

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

OREGON OCCUPATIONAL SAFETY)	Docket No. 14-00003SH
AND HEALTH DIVISION)	
)	
Plaintiff,)	
)	
vs.)	Citation No.: C9048-073-13
)	
AMERICA 1ST ROOFING &)	
BUILDERS, INC.)	
)	
Defendant.)	OPINION AND ORDER

Pursuant to notice, a hearing was held in Salem, Oregon, on February 3, 2016, before Administrative Law Judge Naugle. Plaintiff, OR-OSHA, was represented by Assistant Attorney General Kyle J. Martin. Defendant, America 1st Roofing & Builders, Inc., was represented by David Leak. Larry Goldsby appeared as the OR-OSHA representative.

Plaintiff's Exhibits 1-24 and 9A were submitted and admitted into evidence without objection. The record closed at the conclusion of the hearing.

ISSUE

Propriety of the August 29, 2013 Citation and Notification of Penalty alleging one violation with total proposed penalties of \$7,000.

FINDINGS OF FACT

Defendant employs workers in the State of Oregon.

In May 2011, OR-OSHA issued a Citation on Defendant that included a violation of OAR 437-003-1501 with total proposed penalties of \$325. Antonio Martinez was the crew lead and was working within 20 feet of employee Carlos Olmos, who was exposed to a fall hazard of more than 10 feet and not using fall

protection. (Ex. 2.) Defendant did not contest the Citation, and it became a Final Order. (Ex. 16.)

In April 2012, OR-OSHA issued a Citation on Defendant that included a violation of OAR 437-003-1501 with total proposed penalties of \$7,100. Antonio Martinez was the person in charge, and Carlos Olmos was the employee exposed to a fall hazard of more than 10 feet and not using fall protection. (Ex. 3.) Defendant did not contest the Citation, and it became a Final Order. (Ex. 17.)

On July 26, 2013, OR-OSHA Safety Compliance Officer (SCO), Larry Goldsby, was driving in Molalla, Oregon, and observed workers on an apartment complex roof who did not appear to be using fall protection.

SCO Goldsby took photographs and initiated a local emphasis falls in construction inspection at approximately 1:00 p.m. (Testimony of Goldsby, Exs. 9, 9A.) SCO Goldsby conducted an opening conference and learned that the Defendant had six employees working at the jobsite and determined that it was approximately 30 feet from the roof eave to the ground. Antonio Martinez told SCO Goldsby that he was in charge and assigned work to the other employees. Mr. Martinez said they were using fall protection earlier in the day and were at a point where they needed to install permanent anchors from the general contractor and had taken off their company anchors and were not tied off after lunch. (Testimony of Goldsby, Ex. 7.)

SCO Goldsby interviewed Defendant employee Jessica Adams. Ms. Adams said Mr. Martinez was in charge and that she was working on the roof and at the time of the inspection she was not tied off. (Testimony of Goldsby, Ex. 7.)

SCO Goldsby interviewed Carlos Almos, who said that he had been anchored off while working before lunch, but not after, and that Mr. Martinez didn't tell him he needed to tie off after lunch. (Testimony of Goldsby, Ex. 7.)

On August 29, 2013, OR-OSHA issued a Citation and Notification of Penalty on Defendant for a serious repeat violation of OAR 437-003-1501 for having employees exposed to a fall of approximately 30 feet from a roof and not using some type of fall protection system. Medium probability and fatal severity ratings were determined, and a proposed repeat violation penalty of \$7,000 was assessed. (Exs. 13, 22.)

Defendant timely requested a hearing. (Ex. 14.)

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David Leak testified that he is the Defendant's safety manager for Oregon and Washington and oversees training and inspections. Mr. Leak testified that Defendant had a safety program in place and conducted weekly safety meetings in Spanish and English (Ex. 5.), conducted jobsite inspections (Ex. 4.), had a disciplinary policy in place in July 2013 (Ex. 23.), and had taken disciplinary action for safety violations (Ex. 11.).¹ (Testimony of Leak.)

Defendant's disciplinary policy states:

"Note! Immediate Termination will result from all fall protection violations."

"Nota! Todas las violaciones de fall protección resulta in terminacion enmediatamente."

(Exhibit 23, emphasis in original.)

Mr. Leak acknowledged there were no signed disciplinary policy documents for the workers on the jobsite at issue. Mr. Leak also acknowledged that at the time Mr. Martinez committed the fall protection violation at issue he had also committed two prior fall protection violations. Mr. Leak further acknowledged that at the time Mr. Almos committed the fall protection violation at issue he had also committed two prior fall protection violations. (Testimony of Leak.)

CONCLUSIONS OF LAW AND OPINION

OR-OSHA has the burden of proving, by a preponderance of evidence, the denied violation and the reasonableness of the contested penalty. *See* OAR 438-085-0820(1), (3).

In addition to proving applicability of the cited standard and the employer's noncompliance, OR-OSHA must prove employee exposure to the hazardous condition. *See OR-OSHA v. Moore Excavation, Inc.*, 257 Or App 567 (2013).

Further, where the employer is charged with a serious violation, the citation will not be upheld "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." ORS 654.086(2). *See OR-OSHA v. CBI Services, Inc.*, 356 Or 577 (2014).

Here, the Defendant indicated that it did not dispute the facts presented by OR-OSHA or the determination and calculation of the proposed penalty. Rather,

¹ Defendant, during an August 2013 jobsite safety inspection, cited employee Aurelio Antonio Rebolla for no anchors and issued a written warning and imposed one day off as discipline. (Ex. 11.)

the Defendant argued that the lead person, Antonio Martinez, engaged in employee misconduct in not directing the other employees to use fall protection.

The defense of unpreventable employee misconduct requires "that the violative conduct of the employee was idiosyncratic and unforeseeable." *L.E. Meyers Co.*, 1993 OSAHRC LEXIS 38. In order to prevail on this defense, Defendant must prove that: (1) it has work rules designed to prevent the violation; (2) it has adequately communicated those rules; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations were discovered. *Burford's Tree, Inc.*, 2010 OSAHRC LEXIS 1.

Here, even if I were to assume *arguendo* that Defendant established the first three elements, it did not prove that it has effectively enforced the rules when violations were discovered. The Defendant's disciplinary policy provides that immediate termination will result from all fall protection violations. However, the documentary record and Mr. Leak's testimony established that both Mr. Martinez and Mr. Almos had two prior fall protection violations preceding the violations at issue here. Additionally, when Mr. Rebolla was disciplined in August 2013 for no roof anchors, he received a written warning and one day off. (Ex. 11.) As the record established fall protection violations for three employees but contained no evidence these employees were immediately terminated per the Defendant's disciplinary policy, I am unable to conclude Defendant effectively enforced its rules when violations were discovered. Accordingly, the unpreventable employee misconduct defense is not applicable to Defendant.

In sum, as Defendant did not dispute any of the facts presented by OR-OSHA or the determination and calculation of the proposed penalty, I am persuaded that on this record OR-OSHA met its burden of proof regarding the Citation at issue. Consequently, because the Defendant did not prevail on the unpreventable employee misconduct defense, I affirm.

ORDER

The August 29, 2013 Citation and Notification of Penalty alleging one violation with total proposed penalties of \$7,000 is affirmed.

NOTICE TO ALL PARTIES: You are entitled to judicial review of this Order. Proceedings for review are to be instituted by filing a petition in the Court of Appeals, Supreme Court Building, Salem, Oregon 97301-2563, within 60 days following the date this Order is entered and served as shown hereon. The procedure for such judicial review is prescribed by ORS 183.480 and ORS 183.482.

Entered at Salem, Oregon, on **March 31, 2016**, with copies mailed to:

Workers' Compensation Board

/s/ Gregory J. Naugle

Gregory J. Naugle

Administrative Law Judge