SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 97-640
S & J HAAS CONSTRUCTION, INC., Respondent.	:	**E-Z**

Appearances:

Helen J. Schuitmaker, Esquire
Office of the Solicitor
U. S. Department of Labor
Chicago, Illinois
For Complainant

James F. Haas
S & J Haas Construction, Inc.
Trenton, Illinois
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

S & J Haas Construction, Inc., (S&J) contests Citation No. 1, items 1a and 1b, issued by the Secretary on April 8, 1997, pursuant to the Occupational Safety and Health Act of 1970 (the Act). The Secretary classifies the citation as "repeated." The citation resulted from an abbreviated inspection of S&J conducted by Occupational Safety and Health Administration (OSHA) compliance officer Cynthia Wagner on March 27, 1997. S&J is a small residential construction contractor, which at the time of the inspection was building a private residence in a subdivision in O'Fallon, Illinois.

Specifically, the Secretary alleges in item 1a that S&J failed to comply with the fall protection standard of § 1926.501(b)(13), and in item 1b that a competent person did not train S&J's employees, in violation of § 1926.503(a)(2)(iii). S&J asserts that the inspection was improper. It denies that it violated either standard. It claims that compliance with the requirements of item 1a would have created a greater hazard, and that its training was sufficient for item 1b. For the reasons stated, the Secretary's position is accepted for item 1a; S&J's is accepted for item 1b.

Background

S&J is a family owned and operated corporation. James Haas and his wife are partners and owners of S&J. James Haas also owns another small construction company, Haas Homes (Tr. 93). On occasion, Haas Homes's employees were loaned to S&J, a situation which

occurred on the day of the inspection. Combined, the two companies (S&J and Haas Homes) employed seven employees; two of these were non-family members (Tr. 106). On March 27,1997, S&J was building a large multi-level private home.

This case was heard on July 31, 1997, pursuant to the "E-Z Trial Procedures," 29 C.F.R. § 2200.200-211. Jurisdiction and coverage are admitted (Prehearing Order).

The Inspection was Valid

While driving from another jobsite, compliance Officer Wagner observed construction activities on a house within a subdivision. Turning into the subdivision, she saw three individuals walking on the roof of a multi-level home. The individuals were off-loading shingles onto the roof from a boom truck (Exh. C-1; Tr. 11, 87). Wagner noted that none of the three used a harness and lanyard for fall protection. Nor was there a catch platform, guardrails around the roof, or slide guards ("toeboards") on the roof, any of which could serve as an alternate means of fall protection (Tr. 12, 52).

Under OSHA's local emphasis program for fall protection in construction, Wagner approached the house to begin the inspection (Tr. 36). James Haas met her there. Wagner identified herself and her purpose. James Haas confirmed that S&J was the employer.[1] James Haas told Wagner that he wanted to make a phone call and that, until he returned, she was not allowed onto the property. Wagner knew there was a telephone 3 miles from the jobsite. She responded that this would be fine and that she would wait for Haas to return. While standing in the street, Wagner took photographs of the individuals on the roof working without harnesses and lanyards. James Haas went back to the workers, talked to them briefly, and then left the site. The workers came down from the roof, put on harnesses, and returned to their work of stacking shingles. Haas had not come back to the jobsite by the time the workers left, around noontime, one and a half hours later. Wagner believed that there was no longer a reason to remain waiting for Haas, and she also left the worksite (Tr. 16, 45, 58-59). After subsequent discussions with Haas at OSHA's Area Office, but without Wagner's return to the worksite, the citation was issued.

S&J contends that Wagner's actions in documenting violations without Haas's approval were unlawful. S&J asserts that it could not give permission for the investigation because it did not own the property. S&J is wrong on both counts. If S&J had authority to

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[1]Both S&J and Haas Homes are under the direct control of James Haas (Tr. 94, 97, 106). James Haas has obvious authority over each Haas Homes employee loaned to S&J. For purposes of this case, it is unnecessary to distinguish whether Haas Homes or S&J was the nominal employer of a particular employee.

be on the worksite, it could permit an inspection. It was not required to do so, however. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). Wagner did not go onto S&J's site but waited on the subdivision street, an area where a member of the public could properly be (Tr. 58). "What is observable by the public is observable without a warrant by the Government inspector as well." *Marshall v. Barlow's Inc.,* 436 U.S. at 315; *L.R. Willson and Sons Inc.*, 17 OSHC BNA 2059 (No. 9401546, 1997). Wagner did not seek to interview employees while at the site. She limited the inspection to what she could observe from a public area. The inspection complied with the requirements of the Fourth Amendment and with the Act. The inspection was valid.

Alleged Repeat Citation

Item 1a: § 1926.501(b)(13)

The Secretary asserts that S&J failed to protect employees engaged in residential construction from fall hazards, in violation of § 1926.501(b)(13). Specifically, the Secretary contends that employees were unloading roofing shingles without fall protection. Based on a citation issued two years earlier, the Secretary asserts that the violation was repeated.

S&J claims that it complied with the requirements of OSHA Instruction STD 3.1 (December 8, 1995) (even though it was unaware of the existence of the document until OSHA provided James Haas with a summarized industry article during a subsequent meeting), and, thus, it complied with the standard. Alternatively, S&J contends that if the standard required employees to use fall protection while placing shingles on the roof, then use of harnesses, lanyards, lifelines, and grab ropes presented a greater hazard to employees. Finally, S&J contends that if violations occurred for item 1a, it was not "repeated," because the underlying facts of the first citation would not have constituted a violation under STD 3.1.

Section 1926.501(b)(13) provides:

> (13) "Residential construction." Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.
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> Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate

to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

In its December 8, 1995 enforcement Instruction, STD 3.1, OSHA's National Office discusses fall protection measures for residential construction. STD 3.1 references measures in Subpart M's Appendix E. It details "alternate fall protection measures" for employers engaged in residential construction which do not wish to use conventional fall protection.

Pertinent to this case, alternate fall protection measures may apply to residential roofing work "where the roof slope is 8 in 12 or less and the eave to lower level fall distance is 25 feet or less." (STD 3.1 p.6). The parties agree that S&J's roof was 8 in 12 (Tr. 7-8). The parties disagree whether employees were exposed to an eave height greater than 25 feet. The Secretary claims exposure was in excess of 25 feet, and S&J asserts the contrary. S&J is correct. On the front elevation, the eave to lower level distance was 25 feet or less. On a portion of the back elevation which accommodated the basement, the distance was greater than 25 feet (Tr. 109). The Secretary did not prove that employees were at the basement elevation during the time they unloaded shingles without fall protection.[2] Employee were exposed only on the part of a roof having an eave to lower level fall distance of 25 feet or less.

The "alternate measures" of STD 3.1, thus, could have been utilized by S&J. However, S&J did *not* utilize any of the approved alternate measures. S&J is incorrect in interpreting STD 3.1 as allowing roofing work without fall protection for roofs up to 8 in 12 and 25 feet. S&J also implies that it was not at the stage of the roofing process where it could install slide guards. The argument was not supported. There was no proof that S&J had a fall protection plan or that slide guards were used as part of a plan. S&J utilized only conventional fall protection. STD 3.1 is of no relevance to this case.

Employees were without fall protection at heights greater than 6 feet above the lower level. Unless S&J establishes a defense, it has violated the terms of the standard.

Use of Harnesses Was Not a Greater Hazard

S&J contends that, on a case-by-case basis, its employees could decide whether complying with safety requirements presented a greater hazard. According to employee Brian

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[2] Although Exhibit C-1 appears to show an employee at the side of the roof peak, the employee may be on the side of the elevation which did not extend down three stories (Tr. 14, 83-84, 109). Restrictions imposed in Wagner's inspection lessen the credibility of her observations. She stood approximately 100 feet away from the house (Tr. 38). Further, it was S&J's practice to unload and stack shingles only on one half of the roof, which in this case would have been the front half of the roof (Tr. 114).

Dumstorff, S&J normally used harnesses and lanyards while applying roofing felt and shingling a roof (Tr. 68):

> The only time we don't is when we unload the shingles on to the roof. Then, as we usually get to a tie-off point, everybody takes their own little section of the roof and gets their harnesses on and they start shingling.

In Dumstorff's opinion, while unloading shingles, lanyards may "get in the way" and "[get] tangled in your feet . . . like walking on kid's toys" (Tr. 79). This type of subjective opinion is far from what is required to establish a greater hazard defense.

To meet the defense, an employer must prove that:

> (1) the hazards created by complying with the standard are greater than those of noncompliance, (2) other methods of protecting its employees from the hazards are not available, and (3) a variance is not available or that application for a variance is inappropriate.

Spancrete Northeast, Inc., 16 OSHC BNA 1616, 1618 (No. 90-1726, 1994), *aff'd*, 40 F.3d 1237 (2d Cir. 1994).

Not only did S&J fail to present any evidence for elements (2) and (3), but its evidence as to element (a) was contradictory. Contrary to Dumstorff's practice, employee Dennis Haas usually used harnesses and lanyards while unloading shingles on a roof (Tr. 97-98). S&J's defense is rejected. The violation is affirmed.

Repeated Classification

Under *Potlatch Corp.,* 7 BNA OSHC 1061, 1063 (No. 16183, 1979), 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." For a specific standard, such as § 1926.501(b)(13), the Secretary establishes a *prima facie* case of similarity by showing that both violations are of the *same* standard. Here, an uncontested citation was issued to S&J on October 2, 1995. Item 1b of the that citation was for a violation of § 1926.501(b)(13) (Exh. C-3; Tr. 28). Because the citation was uncontested, it became final by operation of law 15 working days after issuance. The Secretary established a *prima facie* case for the repeat classification.

S&J defends against the repeat classification by generally asserting that the circumstances of the earlier violation would not constitute a violation under STD 3.1. S&J did not present the circumstances of the earlier violation. Even if S&J had shown that the prior violation fit within STD 3.1, which it did not, the circumstances of both violations could still be "substantially similar." The violation is properly classified as repeat.

Penalty

The Commission is the final arbiter of penalties in all contested cases. It must give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. *J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.,* 15 BNA OSHC 1481, 1483 (No. 88-691, 1992). Since the violation is "repeated," such facts as the proximity of the earlier violation to the present one and similarities between the two violations are also considered. *J.L. Foti Constr. v. OSHRC,* 687 F.2d 853, 856 (6th Cir. 1982).

For approximately 15 minutes, three employees distributed individual 80 pound bundles of shingles on a steep roof. They were exposed to falls of approximately 25 feet. Falls from that distance could result in serious injury or death (Tr. 29). S&J violated the same fall protection requirement less than two years earlier. The repeat nature of the violation bears heavily on the penalty. For OSHA's proposed penalty, it factored in a 60 percent reduction for size (Tr. 30). S&J is a very small, family-owned company. Some further reduction for size is considered appropriate for a company employing only the partners and an additional employee, even if employees may be borrowed from its related company (Tr. 94, 106). A penalty of $3,500 is assessed.

Item 1b: § 1926.503(a)(2)(iii)

The Secretary asserts that a competent person, qualified in use and operation of fall protection, did not train each employee. She seeks to prove this violation through Wagner's observations that: (1) employees did not use fall protection while initially unloading shingles; (2) they pulled or flipped their lanyards after putting on their harnesses; and (3) three employees were tied to one tie-off-point (Tr. 20, 26).

The standard provides:

> (a) *Training Program.* (2) The employer shall assure that each employee has been trained, as necessary, by a competent person qualified in the following areas:
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> > (iii) The use and operation of guardrail systems, personal fall arrest systems, safety net systems, warning line systems, safety monitoring systems, controlled access zones, and other protection to be used.

The Secretary may not assume a lack of training solely because another standard has been violated. Within Subpart M, different standards address various types of required training. This standard governs training on the fall protection employees were expected to use. S&J used conventional fall protection *i.e.*, harnesses, lanyards, lifelines, and rope grabs. James Haas testified that he trained employees on the procedures for the proper use of the equipment. Employees verified that they were trained on the equipment (Tr. 80, 107). Employees convincingly challenged Wagner's observations regarding their use of the rope grabs and lanyards. Other than Wagner's conclusion, the Secretary did not explain how use of one tie-off-point was inappropriate or inadequate in S&J's circumstances and, thus, why this illustrated a lack of training (Tr. 68, 85). The Secretary did not meet her burden of proof. The violation is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED that Citation No. 1, item 1a, is affirmed as a repeat violation, for which a penalty of $3,500 is assessed; and that item 1b is vacated.

Dated this 15th day of September, 1997.

NANCY J. SPIES
Judge