SECRETARY OF LABOR, Complainant, v. COPPELL CONSTRUCTION COMPANY, INC., and its successors, Respondent.	OSHRC DOCKET NO. 02-1885

APPEARANCES:

For the Complainant:
C. Elizabeth Fahy, Esq., Danielle Jaberg, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:
Frederic Gover, Esq., Canterbury, Stuber, Elder, Gooch & Surratt, Dallas, Texas

Before: Administrative Law Judge: Benjamin R. Loye

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, Coppell Construction Company, Inc., and its successors (Coppell), at all times relevant to this action maintained a place of business at the Dallas/Fort Worth Airport, Terminal F (DFW), where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On September 9, 2002, after receiving a videotape purporting to show Coppell employees working without fall protection at the DFW work site, the Occupational Safety and Health Administration (OSHA) initiated an inspection of Coppell's DFW work site. As a result of that inspection, Coppell was issued citations alleging violations of 29 C.F.R. 1926.501(b)(1) of the Act together with a proposed penalty. By filing a timely notice of contest Coppell brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On May 15, 2003 a hearing was held in Dallas, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge which is 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net system, or personal fall arrest systems.

a) On or about 9/4/02, APM, DFW construction site: An employee was observed standing on the APM rolling up an extension cord and was not protected from falling to the ground below. The employee was wearing a safety harness but was not tied off to a safety life line. The employee was potentially exposed to a fall of approximately 50 feet to the ground below.

b) On or about 9/4/02, APM, DFW construction site: A second employee was observed standing on the APM and was not protected from falling to the ground below. The employee was wearing a safety harness but was not tied off to a safety life line. The employee was potentially exposed to a fall of approximately 50 feet to the ground below.

Facts

OSHA Compliance Officer (CO) Josh Lewis testified that prior to initiating the subject inspection, the OSHA Fort Worth area office received a video depicting two Coppell employees working at the Dallas/Fort Worth (DFW) airport (Tr. 14, 16-17; Exh. C-2). The employees were working on the unprotected edge of an automated people mover (APM) at a height of 50 feet without the benefit of fall protection (Tr. 20, 25-26, 35). On September 9, 2002, following his receipt of the video, Lewis visited Coppell's DFW work site and discussed the video with Coppell's president, Mr. Weger, and its safety director, David Leyva (Tr. 19, 45). Weger and Leyva identified one of the employees as Oscar Baldez, and the other as Roberto Quintero (Tr. 19-20). On September 13, 2002, Lewis interviewed the employees, both of whom identified themselves on the video (Tr. 33, 46).

In the video, Mr. Baldez is wearing a safety harness and dual lanyards, but is not clipped to a lifeline (Tr. 35-36, 38). Baldez told Lewis that he unclipped his lanyard so that he could get around some other employees in order to roll up an extension cord (Tr. 41-42). At the hearing Baldez testified identically (Tr. 102, 108). Baldez stated that Coppell has a work rule requiring that its employees be tied off 100% of the time, and that he was aware of the rule (Tr. 101). Baldez testified that he saw that, in the area where the other workers were standing, 8 to 10 feet of decking had already been laid, so he unclipped his lanyard long enough to go around them (Tr. 103). Baldez stated that it was the easiest way to roll up the cord, and that it appeared he could safely untie. Baldez testified that he tied on again immediately after passing the other workers

(Tr. 104-05).

Roberto Quintero is depicted standing two or three feet from the edge of a 50 foot high capital in the video; there is no lifeline visible (Tr. 46, 68; Exh. C-2). When interviewed, and at the hearing, Quintero was unable to recall the incident, or whether or not he was tied off when the tape was made. Quintero believed he would have tied off because of the danger. He stated that his lifeline might have been hidden behind his left leg (Tr. 49, 66, 114-16). Quintero testified that he attended a 40 hour safety training course at DFW (Tr. 112-13). He was aware that he was required to be tied off any time he was working above six feet (Tr. 112-13).

Discussion

The cited standard provides:

> *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 (1.8m) 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.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29,239, p. 39,157 (No. 87-1359, 1991).

Applicability. It is undisputed that the cited standard applies. The surface on which Coppell's employees were working was well in excess of six feet above the ground. Coppell employees were required to wear fall protection 100% of the time they were working.

Failure to Comply/Access. Employee Baldez admitted that he untied while working on the elevated surface. It is clear from the video that Baldez was exposed to the unprotected edge. The violation described in instance a) has been proven.

Employee Quintero thought he was probably tied off at the time the video was taken. The videotape was not made during an OSHA inspection by an OSHA compliance officer; there was no contemporaneous interview with the employee involved; the creator of the videotape did not testify as to his or her contemporaneous observations. This judge has examined the videotape, but cannot ascertain whether Quintero is wearing a lanyard. I cannot find that the Secretary has

shown, by a preponderance of the evidence, that Quintero failed to comply with the cited standard. Instance b) is, therefore, vacated.

Knowledge. Coppell maintains that it was unaware of Baldez' misconduct. It further argues that it had no reason to suspect its employees would violate its 100% tie-off rule, and that Baldez' misconduct was unpreventable.

Facts

David Leyva, Coppell's safety director, testified that all Coppell employees receive safety training during their orientation (Tr. 120). Annual safety updates are provided in both English and Spanish for employees who remain with the company (Tr. 120). Coppell's tie-off policy requires that employees working above the ground be tied off 100% of the time; its disciplinary procedures state that employees observed working off the ground without fall protection will be removed from the structure (Tr. 126-28; Exh. R-1).

Jesus Ramirez is a foreman with Coppell (Tr. 82). Ramirez was supervising between 17 and 22 employees at the DFW project in August and September 2002 (Tr. 83). Ramirez testified that DFW provided 40 hours of safety training for the subcontractors, including instruction on the 100% tie-off rule (Tr. 92-93). In addition, he held daily safety meetings at the site, during which he went over Daily Job Hazard Analysis sheets with his workers in both English and Spanish (Tr. 83-84; Exh. R-2). Coppell's 100% tie-off rule was included in each daily briefing (Tr. 91; Exh. R-2). Employees on the site, including Baldez and Quintero, signed off to indicate their presence at the meetings (Tr. 84-85). Ramirez testified that he never saw his employees untie, and that none of the other contractors on site informed him that his employees were not tying off (Tr. 91, 98). Though he had the authority to do so, prior to the OSHA citation in this matter, Ramirez had no occasion to write any warnings, or to suspend or fire any workers for infractions of Coppell's rules (Tr. 95-96).

David Leyva determined that following the OSHA inspection, Baldez and Quintero would be suspended while the alleged incidents were investigated (Tr. 96). After completing its investigation, Coppell found that Baldez had violated company safety rules (Tr. 107). Levya testified that Baldez' violation was his first. Moreover, Coppell believed Baldez was an employee worth saving, and so allowed him to return to work three days later, after receiving a written reprimand warning him that further violations of the rules would result in his termination

(Tr.135; Exh. C-4). Quintero was allowed to return to work five days after his suspension, after Coppell failed to determine whether any safety rules had actually been violated in his case (Tr. 115; Exh. R-3).

Leyva testified that he had disciplined other Coppell employees for violations of safety rules (Tr. 141-42; Exh. R-5). Coppell produced incident reports regarding employee violations of safety rules written in 2000 and 2002. The incident reports note that: 1) On January 7, 2000, a supervisory employee, Wally Stults, was verbally reminded to put on his hard hat upon leaving the cab of his equipment; 2) On June 26, 2000, two employees received verbal warnings, reminding them to wear eye protection, or "stronger measures would follow"; 3) On October 1, 2000, two employees were verbally reprimanded after receiving earlier warnings about the need to wear safety glasses; 4) On June 27, 2002, an employee, Carmelo Arellano, cut away the roots of a tree, causing the tree to fall into a power line. The incident was discussed with Arellano in hopes of avoiding a reoccurrence; 5) On October 16, 2002, a truck driver, Gary Lemons, was warned about his unsafe driving; 6) On October 24, 2002, two employees were asked to remove ear rings, or face time off without pay and/or termination (Exh. R-5).

Discussion

There is no evidence that Coppell's foreman, Jesse Ramirez, was in the area where the cited violation occurred, or otherwise had actual knowledge of the cited conduct. The Secretary argues that Coppell's constructive knowledge of the violation has been established, however, because the violation was in plain sight. Complainant argues that Coppell could have discovered the violation had it exercised reasonable diligence in supervising its employees.

In a recent case, *Stahl Roofing, Inc.*, No. 00-1268 (consolidated cases) (February 21, 2003) [Commission slip opinion], the Commission noted that employer knowledge is not established merely because the employer has not detected every hazardous instance on its work site. Unless the employer has reason to believe that additional monitoring is necessary and will lead to the discovery of instances of employee misconduct, an employer need only use reasonable diligence in the supervision of its employees. Reasonable diligence does not require that each employee be under the continual surveillance of supervisory personnel. *Id.*

Coppell has demonstrated that it had a safety program which included a 100% tie-off rule. The 100% tie-off rule was reinforced by the general contractor on this site, who provided a full

40 hours of safety training for its subcontractors. The rule was also discussed during daily safety meetings held on the site by Coppell's foreman, Ramirez. All the witnesses testifying, including Baldez, were fully aware of the tie-off rule. Coppell's safety rules were not only effectively communicated to its employees, but were enforced through Coppell's disciplinary procedures, which included both verbal and written warnings for violations of safety rules. After receiving a copy of the videotape that prompted the OSHA inspection, Coppell suspended the employees involved in the investigation without pay, and informed them that further violations of the rules would result in termination.

The Secretary has not shown that Ramirez had any reason to know that his employees would violate the 100% tie-off rule. He never saw any of his employees untie; none of the other contractors on the site reported any misconduct to him. Baldez, specifically, had a clean safety record prior to this incident. Because Baldez' exposure was brief, lasting only the amount of time it took him to go around the other employees working on the elevated surface, there is no reason to assume that Ramirez should have seen the incident.

The only evidence in the record shows that Coppell exercised due diligence in the enforcement of its safety rules, including the rule requiring 100% tie-off. That a third party observed a Coppell employee violating the fall protection rules on the DFW work site is insufficient, in itself, to establish the element of employer knowledge. Complainant failed to make out her *prima facie* case, and the citation is vacated.

ORDER

1. Citation 1, item 1, alleging violation of 29 C.F.R. §1926.501(b)(1) is VACATED.

/s/
Benjamin R. Loye,
Judge, OSHRC

Dated: July 30, 2003