Secretary of Labor,	*	
Complainant,	*	
	*	
v.	*	OSHRC Docket No. **98-0264**
	*	
Nelson Tree Service, Inc.,	*	**(E-Z)**
Respondent.	*	

Appearances:

Helen Schuitmaker, Esquire
Andrea Phillips, Esquire
Office of the Solicitor
U. S. Department of Labor
Chicago, Illinois
For Complainant

Gary W. Auman, Esquire
Dunlevey, Mahan and Furry
Dayton, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Nelson Tree Service, Inc. (Nelson), specializes in clearing trees from commercial power lines. Its employees often work from aerial lifts in order to trim trees overhead. Nelson contests the one-item serious citation issued to it by the Occupational Safety and Health Administration (OSHA) on January 23, 1998. The citation alleges that one of Nelson's employees was not tied off while working from the elevated bucket of an aerial lift. The citation resulted from a local fall emphasis program inspection conducted by OSHA compliance officer Kenneth Korroll on October 17, 1997 (Tr. 23). Nelson maintains that it was without knowledge of the violation. If, however, a *prima facie* violation is shown, Nelson argues that the incident was the result of employee misconduct. For the reasons stated below, Nelson's first position is correct.

This case proceeded under the E-Z trial procedures of §§ 2200.201 - .212. The hearing was held on June 26, 1998, in Chicago, Illinois. Both parties were represented by attorneys, and each submitted argument in the case.

Citation No. 1

Item 1:§ 1910.67(c)(2)(v)

It is stipulated that "Ste[phen] Krafft, the employee involved, was not wearing his safety belt at the time of the inspection" (Tr. 5). The Secretary asserts that Krafft's failure to be tied off in the aerial lift was a violation of § 1910.67(c)(2)(v). The standard provides that "[a] body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift." To prove a violation of the standard the Secretary must establish that (1) the standard applies to the working conditions, (2) the terms of the standard were not met, (3) employees had access to the condition, and (4) the employer either knew of the condition or could have known with the exercise of reasonable diligence. *Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

This fall protection standard applies to an employee in an aerial lift. The terms of the standard were not met when Krafft failed to tie off while elevated in the lift. Krafft was exposed to the hazard. Elements (1) through (3) are established. Only element (4), *i.e.*, that Nelson knew or could have known of the violation, remains to be established as part of the Secretary's *prima facie* case. *Kraft Food Ingredients Corp.*, 16 BNA OSHC 1393, 1399 (No. 88-1736, 1993).

Did Nelson Have Knowledge of the Violative Conditions?

The Secretary asserts that Nelson had knowledge of the violation. This is so, she argues, because Nelson's supervising crewleader, John Hawkins, knew that Krafft was not wearing his safety belt, and Hawkins's knowledge should be imputed to the company. *Gary Concrete*, 15 BNA OSHC 1051, 1055 (No. 86-1087, 1991) (foreman's constructive knowledge imputed to employer). Hawkins had the type of duties and responsibilities which could have supported imputing his knowledge to the employer (Tr. 82, 97). Here, however, Hawkins had neither actual nor constructive knowledge of the violation.

No Actual Knowledge

As was customary, Nelson employed a two-person crew to trim trees from the aerial lift. On October 17, 1998, crewleader John Hawkins and apprentice Stephen Krafft trimmed trees in DeKalb, Illinois. Hawkins trimmed trees from the aerial lift in the morning, and Krafft worked

below on the ground. Hawkins wore and attached his safety belt to the bucket while he worked from the aerial lift that morning. After lunch, the employees exchanged work positions: Krafft worked from the lift and Hawkins worked on the ground. Hawkins watched while Krafft put on and attached his safety belt when he began work that afternoon (Tr. 52-53, 81).

After Krafft had cut tree limbs for approximately an hour and a half, his chain saw ran out of gas. Krafft brought the lift down to get the saw refueled. Hawkins met him on the ground and took the saw around to the side of the truck to refuel it. At this juncture, Krafft took off his safety belt and went into a nearby field to relieve himself (Tr. 84).

Hawkins finished refueling Krafft's chain saw. Seeing that Krafft was not at the lift, Hawkins correctly guessed why Krafft was absent. Hawkins placed the saw in the bucket of the lift. Hawkins went back to the truck and sat in it to finish his weekly paperwork. While Hawkins was in the truck, he heard the aerial lift's motor begin to run. Hawkins knew by this that Krafft was inside the lift and was operating it. When Hawkins left the truck, Krafft was already 10 to 12 feet in the air (Tr. 44, 85-86). From Hawkins position on the ground, it was not possible to see whether Krafft was wearing his safety belt (Tr. 42, 78).

OSHA compliance officer Korroll stopped to investigate the worksite. As Korroll approached closer, Stephen Krafft was in the bucket of the lift and Hawkins was watching Krafft from the ground. According to Korroll, he asked Hawkins whether Krafft was wearing a safety belt. Hawkins allegedly replied that he didn't think so. Krafft then brought the lift down, either because he was finished or because he was motioned down (Tr. 9-11).

As the bucket descended, Korroll saw that Krafft was not wearing his safety belt. When Korroll asked Krafft why not, Krafft replied that he always wore his safety belt and had worn it earlier that day. He stated that he had not put his safety belt back on when he returned to finish the two small cuts left to do that day. Krafft estimated that the cuts took three minutes (Tr. 11, 55). Krafft and Hawkins quickly informed Korroll that Nelson had a workrule which required them to wear safety belts at all times when elevated in an aerial lift. They also explained to Korroll that the infraction was considered to be serious by them and by the company. The men stated that they would be disciplined for violating the workrule (Tr. 26-27).

Later, Krafft was reprimanded with a day off without pay. Hawkins was "written up" because, as he explained, a supervisor has the ultimate responsibility to ensure that the other worker wore his or her safety belt (Tr. 45, 95). Hawkins's supervisor, general foreman Robert Kuter, arrived at the site shortly after the OSHA inspector left, and spoke to the men about the incident. Kuter was convinced that Hawkins had no knowledge of Krafft's failure to wear his safety belt before OSHA arrived. According to Kuter, if Hawkins had known, he would have been more severely disciplined (Tr. 168-169).

Hawkins denies that he told the OSHA inspector that he did not think Krafft was wearing a safety belt (Tr. 92). Both Hawkins and Korroll were credible witnesses. However, the surrounding circumstances (such as the height of the bucket when Hawkins came out of the truck, the fact that not even Korroll believed anyone could tell from the ground whether Krafft wore a belt, the corroborative statements of Krafft, and the employees' routine use of the safety belts) strongly suggest that Korroll's memory was inaccurate on that point. Further, the brevity of the incident lessened Hawkins's opportunity to learn of the safety violation. The Secretary did not introduce any corroborative written statements or contemporaneous notes to support the alleged admission. The credible evidence supports that Hawkins did not have actual knowledge of Krafft's failure to wear his safety belt on October 17, 1997.

No Imputed Knowledge

Hawkins could not have known, with the exercise of reasonable diligence, that Krafft was not wearing a safety belt. Nelson's workrule required the use of safety belts on an aerial lift. At the beginning of their employment, Nelson's employees were tested regarding their knowledge of the rule. Employees also participated in weekly safety meetings, although the particular topic was not covered during a meeting attended by Krafft before the inspection. Of more significance to the undersigned, however, was the fact that the safety belt workrule was strongly emphasized at the crew level. Kuter and Hawkins stressed use of safety belts as they carried out their respective supervisory duties. As part of Krafft's ongoing apprentice training, Hawkins regularly reminded Krafft to put on his safety belt when going up in the lift (Tr. 51, 71, 131).

The Secretary relies on Krafft's disciplinary notice to show that this was not the first time Krafft had been disciplined (Exh. R-3). On the disciplinary form Kuter circled "2nd notice of a

violation." Even if it were assumed that an earlier incident involved the use of a safety belt, constructive knowledge is not established. A previous reprimand does not obligate a supervisor thereafter to maintain 100 percent visual contact with the reprimanded employee.

Krafft, knowing of the workrule, of its importance to Nelson, and of the consequences for disobeying it, impulsively took a short cut which affected his safety. Hawkins exercised reasonable diligence even though he failed to detect the brief incident. Because the Secretary failed to establish actual or constructive knowledge, the alleged violation of § 1910.67(c)(2)(5) is vacated.

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), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED that:

Item 1 of Citation No. 1, alleging a serious violation of § 1910.167(c)(2)(v), and the Secretary's proposed penalty for that item are vacated.

NANCY J. SPIES
Judge

Date: August 7, 1998