UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
HARTFORD ROOFING CO., INC.
Respondent.

OSHRC DOCKET
NO. 92-1162

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 October 27, 1993. The decision of the Judge will become a final order of the Commission on November 26, 1993 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 November 16, 1993 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:

Executive Secretary
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Review Commission
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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: October 27, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1162

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SECRETARY OF LABOR, Complainant v. HARTFORD ROOFING CO., INC. Respondent.	OSHRC Docket No. 92-1162

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U.S. Department of Labor
For Complainant

Jill Hartley, Esq.
Cohn & Birnbaum, P.C.
Hartford, CT
For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

On March 6, 1992, Hartford Roofing Co., Inc. ("Hartford") was cited for an alleged serious violation of 29 C.F.R. § 1926.500(g)(3)(i) which requires warning lines to be erected around all sides of the area on a low-pitched roof in which employees are performing built-up roofing work. A penalty of $1750 is proposed. The citation was issued as the result of an inspection conducted on December 12, 1991 at Norwalk Hospital in Norwalk, Connecticut, where Hartford was constructing a roof on one of the hospital's storage facilities (Tr. 31, 85, 90; Exhibits C-2, C-3 & C-6).

Hartford's employees were performing built-up roofing work on a roof which was approximately 69 feet wide, 19 feet from the ground, and low-pitched (Tr. 11-12, 91-92; Exhibits C-2, C-3, C-6 & C-7). In preparation for this project, two Hartford employees, James Bartholomew and Winston Gordon, were assigned to move several slabs of sheetrock

piled about six feet from the roof's edge to another area of the roof (Tr. 10, 92-95, 100, 105-06; Exhibits C-2 through C-6). It is undisputed that performing this task placed these employees approximately eight feet from the edge of the roof (Tr. 9-10, 15-16, 106-08; Exhibits C-4 & C-5).[1]

The Secretary contends that Hartford failed to guard the roof perimeter in accordance with the requirements of the roofing standard. Where, as here, the roof exceeds fifty feet in width, the general provisions of § 1926.500(g)(1) provide two methods by which employees performing low-pitched roofing work can be protected from falling off an unguarded roof edge: by the use of a motion-stopping safety system (MSS system) or by the use of a warning line system erected not less than six feet from the roof edge and supplemented for employees working between the warning line and the roof edge by the use of either an MSS system or a safety monitoring system.

There was neither a MSS system nor a warning line system in place at the worksite in question. The only method of protection used by Hartford was a safety monitoring system whereby one employee, assigned as a monitor, monitored the safety of the other employees in the roofing crew (Tr. 11-12, 95-97, 111, 116; Exhibits C-4, C-5 & C-6). Section 1926.500(g)(1)(iii) expressly limits the exclusive use of a monitor to roofs which are 50 feet or less in width. Since it is undisputed that the roof on which the Hartford employees were working was about 69 feet wide, a safety monitoring system was not an appropriate method of protection to employ at this site. Although, as Hartford points out, the actual area in which the employees were performing work was only about 50 feet wide, it is clear that the 50-foot restriction limiting the use of this option is based upon the width of the *entire roof*, not the width of the work area. *Phoenix Roofing, Inc. v. Dole*, 874 F.2d 1027, 1031 (5th Cir. 1989) (*"Phoenix Roofing"*). *See also* § 1926.502(p)(6). Therefore, the use of a safety monitor in this situation runs counter to the plain meaning of the regulations.

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[1]According to Ross Tyler Adams, Hartford's foreman at the Norwalk site, Mark Canino, a third employee alleged to have been working near the roof's edge at the time of the inspection, was installing a vapor barrier at the roof's perimeter with another employee; both were apparently tied off with safety belts (Tr. 85, 98-101, 103, 108, 112-13; Exhibit C-6). The Secretary has limited his case to the alleged exposure of Bartholomew and Gordon.

Hartford contends that the Secretary has failed to prove the employees had "access to a zone of danger" while working eight feet from the roof's edge and that access cannot be presumed by the mere presence of the employees on a low-pitched roof with an unguarded perimeter. Hartford strenuously maintains that in order to prove access to a hazard, the Secretary must show that "it is reasonably predictable that employees will be, are, or have been in a zone of danger." *Clement Food Co.*, 11 BNA OSHC 2120, 2123, 1985 CCH OSHD ¶ 26,972 (No. 80-607, 1984).[2]

The roofing standard was promulgated in recognition of the fact that employees who perform built-up roofing work on a low-pitched roof are exposed to a serious fall hazard; the standard specifies the methods of protection to be utilized under certain conditions (Tr. 32-34, 41). See 45 Fed. Reg. 75,619(1980) ("Based on the information in the record, OSHA concludes that employees working on roofs are confronted with a significant risk of serious injury of death."). *See also Lee Way Motor Freight, Inc. v. Secretary of Labor*, 511 F.2d 864, (10th Cir. 1975) ("The standard [section 1910.22(c)] presupposes the obvious, namely, that an open unguarded pit necessarily presents the hazard that someone may fall into it"). Hartford maintains that Bartholomew and Gordon did not need to be protected by the use of a warning line because they were being monitored by Adams and were not working within six feet of the roof's edge (Tr. 8-12, 97-98, 108-10, 112-14). However, the preamble to the roofing standard rejects the notion of distance qualification, such as Hartford urges:

> Some comments suggested that the standard not apply to work activity that is to take place exclusively at the roof edge...or exclusively away from the edge.... While the... benefits of the [warning] line may not be as critical at these points, *other*

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[2]To bolster this argument, Hartford cites two administrative law judge ("ALJ") decisions, neither of which govern the resolution of this dispute since they are unreviewed opinions and therefore, not binding precedent. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976). Moreover, the factual circumstances and legal issues presented in each case are different from the one at hand. *See Skyline Roofing & Sheet Metal, Inc.*, 13 BNA OSHC 1297, 1298, 1987 CCH OSHD ¶ 27,922 (Nos. 85-518 & 85-339, 1987) (alleged violation of § 1926.500(g)(1) vacated where ALJ concluded that compliance officer's testimony placing employees six or seven feet form roof's edge was unreliable); *A. Wachsberger Roofing & Sheet Metal Works, Inc.*, 12 BNA OSHC 1517, 1518, 1985 CCH OSHD ¶ 27,391 (No. 84-810, 1985) (alleged violation of § 1926.500(g)(1) vacated where ALJ credited supervisor's testimony establishing that employees were working 40 feet from the perimeter and had installed a warning line system over compliance officer's testimony).

features [of the line] still contribute to the safety of the employees both inside and outside the warning line.

45 Fed. Reg. 75,622 (1980)(emphasis added).

To place a distance limitation upon the protection requirements of the roofing standard would thwart the safeguards which the standard was designed to achieve. Employees preoccupied with their tasks can easily lose track of exactly where on a roof they are in proximity to its edge; Adams conceded as much at the hearing (Tr. 114-16). A warning line placed six feet from the roof's edge alleviates this problem by alerting an employee working on the roof that he is nearing the perimeter; as long as a warning line is up, the employee can work freely within this area without having to utilize any other form of fall protection (Tr. 33-34, 36-37). See 45 Fed. Reg. 75,622 (1980). Even Adams acknowledged that the safety of Bartholomew and Gordon would have been enhanced had a warning line been utilized (Tr. 116-17, 125-25).

Relying on *Phoenix Roofing*, supra, Hartford argues that the violation should be classified as *de minimis*. A violation may be considered *de minimis* "where the level of protection that the employer afforded employees [is] not significantly different from that required by technical compliance with the standard." *Erie Coke Corp.*, 15 BNA OSHC 1561, 1570, 1992 CCH OSHD ¶ 29,653 (No. 88-611, 1992), *aff'd on other grounds*, 16 BNA OSHC 1241 (3rd Cir. 1993). In *Phoenix Roofing*, the Fifth Circuit Court of Appeals concluded that the use of a safety monitor under the circumstances of that case provided protection for exposed employees that was at least equal to the protection a warning line would have provided had one been erected, despite the fact that roof was over 50 feet wide and the use of a safety monitor constituted a technical violation of the roofing standard. The Court held that under the facts presented the § 1926.500(g)(3) violation was *de minimis*. *Phoenix Roofing* at 1032.

Phoenix Roofing, however, does not sustain Hartford's contention. That case rested upon the facts that the exposed employees were working four feet from the roof's edge and, instead of a warning line, a monitoring system was being used whereby two employees had as their sole responsibility the duty to watch those working on the roof and warn them if they approached the edge. The Court noted that because the workers were already outside

the 6 foot line, they would have received no benefit from a warning line located 6 feet from the edge; and that the workers,being near the edge of the roof, were protected by monitors, one of the two options required by the standard.[3]

There is an important distinction between working at or near the edge of the roof and working away from the edge where a warning line delineates the more hazardous area at the roof edge. That distinction is nearly lost sight of by Hartford's "access-to-zone-of-danger" argument, but was clearly recognized by Judge Garwood in his dissenting opinion in the *Phoenix Roofing* case, where he noted that "closeness to the edge, as such, can produce a violation only when there is neither a motion-stopping safety system nor a safety monitoring system, and here the citation does not allege the absence of a proper safety monitoring system..." *Id* at 1035 n.3. Judge Garwood stated:

> The compliance officer's testimony is consistent with the commonsense observation that a warning line has the potential advantage over monitors in that the monitors may from time to time be distracted or inattentive. I readily concede that the warning line would not enhance safety for those employees working outside of it...But it seems obvious that the employees worked not only along the edge of the roof, but also on the portions of the roof which would have been protected by a proper warning line.
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> * * * *
>
> The employer complied with the portion of paragraph (ii) calling for monitors for employees working between the warning line and the roof edge, but did not comply with the basic requirement of paragraph (ii) that there be a warning line system at least six feet from the roof edge. *See* 29 C.F.R. § 1926.500(g)(3). There is no showing that all the employees working on the roof on this occasion worked only within six feet of the roof edge. That is a matter on which the employer should have the burden to the extent that it relies on such a state of facts as a basis for claiming that the violation was no more than *de minimis* because compliance with the regulations would not have enhanced safety beyond that provided by the

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[3]The Court also noted that while the OSHA standard requires only one monitor every 50 feet (29 C.F.R. § 1926.500(g)(1)(iii), *Phoenix* was using 2 monitors within a 32-foot area, which calculated to 3 times as many monitors as the standard mandated. *Phoenix Roofing* at 1031 n.6.

> employer. We should thus make the wholly logical assumption that the employees were working both outside of and within the area where protection would have been afforded by the warning line.

Id. at 1035.

The evidentiary record does not provide a basis for concluding that Hartford's safety monitor was equal to the protection provided by the mandated warning line system. The potential consequence of failing to comply with the cited standard was serious,[4] and a penalty of $1,500 is warranted under the penalty criteria of 29 U.S.C. § 666(j).

Based upon the foregoing findings and conclusions, it is

ORDERED that the citation is affirmed and a penalty of $1,500 is assessed.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: October 22, 1993
Boston, Massachusetts

[4]A violation may be deemed serious "where, although the accident itself is merely possible (i.e., in statutory terms 'could result from a condition'), there is a substantial probability of serious injury if it does occur." *Shaw Const., Inc. v. OSHRC*, 534 F.2d 1183, 1185 (5th Cir. 1976).