United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR, Complainant, v. M.D. ROOFING & SIDING, L.L.C., Respondent.	OSHRC DOCKET NO. 05-1070

Appearances:

Andrea J. Appel, Esquire
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant.

John McCullough, President
M.D. Roofing & Siding, L.L.C.
Philadelphia, Pennsylvania
For the Respondent, *pro se.*

Before: Administrative Law Judge Covette Rooney

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"). Respondent, M D. Roofing and Siding, at all times relevant to this action maintained a job site at 760 South 13th Street, Philadelphia, Pennsylvania, where it was engaged in residential roofing work. On April 27, 2005, the Occupational Safety and Health Administration ("OSHA") inspected Respondent's job site. As a result of that inspection, on May 4, 2005, Respondent was issued a serious citation alleging a violation of OSHA's residential construction requirements with a proposed penalty in the amount of $1,000.00. Respondent filed a timely notice of contest and this matter was designated for E-Z Trial pursuant to Commission Rule

203(a).[1] A hearing was held on October 27, 2005, in Philadelphia, Pennsylvania. At the commencement of the hearing, the parties stipulated that Respondent is a covered employer within the meaning of the Act and that the Commission has jurisdiction over this proceeding. (Tr. 5). Both parties have filed post-hearing briefs, and this matter is ready for disposition.

The Inspection

Upon arriving at the Respondent's work site on April 27, 2005, OSHA Compliance Officer ("CO") Wylie Hinson observed two employees on two separate roofs performing roofing activities without fall protection. One employee, Fran Gillespie, was 22 feet from the ground, and he was observed near the edge of the roof with a tar mop in his hand and also unwrapping a bundle of tar paper near the edge. A second employee, Javier Gueriar, was observed on a second roof 8 feet above the first and 30 feet from the ground. He was seen walking back and forth to the edge of the roof and bending down to install flashing. A third employee, Joe Conner, the foreman, was observed climbing a ladder up to the lower roof. The roof edges the employees were working near were unprotected, and there was no type of fall prevention equipment in use to keep the employees from falling from the edges. CO Hinson photographed the employees and continued to watch them for about 15 minutes. He then held an opening inspection with Ed McKenna, who identified himself as the person in charge of the site for Respondent. Mr. McKenna confirmed the heights of the roofs and told him the employees worked for Respondent. He also informed the CO the employees were in the process of putting hot tar on the roofs. Once the employees came down, CO Hinson spoke with them. Mr Gueriar told the CO Mr. Gillespie was his safety monitor, and Mr. Gillespie told the CO Mr. Gueriar was his safety monitor. The foreman, Mr. Conner, who had been working not only on the lower roof but also on the ground preparing the hot tar, told the CO he had been Mr. Geurier's safety monitor from the ground. (Tr. 13-14, 21-32, 54-55, 62, 70-71; Ex. G -1(a) through (h)).

The Secretary's Burden of Proof

The Secretary has the burden of proving her case by a preponderance of the evidence. In order to establish a violation of an OSHA standard, the Secretary must show (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access

[1]After this proceeding commenced, the Commission amended its procedural rules to refer to its E-Z Trial proceedings as "Simplified Proceedings." *See* 29 C.F.R. § 2200.200 *et seq.*

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 OSHA 2131, 2138 (No. 90-1747, 1994).

Citation 1, Items 1a and 1b

29 C.F.R. 1926.501(b)13, the cited standard, provides in pertinent part as follows:

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

The citation alleges as follows:

> a) Jobsite, 760 South 13th Street, Top Roof - An employee was performing roofing operations on the edge 30' above ground level without conventional or alternative methods of fall protection on or about 04/27/05.
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> b) Jobsite, 760 South 13th Street, Rear Roof - An employee was performing roofing operations on the edge 22' above ground level without conventional or alternative methods of fall protection or about 04/27/05.

In lieu of conventional fall protection, section 1926.501(b)(10) allows an employer to use a safety monitoring system on roofs 50 feet or less in width.[2] In addition, section 1926.502(h) sets forth the requirements for a safety monitoring system.[3] Among the requirements are that the safety monitor: shall be on the same walking/working surface of the employee being monitored; shall not

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[2]29 C.F.R. 1926. 501(b)(10) provides, in pertinent part, that "on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted."

[3]29 C.F.R. 1926.502(h)(1) provides that "[t]he employer shall designate a competent person to monitor the safety of other employees and the employer shall ensure that the safety monitor complies with the following requirements:

> (i) The safety monitor shall be competent to recognize fall hazards;
> (ii) The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner;
> (iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored;
> (iv) The safety monitor shall be close enough to communicate orally with the employee; and
> (v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

have other responsibilities which could take the monitor's attention from the monitoring function; shall be close enough to communicate orally with the employee. Respondent contends that it was not in violation of the cited standard because it had a safety monitoring system in place. John McCullough, Respondent's President, testified that when installing hot asphalt, a safety monitoring plan was implemented that required one man to mop the hot asphalt to the edge of the roof while the other man did nothing but watch and monitor him. Mr McCullough also testified that the employees were engaged in preparatory work and thus were not yet performing actual roofing work, *i.e.*, pouring hot asphalt roofing material, when the CO saw them. He conceded, however, he was not present on the site at the time the CO was making his observations. (Tr. 8, 77-79; Ex. R-1).

I disagree with Respondent's contention that the employees were not engaged in actual roofing work requiring fall protection when the CO saw them. I find that the evidence demonstrates that roofing work was well underway and that the activities preceding the actual pouring of the hot asphalt required fall protection.[4] The CO's testimony, which was not rebutted, demonstrates that the employees and the foreman could not have been effectively monitoring one another because they were not working on the same surface, they were all engaged in other activities which took their

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[4]Section 1926.500(a)(1) states that the provisions of subpart M do not apply when the employer establishes that employees are only inspecting, investigating, or assessing workplace conditions prior to the actual start of the work or after work has been completed. The preamble to this section states that:

> It was OSHA's intent when it proposed this provision that the exclusion would only apply at the two times stated above, not during the period when construction work is being performed ... the exception would apply where an employee goes onto a roof in need of repair to inspect the roof and to estimate what work is needed. During such an inspection, guardrails, body belts, body harnesses, safety nets, or other safety systems would not be required. 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. The intent of the provision is also to recognize that after all work has been completed, and workers have left the area, there may be a need for building inspectors, owners, etc. to inspect the work. OSHA recognizes that in these situations, all fall protection equipment, such as perimeter guardrail systems, may have been removed. OSHA is not requiring the installation of the systems for a second time for inspectors, because the Agency recognizes it would be unreasonably burdensome to require the reinstallation of fall protection equipment after all the work has been completed. *See* 59 Fed Reg. 40672, 40675 (1994).

attention from one another, and they did not have the ability to communicate orally with one another. (Tr. 28-30). The employees the CO observed on the roof were exposed to potential fall hazards, and Respondent has not established that it was using a safety monitoring system. Furthermore, two supervisory employees, Mr. McKenna and Mr. Conner, were on the work site and had actual knowledge of the cited conditions. (Tr. 23-26). The Secretary has established the alleged violation of 29 C.F.R. 1926.501(b)(13).

Classification of the Violation

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result" from the violation. In order to show that a violation is serious, the Secretary need not establish that an accident is likely to occur, but, rather, that an accident is possible and that it is probable that death or serious physical harm could occur. *Flintco, Inc.*,16 BNA OSHA 1404, 1405 (No 92-1396, 1993). Based on the record, the violation is properly classified as serious; employees were exposed to the hazard of falling 22 feet and 30 feet onto the ground below, which clearly could have resulted in serious injuries or death. (Tr. 35). The violation is accordingly affirmed as serious.

Penalty

Once a contested case is before the Commission, the amount of the penalty proposed by the Secretary is just that -- a proposal. What constitutes an appropriate penalty is a determination the Commission, as the final arbiter of penalties, must make. In making a penalty determination, "due consideration" must be give to the four criteria set out in section 17(j) of the Act, 29 U.S.C. § 666(j), that is, the gravity of the violation and the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and the gravity of a violation is generally the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood of an injury. *J.A. Jones, supra.*

The record shows that the severity of the violation in this case was high, as falls from the heights involved could have resulted in serious injuries or death; however, the probability of an accident occurring was lesser because the roofs were fairly large. (Tr. 35-36). The gravity-based

penalty was adjusted due to the size of the employer, but no adjustments were made for good faith or history in light of certain inaccuracies in the employer's safety program and the fact that Respondent had been cited for a serious violation within the previous three years. (Tr. 37-38). In view of the aforementioned factors, I find that the proposed penalty of $1,000.00 is appropriate.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Items 1a and 1b, alleging serious violations of 29 C.F.R. 1926.501(b)(13), are affirmed, and a total penalty of $1,000.00 is assessed.

/s/

Covette Rooney
Judge, OSHRC

Dated: December 12, 2005
Washington, D.C.