

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

UPSTATE ROOFING, INC.,

Respondent.

DOCKET NO. 01-0336

APPEARANCES:

Noelle B. Fischer, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Robert G. Walsh, Esquire
Blasdell, New York
For the Respondent.

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (“the Act”). On July 12, 2000, Michael Chan, an employee of Respondent, fell from the roof at a work site in Gates, New York. The ensuing OSHA inspection resulted in the issuance of a serious citation alleging a violation of 29 C.F.R. § 1926.503(c)(3) and a repeat citation alleging violations of 29 C.F.R. §§ 1926.502(h)(1)(ii) and (v).¹ Upstate filed a timely notice of contest, and a hearing was held on January 22 and 23, 2002. Post-hearing briefs have been submitted.

¹Prior to the hearing, the Secretary withdrew Citation 3, which had alleged an “other than serious” violation of 29 C.F.R. § 1926.503(b)(1).

Jurisdiction

At all times relevant to this action, Respondent, Upstate Roofing, Inc. (“Upstate”), was a roofing contractor engaged in installing a new roof at the work site. (Tr. 15). Upstate admits in its answer that the Commission has jurisdiction over it and the action. I accordingly conclude that Upstate is an employer within the meaning of section 3(5) of the Act and that the Commission has jurisdiction over the parties and the subject matter of this proceeding.

Background and Relevant Testimony

The building Mr. Chan fell from was a one-story structure that measured 19 feet, 10 inches from the ground to the edge of the roof. The roof was approximately 100 by 250 feet, although the south edge was cut back in two 48-foot-long sections, creating a jogged shape on that side. There were no guardrails around the edge of the roof where the employees were working, and no employees wore safety belts or other protective equipment to prevent them from falling. Instead, Upstate cordoned off the south side of the roof with warning lines located about 26 feet from the edge (the “controlled area”), and the jogged area was thus contained in the controlled area. Upstate also designated employee Guy Nelson Getz to act as the safety monitor. In addition to this responsibility, Mr. Getz passed insulation sheets under the warning line to Mr. Chan, who laid the sheets on the roof. The insulation sheets were 4 feet wide, 8 feet long and 2 3/4 inches thick. They were stored in a pile, in bundles of 20 to 25 sheets. It is not clear from the testimony whether Mr. Getz retrieved the insulation from the pile by bundle or by individual sheet. (Tr. 15-26, 204-205, 216-217, 259, 345, 468-471, 475-77, Exhs. C-3, C-14, R-17).

There are differing accounts concerning the location of the insulation pile and Mr. Getz’s activities immediately before the accident. Chad Cooper, formerly an assistant foreman for Upstate, testified that the pile was located in the center of the roof, about 20 feet from the warning line, and that Mr. Getz was “walking back” from the pile when Mr. Chan fell. (Tr. 31-32, 84-85). Ronald Pappin, another former Upstate employee, testified that the pile was about 6 feet away from the warning line, towards the center of the roof. Mr. Pappin estimated that it took Mr. Getz approximately 40 seconds to retrieve the insulation and that this duty required Mr. Getz to turn away from the controlled area. (Tr. 210-218). Mr. Getz testified that the insulation pile was located to his right and in front of him, or in back of him, and that he was able to reach “behind” to retrieve the

insulation without taking his eyes off of Mr. Chan. (Tr. 554-556, 575-577, Exh. R-19). William Santiago, Upstate's foreman, testified that the insulation pile was located to the left of Mr. Getz and that Mr. Getz was able to retrieve the sheets and pass them to Mr. Chan without interfering with his monitoring duties. (Tr. 480, Exh. R-17). Mr. Chan, who had some memory loss from the head injury he sustained in the fall, testified that Mr. Getz was on the ground, operating the forklift, when the accident occurred. (Tr. 163-166).

On the day of the accident Mr. Santiago was working in the controlled area with Mr. Chan, fastening insulation sheets to the roof's membrane. At the time of the accident, Mr. Santiago and Mr. Chan were standing on one of the jogged extensions when Mr. Chan fell backwards into the cut-out area between the jogged extensions. (Tr. 16, 23-28, 304-307, 449-451). Despite the fact that he was the safety monitor, Mr. Getz did not witness the accident. He explained that he had turned his head away from the controlled area at the precise moment Mr. Chan fell, because he thought that somebody had shouted his name. Mr. Getz also testified that, about five minutes before the accident, he had warned Mr. Chan to be careful. (Tr. 555-559).

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary has the burden of establishing that:

(1) the standard applies, (2) the employer violated the terms of the standard, (3) Respondent's employees had access to the violative condition, and (4) the employer had actual or constructive knowledge of the violative condition.

Gary Concrete Prod., Inc., 15 BNA OSHC 1051, 1052 (No. 86-1087, 1991).

Serious Citation 1, Item 1

This citation item alleges a violation of the terms of 29 C.F.R. §1926.503(c)(3). The cited standard requires an employer to retrain an employee in fall protection when inadequacies in the employee's knowledge or use of fall protection systems indicate that he has not retained the requisite understanding or skill. The Secretary argues that Mr. Getz allowed his other duties to interfere with his monitoring function, requiring that Upstate retrain him. (Tr. 355-356).

The Secretary met her burden of establishing a violation of the terms of the cited standard. As is discussed below, I find that Mr. Getz was not properly performing the function of safety monitor. The manner in which he retrieved and passed the insulation clearly interfered with his

safety monitor duties, and it should have been apparent to the on-site foreman that Mr. Getz had not retained the requisite understanding or skill to act as safety monitor. The standard thus applies, and Upstate had an obligation under the standard to retrain Mr. Getz. The on-site foreman could easily have retrained Mr. Getz but made no effort to do so, and, therefore, the terms of the standard were violated. The fact that Mr. Chan and Mr. Santiago were working in the controlled area near the edge of the roof demonstrates that Upstate employees were exposed to the hazard.

I also find that Upstate had knowledge of the violation. Mr. Santiago was present on the roof for 30 minutes while Mr. Getz was retrieving and passing insulation and also acting as safety monitor. Mr. Santiago should have known Mr. Getz could not do both jobs, given the location of the insulation pile in relation to the controlled area and the size of the sheets. Mr. Santiago was in charge of the work and the manner it was to be done, and he was also responsible for ensuring that appropriate safety measures were taken. (Tr. 16, 133-134, 449-451). He was thus in a supervisory role, and, under Commission precedent, his knowledge is imputed to his employer. *See Halmar Corp.*, 17 BNA OSHC 1014 (No. 94-2043, 1997). This violation is affirmed.

The Secretary has classified this item as a serious violation and has proposed a penalty of \$3,000.00. I find the classification appropriate due to the serious nature of the injuries which could, and did, occur because the safety monitor lacked the understanding and skill necessary to safely perform his job. The violation was given a high severity, based on the serious nature of the potential injuries and the proximity to the edge of the exposed employees. An adjustment to the penalty was made for the company's size, but there were no adjustments for good faith or history. (Tr. 357-358). I find the proposed penalty appropriate, and, accordingly, a penalty of \$3,000.00 is assessed.

Repeat Citation 2, Item 1

This item alleges a violation of the terms of 29 C.F.R. § 1926.502(h)(1)(ii), which requires a safety monitor to warn an employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner. The OSHA compliance officer (“CO”) who conducted the

inspection recommended the issuance of this item because Mr. Chan allegedly was not warned that he was near the edge and exposed to a fall hazard.² (Tr. 358-359).

The Secretary's proof fell short of establishing either that Mr. Chan appeared to be either unaware of the fall hazard or acting in an unsafe manner. Rather, the evidence demonstrates that Mr. Chan was aware that his duties on that day would take him into a controlled area and close to the roof's edge. (Tr. 143). At best, there was some evidence indicating that Mr. Chan was possibly not facing the edge while he was laying insulation down, and that at some point, he was observed within one foot from the edge. (Tr. 144, 212, 236). The standard, however, speaks in terms of whether an employee *appears* to be acting in an unsafe manner, and the evidence did not persuade me that this element was proven. The Secretary submitted no evidence with respect to how long Mr. Chan was observed within one foot of the edge or how long he remained with his back to the edge, and whether this was apparent to the safety monitor. Nor was there any evidence that Mr. Chan was seen horsing around or otherwise appeared to be acting in an unsafe manner. Indeed, the Secretary makes no argument with respect to the applicability of the standard, and the CO offered no testimony in this regard.³ The Secretary thus failed to show that the standard applies, and this citation item is vacated.

Repeat Citation 2, Item 2

This citation item alleges a violation of the terms of 29 C.F.R. § 1926.502(h)(1)(v). The standard provides that the safety monitor "shall not have other responsibilities which could take the monitor's attention from the monitoring function." The standard applies, as Upstate had designated a safety monitor for the protection of the roofers working in the controlled area.

I also find that Mr. Getz's other responsibilities in fact took his attention away from his monitoring function. It is clear that a safety monitor is not completely prohibited from having other

² Mr. Getz testified that he had warned Mr. Chan to be careful about five minutes before the accident. (Tr. 587-191). No other witness testified to having heard such a warning, and it should be noted that I have found Mr. Getz to be an unreliable witness. My resolution of this item, however, makes it unnecessary to address the credibility of this particular statement.

³ The CO apparently believed that the standard applied solely because Mr. Chan fell. (Tr.358-359). While I am well aware of the accident in this case, that an accident occurred does not, in and of itself, prove that the standard applies.

responsibilities. He may not, however, be so busy with other responsibilities that the monitoring function is encumbered. *Beta Constr. Co.*, 15 BNA OSHC 1435 (No. 91-102, 1993). In this case, regardless of the exact location of the insulation pile, it is evident that its placement required Mr. Getz to turn his back on the controlled zone for a period of time, on a regular basis. The sheets were 4 feet by 8 feet, and it would have been difficult, if not impossible, for Mr. Getz to simply reach over to the pile, grab a sheet with one hand, and pass it under the warning line, while observing the employees in the controlled area, and this is so even if he were retrieving the sheets individually rather than in bundles. Indeed, Mr. Getz admitted that Mr. Chan had to use both hands just to slide each sheet into place. Further, the wind was blowing on the morning of the accident, which likely caused the sheets to be especially unwieldy. (Tr. 18, 32, 216-217, 360-361, Exh. C-4, p. 249). It is also significant that Mr. Getz did not see the accident, (Tr. 557), which supports the finding that his activities took his attention away from his monitoring function.⁴ The Secretary has thus proven the terms of the standard were violated. In addition, the Secretary has met her burden of showing that employees were exposed to the cited hazard, as Mr. Chan and Mr. Santiago were both working in the controlled area and were exposed to the danger of falling 19 feet, 10 inches to the ground.

I also conclude that Upstate had knowledge of the violation. Mr. Getz's activities were in plain view of Mr. Santiago, who clearly knew that Mr. Getz was retrieving insulation from the pile and passing sheets to Mr. Chan. The size of the sheets and the location of the pile required Mr. Getz to turn his focus away from the employees working in the controlled area, and Mr. Santiago should thus have been aware that Mr. Getz was unable to effectively perform his monitoring function. As the foreman, Mr. Santiago's knowledge is imputed to the company. *See Halmar Corp., supra*.

Upstate argues that Mr. Getz maintained visual contact with Mr. Chan and Mr. Santiago and that he was able to reach for the insulation sheets and take them to the workers without interfering with his ability to monitor them. Upstate also argues that this is a common practice in the industry and that the Secretary's witnesses who testified about Mr. Getz's activities were not credible. These arguments are not persuasive. Not only was Mr. Getz's testimony contrary to that of the Secretary's

⁴As discussed *infra*, I did not find Mr. Getz to be a credible witness. I also did not find believable his excuse for why he did not observe the accident.

witnesses and his own foreman, it was internally inconsistent. In this regard, I note that he testified both that the pile was not behind him and that it was behind him but that, in any case, he could reach it to retrieve the sheets without turning his back on Mr. Chan and Mr. Santiago. His testimony was also contrary to his signed statement, in which he claimed that another employee handed him the sheets. (Tr. 579, Exhs. C-4, R-20). Further, Mr. Getz's excuse as to why he did not see the accident was simply not believable; I found his story to be a convenient fabrication that no other witness corroborated.⁵ For these reasons, as well as his demeanor on the stand and the evasive manner in which he responded to questions, I find that Mr. Getz was not a credible witness.⁶

I have considered Upstate's argument that Mr. Cooper and Mr. Pappin were biased against the company. (Tr. 102-105). I observed these witnesses on the stand, however, and the manner in which they responded to questions. I found them both to be credible witnesses with respect to their recollections of the accident and the location of the insulation pile, even though Mr. Cooper recalled its distance from the warning line to be about 20 feet and Mr. Pappin recalled that distance to be about 6 feet. Nevertheless, even if I were to discredit their testimony, I would still conclude that Mr. Getz was unable to perform his function as safety monitor, based on the other credible testimony in this case and, in particular, Mr. Santiago's testimony about the location of the insulation pile. This citation item is accordingly affirmed.

The Secretary has classified this item as "repeated." To establish that a violation is repeated, the Secretary must show that there was a final Commission order against the same employer for a substantially similar violation at the time of the alleged repeated violation. *Potlach Corp.*, 7 BNA OSHC 1061, 1064 (No. 16183, 1979). A key factor is whether the two violations resulted in

⁵As further evidence of the inconsistency of Mr. Getz's testimony, he claimed during his deposition that someone had shouted "Nelson," causing him to turn his head, despite the fact that "everybody" calls him "Guy." At the hearing, on the other hand, he testified that he is commonly known as "Nelson." (Tr. 535, Exh. C-3).

⁶ I similarly discredit Mr. Chan's testimony that Mr. Getz was operating a forklift at the time of the accident. (Tr. 164). This, too, was inconsistent with all the other witness accounts. Moreover, it makes no logical sense, as the forklift was used on the day of the accident solely to place tools on the roof, which, of necessity, took place before the crew began work. (Tr. 225). Finally, as noted above, Mr. Chan himself admitted to having sustained memory loss.

substantially similar hazards. *Amerisig Southeast, Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996), *aff'd without published opinion*, 17 F.3d 1433 (11th Cir. 1997). The evidence demonstrates that there were three prior final orders for violations of fall protection standards against Upstate. Specifically, citations alleging violations of 29 C.F.R. §1926.501(b)(1) and 29 C.F.R. §1926.501(b)(10) became final orders of the Commission on June 29, 1998, and a citation alleging a violation of 29 C.F.R. § 1926.501(b)(11) became a final order of the Commission on May 11, 2000. (Exhs. C-5-13). In these previous cases, Upstate employees were not provided with an appropriate fall protection safety program and, as a result, were exposed to the hazard of falling from roofs. This hazard is precisely the hazard to which Mr. Chan and Mr. Santiago were exposed. I thus find that the prior violations are substantially similar to the one in this case, and this item is affirmed as repeated.

The Secretary has proposed a penalty of \$15,000.00 for this item. The gravity of the violation was high, in that two employees were exposed to death or serious injury from falling almost 20 feet to the ground. No adjustments to the penalty were made for good faith or history, but an adjustment for size was made due to the size of the employer's business. (Tr. 359-361). I find the Secretary's proposed penalty to be appropriate, and a penalty of \$15,000.00 is therefore assessed.

ORDER

Based on the foregoing decision, the disposition of the citation items, and the penalties assessed therefor, is as follows:

Citation Item	Violation	Disposition	Classification	Penalty
Citation 1 Item 1	§ 1926.503(c)(3)	Affirmed	Serious	\$3,000.00
Citation 2 Item 1	§ 1926.502(h)(1)(ii)	Vacated		
Citation 2 Item 2	§ 1926.502(h)(1)(v)	Affirmed	Repeated	\$15,000.00
Citation 3 Item 1	§ 1926.503(b)(1)	Vacated		

/s/

G. MARVIN BOBER
Administrative Law Judge

Dated: September 3, 2002
Washington, D.C.