

FACTS

On April 7, 2010 Compliance Officer Steve Warner was driving by Route 1 in Scarborough, Maine, when he observed employees working on the edge of a flat roof on a commercial building without being tied off. (Tr. 17, Ex. C-3, photo 7) The CO stopped his car and took several photos. (Tr. 24)

From the adjacent parking lot, the CO observed two employees, one with a hat and one bare headed, working on a roof approximately 20-feet off the ground. (Stipulation #6) The employee without the hat was rolling glue on the roof with no fall protection and standing in front of a 12-inch parapet. (Tr. 16-17, Ex C3 (1-4)) The employee with the hat was standing behind a large parapet. (Tr. 22, Ex. C-3 photos 5-6) The CO crossed the street and climbed a ladder onto the roof, which was approximately 20-feet above the ground. (Stipulation 6) Warner identified himself as an OSHA Compliance Officer. The employee with the hat was identified as Davis and the employee without the hat identified himself as Crockett and asserted that he was in charge. (Tr. 39-40). Crockett told the CO that he and Davis were not tied off because they did not want to drag their lanyards through the glue they had spread on the roof. (Tr. 41)

Although neither employee was tied off, the CO observed that they were both wearing harnesses. Indeed, both employees had all the components necessary for proper fall protection. (Tr. 28-29, 35) In his OSHA 1B report, the CO wrote that “the foreman stated that he knew he needed to be tied off” and that “this would properly [sic] cost him his job.” (Ex. C-2)

As a result of the inspection, Tecta was issued a citation alleging a repeated violation of 29 C.F.R. §1926.501(b). The standard provides:

Sec. 1926.501 Duty to have fall protection.

* * *

(b)(10) Roofing work on Low-slope roofs. Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

The Secretary proposed penalty of \$50,000. Prior to the hearing, the Secretary amended the citation by reducing the charge to a serious violation with a proposed penalty of \$5000.

Testimony

1. Steven Warner

Steven Warner he has been an OSHA Compliance Officer for 30 years. (Tr. 14) In that time, he has conducted approximately 500 fall protection roofing inspections. (Tr. 15) He testified that, as part of the OSHA local emphasis program on fall protection, wherever he goes, he looks around to see that employees have proper fall protection. (Tr. 16) On the morning of April 7, 2010, he was driving in Scarborough, Maine. On Route 1, he noticed some people working on a roof without being tied off. It was a flat roof and people were rolling something onto it. He stopped and took some photographs. (Tr. 15-17, Ex. C-3, photos 1-7) The employees were 2-3 feet from the edge of the roof. (Tr. 20) There was a foot high parapet. (Tr. 30) They were not tied off, and their lanyards were hanging. (Tr. 26, Ex. C-3 photo. 9) However, there were unused tie-off ropes adjacent to where the employees were standing. (Tr. 28, Ex. C-3, photo 11) The tie-off ropes were attached to a vent pipe. (Tr. 36) The CO testified that, had they been using the ropes, they would have had proper fall protection. (Tr. 29)

CO Warner testified that the employee without the cap identified himself as foreman. He did not recall his name. (Tr. 40) He told the CO that he was an experienced roofer. (Tr. 68) The CO asked the foreman why he wasn't tied-off. (Tr. 40) The foreman told him that they had been tied-off, but that they didn't want to drag their lanyards through the glue they were rolling onto the roof and get them all sticky and gooey. (Tr. 41) They all then came down from the roof. (Tr. 42)

The CO held a closing conference with the employee who identified himself as foreman. (Tr. 42) They discussed the nature of the apparent hazard and told the foreman how to contact him if he had any questions. (Tr. 43) According to the CO, the foreman, now identified as Crockett, told him that "this would properly [sic] cost him his job." (Tr. 59, 62, Ex. C-2)

The CO prepared a report, the OSHA 1A (Tr. 45-46, Ex. C-1) The CO testified that, in proposing \$5000 penalty, he considered that Tecta had over 250 employees and was not given any reduction for size. (Tr. 47-48) He gave no credit for good-faith because, "if they had good faith, they wouldn't be up on the roof not tied off." (Tr. 48) Also, the CO determined that they had an OSHA history and were not entitled to credit for a good OSHA history. (Tr. 48) According to the CO, the gravity of the violation was high and there was a "greater" probability that an accident would occur. (Tr. 48)

The CO testified that it's important for a company to have a written safety program and that the program be regularly reviewed because OSHA regulations change. (Tr. 53-54) He agreed that the 9th revision of Respondent's safety program took place in April 10, 2010. (Tr. 56, Ex. R-2) Reading from the 9th revision, the CO noted that Respondent's safety program said, in bright black letters, that fall protection violations would prompt immediate termination of the employee. (Tr. 61) The CO agreed that statement constituted a strong enforcement policy. (Tr. 63) However, he would not agree that a strong policy was in effect on the day of the inspection. He noted that the inspection was on April 7, 2010 while the revised policy was dated April 10, 2010 (Tr. 63) According to the CO you need to have an enforcement policy that is systematically and consistently enforced. (Tr. 65) Therefore, if the rules say you have to be fired, the rules must be followed. (Tr. 77) Similarly, if the policy calls for sending someone back to the OSHA 10-hour course, that is the policy that must be followed. (Tr. 78) The CO opined that he disagreed with the philosophy behind the concept of the unpreventable misconduct defense because every company he ever cited in 30 years claimed employee misconduct. (Tr. 79)

The CO observed that Crockett had on a harness and was wearing it correctly. (Tr. 70) Also, the lifelines, though not attached to the employees, were properly laid out. (Tr. 72) On that basis, he agreed that someone successfully taught Crockett how to put on a harness and lay out a lifeline. (Tr. 70, 72) Crockett was also wearing a lanyard attached to the harness, which the CO considered to be a critical component of fall protection. (Tr. 70-71) The CO testified that all the safety equipment was provided by Tecta. (Tr. 73)

According to the CO, a lapse in training could result in an employee not being tied-off. (Tr. 74) He also agreed that not having the proper equipment could be another reason why an employee is not properly tied-off. (Tr. 74) Furthermore, an employee might not be tied-off due to a flagrant disregard of the workrules. (Tr. 75) He agreed that, generally, employees not being tied-off due to a disregard of the rules create a different scenario from employees not being tied-off because of a mistake in judging how far they are from the roof edge. (Tr. 76)

2. Peter Owens

Respondent's first witness, Peter Owens, is the President of Tecta America New England. (Tr. 81) He founded Delta Roofing in April 1988, which was bought by Tecta in June 2007. He has been president of Tecta America New England since the purchase. (Tr. 81-82) Tecta America New England is a wholly owned subsidiary of Tecta America. (Tr. 82) Tecta America

New England is solely involved in commercial roofing and does no residential work. (Tr. 82)

Owens testified that in the last five years, Tecta has won two gold American Builders and Contractors (ABC) safety awards, four ABC platinum safety awards, and an ABC national safety award. (Tr. 83) Owens explained that a gold award is a first level award while the platinum award is the highest level. (Tr. 84) The criteria for a platinum award are based on the loss rate ratio and the size of the company versus last time. (Tr. 84) Owens pointed out that the ABC represents all construction trades, not just roofing. (Tr. 84) Owens further explained that a company has to apply to compete for a National Award. There was somewhere between 90,000 and 92,000 applicants out of which 250 were selected to compete. Out of those 250 companies, only 25 companies, from across all the construction trades actually won the award. (Tr. 85)

Owens asserted that he wrote the 7th revision of the Tecta America New England safety program, as well as the six previous versions. (Tr. 86, Ex. R-3) He also wrote the 9th revision dated April 2010. He testified that the manuals are regularly revised to keep up with changes in the industry as well as their own investigations of their job sites. (Tr. 87)

He explained that the safety manuals are rewritten in January of the year the revision is taking place and is actually issued to each of the branches in March. At that time, his safety director, Jay Maschmeier, goes to the jobs and different branches and conducts training. (Tr. 88) Maschmeier schedules a company meeting to issue the manual to current employees. Each employee is issued a manual and required to read it. At the meeting, Maschmeier goes through each category of the manual and touches on specifics, such as fall protection. Employees sign a sheet to confirm that they attended the meeting and went through the manual. (Tr. 92) On April 1, the manual is actually issued to new employees. He explained that January-March is the slowest time of the year and that this slowdown is used to allow the manuals to be rewritten.

Owens testified that there was a change in the disciplinary policy from version 7 to version 9 of the manual. The change was that they went to 100% fall protection and changed the disciplinary procedures for noncompliance to termination. These changes were implemented because of the seriousness of fall hazards. (Tr. 87) The purpose of going to 100% fall protection was to differentiate them from other companies and had nothing to do with improving the company's Worker's Compensation rates, which were already "phenomenal." (Tr. 101) According to Owens, a typical roofer in an insurance pool has a "1" rating. Tecta's rating is .54 and, in 2007 was .7. (Tr. 110)

Owens testified that Crockett signed the attendance sheet confirming that he received the manual, but there was no attestation that he actually read it. (Tr. 93) According to Owens, there are periodic updates and safety meetings held at all the branches. (Tr. 100) Moreover, in December 2009, when the company decided to go to 100% fall protection, they had a meeting at all the branches discussing fall protection and discipline. (Tr. 100) However, Owens testified that the statement in the new manual that fall protection violations will lead to termination is not exactly correct. To be accurate, it should say that there will be immediate termination unless, after investigation and further probing, there is a decision not to terminate. (Tr. 108)

Owens also explained that when he became aware of the instant violations, Crockett and Davis were suspended without pay rather than immediately fired because they needed to know what went wrong. The investigation was conducted by Jay Maschmeier. (Tr. 89-90) As a result of Maschmeier's investigation, only Davis was terminated. (Tr. 90) It was determined that Davis had a spotty safety record and had gone through numerous safety meetings. They believed that Davis' problems could not be corrected and that he could not be retrained. (Tr. 106-107)

Owens testified that Crockett was not fired because he had a good record and he believed that Crockett could be retrained. He understood that he broke the rules and this was his first offense. However, Crockett was suspended. He was required to go through the OSHA 10-hour course again, as well as attend Tecta safety meetings and relearn the safety program. (Tr. 107, 109) Since the violation, Crockett's work record has been perfect. (Tr. 109)

Owens explained the difference between service work and contract work. Contract work was defined as work that takes longer than service work. Contract work may last several days. Tecta does site inspections for contract work. (Tr. 94) Owens explained that because service work is of short duration, sometimes less than an hour, it is not practical to schedule an inspection. (Tr. 97-98) A Job Inspection Form is used only for contract job inspections while they are in progress. (Tr. 94) The inspections are generally performed by Maschmeier, who visits the branches weekly, inspecting jobs. (Tr. 95) If Maschmeier finds any infraction, he shuts down the project and holds a safety meeting at the roof. (Tr. 101) Everyone is gathered and he goes through the specifics of what was found. (Tr. 101) These inspections are conducted for short term service work only when Maschmeier has time available. (Tr. 95, 97)

According to Owens, over the years, there have been only one or two incidents of fall protection violations. (Tr. 102) To the best of his recollection, this incident was the first fall

incident involving a foreman, and the first time that two employees failed to wear fall protection at the same time. (Tr. 104) He had no record of disciplining employees for fall protection because there had been only had a couple of incidents over the last five years. (Tr. 103) Owens testified that Crockett's explanation about not wanting to drag the lines through the glue was not a valid reason not to tie-off. (Tr. 105) Employees are instructed that if they ever find anything out of the ordinary as it relates to safety they are to immediately call the office. He was not aware that Crockett ever called the office. (Tr. 106)

According to Owens, before Crockett went out on the job, he met with the service manager at the Maine branch where they discussed fall protection, the specifics of the job, and procedures. (Tr. 99)

3. Jay Maschmeier

Jay Maschmeier is the Safety and Operations Director for Tecta. (Tr. 112) He has been with Tecta and formerly Delta for 22 years. (Tr. 113) He has also been a foreman and a field supervisor. He has been through the OSHA 10 and 30-hour courses as well as numerous other courses and training. (Tr. 113) He also received training from Keene State College for authorization to issue 10 and 30-hour OSHA cards. (Tr. 113) He worked hand in hand with Peter Owens to draft the Tecta safety manual. (Tr. 114)

Maschmeier testified that going over the revisions with the employees is a four to six hour process done in conjunction with the human resources department. (Tr. 116) They go through the various points and highlights and then the specifics of what was changed so everyone understands the changes. At the end, the employees sign a sheet stating that they understand the changes. (Tr. 117) To assess whether the message was disseminated to the employees, there is a question and answer session after the meetings. Plus, he gives his card to employees so they can call him if they are reluctant to talk in public. (Tr. 127)

Maschmeier prioritizes his visits based on the difficulty of the job and the nature of the exposure. (Tr. 114) When a job lasts more than a day, they try to get out and conduct an inspection. (Tr. 128) This job was scheduled to last only one day. (Tr. 128) To ensure that employees are acting safely on service jobs, he talks to service managers to ensure that they are implementing the rules properly. (Tr. 129) In both 2009 and 2010, the company wrote up fewer than ten employees for fall violations. Employees were disciplined with suspensions and loss of holiday and vacation pay. (Tr. 130) These violations involved violations other than failure to tie

off, such as setting up beyond the 15 degree designated swing radius. (Tr. 131) None of these violations involved the failure to tie-off. (Tr. 131) Indeed, nobody was written up for failure to use any fall protection at all between 2006 and 2008. (Tr. 131) Moreover, nobody other than Davis was fired for safety violations in 2010. (Tr. 132) Indeed, he couldn't recall any employee other than Davis being terminated for fall protection violations in the last 5-6 years. (Tr. 138)

The company issues ropes, harnesses and lanyards to its employees. (Tr. 117-118) He noted that, from the photographs, it appears that on the instant job, the lifelines were set properly and that the missing link was attaching the lanyard to the lifeline. (Tr. 118) Maschmeier explained the process used to analyze the reasons why a safety violation occurs. He indicated that the questions asked are: (1) Why did this happen? (2) Why did you make that decision? And (3) Why wasn't this in place? (Tr. 118-119) He stressed that he is always looking for new and better ways to do things and that if something is not working he changes it. (Tr. 119)

Maschmeier also testified that the Maine branch manager, Wayne Tardy, was responsible for the job and both employees on the roof. While the employees were service technicians, Tardy was responsible for the initial job costing and job hazard analysis. (Tr. 121) Maschmeier testified that, although Tardy performed a job hazard analysis, he didn't have a meeting in the morning. (Tr. 122) He conceded that, if Tardy held a safety meeting, it might have made a difference. (Tr. 140) Once the job begins, Tardy is not on the job 100% of the time. Rather he performs spot checks. (Tr. 122) Tardy was written up because, although he issued a job hazard analysis, he failed to visit the job and did not go over it with his men to assure that they understood what was expected of them. (Tr. 122)

Maschmeier explained that on a two man crew, all employees are basically equal. (Tr. 138) He never discussed with Crockett why he identified himself to the CO as foreman. (Tr. 139) He also explained that, if he catches an employee not tied-off he will terminate that employee immediately. However, when the employee is explaining the situation, shows that there was a misunderstanding, explains himself, and demonstrates that he was proceeding with good intentions, the situation is reviewable. (Tr. 139) According to Maschmeier, Davis and Crockett were both immediately suspended pending the investigation, which lasted about two weeks. (Tr. 120) His initial reaction was to terminate both of them. But, he realized that people's lives and incomes were at stake, so he wanted to make sure he had all the facts. (Tr. 120)

Davis could not give a valid reason why he was not tied-off. Tardy told Maschmeier that

Davis had a problem following direction and had a few minor safety violations that were never reported because they were not life threatening. These involved things like hard hats and safety glasses not being worn. (Tr. 122-123) Davis was terminated because Tardy did not believe that he was retrainable and that he would be a risk down the line. (Tr. 123)

On the other hand, Crockett had an explanation for his failure to tie-off, i.e. he didn't want to drag the lanyards through the glue. He also thought that it was permissible not to tie-off because he misunderstood the six-foot rule for perimeter and leading edge work. Under this rule, the requirement to be tied-off varies with the type of job. Roofers have to tie-off if they come within six-feet of the edge; operators of mechanical equipment must tie-off within 10-feet of the leading edge; and all other activities must be tied-off when within 15-feet of the edge. (Tr. 124) Maschmeier noted that OSHA regulations require that employees be tied-off when they are six-feet or less from the roof edge. (Tr. 134) The Tecta manual requires tie-off whenever the fall distance to the next lower level is six feet. (Tr. 134) This was the first problem with Crockett. Because they concluded that he might have misinterpreted his training, they revoked his OSHA 10-hour card which is required to work. (Tr. 124, 132) He was given a 60-day window to redo his 10-hour card. Crockett has reearned his card and has had no trouble since. (Tr. 125)

The crew was taking a break, waiting for the glue to dry, so they weren't performing any work. Crockett believed that they were at a sufficient distance from the edge to permit them to unclip their lanyards. (Tr. 124) Maschmeier acknowledged that the photographs depict the employees at the edge of the roof, but speculated that the difference was due to the difficulty in determining depth in a photograph. (Tr. 133) Nonetheless, that the lines were set and harnesses worn demonstrate that the employees were doing what they were supposed to be doing. (Tr. 133-134)

In Maschmeier's opinion, the incident was the result of unpreventable employee misconduct ("UEM") because the decision not to tie-off was the personal choice of employees to not implement their training. (Tr. 126) Despite this incident, they won the Platinum award. (Tr. 142) However, the 2010 award is based on 2009 performance. (Tr. 143)

Discussion

A. Did the Secretary Establish Prima Facie Knowledge?

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the

standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer could have known of the existence of the hazard with the exercise of reasonable diligence. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

There is no dispute that the cited standard applies, that the employees failed to comply with the terms of the standard and that the employees had access to the hazard covered by the standard. Respondent asserts, however, that the Secretary failed to establish that it knew or could have known of the hazard with the exercise of reasonable diligence. Additionally, Tecta argues that, if the Secretary made a *prima facie* showing of knowledge, the violation was the result of unpreventable employee misconduct.

The Secretary satisfies her burden of showing knowledge by establishing that the cited employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *United States Steel Corp.* 12 BNA OSHC 1692, 1699 (No. 79-1998, 1986).

The Commission has held that “[a]n inquiry into whether an employer was reasonably diligent involves several factors, including the employer’s obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.” *Stahl Roofing Inc.*, 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003)

Tecta asserts that its safety program, training, and discipline establish that Crockett’s and Davis’ violation of the fall protection policy was unforeseeable. It points out that that employees were aware of the workrule and knew that they should have been tied off. Moreover, neither employee had previously been disciplined for violating Tecta’s fall protection rules. Those rules were communicated and enforced. Therefore, there was no evidence that Tecta had either actual or constructive knowledge that Crockett and Davis would violate the fall protection rules.

The Secretary argues that she made a *prima facie* showing of knowledge. She points out that Crockett was the foreman on the site and that Crockett knew or should have known that the crew was required to tie-off. As foreman, Crockett’s knowledge is imputed to Tecta. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff’d without published opinion*, 19 F.3d 643 (3d Cir. 1994); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1538, (No. 86-360, 1992).

Respondent contends that Crockett was not the foreman. Although he identified himself as foreman to the CO, Tecta points out that Crockett was not part of Tecta’s management

personnel. He was not responsible for directing the work of Davis and did have the power to discipline. Maschmeier testified that on a two-man crew, nobody is actually designated foreman. Rather, the employees share the responsibility for getting the work done.

I find that the preponderance of the evidence establishes that Crockett was the working foreman on the site. During his investigation, Maschmeier never discussed with Davis if he considered Crockett to be the foreman. (Tr. 137) Similarly, he never discussed with Crockett why he identified himself as foreman. (Tr. 139) However, although Maschmeier testified that Crockett and Davis had shared responsibility for getting the work accomplished, he also admitted that “for that one job he was in charge of making sure that the job got done.” (Tr. 136) While Maschmeier was vague regarding the status of Crockett, Respondent’s president, Peter Owens definitively testified that, on this job, Davis was the laborer and Crockett was the foreman. (Tr. 107)

That Crockett did not have any management responsibilities does not call for a different result. An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Kerns Brothers Tree Service*, 18 BNA OSHC 2064, 2068-2069 (No. 96-1719, 2000); *Tampa Shipyards Inc.*, 15 BNA OSHC at 1537; *See also Access Equipment*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999)(employee who was "in charge of" or "the lead person for" one or two employees who erected scaffolds "can be considered a supervisor"). This is true, even where the leadman holds no official supervisory authority. *John H. Quinlan, d/b/a Quinlan Enterprises*, 17 BNA OSHC 1194, 1196, n.2 (No. 92-0756, 1995)

Finding that Crockett was the foreman on the site, and that he knew or should have known of the violative condition, that knowledge is imputed to Tecta. Therefore, the Secretary has made the requisite *prima facie* showing of knowledge. *Baytown Constr. Co.*, 15 BNA OSHC 1705, 1710 (No. 88-2912S, 1992), *aff'd without published opinion*, 983 F.2d 282 (5th Cir. 1993); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991).

B. Did Respondent Establish the Unpreventable Employee Misconduct Defense?

Tecta asserts that, if the Secretary established *prima facie* knowledge, that showing was rebutted because it established, as an affirmative defense, that the violation was the result of unpreventable employee misconduct.

To establish the “unpreventable employee misconduct” defense, the employer must rebut

the Secretary's showing of knowledge by proving: (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *E.g., Precast Services, Inc.*, 17 BNA OSHC 1454, 1455, (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997).

Tecta asserts that it established all four elements of the affirmative defense. The record shows that Tecta has an excellent safety program, that it has established work rules designed to prevent the violation, and that it has effectively enforced those rules when violations are discovered. However, the evidence also demonstrates several failures fatal to the defense.

A critical element of the "Unpreventable Employee Misconduct Defense" requires that the employer has taken steps to discover violations. The preponderance of the evidence, however, clearly demonstrates that, on this job, Tecta failed to take any steps to discover the violation. Owens testified that Maschmeier is sent out to inspect contract work. Maschmeier confirmed that regular inspections are set only for contract work, which generally lasts more than a day. (Tr. 128) Service work, which can last anywhere from 15 minutes to two days, is inspected only on a time available basis. (Tr. 95-96, 127-128) Indeed, Owens testified that the company's inspection form is used only for contract work, and not for the shorter term service work. (Tr. 94, Ex. C-2, pp. 20-22) Owens pointed out that it is not realistic to have Maschmeier schedule an inspection for a job that lasts only an hour or two. (Tr. 97-98) However, while it may be impractical to conduct inspections of a job that lasts only a couple of hours, the evidence established that this job was scheduled to last one day. (Tr. 128)

In the absence of a scheduled inspection from Maschmeier, it was established that the obligation to ensure that employees comply with the safety rules falls on the branch manager. Maschmeier made it clear that branch manager Tardy "was ultimately responsible for the actions of his guys." (Tr. 99, 121) Part of that responsibility is to ensure that employees are implementing the Tecta safety program (Tr. 129) and to conduct periodic inspections of jobs under his control. (Tr. 122) Nonetheless, the evidence demonstrates that after setting up the job, branch manager Tardy left the site and never checked to ensure that the employees were operating safely. (Tr. 122) Significantly, while the evidence indicates that Crockett had an excellent safety record, it also demonstrates that there were various problems with Davis which contributed to the decision to terminate him. (Tr. 123) Had Tardy been reasonably diligent,

knowing of Davis problems, he would have made an effort to check on the safety status of the job.

Another element of the defense requires that the employer adequately communicate its rules to employees. Here, the evidence demonstrates at least two critical flaws in the communication of its safety rules.

First, an employer has a duty, not only to inspect a worksite for hazards, but to then give employees the appropriate instructions. *Pressure Concrete*, 15 BNA OSHC 2011, 2016 (No. 90-2668, 1992). As required, Tardy prepared a hazard analysis of the roofing job. (Tr. 121-122), However, he never held a pre-work meeting with the crew, and never communicated the contents of the hazard analysis. (Tr. 122) As Maschmeier testified, communication of the hazard analysis helps employees to know what is expected of them. (Tr. 122) Maschmeier further testified that, depending on the timing, had Tardy held the requisite meeting, it might have made a difference as to whether the employees' tied-off. (Tr. 140)

By neither communicating the hazard analysis to his employees nor conducting spot checks of the site, Tardy was not reasonably diligent in checking for safety violations and, therefore, had constructive knowledge of the violation. There is no question that, as a branch manager, Tardy was a management employee. His knowledge is, therefore, imputed to Tecta.

Furthermore, as a result of his investigation, Maschmeier concluded that Crockett misinterpreted his training and misunderstood the six-foot rule for perimeter and leading edge work and that, as a result of this misunderstanding, he thought he was far enough away from the edge to unclip his harness. (Tr. 124) As a result, Crockett had his 10-hour OSHA card revoked and was required to redo the training. (Tr. 125)

An employer's obligation to communicate work rules goes beyond merely presenting the information to employees and having them sign a sheet stating that the information was understood. Rather, "a reasonably prudent employer would attempt to give instructions that can be understood and remembered by its employees, and would make at least some effort to assure that the employees did, in fact, understand the instructions" *Pressure Concrete*, 15 BNA OSHC at 2017. That there was a question and answer session after Maschmeier's presentation does not constitute a reasonable assessment of employee comprehension since, to ask a relevant question, an employee must know what he or she does not understand.

Employees are supposed to read the manuals distributed by Tecta. However, in reality,

whether the manual is actually read is left to the individual employee. (Tr. 92) While Crockett and Davis both signed the sheet stating that they received the safety manual, there is no evidence that either employee ever read the document. (Tr. 92-93) Furthermore, the evidence demonstrates that even Maschmeier was uncertain about the scope of Tecta's fall protection rules. In this regard Maschmeier testified:

Q. Now, I believe you also said that you had come to the conclusion that Mr. Crockett made a personal choice to do what he had done in not being clipped off; correct?

A. Based on his knowledge, yes.

Q. Based on his knowledge, okay.

So he was mistaken about not knowing the distances or that he simply choosed (sic) not to clip off some other reason?

A. Its two different questions as far as I'm concerned. He was mistaken in his distance calculations because based on—if you read the OSHA regulations it does imply 6 feet as being a leading edge and that's when a roofer you need to be tied off or have some kind of fall protection implemented. It does not state however that beyond 6 feet in the interior of the roof you need to be tied off or implement some kind of fall protection.

So there's kind of a gray area there as far as how it's cited—its cited in the regulations, as far as I'm concerned. And that's something that we need to clear up in our training, as well.

(Tr. 133-134)

As the Secretary points out, this testimony demonstrates that even Tecta's own safety director did not have a clear understanding of his own company's work rules as he, like Crockett, conflates controlled access zones and warning line systems with basic fall protection requirements. Also, that Crockett told the CO that, as a result of the violation he would likely be fired, demonstrates that, as a result of the inspection, he understood that he violated the workrule. However, it does not demonstrate that, before the violation was pointed out by the CO, he fully understood the rule.

Therefore, it is clear from the evidence that Tecta's communication of its safety rules to its employees was deficient because (1) Tardy failed to communicate the Hazard Analysis to the crew and (2) respondent failed to communicate the tie-off rule in a manner that would enable it to be fully understood by the employees.

Accordingly, with the evidence establishing that Tecta failed to take reasonable steps to discover violations of its workrule and failed to adequately communicate those workrules to its employees, I find that Respondent failed to establish the affirmative defense of "unpreventable

employee misconduct.” Therefore, the violation was established.

C. Penalty

The Secretary has proposed a \$5000 penalty for this serious violation. A violation is serious where, if an incident occurs, the result could be death or serious physical harm. *Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 1188 (No. 91-3144, 2000)(Consolidated). Had an employee fallen from the roof, 20-feet to the ground below, the results would clearly have been death or serious physical harm. (Tr. 48, Ex. C-2) Accordingly, the violation was properly characterized as serious.

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the South, Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990). The CO testified that the gravity of the violation was high. He also determined that there was a high probability of an accident. (Tr. 47-49) With over 250 employees, no deduction was given for Tecta's size. (Tr. 47) He also testified that Tecta had a prior history with OSHA. Thus, no history was given for either safety history or good faith. (Tr. 48) I find that the Secretary properly considered the statutory factors when proposing the \$5000 penalty and that the proposed penalty is appropriate.

Accordingly, it is **ORDERED** that Citation 1, item 1 for violation of 29 C.F.R. §1926.501(b)(10) is **AFFIRMED** and a penalty of \$5000 is assessed.

SO ORDERED.

_____/s/_____

The Honorable G. Marvin Bober
U.S. OSHRC Judge

Dated: July 21, 2011

Washington, D.C.