SECRETARY OF LABOR, Complainant, v. KERNS BROTHERS TREE SERVICE, Respondent.	OSHRC Docket No. 96-1719

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

The issue in this case is whether the employer, Kerns Brothers Tree Service ("Kerns"), had the requisite knowledge of the failure of one of its crew leaders to require the use of hard hats on a job, so that it could be found in violation of the Occupational Safety and Health Act ("the Act"), 29 U.S.C. §§ 651-678. For the reasons later discussed, we apply the precedent of the Third Circuit United States Court of Appeals. Applying that court's test set forth in *Pennsylvania Power & Light Co. v. OSHRC ("PP&L")*, 737 F.2d 350 (3d Cir. 1984), we find that the Secretary of Labor did not meet her burden of proof of employer knowledge. Thus, we vacate the citation issued to Kerns by the Secretary's Occupational Safety and Health Administration ("OSHA").

FACTS

Following a fatal head injury to Charles Osterhout, the leader of a three-person tree trimming crew on the premises of a Kerns customer in Wilmington, OSHA inspected and cited Kerns for an alleged serious violation of the general industry hard hat standard, 29

C.F.R. § 1910.135(a)(1).[1] The fatality report by OSHA Compliance Officer ("CO") Keith Matthews, which was received as an exhibit, provides the evidence as to how the accident happened. It states:

> Employee (Deceased) was standing within Drop Zone, when another employee was in a tree approximately 40-45 feet high cutting an approximately 5 foot long, 5 [to] 8 inches in diameter log. After making cut, log fell striking the employee below, resulting in fatal injury.

None of the crew members were wearing hard hats, although it is undisputed that Kerns had told them numerous times that it required hard hats whenever there was a hazard of falling objects. Osterhout's fellow crew members were Timothy Ennis and Calvin Allen. Ennis, a climber and foreman for Kerns, was cutting the limbs off a hemlock tree. Allen was the groundsman -- he collected the debris and put it in the chipper.

John Kerns, an arborist/salesman and co-owner of the company, testified that the "crew leader's responsibility is to take the written work order and make sure that the work is done according to those specifications and in a safe manner." The crew leader is an hourly employee, the same as the other crew members. Mr. Kerns testified that the crew leader has no authority to discipline an employee "other than asking them to do something."

Mike Hadley, Kerns' other arborist/salesman, who also served as its safety director, testified that a crew leader can give a "verbal warning" about safety. Hadley explained that the crew leader has "the authority in the field to cure" a safety violation by telling the employee what to do or communicating with John Kerns or himself. He further testified that when he was not at a jobsite during the work, the crew leader was "in charge of enforcing safety regulations." He also testified, however, that the crew leader has no authority to "discipline" the employee at the scene. The crew leader must get Mr. Kerns' or Mr. Hadley's

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[1]That provision states:

> The employer shall ensure that each affected employee wears a protective helmet when working in areas where there is a potential for injury to the head from falling objects.

approval to change the method of the job or resolve quality or safety questions. Hadley did not consider the crew leader to be a supervisor.

There is no dispute that Kerns' hard hat rule was appropriate and that the company adequately communicated that rule to its employees. CO Matthews testified that both Allen and Ennis acknowledged to him that they knew Kerns expected them to wear their hard hats when performing their work.[2] Kerns had adopted the American National Standards Institute (ANSI) hard hat rule, which states: "Head protection [meeting ANSI requirements] shall be worn by workers engaged in tree operations." ANSI Z133.1-1988, *Pruning, Trimming, Repairing, Maintaining, and Removing Trees, and Cutting Brush -- Safety Requirements*, section 4.2.2 (rev. 1994). Hadley testified that under that rule, "if there is ever a danger of falling objects or [a] hazard, a hard hat must be worn during those times."

John Kerns and Hadley visited the great majority of the jobs they sold. Hadley testified that he visited "better than 75 percent" of the jobs he had sold to check on whether the work was being done properly. He "might be 15 minutes behind them or an hour behind them." John Kerns estimated that he visited approximately 90 to 95 percent of the jobs he had sold, and 20-25 percent of Hadley's jobs, for the same purpose. Neither man announced when he would arrive at a job. Even so, they have found safety violations at jobsites "very infrequently."

Neither John Kerns nor Hadley visited the site of the fatality on the day in question (Hadley had sold that job). Mr. Kerns had visited a different jobsite that morning, however,

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[2]Hadley communicated that rule to the employees during Kerns' weekly safety meetings. Attendance sheets show that hard hats were discussed at a safety meeting less than three weeks before the accident, and that all three crew members involved here were present at that meeting. Hard hats also were on the agenda of at least five other meetings during the year before the accident, and the evidence shows that each of the crew members involved here attended several of those meetings.

when the same crew was working there, and he observed all the crew members wearing hard hats and their other protective equipment.

John Kerns and Hadley testified that their company had a program of progressive discipline including verbal warnings, written warnings, and more serious measures including termination. Kerns had given verbal and written warnings to numerous employees during the past four years. John Kerns testified that he had terminated employees for "safety violations and other reasons." Hadley testified that during the past five years, several employees had been given time off without pay for safety infractions. Two days after Osterhout's fatality, Kerns issued written safety warnings to Allen and Ennis regarding that job.[3]

Osterhout had worked for Kerns for about three years and had not been issued a warning for safety violations or other problems. John Kerns testified that he had seen Osterhout at hundreds of jobsites and never had observed Osterhout violating any safety or quality standard. Hadley testified to the same effect. The only prior warning to Allen was for not wearing eye protection while using a chipper. The only safety warning to Ennis had been to "Watch your damage control" -- that is, damage to property while doing the work. Allen and Ennis did not testify, and there is no evidence that they had received any warning for failure to wear their hard hats. (CO Matthews' testimony on the subject was simply that they acknowledged having been told Kerns' hard hat policy many times.)

Kerns' records show that one crew leader, Jim Lockhart, had been disciplined for a hard hat violation. He received a three-day suspension without pay on Feb. 16, 1996, for that

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[3]Allen's warning was for failure to wear his hard hat. Ennis's warning was for endangering Osterhout -- it did not mention hard hats. As noted, however, Ennis knew that Kerns expected him to wear a hard hat on that job.

violation and five other matters.[4] The warning form noted three previous warnings Lockhart had received and added, "See folder for others!" Lockhart's previous safety-related warnings were for: (1) placing himself and two other employees in danger while cutting the top out of a tree (August 1994); being too far out on a limb while pruning branches and endangering another employee in the process (November 1995); and (3) speeding (December 1995).

The Delaware Workplace Safety Program ("DWSP"), which Kerns joined in 1991, conducted an unannounced inspection at a Kerns jobsite once a year, and Kerns had passed each inspection. The DWSP is run by the State of Delaware's Insurance Commission.[5] Kerns also was a member of the National Arborist Association ("NAA") and used the NAA's hard hat training materials at times during its weekly "tailgate" safety meetings. In addition, Kerns was a member of the International Society of Arborculture ("ISA") and the Delmarva Safety Council. Every February, Kerns employees attended a symposium put on by the Penn/Del Chapter of the ISA. The subjects discussed included safety and proper equipment, and Kerns paid the employees' way to the symposium. OSHA had no record of any prior citation to Kerns, which had been in business for 24 years.

JUDGE'S DECISION

Commission Administrative Law Judge Michael Schoenfeld affirmed the citation. He noted Kerns' concession that the hard hat standard applied and that Osterhout did not comply with it. In his view, the only disputed issue was whether Kerns established the

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[4]Those matters were as follows: "Employee did not speak to office regarding absence. Employee has been warned about excessive absences. . . . Equipment not being properly inventoried. Damage to client's property. Leaving early."

[5]John Kerns testified that his company joined the DWSP at the recommendation of Kerns' insurance agent. Kerns paid the DWSP for those inspections, and its insurance premiums were reduced based on those inspections.

affirmative defense of unpreventable employee misconduct.[6] In rejecting Kerns' defense, the judge noted that it is undisputed that Kerns had an applicable safety rule, and that its rules were effectively communicated to employees. He found, however:

> Respondent has not proven its alleged defense of unpreventable employee misconduct because its crew leader's failure to wear a hard hat, as well as the failure of the other two members of his crew to do so, is sufficient evidence of lax enforcement of the company's safety rule requiring the wearing of hard hats so as to impute knowledge of the violation to the employer even where the employer has an otherwise effective safety program and an "unblemished" safety record.

He further stated that, "were the question whether Respondent had knowledge of the violative condition (crew not wearing hard hats) such knowledge would have been imputed to Respondent because the condition existed with the actual knowledge of its crew leader."

DISCUSSION

Under long-standing Commission and court precedent, the Secretary bears the burden of proof on each element of a violation of a standard, including that the employer had actual or constructive knowledge of the cited conditions. *E.g., Access Equipment Systems Inc.*, 18 BNA OSHC 1718, 1720, 1999 CCH OSHD ¶ 31,821, p. 46,775 (No. 95-1449, 1999). *See also, e.g., PP&L*, 737 F.2d at 357 (noting prevailing view in courts). The standard of proof in Commission adjudications is the preponderance of the evidence. *See, e.g., Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2131, 1981 CCH OSHD 25,578, p. 31,901

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[6]In order to establish that defense, the employer must show by a preponderance of the evidence: (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps calculated to discover whether violations are occurring, and (4) that it has effectively enforced the rules when violations are discovered. *E.g., Jersey Steel Erectors*, 16 BNA OSHC 1162, 1993-95 CCH OSHD ¶ 30,041 (No. 90-1307, 1993) (and cases cited therein), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994)).

(No. 78-6247, 1981), *vac'd in part on other grounds*, 681 F.2d 69 (1st Cir. 1982). Kerns does not dispute that the cited provision applies, that Osterhout failed to comply with it, and that he had access to the cited hazards. The only other element of a violation is employer knowledge.

The judge's opinion suggests that Kerns conceded the knowledge issue, but the record does not show that Kerns actually did so. From the outset, Kerns argued that it should not be held responsible for Osterhout's knowledge and misconduct. In its post-hearing brief to the judge, it relied extensively on *PP&L*. The Commission's briefing notice expressly requested the parties' positions on whether the Secretary established that Kerns had the requisite knowledge of the violative conditions. The issue is properly before us.

a. Whether Third Circuit precedent should be applied here

Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case -- even though it may differ from the Commission's precedent. *See, e.g.*, *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794-95, 1991-93 CCH OSHD ¶ 29,770, p. 40,489 (No. 90-998, 1992). The Third Circuit has jurisdiction over both the site of the alleged violation and Kerns' business office, both of which were located in Wilmington, Delaware. *See* 29 U.S.C. §§ 660(a) and (b) (employer or Secretary may appeal Commission order to federal court of appeals for circuit in which violation allegedly occurred, or where employer has its principal office; employer also may appeal to District of Columbia Circuit). Accordingly, we apply its precedent here.[7]

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[7]The Secretary renews her argument that the precedent of the Commission and the courts, including the Third Circuit, is wrong in imposing on her any burden of proving employer knowledge of the violative conditions. As noted, the Secretary argues that she lacks the burden of proving employer knowledge of the violative condition. This is a broader

(continued...)

The Third Circuit's precedent on the burden of proof of knowledge is explained in *PP&L*.

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[7](...continued)
proposition than that addressed by *PP&L*, in which the court found only that where the Secretary makes a *prima facie* case of knowledge by proving supervisory misconduct, she retains the ultimate burden of persuasion where the employer introduces evidence concerning the adequacy of its safety program. 737 F.2d at 358.

Citing *Martin v. OSHRC [CF&I Steel Corp.]*, 499 U.S. 144 (1991), the Secretary also contends that deference should be accorded to her statutory interpretation regarding the necessary elements of a violation. *CF&I*, however, holds only that deference is owed to the Secretary's reasonable interpretations of the standards and regulations she promulgates. It does not address the question of deference concerning contested interpretations of the statute itself. Moreover, the Commission has held that as the entity charged with "the final administrative adjudication of the Act," it does not owe deference to the Secretary's interpretations of the Act. *Arcadian Corp.*, 17 BNA OSHC 1345, 1352, 1993-95 CCH OSHD ¶ 30,856, p. 42,921 (No. 93-3270, 1995), *aff'd on other grounds*, 110 F.3d 1192 (5th Cir. 1997). *Cf. id.*, 17 BNA OSHC at 1360, 1993-95 CCH OSHD at p. 42,930 (Weisberg, Chairman, dissenting) (Commission does not owe deference to Secretary's interpretations of Act generally, but does as to issue that "relates directly to the Secretary's prosecutorial discretion and goes to the heart of [her] enforcement authority"). Although the Third Circuit recently addressed the statutory deference issue in *Secy. of Labor v. D. M. Sabia Co.*, 90 F.3d 854 (3d Cir. 1996), concerning the meaning of the statutory term "repeatedly," it was not called upon there to resolve a statutory interpretation disagreement between the Secretary and the Commission. 90 F.3d at 860 n.12 ("[s]ince *Potlatch*, the Commission and the Secretary have been in full accord as to the definition of the term 'repeatedly'"). Accordingly, we conclude that *PP&L* remains applicable Third Circuit precedent.

> In cases where the Secretary proves that a company supervisor had knowledge of, or participated in, conduct violating the Act, we do not quarrel with the logic of requiring the company to come forward with some evidence that it has undertaken reasonable safety precautions. . . . We do hold, however, that the Secretary may not shift to the employer the ultimate risk of non-persuasion in a case where the inference of employer knowledge [of a serious violation] is raised only by proof of a supervisor's misconduct.

737 F.2d at 357-58. The court noted its prior holding "that the Secretary bears the burden of proving foreseeability when the regulation at issue can be characterized as a general safety standard." *Id.* at 357 (citing *Voegele Co. v. OSHRC*, 625 F.2d 1075, 1079 (3d Cir. 1980)). The court held that "the participation of the company's own supervisory personnel may be evidence that an employer could have foreseen and prevented a violation through the exercise of reasonable diligence, but it will not, standing alone, end the inquiry into foreseeability." *Id.* In *PP&L*, as in this case, the judge imputed employer knowledge based on noncompliance with a general OSHA standard by the crew leader of a three-person crew at a remote worksite.[8] The hard hat standard at issue here is similar in generality to the standard at issue in *PP&L*, because it requires hard hats only when a hazard is present -- "a

[8]The Secretary cited and tried this case based on Osterhout's misconduct rather than any noncompliance with the cited standard by the other crew members. The very limited evidence -- which consists of the CO's description quoted above from his fatality report -- does not demonstrate that the other crew members had the requisite exposure to "a potential for injury to the head from falling objects" to establish a violation based on their failure to wear hard hats.

potential for injury to the head from falling objects."[9] Therefore, we will apply the rule of *PP&L* here.[10]

b. Whether Kerns' crew leader was a supervisor

As a first step in determining whether Kerns had knowledge through its crew leader, Osterhout, we must consider whether that crew leader was a supervisor. Kerns argues that it was not responsible for Osterhout's actions because he did not have "supervisory power

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[9]There, the crew leader failed to comply with a standard which required that "lifting equipment shall be bonded to an effective ground or it shall be considered energized and barricaded *when utilized near energized equipment or lines*." 29 C.F.R. § 1926.955(a)(6)(ii) (emphasis added).

[10]Chairman Rogers and Commissioner Weisberg agree with the opinion of their colleague, as expressed in the concurrence, that under Commission precedent an employer can avoid the imputation of knowledge based on supervisory misconduct by establishing that it "took reasonable measures to prevent the occurrence of the violation." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993). In their view, however, Commission precedent has, at times, been less explicit regarding which party bears the burden of persuasion as to this evidence. *Compare Tampa Shipyards*, 15 BNA OSHC 1533, 1538, 1991-93 CCH OSHD ¶ 29,617, p. 40,100 (No. 86-630, 1992), and *Pride Oil Well Service*, 15 BNA OSHC 1809, 1815, 1991-93 CCH OSHD ¶ 29,807, p. 40,585 (No. 87-692, 1992) (employer must "offer evidence" to rebut prima facie proof of knowledge), with *Dover Elevator*, 16 BNA OSHC at 1286, 1993-95 CCH OSHD at p. 41,480 ("[s]ince the Secretary made a prima facie showing of knowledge through Dover's supervisory employee, *the burden shifts to Dover* to rebut the Secretary's case") (emphasis added). Chairman Rogers and Commissioner Weisberg find it unnecessary in this case, however, to resolve any question or reconcile any conflict under Commission precedent concerning allocation of this burden since the Third Circuit has addressed the issue and its precedent is controlling.

similar to that of foremen or supervisors." As mentioned, however, Osterhout was responsible for seeing that the work was done safely and properly, based on the written work order. He also had the authority to issue a "verbal warning" for a safety violation committed in his presence, although he had no authority to actually *discipline* an employee.

We agree with the judge that Osterhout should be considered a first-level supervisor for purposes of the Act. "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." *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1537, 1991-93 CCH OSHD ¶ 29,617, p. 40,100 (No. 86-630, 1992). There, the Commission held that "leadermen" were supervisors, even though they had no disciplinary authority, because they were "responsible to higher supervision for the progress and execution of the work" and for informing superintendents of safety problems reported to them by employees. 15 BNA OSHC at 1538 and note 10, 1991-93 CCH OSHD at pp. 40,100-01 and note 10. *See also Access Equipment*, 18 BNA OSHC at 1726, 1999 CCH OSHD at p. 46,782 (employee who was "in charge of" or "the lead person for" one or two employees who erected scaffolds "can be considered a supervisor"); *Mercer Well Serv.*, 5 BNA OSHC 1893, 1894, 1977-78 CCH OSHD ¶ 22,210, p. 26,723 (No. 76-2337, 1977) (crew chief was supervisor for purposes of the Act where he maintained contact with designated supervisor to relay orders to crew and report problems to that supervisor); *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993) (an "employee who is empowered to direct that corrective measures be taken is a supervisory employee;" formal title of employee is not controlling, but rather substance of employee's duties). In *PP&L*, the Third Circuit considered the crew leader of a three-person electrical utility crew at a remote worksite to be a supervisor for purposes of determining the employer's knowledge of the violative conditions. 737 F.2d at 352, 355.

c. Whether knowledge was proven under Third Circuit precedent

As mentioned, *PP&L* held that "the Secretary may not shift to the employer the ultimate risk of non-persuasion in a case where the inference of employer knowledge [of a

serious violation] is raised only by proof of a supervisor's misconduct." *Id.* at 358. The court quoted with approval the Eighth Circuit's test:

> [A]n employer will be "excused from responsibility for acts of its supervisory employees" upon a showing "that the acts were contrary to a consistently enforced company policy, that the supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by its supervisors."

Id. (quoting *Western Waterproofing Co. v. Marshall*, 576 F.2d 139 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978)). The court approved the Commission's statement that the Secretary should not "overemphasize the formal aspects of [a company's] safety program and fail to give proper significance to its substance." *Id.* (quoting *Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1782, 1982 CCH OSHD ¶ 26,128, p. 32,887 (No. 76-2636, 1982)). The court found insufficient evidence on the record that the employer "failed to exercise reasonable care to prevent violations of" the cited standard. *Id.* Thus, it found that the misconduct by PP&L's supervisor was not shown to be "reasonably foreseeable to, or preventable by, PP&L." *Id.* at 359.

The case now before us bears numerous similarities to *PP&L*. We will analyze the evidence under the specific criteria which the Third Circuit stated would excuse the employer from responsibility for its supervisor's actions: adequate training of supervisors in safety matters, reasonable steps to discover safety violations committed by supervisors, and a consistently enforced company safety policy.

i. Training of supervisors

It is undisputed that Kerns instructed supervisors and other employees adequately in its hard hat rule, which complied with the cited standard. Based on this record, Kerns' training of supervisors in other safety matters also was adequate. As mentioned, it used safety training materials of the National Arborist Association (NAA) for some of its weekly "tailgate" safety meetings. It sent its employees to an annual symposium of the Penn/Del Chapter of the ISA, which included a discussion of safety issues and proper equipment.

Kerns was a member of both of those organizations and of the Delmarva Safety Council. The record shows Kerns to be conscientious about safety generally.

ii. Steps to discover violations committed by supervisors

We also find that Kerns took reasonable steps to discover safety violations by supervisors. John Kerns testified that he visited approximately 90 to 95 percent of the jobs he had sold to check on proper performance of the work, and Hadley testified that he visited at least 75 percent of the jobs he had sold for the same purpose. They did not announce when they were going to arrive at the jobsite. The fact that a Kerns manager did not visit the short, relatively simple job at issue here was not shown to be unreasonable, given the few violations it had found during its frequent inspections of this crew and Kerns' other crews.

Further, Osterhout had an unblemished safety record, based on the testimony of John Kerns and Hadley. Both of them testified that they had observed Osterhout frequently on jobsites during his three years with the company and never saw him violating a safety rule. The court in *PP&L* found it significant that the supervisor involved there had "an unblemished safety record," and that his hazardous activity was at odds with his previous practice. 737 F.2d at 359. The same factors are present here. Also, contrary to the Secretary's argument, the evidence does not show that Allen and Ennis previously had failed to wear their hard hats when required. The evidence is merely that they had been informed of Kerns' hard hat policy many times.[11] We find no basis in this limited record to believe that Kerns should have recognized that more intensive supervision was necessary to prevent hard hat violations.

iii. Enforcement of safety policy

As mentioned, Kerns had a progressive discipline program which included verbal warnings, written warnings, and termination. The evidence indicates that Kerns disciplined

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[11]In his decision, the judge stated that the two surviving crew members "had received (several to numerous) verbal reprimands for the failure" to wear their hard hats. The record does not support this statement.

employees on the few occasions when it found them violating safety rules. Kerns had given verbal and written warnings to numerous employees, and John Kerns testified that he had terminated employees for "safety violations and other reasons."[12]

Eight months before Osterhout's accident, Kerns had suspended another crew leader for three days without pay for a hard hat violation and other infractions of company policy. That supervisor, Jim Lockhart, had been reprimanded following each of his safety rule violations, and Kerns meted out severe discipline to him when it found that several verbal reprimands had not caused him to obey its rules consistently. Kerns had issued a prior warning to crew member Allen for lack of eye protection, and to Ennis regarding damage control. (As mentioned, however, the evidence does *not* show that either Allen or Ennis previously had violated Kerns' hard hat policy or received a warning for doing so.) Further, John Kerns testified that his company passed the DWSP's unannounced inspection each year since voluntarily joining that program five years before the accident.

PP&L relied on findings that the employer there acted in good faith, that it had an "excellent overall safety program," and that the evidence of certain lapses in safety rule enforcement had little or no probative value because they occurred long before the events at issue. 737 F.2d at 359. Similarly here, the Secretary has not adequately rebutted the testimony of Kerns' managers to the effect that it acted in good faith and had a comprehensive safety program, including membership in many safety-related organizations -- the DWSP, NAA, ISA, and Delmarva Safety Council. Further, we find little or no

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[12]The Secretary notes that no documentation was presented to support the testimony just quoted. Kerns provided a good deal of documentation, however, regarding its hard hat rule and the communication and enforcement of that rule. It submitted records of numerous written reprimands and at least one suspension without pay. In any event, under *PP&L*, the ultimate burden is on the Secretary to affirmatively show deficiencies in the employer's safety program, and she has not done so here.

evidence of prior lapses in safety rule enforcement.[13] We find that, based on the evidence here, Kerns consistently enforced its hard hat rule and its other safety rules, and that its enforcement efforts appeared effective until Osterhout's fatality.

Judge Schoenfeld inferred that Kerns was not effectively enforcing its hard hat rule based on the fact that Osterhout violated it and condoned the failure of the other crew members to obey it. However, there is strong rebuttal evidence that Kerns: (1) properly trained Osterhout and found him to be a consistently safe crew leader, who had seen to it that his crews wore hard hats; and (2) regularly monitored worksites for safety compliance and enforced its rules on the infrequent occasions when infractions occurred. Accordingly, we find that the imputation of employer knowledge here, based on crew leader Osterhout's misconduct, is improper under Third Circuit precedent. *Compare Brock v. L. E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1274, 1278 (6th Cir. 1987) (unpreventable employee

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[13]The NAA had advised Kerns on the elements of an adequate safety program, and Kerns' program was not shown to be inadequate by those criteria. The NAA advised:

> National Arborist Association training programs alone do *not* ensure worker safety. An adequate safety program would contain at least these additional ingredients.
>
> 1. An ongoing, complete and conscientious program of instruction including in-the-field instruction by the employer, for which the NAA program is only a starting framework.
> 2. Comprehensive company work place safety rules, with compliance monitored on a regular basis and the rules enforced by discipline where appropriate.
> 3. An employee's obligation to conscientiously abide by the employer's safety rules.

As mentioned, Kerns used the NAA's hard hat training materials at times during its weekly "tailgate" safety meetings. Kerns also presented substantial evidence of regular, unannounced monitoring of worksite safety, of discipline where appropriate, and of its employees' understanding of their obligation to obey its safety rules.

misconduct defense not proven where Myers's foreman told electric line crew they did not need safety belts on job at issue, although OSHA standard required them; foreman did not conduct tailgate safety meetings as mandated; and Myers's district manager stated that he felt good linemen did not need safety belts for such work).

The fact that all *three* crew members here failed to wear their hard hats, and that Ennis as well as Osterhout had acted as a crew leader for Kerns, suggests that noncompliance with its hard hat rule was more of a problem than its managers knew. Nevertheless, the limited evidence fails to establish that the noncompliance here was reasonably foreseeable, given the unrebutted evidence of regular, unannounced inspections, infrequent violations, and consistent enforcement of rules when Kerns' management discovered violations. *Cf., e.g., CMC Electric, Inc.*, 18 BNA OSHC 1737, 1741, 1999 CCH OSHD ¶ 31,817, p. 46,746 (No. 96-169, 1999) (hard hat violation found where "all three CMC employees at this site failed to wear hard hats and there was evidence of a number of occasions at other sites where CMC's employees failed to wear hard hats;" and "there was little evidence of an earnest effort [by CMC] to ensure compliance"), *appeal filed*, No. 99-3801 (6th Cir., June 22, 1999). As noted earlier, the limited record does not indicate whether Ennis and Allen had the requisite exposure to falling objects such that their failure to wear hard hats constituted violations of the standard.

The Secretary argues that the violation was foreseeable because Kerns had a haphazard program of verbal and written warnings that led to no definite result, except that it caused Kerns' workers to take its work rule less than seriously. However, the Secretary has not presented evidence to rebut the testimony of John Kerns and Hadley that the employees generally *did* take the hard hat rule seriously. Based on the record, the Secretary has not rebutted the evidence that Kerns had a formal, well-conceived program for enforcing its hard hat rule and exercised reasonable diligence in carrying out that program.[14]

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[14]In another post-*PP&L* hard hat case arising within the Third Circuit, the (continued...)

Thus, we vacate the alleged serious violation of the standard at 29 C.F.R. § 1910.135(a)(1). SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Stuart E. Weisberg
Commissioner

Dated: March 16, 2000

[14](...continued)
Commission affirmed a violation based on a company supervisor's failure to enforce hard hat use on a construction site. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1993-95 CCH OSHD ¶ 30,041 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994)). The cited standard there was 29 C.F.R. § 1926.100(a), which is comparable in generality to the standard cited here. It 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.

The Commission analyzed the evidence under its own precedent, but it also found that a violation existed under *PP&L*, because the noncompliance there was reasonably foreseeable -- "the reluctance of the steel connectors to wear hard hats was well known to the company." 16 BNA OSHC at 1164 note 2, 1993-95 CCH OSHD at p. 41,216 note 2. By contrast, the evidence here does not show that it was reasonably foreseeable to Kerns that its crew members might not wear their hard hats when required. *Jersey Steel* is, therefore, distinguishable on its facts and does not compel a different result here.

VISSCHER, Commissioner, concurring:

I agree with my colleagues that the Secretary has failed to establish the employer's knowledge of violative conduct, and therefore the citation should be vacated. The majority's decision, however, rests solely on the precedent of the Court of Appeals for the Third Circuit as stated in *Pennsylvania Pwr. & Light Co. v. OSHRC*, 737 F.2d 350 (3d Cir. 1984) ("*PP&L*"). As set forth below, I believe this decision finds equal support in the precedent of the Commission and the "long-standing Commission and court precedent" noted by my colleagues that "the Secretary bears the burden of proof on each element of a violation of a standard, including that the employer had actual or constructive knowledge."

Not only the Third Circuit, but all courts that have addressed the issue of employer knowledge have placed this burden on the Secretary.[15] Whether the Secretary seeks to prove constructive knowledge on the basis of deficiencies in the employer's safety program, or actual knowledge on the basis of the imputed knowledge of a supervisor, it is only proper that the employer be given an opportunity to rebut the Secretary's evidence. In *PP&L*, the Court of Appeals for the Third Circuit held that an employer must be allowed this same opportunity to rebut knowledge that otherwise would be imputed from a supervisor's misconduct. "The participation of the company's own supervisory personnel may be evidence that an employer could have foreseen and prevented a violation through the

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[15]*See, e.g., Donovan v. General Motors Corp.*, 764 F.2d 32 (1st Cir. 1985); *D.A. Collins Construction Co. Inc. v. Secretary of Labor*, 117 F.3d 691 (2nd Cir. 1997); *Pennsylvania Pwr. & Light Co. v. OSHRC*, 737 F.2d 350 (3d Cir. 1984); *L.R. Willson and Sons, Inc. v. Secretary of Labor*, 134 F. 3d 1235 (4th Cir.), *cert. denied*, 525 U.S. 962 (1998); *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976); *Brock v. L.E. Myers Co.*, 818 F.2d 1270 (6th Cir.), *cert. denied*, 484 U.S. 989 (1987); *Western Waterproofing Co. v. Marshall*, 576 F.2d 139 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978); *Brennan v. OSHRC (Alsea Lumber Co.)*, 511 F.2d 1139 (9th Cir. 1975); *Capital Electric Line Builders of Kansas v. Marshall*, 678 F.2d 128, 10 BNA OSHC 1593 (10th Cir. 1982); and *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).

exercise of reasonable diligence, but it will not, standing alone, end the inquiry into foreseeability." *Id.* at 358.[16] As indicated above, I fully agree with the majority's application of the principles stated by the court to the facts in this case.

The Commission's own precedent allows an employer the same opportunity to rebut the Secretary's evidence of actual or constructive knowledge. In *Pride Oil Well Service*, 15 BNA OSHC 1809, 1815 1991-93 CCH OSHD ¶ 29,807, pp. 40,583-86 (No. 87-692, 1992), the Commission made clear that an employer may rebut the Secretary's *prima facie* proof of a supervisior's knowledge, and therefore avoid the imputation of that supervisor's knowledge, by offering evidence that it had "established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated." *See also Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993) (employer may avoid imputation of its supervisor's knowledge by showing "that it had

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[16] *See also L.R. Willson and Sons, supra* note 1, at 1240 ("despite a finding of knowledge of the violation on the part of a supervisory employee, the [Secretary bears] the burden of proving that the supervisory employee's acts were not unforeseeable or unpreventable");*Western Waterproofing, supra* note 1, at 144 (employer is "excused from responsibility for acts of its supervisory employees" upon a showing "that the acts were contrary to a consistently enforced company policy, that supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by its supervisors"); and *Capital Electric Line Builders, supra* note 1, at 129-30 (comparable rule for non-supervisory employees). *Cf. New York State Electric & Gas Corporation v. Secretary of Labor*, 88 F.3d 98, 108 (2nd Cir. 1996) ("*NYSEG*") (where Secretary seeks to establish constructive knowledge based on the inadequacy of an employer's safety program, burden of proof as to the safety program remains on Secretary and may not be shifted to employer).

prescribed work rules that satisfy the requirements of the cited standard and that it had adequately communicated and effectively enforced such rules"); and *Jersey Steel Erectors,* 16 BNA OSHC 1162, 1164, 1993 CCH OSHD ¶ 30,041, p. 41,216 (No. 90-1307 1993) *aff'd without published opinion,* 19 F.3d 643 (3d Cir. 1994) (where foreman was not reasonably diligent in enforcing a safety rule, rebuttal failed and his constructive knowledge of a violation was imputable to the company).

In short, I believe our decision here is consistent not only with *PP&L*, but with Commission precedent and with the general principle that the Secretary bears the burden of proof on employer knowledge.[17]

/s/
Gary L. Visscher
Commissioner

Date: March 16, 2000

[17]It is true that evidence concerning the adequacy of an employer's safety program, which is relevant to the Secretary's burden of employer knowledge, may be and often is presented by the employer in support of an affirmative defense of "unpreventable employee misconduct," which the employer must plead and prove. As the Second Circuit Court of Appeals has pointed out, however, "the fact that the employer might litigate a similar or even an identical issue as an affirmative defense does not logically remove an element from the complainant's case." *NYSEG, supra* note 2, at 107.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. KERNS BROTHERS TREE SERVICE, Respondent.	DOCKET NO. 96-1719

Appearances: Andrea Appel, Esq,
Howard Agran, Esq.
U.S. Department of Labor
Office of the Solicitor
For Complainant

James F. Kipp, Esq.
Trzuskowski, Kipp, Kelleher & Pearce, P.A.
Wilmington, DE
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

While conceding that the standard requiring the use of hardhats[18] was applicable and was violated, Respondent nonetheless maintains that it cannot be held responsible under the Act[19] under the well-recognized affirmative defense of unpreventible employee misconduct. For the reasons

[18] Title 29 C.F.R. § 1910.135(a)(1).

[19] Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 - 678.

which follow, Respondent's defense is rejected and the alleged violation is affirmed.

Respondent has not proven its alleged defense of unpreventible employee misconduct because its crew leader's failure to wear a hard hat, as well as the failure of the other two members of his crew to do so, is sufficient evidence of lax enforcement of the company's safety rule requiring the wearing of hard hats so as to impute knowledge of the violation to the employer even where the employer has an otherwise effective safety program and an "unblemished" safety record.

The relevant facts of this case are undisputed.

An employee of Respondent, designated as the crew leader of a three member crew assigned the job of tree trimming, suffered a fatal injury when struck from above by a falling limb which had just been cut by another member of the crew. Respondent had specific safety rules requiring the wearing of hardhats where such dangers existed. Its safety rules were well known to the employees and the subject of "tail-gate" talks and safety meetings. Respondent's written safety program included a method of progressive discipline for employees who violated safety requirements. Nevertheless, the two surviving crew members testified that they each had been told numerous times to wear their hard hats and had received (several to numerous) verbal reprimands for the failure to do so. As a crew leader, the deceased had no authority to hire or fire employees for safety violations but could give them verbal warnings. The crew leader was imbued with the authority in the field to "cure" safety violations. The work site at which the violation occurred was under the overall control of an "arborist-salesman" who visited the site (as the person whose sale it was) only on an intermittent basis and then only for a short period of time. The "arborist-salesman," Respondent's putative safety director, could not recall any instance in which an employee was significantly disciplined for safety infractions.

The unpreventible employee misconduct defense was well outlined by the United States Court of Appeals for the First Circuit in *P. Gioioso & Sons, Inc., v. Secretary of Labor*, 115 F.3d 100, 110 (1997), as follows:

> The contours of the UEM (unpreventable employee misconduct) defense are relatively well defined. To reach safe harbor, an employer must demonstrate that it (1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance, and (4) effectively enforced the rule whenever employees transgressed it. See *New York State*

> *Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 105 (2d Cir.1996); *General Dynamics*, 599 F.2d at 458-59; *Jensen Constr. Co.*, 7 O.S.H. Cas. (BNA) 1477, 1479 (1979). The employer must shoulder the burden of proving all four elements of the UEM defense. See *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir.1987); *General Dynamics*, 599 F.2d at 459. Sustaining this burden requires more than pious platitudes: "an employer must do all it feasibly can to prevent foreseeable hazards, including dangerous conduct by its employees." *General Dynamics*, 599 F.2d at 458; accord *H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 818 (5th Cir.1981).

(Footnotes omitted.)

Where, as here, the Secretary concedes that Respondent had an applicable safety rule, and that its rules were "effectively communicated" to employees, the employer must still show that the program was effectively enforced. Thus, even if an employer establishes work rules and communicates them to its employees, the defense of unpreventable employee misconduct cannot be sustained unless the employer also proves that it insists upon compliance with the rules and regularly enforces them. See *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994).[20] Where foremen and crew leaders themselves violate safety rules (and especially there they silently condone such activity by failing to put a stop to such violations) the reasonable inference is raised that the "rule" is not being effectively enforced as required. Evidence that a foreman or supervisor has violated a statutory standard permits an inference that the employer's safety program has not

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[20] In a similar vein, were the question whether Respondent had knowledge of the violative condition (crew not wearing hardhats) such knowledge would have been imputed to Respondent because the condition existed with the actual knowledge of its crew leader. *New York State Electric and Gas v. Secretary of Labor*, 88 F.3d 98, 105 (1996); *Jersey Steel Erectors, 16 BNA OSHC 1162 (No. 90-1307, 1993).* Such is the case even though the crew leader was temporarily in that position. See *Dover Elevator*, 16 BNA OSHC 1281, 1286 (No. 91-862) (Whatever the official title, one delegated authority to order corrective measures is a "supervisor" for imputation.)

been adequately enforced. See *Brock v. L. E. Myers Co., High Voltage Div.,* 818 F.2d 1270, 1277, *cert. denied,* 484 U.S. 989 (1987).

The inference of less than fully effective safety program enforcement is thus raised in this case. Respondent's evidence that intermittent and unexpected site visits were made by its salesmen who had a higher degree of supervisory authority than did the crew leaders, or that once a year, unannounced inspections were made under the Delaware Workplace Safety Program, are insufficient to rebut the inference. They show, at best, that there might have been intermittent compliance with the hardhat rule. Moreover, Respondent's past history of twenty-four years of operation without ever having been cited for a safety violation is considered within the context of its "history" under § 17(j) of the Act.

Based on the above, I find that Respondent has failed to fulfill its burden of proving that its safety program was effectively enforced. Thus, its asserted defense as to unpreventible employee misconduct is rejected. The violation is AFFIRMED.

Neither classification of the violation as "serious,"[21] nor the amount of the penalty proposed by the Secretary were challenged by Respondent or are argued in post-hearing briefs. Accordingly, the violation is concluded to be serious and the penalty of $1,500.00 is assessed therefor.

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[21] Act, § 17(k), 29 U.S.C. § 666(j).

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply with the standard as alleged in Citation 1, Item 1, 29 C.F.R. § 1910.135(a)(1).

4. The violation was serious within the meaning of § 17(k) of the Act.

5. A civil penalty in the amount of $1,500.00 is appropriate therefor.

ORDER

1. Citation 1, Item 1 is AFFIRMED.

2. A civil penalty of $1,500.00 is assessed.

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Michael H. Schoenfeld
Judge, OSHRC

Dated:
Washington, DC