



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

Phone: (303) 844-3409

Fax: (303) 844-3759

SECRETARY OF LABOR,

Complainant,

v.

EARL F. DOUGLASS ROOFING CO.,

Respondent.

OSHRC DOCKET NO. 04-1552

APPEARANCES:

For the Complainant:

Oscar L. Hampton, III, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

Robert R. Miller, Esq., Stettner, Miller & Cohn, P.C., Denver, Colorado

Before: Administrative Law Judge: Sidney J. Goldstein

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, Earl F. Douglass Roofing Co. (Douglass), maintained a place of business at an apartment complex on 9th Avenue, between 16th and 17th Streets, in Greeley, Colorado, where it was involved in a re-roofing project. Douglass admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On July 26, 2004, following its receipt of a complaint (Tr. 18-19), the Occupational Safety and Health Administration (OSHA) conducted an inspection at Douglass' Greeley work site. As a result of that inspection, OSHA issued a citation alleging violation of §1926.501(b)(13) of the regulations. By filing a timely notice of contest Douglass brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On June 14, 2005, a hearing was held in Denver, Colorado. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violation of §1926.501(b)(13)

Serious citation 1, item 1 alleges:

29 CFR 1926.501(b)(13): Each employee engaged in residential construction activities 6 feet or more above lower levels was not protected by guardrail systems, safety net systems, or personal fall arrest systems, nor was an alternative fall protection measure provided.

Douglass Roofing @ 9th Avenue between 16th and 17th, Greeley, CO 80631: On or before July 26th 2004, the employer did not ensure that fall protection systems were utilized by employees engaged in re-roofing activities while working at the unprotected edges of a 5 in 12 sloped roof on a multi-family residential housing complex. Employees were wearing full body harnesses, but were not utilizing a fall protective system in conjunction with the harness. Employees were exposed to fall hazards of approximately 23' 8" on the south side of the roof, directly adjacent to the work operations, and 21' 5" on the north roof.

* * *

DOUGLAS (sic) ROOFING WAS PREVIOUSLY CITED FOR A VIOLATION FOR A SUBSTANTIALLY SIMILAR CONDITION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD (29 CFR 1926.501(B)(10)) WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER 306374083, CITATION NUMBER 1, ITEM NUMBER 1, ISSUED ON NOVEMBER 12, 2003, WITH RESPECT TO A WORKPLACE LOCATED AT 5400 ZIEGLER ROAD, FORT COLLINS, CO 80526.

Facts

It is undisputed that on July 26, 2004, at approximately 3:00 p.m., at the Greeley work site, three Douglass employees were working on a roof in excess of 21 feet above the ground without fall protection (Tr. 20-23, 29, 52, 58, 83, 208, 259-60; Exh. C-1). The employees were wearing harnesses, and in one case, a lanyard. None, however, were tied off to an anchorage (Tr. 27-28, 47, 94, 208; Exh. C-1). Douglass' foreman, Miguel Gonzalez, knew the men were working without fall protection (Tr. 337). He told OSHA Compliance Officer (CO) Robert Blomster that the crew was almost finished working for the day, and had taken the anchors off the roof in preparation for their departure (Tr. 33-35, 42, 50). The crew was not finished with the re-roofing, however, and was still working when Blomster began videotaping them (Tr. 60-61, 65-66, 115; Exh. C-1). Blomster concluded that Douglass had constructive knowledge of the cited violation because Mr. Gonzalez was a foreman (Tr. 113).

It is undisputed that Douglass had a safety rule requiring fall protection whenever employees are exposed to falls of greater than six feet (Tr. 107). Employees working on steep roofs are to be tied off 100% of the time (Tr. 156, 302). Miguel Gonzalez had received training in the fall protection rule, as had his crew (Tr. 107, 117-18). The crew was provided with fall protection equipment including full-body harnesses, rope grab lanyards and lifelines, all of which were present at the job site (Tr. 126, 156-57).

Douglass has an extensive safety program, and a permanent safety committee, which meets monthly to discuss accidents and citations, disciplinary actions, possible corrective actions and policy changes (Tr. 155; Exh. R-5). Douglass requires that its superintendents attend a 40-hour OSHA outreach training program (Tr. 155). The superintendents, in turn, teach 10 hour OSHA courses for Douglass foremen (Tr. 155). Douglass' foremen conduct weekly toolbox safety meetings (Tr. 155). Douglass' safety program requires that job site audits be conducted by both its project managers and its superintendents (Tr. 120, 160-61; Exh. R-5, p. 9, 12). In addition, Douglass' insurance loss control specialist conducts unannounced job site inspections (Tr. 162). Incentive programs reward foremen for the safe completion of quality work (Tr. 163). Employees, including supervisors, found violating Douglass' safety rules are punished with a program of progressive discipline beginning with a verbal or written warning, followed by a suspension without pay and termination in the event of a third violation (Tr. 128, 164-68, 270-71; Exh. R-10).

Gonzalez's superintendent, Robert Schissler, attended the OSHA outreach program (Tr. 158; Exh. R-6, p. 1). Schissler provided 10 hours of OSHA training for Gonzalez and his crew in February, 2004 (Tr. 158, 304; Exh. R-6, p. 2). Schissler inspected Gonzalez's job sites on a daily basis (Tr. 319). Michael Cohig, the project manager on the Greeley job, supervised Gonzalez's work on other jobs (Tr. 225). Neither Schissler nor Cohig had ever found Gonzalez, who had been a foreman for approximately five years, in violation the fall protection rules, or of any other safety rules (Tr. 183-84, 198, 225, 267, 296, 328). Schissler testified that he found Gonzalez trustworthy (Tr. 325).

Cohig, Schissler, and Gonzalez conducted a pre-construction meeting at the Greeley job site on July 25, 2004 (Tr. 233, 301, 306). Together they filled out a checklist indicating that they had reviewed the site, job requirements, equipment and materials needed, and the safety concerns posed by the job (Tr. 235-38; Exh. R-11). Specific safety concerns included ladders, falling debris and falls (Tr. 238; Exh. R-11, p. 7). It was determined that fall hazards would be addressed by using safety lines (Exh. R-11, p. 8).

Cohig visited the site unannounced around 11:00 a.m., on July 26, 2004, at which time all the employees were tied off (Tr. 228, 250-52, 261). Cohig spoke with Gonzalez that morning, reminding him that employees were to be tied off at all times (Tr. 263). Schissler also conducted an unannounced audit of the work site around noon and found that the employees were using fall protection (Tr. 112, 306-08).

Gonzalez and his crew were disciplined following the OSHA inspection (Tr. 127, 182, 245; R-14). The crew was suspended for three days. In addition, Gonzalez's pay was reduced for a year, and he was required to teach a safety class stressing the importance of wearing fall protection (Tr. 168-69, 182-83,

341). Gonzalez testified that he had always worn his fall protection on other jobs. He understood that if he failed to use fall protection in the future he would be fired (Tr. 339-40).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the terms of the standard were not met; (3) employees had access to the violative condition; and (4) the cited employer either knew of the violative conditions or could have known with the exercise of reasonable diligence. *See, e.g., Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2170, 2171, 2000 CCH OSHD ¶32,137 (No. 99-0257, 2000). In this case, although the existence of the violative condition is not contested, the Secretary failed to demonstrate Douglass' actual or constructive knowledge of the violation.

The Commission has held that the knowledge, actual or constructive, of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes that the failure of employees, including any supervisory employees, to follow proper procedures was unpreventable.¹ *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-531, 1991). In other words, the record must show that the employer exercised reasonable diligence both in establishing work rules designed to prevent the occurrence of violations and in communicating and enforcing those rules. *See, e.g., Stahl Roofing, Inc.*, ___ BNA OSHC ___, 2002 CCH OSHD ¶32,646 (Nos. 00-1268, 00-1637, 2003).

It is undisputed that Douglass had an extensive safety program that included a fall protection rule designed to prevent the cited fall violation. The cited crew members and their foreman, Gonzalez, received fall protection training a few months prior to the OSHA inspection. On the day of the inspection, employees were provided with all the equipment necessary to comply with Douglass' 100% tie off rule. Douglass conducted two unannounced inspections of the work site within a few hours of the violation, at which time employees were properly tied off. After the violations were reported, all the employees involved were disciplined. The discipline meted out was consistent with the progressive disciplinary program established by Douglass.

¹ The Tenth Circuit has held that where a violation turns on omissions by supervisory personnel, it remains the Secretary's burden to show that the supervisor's failure to instruct was itself foreseeable. *Capital Electric Line Builders, Inc. v. Marshall*, 678 F.2d 128 (10th Cir. 1982). Because the record establishes that Douglass exercised reasonable diligence in training and supervising all its personnel, it is unnecessary to address the proper allocation of the burden of proof.

Nonetheless, the Secretary maintains that Douglass' safety program was ineffective, in that foremen and superintendents were not required to keep written records documenting, on a daily basis, whether employees were in compliance with the fall protection rules. Currently Douglass relies on a system where only negative findings, *i.e.*, failures to comply with safety rules, require a written report. In addition, the Secretary argues that Douglass' receipt of a citation for violation of a different residential roofing standard in October, 2003 (Exh. C-3) should have alerted Douglass to a need for increased supervision at its work sites. The Secretary's position is not supported by current Commission precedent. The Commission has stated that "an employer's duty is to take *reasonably* diligent measures to inspect its worksites and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard" *Texas A.C.A. Inc.*, 17 BNA OSHC 1048, 1051, 1993-95 CCH OSHD ¶30,653, ¶42,527 (No. 91-3467, 1995)(emphasis in original). There is no evidence that Mr. Gonzalez was involved in the low slope roofing job that led to the 2003 OSHA citation. Nothing in the record indicates that Douglass had any reason to believe that Gonzalez would allow his crew to work without fall protection. Two separate unannounced visits within hours of the OSHA inspection revealed no violations. OSHA's conclusion that job safety would be enhanced if written documentation of every job site inspection were required is mere speculation and is not supported by any concrete evidence. On this record it cannot be found that Douglass failed to use reasonable diligence either in its training of employees or in its efforts to discover and prevent violations of its established safety rules.

The Secretary failed to establish a violation of the cited standard, and the citation is VACATED.

ORDER

1. Serious citation 1, item 1 is DISMISSED.

/s/

Sidney J. Goldstein
Judge, OSHRC

Dated: October 13, 2005