

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of S.G.O. Roofing and  
Construction, MN OSH Docket No. 11191,  
Inspection No. 316686849

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER**

The above-entitled matter came before Administrative Law Judge Jeanne M. Cochran for a contested case hearing on November 12, 2013. Written closing arguments were filed by the parties after the evidentiary hearing. The hearing record closed on December 6, 2013, upon the filing of the last written submission.

Jackson Evans, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Justin Fettig, Safety Coordinator, S.G.O. Roofing and Construction LLC, appeared on behalf of Respondent S.G.O. Roofing and Construction LLC (Respondent or S.G.O.).

**STATEMENT OF THE ISSUES**

1. Whether Respondent failed to comply with the fall protection requirements of 29 C.F.R. 1926.501(b)(10) and therefore violated Minn. Stat. § 182.653, subd. 3?
2. If so, was the violation serious and the penalty properly calculated?

**SUMMARY OF DECISION**

Based on the evidence in the hearing record, the Administrative Law Judge concludes that the Department has not demonstrated by a preponderance of the evidence that S.G.O. Roofing and Construction LLC failed to comply with the fall protection requirements of 29 C.F.R. 1926.501(b)(10).

## FINDINGS OF FACT

1. S.G.O. is a commercial roofing company based in Lakeville, Minnesota. S.G.O. has been in business for approximately 13 years. S.G.O. is a small, closely held corporation with not more than 30 employees.<sup>1</sup>

2. Safety is a top priority for S.G.O. All employees of S.G.O. are trained as safety monitors when they start with the company. The company also conducts weekly safety toolbox talks, and provides formal safety training for all of its employees at least two to three times a year.<sup>2</sup>

3. All S.G.O. employees are required to wear a yellow safety vest and white hard hat while at a job site. Employees are issued the yellow safety vest and white hard hat when they start employment with the company. If an employee is not wearing the safety vest or hard hat, company policy states that the foreman cannot allow the employee on the job site.<sup>3</sup>

### Fall Protection Requirements

4. Roofing companies operating in Minnesota are required to comply with occupational safety and health act (ISHA) standards regarding fall protection. OSHA requires that employees engaged in roofing activities on a low sloped roof with unprotected sides or edges must have fall protection if the roof is six feet or more above the lower level. Fall protection can consist of: (1) guardrail systems; (2) a safety net system; (3) personal fall arrest system; (4) a combination of a warning line system and guardrail system; (5) warning line system and safety net system; (6) combination of a warning line system and a personal fall arrest system; (7) warning line system and safety monitoring system; or (h) on roofs 50 feet or less in width, the use of a safety monitoring system alone.<sup>4</sup> When a warning line system and safety monitor system is used, a safety monitor is only required to be in place when an employee is working outside of the warning line.<sup>5</sup>

5. A warning line system is a system of ropes, wires, or chains and supporting stanchions. A warning line shall be flagged at intervals of not more than six-feet with high-visibility material. The warning line system shall be erected around all sides of the roof area, and shall be located not less than 6 feet from the roof edge.<sup>6</sup>

6. A safety monitoring system is a system whereby a designated employee monitors the safety of an employee who is working outside of the warning line. The designated employee or "safety monitor" shall be competent to recognize fall hazards,

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<sup>1</sup> Testimony (Test.) of Steven Olson; Notice and Order for Hearing and Prehearing Conference (April 10, 2013).

<sup>2</sup> *Id.*; see also, Exhibits (Exs.) A-P.

<sup>3</sup> Test. of S. Olson.

<sup>4</sup> Minn. Stat. § 182.653, subd. 3; Minn. R. 5205.0010, subd. 6; 29 C.F.R. 1926.501(b)(10).

<sup>5</sup> See July 23, 1996 USDOL Office of Construction Standards and Compliance Assistance Letter of Interpretation; Test. of Ron Wallace.

<sup>6</sup> 29 C.F.R. 1926.502(f)(1)-(2).

shall be close enough to communicate orally with the employee, and shall not have other responsibilities which could take the safety monitor's attention away from the monitoring function. The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner.<sup>7</sup>

### **September 18, 2013 Inspection by the Department**

7. On the morning of September 18, 2012, Ron Wallace, a Safety Investigator with the Department, conducted an inspection at 4001 Lake Breeze Avenue in Brooklyn Center, Minnesota. A new commercial industrial warehouse was being built on the site.<sup>8</sup>

8. Opus Design Build was the general contractor for the job. S.G.O. was hired as a roofing subcontractor for the building project.<sup>9</sup>

9. Wallace has been a Safety Investigator with the Department for the last four years. Wallace has been trained on the requirements of OSHA, and has had specific training on fall protection. Wallace has conducted over 520 OSHA inspections, approximately 60-70 percent of those involved fall protection issues. Prior to becoming a Safety Investigator with the Department, Wallace owned a construction company that did both residential and commercial construction work.<sup>10</sup>

10. When Wallace arrived at the Brooklyn Center site on the morning of September 18, 2012, he observed an individual working on the roof of the building.<sup>11</sup> The roof of the building is a flat, rectangular shaped surface and is approximately 100,000 square feet in size. An individual can see any point on the roof from any other point on the roof.<sup>12</sup>

11. The roof is approximately 30 feet from ground level, and has short parapet wall along the edge.<sup>13</sup>

12. Wallace observed the individual on the roof for about five to ten minutes. According to Wallace, the individual was working with the roofing liner. A flagged warning line system was set up on the roof. For a portion of the time, the individual was working near the edge of the roof, outside of the flagged, warning line.<sup>14</sup>

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<sup>7</sup> 29 C.F.R. 1926.502(h).

<sup>8</sup> Ex. 1; Test. of Ron Wallace.

<sup>9</sup> Test. of R. Wallace; Test. of Steven Olson.

<sup>10</sup> Test. of R. Wallace.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; Exs. 3, 5, 7-9.

<sup>14</sup> *Id.*; Exs. 3-5.

13. Wallace did not observe any other individuals on the roof during this five to ten minute period, but he was not able to see the entire roof from his vantage point. At the time, Wallace was located approximately 100-120 yards away from the building.<sup>15</sup>

14. Wallace took three photographs of the individual on the roof. The pictures show the individual was wearing jeans and a camouflage jacket with the hood up. The individual did not have on a hard hat or safety vest. The individual was not wearing a personal fall arrest system, was not hooked up to an anchored rope, and was not protected by a guardrail. In one of the photos, the individual is standing outside of the flagged, warning line.<sup>16</sup>

15. After observing the individual on the roof for five to ten minutes, Wallace went over to the building and spoke with the Opus job site superintendent. He told Wallace that S.G.O. was the only contractor working on the roof. There were other contractors working on the building at ground level such as painters, plumbers, and excavators.<sup>17</sup>

16. Wallace then went up a ladder to observe the roof and take additional photos. Wallace remained on the ladder while he did so. At no time, did he get up on the roof itself.<sup>18</sup> Approximately fifteen to twenty minutes had passed from the time that he arrived at the job site and the time that he went up the ladder.<sup>19</sup>

17. The photos taken from the ladder show a number of individuals in yellow vests and white hard hats working on the roof. The photos also show one individual in a blue sweatshirt without a vest or hard hat, and another individual in an orange vest. In addition, the photos show some of the materials and tools used by the workers.<sup>20</sup>

18. When Wallace took the photos from the top of the ladder, all of the individuals on the roof, including the S.G.O. job foreman, were actively working on roofing activities and were doing so within the warning line.<sup>21</sup>

19. According to Wallace, there was a large amount of noise on the roof from the construction activity going on at the job site, as well as from the wind. The noise was at least as loud as a busy metropolitan street.<sup>22</sup>

20. Wallace did not see a chair or any other place where a safety monitor may have been sitting and observing the individual who was working near the edge of the roof when he first arrived.<sup>23</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> Exs. 3-5.

<sup>17</sup> Test. of R. Wallace.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Exs. 7-9.

<sup>21</sup> Test. of R. Wallace; Exs. 7-9.

<sup>22</sup> Test. of R. Wallace.

<sup>23</sup> *Id.*

21. Wallace then asked the S.G.O. job foreman on-site and another worker to come talk to him at ground level.<sup>24</sup>

22. Wallace asked the job foreman what type of fall protection S.G.O. was using that day. The job foreman responded that fall protection was not needed because all S.G.O. employees were working inside the warning line.<sup>25</sup>

23. Wallace also spoke with another individual who was working on the roof, the man in the blue sweatshirt pictured in Exhibit 9. He told Wallace that he worked for S.G.O. and had been trained as a safety monitor. He also said that everyone on the roof had been trained as a safety monitor.<sup>26</sup> He did not say that he was acting as a safety monitor on that day.<sup>27</sup>

24. Wallace then spoke with the foreman again. He told the foreman that OSHA requires that there be a safety monitor or other fall protection in place when an employee is working outside the warning line. Wallace told the foreman that he had seen an employee working outside of the line without a safety monitor. The foreman did not contest the assertion that there had been no safety monitor earlier in the morning when Wallace saw an individual working outside the line. The foreman also stated that he would make sure to have a safety monitor in place if an employee was working outside of the warning line.<sup>28</sup>

25. Wallace was told by the S.G.O. foreman that there were nine S.G.O. employees working on the roof that day. Wallace did not count the number of individuals on the roof when he did his inspection.<sup>29</sup> Nor did Wallace confirm with the S.G.O. foreman or anyone else that the person who was working outside of the safety line when he first arrived was an S.G.O. employee.<sup>30</sup>

26. On September 20, 2012, Wallace spoke by telephone with a representative of S.G.O. They discussed the inspection that took place two days earlier. During the telephone conference, Wallace told the S.G.O. foreman that he would be issuing a citation for a fall protection violation as a result of his inspection on September 18, 2012.<sup>31</sup>

27. On October 11, 2012, Wallace issued a citation to S.G.O. for violating the fall protection standards set forth in 29 C.F.R. § 1926.501(b)(10). The citation states that “[e]mployees” of S.G.O were working on the roof of the building at 4001 Lake

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; Ex. 1.

Breeze Avenue in Brooklyn Center without the required fall protection.<sup>32</sup> The Citation classifies the violation as serious and imposes a penalty of \$1,400.<sup>33</sup>

28. At the hearing, Steven G. Olson, a part-owner of S.G.O, disputed that S.G.O. violated the fall protection standard. Olson maintained that the person that Wallace saw outside of the warning line was not an S.G.O. employee.<sup>34</sup>

29. Olson started the company approximately 13 years ago and knows the employees of S.G.O., most of them very well.<sup>35</sup> Olson stated that he does not recognize the individual in the camouflage jacket cited by Wallace and pictured in Exhibits 3-5. Olson noted that the individual was not wearing the yellow safety vest and white hard hat that S.G.O. employees are required to wear while on the job. He also stated that the individual does not appear to be engaged in roofing work.<sup>36</sup>

30. According to Olson, S.G.O.'s payroll records show that there were only eight S.G.O. employees working on the roof at the site on the day of the inspection. Olson stated that he knows the physique of those eight employees, and their physical appearance does not match that of the individual pictured in Exhibits 3-5. In addition, all eight employees told Olson that they were working within the warning line on that day.<sup>37</sup>

31. Olson also stated that two other individuals, who are pictured in Exhibit 9, the one in the orange vest and the one in the blue sweatshirt, are not S.G.O. employees.<sup>38</sup>

32. Olson has worked in the roofing business for approximately 35 years. Olson has worked as a roofer, a foreman, and a business owner. Olson noted that it is common for workers from other trades such as plumbers, electricians, and heating/cooling workers to be working on a roof at the same time as the roofing contractor. In addition, other trades besides roofers may trim the roofing membrane as part of their work.<sup>39</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Administrative Law Judge has jurisdiction to consider this matter under Minn. Stat. §§ 182.661, subd. 3, and 14.50.

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<sup>32</sup> Notice and Order for Hearing, Ex. 2.

<sup>33</sup> *Id.*

<sup>34</sup> Test. of S. Olson.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

2. The Department gave S.G.O. proper notice of the hearing and has fulfilled all relevant substantive and procedural requirements of statute and rule.

3. The Department has the burden of proof to establish, by a preponderance of the evidence, the occupational safety and health violation charged, and the appropriateness of the penalty proposed.

4. S.G.O. is an employer, as defined in Minn. Stat. § 182.651, subd. 7.

5. Pursuant to Minn. Stat. § 182.653, subd. 3 and Minn. R. 5202.0010, subp. 6, S.G.O. is required to comply with the fall protection requirements set forth in 29 C.F.R. 1926.501(b)(10).

6. This rule provides that employees engaged in roofing activities on a low sloped roof with unprotected sides and edges must have fall protection if the roof is six feet or more above a lower level. Fall protection can consist of: (1) guardrail systems; (2) a safety net system; (3) personal fall arrest system; (4) a combination of a warning line system and guardrail system; (5) warning line system and safety net system; (6) combination of a warning line system and a personal fall arrest system; (7) warning line system and safety monitoring system; or (h) on roofs 50 feet or less in width, the use of a safety monitoring system alone.<sup>40</sup> When a warning line system and safety monitor system is used, a safety monitor is only required to be in place when an employee is working outside of the warning line.<sup>41</sup>

7. The Department has failed to meet its burden to establish that S.G.O. violated the fall protection requirements of 29 C.F.R. 1926.501(b)(10) because it has not established by a preponderance of the evidence that the individual who Wallace observed working outside of the warning line on September 18, 2012, was in fact an employee of S.G.O.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

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<sup>40</sup> 29 C.F.R. 1926.501(b)(10).

<sup>41</sup> See July 23, 1996 USDOL Office of Construction Standards and Compliance Assistance letter of interpretation; see *also*, Test. of R. Wallace.

## ORDER

The Citation and Notification of Penalty issued on October 11, 2012 in conjunction with Inspection Number 316686849 are hereby **VACATED**. No penalty is assessed against S.G.O. Roofing and Construction LLC.

Dated: January 6, 2014

s/Jeanne M. Cochran  

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JEANNE M. COCHRAN  
Administrative Law Judge

Reported: Digitally Recorded  
No transcript prepared

## NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat. § § 182.661, subd. 3, and 182.664, subd. 5, the employer, the employee, or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this decision and order.

## MEMORANDUM

Employers in Minnesota are required to comply with the standards and rules promulgated under the Minnesota Occupational Safety and Health Act (Act).<sup>42</sup> The Act defines “employer” as “a person who employs one or more employees [including] any person who has the power to hire, fire, transfer, or who acts in the interest of, or a representative of, an employer . . . .”<sup>43</sup> “Employee” is defined as “any person suffered or permitted to work by an employer, including any person acting directly or indirectly in the interest of or as a representative of, an employer . . . .”<sup>44</sup>

Pursuant to Minn. R. 5205.0010, subd. 6, the Department of Labor and Industry adopted by reference Part 1926 of Volume 29 of the U.S. Code of Federal Regulations. Part 1926.501(b)(10) sets forth fall protection requirements that an employer and its employees must comply with when doing roofing work on a flat roof. This OSHA rule provides that employees engaged in roofing activities on a low sloped roof with unprotected sides and edges must have fall protection if the roof is six feet or more

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<sup>42</sup> Minn. Stat. § 182.653, subd. 3.

<sup>43</sup> Minn. Stat. § 182.651, subd. 7.

<sup>44</sup> Minn. Stat. § 182.651, subd. 9.

above a lower level. Fall protection can consist of: (1) guardrail systems; (2) a safety net system; (3) personal fall arrest system; (4) a combination of a warning line system and guardrail system; (5) warning line system and safety net system; (6) combination of a warning line system and a personal fall arrest system; (7) warning line system and safety monitoring system; or (h) on roofs 50 feet or less in width, the use of a safety monitoring system alone.<sup>45</sup> When a warning line system and safety monitor system is used, a safety monitor is only required to be in place when an employee is working outside of the warning line.<sup>46</sup>

In order to establish a violation of a specific standard under the Act, the Department must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure by the employer to comply with the cited standard; (3) an employee had access or was exposed to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative condition.<sup>47</sup>

A preponderance of the evidence means that it must be established by a greater weight of the evidence.<sup>48</sup> “It must be of a greater or more convincing effect and ... lead you to believe that it is more likely that the claim...is true than...not true.”<sup>49</sup> The preponderance of the evidence standard is less than the clear and convincing standard, and less than the proof beyond a reasonable doubt standard used in criminal trials.<sup>50</sup>

In this case, the Department maintains that S.G.O. violated the fall protection requirements of 29 C.F.R. 1926.501(b)(10) on the morning of September 18, 2012 when an individual in a camouflage jacket was working outside of the warning line without a safety monitor or other fall protection. The Department asserts that the individual was an S.G.O. employee.<sup>51</sup> S.G.O. counters that the individual who was outside of the warning line was not an S.G.O. employee, and therefore S.G.O. did not violate the fall protection requirements of 29 C.F.R. 1926.501(b)(10). S.G.O. also argues that even assuming the individual was an S.G.O. employee, the Department has not established that there was no safety monitor in place at the time.<sup>52</sup>

The question of whether the Department has met its burden of proof in this case is a close one. After carefully reviewing the evidentiary record, however, the

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<sup>45</sup> 29 C.F.R. 1926.501(b)(10).

<sup>46</sup> See July 23, 1996 USDOL Office of Construction Standards and Compliance Assistance Letter of Interpretation; see also, Test. of R. Wallace.

<sup>47</sup> *Dun-Par Engineered Form Co.*, 12 OSHC 1962, 1986-87 OSHD ¶ 27,651 (1986), *rev'd on other grounds*, 843 F.3d 1135 (8<sup>th</sup> Cir. 1988); *Gilles & Cotting, Inc.*, 3 OSHC 2002, 1975-76 OSHD ¶ 20,448 (1976).

<sup>48</sup> 4 Minnesota Practice, CIV JIG 14.15 (2012).

<sup>49</sup> *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

<sup>50</sup> *State v. Shamp*, 422 N.W.2d 520, 525 (Minn. Ct. App. 1988), *review denied* (Minn. June 10, 1988) (citing *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978)).

<sup>51</sup> Department's Letter Brief (filed December 6, 2013).

<sup>52</sup> Respondent's Post Hearing Summary (filed December 4, 2013). The Administrative Law Judge notes that S.G.O. did not contest the classification of the violation as “serious” or the calculation of the penalty amount at the hearing or in its Post Hearing Summary.

Administrative Law Judge concludes that the Department has failed to establish by a preponderance of the evidence that the individual who Wallace viewed working outside of the warning line was in fact an employee of S.G.O. The Department did not present any direct evidence to support its position. Wallace did not speak with the individual in the camouflage jacket; nor did Wallace ask the S.G.O. foreman or anyone else if the individual in the camouflage jacket worked for S.G.O.<sup>53</sup> Instead, Wallace assumed that the individual worked for S.G.O. because the Opus job site superintendent told Wallace that S.G.O. was the only contractor working on the roof that day, and because the S.G.O. foreman told Wallace that all the people working on the roof were S.G.O. employees. The Opus job site superintendent, however, was not actually on the roof that morning.<sup>54</sup> Moreover, Wallace spoke to the S.G.O. foreman approximately fifteen minutes after he observed the individual working outside the warning line. Given the time difference, the people working on the roof at the time the S.G.O. foreman answered Wallace's question were not necessarily the same as the people who were on the roof when Wallace observed the individual in the camouflage jacket outside of the warning line. In addition, while the S.G.O. foreman was on the roof, he was actively engaged in roofing activities and was not monitoring who was coming and going from the roof at all times.<sup>55</sup>

Weighed against the Department's indirect, circumstantial evidence is the testimony of Steve Olson. Olson testified credibly that the individual in the camouflage jacket, who Wallace saw outside of the warning line and who is pictured in Exhibits 3-5, is not an S.G.O. employee. The individual did not have on the standard issue S.G.O. yellow safety vest and white hard hat, and he does not look like any S.G.O. employee on the payroll for that day. Olson noted that he does not know who the individual is, but it is common for other trades to work on a roof at the same time as S.G.O.

When the record as a whole is considered, the Administrative Law Judge concludes that the Department has not established by a greater weight of the evidence that the individual who Wallace saw outside of the warning line was in fact an S.G.O. employee. Because the Department has failed to meet its burden to show that it was an employee of S.G.O. who was working outside of the warning line without a safety monitor or other adequate fall protection, the Department has failed to demonstrate that S.G.O. violated the fall protection requirements of 29 C.F.R. 1926.501(b)(10). Therefore, the Citation and Notification of Penalty issued to S.G.O. are vacated.

**J. M. C.**

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<sup>53</sup> Test. of R. Wallace.

<sup>54</sup> Test. of R. Wallace; Test. of S. Olson.

<sup>55</sup> Test. of R. Wallace.