STATE OF ALASKA

Department Of Labor and Workforce Development

Occupational Safety and Health Review Board

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STATE OF ALASKA, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, DIVISION OF LABOR STANDARDS AND SAFETY, OCCUPATIONAL SAFETY AND HEALTH SECTION,

Complainant,

v.

RAIN PROOF ROOFING, LLC,

Contestant.

Docket No. 04-2203
Inspection No. 305762346

DECISION AND ORDER

I. INTRODUCTION

This matter arises from an occupational safety and health inspection at a worksite under the control of Rain Proof Roofing, LLC (Rain Proof) in Anchorage on April 13, 2004. As a result of the inspection the State of Alaska, Department of Labor and Workforce Development (Department) issued a citation to Rain Proof alleging violations of ocupational safety and health standards.

Rain Proof contested Citation 1, Item 2 of the Department's citation. This item alleges a violation of 29 CFR 1926.501(b)(13) for failing to enforce the use of adequate fall protection measures by employees exposed to fall hazards while working on a roof. This item was classified as a "serious" violation with a proposed penalty of $3,000.

The Board hearing was held on April 17, 2006. The Department was represented by Assistant Attorney General Larry McKinstry. Rain Proof was represented by Jacob Nist of Perkins Coie, LLP. Both parties presented witness testimony, documentary evidence and oral argument. Upon consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. On April 13, 2004, at approximately 4:00 p.m., Department enforcement officer Vern Watts conducted an occupational safety and health (OSHA) inspection of a construction worksite at the Dowling Road Apartment Complex (Hallmark) in Anchorage, Alaska. Rain Proof was performing roofing work at the site.

2. During the inspection Watts saw two Rain Proof employees working on the roof installing roofing materials with power-operated nail guns. The employees had access to the roof from a scissor truck with an elevated bed. Watts took photographs of the worksite and of one of the employees working on the roof. (Exs. 2A through 2J.)

3. The apartment complex was two stories high with a peaked roof. Watts estimated the top of the roof at about 30-35 feet and the roof eaves at about 25 feet above the ground. He estimated the pitch of the roof at approximately 6 in 12.

4. Watts asked the two employees to come down from the roof. They identified themselves as John Fuller and Keith Steinke. According to Watts, neither employee was wearing a safety harness or was adequately protected against fall hazards while working on the roof.

5. Fuller testified that he was wearing a safety harness earlier in the day but had removed it and put it in his vehicle. Subsequently he went back on the roof to finish putting on the roof cap but neglected to put on his safety harness.

6. Steinke said that he had adequate fall protection because there was a slide guard (a 10-foot-long 2 x 8 inch board) at the edge of the roof where he was working. In Watts' opinion, the slide guard was inadequate fall protection because Steinke's work likely involved movement to other areas of the roof where there was no slide guard or fall protection.

7. There was no Rain Proof supervisor at the worksite when Watts first arrived. About 15 minutes after he began his inspection, two Rain Proof supervisors appeared at the worksite: superintendent Earl Holland and safety manager Brent Eaton. Holland and Eaton discussed Rain Proof's "Residential Roofing Fall Protection Plan" with Watts. (Ex. M.) Under the plan, employees working on a roof pitch of 6 in 12 at a height of more than 6 feet were required to use a personal fall arrest system (e.g., a safety harness) or slide guards attached at the eave of the roof. At a height of more than 25 feet, employees were required to use a personal fall arrest system only. Rain Proof's fall protection plan was given to all roofing employees, including Fuller and Steinke, in the form of a laminated card which they could carry with them.

8. According to Holland and Eaton, Rain Proof employs about 65-70 roofers at multiple work locations. A supervisor is not at each worksite on a continuous basis. However, superintendent Holland makes random unannounced visits to each worksite every day to check safety compliance and the progress of the job. Neither Holland nor Eaton was aware that Fuller was not wearing his safety harness when Watts arrived at the worksite.

9. Rain Proof employees are required to attend weekly safety meetings every Monday morning, lasting about 7-10 minutes. The safety meetings cover a variety of topics, including fall protection. Rain Proof provided documentation that a safety meeting was conducted on April 12, 2004, the day before Watts' inspection. Both Fuller and Steinke attended this safety meeting. One of the topics discussed at the meeting was fall protection. (Ex. E.)

10. Under Rain Proof's discipline policy in existence at the time of the inspection, an employee who violated the company's safety rules would be disciplined. For a first offense, the employee would lose his eligibility for the next monthly drawing for prizes. For a second offense, the employee would receive a written reprimand; for a third offense, the employee would be suspended for three days; and for a fourth offense, the employee would be terminated. (Ex. 5.) In the fall of 2004, after the inspection in this case, Rain Proof made its discipline policy stricter by imposing a written reprimand for a first safety violation; a suspension for a second offense; and termination for a third offense. In addition, Eaton testified that the company no longer uses slide guards as a means of fall protection but instead requires all of its employees working on a roof to use a safety harness tied off to an anchor.

11. As a result of Watts' inspection, the Department cited Rain Proof for a violation of 29 CFR 1926.501(b)(13) for failing to enforce the use of adequate fall protection by employees working on a roof more than six feet above the ground or a lower level. The violation was classified as "serious" based on Watts' determination as to the relative probability of an accident and the severity of any resulting injury.

12. Under the Department's penalty calculation guidelines, the initial unadjusted penalty for the violation was $5,000. This amount was reduced by 40% based on Rain Proof's company size. No reduction was given for history because Rain Proof had previously been cited for similar fall protection violations. Nor was Rain Proof given any penalty reduction for good faith. Applying the penalty reduction for company size, the final penalty proposed by the Department for this alleged violation was $3,000. (Ex. 1B.)

III. CONCLUSIONS OF LAW

A. Proof of Violation

To establish a violation of an occupational safety and health standard, the Department must prove by a preponderance of the evidence that (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) one or more employees were exposed or had access to the violative condition; and (4) the employer knew or could have known of the existence of the violative condition with the exercise of reasonable diligence. *See* Mark A. Rothstein, *Occupational Safety and Health Law*, §102 (4th ed. 1998) (hereinafter "Rothstein"); *see also* 8 AAC 61.205(l) (burden of proof for citations and penalties is on the Department by a preponderance of the evidence.)

29 CFR 1926.501(b)(13) provides:

> *Residential Construction.* Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.

With respect to employee Fuller, Rain Proof argues that the Department has failed to prove that Rain Proof supervisors knew or should have known that Fuller would remove his safety harness while working on the roof. We are unpersuaded by this argument. As the case law makes clear, the Department must prove that the employer actually knew, or could have known with the exercise of reasonable diligence, the physical conditions creating the cited hazard. Factors relevant in the reasonable diligence inquiry include the employer's duty to inspect the work area and anticipate hazards, the duty to adequately supervise employees, and the duty to implement a proper training program and work rules. *N & N Contractors, Inc. v. OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001). In this case, the fall hazards from working on the roof were obvious and in plain view. Moreover, the employer has a safety responsibility to adequately supervise its employees in the performance of their work. Any reasonable supervision at the worksite would have disclosed that Fuller was not wearing his safety harness while working on the roof. We cannot excuse the employer knowledge requirement simply because Rain Proof elected not to have a supervisor continuously present at the worksite but instead used a system of random spot inspections. We conclude that with the exercise of reasonable diligence in supervising the worksite, Rain Proof would have been aware that one of its employees was not using his safety harness. Accordingly, we find that the employer knowledge requirement has been satisfied as part of the Department's *prima facie* case.

With respect to employee Steinke, we are unable to conclude that the Department has proved a violation of the cited standard. Under the standard, slide guards are an acceptable means of fall protection. Although enforcement officer Watts believed that the slide guard was inadequate because Steinke's job tasks "probably" involved movement to other areas of the roof not protected by the slide guard, this appears to be mere speculation by Watts and is not supported by any testimonial, documentary or photographic evidence in the record. Accordingly, we conclude that the Department has not proved by a preponderance of the evidence that Rain Proof violated the cited standard with respect to Steinke.[1]

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[1] As a general matter, we find that the Department's documentation is deficient because the enforcement officer merely did a visual estimate of the relevant roof heights and pitch, without taking any actual measurements. We do not accept the Department's explanation that it was "too hazardous" for the inspector to actually go up on the roof and take measurements. When an alleged safety violation is based upon specific measurements such (continued...)

B. Employee Misconduct Defense

Rain Proof argues that even if there was a violation of the fall protection standard with respect to employee Fuller, it should not be held responsible because the violation was caused by unpreventable employee misconduct. In response, the Department argues that Rain Proof has not established the required elements of the employee misconduct defense recognized in OSHA law.

Unpreventable employee misconduct is an affirmative defense on which the employer bears the burden of proof. *See* Rothstein at §117. To establish the defense, the employer must prove by a preponderance of the evidence that: (1) the employer has established work rules designed to prevent the violation; (2) the employer has adequately communicated these rules to its employees; (3) the employer has taken adequate steps to discover violations of its work rules; and (4) the employer has effectively enforced its rules when violations have been discovered. *Id.*

Although it is a close call, we find that Rain Proof has not met its burden of proof to establish the employee misconduct defense with respect to employee Fuller. We find that Rain Proof had established adequate work rules on paper regarding fall protection and had provided employees with the necessary equipment such as safety harnesses. In addition, we find that Rain Proof adequately communicated its fall protection rules to its roofing employees. However, we find that Rain Proof did not exercise reasonable diligence to discover violations of its fall protection rules. Significantly, there was no supervisor at the worksite when Fuller was working on the roof without his safety harness or other fall protection. As we indicated earlier, when employees are continuously exposed to fall hazards by spending most of their time working on an elevated roof, we do not consider one or two daily spot inspections by a supervisor to be adequate in detecting workplace hazards.

Furthermore, we find that Rain Proof's disciplinary program for enforcing its safety rules was not strict enough to ensure compliance with its fall protection requirements. Fuller testified that he was told he had "gotten written up" for not wearing his safety harness during the OSHA inspection, but there is no evidence that he was actually issued a disciplinary reprimand. Under Rain Proof's disciplinary policy in effect at the time, Fuller merely lost his eligibility for the current monthly drawing for prizes, which we do not consider to be an adequate penalty for significant safety rule violations. For the foregoing reasons, we conclude that Rain Proof has failed to establish the affirmative defense of unpreventable employee misconduct.

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[1](...continued)
as height or distance, we believe the Department should take actual measurements rather than rely on visual estimates.

C. Classification of Violation and Penalty Assessment

AS 18.60.095(b) provides that a serious violation is considered to exist if the violation creates in the place of employment a substantial probability of death or serious physical harm. Under OSHA case law, it has been held that it is not necessary to prove that there is a substantial probability that an accident will occur; it is only necessary to prove that an accident is possible and that death or serious physical harm could result. *See* Rothstein at §313.[2]

Here Rain Proof makes no specific arguments contesting either the classification of the violation or the amount of the penalty. We find ample evidence to support the classification of this violation as serious. Rain Proof's employees were working at heights of greater than 20 feet and it is readily apparent that if an employee were to fall from the roof, serious injury or death could likely result. Therefore we believe the violation was properly classified.

The Department may assess a penalty of up to $7,000 for a serious violation. AS 18.60.095(b). In assessing a penalty, the Department must give due consideration to the employer's size, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. AS 18.60.095(h). To calculate monetary penalties, the Department relies on guidelines set forth in the Field Inspection Reference Manual (FIRM). 8 AAC 61.140(c). The Board, however, is not bound by the FIRM in evaluating the classification of a violation or the assessment of a penalty. 8 AAC 61.140(h). Here we find that certain mitigating factors exist warranting a further reduction in the penalty. First, although the Department established a *prima facie* case of violation, we recognize that Rain Proof has presented a close question on the employee misconduct defense. Second, Rain Proof recently decided to no longer use slide guards as a means of fall protection and now requires all roofing workers to tie-off using a harness. Third, Rain Proof has implemented a stricter discipline policy that should increase the likelihood that employees will comply with fall protection requirements. For these mitigating reasons, we exercise our discretion and reduce the penalty amount to $1.

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[2] The Alaska Supreme Court has held that because the Alaska OSHA Act is based on the federal OSHA Act, consideration of federal case law is appropriate. *Reed v. Municipality of Anchorage*, 782 P.2d 1155, 1157 n.5 (Alaska 1989).

IV. ORDER

1. Citation 1, Item 2 is AFFIRMED as a "serious" violation.
2. The proposed penalty is reduced from $3,000 to $1.

DATED this 17th day of August, 2006.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: _____
Timothy O. Sharp, Chair

By: _____
Thor Christianson, Member

By: _____
Thomas A. Trosvig, Member

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APPEAL PROCEDURES

A person affected by an order of the OSH Review Board may obtain judicial review by filing a notice of appeal in the Superior Court as provided in the Alaska Rules of Appellate Procedure. The notice of appeal must be filed within 30 days from the date of filing of the order as certified below. After 30 days from the date of filing of the order, the order becomes final and is not subject to review by any court. AS 18.60.097.

CERTIFICATION

I hereby certify that on the 17th day of August, 2006, the foregoing in the matter of the Alaska Department of Labor vs. Rain Proof Roofing, LLC, Docket No. 04-2203, was filed in the office of the OSH Review Board at Juneau, Alaska and that on the same date a true and correct copy was mailed to each party at its address of record.

Becky Weimer
Becky Weimer
Administrative Assistant