SECRETARY OF LABOR, Complainant, v. TRIPLE J CONSTRUCTION, Respondent.	OSHRC Docket No. 96-1498

APPEARANCES:

For the Complainant:
David M. Kahn, Esq., Christine Z. Heri, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois.

For the Respondent:
John Cathcart, Triple J. Construction, Marissa, Illinois

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor against Triple J Construction to enforce two items of a repeat citation served by the Occupational Safety and Health Administration upon the company for the alleged violation of safety regulations relating to the roofing industry. The matter arose after a compliance officer for the Administration inspected a worksite of the Respondent, concluded that it was in violation of the two safety regulations, and recommended that the citation be issued. The Respondent disagreed with the citation and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in St. Louis, Missouri.

Citation 1, Item 1 alleged that:

At the job site, three employees of Triple J Construction Company were observed and photographed removing pre-existing shingles and tar paper from a residential home. The roof's pitch was 12:12 with a ground to eave height of approximately 12 feet. Neither conventional fall protection nor adequate slide guards were in use or available. These employees were exposed to a serious fall hazard.

Triple J Construction Company was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent standard 29 CFR 1926.501(b)(13) which was contained in OSHA Inspection 106552607, Citation 1, Item 1b, issued on 07-14-95, and OSHA Inspection 106549207, Citation 1, Item 2, issued on 10-18-95.

in violation of the regulation at 29 CFR 1926.503(a)(1) reading:

> **§1926.503 Training requirements.**
>
> The following training provisions supplement and clarify the requirements of §1926.21 regarding the hazards addressed in subpart M of this part.
>
> (a) *Training Program*. (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

Citation 1, Item 2 alleged that:

At the job site, three employees of Triple J Construction Company were observed and photographed removing pre-existing shingles and tar paper from a residential home. The roof's pitch was 12:12 with a ground to eave height of approximately 12 feet. Neither conventional fall protection nor adequate slide guards were in use or available. The employer failed to adequately instruct these employees in the proper use of conventional fall protection or adequate slide guards to abate exposure to this serious fall hazard.

Triple J Construction Company was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent standard 29 CFR 1926.503(a)(1) which was contained in OSHA Inspection 106552607, Citation 1, Item 1c, issued on 07-14-95.

in violation of the regulation found at 29 CFR 1926.501(b)(13) which provides:

> (13) *Residential construction*. Each employee engaged in residential construction activities 6 feet (1.8 m) 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.

The pertinent historical facts are not in substantial dispute and may be briefly summarized. On July 14, 1995, the Administration cited this employing unit for its failure to utilize conventional fall protection and to develop an adequate training program for employees exposed to fall hazards. This situation was resolved by a settlement agreement, and the citation became a final order of the Commission. On August 22, 1995, and again on September 1, 1995, the Administration cited the Respondent for the same violations. There was no notice of contest in connection with these two citations, and they also became final orders of the Commission. The current controversy resulted from an inspection of the company's worksite on September 19, 1996.

On the latter date the compliance officer observed individuals working on a roof higher than six feet from the ground without the protection required by the regulation. Photographs of the worksite confirm that individuals were working on a roof more than six feet from the ground without fall protection. This infraction was not disputed at the hearing. Indeed, the Respondent's principal official informed the compliance officer that the company did not intend to abide by OSHA's safety regulations.

In its answer the Respondent presented three reasons why the citation was not in order. First, it denied that it was in violation of the regulations; second, that it was not engaged in interstate commerce because it purchased materials from suppliers within the State of Illinois only; and third, that it had no employees and therefore not subject to the Occupational Safety and Health Act of 1970.

As noted, pictures taken at the worksite establish that individuals engaged in the residential construction activities six feet or above lower levels were not protected by guardrail systems, safety nets, or personal fall arrest systems or any alternative fall protection method measures. The Respondent also failed to demonstrate that the fall protection measures were infeasible or created a greater hazard to use these systems. There were also no plans to develop a training program for workers exposed to fall hazards. In fact, Respondent advised the compliance officer that it did not intend to abide by the Act's safety regulations. Thus, I find that the Respondent was in violation of the two regulations relating to fall protection and to training in that regard.

Respondent's second defense was that it had no supplies from outside the State of Illinois, and therefore it was not engaged in interstate commerce. There is little problem in addressing this defense. The compliance officer found the packaging of roof tiling material addressed to the Respondent and mailed from the State of Indiana. To confirm Respondent's status under the commerce problem, the compliance officer contacted the manufacturer of the material and was informed that the roofing material was manufactured in either Indiana or Minnesota and was mailed from its Indiana plant. It follows that the Respondent was engaged in interstate commerce, and this defense was not established.

With respect to the partnership defense, the principals, in the hope of avoiding compliance with the Occupational Safety and Health Act, entered into two agreements with its roofers. One document was entitled Sales Contract, under the terms of which John Cathcart, Sr., John Cathcart, Jr., and John Coke, Jr. sold to a number of individuals one per cent of the Triple J Construction business for one dollar. The agreements were loosely drawn in that some contracts were undated, and others were drawn in name of one person but signed by another. None of the workers actually paid the one dollar purchase price.

The second document was entitled GENERAL PARTNERSHIP AGREEMENT OF TRIPLE J CONSTRUCTION COMPANY. Its front page is headed General Partnership. For $12,500.00 John Cathcart, Sr. and John Coke, Jr. are shown as each owning 45.5% of the business. Nine other individuals are listed as having a one per cent interest in the enterprise. Mr. Cathcart was designated as Managing Partner with authority and responsibility to manage the business including the right and power to set wages, assign work and do all bidding. Income, gains, losses and credits were to be pro-rated in accordance with partnership shares. The purpose of the agreement was to confer partnership status upon the roofers. The Respondent reasoned that if all its workers were partners, the company would have no employees and therefore no responsibility under the Act.

The employment status of workers under contract arrangements has been before the Review Commission on other occasions. The Commission has held that the caption of the agreement between employer and workers is not necessarily determinative of the employment relationship. Economic reality is the test to be applied if there is a question of an individual's employment status. The tests include whom the workers consider as their

employer; who pays the wages; who controls the workers' activities; who has the power to control the workers; and who has the authority to hire, fire or modify the employment conditions. The fundamental inquiry is the right to control.

Under the arrangement in issue Mr. Cathcart had the right to control workers listed in the partnership document. As managing partner he set all wages, assigned all work and did all bidding. Thus, he had the power to change the workers' pay, assign work at his pleasure and bid or decline to bid on roofing jobs. Under this assignment of authority the roofers were entirely dependent upon Mr. Cathcart for their livelihood. Mr. Cathcart, on behalf of Triple J Construction, was in control of the business, and therefore the roofers mentioned in the partnership agreement were merely employees of the company.

In conclusion, I find that:

l. The Respondent was in violation of 29 C.F.R. §1926.501(b)(13).

2. The Respondent was in violation of 29 C.F.R. §1926.503(a)(1).

3. The Respondent was engaged in interstate commerce.

4. The roofers associated with the Respondent were its employees under the Occupational Safety and Health Act of 1970.

The citation and penalties are therefore AFFIRMED.

Sidney J. Goldstein
Judge, OSHRC

Dated: