SECRETARY OF LABOR, Complainant, v. WALTER JENSEN, d/b/a S & W CONSTRUCTION, Respondent.	:	OSHRC Docket Nos. 95-1221 95-1223

Appearances:

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For Complainant

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For Respondent

Before Administrative Law Judge Richard DeBenedetto:

DECISION AND ORDER

Walter Jensen doing business as S & W Construction was cited on two occasions for violations of various safety standards in connection with the performance of residential construction work. The Secretary proceeded against respondent in these consolidated cases under the assumption that S & W Construction was a corporation. When it became clear to Secretary's counsel during the hearing that Walter Jensen was in fact the owner of an unincorporated construction firm doing business under the name of S & W Construction, counsel for the Secretary moved to add Walter Jensen as a party. The motion was granted (Tr. 153).

The two cases arise out of two separate residential construction sites. Both cases involve working conditions directly related to the performance of roofing work on steep roofs under the supervision of the same foreman, Chris Kallechy. The time lapse between the two events was less than five weeks.[1]

The inspections of the two work sites were conducted by the same OSHA compliance officer, Stephen Rook, whose testimony describing the working conditions and practices he observed during the performance of the roofing jobs was not disputed by Jensen, with one exception discussed below.

[1] A "steep roof" means a roof having a slope greater than 4 in 12 (vertical to horizontal). 29 C.F.R. § 1926.500(b).

Inspection of the first residence took place on May 11 and again on May 14, 1995. On the initial visit, the compliance officer observed three of Jensen's employees, including the foreman, working on a roof of a two-story residence, 25 feet high from ground to eaves. The roof was sloped approximately 15 in 12 (vertical to horizontal). The only equipment placed on the roof to aid the workers while performing the roofing operations were two "roofing brackets," a device that gave the roofers a foothold or traction on the steep roof, but nothing more in the nature of fall protection, such as guardrails, safety net or body belt. The foreman was seen straddling the roof peak without even the benefit of a bracket nearby (Tr. 12-20).

All three employees were exposed to the danger of head injury from falling nails, roofing shingles and tools, but no one was wearing a protective helmet (Tr. 22, 34). The compliance officer questioned all three employees to determine the extent of their knowledge or training in the use of fall protection systems. None had any knowledge of the fall protection required by OSHA (Tr. 29). The compliance officer noticed that electrical transmission lines ran about 10 feet above the roof's peak. When he questioned the three employees about the overhead power lines, they did not know whether the lines were energized. The compliance officer contacted the company supplying the electric power and was informed that the lines were in fact deenergized (Tr. 32-33).

The compliance officer spent some time with all three employees discussing the requirements of the OSHA safety standards related to the conditions as they were observed by the compliance officer. Before concluding his visit for the day, the compliance officer provided them with a copy of the OSHA standards (Tr. 30-33).

The compliance officer returned to the same work site three days later, on May 14, and found Jensen's roofers working on the roof without any fall protection. On this occasion there were five employees, including foreman Chris Kallechy and Joe Furr who worked for Jensen as a foreman on other jobs. When the compliance officer confronted Kallechy about the missing fall protection that they discussed just three days ago, Kallechy replied: "Talk to Walter [Jensen], I just do what I'm told" (Tr. 35, 39 40, 43). The compliance officer concluded his inspection with a "closing conference" the following day with Walter Jensen, at which time the OSHA standards were reviewed and Jensen was given a copy of the standards (Tr. 45-46).

About a month later, June 19. 1995, Jensen had another residential roofing project in progress

that came under OSHA scrutiny. It was a two-story apartment house with a roof sloped about 9 in 12 (vertical to horizontal). One side of the roof was 18 feet from ground to eaves, the other side was 14 feet from ground to eaves; the roof itself measured 10 feet from the eaves to peak. The compliance officer observed two employees on the ground while three were working on both sides of the roof without fall protection. Chris Kallechy, the job foreman was one of the men on the roof. Kallechy came down from the roof at the request of the compliance officer to discuss the ongoing procedures. At the conclusion of the discussion, Kallechy went back up to the roof to resume his work (Tr. 46-53, 55).

As he did on the previous job site, the compliance officer pointedly asked Kallechy why the roofing work was being done without the use of fall protection. Kallechy's response was the same: "Talk to Walter [Jensen], I just do what I'm told" (Tr. 55).

Other violative conditions observed by the compliance officer at the two-story apartment house project were the following: none of the five employees was wearing a helmet for protection against impact of falling tools and materials (Tr. 57); the roofers used a 15-foot-high scaffold without guardrails and toeboards on the open sides and ends of the two-plank platform (Tr. 55-56; Exhs. C-2, C-5, C-7).

The one other alleged violative condition noted by the compliance officer was the presence of an energized overhead power line which operated at 120 to 240 volts. The roofers were seen working within 5 feet of the line (Tr. 58; Exh. C-7). When questioned on cross-examination, the compliance officer acknowledged that the line was insulated, but he maintained that the OSHA standard "specifically provides that...whenever [employees] work within ten feet of energized lines, that they either be deenergized or isolated." He also stated that "because of the climate, the insulation can't be guaranteed," at the same time, he admitted he "didn't get close enough to inspect the integrity of the insulation" (Tr. 108-09).

In addition to the vagueness and ambiguity of his testimony, the compliance officer was mistaken in his view of the alternative protective measures that are legally available. The cited electrical standard, 29 C.F.R. § 1926.416(g)(2), allows several options, including *insulating* the line:

> *Overhead lines*. If work is to be performed near overhead lines, the lines shall be deenergized and grounded, or other protective measures shall be provided before work is started....If protective measures, such

> as guarding, isolating, or *insulating*, are provided, these precautions shall prevent employees from contacting such lines directly with any part of their body or indirectly through conductive materials, tools, or equipment. (Emphasis added.)

The Secretary has failed to meet her burden of proving that the overhead-line standard was violated, consequently that item must be dismissed.

With respect to all the other charges brought by the Secretary, Jensen did not dispute the compliance officer's version of the conditions which form the basis of the citations, and there is sufficient evidence to support finding that the various safety standards addressing the cited working conditions at the two residential construction projects were violated to the degree claimed by the Secretary.

The only affirmative defense raised in Jensen's answers to the Secretary's complaints, was his current status under Chapter 7 bankruptcy laws whereby his business assets were being liquidated by a trustee to pay his creditors. The bankruptcy proceeding is neither a defense to the merits of the case nor, by itself, a mitigating factor in assessing a monetary penalty.

Jensen testified that during 1995, he employed 10 to 12 persons, including foreman Kallechy who worked for him for 4 or 5 years. He maintained that he purchased a whole line of safety equipment sufficient for 15 workers; that all employees were instructed to use such equipment; that he made an effort to visit each work site on a daily schedule to assure compliance with safety rules; that whenever he was at a construction site he would discuss the OSHA safety requirements with his employees and impose sanctions whenever necessary. He also stated that for the past two years he had employed a part-time safety consultant (Tr. 118-135), 145).

Jensen's testimony may be paraphrased in a nutshell as invoking the affirmative defense of unpreventable employee misconduct. In fact, at one point during the hearing Jensen proposed that OSHA should have imposed a monetary penalty on the employees who committed the offenses (Tr. 137). The Commission's procedural Rule 34(b)(4), 29 C.F.R. § 2200.34(b)(4), provides that unless an affirmative defense is asserted in the answer, the employer may be prohibited from raising it at a later stage in the proceeding, unless it is demonstrated that the defense was asserted as soon as practicable.

Because the issue was raised by Jensen in his prehearing disclosure statement of December

4, 1995, and there was no claim by the Secretary that she was prejudiced in presenting her cases, the defense of employee misconduct shall be treated in all respects as if it had been raised in the answer.

To establish the defense of unpreventable employee misconduct, the employer must show that "it had established a work rule designed to prevent the violation, adequately communicated those work rules, and effectively enforced those work rules when they were violated." *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1816, 1991-93 CCH OSHD ¶ 29, 807, p. 40,585 (No. 87-692, 1992). Applying the test to the record in the present cases, we find no basis for concluding that Jensen met his responsibilities in controlling the work environment and his employees' actions for the purpose of complying with OSHA's safety requirements.

It is impossible to reconcile the violative conditions found by the compliance officer at the two construction projects simply on the argument of unpreventable employee misconduct. The persistent violations and the lack of motivation, despite the compliance officer's efforts to promote understanding on the part of the roofers regarding the necessary precautions to be taken during the performance of roofing work, were so egregious as to render Jensen's professed safety program totally unconvincing. Foreman Kallechy made it starkly clear to the compliance officer that, despite the requirements of the OSHA safety regulations, he would continue to perform the roofing work in accordance with his boss's orders. The record justifies believing that statement.

Both roofing projects resulted in citations for willful violations of the same fall! protection standard at 29 C.F.R. § 1926.501(b)(11) which provides:

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

A violation is willful if committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶27,893. P. 36,589 (No. 85-355, 1987): *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063, 1984-85 CCH OSHD ¶27,101. P. 34,948 (No. 79-383, 1984). A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety. *General Motors Corp.*, *Electro-Motive Div.*, 14

BNA OSHC 2064, 2068, 1991 CCH OSHD ¶29,240, p. 39,168 (No. 82-630, 1991) (consolidated); *Williams*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,509.

The evidence clearly demonstrates that following the compliance officer's initial visit to the first roofing project, subsequent roofing activities were performed at both residential construction sites, under the same foreman, in a manner exhibiting a conscious disregard for employee safety.

Jensen apparently attached little or no importance to the compliance officer's testimony regarding the information obtained during his interviews with the employees, particularly foreman Kallechy. As discussed during the hearing, the employee statements expressly fall outside the hearsay concept and qualify as admissions under Rule 801(d)(2)(D) of the Federal Rules of Evidence because they relate to matters within the scope of their employment and were made while they were on the job.

The first roofing project also produced a citation or citation item for repeat violation of the training standard at § 1926.503(a)(2), which requires the employer to provide training to each employee exposed to fall hazards, the training to be given by a competent person qualified in specified areas geared to minimizing the fall hazards.

At the construction site in question, the employees had no understanding as to the procedures that were required to be followed in order to assure protection against fall hazards. Jensen's S & W Construction firm was previously cited for noncompliance with the safety training standard at § 1926.21(b)(2) in May 1992. Although the 21(b)(2) standard covers safety training in general construction activities, the citation was issued in connection with "the use of scaffolds and the safety rules involved in roofing operations." Jensen waived his right to contest the citation pursuant to a settlement agreement executed on May 19, 1992. An uncontested citation is deemed a final order of the Commission. 29 U.S.C. § 659(a).

Under Commission precedent, a violation is repeated if , at the time of the alleged 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, p. 28,171 (No. 16183, 1979). The evidence establishes that the current training violation was repeated within the meaning of section 17(a) of the Act, 29 U.S.C. § 666(a).

The following is a brief summary of the citation items characterized as "serious": a citation item was issued in each of the two roofing projects for noncompliance with the head! protection standard at § 1926.100(a), which requires employees to wear protective helmets when working in areas where there is a possible danger of head injury from impact, or from falling or flying objects. The record supports the Secretary's charges in both cases.

The second roofing project resulted in a citation item for failure to install guardrails and toeboards on all open sides and ends of a scaffold platform more than 10 feet above the ground in accordance with § 1926.451(a)(4). The evidence supports this citation item.

As previously discussed, the only charge made against Jensen that has no merit relates to the overhead power line cited in the second roofing project. This charge, which appears as item 2 of citation number 1, is dismissed. As to the remaining serious items, for a violation to be serious under section 17(k) of the Act, 29 U.S.C. § 666(k), the record must establish that there was a substantial probability that death or serious physical harm could result if an accident occurred. The probability of the accident occurring is irrelevant. *Niagara Mohawk Power Corp.*, 7 BNA OSHC 1447, 1979 CCH OSHD ¶23,670 (No. 76-2414, 1979).

Given the fact that the fall hazards involved heights ranging from 14 feet to more than 25 feet, there was a substantial threat of serious physical injury either by falling from the roof or scaffold platform or by being struck on the head by falling objects. Consequently, the characterization of the violations as serious is justified.

PENALTIES

Section 17(j) of the Act, 29 U.S.C. § 666(j), provides that the Commission shall assess an appropriate penalty for violations, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations.

Implicit in the classification of a violation as willful, repeat or serious is the measure of culpability of the cited employer. This is reflected in the statutory penalty scheme. Section 17(a), 29 U.S.C. § 666(a), provides a maximum penalty of $70,000 for each willful or repeated violation

and a minimum of $5,000 for each willful violation. Section 17(b) provides a maximum penalty of $7,000 for each serious violation.[2]

In the case arising out of the first roofing job, docketed as 95-1221, there are three single-item citations, designated as serious citation number 1 (protective helmet), willful citation number 2 (unprotected steep roof), and repeat citation number 3 (fall-protection training), for which penalties of $600, $28,000 and $1,000 are proposed respectively.

The case involving the second roofing project, docketed as 95-1223, comprises two citations, serious citation number 1 with two affirmed items: item 1 (protective helmet) and item 3 (unprotected scaffold); willful citation number 2 (unprotected steep roof). The Secretary has proposed penalties of $450, $600 and $16,500, respectively.

In view of the flagrant nature of the violations, it is obvious that the Secretary has adopted a singularly temperate tone in assessing the circumstances of these cases, probably because of Jensen's financial problems. There is no valid basis for reducing the penalties proposed by the Secretary, which are deemed to be appropriate.

Based upon the foregoing findings and conclusions, it is

ORDERED that in the case docketed as 95-1221, citations number 1, 2 and 3 are affirmed, and penalties totaling $29,600 are assessed. It is further

ORDERED that in the case docketed as 95-1223, items 1 and 3 of citation number 1 are affirmed, item 2 of that citation is vacated, citation number 2 is affirmed, and penalties totaling $17,550 are assessed.

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RICHARD DeBENEDETTO
Judge, OSHRC

Dated: ____________________
Boston, Massachusetts

[2] A violation determined not to be of a serious nature may also be assessed a penalty of up to $7,000 for each such violation. 29 U.S.C. § 666(c).