SECRETARY OF LABOR, Complainant, v. METAL BUILDINGS OF WISCONSIN, INC., Respondent.	OSHRC DOCKET NO. 97-0413

APPEARANCES:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

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Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor to enforce a citation issued to the Respondent by the Occupational Safety and Health Administration for the alleged violation of a regulation relating to fall protection in construction work. The matter arose after a compliance officer for the Administration inspected a worksite of the

Respondent, concluded that it was in violation of the regulation and recommended that the "willful" citation be issued. The Respondent disagreed with this determination and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in Milwaukee, Wisconsin.

The citation charged that:

Safety nets were not provided when workplaces were more than 25-feet above the ground or water surface, or other surface(s) where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts were impractical.

> (a) Fall protection (safety nets or any other effective alternative fall protection) was not provided for an employee installing steel decking on the metal structure (bar joists) of the building, located at 11500 80th Avenue, Pleasant Prairie, Wisconsin. This condition exposed the employee to a potential fall hazard of 37 feet to the ground below.

in violation of the regulation found at 29 C.F.R. §1926.105(a) which reads as follows:

> §1926.105 Safety nets.
> (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

The salient facts are not in substantial dispute and may be briefly summarized. In response to a fatality at a Respondent's worksite, an Administration compliance officer investigated the mishap and ascertained that Respondent employed workers to lay metal decking on a building approximately 37 feet high. Employees installing the decking wore no fall protection, and one worker fell through a space in the decking. Safety nets were not used because of a fire hazard. Instead, the Respondent utilized a safety monitoring system whereby one person observed the work as it progressed, identified the hazards, and took corrective action where necessary.

The citation was issued because safety nets were not provided when the workplace was more than 25 feet above ground level, where ladders, scaffolding, cable platforms, temporary floors, safety lines and safety belts were impractical. The inspector was of the view that some sort of safety net was practical and could have been utilized.

After the accident the Respondent finished the job with harnesses and lanyards. The inspector categorized the failure to use fall protection as a "willful" violation of the regulation because some type of fall protection was feasible, because the Respondent had knowledge of the standard and its background, because its supervisors had OSHA training in fall protection, and because it failed to train employees properly.

Complainant's Assistant Area Director reviewed and affirmed the compliance officer's

classification of the citation as "willful." He also concluded that safety belts would have been practical.

An experienced iron worker employed by the Respondent acted as foreman and safety monitor on the job. He was responsible for flagged areas, assuring that unauthorized personnel did not enter the danger zone. Workers on the roof were not tied off, and the company did not use safety nets because welding took place nearby. Employees could have used harnesses but did not do so until after the accident. The Respondent had a fall protection plan; and each employee was required to read and to sign the document. The foreman added that at his safety position he observed workers during edging duties and could communicate with them if necessary. He made sure that no one worked on the roof unless authorized to do so.

Other evidence in the record is to the effect that Respondent is very safety minded and earned seven safety plaques in the last fifteen years. Safety priority includes foreman training, weekly tool box talks, and on the job training. A part owner of the Respondent also testified that it was not feasible to tie off decking workers or to utilize safety nets. Therefore he was under the impression that a fall monitoring system would satisfy the requirements of the regulation. In his opinion employees had a good fall protection program.

The president of the Respondent confirmed the safety awards, adding that the company spends lots of time on safety matters. He thought nets were not practical. New employees undergo an apprenticeship, including safety and fall protection procedures. The Respondent now uses safety lines and harnesses.

Under the foregoing circumstances the Complainant argues that the Respondent was in violation of the standard at 29 C.F.R. §1926.105(a) as charged in the citation.

On the other hand Respondent contends that the workers on the roof were doing leading edge work, and that the requirements of Subpart M of the regulations discuss various other fall protection plans.

The facts in this case closely parallel the situation in *Secretary of Labor v State Sheet metal Co.*, OSHRC Docket Nos. 90-1620 and 90-2895, 16 OSHC 1155, 4/27/93. There also the company was installing roofing decking. In one of the cases the company was working on a one story warehouse 27 feet high, 148,000 square feet of floor space and was constructed in sections or "bays."

There was no fall protection. Nets were not used because they were difficult and expensive. In that case the commission held that a *prima facie* violation of Section 1926.105(a) is established if the Secretary can show that employees were subject to falls of 25 feet or more, and none of the safety devices listed in the standard were utilized. The essential facts are (1) that the building was more than 25 feet high; and (2) that no fall protection was being used.

In the current case there is no question that employees were exposed to falls of over 25 feet; that management knew that employees worked at the edge of decking; and that no fall protection was being used. The fact that other members of the industry did not use nets is not dispositive.

Respondent mentioned that there was difficulty with some of the suggested safety measures. However, the Commission has ruled before such a defense is considered, an employer must prove that the hazards caused by complying with the standard are greater than those encountered by not complying; that alternative measures of protecting employees were either used or not available; and that application for variances under Section 6(d) of the Act would be inappropriate.

Before an employer elects to ignore the requirements of the standard at 29 C.F.R. §1926.105(a) because compliance would create a greater hazard, the employer must explore all possible alternatives and is not limited to those methods of protection listed in the standard. Again, before an employer is excused from ignoring the

standard's requirements and leaving its employees unprotected, it must show that it explored all possible alternative forms of protection.

Under the terms of the standard, nets are the least preferred means of protecting employees. If one of the other methods specified can be used, it should be used.

The record discloses that after a second fall, the Respondent adopted fall protection measures, thus establishing that alternatives to netting were available and practical.

In conclusion I find that Section 29 C.F.R. 1926.105(a) is applicable in the current matter; and that the Respondent was in violation of this section of the regulations.

Willful Violation

The term "willful violation" has been defined as follows:

A willful violation is one committed with intentional, knowing or voluntary disregard

> for the requirements of the Act, or with plain indifference to employee safety. *E.g.*, *Williams Enterprises, Inc*., 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶27,893, p. 36,589 (No. 85-355, 1987). It is differentiated from other types of violations by a "heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference." *Id.*

Calang Corp., 14 BNA OSHC 1789, 1791, 1990 CCH OSHD ¶29,531 (No. 85-319, 1990).

As noted, the compliance officer recommended and the Administration adopted his conclusion that the infraction was willful in nature, resulting in a suggested penalty of $42,000.00. The classification of willful was based on his opinion that some type of fall protection was feasible and because the Respondent had knowledge of the standard and its background, its supervisors had OSHA training, and it did not investigate all fall protection options.

On the other hand, the record discloses the Respondent had a fall protection plan in effect, and the company foreman acted as a safety monitor on the project. He cordoned off the danger area, prevented unauthorized employees from entering the danger zone, and warned decking workers if they were too close to the edges. Further, there is testimony to the effect that the Respondent is very safety minded, was awarded at least seven plaques for its attention to safety on the job, conducted weekly tool box talks, and furnished all employees safety and fall protection training.

From the facts in this case I cannot conclude that the Respondent intentionally or knowingly disregarded the requirements of the Act. Indeed, the company believed it was following the requirements of another section of the regulation by having a safety monitor observing the progress of the edging. Thus the Respondent did not willfully disregard or exhibit plain indifference to the regulation.

While the Respondent's failure to comply with the regulation in issue was not willful, it does come within the meaning of "serious" which is defined in Section 17(k) of the Occupational Safety and Health Act of 1970 as follows:

> (k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The evidence discloses that the Respondent was aware of the danger in working 37 feet above ground without fall protection, had knowledge of the potentially harmful condition, and knew that a fall from that height could result in death or serious physical harm.

I therefore conclude that the Respondent was in serious violation of the regulation found at 29 C.F.R. §1926.105(a), and I assess a penalty of $7,000.00.

Sidney J. Goldstein
Judge, OSHRC

Dated: