UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. KEENAN, HOPKINS, SCHMIDT AND STOWELL CONTRACTORS, INC. dba KHS&S CONTRACTORS, Respondent.	DOCKET NO. 18-1306

Appearances:

Summer Silversmith, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO
For Complainant

Kristin R.B. White, Esq., Fisher and Phillips, LLP, Denver, CO
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

An employee was injured while working from an aerial lift basket at Respondent's worksite in Littleton, Colorado on July 2, 2018. As a result, OSHA conducted an investigation. During the worksite inspection, Compliance Safety and Health Officer ("CSHO") Shane Lane learned that employees were climbing on, standing on, and working from the aerial lift basket guardrails to perform their work. Based on CSHO Lane's investigation and recommendation, Complainant issued a *Citation and Notification of Penalty*, alleging Respondent committed a single, serious violation of 29 C.F.R. § 1926.453(b)(2)(iv), and proposed a penalty of $5,543.

Respondent timely contested the *Citation*, which brought the matter before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act.

A trial was conducted in Denver, Colorado on April 9, 2019. Four witnesses testified at trial: (1) Fernando Ruiz Moya, former employee of Respondent; (2) Martin Rojas, current employee of Respondent; (3) CSHO Shane Lane; (4) Christian Mancera, Respondent's Regional Safety Engineer. (Tr. 29, 81, 127, 201). Both parties timely submitted post-trial briefs for the Court's consideration.

Jurisdiction & Stipulations

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 18). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The parties also stipulated to other factual matters, which were read into the record. (Tr. 18-20).

Factual Background

In July of 2018, Respondent was engaged as a subcontractor to Hensel Phelps, helping construct a new building ("ATLO facility") on a Lockheed Martin campus in Littleton, Colorado. (Tr. 19, 130). Respondent's employees performed framing work and drywall/densglass installation. (Tr. 19, 33, 133). While the parties agreed that the OSHA inspection resulted from an employee injury while working on an aerial lift, that accident is not the focus of the alleged violation in the case. (Tr. 24, 84). Rather, CSHO Lane learned facts related to this alleged violation while he was onsite conducting his inspection. (Tr. 84, 134).

Respondent's employees Fernando Ruiz Moya ("Ruiz") and Martin Rojas ("Rojas") were assigned to install drywall/densglass[1] to the exterior, upper levels of the building, from an aerial lift basket, on July 2, 2018. (Tr. 33-34, 85, 164-165, 209; Exs. C-6, C-11). They were working approximately 60-80 feet above the ground. (Tr. 34, 71, 85). They had been performing this type of work for approximately eight days. (Tr. 35, 88). Their work was supervised by two of Respondent's foremen, Morgan Payne and Ricardo Cereceres. (Tr. 34-35, 83, 85, 242).

This was an unusual job, in that the structural I-beams of the building were exposed, and the drywall/densglass had to be installed by reaching through or around the exterior I-beams and duct work. (Tr. 37, 89, 145; Exs. C-8, C-9). The distance from their aerial lift basket to the point of installation was sometimes 3-4 feet. (Tr. 113). Therefore, the two employees often had difficulty reaching the location of the drywall installation from the aerial lift basket. (Tr. 91). Each 4'x8' sheet of drywall/densglass weighed about 40 pounds, and needed to be screwed down every 8 inches. (Tr. 43-44). Ruiz estimated that each sheet required 20-25 screws during installation, and took about 10-15 minutes per sheet to install. (Tr. 50, 52).

So, with the consent and instruction of supervisors Payne and Cereceres, the employees installed self-retracting lanyards (often referred to by witnesses as "yo-yos") on the steel beams above their basket, so they could tie-off when they stepped out of the basket onto the guardrails or building I-beams. (Tr. 43-44, 60, 72, 97, 113). They turned the yo-yo strap in to either Supervisor Payne or "the tool guy" at the end of each work day. (Tr. 98).

The aerial lift (aka "boom lift") had two tubular metal guardrails which encompassed the floor of the basket. (Tr. 36; Ex. C-6). Ruiz and Rojas were consistent in their explanation of how they used the guardrails to perform their work. Ruiz and Rojas explained that they

[1] Although employees repeatedly referred to the sheets being installed as "drywall," it apparently was commercially called "densglass." (Tr. 41). The sheet size and installation method for the material appears to be the same. (Tr. 206).

positioned themselves in whatever position enabled them to get the drywall/densglass installed. (Tr. 53, 92). Sometimes, the employees got out of the basket entirely and stood on an I-beam. (Tr. 92). They used the basket gate if possible, but if it could not be opened, just climbed out using the guard rails. (Tr. 93, 95, 112, 121-22). Other times, to install the drywall, they stood with one foot in the basket, and one foot on the basket railing. (Tr. 51, 95). Sometimes, they stood with both feet on the basket railing – top rails and/or mid-rails. (Tr. 49, 70). When asked about Respondent's instructions regarding standing on the aerial basket guard rails, Ruiz testified: "The only thing they wanted there was the job done." (Tr. 53). Ruiz and Rojas both said that they were authorized, by Supervisors Payne and Cereceres, to get out of the basket and stand on the basket rails to get their job done, as long as they were tied-off to the yo-yo strap. (Tr. 100, 108, 117, 124).

Ruiz estimated that about 12-15 sheets of drywall were installed daily while they stood up on the aerial lift basket railing. (Tr. 52). Rojas estimated that they needed to climb up on the basket rails to do their job about every 15 minutes, or about 3 times per hour. (Tr. 94). He said each time he climbed up on the basket rail, it usually lasted about 5 minutes. (Tr. 94). The employees were tied-off to the yo-yo line whenever they stood on the basket rails, or whenever they got out of the basket all together. (Tr. 47, 50, 69, 71, 148). As the employees climbed around on the guard rails, the basket often swayed or moved. (Tr. 94-95). Rojas, who was still working for Respondent at the time of trial, testified that: "You feel like you're in a boat. If you are not used to being on that type of surface, then yeah, it will move and you can fall. You can injure yourself." (Tr. 94-95).

Neither Payne or Cereceres ever instructed them not to use the aerial lift guardrails to perform their work. (Tr. 53,060). Throughout the day, they often saw Supervisor Payne walking

around underneath their elevated basket. (Tr. 54, 106). In fact, the boom lift got stuck in position twice on the day of the OSHA inspection, and Supervisor Payne had to come fix their machine. (Tr. 55-56, 101, 105). Supervisor Cereceres also walked by them a couple of times during the day, once telling them to raise the fall protection yo-yo strap to a higher position. (Tr. 59-60, 106).

In addition to both supervisors walking and working underneath them throughout the day; fixing their stuck machine twice, and commenting on the position of their yo-yo strap, the aerial lift was also positioned about 25 feet from the main entrance/exit to the jobsite. (Tr. 57, 142). Furthermore, Respondent's jobsite trailer was visible from the boom lift, about 150 feet away. (Tr. 58, 107-108, 134-135).

The Court also notes that both employees made comments during their testimony that calls into question documentation of their safety training. After the July 2, 2018 accident, Ruiz testified that he was asked by Respondent to sign some papers, but was told not to date them. (Tr. 74-75). Ruiz was suspended for two days after the accident, and then ultimately terminated. (Tr. 77). When asked at trial about his signature on some safety training documents, Rojas testified the documents had his name on them, but not his signature. (Tr. 110; Ex. R-8). "I don't write my name like that. I did not write that. I don't know who would do that. I have no idea [sic] whose that handwriting is." (Tr. 110-111). However, Rojas did acknowledge receiving some safety training in April of 2018. (Tr. 111).

Discussion

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR §1926.453(b)(2)(iv): Employee(s) working in an aerial lift were sitting or climbing on the edge of the basket:

(a) On or about July 2, 2018, employees were exposed to fall injuries while climbing on the guardrails of a boom lift to position themselves in a more desired working position to install exterior drywall panels on a commercial building.

Citation and Notification of Penalty at 6.

The cited standard provides:

Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position.

29 CFR §1926.453(b)(2)(iv).

To establish a violation of an OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

The Standard Applied and Was Violated

Ruiz and Rojas were working from a Snorkel, Model TB 86J personnel lift. (Tr. 163-166; Ex. C-11). CSHO Lane and Regional Safety Engineer Manceras agreed that the lift at issue was an "aerial lift," as the term is used in the cited regulation. (Tr. 63-165; 209, 215; Ex. C-11). It is also undisputed that Respondent's employees were engaged in construction work on a new building, encompassed by 29 C.F.R. Part 1926 *et al*. Therefore, the cited regulation applied to the work being performed.

Respondent argues that the regulations under Subpart M general fall protection standards more appropriately applied to this case, not Subpart L (where the cited regulation is located) dealing with aerial lifts. That perhaps may be true during those times when the employees exited the aerial lift basket and were working from the I-beams of the building (as they were no longer

in the aerial lift), but not while they were still standing/working from the lift.[2] While employees were working from the aerial lift basket, even when inappropriately standing on the guardrails of the basket, the aerial lift safety regulations applied. The Commission has consistently held that specific standards prevail in application over more general standards. *Cincinnati Gas & Electric*, 21 BNA OSHC 1057 (No. 01-0711, 2005); see also 29 C.F.R. § 1910.5(c)(1), "If a particular standard is specifically applicable to a condition, practice, means, method operation, or process, it shall prevail over any different general standard which might otherwise be applicable . . . ." Respondent's argument that the cited regulation did not apply is rejected.

Ruiz and Rojas admitted to repeatedly climbing on, standing on, and working from the guardrails of the aerial lift basket to perform their installation work. The cited regulation specifically prohibits that activity from the "edge" of an aerial lift. The term "edge" as used in the cited regulation has consistently been found to include the guardrails encompassing the lift basket. *Universal Construction Company*, 18 BNA OSHC 1390 (No. 97-1946, 1998, ALJ); *Ruscilli Construction Co*., 18 BNA OSHC 1793 (No. 97-1603, 1999, ALJ); *Baker Drywall Co*., 18 BNA OSHC 1862 (No. 98-2088, 1999, ALJ); *Ernest Bock & Sons, Inc*., 2001 CCH OSHD 32,408 (OSHRC, 2001, ALJ).

In addition, a 2002 OSHA Letter of Interpretation specifically addressed the question of whether an employee can stand on the guardrails of an aerial lift basket to work, if properly tied off to a self-retracting lanyard. (Tr. 169-170; Ex. C-12). "The answer is no for aerial lifts." (Ex. C-12). The 2004 OSHA Letter of Interpretation introduced by Respondent does not create an exception to the cited regulation, nor introduce any inconsistency with the above discussion. (Ex.

[2] The Court notes that Subpart M of Part 1926 does contain Subpart V, regulations applicable to the use of aerial lifts while constructing "Electric Power Transmission and Distribution" lines, which were not involved in this case. 29 C.F.R. § 1926.950 *et al*.

R-4). Accordingly, the cited regulation applied to the work being performed, and its terms were violated.

Respondent's Employees were Exposed to a Hazardous Condition

To establish employee exposure, the Secretary must show that Respondent's employees were actually exposed to the violative condition or that it was "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). Respondent's employees, Ruiz and Rojas, repeatedly and consistently climbed on, stood on, and worked from the guardrails of the aerial lift basket to perform their installation work. The record establishes that this occurred on July 3, 2018, and previous days, while they were doing the same type of work. Employee exposure to the hazardous condition was clearly established.

Respondent Had Knowledge of the Hazardous Condition

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a supervisor is, or should be, aware of the noncomplying conduct of a subordinate, it is reasonable to charge the employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980).

Ruiz and Rojas were standing on and climbing on the aerial lift basket guardrails multiple times per hour, throughout the day. (Tr. 49-52, 93-95, 171). Supervisors Payne and Cereceres acknowledged providing them with a yo-yo strap to enable them to climb out of the basket as needed. Payne, and to a lesser extent Cereceres, were seen walking around the job underneath the two employees throughout the day. Payne even repaired their stuck aerial lift twice. Cereceres stopped and commented on the location of their yo-yo on one occasion. In addition, the aerial lift was visible from Respondent's job trailer, and was only 25 feet from the jobsite entrance/exit. Although the record contains no evidence that Payne or Cereceres specifically observed Ruiz and/or Rojas standing or climbing on the aerial lift rails, the violative condition was open, obvious, and in plain view. With the exercise of reasonable diligence, both Payne and Cereceres should have known what Ruiz and Rojas were doing to perform their assigned task. Reasonable diligence includes adequate supervision of employees, the formulation and implementation of work rules, and adequate training programs to ensure that the work is safe. *Pride Oil Well Serv*., 15 BNA OSHC 1809 (No. 87-692, 1992).

The Court finds that Respondent knew, or with the exercise of reasonable diligence, should have known that Ruiz and Rojas were repeatedly standing on, climbing on, and working from the aerial lift basket guardrails.

The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that *if* an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible

injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

If Ruiz or Rojas had slipped while working from the aerial lift guardrails, they could have been seriously injured. The self-retracting lanyard, or yo-yo, they were connected to would quickly slow the rate of the fall or swing, but would not prevent it. (Tr. 149). Complainant and Respondent disagreed on the distance that the employees would fall or swing if they lost their footing while standing on the guardrails. Complainant argued they could have fallen as much as 14 feet before the fall protection equipment stopped them. (Tr. 151). Respondent argued it would have only been 2 feet of free fall. (Tr. 211-212, 240). The Court finds that a slip, fall, or swing of even 2-3 feet by either employee, could have resulted in them striking the steel I-beam, the outside of the basket, or falling in between the basket and the steel I-beams. (Tr. 152-154, 171). This could have resulted in serious injuries, including head injuries or broken limbs. (Tr. 154, 172). This is especially true considering the shaky, unsteadiness of the aerial lift basket as employees moved around. (Tr. 94-95, 154). Citation 1, Item 1 was properly characterized as a serious violation of the Act.

Respondent Failed to Prove the Affirmative Defense of Unpreventable Employee Misconduct

In order to prevail on a claim of unpreventable employee misconduct, Respondent must show: (1) it established work rules designed to prevent the violation; (2) it adequately communicated those rules to its employees; (3) it took steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were detected. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096–97 (No. 10-0359, 2012). In other words, it is incumbent upon Respondent to "demonstrate that the actions of the employee were a departure from a uniformly

and effectively communicated and enforced workrule [sic]." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991).

Respondent's Regional Safety Engineer, Christian Mancera, testified that Respondent had a rule in place specifically prohibiting employees from working from aerial lift basket railings.[3] (Tr. 217; Ex. R-3). Respondent's Safety Manual, under aerial boom lifts, states: "Do not stand on rails of aerial boom lift to gain greater height." Both employees were trained and authorized to operate the aerial lift. (Tr. 65-67, 88). The operating manual for the aerial lift also specifically states: "Do not climb on guardrails." (Tr. 167, Ex. C-11).

The record established, however, that Respondent was not monitoring for compliance with this rule, nor enforcing it when employees were not complying. Supervisors Payne and Cereceres were walking under and around Ruiz and Rojas throughout the day while they stood and climbed on the basket guard rails. Both employees testified that they needed to do that constantly, multiple times per hour, while the lift was in plain sight of anyone in the area underneath them; in plain sight of the jobsite entrance/exit; and in plain sight of Respondent's jobsite trailer. And more specifically, Supervisor Payne issued them the yo-yo strap so they could climb out of the basket and Cereceres even commented on its location at one point in the day. Clearly, despite the company policy and aerial lift manual rule, Respondent's supervisors were not monitoring for, or enforcing any kind of prohibition on standing on or working from aerial lift basket guard rails. *Automatic Sprinkler Corp.*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980) (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.")). This Court is

[3] The Court did not find Mr. Mancera to be very credible. For example, he testified that the *first time* he had ever heard of employees working from basket guardrails was *during this trial*. (Tr. 214, lines 23-25). This seems highly improbable considering his position as Respondent's Regional Safety Engineer; that the *Citation* alleged that fact back in 2018; and that the allegation in this case would not have been discussed with him during pre-trial discovery, or during preparation for his trial testimony.

convinced that the two employees were expected to get the drywall/densglass installed in whatever manner was needed, including repeatedly standing on and working from the aerial lift guardrails, in full view and with full knowledge of their two supervisors.

Additionally, there was no evidence of Respondent disciplining employees for standing on, climbing on, or working from aerial lift guardrails until after the inspection. CSHO Lane was told that after this incident, an employee was disciplined for working from aerial lift basket guardrails, though no documentation was provided. (Tr. 157).

Respondent failed to establish that it adequately communicated a prohibition on standing/ climbing on aerial lift guardrails to the employees; that it took steps to discover violations of that rule; or that it effectively enforced the rule when violations were detected. As such, Respondent's assertion of unpreventable employee misconduct is REJECTED.

Respondent Failed to Prove the Affirmative Defense of Impossibility or Infeasibility

The defense of infeasibility requires an employer to prove that: (1) the means of compliance prescribed by the standard were technologically or economically infeasible, or necessary work operations were technologically infeasible after implementation; and (2) there were no feasible alternative means of protection, or an alternative method of protection was used. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1993–95 CCH OSHD ¶ 30,485 (No. 91-1167, 1994). See also *A. J. McNulty & Co.*, 19 BNA OSHC 1121, 1129 (No. 94-1758, 2000). The employer has the burden of proving infeasibility of compliance. *State Sheet Metal*, 16 BNA OSHC 1155, 1161 (No. 90-2894, 1993).

Respondent failed to establish that the drywall/densglass installation work could not have been performed by exiting the aerial lift basket properly and working from the I-beams (as

employees said they did part of the time). Respondent also failed to establish that the more difficult sections of drywall/densglass could not have been installed from inside the building itself, rather than externally from an elevated lift. It was Respondent's burden, in asserting this defense, to establish that there were no other methods available to install the drywall/densglass other than employees standing on the guardrails of the aerial lift basket. Respondent failed to meet that burden. Accordingly, Respondent's assertion of impossibility/infeasibility of compliance is REJECTED. Similar arguments of impossibility, under similar factual conditions, have been rejected at the Commission. *Ruscilli Construction Co*, *supra*.

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Complainant proposed a penalty of $5,543 because CSHO Lane concluded that this was a low gravity violation. (Tr. 175). He determined that the severity of injury likely to occur from the violation was "low," and the probability of an accident was "lesser." (Tr. 175). In calculating the proposed penalty, Complainant considered Respondent's status as a large

employer with approximately 900 employees; afforded no good faith penalty reduction; nor any reduction based on violation history. (Tr. 176). The record establishes that two employees were exposed to the violative condition repeatedly and continuously throughout the shift on July 3, 2018 and on previous days. Based on the totality of the circumstances discussed above, the Court sees no reason to depart from Complainant's proposed penalty. A penalty of $5,543 is appropriate and will be assessed.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Respondent's *Motion for a New Trial*, made in its *Post-Hearing Brief*, based upon the timing of the disclosure of two unredacted government informant witness statements[4] is DENIED; and

2. Citation 1, Item 1 is AFFIRMED as a serious violation, and a penalty of $5,543 is ASSESSED.

/s/ Brian A. Duncan

Date: January 17, 2020
Denver, CO

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission

[4] (Tr. 21-22, 62, 80).