Secretary of Labor,
Complainant,
v.

Field & Associates, Inc.,
Respondent.

OSHRC Docket No. **99-1951**

APPEARANCES

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U. S. Department of Labor
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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Field & Associates, Inc. (F&A), primarily a commercial roofing contractor, was performing a residential roofing job in Urbana, Ohio, on April 7, 1999, when the Occupational Safety and Health Administration (OSHA) initiated an inspection. As a result of OSHA's inspection, F&A received serious and willful citations on October 6, 1999. F&A timely contested the citations.

The serious citation alleges violations of 29 C.F.R. § 1926.404(b)(1)(i) (item 1) for failing to have a ground fault circuit interrupter (GFCI) on an extension cord used to power the air compressor; 29 C.F.R. § 1926.404(f)(6) (item 2) for failing to have a continuance path to ground as a result of an improperly installed adapter; 29 C.F.R. § 1926.405(g)(2)(iv) (item 3) for failing to have a properly installed strain relief on the air compressor; 29 C.F.R. § 1926.416(a)(1) (item 4) for permitting an employee to work on a live electrical circuit box which was not de-energized or guarded by insulation; 29 C.F.R. § 1926.501(b)(13) (item 5) for failing to protect employees on the porch roof from a fall hazard by a guardrail system, safety net system or personal fall arrest system; 29 C.F.R. § 1926.1053(b)(1) (item 6) for failing to extend a portable ladder at least 3 feet above the landing; and 29 C.F.R. § 1926.1053(b)(22) (item 7) for permitting employees to carry plywood sheets up a portable ladder. A penalty of $3,000 is proposed for each serious violation with the exception of item 3, which proposes a penalty of $1,500.

The willful citation alleges violations of 29 C.F.R. § 1926.100(a) (item 1) for employees failing to wear hard hats; and 29 C.F.R. § 1926.501(b)(13) (item 2) for failing to protect an employee on the house roof from fall hazards by a guardrail system, safety net system or personal fall arrest system. The willful citation proposes penalties of $33,000 and $42,000 respectively.

The hearing was held on June 5 and 6, 2000, in Dayton, Ohio. The parties stipulated jurisdiction and coverage (Tr. 4). The parties filed post-hearing briefs and reply briefs.

F&A argues that Gary Iddings was not a supervisor of the crew for the purpose of imputing knowledge. If knowledge is imputed, F&A asserts unpreventable employee misconduct. Also, F&A does not dispute the violative conditions as to many of the alleged violations but challenges the extent of the hazard posed to employees.

For the reasons discussed, the violations are vacated based on the employee misconduct defense.

The Inspection

F&A's is currently in the business as a commercial roofing contractor. In business since 1946, F&A has offices in Springfield, Ohio. Charles Field has been F&A's president and CEO for 15 years. F&A employs approximately 37 employees. When busy, it has four commercial roofing crews, who are members of the union. Until late 1999, F&A also performed some residential roofing with one crew of three non-union employees (Tr. 88, 184, 294-295, 297-298, 300, 399).

During OSHA's inspection, F&A's residential roofing crew consisted of 3 brothers -- Gary Iddings, Jason Iddings, and Michael Iddings. Gary Iddings, 23 years old, had approximately 4 years of roofing experience. His brother, Jason Iddings, 21 years old, had 2 years of roofing experience. The youngest brother, Michael Iddings, 19 years old, had less than 5 months' of roofing experience (Tr. 178-179, 273-277).

The residential roofing crew was assigned work by F&A's co-founder, Paul Field, who was 88 years old.[1] Paul Field, father of Charles Field, worked as a consultant for F&A. He was responsible for obtaining the residential roofing work and setting up the jobs for the crew. Once the jobs were set up, Paul Field typically visited the roofing project daily for a few minutes. Because of his age, he often remained in his car (Tr. 182, 236-237, 281-282, 295-296).

[1]Paul Field died May 12, 2000 (Tr. 325).

On April 7, 1999, the residential roofing crew was re-roofing a two-story Victorian house in Urbana, Ohio. The job involved removing the slate roof and replacing it with asphalt shingles. The roof was steep, a 12 in 12 pitch (45 degrees). The eaves were 25.6 feet above ground level (Exh. C-2; Tr. 18-19, 195-196).

A porch with a flat roof 14.7 feet above ground level was along the front of the house. Around the perimeter of the porch roof, a railing, 2-feet high and 1 ½-feet wide, was located 34-inches in from the edge. The porch roof was not being replaced (Tr. 18, 217, 255, 377-378, 410-411).

To access the house roof, the crew used a ladder to climb onto the porch roof and another ladder on the porch roof to climb to the sloped roof. The porch roof was used to place plywood and some equipment which was to be used on the sloped roof (Exh. C-2; Tr. 42, 46).

At approximately 2:45 p.m., safety and health compliance officer (CO) Dale Henderson, while returning to his office from another inspection, observed an employee on the sloped roof without fall protection. He stopped, received permission from his office and initiated an inspection of F&A's roofing job. The crew had removed the slate roof from the front of the house and was placing plywood sheets on the roof to support the new asphalt shingles (Tr. 11-12, 105, 197-198).

CO Henderson conducted the inspection with F&A employee Gary Iddings, who he understood was the crew foreman. Later, Gene McAllister, F&A's safety officer and operations manager, later participated in the inspection. CO Henderson had previously inspected another F&A project which resulted in contested citations[2] (Tr. 13, 15, 89, 172).

After interviewing employees, videotaping the site, and taking measurements, CO Henderson left the site at approximately 5:00 p.m. He returned on April 8, 1999, for additional interviews, reviewing abatement and conducting a closing conference (Tr. 15-16, 20, 105, 166). Based on the inspection, citations were issued.

Discussion

The Secretary has the burden of proving a violation.

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[2]Docket 97-1585. ALJ Welsch's decision entered June 18, 1999, affirmed violations for the lack of fall protection, § 19261926.501(b)(11), and for failing to store roofing materials six feet from the edge, § 1926.502(j)(7)(i), at a church roof project in Springfield, Ohio. The decision is on review before the Review Commission (Tr. 90).

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

F&A does not dispute the application of the cited standards to its house re-roofing project. The principal issue in dispute is whether F&A knew or should have known of the violative condition. F&A asserts that it lacked knowledge of any violation and that Gary Iddings was not a foreman for the purposes of imputing knowledge.

Employer Knowledge

During OSHA's inspection, Gary Iddings identified himself as the crew foreman (Exhs. C-3, C-4; Tr. 13). The Secretary asserts that as foreman, Iddings' knowledge as to the conditions at the job site are imputed to F&A.

F&A argues that Gary Iddings was not a foreman and did not have any supervisory responsibility. F&A asserts that Iddings performed the same duties as the crew members. He was not delegated additional authority (F&A Reply Brief, p.2). When asked who was responsible to eliminate hazardous conditions on the job site, Gary Iddings testified "Oh, I'm sure it was a group effort" (Tr. 204). F&A maintains that the crew was supervised by Paul Field, who set-up the residential jobs and Gene McAllister, safety director, who performed periodic safety inspections and decided the equipment needs of each job (Tr. 318, 320).

To establish an employer's knowledge of a violative condition, the Secretary must show that the employer knew or, with the exercise of reasonable diligence, should have known of the condition. *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). As a corporate employer, knowledge is obtained through its agents having supervisory responsibility over job conditions and employees. A supervisory employee's actual or constructive knowledge is imputed to the corporate employer. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

The residential roofing crew consisted of three brothers -- Gary Iddings, 23 years old with 4 years roofing experience, Jason Iddings, 21 years old with 2 years of roofing experience, and

Michael Iddings, 19 years old with less than 5 months of roofing experience (Tr. 178-179, 273-277). No other F&A employees worked on the re-roofing job. Paul Field had been to the job site for 10 minutes prior to the OSHA inspection and Gene McAllister had not been to the job after the crew started work[3] (Tr. 236, 282, 379).

There is no dispute that Gary Iddings did not have authority to hire, fire or discipline employees for violating safety rules. He did not deal with customers, make pricing decisions, resolve complaints, or independently change the scope of the work (Tr. 309, 311-312). According to F&A, he also did not have the authority to set pay rates (Tr. 359). He was not identified on F&A's payroll as a foreman like other foremen (Exh. R-3).

On the other hand, F&A concedes that Gary Iddings was the oldest brother and tended to be the most outspoken. He had the most roofing experience, and he was the brother most dealt with by F&A (Tr. 327-328). Also, Gary Iddings, like other employees, had the authority to correct safety violations (Tr. 311).

The substance of the delegation of authority, not the title of the employee, is controlling in determining whether an employee is a supervisor. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1577, 1583 (No. 91-2626, 1992) (a leadman's knowledge imputable to employer despite his status as bargaining unit employee). 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. *A. P. O'Horo*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991) (laborer designated as working foreman) *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1382 (No. 76-4271, 1981) (plasterer functioned as a supervisor).

During OSHA's inspection, Gary Iddings identified himself to OSHA as the foreman and that he was in charge of the job site. When asked how long he had been a foreman, Iddings, rather than deny it, stated that he had been a foreman for 8 or 9 months. Later in the interview, when told that McAllister had referred to him as the foreman, Iddings replied "Sure I am. I'm the oldest one, I'm the one-somebody got to be foreman, so I'm foreman" (Exh. C-3). Iddings also stated that he had the authority to correct safety violations on the job. Also, if they encountered unsafe conditions, he could shut the job down and purchase the necessary safety equipment (Tr. 13-14, 202). It was Gary Iddings who purchased a new GFCI to abate one of OSHA's alleged violations (Exh. C-4;

[3]McAllister testified that he intended to visit the site on the afternoon of OSHA's inspection (Tr. 380).

Tr. 395). Although Iddings did not have the authority to hire, fire or discipline employees, McAllister acknowledges that none of F&A's designated foremen have the authority (Tr. 341, 418).

Gary Iddings took the lead in dealing with CO Henderson and called F&A to notify them of OSHA's inspection (Tr. 14-15). Gary Iddings was given the crew's roofing assignments by Paul Field. He acted as a go-between for the crew and Paul Field (Tr. 181, 185). He testified that he had the authority to recommend workers for hire and discipline on "my crew" (Tr. 181). Iddings was responsible for turning in F&A's weekly tool box attendance sheets (Tr. 187). He also kept and turned in the crew's time sheets to F&A (Tr. 280). Gary Iddings determined the amount of compensation paid to his younger brother. When asked who made the decision as to the amount of pay for a worker, Gary Iddings answered, "I made the decision" (Tr. 279).

F&A's written safety program directs that each crew will be supervised by a foreman. The safety program specifically delineates the foreman's duties and responsibilities (Exh. C-5). Those duties include daily inspection of equipment and workplace. Gary Iddings was responsible for the safety checks of equipment. He also took on many of the other responsibilities delineated to a foreman (Tr. 203, 207). When working with the crew, F&A dealt primarily with Gary Iddings (Tr. 327-328). During OSHA's inspection, McAllister agreed that Iddings was the crew's supervisor (Tr. 358-359). McAllister testified that Gary Iddings had the authority to ensure that the crew wore fall protection (Tr. 381). He stated that "Gary just ran his crew" and that he was expected to be the discussion leader for the required tool box talks (Tr. 383-385). McAllister identified the weekly tool box attendance sheets as "Gary's file" (Tr. 403). On a subsequent project, Gary Iddings was named site "safety officer" pursuant to the contractor's requirements (Exh. R-7; Tr. 401, 419).

Based on the record, Gary Iddings assumed supervisory responsibility over his brothers. F&A was aware and treated him as a supervisor. Gary Iddings had the most roofing experience and was the older brother. He exercised considerable independent authority on behalf of F&A. He supervised his brothers. He possessed authority to purchase material on F&A's account in buying the new GFCI. F&A dealt with him as a the crew's foreman. F&A's safety program envisioned a foreman for each job. Gary Iddings was F&A's representative on site. He assumed that role in dealing with the OSHA compliance officer in the opening conference and continued in the role with safety director McAllister on site.

Neither Paul Field nor Gene McAllister were regularly on-site to ensure the crew's day to day safe operation. The only management official who regularly visited the residential roofing jobs was Paul Field, an elderly man whose visits were of a short duration of approximately 10 minutes, and generally made without getting out of his car. He was there to check on the job's progress and not safety (Exh. C-4; Tr. 182-183, 236, 281-282).

F&A's claim that McAllister was responsible for the foreman duties is also unrealistic. McAllister was not regularly on-site and foreman responsibilities, such as directing the crew's work and inspecting the workplace and equipment before starting work, could not be done by him. Gene McAllister's visits were random and he was responsible for visiting all F&A roofing crews. He could not visit every residential roofing project because they lasted only a couple of days (Tr. 405-406). Gary Iddings testified that the crew might see McAllister two or three times a week and sometimes "wouldn't see him for a whole week" (Tr. 183).

Gary Iddings' knowledge of the worksite conditions is imputed to F&A for the purposes of establishing F&A's knowledge of the violative conditions.

SERIOUS CITATION NO. 1

Items 1 and 2 - Alleged Violations of § 1926.404(b)(1)(i) and § 1926.404(f)(6)

The citation (item 1) alleges that a ground fault circuit interrupter (GFCI) was not on the extension cord connected to the air compressor. Section 1926.404(b)(1)(i) requires an employer to use either a GFCI or an assured equipment grounding conductor program.

The citation (item 2) also alleges that an adapter for the extension cord used to convert a two- prong outlet at the house into a grounded outlet was not properly connected. Section 1926.404(f)(6) requires a permanent and continuous path to ground from circuits, equipment and enclosures.

F&A does not dispute the cited conditions. The extension cord was used to connect the house current to the F&A air compressor which powered the nail gun. There was no assured equipment grounding conductor program and a GFCI was not on the extension cord (Exh. C-4; Tr. 194, 209). The adapter plugged into the two-prong house outlet was not installed with the grounding wire attached to the outlet. The metal tab on the adapter which provides grounding was not screwed to the faceplate. The tab was instead folded out of the way (Tr. 82-83). Gary Iddings

admitted that he had plugged in the adapter (Tr. 37, 109). When the lack of a GFCI and an improperly installed adapter were identified, the problems were corrected (Tr. 34, 37, 214).

F&A argues that the violations were improperly classified as serious because employees were not exposed to an electrical hazard (F&A Brief, p. 39). The day was clear and dry. The air compressor had a built-in circuit interrupter. The compressor was not touched by employees except to turn it on and off (Tr. 106, 111, 222, 266, 373). The compressor supplied a nail gun with air pressure through a rubber hose which would not conduct electricity. According to F&A, an electric current could not pass from the compressor to the nail gun or the employee (Tr. 269, 368).

F&A's argument is rejected. A hazard is presumed by the terms of the standards. The safety requirements in the standards are not predicated on the existence of a hazard. They are mandatory. *Stan Best, Inc.*, 11 BNA OSHC 1222, 1231 (No. 76-4355, 1983). The requirements for GFCI and a continuous path to ground are intended to protect against injury resulting from an instance of inattention or bad judgment, as well as from risks arising from the operation of the equipment. *Pass & Seymour,* 7 BNA OSHC 1961, 1963 (No. 76-4520, 1979). Gary Iddings agreed that a GFCI should have been in place and that the use of the compressor without GFCI created a hazard (Tr. 33-34, 194). A GFCI would prevent an electrical surge (Tr. 193). F&A's written safety program required the use of a GFCI and a properly installed adapter (Exh. C-5; Tr. 36, 111, 364). An electrical hazard existed when turning on and off the compressor (Tr. 106). The hazard was electrocution.

The test for determining whether employees are exposed to a hazard is whether it is "reasonably predictable" that employees would be in the zone of danger created by a noncomplying condition. *Kokosing Construction Co., Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). Without the GFCI and a properly installed adapter, employees were in the zone of danger when touching the compressor. The record establishes noncompliance as described in Items 1 and 2.

Item 3 - Alleged Violation of § 1926.405(g)(2)(iv)

The citation alleges that the strain relief was not properly connected to the flexible cord for the air compressor. Section 1926.405(g)(2)(iv) provides:

> Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

There is no dispute that the strain relief inside the circuit box for the air compressor was loose so that the flexible cord was held by the terminal screws. The strain relief consisted of a metal wire connector which screwed into the top of the plastic housing. A nut attached to the bottom had vibrated loose and nothing prevented a pull on the flexible cord from being directly transmitted to the terminal screws. Gary Iddings testified that the strain relief frequently vibrated loose and when it did, he tightened the attachment with a screw driver (Exhs. C-2, C-6; Tr. 38-39, 69, 115, 117, 238). F&A argues that it complied with the standard because there was a strain relief device. Also, because the air compressor was stationary, F&A asserts that there was no pressure put on the flexible cord or the terminal screws requiring a strain relief. The violation was improperly classified as serious (F&A Brief, p. 40; Tr. 106, 367).

The standard requires a strain relief to avoid a potential electrical hazard. F&A concedes that the roofing crew at least touched the air compressor to turn it on and off (Tr. 106, 266). F&A did not comply with the standard. A loose strain relief is the same as not having a strain relief because the loosened device failed to "prevent pull from being directly transmitted to joints or terminal screws" as required by the standard. The weight of the cord directly transmitted to the terminal screws (Tr. 115). Without a proper strain relief, there existed the possibility that the compressor could become energized if wires came loose and made contact with the metal parts of the compressor (Tr. 38-39). Gary Iddings attempted to tighten the strain relief while the compressor was energized (Tr. 238). The record establishes noncompliance.

Item 4 - Alleged violation of § 1926.416(a)(1)

The citation alleges that an employee was reaching inside the electric circuit box for the compressor without deenergizing and grounding the circuit box. Section 1926.416(a)(1) provides:

> No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

After observing the loose strain relief, Gary Iddings attempted to tighten the nut. The compressor was energized and running. Also present was F&A's safety director Gene McAllister, who denied knowing what Iddings was doing. He thought Iddings was going to close the cover.

When CO Henderson realized Iddings was reaching into a live circuit, he immediately stopped him and directed that the circuit box be de-energized. The compressor was unplugged and the strain relief tightened (Tr. 39, 238, 364-365).

Iddings testified that he was attempting to follow the directions of CO Henderson by tightening the strain relief (Tr. 237-238). Although such directions were not given, it is reasonable to assume that Iddings misunderstood and attempted to correct the condition immediately without first de-energizing the compressor. It is not grounds for issuance of a citation if an employee's exposure to a hazard occurs when the employee complies with a perceived request of an OSHA compliance officer. *Inland Steel Co*., 12 BNA OSHC 1968,1983 (No. 79-3286, 1986). Iddings could have reasonably believed that he was complying with the compliance officer's request. Further, Iddings was stopped before exposure and possible contact with an energized electrical circuit. The standard was not violated. Item 4 is vacated.

Item 5 - Alleged Violation of § 1926.501(b)(13)

The citation alleges that employees on the porch roof were not protected from a fall hazard by a guardrail system, safety net system or personal fall arrest system. Section 1926.501(b)(13) provides:

> Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels shall be protected by guardrail systems, safety net systems, or personal fall arrest systems unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

The porch roof in front of the house was used by the roofing crew to gain access to the house roof which needed to be replaced. Employees climbed a ladder from the ground to the porch roof and another ladder on the porch roof to access the house roof. The porch roof was in excess of 12 feet above ground level (Exh. C-2; Tr. 18, 42-44, 199).

Around the perimeter of the porch roof, a decorative railing was located approximately 18 inches from the roof's edge. The railing was less than 28 inches high; an adequate guard railing is 42 inches high. When climbing to the porch roof, the employee on the ladder stepped onto the ledge

outside the railing and then stepped over the railing. The crew used the porch to store equipment such as plywood sheets for use on the house roof. The crew was not replacing the porch roof. When working at heights, F&A's safety program requires fall protection. There is no dispute that while on the porch roof, employees were not tied off (Exhs. C-3, C-5; Tr. 65-67, 57-58, 78-81, 217, 264).

F&A argues that because the porch roof was flat and surrounded by a decorative railing, fall protection was not required. F&A asserts that the violation was improperly classified as serious (F&A Brief, p. 42).

The record fails to establish employee exposure. According to the testimony, the 48-inch wide plywood sheets were placed along the inside of the porch railing during the morning. When OSHA arrived, the plywood was being moved up to the house roof (Tr. 218). The porch railing was more than 2 feet high and 1 ½ feet wide. It was approximately 18 inches from the roof edge. It was a sturdy decorative railing (Tr. 217, 255, 377-378, 396). Employees standing/working inside the railing were more than 4 feet from the edge. The only time an employee was not inside the railing was when getting on or off the ladder. There was no work performed outside the decorative railing. In commercial flat roofing projects, an employer is permitted to place a warning line and establish a controlled access zone. F&A's roofers were exposed to the same hazard before reaching the porch railing as a commercial roofer before reaching a warning line (*See* § 1926.501(b)(10); Tr. 131, 390). Employees' exposure has not been established. Item 5 is vacated.

Item 6 - Alleged Violation of § 1926.1053(b)(1)

The citation alleges that a portable ladder used to access the house roof was not secured. Section 1926.1053(b)(1), in part, requires that the ladder's side rails extend at least 3 feet above the upper landing or, if such an extension is not possible because of the ladder's length, the ladder is then secured at its top to a rigid support that will not deflect and a grasping device, such as a grabrail, is provided to assist employees in mounting and dismounting the ladder.

F&A does not dispute that the ladder on the porch roof which was used to gain access to the house roof did not extend at least 3 feet above the landing. The ladder extended less than 24 inches above the landing and was not secured. OSHA's video shows the ladder being moved and it could have been extended -- 4 or 5 overlapping rungs are shown (Exhs. C-2, C-3; Tr. 46, 133). Gary Iddings testified that the ladder was intentionally not extended to prevent it from pivoting under the

weight of the plywood sheets which were being pushed up the ladder onto the roof. He did not want the ladder kicking out from the weight (Tr. 257-259).

F&A's safety program requires the ladder to extend 36 inches. According to McAllister, discipline was issued to the employees (Tr. 361). Since the ladder did not extend above the eaves as required by the standard, employees were exposed to a fall hazard unless the ladder was secured (Tr. 47).

The issue becomes whether the ladder was secured (F&A's Brief, p. 44; Secretary's Reply Brief, p. 5). CO Henderson did not personally examine the ladder. He could not see whether the ladder was tied off. The citation was based on Iddings' statement during the inspection (C-3; Tr. 46-47, 61, 81, 138-140).

F&A's safety director McAllister testified that he "believed" that the ladder was tied off based on viewing OSHA's videotape. The video shows possible tie off ropes on the ladder (Exh. C-2; Tr. 372).

The Secretary failed to establish a violation. The citation is not based on personal observation but on an interview statement of Gary Iddings. At the hearing, Gary Iddings could not recall if the ladder was tied off. But, if it was tied off, it was done by someone else (Tr. 263). Additionally, the Secretary's evidence fails to show that employees used the ladder in this configuration to access the house roof. The ladder was used to push plywood sheets up to the roof. It was not shown that employees climbed the ladder to access the roof without extending the ladder 3 feet above the eaves. Item 6 is vacated.

Item 7 - Alleged Violation of § 1926.1053(b)(22)

The citation alleges that an employee carrying a sheet of plywood up a portable ladder from the porch roof to the house roof was exposed to a fall. Section 1926.1053(b)(22) provides:

> An employee shall not carry any object or load that could cause the employee to lose balance and fall.

OSHA's video during the inspection shows an employee (Michael Iddings) climbing up the bottom 4 rungs of a portable ladder while sliding a piece of plywood up the ladder to another employee (Jason Iddings) on the house roof. Michael Iddings is not holding onto the ladder; both hands are holding the plywood. He was not tied off (Exh. C-2; Tr. 47-48, 62-64).

OSHA is concerned that the plywood could slip and knock the employee off the ladder. F&A argues that the employee was not carrying any objects (F&A's Brief, p. 46).

F&A's argument is rejected. In order to slide the plywood sheet up the ladder, the employee was moving and transferring the plywood from one place to another, which is within the common definition of "carry." The employee was not holding onto the ladder. Without his hands on the ladder and not otherwise tied off, the employee could lose his balance and fall from the ladder with the plywood sheet. Noncompliance as described in Item 7 is established.

WILLFUL CITATION NO. 2

Item 1 - Alleged violation of § 1926.100(a)

The citation alleges that employees exposed to head injuries were not wearing hard hats or other protective helmets. Section 1926.100(a) provides:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

CO Henderson observed employees sliding plywood sheets up to the roof while not wearing hard hats. Also, an employee without a hard hat is seen climbing up the ladder and handing a hammer to an employee on the roof. Located on the roof was a pitch fork and a box of nails. During his interview, Gary Iddings stated that he was aware hard hats should have been worn and his failure to do so was "bad judgment." Iddings stated that "anytime somebody is working above, you're supposed to wear a hard hat" (Exhs. C-2, C-4; Tr. 49-51, 62, 64).

Contrary to his statement to OSHA, Gary Iddings testified that there was no danger of falling objects (Tr. 223). With regard to the box of nails and the pitch fork on the roof, the record suggests that they were secured, preventing them from falling from the roof (Tr. 287-288, 362, 391-392).

F&A's written safety policy requires hard hats when employees are exposed to the hazard of head injury (Exh. C-5; Tr. 50). F&A concedes that in a situation when two employees are assisting in pushing plywood sheets up a ladder to a third employee on the roof, its "safety policy requires that the employees below must wear hard hats" (F&A's Brief, p. 33). The hard hats are provided by F&A (Tr. 366). The plywood sheets, the hammer, and the employee on the house roof were above the head of the employees on the porch roof. The employees on the porch roof were exposed to these

objects if they fell. The employees were not wearing hard hats. Noncompliance as described in Item 1 is established.

Item 2 - Alleged Violation of § 1926.501(b)(13)

The citation alleges that the employees performing re-roofing operations on a steep slope roof and the employee standing on the decorative railing on the porch roof were not protected from a fall hazard by guardrail systems, safety net systems, or personal fall arrest systems as required by § 1926.501(b)(13).[4]

CO Henderson observed an employee working on the house roof without his fall protection being tied off. He was wearing a safety harness. Fall protection equipment was available. The employee was lifting plywood sheets from the ladder to the roof. The height of the house roof was approximately 25.6 feet above the ground level and 12 feet above the porch roof. The pitch of the house roof was approximately 45 degrees. One employee (Jason Iddings) is shown on the house roof and another employee (Gary Iddings) is standing on the decorative porch railing. Neither employee was using fall protection. Gary Iddings testified that the crew was using fall protection in the morning when removing the slate roof (Exhs. C-2, C-3; Tr. 52-54, 60, 249).

F&A's fall protection policy required employees to use fall protection (Exh. C-5; Tr. 361). However, when moving the plywood sheets to the roof, there is no dispute that the employees were not using fall protection. Noncompliance as described in Item 2 is established.

Unpreventable Employee Misconduct

With regard to the violative conditions established in citations nos. 1 and 2, F&A asserts unpreventable employee misconduct as an affirmative defense. In order to establish the defense, F&A must show that (1) it has established work rules designed to prevent the alleged violation, (2) it has adequately communicated these work rules to its employees, (3) it has taken steps to discover violations of the work rules, and (4) it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd. without published opinion*, 106 F.3d. 401 (6th Cir. 1997).

[4]Section 1926.501(b)(13) is quoted in reference to item 5 of citation no. 1.

F&A argues that Gary Iddings and his brothers did not comply with company rules, and it lacked any reason to know of the misconduct. As discussed, Gary Iddings is considered a foreman. When the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the unsafe activity, including adequate instruction and supervision. *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). "Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under his supervision. . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Id.* at 1017.

Work Rules

There is no dispute that F&A has established work rules addressing each of the alleged violative conditions cited by OSHA. F&A has written safety rules involving the use of a GFCI, strain reliefs, fall protection, portable ladders and hard hats (Exh. C-5). F&A's written rules require a GFCI when not a part of the permanent or temporary electric service (Tr. 35-36). The safety rules also require that "[n]o employee shall work without fall protection in areas with unprotected sides or edges six feet or more above lower levels" (Tr. 58). Ladders are required to be tied off and extended 36 inches above the roof. Hard hats are to be used anytime another employee is working above or when employees are subject to a head injury hazard (Tr. 50-51, 343). F&A's safety rules also require a continuance path to ground to avoid an electrical hazard (Tr. 111-112). In general, the safety rules are designed to prevent the violative condition and are similar to the requirements of the OSHA standards cited.

Additionally, F&A provides the safety equipment necessary to comply. It provides employees with full-body harnesses, including life lines, ladders, hard hats, adapters, and GFCIs (Tr. 194, 366).

Communication of Work Rules

The record shows that the work rules were communicated to employees. When an employee is hired, he is given a copy of F&A's written safety policy to read and sign. It "had to be fully read and signed off" (Tr. 186, 241, 303). Additionally, the roofers view a 15-minute video on fall protection, which Iddings saw at least 4 times. The video is from a fall protection manufacturer and

discusses the types and proper use of fall protection. It does not address when fall protection is required (Tr. 186, 352, 385-386).

Also, weekly tool box talks were conducted by each roofing crew on pre-designated safety issues and each employee, including Iddings, signed the attendance sheet. Hard hat safety and fall protection were discussed during the weekly toolbox talks. For the safety talks, F&A uses materials from the National Roofing Contractors Association (Tr. 303-304, 322, 352).

Based on his statements and trial testimony, Gary Iddings knew F&A's safety rules and that he was not in compliance. For example, Iddings testified that employees are told "anytime somebody is working above them, you're supposed to wear your [hard] hat" (Tr. 51). He knew the requirements for a GFCI, fall protection and ladder safety (Exh. C-3, C-4). Regardless, Iddings testified that he and his brothers frequently violated the safety requirements of F&A and OSHA (Tr. 190-191). He considered the rules "pretty strict" (Tr. 191). The brothers had told McAllister that they could work safely without following the company safety requirements (Tr. 395).

Monitoring Compliance

Once it has been shown that an employer has appropriate work rules which are communicated to employees, the focus turns to its procedures for monitoring employee conduct and compliance with the work rules. It is not enough that an employer has developed an exemplary safety program on paper. Rather, "the proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program" *Brock v. L. E. Meyers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987), *cert. denied* 484 U.S. 989 (1987). An effectively implemented safety program requires "a diligent effort to discover and discourage violations of safety rules by employees." *Paul Betty, d/b/a Betty Brothers,* 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981).

The violative conditions were in plain view and could have been observed by a diligent supervisor. However, an employer is not required to provide constant surveillance. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999). In this case, the *de facto* foreman on site was the problem. His attitude towards safety requirements appeared cavalier and unconcerned. Despite the safety rules and training, Gary Iddings testified that he and his brothers violated F&A's safety policy and OSHA's standards "all the time" (Tr. 191-192). Iddings stated "that's how I do my job" (Tr. 191). He described the safety requirements of F&A and OSHA as "too strict" (Tr. 205).

F&A's safety director Gene McAllister conducted random unannounced safety inspections of each jobsite. The purpose of the inspections was to ensure that roofing crews were operating safely. During his inspections, McAllister completed a safety checklist which identified potential hazards. The checklist included inspections for GFCI, permanent and continuous path to ground, ladder safety, hard hats and fall protection (Tr. 340, 343-344, 353-354).

McAllister's previous unannounced inspections of Iddings' crew found no violations of F&A's safety rules or OSHA regulations. McAllister testified that he had no reason to believe Iddings would not comply with safety rules. Also, the record does not show any job related injuries to the Iddings' crew (Exh. R-7; Tr. 374, 376, 416).

The illness/injury records for all F&A crews does not show a high rate. The OSHA 200 log for 1999 shows no injuries from electricity, falls or the lack of a hard hat. It does list 4 injuries, including an injury to another residential roofer who cut his finger. The injury did not result in any lost workdays (Exh. R-6; Tr. 339). The 1998 OSHA 200 log also shows 4 injuries including 2 injuries to residential roofers (stepping on nail and cervical sprain). Neither injury resulted in lost workdays (Exh. R-5). The 200 logs do not report on injuries to any member of the Iddings' crew.

Based on McAllister's frequent monitoring visits and the lack of a basis requiring more intensive supervision, F&A's safety monitoring program was adequate. *New York State Electric & Gas Corp*., (No. 91-2897, Oct. 27, 2000). Also *see Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995) (employer's duty is to take reasonably diligent measures to detect hazardous conditions through inspections of worksites; it is not obligated to detect or become aware of every instance of a hazard). McAllister randomly inspected each of the commercial projects at least once and most residential projects. The typical residential project lasts only a couple of days. The Urbana house project was completed in two days (Tr. 212). McAllister testified that he was scheduled to visit the site on the afternoon of OSHA's inspection (Tr. 380). Iddings testified that his crew would see McAllister sometimes three times a week (Tr. 183). Additionally, Paul Field visited the jobsites "almost daily" (Tr. 183). Under the circumstances of this case, F&A has established that its frequency of monitoring was reasonable and its scope of monitoring was adequate.

Enforcement of Work Rules

Adequate enforcement, the final element of the employee misconduct defense, includes a progressive disciplinary plan consisting of higher levels of punishment designed to deter employees who violate the employer's work rules. To prove that its disciplinary system is more than a paper program, an employer must show evidence of having actually administered the discipline outlined in its policies and procedures. *Pace Construction Corp*., 14 BNA OSHC 2216, 2218-19 (No. 86-758, 1991).

F&A's written safety policy provides for levels of discipline starting with written reprimands for willful violations of its safety rules and concluding with termination for repeated violations (Exh. C-5). F&A made part of the record its terminations and written warnings for willful violations. It shows that employees were discharged for various safety violations (Exh. R-9; Tr. 348).

If McAllister spotted a violation during his unannounced inspection, he would write it up if it was a willful violation. If it was not a willful violation, he would give the employee a verbal warning. According to McAllister, if a second violation was found within 12 months of the verbal warning, the employee was given a written safety notice. If three willful violations occurred within a 12-month period, the employee was discharged. There was no record kept of the verbal warnings, except an occasional note on the safety checklist (Exh. C-7; Tr. 302, 344-345, 351, 423-426).

The Secretary argues that F&A's disciplinary program does not identify verbal warnings as part of the program (Exh. C-5). However, employees understood the program, including the use of verbal warnings. Iddings described the program as a verbal warning, a written notice, and three written notices resulted in termination (Tr. 289-290, 292-293). Gary Iddings testified that the company's disciplinary policy "was laid out exactly how it works" (Tr. 255).

McAllister has issued discipline to employees for not using fall protection, a GFCI, and connecting the ground to the outlet (Exh. R-9). As a result of OSHA's inspection, McAllister issued a written warning to Iddings for not extending the ladder 36 inches above the roof because of an earlier verbal warning in August, 1998 (Tr. 345). Iddings testified that he and his brothers also received written warnings for failing to tie off harnesses and possibly the GFCI (Tr. 282-283) The Iddings crew quit F&A in September, 1999 (Tr. 179).

The record reflects that F&A maintained an effective discipline program. It was written, enforced and understood by employees. F&A has established the unpreventable employee misconduct defense and the violations are vacated.

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 the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Serious Citation No. 1:

1. Item 1, violation of § 1926.404(b)(1)(i), is vacated and no penalty is assessed.
2. Item 2, violation of § 1926.404(f)(6), is vacated and no penalty is assessed.
3. Item 3, violation of §1926.405(g)(2)(iv), is vacated and no penalty is assessed.
4. Item 4, violation of § 1926.416(a)(1), is vacated and no penalty is assessed.
5. Item 5, violation of § 1926.501(b)(13), is vacated and no penalty is assessed.
6. Item 6, violation of § 1926.1053(b)(1), is vacated and no penalty is assessed.
7. Item 7, violation of § 1926.1053(b)(22), is vacated and no penalty is assessed.

Willful Citation No. 2:

1. Item 1, violation of § 1926.100(a), is vacated and no penalty is assessed.
2. Item 2, violation of § 1926.501(b)(13), is vacated and no penalty is assessed.

/s/

KEN S. WELSCH
Judge

Date: January 2, 2001