SECRETARY OF LABOR, Complainant, v. STAZ-ON ROOFING, INC., and its successors, Respondent.	OSHRC DOCKET NO. 02-2229

APPEARANCES:

For the Complainant:
Mike Shoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:
Robert E. Rader, Jr., Esq., Rader & Campbell, Dallas, Texas

Before: Administrative Law Judge: Robert A. Yetman

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").

Respondent, Staz-On Roofing, Inc., and its successors (Staz-On), at all times relevant to this action maintained a place of business at 5350 Fossil Creek Road, Haltom City, 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 November 12-14, 2002, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Staz-On's Fossil Creek work site. As a result of that inspection, Staz-On was issued a citation alleging violations of 29 C.F.R. §§1926.21(b)(2) and 1926.501(b)(13) of the Act together with proposed penalties. By filing a timely notice of contest Staz-On brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 9, 2003, a hearing was held in Dallas, Texas. At that hearing, citation 1, item 1, alleging violation of 29 C.F.R. §1926.21(b)(2) was withdrawn (Tr. 6). The parties have submitted briefs on the remaining issues and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 2 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 personal fall arrest systems, safety net system or guardrails.

Employer did not ensure that each employee engaged in residential construction activities and 6 feet or more above lower levels was protected from falling by a personal fall arrest system.

a. On or about November 12, 2002 at the work site located at 5350 Fossil Creek, Haltom City, Texas, employees were potentially exposed to a fall of 29 feet and 6 inches to the ground below.

b. Also on or about November 14, 2002 at same location, employees were again observed working at heights above 30 feet. Employees were potentially exposed to a fall of more than 30 feet to the ground below.

Facts

At the April 9, 2003 hearing, OSHA Compliance Officer (CO) Ruth Rodriguez testified that on November 12, 2002, she observed four workers laying felt on the roof at Staz-On's Fossil Creek site. Two of the workers were not using fall protection (Tr. 11, 19, 49). Rodriguez stopped and photographed what she believed were violations of the Act (Tr. 11, 14; Exh. C-2, C-3, C-4). Two of her photographs show one of the unprotected employees carrying a roll of felt along the ridge line of the roof, while a second unprotected worker walks across the sloped roof front to the right hand eave, where two other workers are kneeling (Tr. 131-32; Exh. C-2, C-3). In Complainant's exhibit C-4, the first employee has handed off the roll of felt to the second worker, who carries it to the kneeling workers (Tr. C-4).

Because she was on her way to a scheduled trench inspection on November 12, 2002, Rodriguez was unable to visit the Fossil Creek site until November 14, 2003 (Tr. 11-13). When she arrived at the site on November 14, 2003, Rodriguez observed and photographed Staz-On's foreman, James Copley, on the roof putting on his harness (Tr. 13, 15, 19; Exh. C-1). Another Staz-On employee, Omar Torres, was not tied off (Tr. 23). A third employee, Miguel Angel Morales was neither tied off, nor was he wearing a harness (Tr. 23-24, 27, 39-40, 46). Rodriguez testified that though an anchor had been affixed to the roof and lines attached to it, the lines were not being used by employees (Tr. 25). According to Rodriguez, all five Staz-On employees on the site that day admitted that there were times when they did not tie off (Tr. 35-36).

Only Staz-On employees were working on the cited roof on November 12, 2002 (Tr. 52-53). Through her employee interviews, Rodriguez was able to identify the two unprotected

workers she photographed on November 12 as foreman Copley and laborer Torres (Tr. 16, 24, 50, 56-58).

At the hearing, Omar Torres identified himself and James Copley as the unprotected employees in Complainant's exhibits C-2, C-3, and C-4 (Tr. 172). Torres testified that he and James Copley were the only employees retrieving felt (Tr. 171). Torres stated that his feet got tired from walking along the top of the roof ridge, and, as pictured in Complainant's exhibit C-4, he passed the roll of felt on to Copley (Tr. 175, 179). On other occasions Torres handed off the roll of felt to Copley or one of the other workers (Tr. 180). Torres testified that the hand-off did not feel awkward or unsafe (Tr. 181). According to Torres, all the other men on the crew tied off all the time (Tr. 171).

Torres testified that he was reprimanded by Staz-On for not being tied off at the Fossil Creek site (Tr. 185). That reprimand was not withdrawn by the company although Torres told David Crawford, Staz-On's safety director, that he was only going for materials (Tr. 186). Copley received a first reprimand based on Crawford's observation of him working on the roof without fall protection on November 13, 2002 (Exh. R-11). He received a second reprimand based on his failure to don his harness on November 14, 2002 (Exh. R-11). Both reprimands were issued on December 9, 2002, after issuance of the OSHA citation.

Safety Director Crawford testified that he was aware that Copley and Torres were working without fall protection at the Fossil Creek site (Tr. 57-58, 60, 62). According to Crawford, Staz-On normally stores materials all along the roof so that employees can access the rolls while remaining tied off (Tr. 62-63; *see also*, testimony of Paul Graham, Tr. 119). At the Fossil Creek location, however, the rolls of felt that Staz-On was using to cover the roof had been placed by the framer in the only accessible area of the 70 x 170 foot roof, *i.e.*, in the center, on the front edge (Tr. 83-84, 88, 120). The rolls were too far away to be reached by the workers, who were wearing 50-foot lanyards (Tr. 85). Crawford testified that he knew that employees unhooked from the anchor and walked, unprotected, 20-25 feet to the area where the rolls of felt were stored (Tr. 58, 86). After retrieving their materials the employees would hook up to the anchor to lay the felt (Tr. 63).

Crawford testified that he was not aware of a feasible way for his employees to remain tied off to the existing anchors while retrieving felt on this job. However, he agreed that anchors

could have been attached along the roof edge "with as many lines as necessary so that employees could [walk] from one end of the building to the other [and] stay tied off at all times" (Tr. 67-68).[1] Crawford also acknowledged that fall protection could have been provided to the individual carrying the roll of felt (Tr. 69, 70 Exh. C-2). Crawford claimed to have investigated the feasibility of guardrails and safety nets (Tr. 92). Paul Graham, Staz-On's president, testified that he discussed erecting scaffolding (Tr. 123). However, the anchors for the fall arrest system were already in place (Tr. 92). Both Crawford and Graham felt that adding a second fall protection system would expose employees to a greater hazard than simply unhooking for those periods when they would be required to retrieve rolls of felt unprotected (Tr. 96, 123). Crawford testified that the employees had to retrieve felt for approximately five minutes, five or six times a day, and would be exposed to the cited fall hazard for only 30 minutes or so each day (Tr. 96, 123). Erecting guardrails or scaffolding could take two or three hours (or days, depending on who was testifying), during which employees would be exposed to the danger of falling (Tr. 96, 123, 125, 158). Graham admitted that employees would not actually be exposed to the hazard of falling while erecting guardrails or scaffolding, because they could be tied off; however, Graham claimed to be worried that the workers might be frightened if they fell and were left dangling from the edge (Tr. 147, 157).

Crawford further testified that additional anchors and/or a safety line were infeasible. According to Crawford, two or three men cannot attach to a safety line on a roof where the men are working in different areas and causing the line to deflect in different directions, unless additional anchors are added (Tr. 195). Graham testified that it would be cumbersome and dangerous to switch between multiple anchor points while carrying a roll of felt, which weighs approximately 35-40 pounds (Tr. 72, 150, 156). He also stated it would be dangerous for two employees, tied off to separate anchors, to pass off the heavy roll of felt (Tr. 161-62).

Crawford admitted that it was unsafe for an employee to walk along the peak of the roof carrying a roll of felt, and that an employee falling from that height would be seriously injured or killed (Tr. 93-94). Nonetheless, Crawford testified, he believed it was permissible to allow employees to unhook their lanyards when it was impractical for them to retrieve working

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[1] Mr. Crawford contradicted his testimony during cross examination by stating that employees carrying felt could not be tied off at all times (Tr. 86, 90, 92).

materials while tied off (Tr. 75).

Staz-On did not develop a written fall protection plan in accordance with 29 C.F.R. §1926.502(k) (Tr. 94-95, 137). No controlled access zone was established and no monitoring system was in place (Tr. 139-40). Graham testified that it "just wasn't necessary" given the short period of time his employees would not be tied off (Tr. 137-39).

Discussion

With regard to instance a), Staz-On admits that both foreman Copley and laborer Torres were working on the cited roof on November 12, 2002 without fall protection. Staz-On argues that it was not required to comply with 29 CFR §1926.501(b)(13), however, because it was infeasible to do so, and because providing alternative fall protection would have created a greater hazard. Though clearly required by the standard, Respondent apparently maintains that it did not need to develop a written plan complying with subparagraph (k), reproduced below, and, *inter alia*, describing attempts to find a feasible means of protecting its employees from fall hazards.

Staz-On also admits that Copley did not tie off before accessing the roof on November 12, 2002, as alleged in instance b). Staz-On claims that Copley had been trained to do so, and that his failure to tie off constituted unpreventable employee misconduct. The cited standard states in pertinent part, that:

> Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k)[2] of §1926.502.

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[2] (k) *Fall protection plan.* This option is available only to employees engaged in leading edge work, precast concrete erection work, or residential construction work (See Sec. 1926.501(b)(2), (b)(12), and (b)(13)) who can demonstrate that it is infeasible or it creates a greater hazard to use conventional fall protection equipment. The fall protection plan must conform to the following provisions.

(1) The fall protection plan shall be prepared by a qualified person and developed specifically for the site where the leading edge work, precast concrete work, or residential construction work is being performed and the plan must be maintained up to date.

(2) Any changes to the fall protection plan shall be approved by a qualified person.

(3) A copy of the fall protection plan with all approved changes shall be maintained at the job site.

(4) The implementation of the fall protection plan shall be under the supervision of a competent person.

(5) The fall protection plan shall document the reasons why the use of conventional fall protection systems (guardrail systems, personal fall arrest systems, or safety nets systems) are infeasible or why their use would

> Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with § 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

Instance a). To establish the affirmative defense of infeasibility, an employer must show that: 1) the means of compliance prescribed by the applicable standard would have been infeasible, in that, (a) its implementation would have been technologically or economically infeasible, *i.e.*, there is no way to use the precaution required for its intended purpose without unreasonably disrupting the work to be performed, *see, Seibel Modern Mfg & Welding Corp.*, 15 BNA OSHC 1218, 1991-93 CCH OSHD ¶29,442 (No. 88-821, 1991), or, (b) necessary work operations would have been technologically or economically infeasible after its implementation, *and* (2) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994).

Staz-On failed to show that it was infeasible, or even impractical, for its employees to perform their assigned tasks on this location while using a standard fall arrest system. Laborer Torres testified that he could and did hand off rolls of felt to foreman Copley, who could have been, but was not tied off when he received them. Torres testified that it was neither awkward nor dangerous to do so. Had an additonal anchor point, closer to the stored felt, been provided for Torres, supplies could have been relayed to the area where work was taking place, without any employees being exposed to a fall hazard. The hazard to which Torres would have been

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create a greater hazard.

(6) The fall protection plan shall include a written discussion of other measures that will be taken to reduce or eliminate the fall hazard for workers who cannot be provided with protection from the conventional fall protection systems. For example, the employer shall discuss the extent to which scaffolds, ladders, or vehicle mounted work platforms can be used to provide a safer working surface and thereby reduce the hazard of falling.

(7) The fall protection plan shall identify each location where conventional fall protection methods cannot be used. These locations shall then be classified as controlled access zones and the employer must comply with the criteria in paragraph (g) of this section.

(8) Where no other alternative measure has been implemented, the employer shall implement a safety monitoring system in conformance with Sec. 1926.502(h).

(9) The fall protection plan must include a statement which provides the name or other method of identification for each employee who is designated to work in controlled access zones. No other employees may enter controlled access zones.

(10) In the event an employee falls, or some other related, serious incident occurs, (e.g., a near miss) the employer shall investigate the circumstances of the fall or other incident to determine if the fall protection plan needs to be changed (e.g. new practices, procedures, or training) and shall implement those changes to prevent similar types of falls or incidents.

exposed under those circumstances, *i.e.*, that of momentarily unhooking to tie off to the second anchor point, clearly poses less danger than having him walk, unprotected, 20-25 feet across the narrow roof ridge, while carrying a heavy roll of felt.

In addition, the record does not support Staz-On's contention that its employees only unhooked for the limited purpose of retrieving felt. In Complainant's exhibits C-2 and C-3, Staz-On's foreman is clearly depicted walking around on the roof without fall protection. He is not carrying a roll of felt; he is not heading towards the area where the felt was stored. He is in no way engaged in the activity for which Staz-On claims to have needed an exemption from the fall protection standards on this "unusual" site. Moreover, the record shows that both Copley and Torres were disciplined for working without fall protection. If, as Staz-On claims, their behavior was sanctioned because of the infeasibility of using traditional means of fall protection, it would have been inappropriate to punish that behavior. The inconsistencies between the observed facts and the "fall protection program" described by Staz-On's witnesses supports the conclusion that Staz-On's alleged "fall protection program" was concocted only after its receipt of the OSHA citation. The record establishes that Staz-On allowed its employees to dispense with fall protection in this case because it was more convenient to do so. Staz-On failed to establish the affirmative defense of infeasibility. Accordingly, the violation is affirmed.

Employee misconduct. In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: (a) established work rules designed to prevent the violation; (b) adequately communicated those work rules to its employees (including supervisors); (c) taken reasonable steps to discover violations of those work rules; (d) and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

Facts

Staz-On maintains that its employees are trained to use fall protection (Tr. 105). They receive a copy of the employee manual when they are hired and they are required to attend a 10-hour OSHA training course (Tr. 106, 109; Exh. R-2, R-3). Employees attend weekly safety meetings on site (Tr. 106; Exh. R-4 through R-9). Paul Graham testified that employees are trained to put their harnesses on before they go up on the roof (Tr. 129; *see also*, testimony of Omar Torres, Tr. 178). Copley told CO Rodriguez that he knew better than to be up on the roof

without fall protection (Tr. 27). Graham testified that Copely was reprimanded for failing to put his harness on before going onto the roof on November 14 (Tr. 129). The reprimand for November 14, however, clearly states that its was Copley's second violation and he had been observed on the roof without fall protection on the previous day (Exh. R-11).

Discussion

Despite Staz-On's evidence of safety training, it cannot be found that it had an adequately communicated safety rule prohibiting the violative conduct. Employees, one of them a supervisor, were seen working on the roof without fall protection on three different days. *See, e.g. Consolidated Freightways Corp.* 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-351, 1991); *Gem Industrial, Inc.* 17 BNA OSHC 1861, 1865, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996). Staz-On claims to have condoned working without fall protection in limited circumstances, however, it is clear from the evidence that employees worked without fall protection whenever it was more convenient to do so and would not have been disciplined for failing to use fall protection had there been no OSHA inspection. Respondent has failed to make out the affirmative defense of employee misconduct.

Penalty

CO Rodriguez testified that the gravity of the violation was high, in that the employees walking on the ridge of the cited roof were 42 feet above the ground (Tr. 28). The conditions were windy, with gusts of up to 25 miles per hour, and the employees were weighted down with heavy rolls of felt (Tr. 28). Rodriguez and Staz-On's own safety director agreed that a fall would certainly result in serious injury, up to and including death (Tr. 29, 93-94). The gravity based proposed penalty in this case was determined to be $5,000.00. OSHA recommends that the penalty be reduced to $1,500.00 based on Staz-On's small size and the absence of prior serious citations (Tr. 29-31).

For purpose of assessing a penalty for violations, section 17(j) of the act requires that due consideration must be given four criteria: (a) the size of the employers' business, (b) the gravity of the violation (c) good faith of the employer and (d) prior history of violations. In *Secretary v. J.A. Jones Construction Company*, 15 BNA OSHA 2201 (1993) the Commission stated:

> These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶29,582, p. 40,033

> (No. 88-2681, 1992); *Astra Pharmaceutical Prods., Inc.*, 10 BNA OSHC 2070 (No. 78-6247, 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132, 1981 CCH OSHD ¶25,738 p. 32, 107 (No. 76-2644, 1981).

Although the gravity of the cited violation is high (Tr. 29, 30) greater weight must be given to the good faith or, in this case, the lack of good faith exhibited by Respondent's management representatives at the hearing as reflected by the testimony and demeanor of Respondent's president and safety director. Both individuals insisted that employees of this firm may be required to work on residential roofs without fall protection in violation of the cited standard when, based upon their experience, it is deemed appropriate. Both witnesses testified that certain conditions may exist during the work activities which require their employees be exposed to fall hazards for short periods of time; however, neither individual defined what a "short period of time" is except that it could be as long as 20-30 minutes per day (Tr. 123). This decision making process was delegated to the employees at the job site without any training or guidance related to the specific job site instructing them how to avoid fall hazards by safety measures other than personal fall protection. It was apparent at the hearing that Respondent's president had never read the fall protection standards applicable to his firm (Tr. 136). The totality of the testimony of the Respondent's president and safety director leads to the conclusion that neither individual appreciates the hazards that Respondent's employees are exposed to when working on residential roofs without appropriate fall protection. Moreover, the training provided by the safety director will, if unchanged, require employees to be exposed to fall hazards on the future.

Thus, the good faith factor is of primary importance in ensuring that the violations committed in this case will not be repeated in the future. The only tool available to the Commission to ensure that Respondent appreciates the importance of complying with fall protection standards is by assessing a penalty which will, to the extent possible, encourage future compliance. Accordingly, a penalty in the amount of $5,000.00 is assessed for the violation.

Findings of Fact

Findings of fact relevant and necessary to a determination of all issues have been made above, Fed.R.Civ.P 52(a). All proposed findings of fact inconsistent with this decision are

hereby denied.

Conclusions of Law

1. Respondent, Staz-on Roofing, Inc., is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.
2. Respondent Staz-on Roofing, Inc. at all times material to this proceeding, was subject to requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of Respondent and the subject matter of this proceeding as it relates to said Respondent.
3. At the time and place alleged, Respondent was in violation of the standard set forth at 29 CFR § 1926.501 (b)(13) and said violation was serious within the meaning of the Act.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR §1926.501(b)(13) is AFFIRMED, and a penalty of $5,000.00 is ASSESSED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: July 30, 2003