SECRETARY OF LABOR, Complainant, v. FIELD & ASSOCIATES, INC., Respondent.	:	Docket No. 97-1585

DECISION

BEFORE: ROGERS, Chairman and EISENBREY, Commissioner.

BY THE COMMISSION:

On August 20, 1997, two Field & Associates (Field) employees were distributing bundles of roofing shingles along the peak of a newly constructed church roof in Tipp City, Ohio. Two OSHA compliance officers, Dale Henderson and Samuel Merrick, passing the worksite en route to another inspection, noticed that the employees were not using any fall protection. The compliance officers obtained permission to inspect the site and conducted an inspection.

As a result of that inspection, one citation alleging five serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651-678 ("the Act"), was issued. Following the hearing, Administrative Law Judge Kenneth S. Welsch issued a decision in which he affirmed two of the five items and assessed a penalty of $2000 for each item. Those

two items are before the Commission on review.[1] The first item, item 2, alleged a violation of 29 C.F.R. § 1926.501(b)(11)[2] on the ground that the employees were not protected from falling by a guardrail system, safety nets, or a personal fall arrest system. The second item, item 3, alleged a violation of 29 C.F.R. § 502(j)(7)(i) on the ground that materials were not "kept" six feet back from the edge of the roof.

Having reviewed the record and the arguments of the parties, we affirm item 2 and vacate item 3 of the citation and assess a penalty of $2000 for item 2.

I. FALL PROTECTION- 29 C.F.R. § 1926. 501(b)(11)[3]

At the time of the inspection, the two Field employees were working on the roof, assisting a vendor's employee in unloading shingles onto the roof from a pallet lifted onto the roof by a crane. The peak of the roof was approximately 26 feet above the ground and the eave was approximately 10.3 feet above the ground. The slope at this height was 5.5 in 12.[4] It is undisputed that employees working on a roof with this slope and height above

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[1]The other items, involving a ladder violation, and two training violations, were vacated by the judge. The Secretary did not seek review of the those items.

[2]The item was amended three weeks prior to the hearing to allege in the alternative a violation of §1926.501(b)(13), the standard that applies to fall hazards during residential construction. Finding that the church did not qualify as residential construction, the judge held this standard inapplicable.

[3]§ 1926.501 **Duty to have fall protection.**

* * *

(b)(11) *Steep roofs.* Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

[4]Under § 1926.500(b) a steep roof is defined as a roof with a slope of greater than 4

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ground must use one of the forms of fall protection specified in § 1926.501(b)(11). Because the employees used no fall protection, the Secretary cited respondent for a serious violation of the standard and proposed a penalty of $2500. Judge Welsch found that the Secretary had established that Field violated the standard. He affirmed the item and assessed a $2000 penalty. We affirm.

Discussion

On review, Field renews the three major arguments for vacation the judge rejected in his decision. First, it contends that the cited standard was not applicable because it was not engaged in roofing work at the time of the citation. Second, Field argues that because it was doing the same work as the vendor, it should have been exempt from the standard's requirements under an interpretation issued by the Secretary that exempts vendors from some of the requirements of the standard. Finally, Field argues that the item should be vacated because it established that the use of safety belts on the site would have created a "greater hazard."

Does the Standard Apply?[5]

Field contends that the standard does not apply because its employees were not engaged in roofing work during the inspection. Although the parties vigorously disagree as to whether unloading shingles constitutes roofing work, we find that their arguments are misplaced. On its face, the standard simply and plainly states that "[e]ach *employee* . . .

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[4](...continued)
in 12, vertical to horizontal.

[5]As part of her prima facie case the Secretary must show that the standard is applicable. *Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), (listing the four elements of the Secretary's prima facie case, the first of which is showing that the standard is applicable), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The other elements of the Secretary's prima facie case are not in dispute.

shall be protected from falling. . . ." Emphasis added. Field has not cited, and we have not found, any provision relating to the scope of the fall protection standards contained in subpart M of 29 C.F.R. Part 1926 that limits the application of this standard to only those exposed employees who are actually conducting roofing work.[6] Moreover, § 1926.501(b)(10), the standard immediately preceding the cited standard, entitled *"Roofing work on Low-slope roofs,"* expressly limits its applicability to roofing work. Under the principle *"expressio unius est exclusio alterius,"* the fact that the Secretary expressly limited § 1926.501(b)(10) to employees engaged in roofing work while failing to include that limitation in the cited standard, is compelling evidence that the Secretary intended *not* to limit the scope of the cited standard to employees who are engaged in roofing work. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2159, 1993-95 CCH OSHD ¶ 30,636, p. 42,475 (No. 90-1747, 1994). Therefore, we find that the standard is applicable regardless of whether Field's employees were engaged in roofing work.

Did the Vendor's Exception Apply to Respondent?

Field claims that it is exempt from the requirements of the standard by what it terms the "vendor's exception." That exception is embodied in a February 2, 1995 Clarification/Interpretation from John B. Miles, Jr., OSHA's Director of Compliance Programs, to the Regional Administrators ("the Interpretation"). That document, designated as Interpretation M-2, addressed the obligations of a vendor of roofing materials to comply with the Subpart M fall protection standards. The Interpretation notes that, because they are delivering construction materials, *suppliers* of roofing materials are required under Subpart M to protect their employees from falls when possible. It further explains that employees

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[6]There is an exception, not applicable here, with respect to employees who are "making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed." 29 C.F.R.§ 1926.500(a)(1). *See also* §1926.500(a)(2)(i)-(vi) (Scope, application, and definitions applicable to this subpart).

must be provided with personal fall arrest equipment to attach to an anchor point "if available." However, according to the Interpretation, during the distribution of roofing materials, "OSHA will not require the vendor's employees to install a[n] anchorage point for fall protection equipment regardless of the slope of the roof or the fall distance."

The document explained the basis for the decision:

> Delivering the materials directly to the roof eliminates hazards for other employees on the job who otherwise would have to move the materials from ground level to the roof. In recognition of this and in recognition that the roofing supplier will only be on the roof for a short period of time and focused on one task, OSHA is issuing this compliance interpretation. However, if the contractor has a suitable anchorage point available for use by the vendor's employee, it should be used.

Field argues that it qualifies for the exception because its employees were doing the same type of work as the vendor and that such work (the hoisting and storing of shingles) is the type of work addressed by the exception. We disagree. By its terms, the exception is limited to roofing material vendors whose employees are distributing roofing materials to customers' jobsites. Although the applicability of the exception to *vendors* might be determined by the nature of their particular task, the exception is not applicable *at all* to nonvendor employers, regardless of the type of work being performed.[7]

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[7]*Seyforth Roofing Co.*, 16 BNA OSHC 2031, 2033, 1993-95 CCH OSHD ¶ 30,599, p. 42,381 (No. 90-0086, 1994), relied on by Field, does not require a contrary result. In *Seyforth*, the employer was cited for violating the roof fall protection standard at former 29 C.F.R. § 1926.500(g)(1). The standard's scope provision specifically exempted from that standard employees who are on the roof "only to inspect, investigate, or estimate roof level conditions." Former 29 C.F.R. § 1926.500(g)(2). Finding that the exemption was specifically applicable to Seyforth, the Commission vacated the item. The exemption at issue in *Seyforth* was based on the type of work being performed; the vendor's exception at issue here is based initially on the type of employer. Our differing conclusions as to these two different exceptions are governed by the single principle that the intended scope of each exception is

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Respondent also relies on two other interpretive documents issued by OSHA. The first is a May 30, 1996 letter from Roy Gurnham, OSHA Director of the Office of Construction Services, concerning the February 1995 Interpretation as it pertains to vendors or suppliers of roofing materials. While Field argues that the letter expands the scope of the exception as to vendors, the letter does not purport to extend the exception to roofers under any circumstances.

Field also points to an interpretation designated M-1, a sister interpretation to M-2, which was discussed in the preamble to OSHA's *Advance Notice of Proposed Rulemaking on Fall Protection in the Construction Industry*. 64 Fed. Reg. 38078, 38083 (1999). Field argues that this interpretation would have exempted it from the standard if it had picked up the roofing materials rather than having them delivered by the vendor. We find nothing in the record to support Field's argument. Field did not introduce the document into evidence, but relied only on the compliance officer's recollection of its contents at the hearing. His recollection, that the interpretation would treat the roofer as a vendor where the roofer picks up and delivers its own shingles, is disputed by the Secretary who argues that if the compliance officer was referring to Interpretation M-1, that interpretation bears no relationship to the position propounded by Field.[8] We agree with the Secretary.

According to the preamble, Interpretation M-1 actually addressed the question of when a vendor's employees are engaged in construction. The only part of the interpretation that even faintly resembles Field's contention is the provision stating that when the contractor picks up the roofing material at the vendor's store or outlet, the *vendor* is not engaged in *construction* work.

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[7](...continued)
evident from its plain language.

[8]In any event, it is well-established that OSHA is not bound by the representations or interpretations of its compliance officers. *L.R. Willson & Son, Inc. v. Donovan*, 685 F.2d 664, 675 (D.C. Cir. 1982); *Western Steel Co.*, 4 BNA OSHC 1640, 1643, 1976-77 CCH OSHD ¶ 21,054, p. 23,341 (No. 3528, 1976).

> [I]f a construction contractor picks up materials at the vendor's store or outlet (rather than having the vendor deliver the materials), the vendor is not engaged in construction. Therefore, vendor employees delivering materials to a construction site and exposed to fall hazards of 6 feet (1.8 m) or more are covered by subpart M (Interpretation M-1).

Id. Accordingly, we conclude that there is no merit in Field's claim that the "vendor's exception" applied to its roofing employees.

Did Field establish the "Greater Hazard" affirmative defense?

At the hearing, respondent raised, for the first time, the greater hazard defense. The judge refused to consider the defense on the grounds that it was not raised in the answer and, therefore, not timely raised. Commission Rule 34(b)(3), 29 C.F.R. § 2200.34(b)(3), plainly states that the "answer shall include all affirmative defenses being asserted." Furthermore, Commission Rule 34(b)(4), 29 C.F.R. § 1926.2200.34(b)(4) warns that:

> The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.

Field contends that it should be excused for its failure to timely raise the defense because it was raised in the context of the Secretary's amendment, made at the hearing, to allege in the alternative, a violation of §1926.501(b)(13). That standard, which the judge ultimately found inapplicable, provides the following exception:

> When the employer can demonstrate that it is infeasible or creates a greater hazard to use [guardrail systems, safety net systems, or personal fall arrest systems], the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

We agree with the judge that by raising the affirmative defense at the hearing, Field failed to timely raise the defense as required by Commission Rule 34(b)(3). Field also failed to provide any basis for relief from this lateness by showing that it "asserted the defense as soon as practicable." Commission Rule 34(b)(4), 29 C.F.R. § 2200.34(b)(4). Indeed, in its brief, Field concedes that it was not attempting to invoke the affirmative defense, but rather merely attempting to invoke the exception under the standard cited in the alternative, § 1926.501(b)(13).[9] Accordingly, Field's attempt to assert the "greater hazard" defense fails

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[9] As to the merits of the defense, Field contends that the use of safety belts and lanyards would have presented a tripping hazard to the vendor's employee who, it contends, was not obligated to use fall protection because of the "vendor's exception," discussed *supra*. We note, however, that under §1926.501(b)(11) Field was not limited to a PFAS as

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vis-a-vis § 1926.501(b)(11). We therefore affirm item 2 of the citation alleging a violation of 29 C.F.R. § 1926.501(b)(11).

Penalty

Section 17(j) of the Act, 29 U.S.C. § 666(j), provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. 29 U.S.C. § 666(j). The Secretary proposed a penalty of $2500 for the violation. At the hearing, the compliance officer testified that no credit was given for good faith. The judge disagreed with the Secretary and determined that credit should be accorded for that factor. Accordingly, he lowered the penalty to $2000. Neither party has taken exception to the judge's assessment, and we conclude that it is supported by the record.

II. IMPROPER STORAGE OF ROOFING MATERIAL-29 C.F.R. § 1926.502(j)(7)(i)[10]

It is undisputed that bundles of shingles were placed within six feet of the roof's edge. The bundles were placed close to the edge to stabilize the pallet of shingles that was hoisted

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[9](...continued)
the only permissible means of fall protection. Moreover, Field failed to present any evidence regarding one of the elements of the greater hazard defense, that it used alternative methods of fall protection or that such alternative means were unavailable. *Lauhoff Grain Corp.*, 13 BNA OSHC 1084, 1088, 1986-87 CCH OSHD ¶ 27, 814, pp.36,397-98 (No.81-984,1987).

[10]§ 1926.502 **Fall protection systems criteria and practices.**

* * *

(j) *Protection from falling objects.*

* * *

(7) During the performance of roofing work:

(i) Materials and equipment shall not be stored within 6 feet (1.8 m) of a roof edge unless guardrails are erected at the edge.

by crane onto the roof for unloading. The pallet remained hooked to the crane during unloading. Although he did not make a precise measurement, the compliance officer estimated that the bundles were 39 inches from the edge. As a result, Field was cited for a violation of § 1926.502(j)(7)(i) for storing material within six feet of a roof edge.

The judge affirmed the item as serious and assessed a $2000 penalty. He noted that the shingles were not to be applied for three days, and rejected Field's assertion that it was necessary to place the shingles near the edge to stabilize the pallets.

Discussion

The courts and the Commission have generally held that, on construction sites, construction materials are stored until they are either actually used or incorporated into the building. S*ecretary v. Underhill Construction Co.*, 513 F.2d 1032 (2d Cir. 1975); *Blount International Ltd.*, 15 BNA OSHC 1897, 1898, 1991-93 CCH OSHD ¶ 29,854, p. 40,748 (No. 89-1394, 1992)*; Perini Corp.*, 6 BNA OSHC 1609, 1611, 1978 CCH OSHD ¶ 22,772, p. 27,494 (No. 13029, 1978)*; Sierra Corp.*, 6 BNA OSHC 1279, 1280-81, 1978 CCH OSHD ¶ 22,506, p. 27,158 (No. 13638, 1978). Field argues that the shingles were not "in storage" because they were being used to stabilize the pallet while it was being unloaded. The Secretary minimizes the importance of the bundles of shingles being used to stabilize the pallets. She notes that when the pallets were removed from the roof for replenishing, the shingles they rested on remained behind.

We find it unnecessary, however, to decide whether the bundles were being stored in violation of the standard because we find that the evidence is insufficient to establish employee exposure to the hazard.[11] The purpose of the standard, which is labeled "Protection from Falling Objects," is to prevent materials from falling onto employees working below

[11]One of the elements the Secretary must show to establish a prima facie violation is that employees are exposed to the cited hazard. *Astra Pharmaceutical Prods.*, 9 BNA OSHC at 2129, 1981 CCH OSHD at pp. 31,899-900.

the roof. 29 C.F.R.§ 1926.502(j).[12] The Secretary could establish exposure by showing that employees were actually exposed to the hazard, or that it was reasonably predictable that during the course of their normal work duties, employees might be in the "zone of danger" posed by the condition. *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1073, 1998 CCH OSHD ¶ 31,463, pp. 44,505-506 (No. 93-1853, 1997).

Here, the Secretary failed to introduce evidence to establish either that employees were actually exposed to falling materials, or that it was reasonably predictable that they would be in the "zone of danger." The Secretary argues that the general contractor's field superintendent, apparently the only employee at the site besides the two Field employees and the vendor's employee, might have walked under that part of the roof where the materials were placed. However, the Secretary has not shown that the superintendent walked or would have had any reason to walk to that part of the site, especially since there was no other work occurring on the site on that day. Moreover, the ladder that provided access to the roof was not on the same side of the building as the bundles of shingles. Therefore, neither the Field employees nor the vendor's employee would necessarily have been exposed while either going onto or off the roof. The evidence does show that the crane was on the same side of the roof as the shingles and that the vendor's employee would board the crane to raise and lower the pallet for reloading. However, there is no evidence as to the exact location of the crane in relation to the roof, or that the vendor's employee passed, or had any reason to pass, under the roof where the pallets were unloaded. Therefore, we find insufficient evidence that the vendor's employee was exposed to the hazard of material falling from the roof.

We therefore reverse the judge and vacate item 3.

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[12]The Secretary appears to have mistakenly analyzed this citation as a tripping hazard. At the hearing, when specifically asked by the Secretary to identify the nature of the hazard caused by storing the shingles at the edge of the roof, the compliance officer replied that employees could trip over the shingles and fall off the roof.

ORDER

Accordingly, it is ORDERED that item 2 for violation of 29 C.F.R. § 1926.501(b)(11) is affirmed and a penalty of $2000 is assessed. Item 3 for violation of 29 C.F.R. § 1926.502(j)(7)(i) is vacated.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: April 17, 2001

Secretary of Labor,

Complainant,

v.

OSHRC Docket No. **97-1585**

APPEARANCES

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Field & Associates, Inc. (F&A), with a place of business in Springfield, Ohio, is a roofing contractor. On August 20, 1997, two F&A employees were distributing bundles of roofing shingles along the peak of a newly constructed church's roof when the Occupational Safety and Health Administration (OSHA) inspected the site. As a result of the OSHA inspection, F&A received a serious citation on August 27, 1997.

The serious citation alleges that F&A violated § 1926.21(b)(2) (item 1) for failing to train employees in the hazard of climbing a ladder which extended less than three feet above the roof's eaves; § 1926.501(b)(11)[13] (item 2) for failing to protect employees distributing roofing shingles from falls with a guardrail system, safety nets or a personal fall arrest system; § 1926.502(j)(7)(i) (item 3) for failing to store roofing material six feet from the roof's edge; § 1926.503(a)(1) (item 4) for failing to train employees in fall hazards and the use of fall protection equipment; and § 1926.1053(b)(1)(item 5) for using a ladder which did not extend at least three feet above the roof's eaves. OSHA proposes a penalty of $2,500 for each alleged violation.

[13] Prior to hearing, the Secretary amended to plead in the alternative a violation of § 1926.501(b)(13), which requires fall protection for residential construction unless it is infeasible or creates a greater hazard.

The hearing was held August 4, 1998, in Dayton, Ohio. The parties stipulated jurisdiction and coverage (Tr. 4). Also, the parties agreed that on August 20, 1997 (1) F&A employees were distributing roofing materials on the roof; (2) the slope of the roof was 5.5 in 12;[14] and (3) F&A employees were not wearing fall protection equipment (Tr. 4-5).

F&A disputes each alleged violation and argues that distributing roofing material on the roof did not require fall protection because of a vendor's exception. The vendors' exception is not applicable to F&A. However, because of insufficient evidence, the alleged violations for failing to instruct on ladder safety (item 1); for the lack of fall protection training (item 4); and for the unsafe placement of the ladder (item 5) are vacated. The violations alleging the lack of fall protection (item 2) and the placement of roofing material within six feet of the roof's edge (item 3) are affirmed. A total penalty of $4,000 is assessed.

The Inspection

F&A contracted in April, 1997, with Peterson Construction Company to install the roofing shingles, flashing, and isolated roof decking for Saint John the Baptist Church in Tipp City, Ohio (Exh. R-2; Tr. 264). The church was approximately 11,000 square feet. The peak of the roof was approximately 26 feet above the lower level and the roof's eave was 10.3 feet (Exhs. C-1, C-3; Tr. 62).

On August 20, 1997, roofing materials were delivered to the site by a vendor. The roofing deck had been installed by another contractor. Using a truck crane, the vendor's employee hoisted pallets (skids) of roofing shingles onto the roof. Two of F&A's employees, foreman Robert Hayes and employee John Fricke, were on the roof unloading the pallets and distributing the bundles of shingles along the peak (Tr. 314, 321). After placing the pallets of roofing shingles on the roof, the vendor's employee climbed a ladder to the roof and assisted the F&A employees in distributing the shingles (Exhs. C-3, C-5; Tr. 319-321). The job took less than two hours (Tr. 318, 320, 323). After distributing the shingles on the roof, F&A did not install or apply the shingles for approximately another three days (Tr. 338).

[14] 5.5 in 12 applies to the pitch of the roof. For each 5.5 inches vertical, there is 12 inches horizontal (Tr. 37, 268-269).

While on the way to conduct another inspection, OSHA safety compliance officers (CO) Dale Henderson and Samuel Merrick observed the employees on the church's roof without any fall protection (Tr. 18-19, 131). In accordance with OSHA's local emphasis program on fall protection, the compliance officers obtained permission to inspect the site (Tr. 18). As a result of their inspection, the serious citation was issued to F&A (Tr. 20, 131). No citation was issued to the vendor (Tr. 78-79).

Discussion

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).

There is no dispute that the two F&A employees on the church's roof were not protected from falls by any fall protection equipment (Tr. 6). The employees were exposed to falls in excess of 10 feet (Tr. 62). Also, it is not disputed that knowledge of an unsafe condition, if one is found, is imputed to F&A because of the presence and supervision of Robert Hayes, F&A's foreman in charge of the site (Tr. 51, 313-314). Hayes placed the ladder and was on the roof distributing the shingles (Tr. 314, 316).

The actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary makes a prima facie showing of knowledge by establishing that a supervisory employee knew of, or was responsible for, the violation. *Dover Elevator Co.,* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993); *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986) (the actual or constructive knowledge of an employer's foreman is imputed to the employer).

Item 1 - Alleged Violation of § 1926.21(b)(2).

The citation alleges that F&A failed to train employees in the hazard of climbing an extension ladder which did not extend at least three feet above the roof's eaves[15] (Tr. 21). Section 1926.21(b)(2) provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Section 1926.21(b)(2) is a general standard. In determining the scope of an employer's duty under a general standard, an employer is expected to conform its safety program to known duties and those measures that a reasonably prudent employer similarly situated adopts. *Northwood Stone & Asphalt, Inc.,*16 BNA OSHC 2097 (No. 91-3409, 1994) *aff'd.* 82 F.3d 418 (6th Cir. 1996). "An employer complies with section 1926.21(b)(2) when it instructs employees about the hazards they may encounter on the job and the regulations applicable to those hazards." *Concrete Construction Co.,* 15 BNA OSHC 1614, 1619 (No. 89-2019, 1992). A failure to enforce a safety standard does not establish a violation of § 1926.21(b)(2). *Dravo Engineers and Constructors,* 11 BNA OSHC 2010 (No. 81-748, 1984).

CO Henderson testified that when asked if F&A employees had received training in the proper placement of ladders, foreman Robert Hayes stated that he had been trained, but he was not sure of the other employee, Fricke (Tr. 30-31). Fricke told CO Henderson that he had not been trained (Tr. 31). Fricke did not testify at the hearing. CO Henderson also testified that Charles McAllister, F&A's safety director, did not have any documentation showing whether Fricke had been trained and stated, "[w]ell, the gentleman is scheduled to go to training" (Tr. 32-33, 134).

McAllister disputed Henderson's testimony. He testified that all employees who work for F&A were trained in the recognition of hazards on a job before they begin work on the job. Foreman Hayes testified that he had received training on ladder safety, including placing a ladder at least 36 inches above the roof's eaves (Tr. 317-318). When each new employee is hired, McAllister stated that he goes over the company's safety program and gives each employee a copy of the safety program. McAllister testified that the employees are shown films on fall protection and other safety

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[15] F&A is also cited for violating § 1926.1053(b)(1) (item 5) for using a ladder which did not extend at least three feet above the roof's eaves.

matters related to roofing (Exh. C-2; Tr. 276). He denied making the statement to CO Henderson about Fricke's training (Tr. 301-302). McAllister testified that every employee on the church job site had been trained (Tr. 301). McAllister, however, agreed that at the time of OSHA's inspection on August 20, 1997, the employees had not been trained in the recognition of hazards specific to the Tipp City job because F&A was merely stocking the roof and was not going to install the shingles for another three days (Tr. 276-277).

F&A argues that ladder training is covered in § 1926.1060. Section 1926.1060 specifically advises that it clarifies the training requirements of § 1926.21(b)(2). Section 1926.1060(a)(1)(iii) provides:

> The employer shall provide a training program for each employee using ladders and stairways, as necessary. The program shall enable each employee to recognize hazards related to ladders and stairways, and shall train each employee in the procedures to be followed to minimize these hazards.
> (1) The employer shall ensure that each employee has been trained by a competent person in the following areas, as applicable:
> (iii) The proper construction, use, placement, and care in handling of all stairways and ladders.

It is well settled that a general standard is not preempted by a specific standard, unless both address the same particular hazard. *Williams Enterprises of Ga., Inc.*, 832 F.2d 567, 570 (11th Cir. 1987). If the same hazard is addressed, then it must be determined whether, as applied in the case, the specific standard preempts the application of the general standard. *McNally Construction & Tunneling Co.*,16 BNA OSHC 1879, 1880 (No. 90-2337, 1994).

As stated by its terms, § 1926.1060 clarifies the requirements of § 1926.21(b)(2). It preempts § 1926.21(b)(2). Therefore, an allegation of § 1926.21(b)(2) for failing to instruct in ladder placement is not proper. Section 1926.1060(a)(1)(iii) should have been cited.

Also, F&A argues that the vendor was not cited, although its employee used the ladder to access the roof (F&A Brief, p. 8). The decision to cite an employer is within the prosecutorial discretion of the Secretary. Ordinarily, the Review Commission will not review the Secretary's decision whether to cite an employer. It is noted that the ladder belonged to F&A and F&A's foreman placed the ladder against the roof (Tr. 316).

The record is uncontroverted that Hayes was trained in ladder placement, as required by § 1926.21(b)(2). The issue is whether employee Fricke was similarly trained. There is no written

record showing that Fricke received the training. However, F&A's company safety policy specifically instructs that as a safety practice "[L]adders will be extended 36" above roof or scaffold. Ladders will be tied off and have safety shoes in place. Ladder areas will be clear for access" (Exh. C-2). McAllister testified that all employees are given a copy of F&A's safety policy. The compliance officers' observations regarding the placement of the ladder do not prove that an employee was not properly trained in ladder safety.

The alleged statement by Fricke to CO Henderson regarding the lack of training was voluntarily struck by the Secretary (Tr. 31-32). However, even if considered as admission under Rule 801(d)(2), Federal Rules of Evidence, little weight is given to the statement because it was not shown to be recorded or under oath. There is no way to know the questions asked or the actual responses to judge if they were ambiguous or confusing. There was no reason given for Fricke's failure to testify at the hearing. Also, the testimony of McAllister under oath and subject to cross- examination contradicted the statement. McAllister testified that Fricke was trained on the placement of the ladder, including the 36-inch requirement above the eave (Tr. 281). Trial testimony under oath is given more weight than the unrecorded recollection of statements made during an inspection almost a year earlier. The fact that there is no record of Fricke's training is not dispositive. The standard does not require that the training must be documented or recorded. The record fails to show by a preponderance of evidence that Fricke was not trained in the recognition of hazards associated with ladder placement. The violation of § 1926.21(b)(2) is vacated.

Item 2 - Alleged Violation of § 1926.501(b)(11) or, in the Alternative, § 1926.501(b)(13)

The citation alleges that two employees were on the church's roof exposed to a fall in excess of six feet without fall protection. Section 1926.501(b)(11) provides:

> Each employee on a steep roof with unprotected sides and edges 6 feet (1.8m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

There is no dispute that the roof's slope was 5.5 in 12; it was more than 10 feet above the ground level; and the employees on the roof were not protected from falls by any fall protection equipment (Tr. 5-6). The definition of a steep roof at § 1926.500(b) is greater than 4 in 12, vertical

to horizontal. Also, F&A stipulated that its employees were on the roof on August 20, 1997, without fall protection distributing bundles of roofing shingles along the roof's peak. The roofing shingles were not installed for at least three days (Tr. 338).

F&A had fall protection equipment at the church at the time of the inspection but did not use it (Tr. 37-38, 324). F&A's safety program requires the use of fall protection (Exh. C-2; Tr. 34). It states that "No employee shall work without fall protection in areas with unprotected sides and/or edges 6 feet or more above lower level" (Exh. C-2). F&A's fall protection policy states that "[e]ach employee on a steep roof with unprotected sides and edges 6ft or more above lower levels, shall be protected from falling by, guardrail systems, with toeboards, safety net systems, or personal fall arrest systems" (Exh. C-4).

F&A initially argues that distributing roofing shingles on the church is residential work covered under § 1926.501(b)(13). Section 1926.501(b)(13) provides:

> Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

F&A's residential construction argument is rejected. Although not defined, the Secretary by interim fall protection guidelines (Exh. C-9) defines residential construction as follows:

> [S]tructures where the working environment and the construction materials, methods, and procedures employed are essentially the same as those used for a typical house (single-family dwelling) and townhouse construction. Discrete parts of a large commercial structure may come within the scope of this directive (for example a shingled entranceway to a mall), but such coverage does not mean that the entire structure thereby comes within the terms of this directive.

The church project was not shown to be residential construction. The church was permitted by local zoning as a commercial building under a business classification (Tr. 38-39). The employees were distributing the bundles of shingles over the entire roof, not a discrete portion. It was commercial work and § 1926.501(b)(11) applies.

F&A also argues that it is entitled to the vendor's exception from fall protection. CO Henderson testified that upon arrival at the site, he observed three employees removing materials from a pallet and distributing the material on the roof. He identified two employees as employees of F&A and the third employee as the vendor's employee (Exh. C-3; Tr. 35-36). The vendor was not cited because of OSHA's interpretation, which excludes vendor's employees from complying with the fall protection standards when they are delivering roofing materials (Exh. R-1; Tr. 36-37). OSHA's compliance interpretation, dated February 2, 1997, provided that vendors while distributing the roofing materials:

> Once on the roof the vendor's employee will receive the roofing products from a conveyor belt (lift truck or similar equipment) and then distribute the products onto the roof of various locations. During this distribution process, OSHA will not require the vendor's employees to install an anchorage point for fall protection equipment regardless of the slope of the roof or the fall distance.

As the basis for the interpretation, the Secretary states:

> Delivering the materials directly to the roof eliminates hazards for other employees on the job who otherwise would have to move the materials from ground level to the roof. In recognition of this and in recognition that the roofing supplier will only be on the roof for a short period of time and focused on one task, OSHA is issuing this compliance interpretation.

(Exh. R-1).

CO Henderson explained the interpretation on the basis that a vendor's employee does not do roofing work all the time and is not on the roof very long. It also eliminates roofers from carrying shingles up a ladder which would "really be a hazard" (Tr. 41-42). Henderson also testified that he was shown by F&A another interpretation that "if a roofer goes and buys the materials and places and delivers them themselves, they have the same exception" (Tr. 103).

F&A argues that its employees, on August 20, 1997, were acting in every way as a vendor. If the vendor's exception does not apply to F&A, it is a denial of equal protection (F&A Brief, pp. 12-13). The two F&A employees were on the roof for no longer a period of time than was the vendor's employee. They were also focused on distributing bundles of shingles along the roof's peak in preparation of roofing work which was to occur in another three days. There was no other work being done on the roof at the time. They were distributing the roofing materials in the same manner

as the vendor's employee (Tr. 103-104). The vendor's employee worked in the same manner as F&A's employees (Tr. 74-75, 78). The F&A employees were exposed to the same fall hazard as the vendor's employee (Tr. 105-106).

OSHA's internal documents and interpretations do not have the force and effect of law, and do not confer procedural or substantive rights or duties on individuals. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2173 (No. 87-922, 1993). However, the Secretary's reasonable interpretation of an ambiguous standard is entitled to substantial deference. *Martin v. OSHRC*, 499 U.S. 144, 111 S.Ct. 1171 (1991).

A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception. *Armstrong Steel Erectors., Inc*., 17 BNA OSHC 1385, 1389 (No. 92-262, 1995). Exceptions are to be narrowly construed, even if the language appears imprecise.

In this case, the vendor's exception is not shown to apply to F&A's work on August 20, 1997. F&A is not a vendor or roofing supplier (Tr. 42, 219). Although the vendor's employee was assisting in distributing the shingles, F&A is not a vendor. Also, the Secretary's interpretation does not except the vendor's employees from fall protection. OSHA's interpretation states that a vendor "will be required under Subpart M to protect your employees from falls of 6 feet or more to lower levels when possible" (Exh. R-1). In distributing roofing materials on the roof, the Secretary's interpretation merely does not require the vendor's employees to install an anchorage point for fall protection equipment. It does not relieve the vendor from protecting in some manner its employee from fall hazards. It is not shown that an anchorage point was not installed or that F&A could not have installed an anchorage point. Unlike a vendor, the roofing contractor is in a position to install anchorage points. Although F&A's employees were only on the roof a short time and only distributing the roofing material at the time of OSHA's inspection, it is still required to provide fall protection. The reference to another interpretation extending to employers' performing the same function as a vendor is not established by the record. No other written interpretations were offered into evidence at the hearing or identified in F&A's post-hearing brief. Also, the compliance officer's testimony regarding another interpretation is not given weight because it is not shown that he is in a position to render official and binding interpretations of the Secretary's safety standards.

Also, F&A argues that distributing roofing material is not roofing work. The definition of roofing work at § 1026.500(b) is "the hoisting, storage, application, and removal of roofing material and equipment, including related insulation, sheet metal and vapor barrier work, but not including the construction of the roof deck." The work performed by F&A was distributing roofing shingles along the roof's peak for later installation. The shingles were being stored. The distribution of roofing materials is within the definition of roofing work. Stephen Field, F&A's president, agreed that his employees were engaged in roofing work within the meaning of § 1926.500 when storing the roofing materials on the roof (Tr. 300).

Finally, F&A also asserts a greater hazard defense (F&A Brief, p. 17). F&A argues that if its employees were required to wear personal fall arrest equipment with lifelines and body harnesses, a significant hazard would be created because of the possibility of tripping and falling while employees were carrying up to 100-pound bundles of roofing materials (Tr. 177-178). The vendor's employee would also be at risk of tripping (Tr. 328-329).

In order to establish a greater hazard, an employer must show that (1) the hazards of compliance exceed the hazards of noncompliance; (2) alternative means of protecting employees are unavailable; and (3) a variance is unavailable or inappropriate. *Lauhoff Grain Corp.*, 13 BNA OSHC 1084, 1088 (No. 81-984, 1987).

F&A's greater hazard defense is waived because it was not pled or raised prior to or at the hearing. If not raised by a party, fairness directs that the affirmative defense should not be considered. *National Engineering & Contracting Co.*, 16 BNA OSHC 1778, 1779 (No. 92-73, 1994). Even if considered, the defense is not available to F&A. Foreman Hayes admitted that he has used fall protection while distributing materials on the roof (Tr. 335). It was not shown that it could not have been used on the church's roof. Charles Wimsatt, a witness for F&A, agreed that fall protection could be used.

Therefore, a serious violation of § 1926.501(b)(1) is supported by the record. Two of F&A's employees, including its foreman, were engaged on the roof without any fall protection. The employees were exposed to a fall hazard in excess of ten feet. According to F&A's fall protection plan, "each employee on a steep roof with unprotected sides and edges 6ft or more above lower levels, shall be protected from falling by guardrail systems, with toe boards, safety net systems or

personal fall arrest systems" (Exh. C-4). F&A had fall protection equipment, including harnesses, on the site but it was not used by the employees.

Item 3 - Alleged Violation of § 1926.502(j)(7)(i)

The citation alleges that F&A failed to keep roofing materials six feet back from the roof's edge. Section 1926.502(j)(7)(i) provides that during roofing work:

> Materials and equipment shall not be stored within 6 feet (1.8m) of a roof edge, unless guardrails are erected at the edge.

Although not measured, there is no dispute that the pallets and some bundles of shingles were within six feet of the roof's edge. There was no guardrail at the edge (Exhs. C-3, C-5). CO Henderson determined that the shingles were 39 inches from the edge. His determination was based on an estimate of the size of the shingles (Exh. C-5; Tr. 49-50). Hayes and McAllister agreed that the bundles of shingles were placed within six feet of the roof's edge (Tr. 50, 138, 288). Henderson was also told that F&A's company policy requires materials to be kept more than six feet from the edge (Tr. 50). McAllister issued an employee warning notice to Hayes for "storing materials within 6 feet of rake edge" (Exh. C-10; Tr. 254-255). McAllister, however, testified that Hayes did not violate the policy and the warning notice was issued as a training tool (Tr. 292-293, 298). Hayes did not lose any pay or days off from work as a result of the warning (Tr. 293).

F&A argues that some bundles of shingles were placed close to the edge to stabilize the pallets which were hoisted onto the roof for unloading (Tr. 320). F&A asserts that the standard is ambiguous because Subsection (ii) states that "Materials which are piled, grouped, or stacked near a roof edge shall be stable and self-supporting." Both subsections apply "during the performance of roofing work." The parties stipulated that at the time of the inspection employees were distributing roofing shingles along the roof's peak (Tr. 4, 77). On August 20, 1997, at no time were the employees installing or applying the shingles to the roof. F&A argues, therefore, that § 1926.502(j)(7) does not apply.

F&A's argument is rejected. Storing roofing shingles on the roof for later installation is within the definition of roofing work at § 1920.500(b). F&A agrees that bundles of shingles were placed near the edge to stabilize the pallet's being unloaded.

A serious violation of § 1926.502(j)(7)(i) is affirmed. The foreman supervising the job was on site directing the unloading of the pallets. Bundles of shingles had been placed approximately 39 inches from the edge. F&A claims it was necessary to stabilize the pallets when hoisted onto the roof. The shingles were not applied for at least three days. There were no guardrails at the edge, and employees were not wearing fall protection. F&A's fall protection program provides that employees working at hoisting areas are to be protected from falling by guardrails or personal fall arrest systems (Exh. C-4).

Item 4 - Alleged Violation of § 1926.503(a)(1)

The citation alleges that F&A failed to train each employee in the fall hazards associated with working on an unprotected roof and the requirements for fall protection (Tr. 52). Section 1926.503(a)(1) provides:

> The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

During OSHA's inspection, McAllister gave CO Henderson documentation showing that Hayes had been trained in fall protection. Hayes testified that he had been trained in fall protection (Tr. 317). However, no documentation was submitted showing whether Fricke had been trained. According to CO Henderson, McAllister was not sure of Fricke's training (Tr. 98). He assured Henderson that Fricke would not be allowed on the roof without prior training (Tr. 53-54). Also, CO Henderson testified that there was no site-specific fall protection plan for the church (Tr. 43-44, 277). The fall protection plan on the site was for a school project with a low slope roof (2 in 12). The church had a steep roof (5.5 in 12) (Tr. 44, 303, 340).

McAllister denied making the statement regarding Fricke's training to CO Henderson. He testified that both Hayes and Fricke had been trained (Tr. 279, 302). McAllister testified that Fricke had been trained in F&A's policy concerning steep slope roofing (Tr. 279, 280). He testified that his training involved the recognition of fall hazards and the procedures to minimize the hazards (Tr. 295). He stated that the training was consistent with F&A's written policy (Exh. C-4; Tr. 280). Henderson agreed that F&A's written fall protection policy was adequate for commercial roof training (Tr. 98).

McAllister agreed that at the time of OSHA's inspection, there was no site-specific plan for the church because the employees were stocking the roof and not intending to apply the shingles for another three days (Tr. 276-277). F&A was not cited for having the wrong fall protection program.

There is no dispute that the two employees, including a supervisor, were not wearing fall protection while distributing the roofing shingles. However, OSHA agrees that foreman Hayes received fall protection training. The issue is whether employee Fricke had received training. Fricke did not testify. McAllister testified that Fricke was trained. His testimony was not contradicted. During the inspection, CO Henderson was told only that McAllister was not sure of Fricke's training. F&A submitted no documentation showing any training. However, the standard does not require written documentation of training. The Secretary failed to establish a violation by a preponderance of the evidence. The alleged violation of § 1926.503(a)(1) is vacated.

Item 5 - Alleged Violation of § 1926.1053(b)(1)

The citation alleges that F&A failed to ensure the ladder extended at least three feet beyond the upper landing surface (Tr. 27-28). Section 1926.1053(b)(1) provides that:

> When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9m) above the upper landing surface to which the ladder is used to gain access.

A 24-foot extension ladder was placed against the church wall for the employees to access the roof level (Exh. C-1; Tr. 288, 316). Employees were exposed to falls in excess of ten feet (Tr. 58). CO Merrick measured the ladder with a 25-foot engineering rod and determined that the ladder extended only 28 inches above the roof's landing surface (Tr. 140-141). According to Henderson, Hayes admitted that the ladder was not three feet above the landing, and it was not tied off. Also, he stated that Hayes agreed to raise the ladder to three feet (Tr. 25-26, 31, 58).

F&A stipulates that the distance between ladder rungs was 14 inches (Tr. 287). CO Henderson agrees (Tr. 23). Foreman Hayes testified that he did not measure whether the ladder was 36 inches above the edge (Tr. 331). However, he intended to extend the ladder to the proper distance (Tr. 316). He stated that he used the distance between the rungs as his guide (Tr. 318). He did not want to extend it too far above the eaves because of a leverage situation (Tr. 317).

F&A's written safety program states that "ladders will be 36 inches above the roof or scaffold" (Exh. C-2; Tr. 26). Although McAllister testified that Hayes did nothing wrong, he issued an employee warning to Hayes for a "ladder not 36" above a roof" (Exh. C-10; Tr. 292-293). McAllister testified that when he observed the ladder on August 29, 1997, he believed that it did extend 36 inches above the landing (Exh. C-1; Tr. 304-305).

F&A argues that the compliance officers did not get an accurate measurement. Neither Merrick nor Henderson climbed the ladder and directly measured the distance above the eaves. Merrick used a 25-foot engineering rod from ground level to make the measurement (Tr. 154-155). Merrick described placing the rod on the ground and holding it vertically to estimate the height of the angled ladder (Tr. 155, 161). The vertical rod was approximately 30 inches from the top to the ladder (Tr. 161). Because Merrick used the rod vertically, F&A argues that the actual distance of a ladder above the edge was more than 36 inches (F&A Brief, p. 26).

There is no dispute that a 24-foot extension ladder was used to access the roof, which was 10.3 feet above the ground level. Using an engineering rod, CO Merrick estimated the height of the ladder as 13.8 feet above the ground. Merrick agreed that it was an estimate and he had to take into consideration the angle of the ladder to the roof as well as the angle from which he was viewing the engineering rod (Tr. 171-172). Also, based on a photograph of the ladder, the ladder extended two rungs above the eaves (Exh. C-1; Tr. 287). CO Henderson measured distance between rungs as 14 inches or 28 inches for two rungs (Exh. C-1). According to Hayes, the side rails extended another 6 to 8 inches above the top rung (Tr. 287). The record, therefore, fails to show that the ladder did not extend at least 3 feet above the landing surface. The violation of § 1926.1053(b)(1) is vacated.

Penalty Consideration for Citation

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to 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 the principal factor to be considered.

F&A is a small employer with less than 20 employees. Two of F&A's employees were at the church and exposed to the conditions. F&A is also entitled to credit for history in that there is no record of past serious violations. F&A had received one previous OSHA inspection but no violations

were found. F&A is also entitled to good faith credit because it maintained safety and fall protection programs in which OSHA was unable to identify any deficiencies. Also, there is no evidence that F&A was uncooperative during the inspection (Tr. 28-30, 48).

A penalty of $2,000 is reasonable for violation of § 1926.501(b)(1) (item 2). Although Foreman Hayes had a harness on site, there was no fall protection used by the two employees. The employees were exposed to a fall hazard in excess of ten feet. The employees were working on a steep sloped roof (5.5 in 12) carrying 50 pound bundles of roofing materials.

A penalty of $2,000 is reasonable for violation of § 1926.502(j)(7)(i) (item 3). The shingle bundles were placed within six feet of the roof's edge. It was in excess of 26 feet from the peak to the ground level. Two F&A employees were exposed to the fall hazard.

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 serious Citation:

1. Item 1, alleging violation of § 1926.21(b)(2), is vacated.

2. Item 2, alleging violation of § 1926.501(b)(11), is affirmed and a penalty of $2,000 is assessed.

3. Item 3, alleging violation of § 1926.602(j)(7)(i), is affirmed and a penalty of $2,000 is assessed.

4. Item 4, alleging violation of § 1926.503(a)(1), is vacated.

5. Item 5, alleging violation of § 1926.1053(b)(1), is vacated.

/s/
KEN S. WELSCH
Judge

Date: June 18, 1999