UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR
Complainant,
v.
ALLSTATE ROOFING, INC.
Respondent.

OSHRC DOCKET
NO. 93-0832

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 10, 1993. The decision of the Judge will become a final order of the Commission on January 10, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 30, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 10, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0832

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Tedrick Housh, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Bldg., Room 2106
911 Walnut Street
Kansas City, MO 64106

Vanessa M. Ceravolo, Esquire
P. O. Box 1197
Kalispell, MT 59903 1197

James H. Barkley
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204 3582

00111625097:08

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 N. SPEER BOULEVARD
ROOM 250
DENVER, COLORADO 80204-3582

PHONE
COM (303) 844-2281
FTS (303) 844-2281

FAX
COM (303) 844-3759
FTS (303) 844-3759

SECRETARY OF LABOR, Complainant, v. ALLSTATE ROOFING, INC., Respondent.	OSHRC DOCKET NO. 93-0832

APPEARANCES:

For the Complainant:
Dewey P. Sloan, Jr., Esq. Office of the Solicitor,
U. S. Department of Labor, Kansas City, Missouri

For the Respondent:
Vanessa M. Ceravolo, Esq., Kalispell, Montana

DECISION AND ORDER

Barkley, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq, hereafter referred to as the Act).

Respondent, Allstate Roofing, Inc. (Allstate) at all times relevant to this action, maintained a place of business at Charles and Monad, Billings, Montana, where it was engaged in roofing construction. Allstate admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On January 19, 1993 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Allstate's Charles and Monad worksite (Tr. 17). As a result of

the inspection, Allstate was issued a "willful" citation alleging violation of §§1926.500(g)(1), together with proposed penalties, pursuant to the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On August 19, 1993, a hearing was held in Billings, Montana. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

Citation 1, item 1 states:

29 CFR 1926.500(g)(1): Employees engaged in built-up roofing work on low-pitched roofs with a ground to eave height greater than 16 feet were not protected from falling by using one of the methods described in 29 CFR 1926.500(g)(1)(i) through (iii) at all unprotected sides and edges of the roof.

(a) Monad & Charles: Employees working on edge of roof approximately 20 feet above ground level.

The cited standard provides:

> (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)[1]; 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.

[1] §1926.502(5) defines MSS Systems (motion stopping-safety systems) as "fall protection using the following equipment singly or in combination; standard railings (guardrails) as described in §1926.500(f); scaffolds or platforms with guardrails as described in §1926.451; safety nets as described in §1926.105; and safety belt systems as described in §1926.104.

Issues

I. Whether the Secretary has, by a preponderance of the evidence, made out a prima facie case that Allstate violated §1926.500(g)(1) on January 19, 1993?

a. Whether, in order to prove a violation of a standard under §5(a)(2) of the Act, the Secretary has the burden of proving the reasonableness of abatement measures specified within cited standards?

II. Whether Allstate has shown the infeasibility of abatement measures specified under §1926.500(g)(1)?

III. Whether alternative protective measures taken by Allstate excuse the cited violation?

IV. Whether alternative protective measures taken by Allstate render any violation *de minimis*?

V. Whether Allstate's violation of §1926.500(g)(1), if any, was correctly classified as "willful?"

VI. Whether the proposed penalty of $28,000.00 is appropriate?

Facts

On August 19, 1993, following a phone complaint, OSHA Compliance Officer (CO), Thomas Wild, visited Allstate's Billings worksite (Tr. 17-18). There Wild observed and videotaped approximately five Allstate employees scattered on the north, east and southeast end of a roof, working without the benefit of fall protection (Tr. 19-20, 23, 55, 59, 171; Exh. C-1 through C-6; *see also*, testimony of James Jones, Tr. 144, 147; Stanley Ludwig, Tr. 155). Specifically, Wild observed one employee walk to within approximately three feet of the unguarded roof's edge to throw down roofing materials (Tr. 24, 39, 76, 158; Exh. C-7, C-8).

Allstate's safety director evaluates each job site prior to commencement of work, including the pitch of the roof and the ground to eave height.

The rooftop was 20 feet from the eaves to the ground (Tr. 81). It measured 200 feet long by 120 feet wide (Tr. 91). The roof was nearly flat, with a 1:12 pitch (Tr. 157, 186). Allstate employees were operating drills; there was also a heat welding machine with a generator or compressor running near the center of the roof (Tr. 50-51, 166). CO Wild

testified that the site was very noisy; that the compressor noise interfered with conversation within approximately 30 feet of it (Tr. 50-52).

Discussion

I.

Under Commission precedent, in order to prove a violation of section 5(a)(2) of the Act, the Secretary need show only that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

Allstate admits that the single-ply roof system attached with mechanically fastened screws and heat welded seams at Charles and Monad falls under OSHA's definition of "built-up roofing"[2], governed by §1926.500(g) (Tr. 83, 113, 135). The ground to eave height was greater than sixteen (16) feet. Allstate's supervisor and safety director, Michael Phillips further admits that they "did not implement 500(g)" at that location (Tr. 201). The evidence establishes that employees were exposed to the cited condition, and that the employer was not only aware of those condition, but approved of them. The Secretary has, therefore, made out her prima facie case.

Allstate argues that the Secretary failed to meet her burden of proving that the use of the required safety equipment was reasonable or appropriate at Allstate's worksite, relying on *Spancrete Northeast, Inc. v. OSHRC*, 905 F.2d 589 (2nd Cir. 1990). The case cited by Allstate, however, does not reflect the state of the law of either the Ninth Circuit, where this case is situated, or of the Commission itself.

---

[2] §1926.502(1) *Built-up roofing*--a weather-proofing cover, applied over roof decks, consisting of either a liquid-applied system, a single-ply system, or a multiple-ply system. Liquid-applied systems generally consist of silicone rubber, plastics, or similar material applied by spray or roller equipment. Single-ply systems generally consist of a single layer of synthetic rubber, plastic, or similar material and a layer or adhesive. . ..

II.

In order to make out the affirmative defense of infeasibility, Allstate must show that none of the abatement measures specified in subsection 500(g) were feasible at Allstate's Billings worksite. The Commission has held that:

> Employers must alter their customary work practices to the extent that alterations are reasonably necessary to accommodate the abatement measures specified by OSHA standards. . .. [However,] an abatement measure must be useable, during employees' activities, for its intended purpose of protecting employees. If there is no way to use a measure for its intended purpose without unreasonably disrupting the work activities, the mere fact that the measure's installation is physically possible does not in our view mean that we should compel the employer to install the measure. *Seibel Modern Mfg. & Welding Corp. supra at* 1228, 39,685.

At the hearing, Allstate specifically stated that compliance with the cited standard was possible (Tr. 118, 192), although it introduced evidence that safety lines would become tangled and pull up the screws holding down the roof, increasing the time necessary to complete the job (Tr. 118, 135-36, 156, 192). No evidence regarding the feasibility of other motion-stopping systems, such as guardrails was introduced, nor did Allstate address the feasibility of a warning line system.

Allstate failed to show that the safety measures specified by the standard were infeasible, and so to make out its affirmative defense.

III.

In addition, this judge rejects Allstate's argument that its use of a verbal safety monitoring system as provided for under 500(g)(iii) excuses its failure to use physical fall protection. The plain language of subsection (g)(iii) restricts the use of safety monitoring systems to roofs fifty feet or less in width, where mechanical equipment is not being used or stored. The plain language of (g)(iii) clearly does not provide for a safety monitoring system here, where the roof width was 120 feet[3] and mechanical equipment was in use.

---

[3] Simple rectangular roofs may not be subdivided. Appendix A to Subpart M for §1926.500(g)(1)--Roof Widths, serves as a guideline to subdividing irregularly shaped roofs. Its stated purpose is to "minimize the number of roof areas where §1926.500(g)(1)(iii) can be applied."

The Commission has held that where a specifications standard does not provide for an alternative form of compliance, "the fact that the employer has implemented an alternative measure instead of the specified measure cannot, in itself, justify vacating a citation." *Secretary of Labor v. R & R Builders, Inc.*, 15 BNA OSHC 1383, 1991 CCH OSHD ¶ (No. 88-282, 1991).

IV.

Allstate argues that its alternative measures, though not in technical compliance with the standard, provide equal protection from the fall hazard, and that the violation should properly be classified as *de minimis*. Allstate cites *Phoenix Roofing, Inc. v. Dole*, 874 F.2d 1027 (5th Cir. 1989), a case involving the same standard in which the Fifth Circuit found "no significant difference between the protection provided by the employer and that which would be afforded by technical compliance with the standard." *Id* at 1032.

The facts of the case at bar, while similar to those addressed in *Phoenix Roofing*, do not compel the result reached there. Here, the roof was too large for the single monitor, Ludwig, to see all the employees at once (Tr. 83, 136; Exh. C-1, at 3:50). Ludwig admitted at hearing that he had to move around the roof to observe employees who were performing different tasks on different sections of the roof (Tr. 155). Additionally, the noise from the drills and compressor in use on the rooftop could have prevented Ludwig's warnings from being heard or heeded.

A designation of *de minimis* is appropriate only where the absence of any direct nexus between the employer's noncompliance and employee safety and health renders an abatement order inappropriate. This judge finds that Allstate's use of a safety monitoring system did not provide protection equal to that mandated by the standard, and appreciably diminished worker safety. The violation cited was not merely technical, and cannot be classified as *de minimis*.

V

Under Commission precedent, a violation is willful if "it was committed voluntarily with either an intentional disregard for the requirements of the Act, or plain indifference to

employee safety." *United States Steel Corp.*, 12 BNA OSHC 1692, 1703, 1986-87 CCH OSHD ¶27,517, p. 35,675 (No. 79-1998, 1986).

On September 10, 1991 Allstate received a "serious" citation alleging violation of §1926.500(g) (Tr. 91; Exh. C-11). At that time CO Wolf advised the job superintendent, Mike Phillips, as to the requirements of §1926.500(g), specifically discussing safety belts, lanyards, and static lines as well as warning lines (Tr. 61-67). Stan Ludwig was the foreman on the job site (Tr. 91). On March 24, 1992, and June 2, 1992 Allstate received "repeat" citations for violations of the same standard (Tr. 94, Exh. C-12, C-14). Either Ludwig or Phillips were involved in each of the cited incidents (Tr. 96). Phillips executed all three settlement agreements (Tr. Exh. C-12, C-14). At the hearing, Allstate admitted it knew the requirements of §1926.500(g) prior to the inspection (Tr. 93).

Nonetheless, despite three previous citations, and their admitted familiarity with §1926.500(g), Allstate personnel went on to uniformly testify that they believed the abatement measures discussed with OSHA applied only to the specific roofs they were working on at the time they were cited, and that the cited standard allowed them complete latitude to determine the "appropriate" fall protection to be provided. (Testimony of Wilbur Phillips, Tr. 115-116; 122; Stanley Ludwig, Tr. 164-165, Michael Phillips, Tr. 190-93).

This judge finds such testimony unconvincing. Although a violation is not willful if the employer had a good faith opinion that it complied with the requirements of a cited standard, the test of good faith for these purposes is an objective one, i.e. whether the employer's belief concerning the interpretation of a standard, was reasonable under the circumstances. *Calang Corp.*, 14 BNA OSHC 1789, 1791, 1987-90 CCH OSHD ¶29,080, p. 38,870 (No. 85-319, 1990).

The plain language of §1926.500(g)(1) is unambiguous; the constraints on the options available to an employer are clearly set forth in the standard. Allstate's supervisory personnel, particularly its safety director, had a duty as well as ample opportunity to read and understand 500(g)'s requirements following each of the three prior citations issued since September 1991. Given Allstate's citation history, its settlements, and the explanation of 500(g) provided by OSHA officials, Allstate's litigation position that it believed it had complete latitude to substitute its own judgment for the requirements of the standard is not

credible. Given its knowledge of §1926.500(g), and its knowledge of the ground to eave height, which triggered the standard's applicability at this particular worksite, Allstate's decision to substitute its own safety procedures for those required by the standard indicates a disregard for the Act's requirements rising to the level of willfulness.

VI.

The size of the employer and the gravity of the offense are factors to be considered in determining the appropriateness of a penalty. *Nacirema Operating Co.*, 1 BNA OSHC 1001, (No. 4, 1972).

One indicia of a company's size is the amount of business it does. Allstate's gross income during 1991 and 1992 was estimated at between two and three million dollars (Tr. 133).

CO Wolf testified, without contradiction, that a fall from 20 feet would result in serious injury or death (Tr. 60). However, Allstate's roofing personnel were experienced and the fall hazard was an obvious one. Weather conditions were good and there were no tripping hazards visible. The likelihood of an accident taking place was small; this judge believes that the gravity of the violation was overstated.

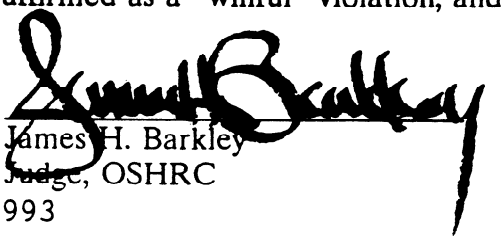
Because the gravity of the violation was overstated, the proposed penalty of $28,000.00 is found to be excessive. A penalty of $12,000.00 will be assessed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

Order

1. Citation 1, item 1 is affirmed as a "willful" violation, and a penalty of $12,000.00 is ASSESSED.



James H. Barkley
Judge, OSHRC

Dated: December 3, 1993