

SECRETARY OF LABOR,

Complainant,

v.

A.D. WILLIS COMPANY, INC.,

Respondent.

OSHRC DOCKET NO. 97-0149

APPEARANCES:

For the Complainant:

Alex Mabry, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

Garreth E. Shaw, Garreth E. Shaw, P.C., San Antonio, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

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, A.D. Willis Co. (Willis), at all times relevant to this action maintained a place of business at the HEB store in Midland, Texas, 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 August 9, 1996 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Willis' Midland work site. As a result of that inspection, Willis was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Willis brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On June 17, 1997, a hearing was held in Austin, Texas. Respondent has filed a post-hearing submission and this matter is ready for disposition.

Alleged Violations

Citation 1, item 1 alleges:

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

Employees were observed working at the front edge of the HEB located at the corner of Midkiff and Wadley Streets. The employees were not provided with any means of fall protection.

The cited standard states:

Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

In the alternative, the Secretary alleges violation of the more specific standard at §1926.501(b)(10), which states:

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 (1.8m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest system, or warning line system and safety monitoring system. . . .

Facts

Compliance Officer (CO) Antonio R. Sanchez testified that on the inspection date he arrived at the HEB site in Midland at around 9:15 to 9:30 a.m. (Tr. 19). Upon his arrival, Sanchez observed and videotaped two Willis employees working at the very edge of the north front corner of the HEB rooftop (Tr. 19-20, 25). The HEB roof is approximately 30 feet high, and 263 feet wide by 310 feet long (Tr. 28). The employees, Ronald Padgett and Albert Nunez, were drilling and welding a flashing at the edge of the roof (Tr. 22, 24). No fall protection was visible (Tr. 22).

Sanchez testified that he spent the next two to two and one half hours inspecting the electrical contractor on site (Tr. 82). At around 11:00 to 11:15 a.m. he went up to the roof (Tr. 27, 96). Sanchez interviewed Padgett, who stated that he was a supervisor for Willis, working as a roofer (Tr. 32; Exh. C-2). Padgett stated that he was drilling T-bar at the edge of the roof, and was not using a safety belt (Tr. 32; Exh. C-2). Sanchez testified that Willis' foreman, George Gomez, agreed that there was no fall protection in place at that time; Sanchez stated that Gomez told him there were normally harnesses and belts on the job, but that they were not on the site that day (Tr. 92, 98).

At the hearing Gomez testified that when Padgett and Nunez were on the roof edge on the morning of August 9, 1996, he was acting as a safety monitor, assuring that the men working on the roof edge were aware of their position (Tr. 116). A warning line system consisting of five freestanding safety stands and a 30 foot line with flagging was placed approximately 10 feet from the roof edge (Tr. 117-18, 131). When the CO arrived on the roof, Gomez' crew had finished working on the edge, and had removed the warning line and placed it in the back of Gomez' truck (Tr. 121, 141). Gomez stated that the CO never asked him about a warning line, and did not recall telling Sanchez that there was no fall protection on the roof (Tr. 122, 158-61).

Sanchez admitted that he could not state whether there had been a warning line and safety monitor on the roof prior to his arrival there at 11:00 a.m. (Tr. 79, 109).

Discussion

Willis' foreman, George Gomez, testified that a warning line was in place and a monitor on duty during the period that Willis' employees were working at the edge of the flat roof. Complainant introduced no contradictory evidence. The CO could not see past the roof edge, and did not go up onto the cited roof until two and one half hours after he saw Padgett and Nunez working at the edge. When he did reach the roof, Willis had completed its work there. The CO is, thus, unable to say whether Padgett and Nunez were protected by a warning line and monitor, or to comment on the adequacy of the fall protection system Gomez maintains was in place.

Complainant's reliance on employee interviews is misplaced, in that those interviews are ambiguous and establish only that Padgett and Nunez were not using safety belts.

Complainant failed to establish, by a preponderance of the evidence, that Willis' employees worked at the edge of the HEB roof without fall protection on August 9, 1996; the citation must be vacated.

ORDER

1. Citation 1, item 1, alleging violation of §1926.501(b)(1) is VACATED.

Stanley M. Schwartz
Judge, OSHRC

Dated: