Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. **00-1331**
	:	
Brand Scaffold Builders, Inc.,	:	**EZ**
Respondent.	:	

APPEARANCES:

Kathleen G. Henderson, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Bradley R. Byrne, Esquire
Adams & Reese, L.L.P.
Mobile, Alabama
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Brand Scaffold Builders, Inc. (Brand), a nationwide construction company engaged in the business of erecting and dismantling scaffolding, was working at the International Paper Company in Mobile, Alabama. On May 24, 2000, Occupational Safety and Health Administration (OSHA) Compliance Officer Dimitrius Critpoulous of the Mobile OSHA Area Office inspected the International Paper mill in Mobile. As a result of this inspection, Brand was issued a serious citation alleging a violation of 29 C. F. R. § 1926.501(b)(1), for failing to provide fall protection by the use of guardrails or personal fall arrest system on a walking surface 54 feet above the ground. Brand timely contested the citation.

This case was designated for E-Z trial procedures under 29 C. F. R. § 2200.200, *et seq.* The hearing was held in Mobile, Alabama, on November 8, 2000. Brand admits jurisdiction and coverage (Pre-hearing Conference Order). Brand further admits that two employees walked across three or four 2-inch by 4-inch boards 54 feet above the ground without fall protection.

Brand denies it violated that standard because it lacked knowledge of the violation and asserts an unpreventable employee misconduct defense.

For the following reasons, the violation is vacated.

Background

In February or March 2000, Brand began working at International Paper (IP) for several different contractors erecting scaffolding, including scaffolding inside and outside the post-consumer waste tank (tank), in order for the tank to be sandblasted and painted (Tr. 9). The tank is 54 feet tall and did not have a top (Tr. 14). It stands right next to the chemical furnace building (building).

Brand's supervisor was Rodney Nall who supervised a crew of about fifteen employees at this site (Tr. 9). These employees were lead carpenters, carpenters and helpers (Tr. 46). On the day of the inspection, Brand was modifying the scaffolding by dismantling and re-erecting part of it (Tr. 14). Nall testified that he instructed the crew to work on re-erecting the scaffolding at the top of the tank by adding another deck on top of the scaffold (Tr. 18-19, 42). He did not give them specific instructions on how to do this work (Tr. 21).

Compliance Officer Critopoulos conducted the walk-around inspection with IP. While he was inspecting the site, he looked up and saw Wilson walking on three boards lying between the top of the tank and the top of the building over 50 feet above the ground (Tr. 88). There were no guardrails, and Wilson was not using any safety arrest system. Compliance Officer Critopoulos told IP to bring the employee down and find out who he was (Tr. 89). IP found Brand's supervisor Nall and its construction manager, Kody McCord (Tr. 90). Compliance Officer Critopoulos conducted an opening conference with them. Nall stated that he had just held a safety meeting that morning with his employees and that Wilson was not following the safety rules (Tr. 92). He further stated that he was not aware that any employees were on boards without fall protection until the compliance officer told him (Tr. 24).

DISCUSSION

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of the standard.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, or the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Alleged Violation of § 1926.501(b)(1)

The citation alleges that Brand did not provide fall protection for an employee who was walking on boards 54 feet above the ground. Section 1926.501(b)(1) provides:

> (b)(1) *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Brand does not dispute that this standard applies to it, that the standard was not complied with, and that an employee had access to the violative condition. Brand does contest that it knew or, with reasonable diligence, should have known of the violative condition.

Knowledge

The test for knowledge is whether "the employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). "Reasonable diligence involves several factors, including an employer's 'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.'" *Id.* at 1814

"Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

Actual Knowledge

There is no evidence of actual employer knowledge of the violative condition in this case. On the day of the inspection at the time of the incident, supervisor Nall was working at the manhole on the other side of the tank away from the incident (Tr. 47). During the day he did visual inspections of the worksite to make sure it complied with Brand's safety policy, but he could not watch everything that his crew did (Tr. 32, 37). Nall testified that he was unaware that boards were put between the building and tank (Tr. 22).

Constructive Knowledge

An employer who lacks actual knowledge can be charged with constructive knowledge. Constructive knowledge "may be imputed to an employer through a supervisory agent." *George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1933 (No. 94-3121, 1999).

Brand contends that the only supervisor on site was Nall and that the carpenters do not qualify as supervisors for imputation of knowledge. Nall testified that he was the one who gave work instructions to the crew every morning (Tr. 18-19).

Although Nall was the "supervisor" on the job site and gave daily instructions to the crew, throughout the day the carpenters gave instructions and supervised their helpers (Tr. 18, 46). Jerry Adams, manager of safety and training, testified that the carpenters who have passed the skills assessment program must tutor the helpers (Tr. 159). Adams admitted that the lead carpenter is the competent person on site rather than having the foreman do the impossible task of looking over fourteen or fifteen employees on the job (Tr. 172).

Wilson testified that an "unidentified" carpenter told him to go over to the top of the building and get material for re-erecting the scaffolding (Tr. 53, 59). To do this, he was instructed to lay boards between the tank and the building (Tr. 53). No one told Wilson to tie off or gave any other safety instructions (Tr. 56, 71). Nevertheless, Wilson said he did what he was told (Tr. 59). To make a walkway, Wilson put four boards about a foot wide each, side by side, not tied together, between the buildings (Tr. 57). He stated he used four boards because he thought four would be safe enough to go across (Tr. 70). Wilson told Adams that his carpenter mentor was present when he was walking on the boards (Tr. 161).

Wilson never identified the carpenter who told him what to do. Construction manager McCord made an inquiry to discover who the carpenter was, but no carpenter would admit that he told Wilson to lay boards between the tank and building (Tr. 74-75).

Constructive knowledge also involves the exercise of reasonable diligence by the employer. An "employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work." *Automatic Sprinkler Corporation of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980); *Texas A. C. A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995). Specifically, an employer must "determine what hazards exist or may arise during the work" and "must then give specific and appropriate instructions to prevent exposure to unsafe conditions." *Automatic Sprinkler* at 1387.

In this case, Brand knew that employees would need to work between the building and the tank because materials were stored on top of the building. Nall stated that he was aware that some materials (nailing boards) used for the scaffolding were stored on the building (TR. 19). Nall did not give specific instructions to the crew as to how to safely move materials from the roof of the building to the tank (Tr. 23, 44). In order to use these materials in the tank, someone would be required to go to the top of the building and transfer the materials to the tank. Nall testified that he assumed that the employees, who would be tied off, would stand on top of the building and pass the materials to other employees standing on the scaffolding on the outside of the tank, about an 8-foot reach (Tr. 20, 35). Brand should have anticipated that the employees might resort to walking over planks between the building and tank, and should have taken specific measures to ensure the safety of employees doing this.

The Secretary has established a violation of 29 C. F. R. § 1926.501(b)(1).

Employee Misconduct Defense

Brand asserts unpreventable employee misconduct as a defense. In order to establish the affirmative defense of employee misconduct, an employer must show:

> (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated the rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered.

Nooter Construction Co., 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

The employer must first show that it has established work rules designed to implement the requirements of the standard. *Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1780, 1784 (No. 91-2524, 1994). There is no dispute that Brand has work rules in its safety manual that are designed

to prevent the violation of § 1926.501(b)(1). According to "Brand Scaffolding Procedures" Procedure Number VII-12, 4.0, employees "shall utilize fall protection when leaving base surfaces except when working on an approved walking/working surface (i.e., having proper guardrails and midrails)" (Exh. R-1). Sections 7.0 and 7.1 of the "Procedures" state that "Brand team members shall not be allowed to use unprotected walkways to expedite materials" and that walkways must have handrails and midrails and if not, employees "shall be stationary and utilize 100% fall protection." (Exh. R-2). These work rules are specific enough to eliminate employee exposure to the fall hazard covered by the standard. *See Beta Construction Co.,* 16 BNA OSHC 1435, 1444 (No. 91-102, 1993).

Jerry Adams, who is the manager of safety and training for the southeast region (eight states) and has been with Brand for thirty years, wrote Brand's safety policies on fall protection. He stated that they exceed OSHA regulations and industry standards (Tr. 141). In addition to writing safety policies, he also teaches most of the training programs. He testified that he taught about 90 to 95 percent of the safety class Wilson attended, and he talked about fall protection (Tr. 142). In addition, he has worked in industry-wide efforts on safety including the Scaffold Industry Association, the National Fall Protection Society, the latest ACCOSH Committee, and works closely with OSHA (Tr. 138-139). Compliance Officer Critopoulos admitted that Brand had a good written accident prevention program and that Brand is a leader in fall protection in the scaffold industry (Tr. 116, 123).

The second requirement to prove the affirmative defense is that an employer must show that it has adequately communicated the rules to its employees. All Brand employees are required to take the training seminar. Adams holds monthly conferences with all of the supervisors and stresses Brand's safety policies (Tr. 145). Nall testified that most mornings on the IP job he had safety meetings with his crew; and, on the day of the incident, he did have a morning safety meeting (Tr. 32, 92). Wilson stated he took the training session on "Introduction to Scaffold" on February 26, 2000, and that it included training on fall protection (Exh. R-3; Tr. 60-61). He testified that, although he did not express any concerns about going across the boards or ask how to tie off while crossing, he knew it was a violation of Brand's policy (Tr. 54, 62). Wilson further stated that the carpenters will tell other employees to tie off when needed. Wilson himself has even told other employees to tie off (Tr. 67). This shows that Brand had adequately communicated its fall protection rules.

Third, an employer must show that it has taken steps to discover violations. "Effective implementation of a safety program requires 'a diligent effort to discover and discourage violations of safety rules by employees.'" *Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999). Adams stated that Brand's safety record for the southeast region was very good, having a total OSHA incident rate of .88 (the national industry average is 10 incidents) out of 1,285 employees in the region and 1,908,877 man-hours from January to October 2000 (Tr. 140-141). In addition to holding safety meetings with his crew almost every day, Nall visually inspected the worksite several times during the day (Tr. 32). The failure to discover a safety violation that occurs in a short period of time is not evidence that the employer was not diligent in its effort to discover violations. No facts were presented to suggest that Brand should have known Wilson would disobey Brand's safety rules. As soon as Nall became aware of the violation, it was corrected by installing handrails and removing all the materials from the roof of the building (Tr. 78).

Finally, the employer must effectively enforce the rules when violations have been discovered. "Evidence of verbal reprimands alone suggests an ineffective disciplinary system." *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 Fd. 3d 401 (6th Cir. 1997). Adams stated that in order to ensure that supervisors are enforcing safety, he examines employees' files for discipline documents (Tr. 146). Furthermore, he instructs all employees during training sessions to call him directly if anyone tells them to do something unsafe (Tr. 153). Brand does administer discipline for failure to follow safety rules. Adams instructs the employees that Brand enforces the safety policies with disciplinary action (Tr. 144). For this particular incident, Supervisor Nall was immediately disciplined. He was given a reprimand and was suspended from work for two or three days (Tr. 26). Laborer Wilson was also disciplined by receiving a written reprimand (Tr. 58).

Brand has established its unpreventable employee misconduct defense. Therefore, the violation is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The preceding 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 on the preceding decision, it is ORDERED that:

Item 1, alleging a violation of 29 C. F. R. § 1926.501(b)(1), is vacated.

/s/

STEPHEN J. SIMKO, JR.
Judge

Date: December 22, 2000