United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. EMS CONSTRUCTION, INC., Respondent.	OSHRC DOCKET NO. 05-1396

APPEARANCES:

For the Complainant:
Satoshi Yanai, Esq., U.S. Department of Labor, Office of the Solicitor, Los Angeles, California

For the Respondent:
Charles Speck, *pro se*, EMS Construction, Vista, California

Before: Administrative Law Judge: James H. Barkley

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, EMS Construction, Inc. (EMS), at all times relevant to this action maintained a place of business at the Viejas Community Recreation Center in Alpine, California where it was engaged in construction. EMS admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Joint Stipulations 1 through 3).

On July 27, 2005, the Occupational Safety and Health Administration (OSHA) conducted an inspection at EMS's Alpine worksite. As a result of that inspection, OSHA issued a citation alleging violations of the roofing standards at 29 CFR §1926.501(b)(11) or, in the alternative (b)(10). By filing a timely notice of contest EMS brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On January 11, 2005, a hearing was held in San Diego, California. No briefs were requested on the issues, and this matter is ready for disposition.

Facts

OSHA Compliance Officer Daniel Mooney testified that on July 27, 2005 he drove by EMS's work site at the Viejas Community Center (Tr. 18, 53). From the highway, Mooney could see two EMS employees, later identified as Hoa Tran and Mike Liears, moving around on a curved roof approximately 150 to 200 feet away (Tr. 36; Exh. C-1).[1] After pulling over, Mooney watched the employees with binoculars for three to six minutes as they took sheet metal off a fork lift, placing it on locations around the roof. At times they approached within a foot or two of the eave of the roof, which rose from approximately 9 feet to 18 feet above the ground (Tr. 19, 23-29, 34, 46; Exh. C-1). Mooney did not see any type of fall protection system in use (Tr. 30). Though Mooney's photographs of the scene are inconclusive (Exh. C-1), the CO stated he was confident he would have seen safety harness straps across the employees' legs, chests and shoulders, and possibly the flash of a line coming from a D ring on the back of the harness (Tr. 31, 44, 97-98, 101-02).

When Mooney arrived at the work site at approximately 9:30 a.m., he met with the general contractor's superintendent, Larry McCubbin, who called the subcontractors together. Mooney saw the EMS crew leaving the roof (Tr. 35, 58, 60). They did not report to the job trailer with the other subcontractors, and McCubbin told Mooney EMS had left the site (Tr. 35-36). After several calls from McCubbin, EMS foreman, Arthur Miranda, returned to the work site at approximately 10:45, where he met with Mooney (Tr. 36-37, 65-67). In what Mooney described as a "tense" interview, Mooney told Miranda EMS was violating the fall protection standard in that its employees were not tied off. Miranda did not dispute Mooney's observations, but argued that there was no violation because the employees did not come within six 6 feet of the edge (Tr. 37-38, 46).

At the hearing, Miranda testified that he was operating the forklift, could not see his workmen at the time of the alleged violation, and so could not say with certainty that they were tied off (Tr. 37, 103-04). Nonetheless, Miranda stated, EMS requires its employees be tied off 100% of the time (Exh. R-7, R-9). According to Miranda, anchors were installed on the high side of the roof for this job, and the crew had been tied off to them earlier in the day. He testified he spent only 5 or 10 minutes in the forklift and could observe his crew the remainder of the time. He, therefore, assumed the men were tied off at the time of the inspection (Tr. 103-15). Miranda denied telling Mooney that he ensured his men stayed 6 feet from the edge of the roof (Tr. 115). He testified that his crew left the worksite on the morning of July 27 to go

[1] On cross examination, Mooney admitted that he did not measure his distance from the work site (Tr. 93-94).

to lunch, that a typical lunch break lasts approximately 30 minutes, and that he returned to the worksite immediately upon receiving superintendent McCubbin's call (Tr. 108).

Finally, Miranda testified that Mooney stated he was going to give them a verbal warning until he learned Miranda was in the fork lift, at which time Mooney decided to write up the violation (Tr. 115). Mooney stated that OSHA does not give verbal warnings; if a CO observes a condition he believes constitutes a serious violation, he is required by statute to recommend a citation be issued (Tr. 63-64).

Alleged Violation of §1926.451(g)(4)(i)

Serious citation 1, item 1 alleges:

29 CFR 1926.501(b)(11): Each employee on a steep roof with unprotected sides and edges 6 feet or more above lower levels were not protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems:

> (a) At the south side of a main building's steep roof, there was no fall protection for employees that obtained metal sheets from the tines of a forklift, exposing employees to the hazard of falling from elevations that varied from 9.66 feet to 18 feet to the ground below.

29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low-sloped roofs with unprotected sides and edges 6 feet or more above lower levels were not 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, warning line system and safety monitoring system:

> (a) At the south side of a main building's steep roof, there was no fall protection for employees that obtained metal sheets from the tines of a forklift, exposing employees to the hazard of falling from elevations that varied from 9.66 feet to 18 feet to the ground below.
>
> The cited standard provides:
>
> 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 (15.25m) or less in width . . . the use of a safety monitoring system alone [i.e. without the warning system] is permitted.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with

the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

Mooney testified that the slope at the top of the roof, where the employees were working, had a slope less than 4 and 12 (vertical to horizontal), establishing that §1926.501(b)(10) is the applicable standard (Tr. 35; 29 CFR 1926.500(b) *Definitions*). The quality of the CO's photographic evidence is poor and fails to show the violative condition (Tr. 72; Exh. C-1, R-3). Nonetheless, Mooney convincingly testified that he saw the two employees working without fall protection. Specifically Mooney stated that the employees were not wearing the harnesses that are an integral part of the fall arrest system EMS claimed to be using (Tr. 80, 95). Mooney's first hand observations are uncontradicted and are, therefore, credited.

EMS's foreman Miranda admitted he could not see the employees at the time of the alleged violation. Miranda testified that he merely assumed the employees were wearing fall protection because they had been trained to do so, and because he had seen them wearing it earlier in the day. Miranda's testimony, is suspect for a number of reasons. Miranda is a current employee who, at the hearing, was responding to questioning by his supervisor. Even so, at hearing, as at his initial questioning on the day of the OSHA inspection, Miranda never denied the violation. Rather than telling Mooney his men were tied off, which would have been the reasonable response, had that been the case, he merely maintained his men were working six feet back from the edge. He took refuge in his lack of knowledge, claiming that he could not see his crew while he was operating the forklift. Despite his professed ignorance of the violation, when he learned of OSHA's presence on the job site, he left the job site with members of his crew, ostensibly for lunch, though it was only 9:30 a.m. He did not return for more than an hour, despite repeated calls from the general contractor, and though only 30 minutes is usually allotted for lunch.

Miranda denies he told the CO his men were six feet back from the edge; he insists there was nothing unusual about his absence from the work site; he denies superintendent McCubbin called him more than once; he maintains that his crew must have been wearing fall protection, because they were trained to do so; he maintains that CO Mooney was only going to issue a verbal warning until he learned that Miranda could not see his crew from the forklift. If Miranda is to be believed, this judge must find that CO Mooney concocted his version of events from whole cloth, including not only his observations, but his conversations with both superintendent McCubbin and foreman Miranda. CO Mooney's demeanor on the stand was straightforward, his description of events consistent with OSHA practices. He was, in short, believable. Miranda's suspicious behavior on the worksite was echoed in his uncomfortable

demeanor on the stand, and his equivocating testimony. Significantly, Miranda, as the foreman, would have been directly responsible for enforcing EMS's safety rules. The violation of those rules are his responsibility. His interest in the outcome of this hearing is more direct and personal than that of the CO. That testimony is, therefore, not credited, and the violation as well as employee access to the violative conditions is established.

Miranda's testimony regarding the use of personal fall protection earlier in the day is also discounted. It is frankly unbelievable that employees who had been wearing harnesses and lanyards earlier in the day would shed them during the 5 to 10 minutes their foreman left the roof to use the forklift. Because the violation was in plain sight, Miranda knew or should have known of the condition. That he knew of the violation is suggested by his removing his crew from the work site in the midst of the job. Employer knowledge has been established.

Penalty

A fall from a low sloped roof between 9 and 18 feet above the ground is serious in that it would likely result in serious injury such as broken bones. One employee was observed near the edge of the roof for less than three to six minutes. The likelihood of an accident occurring was small due to the limited exposure and the low slope of the roof where work was ongoing (Tr. 39-41). EMS had no other serious OSHA violations, and at the hearing it submitted evidence of a safety program including training in fall protection (Exh. R-7, R-8). The CO had no opportunity to see EMS's safety program and so did not include a reduction for good faith in his proposed penalty of $750.00. Taking the relevant factors into account a penalty of $600.00 is appropriate and will be assessed.

ORDER

1. Serious citation 1, item 1, alleging violation of 29 CFR §1926.501(b)(10) is AFFIRMED, and a penalty of $600.00 is ASSESSED.

/s/
James H. Barkley
Judge, OSHRC

Dated: March 16, 2006