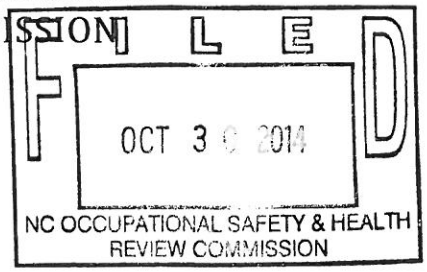
BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF THE
STATE OF NORTH CAROLINA,

Complainant,

317356012

DOCKET NO. OSHANC-2013-5544
OSHA INSPECTION NO. 317356012

CSHO ID: D9827

vs.

BAKER ROOFING COMPANY
and its successors

ORDER

Respondent.

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on July 31, 2014, at the Lee House, 2nd Floor Hearing Room, 422 North Blount Street, in Raleigh, North Carolina.

The Complainant was represented at the hearing by attorney Jason Rosser, Assistant Attorney General, North Carolina Department of Justice and the Respondent was represented by attorney Michael Lord, Williams Mullen PC.

FINDINGS OF FACT

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of N.C. Gen. Stat. § 95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the "Act").

2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about December 20, 2013, contesting a citation issued on November 23, 2013 to Respondent, Baker Roofing ("Respondent" or "Baker Roofing").

3. Respondent, Baker Roofing, is a North Carolina corporation, duly organized and existing under the laws of the State of North Carolina, which does business in the State of North Carolina, subject to the provision of the Act (N.C. Gen Stat § 95-128 and 129) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10). Respondent maintains a place of business in Wilmington, North Carolina and employs 695 workers overall and 4 people were employed at the worksite at the time of the accident.

4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).

5. On September 25 and 26, 2013, Compliance Safety and Health Officer, Ulysses Slade, ("CSHO Slade") inspected Respondent's worksite at the New Hanover County Main Public Library in Wilmington, NC ("site") pursuant to self-referral after observing Respondent employees working on a canopy/roof-like surface "surface" at the site while on his way back to the office from another investigation.

6. CSHO Slade properly entered the site and showed Michael Evans, foreman for Respondent, his credentials. Evans contacted Tony Hunt, Respondent's Construction Superintendent and then granted CSHO Slade permission to inspect the site.

7. At the time of the inspection, Respondent was removing built-up tar/asphalt and installing TPO, a type of plastic on the surface.

8. Evans testified that the roofing materials were the same as Respondent used on other sites.

9. As a result of plain view site hazards, CSHO Slade conducted an opening conference with Evans.

10. CSHO Slade took photographs as he approached the site (See Exhibit A1-A3) and later interviewed Respondents' employees.

11. CSHO Slade conducted a closing conference with Tony Hunt ("Hunt") at the completion of the inspection at the site CSHO Slade recommended that citations be issued.

12. As a result of the recommendations of the compliance officer, on November 21, 2013 the Complainant issued a repeat serious citation and a nonserious citation as follows:

Citation 1 Item 1a: Repeat Serious

Citation 1, Item 1a alleges a serious violation of 29 CFR 1926.501(b)(1): "Employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8) or more above a lower level were not protected from falling by the use of guardrail systems, safety net systems or personal fall arrest system.

13. As CSHO Slade drove up to the site, he observed and photographed Evans and Mike Schroder on the surface, and Jose Hernandez seated on a box on the ground, as depicted in the Complainant's photograph A2.

14. CSHO Slade took measurements, and determined that the surface was 11feet high from the ground level, with no supporting guardrails.

15. The surface Respondent employees were working on was flat and the width was less than 50 feet.

16. Before any work was performed, the fall hazard at the site was discussed with Robert Hudson, Respondent's vice president of environmental health and safety.

17. Hudson testified that they used a safety monitor as a fall protection system for a low sloping roof under 1926.501(b)(10).

18. Evans and Hudson determined that the use of guardrails was not feasible because of the trees and pole and the site; the lanyard was not feasible because after it stretches, the fall distance would be greater than the height of the roof; if a retractable was used, the employee would hit the ground and then be pulled back up; a safety net was not feasible because the space was too tight; and they decided to use to safety monitoring system as fall protection.

19. CSHO Slade also determined that Respondents' employees who were working on the surface other than a roof, had a safety monitor system in place, but were not using safety net systems or personal fall arrest systems.

20. On September 26, 2013, one of Respondents' employees fell from the surface while he was removing large

sections of asphalt, after his glove got caught on a nail. The fall did not make recordable status.

21. Respondent provided anchors/retractables as fall protection after the fall on September 26, 2013, but still used a safety monitor.

22. Without fall protection, there was a possibility of an accident resulting from employees working on the surface 11 feet above the ground; the substantial probable result of falling 11 feet to a cement surface is death.

23. Use of fall protection would have reduced or eliminated the fall hazard.

24. Respondent knew of the hazardous condition in that Respondent's foreman and superintendent were involved in making the decision to use a safety monitoring system.

25. CSHO Slade determined that this was a repeat violation based on the following: a similar previous citation issued in 2011 alleging Respondent violated §1926.501(b)(10), (See Respondent's Exhibit B), the informal settlement agreement (See Respondent's Exhibit C), and the inspection detail (See Respondent's Exhibit D).

26. CSHO Slade found the severity to be high, the probability low, and accessed a Gravity based penalty of $10,000. He applied 10% credit for cooperation proposed an adjusted penalty in the amount of $9,000. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.

27. CSHO Slade had no personal knowledge of the previous citation.

28. In this case, the Respondent was cited under 29 CFR 1926.501(b)(1) referring to the surface Respondent employees were working on as a "canopy" . The possible fall distance was 11 feet.

29. In the prior case, the Respondent was cited under 29 CFR 1926.501(b)(10) where Respondent employees were working on a low slope roof. The possible fall distance ranged from 13'9" to 16'5".

30. The second violation took place over 2 ½ years after the first violation.

31. The previous citation involved a different location, different crew members, different work surfaces and different systems.

"Canopy" v. "Roof" Discussion

Complainant referred to the surface Respondents' employees were working on as a "canopy", not a "roof" and therefore issued a citation to Respondent under §1926.501(b)(1). This section refers to the surface in question as a "walking working surface". The regulations define walking/working surface as a surface, whether horizontal or vertical on which an employee walks or works, **including**, but not limited to, floors, **roofs**, ramps, bridges, runways, formwork and concrete reinforcing steel, but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties. A "roof", as defined by the standards, is the exterior surface on the top of a building. A low-slope roof is defined as a roof having a slope of less than or equal to 4 in 12 (vertical to horizontal). Canopy, while not defined by the standards, is a **roof-like** projection over a door (Webster's Dictionary)

Respondent on the other hand, argues that the surface its employees were working on at the site was a low slope "roof" and, therefore §1926.501(b)(10) applies. Under this section, use of a safety monitor system, alone, is permitted while doing roofing work on a low-slope roof that is 50 feet or less in width. There is no dispute that the surface in question was flat and less than 50 feet in width. Evans testified that the roofing materials were the same as Respondent used on other sites. Hudson testified that the scope of the project was roofing work and the surface Respondent employees were working on was a continuous part of the roof to keep water off and people going in and out safe. He also testified that the use of a safety monitor, while permitted under the standards, is used by Respondent as a last resort. In fact Evans and Hudson discussed the fall hazards and fall protection prior to having their employees work on the surface in question. They determined that the use of guardrails was not feasible because of the trees and pole and the site; the deck was concrete, so it would be difficult to install anchors on the deck; the lanyard was not feasible because after it stretches, the fall distance would be greater than the height of the roof; a safety net was not feasible because the space was too tight. As a result, they decided to use a safety monitoring system as fall protection.

It's clear that both standards, §1926.501(b)(1) and §1926.501(b)(10), while under different subsections of §1926.50, are designed to protect employees against fall hazards. While (b)(1) contemplates "roofs", based on the definition of a walking working surface to include roofs, (b)(10) is more specific and is titled, "roofing work on low-slope roofs". Admittedly, the surface in question does not squarely fall within the definition of a "roof", in that the surface was not on the "top of the building". However, the court is also not convinced that the surface, made of the same material as a "roof", that Respondent employees were doing

"roofing work on", should not fall under (b)(10). The court is also of the opinion that the key difference between (b)(1) and (b)(10) is that when you have employees working on a surface (still 6 feet or more above the ground), and the width of the surface is less than 50 feet, fall protection, by way a safety monitoring system, is permitted. The court finds that the surface at the site, as a continuous part of the "roof", falls under §1926.501(b)(10). Therefore, Respondent was cited under the incorrect standard and Respondent, using a safety monitoring system as fall protection at the site was not in violation of any standard.

Repeat Serious Discussion

Assuming arguendo that the court found that Respondent was in violation under §1926.501(b)(1), the issue before this court would have been the sufficiency of evidence required to support a finding of a repeat violation. The North Carolina Supreme Court held that a "subsequent violation by the same employer substantially similar to a prior violation or violations is a repeated violation **only if** the employer should have known of the standard by virtue of the prior citation or citations." Brooks, Comm'r of Labor v. McWhirter Grading Co., 303 N.C. 573, 590, 281 S.E.2d at 35-36 (1981). Some factors which "constitute a 'repeated' violation, include: the extent to which the condition was obviously unsafe; the proximity in time since the prior citation; whether the management or key employees have changed between the citations; and the number of times the employer has been cited for the same violation." Brooks, Comm'r of Labor v. Hossiery Mills, OSHANC No, 77-178 at 97 (1977).

Complainant takes the position that they established a prime facie case based on the following law: According

to the Federal Review Commission, "a violation is repeated...if at the time of the alleged violation, there was a Commission final order against the same employer for a substantially similar violation" Secretary v. Potlatch Corporation, 7 BNA OSHC at 1063, 1979 CCH OSHD at para. 28,171 (1979). "Under *Potlatch*, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard. The employer then has the burden of rebutting the evidence of similarity." Secretary v. Stone Container, 14 BNA OSHC 1757, 1990 CCH OSHD at para. 29 (1990). Our Superior Court noted that "the Supreme Court of North Carolina adopted the *Potlatch* definition for a repeated violation, with the admonition that a repeated violation is proved only if the subject employer also knows or should have known of the standard by virtue of prior citations." Comm'r of Labor v. C.P Buckner, OSHANC NO. 89-1666, para. 10 (1993)

However, In Hendrix-Barnhill, this court affirmed a repeat serious violation relying on evidence in the form of an Informal Settlement Agreement, (which became a Commission final order) where Respondent was cited in a previous Citation for this same or similar standard within 3 years, in addition to the testimony of Respondent's VP & Triangle Division Manager stating that he was aware of the previous citation. This Review Commission overruled the Order of this court's conclusion that a repeat serious violation existed, stating that the evidence to support the citation as a repeat violation was "obscure". The Review Commission further concluded that "there would need to be more evidence, including the presentation of witnesses, for this classification to be supported." Comm'r of Labor v. Hendrix-Barnhill, OSHANC 2008-4793 (2010). Therefore, even with a Commission final order, the Complainant still has the burden of proving the two violations are substantially similar. In *McWhirter*, even though the fine was paid in the prior

case and did not involve a Commission final order, the *McWhirter* Court found that prior and current violations were not substantially similar and a repeat violation was "unsupported by substantial evidence". Brooks at 591, 36.

In following *Hendrix-Barnhill* and *McWhirter*, the critical question the court would have had to decide was whether the evidence would support a finding that the prior citation was a ***substantially similar violation,*** in so that the Respondent was aware or should have been aware of the standard by virtue of the prior citation?

The standard in issue, §1926.501, is titled "Duty to have fall protection". Complainant alleged that Respondent violated 29 CFR 1926.501(b)(1) while working on a "canopy" without fall protection 11' above ground level. The prior citation alleged Respondent allowed its employees to work on a low slope roof without fall protection at heights ranging from 13'9" to 16'9" above the ground, in violation of §1926.501(b)(10). "Where the violations were of different subsections of the same standard, the subsequent violation is one which *may* form the basis of a citation for a repeated violation." Brooks at 588, 31.

Complainant introduced, over objection of the Respondent, a copy of previous citations issued to Respondent on April, 08, 2011, over 2 ½ years before the issuance of this citation. The prior citation at issue alleged Respondent allowed its employees to work on a low slope roof in Durham, NC. (See Respondent's Exhibit B). Complainant also introduced the Informal Settlement Agreement (See Respondent's Exhibit C), which became a Commission final order, and the inspection detail (See Respondent's Exhibit D). CSHO Slade, reading from the citations in the previous case, testified that Respondent employees were working on a low slope roof from a height that was 13'9" to 16'5"

above the ground. CSHO Slade, however, had no personal knowledge of the previous citation and Hunt testified that "the previous citation involved a different location, different crew members, different roofs and different systems."

While the Complainant would have established that the violations were ***similar***, in that: (1) the violations were by the same employer; (2) involved a similar standard requiring fall protection; and (3) both involved a fall hazard, following *Hendrix-Barnhill* and *McWhirter,* the evidence presented by Complainant failed to support a finding that the prior citation was a **substantially similar violation,** in so that the Respondent was aware, or should have been aware, of the standard by virtue of the prior citation.

Citation 1 Item 1b: Repeat Serious

Citation 1, Item 1b alleges a serious violation of 29 CFR 1926.20(b)(2): "The employer's safety and health program did not provide for frequent and regular inspections of the job sites, materials, and equipment to be made by a competent person. "

32. Citation 1, Item 1b alleges that an inspection by a competent person was not conducted in that employees were allowed to work on a sidewalk canopy 11 foot high above the ground without fall protection.

33. Evans was the designated competent person at the site for Respondent.

34. As defined by the standards, a competent person means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

35. CSHO Slade determined that Evans was incompetent person having made no provisions for fall protection at the site.

36. Evans completed the 10 hour Occupational Safety & Health Training Course in Construction Safety and Health on January 18, 2013.(See Exhibit R-6)

37. Evans completed daily huddle forms beginning September 23, 2013 through September 27, 2013 which identified potential hazards and addressed the required PPE and practices. (See Exhibits R-1-5)

38. Before any work was performed, the fall hazard at the site was discussed with Robert Hudson, Respondent's vice president of environmental health and safety.

39. Evans and Hudson determined that the use of guardrails was not feasible because of the trees and pole and the site; the lanyard was not feasible because after it stretches, the fall distance would be greater than the height of the roof; a safety net was not feasible because the space was too tight; and they decided to use a safety monitoring system as fall protection.

Citation 2 Item 2: Nonserious

Citation 2, Item 2 alleges a serious violation of 29 CFR 1926.451(b)(2): "Scaffold platforms and walkways were not at least 18 inches wide."

40. Citation 2, Item 2 alleges that the employees were working on a scaffold walk board at a height of 4 feet above a concrete sidewalk which was 12 inches wide in violation of 1926.451(b)(2).

41. 1926.451(b)(2) covers scaffold platforms and walkways.

42. Respondent set up a scaffold ladder at the site under 1926.452(n).

43. Respondent was using two 8' frame ladders connected by a 24x12" wide board as a scaffold ladder at the site. (See Exhibits E1-E2)

44. Respondent used the two opposing A frame ladders, which has 4 points of contact with the group for stability, and connected it with the scaffold board for safer ingress and regress.

45. The space on an A frame ladder is less than 18" and does not allow for an 18" scaffold to connect the ladders.

46. This platform ladder scaffold is not unique to the industry and is the preferred method for working at that height. Respondent has used this set up for 7 years.

47. Even 1926.451(b)(2)(1) permits ladder jack scaffolds, top plate bracket scaffold, roof bracket scaffold, and pump jack scaffolds to be 12" wide.

Conclusions of Law

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. Respondent is subject to the provisions and jurisdiction of the Act.

3. Complainant failed to prove by a preponderance of the evidence and substantial evidence that the Respondent failed to use proper fall protection at the site and Citation 1, Item 1a alleging a repeat

serious violation of 29 CFR §1926.501(b)(1) is hereby dismissed.

4. Complainant failed to prove by a preponderance of the evidence that Evans was an incompetent person and Citation 1, Item 1b alleging a serious violation of 29 CFR §1926.20(b)(2) is hereby dismissed.

5. Complainant failed to prove by a preponderance of the evidence that Respondents scaffold ladder set up under 1926.452(n) was a nonserious violation of 29 CFR §1926.451(b)(2) and Citation 2 Item 2 is hereby dismissed.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED ADJUDGED AND DECREED** that Citiation1 Item 1a, Citation 1, Item 1b and Citation 2, Item 2 are hereby dismissed.

This the 24 day of October, 2014.

Monique M. Peebles
Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER, upon:

MICHAEL C LORD
WILLIAMS MULLEN PC
PO BOX 1000
RALEIGH NC 27602

by depositing same the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

JASON ROSSER
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH NC 27602-0629

by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 30th DAY OF October 2014.

OSCAR A. KELLER, JR.
CHAIRMAN

Nancy D. Swaney

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