United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

LATITE ROOFING & SHEET METAL CO., INC.,

Respondent.

OSHRC Docket No. 02-0656

APPEARANCES:

Mark J. Lerner, Esq., Department of Labor, Washington, DC
For the Complainant

William F.Kaspers, Esq., Kaspers & Associates, Atlanta, Georgia
For the Respondent

DECISION

Before**:** RAILTON, Chairman, and ROGERS, Commissioner.

BY THE COMMISSION:

At issue in this case is a citation issued to Respondent Latite Roofing & Sheet Metal Co., Inc. (Latite) alleging serious violation of a residential-construction fall protection standard. Latite contested the citation,[1] and Administrative Law Judge Ken S. Welsch affirmed. We reverse the judge with respect to instance (a) of Citation 1, Item 1, and thus vacate the citation item in part.

Background

Latite is a large roofing contractor in an area of Florida encompassing Palm Beach, Northern Palm Beach, and Dade Counties. At the time of the subject inspection,

[1] Latite also contested a sub-item under the same standard related to a walkway that lacked fall protection, and another citation for stairways that lacked railings. The judge affirmed these citation items and Latite did not petition for review of them.

Latite was installing roofs on a two and three story apartment building at a residential construction site in Fort Lauderdale. The second-story portion of the roof had an eave height of 17 feet, while the third-story portion had an eave height of just under 28 feet. The frame was made of 2- by 4-inch pine wood trusses covered with a plywood deck, on which Latite installed a concrete-tile roof. Latite's roofing process on this and similar wood-framed concrete-tile roofs requires roofers to first complete the "dry-in phase," which consists of laying felt paper over the plywood deck and placing metal flashings around the exposed edges. In the "hot-mopping phase," hot asphalt is mopped over the felt and a second layer of felt is applied. Finally, the tiles are loaded onto the roof and installed with nails.

On December 11, 2001, two OSHA compliance officers observed three Latite employees working on the dry-in phase of the subject apartment building without conventional fall protection. On March 21, 2002, OSHA, in instance (a) of citation 1, item 1, cited Latite under 29 C.F.R. § 1926.501(b)(13),[2] for exposing employees "on a 6 in 12 sloped roof, with a ground to eave height of 27 feet . . . to a fall hazard due to the lack of a fall protection system." Before the judge, Latite did not dispute that it had failed to provide conventional fall protection, but claimed that it was infeasible and posed a greater hazard to do so, and therefore, it had been appropriate to use an alternative fall protection plan. *See* 29 C.F.R. § 1926.501(b)(13) (if employer can demonstrate

[2] Section 1926.501(b)(13) provides:

> *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 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.

infeasibility or greater hazard, employer can implement fall protection plan conforming with 29 C.F.R. § 1926.502(k)). Latite's alternative plan consisted of painting a yellow line three feet from the perimeter of the roof and having a foreman act as a safety monitor.

This is not the first time OSHA and Latite have differed over the use of fall protection in residential construction. In the early 1990's, OSHA cited Latite twice for not having catch platforms in violation of fall protection standards related to scaffolding.[3] Latite hired a firm to develop a portable and reusable catch platform, but, according to Latite, the firm was not successful in designing a platform that would support a falling worker and not interfere with their and other contractors' work. OSHA later withdrew the citations in an informal conference. When section 1926.501 went into effect in 1994, Latite met with OSHA's area director to determine whether it should seek a variance from the new regulations, and the area director told Latite that it should instead develop and implement an alternative fall protection plan under sections 1926.501(b)(13) and 1926.502(k). Latite then developed a plan based on the "Sample Plan for Residential Construction" contained in Appendix E to Subpart M of section 1926. In developing the plan, Latite relied on a July 12, 1995 memorandum by then-Deputy Assistant Secretary of Labor James Stanley (the "Stanley memorandum"), which indicated that contractors complying with Subpart M's provisions for fall protection plans would not always have to demonstrate infeasibility or greater hazard at each project site. This memorandum also stated that "proper notice" would be given to employers if OSHA came across or developed abatement methods that were "equal to or better than those set forth in the attached plans." OSHA first cited Latite for not providing fall protection under section 1926.501(b)(13) in November 1995, but this citation was also withdrawn.

Almost four years later, in June 1999, OSHA again cited Latite under section 1926.501(b)(13), and this time the parties went to a hearing before Judge Welsch. The roofs at issue in that case were materially identical to the one underlying the instant

[3] *See* 29 C.F.R. § 1926.451(u)(3) (1993) (repealed).

citation (*i.e.*, the frames were 2- by 4-inch pine wood trusses covered with plywood, and they had similar slopes and eave heights). The roofing methodology used at both sites was also identical, and the record shows no noteworthy difference in site conditions. In a decision issued on August 30, 2000, the judge vacated the 1999 citation, concluding that Latite had demonstrated through the unrebutted testimony of its expert witnesses that using conventional fall protection systems listed in the cited standard would have created a greater hazard. *Latite Roofing & Sheet Metal Co., Inc.*, Docket No. 99-1292 (Aug. 30, 2000) ("*Latite I*") The Secretary did not petition for review of the decision, and it became a final order of the Commission on October 10, 2000.

Again, OSHA cited Latite on October 28, 2000, and four more times over the next eight months, alleging fall protection violations under various subparts of section 1926.501(b). The Secretary settled four of the citations after a March 1, 2001 meeting between Latite and OSHA in Atlanta, and settled a fifth citation, issued in June 2001, in November 2001. In each case, the Secretary withdrew allegations that Latite employees were not provided fall protection, and instead alleged training violations or violations of the alternative fall protection plan. The record establishes that at the March 2001 meeting OSHA agreed Latite could use an alternative plan if it could show conventional fall protection was infeasible, and that Latite needed to improve its training. Subsequent to the meeting, Latite invested over $100,000 in producing a training video. Also, the parties to the meeting agreed to share technological developments with each other.

After ten days of hearing in the current case, Judge Welsch upheld the instant citation. The judge considered and relied on rebuttal evidence presented by the Secretary's expert witness, Michael Wright, on various types of fall protection including personal fall arrest systems, guardrail systems, catch platforms, and scaffolding.

Discussion

Having considered the record as a whole, particularly the parties' fifteen-year history of inspections and citations involving residential fall protection, followed by settlements, along with possible confusion engendered by the Stanley memorandum, we conclude that Latite lacked fair notice that its conduct at the time of the subject citation

did not comply with the standard. *See, e.g., Martin v. OSHRC (CF&I)*, 499 U.S. 144, 158 (1991) (Secretary's decision to use citation as initial means to announce interpretation may bear on adequacy of notice to regulated parties); *cf. Gen. Elec. Co. v. EPA ("GE")*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (even if agency's interpretation is reasonable, penalty cannot be sustained unless regulated party had fair notice of interpretation).

The record shows that when the new fall protection standards went into effect Latite sought OSHA's advice and was told that rather than file a variance, it should develop an alternative plan. Despite this response, the Secretary has cited Latite six times in the last four years for very similar alleged violations. Each time Latite either prevailed on the merits or the Secretary settled the citations by requiring training or the implementation of a performance plan, the same measure the Secretary recommended to Latite when the standard went into effect. Further, in *Latite I*, the Secretary failed to present any rebuttal evidence to Latite's greater hazard and infeasibility argument, or to give any indication that circumstances had changed such that Latite could no longer rely on its alternative plan. Then, at the subsequent March 2001 meeting, OSHA represented to Latite that an alternative plan would be acceptable in at least some residential roofing situations.

Now, the Secretary argues here that Latite should be able to provide some form of fall protection to its workers, including guardrails, scaffolds, catch platforms, or several types of fall arrest systems, at all stages of the roofing process, a position she is entitled to take for the future. Before the hearing in this case, however, the Secretary appeared to have given Latite the impression that its alternative plan would suffice. Moreover, Latite could reasonably have interpreted the Stanley memorandum as meaning that it was not required to make a site-specific showing of infeasibility at all similar residential building sites, and that it would be notified before being cited if OSHA was planning to change its

position and insist that Latite use a previously unemployed fall protection system.[4] *See GE*, 53 F.3d at 1333-34 (unclear policy statement contributed to lack of fair notice).

Given the Secretary's lengthy and confusing course of conduct with Latite, we conclude Latite lacked notice at the time of the citation that it was under a duty to implement one or more of the fall protection systems the Secretary proposed, and therefore could no longer rely on its alternative plan. *See Diebold v. Marshall*, 585 F.2d 1327, 1336-37 (6th Cir. 1978) (looking at "collection of several factors" including common practice and pattern of administrative enforcement; while employers are under duty of inquiry, duty is not triggered where employer looking at language of regulation or industry practice would believe it was exempt from standard's requirements). *See also GE*, 53 F.3d at 1332 (confusion and disagreement within agency is evidence that employer did not receive fair notice). Thus, we vacate this citation sub-item.[5]

Penalty

The Secretary proposed a $4,500 penalty for the grouped instances of violation cited under section 1926.501(b)(13), one of which is not before us on review. The judge assessed a penalty of $3,000. Because we vacate one of the instances, we reduce the penalty assessed for this item to $1,500.

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[4] In her brief, the Secretary states that the 1995 Stanley memorandum has been partially superseded by two later instructions, Interim Guidelines on Fall Protection in Residential Construction, Instruction STD 3.1 (Dec. 8, 1995), and its plain language revision, STD 3-0.1A. (June 18, 1999) These compliance guidelines allow for use of alternative fall protection procedures for roofing work only where the fall distance is 25 feet or less. As the parties concede, the guidelines do not apply here. But neither of the guideline documents explicitly cancels, amends, or even refers to the Stanley memorandum. In contrast, the plain language revision, STD 3-0.1A, explicitly cancels the original guidelines, STD 3.1. And both the plain language revision and the Stanley memorandum remain available on OSHA's web site, while the original compliance guidelines, STD 3.1, have been archived at an "OSHA ARCHIVE" web site, and are clearly labeled as not representing OSHA policy. Thus, this less than clear relationship between the Stanley memorandum and the current compliance guidelines, STD 3-0.1A, may have contributed to Latite's confusion.

[5] Given our disposition of the case on notice grounds, we find it unnecessary to address Latite's other arguments.

Order

Accordingly, we vacate subpart (a) of item 1 of citation 1, and we assess a penalty of $1,500 on this item.

SO ORDERED.

_____/s/_____
W. Scott Railton
Chairman

_____/s/_____
Thomasina V. Rogers
Commissioner

Dated: September 16, 2005

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. Latite Roofing & Sheet Metal Co., Inc., Respondent.	OSHRC Docket No. **02-0656**

Appearances:

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For Complainant

William F. Kaspers, Esq., Kaspers & Associates Law Offices, LLC, Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Latite Roofing & Sheet Metal Co., Inc. (Latite), a large roofing contractor in south Florida, has had an ongoing dispute with the Occupational Safety and Health Administration (OSHA) on the feasibility of conventional fall protection systems under 29 C.F.R. § 1926.501(b)(13) to protect its roofers on garden apartments with wood truss supported roofs and an eave height in excess of 25 feet. Latite claims that such structures provide unsuitable anchorage for various fall protection systems and the costs are prohibitive. Instead of conventional fall protection, Latite utilizes an alternate fall protection program consisting of employee training, a designated monitor, and a painted warning line 3 feet from the edge of the roof.

On August 30, 2000, this judge vacated a citation issued to Latite, alleging a violation of 29 C.F.R. § 1926.501(b)(13), on the basis that the Secretary failed to rebut Latite's showing of greater hazard in the use of conventional fall protection on a 3-story apartment building with a roof slope of 5 in 12 and an eave height of 28½ feet. Latite's alternate fall protection plan was also found to meet the requirements of the standard. *Latite Roofing and Sheet Metal Co., Inc.,* 19 BNA OSHC

1287 (No. 99-1292, 2000); review not sought by the Secretary (*Latite 1*). *Also see* Exhs. R-8, R-24.

In the present case, OSHA safety compliance officers (COs) Danezza Quintero and Denise Richburg observed on December 11, 2001, three Latite employees installing felt on the roof of a 2 and 3 story garden apartment building (building 10) under construction in Fort Lauderdale, Florida. The employees were not utilizing any conventional fall protection system and were exposed to a fall hazard in excess of 27 feet. As a result of OSHA's inspection, Latite received a serious citation on March 21, 2002. Latite timely contested the citation.

The serious citation alleges that Latite violated 29 C.F.R. § 1926.501(b)(13) (item 1) by failing to provide employees engaged in residential construction with conventional fall protection while installing felt on a roof slope of 6 in 12 and an eave height greater than 27 feet (instance a) or while using a walkway approximately 10 feet above the ground to access the roof (instance b); and 29 C.F.R. § 1926.1052(c)(1) (item 2) by failing to equip two stairways with stair rails leading to the walkway. Penalties of $4,500 and $1,500, respectively, are proposed for the alleged violations.

A hearing was held in Fort Lauderdale, Florida on September 30 - October 4, and November 4 - 8, 2002. Jurisdiction and coverage are stipulated (Tr. 5). The parties filed post-hearing briefs.

Latite denies the alleged violations. Latite argues that its alternate fall protection plan is the only appropriate fall protection for roofs supported by wood trusses such as building 10. Latite claims that conventional fall protection systems, including scaffolding, guardrails and personal fall arrest systems, are infeasible or would present a greater hazard to employees. Also, Latite asserts that OSHA is estopped from issuing the citation for violation of § 1926.501(b)(13) because of (1) the court's previous decision on August 30, 2000; (2) representations made by OSHA officials at meetings in Fort Lauderdale, Atlanta, and Washington, D.C.; and, (3) OSHA's withdrawal of earlier citations alleging violations of § 1926.501(b)(13). If not estopped, Latite argues that the alleged violation is barred by vindictive prosecution.

For the reasons discussed, Latite's estoppel and vindictive prosecution arguments are rejected. The record establishes that conventional fall protection was feasible and not a greater hazard to employees working on building 10 on December 11, 2001. Also, the record shows that employees used the stairway and walkway to access the roof without fall protection. Violations of

§ 1926.501(b)(13) and § 1926.1052(c)(1), therefore, are affirmed, and penalties of $3,000 and $1,000 are assessed.

Background

Latite is a large roofing contractor in south Florida. Latite is owned and operated by David Struve, chief executive officer, and his son Steven Struve, president. David Struve purchased Latite in 1983. Through his ownership, Latite has grown to annual revenues of approximately $50 million and 400 employees. Latite estimates that its residential tile roofing business is in excess of 15% of the market share in the three county south Florida area. Latite claims to have the best safety record of any residential tile roofer in south Florida, with fewer accidents and lower insurance costs (Tr. 652, 743, 749, 754-755, 760, 763-766, 931, 2170).

The principal roof installed by Latite is concrete tiles. The tiles weigh approximately 12 pounds and there are 90 tiles per roofing square. Latite estimates that it takes 20 minutes to set a square of tiles. On building 10, there were approximately 160 squares. The installation of concrete tiles differs from the typical shingle roof where shingles are placed over tar paper. The first phase of tile installation also involves covering the plywood deck with 30-weight felt paper and placing metal flashing around the exposed edges. Latite refers to this process as the dry-in phase. After the dry-in phase is completed, however, hot asphalt is mopped over the felt and another layer of felt is installed. This is referred to as the hot mopping process. When the hot mopping process is completed, the concrete tiles are loaded on the roof and later installed by nails. The county conducts regular inspections throughout the installation process (Tr. 755, 806, 809, 818-819, 945, 977, 1027, 2186).

Latite uses separate crews to perform the dry-in phase, hot mopping process, loading tiles on the roof, and installing the concrete tiles. Each phase is done separately. The entire installation process may extend over a 5-month period, as in this case. For example, Latite's dry-in process on building 10 took 2 days and a crew of 3 employees to install the felt (December 11 and 13) and 1 day for the metal flashing (December 22). The hot mopping process took 2 days and a crew of 4 employees (January 21- 22). The tiles were loaded on the roof in 3 days (January 23-25) by a crew of 4 employees. The concrete tiles were installed over 3 days by a crew of approximately 6 employees (April 23, 24 and 29) (Tr. 793, 795, 814, 816-817, 935, 1004).

Latite owns and uses conventional fall protection equipment on some types of roofs, primarily high rise construction or when there are metal supports (Tr. 895-897). However, on residential roofs supported by wood trusses, Latite relies on its alternate fall protection plan, which was developed in 1995 by its safety consultant, James Hunt, a former OSHA compliance officer (Tr. 1295, 1319, 1324).

In February 2001 Latite began roofing work for general contractor Clark Realty at a project under construction known as the Falls at Marina Bay, in Fort Lauderdale, Florida. The Marina Bay project consisted of 2 and 3 story garden and high rise apartments. Latite's roofing contract for the project was approximately $678,000, of which $37,000 was attributable to building 10 (Exhs. R-3, R-33A; Tr. 795, 804, 932-933, 981).

On the high rise buildings at Marina Bay, Latite used conventional fall protection consisting of catch platforms and lifelines attached to metal supports (Tr. 996-998, 1030-1031, 1335-1336, 1340). However, on the 2 and 3 story garden apartments, Latite utilized its alternate fall protection plan. According to the plan, a warning line was to be painted approximately 3 feet from the roof's edge and the crew chief was designated to monitor and warn employees in this area (red zone) (Exh. R-7; Tr. 892, 899, 919-920).

On December 11, 2001, Latite's dry-in crew initiated work on building 10. Building 10 is a 2 and 3 story garden apartment building with a continuous roof and an eave dimension of 1,000 feet[1] (Exhs. C-4, C-5, C-6, C-12; Tr. 157, 795, 800). The eave height of the roof ranges from 27 feet, 10 inches (3 story portion) to approximately 17 feet (2 story portion) (Tr. 87). The slope of the roof is 6 in 12 (Tr. 44, 793). The roof is supported by 2 x 4 inch wood trusses covered by 5/8 inch plywood deck (Tr. 793, 856).

Latite's crew for the dry-in process consisted of crew foreman Gregorio Rosiaz and roofers Gregorio Estaban and David Hernandez. At the time of OSHA's inspection, Rosiaz had been employed by Latite for 9 years; Estaban for 2 years; and Hernandez for 4 months (Exh. R-5; Tr. 191, 235, 864).

[1]This is the distance around the perimeter of the building on the roof (Tr. 800).

As the crew began installing the first layer of felt, OSHA COs Quintero and Richburg[2] were returning to their office in Fort Lauderdale. The COs observed 3 employees on the roof of building 10 without conventional fall protection (Exhs. C-4, C-5; Tr. 57-58). They were informed that Latite was the roofing subcontractor by Clark Realty's superintendent (Tr. 58-59, 173). Along with the superintendent, the COs proceeded to building 10 (Tr. 60). In addition to the Latite crew on the roof, the carpentry contractor had employees working on the outside of the building (Tr. 166, 233). The superintendent directed all employees from the building (Tr. 60). While other employees were exiting the building, the COs observed crew foreman Rosiaz painting a yellow line approximately 3 feet from the eaves around the roof before exiting the building (Tr. 60). He told the COs that he had "forgotten" to paint the line that morning (Exh. C-6, C-12; Tr. 256). Rosiaz was also Latite's designated monitor on-site (Tr. 89).

Also, the COs were told that the Latite employees had used the building's outdoor stairways and walkway earlier in the morning to carry boxes of nails to the roof. The walkway was approximately 10 feet above the ground. Neither the stairway nor walkway had railings on the open sides (Exhs. C-8, C-9; Tr. 68-70, 208-209, 211, 937).

OSHA's on-site inspection took approximately two hours. On December 21, 2001, Latite faxed to OSHA a copy of its alternate fall protection plan for the Marina Bay site (Exh. C-15; Tr. 313). Based on OSHA's inspection, serious citations were issued for failing to use conventional fall protection on the roof and the walkway and for failing to have stair rails on the stairways.

Discussion

Before discussing the alleged violations, Latite has asserted estoppel and vindictive prosecution as defenses to the alleged violation of § 1926.501(b)(13).

Latite's Estoppel Defense

Latite asserts collateral and equitable estoppel as a bar against a citation for violation of § 1926.501(b)(13) in this case.[3]

[2]Denise Richburg was a compliance officer trainee who had started work in September 2001 (Tr. 57, 312).

[3]Latite's estoppel arguments do not apply to instance (b) of item 1, alleged violation of § 1926.501(b)(13), for employees using the walkway without fall protection, or item 2, the alleged violation of § 1926.1052(c)(1), for the lack of stair rails on the stairway.

A. Collateral Estoppel

Collateral estoppel is a determination by a court in a prior action which is subsequently binding on the parties in the present action. The purpose of collateral estoppel is to foreclose the litigation of issues decided in prior litigation. *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1153 (No. 88-1250, 1993).

Latite's collateral estoppel argument is based on the decision in *Latite 1*. In *Latite 1*, this judge found that the Secretary failed to rebut Latite's showing of greater hazard in the anchorage of conventional fall protection systems on a wooden truss roof of an apartment building under construction in Boca Raton, Florida, in June 1999. The eave height of the roof was 28 feet. The *Latite 1* decision was not appealed by the Secretary and became final.

Latite argues that litigation in the present case is barred because the same issues of feasibility and greater hazard have already been resolved in Latite's favor. Latite notes that the current citation involves the same parties; the same type of garden apartment with wood roof construction; the approximate same eave height of 27 feet, as opposed to 28 feet; the same approximate roof slope of 6 in 12, as opposed to 5 in 12; and the same alleged standard at § 1926.501(b)(13).

As cited by Latite, the Secretary, in *Continental Can Co., USA v. Marshall*, 603 F.2d 590 (7th Cir. 1979), was enjoined from prosecuting noise violations at other company plants because the issue of economic infeasibility for the noise abatement methods recommended by the Secretary had previously been decided in favor of the employer. The Secretary had stipulated in the case that the noise conditions were virtually identical at all of the company's plants.

In this case, Latite's collateral estoppel argument is rejected. The prior unreviewed decision by this court addressed the circumstances, conditions, and evidence presented as to the cited apartment building. The decision did not apply to all of Latite's roofing sites. There is no stipulation that the conditions of the roofs were virtually identical. The *Latite 1* decision was not reviewed by the Commission and is, thus, not considered a final adjudication on all issues. *See Leone Construction Co.*, 3 BNA OSHC 1979 (No. 4090, 1976).

Moreover, as Judge Spies noted in denying Latite's motion for partial summary judgment, the *Latite 1* decision did not hold that "all fall protection for roofs is infeasible or presents a greater hazard in soft pine" (Order Denying Motion, p. 2). Unlike the Respondent in *Continental Can Co.*,

Latite has the burden, specifically under § 1926.501(b)(13), of showing infeasibility and greater hazard at its worksite before it can utilize an alternate fall protection plan as described in § 1926.502(k). OSHA's note following § 1926.501(b)(13) advises an employer that conventional fall protection systems are presumed feasible and would not create a greater hazard to employees. It is the employer's burden to show otherwise.

The court's finding regarding fall protection in *Latite 1* was based on the Secretary's failure to present evidence in rebuttal to Latite's showing of greater hazard regarding adequacy of anchorage in wood trusses. It was not a finding that all conventional fall protection systems were infeasible or a greater hazard beyond that case. In *Latite 1*, OSHA offered no expert testimony to address installation concerns noted by Latite's three industry witnesses who were experienced in residential roofing. Also, it is noted that in the present case, Latite has changed the nature of its argument regarding anchorage from the suitability of yellow pine to support the anchorage, as it did in *Latite 1*, to now argue that the anchorage point needs to be certified by a structural engineer. The Secretary has not changed her position regarding the use of conventional fall protection in this case. An alternate fall protection plan, such as the one used by Latite on building 10, is expected to be a last resort. 59 Fed. Reg. 40672, 40692 (August 9, 1994).

Also, unlike in the *Continental Can* case, there is no agreement that each apartment building and worksite is the same. Latite ordinarily has 1,000 active jobs sites in progress at any time. These job sites involve various roof styles, pitches, heights, roofing materials, and locations (Tr. 985). In determining appropriate fall protection, such as fall arrest, the eave height, wood truss support, and roof pitch are only three factors which must be considered. Other factors to consider include the size and configuration of the roof, ground conditions around the apartment, accessibility to the roof, and the roofing job to be performed (laying felt, hot mopping, installing tile).

Further, the court in the *Continental Can* case only enjoined the Secretary from proceeding until she could establish the feasibility of noise abatement methods unrelated to the one litigated in the initial case. *Id*. at 593, 595. In this case, the record indicates that the types and methods of fall protection systems are constantly changing, modifying, and improving (Tr. 1221). There is a large number of technologies, including new fall protection systems or modifications to existing systems, on the market (Tr. 352, 565, 1987-1988). Over two years lapsed between the hearing in *Latite 1* and

the hearing in this case. The hearing in *Latite 1* was only 3 days and the hearing in this case took two weeks. Also, several of the abatement methods now recommended by OSHA do not depend on anchorage to the wood trusses. The Secretary's expert testified that 9 conventional fall protection systems could have been utilized on building 10 on December 11, 2001, while the employees were laying the felt (Exh. C-21). Using standard equipment, OSHA's expert even designed a 40-foot catch platform with wings connected to the boom of a forklift which he testified could have been used at building 10 and transported for use on other garden apartment projects (Exh. C-23; Tr. 1842-1843). There was no such showing in *Latite 1*. The Secretary is not barred by collateral estoppel from presenting such evidence in this case.

B. Equitable Estoppel

As an affirmative defense, equitable estoppel requires a showing that one party intended or reasonably believed that its conduct or actions would be acted or relied upon by the party claiming estoppel. *Miami Industries, Inc.*, 15 BNA 1258, 1264 (No. 88-671, 1991), *rev'd. estoppel finding in part*, 983 F.2d 1067 (6th Cir. 1992). For purposes of estoppel, however, the Government is not considered the same as a private party. Actions by government agents, even if reasonably relied upon, cannot generally be given an effect that would result in waiving or altering an employer's legal obligations under the Occupational Safety and Health Act (Act). *Id*. at 1265.

Latite's equitable estoppel argument is based on (1) OSHA's withdrawal of other citations which had alleged a violation of § 1926.501(b)(13); (2) a 1995 OSHA memorandum to area offices by the Deputy Assistant Secretary; and (3) meetings that Latite had with OSHA personnel in Fort Lauderdale, Atlanta, and Washington, D.C.. Latite argues that it reasonably relied on the actions of OSHA and statements of its representatives in continuing to use its alternate fall protection plan at building 10.

The record shows that prior to the *Latite 1* decision, citations involving the fall protection standard at § 1926.501(b)(13), or the work platform standard at § 1926.451(a)(3), were withdrawn or amended (Exhs. R-17, R-21, R-22). However, it is noted that the citations involved eave heights of 25 feet or less. When Latite received four citations after the *Latite 1* decision, Latite representatives met with the Atlanta OSHA regional office on March 1, 2001, to discuss the pending citations involving § 1926.501(b)(13) and the use of conventional fall protection on wood truss roofs

in excess of 25 feet in height (Tr. 381, 654, 1177, 1196, 1464-1466). After the meeting, the four citations were resolved. Two citations which involved eave heights in excess of 25 feet were withdrawn or amended to a violation of the alternate fall protection plan (Exhs. R-2, R-13, R-29). The two other citations which involved eave heights less than 25 feet were withdrawn or amended to a failure to train violation (Exhs. R-1, R-13, R-15, R-26; Tr. 379).

Latite's equitable estoppel claim based on OSHA's actions regarding prior citations is rejected. Settlements of citations, including the withdrawal of an alleged violation, may reflect the results of the bargaining process or the lack of evidence as to the particular citation (Tr. 425). Such settlements are not considered "misrepresentations" for the purposes of estoppel. Despite Latite's effort to read some agreement by OSHA into the settlements, it has long been recognized that the Secretary has broad discretion in settling citations, and the reasons for withdrawing a citation may involve other considerations as opposed to an agreement of compliance. The withdrawal of a citation does not constitute a statement by OSHA that the condition is consistent with the standard's requirements. Also, it does not provide the employer with a license to continue to operate in violation of the Act. A withdrawal by the Secretary does not protect Latite from future citations. *Trinity Marine Nashville, Inc.*,19 BNA OSHC 1015, 1019 (No. 98-0144, 2000) *rev'd. on other grounds*, 275 F.3d 423 (5th Cir. 2001).

Similarly, the OSHA 1995 memorandum provides no basis for equitable estoppel. In July, 1995, OSHA Deputy Assistant Secretary issued a memorandum to OSHA area offices which suggested that employers using a fall protection plan in compliance with Appendix E to the regulations would not have to make a separate showing of greater hazard or infeasibility on similar jobs. He stated that "to eliminate the need for contractors to repeatedly make the same arguments and demonstrations at each project site with regard to infeasibility or greater hazard, OSHA will accept the reasons provided in the sample fall protection plan as meeting the plan justification requirements of the standard (Exh. R-12). The memorandum is a policy statement which does not estop Latite from complying with the standard. OSHA describes the memorandum as non-mandatory and for OSHA guidance only (Tr. 349, 471, 477-478, 636-637).

Also, the memorandum was modified by STD 3.1 issued on December 8, 1995, and its plain language revision, STD 3-0.1A, effective June 18, 1999. The STD permits employers to utilize

alternate fall protection plans on roofs with eave heights of less than 25 feet, as described in § 1926.501(k), without showing that conventional fall protection is not feasible or a greater hazard. The STD was in the nature of an administrative exception to § 1926.501(b)(13). Such exceptions are to be narrowly construed. *See Armstrong Steel Erect., Inc*., 17 BNA OSHC 1385 (No. 92-262, 1995). The parties agree that STD 3.1 and STD 3-0.1A do not apply in this case because the eave height, at least in the area where the employees were observed working, was in excess of 25 feet (Tr. 688).

Although not a basis for estoppel, some of the confusion and misunderstanding may be the result of the wording of § 1926.501(b)(13), which allows alternate fall protection plans at any eave height if it is shown that conventional fall protection is infeasible or a greater hazard. By administrative exception, OSHA issued OSHA STD 3.1, which permitted a fall protection plan without a showing of infeasibility or greater hazard if the eave height of the roof was less than 25 feet. Latite's roofing work regularly involves both eave heights, and there appears to be little difference between worksites.

Latite's reliance on meeting with OSHA personnel in Fort Lauderdale, Atlanta, and Washington, D.C., also provides no basis for equitable estoppel. The record of the meetings with OSHA representatives fails to show affirmative misconduct or misrepresentation. The Secretary is not estopped from enforcing a standard except where she has engaged in affirmative misconduct, active misrepresentation, and resulting injustice to the employer. *Erie Coke Corp*., 15 BNA OSHC 1561, 1568-1570 (No. 88-611, 1992).

Since 1991, Latite has attempted to comply with the fall protection requirements and also satisfy its concerns regarding costs and the adequacy of anchorage in wood trusses. Latite hired two outside consultants to review conventional fall protection systems and to assist in developing a fall protection plan. To resolve the dispute, Latite has met with OSHA personnel in the Fort Lauderdale area office numerous times, the Atlanta regional office in March 2001, and even OSHA's national office in Washington, D.C., in July 2002. As a result of the Atlanta meeting, Latite hired a video company for $100,000 to produce a training video on its tile installation processes and alternate fall protection plan, which was shared with OSHA for comment (Tr. 654, 713, 727, 778, 789-791, 834, 1092-1093, 1178-1180, 1216-1217, 1316, 1462).

Despite these efforts, there is no showing that OSHA representatives, at any time, made specific representations that conventional fall protection was infeasible or a greater hazard on wood truss roofs with an eave height in excess of 25 feet. There was never any consensus reached. OSHA made suggestions of various fall protection equipment and Latite discussed the reasons it would not be feasible. Also, the record fails to show that Latite's alternate fall protection plan was accepted by OSHA on all projects when employees were working at heights in excess of 25 feet. OSHA did agree to review Latite's alternate fall protection plan if it was on site (Tr. 1516-1517).[4] One of Latite's attorneys who had arranged and participated in the Atlanta and Washington meetings testified that "[T]here was no sort of explicit statement by the Agency, your plan is appropriate above or beneath 25 feet," although it was implied by the parties (Tr. 1257). His understanding was based on the lack of objection by the OSHA officials as opposed to any affirmative statements (Tr. 1194-1195, 1208, 1256). OSHA's failure to object to topics or statements made by Latite does not mean or imply that OSHA agreed. In the footnote to the standard, OSHA specifically states that conventional fall protection is presumed to be feasible and not a greater hazard.

No written agreements arose from the meetings (Tr. 688). Latite consultant Edwin Granberry testified that an OSHA technical support engineer during the Atlanta meeting even offered several "solutions" for conventional fall protection which he did not review and reject until some time after the meeting (Tr.1115). The lack of any agreement from the Atlanta meeting is also demonstrated by Latite's need to meet with OSHA officials in Washington, D.C. Reflective of the lack of any agreement is also shown in a memo to OSHA dated May 10, 2001, (two months after the Atlanta meeting) by Latite's attorney, who writes that Latite is being told by OSHA "that conventional fall protection must be used by Latite employees whenever they are working on a residential roof with an eave height in excess of 25' (feet)" (Exh. R-15). In another letter dated May 3, 2001, Latite's president identifies employee training as the only agreement reached at the March meeting in Atlanta (Exh. R-19). Neither writer referred to any agreement by the parties that conventional fall protection

[4]Latite notes that OSHA's Assistant Regional Administrator, in response to a question from the court, testified that at the March meeting, OSHA had agreed to accept Latite's infeasibility and greater hazard determinations in its alternate fall protection plan, even if the eave height was in excess of 25 feet (Tr. 1523-1524). However, the administrator specifically repudiated this statement when he testified that there was no agreement at the March meeting or subsequently that conventional fall protection, or any particular fall protection system, was infeasible or a greater hazard on garden apartments with wood truss roofs in excess of 25 feet (Tr. 1570, 1575).

was not required on roofs with eave heights in excess of 25 feet. The result of the Atlanta meeting was the production of a training video, settlement of four citations, and each party was able to discuss their positions. Similarly, the record does not reflect, nor does Latite specifically assert, any representations from the Fort Lauderdale or Washington D.C., meetings.

Also, there is no evidence that Latite reasonably relied upon an agreement with OSHA not to require conventional fall protection or that Latite could use its alternate fall protection plan in all situations when the eave height exceeded 25 feet. Otherwise, Latite would not have written the letters or pursued the meetings. These facts fail to show Latite's reliance upon any representations made by OSHA. Latite's position has been long standing, and it has not changed its position to its detriment. It has always maintained that conventional fall protection was a greater hazard on wooden truss roofs because of anchorage problems and costs.

Latite's estoppel defense is rejected.

Vindictive Prosecution Defense as to § 1926.501(b)(13)

If estoppel is not found, Latite asserts vindictive prosecution as a bar to the citation because of OSHA's repeated issuance of citations to Latite for alleged violations of § 1926.501(b)(13). "Vindictive prosecution is a prosecution to deter or punish the exercise of a protected statutory or constitutional right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982).

In order to establish vindictive prosecution, the moving party must show (1) an exercise of a protected right; (2) the party's stake in the exercise of that right; (3) the unreasonableness of the other party's conduct; and (4) that the prosecution was initiated with the intent to punish the party for the exercise of the protected right. *National Engineering & Contracting Company*, 18 BNA OSHC 1075, 1077 (No. 94-2787, 1997), *aff'd.* 18 BNA OSHC 2114, 2119 (6th Cir. 1999). "In addition to evidence of animus or retaliatory motive," the party "must produce evidence tending to show that it would not have been cited absent that motive." *Id.* at 1078.

Latite's vindictive prosecution claim is also rejected. Steve Struve's letter of May 3, 2001, to OSHA complained of harassment (Exh. R-19). However, the record does not support such a claim. OSHA's inspection in this case was initiated pursuant to an OSHA program (Exh. C-18; Tr. 260). The inspection was not prompted by any knowledge that Latite was the roofing contractor

(Tr. 59, 62). CO Quintero testified that, although she had heard of Latite prior to the inspection, she was not familiar with the *Latite 1* litigation and decision (Tr. 99-100, 104).

Also, there is no showing that Latite was punished for engaging in a protected right. During the period of June 1999 to the present, Latite has received 10 OSHA inspections, of which 7 resulted in citations (Exh. C-19). However, during the period of August 2000 to the date of the hearing, OSHA conducted 150 inspections of employers in Latite's same SIC code in Florida (Exh. C-20; Tr. 1495-1498). It is agreed that Latite was inspected by OSHA more than other roofing contractors (Exh. R-30). However, it is noted that Latite is the largest tile roofing contractor in south Florida. It is, therefore, reasonable to assume that it may be inspected more times (Tr. 755, 931, 1499). At any given time, Latite estimates that it has approximately 38 crews working on projects and has approximately 1,000 active job sites (Tr. 934, 985).

There is also no dispute in this case that Latite was not using conventional fall protection at building 10. The use of an alternate fall protection plan depends on the circumstances of each situation and the available technologies where conventional fall protection systems are shown to be infeasible or a greater hazard. Unlike *Latite 1*, the record in this case establishes the feasibility of various fall protection systems which could have been used on building 10.

Alleged Violations[5]

Item 1 - Alleged Violation of § 1926.501(b)(13)

The citation alleges that Latite failed to provide fall protection to employees installing felt on a sloped roof (instance a) and using a walkway to access the roof (instance b). Section 1926.501(b)(13) provides:

> *Residential construction.* Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels shall be protected by guardrail systems, safety net systems, or personal fall

[5] The Secretary has the burden of proving a violation.

> 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).

> arrest systems 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.

There is no dispute that apartment building 10 is considered residential construction within the meaning of § 1926.501(b)(13). The same process and methods used in installing the roof on the apartment building was agreed by the Secretary to be the same as on single family homes (Exhs. R-4, R-36; Tr. 2004).

A. Laying Felt on the Roof

The eave height of the roof on building 10 was 27 feet 10 inches over the 3 story portions[6] of the building where the employees were observed working. The roof's slope was 6 in 12. CO Quintero measured the eave height and observed the employees working (Tr. 87, 305).

Latite concedes that its employees were not protected from fall hazards by conventional fall protection (safety nets, guardrails, or personal fall arrest systems) as identified in § 1926.501(b)(13). Crew foreman Rosiaz told CO Quintero that employees were not utilizing conventional fall protection while installing felt on building 10 (Tr. 189-191). CO Quintero also observed the employees working on the roof without conventional fall protection (Tr. 87). The employees were exposed to a fall hazard in excess of 27 feet.

With regard to knowledge of the condition, it is undisputed that the felt laying work being done by the roofers conformed to Latite's practice of not using conventional fall protection and, instead, of utilizing an alternate fall protection plan on apartment buildings with wood truss roofs, regardless of the eave height (Tr. 765-766, 848, 1317). Latite knew that its employees were working at heights in excess of 25 feet because of the bid process (Tr. 760-764, 834-838, 848, 1317). Also,

[6]The eave height on the 2 story portions of building 10 was approximately 17 feet (Tr. 305).

crew foreman Rosiaz was responsible for the safety of the employees who were present on the roof (Tr. 990). He was an exposed employee. The actual or constructive knowledge of a condition by a supervisor, such as the crew foreman, is imputed to the employer. *Tampa Shipyards*, 15 BNA OSHC 1533, 1537 (No. 86-360, 1992).

The record, therefore, establishes without dispute that the cited standard at § 1926.501(b)(13) applied to Latite's roofing work on building 10; Latite had knowledge of the condition because Latite and its crew foreman knew that conventional fall protection was not being utilized; and Latite's employees were exposed to fall hazards in excess of 25 feet.

Unless Latite can establish infeasibility or greater hazard as to the use of conventional fall protection, a violation of § 1926.501(b)(13) is established.

Parties' Testimony on Infeasibility and Greater Hazard

Latite claims that conventional methods of fall protection for the employees on wood truss roofs are not feasible and pose a greater hazard to employees. On the day of OSHA's inspection, the roofers were installing the first layer of felt as part of Latite's dry-in process. The Secretary challenges Latite's showing that conventional fall protection was not feasible or a greater hazard.

It is undisputed that STD 3.1 issued December 8, 1995, and as rewritten STD 3-0.1A issued June 18, 1999, is not applicable in this case because the roof height on building 10 was in excess of 25 feet above the ground, at least where the employees were observed working (ALJ Exh. 1).

The Secretary defines "infeasible" to mean the impossibility of performing "the construction work" or "technologically impossible to use any one of" the conventional fall protection systems. *See* § 1926.500(b). To establish the affirmative defense of infeasibility, an employer must show that (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *Armstrong Steel Erectors*, 17 BNA OSHC 1385 (No. 92-262, 1995). The fact that compliance is difficult or expensive is insufficient grounds to excuse compliance with a standard's requirements. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160 (No. 90-1620, 1993). The employer is also expected to exercise some

creativity in seeking to achieve compliance. *Pitt Des Moines, Inc.*, 16 BNA OSHC 1429 (No. 90-1349, 1993).[7]

To establish a greater hazard defense, the employer must demonstrate that (1) the hazards of compliance with the standard are greater than the hazards of noncompliance; (2) other methods of protecting employees from the hazards are not available; and (3) a variance is not available or its application is inappropriate.[8] *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1225 (No. 88-821, 1991).

Latite determined in 1994, when the current fall protection standards were issued, that conventional fall protection was infeasible or a greater hazard at all sites involving apartment buildings with wood truss supported roofs regardless of the eave height (Tr. 968-969, 1316). Latite claims that the tile installation process makes scaffolds, nets, and platforms too expensive to remain competitive and the use of personal fall arrest systems too problematic because of the lack of certified anchorage points (Exh. R-20).

On building 10, the wood trusses were made of 2 x 4 inch southern pine. It is the same pine used for wood trusses in most residential apartment construction throughout the United States (Tr. 976-977). OSHA requires that the anchorages used for attachment of a fall arrest system must be capable of supporting at least 5,000 pounds per employee attached. *See* § 1926.502(d)(15). Latite claims that securing anchorage to the wood trusses requires the approval or certification of the design engineer. Also, Latite argues that the Broward County building code only authorizes the use of 8d nails and, in some circumstances, 10d nails, which might reduce the holding capability of the anchorage (Exhs. R-42, R-43, R-48).

Latite offered the testimony of three witnesses qualified as experts, David Struve, Jim Hunt and Edwin Granberry, who concluded that conventional fall protection was infeasible for roofing operations on wood truss roofs using the materials and methodology at building 10. It is noted that

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[7]In *Latite 1*, Latite's objections to conventional fall protection involved the greater hazard defense based on the lack of adequate anchorage in the soft pine used as wood trusses. In this case, Latite argues both infeasibility and greater hazard.

[8] There is no dispute that a variance was not sought by Latite. As a basis for not seeking a variance, Latite relies on a previous OSHA area director who agreed that a variance application was not reasonable (Tr. 833-834, 1170). However, this was a long time prior to the Marina Bay project.

Latite uses a number of conventional fall protection systems on roofs with other types of construction. In fact, on the high rise condominiums at the Marina Bay project, Latite was using personal fall arrest systems and platforms (Tr. 895-897, 996).

CEO David Struve testified that as a leader in the tile roofing industry, he is unaware and has not seen any roofing contractors using conventional fall protection when installing tile roofs on garden apartments in south Florida (Tr. 989). He opined that, from his experience and observation, there were no conventional fall protection methods feasible for building 10 (Tr. 789, 791, 800, 828, 838, 890, 919-920). Struve stated that in working prior to 1995 with Synco, a safety equipment manufacturer, Latite tested a guardrail system which immediately collapsed when struck by an object or when a load was applied (Tr. 1052-1053). He considered work platforms, nets, and scaffolds, in addition to requiring substantial time to install and dismantle, too expensive and would interfere with the work of other contractors, such as the siding/stucco contractors who need access to the walls. He bases his determination regarding catch platforms on his attempt to use such equipment on a worksite in May, 1992, where an OSHA citation was issued (Exh. R-21; Tr. 789). Also, the cost of repeatedly assembling and dismantling such devices to allow the various Latite crews to perform their processes would make Latite less competitive in the bidding process. With regard to a fall arrest system, Struve stated that such systems, while doing the hot mopping process and other processes, would require a different approach to the work, slow down the work, and be "silly" (Tr. 942). Struve believes that conventional fall protection gives employees a false sense of security (Tr. 920).

Ed Granberry, a retired chemical engineer, based his conclusions regarding the feasibility of conventional fall protection on reading information about wood trusses, visits to other worksites, and prior conclusions while on Latite's payroll (Tr. 1099, 1102-1104, 1113, 1151). Granberry never went to the Marina Bay site and did not review the wood truss specifications for the job (Tr. 1096, 1129). Granberry also never talked to a wood truss manufacturer (Tr. 1147-1148). He has not tested fall protection equipment and admits that he is not qualified to test such equipment (Tr. 1147). Despite these limitations, he opined that a temperature of 150 degrees would affect wood strength and that such a temperature existed inside the roof of building 10 (Tr. 1137-1139). Granberry is not

a structural engineer and his opinion is given little weight in this case. Granberry was unable to identify any fall protection training in the last five years (Tr. 1131-1132).

Jim Hunt, safety consultant and former OSHA industrial hygienist, advised Latite that conventional fall protection would not work and would create a greater hazard (Tr. 1297, 1315, 1319). Hunt has worked with Latite since 1995 on fall protection (Exh. R-37). His opinion was based on observing Latite crews, information from the internet, and watching videotapes (Tr. 1319). Hunt drafted the Latite's alternate fall protection plan using the model at Appendix E to the regulations (Tr. 1329). It is noted that in the plan he developed, he misstates the NIOSH position regarding the preference for passive fall protection systems, such as safety harnesses, to active systems, such as monitoring. In his alternate plan, Hunt states that NIOSH preferred active systems to passive systems, which is incorrect (Tr. 1304-1305; also see 59 Fed. Reg. 40718).

In rebuttal, the Secretary relies on Michael Wright, a structural engineer and fall protection expert with 20 years of experience (Exh. C-21, pp. 2-15). Based on reviewing the OSHA inspection file, the discovery responses, observing residential roofing construction practices in Fort Lauderdale, and listening to the trial testimony, Wright concludes that conventional fall protection for building 10 on December 11, 2001, was feasible and would not create a greater hazard to employees laying felt as well as the other tile installation processes (Tr. 1812-1818). He states that his proposed abatement options were available to Latite on December 11, 2001 (Tr. 1863). In arriving at his abatement options, Wright applies a methodology, referred to as the "hierarchy of control," which is an analysis of the hazard or risk involved and an evaluation of the hazard in terms of the most effective control of elimination or substitution to the less effective control (Exh. C-21, app. C; Tr. 1790, 1814). Wright's hierarchy of control is the implementation of engineering controls such as catch platforms or guardrails (Tr. 1815-1816). If engineering controls fail, personal fall arrest systems such as lanyards or lifelines are used (Tr. 1815-1816).

Wright identified 7 abatement options which he considered feasible for building 10, including catch platforms, manlifts, single point anchorage with self-retracting lanyards, vertical lifelines, horizontal lifelines, guardrails, and scaffolding (Exh. C-21, pp. 20-26; Tr. 1812). Wright testified that fall protection could have been used during all phases of Latite's roofing installation, not just the dry-in phase being performed on December 11. He also opined that the fall protection, in most

cases, was adaptable to Latite's other garden apartment projects (Tr. 1863-1864). A discussion of each proposed fall protection option[9] follows:

a. Catch Platform - The work platform, with an integrated guardrail system, is erected near the eave of the roof and allows employees to perform all phases of the tile installation process from that elevation. This platform is bolted to the building's concrete wall and roof trusses (Exh. C-21, p. 21; Tr. 1839, 1841). With preplanned change in work methods, the platform does not require repeated installation and removal nor must it surround the building at one time (Tr. 1840-1847, 1850). Wright estimates that a wood catch platform for building 10 would cost $20,693 (Exh. C-22).

Additionally, Wright designed a portable catch platform with a maximum variable length of 40 feet mounted on a boom lift. Each end of the mounted platform had a removable 10 foot section which may be removed or positioned to a 90-degree angle. The movable catch platform is only in place while the employees are on the roof. It is moved around the perimeter of the roof as the work progresses. Otherwise, the platform is removed to allow other contractors access to the walls. It can also be transported for use at other jobs. The boom is capable of elevating the platform up to 57 feet high. Wright estimates that the cost to fabricate the portable catch platform was $8,500 - $11,000. Latite already owns several boom lifts (Exh. C-23; Tr. 1842-1843, 1845-1846, 1848, 1971).

Latite estimates that the platform would have to be moved at least 25 times at building 10 and each move would require a 10-15 minute break. Also, the platform could not be used on the marina side of the building because the boom lift could not maneuver in the narrow area. With regard to any of the catch platforms, Latite notes that it would require changes in its roofing methodology to only work in the protected area, as opposed to currently working the entire roof at one time and minimizing the number of times that a roofer has to climb up and down the roof's slope. Latite claims that these changes will slow productivity and increase labor costs. Also, Latite considers it economically illogical to use the boom lift, which is a several million dollar piece of equipment, to lay the roof on building 10.

[9]Wright conceded that safety nets were not a feasible form of fall protection. He did not consider nets because the cost of installing nets around the building far exceeded the cost of roofing the building, making them economically infeasible (Tr. 1826).

b. Manlifts - Manlifts, with a guarded basket to protect the employee from falls, would be elevated to the desired location for the employees to perform work on the roof. The employee in the basket would wear a full body harness and restraint lanyard. Although not really a fall protection option for the installation of the tile roof, Wright recommends the use of manlifts for installing components associated with the other types of fall protection, such as catch platforms at the eaves, anchorage for lifelines, or guardrails at gables. It could also be used to install the metal at the eaves during the dry-in process (Exh. C-21, pp. 21-22; Tr. 1878). The daily rental for a manlift is $225 - $485 depending on the model (Exh. C-22).

The cost of a manlift is approximately $70,000. Latite owns several manlifts. However, David Struve testified that it made no economic sense and would threaten Latite's long term economic viability to use the manlift as contemplated by Wright (Tr. 1055-1056).

c. Personal Fall Arrest Systems

As personal fall arrest systems, Wright's abatement options include the use of self-retracting lanyards, vertical lifelines, and horizontal lifelines (Tr. 1851-1852).

(1) Single Point Anchorage with Self-Retracting Lanyards (SRL) - As described by Wright, the anchorage points are installed at or near the ridge line of the roof and one SRL is attached to each anchorage point (Exh. C-21, p. 22-23). The anchorage point would be the truss and plywood sheathing and the SRL is connected to the anchorage and the employees full body harness (Tr. 1851, 1907, 1909). The cost of the SRL is $1,415 (Exh. C-22).

(2) Vertical Lifelines (VLL) - The anchorage is installed at or near the ridge line of the roof and a synthetic fiber rope is connected to the anchorage at one end and over the eave. A "rope grab" device is connected to the vertical rope so that it will slide along the rope as the employee moves upslope or downslope. The grab locks firmly to the rope in the event of a fall. A short lanyard with an energy absorber is attached to the rope grab device and the back of the employee's full body harness (Exh. C-21, pp. 23-24, Tr. 1852). The installation of one VLL is $155.07 (Exh. C-22; Tr. 2056).

(3) Horizontal Lifelines (HLL) - A wire or synthetic fiber rope is strung between two or more anchorage points parallel to the roof's ridge. One or more SRLs or VLLs are connected to the rope

so that they can slide along the rope between anchorage points (Exh. C-21, pp. 24-25). Each horizontal lifeline is $985.10 (Exh. C-22; Tr. 2052-2053).

d. Guardrails - Although it could be used for all purposes, Wright envisions guardrails as a supplement to other fall protection in areas not covered, such as at the gables (Exh. C-21, pp.25-26). Wright considers guardrails the easiest and most straight forward option to solve a hazard (Tr. 1826). An aerial lift is used to install the guardrails (Tr. 1833). Total cost of the guardrails at building 10 would be $5,291 (Exh. C-22; Tr. 1837). Wright recommends designing the guardrails with multiple hinges so that it could be re-configured for use on all locations on the building and at other building sites (Tr. 2093-2094). Also, with preplanned changes in work methods, guardrails do not require repeated installation and removal, nor must they surround the entire building at one time (Tr. 1833-1835, 1838).

e. Scaffolding - Scaffold supported at grade and tied back to the masonry wall for stability is the last abatement option (Exhs. C-21, p. 26). The cost to rent scaffold is $.30 per square foot per month and an additional $1.00 per square foot for erection and dismantling. Wright estimates the total cost for the 3-story portion of building 10 is $8,450 and $17,537 for the entire building (Exh. C-22; Tr. 1999-2000). Wright opines that the costs could be reduced if the scaffold is used by other contractors (Tr. 2099). Also, Wright believes that with preplanned changes in work methods, the scaffold does not require repeated installation and removal nor must it surround the entire building at one time (Tr. 1999-2000). In a bid solicited by Latite, the cost for scaffold around building 10 was $57,000 (Tr. 1047).

Findings Regarding Feasibility and Greater Hazard

Based on the record, Latite failed to establish infeasibility or greater hazard in this case. Its arguments against the fall protection options recommended by Wright are based, for the most part, on speculation, a reluctance to attempt change, and years of arguing with OSHA. When required by the general contractor, Latite has used conventional fall protection (Tr. 903-904, 907). Otherwise, there is no showing that Latite has attempted to use any conventional fall protection system on garden apartments.

The standard presumes that conventional fall protection is feasible and not a greater hazard. Infeasibility and greater hazards are exceptions to the requirement. Subpart M requires employers to consider the elimination of fall hazards on each work site (Tr. 2604-2605).

> In situations where conventional systems are not used, OSHA does not encourage employers to elect the safety monitoring system as a first choice. Rather, the Agency will permit it to be used in those circumstances when no other alternative, more protective measures can be implemented. Examples of such more protective measures include having employees work from scaffolds, ladders, or vehicle mounted work platforms to provide a safer working surface and thereby reduce the hazard of falling. . . . Accordingly, OSHA has determined that the employer must do what it can to minimize exposure to fall hazards, before turning to the use of safety monitoring systems (29 C.F.R. 502(h)) under a fall protection plan. (59 Fed. Reg. at 40719-40720).

The preamble stresses the importance of preplanning. "Equipment is generally available to provide safe anchorage points for personal arrest systems. It is in this area that preplanning of the construction project is most critical. Focusing on fall protection at the design and planning stages of a construction project will enable an employer to develop measures that protect affected employees from fall hazard." 59 Fed. Reg. at 40684. Also *see Cleveland Consolidated, Inc. v. OSHRC,* 649 F.2d 1160, 1166 (5th Cir. 1981) (The employer has a duty to consider alternative methods of work which permit compliance with the regulation. If an employer was permitted to choose any method of work, and subsequently argue that compliance with OSHA regulations was impossible because of the method chosen, then the regulations could be undermined).

Therefore, Latite is required to consider conventional fall protection on each worksite and the use of conventional fall protection may necessitate changes in Latite's work methods and processes to accommodate the fall protection. As the largest roofing contractor in south Florida, Latite may have sufficient influence to obtain changes from other contractors and general contractors.

Of the recommended systems, Wright opined that using scaffolding, portable guardrail systems, or self-retracting lifelines were the most economical and suitable for building 10 (Exh. C-22; Tr. 2093-2094). However, the choice of the appropriate option by Latite will require preplanning, training of employees, and the services of a competent person and a qualified person.

Also, a combination of fall protection options may be used at the same time on the building or a different option may be used for each of the roofing processes performed by Latite (Tr. 1827). In this case, the employees were performing the dry-in process, which would not involve Latite's concerns regarding the affect of hot asphalt on lifelines and lanyards (Tr. 891). Also, some of Wright's abatement options may not provide complete protection. However, Latite is required to provide even limited protection where it can. A technical defense, where some means of protection is available, is not an excuse for disregarding safety precautions. Even limited compliance is required where it furnishes some protection, even if exact compliance is not possible. *Cleveland Consol.,* 649 F.2d at 1167. Latite does not dispute that it could change work methods to accommodate any of the abatement options (Tr. 2190). However, no methodology changes would have to be implemented by the crews if catch platforms or scaffolds were used except if the device is used only on a portion of the building at a time (Tr. 2191).

Despite the testimony of Latite's witnesses, the standard requires an employer to show specific evidence of infeasibility or greater hazard for each "particular workplace situation." Section 1926.501(b)(13). The mere assertion of the defense is insufficient. The burden placed on the employer is "to establish the worksite-specific circumstances that preclude reliance on conventional fall protection to protect employees from fall hazards." 59 Fed. Reg. 40672, 40684-40685 (August 9, 1994). An employer must demonstrate infeasibility or greater hazard "under the particular circumstances" of the case. *Reich v. Trinity Industries, Inc*., 16 F.3d 1149, 1155 (11th Cir. 1994).

In this case, Latite employees were installing the first layer of felt over the plywood deck as part of the dry-in process. During the hearing, both parties, however, spent considerable time addressing the feasibility or greater hazard of conventional fall protection systems in all phases of Latite's tile processes, including hot mopping and tile installation.

The specific objections by Latite to use of conventional fall protection are separately discussed.

(A) Anchorage

Unlike in *Latite 1,* Latite's objection regarding anchorage appears to be more a claim of infeasibility as opposed to greater hazard. In *Latite 1,* Latite's argument involved the adequacy of

the wood trusses to support the anchorage. In this case, Latite argues the need for certified anchorage points by the design or building engineer and the requirements of the local building code. Anchorage to the wood trusses is required for the personal fall arrest systems, catch platforms, and guardrails recommended by Wright. These fall protection options need to be mounted into the wood trusses along the ridge or eaves of the roof (Tr. 1840). According to Latite, the south Florida building code prevents Latite from connecting to the wood trusses.

As a professional engineer licensed in Florida, Wright testified that in making his recommendations, he considered the appropriate building code requirements and Latite's earlier claim that the wood trusses were not strong enough to support anchoring the fall protection system (Tr. 1857). Wright found that southern pine was more than adequate to support anchorages (Tr. 1856). The southern pine is used for trusses throughout the United States. It has a bending strength of select structural grade of approximately 3,000 psi (Exh. C-21, App. F; Tr. 1856, 1858). According to Wright, a structural engineer, the wood trusses clearly would withstand the force of a man falling if attached to a truss by a personal fall arrest system (Tr. 1860, 1862). In this case, other than expressing concerns, Latite offered no evidence that the wood trusses could not support the anchorage recommended by Wright.

With regard to certification, there is no dispute that building 10 had no certified anchorage points designated by the general contractor or an engineer (Tr. 902). Otherwise, Latite claims that it would have had to work with the truss manufacturer in the design phase to attach reliable anchor points. It is undisputed that Latite was not involved in the design phase of the Marina Bay project.

There is no evidence that Latite requested certified anchor points from the general contractor or that such anchor points could not have been provided. The design engineer or truss engineer who designed building 10 did not testify. Also, there is no showing that the wood trusses in building 10 could not have supported the anchorage. The testimony of John Pistorino,[10] a consulting engineer from Miami, Florida, who participated in drafting the local building codes, corroborates the testimony of Wright. Pistorino testified that if a contractor hires a qualified engineer who communicates with the site engineer of record regarding any anchors to be attached to a roof truss

[10]Latite contracted Pistorino to state whether a roofing company could attach fall protection devices to roof trusses (Exh. R-47; Tr. 2168).

to accommodate a personal fall arrest system, the building code is complied with. He said that the truss manufacturer's engineer should be advised that this equipment will be attached to the truss which the fall protection engineer certifies to accommodate the load (Tr. 2149, 2154, 2156, 2161, 2165). Wright testified that, as a structural engineer registered in Florida, he would take full responsibility for the anchorage points and send a letter to the engineer of record and the truss engineer to that affect (Tr. 2202).

Also, Latite argues that the local building code does not allow the installation of fall protection devices using the size of nails specified in Wright's abatement options (Exhs. R-48, R-49; Tr. 2150-2151, 2155). However, Pistorino conceded that the building code sections specifying nail sizes to be used in trusses were specific to nails used for fastening roof sheathing, not fall protection anchor devices. He testified that engineer's truss shop drawings would specify the limits as to the kind of nails and nail spacing (Exhs. R-42, R-43; Tr. 2160, 2165). The truss layout drawings for building 10 offered by Latite do not show any restriction on the size of nails (Exh. R-50).

(B) Latite's Other Technical Objections

Latite argues that the recommended options will require changes in its methodology and more employee time. Also, Latite claims that personal fall arrest systems such as lanyards are an infeasible option because (1) the ropes increase the risk of employee entanglement and (2) the self-retracting mechanisms quickly become contaminated and stop functioning as intended, particularly during the hot mopping process. Retractable systems, Latite argues, often lock up when contaminated with hot asphalt, potentially cementing an employee in its path.

Wright agrees that employees' work efficiency will decrease the first few times a company implements fall protection measures. However, Wright opined that the efficiency of employees will increase (Tr. 1902). Based on his experience, Wright testified that when employees are trained, the methodology changes actually increase efficiency and profit (Tr. 1974; *see also* the Preamble, 59 Fed. Reg. 40680). These changes in methodology also should include changes necessary to prevent employee entanglements.

Many of David Struve's opinions were based on a meeting with a fall protection equipment company prior to 1995 (Tr. 778). Struve has never personally tested a lifeline or lanyard nor worked with any equipment manufacturer since Synco (Tr. 776). Struve, however, agreed that it is possible

to install tile while attached to personal fall arrest systems (Tr. 941). In fact, he explained that one general contractor for whom he has done residential work requires full tie off and Latite complies (Tr. 903-904, 934). Struve believes, however, that catch platforms would be the most feasible fall protection method for roofing work, specifically the "dry-in" stage, which includes laying felt as done on December 11, 2001 (Tr. 827, 914). Struve testified that he would need an engineered catch platform design before he could determine the attachment point (Tr. 802). Struve does not dispute that at least some fall protection methods are feasible, such as guardrails, catch platforms and lanyard systems (Tr. 809, 826, 889, 941, 944).

From the record, it appears that Latite starts from the premise that its alternate fall protection plan will be used and assumes no conventional method is feasible (Tr. 968-969). Although Latite has contacted structural engineers in the past regarding attachment points for personal fall arrest systems, it did not do so for building 10 (Tr. 949). Struve never stated that the use of conventional fall protection would make roof tile installation impossible. As contemplated by the standard, Struve also recognizes that the need for preplanning and engineering, and the use of such equipment, has to be a rule for everyone to follow (Tr. 919-920). The fall protection standards in Subpart M require all of these elements, including preplanning, engineering, absolute rules, and the participation of all parties, not just builder and owner.

Wright is a professional structural engineer who has taken equipment on the market and has shown how it could be used at building 10. The fact that no other roofing contractor uses fall protection, even if true, is irrelevant in this case because it is Latite's responsibility to ensure the safety of its employees and comply with the standard. Other roofing contractors also will have to comply. An industry is not permitted to maintain the status quo by setting its own standards of care and assume that everyone else will ignore the law. *Peterson Brothers Steel Erection Co.*, 16 BNA OSHC 1196, 1203 (No. 90-2304, 1993).

(C) Economic Feasibility

Latite also failed to show that the cost of compliance would be so unreasonable in light of the protection afforded that the Company's profits would be adversely affected. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2077 (No. 87-1359, 1991). Abatement costs were not shown to affect the company's financial status as a whole. *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1191

(No. 92-1891, 1995). A showing of economic infeasibility requires more than estimated or speculative costs and unsupported concern of the affect to the company's competitiveness in the market. In drafting the standard, OSHA did not consider economic infeasibility to be a basis for failing to provide conventional fall protection. *See* 59 Fed. Reg. 40685.

Latite is a $50 million company with approximately 350 employees engaged in actual roofing work (Tr. 749, 754-755). It is the largest roofing company in the three-county south Florida area. Latite has approximately 1,000 active construction sites at any given time (Tr. 985). The roofing contract given to Latite for the Marina Bay project was $678,205 for 16 buildings (Exhs. R-33A, R-33B; Tr. 932). Latite estimates that price attributable to building 10 was $37,000. Latite's material and labor for building 10 was estimated at $24,000 (Tr. 981, 1027). Thus, Latite claims a profit of approximately $13,000 on building 10. Also, it is noted that Latite already owns and has used almost all of the fall protection equipment identified as feasible by Wright (Tr. 1043).

Assuming certified anchorage points, Latite estimates that using any of the tie off methods would have added $5,360 in labor costs to building 10 (Tr. 2187-2188). According to Latite, the cost of installing catch platforms around the perimeter of building 10, including the cost of installing and removing it four times to accommodate building inspections, would have added approximately $40,000 to the cost of the building (Tr. 824-825).

Wright's estimates for catch platforms and personal fall arrest systems were lower. His estimates were based on actual contact with the distributor and his prior experience. Also, Wright noted that the full cost of a reusable piece of equipment should not be charged against the profit from one building on a single project (Tr. 1900, 1956). Wright testified that if Latite implemented proper storage and took care of any fall protection equipment, such as the catch platform, it could last ten years and could be reused on multiple projects (Tr. 1847). Latite provided its cost estimates based on only one piece of equipment used on a single project (Tr. 1043). Even using Latite's higher estimates, economic infeasibility was not shown.

In that Latite failed to show infeasibility or greater hazard, a violation of § 1926.501(b)(13)[11] is established.

B. Unguarded Walkway

With regard to a violation of § 1926.501(b)(13) for the employees' lack of fall protection while on an elevated walkway (instance b), there is no dispute that a railing was not provided along the open side of an elevated walkway and that the employees had walked across the walkway earlier in the morning carrying boxes of nails to access the roof (Exhs. C-8, C-9; Tr. 70, 208-209, 213). Latite concedes that it knew the employees used the walkway as opposed to a ladder (Tr. 937).

The walkway was approximately 10 feet above the ground. There is no showing that employees used other means of fall protection when crossing the walkway. Although the CO Quintero did not observe the Latite employees using the walkway, she was told by the crew foreman that it was used (Tr. 208-209, 278). She was also told that the general contractor was responsible for installing the railing (Tr. 211).

Latite argues that since the railing was the responsibility of the general contractor and OSHA did not see the employees on the walkway, the violation should be vacated (Latite Brief, p. 72; Tr. 937). Also, Latite argues that the risk of exposure, if any, was no more than a few seconds.

Although the record does not show how often or how many times the employees walked across the walkway, their exposure on the walkway could not have been for more than a few seconds. This was the crew's first day on the site. Also, it is clear that Latite was not responsible

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Although the use of conventional fall protection is found feasible and not a greater hazard in this case, it is also noted that Latite's alternate fall protection plan for building 10 did not comply with § 1926.502(k) and Latite's crew did not follow it (Exh. C-15). The crew foreman painted the warning line after the crew had started laying the felt and when OSHA initiated its inspection. Latite's plan requires the warning line to be placed prior to any work. Also, the court questions whether, on a sloped roof, a controlled access zone (CAZ) only 3 feet from the edge is sufficient to warn of the edge. Latite uses 3 feet based on a requirement in STD 3-0.1A, which provides that "supplies and materials shall not be stored within 6 feet of the rake edge or three feet where tile roof systems are being installed" (Exh. R-4). This section clearly does not apply to laying felt of a CAZ. It is noted that in *Latite 1*, the painted warning line was 6 feet from the roof's edge (Exh. R-25B). Also, although a CAZ under § 1926.500 is not required for roofs with a slope like building 10, such zones are generally physical barriers which control employees from going into the area (Tr. 1871, 1874, 2085). Finally, the record shows that the crew foreman/ monitor was performing his own work and was not on the same walking/working surface as the other employees, which prevented him from observing their work (Tr. 153, 1873). The employees were on the opposite side of the roof's ridge from the crew foreman. A violation of the alternate fall protection plan is a violation of § 1926.501(b)(13) (*also see* Exhs. R-4, R-36, regarding OSHA policy).

for the construction of the walkway or installing the railing. It was the responsibility of the general contractor.

Despite the short duration of employee exposure and Latite's lack of responsibility in creating the unguarded walkway, Latite remains responsible for protecting its employees from unsafe conditions. Even an exposure of a short duration is still an exposure to a hazard. OSHA's purpose is to prevent the first accident. Crew foreman Rosiaz had the authority to take action if he determined or observed an unsafe condition (Tr. 990). There is no showing that Latite attempted to notify the general contractor of the condition or provide other fall protection to its employees walking across the walkway. It was CO Quintero, rather than Latite, who told the general contractor to correct the walkway (Tr. 287). If Latite believed that a ladder was unsafe to carry nails, there is no showing that other alternative conventional fall protection could not have been used on the walkway, including tying off or installing a temporary railing.

A violation of § 1926.501(b)(13) regarding the walkway is established. Latite does not assert defenses of infeasibility or greater hazard as the walkway.

Item 2 -Alleged Violation of § 1926.1052(c)(1)

The citation alleges that Latite failed to equip stair rails on two stairways, exposing employees to a fall hazard 9 feet, 6 inches. Section 1926.1052(c)(1) provides:

> Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with: (i) at least one handrail; and (ii) one stairrail system on each unprotected side or edge.
>
> Note: When the top edge of a stairrail system also serves as a handrail, paragraph (c)(7) of this section applies.

During the inspection, OSHA was informed that Latite employees had used the apartment stairway to carry boxes of nails to the roof. This is the same incident which exposed the employees to the lack of fall protection on the walkway.

The two stairways from the ground to the walkway did not have stair railings on one side. The stairways' other sides did not have handrails. The elevated walkway was located between the two stairways at the top. The height of the stairways at the top was approximately 10 feet above the

ground. The stairways were approximately 4 feet wide. There is no dispute that the stairways were greater than 4 risers and 30 inches high (Exhs. C-8, C-9; Tr. 70, 209, 213).

Similar to its argument regarding the walkway, Latite notes that the stairrails were the responsibility of the general contractor and that OSHA did not see its employees on the stairways. Latite claims that the risk of exposure, if any, was no more than a few seconds.

The record establishes that § 1926.1052(c)(1) applies to the stairways; the stairways were unguarded contrary to the standard's requirement; employees were exposed to the unguarded stairways when carrying the boxes of nails; and Latite knew of the condition based on its crew foreman's presence on site and his responsibility for the employees' safety.

As discussed, although Latite was not responsible for the installation of the stairway or railings and the exposure was of a short duration, Latite remains responsible for protecting its employees from unsafe conditions. Even an exposure of a short duration still exposes the employee to a fall hazard. OSHA's purpose is to prevent the first accident. Crew foreman Rosiaz had the authority to take action if he determined or observed an unsafe condition (Tr. 990). There is no showing that Latite attempted to notify the general contractor or provide other fall protection to its employees using the stairways. It was CO Quintero, rather than Latite, who told the general contractor to correct the stairways (Tr. 287).

A violation of § 1926.1052(c)(1) is established.

Serious Classification for Items 1 and 2

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).

In this case, the record shows that the violations of § 1926.501(b)(13) and § 1926.1052(c)(1) were serious. The failure to use conventional fall protection and stairrails exposed three employees to fall hazards in excess of 25 feet from the roof and 9 feet from the stairway and elevated walkway. Such fall hazards exposed the employees to serious injury or possible death. Latite does not dispute

knowledge. Its crew foreman Rosiaz's knowledge of the conditions is imputed to Latite. Rosiaz had the authority to correct unsafe conditions, but he was also an exposed employee.

Penalty Consideration for Items 1 and 2

The Review Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission must consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is considered the principal factor.

Latite is a large employer with approximately 400 employees. The three employees, including a crew foreman, working at the site were exposed to fall hazards without fall protection. Latite was given credit for history by OSHA (Tr. 91). Latite is also entitled to good faith credit because it does have written safety and health programs, including a fall protection program, and prepared a site-specific fall protection plan. The record shows that Latite does utilize conventional fall protection on many high rise projects where steel supports are used. Latite has a safety supervisor who regularly provides training and a safety consultant who assists in the preparation of the site-specific fall protection plans.

A penalty of $3,000 is reasonable for violation of § 1926.501(b)(13). Three employees were exposed, including the crew foreman, to a fall hazard in excess of 27 feet from the roof and 10 feet from the walkway. Although it has the equipment, Latite did not provide any conventional fall protection systems to employees on building 10. Instead, it relied on its alternate fall protection plan.

A penalty of $1,000 is reasonable for violation of § 1926.1052(c)(1). The three employees used unguarded stairways to access the roof when carrying boxes of nails. The fall hazard was less than 10 feet, and the exposure was for a short duration. Latite was not the responsible contractor for installing the stairrails.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

_____1. Item 1, alleged serious violation of § 1926.501(b)(13), is affirmed and a penalty of $3,000 is assessed.

2. Item 2, alleged serious violation of § 1926.1052(c)(1), is affirmed and a penalty of $1,000 is assessed.

/s/ Ken S. Welsch
KEN S. WELSCH
Judge

Date: May 1, 2003