UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC Docket No. 91-1167
V.I.P. STRUCTURES, INC.,	
Respondent.	

DECISION

Before: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

This case presents the issue of whether it was infeasible for Respondent to use safety nets to protect employees working more than 25 feet above ground.[1] If so, the lack of nets did not constitute a violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. For the following reasons, we reject the employer's defense that compliance was infeasible, and we affirm Judge Edwin G. Salyer's finding that the violation was willful.

I. Feasibility

V.I.P. Structures designs and erects pre-engineered metal buildings in upper New York State. The building in this case was to be an office-warehouse-distribution center in Rochester. When the compliance officer from the Occupational Safety and Health Administration ("OSHA") came to the worksite, the company was installing the roof. V.I.P.

[1]The Secretary's *prima facie* case of violation was established and is not in issue. *See Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) (Secretary must establish applicability of cited standard, existence of violative condition, employee exposure thereto, and employer knowledge thereof), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

had safety nets at the worksite, but could not use them as required by section 1926.105(a),[2] because deep mud had immobilized the boomlifts that the company used to advance the safety nets as installation of the roof continued.[3] Although the V.I.P. superintendent on the site had the authority to temporarily suspend operations during bad weather, such as rain, ice, or strong winds, and had done so on previous occasions, the V.I.P. superintendent at this particular time made the decision to proceed with work on the warehouse roof without having the nets properly positioned.[4] During the inspection and at the hearing, the superintendent stated that he believed that the only solution to the mud problem was to finish enclosing the structure, heat it and dry it out, so that the boomlifts could be moved.

Work on the roof without net protection took place on four days, and the superintendent tried each day to get the boomlifts into operation and, thus, the nets into proper position. However, they could not be freed from the mud until after OSHA inspected the workplace and discovered the violation. Prior to the inspection, the superintendent did not directly tell his supervisor about the unsafe work taking place, and the supervisor failed to elicit that information. Thus the superintendent told his supervisor that there were problems with mud and equipment breakdowns and that he was "trying to move the nets," but he did not explicitly inform the supervisor that the mud and equipment breakdowns were

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[2]The cited standard is 29 C.F.R. § 1926.105(a), which states that "[s]afety 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."

[3]Boomlifts, also referred to in the record as manlifts or aerial lifts, are four-wheel, heavy lifting machines. The company had two of them, one weighing 23 tons and the other, 16 tons.

[4]The superintendent did not *require* employees to work without fall protection. "Basically," he testified, "on Monday I told the guys if they didn't want to go up on the roof without safety nets in place, that they didn't have to work up there, that we'd find other work for them, that nobody was going to be forced to work where they did not feel comfortable." He apparently knew and it is undisputed by the company that the employees would not have been laid off inasmuch as, at this construction site and at other nearby sites under the company's control, including a site located only 12 miles away, there was work to which the employees could be assigned.

making it impossible to move the nets. Nor did he inform the supervisor that the employees were working without safety nets. Evidently the supervisor never asked what were the implications of "trying to move the nets."

After the inspection, certain company officials, including the vice president, strongly reprimanded this superintendent for failing to suspend the roofing work until the safety nets could be advanced. However, the company asserts in essence that its disciplinary measures against the superintendent for allowing the employees to work without safety nets, contrary to the company's own safety rule, should not be taken as a concession that temporarily suspending the roofing work and reassigning the employees was a feasible alternative measure. It continues to argue that the mud made it infeasible to use the nets.

To establish the affirmative defense of infeasibility, an employer must show that (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *See Falcon Steel Co.*, 16 BNA OSHC 1179, 1186-87, 1993 CCH OSHD ¶ 30,059, pp. 41,334-45 (No. 89-2883, 1993) (separately analyzing infeasibility of implementation and infeasibility of operations); *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1226-28, 1991-93 CCH OSHD ¶ 29,442, pp. 39,682-85 (No. 88-821, 1991) (citing cases regarding infeasibility of implementation and infeasibility of operations).

We find that V.I.P.'s claims of infeasibility are easily resolved from admissions made by the company that alternative means of protection were in fact available, thereby defeating the second element of the infeasibility defense. After all, the company can hardly be heard to complain that a further suspension of this roofing operation was not a feasible alternative to compliance here, when it vigorously disciplined its superintendent for not doing just that. Indeed, V.I.P. supervisors, including its vice president, insisted that the roofing operation *should have been* suspended until the safety nets could be advanced. In addition, V.I.P. has also admitted that the employees who were working on the roof could have been reassigned to other company worksites nearby. Reassignment, then, was another alternative to compliance that the company readily admits was feasible. Therefore, we need not and do

not reach the issue of whether § 1926.105(a) would have required V.I.P. to suspend this roofing operation absent such admissions.

II. Willfulness

Under Commission precedent, a willful violation is one committed with intentional, knowing, or voluntary disregard for the Act's requirements, or with plain indifference to employee safety. *E.g. Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). The Secretary must show that the employer was aware of the particular duty at issue in the case, if not the particular standard embodying the duty. *See Morrison-Knudsen Co./Yonkers Contrac. Co., A Joint Venture*, 16 BNA OSHC 1105, 1123-24, 1993 CCH OSHD ¶ 30,048, pp. 41,280-81 (No. 88-572, 1993), *petition for review filed*, No. 93-1385 (D.C. Cir. June 15, 1993). Willful conduct by an employee in a supervisory capacity constitutes a *prima facie* case of willfulness against his or her employer unless the supervisory employee's misconduct was unpreventable. It is the employer's burden to show that the supervisory employee's misconduct was unpreventable. *See, e.g., L.E.Myers Co.*, 16 BNA OSHC 1037, 1046, 1993 CCH OSHD ¶ 30,016, p. 41,132 (No. 90-945, 1993). Good faith efforts at compliance that are incomplete or not entirely effective can negate willfulness provided that they were objectively reasonable in the circumstances. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541, 1992 CCH OSHD ¶ 29,617, p. 40,104 (No. 86-360, 1992) (citing *Calang Corp.*, 14 BNA OSHC 1789, 1792-93, 1987-90 CCH OSHD ¶ 29,080, p. 38,872-73 (No. 85-319, 1990)).

We find that the project superintendent's decision to let employees work without safety nets was a willful action, inasmuch as it constituted an intentional, knowing, and voluntary disregard for the duty to provide fall protection and that his action is imputable to V.I.P.[5] The company asserts that the superintendent's awareness of the work without safety nets was only simple knowledge, not a willful state of mind. We disagree. There is

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[5]Commissioner Foulke would agree that the violation in this case is willfull on the basis that the superintendent was aware that he had the authority to suspend working on the roof for at least a limited period of time but did not do so. Had the superintendent not had this authority, then the company may have proven its infeasibility defense and the Commission would not have needed to rule on the willfulness issue.

ample evidence that the superintendent was conscious of his employer's requirement for safety nets and was conscious, moreover, that by offering the employees work without safety nets he was deliberately exposing them to fall hazards. His foremost desire was to keep the job moving: "[Y]ou want to get it done on time and under budget and everything . . . ." *Compare Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1613, 1992 CCH OSHD ¶ 29,673, p. 40,210 (No. 87-2007, 1992) (foreman's conscious decision to continue work upon a scaffold without guardrails establishes willfulness). It makes no difference that the superintendent left it up to the employees to choose to do the unsafe work, instead of flatly ordering them to do it. Responsibility under the Act for ensuring that employees do not put themselves into any unsafe position rests ultimately upon each employer, not the employees, and employers may not shift their responsibility onto their employees. *See, e.g., PBR, Inc. v. Secretary*, 643 F.2d 890, 895 (1st Cir. 1981); *General Elec. Co.*, 10 BNA OSHC 2034, 2040, 1982 CCH OSHD ¶ 26,259, p. 33,164 (No. 79-504, 1982). Employers may not gamble with the safety of their employees. *See L.E. Myers Co.*, 16 BNA OSHC at 1047-48, 1993 CCH OSHD at p. 41,134.

We also find that the company's program to provide safety nets does not negate the willfulness of the violation. The company contends that its comprehensive fall protection program, combined with the superintendent's history of compliance with the safety net requirement at other worksites and his efforts to advance the safety nets at this worksite, demonstrate the requisite good faith. "[The superintendent] was trying to the best of his ability to provide fall protection, and proceeded with the work because he could not foresee when conditions would change for the better." We disagree. These efforts to advance the nets do not rise to the level of good faith sufficient to negate willfulness. Such efforts are only relevant as indicators of good faith in penalty determinations.

We further question the *company's* attitude toward use of safety nets on this occasion. The supervisor to whom the superintendent reported the equipment breakdowns did not inquire whether the breakdowns were hindering the use of safety nets, or ask what the superintendent meant by saying that "we're trying to move the nets." His testimony chronicling his daily telephone reports prior to the inspection reveals that at least a couple of days passed without any inquiry from his supervisor as to the outcome of the efforts to advance the safety nets. If the authority conferred on the superintendent was so unchecked that a supervisor would not see the need to ask about the status of nets despite the deep mud and

equipment breakdowns, then the company must live with its superintendent's decisions and their consequences, particularly when there is testimony indicating that the higher corporate officials know that this supervisor is prone to put pressure on himself to complete a job.[6]

III. Order

The Secretary proposed a penalty of $28,000,[7] which the judge reduced to $18,000 in view of the company's efforts to use safety nets -- evidence of good faith. On review, neither party directly takes specific issue with the judge's assessment, which we affirm. Accordingly, we affirm the citation alleging a willful violation and assess a penalty of $18,000.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

DATED: July 8, 1994

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[6]The company's vice president testified that this particular superintendent "put a lot of pressure on himself in terms of getting the job done," that is, "in terms of trying to get the project rolling and keeping it on schedule no matter what happened; in terms of the weather or whatever." The superintendent himself testified that, although no company official ever ordered him to hurry a job despite any risks to the employees, there was inherent pressure to complete his jobs "on time and under budget." He explained: "[Y]ou do have a time frame and time is money on a construction site and the longer it takes to do the job, of course, the more cost overruns you're going to have."

[7]The maximum penalty permitted for a willful violation of the Act is now $70,000. An amendment raising the amount from the earlier limit of $10,000 took effect shortly before the occurrence of the violation at issue here. Section 17(a) of the Act, 29 U.S.C. § 666(a), *amended by* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990).

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SECRETARY OF LABOR, Complainant, v. V.I.P. STRUCTURES, INC., Respondent.	Docket No. 91-1167

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on July 8, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

July 8, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-1167

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
VIP STRUCTURES OF ROCHESTER, INC.
Respondent.

OSHRC DOCKET
NO. 91-1167

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 10, 1992. The decision of the Judge will become a final order of the Commission on October 13, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before September 30, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: September 10, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-1167

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SECRETARY OF LABOR, Complainant, v. V.I.P. STRUCTURES, INC., Respondent.	OSHRC Docket No. 91-1167

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For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

The respondent, V.I.P. Structures, Inc.,[1] is a design/build general construction contractor. In the fall of 1990, respondent began construction of a 69,000 square foot warehouse/office building in the city of Rochester, New York (John Street project). By March 1991, the walls of this building had been erected and respondent's employees were

[1] In the citation and the Secretary's complaint, the corporate respondent was referred to as V.I.P. Structures of Rochester, Inc. At the hearing, upon respondent's request, the citation and complaint were amended to reflect the proper corporate name (Tr. 236, 239, 240).

engaged in the installation of a standing seam metal roof deck and gutter in the warehouse portion of the structure. At this point in time, the Bowmansville Occupational Safety and Health Administration area office received a complaint alleging that respondent's employees were working aloft without benefit of safety nets and were using a defective ladder at the John Street worksite. On March 15, 1991, Compliance Officer Colin Sargent, pursuant to the provisions of the Occupational Safety and Health Act (29 U.S.C. § 651, *et seq.*), was dispatched to the site to investigate the matters raised in the complaint.

Upon his arrival at the site, Sargent observed eleven employees of respondent working on the roof, some of whom were located at the leading edge (Tr. 16). These employees were not wearing safety belts nor were they protected from falls by other means (Tr. 17). Compliance Officer Sargent was accompanied during his inspection by Michael Dillie, respondent's jobsite superintendent, who acknowledged that the employees on the roof were working more than 25 feet above ground level[2] (Tr. 19) without safety net protection. During the course of the walk-around, Sargent also noted an extension ladder, the side rails of which did not extend at least three feet above the landing; a failure of respondent to post a "no smoking" sign in a refueling area; the absence of a fire extinguisher in a refueling area; and several gas cylinders which were not secured in an upright position.

As a result of the Secretary's inspection, respondent was issued the following citations:

Serious Citation No. 1

Item No. 1

29 C.F.R. § 1926.1053(b)(1): The side rails of a portable ladder used for access to an upper landing surface did not extend at least 3 feet above the landing:

(a) South Side of Building/West of Loading Dock Area. The side rails on a 40 foot wooden extension ladder, used by employees for access to roof level, extended only 14 inches above the roof deck.

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[2] Sargent took actual measurements of the roof and determined the height of the roof above ground level ranged from 26 feet 4 inches to 31 feet (Exh. C-1; Tr. 27).

Willful Citation No. 2

Item No. 1

29 C.F.R. § 1926.105(a): Safety nets were not 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 was impractical:

> (a) 900 John Street/Warehouse Roof Level. On March 15, 1991, employees installing a standing seam metal roof (which included insulation and multigutter) were exposed to potential falls from elevations ranging from 26 feet 4 inches to 31 feet above adjacent ground level. The employees were not wearing safety belts with attached lanyards and were not otherwise protected against potential falls.

"Other" Citation No. 3

Item No. 1[3]

29 C.F.R. § 1926.152(g)(9): Conspicuous and legible signs prohibiting smoking were not posted in service and refueling areas:

> (a) Between Columns 6 and 7, Line D. A 250-gallon portable gasoline tank was used to refuel aerial lift, a fork lift, and a portable generator.

Item No. 2

29 C.F.R. § 1926.152(g)(9(11): Each service or refueling area was not provided with at least one fire extinguisher having a rating of not less than 20-B:C located so that an extinguisher would be within 75 feet of each pump, dispenser, underground fill pipe opening, or lubrication or service area:

> (a) Between Columns 6 and 7, Line D. A 250-gallon portable gasoline tank was used to refuel aerial lifts, a fork lift, and a portable generator.

Item No. 3

29 C.F.R. § 1926.350(a)(9): Compressed gas cylinders were not secured in an upright position:

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[3] At the hearing, respondent withdrew its notice of contest with respect to this item (Tr. 7) which will be affirmed with no penalty assessed.

(a) South Side of Building. Seven propane cylinders were not secured.

The Secretary proposed a penalty of $2,000 for Serious Citation No. 1, a penalty of $28,000 for Willful Citation No. 2, and no penalty for "Other" Citation No. 3.

Serious Citation No. 1

At the hearing and in its posthearing brief, respondent did not dispute the factual allegations set forth in the citation with respect to this item. The evidence discloses that respondent's employees on the day of inspection were using a portable extension ladder to gain access to their work areas on the roof and that the side rails of this ladder extended only 14 inches above the top landing (Exh. C-11; Tr. 73). This is a clear-cut violation of 29 C.F.R. § 1926.1053(b)(1),[4] which requires a minimum extension of three feet. The compliance officer explained that this inadequate extension was hazardous since employees using the ladder to ascend or descend would be placed in a precarious position subjecting them to a loss of balance and a potential fall of 26 feet (Tr. 74-75).

Respondent's defense to this charge is based upon the testimony of Michael Dillie, who claimed he had been informed late in the afternoon on the day prior to the Secretary's inspection that the ladder in use on the jobsite was cracked. Dillie, therefore, instructed an employee to take the defective ladder down and replace it the following day (the day of the inspection) with a new ladder. Dillie's instruction was implemented on the morning of the inspection before the arrival of Compliance Officer Sargent, but Dillie testified he was unaware of the condition giving rise to the citation until this situation was brought to his attention by Sargent (Tr. 148-149). Upon learning of this condition, Dillie corrected the matter by having "the men extend the ladder" and securing it at the top and bottom (Tr. 150). Respondent's defense is based upon its alleged lack of knowledge of the hazardous condition.

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[4] Section 1926.1053(b)(1) provides:

> (1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access.

It is incumbent upon the Secretary in every case to establish that an employer had knowledge of the violative condition. The required element of knowledge is met upon a showing of either actual or constructive knowledge of the cited condition, the latter of which is satisfied upon a showing that the condition would have been disclosed upon the exercise of "reasonable diligence" by the cited employer. *Walker Towing Corp.* 14 BNA OSHC 2072, 1991 CCH OSHD ¶ 29,239 (No. 87-1359, 1991).

There is some evidence that respondent had actual knowledge of the violative condition. Dillie testified that one of the workers assigned to replace the ladder was Dave Crosby, respondent's ironworker foreman (Tr. 148). Sargent observed Crosby ascend the ladder shortly after the inspection began (Tr. 17). Under these circumstances, it is reasonable to conclude that Crosby had actual knowledge of this situation and, since he was one of respondent's foreman, this knowledge can be imputed to the corporate respondent. *A. P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, 1991 CCH OSHD ¶ 29,223, p. 39,128 (No. 85-369, 1991).

In any event, the evidence of record reflects that respondent had constructive knowledge of the situation. The difference between the existing 14-inch extension and the 36-inch extension required by the standard is substantial and would have been quite obvious to even a casual observer. The condition was in plain view and, since the ladder was the only means of access to the roof, this condition could have been discovered by the exercise of reasonable diligence. Accordingly, the Secretary has established the requisite knowledge and Serious Citation No. 1 will be affirmed.

Willful Citation No. 2

This citation charges respondent with a willful violation of 29 C.F.R. § 1926.105(a)[5] for its failure to protect employees installing a roof by means of safety nets. The basic facts are not in dispute.

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[5] 29 C.F.R. § 1926.105(a) provides:

> (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.

In the initial stages of the roof installation at the John Street project, respondent took steps to protect its employees by means of safety nets and other devices. Beginning with the first two bays, nets were placed in position by workers in boomlifts (also referred to in the record as "manlifts" or "aerial lifts"), who hooked the nets to the main frames of the building (Tr. 127). As the work progressed, these workers using the boomlifts moved the nets forward to protect against falls from the leading edge of the advancing roof. On March 3 and 4, 1991, the Rochester area experienced a severe ice storm[6] and respondent's operations were temporarily discontinued due to adverse weather conditions (Tr. 135). When work resumed, superintendent Dillie asserts he was unable to move the manlifts because of mud and ice (Tr. 133-134). In view of this circumstance, he concluded there was no way to move the nets (Tr. 137). Dillie did, however, decide to proceed with the installation of the roof without safety net protection, although he did inform his employees they would not be required to work under these conditions if they chose not to in which event he would assign them work on the ground or at another location (Tr. 135-136). It does not appear in the record that Dillie advised officials in the home office of his decision to resume work on the roof without safety net protection.

At the time of the Secretary's inspection on March 15, 1991, Sargent observed safety nets suspended below the first bay of the main warehouse and determined through discussions with Dillie and other employees at the site that these nets had not been moved forward since the previous Friday, March 8, 1991 (Tr. 21). Sargent noted, however, that the leading edge of the roof deck extended to the fifth bay on March 15, 1991, (Exh. C-1; Tr. 20), leading him to the conclusion that respondent's employees performed work on the roof without benefit of safety nets on at least four workdays (March 11, 12, 14, and the morning of March 15) prior to his arrival (Tr. 48, 135, 144-145, 176-177). He also determined that perimeter cables had been in place along two edges of the roof providing some exterior fall protection until March 12, 1991, but that these cables had been removed on that date (Tr. 48-50, 176). Thus, on March 14, 1991, and on the morning of March 15,

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[6] This storm is described in the testimony of meteorologist Kevin Williams as one of the worst ice storms in decades. The storm caused widespread damage, creating an emergency and resulting in declarations that Monroe County was a "disaster area" (Tr. 213-214).

performed roofing work without benefit of either safety nets or perimeter cables (Tr. 50, 177). Sargent discussed this situation with Dillie who did not deny that employees had worked without fall protection prior to the inspection. Dillie assured Sargent on the afternoon of March 15, 1991, that he would not send workers back to the roof until the nets were moved (Tr. 71), and Sargent observed the boomlifts in the process of moving the nets before he left the worksite (Tr. 66-67). When Sargent returned to the worksite on March 20, 1991, employees working on the roof were protected by nets and perimeter cables[7] (Tr. 65).

The record supports and this court concludes that respondent permitted employees to work at the leading edge of a roof at heights in excess of 25 feet for substantial periods of time over a period of several days. While performing this work, these employees were not provided with any means of fall protection and were exposed to potential falls which could result in serious injury or death. It is undisputed in the record that the cited standard applies to the cited condition that respondent breached the terms of the standard, that respondent's employees were exposed to the hazard of falls from the roof, and that respondent, through its supervisor Dillie, had knowledge of this condition. The Secretary has, therefore, established a prima facie case.

Respondent's defense to this charge is based upon its assertion that compliance with the cited standard was impossible due to weather conditions that existed at the time of and just prior to the Secretary's inspection.[8] In essence, respondent contends that ground conditions (mud and ice) resulting from the ice storm prevented it from using the boomlifts to move the nets forward. Respondent maintains, therefore, that it was precluded from compliance with the standard due to circumstances beyond its control.

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[7] Sargent testified he was told by workers that this protection was in place on March 16, the day following Sargent's conversation with Dillie (Tr. 65). However, Dillie testified the nets were not finally reset until Tuesday, March 19 (Tr. 138).

[8] During the hearing there was some suggestion that respondent might assert a defense based upon "isolated instance of employee misconduct." However, this defense was not raised in respondent's answer to the Secretary's complaint or pursued in respondent's posthearing brief and will not be considered in this decision.

The so called "impossibility" defense has evolved over the years to one of "infeasibility." Early cases imposed a duty on employers claiming this defense to prove that (1) compliance with the standard was functionally impossible or would preclude performance of required work, and (2) alternative means of protection were unavailable. *M. J. Lee Construction Co.,* 7 BNA OSHC 1140, 1979 CCH OSHD ¶ 23,330 (No. 15094, 1991). In *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949, 1986 CCH OSHD ¶ 27,650 (No. 79-2553, 1986), the Commission overruled prior precedents and held that infeasibility rather than impossibility is the proper focus of this defense. It further held that upon a showing of infeasibility by an employer, the burden of proof shifts to the Secretary to prove the existence of a possible alternative means of protection. The burden of proof problem with regard to alternative measures was reversed in *Seibel Modern Mfg. & Welding Co.*,[9] 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991), which sets forth the Commission's current view that an employer seeking to establish an infeasibility defense "has the burden of establishing either that an alternative protective measure was used or that there was no feasible alternative measure." *Id.* at ¶ 39,685.

In assessing the evidence, this court is not persuaded that respondent has carried its burden of proof on this issue. In the first place, it is not clear beyond all doubt that it was infeasible to move the nets forward under the circumstances in existence following the storm. Dillie testified that weather conditions were severe throughout the period from March 3 (the date of the storm) to March 15 (the date of the Secretary's inspection) to the extent that he was unable to move the boomlifts due to ice and mud. This characterization is somewhat diminished by the testimony of the meteorologist which indicates that temperatures actually warmed up following the storm and melted most of the ice (Tr. 214). His testimony further reflects:

> Subsequent to the storm, as I said, there was a thaw. Temperatures reached 55 on the 6th, 45 on the 7th and then nose-dived, as far as highs goes, below freezing on the 8th, warmed back up on the 9th, back to below freezing on the 10th and the 11th, back above freezing on the 12th, 13th, 14th, 15th, and the next several days as well (Tr. 216).

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[9] This case recites a comprehensive history of the case law on the "impossibility/infeasibility" defense. *Id.* at ¶ 39,682-683.

It would appear from the foregoing that a problem with ice was minimized during the days immediately preceding the Secretary's inspection. However, it is conceivable, as Dillie maintained, that the intermittent freezing and thawing of the ground did create conditions which made it difficult, if not impossible, to move the boomlifts into position to reset the nets. Dillie testified he made numerous attempts to move the boomlifts through the mud with no success and with resultant damage to the machine[10]. He tried to clear the mud around the boomlifts by using a bulldozer, but this also failed (Tr. 135). It is significant to note, however, upon being warned by Sargent that a failure to use nets was a serious infraction of the cited standard, Dillie took immediate steps to rectify the condition and actually did move these nets before Sargent's return to the worksite.

On balance, though not without some difficulty, this court concludes that respondent has established that it was unable to move the nets prior to the Secretary's inspection because of adverse conditions which prevented the use of the boomlifts. This circumstance made the use of the nets infeasible until the boomlifts could be used to move the nets.

Having concluded that respondent has shown it was infeasible to move the nets forward, thereby preventing literal compliance with the cited standard, it must be determined whether respondent has established by a preponderance of the evidence the second element of this defense, *i.e.,* that alternate means of compliance were unavailable.

Respondent established through the testimony of Dillie and James E. Herr, Vice-President and co-owner of the corporate respondent, that the company had a strict policy concerning the use of nets to protect employees working above 20 feet at all times. This policy was established following a fatal accident when company officials decided that the use of safety lanyards and cables did not provide adequate protection to employees working on the roof (Tr. 251) and invested several thousand dollars to purchase safety nets (Tr. 252). Thereafter, the use of safety nets was required whenever respondent's employees were engaged in roofing operations (Tr. 259). This program was communicated to respondent's supervisors and through them to each of respondent's employees (Tr. 260).

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[10] The two boomlifts were heavy machines mounted on four tires. One weighed 23 tons and the other 16 tons (Tr. 186). Due to this circumstance, Dillie's version of the facts is plausible.

It was also included in respondent's comprehensive safety program which specified "Safety nets *are required* for all roofing installations when eave height exceeds twenty feet" (Exh. R-3, pgs. 4-18, Emphasis in Original). Dillie was well aware of the policy just described and had followed the policy in the past.

When Dillie was confronted with the adverse circumstances following the ice storm which prevented him from using the boomlift to move the nets forward, he had one clear and simple alternative -- the cessation of the roofing operations until such time as the nets could be safely moved. This was the course of action dictated by company policy as well as by common sense. It is reflected in the record that this course of action was available to Dillie without imposing undue hardship upon respondent's operations or its employees since Dillie testified that other work was available not only at the John Street worksite, but also at another location "twelve miles down the road in Havon" (Tr. 136, 145). He further testified that he had the authority to "shut the job down" for safety reasons and was told by company officials following the Secretary's inspection that he should have exercised this authority when it became apparent the nets could not be moved (Tr. 196, 197). As a result of Dillie's exercise of what the company considered bad judgment, Dillie was reprimanded and "lost two days vacation" (Tr. 155).

Upon consideration of the foregoing, it is concluded that respondent has failed to establish a defense based upon the unavailability of alternative means of compliance. The remaining matter for resolution is whether the Secretary has established that the violation was willful.

The Review Commission recently defined the term "willful" in *Secretary of Labor v. Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1992 CCH OSHD ¶ 28,063 (Nos. 86-360, 86-469, 1992).

> A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with indifference to employee safety. *E.g., Williams Enterprises,* 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶27,893, p. 36,589 (No. 85-355, 1987). The employer is responsible for the willful nature of its supervisor's actions to the same extent that the employer is responsible for their knowledge of violative conditions. *E.g., Donovan v. Capital City Excavating Co.,* 712 F.2d 1008 [11 OSHC 1581] (6th Cir. 1983) (finding of willful violation required where crew foreman knew

that trench was not supported as OSHA compliance officer had said was required, yet foreman ordered crew to continue work in trench before protective equipment arrived); *Central Soya de Puerto Rico, Inc. v. Secretary of Labor,* 653 F.2d 38, 39-40 [9 OSHC 1998] (1st Cir. 1981) (willful violation found because two first-level supervisors had received repeated warnings of serious fall hazard, and it was not corrected); *Western Waterproofing Co. v. Marshall,* 576 F.2d 139, 144-45 [6 OSHC 1550](8th Cir.) (employer is responsible for willful nature of foreman's disregard of instructions, where foreman's action is preventable), *cert. denied,* 439 U.S. 965 [6 OSHC 2091] (1978) (cited in *Georgia Electric Co. v. Marshall,* 595 F.2d 309, 320 n.27 [7 OSHC 1343] (5th Cir. 1979). *Id.* at 1539

Upon full consideration of the evidence and the criteria set forth in *Tampa Shipyards, supra,* it is clear beyond a reasonable doubt that Dillie's conduct during the period immediately preceding the Secretary's inspection constitutes intentional disregard for the requirements of the Act and plain indifference to employee safety. He was well aware of the hazards associated with working employees at the leading edge of a roof at elevations in excess of 25 feet and was also cognizant of the Act's prohibition against such practice[11] (Tr. 84). Despite his awareness of the potential consequences of allowing employees to work without benefit of any fall protection, Dillie intentionally allowed respondent's employees to work under these conditions for significant periods in total disregard for their safety. Dillie's assertion that he gave employees the option of either working on the roof or performing other work not requiring fall protection is no excuse for his conduct. If anything, it serves to further illustrate his full awareness of the dangerous circumstances he was imposing upon respondent's employees. In view of the fact that Dillie was a first line supervisor, the corporate respondent must share responsibility for his contumacious conduct and has, therefore, together with Dillie, committed a willful violation of the Act.

Penalties

In deliberating an appropriate penalty to be assessed in this matter, the court has considered the elements set forth in section 17(j) of the Act. The court also takes note of

[11] The corporate respondent was made aware of the Act's requirements that safety nets be used as a result of previous citations issued in 1980, 1986 and 1988 (See Exhs. C-13, C-14, C-15).

the fact that the penalty provisions specified in the Act as originally adopted have been recently amended by Congress to include a substantial increase in the maximum allowable for willful violations. The Act, as adopted by Congress in 1970, imposed a limit of $10,000 upon a finding of a willful violation. The penalty provision of the Act was amended by the Budget Reconciliation Act of 1990 to increase the penalty which may be assessed for a violation of the Act by sevenfold (*See* 29 U.S.C. § 666 effective November 5, 1990). In the Conference Agreement reached between the Senate and the House, Congress determined that an increase in penalties was required in order to "deter violations and ensure adequate enforcement by the Occupational Safety and Health Administration," *Congressional Record - House*, No. 12612, dated October 26, 1990. In the case of willful violations, Congress raised the maximum allowable penalty to $70,000 and adopted a mandatory minimum penalty of $5,000 for each infraction.

Under this new provision, the Secretary seeks in this case to impose a total penalty of $30,000 ($2,000 for the serious citation and $28,000 for the willful). While these penalties were calculated in accordance with agency standards (Tr. 85-86), the Review Commission remains the final arbiter with respect to the amount of the penalty to be imposed and may exercise discretion in this regard. *Secretary v. OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973).

The Secretary allowed respondent no credit for "good faith" in making the penalty calculation. In the ordinary case where an employer has committed a willful violation, such an allowance would be inappropriate. In this case, however, certain circumstances suggest that the corporate respondent has demonstrated by its course of conduct preceding and following the Secretary's inspection an entitlement to some consideration for a penalty reduction. As previously noted in this decision, respondent adopted a stringent safety policy requiring the use of nets several years before the Secretary's current inspection. There is reason to believe that this policy was followed throughout respondent's operation and was practiced by Dillie up until the intervening ice storm. Dillie's conduct in allowing employees to work without nets was foolhardy and, while the corporate respondent must share the blame for this act, the evidence reflects that Dillie did not report this occurrence to the corporate respondent until after it was revealed by the Secretary's inspection. It also

appears that the corporate respondent acted responsibly upon learning of the violative conduct by disciplining Dillie and assuring that employees did not work on the roof until the nets were moved. It further appears that the corporate respondent instituted and maintained a model program comprehensibly embracing all aspects of safety well before the occurrence of the incident which gave rise to this proceeding (Tr. 249-253). In view of this history, it is this court's considered opinion that the corporate respondent should not be excessively penalized for the unreported acts of an errant supervisor. A penalty of $20,000 is appropriate under the circumstances of this case, and this amount will be assessed.

"Other" Citation No. 3

Item 2 of this citation charges respondent with a nonserious violation of 29 C.F.R. § 1926.152(g)(11)[12] for its alleged failure to provide a fire extinguisher in a refueling area.

During Sargent's inspection, he noticed a 250-gallon portable gasoline tank used at the worksite to fuel respondent's forklift. He asked Dillie if a fire extinguisher had been provided in the fueling area (Exh. C-3; Tr. 31-33). Dillie initially responded that a fire extinguisher had been provided, but he believed it to be in the company trailer which was 250 to 300 feet from the site of the tank (Tr. 33, 161). When Dillie looked in the trailer, he could not find the extinguisher. Based upon this limited information, Sargent recommended and the Secretary issued the citation in question.

At the hearing, Dillie testified that he had instructed the forklift operator (Joseph Wonderland) to keep the extinguisher within 75 feet of the gas tank as the standard requires (Tr. 160). After his conversation with Sargent, he discovered that the operator had removed the extinguisher from the trailer and placed it in the forklift where it was readily available during refueling operations (Tr. 160). Both the operator of the forklift and other employees involved in using the tank were aware of the fact that the extinguisher was in the forklift (Tr. 162). While Dillie was not aware of the extinguisher's location at the time of the inspection,

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[12] Section 1926.152(g)(11) provides:

> (11) Each service or fueling area shall be provided with at least one fire extinguisher having a rating of not less than 20-B:C located so that an extinguisher will be within 75 feet of each pump, dispenser, underground fill pipe opening, and lubrication or service area.

it is concluded from the evidence that the extinguisher was in the forklift at that time and available for use within 75 feet of the fuel tank. This item will be vacated.

Item 3 of this citation charges respondent with a nonserious violation of 29 C.F.R. § 1926.350(a)(9)[13] for its alleged failure to secure compressed gas cylinders in an upright position. The facts are not in dispute. Sargent observed seven cylinders (four cylinders near the storage trailer and three near the loading dock) which were not secured in an upright position (Exh. C-12; Tr. 76). In its posthearing brief, respondent's sole defense to this charge is that the cited condition posed no real threat to employees. Since this is a specific standard, the existence of a hazard is presumed upon a showing of noncompliance. *Clifford B. Hannay & Sons, Inc.*, 6 BNA OSHC 1336, 1978 CCH OSHD ¶ 22,525 (No. 15983, 1978); *Vecco Concrete Construction Co., Inc.*, 5 BNA OSHC 1960, 1977-78 CCH OSHD ¶ 22,247 (No. 15579, 1977). In any event, the Secretary does not assert the cited event constituted a serious violation of the Act and seeks no penalty. The item will be affirmed as nonserious.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing will constitute findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

ORDER

It is hereby ORDERED:

1) Serious Citation No. 1, item 1, is affirmed.

2) Willful Citation No. 2, item 1, is affirmed.

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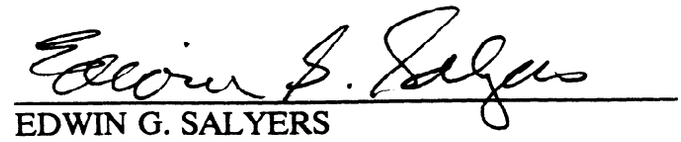
[13] Section 1926.350(a)(9) provides:

> (9) Compressed gas cylinders shall be secured in an upright position at all times except, if necessary, for short periods of time while cylinders are actually being hoisted or carried.

3) A total penalty of $20,000 is assessed for Serious Citation No. 1 and Willful Citation No. 2.

4) "Other" Citation No. 3, items 1 and 3, are affirmed with no penalty assessed.

5) "Other" Citation No. 3, item 2, is vacated.



EDWIN G. SALYERS
Judge

Date: August 31, 1992