SECRETARY OF LABOR,

Complainant,

v.

THOMAS MLODZINSKI,
D/B/A TNT ROOFING,

Respondent.

OSHRC DOCKET NO. 98-2061

Appearances:

Maria L. Spitz, Esquire
Myrna A. Butkovitz, Esquire
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant.

Thomas Mlodzinski
465 Pike Road, Unit 102
Honinger Valley, Pennsylvania
For the Respondent, *pro se*.

Before: Administrative Law Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). Respondent, Thomas Mlodzinski, d/b/a/ TNT Roofing ("TNT"), at all times relevant to this action maintained at a job site at 8800 Bartram Avenue, Philadelphia, Pennsylvania, where it was engaged in roofing the building under construction. TNT admits that it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that it is subject to the requirements of the Act.

On October 29, 1998, OSHA compliance officer ("CO") Gilbert Trujillo conducted an inspection of the subject site pursuant to a complaint OSHA had received about employees working on the roof of a five-story building with no fall protection. As a result, on December 2, 1998, OSHA issued TNT a serious citation with a total proposed penalty of $1,500.00. By filing a timely notice of contest, TNT brought this proceeding before the Commission. A hearing was held on May 11, 1999, in Philadelphia, Pennsylvania. The Secretary has submitted a post-hearing brief, and Respondent has submitted a post-hearing letter.

The Citation

Item 1a alleges a violation of 29 C.F.R. § 1926.501(b)(10) or, in the alternative, 29 C.F.R. § 1926.501(b)(13).[1] Item 1a alleges as follows:

> An employee, working on the roof of the Fairfield Inn, 40 feet from ground level was not using any personal fall arrest system.

The cited standards provide as follows:

> 29 C.F.R. 1926.501(b)(10) -- [E]ach employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.
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> 29 C.F.R. 1926.501(b)(13) -- Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

Item 1b alleges a violation of 29 C.F.R. § 1926.501(b)(11) or, in the alternative, 29 C.F.R. § 1926.501(b)(13), as follows:

> Two employees, working on the roof (6 in 12 pitch) of the Fairfield Inn, 50 feet from ground level, were not using the available personal fall arrest system.

29 C.F.R. § 1926.501(b)(11) provides as follows:

> 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.

The OSHA Inspection

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[1]As issued, items 1a and 1b alleged violations of 29 C.F.R. §§ 1926.501(b)(10) and 1926.501(b)(11). However, by order dated April 29, 1999, I granted the Secretary's motion to amend the citation and complaint to allege alternative violations of 29 C.F.R. 1926.501(b)(13).

CO Trujillo testified that as he approached the site on October 29th, he saw an individual working near the edge of the roof without any fall protection. He videoed him, and, upon arriving at the site, met with Greg Deavors, the supervisor for the general contractor, who said that the only subcontractor on the job was the roofing subcontractor. Deavors then said he had to leave but gave the CO permission to look around. Trujillo went in search of the roofing supervisor, and in the back of the building he saw two individuals working on the roof without fall protection; one was on a low-slope roof about 40 feet from the ground and was nailing shingles about 3 feet from the edge, while the other was on a steep-slope roof about 50 feet from the ground and was nailing shingles about 6 feet from the edge. The CO videoed them and then presented his credentials and asked them to come down, and as he walked around to the front of the building to meet them, he saw another person on the roof without fall protection; this person was also on a steep-slope roof about 50 feet from the ground and he was nailing shingles 4 to 6 feet from the edge. The CO also videoed this individual and, after showing him his credentials, asked him to come down as well.[2] (Tr. 15, 19-35).

CO Trujillo further testified that this last person came down first, and that after he introduced himself and presented his credentials again, the person identified himself as Thomas Mlodzinski, the owner of TNT; he told the CO there were three TNT employees at the site, including himself, that this was their fourth day on the job, and that they were about 75 percent done. The CO said that Mlodzinski was very cooperative until he told him that a citation would be issued and that there could be a monetary penalty, at which point Mlodzinski became angry and walked away. The CO also said that he spoke to the other two workers a short time later, after they had come down, cleaned up the site and were preparing to leave. He introduced himself and presented his credentials, after which he learned that the employee who had been on the low-slope roof was Mr. White, that the other employee was Mr. Altimoro, and that both worked for TNT. When the CO asked him why he had not been wearing fall protection, White replied that they had been wearing it earlier but had stopped using it because they felt secure without it. CO Trujillo returned to the site the next day, at which time he verified with Deavors his estimates of the roof heights; he also verified his belief that White had been working on a low-slope roof and that Altimoro and Mlodzinski had been working

[2]At the hearing, CO Trujillo identified Exhibit G-3 as an edited copy of the video he had taken, and he described what G-3 depicted as he viewed it. (Tr. 21-35).

on steep-slope roofs.[3] Trujillo did not see Mlodzinski, but White and Altimoro were working on the roof again; however, this time each was using a fall arrest system. (Tr. 21-22, 27-39, 56-57).

The Secretary's Burden of Proof

The Secretary has the burden of proving her case by a preponderance of the evidence. In order to establish a violation of an OSHA standard, the Secretary must show (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 condition). *Atlantic Battery Co.*, 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

Discussion

It is clear from the record that the subject structure was a commercial building. It is also clear that one employee was working without fall protection on a low-slope area of the roof and that two employees were working without fall protection on steep-slope areas of the roof. CO Trujillo accordingly determined that section 1926.501(b)(10) applied to the low-slope roof area and that section 1926.501(b)(11) applied to the steep-slope roof areas. However, after the citation was issued, the Secretary determined that the cited conditions also violated section 1926.501(b)(13), which applies to residential construction. The Secretary therefore moved to amend her citation and complaint to allege an alternative violation of section 1926.501(b)(13), and, as noted above, the Secretary's motion was granted. At the hearing, Trujillo discussed Exhibit G-2, OSHA Instruction STD 3.1, dated December 8, 1995, which is entitled "Interim Fall Protection Compliance Guidelines for Residential Construction." He testified that pursuant to G-2, residential construction applies to structures where the work environment and the materials, methods and procedures used are essentially the same as those used for typical house and townhouse construction. He further testified that the conditions he observed at the subject site would also be covered by section 1926.501(b)(13) because the materials, methods and procedures TNT used on the subject building were essentially

[3]The CO testified that Deavors told him that the low-slope roof was a "4-in-12" (one that goes up 4 inches vertically for every 12 horizontal inches) and that the steep-slope roof was a "6-in-12" (one going up 6 inches vertically for every 12 horizontal inches). The CO further testified that OSHA defines a "4-in-12" or lower roof as a low-slope roof and a roof over a "4-in-12" as a steep-slope roof. (Tr. 27-31).

the same as those used in single-family and townhouse construction. Trujillo noted that the fall protection measures set out in section 1926.501(b)(13) are the same as those set out in sections 1926.501(b)(10) and (11), that the protective measures the employer may implement apply to both low-slope and steep-slope roofs, and that his analysis of the conditions at the subject site would be the same if section 1926.501(b)(13) were applied.[4] (Tr. 41-47).

The interpretation of a standard by the promulgating agency is controlling unless "clearly erroneous or inconsistent with the regulation itself." *Udall v. Tallman*, 87 S.Ct. 792, 801 (1965). Moreover, the Secretary's reasonable interpretations of her own regulations are entitled to deference in enforcement proceedings. *Martin v. OSHRC ("C.F. & I. Steel Corp.")*, 111 S.Ct. 1171, 1179 [14 BNA OSHC 2097] (1991). The Secretary's interpretation of section 1926.501(b)(13) as set out above is reasonable and not inconsistent with either the terms or the purpose of the regulation. I find, therefore, that 29 C.F.R. 1926.501(b)(13) applies to the circumstances in this case.

Turning to the cited conditions, TNT has admitted that on October 29, 1998, one of its employees worked on a roof at the site approximately 40 feet above the ground without using any personal fall arrest system; TNT has also admitted that on October 29, 1998, two of its employees

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[4]OSHA Instruction STD 3.1 provides, in pertinent part, that:

> Subpart M does not define "residential construction." For the purposes of interim compliance guidance under this directive, the term "residential construction" applies to structures where the working environment, and the construction materials, methods, and procedures employed are essentially the same as those used for 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 entrance way to a mall), but such coverage does not mean that the entire structure thereby comes within the terms of this directive....Paragraphs 1926.501(b)(10) and (b)(11) address fall protection for employees performing roofing work on low-slope roofs and for employees on steep-slope roofs, respectively. Paragraph (b)(10) specifically allows employers to use alternative fall protection measures for employees on low-slope roofs without having to develop a fall protection plan. Paragraph .501(b)(11) provides for the use of conventional fall protection in all steep slope roofing work, except in residential construction, where §1926.501(b)(13) has been interpreted to allow the employer who has employees performing low or steep slope roof work on a "residence" to have the option of demonstrating that it is appropriate to protect employees from fall hazards through alternative measures.

worked on a roof at the site approximately 50 feet above the ground without using any personal fall arrest system.[5] The CO's testimony and videotape corroborate these admissions and unequivocally establish that section 1926.501(b)(13) applies to the subject site, that TNT did not comply with the standard's terms, and that TNT's employees were exposed to the violative conditions. The CO's testimony and videotape also establish TNT's knowledge of the cited conditions. It is clear Thomas Mlodzinski knew of the standard's requirements, as fall protection was available and used on the job before the inspection. It is also clear Mlodzinski had actual knowledge of the violations, as he was working alongside his employees in the same unsafe manner; as TNT's owner, his knowledge is imputable to the company. *Pride Oil Well Svc.,* 15 BNA OSHC 1809 (No. 87-692, 1992). Based on the record, the cited conditions are affirmed as violations of 29 C.F.R. 1926.501(b)(13).[6]

Classification of the Violation

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is "serious" if there is " a substantial probability that death or serious physical harm could result" from the violation. In order to show that a violation is serious, the Secretary need not establish that an accident is likely to occur, but, rather, that an accident is possible and that it is probable that death or serious physical harm could occur. *Flintco Inc.*,16 BNA OSHA 1404, 1405 (No 92-1396, 1993). CO Trujillo testified that death or serious physical harm would be the expected result from falls from the heights involved in this case. (Tr. 40-41). Based on the record, the violation is properly classified as serious.

Penalty

Once a contested case is before the Commission, the amount of the penalty proposed by the Secretary is just that -- a proposal. What constitutes an appropriate penalty is a determination the Commission, as the final arbiter of penalties, must make. In making a penalty determination, "due consideration" must be give to the four criteria set out in section 17(j) of the Act, 29 U.S.C. § 666(j),

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[5]After TNT failed to respond to the Secretary's First Request for Admissions, which included the two admissions noted above, the Secretary sought an order deeming her requested admissions admitted. My order granting this request was issued on May 5, 1999. (Tr. 7-11; G-4).

[6]In affirming the citation, I note that Thomas Mlodzinski declined to testify or to present any evidence at the hearing. Further, although he indicated that he had never employed the two workers in the CO's video and that he was not the other individual in the video, his assertions were not made under oath and are therefore given no credence. (Tr. 54-58).

that is, the gravity of the violation and the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and the gravity of a violation is generally the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood of an injury. *J.A. Jones, supra.*

The gravity of the violations in this case was high as a fall from the heights involved could have resulted in a fatality, and the probability of an accident was greater as the employees were between 3 to 6 feet from the edge of the roof. The gravity-based penalty of $5,000.00 was adjusted for size (three employees, including the owner) and history (no previous history). No adjustment was made for good faith because of the high gravity of the violative conditions. (Tr. 49-51). In view of the aforementioned factors, I find that the proposed penalty of $1,500.00 is appropriate.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Items 1a and 1b, are AFFIRMED as serious violations of 29 C.F.R. § 1926.501(b)(13), and a total penalty of $1,500.00 is assessed.

Covette Rooney
Judge, OSHRC

Dated:

Washington, D.C.