United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Kirtley Sheetmetal, Inc., Respondent.	OSHRC Docket No. **09-1691**

Appearances:

Lindsay A. Wofford, Esquire, Dallas, Texas
For Complainant

John Currier, Houston, Texas
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Kirtley Sheetmetal, Inc., is engaged in construction contracting. On August 15, 2009, the Occupational Safety and Health Administration (OSHA) conducted an inspection at the Respondent's jobsite in Houston, Texas. As a result of this inspection, OSHA issued a citation to respondent on September 22, 2009. Respondent timely filed a notice contesting the citation and proposed penalties. A hearing was held, pursuant to conventional proceedings in Houston, Texas, on April 13, 2010.

At the close of the hearing, the parties made oral arguments in lieu of filing post-hearing briefs. With the parties consent, a bench decision was entered following the hearing. For the reasons that follow the alleged violations of 29 C.F.R §§ 1926.1053(b)(1) and 1926.1053(b)(4) are affirmed as one serious violation and a penalty of $700.00 is assessed. The alleged violation of 29 C.F.R. § 1926.501(b)(10) is affirmed as a repeat violation and penalty of $1,800.00 is assessed.

Excerpts of relevant transcript pages and paragraphs, including the bench decision entered at the hearing, findings of fact and conclusions of law (Tr. 207-220) are included in this decision as follows:

BENCH DECISION

Back on the record. All right. You've had the opportunity for a complete hearing on this matter. We're in Houston, Texas, in the matter of *Secretary of Labor versus Kirtley Sheet Metal*, 09-1691.

This is a conventional case. However, the matter was argued by the attorneys on both sides by consent in lieu of filing post-hearing briefs, and also by consent that I'm going to issue an Order on the record rather than issuing an Order after the hearing.

This will be included, however, in a written decision which will be issued. The time of appeal, rights of appeal will run to the time that the written decision was received by the parties as in any other normal case.

All right. This case arose as a result of an inspection by the Occupational Safety and Health Administration on August the 15th, 2009. The inspection was conducted of Kirtley Sheet Metal, Incorporated, on the Jobsite 9002 -- it looks like Kings Point Road, Houston, Texas.

The Compliance Officer, Mr. Singh, made the inspections as part of the Regional Emphasis Program, driving by the Respondent's jobsite, where he observed employees of the Respondent and another company working on the roof of a building. He observed these individuals working for approximately 15 to 20 minutes. He left the jobsite and returned later and saw employees and observed them again for about 15 or 20 minutes on that roof before he entered the jobsite.

He saw no employees tied off while working on this roof. However, he did notice they were wearing harnesses and used tools throughout the area of the roof.

The roof varied in height from 19 feet above the ground level at the lowest point to 28 above the ground level at the highest point. It was approximately 53 feet long and 150 feet wide.

As a result of this inspection, three violations were issued to Respondent. Two were grouped into one serious violation, and one was issued as a repeat violation.

The charges are as follows: In Citation 1, Item 1A, it reads, "That because of the portable ladder's length, the ladder side rails did not extend at least three feet above the upper landing surface to which the ladder was used to gain access, and the ladder was not secured at its top to a rigid support, and a grasping device such as a grabrail was not provided to assist employees in mounting and dismounting the ladder. "It goes on to say that,"On August 15th of 2009, at the northwest corner

of the building, employees used an eight-foot stepladder to access the upper landing of the roof, exposing employees to a fall hazard."

Linked with that is Item 1B, alleged violation of 29 C.F.R. Section 1926.1053(b)(4). 1A was the alleged violation of 29 C.F.R. 1926.1053(b)(1). In Item 1B, the allegations are that ladders were used for purposes other than the purposes for which were designed. It goes on to say that, "On August 15, 2009, at the northwest corner of the building, employees used an eight-foot stepladder to access the roof of the building, exposing employees to a fall hazard. A combined proposed penalty of $1,000 was proposed for Item 1A and 1B. The violations were considered by OSHA to be serious and alleged to be serious.

Another violation was proposed as a repeat violation of 29 C.F.R. Section 1926.501(b)(10). In that allegation, the Secretary alleges that the employer did not provide each employee engaged in roofing activities on low-sloped roofs with unprotected sides and edges six feet or more above lower levels with a guardrail system, safety net system, personal fall arrest system or combination of warning line systems and guardrail system, warning line system and safety net system, or a warning line system and personal fall arrest system, or a warning line system and safety monitoring system.

The Secretary goes on to allege that on or about August 15, 2009, at the northwest corner of the building, employees were at an approximate height of 28 feet unprotected. The pitch was 2 to 12 and approximately 153 feet long by 53 feet wide, exposing the employees to fall hazards. It also goes on as part of the repeat allegation: "Kirtley Sheet Metal, Incorporated was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1926.501(b)(10), which was contained in OSHA Inspection No. 312646078, Citation No. 1, Item No. 001, issued on November 20, 2008, with respect to workplace located at 8536 Highway 6 North Houston, Texas. This file became a final order on July 18th, 2009. The alleged proposed penalty for this alleged violation is $4,000.

In order to prove a violation of the standards, the Secretary is required to prove that the standards are applicable, that the terms of the standards were violated, that the Respondent's employees were exposed to the hazards, and the Respondent had requisite knowledge. That is, he knew or could have known with the exercise of reasonable diligence of the violations and the knowledge of the conditions.

I'm going to address the three violations together governing these four elements, and then I'll address each one individually. Regarding applicability of the standards, all are construction standards. All apply to Respondent's construction site here, so I find that the standards are applicable to the work being performed.

Employees were working on the roof or they were on the roof during the time of the inspection, and they used the stepladder to gain access to the roof.

This also leads us into the terms of the standards, whether the terms of the standards were violated or not. With regard to Item 1A, it is clear that the stepladder was not used as required by that standard. There was a stepladder standing next to the rail. It did not extend at least three feet above the upper landing. It was not secured at the top to a rigid support and did not have a grasping device such as a grabrail for mounting and dismounting the ladder.

The stepladder also was used for a purpose other than the purposes for which it was designed. The testimony was elicited and agreed to by the Respondent that the stepladder is used for standing on and not accessing a higher level, and that an extension ladder should have been used to access that level. So the terms of the standards were violated on those two.

In regard to the fall hazard, it's alleged that the employees were on this roof, exposed to falls in excess of six feet. With regard to the level of the roof that was six feet above the next platform below, I don't believe the Secretary has proven sufficiently that there was more than six feet above that platform.

However, employees that were on that roof were exposed to three other sides, and they were on sides ranging from 19 feet to 28 feet above the ground level and were exposed to that fall. So I think the terms of the standard were violated there. The employees were at an approximate height of 28 feet, and there was no protection by guardrails, safety systems, personal fall arrest systems or a combination of warning line systems and guardrail systems and the other combination of factors.

With regard to employee exposures, the Compliance Officer testified, Mr. Singh, that he saw no employees tied off, but they were wearing harnesses and were using tools throughout the roof, but the harnesses were not tied off to anchors.

There was an employee with a red shirt believed by Mr. Kirtley to be his employee, with a bucket next to him performing, appears to be performing work, from the photographs. And he was seen in several photographs, C-1, C-2 and C-5 exhibits.

Another employee was moving plastic that was identified as Respondent's employee. Once again, no brackets were used by the employees.

Mr. Kirtley testified that the employees should be off the roof while the lifeline was being installed, and that Respondent is responsible for his own employees' safety while they're working on these roofs. One man with a drill was changing the lifeline in C-4, and it appears to be the individual who was in the red shirt. Once again, Mr. Kirtley testified that the employees should be off the roof while the line was being changed. Here, Respondent's employees were on the roof.

I find that all four employees of Respondent were unprotected, were on this roof, work was being performed, that all of the employees were exposed, and that the Respondent's foreman admitted to the violative conditions. This one goes to whether the standards were violated, the terms of the standards were violated and whether the employees were exposed. I haven't gotten to the knowledge aspect yet.

Here I find that these employees were actually working on that roof before they were effectively tied off.

Looking to the knowledge aspect. Mr. Singh testified that Jose Flores, the foreman for the Respondent, admitted that it was his fault that no fall protection was there. He did not install the lifelines, and he said that he made a mistake. Mr. Flores left the site for a short time to get ice, and then he returned to the site after Mr. Singh was on the site for a time.

Mr. Flores stated to Mr. Singh that he did not install the lines, and it was the Respondent's responsibility to install those lines. And he also told Mr. Singh that he was gone for only a short period of time.

So having reviewed all of the evidence that has been submitted in this matter, I find that there was knowledge on the part of the employer. While it may not have had actual knowledge of exactly what was going on at all times, he [respondent's foreman Flores] had constructive knowledge. He should have known, with the exercise of reasonable diligence, that his people were on that roof not being tied off while the lifelines were being installed. He left during that time.

There's no evidence he left anyone else in charge to supervise the operation and make sure his employees were not on that roof during the installation of the lifelines or while performing other work without being properly secured.

The Respondent did provide a good ladder for his employees, but it wasn't used. He allowed his employees to use the stepladder to access the higher level. There was, I believe, an effort to

comply with the tie-off requirements by providing this kit, by providing the harnesses, the lifelines and securing apparatus.

The problem here, I believe, was in execution; it was just not followed through. There was not an appreciation by possibly the foreman and the other employees on the site that they need to actually use these things. It was a good-faith effort to provide these items. It just fell apart in the execution.

There's also going in favor of the Respondent, all the violations were corrected during the inspection. Oftentimes, we see those violations are not. Here they were. That goes to the good faith of the employer in this matter. It appears that the failure occurred at the jobsite in following through with good-faith intentions of upper management.

One element that I think I need to address, also, which has not been addressed at this point, and that is the nature of the violations. And I believe that all violations as alleged are serious violations. If an accident occurred, death or serious physical harm could result in falling from a ladder and also falling from the roof, the exposed sides of the roof.

The repeat violation is based on a previous inspection where the same standard was cited and substantially similar working conditions were cited, in that they were falls from a height that work was being performed on an overhang of a wall. A ledge, I guess it was. So that there was a substantially similar situation, and the standard was the same. And so, therefore, the repeat characterization is correct.

And I would find that the first two violations were grouped properly as serious violations, and the second item -- I think it's listed as Item 2-2 but I think it's supposed to be 2-1; is that correct?

MS. WOFFORD: Yes, sir.

JUDGE SIMKO: Or Item 1 of Citation No. 2? Okay. Then that will be affirmed as a repeat violation.

Looking now to the reasonableness of the penalty, given all the factors we've talked about, the seriousness of the conditions and the serious result if someone did fall, and take into consideration the attempts at good-faith efforts to comply, and the correction of the violations at the time of the inspection, while I'm finding violations as alleged, I am finding that the total penalty for the Items 1A and B combined should be $700, and for Item 1 of Citation No. 2, the repeat violation, the penalty should be $1,800, so a total penalty of $2,500 is assessed at this time.

Now, I will incorporate this into a written decision subsequent to the trial as soon as I get the transcript, and you'll be given that. If anyone wishes to appeal that decision, all those rights will be preserved and you'll have the time frame to do that as you normally would.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, Items 1a and 1(b) alleging serious violations of 29 C.F.R. §§ 1926.1053(b)(1) and 1926.1053(b)(4) are affirmed as one serious violation and penalty of $700.00 is assessed.

2. Citation No. 2, Item 1, alleging a repeat violation of 29 C.F.R. § 1926.501(b)(10) is affirmed as a repeat violation and a penalty of $1,800.00 is assessed.

/s/
Judge Stephen J. Simko, Jr.

Date: May 24, 2010