United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. STARK EXCAVATION, INC., Respondent.	OSHRC DOCKET NO. 07-1861

APPEARANCES:

For the Complainant:
Lisa R. Williams, Esq., U.S. Department of Labor, Office of the Solicitor, 230 South Dearborn Street, 8th Floor, Chicago, Ill. 60604

For the Respondent:
Julie O'Keefe, Esq., One Metropolitan Square, Suite 2600, St. Louis, MO. 63102

Before: Administrative Law Judge: James R. Rucker

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

On November 6, 2007 the Secretary issued to Respondent, Stark Excavation, Inc. ("Respondent"), a citation for serious violations of the Act. The citation alleged that Respondent failed to comply with the standard published at 29 CFR §1926.501(b)(1)[1] on the grounds that employees were stripping forms on a bridge without using the required fall protection, exposing them to a 14 foot, 10 inch fall to the rock surface below. A penalty of $7000 was proposed for the violation.[2]

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[1]The standard states that

§**1926.501 Duty to have fall protection**

(b)(1) *Unprotected sides and edges.*

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

[2]The Secretary also alleged a violation of 29 CFR §1926.503(a)(1). However, at the hearing, the Secretary withdrew the item and it is no longer before this Commission.

FACTS

On October 17, 2007, OSHA compliance officer, William Hancock ("CO") was driving on Rt. 24 in Mapleton, Illinois, when he notice a road crew exposed to a fall hazard while working on a bridge. The CO stopped on the side of the road and met with Kevin Pribble, Respondent's superintendent for the project. In addition to Pribble, the crew consisted of two laborers, David Christy and Matt Horn. (Tr. 20, Ex C-2). The crew was stripping wooden forms off the bridge so ironworkers could install guardrails. (Tr. 24-25) They were working at the edge of the bridge without any fall protection and were exposed to a 14 foot, 10 inch fall to the rocks below. (Tr. 24, 28) The employees told the CO that this was a short duration job. (Tr. 25)

During the inspection, the CO reminded Pribble that, three weeks earlier, he stopped at another bridge where Pribble and his crew were preparing to work and warned him of the need for fall protection. (Tr. 25) No citations were issued at that time because the crew was only preparing to begin their work and they were not exposed to a fall hazard. (Tr. 23)

Pribble testified that he should have been wearing fall protection, and that he never made a conscious decision not to use it. Rather, because the job only took 10-15 minutes and the crew just went to their knees and stripped off the forms, the need for fall protection just slipped his mind. (Tr. 121) However, the requisite safety equipment was on site and readily available. (Tr. 66, 132) According to Pribble, when the CO showed up, "it was like brick in the face that I should have complied." (Tr. 121)

Respondent does not dispute that the employees were not using the required fall protection and that they were exposed to a fall hazard. Rather, Respondent asserts the violation was the result of unforeseeable supervisory misconduct.

DISCUSSION

To establish a violation of the Act, the Secretary must establish that the employer knew or, with the exercise of reasonable diligence, should have known of the violation. *Kokosing Constr. Co.*, 21 BNA OSHC 1629, 1631 (No. 04-1665, 2006), *aff'd* 232 Fed. Appx. 510 (6th Cir. 2007). Where the employer is represented on a worksite by a supervisory employee, the knowledge of the supervisor can be imputed to the employer. *Access Equipment Systems Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). However, the employer can rebut the Secretary's showing by establishing, as an affirmative defense, that the violation was caused by the unforeseeable failure of the supervisor to follow proper procedures *L.E. Myers Co.,* 16 BNA OSHC 1037, 1041 (No. 90-945, 1993).

To establish the affirmative defense of unpreventable employee misconduct, the employer must show that it had a thorough safety program which was adequately enforced and communicated and that the violative conduct was idiosyncratic and unforeseeable. The employer must also present evidence concerning the manner in which it enforces its safety rules. *Id.* at 1040. When the alleged misconduct is that of a supervisor, 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. *Archer-Western Contractors Lt.* 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991), *petition for review denied,* 978 F.2d 744 (D.C. Cir. 1992). In such an instance, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its supervisory employee. *Id.*

Having reviewed the testimony and all relevant evidence, I conclude that Respondent has established that the failure of Pribble and his crew to wear fall protection was the result of unforeseeable supervisory misconduct.

The evidence clearly establishes that Respondent has a safety program that is both adequately communicated to employees and enforced. When an employee is hired, he is required to certify that he has received and understands the company safety rules. (Tr. 61, Ex. R-8) Rule #8 in that package states that "Fall protection measures must be implemented by all employees working at unprotected heights of 6'-0" or greater, when applicable by OSHA." (Ex. R-8) Respondent couples its safety rule with a "Fall Management Program" that, among other things, requires supervisors to analyze all "elevated tasks" to determine fall protection needs and provide employees, before beginning work activities, with safety instructions on the proper use, limitations and maintenance of fall protection equipment. (Tr. 163, Ex. C-9)

The evidence also establishes that the rule was properly communicated to employees. For example, fall protection was the topic at the weekly safety meeting of Sept. 6, 2007, conducted by Kevin Pribble before the bridge project began. Handwritten on the line "Special topics for project" was the statement: "100% tie off within 6' of leading edge." (Ex. C-4) Similarly, a tool box meeting conducted by Pribble on August 30, 2007 explicitly states that "<u>the greatest danger during bridge construction is the possibility of falling from one level to another</u>." (emphasis in original) (Ex. C-5)

Respondent's corporate safety director, Wayne Clayton, testified that the heart of Respondent's program is the six foot rule, that requires the use of fall protection whenever an employee is exposed to a fall potential of six feet or greater. (Tr. 163) Clayton also testified that whenever he visits

a jobsite, he tries to talk to the laborers to determine their needs and to ensure that the job is proceeding safely. (Tr. 165)

Furthermore, testimony demonstrates that employees understood the rule and the consequences of noncompliance. Charles Christy testified that he was aware that fall protection was to be used whenever there was a fall hazard (Tr. 67), and understood that the first failure to use fall protection would result in being written up and a one-day suspension without pay; that a second offense would result in a three-day suspension without pay, and that a third offense would lead to termination[3]. (Tr. 63) He also testified that these penalties were well-known and discussed on every job site. (Tr. 64)

Moreover, Pribble testified that fall protection was taken very seriously and that Respondent had a zero tolerance policy for violations. (Tr. 108, 125) He never doubted that, if caught violating the rule, he would face severe consequences, especially since he was a supervisor. (Tr. 111)

The record further demonstrates that Respondent made serious efforts to enforce its safety rules. Exhibit C-10 contains 24 safety citations given to employees for various safety infractions. Most of these involved first offenses where the employee failed to wear a hard hat or safety glasses and resulted in a written warning. One safety citation involved a third offense for not wearing safety glasses for which the employee was disciplined with a written warning and a three day suspension without pay (Ex. C-10, p. 5). Two other employees who violated safety rules a second time received a written warning and a one day suspension without pay. (Ex. C-10, p. 19) Finally, on August 25, 2006 a supervisor was cited for failing to use fall protection when exposed to an 11-foot fall. Consistent with its safety policy, the employee was disciplined for this first offense with a written warning and a 24-hour suspension without pay. (Ex. C-10, p. 24) Finally, as a result of the instant violation, Pribble and the other two employees were all disciplined according to the company safety policy and given a written warning and a 24-hour suspension without pay. (Tr. 81)

While this evidence is sufficient to establish the defense of unpreventable employee misconduct, Pribble was not a rank and file employee, but a supervisor. As noted *supra*, there is an extra burden on an employer to establish that a supervisor engaged in unpreventable misconduct. Central to this burden, the employer must demonstrate that it properly supervised the supervisor to

[3]Lesser penalties were invoked for safety violations deemed less serious, such as the failure to wear a hard hat or safety glasses.

ensure that he was complying with its safety rules. *Archer-Western Contractors Lt.* 15 BNA OSHC at 1017.

In this regard, Respondent has demonstrated that it regularly inspected the worksite to ensure that all safety rules were followed. Jeremy Livengood, Respondent's Peoria area manager, and Pribble's supervisor when on the job in his area (Tr. 55) testified that he visited Pribble's worksite two to three times each week to check on the job progress and safety. (Tr. 152) At these inspections, he never saw any employee working without the requisite fall protection. (Tr. 153) He further testified that he found Pribble to be a very safety conscious person who did not cut corners. (Tr. 154) He did not expect that Pribble would allow his crew to work without fall protection. (Tr. 156).

Safety Director Clayton testified that he visited the worksite on four to five occasions. (Tr. 170) He described Pribble as a proactive person who was very safety conscious. He was impressed with Pribble's serious attitude toward safety and was always in compliance with the safety rules. (Tr. 170) This was supported by Christy, who testified that Pribble was a very safety conscious supervisor who, until the inspection, never allowed his crew to work without fall protection when required. (Tr. 72) Indeed, Clayton testified that, after the inspection, Pribble was embarrassed and promised that it would never happen again. (Tr. 187)

The Commission has recognized that "reasonable diligence" does not impose a requirement for continuous, full-time monitoring. *Stanley Roofing Co.*, 21 BNA OSHC 1462, 1464 (No. 03-0997, 2006). The record demonstrates that Pribble had an excellent safety history and commitment to safety. Moreover, the numerous safety citations issued to employees support the conclusion that Respondent's degree of monitoring its worksites is adequate to detect unsafe work practices On these facts, I find no basis to conclude that there were any circumstances that should have reasonably placed Respondent on notice that more intensive monitoring was necessary. *New York State Electric & Gas Corp.*, 19 BNA OSHC 1227, 1231 (No. 91-2897, 2000); *on remand from New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98 (2d Cir. 1996).

Finally, I note that the Secretary has not introduced any evidence that would establish that Respondent's safety program was, in any way, deficient. Accordingly, I hold that Respondent established that the failure of Pribble and his crew to wear appropriate fall protection at the time of the inspection was the result of unpreventable and unforeseeable supervisory misconduct.

ORDER

Accordingly, it is **ORDERED** that Citation 1, item 1a for violation of 29 CFR §1926.501(b)(1) and the proposed penalty are **VACATED.**

_____/s/_____

James R. Rucker
Judge, OSHRC

Dated: November 18, 2008

Denver, CO.