SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC DOCKET NO. 01-0014
HST ROOFING, INC., Respondent.	:	

APPEARANCES:

Margaret A. Temple, Esquire
Office of the Solicitor
Department of Labor
New York, New York
For the Complainant

Douglas E. Rowe, Esquire
Certilman, Balin, Adler & Hyman, LLP
East Meadow, New York
For the Respondent

BEFORE: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C.§ 651 *et seq.* ("the Act"). On September 12 and 13, 2000, the Occupational Safety and Health Administration ("OSHA") inspected a work site in Edgewater, New Jersey, where employees of HST Roofing, Inc. ("HST"), were engaged in roofing work. After the inspection, OSHA issued to HST a "repeat" citation alleging a violation of 29 C.F.R. § 1926.501(b)(10). HST contested the citation, and a hearing was held on February 20, 2002. Both parties have submitted post-hearing briefs.

Background

At the time of the inspection, HST was involved in the construction of the roof of a large, 16-theater multiplex building. The building was 30 feet high, 200 feet wide and 400 feet long. A parapet wall protected the edge of the roof, except for two areas along the edge where there was no fall

protection of any type. The inspection that resulted in the issuance of the citation occurred when OSHA Compliance Officer ("CO") John Barrett, who was en route to another work site, saw an unprotected worker straddling the parapet on September 12, 2000. The employee did not work for HST, and no HST employees were working on the roof that day. CO Barrett returned to the site on September 13, 2000, at which time he observed 12 HST employees working at various locations on the roof; at least one employee was within 6 inches of the edge. The CO noted that there were no warning lines in place, and, because he learned that HST had intended to use a warning line and a safety monitoring system for fall protection when needed, he recommended issuance of the citation. CO Barrett did not return to the work site again, and he conducted the closing conference by telephone on September 14, 2000. (Tr. 8-12, 16-21, 80-86; Exh. C-4).

"Repeat" Citation 1, Item 1

This item alleges a violation of 29 C.F.R § 1926.501(b)(10), which requires the employer to provide fall protection to employees engaged in roofing activities on roofs with widths of 51 or more feet and unprotected sides and edges 6 feet or more above lower levels.[1] It is undisputed that the roof in question was more than 51 feet in width, that it was more than 6 feet high, and that HST employees were performing roofing work there on September 13, 2000. It is also undisputed that HST did not have in place a warning line system and that there were two areas of the roof that had an open edge with no protection. For the reasons that follow, however, I find that the Secretary failed to prove: (1) that HST employees were exposed to the hazard of the two open edges; and (2) that the cited standard applied to the work area.[2]

The record shows that on September 13, 2000, HST employees were laying small stones on the center of the roof on top of a rubber membrane that had previously been installed. They were not performing any other type of work that day, and their duties did not require them to venture near

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[1]Acceptable fall protection could be a guardrail system, a safety net system, a personal fall arrest system, or any one of these systems, or a safety monitoring system, combined with a warning line system. 29 C.F.R. § 1926.501(b)(10)

[2]To prove her prima facie case, the Secretary must show that the cited standard applies, that the terms of the standard were violated, that employees were exposed to the violation, and that the employer knew or should have known of the violation. *See Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

either of the two unprotected edges. Rather, the employees accessed the roof through an entry in the center of the roof. They then walked to a parapet-protected area to obtain their materials, after which they remained in the center of the roof to lay the stones. (Tr. 44-60, 60-68, 72-77, 80-83; Exh. C-4).

Although CO Barrett testified that he observed employees "all over the roof" and "6 inches from the edge," he never testified that he saw employees in the two areas where there was no parapet protection. In fact, he identified the "edge" where he saw employees as the area near the material hopper, which clearly had parapet protection.[3] The evidence plainly shows that HST's work did not require its employees to walk or work anywhere near the two unprotected areas. In fact, there was evidence that employees were kept 20 to30 feet away from those areas. (Tr. 18, 34-35, 60-61, 74-75).

To establish employee exposure, the Secretary must show "that it is reasonably predictable, either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No.93-1853, 1997). Although proof of actual exposure is not necessarily required, a simple theoretic possibility is insufficient. *Id*. *See also, Donovan v. Adams Steel Erection, Inc*., 766 F.2d 804 (3d Cir., 1985). Here, the Secretary failed to show either actual exposure or a factual basis for concluding that operational necessity or inadvertence could reasonably have caused HST employees to be in the "zone of danger." I accordingly find that HST's employees were not exposed to the cited hazard.

Further, the Secretary did not submit sufficiently reliable evidence to persuade me that the standard applied to HST's work area. HST employees worked near the parapet in the area of the material hopper, and they also may have had access to parapet-protected edges in other locations. For example, Steven Johns, HST's supervisor, testified that employees were laying stone "from end to end," and the video the CO took shows what appears to be stone laid in the area of a parapet-protected edge. (Tr. 28-29, 71-75; Exh. C-4). The standard, however, applies only to an "unprotected side or edge," which 29 C.F.R. § 1926.500 defines as "a side or edge...of a walking/working surface...where there is no wall...at least 39 inches (1.0 m) high. Thus, to establish that the standard applied to HST's work area, the Secretary had to show that the parapet was less than 39 inches high.

[3] The CO testified that "for the most part, (HST employees) had the wheelbarrow at the edge in order to load the stone." (Tr. 83). The evidence clearly demonstrates, however, that the area where HST employees were obtaining their work materials was protected by a parapet wall.

CO Barrett testified that the parapet was no more than 9 inches high.[4] (Tr.80-81). On the other hand, Joe Forames, HST's foreman at the site, testified that the parapet was uniformly the height of his waist, or 39 inches high.[5] (Tr.44-45). I observed the respective demeanors of these individuals as they testified, and I found both to be sincere witnesses. It was evident from his testimony, however, that the CO was insufficiently familiar with the site to make an adequate assessment of the cited hazard. He was on the roof for only a short time on September 13, 2000, he did not measure the parapet, and he apparently was focused on the violations of another contractor at the site. (Tr.9, 19, 28, 33-34; Exh. C-4). In addition, he gave conflicting testimony about the parapet in that he initially stated that there was a parapet along only one side of the building, but later recounted and said he had observed parapet walls throughout the site. He also admitted that the parapet wall near the material hopper, where he observed HST employees working, could have been high enough to satisfy the standard. (Tr. 28-31, 80-81). Finally, the CO's video of the site is inadequate to definitively establish the height of the parapet, although in many frames the wall appears substantially higher than the 9 inches claimed by the Secretary. (Tr. 31, 80-81; Exh. C-4). Based on the record, I find that the CO's testimony about the parapet wall was not reliable and that it did not rebut HST's evidence in this regard. The Secretary has thus not shown the applicability of the standard, and this item is vacated.

Conclusions of Law

1. Respondent, HST Roofing, Inc., is an employer engaged in interstate commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was not in violation 29 C.F.R. § 1926.501(b)(10).

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[4]The CO agreed that if the parapet was 39 inches high, it would be adequate. (Tr. 84-85).

[5]Based on the measurements taken during the hearing, I find that Mr. Forames' his waist was at least 39 inches high. (Tr.65-68).

Order

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

1. "Repeat" Citation 1, Item 1 is vacated.

/s/

Irving Sommer
Chief Judge

Date: 13 MAY 2002
Washington, D.C.