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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 91-102
BETA CONSTRUCTION COMPANY,	:	
Respondent.	:	

DECISION

BEFORE: FOULKE, Chairman; and MONTOYA, Commissioner.

BY THE COMMISSION:

Review Commission Administrative Law Judge Irving Sommer found Beta Construction Company ("Beta") in violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") for failing to comply with the Secretary's standard requiring certain precautions to protect employees from the hazard of falling from a flat roof. The judge concluded that Beta had failed to comply with the standard but that the violation was not shown to be willful as the Secretary had alleged. He amended the Secretary's citation to a serious violation and assessed a penalty of $2500 rather than the $9000 penalty proposed by the Secretary. For the reasons that follow, we affirm the judge's decision.

I. INTRODUCTION

A Beta employee was fatally injured when he fell while applying roofing paper on a building under construction at the District of Columbia correctional facility. Following an inspection of the worksite, the Secretary alleged that Beta's safety monitor failed to maintain proper visual contact with the work crew and thus failed to warn the deceased employee

before he approached the edge of the roof, contrary to 29 C.F.R. § 1926.500(g)(1)(iii), which 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 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 [a rope, wire, or chain on stanchions located at a prescribed distance away from the edge]; 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.

Section 1926.502(p)(7) defines a "safety-monitoring system" as follows:

> A safety system in which a competent person monitors the safety of all employees in a roofing crew, and warns them when it appears to the monitor that they are unaware of the hazard or are acting in an unsafe manner. The competent person must be on the same roof as and within visual sighting distance of the employees, and must be close enough to verbally communicate with the employees.

The judge found that Beta's foreman, Lovell L. Ahalt, was acting as the monitor for the two employees who were performing the work, Alpheus Lawson and the deceased, Stanley Lewis. The judge further found that Ahalt did not discharge the duties of a monitor in the manner required by the standard and concluded that a violation existed on that basis. The primary issues before us are whether the judge erred in rejecting Beta's contention that it had instructed Lawson and Lewis to act as monitors for each other, and, if so, to what extent an employee may be permitted to perform his assigned work duties while at the same time acting as a monitor. We conclude that the evidence does not support the judge's finding that Ahalt was the monitor at the time in question. We further conclude that the standard does not necessarily preclude a work practice by which each member of a 2-man work crew monitors the other. We find that in the narrow circumstances here, however, Beta's employees did not conduct the monitoring in a manner that conforms to the requirements of the standard. Accordingly, we affirm the judge's finding that a violation

existed but for different reasons. We conclude that the judge properly determined that the violation was not willful in nature.[1]

II. MERITS

A. BACKGROUND

1. Identity of the Safety Monitor

Compliance Officer Leonard M. Moore, Jr. inspected the roof of what was designated as Building D, where the deceased, Lewis, had been working. This roof was approximately 34 feet by 28 feet and 73 feet above the ground, and no mechanical equipment was being used on it. There also was an 18½-inch parapet wall over which Lewis fell. Beta had been working at the site for several months. At times, it had been using a crew of as many as 10 to 12 employees. At the time of the fatality, Beta's work was almost completed, and only a 2-man crew, consisting of roofers Lawson and Lewis, was working on the roof in question. Lewis was standing up unrolling the paper and pulling the protective backing off the roll to expose the adhesive surface. Lawson was on his hands and knees rolling out and smoothing out the paper. Also present at the site that day were foreman Ahalt and employee Vernon Godsey.

Five days after the accident, Moore interviewed Beta's employees. Ahalt told Moore that he was both the foreman and the safety monitor. Lawson also gave Moore a statement

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[1]Review in this case was directed on the issues raised by both parties in their petitions. As permitted by Rule 93(b), the Secretary filed two briefs: an initial and a reply brief. However, the Secretary's initial brief addressed only the single issue raised in his own petition,--whether the judge erred in failing to find the violation willful. It was not until the Secretary filed his reply brief that he presented his initial arguments on the issue on which Beta sought review--whether it had violated the terms of the standard. The Commission has issued a recent decision interpreting the application of Rule 93(b) in similar circumstances. In *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2203, 1993 CCH OSHD ¶ 29,964, pp. 41,021-22 (No. 87-2059, 1993), both parties filed petitions for review, and issues were directed for review from both parties' petitions. As he did in this case, the Secretary divided his arguments between two briefs, presenting his arguments with respect to the issues raised by the employer in his second, "response" brief. We held that this type of briefing was improper under Rule 93. We note that the Secretary's reply brief here postdates our decision in *J.A. Jones*. Nevertheless, the Secretary has not acknowledged the Commission's decision nor requested leave of the Commission to file a brief in nonconformity with the Commission's rule. Accordingly, we now emphasize what we believe should have been apparent from our decision in *J.A. Jones*: Rule 93(b) does not permit a party to divide its initial arguments between two briefs. We will no longer accept for filing a reply brief which presents a party's *initial* arguments on any issue.

in which he said that Ahalt was the foreman as well as the monitor. Godsey gave a statement saying that he was working alone on another roof at the time of the accident. At an informal conference at the OSHA area office after the citation was issued, both Michael Allen, Beta's personnel director, and Beta's counsel represented to Gary Griess, the area director, that Ahalt was the safety monitor on the day of the fatality.

At the hearing, however, Allen testified that he originally thought that Ahalt was the safety monitor for the job because he was told that Gerald Jones, Beta's superintendent, had designated Ahalt to be the monitor. Subsequent investigation had led him to understand that Lawson was the safety monitor at the time the fatality occurred. Allen explained that Ahalt had been designated as the safety monitor earlier in the job when there was a larger work crew on the job, at which times Ahalt wore a badge on his hardhat signifying that he was the monitor.

Lawson testified that on the morning of the day the accident occurred, Ahalt spoke to him and to Lewis, telling them that he and another employee were going to the roof of another building to repair some leaks. Lawson stated that he was told by Ahalt "you got to mind the job today," which Lawson understood to mean that he and Lewis were to monitor each other. Lawson said that he and Lewis knew what they were supposed to be doing on the roof. They would alternate tasks; when Lewis was unrolling the paper, Lawson would warn him of the parapet and vice-versa. He gave similar testimony in his deposition which was admitted into the record. He also stated that there had been other occasions prior to November 14 when he had worked on a 2-man crew with Lewis and that at such times he and Lewis would "manage" and warn each other of any danger. When asked about the statement he had given to Moore, in which he had said that Ahalt was the safety monitor, Lawson explained that he meant that Ahalt is the safety monitor when a large crew is working together. Moore did not specifically ask him who was the safety monitor on the day the accident occurred. He also advanced the same explanation in his deposition testimony.

Jones testified that after he gave a safety instruction to the crew about one week before the accident, he reminded Ahalt that sometimes crews had to be split up and that it was Ahalt's responsibility to assign additional monitors as necessary. At that time, Ahalt was wearing a label on his hard hat that read "roof monitor." Ahalt had always been assigned

as the monitor on the job, but other employees had also served as monitors from time to time when the crew had to divide up. Jones did not have first-hand knowledge of the situation on the day of the accident but believed that Lawson "probably" would have been acting as monitor on that day. In addition to Lawson's statement to Moore, Jones also told Moore that both Lewis and Lawson had been monitors before, and Moore testified that he had no reason to believe that Lawson was not competent to serve as a monitor. Debbie Randol, Beta's assistant superintendent, whom Beta had initially assigned to the site, testified that when Lawson and Lewis were the only members of the crew, Lawson would have understood that he was to serve as the monitor even if the foreman or superintendent had not explicitly designated him as the monitor.

Ahalt, who was unable to testify due to illness, testified at a deposition which was admitted in lieu of an appearance at the hearing. In his deposition Ahalt stated, consistent with Lawson's testimony, that he normally was the safety monitor at the D.C. Jail job and served in that capacity on every day except the day of the accident. On that day, because the work was almost completed, Beta reduced the size of the work crew, and Ahalt assigned Lawson and Lewis to finish installing the roof on Building D while he and employee Godsey went to Building B to repair some leaks in the roof which Beta had previously installed on that building. When asked about his statement to Moore, he explained that, like Lawson, he thought that Moore was asking him to describe his normal duties on the jobsite in general, and he reiterated that he was not acting as roof monitor of Building D on the day of the accident.

2. Beta's Safety Program and Instructions for Monitoring

Beta presented extensive evidence regarding its safety program. Allen developed and implemented the program in its present form after he began working at Beta as its safety officer in February 1989, almost two years before the accident occurred. Beta had a safety program which Allen considered to be "adequate" but requiring improvement. Thus, Allen took the following steps: he revised and strengthened Beta's safety manual to bring it into conformity with current OSHA standards including section 1926.500(g), acquired additional materials for the toolbox meetings which Beta's superintendents conduct on a frequent basis, and instituted an orientation and safety indoctrination program for new employees. As part

of this program, all new employees are issued copies of the employee manual, general safety rules, and a fall protection training document which includes the text of section 1926.500(g). Employees are also shown a videotape produced by the National Roofing Contractors Association. This videotape expressly mentions OSHA, discusses the requirements of section 1926.500(g), and demonstrates use of a safety monitor. Beta provides training regardless of whether the employee has prior roofing experience. Employees are required to certify that they have received the training; Beta introduced into the record such certifications signed by Ahalt, Lewis, and Lawson.[2] Allen selects the topics for Beta's toolbox meetings. If he feels that there is a safety rule or practice that needs to be emphasized, if an accident has occurred, or if Beta's insurance carrier recommends specific training, those matters will be brought up at the meetings. Fall protection and handling hot asphalt are covered more frequently than other, more generalized safety topics. However, the superintendents, who conduct the meetings, have discretion to change the subject depending upon the working conditions or hazards encountered on a particular job or repeat a meeting. For example, five days before the accident, Jones conducted a safety meeting which Lewis and Ahalt attended. The prescribed subject for the meeting was warning lines, which were not being used on that job. Accordingly, Jones on his own initiative decided to discuss safety monitoring since that was the type of fall protection selected for the worksite. Beta's training program also includes employee sign-in sheets so that the supervisor can document the attendance at a safety meeting. These sheets are attached to a written summary of the discussion at the meeting. Allen also monitors toolbox talks to make sure that employees are actually receiving the required training and reviews the sign-in sheets that the supervisors submit so that he can determine which supervisory employees are or are not following company procedures. Beta introduced its log showing: the date when the main office instructed its supervisors to conduct each toolbox meeting, the general subject matter of that meeting, and the date when each supervisor actually conducted each scheduled meeting.

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[2]Although Ahalt, Lawson, and Lewis were not new hires, Allen included all existing employees when he implemented the initial safety training portion of the program.

In addition, Allen created an incentive program whereby awards of cash and merchandise were given to employees and supervisors based on their safety, attendance, and work product performance. He enforced Beta's existing requirement that foremen or higher level supervisors complete an investigation report following the occurrence of any accident. Under Beta's formal program for conducting performance appraisals of employees, compliance with safety rules is one of the factors on which employees are evaluated. Beta also introduced documentation showing termination, suspension, or reprimands of seven employees for failing to comply with safety rules or other company policies. Three of these disciplinary actions took place before the accident in question here, and the other four post-dated the accident.

Both Jones, who had been employed as Beta's superintendent for at least 12 years, and Debbie Randol, Beta's assistant superintendent, who works directly under superintendent Jones, corroborated Allen's testimony regarding the safety program. Jones stated that "[i]t was just a rather informal program of talks or bringing up points of safety here and there. It wasn't real well organized in the early parts, but then our office kept working on programs and when Mike Allen got there it got pretty formal and the sign-up sheets and training and manuals and all sorts of things." Jones enumerated a number of subjects that are covered in the written material disseminated by Allen for use in the safety training of employees: hazard communication, use of ladders, safety of roof walls and parapets, safety of the structural deck, roof openings, hoisting cranes, and machinery. Randol likewise noted that the program includes instruction to new employees in matters other than fall protection, including general safety and hazardous substances and materials. On occasion, Beta will be operating as many as eight or nine jobs concurrently, in which event Randol and Jones, as well as Beta's other superintendents, will share the responsibility for conducting the employee toolbox meetings. Allen and Steve Wilt, Beta's president, also conduct monthly meetings of supervisors at which such subjects as accident prevention and electrical safety have been discussed.

Randol and Jones also were familiar with section 1926.500(g) and with the various means of fall protection set forth in that standard. Randol described the duties of a safety monitor as follows:

> The safety monitoring system is where you have a roof monitor that keeps an eye on the crew. The roof has to be 50 foot or narrower. You can't have a real large work area. . . . the roof monitor has to be able to be in visual range and hearing range of all the workmen.
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> The monitor cannot be so involved in a task that they can't be watching the people on the roof. It doesn't mean they can't work, they just can't be confined to one area or one task where they're not watching. And the crew members all know who the monitor is, the monitor or monitors[,] and they know that when the monitor tells them to look out or warns them of a hazard that they pay attention.

She elaborated that when the other employees get close to the edge, the monitor should stop his own work activities and begin observing his co-workers more closely. At toolbox meetings, Jones has instructed employees that the monitor is permitted to perform other work tasks so long as that work does not interfere with his duty to observe the other workers and look out for their safety. As he put it, "So you tell them, yes, they can do some stuff, but it can't distract them or it can't stop them, they can't be bent over all the time looking at the ground, they have to pay attention." Normally, the employee who is unrolling the paper and removing the backing will do so while he is walking backwards towards the roof edge. However, Beta had also established a safety procedure which requires that when the employee comes within 5 feet of the edge he is to turn and face the roof and then roll the paper in a direction parallel to the roof edge.

Lawson testified that he had been doing roofing work since 1973, or for seventeen years prior to the accident. Beta had given him safety training in roof monitoring when it first hired him, as well as additional training after he was hired. He understood that "a safety monitor is supposed to see the man be cautioned from the edges of the roof, and . . . take care of the rest of the persons, look around." He further testified that "[a] safety monitor is supposed to walk around his co-workers and see that they are in the right shape or stay away from the wall or the edges." When a roofer gets close to the edge, "you got to caution him, be careful the edge is behind you. So look what you're doing, don't step back too far because there is an edge behind you." Lawson demonstrated how he would act as monitor while smoothing-out the material; the judge read the following description into the record: "Let the record indicate the witness was on his knees showing how he was straightening--smoothing out material and at the same time indicating he kept his face

forward looking at the other gentleman." Lawson conceded, however, that sometimes his head would be up and sometimes down when he had to look at the work he was doing. Lawson also testified that when employees got close to the roof edge they would either proceed in a direction parallel to the edge, as required by Beta's safety rule, or would apply the material from a forward direction facing the edge.

Lawson last saw Lewis when Lewis was about 5 or 6 feet from the edge. Lawson informed Lewis that he was close to the parapet, and Lewis replied "okay, come on, let's go," or words to that effect. At the time Lawson warned Lewis, Lawson expected Lewis to stop so that they could measure and cut the material to fit it alongside the edge of the roof as prescribed by Beta's safety rule, but Lewis continued to roll out the paper while Lawson was engaged in smoothing-out. Lawson did not see Lewis fall and did not know Lewis had fallen until he heard the roll of roofing material tear.

Ahalt testified that he was aware that in his capacity as crew leader or foreman he is required to report to his supervisor if he sees any employee violating a safety rule, but he had never observed a safety infraction on any of his jobs, and he had never been charged with failing to comply with a safety rule. When Beta first hired him, he was given training in all safety matters including the monitoring system. He understood that a monitor is supposed to warn other employees when they get within approximately 5 feet from the edge or if there are other hazards close to the edge and that the monitor's job is to ensure that the work is performed in a safe manner. However, he conceded that the 5-foot instruction is not set forth in Beta's safety manual.[3] Ahalt also was aware that Beta's practice is that employees are supposed to turn away from the roof edge and work parallel to the edge when they get within 5 feet of it, and he testified that the monitor's job is to let employees know when they are approaching that close to the edge. He corroborated the testimony of other witnesses regarding Beta's regular toolbox meetings, dissemination of written safety rules to employees, and discipline of employees who commit violations.

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[3]Beta's safety manual lists the safety monitoring system as one means of providing fall protection on low-pitched roofs. The manual describes the system as follows: "A safety system in which a competent person monitors all employees in the roofing crew and verbally warns them when it appears that they are unaware of the hazards or they are working unsafely."

Shortly before the accident occurred, Ahalt came onto the roof of Building D and spoke briefly to Lawson and Lewis. At this time, they were about 10 to 12 feet from the edge of the roof, and Lewis was moving in a backward direction. Ahalt testified that he would have remained on the roof to watch Lewis if he had seen Lewis close to the edge. However, when he came up onto the roof, Lewis was not yet at the point where he should be moving alongside rather than towards the edge.

Beta had been cited for three prior violations of the Act for failure to comply with section 1926.500(g)(1): a serious violation following an inspection on May 12, 1983, a repeated violation based on an inspection on January 24, 1986, and another repeated violation approximately two years later. These prior citations alleged that Beta had failed to use "one of the methods" set forth in section 1926.500(g)(1)(i) through (iii) to protect employees from falling. Two other inspections resulted in citations for violations not involving section 1926.500, and there were also two inspections where Beta was found to be in full compliance with the Act, with no citations being issued. All these violations occurred before Allen came to Beta in February 1989. Since then, the Secretary had issued citations to Beta, but those citations were subsequently withdrawn with the exception of the citation at issue here. Both Griess and Moore conceded that Beta did have a safety monitoring program. Moore regarded that program as "impressive," and also conceded that Beta had the best overall safety program of any roofing contractor he had seen. Griess also felt that Beta's program was better than that of many roofing contractors and testified that outside of the citation at issue here, he had no basis to conclude that Beta was not implementing its program. However, he regarded the program as deficient because it did not appear that Beta had taken measures to ensure that the employees fully understood who was to act as safety monitor in the event Ahalt were to leave the work area. Moore and Griess felt that Beta had committed a willful violation on this occasion, in part because it had previously been cited for serious and repeated violations. Griess also took into consideration the fact that Allen indicated that he had made some improvements in Beta's safety training program, but Griess concluded that Allen's efforts did not outweigh Beta's prior history.

B. JUDGE'S DECISION

Judge Sommer concluded that Ahalt was the monitor on the day of the fatality, rejecting Beta's claim that Lawson and Lewis had been appointed to monitor each other. The judge concluded that the terms of the standard were violated because at the time of the accident, Ahalt had turned away from Lewis and Lawson and therefore was not "within visual sighting distance of the employees [and] close enough to verbally communicate with the employees" as specified in the definition at section 1926.502(p)(7).

The judge noted that the evidence conflicted on whether Lawson or Ahalt was the monitor at the time in question. In resolving this conflicting evidence in favor of a finding that Ahalt was the roof monitor at the time of the fatality, the judge reasoned that Ahalt's deposition testimony that he was working with Godsey when the fatality occurred was contradicted by Godsey's written statement that he was working on the other roof by himself. The judge also noted that Ahalt testified that he was the safety monitor on every other day, and the judge further found that Lawson had never been a safety monitor before the accident and was not designated as a safety monitor at the time in question. The judge also made the following credibility finding:

> The evidence adduced from Lawson comprising his signed statement, deposition, and oral testimony is one of conflicting statements which calls into question his memory, mental capacity, truthfulness, and reliability. Initially in his signed statement, Ahalt was the safety monitor; later in his deposition and testimony he seems to be the chosen one; in his deposition he states that both he and Lewis continued to work on the roof and did not speak to Ahalt . . . but at the hearing he testified that they stopped working and spoke to him. . . . I had the opportunity to observe Lawson as he testified, and assess his overall demeanor. His testimony fluctuated and lacked the definiteness and certainty associated with truth. Having considered all the circumstances which bear on the weight of his testimony (it was apparent he was attempting to serve the best interests of his employer), I cannot accept his contention of his being the safety monitor on the date of the fatality, and I reject his testimony thereon. The preponderance of the credible evidence establishes that Ahalt was the safety monitor on roof D on the date of the fatality.

The judge, however, declined to find the violation willful in nature in view of Beta's active safety program. Noting that even compliance officer Moore exhibited high regard for Beta's program, the judge observed that the Secretary appeared to be basing his allegation

of willfulness on the prior citations to Beta. The judge discounted the earliest of these, the 1983 citation, as too remote in time. He concluded that the other two were not dispositive because they predated Allen's arrival at Beta and the subsequent improvements Allen made to Beta's program. The judge determined that these efforts indicated that Beta did not exhibit indifference to employee safety or disregard for the requirements of the Act. Accordingly, he found the violation serious but not willful in nature.

C. DISCUSSION AND ANALYSIS

1. Identity of the Monitor

The parties dispute whether the evidence supports the judge's factual finding that Ahalt and not Lawson was the safety monitor for the crew of Lawson and Lewis on the day of the accident. Beta argues that the judge's determination based on Lawson's demeanor should be rejected because the judge failed to specify the inconsistencies he found in Lawson's testimony and failed to explain why he was discrediting Lawson. Beta notes that Lawson's testimony was both uncontroverted and corroborated by other witnesses and that the judge's conclusion that Ahalt was the safety monitor on the day of the accident is contrary to other evidence of record. Similarly, Beta contends that the statements Lawson and Ahalt gave to compliance officer Moore do not controvert their testimony which establishes that Ahalt was not acting as monitor at the time in question.

Beta asserts, moreover, that Lewis and Lawson were aware of the duties a roof monitor must discharge and that the evidence establishes that it instructed its employees in the appropriate safety monitor procedures for both large and small crews. Beta points out that on the D.C. Jail job, crews normally were larger than two employees and that a 2-man crew was at work on only one day. It argues that to appoint a separate monitor for only two employees who were instructed to watch out for each other would be unreasonable and contrary to common sense.

The Secretary argues that the judge correctly found that Ahalt was acting as safety monitor at Roof D on the date of the accident. Because Ahalt turned away from the crew to obtain materials at a time when he knew Lewis would be moving backwards toward the roof edge while unrolling the roofing paper, Ahalt failed to fulfill the duties of a roof monitor. The Secretary relies on: the contemporaneous statements Ahalt and Lawson gave

to the compliance officer; Allen's initial conclusion that Ahalt was the monitor; and Godsey's contemporaneous statement that he was working alone on the other roof. The Secretary also asserts that the judge's credibility finding based on Lawson's demeanor is the type of finding the Commission ordinarily will not disturb.

Furthermore, the Secretary contends, Beta would have been in violation of the standard even under its theory that Lawson and Lewis were acting as monitors for each other. According to the Secretary, Beta's practice allows the employee's actual work responsibility (in this case, applying and smoothing out the paper) to interfere with and distract him from his monitoring duty. The Secretary points out that Lawson himself conceded that sometimes he would be looking down at his work while Lewis, whom he was supposed to be monitoring, was walking backwards toward the edge of the roof. The Secretary argues that because Lawson's assigned job function would have compromised his ability to monitor Lewis, Beta's procedure does not meet the intent of the standard.

We believe the judge's finding regarding Ahalt's status as monitor is erroneous. The judge relied not on the testimony but on the out-of-court statements of Lawson and Ahalt to compliance officer Moore that Ahalt was the monitor, Allen's representation to the same effect at the informal conference, and arguably Godsey's statement that he was working alone on the other roof. However, both Lawson and Ahalt explained in their testimony that they thought Moore was referring to the monitor for the larger crew that normally worked at the site. Allen, who was not the supervisor at the job, did not have personal knowledge of the identity of the monitor at the time of the accident, and his declaration to Moore at the informal conference was in turn based on a statement by Ahalt to Allen that Allen himself considered unreliable. Godsey's statement does not expressly say that Ahalt was not present at the other roof and is therefore subject to more than one interpretation. For example, Godsey could have meant merely that he was the only nonsupervisory employee on the other roof. Godsey himself did not testify. In the circumstances, it is questionable whether Godsey's statement should be interpreted in a manner contrary to the testimony of Lawson and Ahalt or whether, if so interpreted, the statement should be given dispositive

weight. For that matter, the same is true of the statements of Lawson, Ahalt, and Allen. As the Commission stated in *Power Sys. Div., United Technologies Corp.*, 9 BNA OSHC 1813, 1817, 1981 CCH OSHD ¶ 25,350, p. 31,468 (No. 79-1552, 1981), statements by employees concerning matters within the scope of their employment and made during the existence of the employment relationship, while admissible, should be given weight only to the extent they are reliable. In our view, the testimony of the witnesses satisfactorily explains their prior statements and is sufficient to establish that the statements may not be relied on to show that Ahalt was the monitor at the time in question.

Rather, we find that Lawson was the monitor for Lewis at the time in question.[4] We recognize that the judge made a negative credibility finding based on Lawson's demeanor and that, generally speaking, the Commission will accept the judge's evaluation of a witness' credibility in the light of his demeanor. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993 CCH OSHD ¶ 30,046, p. 41,257 (No. 89-433, 1993); *Asplundh Tree Expert Co.*, 7 BNA OSHC 2074, 2078, 1980 CCH OSHD ¶ 24,147, p. 29,346 (No. 16162, 1979), *rev'g judge's decision on remand from* 6 BNA OSHC 1951, 1978 CCH OSHD ¶ 23,033 (1978); *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297, 1977-78 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978). However, the judge did not explain why he disbelieved Lawson in view of the fact that Lawson's testimony is consistent with the testimony of Ahalt, Jones, and Randol; he did not acknowledge or address Ahalt's and Lawson's explanation of why their testimony differs from the statements they gave to the compliance officer; and his characterization of

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[4]In his deposition, Lawson stated that the day of the accident was the only time he had "served as" a safety monitor. The deposition itself is unclear as to whether Lawson meant that he had never previously performed the duties of a safety monitor or whether he simply meant that the day of the accident was the first occasion when he had specifically been instructed to act as a monitor. We can infer, however, that Lawson was referring to a formal designation as a monitor because he drew such a distinction in his testimony at the hearing. When asked on cross-examination whether he had ever before been a safety monitor for Beta, he replied in the negative. He then started to explain that he had performed the duties of a monitor on other occasions, but the Secretary's counsel then terminated his questioning. Immediately on redirect examination, counsel for Beta asked Lawson if he had been the monitor on a 2-man crew, at which point Lawson answered saying that he and Lewis "managed" each other. Furthermore, Moore conceded that Lawson told him that he had previously been a monitor, but Moore did not include this statement in his written transcription of his conversation with Lawson. On the record before us, we find that only one conclusion is possible: although Lawson may not have considered the term "safety monitor" to be an appropriate characterization of his work duties, he had clearly performed the functions associated with a safety monitor on prior occasions.

a difference between Lawson's testimony at the hearing and Lawson's deposition testimony is inaccurate.[5] As the Commission has stated, a judge's credibility finding must be made in light of the entire record. *Id.* at 1298, 1977-78 CCH OSHD at p. 27,099; *Asplundh*, 6 BNA OSHC at 1953-54, 1978 CCH OSHD at p. 27,841. In *Asplundh*, the Commission set aside a judge's credibility determination in circumstances substantially similar to those here because the judge did not take into account the conflicting testimony of all of the other witnesses. The Commission specifically concluded that the judge erred in according dispositive weight to a statement given by one witness to the compliance officer on the ground that the judge had not considered the possibility that there was a misunderstanding between the declarant and the compliance officer. *Id.* at 1954, 1978 CCH OSHD at p. 27,841.

In its subsequent decision in *Asplundh*, the Commission further held that it was empowered to disregard the judge's credibility findings once it determined that they were not supported by the record and make its own findings based on the preponderance of the evidence. 7 BNA OSHC at 2079, 1980 CCH OSHD at p. 29,347. The weight of the evidence shows that Lawson and Lewis understood that on the day in question, they were to monitor each other. Such a finding is supported by Lawson's testimony at his deposition and at the hearing, as well as by Ahalt's deposition. It is also corroborated by Jones' testimony that Lawson and Lewis both had previously served as monitors. Accordingly, we set aside the judge's finding in favor of a finding that Lawson was the monitor for Lewis at the time in question.

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[5]The judge stated that in his deposition Lawson testified that he and Lewis continued to work and did not talk to Ahalt when Ahalt returned to the roof whereas at the hearing Lawson testified that they stopped working and spoke to Ahalt. In actuality, as Beta points out in its brief, Lawson stated in both his deposition and his hearing testimony that he and Lewis spoke briefly to Ahalt regarding their work progress. The only discrepancy is that in his deposition, Lawson stated that they kept on working whereas at the hearing he said they stopped "a little" out of respect for the foreman. He was not asked whether they ceased work during the entirety of their conversation with Ahalt, which lasted only two to three minutes.

2. Noncompliance with the Terms of the Standard

The question remaining is whether Lawson discharged the functions of monitor in the manner contemplated by the standard.[6] The standard does not expressly require that a monitor perform that duty exclusively. Rather, the standard sets forth performance criteria for determining the effectiveness of the safety monitoring. Specifically, the monitor must provide warnings whenever employees either (1) appear to be unaware of a hazard or (2) are acting in an unsafe manner, and the monitor must be close enough to see the employees (what the definition provision refers to as "within visual sighting distance") and to be heard by them. In promulgating the standard, the Secretary conceded that the phrase "visual sighting distance" does not require that the employees be under the actual visual observation of the monitor at all times. In the preamble to the standard, the Secretary further stated:

> The monitor may have supervisory or nonsupervisory responsibilities as there are no restrictions on the performance of other duties. (It is obvious, however, that the monitor must not be so busy with other responsibilities that the monitoring function is encumbered.)

45 Fed. Reg. 75,618, 75,621 (1980). The Secretary's subsequent program directive reiterates the preamble:

> The standard for perimeter guarding of low-pitched roofs allows the use of a "safety monitoring system" under certain conditions. A question has arisen as to what extent a safety monitor might be engaged in the performance of other duties. The preamble to the new standard specifically allows monitors to have other duties but provides that these duties may not be so extensive that they encumber the monitor's duties as a monitor.

OSHA Instruction STD 3-11.1, *Safety Monitoring System As It Applies to 29 CFR 1926.500(g)(1)* (Mar. 8, 1982). Since the standard itself does not specify the extent to which a monitor may also perform other work duties, the Secretary's statements in the preamble

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[6]Although the judge noted that in their depositions and in Lawson's testimony, Ahalt and Lawson stated that Ahalt instructed Lawson and Lewis to watch each other, he concluded that this instruction "falls far short of a formal delegation of authority." Beta contends that the standard does not require a formal delegation of authority because it imposes a functional rather than literal test for determining whether a monitor is present. The Secretary asserts to the contrary, and the Secretary points out that Ahalt himself wore a badge or label on his hardhat designating him as a monitor. In view of our disposition, we do not now decide whether an employer must formally appoint a monitor as the Secretary contends, nor do we express an opinion on the extent of the efforts an employer must take to make the identity of the monitor known to the other members of a work crew.

may be taken into consideration in determining the standard's meaning. *American Sterilizer Co.*, 15 BNA OSHC 1476, 1478, 1992 CCH OSHD ¶ 29,575, pp. 40,015-16 (No. 86-1179, 1992).

Applying these principles here, we find that Beta's practice, under which one employee moves backwards toward the edge of the roof while the other employee--his monitor--is engaged in smoothing out the roofing material, does not comply with the standard because it allows the monitor to be distracted. In the situation at issue here, for example, Lawson did not see Lewis approach the edge and indeed was not even immediately aware that he had fallen. It is clear from Lawson's description of the manner in which the smoothing-out is performed that the employee doing that work will at times have his head up and at other times will be looking down at the material. Although Beta requires that the monitor give a warning when the employee moving backwards toward the roof edge has come within 5 feet of the edge, and although the testimony of Randol and Jones indicates that monitors were expected to pay attention to the actions of those they were monitoring, there is no indication of any specific guidance to the monitor as to how to focus his attention in relation to the work being performed by the other employee on a 2-man crew. The facts here demonstrate that the monitor's ability to issue the required warning depends on a fortuity that he will be looking up at the other employee at the requisite times. In addition, it is undisputed that Lawson was not observing Lewis as Lewis moved even closer to the edge. Indeed, Randol herself testified that when the employees being monitored come close to the edge, the monitor should stop his own work activities. However, there is no indication that Beta had communicated this specific instruction to Lawson or that Lawson was otherwise aware of it.

In order to be considered effective, an employer's work rule must be clear enough to eliminate employee exposure to the hazard covered by the standard, *Foster-Wheeler Constructors, Inc.*, 16 BNA OSHC 1344, 1349, 1993 CCH OSHD ¶ 30,183, 41,526 (No. 89-287, 1993) or, as we have said, must be "designed to prevent the cited violation," *Gary Concrete Prods. Inc.*, 15 BNA OSHC 1051, 1056, 1991 CCH OSHD ¶ 29,344, p. 39,452 (No. 86-1087, 1991). Generally speaking, the work rule must be sufficiently precise to

implement the requirements of the standard or be functionally equivalent to it. *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1415 n.4, 1992 CCH OSHD ¶ 29,546, p. 39,906 n.4 (No. 89-1027, 1991); *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382, 1991 CCH OSHD ¶ 29,524, pp. 39,849-50 (No. 88-2642, 1991); *see Ormet Corp.*, 14 BNA OSHC 2134, 2139, 1991 CCH OSHD ¶ 29,254, p. 39,203 (No. 85-531, 1991). In the circumstances presented here, the fact that Beta may have had a rule that employees are to turn and move parallel to the roof edge when they come within 5 feet of the edge does not alter the duty of the monitor to keep his coworkers under observation so that he may give the appropriate warning should they approach the edge. We note that if an employer elects to use a warning line system under section 1926.500(g)(1)(ii) rather than a safety monitoring system, section 1926.500(g)(3)(i)(*a*) requires that the warning line be in place no closer than 6 feet from the edge. The standard further requires that the warning line be "supplemented" by either a motion stopping system or safety monitoring system when employees are working between the warning line and the roof edge. Therefore, taken in its entirety, the standard clearly intends that employees be protected by one of the prescribed methods when they are working within close proximity to the edge. We therefore interpret the standard to require, at the very least, that Lawson should have kept Lewis under observation at least long enough to ensure that Lewis had in fact changed the direction of his movement and was proceeding parallel to the roof rather than toward the edge, as Lewis evidently did.

Since we find that Beta's work rule was not adequate to ensure that employees approaching the edge will be monitored while they are exposed to the hazard of a fall, we affirm the Secretary's citation. *Cf. Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1321, 1991 CCH OSHD ¶ 29,500, p. 39,810 (No. 86-351, 1991) (the elements of an effective safety program consist of adequate enforcement and effective communication of relevant work rules).

D. Willfulness

While we find that Beta committed a violation, we conclude, as did the judge, that the violation was not willful in nature. In order to establish a willful violation, the Secretary must show more than simple lack of diligence or carelessness on the part of the employer.

Mobil Oil Corp., 11 BNA OSHC 1700, 1983-84 CCH OSHD ¶ 26,699 (No. 79-4802, 1983). Rather, a willful violation is differentiated from other classifications of violation by the employer's state of mind toward the requirements imposed by a standard. A wilful violation depends upon proof that the employer has manifested either intentional disregard of the requirements of the standard or plain indifference to employee safety. *Hern Iron Works*, 16 BNA OSHC at 1213-14, 1993 CCH OSHD at p. 41,256; *Morrison-Knudson Co./Yonkers Contrac. Co., A Joint Venture*, 16 BNA OSHC 1105, 1123, 1993 CCH OSHD ¶ 30,048, pp. 41,280-81 (No. 88-572, 1993), *petition for review filed*, No. 93-1385 (D.C. Cir. June 15, 1993).

In our view, the judge properly applied the well-established principle that actions an employer takes to enhance safety on its worksite can negate willfulness even if those efforts are not sufficient to fully eliminate the hazardous conditions. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2013, 1991 CCH OSHD ¶ 29,223, p. 39,134 (No. 85-369, 1991); *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987).[7] Thus, the Commission has previously found violations not willful where employers made some efforts to establish safety rules and communicate them to employees or instituted other good faith measures to comply with the standards in question. *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063, 1984-85 CCH OSHD ¶ 27,101, p. 34,948 (No. 79-3831, 1984). An employer's unsuccessful efforts to prevent a violation are sufficient to demonstrate that the employer's state of mind was not one of disregard or indifference so long as the employer acted in an objectively reasonable manner. *J.A. Jones*, 15 BNA OSHC at 2209, 1993 CCH OSHD at p. 41,028.

On review of the record, we conclude that a preponderance of the evidence supports the judge's finding that the measures Beta took to implement and enforce procedures for safety monitoring were not so deficient as to constitute intentional disregard of the

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[7]We disagree with the Secretary's contention that the judge set forth an erroneous legal test for a willful violation. Reading his decision in its entirety, we conclude that the judge did not hold that a willful violation can be established only by proof of indifference to employee safety. Rather, the judge plainly acknowledged the two independent elements of willfulness: plain indifference to employee safety *or* disregard for the requirements of the standard.

standard's requirements or plain indifference to employee safety. Beta plainly acted in an objectively reasonable manner and thus manifested good faith through the establishment and implementation of its comprehensive safety program. *Marmon Group, Inc.*, 11 BNA OSHC 2090, 2092, 1984-85 CCH OSHD ¶ 26,975, p. 34,643 (No. 79-5363, 1984). *Compare Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1611, 1613, 1992 CCH OSHD ¶ 29,673, pp. 40,208, 40,210 (No. 87-2007, 1992) (minimal measures to provide for employee safety will not negate willfulness where there are other circumstances, such as the casual attitude of a foreman to the requirements of the standard, indicating that the employer consciously disregarded the standard). Furthermore, contrary to the Secretary's argument before us on review, Beta's prior violations of section 1926.500(g)(1) are too limited to establish a state of mind that arises to the level of willfulness. Generally speaking, the mere existence of a final order for a substantially similar violation does not prove that a subsequent violation is willful. *Id.* at 1613, 1992 CCH OSHD at p. 40,209. The record here shows that Beta, which had approximately 125 employees at the time of the fatality, is a large roofing contractor which has worked on numerous roofing projects throughout the Washington, D.C. metropolitan area. As previously indicated, at times it works on a substantial number of jobs concurrently. For example, Randol named five other worksites where Beta was performing roofing work at the same time as the worksite involved in this citation, and she testified that she sometimes visits as many as four or five jobs in one day. In our view, a history of three violations of section 1926.500(g)(1) over a period of five years is not sufficiently significant in light of the extent of Beta's roofing work to put Beta on notice that its procedures and safety program were inadequate. *J.A. Jones*, 15 BNA OSHC at 2211, 1993 CCH OSHD at pp. 41,029-30. We also note, as did the judge, that these violations predated Allen's employment with Beta and the subsequent improvements in Beta's safety program which are well detailed in the record.[8]

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[8]We also reject the Secretary's specific objections to the adequacy of Beta's safety program. The Secretary contends that the instructions given to employees were not set forth as formal, established work rules because they do not appear in Beta's written safety manual. While the procedures Beta expected its employees to follow are not fully documented in the written safety program material introduced into evidence, it is clear that they were adequately communicated to the employees and that the employees understood them. The (continued...)

The judge assessed a penalty of $2500 for the serious violation of the Act. Considering the criteria set forth in section 17(j) of the Act, 29 C.F.R. § 666(j), particularly the gravity of the violation, we find the judge's assessment appropriate.[9]

III. ORDER

For the reasons stated, the judge's decision finding Beta in serious but not willful violation for failing to comply with section 1926.500(g)(1)(iii) and assessing a penalty of $2500 therefor is affirmed.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: October 8, 1993

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[8](...continued)
substance of a safety program rather than its formal aspects determine the adequacy of the program. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1287, 1993 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993). The Secretary also asserts that Beta did not instruct its monitors how far they could be from the employees they were monitoring. That contention is not supported by the record, as Ahalt testified that he was told that he should be approximately 10 feet away.

The Secretary contends that Allen's improvements to the safety program dealt only with employee training and not the enforcement of safety rules. The Secretary notes that while the judge did not regard Beta's conduct as arising to the level of willfulness, he did criticize Beta for not showing that it had taken "active measures" to detect violations of safety rules, and he also stated that the evidence of sanctions for violations was "sparse." The record shows, however, that Ahalt understood that he was required to monitor employees for compliance with safety rules and that Beta had disciplined employees for infractions. To the extent that the judge found substantial deficiencies in Beta's safety program in these areas, we conclude that the evidence is to the contrary.

[9]Shortly before the occurrence of the violation at issue here, the maximum penalty permitted for a serious violation of the Act was raised to $7000. Section 17(b) of the Act, 29 U.S.C. § 666(b), *amended by* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990).

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SECRETARY OF LABOR, Complainant, v. BETA CONSTRUTION COMPANY, Respondent.	:	Docket No. 91-0102

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on October 8, 1993. **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.
Executive Secretary

October 8, 1993
Date

Docket No. 91-0102

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SECRETARY OF LABOR
Complainant,
v.
BETA CONSTRUCTION
Respondent.

OSHRC DOCKET
NO. 91-0102

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 July 1, 1992. The decision of the Judge will become a final order of the Commission on July 31, 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 July 21, 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: July 1, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0102

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Complainant,	:	
v.	:	Docket No. 91-0102
BETA CONSTRUCTION CO.,	:	
Respondent.	:	

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For Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 et. seq., ("the Act"), to review a citation issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Following a fatality investigation at a workplace located at the District of Columbia Correctional Facility at 1901 E Street, S.E. Washington, D.C., the Secretary of Labor issued one citation. The complaint alleges concerning citation Number 1, Item 1, that the

respondent, Beta Construction Company (Beta), violated section 5(a)(2) and 29 C.F.R. sec. 1926.500(g)(1)(iii). It charges that on November 14, 1990, the safety monitor failed to maintain visual sighting of employees working on the roof and could not provide verbal warning to a worker approaching the unguarded roof edge of the danger of falling over. The Secretary further alleged that this was a willful violation. A penalty of $9000 was proposed for this violation.

Beta filed a timely notice of contest placing in issue the sole item included in willful Citation Number 1. A hearing was held on October 15-17, 1991, in Washington, D.C. All parties were represented and filed post-hearing briefs.

BACKGROUND

Beta is a corporation with a principal office and place of business at 9010 Edgeworth Drive, Capitol Heights, MD 20743. The Corporation at all times herein was engaged in roofing work. Beta admitted and stipulated to the jurisdictional requirements of the Act.

Compliance Officer, (CO), Leonard M. Moore, Jr. conducted a fatality investigation on November 15, 1990. The investigation concerned the death of Stanley Lewis an employee who on November 14, 1990 fell from the roof where he was working. (Tr. 27).

Beta performed roofing work on roofs A-D at the D.C. Jail. Roof D (where the fatality occurred) was 34 ft. 4 in. by 28 ft. 9 in. and the parapet along the roof's perimeter was 18 1/2 in. Roof D was 73 ft. 8 in. from the ground. (Tr. 32-33).

At the time of the accident Stanley Lewis (the decedent) and Alpheus Lawson were working on roof D applying a waterproofing membrane called bituthane. The decedent was walking backwards towards the edge of the building unrolling the membrane, while Lawson was on his knees smoothing it onto the roof's surface. (Tr. 30-33). Lovell Lee Ahalt, the job foreman, was on roof D at the time. (Exh. G-4). Vernon Godsey, a laborer, was assigned to another roof where he was repairing a leak. (Exh. G-6).

Ahalt entered into a brief conversation with Lewis and Lawson on roof D. Ahalt then turned his back to them, and went to get materials approximately 40 feet away. Lewis and Lawson continued their work. Shortly afterwards, Ahalt and Lawson heard the ripping

of paper. When they looked to see what the noise was, they immediately realized that Lewis had fallen from the roof. Neither saw the actual fall. (Exh. G-4, Exh. G-5).

DISCUSSION

ALLEGED VIOLATION OF 29 C.F.R. sec. 1926.500(g)(1)(iii)

The cited standard reads in pertinent part:

sec. 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 unprotected sides and edges of the roof as follows

. . .

(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.

sec. 1926.502 Definitions applicable to this subpart

. . .

(p) For the purposes of paragraph (g) of sec. 1926.500, the following definitions shall apply:

. . .

(7) "Safety monitoring system"- a safety system in which a competent person monitors the safety of all employees in a roofing crew, and warns them when it appears to the monitor that they are unaware of the hazard or are acting in an unsafe manner. The competent person must be on the same roof as and within visual sighting distance of the employees, and must be close enough to verbally communicate with the employees.

To prove a violation of a standard the Secretary must show that (1) the standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer knew or could have known with the exercise of reasonable diligence of the condition. *Daniel International Corp.*, 9 BNA OSHC

2027 (no. 76-181, 1981). Here there is no dispute that the standard applies to the cited condition. Furthermore, the issue of exposure could not be disputed. It is well established that there were men working on the roof where the alleged violation occurred. At issue is whether the Secretary proved the remaining two elements of her prima facie case.

Two opposing allegations have been proffered regarding the safety monitor on November 14, 1990. The Secretary contends that Ahalt, the foreman and regular safety monitor, was the safety monitor on the day of the accident. The respondent disagrees and argues that on this day on this day Ahalt had appointed the decedent and his coworker to monitor each other. The preponderance of the evidence suggests that respondent's claim is without merit, and that Ahalt was the safety monitor on the day of the fatality.

CO Moore arrived at the premises on November 14, 1990, and investigated the accident. On November 19, 1990, he interviewed and took statements from the men who were at the worksite on the day of the accident. These statements established that Ahalt was the safety monitor on the day in question. Ahalt stated that "[o]n November 14, 1990, I was the Foreman and also the Roof Monitor." (Exh. G-4). Ahalt read and corrected the CO's transcript. (*Id.*, Exh. G-8 62). Lawson's signed statement also stated that "Mr. Ahalt is the Foreman and also the Safety Monitor." (Exh. G-5).

Following the issuance of the citation, at an informal meeting between OSHA and respondent's representatives, Beta's attorney and Beta's safety director, Allen, Beta acknowledged that Ahalt was the safety monitor. (Tr. 266, 273). It was not until some time later that the second scenario began to develop.

Allen testified that he was made aware in January 1991, that Lawson was the safety monitor, not Ahalt. (Tr. 385). In depositions taken eight months after the accident, Ahalt and Lawson stated that Lawson was the safety monitor. (Exh. G-8 24, Exh. G-10 22). Ahalt stated that he was working on roof B with Godsey on November 14. (Exh. G-8 20-21). These changes contradict the prior signed statements.

Ahalt's claim that he was working with Godsey on the day of the accident is contradicted by Godsey's signed statement that he was "working alone" on another roof. (Exh. G-6). Lawson had never been a safety monitor before and has never been one since. (Exh. G-10 64-65, Tr. 562). Ahalt testified that he was the safety monitor on every other

day. (Exh. G-8 54). Furthermore, Lawson was never appointed the safety monitor. Both Ahalt and Lawson said that Ahalt warned them to watch themselves, but this warning falls far short of a formal delegation of authority. (Exh. G-8 24-25, Exh. G-10 25, Tr. 520).

The evidence adduced from Lawson comprising his signed statement, deposition, and oral testimony is one of conflicting statements which calls into question his memory, mental capacity, truthfulness, and reliability. Initially in his signed statement, Ahalt was the safety monitor; later in his deposition and testimony he seems to be the chosen one; in his deposition he states that both he and Lewis continued to work on the roof and did not speak to Ahalt. (Exh. G-10 42-43), but at the hearing he testified that they stopped working and spoke to him. (Tr. 530, 550-51). I had the opportunity to observe Lawson as he testified, and assess his overall demeanor. His testimony fluctuated and lacked the definiteness and certainty associated with truth. Having considered all the circumstances which bear upon the weight of his testimony (it was apparent he was attempting to serve the best interests of his employer), I cannot accept his contention of his being the safety monitor on the date of the fatality, and reject his testimony thereon. The preponderance of the credible evidence establishes that Ahalt was the safety monitor on roof D on the date of the fatality.

It is evident that Ahalt did not fulfill his duties as safety monitor under sec. 1926.500(g)(1)(iii) and sec. 1926.502 (p)(7). There is no dispute that at the time of the accident Ahalt had his back to the workers and was some 40 feet away from them. (Exh. G-8 23, Exh. G-4). Thus, Ahalt could not have been carrying out his duties as a safety monitor which required him to be "within visual sighting distance of the employees, and . . . close enough to verbally communicate with the employees." 29 C.F.R. sec. 1926.502(p)(7). He therefore failed to warn Lewis of the imminent danger. His actions were a clear violation of the standard.

The Secretary must also establish that Beta knew or should have known with the exercise of reasonable diligence of the violative condition. *Daniel International Corp.*, 9 BNA OSHC at 2027. It is well established that "[t]he actual or constructive knowledge of an employer's foreman can be imputed to the employer." *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991). It is the substance of an employer's delegation of authority over other employees that is of primary importance when determining if this relationship

exists. *Iowa Southern Utilities Co.*, 5 BNA OSHC 1138, 1139 (No. 9295, 1977). Here, Ahalt was the on site representative of Beta in charge of safety. He was relied upon by the other workers as their foreman and safety monitor. This responsibility sufficiently tabled Ahalt as one with the authority to direct employees, and as one who had the mantle of being a management supervisor. His supervisory authority is sufficient to impute his conduct to Beta.

Beta further contends that the accident was a result of unpreventable employee misconduct. To prove this claim Beta must show: (1) the employer has established work rules designed to prevent the violation; (2) it has adequately communicated these rules to its employees; (3) it has taken steps to discover violation; (4) it has effectively enforced the rules when violations have been discovered. *Jensen Construction Co.*, 7 BNA OSHC 1477 (No. 76-1538, 1977).

In light of the total evidence of record, I find that this defense is without merit. There was no proof of a work rule requiring that a safety monitor remains within visual sighting distance of an employee. It was not shown, if such a rule exists, that it was communicated to employees. Beta did not show any active measures that it undertook to discover violations of established work rules. Although Beta submitted evidence of past employee sanctions, the evidence was sparse and does not lead me to conclude that there has been effective enforcement of safety regulations. (Exh. R-7). Beta did not discipline either Ahalt or Lawson after this clear failure of the safety monitoring system. Beta has not shown that it has acted to prevent a similar accident in the future.

The Commission has held that an employee misconduct defense is more difficult and rigorous to prove when the employee is a supervisor. Beta would have to show that it adequately trained and supervised Ahalt to sustain this defense. *Daniel Construction Co.*, 10 BNA OSHC 1549, 1552 (No. 16265, 1982). Beta failed to prove it had an adequate training program for its safety monitors. It did not show an ongoing supervision of Ahalt. As the Commission stated in *Jensen Construction Co., supra*, "Moreover, the fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax." Beta has failed to establish its affirmative defense. The preponderance of the evidence exhibits that Beta violated 29 C.F.R. sec. 1926.500(g)(1)(iii).

WILLFULNESS

A violation of the Act is willful if "it was committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee safety." *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1595 (No. 85-12, 1985). A willful charge should not be upheld without clear and convincing proof of a defendant's lack of regard for employee safety. It is not justified if the violation is only marked by carelessness or lack of diligence in discovering or eliminating a violation. A "heightened awareness" of the violation of the standard must be shown to sustain a willful citation. *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987). After reviewing the evidence presented regarding Beta's safety program, I do not believe that Beta has shown an intentional disregard for the Act's requirements, or a plain indifference to employee safety. Thus, the cited violation must be reduced from willful to serious.

The evidence presented shows that Beta does have an active safety program. Its safety manual, while deficient in some respects, does cover a wide range of safety measures its employees must follow. There was repeated testimony that Beta has weekly tool box talks where the topic of conversation is employee safety. (Tr. 357, Exh. R-8C-E). The CO did not give Beta a citation for an inadequate safety program. In fact, the CO stated that Beta's program was the best that he had ever seen by a roofing contractor. (Tr. 129).

The Secretary sought to support its willful citation by the introduction of three past Beta violations of sec. 1926.500(g)(1)(i)-(iii). (Exh. G-13-17). While these citations could have been relevant to establishing a pattern of indifference to employee safety, they fail to do so in the present case. One of the citations was approximately eight years old, and its relevance to the present case is negligible. The other two citations were given before Beta hired a new safety director. (Tr. 336). The safety director said that he improved Beta's "adequate" safety program by supplementing its safety manual and increasing materials for tool box talks. He also implemented an employee orientation program that contains safety indoctrination. (Tr. 337).

The totality of the evidence presents a picture of Beta attempting to strengthen and reinforce its safety program. Overall, 'this reflects a desire to carry out its safety and health

responsibilities. Beta could not be said to be indifferent or have a disregard for the requirements of the Act. In short the evidence does not show an indifference to employee safety tantamount to willfulness, and I so find. Beta, however, did commit a serious violation of 29 C.F.R. sec. 1926.500(g)(1) (iii).

PENALTY

The Secretary proposed a penalty of $9000 for a willful violation of the cited standard. Due to the finding that the violation was serious, and not willful, this penalty is inappropriate. The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. *Long Manufacturing Company*, 554 F.2d 902 (8th Cir. 1977). According to section 17(j) of the Act, the Commission must take into consideration "the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."

I find that a penalty of $2500 is appropriate considering the size of Beta; the gravity of the violation, the death of an employee; its good faith; and its history of past citations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact relevant and necessary to a determination of the contested issues have been found specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact and Conclusions of Law inconsistent with this decision are denied.

ORDER

Based upon the Finding of Facts, Conclusions of Law. and the entire record, it is hereby ordered:

1. Item 1 of Citation no. 1 is amended to a serious violation and as amended is affirmed. A total penalty of $2500 is assessed.

IRVING SOMMER
Judge

DATED: JUN 30 1992
Washington, D.C.