UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 NORTH SPEER BOULEVARD, ROOM 250
DENVER, COLORADO 80204-3582

SECRETARY OF LABOR, Complainant, v. BOB ANDERSON BUILDERS, INC., Respondent.	OSHRC DOCKET NO. 01-0708

APPEARANCES:

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

For the Respondent:
Timothy Costello, Esq., M. Pia Torretti Gekas, Esq., Krukowski & Costello, Milwaukee, Wisconsin

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Bob Anderson Builders, Inc. (Anderson), at all times relevant to this action maintained a place of business at 400 E. Centennial, Oak Creek, Wisconsin, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On January 24, 2001 an Anderson employee was severely injured when he fell from a roof at Anderson's Oak Creek work site. The Occupational Safety and Health Administration (OSHA) commenced an inspection and, as a result of their investigation, Anderson was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Anderson brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 7-8, 2002, a hearing was held in Milwaukee, Wisconsin. At the hearing, Complainant moved to amend Willful citation 2, items 1 and 2, which allege violations of §1926.501(b)(11) and .503(a)(1), respectively, to allege, in the alternative, violations of

§1926.501(b)(13). That motion was granted (Tr. 315, 319). The parties have submitted briefs on the issues, as amended, and this matter is ready for disposition.

Facts

The Oak Creek construction project is a multi-structure 97 unit independent care retirement facility (Tr. 38). Anderson, a framing subcontractor, began work at the Oak Creek site in September of 2000 (Tr. 38, 50). By January 24, 2001 Anderson had completed the installation of roof sheathing on the cited four and one half story (including the basement and attic) structure, and was engaged in installing dormers (Tr. 22, 78, 292-293; Exh. C-9K, C-9J). Travis Decorah, a carpenter with Anderson, testified that he intended to finish up the dormers on the north side roof that morning (Tr. 125, 132). When he arrived At 7:00 a.m. the subject roof was covered with frost. Decorah climbed up to sweep the frost from the area where he would be working using a "scuttle hole" left open in the sheathing to provide roof access (Tr. 14, 22-23, 140). Boards nailed to the roof joists provided rungs for climbing the joists (Tr. 32-33, 116, 151, 190; Exh. C-9B, C-9D). When Paul Poulakos, a new Anderson employee, arrived on the work site shortly thereafter, Daniel Naffier, Anderson's foreman (Tr. 157), told him to help Decorah on the roof (Tr. 18, 91). Poulakos located Decorah, and climbed up through the roof hole to join him (Tr. 20, 100, 115-16). Poulakos slipped on the frost, slid feet first down the roof and fell from the eave to the ground, approximately 32-34 feet below, sustaining serious injuries (Tr. 13, 21, 59, 71). The only fall protection in use on the roof was a single row of slide guards, 2 x 6 inch boards nailed at a 90° angle into 2 x 4 inch boards that were, in turn, nailed into the roof (Tr. 18, 55, 129, 197; Exh. C-9J). Portions of the slide guard had been cut away to make room for the installation of the dormers (Tr. 20). Poulakos slid through one of the unguarded areas (Tr. 20-21) and fell 32-34 feet to the ground sustaining multiple fractures, a concussion and internal injuries (Tr. 107).

Alleged Violation of §1926.1051(a)

Serious citation 1, item 1 alleges:

29 CFR 1926.1051(a): Stairways or ladders were not provided at all personnel points of access where there was a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist was provided:

> (a) On or about January 24, 2001, Oak Creek, Wisconsin employees who were accessing the roof of a 6:12 pitch roof were climbing the trusses and pulling themselves up onto the roof through a hole. The employer did not provided a safe means of access, such as a portable extension ladder. This condition exposed the employees to a potential fall hazard while accessing the roof.

The cited standard provides:

A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

Facts

It is undisputed that employees accessed the cited roof through a scuttle hole. Since no ladder was provided, employees climbed boards nailed to the roof trusses to access the hole. Travis Decorah testified that there was a ladder on site; however, it was easier to climb the trusses (Tr. 152). Foreman Naffier was aware of the practice and considered it standard procedure (Tr. 190). Naffier was not aware, until after the OSHA inspection, that ladder access was required under OSHA regulations (Tr. 191).

It is well settled that the employer's lack of knowledge is a defense to an established violation only when the employer was unaware of the *conditions* in their workplace; *Ormet,*14 BNA OSHC 2134, 1991-93 CCH OSHD ¶29,254 (85-531, 1991). Ignorance of the *standards* does not excuse noncompliance. An employer has a duty to inquire into the requirements of the law. *Peterson Brothers Steel Erection Company*, 16 BNA OSHC 1196, 1991-93 CCH OSHD ¶30,052 (No. 90-2304, 1993), *aff'd.* 26 F.3d 573 (5th Cir. 1994).

Discussion

Scott Brooks, the OSHA Compliance Officer who conducted the inspection of the Oak Creek site (Tr. 281), testified that employees climbing the trusses could have slipped and fallen (Tr. 304). Brooks testified that the violation was "serious," and explained how the proposed penalty of $3,500.00 was calculated (Tr. 313). No evidence relating to the severity of any possible injury was introduced.

According to §17k of the Act, a violation is considered serious if the violative condition or practice gives rise to a "substantial probability" of death or serious physical harm. In his testimony CO Brooks specified neither the possible fall distance from the roof joists to the attic floor, nor the type of injury which might result from a fall. In the absence of any evidence establishing the nature of probable injuries, it cannot be determined whether the cited violation is serious as defined by the Act. In the absence of that evidence, the violation must be affirmed as "other than serious" and a penalty of $100.00 is assessed.

Alleged Violation of §1926.501(b)(11)

Willful citation 2, item 1 alleges:

29 CFR 1926.501(b)(11): Guardrail systems with toeboards, safety net systems, or personal fall arrest system were not used to protect employees from falling from a steep roof with unprotected sides and edges 6 feet or more above lower levels.

> (a) On or about January 24, 2001 at Oak Creek, employees were working on the 6:12 pitch roof and were not protected by guardrail systems, safety net systems or a fall arrest system. This condition exposed the employees to a potential fall hazard of approximately 32 feet to the ground level.
>
> The cited standard provides:
>
> (11) *Steep roofs.* Each employee on a steep roof with unprotected sides and edges 6 feet (1.8m) or more above lower levels shall be protected from falling by guardrails systems with toeboards, safety net systems, or personal fall arrest protection.

Facts

Foreman Naffier testified that Anderson intended to use metal railings on brackets for fall protection on the Oak Creek site (Tr. 162). At some point during construction, however, it was decided that a combination of guardrails and slide guards would be used instead (Tr. 184-85). On December 20, 2001, excess guardrails, *i.e.*, all guardrails not currently in use, were returned to the manufacturer (Tr. 183-84). Naffier testified that on January 24 all brackets and rails on the site were in use, either on more steeply pitched, *i.e.*12:12, roofs, or in areas adjacent to the steeper slopes. Slide guards were implemented on 6:12 pitch roofs (Tr. 162-66). As noted above, a continuous slide guard originally ran the length of the cited roof near the eave (Tr. 197-98). However, the slide guard was cut back to allow for the installation of dormers on the lower roof, leaving unguarded the two and one half foot space through which Paul Poulakos fell (Tr. 198, 210; Exh. C-9J).

Bob Anderson, Anderson's president, testified that it is Anderson's written policy to use guardrails in front of window, door and stair openings, establish controlled access areas and supply monitors for employees working on flat decks (Tr. 283; Exh. C-7). Mr. Anderson stated that there is a further, unwritten, fall protection policy permitting the use of slide guards in lieu of conventional fall protection while engaged in "residential" construction (Tr. 255, 258). Mr. Anderson testified that he believed slide guards were an acceptable fall protection option on the Oak Creek site (Tr. 239). However, Anderson admitted that the precautions taken at the Oak Creek site did not comply either

with Respondent's written fall protection policy, or with OSHA regulations governing "commercial" construction (Tr. 277).

Discussion

Anderson's defense is based on an OSHA publication, OSHA Directive STD 3-0.1A, Interim Fall Protection Compliance Guidelines for Residential Construction. The OSHA instruction modifies 29 CFR §1926.501(b)(13)'s fall protection requirements for residential construction, and sets forth alternative fall protection procedures for employers whose employees are engaged in certain described activities. Anderson maintains that on January 24, 2002 it was engaged in residential construction, and that §1926.501(b)(13) and STD 3-0.1A governed its activities. The Secretary maintains that the "commercial" construction standard for steep roofs, §1926.501(a)(11) was applicable to the cited structure at Anderson's Oak Creek work site.

In pertinent part, Directive STD 3-0.1A states:

> 8. AVAILABILITY OF ALTERNATIVE PROCEDURES. Alternative procedures are available to employers who are (1) engaged in residential construction, and (2) doing one of the listed activities.
>
> 1. Definition of "residential construction."
>
> > 1. For purposes of this instruction, an employer is engaged in residential construction where the working environment, materials, methods and procedures are essentially the same as those used in building a typical single-family home or townhouse.
> >
> > 2. Residential construction is characterized by:
> > • Materials: Wood framing (not steel or concrete); wooden floor joists and roof structures.
> > • Methods: Traditional wood frame construction techniques.
>
> * * *
>
> 2. Listed Activities and Alternative procedures.
> There are four groups of residential construction activities for which alternative fall protection plans are available. Each group has its own set of alternative procedures and will be discussed in Sections IX through XII. The groups are:
>
> > 1. GROUP 1. Installation of floor joists, floor sheathing, and roof sheathing; erecting exterior walls; setting and bracing roof trusses and rafters.
>
> * * *
>
> 9. ALTERNATIVE PROCEDURES FOR GROUP 1: INSTALLATION OF FLOOR JOISTS, FLOOR SHEATHING, AND ROOF SHEATHING; ERECTING EXTERIOR WALLS; SETTING AND BRACING ROOF TRUSSES AND RAFTERS.

> The alternative measures for this group are set out in Appendix E to Subpart M. Appendix E requires the employer to implement a Fall Protection Plan. Such a plan must lay out the safest procedures to be followed at the work site to prevent falls. Although the plan need not be in writing, it must be communicated to all employees on site who might be subject to fall hazards.
>
> NOTE: Height Limitation: The Appendix E plan may only be used on structures up to three and a half stories or 48 feet (including basement, two finished levels, attic). The 48' measure is from the base of the building, at the lowest ground level (including any excavation), to the point of greatest height.

It is undisputed that the Oak Creek project utilized wood construction. The cited structure consisted of wooden floor and roof trusses, 2 x 4 and 2 x 6 studded walls (Tr. 217). The parties stipulate that the peak of the cited roof was 43 feet from the first floor and the basement added another 9 feet (Tr. 295-296). Scott Brooks testified that the cited structure had three finished stories in addition to the attic and basement, and, according to the blueprints, the structure measured 54 feet from the foundation to the roof peak (Tr. 293-94).

The Secretary maintains that the Oak Creek project exceeded the height limitations set forth in Directive 3-0.1A and that the alternative measures allowed under the directive were, therefore, unavailable to Anderson. The evidence supports this conclusion. The plain language of the directive limits its application to buildings under "three and one half stories or 48 feet (including the basement, two finished levels, attic)." Anderson argues the Oak Creek structure was three and one half stories, within the height limitation set out in the residential directive. Anderson's sole support for its position is its contention that that the three and one half story limitation within the directive stands alone and is not modified by the parenthetical reference to a basement, two finished levels and an attic. The Secretary disagrees with Anderson's interpretation, pointing to the reference to two "finished" levels and to the final sentence of the paragraph, which describes how the 48 feet are to be measured, *i.e.*, from the structure's foundation "including any excavation" to its highest point. It is concluded that the directive's alternative provisions for measuring a structure's height are consistent and unambiguous. The Secretary's interpretation is, therefore, reasonable, and must be accepted. The interpretation of a standard by the promulgating agency is controlling unless "clearly erroneous or inconsistent with the regulation itself." *Udall v. Tallman*, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965); *Nooter Construction Co.*, 16 BNA OSHC 1572, 1994 CCH OSHD ¶29,729 (No. 91-237, 1994). Deference must be given to the Secretary's interpretation, if reasonable. *Martin v. OSHRC (CF&I Steel Corp.)*, 111 S.Ct. 1171, 1179 (1991). This judge finds that the standard originally specified, §1926.501(b)(11),

is applicable to the fall hazard. Anderson admits it did not comply with the fall protection standard cited.[1] The evidence establishes that Anderson's employees were exposed to the resulting hazard. The violation is established.

Willful

Facts

James Kasten, the project manager for Wimmer Brothers Development, the general contractor for the project at the Oak Creek site (Tr. 36), stated that in the course of his site inspections he contacted Anderson on four separate occasions about fall protection hazards that he observed (Tr. 25-26, 39; Exh. C-15, C-16, C-17, C-18). On January 2, 2001, Kasten wrote in his log that Anderson was not using fall protection while working on the west roof (Tr. 43; Exh. C-15). Kasten remembered calling Dan Naffier and asking him to remove his men from the hazardous situation (Tr. 43). On January 5, 2001, Kasten again noted in his log that Anderson was not using fall protection (Tr. 46; Exh. C-16). Kasten testified that he called Anderson's office and spoke to Dan Naffier, asking him to take care of the fall hazard (Tr. 46-47). On January 8, 2001, Kasten noted once again that Anderson was not using fall protection; again he called Dan Naffier requesting that he abate the hazard (Tr. 47; Exh. C-17). Finally, Kasten testified, on January 23 he called Anderson to warn them that the roof sheathing crew was working without fall protection (Tr. 49-50; Exh. C-18). Kasten stated that he spoke to Dan Naffier who assured him that Anderson had a fall protection program and they were complying with it (Tr. 52, 81). Kasten also spoke to Bob Anderson on that date and told him that there had been a number of safety issues on the site. Anderson assured him that he was taking care of everything (Tr. 51).

Naffier admitted that Kasten came to him on January 2, 5, and 8, 2001 with concerns about Anderson employees on the roof. According to Naffier, Kasten was worried about employees working at heights, but did not say what steps he would have liked Naffier to take. According to Naffier, Kasten said only that he wouldn't want to see anyone hurt (Tr. 192-94). Naffier remembered that

[1] The result of this citation would not be changed by an amendment to §1926.501(b)(13). As discussed more fully below, it is clear that Anderson was unfamiliar with the residential construction standards, as well as with the residential directive, and its "alternative" protective measures fell far short of the requirements set forth in the directive. For instance, the directive requires that the alternative fall protection plan be supervised by a competent person who "must determine when the roof system is stable enough to support a conventional fall protection system anchorage. . .at that time personal fall arrest systems must be used." (Exh C-6 ¶9.2). The roof sheathing on the cited structure was complete. Foreman Naffier testified that a static line could have been installed had any employee requested a harness; clearly personal fall protection systems could have been used at this stage of construction (Tr. 170-73). CO Brooks testified that Anderson was in violation of almost every aspect of a compliant alternative fall protection plan (Tr. 306-311).

Kasten specifically mentioned guardrails on January 23, but once again, did not require that Naffier take any particular precautions (Tr. 195). Naffier testified that he spoke with Bob Anderson after Kasten talked to him. Mr. Anderson assured Naffier that Anderson was meeting safety guidelines for residential construction (Tr. 180, 182, 269, 271).

Mr. Anderson testified that January 23, 2001 was the first day he became aware of Kasten's concerns (Tr. 268). Mr. Anderson stated that he developed Anderson's fall protection policy from "things that [he had] read, things that [he] was able to pick up in the industry from other general contractors that [he] respected, possibly their – their safety people" (Tr. 249). Mr. Anderson did not possess, and did not provide Dan Naffier with a copy of the OSHA STD 3-0.1A (Tr. 260). Mr. Anderson had never read the residential directive (Tr. 273). In fact, Mr. Anderson did not realize that the residential directive existed until after the January 24, 2001 accident (Tr. 274). Bob Anderson's belief that slide guards were permissible fall protection for residential construction came solely from an informal telephone conversation he had with his son regarding a similar residential care facility (Tr. 373-75, 383, 386-88).

Bob Anderson admitted that in the past five years, two other Anderson employees fell from heights suffering injuries. One employee injured his shoulder when he fell while leaning over a deck (Tr. 231). In 1999, another employee fractured a vertebrae in his neck when a brace was removed from a roof truss and the roof collapsed (Tr. 232-35; Exh. C-25). Lastly, Paul Poulakos was employed by Anderson nine days prior to the accident (Tr. 86, 90). Poulakos had never worked as a carpenter and had worked on a roof only once prior to the day of the accident (Tr. 91)

Discussion

The Commission has defined a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶30,759, p. 42,740 (No. 93-239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). A willful violation is differentiated by the employer's "heightened awareness" of the illegality of the violative conduct or conditions. *Propellex Corporation (Propellex),* 18 BNA OSHD 1677, 1999 CCH OSHD ¶31,792 (No. 96-0265, 1999), In *Propellex* the Commission provided examples of "heightened awareness," citing cases where an employer has been previously cited for violations of the standards in question, or has otherwise been made aware of the requirements of the standards, and is on actual notice that violative conditions exist. *Id.*

The evidence in this case establishes that Anderson was aware of the violative conditions, and intentionally created them when the decision was made to provide no fall protection other than a single

discontinuous row of slide guards just above a 32-34 high eave. While it is true that a finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, the test of good faith for these purposes is an objective one. The employer's opinion that a violative condition conformed to the requirements of the OSHA standard, as asserted by Respondent in this case, must have been reasonable under the circumstances. *Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD ¶29,080 (No. 85-319, 1990). An employer is not spared from a finding of willfulness merely because it took some measures, no matter how minimal, to enhance employee safety. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶29,964 (No. 87-2059, 1993).

This record does not support the conclusion that Anderson had a good faith belief that it was either conforming to OSHA regulations, or providing adequate fall protection for its employees. Respondent failed to comply with its fall protection program because of information obtained during an informal telephone conversation between Mr. Anderson and his son. Mr. Anderson made no effort to contact OSHA or verify that the information was accurate by contacting qualified safety professionals. Notwithstanding his foreman's concern as a result of repeated warnings from the general contractor about employees being exposed to fall hazards, Bob Anderson made no attempt to ascertain whether the fall protection at the work site complied with either residential or conventional fall protection standards. Mr. Anderson's dismissal of the concerns of the general contractor and of his own foreman demonstrates a conscious and deliberate disregard for the requirements of the Act, and for the safety of his employees. Moreover, the fall protection in use at the Oak Creek site was tragically inadequate under the cited conditions. The eaves of the steeply sloped roof were 32-34 feet off the ground, and the roof was covered with frost or snow. Mr. Poulakos, the newly hired and inexperienced employee involved in the January 24, 2002 incident, was sent onto the roof unsupervised and untrained. The evidence in the record establishes that, by failing to ensure adequate fall protection for untrained personnel under such adverse conditions, Anderson's supervisory personnel demonstrated, at the least, plain indifference to employee safety. The Secretary has established that the cited violation was willful.

Penalty

All of Anderson's roofers were exposed to the cited hazard for the duration of the sheathing project. The item is clearly serious, in that a fall from a height of 32-34 feet, as demonstrated in this case, would undoubtedly result in serious injury, and/or the death of an affected employee. The probability of an accident occurring was properly deemed high, because an accident involving serious injuries actually occurred. In computing the penalty CO Brooks originally proposed a gravity based

penalty of $70,000.00. Brooks testified that Anderson was entitled to a 50% reduction in the penalty due to its small size. Bob Anderson testified that Anderson employs between 28 and 38 employees, and grosses between 2 and 2.4 million dollars a year (Tr. 250). CO Brooks testified that he reduced the gravity based penalty by an additional 10% because Anderson had no other citations within the previous three years (Tr. 313). A final penalty of $28,000.00 was proposed for this item. The proposed penalty is deemed appropriate and is assessed.

Alleged Violation of §1926.503(a)(1)

Willful citation 2, item 2 alleges:

29 CFR 1926.503(a)(1): The employer did not provide a training program for each employee who might be exposed to fall hazards in accordance with CFR 1926 Subpart M-Fall Protection.

> (a) On or about January 24, 2001, Oak Creek Wisconsin employees working on the 6:12 pitch roof who were installing the trusses and sheathing were not trained on the hazards associated with this work. This condition exposed the employees to a potential fall hazard of approximately 32 feet.
>
> The cited standard provides:
>
> (a) *Training Program.* (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

Facts

Bob Anderson admitted that his company has no formal fall protection training (Tr. 235, 248). Anderson's written fall safety policy consists of a two page fall protection plan describing fall protection policies on commercial construction. According to Mr. Anderson, the plan requires fall protection when working above six feet, and calls for rails, scaffolding, netting or harnesses (Tr. 254-55; Exh. C-7, C-8). Fall safety policies are communicated during company breakfasts and foremen's meetings. During these meetings, Mr. Anderson relays additional safety information he picks up through "other sources" (Tr. 235).

Dan Naffier testified that he never received any formal classroom training (Tr. 159). His training consisted of an unspecified number of breakfast meetings and on-the-job training he received from his foreman before he was promoted (Tr. 158, 160). Naffier testified that fall protection was discussed at the breakfast meetings, though he never received any instruction in how to erect safety lines or when guardrails were required (Tr. 162). Harnesses and safety belts were specifically

discussed at the meetings. According to Naffier, it was Anderson's policy to offer employees the option of using harnesses (Tr. 161).

Poulakos was the first new hire under Dan Naffier's supervision (Tr. 175). Dan Naffier testified that it was his responsibility to provide Paul Poulakos' training (Tr. 174). Naffier gave Poulakos a copy of the company fall protection program, had him read it, and asked him whether he had any questions (Tr. 174, 176; Exh. C-7). Naffier stated that he pointed out the roof and the slide guards and told Poulakos that whomever he was partnered with would cover his instruction in more depth (Tr. 175). Naffier acknowledged that the fall protection policy he gave Poulakos referred only to fall protection practices on commercial roofing jobs and that the residential fall protection methods in use at the Oak Creek job were not mentioned anywhere in those materials (Tr. 176-77). Naffier testified that he had seen a copy of the Guidelines for Residential Construction on another foreman's desk; however, prior to January 24 he had never read it in its entirety, or been trained in its contents (Tr. 200).

Travis Decorah testified that he was trained only in those OSHA fall protection requirements that were contained in Anderson's fall protection plan. Bob Anderson read from the plan during company breakfasts and sent employees copies of the fall protection plan in the mail (Tr. 126, 148, Exh. C-7). Decorah testified the plan required that guard rails be installed on patio openings, that safety nets be installed on commercial buildings above four stories, and that workers be tied off above six feet (Tr. 126-27). Decorah understood, however, that the six foot requirement applied only to work from man baskets. Prior to the January 24, 2002 accident he never used a harness while working on a roof (Tr. 126-27, 149). Decorah testified that he was told slide guards were to be used for fall protection when applying roof sheathing (Tr. 126, 129, 154). Decorah acknowledged that slide guards were not mentioned in Anderson's written fall protection plan, but stated that he had been told by one of the foremen, Ted Johnson, that slide guards could be used instead of guardrails on roofs (Tr. 142-43). Decorah testified that he primarily received his training from Dan Naffier while on the job or from word of mouth (Tr. 125, 147-48).

Decorah testified that Dan Naffier assigned Paul Poulakos to work with him shortly after Poulakos was hired. Decorah knew that Poulakos had not done the work before and instructed him to be careful walking on the roof, to stay away from sawdust, and to stay above the slide guards (Tr. 146). At the hearing Decorah testified that he did not believe Poulakos had enough training to be working on the roof (Tr. 156).

Paul Poulakos testified that the only training he received after Anderson hired him consisted of reading two sheets of general safety instructions, which included some reference to fall protection, and attending a toolbox meeting about hardhats (Tr. 87, 106; Exh. C-7). Poulakos testified that Naffier did not provide him with any additional instruction on fall hazards (Tr. 89). Poulakos stated that Travis Decorah gave him on-the-job instruction, telling him not to walk backwards, to stand above his materials, and pointing out the slide guard (Tr. 111-12). Poulakos did not believe that his training gave him an appreciation for fall hazards, or for the dangers associated with working at heights (Tr. 105).

Discussion

The evidence establishes that neither Bob Anderson nor the supervisory personnel involved in this matter were familiar with the alternative fall protection standards for residential construction with which Anderson claims to have been compliant. It is well established that Anderson provided virtually no relevant training which would have enabled either Paul Poulakos or Travis Decorah to recognize the hazards created by working on a steep sloped roof, or the procedures that should have been followed to minimize those hazards. The written safety procedures provided Poulakos and Decorah did not relate in any way to the procedure(s) actually used on the roof of the Oak Creek work site. The sole fall protection method in use on the work site, *i.e.*, an incomplete slide guard, was not mentioned in the written plan. Although Decorah was verbally assured by a foreman that slide guards were appropriate fall protection for residential construction, no further instruction on the proper use of slide guards was provided. Poulakos' only relevant instruction consisted of general warnings to be careful when walking and to stay above the slide guards and construction materials. Because of the inadequacy of their training, there was no way either Poulakos or Decorah could have recognized the deficient fall protection provided by Anderson, or realized that more was required under OSHA safety regulations. Because Poulakos and Decorah were not trained to recognize and avoid the hazards associated with working on steeply pitched roofs, in particular, fall hazards, this item is affirmed.

Willful

As noted above, the Commission has held that in order to establish that a violation is willful, the Secretary must demonstrate the employer's heightened awareness of the illegality of the violative conditions. Again, as noted above, the Secretary may meet her burden by establishing that the employer has been previously cited for a violation, or otherwise been made aware of the requirements of the standards, and is on notice that violative conditions exist. *Propellex, supra.* The standard cited here, unlike that cited in the preceding item, is a training standard. Non-compliance with a training standard does not result in an obvious hazard similar to a failure to implement physical safeguards.

Respondent has never been cited for training violations or received warnings about inadequate training from the general contractor, as it had for inadequate fall protection. While Anderson *should* have realized that changing their fall protection plan would also require changes in their training program, it is clear from the record that they did not. Ignorance of the requirements of a standard, however, does not establish willfulness. Where an employer fails to fulfill its responsibilities, the Secretary must, to establish willfulness, demonstrate that even if the employer had known of the cited standard's requirements, it would not have cared that its conduct did not comply. *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1986-87 CCH OSHD ¶27,893 (No. 85-355, 1987). In the absence of any evidence that Anderson was actually aware of the deficiencies in its training program, this violation is not shown, by a preponderance of the evidence, to have been willful.

Penalty

Because the violation in this instance was not shown to be willful, the proposed penalty of $28,000.00 is deemed excessive. However, an evaluation of the evidence in accordance with §17(j) of the Act establishes that the inadequacies in Anderson's training program presented a high gravity factor and serious injury or death were the probable result of those deficiencies. Accordingly, the maximum penalty, in the amount of $7,000.00, is appropriate for this violation.

ORDER

1. Citation 1, item 1, alleging violation of §1926.1051(a) is affirmed as Other-than-serious and a penalty of $100.00 is assessed.
2. Willful citation 2, item 1, alleging violation of §1926.501(b)(11) is AFFIRMED and a penalty of $28,000.00 is ASSESSED.
3. Citation 2, item 2, alleging violation of §1926.503(a)(1) is AFFIRMED as a Serious violation of the Act, and a penalty of $7,000.00 is ASSESSED.

/s/

Robert A. Yetman
Judge, OSHRC

Dated: February 25, 2002