

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

Midwest Roofing & Custom Metals,

Respondent.

OSHRC Docket No. **06-0617**

Appearances:

Brian A. Duncan, Esquire, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Jason La Forest, Owner, Midwest Roofing & Custom Metals, Broken Arrow, Oklahoma
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Midwest Roofing & Custom Metals (Midwest), a sole proprietorship, installs commercial and industrial roofing in Broken Arrow, Oklahoma. On February 28, 2006, Occupational Safety and Health Administration (OSHA) compliance officer Jerry Jackson was driving by the construction of a new International House of Pancakes (IHOP) and observed two employees of Midwest standing on a parapet wall above the roof level without fall protection. As a result of the OSHA inspection, Midwest received a serious citation for violation of 29 C.F.R. § 1926.501(b)(1) for failing to require fall protection for employees on a working/walking surface on top of a parapet wall approximately 23 feet above ground level. The citation proposed a penalty of \$1,500.00. Midwest timely contested the citation.

The case was designated for Simplified Procedures under 29 C.F.R. § 2200.200. The hearing was held on June 19, 2006, in Tulsa, Oklahoma. Midwest is represented by its owner Jason La Forest. The parties stipulated jurisdiction and coverage (Tr. 7). The parties filed post-hearing statements of position.

Midwest denies the violation and argues it was in compliance with § 1926.501(b)(1) because the inside wall of the building was less than 6 feet above the roof and the outside wall of the parapet was protected by scaffolding less than 6 feet below the parapet. Midwest does not assert any affirmative defenses (Tr. 12).

As discussed more fully, a violation of § 1926.501(b)(1) is affirmed and a penalty of \$1,000.00 is assessed.

The Accident

Midwest is engaged in the business of installing industrial and commercial roofs in Broken Arrow, Oklahoma. It has been in business for six years. Midwest is owned by Jason La Forest and employs approximately 12 employees (Tr. 6, 36, 37, 85).

In February 2006, Midwest contracted to install a flat metal roof on a newly constructed IHOP building in Broken Arrow, Oklahoma (Exh. C-1; Tr. 41, 42). The general contractor was South Fork Construction (Tr. 53). The roof was approximately 70 feet by 80 feet (Tr. 39). The roof level was approximately 17 feet above the ground (Tr. 20, 70). Around the roofs' edge, there was a parapet wall,¹ which according to Midwest's executive supervisor Adam Blevins, was 4 feet, 6 inches to 5 feet, 9 inches above the roof level (Tr. 19). Blevins' statement to OSHA described the height of the parapet wall as 6 feet (Exh. C-6). The width of the parapet wall was 12 - 13 inches, except in column areas where it was 3 feet, 6 inches wide (Exh. C-2; Tr. 22, 23). The distance from the top of the parapet wall to the ground was approximately 23 feet (Tr. 19). In addition to installing the metal roof, Midwest contracted to install a metal cap on top of the parapet wall (Tr. 41, 42). Midwest did not construct the parapet wall (Tr. 41).

On February 28, 2006, Midwest's crew began installing the metal cap on top of the parapet wall at approximately 1:00 p.m. (Tr. 38). The crew intended to install 400 feet of parapet capping (Tr. 40). Midwest's crew consisted of seven roofers including foreman Michael Gaskin (Tr. 15, 38). Because of his prior experience with metal roofing, Midwest's executive supervisor Adam Blevins was on site directing the work (Tr. 14-15, 39).

¹ A "parapet wall" is a vertical wall that is around the edge of the roof and perpendicular to the roof level (Tr. 17, 18).

After the metal cap was placed on the parapet wall, Blevins and another employee secured the cap to the parapet wall with rivets (Exhs. C-2, C-3; Tr. 24, 43, 44). In most areas, Blevins and the other employee were able to secure the metal cap while standing on the roof. In the column areas, however, they stood on top of the parapet wall (Tr. 45, 46). Blevins testified it was easier and faster to secure the metal cap by standing on the wall (Tr. 40). The crew had been installing the parapet capping for 2-3 hours prior to the OSHA inspection (Tr. 40). When the employees, including Blevins, stood on top of the parapet wall, the employees did not utilize any fall protection (Exh. C-3). They wore no harnesses and used no tie-off lines. There were no guardrails on the parapet wall or netting below the wall (Tr. 26-27). However, the plastering contractor had installed scaffolding around the outside wall (Exh. C-4; Tr. 57-58). According to Blevins, the scaffolding platform was approximately 5 feet, 8 inches below the top of the parapet wall (Tr. 47).

At approximately 3:00 p.m., OSHA compliance officer Jerry Jackson who had completed a programmed inspection was driving by the IHOP project when he observed two employees standing on top of the parapet without fall protection (Exhs. C-2, Tr. 38, 52). Jackson parked his automobile and initiated an OSHA inspection pursuant to a special emphasis program (Tr. 52). Mr. Jackson did not go onto the roof or take any measurements of the wall (Tr. 69, 71, 74). From the ground, he observed two employees standing on the parapet wall without fall protection for 20 - 30 minutes (Tr. 25, 54, 55, 63).

Jackson described the scaffolding on the outside wall below the parapet wall as inadequately erected and failing to comply with OSHA's scaffolding standards at Subpart L, 29 C.F.R. § 1926.450 *et seq.* The scaffolding was erected and used by the plastering contractor (Tr. 28). Midwest employees did not build or use the scaffold (Tr. 27). Jackson described the scaffold as "just a shamble" (Tr. 60). The scaffold's wooden platform was not fully planked with more than 12-inch gaps (openings) on the outside and inside of the platform (Exhs. C-4, C-5; Tr. 63, 72, 75, 76). Jackson opined the gaps in the planking were wide enough to allow an employee to fall through the gaps to the ground (Tr. 61). The scaffolding was also missing cross-bracing and a ladder (Tr. 60). It was not level and square (Tr. 65). The inadequacy of the scaffold was noted by the general contractor (Exh. C-7).

As a result of Jackson's inspection on March 20, 2006, Midwest received a serious citation for a violation of § 1926.501(b)(1) because of the two employees' failure to utilize fall protection while working on top of the parapet wall. The plastering contractor also received a citation for the scaffolding not being fully planked, missing cross-bracing, lacking a means of access, and its inadequate stability (Tr. 73).

Discussion

The Secretary has the burden of proving a violation of the standard.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Alleged Violation of § 1926.501(b)(1)

The citation alleges the employees, working/walking on top of the parapet wall, were exposed to a fall hazard and were not utilizing a fall protection system. Section 1926.501(b)(1) provides:

Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Midwest does not dispute the application of § 1926.501(b)(1) to its roof installation work on the IHOP project (Tr. 41). Midwest also does not dispute its two employees, including executive supervisor Blevins, were working on top of the parapet wall at approximately 23 feet above the ground without guardrails, safety nets, or personal fall arrest systems (Exh. C-3; Tr. 21, 24, 28). In addition to employees' exposure, the record establishes Midwest knew of the violative condition. Blevins, one of the employees on top of the parapet wall, is the executive supervisor for Midwest. As executive supervisor, he "supervised the supervisors" on site and had the authority to direct and correct employees' work (Tr. 14-15). Blevins' knowledge of the conditions is imputed to Midwest.

Dover Elevator Co. 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Midwest asserts the parapet wall was less than 6 feet above the roof level or the scaffold platform along the outside wall. Midwest, therefore, argues it was in compliance with § 1926.501(b)(1) because the employees did not need fall protection since it was less than 6 feet above a lower level. Midwest notes its executive supervisor, who was on top of the parapet wall, did not believe there was a fall hazard (Tr. 48, 84).

The sole issue in this case is whether the terms of §1926.501(b)(1) were violated. There is no dispute the top of the parapet wall is considered a “walking/working surface.”² The two Midwest employees were installing the metal capping while standing on top of the parapet. Although Blevins told OSHA the top of the parapet wall was 6 feet above the roof level, at the hearing he testified his statement was an approximate height and the actual height was 4 feet, 6 inches in some locations and 5 feet, 8 inches in other locations (Exh. C-6; Tr. 19, 24). Because Jackson did not measure the height of the parapet wall or go on the roof, the Court accepts Blevins’ testimony that the height of the parapet wall was less than 6 feet above the roof level (Tr. 24, 71). Therefore, § 1926.501(b)(1) does not require fall protection for an exposure to the roof level.

However, on the outside wall of the building, it was 23 feet from the top of the parapet wall to the ground (Tr. 19). This raises two questions; (1) whether the scaffold platform was less than 6 feet from the top of the parapet, and (2) whether the scaffold platform constitutes a “lower level” as contemplated by the standard.

The record in this case establishes the scaffold platform was 6 feet or more below the top of the parapet wall. Although Roberts and Blevins made no measurements of the height, Roberts’ calculation of 6 feet or more to the scaffold platform was based on the dimensions of the scaffold which he said was 5 feet or 5 feet, 6 inches, if including the screw jacks and the mud seals (Tr. 69, 70). Midwest asserts the scaffold was 6 feet high (Midwest’s position statement). Accepting either dimensions, the scaffold platform was 17 feet or less above the ground. This is supported by Blevins’ testimony when he described the top level of the scaffold as lower than the roof level, which he stated as 17 feet (Tr. 22, 49, 70). Therefore, with the top of the parapet wall 23 above the ground,

² “Walking/working surface means any surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or tailers, on which employees must be located in order to perform their job duties.” 29 C.F.R. § 1926.500(b) (*Definitions*).

even if the scaffold platform is considered the “lower level” within the standard, the employees standing on top of the parapet wall would require fall protection because it was 6 feet or more to the scaffold platform.

However, even if the scaffold platform was less than 6 feet below the top of the parapet, the record fails to establish it as a “lower level” because of the lack of full planking. The standard defines “lower levels” at 29 C.F.R. § 1926.500(b) (*Definitions*), to mean

those areas or surfaces to which an employee can fall. Such areas or surfaces include, but are not limited to, ground levels, floors, *platforms*, ramps, runways, excavations, pits, tanks, material, water, equipment, structures, or portions thereof. (*emphasis added*).

Jackson testified the missing planks created gaps in the platform’s walking surface of varying widths ranging from 12 inches to 2 feet (Tr. 75). With at least 12-inch openings throughout the platform due to the missing planks, an employee could fall a distance of 23 feet through the platform to the ground level (Exhs. C-4, C-5). Both Blevins and Jackson agreed the missing scaffold planks created openings on the scaffold’s walking surfaces that were wide enough for a person to fall through (Tr. 30, 61). The scaffold was designed to protect the employees working on the scaffold; not an employee standing above the scaffold platform on a 13-inch wide parapet wall (Tr. 68). Therefore, the scaffold platform cannot be considered a surface “to which an employee can fall” as required by the definition of “lower levels.”

Since it has been established that on at least one side of the parapet wall, the employees were exposed to a fall hazard of 6 feet or more, §1926.501(b)(1) requires the employees to use fall protection. The standard specifically identifies the type of fall protection required as “guardrail systems, safety net systems, or personal fall arrest systems.” There is no dispute the two employees standing on the parapet wall were not protected by such fall protection systems.

Midwest’s argument that the scaffold platform provided fall protection is rejected. In *Ranch Masonry, Inc.*, 19 BNA OSHC 1931, 1934 (No. 01-0742, 2002), Judge Spies rejected a scaffold platform as fall protection and stated, “the plain language of the standard (§ 1926.501(b)(1)) makes clear that the employer must choose one of the listed forms of fall protection. Ranch failed to use any form of fall protection.” As in this case, a scaffold platform is not one of the listed forms of fall

protection identified by the standard. This is particularly so here because the scaffold platform had numerous gaps through which an employee can fall.

A violation of § 1926.501(b)(1) is established.

Serious Classification

In order to establish a violation is “serious” under § 17(k) of the Occupational Safety and Health Act (Act), the Secretary must show there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violation.

As discussed previously, Midwest had actual knowledge of the employees’ failure to use fall protection while standing on top of the parapet wall. Blevins’ knowledge as executive supervisor and his participation in the fall hazard without fall protection is imputed to Midwest. It is clear a fall to an improperly constructed scaffold or the ground level 23 feet below could cause death or serious bodily harm (Tr. 65). “In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur.” *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989). Blevins’ belief that he was safe is immaterial and his judgment cannot be substituted for the requirement of the standard.

Penalty Determination

The Review Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Act requires consideration of the size of the employer’s business, history of previous violations, the employer’s good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Midwest is a small employer with approximately 12 employees. Midwest is also given credit for history because it has not received an OSHA citation in the preceding three years (Tr. 37, 66-67, 84). Midwest is not given credit for good faith because its safety attitude seems to rely more on the discretion of its employees as oppose to requiring safety measures for hazards as set forth by the OSHA standards. Executive supervisor Blevins testified he would have used fall protection “if I feel that I need it at that point in time, if we’re in a high area where we’re possibly going to fall, yes, I would use it” (Tr. 84). Blevins decided not to use fall protection because it was more

convenient, easier, and faster to install the metal caps by standing on top of the parapet wall (Tr. 40). Such attitude by a supervisor, show a lack of safety training and understanding of a hazardous condition. Also, it is noted there was no fall protection equipment at the IHOP project prior to the OSHA inspection (Tr. 86). When asked about safety training, Blevins only identified some training provided by the general contractor (Tr. 85). No fall protection training was described.

A penalty of \$1,000.00 is reasonable for Midwest's violation of § 1926.501(b)(1). Two Midwest employees including its executive supervisor were exposed to a fall hazard of 23 feet without fall protection. The employees were exposed for at least 20 minutes. The fact that the exposure of the two employees was less than 30 minutes is immaterial. *Walker Towing Corp.*, 14 BNA OSHC 2072 (No. 87-1359, 1991) (a comparatively brief exposure is sufficient to support the finding of a violation). Midwest's executive supervisor did not use fall protection and he did not recognize a hazard.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Serious Citation 1, Item 1, alleged serious violation of §1926.501(b)(1) is affirmed and a penalty of \$1,000.00 is assessed.

S/ Ken S. Welsch
KEN S. WELSCH
Judge

Date: August 3, 2006