OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street., N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. PRIME ROOFING CORPORATION, Respondent.	OSHRC Docket No. 07-1829

APPEARANCES:

For the Complainant:
Christine T. Eskilson, Esq., U.S. Department of Labor,
Office of the Solicitor,
Boston, MA.

For the Respondent:
William A. Seppala, Pro Se,
Prime Roofing Corp.
P.O. Box 478
New Ipswich, N.H. 03071

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This case is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review a citation issued by the Secretary of Labor ("Secretary"). The citation alleges that respondent, Prime Roofing Corp. ("Prime") committed a repeat violation of the

OSHA safety standard published at 29 C.F.R. §1926.501(b)(10)[1]. The Secretary proposes a penalty of $10,000.00 for the violation.

BACKGROUND

On June 6, 2007, OSHA compliance officer ("CO") Luke McCarthy, was attending a training course at the Ammon Center in Manchester, New Hampshire (Tr. 8). When he arrived at the facility he observed a man at the edge of the roof, hoisting tubes or pipes from the ground level (Tr. 9). Later that morning he observed and photographed other employees vacuuming aggregate rock off the roof (Tr. 9-10. Ex. C-1 and C-2). A call was placed to the OSHA Concord area office which sent CO Christopher Bills to the worksite (Tr. 17). CO Bills arrived at the site at approximately 10:45 that morning and observed an employee at the edge of the roof (Tr. 18, 20). After walking around the site, a Prime Roofing truck pulled up and respondent's vice-president of operations, Mike Goen, introduced himself (Tr. 20).

The roof of the building was low-sloped and irregularly shaped, with two wide sections connected via a narrower section. CO Bills described the roof as resembling a barbell (Tr. 38). The wider section was 59 feet wide, and the narrow section was 49 feet wide (Tr. 29-30). The roof was two stories, or approximately 20 feet above the ground (Tr. 24). Employees were working in the wider section of the roof (Tr. 30).

The CO proceeded to contact Ray Michaud, the representative of the general contractor, Martini Northern (Tr. 22). After the opening conference, the CO began the inspection and proceeded to the roof, accompanied by Mike Goen and Ray Michaud (Tr. 22). During the

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[1]The standard provides:

§1926.501 **Duty to have fall protection.**

* * *

(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.

inspection, the CO photographed Brian Engels, an employee of Vacuum Rentals, at the edge of the roof (Tr. 23-24, Exs. C-3 to C-13). Engels was removing rocks, or roof ballast from the roof via the vacuum trailer (Exs. C-16, C-17, R-1). The removal of the rocks was in preparation for replacement of the roof membrane (Stipulation 7). The CO also observed Ty Martin, an employee of Prime, on the edge of the roof (Tr. 27, 62). Martin was wearing an orange vest that identified him as the safety monitor (Tr. 27, 48, Exs. C-16 & C-17). Warning lines were erected down the center of the roof (Tr. 28, Exs. C-14 to C-17). According to the CO, the lines should have been set back six feet from the edge of the roof on all open sides where employees were going to work. There was no other fall protection on the roof (Tr. 28).

Goen testified that Martin was not on the site to be a safety monitor, but rather to receive delivery of materials (Tr. 77, 81). However, Goen also testified that, when the CO arrived at the site to conduct the inspection, he told Michaud to direct Martin to put on the safety monitor's vest for two reasons: (1) "I felt it was certainly not a bad thing to do, given the conditions," and (2) "it was going to distinguish hm from not being engaged in any roofing work." (Tr. 77). Goen elaborated that "I didn't anticipate it doing any harm to have him put [on] a monitor's vest." (Tr. 83). Moreover, Goen testified that when the CO was taking pictures, he directed Martin to walk closer to the edge of the roof "so he could be in the frame, indicating that there was a person wearing a vest....I was just trying to make a point. I was trying to make a point that pictures do not necessarily always tell the true story." (Tr. 83). Michaud, recalling the incident, stated that Goen asked him to have Martin put on the safety vest and walk over to the edge of the roof "so that the compliance officer could fully be aware of the fact that there was a monitor on the roof." (Ex. C-20, p. 9).

As a result of the inspection, Prime Roofing was issued a citation for a repeat violation of 29 C.F.R. §1926.501(b)(10). The repeat characterization was based on two prior final citations for failure to provide appropriate fall protection from a roof.

DISCUSSION

1. The Violation

Respondent makes two assertions central to its defense. First, it argues that, although it provided the safety lines to Vacuum, it neither set-up the safety lines nor were responsible for the set-up. Respondent's next argues that the standard was not applicable because none of its employees were engaged in roofing work at the time of the inspection. Respondent's arguments are without merit.

A. Safety Lines

The CO testified that Martini's superintendent, Michaud, told him that the warning line system was set up by Prime as a fall protection system, and that it was Prime's idea to place it in a manner that split the roof in half (Tr. 31)[2]. This was verified by Michaud (Depo. Ex. C-20 pp. 7-8). Moreover, according to the CO, Goen also told him that the warning line was set up so they would only need one safety monitor because they were only going to work on one side of the line at a time (Tr. 31). The CO further testified that Vacuum employee Engels also told him that the lines were set up by Prime (Tr. 32). Prime disputes the testimony of CO Bills and the deposition of Michaud regarding the responsibility for setting up the safety lines. At the hearing, Goen suggested that, though provided by Prime, the lines were set-up by Vacuum (Tr. 78, 85-86)[3]. Further, in its brief, Prime points out that much of Michaud's deposition testimony was based on either assumption or tentative memory.

I find that the CO's testimony was direct and unwavering. Moreover, it was fully supported by the testimony given by Michaud in his deposition. On the other hand, Goen's testimony was, at times, confusing and uncertain. This was especially true when Goen described the reason Martin was directed to put on a safety vest. Here, Goen plainly stated, but later

[2]According to the CO, when a roof has sections of different widths, it is permissible to set up a warning line system in a manner that separate the sections of different widths. Here, however, the lines were set up in a manner that simply split the roof in half, without any consideration given to the different sections. (Tr. 67-68)

[3]Significantly, Goen never explicitly stated that Prime was not responsible for setting up the lines. Rather, he testified that Prime employees were at the site to receive roofing equipment being delivered by their crane, not to provide safety for Vacuum (Tr. 73-75). Goen also testified that he did not know the safety requirements for stone removal companies, and that they typically take care of their own OSHA requirements (Tr. 80). Goen admitted that the safety lines belonged to Prime and were brought to the roof by crane on the day of the inspection (Tr. 85-86)

apparently denied, that his purpose was to have Martin photographed wearing the vest to mislead the CO into believing that the required safety monitor was on the site (Compare Tr. 83 with Tr. 87). Moreover, his explanation, that he was trying to make the point that "pictures do not necessarily always tell the true story" (Tr. 83) further indicates a tendency toward fabrication that does little to enhance his credibility. Finally, I find it significant that Goen never explicitly denied, that the lines were set-up by Prime, but only suggested that they were erected by Vacuum. In sum, I find that Goen's testimony was self-contradictory and not credible. On the other hand, I find that the testimony of the CO was credible and consistent with other evidence of record. Accordingly, I find that the preponderance of the evidence establishes that the safety lines were set-up by Prime.

B. Roofing Work

Roofing work is defined at 29 CFR §1926.500 as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck."

Martin was observed acting as the safety monitor on the roof[4]. While this activity may not fit squarely into the definition of roofing work, the provision of a safety monitor to employees clearly engaged in roofing work is integrally related to roofing work. In an analogous situation, the Commission has found activities not normally associated with "construction work" to fall within the purview of the construction industry standards where the tasks were integrally related to construction work. *E.g. Royal Logging Company*, 7 BNA OSHC 1744, 1747, n.7 (No. 15169, 1979); *Bechtel Power Corp.,* 4 BNA OSHC 1005, 1007 (No. 5064, 1976), *aff'd per curium,* No. 76-1365 (8th Cir. Jan. 25, 1977)(work "directly and vitally related" to construction) Similarly, in the recent case of *J.C. Watson Company*, 22 BNA OSHRC — (No.05-0175 & 05-0176, 2008), the Commission found that the employer's post-harvesting operations were not integral to agricultural work and therefore, not subject to the exemption from the General Industry standards at 29 C.F.R. §1910.147(a)(1)(ii)(A).

[4]Even if Martin was sent to the roof to fool the CO, the point remains that he was assigned to act as a safety monitor.

Finding that acting as a safety monitor for employees engaged in roofing work is directly, vitally and integrally related to roofing work, I conclude that the safety monitor was covered by the roofing standards.

Moreover, Prime was responsible for setting up the safety lines and, therefore, was the controlling subcontractor. On a multi-employee worksite, the subcontractor that creates a violative condition bears responsibility under the Act for that violation. *Summit Contractors, Inc.* 21 BNA OSHC 2020 (No. 03-1622, 2007), *appeal filed,* No. 07-2191 (8th Cir., May 21, 2007)[5]. Prime did not set up the safety lines in a proper manner, which exposed Vacuum employees to the falling hazard. Therefore, even if it had no employees of its own engaged in roofing work at the time of the inspection, Prime was still properly cited for the violation as the contractor that created and controlled the hazard.

C. Burden of Proof

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the violation with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075 (No. 87-1359, 1991)

The record establishes that the standard applies. The record also establishes that the requirements of the cited standard were not met. It is not disputed that the edge of the roof was not provided with a guardrail system, 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. Respondent apparently decided to rely on the final option allowed by the standard, a combination of a warning line system and safety monitoring system. The evidence demonstrates, however, that the warning line system was not

[5]In *Summit Contractors, Inc.,* the Commission held that, on a multi-employer worksite, general contractors that neither create or control the violative condition nor have its employees exposed to a violation are not responsible for OSHA violations. However, the Commission reaffirmed its longstanding precedent that an employer who creates or controls the violative condition is responsible even where that employer has no employees exposed to the hazardous condition.

properly erected. The requirements for a warning line system are set forth at 29 CFR §1926.5002(f). One of those requirements is that the warning line "shall be erected not less than 6 feet (1.8 m) from the roof edge." 29 CFR §1926.502 (f)(1)(i) and (ii). Here, however, the warning line was placed down the center of the roof (Tr. 28-30, Ex. C-14-C-17).

The record also demonstrates that Prime created the hazard and that employees of both respondent and Vacuum were exposed to the violation and were seen and photographed working at the edge of the roof (Tr. 9-10, 23-24, 27, Exs. C-1 to C-13). Finally, as the creating and controlling contractor, Prime had knowledge of the violation.

Accordingly, the Secretary has established that Prime Roofing violated the cited standard.

2. Characterization

The Secretary's characterization of the violation as repeated is based on two earlier final citations. The first citation was issued on April 12, 2004, for a serious violation of 29 CFR §1926.501(b)(1)[6] on the grounds that "Employees were walking and working on the lower flat roof without any fall protection, which exposed them to a fall hazard of 11 feet to the ground." (Ex. C-19a) The citation was affirmed by settlement agreement on July 25, 2005 (Ex. C-19b). The second citation was issued on July 21, 2006 (Ex. C-18a). As amended[7], the citation alleged a serious violation of 29 CFR §1926.501(b)(3)[8] on the grounds that "an employee was exposed to an 18 foot fall when retrieving materials from an aerial lift basket while leaning out over the edge of a roof without fall protection." (Ex. C-18b) The citation was affirmed by settlement agreement

[6]The standard requires that "Each employee on a walking/working surface . . .with an unprotected side or edge which is 6 feet (1.8 m)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."

[7]The citation originally alleged a repeat violation of 29 CFR §1926.501(b)(10), but was amended as part of the settlement agreement.

[8]The standard requires, in pertinent part that "Each employee in a hoist area shall be protected from falling 6 feet (1.8 m) or more to lower levels by guardrail systems or personal fall arrest systems. If guardrail systems ...or portions thereof, are removed to facilitate the hoisting operation...and an employee must lean through the access opening or out over the edge of the access opening...that employee shall be protected from fall hazards by a personal fall arrest system."

of the parties on October 12, 2006 (Ex. C-18b). Based on these two citations[9], the Secretary asserts that it was appropriate to characterize the instant violation as repeated.

The Secretary may establish a prima facie case that a violation is repeated by showing that the violations were of the same standard, or if not the same standard, that they were substantially similar. *Midwest Masonry, Inc.*, 19 BNA OSHC 1540, 1542 (No. 00-0322, 2001). Here, the Secretary has demonstrated that the citation issued on April 12, 2004, though of a different standard, was substantially similar to the violation here in that employees were not provided with the required fall protection. (Ex. C-19a and b) Respondent asserts that the matter should not form the basis for a repeat violation because the earlier violation was the result of employee misconduct. An employer's inadequate attempts to comply with a standard might be relevant to a finding of willfulness. Once the violation is established, evidence of an employer's efforts to comply are not relevant to whether the violation is repeated. *See Jersey Steel Erectors,* 16 BNA OSHC 1162, 1168 (No. 90-1307, 1993). *aff'd* 16 F.3d 1219 (3d Cir. 1994).

However, I cannot find that the Secretary has shown that the citation issued on July 21, 2006, was substantially similar to the instant citation. In that instance, the record suggests that the employee was provided with fall protection (a lanyard), but disconnected it when leaning over the edge of the roof while retrieving materials from an arial basket. (Ex. C-18b). Because adequate fall protection was initially provided, I find the situation substantially different from the current situation where, for all practical purposes, no fall protection was provided.

Nonetheless, a citation may be classified as repeated if there is one final order for a substantially similar violation. *Midwest Masonry, Inc.*, 19 BNA OSHC at 1542. Accordingly, based on the citation issued on April 12, 2004, I find that the violation was properly classified as "repeated." However, that the record supports only one prior violation, rather than the two alleged by the Secretary, is relevant in determining an appropriate penalty.

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[9]Although they were not introduced into evidence, the CO testified that his research into Prime's safety history revealed that, since January 2000, Prime has been cited approximately a dozen times for fall protection citations. However, because the Secretary has not introduced any of these additional citations into evidence, they were not considered in my determination of the characterization of the violation. However, this undisputed evidence is relevant when considering respondent's OSHA history for purposes of the penalty assessment.

3. Penalty

When considering the propriety of the penalty the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations. *R.G. Friday Masonry Inc.*, 17 BNA OSHC 1070, 1075 (No. 91-2027, 1995); 29 U.S.C. §666(j). The record demonstrates that the violation was serious because a fall from the roof could have resulted in death or serious physical injury. (Tr. 42) Moreover, the gravity of the violation was high due to the proximity of employees to the unguarded roof edge. (Tr. 42) Considering the gravity of the violation, the Secretary arrived at a base penalty of $5,000, which I find appropriate. That penalty was doubled because of its repeated nature, for a proposed penalty of $10,000. The evidence establishes that respondent has a substantial history of OSHA violations with approximately a dozen citations issued since January 2000. (Tr. 44). Also, while the record is silent as to respondent's size, the Secretary found it inappropriate to reduce the penalty due to respondent's size because of its history of past violations. (Tr. 43) Similarly, due to respondent's safety history, no credit was given for good-faith. Accordingly, the Secretary arrived at a final proposed penalty of $10,000. As noted, however, the record demonstrates that the repeated characterization is supported by one previous citation, rather than the two presumed by the Secretary. Therefore, a penalty reduction is in order. I find it appropriate to increase the $5,000 base penalty by 50%, rather than the 100% proposed by the penalty. Accordingly, I find a total penalty of $7,500.00 to be appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Accordingly, it is **ORDERED** that the citation for a repeat violation of 29 C.F.R. §1926.501(b)(10) is **AFFIRMED** and a penalty of $7,500 is **ASSESSED.**

SO ORDERED

/s/
Covette Rooney
Judge, OSHRC

Dated: June 16, 2008
Washington, DC