

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Ken B. Peterson,
Commissioner,

v.

Kraus Anderson Construction Company.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

The above-entitled matter came before Administrative Law Judge Jeffery Oxley for a hearing on August 25, 2015. Post-hearing briefs were filed by the parties on September 28, and the record closed on that date.

Jonathan Moler, Assistant Attorney General, appeared on behalf of the Occupational Safety & Health Review Board (MnOSHA) of the Department of Labor and Industry. J. Scott Andresen, Bassford Remele, PA, appeared on behalf of Kraus-Anderson Construction Company (Respondent or Kraus-Anderson).

STATEMENT OF THE ISSUES

1. Whether MnOSHA has proven by a preponderance of the evidence that:
 - a. Respondent violated 29 C.F.R. § 1926.501(b)(10) (2015).
 - b. Respondent knew or should have known of the existence of the hazard created by the violation.
 - c. Respondent's employees had access to the hazard created by the violation.
 - d. Whether the items of the citation were properly classified as serious.¹

¹ The Notice and Order for Hearing dated October 2, 2014, identified seven issues for hearing. At the commencement of the hearing, the parties agreed that two of the issues, whether the cited standard applied and whether the abatement period was reasonable, would not be contested. While initially Respondent indicated at the hearing that the amount of the penalty was at issue, Respondent later stated that it was not challenging the penalty amount, leaving MnOSHA with four issues on which it has the burden of proof by a preponderance of the evidence under Minn. R. 1400.7300, subp. 5. (2015).

2. Whether Respondent has proven by a preponderance of the evidence the affirmative defense of employee misconduct.

SUMMARY OF RECOMMENDATION

Based on the evidence in the hearing record, the Administrative Law Judge finds that although Respondent's employees were briefly without fall protection in violation of 29 C.F.R. § 1926.501(b)(10), Respondent could not, with the exercise of reasonable diligence, have known of the violation. Consequently, the violation was not "serious" as that term is defined by Minn. Stat. § 182.651, subd. 12 (2014). Nonetheless, the fall protection standard was violated by Respondent's employees and Respondent failed to prove its affirmative defense of unforeseeable employee misconduct. The Administrative Law Judge finds a reduced penalty of \$1,050 appropriate as the failure to use fall protection, however brief, could still result in severe injury.

FINDINGS OF FACT

1. Respondent Kraus-Anderson Construction Company served as the general contractor for a 12,000 square foot addition to the HealthPartners facility located at 8450 Season Parkway, Woodbury, MN. Kraus-Anderson's work at the facility commenced in July, 2013.²

2. The addition involved, among other work, constructing a parapet along the roof edge of the addition. The edge of the roof was approximately twenty feet above ground level.³

MnOSHA's Investigation

3. 29 CFR § 1926.501(b)(10)⁴ requires that employees engaged in roofing activities on low-slope roofs with unprotected sides and edges six feet or more above lower levels be protected from falling by an approved method of fall protection.

² Exhibit (Ex.) 1 at 1.

³ Testimony (Test.) of Michael Helms; Test. of Carol Sende; Ex. B. at DLI 0102.

⁴ Section 1926.501 (2015) reads:

Duty to have fall protection.

(a) General. (1) This section sets forth requirements for employers to provide fall protection systems. All fall protection required by this section shall conform to the criteria set forth in §1926.502 of this subpart.

(2) The employer shall determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.

(b)(1) Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

4. Respondent had installed an approved method of fall protection consisting of warning lines, with triangular flags attached to the lines at intervals. The warning lines separated the interior area of the roof where employees were not required to wear fall arrest gear from the exterior areas where fall arrest gear was required.⁵ The fall arrest gear consisted of a self-retracting lifeline one end of which was attached to a cable strung between two anchor plates while the other end was to be attached to the D-ring of a harness worn by an employee.⁶ Employees working within the flagged area were sufficiently distant from the roof edge that they were not required to be attached to a fall protection system, while employees outside the warning lines were required to have fall protection.⁷

5. The facts leading to the issuance of a citation by Helms are undisputed. On October 31, 2013, Minnesota Department of Labor and Industry Safety Investigator Michael Helms was returning to his work place when he drove by the HealthPartners facility in Woodbury. Helms saw individuals working at the site and decided to drive closer to the facility to determine if safety measures were in place to protect the workers.⁸

6. Using the telephoto lens of his camera, Helms observed a man, later identified as Michael Cramlet, working near the edge of the roof without adequate fall protection. Cramlet was installing insulation and plywood sheets for the roof's parapet wall, a situation posing a risk of imminent danger for a person without adequate fall protection as the roof was approximately 20 feet above ground level.⁹ Helms took photographs of the scene.

7. Within minutes of first seeing Cramlet on the roof edge, Helms observed, and photographed, a second man, later identified as Bryan Bourgoin, approach Cramlet. Helms had previously observed Bourgoin working near the center of the roof, gathering materials.¹⁰ Bourgoin attached a self-retracting lifeline to the lanyard attached to the D-ring on his full-body harness, gathered up some materials, stepped under the warning lines and stanchion, and walked to where Cramlet worked by the edge of the roof. Bourgoin assisted Cramlet install a few pieces. Then Bourgoin stood up and detached the retracting lifeline from the D-ring of his full-body harness and clipped it to

...

(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, and personal fall arrest system, or warning line system and safety monitoring system.

⁵ The warning line was strung between upright supports with triangular flags attached at intervals to the line. Employees also referred to the area inside the warning line as "the flagged" area. Test. of Bourgoin.

⁶ Test. of Bryan Bourgoin, Test. of Jay Vander Leest, Test. of M. Helms.

⁷ Test. of B. Bourgoin, Test. of J. Vander Leest, Test. of C. Sende.

⁸ Test. of M. Helms, Test. of B. Bourgoin, Test. of Mike Cramlet; Exs. 2, 3.

⁹ Test. of M. Helms; Ex. 13 at DLI 0102.

¹⁰ Ex. 13 at DLI 0102.

the D-ring of Cramlet's full-body harness. Bourgoin then left the roof edge and returned to the area within the warning lines.¹¹

8. Helms could not estimate the length of time between when he first observed Cramlet working on the roof to when Bourgoin returned to the flagged area after clipping in Cramlet.¹²

9. At that time, Bourgoin and Cramlet had done work on the roof for the previous week and a half. Cramlet normally clipped into the fall restraint system when he worked outside of the flagged area on the roof and he had been clipped in shortly before Helms arrived at the scene.¹³ However, at the time Helms was observing him, Cramlet was wearing a fall restraint harness, but was not clipped in to the anchor plate system.¹⁴

10. Cramlet unclipped himself when he had run out of screws for fastening the materials to the parapet and had gone to obtain more screws from within the flagged area and unclipped himself to do so. He forgot to clip into the anchor plate system when he returned to his work on the roof edge. Cramlet had resumed work for a few minutes, probably less than five minutes, when Bourgoin approached him and clipped him in. Bourgoin was unclipped for a "matter of seconds."¹⁵

11. By not being clipped into the fall protection system and working at the edge of a roof 20 feet high, Cramlet, and to a much lesser extent Bourgoin, risked severe injury.¹⁶ Bourgoin's risk was less than Cramlet's because he was further from the roof edge, and he was without fall protection for a very short period of time.

12. With the risk of imminent harm to Cramlet removed because he was now clipped into the fall-restraint system and the risk of imminent harm to Bourgoin similarly removed because he returned to working within the flagged area, Helms sought out the site supervisor, Carol Sende.¹⁷

13. Helms found Sende working in a trailer on the job site and held an opening conference with her. Sende, Bourgoin, and Cramlet are all employees of Kraus-Anderson. The trailer was located such that Sende could see Bourgoin and Cramlet on the roof if she looked through one of its windows. Sende had not seen Cramlet working without fall protection.¹⁸

¹¹ Test. of M. Helms. Exs. 4-6; Ex. 13 at DLI 0102.

¹² Test. of M. Helms.

¹³ Test. of B. Bourgoin.

¹⁴ Exs. 2, 3.

¹⁵ Test. of M. Cramlet, Test. of B. Bourgoin, Test. of M. Helms

¹⁶ Test. of M. Helms.

¹⁷ *Id.*

¹⁸ Test. of M. Helms, Test. of C. Sende; Ex. 1 at DLI 0097; Exs. 8-10; Ex. 13 at DLI 0103.

The Citation

14. Helms issued one citation because first Cramlet and then Bourgoin had been on the edge of the roof without fall protection in violation of 1926.501(b)(10).

15. Citation 01, Item 001 issued to Kraus-Anderson was for a “serious violation” with a severity level of “E” indicating that the injury that could have resulted from the violation would include “Permanent Partial Disability, 15% up to 60%” or “Temporary Total Disability, greater than 10 lost workdays or days of restricted work activity.”¹⁹

16. The citation Helms issued to Kraus-Anderson proposed an unadjusted penalty of \$3,500 and, after adjustments for the Company’s good faith credit and history of violations, an adjusted penalty of \$2,100.²⁰

Kraus-Anderson’s Safety Program

17. Kraus-Anderson has a workplace safety program in place as documented in its October 2012 “Safety and Health Program” (the Safety Program).²¹ Kraus-Anderson requires all new hires to attend an orientation program that includes review of the Safety Program and to view a video that informs employees of the Company’s safety policies.²²

18. Kraus-Anderson’s Safety Program requires job superintendents to hold “specific job-related toolbox talk[s]” on a weekly basis with all crew members. The meetings should include reviews of “[a]ccidents or near accidents” and “actions to prevent recurrence discussed.”²³

19. The Safety Program further states that “[t]he job superintendent, on a weekly basis, will conduct a formal walk-around of the site and document any short comings on the jobsite inspection checklist.” The job superintendent is also required to “[e]stablish a jobsite file of past jobsite inspection checklists for future reference.”²⁴ Kraus-Anderson submitted Jobsite Inspection Checklists for its Gunderson jobsite, but not for the HealthPartners jobsite.²⁵

20. The Safety Program also calls for regular safety meetings, noting that “[i]t is vital to this . . . Program that all safety training and meetings are carefully documented. Written records of all training activities are the responsibility of the Safety Department.”²⁶

¹⁹ Ex. 15 at 5.

²⁰ Ex. 13 at DLI 0104; Ex. 14 at 68-70; Ex. 15 at 5; Ex. B at DLI 0096.

²¹ Ex. 5 at DLI 0013.

²² Ex. E. at DLI 0021.

²³ *Id.*

²⁴ Ex. E. at DLI 0022.

²⁵ *Id.* at DLI 0046-0049.

²⁶ *Id.* at DLI 0022.

21. The Safety Program includes instructions for implementing the Fall Anchor Plate system:

The Fall Protection Anchor Plate system has been designed as a fall restraint and fall arrest anchorage system for the use of both vertical and horizontal safety lines as required by federal and state OSHA. Employees may tie-off directly to the anchor plate or to a horizontal safety line running from two or more anchor plates. The system will provide an anchorage point for any employee working with fall exposures greater than 6 feet. . . .

Anchor plates must be used with other safety components that conform to current OSHA regulations. This includes but is not limited to, full body harness, body restraints, belts, shock absorbing lanyards, retractable lanyards, rope grabs, etc. All employees shall be trained on the construction and use of the system prior to its application. . . .

Employees shall tie-off with a full body harness and shock absorbing lanyard directly to the D-ring on the anchor plate, or the horizontal safety line with a carabineer. Employees shall position themselves so that the lanyard or rope grab will restrain them from falling or not have more than a six foot fall exposure. When tying off from a retractable lanyard, the retractable double locking hook shall be positioned directly on the full body harness 'D' ring.²⁷

Kraus-Anderson's Communication of its Fall Protection Rules to its Employees

22. Kraus-Anderson has a Safety Committee whose role is to ensure that the Company's safety standards are communicated to employees and that employees receive safety training. The Committee also promotes a Company culture of safety awareness. Minutes from meetings of the Company's Safety Committee indicate the Committee met quarterly during 2012 and 2013.²⁸

23. Michael Cramlet and Bryan Bourgoïn both signed acknowledgements of receiving copies of the Safety Program and their responsibility to "read and understand the policies and procedures" set forth therein and that they were subject to discipline for failure to comply with the Safety Program or safe working practices. Bourgoïn received the Safety Program in July 2012 and Cramlet in June of 2013. Both received instruction from Assistant General Superintendent Dan Braaten. The training included fall protection systems and when employees were required to use them.²⁹

24. Kraus-Anderson holds yearly, quarterly, and weekly safety training sessions for employees and issues quarterly "Safety News" newsletters. The Company also maintains an on-line portal to provide employees with access to safety

²⁷ *Id.* at DLI 0023-24. See also Ex. E at DLI 0025

²⁸ Ex. O at KA 00252.

²⁹ Ex. I; Test. of B. Bourgoïn, Test. of M. Cramlet.

information.³⁰ The topic of fall protection was a frequent subject of the safety training sessions.³¹ Fall protection was the subject of a weekly safety meeting or “Tool Box Talk” held by Sende at the HealthPartners-Woodbury site on October 25, 2013 which Cramlet and Bourgoin both attended.³² Sende again addressed fall protection for subcontractors working on the roof on October 29, 2015.³³ Sende held another weekly safety meeting on fall protection which Cramlet and Bourgoin both attended on November 1, 2013, the day following the issuance of the citation.³⁴

25. At the time Bourgoin was to start working on the roof at the HealthPartners project, he was unfamiliar with the anchor plate system of fall protection that Kraus-Anderson used. Vander Leest came to the site to instruct employees on how to install and use the anchor plate system. His training covered the fall protection material in the Safety Program.³⁵

Kraus-Anderson’s Monitoring of Compliance with and Enforcement of its Safety Rules

26. Kraus-Anderson employees conduct job site safety inspections as part of the Safety Program and the HealthPartners site was inspected multiple times.³⁶ Safety Director Vander Leest spent two hours at the Woodbury site on July 20, August 10, September 7, September 28, October 19, November 9, and November 23 of 2013.³⁷ Assistant General Superintendent Dan Braaten spent an hour at the Woodbury site every week from September 28 to November 30, 2013 and Safety Committee Member Brian Turnquist made eight visits to Woodbury during the same span of time.³⁸

27. Kraus-Anderson employees are authorized and instructed to correct safety violations when they observe them, or if unable to correct a hazard, they are to inform a supervisor or superintendent or the Safety Director (Vander Leest) of the hazard.³⁹

28. Kraus-Anderson’s Safety Program contains a section entitled “Disciplinary Procedures for Safety Violations.” It provides for the progressive discipline of employees who violate the Company’s safety rules as follows:

First Offense: Verbal warning: Notification to personnel file and instructions on proper procedure that must be followed to avoid another violation.

³⁰ Test. of J. Vander Leest, Test. of C. Sende; Ex. N at KA 00118.

³¹ Test. of J. Vander Leest, Test. of C. Sende.

³² Ex. K.

³³ Ex. M at KA 0021.

³⁴ Ex. E at DLI 0032-39; Test. of C. Sende, Test. of B. Bourgoin.

³⁵ Test. of B. Bourgoin; Ex. H. at KA 00014-15.

³⁶ The Company provided “Jobsite Inspection Checklists” as examples of what Kraus-Anderson employees do when they conduct safety inspections, but the examples provided related to the Company’s Gunderson Hospital job, not the HealthPartners project. Ex. E at DLI 0046-49.

³⁷ Ex. E. at DLI 0066-72

³⁸ *Id.* at DLI 00-50-65.

³⁹ Test. of B. Bourgoin, Test. of J. Vander Leest, Test. of C. Sende.

Second Offense: Written warning: Copy to personnel file and instruction on proper procedure that must be followed to avoid another violation.

Third Offense: Disciplinary action, which could include discharge for cause as provided in the current labor agreement.

Based on the severity of the violation, the verbal and/or written warning may be bypassed and the employee may be discharged for cause as provided in the current labor agreement.⁴⁰

29. Kraus-Anderson's Safety Program does not contemplate the issuance of a verbal warning unaccompanied by a notification to the employee's personnel file.⁴¹

30. On November 4, 2013, Kraus-Anderson issued a letter of reprimand to Cramlet for not wearing appropriate fall protection while working on the roof. The letter noted that a copy of it would be placed in Cramlet's personnel file.⁴²

31. In addition to a copy of the letter to Cramlet, Kraus-Anderson provided the following evidence that it enforced its disciplinary policy for safety violations:

- (1) On October 17, 2013, Kraus-Anderson sent one employee home early because he was not using fall protection in a lift.⁴³ The record contains no evidence that the violation was documented in the employee's personnel file.
- (2) On November 13, 2001, Kraus-Anderson gave a letter of reprimand to an employee who a MnOSHA inspector observed not wearing appropriate fall protection. The letter indicated that a copy would be placed in the employee's personnel file.⁴⁴
- (3) On August 3, 2000, Kraus-Anderson issued a letter of reprimand to an employee who left a steel grate covering a sump pit unsecured. The letter noted "[t]his is not the first time that this action was noticed. You were previously asked to secure the steel grate any time you access the sump pit. Your actions on August 1st resulted in a trades person falling into the sump pit." The letter indicated that a copy would be placed in the employee's personnel file.⁴⁵

⁴⁰ Ex. H. at KA 00038.

⁴¹ *Id.*

⁴² Ex. E at 0073.

⁴³ *Id.* at DLI 0074.

⁴⁴ *Id.* at DLI 0077.

⁴⁵ *Id.* at DLI 0078

32. Vander Leest could not locate employee personnel files that contained documentation of warnings issued for safety violations because they were kept in different locations and may have been moved into storage facilities.

33. Superintendent Sende never issued written discipline in over 20 years of working as a job superintendent for Kraus-Anderson.⁴⁶ Sende did issue verbal warnings to correct safety concerns, but she did not reduce her warnings to written form for insertion into the violator's personnel file.

34. With the exception of the two written disciplinary letters issued before the instant violation in 2000 and 2001, the Company provided no documents evidencing that the Company consistently updated employee personnel files to reflect verbal warnings for safety violations.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Commissioner (Commissioner) of the Department of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 182.661, subd. 3 (2014).

2. MnOSHA provided proper notice of the citations, penalties, and hearing in this matter, and has fulfilled all relevant procedural requirements under the Minnesota Occupational Safety and Health Act and applicable rules.⁴⁷

3. Kraus-Anderson is an "employer" as defined by Minn. Stat. § 182.651, subd. 7 (2014).

4. Minnesota Statutes section 182.653, subdivision 3 (2014), requires each "employer" to comply with Occupational Safety and Health standards and rules adopted pursuant to Minn. Stat. ch. 182 (2014).

5. Federal Occupational Safety and Health standards for fall protection found at 29 CFR § 1926.501(b)(10), are adopted by reference in Minn. R. 5205.0010 (2015), and are applicable to contractors operating in Minnesota. A "violation of any portion of a standard may be the basis for a citation."⁴⁸

6. The Commissioner has the burden of establishing a violation of an Occupational Safety and Health Standard by a preponderance of the evidence.⁴⁹

7. On October 31, 2013, Kraus-Anderson employee Cramlet violated federal and state fall protection standards by working at the edge of a roof approximately 20

⁴⁶ Test. of C. Sende.

⁴⁷ Minn. Stat. §§ 182.65-.676 (2014); Minn. R. 5205.0010-.1400 (2015).

⁴⁸ Ex. 14 MNOSHA Field Compliance Manual at 43; Minn. R. 5210.0530, subp. 1 (2015).

⁴⁹ Minn. R. 1400.7300, subp. 5.

feet above ground level without being attached to a fall protection system. Kraus-Anderson employee Bourgoin also violated fall protection standards by unclipping from the fall protection system while at the roof edge in order to clip Cramlet to the fall protection system.

8. Minnesota Statutes section 182.651, subdivision 12, defines a “serious violation” of work safety standards as:

[A] violation of any standard, rule, or order which creates 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, in such a place of employment, *unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.* [Italics added].

9. Cramlet’s brief, perhaps five minute failure and Bourgoin’s momentary failure to be clipped into the anchor plate fall prevention system installed on the HealthPartners rooftop did create a “substantial probability that death or serious physical harm could result.”

10. MnOSHA did not prove by a preponderance of the evidence that the violation was “serious” because Kraus-Anderson did not know of the violation and could not, with the exercise of reasonable diligence, have known of it.

11. The Administrative Law Judge finds that while a violation by Kraus-Anderson employees of the OSHA standard for fall protection codified at 29 CFR § 1926.501(b)(10) did occur, the violation was not “serious” as defined in Minn. Stat. § 182.651, subd. 12.

12. Courts and MnOSHA have recognized the affirmative defense of unpreventable or unforeseeable employee misconduct in OSHA cases.⁵⁰ An employer is shielded from liability for workplace safety violations under this defense if the employer:

- (1) Established work rules to prevent the reckless behavior or unsafe condition from occurring;
- (2) Adequately communicated the rule to its employee;

⁵⁰ The parties stipulated to the four elements of the unpreventable employee misconduct affirmative defense on the record at the hearing.

- (3) Took steps to discover incidents of noncompliance; and
- (4) Effectively enforced the rules whenever employees transgressed them.⁵¹

13. Kraus-Anderson bears the burden of establishing all four elements of the employee misconduct defense by a preponderance of the evidence.⁵²

14. In analyzing whether an employer has met all four elements of the employee misconduct defense, “the proper focus in employee misconduct cases is on the effectiveness of the employer’s implementation of its safety program”⁵³

15. MnOSHA concedes that Kraus-Anderson has a comprehensive health and safety training program; that the Company trains its employees in general occupational safety, that it communicates its safety rules to its employees, and that the Company’s safety rules and training include rules and training for fall protection.⁵⁴

16. Kraus-Anderson did not meet its burden of proving by a preponderance of the evidence that it took steps to discover incidents of non-compliance with its safety rules and effectively enforced them.

17. Although the cited violation was not “serious” because Kraus-Anderson could not have known of the violation with the exercise of reasonable diligence, the violation nonetheless presented a risk of severe harm and a penalty is appropriate. The Administrative Law Judge finds that the Department’s proposed penalty of \$2,100, which is based in part upon the Department’s conclusion that the violation was “serious,” too high and finds a penalty of \$1,050 more appropriate. A penalty of less than \$1,050 would not appropriately indicate the substantial risk of severe injury posed by the employees’ actions.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

⁵¹ *Modern Continental Constr. Co., Inc. v. Occupational Safety and Health Review Comm’n*, 303 F.3d 43, 51 (1st Cir. 2002), citing *P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Commission*, 73 F.3d 1466, 1469 (8th Cir. 1996); see also *Valdak Corp. v. Occupational Safety and Health Review Comm’n*, 73 F.3d 1466, 1469 (8th Cir. 1996) (“To establish the defense of unforeseeable employee misconduct, Valdak must prove that it had a work rule in place which implemented the standard, and that it communicated and enforced the rule.”).

⁵² *Id.*

⁵³ *Valdak*, 73 F.3d at 1469 (citing *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir.), cert. denied, 484 U.S. 989, 108 S. Ct. 479, 98 L.Ed.2d 509 (1987)). See *Danco Constr. Co. v. Occupational Safety & Health Review Comm’n*, 586 F.2d 1243, 1246–47 (8th Cir.1978).

⁵⁴ Complaint’s Post Hearing Brief at 3.

ORDER

MnOSHA Citation Inspection Number 317397701 is revised to reflect that the violations were not “serious” as defined by Minn. Stat. § 182.651, subd. 12, and the penalty amount of the citation is reduced to \$1,050.

Dated: October 28, 2015

s/Jeffery Oxley

JEFFERY OXLEY
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3; .664, subd. 5, the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

MEMORANDUM

Kraus-Anderson does not dispute that MnOSHA fall protection rules were violated when first Cramlet and then Bourgoin were unclipped from fall protection for a short period of time. Nor does the Company dispute that its employees risked a substantial probability of a severe injury by working near the roof edge without being clipped into the fall protection system. However, the Company contends that it should never have received a citation for the momentary violations of its employees and that the Department erred in classifying the violations as “serious.” Further, the Company asserts the affirmative defense of unforeseeable employee misconduct.

The Citation for a Serious Violation

Minnesota Statutes section 182.651, subdivision 12, defines a “serious violation” of work safety standards as:

[A] violation of any standard, rule, or order which creates 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, in such a place of employment, *unless the employer did not, and could not with*

the exercise of reasonable diligence, know of the presence of the violation. [Italics added].

In considering whether employers have exercised reasonable diligence with respect to a hazard, courts have considered not only a supervisor's proximity to the hazard and the length of time the hazard persisted, but also "the foreseeability of a safety violation or hazardous condition, the general circumstances and level of danger inherent in the work, the potential need for continuous supervision, the nature and extent of the supervisor's other duties, the supervised workers' training and experience, the extent and efficacy of the employer's safety programs and precautions."⁵⁵

Kraus-Anderson established rules on fall protection and trained Bourgoin and Cramlet on fall protection when they were hired. The necessity to use fall protection when working on the roof of the HealthPartners project was underscored by Safety Director Vander Leest when he came to assist with installing the fall protection anchor plate system at the HealthPartners site. The week before the incident giving rise to the citation, Job Superintendent Sende gave a "Tool Time Talk" to Bourgoin and Cramlet about using fall protection on the roof. Both Cramlet and Bourgoin testified credibly that they knew fall protection was required when they were working on the roof outside of the flagged area. There is no evidence that either Cramlet or Bourgoin had violated the fall protection rule prior to Helm's inspection.

The fact that Bourgoin clipped Cramlet in is evidence that Kraus-Anderson employees knew the work rule requiring fall protection and accepted responsibility for correcting safety violations when they observed one. Both Bourgoin and Cramlet testified that they knew they would be subject to discipline for safety violations.⁵⁶

The Administrative Law Judge finds that the duration of the violation is highly significant as is the fact that Bourgoin cured Cramlet's violation when he noticed that Cramlet was unclipped. The time span during which the employees were not clipped into the fall protection system was very brief, perhaps five minutes.⁵⁷

Given the short time duration of the violations, approximately five minutes for Cramlet and much less for Bourgoin, and that the violations were corrected by the

⁵⁵ *Oregon Occupational Safety & Health Div. v. CBI Services, Inc.*, 254 Or. App. 466, 481, 295 P.3d 660, 669 (Jan. 2013).

⁵⁶ Test. of B. Bourgoin, Test. of M. Cramlet.

⁵⁷ Constructive knowledge of the violation would be imputable if, all other circumstances being the same, Cramlet had been unclipped from fall protection for a day or for several hours. Sende did perform walk around inspections as part of her job duties and could have been expected to see an employee working at the roof edge who was unprotected for a longer period of time. See *Secretary of Labor v. J. Reed Constructors, Inc.*, 24 O.S.H. Cas. (BNA) 2199 (O.S.H.R.C.A.L.J.), 2014 WL 1512489 (Finding constructive knowledge of violation where employees lacked required fall protection for six hours.); Constructive knowledge has been imputed where a supervisor knowingly failed to clip in to fall protection and observed co-worker without any fall protection for seven or eight minutes. *Secretary of Labor v. MDC Drywall, Inc.*, 2015 O.S.H.D. (CCH) P 33464, 2015 WL 3745614 ("While reasonable diligence does not require full-time monitoring, inadequate supervision of employees constitutes a lack of reasonable diligence.").

employees themselves, Kraus-Anderson could only have done more to detect the hazard posed by Cramlet's failure to clip in if Sende or another supervisor had been monitoring Cramlet at the time of the violation. Although Sende could have seen Cramlet from the window of the trailer where she was at the time Cramlet was not clipped in, it is not reasonable to require job superintendents to constantly monitor construction workers for safety rule compliance when required safety devices are in place, workers have been trained in the use of the safety devices, know they are required to use the devices, and have been using them as prescribed.

As the length of time a violation is occurring increases, it becomes more reasonable to expect the employer to have knowledge of the violation, but five minutes is insufficient to impute constructive knowledge to someone not directly observing the hazard when the required safety devices are in place, workers have been trained in the use of the devices and understand they must use them or face discipline, and have been observed using the safety devices as required.

Other than continuous visual monitoring of employees, the record does not show any feasible additional measures the Company could have taken to have discovered that its fall protection rules were being violated on October 31, 2013. The standard of "reasonable diligence" does not require a superintendent to watch every person at a work site every minute of the workday.⁵⁸ Accordingly, the Administrative Law Judge concludes that the violation was nonserious because Kraus-Anderson, with the exercise of reasonable diligence, would not have known that Cramlet was unclipped from fall protection for about five minutes.

Kraus-Anderson does not dispute the amount of the penalty and the amount assessed is within the statutory limits for violations which are nonserious.⁵⁹ Nonetheless, the Administrative Law Judge finds that a reduction of the amount of the penalty is appropriate because the citation does not meet the statutory definition of

⁵⁸ *Secretary of Labor v. L & B Products, Corp.*, 18 O.S.H. Ca. (BNA) 1322 (O.S.H.R.C.A.L.J., 1998 O.S.H.D. (CCH), ¶ 31542, 1998 WL 99283 (finding employer had constructive knowledge of safety violations at a factory where supervisors were present and could easily observe the safety conditions throughout the day); *Overaa Constr., v. California Occupational Safety and Health Appeals Board*, 147 Cal App. 4th 235, 249 (finding constructive knowledge where a superintendent failed to protect employees working in an excavation from cave-in for over one week); *Sec. of Labor v. Marine Terminals Corp.*, OSHRC Doc. No. 85-1468, 1986 WL 53556 (Sept. 30, 1986) at *11 ("ALJ's decision to uphold the citation was supportable only if the employer is to be required to constantly monitor the behavior of all of its supervisory and nonsupervisory employees 24 hours a day. This is clearly not the law. All that is required is that the employer use reasonable diligence to discover and eliminate safety violations.") *Sec. of Labor v. Safway Scaffolding*, 2014 O.S.H.D. (CCH) ¶ 33345, 2013 WL 5178024 (Upholding violation where the violation was easily visible by foreman and project manager "for almost 90 minutes," but noting that the "Court is not suggesting that Respondent provide constant surveillance for safety violations, as such would not be reasonable."); *see also Sanchez Arango Constr.* 23 O.S.H. Cas. (BNA) ¶ 1742 (O.S.H.R.C.A.L.J. Apr. 11, 2011) (rejecting unforeseeable employee misconduct defense when employee was without required fall protection for 15 minutes and was plainly visible to two foremen.)

⁵⁹ Minn. Stat. § 182.666, subd. 3 (2014) (Penalty of up to \$7,000 allowed for a violation that is not serious).

“serious.” A reduction of 50 percent reflects the reduction from a serious to a nonserious violation while still recognizing the gravity of the hazard posed by the failure to use fall protection.

The Affirmative Defense of Employee Misconduct

The Company argues that the citation should be dismissed because the violation was the result of unforeseeable employee misconduct. The Company bears the burden of proving by a preponderance of the evidence that it:

1. Established work rules to prevent the reckless behavior or unsafe condition from occurring;
2. Adequately communicated the rule to its employee;
3. Took steps to discover incidents of noncompliance; and
4. Effectively enforced the rules whenever employees transgressed them.⁶⁰

MnOSHA concedes that Kraus-Anderson demonstrated it met the first two elements of this affirmative defense – that it had established work rules requiring the use of fall protection for persons working on the roof at the HealthPartners site and that it had communicated those rules to employees. MnOSHA contends, however, that Kraus-Anderson did not demonstrate that it was reasonably diligent in inspecting its worksites in order to discover safety violations and in enforcing its safety rules because the Company provided no documentation of its safety audits of the HealthPartners job site and scant documentation of disciplining employees for safety violations.⁶¹

The Administrative Law Judge finds that the evidence does not support a conclusion that Kraus-Anderson met its burden of proof with respect to the third and fourth elements of the defense. Kraus-Anderson employees Vander Leest and Sende both testified credibly that they conducted safety inspections and walk-throughs at the HealthPartners site and ordered safety violations remedied when they found them.⁶² However, neither produced examples of written documentation of their inspections or notifications to employee files for safety rule violations at the HealthPartners site.

Responsibility “g.” of the Company’s Safety Department includes the requirement to “[m]aintain records of safety inspections and follow-up on corrective action.”⁶³ Kraus-Anderson provided the time sheets of three management employees (Vander Leest, Braaten, and Turnquist) indicating when they visited the HealthPartners site. The duties of these individuals included responsibility for conducting safety inspections. The Company submitted the time sheets as evidence that management sought to discover safety violations. Kraus-Anderson also provided “Safety Inspection Checklists” used to document safety rule violations and provided two such checklists that had been filled out, but they were for the Gunderson Hospital project and not the HealthPartners

⁶⁰ *Valdak Corp. v. Occupational Safety and Health Review Com’n*, 73 F.3d 1466, 1469 (8th Cir. 1996).

⁶¹ Complaint’s Post-Hearing Brief at 6.

⁶² Test. of C. Sende, Test. of J. Vander Leest.

⁶³ Ex. H. at KA00006.

project.⁶⁴ The Company did not produce any such completed checklists for the HealthPartners job.

It is concerning that safety inspection checklists were not produced for the HealthPartners site. The fact that Safety Director Vander Leest could not locate such documents suggests that they either do not exist or that they are not maintained in a location that permits their use to determine if corrections to observed violations have been made or to document that no safety violations were observed. Although the Administrative Law Judge did find Vander Leest and Sende credible when they spoke of their efforts to promote safety on the job, the Administrative Law Judge finds that their inattention to their responsibility under the Safety Program to maintain documentation undermines the Company's unforeseeable employee misconduct defense.

The Company provided no records of safety inspections at the HealthPartners site or of follow-up actions, despite asserting that three management level employees conducted multiple safety inspections there. It is troubling that supervisory employees failed to meet their responsibilities under the Safety Program by failing to record their safety inspections and by failing to maintain the records after completing the inspections.

Just as the Company did not produce documentary evidence that management conducted safety inspections at the HealthPartners site, it similarly did not produce documentation from its personnel files of verbal warnings that were given for first offenses as required by its Safety Program at any job site.⁶⁵ Sende and Vander Leest are both long-term employees of Kraus-Anderson. Both have issued verbal warnings for safety violations. In over twenty years of job site supervision, Sende has never issued a written warning.⁶⁶ Despite its supervisory personnel's testimony of having given numerous verbal warnings, the Company provided almost no documentary evidence that verbal warnings for safety violations were noted in offenders' personnel files. As MnOSHA correctly observed, of "the four written disciplinary records it [Kraus-Anderson] produced, three were the result of a Minnesota OSHA inspection, as opposed to an independent safety audit conducted by Kraus Anderson."⁶⁷

Kraus-Anderson argues that its disciplinary policy is rarely put to use because when "violations occur, they typically result in an initial verbal warning that corrects the behavior."⁶⁸ More serious violations, the Company contends, result in written discipline.⁶⁹

⁶⁴ Ex. E. at DLI 0046-0049.

⁶⁵ Ex. H. at KA00038.

⁶⁶ Test. of C. Sende.

⁶⁷ Department's Post-Hearing Brief at 9.

⁶⁸ *Kraus-Anderson Construction Company's Closing Argument* at 11. Kraus Anderson contends that "[t]he relative dearth of documented discipline for failure to follow fall protection policies demonstrates that KA's (Kraus-Anderson's) entire safety program, including its disciplinary system, is doing what it is supposed to do." *Kraus-Anderson Construction Company's Closing Argument* at 11. *But see Valley Interior Systems, Inc. v. Occupational Safety and Health Review Comm'n*, 288 Fed. Appx. 238, 241; 2008 WL 2906856, **3, 22 O.S.H. Cas. (BNA) 1295 ("Valley did not introduce any evidence that it

The difficulty with the Company's practice of issuing verbal warnings for less serious safety violations and written warnings for more serious violations is that the Company's Safety Program does not contemplate undocumented verbal warnings. The Safety Program requires notification of verbal warnings to be placed in the offender's personnel file. The practice of issuing undocumented verbal warnings for first offenses undermines Kraus-Anderson's safety enforcement mechanism of progressive discipline. Without documenting a first offense as such, identifying an employee's second or third offense is problematic, especially when employees have had multiple supervisors or have worked at multiple job sites.⁷⁰

Although Vander Leest testified that the Company did document discipline for safety violations, he could not produce documentation of verbal warnings that the Safety Program required to be noted in personnel records. The Administrative Law Judge finds the record of written discipline issued in 2000 and the one from 2001 too remote in time to be evidence of a robust disciplinary process in 2013. The Company did provide evidence of disciplining an employee shortly before the October 31, 2013 incident and that it disciplined Cramlet after that incident. The email reporting that an employee had been sent home for a safety violation shortly before the October 31, 2013 incident involving Cramlet is not a written warning to the employee. The email states that "[i]f it [the violation] happens again we will need to address." This raises the question of how the Company can be certain that its supervisors knew that this violation did not happen before or, if it happened again, that its supervisors would recognize it as a repeat violation when the Company's Safety Director could not locate personnel files with safety rule violation notifications.

The Company's Safety Program makes no mention of verbal warnings for safety violations that do not need to be noted in employees' personnel files. Nor does it speak

enforced the particular rule Of course, producing such evidence would be impossible if there were no prior violations of that rule, nevertheless, the burden remained on Valley.").

⁶⁹ *Id.*

⁷⁰ See *Sec. of Labor v. Stark Excavating, Inc.*, OSHRC Doc. Nos. 09-0005, 09-0005, 2010 WL 10882210 (May 2014) ("Stark's policy expressly required written warnings with progressive disciplinary consequences, so giving only oral warnings undermined the policy's progressive nature.") affirmed in part, vacated in part by *Sec. of Labor v. Stark Excavating, Inc.* 2014 WL 5825310 (Nov. 2014); *P. Gioioso & Sons, Inc. v. Occupational Safety & Health Review Comm'n*, 115 F.3d 100, 110 (1st Cir. 1997). In *Gioioso*, the Administrative Law Judge denied the affirmative defense of unpreventable employee misconduct:

The ALJ found most compelling the lack of any substantial evidence in the record that the petitioner effectively enforced its safety program. It provided no evidence of unscheduled safety audits or mandatory safety checklists, and no documentation that it ever executed its four-tiered disciplinary policy. This lacuna in the proof undermines its attempt to mount a viable UEM [Unavoidable Employee Misconduct] defense. See *Hamilton Fixture*, 16 O.S.H. Cas. (BNA) 1073, 1090 (1993) (finding the evidence insufficient where there was no proof to establish adequate enforcement even though the written work rule was adequate), *aff'd*, 28 F.3d 1213 (6th Cir.1994). Even when a safety program is thorough and properly conceived, lax administration renders it ineffective (and, thus, vitiates reliance on the UEM defense). See *Brock*, 818 F.2d at 1274, 1278 (in which the ALJ rejected a UEM defense when the employer could not produce records evidencing employees' receipt of safety manuals, the occurrence of safety meetings, and the like).

of safety inspections that do not require documentation. The Safety Program requires that all safety violations be documented. This documentation is necessary to ensure that safety violations are remedied and that repeated violations can be addressed appropriately. The Administrative Law Judge finds that the virtual absence of pre-citation disciplinary and site inspection documentation for the HealthPartners project is fatal to the Company's unforeseeable employee misconduct defense.⁷¹

J. O.

⁷¹ *Quandel Constr. Grp., Inc. Respondent*, 14-1434, 2015 WL 4620232 at *4 (Finding inadequate documentation defeats employee misconduct defense); *Stark Excavating, Inc., Respondent*, 09-0004, 2010 WL 10992210 at *9 ("The court notes that the Respondent's policy does not allow 'verbal' warnings to be issued in lieu of the written safety tickets" and consequently denied employee misconduct defense); *Precast Servs., Inc.*, 17 B.N.A. O.S.H.C. at ¶ 1454-55, 1995-97 C.C.H O.S.H.D. ("To prove that its disciplinary system is more than a 'paper program,' an employer must present evidence of having actually administered the discipline outlined in its policy and procedures."); *P. Gioiso & Sons, Inc. v. Occupational Safety & Health Review Comm'n*, 115 F.3d 100, 110 (1st Cir. 1997) (Lack of substantial evidence that petitioner effectively enforced its safety program undermines employee misconduct defense.)