SECRETARY OF LABOR,

Complainant,

v.

Latite Roofing & Sheet Metal Co., Inc.,

Respondent.

OSHRC Docket No. 99-1292

APPEARANCES:

Ann G. Paschall, Esq.,Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia,
For Complainant

William F. Kaspers, Esq., Fisher & Phillips, L.L.P.Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Latite Roofing & Sheet Metal Co., Inc. (Latite), contests two citations issued by the Secretary on June 29, 1999. The citations resulted from an inspection of a residential construction site in Boca Raton, Florida, on June 10, 1999. Occupational Safety and Health Administration (OSHA) compliance officer Douglas Prince had finished conducting a referral inspection of Gables Residential, the general contractor, when he noticed two of Latite's employees engaged in roofing work at a height of 28½ feet without the use of visible fall protection. Prince proceeded to conduct an inspection of Latite. The Secretary subsequently issued the two citations that are at issue here.

Citation no. 1 alleges a serious violation of 29 C.F.R. § 1926.501(b)(13) for failing to provide fall protection for employees engaged in residential construction activities 6 feet or more

above lower levels. A penalty of $4,500 is proposed. Citation no. 2 alleges an other-than-serious violation of 29 C.F.R. § 1926.503(b)(1) for failing to have the trainer's signature on the employees' certificates of training. No penalty is proposed.

Latite stipulated to jurisdiction and coverage (Tr. 5). A hearing was held in this matter on December 7 and 8, 1999. The parties have filed post-hearing briefs and Latite has filed a reply brief. Latite asserts the affirmative defenses of greater hazard and infeasibility. Latite also argues the compliance officer Prince failed to conduct the inspection in a reasonable manner.

Based on the record, the alleged violation for failing to provide fall protection is vacated. The other-than-serious violation is affirmed.

Background

Latite is a large roofing contractor located in South Florida. It has been in the roofing business for 50 years and employs approximately 350 employees (Tr. 18, 20, 55, 206). On June 10, 1999, Latite was engaged in roofing a 3-story apartment complex known as Ponte Verde under construction on Grand Verde Way in Boca Raton, Florida.

Compliance officer Douglas Prince had completed conducting a referral inspection of the general contractor's (Gables Residential) construction site. As Prince was leaving, he noticed two employees working atop the third floor of the apartment complex. Prince did not observe any form of fall protection being used by the employees, whom Gables Residential's superintendent identified as Latite employees. The superintendent for Gables Residential granted Prince permission to inspect the roofing site. Prince videotaped the employees on the roof before contacting them.

The two employees, Latite foreman Lucio Lozano and Latite employee Carlos Lopez (also known as Carlos Diaz), were summoned from the roof by the superintendent of Gables Residential and were interviewed by Prince (Tr. 28, 412). As Prince was interviewing the two employees, Latite project manager Harry Winger arrived and Prince spoke with him (Tr. 27). Prince also interviewed Latite safety supervisor Barbara Struve and examined Latite's certificates of training and other safety records (Tr. 411).

Upon Prince's recommendation, the Secretary issued the two citations at issue here. Latite met in an informal conference with Jose Sanchez, area director for OSHA's Fort Lauderdale office (Tr. 352, 362-363). Latite presented an explanation to Sanchez as to why it believed that the use of conventional fall protection was infeasible and created a greater hazard. Latite had met in informal conferences with Sanchez following three separate previous citations for failure to use fall protection at different construction sites, and Sanchez had deleted the citation each time. Sanchez declined to delete the citation for failure to use fall protection in the present case (Exhs. R-4, 5, 6; Tr. 367-368).

The Reasonableness of Compliance Officer Prince's Inspection

Latite asserts that Prince's conduct of the inspection was unreasonable and illegal, violating § 8(a) of the Occupational Safety and Health Act (Act), Florida state law, and the Fourth Amendment, and that any evidence Prince gathered in the course of his inspection should be deemed inadmissible. The Secretary argues that Latite failed to raise these affirmative defenses prior to the hearing, that Prince had permission to conduct the inspection, and that Latite suffered no prejudice from any alleged improprieties on Prince's part.

Latite's accusation that Prince's inspection was unreasonable stems from two facts: (1) Prince videotaped Latite's employees on the roof prior to conducting an opening conference with Latite, and (2) Prince interviewed the employees and Winger without advising them that the video camera was on and was recording their interviews.

Videotaping Prior to the Opening Conference

As Prince was driving away from the construction site, he noticed the two Latite employees on the roof. He was on State Road 7 at the time (Tr. 50). He returned to the construction site and received permission from the Gables Residential superintendent to conduct a further inspection. Prince was standing on the construction site property when he began videotaping the Latite employees on the roof (Tr. 31, 34). At the hearing, the Secretary introduced nine photographs that were taken from the videotape, showing the Latite employees working on the roof (Exh. C-1 - C-9). The Secretary did not introduce the videotape.

Latite argues that Prince's videotaping of its employees on the roof violated § 8(a) of the Act, as well as its Fourth Amendment rights. Section 8(a) of the Act provides:

> In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized--
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials within, and to question privately any such employer, owner, operator, agent or employee.

Latite argues that the presentation of credentials is a prerequisite to any inspection, and that Prince's failure to present his credentials to a Latite representative before he started videotaping renders his entire inspection unreasonable. Latite's argument is the same as that put forth by the respondent in *L. R. Willson and Sons, Inc.*, 17 BNA OSHC 2059 (No. 94-1546, 1997), *aff'd in part, reversed (on other grounds) in part*, 134 F. 3d 1235 (4th Cir. 1998).

In *Willson*, the employer argued that because a compliance officer did not give the employer notice that he was videotaping the activities of its employees prior to presenting his credentials, the compliance officer violated both the Fourth Amendment and § 8(a). The Commission rejected this argument.

The Commission first found that the employer had no reasonable expectation to privacy in its worksite when its employees' activities were open to the public view. In the present case, Prince first observed the Latite employees on the roof from a public roadway. Latite had no reasonable expectation of privacy when its employees were working outside at an elevation of 28 feet.

The Commission then found that the compliance officer did not violate § 8(a) of the Act when he videotaped the worksite activity prior to presenting his credentials to the employer. The Commission held:

> By its terms, section 8(a) authorizes the Secretary, upon presentation of credentials, (1) to enter a workplace, *and*, (2) to inspect it, in that order. The

> introductory clause in section 8 applies to both sections 8(a)(1) and 8(a)(2), which are joined by the conjunctive "and." The sequence in which §§ 8(a)(1) & (2) appear leads us to conclude that Congress contemplated that the Secretary would present his credentials, then enter the worksite, then conduct the inspection. Therefore, we conclude that section 8(a) did not preclude the compliance officer in this case from observing the cited conditions from a location off the worksite before he presented his credentials and entered the worksite to conduct the inspection. . . . [T]he requirement in section 8(a)(1) that the compliance officer present his credentials before commencing an inspection applies only to physical inspections on the worksite.

Willson, 17 BNA OSHC at 2061.

The present case differs in only one aspect from *Willson*. Prince did not videotape Latite's workers from a location "off the worksite." Prince was, with the general contractor's permission, on the construction site. He was not, however, on Latite's specific worksite, which was the building which the workers were roofing at the time of his inspection. Prince was approximately 50 to 60 feet away from the building when he was videotaping the employees (Tr. 89). Prince did not go up on the roof, but he did inspect the building and its immediate surroundings after presenting his credentials to Latite's representatives.

The Commission's reasoning still applies. Prince did not violate § 8(a)(1) by observing, and videotaping, the cited conditions before he presented his credentials and conducted his physical inspection. The only Latite employees present at the site when Prince arrived were the two employees on the roof. Prince videotaped the employees while he was waiting for the general contractor to summon them. Until the Latite employees descended from the roof, there was no one to whom Prince could present his credentials.

The Secretary did not violate § 8(a) or Latite's Fourth Amendment rights.

Videotaping Employee Interviews Without Their Knowledge

Latite also argues that Prince violated Florida law when Prince interviewed Lozano, Lopez, and Winger without informing them that the video camera hanging from its strap around his neck was on and was recording their interviews. Prince asserted that he had notified them that the video camera was on. Although Prince's assertion that he informed Lozano and Lopez that they were being taped is suspect, neither one of them testified, leaving Prince's assertion

unrebutted. Latite did establish, however, that Prince failed to inform Winger that his interview was being taped (Tr. 79, 126, 166-167).

Latite contends that Prince violated a Florida state law that prohibits intercepting oral communications without the consent of the person doing the communicating. Fla. Stat. Ann. § 943.03. Latite argues that the entire videotape is inadmissible based on Prince's violation of Florida state law.

This court has jurisdiction to determine whether or not an employer committed violations of the Act. It is not empowered to determine matters of state criminal law. Whether Prince violated Florida law when he taped Winger without his knowledge or consent is beyond the purview of this court. It is noted that the Secretary did not seek to admit the videotape or any portion of the taped or transcribed interviews with Latite employees.

Prince's inspection was not unreasonable within the meaning of § 8(a). He did not violate Latite's Fourth Amendment rights. The photographs taken from the videotape and Prince's testimony were properly allowed at the hearing.

Citation No. 1

Item 1: Alleged Serious Violation of § 1926.501(b)(13)

The Secretary alleges that Latite committed a serious violation of § 1926.501(b)(13), which provides:

> Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: when the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.
>
> NOTE: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with § 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

The Secretary has the burden of proving her case by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

In order to establish that a violation is "serious" under §17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Latite concedes that the Secretary has met her burden with regard to the applicability, employee access, and employer knowledge elements of proof (Latite's brief, p. 19). The only element at issue is whether or not Latite complied with § 1926.501(b)(13).

It is undisputed that Latite was not using a guardrail system, a safety net system, or personal fall arrest systems on June 10, 1999, when Lozano and Lopez were installing metal flashing on the roof of a three-story apartment building. The roof was 28 feet and 6 inches high, with a 5 in 12 slope (Tr. 164).

Latite argues that the conventional methods of fall protection listed in § 501(b)(13) were not feasible and presented a greater hazard. The company contends that it developed and implemented an alternative fall protection plan that met the requirements of § 1926.502(k), in accordance with the exception provided in § 1926.501(b)(13).[1]

---

[1] On December 8, 1995, the Secretary issued OSHA Directive STD 3.1 ("Interim Fall Protection Compliance Guidelines for Residential Construction") (Exh. ALJ-2). Instruction 3.1 allows an employer to implement an alternative written fall protection plan in lieu of the conventional methods of fall protection listed in § 1926.501(b)(13) without first showing that the use of those methods would be infeasible or would create a greater hazard. Instruction STD 3.1 applies to roofs that are 25 feet or less in height. Although Instruction STD 3.1 was discussed at the hearing, the parties agree that it is not applicable in the present case, where Latite's employees were working above 25 feet.

The Infeasibility and Greater Hazard Defenses

> In order to establish the affirmative defense of infeasibility, an employer must prove 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.

Armstrong Steel Erectors, Inc., 17 BNA OSHC 1385, 1387 (No. 92-262, 1995).

> To establish the greater hazard defense, an employer must prove that (1) the hazards created by complying with the standard are greater than those of noncompliance, (2) other methods of protecting its employees from the hazards are not available, and (3) a variance is not available or that application for a variance is inappropriate.

Spancrete Northeast, Inc., 16 BNA OSHC 1616, 1618 (No. 90-1726, 1994), *aff'd*, 40 F. 3d 1237 (2d Cir. 1994).

Latite asserts both of these affirmative defenses but actually bases its defense on the greater hazard argument. Latite does not argue that conventional methods of fall protection were technologically infeasible, only that the attachment of any form of fall protection to the soft pine used in the roof construction in South Florida would fail to hold the weight of an employee in the event of a fall. Latite's defense will be considered a greater hazard defense.

Latite called three witnesses who were experienced in residential roofing: Latite president David Struve, construction consultant Jim Hunt, and safety consultant Edwin Granberry. David Struve has a bachelor of science degree in civil engineering (Tr. 191). After working as an industrial engineer, Struve ran Gory Associated Industries, one of the largest roofing tile manufacturers in the United States (Tr. 194). Struve traveled throughout Europe studying roofing systems and developing new systems for improving tile roofing in South Florida (Tr. 194-196).

Struve explained that there was no safe anchorage point for any of the conventional methods of fall protection listed in § 1926.204(b)(13) at the apartment complex. The wood trusses were 2-inch by 4-inch yellow pine. Struve stated, "The first trick is to find the wood to

anchor this to, and then the next trick is every time you put a nail or a screw in you are to some extent weakening the strength of the piece if you hit it" (Tr. 226). Struve asserted that there was no adequate structural attachment point for guardrails, safety nets, or personal fall arrest systems (Tr. 230-232). He testified that Latite "worked with Synco [a safety equipment company] a solid year to come up with a means by which we could come up with edge protection or a better fall protection for our employees," but "couldn't come up with anything that you could get an attachment that would even put up with a load of 30 pounds. . . [r]olling down the roof, it would just tear it right off" (Tr. 232).

Jim Hunt is a former OSHA compliance officer. He has worked as a construction consultant in South Florida for more than 10 years (Tr. 373). He testified that the use of conventional fall protection methods would have created a greater hazard to the employees than not using them (Tr. 383).

Edwin Granberry served as a director of safety for Pan American World Airways and Pratt-Whitney Aircraft (Tr. 393). He is the regional vice-president for the American Society of Safety Engineers (Tr. 394). Granberry was asked if it was feasible to use the conventional fall protection methods listed in § 1926.501(b)(13) at the Ponte Verde apartment complex. He replied (Tr. 402-403):

> In using the word "feasible," you could obviously install anchor points and attachment points and use lifelines and lanyards and harnesses and all that, but I would consider it inappropriate, not feasible, and it creates a more dangerous condition for the workmen. . . .
>
> [T]he attachment or an anchor point needs to be part of or secured to, a permanent part of the structure that will not fail or deform if one of the workmen falls.
>
> A piece of pine wood, pine is a very variable wood, it splits easily, it doesn't have consistent structure throughout its attachment to either a two-by-four or two-by-six or whatever.
>
> There is no steel to tie off to. In my opinion, it would give the work crew a false sense of security.

The Secretary offered no expert testimony to rebut the testimony of Latite's witnesses. Compliance officer Prince acknowledged that he is not an expert in residential roofing (Tr. 107). Prince had moved to South Florida within the year prior to his inspection of Latite's worksite. He

testified that he had observed conventional fall protection methods being used by roofers in South Florida, but he could not name any employers who had used conventional fall protection or identify the location where he had seen it used (Tr. 108).

As part of its burden to prove the greater hazard defense, Latite must establish that a variance was not available or that application for a variance would have been inappropriate. OSHA area director Jose Sanchez was questioned regarding Latite's efforts to secure a variance (Tr. 354-355):

> Q.: And, when OSHA notified the public that it was going to come out with some regulations applicable to residential roofing, do you recall a meeting with Mr. Struve and several other roofers to discuss whether or not Latite and other roofers ought to seek a variance?
>
> Sanchez: Yes, I vaguely remember that, yes.
>
> Q.: And, your suggestion at that meeting was rather than seek a variance and go through that procedure, the better approach would be for Latite to develop and implement a fall protection plan suitable to OSHA's requirements, correct?
>
> Sanchez: Yes, I did point out that the new standards give employers an option to develop, and implement a fall protection plan, and I believe--I don't recall distinctly but I thought a variance would not be appropriate at that point in time.

Latite has demonstrated that the use of the conventional fall protection methods listed in § 1926.501(b)(13) would create a greater hazard for its employees and that application for a variance would have been inappropriate.

The exception to § 1926.501(b)(13) provides that if an employer can demonstrate that it creates a greater hazard to use a conventional fall protection system, the employer "shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502."

Section 1926.502(k) sets out the requirements for the option of developing and implementing a written fall protection plan. Exhibit R-2 is a copy of Latite's written fall protection plan, developed by Jim Hunt specifically for the Ponte Verde site.

Section 1926.502(k)(8) provides: "Where no other alternative measure has been implemented, the employer shall implement a safety monitoring system in conformance with

§ 1926.502(h)." The safety monitoring system is the system that Latite was using at the time of Prince's inspection. Latite painted yellow lines marking the perimeter of the roof as a visual cue to the roofers that they are at the edge of the roof. Foreman Lozano acted as the safety monitor for Lopez, the one other employee on the roof.

The Secretary argues that Lozano could not have been an effective monitor because he and Lopez were working on a sloped roof which would prevent Lozano from seeing Lopez at times. The Secretary also argues that Lozano's duties would have prevented him from being an effective monitor. Section 1926.502(h)(iii) states: "The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored[.]"

Prince testified that he did not go up on the roof (Tr. 93). The only observation he made of the employees on the roof was from the ground 50 to 60 feet away. Prince was in no position to determine whether Latite was effectively implementing its fall protection plan.

The Secretary has failed to establish a violation of § 1926.501(b)(13). Latite has demonstrated that the use of the fall protection methods listed in the cited standard would have created a greater hazard. Latite has established that it developed and implemented a fall protection plan that met the requirements of § 1926.502(k). The item is vacated.

Citation No. 2

Item 1: Alleged Other-Than-Serious Violation of § 1926.503(b)(1)

The Secretary alleges that Latite committed an other-than-serious violation of § 1926.503(b)(1), which provides in pertinent part:

> The employer shall verify compliance with paragraph (a) of this section by preparing a written certification record. The written certification record shall contain the name or other identity of the employee trained, the date(s) of the training, and the signature of the person who conducted the training or the signature of the employer.

Barbara Struve is Latite's safety supervisor (Tr. 408). She conducts most of the safety training and maintains the written certification records. Struve testified that if someone else came

in to provide training, that person would sign the training certification records. If Struve provided the training, she would not sign the certification record (Tr. 414).

The Secretary acknowledges that Latite's employees were properly trained, but cited Latite because Barbara Struve failed to sign the records. Struve testified that after Prince pointed out that the trainer's signature is required, she began signing the certification records (Tr. 416).

Latite argues that the violation should be classified as de minimis. A de minimis violation is one that has no direct or immediate relationship to safety or health. *Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1419, 1427 (No. 90-1106, 1993). A de minimis violation carries no penalty and requires no abatement.

One of the purposes of the certification standard is to provide a record of the nature and content of the training given to individual employees. If the signature of the trainer is missing, it may become difficult to assess the level of training over the passage of time. The violation is properly classified as other-than-serious.

No penalty is assessed based on the low gravity of the violation. Barbara Struve was both the trainer and the keeper of the records at the time of the inspection. She was available to provide information regarding the training given to the employees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Item 1 of citation no. 1, alleging a serious violation of § 1926.501(b)(13), is vacated and no penalty is assessed; and

2. Item 1 of citation no. 2, alleging an other-than-serious violation of § 1926.503(b)(1), is affirmed and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: August 30, 2000