SECRETARY OF LABOR, Complainant, v. PETE MILLER, INC., Respondent.	OSHRC Docket No. 99-947

DECISION

Before: ROGERS, Chairman, and WEISBERG, Commissioner.

BY THE COMMISSION:

Pete Miller, Inc. ("Pete Miller") was the roofing subcontractor at a construction site in Marysville, Ohio when a compliance officer ("CO") of the Occupational Safety and Health Administration ("OSHA") inspected the worksite. As a result of that inspection, OSHA issued Pete Miller a citation alleging serious violations of three standards promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Pete Miller contested that citation, and a hearing was held before Administrative Law Judge Ann Z. Cook. The judge vacated items 1 and 2 of the citation but affirmed item 3. The judge's decision as to item 3 of the citation has been directed for review pursuant to section 12(j) of the Act, 29 U.S.C. § 661(j). For the reasons that follow, we find that the judge did not err in finding that Pete Miller was in violation of the cited standard.

Pete Miller was performing the roofing for an addition to a hospital. This work involved demolishing roof curbs or rails on an existing flat roof and removing them from the roof. To remove the curbs, which weighed approximately 150 pounds and were eight

to ten feet long, two Pete Miller employees handed the curbs down to a third employee, Kenneth Humbert, who was standing on a flat "canopy" roof approximately six feet below. Humbert, in turn, pushed them to the edge of the roof, checked with the Pete Miller employee on the ground to be sure that there was nobody below, and pushed the curbs over the edge of the roof so that they fell to the ground approximately 15 feet below. At the hearing, Humbert testified that once the end of the curb was over the edge of the roof, he would give the curb a push and never come closer than eight feet of the edge of the roof. The CO, however, estimated that he had observed the employee within six feet of the edge.

There was no railing or other guard around the edge of the lower roof from which the employee was pushing the curbs, and the employee was not wearing a safety belt and lanyard or using any other protective equipment to prevent him from falling off the roof. Instead of using protective equipment to prevent a fall, Pete Miller had designated its foreman, who was on the higher roof, to act as the safety monitor to watch employees and warn them if they approached too close to the edge of the roof. The use of a safety monitor is one method of fall protection permitted under 29 C. F. R. § 1926.501(b)(10). Because the foreman was on a different level from the employee he was monitoring, OSHA issued a citation alleging that Pete Miller had violated the safety standard at 29 C.F.R. § 1926.502(h)(1)(iii).[1]

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[1]That standard provides:

> **§ 1926.502 Fall protection systems criteria and practices.**
> . . . .
> (h) *Safety monitoring systems.* Safety monitoring systems [See §§ 1926.501(b)(10) and 1926.502(k)] and their use shall comply with the following provisions:
> (1) The 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:
> . . . .
> (iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored . . . .

The judge affirmed this item of the citation, finding that "the narrowness of the roof and the work [the employee] was doing subjected him to a fall hazard" and concluding that he "could have lost his bearings, gotten too near the edge, and fallen." On review, the Commission requested the parties to address the following issues:

> 1) With respect to the alleged violation of 29 C.F.R. § 1926.502(h)(1)(iii), whether the judge erred in finding that the Secretary established employee exposure.
> 2) Assuming the judge did not err in finding employee exposure, whether the judge erred in finding that the Respondent's designated safety monitor failed to satisfy the requirements of 29 C.F.R. § 1926.502(h)(1)(iii).

Discussion

Employee exposure to the violative condition is one of the elements of a violation which the Secretary must prove.

> [I]n order for the Secretary to establish employee exposure to a hazard she must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. We emphasize that . . . the inquiry is not simply into whether exposure is theoretically possible. Rather, the question is whether employee entry into the danger zone is reasonably predictable.

Fabricated Metal Prods., Inc., 18 BNA OSHC 1072, 1074, 1999 CCH OSHD ¶ 31,463, pp. 44,506-07 (No. 93-1853, 1997). Here, we find that it was reasonably predictable that Humbert would enter the zone of danger. He was receiving 150-lb. metal curbs or rails from two employees who were standing six feet above him. These articles were 8 - 10 feet long. The roof on which he was standing was 10 feet by 12 feet. The CO estimated that he had observed Humbert within six feet of the edge. Humbert testified that he never came closer than eight feet from the edge. Nevertheless, we agree with Judge Cook's finding that, even assuming that Humbert never came closer than eight feet from the edge, given the size and weight of the objects he was holding and the nature of his work, it was reasonably foreseeable that he could stagger under the weight of the curb or could stumble, placing him well within the danger zone. We therefore agree that the judge correctly found that the employee was exposed to the hazard of falling off the roof to the ground fifteen feet below.

See, e.g., Phoenix Roofing, Inc., 17 BNA OSHC 1076, 1079, 1993-95 CCH OSHD ¶30,699, pp. 42,605-06 (No. 90-2148, 1995) (access to fall hazard reasonably predictable where employees delivered materials to location within 12 feet of unguarded skylights and where employees might reasonably believe they were permitted in unguarded area), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996).

We also agree with the judge in finding that Pete Miller had violated the standard. By its terms, the standard clearly and unambiguously requires that the safety monitor be on the same surface as the employee or employees being monitored. That was not the case here; the monitor was on the upper roof six feet above Humbert. Although Pete Miller suggests that the safety monitor was actually in a better position to see Humbert than he would have been if they had both been on the same level, the company does not deny that it failed to comply with the precise terms of the standard. Further, the foreman who acted as safety monitor admitted that there were periods when he could not see Humbert, and there was testimony that Humbert could not always see the foreman. This evidence negates the company's position.

Pete Miller also argues that there were other individuals, including the general contractor's project superintendent, on the upper roof who could observe Humbert and warn him if he was too close to the edge. These individuals had not been designated as safety monitors under the standard, and there is no indication in the record that they were in any way aware that they had any responsibility for acting as a monitor. *See Armstrong Steel Erectors, Inc.*, 18 BNA OSHC 1630, 1635, 1998 CCH OSHD ¶ 31,476, p. 44,571-72 (No. 97-250, 1999). We therefore find that the judge did not err in finding Pete Miller in violation.

Characterization and penalty

The Secretary alleged that the violation was serious. A violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), "if there is a substantial probability that death or serious physical harm could result." That provision does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur. *Miniature Nut & Screw Corp.*, 17 BNA OSHC 1557, 1558, 1995-97 CCH OSHD ¶ 30,986, p. 43,176 (No. 93-2535, 1996). If the employee had fallen off the roof, he would have fallen fifteen feet to the ground below, and we find that the likely result of such a fall would have been a serious injury, especially if he had fallen on one of the objects he had pushed over the side or had fallen with one and had it land on him. We therefore find that the violation was serious.

The Secretary proposed a penalty of $2,500 for this item, which the judge reduced to $1,000 based on good faith and lower gravity. On review, neither party disputed the amount of the penalty assessed by the judge. We therefore see no reason to disturb the judge's assessment.

Conclusion

Accordingly, we affirm the administrative law judge's finding that Pete Miller was in serious violation of the standard at 29 C.F.R. § 1926.502(h)(1)(iii), and we assess a penalty of $1,000 for that violation.

/s/
Thomasina V. Rogers
Chairman

/s/
Stuart E. Weisberg
Commissioner

Dated: December 8, 2000

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR, Complainant, v. PETER MILLER, INC., Respondent.	OSHRC DOCKET No. 99-0947

APPEARANCES:

For the Complainant:
Michelle DeBaltzo, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio

For the Respondent:
Douglas Suter, Esquire, Isaac, Brant, Ledman & Teetor, Columbus, Ohio

Before: Administrative Law Judge Ann Z. Cook

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, Peter Miller, Inc. ("Miller"), was the roofing subcontractor on the construction of an addition to the Marysville Hospital in Marysville, Ohio. On April 8, 1998, the Occupational Safety and Health Administration ("OSHA") conducted an inspection at that work site, and, as a result, Miller received a three-item serious citation. Miller filed a timely notice of contest, and a hearing was held in Columbus, Ohio on February 10, 2000.

Respondent is an employer engaged in a business affecting interstate commerce and is an employer within the meaning of section 3 of the Act. Accordingly, the Commission has jurisdiction over the parties and the subject matter. (JX-1).

THE BURDEN OF PROOF

To establish a violation of a standard, the Secretary has the burden of proving, by a preponderance of the evidence:

> (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 SERIOUS VIOLATION OF 29 C.F.R. 1926.403(I)(2)(I)

Citation 1, Item 1 alleges that Miller violated 29 C.F.R. 1926.403(I)(2)(I) by exposing employees to two unguarded 120/208-volt electrical panels located near the stairway on the southeast corner of the second floor. The standard requires that live parts of electrical equipment operating at 50 volts or more must be guarded against accidental contact by cabinets, other forms of enclosure or by one of the means listed in subparagraphs (A) through (D) of the standard.

The relevant facts are generally agreed upon. The two electrical panels near the stairwell were live, operating at 120/208 volts, and were uncovered at the time of the inspection. A person reaching the second floor by the stairs would come within 2 to 3 feet of the unguarded panels. Miller's foreman on the job, Justin Powers, acknowledged using the stairs twice on April 8, 1999, the day of the inspection. Miller had no authority over Knox, the electrical subcontractor that had installed the panels, and had no authority to cover or otherwise protect the panels. (Tr. 20-23, 53, 78, 92, 100, 103-04; CX-2.) Although Miller neither created nor controlled the hazard, the evidence shows that a Miller employee came close enough to the panel to accidentally trip or fall and come into contact with the live, unguarded panel. That employee was a foreman who was aware of the hazard. The Secretary has thereby established a prima facie showing of a violation.

Miller asserts the multi-employer work site defense. That defense recognizes that it is unfair to hold an employer liable for its employees' exposure to a hazard that it did not create or control, as long as the employer has taken reasonable and realistic measures to protect its employees from the hazard. *Anning-Johnson Co.*, 4 BNA OSHC 1193 (Nos. 3694 & 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1975). Having established that it did not create the hazard and had no authority to abate the hazard, the employer must additionally establish that it exercised reasonable care and diligence to protect its employees. What constitutes reasonable and

realistic protective measures must be determined in light of the circumstances at the work site. *J.H. MacKay Elec. Co.*, 6 BNA OSHC 1947, 1950 (No. 16110, 1978); *Hayden Elec. Serv., Inc.*, 4 BNA OSHC 1494, 1495 (Nos. 4034 & 4147, 1976).

Miller's safety director, Dennis Haycock, testified that he first noted the uncovered electrical panels in September. He informed the general contractor's superintendent and at once instructed Miller's employees to avoid the hazard by using the rear stairs whenever possible. Employees were required to sign off to verify that they were aware of the unguarded panels, and they normally used the rear stairs when they needed to get to the second floor. In December, both Haycock and an outside safety consultant that Miller employed found the panels uncovered during another inspection. This time, Miller asked the general contractor in writing to abate the hazard. Powers, the foreman, testified that employees used the rear stairs but occasionally had to walk through the area of the panels.[2] (Tr. 77-80, 84-85, 98-105; RX-2, RX-3.)

I find that these corrective measures were adequate and reasonable under the circumstances because they significantly limited both the number of employees exposed and the duration of their exposure. The Secretary argues that Miller could have done more, such as complaining more frequently to the general contractor and telling employees they would be disciplined if they went near the panels unnecessarily. However, the appropriate standard is whether Miller acted as a reasonable employer would have under the circumstances, not whether Miller could have done more. *Elec. Smith, Inc. v. Secretary of Labor*, 666 F.2d 1267, 1273-74 (9th Cir. 1982). I find that Miller has established its affirmative defense and accordingly vacate Item 1 of Citation 1.

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.501(b)(3)

Citation 1, Item 2 alleges Miller violated 29 C.F.R. 1926.501(b)(3) when employees lowered curbs from a hoist area on an upper roof to a lower roof without using fall protection, which exposed the employees to a 6-foot fall hazard. The cited standard provides:

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[2]Powers testified he used the stairs by the electrical panels on the day of the inspection as he was in a hurry to join the walk-around. I do not consider this an indication of his normal practice.

> *Hoist areas*. Each employee in a hoist area shall be protected from falling 6 feet (1.8m) or more to lower levels by guardrail systems or personal fall arrest systems. If guardrail systems ... are removed to facilitate the hoisting operation (e.g., during landing of materials), and an employee must lean through the access opening or out over the edge of the access opening (to receive or guide equipment and materials, for example), that employee shall be protected from fall hazards by a personal fall arrest system.

The Secretary alleges the violation occurred when a Miller employee on the main roof leaned out over its edge when he passed a demolished curb down to another employee on the lower roof, who in turn pushed it off the lower roof to the ground below. The difference between the main and the lower roofs was 6 feet or less, and no guardrails or personal fall arrest systems were in use. The OSHA compliance officer ("CO") testified that before he presented his credentials, he observed and videotaped workers on the roof and saw one of them lean over the edge of the upper roof. He further testified that Exhibit CX-5, a photo made from the video, shows the employee leaning out over the roof edge. (Tr. 26-33, 49; CX-4, CX-5.) The CO's testimony was directly contradicted by Powers, who at the time of the photo was about 2 feet from the employee. Powers testified that the pictured employee did not lean out over the edge of the upper roof. (Tr. 96 .)

Miller disputes both that the area where the curb was lowered was a "hoisting area" and that any one leaned over the edge of the upper roof. The term "hoisting area" is not defined in the standard. The CO described it as an area where materials are handed from one level to another. Miller's safety director, on the other hand, described hoisting as the on-loading or off-loading of materials using some sort of equipment or mechanical device. He also testified that removal of scrap was part of ordinary roofing work. Kenneth Humbert, the Miller employee who was working on the lower roof that day, testified that he did not consider what they were doing as hoisting and that no roofing materials had been hoisted up to the roof that day. (Tr. 29, 70, 81, 88-89.)

I find the CO's definition of the term "hoisting area" too broad. The Random House Dictionary of the English Language, Unabridged Edition, 1971, defines the verb "hoist" as

"to raise or lift, especially by some mechanical appliance." The standard's use of the words "during landing of materials" and "to receive or guide equipment or materials" also indicates that hoisting is more than handing something down from one level to another. I conclude the Secretary has not shown that the area where the curbs were lowered from the upper roof to the lower roof was a hoist area and that she has not established that the standard applies. I further conclude that the Secretary has not shown that an employee leaned over the edge when lowering a curb to the lower level. The video and photo are equivocal and do not clearly show a reaching beyond the edge. The CO was at some distance when he saw the activity on the roof, and Powers, the closest observer, testified that no reaching out occurred. The Secretary has not established Miller's noncompliance with the standard. Item 2 of Citation 1 is vacated.

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.502(h)(1)(iii)

Citation 1, Item 3 alleges that the safety monitor was not on the same walking/working surface and within visual sighting distance of the employee being monitored, exposing the employee to a 15-foot, 3-inch fall hazard in violation of 29 C.F.R. 1926.502(h)(1)(iii).[3] The lower roof was low-sloped and approximately 10 feet by 12 feet, and, therefore, the use of a safety monitor alone was sufficient. *See* 29 C.F.R. 1926.501(b)(10). Powers, the designated safety monitor, was on the upper roof watching the other employees on that roof and Humbert on the lower roof. He was able to see Humbert most of the time, but he could not always watch Humbert and the other employees at the same time. As he received the curbs from the upper roof and pushed them off the lower roof, Humbert came within 6 to 8 feet of the edge. The general contractor's superintendent was also on the upper roof watching the curbs being lowered. (Tr. 36-40, 58, 62-64, 68, 97-98, 101, 105; JX-1.)

[3] The citation alleges "On the top roof ... the safety monitor was not on the same walking working surface [as the employee]." At trial, and in their pre-hearing and post-hearing submissions, the parties assumed that any violation resulted from the employee being on the lower roof and not within visual sighting distance of the monitor on the upper roof.

The cited standard applies and requires the safety monitor and the monitored employee to be on the same walking/working surface, which Powers and Humbert clearly were not. Because Powers, the foreman, was the safety monitor, his knowledge of the violative condition is attributable to his employer. Miller maintains Humbert was not exposed to a fall hazard as he was never more than 8 feet from the edge. Even assuming that to be true, the narrowness of the roof and the work Humbert was doing subjected him to a fall hazard. The curbs were 8 to 10 feet long and weighed 150 pounds, and Humbert could have lost his bearings, gotten too near the edge, and fallen. The lower roof was 15 feet above the ground and a fall from that height would have resulted in serious injury. (Tr. 62-63; JX-1.) I find the Secretary has established the alleged violation and that the violation was serious.

The proposed penalty for this item is $2,500.00. Section 17(j) of the Act, 29 U.S.C. § 666(j), states that penalty assessment requires due consideration to be given to the employer's size, history and good faith, and to the gravity of the violation. Gravity, usually the most significant factor, is judged by the number of employees exposed, the duration of the exposure, precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). The Secretary assessed the severity of any injury as high and the probability of injury as greater and then made adjustments for size and history but not for good faith. I assess the probability as much lower. One employee was exposed to the hazard, the exposure was not long, he was at all times 6 to 8 feet back from the roof edge, and he was watched closely by Powers and at least casually by the general contractor's superintendent. I also believe credit should be given for Miller's safety program. I conclude that a penalty of $1,000.00 is appropriate.

FINDINGS OF FACT

The foregoing constitutes my findings of fact in accordance with Federal Rule of Civil Procedure 52(a). Any proposed findings of fact inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter pursuant to section 10(c) of the Act.

2. Respondent was not in violation of 29 C.F.R. §§ 1926.403(I)(2)(I) and 1926.501(b)(3).

3. Respondent was in serious violation of 29 C.F.R. 1926.502(h)(iii), and a penalty of $1,000.00 is appropriate.

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 1 and 2 of Citation 1 are vacated.

2. Item 3 of Citation 1 is affirmed, and a penalty of $1,000.00 is assessed

Ann Z. Cook
Judge, OSHRC

Dated: 20 APR 2000
Washington, D.C