SECRETARY OF LABOR, Complainant, v. OTIS ELEVATOR, INC., Respondent.	OSHRC DOCKET NO. 99-1071

APPEARANCES:

For the Complainant:
Tobias B. Fritz, Esq., United States Department of Labor, Office of the Solicitor, Kansas City, Missouri

For the Respondent:
W. Scott Railton, Esq., Reed Smith Shaw & McClay LLP, McLean, Virginia

Before: Administrative Law Judge: James H. Barkley

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, Otis Elevator, Inc. (Otis), at all times relevant to this action maintained a place of business at the Summit Hotel at 1 Lone Mountain Road, Big Sky, Montana, where it was engaged in elevator construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On March 4, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Otis's Summit Hotel work site. As a result of that inspection, Otis was issued a citation alleging violation of §1926.501(b)(1) of the Act together with proposed penalty. By filing a timely notice of contest Otis brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 29, 1999, a hearing was held in Bozeman, Montana. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation

Repeat citation 1, item 1, as amended, alleges:

29 CFR 1926.501(b)(1): 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 was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:

> (a) Big Sky, Montana: Employees exposed to a fall of approximately 112 feet to the concrete below.

Otis does not dispute the existence of the underlying violative conditions.

On March 4, 1999, during her inspection of Otis' Summit Hotel work site, Compliance Officer (CO) Tina Mailloux twice, within approximately 45 minutes, observed four Otis employees riding on an unguarded elevator platform: territory manager Donald Henline, lead mechanic Troy Hooper, and helpers Michael Reinig and John Jaeger (Tr. 22-25, 31). Otis admits that the four employees were "joyriding" the recently completed platform (Tr. 101; Respondent's post-hearing brief, p. 14).

Otis maintains, however, that the incident was the result of unforeseeable employee misconduct.

Employee Misconduct

In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶ (91-2897, 1995).

Facts

Sue Nichani, Otis' senior manager of safety and environment, testified that Otis has a safety program which covers fall protection (Tr. 70). Otis' Policies and Practices Manual requires that fall protection be used by employees working six or more feet above the ground (Exh. R-2B). Section 15 in Otis' Employee Safety Handbook sets forth the safety rule in detail, describing alternate means of fall protection and when it must be used (Tr. 71; Exh. R-3A).

Nichani testified that all Otis employees are issued a copy of the safety handbook on the first day of their employment (Tr. 72). Nichani stated that Otis develops tool box programs and video tapes on fall protection, and provides interactive computer training for employees (Tr. 90). In addition, Nichani testified, Otis provides coveralls with a built in safety harness free of charge to all employees requesting them (Tr. 86).

Nichani testified that Otis has a progressive disciplinary system covering violations of the fall protection rules; hourly employees discovered violating the rules are suspended for two days with pay, and must undergo retraining; management/supervisory personnel are suspended without pay for two days (Tr. 92-94; Exh. R-2A). Otis introduced lists of fall protection suspensions meted out since 1993 (Tr. 77; Exh. R-6A, 6B). Nichani testified that further infractions would result in termination (Tr. 94). Nichani stated that she had terminated one employee herself, and believed that there were employees terminated in other regions as well (Tr. 94-95). As a result of the March 4, 1999 incident, the three field employees involved were suspended for two days and retrained on fall safety (Tr. 101, 218; Exh. R-10). Donald Henline was suspended for two days without pay (Tr. 149, 173).

Nichani testified that she and five safety managers working under her supervision conduct a total of 15 to 20 safety audits every quarter, each covering 8 to 10 job sites (Tr. 88-89). The audits are intended to ensure the implementation of Otis' safety processes and policies (Tr. 88). In addition local supervisors are required to audit two job sites per month, and are required to test the knowledge and working practices of each of their employees annually (Tr. 89, 92; Exh. R-12D).

Nichani testified that as a result of its strong safety program, Otis has had no fatalities resulting from falls in the past five years (Tr. 99).

Donald Henline has worked in the elevator industry for 26 years, and for Otis for the last 21 (Tr. 156-57, 182). Henline became Otis' territory manager in 1995, and is the highest ranking Otis employee in the state of Montana (Tr. 100, 156). Henline's training was the responsibility of Mike Mutal, Otis' Regional Field Operations Manager in Seattle (Tr. 103, 111). Mutal testified that in 1998 Henline participated in two days of annual training which included approximately an hour on fall protection (Tr. 126). In both 1998 and 1999 Henline was rated as "fully competent" by his location manager, Ron Kolojohn (Tr. 134-36, 174; Exh. R-19). Mutal

testified that he had been on construction sites where Henline demonstrated safe work practices, including in the area of fall protection, and would rate him highly (Tr. 138-39).

Mutal testified that his office assures that Otis' field supervisors are supplying the required safety training by monitoring employee records (Tr. 112-13). Mutal identified training records showing that Hooper, Jaeger and Reinig had all received training in fall protection (Tr. 119; Exh. R-11B, p. 33, 43, 44, R-17, p. 7). Don Henline is listed as the instructor for some of the field training in fall protection (Exh. R-11B, p. 46, 67).

Henline testified that he was trained in fall protection both at Otis' Spokane location and in the field in Salt Lake (Tr. 158). Henline stated that he had not been written up by Otis for any safety violations prior to the cited incident (Tr. 175).

Henline stated that he bears 100% of the responsibility for the training of Otis employees under his supervision (Tr. 158). Henline testified that he discusses fall protection at every job, and ensures that fall protection is being used during his job site visits (Tr. 158). Henline stated that he tries to get to each job site before his men begin work to ensure that the hoistways have been properly constructed, and barricades installed; he tries to get to the job site at least once during installation to check on the progress of the job (Tr. 159).

Henline testified that he conducted his customary pre-installation inspection of the Summit Hotel job site, and that he visited the site approximately twice a month between December 1998 and March 1999 to audit the safety precautions in use, and check on the progress of the installation (Tr. 160, 162). Henline testified that he did not notice any discrepancies in his men's safety practices during his audits (Tr. 164). Henline admitted that although it is his responsibility to submit written records of his audits, he failed to write up any of his audits on the Summit Hotel job (Tr. 164). Henline stated that he had no excuse for his failure to reduce his audits to writing; he further stated that he was not disciplined for failing to do so (Tr. 165). Henline surmised that his failure to submit the required paperwork was not noticed by his superiors (Tr. 181).

Henline testified that March 4, 1999 was the first day that a completed elevator platform was in full running condition (Tr. 168). Henline stated that the elevator at the Summit Hotel site was the first GEM, "geared elebonic model" unit he had installed in Montana (Tr. 155, 161-62). Henline testified that he and his foreman, Troy Hooper were "pretty excited" about the

GEM, and "like a bunch of kids," hopped on the unguarded platform to ride it up to the machine room to check on the progress of work in the hoistway and machine room (Tr. 170). Henline could not remember how many trips they took before being stopped by CO Mailloux (Tr. 171).

Henline testified that he was aware of Otis' rule requiring the use of fall protection on the job at all times, and that he had not previously violated Otis' fall protection rules (Tr. 173, 76). Henline testified that he had no excuse for failing to use fall protection in this instance, but admitted that he had no lanyard with him, and so could not have tied off in any event (Tr. 172).

Henline testified that he was the only one on the site with supervisory authority; only he could require employees to comply with safety rules, or discipline their failure to do so (Tr. 163, 184). The lead mechanic, who acted as foreman on the site, Troy Hooper, cannot cite workers for infractions (Tr. 184). If Hooper noted a safety violation he would have to call Henline to back him up (Tr. 185). Henline stated that Hooper had never called him to report any infractions (Tr. 186).

Troy Hooper testified that he was in charge of the day to day work at the Summit Hotel site (Tr. 219). Hooper stated, however, that he had no disciplinary powers and could only ask fellow Otis employees to comply with safety rules; he could not enforce the rules (Tr. 195, 220). Hooper stated that he had never issued any safety orders (Tr. 195). Hooper felt that "[e]verybody's trained the same so they were required to do their own safety"(Tr. 221). Hooper testified that he could not make someone tie off , for instance; only Henline could prevent employees from engaging in activities which were dangerous, or in violation of Otis' rules (Tr. 221, 223). Hooper stated that he had not had occasion to call in Henline, because he had not had any safety problems at the Summit Hotel job (Tr. 195-96).

Hooper was aware that Otis' rules required him to use fall protection whenever working within six feet of a one-foot by one-foot hole more than six feet off the ground (Tr. 198). Hooper testified that he had been made aware of the rule through the employee safety handbook and regular safety talks (Tr. 199-200). Hooper testified that they just "weren't thinking" when they rode the unguarded permanent platform to the machine room to check on the project's progress (Tr. 214, 217). Hooper testified that when he realized that CO Mailloux was with OSHA, he immediately tied off (Tr. 216).

Helpers Michael Reinig and John Jaeger similarly testified that they had been trained in, and were conversant with Otis' fall protection rules (Tr. 234-36, 240-42). Reinig stated that he could not explain his failure to use fall protection on March 4, except to say that he was with his manager, and wasn't performing any type of work procedure (Tr. 233, 237). Reinig stated that he felt he was safe, and did not expect to be disciplined, until he saw the OSHA CO (Tr. 237).

Discussion

The facts show that Otis had a work rule designed to prevent its employees from working on unguarded surfaces in excess of six feet without fall protection. Each of the employees involved in the misconduct testified in this matter that the rule had been communicated to them. The facts in this case, however, do not establish that the fall protection rules were effectively enforced.

First, the Commission has held that "where all the employees participating in a particular activity violate an employer's work rule, the unanimity of noncomplying conduct suggests ineffective enforcement of the work rule." *Gem Industrial, Inc.*, 17 BNA OSHC 1861, 1865, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996). In this case four employees, including the lead mechanic and the project superintendent were engaged in the cited misconduct. It is not credible that four employees, including a lead mechanic and project superintendent with over 20 years of experience in the elevator industry became so excited over the completion of a geared elevator platform that they all, simultaneously, forgot an effectively enforced work rule.

Additionally, the presence of Henline, a representative of Otis' management, lent the prohibited activity the appearance of legitimacy. Commission precedent establishes that misconduct by a supervisor constitutes strong evidence that the safety program is lax. *Consolidated Freightways Corp.* 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-351, 1991).

Finally, as noted above, effective enforcement requires the exercise of reasonable diligence to discover violations. *Pace Construction Corp.* 14 BNA OSHC 2216, 1991-93 CCH-OSHD ¶29,333 (No. 86-758, 1991). Otis admits it had no supervisory personnel on the Summit Hotel site on a day to day basis. Henline, who acted as construction superintendent, conducted safety audits infrequently, visiting the site only two or three times each month. Hooper, the

foreman on site, did not believe he had any authority to enforce safety rules on the site, and felt that each man was responsible for his own safety. Hooper could call Henline to report safety infractions. However, Otis failed to establish that Hooper had been assigned any responsibility for identifying hazardous conditions that other employees might be exposed to, or assuring that the other workers on the job site worked safely. It is clear that Hooper was not authorized to take prompt corrective measures to eliminate hazardous conditions that he might identify. Under the circumstances, I cannot find that Otis exercised reasonable diligence in discovering violations of its safety rules.

Otis has not made out its affirmative defense, and the citation will be affirmed.

Repeat Classification

In the alternative, Otis argues that the cited violation is not a "repeat" violation under the Act.

A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (16183, 1979). The entry into the record of a prior citation issued to Respondent alleging a violation of the same standard, combined with Respondent's further concessions that the prior citation was not contested and had become a final order prior to the date of the inspection giving rise to the present citation was sufficient to complete the Secretary's *prima facie* case. *Stone Container Corp.*, 14 BNA OSHC 1757, 1990 CCH OSHD ¶29,064 (No. 88-310, 1990). The burden of demonstrating the dissimilarity of the violation is then shifted to the Respondent.

Complainant introduced a 1996 citation charging Otis with an earlier violation of §1926.501(b)(1) on a New Jersey work site, wherein "employee(s) performing their duties at the [1st floor elevator shaft] material handling area were exposed to falls of 8' into the elevator pit." The matter was settled and the item was affirmed, becoming a final order of the Commission on April 21, 1997 (Tr. 30; Exh. C-2). Respondent introduced a contemporaneous report of the foreman on that site, who stated that the hoistway barricades had been improperly installed by the general contractor, and that Otis was in the process of correcting the barricades themselves when the OSHA inspection was made (Exh. R-8).

This judge finds that the violation cited in 1996 was sufficient to place Otis on notice of the need to ensure that hoistways are adequately barricaded. Though a responsibility of the general contractor, Otis mechanics working in the elevator hoistways will inevitably be exposed to fall hazards resulting from the general contractor's inadequate, or untimely installation of barricading or guardrails. In this case, however, the record shows that an inspection of the general contractor's barricades was made prior to Otis beginning work on the site (Tr. 160, 62; *see also* Exh. R-18). Inadequacies in the barricading were noted, and presumably corrected prior to the OSHA inspection (Exh. R-18). None were cited here.

Where, as here, the employer has adequately responded to a prior OSHA citation, the occurrence of the second violation does not demonstrate a need for "greater than normal incentive[s] to comply with the Act." *See*, *Monitor Construction Co.*, 16 BNA OSHC 1589, 1594, 1994 CCH OSHD ¶30,338 (No. 91-1807, 1994)*.; Todd Shipyards Corp. v. Secretary of Labor*, 586 F.2d 683, 685 (9th Cir. 1978).

The 1996 citation did *not* put Otis on notice that its rules regarding the use of personal fall protection were inadequately enforced in the Montana territory. This judge cannot find, therefore, that the violation cited here is substantially similar to the 1996 incident, or that it is necessary or proper to invoke the sanctions provided for repeated violations under §17(a) of the Act.

Penalty

Facts

Otis elevator is a large company, with several thousand employees (Tr. 31).

The cited platform was approximately six by six feet in size (Tr. 26, 187). With four men on the platform, none were more than a few feet from an edge (Tr. 187, 215). Brace rods on the one side of the platform provided some protection from a 15 foot opening where the adjacent hoistway was located (Tr. 41, 189, 212). There was a two foot opening on the opposite side where the elevator's counter weights moved up and down (Tr. 211). CO Mailloux believed that the moving cable could snag an inattentive rider and drag him off the platform (Tr. 27). The fall hazard was 112 feet from the ninth floor (Tr. 28, 39). Such a fall would result in death (Tr. 31).

The employees involved testified that the cited platform had not been used previously for any reason; all work was done from a guarded work platform in the hoistway (Tr. 46, 51, 168, 204, 232). Additional fall protection in the form of two lifelines per hoistway was provided (Tr. 169).

The voluminous records demonstrate Otis' good faith, establishing that Otis made extensive efforts to ensure employee compliance with OSHA Standards, including the implementation of fall protection rules, new-hire and ongoing fall protection training, use of specialized coveralls designed to make tying off easy and regularly scheduled safety audits (Exh. R-1 through R-20). As a result Otis has had no fall fatalities in the past five years (Tr. 76, 99). All the employees involved have already been disciplined in conformance with the pre-existing safety program.

Discussion

The citation will be affirmed as a "serious" violation. It is clear that a fall from a moving platform would result in serious injury. The violation was originally cited as serious, and a penalty of $5,000.00 was proposed. The evidence supports the Secretary's original penalty calculations, which take into account the statutory criteria, *i.e.* size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972).

A penalty of $5,000.00 is assessed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.501(b)(1) is AFFIRMED as a "serious" violation and a penalty of $5,000.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: