UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Crowther Roofing & Sheet Metal of Florida, Respondent.	OSHRC Docket No. **10-1081** **Simplified Proceedings**

Appearances:

Carmen L. Alexander, Esquire, and John Black, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

Mark B. Cohn, Esquire, Attorney at Law, Naples, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Crowther Roofing & Sheet Metal of Florida (Crowther) is a large roofing contractor in south Florida. On May 6, 2010, Crowther received a serious citation as a result of an inspection by the Occupational Safety and Health Administration (OSHA) of a re-roofing project at an apartment building in Clearwater, Florida. The citation alleges Crowther violated 29 C.F.R. § 1926.501(b)(11) for employees' failing to tie-off their fall protection while snapping chalk lines on a steep roof. The citation proposes a penalty of $4,500.00. Crowther timely contested the citation.

The hearing, designated for simplified proceedings pursuant to 29 C.F.R. § 2200.200 *et seq.*, was held on August 31, 2010, in Fort Myers, Florida. Crowther stipulated jurisdiction and coverage (Tr. 5). The parties have filed post hearing briefs.

Crowther admits two employees were working on a steep roof without tying off their safety harnesses. Crowther asserts it lacked knowledge of the failure to tie-off and, as an affirmative defense, unpreventable employee misconduct. Crowther maintains its superintendent was engaged

in other activities and was unable to observe the employees. He had reminded them to tie-off during the morning meeting. Crowther enforces a 100 percent tie-off rule on all steep roofs. (Tr. 5, 9, 172, 176).

For the reasons discussed, a violation of § 1926.501(b)(11) is affirmed and a penalty of $3,500,00 is assessed.

Inspection

Crowther is a large roofing contractor with offices in Fort Myers, Florida. It performs roofing work throughout the state of Florida and in several other southern states. Crowther employs approximately 450 employees. It maintains a separate safety office which is headed by Ronald Coveleski and includes one safety trainer, Kendall Henry, and three safety inspectors (Tr. 14-15, 228, 235).

On March 15, 2010, Crowther began a re-roofing project at the Regency Oaks Apartments in Clearwater, Florida. The Regency Oaks is a retirement community consisting of approximately eight buildings. One of the apartment buildings, referred to as the "South" building, is five stories high. The building's roof is a "hip roof" which has two sloped sides and a flat peak. The flat peak is approximately 8 feet wide. The sloped sides are 5 in 12, vertical to horizontal, and each side is 45 feet wide. The roof is approximately 60 feet above the ground (Tr. 167, 189-190, 195, 202, 213, 216).

Crowther's job on the "South" building was replacing the old roof shingles with new shingles. At the time of the OSHA inspection, Crowther's crews had removed the old shingles and were in the process of "snapping" chalk lines before installing the new shingles. Crowther's work at the Regency Oaks was continuing at the time of the hearing (Tr. 100, 214, 218).

On April 23, 2010, at approximately 7:30 a.m., OSHA Compliance Officer Luis Cebollero, pursuant to a local emphasis program on fall hazards, was driving his car in Clearwater, Florida, when he observed several employees on the roof of the "South" building at the Regency Oaks Apartments. The employees were not tied-off or otherwise protected from the fall hazard (Tr. 122-123, 166). Cebollero drove into the complex and took photographs. After locating Crowther's superintendent of the slope department, Gary Stanczik, Cebollero asked him to identify the employees in the photographs and have them come to the ground. Stanczik complied and four employees, two

foremen, Jose (Franklin) Herrera, and Mario Hirojose, and two roofers, Salvador Menendez (Melendez) and Armando Valencia, were verbally interviewed by Cebollero (Tr. 83, 126, 133, 209, 219). The employees told Cebollero the lifelines interfered with them snapping chalk lines (Tr. 137).

As a result of the OSHA inspection, Crowther received the serious citation for alleged violation of § 1926.501(b)(11).

Discussion

The Secretary has the burden of proving a violation of a standard such as § 1926.501(b)(11).

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Crowther does not dispute the application of the construction fall protection standards at § 1926.500 *et. Seq.*, to its re-roofing project at the Regency Oaks Apartments on April 23, 2010. Crowther also does not dispute that two employees were not tied-off to fall protection and were exposed to a fall hazard of approximately 60 feet.[1]

Alleged Violation

Alleged Violation of § 1926.501(b)(11)

The citation alleges that "on the northside of building 2770 rooftop (5/12 slope) where the roof was being repaired, no fall protection was used by some employees exposed to a fall hazard at a height between 60 and 80 feet." Section 1926.501(b)(11) provides:

> *Steep roofs.* Each employee on a steep roof with unprotected side and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net system, or personal fall arrest systems.

A "steep roof" is defined at § 1926.500(b) as "a roof having a slope greater than 4 in 12

[1]Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991).

(vertical to horizontal)." With a slope of 5 in 12, there is no dispute the roof on the "South" building was a steep roof.

Also, it is not disputed two employees, Salvador Menendez and Armando Valencia, were working on the roof without tying off their fall protection (Tr. 172, 176). The two employees were snapping chalk lines. They told Cebollero the lanyard or life line would interfere with the chalk lines (Tr. 137). Foreman Herrera, who was on the flat peak of the "hip" roof without tying off, told Cebollero the same thing (Tr. 139-140).

Although Crowther disputes whether Herrera's failure to tie-off his fall protection violated the OSHA standard, it concedes Herrera was required under its own safety rules to be tied-off (Tr. 255). Herrera was observed on the flat 8-foot wide peak of the roof, at least 45 feet from the roof's edge (Tr. 110, 171). The record fails to establish Herrera was exposed to a fall hazard.

However, the roof was 60 feet above the ground and the two employees, Menendez and Valencia, were on the slopped side of the roof, not tied-off (Tr. 142). According to Cebollero, the employees were observed close to the roof's edge (Tr. 125, 143). The employees' exposure to a fall hazard is established.

The record establishes Crowther violated the fall protection requirements of § 1926.500(b)(11) and two employees were exposed to a fall hazard of 60 feet.[2]

Knowledge

Crowther disputes it knew or should have known of the employees' failure to tie-off. Superintendent Stanczik, at the time of the OSHA inspection, was on a forklift moving pallets of shingles approximately 600 feet from the "South" building (Tr. 193-194). He testified he could not see the employees on the roof from his location. He also had told them to tie-off during the morning meeting (Tr. 217). Crowther disputes that foreman Herrera's knowledge of the employees' lack of fall protection is imputable to Crowther because Herrera was a working foreman and not part of the company's management. Herrera did not have the authority to discipline employees (Tr. 95, 226-227).

In order to establish an employer's knowledge of a violation, the Secretary must show the

[2]There is no dispute that guardrails, nets or other fall protection were not available.

employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engd Form Co*.,12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986).

The record in this case is sufficient to impute Herrera's knowledge of the two employees' failure to tie-off to Crowther. Crowther had two foremen, Herrera and Hirojose, on the roof in clear view of the two employees. Foreman Herrera acknowledged knowing the two employees were not tied-off while snapping the chalk lines. He was responsible for directing their work (Tr. 100, 202). According to superintendent Stanczik, the foremen on the roof were in charge of ensuring that safety was observed by the crew and the company's safety rules were followed (Tr. 204). This is reiterated in Crowther's safety plan. The foremen have authority to correct hazards (Tr. 227). Stanczik considered the foremen in charge of the crew when he was away as was the situation on April 23, 2010. Although Herrera observed the two employees not tied off, he testified "I didn't say anything" (Tr. 117).

Herrera's authority as foreman is sufficient in this case to impute his knowledge of the employees' failure to tie-off to Crowther. *See Diamond Installations Inc.*, 21 BNA OSHC 1688, 1691 (Nos. 02-2080 and 02-2081, 2006) (the knowledge of a gang foreman who, although not considered management by the employer, could direct the work of crew members and stop the work of a noncompliant worker, is imputed to the employer). The substance of the foreman's delegation of authority, such as given to Herrera, not his title as working foreman, is controlling in determining whether an employee is a supervisor for the purposes of imputing knowledge. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1577, 1583 (No. 91-2626, 1992) (a leadman's knowledge imputable to the employer despite his status as bargaining unit employee). Also, see *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (Nos 86-360 86-469, 1992) (an employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer).

The fact Herrera failed to tie-off in accordance with Crowther's safety rule is not relevant to the issue of imputing his knowledge of the activities of the two employees to Crowther. Herrera's failure to tie-off was not shown to be a violation of the OSHA standard.

A violation of § 1926.501(b)(11) is established.

Unpreventable Employee Misconduct

Crowther asserts unpreventable employee misconduct. It claims the two employees who failed to tie-off violated the company's 100 percent fall protection rule and their training when snapping chalk lines on a steep roof.

> To establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took steps to discover violations of the rule; and effectively enforced the rule.

Schuler-Haas Electric Corp., 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006).

Where, as here, the purported employees' misconduct includes the actions of a supervisory employee (foreman Herrera), the employer faces a higher standard of proof. "[W]here a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991).

Established Work Rule

A work rule is defined as "an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076 (No. 12354, 1977). The work rule must be clear enough to eliminate employees' exposure to the hazard covered by the standard and must be designed to prevent the unsafe condition. *Beta Construction Co.*, 16 BNA OSHC 1434, 1444 (No. 91-102, 1993).

There is no dispute Crowther has a 100 percent tie-off rule which applies to all employees on any roof and requires the use of fall protection (Tr. 111, 159, 199). Crowther's Safety Policy Manual states that "Crowther has a 100% Fall Protection Program" which requires that "safety harnesses must be worn and tied-off when working on the following . . . sloping roofs . . . flat roofs without handrails within six feet of the edge or roof openings . . . " (Exh. R-14).

The record shows Crowther's work rule is clear regarding the use of fall protection and was designed to eliminate the fall hazard. OSHA does not dispute Crowther has an established work

rule.

Communication of the Work Rule

The second element of the misconduct defense is met when the employees are well-trained, experienced and know the work rules. The employer must show that it has communicated the specific rule that is in issue to employees. Hamilton Fixtures, 16 BNA OSHC 1073, 1090 (No. 88-1722, 1994).

The record shows that Crowther's employees were trained on the 100 percent tie-off rule and were aware of the fall hazards on steep roofs (Exhs. R-1, R-2). Crowther has a full time training officer, Kendall Henry, who is a qualified OSHA outreach instructor (Tr. 14, 16-17). Each employee's training is maintained on a computer tracking system. The employees receive initial fall protection training including a one hour video at the time of hire and annual training thereafter which covers the 100 percent tie-off rule (Tr. 20-21, 23). The orientation and annual training include testing the employees on the information. If an employee fails to answer questions correctly, the information is discussed with the employee and the employee is retested (Tr. 24). The employee is required to pass the test or he does not work. All training and testing are done in the employee's native language.

The use of fall protection is also taught by Miller Equipment Company which sells fall protection equipment to Crowther (Exh. R-4; Tr. 30-31). Crowther provides each employee with a fall protection kit consisting of the harness, rope, lanyard and anchors. Other equipment, such as additional anchors, glasses and gloves, is provided based upon the project need (Tr. 237).

The need for fall protection is a regular topic of the weekly tool box meetings (Tr. 22). According to superintendent Stanczik, he also reminds employees every morning before starting work to wear their fall protection.

Compliance Officer Ceballero rated Crowther's training program as "adequate" (Tr. 160). OSHA does not dispute the employees received training on the work rule. Crowther's 100 percent tie-off fall protection rule was communicated to employees.

Steps to Discover Violations

The effective implementation of a safety program requires "a diligent effort to discover and discourage violations of safety rules by employees." Propellex Corp., 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999). An employer must show its safety rule is effectively enforced through

supervision adequate to detect failure to comply with its rules. Texas A.C.A., Inc., 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995) (employer's duty is to take reasonably diligent measures to detect hazardous conditions through inspections of worksites).

Crowther's safety department has three inspectors who typically visit every worksite, three times a week. Crowther employs approximately 450 employees and has 20 worksites at any time (Tr. 261). According to Henry, the safety inspectors and superintendents issue employees "safety tickets" (citations) for violations of the company's safety rules including the 100 percent tie-off rule (Tr. 59). Superintendent Stanczik testified, however, that he did not have the authority and did not issue safety tickets (Tr. 223-224).

The preprinted safety tickets contain three categories of violation, Class A, B, or C. Class C violations are the most severe class of violation. The tickets also contain predetermined point values from 1 to 10 depending upon the class of violation and its severity. A Class C violation requires 8 to 10 points. The failure to tie-off is considered a Class C violation and generally warrants 10 points (Tr. 39-40, 61).

According to Crowther's safety program, if an employee receives more than 20 points during a six-month work period, he is to receive a suspension of one to three days or termination depending on the severity (Tr. 34-35, 38). After six months, the points are removed but the safety tickets remain in the employee's personnel file (Tr. 61-62). The employee can reduce his points by receiving additional safety training.

In addition to the safety ticket system, superintendents, senior foremen, project managers are involved in a monitory point system based upon the contract value of the project. There are 14 maximum points available of which 6 points relate to safety. The supervisor begins a project with the maximum 6 safety points and for each safety violation found on the project, a point is taken away, thus reducing his bonus. For the Regency Oaks project, each point was valued at $698.00 for a possible bonus of $3,700.00 relating to safety (Tr. 231).

The frequency of the on-site inspections by the safety department, the scope of such inspections as reflected by the safety tickets, and bonuses system for supervisors show Crowther's attempts to discover violations of its 100 percent tie-off rule. However, the record is replete with multiple tie-off violations, many involving the same employees, including foremen such as Herrera.

It is noted that in 2010 (January 1 to August 6), of the approximate 100 safety tickets issued, 55 tickets involved the failure to utilize fall protection including not tying off, connect, or use of a monitor (Exh. R-10).

Such repeated violations are indicative of a deficient safety program in detecting and correcting violations. Although management bonuses encourage a safe workplace, such bonuses may discourage superintendents from keeping the company informed of unsafe employees or recurring unsafe conditions in the workplace. Superintendent Stanczik did not issue safety tickets and was not aware of Herrera's multiple safety tickets for not tying off (Tr. 205).

Effective Enforcement of Rule

The adequate enforcement of its safety program is another critical element of the defense. An employer is expected to have a progressive disciplinary plan consisting of increasingly harsh measures taken against employees who violate the work rule. To prove its disciplinary system is more than a paper program, an employer must show evidence of having actually administered the discipline outlined in its policy and procedures. *Pace Constr. Corp.*, 14 BNA OSHC 2216 (No, 86-758,1991). Evidence of a variety of punitive measures tends to demonstrate that an effective disciplinary system was in place. *Beta Constr.*, 16 BNA OSHC 1435 (No.91-102, 1993), *aff'd per curiam*, (D.C. Apr 12, 1995).

According to Crowther's Safety Citation Policy, "employees with excessive points shall receive suspension, job reclassification, or termination" (Exh. R-4). Once an employee receives 20 points in a six-month period, Henry testified the employee is to receive a suspension without pay of at least one day to as many as three days (Tr. 34, 39). After the first suspension, if the employee continues accumulating points, the discipline is to increase. At 30 points, the employee is to receive a suspension for a minimum of two days and depending upon the severity, for as many as five days or termination. In fact, Henry testified that if an employee receives a third ticket, the employee generally is terminated (Tr. 35-36).

The record, however, fails to show the employees, including foreman Herrera actually received the discipline as outlined in Crowther's program, prior to the OSHA inspection on April 23,

2010.[3] The record shows the 100 percent tie-off safety rule was repeatedly violated without any evidence of real consequence necessary to show a progressive disciplinary program. No record of suspensions and terminations was presented. The testimony by Henry regarding possible discipline is not accepted as evidence of an employee's actual discipline, if any (Tr. 69, 77, 79, 82). An employee's discipline record is maintained only in his personnel file and there is no showing Henry had reviewed the personnel files (Tr. 68). The safety ticket program as implemented was not shown to be effective or a deterrent to repeated violations of safety rules.

For example, foreman Herrera, during his five years with Crowther, received at least seven safety tickets for failing to tie-off in addition to several other Class C violations (Exh. R-10; Tr. 85, 91, 107, 249, 251). Herrera testified he only received two suspensions for such repeated violations. Herrera was not terminated until after the OSHA inspection and after receiving two more tickets for failing to tie-off on May 4 and May 28, 2010 (Tr. 90, 92, 252). It took Crowther five years and twelve documented Class C violations including nine documented failing to tie-off safety tickets before it terminated Herrera which was apparently due to Crowther's zero tolerance policy initiated after the OSHA inspection (Tr. 208-210).

The lack of enforcement is also demonstrated by the treatment of Menendez. Menendez was cited for failing to tie-off on April 23, 2010, as a result of the OSHA inspection. However, Menendez had eight prior documented failing to tie-off violations; four of the violations occurring in a two-month period, November 21, 2005 to January 7, 2006. The record fails to show evidence that Menendez was suspended or terminated for his repeated Class C violations (Tr. 81-84).

In addition to Herrera and Menendez, the record shows many other employees who were similarly ticketed for Class C violations but were not shown to receive discipline (Exh. R-10). Alfredo Cruz failed to tie-off three times in a four-month period: May 31 - September 15, 2006 (Tr. 69-70). Miguel Oritz failed to tie-off at least four times in a four-month period: May 31 - September 15, 2006. There is no showing Oritz was progressively disciplined when he reached 20 points or terminated when he reached 30 points or 40 points (Tr. 70-72). Another employee, Ernesto Casas committed four Class C violations including failure to tie off, twice in two days, and improper use of

[3]Since the OSHA inspection, it appears Crowther now has a new "zero tolerance" policy (Tr. 208-210).

fall protection from March 3, 2006 to June 29, 2007. There is no evidence Casas received any discipline.

For failing to tie-off at the Regency Oaks Apartments, both Menendez and Valencia received safety tickets and 10 points on April 23, 2010 (Tr. 32). Although Herrera violated the company's 100 percent tie-off rule, Herrera did not receive a safety ticket for the April 23 incident. However, Herrera was terminated on May 28, 2010, after receiving two more violations for failing to tie-off his harness (Tr. 92).

Such action was too little and too late. The record does not establish that Crowther had an adequate discipline program to enforce its 100 percent fall protection rule. Herrera and the other employees' repeated failure to tie-off in violation of the company's safety rule and Herrera's statement to OSHA defending the two employees' failure to tie-off while snapping chalk lines, are strong evidence of Crowther's ineffective safety program. By failing to present evidence of actual progressive discipline, Crowther failed to meet its burden of establishing it had an effective enforcement program prior to April 23, 1910.

Crowther's unpreventable employee misconduct defense is rejected and the violation of § 1926.501(b)(11) is affirmed.

Serious Classification

The Secretary properly classified the violation of §1926.501(b)(11) as serious. In order to establish that a violation is "serious" under § 17(k) of the Occupational Safety and Health Act (Act), the Secretary must show there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violative condition.

As discussed, Crowther knew of the violative condition. Foreman Herrera was present and directing the work of the two employees. He even supported their decision not to tie-off (Tr. 139-140). With regard to the risk of harm, a fall from a roof 60 feet above the ground clearly would cause death or at the least serious physical injury. The employees were observed close to the edge (Tr. 143). Crowther does not dispute the serious classification.

Penalty Determination

The Review Commission is the final arbiter of penalties in all contested cases. In determining

an appropriate penalty under § 17(j) of the Act, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Crowther is not entitled to credit for size because it is a large employer with approximately 450 employees. Crowther is entitled to credit for history and good faith. Crowther has not received an OSHA citation in the proceeding three years (Tr. 144). Although found to be ineffective based upon the multiple violations by the same employees, Crowther has attempted to maintain a safety program with written safety rules, regular safety training, and a separate safety department with three safety inspectors and a safety trainer. Its training and safety ticket programs are maintained on the computer for easier access and effective tracking.

A penalty of $3,500.00 is reasonable for serious violation of § 1926.501(b)(11). There were two employees not tied off and exposed to a fall hazard of 60 feet. One employee and the crew foreman had a history of repeatedly failing to tie-off. The fall protection equipment was in place and the employees were wearing their safety harnesses. There is no showing the employees failed to tie-off while removing and replacing the shingles.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Serious Citation 1

Item 1, alleged serious violation of §1926.501(b)(11) is affirmed and a penalty of $3,500.00 is assessed.

\s\ Ken S. Welsch
KEN S. WELSCH
Judge

Date: October 15, 2010