COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4219-05

COMMISSIONER, DEPARTMENT OF LABOR — COMPLAINANT

v

AMERICAN ROOFING AND METAL COMPANY, INC — RESPONDENT

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James R. Grider, Jr. for the commissioner. Philip J. Siegel and Richard D. Remmers for American Roofing.

DECISION AND ORDER OF THE REVIEW COMMISSION

This case comes to us on the commissioner of labor's petition for discretionary review (PDR). We granted review and asked for briefs. After receiving the briefs, we asked the parties to answer three questions. 803 KAR 50:010, section 48 (5). Labor's PDR says American Roofing's foreman could have known of the violative condition with the exercise of reasonable diligence and the company failed to prove its affirmative defense of employee misconduct.

KRS 336.015 (1) charges the commissioner of labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the executive director of the office of occupational safety and health compliance issues citations. KRS 338.141 (1). If the cited employer notifies the executive director of his intent to challenge a citation, the Kentucky occupational safety and health review commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the review commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review with the review commission; the review commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the commission takes a case on review, it may make its own findings of fact and conclusions of law. In Brennan, Secretary of Labor v OSHRC and Interstate Glass,[1] 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, the eighth circuit said when the commission hears a case it does so "de novo." See also Accu-Namics, Inc v OSHRC, 515 F2d 828, 833 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299.

Department of Labor compliance officer (CO) Seth Bendorf initiated his inspection of American Roofing's job site when he saw two men working without fall protection on the roof of a house which, it turned out, was some 25 feet above the ground below. Transcript of the evidence, page 38 (TE 38). Photographs taken by the compliance officer show the men on the roof without fall protection. See exhibits 2 D and 2 E. According to the cited occupational safety and health standard, an employer must provide fall protection to its employees who are working at a residential construction work site when these workers are six feet or more above lower levels, here the ground, and are not protected by either a guardrail system, safety net system, or personal fall arrest system. 29 CFR 1926.501 (b) (13).[2] For this particular job the

[1] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2001), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

[2] 803 KAR 2:412 incorporated this standard by reference in Kentucky.

compliance officer said the two men working on the roof should have been wearing harnesses and lifelines as fall protection; he mentioned a guardrail system as an alternative fall protection system. TE 68. As stated in the definitions section of 29 CFR 1926.500 (b), a personal fall arrest system consists of an anchorage, a harness worn by an employee and a lanyard. See 29 CFR 1926.502 (d) and appendix C. Photographic exhibit 2 I shows two fall protection harnesses lying on the ground while exhibit 2G shows two lanyards.

Mr. Bendorf inspected American Roofing in Louisville on May 10, 2005. TE 30. He said the two men were working on the roof of a house. TE 58 and 64. Donnie Hall worked as American Roofing's foreman. The two employees worked for him. TE 31 and 32. We find the department proved an employer-employee relationship. KRS 338.031 (1) (a). The compliance officer held an opening conference with Foreman Hall. TE 31. Later, the CO had a closing conference with Scott Schmitt, the company's safety and human resources director. TE 32 and 194.

Foreman Hall testified for the company. He said his full name was Gary D. Hall, Sr. TE 75. He identified the two men working for him on the roof, the day of the inspection, as Gary D. Hall, Jr, his son, and Robert Cook. TE 78. To minimize confusion, we will refer to the foreman as Donnie Hall and his son as D. J. Hall or senior and junior.

After concluding its inspection, the department of labor issued a repeat serious citation with a proposed penalty of $15,000[3] to American Roofing which then filed its

[3] To establish a penalty for a repeat violation, the compliance officer first must determine a serious penalty. He fixes a gravity based penalty composed of two factors: seriousness of an injury and the probability of an injury should one occur. KRS 338.991 (11). The compliance officer found high severity because of a fall of 25 feet (high, medium and low being the choices) and greater probability of an injury (greater or

notice of contest. KRS 338.141 (1). On review, American Roofing has not raised any issues about the calculation or appropriateness of the proposed penalty should the citation be sustained. Here is the repeat serious citation:

> 29 CFR 1926.501 (b) (13) *Residential Construction*:
> Each employee engaged in residential construction...six feet...or more above lower levels was not protected by guardrail systems, safety net system, or personal fall arrest system...
> a. Two employees were installing shingles on a residential roof, located at 5112 Bannon Crossing, 25 feet 6 inches above the ground with no fall protection in place.
> This is a repeat violation as similar violations were cited as a result of inspection 305908352 closed on 9/9/04, inspection 304912594 closed on 9/9/04, and inspection 306518382 closed on 9/9/04

In order to prove a violation labor must show, one, the standard applies to the cited condition, two, the terms of the standard were not met, three, one or more of the employer's employees had access to the cited conditions and, four, the employer knew, or with the exercise of reasonable diligence, could have known of the violative conditions. Ormet Corporation,[4] a federal review commission decision, CCH OSHD 29,254, page 39,199. Labor's compliance officer found two American Roofing employees working on a roof 25 feet above the ground below without fall protection. TE 59. Foreman Hall admitted the two employees were on the roof without fall protection. TE 107. The cited regulation[5] is directed to residential construction. We find, as did our hearing officer (RO

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lesser) because the two employees were right at the edge of the roof without fall protection. High severity/greater probability produced a gravity based penalty of $5,000. Then under 803 KAR 2:115, section 1 (2), the company got a 40% adjustment credit for size (number of employees) but none for good faith or history of prior violations because the violation was classified as high serious and greater probability. TE 42 and 43. The CO applied the 40% credit and then consulted the compliance manual to increase the repeat penalty to $15,000. TE 42 and 43. The maximum penalty for a repeat violation is $70,000. KRS 338.991 (1).

[4] To find this case on line, go to oshrc.gov. Click on decisions and select the year 1991 for final commission decisions.

[5] We will use the words standard and regulation interchangeably.

10), labor proved elements one, two and three as laid out in Ormet and American Roofing has not argued to the contrary. At issue in this case, then, is whether the department of labor proved employer knowledge, element four, and whether American Roofing proved the elements of the affirmative defense known as employee misconduct.

For a repeat violation the department of labor must also prove a history of prior violations. Specifically, the department must show "...there was a Commission final order against the same employer for a substantially similar violation." Hackensack Steel Corporation,[6] a federal review commission decision, CCH OSHD 32,690, page 51,558. In the case at bar the department introduced three prior citations. See exhibits 4, 5 and 6. American Roofing had no objection to the three exhibits and stipulated to the dates of the inspections which were March 25, 2003, May 28, 2003 and November 14, 2003. TE 43-44. These cases were settled and so became a final order of the review commission on September 9, 2004.

This case was tried before Hearing Officer Scott Majors on November 8, 2005. Mr. Majors in his recommended order[7] dismissed the repeat serious citation and proposed penalty. Recommended order, page 16 (RO 16). Mr. Majors said the department of labor failed to prove employer knowledge of the violation and American Roofing proved its employee misconduct defense. Either of Mr. Majors's rulings would have been sufficient for him to dismiss the citation and penalty.

We have examined the trial transcript and exhibits, the hearing officer's recommended order and all briefs filed with this commission. Exercising the authority found in KRS 338.071 (4), KRS 338.081 (3) and 803 KAR 50:010, section 47 (3), we

[6] Go to oshrc.gov. Click on the year 2003 for final commission decisions.
[7] Section 47, 803 KAR 50:010.

reverse our hearing officer's recommended order and sustain both the repeat serious citation and the penalty of $15,000.

Employer Knowledge

KRS 338.991 (11) defines a serious violation. The statute itself contains the requirements for proving employer knowledge of a violation; it says in part:

> ...a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists...in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. (emphasis added)

Hearing Officer Majors concluded the department of labor failed to prove employer knowledge. He said Donnie Hall, the foreman, did not see the two men working on the roof without fall protection because he ordered them to do some work not requiring fall protection equipment and he then went across the street to another work site. Mr. Majors said the foreman could not have been aware Mr. Cook and his son would violate the cited standard by climbing on the roof without fall protection and thereby violate company policy. RO 12.

Foreman Hall testified he told his son and Mr. Cook to move the ladder to the right, tie it off and "We're going to lunch." TE 108. Then Foreman Hall backed his truck up to a dumpster to unload it. TE 83. He said he did not see the two men on the roof without fall protection. TE 85.

An employer's knowledge of a violation may be proven in two ways: one is actual knowledge and the second is constructive knowledge. In Kokosing Construction

Company, Inc,[8] a federal commission decision, CCH OSHD 31,207, the company was cited for exposing its employees to unguarded rebar, reinforcing steel, which presents an impailment hazard should an employee fall on one. There was no direct evidence Kokosing knew about the unguarded rebar; rather the compliance officer testified the unguarded rebar was in "plain view[9] when he entered the work area to conduct his inspection..." The commission said:

> The conspicuous location, the readily observable nature of the violative condition, and the presence of Kokosing's crews in the area warrant a finding of constructive knowledge. At page 43,723.

The facts in the instant case fit the rule found in Kokosing. Cook and Junior worked on a roof 25 feet in the air; they were visible to the compliance officer in his car. Foreman Hall testified he was in the work area but was engaged in another task. He said once he gave an order, he did not have to supervise. He was asked:

> Q. How do you as a foreman ensure that they have on harnesses?
> A. Well, I'm like you, if people tell your son to do something or your employee to do something but you're not there, you just assume that they've got enough respect for you that they'll do it. TE 109.

Foreman Hall gave an order but then did not know whether it was carried out.

In Hackensack Steel Corporation, supra, the company's foreman directed his employees to connect steel beams at height. To do the job, the Hackensack employees needed fall protection and hard hats. After giving the order to connect the steel, the foreman began "selecting the connecting beams and did not have the two connectors, the

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[8] Go to oshrc.gov. Click on the year 1996 for final commission decisions.

[9] In Pike Company, Inc, CCH OSHD 31,858, page 46,978, the federal administrative law judge found employer knowledge because the worker on a 20 foot tall scaffold was in "plain view." The employer could have discovered the violation with reasonable diligence. OSHRC.gov. Select final administrative law judges decision and select year 1999.

employees, in sight at the time the compliance officer observed the cited conditions." At page 51,555. Hackensack argued the company did not have knowledge of the violations. On this issue of employer knowledge, the federal commission in Hackensack said:

> There is conflicting testimony in the record concerning whether the foreman had actual knowledge of the violative conditions, but it is not necessary to resolve this conflict since we find, for the following reasons, that Hackensack could have discovered the violations had it exercised reasonable diligence.
>
> At page 51,556.

In both Hackensack and the case at bar, the employer had previously been cited for fall protection violations, three times for American Roofing and "numerous times" for Hackensack, and both had been issued repeat citations. Hackensack's foreman had been involved in a previous citation and so had American Roofing's. TE 68-69. The commission said given Hackensack's history of fall protection violations, its foreman

> should have done more to discover safety hazards than he did. This is not suggest that he had to monitor the connectors the entire time they were on the steel. However, we find that it is reasonable to expect him to have checked on them from time-to-time...
>
> At page 51,556.

Now in the case at bar, American Roofing's foreman testified he directed the two men to move the ladder; he said he did not direct them to the roof where fall protection would be required. Our point here is foreman Donnie Hall had performed no monitoring at all on the day of the inspection. Senior said he arrived at the construction site at around 10:30 AM. TE 79. Mr. Cook and Junior had reported to work at the house in question around 7:30 AM. This commission asked the parties, our first question, to confirm those times which they did. See the department of labor's brief of May 4, 2007 and American Roofing's dated May 4 as well.

Mr. Cook and junior worked on the roof on and off from 7:30 AM to 10:30 AM when Senior arrived to give the order, he said, to move the ladder. Senior then drove away in his truck to a location next door where he could not see his men, on the roof or otherwise. At no time on May 10, 2005 did foreman Hall do any monitoring of his employees before the compliance officer arrived. Given American Roofing's history of prior violations, exhibits 4, 5 and 6, American Roofing "should have perceived a need for increased monitoring." Hackensack at page 51,556. Mr. Hall, senior, provided no supervision on May 10.

American Roofing bases its employer knowledge argument on the oral testimony of Foreman Hall. Although the senior Mr. Hall testified he instructed his son and Mr. Cook to move the ladder, and presumably to have no occasion to get on the roof without fall protection, we do not find Mr. Hall's testimony credible. In a statement dated May 10, 2005, exhibit 10, Senior said he:

> told Robert Cook and donnie Hall Jr to briefly tidy up the roof right before going to lunch. In the process DJ, and Robert was [sic] caught on the roof without fall protection. All though we were in the process of reorganizing and moving the fall protection to another location, DJ and Robert should have made sure they were safe. We all take responsibility for our actions, and have no hard feelings for the consiquencess. [sic]
>
> s/ D.J. Hall
> Gary D. Hall SR
> Robert Cook
> 5-10-05

On May 10, the date of the incident, the foreman said nothing about moving the ladder. Rather, he said he sent his men to "tidy up the roof." This statement conflicts with Senior's testimony on the day of the trial.

Then on June 20, 2005 Mr. Hall, Jr, wrote a second statement. He said his father told him to "untie the hoist and move it to the right side of the roof." Exhibit 13. Scott Schmitt, AR's safety manager testified; he said he had conducted an investigation after the inspection. On the witness stand, he said "We need a better statement..." TE 220. He meant the June 20 statement, exhibit 13, as the better statement.

In his recommended order Hearing Officer Majors said the department of labor offered no evidence Foreman Hall possessed "constructive knowledge" of the violation. RO 12. In Hackensack, supra, the federal commission said it expected the foreman to have "checked them from time-to-time..." At 51,556. Foreman Hall did not check on his men even though they worked on the roof some 15 to 20 minutes. TE 136. Mr. Hall, Jr, said the ladder moving job, what Senior said he had told the men to do, would only take around five to ten minutes. TE 139. After ten minutes had elapsed, the foreman did not check and he did not check on his men thereafter. It took the intervention of the compliance officer to discover the violation.

American Roofing settled three fall protection cases which became the basis for the repeat violation. According to law, one prior citation which is a final order is sufficient to issue a repeat citation. George Hyman Construction Company v OSHRC, 582 F2d 834, 839 (CA4 1978). Foreman Hall was involved in one of the prior citations. We find the three prior citations, and Foreman Hall's failure to supervise the two men on May 10 proved American Roofing's foreman had constructive knowledge of the violation.

Hackensack stands for the proposition the employer need not constantly observe his men. There is no absolute duty and Hackensack does not impose one. However, the

commission in Hackensack said the foreman should have "checked on them from time-to-time..." because of the prior violations. At page 51,556. In the case at bar, the foreman did no checking on May 10, again in the face of the prior fall protection citations.

The foreman's constructive knowledge is imputed to the company. Dover Elevator Co, Inc, [10] a federal review, commission decision, CCH OSHD 30,148, page 41,480. For one thing, the company knew of the three prior citations for fall protection violations. For another, the company knew Foreman Hall was, on the morning of May 10, working two jobs. Senior testified he "had to go look at another job that I was starting." TE 79. The other job was not the one right across the street where Senior positioned himself when he arrived at the work site at 10:30 AM. From this, we infer the company knew Senior was working on two jobs on May 10. Finally, Senior testified he was trained to understand if he was "off doing something else," he was "still responsible for...[his] men." TE 77. Here we infer the company made its foreman responsible for the conduct of the workers whether he was on a particular job site or not.

> Constructive knowledge is shown if the employer could have discovered the existence of the violative condition with the exercise of reasonable diligence...Whether an employer was reasonably diligent involves a consideration of several factors including...[a duty]...to adequately supervise employees, and to take measures to prevent the occurrence of violations. (emphasis added)
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> Revoli Construction Company,[11] a review commission decision, CCH OSHD 32,497, page 50,376.

[10] OSHRC.gov. Then click on decisions and select final commission decisions for the year 1993.
[11] OSHRC.gov. Select decisions and click on final commission decisions for 2001.

American Roofing knew it had received three previous fall protection citations which were of sufficiently recent vintage to be used as a basis for a repeat violation and still permitted Foreman Hall to work two jobs on May 10.

We conclude the department of labor proved American Roofing had constructive knowledge of the violation, and reverse the hearing officer on this point, for the following reasons. Despite Schmitt's safety training, Senior felt no duty on May 10 to supervise his men. Obviously, American Roofing permitted Senior to work the two jobs. Senior was under the belief, he said, he could give an order and not be concerned whether it was carried out. We infer Foreman Hall's testimony about giving an order and then not making sure it was followed applied to the May 10 work day when he absented himself from the job site for several hours. American Roofing had three prior citations for fall protection which put it on notice it should have a "heighten[ed]...awareness"[12] of its need to make sure its workers wore the fall protection equipment about which they had been trained. Company fall protection training and Scott Schmitt's random inspections are for naught if the foreman absents himself from a job and then, when he arrives, gives an order and deliberately places himself where he could not see the men on the roof. American Roofing had no cause to be surprised when the two men were caught on the roof without fall protection.

Employee Misconduct Defense

Affirmative defenses have become very important to employers litigating citations. Employee misconduct is often raised as a defense. While the department of labor has the burden to prove the elements of the violation, Ormet Corporation, supra,

[12] Precast Services, Inc, a federal review commission decision, CCH OSHD 30,910, p 43,036. Click on OSHRC.gov and select first decisions and then final commission decisions for the year 1995.

and 803 KAR 50:0l0, section 43, the employer must first raise and then prove an affirmative defense. CR 8.03.[13]

In Jenson Construction Company, CCH OSHD 23,664, page 28,695, the federal review commission laid out the four elements an employer must prove to establish the defense of employee misconduct. They are:

1. the employer has established work rules designed to prevent the violation,

2. the employer has adequately communicated these rules to its employees,

3. the employer has taken steps to discover violations and

4. the employer has effectively enforced the rules when violations are discovered.

In his recommended order our hearing officer said the department of labor does not question American Roofing's proof about, one, establishing work rules, two, communicating those rules and, three, taking steps to discover violations. RO 15. After we granted review, received the first set of briefs from the parties and reviewed the trial record, we became concerned whether the company proved it had taken steps to discover violations, the third element. Because Foreman Hall was absent from the work site from 7:30 AM until 10:30 AM on May 10 and because when he arrived he gave an order and then did not determine whether it was carried out, we asked the parties to answer three questions. We wanted to know when the three employees arrived on May 10 and if Foreman Hall spent any time that day observing his son and Mr. Cook at work. Then we asked if Hall, Sr, had not observed the two men on the roof on May 10 before the inspection began that day, would this fact , assuming it were true, affect the ability of the

[13] Section 4 (2), 803 KAR 50:010, our rules of procedure, says the civil rules will apply to our cases where applicable.

respondent to prove it took steps to discover violations, the third element of the affirmative defense? This is not an idle concern.

While the two American Roofing's employees testified they retrieved their fall protection gear which had been locked in the house before beginning their work on May 10, Junior for example testified the gear was "behind a tree during the inspection" (TE 133), Robert Cook said something else quite different. On direct examination of Mr. Cook in response to a question about retrieving the fall protection gear which was photographed by the compliance officer and entered as exhibits 2G and 2I, the following exchange took place:

> Q. What was discussed to the best of your recollection?
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> A. Best of my recollection all it was, was him [the CO] introducing himself, who he was, and did Donnie know that he had guys on the roof over there not tied off. And what kind of safety equipment we were using.
>
> Q. What did Donnie say in response to that?
>
> A. Donnie was--had me go to his truck and grab his safety equipment out of his truck.
>
> Q. Okay. And where was your fall protection equipment at this time.
>
> A. Still in the back of the house across the street.
>
> (emphasis added) TE 171.

At this point the examiner changed the subject. From a careful reading of the above questions and answers, it appears Mr. Cook was caught unawares by a change in the subject matter of the questions, prompting him to give an off hand and precise statement about the location of his fall protection gear. It was not behind a tree or in Donnie's truck - it was still in the back of the house. If Mr. Cook's fall protection equipment was still in

the house across the street, and we find it was, that means Mr. Cook and Junior worked the morning of May 10 without supervision and also without fall protection equipment.

Our hearing office in his recommended order found Cook and Junior's fall protection equipment was behind a tree. RO 8. We disagree and reverse him on this point.[14] Compliance Officer Bendorf testified he took photographs of the fall protection equipment used by the company at the work site; it was in Senior's truck. TE 35, TE 55-56 and exhibits 2 H and 2 I. Junior said his fall protection equipment was locked in the house at the beginning of work on May 10. TE 131. Junior said he and Mr. Cook put on the equipment; he said after he and Cook worked on the roof for a while, it was raining on and off, he and Mr. Cook climbed down and put the equipment behind a tree. TE 133.

D. J. Hall, Jr, said the compliance officer asked him about the equipment and how it was used; he did not remember any other questions. TE 140. Junior said he had keys to the house, presumably where they kept the equipment at night. TE 151. Senior confirmed that his two men locked their harnesses in the house "before they left" at night. TE 82. Mr. Cook testified he had on May 10 arrived at the house, removed his equipment from inside the house and put it on to work. TE 165.

While both Junior and Mr. Cook testified they had taken the equipment from the house that day and put it on, we find Mr. Cook's statement the equipment was still in the house to be more credible. Compliance Officer Bendorf had inquired about the fall protection equipment and was taken to the foreman's truck; he took pictures of the equipment removed from the truck which labor admitted as exhibits 2 H and 2 I. Bendorf said he moved about the work site for his inspection but saw no other fall protection

[14] Secretary, Labor Cabinet v Boston Gear, Inc, Ky, 25 SW3d 130, 134 (2001). The review commission is the ultimate decision maker.

equipment, lying behind a tree or elsewhere. TE 255. Compliance Officer Bendorf might simply have missed the equipment behind the tree; Hearing Officer Majors said perhaps there were two sets of equipment: one behind the tree and the other in the truck. We find, however, Mr. Cook resolved this conflict when he said the equipment, at the time of the compliance officer's arrival, was still locked in the house. TE 171. When the compliance officer asked about the fall protection equipment, Mr. Cook showed him the harnesses which were in the foreman's truck, not behind a tree. Compliance Officer Bendorf during his inspection saw no fall protection equipment on the premises other than what was taken from the truck. When Mr. Cook said his fall protection equipment was still in the house, he was serving neither his interests nor those of the company.

The lack of supervision, as well as the location of the fall protection equipment in the back of the house when the compliance officer arrived, raises a question about whether American Roofing proved the third element of the employee misconduct affirmative defense: whether the employer has taken steps to discover violations. We know of course training director Scott Schmitt testified at length about his safety training program, he was hired after the three prior fall protection citations were issued to the company, and his unannounced visits to construction sites. But if Foreman Hall was not supervising and the fall protection equipment was still in the house, that calls into question whether the company was doing what it must to discover violations and thus to prevail on the third element of its affirmative defense. The same would be true if the foreman were simply not supervising.

We return to the third question we asked the parties: if Mr. Hall, Sr, on May 10 did not observe Mr. Cook and D.J. Hall, Jr, working on the roof of the house, would this

fact (assuming it were true) affect the ability of American Roofing to prove the third element of the employee misconduct defense? In response, the company argued Mr. Schmitt's training, his random inspections and his "write ups" of employees who broke the rules proved the third element. American Roofing then cited a number of cases to make its point. See American Roofing's brief filed on May 7, 2007, p 5. For example, American Roofing cited to Rawson Contractors, Inc,[15] a federal review commission decision, CCH OSHD 32,657, where the commission said the company took reasonable steps to discover violations. Rawson's president made regular visits to company work sites, "including a visit to the subject work site on the morning of the inspection." At page 51,326. In the case at bar, however, the first person to observe American Roofing employees at work on May 10, 2005 was the compliance officer.

If Mr. Schmitt's commendable safety program were all we have before us, then the hearing officer would have made the correct decision when he concluded American Roofing proved the third element of its employee misconduct affirmative defense. But there is more. First of all, the company had three prior citations for fall protection violations which were recent enough for the department of labor to use them to prove the repeat violation. Second, Foreman Hall did no supervising of his son and Mr. Cook on May 10, the date of the inspection; and in fact when Senior arrived at the work site that day, he positioned himself where he could not see his men. Third, Mr. Cook convincingly testified his fall protection gear was still in the back of the house when the compliance officer arrived on May 10 to find him on the roof 25 feet from the ground. Fourth, Foreman Hall testified about his belief he could give his men an order and then direct his attention elsewhere, a fact confirmed by his absence from the job site the

[15] OSHRC.gov. Then select decisions and click on final commission decisions for 2003.

morning of May 10 and his conduct after he arrived. Fifth, neither Mr. Cook nor D.J. Hall, Jr, had on fall protection when the compliance officer arrived.

In Monahan and Loughlin, Inc, a federal ALJ decision, CCH OSHD 29,352, the judge upheld a citation charging a failure to cover floor openings despite the fact the company said it lacked knowledge of the violation. The ALJ said the company had a duty to protect its employees even though it did not have a foreman on the job site to enforce its safety rules. While the ruling in Monahan and Loughlin is about employer knowledge, the case stands for the proposition a company has a duty to enforce its safety rules whether it has supervision on the job or not.

Although the department's burden to prove constructive knowledge of the violation and the employer's to prove the third element of the employee misconduct defense share common elements, here the prior citations, the lack of supervision on May 10 and the two men working on the roof at a time when their fall protection equipment (at least Mr. Cook's) was in the back of the house, each party must shoulder its own burden - employer knowledge for the department of labor and employee misconduct for American Roofing. Precast Services, supra, at page 43,036-43,037.

In Pike Company, Inc, supra, at page 46,978, an employee worked on a scaffold 20 feet in the air without the required ladder; he had gained access to the scaffold by climbing on it which was a violation. The ALJ rejected the third element of the employee misconduct defense, "that the rules were actually enforced by periodic inspections or other means," in part, because the violation took place in plain view, lasted up to one hour and went undetected by supervision. In the instant case, the violation

lasted for 15 to 20 minutes, was in plain view and went undetected by the foreman who was in the area.

In Brock, Secretary of Labor v The L.E. Myers Company, High Voltage Division and OSHRC, 818 F2d 1270, 1277 (CA6 1987), CCH OSHD 27,919, page 36,618, the court said "the employer who wishes to rely on the presence of an effective safety program to establish that it could not reasonably have foreseen the aberrant behavior of its employees must demonstrate that program's effectiveness in practice as well as in theory." (emphasis added) Through the testimony of its safety director Scott Schmitt, American Roofing painstakingly proved the theory of its safety program. In practice, however, the company had fallen short, at least on May 10, 2005. On the day of the inspection, the foreman absented himself from the work site from 7:30 AM until 10:30 AM. And when he did arrive, the foreman gave an order, got in his truck and drove to a nearby location where he could not see Mr. Cook and his son on the roof. For all practical purposes, Foreman Hall was not on site all morning.

Foreman Hall testified to his belief he could give an order and then go about his business elsewhere, leaving the decision whether to follow the company rules to his employees. A federal ALJ in McGuire and Bennett, Inc, CCH OSHD 29,757, ruled the employer failed to prove the affirmative defense of employee misconduct because no steps were taken to discover violations and it did not effectively enforce its safety rules when violations were discovered. For our purposes, the ALJ in McGuire relied in part on the fact the company superintendent said he expected the workers to supervise themselves so far as the safety rules were concerned.

Based on our analysis of the prior violations and the events of May 10 leading up to the appearance of the compliance officer, we find the company did not take steps to discover violations. Because the company failed to prove this necessary, third element of the employee misconduct defense, we conclude American Roofing failed to prove its employee misconduct defense. Finding as we did the company failed to discover violations, we need not today decide whether the company enforced its safety rules through progressive discipline.

For the reasons expressed, we sustain the repeat serious citation charging the company with violating 29 CFR 1926. 501 (b) (13) and the penalty of $15,000. The department of labor proved employer knowledge while American Roofing failed to prove its affirmative defense of employee misconduct. The hearing officer's recommended order is reversed.

It is so ordered.

October 2, 2007.

Kevin G. Sell
Chairman

Sandy Jones
Commissioner

William T. Adams, Jr.
Commissioner

Certificate of Service

This is to certify a copy of the decision and order of the commission was mailed to the parties on October 2, 2007 in the manner indicated:

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