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. J. Reed Constructors, Inc.,[1] Respondent.	OSHRC Docket No. **12-2152**

Appearances:

Josh Bernstein, Esquire, U. S. Department of Labor, Office of the Solicitor, Dallas, Texas
For the Complainant

John S. McLindon, Esquire, Walters Papillion Thomas Cullens, LLC., Baton Rouge, Louisiana
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

J. Reed Constructors, Inc., (JRC) contests a one-item Citation and Notification of Penalty issued to it by the Secretary on October 5, 2012. The Secretary issued the Citation and Notification of Penalty following an inspection conducted by Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO) Jason Coffey on July 31, 2012, at a worksite in Plaquemine, Louisiana.

Item 1 of the Citation alleges a repeat violation of 29 C.F.R. § 1926.453(b)(2)(v), for permitting employees to perform work from an aerial lift without adequate fall protection. The Secretary proposed a penalty of $14,000.00 for Item 1. JRC timely contested the Citation and Notification of Penalty.

A hearing was held in this matter on August 21, 2013, in Baton Rouge, Louisiana. The parties stipulate the Commission has jurisdiction over this proceeding under § 10(c) of the

[1] Pleadings and orders in this case have identified Respondent as J Reed Constructors, Inc., without a period in the corporate name. Filings with the Louisiana Secretary of State's Office, however, reveal that the proper name for this company includes a period. Accordingly, the case caption is hereby amended to reflect J. Reed Constructors, Inc., as the correct name for the Respondent in this matter.

Occupational Safety and Health Act of 1970 (Act) and that it is an employer covered under § 3(5) of the Act (Tr. 12). The parties have filed post-hearing briefs. JRC concedes its employees violated the cited standard, but contends it was unaware of the violation. JRC also asserts the affirmative defense of unpreventable employee misconduct.

For the reasons discussed below, Item 1 of the Citation is AFFIRMED as a repeat violation of § 1926.453(b)(2)(v) and a penalty of $14,000.00 is assessed.

Background

Reed Luneau is the owner and president of JRC. His parents founded the company in 1984. Originally JRC acted as a subcontractor specializing in erecting metal buildings. In 2000, Luneau began working for the company. Under his guidance, JRC branched out into general commercial contracting (Tr. 28, 201).

On July 13, 2012, JRC was acting as the general contractor on a project to renovate the entrance to a school on St. Louis Road in Plaquemine, Louisiana. JRC's superintendent on the site was Blaine Smith (Tr. 147).[2] Smith was overseeing six JRC employees and twenty-five subcontractors on July 31, 2012. By that time, JRC had been working on the project for approximately six months (Tr. 65, 155, 157, 179).

That day, CSHO Coffey was driving by the renovation project when he observed two workers in an aerial lift applying Tyvek sheeting to the exterior walls of the school entrance. The aerial lift was raised approximately 35 feet high. The workers were not tied off (Exh. C-1; Tr. 98-99). CSHO Coffey parked nearby and approached the worksite on foot. He took several photographs of the site and then sought out a representative of the general contractor. He found Smith inside the school building, in a room he had taken over as his office during the project (Tr. 100-101). CSHO Coffey held an opening conference with Smith and showed him the photographs he had taken. Smith acknowledged that the workers photographed applying Tyvek sheets from the aerial lift were JRC employees (Tr. 67). JRC had fall protection equipment (body harnesses and lanyards) available for use on the site (Tr. 186).

JRC's work day begins at 7:00 a.m. (Tr. 72). CSHO Coffey arrived at the site at approximately 3:30 (Tr. 104). CSHO Coffey asked Smith how long the two employees had been

[2] Smith testified his full name is "Paul Blaine Smith" (Tr. 63). CSHO Coffey identified JRC's superintendent as "Mr. Blaine" and referred to him as such throughout his testimony (Tr. 101). The witnesses and the parties' counsel also referred to the superintendent as "Blaine" or "Mr. Blaine." He will be referred to as "Smith" in this Decision.

working in the aerial lift. Smith indicated he did not know because another subcontractor had been using the lift earlier in the day and he was not aware of when the JRC crew took possession of it (Tr. 158). Another JRC employee (Employee #1) was in the immediate area. Smith told CSHO Coffey to ask Employee #1 how long the JRC employees had been in the aerial lift (Tr. 105). Employee #1 informed CSHO Coffey that the JRC employees were "at least, in the aerial lift for six hours" (Tr. 106).[3]

The Secretary previously had issued citations to JRC for violations of § 1926.453(b)(2)(v) in 2008 and 2009 (Exhs. C-3 and C-5). JRC did not contest the citations and agreed to pay reduced penalties in settlement of them. The citations became Final Orders of the Commission (Exhs. C-2 and C-4).

The Citation

Item 1: Alleged Repeat Violation of § 1926.453(b)(2)(v)

Item 1 of the Citation alleges:

> On or about July 31, 2012; on the west side of the jobsite, employees were allowed to perform work while utilizing an aerial lift without adequate fall protection. Employees were observed standing in an aerial lift at a height of approx. 35 ft. without the use of personal fall protection while installing Tyvek commercial wrap to an exterior wall of the building.

Section 1926.453(b)(2)(v) provides:

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

JRC Concedes the First Three Elements of the Secretary's Burden of Proof

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.

[3] Both parties attempted to elicit testimony from Employee #1 at the hearing (Tr. 87-92, 197-200). Employee #1 asserted he did not recognize CSHO Coffey and had not spoken with him during the inspection. In fact, Employee #1 denied he knew anything about anything: "See there? I don't remember seeing over there, OSHA over there. I don't see nothing. Nobody told me nothing, you know. . . . I'm busy, you know. You know, I'm working. I remember seeing—I don't remember if somebody told me something, you know. I don't remember seeing over there. I don't remember. Nobody told me nothing" (Tr. 91). The undersigned closely observed the demeanor of Employee #1. He was ill at ease and clearly regretted his onsite conversation with CSHO Coffey. It is determined that, rather than give testimony adverse to his employer (whose president was sitting in the hearing room), Employee #1 resorted to the "I know nothing" defense. The undersigned credits CSHO Coffey's testimony that Employee #1 told him the JRC employees had been in the aerial lift for six hours.

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

JRC contests only the knowledge element of the Secretary's burden of proof. JRC stipulated "that the cited standard is applicable" (Tr. 12). Section 1926.450(a), the definition section of Subpart L, provides: "the criteria for aerial lifts are set out exclusively in § 1926.453." It is undisputed JRC's crew was working from an aerial lift. JRC admitted its employees failed to comply with the terms of § 1926.453(b)(2)(v) (Tr. 40, 171). JRC stipulated that its employees had access to the violative condition and "the cited hazard was sufficient to cause serious bodily injury or death" (Tr. 12-13). JRC reiterates in its post-hearing brief, "There is no dispute that the two employees . . . were in a manlift and were not clipped in properly pursuant to OSHA regulations" (JRC's brief, p. 2). JRC asserts only that "the owners and the management of the company did not know that the violation was going on" (Tr. 13).

Knowledge

A supervisor's knowledge of a subordinate's misconduct is imputable to the employer. *Comtran Group, Inc.,* 722 F.3d 1304, 1317 (11th Cir. 2013). Smith is the only JRC employee on the site identified as a supervisor. He was inside the school building in his makeshift office when CSHO Coffey arrived at the worksite on July 31, 2012. There is no evidence he observed the JRC employees working from the aerial lift without fall protection (Tr. 100-101). The record establishes Smith did not have actual knowledge of the JRC employees' failure to tie off while working from the aerial lift.

The Secretary argues that Smith had constructive knowledge of the employees' violative conduct. Constructive knowledge means the employer either knew of 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). Each of the listed factors is addressed in turn:

Work Rules and Training Programs

JRC did not provide safety training classes for the employees who were in the aerial lift (Tr. 212-213). JRC has a written Safety Manual (Exh. R-3). It distributes copies of the Safety Manual to the superintendents on its worksites so that they can go over the safety rules with

JRC's employees "as needed" (Tr. 205). Nonsupervisory employees are not given their own copies of the Safety Manual (Tr. 206).

The Safety Manual states: "Safety harnesses must be worn and tied off 100% whenever you are working 6 feet above grade" (Exh. R-3, Tab B). This rule is listed along with other general safety rules, such as admonitions not to wear tennis shoes and tank tops and not to engage in horseplay. JRC does not have a written work rule specifically addressing the requirement to tie off while working from an aerial lift (Tr. 173-174).

The two employees observed in the aerial lift spoke Spanish as their first language. JRC does not have a Spanish version of the Safety Manual (Tr. 76). Smith stated that if an employee does not speak English very well, he is paired with another employee who does: "[U]sually, we paired them up. I don't know if it was intentional or not but usually one guy spoke a little bit better than the other" (Tr. 151-152). Smith also testified he could communicate at a rudimentary level in Spanish: "And I do know some Spanish like, you know, *cuidado*, which means 'be careful, caution.' *Despaseo* means 'work slow.' *Trabajo desposeo.* So I can communicate somewhat with these guys" (Tr. 152).

Supervision of Employees

Smith explained why he was not able to check on the JRC employees in the aerial lift during the six hours they were applying the Tyvek sheets to the exterior wall:

> So in a typical day, I'm pretty much all over the place. Sometimes I have to sit down with guys 30 minutes, you know, to read a set of plans of look at plans or make some phone calls to the architect or engineer to find out information that these guys need to do in order to perform their scope of work.
>
> So I can't just, you know, sit there and watch just one set of guys work. I'm really kind of all over the place. This job is, like, 700 feet long and 250 feet deep and the building is 12,000 square feet and it's two stories.
>
> So I may be upstairs, downstairs, upstairs, downstairs, go in, come out, you know, just trying to coordinate it and watch what everybody is doing and make sure they do a good job and make sure they do a safe job.

(Tr. 157). Smith acknowledged he was "super busy" the day of the inspection (Tr. 173).

Luneau testified, "We tell the guys what they need to do and when they need to do it and what safety equipment is provided for them, but I can't be everywhere all the time" (Tr. 210). He also stated, "[T]here's no way to babysit everybody" (Tr. 211).

Anticipation of Hazards

JRC has a history of employees failing to tie off while working from aerial lifts. On January 15, 2008, an OSHA CSHO inspected a JRC worksite in Covington, Louisiana. The Secretary issued a citation for a serious violation of § 1926.453(b)(2)(v) following the inspection. The alleged violation description (AVD) from that citation states:

> The employer allowed his employee to install insulation to the front of the building working out of a JLG aerial lift at a height of 24 feet without a body belt with lanyard (restraining device) nor a full body harness with lanyard (personal fall protection system).

On November 14, 2008, an OSHA CSHO inspected a JRC worksite in Waco, Texas. The Secretary subsequently cited JRC for a repeat violation of § 1926.453(b)(2)(v). The AVD from that citation states:

> On or about November 14, 2008, and times prior thereto, at the construction site: Two employees, installing side paneling, were working from the platforms of the Genie S-85 and S-65 articulating extensible aerial lifts and were not using personal fall arrest systems or fall restraint systems attached to the boom or basket.

Measures to Prevent Occurrence of Violations

According to JRC's policy, superintendents are supposed to develop a series of Job Safety Analysis (JSA) forms for each worksite. JRC's Safety Manual provides:

> The Job Safety Analysis (JSA) program is cornerstone to the safety program at JRC. The intent of the JSA program is to create an exchange between all levels of personnel and identify 3 key considerations in the performance of a task. The 3 considerations include (1) a step by step breakdown of the task, (2) identification of the potential hazards associated with each step, and (3) precautions to be taken to minimize injury risks.

(Exh. R-3, Tab B). JRC's Safety Manual states, "Each foreman is expected to develop, revise or review a minimum of 4 JSAs per month. Upon completion the JSA should be submitted to the project manager for review and approval" (Exh. R-3, Tab B).

Smith did not develop any JSAs for the school renovation project. He testified he failed to develop any JSAs in the six months prior to the OSHA inspection and did not develop any during the three months remaining after the inspection (Tr. 176-177). JRC president Luneau testified he was aware Smith was not submitting JSAs for the project but Luneau neither reprimanded Smith nor reminded him of the company's "cornerstone" program (Tr. 216-217).

JRC did not discipline the two employees for working in the aerial lift without fall protection, other than Smith yelling at them (Tr. 80-81, 153, 159). The employees were not

suspended, docked pay, or written up. When asked if he fired the employees, Smith replied, "No. A good worker is a good worker" (Tr. 194).

Analysis

The record establishes JRC failed to adequately train its employees in fall protection safety, failed to adequately monitor its employees' use of fall protection despite a history of employees failing to tie off while working from an aerial lift, and failed to take measures to prevent fall protection violations. JRC did not have a specific work rule requiring employees to tie off while working from an aerial lift. Its safety program was communicated to its employees at the discretion of the supervisor. Some employees could not speak English well. The rudimentary Spanish Smith testified he could speak was not adequate to convey specific safety rules to the non-English speaking employees. Smith could not tell the CSHO how long the employees had been in the aerial lift because he apparently had not gone outside of the school building since the beginning of the work day. The aerial lift was in plain view. The CSHO observed the employees working without fall protection from his vehicle as he drove on a street approximately 100 feet away (Tr. 100). JRC did not discipline the employees in the aerial lift.

Under these circumstances, it is determined that JRC failed to exercise reasonable diligence to prevent its employees' violative conduct. The company was on notice that its employees at times failed to tie off while working from aerial lifts. JRC took no steps to ensure the aerial lift crew was monitored and did not discipline the crew once the violation was discovered. The failure to discipline employees for violating basic safety rules (JRC has a 100 percent tie off rule) signals to the employees that the company does not take its safety program seriously. JRC's lax monitoring and lack of discipline demonstrate an absence of reasonable diligence. *Lake Erie Constr. Co.,* 21 BNA OSHC 1285 (No. 02-0520, 2005) (Commission finds constructive knowledge based in part on employer's failure to utilize disciplinary program for inadequate fall protection).

The violative activity was in plain sight. Smith spent the day inside the building on which the employees were working.

> The Commission has held that "the conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area warrant a finding of constructive knowledge." *Kokosing Constr. Co*., 17BNA OSHC1869, 1871, 1993-95CCH OSHD ¶ 31,207, p.43,723 (No. 92-2596, 1996). Additionally, constructive knowledge may be found where a supervisory

> employee was in close proximity to a readily apparent violation. *Hamilton Fixture*, 16 BNA OSHC1073, 1089, 1993-95CCH OSHD ¶ 30,034, p.41,184 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) (unpublished).

KS Energy Services, Inc., 22 BNA OSHC 1261, 1265-1266 (No. 06-1416, 2008).

It is determined that Smith would have known of the violative conduct of the JRC employees in the aerial lift with the exercise of reasonable diligence. The Secretary established constructive knowledge of the violative conduct. JRC violated § 1926.453(b)2)(v).

Employee Misconduct Defense

JRC argues its employees engaged in employee misconduct when they failed to tie off while working from the aerial lift. "To establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule." *Schuler-Haas Electric Corp.,* 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006).

JRC's employee misconduct defense fails for most of the same reasons the Secretary's case for constructive knowledge succeeded. JRC had a work rule requiring employees to tie off when working at elevations of six feet or more. Otherwise, JRC failed to establish the elements of its affirmative defense.

JRC failed to adequately communicate its work rule to its employees. The company does not issue copies of its Safety Manual to employees and does not require its supervisors to go over the safety manual with their crews. Rather, the supervisors determine what parts of the Safety Manual they will share with their employees "as needed" (Tr. 205). JRC does not have a Spanish version of the Safety Manual although it employs Spanish-speaking employees who do not speak English well. Smith lacks proficiency in Spanish. JRC produced no documentation that it trained any of its employees in the use of fall protection (Tr. 56).

JRC failed to take reasonable steps to discover violations of its six-foot rule and utterly failed to enforce the rule. Although JRC had its JSA program in place, it did not implement it. Smith neglected to submit a single JSA for the nine-month project, without repercussions. JRC did not discipline employees who were found to be in violation of its six-foot rule. Luneau admitted JRC did not follow its own disciplinary policy (Tr. 48). When asked if he agreed that because JRC "doesn't really follow its own policy, that your discipline program is really not effective," Luneau replied, "Correct" (Tr. 49).

Luneau testified regarding the effectiveness of its safety program:

> Q. JSAs should have been done at this work site, correct?
>
> Luneau: Yes.
>
> Q. And that would have been the management tool that would have been a safe and effective way to train and discuss these hazards with these employees, correct?
>
> Luneau: Yes.
>
> Q. And since there were no JSAs, in that way, you guys really violated your own policy, correct?
>
> Luneau: Yes.
>
> Q. And you agree that this is yet another reason as to why your safety and health program was not effective at the time?
>
> Luneau: Yes.

(Tr. 55).

JRC has failed to meet its burden of proving the employee misconduct defense. Item 1 is affirmed.

Repeat Classification

The Secretary classified Item 1 of the Citation as a repeat violation. In order to establish a repeat violation, the Secretary must show that at time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.,* 6 BNA OSHC 1061, 1063 (No. 16183, 1979).

The day of the inspection, July 31, 2012, two Commission final orders existed against JRC for the violation of the same standard at issue here, § 1926.453(b)(2)(v) (Exhs. C-2 through C-5). In both previous cases, JRC's employees were working from aerial lifts installing material on the exterior of a building.

The Secretary has established two final orders existed for violations almost identical to the violation at issue here. Item 1 is properly classified as a repeat violation.

Penalty Determination

> The Commission "is the final arbiter of penalties . . . ." *Hern Iron Works, Inc*., 16 BNA OSHC 1619, 1622, 1993-95 CCH OSHD ¶ 30,363, p. 41,882 (No. 88-1962, 1994), aff'd, 937 F.2d 612 (9th Cir. 1991) (table); see *Valdak Corp*., 17 BNA OSHC 1135, 1138, 1993-95 CCH OSHD ¶ 30,759, p. 42.742 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), aff'd, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives

> due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc*., 19 BNA OSHC 1374, 1378, 2001 CCH OSHD ¶ 32,320, p. 49,478 (No. 99-0322, 2001), aff'd, 34 F. App'x 152 (5th Cir. 2002) (unpublished). When determining gravity, the Commission considers the number of exposed employees, the duration of their exposure, whether precautions could have been taken against injury, and the likelihood of injury. *Capform*, 19 BNA OSHC at 1378, 2001 CCH OSHD at p. 49,478.

M.V.P. Piping Co., Inc. (No. 12-1233, 2014).

The Secretary proposed a penalty of $14,000.00. JRC had fewer than 25 employees at the time of the inspection (Tr. 110). Had the two employees at issue here fallen from a height of 35 feet, the likely result would be death or serious physical injury. They were exposed to the fall hazard for approximately six hours. The gravity of the violation is high.

In 2008, the Secretary and JRC entered into an Expedited Informal Settlement Agreement under which JRC paid $360.00 rather than the $600.00 penalty originally proposed by the Secretary (Exhs. C-4 and C-5). In 2009, the Secretary and JRC entered into a Settlement Agreement under which JRC paid $3,000.00 rather the $4,000.00 penalty originally proposed by the Secretary (Exhs. C-2 and C-3). Neither penalty seems to have impressed JRC with the gravity of the violative conduct. Upon consideration of the "double repeat" nature of the violation in the instant case, the undersigned determines that assessment in full of the Secretary's proposed penalty of $14,000.00 is warranted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that Item 1 of the Citation, alleging a repeat violation of § 1926.453(b)(2)(v), is AFFIRMED and a penalty of $14,000.00 is assessed.

/s/

Date: March 7, 2014 **JUDGE SHARON D. CALHOUN**