SECRETARY OF LABOR, Complainant, v. WOLKOW BRAKER ROOFING CORP, Respondent.	OSHRC DOCKET NOs. 97-1773 & 98-0245, consolidated

APPEARANCES:

For the Complainant:
Susan B. Jacobs, Esq., U.S. Department of Labor, Office of the Solicitor, New York, New York

For the Respondent:
Stephen C. Yohay, Esq., Robin S. Horning, Esq., McDermott, Will & Emery, Washington D.C.

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act") Respondent, Wolkow Braker Roofing Company (Wolkow), at all times relevant to this action maintained a place of business at 111 Main Street, White Plains, New York, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 17-20, and July 30, 1997, compliance officers employed by the Occupational Safety and Health Administration (OSHA) visited Respondent's worksite at White Plains, New York. As a result of the June visit, Wolkow was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Wolkow brought this proceeding before the Occupational Safety and Health Review Commission (Commission). That matter, concerning allegedly "serious" fall hazards and ladder safety violations, was assigned Docket No. 97-1773. Citations resulting from the July visit were also contested and assigned Docket No. 98-0245. The violations allegedly observed during the July visit include two separate fall hazards which were cited as "willful" because of their alleged similarity to the fall hazard cited as a result of the earlier OSHA visit.

The matters were consolidated and a hearing was held on September 9-11, 1998 in New York, New York. The parties have submitted briefs on the issues and this matter is ready for disposition.

DOCKET NO. 97-1773

Alleged Violations of §1926.501(b)(10)

SERIOUS CITATION 1, ITEM 1a ALLEGES:

29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low slope roofs with unprotected sides and edges 6 feet or more above lower levels were not protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system, or a safety monitoring system alone of roofs 50 feet or less in width:

> a) Employees performing roofing work and walking in a drainage trough approximately 200 feet long and 23 inches wide on the outer edge of a flat roof were not protected by guardrails, a fall arrest system, safety nets, a safety monitor or any other fall protection system. The exterior side of the trough consisted of a parapet approximately 27 inches high and 18 inches wide exposed to a drop of 8 stories to the ground below.

Facts

Peter West, an OSHA Compliance Officer (CO), testified that the June 17-20, 1997 inspection took place in response to a complaint received in OSHA's area office. The Complainant was concerned about men working without fall protection on a roof several stories above the street (Tr. 19-20). When West arrived at Wolkow's White Plains worksite, he observed and videotaped three Wolkow employees, later identified as Nick Siciliano, Alcides Rodriguez, and a third employee identified variously as Sokoloff or Quiorz, working in a drain trough directly behind a parapet at the roof edge of an eight story building with no visible means of fall protection (Tr. 20-21, 24, 313; Exh. C-2).

The drain trough was approximately 23-24 inches wide and 175-200 feet long. The edge of a false roof ran along the interior of the trough approximately 24 inches above the bearing roof (Tr. 45,49,92,136; Exh. C-2, C-4). Along the outer edge of the trough was a parapet approximately a foot wide (Tr. 68) and 27-28 inches high when measured from the outer edge of the trough floor (Tr. 22, 24). West stated that the bottom of the trough where Wolkow's men stood sloped down 1/2 to 3/4 of an inch and was only slightly lower than at the edge (Tr. 718). He also testified that a parapet of that height may be considered a midrail and toeboard; however, a top rail at 42 inches, ±3 inches is required to comply with OSHA regulations (Tr. 24). According to West, he met with Wolkow's foreman, Nick

Siciliano, who told West that they were not using a safety monitoring system (Tr. 26); however, safety belts were on site which could be used for fall protection (Tr. 26).

Mr. Siciliano testified that he disagreed with the compliance officer's assessment and he did not believe any safety hazard existed or that safety belts were necessary (Tr. 338, 354). Siciliano stated that the trough where the employees were working sloped down approximately 6 inches, and the height of the parapet was approximately 34-35 inches when measured from the bottom of the trough and provided adequate protection against falls (Tr. 277, 313, 328). Moreover, at the time of the inspection the crew, while replacing a roof drain and patching areas with cement, worked on their hands and knees 90 percent of the time (Tr. 314). John McCarthy, a safety and health consultant employed by Wolkow during the relevant periods, testified as an expert in fall protection (Tr. 495; Exh. R-1). McCarthy testified that he considered Nick Siciliano to be a competent person as defined by the OSHA fall protection standards (Tr. 506). He agreed with Siciliano that the employees working in the trough at the White Plains site were not exposed to a fall hazard (Tr. 528) because the parapet provided adequate protection, even though it did not comply with height requirements to qualify as a guardrail under OSHA regulations (Tr. 530-31, 566).

Although Mr. Siciliano testified that he acted as a safety monitor on the job, contradicting his statement to CO West, (Tr. 351), he did not tell his employees that he was acting as a safety monitor. He usually ended up watching his men because he felt it was part of his job as foreman (Tr. 348, 352, 364). Though he claimed not to be working, Siciliano testified that he was kneeling as he supervised his crew; however, he could see everyone working in the trough (Tr. 316-17). Siciliano stated that he was in the trough area approximately 80-85% of the time and, if he left, he would tell his second man, Alcides Rodriguez, to watch the men (Tr. 316, 349, 356). Mr. Rodriguez testified that he was Siciliano's second man and acted as foreman when Siciliano left the site (Tr. 237, 261). He always watched his people (Tr. 246); however, when Siciliano left him in charge he continued to work and there were times when he was not facing his co-workers (Tr. 240, 246, 260).

Although he disagreed with the compliance officer regarding the need for fall protection in addition to the parapet wall, Mr. Siciliano erected a cable which, according to the citation issued to Respondent, complied with the standard. Compliance officer West returned to the jobsite on June 20, 1997 and determined that the fall protection cable was too high. Respondent lowered the cable and Mr. West was satisfied that compliance with the standard had been achieved (Tr. 28, 53).

Discussion

Section 1926.501(b)(10) provides:

> Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width . . . the use of a safety monitoring system alone . . . is permitted.

In its posthearing brief Respondent concedes that the parapet wall failed to comply with the standard cited above (Brief pgs. 19-22). Respondent insists, however, that a safety monitoring system was in place and any violation was *de minimis* because there was virtually no possibility of an employee falling over the parapet wall.

Safety Monitor. The parties stipulate that the roof area where Wolkow's employees were working was less than 50 feet in width (Tr. 14). A safety monitoring system would, therefore, have been permissible under OSHA regulations. Based on the record, however, there is no credible evidence in support of a finding that a safety monitoring system was in place. CO West testified, credibly, that Nick Siciliano specifically told him during the inspection that they were not using a safety monitoring system on the site. Siciliano did not explain his contradictory statement at the hearing, stating only that he felt that watching the men he supervised was always part of his job as foreman.

Section 1926.500(h) mandates that for any safety monitoring system:

> (1) The employer shall designate a competent person to monitor the safety of other employees and the employer shall ensure that the safety monitor complies with the following requirements:
>
> (i) The safety monitor shall be competent to recognize fall hazards;
> (ii) 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;
> (iii) The safety monitor shall be on the same walking/working surface and within visual siting distance of the employee being monitored;
> (iv) The safety monitor shall be close enough to communicate orally with the employee;
> (v) The safety monitor shall not have other responsibilities that could take the monitor's attention from the monitoring function.

Siciliano's post-hoc "feeling" that it was always part of his job as foreman to watch his men fails to meet the requirements of §1926.500(h), and fails to establish that Wolkow had a safety monitoring system in place on June 17, 1997. Though Siciliano was approved to act as the roofing foreman on the

White Plains worksite (*See*, testimony of Felix Wolkowitz, Tr. 649), there is no evidence that the use of a safety monitor was ever contemplated prior to the June 17 OSHA inspection, or that Siciliano was ever assigned to act in that capacity (*See*, testimony of Gerald Wolkowitz, Tr. 679-80, intimating that use of a dedicated monitor was anticipated only on U or horseshoe shaped roof). Siciliano merely testified that he always felt that he should watch the men as part of his supervisory role. Similarly, no one specifically assigned Rodriguez to act as safety monitor on the White Plains job. Rodriguez testified that he was asked to act as "second man." suggesting that his safety duties were implicit in that job.[1]

It is well established in this record that Siciliano and Rodriguez had substantial responsibilities that averted their attention from any monitoring function. Accordingly, the record fully supports the conclusion that no safety monitoring system was contemplated prior to the OSHA inspection. Siciliano admitted that he spent 15-20% of his time away from the area on other tasks. Rodriguez continued to work when Siciliano left the area and admitted that he could not always see the other employees. The conduct of both employees is inconsistent with their claim that they performed the duties of a safety monitor. Because the required fall protection was not provided, citation 1, item 1a is AFFIRMED.

De Minimis. A violation is *de minimis* when there is technical noncompliance with a standard; however, the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987) Respondent claims: 1) that its employees worked mainly from their knees, and 2) because the parapet provided substantially similar protection to that required by the cited standard there was no significant risk of any employee falling from the trough area. The evidence, however, fails to support this argument.

CO West testified that he observed Wolkow employees alternately standing and kneeling throughout the entire time he observed them. Moreover, Complainant's videotape shows all three of Wolkow's employees standing simultaneously and clearly exposed to a fall hazard since the parapet extended only to the employees' mid-thigh level (*See also*, testimony of CO Paradiso, Tr. 164, stating that the parapet came just above the workers' knees). Though the parapet might serve to remind workers of their proximity to the edge, it would not prevent a fall. Moreover, the cited violation bears

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[1] *Beta Construction Co.*, 16 BNA OSHC 1435, 1993 CCH OSHD ¶30,239 (No. 91-102, 1993), cited by Wolkow, is not dispositive here. As Wolkow notes, the Commission refused to reach the question of whether an employer must formally appoint a monitor, or make the identity of the monitor known to monitored employees. The sole issue under scrutiny there, however, was the identity of the safety monitor. There was no question that the employer actually had a safety monitoring system in place at the time of the violations.

more than a negligible relation to employee safety and is, therefore, not *de minimis*. As CO West testified, a fall from the eight story building would, in all probability result in death (Tr. 55). Clearly, the violation was properly classified as "serious." Although the portion of the workday Wolkow's employees spent on their knees, and the partial protection provided by the parapet reduce the likelihood of an accident, the reduced gravity of the violation is reflected in the assessed penalty, discussed *infra*. *See, Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

Alleged Violation of §1926.503(a)(1)

SERIOUS CITATION 1, ITEM 1b ALLEGES:

29 CFR 1926.503(a)(1): The employer did not provide a training program to enable each employee to recognize the hazards of falling and train each employee in the procedures to be followed in order to minimize these hazards:

Location: Roof, East side, NYNEX Building, 111 Main Street, White Plains, NY.

On or about 06/17/97

> a) The employer did not provide the employees adequate fall protection training enabling them to recognize and minimize fall hazards. Employees performing roofing work and walking in a drainage trough approximately 200 feet long and 23 inches wide on the outer edge of a flat roof were not protected by guardrails, a fall arrest system, safety nets, a safety monitor or any other fall protection system. The exterior side of the trough consisted of a parapet approximately 27 inches high and 18 inches wide exposed to a drop of 8 stories to the ground below.

Facts

CO West testified that none of the three exposed employees, Siciliano, Sokoloff (or Quiorz) and Rodriguez, saw anything dangerous about what they were doing (Tr. 31-32). West admitted that all the employees stated that they had received training; however, he believed that the employees had not been adequately trained in fall hazards because they failed to recognize the hazard for which Wolkow was cited (Tr. 32, 77). West also noted that Wolkow's Tool Box Class Schedule for 1997 did not indicate any specific fall protection safety training (Tr. 33; Exh. C-1).

At the hearing Siciliano testified that, as a union apprentice, he received safety training including training in fall protection and ladder safety (Tr. 303-04). Siciliano stated that Wolkow had a written safety program, "Passport to Safety," and provided training which included the training videos, "Fall Protection, It's About T.I.M.E," and "Roof Safety," covering fall protection and perimeter systems (Tr. 305; Exh. R-7, R-10, R-11). Siciliano stated that the shop supervisor, Richard Hanna, or the company safety officer, John McCarthy, held safety meetings either quarterly or every six months to update the foremen in safety matters (Tr. 308-10). Siciliano testified that he conducted toolbox

safety meetings every week for his roofing crew (Tr. 305) and discussed setting up perimeter barriers, safety lines, safety harnesses, and systems monitors (Tr. 307). He stated that he knew from his training and apprenticeship which conditions require harnesses and/or lines and how they are used. He also knows that a guardrail must be at least 42 inches high (Tr. 308). McCarthy testified that he conducted a seminar for Wolkow employees specifically covering fall protection during the spring of 1995 (Tr. 508-15; R-2, R-3), as well as ongoing toolbox training after 1995. He discussed fall protection issues with Wolkow's foremen every time he was on a jobsite (Tr. 508, 516).

Rodriguez testified that Wolkow has a written safety program, entitled "Passport to Safety" (Tr. 232) and he received training[2] at Wolkow's shop during toolbox meetings and at a dinner safety talk (Tr. 229-35). Rodriguez stated that, prior to the OSHA inspection, he viewed tapes addressing fall protection, hard hats, ladders and housekeeping (Tr. 230; Exh. R-10, R-11). He stated that he understood about protection requirements at the time of the June inspection and he knows that guardrails must be between 39 and 42 inches high, though he was not familiar with specific Federal OSHA requirements. He is familiar with the use of safety lines and harnesses as alternative fall protection (Tr. 236, 244-45, 254, 264). Rodriguez, like Siciliano, testified that he did not believe that the employees working inside the parapet were exposed to a fall hazard because of the partial protection provided by the parapet and the amount of time the employees spent on their knees (Tr. 243, 248).

Discussion

In support of this allegation, complainant points to the statements made to compliance officer West by Respondent's employees at the worksite that none of the employees believed working in close proximity to the parapet wall surrounding the outer edge of the building was "dangerous or hazardous." Based upon these statements, Complainant asserts that the employees "had not been adequately trained" (Complainant's brief, pg. 13). Moreover, according to Complainant, the employees were not sure of the height requirements for determining when fall protection must be used and the training provided by Respondent to its employees; specifically, 1997 Tool Box class schedule, did not address fall protection. Even if fall protection was provided, said training was not site specific. Thus, since the employees were not trained properly, they were unable to recognize "that a fall hazard existed in the trough (Tr. 55-6)" (Complainant's brief, pg. 14).

[2] Tyrone Plotkin was not named as an exposed employee, but provided testimony regarding Wolkow's training which corroborated Rodriguez' and Siciliano's (Tr. 270-72, 275).

As its defense to this item, Respondent relies upon testimony that the weekly tool box meetings included discussions of "fall protection: (Tr. 305-307, Exh. C-1) and the videos which each employee was required to watch during training sessions provided instructions regarding fall protection procedures (Tr. 308, Exh. R-10, R-11). Moreover, Respondent's safety manual "Passport to Safety" and the "Pocket Guide to Safety" provided fall protection safety instructions to the employees. Finally, Respondent's safety consultant presented a safety training seminar regarding the fall protection standard and safety meetings were conducted three to four times a year by the firm's owners wherein various safety topics, including fall protection, were discussed (Tr. 309, 572).

There is no dispute between the parties that Respondent provided safety training to its employees. It appears, however, that Complainant is arguing that the quality and content of the training was inadequate in the specific area of fall protection[3] and, implicit in its argument, that Respondent failed to enforce its safety work rules regarding fall protection. This conclusion is based primarily upon employee responses to the compliance officer's questioning at the worksite. On the other hand employee testimony at the hearing supports the conclusion that they believed the training they received was appropriate for their work activities. No employee testified that they believed Respondent's training program was deficient for fall protection. Thus, the weight of the evidence supports the conclusion that Respondent's training program for fall protection met the requirements of the standard. Moreover, the plain language of the cited standard may not be stretched to require employer enforcement of the training requirements at the worksite. The Review Commission considered this issue in *Dravo Engineers and Constructors* 11 BNA OSHC 2010, 2012 (1988) regarding a training requirement and stated:

> The Secretary argues that the Commission has held that employers must effectively enforce their work rules to avoid being found in violation of standards, and that the Commission should therefore uphold the judge's decision in this case and find a violation based on the lack of enforcement of Dravo's instructions. The Secretary relies in support on cases concerning the unpreventable employee misconduct defense. These cases are inapposite since they deal with a defense raised by employers in arguing that they should not be held responsible for failing to prevent their employees' misconduct. This case, on the other hand, involves the burden of the Secretary to prove a violation of a particular standard which imposes the duty to instruct employees. This duty was not breached. The Secretary would read into the standard the additional duty to enforce the instructions. We decline to rewrite the standard to impose a duty not otherwise required. (*Citations omitted).*

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[3] The standard requires the training program to "enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards. According to Webster's II New Riverside University Dictionary (1989) "enable" means "supply with the means, knowledge or chance."

For the foregoing reasons, Serious citation item 1(b) is VACATED.

Penalty

Items 1a and 1b were grouped because they involve similar or related hazards. A penalty of $3,000.00 was proposed for these two items. As noted above, the violation at citation 1, item 1a was properly classified as "serious" in that a fall from an eight story building to the ground below would result in death (Tr. 55). The likelihood of an accident occurring was low, decreasing the gravity of the violation. Wolkow is a medium sized company, with between 30 and 80 employees, 52 at the time of the violation (Tr. 589). CO West testified that the penalty proposed reflects a 40% reduction for size (Tr. 57). No reductions were given for prior history because Wolkow had received another OSHA citation within the prior three years (Tr. 58). Wolkow has never had a perimeter fall (Tr. 311). West stated that no reduction was given for good faith because of the high gravity of the violation (Tr. 59). One of the two items has been vacated. As discussed above, the probability of an accident was overstated and Complainant introduced no other evidence of bad faith. Taking into account the relevant factors, a penalty of $2,000.00 is appropriate.

Alleged Violations of §1926.1053 *et seq.*

Items 2a through 2d have been grouped because they involved similar or related hazards that may increase the potential for injury resulting from an accident.

SERIOUS CITATION 1, ITEM 2a ALLEGES:

29 CFR 1926.1053(b)(1): Portable ladders were used for access to an upper landing surface and the ladder siderails did not extend at least 3 feet (.9 m) above the upper landing surface to which the ladder was used to gain access:

Location: Roof, East side, NYNEX Building, 111 Main Street, White Plains, NY.

On or about 06/17/97

a) Employees used a 3 rung job made wooden ladder approximately 89 inches high by 30 inches wide to access a "false" low sloped roof, 200 feet long by 12.5 feet wide at a landing height of approximately 83 inches. Side rails did not extend at least 3 feet above the landing.

SERIOUS CITATION 1, ITEM 2b ALLEGES:

29 CFR 1926.1053(a)(2): Ladder rungs, cleats, and steps were not parallel, level, and uniformly spaced when the ladder was in position for use:

Location: Roof, East side, NYNEX Building, 111 Main Street, White Plains, NY.

On or about 06/17/97

a) Employees used a 3 rung job made wooden ladder approximately 89 inches high by 30 inches wide with rungs positioned at 22.5 inches from the ground to the first rung, 17.5 inches from the first to second rung and 16.0 inches from the second to third rung to access a low sloped roof at approximately 83 inches in height.

SERIOUS CITATION 1, ITEM 2c ALLEGES:

29 CFR 1926.1053(b)(16): Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, were not either immediately marked in a manner that readily identified them as defective, or tagged with "Do Not Use" or similar language, and were not withdrawn from service until repaired:

Location: Roof, East side, NYNEX Building, 111 Main Street, White Plains, NY.

On or about 06/17/97

a) Employees used a 3 cleat (rung) job made wooden ladder to access a 83 inch high roof. The 2x4 cleats were not notched in to the side rails or supported by blocks attached to the side rails located between the cleats (rungs). The ladder is structurally deficient.

Facts

CO West testified that he observed an 89 inch high job-made wooden ladder on the site (Tr. 34). The rungs of the ladder were not uniformly spaced. The first rung was 22.5 inches from the ground, the second was 17.5 inches above the first and the third rung was 16 inches above the second (Tr. 36). The rungs were not inset into the side rails, but were secured by nails from the side (Tr. 37). Blocks of wood were supporting the second and third rungs; however, nothing was placed between the first and second rungs to prevent collapse of the rungs (Tr. 37-38). West stated that the ladder accessed the false roof and extended only 6 inches above the landing level (Tr. 34). Although West did not see anyone using the ladder, he testified that Foreman Siciliano told him his employees used the job made ladder to reach the work area via the sloped false roof (Tr. 35, 80, 82). However, Siciliano testified that the job ladder did not belong to Wolkow and neither he nor his employees used the ladder (Tr. 318, 332-33, 359). Mr. Siciliano stated that his employees accessed the work area by going under the false roof and denied that he told West that his employees used the ladder (Tr. 358). Moreover, Alcides Rodriguez testified that he never used the ladder cited in item 2, and never saw any other Wolkow employees using it (Tr. 258). West testified that Wolkow abated the hazard by removing the job-made ladder from the area (Tr. 54).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that employees had access to the violative condition. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991). To show access, the Secretary must prove that employees have been, are, or will be in zones of danger during either their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Carpenter Contracting Corp.* 11 BNA OSHC 2027, 1984 CCH OSHD ¶29,950 (No. 81-838, 1984). *See also Astra Pharmaceutical Products* 681 F.2d 69 (1st cir 1982); *Gary Concrete Products* 15 BNA OSHC 1051, 1052 (1991).

The Commission has defined "preponderance of the evidence" as "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Ultimate Distrib. Systems, Inc.* 11 OSHC 1569, 1570 (1982). To carry that burden the Secretary relies exclusively upon the "admission" of Foreman Siciliano to compliance officer West that Respondent's employees used the ladder to access the work area.[4] This testimony is admissible pursuant to FRE Rule 801(d)(2)(D) (employee admissions). Admissibility, however, does not establish trustworthiness or reliability of the statement. The Commission has held that an out of court employee statement "inherently has less probative value than would the employee's own testimony and is not necessarily entitled to dispositive weight." *Continental Electric Co.* 13 BNA OSHC 2153, 2155, n. 6 (No. 83-0921, 1989 CCH OSHD ¶29,354). In this case, however, the declarant, Siciliano, testified that he and his employees did not use the ladder nor was there any reason to use the ladder to access the work area (Tr. 358, 359). Indeed, Mr. Siciliano stated that he was unaware of who owned the ladder (Tr. 359). Thus, in the absence of any evidence in support of the disputed "admission" related by Mr. West, these items must be VACATED.

[4] West also testified that unknown employees also stated that they used the ladder (Tr. 80, 81). No weight is given to this evidence.

Alleged Violation of §1926.1060(a)

SERIOUS CITATION 1, ITEM 2d ALLEGES:

29 CFR 1926.1060(a): The employer did not provide a training program for each employee using ladders and stairways which would train each employee in the procedures to be followed to minimize hazards related to ladders and stairways:

Location: Roof, East side, NYNEX Building, 111 Main Street, White Plains, NY.

On or about 06/17/97

> a) Employer did not provide an effective training program ensuring employees recognize and minimize the hazard of using an 89 inches high X 30 inches wide job-made ladder to access a roof landing 83 inches high. The side rails did not extend at least 3 feet above the landing. The rungs were also improperly spaced at 22.5 inches, 39 inches and 55 inches from the bottom.

Facts

Though the employees on site told West they had been trained, West believed that the training was inadequate, because none of the employees thought that the job-made ladder was hazardous (Tr. 39, 84). West admitted that he did not ascertain what kind of training Wolkow provided its employees (Tr. 62). Ladder training is listed as the subject of Wolkow's May 30, 1997 Tool Box Class Schedule (Tr. 61-62; Exh. C-1). Moreover, Foreman Siciliano stated that he told CO West that his training included ladder safety (Tr. 335), and that ladder safety had been the topic of his toolbox talk a couple of days before the inspection (Tr. 333-34). Rodriguez also testified that received instruction about ladder safety and understood that a ladder must project a minimum of three feet above the landing area accessed (Tr. 236).

Discussion

The cited standard provides:

> The employer shall provide a training program for each employee using ladders and stairways, as necessary. The program shall enable each employee to recognize hazards related to ladders and stairways, and shall train each employee in the procedures to be followed to minimize these hazards.

Complainant maintains that the inadequacy of Wolkow's training is demonstrated by the existence of the cited violation at the site and the employees' failure to perceive any danger from the cited ladder. It was not established by a preponderance of the evidence, however, that Wolkow's employees ever used the cited ladder. Section 1926.1060(a) requires only that the employer supply employees with the knowledge necessary to recognize the named hazards. Wolkow employees told CO West, and testified at the hearing, that they had received training required by the standard.

Because the evidence establishes that the named employees were provided with the required training, the citation is VACATED.

DOCKET NO. 98-0245

Alleged Violation of §1926.153(h)(11)

SERIOUS CITATION 1, ITEM 1 ALLEGES:

29 CFR 1926.153(h)(11): Liquefied petroleum gas (lpg) containers having a water capacity greater than 2 ½ pounds (nominal 1 pound LP-Gas capacity) connected for use were not standing on a firm and substantially level surface and were not secured in an upright position:

Location: 111 Main Street, White Plains, NY.

On or about 7/30/97,

> a) Two 40 pound LP-Gas containers connected for use were lying on their sides and not secured in an upright position.

Facts

CO Robert Paradiso testified that on July 30, 1997, following OSHA's receipt of a referral alluding to unsafe conditions on the worksite, he was assigned to conduct an inspection of 111 Main Street, White Plains, New York (Tr. 87). When Paradiso arrived at the worksite he found two 40 pound LP gas containers connected for use, lying on their sides and a third canister was secured in the upright position (Tr. 96, 121; Exh. C-3). CO Paradiso stated that Nick Siciliano told him the tanks were being used to heat the back of Veral aluminum flashing which was being applied to the roof and parapet (Tr. 97). Paradiso testified that the valves on the top of the tanks could be damaged as they lay on their sides creating a fire hazard (Tr. 96). Wolkow had a cage on the lower roof where other LPG gas containers were properly secured (Tr. 100). Siciliano testified that the gas cylinder was empty (Tr. 352).

Discussion

The cited subparagraph (11) is found under subheading (h) *Containers and equipment used inside of buildings or structures,* which also states:

> (1) When operational requirements make portable use of containers necessary, and their location outside of buildings or structures is impracticable, containers and equipment shall be permitted to be used inside of buildings or structures in accordance with paragraphs (h)(2) through (11) of this section.

By its unambiguous terms, the cited standard applies only to containers and equipment used inside of structures. It is well settled that the Secretary may not extend the reach of a standard beyond the plain meaning of a regulation's language, thus depriving the employer of fair warning of proscribed conduct. *See e.g., Bethlehem Steel v. OSHRC*, 573 F.2d 157 (3rd Cir. 1978); *Dravo Corporation v. OSHRC,* 613 F.2d 1227, (3rd Cir. 1980). Because nothing in the standard suggests its applicability to LP gas containers used out of doors, the citation is dismissed.

Alleged Violation of §1926.501(b)(10)

WILLFUL CITATION 2, ITEM 1a ALLEGES:

29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low slope roofs with unprotected sides and edges 6 feet or more above lower levels were not protected from falling by guardrails systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system and personal fall arrest system, or warning line system and safety monitoring system, or a safety monitoring system alone on roofs 50 feet or less in width:

Location: 111 Main Street, White Plains, NY 10601.

On or about 7/30/97,

> a) The employer did not provide any type of fall protection system for employees applying Veral Aluminum Flashing to the 28.5 inches high parapet that ran approximately 175 feet along the outer edge of the roof. The parapet was 8 stories above the ground below.

Facts

The analysis of this alleged violation requires a review of the events which led to the issuance of the citation. On June 19, 1997, compliance officer West visited Respondent's worksite and observed a condition which he believed violated the standard set forth at 1926.501(b)(10); specifically, that appropriate fall protection was not provided to employees working in close proximity to the roof edge. Mr. West concluded that the parapet at the edge of the roof did not fulfill the requirements of the standard. Although this information was conveyed to Respondent's representatives at the worksite, Respondent was under no legal duty to correct the condition until the Secretary or her authorized representative determined that Respondent had violated the standard and a citation was issued.[5] There is no evidence in this record that compliance officer West was an "authorized representative" of the Secretary for purposes of issuing citations or, if he was, that he exercised that authority at that time.

[5] Section 9(a) of the Act reads in pertinent part: "If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of ... the Act ... he shall with reasonable promptness issue a citation to the employer."

Mr. West returned to the worksite on June 20, 1997 and, once again, observed a condition which he believed did not fully correct the hazardous condition which he observed on June 17. However, in the absence of a citation, Respondent continued to be under no legal obligation to abate the condition.

On July 30, 1997, a second compliance officer, Mr. Paradiso, visited Respondent's worksite and observed virtually the same conditions and work activities involving the same employees that Mr. West observed during the June 17 visit. However, a citation still had not been issued as of that date with respect to the alleged hazardous condition and Respondent continued to be under no legal obligation to correct the conditions at that time. The critical point in this discussion is the fact that the conditions observed by compliance officers West and Paradiso were virtually identical regarding the alleged violative conditions with minor variations in the work activities of the employees. The alleged hazard to which employees were exposed remained the same on June 17, June 20 and July 30, 1997. Moreover, nothing in this record indicates that the Secretary filed or considered filing an imminent danger petition with the District Court.

On September 9, 1997, almost three months after compliance officer West's visit to the worksite, the Secretary's authorized representative, Area Director Cathie Mannion, determined that the conditions observed by the compliance officer violated the cited standard and issued a citation to Respondent. A second citation containing the instant violation was issued on January 20, 1998 for the conditions observed by compliance officer Paradiso six months earlier which were essentially identical to the conditions observed by CO West a month prior to Mr. Paradiso's visit. Under these circumstances, Respondent has been issued two citations for the same violative conditions.

The Review Commission faced a substantially similar issue in *Secretary of Labor v. Andrew Catapano Enterprises, Inc.* 17 BNA OSHC 1777 (1996). In *Catapano*, Respondent had been cited repeatedly by separate citations for a failure to train its employees. Under the circumstances of that case the Commission stated:

> . . . the Secretary cited a failure to train in the first inspection for the same reasons he cited a failure to train in all the succeeding inspections: "Employees were not formally trained in the recognition and avoidance of unsafe working conditions and practices on or about 9/20/89." Only the date changed. As far as this record establishes, the employees did not change, and the working conditions and applicable regulations did not change. Yet Catapano was cited six more times in the succeeding docket numbers, all for the same failure to train. We find that the evidence adduced in these cases permits only a single citation and penalty assessment under the language of [the standard]" *ibid* at 1780.

In this case, the conditions observed on July 30, 1997 which form the basis for the instant citation were essentially the same as the conditions which formed the basis for item 1(a) of

Docket No. 97-1773 discussed above. That item has been affirmed. However, the exposed employees, the working conditions and the applicable regulation remained the same for that item and the instant item. Moreover, Respondent was under no legal duty to change any working conditions until a citation was issued with an abatement date for the conditions initially observed by CO West during his June 17 inspection. Since the instant citation is a duplication of the citation issued September 10, 1997, this item must be VACATED.

Alleged Violation of §1926.501(b)(1)

WILLFUL CITATION 2, ITEM 1b ALLEGES:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge 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:

Location: 111 Main Street, White Plains, NY.

On or about 7/30/97,

> a) The employer did not provide any type of fall protection system for employees installing the railing on the parapet surrounding the AC units. The parapet was approximately 12 inches high and 14 feet above the lower flat roof.
>
> The cited standard provides:
>
> *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.

Facts

CO Paradiso testified that when he arrived on Wolkow's worksite, he observed two employees, Vinny and Jimmy Cerminaro, installing a pipe guard rail around an air-conditioning unit without visible fall protection (Tr. 89, 111, 154). The base of the air conditioning unit sat on a surface 14 feet below the roof area where Wolkow's employees were working, and extended up through an opening in the roof (Tr. 105; Exh. C-3). There was a space between the air conditioning unit and the surrounding roof through which the employees could fall fourteen feet. The roof opening was surrounded on all four sides by a 12 inch parapet (Tr. 111; Exh. C-3) and Mr. Paradiso observed both employees with their upper bodies hanging over the parapet without any visible means of fall protection. The employees were reattaching a pre-existing guardrail (Tr. 112, 119, 144, 191).

Foreman Siciliano confirmed that at the time of the OSHA inspection the Cerminaro brothers had finished installing metal coping around the air conditioning unit and were reinstalling guardrail

posts to the inside face of the parapet wall (Tr. 341), however, he did not direct the Cerminaros' work because the Cerminaro's were sheet metal men (Tr. 343). Siciliano testified that Vincent Cerminaro was the foreman of the sheet metal crew (Tr. 343) and because the crew was small, Vincent performed sheet metal work in addition to directing the work (Tr. 343).

James Cerminaro testified that the guardrails around the air conditioning unit had been removed a few days before the OSHA inspection so that waterproofing could be installed over the parapet (Tr. 388-89). On the day of the inspection, the Cerminaro's had finished their work and were reinstalling the guardrailing (Tr. 396-97). Mr. James Cerminaro testified that he leaned against the parapet, either laying on his stomach or working from his knees as he replaced the guardrailing (Tr. 383-84, 394) and his brother, Vincent Cerminaro, performed the same work (Tr. 396). James Cerminaro stated that his brother, Vincent, supervised the installation of the metal coping around the air conditioning unit (Tr. 382-83).

Vincent Cerminaro acknowledged that he was the foreman for Wolkow's sheet metal workers (Tr. 347). He kept the employees' time, ordered materials, and made sure there was sufficient manpower for a given job (Tr. 433-34). In addition, Cerminaro stated that it was his responsibility to monitor the safety on the job (Tr. 434), however, he did not know the requirements for being a safety monitor (Tr. 447). Foreman Cerminaro knew the roof opening surrounding the air conditioning unit was 14 feet above the surface below and that OSHA regulations require guarding around fall hazards of 10 feet or more (Tr. 445-46). Nevertheless, he did not believe the roof opening posed any danger because he and his brother James performed the work while on their stomachs or their knees (Tr. 440, 443, 445).

Discussion

Respondent argues that the cited standard is preempted by a more specifically applicable standard at §1926.501(b)(10) *Roofing work on Low-slope roofs* and compliance with that standard was achieved by using a safety monitor in lieu of physical fall arrest systems. 29 CFR §1926.500(b) defines "roofing work" as: "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck." It is undisputed that the exposed employees were involved in the re-installation of guardrails at the time of the OSHA inspection. Because guardrail installation is not included in the

definition of roofing work, Wolkow was correctly cited under §1926.501(b).[6] Based on this record, there is sufficient evidence to support the alleged violation. Accordingly, this item is AFFIRMED.

Willful

The Commission has held that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. It is differentiated from other types of violations by a heightened awareness of the illegality of the conduct or conditions, and by the state of mind -- conscious disregard or plain indifference. *See Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD ¶24,419 (No. 76-3743, 1980). The Secretary maintains that following the June 17, 1997 OSHA inspection Respondent, and specifically Foreman Siciliano, had a heightened awareness of OSHA's fall protection requirements. Complainant argues that Mr. Siciliano's failure to ensure that the Cerminaro's were working around the air conditioning unit with fall protection evidences a blatant disregard of the Act's requirements.

The evidence establishes, however, that Siciliano was the roofing foreman, and did not supervise the sheet metal crew. Vincent Cerminaro was the supervisor for the two man crew and his decision not to require fall protection was attributable to the low probability of falling. Of necessity, the Cerminaro's worked from their stomachs and knees, leaning over a foot high parapet to re-attach the guardrails. Although Cerminaro's failure to appreciate a fall hazard under the conditions described shows poor judgment, his conduct falls short of being a conscious disregard for the Act. *See, Propellex Corporation (Propellex)*, No. 96-0265, slip op. at 14 (March 30, 1999)[violation not willful where neither foreman or supervisor appreciated the hazardous nature of the conditions].

The violation was alleged, in the alternative, as a "serious" violation, and will be affirmed as such. A 14 foot fall to the floor below would likely result in serious physical harm, as required under section 17(k) of the Act. As discussed above, the likelihood of an accident occuring, and thus the gravity of the violation, was low. Taking into account the other relevant factors discussed under citation 1, item 1 at Docket No. 97-1773 above, a penalty of $2,000.00 is considered appropriate.

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[6] Even in the event that §1926.501(b)(10) is found more specifically applicable, a *sua sponte* post-trial amendment of the pleadings pursuant to Rule 15 FRCP would be proper because the issues raised by Wolkow were tried by the implied consent of the parties. *See, Peavey Co.*,16 BNA OSHC 2022, 1994 CCH OSHD ¶30,572 (No. 89-2836, 1994). Consent is implied from Wolkow's introduction of evidence relevant to issues raised under subsection (b)(10), *i.e.*, safety monitoring. *See, McWilliams Forge Company, Inc.*, 11 BNA OSHC 2128, 1984 CCH OSHD ¶26,979 (No. 80-5868, 1984). On this record amendment of the citation would produce no different result, however, because the evidence fails to establish that Wolkow had a dedicated safety monitor on the sheet metal crew. Thus, Respondent failed to comply with either standard.

ORDER

Docket No. 97-1773

1. Citation 1, item 1a, alleging violation of §1926.501(b)(1) is AFFIRMED as a "serious" violation of the Act, and a penalty of $2,000.00 is ASSESSED.

2. Citation 1, item 1b, alleging violation of §1926.503(a)(1) is VACATED.

3. Citation 1, items 2a, 2b and 2c, alleging violations of §1926.1053(b)(1), (a)(2), and (b)(16), respectively, are VACATED.

4. Citation 1, item 2d, alleging violation of §1926.1060(a) is VACATED.

Docket No. 98-0245

5. Citation 1, item 1, alleging violation of §1926.153(h)(11) is VACATED.

6. Citation 2, item 1a, alleging violation of §1926.501(b)(10) is VACATED

7. Citation 2, item 1b, alleging violation of §1926.501(b)(1) is AFFIRMED as a "serious" violation of the Act, and a penalty of $2,000.00 is ASSESSED.

Robert A. Yetman
Judge, OSHRC

Dated: