UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
NEW ENGLAND ROOFING & SHEETMETAL CO.
Respondent.

OSHRC DOCKET
NO. 93-1833

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 June 22, 1994. The decision of the Judge will become a final order of the Commission on July 22, 1994 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 July 12, 1994 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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. 6/22/94

Ray H. Darling, Jr.
Executive Secretary

Date: June 22, 1994

DOCKET NO. 93-1833

NOTICE IS GIVEN TO THE FOLLOWING:

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Barbara Hassenfeld-Rutberg
Administrative Law Judge
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SECRETARY OF LABOR

Complainant

OSHRC Docket No. 93-1833

v.

NEW ENGLAND ROOFING AND SHEET METAL CO.

Respondent

Appearances:

Kathryn Diaz, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Barrett A. Metzler
Northeast Safety Management, Inc.
West Hartford, CT.
For Respondent

Before: Administrative Law Judge Barbara L. Hassenfeld-Rutberg

DECISION AND ORDER

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., (the Act).

On June 9, 1993, Respondent, New England Roofing and Sheet Metal Co. (" NE Roofing") was cited for serious violations totaling $2500.00 in proposed penalties. The citation was issued as the result of an inspection conducted on June 3, 1993 at 59 Elm Street, New Haven, CT where the respondent was performing work on a low-pitched roof a roof. David Pataky, a compliance officer (CO) of the Occupational Safety and Health Administration (OSHA) was driving by the site when he looked up to the roof and noticed the alleged violations.

Administration (OSHA) was driving by the site when he looked up to the roof and noticed the alleged violations.

A hearing was held in this case on February 25, 1994 and March 21, 1994 in Boston, Massachusetts, presided over by Judge Barbara L. Hassenfeld-Rutberg.

DISCUSSION

Serious citation, items 1a, 1b and 1c

The standard alleged in item 1a at 29 CFR 1926.500(g)(1) provides: During the performance of built-up roofing work on low-pitched roofs with a ground to eave height greater than 16 feet (4.9 meters), employees engaged in such work shall be protected from falling from all unprotected sides and edges of the roof as follows:

> (i) By the use of a motion-stopping-system (MSS system); or
> (ii) By the use of a warning line system erected and maintained as provided in paragraph (g)(3) of this section and supplemented for employees working between the warning line and the roof edge by the use of either an MSS system or, where mechanical equipment is not being used or stored, by the use of a safety monitoring system; or
> (iii) By the use of a safety monitoring system on roofs fifty feet (15.25 meters) or less in width (see Appendix A),where mechanical equipment is not being used or stored.

The standard alleged in item 1b at 29 CFR 1926.500(g)(3)(i) provides:

> Warning lines shall be erected around all sides of the work area.

When CO Pataky was passing by the site, he noticed from the street level that three of the Respondent's employees were working at the roof edge of a five story building (Tr.63) having the height of approximately 60 feet. He parked his car and took his camera and proceeded to the roof of the building. When he arrived on the roof, one of the employees was still at the edge. Exhibit C1 shows one of the Respondent's employees at the edge of the roof at one of the unprotected sides of the roof. Built-up roofing work was being performed at the site (Tr. 33, 43, Ex.C 20). Measurements taken of the roof top by the CO indicated that it was wider than 50 feet when measured in accordance with

the regulations and examples provided in Appendix A, which indicates the correct method of measuring (Ex. C21-23).

The Complainant contends that NE Roofing failed to guard the roof perimeter in accordance with the requirements of the roofing standard set out herein above. There was neither an MSS nor a warning line system erected not less than six feet from the roof edge and supplemented for employees between the warning line and the roof edge by the use of either an MSS system or a safety monitoring system. A safety monitor alone does not meet the requirements of the standard in this case as the proper measurement of the width of the roof was more than 50 feet . Here there was neither an MSS system nor a warning line in use when the CO arrived and employees were working within 6 feet of the roof edge; indeed, not even a safety monitor was being used (Tr. 54, Exs. C 6,8,9,10,13,14). It wasn't until after the foreman, Charles Smith contacted the Respondent's representative, Mr. Metzler, by mobile phone that a safety monitor system was started (Tr.45-46, 54). An employee in a yellow shirt began to act as the so-called safety monitor (Exs. C 11,12,15,17). However, that employee was sometimes busy smoking, working, standing at the roof edge, or had his back to the employees he was supposed to be monitoring (Exs. C 3, 16). Section 1926.500(g)(1)(iii) expressly limits the exclusive use of a safety monitor to roofs that are 50 feet or less in width and where no mechanical equipment is used or stored. Mr. Pataky testified that even if the roof had been less than 50 feet wide, which he contends it was not, the Respondent's monitor's behavior would not have met the requirements of the regulations. The Complainant correctly states that the 50 foot restriction limiting the use of only a safety monitor is based on the width of the *entire roof*, not the width of the work area as the Respondent is alleging. *Phoenix Roofing, Inc. v. Dole*, 874 F.2d 1027, 1031 (5th Cir. 1989). The diagram in Ex. C2 shows that at the time of the inspection, the north and west walls were unprotected. In Exs. C11,12, 20 where there is mechanical equipment (Tr. 47), employees are walking from the south side to the north side. The above-cited roofing standards were promulgated in recognition of the fact that employees who perform built-up roofing work on a low-pitched roof are exposed to a serious[1] fall hazard. This judge

1. A serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. *Section 17(k) of the OSHA Act, 29 U.S.C. section 666(k).*

finds that the roof when properly measured (Exs. C21-23) is 55 feet by 100 feet (Tr. 52,59), which exceeds 50 feet in width; therefore, the use of just a safety monitor by the Respondent in this case runs counter to the plain meaning of the regulations; cf. *Secretary of Labor v. Hartford Roofing Co., Inc.*, OSHRC Docket No. 92-1162 (DeBenedetto, J.)

The standard alleged in item 1c at 29 CFR 1926.500 (g)(4) provides:

> Mechanical equipment may be used or stored only in areas where employees are being protected by either a warning line or an MSS system. Mechanical equipment may not be used or stored between the warning line and the roof edge unless the employees are being protected by an MSS system. Mechanical equipment may not be used or stored where the only protection provided is by a safety monitoring system.

Here, the CO witnessed a hot tar lugger, material cart and other mechanical equipment stored or used on the roof (Tr. 35, 36, 39, 40, Exs. C 4,5,6,7,11,19, 20), but there was no warning line or MSS system for the employees working on that roof. The circumstances under which the employees were working required a warning line or an MSS system and the use solely of a safety monitor was in violation of the regulations.

Serious citation 1, item 2

Item 2 of the citation alleges a violation of 29 CFR 1926.500 (g)(5) which provides:

> Employees working in a roof edge materials handling or materials storage area located on a low-pitched roof with a ground to eave height greater than 16 feet (4.9 meters) shall be protected from falling by the use of an MSS system along all the sides and edges of the area.

Mr. Pataky testified that he observed employees working in a roof edge materials handling or materials storage area on a low-pitched roof with a ground to eave height more than 16 feet without the protection of an MSS as required by the above standard (Tr. 61-64, Exs. C 4,5, 7, 11, 19, 20). There was a bitumen pipe outlet as well as a material hoist area (Exs. C 7,-9, 12, 18-20) that met the definition of materials handling or materials storage area as described the above cited regulation. A safety monitor system can not be used in such a situation as was present at the inspection site (Tr. 48, Ex. C 20). An employer can not unilaterally change the rules and decide that a particular situation is safe for its employees when the method used runs counter to the regulations. If it wishes

to seek a variance, it must do so before commencing work and in accordance with the methods provided for in the OSHA Act, 29 U.S.C., section 655 (d), Part 1905. The Respondent here neither complied with the regulations nor sought a variance. The evidentiary record in this case does not allow a conclusion that NE Roofing's use of a safety monitor alone met the standards cited in Serious citation, items 1a, 1b, 1c and 2. NE Roofing must be found to have violated the law and all the items of the citation must be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law inconsistent with this decision are denied.

ORDER

Serious citation 1, items 1a, 1b, and 1c alleging violations of 29 CFR 1926.500(g)(1), (g)(3)(i) and (g)(4) are **AFFIRMED** and a penalty of $1250.00 is assessed.

Serious citation 1, item 2 alleging a violation of 29 CFR 1926.500(g)(5) is **AFFIRMED** and a penalty of $1250.00 is assessed.

Barbara L Hassenfeld-Rutberg

BARBARA L. HASSENFELD-RUTBERG
Judge, OSHRC

Date: June 14, 1994
Boston, Massachusetts