

Secretary of Labor,

Complainant,

v.

Structural Building Systems, Inc.

Respondent.

OSHRC Docket No. 03-0757

Appearances:

Patrick L. DePace, Esquire  
Office of the Solicitor  
U. S. Department of Labor  
Cleveland, Ohio

For Complainant

F. Benjamin Riek, III, Esquire  
Riek & Associates Co., L.P.A.  
Cleveland, Ohio  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

Structural Building Systems, Inc. (SBS), supplies labor to contractors for concrete placement, carpentry, and steel erection work in Ohio. On December 31, 2002, SBS employees were engaged in steel erection work for a new middle school in Bay Village, Ohio, when an iron worker sustained head and other injuries after falling approximately 20 feet. The ironworker was not utilizing any fall protection.

As a result of an inspection by the Occupational Safety and Health Administration (OSHA), SBS received a serious citation on March 18, 2003, for alleged violation of 29 C.F.R. § 1926.760(a)(1),<sup>1</sup> for permitting an ironworker, exposed to a fall of approximately 20 feet, to stand on an unsecured single sheet of steel decking without utilizing fall protection. The citation proposes a penalty of \$4,200. SBS timely contested the citation.

The hearing was held in Cleveland, Ohio, on September 18 through 19, 2003. The parties stipulated coverage and jurisdiction (Tr. 4).

SBS denies the alleged violation of § 1926.760(a)(1). SBS asserts unpreventable

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<sup>1</sup>The citation incorrectly cited § 1926.761(a)(1), which does not exist. Complainant's unopposed motion to amend the citation to allege a violation of § 1926.760(a)(1) was granted (Tr. 5).

employee misconduct and argues that its foreman failed to comply with SBS's communicated and enforced work rules which require 100 per cent fall protection.

For the reasons discussed, SBS's unpreventable employee misconduct defense is rejected and the serious citation is affirmed. A total penalty of \$4,000 is assessed.

### *Background*

SBS supplies labor to C. T. Taylor Company and other contractors to perform concrete placement, carpentry, and steel erection work (Tr. 321-322). SBS is owned by C.T. Taylor Company (Tr. 382). It was incorporated in 1997 and has its offices in Hudson, Ohio (Complaint/Answer; Tr. 321). SBS's president is Paul Mills. Depending on the season, SBS employs 35 to 100 employees (Tr. 321, 379-380).

During the fall of 2001, SBS contracted to perform the foundation work, flat concrete work, steel erection, and the general trade work for the construction of a new middle school in Bay Village, Ohio (Tr. 34, 146, 164, 381). The middle school was designed to be approximately 100,000 square feet with two gymnasiums, a cafeteria and two wings of classrooms on the first and second floors (Tr. 390). Project and Construction Services (PCS) was the construction manager for the project (Tr. 150). SBS's project superintendent was Michael Cooper (Tr. 145). The school was scheduled to be completed in January 2004 (Tr. 390).

SBS started its steel erection work on the school in August 2002 (Tr. 233, 400). Its steel erection crew consisted of five to seven employees supervised by steel erection superintendent Frank Trunck (Tr. 159, 224). However, in December 2002, Trunck went on vacation for the holidays and Anthony Hejl, an SBS structural erection foreman for four years, was brought to the school to supervise the ironworkers (Tr. 162, 239, 343).

On New Year's eve, December 31, 2002, a crew of six ironworkers started work at approximately 7:00 a.m (Tr. 246, 287). The weather was misty and hazy. The temperature was approximately 35 degrees (Tr. 162, 246). As the morning progressed, it began to rain and sleet (Tr. 119-120, 167, 256, 421). Because of the holiday, the crew intended to begin installing the roof decking over the kitchen area and to work only until noon (Tr. 162, 246, 281). This was to be the crew's first day of installing roof decking (Tr. 163, 145-246).

Before starting the decking work, however, foreman Hejl assigned two employees to

gather the materials for the decking, two other employees to break the steel out, and the other two employees to fabricate a piece of steel for an entryway (Tr. 247-248, 252, 277-278). These assignments were performed on the ground (Tr. 280). After completing these jobs, the crew was ready to begin the decking work.

However, because the steel was becoming “pretty wet and slippery,” superintendent Cooper and foreman Hejl elected to “wrap it up” after the morning break and not lay any roof decking (Tr. 167-168, 256). Before going home, foreman Hejl directed the crew to tie down the decking bundles and secure the job (Tr. 169, 257, 260). It was approximately 9:30 a.m. (Tr. 168, 256).

While other employees were securing the materials, foreman Hejl asked employee Troy Yates, who was also on the roof, to assist him in moving a 20-foot piece of 2-inch x 2-inch steel tubing several feet over steel joists to be welded before the roof decking was installed (Tr. 175, 261, 265). The tube weighed approximately 200 pounds and was lying on a piece of unsecured steel decking next to a mason wall (Exhs. C-3, C-10, R-10; Tr. 275, 285). The roof was otherwise framed in joists and trusses. No other pieces of roof decking were in the area. The roof was approximately 20 feet above ground level.

As Yates, who was in the lead, moved the steel tube over the steel joists, the end of the steel tube Hejl was holding struck the mason wall which caused the tube to vibrate and Yates to lose his balance. Yates fell approximately 20 feet to the concrete floor (Tr. 265-268). Although both men were wearing harnesses and lanyards, neither Yates nor Hejl were tied off or utilizing any fall

protection (Tr. 66-67, 203, 268). Hejl testified that he was simply in a hurry to move the steel tube and end the work for the day (Tr. 270).

As a result of the fall, Yates sustained head, face and arm injuries and was in the hospital for several weeks (Exh. R-4; Tr. 43-44, 70). At the time of the hearing in this case, he had still not returned to work (Tr. 356).

After the accident, OSHA safety and health Compliance Officer (CO) Eric Peterson, who was conducting programmed inspections nearby, was directed to investigate the accident site at the middle school (Tr. 57-58). Peterson arrived onsite at approximately 12 noon (Tr. 119, 179). He met with president Mills, project superintendent Cooper, and SBS’s attorney (Tr. 60). CO Peterson

observed the accident site from ground level where he took photographs and made measurements (Tr. 61, 63). He was onsite for two hours (Tr. 120). After his inspection, he interviewed Yates and Hejl and reviewed documents received from SBS (Exh. R-4; Tr. 65, 86, 130). Based on CO Peterson's inspection, SBS was issued a serious citation for violation of 29 C.F.R. § 1926.760(a)(1).

### *Discussion*

#### Alleged Violation of §1926.760(a)(1)

The citation alleges that an SBS's ironworker was not protected from a fall hazard while working on a single sheet of steel deck approximately 20 feet above the ground.<sup>2</sup> 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.

There is no dispute regarding (1) the application of § 1926.760(a)(1)<sup>3</sup> to SBS's steel erection activities at the middle school project; (2) the employees' noncompliance with the requirements of § 1926.760(a)(1) by failing to utilize fall protection when moving the steel tube; and (3) the employees' exposure to a fall hazard of 20 feet. SBS does not dispute that § 1926.760(a)(1)

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<sup>2</sup>Neither foreman Hejl nor Yates were utilizing fall protection at the time of the accident. Also, Hejl described that Yates was standing on a steel joist when he fell (Exh. R-10).

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The Subpart R "*Steel Erection*" standards were published on January 18, 2001 (66 FR 5265). OSHA began conducting general schedule inspections under the new standards on March 18, 2002 (CPL 2-1.34 issued March 22, 2002). Despite SBS safety officer Gay's confusion, the Subpart R standards were in effect and applicable at the time of the accident on December 31, 2002 (Tr. 313). Also, § 1926.760(a)(3) does not apply because the employees were not working in a controlled decking zone (CDZ). At the time of the accident, the employees were not installing the decking (Exh. C-1; Tr. 306, 415).

applied to SBS's steel erection activities at the time of the accident (Tr. 11). SBS concedes that Yates and Hejl were not utilizing fall protection at the time of the accident. They also agreed that fall protection was feasible and should have been utilized by them (Exh. C-1; Tr. 18-19, 203-204, 294).

SBS does not dispute that if its unpreventable employee misconduct defense is rejected, employer knowledge is established by the presence and participation of foreman Anthony Hejl. Hejl was a foreman for SBS for four years. He supervised the employees in the steel erection crew. He had the authority to discipline the employees, direct their work activities, and was responsible for their safety. Hejl directed Yates to move the steel tube, knowing that fall protection was not being utilized (Exh. R-4; Tr. 236, 268, 276, 287, 343).

An employee such as Hejl, who had been delegated authority over other SBS employees, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1538 (Nos 86-360 & 86-469, 1992). A supervisor's knowledge of his own actions or inactions is imputed to his employer. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

#### Unpreventable Employee Misconduct

SBS asserts that any violation of § 1926.760(a)(1) was the result of supervisor and employee misconduct. As an affirmative defense, it is SBS's burden to show that the employees' misconduct was unpreventable. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994). In order to establish unpreventable employee misconduct, the Review Commission requires an employer to prove that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these work rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

The Sixth Circuit where this case arises has further held that "an employer must show that it has a thorough safety program, it has communicated and fully enforced the program, the conduct of the employee was unforeseeable, and the safety program was effective in theory and practice." *Danis-Shook Joint Venture XXV v. Secretary of Labor*, 319 F.3d 805, 812 (6<sup>th</sup> Cir. 2003). An employer that relies on the presence of an effective safety program to establish that it could not have reasonably foreseen the aberrant behavior of its employee must demonstrate the program's effectiveness in

practice as well as theory.

SBS argues that foreman Hejl's failure to instruct Yates to utilize fall protection was unpreventable misconduct. "[W]here a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision . . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991).

Having reviewed the record and its safety program, SBS's employee misconduct defense is rejected. SBS failed to show that it had a specific work rule addressing the hazard confronting the employees on December 31, 2002, which was adequately communicated and enforced.

### **SBS's Work Rules**

As an essential element of the employee misconduct defense, the employer needs to establish that it has a work rule designed to prevent the violation. *Pride Oil Well Serv.*, 15 BNA OSHC at 1816. A work rule is defined as "an employer directive that requires or proscribes certain conduct, and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076 (No. 12354, 1977) (employer's warning to employees to avoid unsafe areas was "too general to be an effective work rule"). An employer's work rule, to be effective, must be clear enough to eliminate employee exposure to the safety hazards addressed by the standard or designed to prevent the hazards. *Foster-Wheeler Constructors, Inc.*, 16 BNA OSHC 1344, 1349 (No. 89-287, 1993).

In this case, SBS maintained a written site specific fall protection plan at its trailer at the Bay Village Middle School project (Exh. C-5).<sup>4</sup> When employees first arrived onsite, they were directed to sign the plan showing that they read it (Exhs. C-4, C-5, R-22; Tr. 398). The plan was signed by Yates and Hejl (Exhs. C-4, C-5, R-22). For roofing operations, the plan states that "[i]t is the

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<sup>4</sup>Exh. R-6 is also a site specific fall protection plan for the middle school prepared in August 2002 by part-time safety officer William Gay. However, it was not shown that Exh. R-6 was being utilized on the middle school project. SBS concedes that the site specific plan at Exhibit C-5 was the plan onsite at the time of the accident (Tr. 377, 401). It is noted that Gay had not seen the plan and did not know who prepared it (Tr. 304). Also, Exhibit C-5 identifies the job as the "Technical Consumer Products Project" as opposed to the "Bay Village Project." According to Cooper, it was a mistake (Tr. 402).

policy of Structural Building Systems, Inc. to maintain 100% fall protection where feasible.” For fall protection in roofing and decking operations, SBS’s plan relied upon the use of a controlled access zone (CAZ) because according to SBS, the construction of a roof system did not provide suitable anchorage points to support conventional fall protection (Exh. C-5). However, SBS agrees that its site specific plan did not apply in this case “since the site specific plan was not meant to cover every conceivable contingency” (SBS’s Brief, p. 6).

Although not written in the plan, SBS relies upon a general rule requiring 100 percent fall protection above 6 feet to cover a situation such as moving a steel tube before ending the workday. Foreman Hejl and employee Dennis Turkovich testified that they understood the company rule to be 100 percent fall protection above 6 feet (Tr. 246, 422). Both foreman Hejl and employee Yates acknowledged that the accident was their fault because they chose not to utilize their fall protection (Tr. 89, 269). Foreman Hejl agreed that they could have tied off their body harness (Tr. 269). Also, there is no dispute that SBS had fall protection equipment onsite including retractable lanyards, body harnesses, and stanchions (Exh. R-5; Tr. 31, 297).

SBS’s written site specific plan limits the use of fall protection in roofing operations to an issue of feasibility and the use of a CAZ for decking operations. SBS’s rule regarding 100 percent fall protection above 6 feet is unwritten and was not in SBS’s site specific plan for the middle school project (Tr. 246, 318, 422). The plan did not specifically address the fall protection required under the conditions of moving a steel tube before establishing a CAZ (Tr. 317). At the time of the accident, the parties agree that decking work was not being performed, and a CAZ had not been established (Exh. C-1; Tr. 306).

Foreman Hejl testified that he was not using fall protection “because we were cleaning up and moving that piece of steel” (Tr. 268). Despite Hejl’s recognition that he violated the company unwritten 6-foot rule, his attempted justification for not utilizing fall protection shows a lack of understanding that it was required at the time of the accident. As foreman, it was his responsibility to ensure the safe performance of the work. Also, there is no showing that employee Yates questioned the failure to use fall protection or that he understood the application of SBS’s 6-foot rule. It is also noted that a potential hazard was even greater because of the wet and slippery condition of the steel due to rainy weather (Tr. 168). Ignoring this hazard, Hejl decided to get the steel tube moved quickly without fall protection and then go home (Tr. 270). Neither Hejl nor Yates appreciated the mandatory nature of

SBS's unwritten rule or its scope.

The ineffectiveness of SBS's work rule as applied to pre-CAZ work is shown by the failure of two employees, including a foreman supervisor, to utilize any fall protection when performing other than decking work even during unfavorable weather conditions.

### **SBS's Communication of its Work Rules**

As the second element of the misconduct defense, an employer must show that it has communicated the specific work rules at issue to its employees. *Hamilton Fixtures*, 16 BNA OSHC 1073, 1090 (No. 88-1720, 1994).

In this case, the record shows that employees including Yates and Hejl received training in fall protection (Exhs. R-7, R-16, R-19, R-20). The training consisted of watching videos, testing, and demonstrations. An outside contractor was used to train all employees on fall protection issues, among other topics (Tr. 324, 334). The employees received a safety manual and safety equipment. Additionally, superintendent Cooper testified that he has taken a couple of OSHA classes (10-hour courses) and another OSHA class (a 30-hour class) in January 2002 (Tr. 147-148). Foreman Hejl testified that he received training on the new steel erection standards at Subpart R in December 2001 (Exh. R-3; Tr. 239-240). This training was also given to Yates and other SBS employees (Exh. R-3). SBS also held weekly safety meetings every Friday when employees were paid (Tr. 107). A piece of paper with a written safety topic, which is put in each pay envelope, is read to the employees (Exh. R-8; Tr. 191).

SBS's rule regarding 100 percent fall protection above 6 feet was discussed with each employee at the time he was hired and during the 10-hour OSHA safety course (Tr. 18-19, 147, 246). Some members of Hejl's crew were even shown a video which discussed the rule several days before the accident (Tr. 334).

Regardless of this training, two employees including a supervisor foreman failed to utilize fall protection when in a hurry to end the workday. Although a supervisor's participation in the violation does not itself establish that a safety program is inadequate, safety infractions by supervisors are evidence of poor communication and implementation of a safety program. Also, it is noted that SBS's president considered the safety program as "not up to snuff" and recognized that supervisors and employees "were not buying into it" (Tr. 327, 374). Therefore, he was in the process of implementing a new incentive based safety program to begin on January 1, 2003, the day after the accident (Exh. R-

17; Tr. 328-329).

### **SBS's Steps to Discover Violations**

Effective implementation of a safety program requires “a diligent effort to discover and discourage violations of safety rules by employees.” *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

In this case the violative condition, although of relative short duration, was in plain view and could have been observed by a diligent supervisor. Although superintendent Cooper did not observe the steel tube being moved, he was onsite and in the area. Also, it is noted that foreman Hejl directed the placement of the steel tube and participated in its movement without utilizing fall protection. At the time neither Hejl nor Yates were tied off.

Although an employer is not required to provide constant surveillance, he is expected to take reasonable steps to monitor for unsafe conditions. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999); also *see Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995) (although the employer's duty is to take reasonably diligent measures to detect hazardous conditions through inspections of worksites; it is not obligated to detect or become aware of every instance of a hazard). Effective program implementation requires “a diligent effort to discover and discourage violations of safety rules by employees.” *Paul Betty d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981).

William Gay, C. T. Taylor's part-time safety officer,<sup>5</sup> testified that he inspected SBS's middle school project approximately once a week since August 2002 (Tr. 33, 154-155). Generally, he walked the site with project superintendent Cooper. If he observed safety violations, he and Cooper would have the violations corrected immediately. If Cooper was not present for the walkaround, Gay would prepare an inspection report and send it to Cooper to correct the items (Exhs. C-1, C-2, R-1; Tr. 26, 155).

Superintendent Cooper testified he leaves his contractor's trailer five or six times during the day and walks the project checking on progress (Tr. 229). If he observes a safety hazard, he immediately gets it corrected (160-161). Although Cooper testified that he has written up workers for

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<sup>5</sup>Gay was off work due to health problems from January to July 2002 (Tr. 300, 304). Gay worked three days a week (Tr. 325). Prior to the accident, SBS hired a full-time safety officer, Stan Coniglia (Tr. 326).

safety violations, he did not view this as a major part of his job (Tr. 200). Safety inspections were also apparently made by the State of Ohio's Industrial Commission (Tr. 157, 214). However, the frequency and nature of such inspections was not established.

The fact that foreman Hejl failed to utilize fall protection and did not direct Yates to also tie off is strong evidence that SBS's safety program was lax. *Daniel Construction Co.*, 10 BNA OSHC 1549, 1552 (No. 16265, 1982) (job superintendent's failure to use safety belts and lanyards in his presence while other violations occurred in plain view establishes that work rule regarding fall protection was not effectively enforced).

Despite SBS's monitoring efforts, it is noted that SBS received two prior OSHA citations which included the lack of fall protection violations on January 31, 2000, and June 3, 2002 (Exhs. C-6, C-7; Tr. 386-388). Neither prior citation involved the Bay Village school project. A serious citation issued on January 31, 2000, included violations of § 1926.501(b)(1) for failure of employees working at the edge of the third floor to utilize fall protection and § 1926.501(b)(6) for employees using a walkway to access a floor area without a guardrail system or by use of a personal fall arrest system (Exh. C-6). A serious citation was issued on June 3, 2002, in violation of § 1926.501(b)(11) for failure of two employees on a flat roof to utilize proper fall protection, exposing them to falls of 25 and 17 feet (Exh. C-7). It is noted that Trunck was steel erection superintendent during the June 2002 citation (Tr. 386-387).

### **SBS's Enforcement of Safety Rules**

Adequate enforcement is also viewed as a critical element of the employee misconduct defense. To show that an employer's disciplinary system is more than a paper program, an employer must have evidence of having actually administered the discipline outlined in its policy and procedures. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003) (despite written disciplinary policy, there was no showing that there was any progressive discipline). Evidence of a variety of disciplinary measures tends to demonstrate that an effective disciplinary system is in place. There should be a showing that disciplinary action progressed to higher levels of punishment designed to provide deterrence. Evidence showing a failure to progress to higher levels of discipline may show ineffective enforcement. Also, the repeated noncompliance of work rules and the number of employees involved in misconduct are indications of ineffective enforcement. *GEM Industrial Inc.* 17

BNA OSHC 1861, 1865 (No. 93-1122, 1996), *aff'd*, 18 BNA OSHC 1358 (6<sup>th</sup> Cir. 1998) (although employer had system of verbal and written reprimands, it was ineffective enforcement because the same work rule had been violated three times in the month prior to OSHA inspection).

In this case, president Mills, superintendent Cooper, and foreman Hejl testified that SBS's disciplinary program which is unwritten, involved verbal warnings, written warnings, days off, and termination (Tr. 199, 271, 373, 389). Cooper testified that he has written up employees, including steel erection superintendent Trunck, who was present when an employee at the Bay Village project was working from a man basket without fall protection (Tr. 161, 197). It is noted that Trunck was also the subject exposed employee in a June 2002 OSHA citation for which there is no evidence of disciplinary action (Exh. C-7; Tr. 386-387).

The record indicates that SBS's unwritten disciplinary program was not effectively communicated to employees. On December 31, employee Dennis Turkovich, who was erecting steel on the Bay Village project, testified that he was not familiar with SBS's disciplinary policy (Tr. 425). Also, superintendent Cooper testified he has seen a written program and that an employee received a written reprimand for a first infraction (Tr. 199). However, he explained that he only writes up infractions that are "glaring and obvious," or if repeatedly committed. Otherwise, he verbally instructs the employee to correct the infraction without a reprimand (Tr. 199-201). Similarly, safety officer Gay testified that he has seen employees without fall protection but did not discipline them (Tr. 45, 296, 307).

The lack of a written disciplinary program which is inconsistently applied results in ineffective enforcement of safety rules. Cooper could not explain why a safety infraction results in a verbal, as opposed to, a written reprimand (Tr. 200). Also, he showed no understanding of what happens to written reprimands after sending them to the office (Tr. 198).

In terms of disciplinary action, foreman Hejl testified he was written up for not utilizing fall protection at the time of the December 31 accident (Tr. 272). Previously, he had only been written up for damaging a \$700 tire (Tr. 271, 286). Hejl has received prior verbal warnings about safety glasses, a fire extinguisher, and work ethics (Tr. 272).

According to president Mills, Hejl and Cooper received verbal warnings from Mills and

written reprimands from safety officer Gay as a result of the December 31, 2002, accident<sup>6</sup> (Tr. 393-394). He also testified that a written reprimand has been prepared for Yates, but it has not yet been given to him because he has not yet returned to work (Tr. 373-374).

Other than the testimony regarding the written reprimands, copies of such reprimands were not offered into evidence or shown to involve a violation of SBS's 6-foot fall protection rule. Besides receiving verbal and written reprimands, there is also no showing that any employee received a suspension, loss of pay, or was terminated for safety infractions.

It is noted that in this case at least two employees, including a foreman, were involved in the misconduct. Foreman Hejl not only failed to enforce the fall protection rules, but he violated them himself. This suggests ineffective enforcement. *See Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1992) (employee misconduct denied in part because of the lack of documentation showing a progressive enforcement strategy).

#### Serious Classification

In order to establish that a violation is "serious" under § 17(k) of the Occupational Safety and Health Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020,1024 (No. 86-521, 1991).

Based on the presence of foreman Hejl and the exposure to a fall hazard of approximately 20 feet without fall protection, the violation was properly classified as serious. Hejl's knowledge of the unsafe condition is imputed to SBS. Also, Yates' injuries show the serious nature of the violation. Employee Yates suffered head and face injuries. He spent several weeks in the hospital, received workers compensation, and as of September 20, 2003, has been unable to return to work even in a plant job.

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<sup>6</sup>It is true that "Commission precedent does not rule out consideration of post inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline." *Precast Services Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995) *aff'd*, 106 F.3d 401 (6<sup>th</sup> Cir. 1997). However, no documentation was offered to show SBS's discipline.

## Penalty Consideration

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.

At the time of the accident, SBS employed less than forty employees. It had less than ten employees working at the middle school project on December 31, 2002 (Tr. 71, 121). SBS is entitled to credit for size as a medium size employer. SBS is also entitled to credit for good faith because of its attempts to provide a safe workplace, the use of a safety officer to inspect the worksites at least once a week, a site specific fall protection plan, and the availability of safety equipment at the project. The two employees involved in the accident were wearing body harnesses and lanyards. SBS is not entitled to credit for history because it had received two serious citation in the preceding three years for lack of fall protection (Exhs. C-6, C-7; Tr. 71).<sup>7</sup>

A penalty of \$4,000 is appropriate for SBS's violation of § 1926.760(a)(1). Two employees including its foreman failed to utilize fall protection. In addition, it is noted that the cold and rain made working on the steel joists, trusses, and an unsecured piece of metal deck even more unsafe. The employees were exposed to a fall hazard of approximately 20 feet to a concrete floor (Tr. 37).

## **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**

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<sup>7</sup> The June 3, 2002, citation was issued to C. T. Taylor, but it involved employees of SBS.

Based upon the foregoing decision, it is ORDERED:

Serious violation of § 1926.760(a)(1) is affirmed and penalty of \$4,000 is assessed.

/s/

**KEN S. WELSCH**

Judge

**Date:** January 15, 2004