UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MDC DRYWALL, INC. and its successors, Respondent.	DOCKET NO. 13-1396

Appearances:

Richard Moyed, Esq., Office of the Solicitor, U.S. Dept. of Labor, Dallas, TX
For Complainant

Joseph W. Wantuck, Esq., Wantuck Law Firm, LLC, Springfield, MO
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This case is before the United States Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On May 7, 2013, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite, located at 901 NW Expressway, Suite 1023, Oklahoma City, Oklahoma, which Compliance Safety and Health Officer Stacy McAndrews identified as the Penn Square Mall ("worksite"). (Tr. 27). As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent. The Citation alleges a single, repeat violation of 29 C.F.R. § 1926.453(b)(2)(v),

with a proposed penalty of $27,500.00. Respondent timely contested the Citation. A trial was conducted in Oklahoma City, Oklahoma on November 18, 2014. The parties each submitted post-trial briefs for consideration.

Two witnesses testified at trial: (1) Stacy McAndrews, OSHA Compliance Safety and Health Officer ("CSHO"); and (2) Martin Fulbright, a safety consultant employed by Brittney, Inc.

Jurisdiction

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act. (Tr. 21–22). The parties also stipulated that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 21–22). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Background

According to CSHO McAndrews, her supervisors directed her to conduct construction inspections in response to a hailstorm that had recently gone through the area. (Tr. 27). As she was driving around in the Oklahoma City area, she noticed two individuals working from an aerial lift at the Penn Square Mall. (Tr. 27–28). CSHO McAndrews pulled into the parking lot and took photographs of the workers. (Ex. C-3). Upon closer examination, she noticed that the individual inside the elevated bucket, operating the aerial lift, did not have his lanyard attached to anything, and that his co-worker, who had just climbed into the lift bucket from the roof, did not have a harness or lanyard on at all. (Tr. 27–28; Ex. C-3). At the time she took pictures of the two individuals in the lift basket, they were approximately 24 feet in the air. (Tr. 28).

CSHO McAndrews approached the individuals in the lift and presented her OSHA credentials. (Tr. 28). Hector Munoz, the gentleman who was operating the lift, identified himself as the foreman. (Tr. 28). The other individual in the aerial lift was Respondent's employee Dana Lancaster. (Tr. 29). CSHO McAndrews interviewed Mr. Munoz and Mr. Lancaster, specifically asking how long they had worked for Respondent, and whether they had received fall protection training. (Tr. 29). Mr. Munoz indicated that he had worked for Respondent for many years and that he had received fall protection training. (Tr. 29, 132). Mr. Lancaster, on the other hand, had only been employed for a few months and told CSHO McAndrews that he had not received any fall protection training. (Tr. 29). Mr. Munoz also told CSHO McAndrews that they had another harness and lanyard on site, but that it was in the truck. (Tr. 184–85).

As part of her investigation, CSHO McAndrews researched Respondent's OSHA violation history and discovered that it had been previously cited for employees not wearing fall protection in areal lift baskets in October of 2010, at a worksite in Arkansas. (Tr. 35; Ex. C-4). CSHO McAndrews subsequently recommended the issuance of the violation in dispute in this case.

Citation 1, Item 1

Complainant alleged a repeat violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.453(b)(2)(v): A body belt with a lanyard attached to the boom or basket was not worn by employee(s) when working from an aerial lift:
>
> MDC DRYWALL, INC WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT 29 CFR 1926.453(b)(2)(v), WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER 314914417 CITATION 01, ITEM 001 AND WAS AFFIRMED AS A FINAL ORDER ON DECEMBER 15, 2010, WITH RESPECT TO A WORKPLACE LOCATED AT 2700 SOUTH SHACKLEFORD RD., LITTLE ROCK, AR.
>
> On or about May 17, 2013 at 901 NW Expressway, Suite 1023, Oklahoma, MDC Drywall, Inc., did not ensure each employee was wearing a safety harness with

> lanyard attached to the proper anchor points while in the JLG 800S Aerial lift basket exposing employees to a fall from approximately 20 ft to the ground below.

The cited standard provides:

> A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

29 C.F.R. § 1926.453(b)(2)(v).

Applicable Law

To establish a violation of an OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

Discussion

The Cited Standard Applies

The cited standard applies to "aerial lifts", which is a type of "vehicle-mounted aerial device used to elevate personnel to job-sites above ground" and includes extensible boom platforms, articulating boom platforms, aerial ladders, vertical towers, or a combination thereof. 29 C.F.R. § 1926.453(a). CSHO McAndrews testified that the piece of equipment at issue was an aerial lift, and the photos she took illustrate that it is used as such. (Tr. 27–28) Accordingly, the cited standard applies.

The Terms of the Standard were Violated

The language of the standard is plain—"A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift." 29 C.F.R. § 1926.453(b)(2)(v). In this

case, Mr. Munoz was wearing a safety harness and lanyard, but it was not attached to the boom or basket of the lift. (Ex. C-3). Mr. Lancaster, on the other hand, was not wearing any fall protection equipment at all when he accessed the lift basket from the roof. Thus, the terms of the standard were violated as to both employees.

Respondent's Employees were Exposed to the Hazard

Access to a hazardous condition exists "if there is a 'reasonable predictability' that employees 'will be, are, or have been in' the 'zone of danger.'" *Kokosing*, 17 BNA OSHC 1869 (citing *Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994)). The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995).

There is no real question as to whether Mr. Munoz and Mr. Lancaster were exposed to the hazard. Neither employee was properly secured to the aerial lift as required by the standard, which exposed them to the possibility of a 24-foot fall. Although CSHO McAndrews and Mr. Fulbright testified that such an event was unlikely due to the lift being parked on level, stable asphalt, both agreed that the failure to properly use fall protection exposed the employees to the hazard. (Tr. 39–41, 86–87).

Respondent Knew or Could Have Known of the Hazard

Respondent also knew or, with the exercise of reasonable diligence, could have known of the violative condition. "The actual or constructive knowledge of an employer's foreman can be imputed to the employer." *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82–928, 1986); *Austin Building Co. v. OSHRC*, 647 F.2d 1063 (10th Cir. 1981). "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." *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1381–82 (No. 76–4271, 1981).

Respondent makes two separate arguments that it did not know, nor could it have known, of the violative condition. First, Respondent contends that Mr. Munoz was not a supervisor. As noted above, CSHO McAndrews immediately asked for the foreman or person-in-charge of the worksite. (Tr. 28). Mr. Munoz stated that he was the foreman and person-in-charge. (Tr. 28). Respondent's only witness at trial, Mr. Fulbright, also confirmed that Mr. Munoz was a foreman. (Tr. 182). There were no other MDC supervisors or employees at the worksite besides Mr. Munoz and Mr. Lancaster. Although Kevin Dart was later identified as the Project Manager, he was not present at the worksite at the time of the inspection.

The Court finds that, absent any reliable evidence to the contrary, Mr. Munoz had been delegated responsibility over Mr. Lancaster and the work being performed by Respondent at the Penn Square Mall worksite. Respondent failed to put forth any credible evidence to rebut Mr. Munoz's admission to CSHO McAndrews that he was the on-site supervisor at the time.[1]

Respondent also contends that, even with the exercise of reasonable diligence, it could not have discovered the violation because the entire episode lasted only seven to eight minutes by CSHO McAndrews' estimation. (Tr. 55). Thus, Respondent argues that it would have been impossible to discover the violation without implementing near-constant employee surveillance.

Even if the Court accepted Respondent's argument that Mr. Munoz was not acting as a supervisor (which it does not), the Court would still find that Respondent could have known of the violative condition. While reasonable diligence does not require full-time monitoring,

1. It is important to point out that neither Complainant nor Respondent called any witnesses employed by MDC Drywall. (Tr. 188). Complainant's only evidence came from CSHO McAndrews. Respondent's only evidence came from Mr. Fulbright, who provides safety consulting services to 300 companies, one of which is Respondent. (Tr. 169).

inadequate supervision of employees constitutes a lack of reasonable diligence. *See Stanley Roofing Co., Inc.*, 21 BNA OSHC 1462, 1463–64 (No. 03-0997); *see also Lakeside Construction, L.L.C.*, 24 BNA OSHC 1445 (No. 12-0422, 2012) (ALJ) (finding that failure to provide supervision over employees constituted a lack of reasonable diligence and that Respondent could have known of the violation because it was in plain view). The violative condition in this case was plainly visible from the mall parking lot.

Based on the foregoing, the Court finds that Respondent had actual knowledge of the condition, imputed through Mr. Munoz. Mr. Munoz was specifically aware of his own failure to connect his lanyard to the aerial lift, as well as Mr. Lancaster's complete lack of any fall protection gear whatsoever.

The Violation was Properly Characterized as "Repeat"

"A violation is repeated under section 17(a) of the Act if, at the time of the alleged violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch*, 7 BNA OSHC 1061 (No. 16183, 1979). One of the ways in which Complainant can establish substantial similarity is by showing that the prior and present violations are for failure to comply with the same standard under section 5(a)(2) of the Act. *Id.* A *prima facie* showing of substantial similarity can be rebutted by evidence that the conditions and hazards associated with the violations are different. *Id.*

Respondent was previously cited for a violation of 29 C.F.R. § 1926.453(b)(2)(v), which became a final order of the Commission in December 2010. (Tr. 35; Ex. C-4 at 20–22). More specifically, Respondent's 2010 violation was based on an employee not wearing a body belt while working from an aerial lift approximately 24 feet above the ground. (*Id.*). Because both the current and prior violations involved the same standard and exposed employees to the same

hazard, the Court finds that the two violations are substantially similar. Accordingly, Citation 1, Item 1 was properly characterized as a repeat violation of the Act.

Affirmative Defenses

Respondent argues two affirmative defenses: (1) that Complainant conducted a warrantless search without Respondent's consent; and (2) that the alleged violation was the result of unpreventable employee misconduct. As an initial matter, the Court notes that Respondent failed to call a single employee, supervisor, or executive from MDC Drywall to support its affirmative defense claims.

The Supreme Court has recognized the constitutional right of individuals to be free from warrantless OSHA inspections. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). Valid consent, however, operates as a waiver of the warrant requirement. *Id*. at 316. Such consent need not be express—failure to object to a known search constitutes consent. *Cody-Zeigler, Inc*. 19 BNA OSHC 1410 (Nos. 99-0912 *et al.,* 2001); *J.L. Foti Construction*, 786 F.2d 1165 (6th Cir. 1986)(*unpublished opinion*); *U.S. v. Thriftimart, Inc.*, 429 F.2d 1006 (9th Cir. 1970).

CSHO McAndrews testified that she "approached the aerial lift, presented my credentials—they were on the way down anyway—explained the purpose of my inspection, who I was, and just talked to them about what was—what I had observed." (Tr. 28). During that interaction, Mr. Munoz identified himself as the foreman and person in charge of the worksite. (Tr. 28). On cross-examination, CSHO McAndrews admitted that she did not specifically ask Mr. Munoz for consent to conduct the inspection. (Tr. 58). However, she also testified that neither Mr. Munoz nor Mr. Lancaster, Respondent's only employees at the worksite, objected to her conducting the inspection. (Tr. 82).

The Court finds that CSHO McAndrews promptly identified herself as a Compliance Safety and Health Officer and clearly expressed that she was conducting an OSHA inspection of the worksite. While she did not specifically ask for consent to search, the purpose for her visit was made clear. Further, though not specifically expressed, the Court finds that CSHO McAndrews reasonably relied upon Mr. Munoz's apparent and actual authority to consent to her inspection. No witnesses from MDC Drywall were called testify in opposition to CSHO McAndrews explanation of these events. Thus, there is no credible, countervailing evidence regarding consent. Accordingly, Respondent's Fourth Amendment defense is rejected.

In order to prevail on Respondent's assertion of the unpreventable employee misconduct defense, Respondent must prove that: (1) it had work rules designed to prevent the violation; (2) it had adequately communicated those rules to employees; (3) it had taken steps to discover violations; and (4) it had effectively enforced the rules when violations are discovered. *Burford's Tree, Inc.*, 22 BNA OSHC 1948 (No. 07-1899, 2010). "A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1017, 1991), *aff'd without published opinion*, 978 F.2d 744 (D.C. Cir. 1992).

In his twenty years as a safety consultant to Respondent, Mr. Fulbright testified that he helped draft Respondent's safety policies. (Tr. 91). Through Mr. Fulbright, Respondent introduced a number of exhibits indicating that it had work rules in place designed to prevent the violation. (Exs. R-1 to R-14, R-20). However, Mr. Fulbright is not an employee of Respondent and, thus, could not competently testify as to whether Respondent adequately communicated those rules, took adequate steps to discover violations of those rules, or effectively enforced

those rules when violations were discovered.[2] Such actions are the province of Respondent's management team, none of whom testified at trial. Although Mr. Fulbright testified that his company performed random inspections of Respondent's worksites at least once every six months, that only addresses one element of the employee misconduct defense and does not, by itself, constitute a reasonably diligent effort to discover violations of safety rules.

Respondent attempted to introduce a number of documents in further support of its employee misconduct defense through Mr. Fulbright. However, he could not properly authenticate those exhibits, nor could he overcome properly lodged hearsay and personal knowledge objections. (Tr. 138-180). Therefore, many documents that may have been germane to Respondent's defense were excluded. As noted above, it is Respondent's burden to prove the application of an affirmative defense. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993). That burden is all the more difficult when, as here, the violative conduct involves a supervisor. *CBI Servs., Inc.*, 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001).

The Court finds that Respondent failed to present sufficient evidence to establish the elements of an unpreventable employee misconduct defense. Accordingly, Respondent's assertion of the employee misconduct defense is rejected.

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined

2. For example, Mr. Fulbright could not testify as to whether Mr. Munoz or Mr. Lancaster were trained on fall protection; he could only testify that such training was required by Respondent's policies. (Tr. 122, 179). Thus, the only evidence as to fall protection training provided Mr. Lancaster was his statement during the inspection that he never received any. (Tr. 29).

by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Respondent is a large employer, with over 1,000 employees working in multiple states. (Tr. 41). The violation exposed Respondent's employees to the possibility of a fall of approximately 24 feet. CSHO McAndrews and Mr. Fulbright both agreed that a fall from that height would likely result in death or serious injury.[3] However, based on the fact that the lift was stationary and located on level, paved ground, the Court agrees with Complainant's determination that the probability of an accident actually occurring was low. (Tr. 39). Considering these factors, the totality of the record, and the fact that Respondent was cited for a violation of the same standard three years earlier, the Court finds that a penalty of $10,000.00 is appropriate.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1 is hereby AFFIRMED as a REPEAT violation of the Act, and a penalty of $10,000.00 is ASSESSED.

Brian A. Duncan

Date: May 8, 2015
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission

3. Respondent argues that there was not a substantial probability of death or serious injury under the conditions present at the worksite. However, Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *See Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984).