

STATE OF INDIANA)
)
) SS:
COUNTY OF MARION)

BEFORE THE IOSHA BOARD OF SAFETY REVIEW
CASE DOCKET NO. 16-003

IN THE MATTER OF THE)
COMMISSIONER OF LABOR,)
)
Complainant,)
)
v.)
)
SKYLINE ROOFING AND SHEET)
METAL COMPANY, INC.,)
)
Respondent.)

FILED
JUN 22 2017
Indiana Board of
Safety Review

FINAL ORDER

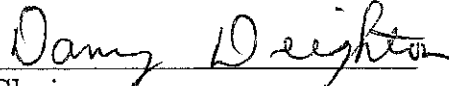
Danny Vaughn, designated by the Indiana Board of Safety Review (hereinafter "Board") pursuant to IC 4-21.5-3-9 to act as an administrative law judge ("ALJ"), issued the Administrative Law Judge's Recommended Findings of Fact, Conclusions of Law and Order ("ALJ's Recommended Order") in this case on April 28, 2017.

A copy of the ALJ's Recommended Order is attached hereto as Exhibit A and made a part hereof.

On May 16, 2017, pursuant to Indiana Code section 4-21.5-3-29, Respondent filed its Objections to the ALJ's Recommended Order. On June 15, 2017, the Complainant filed its response to the Respondent's objections.

Having reviewed the Respondent's objections, and Complainant's response pursuant to IC 4-21.5-3-29(b), the Indiana Board of Safety Review hereby AFFIRMS the ALJ's Recommended Order and adopts it as the Final Order in this proceeding.

SO ORDERED, this 22nd day of JUNE, 2017.


Chairman
Indiana Board of Safety Review

Copies to:

J. Anthony Hardman
General Counsel
Indiana Department of Labor
402 W. Washington St., Rm. W195
Indianapolis, IN 46204

Jason D. May
Law Offices of Jason D. May, LLC
9201 N. Meridian Street, Suite 220
Indianapolis, IN 46240

STATE OF INDIANA)
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COUNTY OF MARION)

BEFORE THE IOSHA BOARD OF
SAFETY REVIEW
CASE DOCKET NO. 16-003

IN THE MATTER OF:)
)
COMMISSIONER OF LABOR,)
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Complainant,)
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v.)
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SKYLINE ROOFING AND SHEET)
METAL CO., INC.)
AND ITS SUCCESSORS,)
)
Respondent.)

FILED

APR 28 2017

Indiana Board of
Safety Review

ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

Comes now Danny Vaughn, Administrative Law Judge designated by the Indiana Board of Safety Review ("Board") in this proceeding, and hearing having been held, now issues and files this Recommended Order with the Board.

In accordance with Ind. Code § 4-21.5-3-29, notice is hereby given that any objection to the Administrative Law Judge's Recommended Order must be filed with the Board, identifying the basis of the objection with reasonable particularity; no later than eighteen (18) days from the date of the issuance of this order, unless such date is a Saturday, Sunday, or legal holiday under the state statute, in which case the deadline would be the first day thereafter that is not a Saturday, a Sunday, or a legal holiday under state statute. This Administrative Law Judge's Order is not the final order of the Board in this proceeding. However, in the absence of any objection, the Board will either affirm the Administrative Law Judge's order as its final order or



will serve notice of its intent to review any issue related to the Administrative Law Judge's Order.

FINDINGS OF FACT

1. Skyline Roofing and Sheet Metal Co., Inc. (hereinafter, "Skyline" or "Respondent"), with a business address of 3060 W. Minnesota St., Indianapolis, Indiana 46241, was inspected by the Indiana Occupational Safety and Health Administration (hereinafter, "IOSHA") division of the Indiana Department of Labor (hereinafter, "IDOL"), under inspection no. 317866002 on May 19, 2015 through June 2, 2015 as indicated in the Safety Order and Notification of Penalty issued August 4, 2015 (hereinafter "Safety Order") on file with the Board of Safety Review. (Bd's Hr'g Ex. A.)
2. Compliance Safety and Health Officer (hereinafter, "CSHO"), Jorge Villalta, conducted said inspection at the new Applebee's (hereinafter "the Building") construction site at 11740 U.S. Hwy. 31, Edinburgh, IN 46124 (hereinafter, "Worksite"). (Hr'g Tr. 16:4-15.) (Bd's Hr'g Ex A.) (Hr'g Ex. C1.)
3. On August 4, 2015, as a result of said inspection conducted by the IDOL, IOSHA issued Safety Order 1, Items 1-4 to Respondent, pursuant to Ind. Code § 22-8-1.1-25.1, for various violations of the Indiana Occupational Safety and Health Act (hereinafter, "Act"), as codified under Ind. Code 22-8-1.1. (Bd's Hr'g Ex. A.)
4. Respondent timely petitioned to contest Safety Order 1, Items 1-4 on or about February 10, 2016. (Bd's Hr'g Ex. A.)
5. As provided by notice, the hearing was held on October 6-7, 2016, scheduled to begin at 9:00 a.m. each day, before Administrative Law Judge Danny Vaughn on the 6th in Conference Center Room 10 of the Indiana Government Center South, 402 West Washington,

Indianapolis, Indiana 46204, and on the 7th in the Worker's Compensation Board Hearing Room, 402 West Washington, Rm. W196, Indianapolis, Indiana 46204. (Bd's Hr'g Ex. D – Order on Scheduling Conference.) (Hr'g Tr. 1:13-18)

6. J. Anthony Hardman, General Counsel for the IDOL, represented Complainant. (Bd's Hr'g Ex. B.) (Hr'g Tr. 2:2-5)
7. Jason D. May, Counsel from The Law Offices of Jason D. May, represented Respondent. (Hr'g Tr. 2:6-9)
8. At the commencement of the hearing, Complainant moved to dismiss Safety Order 1, Items 1 and 4 with prejudice. Respondent did not object and agreed to stipulate and Judge Vaughn granted the motion and dismissed Items 1 and 4. (Hr'g Tr. 9:13-10:18.)
9. Complainant called one witness: CSHO Jorge Villalta (hereinafter "Mr. Villalta"), IOSHA - Construction Safety Section. (Hr'g Tr. 3:2; 12:19-13:6)
10. Respondent called as his witnesses: Fabian Salazar, employee of Skyline, and Paul Russell, President and owner of Skyline. (Hr'g Tr. 3:5&7; 161:10-20; 200:6-15.)
11. Safety Order 1, Item 2 alleges a "Serious" violation of 29 CFR 1926.501(b)(1) as follows:

Each employee on a walking/working surface with an unprotected side or edge which was 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:

North Side Roof – On or about May 19, 2015, employee working/standing directly next to the parapet wall approximately 2 feet 8 inches high, was not protected from falling approximate 17 feet 6 inches to the lower level.

West Side Roof – On or about May 19, 2015, employee working/standing directly next to the parapet wall approximately 4 feet high, was not protected from falling approximate 18 feet 10 inches to the lower level.

(Bd's Hr'g Ex. A.)

12. The proposed penalty for Safety Order 1, Item 2 is a civil penalty of Three Thousand Dollars (\$3,000). (Bd's Hr'g Ex. A.)

13. Safety Order 1, Item 3 alleges a "Serious" violation of 29 CFR 1926.501(b)(4)(ii) as follows:

Each employee on a walking/working surface was not protected from tripping in or stepping into or through holes (including skylights) by covers.

Job Site – On or about May 19, 2015, employees were not protected, from tripping in or stepping into a roof hatch hole approximately 30 inches by 36 inches at approximately 14 feet 10 inches on the flat roof, by any means.

(Bd's Hr'g Ex. A.)

14. The proposed penalty for Safety Order 1, Item 3 is a civil penalty of Three Thousand Dollars (\$3,000). (Bd's Hr'g Ex. A.)

15. Skyline is a construction company with one or more employees who were working at the Worksite in Indiana on May 19, 2015. (Hr'g Tr. 16:16-21; 19:9-14; 20:9-21:3.) (Hr'g Ex. C1.)

16. Skyline was doing roofing work on the Building at the Worksite on May 19, 2015, which is considered construction work under OSHA standards. (Hr'g Tr. 16:16-21.)

17. When Mr. Villalta first arrived at the Worksite on May 19, 2015, he saw two men on the roof of the Building next to a parapet wall at the North edge of the Building. (Hr'g Tr. 24:13-22; 43:20-45:7.) (Hr'g Ex. C2, 3, 5, and 6.)

18. The men were Skyline employees with the first names of Antonio and Noe. (Hr'g Tr. 25:19-26:4; 28:16-20.) (Hr'g Ex. C2, 3, and 4.)

19. The Skyline employees identified on the roof were standing on a walking/working surface under the OSHA standard cited. (Hr'g Tr. 48:12-16.)

20. The distance from where they were standing to the next lower level was greater than six feet. It was approximately seventeen feet, six inches. (Hr'g Tr. 48:17-49:6.)

21. The men were not protected from falling over the edge of the roof by a guardrail, safety net, or fall arrest system. (Hr'g Tr. 49:7-50:9.)
22. To meet OSHA standards, a guardrail must be 42 +/- 3 inches high. The lowest allowable height being 39 inches. (Hr'g Tr. 49:7-14.)
23. The parapet that was at the North edge of the roof was only approximately knee high as observed by Mr. Villalta from the ground; was measured to be approximately two feet, eight inches (32 inches) by the General Contractor, Chris Rudolf; and shown on the structural prints by Skyline's President Paul Russell to be approximately two feet, nine inches (33 inches) as taken from one print, and twenty-eight and one half inches (28.5 inches) as calculated from another print which he stated is more reliable. All of these are less than the required minimum thirty-nine (39) inches for a guardrail. (Hr'g Tr. 47:13-48:11; 258:14-260:13.)
24. Skyline had a foreman at the Worksite on May 19, 2015. His name was Fabian Salazar. (Hr'g Tr. 50:10-23.)
25. Foreman Salazar had knowledge that Skyline employees were next to the unprotected edge of the roof without fall protection, but failed to keep them from exposure. (Hr'g Tr. 51:5-52:20; 190:6-193:3.) (Hr'g Ex. C7.)
26. Foreman Salazar stated that he had been working on the roof all day with the other Skyline employees. (Hr'g Tr. 194:13-20.)
27. There is a substantial probability that death or serious physical harm could result from falling off the roof at the Worksite. (Hr'g Tr. 53:5-21.)
28. Based on IOSHA guidelines, a penalty of three thousand dollars (\$3,000) is reasonable for the citation contained in Safety Order 1, Item 2. (Hr'g Tr. 53:22-55:22.) (Hr'g Ex. C8.)

29. Skyline employees, Ramon Prado and Raul Ramos Vasquez (hereinafter “the Two Employees”), were working at the Worksite on May 19, 2015, on the roof of the Building which is a walking/working surface under the OSHA standard cited. (Hr’g Tr. 69:4-13; 71:2-4.) (Hr’g Ex. C6, 9, and 13.)
30. There was a hole in the roof surface where the Two Employees were working that day that measured approximately 30 x 36 inches (or approximately 3’ by 3’). This hole was approximately 14 feet, 10 inches above the floor below and was covered by a hatch. (Hr’g Tr. 58:21-61:10; 67:4-69:3; 166:16-168:6.) (Hr’g Ex. C6, and 9-12.)
31. The Two Employees were installing insulation to the roof surface that day around the area of the hole in the roof of the Building. (Hr’g Tr. 72:23-73:7; 194:13-20.) (Hr’g Ex. C9.)
32. That same day, the Two Employees moved the hatch, each being on opposite sides of it, in order to continue laying the insulation. Mr. Ramos Vasquez stepped backward, moving the hatch, while Mr. Prado stepped forward and fell in the hole that was under the hatch as it moved. (Hr’g Tr. 58:21-61:10; 164:4-8; 194:21-23.) (Hr’g Ex. C14 and 15.)
33. Evidence suggests that the hatch was not fastened down when the Two Employees moved it before Mr. Prado fell through the hole, despite Foreman Salazar’s testimony that he fastened it to the roof. (Hr’g Tr. 84:21-86:3; 122:18-123:6; 159:9-12; 179:15-18.)
34. Evidence suggests that the Two Employees did not know there was a hole under the hatch, despite Foreman Salazar’s testimony that he told the Two Employees that there was. (Hr’g Tr. 74:5-75:15; 80:11-16; 84:21-86:3; 142:18-144:8; 157:13-158:10.) (Hr’g Ex. C14 and 15.)
35. There were no markings on or near the hatch or other indication that it was covering a hole as is customary in the construction industry. (Hr’g Tr. 74:13-75:15) (Hr’g Ex. C9.)

36. Foreman Salazar had knowledge that Skyline employees were working near the hole in the roof and they had to move the hatch in order to continue laying the insulation. He was also on the roof with them when they moved it and Mr. Prado fell, but he failed to keep the Two Employees from exposure to the fall hazard. (Hr'g Tr. 194:13-23; 255:15-18.)
37. There is a substantial probability that death or serious physical harm could result from falling through the hole in the roof of the Building at the Worksite. (Hr'g Tr. 53:5-21; 86:4-19.)
38. Based on IOSHA guidelines, a penalty of three thousand dollars (\$3,000) is reasonable for the citation contained in Safety Order 1, Item 3. (Hr'g Tr. 53:22-55:22; 86:4-19.) (Hr'g Ex. C8.)

CONCLUSIONS OF LAW

39. The board has jurisdiction over the subject matter of this action and the parties pursuant to Ind. Code § 22-8-1.1-30.1.
40. Ind. Code chapter 22-8-1.1 applies to Respondent and Respondent's Worksite which is the subject matter of this action.
41. "To prove a violation of an OSHA standard, the [Complainant] must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition." *Seaworld of Fla., LLC*, 2012 OSAHRC LEXIS 40, 19-20; 2012 OSHD (CCH) P33, 247 (2012).
42. Respondent is an employer as defined by Ind. Code § 22-8-1.1-1, "'Employer' means any individual or type of organization including the state and all its political subdivisions, that has in its employ one (1) or more individuals." (See ¶ 15 herein.)

43. Pursuant to Ind. Code § 22-8-1.1-3.1, "Every employer shall comply with the occupational health and safety standards promulgated under this chapter, and pursuant to any directions in such standards, keep his employees informed of their protections and obligations under the chapter, the hazards of the work place and suitable precautions, relevant symptoms and emergency treatment for such hazards."

44. Indiana has adopted federal OSHA standards. In 1992, the Indiana Court of Appeals held the following:

IC 22-8-1.1-2 mandates that employers establish and maintain work conditions that are "reasonably safe and healthful for employees," and free from recognized hazards that may cause death or serious physical harm to employees. This policy is similar to that of the FLSA, found compelling by the Court in *Barrentine*, which was enacted to protect all covered workers from "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 450 U.S. at 739, 101 S. Ct. at 1444 (quoting 29 U.S.C. § 202(a)). In fact, Indiana has adopted all federal OSHA standards, unless replaced by a state-promulgated standard that is at least as effective in providing a safe and healthful workplace. IC 22-8-1.1-13.1.

Com'r of Labor v. Talbert Mfg. Co., 593 N.E.2d 1229, 1231-32 (Ind. Ct. App. 1992).

45. Because the Act and the federal Occupational Safety and Health Administration Act are similar, the rationales used by federal courts apply in interpreting the Act. *Com'r of Labor v. Gary Steel Prods. Corp.*, 643 N.E.2d 407, 412 (Ind. Ct. App. 1994).

46. The Construction safety and health standards found in 29 CFR 1926 are applicable to "construction work," which is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 CFR 1926.32(g).

Safety Order 1, Item 2

47. Safety Order 1, Item 2 alleges a serious violation of 29 CFR 1926.501(b)(1) which reads as follows:

'Unprotected sides and edges.' Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) 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 C.F.R. § 1926.501(b)(1) (2016).

48. The job being done by Skyline employees at the Worksite on May 19, 2015, is considered "construction work" under the Act. (29 C.F.R. § 1926.32(g) (2016) and ¶ 16 herein)
49. Skyline is an employer that was doing construction work in Indiana and must comply with 29 CFR 1926.501(b)(1). (See *General Applicability of Standards* and ¶¶ 15&16 herein.)
50. On May 19, 2015, two Skyline employees were seen standing next to a parapet at the edge of the roof on a walking/working surface. (See ¶¶ 17-19 herein.)
51. From where the two observed employees were standing at the edge of the roof to the next lower level was greater than six (6) feet in height. (See ¶ 20 herein.)
52. The two observed Skyline employees were not protected from falling over the edge of the roof "by the use of guardrail systems, safety net systems, or personal fall arrest systems" as required by the standard cited. (See ¶ 21 herein.)
53. The parapet height of less than thirty-nine inches was not sufficient to qualify as a guardrail under OSHA standards. (See ¶¶ 22-23 herein.) (29 C.F.R. § 1926.502(b)(1) (2016))
54. Respondent elicited testimony at the hearing regarding warning line and safety monitoring systems being in use at the Worksite on May 19, 2015, however, these systems are not elements of the standard cited, 29 C.F.R. § 1926.501(b)(1), and their use may not be substituted for the required safety systems that are listed. (Hr'g Tr. 98:14-99:8.)
55. If 29 C.F.R. § 1926.501(b)(10) applied, where warning line and safety monitoring systems are permitted, the standard require (sic) a showing that exposed employees were engaged in roofing activity at the time of the violation.

56. Complainant's chief witness, Mr. Villalta, never testified that the Skyline employees he observed at the worksite were engaged in roofing activities, he stated they were merely standing there.

57. Respondent's arguments for substituting use of a warning line and safety monitor system for employees' protection were not persuasive, but assuming *arguendo* they were, evidence suggests that these systems were not effectively implemented.

58. The employer must be found to have knowledge only of the violative condition; not of whether that condition presents a substantial probability of causing death or serious physical harm to an employee. *RSR Corp. v. Donovan & OSHRC*, 747 F. 2d 294, 12 OSHC 1073 (5th Cir. 1984), *aff'd*. 9 OSHC 2099 (1981).

59. The employer does not have to have actual knowledge of a violative condition. Employer knowledge may be shown by evidence that the employer could have known through the exercise of reasonable diligence, or constructive knowledge, such as the following:

- The violation/hazard was in plain view and obvious;
- The duration of the hazardous condition was not brief;
- The employer failed to regularly inspect the workplace for readily identifiable hazards; and
- The employer failed to train and supervise employees regarding the particular hazard.

IOSHA's Field Operations Manual, Chapter 4, Section II.C.4.b.

60. "The actual or constructive knowledge of a supervisor who is aware of a violative condition or practice can usually be imputed to the employer for purposes of establishing knowledge."

IOSHA's Field Operations Manual, Chapter 4, Section II.C.4.c.

61. Skyline's foreman had actual knowledge that Skyline employees would go near the unprotected edge of the roof without fall protection. This actual knowledge of the foreman is imputed to Skyline. (See ¶¶ 24 and 25 herein)
62. Skyline's foreman could have known with the exercise of reasonable diligence that Skyline employees were standing near the unprotected edge of the roof without fall protection because he stated that he worked on the roof all day with the other Skyline employees. Evidence was shown that the violation/hazard was in plain view and obvious. This constructive knowledge of the foreman is imputed to Skyline. (See ¶¶ 17, 24, and 26 herein)
63. To establish a "Serious" violation of the Act, the Complainant has the additional burden of showing that employee exposure to the cited condition could result in the substantial probability of death or serious physical harm. 29 USC § 666(k) (1985); *Crescent Wharf & Warehouse Co.*, 1973 OSAHRC LEXIS 324; 1973 OSHD (CCH) P15,503 (1973). The Complainant need not prove that an injury is substantially probable, but only that should an injury occur; it is substantially probable that the injury would be a serious one.
64. Ind. Code § 22-8-1.1-27.1(b) provides the following:
- a serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists or from one (1) or more practices, means, methods, operations, or processes which have been adopted or are in use in the place of employment, unless the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.
65. Mr. Villalta testified that in his experience there is a substantial probability that death or serious physical harm could result from falling off the roof at the Worksite. This testimony was not contradicted. (See ¶ 27 herein.)
66. Complainant has proven all the elements of a serious violation of 29 CFR 1926.501(b)(1).
67. No affirmative employee misconduct defense was raised for this citation. (See ¶ 39 herein.)

68. "Any employer who has received a safety order for a serious violation of any standard, rule, or order or this chapter may be assessed a civil penalty of up to seven thousand dollars (\$7,000) for each such violation." Ind. Code § 22-8-1.1-27.1(a)(2).
69. A penalty of Three Thousand Dollars (\$3,000), assessed using IOSHA guidelines and a Penalty Assessment Worksheet, is reasonable for a serious violation of 29 CFR 1926.501(b)(1) as cited in Safety Order 1, Item 2. (See ¶ 28 herein.)

Safety Order 1, Item 3

70. Safety Order 1, Item 3 alleges a serious violation of 29 CFR 1926.501(b)(4)(ii) which reads as follows:

Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.

29 C.F.R. § 1926.501(b)(4)(ii) (2016).

71. The job being done by Skyline employees at the Worksite on May 19, 2015, is considered "construction work" under the Act. (29 C.F.R. § 1926.32(g) (2016) and ¶ 16 herein)
72. Skyline is an employer that was doing construction work in Indiana and must comply with 29 CFR 1926.501(b)(4)(ii). (See *General Applicability of Standards* and ¶¶ 15&16 herein.)
73. On May 19, 2015, two Skyline employees were on a walking/working surface working near a hole in the roof. (See ¶¶ 29-31 herein.) (29 C.F.R. § 1926.500(b) (2016), definition of hole.)
74. From the hole in the roof to the next lower level was greater than six (6) feet in height. (See ¶ 30 herein.)
75. On May 19, 2015, while Skyline employees were working laying down insulation over the roof decking, a roof hatch covered the hole in the roof. The hatch was just sitting there without any markings or identification as to what it was or why it was there. (See ¶¶ 29-31 and 35 herein.)

76. This “cover” did not provide sufficient protection to prevent one Skyline employee “from tripping in or stepping into or through” the hole in the roof that was under the cover. (See ¶ 32 herein.)
77. Two employees had to move the hatch to continue laying insulation on the roof decking and the hatch was not secured in place so that it would have taken some effort to move, it was not identified with any sort of markings, nor were the two employees even aware that there was a hole in the roof under the hatch. (See ¶¶ 32-35 herein.)
78. In this case, the signed statement by Raul Ramos Vasquez, the non-injured Skyline employee who moved the hatch, is considered with the same weight as live testimony (not hearsay). (Hr’g Tr. 266:8-268:21.) (Hr’g Ex. C15.)
79. Foreman Salazar’s testimony that he told everyone that there was a hole under the hatch lacks credibility when compared to the testimony and the actions of the two employees involved. Mr. Ramos Vasquez’s testimony that he and Ramon Prado, the injured Skyline employee who fell, were not aware there was a hole under the hatch is supported by both Mr. Villalta’s testimony about what they told him and Mr. Prado’s statement taken by Mr. Villalta. (See ¶ 34 herein.) It does not matter if Foreman Salazar and Skyline President Paul Russell say that they know when they see a roof hatch that there is a hole under it if the employees doing the work, the ones that matter, the ones who they are charged under the IOSH Act to protect, say that they didn’t know.
80. The actions of the two employees who moved the hatch indicate that they did not know that there was a hole under the hatch. Knowing there was a hole there, Mr. Prado would not have stepped forward right into it, nor would Mr. Ramos Vasquez have backed up and pulled his co-worker into it. The actions of two people who knew there was a hole under it would have

been to each step to the side in the same direction as they moved the hatch so that neither of them would fall into the hole under it.

81. Foreman Salazar's testimony that he fastened the hatch down is not credible either due to conflicting statements. Besides Mr. Villalta testifying that Mr. Ramos Vasquez and Mr. Prado both told him that it was not fastened down when they moved it, Respondent's counsel and Foreman Salazar both stated that it would either be difficult or could not be moved if it was fastened down. (See ¶ 33 herein.)

82. Same as paragraphs 78-80 herein.

83. The employer must be found to have knowledge only of the violative condition; not of whether that condition presents a substantial probability of causing death or serious physical harm to an employee. *RSR Corp. v. Donovan & OSHRC*, 747 F. 2d 294, 12 OSHC 1073 (5th Cir. 1984), *aff'd*. 9 OSHC 2099 (1981).

84. The employer does not have to have actual knowledge of a violative condition. Employer knowledge may be shown by evidence that the employer could have known through the exercise of reasonable diligence, or constructive knowledge, such as the following:

- The violation/hazard was in plain view and obvious;
- The duration of the hazardous condition was not brief;
- The employer failed to regularly inspect the workplace for readily identifiable hazards; and
- The employer failed to train and supervise employees regarding the particular hazard.

IOSHA's Field Operations Manual, Chapter 4, Section II.C.4.b.

85. "The actual or constructive knowledge of a supervisor who is aware of a violative condition or practice can usually be imputed to the employer for purposes of establishing knowledge."

IOSHA's Field Operations Manual, Chapter 4, Section II.C.4.c.

86. Skyline's foreman had actual knowledge that Skyline employees were working near the hole and would have to move the hatch to install insulation and once the hatch moved, they would not be "protected from tripping in or stepping into or through" the hole. This actual knowledge of the foreman is imputed to Skyline. (See ¶ 36 herein)

87. Skyline's foreman could have known with the exercise of reasonable diligence that Skyline employees would not be "protected from tripping in or stepping into or through" the hole because he stated that he worked on the roof all day with the other Skyline employees and he was on the roof when they moved the hatch and Mr. Prado fell. The roof was a flat open roof such that the hatch area was in plain view and obvious. This constructive knowledge of the foreman is imputed to Skyline. (See ¶ 36 herein)

88. To establish a "Serious" violation of the Act, the Complainant has the additional burden of showing that employee exposure to the cited condition could result in the substantial probability of death or serious physical harm. 29 USC § 666(k) (1985); *Crescent Wharf & Warehouse Co.*, 1973 OSAHRC LEXIS 324; 1973 OSHD (CCH) P15, 503 (1973). The Complainant need not prove that an injury is substantially probable, but only that should an injury occur, it is substantially probable that the injury would be a serious one.

89. Ind. Code § 22-8-1.1-27.1(b) provides the following:

a serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists or from one (1) or more practices, means, methods, operations, or processes which have been adopted or are in use in the place of employment, unless the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.

90. Mr. Villalta testified that in his experience there is a substantial probability that death or serious physical harm could result from falling through a hole in the roof at the Worksite.

This testimony was not contradicted. (See ¶ 37 herein.)

91. Complainant has proven all the elements of a serious violation of 29 CFR 1926.501(b)(4)(ii).

92. No affirmative employee misconduct defense was raised for this citation. (See ¶ 39 herein.)

93. "Any employer who has received a safety order for a serious violation of any standard, rule, or order or this chapter may be assessed a civil penalty of up to seven thousand dollars (\$7,000) for each such violation." Ind. Code § 22-8-1.1-27.1(a)(2).

94. A penalty of Three Thousand Dollars (\$3,000), assessed using IOSHA guidelines and a Penalty Assessment Worksheet, is reasonable for a serious violation of 29 CFR 1926.501(b)(4)(ii) as cited in Safety Order 1, Item 3. (See ¶ 38 herein.)

ORDER

IT IS THEREFORE the ALJ's Recommended Order to the Indiana Board of Safety Review that violations identified as Safety Order 01, Items 002 and 003 under Inspection Number 317866002 are upheld as to the violations, the classifications, and the penalty assessments.

DATED: _____

4/28/17

Danny Vaughn
Administrative Law Judge

Copies to:

J. Anthony Hardman
General Counsel
Indiana Department of Labor
402 West Washington Street, Room W-195
Indianapolis, Indiana 46204
johardman@dol.in.gov

Jason D. May
Law Offices of Jason D. May, LLC
9201 N. Meridian Street, Suite 220
Indianapolis, Indiana 46240
Jason.may@jasonmaylaw.com

Indiana Department of Labor

Indiana Occupational Safety and Health Administration
402 West Washington St - Room W195
Indianapolis, IN 46204
Phone: 317-232-1979 FAX: (317)233-3790



Certified mail #917190 0005 2720 0047 2806 8-4-15 JTO

Safety Order and Notification of Penalty

To:

Skyline Roofing & Sheet Metal Company Inc
3060 W. Minnesota St
Indianapolis, IN 46241

Inspection Number: 317866002
CSHO ID: U7851
Optional Report No.: 03815
Inspection Date(s): 5/19/2015 - 6/2/2015
Issuance Date: 8/4/2015

Inspection Site:

11740 US- 31,
Edinburgh, IN 46124

The violation(s) described in this Safety Order and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.

An inspection of your place of employment has revealed conditions which we believe do not comply with the provisions of the Indiana Occupational Safety and Health Act (Indiana Code Chapter 22-8-1.1) or the standards or rules adopted thereunder. Accordingly, enclosed please find safety order(s) and notification(s) of penalty describing such violation(s) with references to applicable standards, rules, or provisions of the statute and stating the amount of any penalty(ies).

Informal Conference - Please be advised that it may be possible to informally settle any potential dispute without initiating the more elaborate proceedings brought on by a petition for review. Prior to filing a petition for review, you may request an informal conference concerning any of the results of the inspection (safety orders, penalties, abatement dates, etc.) by contacting the Indiana Department of Labor/IOSHA, preferably by telephone, in a prompt manner. Please be advised that a request for an informal conference cannot extend the fifteen working day period for filing a petition for review. Informal conferences frequently resolve any possible disputes, and therefore you are urged to take advantage of this opportunity. Because of the limited time period and in order to facilitate scheduling, any requests for an informal conference should be made promptly upon your receipt of the safety order(s) and notification(s) of penalty.

Right to Contest - You are hereby also notified that you are entitled to seek administrative review of the safety order(s), penalty(ies), or both by filing a written petition for review at the above address postmarked within fifteen working days of your receipt of the safety order(s) and notification(s) of penalty. ("Working days" means Mondays through Fridays, but does not include Saturdays, Sundays, legal holidays under a state statute or days on which the Indiana Department of Labor's offices are closed during regular business hours). If you do not file such a petition for review (contest), the safety order(s)

and penalty(ies) shall be deemed final orders of the Board of Safety Review and not subject to review by any court or agency. The issuance of a safety order does not constitute a finding that a violation has occurred unless no petition for review is filed, or if a petition for review (contest) is filed, it must contain a statement of its basis and should reference the above inspection number. Upon receipt of your petition for review, we will affirm, amend or dismiss the safety order(s) and notification(s) of penalty. If we affirm, your petition for review will be granted (unless it was not timely) and the dispute will be certified by the Board of Safety Review for further proceedings. The Board of Safety Review is an independent agency appointed by the governor with authority to conduct hearings and to issue decisions concerning disputed safety order(s) and notification(s) of penalty. If we amend the safety order(s) or notification(s) of penalty, your petition for review shall be deemed moot. However, you will then be given an opportunity to file a petition for review concerning the amended safety order(s) and notification(s) of penalty.

Please be advised that an employee or representative of employees may file a petition for review to contest the reasonableness of the time stated in the safety order(s) for the abatement of any violation.

Posting - Upon receipt of any safety order(s) you are required to post such safety order(s), or a copy thereof, unedited, at or near each place an alleged violation referred to in the safety order(s) occurred. However, if your operations are such that it is not practicable to post the safety order(s) at or near each place of alleged violation, such safety order(s) shall be posted, unedited, in a prominent place where it will be readily observable by all affected employees. For example, if you are engaged in activities which are physically dispersed, the safety order(s) may be posted at the location from which the employees operate to carry out their activities. You must take steps to ensure that the safety order is not altered, defaced, or covered by other material. Posting shall be until the violation is abated, or for three working days, whichever is longer.

Penalties - Penalties are due within fifteen (15) working days of receipt of this notification unless contested. Abatement does not constitute payment of penalties.

Abatement - The conditions cited in the safety order(s) must be corrected (abated) on or before the date shown for each item on the safety order(s) and notification(s) of penalty unless:

(1) You file a petition for review concerning the violation, in which case the full abatement period shall commence from the issuance of a final decision by the Board of Safety Review or the courts which requires compliance with the safety order; or

(2) The abatement period is extended by the granting of a petition for modification of abatement date.

PMAs - The petition for modification of abatement date is a manner in which you may seek additional time to correct (abate) a violation without having to file a petition for review concerning the safety order, or after the expiration of the time period to file such a petition for review when it becomes apparent that you need extra time to abate the violation. A petition for modification of abatement date shall be in writing and shall include the following information:

(1) All steps you have taken, and the dates of such actions, in an effort to achieve compliance

during the prescribed abatement period.

(2) The specific additional abatement time necessary in order to achieve compliance.

(3) The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.

(4) All available interim steps being taken to safeguard employees against the cited hazard during the abatement period.

(5) A certification that a copy of the petition has been posted, and if appropriate, served on the authorized representative of affected employees, and a certification of the date upon which such posting and service was made.

A petition for modification of abatement date shall be filed with the Indiana Department of Labor/IOSHA no later than the close of the next working day following the date on which abatement was originally required. A later-filed petition shall be accompanied by the employer's statement of exceptional circumstances explaining the delay. A copy of such petition shall be posted in a conspicuous place where all affected employees will have notice thereof or near such location where the violation occurred. The petition shall remain posted until the time period for the filing of a petition for review of the Commissioner's granting or denying the petition expires. Where affected employees are represented by an authorized representative, said representative shall be served a copy of such petition.

Notification of Corrective Action - Correction of the alleged violations which have an abatement period of thirty (30) days or less should be reported in writing to us promptly upon correction. A "Letter of Abatement" form and an "Abatement Photographs" worksheet are enclosed for your assistance in providing adequate documentation of abatement. Reports of corrections should show specific corrective action on each alleged violation and the date of such action. On alleged violations with abatement periods of more than thirty (30) days, a written progress report should be submitted, detailing what has been done, what remains to be done, and the time needed to fully abate each such violation. When the alleged violation is fully abated, we should be so advised. Timely correction of an alleged violation does not affect the initial proposed penalty..

Followup Inspections - Please be advised that a followup inspection may be made for the purpose of ascertaining that you have posted the safety order(s) and corrected the alleged violations. Failure to correct an alleged violation may result in additional penalties for each day that the violation has not been corrected.

Employer Discrimination Unlawful - The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 30 days after the discrimination occurred with the Indiana Department of Labor/IOSHA at the address shown above.

Notice to Employees - The law gives an employee or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The contest must

be mailed to the Indiana Department of Labor/IOSHA at the address shown above within fifteen (15) working days (excluding weekends and State holidays) or receipt by the employer of this safety order and penalty.

If you wish additional information, you may direct such requests to us at the address or telephone number stated above.

Indiana Department of Labor

NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

An informal conference has been scheduled with IOSHA to discuss the safety order(s) issued on 8/4/2015. The conference will be held at the IOSHA office located at 402 West Washington Street, Room W195, Indianapolis, IN 46204 on _____ at _____. Employees and/or representatives of employees have a right to attend an informal conference.

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 317866002
Inspection Date(s): 5/19/2015 - 6/2/2015
Issuance Date: 8/4/2015
CSHO ID: U7851
Optional Report No.: 03815

Safety Order and Notification of Penalty

Company Name: Skyline Roofing & Sheet Metal Company Inc
Inspection Site: 11740 US- 31,, Edinburgh, IN 46124

Safety Order 01 Item 001

Type of Violation: **Serious**

29 CFR 1926.20(b)(2): The employers safety and health program did not provide for frequent and regular inspections of the jobsite and equipment by a competent person:

Job site On or about- May 19, 2015, the employers competent person, on the site, failed to identify existing and predictable hazards and/or take the necessary measures to alleviate the hazards of falls.

Date By Which Violation Must Be Abated: 9/21/2015
Proposed Penalty: \$3,000.00

Indiana Department of Labor
Occupational Safety and Health Administration

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Safety Order and Notification of Penalty

Company Name: Skyline Roofing & Sheet Metal Company Inc
Inspection Site: 11740 US- 31,, Edinburgh, IN 46124

Safety Order 01 Item 002

Type of Violation: **Serious**

29 CFR 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge which was 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:

North side Roof On or about- May 19, 2015, employee working/standing directly next to the parapet wall approximate 2 feet 8 inches high, was not protected from falling approximate 17 feet 6 inches to the lower level.

West side Roof On or about- May 19, 2015, employee working/standing directly next to the parapet wall approximate 4 feet high, was not protected from falling approximate 18 feet 10 inches to the lower level.

Date By Which Violation Must Be Abated: 8/28/2015
Proposed Penalty: \$3,000.00

Indiana Department of Labor
Occupational Safety and Health Administration

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Safety Order and Notification of Penalty

Company Name: Skyline Roofing & Sheet Metal Company Inc
Inspection Site: 11740 US- 31,, Edinburgh, IN 46124

Safety Order 01 Item 003

Type of Violation: **Serious**

29 CFR 1926.501(b)(4)(ii): Each employee on a walking/working surface was not protected from tripping in or stepping into or through holes (including skylights) by covers:

Job site On or about- May 19, 2015, employees were not protected, from tripping in or stepping into a roof hatch hole approximately 30 inches by 36 inches at approximately 14 feet 10 inches on the flat roof, by any means.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$3,000.00

Indiana Department of Labor
Occupational Safety and Health Administration

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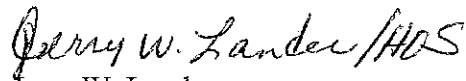
Safety Order 01 Item 004

Type of Violation: **Serious**

29 CFR 1926.503(a)(1): The employer did not provide a training program for each employee exposed to fall hazards:

Job site- On or about- May 19, 2015, employees exposed to fall hazards were not provided with a fall training program.

Date By Which Violation Must Be Abated: 9/21/2015
Proposed Penalty: \$3,000.00


Jerry W. Lander
Director of Construction Safety

Indiana Department of Labor

Indiana Occupational Safety and Health Administration
402 West Washington St - Room W195
Indianapolis, IN 46204
Phone: (317)232-1979 FAX: (317)233-3790



INVOICE/DEBT COLLECTION NOTICE

Company Name: Skyline Roofing & Sheet Metal Company Inc
Inspection Site: 11740 US- 31,, Edinburgh, IN 46124
Issuance Date: 8/4/2015

Summary of Penalties for Inspection Number: 317866002

Safety Order 1, Serious = \$12,000.00
TOTAL PENALTIES = \$12,000.00

Penalties are due within fifteen (15) working days of receipt of this notification unless contested. Make your check or money order payable to: "Indiana DOL/IOSHA". Please indicate IOSHA's Inspection Number (indicated above) on the remittance.

IOSHA does not agree to any restrictions or conditions or endorsements put on any check or money order for less than full amount due, and will cash the check or money order as if these restrictions, conditions, or endorsements do not exist.

Corrective action, taken by you for each alleged violation should be submitted to this office on or about the abatement dates indicated on the Safety Order and Notification of Penalty.

A work sheet has been provided to assist in providing the required abatement information. A completed copy of this work sheet should be posted at the worksite with the safety order(s).

Jerry W. Lander / HOS
Jerry W. Lander
Director of Construction Safety

08/04/15
Date