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SECRETARY OF LABOR, Complainant, v. THE HARTFORD ROOFING CO., INC. Respondent.	:	Docket No. 92-3855

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 15, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Date September 15, 1995

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-3855

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 92-3855
HARTFORD ROOFING CO., INC.,	:	
Respondent.	:	

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

In June 1992, Hartford Roofing Co., Inc. was performing built-up roofing work[1] at the Lord & Taylor Department Store in Trumbull, Connecticut. During an inspection, an OSHA compliance officer observed six employees working in proximity to an unguarded roof edge. As a result of these conditions, the Secretary issued a citation that alleged willful, or in the alternative, repeated violations of § 1926.500(g)(1) and § 1926.500(a)(4).[2] Because

[1]Built-up roofing work consists of the placing of layers of felts and asphalt over a substrate-usually wood, insulation and concrete.

[2]§ 1926.500 Guardrails, handrails, and covers.

. . . .

(g) *Guarding of low-pitched roof perimeters during the performance of built-up roofing work-* (1) *General provisions.* During the performance of built-up roofing work on low-pitched roofs with a ground to eave height greater than 16 feet (4.9 meters), employees engaged in such work shall be protected from falling from all unprotected sides and edges of the roof as follows:

(continued...)

of Hartford's history of prior violations, the Secretary determined the violations to be "egregious," and alleged a separate violation for each employee exposed. The Secretary proposed penalties of $35,000 for each of the six employees exposed, for a total proposed penalty of $210,000.

Administrative Law Judge Richard DeBenedetto found the violation to be repeated, but not willful. Citing *Caterpillar, Inc.*, 15 BNA OSHC 2153, 1991-93 CCH OSHD ¶ 29,962 (No. 87-0922, 1993), he also determined that, because the violations were caused by a single course of conduct (failing to provide proper perimeter guarding) it was inappropriate to cite each exposure as a separate violation. He assessed a single penalty of $15,000 for the repeated violation.

We find that the judge properly found the violation to be repeated, but not willful. Moreover, we agree with the judge that, given the standards cited here, it was inappropriate for the Secretary to cite a separate violation for each exposed employee. However, we find that in view of Hartford's safety history, the penalty assessed by the judge was not appropriate. We assess a penalty of $35,000.

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[2](...continued)

(i) By the use of a motion-stopping-safety system (MSS); or

(ii) By the use of a warning line system erected and maintained as provided in paragraph (g)(3) of this section and supplemented for employees working between the warning line and the roof edge by the use of either an MSS system or, where mechanical equipment is not being used or stored, by the use of a safety monitoring system; or

(iii) By the use of a safety monitoring system on roofs fifty feet (15.25 meters) or less in width (see Appendix A), where mechanical equipment is not being used or stored.

. . . .

(4) *Mechanical equipment.* Mechanical equipment may be used or stored only in areas where employees are being protected by either a warning line or an MSS system. Mechanical equipment may not be used or stored between the warning line and the roof edge unless the employees are being protected by an MSS system. Mechanical equipment may not be used or stored where the only protection provided is by a safety monitoring system.

BACKGROUND

The roof at the Lord & Taylor Department Store measured 200 by 300 feet, was 39 feet high, and had a partially constructed parapet around most of the roof perimeter. Because the parapet walls were less than 36 inches high, the perimeter of the roof was "unprotected" within the meaning of § 1926.502(p)(8),[3] and Hartford was required by § 1926.500(g)(1) to protect its employees working there from falling by using either a motion stopping safety system or a warning line standard.

At the time of the inspection, six Hartford employees were applying waterproofing and insulation materials to the surface of the roof and the parapet, which varied in height from approximately 14-29 inches. Employees in one group were applying material directly on a 24 inch high parapet wall. Employees in a second group were applying material in an area that came right up to an 18 inch high parapet.

The judge found, and Hartford does not dispute on review, that it was not using appropriate measures to protect its employees from the unguarded roof. Hartford provided neither a warning line nor a Motion Stopping Safety system (MSS) for its employees. Hartford did use a safety monitoring system in which one employee was assigned to monitor the location of the other employees. However, section 1926.500(g)(4) did not permit reliance on a safety monitoring system because the roof was wider than 50 feet and mechanical equipment was on the roof. The evidence also showed that the system was inadequate. Several employees apparently were unaware that they were being monitored and the monitor walked as much as 100 feet from the employees he was supposed to be watching.

WILLFULNESS

Although Hartford clearly committed a violation of the standards, we agree with the judge that the violation is not willful. A violation is willful if it is committed with intentional, knowing or voluntary disregard for the requirements of the Occupational Safety and Health Act (the "Act"). *L.E. Myers Co.*, 16 BNA OSHC 1037, 1046, 1993 CCH OSHD ¶ 30,016,

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[3] Under § 1926.502(p)(8) an "unprotected" side of a roof is "any side or edge of a roof perimeter where there is no wall three feet (.9 meters) or more in height."

p. 41,132 (No. 90-945, 1993); *Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated); *Williams*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,509.

It is a well-established principle that actions taken by an employer to enhance safety on its worksite can negate willfulness even if those efforts are not sufficient to fully eliminate the hazardous condition. *Beta Construction Co.*, 16 BNA OSHC 1435, 1444, 1993 CCH OSHD ¶ 30,239, p. 41,652 (No. 91-102, 1993), *appeal docketed*, No. 93-1817 (D.C. Cir. Dec. 3, 1993); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2013, 1991 CCH OSHD ¶ 29,223, p. 39,134 (No. 85-369, 1991). Thus, the Commission has previously found violations not willful where employers made efforts to establish safety rules and communicate them to employees or instituted other good faith measures to comply with the standards in question. *Beta Constr.*, 16 BNA OSHC at 1445, 1993 CCH OSHD at p. 41,652. An employer's unsuccessful efforts to prevent a violation are sufficient to demonstrate that the employer's state of mind was not one of disregard or indifference so long as the employer acted in an objectively reasonable manner. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2209, 1991-93 CCH OSHD ¶ 29,964, p. 41,029 (No. 87-2059, 1993).

The record discloses that Hartford, which is one of the largest roofing contractors in Connecticut, has a history of prior violations, including several citations for failing to comply with the roofing standards cited in this case. Hartford had also entered into three settlement agreements, most recently in November 1991, a year before this inspection, when it specifically agreed to comply with OSHA roofing standards. Generally, however, the mere existence of prior violations do not establish that a violation was willful. To prevent the distinction between repeated and willful violations from being blurred, there must be other evidence to support a finding of willfulness. *Beta Constr.*, 16 BNA OSHC at 1445, 1993 CCH OSHD at p. 41,652 (No. 91-102, 1993).

Having reviewed the record, we conclude that a preponderance of the evidence establishes that Hartford took note of the deficiencies in its safety program and that the measures it took to improve its compliance with OSHA roofing standards were not so deficient as to constitute intentional disregard of the standards' requirements or plain indifference to employee safety. Moreover, while the evidence establishes that the violation was repeated, we find insufficient additional evidence to justify finding that the violation was also willful.

In an effort to improve its safety record Hartford hired Barry Metzler, a Certified Safety Professional (CSP), as a safety consultant. It also hired Jason Woz to be its full-time, in house corporate safety manager and instituted a safety program that included safety training. As part of his functions, Woz conducted 59 inspections on 34 Hartford job sites from January 1, 1991 to June 22, 1992 and found 100 specific violations of the roof perimeter guarding standards.

Metzler inspected the Trumbull worksite before Hartford began work there. According to Wayne Lukas, the foreman on the site, Metzler told him to put up safety lines wherever there was no parapet. Lukas erroneously took this to mean that, where there was a parapet, regardless of its height, safety lines were not necessary. Even though Hartford should have been familiar with the requirements of the cited standards, safety notes taken by Woz, then Metzler's assistant, during the job suggest confusion regarding the requirements of the standards. On June 4, during the job set-up, Woz's safety notes indicate that "the job has a parapet wall so no additional fall protection is required." At the hearing, Woz explained that this referred to the mall area of the roof where the parapets were, to the best of his recollection, 36 inches high. He further testified that he told Lukas that, on the penthouse section and on the upper elevation of the roof, warning lines would be required. Indeed, on June 11, he noted that "No safety violations. Warning lines were in place on the upper roof." Finally, on June 26, he noted that there were no safety violations because "a safety monitor were [sic] being used for employees working along a parapet wall that was ranging in height from 21 to 34"."

This last entry demonstrates that, while Woz was aware that a roof with a parapet less than 36 inches in height is considered unguarded, he apparently was unaware that,

where the roof is greater than 50 feet in width or where there is mechanical equipment on the roof, a monitor is not sufficient to satisfy the standards. The roofing standards are complex and not perfectly clear. *Brock v. Morello Bros. Construction Inc.*, 809 F.2d 161, 162 (1st Cir. 1987). Therefore, Woz's ignorance of the requirements of the standard strongly suggests that the failure to inform Lukas of the proper safety requirements did not constitute either an intentional disregard or plain indifference to the Act.

Moreover, the evidence establishes that, at other locations at the job site, Hartford provided proper perimeter protection. Again, this strongly suggests that the failure to provide fall protection at the two cited locations was the product of negligence and misunderstanding rather than an intentional disregard or plain indifference to the Act.

Finally, we find these circumstances to be distinguishable from those in *S.G. Loewendick & Sons, Inc.*, 16 BNA OSHC 1954, 1994 CCH OSHD ¶ 30,558 (No.91-2487, 1994), *pet. for rev. filed*, No. 94-1662 (D.C. Cir. Oct. 6, 1994), relied on by the Secretary. In *Loewendick*, the employer ignored a compliance officer's explicit warning that a specific condition was in violation of the Act. While Hartford had been issued prior citations, there is no contention that it was specifically warned that the cited locations were in violation of the roofing standards. Thus, the connection between the warning and the violative condition is far more remote than the situation in *Loewendick*.

Although we find the violation to be nonwillful, the judge properly found that the violations were repeated. A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Edward Joy*, 15 BNA OSHC 2091, 2092, 1991-93 CCH OSHD ¶ 29,938, p. 40,904 (No. 91-1710, 1993); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). Unless the violation involves a general standard, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard. *Edward Joy Co., Id.* The record shows that Hartford has prior violations for failing to comply with the roofing standards cited here. On this record, we find that the citation is properly classified as repeated.

PER-EMPLOYEE VIOLATIONS

The Secretary seeks to cite Hartford for six separate violations of the same roofing standard because six employees were allegedly exposed to the unguarded roof perimeter. To support his decision to cite a separate violation for each employee exposed to a hazard the Secretary relies on *Caterpillar, Inc.*, 15 BNA OSHC 2153, 1991-93 CCH OSHD ¶ 29,962 (No. 87-0922, 1993). At issue in *Caterpillar* were violations of the OSHA recordkeeping standard at 29 C.F.R. § 1904.2(a), which requires an employer to record each work related injury and illness. The Secretary cited each failure to make a required entry as a separate violation on the grounds that each failure to record depended upon entirely different facts: different injuries, illnesses, dates, methods of treatment, and separate decisions and actions of not recording. We held that the Secretary had the authority to cite each failure to record as a separate violation if "the Act and the cited regulation permit[ted] multiple ... units of prosecution," i.e., if they prohibit[ed] individual acts. *Id* at 15 BNA OSHC 2172, 1993 CCH OSHD p. 41,005.

We concluded that the cited standard, which required the employer to "enter each recordable injury," could "reasonably be read to involve as many violations as there were failures to record, particularly when the injuries took place over a period of time and involved different employees and different types of injury and treatment." *Id* at 15 BNA OSHC 2173, 1993 CCH OSHD p. 41,006. However, we also stated that "[n]ot all violations of the Act, standards, or regulations lend themselves to multiple citations..." *Id.* Moreover, we specifically noted that the Commission has not "affirmed separate violations or penalties on a per employee exposed basis." *Id.* [footnotes omitted]

Our statement of the Secretary's authority was based, of course, on the language of the Act itself. Under section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), each employer has the duty to "comply with occupational safety and health standards promulgated under this chapter." A standard is defined as:

> a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

Section 3(8) of the Act, 29 U.S.C. § 652(8)

A standard then requires that conditions or practices be in place to provide safe and healthful places of employment. Some standards implicate the protection, etc. of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per-instance basis. However, where a single practice, method or condition affects multiple employees, there can be only one violation of the standard.[4]

For example, to establish that an employer failed to adequately guard a machine as required by § 1910.212(a)(3)(ii),[5] the Secretary must show that the machine was available for use to employees. Whether the machine was available for use by one or several employees, a single violation of that standard would be established.[6] The resulting order of the Commission would require the employer to install an appropriate guard on the machine. Here, under the Secretary's theory, the exposure of each employee to the unguarded machine would constitute a separate violation, even though the hazard could be abated as to all the exposed employees by the discrete act of adequately guarding the machine. Each violation would result in the same order requiring the same abatement. The

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[4]In a similar vein, the Commission has previously held that citations are duplicative where they involve substantially the same violative conduct. *Flint Engineering & Constr. Co.*, 15 BNA OSHC 2052, 2057, 1991-93 CCH OSHD ¶ 29,923, p. 40,855 (No. 90-2873, 1992). Thus, in *Capform*, 13 BNA OSHC 2219, 1987-90 CCH OSHD ¶ 28,503 (No. 84-0556, 1989) the Commission vacated one of two citations under the former trench standards since compliance with one necessarily resulted in compliance with the other.

[5]**§ 1910.212 General requirements for all machines.**

(a) *Machine guarding-* (1) *Types of guarding.* . . .

. . . .

(3) *Point of operation guarding.* . . .

(ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. . . .

[6]However, if the employer had multiple unguarded machines, the failure to guard each machine would constitute a discrete violation and could be individually cited. *See Hoffman Constr.*, 6 BNA OSHC 1274, 1977-78 CCH OSHD ¶ 22,489 (No. 4182, 1978)

only practical result would be the creation of authority to propose multiple monetary penalties for the same conduct.

Long-established case law has established that to prove a violation of a standard, the Secretary must establish, by a preponderance of the evidence, four basic elements.[7] One of the elements that the Secretary must prove is employee exposure to the hazard. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2006, 1991 CCH OSHD ¶ 29,223, p. 39,127 (No. 85-369, 1991). Exposure of only a single employee to a zone of danger has been universally accepted by the courts and the Commission to satisfy the element. *E.g., Brown & Root, Inc. v. OSAHRC*, 639 F.2d 1289 (5th Cir. 1981). Therefore, for purposes of establishing exposure, it makes no difference whether one or ten employees were exposed. As noted *infra*, the number of employees exposed is relevant in assessing an appropriate penalty. Under the Secretary's theory, however, the exposure of ten employees to that same condition would create ten separate violations. Thus, by citing a separate violation for each exposed employee, the Secretary is seeking to elevate an element of a violation into the definition of a violation. We can find nothing in the statute or case law that would justify expanding an element of an offense into the gravamen of the offense.[8]

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[7]To establish a violation of a standard, the Secretary must establish by a preponderance of the evidence that (1) the standard applies to the facts of the case; (2) there was a failure to comply with the standard; (3) employees had access to the violative condition; and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. *Astra Pharmaceutical Products*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd*, 681 F.2d 69 (1st Cir. 1982).

[8]In rejecting per-employee penalties, Judge DeBenedetto relied, in part, on *United States v. Universal CIT Credit Corp.*, 344 U.S. 218 (1952). In that case, the Supreme Court held, in a criminal context, that a managerial decision not to pay the minimum wage to several employees in violation of the Fair Labor Standards Act (FLSA), which requires the minimum wage be paid to "each employee," constituted only one offense. The Secretary contends that the judge erred in relying on that case because it involved criminal, not civil actions and, therefore, is not dispositive. Moreover, he points out, the Supreme Court noted that the civil enforcement provisions of the statute, was unquestionably on the basis of "each employee."

(continued...)

We would stress that the impropriety of citing a violation on a per-employee basis does not, in any manner, render indistinguishable a violation where one employee is exposed to a hazard from a violation where multiple employees are exposed. To the contrary, the number of employees exposed to a hazard has always been a matter of concern in every citation. As noted previously, when determining an appropriate penalty, typically the most significant factor the Commission considers is the gravity of the violation. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992); section 17(j) of the Act, 29 U.S.C. § 666(j).[9] In turn, the number of employees exposed to the violation is one of the elements used to determine gravity. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132, 1981 CCH OSHD ¶ 25,738, p. 32,107 (No. 76-2644, 1981). Indeed, the Secretary has directed its own personnel to consider the number of employees exposed

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[8](...continued)
CIT does not affect our holding. First, we are not relying here on that line of cases that requires a specific statement of intent to impose criminal liability on a per-event, or per-employee basis. Moreover, we find that the Supreme Court's statement regarding the scope of civil liability under the minimum wage provisions of the FLSA do nothing to resolve the issue of the scope of civil liability under the Act. The civil "prosecution" under the FLSA that was referred to by the Court was not for a civil penalty, but for restitution which necessarily requires a per-employee focus. The penalty provisions in the Act have nothing to do with reimbursing employees for any specific monetary losses. Nor is there anything in the Act that suggests that the penalty provisions require a per-employee focus. In that regard, we note that, in *Universal CIT Credit Corp.*, the Court specifically stated that

> If Congress had wanted to attach criminal consequences to each separate civil liability it could easily have said so, just as it had no difficulty in stating *explicitly* that the unit for civil liability was what was owing to each employee.

344 U.S. at 222 (emphasis added)

[9]Section 17(j) provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

when determining the gravity of a violation for purposes of arriving at an appropriate penalty. *Field Operations Manual*, Chapter IV(C)(2)(f)(2)(a). Again, we find nothing in the statute or case law that would authorize expanding a penalty factor into the gravamen of a violation.

Relying on *Cuyahoga Valley R. Co. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985), the Secretary further argues that, as the agency that enforces the Act, he has the *discretion* to cite a separate violation of the standard for each exposed employee. *Cuyahoga* recognized that, as an extension of the Secretary's prosecutorial authority to issue a citation, he had the authority to determine when the citation should be withdrawn. *Cuyahoga* did not examine the scope of the Secretary's authority to issue citations. Nor did it grant the Secretary the discretion to create new definitions of a violation. As we have seen, the Secretary's discretion to define violations is limited by his authority as defined by the four corners of the Act. Here, that authority restricts his discretion to cite multiple violations to those standards which are capable of such interpretation. *Caterpillar* at 15 BNA OSHC 2173, 1993 CCH OSHD p. 41,006. Some standards, such as the one cited here, are incapable of such interpretation without conflicting with section 3(8) of the Act.

This is not, as the Secretary argues, a question of deference under *Martin v. OSHRC ("CF&I")*, 499 U.S. 144 (1991). Although we agree that the cited standard imposes a duty to protect each employee from falling, it mandates the use of one of several alternative protective systems. Conceivably, an employer might use more than one system. However, Hartford's or any other employer's failure to comply with the standard does not permit the Secretary to allege a separate violation and seek a separate abatement order for each employee on the roof. In claiming the discretion to issue per-instance citations here, the Secretary is actually asking us to defer to his interpretation of sections 3(8) and 5(a)(2) of the Act. While, under *CF&I*, we must defer to the Secretary's reasonable interpretation of standards, such deference is not owed the Secretary where at issue is not a standard, but a provision of the Act. *Hern Iron Works*, 16 BNA OSHC 1619, 1621, 1994 CCH OSHD ¶ 30,363, p. 41,881 (No. 88-1962, 1994).

We find no merit in the Secretary's claim that many violative conditions that facially constitute a separate violation for each act of noncompliance can be abated by a single act, thereby circumventing the Commission decision in *Caterpillar*. Although many standards that involve multiple violations can be abated by a single action, this does not necessarily result in the circumvention of our decision in *Caterpillar*. For example, 29 C.F.R. § 1910.134 sets forth the requirements for the use of respirators where effective engineering controls are not sufficient to control atmospheric contamination. As long as employees are working in a contaminated environment, the failure to provide each of them with appropriate respirators could constitute a separate and discrete violations. However, if the employer is able to reduce the level of air contaminants to acceptable levels, that single action would render the standard inapplicable. Nonetheless, the condition or practice at which the standard is directed, within the meaning of section 3(8) of the Act, is not the level of air contamination, but the individual and discrete failure to provide an employee working within a contaminated environment with a proper respirator.[10]

The Secretary's attempt to define a violation on a case-by-case basis irrespective of the language of the standard would also often contravene the plain language of the Act. Section 9(a) of the Act, 29 U.S.C. § 658(a) which states:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he *shall* with reasonable promptness issue a citation to the employer. (Emphasis added).

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[10]An employer's decision to terminate operations eliminates employee exposure to a violative condition and, therefore, technically eliminates the hazard. The purpose of the Act is not, however, to eliminate places of employment. Rather it is to allow employees to earn their livelihoods at places of employment under safe and healthful working conditions. Section 1(b) of the Act, 29 U.S.C. 651(b). Thus, OSHA standards do not contemplate the termination of operations as a form of abatement. To the contrary, OSHA standards embody the primary goal of the Act by eliminating unsafe working conditions in the context of a functioning workplace.

This provision clearly indicates that the Secretary has no discretion to decide, on a case-by-case basis, whether to cite violations on a per-employee basis or to combine all exposed employees into a single citation. If a workplace condition as defined by a standard constitutes a single violation for all exposed employees, the Secretary, under section 9(a) of the Act, would be required to issue a citation for each of the violations. However, section 17 of the Act[11] places limitations on penalty amounts on a *per violation* basis. By expanding a single violation into multiple violations based on the number of employees exposed, the aggregate penalty could exceed the otherwise single violation limits. We think that this not only would specifically contravene the provisions of section 17, but would effectively render them nugatory.[12] Penalty limits could be arbitrarily set by the Secretary based on the number of employees at a jobsite, or some other factor. Accordingly, we conclude that these provisions similarly require our conclusion that the number of employees exposed is not a basis for separate violations.

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[11]Similarly, section 17(a) of the Act, 29 U.S.C. § 666(a), commands that any employer who willfully violates the requirements of the Act "may be assessed a civil penalty of not more than $70,000 for *each* violation, but not less than $5,000 for *each* willful *violation*." (Emphasis added)

Moreover, section 17(b), 29 U.S.C. § 666(b), states that any employer who receives a citation for a serious violation "*shall* be assessed a civil penalty of up to $7,000 for *each* such *violation*." (Emphasis added)

[12]In this regard we note that when Congress passed the *Omnibus Budget Reconciliation Act of 1990* (Budget Act), Pub. L. No. 101-508, 104 Stat. 1388-29 (1990), it specifically imposed per-employee penalties under the Fair Labor Standards Act's (FLSA) child labor provision. 29 U.S.C. § 216(e), amended by the Budget Act § 3103(1)(B). While Congress simultaneously amended the Occupational Safety and Health Act to substantially increase potential penalties, no mention was made of per-employee penalties. Budget Act at § 3101. In this regard, we note that the Secretary's "egregious" policy was under challenge at the time the FLSA was being amended. It is likely that Congress knew about the egregious policy and the challenges to it. Had Congress wanted to endorse that policy, it could have easily done so by amending the Act, as it amended the FLSA to expressly allow for per-employee violations. Congress' failure to do strongly suggests that Congress did not intend to impose per-employee penalties for OSHA violations.

Section 9(a) of the Act does not impair the discretion of the Secretary to determine whether to issue, as in *Caterpillar*, separate violations for each discrete failure to comply with a standard. Where the Act and standard clearly allow the Secretary to consider each failure to comply with a standard as a discrete violation, he also has the discretion to group them for penalty purposes as if they were one violation. *See H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981); *Hoffman Constr.*, 6 BNA OSHC 1274, 1977-78 CCH OSHD ¶ 22,489 (No. 4182, 1978). Here, however, the Secretary seeks the discretion to expand what is clearly a single violation into multiple violations based on the number of employees exposed, even where the standard calls for abatement by the performance of a single discrete action.

We also note that, given the Secretary's mandate to cite *each* violation, to interpret the Act to require per employee violations for single acts of commission/omission would imply that, for twenty-four years, the Commission, the Secretary, and the courts have misinterpreted the Act to affirm only single citations where multiple violations were required by the statute. Absent a change in the statute, some Congressional attempt to correct this long-standing "error" or, at the minimum, some repeated judicial expression of concern about what constitutes a violation under the Act, we cannot conclude that all practice thus far was in error and that it is this new policy that is correct.

However much we may sympathize with the Secretary's desire to enhance the deterrent effect of penalties by citing on a per-employee basis, the proper forum to achieve that goal lies in the halls of Congress. The issue we decide today in not a question of discretion. It is a question of statutory authority. Given the clarity in the language and structure of the Act and the lack of any evidence that Congress intended its penalty provisions to apply on a per-employee basis, we can only conclude that the Secretary's attempt to cite a separate violation for each employees exposed to a hazard, regardless of the plain language of the standard, is an improper attempt to circumvent the penalty provisions of the Act.

PENALTY

The Secretary proposed a penalty of $35,000 for each of the six willful violations. The judge, having rejected both the Secretary's attempt to cite on a per-employee basis and having found that the violation was not willful, found only one repeated violation of the Act and assessed a $15,000 penalty. The judge provided no analysis to justify his penalty assessment. In that regard, his penalty assessment does not reflect the depth of consideration required by the Commission. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2213-14, 1991-93 CCH OSHD at p. 41,033. However, in finding the violation to be nonwillful, the judge determined that, despite the repeated nature of the violation, Hartford was operating in good-faith because it had taken measures to improve its safety program, used perimeter protection at other areas of the workplace, and assigned a safety monitor to the cited areas.

Although we find that the Secretary improperly cited Hartford for six violations, the record does show that Hartford's employees were exposed to the hazard of the unguarded roof. Moreover, even though the violation was nonwillful, it was repeated. Unlike willful violations, there is no minimum penalty for repeated violations. However, both repeated and willful violations carry a maximum penalty of $70,000 per violation. Section 17(a) of the Act, 29 U.S.C. § 666(a).

Considering the penalty factors of section 17(j), we find that the gravity of the violation was moderate. First, we note that six employees were exposed to the unguarded roofing conditions. A monitoring system was being used, and there was a parapet at the edge of the roof which, at the least, served as some warning to these employees that they were at the roof edge. Moreover, Hartford's expert witness, Richard Kaletsky, a former OSHA assistant area director, testified that there was a "very, very, very small chance that anybody would fall" off the roof because of the parapet, flatness of the roof, experience of the employees, and good weather.

On the other hand, the quality of the monitoring was in doubt. This was a large roof, measuring 200 feet by 300 feet and mechanical equipment was stored there. These conditions would have made it difficult for any monitor to keep track of all the employees. Moreover, several employees testified that they were unaware that their movements were

being monitored. Finally, the roof was 39 feet high. Had an employee fallen off the roof death would have been the likely result.

As demonstrated by the repeated nature of the violations, Hartford has a substantial history of prior safety violations. However, we also find that Hartford did establish a measure of good faith. It made serious attempts to remedy weaknesses in its safety program. It hired a safety consultant and, later, a full-time corporate safety manager who conducted regular inspections of Hartford's worksites. We also note that, on other locations on the worksite, Hartford did take appropriate measures to protect its employees from the unguarded roof edge. These measures taken by the company to improve safety were significant and demonstrated a concern for the health and safety of its employees. Nonetheless, as the Secretary properly observes, Hartford's program had significant weaknesses, such as inadequate discipline. Certainly, the apparent ignorance of foreman Lukas regarding the requirements of the roofing standards, demonstrates a measure of lassitude in the program that mitigates the level of good faith demonstrated by Hartford.

Finally, the record establishes that Hartford is an employer of moderate to large size, with usually between 230-250 employees on the payroll.

In light of these factors, we find that the $15,000 assessed by the judge to be inadequate. Specifically, the judge failed to take into account the weaknesses inherent in Hartford's safety program and, as a result, granted too much credit for good faith. Upon consideration of all the factors, we find that a penalty of $35,000 is appropriate to persuade Hartford to improve the efficacy of its safety program and to encourage future compliance with the Act.

ORDER

Accordingly, it is ORDERED that one citation for repeat violation of the standards at 29 U.S.C. § 1926.500(g)(1) and (g)(4) is AFFIRMED. A penalty of $35,000 is ASSESSED.

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: April 27, 1995

Hartford Roofing Co., Inc., Docket No. 92-3855

WEISBERG, Chairman, dissenting:

I.

Although the confidentiality of the Commission's deliberative process in this case has already been breached, the importance of maintaining confidentiality in our deliberative process makes me extremely reluctant to discuss this process further here. However, the affront to the integrity and reputation of the Commission produced by the controversy surrounding the processing of this case leaves me little choice.

I note first that the Commission's sole function is adjudicatory. Indeed, the Supreme Court analogized the Commission to a "court" in *Martin v. OSHRC (CF&I Steel Corp.),*499 U.S. 144, 154 (1991). Moreover, as the Occupational Safety and Health Act of 1970, 29 U.S.C.§§ 651-678 ("the Act") calls for the appointment of three Commissioners, it envisions that the adjudicative process will be a collegial one. Consistent with collegial decision making it has been the Commission's longstanding and unwavering practice that all three Commissioners participate in every case absent recusal on the part of one of the Commissioners. This practice assumes that each Commissioner has a reasonable opportunity to act on each case. Such action might consist of circulating a separate or dissenting opinion and responsive revisions in an attempt to persuade other Commissioners of the merits of his or her position or, alternatively, to force them to address issues or case precedent they might prefer to avoid. The circulation of opinions and responses sharpens debate and improves the articulation of views on all sides, the very essence of collegial decision making. Thus, the quorum provision of the Act, section 12(f), 29 U.S.C. § 661(f), has always been *de facto*

interpreted as merely enabling the Commission to act when either the third Commissioner has chosen not to participate in a case for whatever reason or a Commissioner position is vacant. Indeed, there is no basis for interpreting 12(f) as a tool for, in effect, aborting the deliberative process by permitting two Commissioners to unilaterally act on their own without the participation of a third sitting Commissioner.

On April 27, 1995, the last day of former Commissioner Edwin Foulke's term, Commissioners Foulke and Montoya signed an opinion in this case and one in *Arcadian Corporation*, OSHRC Docket No. 93-3270.[1] These cases both raise important issues concerning the Secretary's discretion to cite an employer on a person by person or instance by instance basis under his "egregious, willful" policy and are inextricably interrelated, as the Commission acknowledged on July 15, 1994 when it granted Hartford's motion requesting that the two cases be considered "in conjunction" with one another.

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[1] When a single Commissioner directs a case for review, the Commissioner signs and dates the direction and delivers it to the Executive Secretary to be issued. In contrast, the usual practice for issuing a Commission decision is that, when deliberations on the case have been completed and all the Commissioners have signed off on either the main or a separate opinion, the signed opinion(s) are delivered first to the Office of General Counsel so that the Commission decision number can be placed on the first page. Then the opinion(s) normally are delivered by the General Counsel's Office to the Executive Secretary, who enters the issuance date on the signature page(s) and issues the decision. Unlike *Gurney Industries,* 1 BNA OSHC 1376, 1973-74 CCH OSHD ¶ 16,805 (No. 722, 1973)(date of issuance of direction for review is the date the direction is delivered to the Executive Secretary and *not* the date that it is signed by the Commissioner) which specifically relates to a direction for review that, under section 12(j) of the Act, can be done by any Commission member acting alone, the instant case involves the issuance of a *decision* by the three-member Commission entailing a different protocol. However, on April 27, Commissioners Montoya and Foulke submitted the opinions they had signed in these cases to the Executive Secretary, with the date of April 27 already entered on the signature page and without the Commission decision number on the first page.

On the afternoon of April 27, Commissioner Montoya, relying on section 12(f) of the Act which, as noted above, merely provides that two Commission members constitute a quorum, informed the Commission's Executive Secretary by memorandum that she "expect[ed]" the two decisions to be issued that day and that any separate opinion from the Chairman could follow. Her memorandum was not copied by her to me or to then-Commissioner Foulke, nor had I been informed earlier that an attempt would be made to issue these cases whether or not I had yet completed and circulated my separate opinion. The Executive Secretary then responded to Commissioner Montoya by memorandum and circulated his response and Commissioner Montoya's memorandum to all the Commissioners stating that he had not been instructed by then-Commissioner Foulke to issue the signed opinions or to issue them without the Chairman's signature or opinion. Commissioner Foulke did not respond to that memorandum nor did he take any other action to instruct the Executive Secretary to issue the cases without my participation.

However, shortly after his term ended, former Commissioner Foulke apparently informed Arcadian, the respondent in the companion case, that he had signed opinions in *Arcadian* and *Hartford* the day his term ended (see letter from Arcadian's attorneys to the Commission's Executive Secretary dated May 1, 1995 and attached as Exhibit A to Arcadian's petition in *In re: Arcadian Corporation,* No. 95-1259 (D.C. Cir.) filed May 15, 1995)). It is unclear who informed Arcadian and Hartford that Commissioner Montoya had signed the opinions as well. In any event, mandamus actions in the circuit court against the

Commission, the Executive Secretary and myself were subsequently filed by Arcadian and Hartford attempting to force the Commission to issue the opinions signed by my two colleagues as a final action of the Commission without my participation. *In re: Arcadian Corp., supra; In re: The Hartford Roofing Co.,* No. 95-1282 (D.C. Cir. filed May 31, 1995). Subsequently, several members of Congress, including two House subcommittee chairmen, began expressing their concern and, in some instances, questioning why the opinions reportedly signed by my colleagues in April had not issued.

Putting aside the question of the chilling effect that contacts by a former Commissioner with one party to a case may have on the deliberative process, I feel compelled, however, to address the question of the threat to the deliberative process posed by the attempt to issue these cases without my participation. Commissioner Montoya's view, that under section 12(f) two Commissioners constitute a quorum and therefore they are free to act without providing the third Commissioner a reasonable opportunity to respond, has the effect of relegating the third Commissioner to "potted plant" status. Indeed, the ordinary definition of a "quorum" is "the number of the members of an organized body . . . that when duly assembled is legally competent to transact business *in the absence of other members.*" *Webster's Third New International Dictionary* at 1968 (1986) (emphasis added). *See Murray v. National Broadcasting Co.*, 35 F.3d 45 (2d Cir. 1994). The Congress did not provide for three Commissioners only to have two Commissioners take it upon themselves to act without affording the third a reasonable opportunity to "weigh in".

As to Commissioner Montoya's suggestion that I could issue a separate opinion later on, I know of no case in the Commission's almost twenty-five year history, and Commissioner Montoya has not cited any, where the Commission has issued a decision on a piecemeal basis. The sixty day time period for appealing a Commission decision to the court of appeals runs from the issuance date. Section 11(a) & (b) of the Act, 29 U.S .C. § 660(a) & (b). *Reich v. Trinity Industries*, 16 F.3d 1149, 1155 (11th Cir. 1994) (cross-petition denied if not filed within sixty days after issuance of Commission decision). *See also Midway Indus. Contractors v. OSHRC*, 616 F.2d 346 (7th Cir. 1980). Clearly, the parties should have the benefit of the opinion of all three sitting Commissioners before determining whether to file an appeal. Nor should the third Commissioner by fiat, as opposed to by duly promulgated Commission procedures, be given a time period to respond which bears no relationship to reasonableness. Most importantly, however, this approach denies a third Commissioner the opportunity to change his colleagues' view or to elicit response by forcing them to address issues, arguments or case precedent they might prefer not to deal with. Under this approach "collegial" decision making is thus reduced to a forum for unilateral statements of position with no further illumination through the process of debate and comment or responsive revisions.[2]

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[2] Commissioner Montoya's present notion that somehow the deliberative process was concluded when this case was voted on at a Commission meeting makes a mockery of that process and the concept of collegial decision making. It is undisputable that the votes taken at a Commission meeting are "preliminary" in nature and not binding. Not only can a Commissioner change his or her vote or rationale up to the moment that a decision issues but most, if not all Commissioners, including myself and Commissioner Montoya, have exercised their right to do so. Indeed, in one particular case, both former Commissioner

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Moreover, any suggestion that I deliberately withheld my opinion in these two cases to block or "pocket veto" decisions by my colleagues simply because I disagreed with the results is totally baseless. During the last two months of Commissioner Foulke's term, the Commission issued more than twenty decisions. *Ralph Taynton d/b/a Service Specialty Co.*, 17 BNA OSHC 1205, 1995 CCH OSHD ¶ 30,766 (No. 92-498, 1995), *petition for review filed*, No. 95-4788 (11th Cir. June 26, 1995) and *General Motors Corp., Delco Chassis* Div., 17 BNA OSHC 1217, 1995 CCH OSHD ¶ 30,793 (No. 91-2973, 1995) (consolidated), *petition for review filed*, No. 95-3660 (6th Cir. June 9, 1995), two similarly important precedent setting cases in which I dissented issued during the last two days of Commissioner Foulke's term. Given the crush of cases the Commission considered and issued in the last months of Commissioner Foulke's term, the comprehensive separate opinions that I drafted, and the time it took for the majority opinions in *Arcadian* and *Hartford Roofing* to coalesce and circulate, there simply was insufficient time for me to draft dissenting opinions in these two related cases. In this regard, in one of these cases my colleagues took almost seven months to complete a *first draft* of the majority opinion and in the other a *first draft* of the majority opinion was not even completed and circulated until the final days of Commissioner Foulke's term. Revisions to both majority opinions continued to be made until 48 hours before the end of Commissioner Foulke's term.

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[2](...continued)
Foulke and myself were persuaded by the rationale and case precedent cited in a dissenting opinion circulated by Commissioner Montoya and we both changed our votes and joined Commissioner Montoya.

The Commission issued an exceptional number of cases in the last months of Commissioner Foulke's term. Regrettably, this case was not among them. However, typically when a commissioner's or board member's term ends there are many cases in various stages of the decision-making process, some closer to completion than others, and not all cases that that commissioner has worked on issue.

Nevertheless, I am mindful that during the Commission's early years, apparently on an occasional and ad hoc basis, the Commission, without discussion, issued decisions with a departing Commissioner's signature after that individual's term had ended. *See, e.g., Southern Bell Telephone and Telegraph Co.* 5 BNA OSHC 1405, 1977-78 CCH OSHD ¶21,840 (No. 10,340, 1977), *General Electric Co.* 5 BNA OSHC 1448 1977-78 CCH OSHD ¶21,853 (No. 11,344,1977), *rev'd,* 583 F.2d 61 (2d Cir. 1978). It appears that the Commission has issued only one decision in the last decade with a departing Commissioner's signature after the expiration of that member's term. Evidently, in all those cases the three Commissioners had consented to issuing the decisions after the expiration of a Commissioner's term. Moreover, it does not appear that the validity of those Commission decisions was challenged or that the issue of whether a Commissioner's signature authority survives the expiration of his term was raised before the courts.

In my view, former Commissioner Foulke's signature on this Commission decision is invalid. There is nothing in the Act to suggest that Congress intended that a Commissioner's signature authority would continue past the expiration of his or her term. Nor is there a consistent and agreed upon practice of doing so. *Cf. State of Idaho v. ICC,* 939

F. 2d 784 (9th Cir. 1991). Indeed, in theory, Commissioner Foulke's successor could have been sworn in on April 28. Had this occurred, continuing to count Commissioner Foulke's vote could have resulted in four votes by a three-member Commission. Moreover, Commissioner Foulke's departure deprives me of the opportunity to persuade him by means of a well reasoned-dissent to change his vote or to elicit response.

I have now had an opportunity to craft my dissent in this case and have given Commissioner Montoya every opportunity to respond, which she declined.[3] Therefore, given the controversy that has arisen and the resulting disruption and the aspersions cast on the integrity of the Commission, I believe that the public interest is best served at this juncture by issuing this decision with former Commissioner Foulke's signature. The Secretary is then free to challenge the validity of this decision on appeal, thus permitting the courts to decide the troubling issues that are raised.

II.

I disagree with the majority's resolution of both of the principal issues that are before the Commission on review. Relying primarily on the efforts that Hartford made, after receiving prior citations for roofing standard violations, to improve its compliance with that

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[3] Rather than respond in a collegial fashion in the proper forum, in this decision, as envisioned by Congress when it established this three-member Commission, Commissioner Montoya instead today filed a petition for a writ of mandamus in the D.C. Circuit Court of Appeals. *In re: Montoya*, No. 95- (D.C. Cir. filed September 15, 1995). She filed this action in her own name and also, inexplicably, "on behalf of the Commission," and has moved to have her mandamus petition consolidated with those of Arcadian and Hartford, the parties in these cases before us.

standard and to correct deficiencies in its safety program, my colleagues conclude that Hartford's most recent violations of 29 C.F.R. § 1926.500(g)(1) & (4) were not willful, as alleged. I agree with the majority that Hartford's commendable efforts preclude a finding that it was plainly indifferent to employee safety and that the instant violations were not willful under this prong of the Commission's two-pronged test. However, I find that the Secretary met his burden of proving, by a preponderance of the evidence, that the instant violations were committed with intentional, knowing or voluntary disregard for the requirements of the cited standards and that they are therefore properly characterized as willful under this alternative test. I also take issue with my colleagues' holding that the Secretary has no statutory authority to cite separate violations of these standards for each employee exposed to the resulting hazard. Under the holding and rationale of *Caterpillar, Inc.*, 15 BNA OSHC 2153, 1991-93 CCH OSHD ¶ 29,962 (No. 87-922, 1993), and its progeny, the Secretary has the authority, in the exercise of his prosecutorial discretion, to cite violations of section 1926.500(g)(1) on an instance-by-instance basis. More specifically, he has the discretion, which he has properly exercised in this case, to cite the exposure of each employee who performs built-up roofing work under circumstances that contravene 1926.500(g)(1) as a separate instance of noncompliance with that standard. Accordingly, I must dissent.

Willfulness

Under long-established Commission precedent, a violation is willful if it is "committed with intentional, knowing or voluntary disregard for the requirements of the Act *or* with plain indifference to employee safety." *E.g.*, *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1995 CCH OSHD ¶ 30,759, p. 42,740 (No. 93-239, 1995), *petition for review filed,* No. 95-2194 (8th Cir. May 15, 1995); *Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987) (emphasis added). "It is differentiated from other types of violations by a 'heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference.' " *Calang Corp.*, 14 BNA OSHC 1789, 1791, 1987-90 CCH OSHD ¶ 29,080, p. 38,870, (No. 85-319, 1990), *quoting Williams Enterp.*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,589. Willfulness is established if there is "evidence that an employer knew of an applicable standard or provision prohibiting the [cited] conduct or condition and [yet] consciously disregarded the standard." *S.G. Loewendick & Sons, Inc.*, 16 BNA OSHC 1954, 1959, 1994 CCH OSHD ¶ 30,558, p. 42,287 (No. 91-2487, 1994), *petition for review filed,* No. 94-1662 (D.C. Cir. Oct. 6, 1994).

Here, the record establishes that the violations before us were the result of an intentional, knowing, and voluntary decision by Hartford's foreman, Daryl Lukas, concerning the measures that would be taken to protect six employees against a 39-foot fall from the roof where they were working. Thus, Judge DeBenedetto, citing Lukas' own testimony, found in effect that Lukas had made a deliberate decision "not to erect warning lines or use an MSS system on the day of the inspection" and that Lukas had made this

decision "after a conscious evaluation of the type of work to be performed by the employees and the degree of movement involved in that work." Other management personnel, including corporate safety manager Woz and project manager Houle, were in a position to see the cited hazard. Yet, they did not order Lukas to use either an MSS system or warning lines.

It is also beyond dispute that this intentional management decision was made on behalf of a corporate employer that had a "heightened awareness" of the requirements of the standards at issue. Between 1982 and the date of the instant inspection, Hartford had received sixteen citations for failing to comply with various provisions of section 1926.500, a standard that requires basic but significant precautions against falls from working surfaces in the construction industry. Almost all of these prior citations had alleged one or more violations of section 1926.500(g), the standard adopted by the Secretary in 1980 to provide employers greater flexibility in the "[g]uarding of low-pitched roof perimeters during . . . built-up roofing work." Indeed, seven of the citations alleged violations of section 1926.500(g)(1), which is one of the specific provisions at issue in this case, and four alleged noncompliance with section 1926.500(g)(4), which is the other. Hartford had also entered into prior settlement agreements with the Secretary, and it had specifically agreed in the most recent of these to comply with OSHA's roofing standard. A mere three months before the instant inspection, Hartford's contest of one of the prior 1926.500(g)(4) violations had been resolved by a settlement agreement in which Hartford had acknowledged its failure to comply with the cited standard based on improper reliance on a safety monitor as the means of protection (which is also the basis of the violations in the instant case).

The record further establishes that foreman Lukas shared his employer's "heightened awareness" of the applicable safety standards. Lukas had been present as the foreman at 14 to 16 Hartford worksites when corporate safety manager Woz conducted internal safety inspections that revealed violations of the Secretary's roof perimeter protection standards. Although Lukas had not been disciplined for any of these prior violations, Woz asserted that Lukas had been notified of the deficiencies observed in the perimeter protection provided.

Notwithstanding Hartford's heightened awareness of the applicable safety standards, it is clear on the record before us that Hartford's deliberate decision concerning the roof perimeter protection measures to be taken at the time of the alleged violations was *not* based on the requirements of those standards. Rather, the decision was directly contrary to section 1926.500(g)(1)'s plain terms. That standard provides that "employees engaged in . . . [built-up roofing work on low pitched roofs] shall be protected from falling from all *unprotected* sides and edges of the roof" (emphasis added). By definition, the sides and edges of a roof perimeter are "unprotected" if "there is no wall three feet (.9 meters) or more in height." 29 C.F.R. § 1926.502(p)(8). At the time of the instant violations, the two groups of employees at issue were working in areas where the roof parapets were only 18 and 24 inches high, respectively. Therefore, an employer attempting in good faith to comply with the cited standard would have had no difficulty in determining that the protective measures described in that standard were required on the roof in question.

A simple reading of the standard's plain terms clearly shows that the protective measure chosen by Hartford was not a permissible option on the roof in question. Under the

express terms of section 1926.500(g)(1)(iii), an employer cannot select a safety monitoring system as its sole means of protection if the roof is more than fifty feet in width. Yet, here the roof measured 200 by 300 feet, making it four times as wide as the standard's maximum limit. In addition, the standard expressly precludes reliance on a safety monitoring system when "mechanical equipment" is being "used or stored" on the roof. Yet, here there were several pieces of mechanical equipment that were both used and stored on the roof.

It therefore seems obvious that foreman Lukas did not base his decision concerning protective measures on the requirements of the cited standard. Instead, his own testimony establishes that he based his decision that no fall protection was necessary (beyond the limited protection provided by the monitor and the parapet walls) on his belief "that I was [not] endangering my men in any way." Under the case law, however, such a decision, made by an employer with a heightened awareness of a standard's requirements, to rely upon its own assessment of the hazard involved rather than the precautions required under the standard's terms, is properly characterized as an "intentional, knowing or voluntary disregard" for the standard's requirements and thus a willful violation of the Act. *See, e.g.*, *Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983) (decision to continue work in noncomplying trench was willful notwithstanding a "good faith belief that the workers could continue . . . without hazard"); *Conie Constr., Inc.*, 16 BNA OSHC 1870, 1872-73, 1994 CCH OSHD ¶ 30,474, p. 42,090 (No. 92-264, 1994) (foreman rejected the standard's requirements in favor of his judgment that the trench was safe); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2013, 1991-93 CCH OSHD ¶ 29,223, p. 39,134, (No. 85-369, 1991)

(company "permitted" its foreman and its backhoe operator "to substitute their judgment as to whether the trench was safe").

Multiple Citations

I also disagree with the majority's conclusion that the Secretary lacked statutory authority to issue six separate citations for willful violation of 29 C.F.R. § 1926.500(g)(1) & (4). Unlike my colleagues, Judge DeBenedetto correctly acknowledged in his decision that this issue is governed by the Commission precedent established in *Caterpillar*. However, he then erred in my view in holding that, under that precedent, it was inappropriate for the Secretary to cite the exposure of each employee working near the unprotected sides and edges of the roof in question as a separate violation.

In *Caterpillar*, the Commission concluded that, depending on the standard or regulation involved, the Secretary may have authority under the Act to cite each instance of noncompliance with the requirement as a separate violation. It further concluded that "[t]he test of whether the Act and the cited regulation permits multiple or single units of prosecution is whether they prohibit individual acts, or a single course of action."[4] 15 BNA

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[4] Although my colleagues both joined in the Commission decision that formulated the above-quoted test for determining whether instance-by-instance citations are proper, they have made no effort in this case to apply that test to the citations that are before us. Somewhat surprisingly, they acknowledge here that "[s]ome standards implicate the protection, etc. of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per-instance basis." However, they then fail to analyze the standard in question, section 1926.500(g)(1), to see whether it is such a standard. Moreover, immediately after they correctly observe that instance-by-instance citations can sometimes be equated with employee-by-employee

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OSHC at 2172. In *Caterpillar*, the Secretary had cited individually 167 failures to record injuries in violation of 29 C.F.R. § 1904.2(a). That regulation requires employers to "enter each recordable injury or illness on the log." Based on the language of the cited regulation, the Commission held that, every time the employer failed to enter a particular recordable injury or illness on a log, there was an "individual act" and "it was [therefore] within the discretion of the Secretary to cite each failure to record as a separate violation." It then proceeded to assess a separate penalty for each of the cited violations, further holding that the Act neither mandates nor prohibits separate penalties with respect to each instance of a violation of a particular standard. 15 BNA OSHC at 2172, 1991-93 CCH OSHD at p. 41,005; cited with approval at *S.A. Healy Co.*, 17 BNA OSHC 1145, 1151, 1995 CCH OSHD ¶ 30,719, p. 42,639 (No. 89-1508, 1995), *petition for review filed,* No. 95-2421 (7th Cir. June 15, 1995).

In subsequent decisions, the Commission has reaffirmed *Caterpillar*, upholding the Secretary's issuance of instance-by-instance citations for multiple violations not only of the recordkeeping regulation but also of other appropriate standards, and assessing separate penalties for each cited violation. *See Sanders Lead Co.*, 17 BNA OSHC 1197, 1995 CCH OSHD ¶ 30,740, (No. 87-260, 1995), *petitions for review filed,* No. 95-1327 (D.C. Cir. June 23, 1995), & No. 95-6519 (11th Cir. June 26, 1995) (medical removal protection standard,

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[4](...continued)
citations, they make the erroneous assertion that "where a single practice, method or condition affects multiple employees, there can be only one violation of the standard." As the case law discussion set forth herein clearly reveals, that assertion is directly contradicted by Commission precedent that my colleagues have helped to create.

29 C.F.R. § 1910.1025(k)(1)(i)(D), requiring employer to "remove an employee from work having an exposure to lead at or above the action level," permits the Secretary to cite as many violations as there were failures to remove; respirator fit-test standard, 29 C.F.R. § 1910.1025(f)(3)(ii), requiring employer to "perform either quantitative or qualitative face fit tests . . . for each employee wearing negative pressure respirators," permits citation by the Secretary on an employee-by-employee basis); *Kohler Co.*, 16 BNA OSHC 1769, 1776, 1994 CCH OSHD ¶ 30,457, p. 42,064 (No. 88-237, 1994) (Secretary had authority to cite 277 separate violations of the recordkeeping regulation at section 1904.2(a)); *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1209, 1993 CCH OSHD ¶ 30,046, p. 41,251 (No. 89-433, 1993) (employer properly cited for several separate recordkeeping violations of section 1904.2(a)); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213, 1991-93 CCH OSHD ¶ 29,964, pp. 41,032-33 (No. 87-2059, 1993) (employer failed to provide fall protection at 77 discrete, individual locations where employees were exposed to a fall hazard in violation of 29 C.F.R. § 1926.500).

The key to each of the decisions listed above is the *language* of the standard or regulation that has been cited. *E.g.*, *Sanders Lead*, 17 BNA OSHC at 1200, 1995 CCH OSHD at p. 42,691. ("It is . . . the language of the standard that is determinative"). If that language can be interpreted in such a manner that each individually cited instance of noncompliance constitutes a separate and distinct violation of the standard, then the Commission has held that the Secretary does not exceed his authority under the Act by citing the violations on an instance-by-instance basis rather than "grouping" them into a single

citation item. *See, e.g., Caterpillar*, 15 BNA OSHC at 2173, 1991-93 CCH OSHD at p. 41,006 (section 1904.2(a) "*can reasonably be read* to involve as many violations as there were failures to record" (emphasis added)).

Here, Judge DeBenedetto examined the language of section 1926.500(g)(1) and concluded that it could only be interpreted as prohibiting "a single course of action" rather than "individual act[s]" within the meaning of *Caterpillar*. *See supra*. He found it critical that "Hartford did not make six different decisions regarding fall protection" on the day of the alleged violations, but rather "made one decision which impacted on six people." Therefore, he concluded, "Hartford's failure to provide the appropriate fall protection for its employees on the roof constituted a single course of conduct, not a series of individual acts." In the judge's view, his determination was confirmed by the fact that one method of abatement, *e.g.*, installing a toprail along the parapet, could have eliminated the fall hazard for all six employees.

I conclude that this reasoning is directly contrary to Commission precedent, including in particular our recent decision in *Sanders Lead*. In that case, we assessed instance-by-instance penalties for fifteen separately-charged violations of 29 C.F.R. § 1910.1025(k)(1)(i)(D), based on the employer's failure to medically remove fifteen employees whose blood lead levels exceeded permissible limits. We did not dispute Sander's claim in that case that all fifteen violations had resulted from a single management decision that "impacted on" fifteen employees (to paraphrase Judge DeBenedetto in the instant case). Nevertheless, we held that the language of the cited standard permitted the

Secretary "to cite as many violations as there were failures to remove":

> It is not the single decision by an employer not to remove employees, but the language of the standard that is determinative. Sanders . . . may have made a single management decision to apply certain criteria uniformly to all employees. Nevertheless, we find, as we did in *Caterpillar*, that a per-instance assessment is still appropriate.

17 BNA OSHC at 1200.

In *Sanders Lead* the Commission also assessed instance-by-instance penalties for fourteen separate violations of the respirator fit-test standard, section 1910.1025(f)(3)(ii). That standard requires employers to test each employee's respirator at least semiannually and that the testing be performed in a separate chamber.[5] Although Sanders performed regular respirator fit testing, it did the testing in the employee's work area and did not use a test chamber. Thus, as was the case with the medical removal protection (MRP) standard, all fourteen violations of the respirator fit-test standard resulted from a single management decision (not to perform the testing in a separate chamber) that "impacted on" fourteen employees. The Commission in *Sanders Lead* concluded that the language of the respirator fit-test standard permits a per-instance assessment.

Similarly, in *Kohler Co.*, the Commission noted that 202 of the recordkeeping violations before it were all attributed to a single defect in the employer's recordkeeping program. 16 BNA OSHC at 1777 n.17, p. 42,065 n.17 ("202 instances . . . were due solely to failure to track follow-up treatment"). Nevertheless, even though (a) *Kohler Co.* was clearly a case where "a single practice . . . [had affected] multiple employees," *see supra* note 4, and (b) a single abatement order would have sufficed to eliminate that practice, my

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[5] The standard requires employers to check each employee's respirator using one of three methods. Sanders chose the isoamyl acetate or banana oil test whereby an employer is required to construct a test chamber (large plastic bag hung upside down on a frame) in a separate room, to hang a paper towel wetted with banana oil inside the chamber, and to have the employee, wearing the respirator, move his or her head around in different positions and talk while in the chamber, as the employer continually checks whether the employee can smell the banana scent.

colleagues affirmed the judge's finding of 277 separate violations of section 1904.2(a), and they assessed penalties accordingly on an instance-by-instance basis. 16 BNA OSHC at 1776-78, 1994 CCH OSHD at pp. 42,064-65.

What these cases illustrate is that the distinction drawn in *Caterpillar* between standards and regulations that prohibit "individual acts" and those that prohibit "a single course of action" is often illusory. Indeed, the regulation at issue in *Caterpillar*, 29 C.F.R. § 1904.2(a), is a good example of a regulation that can be interpreted either way. My colleagues held in *Caterpillar* that 1904.2(a) could be interpreted and applied as prohibiting "individual acts" of failure to record injuries and illnesses on a log. However, they did not even suggest that 1904.2(a) could not alternatively be interpreted and applied as also prohibiting "a single course of action." On the contrary, they explicitly acknowledged that, prior to 1986, the Secretary had consistently interpreted and applied that regulation as a broad prohibition against failure to maintain a complete and accurate OSHA log. *See* 15 BNA OSHC at 2172-73. Significantly, the Commission's decision neither stated nor implied that the Secretary's prior interpretation of 1904.2(a) had been incorrect or that the Secretary would no longer be permitted to enforce the regulation in that manner. Rather, the Commission clearly implied that either interpretation of the regulation was *permissible* and that the Secretary, in the exercise of his prosecutorial discretion, could choose whether to cite a single violation of the regulation or to issue multiple citations on an instance-by-instance basis.

I would hold that the standard at issue here, section 1926.500(g)(1) is similarly a standard that can "reasonably be read to involve as many violations as there were failures to [protect employees from falling from unprotected sides and edges of a roof]." *Caterpillar*, 15 BNA OSHC at 2173, 1993 CCH OSHD at p. 41,006. *Cf. Arcadian Corp.*, OSHRC Docket No. 93-3270, issued this same day, (Weisberg, dissenting) (section 5(a)(1) of the Act "can reasonably be read to involve as many violations as there were failures" to protect employees against recognized hazards). The basic requirement of section 1926.500(g)(1) is that the employer protect *each* employee who engages in roofing work on a particular type

of roof against falls from the unprotected sides and edges of the roof. While Judge DeBenedetto correctly noted that employers *may*, under the terms of the standard, choose a single means of protection, such as perimeter guarding, that would prevent falls by any employee working on the roof, I find nothing in either the language of the standard or its legislative history that indicates that the employer *must* use the same means of protection for all exposed employees.

As the preamble to the final standard reveals, the primary purpose behind the Secretary's promulgation of section 1926.500(g) was to provide greater flexibility to roofing contractors that were having difficulty in attempting to protect their workers through conventional guarding systems. *See* 45 Fed. Reg. 75,618-24 (1980). Under the roofing perimeter protection standard, employers still have the option of using these conventional methods, which include guardrails, platforms or scaffolds with guardrails, safety nets, and safety belt systems, and which are collectively identified as "motion-stopping-safety (MSS) systems." 29 C.F.R. §§ 1926.500(g)(1)(i) & 1926.502(p)(5). However, they also have the additional options of using a warning line system and, on some roofs, but not the roof at issue here, a safety monitoring system. 29 C.F.R. § 1926.500(g)(1)(ii) & (iii).

The clear implication of the cited standard is that the employer may choose to protect different employees or different groups of employees working on the same roof through different means. In any event, as the Secretary correctly points out in his review brief, one of the means of protection that is expressly permitted under the standard is to provide each employee working on the roof with an individualized safety line. Therefore, I agree with the Secretary's assertion that "[i]t is . . . not at all the case that the employer's course of conduct in committing these violations was necessarily and exclusively a single act." Certainly, if Hartford had provided safety lines for four of the employees working on the roof in question while leaving the other two unprotected, my colleagues would have had little difficulty in characterizing those two instances of noncompliance with section 1926.500(g)(1) as two separate and distinct violations of the Act.

For the reasons indicated, I conclude that section 1926.500(g)(1) can "reasonably be read" as prohibiting "individual acts," specifically, the failure to protect individual employees against falls from the unprotected perimeters of specified roofs. I would therefore hold that the Secretary was authorized to issue six separate citations for violation of section 1926.500(g)(1) & (4) under the guidelines set forth in *Caterpillar* and its progeny. Having concluded that the multiple citations issue in this case is governed by Commission precedent, I need not address the issue that the majority treats as being determinative, *i.e.*, whether the Secretary exceeds his authority under the Act by "attempt[ing] to define a violation on a case-by-case basis *irrespective of the language of the standard.*" (Emphasis added). My conclusion that the Secretary had the authority to cite Hartford's six violations of section 1926.500(g)(1) as separate violations of the Act is *dependent on* and not "irrespective of" the language of that standard.

Dated: September 15, 1995

Stuart E. Weisberg

STUART E. WEISBERG
Chairman