United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Ramco Erectors, Inc., Respondent.	OSHRC Docket No. **14-0453**

Appearances:

Michael Schoen, Esquire, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For the Secretary

Keith Coulter, Esquire, Hahn, Coulter, P.C., Houston, TX
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Ramco Erectors, Inc., (Ramco) is a steel erection contractor whose principal office is in Houston, Texas. On February 5, 2014, one of Ramco's employees fell from a building under construction at one of Ramco's worksites in Spring, Texas. The Occupational Safety and Health Administration (OSHA) conducted an inspection of the worksite the following day. As a result of the inspection, the Secretary issued a Citation and Notification of Penalty to Ramco, alleging a serious violation of 29 C.F.R. § 1926.502(d)(8), for failing to ensure horizontal lifelines were installed and used under the supervision of a qualified person (Item 1), and a repeat violation of 29 C.F.R. § 1926.760(a)(1), for failing to ensure its employees used fall protection when working on a surface with an unprotected edge more than 15 feet above a lower level (Item 2). The Secretary proposed a penalty of $4,950.00 for Item 1 and a penalty of $34,650.00 for Item 2.

The Court held a hearing in this matter on September 29 and 30, 2014, in Houston, Texas. The parties submitted post-hearing briefs on January 23, 2015. Prior to the hearing, the Secretary and Ramco resolved some of the issues that arose in the initial stages of this

proceeding. The parties submitted these stipulations in their Agreed Prehearing Statement, dated September 25, 2014.

AGREED STIPULATIONS

1. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Occupational Safety and Health Act of 1970 (hereinafter "the Act"), 29 U.S.C. § 659(c).

2. Respondent, Ramco Erectors, Inc., is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5).

3. As a result of an inspection at Respondent's workplace at the subject jobsite, Respondent was timely issued citations for serious and repeat violations pursuant to Section 9(a) of the Act, as set forth in Exhibit A to the Complaint in this proceeding.

4. Complainant timely received a notice of intent to contest the aforesaid citation and notification of proposed penalty on March 20, 2014.

5. 29 C.F.R. 1926.502(d)(8) is applicable to the work being performed by Respondent's employees at the jobsite in Spring, Texas on February 5, 2014, which was the subject of OSHA inspection No. 957703.

6. 29 C.F.R. 1926.760(a)(1) is applicable to the work being performed by Respondent's employees at the jobsite in Spring, Texas on February 5, 2014, which was the subject of OSHA inspection No. 957703.

7. Respondent did not reprimand or discipline or take any negative employment action with any employee for any reason in connection with the work being performed at the jobsite in Spring, Texas, where Respondent was performing work at the time of the OSHA inspection on February 6, 2014.

8. Ramco Erectors, Inc., was previously cited for a violation of 29 C.F.R. 1926.760(a)(1), contained in OSHA Inspection No. 314338930.

9. The previous citation issued to Respondent for a violation of 29 C.F.R. 1926.760(a)(1), contained in OSHA inspection No. 314338930, was affirmed and became a final order on September 22, 2010.

10. Respondent was previously cited for a violation of 29 C.F.R. 1926.760(a)(1), contained in OSHA Inspection No. 316283266.

11. The previous citation issued to Respondent for a violation of 29 C.F.R. 1926.760(a)(1), contained in OSHA Inspection No. 316283266, was affirmed and became a final order on May 10, 2012.

(Agreed Prehearing Statement, ¶¶ 1-11.) Based on the record and the Agreed Stipulations, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the

Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651--678 (2014) (Act), and that Ramco is a covered employer under § 3(5) of the Act.

At the hearing, the Secretary withdrew Item 1 of the Citation "in exchange for additional abatement measures by the Respondent." (Tr. 9.) The parties submitted a partial Settlement Agreement formalizing this withdrawal on October 27, 2014. On November 7, 2014, the Court issued an Order Approving Partial Settlement Agreement.

Only Item 2 is left for consideration. Ramco contends the Secretary failed to establish the element of employer knowledge with regard to its employee's failure to comply with the requirements of 29 C.F.R § 1926.760(a)(1). Should the Court find the Secretary established employer knowledge, Ramco contends the violation of the cited standard was the result of unpreventable employee misconduct. Should the Court affirm Item 1, Ramco argues the Secretary failed to establish the classification of the violation as repeat is appropriate.[1]

For the reasons that follow, the Court VACATES Item 2 of Citation No. 1 and assesses no penalty.

Background

On February 5, 2014, a steel erection crew employed by Ramco was working on a building located on Spring Hill Drive in Spring, Texas. The building was planned as a trampoline and tumbling center. It was 28 feet high at its lowest pitch and 30 feet high at its highest pitch (Exh. C-9).

The crew's regular Foreman was not at the site that day because he was participating in a 30-hour OSHA class (Tr. 220, 309). The employee who was injured in this case (referred to as Employee #1) had worked for Ramco for "eight to nine years" at the time of his accident (Tr. 157). The employees working on the top of the structure were wearing safety harnesses and had

[1] "A violation is repeated if the employer was previously cited for a substantially similar violation and that citation became a final order before the occurrence of the alleged repeated violation. *Bunge Corp.*, 638 F.2d 831, 837 (5th Cir. 1981); *Potlatch Corp.*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979). The Secretary establishes a prima facie case of substantial similarity by showing that the prior and present violations are for failure to comply with the same standard. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-1995 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994)." *Deep S. Crane & Rigging Co.,* 23 BNA OSHC 2099, (No. 09-040, 2012). Here, Ramco twice previously was cited for violating the same standard, § 1926.760(a)(1), and those citations became final orders of the Commission (Agreed Stipulations, ¶¶8-11; Exhs. C-14 & C-15). Although the previous violations involved several employees working outside of perimeter lines without lanyards, rather than one employee inadvertently failing to tie off, as here, the Secretary established the prior violations are substantially similar. Had the Court found a violation of the cited standard in the instant case, the Court also would have determined the violation was repeat.

lanyards and safety lines available to them. At some point, Employee #1 unhooked his lanyard from the safety line. A gust of wind blew up a piece of insulation which distracted Employee #1, causing him to lose his balance and fall approximately 28 feet to the concrete surface below (Tr. 164-165, 173-178). Employee #1 sustained a broken elbow and a broken femur in the fall (Exh. C-9). At the time of the hearing (approximately seven months after his fall), Employee #1 was still unable to return to work (Tr. 181).

Use of Fall Protection

The crew's assignment on the day in question was to place 6-foot wide sheets of insulation on the roof and then to cover those with 2-foot wide metal sheets. At least two other crew members were working on the site that day. The crew members handed Employee #1 the metal sheets, which he placed over the insulation. After placing a number of the metal sheets on a section of the roof, Employee #1 would then cross over the roof and secure the metal sheets with screws.

In his post-hearing brief, the Secretary claims Employee #1 unhooked from the safety line to which one end of his lanyard (attached to his safety harness) was connected whenever he crossed over the roof to secure the metal sheets he had placed. The Secretary claims Employee #1 would unhook from the safety line, walk across the roof, and then "would secure himself to the safety line, or yo-yo line, being used by other Ramco employees. . . . [Employee #1] had performed this sequence about 10 times during the day on February 5, 2014. . . . *It is undisputed during that period of time [Employee #1] was crossing over, he was unhooked from any safety line and was not protected from falling."* (Secretary's brief, pp. 3-4.) (citations to transcript omitted.)

The Secretary's statement is a mischaracterization of the record. The question of whether Employee #1 was tied off during the occasions he crossed over the roof is one of the central issues litigated at the hearing. It was the subject of much of the testimony and of several physical demonstrations during the hearing using fall protection equipment. Ramco strongly disputes the Secretary's assertion and argues Employee #1 inadvertently failed to tie off for only a fleeting moment, when he mistakenly unhooked the wrong lanyard end from his safety harness.

The Secretary's only witness at the hearing was Derek Rusin, the compliance safety and health officer (CSHO). He arrived at the worksite at approximately 8:30 a.m. the day after Employee #1 fell from the top of the building (Tr. 115). He interviewed Ramco's Foreman and

two crew members who were present that day. All three employees speak Spanish as their first language. The CSHO, who does not speak Spanish, spoke with the Foreman in English. He spoke to the other two crew members, who spoke only Spanish, with the aid of an employee who worked for another subcontractor on the worksite (Tr. 110, 112-113, 147-148). The CSHO did not interview Employee #1 (Tr. 96).

Several miscommunications occurred during these interviews. The Foreman testified he was not onsite the day of the accident because he was attending an OSHA safety training class, a statement that was corroborated by Employee #1, the only witness who was onsite that day, and Ramco's safety supervisor (Tr. 197, 221-222, 309). Yet the CSHO understood up until the time of the hearing that the Foreman was onsite and supervising Employee #1 at the time of his accident. "I believed [the Foreman] was present. I'm hearing now that he was at a 30-hour course, but I remember speaking with him and him saying he was over on the west side of the building working with a boom lift or an aerial lift." (Tr. 97.) When describing how he believed the accident occurred, the CSHO stated he based his conclusions on the statements of the employees, but "it was kind of confusing from what they were saying[.]" (Tr. 82.)

There were gaps in the CSHO's understanding of the circumstances surrounding the accident. When asked how Employee #1 was connected to a clamp that was part of the fall protection equipment installed on the roof, the CSHO replied, "I can't be 100 percent sure about that because nobody knew. None of the employees could tell me exactly[.]" (Tr. 92.) The CSHO also was confused about the functioning of the fall protection equipment Ramco's crew was using on the roof. "[T]here was a yo-yo available. I may have not have documented that down, but I looked at the equipment they had out on the site. And some of the photos were of equipment that I didn't quite understand, which was that horizontal life line set-up." (Tr. 122.) The CSHO did not determine the method Employee #1 was using to connect and disconnect to the safety lines:

> Q. Were you able to learn from your inspection, the physical act of hooking and unhooking? Can you describe what that might involve for [Employee #1] on the roof?
>
> The CSHO: No, I didn't.
>
> Q. The kind of hook or clamp? I mean, how they were actually operating the hook?
>
> The CSHO: I didn't ask how he was unhooking or not.

(Tr. 95.) The CSHO acknowledged that "the fall protection equipment that was needed was all in place and available for employees on this job site," (Tr. 114) and that Employee #1 "had his harness on, had his lanyard on and had access to an attachment points that he could connect them to[.]" (Tr. 138.)

Ramco contends its employees are trained in the use of the fall protection equipment. On its worksites, Ramco routinely installs a horizontal life line that serves as an attachment point to which an employee can connect his lanyard, one end of which is attached to his safety harness. The safety harnesses are equipped with loops to which the lanyards are connected by means of latches (also called hooks). Ramco's method of fall protection requires its employees to wear a Y-shaped double lanyard, capable of connecting to two different attachment points at the same time, so that an employee can move from one area of the roof to another while remaining tied off the entire time. Another attachment point is created by connecting a self-retracting line, referred to as a yo-yo, to the metal decking using clamps. The yo-yo used by Ramco's crew the day of the accident was 30 feet long (Tr. 165). Employees also use a beam cable (also referred to as a beamer, cheater, or small cable), which is wrapped around a girder, rafter, or other structural member, to provide another attachment point for employees working in an undecked area of the roof. At the hearing, a "leg" of the Y-shaped lanyard that is connected to an attachment point (meaning the employee is tied-off) was referred to as a live or attached end. A leg of the lanyard that is not connected to an attachment point was referred to as a dead or loose end (Demonstrative Exhs. A through G; Tr. 160, 164-165, 207, 219-220, 254-255, 300-302).

Alvino Jaramillo is Ramco's safety supervisor (Tr. 251). He was the assistant supervisor to safety supervisor Julio Bernal on February 5, 2014, the day of the accident (Tr. 252). Jaramillo testified that each new employee at Ramco is provided with safety training upon hire and that yearly safety presentations are given by Safety Consultants, a safety training provider (Tr. 253-254). Jaramillo personally demonstrates Ramco's fall protection method to each new hire. He shows them how to put on the safety harness while on the ground and then takes them up on top of Ramco's building to show them how to tie off (Tr. 253).

> I personally put the harness on, show them how to put the harness on. And once they have the harness on, we have -- I go on the roof and show them how to -- we have clips, the safety clips, where we tie off to the yo-yo's. I show them that, show them how to tie off to that, when you tie off, how you disconnect. And then -- we don't have machines, like manlifts, but I explain to them, personally explain to them, that when you're in the machines, you have to tie off. And when you

> untie, you make sure one is connected before you untie this one. So we have two double lanyards – we have a double lanyard so one lanyard has to be tied off before you disconnect the other one. That way, you're a 100 percent tied off.

(Tr. 253-254.)

On cross-examination, the Secretary's counsel zeroed in on the technique which Ramco trained its employees to use when switching from one attachment point to another:

> Q. So do you teach them in your training that they can unhook this portion of the lanyard, [demonstrating] fall protected and then have the yo-yo line tossed to them or thrown to them by another employee so that they can catch that line and hook onto the ring? [Demonstrating]
>
> Jaramillo: No, because I wouldn't be training them right.
>
> Q. That would what?
>
> Jaramillo: I wouldn't be training them right. I wouldn't be training them to be a 100 percent tied off.
>
> Q. That's an incorrect way to do it? [Demonstrating]
>
> Jaramillo: The way you just did it right now, yes, sir.
>
> Q. So being unhooked from your lanyard, either one of these hooks on your lanyard, [demonstrating] even if you're holding this line in your hand or one of these hooks of the lanyard in your hand, [demonstrating] if you're not hooked to a yo-yo, then that is an incorrect fall protection according to Ramco?
>
> Jaramillo: If you're not tied off at all, that's incorrect.

(Tr. 300-301.) The Secretary's counsel went on to ask Jaramillo variations of this question four more times (Tr. 302, 304-305) and each time Jaramillo responded to the effect, "I already explained that. You're not supposed to unhook before you're tied off to something else." (Tr. 304.)

The Foreman, testifying with the aid of an interpreter (Tr. 214-215), corroborated Jaramillo's explanation of the fall protection method in which he personally trained Employee #1.

> Q. [C]an you walk through the steps of how you make that transfer from being connected to the cheater to being connected to the yo-yo?
>
> The Foreman: The lanyard has two hooks is what we call it. So one remains connected to the cheater, and we release the other one and we connect it to the yo-yo, which is what I have told them and explained to them all the time.
>
> Q. Have you told them whether you release the leg of the yo-yo that's attached to the cheater before or after you connect to the yo-yo?

The Foreman: No. They have to be connected to the cheater and the yo-yo and before they disconnect from anything.

Q. And is that something you've told all of your people?

The Foreman: Yes.

(Tr. 119-220.)

The Foreman was questioned regarding the CSHO's impression that he had told the CSHO that Employee #1 was not tied off when he crossed the roof.

Q. And so when you said that [Employee #1] could not have tied off to both anchor points, did you mean he could never be tied off to both anchor points or are you saying he couldn't stay tied off without the yo-yo getting in the way?

The Foreman: He didn't have to be tied off to both of them. He had to be tied to one so that he could – so that he could do the work.

Q. Is that what you meant when you told the OSHA compliance officer that [Employee #1] couldn't tie off to both anchor points at the same time because it would take longer to get the sheet metal under and around the yo-yo?

The Foreman: That's what I tried to explain to him.

(Tr. 225.)

Employee #1 corroborated the testimony of Jaramillo and the Foreman with regard to the method of fall protection in which Ramco trains its employees. He demonstrated the method at the hearing, showing that Ramco employees are trained to attach the dead end of their lanyard to a new attachment point before unhooking the live end of the lanyard (Tr. 172-176). When asked if, on the day of his accident, he planned to remain connected to the cheater until he completed connecting to the yo-yo, Employee #1 responded, "Yes, that's the plan to always stay there." (Tr. 173.)

Employee #1 described the circumstances immediately prior to his fall. The live end of his lanyard was attached to a cheater connected to a structural member of the roof. He was ready to move to another part of the roof. He planned to connect to the yo-yo thrown to him by another crew member and then to disconnect from the cheater. "I was waiting to have the [yo-yo] cable thrown to me to stand up and move towards where the roof was already placed. . . . I was going to hook on it, and then I was going to move over it." (Tr. 164-165.) As he waited for another crew member to toss him the yo-yo, Employee #1 unhooked what he thought was the dead end of his lanyard from a loop on his safety harness. Instead, he had unhooked the live lanyard end attached to the cheater (Tr. 173-176, 190, 196-197). Employee #1 attributed his

mistake to his distraction caused by sudden gusts of wind that arose, causing the uncovered insulation to lift up.

> Q. And do you remember if a blast or a gust of wind caused any of the metal sheets or the panels to move and make you lose your balance?
>
> Employee #1: Not the metal sheets but the insulation did move, did lift up.
>
> Q. Is that what caused you to lose your balance and fall?
>
> Employee #1: Yes, right about when I was about to tie myself off, the insulation came loose.
>
> Q. Do you agree that if you had already hooked onto a yo-yo line that you would not have fallen?
>
> Employee #1: I am in agreement that if I had been hooked, I would not have fallen.
>
> Q. You mentioned earlier that you were in a hurry. Can you tell us why you were in such a hurry?
>
> Employee #1: For the same reason, it was beginning to be windy. It's the same reason that the insulation came off.

(Tr. 203-204.) Employee #1 was candid and straightforward in his account of his fall from the roof.

> I was standing here on the rafter and the insulation was there on the side and began to lift, to move. And I don't know what happened. It caught me off – it managed to immobilize me, to tie me up kind of. . . . Frankly, I don't know what happened. I don't know if it moved me or it distracted me, but that's when it happened. . . . [The insulation] came unglued and it began to move. I think it was because of the wind. I think it was because of that. . . . Because of the wind. The wind was coming. The wind was blowing and we didn't want everything to start blowing off.

(Tr. 208-209.)

Based on the record, the Court credits the testimony of Jaramillo, the Foreman, and Employee #1 that Ramco trains its employees to remain tied off at all times, disconnecting from one attachment point only after having connected the other end of the Y-shaped lanyard to the new attachment point. The Court also credits Employee #1's testimony that he had been tied off on February 5, 2014, while working on the roof until immediately before his fall, when he inadvertently unhooked the wrong end of the lanyard, unknowingly disconnecting himself from the cheater before he had connected to the yo-yo.

The witnesses were sequestered, yet Ramco's employees were congruent, consistent, and unwavering in their testimony under cross-examination. The Court observed their respective

demeanors and found them credible. The Foreman and Employee #1 testified with the aid of an interpreter. The Court was impressed with the effort and responsiveness of these witnesses as they repeatedly explained the intricacies of Ramco's fall protection method during demonstrations, despite the difficulties presented by the use of two different languages.

The different languages appear to have hampered the CSHO's inspection, however. He interviewed Spanish-speaking workers in English, which gave rise to miscommunication problems. The CSHO conceded he had been confused during the employee interviews. The CSHO misunderstood the Foreman's statement that he had attended an OSHA safety class the day before and had not been present at the time of the accident. He did not fully understand how all of the fall protection equipment on the roof was used and he did not inquire into the method Ramco's employees used to connect and disconnect to attachment points as they moved across the roof. The Court does not credit the CSHO's testimony that Employee #1 routinely did not tie off when he crossed over the roof from one side to the other.

The Court finds the record establishes Employee #1 was working without fall protection only in the immediate moments before he fell on February 5, 2014. The Secretary failed to establish by a preponderance of the evidence that Employee #1 was working without fall protection at any other time that day. The Court specifically rejects the Secretary's claim in his post hearing brief that "[Employee #1] had performed this [crossing the roof] sequence about 10 times during the day on February 5, 2014. . . . It is undisputed during that period of time [Employee #1] was crossing over, he was unhooked from any safety line and was not protected from falling." (Secretary's brief, pp. 3-4.) This statement is disputed and the Court finds the Secretary failed to prove it.

The Citation

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Item 2: Alleged Repeat Violation of 29 C.F.R. § 1926.760(a)(1)

Item 2 of the Citation alleges:

> The employer did not ensure that employees are protected from falling while engaged in steel erection activities at heights greater than 15 feet. This violation occurred on or about February 05, 2014, when employees were exposed to a fall hazard while installing metal sheeting on a roof at heights greater than 15 feet without a fall protection system.

Item 2 of the Citation states Ramco "was previously cited for a violation of this Occupational Safety and Health standard" in OSHA Inspection No. 314338930, which became a Final Order on September 22, 2010, and in OSHA Inspection No. 316283266, which became a Final Order on May 10, 2012.

Section 1926.760(a)(1) provides:

> Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.[2]

Ramco does not dispute the record establishes the first three elements of the Secretary's burden of proof. Section 1926.760(a)(1) applies to any employee "engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level." The parties have stipulated § 1926.760(a)(1) applies to the cited conditions (Agreed Prehearing Statement, ¶ 6). It also is undisputed Employee #1 was not using fall protection when he fell from the top of the building under construction, in violation of the terms of § 1926.760(a)(1). The fact that Employee #1 fell from a height of 28 feet, breaking his elbow and femur, establishes he was exposed to a fall hazard. The only element at issue is that of employer knowledge.

Employer Knowledge

In order to establish a violation of an OSHA standard, the Secretary must show the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. The Secretary's theory is that Employee #2 was the acting supervisor the day of the accident and he had either actual or constructive knowledge of Employee #1's failure to tie off; thus, under Commission precedent, Employee #2's knowledge is imputed to Ramco. *Dover Elevator Co.,* 16 BNA OSHC 1281 (No. 91-862, 1993) (a supervisor's knowledge of

[2] Section 1926.760(a)(3), which is not at issue here, provides:

> Connectors and employees working in controlled decking zones shall be protected from fall hazards as provided in paragraphs (b) and (c) of this section, respectively.

violative conduct may be imputed to the employer). The record, however, is not so clear-cut with regard to the identity of the acting supervisor.

The Secretary bases his claim that Employee #2 was the acting supervisor on Employee #1's testimony. When asked who the supervisor in charge of his work crew was, Employee #1 responded, "There was a gentleman that was carrying some material off—up to us." (Tr. 197.) Employee #1 then identified by name Employee #2. Employee #1 answered several more questions regarding Employee #2.

> Q. How was it communicated to you that he was the supervisor of your work crew while Mr. Chavez was away?
>
> Employee #1: We all already know he's the one that stays in charge.
>
> Q. Does he have a title of leadman or foreman or something like that?
>
> Employee #1: I don't know.
>
> Q. Had he been your supervisor before on other occasions?
>
> Employee #1: Yes, several times he had remained there with us.
>
> Q. Had he been working with you on the roof?
>
> Employee #1: Yes.
>
> Q. Were you taking orders from him that day?
>
> Employee #1: Yes, he was directing us that day.

(Tr. 198.)

The Foreman, however, testified he left both Employee #1 and Employee #2 in charge, but Employee #1 was the more senior employee.

> Q. Did you leave anyone in particular in charge of the crew when you were gone?
>
> The Foreman: [Employee #1] is the one that had the most experience, and I left him in charge but there was another young man as well that I left in charge, although he didn't have as much experience but he, too, was in charge.
>
> Q. And who decided which worker would be laying the insulation on the undecked portion of the roof?
>
> The Foreman: I told [Employee #1] to be the one to lay that insulation. He was the one with the most experience to do that on that occasion.

(Tr. 221.)

Because the Foreman left both employees in charge, the Court will treat them both as acting supervisors. An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an

employer. *American Engineering & Development Corp*., 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Diamond Installations, Inc*., 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006); *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992).

Actual Knowledge

The Secretary failed to adduce *any* evidence establishing Employee #2 had actual knowledge Employee #1 was not using fall protection immediately before he fell from the roof. The Secretary did not call Employee #2 as a witness. The CSHO did not testify that Employee #2 told him he knew Employee #1 was not tied off immediately before he fell from the roof. His written statement to the CSHO was not offered into evidence.[3] Employee #2 was not working on the roof continually with the other employees; rather, "he was carrying some material . . . up to" the employees working on the roof (Tr. 197). The Court finds the Secretary failed to establish Employee #2 had actual knowledge of the alleged violation.

The Court also finds Employee #1 did not have actual knowledge of the alleged violation. He was questioned specifically about his knowledge at the hearing.

> Q. At the time of your fall, did you realize that you had disconnected the top latch instead of the bottom latch as shown in that last picture?
>
> Employee #1: Yes, because that's when I went down.
>
> Q. Did you know that before you fell?
>
> Employee #1: As I was going down, I thought "Oh."
>
> Q. Before you started to fall, were you aware that you had grabbed the wrong latch?
>
> Employee #1: No, I hadn't so far.
>
> Q. I guess if you were aware, it wouldn't have happened?
>
> Employee #1: Had I realized it, I would have hooked up somehow and remained high.

(Tr. 178-179.) Employee #1 did not realize until the moment he was falling that he had disconnected his lanyard end that connected to the cheater, rather than the dead end, and was thus not using fall protection at that moment. He was distracted by the gusts of wind lifting the sheet of insulation. Employee #1 testified consistently that he made a mistake and that he was not paying attention when he unhooked the wrong lanyard end (Tr. 172, 189, 192). "Yes, I was

[3] The CSHO likely did not focus on Employee #2's awareness of the actions of Employee #1 when he was taking the employee's statement because the CSHO was operating under the mistaken impression the Foreman had been present the day of the accident. In the Violation Worksheet the CSHO completed as part of his inspection, under *Employer Knowledge* the CSHO wrote, "[The Foreman] was at the site supervising the employees." (Exh. C-9.)

going to unhook from one and I was going to remain tied up to the other one but I unhooked the other one. I made a mistake." (Tr. 178.) The Court determines Employee #1's awareness that he was not tied off, realized only as he plummeted 30 feet to the concrete below, was instantaneous with his impact resulting in serious injuries. His action in mistakenly disconnecting the live end of his lanyard was not intentional or planned. As such, the Court finds Employee #1 did not have actual knowledge of his violative conduct.

Furthermore, even if the Court determined Employee #1 did have actual knowledge of his failure to tie off, that would not be the end of the inquiry. Although the Secretary cited Commission precedent holding that a supervisory employee's knowledge may be imputed to the employer, that holding is not the law the Commission applies in cases, such as this one, arising in the Fifth Circuit. "Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it may clearly differ from the Commission's law." *D.M. Sabia Co.*, 17 BNA OSHC 1413, 1414 (No. 93-3274, 1995), *vacated and remanded on other grounds*, 90 F.3d 854 (3rd Cir. 1996).

The Fifth Circuit has rejected the Commission's approach of imputing a supervisor's knowledge to the employer when it is knowledge of his own violative conduct and no other employees are involved. Instead, the court has imposed an additional burden on the Secretary to show that the supervisor's violative conduct was foreseeable by the employer.

> [A] supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable. As with each element required to establish a violation, employer knowledge must be established by the Secretary, as an element of § 666(k). *Trinity Indus., Inc. v. OSHRC,* 206 F.3d 539, 542 (5th Cir.2000) (citing *Carlisle Equip. Co. v. Sec. of Labor,* 24 F.3d 790, 792-93 (6th Cir.1994) ("Knowledge is a fundamental element of the Secretary of Labor's burden of proof for establishing a violation of OSHA regulations."))

W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety & Health Review Comm'n, 459 F.3d 604, 608-09 (5th Cir. 2006) (emphasis in original).

Assuming *arguendo* the Court determined Employee #1 had actual knowledge of his failure to tie off, the Secretary would have the burden of establishing it was foreseeable by Ramco that Employee #1 would fail to use fall protection. To do this, the Secretary would have to demonstrate inadequacies in Ramco's safety policy, training, and discipline. The Secretary has failed to do so here.

Foreseeability

Ramco had an established work rule requiring employees to tie off 100 percent of the time when working at heights of 15 feet or higher (actually Ramco imposed a more stringent rule, requiring employees to tie off when working at heights of 6 feet or more (Exh. R-1, p. 4)). Employee #1 testified repeatedly that he knew he was supposed to be tied off at all times when on the roof (Tr. 160-162, 173, 182-183, 186, 187, 189, 193-194, 207). He stated Ramco provided him with safety training when he was initially hired and periodically afterwards. When asked if received training when he started working eight or nine years previously, Employee #1 responded, "Yes, that's where I received some classes when I began to work there but there was always more classes. They always give us more classes." (Tr. 182.) Employee #1 demonstrated he had been trained in and was well aware of Ramco's safety policy requiring employees to tie off.

> Q. And the rule that you told us about that you should always be tied off, were you given that rule in writing or was it something that someone told you verbally?
>
> Employee #1: I saw it in the video and it's always been told to me that we have to be tied off a 100 percent of the time.
>
> Q. Do you have a name for that rule?
>
> Employee #1: I don't know.
>
> Q. In Spanish, do people use the phrase "a 100 percent tied off"?
>
> Employee #1: We call it being tied off at 100 percent.

(Tr. 207.)

The Secretary faults Ramco's safety program and training primarily because, although the majority of Ramco's approximately 200 employees speak Spanish as their first language (Tr. 294), Ramco adduced "no record evidence that any training on specific steel erection fall protection was ever provided in Spanish to any of the Ramco employees." (Secretary's brief, pp. 17-18.) "Ramco was not able to produce any documents, in English or in Spanish, that specifically stated an adequate work rule informing employees of any requirement regarding fall protection at heights above 15 feet when performing steel erection activities." (*Id.* at 18.)

Contrary to the Secretary's statement, Ramco's written safety program directs employees, "Use lifelines, safety harnesses and lanyards when you are working higher than 6 feet off the ground." (Exh. R-1, p. 4.) The Foreman testified he has copies of Ramco's safety program in

English and Spanish that he keeps in his truck (Tr. 230-231). He stated he does not give each member of his crew his own copy of the safety program, but that he reads it to them (Tr. 231). The Foreman stated, "Since I have been with the company for a very long time, every time there is a new employee, he is asked in what language does he prefer, English or Spanish." (Tr. 233.) If the employee's preferred language is Spanish, the Foreman testified, Ramco provides "everything [in Spanish]. Videos, paperwork, papers, even the employment application is given to them in Spanish." (Tr. 234.) There is no dispute that Ramco effectively communicated its 100 percent tie-off rule to its employees. Here, the two employee witnesses who engage in steel erection (the Foreman and Employee #1) testified consistently and repeatedly that Ramco trained them to tie off 100 percent of the time when working at heights of 6 feet or higher (Exh. R-1, p. 4; Tr. 158, 182, 193, 207, 218-219).

Safety supervisor Jaramillo testified he trained new hires to remain tied off 100 percent of the time when working at heights above 6 feet. Jaramillo teaches new hires how to put on a safety harness and then takes them up on the roof of Ramco's building to demonstrate Ramco's method of fall protection (Tr. 253-254). The Secretary contends it is evidence of the inadequacy of Ramco's safety program that Jaramillo "said that he did not provide any fall protection training to [Employee #1]." (*Id.*) The Secretary appears to be referring to Jaramillo's responding, "No," when asked if he had personally trained Employee #1 in the use of fall protection (Tr. 286). Jaramillo, however, testified he had only been in the position of safety supervisor since November of 2013, just three months before Employee #1's accident. Prior to that, Julio Bernal was Ramco's safety supervisor in charge of training (Tr. 252). The Secretary states in his brief, "Mr. Jaramillo, Ramco's safety supervisor, did not visit any job site where [Employee #1] or [The Foreman] were working nor conduct any safety meeting." (Secretary's brief, pp. 18-19.) This is a distortion of Jaramillo's testimony. Jaramillo responded, "No," when asked if he visited a job site where Employee #1 and the Foreman were working *and conducted a safety meeting* (Tr. 287-288). But Jaramillo clearly testified that as part of his training, he accompanied then-current safety supervisor Bernal as he conducted spot inspections at job sites, including ones on which Employee # 1 and the Foreman were working.

> Q. Did you visit any job site that [Employee #1] was working at during November 2013 to 2014?
>
> Jaramillo: Yes.
>
> Q. That was "yes"?

Jaramillo: Yes, sir.

Q. And was [the Foreman] the [acting] foreman at that time?

Jaramillo: Yes, sir.

Q. All right. And did you attend any safety meetings during that period of time with them?

Jaramillo: I can't recall. I mean, if it wasn't me, it was probably Julio but I can't recall myself personally.

Q. All right. And I thought that you testified that you and Julio would divide up and go out to about three sites per day; is that correct?

Jaramillo: Yes.

Q. Were you doing that in that time frame of November 13 to February 2014?

Jaramillo: When I was training, no, we would go out together. That's when we were training. I was riding around.

Q. So anytime you visited a job site where [the Foreman] and [Employee #1] were working, would you have been with Mr. Bernal?

Jaramillo: The first two months I was training. And after I was done training then I was on my own.

(Tr. 286-287.)

Secretary's counsel thoroughly cross-examined Jaramillo regarding instances for which Ramco might deem it acceptable for an employee working at a height of 15 feet or more to disconnect from all attachment points. In every instance, Jaramillo emphatically asserted Ramco's employees must be tied off 100 percent of the time and there are no circumstances in which that rule may be ignored (Tr. 300-302).

The Secretary also failed to establish Ramco's supervision was inadequate. As noted, safety Supervisor Bernal conducted spot inspections of Ramco's worksites (Tr. 286-287). The Foreman had personally trained Employee #1 in the use of fall protection and considered him "one of my best employees regarding safety" and he had never failed to tie off (Tr. 220). Employee #1 demonstrated at the hearing that his supervisor had adequately trained him in the use of fall protection.

Q. And when you unhooked yourself from that line, is that how [the Foreman] had taught you to do it?

Employee: No, that's not correct.

Q. How had [the Foreman] taught you to unhook and hook onto another safety line?

> The Employee: If I am hooked to the cable, in order to hook up to another cable, I grab the line. And when I am hooked to that cable, then I release the other. [Indicating]

(Tr. 189.)

Constructive Knowledge

Constructive knowledge means the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions. "An inquiry into whether an employer was reasonably diligent involves several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Stahl Roofing Inc*., 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003). The factors of adequate work rules, training programs, and supervision were discussed under the foreseeability analysis above.

The Secretary failed to establish Employee #2, acting as co-supervisor, had constructive knowledge of Employee #1's momentary failure to tie off. The Secretary adduced no evidence showing Employee #2 had the opportunity, with the exercise of reasonable diligence, to detect Employee #1's safety lapse and have him correct it. *See, e.g., Kaspar Wire Works, Inc.,* 18 BNA OSHC 2178, 2196-97 (No. 90-2775, 2000) (concluding that "in the absence of any evidence indicating how long the violative conditions had been in existence, we are unable to evaluate whether [the employer] could have known of them even if it had been reasonably diligent in inspecting its equipment"), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001); *Ragnar Benson, Inc.,* 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999) (concluding that constructive knowledge was not shown where lack of evidence of violation's duration precluded Commission from determining whether employer could have known of conditions with exercise of reasonable diligence).

The Secretary also failed to establish Ramco did not anticipate hazards to which employees may be exposed and to take measures to prevent the occurrence of violations. Ramco anticipated the hazard of falling from the rooftop and took the preventive measure of installing anchor points and requiring its employees to tie off 100 percent to the anchor points using their personal fall arrest systems. It is undisputed "the fall protection equipment that was needed was all in place and available for employees on this job site," (Tr. 114) and that Employee #1 "had his harness on, had his lanyard on and had access to an attachment points that he could connect them to[.]" (Tr. 138.)

The Court finds the Secretary failed to establish constructive knowledge. The Secretary has failed to establish Ramco had either actual or constructive knowledge of Employee #1's momentary failure to tie off. Therefore, Item 2 is VACATED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Item 2 of Citation No. 1, alleging a repeat violation of § 1926.760(a)(1, is VACATED and no penalty is assessed.

/s/

Date: March 30, 2015

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