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STATE OF ALASKA,
DEPARTMENT OF LABOR,

Complainant,

v.

GENERAL ROOFING COMPANY,

Contestant.

Docket No. 93-975
Inspection No. Sa-9589-236-93

DECISION AND ORDER

General Roofing Company contests a citation issued by the State of Alaska, Department of Labor ("Department") following an occupational safety and health inspection at 5700 Lake Otis Parkway, Anchorage, Alaska, on March 31, 1993.

The Department's citation alleges that General Roofing violated Construction Code 05.240(d)(1) by failing to protect employees from fall hazards during roofing work on two three-story buildings. The violation was classified as "serious" and a monetary penalty of $125 was assessed.

General Roofing timely contested the Department's citation. A hearing was held before the Board in Anchorage on November 17, 1993. The Department was represented by Assistant Attorney General Toby Steinberger. General Roofing was represented

by its owner Glenn Smart. The parties presented witness testimony, documentary evidence and argument. Upon consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order in this matter.

FINDINGS OF FACT

1. On March 31, 1993, Department Compliance Officer Danny Sanchez conducted an occupational health and safety inspection of a worksite under the control of General Roofing Company at 5700 Lake Otis Parkway, Anchorage, Alaska.

2. General Roofing was performing repairs on the roofs of two three-story apartment buildings that had sustained wind damage.

3. The roofs in question had a pitch of less than 4 in 12 and qualified as "low-pitched roofs" under the Construction Code.

4. Sanchez estimated the ground-to-eave height of the roofs at approximately 23 feet.

5. General Roofing had approximately eight employees at the worksite. The employees were removing old damaged shingles and tar paper, applying a layer of felt over the roof deck, and installing new shingle roofing containing mineral aggregate.

6. Parts of the roofs were covered with snow.

7. Sanchez did not see any fall protection for the employees working on the roofs. There was no motion-stopping safety system (MSS system) in use, such as guardrails, scaffolds, safety nets or safety belts; there were no warning lines around the perimeter of the work area; and there was no safety observer or other monitoring system to oversee the roofing work.

8. Sanchez spoke to two employees at the worksite who told him they had been provided with safety belts by General Roofing but had not been required to wear them because the work was on low-pitched roofs.

9. After Sanchez brought the alleged violation to the attention of General Roofing owner Glenn Smart, the two employees were instructed to put on their safety belts.

10. Smart testified that he provided safety belts and harnesses to his employees but that he was not in a position to constantly monitor the employees and could not force them to use the equipment.

11. The alleged violation was classified as "serious" because there were approximately eight employees working on the roofs on a daily basis and in the Department's view there was a high risk of serious injury or death in the event of a fall from the roofs.

12. Relying on the Department's penalty assessment guidelines, an initial penalty of $2,500 was calculated based on

the probability and severity of an injury occurring as a result of the cited hazard. The initial penalty was reduced by 60% due to the employer's small company size; by an additional 25% for the employer's good faith in immediately abating the hazard; and by an additional 10% because the employer had no recent history of safety violations. Thus the penalty actually assessed against General Roofing was $125.

CONCLUSIONS OF LAW

Construction Code 05.240(d)(1) provides:

> General Provisions. 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:
>
> > (A) By the use of a motion-stopping safety system (MSS system); or
> >
> > (B) By the use of the warning line system erected and maintained as provided in paragraph (d)(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
> >
> > (C) By the use of a safety monitoring system on roofs 50 feet (15.25 meters) or less in width (see Appendix A) where mechanical equipment is not being used or stored. When a safety monitoring system is used, the person doing the

> monitoring must be on the same roof as and within visual sighting distance of the employees, and must be close enough to verbally communicate with the employees.

Construction Code 05.240(h)(1) defines "built-up roofing" as

> a weatherproofing cover, applied over roof decks, consisting of either a liquid-applied system, a single-ply system, or a multiple-ply system. Liquid-applied systems generally consist of silicone rubber, plastics, or similar material applied by spray or roller equipment. Single-ply systems generally consist of a single layer of synthetic rubber, plastic, or similar material, and a layer of adhesive. Multiple-ply systems generally consist of layers of felt and bitumen, and may be covered with a layer of mineral aggregate.

Construction Code 05.240(h)(2) defines "built-up roofing work" as

> the hoisting, storage, application, and removal of built-up roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck.

To prove an occupational safety and health violation, the Department must demonstrate by a preponderance of the evidence that 1) the cited standard applies to the cited employer; 2) there was a failure to comply with the cited standard; 3) one or more employees were exposed to the condition cited; and 4) the cited employer knew or could have known of the cited condition with the

exercise of reasonable diligence. See Rothstein, Occupational Safety and Health Law § 102, at 138-39 (3rd ed. 1990).

We must first determine whether the standard cited by the Department applies to the roofing work performed by General Roofing. There is no dispute that General Roofing was working on "low-pitched roofs with a ground to eave height greater than 16 feet." There was some question, however, about whether the work performed by General Roofing qualified as "built-up roofing work" subject to the requirements of the Construction Code 05.240(d)(1). On this issue, compliance officer Sanchez testified that General Roofing employees were applying a "multiple-ply system" consisting of a layer of felt over the roof deck covered with a layer of shingles containing mineral aggregate. This evidence was not contradicted by General Roofing. Moreover, compliance supervisor Dennis Smythe testified that several years earlier the Department had obtained an opinion from federal OSHA that Construction Code 05.240(d)(1), which is based on a similar federal standard, applied to shingle roofing work. On the basis of the above evidence, therefore, we conclude that the work performed by General Roofing was "built-up roofing work" subject to the requirements of Construction Code 05.240(d)(1).

We next address whether General Roofing failed to comply with the specific fall protection requirements in Construction Code 05.240(d)(1). The uncontroverted evidence shows

that at the time of the inspection 1) there was no use of an MSS system such as guardrails, scaffolds, safety nets or safety belts; 2) there were no warning lines around the perimeter of the work; and 3) there was no safety monitoring system in place. Accordingly, we conclude that General Roofing failed to comply with the cited standard.

The evidence further demonstrates that eight employees of General Roofing had access to or were working on the roofs without fall protection, and that some of these employees were working near the edge of the roofs. Thus the employee exposure requirement has been satisfied. Further, we conclude that the cited condition was open and obvious and that the employer had ample notice of the cited condition. Accordingly, we find the Department has satisfied its burden of proof to establish a prima facie case violation of the cited standard.

We now turn to the defenses and objections raised by General Roofing. Owner Glenn Smart contends that he provided safety belts and other safety equipment to his employees but that they chose not to use the equipment. Smart asserts that he cannot monitor his employees all of the time and that they are primarily responsible for their own safety. We reject this argument. The OSHA Act places primary responsibility for complying with applicable safety requirements on the employer, not on individual employees. AS 18.60.075 specifically states that "An employer

shall do everything necessary to protect the life, health and safety of employees..."(emphasis added). In this case, there is no evidence that General Roofing had a policy, communicated to its employees, requiring the use the safety equipment and providing for disciplinary action for failure to do so. Under these circumstances, we find that the recognized defense of "employee misconduct" has not been established. See Rothstein, supra, § 117 at 160-65.

General Roofing also argues that it has a good safety record, conducts regular safety meetings and promptly abated the hazard upon being notified of the violation. However, these factors do not serve to excuse General Roofing from liability for the violation. Rather, they are mitigating circumstances that may be taken into consideration in reducing the monetary penalty assessed. See Rothstein, supra, § 334 at 359-61. We find the Department did consider these factors in awarding General Roofing the maximum penalty reduction allowable for good faith and prior history (see Exhibit 2). We find no basis to make any further adjustment to the penalty assessed by the Department.

General Roofing made a number of other objections concerning, among other things, the qualifications and credentials of the compliance officer; the authority of the Department to conduct the inspection; and the admissibility of the Department's videotape of the inspection. We find no merit in any of these

objections. Lastly, General Roofing made an argument based on the Uniform Commercial Code which we find inapplicable and beyond the scope of this proceeding.

ORDER

1. Citation 1 is AFFIRMED as a "serious" violation.

2. The assessed penalty of $125 is AFFIRMED.

DATED this 10TH day of March, 1994.

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Wayne A. Gregory, Chairman

Donald F. Hoff, Jr., Member