United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. AQUATEK SYSTEMS, INC., Respondent.	OSHRC Docket No. 03-1351

APPEARANCES:

Howard M. Radzely, Esq., Joseph M. Woodward, Esq., Alexander Fernández, Esq., Daniel J. Mick, Esq., Lauren S. Goodman, Esq., Department of Labor, Washington, DC
For the Complainant

Robert E. Rader, Jr., Esq., Rader & Campbell, Dallas, TX
For the Respondent

DECISION

Before: RAILTON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

Before the Commission on review is a decision by Administrative Law Judge Benjamin R. Loye, in which he affirmed a citation alleging that Aquatek Systems, Inc. ("Aquatek") violated 29 C.F.R. § 1926.501(b)(13).[1] For the reasons below, we reverse the judge and vacate the citation.

[1] That standard provides:

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

Background

Aquatek is a small company engaged in various types of waterproofing work. At the subject worksite, Aquatek was under contract to waterproof the balconies and breezeways on an apartment building located in Euless, Texas. When Aquatek's employees arrived at the worksite on the morning of January 7, 2003, all but two or three of the balconies had guardrails installed. Aquatek foreman Ronnie Morris instructed his two employees to begin working on the balconies with guardrails while he spoke to the general contractor about installing guardrails on the unprotected balconies. At approximately 1:30 p.m., Aquatek had finished waterproofing the balconies with guardrails, but the general contractor still had not installed guardrails on the remaining unprotected balconies. As it was late in the workday, foreman Morris assumed that it was unlikely that the general contractor would install guardrails on the remaining balconies that day. Since Aquatek was supposed to complete its work at the site by the end of the day, foreman Morris then instructed his employees to waterproof the remaining unprotected balconies while working on their hands and knees.

Discussion

The threshold issue on review is whether the Secretary established her burden of proving knowledge of the cited fall protection violation. Specifically, Aquatek argues that the judge erred in finding that the Secretary made out a prima facie showing of knowledge based on foreman Morris' knowledge of the cited condition, and that Aquatek failed to rebut this showing.

Under well-established Commission precedent, the Secretary bears the burden of proof on each element of a violation of a standard, including a showing that the employer had actual or constructive knowledge of the cited conditions. *E.g., Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1720, 1999 CCH OSHD ¶ 31,821, p. 46,782 (No. 95-1449, 1999). Generally, the actual or constructive knowledge of a supervisor can be imputed to the employer. *E.g., Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993). Therefore, the Secretary establishes a prima facie showing of knowledge by proving that a supervisory employee was responsible for the

violation. *See H.E. Wiese, Inc.*, 10 BNA OSHC 1499, 1505, 1982 CCH OSHD ¶ 25,985, p. 32,614 (No. 78-204, 1982) (consolidated), *aff'd per curiam*, 705 F.2d 449 (5th Cir. 1983). Here, it is undisputed that foreman Morris was the supervisor of the employees and was responsible for directing the employees and ensuring that they worked safely. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080, 2002-04 CCH OSHD ¶ 32,657, p. 51,326 (No. 99-0018, 2003) (imputing knowledge of foreman who was responsible for identifying and taking prompt corrective measures to eliminate hazards). *See also Danis-Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003) (knowledge of foreman may be imputed to employer); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1964-66, 1986-87 CCH OSHD ¶ 27,651, pp. 36,031-33 (No. 82-928, 1986) (knowledge of foreman who had safety responsibilities may be imputed to employer). It is also undisputed that foreman Morris was responsible for the violation by instructing his employees to work on the unprotected balconies without fall protection. Accordingly, we find that the Secretary made a prima facie showing of knowledge.

An employer may rebut the Secretary's prima facie showing of knowledge with evidence that it took reasonable measures to prevent the occurrence of the violation. *E.g.*, *Dover Elevator*, 16 BNA OSHC at 1286, 1993-95 CCH OSHD at p. 41,480; *Consol. Freightways Corp.*, 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶ 29,500, p. 39,810 (No. 86-351, 1991). In particular, the employer must show that it had a work rule that satisfied the requirements of the standard, which it adequately communicated and enforced. *Id.* Here, the judge rejected Aquatek's rebuttal evidence based on his finding that the company had "no written safety program, no written disciplinary program, [and] no record of prior disciplinary actions."

We find that Aquatek took reasonable measures to prevent the occurrence of fall protection violations. The evidence establishes that Aquatek had a verbal rule specifically prohibiting its employees from working on balconies without fall protection, and that rule was adequately communicated to employees, including foreman Morris. Contrary to the judge, we see no reason to question the adequacy of Aquatek's safety program simply

because it is not written. The Commission has never required an employer to reduce its safety rules to writing. *See Capform, Inc.*, 16 BNA OSHC 2040, 2043, 1993-95 CCH OSHD ¶ 30,589, p. 42,358 (No. 91-1613, 1994) (Commission does not require safety rules to be written as long as rules are clearly and effectively communicated to employees). Indeed, Aquatek's small size – a total of four employees, including owner Ken Morris and his brother, foreman Morris – makes it an unlikely candidate for a formal written safety program of the kind typically associated with larger companies.

We also disagree with the judge's finding that Aquatek failed to provide sufficient evidence of enforcement. Based on the record before us, Ken Morris normally monitored his employees' compliance with safety rules by making daily visits to worksites, and had never discovered employees violating Aquatek's fall protection rule. That he did not visit this one-day, relatively simple job was therefore reasonable under the circumstances. *See Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2182-83, 2002-04 CCH OSHD ¶ 32,646, p. 51,219 (No. 00-1268, 2003) (consolidated) (citing *Dover Elevator*, 16 BNA OSHC at 1287, 1993-95 CCH OSHD at p. 41,480) (increased efforts to monitor employee compliance not required where employees involved had good safety record and had not previously been found in violation of safety rules). Moreover, Ken Morris' reprimand of foreman Morris after discovering that he had violated the fall protection rule demonstrates that the company enforced its safety rules. *See Stahl*, 19 BNA OSHC at 2183, 2002-04 CCH OSHD at pp. 51,219-20 (consolidated) (enforcement adequate where employees disciplined on the few occasions they were found to have violated safety rules). The Secretary fails to point to anything in the record to establish otherwise.

On this record, we find that Aquatek rebutted the Secretary's prima facie showing of knowledge. Accordingly, the Secretary failed to establish a violation of section 1926.501(b)(13).[2]

[2] Under these circumstances, we need not address Aquatek's other arguments on review.

Order

The judge's decision is reversed and the citation is vacated.

SO ORDERED.

_/s/_____
W. Scott Railton
Chairman

_/s/_____
Thomasina V. Rogers
Commissioner

Dated: February 2, 2006

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SECRETARY OF LABOR, Complainant, v. AQUATEK SYSTEMS, INC., and its successors, Respondent.	OSHRC DOCKET NO. 03-1351

APPEARANCES:

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For the Respondent:
Robert E. Rader, Jr., Esq., Rader & Campbell, Dallas Texas

Before: Administrative Law Judge: Benjamin R. Loye

AMENDED DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Aquatek Systems, Inc. (Aquatek), at all times relevant to this action maintained a place of business at the Mandolin Apartments in Euless, Texas, where its employees were waterproofing balcony decks. On January 7, 2002, Richard S. Ranck, an area director with the Occupational Safety and Health Administration (OSHA) observed and photographed apparent violations of the Act at Aquatek's Euless work site. As a result of those observations and subsequent investigations, Aquatek was issued a citation alleging a violation of 29 CFR §1926.501(b)(13) of the Act. By filing a timely notice of contest, Aquatek brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On December 3, 2003 a hearing was held in Dallas, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation

29 CFR 1926.501(b)(13): Each employee engaged in residential construction activities 6 feet or more above lower levels shall be protected by personal fall arrest systems, safety net systems or guardrails.

> On or about January 7, 2003, building #30, Mandolin II Apartment construction site located at 2525 Hwy. 360, Euless Texas: The waterproofing contractor as a controlling employer did not ensure that a fall protection system such as but not limited to guardrails were erected on an unprotected balcony prior to the start of waterproofing activities.
>
> The cited standard requires:
>
> > Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. . . .

Facts

Area director Ranck testified that on January 7, 2003, at approximately 1:30 p.m., he observed and photographed workers on a second-story balcony of the Mandolin apartments (Tr. 10-16; Exh. C-1 through C-5). Though a number of other balconies were guarded, the balcony in question was unguarded, and the workers on it were not using any alternative means of fall protection (Tr. 10, 20, 37-38). During the first week of February OSHA Compliance Officer (CO) Joshua Lewis met with the general contractor at the Mandolin site (Tr. 26, 34). He reviewed the engineering drawings and determined that the second floor balconies were ten feet nine inches above the ground (Tr. 34-35). In mid-April, 2003 Lewis met with Ronnie Morris, the Aquatek supervisor in charge at the Mandolin work site (Tr. 46, 49, 54, 95). Morris identified himself and the two other workers on the unguarded balcony as employees of Aquatek (Tr. 47-49; Exh. C-2 through C-5).

At the hearing Ronnie Morris testified that on January 7, 2003 his crew arrived on the Mandolin site intending to spray primer and put down peel-and-stick waterproofing (Tr. 97, 99). The only materials his crew had were the waterproofing and a utility knife (Tr. 100; *see also*, testimony of CO Lewis, Tr. 65). According to Morris, there were guardrails on the third floor balconies and 95% of the second floor balconies (Tr. 101). Morris had his crew start working on the third floor, while he went to the general contractor to ask that the missing handrails be installed (Tr. 112-13; *see also*, testimony of CO Lewis, Tr. 57-58, 65).[1] Morris understood that the handrails would be installed; however, they were not in place

[1] Aquatek's subcontractor's agreement states that it is responsible for "initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the contract" (Tr. 41; Exh. C-9). However, it is clear from the record that the general was responsible for erecting guardrails on the balconies

by the time his crew reached the second floor at around 1:30 (Tr. 113-14). Morris concluded that, because work normally stopped on construction sites at 3:00 p.m, the railings would not be installed that day (Tr. 114-15). Rather than halt work Morris instructed his crew to complete their work on the remaining two or three balconies from their hands and knees to minimize their exposure to the fall hazard (Tr. 117, 124). Morris estimated that it would take 10 to 15 minutes to complete the waterproofing for each of the remaining balconies (Tr. 50, 98-99, 115). He believed it would take only a few minutes to complete the job, and that no one would find out about it (Tr. 121). Though Morris knew he was violating Aquatek's safety policy, he understood that the concrete on the balconies would be poured the following day, and that he had only that day to complete his work (Tr. 99, 114, 117, 121; *see also*, testimony of CO Lewis, Tr. 84). Morris was on site on January 8, 2003, however, inspecting the previous day's work (Tr. 100).

Morris' crew could not have erected the hand rails themselves because they had no wood, saws, hammers or nails (Tr. 117-18). Though Aquatek uses harnesses and safety lines on some job sites, Morris' crew had not brought the fall protection equipment with them (Tr. 118). Morris stated that there was no place to anchor a safety line in any event (Tr. 119).

Kenneth Morris, Aquatek's owner, testified that all its employees are trained in fall hazards and the means of protecting against them (Tr. 126). Ronnie Morris completed a fall protection training course in February 2001 (Tr. 106, 108-09; Exh. R-4), and was aware that Aquatek's safety rules prohibit working on unguarded balconies (Tr. 112, 128). Both Kenneth and Ronnie Morris testified that Ronnie had never violated a safety rule before (Tr. 123, 130). Ronnie Morris stated that, normally, he would halt work rather than allow his crew to work at heights without fall protection (Tr. 114-16). Ronnie Morris testified that had Kenneth Morris seen him working without guard rails, he would have stopped the work and reprimanded him (Tr. 122-23, 126). Kenneth Morris testified identically (Tr. 131). Kenneth Morris testified that he monitors Aquatek's jobs, though he was not at the cited work site (Tr. 130). Ronnie Morris was verbally reprimanded when OSHA contacted Aquatek (Tr. 124-25, 131).

None of Aquatek's employees have ever been injured in a fall during the 12 years it has been in business (Tr. 127).

Discussion

Non-creating, non-controlling employers. Respondent does not deny the existence of the cited violative condition, but raises the "limited multi-employer worksite" defense. The Commission has held that a subcontractor is not liable for violations of the Act where: 1) it did not create the violative condition;

(Tr. 79, 129-30). The general contractor was issued a citation in this matter as the controlling contractor (Tr. 67).

2) it did not control the violative condition such that it could realistically have abated the condition in the manner required by the standard; and 3) it made reasonable alternative efforts to protect its employees from the violative condition. *See, Capform, Inc.*, 16 BNA OSHC 2040, 1994 CCH OSHD ¶30,589(No. 91-1613, 1994); *Lee Roy Westbrook Construction Company, Inc.*, 13 BNA OSHC 2104, 1989 CCH OSHD ¶28,465 (No. 85-601, 1989).

The evidence establishes that Aquatek did not create the cited violative condition. Nor did it control the violative condition, as it could not have realistically abated the condition the manner contemplated by the standard. Aquatek expected the general contractor to erect guardrails on all the balconies, and had neither the materials nor the tools with which to erect handrails. It had no fall arrest systems on the site. After discovering the hazard Aquatek notified the general contractor, asking that guardrails be installed. Employees were, at first, directed to work only in guarded areas. When the general contractor had not installed the missing guardrails by 1:30 p.m., Morris abandoned his attempt to protect his crew from fall hazards, and had them finish the job quickly, on their hands and knees,[2] in hopes that no one would notice. This judge cannot find that Ronnie Morris' single request to the general contractor was as much as a reasonable employer would have done to protect its employees in these circumstances. In balancing the cited hazard against Aquatek's concern for efficiency and economy this judge notes that Aquatek's owner testified that he would have stopped work, rather than allowing employees to proceed without fall protection. In this case, where the owner would have done more than its supervisor, who made only a single complaint to the general contractor, I cannot find that the employer took reasonable alternative steps to protect its employees. *See, Capform, Inc.*, 16 BNA OSHC 2040, 1994 CCH OSHD ¶30,589(No. 91-1613, 1994). Aquatek failed to prove this affirmative defense.

Knowledge. It is undisputed that Ronnie Morris was aware of the cited violation. Aquatek maintains, however, that it could not have known that its supervisor would ignore company work rules and allow employees to work without fall protection. The Commission has held that once the Secretary has made a prima facie showing of employer knowledge through its supervisory employee, the employer can rebut that showing by establishing that the failure of the supervisory employee to follow proper procedures was unpreventable. In particular, the employer must establish that it had relevant work rules that were adequately communicated and effectively enforced. *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-531, 1991).

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[2] Appendix E to subpart M lists some alternative protective measures employees can provide where conventional fall protection is infeasible, including Controlled Access Zones (CAZ) and monitors. This judge can find no support for Aquatek's contention that working from hands and knees reduces fall hazards.

In this case, three employees were observed working without fall protection with the express approval of their supervisor, Morris, who instructed them to violate a well recognized safety rule in the performance of a standard task. Aquatek has no written safety program, no written disciplinary program, no record of prior disciplinary actions. Aquatek relies solely on Kenneth and Ronnie Morris' assertions that Aquatek had a safety program including a rule requiring the use of fall protection at heights over six feet, and that there were *no* prior violations of those rules requiring disciplinary action. The only discipline meted out in this instance was a verbal reprimand to the supervisor.

The Commission has held that unanimity of noncomplying conduct by all employees suggests ineffective enforcement. *Gem Industrial, Inc.,* 17 BNA OSHC 1861, 1865, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996). It has further held that misconduct by a supervisor constitutes strong evidence that an employer's safety program is lax. *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-351, 1991)*; New England Tel. & Tel. Co. v. Secretary of Labor,* 589 F.2d 81, (1st Cir. 1978). Aquatek's showing failed to establish that it effectively enforced its fall protection rules. It's disciplinary program, never utilized until Aquatek received the OSHA citations at bar, clearly failed to influence the behavior of its employees, who uniformly disregarded its fall protection rules when it was more convenient to do so. *Precast Services, Inc.,* 17 BNA OSHC 1454, 1995 CCH OSHD ¶30,910 (93-2971, 1995). Moreover Aquatek simply did not introduce *any* evidence establishing that it exercised reasonable diligence in discovering violations of its fall protection rules. *Pace Construction Corp.* 14 BNA OSHC 2216, 1991-93 CCH-OSHD ¶29,333 (No. 86-758, 1991).

As Aquatek failed to rebut the Secretary's prima facie showing of knowledge, this violation is established.

Penalty

Aquatek is a small employer with four employees (Tr. 94). Three employees were exposed to the 10 foot 9 inch fall hazard for approximately 15 minutes per balcony. Area Director Ranck testified that between July 23, 2003 and December 1, 2003, OSHA investigated 11 fatalities resulting from falls of 10 feet 9 inches or less (Tr. 23). CO Lewis testified that the likelihood of an accident occurring was high as the employees had to work at the edge of the balcony while laying waterproofing (Tr. 52).

The proposed penalty, $1,500.00, is deemed appropriate, and will be assessed.

ORDER

1. Citation 1, items alleging violation of 29 CFR 1926.501(b)(13) is AFFIRMED, and a penalty of $1,500 is ASSESSED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: March 25, 2004