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

SECRETARY OF LABOR Complainant v. PRIME ROOFING CORPORATION, Respondent	OSHRC DOCKET NO. 07-0252

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER ON REMAND

The Commission has remanded this matter to me in order "to allow for full consideration of the Secretary's motion to amend." This case arose after the Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, Prime Roofing Corporation ("Respondent" or "Prime"), and, on January 17, 2007, issued to Respondent a citation alleging a "repeat" violation of 29 C.F.R. 1926.501(b)(1). Following a hearing in this matter on June 26, 2007, I issued a decision and order vacating the alleged violation on September 18, 2007. On September 27, 2007, the Secretary filed a Motion to Amend Pleadings, in which she sought to amend her complaint to allege, alternatively, a violation of 29 C.F.R. 1926.501(b)(10). I did not rule on the motion and submitted my decision and order to the Executive Secretary for docketing on September 28, 2007. On that same day, Prime filed a letter with my office asking that the Secretary's motion be denied. On October 9, 2007, the Secretary submitted the same motion along with an accompanying letter to the Commission and asked that the Commission consider the two documents to be her Petition for Discretionary Review. On October 24, 2007, Prime filed with the Commission a statement in opposition to the Secretary's petition and requested that the Commission deny the motion to amend. The Commission's remand order was dated October 31, 2007.

Background

The Secretary's citation and complaint alleged a violation 29 C.F.R. 1926.501(b)(1), which provides as follows:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

The Secretary based her citation and complaint on the observations of the OSHA compliance officer ("CO") during his inspection that Mr. Dion, an employee of Prime, was working on a parapet wall about 22 feet from the ground without fall protection. In its notice of contest and its answer, filed on January 22 and February 15, 2007, respectively, Prime asserted that it did not violate the cited standard, noting that Mr. Dion was protected by a safety monitor, Mr. Crespo, another employee of Prime, who was watching Mr. Dion work. On March 15, 2007, the parties submitted a joint response to my order requesting planning recommendations. In the response, the parties identified the central issue as the allegation that Prime did not protect an employee working on a roof parapet from falling; according to the response, Prime had a monitor observing the employee, but the Secretary alleged that the monitor was insufficient. The Secretary's pre-hearing statement, filed June 7, 2007, identified the issue as "one of fact," *i.e.*, an employee of Prime was exposed to a fall without protection. The Secretary's statement included the parties' Stipulations of Fact, which indicated that Prime's position was that Mr. Dion was performing roofing work and was protected by Mr. Crespo, the safety monitor, which was permitted by the fall protection standard.[1] Respondent's pre-hearing statement, filed June 8, 2007, repeated that it had used a safety monitoring system at the site, which is allowed under the standard.

At the beginning of the hearing, held on June 26, 2007, the Secretary reiterated her position that a safety monitor was not effective protection under the circumstances at the subject site and that the standard did not permit it.[2] (Tr. 9-10). Although Respondent's representative did not make an

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[1]The stipulations were admitted as Exhibit G-1 at the hearing.

[2]In support of her position, the Secretary elicited testimony from the OSHA CO to the effect that while the fall protection standard allowed the use of a warning line and safety monitor in some situations, that provision did not apply here as Mr. Dion was working on a parapet and

opening statement, it became clear from his statements on the record and the testimony he elicited that Prime's position was that, because Mr. Dion was performing roofing work, the use of a combination warning line and safety monitoring system was permissible.[3] (Tr. 69-70, 78-85, 100-03, 112-18, 127-35, 157-59, 189). In its post-hearing filing, Respondent did not identify by number the standard it believed applied, but it repeated its position that it had been following an approved fall protection system under the standard, that is, the use of a warning line and a safety monitor. The Secretary specifically stated in her post-hearing brief that Prime was attempting "to interpose a different standard, that set forth at 29 C.F.R. 1926.501(b)(10)." *See* Sec. Brief, p. 8. She contended, however, that Mr. Dion was not doing roofing work and that the second standard did not apply.

In my decision and order, I found that Mr. Dion was in fact performing roofing work and that, as Prime indicated, 29 C.F.R. 1926.501(b)(10) was the applicable standard. That standard states that:

> *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 (1.8 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.

My finding as to Mr. Dion's work was based on the evidence of record, including testimony of the CO and Mr. Dion, certain definitions found on the National Roofing Contractors Association ("NRCA") website, and the term "roofing work" set out at 29 C.F.R. 1926.500(b), as follows:

> *Roofing work* means the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck.

My finding was also based on an OSHA interpretation letter dated May 3, 2001, entitled "Fall protection requirements for workers engaged in 'roof blocking.'" The letter addressed 29 C.F.R. §§ 1926.501(b)(1) and (b)(10) in the context of fall protection for workers performing "roof blocking." The letter described "roof blocking" as framing put around a hole (used for ventilation, heating, etc.)

Mr. Crespo was not properly fulfilling a monitor's duties. The CO did not identify by number the standard to which he was referring. (Tr. 41-45).

[3]Prime's president has represented Respondent *pro se* throughout these proceedings.

in a low-slope roof that provides support for equipment and aids in sealing the roof. The letter then went on to describe two ways to install roof blocking; in one, it is done as an integral part of the installation of the roof weatherproofing material and is considered roofing work, while in the other, it is done separately and before installation of the weatherproofing material begins and is thus not roofing work. The letter noted the definition of "roofing work" set out at 29 C.F.R. 1926.500(b) and stated that if the blocking is done as an integral part of installing the weatherproofing material on a low-slope roof, then 29 C.F.R. 1926.501(b)(10) applies; if the blocking is done separately, then 29 C.F.R. 1926.501(b)(10) does not apply. The letter also noted that the classification of the work as "roofing work" depends on the installation method used and not the trade of the worker.

My finding was further based on a Commission decision, *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331 (No. 00-1986, 2003). There, the employer was cited for violating 29 C.F.R. 1926.502(j)(7)(i), which prohibits storing materials and equipment within 6 feet of a roof edge, unless guardrails are erected at the edge, during roofing work. The employer argued it did not violate the standard as no roofing work was being done on the subject roofs and the materials on those roofs were put there temporarily. 20 BNA OSHC 1344. The Commission noted the definition of "roofing work," set out at 29 C.F.R. 1926.500(b), which includes storing roofing materials and equipment, and stated that the storage of roofing materials is roofing work. 20 BNA OSHC 1344 n.19. The Commission further noted the cited standard does not specify that roofing work must be taking place in the same area or on the same level as the materials stored and that, in any case, employees were in fact traversing the subject roofs on the day of the inspection. 20 BNA OSHC 1344.

Discussion

The Secretary contends that amending the complaint pursuant to Federal Rule of Civil Procedure 15(b) ("Rule 15(b)") to allege a violation of 29 C.F.R. 1926.501(b)(10) in the alternative is appropriate in this case. I do not agree.

Rule 15(b) states, in relevant part, as follows:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

The Commission has held that amendment under the foregoing portion of Rule 15(b) is proper only if the parties both tried an unpleaded issue and consented to do so; consent can be found only when the parties knew, that is, "squarely recognized," that they were trying an unpleaded issue. *Armour Food Co.*, 14 BNA OSHC 1817, 1823-24 (No. 86-247, 1990), citing to *McWilliams Forge Co.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984). The Commission has also held that consent is not implied by a party's failure to object to evidence that is relevant to both pleaded and unpleaded issues, at least in the absence of some obvious attempt to raise the unpleaded issue. *McWilliams Forge Co.*, 11 BNA OSHC at 2130. The First Circuit, where this case arose, agrees with the Commission in this regard and has stated that "[t]he introduction of evidence directly relevant to a pleaded issue cannot be the basis for a founded claim that the opposing party should have realized that a new issue was infiltrating the case." *U.S. v. Davis*, 261 F.3d 1, 59 (1st Cir. 2001), citing to *DCPB, Inc. v. City of Lebanon*, 957 F.2d 913, 917 (1st Cir. 1992).

I find that the parties in this case did not "squarely recognize" that they were trying the issue of whether Respondent was in violation of 29 C.F.R. 1926.501(b)(10). It is clear that both parties knew from the inception of this case that Respondent was defending against the alleged violation of 29 C.F.R. 1926.501(b)(1) by asserting that it had used a safety monitor at the site; during the course of the hearing, it became apparent that Respondent was asserting that Mr. Dion was performing roofing work and that its use of a warning line and a safety monitor was proper under the fall protection standard. However, in my view, these facts do not signify that the parties tried an alleged violation of 29 C.F.R. 1926.501(b)(10) by consent, particularly since the evidence supporting Respondent's defense against the pleaded violation was the same as that that would have been used to show a violation of 29 C.F.R. 1926.501(b)(10).

I further find that Respondent would be prejudiced by the amendment the Secretary seeks. First, based on the foregoing, Respondent did not recognize it was trying the issue of an alleged violation of 1926.501(b)(10); if it had, it might have presented its case differently and/or presented additional evidence. This prejudice is especially noteworthy here, where Respondent was appearing *pro se*. Second, the Secretary's motion for an amendment was untimely. My decision that the applicable standard was 1926.501(b)(10) was based on the information set out *supra*, all of which was available to the Secretary before the hearing; specifically, the Secretary had access to the CO's

information from the inspection, the NRCA website,[4] the definition of "roofing work" under the standard, the OSHA interpretation letter, and the Commission's decision in *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331 (No. 00-1986, 2003). Of particular importance are the OSHA interpretation letter and the *Capeway* decision, which in my opinion plainly demonstrate the applicability of 1926.501(b)(10) in this case. The Secretary, however, was evidently unaware of these documents and continued to assert that 1926.501(b)(1) was the applicable standard throughout the hearing and afterwards. Third, even after my decision was issued, the Secretary waited until the day before I submitted the decision to the Executive Secretary to file her motion to amend.

The First Circuit has held that "prejudice is an almost inevitable concomitant in situations where, as here, the late amendment attempts to superimpose a new (untried) theory on evidence introduced for other purposes." *DCPB, Inc. v. City of Lebanon*, 957 F.2d at 917 (citation omitted). That court has also held that, in weighing prejudice, "an important factor is whether the movant has shown any justification for its delay in moving to amend." *Id*. In addition, the First Circuit has stated that "[w]here the party seeking amendment of the pleadings has shown no justification for its delay in doing so, we have affirmed the trial court's ruling to deny the amendment." *U.S. v. Davis*, 261 F.3d at 59 (citation omitted). Here, the Secretary could have sought an amendment at any time during the hearing, based upon the information that was available to her, but she did not. She also could have filed her motion in a more timely fashion after my decision was issued, but, again, she did not. Finally, she has shown no justification for her delay in filing her motion to amend. In these circumstances, the Secretary's motion to amend her complaint is denied.[5] This is especially

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[4]As noted in my decision, the CO used the NRCA website to look up certain definitions that were received in evidence at the hearing.

[5]In denying the motion, I have noted the Secretary's statement in her motion that the undersigned "clearly articulate[d] the reasons why Respondent violated the standard." *See* Sec. Motion, p. 1. I did, in fact, indicate in my decision that Respondent had not complied with 29 C.F.R. 1926.501(b)(10). However, as noted *supra*, it is improper to base an amendment on evidence relevant to both a pleaded and an unpleaded issue, in the absence of some obvious attempt to raise the unpleaded issue. Further, if the Secretary had sought an amendment during the hearing, Respondent would have been given the opportunity to present further evidence in regard to whether it had complied with 29 C.F.R. 1926.501(b)(10). I have also noted the Secretary's statement that, if her motion is granted, she "would not object to Respondent being

appropriate here, where Respondent has appeared *pro se* throughout these proceedings and the Secretary has been represented by experienced counsel. The Commission has recognized that *pro se* employers may be given additional consideration in light of their *pro se* status. *Arkansas Abatement Serv. Corp.*, 17 BNA OSHC 1163, 1165 (No. 94-2210, 1995); *Manti d/b/a Manti Homes*, 16 BNA OSHC 1458, 1461 (No. 92-2222, 1993); *Choice Elec. Corp.*, 14 BNA OSHC 1899, 1900-01 (No. 88-1393, 1990); *Seward Motor Freight, Inc.*, 13 BNA OSHC 2230, 2232-23 (No. 86-1691, 1989).

Based upon the foregoing, the Secretary's motion to amend is DENIED.

/s/
Covette Rooney
Judge, OSHRC

Date: 11/19/07
Washington, D.C.

offered an additional opportunity to present evidence on this point." *See* Sec. Motion, p. 5. However, in my view, granting the amendment would be giving the Secretary a "second bite of the apple," particularly when she could have sought an amendment earlier but did not do so.

SECRETARY OF LABOR Complainant, v. PRIME ROOFING CORPORATION Respondent.	OSHRC DOCKET NO. 07-0252

Appearances:

Paul J. Katz, Esquire
U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

William A. Seppala, President
Prime Roofing Corporation
New Ipswich, New Hampshire
For the Respondent, *pro se*.

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a work site of Respondent, Prime Roofing Corporation ("Respondent" or "Prime"), located in Hooksett, New Hampshire, on October 24, 2006. As a result, OSHA issued to Respondent a Citation and Notification of Penalty alleging a "repeat" violation of 29 C.F.R. 1926.501(b)(1). Respondent contested the citation, and the hearing in this matter was held in Boston, Massachusetts, on June 26, 2007. Both parties have filed post-hearing submissions.[6]

Background

On October 24, 2006, OSHA Compliance Officer ("CO") Christopher Bills was driving to a work site in Hooksett, New Hampshire, pursuant to an assignment he had received, when he observed

[6]Prime filed a reply to the Secretary's post-hearing brief. The reply was dated September 5, 2007, but it was not received in this office until September 11, 2007, which was 12 days after August 30, 2007, the date the parties were told to file their replies. (Tr. 193). The Secretary has objected to the reply as being late and as attempting to introduce new evidence into this matter. The Secretary's objection is well taken, and I have not considered Respondent's late-filed submission in reaching my decision in this matter.

another work site and saw an individual without fall protection straddling a parapet wall, about 22 feet from the ground, at the edge of the Walgreens building under construction. CO Bills called his office and talked to his supervisor, who told him to inspect the site, whereupon the CO turned around and drove back to the site.[7] While stopped at the intersection across from the site, the CO took G-2a, a photo showing one employee straddling the parapet wall and a second employee with his back to the first. Once on the site, the CO took two more photos, G-2b and G-2c; G-2b shows the first employee straddling the parapet wall and the second employee watching him, while G-2c shows the first employee on his hands and knees on top of the parapet wall with his head, hands, and left arm and shoulder over the edge of the wall. (Tr. 14-17, 20-22, 30-31, 64-66).

After entering the site, the CO met with David Marion, Prime's foreman, and held an opening conference; the CO told Mr. Marion that he was inspecting the site due to the employee he had seen on the parapet and that he wanted to interview the two employees. CO Bills and Mr. Marion then went to the building and the employees were asked to come down. The CO spoke to Kevin Dion, the employee who had been on the parapet, who said he had been cutting a groove and finishing the flashing for the parapet wall; Mr. Dion also said he had been doing that work for 20 to 30 minutes and that the job shouldn't take more than 45 minutes.[8] The CO also spoke to Angel Crespo, the second employee, and learned he was supposed to be acting as a monitor for Mr. Dion; however, the CO had noted that Mr. Crespo was away from the area, and that he had had his back to Mr. Dion, when he seemed to be getting materials for Mr. Dion. (Tr. 17-19, 27-30, 41-42, 45, 94, 99-100).

During the inspection, CO Bills discussed the lack of fall protection with Mr. Marion, who replied that the monitor was the protection they had at the site. After finishing his inspection, which took less than an hour, the CO had a brief closing conference with Mr. Marion and told him he had issues with the employee exposure he had seen. The CO also had a telephonic closing conference

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[7]The CO testified that he acted pursuant to his office's local emphasis program in regard to fall hazards, which requires a CO, upon observing an apparent fall hazard, to contact the office and then conduct an inspection. (Tr. 15, 36).

[8]The CO stated that the proper term for Mr. Dion's work was "cutting a reglet" and that he understood what Mr. Dion said to mean he was putting in a drain on the parapet wall. (Tr. 27).

about a month later, with William Seppala, Prime's president, and he advised Mr. Seppala of the fall protection violation he had seen. The citation was issued on January 17, 2007. (Tr. 54-58, 62).

Jurisdiction

The parties have stipulated that the Commission has jurisdiction over this matter. They have also stipulated that Respondent is engaged in a business affecting interstate commerce and that Respondent is an employer within the meaning of section 3(5) of the Act.[9] I find, accordingly, that the Commission has jurisdiction over the parties and the subject matter in this case.

Whether the Inspection was Proper

As a preliminary matter, I note that Prime, at the hearing, offered testimony suggesting that the inspection was improper. For example, Mr. Marion testified that when he approached the CO upon his arrival, the CO told him he did not want to talk to him but to the two employees on the roof; he also testified that he tried to speak to the CO several times but that the CO refused to talk to him and also did not hold a closing conference with him. (Tr. 178-83). Mr. Dion also testified that the CO did not want to talk to Mr. Marion. (Tr. 118-19). The CO, however, testified as set out *supra*; that is, he testified that he held an opening conference with Mr. Marion and told him why he was there, that Mr. Marion went with him on his inspection, and that he held a brief closing conference with Mr. Marion and, later, a telephonic closing conference with Mr. Seppala. The CO also testified that he followed all the proper procedures during his inspection. (Tr. 17-19, 54-59, 62-63). I observed the respective demeanors of these three witnesses as they testified, including their facial expressions and body language, and while I found the CO to be a credible and convincing witness, I found Mr. Marion and Mr. Dion to be less than candid. The CO's testimony is thus credited over that of Mr. Marion and Mr. Dion, and I find the inspection was conducted properly.

The Parties' Positions

The Secretary contends that Prime was in violation of 29 C.F.R. 1926.501(b)(1), which provides as follows:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall

[9]These stipulations are set out in G-1, the parties' Stipulation of Facts.

be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Prime, however, contends that Mr. Dion's work on the parapet was roofing work and that it was permitted to use a combination warning line and safety monitoring system, as set out in 29 C.F.R. 1926.501(b)(10). That standard states that:

> *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 (1.8 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.

The Secretary disputes that Mr. Dion was performing roofing work, noting that the term "roofing work" is defined at 29 C.F.R 1926.500(b) as follows:

> *Roofing work* means the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck.

The Secretary also notes that even if Mr. Dion had been doing roofing work, Mr. Crespo was not performing monitoring as required by 29 C.F.R. 1926.502(h)(1)(i)-(v), which state that:

> (i) The safety monitor shall be competent to recognize fall hazards;
> (ii) The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner;
> (iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored;
> (iv) The safety monitor shall be close enough to communicate orally with the employee; and
> (v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

Discussion

To prove a violation of a specific OSHA standard, the Secretary must show that (1) the cited standard applies, (2) the terms of the standard were not met, (3) employees had access to the violative condition, and (4) the employer knew, or could have known with the exercise of reasonable diligence,

of the violative condition. *Astra Pharmacentical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

For the cited standard to apply, employees must be working on an exposed side or edge that is 6 feet or more above a lower level. The CO estimated the distance from the parapet where Mr. Dion was to the ground to be about 22 feet and the distance from that parapet to the metal panel structure below the parapet to be about 9 feet.[10] He stated that if Mr. Dion had fallen, he could have struck the panel structure on the way down and/or gone straight through it to the ground because the panels were not yet in place and the structure thus had large holes in it. (Tr. 14, 27, 32, 66-67; G-2a). Mr. Dion, on the other hand, testified he measured the distance from the parapet where he had been working to the top of the panel structure to be "exactly 5 feet."[11] He later testified that he "believed" he measured the distance and that it was "right around 5 feet, 6 feet. Five feet." (Tr. 116-17, 153). I find Mr. Dion's testimony to be equivocal on its face. Moreover, based on my credibility findings set out *supra*, I do not credit his testimony that he measured the distance from the parapet to the panel structure to be 5 feet. Rather, I credit the CO's estimate that that distance was about 9 feet and his further estimate that the distance from the parapet to the ground was about 22 feet, particularly upon viewing G-2a. I find, accordingly, that Mr. Dion was exposed to a fall of 9 feet if he had landed on the metal structure and a fall of 22 feet if he had fallen all the way to the ground.

A further issue as to the applicability of the standard is whether Mr. Dion was performing roofing work. The Secretary contends the cited standard applies, and not 29 C.F.R. 1926.501(b)(10), because Mr. Dion was not doing roofing work. The CO testified that installing the water drainage piece was not roofing work, as the drainage piece was being attached to the parapet wall and the building itself; he explained that the parapet is part of the wall, not the roof, and that the parapet and the roof are separate and distinct. The CO further testified that roofing work is putting a cover on top

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[10]The CO noted the parapet wall had three different levels and that Mr. Dion was on the lowest-level parapet, as shown in G-2a. He also noted he did not go up on the roof on October 24, 2006, but returned later, after the construction was completed, and he received the owner's permission to go up to the roof. While there, he measured the subject parapet to be 17 inches wide and 16 inches high on the roof side. (Tr. 23-26, 66-67, 71-74, 83, 87).

[11]Mr. Dion said he returned to the site in December 2006, after the inspection, and that at that time he took R-1b, R-2a and R-2b, photos of the completed roof.

of a building and that the cover can consist of shingles, stone, metal, or rubber-type membranous, or elastic, material. (Tr. 16-17, 33-35). The CO then noted the definitions of "roof" and "parapet," according to the National Roofing Contractors Association ("NRCA"), which he found on the NRCA's website.[12] (Tr. 78-81). Those definitions are as follows:

Roof:: (1) the cover of a building; (2) to cover with a roof.

Parapet wall: the part of a perimeter wall that extends above the roof.

Prime argues that these definitions and others on the NRCA website simply describe what the particular item is and do not establish that working on a parapet wall is not roofing work; it asserts that the parapet wall at issue and the related flashing work were integral parts of the low-slope roofing system on the Walgreens building. Prime also asserts that every low-slope roofing system has such types of details on the roof. *See* Prime's post-hearing filing, p. 2. In support of its position, Prime presented the testimony of Mr. Dion.

Mr. Dion, a roofer for four years, testified that the roofing job was 99 percent done when he got there and that putting in the reglet, removing the warning line system and cleaning up were all that was left to do on the roofing job. He further testified that his work at the site was to "cut a reglet into a block" in order to terminate that part of the roof; he elaborated that cutting the reglet involved cutting into the mortar between the bricks, putting in the reglet, and then caulking it and sealing the finishing touches of that job. Mr. Dion identified R-1b, R-2a and R-2b as photos he took of the roof in December 2006, after the inspection. He noted that R-1b showed where he worked and the piece he put in place on the wall. He also noted that R-2a and R-2b showed the black membrane that covered the roof and the parapet walls, making it all part of the roofing system, and he said that the metal caps on the parapet walls "terminate[d] the membrane." Mr. Dion pointed out the beige heating and cooling unit shown on the right-hand side of R-2a and R-2b. He explained that the unit also required flashing; the "curb" the unit sat on was "rubberized" and "flashed," and the unit also had a gutter and "downspout" for water runoff.[13] Mr. Dion considered the entire unit and everything else

[12]The CO testified that he learned that Respondent was a member of the NRCA and that he looked up the definitions on the NRCA website. G-5 and G-6 show the definitions set out on the NRCA website. (Tr. 81).

[13]Mr. Dion marked the gutter with an arrow on R-2b. (Tr. 133).

on the roof, including the parapet walls, to be components of the membrane roofing system, and he disagreed with the NRCA's definition of a parapet wall as being part of the perimeter wall. (Tr. 112, 115-18, 128-36, 140-45, 151-52, 155-59).

I agree with Prime's position that Mr. Dion's work at the site was roofing work. First, the definition of "roofing work," set out *supra*, "means the ... application and removal of roofing materials and equipment, including related insulation, sheet metal and vapor barrier work...." Second, although the CO characterized Mr. Dion's work as putting in a drain on the wall, his description of the work was essentially the same as Mr. Dion's; that is, Mr. Dion was cutting a groove, or cutting a reglet, and finishing the flashing on the parapet wall. (Tr. 27). Third, the CO went on to state that the purpose of the work was so that the water coming down from the top of the parapet would not enter or touch the brick work and would instead be funneled to the roof. (Tr. 27). In my view, this testimony indicates Mr. Dion's work at the site was roofing work, in that it involved completing the waterproofing of the roofing system. This conclusion is supported by the glossary set out on the NRCA website, the same site the CO used to find the terms "parapet wall" and "roof," noted above.[14] The glossary contains, among others, the following terms and definitions:

> **Counterflashing:** formed metal or elastomeric sheeting secured on or into a wall ... or other surface, to cover and protect the upper edge of a base flashing and its associated fasteners.
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> **Flashing:** components used to weatherproof or seal the roof system edges at ... walls ... and other places where the roof covering is interrupted or terminated. For example, membrane base flashing covers the edge of the field membrane, and cap flashings or counterflashings shield the upper edges of the base flashing.
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> **Membrane:** a flexible or semi-flexible roof covering or waterproofing whose primary function is to exclude water.
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> **Raggle:** a groove or slot, often cut in a masonry wall or other vertical surface adjoining a roof, for inserting an inset flashing component such as a reglet.
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> **Reglet:** a sheet metal receiver for the attachment of counterflashing. A reglet may be surface-mounted, inset into a raggle or embedded behind cladding.
>
> **Roof system:** a system of interacting roof components, generally consisting of membrane or primary roof covering and roof insulation (not including the roof deck)

[14]The glossary is located at: www.nrca.net/rp/technical/search/glossary.

designed to weatherproof and, sometimes, to improve the building's thermal resistance.

Termination: the treatment or method of anchoring and/or sealing the free edges of the membrane in a roofing or waterproofing system.

Waterproofing: treatment of a surface or structure to prevent the passage of water under hydrostatic pressure.

Based on the foregoing, and the evidence of record, I conclude Mr. Dion cut a groove (or raggle) into the mortar of the wall to insert a reglet (a sheet metal receiver) into the wall. It would then appear that, consistent with the glossary terms and definitions set out above, and R-1b, he put counterflashing into the reglet to cover and protect the edge of the roof membrane termination on the wall. I find, therefore, that Mr. Dion was performing roofing work at the site.

My finding is supported by an OSHA standard interpretation letter dated May 3, 2001, entitled "Fall protection requirements for workers engaged in 'roof blocking.'"[15] The letter addresses 29 C.F.R. §§ 1926.501(b)(1) and (b)(10) in the context of fall protection requirements for workers performing "roof blocking." The letter describes "roof blocking" as framing that is put around a hole (used for ventilation, heating, etc.) in a low-slope roof that provides support for equipment and aids in sealing the roof; this type of roof blocking is not part of the support structure of the roof. The letter goes on to describe two ways to install roof blocking; in one, it is done as an integral part of the installation of the weatherproofing material for the roof and is considered roofing work, while in the other, it is done separately and before installation of the weatherproofing material begins and is thus not roofing work. The letter notes the definition of "roofing work" set out at 29 C.F.R. 1926.500(b) and states that if the blocking is done as an integral part of installing the weatherproofing material on a low-slope roof, then 29 C.F.R. 1926.501(b)(10) applies; if the blocking is done separately, then 29 C.F.R. 1926.501(b)(10) does not apply. The letter also notes that the classification of the work as "roofing work" does not depend on whether the work is done by a roofing contractor or by a carpentry contractor; it is the installation method used, and not the trade of the worker, that determines whether the fall protection methods in 29 C.F.R. 1926.501(b)(10) are available.

[15]This letter is on OSHA's web site, which is www.osha.gov, in the "Interpretations" section under "Laws & Regulations."

My finding is also supported by a Commission decision, *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331 (No. 00-1986, 2003). There, the employer was cited for violating 29 C.F.R. 1926.502(j)(7)(i), which prohibits storing materials and equipment within 6 feet of a roof edge, unless guardrails are erected at the edge, during the performance of roofing work. The employer argued it did not violate the standard because no roofing work was being done on the two roofs in question and because the materials on those roofs were placed there only temporarily. 20 BNA OSHC 1344. The Commission noted the definition of "roofing work," set out at 29 C.F.R. 1926.500(b), which includes the storage of roofing materials and equipment, and stated that the storage of roofing materials is considered to be roofing work. 20 BNA OSHC 1344 n.19. The Commission further noted that the cited standard does not specify that roofing work must be taking place in the same area or on the same level as the materials stored and that, in any case, employees were in fact traversing the roofs in question on the day of the inspection. 20 BNA OSHC 1344.

The Secretary has cited to three decisions in support of her position.[16] Two of these cases are decisions of Commission judges. *See Midwest Roofing & Custom Materials*, 21 BNA OSHC 1854 (No. 06-0617, 2006); *Wolkow Braker Roofing Corp.*, 18 BNA OSHC 1891 (No. 97-1773, 1999). The third case is a decision of the North Carolina Safety and Health Review Board. *See Commissioner of Labor of the State of North Carolina v. Young Contracting Co., Inc.*, OSHANC 2002-4130, 2004. In all three of these cases, the alleged violations of the same standard cited here were affirmed. However, in *Young Contracting*, the facts do not indicate whether the employees standing on the parapet wall were doing roofing work. Moreover, in *Midwest Roofing*, while the employees were doing roofing work, the employer did not dispute the applicability of the cited standard. Finally, in *Wolkow Braker Roofing*, while the employees were roofers, the work they were doing at the particular time the CO saw them (and for which the employer was cited) was installing guardrails around a roof opening without any fall protection; therefore, the work they were performing was not "roofing work" under the standard.[17]

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[16]The Secretary included copies of these decisions with her brief. Further, she notes the web site for the North Carolina case as: http://www.oshrb.state.nc.us/opinions/rb/02-4130.html.

[17]It should be noted that in *Wolkow*, there were two different inspections and two different docket numbers. The portion of the case noted above involved Docket No. 98-0245. In the other

In light of all of the foregoing, I conclude the Secretary has not met her burden of proving the applicability of the cited standard. Item 1 of Repeat Citation 1 is therefore vacated.

In vacating the citation item, I am aware that, although Prime contends it had a warning line and a monitor on the roof as set out in 29 C.F.R. 1926.501(b)(10), the Secretary contends that Mr. Crespo was not performing monitoring as required by 29 C.F.R. 1926.502(h)(1)(i)-(v). The CO testified, in fact, that he saw Mr. Crespo with his back to Mr. Dion, as shown in G-2a, and that he also observed that Mr. Crespo left the area twice, apparently to get items Mr. Dion needed. The CO also testified that the employees were not on the same level, as required; Mr. Crespo was standing on the roof level, while Mr. Dion was on the parapet wall, which was16 inches higher than the roof level. (Tr. 22, 41-45, 65-66, 94, 99-100). In addition, there is no evidence in the record that Mr. Crespo warned Mr. Dion about working on the parapet, even when he was on his hands and knees on the parapet with his head, hands and left arm and shoulder over the edge, as shown in G-2c. Mr. Dion and Mr. Crespo both testified they could not recall any warnings given, although Mr. Dion then testified that Mr. Crespo had said, as they were going up to the roof, that they were going to be working out on the edge. (Tr. 139-40, 149, 167-70). Mr. Dion testified that he felt very safe working on the parapet, even as shown in G-2c. (Tr. 137-38). However, I find that Mr. Dion's work on the parapet was inherently unsafe, based upon the record, even if Mr. Crespo had been doing nothing but monitoring him. I further find that another type of fall protection, such as tying off, should have been used.[18] Regardless, the Secretary has not alleged a violation of 29 C.F.R. 1926.501(b)(10) in the alternative. Furthermore, I conclude that it would be unfair to Prime to amend the citation at this late stage of the proceedings. The citation will not, accordingly, be amended to allege a violation of 29 C.F.R. 1926.501(b)(10).

ORDER

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inspection, Docket No. 97-1773, an alleged violation of 29 C.F.R. 1926.501(b)(10) was affirmed because, despite the employer's argument that it had a safety monitoring system in place for its employees who were doing roofing work, the evidence showed that no such system was in place.

[18]The CO testified about how an anchor point could have been installed in the roof, such that tying off could have been accomplished. (Tr. 38-40, 61-62, 74-76, 94). Prime presented no credible evidence to rebut the CO's testimony.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of Repeat Citation 1, alleging a violation of 29 C.F.R. 1926.501(b)(1), is VACATED.

/s/
Covette Rooney
Judge, OSHRC

Date: 10/25/07
Washington, D.C.