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NO. 53020-1-II

**IN THE COURT OF APPEALS, DIVISION II
THE STATE OF WASHINGTON**

VALENTINE ROOFING, INC.

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent.

**REPLY BRIEF OF APPELLANT
VALENTINE ROOFING, INC.**

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I. REPLY TO RESPONDENT'S OPENING BRIEF

A. The Board's determination that the employees were not exempt from using fall protection during the installation and disassembly of their anchor points is not supported by substantial evidence.

Contrary the Department's arguments, the Board's determination that the employees were not exempt from using fall protection during the installation and disassembly of their anchor points is not supported by substantial evidence. Item 1-1a contains a violation of WAC 296-155-24611(1)(a), which provides: "you must ensure that the appropriate fall protection systems is provided, installed, and implemented... when employees are exposed to fall hazards of 10 feet or more to the ground or lower level while engaged in roofing work on a low pitched roof." (CABR 145).

Similarly, Item 1-1b contains a violation of WAC 296-155-24609(4)(d), which provides that you must guard floor openings by a fall restraint system "whenever there is a danger of falling through an unprotected skylight opening." (CABR 145).

However, employees are exempt from the requirements of WAC 296-155-24611 and WAC 296-155-24609 under WAC 296-155-24605(4)(a) in the following circumstance: "during the initial installation of the fall protection anchor (prior to engaging in any work activity), or the disassembly of the fall protection anchor after the work has been completed."

Here, Mr. Portillo unequivocally testified that he and his crew were re-setting anchor points for their lifelines during the Department's inspection, and that he and his crew were always tied off to the anchor points

except for the short periods of time it took to initially install and reinstall the anchor points. (CABR 317-18, 333). The Employer also introduced evidence establishing that the anchor points, through the patched portions of roof, were installed sixteen feet from the edge of the roof, as testified to by Mr. Portillo. (CABR 380-81, 479-84). Mr. Johnson even agreed that the employees were wearing body harnesses, and there was no reason for the employees to wear full-body harnesses unless they were going to use them to tie off during the job. (CABR 271, 278).

The Board failed to address this evidence in its unsupported Decision and Order. The Department also offered no evidence to refute Mr. Portillo's testimony or the veracity of his statements. Indeed, Mr. Johnson never went on the roof and was, therefore, unable to see where the workers were on the roof at the time of his inspection, unable to tell what the workers were doing at the time of his inspection, and unable to confirm whether anchor points had been used that day. (CABR 272-73). The Department and Board also failed to address the fact that Mr. Johnson failed to inquire on how much work had been completed on the roof at the time of his inspection. (CABR 273).

Instead, the Department cites to evidence regarding the amount of time CSHO Johnson observed the employees working on the roof. However, Mr. Johnson testified that he only saw the employees working for "minutes" before ordering them to come off the roof. (CABR 224). This is hardly enough time to determine what the workers were doing at the time he arrived at the inspection site, especially considering Mr. Portillo testified it took

approximately 10-15 minutes to reinstall the safety anchors because you have to take out a lot of screws and put down the insulation and covering. (CABR 320). The Department offered no evidence to contradict Mr. Portillo's statement.

Furthermore, despite the Department's arguments to the contrary, allowing the exception to apply in this case would not endanger the employees nor would it lead to absurd results. As Mr. Portillo testified, the safety anchors had to be removed to install the new PVC membrane before re-installing the safety anchors, as there was no insulation underneath. (CABR 318-19). As such, the employees were removing and reinstalling the safety anchors out of necessity. At that time, the employees were approximately 15 to 16 feet away from the perimeter of the roof and had no reason to go anywhere near the edge of the roof when re-installing their safety anchors. (CABR 333-34). Simply put, failing to apply the exception under the facts of this case would prove to be unworkable and unreasonable.

Clearly, the Board's failure to recognize the Employer's exemption from using fall protection when installing and disassembling their anchors is not only unsupported by substantial evidence, but also in stark contrast to all other evidence in the record.

B. The Board's determinations that employees were exposed to the violative conditions are not supported by substantial evidence.

The Board's determination that the Department established that employees were exposed to a fall hazard from the roof's perimeter, the skylight, or the blue ladder is not supported by substantial evidence because

the employees were outside the zone of danger during the brief period of time that they were not tied off, and it was not reasonably likely that the employees would have entered the zone of danger based off their work duties.

To determine whether a worker is exposed to a hazard in violation of WISHA, the Department must show that the worker had access to the violative conditions. *Mid Mountain Contractors, Inc. v. Dep't of Labor and Indus.*, 136 Wn. App. 1, 5, 146 P.3d 1212 (2006). To establish employee access, the Department must show by reasonable predictability that, in the course of the workers' duties, employees will be, are, or have been in the zone of danger. *Id.*

The zone of danger is determined by the hazard presented by the violative condition and is normally the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995). The inquiry is not whether the exposure is theoretically possible, but whether the employee's entry into the danger zone is reasonably predictable. *See Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997).

Here, the Department failed to establish that any employees were exposed to a fall hazard because the employees were outside of the zone of danger and working in a faraway proximity to the roof's perimeter and the skylight for the brief period that they were reinstalling their safety anchors.

First, the Department states that the employees were working on the upper roof without fall protection, had access to the unguarded roof, and nothing prevented the employees from walking to any edge of the roof. However, although CSHO Johnson's photographs show the workers wearing harnesses without being tied off, they were installing anchor points at that time. The safety anchors had to be removed to install the new PVC membrane before the employees could re-install the safety anchors, as there was no insulation underneath.

During this approximately 15-minute period, the employees maintained 15-16 feet from the roof's perimeter. (CABR 333-34). Mr. Portillo testified that they were not close to the edge at any time when they were reinstalling the safety anchors. This distance was exemplified by the photos taken on the worksite on August 2, 2017, at the inspection site, which included a photograph of the patch used for the safety anchors that were 16 feet from the roof's perimeter. (CABR 380-81, 477-497).

Otherwise, at every single moment that they were exposed to any danger, the employees were tied off. (CABR 333). CSHO Johnson even admitted there was no other reason for the worker to be wearing a harness during his inspection. Significantly, the Department failed to provide any evidence that the employees needed to go to the roof's edge without being tied off. Given the above, the Department failed to establish that it was reasonably predictable that the employees would have entered the zone of danger surrounding the roof's perimeter or the skylight while re-installing their safety anchors.

Additionally, although CSHO Johnson testified that he believed the employee closest to the roof's perimeter was about 5 feet away, his belief is pure speculation. That is, the Board failed to recognize that Mr. Johnson never took any measurements from the edge of the roof to the location where the employees were standing when he took his photographs, nor did he know exactly where the employees were standing on the roof when he took his photographs. (CABR 273-74). Indeed, he never even went on the roof, and he could not see the top of the roof from his vantage point. (CABR 272). Additionally, even though CSHO Johnson testified that it was his belief that the employee closest to the roof's perimeter was about 5 feet away, the Board fails to mention that Mr. Johnson did not testify to the grounds that formed his belief. One would surmise that it was based off his photographs; however, his photographs were taken approximately 40 feet away from ground level. (CABR 259-60).

Furthermore, the Department's arguments regarding exposure related to the skylight are even more tenuous. Mr. Johnson did not know how close the employees got to the skylight while they were working on the roof that day. (CABR 276). Nor did the Department establish how far from the skylights the employees were when they were reinstalling their anchor points. By CSHO Johnson's logic, the employees would have been exposed to the skylight hazard if they were 50 feet from the skylight. (CABR 276).

However, CSHO Johnson's opinion and the evidence presented by the Department fail to establish that it was reasonably predictable that, during the employees' duties, they would be exposed to the alleged skylight fall

hazard. Instead, the evidence clearly and unequivocally establishes that the employees installed a safety anchor near the skylight, which was used when working near the skylight. (CABR 333, 465).

Given the above, even though there were no barriers preventing the employees from walking towards the roof or the skylight, they were always tied off whenever they were near the edge of the roof or of the skylight. Accordingly, it was not reasonably predictable that, in the course of the employees' duties, they were exposed to the unguarded edge of the roof or skylight. *See Secretary of Labor v. Tricon Industries, Inc.*, 24 BNA OSHRC 1427 (No. 11-1877, 2012) (determining the Secretary failed to establish that Tricon employees were in the zone of danger when they were no closer than six to seven feet from the unguarded edge because there was no evidence to suggest that it was reasonably predictable that employees had any reason or occasion to wander around the deck, or that in the course of their assigned working duties or their personal comfort activities while on the job, they would come any closer to the edge of the deck); *see also Secretary of Labor v. Fastrack Erectors*, 21 BNA OSHC 1109 (No. 04-0780, 2004) (determining that the record failed to show that the employees were exposed to a fall hazard when the testimony established that employees were never closer than 6 feet from the edge and there was no reason for the employees to be closer than 6 feet from the edge).

Finally, The Board's determinations that the employees were exposed to the blue self-supporting ladder used in a partially closed position that did not extend at least three feet above the upper landing surface or

secured at the top is not supported by substantial evidence because the Department failed to establish that any employees were exposed to the ladder violations. First, Item 2-1 involves an alleged violation of WAC 296-875-40050(1), which requires employers to ensure self-supporting ladders are not used as single ladders or in a partially closed position. Secondly, Item 2-2 involves an alleged violation of WAC 296-876-40030(2), which requires that ladders extend at least three feet above the upper landing surface or be secured at the top by a grasping device and placed in a way to avoid slippage. Both violations involve the blue ladder shown in Exhibits 7 and 8. (CABR 460-61).

Here, Mr. Portillo's testimony clearly establishes that the employees used the 32-foot ladder on the west side, or the backside, of the house to access the upper portion of the roof; as well as, to come down from the upper portion of the roof when ordered to do so by CSHO Johnson. (CABR 314-15, 330-31). The blue ladder, shown in Exhibits 7 and 8, was never used, nor was it needed for access, as it was only at the inspection site for emergency purposes. (CABR 333).

Significantly, CSHO Johnson could not see how the employees came down from the upper portion of the roof because a big bundle of roofing material obstructed his view. (CABR 218, 263). He only speculated that the employees used the blue ladder, even though he did not see the employees use the blue ladder. (CABR 263).

However, via impeachment, CSHO Johnson previously admitted in a discovery deposition that he did see the employees come down the self-

supporting ladder. (CABR 266-68). CSHO Johnson asserted that the blue ladder was the only way the employees could access the upper roof, which is clearly contradicted by Mr. Portillo's testimony and the fact that CSHO Johnson did not walk all the way around the house. As such, he did not see the ladder testified to by Mr. Portillo.

Nonetheless, the Board mistakenly determined, and the Department mistakenly argues, that the blue ladder was the only ladder to access the upper level of the house, as Mr. Johnson did not observe any other way for the employees to access the upper roof, and he would have taken a photograph of another ladder had it been at the jobsite. Again, Mr. Johnson's belief is pure speculation because he did not walk all the way around the house, he did not go on the roof, and he could not see the top of the roof from his vantage point. The Board determined Mr. Johnson to be more credible, even though he offered conflicting, contradictory statements at trial compared to his discovery deposition. The Board also determined he did not have any motivation to lie or be deceitful, but his memory was clearly deficient during his testimony. Simply put, the Board's determination is not supported by substantial evidence and clearly contradicted by the record.

Given the above, the Department failed to establish that any employees were exposed to a ladder hazard and, as a result, Items 2-1 and 2-2 should be vacated.

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II. CONCLUSION

Based on the above, the Board respectfully erred by affirming the cited serious violations because substantial evidence does not support its determinations, as the employees were exempt from using fall protection during the installation and disassembly of their anchor points per WAC 296-155-24605(4)(a), and the Department failed to establish that any employees were exposed to a fall hazard or a ladder hazard. As such, the Employer respectfully requests that this court reverse the Board's Decision and Order and vacates the Citation's serious violations.

Respectfully submitted this 25th day of June 2019.

s/ Aaron K. Owada

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CERTIFICATE OF SERVICE

I certify that on June 25, 2019, I caused the original and copy of the **Employer's/Appellant's Reply Brief** to be filed via Electronic Filing, with the Court of Appeals, Division II and that I further served a true and correct copy of same, on:

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