SECRETARY OF LABOR, Complainant, v. LEWIS MECHANICAL & IRON WORKS, INC., Respondent.	OSHRC DOCKET NO. 96-1335

APPEARANCES:

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

For the Respondent:
Charles Johnson, Esq., Johnson Olsen, Chartered, Pocatello, 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, Lewis Mechanical & Iron Works, Inc. (Lewis), at all times relevant to this action maintained a place of business at 15134 W. Hunziker Road, Pocatello, 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.

Upon receipt of a complaint, the Occupational Safety and Health Administration (OSHA) initiated an inspection of Lewis' Pocatello work site on June 26-27, 1996. On September 4, 1996, Lewis was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Lewis brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 30, through October 1, 1997, a hearing was held in Pocatello, Idaho. The parties have submitted briefs on the issues and this matter is ready for disposition.

The Inspection

As a threshold matter, Lewis objects to the OSHA inspection. Lewis maintains that OSHA had no probable cause to inspect its work site, because the complaint leading to the inspection was made by a union

organizer, Michael Pettaway (Tr. 139, 160), and not by an employee or employee representative. Respondent cites Section 8(f) of the Act, which requires the Secretary to investigate reasonably grounded employee complaints.

Section 8(f) provides that any employee or representative of employees may request an inspection by giving notice to the Secretary or his authorized representative of safety and/or health violations which threaten physical harm. Under Section 8(g) the Secretary *must* investigate reasonable employee complaints. Section 8(g) does not, however, preclude the instigation of investigations based on other criteria, including non-employee complaints.

Moreover, whether the complaint constituted probable cause sufficient to obtain a warrant is not at issue. No warrant was requested, or was necessary in this case. The construction site where the alleged violations took place is open to public view (Tr. 207-08). All of the subcontractors contacted at the multi-employer site acquiesced to the inspection (Tr. 238, 253, 265). In a consensual inspection no probable cause issues arise.

Respondent has stated no cognizable objection to the inspection.

Alleged Violations

Citation 1, item 1 alleges:

29 CFR 1926.501(b)(15): Each employee on a walking/working surface 6 feet (1.8m) or more above lower levels not otherwise addressed in 1926.500(a)(2) or in 1926.501(b)(14)[1] was not protected from falling by a guardrail system, safety net system, or personal fall arrest system:

(a) Center Bay, crane rail beams: On or about June 26, 1996 and at time prior thereto, employees were not utilizing fall protection while installing bridge crane rails at heights above 30 feet.

The cited standard provides:

> *Walking/working surfaces not otherwise addressed.* Except as provided in §1926.500(a)(2) or in §1926.501(b)(1) through (b)(14), each employee on a walking/working surface 6 feet (1.8m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system.

Facts

David Mahlum, OSHA Compliance Officer (CO), testified that on June 20, 1996, he placed a call to Richard Lewis, president of Lewis Mechanical, to notify him of a complaint regarding fall hazards in

[1] The named sections address specific fall hazards including: unprotected sides and edges, leading edges, hoist areas, floor holes, formwork, ramps, runways and walkways, excavations, bricklaying, roofs, precast concrete erection, residential construction and wall openings, none of which are applicable here.

excess of 25 feet that were observed on his work site (Tr. 200-01). Mahlum stated that he discussed OSHA's requirement that workers be protected from such fall hazards 100% of the time, and talked about the means of fulfilling that requirement, *i.e.* harnesses and lanyards in conjunction with aerial lifts or catenary lines, and scaffolding (Tr. 201, 291-92).

Lewis testified that he told Mahlum that the facility they were building would involve work above 25 feet, that Lewis had a fall protection plan, and that Lewis would have a meeting to assure that its employees understood the plan (Tr. 410). Lewis indicated that they would be using articulating man baskets to perform the work, and that employees would be tied off at all times (Tr. 411, 417, 447). Lewis understood that his employees had to be tied off if and when they moved on the steel (Tr. 447). However, he stated that the men were not supposed to leave the baskets; and that had he been informed that the work could not be done from inside the man baskets, he would have come up with a different system (Tr. 427, 446-47). Lewis admitted that he did not explain the meaning of 100% fall protection to his foremen, believing it was unnecessary (Tr. 456).

On June 26, 1996, Mahlum arrived at Lewis' work site to conduct an inspection of the site (Tr. 203). Upon his arrival at the site, Mahlum observed men working on the steel without fall protection, two of whom were identified as employees of Lewis Mechanical (Tr. 208, 212, 225-27). The Lewis employees were walking on steel beams approximately 30-33 feet above the ground (Tr. 224).

Brian Robinson, a fabricator, testified that at the time of the OSHA inspection, he, Buck Briggs, Pat Combs, and Caleb Casper were working from man baskets, aligning, and fastening down the crane rails and then unrigging them from the crane hoist (Tr. 40-45). Robinson testified that he normally worked in the shop, and did not generally work at heights (Tr. 49). Prior to beginning work on the crane rails, Robinson was issued a harness and lanyard and shown how to use them (Tr. 50). Robinson was instructed to wear fall protection whenever he was more than 6 feet off the ground (Tr. 47, 61). Robinson testified that he wore a harness and lanyard, and tied off whenever he was in the man basket, and when he was working on the crane rail (Tr. 47, 50). Robinson admitted, however, that he did not tie off when he left the basket to take measurements on the day of the OSHA inspection (Tr. 51, 72). Robinson admitted that he also left the basket without tying off in order to unrig the crane from the crane rail, and to install bolts or nuts on the back side of the crane rails (Tr. 52; *See also*, testimony of Tim Waterman, Tr. 369, 378). Robinson stated that he could have tied off in some instances where he could not work from the man basket (Tr. 72-73). He did not feel he was in any danger, however, or believe that it was necessary to tie off during the

brief periods he was out of the man basket (Tr. 51-53). No one in Lewis' management told him that he could be disciplined for not tying off (Tr. 62).

Caleb Casper, a welder, testified that prior to the inspection he was given a harness and lanyard, and told to tie off in the man basket (Tr. 95, 97, 119). Casper testified that at the time of the OSHA inspection he was taking a measurement, so that the crane rail could be cut to length (Tr. 98). He was not tied off when he left the basket, or as he walked to the end of the beam (Tr. 98-99). Casper also stated that during bolting up, one man would stay in the basket, while the other walked to the end of the beam to assure that the crane rail was aligned (Tr. 100-02). He testified that there was nothing to attach his lanyard to, and the lanyards were too short to wrap around the steel (Tr. 102, 128-29). Casper stated that with an additional scissor lift on each beam, all the work could have been done without walking the steel (Tr. 129). Casper testified that he, Robinson and Pat Combs all walked the beams without fall protection to unhook the crane rail from the crane, and to bolt the crane rail in place (Tr. 103, 130).

Dave Decato and Tim Waterman were Lewis' supervisors on the site (Tr. 46, 76, 365). Caleb Casper testified that Decato was present and saw him when he walked the beams (Tr. 104). Casper stated that neither Waterman nor Decato reprimanded him about being tied off until after the OSHA inspection (Tr. 104, 119).

Waterman testified that he understood work was generally to be performed from inside the man baskets (Tr. 360, 369). Men working on the steel were to be tied off (Tr. 360-61). Waterman stated that he did not understand that Lewis' fall protection policy applied to employees simply moving from the basket to their work position, and that he had watched employees walk the beams half a dozen times without comment (Tr. 367-68). Waterman admitted that in one instance he had given Pat Combs permission to walk approximately 4 feet across a beam to unhook the crane (Tr. 377-78). Waterman stated that the men tied off most of the time when actually working, but admitted that he occasionally observed Lewis employees working without fall protection. He would then ask the employee to tie off if he could (Tr. 361). Waterman never reprimanded employees who violated the fall protection policies (Tr. 363).

Dave Decato testified that at the time Lewis employees received harnesses and lanyards, they were cautioned to tie off any time they were in or out of the man basket (Tr. 383). He stated that after the project first began he personally cautioned three employees whom he observed working on the steel without fall protection (Tr. 384-85). Decato stated that he later delegated that responsibility to Waterman, who was the employees' immediate supervisor. When Decato would see an employee who was not tied off he would inform Waterman (Tr. 385).

Lewis' fall protection policy states that violations of the policy may result in automatic suspension and/or discharge (Tr. 388-89). Decato, however, never reprimanded or otherwise disciplined any employee for failing to use fall protection (Tr. 385). Decato stated that if he "suspended or fired every guy that broke the rules, [he] wouldn't have any employees." (Tr. 390).

Decato knew failure to follow Lewis' fall protection plan also constituted a violation of OSHA regulations (Tr. 390).

Richard Lewis testified that Lewis Mechanical is a mechanical contractor, dealing mainly with heating, air conditioning, and ventilation in large commercial projects (Tr. 401). Lewis does not generally perform work above 25 feet (Tr. 401). Originally, Lewis subcontracted out the steel work on its new facility to Palmer Builders, but when a conflict arose, Lewis agreed to do the crane installation itself (Tr. 402). Lewis testified that although he was on the construction site daily, he never observed any violations of the fall protection plan, and was never informed of employee violations by his supervisory personnel (Tr. 425-27, 454).

The crane rails were installed in less than a week (Tr. 48, 463-65). Lewis has never been cited for fall protection violations above 25 feet (Tr. 400).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991)

Applicability. Lewis maintains that its employees were engaged in steel erection, and that the cited standard is inapplicable.

The Secretary agrees that the construction standard dealing with fall protection found at §29 CFR 1926.501(b)(15) is not applicable to steel erection. Standards specifically applicable to steel erection have been promulgated, and are found in Subpart R-**Steel Erection** §1926.750. However, Complainant maintains that the activities in which Lewis' employees were engaged at the time of the OSHA inspection are not classified as "steel erection," and are not covered by Subpart R.[2]

[2] At the hearing, Complainant moved to amend the complaint to include alleged violations of §1926.105, the general fall protection standard, in the alternative. That motion was granted (Tr. 21); however, my findings here make discussion of the alternative charge unnecessary.

OSHA has issued a letter of interpretation defining the scope of "steel erection" (Tr. 217-22; Exh. C-13a). That letter defines steel erection as:

> . . .the movement and erection of skeleton steel members (structural steel) in or on buildings and nonbuilding structures. It includes initial connection, moving point to point, installing metal floor or roof decking, welding, bolting and similar activities. It does not mean the erection of steel members such as lintels, stairs, railings, curtain walls, windows, architectural metal work, column covers, catwalks, and similar nonskeletal items, nor does it mean the placement of reinforcing rods in concrete structures.

CO Mahlum stated that he observed Lewis' employees walking on I-beams taking measurement for the crane rails. The I-beams stood on supporting structural column members tied in by grid line joists and purlins (Tr. 271-72). The I-beams support the crane rails, which in turn support the bridge crane (Tr. 271). Mahlum stated that the crane rails are not structural members (Tr. 223, 271).

Richard Lewis testified that the I-beams to which the crane rails are bolted provide the lateral support for the entire building, and are structural members (Tr. 436).

Lewis was cited for fall protection violations occurring during the installation of the crane rails. The structural I-beams which support the rails were already in place when measurements for the crane rail were taken, and during all the other activities which Lewis employees testified were performed without fall protection. Though the I-beams may be structural steel as defined by the Secretary; the crane rails are not. The installation of crane rails does not fall under the steel erection standard, but is covered by Section 500. The cited standard is applicable.

The Violation. Lewis' employees admit that they regularly violated the cited standard during the installation of the crane rails, walking on the steel more than 6 feet above the ground without using fall protection. Lewis' supervisory personnel admit they observed the employees doing so. The violations are established.

Infeasibility. Lewis maintains that it would have been infeasible to utilize any of the fall protection methods prescribed by the cited standard.

To establish the affirmative defense of infeasibility, an employer must show that, 1) the means of compliance prescribed by the applicable standard would have been infeasible, and 2) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994).

The standard requires either a guardrail system, safety nets or a personal fall arrest system. The Secretary does not argue that guardrails or safety nets should have been used on the Lewis work site.

Richard Lewis testified that personal fall arrest systems could not be used either, because there was no place for employees to tie off. Lewis stated that a catenary line could be installed for use as an anchor, but not until the I-beams were in place to provide lateral support for the catenary (Tr. 420).

CO Mahlum testified that catenary lines were feasible (Tr. 228). Caleb Casper testified that a catenary line was installed after the inspection, and could have been installed prior to beginning work on the crane rails (Tr. 113-14).

As discussed above, Lewis was cited for violations observed *after* the installation of the I-beams, at which time installation of catenary lines was feasible. Moreover, other means of abating the hazard were available to Lewis. CO Mahlum testified that the work could have been done with aerial lifts. Lewis himself believed that all the work could have been done from a man basket. Caleb Casper testified that Lewis did not have employees use the catenary lines which were installed after the inspection, but provided them with additional scissor lifts from which to do their work (Tr. 114, 129).

Lewis failed to establish either that the prescribed means of abatement were infeasible or that alternative measures were unavailable to protect its employees, and so has not proven its affirmative defense.

Employee misconduct. Lewis maintains that it complied with the cited standard in that it provided a fall protection system. Lewis maintains that it cannot be held responsible for its employees' failure to utilize such system.

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).

The record establishes that neither the employees on the steel nor the supervisory personnel were adequately informed that Lewis required 100% fall protection. With the exception of Dave Decato, all of Lewis' employees believed that the 6 foot tie off requirement applied only when they were in the man baskets or working from a stationary position. Not one was aware that it was against company policy to walk on the steel.

Moreover, Lewis did not enforce its fall protection plan effectively. Supervisory personnel regularly observed employees both working on the steel and accessing work positions without using fall protection. Decato believed that taking disciplinary steps would leave him without employees, and so took no action

beyond asking employees to tie off. Decato then delegated responsibility for enforcing fall protection policies to Tim Waterman, who was never trained in OSHA requirements or in the requirements of Lewis fall protection plan. Waterman went so far as to give one employee permission to work without fall protection, in contravention of OSHA regulations and Lewis' fall protection program.

Lewis failed to establish the affirmative defense of employee misconduct.

Willful. A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. It is differentiated from other types of violations by a "heightened awareness -- of the illegality of the conduct or conditions -- and by the state of mind -- conscious disregard or plain indifference. *See Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD ¶24,419 (No. 76-3743, 1980).

The record establishes that Lewis was, in fact, indifferent to OSHA's fall protection requirements, and to the safety of its employees. Lewis' employees were inexperienced in working at heights, yet little or no care was taken to assure that they understood the safety requirements for such work before being sent up on the steel. Their immediate supervisor, Tim Waterman, was not trained in the requirements of Lewis' own fall protection plan or in the applicable OSHA standards. Dave Decato, Waterman's superior, abandoned any efforts to enforce fall protection requirements to Waterman, though he knew that employee infractions continued. Lewis was not informed of the continuing infractions, and made no inquires regarding fall protection, though all the supervisory personnel were aware that OSHA had contacted Lewis, and could be visiting the work site (Tr. 359-60, 382).

The facts demonstrate Lewis' indifference, both to OSHA requirements and to employee safety. That Lewis failed to take more than minimal measures to assure that its employees were protected from fall hazards after being contacted by an OSHA CO, cautioned about the specific hazard for which they were cited, told of available remedial measures, and forewarned of a probable inspection, shows the heightened awareness necessary to establish a that the violation was willful.

The violation was correctly classified as "willful."

Penalty. CO Mahlum originally proposed a penalty of $35,000.00 based on the statutory criteria; the employer's size, the gravity of the violation, the employer's good faith, and history of OSHA violations (Tr. 284-85). Ryan Kuehmichel, the OSHA Area Director, testified that the proposed credit for the employer's size was later reduced because of the "egregious" nature of the violation (Tr. 303, 318). A penalty of $56,000.00 was proposed.

Lewis maintains approximately 130-140 employees (Tr. 440). The gravity of the cited violation is high. A fall from the I-beam would likely result in death (Tr. 225). The violations, however, were short lived in nature. The employees all testified that they were generally on the steel for only a few minutes (Tr. 51, 72), over a period of a few days. The employer does not normally perform the kind of work in which it was involved at the time of the inspection. Complainant did not introduce any evidence of prior fall protection violations. Fall protection equipment was provided and was used for a substantial portion of the day.

The violation itself is not "egregious," as Complainant maintains. Nor do I find that Lewis' failure to heed CO Mahlum's warning regarding OSHA's 100% fall protection requirement justifies the additional penalty proposed by the Secretary. I find that the penalty originally proposed by the CO, $35,000.00, is appropriate.

ORDER

1. Citation 1, item 1, alleging violation of §1926.501(b)(15) is AFFIRMED, and a penalty of $35,000.00 is ASSESSED.

Benjamin R. Loye
Judge, OSHRC

Dated: