Understanding OSHA: 
A Case Study

The case of *Secretary of Labor v. D.W. Caldwell, Inc.* presents an example of a commercial roofing contractor receiving an Occupational Safety and Health Administration (OSHA) citation alleging a willful violation of OSHA’s fall-protection standards. Although the roofing contractor was unsuccessful arguing its unforeseeable employee misconduct defense, it did successfully contest the citation on the grounds the willful classification was inappropriate.

D.W. Caldwell Inc., Douglasville, Ga., is a commercial sheet metal and roofing contractor. On March 29, 2012, one of its crews was installing a new metal roof system on a school building in Selma, Ala., when an OSHA compliance officer observed employees on the steep-slope roof not tied-off with their safety harnesses to anchor points.

The OSHA compliance officer held an opening conference with the company foreman. During the conference, the foreman admitted the crew was not tied-off despite the company’s policy of having everyone tied-off 100 percent of the time. The foreman claimed it was difficult for the crew to tie-off because they had to walk 60 to 100 feet to pick up material and it slowed production to anchor the harness. The foreman also testified he discussed the use of anchors with one employee, but he decided not to require it.

Importantly, one day before the OSHA inspection, the foreman was advised by the general contractor’s superintendent that an employee was not tied-off. The foreman acknowledged the situation, and he instructed the employee to tie-off. The foreman admitted the crew was “caught.” The following day, however, the foreman allowed the crew to continue to not tie-off their harnesses.

As a result of the evidence obtained during the inspection, including the foreman’s own statements, D.W. Caldwell received a willful citation alleging it willfully violated 29 C.F.R. § 1926.501(b)(1) for failing to protect employees on a roof from falling by the use of a guardrail system, safety-net system or personal fall-arrest system. In the alternative, OSHA alleged a willful violation of 29 C.F.R. § 1926.501(b)(11) for the lack of fall protection on a steep-slope roof system.

D.W. Caldwell responded to the citation by filing its notice of contest. D.W. Caldwell asserted the willful violation was inappropriate because the company was not aware of the crew’s failure to use fall protection, and it should not be held to the knowledge of the crew foreman. D.W. Caldwell also argued the citation should be vacated based on its unforeseeable employee misconduct defense.

**The unforeseeable employee misconduct defense**

Prevailing on the unforeseeable employee misconduct defense requires the employer to show it has a work rule addressing the violation; it communicates the work rule to its employees through safety
training; it takes steps through self-inspections to determine whether its employees are acting in accordance with the company rules; and it disciplines employees found to have violated company safety rules.

In support of its misconduct defense, D.W. Caldwell did show it had a work rule addressing the violations, and the rules required fall protection at all times. D.W. Caldwell also argued it communicated its work rules to its employees through safety training. The safety training provided consisted of 30-minute weekly safety meetings. D.W. Caldwell was able to produce documents showing the subject crew had been provided with fall-protection training two times during the five months before OSHA’s inspection. The administrative law judge discounted the training provided by D.W. Caldwell because of the crew’s pattern of noncompliance. In this instance, the foreman and crew at issue had received written reprimands for not tying off one year before the OSHA inspection. The pattern of noncompliance showed the work rules were not being adequately communicated to employees, according to the administrative law judge.

D.W. Caldwell also presented evidence it took reasonable steps to monitor for unsafe conditions. The testimony presented at the hearing indicated projects were visited on a regular basis, but none of the visits were documented. The administrative law judge concluded the company’s method to discover a crew’s disregard of fall protection was not adequate. In support of his conclusion, the judge noted there was no evidence a complete safety inspection of the crew was performed with use of a checklist or other guideline. The judge also relied on the fact the frequency of inspections was determined based on a job site’s proximity to the company’s office and how often the company needed to deliver materials and check on work progress. In this instance, the job site only was inspected three times during a six-week period after the crew began its roofing work.

Concerning the company’s enforcement of its safety rules, the judge noted the disciplinary program was neither written nor provided for progressive discipline. As previously noted, the foreman of the crew at issue received written reprimands one year before the OSHA inspection for not tying off. The judge noted no one was suspended, and other than verbal warnings or written reprimands, there was no evidence discipline included loss of pay, days off from work or termination. Moreover, the judge stated where all employees in a crew violate an employer’s work rule, the unanimity of their noncompliance shows weak enforcement of the work rule.

Based on the judge’s analysis of the four factors comprising the unforeseeable employee misconduct defense, the judge rejected the defense.

**Willful classification**

Next, the judge considered the willful classification of the violation. A willful violation is a violation committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain
indifference to employee safety. A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation.

In this instance, the judge concluded D.W. Caldwell’s conduct did not rise to the level of willful. In support of his conclusion, the judge noted that though inadequate, D.W. Caldwell did have a written safety program and did conduct weekly safety meetings. Also, the judge noted project sites were regularly visited at least once a week to check on progress and employee safety. Moreover, the testimony revealed that when violations were discovered on job visits, the problem was corrected immediately. The judge also commented the company issued verbal warnings and filed written reprimands with employees as a means to enforce its safety rules. Also, the company provided its employees with necessary fall-protection equipment.

Based on these facts, which were not enough to support the unforeseeable employee misconduct defense, the judge reclassified the violation from willful to serious. The judge stated that though the foreman’s conduct demonstrated poor judgment, it was not intentional and did not reveal a reckless disregard for the requirements of the Act. According to the judge, it also was noteworthy the foreman believed that not using the rope anchors while carrying metal panels 60 feet was not a fall hazard because of the size of the roof and that most of the work was being done near the peak. The judge also noted the foreman had received proper fall-protection training, and the company purchased retractable lines after OSHA’s inspection.

Reclassifying the violation from a willful violation to a serious violation had the effect of reducing the penalty amount from $28,000 to $6,000.

Revisit your safety program

This case presents a good discussion regarding the employer’s unforeseeable employee misconduct defense and the willful classification for an OSHA violation. Although D.W. Caldwell had evidence for each of the four elements of an unforeseeable employee misconduct defense, the fact that numerous employees, including the foreman, were guilty of the violation lead the judge to conclude that either the company’s training, self-inspections or disciplinary program were ineffective.

Although its training, self-inspections and disciplinary program were deemed ineffective for purposes of prevailing on its unforeseeable employee misconduct defense, the fact the company had a work rule addressing the violation, conducted self-inspections and administered discipline when violations were discovered was enough to overcome a willful classification of the violation.
In light of the outcome of the D.W. Caldwell case, you are encouraged to revisit and review your safety programs and consider the effectiveness of the training you provide, the self-inspections performed and the discipline administered when numerous employees are found violating a company work rule.