

STATE OF ALASKA

DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD

WALTER J. HICKEL, GOVERNOR

P.O. BOX 21149
JUNEAU, ALASKA 99802-1149
PHONE: (907) 465-2700
FAX: (907) 465-2784

WAYNE GREGORY
CHAIRMAN
DONALD F. HOFF, JR.
LAWRENCE D. WEISS

ROBERT W. LANDAU
HEARING OFFICER

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
v.)
)
MacMILLAN CONSTRUCTION CO.,)
)
Contestant.)
)

Docket No. 91-891
Inspection No. 01-0120-060-91

RECEIVED
JUL 20 1992
Law Offices of Robert W. Landau

DECISION AND ORDER

MacMillan Construction Company (MacMillan) contests two citations issued by the State of Alaska, Department of Labor (Department) following an occupational safety and health inspection of MacMillan's worksite in Ketchikan on July 3, 1991.

The citations in contest are Citations 1 and 2. Citation 1 alleges a violation of Construction Code 05.240(e)(1) for failing to provide catch platforms or safety belts to protect employees working on a roof approximately 20 feet from ground level. The citation was classified as "serious" and a penalty of \$500 was assessed. Citation 2 alleges a violation of Construction Code 05.120(b)(1)(D) for erecting scaffolds without proper guardrails

or toeboards. This violation also was classified as "serious" and a penalty of \$500 was assessed.

A hearing was held before the full Board in Ketchikan on March 11, 1992. The Department was represented by Assistant Attorney General Lisa M. Fitzpatrick. MacMillan was represented by its owner, Donald A. MacMillan. Both parties presented witness testimony, documentary evidence and arguments. Upon review and consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. On July 3, 1991, Department compliance officer Phil Oldring conducted an occupational safety inspection of a worksite under the control of MacMillan at 2644 Second Avenue, Ketchikan, Alaska.

2. MacMillan was engaged in re-roofing the entire roof of a private residence. The work consisted of stripping the old roof, nailing down plywood and installing new shingles.

3. During the inspection, Oldring observed two employees working on the roof of the house. Neither employee was tied off with a safety belt.

4. Scaffolds had been erected in various places around the exterior of the house. However, there was no scaffolding or catch platform under portions of the roof where Oldring observed employees working. (Ex. A.)

5. Oldring estimated the distance from the ground to the roof eave at approximately 20 feet. This was verbally confirmed by one of the employees at the site.

6. Oldring also noticed that several of the scaffolds erected by MacMillan lacked guardrails and toeboards. The scaffolds had upper levels more than six feet off the ground. (Exs. A, B and C.)

7. During the inspection Oldring spoke to Donald MacMillan, the owner of MacMillan Construction. MacMillan declined to participate in either the opening or closing conference of the inspection. MacMillan was concerned about getting the roofing work completed that day because he was worried about the rain clouds coming in.

8. When Oldring asked for the employees to come down from the roof until the safety violations could be corrected, MacMillan became upset and instructed his employees to continue working on the roof.

9. MacMillan initially contended that the height of the roof was slightly under 16 feet and therefore catch platforms or safety belts were not required under the Code. However, after reviewing his diary notes at the hearing, MacMillan conceded that the roof was more than 16 feet high.

10. MacMillan was opposed to the use of safety lines or belts because he felt they would create a tripping hazard. Instead, he had his employees nail 2x4s across the roof as steps,

a procedure he believed was safer than using belts. (Exs. 1, 2, 3 and 9.)

11. MacMillan conceded that some of the scaffolds lacked guardrails and toeboards. He contended, however, that guardrails and toeboards would interfere with lifting the 4x8-foot plywood sheets onto the roof and throwing the old shingles down from the roof. He also stated that some of the scaffolds were in the process of being taken down when the inspector arrived and thus did not have all the necessary guardrails.

12. MacMillan felt that Oldring was harassing him during the inspection. He alleged that Oldring threatened him with the words "I got you" or "I'll nail you." MacMillan further alleged that Oldring "went berserk and threatened to shut the job down." Oldring denied these allegations and testified that he conducted the inspection according to the Department's written inspection procedures.

13. The day after the inspection, MacMillan installed guardrails on the scaffolds and provided safety belts to his employees. (Exs. 3, 4, 5 and 8.)

14. Because of the potential for serious injury or death in the event of a fall from the roof or the scaffolds, Oldring classified both Citations 1 and 2 as "serious" violations.

15. The initial unadjusted penalty for a serious violation is \$1,000. MacMillan was given the maximum 40% credit for company size and 10% credit for no history of prior violations. MacMillan was not given any penalty reduction for good faith due

to the refusal to promptly abate the hazards. After application of the penalty reductions, the final assessed penalties for Citations 1 and 2 were \$500 each.

CONCLUSIONS OF LAW

Construction Code 05.240(e)(1) states:

A catch platform shall be installed below the working area of roofs more than 16 feet from the ground to eaves with a slope greater than 4 inches and 12 inches without a parapet. In width the platform shall extend two feet beyond the projection of the eaves and shall be provided with a guardrail, midrail and toeboard. This provision shall not apply where employees engaged in work upon such roofs are protected by a safety belt attached to a lifeline.

Construction Code 05.120(b)(1)(D) states:

Guardrails and toeboards shall be installed on all open sides and ends of platforms more than six feet above the ground or floor, except needle beam scaffolds and floats. Scaffolds four feet to six feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

With respect to Citation 1, a preponderance of the evidence establishes that the height of the roof in question was greater than 16 feet from ground to eave. Therefore, catch platforms or safety belts were required to protect employees working on the roof. The evidence further establishes that employees were working on the entire roof yet no safety belts were being used and the scaffolds erected protected only a part of the

roof's perimeter. Under these circumstances, we conclude that the Department has established a prima facie case of violation.

With respect to Citation 2, a preponderance of the evidence establishes that MacMillan's scaffolds were more than six feet above the ground and did not have all the required top rails, midrails and toeboards. While some of the scaffolds may have been partly in compliance, the photographic evidence clearly shows the missing guardrails and toeboards. See Exs. A, B and C. Accordingly, we conclude that a prima facie case of violation has been presented.

MacMillan asserts a number of defenses to the above violations. First, MacMillan maintains that the citations are defective because they specify the wrong address of the worksite. At the hearing, the Department moved to amend the citation to correct the error. We find that there is no real dispute regarding the correct address of the worksite and that the employer was not prejudiced by allowing the citation to be corrected to conform to the evidence. See Rothstein, Occupational Safety and Health Law §§ 424-25, at 420-23 (3d. ed. 1990).

Second, MacMillan disagrees with the need for catch platforms around the entire perimeter of the roof, particularly the peaked gable section of the roof. See Ex. A. However, the Construction Code requires catch platforms below all work areas of roofs more than 16 feet high. "Work area" is defined as "that portion of a roof where built-up roofing is being performed." Construction Code 05.240(h)(9). There is no exception for roof

gables or peaks. Therefore, since the roofing work was being performed over the entire roof area, the Code would require catch platforms or safety belts around the entire perimeter of the roof, not simply in areas where workers might climb up or down from the roof.

Third, MacMillan asserts that the 2x4s nailed across the roof as safety steps are safer than using belts or lines which pose a tripping hazard. However, the Code only permits two methods of compliance: catch platforms or safety belts. Nowhere does the Code permit the use of nailed boards across a roof as a substitute. It is beyond the Board's authority to allow such an alternative method of compliance. If an employer believes there is an alternative method of compliance that is safer than the methods prescribed by the Code, its proper recourse is to petition the Department to amend the Code or grant a variance.

Fourth, MacMillan contends that guardrails and toeboards on its scaffolds are inconvenient and impractical because they interfere with throwing off old shingles and lifting up the large sheets of plywood onto the roof. We cannot accept this argument either. See generally Rothstein, supra, § 120 at 168-69. While there may be some additional inconvenience in complying with the scaffolding requirements, there is no evidence that compliance with the Code would have actually prevented MacMillan from performing its job. In fact, the evidence suggests that MacMillan could have complied with the scaffolding requirements while using other methods to dispose of the old shingles and/or lift the plywood

sheets to the roof. Whenever there is a conflict between employer convenience and employee safety, the OSHA law requires that safety considerations must come first.

Finally, MacMillan argues that compliance officer Oldring harassed him and threatened to shut down the job. After listening to the testimony, however, we find no credible evidence of misconduct by the compliance officer. He was simply doing his job in accordance with the Department's inspection guidelines and procedures. Furthermore, given our findings and conclusions regarding safety violations at the worksite, the compliance officer was fully justified in citing MacMillan. We note that in lieu of promptly abating the violations, MacMillan ordered his employees to continue working on the roof and did not correct the violations until at least the following day. MacMillan appeared to be more concerned with the speedy completion of his job than with the safety of his employees.

With respect to the classification of the violations, we conclude they were properly classified as "serious." In the event an employee were to fall from the roof or a scaffold, there is no doubt that the resulting injury could be serious or even fatal. See AS 18.60.095(b).

Lastly, we have reviewed the Department's penalty calculations and can find no reason to disturb them. MacMillan was given the maximum credit for company size and no history of prior violations. The Department properly denied credit for good faith

in light of MacMillan's refusal to cooperate during the inspection and promptly abate the violations.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board orders as follows:

1. Citation 1 is AFFIRMED as a "serious" violation with a penalty of \$500.
2. Citation 2 is AFFIRMED as a "serious" violation with a penalty of \$500.

DATED this 16th day of July, 1992.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: Wayne A. Gregory
Wayne A. Gregory, Chairman

By: Donald F. Hoff, Jr.
Donald F. Hoff, Jr., Member

By: Lawrence D. Weiss
Lawrence D. Weiss, Member

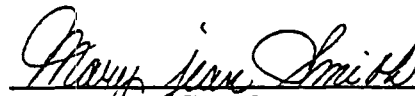
OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD
P.O. BOX 21149
JUNEAU, ALASKA 99802-1149

NOTICE TO ALL PARTIES

A person affected by an Order of the OSH Review Board may obtain a review of the Order by filing a complaint challenging the Order in Superior Court. The affected person must file the complaint within 30 days from the date of the issuance of the Order by the OSH Review Board. After 30 days from the date of the issuance of the Order, the order becomes final and is not subject to review by any court. AS 18.60.097(a).

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of the Alaska Department of Labor vs. MacMillan Construction Company, Docket No. 91-891, filed in the office of the OSH Review Board at Juneau, Alaska, this 16th day of July, 1992.



Mary Jean Smith
OSH Review Board

OSH:12