SECRETARY OF LABOR, Complainant, v. LANCASTER ENTERPRISES, INC., d/b/a ORBIT ROOFING CO. Respondent.	OSHRC Docket No. 97-0771

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

Following a fatal injury to an employee of Lancaster Enterprises, Inc., d/b/a Orbit Roofing Co. ("Lancaster"), the Occupational Safety and Health Administration ("OSHA") inspected Lancaster's worksite and issued one citation alleging six violations of various construction standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (the "Act"). Lancaster contested the citation in its entirety. After a hearing at which compliance officer ("CO") Alexander Jay Steel, Jr. was the only witness, Administrative Law Judge Robert A. Yetman affirmed two and vacated three of the items.[1] At issue before the Commission is the judge's decision to vacate Item 1, which alleges that Respondent failed to implement a safety program, as well as the Secretary's motion to amend Item 1.

[1]The judge affirmed Item 5, which alleged that Respondent failed to protect its employees from fall hazards; and Item 6, which alleged that it failed to provide fall protection training. He vacated Item 1, which alleged that Respondent failed to implement a safety program; Item 3, which alleged that it failed to use an enclosed chute when throwing materials from the roof; and Item 4, which alleged that it failed to cover skylights in the surface of the roof. The Secretary withdrew Item 2, which alleged that Respondent's employees did not wear hardhats when required to do so.

Also before the Commission is the judge's decision to vacate Item 4, which alleges that Respondent failed to cover skylights at the worksite. For the reasons stated below, we affirm the judge's decision in part and reverse in part.

I. BACKGROUND

Lancaster is headquartered in Massachusetts, where it performs roofing work. During the time in question, a crew of four Lancaster employees, including a foreman, was installing a rubber roof on the three-story "Cleaves Court" apartment building in Roxbury, Massachusetts. To access the roof, the employees ascended stairs to the building's third floor and then climbed up a ladder, through a square hatchway. The roof was approximately 60 feet long, from front to back, and rectangular; however, it is not clear how wide the roof was. Most of the roof's surface was flat, and there were three skylights installed in it.

On January 13, 1997, employee John Kulikowski worked above the building's porches on the rear portion of the roof, which had a slight pitch. While Kulikowski was working, he stepped in glue that had been poured near the edge of the roof, slipped, and fell 33 feet to his death.

II. ITEM 1: SAFETY PROGRAM/TRAINING

Item 1 alleges that "[a] Safety Program, which included weekly safety meetings, training and walkaround inspections, was not implemented to train and instruct employees in the recognition and avoidance of unsafe conditions," in violation of 29 C.F.R. § 1926.20(b)(1).[2] CO Steel alleged that this item "generally include[s] all safety, for all types of construction sites, hardhats, and ladders."[3]

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[2]The cited standard provides:

> **§ 1926.20 General safety and health provisions.**
> * * *
> (b) *Accident prevention responsibilities.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

[3]As noted, the Secretary alleged a separate fall protection training violation in Item (continued...)

CO Steel stated that Marie Raftes, Lancaster's owner and president, admitted to him that Lancaster did not have a safety program and "had contacted Mr. Metzler for assistance in that matter."[4] Steel also testified that Don Bullens, Lancaster's project manager and superintendent, admitted to him that the company did not have a safety program, did not conduct weekly safety meetings, and had not conducted safety training for any of its employees. Steel added that Joseph Bebo, who had worked for Lancaster for one and one-half weeks before the accident and who was the foreman on the day of the accident, informed him that "he had never seen a program, or . . . that [Lancaster] had never had any safety meetings, [that] there was no safety ever discussed at any time since he had been in the employ of the company, and [that he had] . . . concluded that there must be no program."

The judge vacated Item 1, holding that: (1) the cited standard, on its face, did not make clear what conduct was required, and (2) there was no direct evidence that hazards covered by 29 C.F.R. Part 1926, the construction industry standards, existed at Respondent's worksite and required the establishment of a safety program.

We affirm the judge's decision to vacate this item. Under section 1926.20(b)(1), "an employer may reasonably be expected to conform its safety program to any known duties[,] and . . . a safety program must include those measures for detecting and correcting hazards [that] a reasonably prudent employer similarly situated would adopt." *Northwood Stone & Asphalt*, 16 BNA OSHC 2097, 2099, 1993-95 CCH OSHD ¶ 30,583, p. 42,349 (No. 91-3409, 1994), *aff'd without published opinion*, 82 F.3d 418 (6th Cir. 1996). We find that the Secretary did not make a case under either prong of the test. She offered no proof that Lancaster actually knew of any duties under this standard to train employees in regard to ladders and hardhats. Nor did she introduce evidence to show that a reasonably prudent employer in Lancaster's position would have adopted a safety program addressing hazards

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[3](...continued)
6, which was affirmed by the judge and is not on review before the Commission. *See* n.1, *supra.*

[4]Barrett A. Metzler is Respondent's non-attorney representative in these proceedings.

related to the use of ladders or requiring hardhats. The Secretary claims that "conditions and equipment clearly regulated under Part 1926 . . . existed at the worksite" and that Lancaster's employees were "potential[ly] expos[ed]" to "commonly encountered construction hazards," but she fails to identify any such hazards (other than the fall hazards addressed in Items 4 and 6) or point to any related accidents.[5]

Amendment

On review, the Secretary moves to amend Item 1 to allege violations of specific training standards, 29 C.F.R. §§ 1926.21(b)(2) and 1926.1060(a), instead of the general provision cited. Although Lancaster did not respond to the Secretary's motion, we will consider its merits.[6] *Cf. Seward Motor Freight*, 13 BNA OSHC 2230, 2232, 1987-90 CCH OSHD ¶ 28,506, pp. 37,785-86 (No. 86-1691, 1989) (Commission considers the merits of unopposed motions to amend).

Posthearing amendments are permissible under Federal Rule of Civil Procedure 15(b) if the parties "squarely recognized" that they were trying the unpleaded issue and either expressly or implicitly consented to trial of the unpleaded issue.[7] *McWilliams Forge Co.*,

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[5]Chairman Rogers would emphasize that the holding in this case should not be construed as in any way endorsing the employer's general lack of effort to create and maintain a safety program.

[6]Although motions to amend are not uncommon, we note the timing of the Secretary's motion here. She filed this motion with the Commission on November 13, 1998, almost three months after the Commission directed this case for review on August 31, 1998. The motion followed the filing of a statement by the employer's representative in which he admitted that he was unable to contact the employer and, therefore, declined to file a brief on review.

[7]Rule 15(b) provides in relevant part:

> **(b) Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion

(continued...)

11 BNA OSHC 2128, 2129-30, 1984-85 CCH OSHD ¶ 26,979, p. 34,669 (No. 80-5868, 1984). The test for determining trial by consent is whether the parties clearly knew that the evidence was directed toward an unpleaded issue. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1516, 1993-95 CCH OSHD ¶ 30,300, p. 41,749 (No. 91-373, 1993). Amendments are also permissible where they merely add an alternative legal theory, but do not alter the essential factual allegations of the citation. *A.L. Baumgartner Constr.*, 16 BNA OSHC 1995, 1997, 1993-95 CCH OSHD ¶ 30,554, p. 42,272 (No. 92-1022, 1994) (affirming judge's *sua sponte* amendment).

1. 29 C.F.R. § 1926.21(b)(2)[8]

The Secretary argues that "the facts tried in this case clearly describe a violation" of section 1926.21(b)(2). She makes two factual assertions. She contends that Lancaster should have trained its employees in the use of a materials disposal chute because "the record included evidence that materials were being thrown off the roof toward a dumpster in the parking lot more than 20 feet below[, and] a debris chute was not used to contain the falling debris." She also asserts that Lancaster's employees should have been trained in the use of hardhats because employees using "outside stairs" on the apartment building's porches were "exposed to the hazard of being struck by materials blowing or being thrown off the roof towards the dumpster" and because "[e]mployees climbing up the ladder through the roof hatchway were . . . exposed to head injury from dropped or kicked roofing tools, adhesive rollers, and other tools being used to replace and install several skylights." Neither

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[7](...continued)
of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

[8]This standard provides:

§ 1926.21 Safety training and education.
* * *
(b) *Employer responsibility.* * * * (2) 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.

of these assertions establishes that the parties recognized that they were trying this issue. Although CO Steel testified that an employee threw material off the roof on January 13, 1997, and Respondent did not object, this evidence does not indicate trial by consent because it was introduced in support of a pleaded issue, Item 3, which alleged that Respondent failed to use an enclosed debris chute when required.[9] *See McWilliams Forge*, 11 BNA OSHC at 2130, 1984-85 CCH OSHD at p. 34,669 (failure to object to evidence that is relevant to both pleaded and unpleaded issues does not demonstrate implied consent in the absence of some obvious attempt to raise the unpleaded issue). There is no other evidence in the record related to disposal chutes. Similarly, the Secretary's allegations regarding the need for and lack of hardhats to protect employees from items being blown or thrown from the roof or items being dropped or kicked onto employees on the ladder are based on mere speculation and were not tried at all.[10] The only mention of hardhats at the hearing was CO Steel's

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[9]The Secretary alleged in Item 3 that Respondent violated § 1926.252(a), which provides in relevant part:

> **§ 1926.252 Disposal of waste materials.**
>
> (a) Whenever materials are dropped more than 20 feet to any point lying outside the exterior walls of the building, an enclosed chute of wood, or equivalent material, shall be used.

Item 3 was tried at the hearing and briefed by both parties. The judge vacated it because he found no evidence of exposure, and the Secretary did not petition for review of his decision to vacate.

[10]The Secretary alleged in Item 2 that Respondent violated § 1926.100(a), which provides in relevant part:

> **§ 1926.100 Head protection.**
>
> (a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The Secretary withdrew Item 2 at the hearing without explanation.

statement that the alleged violation of section 1926.20(b)(1) turned on the absence of a program dealing with "all safety, for all types of construction sites, hardhats, and ladders." Thus, it is clear that this issue was not tried by consent and that granting the amendment would impermissibly expand the factual allegations of the citation. We therefore deny the Secretary's motion to amend the citation to allege a violation of section 1926.21(b)(2).

2. 29 C.F.R. § 1926.1060(a)[11]

We also deny the Secretary's motion to amend the citation to allege a violation of section 1926.1060(a) for Lancaster's failure to train its employees to recognize hazards related to ladders and stairways, which the Secretary describes as "commonly encountered construction hazards." There is scant evidence in the record about the condition of the portable ladder the Secretary refers to, usage of the ladder, or the surface on which it was used. Indeed, there was no specific evidence introduced at the hearing identifying any "hazards related to ladders and stairways" at Lancaster's worksite. Moreover, the evidence in the record that Lancaster's employees used a ladder was relevant to pleaded issues, including Item 4 which alleged that Respondent's employees using the ladder and hatchway were exposed to unprotected skylights in the roof.

For the foregoing reasons, the Secretary's motion is denied.

III. ITEM 4: SKYLIGHTS

Item 4 of the citation provides in relevant part: "[e]mployees were exposed to possible serious injury while walking and/or working on the roof where skylights were not provided with covers to prevent an employee from falling through the plexiglass skylight." As noted, the roof of the apartment building was approximately 60 feet long from front to back. Its

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[11]This standard provides:

> **§ 1926.1060 Training requirements.**
> * * *
> (a) The employer shall provide a training program for each employee using ladders and stairways, as necessary. The program shall enable each employee to recognize hazards related to ladders and stairways, and shall train each employee in the procedures to be followed to minimize these hazards.

rectangular, low-sloping surface was divided into sections by an unknown number of parapets that ran from front to back. The sections of the roof between the parapets measured approximately 21 feet each; however, the total width of the roof from side to side is not clear from the record. CO Steel testified that when he inspected Lancaster's worksite, the only way to access the roof was to climb a ladder from the third floor of the building through a square hatchway opening near the back of the roof.

At the time of the inspection, there were two relatively new, plexiglass skylight fixtures installed in the roof, near the front of the building. The square bases of these skylight fixtures measured 40x40 inches and sat above the surface of the roof. Their plexiglass tops had a "bubble" or "dome" shape. There was also an older, glass skylight fixture installed in the roof, near the back of the building, adjacent to the hatchway. The base of this skylight fixture was square and sat above the surface of the roof, and its top had an "A-frame" shape.[12]

To prove a violation, the Secretary must show by a preponderance of the evidence 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." *Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-

[12]We note that the citation was not artfully drafted and neither explicitly refers to the glass skylight, nor cites the appropriate subsection of the standard. *See* n.13, *infra.* Nonetheless, we interpret the citation to include the glass skylight. At the hearing, CO Steel discussed the location of the glass skylight near the hatchway and included it in his sketch of the roof. The Secretary introduced a photograph of the glass skylight and hatchway. The employer did not question Steel's testimony describing the hazard, which did not specify which of the skylights was the basis for Item 4. The employer did not object to the introduction of any of this evidence and did not challenge the relevance of such evidence in its motion to dismiss made during the hearing. Additionally, Respondent's posthearing brief describes one of Complainant's photographic exhibits as depicting certain individuals "near two of the skylights," indicating that it was aware that there was another skylight that was not included in the photograph. Moreover, the Secretary raised explicit arguments about exposure to the hazard posed by the glass skylight in her posthearing brief, and Respondent did not request an opportunity to respond.

900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The judge vacated this item because he found no evidence that employees were exposed to the hazard, and he did not address the other elements of the violation. For the reasons stated below, we reverse the judge's decision and affirm this item.

A. Applicability of the Standard

Section 1926.501(b)(4)(i) provides that: "[e]ach employee on a walking/working surface shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes."[13] This plain language requires protection against falling through holes *and* skylights. An "empty" skylight, *i.e.*, an opening cut in a roof in preparation for the installation of a skylight fixture, is a hole that must be protected within the meaning of

[13]The Secretary originally cited Lancaster for a violation of 29 C.F.R. § 1926.501(b)(4)(iii), which provides that "[e]ach employee on a walking/working surface shall be protected from objects falling through holes (including skylights) by covers." The judge, however, found that the language of the citation describes an alleged hazard of "*tripping in or stepping into or through skylights.*" (Emphasis in original). He amended the citation *sua sponte* to allege a violation of 29 C.F.R. § 1926.501(b)(4)(ii), which requires that "[e]ach employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers," and he held that the parties tried by consent the issue of whether Respondent violated this section. Respondent has not challenged the amendment.

We agree with the judge that the hazard is employees falling or tripping into the skylights. The record clearly supports this notion. In addition to the language of the citation, CO Steel testified that an employee could trip, slip, or fall into a skylight. In its posthearing brief, the employer disputed that objects could fall through the skylights, but acknowledged the possibility that employees could fall through them.

We note that § 1926.501(b)(4)(ii), amended to by the judge, refers to employees "tripping in or stepping into or through holes," whereas § 1926.501(b)(4)(i) refers to employees "falling through holes." Here, the skylight openings appear to be large enough for an employee to fall through to the apartment below. Moreover, the Secretary relied on the language of § 1926.501(b)(4)(i) in her posthearing brief, and Respondent did not object. Thus, while the judge correctly identified the hazard at issue, we correct the judge's amendment to allege a violation of 29 C.F.R. § 1926.501(b)(4)(i).

the standard. *See* 29 C.F.R. § 1926.500(b) (defining "hole"). Therefore, applying the standard only to empty skylights would render the language "(including skylights)" superfluous. *See Empire Co. v. OSHRC,* 136 F.3d 873 (1st Cir. 1998) (basic canon of statutory construction that every portion of the regulatory language must have meaning); *General Motors,* 17 BNA OSHC 1217, 1220, 1993-95 CCH OSHD ¶ 30,793, p. 42,810 (No. 91-2973, 1995) (consolidated) (must give effect to every clause and word in defining a standard's application), *aff'd,* 89 F.3d 313 (6th Cir. 1996). Moreover, the Commission has held that skylights covered with translucent material are "skylight openings" subject to guarding requirements. *See Phoenix Roofing,* 17 BNA OSHC 1076, 1077-78, 1993-95 CCH OSHD ¶ 30,699, pp. 42,603-04 (No. 90-2148, 1995) (citing 29 C.F.R. § 1926.500(b)(4) (1994)), *aff'd without published opinion,* 79 F.3d 1146 (5th Cir. 1996). We conclude, therefore, that the cited standard clearly applies to "intact" skylight fixtures, *i.e.,* those with a plexiglass or glass top in place, as well as empty skylights. Accordingly, we find that the standard's guarding requirement applies to the skylights at Lancaster's worksite.

B. Noncompliance

Photographs taken during the inspection and CO Steel's testimony establish that the glass and plexiglass skylights were not protected by covers or guardrail systems on January 14, 1997. CO Steel also testified that the plexiglass skylights "had a warning label on them that said hazardous. I believe it said 'Fall hazard. These domes will not contain your weight,' or 'will not hold your weight[.]'" There was an apartment below the skylights.

Additionally, the record shows that superintendent Bullens was on the roof on January 14, 1997, during the inspection, and on January 13, 1997, the day the accident occurred. Steel testified that Bullens told him on January 14, 1997 that "this was the way the roof was [on January 13, 1997]. It hadn't changed. The only thing that had changed was, the rubber roof had been installed." Thus, the evidence establishes that the skylights were not in compliance with the standard on January 13, 1997, and January 14, 1997.

C. Access

We also find that Lancaster's employees were exposed to the hazard posed by the unprotected glass skylight on January 13, 1997. According to CO Steel, the ladder in the

hatchway was the only means of accessing the roof when he inspected the worksite on January 14, 1997. Based on conversations with Lancaster's employees, he also testified that immediately after Kulikowski fell on January 13, 1997, foreman Bebo "ran for the hatchway, and ran down the ladder to see what had happened." The precise distance between the glass skylight and the employees' work area is not clear from the testimony; however, it is clear from the CO's sketch of the roof and the photograph of the hatchway that the glass skylight is closely adjacent to the hatchway and ladder. The use of the hatchway to get to and from the roof made it reasonably predictable that an employee would enter the zone of danger presented by the unguarded glass skylight. *See Fabricated Metal Prods.,* 18 BNA OSHC 1072, 1073-74, 1998 CCH OSHD ¶ 31,463, p. 44,506-07 (No. 93-1853, 1997) (citing *Gilles & Cotting, Inc.,* 3 BNA OSHC 2002, 1975-76 CCH OSHD ¶ 20,448 (No. 504, 1976)); *Phoenix Roofing,* 17 BNA OSHC at 1079, 1993-95 CCH OSHD at p. 42,605.

However, the evidence does not show that employees were exposed to the hazard posed by the plexiglass skylights. Kulikowski, McManis, and Walsh worked at the rear of the 60-foot roof, and there is no evidence that they walked or worked near the plexiglass skylights at the front of the roof on January 13, 1997. *See RGM Constr. Co.*, 17 BNA OSHC 1229, 1234, 1993-95 CCH OSHD ¶ 30,754, pp. 42,729-30 (No. 91-2107, 1995). Steel's testimony that foreman Bebo was "working on one of the skylights, or preparing one of the skylights for installation at another point on the roof" does not establish where Bebo worked in relation to the plexiglass skylights on January 13, 1997 and suggests that Bebo may have been working on the glass skylight fixture, which was at the back of the roof, or preparing a new dome to be installed, which could have been anywhere on the roof. Moreover, it is not clear whether Lancaster's employees, or other contractors, installed the plexiglass skylights, and even if we assume *arguendo* that Lancaster's employees installed the skylight fixtures, there is no evidence they installed them on January 13, 1997 or January 14, 1997, the only days on which the Secretary has established that a violative condition existed.

D. Knowledge

To meet her burden of establishing employer knowledge, the Secretary must show that the cited employer either knew or, with the exercise of reasonable diligence, could have

known of the presence of the violative condition. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,583 (No. 87-692, 1992); *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer. *Tampa Shipyards*, 15 BNA OSHC 1533, 1537, 1991-93 CCH OSHD ¶ 29,617, p. 40,100 (No. 86-360, 1992) (consolidated).

As noted, the record shows that superintendent Bullens was on the roof on January 13, 1997, the day the accident occurred, and on January 14, 1997, during the inspection, and that he told Steel on January 14, 1997 that the condition of the roof had not changed. Also as noted, the record shows that foreman Bebo was on the roof on January 13, 1997 and that he used the hatchway ladder on that date. Additionally, the unprotected glass skylight fixture was readily observed during the inspection. Because superintendent Bullens observed the hazardous condition during the inspection and confirmed that the roof was unchanged from the day before, and because the glass skylight was readily observable and closely adjacent to the ladder foreman Bebo used on January 13, 1997, we hold that Lancaster had constructive knowledge of the violation. *See Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871, 1995-97 CCH OSHD ¶ 31,207, p. 43,723 (No. 92-2596, 1996) (finding constructive knowledge due to the conspicuous location and readily observable nature of the violative condition, as well as the presence of the employer's crews in the area). We therefore find that the Secretary established a violation and affirm Item 4 as to the glass skylight.[14]

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[14]Respondent argues in its posthearing brief, upon which it relies here, that those portions of CO Steel's testimony concerning statements made to him by others are inadmissible hearsay. Judge Yetman's decision contains a detailed and well reasoned analysis of the evidentiary issues raised. The judge concluded, based on the relevant subsections of Federal Rule of Evidence 801(d)(2), that the testimony was not hearsay and was admissible. He also concluded that these unrebutted statements were sufficient to affirm the fall protection violation alleged in Item 5. The statements on which we rely in affirming Item 4 are also not hearsay and are admissible. *See* Fed. R. Evid. 801(d)(2)(A) and (D). Although the reliability of these particular statements was not specifically considered by the

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IV. CHARACTERIZATION OF THE VIOLATION

"[A] violation is serious if there is a substantial probability that death or serious physical harm could result from the violation." *Capform, Inc.*, 16 BNA OSHC 2040, 2042, 1993-95 CCH OSHD ¶ 30,589, p. 42,357 (No. 91-1613, 1994) (citing 29 U.S.C. § 666(k)). The judge did not reach this issue. Here, CO Steel testified that "if an employee . . . tripped, slipped, or potentially, f[e]ll into one of these [skylights], he could be seriously hurt, or death could result." An employee who fell through the opening could be cut by the glass and could fall through onto the floor of the apartment below. We find that the violation was serious. *Cf. Phoenix Roofing*, 17 BNA OSHC at 1078, 1993-95 CCH OSHD at p. 42,604-05 (a 23 square-inch skylight opening that was flush with the roof surface, lacked any parapet or barricade around it, and had only flimsy covering of translucent material presented a fall hazard).

V. PENALTY

The Act mandates that the Commission give "due consideration . . . to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). "The gravity of a particular violation depends on 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." *Id.* The Secretary proposed a penalty of $4,500 for the skylight item.

In applying the four factors here, we note that we affirm the violation in regard to only one of the three skylights alleged by the Secretary to be in violation, and we note that

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[14](...continued)
judge, we conclude that his findings regarding CO Steel's other testimony would apply to these similarly unrebutted statements as well.

the fatal accident was not related to it. The employer is small, with ten employees, and there is no evidence of other recent violations. In regard to good faith, we note that Lancaster had no safety program. In light of these four factors, we assess a penalty of $2,500.

VI. ORDER

For the reasons set forth above, we vacate Item 1. We affirm Item 4 as a serious violation of 29 C.F.R. § 1926.501(b)(4)(i) for which we assess a penalty of $2,500.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

/s/
Stuart E. Weisberg
Commissioner

Date: August 1, 2000

SECRETARY OF LABOR,

Complainant,

OSHRC
Docket No. 97-0771

v.

LANCASTER ENTERPRISES, INC., d/b/a
ORBIT ROOFING COMPANY,

Respondent.

Appearances:

Christine Eskilson, Esq.
Office of the Solicitor, Boston, MA
U.S. Department of Labor
For Complainant

Barrett A. Metzler, CSP
Northeast Safety Management, Inc.
Columbia, Connecticut
For Respondent

Before Administrative Law Judge Robert A.Yetman

DECISION AND ORDER

This proceeding arises under § 10 (c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq* ("the Act") to review a citation issued by the Secretary of Labor pursuant to § 9 (a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10 (a) of the Act.

Following a fatal accident at Respondent's work site on January 13,1997, an inspection was conducted by complainant commencing January 14, 1997. As a result of the inspection, a serious citation was issued to Respondent alleging six violations of various construction standards. Complainant withdrew item 2 of the citation and the penalty proposed for said violation at the hearing

conducted in this matter. In response to the complaint filed by the Secretary with this commission, Respondent concedes subject matter jurisdiction of the commission as well as jurisdiction over Respondent. Respondent generally denies the remaining allegations within the complaint and asserts four affirmative defenses.

The following facts were stipulated by the parties:

> **1.** On January 13, 1997, employees of Lancaster Enterprises, Inc., d/b/a Orbit Roofing ("Orbit"), were engaged in roofing activities at 5-17 Cleaves Court, Roxbury Massachusetts pursuant to a contract with Northeast Cleaves Limited Partnership, the owners of Cleaves Court Apartments. The job had started during the last week of December 1996.
>
> **2.** 5-17 Cleaves Court is an apartment building. Orbit employees were installing a rubber roof.
>
> **3.** The roof of 5-17 Cleaves Court is a low-slope roof approximately thirty-three feet above the ground.
>
> **4.** At approximately 2:30 p.m. on January 13, 1997, Orbit employee John Kulikowski fell from the roof at Cleaves Court and died.
>
> **5.** At the time of the fall, Kulikowski and Orbit employee Mark McManus were engaged in laying rubber to finish the plywood roof section above the porch at the rear of 5-17 Cleaves Court.
>
> **6.** At the time of the fall, Orbit employees Edward Walsh and Joseph Bebo were also on the roof. Bebo was the foreman for the job.
>
> **7.** Orbit did not use a guardrail system to protect its employees from falling from the edge of the roof.
>
> **8.** Orbit did not use a safety net system to protect its employees from falling from the edge of the roof.
>
> **9.** Orbit did not use a personal fall arrest system to protect its employees from falling from the edge of the roof.

Respondent's answers to complainant's interrogations and response to requests to produce documents (Exhibits C-1 and C-2) were also entered into evidence. Complainant called one witness, Mr. Alexander Jay Steel, the compliance officer who conducted the investigation and respondent rested its case without calling any witnesses. Although the period of investigation set forth in the

citation is January 14, 1997 to August 4, 1997, the evidence elicited at the hearing supports the inference that all of the alleged violations occurred on January 13, 1997.[15]

Discussion

The citation issued to Respondent contains the following alleged construction standard violations:[16]

> Citation 1 Item No. 1
>
> 29 CFR 1926.20(b)(1)
>
> The employer did not initiate and maintain such programs as were necessary to comply with this part:
>
> Jobsite:
>
> > A Safety Program, which included, weekly safety meetings, training and walkaround inspections, was not implemented, to train and instruct employees in the recognition and avoidance of unsafe conditions.

The standard set forth at 29 CFR 1926.20(b)(1) reads as follows:

> (b) *Accident Prevention Responsibilities*
>
> (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

The language of the cited standard is remarkable because, on its face, it cannot be determined what conduct is required of Respondent. Moreover, the standard appears to grant discretion to employers to determine which programs "may be necessary to comply with this part." In this instance the Secretary takes the position that Respondent violated the standard by failing to have a safety program. In support of the allegation, complainant points to the testimony of compliance officer Steel that the firm's owner, Marie Raftes, and superintendent, Mr. Dan Bullens, admitted to him that

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15 According to compliance officer Steel, no employees were working on the roof on January 14, 1997.

16 Although not addressed by the Secretary at the hearing or in her post hearing brief, the record supports the conclusion that roofing activities fall within the meaning of construction. See 29 CFR 1910.12(b); *Tilo Company Inc.* 1971-1973 CCH OSHD ¶ 15,678.

Respondent firm did not have a safety program, did not conduct safety meetings or provide safety training to employees (Tr. 66-67).[17] However, according to Mr. Steel, the alleged violation relates to the firm's failure to have a safety program relating to matters other than roofing operations (Tr. 77). The failure to have a safety program relating directly to the roofing industry is addressed at citation item 6 *infra*.

Although the standard cited in this instance is a paragon of ambiguity regarding the substance of the safety program required, (See *Pelron Corp* 12 BNA at 1835 where the Commission stated that the Secretary must define an alleged hazard in a way that "apprises the employer of its obligations.") the Review Commission has held that a reasonably prudent and experienced employer would understand which "specific measures" are required to be taken under the standard to protect employees from safety hazards that may be present at specific worksites *see Northwood Stone and Asphalt 1994 CCH OSHD ¶ 30,583 at page 42,349.* The only evidence presented by the Secretary in support of this allegation is the "admission" made to the compliance officer by management personnel that the firm did not have a safety program.[18] Although there is no evidence regarding the hazards that are reasonably expected to be present at Respondent's worksites, it is inferred, based upon the record in this case, that employees are exposed, at a minimum, to fall hazards. However, the paucity of this record leaves one to guess at which specific hazards must be addressed by a safety program. Clearly, Respondent need not have a safety program for ship repair (29 CFR 1926.30) and it is unlikely that Respondent's work activities require an employee emergency action plan (29 CFR 1926.35) or that Respondent is required to provide means of egress pursuant to 29 CFR 1926.34. Although Complainant has established that management officials of this small company acknowledged to an interrogating government official that the firm does not have a safety program, there is no direct evidence that specific hazards covered by subpart C of the regulations or at another part of the 1926 construction standards existed at respondent's worksite which required the establishment of a safety program contemplated by the Secretary. Indeed, it is not known what the Secretary requires in this instance. This is particularly significant since the Secretary cited Respondent for its failure to have a training program for employees exposed to fall hazards *see* item 6 *infra*. In the absence of any

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[17]This testimony was admitted into evidence pursuant to Rule 801(d)(2)(A) Fed. Rules of Ev.

[18]

There is no requirement that the programs required by the standard must be in writing *see generally* Subpart C 29 CFR 1926.20 et seq.

evidence establishing hazards covered by subpart C, or any other part of the construction standards, for which a safety program must be established, this item must be vacated.

> Citation 1 Item 3
>
> 29 CFR 1926.252(a): An enclosed chute of wood, or equivalent material, was not used where materials were dropped more than 20 feet to points lying outside the exterior walls of the building(s):
>
> Jobsite: Cleaves Court Apartments
>
> > An enclosed chute was not used when materials were thrown from the roof level to a dumpster located greater than 20 feet below the roof level.

The only evidence presented by the Secretary in support of this alleged violation are the "admissions" of Mr. Dan Bullens, Respondent's superintendent and an employee named Walsh; both of whom were interviewed by the compliance officer. According to compliance officer Steel, Mr. Bullens stated that there was no enclosed chute from the roof to the waste dumpster located on the ground level as required by the standard. Moreover, Mr. Walsh told Mr. Steel that on January 13, he threw materials from the roof (Tr. 82). In addition, the roof level was more than twenty feet above the top edge of the dumpster into which debris was dropped (Tr. 86). A critical element missing from complainant's presentation, however, is any evidence that employees were in danger of being struck by falling materials. Thus, Complainant has failed to establish a fundamental element; employee exposure to a hazard, *see Turner Construction Co.* 1987-1990 CCH OSHD ¶ 28,031; *McCrory - Sumwalt Construction* 1974-1975 CCH OSHD 19,552. In the absence of any evidence of employee exposure to the alleged hazard, this item must be vacated.

> Citation 1 Item 4
>
> 29 CFR 1926.501(b)(4)(iii): Each employee on a walking/working surface were not protected from objects falling through holes, including skylights, which were not provided with covers.
>
> Jobsite: Cleaves Court Apartments, roof level:
>
> > Employees were exposed to possible serious injury while walking and/or working on the roof where skylights were not provided with

covers to prevent an employee from falling through the plexiglass skylight.

As set forth above, the standard cited herein requires that employees be protected from *objects* falling through the skylights located at the worksite. The descriptive language contained in the citation, however, describes an alleged violation of 29 CFR 1926.501(b)(4)(ii); that is, employees shall be protected from *tripping in or stepping into or through skylights by covers.* It is clear from the descriptive language contained in the citation, as well as the evidence elicited at the hearing from the compliance officer, that the Secretary intended to cite respondent for a violation of 29 CFR 1926.501(b)(4)(ii) rather than (b)(4)(iii). Based upon the record, it is concluded that the parties tried the issue of whether Respondent violated section 1926.501(b)(4)(ii) by consent. Accordingly, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, citation item 4 is amended to allege a violation of section 1926.501(b)(4)(ii). *National Realty and Construction Co. v. OSHRC* 489F2d 1257 (D.C. Cir 1973); *John and Ray Carlstrom* 6 BNA OSHC 2101(1978); *Rodney E. Fossett* 7 BNA OSHC 1915(1979).

As with the other alleged violations, the only witness called by the Secretary to establish this violation was the compliance officer, Mr. Steel. Photographs depicting the skylights on January 14 were entered into evidence without objection (Exhibits C-7, C-8). These photographs were taken when no work was being performed at the worksite. Compliance officer Steel testified that he was told by superintendent Bullens that the roof conditions, including the skylights, were the same as in the photographs on January 13. There is no evidence, however, that any employee was working or walking in such proximity to the skylights that they were exposed to the hazard of tripping or stepping into or through the skylights. Once again the Secretary invites speculation that employees must have been in close proximity to the skylights during their normal work activity without providing any basis for arriving at the conclusion. Because of the failure to present any percipient witnesses to the conditions as they existed at the worksite, including employee exposure on January 13, I am constrained to vacate this item.

Citation 1 Item 5

29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low sloped roofs with unprotected sides and edges, six feet or more above the lower levels, were not protected from falling by the

use of a guardrail system, safety net system, or personal fall arrest system:

Jobsite: Cleaves Court Apartments, roof level, rear of the building area.

The Secretary amended the descriptive language of this item at the hearing to read as follows:

On or about January 13, 1997, employees of this company were exposed to serious fall hazards while performing their work duties on the roof, where the use of a guardrail system, safety monitor or personal fall arrest system was not used to prevent a fall from the unprotected edge of the roof, greater than six (6) feet to the parking lot.

The Secretary asserts that Respondent's alleged failure to comply with the aforesaid standard resulted in the tragic death of Respondent's employee. As in the case of the other alleged violations, the Secretary presented one witness in support of the allegation. Although the witness, compliance officer Steel, was not present at the work site at the time of the accident, he interviewed management personnel and related the "admissions" made to him by those officials. Respondent presented no witnesses or other evidence regarding this item.

The following facts have been gleaned from this sparse record. On January 13, 1998, Respondent's employees were engaged in placing a new roof on an apartment building located at Roxbury Massachusetts. It was a slightly pitched flat roof, 57 feet 7 inches by 66 feet 33 inches (Tr. 37) and approximately 33 feet high (Stipulation #3). The roof also extended over porches which were located along the length of the three story building (Tr. 31, Ex C-1). Four of Respondent's employees were on the roof installing insulation board over the plywood roofing materials which was then covered with glue. Finally, sheet rubber was placed on the glue. Employees Kulikowski and McManus were working at the edge of the roof which extended over the porches applying the glue and rubber to the roof surface. Respondent's foreman, Mr. Bebo, was working at another part of the roof; however, he was not observing employees Kulikowski and McManus standing at the roof edge. He heard a bang, turned around and saw only Mr. McManus standing at the roof edge. He yelled for someone to call an ambulance. The fourth person, Mr. Walsh, was cleaning up debris at the time of the accident (Tr. 55-57). All of this information was conveyed to Mr. Steel by Mr. Bebo and was admitted into evidence pursuant to Rule 801(d)(2)(A) of the Federal Rules of Evidence.

Mr. Bebo also told compliance officer Steel that warning lines had been placed on the roof but had been moved back from the edge approximately six feet because they interfered with the work (Tr. 54 see Exh. C-6). According to compliance officer Steel, he was told by management representatives that the injured employee was working within one foot of the roof edge (Tr. 47, 55). Respondent stipulated that no guardrails, safety nets or personnel fall arrest systems were in use at the time of the accident. Moreover, according to Mr. Steel, Respondent's superintendent, Dan Bullens admitted that no safety monitor had been designated or was used on the roof at the time of the accident (Tr. 51) See 29 CFR 1926.502(h)(1). Although Mr. Bullens was not present at the worksite at the time of the accident, his admission to Mr. Steel was admitted into evidence pursuant to Rule 801(d)(2)(B) of the Federal Rules of Evidence.

In order to establish that Respondent failed to comply with the cited standard, the Secretary must prove that (1) the standard applies; (2) the employer failed to comply with the terms of the standard; (3) employees had access to the cited condition; (4) the Respondent knew, or with the exercise of reasonable diligence, could have known of the violative condition. *Astra Pharmaceutical Products, Inc.*, 1981 CCH OSHC ¶ 25,578, aff'd 681 F.2d 69 (1st. Cir. 1982); *Secretary of Labor v. Gary Concrete Products,* 15 BNA OSHC 1051, 1052, 1991-1993 CCH OSHD ¶ 29,344 (1991). The burden of establishing these elements rests with the Secretary of Labor. Moreover, the elements must be established by a preponderance of the evidence *Armor Elevator Co.* 1 OSHC 1409, 1973-1974 OSHD ¶ 16,958 (1973). The Commission has defined "preponderance of the evidence" as "that quantum of evidence which is sufficient to convince the trier of fact that the facts as asserted by a proponent are more probably true than false" *Ultimate Distrib Systems, Inc.*, 10 OSHC 1569, 1570 (1982). To carry that burden, the secretary relied exclusively upon admissions made to the compliance officer by Respondent's management representatives. These statements were admitted pursuant to FRE Rule 801(d)(2)(A) and (B). Admissibility, however, does not establish the trustworthiness or reliability of those statements *see Regina Construction Co.* 15 BNA OSHC 1044 (1991). In *Regina* the Commission stated:

> Although admissions under rule 801(d)(2)(D) (employee statements), are not inherently reliable, there are several factors that make then likely to be trustworthy, including: (1) The declarant does not

> have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant is well informed and not likely to speak carelessly; (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted. 4D. Louisell & C. Mueller, *Federal Evidence* § 426 (1980 & Supp. 1990).

Id at 1048

Based upon the record in this case as a whole, certain inferences can be made regarding the statement made to the compliance officer. First, based upon the nature of the admissions, there is no basis to conclude that the management representatives were concerned about their own self interest or felt pressure from their employer. Moreover, it is clear that Respondent had an ample opportunity to rebut the information contained in the statements. However, an out of court statement "inherently has less probative value than would the employee's own testimony and is not necessarily entitled to dispositive weight" *Continental Electric Co.,* 13 BNA OSHC 2153,2155, N.6 (1989). The reason is obvious; credibility findings are critical in evaluating conflicting or inconsistent statements. In *Morrison-Knudsen, Inc.,* 13 BNA OSHC at 1124, the Commission stated:

> "When an out-of-court statement is introduced, the trier of fact has no opportunity to assess the credibility of the person who made the statement and must therefore allow for the possibility that the statement is exaggerated, incomplete, taken out of context, or even false. Also, neither the other party nor the judge has a chance to cross-examine the person who made the statement. The only person able to evaluate the statement's credibility is the person who heard the statement and is testifying to its contents. These considerations suggest that out-of-court statements can not always be taken at face value."

Moreover, there is no indication that the individuals who gave the statements were unavailable to testify.

It is recognized, however, that an admission against self interest made by management personnel to a compliance officer is strong evidence, as in this case, that Respondent failed to comply with the aforesaid standard as alleged. Thus, there is a sufficient basis in the record for concluding that the facts asserted by the Complainant are more probably true than false. *See Ultimate Distrib. Systems Inc. supra.* I am compelled to reach this conclusion because of Respondent's failure to shed any light on the conditions at the worksite or the activities of the employees involved at the time of the tragic accident. As stated by the First Circuit Court of Appeals in *Astra Pharmaceutical Products Inc.* 681F2d at 74:

> While the Secretary had the burden of proving its case by substantial evidence, what constitutes substantial evidence varies with the circumstances. The "evidence a reasonable mind might accept as adequate to support a conclusion" is surely less in a case like this is where it stands entirely unrebutted in the record by a party having full possession of all the facts, than in a case where there is contrary evidence to detract from its weight. *See, e.g., Noranda Aluminum, Inc. v. OSHRC,* 593 F.2d 811, 814 & n.5 (8th Cir. 1979) (decision to leave Secretary's case unrebutted "a legitimate but always dangerous defense tactic in litigation"); *Stephenson Enterprises, Inc. v. Marshall,* 578 F.2d 1021, 1026 (5th Cir. 1978). Thus, thin as the underlying evidence was, we find it sufficient in these circumstances.

For the foregoing reasons, the violation alleged is affirmed. Furthermore, in view of the tragic consequences at the worksite, the violation is found to be serious within the meaning of the statute. The Secretary proposes a penalty in the amount of $6,300 for the violation. This proposal is based upon a high gravity factor (death of an employee) with a 10% reduction from the maximum penalty of $7,000 due to Respondent's history of no prior violations. For these reasons the proposed penalty in the amount of $6,300 is assessed for the violation.

> Citation 1 Item 6
>
> 29 CFR 1926.503(a)(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:
>
> Jobsite: Cleaves Court Apartments, roof level, rear of the building area
>
> On or about January 13, 1997, employees were not adequately instructed and trained in the recognition and avoidance of unsafe conditions, with regards to working on a roof and the fall hazards to which they may be exposed, and the regulations applicable to that type of work environment.

According to compliance officer Steel, management representatives admitted that the company did not possess a training program for employees exposed to fall hazards nor had any of Respondent's employees been trained in the recognition of fall hazards and the procedures to be followed to minimize fall hazards (Tr. 37). Respondent failed to present any evidence to rebut or explain these admissions. Accordingly, for the reasons set forth at citation item 5 *supra*, this item is affirmed as a serious violation. Moreover, for the reasons set forth above, the proposed penalty in the amount of $4,500 is assessed for the violation.

Findings of Fact

All findings of fact 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. Proposed findings of fact that are inconsistent with this decision are denied.

Conclusions of Law

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the act.

2. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and the subject matter of this proceeding.

3. At the time and place alleged, Respondent was not in violation of 1926.20(b)(1) (citation 1 item 1).

4. At the time and place alleged, Respondent was not in violation of 29 CFR 1926.252(a) (citation 1 item 3).

5. At the time and place alleged, Respondent was not in violation of 29 CFR 1926.501(b)(4)(iii) (citation 1 item 4).

6. At the time and place alleged, Respondent was in violation of 29 CFR 1926.501(b)(ii) and said violation was serious within the meaning of the Act (citation 1 item 5).

7. At the time and place alleged, Respondent was in violation of 29 CFR 1926.503(a)(1) and said violation was serious within the meaning of the Act (citation 1 item 6).

Order

1. Serious citation 1 item 1 is **VACATED**.

2. Serious citation 1 item 2 is **WITHDRAWN**.

3. Serious citation 1 item 3 is **VACATED**.

4. Serious citation 1 item 4 is **VACATED**.

5. Serious citation 1 item 5 is **affirmed and a penalty in the amount of $6,300 is assessed thereto.**

6. Serious citation 1 item 6 is **affirmed and a penalty in the amount of $4,500 is assessed thereto**.

/s/

ROBERT A. YETMAN
Judge, OSHRC

Dated: July 23, 1998
Boston, MA