BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

MID-SOUTH ERECTORS, INC.
and its successors,

RESPONDENT.

DOCKET NO. OSHANC 2002-4127
OSHA INSPECTION NO. 304956394
CSHO ID NO. J4861

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the 2nd day of December, 2003, in Room 124, First Floor, Old YWCA Building, 217 West Jones Street, Raleigh, North Carolina by Oscar A. Keller, Jr,. Chairman, Dr. Richard G. Pearson and Janice Smith Gerald, Members of the Safety and Health Review Board of North Carolina .

APPEARANCES

Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Donald McCarver, President, Mid-South Erectors, Charlotte, North Carolina, *pro se* for the Respondent.

ISSUES PRESENTED

1. Did the Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.105(a) by not providing a safety net or other fall protection when his employees were working at a height greater than 25 feet?

2. Did Mid-South Erectors comply with the requirements of the new Steel Erection Standard by providing a Controlled Decking Zone and proper training for his employees when his employees were working between 15 feet and 30 feet?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 CFR 1926.105(a) provides:

> Safety nets shall be provided when workplaces are more than twenty-five feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is not practical.

The following regulations were initially set to be effective on July 17, 2001 for the Federal government and July 18, 2001 for North Carolina. A directive by the US Department of Labor indicates that the regulations would become effective on July 17, 2001 to be published in the Federal Register July 18, 2001. The Construction standards promulgated by the North Carolina Department of Labor indicate that they are to be effective on July 18, 2001. This effective date for both the federal and the state was changed later to January 18, 2002. This change was noted in the Federal Register and the North Carolina Register.

2. 1926.750(b)(1) provides:

Steel erection activities include hoisting, laying out, placing, connecting, welding, burning, guying, racing, bolting, plumbing and rigging structural steel, steel joists and metal buildings; installing metal decking, curtain walls, window walls, siding systems, miscellaneous metals, ornamental iron and similar materials; and moving point-to-point while performing these activities.

3. 1926.751 provides:

Definitions.

"Controlled Decking Zone" (CDZ) means an area in which certain work (for example, initial installation and placement of metal decking) may take place without the use of guardrail systems, personal fall arrest systems, fall restraint systems, or safety net systems and where access to the zone is controlled.

"Leading edge" means the unprotected side and edge of a floor, roof, or form work for a floor or other walking/working surface (such as deck) which changes location as additional floor, roof, decking or form work sections are placed, formed or constructed.

4. 1926.760(c) provides:

Controlled Decking Zone (CDZ). A controlled decking zone may be established in that area of the structure over 15 and up to 30 feet above a lower level where metal decking is initially being installed and forms the leading edge of a work area. In each CDZ, the following shall apply:

(1) Each employee working at the leading edge in a CDZ shall be protected from fall hazards of more than two stories or 30 feet (9.1 m), whichever is less.

(2) Access to a CDZ shall be limited to only those employees engaged in leading edge work.

(3) The boundaries of a CDZ shall be designated and clearly marked. The CDZ shall not be more than 90 feet (27.4 m) wide and 90 (27.4 m) feet deep from any leading edge. The CDZ shall be marked by the use of control lines or the equivalent. Examples of acceptable procedures for demarcating CDZ's can be found in Appendix D to this subpart.

(4) Each employee working in a CDZ shall have completed CDZ training in accordance with § 1926.761.

5. Appendix D to Subpart R-Illustration of the Use of Control Lines to Demarcate Controlled Decking Zones (CDZs): Non-mandatory Guidelines for Complying with § 1926.760(c)(3)

(1) When used to control access to areas where leading edge and initial securement of metal deck and other operations connected with leading edge work are taking place, the controlled decking zone (CDZ) is defined by a control line or by any other means that restricts access.

6. 1926.761(c)(3) Training provides:

Controlled Decking Zone Procedures. Where CDZs are being used, the employer shall assure that each employee has been provided training in the following areas:

(i) The nature of the hazards associated with work within a controlled decking zone; and

(ii) The establishment, access, proper installation techniques and work practices required by § 1926.760(c) and § 1926.754(e).

The Safety and Health Review Board of North Carolina, after having reviewed and considered the record, the briefs and the arguments of the parties, hereby affirms the decision of the Hearing Examiner to the extent that it is not inconsistent with this opinion and makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.

2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).

3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10).

4. The employer (Respondent) Mid-South Erectors is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. Beginning on October 17, 2001, Safety Compliance Officer Robert Jacobson, employed by the North Carolina Department of Labor (NCDOL), conducted a fatality inspection of Respondent's worksite located at 8350 Old Plank Road in Charlotte, North Carolina..

6. As a result of this inspection, on April 9, 2002, the Occupational Safety and Health Division of the North Carolina Department of Labor cited Respondent for a serious violation of 29 CFR 1926.105(a) for the failure to have fall protection with a proposed penalty of $1050.00.

7. Respondent submitted a timely Notice of Contest dated May 3, 2002, which was filed with the Board on May 7, 2002.

8. On or about May 21, 2002, Respondent filed its Statement of Employer/Respondent's Position with the Board in which it denied the violation and objected to the penalty.

9. This matter was heard by the Honorable Richard M. Koch, Hearing Examiner, in Charlotte, North Carolina on January 21, 2003.

10. Complainant was represented by Claud Whitener, Assistant Attorney General for the North Carolina Department of Justice and Respondent was represented by Donald McCarver, owner and CEO.

11. On February 26, 2003, Hearing Examiner Koch filed an Order, dated February 10, 2003, in this matter affirming Citation Number One, Item 1 as a serious violation of 29 CFR 1926.105(a) with a penalty of $1,050.00.

12. On March 21, 2003, Respondent filed its *pro se* Petition for Review.

13. On April 3, 2003, the Chairman of the Safety and Health Review Board entered an Order granting Respondent's Petition for Review.

14. The Safety and Health Review Board of North Carolina (Review Board) assumed jurisdiction over the issues in contest. (N.C. Gen. Stat § 95-135).

15. The issues on appeal were heard by the full Board on December 2, 2003.

16. The Board adopts the Hearing Examiner's findings of facts numbered 1 through 18.

17. Working on a roof at a height of more than 25 feet above the surface below without fall protection, in this case safety nets, created the hazard that an employee would fall to the surface below causing serious injury or death.

18. The hazard of working on a roof at a height of more than 25 feet above the surface below without fall protection, in this case safety nets, created the possibility of an accident.

19. The substantial probable result of that accident could be serious injury such as broken bones, internal injuries and/or death.

20. The Respondent knew or should have known that working without fall protection at a height of more than 25 feet above the surface below created a hazardous condition in that its supervisor, Paul Davis, was on the site and observed the hazardous conditions.

21. The use of the fall protection, in this case safety nets, would have reduced or eliminated the hazard of falling to the surface below.

22. Respondent's employee, Hector Gabriel Valencuela-Riveria was working without any fall protection (including without safety nets) at a height greater than 25 feet (approximately 29 and ½ feet) for 30 minutes while the four pieces of decking were laid into position on the morning of October 17, 2001, the date of the accident. (T pp 59-65, 91-92).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The Board has jurisdiction of this cause and the parties are properly before this Board.

3. The Complainant has proven by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.105(a) for the failure to use safety nets or other fall protection when employees are working 25 feet or more above the surface below.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that "Upon review of the report and determination by the hearing examiner the Board may adopt, modify or vacate the report of the hearing examiner . . . and the report, decision, or determination of the Board upon review shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record." "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

The Board follows the policy that ordinarily "facts found by a hearing examiner will be held conclusive when such facts are supported by substantial evidence. . . Substantial evidence means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion' ", Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976).

In order to prove a violation of a personal protective standard the Commissioner of Labor must prove by a preponderance of the evidence each of the following elements:

1. A hazard existed;

2. employees were exposed;

3. the use of the personal protective equipment would have eliminated (or lessened) the hazard;

4. the hazard created the possibility of an accident;

5. the substantial probability of an accident would be death or serious physical injury and

6. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniels, supra) of the condition or conduct that created the hazard.

If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered six above. See, Brooks v. Daniel Construction Company, 2 OSHANC 299, at 305 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

Prestige Farms, 6 NCOSHD ____, OSHANC 93-2619 (RB 1995), (http://www.oshrb.state.nc.us/opinions/rb/93-2619.html)

The Respondent in this case is a *pro se* litigant and he makes three objections to the Hearing Examiner's order. He made factual arguments at the hearing before the Review Board that the height at which the men were working was less than 25 feet and that the regulation did not apply to him. In his letter filed with the Board as his brief, he makes the arguments that the regulation did not apply to him because a new steel erection standard was in effect and that the employee disregarded directions from his supervisor to not go up on the building. First we will discuss the history of the steel erection standard and then we will discuss each of those challenges *seriatim*.

Subpart R of 29 CFR 1926, the Steel Erection Standard, was adopted in 1971 pursuant to the mandate of the Occupational Safety and Health Act of 1970 that the Secretary of Labor adopt established Federal Standards issued under other statutes as occupational safety and health standards. *(See*, 63 Fed. Reg. 43,451-43,513 for the history of the Steel Erection Standard that is set out in this and the following paragraphs.) The Steel Erection industry has challenged the application of general construction standards to their industry on the arguments, among others, that the provisions of Subpart R were exclusive and preempted the application of general construction standards. The Secretary of Labor has held the position that the personal protective provisions of the construction standards, specifically 29 CFR 1926.28(a) and 29 CFR 1926.105(a) apply to Subpart R to supplement the protection of steel workers in areas not covered by a specific steel erection standard. The federal Review Commission initially held that 29 CFR 1926.105(a) applied to exterior falls when the height was 25 feet or greater on the basis that the Steel Erection Standard was not exclusive and did not have a standard that covered exterior falls. *E.g., Williams Enterprises, Inc*., 1983-83 OSHD ¶ 26,542 (RC, 1983), *aff'd*, 1984-85 OSHD ¶ 27,057, 744 F.2d 170 (D.C. Cir. 1984). The federal Review Commission changed its interpretation and held in a string of cases that 29 CFR 1926.105(a) did not apply to steel erection because the provisions of Subpart R were exclusive and preempted the application of 29 CFR 1926.105(a). *E.g., Williams Enterprises of Georgia, Inc*., 1986-87 OSHD ¶ 27,692 (RC, 1986), *reversed*, 1987-90 OSHD ¶ 28,082, 832 F.2d 567 (11th Cir. 1987). Four Circuit Courts of Appeal reversed the Review Commission and held that Subpart R was not exclusive and 29 CFR 1926.105(a) applied to steel erection. *Id*; *L.R. Willson & Sons*, 773 F.2d 1377 (D.C. Cir. 1983); *Adams Steel Erection, Inc*., 766 F.2d 804 (3rd Cir. 1985); *Daniel Marr*, 763 F.2d 477 (1st Cir. 1985). The Review Commission then adopted the position of a majority of the federal Court of Appeals and held that Subpart R did not preempt the application of general construction standards to steel erection work and overruled all Commission decisions to the contrary. *Bratton Corp*., 1987-90 OSHD ¶ 29,152 (RC 1990). (This case involved the application of the personal protective provision, 29 CFR 1926.28(a), but the reasoning is applicable to 29 CFR 1926.105(a)).

Starting in 1984 in response to several requests for clarification of provisions of the steel erection standards including those pertaining to fall protection, federal OSHA started revising the Steel Erection Standard. In 1986 federal OSHA started proceedings to revise Subpart M, the fall protection provisions for the Construction

Industry. Many of the employers in the Steel Erection Industry commented in the rule making process that they were confused about whether Subpart R or Subpart M governed the erection of steel. In 1988 federal OSHA announced that it was going to develop a revised standard which would provide comprehensive coverage for fall protection in steel erection and stated in the Federal Register:

> OSHA intends, therefore, that the consolidation and revision of fall protection provisions in subpart M do not apply to steel erection and that the current fall protection requirements of Part 1926 continue to cover steel erection until the steel erection rulemaking is completed. Accordingly, in order to maintain coverage under existing fall protection standards pending completion of the separate steel erection fall protection rulemaking, OSHA plans to redesignate existing Secs. 1926.104, 1926.105, 1926.107(b), 1926.107(c), 1926.107(f), 1926.500 (with Appendix A), 1926.501, 1926.502 into Subpart R when the Agency issues the final rule for the subpart M rulemaking.

53 Fed. Reg. 2048 (1988). After issuing that paradigm of clarity, federal OSHA embarked on a ten year effort to revise the steel erection standard which made use of the negotiated rule making process and the establishment of the Steel Erection Negotiated Rulemaking Advisory Committee (SENRAC). In order to clear up confusion about what provisions of the standards applied to steel erection while the steel erection standard was being revised, Deputy Assistant Secretary of Labor, James W. Stanley on July 10, 1995 issued a Standards Interpretation Memorandum titled "Fall Protection in Steel Erection". The application of 29 CFR 1926.105(a) to steel erection was set out in the memorandum in the following language:

> 2. Fall protection for steel erection activities shall be provided consistent with the following:
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> a. Tiered buildings:
>
> i. Exterior fall hazards of 25 feet or more are covered by 1926.105(a). Exterior fall protection is not required for fall hazards of less than 25 feet.
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> .
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> .
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> b. Non-tiered buildings:
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> Exterior and interior fall hazards of 25 feet or more are covered by 1926.105(a). Fall protection is not required for fall hazards of less than 25 feet.
>
> .
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> .
>
> c. Non-building structures:
>
> Exterior and interior fall hazards of 25 feet or more are covered by 1926.105(a). Fall protection is not required for fall hazards of less than 25 feet.
>
> 3. Former (i.e. prior to February 6, 1995) paragraphs 29 CFR 1926.104, 1926.105, and 1926.107(b), (c), and (f) will continue to apply to steel erection activities.

James W. Stanley, Deputy Assistant Secretary of Labor, *Standards Interpretation*, "Fall Protection in Steel Erection" (July 10, 1995).

This interpretation of the steel erection standard was adopted by North Carolina on May 11, 1999 in Operational Procedural Notice 121. By 2001 all of the federal rule making process had been completed and federal OSHA announced in a news release dated January 17, 2001 that the new final steel erection standard would become

effective on July 18, 2001. OSHA National News Release, U.S. Department of Labor, Office of Public Affairs, National News Release USDL: 01-24 (January 17, 2001), 66 Fed. Reg. 5196 (2001). On July 13, 2001, federal OSHA announced in a new release dated July 13, 2001 that the effective date of the final steel erection standard would be delayed until January 18, 2002. OSHA National News Release, U.S. Department of Labor, OSHA, Office of Communication, National News Release (July 13, 2001), 66 Fed. Reg. 37137-37139 (2001). On January 18, 2002, federal OSHA announced in a new release that the new steel erection standard did in fact take effect on January 18, 2002. OSHA National News Release, U.S. Department of Labor, OSHA, Office of Communication, National News Release (January 18, 2002). North Carolina's adoption of the new steel erection standard paralleled that of federal OSHA and is detailed below. It is against this backdrop of regulatory and judicial activity that this case arises.

At the time of the accident and inspection the interpretation of 1926.105(a) for non-tiered buildings (usually single story) applied to Respondent's steel erection activities and both exterior and interior fall hazards of 25 feet or more required safety nets when other means of fall protection were not feasible. At the hearing before the Hearing Examiner, Mr. McCarver, Respondent's president challenged the Compliance Officers measurements as inaccurate. At the hearing before the Board he stated that he measured the height at which the employee fell off the building and it was just shy of 25 feet. The Compliance officer testified that he measured the height to the top edge of the decking at approximately 29 and ½ feet and that he calculated the height to be 29 feet 9.75 inches using the slope of the roof and the height at the eves that he got from the drawings. (T pp 62-66, Complainant's Exhibit # 10). When there is conflicting evidence and the Hearing Examiner chooses between the two, the Board will accept the Hearing Examiner's finding if it is supported by substantial evidence. The Compliance Officer's testimony as to the height of the top edge of the decking is certainly substantial evidence meeting that burden and satisfies the Complainant's burden of proving that the Respondent's employee was working at a height of greater than 25 feet so as to be subject to 29 CFR 1926.105(a).

Respondent next argues that even if his employee was working at a height greater than 25 feet, the height was less than 30 feet and Respondent met the requirements of the new steel erection standard which Respondent states was in effect at the time of the inspection. Under the new steel erection standard he was not required to use any fall protection if the worksite was under 30 feet but could instead use a controlled decking zone (CDZ).

Under the revised steel erection standard, fall protection is required whenever employees engaged in steel erection are on a walking/working surface 15 feet or more above a lower level. Fall protection is limited to guardrails, safety nets, personal fall arrest, positioning devices or fall restraint systems. (See 29 CFR 1926. 760(a)(1).) However, there is an exception for the employees' initial laying of metal decking which forms a leading edge. In this case, the employer may use a "controlled decking zone" (CDZ) for heights between 15 and 30 feet. (See 29 CFR 1926.760(c)) Because Respondent's employees were working just under 30 feet, arguably, the controlled decking zone would have been available to Respondent under the revised steel erection standard if it were in effect at the time of the accident.

The effective date of the new steel erection standard, 29 CFR §1926.750 *et seq*. has been a source of confusion in this case. The changes in the effective date of the new steel erection standard on the federal level have been detailed above. In North Carolina the effective date was published as July 18, 2001 in North Carolina Occupational Safety and Health Standard for the Construction Industry., (March, 2001) by the North Carolina Department of Labor. However, the effective date was changed by a Notice of Rule-making Proceeding published in the North Carolina Register that "Effective January 18, 2002, the North Carolina Department of Labor Division of Occupational Safety and Health has proposed to adopt verbatim the new federal steel erection standard." 16 N.C. Reg. 736 (Nov. 1, 2001). On January 2, 2002, the January 18, 2002 effective date was confirmed by a notice in the North Carolina Register that "Effective January 18, 2002, the North Carolina Department of Labor Division of Occupational Safety and Health has adopted verbatim the new federal steel erection standard." 16 N.C. Reg. 1313 (Jan. 2, 2002).

After the hearing Respondent sent the Hearing Examiner a copy of the January 17, 2001 federal OSHA News Release indicating that the new steel erection standard became effective on July 18, 2001. The confusion over the effective dates of the new steel erection standard and notions of fundamental fairness leads the Board to decide the issue of whether Respondent complied with the new steel erection standard.

The compliance officer testified that one of Respondent's employees worked at a height of about 29 feet 9.75 inches for about ½ hour and that he was required by 1926.105(a) to be protected by ladders, scaffolds, catch platforms, temporary floors, safety lines, safety belts or safety nets. Officer Jacobson testified that there was no sign of a CDZ when he arrived to conduct the inspection and that the Respondent did not clearly mark the zone as required by 29 CFR 1926.760(c)(3).

29 CFR 1926.760(c)(4) and 761(c)(3) of the new steel erection standard requires extensive training in the use of a CDZ. The role of training in the establishment of the Controlled decking zone was stated by federal OSHA as follows:

> A core requirement of the CDZ alternative is § 1926.761(c)(3), which specifies that only employees trained in accordance with the standard's CDZ training provisions are allowed in the CDZ. That provision requires that each employee be provided training in "the nature of the hazards associated with work within a controlled decking zone; and the establishment, access, proper installation techniques and work practices required by § 1926.760(c) and § 1926.754(e). This special CDZ training supplements the required fall hazard training in § 1926.761(a). OSHA believes that the implementation of these new training provisions will improve the safety of all employees who work in areas where decking is being installed.

66 Fed. Reg. 5249 (2001). Officer Jacobson asked for training documentation at the time of the inspection and none was provided. Moreover training documentation was subpoenaed for production at the hearing but not provided. The hearing examiner, Judge Koch gave the Respondent's owner, Mr. McCarver an opportunity at the hearing to have his secretary fax a copy of any training records that he had to the Judge's office. Mr. McCarver did not provide any training records. The employee who fell to his death, Mr. Hector Gabriel Valencuela-Rivera had only worked with Respondent for two weeks. Two weeks is not sufficient time to train an employee in the requirements of 1926.761(c)(3), 1926.760(c) and 1926.754(e) which are comprehensive and are delineated above in the "Statutes and Regulations at Issue" section. The fact that Mr. Rivera backed off of the roof and fell to his death proves the need for extensive training before utilizing the controlled decking zone. The new steel erection standard was not in effect at the time of the accident and inspection and the overwhelming evidence is that Respondent did not comply with the new steel erection standard even if it had been in effect.

Respondent's last challenge is that the employee that feel to his death disregarded instructions to not go back up on the roof and to never walk backwards while installing decking. Respondent was not cited for the exposure of the employee when he returned to the roof contrary to the instructions of his supervisor but was cited for the exposure of the employee while they were laying the first 4 pieces of metal roofing and that exposure alone supports the citations. (T pp 59-65, 91-92). However, Respondent's argument is an isolated employee affirmative defense and even if we assume that the defense is applicable, Respondent has failed to meets its burden of proof. In asserting such defense the burden of proof is on the employer to establish the following:

> (1) the employer has taken all feasible steps to prevent an accident from occurring;
>
> (2) the employee action was contrary to an effectively communicated work rule;
>
> (3)that work rule was effectively enforced; and
>
> (4) that the employer had neither actual nor constructive knowledge of the violation.

O.S. Steel Erectors v Brooks, 84 N.C. App 630, 2NCOSHD 529, 534 (1987); Daniel International Corp. v OSHRC, 683 F.2d 361(11th Cir. 1981). Complainant issued a Subpoena Duces Tecum to Respondent to bring among others "All documents describing work rules regarding the use [of] fall protection equipment . . . , All documents describing any . . . discipline that . . . employees might be subject to if they violated work rules . . . , All documents recording or describing the fall protection training received by Hector Gabriel Valencuela-Riveria . . . and All documents . . . describing any and all disciplinary action(s) . . . taken by Mid-South Erectors, Inc. against any of its employees in North Carolina involving discipline for violations or rules or policies regarding the use of fall protection . . ." (Complainant's exhibit # 12, T 10-41). Respondent did not present any documents

that were responsive to these requests and presented no evidence at the hearing that showed that it had an effectively communicated and enforced work rule regarding the uses of fall protection. Respondent has failed to meets its burden of proving the isolated employee affirmative defense.

In conclusion, Complainant has met its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.105(a) by failing to provide safety nets while an employee was laying decking when the height to the surface below was greater than 25 feet. The new steel erection standard which would have allowed a controlled decking zone between 15 and 30 feet was not in effect at the time of the accident and inspection and, even if it had been in effect, Respondent did not comply with it. Respondent has also failed to meet its burden of proving the affirmative defense that the employee action was a result of isolated employee misconduct.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's February 10, 2003 Order in this cause be, and hereby is, **AFFIRMED,** to the extent that it is not inconsistent with this opinion, and Respondent is found to have committed a serious violation of 29 CFR 1926.105(a), as alleged in Citation One, Item 1, with an assessed penalty of $1,050.00 and Respondent is **ORDERED** to abate the violation and to pay the assessed penalty of $1,050.00 within 30 days of the filing date of this order.

This the 22nd day of June, 2004.

_____
OSCAR A. KELLER, JR., CHAIRMAN

_____
RICHARD G. PEARSON, MEMBER

Board Member, Janice Smith Gerald, dissenting:

I respectively dissent. As stated by the majority, the burden is on the Complainant to prove by a preponderance of the evidence that the Respondent committed the violation for which he is charged. The burden is on the Complainant to prove each and every element of the charges. One of the elements that the Complainant is required to prove by a preponderance of the evidence is employee exposure. The compliance officer testified that at the time that Mr. Riviera fell he was not wearing fall protection but that he was unable to determine whether Mr. Riviera was wearing fall protection at anytime earlier that day. (T p126-127). The compliance officer did testify that he was told that Ezekiel was not wearing any fall protection that day. (T p 127). The compliance officer also testified that only Ezekiel and Hector (Mr. Riviera) were installing the decking and that the one working at the bottom was exposed to a fall of less than 25 feet and didn't need fall protection but he didn't know who was working at the top and who was working at the bottom. (T pp 91-92). He also testified that only one employee was exposed to the fall hazard at any one time. (T p 93-94). The Complainant based the citations on the alleged failure to wear fall protection while the decking was being laid and not on the failure to wear fall protection when Mr. Rivera fell to his death. (T p133, Complainant's Brief, p 10). If Ezekiel was working at the lower edge of the decking, he was not required to wear fall protection and if Mr. Riviera was working at the top edge, there was no evidence that he wasn't wearing fall protection at the time they were laying the four pieces of decking. Complainant has failed to meet its burden of proving employee exposure because there was no evidence that Ezekiel, who was not wearing fall protection, was working at the top edge and was, therefore, exposed to a fall greater than 25 feet and there was no evidence that Mr. Riviera was not wearing fall protection.

The compliance officer testified that scissor lifts could have been used to break a person's fall and would have complied with the standard, 29 CFR 1926.105(a). (T pp 82-83). The photographic exhibits show that there were three scissor lifts parked in the area where the steel decking was being installed. (Complainant's exhibits # 1, 2, 6 and 7). Mr. McCarver, the president of Respondent, testified that the three lifts were there for the employees to work out of. (T pp117, 118, 124). Mr. McCarver also testified that the employees used the lifts some but he didn't know if they used them on the day of the accident because he wasn't there. (T pp 124-125). He said that that was what he rented the lifts for referring to using them for fall protection while installing the decking. (T pp 124-125). In his closing argument before the Hearing Examiner, Mr. McCarver made the following statement:

> Your Honor, you've got to build a workplace before you put a fall protection in. You can't just go up there and put them in out there in mid-air and say I' m going to put a cable to the other side. You've got to get a pack [sic-deck?] for them for the people to work off of. That's what I'm trying to tell him. If they had have used these scissor lifts at the end of that decking, and when they got that up there right, then he'd put a cable across there and they could have put a fall harness on. That's the whole thing. The man did not know [sic-do?] what he was told to do. And if you understand erection of steel, you've got to make your workplace to get started. And that's the reason why these lifts were there, to get them a workplace to get started. And then, you can put a ratline across there and put a twenty-foot lanyard on them, and when they fall, they're going to hit the floor anyway. Because if you've got a ratline and you're carrying decking, you've got to be able to go to the other end of that decking and bring it back up here where it's going. So, we didn't do anything wrong. It's just the fact that they don't understand erection.

(T pp133-134). The preponderance of the evidence is that the lifts were there for Mr. McCarver's employees to use to put up the first row of decking. There is no evidence that they did not use the lifts. The Respondent has presented evidence that the lifts were there to be used and the Complainant has admitted that the use of the lifts would have complied with 29 CFR 1926.105(a). The burden is not on the Respondent to prove that he complied with the standard. The burden is on Complainant to prove that Respondent violated the standard. Since the Respondent has put on evidence that scissor lifts were provided for the employees to use, the Complainant must present some evidence, either hearsay or direct testimony by an eye witness, that the Respondent's employees were installing the decking without using the scissor lifts as fall protection. The Complainant has presented no evidence that the employees were working without using the scissor lifts as fall protection and has failed to meet its burden of proving the violation by a preponderance of the evidence.

At the hearing before the Board, the Respondent's foreman, Paul Davis asked to say something and over the objections of the Complainant, pursuant to N.C.G.S. 95-135(i) (the Board may allow "in its discretion the taking of further evidence upon any question or issue."), the Board allowed the foreman to speak. The testimony, although not under oath, was as follows:

> Paul Davis: Sir, them lifts on exhibit 2, the reason that lift is right there, they come down from the top and went over and brought the other men down for break when I stopped. That lift has been at the controlled edge at the end of the sheets when they was laying it. If you look back in the book on the controlled decking zones you have a 90 by 90 square foot before you have to barricade on the controlled decking zone. You got to establish the controlled decking zone before you can barricade it but that lift was at that end of the decking when they was laying and I reckon he assumed it was still there when he stepped off cause it was on the other end at the time he did fall.
>
> Chairman Keller: What you are saying though, there was no fall protection there.
>
> Paul Davis: That decking was a platform, it was up and there was a man moving it down as they was laying the sheets.
>
> Chairman Keller: Okay.
>
> Paul Davis: That's all I got to say, it <u>was</u> there when we was laying. (Unintelligible) and it went back there without anyone telling him to.

(Tape of Review Board Hearing titled: Mid-South, 02-4127, dated 12-2-03, emphasis in original). Although this testimony, which was not under oath and was without cross examination by Complainant, may not have been sufficient to prove that the scissor lifts were used for fall protection, it stands in stark contrast to the lack of any evidence by the Complainant that the lifts were not used and certainly collaborates the testimony of Mr. McCarver that the scissor lifts were there to provide fall protection while the employees laid the first row of decking so they could then set up a "rat line" to which they could tie off their fall protection harnesses.

The history of the Steel Erection Standard set out in the opinion above by the majority shows that during the whole period since the passage of the OSH Act there has been confusion in the steel erection industry about the application of fall protection to the industry. In a standards notice put out by the North Carolina Department of Labor in 1977 and signed by L. A. Weaver, Acting OSHA Director, the following language was used:

> Continued confusion and uncertainty exists over the application of fall protection and related safety devices and personal protective equipment requirements to steel erection operations. This Standard Notice is intended to further clarify the requirements and to establish a standard interpretation to be enforced by all construction Safety Officers. The basic areas of question are:
>
> 1. At what height is fall protection required?
>
> 2. What constitutes acceptable fall protection?

Standards Notice 12 (Rev. 1), North Carolina Department of Labor, Office of Occupational Safety and Health, Raleigh, North Carolina, signed by L. A. Weaver, Acting OSHA Director and Michael R. Peeler, OSHA Standards Engineer, Filing Date of March 21, 1977.

Mr. McCarver's confusion about whether the new standards applied to him parallels the confusion in the industry over the history of the enforcement of the Federal and North Carolina OSH Act. The same two questions that were pointed out in the 1977 Standards Notice quoted above are the same two questions that Mr. McCarver had. Was he required to have fall protection at 30 feet or at 25 feet and what type of fall protection was he required to have, safety nets, scissor lifts or a controlled decking zone? It is certainly understandable that Mr. McCarver would believe that he could use a controlled decking zone (CDZ) between 15 feet and 30 feet on October 17, 2001 when the effective date for the new steel erection standard which allowed a controlled decking zone (CDZ) between 15 feet and 30 feet was published as July 18, 2001 in the North Carolina Occupational Safety and Health Standard for the Construction Industry, (March, 2001).

I, like the majority, believe that the confusion over the effective dates of the new steel erection standard and notions of fundamental fairness leads me to decide the issue of whether Respondent complied with the new steel erection standard but I come up with a result different from that of the majority. I would find that the Respondent complied with the new steel erection standard. The evidence show that there were only two men on the roof laying the 25 feet, 9 inch by 3 feet pieces of metal decking and that only four pieces were laid. This gives a surface of approximately 26 feet by 12 feet off of which the men were working. Appendix D to Subpart R set out in the Standards section of the majority opinion allows a CDZ to be "defined by a control line or any other means that restricts access. In a standards interpretation letter titled "Designation of an entire floor as a controlled decking zone for steel decking work, Federal OSH allowed an entire floor to be designated as a CDZ and stated:

> Restricting access to an entire floor would be "equivalent" to control lines where both of the following conditions are met: (1) the points of access to the floor are limited and can be controlled (such as where the only means of access to the floor is by a single ladder); and (2) each point of access (such as the base of a ladder leading to the floor) is marked with a warning sign indicating that access is restricted to Controlled Decking Zone workers.

Standards Interpretation Letter, "Designation of an entire floor as a controlled decking zone for steel decking work", dated December 22, 2003, addressed to Mr. Doug Schneider, Safety Solutions, Inc.

Restricting access to the first row of decking to only the two employees that were laying the decking and were engaged in the leading edge work meets the requirement of "any other means that restricts access". The only visible means of access and the method of access testified to at the hearing before the Review Board was by use of the scissors lifts and they would not need to be marked with a warning sign that access was limited to Controlled Decking workers. Once the workers are on the roof the scissors jacks are in the extended position and no one on the ground can access them so there is no need to mark them. 29 CFR 1926.760(c) allows a maximum of 90 feet by 90 feet for the CDZ and a 26 by 12 feet area is a small fraction (approximately 1/26th) of the allowable area. The compliance officer testified that the four pieces of sheeting covered about 1/4 to 1/5 of the length of the building. (T p 84). If the employees had continued and laid the sheeting the entire length of the roof which according to the compliance officer's estimate would be approximately 60 feet then the CDZ would have been approximately 60 feet by 26 feet, well within the 90 by 90 feet requirement for the CDZ. The same Standards Interpretation letter referenced above states that one of the purposes of limiting the CDZ to 90 feet by 90 feet is to limit the size of the area where workers are unprotected by conventional fall protection. Guard rails and other conventional fall protection are not required until the 90 feet by 90 feet area has been reached and Respondent had not reached that limit. If Respondent had then installed the "rat line" for the men to attach their safety harness after completing the first run as the compliance officer testified he was told they were going to do, then he would have been in compliance with both the new and the old Steel Erection Standard on his second and successive runs of decking. (T p 84-85).

This procedure which was approved by federal OSH in this Standards Interpretation letter is the exact procedure that Mr. McCarver stated in his closing that he was using in laying the first row of decking and was going to use in making the second and successive runs of decking. It is also the exact procedure that his foreman, Mr. Paul Davis stated that he was going to use after laying the first row of decking. If they were complying with the new Steel Erection standard's CDZ requirements, they would not have needed to use the scissor lifts when they were running the first row of decking because the distance at the top and bottom of the decking was less than 30 feet. The majority argues that the Respondent did not meet the training requirements of the new standard, however, he was not cited for failing to train the employees, he was cited for failure to use safety nets at a height above 25 feet. He was not cited for the lack of fall protection when the deceased employee went up on the roof when he was told not to and then fell to his death but was cited for the lack of fall protection during the 30 minutes that it took the two employees to lay the four pieces of decking.

If the accident and inspection had occurred after January 18, 2002, which would have been three months and one day later, Respondent would have been in compliance with the new standard under the later revised effective date. I would find that on October 17, 2001, the date of the accident and inspection, the Respondent was in compliance with the new Steel Erection Standard which the Department of Labor announced as effective July 18, 2001 and that the Department of Labor is estopped from charging Respondent under the Old Steel Erection Standard. It was an unfortunate accident that a man fell to his death but I fail to see how the passage of three months makes a practice safer. If the method that the Respondent used on October 17, 2001 was considered safe on January 18, 2002, it should be considered safe on October 17, 2001 when the employer is following that same procedure published as effective on July 18, 2001 in its Standards Manual, North Carolina Occupational Safety and Health Standard for the Construction Industry.

In summary, I would find that the Complainant has failed to prove an essential element of its case, that any employee was exposed to a fall greater than 25 feet. The Complainant has also failed to prove that the scissor lifts were not used and, therefore, that the Respondent violated the standard. The Respondent has put on evidence that it complied with the CDZ requirements of the new Steel Erection Standard and the Complainant has not presented any evidence that Respondent did not comply with the new Steel Erection Standard other than the training requirements for which the Respondent was not charged. I would find that the Complainant is estopped from finding Respondent in violation of the old standards because the Construction Standards manual published by the Complainant indicated that the new Steel Erection Standard was in effect at the time of accident and inspection. I would find that the Respondent was not in violation of 29 CFR 1926.105(a) and would dismiss the citations.

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JANICE SMITH GERALD, MEMBER