United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. W.G. Yates Construction Co., Hvy. Div., Respondent.	OSHRC Docket No. **03-2162** **(Remand)**

Appearances:

J. Phillip Giannikas, Esquire, Nashville, Tennessee
For Complainant

Robert E. Rader, Jr., Esquire, Dallas, Texas
For Respondent

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

DECISION AND ORDER ON REMAND

W.G. Yates Construction Co., Hvy. Div. (Yates), is engaged in construction contracting. On September 11, 2003, the Occupational Safety and Health Administration (OSHA) conducted an inspection on Yates's jobsite in Hoover, Alabama. As a result of the inspection, the Secretary cited Yates for violating two of OSHA's construction standards: 29 C.F.R. § 1926.501(b)(1), for failing to ensure each employee exposed to a fall hazard greater than 6 feet used fall protection (Item1), and 29 C.F.R. § 1926.502(a)(2), for failing to ensure employees wearing full body harnesses were wearing them correctly (Item2).

Yates contested the citation and penalties. The case went to hearing on May 26, 2004, in Birmingham, Alabama, with the undersigned judge presiding. Items 1 and 2 of the citation were affirmed and penalties of $5,000.00 and $4,000.00 respectively were assessed. Yates was found to have violated 29 C.F.R. § 1926.501(b)(1) (Item 1) because its foreman Martin Olvera did not wear a body harness and lanyard when exposed to a fall of 65 feet. As foreman, Olvera's knowledge was imputed to Yates.

On January 31, 2005, the decision in *W.G. Yates & Sons Construction Co.*, 21 BNA OSHRC 1171 (No. 03-2162, 2005), became a final order of the Commission after the Commission declined

to direct the case for review. On August 4, 2006, the Court of Appeals for the Fifth Circuit vacated that part of the decision affirming Item 1 of Citation No.1. The court remanded the case to the Commission "for proceedings not inconsistent with this opinion." *W.G. Yates & Sons Construction Co., Inc., Hvy. Div V. OSHRC,* 459 F.3d 604,610 (5th Cir. 2006). Specifically, the court ordered the Commission "to conduct a foreseeablility analysis to determine whether the knowledge of [Yates's foreman] Olvera can be imputed to Yates." *Id.* The court determined the Secretary, and not Yates, bears the burden of proving the foreseeability of Olvera's failure to wear fall protection. On March 14, 2007, the Commission remanded the case to this judge for "further proceedings consistent with the court's decision."

The court of appeals identifies the essential question as:

> [W]hen is it appropriate (or inappropriate) to impute the supervisor's knowledge of his own misconduct to the employer. The answer to this question will guide this appeal.

Yates, 459 F.3d *at* 607.

The court acknowledges that the different circuits hold differing opinions on this issue. It states, "Although our Circuit has not directly answered this question, our holding in *Horne Plumbing* [528 f.2d 564 (5th Cir. 1976)] is instructive." *Yates,* 459 F.3d *at* 608.

The court reads *Horne Plumbing* as holding (*Id. at* 608-609, emphasis in original):

> [A] supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable.

Foreseeablilty Analysis

On remand, the parties were given the opportunity to produce additional evidence at hearing regarding knowledge and foreseeability. Both parties declined. An analysis of foreseeability must, therefore, be done based on the record.

In the original decision in this case, deficiencies in respondent's safety program were discussed. Respondent had a general written rule regarding the use of body harnesses and lanyards. Respondent's fall protection provisions of its training program were found to be general in nature

and not site-specific. There was a lack of understanding by supervisors of fall protection needs on this site and evidence that respondent's safety program was lax. Evidence suggested ineffective communication of the safety program and a flawed inconsistently enforced disciplinary program.

Those deficiencies were sufficient to conclude that respondent failed to meet its burden to prove the violative conditions were the result of unpreventable employee misconduct. After further review, this conclusion remains unchanged.

In accordance with the order of the Fifth Circuit, however, my analysis now focuses on whether the Secretary has met her burden to prove that the supervisor's knowledge of his own misconduct can be imputed to the employer when that conduct is contrary to the employer's policies.

While Yates failed to meet its burden to prove unpreventable employee misconduct, it did present some evidence of an established general safety program. Respondent's written safety policy includes a rule generally addressing the infraction committed by Olvera (Exh. R-1, p.18, 20):

> 7.6 Personal Fall Protection.
>
> Body harnesses with lanyards must be worn when working six (6) feet or more off the ground. Safety nets may be used in certain applications. See chapter 8 "Working in Elevated Locations" for detailed information.
>
> 8.2 Body Harnesses & Lanyards
>
> A body harness and lanyard must be worn when working six (6) feet or more in height above an unguarded and unsecured working surface.

Yates has a progressive disciplinary system. Depending upon the frequency and severity of the infraction, employees who violate safety rules can receive an oral reprimand, a written reprimand, or termination (Exh. R-2). Enforcement of this system is somewhat inconsistent and flawed.

Yates issued a written reprimand to Olvera on September 13, 2003, for his failure to wear fall protection on the day of the OSHA inspection. Under "Action Taken," in the violation report, Yates has written "Had retraining before work resumed" (Exh. R-4). Neither Olvera nor the two employees in his crew were reprimanded for improper wearing of safety harnesses.

The Secretary presented no new evidence on remand, but relied on evidence presented at the original trial. Evidence at that trial was sufficient to reject respondent's affirmative defense of unpreventable employee misconduct. Respondent, at trial, however, presented some evidence of a general safety program that included a progressive disciplinary system. Yates provides safety training during orientation and conducts mandatory weekly safety meetings on jobsites. The Secretary has failed to present sufficient evidence to overcome this opposing evidence. She has failed to meet her burden to establish respondent's safety program, training and discipline were so deficient that Olvera's misconduct was foreseeable. Failure to prove foreseeabiliy in this case necessarily means failure to prove Yates had knowledge of the violative conduct of its supervisor. The alleged violation of 29 C.F.R. § 1926.501(b)(1) is vacated.

Findings of Facts & Conclusion 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 Civile Procedure.

Order

Based upon the foregoing decision on remand, it is hereby ORDERED that Item 1 of Citation No 1., alleging as serious violation of 29 C.F.R. § 1926.501(b)(1) is vacated.

/s/
JUDGE STEPHEN J. SIMKO, JR.

February 11, 2008