United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant,	:	OSHRC Docket No. 03-0997
STANLEY ROOFING COMPANY, INC. Respondent	:	

APPEARANCES:

Peter J. Vassalo, Attorney; Ann Rosenthal, Counsel for Appellate Litigation; Daniel J. Mick, Counsel for Regional Trial Litigation; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; Department of Labor, Washington, DC
For the Complainant

Richard D. Wayne, Esq.; Brian E. Lewis, Esq.; Hinckley, Allen & Snyder LLP, Boston, MA
For the Respondent

DECISION

Before: RAILTON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

Stanley Roofing Company, Inc. (Stanley) was engaged in roofing work at the Shirley New Middle School in Shirley, Massachusetts, when OSHA compliance officer (CO) Jeffery Erskine conducted an inspection of the site on October 29, 2002. As a result of this inspection, the Secretary cited Stanley for a willful violation of 29 C.F.R. § 1926.501(b)(2), alleging that Stanley employees were not protected from falling to the ground below while engaged in leading edge construction more than six feet above a lower level.[1] She proposed a penalty of

[1] The standard states in pertinent part:

$35,000.[2] Following a hearing, Administrative Law Judge Covette Rooney affirmed the citation and assessed the $35,000 penalty.

At issue before the Commission is whether the Secretary established that Stanley had knowledge of the cited conditions and whether she established that the violation was willful. For the reasons that follow, we find that the Secretary established constructive knowledge, but we recharacterize the citation as serious and assess a penalty of $5,000.

BACKGROUND

CO Erskine testified that he observed five Stanley employees unloading insulation boards at the edge of a sloped roof that was 33 feet above ground level. Erskine photographed the employees from a distance of approximately 200 feet away at a location outside the worksite. Using binoculars "to get a closer look" at the activity on the roof, he observed three employees working without fall protection. He stated that two other employees wore harnesses and lanyards, but he was unable to determine whether those employees were tied off.

After photographing the employees and observing them through binoculars, Erskine entered the property and introduced himself to Gary Taylor, superintendent for Jackson Construction Company (Jackson), the general contractor at the site. Erskine also met Jackson safety director Mark Walraven, who accompanied him on the Stanley inspection. Erskine, Walraven, and Taylor proceeded to the building where Stanley employees were working on the roof, and at Erskine's request, one of the Jackson managers called up to the roof for the

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> **§ 1926.501(b)(2)** *Leading Edges.* (i) Each employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems.

[2] At the commencement of the hearing, the judge granted the Secretary's unopposed motion to amend her proposed penalty from $42,000 to $35,000 to allow for a ten percent credit for lack of prior history that had not been calculated in her original proposal.

Stanley foreman to come down.[3] Erskine, Walraven, and Taylor, all testified that Stanley employee David Beauparlant responded to the request by descending from the roof in an aerial lift and identifying himself as the Stanley foreman. According to their testimony, Beauparlant, who did not testify at the hearing, stated that he knew he should have been wearing fall protection, but thought unloading materials onto the roof would only take a few minutes.

DISCUSSION

Knowledge

To prove knowledge, the Secretary must show that Stanley either knew or, with the exercise of reasonable diligence, could have known of the violative conduct. *See, e.g., Pride Oil Well Svc.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,581 (No. 87-692, 1992). Here, the judge found that the Secretary established both actual and constructive knowledge. Specifically, she concluded that Beauparlant was a supervisory employee whose actual knowledge of the violative conditions was imputable to Stanley, and that constructive knowledge was established based on evidence of Stanley's inadequate supervision of employees and insufficient monitoring for potential violations at the site.

On review, Stanley disputes both of the judge's findings. With respect to actual knowledge, Stanley argues that Beauparlant was not a supervisor or foreman at the site and that his knowledge of the cited conditions is therefore not imputable to the company. We agree that Beauparlant's actual knowledge is not imputable because the record fails to show that Stanley designated Beauparlant as an onsite foreman. While CO Erskine and Jackson managers Taylor and Walraven all testified that Beauparlant represented himself as a foreman, Stanley officials denied he was a foreman and Beauparlant did not testify. Based on this

[3] There was conflicting testimony as to whether Walraven or Taylor called up to the roof for the foreman. CO Erskine and Walraven testified that it was Walraven; Taylor stated that it was he.

record, we find that the evidence is essentially in equipoise and thus the Secretary has not met her burden of proof as to Beauparlant's supervisory status.[4] According to owner Paul Stanley, there was no intermediate supervisor between him and the employees present at the worksite. Owner Stanley stated that he supervised his employees by communicating via cellular "walkie-talkie" telephones and by making "sporadic visits" to the site. Beauparlant was simply one of four employees with cell phones at the worksite. In addition, Stanley's payroll records identify Beauparlant's job title as "Roofer," and show that he earned the same hourly wage as other roofers. In this context, because the record evidence fails to establish that Stanley ever delegated any authority to Beauparlant, we find that his actual knowledge of the violative conditions cannot be imputed to the company.

However, with respect to constructive knowledge we agree with the judge's finding that "offsite supervision via cellular phone communication" by owner Paul Stanley, and his son, project manager, Jason Stanley, was inadequate in this case. Under Commission precedent, "reasonable steps to monitor compliance with safety requirements are part of an effective safety program." *Southwestern Bell Telephone Co.*, 19 BNA OSHC 1097, 1099, 2000 CCH OSHD ¶ 32,198, p. 48,748 (No. 98-1748, 2000), *aff'd without published opinion*, 277 F.3d 1374 (5th Cir. 2001). "Reasonable diligence implies effort, attention, and action; not mere reliance upon another to make violations known." *N & N Contractors, Inc.*, 18

[4] In fact, even if Beauparlant had represented himself as a foreman to CO Erskine and Jackson's managers, such a unilateral representation, standing alone, does not accord him supervisory status absent "other indicia of authority" or other evidence to show that he was designated to act on behalf of the company. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080, 2003 CCH OSHD ¶ 32,657, p. 51,326 (No. 99-0018, 2003) (job titles are not controlling and supervisory status can be determined on the basis of "other indicia of authority that the employer has empowered a foreman or other employee to exercise on its behalf"). No such indicia or evidence was present in this case.

BNA OSHC 2121, 2124, 2000 CCH OSHD ¶ 32,101, p. 48,241 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001).

Here, the record shows that Stanley's office was located two hours away from the worksite, and Paul and Jason Stanley monitored work conditions by maintaining frequent contact with their employees, including on the day of the inspection, via cellular walkie-talkie telephones. The two men also visited the site approximately six times during the year it took to complete the project. However, the inspection in this case occurred one month after the project began. For that period, the record does not show that any site visits were made after the first two weeks of the project when Paul Stanley visited the site to evaluate conditions and train employees how to safely access the roof.

Moreover, by using cell phone communication as a primary means of monitoring the site during the weeks before the inspection, Paul and Jason Stanley expected non-supervisory employees in the field to monitor compliance with safety rules and make hazardous conditions known to them. The Commission has recognized that reasonable diligence does not "impose a requirement for continuous, full-time monitoring[.]" *New York State Electric & Gas Corp*, 19 BNA OSHC 1227, 1231, 2000 CCH OSHD ¶ 32,217, p. 48,874 (No. 91-2897, 2000) *on remand from New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98 (2d Cir. 1996). At the same time, reasonable diligence requires more than a primary reliance on cell phone communications with employees for weeks at a stretch. *See Halmar Corp.*, 18 BNA OSHC 1014, 1016, 1995-97 CCH OSHD ¶ 31,419, p. 44,410 (No. 94-2043, 1997) (reasonable diligence includes inspecting worksite and anticipating hazards), *aff'd without published opinion*, 152 F.3d 918 (2nd Cir. 1998); *N & N Contractors*, 18 BNA OSHC at 2124, 2000 CCH OSHD at p. 48,241 (reasonable diligence means more than "mere reliance" on actions of

others). Accordingly, we conclude that the Secretary established that Stanley had constructive knowledge of the violation.[5]

Willful Characterization

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." *Spirit Homes, Inc.*, 20 BNA OSHC 1629, 1630, 2002 CCH OSHD ¶ 32,714, p. 51,820 (No. 00-1807, 2004) (consolidated) (quoting *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)). To establish willfulness, "[t]he Secretary must show that the

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[5] Before the Commission, Stanley has raised issues regarding the judge's credibility findings in this case. One of Stanley's roofers, Misael Solis, who testified for the company, stated that Beauparlant was not a supervisor and that "everybody" on the roof was tied off. According to its witness list, Stanley also planned to call three other roofers, including Beauparlant, to testify at the hearing. However, Stanley was unable to locate Beauparlant, and with respect to the other two roofers, Stanley made an offer of proof at the end of the hearing that the other two roofers would give testimony very similar to that of Solis. The judge accepted the proffered testimony. In her decision, she found that Solis was not credible based upon his demeanor. According to the judge, Solis responded "quickly and succinctly" only to questions from Respondent's counsel, and not to those from the Secretary's counsel. On this basis, the judge also found that the proffered testimony by the other two roofers "would have been similarly biased."

We agree with Stanley that the judge's demeanor-based finding regarding Solis's lack of credibility is not a proper basis for rejecting the proffered testimony of the other roofers because the judge had no opportunity to observe *their* demeanor during testimony. However, we find the proffered testimony of the other roofers to be merely cumulative and insufficient to rebut the weight of testimony from the compliance officer and the two Jackson officials. Both the CO and Jackson testified that they personally observed Beauparlant and other roofers working on the roof without fall protection during the inspection, and also observed Beauparlant descend from the roof and admit to them that he should have been wearing fall protection. *See Metro Steel Construction Co.*, 18 BNA OSHC 1705, 1707-8, 1999 CCH OSHD ¶ 31,802, pp. 46,665-66 (No. 96-1459, 1999) (Commission is in as good a position as the judge to determine the facts where resolution of conflicting testimony is based on factors other than demeanor of the witnesses).

employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care." *Id.* (quoting *Propellex Corp.*, 18 BNA OSHC 1677, 1684, 1999 CCH OSHD ¶ 31,792, pp. 46,591-92 (No. 96-0265, 1999)).

In affirming the violation as willful, the judge found that Beauparlant's failure to use fall protection was willful, and therefore, his conduct as a supervisory employee was imputable to Stanley. *Fluor Daniel*, 19 BNA OSHC 1529, 1534 n. 8, 2001 CCH OSHD ¶ 32,443, p. 50,047 n. 8 (No. 96-1729, 2001) (consolidated), *aff'd* 295 F.3d 1232 (11th Cir. 2002) (willful state of mind of a supervisor may be imputed to an employer). Because we find the evidence insufficient to establish that Beauparlant was the designated foreman at the site, his conduct cannot be imputed to Stanley as a basis for establishing willfulness.

Moreover, upon review of the record, we find no other basis on which to characterize this violation as willful. The judge concluded that notwithstanding Beauparlant's conduct, a willful characterization was appropriate based on owner Paul Stanley's heightened awareness of the hazards associated with working on a sloped roof and his failure to take effective steps to monitor the work site. On review, Stanley maintains that it had no actual knowledge of hazardous conditions at the site, and that it engaged in good faith efforts to comply with the standard and eliminate hazards by using an experienced crew, evaluating the job, training employees, and providing proper fall protection equipment.

We agree that Stanley made some efforts to ensure that its employees at the worksite were protected from falling. As previously noted, Paul Stanley visited the site at the commencement of the job to assess the hazards associated with working on the roof and to provide safety training to employees. While Stanley's subsequent failure to monitor the site in person during the weeks prior to the inspection or to delegate that responsibility to a foreman is certainly negligent conduct, we find it to be insufficient to establish a willful state of mind. *See, e.g.*, *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1264 (D.C. Cir.

2003) ("*American Wrecking*") (mere negligence or a lack of diligence is not sufficient to establish willfulness.).

The Secretary argues on review that in addition to the lack of onsite supervision noted by the judge, Stanley's history of nine previous citations over a twenty-three year period, the most recent being more than three years before the inspection, put the company on notice that its employees' use of fall protection was lax, thus suggesting plain indifference on the part of Stanley.[6] Such evidence could indeed help support a finding of plain indifference and willfulness. *See A.E. Staley Mfg. Co. v. Sec'y of Labor*, 295 F.3d 1341, 1351 (D.C. Cir. 2002) (willfulness can be inferred from evidence of plain indifference without direct evidence that employer knew of each individual violation). However, while the timing of their conversation is unclear, Jackson superintendent Taylor testified that after he spoke with Jason Stanley once about fall protection problems, Stanley employees "made a tremendous effort to work more safely" and "the results were exemplary[.]" This evidence would tend to support a finding of only negligence or lack of diligence, rather than plain indifference, on the part of Stanley. *See American Wrecking*. Moreover, we note that the Secretary's reliance on Stanley's prior history to support a willful characterization seems at odds with her motion at the start of the hearing seeking to reduce the penalty proposed for this violation based on Stanley's lack of prior history. Accordingly, we find that the Secretary has not met her burden of proof to show the requisite state of mind for willfulness of this violation.

Although the violation was not cited as serious, the record establishes the seriousness of the violation within the meaning of section 17(k) of the Act. 29

[6] The Secretary also maintains that notice of compliance problems at the site was provided to Stanley by Jackson officials. The evidence presented, however, is inconclusive as to whether or not any warnings were issued to Stanley *prior* to the inspection.

U.S.C. 666(k).[7] *See also*, *E. L. Davis Contracting Co.*, 16 BNA OSHC 2046, 2052, 1993-95 CCH OSHD ¶ 30,580, p. 42,342 (No. 92-35, 1994), citing *Simplex Time Recorder Company*, 12 BNA OSHC 1591, 1596-97, 1984-85 CCH OSHD ¶ 27,456, p. 35,572 (No. 82-12, 1985) (violation found serious rather than willful where seriousness was evident from record). A serious violation is deemed to exist when there is a "substantial probability that death or serious physical harm could result" from a condition or practice. Section 17(k). Here, employees working at the edge of a roof had no protection from falling approximately 33 feet to the ground below. The compliance officer testified that he considered the cited conditions to be serious enough to "put someone in danger of life and limb." We agree. Accordingly, we characterize the violation as serious.

Penalty

Section 17(j) of the Occupational Safety and Health Act, 29 U.S.C. 666(j), provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the gravity of the violation, and to an employer's size, previous history, and good faith. These penalty factors need not be accorded equal weight; gravity is generally the primary element. *Orion Construction Inc.*, 18 BNA OSHC 1867, 1999 CCH OSHD ¶ 31,896 (No. 98-2014, 1999), and cases cited therein. In evaluating the gravity of the violation, consideration is given to factors such as the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.

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[7] Section 17(k) states:

> 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.

See J.A. Jones Constr. Co., 15 BNA OSHC 2201, 2213-14, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993).

Here, Stanley was a small company with approximately 33 employees at the time of the inspection. While it had a history of previous OSHA violations, the most recent one at the time of the inspection occurred in 1999. The gravity of the violation in this case was moderately high because, although the number of employees exposed was low, there was evidence of repeated exposures based on the CO's testimony that he observed employees working without fall protection at the edge of the roof when he arrived and again approximately an hour later when he approached the building with the Jackson officials. With respect to good faith, the evidence shows that Stanley made some efforts to ensure that its roofers tied off safely; however, these efforts were unsuccessful due to its inadequate monitoring of conditions at the site. We therefore find it appropriate to assess a penalty of $5,000.

ORDER

Accordingly, we affirm the citation for violation of section 1926.501(b)(2), but recharacterize it as a serious violation. A penalty of $ 5,000 is assessed.

SO ORDERED.

/s/_____
W. Scott Railton
Chairman

/s/_____
Thomasina V. Rogers
Commissioner

Dated: March 3, 2006

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
v.	:	OSHRC DOCKET NO. 03-0997
	:	
STANLEY ROOFING COMPANY, INC.,	:	
	:	
Respondent.	:	

Appearances:

Karen J. Froom, Esquire
Office of the Solicitor
U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Richard D. Wayne, Esquire
Hinckley, Allen and Snyder, LLP
Boston, Massachusetts
For the Respondent.

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et seq.*) ("the Act"). Respondent, Stanley Roofing Company, Inc., at all times relevant to this action maintained a work site at the Shirley New Middle School in Shirley, Massachusetts, where it was engaged in roof installation. Respondent admits it is an employer engaged in a business affecting commerce and that it is subject to the requirements of the Act.

On October 29, 2002, OSHA compliance officer ("CO'") Jeffery Erskine conducted an inspection of the subject work site. Upon entering the site, he observed, *inter alia*, employees off-loading a lull and installing insulation on the multi-sided roof of the school. (Tr. 8-9, 19-30). As a result of this inspection, on April 28, 2003, Respondent was issued a willful citation alleging a

violation of 29 C.F.R. § 1926.501(b)(2), with a total proposed penalty of $35,000.00.[1] By filing a timely notice of contest, Respondent brought this proceeding before the Commission. The contested violation was the subject of a hearing held before the undersigned in Boston, Massachusetts, on March 9 and 10, 2004. Counsel for the parties have submitted post-hearing briefs and reply briefs, and this matter is ready for disposition.

Burden of Proof

The Secretary has the burden of proving her case by a preponderance of the evidence. In order to establish a violation of an OSHA standard, the Secretary must show (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative condition, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition).[2] *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Alleged Violation

The cited standard, 29 C.F.R. § 1926.501(b)(2), states in pertinent part that "[e]ach employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems."[3] The citation alleges that employees engaged in leading edge construction, more than 6 feet above a lower level, were not protected from falling to the ground below.

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[1] The Secretary moved to amend the penalty from $42,000.00 to $35,000.00 at the commencement of the hearing. (Tr. 5).

[2] An inquiry into whether an employer was reasonably diligent involves a number of factors, including the employer's obligation to have adequate rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations. Lack of reasonable diligence may also be shown by evidence of an employer's failure to take measures to prevent the occurrence of violative conditions. *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003), citing to *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-707, 2001).

[3] 29 C.F.R. 1926.500(b) defines "leading edge" as "the edge of a floor, roof, or formwork for a floor or other walking/working surface (such as the deck) which changes location as additional floor, roof, decking, or formwork sections are placed, formed, or constructed. A leading edge is considered to be an 'unprotected side and edge' during periods when it is not actively and continuously under construction."

Discussion

The record establishes that the subject school was an 80,000-square-foot project on a 33-acre site. The record further establishes that Jackson Construction ("Jackson") was the general contractor at the site and that Respondent was the roofing subcontractor. CO Erskine testified that upon arriving at the site, from a distance of 150 to 200 feet away, he observed employees working on the roof of the school without fall protection; the roof was about 33 feet above the ground. The CO used binoculars for a closer look and took some photos of his observations; the photos depict employees taking insulation from a lull at the edge of the roof and installing the insulation on the roof. The CO saw several employees on the roof without fall protection, including one in a white hard hat and another in a red-sleeved shirt who was assisting him; he also saw some other workers with lanyards but could not determine if they were tied off.[4] In addition, the CO saw individuals in a scissor lift who were not wearing fall protection; however, according to the CO, employees in a scissor lift do not have to be tied off. (Tr. 9, 23-32, 37, 62-72, 85-86, 93; Exhs. C-1 through C-6).

The CO next proceeded to Jackson's trailer and met with Superintendent Gary Taylor. About an hour later, the CO, Gary Taylor and Mark Walraven, Jackson's safety director, went to the area where the CO had seen the employees; the employees were engaged in the same activities without fall protection. The CO asked Mr. Walraven to call down the crew's foreman, after which David Beauparlant came down from the roof and identified himself as the foreman for Respondent. When asked why he was working without fall protection, Mr. Beauparlent apologized and explained that although he knew he should have worn protection, he had not done so because it was only going to take him a few minutes to unload the insulation. Mr. Beauparlent then went to the company's truck and put on a harness before going back up to the roof. The CO held a closing conference with Mr. Beauparlant later that morning. Later in the inspection, the CO learned that Mr. Walraven had issued a written warning to Respondent four days prior to his inspection; the warning was issued due to employees not wearing fall protection. (Tr. 33-40, 75, 140-41).

[4] In his photos, the CO circled the employee in the white hard hat and denoted two other employees without protection, including the one in the red-sleeved shirt, with an "X." He denoted the latter employees, that is, those with lanyards, with arrows. *See* Exhibits C-1 through C-6.

Mr. Walraven and Mr. Taylor also testified at the hearing. Mr. Walraven stated that as they approached the roof area the CO had observed, he himself saw two workers climb from the scissor lift to the roof without tying off. He further stated that when he shouted to Respondent's workers for their foreman, Mr. Beauparlant was the individual who came down and identified himself as the foreman. Mr. Walraven recalled that Mr. Beauparlant explained that he knew he and his crew should have been tied off but that he was only going to be on the roof for a few minutes; he also recalled that Mr. Beauparlant said that he had been warned in the past. (Tr. 197-200, 223). Mr. Taylor stated that he saw a worker without a harness on the day of the inspection. He recalled that Mr. Walraven had pointed up to that worker and said "what's up with that? Why doesn't this guy have a harness?" When the CO asked them to get the foreman, Mr. Taylor called to Mr. Beauparlant and requested that he come down and speak to the OSHA inspector.[5] (Tr. 241-42, 301).

In defense of this item, Respondent presented the testimony of Miseal Solis, an employee of Stanley Roofing Company who identified himself as the person circled in Exhibits C-1 through C-6; he also identified the other employees shown in the photos. Mr. Solis testified that he and the other workers in the photos were installing insulation and that they were all tied off all day. He further testified that Mr.Beauparlant drove the lull all day, bringing material to the roof when needed. When asked specifically whether Mr. Beauparlant was on the roof on the day of the inspection, Mr. Solis responded "[n]o, he's not around." Mr. Solis also said that no one ever told him Mr. Beauparlant was the foreman. He found out about the OSHA inspection when Mr. Beauparlant called him from the ground and said that OSHA was there. (Tr. 318-32, 335-40, 345-51, 355).

It is clear from the above that the testimony of Mr. Solis differs dramatically from that of the other witnesses in regard to Mr. Beauparlant's activities on the day of the inspection. The CO testified that the individual circled in the photos was Mr. Beauparlant, who admitted to working without fall protection on the roof, while Mr. Solis testified that Mr. Beauparlant was in the lull and

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[5] Respondent argues that Mr. Taylor's testimony should be discredited because of a discussion he and Mr. Walraven had during a break in his testimony, which was a violation of the sequestration order. (Tr. 255-56; R. Brief, p. 16). However, I questioned Mr. Taylor about this conversation, and I find that it did not lead to tainted testimony. Additionally, based upon his demeanor and directness in responding to inquiries about the conversation, I find him to be a credible witness. Finally, I find that Respondent has demonstrated no prejudice from this incident.

not on the roof that day and that he (Solis) was the person circled in the photos. (Tr. 35-36, 64-72, 318-24, 335-39). Respondent contends that all of the employees on the roof were short in stature and that the CO misidentified the person in the white hard hat because Mr. Beauparlant is 6 feet tall. The record does in fact indicate that Mr. Beauparlant is 6 feet tall. (Tr. 89, 260-61; Exh. R-4). However, I find that the heights of the pictured individuals cannot be determined from C-1 through C-6 and that, accordingly, the photos may not be relied upon to establish the identity of the circled individual. Further, the record shows that Mr. Beauparlent's whereabouts were unknown at the time of the hearing and that, therefore, that neither party was able to obtain him as a witness. (Tr. 258-59).

Regardless, I find that Mr. Beauparlant was in fact on the roof that day. The record shows that Mr. Beauparlant operated the lull and that after delivering materials he worked on the roof with the other employees. (Tr. 247). The record also shows that when Mr. Walraven and Mr. Taylor summoned the foreman, it was Mr. Beauparlant who came down from the roof to talk to the CO. (Tr. 198-200, 223, 242, 301). Finally, the CO, Mr. Walraven and Mr. Taylor all testified that Mr. Beauparlant admitted he had been working on the roof without fall protection. (Tr. 35-36, 198-200, 242). In light of their testimony, I find the testimony of Mr. Solis that Mr. Beauparlant was not on the roof that day incredible. In addition, I observed the demeanor of Mr. Solis on the witness stand, and I noted that while he was able to respond quickly and succinctly to questions from Respondent's counsel he was unable to do so with respect to questions from the Secretary's counsel. I conclude that the testimony of Mr. Solis was biased and framed to serve the interests of his employer.[6] His testimony is consequently not credited.

The record clearly shows that the work Respondent's employees were performing on the day of the inspection involved work at the edge of the roof. (Tr. 420-23). I thus find that the standard is applicable and, in view of the above, I also find that Respondent violated the terms of the standard and that employees were exposed to the hazard of falling 33 feet. I further find that Respondent had both actual and constructive knowledge of the alleged violation. As to actual knowledge, although Respondent argues that Mr. Beauparlant had no authority on the site, Mr. Beauparlant identified himself as the foreman of the crew and admitted that he knew he should have been tied off. (Tr. 35,

[6] I conclude that proffered similar testimony by other employee witnesses would have been equally biased.

197-99, 224, 242 301). Moreover, Jackson's superintendent, Mr. Taylor, who ran the job and coordinated the work, confirmed Mr. Beauparlant had duties that were similar to those a foreman would perform, such as attending tool box meetings and directing work on the site. (Tr. 235-37). In addition, when the CO told Jason Stanley, Respondent's project manager, what the foreman had admitted, Mr. Stanley did not dispute that Mr. Beauparlant was a foreman. (Tr. 40-41, 513). I conclude that the record shows Mr. Beauparlant's authority over the other employees at the site and that his knowledge is imputable to Respondent. *See Propellex Corp.*, 18 BNA OSHA 1677, 1679-80 (No. 96-0265, 2000); *Kern Bros. Tree Serv.*, 18 BNA OSHA 2064, 2068-69 (No. 96-1719, 2000).

As to constructive knowledge, the record shows Respondent failed to exercise reasonable diligence to discover and prevent violations such as the one cited here. Nextel cellular phones were the primary means Respondent used for communicating with the crew about daily issues, including safety. Owner Paul Stanley testified that he knew the crew was going to do a slope roof on the day of the inspection and that he had thus called that morning to make sure everyone had fall protection; a crew member subsequently called and told him about the OSHA inspection and assured him that everyone was tied off. (Tr. 437, 440-41). Jason Stanley testified that he knew the crew was tied off at the time of the inspection because he "took their word for it " (Tr. 514). Such offsite supervision, via cellular phone communication, is inadequate, particularly since the Stanleys themselves made infrequent visits to the job site and assigned no one else this responsibility. (Tr. 481-83, 487, 517). Moreover, according to Paul Stanley, he was involved in the setup of the job site at the beginning of the project because of safety concerns, and I find that it is reasonable to have expected him or some other designated employee to have personally checked on the fall protection situation on a regular basis. *See Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980) (employer "must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work"). Consequently, I find that the Secretary has established that Respondent failed to exercise reasonable diligence.

Based upon the evidence of record, I find that the Secretary has met her burden of proving the alleged violation.[7]

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[7] In its post-hearing brief, Respondent raised a number of issues which, according to (continued...)

The Willful Classification

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. A willful violation is differentiated from a non-willful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. A showing of evil or malicious intent is not necessary to establish willfulness.[8] *Great Lakes Packaging Corp.*, 18 BNA OSHC 2138 (No. 97-2030, 2000). On the other hand, a willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete. The test of good faith for these purposes is an objective one – whether the employer's belief concerning a factual matter or concerning the interpretation of a rule was reasonable under the circumstances of the case. *Great Lakes Packaging Corp.*, 18 BNA OSHC 2138, 2140-41 (No. 97-2030, 2000).

I find that the Secretary has established a willful violation based upon Mr. Beauparlant's decision to not use fall protection. It is clear from the record that Mr. Beauparlant knew that fall protection was required as a result of previous warnings from Jackson.[9] Further, Paul Stanley had called the site that morning and given instructions that employees were to use their fall protection

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[7](...continued)
Respondent, require dismissing the citation, including failure to issue the citation with reasonable promptness and failure to follow inspection procedures. (R. Brief, pp. 17-18). These issues are all affirmative defenses that were not raised until Respondent filed its post-hearing brief. Respondent's arguments as to these issues are therefore rejected. *See* 29 C.F. R. 2200.34(b).

[8] "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." *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (Nos. 86-360 & 86-469, 1992) (citations omitted).

[9] Shortly after the project began, Mr. Walraven observed that Respondent's employees were using a man lift to get onto and off of the roof and were not tying off to do so. He gave them several verbal warnings in this regard, and on October 25, 2002, he issued a written warning and gave it to Mr. Taylor to deliver. Mr. Taylor had also given verbal warnings to Respondent about not tying off, and he gave these warnings to Mr. Beauparlant. When Mr. Taylor went to deliver Mr. Walraven's written warning, Mr. Beauparlant was not at the site; Mr. Taylor thus gave the warning to the employee who had been working without protection. (Tr. 181-84, 224-25, 235, 239-41; Exh. C-9).

equipment. (Tr. 440). In spite of this, Mr. Beauparlant made a conscious decision to proceed without that equipment. His explanation that he thought the unloading work would only take a few minutes is meaningless, in light of the fact that the CO made his observations for over an hour. (Tr. 33, 36). Moreover, there is no evidence that Mr. Beauparlant had a good faith belief that his actions were reasonable under the circumstances.

Although the foregoing is sufficient to dispose of this matter, it is my conclusion that the willful classification would be appropriate even if the record had established that Respondent had had no one in charge at the site. Paul Stanley had a heightened awareness of the hazards associated with working on a sloped roof, as demonstrated by his telephone call to the site on the morning of the inspection. However, he failed to take effective steps to monitor the situation, such as designating an individual to make site visits on a regular basis in order to check on safety issues such as the fall protection situation in this case. Such steps were in fact necessary, in light of the observations that led to the issuance of the subject citation. I find that the evidence demonstrates plain indifference to employee safety, and this citation item is accordingly affirmed as a willful violation.

Penalty Assessment

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14. As to the gravity of this item, I find the severity high, in that, if an employee working near the edge of a roof were to fall 33 feet, the result would likely be serious injury or death. I also find the probability of an injury occurring as greater, due to the length of time of exposure in this case. The record indicates that an adjustment for size and for history is appropriate; however, no adjustment for good faith is warranted in light of the willful nature of the violation. (Tr. 60-63). I conclude that the proposed penalty of $35,000.00 is appropriate. A penalty of $35,000.00 is accordingly assessed for this citation item.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes my findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.501(b)(2), is AFFIRMED as a willful violation, and a penalty of $35,000.00 is assessed.

/s/

Covette Rooney
Judge, OSHRC

Dated: July 12, 2004
Washington, D.C.