

BEFORE THE ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

STATE OF ALASKA, DEPARTMENT OF LABOR)
AND WORKFORCE DEVELOPMENT, DIVISION)
OF LABOR STANDARDS & SAFETY,)
OCCUPATIONAL SAFETY & HEALTH SECTION,)
)
Complainant,)
)
vs.)
)
RAIN PROOF ROOFING)
)
Contestant.)
_____)

Docket No. 19-3041
Inspection No. 1351934
OAH No. 19-0061-OSH

DECISION AND ORDER

I. Introduction

On October 9, 2018 two Rain Proof Roofing (Rain Proof) employees were retiling and reshingling the multiple roofs of the Baha’i National Center in Anchorage, Alaska. Representatives from Alaska Department of Labor and Workforce Development, Division of Labor Standards and Safety, Occupational Safety and Health Section (Division) arrived on site and determined that a Rain Proof employee was working on a roof without proper fall protection. When directed by the Division inspector to come down to speak with him, the employee descended the roof by jumping onto a mobile scaffold, which lowered him to the ground. The Division determined that a requisite ladder or stairway had not been provided, allowing the employee to descend more safely. The Division issued Rain Proof two citations based on these violations of occupational safety and health standards, as well as a third citation requiring mandatory retraining on these standards for both the employee on the roof and the on-site foreman. Rain Proof filed notice that it was contesting the citations and the case was set for a hearing before the Occupational Safety and Health Review Board (Board).

After the hearing concluded the Board members met and discussed the evidence and arguments presented in the case. After careful consideration, the Board unanimously concluded that all three citations are to be vacated.

II. Factual History

On October 9, 2019, the Division received an anonymous tip that workers were seen on a roof without fall protection. Jim Pinder, a Certified Safety and Health Official, and Ron Larsen, then Assistant Chief of Enforcement,¹ responded by driving to 13501 Brayton Drive, the Baha'i National Center in Anchorage, Alaska.² They pulled in to the driveway behind the building and observed a worker on one of the low sloped roofs of the building, and another worker on the ground, next to a truck with a mobile scaffold raised to the level of the roof.³

Mr. Pinder presented his credentials and introduced himself to the worker on the ground, Nathan Wenger, the site foreman. He directed the worker on the roof, Taylor Brink, to come down and speak with him. Having work camera in hand, Mr. Pinder took a picture of Mr. Brink descending by jumping from the roof to the bed of the work truck, which had been raised to the level of the roof via a scissor scaffold. He was then lowered to the ground. At the time Mr. Brink was on the roof he had no fall protection in place, namely guardrails, safety nets, a warning line, or a personal fall arrest system.

Mr. Pinder advised the two employees that he was going to conduct a partial walk-around inspection of the worksite. Mr. Wenger was permitted to call his supervisor, Adam Hartman, and Human Resources Manager, Misty Stoddard, both of whom arrived shortly thereafter. Mr. Pinder recorded the height of the low slope roof where Mr. Brink had been standing as 8 feet, 2 inches from the ground to the first tile.⁴ The slope of the roof measured 41 inches.⁵ Mr. Pinder did not make any additional measurements, namely the pitch of the roof or the distance of the bed of the lift from the roof when the scaffold was extended. He noted that there were no ladders provided against the roof where Mr. Brink had been standing. He did not continue his inspection around to the front of the building. He concluded his inspection by speaking individually with Mr. Wegner and Mr. Brink. After returning to the office he also solicited - and received -

¹ Mr. Larsen has since been promoted to the position of Chief of Enforcement.

² Initially, Pinder and Larsen responded to the wrong address and had to return to the office for clarification. The citation issued by the Division lists the cite address as "3836 Westwind Ct, Anchorage," which is a private residence. It is presumed in this decision that this is a mistake, as the Baha'i National Center as depicted in the Division exhibits is located at 13501 Brayton Drive in Anchorage.

³ Pinder testimony, Larsen testimony, Division Ex. 1, p. 4.

⁴ Division Ex. 7, 8.

⁵ Division Ex. 9, 10, 11, Pinder testimony.

copies of Rain Proof's workplace safety logs and jobsite addresses, and proof that both Mr. Wegner and Mr. Brink had received fall protection training.

Several months later, in January of 2019, the Division issued Rain Proof three citations under 29 CFR 1926.501(b)(10), 29 CFR 1926.1051(a), and 29 CFR 1926.1060(b) for Mr. Brink's failure to wear fall protection, for the absence of a ladder, and for the employees' lack of adequate training regarding stairways and ladders as seemingly as evidenced by these worksite oversights. Rain Proof filed notice that it was contesting the violations.

III. Procedural History

A formal telephonic hearing regarding this matter was held before Board members Tom Trosvig and Vincent Perez over the course of two days, July 7-8, 2020. The hearing was audio-recorded. Rain Proof Roofing and the Division were represented by Jeff Robinson and Charles Brasington, respectively. Testimony was taken from Certified Safety and Health Official Jim Pinder, Chief of Enforcement Ron Larsen, Human Resources Manager (and Rain Proof co-owner) Misty Stoddard, Superintendent Adam Hartman, Foreman Nathan Wenger, and Shingler/Roofer Taylor Brink. The record closed at the conclusion of the hearing.

IV. Discussion

A. Standard of Proof

The Legislature has established occupational safety and health standards and regulations largely by adopting the federal standards.⁶ If a violation of a standard is identified, then the Division 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.⁷

⁶ See AS 18.60.075(a)(1).

⁷ See Mark A. Rothstein, *Occupational Safety and Health Law*, § 102 (4th ed. 1998); see also 8 AAC 61.205(i) (burden of proof for citations and penalties is on the department [division] by a preponderance of the evidence).

B. Duty to have fall protection

The first citation issued to Rain Proof by the Division was based on the following regulation:

Duty to have fall protection, 29 CFR 1926.501(b)(10)

“Roofing work on Low-slope roofs.” Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. []

There is little dispute between the parties that the cited application applies to Rain Proof as a roofing company, or the Baha’i roofing project at the center of this matter.⁸

1. The Division’s evidence in support of the citation

Through his worksite inspection on October 9, 2018, Mr. Pinder determined that the height of the roof of the Baha’i center where Mr. Brink was seen standing was 8 feet, 2 inches from the ground to the first row of tiles and had unprotected sides.⁹ Since Mr. Brink was not wearing any fall protection, nor was any installed, he was exposed to the danger of falling off the roof and suffering significant injury. Mr. Wenger, a Rain Proof employee and the foreman on the job, testified that he raised Mr. Brink up to the roof by lifting the bed of the truck via a scissor lift, which allowed the vehicle to also function as mobile scaffolding. He testified that he was aware that Mr. Brink was on the roof without fall protection.

2. Rain Proof’s affirmative defense

In response, Rain Proof proffers an affirmative defense, which effectively shifts the burden of proof. Rain Proof must establish by a preponderance of the evidence that

⁸ Mr. Larsen admitted that the pitch of the roof was never measured. Therefore, it was never established that the roof was “low-slope,” which is defined under 1926.500(b) as “a roof having a slope of less than or equal to 4 inches of vertical rise for every 12 inches horizontal length.” Clearly the Division has the capacity to measure pitch as evidenced by Division Ex. 22, a photo of this measurement taken at a different worksite. Regardless, at the hearing Rain Proof did not pursue this argument, and this decision presumes that the Baha’i roof was “low-slope” as seemingly accepted by the parties.

⁹ Pinder testimony. See also Division Ex. 7,8.

Mr. Brink’s actions fall under an “inspection exception” provided by 29 CFR 1926.500(a)(1). The standards states,

[T]he provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of the workplace conditions prior to the actual start of construction work or after all construction work has been completed.

Rain Proof asserts that Mr. Brink was on the roof solely to determine where to install anchor points for the requisite fall protection, and that no shingling or tiling work had begun.

The Division argues that the exception does not apply as it is restricted by time and activity, and that work had commenced on the Baha’i roof weeks earlier. It is only at the very start or at the completion of the project, the Division avers, that the Rain Proof employees could assess the workplace conditions without fall gear under the inspection exception. The project was in neither stage; portions of the roof were completed, as evidenced by photos submitted into the record, while others were unfinished, indicating the project was ongoing. Photos taken by Mr. Pinder show Mr. Brink wearing knee pads, there was a pile of shingles on the roof very near to where Mr. Brink was standing, and a small wooden ladder was propped up between two levels of the roof – all signs that work had already begun in the area that Mr. Brink was assessing.¹⁰ Inspecting the workspace, the Division therefore insists, was untimely.

The Division cites to the Federal Register in asserting that inspection is an activity restricted in time.¹¹ Under the standard established there, an inspection should be sufficiently brief that an individual can accomplish the task without going near a “danger zone,” and the assessment should be able to be completed in a shorter amount of time than would be needed to install fall protection.¹² The Division argues that as Mr. Brink jumped into the bed of the truck from the roof he was exposed to the roof’s edge, which is inherently a “danger zone.” Additionally, Mr. Brink was on the roof from the time the Division received an anonymous tip regarding “workers on a roof” until the time the

¹⁰ Division Ex. 12.

¹¹ Division’s Prehearing Brief, p. 10.

¹² *Id.*

Division arrived, meaning his exposure to a fall hazard far exceeded the brief duration contemplated by the inspection exception.

The Division is misguided. While it is correct that inspection is expected to last only a “short duration,” OSHA has consistently rejected specifying an acceptable time span for a worker to be exposed to a fall hazard.¹³ Regarding the duration of Mr. Brink’s exposure, Mr. Pinder testified that after his office received the anonymous report that “workers” were on a roof without fall protection he and Mr. Larsen arrived at the Baha’i center approximately half an hour later.¹⁴ From the road he saw the bed of the truck was initially lowered, but when he and Mr. Larsen pulled in to the back of the building, it had been raised to the level of the roof.¹⁵ Mr. Wenger was standing right next to the truck, near the cab, where the scaffolding controls are located.¹⁶ This dovetails with the credible testimony of Mr. Brink and Mr. Wenger, both of whom explained that immediately prior to the arrival of Mr. Pinder they had just finished tiling a roof on another side of the Baha’i building. They drove the truck around to the back of the building and Mr. Wegner raised Mr. Brink up to the roof moments before the arrival of the Division.¹⁷ Mr. Brink testified that he had not yet even begun the inspection; he had only been on the roof for approximately 15 seconds prior to their arrival. Mr. Wegner estimated it was 30 seconds. Regardless whether Mr. Brink was actually inspecting the roof or simply just stepping off the mobile scaffold, he was clearly exposed to a fall hazard for an exceedingly short duration.

Regarding the activity restriction, both Rain Proof employees also testified that Mr. Brink ascended to the roof to evaluate where to place anchor points for the fall protection, not to perform any work. As the Baha’i roofing project was several weeks in duration and involved multiple roofs of varying heights and slopes on different sides of the building, the Rain Proof employees opted to evaluate each work space individually as

¹³ United States Department of Labor, Occupational Safety and Health Administration, Interpretation of OSHA Fall Protection Exemption (29 CFR 1926.500(a)(1)) during inspection, investigation and assessment activities, Standard Number 1926.500; 1926.500(a)(1), Letter # 20091112-9340 available at <https://www.osha.gov/laws-regs/standardinterpretations/2010-03-02-1>.

¹⁴ Pinder testimony.

¹⁵ Pinder testimony.

¹⁶ *Id.* See also Division Ex. 2.

¹⁷ Wegner and Brink testimony.

they completed every roof in progression.¹⁸ It would have been inefficient and cumbersome to attempt to assess and record the fall protection needed for every individual project area at the commencement of the entire roofing job. Nor are there any obvious safety benefits to this approach, rather than the piecemeal evaluations conducted by Rain Proof.

Additionally, nothing in the state or federal OSHA regulations specify that an inspection must be conducted before work commences *on an entire project*, which could conceivably last weeks, if not months. Rather, one reason behind allowing an inspection to take place at the beginning of a work project is that there is a lower risk of hazards in part because no work tools or materials are in the workspace.¹⁹

The pictures taken by Mr. Pinder clearly show that the roof where Mr. Brink was standing was devoid of any tools, hoses or other equipment.²⁰ Safety harnesses, hoses for pneumatic tools, piles of shingles, tool belts and a set of knee pads are still piled in the bed of the Rain Proof work truck.²¹ Mr. Brink testified that he could not shingle a roof without his tool belt and tools, neither of which he had when he was photographed on the roof. Mr. Pinder admitted that he did not see anyone carrying the bundle of shingles up to the roof that he seen near where Mr. Brink was standing. Mr. Wegner testified that he and Mr. Brink wore knee pads all day, every day, so the fact that Mr. Brink was wearing his was not a conclusive indication that any work had begun. Mr. Larsen testified that an employee of the Baha'i National Center exited the building when they were there and reported that the wooden ladder propped up between the two levels of the roof belonged to the Center was not set up by Rain Proof employees.

Finally, the assertion that Mr. Brink was near a “danger zone” when he jumped onto the truck bed from the roof and that therefore his assessment of possible anchor points for fall protection should not fall under the inspection exception is without merit. Any individual ascending to a roof by way of a scaffolding or a ladder is exposed to the

¹⁸ *Id.*

¹⁹ United States Department of Labor, Occupational Safety and Health Administration, Interpretation of OSHA Fall Protection Exemption (29 CFR 1926.500(a)(1)) during inspection, investigation and assessment activities, Standard Number 1926.500; 1926.500(a)(1), Letter # 20091112-9340 available at <https://www.osha.gov/laws-regs/standardinterpretations/2010-03-02-1>.

²⁰ Division Ex. 6.

²¹ Division Ex. 13.

roof edge, at some point. The exception refers to inspections, not to means of ascent or descent, which are governed by distinct regulations.²² There was no evidence presented at the hearing that Mr. Brink was exposed to a “danger zone” in the course of his assessment of possible anchor points for fall gear, as he testified credibly that he was only on the roof momentarily before the arrival of Mr. Pinder and had not yet begun his assessment of the workspace.

In short, Mr. Brink was on the roof of the Baha’i National Center without proper fall gear in violation of 29 CFR 1926.501(b)(10). However, as he was on the roof very briefly and solely to assess possible anchor points for the use of fall gear in the workplace where he and Mr. Wegner would next be installing shingles, his lack of fall gear is excused under the inspection exception set forth in 29 CFR 1926.500(a)(1). The citation is therefore vacated.

C. Failure to provide ladders

The second citation issued by the Division is based on 29 CFR 1926.1051(a), which reads as follows:

A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

As the legal burden remains the same, to prevail on this citation the Division must prove by a preponderance of the evidence that (1) this was a worksite where the regulation is applicable; (2) Rain Proof did not comply; (3) Mr. Wegner and/or Mr. Brink were exposed to the absence of a stairway or ladder; and (4) Rain Proof knew or could have known of the absence of a ladder with the exercise of reasonable diligence.²³

At the hearing, the Division’s primary argument was that the photo submitted into the record of Mr. Brink jumping from the roof was inherent proof that he was descending from the roof unsafely, in violation of both the spirit and the substance of the regulation regarding stairways and ladders.²⁴ In the picture there is clearly a space between the bed of the truck and the roof, presenting the risk of Mr. Brink falling to the ground and

²² See 29 CFR 1926.1050.

²³ See Mark A. Rothstein, *Occupational Safety and Health Law*, § 102 (4th ed. 1998).

²⁴ Pinder admitted at the hearing that he would not have issued any citations in this matter had he not captured Brink on camera jumping to the bed of the truck.

suffering serious physical injury. He jumped from the roof as there was no ladder or stairway provided, as required by the regulation. Additionally, the mobile scaffolding was deficient as it was missing two metal section forming the walls of the bed.

But the Division's arguments fall short of reaching the threshold of a "preponderance of the evidence," as the inspection displayed a lack of due diligence. As a threshold matter, it is unclear that the regulation is even applicable, as no measurements were ever taken regarding the distance of the scaffold from the roof, so it was not established that there was a requisite break in elevation of 19 inches or more. Presuming, however, that the break did exceed 19 inches or that the Division is basing the citation on the break in elevation between the roof and the ground, proving the remaining elements of the regulation remains problematic.

First, Mr. Pinder acknowledged that he only performed a partial, not full, inspection of the worksite. Although the regulation is silent regarding *where* a ladder must be provided in relation to a mobile scaffold, Mr. Pinder did not bother to circumnavigate the building to check for ladders and document his observations. Mr. Larsen, who was participating in his first inspection and was accompanying Mr. Pinder largely to observe, walked to the front of the building and testified that he saw a "ladder scaffold" set up. But few details were offered at the hearing regarding the ladder scaffold, as Mr. Pinder did not inspect it, nor were any photos submitted.

Second, the Division relies on the intent of the regulation – ensuring that workers access and exit a roof safely – by claiming that while ladder scaffolding may have been available in the rear of the building, it would have been inherently too dangerous to access from where Mr. Brink was seen standing. However, Mr. Pinder never explained, nor is it specified in the preamble to the ladder regulation, why it would be safer to have both a mobile scaffold available as well as a ladder. Presumably, a mobile scaffold that meets OSHA regulations could provide an equally safe entry and exit point as a ladder.

Additionally, considering the underlying motivation of OSHA regulations and their enforcement is ultimately the safety of workers, Mr. Wegner testified that after Mr. Pinder arrived on the worksite and identified himself as an OSHA inspector, he immediately directed Mr. Brink to get off the roof in "a raised voice and aggressive

tone.”²⁵ Mr. Brink testified that the command scared him, causing him to panic and quickly jump back on to the bed of the truck to be lowered to the ground. Mr. Pinder’s own conduct belies a commitment to safety protocol, as he did not first check to make sure a ladder was available to Mr. Brink, or order that one be provided. Instead, issuing a directive that was at best startling compelled Mr. Brink to jump off the roof, an action the Division now unfairly claims was due to his lack of training, if not also poor judgment.

Finally, the Division’s argument that Mr. Brink’s jump to the bed of the mobile scaffold was unsafe has little relevance to 29 CRF 1926.1051(a), which addresses situations where a ladder must be provided at a worksite. It is puzzling that the Division did not base this citation under a different regulation, or Section 5(a)(1) of the OSHA Act (also called the “General Duty Clause”). The clause is implicated when there is no standard that applies to a perceived violation, which is deemed a “recognized serious hazard” that the employer did not take reasonable steps to prevent or abate. The Division seemingly overlooked or rejected an alternate charging decision from the very start of the inspection, as evidenced by the fact that no measurements were taken at the worksite of the distance of the mobile scaffold from the roof when Mr. Brink jumped. The single photo provided is taken from an angle, forcing the Board to either estimate the distance of the gap, or, alternatively, “apply the Pythagorean Theorem,” as suggested by the Division. Neither option is viable or appropriate, and the failure to better document the gap and/or pursue a violation under a more applicable regulation represents another lack of due diligence by the Division.

In short, the Division failed to prove by a preponderance of the evidence the justification for the second citation regarding the lack of a requisite ladder as specified under 29 CRF 1926.1051(a). The inspector did not walk around the building to ascertain that ladders were not available either prior to ordering Mr. Brink to get off the roof, or immediately thereafter when documenting the worksite. The Division’s reliance on the picture of Mr. Brink jumping as sufficient evidence that a violation happened is misguided, as the citation at issue was based on a regulation regarding ladders, not, for example, general workplace safety or a regulation specific to mobile scaffolds. Therefore, the second citation is vacated.

²⁵ Wenger testimony.

D. Failure to provide retraining regarding the proper use of ladders and stairways

The third and final citation at issue is based on 29 CRF 1926.1060(b), which addresses training programs specific to ladders and stairways and reads in relevant part:

Retraining shall be provided for each employee as necessary so that the employee maintains the understanding and knowledge acquired through compliance with this section.

As the citation issued under 29 CRF 1926.1051(a), the ladder regulation, is vacated, mandatory retraining is not applicable and this citation is also vacated.

V. **Conclusion**

The Division did not establish violations of 29 CFR 1926.501(b)(10), 29 CFR 1926.1051(a), and 29 CFR 1926.1060(b). In objection to the first citation regarding a failure to use requisite fall protection, Rain Proof Roofing effectively raised and proved by a preponderance of the evidence that its employee was not working on the roof, but just performing an inspection and thus his actions fall under a fall protection exemption. The second citation regarding the absence of a ladder was not proven by a preponderance of the evidence by the Division as the inspection lacked appropriate due diligence. And due to the dismissal of the prior two citations, the final citation regarding retraining requirements is no longer applicable. The Division's citations are VACATED.

VI. **Right to Appeal**

A person affected by an order issued by the Board may obtain judicial review of the order by filing a notice of appeal in the Superior Court as provided in the Alaska Rules of Appellate Procedure.²⁶ The notice of appeal must be filed in the Superior Court within 30 days from the date that the decision appealed from is mailed or otherwise distributed to the appellant.²⁷ If a notice of appeal is not timely filed, the order becomes final and is not subject to review by any court.

Dated: 8/6/20, Occupational Safety and Health Review Board

Signed

Vincent Perez, Chairperson

Signed

Thomas Trosvig, Member

[This document has been modified to conform to the technical standards for publication.
Names may have been changed to protect privacy.]

²⁶ AS 18.60.097, Rule of Appellate Procedure 602(a)(2).

²⁷ *Id.*