SECRETARY OF LABOR, Complainant, v. MICRON CONSTRUCTION, INC., Respondent.	OSHRC DOCKET NO. 97-0245

APPEARANCES:

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

For the Respondent:
Mark A. Redford, Esq., Micron Construction, Boise, 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, Micron Construction, Inc. (Micron), at all times relevant to this action maintained a place of business at 3000 W. Pine, Meridian, 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.

On January 14, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Micron's Meridian work site. As a result of that inspection, Micron was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Micron brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On August 21, 1997, a hearing was held in Boise, Idaho. At the hearing, the Secretary withdrew citation 1, item b (Tr. 7). The parties have submitted briefs on the remaining issues and this matter is ready for disposition.

Alleged Violations

Citation 1, item 1 alleges:

29 CAR 1926.95(a): Personal protective equipment was not used as the manufacturer intended.

(a) At 3000 Pine, in Meridian, ID: A subcontractor's employee attached his lanyard to the cable of another subcontractor's employee's self-retracting life line while they both were working approximately 40 feet above the ground. The action exposed both employees to injury in the event that one of them fell.

Citation 1, item 2 alleges:

29 CFR 1926.105(a): Safety nets were not provided when workplaces were more than 25 feet above the ground or water surface, or other surface(s) where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts was impractical:

(a) At 3000 Pine in Meridian, ID: A subcontractor's employee was using a one lanyard fall protection system when bolting perlins to a beam exposing himself to approximately a 40 foot fall when he moved to a new work position.

Citation 1, item 3 alleges:

29 CFR 1926.453(b)(2)(v): A body belt and lanyard was not attached to the boom or basket when working from an aerial lift:

(a) At 3000 Pine I (sic) Meridian: A subcontractor's employee was working in a JLG aerial lift and did not have his lanyard attached to the hardened point, exposing himself to approximately a 16 foot fall to the frozen ground below.

Facts:

Micron is a construction management organization (Tr. 146). Its own employees were not involved in the incidents on which the citations were based; the alleged violations were committed by employees of Micron's structural steel subcontractor, Hansen & Rice (Hansen). The facts of those violations are not seriously disputed. Hansen was cited for the same violations that are at issue in this matter, and paid the fines assessed by the Secretary (Tr. 76).

Employee 1, items 1 and 2. On January 14, 1997, OSHA Compliance Officer(s) Virgle Howell and Steve Gossman observed a Hansen employee on the steel at the Meridian site, approximately 40 feet above the ground (Tr. 23, 25, 27). The employee had a single lanyard attached to his safety belt;

the lanyard was attached to the retractable lifeline of another steel worker (Tr. 23, 219)[1]. The parties agree that that two lanyards or a retractable lifeline are required to provide 100% fall protection for steel workers moving on the steel (Tr. 76). It is undisputed that the manufacturer prohibits the practice of tying off two lanyards to a single retractable lanyard (Tr. 24-25).

Employee 2, item 3. A Hansen employee was observed riding in the basket of an aerial lift 16 feet above the ground without having attached his lanyard to the boom basket (Tr. 41-43, 64, 160).

Knowledge. Ronald Hatch, Micron's safety director, testified that Micron develops a comprehensive safety program for each of its projects (Tr. 143; Exh. R-4). The project specific program that was included in Hansen's contract with Micron explained Micron's 100% fall protection policy for employees working six or more feet above the ground, and specifically stated that the 100% policy was applicable to steel erection (Tr. 144-45; Exh. R-4, p. 5). Micron expected their subcontractors to have their own safety programs in addition to the Micron program, and did ascertain that Hansen had such a program (Tr. 146).[2] Under the terms of their contract, Micron had the right to stop work in the event that Hansen failed to take timely action to correct any safety deficiencies discovered (Tr. 169). Micron further had the right to terminate the contract for repeated violations (Tr. 170).

Micron discussed fall protection with Hansen at pre-construction meetings on December 12, 1996 and January 3, 1997 (Tr. 155-56). Micron suggested substituting retractable lanyards for a two lanyard system, to facilitate tying off 100% of the time (Tr. 177).

Micron did not assign a full time safety person to the Meridian job; however, either Hatch or another Micron safety technician, Fred Grimes, visited the project every day there was steel erection activity going on (Tr. 185-88). A project manager, the project engineer, the project superintendent and assistant superintendent were on site full time (Tr. 189). Hatch testified that he and other members of Micron management observed Hansen employees working from aerial lifts prior to the cited incident; all such employees were tied off (Tr. 175). During the steel work Hatch observed, steel workers moved on the steel with two lanyards or with a retractable life line (Tr. 179).

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[1] Micron speculates that employee 1 was tied off to a perlin when CO Howell arrived on the site, and only clipped on to the retractable when confused by the CO's questions, yelled up to him from the ground (Tr. 235). No evidence was submitted in support of this theory. No Micron personnel were present during this portion of the inspection, and nothing in the CO's videotape supports Micron's contention.

[2] At the hearing, Complainant elicited contradictory testimony regarding Hansen's safety program, gleaned from the CO's interviews with Hansen employees. Such evidence is hearsay, not subject to the exception provided at Fed. R. Evid. 801(d)(2)(D), which applies only to statements of agents of a party opponent. Respondent properly objected to the admission of all hearsay testimony, and such testimony is excluded.

During the inspection, John Schafer, the project superintendent, was in Micron's construction trailer working on a meeting schedule (Tr. 217-18). Schafer had made some walk-throughs that day (Tr. 224), but had not seen any Hansen employees on the steel with a single lanyard (Tr. 37). Nor had he observed the Hansen employee in the man basket (Tr. 44). Schafer testified that Owen Shirley, the assistant superintendent, also conducted walk-throughs of the site, but was at lunch at the time of the OSHA inspection (Tr. 221-22).

Discussion

The sole issue in this case is whether the Secretary established Micron's knowledge of the cited violations.[3] 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 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). The evidence establishes that Micron was not present during, and had no actual knowledge of the cited conditions. Complainant, however, maintains that Micron had constructive knowledge in that it failed to exercise due diligence in anticipating the cited hazard and preventing its occurrence. *See; Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233, 1981 CCH OSHD ¶25,129, p. 31,032 (No. 76-4627, 1981). This judge does not agree.

Complainant introduced no evidence suggesting that Micron failed to exercise due diligence in its oversight of Hansen's fall protection program. To the contrary, the evidence shows that Micron took an active role in investigating Hansen's safety program and suggesting improvements to assure that 100% fall protection would be provided. Micron monitored Hansen's performance on the work site, and found it to be satisfactory. Nothing in the record suggests that Micron was on notice that closer supervision was required to assure Hansen's compliance with its fall protection policy.

Complainant argues that two Hansen employees were simultaneously exposed to fall hazards, suggesting lax enforcement of the 100% fall protection policy. This judge declines to infer from these two transitory violations that Hansen's employees committed such infractions routinely, which conduct would have put Micron on notice of problems with Hansen's enforcement of its fall protection policy. In the absence of notice that Hansen's employees were disregarding fall protection policies, due diligence did not require Micron to duplicate the safety efforts of its subcontractor, whose duty it is to closely supervise its

[3] Micron maintains that OSHA did not have probable cause to conduct the inspection which resulted in the citations at issue. Probable cause is required to procure a warrant in cases where an employer refuses OSHA entry to its work site. No showing of probable cause is required in a consensual inspection. Micron does not claim that this inspection was non-consensual. Probable cause, therefore, is not at issue.

own employees in the performance of their work. *See, Blount International Ltd.*, 15 BNA OSHC 1897, 1900, fn. 4, 1992 CCH OSHD ¶29,854 (No. 89-1394, 1992). The Secretary has not shown, by a preponderance of the evidence, that due diligence required Micron to continuously monitor Hansen's employee.

The Secretary has not established that Micron knew, or should have known of the cited violations. The citation must be vacated.

ORDER

1. Citation 1, item 1, alleging violation of §1926.95(a) is VACATED.

2. Citation 1, item 2, alleging violation of §1926.105(a) is VACATED.

3. Citation 1, item 3, alleging violation of §1926.453(b)(2)(v) is VACATED.

Benjamin R. Loye
Judge, OSHRC

Dated: