SECRETARY OF LABOR, Complainant, v. MEDICAL CONSTRUCTION GROUP, Respondent.	OSHRC DOCKET NO. 97-0691

APPEARANCES:

For the Complainant:
Matthew Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:
John K. Butler, Esq., Benoit, Alexander, Sinclair, Harwood & High, LLP, Twin Falls, Idaho

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Medical Construction Group (MCG), at all times relevant to this action maintained a place of business at Magic Valley Regional Medical Center, Twin Falls, Idaho, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On April 3, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of MCG's Twin Falls work site. As a result of that inspection, MCG was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest MCG brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On December 2, 1997, a hearing was held in Twin Falls, Idaho. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

29 CFR 1926.105(a): Safety nets were not provided when workplaces were more than 25 feet above the ground or water surface, or other surface(s) where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines or safety belts was impractical:

(a) When erecting steel beams employees of R&L Construction were exposed to approximately a 30 foot fall to the inside and outside of the building. The erectors were not using any type of fall protection exposing themselves to injury or death should they have fallen.

Facts

OSHA Compliance Officer (CO) Steve Gossman testified that when he arrived on MCG's Twin Falls work site on April 3 1997, he observed employees of R&L Construction connecting steel without using fall protection. At that time the ironworkers were working at heights below 25 feet (Tr. 87-89). Gossman returned to the site approximately one hour later, at which time the workers had moved to the next level, where they were connecting steel above 29 feet (Tr. 91, 108-112; Exh. C-6). Gossman videotaped the alleged violations, and proceeded to the MCG trailer, where he met with Dick Lindsay, MCG's project superintendent (Tr. 91, 154).

MCG, the general contractor, had only one employee on the Twin Falls work site, Superintendent Lindsay (Tr. 137, 185). Lindsay testified that his duties on the work site were basically to direct and schedule the work on the site, and to assure that materials arrive on the site as needed (Tr. 155).

Lindsay testified that R&L, as a subcontractor, was responsible for complying with all applicable safety regulations (Tr. 161-62). It is the policy of MCG, however, to provide a safe work environment for its tradespeople, and MCG reserves the right to ban from the work site any individual or company refusing to correct observed safety violations (Tr. 8, 74; Exh. R-2, Exhibit D). Superintendent Lindsay did take some responsibility for safety, conducting weekly toolbox talks, in conjunction with job meetings (Tr. 157). Lindsay selected and spoke on safety topics that he deemed pertinent to the work that was taking place on the site that week (Tr. 158). Lindsay told CO Gossman that he toured the project once daily looking for safety problems, which he would report to the subcontractor responsible (Tr. 96, 184-85, 191).

Lindsay was aware that OSHA generally required fall protection (Tr. 190). Lindsay admitted, however, that he was not familiar with OSHA regulations specifically applicable to steel erection, though the Twin Falls project was the third building he had supervised from the ground up (Tr. 161, 173, 179-80). MCG provided Lindsay with no formal safety instruction (Tr. 174). Though he did not know at what heights OSHA requires fall protection, Lindsay testified that he would have reported any worker he saw

who was not tied off to his supervisor, regardless of the height at which the employee was working (Tr. 190).

Lindsay testified that he was not aware that R&L workers were not tying off prior to CO Gossman's arrival in his trailer on April 3, 1997 (Tr. 161, 163). Gossman testified that he could see R&L employees at work from the window of the MCG trailer (Tr. 91-93). Lindsay admitted that he could see that the steel workers were not tied off when he looked out the trailer window (Tr. 166).

Kirt Upton, R&L's foreman, testified that R&L had a 100% tie off rule, and that he was unaware of any circumstances where R&L employees worked without tying off other than the instance videotaped by CO Gossman (Tr. 58, 65, 67, 70, 118). However, Tracy Francis, an R&L ironworker, testified that although R&L employees were supposed to be tied off at all times, they generally did not tie off unless they were stationary (Tr. 47-49). Francis admitted that the they were allowed to move from point to point without tying off despite the 100% tie off rule (Tr. 49-50). Francis testified that Upton was aware of some instances of non-compliance with the rule (Tr. 51).

Discussion

The existence of the cited conditions is not disputed. MCG argues that it should not have been cited, because no MCG employees were exposed to the hazardous conditions. Commission precedent, however, has long held that on a multi-employer site the general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. The general contractor is, therefore, responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity. *IBP Inc.,* 17 BNA OSHC 2073, 1997 CCH OSHD ¶31,296 (No. 93-3059, 1997).

MCG maintains that it could not have been expected to prevent cited violations of which it had no knowledge. MCG notes that, as part of its *prima facie case,* the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986).

The Commission has held that reasonable diligence includes adequate supervision of employees and the formulation and implementation of training programs and work rules designed to ensure that employees perform their work safely. *See; Mosser Construction Co.,* 15 BNA OSHC 1408, 1991-93 CCH OSHD ¶29,546 (No. 89-1027, 1991). It is clear from the record that MCG provided no meaningful supervision of structural steel workers. Project Superintendent Lindsay conducted only a single daily walkaround of the jobsite. Thus, he never observed R&L employees working without fall protection, though the steel

workers never used fall protection at heights below 25 feet,[1] and routinely failed to tie off above 25 feet except when stationary. The evidence establishes that the violation was ongoing and plainly visible from the window of the MCG trailer were Superintendent Lindsay spent most of his time. Moreover, Lindsay was unqualified to supervise R&L's training and/or work rules, because Lindsay was admittedly unfamiliar with OSHA regulations applicable to steel erection. Although a general contractor is not required to duplicate the safety efforts of its specialty subcontractors, it should, at a minimum, apprise itself of the safety requirements to which its subcontractors are subject, and the measures the subcontractor has made to assure compliance with such requirements. *Blount International, Ltd.*, 15 BNA OSHC 1897, 1992 CCH OSHD ¶29,854 (No. 89-1394, 1992). This MCG failed to do.

MCG has not, under these circumstances, shown that it provided adequate supervision of its structural steel subcontractor.

Penalty

A penalty of $2,000.00 was proposed.

The violation was correctly characterized as "serious" in nature. CO Gossman testified that a fall from 29 feet could result in injuries including broken bones and/or death (Tr. 101, 104). Gossman testified that MCG had received OSHA citations in the past, though not on the Twin Falls site (Tr. 132).

The proposed penalty is deemed appropriate, and will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.105(a) is AFFIRMED, and a penalty of $2,000.00 is ASSESSED.

Benjamin R. Loye
Judge, OSHRC

Dated:

[1] OSHA does not require fall protection for steel workers below 25 feet; Lindsay, however, stated that he would have reported any steel worker failing to use fall protection at any height.