SECRETARY OF LABOR,

Complainant,

v.

HOLLAND ROOFING OF COLUMBUS, INC.,

Respondent.

OSHRC DOCKET NO. 01-1629

APPEARANCES:

Patrick L. DePace, Esq.
U.S. Department of Labor
Cleveland, OH
For the Complainant

Gary W. Auman, Esq.
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Dayton, OH
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"). This case arose following an OSHA inspection on July 2 and 3, 2001, at a work site in Portsmouth, Ohio. After the inspection, the Secretary issued to Holland Roofing of Columbus ("Holland") a citation alleging a serious violation of 29 C.F.R. § 1926.501(h)(1)(iii) and a willful violation of 29 C.F.R. § 1926.502(h)(v). Holland filed a timely notice of contest, and an administrative trial was held on April 18, 2002. Both parties have filed post-trial briefs.[1]

[1] Holland had two motions outstanding at the time of the administrative trial. The first motion sought to preclude the Secretary from offering certain documents into evidence. This motion was rendered moot when the Secretary never sought to admit the allegedly objectionable items during the trial. Holland's second motion was for the inclusion of additional evidence and for sanctions. That part of the motion which sought inclusion was rendered moot when the items were admitted during the trial.

(continued...)

Jurisdiction

At all times relevant to this action, Holland was a contractor performing roofing work at the work site. (Tr. 52). Holland stipulates that the Commission has jurisdiction over it and the action. I accordingly conclude that Holland 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

On July 2, 2001, OSHA Compliance Officer ("CO") Robert Barbour observed and videotaped Holland employees performing work on a flat portion of the roof of a three-story structure at the site. This flat area of the roof was on the second story and was described as less than 50 feet deep and less than 50 feet wide. CO Barbour noted that there was no effective guarding around the edge of the roof or any other form of fall protection in use, even though employees were working on the roof and were exposed to falls of over 20 feet. Holland employee Brad Setters, who was later identified as the site supervisor and the designated safety monitor for the flat roof, was videotaped standing at the peak of a pitched roof one level above the flat roof area and speaking on a cellular telephone. He was also later videotaped on the flat roof, performing work with his back to some of the employees he was to have been monitoring. (Tr. 15, 20, 32-33, 51-59, Exh. C-1).

Holland employee Leslie Clark, who was videotaped working on the flat roof area, testified that a "6 or 3 foot high" "guardrail" protected the open edge of that area. In identifying this "guardrail," however, Mr. Clark pointed to a tall rail supported by what appeared to be metal poles spaced 4 to 6 feet apart. There was only one horizontal rail, and it was as high as or higher than the heads of the workers standing on the flat roof. (Tr. 21, 30, 38-39, Exh. C-1).

The Serious Citation Item

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. §1926.502(h)(1)(iii). The cited standard requires that an employer ensure that the designated safety monitor "be on the same walking/working surface and within visual sighting distance of the employee being monitored." Holland chose to use a safety monitoring system in lieu of another form of fall protection, (Tr. 136), and I therefore conclude that the standard applies. Because Mr. Setters was on the peak of the pitched roof one story above the employees he should have been monitoring, I also conclude that the standard's terms were violated. (Exh.

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[1](...continued)
Holland's application for sanctions, however, was denied. (Tr. 87-97, 217). In its post-trial brief, Holland moved to renew its motion for sanctions against the Secretary. That motion is herein denied. *See* Commission Rule 40(a), 29 C.F.R. § 3300.40(a).

C-1). At least one employee was working close to the edge at the time that Mr. Setters was on the upper level, and this, I find, shows that Holland employees were exposed to the cited hazard. (Exh. C-1).

I further conclude that Holland had knowledge of the hazard. Mr. Setters had actual knowledge that he was not on the same level as the employees he was designated to monitor. In fact, he admitted to CO Barbour that he had been acting "negligently." (Tr. 55-56). In addition to being the safety monitor, Mr. Setters was the site supervisor. (Tr. 15, 128-129). His actual knowledge, therefore, will be imputed to the company.[2] *See Southwestern Bell Tel. Co.,* 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000); *Halmar Corp.*, 17 BNA OSHC 1014 (No. 94-2043, 1997). The Secretary has accordingly established a violation of the cited standard.[3]

In support of its contention that it did not violate the standard, Holland argues that the CO's testimony should be discredited because (1) he did not prove that Mr. Setters could not see the employees working on the lower level from his perch at the top of the pitched roof; and (2) the CO relied for his measurements on blueprints which Holland claims were incorrect. These arguments are rejected. As to (1), the standard specifically requires that a safety monitor remain on the same level as the workers *and* that he be able to observe the workers. The violation thus occurred when Mr. Setters left the flat roof, regardless of whether he could observe the workers from the higher point. As to (2), the standard applies whether the roof was 29 by 29 feet, as indicated in the blueprints, or 20 by 29 feet, as claimed by Holland's president, Steven Johnson. (Tr. 122, 141).

Holland further argues there was a guardrail on the flat roof and that, therefore, the Secretary did not prove that employees were exposed to a hazard. (Resp. Brief p. 21). As indicated above, the "guardrail" that Mr. Clark identified consisted of only one horizontal rail that was at least as high as the heads of the workers. (Tr. 38, Exh. C-1). Even taking into account the fact that this rail might appear higher in the video because of the angle from which the video was taken, I find that the rail was too high to serve as effective

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[2] Holland's unsupported argument that the imputation to the company of a supervisor's actual knowledge of a violation is unconstitutional is rejected.

[3] In order to prove that an employer violated an OSHA standard, the Secretary must show that: (1) the standard applies to the working conditions; (2) the terms of the standard were not met; (3) employees had access to the violative condition; and (4) the employer either knew, or with the exercise of reasonable diligence should have known, of the violative condition. *Kiewit Western Co.*, 16 BNA 1689, 1691 (No. 91-2578, 1994).

fall protection. Moreover, under 29 C.F.R. § 1926.502(b)(2), in order to be considered adequate fall protection, guarding must include a mid-rail that is at least 21 inches high. The "guarding" on which Holland relies, however, clearly had no mid-rail.

Finally, Holland argues that it should not be held liable for either of the alleged violations in this case because both occurred as the result of the unforeseeable and unpreventable misconduct of Mr. Setters. Holland had the burden of proving this defense, and, as discussed below, it failed to do so. *See, e.g., Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1816 (No. 87-692, 1992); *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir., 1987).

This item is affirmed as a serious violation because there was a substantial probability of serious physical harm or death if an employee had fallen over 20 feet to the ground. (Tr. 52-53). The Secretary has proposed a penalty of $2,000.00 for this item. After giving due consideration to the evidence regarding Holland's size, history and good faith, and to the gravity of the violation, I find the proposed penalty appropriate. The penalty as proposed is therefore assessed. (Tr. 63-64, 100).

The Willful Citation Item

Citation 1, Item 2 alleges a willful violation of 29 C.F.R. § 1926.502(h)(1)(v). The cited standard requires that an employer ensure that the designated safety monitor "not have other responsibilities that could take the monitor's attention from the monitoring function." The standard applies, because Holland chose to use a safety monitoring system to protect its employees from falling off the flat roof. I also conclude the terms of the standard were violated, because Mr. Setters, in bending down to assist a worker place materials, had his back to the other roofers for several minutes. (Exh. C-1). This activity clearly interfered with his ability to effectively monitor the other workers on the roof. (Tr. 15, 57, Exh. R-4). Holland employees were exposed to the hazard, in that they were working on an insufficiently guarded roof 20 feet above the ground and Mr. Setters was not paying attention to what they were doing. Finally, the Secretary has established the knowledge element of her case. Mr. Setters knew, or should have known, that his activity interfered with his ability to safely monitor the other roofers, and, as with Item 1, his knowledge is imputed to Holland.

Holland argues that it should not be held liable for the alleged violation because the Secretary did not show that Mr. Setters' *designated* responsibilities caused him to turn away from the roofers he should have been monitoring.[4] This argument is not persuasive. Mr. Setter's act of bending down to assist a roofer

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[4] Mr. Johnson, Holland's president, testified that Mr. Setters was the site supervisor and was responsible for ensuring compliance with the job's specifications. Mr. Johnson also testified that Mr.

(continued...)

place materials was compatible with his admitted obligation to ensure that the materials were placed in accordance with the specifications of the job and the manufacturer as well as with his position of site supervisor. (Tr. 186-187). Based on the record, the Secretary has met her burden of demonstrating the alleged violation.

The Secretary has classified this citation item as willful. In order to show that a violation is properly characterized as willful, the Secretary must show that it was committed with intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Monfort of Colorado, Inc.*, 14 BNA OSHC 2055, 2063 (No. 87-1220, 1991). Where the violative conduct was that of a supervisor, the employer may be held responsible for the willful nature of the supervisor's actions without any separate proof of willful conduct on the employer's part. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (Nos. 86-360 and 86-469, 1992).

I find that neither Mr. Johnson's act of designating Mr. Setters as both superintendent and safety monitor, nor Mr. Setters' act of helping to place materials on the flat roof, reflects intentional disregard for the requirements of the Act or plain indifference to employee safety. Mr. Setters assisted a worker for only a few moments, there was no evidence that he had a practice of unsafe behavior before that date, and he expressed regret for his actions during the OSHA inspection.[5] (Tr. 62). Similarly, Johnson's act, while possibly negligent, was not willful, in my opinion. Although Mr. Setters did not do so here, it is certainly conceivable that a trained employee working pursuant to an effective and *enforced* safety monitoring plan could adequately serve as both site supervisor and safety monitor for a small crew in a clearly delineated work area. Moreover, Holland had an extensive safety program that included employee training, a written safety manual for foremen that specifically addressed this type of hazard, and daily site safety inspections by Holland supervisors and unannounced safety inspections by "Holland Roofing Group."[6] (Tr. 14-15, 31-

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[4](...continued)
Setter's only duty was to monitor the other employees. This testimony is patently inconsistent and is thus not credited. (Tr. 128-129, 136-137, 145, 186-187).

[5] It is necessary to note that this violation is based solely on Setters' activities while on the flat roof. The Secretary submitted no proof that the Setters' use of the telephone and his climb to the top of the pitched roof were part of Setters' responsibilities.

[6] "Holland Roofing Group" is an administrative company that
(continued...)

35, 130-135, 151, 192-193). Finally, the Secretary submitted no evidence that Holland had ever had a prior OSHA violation. I conclude, therefore, that this citation item was not properly classified as willful.

Having found the violation was not willful, I nonetheless conclude that it was serious, as there was a substantial probability of serious injury or death if an employee had fallen 20 feet from the flat roof area to the ground below. (Tr. 52-53). With respect to an appropriate penalty, I have given due consideration to the evidence regarding Holland's size, history and good faith. I have also given due consideration to the gravity of the violation, and to its temporary nature, which mitigates somewhat the gravity. I find that a penalty of $500.00 is appropriate, and a $500.00 penalty is accordingly assessed for this citation item. (Tr. 63-64, 100).

Holland's Defense of Unpreventable Employee Misconduct

As indicated above, Holland argued it should not be held liable for either citation item, based on its contention that the alleged violations were caused by the unforeseeable and unpreventable misconduct of Mr. Setters. To establish this affirmative defense, an employer must prove that it has: (a) established work rules designed to prevent the violation, (b) adequately communicated those work rules to its employees, (c) taken steps to discover violations, and (d) effectively enforced the rules when violations were discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). As noted *supra*, Holland submitted unrebutted proof that it established work rules designed to prevent the violations, that it took steps to detect violations, and that it had a written safety manual for foremen that addressed both violations in language adopting, *verbatim*, the cited standards.[7] (Tr. 127-134, Exh. R-4). In addition, Holland conducted job site safety inspections every morning and had daily on-site safety meetings; Holland also had unannounced safety inspections. (Tr. 27, 31,192-195). Finally, Holland provided safety training to its employees, and there was unrebutted evidence that Mr. Setters had been trained in the provisions of the Foreman's Safety Manual and that Mr. Johnson had discussed the safety monitor's responsibilities with him when he assigned Mr. Setters to the Portsmouth site. (Tr. 129-135).

However, Holland failed to show it effectively disciplined employees when safety violations occurred. Despite the fact that there were prior safety infractions, some involving sites where Mr. Setters

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[6](...continued)
has an undisclosed relationship with five companies, one of which is Holland. (Tr. 193-194)

[7] The "Foreman's Safety Manual," a 57-page document, was the only safety manual Holland offered into evidence. (Tr. 132-133, Exh. R-4). Mr. Johnson testified that Holland had a separate manual for employees, but no such manual was offered. (Tr. 131)

had worked, Holland gave only verbal warnings.[8] (Tr. 153, 198-200). This does not constitute effective discipline, in my opinion, and Commission precedent has indicated that evidence solely of verbal reprimands suggests an insufficient disciplinary program. *Precast Serv., Inc.,* 17 BNA OSHC 1454 (No. 93-2971, 1995). Mr. Setters, in fact, received no discipline for his admittedly violative conduct at the subject site. (Tr. 139, 159). Further, the written disciplinary plan in Holland's Foreman's Safety Manual was inadequate. It provided only for either a verbal warning or employee termination. In my view, this provision would not reasonably influence employee behavior because it does not discipline employees who commit dangerous safety infractions that are not so egregious as to warrant termination. Rather, the plan should have provided for progressive discipline with increasingly harsh punishment. *See Precast Serv., supra,* at 1455. In addition, Holland's plan was confusing and internally inconsistent; it provided for only verbal warnings, but also contained a written employee warning form. (Exh. R-4).

Finally, the misconduct in this case was committed by a supervisor, and, under Commission precedent, this renders the asserted defense much more difficult to establish because it is the supervisor's duty to ensure the safety of employees under his supervision. *L.E. Myers Co.,*16 BNA OSHC 1037,1041 (No.90-945, 1993). Moreover, the fact that Setters himself was involved in the violative conduct is strong evidence that Holland was lax in enforcing its safety rules. *See Consolidated Freightways Corp.*, 15 BNA OSHC 1317 (No. 86-351, 1991).

For all of the foregoing reasons, I conclude that Holland failed to meet its burden of establishing the affirmative defense of unpreventable employee misconduct.

ORDER

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

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[8] Mr. Johnson testified he would have issued written warnings if he had ever observed second infractions at Holland's job sites, but he could not recall if this had ever occurred. (Tr. 167). Based on his demeanor while testifying, and on the fact that Holland's disciplinary plan had no specific provision for written warnings, I do not find this statement credible. Further, just as Holland had the burden of showing it effectively enforced its safety program, it also had the burden of showing whether there had been repeated safety infractions and what it had done about such infractions.

Citation Item	Violation	Disposition	Classification	Penalty
Citation 1 Item 1	29 C.F.R § 1926.501(h)(1)(iii)	Affirmed	Serious	$2,000.00
Citation 1 Item 2	29 C.F.R. §1926.502(h)(v)	Affirmed	Serious	$ 500.00

And it is further **ORDERED**:

That Holland's motion to renew its motion for sanctions is denied.

/s/
G. MARVIN BOBER
Judge, OSHRC

Dated: October 28, 2002
Washington, D.C.