UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
CEI WEST ROOFING COMPANY, INC.
Respondent.

OSHRC DOCKET
NO. 94-1726

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 6, 1995. The decision of the Judge will become a final order of the Commission on May 8, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before April 26, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: April 6, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-1726

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. CEI WEST ROOFING COMPANY, INC., Respondent.	OSHRC DOCKET NO. 94-1726

APPEARANCES:

Evert H. Van Wijk, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

Kay-Dawn G. Allen, Esq., Denver, Colorado

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 et seq.; hereafter called the "Act").

Respondent, CEI West Roofing Company, Inc. (CEI), at all times relevant to this action maintained a worksite at 7935 East Prentice Avenue, Englewood, Colorado, where it was engaged in roofing construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 12, 1994, pursuant to an investigation of CEI's Englewood worksite, the Occupational Safety and Health Administration (OSHA) issued a citation, together with proposed penalties, alleging violations of the Act. By filing a timely notice of contest

Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 20, 1994 a hearing was held in Denver, Colorado. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.100(a): Employees were not protected by protective helmets while working in areas where there was a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns:

a) At 7935 E. Prentice Avenue, Englewood, CO: Employees were exposed to overhead hazards while landing materials brought by crane without using hardhats.

Serious citation 1, item 2 alleges:

29 CFR 1926.200(g)(1): Construction areas were not posted with legible traffic signs at points of hazards:

a) At 7935 E. Prentice Avenue, Englewood, CO: Employees were exposed to traffic hazards while delivering and loading supplies in a traffic lane.

Serious citation 1, item 3 alleges:

29 CFR 1926.500(g)(5): Employees working in a roof edge materials handling or a material storage area on lowpitched roof with a ground to eave height greater than 16 feet were not protected from falling by the use of a motion stopping safety system (MSS system) along all unprotected roof sides and edges:

a) At 7935 E. Prentice Avenue, Englewood, CO: Employees were exposed to fall hazards while landing materials brought by crane to the roof.

Issues

CEI admits it was in violation of the standards cited at citation 1, items 1 and 3 on the date of the inspection, but raises the affirmative defense of isolated employee misconduct. CEI maintains that the standard cited at citation 1, item 2 was inapplicable to its Englewood worksite.

Employee Misconduct

On the morning of January 5, 1994, CEI employees were preparing to perform roofing repair work at the Englewood site. The employees at the worksite were Vaughn Benally, CEI's foreman; Gerritt Verschuur, a CEI employee; and Chris Nolan, an employee of Stand-By Personnel (Tr. 20-21). None of the employees were wearing hard hats (Tr. 21). There were not enough hard hats on site for the three employees (Tr. 30). Nolan told Compliance Officer (CO) Michael Kelly that he was told he did not need a hard hat (Tr. 31). Verschuur told Kelly they did not usually wear hard hats when they were just unloading "real quickly" (Tr. 32). Benally told Kelly they didn't usually wear hard hats because there were no overhead hazards when working on a roof (Tr. 33).

When Kelly arrived at the worksite, Benally and Nolan were on the unguarded roof, standing near the edge, signalling the crane (Tr. 38-39). Two stanchions were on the roof, and a rope for use as a motion stopping device were on site. The equipment was not, however, being used for its intended purpose (Tr. 41-42).

Leonard Drotar, CEI's risk manager (Tr. 67), testified that all permanent CEI employees are required to go through an hour and one half orientation program upon hiring (Tr. 120). They are required to view videos on personal protective equipment and fall hazards (Tr. 67, 79-80; Exh. R-3, R-4), and to sign off indicating that they have received, read, and understood the company safety policy (Tr. 68). In January 1993 CEI policy required the use of hard hats whenever there was an overhead danger from overhead cranes (Tr. 88-90; Exh. R-1). CEI policy requires employees to be tied off whenever working near an unguarded roof edge (Tr. 92-93; Exh. R-1, p. 17, 19-21; Exh. R-2, p. 3-5). Foreman Benally sat in on the orientation program and viewed both videos when he was hired in August 1990 (Tr. 80-81, 85). He received an additional copy of CEI's safety manual on April 10, 1992 (Tr. 86). Drotar stated that he personally discussed the need for hard hats with Benally at least 20 times (Tr. 88), and was aware of at least five meetings concerning roof guarding at which Benally was present (Tr. 141). Dated sign up sheets establish that Benally was present at the March 26, and May 21, 1993 monthly safety meetings during which CEI's policy on, and means of appropriate fall protection, were discussed (Tr. 78-79).

Verschuur participated in CEI's orientation and training when he was rehired in 1992 after being released for unsafe driving practices (Tr. 122, 142).

Temporary employees do not receive formal training; the foreman on site is instructed to provide training relevant to the specific hazards the employee might be expected to encounter on that particular project (Tr. 70-71). Foremen are required to implement the safety program on their job sites (Tr. 95; Exh. R-11). Benally was present at a 1993 foreman's meeting where the foreman's responsibility for implementing safety procedures and training temporary workers was discussed (Tr. 72, 97, 169-70).

CEI's management personnel, including Drotar, conduct periodic inspections of CEI jobsites; jobsite safety checklists are filled out indicating the foreman's and his supervisor's ability to maintain job safety (Tr. 69, 100, 102, 130). Verbal and written warnings, suspension and dismissal may all be used to discipline infractions (Tr. 103). CEI introduced evidence that two other foremen, Djuan Luckett and Mike Robinson, were disciplined for safety infractions before January 1994 (Tr. 108-10). Prior to January 1994, Drotar had inspected several of Benally's jobs; he was unaware that Benally was not following work rules, and considered Benally adequate in his adherence to company safety practices (Tr. 83, 101).

On January 4, 1994, Benally and his supervisor, Tom Anderson, met at the Englewood jobsite to review the safety procedures for this job prior to its commencement (Tr. 155). They discussed the warning line requirements, the equipment necessary, and the proper location for the employees to tie off, as well as the need for hard hats (Tr. 155-56). Anderson was not on site at the time of the OSHA inspection (Tr. 156). Following the OSHA inspection which is the subject of this action, Benally was suspended for two weeks, and a letter of reprimand entered in his file (Tr. 107).

Discussion

The Commission has stated that, "[i]n order to establish an unpreventable employee misconduct defense, the employer must establish that the violative conduct on the part of an employee was a departure from a uniformly and effectively communicated and enforced work rule." *Mosser Construction Co.* 15 BNA OSHC 1408, 1414, 1991 CCH OSHD ¶29,546, p. 39,905 (No. 89-1027, 1991). "When the alleged misconduct is that of

a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017, 1991 CCH OSHD ¶29,317 p. 39,378 (No. 87-1067, 1991).

Hard Hats

The evidence establishes that CEI's safety program included a work rules specifically intended to address the cited safety hazard, *i.e.* requiring the use of hard hats where overhead cranes were in use. However, neither of the permanent CEI employees at the worksite recognized an overhead hazard from the crane; both told the inspecting CO that it wasn't their general practice to wear hard hats. The undersigned notes that CEI has since changed its workrule to eliminate its discretionary language. Currently, CEI requires that hard hats be worn at all times (Tr. 89).

The contemporaneous comments of CEI's employees and the failure of any of the employees to wear hard hats, indicates a pattern of practice which should have been discovered by CEI supervisory personnel. This judge cannot find, therefore, that CEI's workrule was adequately communicated and enforced so as to eliminate the cited hazard. Citation 1, item 1 will be affirmed.

Penalty

A penalty of $1,225.00 was proposed. CEI is a medium sized employer, with 70 employees (Tr. 30). CEI has a good safety record, it has received no other OSHA citations in the past three years (Tr. 31); moreover, CEI has demonstrated its good faith by modifying its already significant safety program. The gravity of the violation is moderately high; serious head injury would be the result of an employee being struck by material (gravel, patching, lugs of tar), falling from the bucket as it was hoisted to the roof (Tr. 30).

I find the proposed penalty appropriate; $1,225.00 will be assessed.

Fall Protection

CEI's workrules also specifically address the provision of fall protection when working on an unguarded roof.

Benally, the foreman on site, had been instructed in CEI's safety rules and in his duty to impart the rules, including the rules on fall protection, to employees under his supervision and to enforce them where appropriate.

Complainant does not maintain that CEI's practice of providing on the job instruction, including safety instructions, is in itself inadequate. Rather Complainant maintains that CEI made no efforts to ensure that its foremen provided the necessary training to day laborers. The evidence, however, establishes that CEI regularly audited its foremen and disciplined them for safety infractions, and that CEI had audited Benally prior to the incident which led to the current citation, but found no reason to monitor Benally more closely. Benally was, in fact, supervised by his superintendent, with whom he discussed the provision and use of safety equipment on this job. No safety audit had been performed at this jobsite prior to the OSHA inspection, because the job had just commenced that morning. An audit was performed that afternoon (Tr. 128). When Benally's failure to adhere to the rules came to CEI's attention, he was suspended for two weeks.

It has long been recognized that the Act does not require the employer become an absolute guarantor of its employees' safety. *Standard Glass Co.*, 1 BNA OSHC 1045, 1971-73 CCH OSHD ¶15,146 (No. 259, 1972). Although this judge hesitates to lay the responsibility for the cited conduct at the door of a current employee who was not called by the employer to testify, the testimony of CEI's Drotar regarding the efficacy of its fall protection program was uncontradicted. Unlike the hard hat item, Complainant here called no employees and introduced no evidence of a pattern of noncompliance with CEI's fall protection work rule. Benally's single failure to erect a motion stopping system does not in itself demonstrate that CEI's communication and/or enforcement of its fall protection rule was lax or ineffective. The mere fact that the violation occurred is insufficient to rebut CEI's showing that it had an effectively implemented work rule; the employee misconduct defense would be meaningless if the mere fact that a work rule was disregarded was enough to establish that the rule was not effectively communicated and enforced.

I find that CEI took the steps a reasonable employer would have taken to ensure its safety rules were followed, and that the cited violations were the result of the unforeseeable misconduct of its foreman.

Citation 1, item 3 is vacated.

Point of Hazard

A dump truck with gravel was parked in the traffic lane in front of the building being reroofed when the CO arrived at the worksite; another truck loaded with roofing materials drove up and parked in the center of the lane during the inspection (Tr. 34, 37; Exh. C-4). Cars accessing the parking lot came up an inclined blind ramp to the right of the worksite (Tr. 35). While he was on the site CO Kelly flagged down a vehicle coming around the corner, and asked the driver to slow down. Kelly noted a number of other vehicles traveling the traffic lane partially blocked by CEI's truck (Tr. 35). Kelly also noted two CEI employees standing in the traffic lane (Tr. 36).

Drotar testified that he did not perceive a traffic hazard on the scene because the trucks were clearly visible as soon as you came up the ramp, the cars in the blocked traffic lane were moving at reduced speeds, and alternate routes were available (Tr. 91-92). Drotar admitted that an employee struck by a car, even at dramatically reduced speeds, could sustain serious injury (Tr. 135).

Discussion

The cited standard requires that "[c]onstruction areas shall be posted with legible traffic signs at points of hazard."

Because vehicles move freely through the public traffic lane in which CEI employees worked, I find that area constituted a point of hazard, and that the cited standard was applicable. There being no other issue in dispute, citation 1, item 2 will be affirmed.

Penalty

Respondent admits that an employee struck by a moving vehicle would likely sustain serious injury. The violation is, therefore, correctly classified as "serious."

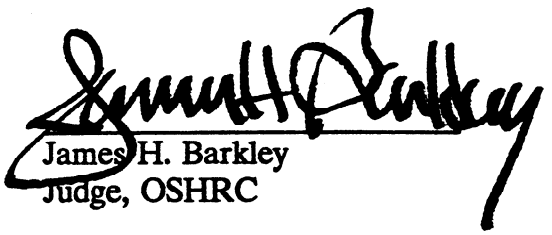
A penalty of $875.00 was proposed. The gravity of the cited standard is moderately low. Based on the gravity of the violation, and the statutory criteria discussed above, the proposed penalty is deemed appropriate and will be assessed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.100(a) is AFFIRMED, and a penalty of $1,225.00 is ASSESSED.
2. Serious citation 1, item 2, alleging violation of §1926.200(g)(1) is AFFIRMED and a penalty of $875.00 is ASSESSED.
3. Serious citation 1, item 3, alleging violation of §1926.500(g)(5) is VACATED.



James H. Barkley
Judge, OSHRC

Dated: March 24, 1995