United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. C. E. WYLIE CONSTRUCTION CO., and its successors, Respondent.	OSHRC DOCKET NO. 01-1043

APPEARANCES:

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

For the Respondent:
Mark T. Bennett, Esq., Merrill, Schultz & Wolds, Ltd., San Diego, 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 *et seq.*; hereafter called the "Act").

Respondent, C. E. Wylie Construction Co., and its successors (Wylie), at all times relevant to this action maintained a place of business at Hangar 2, Miramar Air Station, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On April 23, 2001 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Wylie's Miramar work site. As a result of that inspection, Wylie was issued a citation alleging violations of 29 CFR §1926.501(b)(1) of Act together with a proposed penalty. By filing a timely notice of contest Wylie brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On May 7, 2002, a hearing was held in San Diego, California. At the hearing the parties stipulated that the only matter remaining at issue was Citation 1, item 1a, instance (b)(Tr. 32-36, Exh. C-1), which alleges:

> North End of Hanger 2: Employees working on upper roof 15 feet above the lower level and within 1 foot of the edge was not protected by a guard rail system, safety net system, or personal fall arrest system.

The parties have submitted briefs on the remaining issue and this matter is ready for disposition.

Facts

OSHA's Compliance Officer, Marion Moore, testified that on April 23, 2001, as he drove up to hanger Number 2 at Miramar Air Station, he observed a Wylie employee, David Tidey, working on an unprotected flat roof, the hanger door roof, which projected from the barrel shaped hangar roof (Tr. 30, 38, 50, 78-79, 134; Exh. C-3a through C-3f). Moore stated that at one point Mr. Tidey leaned over the front of the projecting roof to talk to someone on the next flat surface below (Tr. 78; Exh. C-3f). According to Moore, he observed Tidey on the upper roof for approximately ten minutes, and that Tidey was exposed to the hazard of falling from the front of the projecting roof to the flat roof below for approximately two to five minutes (Tr. 38, 75, 80; Exh. C-3a through C-3f). Moore stated that he measured the fall hazard from the front of the unprotected roof, and found it was 15 feet from the roof to the next flat surface below (Tr. 74-75).

Bruce Hamel, a superintendent with Wylie, testified that the "work surface" of the hanger door roof extended approximately 10 feet out from the barrel roof (Tr. 141). Where the projecting area extended beyond the barrel roof of the hangar, *i.e.* at the end of the work surface, the roof is surrounded by a two foot parapet (Tr. 146). CO Moore estimated the height of the open work surface of the hanger door roof as approximately 10 to 12 feet above the flat surface, where the barrel roof ended and the parapet began (Tr. 93-94, 146; Exh. C-3b). As the hanger door roof intersected the rising barrel roof, the fall distance rapidly fell to zero (Tr. 145-45; Exh. C-3a through C-3f).

Both Hamel and David Tidey stated that Tidey was installing safety cable for the gable end of the barrel roof when he was photographed by CO Moore (Tr. 129, 151, 171). Hamel knew that Mr. Tidey was not wearing a safety harness at that time (151, 160). Both he and Tidey testified that there was nothing to fasten a lanyard to in the area where Tidey was working (Tr. 152, 160, 171). Hamel stated that no warning lines were installed on the edge of the parapet roof as Tidey's task would be completed within half an hour, and, in any event, did not require him to work out near the parapet (Tr. 157, 163, 173; Exh. R-4). No safety monitor was provided on the hanger door roof as there was so little room (Tr. 157, 162). Hamel stated that Tidey was instructed to stay away from the leading edge while he worked (Tr. 153, 157). Tidey stated that he was told to stay close to the building, *i.e.* the barrel roof (Tr. 171-72). In addition, Tidey used a buddy system (Tr. 172). His "buddy," Mr. Wylie,

was to look out for him while he installed the safety cable (Tr. 172). Tidey testified that he had no work to perform close to the parapet, and only went to the parapet and leaned over it for a minute or so to answer a question of Mr. Wylie's (Tr. 173).

Discussion

Section 8(e). As a threshold matter, Wylie argues that the citation in the above captioned matter should be dismissed because CO Moore violated its right to be present during the inspection by photographing Mr. Tidey from the parking lot before presenting himself at Wylie's office. The Commission, however, has held that no remedy is available for a CO's failure to comply with the strict provisions of §8(e) of the Act, requiring that "a representative of the employer. . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace," unless the employer can demonstrate that it was substantially prejudiced by the alleged noncompliance. *Gem Industrial, Inc.* 17 BNA OSHC 1861, 1865, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996). Wylie does not claim to have suffered prejudice, and the record reveals none. Wylie's request for dismissal is, therefore, without merit.

The violation. The cited standard requires:

> *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 (1.8 m) 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.

The violation is admitted. Wylie's witnesses admitted that during the course of his duties, Mr. Tidey leaned over the unguarded parapet of the hanger door roof to speak with his employer, Mr. Wylie. Mr. Tidey was not wearing a safety harness, and was exposed to a 15 foot fall hazard.

Infeasibility. Wylie maintains that it was infeasible for Mr. Tidey to use personal fall protection, *i.e.*, a harness and lanyard, because there was nowhere to tie off on the hanger door roof. The installation of guardrails without personal fall protection would expose the installer to the very fall hazard to which Tidey was exposed, but for a significantly longer time. Wylie further maintains that it was infeasible to install a safety net, because nets are only effective where there is a drop distance of 25 feet (Wylie's Post-Hearing Brief, p. 7).

To establish the affirmative defense of infeasibility, an employer must show that 1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and

(2) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994). It is clear from the record that personal fall protection and nets were infeasible. Guardrails were, at best, impractical; moreover the Secretary does not suggest that guardrails would have been appropriate. Alternative fall protection suggested by the Secretary included warning lines and/or a placing a monitor on the roof. Wylie claims that the roof was too small to implement those measures, but failed to support its conclusion on the record. Rather Wylie maintains that its alternative protective measures, *i.e.* instructing Mr. Tidey to stay close to the barrel roof and providing a monitor on the flat roof below to watch Tidey as he worked, were adequate. In addition, Wylie argues, when Mr. Tidey stepped to the front edge of the roof, the two foot parapet prevented Tidey from inadvertently stepping off the edge.

Based on the evidence, this judge cannot find that the alternative means of fall protection suggested by the Secretary were infeasible. However, though Wylie may have been in technical violation of the cited standard, on this record it is clear that this violation should be classified as *de minimis.* A violation is *de minimis* when there is technical noncompliance with a standard, but the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Chao v. Symms Fruit Ranch, Inc.*, 242 F. 3rd 894 (9th Cir. 2001)[reduction of a violation to *de minimis* within the Commission's statutory prerogative to "direct other appropriate relief"]; *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987). In *Phoenix Roofing, Inc.*, 874 F.2d 1027 (5th Cir 1989) the 5th Circuit held that a *de minimis* classification is required as a matter of law where 1) no, or only minor injury will result, 2) the possibility of injury is remote, *or* 3) there is no significant difference between protection provided by employer and that afforded by technical compliance with standard. When Mr. Tidey deliberately stepped up to the parapet wall, he was well aware of his position. Even CO Moore admitted that Tidey was unlikely to fall over the two foot barrier during his brief conversation with Mr. Wylie (Tr. 97).[1] The possibility of an accident occurring under these conditions is negligible, and the Secretary has not suggested a single feasible means of fall protection which would have exceeded the protection provided by the two foot parapet, combined with the buddy system described by Mr. Tidey.

[1] It is not clear from the photographic evidence that Mr. Tidey was in the zone of danger at any other time during the inspection period. Only Exh. C-3F clearly shows Tidey at the edge of the roof.

ORDER

1. Citation 1, item 1, alleging violation of §1926.501(b)(1) is AFFIRMED as a *de minimis* violation of the Act. Neither abatement nor penalty are deemed appropriate.

/s/

Benjamin R. Loye
Judge, OSHRC

Dated: July 25, 2002