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SECRETARY OF LABOR, Complainant, v. SEYFORTH ROOFING COMPANY, Respondent.	OSHRC Docket No. 90-0086

DECISION

BEFORE: WEISBERG, Chairman, FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

I. BACKGROUND

As a result of the OSHA investigation and inspection that occurred after an employee fell to his death from a roof that was not equipped with safety lines, Seyforth was issued a citation[1] for a repeated violation of 29 C.F.R. § 1926.500(g)(1).[2] A $2000 penalty was

[1]Seyforth was also issued a citation for serious violation of § 1926.500(g)(6)(i) and (ii). The judge vacated these items and the Secretary does not challenge the disposition.

[2]The standard provides:

> **§ 1926.500 Guardrails, handrails, and covers.**
>
> . . . .
>
> (g) *Guarding of low-pitched roof perimeters during the performance of built up roofing work*-(1) *General provisions.* During the performance of built-up roofing work on low-pitched roofs with a ground to eave height greater than 16 feet (4.9 meters), employees engaged in such work shall be protected from falling from all unprotected

(continued...)

proposed. Administrative Law Judge E. Carter Botkin vacated the citation on the grounds that the violation was the result of unpreventable employee misconduct. For the reasons that follow, we also vacate the citation but for different reasons than those assigned by the judge.

II. FACTS

On Monday, November 6, 1989, Seyforth Roofing Co. was completing a reroofing job on a 12-story building in Irving, Texas. The roof was 217 feet long by 122 feet wide with a 2-foot high parapet wall along the perimeter. The work, done in sections 50 feet long by 36 to 40 feet wide, involved tearing off the old roof, laying down insulation and roofing paper, applying hot asphalt, and covering the surface with roofing material.

Seyforth normally used a warning system to protect employees working on the roof. The warning system consisted of a flag warning line attached to stanchions located 6 feet from the edge of the roof and a safety monitor for employees working outside the line. The foreman was usually the designated safety monitor with the sole responsibility of watching and warning employees who had to work outside of the safety line. On Friday, November 3, the warning line system was taken down for the weekend because of high winds. On the next Monday, November 6, the only work planned was on the penthouse, a structure which rose from the middle of the roof. The penthouse housed a stairwell and Seyforth's employees used it for changing clothes and eating lunch. Because employees had no reason

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[2](...continued)

sides and edges of the roof as follows:

(i) By the use of a motion-stopping-safety system (MSS system); or

(ii) By the use of a warning line system erected and maintained as provided in paragraph (g)(3) of this section and supplemented for employees working between the warning line and the roof edge by the use of either an MSS system or, where mechanical equipment is not being used or stored, by the use of a safety monitoring system; or

(iii) By the use of a safety monitoring system on roofs fifty feet (15.25 meters) or less in width (see Appendix A), where mechanical equipment is not being used or stored.

. . . .

(3) *Warning lines.* (i) Warning lines shall be erected around all sides of the work area. (*a*) When mechanical equipment is not being used, the warning line shall be erected not less than six feet (1.8 meters) from the roof edge.

to go near the perimeter of the roof while working on the top of the penthouse, the warning lines were not erected.

That morning, Seyforth's foreman, Mike Lambert, did not report to work because of a death in his family. Floyd Sanders, who had been a foreman on previous jobs, was designated foreman during Lambert's absence. After lunch, George Rosado, Seyforth's safety manager, radioed Sanders and asked if more roofing materials were needed. Sanders and three other employees went to measure an area along the south edge of the parapet wall in order to assess the need for more materials. Sanders did not act as a safety monitor, even though he watched Mike Moore, one of the employees, taking measurements at the edge of the roof. While in the process of measuring Moore fell to his death.[3]

III. DISPOSITION

We conclude that the Secretary has failed to establish a violation of section 1926.500(g)(1). In his complaint, the Secretary alleged that "[e]mployees had access to or were exposed to [the hazard of the unguarded roof perimeter] because employees of respondent performed work within the zone of danger."[4] Judge Botkin vacated the citation on traditional exposure grounds. He found that the measurements could have been taken 20 to 30 feet from the roof perimeter. The judge also found that Seyforth had a work rule

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[3]The judge declined to credit the testimony of Sanders that earlier during the job, Seyforth did not provide safety lines and monitors. The judge stated that, given that the credible evidence established that it was Seyforth's regular practice to plan and inspect the safety system on each job, and the circumstances under which Sanders left Seyforth, the testimony of Rosado, Smith and Lambert that proper safety precautions were taken earlier on the job, is credited over that of Sanders. The Commission normally will not disturb a judge's credibility finding because it is the judge who has lived with the case, heard the witnesses, and observed their demeanor. *Archer-Western Contrac., Ltd.*, 15 BNA OSHC 1013, 1016, 1991-93 CCH OSHD ¶ 29,317, p. 39,377, *aff'd*, 978 F.2d 744 (D.C. Cir. 1992); *Kent Nowlin Constr. Co.*, Inc, 8 BNA OSHC 1286, 1980 CCH OSHD ¶ 24,459 (No. 76-191, 1980) (consolidated). We find no basis for overturning those findings here.

[4]The "zone of danger" is determined by the hazard presented by the violative condition. Normally, it is that area surrounding the violative condition that presents the danger to employees to which the standard is addressed. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No.504, 1976)

that prohibited employees from approaching a roof edge if safety lines were not in place and that the rule was both adequately communicated and effectively enforced. Accordingly, he concluded that Moore's exposure to the perimeter and subsequent fall were the result of unpreventable employee misconduct.

On review, the Secretary advances, for the first time in this proceeding, an interpretation of section 1926.500(g)(1) that would require protection whenever employees work on a roof, regardless of how far from the edge they are working. This interpretation would effectively expand the "zone of danger" to encompass the entire roof. Under this view, the Secretary argues, even if Moore's approach to the edge of the roof resulted from a violation of Seyforth's work rules, Seyforth is still responsible for the violation because an employee performing roofing work anywhere on the roof should have been protected by one of the methods described in the standard.

According to Commission rule 92(c), 29 CFR § 2200.92(c)[5], the Commission will ordinarily not review issues that the judge did not have the opportunity to pass upon and the adverse party did not have an opportunity to litigate. However, even if we were to consider the Secretary's interpretation, we find that it would not dispose of the question before us. The outcome of this case is controlled by section 1926.500(g)(2)[6], which states that the fall

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[5] The rule states:

> **§ 2200.92 Review by the Commission.**
>
> . . . .
>
> (c) *Issues not raised before Judge.* The Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon. In exercising discretion to review issues that the Judge did not have the opportunity to pass upon, the Commission may consider such factors as whether there was good cause for not raising the issue before the Judge, the degree to which the issue is factual, the degree to which proceedings will be disrupted or delayed by raising the issue on review, whether the ability of an adverse party to press a claim or defense would be impaired, and whether considering the new issue would avoid injustice or ensure that judgment will be rendered in accordance with the law and facts.

[6]Section 1926.500(g)(2) provides that:

(continued...)

protection requirements of section 1926.500(g)(1) do not apply "where employees are on the roof only to inspect, investigate, or estimate roof level conditions."[7] Here, the evidence is undisputed that Sanders, Moore, and the two other employees were at the edge of the roof for the sole purpose of taking measurements to determine how much material was needed to complete the job. This type of measurement is precisely the type of work that was intended to be exempted from the standard.

We also find that the Secretary has not shown by a preponderance of the evidence that other employees were performing other work on the roof on the day of the accident. We therefore conclude that the exception applies. The testimony of Rosado and Lambert established that work on the day of the accident was on the penthouse roof. Rosado testified that the penthouse roof was the only area where the crew was working. He also stated that the mop carts on top of the penthouse roof, which were shown in one of the photographs introduced into evidence, contained the asphalt that was to be used by employees working on the penthouse roof. Lambert, the regular foreman on the job, also testified that, although he was not present on the day of the accident, the work scheduled for that day was on the penthouse roof. The presence of the portable toilet and the tar

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[6](...continued)

> The provisions of paragraph (g)(1) of this section do not apply at points of access such as stairways, ladders, and ramps, or where employees are on the roof only to inspect, investigate, or estimate roof level conditions. Roof edge materials handling areas and materials storage areas shall be guarded as provided in paragraph (g)(5) of this section.

[7]The Secretary explained his rationale for the exception in the Preamble to the standard:

> The exception . . . is provided because these operations are normally conducted in good weather, require little time, if any, near the roof edge, do not require the employees to be on the roof for long periods of time, and involve work of a nature such that the employee is more likely to be aware of his proximity to the roof edge.

45 Fed. Reg. 75,622 (1980)

wagon on the roof level do not, as the Secretary argues, suggest that other work was being performed. There is no dispute that employees worked on the roof before the day of the accident and that they were going to work on the roof afterwards. The very reason the crew was asked to take measurements was to determine how much material was needed to complete the work on the roof. With work on the roof still to be done, we find no reason for Seyforth to have removed either the portable toilet or the tar wagon.[8] Furthermore, there is no evidence that either the tar wagon or the portable toilet were used on the day of the accident. Therefore, we cannot infer the presence of employees on the roof from the presence of the tar wagon and the portable toilet. The only employees shown to be on the roof were there for the purpose of measuring and came within the exception in section 1926.500(g)(2)[9].

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[8]We note that Sanders testified that the crew was working on the roof on the day of the accident. As noted earlier, however, the judge, recognizing the circumstances under which he had left his employment at Seyforth, refused to credit Sanders' testimony that the crew did not provide any motion stopping system prior to the day of the accident. In light of the judge's credibility finding and the contrary testimony on this point, we have no reason to credit Sanders' testimony on such a closely-related issue.

[9]In light of our disposition of this case, we find it unnecessary to reach the Respondent's unpreventable employee misconduct defense.

Chairman Weisberg notes that in her concurring opinion, Commissioner Montoya faults the majority for basing its decision on the provisions of 29 C.F.R. § 1926.500(g)(2) rather than the unpreventable employee misconduct defense relied on by the judge. Chairman Weisberg believes there are good reasons for not finding that Seyforth has established the unpreventable employee misconduct defense.

As an initial matter, he doubts whether the unpreventable employee misconduct doctrine is appropriately utilized where the misconduct in question is attributable to an employer's own agent, a supervisor. However, consistent with Commission precedent, when the alleged misconduct is that of a supervisory employee, the employer must establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its supervisory employee. *Daniel Constr.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027, p. 32,672 (No. 16265, 1982). A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax. *Brock v. L.E. Myers Co., Id. Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1321, 1991 CCH OSHD ¶ 29,500, p.

(continued...)

Accordingly, we find that the employees taking the measurements were performing exempted work under the provisions of section 1926.500(g)(2) and were not required to be provided with perimeter protection, and that the Secretary failed to establish that Seyforth violated section 1926.500(g)(1).

The citation for a repeated violation of section 1926.500(g)(1) is VACATED.

Stuart E. Weisberg
Stuart Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Dated: 9/26/94

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[9](...continued)
39,810 (No. 86-0351, 1991). Therefore, where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. *Id.* Moreover, the Commission has held that the failure to give specific instructions on how to accomplish a job can amount to a lack of reasonable diligence. *Gary Concrete Products, Inc.* 15 BNA OSHC 1051, 1056, 1991 CCH OSHD ¶ 29,344, p. 39,453 (No.86-1087, 1991).

Chairman Weisberg further observes that the record establishes that the warning lines had been taken down due to high winds on the roof. Moreover, Rosado, Seyforth's safety manager, knew that taking the needed measurements at the roof perimeter was one of Sanders' options. Nonetheless, there is no evidence he gave Sanders specific instructions on how to accomplish the job safely, even though Seyforth's safety program addressed only general safety procedures. Just before the accident, acting foreman Sanders was standing 10-15 feet from Moore, yet never warned him that he was at the roof edge. Nor did Sanders designate anyone to act as safety monitor with the responsibility of watching and warning employees, even though it was his duty as foreman to do so. From these circumstances, Chairman Weisberg would conclude that Seyforth has failed to establish that it met the more rigorous standard of proof that is necessary under Commission precedent to establish this defense for a supervisory employee.

MONTOYA, Commissioner, concurring:

I agree with my colleagues that the alleged violation of section 1926.500(g)(1) should be vacated. The evidence fails to establish that Seyforth's employees performed any work on the roof on the day of accident, other than the taking of measurements. Therefore, the Secretary has indeed failed to establish that any employee, besides those that approached the roof edge in direct violation of company rules, were exposed to the hazard of the unguarded edge.

My concern is for the willingness of the majority to rest its decision on the provisions of section 1926.500(g)(2), rather than the unpreventable misconduct of Seyforth's employees, including supervisor Floyd Sanders. Neither party raised the section 1926.500(g)(2) exemption for employees taking measurements until this case was on review. As the majority itself notes, Commission Rule 92(c), 29 CFR § 2200.92(c), provides that the Commission will not ordinarily review issues that the judge did not have the opportunity to pass upon. Though the Commission is not without discretion to review such issues, I would not deviate from ordinary practice here.

First, because Seyforth argues for an exemption from a standard, the burden was on Seyforth to establish its applicability. *Agrico Chem. Co.*, 4 BNA OSHC 1727, 1975-76 CCH OSHD ¶ 21,116 (No. 8285, 1976). That the evidence of record supports this argument is merely fortuitous: it was not an issue at the hearing. Other than raising the exemption in its brief, Seyforth has not developed a legal argument to support its applicability. Furthermore, by considering the issue in this posture, the Commission has deprived the Secretary of an adequate opportunity to rebut the applicability of the exemption, another practice inconsistent with Commission Rule 92(c).

Second, and more importantly, I see no reason to disturb the judge's result. While a finding of unpreventable supervisory misconduct causes me some discomfort, it is hard to disagree with the judge that the defense has been established when, as here, the relevant testimony went unrebutted. As the judge found, the record clearly indicates that by taking measurements at the edge of the roof without first reinstalling fall protection, both Sanders and Moore were operating contrary to the company's work rule which was adequately

communicated and enforced. See *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 79-1538, 1979).

Velma Montoya
Commissioner

Dated 9-27-94

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SECRETARY OF LABOR, Complainant, v. SEYFORTH ROOFING COMPANY, Respondent.	:	Docket No. 90-0086

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 26, 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

Ray H. Darling, Jr.

September 26, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-0086

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SECRETARY OF LABOR
Complainant,
v.
SEYFORTH ROOFING COMPANY, INC.
Respondent.

OSHRC DOCKET
NO. 90-0086

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 August 6, 1992. The decision of the Judge will become a final order of the Commission on September 8, 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 August 26, 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:

Executive Secretary
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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: August 6, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 90-0086

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SECRETARY OF LABOR, Complainant, v. SEYFORTH ROOFING COMPANY, INC., Respondent.	OSHRC DOCKET NO. 90-0086

APPEARANCES:

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Margaret Terry, Esquire
Dallas, Texas
For the Complainant.

Robert E. Rader, Jr., Esquire
Dallas, Texas
For the Respondent.

Before: Administrative Law Judge E. Carter Botkin

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

The Occupational Safety and Health Administration ("OSHA") inspected a roofing project in Irving, Texas, after a tragic accident on November 6, 1989, in which one of Seyforth's employees fell off a twelve-story building and sustained fatal injuries. As a result of the inspection, two citations were issued. Serious citation number 1 alleges violations of 29 C.F.R. §§ 1926.500(g)(6)(i) and 1926.500(g)(6)(ii), and repeat citation number 2 alleges a violation of 29 C.F.R. § 1926.500(g)(1). Seyforth contested the citations, and a hearing was held on January 31, 1991. The relevant evidence is set out below, followed by a discussion of the alleged violations.

The Evidence

The record shows Seyforth had approximately thirteen employees at the site engaged in re-roofing the building. The roof was 122 by 217 feet with a 2-foot-high parapet wall along its perimeter, and the work, done in sections of 36-40 by 50 feet, involved tearing off the old roof, laying down insulation and roofing paper and applying hot asphalt, and covering the surface with white roofing material. The job, which had been in progress for three to four weeks, was near completion on November 6, and employees were finishing the roofing of the penthouse, a structure near the roof's center housing the cooling units and stairwell. Mike Moore, one of the roofers, went out to get sodas for the crew at lunch. After he returned, George Rosado, Seyforth's safety officer, radioed the foreman at the site, Floyd Sanders, and asked if more materials were needed. Sanders, Moore and two others went to measure an area along the south edge of the parapet wall, and Moore fell from the building as he was in the process of measuring. (Tr. 13-17; 20-21; 60; 78-80; 92; 113-21; 156-57; 168; 191; 194-96; 243; C-7A; C-7B).

William Burke, the OSHA compliance officer ("CO") who conducted the inspection, testified he arrived at the site an hour or two after the accident and took C-1-6, showing the roof and area from which Moore fell. Burke noted there were no barriers, warning lines or guard rails on the roof. He said Sanders indicated none were in use and that there had been no safety monitor on the roof that day; Sanders also indicated no training was given regarding the hazards of working on the roof. Rosado was also present at the inspection, and Burke asked him for all information pertaining to training in regard to the work at the site; Rosado gave him C-8, Seyforth's general safety rules for employees, and C-9, affidavits of employees that they had read and understood the rules. Rosado also gave him C-10, minutes of safety meetings held at the site, and C-11, Seyforth's hazard communication ("HAZCOM") program. Burke said Seyforth was cited because no safety system was used the day of the accident and because the documents he saw did not constitute a training program complying with the standard. (Tr. 9-22; 31-45; 58-60; 63-64; 70; 75-77).

Floyd Sanders has 17 to 18 years experience as a roofer, and worked for Seyforth as a foreman for seven or eight months. He testified he was hired by Pat Smith, Seyforth's job

superintendent, that he was given an orientation which included the company safety rules, and that he signed R-8, an acknowledgement he had had the orientation. Sanders said he worked as a foreman on two jobs prior to the Irving job, and that before beginning them he and Smith went to the sites to decide what types of safety systems to use; on the Bowie School job, warning lines and a safety monitor were used, and on the EDS job, a cable to which safety lines were attached was used. Sanders noted Moore helped set up the systems on both jobs, and that he had told Moore and the rest of the crew on the Bowie job to stay inside the warning lines unless there was a monitor. Sanders further noted Rosado inspected both jobs after they were set up, that R-13 was the checklist Rosado filled out for the Bowie job, and that the "warning systems" item was checked as satisfactory. (Tr. 90-91; 94; 100-09; 114; 123-24).

Sanders further testified that after completing the EDS job, he and his crew were sent to the Irving site, where Mike Lambert had already been assigned foreman, rather than being laid off before starting their next project. Sanders noted it was the only Seyforth site he worked on that did not use any safety or warning devices, but that he or Lambert had told someone to watch employees on days when they were working near the edge of the roof. Sanders said no training was provided at the site in regard to fall hazards, but that he and Lambert discussed safety with employees at all times. He also said weekly safety meetings were held at the site, and that he had conducted such meetings when he was a foreman; Rosado would send him a safety memo with his weekly check and he would read it to employees, after which it was signed by everyone and returned to Rosado. Sanders said he had not seen C-13, a memo about perimeter safety, until he received it with his check on November 22, 1989. (Tr. 92-98; 106; 109-13; 126-27).

Sanders was told to act as foreman on the day of the accident because Lambert was absent due to a death in his family. Sanders said there was no fall hazard in working on the penthouse, and that there was no safety monitor that day because no one was working near the edge. He also said the measurements could have been taken 20 to 30 feet from the edge, and that while he was watching Moore from 10 to 15 feet away as he bent over to measure, he did not tell him to get away from the edge. Sanders stated he had not seen Moore drinking beer that day, and that he would have been fired if he had; he pointed out

he himself was fired after the autopsy report was received, which showed Moore had alcohol in his system. Sanders said Moore was a safe worker until the day of the accident, that he knew what precautions to take when working on the edge of a roof, and that he would not have anticipated Moore would have done anything dangerous. (Tr. 115-27).

George Rosado has been Seyforth's safety officer since April 1989. He testified that safety orientation and meeting procedures were already in place when he was hired, but that he expanded them. He explained Smith wrote some of the safety memos and that he wrote the rest based on his review of OSHA standards and the National Roofer's Contract Association handbook; he further explained there are seventeen safety memos in English and Spanish which he sends to job foremen to present to employees every week on a rotating basis, and that all of them were in use before the accident. Rosado said he did not give the CO all the memos because he understood him to be asking for documents reflecting training provided to the employees on the site. (Tr. 135-149; 154; 181-84; R-1-2; R-6).

Rosado further testified that C-8 is discussed with new hires, that the hazards of roofing work are emphasized, and that Moore had gone through the safety orientation. He said the HAZCOM program contains a checklist to make sure everything is covered, and that the information in the safety memos is discussed with employees before they ever go up on a roof and repeated during weekly safety meetings. He also said the foreman and superintendent discuss the hazards of the job with the crew before beginning work, and that employees are trained in the use of warning lines and safety monitors and in procedures for erecting and maintaining safety systems and for handling and storage of equipment and materials. (Tr. 157-64; 187-91; 196-201; C-9; C-11; R-11).

Rosado noted he developed R-3, the project inspection form, and that he used it at the beginning of a project and to follow up on any problems. He further noted R-4 was the form for the subject site, and that he went over it with Lambert. Rosado said Smith and Lambert decided on the safety system used at the site; he described it as a flagged warning line attached to stanchions located 6 feet from the edge of the roof and the use of a safety monitor for employees working outside the line. Rosado observed he was on the site several times a week, and that the system was in place every time he was there except for the day of the accident; he explained that the lines were taken down on weekends due to the high

winds on the roof, and that there was no need to replace them on November 6, a Monday, because employees were working on the penthouse. (Tr. 150-56; 168-70; 184-87; 191-99).

Rosado identified R-5 as a copy of Seyforth's alcohol and drug abuse policy signed by Moore, and noted that work rules are enforced with verbal warnings, leave without pay and termination. He said Sanders was demoted after the accident because he had allowed an employee to work at the edge of the roof without any fall protection, and that he was fired after the autopsy report showed Moore had alcohol in his system, particularly since it was suspected Sanders may also have been drinking that day. Rosado stated that based on their prior performance, the company had no reason to anticipate the misconduct of either Sanders or Moore on the day of the accident. (Tr. 159; 164-67; 171; 176-80; R-14).

Patrick Smith has been in the roofing business since 1979 and has worked for Seyforth since 1987. He testified he goes to new sites with job foremen to develop safety systems, that the safety line and monitor system he and Lambert devised was in use both times he visited the subject site, and that the monitor's only job is to watch employees outside the line and warn them when they approach the edge. Smith further testified he provides safety training to new hires, and that weekly training is given pursuant to the topics in R-1. He said employees, including Moore, were trained in the use of warning lines, and that he had disciplined employees for violating safety rules. He also said he discussed fall hazards and protections with Sanders and Moore, that Sanders had appeared to run a safe job on the Bowie and EDS projects, and that he would not have expected Sanders to allow Moore to work near the edge without protection or Moore to do so. (Tr. 226-39).

Mike Lambert has 25 to 26 years experience in the roofing business. He testified the warning line he and Smith devised was always used when he was at the site, but that there would have been no reason for it if employees were working only on the penthouse. He further testified either he or Sanders acted as a safety monitor if anyone worked outside the line, and that the monitor's sole function was to watch employees and warn them when they got close to the edge. Lambert said he gave safety training to his crew, which included weekly meetings covering the topics in R-1 and information about how to recognize and deal with the hazards of the job, and that he constantly told Moore and the rest of the crew to not go outside the line unless there was a monitor. Lambert noted he disciplined safety

violations, and that as a foreman he had never had an employee fall from a roof. (Tr. 241-50).

29 C.F.R. § 1926.500(g)(6)(i) and (ii)

1926.500(g)(6)(i) and (ii) provide as follows:

> (i) The employer shall provide a training program for all employees engaged in built-up roofing work so that they are able to recognize and deal with the hazards of falling associated with working near a roof perimeter. The employees shall also be trained in the safety procedures to be followed in order to prevent such falls.
>
> (ii) The employer shall assure that employees engaged in built-up roofing work have been trained and instructed in the following areas: (a) The nature of fall hazards in the work area near a roof edge; (b) The function, use, and operation of the MSS system, warning line, and safety monitoring systems to be used; (c) The correct procedures for erecting, maintaining, and disassembling the systems to be used; (d) The role of each employee in the safety monitoring system when this system is used; (e) The limitations on the use of mechanical equipment; and (f) The correct procedures for the handling and storage of equipment and materials.

The CO recommended these citation items on the basis of the documentation he was provided by Rosado, which he concluded did not constitute a training program in compliance with the standard. However, as the CO acknowledged, the standard does not require the training program to be in writing. (Tr. 68). Moreover, Rosado's failure to provide all of the company's safety memos was apparently due to his interpreting the CO's request to pertain only to documents reflecting training given to the employees at the site. (Tr. 154). Regardless, I conclude Seyforth was not in violation of the standards. My reasons follow.

The record shows that Seyforth's training procedures, which were in effect well before the accident, include an orientation for new hires consisting of a discussion of C-8, Seyforth's general safety rules, and an emphasis on the hazards of roofing work. Item 9 of C-8 summarizes protective system requirements, including the use of warning lines and safety belts or a safety monitor when employees are outside the lines. The topics in R-1 are discussed with employees before they ever get up on a roof, and are repeated by jobsite foremen at weekly safety meetings. C-13, one of the topics in R-1, deals with perimeter safety; it addresses the use of warning lines and safety monitors, materials storage and

equipment operation. The hazards of each job are discussed with the crew before work begins and throughout the project, and employees are trained in the procedures for erecting and maintaining safety systems and in the use of warning lines and safety monitors.

The only testimony detracting from the foregoing was that of Sanders. He testified no training was given at the site in regard to fall hazards, and that he had never seen C-13 before November 22, 1989. However, he also testified he and Lambert talked to the crew about safety at all times, and Lambert testified he constantly told the crew to not go outside the warning line unless there was a safety monitor. (Tr. 96; 244-45). Moreover, Rosado testified C-13 was in use before the accident, and that it was not the subject of a safety meeting at the site because it did not come up for distribution in the rotation system at that time. (Tr. 140-49). I observed the demeanor of Lambert and Rosado and found them believable. Their testimony is therefore credited over that of Sanders, particularly in view of the circumstances under which he left Seyforth. Based on the record, Seyforth met the requirements of the subject standards. The citation items are vacated.

29 C.F.R. § 1926.500(g)(1)

1926.500(g)(1) provides, in pertinent part, as follows:

> During the performance of built-up roofing work on low-pitched roofs with a ground to eave height greater than 16 feet (4.9 meters), employees engaged in such work shall be protected from falling from all unprotected sides and edges of the roof as follows ... (ii) By the use of a warning line system erected and maintained as provided in paragraph (g)(3) of this section and supplemented for employees working between the warning line and the roof edge by the use of either an MSS system or, where mechanical equipment is not being used or stored, by the use of a safety monitoring system....

It is undisputed that there was no warning line or safety monitor in use on the day of the accident. However, the record establishes Seyforth's employees on that day were engaged in finishing the roofing of the penthouse, which was located in the middle of the roof. The record further establishes that a warning line and safety monitor system had been used at the site throughout the project, and that the line was removed November 3 because of the high winds on the roof and not replaced November 6 due to the lack of any fall hazard in performing the work on the penthouse. Although Sanders testified that no

warning line was ever used at the site, Rosado, Smith and Lambert testified to the contrary. Their testimony was credible and is supported by the evidence regarding Seyforth's regular practice of planning and inspecting the safety system on each job, which Sanders himself acknowledged. Moreover, the circumstances under which Sanders left the employ of Seyforth has been noted *supra*. Accordingly, the testimony of Rosado, Smith and Lambert is credited over that of Sanders.

The subject citation was issued because of Moore's measuring on the edge of the roof without any protection. However, the record establishes the measuring could have been done 20 to 30 feet from the perimeter, and that Moore's presence on the edge of the roof and the ensuing accident were the result of unpreventable employee misconduct. To demonstrate unpreventable employee misconduct, an employer must show it both established and adequately communicated work rules designed to prevent the violation. It must also show it made efforts to discover violations and effectively enforced the rules when it detected violations. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979).

The record shows that Seyforth had a rule requiring the use of protection (safety belts or monitors) for work performed near the perimeter of a roof, and a rule prohibiting the consumption of alcoholic beverages. These rules were communicated to employees upon hire, discussed with them before they ever went up on a roof, and repeated in jobsite safety meetings. *See* C-8-9; R-1; R-5; R-8. The hazards of each site were discussed with the crew at the beginning of the job and throughout the duration of the project. Seyforth made efforts to discover violations of its rules through the presence of experienced foremen at its sites and visits by its safety officer and job superintendent; violations were enforced through verbal warnings, leave without pay and termination.

The record further shows that both Moore and Sanders were well aware of the prohibitions against drinking on the job and working on the edge of a roof without any protection. However, in spite of this awareness, Moore consumed alcohol on the day of the accident and Sanders may have done so. Further, Moore went to the edge of the roof to take measurements without any fall protection, even though he could have done so from 20 to 30 feet away, and Sanders watched him from 10 to 15 feet away without telling him to get

away from the edge. Based on the facts of this case, it can only be concluded that the accident was the result of unpreventable employee misconduct and that Seyforth was not in violation of the subject standard. The citation is vacated.

Conclusions of Law

1. Respondent, Seyforth Roofing Company, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. On November 6, 1989, Respondent was not in violation of 29 C.F.R. §§ 1926.500(g)(1), 1926.500(g)(6)(i) or 1926.500(g)(6)(ii).

Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1 and 2 of serious citation number 1 are VACATED.
2. Item 1 of repeat citation number 2 is VACATED.

E. Carter Botkin
Administrative Law Judge

DATE: JUL 27 1992