UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
C. R. HUFFER ROOFING
Respondent.

OSHRC DOCKET
NO. 92-2537

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 October 15, 1993. The decision of the Judge will become a final order of the Commission on November 15, 1993 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 November 4, 1993 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.
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200 Constitution Avenue, N.W.
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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. /SKW

Date: October 15, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-2537

NOTICE IS GIVEN TO THE FOLLOWING:

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John H. Frye, III
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SECRETARY OF LABOR, Complainant, v. C.R. HUFFER ROOFING & SHEET METAL, INC., Respondent.	:	Docket No. 92-2537

Appearances:

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Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio

For the Secretary

Roger L. Sabo, Esquire
Schottenstein, Zox & Dunn
Huntington Center
Columbus, Ohio

For the Respondent

BEFORE: Administrative Law Judge John H Frye, III

DECISION AND ORDER

I. INTRODUCTION

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651-678 (1970). On June 16 and 17, 1992, Richard L. Burns, a Compliance Officer of the United States Department of Labor, Occupational Safety and Health Administration, conducted an inspection of a worksite which involved remodeling and rehabilitation of a fire station in Upper Arlington, Ohio, at which Respondent, C.R. Huffer Roofing and Sheet Metal, Inc., was a subcontractor engaged in roofing work. As a result of that inspection,

citations were issued against Respondent alleging it had committed serious violations of Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2). Respondent timely filed a Notice of Contest. Pursuant to Notice, this case was heard in Columbus, Ohio, on March 25, 1993. No additional parties appeared to intervene. Following the hearing, briefs were submitted by the parties.

II. FINDINGS OF FACT

A. Background

1. Respondent C.R. Huffer Roofing and Sheet Metal, Inc. does commercial installation of roofing. This includes rubber roofs, built-up roofs, shingles, and slate (Tr. 93).

2. Huffer has a safety program (Tr. 64, 72, 99). Huffer has periodic safety meetings where issues such as safety belts and life lines are discussed and videos are shown (Tr. 99). This includes training of the employees on the work site in question (Tr. 64, 72-73, 76, 82).

B. The Upper Arlington Fire Station Project.

1. In June of 1992, Huffer was working on renovation of Fire House No. 1 in Upper Arlington, Ohio (Tr. 12, 95). The station is located on Arlington Avenue in that town, a suburb of Columbus, Ohio (Tr. 95).

2. Huffer placed shingles on the mansard roof and dormer windows, and a rubber roof on the flat portion of the roof (Tr. 95-96; RX 3).

C. OSHA Inspects the Project.

1. On June 16, 1992, at around 12:00 noon, Richard Burns of the Occupational Safety and Health Administration arrived at the Arlington Fire Station to conduct a regularly scheduled inspection (Tr. 11). He sat outside of the site and observed what was going on for about fifteen minutes (Tr. 12).

2. Following his observation of the site, Mr. Burns identified himself to the general contractor's representative and asked him, when he finished his lunch, to gather a foreman from each of the five contractors on site for the opening conference (Tr. 13-14).

At the conference, Huffer was represented by Jim Eddington, who was not the foreman (Tr. 83).

3. Mr. Burns then conducted an inspection of the site, including Huffer's work on the roof (Tr. 15). He observed two Huffer employees on the flat roof part and one employee on the roof jacks (Tr. 16-17; GX 3; GX 4). He also observed a stairwell, which he concluded was inappropriately guarded, located between both the second and third floors (Tr. 50).

D. Citations Are Issued to Huffer.

1. On July 12, 1992, the Secretary issued the following citations to Huffer:

a. Citation 1, Item 1, charged a serious violation of Section 29 C.F.R. 1926.20(b)(1) in that Huffer allegedly did not have an accident prevention program dealing with predictable fall hazards;

b. Citation 1, Item 2, charged a serious violation of Section 29 C.F.R. 1926.28(a) in that Huffer employees allegedly did not utilize appropriate personal protective equipment to guard against falls;

c. Citation 1, Item 3, charged a serious violation of Section 29 C.F.R. 1926.500(b)(2) in that Huffer allegedly did not guard ladderway openings with standard railings and toeboards;

d. Citation 1, Item 4, charged a serious violation of Section 29 C.F.R. 1926.556(b)(2)(i) in that the lift controls on a Bode Finn aerial lift allegedly were not checked daily;

e. Citation 1, Item 5, charged a serious violation of Section 29 C.F.R. 1926.556(b)(2)(iv) in that employees working in an aerial lift allegedly were not standing firmly on the floor of the basket, but were observed climbing over the top of the guard rails onto the roof;

f. Citation 2, Item 1, charged a repeat violation of 29 C.F.R. 1926.21(b)(2) in that Huffer allegedly did not instruct its employees in the recognition and avoidance of unsafe conditions such as open sided floors; and

g. Citation 2, Item 2, charged a repeat violation of 29 C.F.R. 1926.21(b)(2) in that Huffer allegedly did not instruct its employees in the recognition and avoidance of unsafe conditions such as 35 foot fall hazards.

2. At the opening of the hearing, the Secretary's counsel indicated that the Secretary was vacating Citation 1, Item 1, and all of Citation 2. He also reported that the parties had agreed that Citation 1, Item 4, should be affirmed as an other-than-serious violation. Trial proceeded on Citation 1, Items 2, 3, and 5.

III. Opinion

A. CITATION 1, ITEM 2 - EMPLOYEE'S ALLEGED FAILURE TO WEAR APPROPRIATE PROTECTIVE EQUIPMENT WHEN EXPOSED TO A FALL OF APPROXIMATELY 35 FEET - 29 C.F.R. 1926.28(a).

Citation 1, Item 2, alleges a violation of 29 C.F.R. 1926.28(a), which provides:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to employees.

The Commission has held that a violation of this standard requires a showing first, that employees are exposed to a hazard requiring the use of personal protective equipment and second, that 29 C.F.R. Part 1926 indicates a need for using such equipment to reduce the hazard to employees. *L.E. Myers Co.*, 12 BNA OSHC 1609 (1986), *aff'd. on other grounds*, 818 F. 2d 1270 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987). The Secretary alleges that one of Respondent's employees, Mr. George Hickman, was observed standing on a roof jack[1] approximately 35 feet above the ground without any fall protection.

[1]A roof jack consists of planking resting on brackets attached to a steeply pitched roof in order to provide a place from which to work. In this case, the roof jack was attached to the mansard roof.

Further, the Secretary argues that 29 C.F.R. 1926.451(u) indicates a need for using a safety belt and lanyard in such a situation.

It is undisputed that Mr. Hickman was in fact working on the roof jack and thus was exposed to this fall hazard. However, whether he was utilizing a safety belt and lanyard is disputed. Mr. Burns, the Compliance officer, maintains that he was not, while Mr. Hickman and his foreman, Mr. Herman Hickman, maintain that he was (Tr. 21, 61-62, 64-65, 66, 73-75). Mr. Burns took a photograph of Mr. Hickman standing on the roof jack which does not indicate whether Mr. Hickman was tied off (Tr. 40-41; GX-3), and a blow-up of that photo (RX-3), while it indicates that Mr. Hickman may have been tied-off, is not conclusive.[2] Because the sum total of the evidence is inconclusive, I find that the Secretary has failed to meet his burden of establishing that a violation of § 1926.28(a) occurred. Accordingly, Citation 1, Item 2 is vacated.

B. CITATION 1, ITEM 3 - ALLEGED FAILURE TO LADDERWAY FLOOR OPENINGS - 29 C.F.R. 1926.500(b)(2).

The Secretary maintains that Respondent's failure to ensure that ladderway floor openings were guarded violated 29 C.F.R. 1926.500(b)(2). That standard is part of the standards governing temporary or emergency conditions in construction work where there is a danger of employees falling through floor, roof or wall openings and provides, in pertinent part:

[2]The blow-up depicts an object extending downward from the left side of Mr. Hickman's belt which may or may not be a lanyard. The Compliance Officer testified that another exhibit (RX-2) shows a safety line attached to the left side of Mr. Hickman's belt. See Tr. 41-45.

> Ladderway floor openings or platforms shall be guarded by standard railings with standard toeboards on all exposed sides...

During the inspection, Mr. Burns noticed that on the east side of the second and third floors, ladderway floor openings were unguarded, exposing employees to at least a 12 foot fall to the next level. Mr. Burns testified that Jim Eddington, who represented Huffer at the opening conference, stated that Respondent's employees had utilized the ladderway openings for access to and egress from the roof.[3]

Respondent points out that no pictures were introduced with respect to Huffer employees utilizing the ladderways. It notes that the only basis for the violation is the statement by Mr. Burns that Eddington told him he had used the stairwell. Eddington testified that he did not recall making any such statement (Tr. 88).

Respondent argues that citations may not be affirmed based on hearsay and notes that, given the existence of five contractors on the project, the Compliance Officer could well be confused about use of the ladderways by Huffer employees.[4] In his reply, the Secretary argues that Eddington's statement is not hearsay under Federal Rules of Evidence 801(d)(2). Regardless whether Eddington's statement may be viewed as hearsay, in light of the differing statements of the other employees who testified and Eddington's failure of recollection, his statement is insufficient to satisfy the Secretary's burden of proof. I find that the Secretary

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[3] The Secretary recognizes that Respondent's employees testified at the hearing that they accessed the roof by way of the aerial platform. However, he argues that, given the nature of the work and the period of time the Respondent was on the worksite, employee testimony that they never used the ladderway openings is so unlikely that it simply can not be taken seriously.

[4] Employees other than those of Huffer also worked on the roof (Tr. 66). Mr. Burns had only been on twenty inspections as of the date of this inspection, including joint inspections (Tr. 32). It was his impression Eddington was the foreman or that there were two foremen and one worker (Tr. 37-38), although Herman Hickman was the only foreman and in charge (Tr. 59).

has failed to establish that a violation of § 1926.500(b)(2) occurred. Accordingly, Citation 1, Item 3 is **vacated.**

C. CITATION 1, ITEM 5 - RESPONDENT'S PRACTICE OF ALLOWING EMPLOYEES TO CLIMB ON THE EDGE OF THE BASKET OF THE AERIAL LIFT FOR ACCESS TO THE ROOF AREA ALLEGEDLY VIOLATED 29 C.F.R. 1926.556(b)(2)(iv)

It is undisputed that Respondent allowed employees to climb over the edge of the basket of the aerial lift to gain access to the roof.[5] The Secretary maintains that this violated 29 C.F.R. 1926.556(b)(2)(iv). That standard provides, in pertinent part:

> Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket....

Huffer disputes that the cited standard is applicable. Huffer asserts that the standard applies only to the use of the lift as a work platform, not as a means of access to a work area, pointing out that under OSHA's interpretation, an employee could never get in or out of an aerial basket. If that is a hazard, Huffer argues, it is not dealt with by the standard, which cannot be expanded "to mean what an agency [allegedly] intended but did not adequately express." *Diamond Roofing Co. v. OSHRC,* 528 F. 2d 645, 649 (5th Cir. 1973). *See also, Gates & Fox Co. v. OSHRC,* 790 F. 2d 154 (D.C. Cir. 1986). "A standard must clearly state what an employer is required to do in order to comply." *Contractors Welding of Western New York,* 15 BNA OSHC 1249, 1251 (1991). In his reply, the Secretary points out that "[c]learly, the words as well as the intent of the standard prohibits the use of the lift in the manner used by Respondent in this case."

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[5]Mr. Burns and Mr. George Hickman described this process. See Tr. 27, 61.

The Secretary's interpretation of the standard is reasonable. There is no provision in the standard which covers ingress and egress at elevated locations, and the fact that employees had to climb over the railing to do so implies that the aerial lift was not intended to be used in the manner in which Huffer used it. Moreover, a separate standard - § 1926.552 Material hoists, personnel hoists, and elevators - covers this particular function. Citation 1, Item 5, is affirmed. Respondent did not contest the amount of the penalty levied; consequently it too is affirmed.

IV. CONCLUSIONS OF LAW

A. Respondent C. R. Huffer Roofing & Sheet Metal, Inc., was at all times pertinent hereto an employer within the meaning of Section 3(5) of the Occupational Safety & Health Act of 1970, 29 U.S.C. Section 651-678 (1970).

B. The Occupational Safety & Health Review Commission has jurisdiction of the parties and the subject matter.

C. Respondent C. R. Huffer Roofing & Sheet Metal, Inc., was not in violation of the standard set out at 29 CFR § 1926.28(a) as charged in Citation 1, Item 2.

D. Respondent C. R. Huffer Roofing & Sheet Metal, Inc., was not in violation of the standard set out at 29 CFR § 1926.500(b)(2) as charged in Citation 1, Item 3.

E. Respondent C. R. Huffer Roofing & Sheet Metal, Inc., committed a serious violation of the standard set out at 29 CFR § 1910.556(b)(2)(iv) as charged in the Citation 1, Item 5. A civil penalty of $3000 is appropriate.

V. ORDER

A. Citation 1, Items 2 and 3, are vacated.

B. Citation 1, Item 5, is affirmed. A civil penalty of $3000 is assessed.

JOHN H FRYE, III
Judge, OSHRC

Dated: OCT 15 1993
Washington, D.C.