United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
721 19th Street, Room 407
Denver, Colorado 80202

Secretary of Labor, Complainant, v. Gale Insulation, Respondent.	OSHRC DOCKET NO. 08-1107

Appearances:

Lindsay A. Wofford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, California
For Respondent

Before: Administrative Law Judge James R. Rucker, Jr.

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Gale Insulation ("Respondent") worksite in El Paso, Texas on July 11, 2008. As a result of that inspection, OSHA issued one citation to Respondent alleging a serious violation of 29 C.F.R. 1926.501(b)(13). A penalty of $2,500 was proposed for the violation. Respondent timely contested the citation and an administrative trial was held February 26, 2009, in El Paso, Texas. Both parties have filed post-trial Memorandums of Points and Authorities and this case is ready for disposition.

Jurisdiction

The parties agree that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The parties also agree that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *(Complaint and Answer).*

Factual Findings

On July 11, 2008, OSHA Compliance Safety and Health Officer Jessica Martinez was driving around El Paso, Texas with an OSHA trainee, looking for safety and health violations relating to OSHA's local emphasis programs. (Tr. 8). CSHO Martinez observed and photographed an employee working on the roof of a newly constructed home in a residential neighborhood. (Tr. 54, 57; Ex. C-1, C-2). She then entered the worksite and initiated an OSHA inspection, which lasted approximately thirty minutes. (Tr. 60, 65).

The employee on the roof, Felix Olivos, was accompanied by Luis Gasson, who was picking up trash and debris on the ground. (Tr. 17-18, 24). Mr. Olivos was in the process of installing chimney cap flashing, a process which takes about 15-20 minutes. (Tr. 20, 25). Both men were employed by Respondent. (Tr. 15-16, 23). Mr. Olivos was observed standing on the sloped roof, approximately twenty-five feet above the ground, without using any type of fall protection. (Tr. 57-58 ; Ex. C-1, C-2). There was no guardrail, safety net system, or personal fall arrest system. (Tr. 68; Ex. C-1, C-2). At the time of the inspection, the company truck being used by Mr. Olivos and Mr. Gasson contained a harness and two types of lanyards. (Tr. 26, 90-91, 116; Ex. R-2). One of the lanyards was a rope which could be secured to the chimney itself to prevent employees from traveling more than two feet from the chimney being worked on. (Tr. 108-109).

Respondent primarily employs two types of workers: chimney installers and insulation installers. Respondent's typical practice for chimney installers, like Mr. Olivos and Mr. Gasson, was to receive daily work assignments and then travel from site to site performing duties for the Respondent. (Tr. 21). On

larger jobs, and especially when insulation was being installed, Respondent frequently had supervisors on site. (Tr. 28). There was no supervisor at this location.

During the trial, Mr. Olivos stated that he believed Mr. Gasson to be his supervisor. (Tr. 17, 25). However, Mr. Olivos' testimony squarely contradicts Kyle Millet, Respondent's Division Manager. (Tr. 17, 20, 97, 114). Mr. Millet testified that they were both non-supervisory installers, who received the exact same rates of pay, with no supervisory responsibilities. (Tr. 96-97, 114). I credit the testimony of Mr. Millet on this issue and find that both Mr. Olivos and Mr. Gasson were non-supervisory chimney installers.[1] In fact, Respondent's management did not even learn that an OSHA inspection had occurred until they were contacted by OSHA five days later.[2] (Tr. 66, 101). Apparently, neither Mr. Olivos nor Mr. Gasson ever informed anyone of the inspection.

During the inspection, Mr. Olivos told Compliance Officer Martinez that he was not using a safety harness and lanyard because there was nothing on the roof to which it could be secured. (Tr. 26). Though his testimony was conflicted on this issue, Mr. Olivos finally conceded that he had received fall protection training but maintained that he was never specifically instructed on the use of harnesses. (Tr. 31-37). He testified he did not remember ever wearing a safety harness on any previous jobs. (Tr. 36-37). He did acknowledge, however, that fall protection was the topic of discussion at "a lot of the safety meetings." (Tr. 44-45).

Mr. Olivos eventually admitted during the trial that he knew he was supposed to be wearing a harness, but claimed that he did not know there was one in his truck. (Tr. 43, line 13). He stated that if he had known there was a safety harness in the truck, he would have used it that day. (Tr. 43). However, testimony, documentation, and photographs presented at trial established that there was a harness and

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[1] The Secretary apparently concedes that Mr. Gasson was not a supervisor because she does not argue the point in her post-trial brief.

[2] CSHO Martinez provided Mr. Olivos with an opportunity at the beginning of the inspection to contact Respondent's management to advise them of her presence on site. Mr. Olivos declined. (Tr. 60).

lanyard in the truck that day, that Respondent's trucks were typically equipped with harnesses and lanyards, and that employees completed a daily checklist which confirmed, *inter alia*, that all required safety equipment was in their truck. (Tr. 22, 94-95, 108-109; Ex. R-2).

Respondent also produced a written Job Safety Analysis detailing the procedures for installing chimney caps - the work being performed by Mr. Olivos during this inspection. (Tr. 93, 95; Ex. R-1). It requires employees to "use [a]safety harness" when "installing cap, collar, and flashing." (Ex. R-1). Although the Job Safety Analysis is not provided to employees, it is used as a guide to conduct employee training, in both Spanish and English. (Tr. 33, 110).

Mr. Olivos' denial of training on safety harnesses and claim that he had never worn one previously squarely contradicted the testimony of Respondent's Safety Coordinator, Shaun Selby. Mr. Selby's duties include conducting employee safety training (in Spanish and English), leading weekly safety meetings, and visiting jobsites to ensure safety compliance. (Tr. 28, 74, 118, 126-128, 131). Mr. Selby personally trained both Mr. Olivos and Mr. Gasson on Respondent's fall protection policies on December 12, 2007. (Tr. 122-123; Ex. R-3). Mr. Selby explained that during this training, employees were required to put on their harnesses and lanyards to verify that they knew how to properly use them. (Tr. 122-125).

To verify that employees are following Respondent's safety rules, Mr. Selby visits chimney-related jobsites once a week and insulation-related jobsites three times a week. (Tr. 129). He usually completes an audit form reflecting his visits. (Tr. 127; Ex. R-4). When he discovers safety violations, he removes employees from the situation, requires them to correct the condition, and issues oral or written reprimands depending on the situation. (Tr. 129-132). Respondent had a progressive discipline policy in effect at the time of the inspection which ranged from oral warnings to termination. (Tr. 98; Ex. R-6). Mr. Olivos had actually been observed properly using his safety harness during one of Mr. Selby's safety audits two months before this inspection. (Tr. 135-137; Ex. R-4). He testified that he has no doubt that Mr. Olivos knew he was supposed to be tied off while working on the roof that day. (Tr. 132). Mr. Selby stated that "even if

you're going up there just to switch out a cap really quick, there's no exceptions because an accident can happen in seconds." (Tr. 132).

With regard to the content of Respondent's fall protection training, specific training on the use of safety harnesses, Mr. Olivos' past use of safety harnesses, the presence of a safety harness and lanyard in the truck, and Mr. Olivos' knowledge of the presence of a safety harness in the truck, I credit the testimony and corroborating documentation of Mr. Selby and Mr. Millet over the inconsistent testimony of Mr. Olivos.

Discussion

To establish a *prima facie* violation of the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Citation 1 Item 1

29 C.F.R. 1926.501(b)(13) provides:

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

This standard mandates the use of fall protection when residential construction employees are six feet or more above the next lower level. The Secretary established that Respondent's employee was

working twenty-five feet above the ground. The standard clearly applies to the cited condition.[3] The record also establishes that Respondent's employee was not using any type of fall protection while performing his work. Therefore, the standard was violated and employee exposure to the hazardous condition was established.

The primary issues in dispute are: (1) whether or not the employer knew, or with the exercise of reasonable diligence, should have known of the violative condition, and (2) whether the exposed employee engaged in unpreventable employee misconduct.

The Secretary argues that Respondent had constructive knowledge of this hazardous condition. However, there was no evidence of a supervisor working on site or having visited the site that day. There was no evidence of Respondent having prior knowledge of Mr. Olivos' failure to use his harness and lanyard on other jobsites. Mr. Olivos received fall protection training from Respondent's Safety Coordinator and was specifically required to demonstrate his ability to properly use his safety harness during the training. Mr. Olivos had even been specifically observed by Respondent's Safety Coordinator properly using his harness on at least one previous jobsite. Finally, Respondent's Safety Coordinator frequently visited Respondent's jobsites to ensure and document safety compliance.

The Commission has stated that "an employer's duty is to take reasonably diligent measures to inspect its worksites and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard." *Texas A.C.A. Inc.*, 17 BNA OSHC 1048, 1993-1995 CCH OSHD ¶30,653 (No. 91-3467, 1995). Considering the totality of the circumstances, I find that Respondent exercised reasonable diligence in training and monitoring for fall protection safety compliance and it would be inappropriate, based on this record, to charge Respondent with constructive knowledge of this condition. The Secretary failed to establish that Respondent knew,

[3] The exceptions referenced in the standard are apparently not at issue in this case because neither party presented any evidence or argument relating to them.

or with the exercise of reasonable diligence, should have known of the violative condition. Since the Secretary failed to establish all of the elements of a *prima facie* violation, Citation 1 Item 1 must be vacated.

Affirmative Defenses

Typically, the Secretary's failure to establish all of the elements of a *prima facie* violation would end the analysis. However, in this instance, I will briefly address the employer's alleged affirmative defense of unpreventable employee misconduct. To meet the burden of an employee misconduct defense, the Respondent must prove that it: (1) established work rules designed to prevent the violation, (2) adequately communicated the rules to employees, (3) has taken steps to discover violations of the rules, and (4) effectively enforced the rules when violations were discovered. *W.G. Yates & Sons Const. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006).

Respondent had a work rule requiring the use of safety harnesses and lanyards any time employees were working on a roof. The rule was effectively communicated to employees in Spanish and English. Respondent also required employees, during fall protection training, to actually put harnesses and lanyards on to ensure they knew how to properly use them. In addition, follow-up discussions on the use of fall protection were periodically conducted during weekly safety meetings. Respondent's Safety Coordinator frequently visited jobsites to ensure compliance with Respondent's rules and policies. These visits were documented. When violations of safety procedures were discovered, employees were corrected through the application of a progressive discipline policy which ranged from oral warnings to termination. The exposed employee in this instance was present on some of the jobsites audited by Respondent's Safety Coordinator and was specifically observed on at least one prior occasion properly using his harness and lanyard. There was no evidence that the exposed employee had ever been observed not using his safety harness when working conditions required it. Lastly, and perhaps most importantly, Mr. Olivos testified that he knew he was supposed to be wearing his safety harness that day.

Therefore, I find that even if the Secretary had established a *prima facie* violation, Respondent rebutted that evidence by establishing the elements of unpreventable employee misconduct in this instance. Respondent did not argue the merits of any other affirmative defenses. Therefore, any other pled affirmative defenses are deemed abandoned.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1 is VACATED.

Date: May 11, 2009
Denver, Colorado

/s/_____
James R. Rucker, Jr.
Judge, OSHRC