SECRETARY OF LABOR, Complainant, v. STAHL ROOFING, INC., Respondent.	OSHRC Docket Nos. 00-1268 & 00-1637

DECISION

Before: RAILTON, Chairman; ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

Before us is a decision in two cases involving Stahl Roofing, Inc. Each case arises out of an inspection by a compliance officer of the Occupational Safety and Health Administration ("OSHA") of a worksite where Stahl was installing roofing on new homes. As a result of those inspections, OSHA issued citations alleging that Stahl had violated construction safety and health standards on fall protection and eye protection. Stahl contested the citations, and a hearing was held before Administrative Law Judge Sidney J. Goldstein, who affirmed the citations. For the reasons below, we reverse the judge's findings and vacate the citations.

Background

On June 2, 2000, a compliance officer was driving through a subdivision near Loveland, Colorado, when he saw two men installing asphalt shingles on the roof of a house. Although one of the roofers was wearing a safety harness connected to an anchoring point at the ridge, it appeared that the other roofer was not "tied off." It also appeared that one of the men was using a pneumatic nail gun but was not wearing eye protection. Based on these observations, OSHA cited Stahl for a serious violation of the eye protection standard at 29 C.F.R. § 1926.102(a)(1)[1] and a serious violation of the fall protection standard at 29 C.F.R. § 1926.501(b)(11). After Stahl contested the citation, the Secretary filed a complaint in which she amended the fall protection item to allege a violation of section 1926.501(b)(13),[2] instead of the section originally specified. The judge affirmed both items of the citation, and Stahl sought review of the judge's decision.

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[1]That standard provides:

> **§ 1926.102 Eye and face protection.**
> (a) *General.* (1) Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

[2]That standard provides:

> **§ 1926.501 Duty to have fall protection.**
> * * *
> (b) * * *
> (13) *Residential construction.* Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision of paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1916.502.

The crew at this site was made up of three roofers. The job began on June 1, 2000, and was in its second day when the compliance officer observed the employees on the roof. The peak of the roof was approximately 28 feet high and its eaves were approximately 23 feet above the ground. Stahl's field supervisor for this area, David Scherer, had visited the worksite twice on June 1– early in the morning and then again later that afternoon. During the first visit, he determined that the employees had the necessary fall protection and eye protection. When he returned, the roofers were working on the roof, all of them were tied off, and they were wearing eye protection. Scherer also visited the site on June 2, the morning of the OSHA inspection, before the employees went onto the roof. He determined that they had the appropriate safety equipment. He left to perform other duties and learned about the OSHA inspection from his office. He immediately returned to the office and traveled to the worksite with Stahl's safety manager, Donald Smith. When they arrived, the compliance officer had left, but the two employees admitted that they had been working without proper eye or fall protection. Stahl issued both employees written warnings that afternoon and fined them $100 each.

Stahl does not assign a supervisor to each jobsite full time. Its field supervisors are each assigned a different territory, and crews are assigned wherever work happens to be. The number of crews for which a supervisor is responsible will therefore vary from day to day, but the supervisor is expected to visit each worksite in his territory at least once a day. During the period covered by these cases, June through August, 2000, Stahl averaged 70-80 jobs a week, with each job lasting one or two days. On a typical day, Stahl would have 13-14 crews working, all overseen by seven supervisors plus the company's safety director and its safety manager. The safety director and the safety manager both conducted unannounced worksite visits to observe the company's employees.

Previously, Stahl was cited by OSHA for fall protection violations. In 1995, a citation was issued but withdrawn by OSHA after meeting with Stahl. In 1998, Stahl was cited twice

in a two-week period by different OSHA offices, but both citations were withdrawn pursuant to settlement agreements.

Discussion

The only issue on review is whether the Secretary has carried her burden of establishing that Stahl had knowledge of the violations.[3] There is no suggestion here that Stahl had actual knowledge of the violations committed by its roofers. The question is whether it had constructive knowledge; that is, whether it failed to act with reasonable diligence to discover and prevent the violations. The judge concluded that Stahl had constructive knowledge "that its safety program was ineffective or improperly communicated." He predicated his decision on the fact that Stahl was previously cited for similar violations. For the following reasons, we reverse, finding that the Secretary failed to establish that Stahl had constructive knowledge of these violations.

An inquiry into whether an employer was reasonably diligent involves several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations. *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407, 2001 CCH OSHD ¶ 32,331, p. 49,552 (No. 99-707, 2001).

With regard to the first factor, Stahl has work rules requiring the use of both eye protection and fall protection. Stahl's rule on fall protection requires that safety harnesses be worn and workers be tied off at any unprotected position above six feet. The Secretary asserts that Stahl's rule is not specifically tailored for roofing, that it should cover what equipment should be used under what conditions, and that it should include pictures.

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[3]To prove a violation of a standard, the Secretary must establish that (1) the standard applies to the conditions cited; (2) the terms of the standard were not met; (3) employees had access to the violative conditions; and (4) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence. *Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2170, 2171, 2000 CCH OSHD ¶ 32,137, p. 48-443 (No. 99-257, 2000). The first three elements are not before us here.

However, the rule reflects the requirements of the cited standard. *See, e.g., El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1425 n.6, 1993-95 CCH OSHD ¶ 30,231, p. 41,621 n.6 (No. 90-1106, 1993) (employers must model rules on applicable requirements). We therefore find no inadequacy in Stahl's safety rule covering fall protection. Similarly, Stahl's rule covering eye protection states that safety glasses are required for employees performing any operation that may present the hazard of eye injury, such as driving nails. Again, that rule covers the situation cited here by the Secretary. Although the Secretary criticized its placement in the section dealing with work clothes, she has not asserted that it is inadequate to protect employees. Based on these two safety rules, it is clear that Stahl anticipated the hazards contemplated by the cited standards and formulated rules to prevent employee exposure to them.

The record also shows that the rules were adequately communicated to Stahl's employees. Stahl's safety manager, who had taken OSHA's construction safety course and received fall protection training from the manufacturer of the safety equipment Stahl uses, described in detail how he trains every new employee before the employee is put on the payroll. He gives the applicant a copy of Stahl's safety policy and goes over every safety rule, with the help of an interpreter, if necessary. He then demonstrates how to use the safety equipment that is issued to all new employees. Before being hired, the applicant must demonstrate the use of the equipment and sign an acknowledgment form agreeing to obey Stahl's safety rules. In addition, Stahl periodically holds company-wide safety meetings, which include all supervisors and roofers, and weekly "toolbox" meetings at which safety issues are discussed, including materials provided by the company's insurance carrier. Stahl's supervisors also independently conduct safety meetings with their crews. The record establishes that the two employees involved in the violations here recently attended toolbox meetings at which eye protection and fall protection were discussed.

Stahl also has a program of progressive discipline for any employee who violates its safety rules, beginning with an oral reprimand and progressing through a written reprimand,

docking pay, and termination. While there is some flexibility based on the severity of the violation and the attitude of the employee being corrected, the record indicates that the progression is followed. Oral warnings are not documented, so it is unclear how many of them have occurred. However, written warnings are recorded, and exhibits in the record documenting Stahl's enforcement show that employees have been fined and terminated. The Secretary has not shown what more Stahl should have done with regard to enforcement.

The record also shows that Stahl provided adequate supervision. The Secretary argues that adequate supervision was impossible because Stahl's supervisors were "spread incredibly thin across a dauntingly large territory."[4] We find little support for this claim. Stahl's supervisors are expected to visit each worksite at least once a day, and the record indicates that they come close to meeting this goal. In addition, Smith, the safety manager, visits ten to fifteen sites a week, and the safety director, who is also the company president, makes unannounced visits to worksites during the week. The Secretary argues that Stahl should have provided more supervision, but she failed to specify how much would be necessary to assure compliance, what additional measures Stahl should have taken, or how Stahl's supervision was insufficient. *See Trinity Marine Nashville, Inc.*, 19 BNA OSHC 1015, 1017, 2000 CCH OSHD ¶ 32,158, p. 48,527 (No. 98-144, 2000), *rev'd on other grounds*, 275 F.3d 423 (5th Cir. 2002).

The thrust of the Secretary's argument seems to be that the very fact the violations occurred proves Stahl's supervision was inadequate. However, an "employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard." *Texas A.C.A., Inc.*, 17 BNA OSHC 1048,

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[4]As an example, the Secretary asserts that one of Stahl's supervisors had 6-8 crews under him and could not possibly have inspected them all. The record indicates, however, that this supervisor was simply asked how many crews he supervised in early June, and his answer may not have been limited to a single day.

1051, 1993-95 CCH OSHD ¶ 30653, p. 42,527 (No. 91-3467, 1995) (emphasis in original). "Where the evidence fails to show that the employer should have perceived a need for additional monitoring or that such an effort would have led to the discovery of instances of employee misconduct, increased supervisory efforts to monitor employee compliance are not required." *Dover Elevator Co.*, 16 BNA 1281, 1287, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993).

In determining whether Stahl should have perceived the need for additional monitoring, we note that the employees involved had good safety records and had not previously been found in violation of Stahl's safety rules. They were using fall protection and eye protection when Scherer inspected the worksite the previous afternoon and one of them was tied off for most of the OSHA inspection. Although Stahl's safety manager, Smith, had not yet inspected this particular site, he had inspected this crew at other sites and found the employees always using their safety equipment. The crew's work history therefore gave Stahl no notice that greater supervision was necessary. "Insisting that each employee be under continual supervisor surveillance is a patently unworkable burden on employers." *New York State Elec. & Gas Corp. v. Secretary*, 88 F.3d 98, 109 (2d Cir. 1996).

The Secretary argues that there is too little documentation of Stahl's disciplinary program to demonstrate diligent enforcement. The record simply does not support this claim. On the contrary, the evidence before us shows that Stahl's fall protection rules were being enforced. We note, in particular, that the very afternoon following OSHA's morning inspection, both noncomplying employees were given written reprimands and fined, and one of them was subsequently terminated for committing a second safety violation. Thus, the record shows that Stahl disciplined its employees "on the few occasions when it found them violating safety rules." *Kerns Bros. Tree Svc.*, 18 BNA OSHC 2064, 2070, 2000 CCH OSHD ¶ 32,053, p. 48,006 (No. 96-1719, 2000).

We also find little merit to the Secretary's claim that, under the circumstances here, Stahl's two prior citations from 1998, both of which were withdrawn, gave Stahl notice that

its safety program was inadequate. As discussed above, the Secretary has failed to show that Stahl was not reasonably diligent in addressing fall and eye protection hazards at its worksites. In other words, the Secretary has not shown that Stahl's safety program at the time of the current inspection was inadequate. In the settlement agreements, the Secretary withdrew the citations, and Stahl stipulated that it would conduct additional fall protection training for its supervisors, stressing the importance of frequent supervisory inspections of its worksites. Our review of the record shows that the training was conducted, and we find nothing to indicate that the other commitment was not fulfilled as well.

OSHA's area director testified that a company's history of accidents is an important factor to consider when evaluating the effectiveness of its safety program. Here, the record shows that Stahl had no accidents resulting from a failure to use fall protection or eye protection. In fact, in its one "near miss," a serious fall was averted because the employee was tied off when a gas line explosion nearby blew him off his feet. We also consider the fact that, on the questionnaire Stahl sends to builders asking for evaluations of its crews, the first question is about safety. Several completed forms were introduced into evidence, and the evaluations unanimously indicated that Stahl's employees used fall protection, eye protection, and other personal protective equipment.

The Secretary argues that because Stahl's employees are paid according to the amount of roofing they install, Stahl had notice that there was an incentive to ignore the rules. However, there is no evidence that employees actually disregarded safety rules because of the method by which their pay was calculated. We see no basis in the record to find that Stahl's method of calculating pay had a negative effect on employee safety.

We find that the Secretary has not carried her burden of proving that Stahl failed to exercise reasonable diligence. Accordingly, we conclude that the knowledge element of the Secretary's burden of proof has not been established and that both items must be vacated.[5]

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[5]We would vacate the eye protection item even if knowledge had been shown. The standard (continued...)

Background

On August 9, 2000, the same compliance officer involved in the previous case was driving past a residential construction site near Mead, Colorado, when he observed what appeared to be safety violations at two different houses under construction. At one house, two individuals were on the roof without fall protection. At the other, several employees were on a scaffold that did not appear safe. The compliance officer elected to inspect the scaffold first because a larger number of individuals were exposed, and when he returned to the other house after that inspection, he found the two men still on the roof. He asked them to come down but had difficulty communicating with them because they did not speak English and he did not speak Spanish. At that point, two other individuals arrived at the site, one of whom identified himself as Armando Robles. Robles said that the crew's safety

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[5](...continued)
mandates that employees be provided with eye and face protection when their work presents the potential for eye or face injury. "Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding a case, even though it may clearly differ from the Commission's law." *D.M. Sabia Co.*, 17 BNA OSHC 1413, 1414, 1995-97 CCH OSHD ¶ 30,930, p. 43,058 (No. 93-3274, 1995), *vacated and remanded on other grounds*, 90 F.3d 854 (3rd Cir. 1996). Under the law of the circuit where this case arose, the Tenth Circuit has found that "the plain meaning of the phrase 'shall be provided' is that an employer must furnish or make available," not require use. *Borton, Inc. v. OSHRC*, 734 F.2d 508, 510 (10th Cir. 1984) (citing *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1118-19 (10th Cir. 1977)). Here, both employees had been issued protective eyewear and had been wearing it when the supervisor inspected the worksite the previous afternoon. The compliance officer's testimony that he did not see any eye protection at the site does not establish that there was none, however, because he admitted he could not speak Spanish and therefore was unable to ask the employees whether they had eye protection. He left the site before Stahl's safety manager arrived with the supervisor for this worksite. After the inspection, the employee who had been using the nail gun without eye protection admitted to the safety manager that there was eye protection in the truck but that he had not been wearing it. On this record, it is clear that Stahl had provided eye protection to its employees and, under the law of the Tenth Circuit, had complied with the standard.

harnesses were in his vehicle because he was bringing them from a previous job. Robles was able to get the two men to come down from the roof, and the compliance officer took their names: Juan Iuzuuza and Oscar Ortiz.

The compliance officer estimated it was about half an hour from the time he first saw the men on the roof until Robles got them down, and he also estimated that they were exposed to a fall of 22 feet from the edge of the roof to the ground. Based on these observations, OSHA cited Stahl for a violation of the construction safety fall protection standard at 29 C.F.R. § 1926.501(b)(13), the same standard at issue in the other case. Stahl contested the citation, and Judge Goldstein affirmed the citation as part of the same discussion of the previous case. Again, Stahl asserts that it should not be held responsible for the violation because it had no knowledge of it.

At the hearing, the compliance officer described Robles as "the foreman" and said that Robles admitted he knew the two men should have been wearing fall protection. Because Robles spoke English and had the crew's equipment in his vehicle, the compliance officer apparently assumed that he was in charge of the crew, but the evidence does not support that assumption. Robles denied that he had ever indicated he was a foreman, and the record establishes that Robles was not a supervisor. Any knowledge he may have had, therefore, cannot be imputed to Stahl. *Cf. Access Equip. Sys.*, 18 BNA OSHC 1718, 1726, 1999 CCH OSHD ¶ 31,821, p. 46,782 (No. 95-1449, 1999) (knowledge of supervisor can be imputed to employer).

Robles was one of a three-man crew that included Oscar Ortiz and Jorge Sanchez, all roofers. They had begun work on the house in question two days earlier, on Monday, August 7, 2000. After working there for one day, they were assigned to a site in Denver and worked there Tuesday and Wednesday morning. About 11:00 Wednesday morning, August 9, the crew reached a point where it had to stop work because other trades had to take equipment and fixtures into the house through the roof. Wanting to continue working, the crew decided to return to the Mead site and finish there. The crew put its equipment in Robles' car, and

Robles and Sanchez went in that car, while Ortiz took his own vehicle. Ortiz arrived at the Mead site before Robles and Sanchez.

Both locations were in the territory of one supervisor, Robert Reinhard, who had inspected the crew at the Mead site on Monday, and at the Denver site on Tuesday and Wednesday mornings. Reinhard did not know that the crew had moved from the Denver site to Mead until he was informed about the OSHA inspection. He became the field superintendent for that area on July 31, 2000, little more than a week before the inspection, and his predecessor, Brian Bridgitte, had told him this was one of Stahl's better crews. Reinhard was unaware that Ortiz, who was hired May 19, 2000, and given Stahl's safety training, had been given a written warning by field supervisor Leonard Woodyard on July 13, 2000, for not wearing safety equipment and was warned that his next violation would result in a deduction from his pay.

As noted, Ortiz was one of the two individuals observed on the roof by the compliance officer. The other person identified himself as Juan Iuzuuza, but Stahl did not have an employee by that name. The third member of the three-man crew, Sanchez, traveled with Robles and arrived after the compliance officer attempted to interview the two individuals he had observed on the roof. It therefore appears that Iuzuuza was not a Stahl employee.

Discussion

Because no supervisor was present when the violation occurred, Stahl lacked actual knowledge of the violation. As in the previous case, the question is whether the Secretary established that Stahl had constructive knowledge that the violation was likely to occur because it failed to exercise reasonable diligence to prevent it. Although the facts presented here make this a closer case, we find that the Secretary has not met her burden to show constructive knowledge.

As discussed above, the Secretary failed to establish that Stahl was not exercising reasonable diligence at the time of the June citation. However, the circumstances of this case raise greater concerns about Stahl's safety program because the June citation should

have alerted Stahl that its training and enforcement may not be completely effective. We find, however, that given the steps Stahl took after the June citation, the Secretary has not shown that Stahl knew or should have known that even greater efforts were necessary. The two employees involved in the June violations were given written warnings and their pay was docked the day of the subject inspection. One of them was subsequently fired when he was found committing a second violation. In connection with the August violation, Ortiz was given a written reprimand and was fined more than the others because he had a prior warning. Ortiz accepted the fine and had no further violations at the time of the hearing. This is not a case where Stahl began its enforcement efforts only after it was cited in these cases. The record shows that it had consistently issued written reprimands and fines before the two citations here. *Cf. Precast Services, Inc.*, 17 BNA OSHC 1454, 1455-56, 1995-97 CCH OSHD ¶ 30,910, pp. 43,035 (No. 93-2971, 1995) (unpreventable employee misconduct affirmative defense; employer introduced no evidence of pre-inspection discipline), *aff'd*, 106 F.3d 401 (6th Cir. 1997) (unpublished).

The fact that his current supervisor not only was unaware that Ortiz had recently been written up for a safety violation but had been told that this was a good crew by his predecessor is a matter of concern to us because it suggests a lack of communication within the company regarding safety violations. While Reinhard was not a field supervisor at the time of Ortiz' first violation, his predecessor should have included that information in his critique of the crew. Nonetheless, the record shows that Ortiz was given a written reprimand for the earlier violation and also fined for the instant violation, demonstrating that Stahl was in fact detecting violations and enforcing its rules.

Under these circumstances, we find the Secretary has failed to carry her burden of showing that the steps taken by Stahl fell short of reasonable diligence. We therefore find that the Secretary has failed to prove knowledge and vacate this item.

Conclusion

For the reasons set out above, we vacate both items alleged in the citation in Docket Number 00-1268 and the single item in Docket Number 00-1637.

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

/s/
James M. Stephens
Commissioner

Dated: February 21, 2003

SECRETARY OF LABOR, Complainant, v. STAHL ROOFING, INC., Respondent.	OSHRC Docket Nos. 00-1268 & 00-1637

APPEARANCES:

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Rodney L. Smith, Esq., Sherman & Howard, Denver, Colorado

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

In these two cases the Secretary of Labor seeks to affirm two citations issued by the Occupational Safety and Health Administration to Stahl Roofing, Inc. for the alleged violations of safety regulations adopted under the Occupational Safety and Health Act of 1970. The matters arose after a compliance officers for the Agency inspected Respondent's worksites in Denver and Littleton, Colorado, concluded that the company was in violation of safety standards related to the roofing industry, and recommended that the citations be issued. The employer disagreed with the citations and filed notice of contest. After complaints and answers were filed with this Commission, the parties request that the matters be consolidated for the purpose of hearing was granted, and they will be disposed of in this one report.

Documents in the record disclose that on February 27, 1998, a representative of the Administration inspected a Littleton, Colorado roofing worksite of the Respondent. After the visit the Agency issued a citation to the company for the alleged violation of a safety regulation found at

29 CFR §1926.501(b)(13) which provides that each employee engaged in residential construction activities six feet or more above floor levels be protected by guardrail systems, safety nets or personal fall arrest systems. The citation charged that the company at its Littleton worksite had employees who did not use fall protection or other alternative measures when falls could exceed six feet.

When the Respondent advanced the defense of employee misconduct the parties entered into a settlement agreement whereby the Administration withdrew the citation, and the Respondent agreed to conduct refresher fall protection training for all its field supervisors and to stress the importance of frequent on-site supervision training to assure that required fall protection is consistently maintained.

Again, on March 6, 1998, an Administration inspector visited a Respondent roofing worksite in Denver, Colorado, and concluded that the company violated a safety regulation which provides that each employee on a steep roof with unprotected sides and edges six feet or more above the ground be protected from falling by guardrail systems with toeboards, safety net systems or personal fall arrest systems. The citation alleged that Respondent's employees engaged in the application of roofing shingles were exposed to falls of approximately 30 feet and harnesses were not attached to lifelines. The Respondent advanced the same defense of employee misconduct as in the previous citation, and substantially the same settlement agreement was entered into by the parties wherein the Administration withdrew the citation and the Respondent made the same promises as contained in the Littleton matter.

The current controversies involve subsequent inspections at company worksites in Loveland and Mead, Colorado.

At the hearing an Agency safety officer testified that on June 2, 2000, he inspected a Loveland worksite of the Respondent, observed violations of two safety regulations, and recommended that a two-item citation be issued. Item 1 alleged that the Respondent violated the regulation at 29 CFR §1926.102(a)(1) in that eye and face protective equipment was not used when machines or operations present potential eye or face injury. The regulation provides that employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical agents. Item 2 of the citation stated Respondent's

employees at the Loveland site were observed roofing a house with ground to eaves height of approximately 23 feet without the use of guardrail systems with toeboards, safety net systems, or personal fall arrest systems in violation of the same regulation as in the March 8, 1998 Denver inspection.

Again, on August 9, 2000, the same official visited a Respondent's worksite in Mead, Colorado. There he observed two Respondent's employees at a roof edge about 22 feet above ground without fall protection. According to the inspector one employee, who identified himself as a foreman, told him that the workers used fall protection at another worksite; that he was aware fall protection was needed; and that the equipment was in his car. As a result, the Administration issued another citation to the company for the alleged violation of the same regulation as shown in the February 27, 1999 citation.

The Respondent's president, supervisor, field and safety manager, custom tile division supervisor and roofer testified on its behalf. Summarized, they stated that company policy requires fall protection and safety glasses when appropriate. There is also a safety program which includes safety meetings and training. The Respondent made sure that its employees understood its safety policy, and instructions were given in Spanish, if necessary. All roofers were furnished with safety equipment and instructed in its use. Although the company policy was to inspect jobs daily to assure safety compliance, supervisors could not visit all worksites daily due to their location.

The Respondent does not deny that on the inspective occasions its employees were working on roofing projects without proper fall and eye protection as charged. Nevertheless, the company argues in its posthearing brief that the citations should be dismissed because the Secretary failed to prove that it had actual or constructive knowledge of the alleged violative conditions. Alternatively, the alleged violations were the result of unpreventable employee misconduct.

As pointed out by Respondent, in order to sustain a serious violation, the Secretary must bear the burden of proving four elements: (1) that the appropriate health and safety standard applies; (2) the employer failed to comply with the standard; (3) employees had access to the violative condition and (4) the employer had knowledge or constructive knowledge of the condition. The knowledge may be satisfied by proof either that the employer actually knew, or with the exercise of reasonable

diligence, could have known, of the violative condition. Constructive knowledge may be predicated on the employer's failure to establish an adequate safety and health program to detect hazards.

In its brief the Respondent argues that the Complainant did not establish the fourth item in that there was no proof that the Respondent company had knowledge or constructive knowledge of the conditions. There can be no question that the Respondent received a citation after the February 27, 1998 inspection informing it that its personnel were working without the proper fall protection. When the Respondent entered into the settlement agreement, it had at least constructive knowledge of this situation when it agreed to stress the importance of frequent on-site supervision training to assure that required fall protection is consistently maintained.

Further, when the Respondent received a citation on March 11, 1998, in connection with an inspection at one of its worksites, it was again reminded that its workers were found without proper fall protection. The Respondent was alerted to the shortcomings of its safety program when it entered into the same type of settlement agreement as in the prior citation. I therefore conclude that the Respondent had at least constructive knowledge that its safety program was ineffective or improperly communicated because two citations were issued to the company before the citations under current review were forwarded to it.

The Respondent also advances the defense of employee misconduct. The Commission has ruled that to establish this defense the employer must prove that it established work rules to prevent the reckless behavior or unsafe condition from happening; that it adequately communicated the rule to its employees; that it took steps to discover incidents of noncompliance; and that it effectively enforced the rule whenever employees transgressed it. Further, the employee conduct or exposure must have resulted from "idiosyncratic" "demented," or "suicidal behavior."

In the current cases there appears to be a pattern of employee disregard of the safety belt workplace rule; Respondent's safety program was, therefore, ineffective. Inasmuch as multiple violations occurred, I conclude that the employer's workplace safety rules were inadequately communicated and not always effective.

This is not a matter of a single employee acting in violation of safety rules. Where a number of workers are operating in danger zones, the Respondent has failed to establish the defense of unpreventable employee misconduct

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In conclusion, with respect to OSHRC Docket No. 00-1268, I find:

1. That the Respondent was in violation of the regulation found at 29 CFR §1926.102(a)(1), and the recommended penalty of $1,250.00 is AFFIRMED.
2. That the Respondent was in violation of the regulation found at 29 CFR §1926.501(b)(13), and the recommended penalty of $1,250.00 is AFFIRMED.

With respect to OSHRC Docket No. 00-1637, I find:

3. That the Respondent was in violation of the regulation found at 29 CFR §1926.501(b)(13), and the recommended penalty of $1,125.00 is AFFIRMED.

/s/
Sidney J. Goldstein
Judge, OSHRC

Dated: April 4, 2001