



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409

Fax: (303) 844-3759

SECRETARY OF LABOR,

Complainant,

v.

WILLIAMS INSULATION, and its successors,

Respondent.

OSHRC DOCKET NO. 05-0031

APPEARANCES:

For the Complainant:

Carlton C. Jackson, Esq., Thomas A. Paige, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, California

Before: Administrative Law Judge: Benjamin R. Loye

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, Williams Insulation, (Williams), at all times relevant to this action maintained a place of business at 625 Vista Ridge Mall Drive, Lewisville, Texas, where it was engaged in residential construction. Williams admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On October 20, 2004, the Occupational Safety and Health Administration (OSHA) initiated an inspection at Williams' Lewisville work site. As a result of that inspection, Williams was issued a citation alleging a violation of 29 C.F.R. §1926.501(b)(13) of the Act. By filing a timely notice of contest Williams brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On April 26, 2005, a hearing was held on this matter in Dallas, Texas. Briefs have been submitted and this matter is ready for disposition.

Alleged Violation of §1926.501(b)(13)

Serious Citation 1, item 1 alleges:

29 CFR 1926.501(b)(13): Williams Insulation did not ensure that each employee engaged in residential construction activities 6 feet or more above lower levels was be (sic) protected by personal fall arrest systems, safety net system or guardrails.

On or about October 20, 2004 at the work site located at 625 Vista Ridge Drive, Lewisville, an employee installing (sic) chimney caps was exposed to a fall of more than 40 feet to the concrete below.

Facts

At around 8:30 a.m. on October 20, 2004, two OSHA Compliance Officers (CO), Ruth Rodriguez and Josh Lewis, arrived at the construction site on Vista Ridge Drive in Lewisville (Tr. 13-14). CO Rodriguez testified that immediately after commencing the inspection, they observed and photographed a laborer on a roof 40 feet above the ground working without the benefit of fall protection (Tr. 14-16, 25; Exh. C-1 through C-7). The laborer was identified by the general contractor as an employee of Williams Insulation, Juan Gomez (Tr. 20, 22). Mr. Gomez was wearing a tool belt, straddling a chimney, looking down into it (Tr. 18-19; Exh. C-1, C-2). Rodriguez testified that Gomez capped the chimney, and then walked to a second chimney on the other side of the roof, where he covered the top of that chimney with a sheet of plywood (Tr. 19, 30; Exh. C-3, C-4). Gabriel Martinez, William's foreman told CO Rodriguez that he knew Gomez was on the roof, and that he was not wearing fall protection (Tr. 21). According to Martinez, Gomez was supposed to be installing anchors prior to the start of the work day (Tr. 22-23). His safety harness was on the ground (Tr. 25). According to Rodriguez, Gomez should have been wearing a harness, so that he could tie off as soon as he installed the first roof anchor (Tr. 27).

CO Lewis testified similarly (Tr. 52-57), adding that he saw Gomez carrying the sheet of plywood as he walked across the roof (Tr. 52, 54). Lewis testified that he asked Martinez why Gomez was working with the plywood instead of installing roof anchors; Martinez replied that he did not know (Tr. 56).

Discussion

The cited standard provides:

Residential construction. Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels shall be protected by guardrail systems, safety net systems, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. . . .

Williams admits that its employee was not protected by any of the prescribed means, but argues that the cited standard was not applicable in this case. Williams relies on the exception provided in 29 CFR §1926.500(a)(1) which states:

The provisions of this subpart do not apply when employees are making an inspection, investigation or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed.

Williams argues that Mr. Gomez was merely assessing the chimneys at the Lewisville site prior to beginning the work of installing the chimney caps. The Secretary maintains that the cited exception does not apply where construction is ongoing or where an employee is performing work other than observation. When a standard contains an exception to its general requirement, the burden of proving that the exception applies lies with the party claiming the benefit of the exception. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1991-93 CCH OSHD ¶30,059 (No. 89-2883, 89-3444, 1993). As noted by the Secretary, exemptions to the sweep of remedial legislation must be narrowly construed and limited to effect only the remedy intended. *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1379 (No. 15462, 1980). The preamble to the final rule, discussing the cited exception, notes that:

. . . [E]mployees engaged in inspecting, investigating and assessing workplace conditions before the actual work begins . . . most likely would be able to accomplish their work without going near the danger zone. . . [S]uch individuals. . . tend to be very focused on their footing, ever alert and aware of the hazards associated with falling. . . . In addition, OSHA anticipates that employees who inspect, investigate or assess workplace conditions will be more aware of their proximity to an unprotected edge. . . .

In this case, the Secretary argues that because Gomez was carrying plywood across the roof and maneuvering it onto a chimney, he could not have been focusing on his footing as anticipated by the exception. This judge agrees. Clearly Gomez' activity is not of the type the Secretary intended to include under the §500(a)(1) exemption. Moreover, the need for the exemption is not present in this case. In the preamble, the Secretary notes that:

[R]equiring the installation of fall protection systems under such circumstances [*i.e.*, during pre or post construction inspections] would expose the employee who installs those systems to falling hazards for a longer time than the person performing an inspection or similar work. . . . However, if inspections are made while construction operations are underway, all employees who are exposed to fall hazards while performing these inspections must be protected as required by subpart M.

In this case, Williams maintains that Gomez was on the roof for the express purpose of installing fall protection. If so, there was no additional risk involved in installing the fall protection prior to his “assessment”¹ of the chimney.

Finally, it is clear that construction at the Lewisville site was underway but not completed. As Williams admits, the chimney caps had yet to be installed.

The violation has been established.

Penalty

Rodriguez testified that she observed Gomez on the roof for approximately ten to eleven minutes (Tr. 24, 31). A fall from 40 feet would probably result in the employee’s death (Tr. 32). Respondent stipulates that, should a violation be found, the proposed penalty of \$1,500.00 is appropriate (Tr. 33). That amount is, therefore, assessed.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR 1926.501(b)(13) is AFFIRMED, and a penalty of \$1,500.00 is ASSESSED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: June 20, 2005

¹ Williams introduced no witnesses and adduced no testimony on this issue. Aside from the unsupported assertions of its counsel, there is nothing in the record tending to establish that covering chimneys with plywood constitutes “inspection, investigation or assessment.”