SECRETARY OF LABOR, Complainant, v. ELGIN ROOFING COMPANY, Respondent.	OSHRC DOCKET NO. 99-1477

APPEARANCES:

Lisa R. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

Robert E. Mann, Esq., Franczek Sullivan PC, Chicago, Illinois

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor against Elgin Roofing Company to enforce two citations issued by the Occupational Safety and Health Administration to the company for alleged violations of safety regulations at one of its worksites. The matter arose after a compliance officer for the Administration inspected a company worksite, concluded that it was in violation of safety regulations adopted under the Occupational Safety and Health Act of 1970, and recommended that the citations be issued. After settlement negotiations were unsuccessful, a complaint and answer were filed with this Commission, and a hearing was held in Chicago, Illinois.

Citation 1, item 1 charged that:

Points of access were not connected to the work area by an access path formed by two warning lines.

Dean Street/16 feet above grade. Employees using a ladder to access/egress the roof at the Dean Street jobsite were exposed to fall related hazards. A safe access path was not provided.

in violation of the regulation found at 29 CFR 1926.502(f)(1)(iii) reading:

> (iii) Points of access, materials handling areas, storage areas, and hoisting areas shall be connected to the work area by an access path formed by two warning lines.

Evidence at the hearing disclosed that the warning lines were in effect at the time the job was started. However, they were removed prior to the inspection. This condition was confirmed by photographs taken by the compliance officer, and the Respondent does not dispute that the sub-standard condition existed. Thus, the standard was violated when workers were permitted on the job without two warning lines. This item of the citation is therefore affirmed.

Citation 1, item 2 states:

> Materials and equipment shall not be stored within 6 feet of a roof edge unless guardrails are erected at the edge.
>
> Dean Street/16 feet above grade. Employees placing and retrieving equipment and tools off the parapet wall at the Dean Street jobsite were exposed to fall hazards. Equipment and tools were places on the parapet wall where positive fall arrest was not utilized.

in violation of the regulation found at 29 CFR 1926.502(j)(7)(i) reading:

> (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.

The Respondent admits that while several roof level photographs depict materials and hand tools resting on an 18 inch parapet along the edge of the roof, no picture reflects employees working beneath the equipment shown on the parapet. It argues that there was no violation of the standard because no employee was exposed to the hazard of falling equipment or tools. In its view the standard addresses the hazards of failing objects only, and thus no worker was exposed to this problem.

While section (j) is entitled Protection from Falling Objects, subsection (i) demands that

materials and equipment shall not be stored within 6 feet of the edge unless guardrails are erected at the edge. Since the specified equipment was stored less than 6 feet from the edge without the protection of guardrails, this item of the citation is also affirmed.

Citation 2, item 1 is shown below:

29 CFR 1926.501(b)(3): Each employee in a hoist area not protected from falling 6 feet or more to lower levels by the use of guardrails systems or personal fall arrest systems.

16 feet above grade. Employees pulling on a rope to activate the hot kettle in a hoist area at the Dean Street jobsite were exposed to fall hazards. Positive fall arrest was not provided.

in violation of the regulation at 29 CFR 1926.501(b)(3)

> (3) *Hoist areas.* Each employee in a hoist area shall be protected from falling 6 feet (1.8 m) or more to lower levels by guardrail systems or personal fall arrest systems. If guardrail systems, [or chain, gate, or guardrail] or portions thereof, are removed to facilitate the hoisting operation (e.g., during landing of materials), and an employee must lean through the access opening or out over the edge of the access opening (to receive or guide equipment and materials, for example), that employee shall be protected from fall hazards by a personal fall arrest system.

On this matter the compliance officer testified that he witnessed and took pictures of an employee on the roof driving a four wheeler pulling a hot lugger. As the worker neared the rear of the building to fill up the hot lugger, he went to the edge of the roof, grabbed a rope and started to pull on it. Later when the officer returned to the roof he again saw an employee pulling on the rope at the roof's edge. Both the foreman and the worker at the roof's edge were unprotected.

Respondent's testimony on this issue was to the effect that a crane was utilized 95% of the time in lifting activity. While a crane may have been operational in 95% of the cases, the compliance officer saw the foreman and an employee at the roof's edge pulling on a rope. His observation was confirmed by photographs. Therefore, citation 2, item 1 is affirmed.

Citation 2, item 2 alleged that:

Each employee on a walking/working surface was not protected from falling through holes (including skylights) by covers.

8 feet above lower level. Employees conducting roofing work with mechanical equipment and push

carts at the Dean Street jobsite were exposed to fall hazards. Skylights were not protect (sic) by covers.

in violation of the regulation found at 29 CFR 1926.501(b)(4)(ii) which reads as follows:

> (ii) Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.

Although the Complainant did not consider the skylights covered, the photographs disclosed that acrylic plastic covers protected workers. This item of citation 2 is vacated.

Citation 2, item 3 declared that Respondent violated the regulation at 29 CFR 1926.501(b)(10) in that:

> Employees engaged in roofing work on low-sloped roofs with an unprotected side or edge 6 feet or more above lower levels were not protected from falling by using guardrails systems, safety net systems, personal fall arrest systems, or a combination of warning line system and safety monitoring system.
>
> Dean Street/20 and 16 feet above grade. Employees conducting roofing operations at the Dean Street jobsite were exposed to fall hazards. Fall protection was not provided for work being conducted at the roofs edge.

thus violating the regulation which reads as follows:

> (10) *Roofing work on Low-slope roofs.* Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8m) 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.

On this item the compliance officer testified that there were warning lines on three sides of the roof. One side of the roof was unprotected. The foreman explained that safety monitors were assigned to prevent employees from falling off the roof. None of the photographs of the area

depicted safety monitors on the unprotected roof side. In any event, Respondent agreed that the "working conditions on the roof following removal of the warning lines were substandard."

Citation 2, item 3 is affirmed.

Citation 2, item 4 charged:

> Mechanical equipment on roofs shall be used or stored only in areas protected by a warning line system, guardrail system, or personal fall arrest system.
>
> Dean Street/20 and 16 feet above grade. Employees using mechanical equipment closer than 6 feet to the roofs edge at the Dean Street jobsite were exposed to fall hazards. Fall protection was not utilized.

thus violating the regulation at 29 CFR 1926.502(f)(4) shown below:

> (4) Mechanical equipment on roofs shall be used or stored only in areas where employees are protected by a warning line system, guardrail system, or personal fall arrest system.

Respondent admits the evidence that mechanical equipment was driven within six feet from the roof edge is mixed; but that it appears from at least one photograph equipment was used in the vicinity of the roof edge without benefit of a warning line system. The company also accepts that the operation of the mechanical equipment under these circumstances was substandard. Thus, this item of citation 2 is affirmed.

The Respondent advances the defense of employee misconduct. As pointed out by the Complainant, the Commission has ruled that to establish this defense the employer must prove that it established work rules to prevent the reckless behavior or unsafe condition from happening; that it adequately communicated the rule to its employees; that it took steps to discover incidents of noncompliance; and that it effectively enforced the rule whenever employees transgressed it. Further, the employee conduct or exposure must have resulted from "idiosyncratic," "demented," or "suicidal behavior." Where a supervisory employee is involved, the alleged misconduct is strong evidence that the safety program was lax. Therefore, in this case proof of unpreventable employee misconduct is more rigorous, and the defense is more difficult to establish.

This is not a matter where a single employee was acting in violation of safety rules. Where a number of its workers are operating in danger zones, the Respondent has failed to establish the

defense of unpreventable employee misconduct.

Willful

In this case Citation 1 was shown as "Serious" and Citation 2 was designated as "Willful." The term "willful violation" has been defined as follows:

> A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. E.g., W*illiams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶27,893, p.26,589 (No. 85-355, 1987). It is differentiated from other types of violations by a "heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference." *Id.*

Calange Corp., 14 BNA OSHC 1789, 1791, 1990 CCH OSHD ¶29,531 (No. 85-319, 1990).

The Secretary adopted the compliance officer's recommendation in Citation 2 that the infractions were willful in nature. The classification was based upon his opinion that the employer knew of OSHA rules, the violations occurred, the foreman said that warning lines were a hassle, and that only three of the four roof sides were protected.

On the other hand, the record discloses that the Respondent engaged an outside safety consultant to develop a safety program; that its employees received considerable training by consultants, including a ten-hour course for some foremen; that it conducted safety meetings; and that it provided safety equipment such as hard hats, gloves, goggles, fall arrest systems, lanyards and harnesses.

In addition, there were pre-job safety meetings, a daily safety check list, and a diagram for each worksite. The president of the respondent was also on the job daily. As part of a joint safety program with the union, outside safety consultants made random and unannounced safety inspections of the employer's worksites. The company insurance carrier conducted safety audits; and Respondent received higher than average ratings regarding safety.

Inspections were also made in conjunction with the local contractor's association. No employee ever filed a safety grievance with the union, and all infractions were corrected immediately. Finally, employees were not totally unprotected since there were warning lines on three of the four sides of the roof. No worker was injured.

On the basis of these facts, I cannot conclude that the Respondent was in willful violation of the Occupational Safety and Health Act of 1970.

While the Respondent's failure to comply with the regulations in issue was not willful, it does come within the definition of "serious" which is defined in Section 17(k) of the Occupational Safety and Health Act of 1970 as follows:

> (k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

I find that the Respondent violated the regulations found at 29 CFR 1926.502(f)(1)(i); 29 CFR 1926.502(j)(7)(i); 29 CFR 1926.501(b)(3); 29 CFR 1926.501(b)(10) and 29 CFR 1926.502(f)(4) in that the regulations applied to the cited conditions; that its employees had access to the hazardous conditions; that the Respondent knew or could have known of the hazardous conditions with the exercise of reasonable diligence and that serious injury could have resulted.

I also find that the Respondent was not in violation of the regulation found at 29 CFR 1926.501(b)(4)(ii).

In sum:

Citation 1, item 1 is AFFIRMED with a penalty of $2,100.00.

Citation 1, item 2 is AFFIRMED with a penalty of $2,100.00.

Citation 2, item 1 is AFFIRMED with a penalty of $5,000.00.

Citation 2, item 2 is VACATED.

Citation 2, item 3 is AFFIRMED with a penalty of $5,000.00.

Citation 2, item 4 is AFFIRMED with a penalty of $5,000.00.

/s/

Sidney J. Goldstein
Judge, OSHRC

Dated: January 8, 2001