United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Office of
Executive Secretary

Phone: (202) 606-5100
Fax: (202) 606-5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-3396
ROBERT LETTRICK ROOFING COMPANY,	:	
Respondent.	:	

ORDER

This matter is before the Commission on a direction for review entered by Chairman Stuart E. Weisberg and Commissioner Velma Montoya on June 1, 1995. The parties have now filed a stipulation and settlement agreement supplemented by a letter from the Secretary.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement and the Secretary's letter, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the purposes of the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

Stuart E. Weisberg

Stuart E. Weisberg
Chairman

Date: December 11, 1995

Velma Montoya

Velma Montoya
Commissioner

United States of America
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NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on December 11, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Date: December 11, 1995

Ray H. Darling, Jr.
Executive Secretary

93-3396

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick
Orlando J. Pannocchia
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Patricia Rodenhausen
Office of the Solicitor, U.S. DOL
201 Varick Street, Room 707
New York, NY 10014

Donald W. Boyajian
Dreyer, Boyajian & Tuttle
75 Columbia Street
Albany, NY 12210

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT B. REICH, SECRETARY OF LABOR, Complainant, v. ROBERT LETTRICK ROOFING COMPANY, Respondent.	OSHRC Docket No. 93-3396

STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached agreement on a full and complete settlement and disposition of the issues in this proceeding which is currently pending before the Commission.

II

It is hereby stipulated and agreed by and between the Complainant, Secretary of Labor and the Respondent, Robert Lettrick Roofing Company, that:

1. Complainant hereby withdraws item 4 of Serious Citation 1, alleging a violation of 29 C.F.R. §1926.405(a)(2)(ii) (J), issued to Respondent and the notification of proposed penalty for that item.

2. Complainant hereby amends the proposed penalty for item 2 of Serious Citation 1 to $500 for the alleged violation of §1926.100(a).

3. Complainant hereby amends the proposed penalty for item 5 of Serious Citation 1 to $600 for the alleged violation of §1926.451(s)(1).

4. Complainant hereby amends the proposed penalties for items 1, 2, and 3 of Repeat Citation 2, alleging violations of §§1903.2(a)(1), 1926.59(e)(1) and 1926.59(g)(8) respectively, to $500 for each item, for a total proposed penalty of $1,500.

5. Complainant hereby amends item 5 of Repeat Citation 2 to characterize the alleged violation of §1926.451(u)(3) as a serious violation of the Act. The proposed penalty for this citation item is amended to $3,000.

6. Respondent hereby withdraws its notice of contest to the citations and penalties as referenced and amended herein.

7. Respondent hereby agrees to pay a penalty of $5,600 by submitting its check, made payable to U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) to the Albany, N.Y. Area Office within 45 days from the date of this Agreement.

8. Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

9. None of the foregoing agreements, statements, stipulations, or actions taken by Robert Lettrick Roofing Company shall be deemed an admission by Respondent of the allegations contained in the citations or the complaint herein. The agreements, statements, stipulations, and actions herein are made

solely for the purpose of settling this matter economically and amicably and shall not be used for any other purpose, except for subsequent proceedings and matters brought by the Secretary of Labor directly under the provisions of the Occupational Safety and Health (OSH) Act of 1970.

10. Respondent states that there are no authorized representatives of affected employees.

11. The parties agree that this Stipulation and Settlement Agreement is effective upon execution.

12. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at its main office on the 15th day of November 1995, pursuant to Commission Rules 7 and 100, and will remain posted for a period of ten (10) days.

Dated this 15 day of November, 1995.

Respectfully submitted,

THOMAS S. WILLIAMSON, JR.
Solicitor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DONALD G. SHALHOUB
Deputy Associate Solicitor for
Occupational Safety and Health

DANIEL J. MICK
Counsel for Regional
Trial Litigation

DONALD W. BOYAJIAN, ESQ.
Attorney for Robert Lettrick
Roofing Company
Dreyer, Boyajian & Tuttle
75 Columbia Street
Albany, N.Y. 12210

ORLANDO J. PANNOCCHIA
Attorney for the
Secretary of Labor
200 Constitution Ave., NW, S4004
Washington, D.C. 20210

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

December 6, 1995

via Telefax

Ray H. Darling, Jr.
Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th Street, N.W.
Suite 980
Washington, D.C. 20036-3419

Re: Secretary of Labor v. Robert Lettrick Roofing Co., OSHRC Docket No. 93-3396

Dear Mr. Darling:

In response to your correspondence of December 1, 1995, this is to inform the Commission that respondent has agreed to pay additional penalties totalling $2,400 assessed by the administrative law judge as a result of her affirming serious citation 1, item 3 ($800), and repeat citation 2, item 4 ($1,600). Complainant and respondent overlooked incorporating these two items in the Settlement as they were not among the issues directed for review in this case. The parties regret any inconvenience this may have caused the Commission.

Sincerely,

Orlando J. Pannocchia
Attorney for the
Secretary of Labor

cc: Donald W. Boyajian, Esq.
DREYER, BOYAJIAN & TUTTLE
75 Columbia Street
Albany, NY 12210

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
ROBERT LETTRICK ROOFING
Respondent.

OSHRC DOCKET
NO. 93-3396

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 3, 1995. The decision of the Judge will become a final order of the Commission on June 1, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before May 23, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /jw

Date: May 3, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-3396

NOTICE IS GIVEN TO THE FOLLOWING:

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Donald B. Boyajian, Esquire
Dreyer, Boyajian & Tuttle
75 Columbia Street
Albany, NY 12210

Barbara Hassenfeld-Rutberg
Administrative Law Judge
Occupational Safety and Health
Review Commission
McCormack Post Office and
Courthouse, Room 420
Boston, MA 02109 4501

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
ROOM 420
BOSTON, MASSACHUSETTS 02109-4501

PHONE:
COM (617) 223-9746
FTS (617) 223-9746

FAX:
COM (617) 223-4004
FTS (617) 223-4004

SECRETARY OF LABOR :

Complainant :

v. :

ROBERT LETTRICK ROOFING COMPANY :

Respondent :

OSHRC
DOCKET NO. 93-3396

Appearances:

William G. Staton, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Donald W. Boyajian, Esq.
Dreyer, Boyajian & Tuttle
Albany, NY 12210
For Respondent

Before: Administrative Law Judge Barbara L. Hassenfeld-Rutberg

DECISION AND ORDER

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

On November 3, 1993, Respondent, Robert Lettick Roofing Company ("Lettrick"), was issued three citations, a serious citation alleging seven violations, a repeat citation alleging five violations and an other than serious citation alleging two violations. Lettrick contested the serious and repeat citations but did not contest the two items in the other than

serious citation. The Secretary withdrew items 1 and 6 of the serious citation, leaving in contest five serious items with a total proposed penalty of $5,800.00 and five repeat items with total proposed penalty of $15,600.00 for a total proposed penalty for both citations of $21,400.00. The citations resulted from an investigation conducted by the Occupational Safety and Health Administration ("OSHA") of a construction site at 722 North Broadway, Saratoga, New York from September 28-30, 1993.

Lettrick filed a timely Notice of Contest and Answer to the Complaint; thus, a hearing was held in Albany, New York on October 12 and 13, 1994, presided over by Judge Barbara L. Hassenfeld-Rutberg.

BACKGROUND

The Respondent is in the roofing business in the Albany, New York area and at the time of the inspection was performing work on the roof of an older mansion type home in Saratoga, New York (Tr. 13). As a result of a telephone complaint received by OSHA, compliance officer Mr. Paul Wigger, a construction specialist with OSHA since 1983, was sent to the site. Upon arrival at the site, Mr. James Taylor, the foreman, came down from the roof to talk to the compliance officer at the latter's request. The home was a three story structure and had some very steep towers, and Wigger determined the pitch of the roof to be a twelve pitch, forty-five degree angle roof (Tr. 13). At the time of the inspection, Lettrick had six employees on the site (Tr.13).

DISCUSSION

I. Serious Citation 1, Item 1

This item was withdrawn by the Secretary at the hearing and in writing by a Stipulation of Partial Withdrawal filed with the undersigned judge on December 20, 1994.

I. Serious Citation 1, Item 2

The Secretary has charged that the Respondent violated 29 C.F.R. §1926.100(a)[1]. The OSHA compliance officer, Mr. Paul Wigger, testified that when he arrived at the site, he

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[1] 29 C.F.R. §100(a) provides: Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

did not see anyone wearing a hard hat (Tr. 21, 24). He observed employees working on the roof approximately 28 from ground level and employees on the ground directly below the roof (Tr. 21). The men on the ground were engaged in picking up materials at ground level or in cutting plywood (Tr.21). Employees on the roof were putting down plywood and one employee was on the ground cutting the plywood to the size needed, carrying the pieces partially up the ladder and handing them to someone working on the roof (Tr. 23). Wigger opined that the two employees working on the ground near the house without a hard hat were exposed to the danger of serious head injury from falling objects because other employees were working on the roof overhead (Tr. 22, 24-26). There was material right near the bottom of the eave of the roof and in the front of the house and there was a porch; thus, there also was the danger that material could slide off the porch onto the ground directly in front of the house where the employees were seen picking up material (Tr. 24). This violation is affirmed as serious and in consideration of the testimony on this item and the penalty criteria in §17(j) of the Act, 29 U.S.C. §666(j), I find based on the size of the company of less than twenty-five employees, some prior history and the serious nature of the violation, that $1400.00 is a reasonable and appropriate penalty for this violation.

III. Serious Citation 1, Item 3

For this violation, the Secretary has charged that the Respondent has violated 29 C.F.R. §152(a)(1)[2] because there were two 2 ½ gallon plastic containers partially filled with gasoline used to fuel a gas powered Honda Portable Generator on the site (Tr.28, 33). Wigger testified that these plastic containers did not meet the definition of an approved container or a safety can as it had no flash arresting screen and self-closing lid (Tr. 28-29, Exs. C-1 & C-2). One of the containers was found in the rear of the house and the other one very close to the generator (Tr. 29). The compliance officer testified that there was a danger

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[2] 29 C.F.R. §1926.152(a)(1) provides that: Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids. Approved metal safety cans shall be used for the handling and use of flammable liquids in quantities greater than one gallon, except that this shall not apply to those flammable liquid materials which are highly viscid (extremely hard to pour), which may be used and handled in original shipping containers. For quantities of one gallon or less, only the original container or approved metal safety cans shall be used for storage, use, and handling of flammable liquids.

from the use of those containers with flammable fluids because if there was a fire, the gasoline would accelerate a fire (Tr. 32). This violation is affirmed as serious and in consideration of the testimony on this item and the penalty criteria in §17(j) of the Act, 29 U.S.C. §666(j), I find based on the size of the company of less than twenty-five employees, some prior history and the serious nature of the violation, that $800.00 is a reasonable and appropriate penalty for this violation.

IV. Serious Citation 1, Item 4

The violation alleged here concerns 29 C.F.R.§1926.405(a)(2)(ii)(J)[3] by the Respondent's use of a compressor on the roof to power pneumatic tools that was connected to the Honda Portable Generator by an ungrounded extension cord. The compliance officer found that the standard requiring the use of three-wire cords on construction sites was not met as the plug in issue here had a ground prong missing. This cord was being used from the generator to an air compressor that powered pneumatic tools used to put down material on the roof (Tr. 35). He felt that electrical current would flow through a person and through the ground and back to the generator, thus causing serious injury or electrocution to the employees (Tr.36) . This violation is affirmed as serious and in consideration of the testimony on this item and the penalty criteria in §17(j) of the Act, 29 U.S.C. §666(j), I find based on the size of the company of less than twenty-five employees, some prior history and the serious nature of the violation, that $800.00 is a reasonable and appropriate penalty for this violation.

V. Serious Citation 1, item 5

The Secretary has alleged that Lettrick violated 29 C.F.R.§ 1926.451(s)(1)[4] by using a ladder jack scaffold at a height greater than 20 feet above the ground.

Wigger testified that there were ladder jack scaffolds on the side and rear of the house (Tr. 38). He used trigonometric calculations to estimate the height of the ladder jack

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[3] 29 C.F.R.§ 1926.405(a)(2)(ii)(J) provides that: Extension cord sets used with portable electric tools and appliances shall be of three-wire type and shall be designed for hard or extra-hard usage. Flexible cords used with temporary and portable lights shall be designed for hard or extra-hard usage.

[4] 29 C.F.R.§ 1926.451 (s)(1) provides that: All ladder jack scaffolds shall be limited to light duty and shall not exceed a height of 20 feet above the floor or ground.

scaffolds. His calculations established the respective heights to 24 and 26 feet above the ground (Tr.41). The inspector never observed employees working on the ladder jack scaffolding. However, he did speak to Lettrick's foreman about whether the height of the ladder jack scaffolds had recently changed and was told that it had not. From this information, Wigger determined that a violation had occurred (Tr.42).

Mr. George Allain, Jr., Lettrick's manager (Tr. 271), testified at the hearing that he installed snow shields on the roof's eave using the ladder jack scaffolds on the side of the house. He estimated that the height of the ladder jack scaffold to be between 21 and 23 feet above the ground (Tr. 282). Section 1926.451(s)(1) prohibits the use of ladder jack scaffolding at height greater than 20 feet above the ground. Allain's testimony, the information given to Wigger by the foreman along with measurements and calculations made by Wigger establish that a violation occurred. The compliance officer noted that exceeding the load on the planking could lead to its breaking, which could result in serious physical harm or death (Tr. 55). This violation is affirmed as serious and in consideration of the testimony on this item and the penalty criteria in §17(j) of the Act, 29 U.S.C. §666(j), I find based on the size of the company of less than twenty-five employees, some prior history and the serious nature of the violation, that $800.00 is a reasonable and appropriate penalty for this violation.

VI. Serious Citation 1, item 6

This item was withdrawn by the Secretary.

VII. Serious Citation 1, item 7

The Secretary alleged that Lettrick violated section 1926.451 (u)(2)[5] by its failure to install roofing brackets on a roof with a ground to eave height greater than 16 feet and a pitch greater than 4 inches in 12 inches. Wigger testified that he saw Lettrick employees working on the roof without roofing brackets (Tr. 56). The Secretary introduced into evidence photographs taken by Mr. Wigger of the two Lettrick employees working on the front roof (Exhibit C-5 & C-6). These photographs show one employee standing near the eave and exhibit C-5 also shows a second employee sitting near the top of roof. Wigger testified that

[5] 29 C.F.R. §1926.451(u)(2) provides in relevant part: Brackets shall be secured in place by nailing in addition to the pointed metal projections. When it is impractical to nail brackets, rope supports shall be used.

the employee near the eave was standing on a roofing bracket but the other one was not (Tr. 59-60). Mr. Wigger decided that violation had occurred because the second employee did not have the support of a roofing bracket.

The issue of whether the second employee is supported by a roofing bracket is difficult to resolve based upon exhibit C-5. Allain testified that it was hard to determine from the photograph whether there was anything under the employee's foot (Tr. 246). He also testified that the requirements of roof installation necessitates occasions where workers will be unable to work with roofing brackets for support, which is especially true when installing the roofing brackets (Tr. 243-244).

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must establish that a particular standard applies to the facts, that the cited employer failed to comply with the standard, and that employees had access to the hazard. *Anning Johnson Co.*, 4 BNA OSHRC 1193, 1197, 1975 -1976 CCH OSHD ¶20,690 (Nos. 3694 and 4409, 1976). Section 1926.451(u)(2) requires the installation of roofing brackets; section 451(u)(1) requires the brackets to be constructed to fit the pitch of the roof.

The Secretary has not shown that Lettrick failed to comply with section 1926.451(u)(2). Wigger testified that a roofing bracket was installed at the eave of the roof but found a violation because there were no roofing brackets installed at intervals up the roof. The evidence introduced by way of testimony and photographs was not conclusive on the issue of what brackets were on the roof above the eave and in what stages of work the brackets were required to be used on the roof. Also, the Secretary did not introduce any evidence that the section cited requires interval installation of roofing brackets. No violation of section 1926.451(u)(2) is found and the item is vacated.

Repeat Citation 2

The Occupational Safety and Health Review Commission ("Commission") has set as precedent that a violation is *repeated* if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶23,294 (No. 16183, 1979). Under *Potlatch*, the Secretary may establish a prima facie case of similarity by showing that

the prior violations are for failure to comply with the same standard. The burden is then shifted to the employer to show that the past and present violations are not substantially similar. If the standards are not the same, however, the Secretary must present other evidence that the violations were substantially similar and involved similar hazards. *John R. Jurgensen Co.*, 12 BNA OSHC 1889, 1895, 1986 CCH OSHD p. 27, 641 (No. 83-1224, 1986).

VIII. Repeat Citation 2, Item 1

The Secretary alleged that Lettrick violated 29 C.F.R. §1903.2(a)(1)[6] because it failed to post at the work site an OSHA Notice to inform employees of the protections and obligations provided for in the Act.

Wigger testified that he did not see an OSHA notice on the job site (Tr. 158) and asked either Taylor or Allain whether there was an OSHA Notice posted who told him there was none (Tr.197-198). Lettrick presented no evidence to indicate that the notice was posted at the time of the inspection. Therefore, a violation of 29 CFR 1903.2 (a)(1) is found to have occurred and the item is affirmed.

The Secretary classified this violation as *repeat.* As evidence of the repeat nature of the violation, the Secretary introduced a copy of a previous citation issued to the Lettrick on April 6, 1992. A final order for the previous citation was issued against Lettrick on August 10, 1992 (Exhibit C-7). The past and present violations are of the same standard. Lettrick presented no evidence to show that the violations were not substantially similar. Under *Potlatch*, Citation 2, item 1, this violation is affirmed as repeat. In consideration of the testimony on this item and the penalty criteria in §17(j) of the Act, 29 U.S.C. §666(j), I find based on the size of the company of less than twenty-five employees, and the repeat nature of the violation, that $800.00 is a reasonable and appropriate penalty for this violation.

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[6] 29 C.F.R. §1903.2(a)(1) provides in relevant part: Each employer shall post and keep posted a notice or notices, to be furnished by the Occupational Safety and Health Administration... informing employees of the protections and obligations provided for in the Act, and that for assistance and information...employees should contact the employer or the nearest office of the Department of Labor. Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted...

IX. Repeat Citation 2, items 2, 3 & 4

The Secretary alleged that Lettrick violated three sections of the Hazard Communication Standard: 29 C.F.R. §1926.59(e)(1)[7] failure to maintain a written hazard communication program at the workplace; section 1926.59(g)(8)[8] failure to maintain copies of Material Safety Data Sheets ("MSDSs") for hazardous chemicals located within the workplace; and section 1926.59(h)[9] failure to provide employees with information and training on hazardous chemicals in their workplace.

Upon arriving at the Respondent's workplace, Wigger discovered hazardous chemicals, including gasoline, flashing cement, roofing primer and roofing sealant (Tr. 165). He asked Taylor for Lettrick's written hazard communication program, and the foreman told him that one existed but admitted it was not at the job site (Tr. 164). The compliance officer next asked Taylor for the MSDSs for the hazardous chemicals present at the workplace and was told that there were no MSDSs present (Tr. 172). When Wigger inquired from other employees about Lettrick's hazard communication program and any OSHA training they had received, including how to retrieve information from an MSDS, the workers did not indicate that they had received training and appeared not even to know what he was talking about (Tr.175). Citation 2, items 2 and 3 were issued because there was no written hazard communication program (including MSDSs) at the workplace. Citation 2, item 4 was issued

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[7] 29 C.F.R. §1926.59(e)(1) provides in relevant part: Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met...

[8] 29 C.F.R. §1926.59(g)(8) provides in relevant part: The employer shall maintain in the workplace copies of the required material safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

[9] 29 C.F.R.§ 1926.59(h) provides in relevant part: Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. . . . (2)Employees shall be informed of : (I) methods and observation that may be used to detect the presence or release of a hazardous chemical in the work area. . . . (iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use appropriate hazard information.

because the employees did not receive proper training regarding the hazardous materials at the job site .

Respondent's manager testified that Lettrick did have a written hazard communication program and that copies of the program were normally kept in the trucks at the various work sites (Tr. 248-251). He alleged that the written hazard communication program for this site had been inadvertently removed from the truck the previous day during a routine cleaning of the truck (Tr. 250). Allain asserted that the written hazard communication program contained MSDSs for the chemicals at the workplace and that all employees had received OSHA training (Tr. 251).

Section 1926.59(e)(1), requires employers to "develop, implement and maintain *at the workplace*" (emphasis added) a written hazard communication program. Section 1926.59 (g)(8) requires that the MSDS for each hazardous chemical in the workplace be "readily accessible during each work shift". "Workplace" is defined in Section 1926.59 (c)[10] to include each of an employer's job sites. There is a reason for these requirements. If the employee at the job site should need to consult the program for information regarding a hazardous material that he is about to use, or has used, or that has been spilled or otherwise caused an emergency situation, the program provides him no help if it is located miles away at the company office. *Ford Development Corp.*, 15 BNA OSHC 2003, 2005, 1992 CCH OSHD ¶29,900 (No. 90-1505, 1992). Lettrick's failure to keep the written hazard communication program and MSDSs readily accessible at the workplace while employees were exposed to hazardous chemicals violates sections 1926.59(e)(1), and 1926.59(g)(8). Lettrick's argument that the violation was excusable because circumstances surrounding the removal of the written hazard communication program from the site were unforeseeable is not persuasive. If indeed Allain instructed an employee to clean out the truck, he had the responsibility to ensure that the employee put the hazard communication program back into the truck so as to be at the job site where it would be available and accessible for the employees. A valid excuse can only be found where Lettrick did more than was done in the

[10] Workplace means an establishment, job site, or project, at one geographical location containing one or more work areas.

instant case to ensure that the violative condition did not exist. *See, Horne Plumbing and Heating Co. V. OSHRC*, 528 F.2d 564, 569 (1976).

The employees' apparent lack of knowledge about Lettrick's written hazard communication program or how to retrieve information from MSDS is sufficient to establish that Lettrick violated section 1926.59 (h). Respondent failed to show that its employees had been trained in accordance with the regulation.

The Secretary classified the present the hazard communication violations as repeat. To support this classification, the Secretary introduced into evidence copies of two citations issued to Lettrick on April 6, 1992, containing allegations of violations of section 1926.59, paragraphs (e)(1), (g)(8), and (h) (Exhibits C-14 & C-15). A final order against Lettrick was issued on those items on August 10, 1992. The Secretary has presented a prima facie case, as contemplated in *Potlatch.* Lettrick has failed to prove that the past and present violations were not substantially similar; thus, Citation 2, items 2, 3, and 4, were correctly classified as repeat. In consideration of the testimony on these three items and the penalty criteria in §17(j) of the Act, 29 U.S.C. §666(j), I find based on the size of the company of less than twenty-five employees, and the repeat nature of the violations, that $1600.00 per item for a total penalty of $4800.00 for all three items is a reasonable and appropriate penalty for these violations.

X. Citation 2, Item 5

In this item, the Secretary alleges that Lettrick violated 29 C.F.R. 1926 § 1926.451(u)(3)[11] by not providing the required fall protection. Catch platforms were not installed as required below the working area of roof with an eave height greater than 16 feet above the ground and a pitch greater than 4 inches in 12 inches without a parapet. In lieu of a catch platform, safety belts and lifelines may be used. At the hearing, Wigger testified that he witnessed Lettrick employees working on the roof with a ground to eave distance of 28 feet and a pitch of 12 inches in 12 inches, but neither the mandated catch platforms or safety

[11] 29 C.F.R.§ 1926.451(u)(3) provides: A catch platform shall be installed below the working area of roofs more than 16 feet from the ground to the eaves with a slope greater than 4 inches in 12 inches without a parapet. In width, the platform shall extend 2 feet beyond the protection of the eaves, and shall be provided with a guardrail, midrail, and toeboard. This provision shall not apply where employees engaged in work upon such roofs are protected by a safety belt attached to a lifeline.

belts and lifelines were installed (Tr. 177-179).

Lettrick counters that section 1926.451(u) (3) was not applicable because the correct "working" height was the less than 11 feet (the distance from the roof eave to the roof of the porch). No precedent was cited for this unique way to measure the height of the roof. Lettrick further argues that even if section 1926.451(u)(3) applied, neither catch platforms or safety belts and lifelines were feasible for installation on this particular roof, that the installation of catch platforms would be too expensive and time consuming and that lifelines created tripping hazards. The Secretary's burden is to show that installation of fall protection was required. The burden then shifts to Lettrick to show impossibility of compliance because compliance with the standard was functionally impossible or would preclude performance of required work; and alternative means of employee protection are unavailable or were in use. *See, M.J. Lee Construction Co.*, 7 OSCH 1140, 1979 OSHD ¶ 23,330 (1979). Respondent's excuses for failure to comply with the standard do not meet burden required for an adequate defense for non-compliance. *See, Brock v. Williams Enterprises of Georgia, Inc.*, 832 F.2d 567, 573 (1987). Respondent violated section 1926.45 (u)(3), by failing to provide the required fall protection, and the citation is affirmed.

The Secretary classified citation 2, item 5 as repeat. As evidence of a substantially similar past violation, the Secretary introduced a copy of willful violation 29 C.F.R.§ 1926.500(g) (1)[12] citation issued to Lettrick on April 6, 1992 (Exhibit C-16, Tr. 184). A final order on that citation against Lettrick was issued on August 10, 1992. Where the Secretary asserts that the violation is repeat but the previous standard differs from the present standard, the Secretary bears the burden of showing that hazards involved in both violations are substantially similar. *Jurgensen, supra* at 1889.

Section 1926.500(g) (1) requires that employees working on a low pitch roof, with a ground to eave height greater than 16 feet, must be protected from falling by use of either a motion stopping system, a warning line system, or a monitor. The facts presented in the

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[12] 29 C.F.R. §1926.500(g)(1) provides: During the performance of built-up roofing work on low pitched roofs with a ground to eave height greater than 16 feet (4.9 meters), employees engaged in such work shall be protected from falling from all unprotected sides and edges of the roof as follows: (I) by use of motion stopping system; or (ii)by use of a warning line system; or (iii)by use of a safety monitoring system.

instant case are sufficient to find a substantially similar repeat violation. Sections 1926.500(g)(1) and 1926.451(u)(3) address the same hazard - protecting employees from falling hazards while working on a roof greater than 16 feet above the ground. The present violation was correctly classified as a repeat. In consideration of the testimony on this item and the penalty criteria in §17(j) of the Act, 29 U.S.C. §666(j), I find based on the size of the company of less than twenty-five employees, and the repeat nature of a prior willful violation, that $10,000.00 is a reasonable and appropriate penalty for this violation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Serious citation 1, item 1 was WITHDRAWN by the Complainant.

Serious citation 1, item 2, alleging a violation of 29 C.F.R.§1926.100(a) is AFFIRMED and a penalty of $1400.00 is assessed.

Serious citation 1, item 3, alleging a violation of 29 C.F.R.§1926.152(a)(1) is AFFIRMED and a penalty of $800.00 is assessed.

Serious citation 1, item 4, alleging a violation of 29 C.F.R.§1926.405(a)(2)(ii)(J) is AFFIRMED and a penalty of $800.00 is assessed.

Serious citation 1, item 5, alleging a violation of 29 C.F.R.§1926.451(s)(1) is AFFIRMED and a penalty of $800.00 is assessed.

Serious citation 1, item 6 was WITHDRAWN by the Complainant.

Serious citation 1, item 7, alleging a violation of 29 C.F.R.§1926.451(u)(2) is VACATED.

Repeat citation 2, item 1, alleging a violation of 29 C.F.R.§1903.2(a)(1) is AFFIRMED and a penalty of $800.00 is assessed.

Repeat citation 2, item 2, alleging a violation of 29 C.F.R.§59(e)(1) is AFFIRMED and

a penalty of $1600.00 is assessed.

Repeat citation 2, item 3, alleging a violation of 29 C.F.R.§59(g)(8) is AFFIRMED and a penalty of $1600.00 is assessed.

Repeat citation 2, item 4, alleging a violation of 29 C.F.R.§59(h) is AFFIRMED and a penalty of $1600.00 is assessed.

Repeat citation 2, item 5, alleging a violation of 29 C.F.R.§451(u)(3) is AFFIRMED and a penalty of $10,000.00 is assessed.

BARBARA L. HASSENFELD-RUTBERG
Judge, OSHRC

Date: April 24, 1995
Boston, Massachusetts