UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Sawyer Steel, Inc., Respondent.	OSHRC Docket No. **04-0429**

Appearances:

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Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

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For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Sawyer Steel, Inc. (SSI) is a steel erection contractor whose principal place of business is located in Holland, Ohio. In October 2003, SSI began erecting the steel for an Aldi grocery store on Glendale Avenue in Toledo, Ohio. On October 8, 2003, SSI employee Paul Mowry sustained fatal injuries when he fell from a joist as he attempted to release the choker from a bundle of perimeter angle being landed by crane. As a result of Mowry's accident, Occupational Safety and Health Administration (OSHA) compliance officer Leslie Kinn began an inspection of the Aldi worksite on October 15, 2003. Following Kinn's inspection, the Secretary issued two citations to SSI on February 20, 2004.

Citation No. 2 contained one item, alleging an other-than-serious violation of 29 CFR § 1904.40(a). At the hearing, the Secretary withdrew Item 1 of Citation No. 2, thus disposing of Citation No. 2 in its entirety.

Citation No. 1 originally contained seven items alleging serious violations of the Part 1926 construction standards. At the hearing the Secretary withdrew Item 4 of the citation, which alleged a violation of 29 CFR § 1926.757(d)(1)(ii). The court, upon the Secretary's motion, amended Item 3 of the citation to allege a violation of 29 CFR § 1926.754(a), rather than of 29 CFR § 1926.757(d)(1)(i).

The six remaining items of Citation No. 1 at issue in this proceeding are:

Item 1, which alleges a violation of 29 CFR § 1926.752(b) for erecting steel without having received written notification that the concrete had attained sufficient strength to support the loads imposed during the steel erection;

Item 2, which alleges a violation of 29 CFR § 1926.757(b)(3), for failing to attach each steel joist to the support structure immediately upon placement in the final erection position;

Item 3, which alleges a violation of 29 CFR § 1926.754(a), for failing to maintain structural stability at all times during the erection process;

Item 5, which alleges a violation of 29 CFR § 1926.757(e)(2), for allowing construction loads on the steel joists before all bridging was installed and anchored and all joist-bearing ends were attached;

Item 6, which alleges a violation of 29 CFR § 1926.757(e)(5), for failing to place the edge of a construction load within 1 foot of the bearing surface of the joist end; and

Item 7, which alleges a violation of 29 CFR § 1926.760(a)(1), for failing to ensure employees on a walking/working surface more than 15 feet above a lower level used fall protection.

A hearing was held in this matter on July 14, 2004, in Toledo, Ohio. The parties have filed post-hearing briefs. SSI contests all of the remaining items and proposed penalties generally, on the grounds that the Secretary failed to prove the alleged violations. SSI also contends that Items 2, 5, and 6 should be vacated because 29 CFR §§ 1926.757(b)(3), (e)(2), and (e)(5) are not applicable to the type of joists being used at the Aldi worksite. SSI further asserts the affirmative defense of unpreventable employee misconduct on the part of Paul Mowry.

For the reasons discussed below, Citation No. 1, Items 1, 2, 5, and 7 are affirmed, and Items 3 and 6 are vacated.

Background

SSI began erecting steel for the Glendale Avenue Aldi grocery store in Toledo, Ohio, in October 2003.[1] SSI's job superintendent for the project was T. J. Walters. Its foreman was Robert Enright. Enright's crew consisted of ironworkers Paul Mowry, Jason Brown, Robert McCullough, Andy Hobbs, and Greg Kohne.

The crew began erecting steel the week of October 6. The members of the crew erected the columns for the center beam and positioned 48-foot span joists and 38-foot span joists on each side of the center beam. Mowry bolted the ends of the joists on the center beam using one bolt. Hobbs followed behind him and welded the joists in place on the center beam. The other ends of the joists sat, unbolted and unwelded, at the east interior masonry wall. Bridging, to be placed between the joists, had not yet been installed. The crew positioned the joists approximately 15 feet above the concrete floor of the structure.

On Wednesday, October 8, SSI's crew was working with a rented crane and crane operator to hoist bundles of perimeter angle (also referred to as angle iron) onto the joists, to be put in place later for roofers to lay the decking. The crane operator could not see where he was to land the bundles, so one ironworker would sit on an exterior masonry wall and relay hand signals between the crane operator and the other ironworker who was directing the landing. Brown directed the landing of the first two bundles next to the west wall. Mowry directed the landing of the third bundle.

Although it was unnecessary for him to do so, Mowry exited the scissors lift and climbed onto one of the joists before the crane operator landed the third bundle. Mowry gave Brown a signal to "cable down easy" to relay to the crane operator (Tr. 96). The crane operator, at Mowry's direction, landed the bundle on three joists 28 to 30 feet from the center beam.

While sitting on the joist, Mowry (who was not using fall protection) released one choker of the bundle. Before he could release the second choker, the three joists on which the third bundle was

[1] Unless otherwise noted, all dates referred to in this decision occurred in 2003.

lying rolled over, including the joist on which Mowry was sitting. Mowry fell to the concrete floor, sustaining injuries from which he subsequently died.

Compliance officer Leslie Kinn arrived at the Aldi worksite on October 15. Kinn conducted an inspection, took photographs, and interviewed SSI employees and employees of general contractor Tri-C. Based upon Kinn's inspection, the Secretary issued two citations to SSI on February 20, 2004.

Discussion

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Applicability of 29 CFR § 1926.757 to the Joists

SSI contends that the sections of 29 CFR § 1926.757 cited in Items 2 , 5, and 6 should be vacated for the same reason that the Secretary withdrew Item 4 and moved to amend Item 3: that 29 CFR § 1926.757 does not apply to the type of joists that SSI was using at the Aldi worksite.

In its post-hearing brief, SSI states (SSI's brief, p. 19, citations to transcript omitted):

> The joists used at the Aldi job are KSP joists. . . .During Leslie Kinn's deposition, it became evident that KSP joists are not of the type covered by .757. Complainant conceded this point in withdrawing .757(d)(i) and (ii). . . . Respondent submits the three remaining .757 citations must also be withdrawn.
>
> Section 29 CFR § 1926.757 addresses open web steel joists. Respondent submits that the open web steel joists governed in .757 are referenced in Tables A and B. Tables A and B set forth the type of joists that require erection bridging. The joists involved in the accident are referred to as 26KSP2. . . . These joists are special joists, i.e, "SP." They are heavier and "made for snow loads" (T. Sawyer 214). Tables A or B simply do not refer to these KSP joists.

Contrary to SSI's assertion, the Secretary did not stipulate or concede at the hearing "that KSP joists are not of the type covered by .757." Counsel for the Secretary conceded only that paragraph (d) of 29 CFR § 1926.757 does not apply to the KSP joists (Tr. 4):

> In pretrial discovery in a deposition, it was determined that the particular types of joists that are of the type that are not covered by paragraph 757(d), and Counsel for Respondent essentially pointed that out to me, and I researched it and concurred and recognized that those items could not stand on their own. Therefore, in addition to asking for the amendment, I have withdrawn Item 4.

SSI moved for a directed verdict at the hearing partly on the grounds that 29 CFR § 1926.757 is inapplicable to Items 2, 5, and 6. In response to SSI's motion for directed verdict, counsel for the Secretary reiterated the Secretary's position that Tables A and B apply only to 29 CFR § 1926.757(d) (Tr. 139):

> [A]s I stated initially, that was the basis for our withdrawing Item 4 and amending Item 3, and the fact that those joists were not included in the table does not affect the other violations and only applies to that section of .757, and, therefore, that would not be grounds for a directed verdict.

Applicability of 29 CFR § 1926.757 to Items 2, 5, and 6 turns upon whether Tables A and B apply only to the sections of the standard that explicitly refer to them, or whether they apply to the standard in its entirety. It is thus necessary to analyze the standard closely.

The standard at 29 CFR § 1926.757 is entitled "Open web steel joists," and it appears in Subpart R of the construction standards, which is entitled "Steel Erection." The definition section for Subpart R is found at 29 CFR § 1926.751, which provides in pertinent part:

> *Steel joist* means an open web, secondary load-carrying member of 144 feet (43.9 m) or less, designed by the manufacturer, used for the support of floors and roofs. This does not include structural steel trusses or cold-formed joists.

Section 1926.757 contains paragraphs (a) through (e). Paragraphs (a), (b), and (e) do not refer to Tables A and B. Paragraph sections (c)(1), (c)(3), (c)(4), and (d)(1) do refer to Tables A and B. Table A is entitled "ERECTION BRIDGING FOR SHORT SPAN JOISTS." It lists over one hundred types of "K" series joists and the length of erection bridging required for each type. Table B is entitled "ERECTION BRIDGING FOR LONG SPAN JOISTS." It lists fifty-four types of "LH"

and "DLH" series joists and the required length of erection bridging. The KSP joists at issue in this case do not appear in either Table.

Nothing in the standard states that 29 CFR § 1926.757 applies only to the joists listed in Tables A and B. The Tables themselves are not designated as exhaustive or all-inclusive of every type of joist used in the construction industry. Paragraph (a) does not limit the scope of the standard's application to joists listed in Tables A and B. The standard does not refer to the Tables until paragraph (c). Paragraph (d) is captioned "Erection bridging," highlighting its specific relationship with Tables A and B, which address erection bridging.

As previously noted, the standard addresses "open web steel joists," and a steel joist is defined as "an open web, secondary load-carrying member of 144 feet (43.9 m) or less, designed by the manufacturer, used for the support of floors and roofs." The definition does not limit steel joists to those listed in Tables A and B. It is undisputed that the KSP joists used by SSI are steel joists as defined under Subpart R. No other standard specifically addresses steel joists. Limiting coverage of 29 CFR § 1926.757 to the joists listed in Tables A and B would result in a gap in coverage that would expose ironworkers to hazardous conditions.

Permitting such a gap would be contrary to the stated purpose of 29 CFR § 1926.757 as clearly explained in its preamble (66 Fed. Reg. 5317-5325 (2001)):

> Some of the most serious risks facing the ironworker are encountered during the erection of open web steel joists, particularly landing loads on unbridged joists and improperly placing loads on joists.

In discussing paragraph (c)(1) of the standard, the preamble establishes that Tables A and B refer only to certain joists that require bridging and acknowledges that other joists exist which are covered by the standard (*Id.,* emphasis added):

> Paragraph (c)(1) of the final rule requires that *for joists that require bridging as provided in Tables A and B,* at least one end of each steel joist must be attached on both sides of the seat to the support structure before the hoisting cables can be released . . . For further clarification, to address an oversight in the proposed standard and to conform with SJI [Steel Joist Institute] specifications, this provision *has been limited to the joists that require bridging as identified in Tables A or B.* This clarification will allow smaller lighter joists (that do not require bridging and can be landed in bundles) to be placed on the structure and spread out by hand.

SSI's argument that 29 CFR § 1926.757 is inapplicable to Items 2, 5, and 6 is rejected. The KSP joints are covered by the sections of the standard that do not specifically refer to Tables A and B.

Alleged Serious Violation of 29 CFR § 1926.752(b)

Section 1926.752(b) provides:

> A steel erection contractor shall not erect steel unless it has received written notification that the concrete in the footings, piers, and walls or the mortar in the masonry piers and walls has attained, on the basis of an appropriate ASTM standard test method of field cured samples, either 75 percent of the intended minimum compressive strength or sufficient strength to support the loads imposed during erection.

In Citation No. 1, Item 1, the Secretary alleges:

> The steel erection contractor erected steel without receiving written notification that the concrete in the footings, piers and walls or the mortar in the masonry piers and walls had attained, on the basis of an appropriate ASTM standard test method of field-cured samples, either 75 percent of the intended minimum compressive design strength or sufficient strength to support the loads imposed during steel erection.
>
> On or about January 8, 2004, as part of the continuing investigation started on October 15, 2003, the employer failed to produce the written notification which confirmed commencement of steel erection could occur.

In its post-hearing brief, SSI concedes that it did not comply with the terms of this standard (SSI's brief, p. 18). SSI did not receive written notification that the concrete had attained sufficient strength before it began erecting steel at the Aldi worksite. Foreman Enright stated that he began work when directed by his job superintendent. He did not see written notification and did not know if SSI received such notification. SSI president Larry Sawyer acknowledged that his company did not receive written notification before it began erecting steel, but attempted to excuse SSI's noncompliance (Tr. 187):

> The footer had been poured for two months. The walls had been sitting up there for another month. Cure time is according to what the psi of the concrete that you're using, three to seven days, a month, three to four days, but a month is plenty.
>
> I mean, there was not an issue about safety about going in there.

Sawyer's testimony left the impression that it is not atypical for SSI to begin erecting steel without receiving the written notification required by 29 CFR § 1926.757(b). In defending SSI's action, Sawyer stated, "We can shut a job down–and I believe it was previous to the accident of Paul

Mowry because the concrete was poured on Friday, and [we] went in there on a Saturday, and we said, 'No'" (Tr. 187). SSI had presumably not received written notification before it sent its crew out to erect steel on the Saturday job. Sawyer claims that he and SSI's employees can determine on their own whether or not recently poured concrete has cured. SSI seeks to rely on its own judgment rather than waiting for written notification in compliance with the standard.

The preamble explains the reason for the standard's promulgation (*Id):*

> SENRAC [Steel Erection Negotiated Rulemaking Advisory Committee] found that many accidents involving collapse could have been averted had adequate pre-erection communication and planning occurred (63 FR 43461). . . .OSHA agrees that both the controlling contractor and steel erector usually would not know if concrete has cured unless the ASTM standard method test has been performed.

The Secretary has established that the cited standard applies, that SSI did not comply with its terms, and that SSI knew that it began erecting steel without receiving written notification. SSI argues, however, that the Secretary has failed to prove SSI's employees were exposed to a hazard because the concrete was cured. SSI adduced no proof at the hearing that the concrete was, in fact, cured[2]. SSI based its conclusion on general "cure time," a method which the standard implicitly rejects and which OSHA explicitly rejects in CPL 2-1.34, in a question and answer section:

> ***Question 15: Section 1926.752(a)(1) and (b) require that an appropriate ASTM standard test method be used to determine that field-cured concrete/mortar testing samples have attained 75% of the intended minimum compressive strength or sufficient strength to support loads imposed during steel erection before that erection begins. Can I rely on cure time instead of doing such a test?***
>
> Answer: No. The standard does not provide that cure time may be used instead of the ASTM test. Because of the many factors that influence cure rates (temperature,

[2] SSI attached copies of documents as Exhibit A to its post-hearing brief. The documents purport to be reports of concrete compressive strength test results from the Aldi worksite. SSI claims that the reports show that concrete had attained sufficient strength to support the loads imposed during steel erection at the time SSI began erecting steel. SSI does not explain why it did not adduce this evidence at the hearing. SSI rested its case and the court closed the hearing in this matter on July 14, 2004. The court cannot take notice of evidence submitted two months after the close of the hearing, presented without foundation or opportunity for the adverse party to examine it. Exhibit A to SSI's brief will not be considered in deciding this issue.

humidity, ingredient ratios, etc.), cure time is an unreliable means of assessing how much the concrete has cured.

The existence of a standard presumes a hazard is present when the terms of the standard are not met. *Wright & Lopez,* 10 BNA OSHC 1108 (No. 76-256, 1981). Arguing that a hazard does not exist is an "impermissible challenge to the wisdom of the standard." *Heath & Stich, Inc.,* 8 BNA OSHC 1640, 1643 (No. 14188, 1980). SSI's six-man crew was exposed to the hazard of erecting steel on concrete that potentially had not attained sufficient strength to support the loads imposed upon it. The Secretary has established a violation.

SSI contends that any violation of 29 CFR § 1926.752(b) should be classified as de minimis. The Commission has found violations to be de mimimis when "the hazards presented are too trifling to warrant the imposition of an abatement requirement or the assessment of a penalty." *Southwestern Electric Power Co.*, 8 BNA OSHC 1974, 1976 (Nos. 77-3391 and 77-3890, 1980). The standard at issue is designed to prevent concrete collapsing because a steel erector begins erecting steel before the concrete has attained sufficient strength. The hazard is not trifling. If the concrete collapses, the likely result would be death or serious physical injuries to the employees. The violation is properly classified as serious.

Alleged Serious Violation of 29 CFR § 1926.757(b)(3)

The Secretary alleges that SSI committed a serious violation of 29 CFR § 1926.757(b)(3), which provides:

> Except as provided in paragraph (b)(4) of this section, each steel joist shall be attached to the support structure, at least at one end on both sides of the seat, immediately upon placement in the final erection position and before additional joists are placed.[3]

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[3] Section 1926.757(b)(4) provides:
Panels that have been pre-assembled from steel joists with bridging shall be attached to the structure at each corner before the hoisting cables are released.

This exception is not at issue in this proceeding.

In Citation No. 1, Item 2, the Secretary alleges:

> Except as provided in paragraph (b)(4) of this section, each steel joist was not attached to the support structure, at least at one end on both sides of the seat, immediately upon placement in the final erection position and before additional joists were placed.
>
> On or about October 8, 2003, the employer did not ensure that all steel bar joists that were placed in their final position were bolted at one end on both sides of the seat, in that three steel joists rolled out and fell to the ground while an employee was landing a bundle of angle iron on the joists.

It is undisputed that on each joist Mowry bolted only one side of the seat to the center beam.

In addition to SSI's argument that 29 CFR § 1926.757 as a whole does not apply to the KSP joints, the company argues that 29 CFR § 1926.757(b)(3) specifically does not apply to the KSP joists. SSI states that paragraph (b)(3) must be read in conjunction with paragraphs (b)(1) and (b)(2), which provide:

> (1) Each end of "K" series steel joists shall be attached to the support structure with a minimum of two 1/8 inch (3 mm) fillet welds 1 inch (25 mm) long or with two ½ inch (13 mm) bolts, or the equivalent.
>
> (2) Each end of the ""LH" and "DLH" series steel joists and steel joist girders shall be attached to the support structure with a minimum of two 1/4-inch (6 mm) fillet welds 2 inches (51 mm) long, or with two 3/4-inch (19 mm) bolts, or the equivalent.

SSI's argument appears to be that the KSP joists it used at the Aldi site are not part of the "K," "LH," or "DLH" series referred to in paragraphs (b)(1) and (2). Foreman Enright, however, responded, "Yes," when asked if the 26KSP joists used at the Aldi site are in the "K" series (Tr. 40-41). The cited standard applies to the joists at issue.

SSI also argues that the three joists that fell were not yet placed in their "final erection position," so that it was not required to bolt both sides of the seat. The standard does not define "final erection position." Enright, Brown, and Sawyer each testified that they did not consider the joists to be in their final erection position because the joists still had to be pulled to center them. Enright testified that the joists were within 1/8 to 1/4 inch from their final erection position. Brown

testified that the joists were within an inch or two of their final erection position, noting that the ends of the joists sit in pockets that are only 10 inches wide.

It is undisputed that SSI could have bolted both sides of the seat to the center beam and still adjusted the joists to what it considered the final erection position. Brown stated that it is standard practice to bolt both sides of the seat (Tr. 98):

> Q. Do you know would it be standard practice to bolt them on both sides of the seat or one side?
>
> Brown: Yes, if you're sitting there, I would, you know bolt them both sides.
>
> Q. Okay.
>
> Brown: It's only one more bolt, you know.

Furthermore, SSI's argument focuses only on the part of the standard that requires the employer to bolt both sides of the seat immediately upon placement of the joist in its final erection position. It ignores the second part of the conjunctive that states, "and before additional joists are placed." SSI had placed at least two more joists after placing the first one and failing to bolt both sides of its seat. This is the very hazard that paragraph (b)(3) seeks to prevent (66 Fed. Reg. 5317-5325):

> Paragraph (b)(3) of the final addresses the hazards associated with the following improper erection sequence: landing joists on the support structure; spreading them out unattached to their final position; and then attaching them. This procedure creates the potential for worker injury because joists handled in this manner may fall or the structure may collapse.

The Secretary has established that the cited standard applies and that SSI failed to comply with the terms of the standard. SSI argues that Mowry's undeniable exposure to the hazardous condition was the result of his own isolated misconduct because "Mowry knew he was instructed to work out of a scissors lift" and that getting out of the scissors lift was "contrary to his foreman's directive" (SSI's brief, p. 28). This statement is directly at odds with Enright's testimony (Tr. 49-50):

> Q. Did you instruct him to land angle iron–to stay in the lift when he landed the angle iron?
>
> Enright: No.
>
> Q. Did you expect him to do that?

> Enright: We supplied lifts and safety equipment for all the employees to use. Okay? I would have personally stayed in the lift myself and landed it next to the center beam but that's me personally.
>
> Q. According to Sawyer Steel's Safety Program, should Mr. Mowry have stayed in the lift?
>
> Enright: Well, see, that's kind of like up to the employee. You supply him with safety equipment to tie off and, I mean, it's not like they dictate, you know you have to stay in the lift. They supply the means of safety devices.

The Secretary has established that Mowry was exposed to the hazardous conditions created by SSI's noncompliance.

Enright was aware that Mowry had only bolted one side of the seat of each of the joists to the center beam (Tr. 34-35). "The knowledge of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes substantial grounds for not imputing the knowledge." *Ormet Corp.*, 14 BNA OSHC 2134, 2138-39 (No. 85-531, 1991). SSI argues that Mowry was engaging in employee misconduct when he bolted only one side of the seat. This argument is rejected. There is no evidence that Enright instructed Mowry to bolt both sides of the seat. In fact, in describing how he runs a typical steel erection project as foreman, Enright specifically stated that only one bolt is used (Tr. 38; emphasis added): "See, when you connect, normal practice is *you throw one bolt in it,* tighten it down and then the detailers come through, get them endowed, get them centered, weld them up and finish bolting them."

The Secretary has established a violation of 29 CFR § 1926.757(b)(3). The collapse of the joists resulted in the death of an employee. The violation is properly classified as serious.

Alleged Serious Violation of 29 CFR § 1926.754(a)

Item 3 originally alleged a violation of 29 CFR § 1926.757(d)(1)(i), which, as noted, the Secretary conceded at the beginning of the hearing does not apply to the KSP joists. Upon the Secretary's motion, the court granted amendment of Item 3 to allege a serious violation of 29 CFR § 1926.754(a), which provides:

Structural stability shall be maintained at all times during the erection process.

The Secretary did not adduce evidence at the hearing specifically addressing this item. The only argument she musters in her post-hearing brief is, "There is no dispute that structural stability was not maintained at all times during the erection process because the accident involving Paul Mowry clearly involved a failure to maintain structural stability" (Secretary's brief, p. 11). This circular argument is accompanied by citations to exhibit photographs showing the collapsed joists.

The Secretary does not suggest appropriate abatement measures for this item. She cited SSI for the violation of 29 CFR §§ 1926.752(b), 757(b)(3), 757(e)(2), and 757(e)(5), all of which address specifically structural stability. Compliance with these specific standards would result in the structural stability that the general standard requires. The Commission has held citations to be duplicative where they involve substantially the same violative conduct. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 114 (No. 84-696, 1987). It is determined that 29 CFR § 1926.754(a) is duplicative of the standards cited above. Accordingly, Item 3 is vacated.

Alleged Serious Violation of 29 CFR § 1926.757(e)(2)

The Secretary alleges that SSI committed a serious violation of 29 CFR § 1926.757(e)(2), which provides:

> Except for paragraph (e)(4) of this section, no construction loads are allowed on the steel joists until all bridging is installed and anchored and all joist-bearing ends are attached.[4]

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[4] The standard at 29 CFR § 1926.757(e)(4) provides:

No bundle of decking may be placed on steel joists until all bridging has been installed and anchored and all joist bearing ends attached, unless all of the following conditions are met:

(i) The employer has first determined from a qualified person and documented in a site-specific erection plan that the structure or portion of the structure is capable of supporting the load;
(ii) The bundle of decking is placed on a minimum of three steel joists;
(iii) The joists supporting the bundle of decking are attached at both ends;
(iv) At least one row of bridging is installed and anchored;
(v) The total weight of the bundle of decking does not exceed 4,000 pounds (1816 kg); and
(vii) Placement of the bundle of decking shall be in accordance with paragraph (e)(5) of this section.

(continued...)

In Citation No. 1, Item 5, the Secretary alleges:

> Construction loads were allowed on the steel joists and all bridging was not installed and anchored and all joist bearing ends were not attached.
>
> On or about October 8, 2003, the employer did not ensure that all steel joists were bridged, anchored, and all joist-bearing ends were attached, in that employees were landing perimeter angle iron on the joists and three joists fell out and fell to the ground.

SSI argues there are two reasons that the cited standard does not apply to the cited conditions: (1) the KSP joists being used on the Aldi site did not require bridging, and (2) the load of perimeter angle was not a "construction load" within the meaning of the standard. SSI is mistaken on both counts.

SSI states in its post-hearing brief that the Secretary "conceded that the subject joists do not require erection bridging," so that compliance with 29 CFR § 1926.757(e)(2) is not mandated (SSI's brief, p. 20). SSI once again mischaracterizes the Secretary's position. The Secretary conceded that the KSP joists do not appear in Tables A and B of the standard; she did not concede that the joists do not require bridging. The cited standard does not state that construction loads cannot be allowed on steel joists until all bridging as provided for in Tables A and B is installed. It only prohibits landing construction loads until bridging is installed. The plans for the Aldi grocery store called for bridging (Exh. J-1). Enright testified that he planned to install the bridging after his crew had finished landing the perimeter angle.

SSI also states, "[T]he Aldi design drawings did <u>not</u> call out the installation of <u>any</u> diagonal erection bridging (T. Enright 90-91)" (SSI's brief, p.21; emphasis in original). This assertion is puzzling. It is undisputed that Enright planned to install bridging after the perimeter angle was hoisted to the joist level. The pages of the transcript cited by SSI do not bear out its claim. Enright is questioned about the sequencing of the steel erection. The specific question put to Enright about what the plans required with regard to the bridging was (Tr. 90): "Do the drawings, Mr. Enright, tell you when it is you are to install the x-bridging?" to which Enright responds, "No." Enright goes on

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[4](...continued)

SSI does not claim that this exception applies.

to testify that sometimes drawings do specify the sequence of work, and sometimes they do not, and in this case they did not. Both horizontal and diagonal bridging were specifically required by the plans (Exh. J-1). The standard applies to the KSP joists.

SSI also argues that the standard does not apply because it refers to the landing of "construction loads," which SSI claims the perimeter angle was not. SSI contends, incorrectly, that "construction load" is not defined in 29 CFR § 1926.751.[5] The standard at 29 CFR § 1926.751 provides: "*Construction load (for joist erection)* means any load other than the weight of the employee(s), the joists and the bridging bundle."

The load of perimeter angle was not (1) an employee or employees, (2) the joists, or (3) the bridging bundle. Therefore, the load of perimeter angle was a construction load. In the section addressing 29 CFR § 1926.757(e)(2), the preamble states (*Id.)*:

> Paragraph (e)(2) prohibits placement of any construction loads on steel joists until all bridging is installed and anchored and all joist bearing ends are attached in accordance with § 1926.757(b). As defined in the final rule, a construction load means any load other than the weight of the employee(s), the joists and the bridging bundle. Although bundles of decking constitute a construction load under this definition, under certain conditions decking can be placed safely on the steel joists before all the bridging is installed and anchored. These conditions form the basis for the exceptions in paragraph (e)(4) of this section.

Section 1926.757(e)(2) applies to the both the KSP joists and the load of perimeter angle at issue.

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[5] SSI's argument in its entirety on this issue is (SSI's brief, p. 21):

> Of utmost significance is the undisputed testimony that perimeter angle iron is not a "construction load." (T. Sawyer 216) OSHA does <u>not</u> define "construction load" in the Definitions set forth at § 1926.751. The standard specifies "construction loads:" joist bridging and decking. It does not make any reference to perimeter angle iron.

When the OSHA standards clearly define "construction load" so as to include the load at issue, the opinion of the company's president that a load was not a construction load carries no weight. The rest of SSI's argument is simply wrong.

It is undisputed that SSI had not yet installed the bridging required by the plans. Neither were the joist-bearing ends attached at the east end of the joists. Enright knew that the bridging was not installed and that the ends of the joists were not attached. SSI's noncompliance with the terms of this standard exposed Mowry to the risk of serious physical injury or death. The Secretary has established a serious violation of 29 CFR § 1926.757(e)(2). Item 5 is affirmed.

Alleged Serious Violation of 29 CFR § 1926.757(e)(5)

The standard at 29 CFR § 1926.757(e)(5) provides:

> The edge of the construction load shall be placed within 1 foot (.30 m) of the bearing surface of the joist end.

In Citation No. 1, Item 6, the Secretary alleges:

> The edge of the construction load was not placed within 1 foot (.30 m) of the bearing surface of the joist end.
>
> On or about October 8, 2003, the employer did not ensure that the edge of the load of angle iron being landed was placed within 30' to 35' of the centerline bearing beam (approximately 13' from east wall) in that three steel joists rolled out and fell to the ground from the angle iron being placed near the center of the joists.

It is undisputed that the edge of the load of perimeter angle was not placed within 1 foot of the bearing surface of the joist ends, but was placed in the middle of the joists, approximately 28 feet from the center beam. Noncompliance with this standard exposed Mowry to the risk of serious physical injury or death.

SSI contends that the Secretary failed to establish that it knew or, with the exercise of reasonable diligence, could have known, that Mowry would choose to land the construction load at that area of the joists.

Foreman Enright instructed his crew generally to land two bundles of five pieces of perimeter angle each "within a foot of the block wall on the joist" (Tr. 14). Enright instructed Mowry personally with respect to nine pieces of perimeter angle left over (Tr. 14-15): "[M]e and Paul walked over, and I told Paul that I wanted him to lay them–now, this goes to the interior of the

building. I told Paul I wanted him to lay them at the center beam on the site that were bolted into the beam." After giving this instruction, Enright began sorting materials for work at the front of the building. Brown landed the first two bundles of perimeter angle. For the third load, Mowry switched jobs with Brown and was directing the landing. Enright stated, "[T]he next thing I hear was a crash-like and turned around and Paul was probably five-eights to three-quarters to the far wall away from that center beam that was bolted" (Tr. 15). Enright had no actual knowledge that Mowry had landed the edge of the construction load more than a foot away from the bearing surface of the joist end.

Employer knowledge can be established by showing constructive knowledge. Constructive knowledge is shown if the employer could have known of the violative condition with the exercise of reasonable diligence. Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, and to take measures to prevent the occurrence of the violation. *Pride Oil Well Service,* 15 BNA OSHC 1809 (No. 87-692, 1992).[6]

SSI has a written safety program. Each new employee is given a copy of SSI's safety manual. SSI provides safety training for its employees and conducts weekly toolbox meetings. SSI does not, however, have an established work rule designed to prevent the landing the edge of a construction load more than a foot away from a joist end. SSI president Larry Sawyer admitted that no such rule exists (Tr. 211-212):

> Q. [D]id Paul Mowry violate any written Company safety rule in setting the load of angle iron where he did?
>
> Sawyer: I don't believe there is a safety rule telling about an unsafe pick or, you know, a landing. I'm trying–it's not a positive– I'm sorry.
>
> Q. That's okay. Let me ask the converse. Is there any safety rule that says the load should only be landed near–
>
> Sawyer: Barrier points?
>
> Q. –Barrier points?

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[6] SSI also asserts the affirmative defense of employee misconduct

Sawyer: Is there any safety rule? We go to Exhibit Q, you will see, it's called "Open Web Steel Joist." There is a 26-minute video on there.

Q. You're referring to Exhibit P, correct?

Sawyer: Is it P? Okay. Through Subpart R and through the training that we do in the union, it will show you where to land, and it does talk about barrier joists.

Q. That's not a written company safety rule?

Sawyer: No, it's an OSHA rule. No, I'm saying that the video was taken off of OSHA and it parallels OSHA.

Exhibit P is part of Exhibit R-2. The page to which Sawyer referred appears to be a photocopy of the cover for a videotape. The videotape is entitled "Open Web Steel Joists." The cover indicates that the tape is part of the "Ironworkers Video Training Series" put out by the National Ironworkers and Employers Apprenticeship Training and Journeyman Upgrading Fund.

Despite SSI's lack of a specific work rule prohibiting landing the edge of construction loads more than a foot from the joist edges, Enright did not have constructive knowledge of the violative condition. Enright gave specific procedural and safety instructions to his crew, directing them to land the loads at specific locations near the joist edges. The first two loads were landed as instructed. Enright gave specific instructions to Mowry on where to land the third load, and relied on Mowry's experience and competency to land that load properly without direct supervision. Mowry was an experienced ironworker. He had worked for SSI for eight years. He had worked as a foreman for five years. Mowry had been foreman for the steel erection on a Wal-Mart store, located in the same complex as the Aldi store. The Wal-Mart project ran for three months. Larry Sawyer testified that Mowry always followed instructions well, and that the only reason Mowry was not the foreman on the Aldi project was "because he ran a day late on a job that he was doing" (Tr. 173). Enright had worked with Mowry on several previous projects.

Mowry had received ironworker training provided by the Ironworker's Union. He had been trained as a competent person. It is standard practice in the steel erection industry to land loads within a foot of the joist ends. Enright had no reason to believe that Mowry would disregard his

direct order, or that he would land the load in a hazardous manner. Enright was confident in Mowry's abilities noting that Mowry "ran a bigger job than this right down the road" (Tr. 61).

The employee was given a specific order and instruction as to the method of landing the materials. Even though this is not a written safety rule, it does constitute a safety instruction and precaution taken by SSI. Furthermore, SSI provided adequate supervision of this operation.

Based upon the record, it is determined that Enright had no knowledge, either actual or constructive, that Mowry would land the construction load in an unsafe manner. The Secretary has failed to produce sufficient evidence to prove a violation of 29 CFR § 1926.757(e)(5). The alleged violation of this standard is vacated.

Alleged Serious Violation of 29 CFR § 1926.760(a)(1)

Section 1926.760(a)(1) provides:

> Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

In Citation No. 1, Item 7, the Secretary alleges:

> Employees engaged in steel erection activities on a walking working surface with an unprotected side or edge, more than 15 feet above a lower level were not protected from falling by conventional fall protection methods.
>
> On or about October 8, 2003, the employer did not ensure that all employees engaged in landing angle iron, welding and plumbing up activities were protected from falling. Employees were working approximately 16 ½ feet above ground level.

The record establishes that on October 8, Mowry, Hobbs, and Brown were each working at heights of approximately 16 feet. SSI had provided them with fall protection (harnesses and lanyards), but none of them had tied off while they were working.

SSI argues that Mowry and Brown were connectors, and so were not bound by the requirements of the cited standard section. Connectors are required to use fall protection for fall hazards "of more than two stories or 30 feet above a lower level, whichever is less." 29 CFR § 1926.760(b)(1). Section 1926.751 defines "connector" as "an employee who, working with hoisting

equipment, is placing and connecting structural members and/or components." The Secretary argues that none of the employees were performing connecting work at the time the accident occurred.

In the section addressing the definitions found in 29 CFR § 1926.751, the preamble states (66 Fed. Reg. 5317-5325):

> The definition is very specific; connecting is distinguished from other steel erection activities by the elements in the definition. For example, spreading and securing bar joists by hand would not be considered connecting, since that work is not done "with hoisting equipment." Therefore, an employee is a "connector" only when working with "hoisting equipment." This includes placing components as they are received from hoisting equipment, and then connecting those components while hoisting equipment is overhead.

Under this definition, it is determined that Mowry was working as a connector at the time of the accident. The pieces of perimeter angle are components that Mowry was in the process of releasing from hoisting equipment. The failure of Mowry to use fall protection while seated on the joist was not a violation of the cited standard.

Brown, however, was not working as a connector as he sat on the 16-foot masonry wall and relayed signals between Mowry and the crane operator. Brown was not working directly with hoisting equipment, and he was neither placing nor connecting structural members or components. Brown had no excuse for not tying off as he sat on the wall. He was wearing a harness and attached lanyard. When asked if he could have tied off, Brown responded, "Yes, I probably could have tied off to a joist tail or something like that" (Tr. 95). Hobbs was also not working as a connector at the time of the accident. Hobbs told Kinn that he was doing finishing work, performing welding at a height of 16 feet. Hobbs, like Brown, was wearing a harness but was not tied off. Hobbs and Brown were not using fall protection, in violation of 29 CFR § 1926.760(a)(1).

SSI contends that Enright did not have actual or constructive knowledge that his crew members were not tied off. Enright stated that he did not know whether or not Brown was using fall protection. When asked if Hobbs used fall protection, Enright stated that he thought so, but did not actually observe him doing so.

SSI has an established work rule requiring employees to tie off (SSI actually had a more stringent rule than OSHA, requiring everyone, even connectors, to tie off over 6 feet). SSI has a

100% tie-off policy. Sawyer testified that both Mowry and Brown were violating company policy when they were working without tying off.

Despite the 100% tie-off policy, three members of Enright's five-man crew ignored the rule while working at more than twice the height at which SSI requires mandatory tie-off. Enright was on the premises during this time. The employees were working in an open area at the topmost part of the structure, in plain view of anyone on the site. The Commission in *New York State Electric & Gas Corp.*, 19 BNA OSHC 1227, 1229 (No. 91-2897, 2000), noted:

> [W]here a supervisory employee is in close proximity to a readily apparent safety violation, the supervisor may be charged with constructive knowledge of the violation. *Hamilton Fixture,* 16 BNA OSHC 1073 (No. 88-1720, 1993) *aff'd without published opinion,* 28 F.3d 1213 (6th Cir. 1994). Such knowledge is imputable to the employer and is sufficient to make a prima facie showing of employer knowledge. *Pride Oil Well Service,* 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

The Secretary has established constructive knowledge on the part of Enright, whose knowledge is imputed to SSI. SSI committed a serious violation of 29 CFR § 1926.760(a)(1).

SSI asserts the employee misconduct defense for this item, but only with regard to Mowry.[7] As noted, Mowry was working as a connector and so was not in violation of the cited standard–Brown and Hobbs were. The evidence needed to establish constructive knowledge is similar to the evidence needed for the employer to establish an affirmative defense of employee misconduct. The primary difference between establishing constructive knowledge and establishing employee misconduct is which party has the burden of proof. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA

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[7] If it is found to have met its burden of proof, Mowry violated Sawyer's site specific rule to work out of a scissors lift. The evidence is undisputed that it was unquestionable employee misconduct not to have followed Sawyer's site specific work rule and his foreman's directive.

(SSI's brief, p. 32).

OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion,* 106 F. 3d 401 (6th Cir. 1997). SSI adduced no evidence that Enright took any steps to detect the multiple and ongoing violations of SSI's 100% tie-off rule. While an employer "is not in violation simply because it has not detected or become aware of every instance of a hazard," *Texas A. C. A., Inc.,* 17 BNA OSHC 1048, 1051 (No. 91-3467, 1995), the record in the present case establishes that Enright adopted a laissez faire attitude to fall protection. SSI's employee misconduct defense is rejected.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

SSI employed 20 or 21 employees at the time of Kinn's inspection. The company has no history of previous violations in the three years prior to the inspection in the present case. SSI demonstrated good faith during this proceeding.

The gravity of the violative conditions in the affirmed items is high. As the preamble to Subpart R notes, the erection of steel joists is one of the most deadly activities that ironworkers engage in. It is determined that the appropriate penalties for the affirmed items are:

Item 1	$1,500.00
Item 2	$2,100.00
Item 5	$2,100.00
Item 7	$2,100.00

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that,

1. Item 1 of Citation No. 1, alleging a violation of 29 CFR § 1926.752(b), is affirmed and a penalty of $1,500.00 is assessed;

2. Item 2 of Citation No. 1, alleging a violation of 29 CFR § 1926.757(b)(3), is affirmed and a penalty of $2,100.00 is assessed;

3. Amended Item 3 of Citation No. 1, alleging a violation of 29 CFR § 1926.754(a), is vacated and no penalty is assessed;

4. Item 4 of Citation No. 1, alleging a violation of 29 CFR § 1926.757(d)(1)(ii), was withdrawn by the Secretary and is vacated;

5. Item 5 of Citation No. 1, alleging a violation of 29 CFR § 1926.757(e)(2), is affirmed and a penalty of $2,100.00 is assessed;

6. Item 6 of Citation No. 1, alleging a violation of 29 CFR § 1926.757(e)(5), is vacated and no penalty is assessed;

7. Item 7 of Citation No. 1, alleging a violation of 29 CFR § 1926.760(a)(1), is affirmed and a penalty of $2,100.00 is assessed; and

8. Item 1 of Citation No. 2, alleging a violation of 29 CFR § 1904.40(a), was withdrawn by the Secretary and is vacated.

/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: December 22, 2004