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VOSHA Review Board

#STATE OF VERMONT
OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

COMMISSIONER,
VERMONT DEPARTMENT OF LABOR,
Complainant

v.

Docket #RB889

ALIANCE MECHANICAL, INC.
Respondent

NOTICE OF DECISION

This matter came on for hearing on February 22, 2013 before the Hearing Officer, Alan S. Rome, Esq., and his associate, Thomas A. Jigielski, VOSHA Board Member. Appearing for Alliance Mechanical was Jason Patnaude. Appearing for the Commission of Labor was Dirk Anderson, Esq., counsel for the Department.

Based on the evidence presented, both documentary and testimonial, the following findings are made:

1. On January 23, 2012, a Citation and Notification of Penalty was sent to the Respondent, Alliance Mechanical, Inc.

2. The Citation was pursuant to 29 CFR 1926-501(b)(1), noted as a "serious violation." The violation stated as follows: "Each employee on a walking-working surface (horizontal and vertical surface) with an unprotected side or edge which is six feet or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems. 29 CFR 1926-501(b)(1).

3. On the date in question, October 19, 2011, an employee of Respondent, William Kirk, was working for the company at Thai House Restaurant, Highgate Commons, St. Albans, Vermont. It was conceded by Mr. Kirk at the hearing that the roof was six feet or more above a

lower level.

4. Also conceded at the hearing was the fact that there was no guardrail system, safety net systems, or personal fall arrest systems.

5. Mr. Kirk stated that he had in the past taken a "10 hour OSHA course." His testimony was a bit vague as to what was taught at that session and when it was given. It should be pointed out, however, that his having taken the course in the past was not relevant to the case at hand.

6. Also, it was pointed out by Jason Patnaude, officer of the company, that at this point in time the company is having a much stricter interpretation of the subject rule. In other words, they are apparently using guard rail systems, safety net systems, or personal fall arrest systems. Again, however, that is not relevant to the present question as to whether they violated the rule at issue which happened on October 19, 2011 when Mr. Kirk was working on the roof of the restaurant.

7. Safety Compliance Officer Newton testified at the hearing. Mr. Newton has had a great deal of experience as a Safety Compliance Officer for VOSHA. On October 19, 2011, it was Mr. Newton who observed Mr. Kirk on the roof of Thai House Restaurant. Mr. Newton testified quite clearly that Mr. Kirk was working six feet above the ground (at least). Also, he testified that he and Mr. Kirk had a conversation at that time when he observed him working on the roof.

8. According to Mr. Newton, Mr. Kirk conceded that he was working without guard rail systems, safety net systems, or personal fall arrest systems.

9. Certain exhibits, among them Exhibit "A" and Exhibit "D" were admitted without objection at the hearing. Although somewhat nebulous, the exhibits do seem to show that Mr.

Kirk was working more than six feet above street level. Also, as stated, supra, Mr. Kirk conceded that he was working six feet above street level.

10. Also, as stated by Mr. Newton, and conceded to by Mr. Kirk, he was an employee at the time of observance on the roof. Also, he was "doing a fall changeover" on behalf of the company and in service for the restaurant.

11. It is recognized by the Hearing Officer that when a Safety Compliance Officer such as Mr. Newton observes what he feels to be a regulatory violation he is required to inspect the problem. That is what happened in St. Albans on the day in question.

12. When asked by the Hearing Officer at the hearing as to what Mr. Kirk should have done on the day in question, Mr. Newton was of the opinion that, at the least, he should have used a "harness." As conceded by Mr. Kirk, that was not done on the day in question, nor did Mr. Kirk use any other devices for safety reasons on that day.

13. Jason Patnaude was of the opinion that the rules were "too confusing" for the company to understand. The Hearing Officer does not find that this argument is persuasive.

14. It is recognized that Exhibit "D" was admitted at the hearing. It is a photo which shows the flat roof of the restaurant in question. It shows quite clearly to the Hearing Officer that the flat roof which was being worked on was far greater than six feet from ground level.

CONCLUSIONS OF LAW

As stated in the Findings, supra, the Department of Labor found a "serious" violation in this case and issued the following violation:

Citation 1. Type of Violation: Serious

> 29 CFR 1926-501(b)(1). Each employee on a walking-working surface (horizontal and vertical surface) with an unprotected side or edge which is six feet or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

29 CFR 1926-501(b)(1).

As stated in the Findings, supra, it seems clear that the company did violate the aforementioned CFR regulation. There was some discussion at the hearing concerning OSHA interpretation letters which were presented at the hearing (states "G" as admitted). Those interpretations dealt with questions regarding whether or not workers could be on a roof if there was a warning line fifteen feet from the edge. It should be pointed out, however, that such an interpretation letter is not relevant to the issue at hand. In this case, Mr. Kirk admitted that there were no warning lines which were created on top of the restaurant roof in question.

Therefore, it seems quite clear that, although with no ill intent, Mr. Kirk, on behalf of the company, was working on that day in violation of 29 CFR 1926-501(b)(1). The violation is affirmed by the Hearing Officer.

VIOLATION PENALTY

The penalty given was in the amount of $750.00. That penalty is well within the guidelines and is affirmed by the Hearing Officer.

ORDER

The order of the Hearing Officer is to affirm both the violation as promulgated by the Department and, as stated, supra, the penalty is hereby affirmed.

Dated at Montpelier, Vermont this 14th day of March, 2013.

ALAN S. ROME, ESQ.
VOSHA HEARING OFFICER