge of rooftop safety, that he knew what warning lines and monitors were and what they were required to do, and that he had received safety sheets and was trained in the hazards of the job. (Tr. 150-151). I disagree. Mr. Kirby's actual testimony was that the only training he had was when he started with the company, that there were "like safety sheets that we had to read over and sign [and] [t]hat was basically it," and that safety meetings consisted of "five minute safety talks." (Tr. 150-151).

Finally, Capeway refers to the testimony of Mario Araujo, one of the supervisors at the site, and Jose Calheta, Capeway's President. However, this testimony does not establish compliance with the standard. When asked if he had had any safety training in the year he had been employed by the company, Mr. Araujo's response was "Not at Capeway I didn't." (Tr. 155-156). In addition, although Mr. Calheta testified that new employees would be given a "hiring package which discusses all the topics of safety," he also testified that there was no other type of training. (Tr. 127-29). Based on the record, the Secretary has demonstrated that Capeway failed to "instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work to control or eliminate any hazards or other exposure to illness or injury," as required by the standard.

The Secretary has characterized this item as a serious violation and has proposed a penalty of $3,000.00. Mr. Barletta testified that employees were working in danger zones without being aware of it, that they did not understand or know how to use fall protection

systems, and that they did not know how to put up warning lines properly or how to work with and communicate with a monitor; he also testified that the violation was of high severity, in that a 25-foot fall could lead to a fatality or disability, and that the probability was greater because of the number of employees, the nature of the work, and how close they were to the edge. Mr. Barletta reduced the gravity-based penalty of $5,000.00 by 40 percent due to the small size of the company, resulting in a proposed penalty of $3,000.00. (Tr.86-87). On the basis of this testimony, I conclude that the serious classification and the proposed penalty are appropriate. This item is accordingly affirmed as a serious violation, and the proposed penalty of $3,000.00 is assessed.

Serious Citation 1, Item 2 - Proposed Penalty: $3,000.00

> 29 C.F.R. 1926.501(b)(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 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 (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

The language of this regulation is very clear. It requires employees working on low-slope roofs more than 50 feet wide and having unprotected sides or edges 6 feet or more above lower levels to be protected from falls by: guardrail systems, safety net systems or personal fall arrest systems; a warning line in conjunction with any one of these systems; or

a warning line in conjunction with a safety monitoring system. If a roof is 50 feet or less in width, the use of a safety monitoring system alone is permitted.

Capeway asserts that the curbing on the roof broke the continuity of the roof and that the edge of the roof where employees were working was located at the curbing. Capeway also references paragraph 3 of Appendix A to Subpart M, which provides that "[R]oofs which are comprised of several separate, non-contiguous roof areas ***, may be considered a series of individual roofs." Hence, Capeway argues that the "interpretation provided by Appendix A indicates that the edge of the inner roof is the curbing, thus not meeting the requirements of an unprotected edge."

In my opinion, this argument ignores three critical factors. First, the curbing did not create a substantial barrier, being merely 6 inches high and 10 inches wide; a guardrail, by comparison, is approximately 42 inches high. Second, Capeway employees were working simultaneously on both sides of the curbing, which certainly reflects the continuity and contiguous nature of the roof; in this regard, I note Mr. Calheta's testimony that the roof was "continuous" and that it was the "[s]ame building, same roof, it's just [a] separate section of the roof, but it's still the same building." (Tr. 135-136). Third, there was no elevation change from one side of the curbing to the other. Capeway's assertion is consequently rejected.

The remaining question is whether Capeway provided a fall protection system. Mr. Barletta testified that based on his observations and photographs, the only fall protection that

was available was a combination of a warning line and safety monitoring system. He noted that warning lines have to be around all open sides of the roof being worked on and that the problem with the subject site was that a majority of the open sides did not have any warning lines. He also noted that employees were going outside the warning line at the edge without a monitor being present, that employees were working near the edge of the roof with no warning lines or guardrails in place, and that employees at times worked behind the monitor such that he could not see them. (Tr. 24; 34-39; 44; 49; 55-63; 67; 79; 89-91; 114-116).

Capeway acknowledges these conditions, but argues that it constructively complied with the requirements of the standard. However, the standard mandates that all unprotected edges of low-slope roofs, not merely a single work area, have proper fall protection. *Phoenix Roofing, Inc.*, 13 BNA OSHC 1816 (No. 87-0255, 1988); *rev'd on other grounds*, 874 F.2d 1027 (5th Cir. 1989). The record clearly demonstrates that Capeway did not have the proper fall protection on the roof and that it violated the cited standard.[2]

The serious characterization of this item and the proposed penalty of $3,000.00 are based upon essentially the same rationale as that set out in item 1, *supra*. (Tr. 89-90). This citation item is therefore affirmed as a serious violation, and the proposed penalty of $3,000.00 is assessed.

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[2]Capeway contends it took all of the feasible steps it could to protect employees under the circumstances. To the extent that Capeway is asserting the affirmative defense of infeasibility of compliance, it has not met the elements of the defense. *See, e.g., Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1226-28 (No. 88-0821, 1991).

Serious Citation 1, Item 3 - Proposed Penalty: $3,000.00

> 29 C.F.R. 1926.502(j)(7)(i): During the performance of roofing work; Materials and equipment shall not be stored within 6 feet (1.8 m) of a roof edge unless guardrails are erected at the edge.

The Secretary asserts that Capeway violated this regulation because roofing materials, tools and equipment were stored within 6 feet of the roof edges and no guardrails were erected. Mr. Barletta testified, and his video and photographs show, that there were materials and equipment near the edge of the roof.[3] (Tr. 36-37; 71-76; GX-15-17). Capeway essentially concedes that this was the case, but asserts that some of the materials were being used; thus, those materials were not being "stored." (Tr. 76). *See also* Respondent's Brief, p. 18). This statement, standing alone, may be accurate. However, it does not alter the fact that there were materials located near the edge of the roof, including unopened boxes of materials, that were not being used at the time when Mr. Barletta observed them. I conclude that these materials were being stored within the meaning of the standard and that the Secretary has established the alleged violation. *See Sierra Constr. Corp.*, 6 BNA OSHA 1278, 1280-81 (No. 13638, 1978).

This item has been classified as a serious violation with a proposed penalty of $3,000.00. Mr. Barletta testified that the violation was serious, with a high severity and a greater probability, because employees who moved or handled the materials were exposed

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[3]According to Mr. Barletta's testimony, there were materials "on the edge" as well as 1 to 6 feet from the edge. (Tr. 36-37; 71; 76).

to a 25-foot fall hazard; in addition, materials could have rolled off or been knocked off the edge and injured someone below. (Tr. 91-94). In light of these factors, the classification and proposed penalty are appropriate. This citation item is affirmed as a serious violation, and the proposed penalty of $3,000.00 is assessed.

ORDER

Based upon the foregoing decision, the disposition of the citation items, and the penalties assessed, is as follows:

Citation 1	**Standard**	**Disposition**	**Classification**	**Penalty**
Item 1	1926.21(b)(2)	Affirmed	Serious	$3,000
Item 2	1926.501(b)(10)	Affirmed	Serious	$3,000
Item 3	1926.502(j)(7)(i)	Affirmed	Serious	$3,000

G. MARVIN BOBER
ADMINISTRATIVE LAW JUDGE

Dated:
Washington, D.C.