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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 95-0343
	:	
STAR BRITE CONSTRUCTION CO., INC.,	:	
	:	
Respondent.	:	
	:	

DECISION

Before: ROGERS, Chairman; and EISENBREY, Commissioner.

BY THE COMMISSION:

Star Brite Construction Co., Inc. (“Star Brite”), a roofing and general construction company, was engaged in replacing a low-pitched roof at the Newark Bus Complex from May through mid-December 1994. On January 19, 1995, after an investigation by the Occupational Safety and Health Administration (“OSHA”), the Secretary issued three citations for serious, non-serious and willful violations of various construction safety and health standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”). Star Brite contested the citations, and a hearing was held before Administrative Law Judge Richard DeBenedetto, who affirmed eleven items, vacated five items, and assessed total penalties of \$60,550.¹ At issue on review are two items alleging willful violations of two fall protection standards and three items alleging serious violations

¹Three of the affirmed items were resolved by the parties pursuant to a settlement agreement reached during the hearing.

of three compressed gas cylinder standards. For the reasons that follow, we affirm the judge's decision finding a willful violation of 29 C.F.R. § 1926.500(g)(5) and reverse his decision to vacate the three cylinder items. The Commission also affirms a violation of 29 C.F.R. § 1926.500(g)(1), but is unable to reach agreement on the issue of whether the violation was willful. To resolve this impasse, the Commission affirms that portion of the judge's decision classifying the violation as willful, but accords it the precedential value of an unreviewed judge's decision.

I. Background

Star Brite's work at the Newark Bus Complex was performed in two sections under two contracts with New Jersey Transit Corporation ("New Jersey Transit"). The first roof section, identified in the record as NBC-1, covered a 336,000 square foot area and was replaced between May and September 1994. The second section, identified as NBC-2, covered an adjacent area of 206,720 square feet and was replaced between September and mid-December 1994. Both NBC-1 and NBC-2 were divided into smaller roof areas by a network of 4-foot concrete parapet walls. The ground to eave height of the building was approximately 25 feet. Open edges existed on the north and east sides of NBC-1. The entire length of the east side roof edge of NBC-2 was open. A 9- by 12-foot elevator enclosure located along that edge projected out from the roof line and also had no barrier at its edge.

On October 19, 1994, an OSHA compliance officer visited the NBC-2 site in response to an informal complaint. After observing employees handling materials at the unprotected east edge of NBC-2, the compliance officer entered the job site where he met George Lynardakis ("Lynardakis"), who identified himself as the project manager for Star Brite. While inspecting the roof, the compliance officer also observed six oxygen cylinders and three acetylene cylinders lying on their sides without valve caps in place. Lynardakis told the compliance officer that the cylinders belonged to Star Brite, but that he did not know who placed them on the roof or how long they had been there. The compliance officer reviewed

OSHA's fall protection standards with Lynardakis and specifically advised him of the fall protection requirements for working in a roof edge materials handling and storage area. Lynardakis arranged to have unsecured guardrails assembled around the open edges of the elevator area and promised to secure and extend the railings approximately 20 feet on each side of the elevator area along the unprotected east edge as recommended by the compliance officer.²

During a follow-up inspection on November 4, 1994, the compliance officer again observed employees handling materials at the east edge of the roof where guardrails had been neither secured nor extended. Star Brite's owner, Kostas Smilios ("Smilios"), who was supervising the work on that day, claimed that he was not permitted under the terms of his contract to secure guardrails to the roof. However, later that day he was able to secure the railings to a wood nailer (a piece of wood that ran along the edge of the building) without having to penetrate the roof. When the compliance officer returned to the site on November 7, 1994, he found that the guardrails remained adequately secured around the materials handling and storage area and were also extended along the roof edge on each side of the area. A warning line system had also been erected at the materials handling and storage access area. On November 8, 1994, during another visit to the site, and again on November 9, 1994, when visiting the site for a preliminary closing conference, the compliance officer found no additional exposure to hazardous conditions.

When the compliance officer returned to the NBC-2 site on December 13, 1994, the guardrails had been removed entirely. Although a warning line had been strung along part of the east edge, it was down and hanging against the side of the building in a roof edge area where employees were performing built-up roofing work.

²The compliance officer recommended that the guardrails be extended 20 feet on each side of the elevator area because although he observed employees handling materials only at or near the elevator enclosure area of the roof edge, he noticed a wide expanse of debris and tar residue farther along the unprotected east edge of the roof.

II. Citation 2, Items 1 and 2.

A. Did the judge err in affirming Item 1 of Citation 2, which alleged a willful violation of 29 C.F.R 1926.500(g)(1)?³

Compliance with section 1926.500(g)(1) requires that employers protect employees from fall hazards during the performance of built-up roofing work by using one of the methods described in the standard. A safety monitoring system alone is acceptable only on roofs fifty feet or less in width where mechanical equipment is not being used or stored. On roofs greater than fifty feet in width, either a motion-stopping-safety (MSS) system or a warning line system must be used. If an employer elects to comply by using a warning line system, it must be supplemented for employees working in areas between the warning line and the roof edge by either an MSS system or, where mechanical equipment is not being used or stored, a safety monitoring system.

The Secretary alleges that the standard was violated both before and during the OSHA inspection. The alleged instances occurring before the inspection were based on reports to the compliance officer and testimony at the hearing from six witnesses: Star Brite's

³Subpart M--Floor and Wall Openings

§ 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:

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

subcontractor, Frank Knight (“Knight”), three employees from New Jersey Transit and two employees from LS Transit Systems, the construction manager. The judge had “serious questions concerning the probative value” of their testimony and did not rely on it. We agree with the judge’s assessment of this evidence. Although these witnesses testified that they observed Star Brite employees performing built-up roofing work at the unprotected edges of NBC-1, none specified the size of the roof areas where such instances occurred -- an essential fact for determining the type of fall protection that would have been required to comply with the standard. Both the Secretary and Star Brite submitted exhibits representing the layout of the roof, but neither the exhibits nor the testimony pertaining to them established the precise locations of the 4-foot parapet walls that divided the roof into separate, non-contiguous roof areas.⁴ In addition, none of the Secretary’s witnesses knew whether a safety monitoring system had been used during the performance of built-up roofing work at the edge, and their recollections differed as to the use of other forms of fall protection. Knight testified that he had erected both guardrails and a warning line at NBC-1 to protect his own employees. However, three witnesses from New Jersey Transit recalled seeing neither guardrails nor warning lines in use at NBC-1. One witness from LS Transit Systems remembered seeing Knight’s warning lines and recalled seeing guardrails that she thought might have been erected by Knight. Another LS Transit Systems witness remembered seeing Knight’s warning line at the east edge of NBC-1 but did not recall any guardrails.

While not relying on the testimony of these six witnesses, the judge nevertheless found that pre-inspection violations were established. We disagree. The judge reasoned that “the deficiencies noted by the compliance officer during his several inspections of NBC-2 undoubtedly existed while roofing work was being performed on NBC-1.” To establish a

⁴Appendix A to Subpart M permits roofs “which are comprised of several separate, non-contiguous roof areas” to be considered as a series of individual roofs under the standard.

prima facie case of violation, however, the Secretary must establish the applicability of the cited standard, noncompliance with the terms of the standard, employee exposure to the violative condition, and employer knowledge of the violative condition. See *Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The Secretary has not presented evidence that establishes any of these elements for the pre-inspection allegations.

The record shows that during the OSHA investigation, a violation of section 1926.500(g)(1) occurred at NBC-2 on one occasion, December 13, 1994. On that date, the compliance officer observed employees performing built-up roofing work on a roof that measured greater than fifty feet in width in an area where mechanical equipment was not being used or stored.⁵ In these circumstances, the standard required an MSS system, or a warning line system supplemented by a safety monitor for employees working between the warning line and the roof edge.

It is undisputed that when the compliance officer arrived at the site, employees were not protected by either an MSS system or a properly erected warning line system. Instead, a warning line was hanging against the side of the building below the roof edge area where employees were working. Photographs taken by the compliance officer from the ground level reveal six employees working at the unprotected roof edge -- one employee was working with a mop; others were standing or kneeling at the roof edge. The compliance officer testified that by the time he reached the roof, the employees had scattered. Some were attempting to reset the warning line while others continued to perform built-up roofing work away from the edge and inside the warning line. However, the reset line was improperly

⁵Although the Secretary argues that a tar lugger is human propelled wheeled equipment, distinct from a wheelbarrow or mopcart, and properly characterized as mechanical equipment, it was not shown that employees were working near this equipment while engaged in built-up roofing work on December 13, 1994.

staggered and erected at an average distance of three feet instead of six feet from the edge as required by the standard.⁶ Thus, Star Brite was not in compliance with the standard's requirements when the compliance officer first arrived at the site or when he reached the roof.

Feasibility: Star Brite argues that a warning line system would have made work difficult and impractical for employees performing built-up roofing work at the roof edge. This is essentially a claim of infeasibility. To establish this affirmative defense, an employer must show that “(1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection.” *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874, 1993-95 CCH OSHD paragraph 30,485, p. 42,109 (No. 91-1167, 1994). To support its claim, Star Brite points to Smilios' testimony that a warning line would have been “meaningless” or an impediment to the employees who were unrolling felt and mopping tar at the roof edge. However, Smilios also testified that a mop handle is ten feet in length and that a “mopper” stands approximately ten feet away from the roof edge while mopping tar along the perimeter of the roof. He did not explain why a mopper could not have positioned the ten-foot mop handle under the warning line while mopping the roof edge area or why a “feltman” similarly could not have stepped beneath the warning line to unroll the felt while being monitored. Employers must exercise some creativity in seeking to achieve compliance. *Gregory & Cook Inc.*, 17 BNA OSHC 1189, 1191, 1993-95 CCH OSHD ¶ 30,757, p. 42,735 (No. 92-1891, 1995). *See also*

⁶The standard at 29 C.F.R. § 1926.500(g)(1) provides that a warning line system be “erected and maintained as provided in paragraph (g)(3)” of the section. Paragraph (g)(3) requires that “[w]hen mechanical equipment is not being used, the warning line shall be erected not less than six feet (1.8 meters) from the roof edge.”

Pitt-Des Moines, Inc., 16 BNA OSHC 1429, 1433, 1993-95 CCH OSHD ¶ 30,225, p. 41,608 (No. 90-1349, 1993) (Commission “has long recognized that standards will, in some instances, require some creativity on the part of employers seeking to achieve compliance”); *Walker Towing*, 14 BNA OSHC 2072, 2075, 1991-93 CCH OSHD ¶ 29,239, p. 39,159 (No. 87-1359, 1991) (employer must comply with standard to the extent feasible). Thus, we find no support for Star Brite’s argument that a warning line would have made work infeasible at the roof edge area outside of the warning line.⁷ Therefore, we reject Star Brite’s infeasibility claim and affirm the violation.

De Minimis: We also reject Star Brite’s claim that if a violation is affirmed, it should be reclassified as *de minimis*. A violation is *de minimis* when a deviation from the standard has no “direct or immediate” relationship to employee safety. *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382, 1991-93 CCH OSHD ¶ 29,524, p. 39,850 (No. 88-2642, 1991). Star Brite relies on the fact that the roof was no more than one and a half feet wider than the 50-foot limit in the standard permitting the use of a safety monitoring system alone. However, this fact has no bearing on the issue of whether the violation had a direct or immediate relationship to employee safety. OSHA explained in its preamble to the standard that the use of a safety monitoring system alone is limited to roofs 50 feet or less because workers are never more than 25 feet from an edge and are therefore aware of the proximity of the fall hazard, and a warning line on such roofs would create a very narrow protected work area inside the line. 45 Fed. Reg. at 75,619-621. It is not our role to assess the wisdom of the standard. *See Nooter Constr. Co.*, 16 BNA OSHC 1572, 1575, 1993-95 CCH OSHD ¶ 30,345, p. 41,838 (No. 91-0237, 1994).

⁷Although OSHA acknowledged in its preamble to section 1926.500(g) that the use of MSS systems posed feasibility problems, it did not recognize such problems with warning line systems. *See Guarding of Low-Pitched-Roof Perimeters During the Performance of Built-Up Roofing Work: Final Rule*, 45 Fed. Reg. 75,618, 75,619, 75,621 (1980).

Star Brite also argues that a *de minimis* classification is warranted because its use of a safety monitoring system alone provided protection comparable to that which would have been afforded by technical compliance with the standard. Star Brite relies on *Phoenix Roofing, Inc. v. Secretary of Labor*, 874 F.2d. 1027 (5th Cir. 1989) (“*Phoenix Roofing*”), a case in which the court held that an employer’s use of a safety monitoring system alone during the performance of built-up roofing work at the unprotected edge of a roof wider than fifty feet was a *de minimis* violation.⁸ Star Brite’s reliance on *Phoenix Roofing* is misplaced. Critical to the Sixth Circuit’s decision in that case was the fact that “the citation was based *only* upon the compliance officer’s observation of employees working near the edge of the roof.” *Id.* at 1032. (Emphasis added.) The court reasoned that “the additional presence of a warning line would be only for the protection of employees working further from the perimeter.” *Id.* Unlike *Phoenix Roofing*, the citation here was based not only on employees working at the roof edge but also on employees working farther from the perimeter where a warning line would have served to warn and remind them that they were approaching or working near a fall hazard. We find that Star Brite’s failure to erect the required warning line exposed its employees to a 25-foot fall hazard at the unprotected roof edge and had a direct and immediate relationship to employee safety. Accordingly, we find that the violation is not *de minimis*.

Willfulness: The judge found that “[t]he evidence that clearly demonstrates the willful quality of Star Brite’s noncompliance is its repeated failure to make reasonable efforts to establish and maintain the safeguards called for by the standards despite the exhortations of the compliance officer.” A violation is willful if committed with intentional, knowing, or

⁸Star Brite also cites the unreviewed administrative law judge decision in *Santo J. Ruisi Roofing Co., Inc.*, 13 BNA OSHC 1175, 1986-87 CCH OSHD ¶ 27,865 (No. 86-17, 1987) (ALJ). Unreviewed administrative law judge decisions have no precedential value. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 490, 1976).

voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2012, 1991-93 CCH OSHD ¶ 29,223, p. 39,133 (No. 85-0369, 1991). *See also Babcock & Willcox Co. v. OSHRC*, 622 F.2d 1160, 1167 (3rd Cir. 1980); *Frank Irely, Jr. v. OSHRC*, 519 F.2d 1200 (3rd Cir. 1974). “A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety.” *Hartford Roofing Co.*, 17 BNA OSHC 1361, 1363, 1995-97 CCH OSHD ¶ 30,857, p. 42,933 (No. 92-3855, 1995). *See also General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHC ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated); *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-1257, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987).

The Commission is unable to reach agreement on the characterization of the violation. Commissioner Eisenbrey would affirm the judge’s willful finding. Frank Knight testified that during the work on NBC-1 he specifically discussed with Smilios the need for fall protection at the worksite, explaining to Smilios that Knight was erecting various forms of fall protection as required by his contract with Smilios and by governing regulations. Knight also testified that when he told Smilios that Smilios should install fall protection for his employees, Smilios said that “it’s a pain[;] [i]t takes too much time [and is] not worth the trouble” According to Knight, he had many such conversations with Smilios, including explicit discussion of a possible OSHA inspection, to which Smilios responded, “[S]o what? They come here, they give you a little bitty fine and that’s it.” Smilios denied that these conversations occurred, testifying that he “never” discussed fall protection with Knight.

Based on an evaluation of the veracity of Smilios’ testimony on the entire record before us,⁹ and a comparison of the relative specificity of Knight’s testimony as compared

⁹*Cf. Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000) (“factfinder is entitled to consider a party’s dishonesty about a material fact as ‘affirmative evidence of guilt’”).

to that of Smilios, Commissioner Eisenbrey does not credit Smilios' denial of the fall protection conversations with Knight. Smilios falsely testified that a written safety program containing references to roofing safety was in effect during the OSHA investigation, but it was later shown that the document was actually amended to include those references only after the OSHA investigation. Smilios also testified that George Lynardakis, Star Brite's project manager, never told him that he was required to install fall protection except for guardrails around an elevator shaft. But Lynardakis admitted to the compliance officer that he both gave Smilios a copy of the OSHA fall protection standard and informed Smilios of Lynardakis' earlier agreement to install warning lines and guardrails. Smilios further claimed that he and another employee had acted as safety monitors on December 13, 1994, while a crew of "12 guys" worked on the last section of the roof. In fact, Smilios was not at work on December 13. In addition, Smilios contradicted his own claim that he was unable to secure guardrails to the roof by admitting at the hearing that he realized from his first day on the job that he could have secured guardrails to a wood nailer at the side of the building without having to penetrate the roof. In Commissioner Eisenbrey's view, because such inconsistencies and misrepresentations so weaken the reliability of Smilios as a witness, no weight should be given to his testimony denying the comments alleged by Knight. Commissioner Eisenbrey finds that in contrast to the contradictions and inconsistencies in Smilios' testimony, Knight's testimony was convincingly detailed, consistent, and unequivocal. Accordingly, he credits Knight's testimony and finds that it is unrebutted.

Commissioner Eisenbrey also finds that Star Brite was well aware of the requirements of the standard. The company has a history of a prior violation of the same standard, and its supervisor, Lynardakis, admitted to the compliance officer during their discussion on October 19, 1994, that Star Brite was knowledgeable about the fall protection requirements on roofing jobs and had a "code book" of the requirements in its office. Moreover, Knight's conversations with Smilios made him generally aware of the need for fall protection for employees performing built-up roofing along roof edges. Yet, despite this awareness,

Smilios conveyed to Knight a dismissive attitude about using fall protection,¹⁰ and Lynardakis permitted the employees under his direct supervision to perform built-up roofing work on December 13, 1994, without appropriate fall protection. Commissioner Eisenbrey would find that Lynardakis' conduct is imputable to Star Brite and that his deliberate failure to act in the face of a known duty further supports a finding of plain indifference to employee safety. Thus, based on ample evidence of Star Brite's heightened awareness of the standard's requirements and plain indifference to employee safety, Commissioner Eisenbrey would find that the violation was willful.

The Chairman finds that the Secretary has not proven by a preponderance of the evidence that the violation was willful. In the Chairman's view, the Secretary's case for willfulness rests primarily on the testimony of Knight regarding Smilios' attitude towards safety. Knight's testimony was contradicted by Smilios, but the judge failed to make a credibility determination resolving the dispute. This deficiency would ordinarily result in the Commission remanding the case to the judge for further consideration and explanation. *See C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1298, 1977-78 CCH OSHD ¶ 22,481, p. 27,100 (No. 14249, 1978). However, Judge DeBenedetto is no longer with the Commission. Without his credibility findings, Chairman Rogers cannot resolve the conflicts in the testimony. Thus she has no sufficient basis for crediting the testimony of one witness over the other. The result, in her view, is that the evidence of whether Star Brite did or did not commit a willful violation of the standard is in balance. *See Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1611, 1991-93 CCH OSHD ¶ 29,673, p. 40,207 (No.87-2007, 1992). The Chairman

¹⁰*See Williams Enterprises, Inc.*, 13 BNA OSHC at 1257, 1986-87 CCH OSHD at p. 36,589 (absent familiarity with standard's terms, willfulness may be found based on "evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it").

would therefore vacate the willful characterization because the Secretary failed to meet her burden of proving willfulness by a preponderance of the evidence.

Furthermore, the record is unclear whether the compliance officer discussed the specific fall protection requirements under section 1926.500(g)(1) before December 13, 1994, the day of the violation. The compliance officer's discussions prior to December 13 did involve the fall protection requirements under section 1929.500(g)(5), the violation which the Chairman finds willful. Neither does the record support finding willfulness through Star Brite's supervisor Lynardakis. The fact that he may have made a general admission of Star Brite's familiarity with fall protection requirements on roofing jobs and had a copy of a "code book" in his office does not show knowledge of the standard at issue here.

On review the Secretary asserts that Star Brite had "been cited under the fall protection standards twice before." However, according to the judge and the record, the company had, at the time of these alleged violations, only one prior citation for violating section 1926.500(g)(1) under notably different factual circumstances. As the judge stated in his decision, that does not, by itself, establish willfulness. The second citation that the Secretary refers to appears to be a citation issued a number of months after the alleged violations in this case and is therefore irrelevant for purposes of willfulness in this case.

Under section 12(f) of the Act, 29 U.S.C. § 661(f), official action can only be taken by the Commission with the affirmative vote of at least two members. To resolve the impasse over this classification issue, Chairman Rogers and Commissioner Eisenbrey have agreed to affirm the judge's decision to classify Star Brite's violation of 29 C.F.R. § 1926.500(g)(1) as willful and assess a penalty of \$25,000, but to accord that portion of the judge's decision the precedential value of an unreviewed judge's decision. *See Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 784, 66 L.Ed. 2d 604 (1980).

B. Did the judge err in affirming Item 2 of Citation 2, which alleged a willful violation of 29 C.F.R 1926.500(g)(5).¹¹

Section 1926.500(g)(5) requires that employees working in a roof edge materials handling or storage area be protected by the use of an MSS system along all unprotected roof sides and edges of the area. Here again, the Secretary alleged that the standard was violated both before and during the OSHA investigation. However, for the reasons discussed previously, we find that the testimony by Knight and the witnesses from New Jersey Transit and LS Transit Systems does not provide a sufficient factual basis for establishing exposure, knowledge, or non-compliance for conditions occurring before the OSHA investigation.

¹¹**Subpart M--Floor and Wall Openings**

§ 1926.500 Guardrails, handrails, and covers.

....

(g) *Guarding of low-pitched roof perimeters during the performance of built-up roofing work—*

....

(5) *Roof edge materials handling areas and materials storage.* Employees working in a roof edge materials handling or materials storage area located on a low-pitched roof with a ground to eave height greater than 16 feet (4.9 meters) shall be protected from falling by the use of an MSS system along all unprotected roof sides and edges of the area.

(i) When guardrails are used at hoisting areas, a minimum of four feet of guardrail shall be erected on each side of the access point through which materials are hoisted.

(ii) A chain or gate shall be placed across the opening between the guardrail sections when hoisting operations are not taking place.

(iii) When guardrails are used at bitumen pipe outlets, a minimum of four feet of guardrail shall be erected on each side of the pipe.

(iv) When safety belt systems are used, they shall not be attached to the hoist.

(v) When safety belt systems are used they shall be rigged to allow the movement of employees only as far as the roof edge.

(vi) Materials may not be stored within six feet of the roof edge unless guardrails are erected at the roof edge.

(vii) Materials which are piled, grouped, or stacked shall be stable and self-supporting.

However, the record does establish that the standard was violated during the OSHA investigation at NBC-2. When the compliance officer first visited the site on October 19, 1994, he observed two employees lifting containers by rope to the roof edge, another employee pulling a rope to pump tar to the roof, and other employees moving tar luggers near the edge. No MSS system was in place to protect these employees. After a discussion with the compliance officer, Lynardakis assembled guardrails around the roof edge materials handling and storage area and promised to secure them to the roof. However, when the compliance officer returned to the site on November 4, 1994, he found that the guardrails remained unsecured while employees continued to operate the tar delivery system at the roof edge. Smilios protested to the compliance officer at that time that he could not secure the guardrails because he was not permitted to penetrate the roof, but later that day he did secure and extend guardrails around the roof edge materials handling area. At the hearing, Smilios admitted that he had known from his first day on the job that it was possible to secure guardrails to a wood nailer at the side of the building. When the compliance officer returned to the site on December 13, 1994, the guardrails were gone. Although steam was coming from the tar luggers at the roof edge on that date, the compliance officer did not observe employees working in the area.

In defense, Star Brite argues that because materials were routinely delivered, handled and stored at least six feet away from the roof edge, compliance with the standard did not require an MSS system. This claim is belied by the photographic evidence in the record, which shows that the pipes through which hot tar was pumped up to the roof were leaning against and across the roof edge area both during tar delivery and while not in operation. These pipes were essential and integral components of the tar delivery system, and we agree with the judge that the configuration of the pipes traversing the roof edge qualified the area as a roof edge materials handling and storage area. Section 1926.500(g)(5)(iii) specifically addresses such a configuration by requiring that “[w]hen guardrails are used at bitumen pipe outlets, a minimum of four feet shall be erected on each side.” Here, the pipes leaned against

and across the roof edge on each side of the east edge elevator area. Attached to the end of each pipe was three and a half feet of flexible hose through which employees poured hot tar directly into the tar luggers. Employees worked not only behind but also alongside the luggers during tar delivery, and compliance with the standard clearly required that employees be protected by an MSS system while working in this area.

Star Brite also argues that the incident of an employee lifting a container by rope to the roof edge elevator area on October 19, 1994, was the result of unpreventable employee misconduct. To establish this affirmative defense, an employer must show that it adequately communicated work rules to prevent the behavior and effectively enforced the rules when violations were discovered. *See Nooter Constr. Co.*, 16 BNA OSHC at 1578, 1993-95 CCH OSHD at p. 41,841. Here, the written safety program that was in place at NBC-2 during the OSHA inspection made no reference to roofing safety matters. Smilios testified that during the job he instructed employees to stay “approximately, not, better than six feet” away from the roof edge when materials were delivered to the roof. He also testified that during weekly safety meetings he told his employees “the rules they got to follow for working on the roof. I mean, everybody got to watch the mop man. . . . That’s the standard in the industry.” He provided no additional details about other safety information that he imparted to his employees, and the record fails to show that any work rules prohibiting the cited conduct were adequately communicated to employees.¹² Regarding enforcement, Star Brite claims that it reprimanded one employee for hoisting a container to the roof edge. The photographic evidence, however, shows that not just one, but at least two, employees were involved in lifting containers to the roof edge without adequate fall protection. We agree with the judge that Star Brite presented “no credible evidence to show that [it] had a safety program that was implemented in any significant way at the bus complex project.” We therefore find that the

¹²Smilios admitted that four to six Spanish-speaking employees had difficulty understanding English, and Star Brite presented no evidence to show that work rules had ever been translated for these employees.

unpreventable employee misconduct defense fails and that Star Brite violated 29 C.F.R. § 1926.500(g)(5).

Willfulness: We agree with the judge that the violation is willful. During the compliance officer's first visit to the site on October 19, 1994, he reviewed the requirements of the standard with Lynardakis, who expressly acknowledged that Star Brite was well aware of OSHA's roofing safety standards. Indeed, Star Brite began taking steps toward compliance before the compliance officer left the worksite. Lynardakis began assembling unsecured guardrails around the roof edge materials handling and storage area, but failed to bring the area into compliance with the standard by securing the guardrails. *See Caterpillar Inc.*, 17 BNA OSHC 1731, 1733, 1995-97 CCH OSHD ¶ 31,134, pp. 43,483-84 (No. 93-373, 1996), *aff'd*, 122 F.3d 437 (7th Cir. 1997). When the compliance officer returned to the site on November 4, 1994, the guardrails remained unsecured while employees continued to work in the roof edge materials handling and storage area. The compliance officer testified that the unsecured guardrails may have presented an even greater hazard than no guardrails at all by giving employees a false sense of being protected. The facts here show that Star Brite had a heightened awareness of the standard's requirements, and we agree with the judge that by ignoring the compliance officer's advice on proper compliance, Star Brite demonstrated plain indifference to employee safety. Accordingly, we find that the violation of 29 C.F.R. § 1926.500(g)(5) is willful.

Penalty: The Secretary proposed a penalty of \$56,000, which included a 20 percent reduction for size. After giving Star Brite credit for its effort to limit employee exposure to the unprotected roof edge during the performance of built-up roofing work, the judge assessed a penalty of \$25,000. On review, Star Brite argues that it should have been given an additional 10 percent reduction for safety history and a 40 percent reduction for size.

Under section 17(j) of the Act, 29 U.S.C. 666(j), the Commission must, in its assessment of penalties, give due consideration to the employer's prior history, any good faith, the size of its business, and the gravity of the cited violations. *See J.A. Jones Constr.*

Co., 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). Although the Secretary has devised a formula that assigns certain percentage discounts to some of these factors, the Commission independently evaluates the factors and assesses a penalty amount that it deems appropriate. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, 1993-95 CCH OSHD 30,363, p. 41,882 (No. 88-1962, 1994). Star Brite is a small employer with thirty employees. It has a history of a prior fall protection violation in 1991. The gravity of the current violation is high. Several employees were exposed to a 25-foot fall from the edge of the roof on October 19, 1994, and again two weeks later on November 4, 1994. The judge credited Star Brite for its efforts to limit employee exposure. After giving due consideration to all of the penalty factors, we find that a penalty of \$25,000 is appropriate.¹³

III. Citation 1, items 7, 8, AND 9: Cylinder Storage Items

We next consider whether the judge erred in vacating the items alleging serious violations of 29 C.F.R. § 1926.350(a)(1) for failure to have valve protection caps in place on compressed gas cylinders, 29 C.F.R. § 1926.350(a)(9) for failure to secure compressed gas cylinders in an upright position, and 29 C.F.R. § 1926.350(a)(10) for failure to store oxygen cylinders separately from acetylene cylinders.¹⁴ The judge gave dispositive weight to

¹³We reject Star Brite's contention that it should have been assessed a single penalty for its violations of 29 C.F.R. §§ 1926.500(g)(1) and (5). Under Commission precedent, where the cited standards require different forms of abatement and the use of one form does not necessarily abate both violations, separate citation items for each violation are not duplicative, and the Commission has assessed separate penalties for each violation. *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1390-92, 1991-93 CCH OSHD ¶ 29,531, pp. 39,865-66 (No. 88-282, 1991). Here, section 1926.500(g)(1) permitted the use of a warning line system supplemented by a safety monitoring system to abate the cited conditions. However, such a measure would not have satisfied the requirements of section 1926.500(g)(5), which requires an MSS system at a roof edge materials handling and storage area.

¹⁴§ 1926.350 Gas welding and cutting.

(a) *Transporting, moving, and storing compressed gas cylinders.*

(continued...)

Smilios' testimony that the cylinders were empty. Smilios was the only witness other than the compliance officer to testify concerning the cylinders. The judge concluded that the Secretary failed to prove that the cylinders posed a hazard addressed by the standards.¹⁵ We disagree with the judge's finding.

Under longstanding Commission precedent, there is a rebuttable presumption that compressed gas cylinders are "wholly or partly full, or contain residual gas, and present a hazard." *Huber, Hunt & Nichols, Inc.* 4 BNA OSHC 1406, 1409, 1976-77 CCH OSHD ¶ 20,837, p. 25,012 (No. 6007, 1976) ("*Huber*"); see also *Williams Enterprises, Inc.*, 7 BNA OSHC 1015, 1018-1019, 1979 CCH OSHD ¶ 23,279, p. 28,156 (No. 14748, 1979); *Williams Enterprises of Georgia, Inc.*, 7 BNA OSHC 1900, 1903, 1979 CCH OSHD 24,003, 29,137-38 (No. 13875, 1979); *Trinity Industries, Inc.* 9 BNA OSHC 1515, 1519-20, 1981 CCH OSHD ¶ 25, 297, p. 31,323 (No. 77-3909, 1981). In *Huber*, the Commission characterized a completely empty gas cylinder that presented no hazard as "a hypothetical situation that rarely if ever occurs in practice." *Huber*, 4 BNA OSHC at 1409, 1976-77 CCH OSHD at p. 25,012. We find that Smilios' testimony did not rebut the residual gas presumption here. Smilios had no first-hand knowledge of the condition of the cylinders. He was not present at the NBC-2 site on October 19, 1994, when Star Brite was cited for the cylinder violations. His claim that the cylinders were empty was based on his interpretation of the photographic

¹⁴(...continued)

(1) Valve protection caps shall be in place and secured.

....

(9) Compressed gas cylinders shall be secured in an upright position at all times except, if necessary, for short periods of time while cylinders are actually being hoisted or carried.

(10) Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet (6.1) or by a noncombustible barrier at least 5 feet (1.5 m) high having a fire-resistance rating of at least one-half hour.

¹⁵The judge noted that an alleged tripping hazard should have been cited under a housekeeping standard.

exhibits and on his argument that he had a worksite policy regarding the safe handling and storage of compressed gas cylinders. He explained that his policy required that cylinders be placed on their sides after use and then taken down from the roof at the end of every day or every two days. However, the record shows no evidence that this policy was communicated to, or followed by, employees. In addition, the compliance officer noted that the cylinders were not marked “empty” or “MT” as required for empty cylinders under 29 C.F.R. § 1926.350(j).¹⁶ Given that Smilios was not a witness to the cited condition, we agree with the Secretary that his testimony did not rebut the presumption that the cylinders contained residual gas. *Cf. Andrew Catapano Enterprises Inc.*, 17 BNA OSHC 1777, 1781-82, 1995-97 CCH OSHD ¶ 31,180, p. 43,680 (Nos. 90-0050, 1996) (consolidated) (interpretation of photographic exhibit by company vice president who was not a witness to cited condition fails to rebut Secretary’s *prima facie* case that cylinders were not in use). *See also All Purpose Crane, Inc.*, 13 BNA OSHC 1236, 1239, 1986-87 CCH OSHD ¶ 27,877, p. 36,550 (No. 82-284, 1987) (Commission has the same authority as the judge to evaluate the relative qualifications of various witnesses and weigh their testimony in the light of the totality of the record). Because we find that Smilios’ testimony failed to rebut the residual gas presumption, and there is no other rebuttal evidence on this issue, we reverse the judge’s decision and affirm the citation for serious violations of the compressed gas cylinder standards at 29 C.F.R. §§ 1926.350(a)(1), 1926.350(a)(9), and 1926.350(a)(10).¹⁷

¹⁶Section 1926.350(j) incorporates by reference the technical portions of the American National Standards Institute, Z-49.1-1967, *Safety in Welding and Cutting*, which specifically requires that empty cylinders be marked as such.

¹⁷Star Brite’s argument for *de minimis* classifications of the gas cylinder items is without merit. Under Commission precedent, even residual quantities of flammable compressed gases pose dangers of explosion and projectile hazards. *Huber*, 4 BNA OSHC at 1409, 1976-77 CCH OSHD at p. 25,012. Although the compliance officer opined that the likelihood of gases igniting was remote, he admitted that he was not trained or qualified to determine the probability of an explosion when residual amounts of gases remain in cylinders.

Penalty: The Secretary proposed penalties of \$750 for each of the three cylinder violations, taking into account Star Brite's size and immediate abatement. There is no evidence of a prior history of violation of this standard, but the gravity of the violation is high. Nine cylinders were stored in violation of the standard, and the cited conditions existed for as long as two days. Therefore, we find that a \$750 penalty for each of the three gas cylinder items is appropriate under Section 17(j) of the Act.

ORDER

We affirm item 2 of Citation 2 for willful violation of 29 C.F.R. § 1926.500(g)(5) and assess a penalty of \$25,000. We also affirm items 7, 8, and 9 of Citation 1 for serious violations of 29 C.F.R. § 1926.350(a)(1), 29 C.F.R. § 1926.350(a)(9), and 29 C.F.R. § 1926.350(a)(10), respectively, and assess penalties of \$750 for each item. We affirm a violation of 29 C.F.R. § 1926.500(g)(1), and to resolve the impasse on the characterization of the violation, the Commissioners agree to affirm the judge's finding that the violation is willful and affirm his assessment of a \$25,000 penalty. The portion of the judge's decision concerning the characterization of Star Brite's violation of 29 C.F.R. § 1926.500(g)(1) is accorded the precedential value of an unreviewed judge's decision.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: December 20, 2001

SECRETARY OF LABOR, :
Complainant, :
v. : OSHRC
: Docket No. 95-0343
STAR BRITE CONSTRUCTION CO., INC., :
Respondent. :

Appearances:

Jane Snell Brunner, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Thomas H. Hirsch, Esq.
"Cooper Gables" Professional Building
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For Respondent

Before: Administrative Law Judge Richard DeBenedetto:

DECISION AND ORDER

Star Brite was cited on January 19, 1995, for serious and nonserious violations of various construction safety and health standards. A citation was also issued for willful violations of two roofing standards. The Secretary has proposed penalties totaling \$132,200. Star Brite contested the citations and the penalties.

Star Brite is a roofing company which was engaged by New Jersey Transit Corporation (NJ Transit) to remove and replace the roof of the Newark Bus Complex spanning an area of about one million square feet. The roofing work was performed in two separate phases. The first phase involved one section of the roof designated as "NBC-1", the other section was designated "NBC-2". The work on NBC-1 was performed during the period between mid-May and mid-September of 1994; NBC-2 was done between late September and mid-December of 1994. Star Brite engaged the services of another company, Frank Knight Roofing Co., Inc., as a subcontractor with responsibility for performing part of the roofing work on NBC-1 from mid-May to the first week of July 1994.

Three citations were issued against Star Brite. The alleged violations relating to the 12-item citation number 1 and the single-item citation number 3 involve NBC-2 excepting two subitems of the former¹⁸. The locus of the violations described in willful citation number 2 is alleged to have occurred at both NBC-1 and NBC-2, the basic charges involving the perimeter guarding standard for built-up roofing work and the fall protection standard for roof-edge materials handling and storage areas.

The initial OSHA inspection of the Newark Bus Complex occurred on October 19, 1994, which was prompted by an “informal complaint” from an unnamed person not employed by Star Brite. Picketing by a labor union was going on at the site (Tr. 190-91, 427-28). Inasmuch as the roofing work on NBC-1 had been completed several weeks before OSHA’s arrival at the site, the Secretary’s case involving NBC-1 rests entirely upon the testimony of witnesses who were present at the bus complex while the roofing work was in progress and who were employed by either NJ Transit or LS Transit Systems which was hired by the former to provide construction management services in connection with the bus complex project. The Secretary also relies on the testimony of Frank Knight, owner of the roofing company Star Brite subcontracted to perform work on NBC-1.

GUARDING THE ROOF PERIMETERS

The fall-protection standard at 29 C.F.R. § 1926.500 (g) (1) states that when workers are engaged in applying a weather-proofing cover (called “built-up-roofing work”) on a flat or low-pitched roof more than 16 feet above the ground, the employer must take precautions to protect the employees from falling from the open sides and edges of the roof. The prescribed methods for safeguarding a roof perimeter include the use of a motion-stopping-safety system or “MSS system”, a warning line (a waist-high rope, wire, or chain supported by stanchions) strung around the perimeter at least six feet from the roof edge¹⁹. Where employees work between the warning line and the roof edge, the employer is required to use either a MSS system or (where mechanical

¹⁸. The violations are listed in citation number 1 as items 1a, 1b, and 2 through 12. During the hearing the parties agreed to settle three of the items; the agreement provided that items 3, 4 and 5 were to be affirmed and the proposed penalties were to be reduced to \$1600, \$1500 and \$750, respectively (Tr. 184).

¹⁹. “MSS Systems” include guardrails, safety nets and safety belts. 29 C.F.R. § 1926. 502 (p) (5).
“Warning lines” must be no less than 34 inches and no more than 39 inches from the roof surface. § 1926.500 (3) (ii) (b).

equipment is not being used or stored)²⁰ a safety monitor to alert workers to proceed with caution. Under § 1926.500 (g) (4), mechanical equipment may not be used or stored between the warning line and the roof edge unless employees are protected by a MSS system; and under § 1926.500 (g)(5), employees working in the six-foot “roof edge materials handling or storage area” must be protected by a MSS system.

When compliance officer Gary Jensen approached the building on the first visit of October 19, he saw some workers on the NBC-2 roof at the materials handling area located in the vicinity of the roof edge. One employee was observed handling a lugger²¹, another was at the edge of the roof using a rope to hoist a fuel can from the ground; at one point he was leaning over the edge of the roof (Tr. 189-90, 425-35, Exhs. C-11 through C-19). No MSS system was being used. The height of the roof ranged from 25 to 30 feet, and a network of concrete parapets existed over the vast interior of the roof (Tr. 199-200).

The compliance officer eventually met up with the person in charge of the roofers at that time, George Lynardakis, Star Brite’s project manager, with whom an “opening conference” was held prior to conducting an inspection of the activities on the roof. During the conference Lynardakis assured the compliance officer that Star Brite was well aware of the OSHA requirements for fall protection (Tr. 241-42). On being advised of the need to install guardrails along the perimeter of the roof where the materials handling area was located, Lynardakis promised the compliance officer that it would be done (Tr. 249-50). The compliance officer also testified that Lynardakis admitted on October 19 that fall protection should have been provided in the materials handling area, and that at least three employees were within two feet of the roof edge in that area (Tr. 301-02). When questioned about the use of warning lines, Lynardakis told the compliance officer that the lines were used during the NBC-1 job but that the lines were not available for the job at hand because they were being used on another jobsite (Tr. 429-30).

²⁰. “Mechanical equipment” means “all motor or human propelled wheeled equipment except for wheelbarrows and mopcars” 29 C.F.R. § 1926.502 (p) (4).

²¹. A “lugger” is a metal barrel or tank mounted on a frame with wheels. This mobile tank device, which measures some 4 ½ feet long and 5 feet high, was used to receive and contain hot tar which was pumped through a pipe from ground level where asphalt was boiled in a kettle to form the tar roof cover (Tr. 178, 246-47, 437-38, 708-10, 811-12; Exhs. C-25, C-26).

The compliance officer returned to the bus complex about two weeks later, on November 4, at which time work was still being performed near the roof edge at the same materials handling area. Guardrails had been set up at the perimeter but the compliance officer found that they were not secured or sufficiently extended along the roof edge as discussed with Lynardakis during the initial visit (Tr. 249-50).

Lynardakis was not at the jobsite during the November 4 inspection, instead, the compliance officer met with Star Brite's principal owner, Kostas Smilios, who denied knowing anything about the discussion that took place between the compliance officer and Lynardakis on October 19 concerning guardrails.. According to the compliance officer, Smilios stated that he did not know what a warning line was, but that the lines would be ordered to comply with the regulation. Although Smilios initially balked at the idea of placing guardrails along the roof perimeter, claiming that bolting the rails to the roof edge would damage the roof's integrity, later that day guardrails were installed. The compliance officer's testimony, as to whether the guardrails that were set up during the inspection were fully secured, can be fairly described by turns as ambiguous, vague, and self-contradictory (Tr. 252-54, 459-62). Following repeated probing on cross-examination the compliance officer acknowledged that the perimeter guarding was eventually installed to his satisfaction (Tr. 491).

The compliance officer's November 4 visit was focused to a large extent on a matter involving the dome-shaped plastic covers of the skylights newly installed by Star Brite. Labels were attached to the domes inscribed: "Danger. Risk of Falling." The compliance officer construed this warning as indicating that the "plastic dome will not support bodily weight" (Tr. 476, 498), and he insisted that Smilios either install guardrails around the skylights or keep his employees six feet away from them. Smilios told the compliance officer that the skylight specifications indicated that the domes, which were acrylic with aluminum frames, were capable of supporting up to 400 pounds, and that the roofing work could not be done if he was required to put up guardrails or stop his men from working within a six-foot zone around the skylights. The dispute escalated to the point where the compliance officer threatened to get a court order to force Star Brite to correct the condition as an "imminent danger". The compliance officer also threatened to contact the federal marshal's office to deal with the situation. Whereupon Smilios ordered his employees to stop working and thus the workday ended. Some time soon after the November 4 inspection, the compliance officer learned

that the skylight covers were indeed capable of sustaining the weight of at least a 200-pound person, in accordance with the OSHA standard at § 1926.500 (f)(iv)(Tr. 475-83, 493,499).

The compliance officer returned to the bus complex to resume his inspection on November 7, 8 and 9; however, no roofing work was being performed during those days (Tr. 256-57). When he visited the site on December 13, he saw the roofers working “directly at the edge of NBC-2...without fall protection” (Tr. 257; Exhs.. C-6, C-7, C-8). He also noticed that the guardrails which had been installed on November 4 along the perimeter of the materials handling area had been removed despite apparent signs indicating the same materials handling area was still being used (Tr. 258-59). The compliance officer testified that when he confronted Lynardakis regarding the lack of guardrails, Lynardakis essentially told him that “he had to get the job done and he couldn’t provide protection everywhere on the job” (Tr. 263).

As previously noted, the Secretary’s perimeter guarding case relating to the NBC-1 roofing work, which began in mid-May 1994 and ended by mid-September of 1994, before the matter came to the attention of OSHA, rests upon the testimony of six witnesses, including Star Brite’s subcontractor, Frank Knight, who, along with his own employees, performed part of the work on NBC-1 from mid-May to the first week of July 1994. The five other witnesses were employed at the bus complex by NJ Transit or LS Transit Systems while the roofing work was being performed.

Frank Knight testified that while he supervised his own crew almost every day, he observed Star Brite’s employees working at the edge of the NBC-1 roof without any fall protection, and that he saw no indications that Star Brite used a monitoring system as a safeguard against falling from the roof (Tr 128-29, 165-66). He stated that he had several conversations with Kostas Smilios, Star Brite’s owner, concerning the need for fall protection on the NBC-1 project but Smilios rejected his advice (Tr. 130-31). Knight described the safety systems he used for protecting his employees from falling, including warning lines, guardrail systems and safety belts tied off to air conditioning units and other steel objects that were “permanent fixtures of the roof” (Tr. 131-34).

Henry Santos, NJ Transit’s project manager for both NBC-1 and NBC-2, visited the bus complex once, sometimes twice, a week from April to December 1994. He testified that he saw no guardrails or any other fall protection being used on the roof of NBC-1 and NBC-2 until the arrival of the OSHA compliance officer in October 1994 when the work on NBC-2 was in progress (Tr. 18-20, 27). He recalled that, prior to October 1994, he observed men working within one or two feet

of the roof edge at both NBC-1 and NBC-2; on one occasion a worker was seen near the edge of the roof signaling the crane operator for lifting materials onto the roof of NBC-1; although seeing, “for the most part”, chutes set up at the roof edges, there were occasions when “a handful of employees” were observed “dumping material over the edge of the roof into dumpsters” at both NBC-1 and NBC-2 (Tr. 26-29). On cross-examination, he acknowledged that he did not raise any question with Star Brite regarding the need for fall protection, that he did not know what a safety monitoring system was, and he did not observe Star Brite’s employees while they were actually installing the roof (Tr. 29).

Penelope Page worked for NJ Transit as a supervisor of “employee and facility safety”, with primary responsibility, during the construction project, to monitor the contractors to assure their operations did not expose NJ Transit employees to any hazards. She visited the bus complex about twice a week during the NBC-1 and NBC-2 roof construction from May through December 1994. Although she never was on the roof, she was able to observe from the ground workers positioned at the open edge of the roof of both NBC-1 and NBC-2 giving instructions for lifting materials to the roof and throwing materials off the roof into dumpsters, at which times no fall protection was apparent (Tr. 32-37).

Robert Latinsky, employed as an engineer by LS Transit Systems, acted as construction manager of the project. He was present at the site on a daily basis, including the entire time Star Brite was there from May 1994 to January 1995. On the NBC-1 roof, there were two open edges, one on the north side the other on the east. He observed workers at the edge of the roof at both the north and the east sides of the complex while they were performing material handling and roofing work, specifically, installing “fascia caps” over the roof edge, unloading materials onto the roof, and discarding fragments from the old roof. He testified that the use of guardrails was not observed by him until after the arrival of the compliance officer in October 1994, and the only use of warning lines he could recall was on the east side of NBC-1 where Frank Knight’s employees were working (Tr. 54-69). On cross-examination, Latinsky acknowledged that he did not understand what a safety monitoring system was, and that he was unable to tell in any detail how Star Brite actually went about performing its roofing work (Tr. 77-78).

Judith Lagano worked for LS Transit Systems as an inspector from May 1994 to late 1994. She inspected both the NBC-1 and the NBC-2 roofing projects almost every day. Her job required

her to be on the roof almost all the time. Her testimony as to her observations regarding Star Brite's employees working at or near the edge of the roof of NBC-1 and NBC-2 without fall protection was similar to Latinsky's (Tr. 95-104). She stated that although there were chutes used for moving the debris from the roof into the dumpsters below, there were occasions when the roofers threw the materials over the edge of the NBC-1 roof (Tr. 107). She admitted having no knowledge as to what a safety monitoring system was (Tr. 112).

Joseph Word worked at the bus complex as a safety specialist for NJ Transit; from July through September 1994 he visited the NBC-1 and NBC-2 roofing projects every other week. He testified that on a number of occasions he observed roofers at the edge of the roof of NBC-1 and NBC-2 throwing debris off the roof, and he also saw them applying tar while they were five to 10 feet from the roof's edge. During those occasions, the use of guardrails, warning lines or safety belts was not apparent to him (Tr. 114-19).

Star Brite presented two witnesses in support of its case: Kostas Smilios and Vincent Gallagher, a self-employed safety consultant. The substance of Star Brite's case concerning both NBC-1 and NBC-2 was set forth through the testimony of Smilios, which is summarized as follows: except for the tar which was pumped up to the roof by means of a pipe, all materials and supplies were delivered to the roof by fork-lift and/or crane. Those materials and supplies were deposited by such mechanized equipment at least six feet from the roof's edge. As for the tar, the delivery pipe reached a height of eight feet above the roof surface and was attached to a three-foot-long flexible pipe that was bent into the lugger when pouring the tar. Star Brite required its employees to keep the luggers six feet away from the roof edge when receiving the tar. The pouring of the tar was controlled by a rope located 10 to 15 feet from the roof edge. On those occasions when the roofers were required to work within the six-foot edge area, a safety monitoring system was used. These procedures would appear to satisfy all the requirements for guarding the roof perimeters except for the warning lines. With respect to this safety measure, Star Brite argues that using warning lines would have prevented it from accomplishing the work (Tr. 708-41).

Certain critical facts are set out at the outset to resolve the difficulties presented by the confusing network of conflicting testimony. Smilios, Star Brite's chief witness, admitted that warning lines had not been erected on the roof of either NBC-1 or NBC-2 until after the compliance officer arrived at the bus complex in October 1994 at which time roofing work on NBC-1 had been

completed and work on NBC-2 was in progress (Tr. 813). Smilios also acknowledged that the Secretary's photographic evidence shows Star Brite's project manager Lynardakis and another employee positioned about 4 feet away from the unguarded roof edge of the materials handling area (Tr. 829-31). A series of video stills taken by the compliance officer on October 19, 1994, depict a roofer at the roof edge of the materials handling area, without fall protection, lifting a large fuel can from the ground by a rope (Exhs.. C-12, C-15 through C-18).

If we are to regard Smilios's testimony in a favorable manner as to the issues of guarding the roof perimeters of NBC-1 and NBC-2, including the materials handling areas, then we must accept the notion that it is valid to design a program, for preventing exposure to fall hazards of roofing work, that primarily depends not upon a motion-stopping system or a warning line system, but upon each employee's attitude and ability to respect and strictly follow work rules that (as Star Brite claims) require them to restrict their work activities to an area no less than 6 feet away from the roof edge except only when they are required to work within the 6-foot roof-edge area itself, in which case a safety monitor would be used. Such a notion is clearly inconsistent with the standards for guarding roof perimeters.

Star Brite's defense is undermined by a number of factors. For starters, it should be noted that its safety program which was in effect during the time of the NBC-1 and NBC-2 projects, did not contain any specific references to fall protection (Tr. 835-36; Exh. C-42). Star Brite was previously cited for violating the 500 (g) (1) standard for guarding roof perimeters in June 1991 dealing with a 55-foot fall hazard. That citation became a final order in January 1992 (Tr. 237). On the first day of the OSHA inspection in October 1994, Lynardakis told the compliance officer that Star Brite was well aware of the OSHA requirements for fall protection, but when pressed by the compliance officer to see warning lines for the jobsite at hand, Lynardakis said the lines were being used on another roofing project. During the November 4 inspection, the warning lines were still not erected and when the compliance officer raised the question with Smilios he denied knowing what a warning line was, but assured the compliance officer that the lines would be obtained in order to achieve compliance (Tr. 280, 429-30). When the compliance officer visited the site on December 13, the only warning lines that had been erected were in areas of the roof where the work was not actually being performed (Tr. 228-30; Exhs. C-6 through C-10). So much for the warning lines.

Smilios's testimony regarding the use of a safety monitoring system is vague and unconvincing. He described only one incident with some degree of specificity when a safety monitoring system was used, and that involved NBC-1: as the roofing operation on the east side of the roof approached the edge of the roof, both he and his stepson monitored the roofers for a period of 2 hours while they were working three feet from the roof edge. He went on to state that the same procedure was used on the north side of NBC-1 (Tr. 725-32). No such testimony was offered regarding the NBC-2 project. In fact, we are left with the impression that the entire roofing work on NBC-2 did not require the roofers to work within the 6-foot roof-edge area except on December 13 when the last stage of the process called for installing the "gravel stop", a metal "finish" adjoining the edge of the roof (Tr. 788; Exhs. C-6 through C-8).

Smilios was questioned on direct examination regarding the December 13 "gravel stop" work, and the need to remove the guardrails that had been installed along the roof perimeter at the urging of the compliance officer. Although Smilios was not at the bus complex on the day in question, the following exchange took place (Tr. 787-88):

Q: Do you know if those railings were down on December 13th, other than by pictures and videos and all the testimony indicates?

A: That was [sic] down because I told my people to take it down.

Q: Okay. Why did you tell your people to take down the railings?

A: Because it was the last day of roofing, and it was [sic] getting prepared, you know, to install the gravel stop.

Q: All right. Were, were the, do you know that the railings were taken down on the 13th or taken down on the 12th, the 11th? do you know the exact date they were taken down?

A: During the working day, they was up [sic].

Q: Okay. And you mentioned the word "gravel stop" had to be installed?

A: Yes.

Q: Explain what that is?

A: Gravel stop is the , actually is the finish of the roof on the, on the perimeter of the roof. As the finish [sic], you put in the metal to close the perimeter of the roof.

Q: And would the railings that were up conflict with the installation of that?

A: Of course. The railings was installed on the place the gravel stop was [sic].

No testimony was offered concerning the use of a safety monitoring system, a safety measure that the photographic evidence indicates was called for once the guardrails were removed. One need only glance at the photographs marked as Exhibits C-6 through C-9, taken by the compliance officer on December 13, to conclude that the roofing work went beyond the mere installation of a "gravel stop".

As previously noted, Star Brite pins its defense on Smilios's testimony which was contradicted by the Secretary's witnesses in many material respects. The essence of the perimeter guarding issues, then, is the credibility of the witnesses. And here it must be said that Smilios's uncorroborated testimony as to Star Brite's safety program for fall protection lacked rationality, suffered from internal inconsistency and failed to hang together with other evidence of record.

Smilios failed to make a convincing case that warning lines were infeasible because such lines prevented the roofers from performing their work. It is reasonable to presume that the lines and supportive stanchions could have been moved temporarily to accommodate the roofing process and then replaced in the manner indicated by the 500 (g) (3) standard. That has long been the common sense practice of the roofing trade, a practice not inconsistent with the roofing regulations. Star Brite offered no testimony addressing this obvious factual presumption

From the first day of the compliance officer's arrival at the bus complex on October 19, 1994, to the last day of his physical inspection on December 13, 1994, the same materials handling area on the roof above the elevator enclosure lacked the guardrails or any other motion-stopping system required by the 500 (g) standard, except for the "quick fix" that took place during the November 4 inspection. The compliance officer presented credible testimony that on December 13 he observed luggers containing steaming tar in locations that were likely serviced by the cited materials handling area (Tr. 258-59). In fact, the Secretary's photographic Exhibit 9 depicts roofers using mop carts and mops on December 13.

Star Brite's repeated efforts to prove that the materials handling area in question was not actually a "roof edge" materials handling area within the meaning of the 500 (g) standard has no merit. In her brief, the Secretary has taken great pains, including making geometric calculations, to refute Star Brite's contention that the arrangement of the pipe system allowed for delivery of the tar to take place at least six feet from the roof edge. Secretary's brief at 41-44. Both parties pursue their arguments upon grounds entirely too narrow and artificial in light of the purpose of the safety standard and the realities of the working conditions at the site.

It is not the ultimate delivery point of the tar that determines whether a materials handling area falls within the boundary of the six-foot-wide "roof edge". On NBC-2, the piping ranged from the ground level on up to the roof where the pipe extended some 7 or 8 feet above the roof but sloped over the roof at an angle that required the luggers and roofers to be in proximity to the roof edge

area, where the surface of the roof was covered by tar apparently spilled when the tar was poured from the pipe into the luggers. Obviously, the tar spill was an unavoidable consequence of the delivery system in the materials handling area. Photographic evidence indicates that the spills ran within six feet of the roof edge (Exh. C-25). The configuration of the dual delivery pipes traversing the six-foot-wide “roof edge” area and the presence of oil spills in proximity thereto, constitute more than enough physical presence of the delivery system to qualify as a “roof edge materials handling area” within the meaning of the standard.

One further aspect of Star Brite’s defenses against the Secretary’s perimeter guarding case warrants comment. When the compliance officer made his initial visit to the bus complex on October 19, 1994, George Lynardakis was the only management official on site representing Star Brite. Their discussions regarding the need for guarding the open sides and edges of the roof were apparently limited only to the use of warning lines and guardrails, neither of which admittedly were not being used during the NBC-2 roofing work. According to the compliance officer’s unrebutted testimony, Lynardakis assured the compliance officer on that same day that warning lines would be erected, and guardrails would be installed along the edges of the materials handling area extending a considerable distance beyond the four-foot minimum required for a hoisting area under the regulations (Tr. 249-50)²².

On the follow-up inspection on November 4, the compliance officer encountered Smilios instead of Lynardakis who was not at the site that day. Upon surveying the working area of the roof, the compliance officer noted that the guardrails along the sides of the materials handling area were not secured and had not been extended beyond the hoisting area, and warning lines had not been erected, as Lynardakis had promised. What was noticeably absent during the ensuing discussion between the compliance officer and Smilios was any reference to Star Brite’s safety program for fall protection claimed to have been in place at the time. Instead, Smilios acquiesced in the compliance officer’s exhortations after initially asserting that guardrails could not be secured to the roof (Tr. 253-54).

The one thing that Smilios cannot be accused of is being timid or reticent when faced with an issue concerning his business affairs. His boldness in asserting his views is clearly evidenced

²²The § 1926.500 (g) (5) (i) standard reads:

(i) When guardrails are used at hoisting areas, a minimum of four feet of guardrail shall be erected on each side of the access point through which materials are hoisted.

during his confrontation with the compliance officer over whether the skylight covers were capable of sustaining the weight prescribed by regulations. It turned out that Smilios was right about the adequacy of the skylight covers but the matter was not put to rest before Smilios ordered his roofers to stop working for the remainder of the day (Tr. 482-83).

It is reasonable to believe that if in fact Star Brite had a safety program in place to prevent its employees from being exposed to a fall hazard, as Smilios described in his testimony, he would have made such a program the focal point of his discussions with the compliance officer during the November 4 inspection. One should also think that during the October 19 OSHA visit to the worksite, Lynardakis would have brought to the compliance officer's attention whatever relevant safety measures were in use pursuant to Star Brite's claimed safety rules. In fact, no one acting in behalf of Star Brite made any attempt to demonstrate to the compliance officer any significant control procedures for safeguarding against fall hazards. The record compels the conclusion that the safety measures described by Smilios were designed for the hearing, not for the NBC-1 and NBC-2 roofing project.

WILLFULNESS

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, 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. That Star Brite has a history of a prior roofing violation does not, by itself, establish current deficiencies in its safety program were willful. While there are serious questions concerning the probative value of the testimony presented by the Secretary's witnesses as to some aspects of the NBC-1 job, it is not open to question that the deficiencies noted by the compliance officer during his several inspections of NBC-2 undoubtedly existed while roofing work was being performed on NBC-1.

The evidence that clearly demonstrates the willful quality of Star Brite's noncompliance is its repeated failure to make reasonable efforts to establish and maintain the safeguards called for by

the standards despite the exhortations of the compliance officer. While it is true that Smilios eventually arranged to have all the perimeter guarding erected before the end of the work day on November 4 (even more than was called for by the standards), that corrective action was short-lived; conditions on the roof during the December 13 inspection again failed to meet the perimeter guarding standards.

The Secretary proposes a penalty of \$56,000 for each of the two violated roofing standards, one covering general perimeter guarding and the other the roof-edge materials handling area. Under the OSH Act, a willful violation calls for a minimum penalty of \$5,000 and a maximum of \$70,000 per violation. Section 17(a) of the Act, 29 U.S.C. § 666(a).

Section 17(j) of the Act, 29 U.S.C. § 666(j), provides that penalties be assessed on the basis of four factors: the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations. Generally, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. The roof of the bus complex was 25 to 30 feet high. Had an employee fallen off the roof serious injury would have been a substantially probable result

In its brief, Star Brite mounts an extensive attack against the compliance officer, particularly regarding the willful violations, "because of what, at best, could be called, a personality conflict with Mr. Smilios" Star Brite's brief at 36. In view of the evidence that has been highlighted above, it should be clear that the Secretary's case does not rest upon the compliance officer's testimony alone.

Of particular pertinence to the question of penalties is the compliance officer's own testimony acknowledging that he was influenced in some measure by the dispute he had with Smilios over the skylight question. In fact, his inspection file contains the entry that Smilios stopped work on November 4 "to make OSHA look bad" (Tr. 504-07, 516-17). The record contains other statements of the compliance officer suggesting that, to a degree, he harbored a feeling of ill will toward Smilios (Tr. 486-89). Did the compliance officer's unfavorable attitude improperly influence the Secretary's proposal to assess \$56,000 for each of the two willful violations?

The compliance officer was questioned by counsel for both parties regarding the criteria that was applied in assessing the penalties proposed for each of the alleged violations. The compliance officer's rationale was consistent with the penalty guidelines set out in OSHA's *Field Inspection Reference Manual*, September 1994²³. There is, of course, a latitude inherent in the penalty assessment process within which a determination is made in a particular case according to the circumstances and one's judgement. There is no evidence indicating that the penalties proposed by the Secretary in this case were motivated by hostility or any other improper purpose.

None of the Secretary's witnesses was able to offer any significant testimony regarding the process actually used by Star Brite in performing the built-up roofing work. The compliance officer's observations, for the most part, were limited to the activities at the materials handling area of NBC-2 (Tr. 572-76). Smilios testified that there were 20 to 25 roofers employed at the site (Tr. 715); that the time spent working close to the roof edge was limited in that the weatherproofing cover system was applied by starting at the roof edge and then moving 25 feet to the interior of the roof (Tr. 725-32). Such a methodical procedure would likely have an attenuating affect on the gravity of the violations by having the attention of the employees directed immediately to the roof edge each time the roof covering is applied to a particular area.

It is concluded that the record warrants assessing a penalty of \$25,000 for each of the two willful violations. Star Brite's contention that the two roofing violations should be grouped as a single violation lacks merit. The two violations involve two distinct aspects of the roofing work that was done at the site.

SAFETY TRAINING

Items 1a and 1b of citation number 1 relate to the general safety training standard at § 1926.21 (b) (2) and the specific roofing work training standard at § 1926.500 (g) (6) (i):

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

§ 1926.21 (b)(2).

The employer shall provide a training program for all employees engaged in built-up roofing work so that they are able to recognize and deal with the hazards of

²³In assessing penalties under the Act, the Commission is not bound to follow the Secretary's penalty-computation formula. Star Brite's contention that the Secretary failed to give appropriate credits for history and size is invalid. Star Brite's brief at 60-61.

falling associated with working near a roof perimeter. The employees shall also be trained in the safety procedures to be followed in order to prevent such falls.

§ 1926.500 (g)(6)(i).

The Secretary alleges that Star Brite seriously violated the training standards relating to the use of personal protective equipment and approved gasoline cans, the proper storage of compressed gas cylinders, and the fall hazards associated with built-up roofing work. According to the uncontradicted testimony of the compliance officer, one of Star Brite's employees who was interviewed during the inspection was observed at ground level handling chunks of asphalt, placing them in a kettle to boil. He was not wearing any safety equipment to protect his face and eyes from splashes of hot tar, and he was using unapproved gas cans. The employee, Arsilia Barrera, informed the compliance officer that he did not receive any safety training in connection with the NBC projects and was not instructed in the use of approved gas cans (Tr. 308-12). When the compliance officer interviewed four other named employees on October 19, 1994, they told him that they did not receive any safety training for the NBC projects, including safeguarding against fall hazards during the performance of the roofing work. Only one employee (unidentified) stated that he had received training by Star Brite, but it was given at another construction project (Tr. 315-18, 592).

Star Brite relies on the testimony of Smilios to counter the safety training charges brought by the Secretary (Tr. 800-01). His testimony lacked the specificity and the conviction necessary to outweigh the admissions made to the compliance officer by Star Brite's employees.

During cross-examination, the compliance officer acknowledged that some conditions such as hot tar and gas coming into contact with fire are obvious hazards, Star Brite's counsel apparently suggesting that training in such matters would be superfluous (Tr. 593-94). Such a notion misconceives the fundamental purposes of the standards requiring the employer to educate and train his employees, whether it be an employer conducting a small and less hazardous operation or one conducting a more complex and hazardous operation, and that is to assure that employees are aware of the employer's attitude and approach toward accident prevention, and to assure that employees understand and properly follow established work procedures for their safety.

The record contains no credible evidence to show that Star Brite had a safety program that was implemented in any significant way at the bus complex project. A violation may be deemed serious "where, although the accident itself is merely possible (i.e., in statutory terms 'could result from a condition'), there is a substantial probability of serious injury if it does occur." *Shaw Const.*,

Inc, v. OSHRC, 534 F.2d 1183, 1185 (5th Cir. 1976). 29 U.S.C. § 666 (k). The potential consequences of failing to comply with the training standards were serious, and the proposed penalty of \$2,100 for the grouped violations is assessed.

HAZARD COMMUNICATION

Item 2 of citation number 1 alleges that Star Brite failed to inform and train its employees concerning the hazardous chemicals associated with handling hot asphalt, propane and gasoline, in accordance with the standard at § 1926.59 (h):

Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

Star Brite contends that this alleged violation should have been grouped with the safety training standards covered in items 1a and 1b of the citation. As Star Brite notes in its brief, the compliance officer acknowledged that training violations are normally grouped, but OSHA's grouping policy does not include the citation for hazardous chemicals. Star Brite's brief at 62-63. Such a policy is not unreasonable and easily falls within the scope of OSHA's enforcement discretion.

The compliance officer testified that during the inspection he interviewed five named employees and questioned them about the hazard communication program. He stated that all five employees demonstrated a lack of knowledge and training regarding the matter (Tr. 329).

Star Brite introduced into evidence its hazard communication program (Exh. R-12) which Smilios stated was in existence at the time of the OSHA inspection, including material safety data sheets. Smilios also testified that all employees were informed that the material safety data sheets were located in the on-site office trailer, and that they were given that information "[when they came on the job]" (Tr. 799).

Star Brite's system of simply providing a written hazard communication program at the job site and informing employees of its availability and where it can be found does not meet the standard's "effective information and training" requirements. Training necessarily denotes some reasonable form of instruction by telling and showing what the employees are to know based on

clearly defined objectives consistent with the standard. That Star Brite's safety program was ineffective is clearly shown by the employees negative responses to the compliance officer's questions.

Star Brite was previously cited for violating the same hazard communication standard (Tr. 332). The \$2100 penalty proposed by the secretary is appropriate.

LIQUIFIED PETROLEUM GAS CONTAINER

Item 6 of citation number 1 alleges that a propane cylinder which was being used to fuel the hot kettle operation, was tilted and leaning on roofing materials in violation of the standard at § 1926.153 (g) which reads as follows:

Containers and regulating equipment installed outside of buildings or structures. Containers shall be upright upon firm foundations or otherwise firmly secured. The possible effect on the outlet piping of settling shall be guarded against by a flexible connection or special fitting. (Italics in original.)

The compliance officer testified that during the November 4 inspection he observed that the propane cylinder being used was tilted at a 45 degree angle and leaning on two packages of asphalt. The compliance officer was told by the employee tending the kettle operation that tilting the cylinder produced a hotter flame (Tr. 333-34). The compliance officer was unable to explain why the cylinder had to be "upright", and he admitted that the cylinder was secured by the packages of roofing materials upon which it rested unless someone came along and removed the roofing materials in a careless manner so as to cause the container to drop to the ground (Tr. 340, 588-89).

There are two grounds for dismissing this item of the citation. The first is the compliance officer's own self-defeating testimony. The second is the language of the standard itself, which specifically addresses "*containers...installed outside of buildings or structures.*" The term "install" connotes a fixed or permanent condition, as when the electrician or the plumber places in position lighting fixtures or plumbing apparatus. The portable propane cylinder in question was not installed at the site but was temporarily placed near the kettle during the asphalt heating process.

COMPRESSED GAS CYLINDERS

Items 7 and 8 of citation number 1 allege that a number of compressed gas cylinders stored on the roof of NBC-2 did not have valve protection caps in place and were not secured in an upright position as required by § 1926.350 (a)(1) and § 1926.350 (a)(9) respectively.

Star Brite does not dispute the Secretary's allegations that there were compressed gas cylinders stored on the roof without protection caps on the valves and that they were lying on their sides and not secured in an upright position. Star Brite claims, in substance, that the Secretary has failed to prove that a hazard existed as a consequence of these conditions. Star Brite's brief at 64-66. I agree.

Smilios testified that the cylinders in question, as depicted in the Secretary's photo Exhibits C-32, C-33, C-34, were empty (Tr. 793-94). On cross-examination of the compliance officer, the following exchange took place (Tr. 615-16).

Q: Now, however, you never checked to see whether these tanks were empty; did you?

A: I, I didn't, I had no way of knowing whether they were totally empty or, or partially filled. There's no gauge on them. However, I did not believe that they were empty because they weren't marked as being empty, as they should have been, if they were empty. That's why I thought this--

Q: You didn't do any investigation whether they were empty or not; you didn't ask; you didn't check; you didn't pick them up; you didn't move them; you didn't do anything? You saw them lying there and assumed they were full; right?

A: I wouldn't say I assumed they were full. I--

Q: Assumed they were half full?

A: It, it didn't really matter as far as whether they were full or not, to be honest with you.

Q: It didn't matter--

A: The regulation requires--

Q: --if they were empty?

A: The regulation requires that they be upright, you know, at all times.

Q: Even if they're empty?

A: Yes. The standard doesn't say only if they're full or have gas in them.

Q: And what about the oxygen tanks?

A: (No verbal response.)

Q: Why, what's the hazard that the employees were exposed to because they were lying down and not standing up?

A: I can't really point out a particular hazard other than possibly, you know, having them laying lengthwise and possibly rolling on the ground, you know--

Q: Well, I think Judge DeBenedetto already took care of that telling you he would not accept--

A: Okay, but--

Q: --the indication that they were a tripping hazard. All right. So you don't, other than the potential tripping hazard, you're not aware of any other hazard relative to the oxygen tanks?

A: Well, again, other than, than if they are jarred and rolled against each other and possibly damaged, they, they're supposed to be secured in an upright manner so they can't move. Again, you--

Q: Well, were those tanks stored in an area where there was a, a difference in grade, an angle where they could roll?

A: No, not really.

The compliance officer's assertion that it didn't matter whether the cylinders were full or not is quite remarkable in light of his earlier testimony: When he was asked on direct examination to explain the hazard resulting from absence of a valve protection cap, he stated (Tr. 345):

A Well, if the valve was damaged and the cylinders were under pressure, they could become a projectile, as with the propane we talked about earlier, and could severely injure an employee that happened to be in that area.

When the same question was asked on cross-examination, the compliance officer stated (Tr. 605):

A You get damage, you get damage to the valve, and when you get to those, those cylinders, when you go to use those cylinders, you could have, possible have, a rupture or become a projectile once they're filled with gas.

With respect to item 8 dealing with compressed gas cylinders (six oxygen and three acetylene) that were not secured in an upright position, the compliance officer described the consequent safety problems as threefold: a tripping hazard; rolling and colliding with each other thereby weakening the cylinder wall causing it to become a "projectile"; and in the case of the acetylene cylinders, the acetone ingredient "is prone to be an unstable chemical" and setting the cylinders in a position other than upright would cause it to be unstable (Tr. 347-48, 614).

Except for the alleged tripping hazard, it is clear that the hazards described by the compliance officer are conditioned upon the presence of some quantity of compressed gas in the cylinders. The compliance officer's notion that the regulations in question do not require that the cylinders "have gas in them" has no merit.

The regulations dealing with compressed gas cylinders appear in Subpart J under the caption gas welding and cutting. Paragraph (c) of § 1926.350 expressly addresses the question raised by the compliance officer:

(c) *Treatment of Cylinders.* (1) Cylinders, *whether full or empty*, shall not be used as rollers or supports.

(2) No person other than the gas supplier shall attempt to mix gases in a cylinder. No one except the owner of the cylinder or person authorized by him, shall refill a cylinder. No one shall use a cylinder's contents for purposes other than those

intended by the supplier. All cylinders used shall meet the Department of Transportation requirements published in 49 CFR part 178, subpart C, Specification for Cylinders.

(3) No damaged or defective cylinder shall be used. (Emphasis added.)

Where, as here, the regulations expressly mention within the specified frame of reference that cylinders be treated in a prescribed manner “whether full or empty”, the express quantitative language may not be added by implication throughout the standards listed under § 1926.350. As for OSHA’s concern about a tripping hazard, it should have considered issuing a citation under the housekeeping standard at § 1926.250 (c) which appears in Subpart H-Materials Handling, Storage and Disposal,²⁴ instead of the § 1926.350 standard which does not address a tripping hazard.

The guiding principle controlling the disposition of the issue is set forth in *Trinity Indus., Inc.*, 9 BNA OSHC 1515, 1520, 1981 CCH OSHD P 25, 297, p. 31, 323 (No. 77-3909, 1981)(citing *Williams Enterprises, Inc.*, 7 BNA OSHC 1015, 1018-19, 1979 CCH OSHD P 24,003 (No. 14748, 1979), where the commission said that the cylinder storage standards raise a rebuttable presumption that cylinders contain at least enough residual gas to present a hazard.

In the instant case, unlike the *Trinity* and *Williams* cases, we have a witness, Smilios, who gave positive and uncontradicted testimony that the cylinders were empty. Secretary’s counsel made no effort to undermine, or call into question, Smilios’s testimony on this point in any way. The presumption, therefore, is rebutted.

It is inappropriate for the Secretary to argue that an adverse inference should be drawn regarding the quantity of gas in the cylinders because of Star Brite’s failure to call Lynardakis as a witness to elucidate the matter, since he was at the worksite when the cylinders were observed by the compliance officer. Star Brite’s brief at 70-71. The course taken in the examination of the witnesses and the fact that Lynardakis was susceptible to subpoena by either party render the uncalled-witness rule inapplicable.

SEPARATING OXYGEN CYLINDERS FROM FUEL-GAS CYLINDERS

Item 9 of the citation involves the same oxygen and acetylene cylinders that were discussed in items 7 and 8. Here, the secretary also faces the same problems in satisfying her

²⁴ Paragraph (c) of § 1926.250 reads:

Housekeeping. Storage areas shall be kept free from accumulation of materials that constitute hazards from tripping, fire, explosion, or pest harborage. Vegetation control will be exercised when necessary.

burden of proof. The standard alleged to be violated is § 1926.350 (a)(10), which requires that oxygen cylinders in storage shall be separated from fuel-gas cylinders a minimum distance of 20 feet or by a five-foot-high noncombustible barrier.

The compliance officer described the hazard as follows (Tr. 351):

A The hazard is that acetylene and oxygen are supposed to be separate in case there is a fire in the building, which fires on roofing jobs are not--are known to occur. I'm not saying that every day, but oxygen and acetylene are used together for cutting operation because the oxygen accelerates the acetylene and burns hotter, like 6,000 degrees, and that's why, as a safeguard to workers and everybody concerned, they should be separated whenever they're not in use on a cart.

During cross-examination, the compliance officer's testimony was once again challenged regarding the hazard issue (Tr. 617-18):

Q: Now, would you agree that if those tanks were all empty, then this would not be a violation?

A: No, because, again, the standard doesn't specify full or empty.

Q: But if they're empty, can you tell me what the hazard is?

A: There would probably be no hazard if they're totally empty; however--

Q: So, if there's no hazard, there can't be a violation; can there?

A: Well, through my training, I've always been told that they can never be completely empty. There's always some gas in there.

Q: And through your training, if they are empty, even though there's, then you're saying there might be some residual. Have you been trained as to evaluate what risk and the probability of risk when you're dealing with an empty tank that might have a residual amount of either oxygen or acetylene in it?

A: (No verbal response.)

Q: Did they tell you, you know, well, if it's full, you got, you know, an 80 percent chance of explosion; if it's just a residual, you got a 10 percent; did you ever review anything about that at all?

A: No, I can't say I specifically recall that.

Thus, the Secretary's case again rests upon the residual-gas presumption which has been rebutted by Smilios's positive and uncontradicted testimony that the cylinders were empty. The Secretary having failed to prove that a hazard existed, item 9 of the citation must be dismissed.

GROUND-FAULT PROTECTION

Item 10 of the citation is based upon the undisputed facts that one of Star Brite's employees used a double insulated power drill which was connected to one of the building's permanently wired receptacle outlets by means of several extension cords. The receptacle was

equipped with a ground-fault circuit interrupter (GFCI); however, when the compliance officer tested the receptacle, the GFCI did not function (Tr. 353,623).

Star Brite was cited for violating the standard at § 1926.404 (b)(1)(ii), which provides, in relevant part:

All 120 volt, single-phase, 15- and 20- ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection.

The Secretary contends that Star Brite failed to carry out its responsibility to test the GFCI for defects either “before using the drill” or “that day”, presumably at the start of the work day (Tr. 355). Secretary’s brief at 73-74.

Star Brite raises several defenses . First, it is contended that the standard does not apply in this case because the receptacle outlet was part of the permanent wiring of the building and there is nothing to indicate “there is a violation if the ground fault interrupter malfunctions”. Star Brite’s brief at 68. The use of extension cords to connect the power drill to the building’s permanently wired outlet does not make the extension cords a part of the permanent wiring and does not obviate the necessity to comply with the GFCI standard. *Otis Elevator Co.*, 17 BNA OSHC 1166, 1167 (No. 90-2046, 1995).

Implicit in the ground-fault protection standard is that where, as here, a receptacle outlet is equipped with a GFCI, the employer must exercise reasonable diligence to assure the GFCI operates properly.

Star Brite’s second defense is that the GFCI was tested during the morning of the inspection, as testified to by Smilios. A conflicting account was given by the compliance officer who testified that when he questioned Smilios about the GFCI during the inspection, Smilios told him that the GFCI was tested “approximately a month ago”, or “within the last month” (Tr. 623, 659).

Smilios’s testimony came near the end of the five-day hearing, and bore the earmark of an afterthought. His testimony was so difficult to follow at times that even his own attorney admitted being confused (Tr. 943-44). Smilios’s testimony that the GFCI was tested on the morning of the inspection cannot be given any weight.

Did Star Brite fail to act with reasonable diligence by not testing the GFCI either before use or at the start of the work day, as the Secretary argues? There is no testing requirement expressed in the GFCI standard; however, paragraph (b)(1)(iii) of § 1926.404 specifies certain testing requirements under the “assured equipment grounding conductor program”, which is an alternative to using a GFCI for achieving ground-fault protection:

(iii) Assured equipment grounding conductor program. The employer shall establish and implement an assured equipment grounding conductor program on construction sites covering all cord sets, receptacles which are not a part of the building or structure, and equipment connected by cord and plug which are available for use or used by employees. This program shall comply with the following minimum requirements:

* * * *

(C) Each cord set, attachment cap, plug and receptacle of cord sets, and any equipment connected by cord and plug, except cord sets and receptacles which are fixed and not exposed to damage, shall be visually inspected before each day’s use for external defects, such as deformed or missing pins or insulation damage, and for indications of possible internal damage. Equipment found defective or damaged shall not be used until repaired.

(D) The following tests shall be performed on all cord sets, receptacles which are not a part of the permanent wiring of the building or structure, and cord-and plug-connected equipment required to be grounded:

(1) All equipment grounding conductors shall be tested for continuity and shall be electrically continuous.

(2) Each receptacle and attachment cap or plug shall be tested for correct attachment of the equipment grounding conductor. The equipment grounding conductor shall be connected to its proper terminal.

(E) All required tests shall be performed:

(1) Before first use;

(2) Before equipment is returned to service following any repairs;

(3) Before equipment is used after any incident which can be reasonably suspected to have caused damage (for example, when a cord set is run over); and

(4) *At intervals not to exceed 3 months, except that cord sets and receptacles which are fixed and not exposed to damage shall be tested at intervals not exceeding 6 months.* (Emphasis added.)

Under the grounding conductor program, the only time limit for testing receptacles that are part of the permanent wiring of the building and not exposed to damage is “at intervals not

exceeding 6 months”.²⁵ Given this background, it is apparent that the Secretary believes that employers on construction sites may perform their work for a substantial period of time under the assumption that fixed receptacle outlets, including integrated GFCIs, not exposed to damage, are in proper working condition. There is no basis for concluding that Star Brite failed to exercise reasonable diligence by not testing the GFCI components of the fixed receptacle at a period of time shorter than one month before its use.

Star Brite’s third defense---that no hazard existed even though the GFCI was defective because the power drill was built with double insulation---is moot in view of the conclusion reached; however, it is briefly noted that Star Brite’s own witness, safety consultant Vincent Gallagher, acknowledged that a potential hazard existed should the extension cord become damaged or frayed despite the fact that the drill was double insulated, and that a GFCI would provide protection to employees should such damage occur (Tr. 933-34). See *Otis Elevator Co.*, *supra*, at 17 BNA OSHC 1168.

FALL PROTECTION FOR SKYLIGHT OPENINGS

The two roofing contracts with NJ Transit required Star Brite to replace the skylights on NBC-1 and NBC-2, which was accomplished during the period from the end of July 1994 to mid-December 1994. Although the compliance officer never personally observed the skylight-replacement work being performed, his interviews with two NJ Transit employees, Robert Latinsky and Judith Lagano, led him to conclude that Star Brite failed to provide fall protection for its employees during the one-half to one-hour intervals between the removal of the old skylights and installation of the new (Tr. 69).

In item 11 of the citation, the Secretary alleged that the failure to provide fall protection for skylight openings violated the “floor opening” standard at § 1926.500 (b)(1), which requires that the openings be guarded by “standard railing” or “cover”; as an alternative, the Secretary also alleged violation of the standard at § 1926.105 (a) which reads as follows:

Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

²⁵The secretary did not allege nor does the evidence suggest that the fixed receptacle outlet in question was exposed to damage.

In the complaint, the Secretary added one more alternative legal charge: violation of the fall standard at § 1926.500 (b)(4), which applies specifically to “skylight opening”, but also calls for “standard railing” or “cover” as a means of protection. During the hearing the Secretary conceded that both 500 (b)(1) and 500 (b)(4) did not apply to the conditions at issue because the use of guardrails or covers required by both standards would have been infeasible in that the work had to be performed where the guardrails would have been installed. Secretary’s brief at 76 n. 81.

Both Latinsky and Lagano testified that they observed Star Brite employees working at the edge of the skylight openings installing wooden frames without fall protection (Tr. 69-73, 101-08). The openings were approximately 6 by 12 feet (Tr. 768). Star Brite does not claim it used any form of fall protection during the interval between the removal of the old skylights and the installation of the new. It argues, in effect, that there was no feasible method of providing fall protection for the skylight openings. Star Brite’s brief at 68-69.

A prima facie violation of § 1926.105 (a) is established if the Secretary shows that employees were subject to falls of twenty feet or more and none of the safety devices listed in the standard were utilized. After the Secretary establishes a prima facie case, the employer may affirmatively defend by establishing that it is impossible to use any of the listed safety devices, and that such devices would make performances of the work impossible or result in a greater hazard. *Cleveland Consolidated Inc., v. OSHRC*, 649 F. 2d 1160, 1165 (5th Cir. 1981). *Seibel Modern Manufacturing and Welding Corp.*, 15 BNA OSHC 1218 (No. 88-821, 1991).

In its answer to the Secretary’s charges regarding the skylight openings, Star Brite presented three arguments: (a) “Standard railings were not practicable because of the work being performed”; (b) “use of safety nets was impractical”; and (c) “installation of nets would have exposed employees to a hazard for a longer period than they were exposed in installing skylights”.

Although Star Brite’s answer did not include any mention of “safety lines” or “safety belts”, which are among the devices listed in the cited § 1926.105 (a) standard, they became a matter of much debate during the hearing.²⁶ The Secretary contends that because Star Brite failed

²⁶Section 1926.107 provides the following definitions relevant to a safety belt and safety line:

(continued...)

to plead in its answer the affirmative defense of greater hazard concerning the use of safety belts, it must be excluded as an issue. Secretary's brief at 81. A review of the hearing record discloses that the greater hazard defense in the use of safety belts for skylight openings was fully litigated by the parties without any clear objection by the Secretary that the evidence went to an unpleaded defense. Consequently, Star Brite's answer is amended to conform to the evidence under Rule 15(b) of the Federal Rules of Civil Procedure.

The "impossibility defense" discussed by the fifth circuit in the *Cleveland Consolidated* case, *supra*, 649 F. 2d at 1165, was redefined by the Commission as the "infeasibility defense" in *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553, 1986). To establish the affirmative defense of infeasibility, the employer must show that (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994).

Of those safety devices listed in § 1926.105(a), only safety nets and safety belts were given any serious consideration by the parties. Both Smilios and Gallagher testified that it was infeasible to use safety nets under the skylight openings because of the structural members, pipes and electrical lines that were located under the openings (Tr. 771, 890).

As previously noted, the compliance officer stated that the skylight opening violation was based upon information he obtained through Latinsky and Lagano during the course of his inspection of the bus complex project. The compliance officer did not provide any firsthand knowledge concerning the feasibility of using safety nets for the skylight openings, and he admitted that his interviews with Latinsky and Lagano did not go into the particulars of using

²⁶(...continued)

(b) "Lanyard" means a rope, suitable for supporting one person. One end is fastened to a safety belt or harness and the other end is secured to a substantial object or a safety line.

(c) "Lifeline" means a rope, suitable for supporting one person, to which a lanyard or safety belt (or harness) is attached.

* * * *

(f) "Safety belt" means a device, usually worn around the waist which, by reason of its attachment to a lanyard and lifeline or a structure, will prevent a worker from falling.

safety nets (Tr. 628-29), and that he could not be “sure about whether nets would work under the ceiling in the garage where the busses travel...” (Tr. 422-23). Both Latinsky and Lagano were uncertain about the feasibility of using the safety nets (Tr. 87, 103).

There is no basis for disbelieving the testimony of Star Brite’s witnesses regarding the infeasibility of using safety nets to protect employees from falling through the skylight openings. Star Brite’s infeasibility defense as to this issue has been sustained.

Partly due to the Secretary’s focus on “standard railings” as a precautionary measure, in both the citation and the complaint, the use of safety belts to prevent falling through the skylight openings was addressed by the parties during the hearing in a rather haphazard manner resulting in a mazed record of blurred facts. Both Smilios and Gallagher testified that there were no anchorage points on the roof to secure the safety belts.²⁷ Both witnesses stated that the air conditioning structures on the roof, which the compliance officer recommended as anchorage points in his testimony (Tr. 661-68, 670), were too remote from the skylights to be feasible, that the long lines would have been “in the way” of the roofers installing the roof, and that such lines would have created a tripping hazard (Tr. 737-770, 788-89, 892-93).

In her brief, the secretary makes the following arguments:

And safety belts and safety lines were clearly feasible, as evidenced by the fact that Frank Knight’s employees used safety belts, tying off daily (Tr. 132-133, 142-144) “to units or some other dunnage that was on the roof” (Tr. 132,142), including air conditioning units and other steel-constructed permanent fixtures of the roof (Tr. 133) and even Mr. Smilios admitted that in some areas the line could be attached to a structural member on the roof (Tr. 767-768, 360, 631, 646). Specifically, on both NBC-1 and NBC-2 the employees could have tied off to structural HVAC (heating and air conditioning) equipment which had heavy industrial bases, with a static line (Tr. 6464, 660-661, 666-667). The static line would have been connected both to the safety lanyard and safety belt, and to the heavy industrial base of the structural equipment (Tr. 659-661, 663-664, 666-667). One example of such structural equipment is shown in Exhibit R-1 (Tr. 669-675).

Secretary’s brief at 80 n. 88.

²⁷Section 1926.104 (b) provides:

(b) Lifelines shall be secured above the point of operation to an anchorage or structural member capable of supporting a minimum dead weight of 5,400 pounds.

The Secretary's perspective is burdened with a couple of flaws. The evidence indicates that Frank Knight's employees did not perform any work in connection with the skylights. Moreover, Knight's testimony regarding his extensive use of safety equipment at the bus complex is questionable because of the antagonism and work problems that developed between Knight and Smilios during the course of the roofing operations on NBC-1 (Tr. 790-92).

The Secretary's statement that "even Mr. Smilios admitted that in some areas the line could be attached to a structural member on the roof" is a gross misrepresentation of Smilios's testimony appearing at pages 767-68 of the transcript to which the Secretary cites. The heating and air conditioning units on the roof were precisely what Smilios and Gallagher had in mind when they both asserted that those structures were not feasible to use as an anchorage. Except for the transcript pages 767-68, all transcript references made by the Secretary to support her arguments involve the testimony of the compliance officer who admitted that he did not make any evaluation or judgement as to the use of safety belts for the skylight openings during his visits to the project (Tr. 646-47).

While the Secretary's arguments have their flaws, Star Brite's affirmative defense regarding the safety belt issue is unconvincing. It is important to bear in mind that the skylights were open only for about one hour or less, the time it took to replace the old skylight covers. The skylights were spread over a wide area of the roof, a total of 57 on NBC-1 and 20 on NBC-2, according to the citation. Neither Smilios nor Gallagher provided any testimony which would tend to explain or even suggest in some concrete fashion why safety lines (or lifelines) would not have been feasible if secured to the heating and air conditioning structures in all situations.

The following is an example of some of the information elicited from Gallagher on direct examination (Tr. 891-94):

Q: Okay. Now, the other thing that you mentioned was, which we've had a lot of discussion about in this case, was, I guess, safety lines of some kind while the workers were working.

Were you able, you said you were on the roof, and were you able to evaluate the proximity of air conditioning unit structures on the roof in terms of feasibility of using those as anchor points for people then to work around skylights?

A: I looked at them. Some of them were quite far away, some were closer than others, and they were, they were at haphazard locations.

Q: Is there any risk that workers on the roof would be exposed to if safety lines were used that were extending, say, 20, 30, 40, 50 feet away from the opening?

A: (No verbal response.)

Q: Would those safety lines, themselves, create any hazard?

A: They could, yes, sir.

Q: Such as?

A: Well, there could be a problem of interfering with the roofing work that you're doing if they have to stretch across an area where work is being done. They could create a trip hazard, trip and fall to the same level hazard, for people who'd have to pass by that area.

You'd have a certain amount of length of your life line that you would, you would need to gain access to the type of work that you have to do.

You're going to be carrying, I understand either you'd be lifting the skylight, so you're going to have to have some mobility, and you could have a question of having your life line lanyard length being a length that if you, if you stood at the edge and fell, you would fall greater than 6 feet depending upon the needs that you have for transporting and, and storing the skylight that you just took off.

Q: All right. So, was it, would it have been feasible, your testimony's been explained in the record that if you had two men on each corner of a skylight working, taking it off and then putting it on, did you see, based on locations of those structures and what you've just explained about the distance and other potential hazards, do you believe it was feasible to have all those men somehow tied off to safety lines and doing that installation as I've just explained, two men on each side, moving away and back to the roof and back to the skylight?

A: Well, there were, I don't know how many skylight openings. There were quite a few, and the, and the opportunities for anchorage points at all those would be different.

The ones that I looked at, sometimes the anchorage point would be quite distant, and the design, it would have to be designed, it seems to me, to design the hazards of the system out, it would have to be designed for that particular work.

To have life lines stretched over 40, 50 feet of the building, with varying amounts of mobility that's needed, it seems to me that that would have to be thought out in great detail, and anchorage points should be established.

There's a great danger in saying people should just find an anchorage point. The selection of proper anchorage points is a subject that takes a lot of training for people to be, to understand that, and in most cases, it takes a structural engineer, not just any engineer, but an engineer trained in structures to be able to determine whether an anchorage point is a safe anchorage point or not, and it would just be by coincidence that there would be safe anchorage points in proximity to not create other hazards or to be effective.

This broad overview does not inform us as to why Star Brite could not have arranged the sequence of work for installing the roof in a way that accommodated the crew during the

relatively short periods of time needed to replace each skylight, for the purpose of avoiding or mitigating interruption of the roofing work and tripping hazards. It should be noted that during cross-examination, Gallagher admitted that the fall hazard presented by the skylight openings was a greater hazard than tripping and falling on the roof (Tr. 919-20).

Nor are we persuaded that safety lines, measuring 20 feet or more in length, would have been infeasible because they would have impeded the workers' mobility while they were replacing the skylights. The safety belt would be worn by the worker while he was at or near the edge of the opening, presumably he could disengage the safety belt from the lanyard or safety line to allow him to move freely.

A glancing reference was made during the hearing to the regulation prescribing a maximum free fall of 6 feet when using a lanyard:

Safety belt lanyard shall be a minimum of ½-inch nylon, or equivalent, with a maximum length to provide for a fall of no greater than 6 feet. The rope shall have a nominal breaking strength of 5,400 pounds.

29 C.F.R. § 1926.104(d). The argument being that because the openings measured 6 by 12 feet, the crew replacing the skylights would not be able to work on all four sides of the opening and maintain the maximum 6-foot fall distance because of the limited number of fixed anchorage points available on the roof to secure their safety belts.²⁸ Star Brite's brief at 69.

Employers are expected to comply with OSHA standards in every detail in order to provide some means of reasonably continuous protection from work hazards. Generally speaking, partial protection is inadequate protection. However, the mandate of the OSH Act is "to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions..."(Emphasis added). 29 U.S.C. § 651 (b). It is no defense that the safety belts could not have been used 100% of the time. It is consistent with the purpose of the Act that where, as here, the belts could have been effectively used during a significant portion of the skylight replacement work, compliance with the standard is required. The failure to do so was a serious violation in view of the potential fall from a height of some 26 feet. The Secretary

²⁸The maximum-distance argument may or may not be overcome simply by the use of an attached device--if such a device existed--that allows the length of the lanyard to be adjusted to the appropriate length. This is a technical matter requiring special knowledge which is not imparted by the evidentiary record. If such a device was available, it was the Secretary's burden to produce evidence of this fact as part of her evidence in rebuttal.

recommends that a \$3,000 penalty be assessed. Inasmuch as the use of safety belts would have been feasible only for a substantial portion of the work activity, a penalty of \$1,500 is assessed.

PORTABLE LADDER

Item 12, the last item listed in citation number 1, alleges that a 40-foot portable extension ladder used to gain access to the roof extended only “one foot 5 ½ inches” above the roof landing instead of at least 3 feet as required by the standard at § 1926.1053 (b)(1). The ladder was secured on one side. The compliance officer used the ladder to reach the roof during his initial visit on October 19, 1994, but he did not make any effort to have Star Brite correct the condition until some time after the violation was noted (Tr. 649-50). Star Brite does not dispute the existence of the violation, but contends that the \$1,500 penalty proposed by the Secretary is excessive, in view of the facts that the violation was corrected during the October 19 inspection, and that the compliance officer used the ladder apparently without fear of risking serious injury. Star Brite’s brief at 70.

The compliance officer explained the hazard emanating from the 18-inch ladder deficiency as follows (Tr. 365):

A: It just doesn’t--you don’t have an adequate handhold. You don’t want the employee bending down and reaching down while he’s trying to get on to the side of a ladder to go down, especially at , you know, a 25- or 27-foot height.

It was the only means available to climb up and down the roof of NBC-2 and it was used by all the roofers for “quite a while” (Tr. 649-50). The compliance officer acknowledged that the deficiency in the extension of the ladder did not cause him to have an immediate concern about the danger of falling from the ladder, he apparently being preoccupied with other conditions on the roof (Tr. 649-50). The 18-inch deficiency in the ladder’s rails is not shown to have more than a low gravity, warranting a penalty of \$1,000 under the statutory criteria for assessing penalties.

LIST OF HAZARDOUS CHEMICALS

While Star Brite’s written hazard communication program included copies of the required material safety data sheets for each of the hazardous chemicals used on the project (i.e., gasoline, propane and asphalt), it failed to comply with paragraph (e)(i) of the hazard communication standard § 1926.59 which requires “[a] list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet.”

The purpose of the list is to provide an index useful as a cross-reference to the material safety data sheets (Tr. 371). The Secretary does not propose that a penalty be assessed for the omission of the list of chemicals, and Star Brite has not raised a serious defense in the matter. Citation number 3, classified as nonserious, is affirmed..

Based upon the foregoing findings and conclusions, it is
ORDERED that items 1a and 1b of citation number 1 are affirmed and a penalty of \$2,100 is assessed. It is further
ORDERED that item 2 of citation number 1 is affirmed and a penalty of \$2,100 is assessed. It is further
ORDERED that items 3,4 and 5 of citation number 1 are affirmed and penalties of \$1,600, \$1,500 and \$750 are assessed respectively, in accordance with the settlement agreement. It is further
ORDERED that items 6,7,8,9, and 10 of citation number 1 are vacated. It is further
ORDERED that item 11 of citation number 1 is affirmed and a penalty of \$1,500 is assessed. It is further
ORDERED that item 12 of citation number 1 is affirmed and a penalty of \$1,000 is assessed. It is further
ORDERED that items 1 and 2 of citation number 2 are affirmed, and a penalty of \$25,000 is assessed for each item. It is further
ORDERED that citation number 3 is affirmed.

/s/
RICHARD DeBENEDETTO
Judge, OSHRC

Dated: February 23, 1998
Boston, MA