United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. W.G. YATES & SONS CONSTRUCTION CO., INC., HVY. DIV. Respondent.	OSHRC Docket No. 03-2162

APPEARANCES:

Daniel J. Mick, Counsel for Regional Trial Litigation, Office of the Solicitor; U.S. Department of Labor, Washington, DC
For Complainant

Robert E. Rader, Jr., Esq.; Rader & Campbell, P.C., Dallas, TX
For Respondent

REMAND ORDER

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners

BY THE COMMISSION:

This case is before the Commission on remand from the United States Court of Appeals for the Fifth Circuit. *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006). The court granted Respondent's petition for review of the decision of Commission Administrative Law Judge Stephen J. Simko, Jr. in *W.G. Yates & Sons Constr. Co.*, 21 BNA OSHC 1171, 2005 CCH OSHD ¶ 32,778 (No. 03-2162, 2005) (ALJ), which became a final order when the case was not directed for review by the Commission. Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(j) (2006); Commission Rule 90(d), 29 C.F.R. § 2200.90(d). The

judge affirmed two citation items, alleging violations of fall protection standards, and assessed a total penalty of $9,000.

In its decision dated August 4, 2006, the court vacated the judge's decision to affirm Serious Citation 1, Item 1 because the judge failed to determine whether the Secretary had established that the misconduct of the supervisor involved in the violation was foreseeable. *W.G. Yates & Sons Constr. Co.*, 459 F.3d at 609. Accordingly, the court remanded the matter to allow the Commission "to conduct a foreseeability analysis to determine whether the knowledge of [the supervisor involved in the violation] can be imputed to [the cited employer]." *Id*. at 610.

We, in turn, remand this case to the judge for further proceedings consistent with the court's decision.

SO ORDERED.

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

/s/
Horace A. Thompson III
Commissioner

Dated: March 14, 2007

Secretary of Labor, Complainant v. W.G. Yates & Sons Construction Co., Inc., Hvy. Div., Respondent.	OSHRC Docket No. **03-2162**

Appearances:

J. Phillip Giannikas, Esquire
Office of the Solicitor
U. S. Department of Labor
Nashville, Tennessee
For Complainant

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

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

DECISION AND ORDER

W.G. Yates Construction Co., Inc., Hvy. Div. (Yates) is engaged in construction contracting. On September 11, 2003, the Occupational Safety ad Health Administration (OSHA) conducted an inspection of the Respondent's jobsite in Hoover, Alabama. At the time of this inspection, the Respondent was responsible for the site work for a shopping center and business complex. This work included dirt work and paving. As a result of this inspection, the Respondent was issued a citation and notification of penalty. The Respondent filed a timely notice contesting the citation and proposed penalties. A hearing was held in Birmingham, Alabama, on May 26, 2004. For the reasons that follow, Citation No. 1, Item 1, is affirmed and a penalty of $5,000.00 is assessed; Citation No. 1, Item 2, is affirmed and a penalty of $4,000.00 is assessed.

Background

The Secretary's compliance officers, James Cooley and Ron Hynes, were delivering information to a commercial mall development in Hoover, Alabama, on September 11, 2003. While there, they conducted a brief inspection of another employer. As they prepared to leave the jobsite, the compliance officers noticed three workers laying grass matting on a slope. These individuals were 200 to 300 yards from Mr. Cooley and Mr. Hynes. Two of these workers were wearing safety harnesses backwards. One individual wore no form of fall protection. He was later identified as Martin Olvera, a foreman for Yates. All three worked for the Respondent. At the bottom of the slope where these men were located, the landscape dropped off precipitously 65 feet. After first observing these employees, the compliance officers proceeded cautiously to the area. Fifteen to 20 minutes elapsed between the inspectors' first observation of the three-man crew and their arrival at the employees' location. When Mr. Cooley and Mr. Hynes reached the work area, they photographed these employees still working on the slope: the foreman without fall protection, and the two crew members with safety harnesses on backwards. The compliance officers met with Mr. Olvera, who identified himself as the Respondent's foreman. The inspectors began their inspection. Within a few minutes, John O. Ray, the project superintendent for Yates, arrived at the scene. He stated that Olvera worked for him. He also said that he had inspected the jobsite twice that day. As a result of this inspection, the Respondent was issued a citation alleging two violations and proposing penalties totaling $10,000.00.

Discussion

The Secretary has the burden of proving the 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 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 Serious Violation of 29 C.F.R. § 1926.501(b)(1)

The Secretary in Citation No. 1, Item 1, alleges that:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:
>
> > On or about 09/11/03, at the Patton Creek jobsite, an employee was not using any fall protection system, exposing him to a fall of 65 feet.

The standard at 29 C.F.R. § 1926.501(b)(1) provides:

> (b)(1) *Unprotected sides and edges.* 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.

The cited standard is clearly applicable. At this jobsite the Respondent's employees were engaged in construction activities subject to the provisions of this standard.

Mr. Olvera, the Respondent's foreman of a three-man crew, worked on the slope, a walking/working surface, laying grass matting. At the end of the slope, there was an unprotected edge or side, 65 feet above the next lower ground level. The evidence clearly establishes that no guardrail system or safety net system was in place to protect employees from falling 65 feet from the sloped surface. Mr. Olvera was observed and photographed working near the lower edge of the slope within the zone of danger; and, therefore, he was exposed to falling 65 feet. The result of such a fall would certainly be death or serious physical injury including broken bones and internal injuries.

Photographic evidence and testimony of Mr. Cooley, as well as that of Mr. Olvera, established that Mr. Olvera worked on the slope without any personal fall arrest system or other form of personal fall protection. While conflicting evidence was presented as to the duration of Mr. Olvera's unprotected exposure to a 65-foot fall, and the circumstances of that exposure, evidence established: that the terms of the standard were not complied with; and, that Mr. Olvera was exposed to the hazard of falling 65 feet without any form of fall protection.

The Respondent had knowledge of this violation. It knew, or with the exercise of reasonable diligence could have known, of the violative condition. Mr. Olvera, the Respondent's foreman, knew

that he was working on this slope, exposed to a 65-foot fall with no fall protection. His knowledge of this condition, as a foreman of the three-man Yates crew, is imputed to the Respondent. Mr. Cooley testified that Mr. Olvera worked on this slope without fall protection for at least 15 to 20 minutes. Mr. Olvera testified that he was the Respondent's foreman on this job. He admitted that he was on the slope, but claimed to have been there only five minutes. He testified that he knew he was not to be on the slope without being tied off.

I find that Mr. Cooley's testimony as to the duration of Mr. Olvera's exposure to be credible. He observed Mr. Olvera on the slope from a distance. He then cautiously approached the slope so as not to startle the exposed employee, and photographed Mr. Olvera and his crew continuing to work on the same slope at least 15 minutes later. Mr. Olvera's testimony was merely an unsubstantiated claim that he was on the slope about five minutes. He gave no credible basis for that claim. No other testimony was produced in support of that claim. His testimony on the duration of his exposure lacks credibility.

Joe Holyfield, the Respondent's project manager, testified that Mr. Olvera was the Respondent's foreman and that Mr. Olvera directed the work of the crew. Mr. Holyfield further testified that Mr. Olvera took instructions from him and had his crew follow those instructions. Mr. Olvera, according to Mr. Holyfield, had training on fall hazards. Given Mr. Olvera's position, responsibilities on this job, and training on fall hazards, his knowledge is clearly imputed to his employer, Yates.

The Secretary has produced sufficient evidence to establish a serious violation of 29 C.F.R. § 1926.501(b)(1).

Alleged Serious Violation of 29 C.F.R. § 1926.502(a)(2)

The Secretary in Citation No. 1, Item 2, alleges that:

> Employers shall provide and install all fall protection systems required by this subpart for employee, and shall comply with all other pertinent requirements of this subpart before that employee begins the work that necessitates the fall protection.
>
> On or about 9/11/03, at the Patton Creek jobsite, the fall arrest system being used did not meet the criteria in that:

1. Employees were exposed to the hazard of falls prior to beginning work.

2. The cable system being used was not properly rigged.

3. Employees were wearing their full body harnesses backwards.

4. The keys to vehicles which were being used as anchor points were left in the ignitions, allowing the vehicles to be driven off, and were not chocked to prevent their rolling.

The standard at 29 C.F.R. § 1926.502(a)(2) provides:

> (2) Employers shall provide and install all fall protection systems required by this subpart for an employee, and shall comply with all other pertinent requirements of this subpart before that employee begins the work that necessitates the fall protection.

This standard requires, in part, that employers comply with all pertinent requirements of Subpart M – Fall Protection. The most readily apparent deficiency in the Respondent's fall protection system on this slope occurred when two Yates employees, at the direction of their foreman, wore their safety harnesses backwards while working on the slope, while exposed to a fall of 65 feet.

The Subpart M standard at 29 C.F.R. § 1926.502(d)(17) provides:

> (17) The attachment point of the body belt shall be located in the center of the wearer's back. The attachment point of the body harness shall be located in the center of the wearer's back near shoulder level, or above the wearer's head.

It is undisputed that two employees in Mr. Olvera's crew asked Mr. Olvera for permission to wear their harnesses backwards with the D-ring attachment points located in front of their chests rather than in the center of their backs.

Mr. Cooley, the Secretary's compliance officer, convincingly testified and demonstrated at the hearing that the employees could roll out of the harness, be hung or break their necks when the D-ring attachment is worn in front of the chest, rather than on the wearer's back, as required by the standard.

Mr. Olvera told the two employees in his crew to wear the harnesses backwards so they could reach the bottom of the slope to perform their work. The lanyards provided by Yates were not long enough to allow these employees to wear the harnesses properly and reach their work. The Respondent, through Mr. Olvera, its foreman, substituted its judgment for the requirements of the standard regarding

the location of the D-ring attachment point of the body harness. Such substitution of judgment constitutes noncompliance with the terms of the standard. These employees wore these harnesses backwards on this slope, for at least 45 minutes while exposed to a 65-foot fall, and with the full knowledge and consent of their foreman, Mr. Olvera.

This was obviously not a departure from ordinary practice by the Respondent's employees. Mr. John O. Ray, the Respondent's superintendent of dirt movement, admitted during the inspection that these employees wore the harnesses backwards to make the work easier. At least two supervisory employees, foreman Olvera and superintendent Ray, knew of and accepted the practice of wearing the harnesses backwards.

This practice, standing alone, constitutes a serious violation of 29 C.F.R. §1926.502(a)(2). Further discussion of the three additional practices which allegedly violated the standard is, therefore, not necessary to render a complete and effectual decision relating to this violation.

Alleged Unpreventable Employee Misconduct

In its answer, the Respondent alleged that the violative conditions were the result of isolated instances of employee misconduct of which the Respondent had no knowledge. At the hearing, the Secretary moved to strike the Respondent's defense of employee misconduct as to Citation No. 1, Item 2. That motion was granted. While the Respondent's answer was sufficient to raise the defense as to Items 1 and 2, it failed to pursue that defense as to Item 2 in its response to the Secretary's interrogatory No. 2 (Exh. C-28), and in its prehearing statement. Allowing the Respondent to assert this defense at this hearing would be prejudicial to the Secretary. In its prehearing statement, the Respondent limited its employee misconduct defense to Item 1. In its interrogatory response, Yates also addressed only the violative conditions in Item 1.

The Respondent abandoned this defense as to Item 2 by its discovery responses and its prehearing statement. The Secretary was prejudiced by this conduct and would, therefore, be unable to meet this defense. Under Rule 37 of the Federal Rules of Civil Procedure an incomplete response to an interrogatory is treated as a failure to respond. The appropriate sanction under Rule 37 is to strike

the applicable portion of the pleadings. Here, that portion of th Respondent's answer asserting employee misconduct is stricken as it relates to the allegations found in Item 2 of Citation No. 1.

The Commission has established a four-part test for the unpreventable employee misconduct defense. To establish the affirmative defense of unpreventable employee misconduct, an employer must show: that it has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered. *Jensen Construction Co.,* 7 BNA OSHC 1477 (No. 76-1538, 1979).

Martin Olvera supervised and directed the work activities of his crew and had responsibility for their safety. This crew varied in size between two and seven employees. He has given employees safety warnings and has removed employees from jobs for working unsafely. An employee, such as Olvera, who had been delegated authority over the Respondent's employees, is a supervisor for the purpose of imputing knowledge to an employer. *Structural Building Systems, Inc.,* 20 BNA OSHC 1773, at 1775 (No. 03-0757, 2004).

The Respondent asserts that any violation of 29 C.F.R. § 1926.501(b)(1) was a result of unpreventable employee misconduct by its foreman, Mr. Olvera.

The Respondent has a general written rule that a body harness and lanyard must be worn when working at a height of 6 feet or more above an unguarded or unsecured working surface (Exh. R-1).

Charles Maness, the Respondent's safety director, testified as to Yates' training program. He claimed the provisions for fall protection were site-specific. A review of this program shows that it is general in nature and is not specific to this or any other jobsite. He testified generally that safety was the responsibility of each manager. In addition to orientation of newly hired employees, Yates conducts regular safety meetings at least once a week.

Here, a supervisory employee failed to utilize fall protection on a sloped surface, exposed to a 65-foot fall. The defense of unpreventable employee misconduct is difficult to prove, since it is Mr. Olvera's duty to protect the employees under his supervision. His involvement in the misconduct is strong evidence that Yates' safety program is lax.

Mr. Olvera admitted that he failed to wear a safety harness while working on the slope and attempted to justify his actions based on the short duration of exposure. He also stated that he had not

anticipated returning to the slope after leaving the area. His testimony showed a lack of understanding and appreciation for the need of fall protection in this area. Further evidence of this is the fact that he gave specific permission to his two crew members to wear their harnesses backwards while working on this slope for over 45 minutes.

John Ray, the Respondent's dirt supervisor on this job, testified that wearing harnesses backward allowed easier performance of the work to be done by the employees. This further shows lack of understanding by supervisors of fall protection needs on this site.

During the inspection, Mr. Olvera identified Mr. Ray as his supervisor. Mr. Ray participated during the inspection as the supervisor of the operation. In its discovery response, the Respondent, through counsel, identified John Ray as the supervisor of this operation (Exhs. C-28, C-29). Only at the hearing did the Respondent's witnesses (Holyfield, Olvera and Ray) suggest that Holyfield, not Ray, was Olvera's supervisor. I find the testimony inconsistent with the previous statements and admissions, and find the testimony of all three not to be credible on this point.

Mr. James Cooley, the Secretary's compliance officer who inspected this site, testified about Mr. Olvera's exposure and his response when questioned about his failure to wear a harness. The following is part of that testimony:

> **A:** The standard requires that each employee on a walking/working surface, both horizontal and vertical, with an unprotected side or edge, which is six feet or more above a lower level was not protected from falling by use of a guardrail system, a safety net system or personal fall arrest system.
>
> **Q:** How many of those systems was Mr. Olvera using?
>
> **A:** There was only one in place.
>
> **Q:** He, himself, was he using anything?
>
> **A:** He, himself, wasn't using anything.
>
> **Q:** Okay. Now, you had a conversation with him; correct?
>
> **A:** Yes, sir.
>
> **Q:** What did he tell you about this?

A: He stated that he had gone to use the bathroom just a few minutes prior and had taken his harness off and lanyard and went to use the bathroom and just forgot to put it back on.

Q: To what extent – excuse me – to what extent did you conclude that that story was the truth?

A: We couldn't ascertain that it was the truth.

Q: Why is that?

A: Upon walking from one side of the jobsite to the other, a third harness and lanyard were not found anywhere, either in the cabs of the front-end loader or the bulldozer or anywhere within the area – the work area.

Q: Did he ever mention where it was?

A: He never mentioned where it was.

Q: Okay. How long did you observe him working without a harness?

A: As I stated before, approximately 15 to 20 minutes prior to our arrival at the job site.

Q: So, is this from time that you noticed it or is this while walking approaching the site?

A: Yes, sir.

Q: Now, what did Mr. Olvera do to respond to this violation?

A: We asked Mr. Olvera where his harness and lanyard were and he never answered our question. Also, while I was taking photographs of the way that the anchor, horizontal anchor line was being used and placed, I noticed that one of the individuals in the short-sleeved shirt with the blue hard hat on, physically took his harness off, as shown in photograph C-20. And while observing that, I noticed that that individual in the short-sleeved blue shirt gave it to the individual in the checkered shirt, who then gave it to Mr. Olvera, who put it on. And, meanwhile, the individual in the short-sleeved shirt walked away from the jobsite never to return.

(Tr. 60-61).

When questioned about his reasons for putting on a crew member's harness, Mr. Olvera testified that he was testing it and that John Ray told him the harness was too loose. John Ray could not have told him this, because he arrived at this area after Mr. Olvera put on the harness, as Mr. Cooley testified. Mr. Olvera testified that he had placed his harness in his truck when he went to the bathroom. Mr. Olvera's truck was in the immediate area of the slope. When asked for his harness he did not retrieve his equipment from the truck and did not tell the inspectors where the harness was located. Mr. Olvera's testimony is not credible and is rejected.

Mr. Olvera's lack of appreciation and understanding of the need for appropriate fall protection is shown, not only by his failure to wear a safety harness on this slope, but also by permitting and directing two employees under his supervision to wear their harnesses backwards for at least 45 minutes. Mr. Ray's lack of understanding of fall protection requirements is shown by his acceptance and validation of the practice of wearing harnesses backwards as making the employees' work easier.

All employees involved, including two supervisory employees, failed to follow fall protection requirements. This demonstrates a lack of understanding which is a direct result of a breakdown in communication of any safety rules that might have been issued by the Respondent. It also demonstrates a lax safety program.

Mr. Ray testified that he inspected this site twice on the day of the OSHA inspection. Mr. Ray could not have found obvious fall hazards as he did not recognize or understand the hazard of employees wearing harnesses backwards. The inspections were inadequate attempts to discover violations by the Respondent. An individual must first know what is a violation before he can determine whether one exists at any given time.

The Respondent's disciplinary program was also flawed and inconsistent. Mr. Olvera was given a written warning for failing to wear fall protection while working on the slope on September 11, 2003. Neither he nor the two employees in his crew, however, were given warnings, reprimands or suspensions for improper wearing of the safety harnesses. No mention of this condition was even made in Mr. Olvera's warning letter (Exh. R-4). This suggests ineffective enforcement.

The above demonstrates a lax safety program which was not effectively communicated or enforced. See *Structural Building Systems Inc., supra*.

The Fifth Circuit has recognized the need to demonstrate effective communication and enforcement of company work rules to prove the defense of unpreventable employee misconduct. *H. B. Zachry Co. v. OSHRC*, 638 F.2d 812, at 819 (5th Cir., Unit A, March 2, 1981); *Floyd S. Pike Electrical Contractors, Inc. v. OSHRC*, 576 F.2d 1257 (5th Cir. 1978).

Both cases involved alleged employee misconduct. In *Pike, supra* at 77, the court stated:

> In view of the working foreman's obligation, not only to observe the rules, but to insure that the rules were observed by his men, the company's failure to make any further inquiry or take any further corrective action is particularly significant.
>
> > Because the behavior of supervisory personnel sets an example at the workplace, an employer has–if anything–a *heightened* duty to ensure the proper conduct of such personnel. Second, the fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax.
>
> *National Realty and Construction Co., Inc. v. O.S.H.R.A.C.*, 160 U.S.App.D.C. 133, 143, 489 F.2d 1257, 1267 n. 38 (1973). While OSHA does not require an employer to inscribe a safety regulation on parchment or chisel it in stone, neither does it permit him to treat the rule as if it were written in sand.

The Respondent failed to prove its defense of unpreventable employee misconduct.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. 19 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

Yates is an employer with approximately 6,000 employees. It has no history of violations, which were affirmed in the last three years.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the

precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

This was a three-employee crew. The foreman had no fall protection, and was exposed to a 65-foot fall while working on a sloped surface for at least 15 to 20 minutes. He permitted and directed two employees in his crew to wear safety harnesses improperly while working on the same slope for at least 45 minutes. If these employees fell from the slope, the likely result would be death or serious physical injury. Based on these factors, a penalty of $5,000.00 is assessed for the violation of 29 C.F.R. § 1926.501(b)(1), and a penalty of $4,000.00 is assessed for the violation of 29 C.F.R. § 1926.502(a)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation No. 1, Item 1, alleging a serious violation of 29 C.F.R. §1926.501(b)(1) is affirmed and a penalty of $5,000.00 is assessed.

2. Citation No. 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.502(a)(2) is affirmed and a penalty of $4,000.00 is assessed.

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

Date: December 10, 2004