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. 98-0923

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 four serious violations, in addition to one repeat and one "other" violation, arising from an Occupational Safety and Health Administration ("OSHA") inspection on November 20, 1998. Respondent Murray Roofing Company, Inc. ("Murray") timely contested the citations, and the trial of this matter was held on March 16 and 17, 1999. Both parties have filed post-hearing and reply briefs. Murray does not dispute 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

At about 7 a.m. on November 20, 1998, two Murray crews, consisting of two supervisors and six roofers, began work on a new section of roof at the Regal Cinemas construction site in Orchard Park, New York. Construction of the roof was being done in sections, and that day the roofing crew started on a new section about 40 feet wide. The roofing process consisted of putting down a layer of insulation followed by a layer of rubber membrane and then ballast or rock over the top. Along the roof's perimeter, russ stripping secured the insulation. Between 8 and 8:30 a.m., after the insulation was laid out, Michael Pinelli, one of the roofers, accidentally stepped backward off the roof while laying out russ stripping at the edge. He fell 32 feet to the ground and sustained serious injuries. (Tr. 9-10, 96-97, 166, 272-78, 317-20, 323).

The Secretary alleges in Citation 1 that Murray's safety monitoring system failed to meet four of the requirements of section 1926.502(h)(1) and, in Citation 2, that Murray failed to provide a combination of a safety monitoring and a warning line system or any other acceptable fall protection as required by section 1926.501(b)(10). If there was no safety monitor, the first citation fails and a prima facie violation of the second citation is established. Citation 3 alleges an "other" violation of section 1926.503(b)(1).

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).

The Evidence

The Secretary presented the testimony of Michael Pinelli, the injured roofer, Matthew Willard, another roofer who was working on the roof that day, and Michael Willis, the OSHA compliance officer ("CO") who conducted the inspection. Murray presented the testimony of Daniel

Easton and Terry Velardita, the supervisors at the site that day. Murray also presented the testimony of Dennis McNulty, another of its supervisors, and John Tendorf, its safety director.

Matthew Willard testified that he arrived late, about 7:15 a.m., and that no warning lines were up where work had begun. He further testified that no warning lines were up when he and others laid insulation about 6 feet from the edge. When the insulation was down, Velardita instructed him to get the necessary tools and begin laying russ stripping. Willard yelled at Pinelli to wait for him and headed to get the tools, which were on the roof some 500 feet away. When he returned, he learned Pinelli had fallen and saw the russ stripping hanging over the edge. Willard stated there were no warning lines near the edge where Pinelli had fallen. He also stated that he overheard Easton on a cell phone talking with Jeff Murray, Murray's owner, and that he heard Murray instruct Easton to set up warning lines.[1] Willard testified that to his knowledge no safety monitor had been appointed that day, that Velardita had never instructed him to act as Pinelli's safety monitor, and that he had never had a safety monitor while working for Murray. (Tr. 10-11, 14-17, 61-62, 86-87).

Michael Pinelli testified that neither he nor anyone else had been told to act as a safety monitor that day and that he had never had a safety monitor while working for Murray. He knew a monitor should be appointed for him when he worked near the edge, but he didn't request one because Murray never used them and he believed the supervisors would joke about it if he asked for one. Similarly, Pinelli said that Murray seldom used warning lines and that there were no warning lines up in the work area that morning. (Tr. 97-99, 113, 146-47).

CO Willis testified that he arrived at the work site at about 10:00 a.m. but was unable to gain access to the roof for more than two hours.[2] By that time, all Murray employees had left and the insulation and membrane had been taken up and secured. On the roof, there were stanchions with new rope stretched between them to form a warning line 15 to 20 feet from the edge. He took photographs and a video of the roof; however, he was not permitted to interview Murray employees

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[1]Easton confirmed this conversation but denied Jeff Murray so instructed him. (Tr. 293-94).

[2]Jeff Murray and Murray's counsel insisted on having a pre-inspection conference with all subcontractors represented and then further insisted on driving Willis around the building. By the time this was completed, all Murray employees had departed and the ladder accessing the roof had been removed. The steel erector contractor lifted Willis to the roof on a scissor lift. (Tr. 159-61).

until several months after the accident, and the statements he took from them were not sworn to.[3] (Tr. 158-63, 173, 215-16, 240-41; C-1, C-6, C-8).

Daniel Easton, Pinelli's supervisor that day, testified that he knew roofers were working near the edge that morning and that they would have decided among themselves who would monitor; as he put it, "Everybody looks out for everybody. It's always been that way." When the roofers were laying insulation near the edge, he was elsewhere with the other supervisor. He was also unaware that Pinelli had begun laying stripping at the edge. Easton said that warning lines were up when he arrived that day but were moved out of the way as the insulation and membrane could not be spread without doing so. There were no warning lines at the edge when Pinelli fell. (Tr. 278-81, 297-302).

Terry Velardita, Willard's supervisor that day, testified he had not appointed a safety monitor but that he or Easton had watched the roofers when they laid out insulation near the edge. However, he also testified that he thought he had appointed himself to monitor the roofers laying insulation, but did not tell anyone of that appointment. He said he did not see Pinelli at the edge, and that when Willard returned, he would have appointed himself, Pinelli, or Willard to monitor. As to warning lines, Velardita stated that for the most part, the insulation and membrane could be slipped under the lines so that the lines needed to be moved back and forth only a little.[4] He further stated that warning lines were up 10 feet from the edge when Pinelli fell, and he did not recall saying the opposite at a worker's compensation board hearing in June 1998. (Tr. 321-22, 325-326, 333-42).

Dennis McNulty, the usual supervisor of Willard's crew, was on vacation the day of the accident. He testified about Murray's training program and his practice of always using safety monitors and warning lines. He said he put warning lines up first thing in the morning and only moved them temporarily when installing insulation and membrane; however, he also said that he had supervised the project on which OSHA previously cited Murray for fall protection violations. (Tr. 249-56, 259). John Tendorf, who spends half of his time on his duties as safety director, testified

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[3]Under these circumstances, and because the statements were not accepted into evidence, I find the testimony about them to have no probative value.

[4]This was also the CO's opinion. (Tr. 166-67).

about Murray's safety objectives and training program. (Tr. 348-50, 382-84). Neither McNulty nor Tendorf had any direct knowledge of what occurred on the day of the accident.

Murray urges that Willard, a disgruntled former employee, and Pinelli, who has retained his own attorney, have grudges against Murray that prevent them from being credible witnesses. I disagree. I observed the demeanors of both witnesses and found their testimony to be candid, consistent and convincing. I also found that these two witnesses exhibited considerably less bias than their supervisors, whose job performance is at issue in this case. Moreover, the testimony of the supervisors was simply unpersuasive. Velardita's testimony was internally inconsistent, and he and Easton contradicted each other on some points, such as whether warning lines were up when Pinelli fell and whether insulation can be installed with warning lines in place. The testimony of Easton and Velardita was also contrary to that of Willard and Pinelli as to the use of monitors at the site. For these reasons, the testimony of Willard and Pinelli is credited over that of Easton and Velardita, and I find that there was no safety monitoring system in use at the site and that there were no warning lines in place in the areas where the roofers were working that morning.

Citation 1

Items 1a through 1d of Citation 1 allege violations of 29 C.F.R. §§ 1926.502(h)(1)(i), (ii), (iii) and (iv), as follows:

> a) The safety monitor did not warn the employee when it appeared that the employee was unaware of a fall hazard or was acting in an unsafe manner;
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> b) The safety monitor was not within visual sighting distance of the employee being monitored;
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> c) The safety monitor was not close enough to communicate orally;
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> d) The safety monitor had been assigned other duties.

At the hearing, the CO stated there could be no violation of these sections if there was no safety monitoring system in use. Further, the Secretary indicates the citation was issued only because of some initial evidence that a safety monitoring system was in use. (Tr. 185; Secretary's Brief p. 8-9). Since it is clear from the record that no one was acting as a safety monitor, and that no one was appointed to act as one, the cited standards are not applicable. Citation 1 is therefore vacated.

Citation 2

Citation 2, Item 1, alleges as follows:

> 29 CFR 1926.501(b)(10): Employee(s) engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels were not 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:
>
> a) On or about 11/20/98, Regal Cinemas, Quaker Crossing site, employees engaged in roofing work on a flat roof were exposed to falls of approximately 32 feet to the blacktop/ground below.

The cited standard provides as follows:

> (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.

As a preliminary matter, Murray contends that the roof was less than 50 feet wide because it was being constructed in sections and the section being worked on that day was only about 40 feet wide. Murray argues, therefore, that only a safety monitoring system was required. This argument fails on two counts. First, based on my findings in the preceding discussion, a safety monitoring system was not in use. Second, the roof was not divided into sections, and the area being worked on that day had no changes in elevation or roof line; rather, the work area was simply a contiguous part of a very large roof. (Tr. 170, 335-36; C-1-8). Murray's contention is rejected.

In view of my findings set out *supra*, neither a safety monitoring system nor a warning line system was in use at the site at the time of the accident. Moreover, it is undisputed that employees were working at and/or near the edge of the roof, that the employees were at risk of falling more than 30 feet to the ground below, and that the employees were visible to the supervisors at the site. The Secretary has accordingly established a prima facie violation of the subject standard.

Murray contends that Pinelli's fall was the result of unpreventable employee misconduct. To establish this affirmative defense, an employer must show: (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated the rules to its employees,

(3) that it has taken steps to discover violations of the rules, and (4) that it has effectively enforced the rules when violations have been discovered. *Precast Serv., Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion,* 106 F.3d 401 (6th Cir. 1997). In support of its defense, Murray notes its training program emphasizing fall protection and its work rule prohibiting being on the job under the influence of drugs or alcohol. Murray asserts Pinelli ignored his training by reporting to work under the influence of alcohol and by beginning work at the roof's edge without a monitor and without a foreman assigning him to work there.[5] (Respondent's Brief p. 9-10).

I conclude that Murray has not met the elements of the affirmative defense of unpreventable employee misconduct. Although Murray argues that its safety training program informed employees about the rules they were expected to follow, the evidence establishes that safety rules were generally disregarded in practice by both employees and supervisors. Despite the fact that Murray's rules required fall protection, Willard and Pinelli testified credibly that fall protection was seldom used. Further, the record establishes that Tendorf, the safety director, was poorly informed about accidents and OSHA inspections, and there was no evidence to show that he actually observed on-the-job practices or ever detected safety rule violations. (Tr. 389-90). Finally, while supervisors could suspend or send home noncompliant employees, there was no evidence that any meaningful discipline was ever imposed. (Tr. 292, 342, 386-87). For example, Willard fell while tearing shingles from the edge of an unprotected roof a few weeks before Pinelli's accident, and although Willard's supervisor criticized him for disobeying his instruction to not walk on icy rubber and characterized Willard as having difficulty following rules, he did not discipline him or report the fall to the safety director. (Tr. 23-24, 247-48, 266-67, 390). On the basis of the record, Murray's contention that the accident was due to unpreventable employee misconduct is rejected, and this item is affirmed as a violation of section 1926.501(b)(10).

Turning to the characterization of this citation item, 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. *Potlach Corp.,* 7 BNA OSHC 1061,

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[5]The record indicates that the night before his fall, Pinelli had had several drinks. The record also indicates that a test after his fall revealed alcohol in his blood, although no one at the site had observed anything amiss and he professed to having felt fine. (Tr. 120-24).

1063 (No. 16183, 1979). The Secretary makes a rebuttable prima facie showing of a repeat violation where the prior and present violations are for failure to comply with the same standard. *Id.* Murray was cited for a violation of 29 C.F.R. 1926.501(b)(10) on December 4, 1995. The citation was affirmed on January 26, 1996, by an order approving a settlement that became final on March 4, 1996. (Tr. 177-78; C-9). Murray has not disputed the repeated classification of this citation item. Item 1 of Citation 2 is consequently affirmed as a repeated violation.

The Secretary has proposed a penalty of $14,000.00 for this item, which she calculated by doubling her gravity-based penalty. In determining appropriate penalties for violations, the Commission is to give due consideration to the gravity of the violation as well as the employer's size, history and good faith. The gravity of the violation, generally the most significant consideration in penalty assessment, depends on 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). I consider the gravity of this violation to be moderately high; five employees were exposed to falls of 32 feet, the employees were not protected in any way, although the duration of the exposure was not long, and the condition could have caused, and in fact did cause, serious injuries. I conclude that no reductions for size, history or good faith are appropriate and that the proposed penalty of $14,000.00 is appropriate.

Citation 3

The Secretary alleges that Murray did not make written certification records of training available to OSHA upon request as required by section 1926.503(b)(1). Paragraph (a) of that standard mandates that employers provide a fall hazard training program to each employee who might be exposed to fall hazards, while paragraph (b)(1) requires each employer to prepare a written certification record to verify compliance with paragraph (a). The CO testified that Murray had not responded to a subpoena duces tecum calling for "any and all training records pertaining to fall protection for the last three years." (Tr. 184; C-10). This testimony provides a reasonable basis for concluding that Murray did not prepare the required certification, and Murray has presented nothing to rebut this evidence. This item is accordingly affirmed as an "other" violation. No penalty was proposed for this item, and none is 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. Respondent, Murray Roofing Company, Inc., 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 not in violation of section 5(a)(2) of the Act as alleged in Citation 1, Items 1a, 1b, 1c and 1d.

3. Murray was in repeated violation of section 5(a)(2) of the Act as alleged in Citation 2, Item 1, and a penalty of $14,000.00 is appropriate for this item.

5. Murray was in "other" violation of section 5(a)(2) of the Act as alleged in Citation 3, Item 1, and no penalty is appropriate for this item.

ORDER

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

1. Items 1a, 1b, 1c and 1d of Citation 1 are vacated.

2. Item 1 of Citation 2 is affirmed as a repeated violation, and a penalty of $14,000.00 is assessed.

3. Item 1 of Citation 3 is affirmed as an "other" violation, and no penalty is assessed.

Ann Z. Cook
Judge, OSHRC

Dated:

Washington, D.C.