United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. DADE BUILDERS CONTRACTORS, INC., Respondent.	OSHRC Docket Nos. 19-0988

Appearances:

Karen Mock, Esq., Department of Labor, Office of Solicitor, Atlanta, Georgia
For Complainant

Nicholas C. Hall, Esq., Department of Labor, Office of Solicitor, Atlanta, Georgia
For Complainant

Jose-Trelles Herrera, Esq., Herrera Law Firm, P.A., Miami, Florida
For Respondent

Before: Administrative Law Judge Christopher D. Helms

DECISION AND ORDER

I. Procedural History

This case is before the Occupational Safety and Health Review Commission ("Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). In response to an accident that occurred on November 7, 2018, at 4720 NW 85th Avenue, Doral, Florida 33166 ("worksite"), the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite. As a result of the inspection, on May 3, 2019, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent, alleging two serious violations of the Act, with a total proposed penalty of $13,260.00.

Citation 1, Item 1 alleges that Respondent violated 29 C.F.R. § 1926.20(b)(2) by failing to "initiate and maintain programs which provide for frequent and regular inspections of the job site . . ." Specifically, in the alleged violation description ("AVD"), OSHA alleges that Respondent failed to "inspect the jobsite to ensure employees were protected against falls, exposing employees to a fall of 16 feet."

Citation 1, Item 2 alleges a violation of 29 C.F.R. § 1926.501(b)(1), which requires "[e]ach employee on a walking/working surface with an unprotected side or edge which was 6 feet [] or more above a lower level" to be protected by at least one of three designated fall protection methods (guard rail system, safety net system, or personal fall arrest system). In the AVD, OSHA alleges that Respondent "had not provided a fall protection system for the employees who were laying blocks next to an unprotected edge, exposing the employees to a fall of 16 feet."

The trial of this matter commenced and concluded on October 10, 2019, in Miami, Florida. The following witnesses testified: Tony Maleno, (Project Manager for K.D. Construction); Stephen Merino (Respondent's Director of Operations); and Compliance Safety and Health Officer ("CSHO") Juan Roa.

For the reasons that follow, the citation issued to Respondent as a result of OSHA Inspection No. 1360579 is VACATED, and no penalty is assessed.

II. Stipulations and Jurisdiction

On September 25, 2019, the parties filed an Agreed Prehearing Statement in which the parties specified certain facts that are not in dispute. The parties agreed that Respondent is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, and that Respondent was engaged in construction as of the date of the alleged violation. The parties

further agreed to the location of the worksite, and that the cited standards for Items 1and 2 are applicable.[1] Finally, the parties stipulated that, on November 7, 2018, Jose Rojas and his crew consisting of four people were at the worksite laying cement blocks on the edge of a floor that was approximately 16 feet above ground level.[2]

III. Factual Background

On November 7, 2018, Respondent was performing masonry work as a subcontractor for K.D. Construction on the worksite. (Tr. 17-19). As part of this masonry work, Respondent was contracted to install cement blocks, precast coppers, and precast lentils. (Tr. 18).

Respondent has approximately 20 to 30 employees. (Tr. 57). Respondent's masonry crews range from five to seven masons and four to six laborers. (Tr. 58). Prior to the accident, Respondent had been working on the worksite for approximately six to eight months. (Tr. 43).

Respondent hired a subcontractor, Lexis Enterprise ("Lexis"), to provide a masonry crew to perform work on the worksite. (Tr. 46-47). Jose Rojas, known as "Chema," was the foreman of the masonry crew. (Tr. 47; 107-109). The CSHO testified that although he had asked for the contract during his inspection, he was only provided with a check in which Respondent had paid Lexis. (Tr. 134). There was no evidence presented at trial that a written contract existed between Respondent and Lexis. (Tr. 134).

[1] The parties' Agreed Prehearing Statement represents that the worksite was located at 472 NW 85th Ave., Doral, Florida 33178. However, the Citation notes the Inspection Site as 4720 NW 85th Avenue, Doral, Florida 33178. Further, Complainant's brief represents the worksite as 472 NW 85th Ave., (Complainant's Brief at 3), but Respondent notes the location as 4720 NW 85th Avenue, (Respondent's Brief at 3). While there appears to be a scrivener's error in one or more of these documents, the parties have not raised the worksite location as an issue.

[2] In the Agreed Prehearing Statement, the parties represented that the work activity occurred on November 16, 2018. However, the Citation items reference November 7, 2018, as the date of the alleged violation. Further, it appears the parties have recognized this inconsistency, and have since agreed that November 7, 2018, the date of the Citation, is the correct date to use. (Comp. Brief at 3 n.1).

Stephen Merino is Respondent's Director of Operations. (Tr. 44). As the Director of Operations, Mr. Merino's duties included supervising a few jobsites, dispatching delivery trucks, taking orders for materials from Respondent's contractors on the sites, and checking the sites for safety issues. (Tr. 44-45; 71). Mr. Merino testified that K.D. Construction hired Respondent to handle all the masonry work at the worksite. (Tr. 64).

Mr. Merino and Oviedo (Ovie) Gonzalez were the only supervisors for Respondent. (Tr. 52-53). Both Mr. Merino and Mr. Gonzalez report to Mr. Merino's father, Louis Merino. (Tr. 53). Stephen Merino would visit the worksite three to four times per week and would spend approximately an hour on the worksite during these visits. (Tr. 44). As part of these visits, Mr. Merino would check on the quality and quantity of the masonry block that Respondent was in charge of laying and would check to see if any additional materials were needed. (Tr. 55). In addition, Mr. Merino would check the worksite for safety issues. (Tr. 71). Mr. Gonzales only visited the worksite perhaps three or four times for the entire job. (Tr. 53).

At trial, the recitation of the facts related to the accident was imprecise. Although far from chronicling the incident, the evidence at trial appeared to show that a pallet of blocks (presumably, masonry blocks) was being flown overhead to masons working on the balcony of the second floor at the worksite.[3] (Tr. 72; Citation 1, Items 1 and 2). When the pallet was set down, some blocks fell from the pallet onto the victim, who was located near the edge on the second floor. (Tr. 60, 72; Agreed Prehearing Statement at 4). Although the government stated in its opening statement that the accident resulted in a fatality, (Tr. 11), Respondent contested the

[3] While the government's witness testified that he inspected the worksite four days after the incident, and that the inspection occurred in November, the government did not present specific evidence of the date of the incident or the date of the inspection at trial. (Tr. 141-142). However, based on the government's brief, the parties have agreed that November 7, 2018, the date identified in the Citation, is the date of the alleged violation, and not November 16, 2018, a date identified in the parties' Agreed Prehearing Statement. (Comp. Brief at 3 n.1).

government's statement, (Tr. 13-14). Moreover, contrary to the government's opening statement, although the victim was injured, no evidence was presented at trial that in any way suggested that the accident resulted in a fatality.

The CSHO visited the worksite as part of OSHA's inspection four days after the accident. (Tr. 141-142). During the inspection, the CSHO interviewed Jose Rojas, known as "Chema," the foreman of the masonry crew. (Tr. 47; 107-109). Chema did not testify at the trial. However, the CSHO testified that Chema informed him that Stephen Merino had been directing his work at the worksite. (Tr. 109-111). The CSHO testified that Chema stated that Stephen Merino would direct the crew where to lay blocks on the worksite and he would provide materials to the worksite. (Tr. 111-112). According to Chema's statement to the CSHO, Stephen Merino had directed Chema and his work crew to the second floor. (Tr. 113-114).

The CSHO testified that he was informed during the inspection that there were no wooden barriers or guardrails present on the worksite immediately after the accident. (Tr. 114-115).[4] The CSHO further testified that, according to Chema, only one of the masonry workers on the worksite on the day of the incident had a "yo-yo" (i.e. a retractable fall protection lifeline). (Tr. 115). Chema also informed the CSHO there was only one anchor point for a single crew member to use. (Tr. 115-116). The CSHO determined that only one anchor point existed at the time of the accident, although two additional anchor points were installed after the accident before the CSHO's onsite inspection. (Tr. 122). *See also* Ex. R-4 at 6.

According to the CSHO, all four masonry crew members had been working on the wall of the second floor for about two hours at the time of the accident. (Tr. 123). Neither Stephen

[4] The CSHO testified that he obtained this information from "the safety director for K.D. Construction, and safety manager that they had on site, as well as a consultant for Greystar." Tr. 114. None of the identified individuals testified at trial.

Merino nor Chema inspected the worksite on the day of, or the day before, the accident. (Tr. 110-111, 139-140).

IV. Discussion

A. Applicable Law

To establish a violation of an OSHA standard pursuant to 5(a)(2), Complainant must establish (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

B. Respondent's Employment Relationship with the Exposed Employees

"[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005), 2005 WL 682104 (2005). Here, the government argues that, under OSHA's multi-employer enforcement policy, Respondent is a liable employer. *See* OSHA Instruction CPL 2-00-124, Multi-Employer Citation Policy (Dec. 10, 1999) ("CPL" or

"multi-employer policy"). Based on the multi-employer policy, the government contends that Respondent is liable as both a "controlling" employer and an "exposing" employer.[5] An employer may be responsible for the existence of a violation that endangers workers employed by other companies if that employer exercised control over the jobsite or created the hazardous condition. CPL at X(D).

An employer whose own employees are exposed to a hazard can be liable as an exposing employer. CPL at X(C). Complainant failed to establish that the exposed individuals were employed by Respondent. *See* Tr. 46, 88, 96, 106, 128 (testimony refuting that the individuals were Respondent's employees). Accordingly, the Court finds Respondent is not liable as an exposing employer.

However, even if an employer does not have its own employees exposed to a hazard, the employer can still be liable as a controlling employer under the multi-employer policy. The Commission and seven courts of appeals, including the D.C. Circuit, have upheld the multi-employer policy as a proper exercise of the Secretary's statutory authority. *See Summit Contractors, Inc. v. Sec'y of Labor*, 442 Fed. Appx. 570, 571-72 (D.C. Cir. 2011); *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 818 (8th Cir. 2009); *Universal Const. Co. v. Occupational Safety & Health Review Comm'n*, 182 F.3d 726, 727-32 (10th Cir. 1999*); United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982 (7th Cir. 1999); *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 803-804 (6th Cir. 1984); *Beatty Equip. Leasing, Inc. v. Sec'y of Labor*, 577 F.2d 534, 536-37 (9th Cir. 1978); *Brennan v. OSHRC*, 513 F.2d 1032, 1037-38 (2d Cir. 1975). Under the multi-employer policy, a "controlling employer" is:

[5] The government contends that the CPL provides that an employer may be a "controlling employer" if it exercised control over the jobsite *or created the hazardous condition*. Comp. Brief at 11. However, the multi-employer policy makes a distinction between "creating" employers and "controlling" employers. *See* CPL at X(B) and X(E).

> [a]n employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice . . .

CPL at X(E). The Commission has held that an employer, which creates or controls a cited hazard, has a duty under § 5(a)(2) of the OSH Act, 29 U.S.C. § 666(a)(2), to protect its own employees and to protect those of other employers' "engaged in the common undertaking." *McDevitt Street Bovis, Inc.*, 19 O.S.H. Cas. (BNA) 1108 (OSHRC, 2000), 2000 WL 35559662, *citing Anning-Johnson*, 4 BNA OSHC 1193, 1199 (1976).

Here, Respondent's Director of Operations, Stephen Merino, supervised the worksite. (Tr. 44, 71, 109-111, 114). He was on the worksite three or four days per week and he would be at the worksite approximately an hour during each visit. (Tr. 44). His responsibilities included checking on the quality and quantity of the masonry block that Respondent was laying and checking to see if any additional materials were needed. (Tr. 55). In addition, Mr. Merino would check the worksite for safety issues. (Tr. 71). According to Mr. Merino, he shared responsibility with K.D. Construction to check for and bring up safety concerns to K.D. Construction and to ensure that those on site, presumably the hired masonry crew, were working safely. (Tr. 63-64). Mr. Merino could instruct an individual to put on fall protection, and if they refused, he would inform Chema. (Tr. 65). In view of this, the Court finds that Respondent exercised sufficient control of the masonry crew to qualify as a controlling employer.

C. Citation 1, Item 1

1. The Standard Applies

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

> 29 CFR 1926.20(b)(2): The employer did not initiate and maintain programs which provided for frequent and regular inspections of the job site, materials and equipment to be made by a competent person(s):

> On or about November 7, 2019, on the North side, second story balcony, at the job site located in 4720 NW 85th Avenue, Doral FL 33166, the employer did not inspect the jobsite to ensure employees were protected against falls, exposing the employees to a fall of 16 feet.

(*See Citation and Notification of Penalty* at 6).

Section 1926.20(b)(2) provides:

> Such programs [as may be necessary to comply with this part] shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

In the parties' Agreed Prehearing Statement, the parties agreed the cited standard for Item 1 (1926.20(b)(2)) is applicable. Thus, the Court finds that cited standard applies.

2. Failure to Comply with the Cited Standard

The standard requires a designated competent person to conduct frequent and regular inspections of the worksite, materials, and equipment. At no point during the trial did the government inquire as to whether a "competent person" was present on site.

In its brief, the government argues that Mr. Merino and Chema admitted that they had not conducted inspection of the worksite on the day before, or the day of, the accident. Comp. Brief at 16 (*citing* Tr. 73, 110-111). Mr. Merino testified as follows:

> Q. Did you do any – when I say, you, did Dade Builders do any inspections of the area prior to your – your crew's going and performing work in an area?
>
> A. Dade Builders; no.
>
> Q. So, you rely on the crew themselves –
>
> A. The subcontractor.
>
> Q. --to do any inspection.
>
> A. Yes, the subcontractor.

(Tr. 73). The CSHO testified that Mr. Merino and Chema informed him that they had not inspected the worksite on the day before, or the day of, the accident. (Tr. 110-111). Whether failure to inspect the worksite for a two-day period constitutes a failure to initiate and maintain programs providing for "frequent and regular" inspections is certainly debatable.

Mr. Merino testified he and Chema discussed the scope of the inspections Chema was expected to perform, including things such as impalement hazards, capping off the exposed rebar, and covering holes in the floors. (Tr. 76-77). While Respondent did not require the crew to do anything specifically to document the inspections, (Tr. 77), there is no requirement in Section 1926.20(b)(2) for "frequent and regular inspections" to be documented.

Further, according to Mr. Merino, Respondent had a subcontractor that performs inspections for Respondent on a biweekly basis. (Tr. 77). Mr. Merino testified that the subcontractor, Michael Iles, would visit Respondent's jobsites once every other week to ensure that "all safety measures are up to OSHA standard." (Tr. 77). As Mr. Merino explained: "He is inspecting that scaffolding is erected properly and all tie-offs, all phases of tie-offs are in the correct spot, and that all the masons and laborers are tying off when needed." (Tr. 78). Moreover, he testified that the subcontractor would generate safety reports, that he reviewed those reports as they came in, and that the reports would show that they were safety compliant. (Tr. 78-79).

Certainly, an employer cannot merely "contract away its legal duties to its employees or its ultimate responsibility under the Act by requiring another party to perform them." *Baker Tank Co.*, 17 O.S.H. Cas. (BNA) 1177, 1180 (No. 90-1786-S,

1005), 1995 WL 216828, *4. While an employer may carry out its duties through its own private arrangements with third parties, if those duties are neglected, the employer must show why it cannot enforce the arrangements that were made. *Froedtert Memorial Lutheran Hospital, Inc*., 24 O.S.H. Cas. (BNA) 1153 (OSHRC 2013), 2013 WL 5505282 at *14 (*quoting Central of Georgia R.R. Co. v. OSHRC*, 576 F.2d 620, 624 (5th Cir. 1978). Thus, here, Respondent may not wholly unburden itself from the responsibility of frequent and regular inspections by contracting that duty away to others, including K.D. Construction and/or Chema. Indeed, if the duties were not performed, Respondent must show why it could not enforce the agreements that were made. However, importantly, the government has not shown that those duties were not performed.

Thus, the threshold question remains: whether Respondent either individually or through its contracted party failed to initiate and maintain a program providing for frequent and regular inspections by a competent person. The requisite evidence by the government on this point is simply lacking. The government has not shown that Respondent's program did not provide for frequent and regular inspections. Instead, it has shown that Respondent actually had a written safety program, although it was not provided as evidence, and that as part of Respondent's program it had contracted a third-party to inspect the worksite biweekly and prepare safety reports. (Tr. 176-181). While the government could of course argue that such inspections were insufficient, and thus neither frequent nor regular, the government has provided no evidence justifying such a conclusion. Rather, the government's position seems to rest on testimony that Respondent did not inspect the worksite on the day before and the day of the accident. *See* Comp. Brief at 16.

However, while Section 1926.20(b)(2) requires that the competent person conduct frequent and regular inspections of the worksite, the standard does not set a specific schedule for the inspections, does not require inspections to be documented, and does not require the competent person maintain a continuous presence on the site. Moreover, the government produced no evidence regarding when the third-party contractor conducted the inspections (or evidence refuting that such inspections occurred), whether the inspections were unannounced, how long such inspections lasted, and what was found during the inspections. The government also neither argued nor presented evidence that the third-party contractor was not a competent person. Without such evidence, this Court will not attempt to surmise the scope and extent of the inspections made by Respondent's contractor or whether the contractor qualified as a competent person under the standard. As the government has failed to resolve this question through proffered evidence, the record does not support a finding of inadequate inspection or incompetence of inspecting personnel. Thus, the Court finds that the government has not met its burden of showing that Respondent violated the standard. Accordingly, this item is vacated.

D. Citation 1, Item 2

1. The Standard Applies

Based on the parties' Agreed Prehearing Statement, the parties have agreed that the cited standard for Item 2 is applicable. Under 29 C.F.R. § 1926.501(b)(1), "[e]ach employee on a walking/working surface with an unprotected side or edge which was 6 feet [] or more above a lower level" must be protected by at least one of three designated fall protection methods (guard rail system, safety net system, or personal fall arrest system). Here, employees were working on

a surface that was next to an unprotected edge with a potential fall of 16 feet. Accordingly, by its terms, the standard applies.

2. Failure to Comply with the Cited Standard

Section 1926.501(b)(1) requires one of three methods of fall protection: guard rail system, safety net system, or personal fall arrest system. While there is some question whether such fall protection measures were in place prior to the accident, the evidence adduced at trial demonstrates that none of the three forms of fall protection were being used by the employees at the time of the accident.

Certainly, guardrails were present at the time the CSHO inspected the worksite approximately four days after the accident. (Ex. R-4 at 1-3, 6-9, 13, 15-16; Tr. 116-117). However, the CSHO testified that there was not a wooden barrier at the location where the workers were laying blocks at the time of the accident. (Tr. 114). While the CSHO did not personally observe the violative condition, the CSHO testified that he asked K.D. Construction's safety director, a safety manager on site, and a consultant, all of whom were present immediately after the accident, and they all informed the CSHO that there was no barrier present. (Tr. 114-115). None of these individuals interviewed by the CSHO testified at trial.

As the trial of this matter proceeded under the Simplified Proceedings, the Federal Rules of Evidence did not apply. Commission Rule 200 (29 C.F.R, § 2200.200). Thus, as the Federal Rules of Evidence do not apply in Simplified Proceedings, hearsay is admissible, "[p]rovided it is relevant and material," and under certain circumstances, "can constitute substantial evidence." *Bobo v. United States Dept. of Agriculture*, 52 F.3d 1406, 1414 (6th Cir.1995) (citation omitted). Accordingly, for purposes of this element, the Court credits the testimony of the CSHO and finds that the cited standard was violated on the day of the accident.

3. Respondent's Employees Were Exposed to the Hazard

As discussed in part IV(B), *supra*, Respondent was responsible to protect the exposed employees in this case, as Respondent was a controlling employer which exercised sufficient control over the worksite.

In order to meet its burden of establishing employee exposure to the hazard, the government "must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd*., 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing Fabricated Metal Prods., Inc*., 18 BNA OSHC 1074. The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co*., 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). In *Gilles & Cotting*, 3 BNA OSHC 2002, 2003 (No. 504, 1976), the Commission noted that "the zone or zones of danger will be determined by the hazards presented by the violative condition."

Here, there is no question that employees were working at the worksite and were laying cement blocks on the edge of a floor that was approximately 16 feet above ground level. (*See* Agreed Prehearing Statement at 4). Based on the assigned working duties and workplaces, it is reasonably predictable that the employees would be in the zone of danger and thus exposed to the fall hazard.

4. Respondent's Knowledge of the Conditions

To establish knowledge, the government must prove that Respondent "knew or, with the exercise of reasonable diligence, should have known of the hazardous conditions constituting the violation." *S.J. Louis Constr. of Texas*, 25 BNA OSHC 1892 (No. 12-1045, 2016). According to

the Commission, "Reasonable diligence involves consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations." *Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003). The obligation to inspect (i.e., adequate supervision) for hazards "requires a careful and critical examination, and is not satisfied by a mere opportunity to view equipment." *Hamilton Fixture*, 16 BNA OSHC 1079, 1087 (No. 88-1720, 1993).

In arguing that Respondent had actual knowledge of the violative condition, the government relies principally upon hearsay statements obtained by the CSHO during his inspection. *See* Comp. Brief at 24-25. Specifically, the CSHO testified about statements made by Chema:

> Q. All right. So, my question was, what did Chema tell you during that first discussion you had with him?
>
> A. Chema told me that he had a crew of four, including himself, and they were down to -- hired there to lay block on the second floor. And basically the people that had been directing him was Stephen. At that point, I didn't even know a last name, they just knew a Stephen. And basically they told me they hadn't inspected the site the day before.
>
> And the day of the accident they were just told like to tie off to whatever you can, you know? If we don't have any anchor points, use a rebar if you can. And said that some people had lanyards, some people had yo-yos.

(Tr. 109).

While hearsay testimony is admissible in Simplified Proceedings, the Court must still determine the underlying reliability and probative value of the testimony. *See e.g. School Bd. of Broward Cnty. v. Dep't of Health, Educ. & Welfare*, 525 F. 2d 900, 906 (5th Cir. 1976). Thus, while the Federal Rules of Evidence do not apply in Simplified

Proceedings, they nonetheless provide guidance regarding the types of evidence that may be less reliable. *See e.g*., *Lacinaj v. Ashcroft*, 133 F. App'x 276, 287 (6th Cir. 2005).

Here, the declarant, Chema, did not testify in this case. Thus, Respondent had no opportunity to cross-examine the witness.[6] As the witness did not testify at trial and neither evidence of service of a subpoena nor enforcement of a subpoena was provided, the Court finds the out-of-court statements pertaining to Respondent's knowledge of the violative condition unreliable and affords them little weight.

Moreover, conflicting evidence exists related to Respondent's purported actual knowledge of the violative condition. Stephen Merino testified that he believed that the masonry crew was using fall protection on the day of the accident. (Tr. 59). He further stated at trial that he saw the masonry crew with harnesses on, and "saw a lanyard sticking out from the back, from behind them," however, he did not see to where the crew was tied off. (Tr. 59). Thus, in the light of such live testimony juxtaposed with the hearsay testimony, the Court finds that the Secretary has failed to show actual knowledge of the violative condition.

In the alternative, the government contends that Respondent had constructive knowledge that adequate fall protection did not exist. (Comp. Brief at 25). To establish constructive knowledge, the Secretary must prove "that the 'employer … could have known with the exercise of reasonable diligence of the conditions constituting the violation.'" *Contour Erection & Siding Sys., Inc.,* 22 BNA OSHC 1072, 1073, 2004-09 CCH OSHD ¶ 32,943, p. 53,787 (No. 06-0792,

[6] The Secretary noted at the beginning of trial that, although they did not appear, the government had subpoenaed the owner of Lexis and its foreman (Chema). (Tr. 11-12; *see also* Tr. 113). However, the Secretary did not provide evidence of service of a subpoena. (Tr. 41). The Court inquired whether the government had a telephone number to contact the witnesses and noted that the Court would afford the government time during a break to contact the witnesses. (Tr. 41-42). As an interpreter for the government appeared for one or both witnesses, the Court inquired of the interpreter's name in the event that the government wanted to enforce any subpoena. (Tr. 112-113).

2007) (citation omitted). Whether an employer has exercised reasonable diligence is a question of fact that "will vary with the facts of each case." *Martin v. OSHRC*, 947 F.2d 1483, 1484 (11th Cir. 1991); *see also Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129 (No. 92–0851, 1994) (finding that a preponderance of the evidence established the cited employer was reasonably diligent); *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001) (noting that Secretary has burden of identifying what reasonable diligence required).

Stephen Merino testified that he saw the accident occur. (Tr. 60). He also explained that he saw the masonry crew with harnesses on, and "saw a lanyard sticking out from the back, from behind them," however, he did not see to where the crew was tied off. (Tr. 59). The Secretary, however, argues that he did not go to the second floor on the day of the accident and could not specifically see whether the crew was wearing proper fall protection gear and tied off. (Comp. Brief at 25). Thus, the Secretary argues that he, and thus Respondent, should have known of the lack of fall protection measures on the mason crew's worksite.

However, the government proffered no testimony or other evidence on how long the violative condition existed. While the CSHO testified that Chema had informed him that the crew had been working on the worksite that day for about two hours, (Tr. 123), no evidence was presented regarding whether fall protection was being utilized during that two-hour period. In the absence of clear evidence of the duration of the violative condition, the Court finds that the government has not established that Respondent had constructive knowledge. *See Kaspar Wire Works, Inc*., 18 BNA OSHC 2178, 2196-97, 2000 CCH OSHD ¶ 32,134, p. 48,422 (No. 90-2775, 2000) (concluding that "in the absence of any evidence indicating how long the violative conditions had been in existence, we are unable to evaluate whether [the employer] could have known of them even if it had been reasonably diligent in inspecting its equipment"), *aff'd*, 268

F.3d 1123 (D.C. Cir. 2001); *Ragnar Benson, Inc*., 18 BNA OSHC 1937, 1940, 1999 CCH OSHD ¶ 31,932, p. 47,373 (No. 97-1676, 1999) (concluding that constructive knowledge was not shown where lack of evidence of violation's duration precluded Commission from determining whether employer could have known of conditions with exercise of reasonable diligence).

V. Conclusion

It is the government's burden to establish each element of its case, including the employment relationship between Respondent and the exposed employees, violations of the applicable standards, and Respondent's knowledge of any violative conditions. As discussed herein, the lack of evidence at trial, including the failure to illicit the testimony of a key witness relied upon by the government, created an evidentiary record consisting of unanswered questions and vagaries. In view of the evidence discussed above, the Court finds that Complainant failed to meet its burden. Accordingly, the Citation items proposed in this case are VACATED.

VI. Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Items 1 and 2, are hereby VACATED.

SO ORDERED.

/s/
Christopher D. Helms
Judge, OSHRC

Date: April 13, 2020
Denver, Colorado