

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Murton Roofing, Inc.,

Respondent.

OSHRC Docket No. **09-2143**

Appearances:

Melanie L. Paul, Atlanta, Georgia
For Complainant

Mark Viola, Mankato, Mn
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 USC sec 651 et. seq.; hereinafter called “the Act”) to review a citation issued by the Secretary of Labor pursuant to section 9 (a) of the Act and a proposed assessment of penalty thereon issued pursuant to section 10 (c) of the Act. By citation issued November 19, 2009, pursuant to an inspection of Respondent’s worksite located at Collins Avenue and 22nd Street, Miami, Florida, conducted on November 12, 2009, the Secretary cited Respondent for one repeat violation of the standard set forth at 29 CFR 1926.501(b)(10)¹ with a proposed penalty in the amount of \$4,000 for the alleged offense². Respondent filed an answer

¹ 1The citation reads as follows: 29 CFR 1926.501 (b)(10): Each employee on a low-slope roof with unprotected side and edges 6 feet or more above the lower levels were not protected from falling by a guardrail systems with toe boards, safety nets, or personal fall arrest systems:

On or about 11/12/2009, at Collins Ave & 22 St., in the city of Miami, FL, employees were working on a flat roof without fall protection.

MURTON ROOFING CORPORATION WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVELENT STANDARD 1926.501(B)(10), WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER 312152101, CITATION NUMBER 1, ITEM NUMBER 1, AND WAS AFFIRMED AS FINAL ORDER ON 2/04/2009, WITH RESPECT TO A WORKPLACE LOCATED AT 2558 N. UNIVERSITY DRIVE IN CORAL SPRINGS, FL.

² A second citation alleging a serious violation of 29 CFR 1926.503(a)(2)(viii) was withdrawn by Complainant in the complaint filed with Commission on February 16, 2010.

to the complaint wherein Respondent admits the jurisdictional allegations of the complaint but denies that any violations of the Act occurred during the inspection of the worksite. Respondent also admits the standard cited applies to the work activity performed by its employees. Pretrial discovery was served by Complainant (Requests for admissions, interrogatories) and answered by Respondent (Exhibits C-2, C-4) and a hearing was conducted on May 26, 2010. The parties have submitted post hearing memoranda and the matter is now ripe for decision.

Before discussing the merits of the case, two issues raised by Complainant must be considered. First, the Secretary moved to amend the citation and complaint to allege a willful violation of the standard cited as an alternative to the “repeated” characterization of the alleged offense. Secondly, the Secretary opposes Respondent’s reliance upon the affirmative defense of unpreventable employee misconduct.

This matter was assigned to this Administrative Law Judge for hearing on March 11, 2010. Thereafter by order dated March 16, 2010, a hearing was scheduled for May 5, 2010, which was later rescheduled for May 26, 2010. On May 24, 2010, by facsimile transmittal, Complainant’s counsel filed a motion to amend the citation to plead “willful” as an alternative to the “repeated” characterization of the alleged offense. No memorandum of law accompanied the motion nor was any explanation given within the body of the motion for waiting until the eve of trial to file the motion. The certificate of service attached to the motion asserts that the motion to amend the citation was sent to Mr. Mark Viola, Respondent’s representative via Email on May 24, 2010. Complainant did not file a motion to continue the hearing to allow Respondent an opportunity to respond to the motion.

At approximately 1:30 PM, May 25, 2010, the day before the scheduled hearing, a conference call initiated by the undersigned was conducted with the parties. Respondent was represented by Edward Q. Cassidy, Esq. who had by facsimile, entered his appearance on behalf of Respondent that morning. Mr. Cassidy objected to the motion to amend the complaint. After hearing arguments from both parties, Complainant’s motion to amend the citation was denied. Attorney Cassidy stated that Mr. Viola, a non attorney, would represent Respondent at the hearing the following day. At the hearing, the rationale for denying Complainant’s motion to amend was placed upon the record (TR 8-10). Complainant’s counsel disagreed with the ruling in order to “make the record for appeal” (TR 10). Complainant’s counsel also renewed her motion to amend the citation at the conclusion of the hearing on the ground that the evidence “would support a willful violation” (TR 174). The motion was denied on the ground that the “willful” issue was not tried by consent of the parties.

Procedurally, motions must be filed in accordance with Commission Rule 40. That rule requires, inter alia, that prior to filing a motion “the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion If any other party opposes or does not oppose the motion”. Complainant failed to comply with this rule. Moreover, pursuant to Rule 40 (c), the opposing party must respond to the motion within ten days of service. Complainant should have filed her motion to allow Respondent the time allowed under the rule to file a response. She failed to do so.

However, the motion to amend the citation and complaint to allege willful as an alternative pleading is far from being a procedural motion. In order to establish a repeat violation, the Secretary must provide evidence that at the time of the alleged repeated violation there was a Commission final order against the same employer for a substantially similar violation. A prima facie case of similarity may be established by showing that the prior and present violations were failures to comply with the same standard. Potlatch Corp 7 OSHC 1061(1979) see also Bunge Corp. v. Secretary of Labor 638 F2d 831 (5th Cir 1981). In other words, a repeat violation may be established by evidence that the same employer was cited at least once before and a final order was issued for a substantially similar violation. This burden is generally met by the Secretary by offering into evidence documents maintained by the agency relating to Respondent’s history of prior violations and testimony regarding the similarity of the alleged violations.

On the other hand, a “willful” violation places a substantially different and greater burden of proof upon the Secretary. Although not defined in the Act, “willful” has been defined by the Courts as “conscious and intentional disregard of the conditions”, “deliberate and intentional misconduct”, “utter disregard of consequences”, by Respondent and other similar descriptions. See Brock v. Morello Brothers Construction, Inc. 809 F2d 161 (1st Cir 1987). In order to establish a willful violation, it is necessary to determine the “state of mind” of the employer at the time of the violations. The standard of proof requires that the Secretary produce evidence establishing that the Respondent displayed an intentional disregard for the requirements of the law and made a conscious, intentional, deliberate and voluntary decision to violate the law or was plainly indifferent to the requirements of the statute. A. Schenbek and Company v. Donovan, 646 F2d 799,800 (2nd Cir 1981); Morello Brothers Construction, supra at 164; Georgia Electric co. v. Marshall, 595 F2d 309 (5th Cir 1979). Willful violations are

distinguished by a ‘heightened awareness of illegality – of the conduct or conditions – and by a state of mind-conscious disregard or plain indifference’. Williams Enterprises, Inc. 13 BNA OSHC 1249, 1986-87 CCH OSHD ¶ 27,893 (1987). The Tenth Circuit has determined that an employer’s failure to comply with a safety standard under the Act is “willful” if done knowingly and purposely by an employer who having a free will or choice, either intentionally disregards the standard or is plainly indifferent to the requirements. United States v. Dye Construction Co., 510 F2d 78 at 81 (10th Cir 1975).

Complainant’s burden to establish a willful violation has been defined by the Commission as follows:

“To establish that a violation was willful, the Secretary bears the burden of proving that the violation was committed with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. William Enterprises, Inc., 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27893, p. 36589 (No. 85-355, 1987). There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Hern Iron Works, Inc., 16 BNA OSHC 1206, 1215, 1993 CCH OSHD ¶ 30,046, p. 41,256 (No 89-433, 1993). A violation is not willful if the employer had a good faith belief that it was not in violation. The test of good faith for these purposes is an objective one – whether the employer’s belief concerning the interpretation of a rule was reasonable under the circumstances. General Motors Electro-Motive Div., 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,169 (No. 82-630, 1991).” Secretary of Labor v. S. G. Loewendick and Sons, 16 BNA OSHC 1954, 1958 (1994).

It is well established that the Commission has allowed the “liberal amendment of pleadings” and that view has been upheld by the Circuit Courts Long Manufacturing Co. v. OSHRC 554 F2d 903 (8th Cir 1977); Usery v. Marquette Cement Manufacturing Co. 568 F2d 902 (2nd Cir 1977).³ Alternative

³ Under the Commission procedural rules, the standard applicable to amending the citation and complaint is Fed. R. civ. p. Rule 15. Rule 15 (a) provides:

Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:
21 days after serving it, or

pleadings, as in this case, pursuant to Rule 8(e)(2) of the Federal Rules of Procedure have similarly been liberally accepted by the Review Commission see Donovan v. Royal Logging Co., 645 F2d 822 (9th Cir 1981), affirming 7 BNA OSHC 1744; Usery v. Marquette Cement Mfg. Co., *supra*. The Secretary's regulations also provide for the issuance of citations in the alternative Field Inspection Reference Manual, Ch III c 4(b).

However, there are limits to which the courts will go in granting either a motion to allow pleading in the alternative see Roanoke Iron and Bridge Works Inc. 5 BNA OSHC 1391 affirmed 588 F2d 1351 (4th Cir 1978) or to amend the citation and complaint. Cornell and Co. v. OSHRC 573 F2d 820 (3rd Cir 1978). In Cornell, the Secretary filed a motion to amend the citation and complaint nine days before the hearing by withdrawing the originally cited standard and alleging that a different standard had been violated. Respondent sought dismissal of the amended complaint on the ground that the amendment changed the legal and factual basis of the alleged violation and its ability to prepare a defense had been materially impaired by the delay in filing the amendment more than four months after the inspection and nine days before the hearing. The Third Circuit agreed and held that the Review Commission abused its discretion by granting the motion to amend. The Court found that the amended citation required Respondent to present witnesses to meet the new charge and "that the timing of the final amendment, more than four months after the inspection, made it impossible for Cornell to locate these needed witnesses". Cornell supra. The Court found that the amendment completely changed the nature of the original charges as well as the legal and factual matters in dispute by injecting new issues into the case.

The Court also cited the Review Commission decision in Secretary of Labor v. Frank Briscoe Company, Inc., 4 BNA OSHC 1729 (1976) wherein the Commission reversed the decision of an Administrative Law Judge granting an amendment to a complaint filed two days before a hearing without

(A) If the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e) or (f) whichever is earlier.

Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(2) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

any explanation from the Secretary. The Court noted that the key to administrative pleading is to allow an adequate opportunity to prepare to eliminate the potential for prejudice to a party. The Court observed that “[p]reparing for a hearing of this nature is not the same as preparing for a foot ball game. Surely it is unfair to charge an employer with the burden of guessing what violations the Secretary might charge and preparing a number of defenses accordingly” Cornell at 825.

As demonstrated above, the Secretary has introduced by its “willful” allegations a new and significantly more complex burden of defense upon Respondent. That burden is completely different from defending against a repeat allegation and, at the least, requires the testimony of witnesses to rebut the allegation. Evidence of employer awareness, bad faith, intentional disregard of safety hazards, knowledge of violative conditions, and the state of mind of management officials presented by the Secretary in support of the allegation must be met by Respondent. Moreover, the motion was filed two days before the hearing with no rational reason or explanation for the amendment, much less the timing of the motion, given either in the body of the motion or in a memorandum of law. It is difficult to envision a motion that would be more prejudicial and unfair to Respondent. Accordingly, the decision to deny Complainant’s motion to amend the citation and complaint is reaffirmed.

Complainant at the conclusion of the trial renewed the motion to amend the citation in the alternative to willful on the ground that “the evidence of heightened knowledge was addressed here today and would support a willful violation...” (TR 174). Complainant failed to provide any oral argument or written memorandum in support of the “renewal” motion, nor was the issue raised or discussed, other than in a footnote, in the post trial brief filed by the Secretary⁴. The motion to conform the pleadings to the evidence was denied at the hearing on the ground that Respondent did not consent to try the willful allegation.

Amendments to pleadings after trial is addressed at Rule 15 (b)(2), Federal Rules of Civil Procedure. That rule reads as follows:

For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties’ express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time,

⁴ At page 7 of the post trial memorandum, Complainant list five issues to be discussed. The motion to amend the citation was not listed as an issue.

even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

The Commission has allowed pleadings to be amended during and after the hearing. John and Roy Construction 6 BNA OSHC 2101 (1978); Rodney E. Fossett 7 BNA OSHC 1915 (1979) see also New York State Electric and Gas v. Secretary of Labor 88 F3d 98 (2nd Cir 1996). However, a prerequisite to the granting of a conforming amendment is the express or implied consent of the parties. In this case Respondent expressly objected to the amendment filed by the Secretary and that objection was sustained. Thus, it cannot be found that Respondent thereafter intended to defend against a “willful” allegation. Indeed, Respondent offered no evidence or testimony in opposition to a willful charge.

Nor did Respondent implicitly consent to defend against that issue. Implied consent is often manifested when both parties introduce evidence relevant to the charge alleged by the Secretary. RGM Construction Co. 17 BNA OSHC 1229 (1995). However, consent will be found only when both parties, particularly the Respondent, understand that an unpleaded issue was being litigated. Nordam Group 19 BNA OSHC 1413 (2001). See also McLean-Behm Steel Erectors Inc. v. OSHRC 608 F2d 580 (5th Cir 1979) wherein the Fifth Circuit Court of Appeals reversed the Review Commission’s approval of an amendment by consent and stated: “the unchallenged admission of evidence relevant to both pleaded and unpleaded issues does not imply consent to trial of the unpleaded issues, absent some obvious attempt to raise a new issue.... Because all the proof addressed at the hearing was relevant to the violation originally charged, petitioner’s failure to object to its admission cannot be construed as implied consent to trial of the unpleaded regulation” supra at 582. The only evidence presented by the Secretary in this case that could remotely support a willful allegation was repeated violations of the roofing standards. That evidence, with nothing else, would not support a willful violation. However, it will be evaluated under the category of “history” to determine an appropriate penalty. Moreover, to find “implied” consent under the circumstances of this case would be highly prejudicial to Respondent, particularly since it was represented by a non lawyer at the hearing. See Carlisle Equipment Co v. Secretary of Labor 24 F3d 790 (6th Cir 1994), where the Sixth Circuit Court of Appeals held that the employer must know that the evidence presented by the Secretary is relevant to an unpleaded issue. Accordingly, the denial of the Secretary’s oral motion to conform the pleading to the evidence is reaffirmed.

The second issue raised by the Secretary is her motion to deny Respondent the opportunity to raise unpreventable employee misconduct as an affirmative defense on the ground that Respondent failed to raise the defense in its answer to the complaint. The record reveals that Mark Viola, Vice president of Risk Management, Tecta America Corp,⁵ filed a notice of contest on behalf of Respondent on December 16, 2009. Thereafter, on March 5, 2010, Mr. Viola, a non lawyer, filed an answer to Complainant's complaint wherein Respondent "agreed" to all of the paragraphs of the complaint except paragraph IV and paragraph IX. Paragraph IV states: "The violations occurred on or about November 12,2009 at Collins Avenue and 22nd Street, Miami Beach, Florida (hereinafter "workplace")". The response in the answer to the allegation is "denies. violations were alleged to have occurred on or about November 12, 2009". Paragraph IX of the complaint states, "The penalty proposed for citation No. 2, Item No. 1, as set forth in Exhibit B, is appropriate within the meaning of paragraph 17(i) of the Act. The abatement date fixed was and is reasonable". The response in the answer is "Denies. No violation existed in which to assess a penalty". No affirmative defenses were raised by Respondent in its answer nor is there any indication in the answer that Respondent believed that the violations were the result of unpreventable employee misconduct.

On April 6, 2010, Complainant filed interrogatories upon Respondent. Mr. Viola's responses to interrogatories 1 and 3 describe the extensive training program that Respondent has in place to train employees to prevent safety violations. The answer to interrogatory No. 6 is as follows:

ANSWER: In order to adjust or modify human behavior the consequence has to be soon, certain and positive. This philosophy directly correlates with our Behavior Based Safety program. It is common believe (*sic*) among behavioral scientists that negative consequences to an uncertain event play little or not (*sic*) role in changing human behaviors. In addition, the cultural differences between Hispanic workers and their American counter parts are much different. Behavioral change does not occur overnight nor with a single incident.

It is well established that the Commission seeks to decide cases on the merits rather than pleading technicalities; Merchant's Masonry Inc. 18 BNA OSHC 1936 (1999); Sanitas Cleaning Contractors, Inc. 1 BNA OSHC 1538 (1974). This is particularly the view in cases where the pleading

⁵ Based upon the record in this case it is inferred that Tecta America Corp. created Respondent's safety program.

errors involve non lawyer pro se litigants; Genco, Inc. 6 BNA OSHC 2025 (1978). The Commission has also relaxed the rule on the timely pleading of affirmative defenses in the case of pro se employers provided that the untimely assertion of an affirmative defense does not unduly prejudice the Secretary; Carolyn Manti 16 BNA OSHC 1458 (1993).

Based upon Respondent's answers to pretrial discovery, it is clear that it would be relying upon its extensive training program at the hearing as a defense to the actions of its employees. Moreover, the "pretrial brief" filed by Mr. Viola states that the violation was a result of employee "indifference to their personal safety". It is equally clear that Mr. Viola, by his actions, was not familiar with the technical pleading requirements established by the Commission. Moreover, as demonstrated infra, the Secretary suffered no prejudice by allowing Respondent to rely upon the affirmative defense of unpreventable employee misconduct. Accordingly, Respondent was allowed to submit evidence of unpreventable employee misconduct.

FACTS

Respondent is a roofing contractor with business activities in the Miami, Florida area. On November 12, 2010, Respondent's employees were engaged in roofing activities to repair drains and install flashing on the roof of a building located at Collins Avenue and 22nd Street, Miami Beach, Florida. The workforce consisted of two crews with one laborer and a foreman for each crew. Compliance Officer Hernaldo Carpio, while driving his vehicle on Collins Avenue accompanied by Compliance Officer Angel Diaz, observed workers on the roof of the building without wearing fall protection. He and CO Diaz approached the worksite and conducted an opening conference with foremen Mr. Louis Gomez and Omar Matute. Each foreman was responsible for one employee, Alan Perez and Omar Delgado, respectively. The building upon which the work was performed was approximately 20-25 feet high, was cylindrical and had a flat roof.⁶ The employees accessed the roof by an extension ladder. Both compliance officers observed the four employees walking on the roof and in close proximity to the edge without wearing fall protection. The compliance officers testified that guardrails, safety nets or warning lines were not in place nor was a monitor assigned.

⁶ A "flat roof" is not defined in the standards. However, the Commission and the Courts have determined that a flat roof falls within the coverage of 29 CFR 1926.501(b)(10); Capeway Roofing Systems Inc. v. Chao 391 F3d 56(1st Cir 2004)

Mr. Alberto Sweeney, Respondent's safety director agreed that the four employees were exposed to a falling hazard. According to Sweeney, after the inspection the employees put on their fall protection equipment and placed warning lines around the perimeter of the building to complete the job. Foreman Gomez also admitted to Compliance Officer Carpio that the employees were exposed to a falling hazard. Moreover, all of the necessary fall protection equipment was in the company truck at the worksite and readily accessible to the employees. Mr. Sweeney acknowledged that the employees were aware of the requirement to wear fall protection and they "had everything they needed to work on that roof inside their trucks" (TR 125). Mr. Sweeney further testified as follows: "so they keep enough materials in there (*sic*) truck to where they can go up there. They had all the anchors. They had harnesses. They had Lanyards. Everything they needed was in the truck. It was plain negligence on their part going up on that roof without them. There was, in my point of view, no excuse for that" (TR 126).

As a result of the inspection, Foreman Matute was terminated from employment and the other three employees were given five days off without pay and a reprimand.

The Secretary also submitted evidence of one previous citation issued to Respondent for a violation of 29 CFR 1926.501(b)(10) which was settled by the parties and said settlement became the final order of the Commission see (Exhibit C-2 admissions No 1, 2, 3). This citation forms the basis for the "repeat" characterization of the current citation. Respondent did not object to the introduction of this evidence and made no effort to establish dissimilarities between the prior citation and the current matter.⁷

DISCUSSION

To prove a violation of an OSHA standard the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employees failed to comply with the terms of the standard; (3) employees had access to the violative conditions; (4) the employer either knew or could have known with exercise of reasonable diligence of the violation. Astra Pharmaceutical Prod. Inc. 9 BNA OSHA 2126, 2129 (1981), affirmed 681 F2d 69 (1st Cir 1982). Preponderance of the evidence

⁷ The Secretary also introduced evidence of prior citations issued to Respondent for violations of 29 CFR 1926.501 (b)(11) and 29 CFR 1926.501(b)(1) which were settled by the parties and became the final order of the Commission. These prior citations have been considered as part of the Company's history for purposes of assessing a penalty.

is defined as “that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by the proponent are more probably true than false”. Ultimate Distrib. Systems 10 BNA OSHC 1568 (1982). Moreover, reasonable presumptions and inferences may be drawn based upon the record evidence. See Federal Rules of Evidence Rule 301; American Iron and Steel Institute v. OSHA; 577 F2d 825,831 (3rd Cir 1978); Republic Steel Corp v. OSHA 448 U.S. 917 (1980).

Respondent has stipulated that the cited standard applies to its work activities and its employees failed to comply with the terms of the standard. The un rebutted evidence establishes that Respondent’s employees had access and were exposed to the hazard of falling from the roof. However, Respondent asserts that it did not know nor could it have known of the violative conditions because it had provided extensive training to its employees to comply with the standard when working on roofs. Respondent argues that it should not be held responsible for the unanticipated misconduct of its employees. The unsafe work conditions created by its employees could not have been prevented by Respondent.

To meet its burden of establishing unpreventable employee misconduct, an employer must prove that it has (a) established work rules designed to prevent the violation, (b) adequately communicated those work rules to its employees, (c) taken steps to discover violations and (d) effectively enforced the rules when violations were discovered. American Sterilizer Co. 18 BNA OSHC 1082, 1087 (1997); Propellex Corp. 18 BNA OSHC 1677 (1999).

The essence of Respondent’s unpreventable employee misconduct defense is set forth in Respondent’s post hearing brief as follows:

“...employees who were found in violation of the law had been trained by Murton Roofing to recognize hazards, had been trained in the use and application of fall protection techniques, had equipment on site to prevent such fall hazards, and withheld information from the investigating compliance officers concerning their knowledge of fall protection techniques and the location of equipment on site to prevent fall hazards”. Thus “Murton did not violate the law ... four employees violated the law”. (Respondent’s post hearing brief Pg. 1-2) In support of this argument Respondent points to its:

1. Training programs for the recognition of hazards (Exhibit R-1, R-2, R-5)
2. Training its employees in those programs (Exhibit R-3, R-4, R-6, R-7, R-9 and R-11)
3. Training programs which deal with undesirable behavior (Exhibit R-8, R-11)
4. Its method for dealing with employees engaged in undesirable behavior on November 12, 2009, the day of the inspection (Exhibit C-13,C-16)

According to Safety Director Sweeney the employees observed without wearing fall protection were given instructions the morning before the inspection to "tie off" (TR 126). Moreover, the employees had received training sessions conducted during April, July and August of 2009. Those employees failing a test of their knowledge of fall protection were required to be retrained (TR 98-99; Exhibit R-7, R-9). Indeed, the employees told the compliance officer that they had received fall protection training (TR 51).

Respondent placed heavy reliance on its so-called Behavior Based Safety System developed by Tecta America. This is a training course for managers, executives and supervisors based upon the principle that negative consequences (warning, suspensions, terminations) are not the appropriate means of changing behavior (Respondent's brief pg. 5; Exhibit R-11). Respondent described this theory as follows:

"Managers and supervisors have learned that to change human behavior long term you have to have soon, certain and positive consequences. Murton Roofing's consequence to undesirable acts on the part of their employees is to put those employees back through training on the subject. Behavior Based Safety as presented in Exhibit R-11 is the philosophical approach Murton takes towards the implementation of its safety and health program, which is totally contrary to the Government's approach of changing behavior by creating rules and enforcing progressive discipline. In this case Murton believed that

after this event, the employee's actions were so egregious that severe disciplinary actions were justified". (Respondent's brief pg. 6)

Finally, Mr. Sweeney visits the various jobsites throughout the working day and has not found fall protection violations. He had no explanation as to why OSHA compliance officers observed fall protection violations at three separate jobsites.

The evidence presented by Respondent in support of the unpreventable employee misconduct affirmative defense must be analyzed in accordance with the tests established by the Commission. First, did Respondent establish work rules designed to prevent the violation? The unrebutted evidence on this record establishes that Respondent did have a comprehensive training program which included fall protection training for its employees. This conclusion is buttressed by the fact that the Secretary withdrew the failure to train citation issued to Respondent. Second, were the work rules adequately communicated to the employees? The record reveals that the employees found to have violated the fall protection rules had been trained on three separate occasions during the seven months preceding the inspection and had been instructed on the day of the inspection to "tie off". Third, were steps taken to discover the violations? Effective implementation of a safety program requires a diligent effort to discover and discourage violations of safety rules by employees. American Sterilizer Co., supra. Although Sweeney stated that he visited the jobsites and found no violations of the fall protection standard, on three separate occasions, compliance officers observed violations while driving by worksites. Moreover, the fact that two foremen participated in violating the fall protection requirements leads to the conclusion that supervisory personnel failed to uncover violations and did not require compliance with the fall protection rules by employees.

As noted above, Respondent rejects the "government's approach of changing behavior by creating rules and enforcing progressive discipline". (Respondent's brief at 6) In Respondent's view, retraining employees who violate safety rules is more effective in eliminating "bad conduct" in the future. To accomplish that goal, Respondent put in place what appears to be an elaborate training program for managers and employees. However, based upon the record of this case, it is clear that Respondent's "behavior based safety system" has not achieved the results anticipated by Respondent. On three separate occasions at three separate worksites, compliance officers have observed employees and

foremen violating fall protection safety regulations. It was only after the latest incident that Respondent disciplined employees by issuing reprimands to three employees and terminating the fourth employee. Thus, Respondent has failed to meet its burden of proving unpreventable employee misconduct and that affirmative defense is rejected. Based upon this record, the Secretary has established by the preponderance of the evidence that Respondent violated the standard cited as alleged.

As stated above, in order to establish a repeat violation the Secretary must prove that the same employer was cited at least once before and a final order was issued for a substantially similar violation. Potlatch Corp. 7 BNA OSHC 1061 (1979). As demonstrated above, the Secretary has submitted un rebutted evidence in support of each of the aforesaid elements. Indeed, Respondent admits to previous substantially similar violations of fall protection regulations and concurs that its employees violated a fall protection standard in the instant case. Moreover, the Secretary need not establish a state of mind to violate the standard to establish a repeat violation. In Potlatch supra, the Commission rejected the notion that an additional state of mind element is required to prove a repeat violation, however, the employer's attitude may be considered as one of several factors for penalty assessment. Accordingly, based upon the foregoing, the repeat violation cited by the Secretary in this matter is affirmed.⁸

PENALTY

Section 17(j) of the Act requires that due consideration must be given to four criteria in assessing penalties: size of the employers business, gravity of the violation, good faith and prior history of violations. In J. A. Jones Construction Company 15 BNA OSHC 2201 (1993), the Commission stated:

These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. Trinity Indus., Inc. 15 BNA OSHC 1481 (1992) CCH OSHD ¶ 29,582, p. 40,033 (No 88-1681, 1992); Astra Pharmaceutical Prod. Inc. 10 BNA OSHC 2070 (No 78-6247m 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees

⁸ As an alternative finding, the record supports a finding that the violation was serious within the meaning of the Act in that there was a substantial probability that death or serious harm could result and Respondent knew or with the exercise of reasonable diligence could have known of the presence of the violations. East Coast Texas Motor Freight, Inc. v. OSHRC 671 F2d 845 (5th Cir 1982); Pete Miller Inc. 19 BNA OSHC 1257 (2000); Bethlehem Steel Corp v. OSHRC 607 F2d 1069 (3rd Cir 1979).

exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. Kus-Tum Builders, Inc. 10 BNA OSHC 1128, 1132 (1981) CCH OSHD ¶ 25,738 P. 32, 107 (No 76-26,444, 1982).

In this case, as in every case, the gravity of the violation is the starting point and generally the most important factor in penalty assessment, see Caterpillar Inc. 17 BNA OSHC 1731 (1996). Gravity consists of four factors; the number of exposed employees, the precautions taken to protect employees, the duration of exposure and finally the probability that an accident will occur. The record reveals that four employees were exposed to falling in excess of twenty feet from a roof; however, there is no evidence of any injuries or deaths in this case or in any of the previous cases. The probability of an injury is low to moderate. Moreover, the evidence indicates that Respondent instituted an extensive training program which is an indication of a good faith effort to comply with the fall protection standard. Accordingly, the penalty is reduced to \$3,000.

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 a Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of Citation No.1 was withdrawn by the Secretary. It is therefore vacated and no penalty is assessed.
2. Item 1 of Citation No. 2, alleging a repeat violation of 29 CFR § 1926.501(b)(10), affirmed, and a penalty of \$3,000.00 is assessed.

/s/

Judge Stephen J. Simko, Jr.

Date: October 19, 2010