BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA

FILED

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NC OSH Review Commission

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,	)	
COMPLAINANT,	)	**ORDER**
v.	)	
	)	**OSHANC NO.: 2020-6248**
	)	**INSPECTION NO.'s: 318187358**
STATESVILLE ROOFING & BUILDING RESTORATION, INC. *and its successors,*	)	**CSHO ID: L1173**
RESPONDENT.	)	

THIS MATTER came on for a virtual recorded hearing and was heard remotely before the undersigned on November 1, 2022. The Complainant, Commissioner of Labor of the State of North Carolina, hereafter referred to as Complainant or Commissioner, was represented by Jonathan Jones, Associate Attorney General, North Carolina Department of Labor. Respondent, Statesville Roofing & Building Restoration, Inc., hereafter referred to as Respondent, Company or Statesville, was represented by Michael Lord. Complainant's witnesses were then Compliance Safety and Health Officer, Ted Hendrix, (now a District Supervisor), and District Supervisor, Laura Crawford. Respondent's witnesses were Doug Davidson, President of Statesville Roofing & Building Restoration, Inc.; Mike Cook, Analyst/Project Manager with Respondent; and Ted Hendrix.

Following the conclusion of the hearing, Complainant moved, with the consent of the Respondent, to redact in part or in the alternative, to seal, parts of the recorded video hearing. The Order granting the redaction relief was entered on November 17, 2022.

Based upon the evidence presented at the hearing, including oral argument and post-hearing briefs, and with due consideration of the contentions of both parties, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in the Discussion and enters an Order accordingly.

ISSUES PRESENTED

1. Whether Complainant met its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.501(b)(10) by its employees performing roof repair activities without the use of fall protection, exposing them to a fall of between 14'8" and 15'6".

2. Whether Complainant met its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.1053(b)(1) by its employees using an extension ladder that was placed where it extended approximately two feet above the drip edge rather than at least three feet, exposing the employees to a fall of up to fifteen feet, six inches.

3. Whether Respondent proved its defense of employee misconduct.

4. Whether Complainant properly calculated the penalty amounts for the violations cited.

5. Whether CSHO Hendrix violated the Constitutional rights of Respondent by conducting a search from non-public grounds.

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.501(b)(10) provides as follows:

"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.

29 CFR 1926.1053(b)(1) provides as follows:

When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access . . . .

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest dated February 17, 2020 received by the Commissioner of Labor of the State of North Carolina contesting a citation issued January 24, 2020 to Statesville Roofing and Building Restoration, Inc.

2. Complainant is charged with the enforcement of the Occupational Safety and Health Act of North Carolina, N.C.Gen. Stat. 95-126 *et seq.*, hereafter the "Act."

3. Respondent is a North Carolina corporation with its principal and registered offices located in Statesville, North Carolina. It is a provider of commercial roofing services and employed, at the time of the inspection, 53 employees. Respondent was an employer within the meaning of N.C. Gen. Stat. §95-127(11)

4. On January 21, 2020, Compliance Safety and Health Officer (CSHO) Ted Hendrix, employed by the North Carolina Department of Labor, met with Respondent, Statesville Roofing & Building Restoration, Inc. at one of Respondent's worksites located at 1411 Alexander Street, Statesville, North Carolina, hereafter referred to as "the site." Officer

Hendrix properly entered onto the site and properly conducted the inspection prompting this hearing.

5. On that day, Officer Hendrix observed two workers on the roof of a commercial building without fall protection. Respondent questioned whether Officer Hendrix's observations of the workers had been made from a public right-of-way. It is found specifically that the observations were made from Alexander Street, a public right-of-way.

6. The workers observed on the roof were employees of the Respondent's Repair and Maintenance Division (RMD). They were Andrew Mourey, a technician/foreman who was in charge of the job, and Hesh Atkinson, an Assistant/Helper. Mourey, after speaking by telephone with his supervisor, consented to the inspection.

7. Officer Hendrix properly conducted the inspection.

8. The jobsite was the repair of a roof leak in the northwest corner of what was essentially a flat roof of a 22,500 square foot commercial building.

9. The repair of the roof took approximately fifteen (15) minutes.

10. Mourey and Atkinson had worked for Respondent respectively for over eight and over four years.

11. Neither Mourey nor Atkinson had ever been disciplined for violating safety regulations.

12. Neither Mourey nor Atkinson testified at the hearing, nor was either still employed by Respondent at the time of the hearing.

13. During the inspection, CSHO Hendrix measured the height of the roof on both sides of the corner where the repair was being made. The height ranged from 14'8" on one side to 15'6" above asphalt and concrete hard surfaces. Neither employee was using fall protection equipment, nor were they using any form of alternative fall protection.

14. The ladder used to give the employees access to the roof was properly placed against the wall of the structure, but it was extended approximately two feet above the drip edge of the roof, as opposed to the required three feet.

15. Complainant issued one citation with two parts against Respondent:

    A. Citation Number One, Item 1, alleges a Serious violation of 29 CFR 1926.501(b)(10). It provides that "... each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8m) 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."

B. Citation Number One, Item 2, alleges a Serious violation of 29 CFR 1926.1053(b)(1). It provides that "When portable ladders were used for access to an upper landing and the ladder's length allows, the ladder side rails did not extend at least 3 feet (.9m) above the upper landing surface being accessed."

16. For the alleged violations in Citation One, Items 1 and 2, the Complainant calculated the proposed penalties and proposed abatement dates according to the procedures set forth in the Complainant's *North Carolina Operations Manual.* Pursuant to Chapter VI, Section B, Complainant applied the following Adjustment Factors to the Gravity Based Penalty of $5,000 to calculate the Proposed Adjusted Penalty: 50% credit for size, 10% credit for safety and health programs, and 10% for history, for a total 70% adjustment for each Item, resulting in penalties of $1,500 for each Item.

17. At the time of the inspection, Statesville Roofing had specific work rules 1) requiring workers to use either fall protection PPE or safety monitoring whenever working six feet or more above lower levels; and 2) requiring workers to extend ladders three feet above the upper landing surface being accessed.

18. Statesville Roofing effectively communicated the work rules concerning fall protection and ladder safety to affected employees. The rules were included in the Fall Protection and Ladder Safety sections of the written Safety Programs book, a hard copy of which is available in the RMD and Contract buildings. The Safety Programs are also maintained electronically, and written copies are available upon request at any time by any employee.

19. A progressive four-step disciplinary system for violation of the work rules was part of the safety program and it provided for oral, then written warnings, then a written warning plus layoff, and finally, termination.

20. At the time of the inspection, Mourey and Atkinson had been trained multiple times on Respondent's specific work rules, including the ones requiring workers to use either fall protection PPE or safety monitoring whenever working six feet or more above lower levels and also the ones relating to ladder safety. Both employees had attended Competent Person training for Fall Protection and Ladder Safety on April 8, 2019, just 9 ½ months prior to the inspection.

21. The most recent Fall Protection and Ladder Safety training attended by Mourey and Atkinson had occurred on December 13, 2019, 39 days before the inspection.

22. In the 9 ½ months prior to the inspection Mourey and Atkinson had also been trained on both Fall Protection and Ladder Safety at least two additional times on October 18, 2019 and August 9, 2019 besides the April 8, 2019 and December 13, 2019 dates found above.

23. At the time of the inspection, fall protection PPE was available to both employees, as it was in their work vehicle.

24. When CSHO Hendrix met with Foreman Mourey during the inspection, Mourey referred to the fall protection violation being his responsibility. He said, "That's on me."

25. Mourey was in charge of the job site. While he had to call his supervisor to get approval to allow the inspection to proceed, he was authorized to represent the company for the inspection and he did so. He was a supervisor.

26. Per Citation One, Item 2 of the Citation, Mourey and Atkinson used a portable extension ladder to access the roof. The ladder extended approximately two feet above the drip edge and was long enough to have extended more than three feet above the drip edge.

27. As with Item 1, when Mourey and CSHO Hendrix discussed the Item 2 ladder safety issue, Mourey acknowledged his responsibility for the ladder violation by saying, "That's on me."

28. Following Respondent's last OSHA citation, almost 12 years earlier in 2008, a company vice-president helped initiate a new safety emphasis at the company that changed the culture of the company from just compliance to having every employee be responsible for their own safety as well as others'. A comprehensive safety program was established with written safety policies, including a graduated or progressive disciplinary policy for employees who did not follow the policies.

29. OSHA 300 and 300A records were maintained.

30. A 12-13 member Safety Committee with management and rank and file participation met periodically.

31. Respondent logged more than one million worker hours during the period covered by Commissioner's Exh. 2, p.51and the company's TIR (Total Incident Rating) rating for its insurance had decreased substantially such that in 2019 it had dropped to 1.24 from 5.09 and 5.79 the two previous years.

32. Hendrix asked Respondent for information about its safety program, yet he volunteered that he assumed Respondent's employees were properly trained on the regulations. He volunteered that most of the time when he gets materials from employers about a safety program, he does not receive the *content* of the training course(s) the employees took. He did not testify as to what review he gave to the materials that he received, nor did he testify as to the content of the training courses used to train Mourey or Atkinson.

33. Hendrix needed the information on the company's safety program in order to determine how much of an adjustment factor he should apply for the company's good faith when he calculated the gravity-based penalties for violations.

34. Doug Davidson, Respondent's President, sent an email containing parts of the company's safety program to Hendrix at 3:53 pm on January 22, 2020, the day after the inspection.

The email attached information Hendrix requested, yet noted that if he, Hendrix, wanted to see all their safety programs, then the materials would need to be provided through a system other than email because of their length.

35. Hendrix admitted that he never asked the company to follow through on its offer to provide additional information about the safety program.

36. Hendrix did not know when he saw the email from Davidson. The record does not establish whether Hendrix reviewed the email before submitting the proposed citations to Laura Crawford, District Supervisor, on January 22, 2020.

37. The email and its attachments were not included in the official inspection report provided to Respondent for the hearing.

38. A safety violation, within the Repair and Maintenance Division — the same division that Mourey and Atkinson were employed in — was enforced with discipline on December 13, 2019 with warnings to two employees. On or about December 12, 2019, employees Dale Brucker and Joseph Craven failed to tie off properly when a man-lift was moved. See Respondent's Exhibit 3. The incident resulted in warnings for a "near miss." The two men received written warnings which they acknowledged with their signatures.

39. After the inspection in question and before a citation was issued, Mourey was issued a disciplinary written warning on January 23, 2020. Atkinson received an oral warning. Both Mourey and Atkinson were retrained again.

40. Witness Davidson, Respondent's President, testified credibly at some length concerning inspections of jobs performed by the Repair and Maintenance Division. Complainant's cross examination was rigorous and attempted to elicit an admission from Davidson that RMD's jobs were not inspected by the company. Davidson explained that the company should have done a better job of *documenting* RMD inspections, but he denied that RMD inspections were not being done. He named Mike Cook and Jason Adkins as employees who inspected such jobs along with Dan Pope. He admitted that at the time of the inspection by Hendrix, Tommy McDaniel, foreman Mourey's supervisor, was not doing such inspections because of a health condition.

41. Manager, Mike Cook, conducted safety audits informally and randomly whenever he visited RMD projects and called out any infractions he observed, but he admitted that he tended to visit the "larger" RMD jobs, as it was hard to "catch up" with repair crews that had from 2-6 repair sites per day.

42. Cook visited shorter duration jobs and checked for safety issues but safety would have been a secondary or dual purpose when he would go to such jobs.

43. Davidson conceded that the company could benefit from doing more inspections of short duration RMD jobs. This concession did not detract from Davidson's credibility that inspections of RMD jobs were being done.

44. Crawford, who spoke to Davidson in the Informal Conference, testified, as did Davidson, about their conversation. In requesting post-hearing briefs of the parties, the undersigned noted in his message to counsel that they should not expect any findings based on testimony concerning what was said in the informal conference because of Rule 408 (N.C. Gen. Stat. §8C-1, R. 408). Counsel were told that if they took issue with this position that they should justify their views. Neither party addressed the issue, thus, there are no findings of fact based on the conversation that occurred at the informal conference.

45. Hendrix applied a reduction of 10% for the company's safety program. Hendrix could have applied either 0%, 10%, 25% or 40%.

46. Hendrix applied a mitigating factor to his calculation of good faith of the company because the fifteen minute duration of the repair of the roof was a "very short term hazard."

47. Hendrix did not accept Davidson's email invitation to look at additional information concerning the safety program of the company because he considered Mourey to have been a supervisor who was not following the safety program. He admitted that he did not include the email or its attachments in his report to the District Supervisor recommending the citation's two items, as it would have been an "exercise in paperwork."

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. Respondent is subject to the provisions and jurisdiction of the Act.

3. Black's Law Dictionary, citing the National Labor Relations Act, §2(11), defines "supervisor" to include "any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward , or discipline other employees, *or responsibly to direct them... if... the exercise of such authority is not of a merely routine or clerical judgment, but requires the use of independent judgment.* "

4. Supervisor Mourey's misconduct was not reasonably foreseeable by the Respondent.

5. Complainant did not prove more probably than not that Respondent's safety program was inadequate.

6. Respondent "did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation."

DISCUSSION

Serious Violation Defined

This case turns on the question whether the Complainant proved all the elements of a serious violation of two OSHA regulations. In order to prove a serious violation, Complainant is required to prove what is stated in the definitions included in North Carolina's Occupational Safety and Health Act, §95-127(19):

> Serious violation. – A violation that shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

In this case, the Complainant proved that a hazard existed at a job site of the Respondent's that exposed employees to a substantial probability of death or serious physical harm. The issue remaining concerns the last clause of the above defined serious violation, "unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation."

Opposing Contentions

The importance of the last requirement of the definition is that Statesville's foreman participated in the violations along with a worker. The Complainant contended that the foreman was a supervisor, thus his knowledge was imputable to the company because a supervisor is an agent of the company. In other words, the Respondent had constructive knowledge of the violations based on the *foreman* status of one of the two workers, Andrew Mourey.

Respondent contends that its foreman was a "rogue" supervisor—assuming a foreman can be a supervisor—and notes that the law of the 4th Circuit, which has been followed by this Review Commission, provides that the Commissioner must "prove that a supervisor's misconduct was 'reasonably foreseeable' to establish that the employer had constructive knowledge." *See Ocean Electric Corp. v. Sec'y of Labor,* 594 F.2d 396, 401 (4th Cir. 1979)("But, if the employee's act is an isolated incident of unforeseeable or idiosyncratic behavior, then common sense and the purposes behind the Act require that a citation be set aside"). Further, each constructive knowledge case that turns on the question of knowledge is likely to have facts that are peculiar to only that case. *Brooks v. Acoustics*, 2 NCOSHD 784,787 (1986) ("the doctrine of imputed or constructive knowledge requires the application of the doctrine to the peculiar factual setting of causes in which the issue arises").

Guidance from the Fourth Circuit and Who Has the Burden of Proof?

In the recent *New River Electrical Corporation v. Occupational Safety and Health Review Commission,* 25 F.4th 213, 221 (4th Cir. 2022), that Court notes that reasonable foreseeability can

be proven by showing that an "employer fail[ed] to use reasonable diligence to discern the presence of the violative condition" (*quoting N&N Contractors v. Occupational Safety & Health Review Commission*, 255 F.3d 122, 127 (4th Cir. 2001). This provision is essentially identical to that found in the final clause of the North Carolina statutory definition of a serious violation, "unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation" (N.C. Gen. Stat. §95-126(19).

New River helpfully explains that the Secretary (in the context of this case, the Commissioner) may prove the failure to exercise reasonable diligence in one of three ways or methods:

> 1) failing to take specific risk-prevention measures on the job site where the accident (in this case, *violations*, as there was no accident) occurred;
> 2) pointing to evidence of prior similar violations by employees; and
> 3) failing to use reasonable diligence to discover violations by demonstrating that Respondent had an inadequate safety program or a history of lax enforcement of its work rules. *New River at 221.*

These three ways of proving the failure to exercise reasonable diligence as required by the fourth element of North Carolina's statutory definition of a serious violation provide a helpful and thorough outline through which this decision arrives at the conclusion that Complainant did not prove more likely than not that Respondent committed a serious violation of the OSHA regulations. Bear in mind that the implementing rules of the North Carolina Occupational Safety and Health Review Commission for the conduct of hearings provide expressly that the burden of proof rests with the Complainant "to prove each element of the contested citation by the greater weight of the evidence." 24 N.C.A.C. 03.0514(a).

Complainant addressed its obligation to prove the last clause (or element) of the serious violation by focusing almost entirely, if not entirely, on Mourey's authority as a foreman/supervisor and treated the question of knowledge of the employer as imputed or established. The *Ocean Pacific* decision rejected the idea that imputation of knowledge was appropriate because it was too much like strict liability. *See Brooks v. Floyd S. Pike Electrical Contractors, Inc.*, 2 NCOSHD 1170, 1176 (1987) (Review Board citing with approval *Ocean Pacific* for the position that "Employers are not strictly liable for violations of OSHA standards that result from supervisory misconduct"). By imputing knowledge, for all practical purposes, Complainant treated the question of the employer's knowledge as established; thus, the burden of proof on the question of the safety program was not for *Complainant* to prove that the safety program was *inadequate*, but for *Respondent* to prove that the safety program was *adequate.* This shifted the burden of proof from the Commissioner to the Respondent before Complainant had completed proving its case. The analysis and reasoning of *New River* applies well to North Carolina's statute and its Rule of Procedure and provides a useful way to evaluate the evidence in a supervisory misconduct case.

The question for decision is whether Complainant proved more likely than not that Statesville's safety program was inadequate.

<u>Proving the Failure to Exercise Due Diligence by *New River's* Three Methods</u>

1. Failure to Take Specific Risk-Prevention Steps?

Before addressing the evidence admitted concerning the third method, the first two methods will be addressed. First, did the employees in question fail to take specific risk-prevention steps? The Complainant might have been able to present evidence, for example, that the employees did not, before beginning their repair work, identify any and all hazards they might confront in the course of the repair nor did they refer to any kind of preliminary checklist to help them assess risks associated with the roof repair to be done. *See e.g. New River at* 128 (where one argument presented by the Secretary of Labor was that the Respondent violations were foreseeable because the company did not create a "grounding plan" or conduct a proper risk assessment before beginning work). No evidence of such examples or of otherwise failing to engage in risk prevention activity prior to the roof repair was admitted.

2. Prior Similar Violations?

Second, did Complainant present evidence of prior similar violations by Respondent's employees? There was no such evidence admitted for the two employees involved with the citation in this case. *See e.g. N&N Contractors v. Occupational Safety & Health Rev. Comm'n*, 255 F.3d 122, 127-128 (4th Cir. 2001) (N&N had received notice of two safety violations from its general contractor four months before the citation, plus a supervisor acknowledged frequent violations of the safety standard at issue in the months before the citation). For *other* employees of the company, evidence was admitted that in just the previous month two RMD employees (not Mourey or Atkinson) engaged in conduct that related to a fall hazard and enforcement action followed immediately—both employees were disciplined for their misconduct. Further, Mourey and Atkinson, were nevertheless trained again about both fall protection and ladder safety shortly after their co-workers' violations even though they were not involved in the misconduct. Thus, there was neither evidence of misconduct of other employees without prompt enforcement action nor of Mourey and Atkinson committing other violations.

3. Was Respondent's Safety Program Inadequate?

The third of the three methods identified by the *New River* court requires consideration of whether Complainant proved that Respondent had an inadequate safety program or a history of lax enforcement of its work rules. Restated, if Respondent had an inadequate safety program or lax enforcement of work rules, the *New River* analysis would conclude that Respondent was not reasonably diligent; therefore it was foreseeable that safety violations would occur.

We turn now to an examination of the evidence admitted at hearing both for and against the question of whether Respondent had an inadequate safety program. The evidence for an adequate program consists of the following:

1) Respondent had a detailed written safety program that included policies that addressed the hazards that were the subject of the citation items;
2) Policies were available electronically as well as in notebooks, including one kept in the RMD Warehouse;
3) Employees were given training about safety policies and that training was documented;
4) In addition to regular safety training of employees, competent person training in both fall protection and ladder safety was given, including to both Mourey and Atkinson;
5) Besides the regular training and competent person training given to employees, both Mourey and Atkinson had received, in the 9 ½ months prior to the citation, at least two additional trainings on the policies they violated—fall protection and ladder safety;
6) A progressive four-step disciplinary system was part of the safety program and it provided for oral, then written warnings, then a written warning plus layoff, and finally, termination;
7) PPE was purchased and was available for Mourey and Atkinson in their truck;
8) Safety audits were done of RMD jobs by three named managers;
9) Respondent had no OSHA citations since 2008, and more than one million worker hours were incurred during that period (extrapolated from Commissioner's Exh. 2, p.51);
10) The company's TIR (Total Incident Rating) rating for its insurance had decreased substantially such that in 2019 it had dropped to 1.24 from 5.09 and 5.79 the two previous years;
11) An example of the enforcement of the safety program was illustrated with the discipline of two other employees in the RMD division for the violation of fall protection policies in the month prior to the issuance of the Citation;
12) Following the discovery of the violations of the other employees, Respondent trained both Mourey and Atkinson and other employees on both fall protection and ladder safety;
13) Both Mourey and Atkinson were disciplined before the Citation in this case was issued;
14) The violations observed by the inspector were of a repair that took only 15 minutes;
15) A 12-13 member Safety Committee with management and rank and file participation met periodically;
16) OSHA 300 and 300A records were maintained and admitted as evidence;

The evidence that the safety program was not adequate consisted of the following:

1) No documentation of safety audits of RMD jobs exists (except for the December, 2019 near miss);
2) The company President, while asserting that RMD job safety audits were done by at least three of the management staff, including Mike Cook, acknowledged that they were not documented;
3) Manager, Mike Cook, conducted safety audits informally and randomly whenever he visited RMD projects and called out any infractions he observed, but he admitted that he tended to visit the "larger" RMD jobs, as it was hard to "catch up" with repair crews that had from 2-6 repair sites per day;
4) Cook visited shorter duration jobs and checked for safety issues, but safety would have been a secondary or dual purpose when he would go to such jobs;

5) The company President acknowledged that the company would benefit from more inspections of short duration (RMD) jobs; and
6) Mourey participated in the misconduct that occurred with his co-worker.

What the above evidence shows is that Respondent had a strong safety program with some vulnerability. It had not made safety inspections of short duration repair jobs in the RMD division a routine assignment of its managers. It had instead trained managers to inspect for safety whenever they were on RMD sites, and three to four managers made visits to such sites, but the company had not created a systematic routine to ensure that its RMD employees were following safety policies. The system it had created for RMD monitoring favored larger sites because, as was stated, it was hard to "catch up" with repair crews that could be at any of as many as six places on a given day. The misconduct in this case, like the incident in *Cole Construction,* occurred over a very brief period of approximately 15 minutes. *Cole Construction Co. of Sanford, Inc.,* OSHANC No. 2006-4576 (ALJ Weaver 2007). *Also See, Naegele Outdoor Advertising,* 1 NCOSHD 885, 904 ("... constant supervision is not needed for all jobs ... the difficulties of supervision in some jobs ... may justify a lack thereof .... ").

The question for decision is whether the vulnerabilities identified establish the inadequacy of the safety program of the Respondent more likely than not? Or, stated another way, does the evidence admitted make it more foreseeable than not that a safety violation would occur? This examiner finds that it falls short of the Commissioner's burden of proving more likely than not that the program was inadequate. As noted in *Naegele,* the focus should be less on particular business methods used to provide for employee safety, as "The Act was not designed to force businesses to change their methods of management for doing business, so long as safety standards are being met." *Id.*

With regard to witness Cook's complaint that it was difficult to "catch up" with repair crews that could be at any one of as many as six locations during the course of a day, the words of the court in the New York State Elec. & Gas Corp case bear repeating: "Insisting that each employee be under continual supervisor surveillance is a patently unworkable burden on the employer." (*N.Y. State Elec. & Gas Corp. v. Sec'y of Labor, 88 F.3d 98, 105 (2d Cir. 1996) on remand* 19 BNA OSHC 1227, 2000 CCH OSHD Para 32217, 2000 WL 1535919 at *5 (No. 91-2897, 2000) (Federal Review Commission finding no constructive knowledge where there were no circumstances alerting the employer to a need for more intensive monitoring). Clearly, the company's plan for systematically monitoring its RMD division fell short of an ideal goal. The question for this reviewer is whether that justifies finding that this company did not have an adequate safety program. Is it reasonable to find that 11+ years of operating without a citation suggests that the random system worked? The company's good record is some evidence that it did work, but it should not be determinative. Similarly, the plain fact that a violation occurred and a citation issued does not mean that the safety program was inadequate, especially when there had been no other citations.

There is no standard known by this examiner for how many times per year employees should be trained. The frequency and recency of ladder safety and fall protection training having been

conducted with Mourey and Atkinson is a positive factor that contributes to the adequacy of Statesville's efforts to have a good safety program.

Questions that did not get addressed at the hearing included what was the content of the training, particularly in the fall protection and ladder safety training courses? Given that Mourey and Atkinson had received such frequent training in the short period preceding the violation, one might wonder not just what the content of the training was, but were the employees required to take a test after each training in order to "pass?" If they did take a test, was it proctored properly to ensure that the employees taking the test were being tested in a reliable manner? Additional questions that could have provoked helpful information could have been asked of the two employees, Mourey and Atkinson, who, as noted, were not called as witnesses. Another example of a fertile area for examination was the use of the checklist that appears in Respondent's exhibits. Was it used in the RMD division? If not, why not? Finally, what other evidence of enforcement actions regarding other employees had been taken besides the December, 2019 incident? The foregoing avenues for further examination, as would others, have contributed to the determination of the inadequacy (or adequacy) of the safety program.

This hearing officer finds the efforts made by the company to implement an adequate safety program sufficient, although they fell below an ideal. It is not reasonably foreseeable to expect safety misconduct of two employees who have been trained four times on fall protection and ladder safety in the 9 ½ months prior to their violating the same policies when one of the trainings was for competent person certification and when the most recent training was the month immediately preceding their violation of the same policies. The most recent training followed two other employees in the same company division violating fall protection policies. Their near miss caused the company to retrain a number of employees, including Mourey and Atkinson.

Complainant argued that "short jobs are ripe for shortcuts," but in this case there was no evidence whatsoever to justify believing that Mourey and Atkinson were prone to taking shortcuts. Such a suggestion requires the acceptance of speculation which should not be the basis for finding the Respondent's program inadequate. Commissioner called neither employee to testify. Rather, the two employees had clean disciplinary records for the respective periods of eight and four years that they had been employed. The possibility exists that because the two employees worked short duration jobs that their taking shortcuts was not previously discovered. It is also just as likely, on the evidence adduced at the hearing that their misconduct on this occasion was uncharacteristic of their behavior and that the Respondent's system of safety checks, however short of an ideal it was, was sufficient for the company. As *Naegele Outdoor* posited, "The amount of supervision necessary to maintain an adequate safety program can vary based on the facts of each case." *Naegele,* at 903. Further, "insisting that each employee be under continual supervisor surveillance is a patently unworkable burden on employers." *N.Y. State Elec. & Gas* at 105 (before remand).

As noted earlier, Complainant has another way in which it can demonstrate that Respondent did not exercise reasonable diligence — to show that there was lax enforcement of work rules. The evidence developed at hearing, however, favored the Respondent. The company jumped to discipline two employees in December, 2019 and, as well, moved immediately to retrain

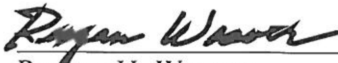
employees on the subject of fall violations. *See Carolina Steel Corp.*, OSHANC 98-3677 (ALJ Garrett, 2000)(evidence of enforcing rules when violations had been discovered internally). This was *the month before* the Commissioner's inspection. Further, the company did not wait to receive a citation before disciplining Mourey and Atkinson for their misconduct. In addition, as noted previously, the company had had no citations since 2008. The OSHA 300 and 300A forms and insurance information in Exhibit 8 show very few incidents of employee injury, especially in the three years prior to the citation. Finally, there was no evidence offered to suggest that there were violations that went unenforced.

In conclusion, while Complainant questioned appropriately the adequacy of Respondent's safety program, it did not prove more likely than not that the program was inadequate. The burden of proof was Complainant's under the rules of the Review Commission to prove that the safety program was not adequate. Had that been done, there would have been justification to believe that the violation of the regulations in issue in this case was foreseeable. Because there was a failure of proof of the fourth clause of the statutory definition of a serious violation, the Citation with both of its items should be dismissed.

Based on the foregoing Findings of Fact and Conclusions of Law and considering the Discussion, **IT IS ORDERED** as follows:

The Citation, including Items 1 and 2 are **DISMISSED**. All other issues are mooted by the dismissal.

This the __5__ day of March, 2023.



Reagan H. Weaver
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

MICHAEL C. LORD
WILLIAMS MULLEN
PO BOX 1000
RALEIGH, NC 27602

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:

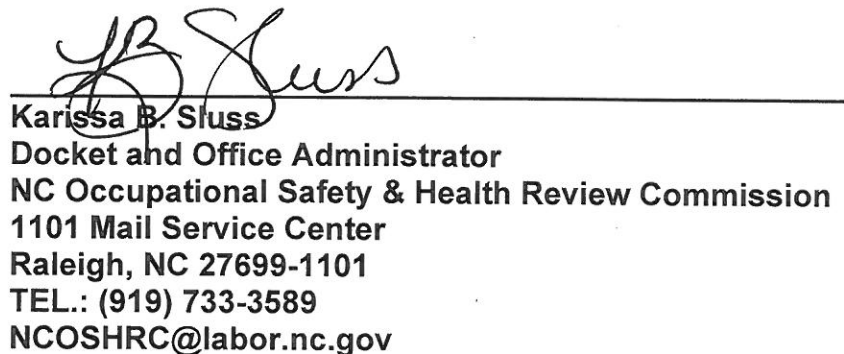
JONATHAN JONES
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

via email to carla.rose@labor.nc.gov.

THIS THE 8 DAY OF March 2023.



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