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Secretary of Labor,  
Complainant,

v.

Southern Pan Services Company,  
Respondent.

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OSHRC Docket No. **98-0635**

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#### APPEARANCES

P.C.	Dana L. Ferguson, Esq. Office of the Solicitor	J. Larry Stine, Esq. Wimberly, Lawson, Steckel, Nelson & Schneider,
	U. S. Department of Labor Atlanta, Georgia For Complainant	Atlanta, Georgia For Respondent

Before: Administrative Law Judge Ken S. Welsch

#### **DECISION AND ORDER**

Southern Pan Services Company (SPS) is a concrete formwork contractor in Atlanta, Georgia. As a result of an inspection by the Occupational Safety and Health Administration (OSHA) on January 22, 1998, SPS received a serious citation for the lack of fall protection while constructing the slab (floor) formwork for the 13th floor of the Peachtree Towers construction project. SPS timely contested the citation.

The citation alleges a violation of § 1926.501(b)(1) for failing to provide personal fall protection, guardrails, or a safety net system for employees working at an unprotected side approximately twelve feet above the lower level. The citation proposes a \$7,000 penalty.

SPS's contest of the citation was designated for E-Z Trial proceedings under § 2200.200, *et seq.* The hearing was held on July 13, 1998, in Atlanta, Georgia. The parties stipulated jurisdiction and coverage (Tr. 5). Also, SPS agreed that if a violation was found, it was properly classified as serious (Tr. 5; also, *see* Prehearing Conference Order). After the hearing, each party filed a post- hearing brief.

The parties dispute whether the open side or edge of the formwork used to construct the 13th floor was a leading edge. SPS argues that § 1926.501(b)(1) is not applicable to the work

performed on the formwork because the employee spraying releasing oil was working at the leading edge, which is governed by § 1926.501(b)(2). The court agrees and finds a violation of § 1926.501(b)(2).

### Background

SPS has constructed concrete formwork since at least 1979 (Tr. 194, 221). SPS employs approximately 500 employees (Tr. 52). Its business is constructing the formwork for columns, walls and slabs (floors).

To construct the formwork for floors, SPS uses tables (scaffolding) with built-in fiberglass pans. Plywood is used to fill in joints or gaps in the pans. The tables at the Peachtree Towers project were 50 feet by 21 feet (Tr. 146).<sup>1</sup> The tables used to construct the next floor are flown by crane from a completed floor underneath and placed on the top floor (Tr. 119). The tables are moved to the floor one at a time and placed lengthwise across the width of the building (Exhs. R-1, R-2). The width of the Peachtree Towers was 90 feet (Tr. 146).

On the first day, enough tables to cover approximately half of the floor are positioned. The floor is completed in two concrete pours (Tr. 71). The tables are aligned and guardrails for the perimeter of the building are installed.<sup>2</sup> After the tables are placed together, the tables are leveled; the gaps and holes are filled in with plywood; and the tables are cleaned of debris. Once cleaned, a releasing agent (oil) is sprayed on the pans and allowed to dry (Tr. 128-129, 136).

According to SPS, aligning the tables and preparing the tables, including oiling the pans, is leading edge work (Tr. 95, 128-129). These activities are performed by SPS inside a controlled access zone. After the releasing agent dries, the controlled access zone is moved and other subcontractors are permitted into the area to install the rebar, place electrical conduit and plumbing sleeves, and pour the concrete. Constructing the formwork for a floor is a three-day process (Tr. 78-81).

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<sup>1</sup>Some tables were 50 feet by 14 feet (Tr. 146). Charles Mathis, superintendent, testified that the tables were 26.6 feet wide (Tr. 76).

<sup>2</sup>A portion of the guardrail system for the perimeter was permanently attached to the tables (Tr. 113-114).

In September 1997 SPS, as a subcontractor for Beers Construction Company, contracted to construct the formwork for the walls, columns and floors for the construction of the 20-story Peachtree Towers office building in Atlanta, Georgia (Tr. 19, 93). SPS's work at the Peachtree Towers was completed approximately April 30, 1998 (Tr. 131). By January 22, 1998, SPS had completed the first 12 floors and began constructing the slab formwork for the 13th floor (Tr. 23, 32).

On January 22, 1998, in response to a fatality, OSHA safety and health compliance officer Pamela Evatt initiated a comprehensive inspection of the construction site (Tr. 21-22)<sup>3</sup>. Evatt started her inspection on the 12th floor. There were approximately six SPS employees on-site (Tr. 20).<sup>4</sup>

On the 12th floor, Evatt observed an SPS employee spraying the releasing oil on the pans along the edge of the partially constructed 13th floor (Exh. C-1; Tr. 23, 25, 157). While spraying the oil, the employee was not protected from falls by guardrails, safety nets or a personal fall arrest system (Exh. C-1; Tr. 25, 151). The employee worked within two feet of the edge of the tables; exposed to a fall of approximately 12 feet to the concrete floor below, the 12th floor (Tr. 28-29, 49). Evatt observed the employee for approximately 15 minutes (Tr. 48). According to the SPS's foreman, the employee took approximately 30 minutes to spray the releasing agent along the 90-foot edge of the formwork (Tr. 145-146). Charles Mathis, superintendent, identified the employee spraying the releasing oil as part of SPS's formwork erecting crew. The employee was spraying inside SPS's controlled access zone and another employee on the tables was monitoring the sprayer's exposure to falls pursuant to SPS's fall protection control plan (Exh. R-3; Tr. 50, 95-96, 144).

The releasing agent, referred to as TJ release oil, is sprayed on the pans to prevent the concrete from sticking to the pans when the tables are removed (Tr. 83-84, 135). When sprayed, the oil is slippery and slimy. Depending on the weather, the oil dries in a couple of hours into a

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<sup>3</sup>Evatt was a member of a fatality inspection team. However, Evatt's inspection did not involve the fatality (Tr. 21, 48). Although the fatality involved an SPS employee, another compliance officer conducted the fatality inspection (Tr. 22).

<sup>4</sup>Normally, SPS had approximately 35 employees on-site (Tr. 20).

tacky wax (Tr. 85). Oiling is the last job done by SPS on the tables before the area is released to other subcontractors (Tr. 82, 136).

### Discussion

The Secretary has the burden of proving a violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

### Alleged Violation

SPS is cited for violation of § 1926.501(b)(1) which provides that:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

SPS does not dispute that the employee spraying the releasing oil was within two feet of the edge of the partially constructed formwork for the 13th floor. It is also uncontradicted that the employee was exposed to a fall hazard without protection by a guardrail system, safety net system or a personal fall arrest system (Exh. C-1). The employee was exposed to a fall of 12 feet, which SPS stipulates is serious within the meaning of the Occupational Safety and Health Act (Tr. 5; Prehearing Conference Order). Also, there is no dispute that SPS knew the employee was working without the fall protection required by the standard.

The threshold issue in dispute is the application of § 1926.501(b)(1)(an unprotected edge) and § 1926.501(b)(2) (leading edges). SPS argues that § 1926.501(b)(2) applies. Section 1926.501(b)(2) provides that:

(I) Each employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

NOTE: There is a presumption that it is feasible and will create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

(ii) Each employee on a walking/working surface 6 feet (1.8m) or more above a lower level where leading edges are under construction, but who is not engaged in the leading edge work, shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system. If a guardrail system is chosen to provide the fall protection, and a controlled access zone has already been established for leading edge work, the control line may be used in lieu of a guardrail along the edge that parallels the leading edge.

SPS asserts that the employee oiling the pans was working at the “leading edge” within the meaning of § 1926.501(b)(2). A “leading edge” is defined at § 1926.500(b) as:

the edge of a floor, roof, or formwork for a floor or other walking/working surface (such as the deck) which changes location as additional floor, roof, decking, or formwork sections are placed, formed, or constructed. A leading edge is considered to be an “unprotected side and edge” during periods when it is not actively and continuously under construction.

The Secretary argues that the employee was not performing leading edge work because oiling pans does not involve constructing the edge of the formwork (Tr. 36).

Application of the standards at § 1926.501(b)(1) or § 1926.501(b)(2)

As an element of the Secretary’s burden to establish a violation of a safety standard, the Secretary must show the application of the cited standard to the alleged violative condition. The Secretary must cite the most applicable standard. A general fall protection standard such as §

1926.501(b)(1), which applies to any “unprotected side or edge which is 6 feet or more above the lower level,” must give way to a more specific standard depending on the type of walking/working surface.

The fall protection standards at § 1926.500, *et seq.*, apply to all construction workplaces unless another construction standard specifically requires fall protection. The standards specify both the fall protection system that must be used and the criteria those systems must meet. The standards are performance-oriented, allowing employers to choose fall protection from various specified options. Section 1926.501(b) identifies 15 different “walking/working surfaces” as defined by § 1926.500(b). The walking/working surfaces identified by the Secretary include an unprotected edge, leading edge, hoist area, ramps or other walkways, roofs, etc. Each surface requires an employer to provide at least some form of fall protection to its employees exposed to a fall hazard.

The fall protection standards are distinguished based on the location of the work, whether the walking/working surface is an unprotected edge or some other opening. Their application depends on the type of walking/working surface. Section 1926.501(b)(2) applies to employees who are at the leading edge. The Secretary defines leading edge but does not define leading edge work. If the employee is engaged in leading edge work or merely working at the leading edge, § 1926.501(b)(2) applies, not § 1926.501(b)(1) as cited by the Secretary.

In this case, the employee spraying the releasing agent was working at the leading edge. The releasing agent prevented the pans from sticking when the concrete was poured. After the employee sprays the pans, the edge changed location as additional tables were flown into position to complete the formwork for the floor. When compliance officer Evatt returned to the site the next week, the 13th floor was completed and SPS was working on the next floor (Tr. 46).

The Secretary failed to show that the leading edge was no longer under active and continuous construction. To be considered an “unprotected side or edge,” the Secretary must establish that the leading edge was in a period of no active construction (definition of leading edge at § 1926.500(b)). According to Evatt, she chose § 1926.501(b)(1) because she did not believe that oiling was “leading edge work” (Tr. 36; Secretary’s Brief, p. 4).

Compliance officer Evatt only observed the employee for 15 minutes. The employee was finishing SPS's work inside the controlled access zone before the leading edge was moved. There is no showing when the last table was positioned or when the next table was expected. Based on SPS's procedure, additional tables were flown into position to complete the formwork for the floor after the oil dried.

According to SPS's safety director and expert, spraying the releasing agent has long been considered by the formwork industry as leading edge work (Tr. 213). Tables were flown into position approximately every 45 minutes (Tr. 68, 120). Although the employee was not engaged in work directly related to extending the leading edge, the edge was actively and continuously being extended. Spraying the releasing agent was an integral part of the leading edge work because it prevented the tables from sticking to the cement when poured.

The leading edge standard, § 1926.501(b)(2), applied to the conditions observed by the compliance officer.

#### Amendment *Sua Sponte*

After determining that a standard is preempted, consideration then is given to whether to amend to the applicable standard. *Vicon Corp.*, 10 BNA OSHC 1153, 1156-57 (No 78-2923, 1981), *aff'd* 691 F.2d 503 (8th Cir. 1982). Amendments to a complaint, including *sua sponte* amendments, are routinely permissible where the amendment merely adds an alternative legal theory but does not alter the essential factual allegations contained in the citation. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1517 (No. 91-373, 1993) (amendment proper because it does not alter citation's factual allegations), *A. L. Baumgarten Construction, Inc.*, 16 BNA OSHC 1995, 1997 (No. 92-1022, 1994) (*sua sponte* amendment after hearing permitted).

SPS argues that the Secretary's case should be dismissed because the wrong standard was cited (SPS Brief, p. 7). SPS opposes any amendment. Also, the Secretary makes no motion to amend. The court, however, finds an amendment justified in this case.

The standard cited, § 1926.501(b)(1), as well as § 1926.501(b)(2), requires that employees exposed to a fall hazard of six feet or more above the lower level are protected by "use

of guardrail systems, safety net systems, or personal fall arrest systems.” Compliance with either standard is the same - a guardrail system, safety net systems, or personal fall arrest system.

The citation notified SPS that the issue involved an employee working at an edge “approximately 12 feet without fall protection, guardrails, or safety net systems, exposing them to serious injury.” The citation described the factual situation that was tried by the parties.

As SPS correctly argued throughout the proceeding, the leading edge standard, § 1926.501(b)(2), was more applicable to the location where the work was performed. SPS unequivocally tried the amended standard. SPS argued infeasibility or a greater hazard to comply with the leading edge standard and offered its fall protection control plan (Exh. R-3). The issues were tried by the parties and the same evidence relied upon to establish a violation of § 1926.501(b)(1) also establishes the noncompliance with § 1926.651(b)(2). *See McWilliams Forge Co.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984), *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995). The central factual allegation remains unchanged by this amendment.

The inquiry under Rule 15(b) of the Federal Rules of Procedure is whether the employer is prejudiced by the amendment. SPS contends that it is prejudiced. SPS, however, fails to identify how it is prejudiced and what additional evidence it would have presented. Throughout the proceeding, it was SPS who argued infeasibility or greater hazard in using fall protection systems without raising it as an affirmative defense. SPS did not object to the compliance officer’s testimony regarding the conditions and in fact offered its own testimony regarding its infeasibility or greater hazard defense. Consequently, the parties tried the issue of the feasibility or greater hazard of fall protection systems at the edge whether under § 1926.501(b)(1) or § 1926.501(b)(2). SPS knew the amended standard was the proper standard.

The citation is amended *sua sponte* to a violation of § 1925.501(b)(2).

#### Violation of § 1926.501(b)(2)

There is no dispute that the employee spraying the releasing oil was working within two feet of the edge. He was exposed to a fall of approximately 12 feet without protection by a

guardrail system, safety net system or a personal arrest system. A violation of § 1926.501(b)(2) is established unless SPS can show infeasibility or greater hazard.

It is not necessary in this decision to decide whether the employee was exposed to fall hazards while constructing leading edges (subsection (i)) or whether the employee was working at a leading edge, but not engaged in constructing the leading edge (subsection (ii)). *Monitor Construction Co.*, 16 BNA OSHC 1589, 1596 (No. 91-1807, 1994) (a determination on whether a leading edge is not necessary for decision in case). SPS's site superintendent agreed that spraying the releasing agent was not directly extending the leading edge (Tr. 97). As examples of activities not considered engaged in leading edge work, the Secretary identified welding, bolting, cutting, bracing, guying, patching, painting or other operations (*See* Appendix E, Sample Fall Protection Plan III, "Detailing").

#### Feasibility or Greater Hazard of Fall Protection

SPS argues that fall protection at the leading edge is infeasible or a greater hazard. Section 1926.501(b)(2) requires the use of a guardrail system, safety net system or personal fall arrest system. In general, SPS argues that there is no place to secure conventional fall protection at the leading edge, and the installation of conventional fall protection exposes employees for a longer period of time to the fall hazard.

To establish the affirmative defense of infeasibility, an employer must show that (1) the means of compliance prescribed by the standard are technologically or economically infeasible, or necessary work operations are technologically infeasible after implementation; and (2) there are no feasible alternative means of protection. *V.I.P Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994). Section 1926.500(b) defines infeasibility as:

it is impossible to perform the construction work using a conventional fall protection system (i.e., guardrail system, safety net system, or personal fall arrest system) or that it is technologically impossible to use any one of these systems to provide fall protection.

Employers are expected to exercise some creativity in seeking to achieve compliance. *Pitt Des Moines, Inc.*, 16 BNA OSHC 1429 (No. 90-1349, 1993).

To establish a greater hazard defense, the employer must demonstrate by a preponderance of the evidence that (1) the hazards of compliance are greater than the hazards of noncompliance; (2) alternative means of protection are unavailable; and (3) a variance was unavailable or inappropriate. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1225 (No. 88-821, 1991).

### Guardrail System

SPS argues that it would require employees possibly two hours to construct a guardrail system along the leading edge. While constructing the guardrail system, employees would be exposed to the same fall hazard as the employee spraying the releasing oil. Also, an additional 15 minutes would be needed to remove the guardrails as new tables were flown into position (Tr. 125, 159-160; SPS Brief, p. 3). SPS also questions whether the 2 x 6 inch wooden board along the side of the table would be sufficient to anchor the guardrail system (Tr. 126).

Compliance officer Evatt testified that when she returned to the site one week later, guardrails were constructed at the edge of the formwork to allow the iron worker to install rebar. The general contractor had installed the guardrail system (Tr. 39, 46-47). Evatt testified that when she observed the guardrail system, SPS had stopped its leading edge work (Tr. 47). The Secretary offered no other evidence showing the feasibility of a guardrail system along the edge of the tables.

As noted by SPS, the Secretary in the preamble to the proposed fall protection standards “acknowledged that erecting guardrails along a leading edge would not be feasible since the guardrail would have to be removed and relocated within a few minutes of its being erected to allow another structural member to be placed” (*see* proposed rule; limited reopening of rulemaking record, 57 FR 34656, August 5, 1992<sup>5</sup>).

The record shows that the time of employees’ exposure to a fall hazard would significantly increase with the installation and removal of a guardrail system as new tables were flown into position. The employee spraying the releasing oil worked at the edge of the formwork

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<sup>5</sup>Copy is attached to SPS brief.

approximately 30 minutes for each set of tables. To erect a guardrail system would increase the employee's exposure an additional two hours. Also, John Harkins, director of safety and expert in formwork, testified that at the Peachtree Towers the anchorage used to secure a guardrail system could not withstand a force of 200-pounds without failure as required by the standard (*See* § 1926.502(b)(3); Tr. 206).

SPS has established that erecting a guardrail system to protect the employee spraying the releasing agent was infeasible and presented a greater hazard.

### Safety Net System

Similarly, a safety net system to protect the employee was shown infeasible and a greater hazard. The preamble to the proposed fall protection standards states that "OSHA also believes that a requirement to erect safety nets often is not feasible because of insufficient room to rig a safety net and because the net would have to be constantly moved" (51 FR 42718, 42721, November 25, 1986). Compliance officer Evatt testified that she did not determine the feasibility of safety nets (Tr. 42). Howard Childers, safety officer, testified that at the Peachtree Towers, the only anchor points were the columns spaced 30 feet apart, which permitted too much deflection in the net. There were only 12 feet from the top of the table to the floor below (Tr. 167-168). Also, since tables were flown into position approximately every 45 minutes, safety nets would need to be continually installed and removed.

### Personal Fall Arrest System

SPS argues that a personal fall arrest system could not be installed to meet the criteria of § 1926.502(d), which requires the safety line to have a deflection of less than 0.04 inches with the application of 250 pounds and its anchorage to withstand 5,000 pounds. Also, SPS argues that there is no place to anchor the lanyard at or above its connection point (§ 1926.502, App.C, II (k)).

A personal fall arrest system is defined at § 1926.500(b) as:

a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body belt or body harness and may include a lanyard, deceleration device, lifeline, or suitable

combinations of these. As of January 1, 1998, the use of a body belt for fall arrest is prohibited.

SPS agrees that horizontal lines could be used by one employee and attached to columns which are 30 feet apart (SPS Brief, p. 4). Charles Mathis, superintendent, testified that the columns could be used to tie off. He was, however, unsure whether the column could withstand the force of 5,000 pounds (§ 1926.502(d); Tr. 77, 100). Roger Black, foreman, and John Harkins, safety director, agreed (Tr. 137, 208-210). There is no evidence that the columns at the Peachtree Towers, in fact, could not withstand 5,000 pounds. SPS offered no evidence of the specific strength capacity of the columns. Also, there was no consideration shown for possibly pre-engineering in anchor points on the tables.

SPS's argument regarding the possible entanglement of lanyards if several employees tied-off to the same lifeline is also rejected. The exposure cited by OSHA involves one employee spraying the releasing agent. The citation does not concern other employees who may have been engaged in leading edge work or performed other jobs at the leading edge. During the spraying operation, there is no evidence that other employees worked at the edge until the oil dried. Therefore, there should be no entanglement problem with other employees. Similarly, SPS's concern that an employee tied-off could swing into the formwork if he fell is speculative (Tr. 164). Any possible injury from the formwork which was not shown by SPS certainly would be far less than a fall of 12 feet to a cement floor.

SPS does not focus its infeasibility or greater hazard defense to the employee performing the spraying operation. Its arguments involve all employees working on advancing the leading edge. This case, however, is limited to the one employee spraying the releasing agent. An employer, attempting to establish infeasibility or greater hazard, is required to establish the worksite-specific circumstances that preclude reliance on conventional fall protection. SPS's defense fails to be specific to the Peachtree Towers or the employee spraying the releasing agent after the tables are flown into position, aligned and leveled. Spraying the agent is the last job done by the erecting crew before SPS moves the controlled access zone.

Also, other than speculative and conclusionary testimony regarding problems with lifelines and anchorage, SPS presented no tests or studies showing that it ever considered the feasibility of

a personal arrest system for the employee spraying the releasing agent at the Peachtree Towers. There is no showing that SPS ever attempted to install or utilize a personal arrest system for the employee at the Peachtree Towers or at any other worksite. John Harkins, director of safety and expert, testified that SPS in 1994 determined fall protection was not feasible at any of its work sites for all employees working at the leading edge (Exh. R-3; Tr. 229). Such generalized rejection of a personal fall arrest system is contrary to the intent of the standard and does not establish infeasibility or greater hazard. SPS fails to establish the basis for its determination as it specifically related to the Peachtree Towers. The feasibility of a fall arrest system depends on the circumstances of particular worksites and the jobs being performed. Although SPS may use only one method in constructing formwork, each worksite differs.

As noted by the Secretary in the preamble to the final fall protection rule (59 FR 4073, August 9, 1994):

In particular, the Agency has frequently found that the use of personal fall arrest systems is feasible even where a guardrail system or safety net system is infeasible. Further, equipment is generally available to provide safe anchorage points for personal fall arrest systems. It is in this area that preplanning of the construction project is most critical. Focusing on fall protection at the design and planning stages of a construction project will enable an employer to develop measures that protect affected employees from fall hazards.

Further, the Secretary noted that:

The Agency is aware that there are workplace situations where the installation of guardrails or safety nets could involve more risk, due to the nature or duration of the exposure, than the work for which protection is required. On the other hand, OSHA has found that, as with the “infeasibility” defense, the “greater hazard” defense does not generally excuse an employer from protecting its affected employees with personal fall arrest systems. In particular, the Agency has found that careful planning of a construction project enables the employer to erect buildings/structures into which the necessary anchorage points for personal fall arrest systems have already been engineered. For example, in the case of precast concrete erection, preplanning may allow for lifting inserts to be

designed so that they function as both anchorage points for personal fall arrest systems and as lifting inserts.

SPS did not show that it specifically considered lifelines and lanyards for the employee spraying. As shown in the photograph of the site, a column was at the edge which was not shown inadequate for securing a lifeline (Exh. C-1). SPS's attempt to question the strength of the rebar is not supported by tests or actual knowledge of the strength of rebar. SPS's witnesses offered merely speculation and unsupported opinion. Compliance officer Evatt testified that, based on her observation from other inspections and conversations with other contractors, a fall arrest system at Peachtree Towers was feasible (Tr. 43).

An infeasibility or greater hazard defense is rejected, and a violation of § 1926.501(b)(2) is affirmed.<sup>6</sup>

#### Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, 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 in determining an appropriate penalty. Gravity is the principal factor to be considered.

SPS employs approximately 500 employees. There were approximately 35 employees on-site; however, one employee spraying the releasing agent was shown exposed to a fall hazard without fall protection. The employee was exposed to a fall of 12 feet to a concrete floor which could cause serious injury or death. SPS acknowledges that a violation, if found, is serious (Tr. 5). The employee was exposed to a fall hazard for 30 minutes each time he sprayed at the edge of the formwork. When sprayed, the surface is slippery. A penalty of \$2,000 is reasonable.

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<sup>6</sup>Although there was evidence given at the hearing regarding the nature of SPS's fall protection control plan (Exh. R-3), SPS was not cited for violation of § 1926.502(k) in this case. SPS subsequently received another citation alleging a violation of § 1926.502(k) (Exh. R-6). The citation issued July 6, 1998, was based on the same OSHA inspection dated January 21, 1998, involving the same construction site at the Peachtree Towers. Because a violation of § 1926.502(k) is not before the court in this proceeding and may be the subject in another proceeding, no determination is made regarding compliance with § 1926.502(k).

**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 ORDERED:

A serious citation, Item 1, alleging violation of § 1926.501(b)(2), is affirmed and a penalty of \$2,000 is assessed.

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KEN S. WELSCH  
Judge

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Date: August 26, 1998