UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
NEW ENGLAND INDUSTRIAL ROOFING
Respondent.

OSHRC DOCKET
NO. 93-0644

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 22, 1994. The decision of the Judge will become a final order of the Commission on October 21, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before October 11, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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200 Constitution Avenue, N.W.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /SKA

Date: September 22, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0644

NOTICE IS GIVEN TO THE FOLLOWING:

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Occupational Safety and Health
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SECRETARY OF LABOR, Complainant v. NEW ENGLAND INDUSTRIAL ROOFING CO., Respondent.	OSHRC DOCKET NO. 93-0644

Appearances:

David L. Baskin, Esq.
U.S. Department of Labor
Boston, MA
For Complainant

Barrett Metzler
Northeast Safety Management, Inc.
West Hartford, CT
For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

New England Industrial Roofing Co. (New England) was cited on January 28, 1993, for serious violations of the roofing standards at: 29 C.F.R. § 1926.500(g)(1) which prescribes various methods to be used for safeguarding a roof perimeter depending upon the working conditions, including a motion-stopping-safety (MSS) system, which is in dispute in the instant case; and 29 C.F.R. § 1926.500(g)(3)(iii)(a) which requires the employer to erect warning lines to form a clear access path to and from the roof. A penalty of $750 is proposed for each of the alleged violations.

The two-item citation was issued as a result of an inspection conducted on December 10, 1992. The worksite consisted of a two-story building 25 feet high, 375 feet long and about 200 feet wide. New England was engaged to remove the old "built-up" roof and replace it with a new one.[1]

When the OSHA compliance officer arrived at the site and approached the building, he observed two persons standing near the edge of the roof looking down. He could not tell whether they were engaged in any work activity (Tr. 13). When he ascended to the roof, he saw two men throwing articles or materials of some sort from the roof to the adjacent ground level (Tr. 16). There was one other person on the roof who was the job foreman. He informed the compliance officer that he and the other two men had been working over a period of some time replacing the old roof with a layer of rubber material applied with adhesive. The job also entailed flashing procedures (Tr. 18-20).

The compliance officer testified that he spent about 40 to 45 minutes on the roof during which time he observed buckets of adhesive, rolls of rubber-like material, and a kettle which was used to heat the adhesive material and which, according to the compliance officer, emitted heat when he approached it (Tr. 19-20). A ladder was placed at one exterior end of the building which was used by the workers for access to the roof. There were no warning lines or perimeter guards erected on the roof, although there were several stanchions dispersed at various places on the roof, which the compliance officer conceded could have been used in connection with a warning line system (Tr. 43-45, 103-04; Exhs. C-1, C-2). When the compliance officer questioned the foreman regarding the absence of perimeter guarding and warning line system, the foreman replied that they had finished doing the roof work and were "in the process of cleaning up" because of "an upcoming storm" (Tr. 22).

These facts as recounted by the compliance officer are not disputed by New England which contends it had been doing some flashing work on the roof in the morning prior to the compliance officer's arrival at the site, that the employees then proceeded to secure the roof area in anticipation of "a predicted hurricane due to strike that evening", and that

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[1] "Built-up-roofing" is defined by § 1926.502(p)(1) as a weatherproofing cover, applied over roof decks, consisting of either a liquid-applied system, a single-ply system, or a multiple-ply system, comprising various materials such as synthetic rubber, plastic, felt or bitumen.

consequently, all the protective equipment was removed and stored under tarpaulins located at various positions on the roof (Exhs. C-1 - C-4). New England's brief at 1.

The Secretary maintains, in substance, that despite the fact that New England was preparing the roof area as a precaution against a possible hurricane, it was engaged in built-up-roofing work, as defined by § 1926.502(p)(2)[2], which required both the use of a MSS system for those employees working at or near the edge of the roof, and warning lines on the roof to form a pathway to the ladder set up for ascending and descending the roof.

The Secretary's argument has merit as to the MSS system. New England's own witness, Roger Linkbonen, the job foreman at the worksite, admitted that the employees went to the edge of the roof to dump debris from the roof (Tr. 98), and the compliance officer testified that he observed two workers throwing articles from the edge of the roof without the presence of a MSS system, thereby exposing those employees to a 25-foot fall hazard.

New England contends that "throwing stuff off the roof does not meet the criteria of performing built-up roofing work, unless it can be shown to be part of the removal of built-up roofing." New England's brief at 3. The record indicates that the only activity taking place on the roof was being done by New England pursuant to its contractual obligations for installing a new roof, a task which also involved removing the old roof. New England had no other business to conduct on that roof. It is perfectly reasonable to conclude that the "stuff" being discarded by the workers standing near the roof's edge consisted of debris from either the old roof or the new. Such activity would clearly fall within the ambit of built-up roofing work.

It should further be observed that New England's contention misconceives the purpose of the OSH Act and the clear intent of the fall protection standard at issue. Section 2(b), 29 U.S.C. § 651(b), sets forth 13 ways in which to achieve the Act's purpose "to assure *so far as possible* every working man and woman in the Nation safe and healthful working

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[2] Section 1926.502(p)(2) reads as follows:

> "[T]he hoisting, storage, application, and removal of built-up roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck."

conditions..." (emphasis added). It would be nothing short of absurd to interpret the fall protection standard in a manner so restricted as to exclude any work activity that may be categorized as having only an indirect relationship to built-up roofing, such as employing one's efforts to clear away and secure the roof area in anticipation of a hurricane. Surely New England, as virtually all other construction trades, must constantly take into account the exigencies presented by inclement weather, and must conduct its business in a manner befitting the situation. That conduct is necessarily an important part of the roofing process. In other words, the safety standards cannot be suspended during the time an employer battens down its operation in coping with one of the exigencies of construction.

There are two independently fatal flaws in the Secretary's case with respect to access warning lines. Firstly, there is evidence to indicate that warning lines had been erected by New England to demarcate a path to the ladder. At the time of the OSHA inspection, the conditions on the roof were such that path warning lines would not have contributed to the safety of the employees: the way to the ladder was wide open and clear (Exh. C-2), and there was no risk that an employee's attention would be distracted from the correct means of egress, or that employees would inadvertently move from a safe pathway into a more hazardous area before reaching the ladder.

Secondly, the evidence indicates that prior to the compliance officer's arrival at the site, a system of guardrails was used as a means of protecting the edges of the roof (Tr. 86). Inasmuch as New England has been found to have violated the perimeter guarding standard at § 1926.500(g)(1) for failing to maintain those guardrails during the pre-hurricane cleanup operation, the warning-line standard is inapplicable. That is to say, because the presence of a MSS system in the form of guardrails would render the roof edge fully protected, the alternative warning-line system would not be required under the provisions of the 500(g)(1) standard.

The absence of the guardrails to protect the employees from the 25-foot fall hazard could have produced serious consequences if an accident had occurred, therefore, the violation is properly classified as serious, 29 U.S.C. § 666(k), and the proposed penalty of $750 is appropriate under 29 U.S.C. § 666(j).

Based upon the foregoing findings of fact and conclusions of law, it is

ORDERED that the charge of serious violation of 29 C.F.R. § 1926.500(g)(1) is affirmed and a penalty of $750 is assessed.

It is further

ORDERED that the charge of violating 29 C.F.R. § 1926.500(g)(3)(iii)(a) is vacated.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: September 14, 1994
Boston, Massachusetts