UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v PROSPECT WATERPROOFING COMPANY, Respondent.	OSHRC DOCKET NO. 97-0571

Appearances:

Donald K. Neely, Esq.
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For Complainant

Joseph H. Kasimer, Esq.
Kasimer and Ittig, P.C.
Falls Church, Virginia
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had a worksite in Washington, D.C., inspected by a compliance officer of the Occupational Safety and Health Administration (“OSHA”), Prospect Waterproofing ("Respon-

dent") was issued one citation alleging one serious violation of the Act in that its employees near the edge of a roof were exposed to a fall hazard. A penalty of $5,600 was proposed. Respondent timely contested. Pursuant to the Order of the Chief Administrative Law Judge designating this case for E-Z Trial under Commission Rule 203(a), 29 C.F.R. § 2200.203(a), the case came on to be heard on August 21, 1997 in Washington, D.C. No affected employees sought to assert party status.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in roofing operations. It is undisputed that at the time of this inspection Respondent was engaged in replacing a roof on a multi-story building in Washington, D.C. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

In accordance with Commission rule 209(f), 29 C.F.R. § 2200.209(f), a decision in this matter was issued orally from the bench following the hearing and oral argument (Tr.140-153). That decision stands as the decision of the Administrative Law Judge and is attached hereto For the reasons stated therein, the citation and notification of proposed penalty in this matter are VACATED.

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[1] *Title 29 U.S.C. § 652(5).*

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

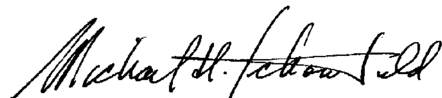
1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in not violation of section 5(a)(2) of the Act as alleged in Citation 1, Item 1.

ORDER

Citation 1, issued to Respondent on March 25, 1997, is VACATED.



Michael H. Schoenfeld
Judge, OSHRC

Dated:
Washington, D.C.

JUDGE SCHOENFELD: Thank you. I think -- I think I have a sufficient grasp of the evidence and the applicable law to make a ruling from the bench and I've looked at some material during our breaks and find that having Westlaw at my desk is a wonderful tool.

I will tell the Parties, before I outline my decision, that my decision is part of the record, it's part of the transcript and will become official and I will send it to you in writing because what I will do when I get the transcript will be to prepare a full, valid, written order referring to this portion of the transcript rather than write things out.

I'm going to start by the simplest way to -- to state this, it's my belief that the evidence, as a whole on this record and I'll try to hit all the highlights that I've considered, demonstrates to me that the Secretary has made a prima facia case of a violation here and that is that -- and I'll go back through this -- the Secretary has made a prima facia case, I think Respondent has provided enough reliable and probative evidence to scale the heights of the affirmative defense of unpreventable employee misconduct and I think the Secretary has failed to come back with evidence to rebut the scaling of those heights, I outline that as my basis for vacating the Citation in this case. I'm also going to note that there is some disagreement in the case law as to whether this kind of situation goes to a lack of knowledge on the part of an employer or as a true affirmative defense and it's a question of shifting burdens of going forward but in any event, whether it was -- I consider the evidence as a whole or as a shifting burden, I would consider that unpreventable employee misconduct has been made out in this case.

There is some very appropo language and very appropo, very recent decisions that I have looked at and I think there's some language that is important in those decisions. United States Court of Appeals for the First Circuit in P. GIOISO, G-I-O-I-O-S-0 And Sons versus Secretary of Labor, and that's docket number 961807, that's the court's docket number, issued on June 13th of this year, the court decision deals with a number of issues and specifically discusses at some length the employee -- unpreventable employee misconduct defense and I'm going to take the time to read what I would quote in a decision.

The court there said, "...The OSHA Act requires that an employer do everything reasonably within its power to insure that its personnel do not violate safety standards but if an

employer lives up to that billing and employee nonetheless fails to use proper equipment or otherwise ignores firmly established safety measures, it seems unfair to hold the employer liable. To address this dilemma, both the Review Commission and the courts have recognized the availability of the unpreventable employee misconduct defense...", which they call "U" "E" "M". "...The contours of the defense are relatively well defined. To reach safe harbor, an employer must demonstrate that it, one, established a work rule to prevent reckless behavior and or unsafe condition from occurring; two, adequately communicated the rule to its employees; three, took steps to discover incidents of noncompliance; and four, effectively enforced the rule whenever employees transgressed it...", and there were two citations to well known cases at that point. The court went on, "...The employer must shoulder the burden of proving all four elements of the defense...", and cites several other cases. "...Sustaining this burden requires more than pius platitudes...", quote, "...An employer must do all it feasibly can to prevent foreseeable hazards including dangerous conduct by its employees...", close quote, citing two more cases. Further on in the decision the court went on and said, "...Even if an employer establishes work rules and communicates them to its employees, the defense of unpreventable employee misconduct cannot be sustained unless the employer also proves that it insists upon compliance with the rules and regularly enforces them...", a citation to another case.

I'm going to also note -- and that's -- I gave you the citation, it's also electronically available at one nine nine seven "W" "L", meaning "Westlaw" number three O nine nine one six and that has been published last week by the Bureau of National Affairs, BNA Reporter and so you have it, that citation is volume seventeen of the "Safety and Health Reporter", page two O nine one.

Interestingly enough, the case immediately following that has very similar language and a similar issue and that's letter "D", letter "A" Collins, <u>D.A. Collins Construction Company</u>, and that is United States Court of Appeals for the Second Circuit issued a decision in their docket number nine six four one nine six, July One, Nineteen Ninety-seven, found at volume seventeen, BNA, two zero nine nine. The court there again went through almost the exact same language and said -- and it has a lot of relevance to this case -- "...Evidence that a foreman or supervisor has violated a statutory standard permits an inference that the employer's safety program has not been

adequately enforced...". What I have before me, as I see this evidence, is not a case of a foreman or supervisor having violated the rule, a well known safety rule, what I see, and I will discuss in a moment, is that it was a foreman or a supervisor who was aware of the rule and apparently did not enforce it and was taken to task for it.

Let me go back through the case now, this specific case and the evidence I looked at and why I'm making
these -- relying on this law, making factual findings.

First, I'm going to comment that I find virtually all of the witnesses who testified I have no specific reason or any reason presented to me to challenge their credibility or believability and I don't find -- I find virtually no inconsistencies in the testimony today. I may point out some misunderstandings or misuse of language but I don't think those are inconsistencies to resolve on the basis of credibility.

I think the first question I have to answer as a matter of fact and I'm going to -- to find as fact at -- the weight of the evidence and the reasonable inferences to be drawn from the evidence is that there was one foreman at the site and the only foreman empowered to act as a foreman was Mr. Sotha Tim, although other individuals may have been at the site and may have had the title of "foreman" or acted as foreman on previous jobs, that does not make them the foreman or supervisory capacity at this site so I find that there was one foreman at this site. I can understand the compliance officer's what I think was perhaps a misunderstanding. As I recall his testimony that various people may have identified themselves by title of "foreman" or even several workmen may have referred to other people by "foreman" but the only person who really took charge and operated as foreman and was, in my opinion the evidence shows it was Sotha Tim and I also point out the fact that the compliance officers were still on the site when Mr. Walsh arrived and he was clearly identified as a higher official and if there were any question about supervisory authority, it seems to me it would have been asked at that time and to the degree it was not asked, I think that raises what may be called a negative inference rule and that is it wasn't followed up on and it quite well may have. I also point out as -- as part of the case, I think the compliance officer testified quite correctly that he felt that Respondent's safety program was adequate and there was adequate communication of the program and again, I want to -- Mr. Austin's testimony, granted, the lack of

experience and certainly he wasn't the lead investigator or compliance officer of this site, seems to me to be consistent with the compliance officer's testimony, Mr. Sancomb's testimony, to the effect that there may have been some confusion or -- or misuse of the term "foreman" because I believe Mr. Austin testified that one foreman said one thing and perhaps another foreman said something else but again, these seem to be identifications generated by the compliance officers and the individual workers they talked to and not any person in charge or truly responsible at the site.

Turning to Mr. Gaines' testimony, Mr. Gaines, in my recollection, clearly identified Sotha Tim as a foreman, he also spoke to somebody named "Butch" as a foreman, to the degree that he may have been trying to indicate that somebody else had authority, I don't think his testimony was meant in that way, I did not take it in that way, one of the pieces of testimony that bothers me in this case and I think is difficult to deal with is Mr. Gaines' testimony that when he first went up on the roof he went over to the edge and at that time apparently was told, was warned not to go -- not to go near the edge but what I -- one of
the -- I'm going to put that aside for a minute, that bothered me and then I looked at Deane's testimony and Deane has the same kind of confusion, it seems to me, between is Sotha Tim or is Butch the foreman, I think he makes it clear later in his testimony that Sotha Tim was the foreman and what's very important to me was he indicated that Butch was the safety monitor so even though Sotha Tim may have been the foreman, Deane understood Butch to be the safety monitor and he testified that Butch told him not to go near the edge. Again, as a safety monitor is not necessarily a supervisory role as -- as we understand it, it's not a management role, it's a duty assigned to a worker on the site and there's certainly no showing in this record otherwise and I think -- so I don't think this is a case in a position where we had a supervisor violating the safety rule himself, other than Tim not putting up the required equipment.

As to what the courts have indicated, at least -- okay, I'm going to go back to the case of P. Gioiso because I think that's very applicable in the case and what the court found there, of the four elements of the unpreventable employee misconduct defense, that is, establishing work rule, adequately communicated it, took steps to discover incidences of violation and effectively enforce it, the court points out that its the last two elements in which the company in that case failed and I

think the court isolates itself on the most two difficult elements of the defense to prove, in my experience. The court there said, "...Sustaining the burden requires more than pius platitudes, an employer must do all he can to reasonably prevent...", from General Dynamics. The court goes on to say, "...The mainstay of Gioiso's argument is that the ALJ unnecessarily required repetitive documentary proof referable to the employee misconduct defense. This is smoke and mirrors, the record reveals quite clearly that the ALJ applied the appropriate legal standard. The employer failed to carry the devoir of persuasion...", D-E-V-O-I-R, "...of persuasion on both the implementation and enforcement components of the defense, this deficit is fatal. Even if an employer establishes work rules and communicates them to its employees, the defense of unpreventable employee misconduct cannot be sustained unless the employer also proves that it insists upon compliance with the rules and regularly enforces them...", and I think, as I said, the court there isolated on the last two elements which are the most difficult to prove and going further in the -- in the same decision, and this is at seventeen, BNA, Two O Nine Eight -- "...While the record reflects that Gioiso, the employer, made a meaningful effort to develop a satisfactory safety program, it is much less conclusive on the issues of implementation and enforcement...", and I think the record before me is persuasive on implementation and enforcement. The court goes on to say that "...The employer's best case is that it distributes safety manuals to all new employees, that these manuals contain information regarding, among other things, lifting of loads, method of trench protection and proper placement of ladders in trenches and that it supplements these materials in various ways. The Petitioner's safety chairman testified that the company sponsors tool box talks at its work site, monthly safety meetings for supervisory personnel and by annual safety seminars for its employees, all of them but this evidence left some fairly conspicuous gaps as to the content of the training exercises, who conducted each session and who attended them, documentation or syllabi or attendance rosters would have gone a long way towards filling these gaps but the Petitioner provided none. Absent such documentation, it cannot persuasively argue that it effectively communicated the rules to its employees...", and I think this record before me stands in very clear distinction to the Gioiso case, the evidence before me is very detailed as to what the seminars contained, who was trained, how they were trained and all of that evidence on this record before me is unrebutted and

unchallenged, there is clear testimony as to the degree of communication here and the employees, themselves, indeed testified that they knew what the rules were and they knew, at least in one case, that he was violating the rules so I find as fact that the Respondent had the appropriate safety rules and that those rules were adequately communicated to its employees.

The fourth and final prong -- or two prongs, that is -- did respondent take steps to discover incidents of noncompliance and did it effectively enforce the rule whenever employees transgressed it? Again, I think the weight of the evidence in this case is to answer both of those questions in the affirmative and that is that the employees knew what the rules were, the supervisors knew what the rules were, there is evidence of some pre-incident enforcement and clearly, evidence of significant enforcement after this, none of which has been challenged, none of which is rebutted on this record and it stands as established by this record.

The testimony of Mr. Walsh and Mr. Cole, which remain unrebutted on this -- on this record are that employees who were found to have violated safety rules have been, in fact, reprimanded and in at least one case, severely disciplined, I don't know what Mr. Tim's annual salary is or what relationship losing a twenty-four hundred dollar bonus might be to the man and there is no other evidence on this record to say that that is not a severe or is a severe punishment but it is a significant punishment and there is no rebuttal to it, even though it arose out of this specific incidence. Evidence of post-accident or post-citation activities on the part of the parties is admissible in Review Commission decisions and before the Review Commission.

Again, Mr. Cole's testimony that the only reason Sotha Tim did not earn the bonus was because of this Citation remains unrebutted on this record. There is activity, there is some evidence of activity by the company in disciplining its employees under its program, it has more than just a paper program. Again, what quantum of proof is needed, this is acceptable evidence, it's reliable evidence, it has not been quantified but neither has it been rebutted. I think, to the degree Respondent made out at least basic showing of enforcement of its safety rules, there is no contrary evidence on this record, there is no indication that its efforts in communication or enforcement or its efforts to discover violations was insufficient in any manner, in any way.

I also point to one other problem and I -- I alluded to this at the beginning. There are

some courts, particularly the Second Circuit, in New York State Electric, which might look at this case as a question of knowledge in the first instance that is whether Respondent knew or reasonably should have known that the violation would occur. Should that be the approach taken if that analytical approach were taken? I think there is sufficient evidence for me to reach the conclusion, and I do reach the conclusion, that under the facts of this case Respondent had no grounds to reasonably know or reasonably anticipate there would be a violation of this safety rule by Mr. Tim or allowance by him of other people violating it, the -- again, the unrebutted testimony on this record dealing with this matter and this individual is that there had never been this type of safety problem with Mr. Tim before, he had been supervised by field superintendents on a number of jobs over a number of years and there is no record of this type of action and indeed, there is evidence that Mr. Walsh had meetings with Mr. Tim prior to this very job and was on the site with Mr. Tim prior to this job and reminded Mr. Tim and had acknowledgement by him of his understanding of the necessity to put out a warning system, nobody above Mr. Tim could do very much more in my opinion and there is no basis to find that Respondent or any of its management officials could have known or reasonably been anticipated to know of a violation so under either type of analyses I would conclude that either the affirmative defense is made out or the Secretary has failed to make a prima facia case of knowledge, I think the Commission will look at this as an affirmative defense case and that's why I put the emphasis on that analysis and to make it clear, I find as fact that the weight of the reliable and credible evidence, the preponderance of the evidence on this record is that Respondent established a work rule that would prevent the behavior or unsafe condition from occurring, that Respondent, by a preponderance of the evidence, demonstrated that it adequately communicated that rule to its employees, that Respondent, by a preponderance of the evidence, demonstrated that it took steps to discover incidents of noncompliance and that Respondent, by weight of the -- preponderance of the evidence demonstrated that it effectively enforced the work rule when employees transgressed it, accordingly I find that the Citation is to be dismissed and that ends my decision.

I will note, as a matter of housekeeping again, that the exhibits will be with the record, when the transcript comes in I will issue a formal order, accompanying that order will be an instruction letter as to time limits, et cetera, for appeal.

Gentlemen, thank you for the presentation of the case and I will note -- I'm almost sorry the roofers aren't here but I will note virtually every case I hear I learn a little bit more about, whether it's roofing or construction I am always grateful to learn a little more.

That completes the hearing in the case of Secretary of Labor versus Prospect Waterproofing, Ninety-seven O Seven Five One, decision to be issued forthwith upon receipt of the transcript.

Thank you, Mr. Neely, thank you Mr. Kasimer, we're off the record.