UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR, Complainant, v. STATE SHEET METAL COMPANY, INC., Respondent.	OSHRC Docket Nos. 90-1620 and 90-2894

DECISION

BEFORE: FOULKE, Chairman, WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

In each of the above cited cases, State Sheet Metal Company ("State") was installing metal roof decking when a compliance officer of the Occupational Safety and Health Administration ("OSHA") inspected the worksites in question. As a result of those inspections, the Secretary of Labor issued two citations, each alleging that State had failed to comply with various OSHA standards, including the standard at 29 C.F.R. § 1926.105(a).[1]

State contested the citations from both inspections, and a hearing was held in each case before an administrative law judge of this Commission. Decisions have been issued in both cases; in each, the judge found that State had violated section 1926.105(a). State sought review of both decisions, and review was directed pursuant to section 12(j) of the

---

[1] That standard provides:

> **§ 1926.105 Safety nets.**
>
> (a) Safety nets shall be provided when workplaces are more than 25 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 impractical.

Occupational Safety & Health Act of 1970 ("the Act"), 29 U.S.C. § 661(j). State also sought consolidation of the two cases under Rule 9 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.9.[2] Finding that the parties to both cases are the same and that there are common issues of law and fact, we conclude that consolidation is appropriate. We therefore consolidate Docket Number 90-1620 and Docket Number 90-2894.

The essential facts are largely undisputed. Having carefully reviewed the records in both cases, we conclude that they may be decided without further briefs.

I. BACKGROUND

State installs sheet metal roof decking on new commercial construction. From the records in these cases, it appears that the manufacturer of the metal decking being installed by State normally enters into a contract with the general contractor to supply and install the roof decking and then takes bids from other companies to perform the installation and lets a contract. In both of these cases, the contract was awarded to Nilsen-Smith Sheet Metal Co. ("Nilsen-Smith"), which has the same owners and management as State. Nilsen-Smith, which does not actually install the decking itself, subcontracted the work to State after it was awarded these contracts.

a. Docket Number 90-1620

In Docket Number 90-1620, State was installing sheet metal roof decking in Mount Olive, New Jersey, on a one-story warehouse that would be occupied by United Parcel Service. The warehouse, which was 27 feet high and had 148,000 square feet of floor space, was being constructed in sections, or "bays," 40 feet by 40 feet. At the time of the inspection, the decking was approximately half completed, with an area 400 feet by 150-200 feet still to be laid. The compliance officer who conducted the Mount Olive inspection saw exposed steel reinforcing bars protruding from the ground below the edge of the completed

---

[2] That rule provides:

> **§ 2200.9 Consolidation.**
>
> Cases may be consolidated on the motion of any party, on the Judge's own motion, or on the Commission's own motion, where there exist common parties, common questions of law or fact or in such other circumstances as justice or the administration of the Act require.

decking and testified that, because no fall protection was being used, an employee who fell could have been impaled or suffered other serious injury.

Mr. Smith, one of the owners of Nilsen-Smith and State, testified that, although it was possible to install nets, it was difficult and expensive. In his opinion, using nets would double the cost of the job, and he could not do the work for his bid price. He does not know what the cost would be either to buy or rent nets, and he has never explored the cost of installing nets or talked to anyone involved in their installation. He had seen nets hung using a power lift, but stated that the floor must be level if a lift is to be used. He stated that none of his competitors uses nets on a one-story building and that he does not include the cost of using nets in his bids because none of his competitors does.

b. Docket Number 90-2894

In Docket Number 90-2894, State was installing metal roofing on a one-story Shop-Rite Food warehouse in South Brunswick, New Jersey. As a result of the inspection at the South Brunswick worksite, Nilsen-Smith was cited for violating three OSHA standards, and Nilsen-Smith contested the citation. During the pleadings stage of the case, the Secretary amended the complaint to allege that the correct employer was State, not its sister company Nilsen-Smith; State has admitted that allegation.

The Secretary also amended the complaint to allege in the alternative, a violation of 29 C.F.R. § 1926.105(a) or 29 C.F.R. § 1926.750(b)(1)(ii).[3] The parties stipulated at the hearing that the warehouse was not a tiered building. Because section 1926.750(b)(1) applies only to tiered buildings, it does not apply to the conditions cited, and the judge therefore adjudicated the allegation that State had violated section 1926.105(a).

---

[3] That standard provides:

> **§ 1926.750 Flooring requirements.**
>
> . . . .
>
> (b) *Temporary flooring—skeleton steel construction in tiered buildings. (1)*
>
> . . . .
>
> (ii) On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet. The nets shall be hung with sufficient clearance to prevent contacts with the surface of structures below.

The warehouse in South Brunswick was 32 feet, 8 inches high and was designed to have 800,000 square feet of floor space. Its floor space was being divided into 320 bays, each 50 feet by 57 feet. The bays were made up of formed concrete columns supporting large header beams and intermediate bar joists. The compliance officer who performed the South Brunswick inspection testified that he saw employees who were decking the roof step from the edge of the decked portion of the roof onto the 4-inch-wide steel joists. No fall protection was being used to prevent them from falling to the ground 32 feet below. He estimated that the cost of the nets, exclusive of labor, would be $700 per bay or $4000 for enough nets to cover 6 bays at a time.

Mr. Smith also testified at the hearing in this case. He described the decking process and insisted that his employees always stood on the decking, not the joists. The metal decking comes in bundles of 45 sheets. The sheets are three feet wide and come in varying lengths, ranging from 10 feet to 34 feet. At the start of a job, the first bundle of decking is put in place and the bottom sheet becomes the first sheet installed. The employees then take the top sheet of the bundle and, standing on the bundle, they put it in place. They then stand on that sheet while they take the next sheet from the bundle and put it into place, and the work continues in this manner, with the employees standing on the decking at all times. A two-man crew can lay 20,000 square feet of decking a day, and a three-man crew can deck 10 bays a day.

Mr. Smith stated that it is physically possible to erect nets and that, while he has never done so himself, he has watched them being put up. He has never seen them used on a one-story building, however, and neither he nor anyone in authority at State had discussed putting up nets on a job like this. In his view, it would not be cost efficient because it would take twice as long to put up the nets as it takes to do the roofing, and the roofing crew could cover more area in a day than a crew could net. Mr. Smith testified that he had bid for this job against five or six other companies who did not include the cost of netting the area in their bids.

Mr. Smith said that the ground had not been leveled when the steel framework for this warehouse went up, and it was too bumpy and muddy to operate a lift truck on it. State was not allowed to move earth inside the building itself. He said that, under industry

practice, a general contractor might level the ground before the roofing is installed as a favor to the roofing subcontractor, but there is no obligation for it to do so. The concrete floor was not poured until after the roofing was completed.

The Secretary called as an expert witness a compliance officer who had not conducted the original inspection but had later visited the South Brunswick worksite. When this compliance officer visited the site, he saw a plumber using a scissor lift to install a sprinkler system. Although there were a few depressions, the compliance officer estimated that 70 per cent of the ground was level and that, in general, it was sufficiently level to use a lift truck to install nets. He testified that, because the roofing crew decked six to seven bays per day, it would be necessary to net that many bays at one time. He estimated that it would take four men approximately four hours to erect the nets in one bay, and that the time required might decrease to three hours as they gained experience, but it would take only one hour per bay to take the nets down. It would take approximately two working days to put up nets in seven bays, while the roofing crew could deck seven bays in one day. Although he had never seen netting used to cover several bays on a one-story building like this one, the compliance officer stated that he had seen structural steel erectors net several bays at one time at the Meadowlands. He gave his opinion that, although using nets could make the job cost three to four times as much, it was feasible to do and that it was practical to do so to save a life.

II. THE ELEMENTS OF A VIOLATION

In order to prove that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) employees had access to the violative conditions; and (4) the employer knew of the violative conditions or could have known with the exercise of reasonable diligence. *Kulka Constr. Mgt. Corp.*, 15 BNA OSHC 1870, 1992 CCH OSHD ¶ 29,829 (No. 88-1167, 1992); *Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981), *aff'd*, 681 F.2d 69 (1st Cir. 1982). "A prima facie violation of section 1926.105(a) is established if the Secretary can show that employees were subject to falls of twenty-five feet or more and none of the safety devices listed in the standard were utilized." *Cleveland Consol., Inc. v. OSHRC*, 649 F.2d 1160, 1165 (5th Cir.

Unit B, 1981); *Sierra Constr. Corp.*, 6 BNA OSHC 1278, 1280, 1978 CCH OSHD ¶ 22,506, p. 27,157 (No. 13638, 1978).

The essential facts in determining whether a prima facie violation has been established are that both warehouses were more than 25 feet high, the distance specified in section 1926.105(a), and that no fall protection was being used at either site.

a. Applicability of the standard

State's employees were performing construction work on an untiered building, working more than 25 feet above the ground. We therefore find that the cited standard applies to the cited working conditions.

b. Failure to comply

State has asserted that it was in compliance because the decking on which its employees were working constituted a temporary floor, which complied with the requirements of section 1926.105(a). In support of this claim, State has cited two decisions involving its sister company, *Nilsen-Smith Roofing & Sheet Metal Co.*, 80 OSAHRC 13/C1 (No. 77-2735, 1980) (ALJ), and *Nilsen-Smith Roofing & Sheet Metal Co.*, 78 OSAHRC 20/A9 (No. 16142, 1978) (ALJ). Both of these decisions were issued by the same administrative law judge, and, contrary to State's assertion, both decisions became final orders by operation of law without being directed for review, under section 12(j) of the Act, 29 C.F.R. § 661(j). As unreviewed administrative law judge's decisions, they do not constitute precedent binding on the Commission. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,378 (No. 4090, 1976). More significantly, the full Commission long ago rejected the argument that a roof constituted a temporary floor and has done so consistently. *Hamilton Roofing Co.*, 6 BNA OSHC 1771, 1978 CCH OSHD ¶ 22,856 (No. 14968, 1978); *Diamond Roofing Co.*, 8 BNA OSHC 1080, 1980 CCH OSHD ¶ 24,274 (No. 76-3653, 1980); *Universal Roofing & Sheet Metal Co.*, 8 BNA OSHC 1453, 1980 CCH OSHD ¶ 24,503 (No. 77-1756, 1980). The Commission's position has also been adopted by some appellate courts. *Corbesco, Inc. v. Dole*, 926 F.2d 422 (5th Cir. 1991); *cf. Brock v. Williams Enterp.*, 832 F.2d 567, 573 (11th Cir. 1987) (temporary floor that does not protect employees from exterior fall does not satisfy section 1926.105(a)). We therefore reject State's assertion that it was in compliance

with section 1926.105(a) because its employees were working on a temporary floor. It is well established that a roof is not a floor. *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976); *Langer Roofing & Sheet Metal, Inc. v. Secretary of Labor*, 524 F.2d 1337 (7th Cir. 1975).

State argues that it has relied for ten years on the two unreviewed decisions involving its sister company. Because those decisions were not issued by the Commission, however, that reliance was not well founded. The Commission had rejected the rationale on which the *Nilsen-Smith* decisions were based, and an employer has a duty to keep itself informed as to the law governing its operations. *Corbesco*, 926 F.2d at 428. Because State should have known that the Commission had rejected the rationale on which it was relying, it could not have reasonably relied on the two unreviewed *Nilsen-Smith* decisions. *See Dole v. East Penn Mfg. Co.*, 894 F.2d 640, 644-46 (3d Cir. 1990).

There was no fall protection of any kind to prevent State's employees from falling from the edge of the roof decking or the 4-inch-wide beams to the ground below. We therefore find that the requirements of the standard were not met.

c. Employee access to the violative condition

The employees were observed working at and near the edge of the metal decking as well as walking on the steel beams on which the decking was being placed. We therefore find that State's employees were exposed to the violative condition, the absence of fall protection.

d. Knowledge of the violative condition

The knowledge element of a violation does not require a showing that the employer was actually aware that it was in violation of an OSHA standard. Rather, it is established if the record shows that the employer knew or should have known of the conditions constituting a violation. *Conagra Flour Milling Co.*, 15 BNA OSHC 1817, 1823, 1992 CCH OSHD ¶ 29,808, p. 40,593 (No. 88-2572, 1992). State's management officials knew that its employees had to work at the edge of the decking and that no fall protection was being used. We therefore find that State's knowledge of the violative conditions has been established.

By proving each of these four elements by a preponderance of the evidence, the Secretary has established prima facie violations at both worksites. We must therefore determine whether State has proven that it should not be held liable for these violations.

III. STATE'S DEFENSES TO THE CITATIONS

State presents three arguments that, it claims, establish that compliance with section 1926.105(a) was infeasible and should therefore excuse its failure to comply. It asserts: (1) that it is not the practice in its industry to use nets; (2) that erecting the nets is more dangerous than working without them; and (3) that using nets is impractical. For the reasons given below, we must reject State's infeasibility assertions and find that State was in violation at both sites.

a. Industry practice

State argues that one reason it is infeasible to use nets is that it will be placed at a competitive disadvantage because none of its competitors uses nets. The fact that other members of the industry do not use nets is not dispositive, however. It may be that the reason State's competitors do not use nets is that they comply with the standard by using some other means of fall protection, and State's witnesses did not eliminate this possibility.

Furthermore, even if everyone else were leaving their employees unprotected, the fact that State's conduct may have been consistent with the normal practice in its industry is irrelevant if the standard specifically requires a different course of action. *Williams Enterp. Inc.*, 13 BNA OSHC 1249, 1253, 1986-87 CCH OSHD ¶ 27,893, p. 36,585 (No. 85-355, 1987); *Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1117, 1986-87 CCH OSHD ¶ 27,829, p. 36,428-29 (No. 84-696, 1987); *see also Brock v. Williams Enterp.*, 832 F.2d at 570-71; *Brock v. L.R. Willson & Sons., Inc.*, 773 F.2d 1377, 1386-88 (D.C. Cir. 1985).

State cannot use the failure of other members of its industry to comply with the requirements of a standard as a defense to a citation, because an employer cannot be excused from noncompliance on the assumption that everyone else will ignore the law. *A.E. Burgess Leather Co.*, 5 BNA OSHC 1096, 1097 n.2, 1977-78 CCH OSHD ¶ 21,573, p. 25,887 n.2 (No. 12501, 1977), *aff'd*, 576 F.2d 948 (1st Cir. 1978).

b. Greater hazard

State also argues that it is infeasible to use nets because its employees would have been more exposed to the hazard of falling while erecting the nets than they were while they decked the roof. Although evidence that compliance with a standard will diminish safety or increase it only slightly may be relevant to whether compliance is feasible, the Commission and the courts of appeals have recognized a separate and distinct affirmative defense of greater hazard. To establish the greater hazard affirmative defense, the employer must prove that the hazards caused by complying with the standard are greater than those encountered by not complying, that alternative means of protecting employees were either used or were not available, and that application for a variance under section 6(d) of the Act would be inappropriate. *See Russ Kaller, Inc.*, 4 BNA OSHC 1758, 1976-77 CCH OSHD ¶ 21,152 (No. 11171, 1976). The party raising the affirmative defense has the burden of proof. *Dole v. Williams Enterp.*, 876 F.2d 186, 188-89 (D.C. Cir. 1989).

Here, State has not addressed any alternative methods of protection in either case. Although State asserts (without citing us to the source of its support for this claim) that the Secretary agreed that the other means of protection listed in section 1926.105(a) were impractical, that statement, if correct, is irrelevant. Before an employer elects to ignore the requirements of a standard because it believes that compliance creates a greater hazard, the employer must explore *all* possible alternatives and is not limited to those methods of protection listed in the standard.

Additionally, State has presented only the unsubstantiated opinion of its owner, who is hardly a disinterested witness. We are unwilling to accept such conclusory statements without being given any factual basis for them, and State has offered no facts on which this conclusion is based. While the witness may sincerely believe that his opinion is correct, the courts have recognized that an employer may have an *incorrect* good-faith belief that compliance creates a greater hazard. *Dole v. Williams Enterp.*, 876 F.2d at n.7; *General Elec. Co. v. Secretary of Labor*, 576 F.2d 558, 561 (3d Cir. 1978). Furthermore, an employer must prove that there is no possible method of erecting the nets that would not constitute a greater hazard. *United States Steel Corp. v. OSHRC*, 537 F.2d 780, 783, (3d Cir. 1976).

In sum, we find that State has failed to carry its burden of proof as to the greater hazard defense.

c. Infeasibility

When a standard states a specific method of complying, an employer seeking to be excused from liability for its failure to comply with the standard has the burden of demonstrating that the action required by the standard is infeasible under the circumstances cited. *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1949, 1986-87 CCH OSHD ¶ 27,650 (No. 79-2553, 1986), *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988); *Ace Sheeting & Repair Co. v. OSHRC*, 555 F.2d 439, 441 (5th Cir. 1977). In order to carry this burden, an employer who raises the affirmative defense of infeasibility must prove that (1) literal compliance with the requirements of the standard was infeasible under the circumstances and (2) *either* an alternative method of protection was used *or* no alternative means of protection was feasible. *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1416, 1992 CCH OSHD ¶ 29,546, p. 39,907 (No. 89-1027, 1991). Courts that have considered the infeasibility defense have concluded that it encompasses both technological and economic factors. *Faultless Div., Bliss & Laughlin Indus. v. Secretary*, 674 F.2d 1177, 1189 (7th Cir. 1982); *Southern Colo. Prestress Co. v. OSHRC*, 586 F.2d 1342, 1351 (10th Cir. 1978); *Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541 (3d Cir. 1976).

In the cases before us, however, the Secretary argued to the administrative law judge that evidence as to the economic impact of compliance was irrelevant. The Secretary is correct that the Commission did generally take that position at one time. *See, e.g., StanBest, Inc.*, 11 BNA OSHC 1222, 1231, 1983-84 CCH OSHD ¶ 26,455, p. 33,624 (No. 76-4355, 1983); *Research Cottrell, Inc.*, 9 BNA OSHC 1489, 1498, 1981 CCH OSHD ¶ 25,284, p. 31,264 (No. 11756, 1981). Subsequently, however, the Commission recognized the affirmative defense of infeasibility. *See Dun-Par Engd. Form Co.*, 12 BNA OSHC 1949, 1986-87 CCH OSHD ¶ 27,650 (No. 79-2553, 1986), *rev'd*, 843 F.2d 1135 (8th Cir. 1988) (*Dun-Par I*). In *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶ 27,651 (No. 82-928, 1986) (*Dun-Par II*), the Commission recognized that an infeasibility defense may include economic factors when it found that the employer had not demon-

strated that the costs were unreasonable in light of the protection afforded and had not shown what effect, if any, the added costs would have on its contract or on its business as a whole. 12 BNA OSHC at 1966, 1986-87 CCH OSHD at p. 36,033-2. *Accord Walker Towing Corp.*, 14 BNA OSHC 2072, 2077, 1991 CCH OSHD ¶ 29,239, p. 39,160-61 (No. 87-1359, 1991); *see also Atlantic & Gulf Stevedores.* The Secretary's argument was therefore incorrect; evidence as to the unreasonable economic impact of compliance with a standard may be relevant to the infeasibility defense.

State argued to the judges who heard these cases that the Secretary had the burden of proving that the use of nets was feasible. The cases relied on by State are not apposite because they arose in other contexts. Although the Secretary does have the burden of proving the feasibility of compliance in some circumstances, this is not one of them. When, as here, an employer who has failed to comply with the requirements of an OSHA standard attempts to avoid liability for this noncompliance on the grounds that complying would be infeasible, the employer has the burden of proving that affirmative defense. *Walker Towing*, 14 BNA OSHC at 2075-77, 1991 CCH OSHD at pp. 39,158-61; *see also Quality Stamping Prod. v. OSHRC*, 709 F.2d 1093, 1099 (6th Cir. 1983); *Arkansas-Best Freight Sys., Inc. v. OSHRC*, 529 F.2d 649, 654 (8th Cir. 1976). We therefore reject State's argument that the Secretary must prove that nets are feasible.

State argues that, if it must use safety nets it will be forced out of business because none of its competitors uses nets and they will therefore be able to submit lower bids. Thus, according to State, it will never get any more business. If State were the only company in its industry required to comply with the standard, State probably could not compete. We cannot vacate the citation on that basis, however, because an employer cannot be excused from compliance on the assumption that everyone else will ignore the law. *A.E. Burgess Leather Co.*, 5 BNA OSHC 1096, 1097 n.2, 1977-78 CCH OSHD ¶ 21,573, p. 25,887 n.2 (No. 12501, 1977), *aff'd*, 576 F.2d 948 (1st Cir. 1978). A primary goal of the Act was to eliminate any competitive disadvantage that a safety-conscious employer might suffer by requiring that *every* employer comply with the applicable OSHA standards. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 521 n.38 (1981). Although State may plausibly argue that the

Secretary could be more vigcrous in informing the sheet metal roof-decking industry about the requirements of section 1926.105(a) and in enforcing those requirements, we cannot accept "everybody else was ignoring the law, too," as an excuse for an employer's failure to obey the requirements of the law.

On the evidence in these combined records, we find that State has failed to carry that burden of showing that compliance with section 1926.105(a) was unreasonable in light of the protection afforded. Although Mr. Smith expressed the opinion that it was not practical to use nets, such an opinion, unsupported by underlying facts, is not enough. Even the admission by the compliance officer who testified for the Secretary as a safety expert that using nets could triple or quadruple the cost of installing the roof decking is not sufficient because it does not address whether such costs would have a severe adverse economic effect on State.

In addition, to prove the infeasibility affirmative defense, an employer seeking to avoid liability for its noncompliance must show that alternative forms of protection were used or that no alternative form of protection was available, just as it must do to prove the greater hazard affirmative defense. *Trinity Indus.*, 15 BNA OSHC 1985, 1987, 1992 CCH OSHD ¶ 29,889, p. 40,787 (No. 892316, 1992). As noted in our discussion of State's greater hazard defense, before an employer will be excused from ignoring a standard's requirements and leaving its employees unprotected, it must show that it has explored all possible alternate forms of protection. Having searched both records here, we find that State has failed to mention any alternative means of protection, much less show that they could not be used. State has therefore failed to prove that element of its affirmative defense.

State asserts that requiring the use of nets will have a devastating effect on the roofing industry. While that assertion may or may not be true, it is not supported by the evidence in these records. More importantly, it misconstrues the effect of our holding. We want to make it clear that we are not saying State or other members of its industry must use nets; all we are holding is that the standard requires that *some* form of fall protection be used.

Because of the wording of section 1926.105(a), it has often been misunderstood. Under the terms of that standard, nets are the *least-preferred* means of protecting employees.

If one of the other methods specified can be used, it should be used. We are familiar from past cases with various methods of protection that might be effective to protect the employees laying the roof decking. In some cases, employers have erected static lines to which a lanyard connected to a safety belt can be attached. In places where the ground was level enough, a catch platform on a mobile scaffold has been used. Given the evidence in the record as to the time and expense involved in erecting safety nets, we assume that State and its competitors will use their ingenuity to find methods of compliance other than nets.

We want to emphasize that State is being found in violation for using *no* fall protection at all and that State could have avoided being found in violation by using *any* effective means of protection. Nets are merely one means of complying with section 1926.105(a), and the least-favored means at that.

IV. CHARACTERIZATION OF THE VIOLATION

The judges both found that the violations were serious. Under section 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious if there is a substantial probability that death or serious physical harm could result. This statement does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur. *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1315, 1991 CCH OSHD ¶ 29,498, p. 39,804 (No. 89-2253, 1991); *Natkin & Co.*, 1 BNA OSHC 1204, 1205, 1971-73 CCH OSHD ¶ 15,679, pp. 20,967-68 (No. 401, 1973). It is clear that the consequences of State's failure to use safety nets could result in serious harm. We therefore find that the violations were serious.

V. PENALTY

Section 17(j) of the Act provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. 29 U.S.C. § 666(j). The most significant factor to be considered in assessing an appropriate penalty, however, is gravity. *Natkin*, 1 BNA OSHC at 1205, 1971-73 CCH OSHD at p. 20,968. We will not reduce the penalty proposed when the violation is of high

gravity. *See Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1981 CCH OSHD ¶ 25,738 (No. 76-2644, 1981).

The Secretary proposed a penalty of $810 for the violation in Docket Number 90-1620, and the judge found a penalty of $100 to be appropriate for the violation and assessed that amount. The Secretary also proposed a penalty of $810 for the violation in Docket Number 90-2894. The judge in that case also found $100 to be an appropriate penalty for that violation and assessed a penalty of $100. The Secretary has not challenged the findings of either judge on this issue. Having considered the information in the record regarding the four penalty factors and the Secretary's failure to object, we consider the penalties assessed by the judges to be appropriate in each case.

VI. CONCLUSION

Accordingly, we find that the administrative law judges did not err in finding, in each of these cases, that State had committed a serious violation of 29 C.F.R. § 1926.105(a), and we assess a penalty of $100 for each violation.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: April 27, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR, Complainant, v. STATE SHEET METAL COMPANY, INC., Respondent.	Docket No. 90-1620 and 90-2894

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 27, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

April 27, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-2894 & 90-1620

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick St., Room 707
New York, NY 10014

John Craner, Esquire
Craner, Nelson, Satkin & Scheer, P.A.
Post Office Box 367
320 Park Avenue
Scotch Plains, New Jersey 07076

Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 420
McCormack Post Office and Courthouse
Boston, MA 02109-4501

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR
Complainant,
v.
STATE SHEET METAL COMPANY
Respondent.

OSHRC DOCKET
NO. 90-1620

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 7, 1992. The decision of the Judge will become a final order of the Commission on August 6, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before July 27, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: July 7, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 90-1620

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

John A. Craner, Esquire
Craner, Nelson, Satkin & Scheer
320 Park Avenue
Post Office Box 367
Scotch Plains, NY 07076

Richard W. Gordon
Administrative Law Judge
Occupational Safety and Health
Review Commission
McCormack Post Office and
Courthouse, Room 420
Boston, MA 02109 4501

00017851841:02

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
ROOM 420
BOSTON, MASSACHUSETTS 02109-4501

PHONE
COM (617) 223-9746
FTS 223-9746

FAX
COM (617) 223-4004
FTS 223-4004

SECRETARY OF LABOR,

Complainant

v.

STATE SHEET METAL CO.

Respondent

OSHRC Docket No. 90-1620

Appearances:

William G. Staton, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

John A. Craner, Esq.
Craner, Nelson, Satkin & Scheer, P.C.
Scotch Plains, New Jersey
For Respondent

Before: Administrative Law Judge Richard W. Gordon

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C., *et. seq.*, ("Act") to review citations issued by the Secretary pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(a) of the Act.

BACKGROUND

On April 16, 1990, Compliance Officer David Katsock entered the worksite located at 303 Waterloo Valley Road in Mt. Olive, New Jersey, to conduct a referral inspection. (Tr. 32) The general contractor, Carlson Mid-Atlantic ("Carlson"), and several subcontractors, of which State Sheet Metal Company ("State Sheet") was one, were constructing a one story steel warehouse for UPS. (Tr. 32, 104) State Sheet was installing the metal decking onto

the warehouse roof, which was 27 feet from the ground and covered approximately 148,000 square feet. (Tr. 33, 104)

Upon entering the worksite, Mr. Katsock held an opening conference with Carlson's representative and immediately afterwards, observed State Sheet employees working on the upper level of the warehouse. (Tr. 32-33) After climbing a ladder to the upper level, Mr. Katsock met with State Sheet's foreman for the project and subsequently held an opening conference with him. (Tr. 33) During his one hour inspection of State Sheet, Mr. Katsock testified that he observed several hazardous conditions at the worksite which exposed State Sheet employees to falls of up to 27 feet from the roof area to the ground below. (Tr. 98-99)

First, Mr. Katsock testified that he observed an opening in the roof deck that measured 34 to 42 inches in width and 72 feet in length. (Tr. 63-66; see also Exhibits C-4 and C-6) He testified that he noticed State Sheet employees crossing over this floor opening from the decked area, onto a steel girder and then onto a bundle of metal decking where they resumed their work. (Tr. 39-40, 66-67; see also Exhibit C-4) Robert J. Smith, owner of Nilsen-Smith Roofing and Sheet Metal Company ("Nilsen-Smith"), a company closely affiliated with State Sheet, and also an official of State Sheet, testified that the floor opening was temporarily left as such by State Sheet employees at the request of the plumbing subcontractor at the worksite. (Tr. 102-103, 114-115) According to Mr. Katsock, Carlson installed guards around the floor opening the day after the inspection. (Tr. 81)

Mr. Katsock further testified that he observed State Sheet employees pass within 3-4 feet of three circular floor holes in the roof deck, each hole measuring approximately 11 and 7/8 inches in diameter. (Tr. 43-44; see also Exhibit C-7) According to Mr. Smith, these floor hole plates were supplied by the plumbing subcontractor and were installed by State Sheet employees. (Tr. 113-114) Mr. Katsock confirmed that the floor holes were indeed "created" for the plumber's work and testified that Carlson, the general contractor, was the one who subsequently covered the holes over. (Tr. 79, 81) Mr. Katsock also testified that located directly underneath the area where State Sheet's employees were installing the roof decking was unguarded "rebar", protruding reinforced steel bars set in cement. (Tr. 62) According to Mr. Katsock, the rebar was subsequently removed by the concrete contractor. (Tr. 81)

Mr. Katsock later testified, however, that he had determined that it was Carlson's responsibility to guard the floor opening, the floor holes and the rebar. (Tr. 36, 79)

At the time of the inspection, State Sheet's employees had not yet completed the decking on an area of the roof measuring approximately 400 feet by 150-200 feet. (Tr. 68; see also Exhibits C-1, C-2, C-3 and C-5) Mr. Katsock testified that he informed State Sheet's foreman that since the employees installing roof decking around this area and using a ladder positioned along the open-sided floor to gain access to the roof were doing so at a height of over 25 feet, some type of fall protection should be utilized. (Tr. 34) While Mr. Katsock agreed with the foreman that the use of safety belts or lanyards was impractical, he told the foreman that in the alternative, safety nets should be provided. (Tr. 34) Mr. Smith contends, however, that the use of safety nets would more than double the total price of the project and would have a detrimental effect on the overall efficiency of the roof decking operation. (Tr. 110-112)

Lastly, Mr. Katsock testified that State Sheet's foreman told him that he had not given the State Sheet employees at this worksite any instructions or training regarding the hazards involved with this particular roof decking project. (Tr. 47) Mr. Smith testified that he had not given these employees any safety training either. (Tr. 137) According to Mr. Smith, State Sheet employees have received safety training on general hazards like the wind, but otherwise, do not receive specific safety instructions from worksite to worksite regarding hazardous conditions because they are already aware of these problems from experience. (Tr. 117-121)

As a result of these observations, State Sheet was issued a citation which alleged serious violations of six standards and proposed an aggregate penalty of $3290.00. In her complaint, the Secretary dropped item 5 of the citation, which alleged a violation of 29 C.F.R. § 1926.500(d)(1), but added the hazard on which it was based to item 2 as a second instance in which § 1926.105(a) was allegedly violated. Doing so reduced the number of serious violations to five and the aggregate penalty to $2650.00.

Item 1 alleges a violation of § 1926.21(b)(2), which deals with State Sheet's failure to train its employees regarding the hazards involved with this particular project. The cited standard states:

§ 1926.21(b) Employer responsibility.
(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

A penalty of $420.00 was proposed.

Item 2 alleges a violation of § 1926.105(a), which deals with State Sheet's failure to provide fall protection at this worksite for its employees thereby exposing them to a fall hazard of 27 feet. The cited standard states:

§ 1926.105 Safety nets.
(a) Safety nets shall be provided when workplaces are more than 25 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 impractical.

A penalty of $810.00 was proposed.

Item 3 and Item 4 allege violations of § 1926.500(b)(1) and § 1926.500(b)(8), which deal respectively with the lack of guarding around the floor opening and the floor holes. These cited standards state:

§ 1926.500(b) Guarding of floor openings and floor holes.
(1) Floor openings shall be guarded by a standard railing and toeboards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

....

(8) Floor holes, into which persons can accidentally walk, shall be guarded by either a standard railing with standard toeboard on all exposed sides, or a floor hole cover of standard strength and construction that is secured against accidental displacement. While the cover is not in place, the floor hole shall be protected by a standard railing.

The Secretary proposed a penalty of $640.00 for the alleged violation of § 1926.500(b)(1) and a penalty of $360.00 for the alleged violation of § 1926.500(b)(8).

Item 6 alleges a violation of § 1926.701(b), which deals with the unguarded rebar positioned underneath State Sheet's work area. The cited standard states:

§ 1926.701(b) Reinforcing Steel. All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

A penalty of $420.00 was proposed.

State Sheet filed a timely notice of contest and a hearing was held before the Occupational Safety and Health Review Commission ("Commission") on March 21, 1990 in New York City. At the hearing, the Secretary objected to State Sheet's last minute allegation of economic infeasibility as an affirmative defense to the alleged violation of § 1926.105(a). However, I allowed the affirmative defense with the understanding that after the hearing, the Secretary could conduct additional discovery on this issue and, if necessary, request an additional hearing. (Tr. 13-14) Both parties have submitted post-hearing briefs and this matter is now ready for decision.

DISCUSSION

I. Alleged Serious Violation of § 1926.21(b)(2)

Mr. Smith testified that general safety hazards such as those posed by the wind and conveyor rollers are the primary hazards with regard to roof decking that have been discussed with State Sheet employees. (Tr. 117-120, 123) These kinds of instructions, Mr. Smith admitted, are not reviewed with employees on a frequent basis and were not reviewed at this particular worksite. (Tr. 123) Mr. Smith also admitted that the employees at this worksite had *not* been warned specifically of the dangers posed by the presence of rebar below their work area or the hazards involved with working near the edge of the roof decking area; according to Mr. Smith, State Sheet employees "just know" that these situations are hazardous because it's "something we've been doing for years." (Tr. 120-121) In other words, since these are "obvious" hazards, there is no need to specifically instruct employees about them. Mr. Smith further testified that he personally did not give any safety instructions to State Sheet employees at this worksite and he did not know if any other representatives of State Sheet had done so either. (Tr. 137) According to Mr. Katsock, the State Sheet foreman told him that he had not given any safety instructions to the employees at this particular worksite. (Tr. 47)

The evidence here indicates that State Sheet employees have received minimal safety training with regard to only a few of the hazards involved with roof decking work. Beyond this limited training, State Sheet simply relies upon the experience and knowledge of its employees to identify and avoid any other "obvious" hazards involved with such work. Assuming that employees will "just know" about these hazards, however, is not enough to

satisfy the requirements of the standard. Mr. Smith's inability to testify confidently about the nature of safety training at State Sheet and his lack of knowledge with regard to the safety instructions given by company representatives besides himself to employees demonstrates that comprehensive safety training is not a policy or program that is vigorously pursued by State Sheet. The mandate of the standard, though, is clear; employees should be kept aware of hazards as they exist and arise in each worksite so that the likelihood of injury can be reduced or eliminated. In failing to do so here, State Sheet exposed its employees to a fall hazard of 27 feet which could have resulted in serious injury or even death.

State Sheet argues that it is not in violation of this standard if it is found that it has not violated any of the other cited standards with regard to safety nets, floor openings, floor holes and rebar. With regard to safety nets, State Sheet specifically relies upon a statement made during the hearing, which it incorrectly attributes to this jurist. According to State Sheet's brief, I stated at page 18 of the transcript, "Well, if there's no requirement for safety nets then there is no requirement to instruct [the employees]." A close examination of the transcript, however, clearly shows that this statement was made, not by *me*, but by State Sheet's counsel during his opening remarks.

Furthermore, this statement, as well as State Sheet's general contention that this alleged violation must fall if the others are vacated, is seriously flawed. The vacating of an alleged violation does *not* automatically mean that there is no hazard involved and thus, no training necessary. For instance, an alleged violation may be vacated against an employer who is able to establish first, that the hazard was created and controlled by another employer and second, that a multiemployer defense exists. According to *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198, 1975-76 CCH OSHD ¶ 20,690 (Nos. 3694 & 4409, 1976) ("*Anning-Johnson*"), a multiemployer defense is established if the respondent can show either that it did not know or could not have known of the hazard involved *or* that it took alternative measures to protect its employees. These alternative measures include, among other things, warning its own employees of the hazard. Therefore, the fact that the employer may have not violated a cited standard does not alter the fact that a hazard may

still exist and employers still have a duty as set forth in the cited standard to instruct employees in how to recognize and avoid such hazardous conditions.

Accordingly, the alleged serious violation of § 1926.21(b)(2) is affirmed and a penalty of $420.00 is found to be reasonable and appropriate under the circumstances.

II. Alleged Serious Violation of § 1926.105(a)

Where an employer is cited under § 1926.105(a) for failing to provide safety nets, in order to establish a violation, the Secretary must show that the potential fall involved was over 25 feet and that none of the protective measures listed in the standard were utilized by the respondent. *Century Steel Erectors, Inc.*, 888 F.2d 1399, 1402 [14 BNA OSHC 1273] (D.C. Cir. 1989) ("*Century Steel*"). Here, Mr. Katsock testified that the warehouse in question was 27 feet high and Mr. Smith confirmed that the roof of the warehouse was approximately 27 feet from the ground. (Tr. 33, 104) In addition, Mr. Katsock testified that he observed State Sheet employees working on the roof of the warehouse without safety belts or safety nets. (Tr. 33-34) Indeed, Mr. Smith admitted that there was no fall protection being used at this worksite by State Sheet employees. (Tr. 133, 139) The Secretary, therefore, has clearly established a violation of the cited standard unless State Sheet is able to successfully refute this evidence.

First, State Sheet contends that § 1926.105(a) is inapplicable to the facts of this case because the roof being installed by its employees served as a "temporary floor"; as a result, the installation of safety nets was not required. In support of this argument, State Sheet cites to two previous Commission decisions in which Nilsen-Smith was cited for alleged violations of § 1926.105(a). In both cases, the same Administrative Law Judge, James P. O'Connell, vacated each citation on the chief basis that the area where the employees were installing metal decking served as a temporary floor, rendering § 1926.105(a) inapplicable. *Nilsen-Smith Roofing & Sheet Metal, Co.*, 8 BNA OSHC 1420, 1980 CCH OSHD ¶ 24,242 (No. 77-2735, 1980) ("*Nilsen-Smith-1980*"); *Nilsen-Smith Roofing & Sheet Metal, Co.*, 6 BNA OSHC 1435, 1978 CCH OSHD ¶ 22,591 (No. 16142, 1978) ("*Nilsen-Smith-1978*"). Contrary to State Sheet's belief, however, neither decision was reviewed by the Commission.

Furthermore, since these cases were decided, the weight of authority on this issue has definitively rejected their reasoning.

In *Diamond Roofing Co., Inc.*, 8 BNA OSHC 1080, 1084, 1980 CCH OSHD ¶ 24,274 (No. 76-3653, 1980) ("*Diamond*"), the Commission "rejected the argument that an unguarded temporary floor from which employees are working is one of the alternative safety devices contemplated by section 1926.105(a) and that a violation...cannot be found if employees are working from this type of surface." The Commission held in *Diamond* that "if the unguarded perimeter of a temporary floor itself gives rise to a fall hazard, it would be anomalous to conclude that the temporary floor constitutes an adequate method of fall protection." *Id.* See also *Universal Roofing & Sheet Metal Co., Inc.*, 8 BNA OSHC 1453, 1980 CCH OSHD ¶ 24,503 (No. 77-1756, 1980); *Midwest Steel Erection, Inc.*, 8 BNA OSHC 1538, 1980 CCH OSHD ¶ 24,525 (No. 76-3880, 1980).

The 5th Circuit recently embraced the Commission's reasoning on this issue in *Corbesco, Inc. v. Dole*, 926 F.2d 422 [14 BNA OSHC 2116] (5th Cir. 1991) ("*Corbesco*"). In *Corbesco*, the court first wrestled with its previous decision on this issue, *Brennan v. OSHRC*, 488 F.2d 337 [1 BNA OSHC 1429] (5th Cir. 1973) ("*Brennan*"), to which State Sheet cites as further support for its position. In *Brennan*, the court held that the term "impractical", as used in § 1926.105(a), was not a precise enough term to put an employer on notice that the use of a temporary floor cannot be considered an acceptable substitute for the use of a safety net if it does not provide adequate fall protection. *Id.* at 338.

Essentially, the court in *Corbesco* did not dispute this finding in *Brennan* with regard to the imprecise nature of the language in § 1926.105(a). *Corbesco* at 428. However, the court in *Corbesco* did note that in the time since the *Brennan* decision, several Commission decisions, including those discussed above, have interpreted § 1926.105(a) to require the use of a safety net in situations where employees are working near the edge of a flat roof that is more than 25 feet above ground; in those cases, the Commission specifically held that the roof cannot serve as a temporary floor and therefore, substitute for the use of a safety net. *Id.* On the basis of these decisions, the court concluded that the employer in *Corbesco* was faced with a different situation than the employer in *Brennan*, because, although "the

wording of the regulation remains imprecise, the Commission has now elucidated its meaning." *Id.*

Once it was determined that the employer in *Corbesco* had notice of its duties under § 1926.105(a), the court went on to hold that "the purpose of the safety devices listed in the regulation is to provide fall protection, and a roof cannot provide fall protection if workers must operate along the perimeter." *Id.* See also Brock v. *Williams Enterps. of Ga., Inc.*, 832 F.2d 567 [13 BNA OSHC 1489] (11th Cir. 1987). The logic of this rationale cannot be denied, and since I am bound by Commission precedent, which clearly rejects the reasoning contained in Judge O'Connell's two *Nilsen-Smith* decisions, I find that the warehouse roof here does not constitute a temporary floor for the purposes of § 1926.105(a); therefore, the cited standard does apply to State Sheet.

In both of the *Nilsen-Smith* decisions, Judge O'Connell identifies the roof decking industry's custom of not using safety nets as one of the factors to consider in deciding whether a violation of § 1926.105(a) exists. *Nilsen-Smith-1980* at 7 [Attached to State Sheet's Brief]; *Nilsen-Smith-1978* at 1435. Subsequent decisions on this issue, however, indicate that industry custom and practice is not really relevant to an analysis that hinges upon the standard's requirement with regard to safety nets. In *Century Steel*, the court held that "the regulatory command of § .105(a) is specific enough so that no reference to industry practice is necessary." *Century Steel* at 1402, citing to *Brock v. L.R. Willson & Sons*, 773 F.2d 1377, 1387 [12 BNA OSHC 1499] (D.C. Cir. 1985). Such evidence, the court concluded, is more appropriate when the practicality of the use of the *other* fall protection measures listed in the standard, such as safety belts, is at issue; because this is an "area of ambiguity", its resolution is better served by a reference to industry custom and practice. *Id.* at 1405.

Here, however, the issue is not whether the use of safety belts or lanyards is practical; in fact, as Mr. Katsock testified, he agreed with the State Sheet foreman that their use was *impractical.* (Tr. 34) Since the issue presented here is State Sheet's failure to use safety nets at the worksite in question and the plain meaning of § 1926.105(a) with regard to safety nets is clear, evidence of industry custom and practice does not shed any new light on the matter. Even if industry custom and practice were relevant to the inquiry presented here, State

Sheet has produced only minimal evidence of what the roof decking industry has done with regard to fall protection. Mr. Smith's uncorroborated testimony that he has never heard of or seen safety nets being used on projects such as this one is simply not enough to make a conclusive determination of industry custom and practice on this issue, particularly in light of Mr. Katsock's conflicting testimony that he has witnessed a roof decking project where safety nets *were* utilized. (Tr. 27-28, 109, 130)

Lastly, State Sheet has alleged economic infeasibility as an affirmative defense to the § 1926.105(a) violation.[1] In order to establish this defense, State Sheet "must demonstrate both that it is extremely costly for [it] to comply with the Secretary's order and that [it] cannot absorb this cost." *Faultless Div., Bliss & Laughlin Indus., Inc.*, 674 F.2d 1177, 1190 [10 BNA OSHC 1481] (7th Cir. 1982). Here, however, State Sheet has only produced vague evidence of the actual costs involved with the use of safety nets on these projects. Mr. Smith alleged that the use of safety nets would have more than doubled the cost of this particular job, but later admitted that this statement is not based on any concrete knowledge of the expenses involved since he has not determined what the actual cost of installing a safety net would be. (Tr. 112, 130-131) Mr. Smith also testified that if safety nets were used by State Sheet, more employees would be needed at the worksite to install them; he never indicates, however, what the actual cost would be for this additional labor. (Tr. 111)

In addition, Mr. Smith's testimony regarding the economic effects the use of safety nets would have on State Sheet's business was sketchy at best. Since there was no definitive evidence of the actual costs presented, there really is no way to determine exactly how these costs would affect State Sheet's business. As a result, State Sheet's claim that the use of safety nets would affect their ability to compete with other contractors lacks credibility. Furthermore, Mr. Smith testified that the costs for safety items are not included in State Sheet's bid for a project, but are considered part of overhead. (Tr. 129-130, 146-147) Thus, it is unclear how the costs of providing fall protection would effect State Sheet's bid

---

[1] Although State Sheet's allegation of infeasibility as an affirmative defense seems to be limited to economic infeasibility, a defense of infeasibility typically includes an argument of technological infeasibility. State Sheet, however, has failed to introduce any evidence on this issue and, in fact, Mr. Smith admitted that safety nets could have been installed at this worksite. (Tr. 139) As a result, State Sheet's allegation of infeasibility as a defense will only be considered in terms of economic infeasibility.

competibility. Based on this testimony, these costs would most likely effect State Sheet's overall operating cost, not its bids, and, again, State Sheet has failed to show exactly how this would affect its business as a whole. Finally, State Sheet has introduced no evidence whatsoever indicating whether these additional costs could be passed on to others. In sum, State Sheet has proven none of the elements necessary to establish an economic infeasibility defense.

In connection with this defense, State Sheet also argues that the use of safety nets is impractical, because the additional employees needed at the worksite to install the nets would take up valuable time that could be spent installing roof decking; as a result, the overall economic efficiency of the operation would be compromised. (Tr. 109-112) The Commission has rejected this notion with regard to the erection of guardrails where, as is the case here, the employer's argument of impracticality, "referring to the additional employees and longer time needed to erect the guardrails...is taken as an argument that the installation of guardrails was not economically feasible." *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1962, 1966, 1986-87 CCH OSHD ¶ 27,651 (No. 82-928, 1986). In this case, the Commission held that the economic infeasibility defense must fail because the employer failed to present any "evidence of the actual added costs for the labor[,]...[did] not demonstrate that the [added] costs were unreasonable in light of the protection afforded and [also did] not [show] what effect, if any, these added costs would have on the contract or business as a whole." *Id.* See also *Walker Towing Corp.*, 14 BNA OSHC 2072, 1987-90 CCH OSHD ¶ 29,239 (No. 87-1359, 1991). Since, as discussed above, State Sheet has failed to present any evidence with regard to these issues and has not shown how these costs would outweigh the fall protection provided, its argument of impracticality must also fail.

The cited standard's requirement that safety nets be used where other fall protection measures are impractical is clear and the Secretary has established that State Sheet failed to comply with this requirement. While the Secretary concedes that the general cost of these nets is high, State Sheet has not shown the exact nature or amount of these costs or even, how these costs might detrimentally affect its business. Therefore, the alleged violation of § 1926.105(a) is affirmed. Although I agree with the Secretary that this is a serious violation due to the nature of the possible injury involved, because State Sheet reasonably

relied upon the two previous *Nilsen-Smith* decisions regarding safety nets, I find that a penalty of $100.00 is more reasonable and appropriate under the circumstances.

III. Alleged Serious Violations of § 1926.500(b)(1) and § 1926.500(b)(8)

Mr. Katsock testified that he observed an unguarded floor opening in the roof deck, measuring 34-42 inches by 72 feet, which he saw State Sheet employees cross over during the course of their work. (Tr. 39-40, 63, 66-67; see also Exhibits C-4 and C-6) He also observed three unguarded floor holes, 11 and 7/8 inches in diameter, which he testified were located to the right of the floor opening and which State Sheet employees passed within 3-4 feet of. (Tr. 43-44; see also Exhibit C-7) Since it introduced no evidence to the contrary, State Sheet does not seem to dispute the dimensions of the floor opening and the floor holes or the fact that both were not guarded.

With regard to the floor opening, though, State Sheet argues that the Secretary has failed to prove a fall hazard because a temporary platform was in place underneath the opening. The platform to which State Sheet seems to be referring is actually the man-lift employed by the plumber to lift pipe to the roof level of the warehouse. (Tr. 69-71; see also Exhibit C-4) It does not appear, however, that this device, for its purposes, would need to extend the full length of the floor opening, but even if it did, it does not alter the guarding requirements of § 1926.500(b)(1). Unlike § 1926.105(a), this standard does not specify a height at which guarding must be installed; therefore, the fact that the man-lift was 5 feet below the floor opening does not change the fact that a fall hazard existed and the opening should be guarded. (Tr. 70) Indeed, Mr. Katsock's testimony regarding the man-lift centered on how the lift served as a catch platform for the purposes of the *safety net* standard, not § 1926.500(d)(1). (Tr. 69-71) Thus, the guarding requirements are not affected by the possible presence of a platform 5 feet below the floor opening.

With regard to the floor holes, State Sheet argues that because § 1926.502(a) defines a "floor hole" as "an opening measuring less than 12 inches but more than 1 inch...in any floor, roof, or platform, through which materials but not persons may fall...", and none of the materials used by State Sheet employees at this worksite were small enough to fall through any of the holes in question, the alleged violation of § 1926.500(d)(8) should be

vacated. The issue here, however, is not whether materials or even persons could fall through the floor holes. In fact, the Secretary has not alleged that the hazard posed by these holes is that materials might fall through them, striking workers below. Furthermore, it is virtually impossible for a person to fall through a hole measuring 11 and 7/8 inches in diameter. The cited standard clearly states that floor holes "into which persons can accidentally walk" should be guarded. Therefore, the hazard here is not that a person could fall *through* such a hole, but that a person could walk *into* such a hole and injure his leg as a result. Accordingly, State Sheet's argument must fail.

With regard to both the floor opening and the floor holes, though, State Sheet's main argument is that because both of these conditions were created for the plumbing subcontractor at the worksite, the guarding requirements were not its responsibility. According to Mr. Smith, the floor opening was a temporary opening left as such by State Sheet employees at the plumber's request. (Tr. 114; also see Exhibit C-4 and C-6) Similarly, the metal plates with large holes in the middle were supplied to State Sheet employees for installation in their unguarded condition. (Tr. 113-114; also see Exhibit C-7) As a result, State Sheet claims that it had no obligation to satisfy the guarding requirements.

The Commission has recognized that multiemployer worksites, such as the one here, present a unique situation in terms of determining liability for hazardous conditions. As noted above in *Anning-Johnson*, the Commission has held that once an employer shows that it did not create or control a hazard, it can escape liability for exposing its employees to the hazard if a multiemployer defense is established. Whether a hazard is created or controlled by an employer hinges primarily upon whether that employer has the ability and authority to abate the hazard, for "it would be unduly burdensome to require particular crafts to correct violations for which they have no expertise...." *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976) ("*Grossman*"). In deciding this issue, consideration may also been given to trade boundaries as well as union constraints. *Anning-Johnson* at 1198, n.13.

Here, State Sheet is attempting to deny ownership of these hazardous conditions simply because the plumber asked it to adapt its work in order to accommodate the

plumber's needs. This request does not change the fact that it was State Sheet who ultimately controlled and performed the work connected with these accommodations. The floor opening was the result of State Sheet's deliberate failure to install decking in a particular area of the roof, and the floor hole plates, although provided by the plumber, were installed by State Sheet employees. In each case, State Sheet had both the ability and the authority to erect guards around or place covers over each area; since State Sheet was the only contractor at the worksite installing the roof decking, doing so would not have stepped on the toes of any other trade, the plumber included.

State Sheet's ability to abate these hazards is not diminished by the fact that Mr. Katsock testified that he determined at the time of the inspection after speaking with Carlson's representative that *Carlson*, the general contractor, was responsible for guarding the floor holes and the floor opening. (Tr. 35-36, 79) In *Grossman*, the Commission noted in dictum that the duties of contractors on a multiemployer worksite are intertwined; as a result, more than one contractor can be responsible for a hazard, including the general contractor. *Grossman* at 1188-1189, n.6. As stated in *Grossman*:

> "the general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors...it is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected."

Id. at 1188. Such reasoning may account for why complaining about a hazardous condition to the worksite's general contractor constitutes an alternative protective measure under the multiemployer defense; the general contractor is usually in the best position to immediately address the problem.

Furthermore, in *Dun-Par Engd. Form Co.*, 8 BNA OSHC 1044, 1047, 1980 CCH OSHD ¶ 24,238 (No. 16062, 1980), *aff'd*, 676 F.2d 1333 (10th Cir. 1982), the Commission rejected an employer's argument that an alleged violation of § 1926.500(d)(1) should be vacated because it was the general contractor's responsibility, by "custom or contract", to install perimeter guarding around the second floor of the building in question. The Commission held that,

> "regardless of who had the contractual responsibility, [the respondent] itself created the hazard by participating in the erection of the opensided floor and leaving its edges

> unguarded...[and] since [the respondent] possessed the materials and skills required to build wooden forms, it surely had the ability to erect the necessary guardrails."

Id. at 1049. Also see *Dun-Par Engd. Form Co.*, 13 BNA OSHC 2147, 1987-90 CCH OSHD ¶ 28,495 (No. 79-2553, 1989). Here, since State Sheet was the sole contractor responsible for the installation of roof decking at this worksite, the unguarded floor opening and floor holes came under its purview and, as discussed above, steps could have easily been taken by State Sheet to abate these hazards. Carlson, on the other hand, clearly had no involvement with the decking of the warehouse roof or even the plumbing work, but abated and claimed responsibility for a hazard which it did not create presumably in its supervisory role as general contractor for the worksite. Carlson's actions do not mean that State Sheet cannot also be responsible for the hazard by way of its obvious participation in its creation. Thus, I find that State Sheet was ultimately responsible for the hazards created by the unguarded floor opening and the floor holes.

Even if State Sheet were able to prove otherwise, though, its employees were still exposed to these hazards, regardless of who created them, and State Sheet has failed to establish a multiemployer defense. According to *Anning-Johnson*, a successful multiemployer defense must show either that an employer did not know or could not have known that a hazard existed or that the employer took alternative measures to protect its employees from the hazard, such as warned them to avoid it or spoke with the general contractor or employer responsible for the hazard about addressing the problem. *Anning-Johnson* at 1198. See also *Grossman* at 1189; *D. Harris Masonry Contrac., Inc.*, 876 F.2d 343 [14 BNA OSHC 1034] (3rd Cir. 1989). First of all, these conditions were clearly known to State Sheet since it was the one who created the floor opening and installed the floor holes. Furthermore, according to Mr. Katsock, State Sheet never discussed the hazards with either Carlson or the plumber nor did it, by Mr. Smith's own admission, alert its employees to the dangers presented by these conditions through safety training or instructions. (Tr. 60-61, 101, 120-121) Therefore, a multiemployer defense has not been established.

In sum, since the unguarded floor opening and floor holes were ultimately State Sheet's responsibility, the alleged violations of § 1926.500(d)(1) and .500(d)(8) are affirmed.

The respective penalties of $640.00 and $360.00 are found to be reasonable and appropriate under the circumstances.

IV. Alleged Serious Violation of § 1926.701(b)

As was the case above with regard to the floor opening and the floor holes, Mr. Katsock testified that Carlson's representative informed him that the rebar located beneath State Sheet's work area at the worksite was Carlson's responsibility; he later testified, though, that it was the concrete contractor who subsequently abated the hazard. (Tr. 36, 79, 81) Unlike the floor holes and the floor opening, though, State Sheet had nothing at all to do with the creation or use of the rebar; therefore, State Sheet lacked both the ability and the authority to abate this hazard. According to Mr. Katsock, however, State Sheet employees were exposed to the unguarded rebar because it was positioned underneath their work area on the roof and State Sheet offered no evidence to contradict this fact. (Tr. 61-62) Therefore, unless State Sheet can establish a multiemployer defense, it will be liable for exposing its employees to the hazard posed by the unguarded rebar, even though another contractor created and controlled it.

Since the rebar was in plain view underneath the work area, State Sheet cannot deny knowledge of the hazard. In fact, Mr. Smith testified that State Sheet employees were not told about the rebar below because "they'd see it". (Tr. 120) This failure to warn its employees of the hazardous condition also demonstrates State Sheet's failure to take alternative measures to protect its employees. In addition, Mr. Katsock testified that State Sheet's foreman told him that he did not complain to Carlson or any other contractor about the rebar. (Tr. 101) Thus, State Sheet has not established a multiemployer defense.

Accordingly, the alleged violation of § 1926.701(b) is affirmed and a penalty of $420.00 is found to be reasonable and appropriate under the circumstances.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

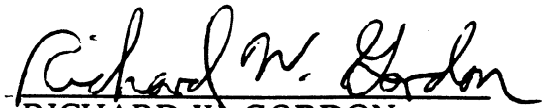
1. Serious citation 1, item 1, alleging a violation of 29 C.F.R. § 1926.21(b)(2), is AFFIRMED and a penalty of $420.00 is ASSESSED.

2. Serious citation 1, item 2, alleging a violation of 29 C.F.R. § 1926.105(a), is AFFIRMED and a penalty of $100.00 is ASSESSED.

3. Serious citation 1, item 3, alleging a violation of 29 C.F.R. § 1926.500(b)(1), is AFFIRMED and a penalty of $640.00 is ASSESSED.

4. Serious citation 1, item 4, alleging a violation of 29 C.F.R. § 1926.500(b)(8), is AFFIRMED and a penalty of $360.00 is ASSESSED.

5. Serious citation 1, item 6, alleging a violation of 29 C.F.R. § 1926.701(b), is AFFIRMED and a penalty of $420.00 is ASSESSED.



RICHARD W. GORDON
Judge, OSHRC

Dated: June 30, 1992
Boston, Massachusetts

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR
Complainant,
v.

STATE SHEET METAL CO., INC.
(FORMERLY DESIGNATED NILSEN-SMITH SHEET/METAL CO.)
Respondent.

OSHRC DOCKET
NO. 90-2894

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 11, 1992. The decision of the Judge will become a final order of the Commission on July 13, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before July 1, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: June 11, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 90-2894

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

John Craner, Esquire
Craner, Nelson, Satkin & Scheer,
P.A
Post Office Box 367
320 Park Avenue
Scotch Plains, NJ 07076

David G. Oringer
Administrative Law Judge
Occupational Safety and Health
Review Commission
McCormack Post Office and
Courthouse, Room 420
Boston, MA 02109 4501

00106172976:02

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
ROOM 420
BOSTON, MASSACHUSETTS 02109-4501

PHONE:
COM (617) 223-9746
FTS 223-9746

FAX:
COM (617) 223-4004
FTS 223-4004

SECRETARY OF LABOR, Complainant v. STATE SHEET METAL CO., INC. (Formerly Designated NILSEN-SMITH SHEET/METAL CO.) Respondent.	OSHRC Docket No. 90-2894

Appearances:

Alan L. Kammerman, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

John Craner, Esq.
Craner, Nelson, Satkin & Scheer, P.C.
Scotch Plains, New Jersey
For Respondent

Before: Administrative Law Judge David G. Oringer

DECISION AND ORDER

This is a proceeding brought under section 10(c) of the Occupational Safety and Health Act of 1970, 84th Stat. 1590; 29 U.S.C. § 651, *et seq.*, (hereinafter referred to as "the Act"), to review a citation issued by the Secretary of Labor (hereinafter sometimes referred to as "Complainant") pursuant to § 9(a) and a proposed assessment of penalties thereon issued, pursuant to § 10(a) of the Act.

The respondent filed a timely notice of contest to the citation and the proposed penalties thereby triggering the jurisdiction of the Commission. After issue joined the case came on for hearing on March 12, 1991, at 10:00 a.m.. Subsequent thereto a second session of the hearing was held so that the government could complete its case.

The Secretary's complaint charged the respondent with serious violations of the standards set forth at 29 C.F.R. 1926.100(a), 29 C.F.R. 1926.500(b)(2) and in the alternative, 29 C.F.R. 1926.750(b)(1)(ii) or 29 C.F.R. 1926.105(a). The first charge of serious violation alleged that an employee was not wearing a protective helmet. The second charge of violation alleged a failure to guard a ladderway floor opening at the roof deck and the last violation pleaded in the alternative was an allegation that the respondent failed to have any fall protection whatsoever for employees laying out roof decking and welding.

In its answer the respondent alleged that the true respondent doing the work at the worksite was State Sheet Metal rather than Nilsen-Smith and the complainant on January 28, 1991, amended the complaint pursuant to respondent's written consent to substitute State Sheet Metal Co., Inc. as the respondent in place of the aforementioned Nilsen-Smith.

In paragraph six of its answer the respondent denied paragraph six of the complaint and also argued that it was not feasible to put in any type of railing. In addition respondent alleged that such railing was contrary to the standard practice in the industry. In paragraph 6 of its answer respondent alleged affirmative defense of infeasibility insofar as the allegation of violation of the standard set forth at 29 C.F.R. 1926.500(b)(2). Respondent did not interpose any affirmative defense against the allegation of violation of the standard set forth in the alternative to wit, either 29 C.F.R. 1926.105(a) or 29 C.F.R. 1926.750(b)(1)(ii).

Subsequent thereto on January 19, 1991, the respondent moved to consolidate the instant cause with a second case against State Sheet Metal Co., Inc. Docket Number 90-1620. The complainant filed a timely objection to the consolidation. Subsequently on January 28, 1991, Judge DeBenedetto denied the respondent's motion to consolidate. The parties in March 1991 filed their Prehearing exchanges. In its Prehearing exchange the respondent failed to raise any infeasibility defense to the allegation of failure to have fall protection which was pleaded by the Secretary in the alternative.

The case was reassigned to Judge Oringer, for hearing, which hearing commenced on March 12, 1991.

At the opening of the hearing the complainant moved to "to preclude respondent's witness, Robert Smith, from testifying concerning the impracticability of putting netting onto the steel bays of the warehouse."... The Secretary's legal representative stated that

respondent's counsel advised by letter dated March 5, that one of his witnesses would be testifying concerning that issue and while respondent termed it "impracticability" he actually was alleging "infeasibility" which was beyond the scope of the pleadings. He alleged that he received the letter one day before the hearing.

The respondent's counsel alleged that his defense was based on decisions by former Commission Judge O'Connell, who in two separate cases in 1977 and 1978 vacated citations alleging violations of the same standard. A reading of these decisions would demonstrate that the Judge found the roof to be a temporary floor. In this case "infeasibility", an affirmative defense, was not pleaded as a defense to the standard set forth at 1926.105(a).

It was the opinion of this Tribunal that without doubt counsel for respondent failed to apprise himself of the rules of the Commission prior to pleading and did not know the rules even when he was in the hearing room. Nevertheless the only prejudice to the Secretary was surprise. Affirmative defenses must be pleaded in the issue formulations stage or such defense is waived. *Chicago Bridge & Iron Company* 1 BNA OSHC 1485 1973-1974 (reversed on other grounds) 514 F.2d 1082 (7th Cir. 1975). This requirement is now incorporated in Rule 36(b) of the Commission Rules of Procedure (29 C.F.R. 2200.36(b) 51 Federal Register 32,015, 32,021 1986; 52 Federal Register 13,831 (1987).

While it is true that a respondent is burdened and bares the errors of counsel, in this case it seemed to me that the only prejudice to the government was surprise and in raising the defense of infeasibility at the hearing the respondent *de facto* attempted to amend his answer in the hearing room at the commencement of the proceeding.

The Commission in a recent case[1] stated, "*Spancrete* failed to amend its answer to add the infeasibility defense. Nor did it move to amend at the hearing."[2] In the instant cause the infeasibility was discussed at the opening of the hearing. Accordingly, I adhere to my ruling made at the time that the prejudice to the government was only that of surprise and this Tribunal offered and gave a continuance to the Secretary to procure whatever testimony it needed and to bring back the principal witness of the respondent for further

---

[1]*Spancrete Northeast, Inc.* 15 BNA OSHC 1020 (Docket No. 86-521) 4/30/91.

[2]Emphasis supplied.

cross-examination, at a subsequent session. The initial hearing however, began immediately so as not to expend further judicial resources.

In addition thereto, the complainant was allowed to enter into full and complete discovery after the first session of the hearing was completed anent any of the affirmative defenses. In this manner neither side was prejudiced by the inadequate answer of the respondent. In any case, in *Spancrete Northeast* the Commission clearly indicated that had the respondent in that case moved to amend at the hearing, the Commission decision may well have been different. In the instant cause, the respondent obviously *de facto* moved to amend the pleadings to include the defenses of infeasibility and I ruled therefor in the manner related above.

THE ALLEGED VIOLATIONS

THE ALLEGATION OF SERIOUS VIOLATION OF THE STANDARD SET FORTH AT 29 C.F.R. 1926.100(a)

The standard alleged to be violated reads as follows;

> 1926.100 *Head Protection.* (a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The compliance officer, one, Leonard Drew, conducted an inspection for the complainant from August 22 through August 29, 1990, at the worksite wherein the respondent was working. The compliance officer (C.O.) is an experienced man who has conducted 950 OSHA inspections. He described the worksite as a single story 800,000 square foot warehouse 30 to 32 feet high. Respondent at the time was installing the roof decking.

The building was made of concrete columns with bays that measured approximately 50 feet by 50 feet (Tr. 119, 120, 129, 31, 32).

The compliance officer testified that he observed one, Robert Smith, the Secretary Treasurer of the corporation who worked for both Nilsen-Smith and State Sheet Metal Co., Inc., descend a ladder from the roof deck and walk along the ground underneath the roof failing to wear a hard hat (Tr. 37, 38). At the time there were other employees of the

respondent on the roof laying out decking and the area contained welding equipment, tools and materials on the roof area (Tr. 37, 38). Mr. Smith testified that upon being advised that an OSHA inspector was on the site he descended in order to get copies of the OSHA decisions in which former Commission Judge O'Connell dismissed charges against respondent for not using nets when working aloft.

The compliance officer testified without disagreement from Mr. Smith that he did not call the latter down from the roof. Mr. Smith, however, probably would not have descended at that time had he not wished to procure the decisions to show them to the compliance officer. The testimony demonstrates that a hard hat was not kept up on the roof and that at least one restroom was inside the building and while the hazard may not be an egregious one nevertheless there is a chance that something from the roof could drop, and descend and strike an employee while descending the ladder while others are working above or when on the way to the interior restroom. Mr. Smith did admit that men working on the roof occasionally descended to relieve themselves during periods when other men were still working aloft (Tr. 136, 137, 139).

The evidence reveals that the respondent apparently does not have a hard hat up on the roof where Mr. Smith and his men are working. While they do not need a hard hat while they are working aloft, inasmuch as there is no one above them, when employees descend the ladder to go down stairs they should wear a hard hat so long as someone is working above them. In other words if a man goes down to relieve himself or if Mr. Smith goes down to speak to anyone as he did here to the compliance officer it is incumbent upon him to wear a hard hat. One should be on the roof for that purpose. Accordingly, I find that the violation was proven, however I find the penalty excessive. The exposure is minimal although in the event of an accident the damage to the person could be destructive. I find a penalty of $100 reasonable and appropriate in the premises.

THE ALLEGATION OF VIOLATION OF THE STANDARD SET FORTH AT 29 C.F.R. 1926.500(b)(2)

The standard reads as follows;

> 29 C.F.R. 1926.500 Guardrails, handrails, and covers. (a) *General provision.* This subpart shall apply to temporary or emergency conditions

where there is danger of employees or materials falling through floor, roof, or wall openings, or from stairways or runways.
(b) *Guarding of floor openings and floor holes.* (2) Ladderway floor openings or platforms shall be guarded by standard railings with standard toeboards on all exposed sides, except at entrance to opening, with the passage through the railing either provided with a swinging gate or so offset that a person cannot walk directly into the opening.

The compliance officer testified that there was a ladder reaching from the ground to the roof edge against which it rested. It was his opinion that inasmuch as the ladder was the only way to ascend or descend to and from the roof that respondent's employees working thereon would be exposed to the hazard of no guardrails surrounding the ladder. He also saw Mr. Smith use the ladder as well as two other employees who were working on the roof (Tr. 48, 49). He testified as to the method of doing it and described railings made of 2 x 4 lumber nailed to free standing extensions with large bases.

I find that the guard at the opening described by the compliance officer is not feasible. The ladder was being used and was the only means of access and ingress. The guardrails as described by the compliance officer were not practical and were not meant for this type of operation. Accordingly, this allegation of violation must fall.

THE ALLEGATION OF VIOLATION OF THE STANDARD SET FORTH AT 29 C.F.R. 1926.750(b)(1)(ii) AND ALTERNATIVELY 29 C.F.R. 1926.105(a)

While the original citation item was amended to include in the alternative the standard set forth at 29 C.F.R. 1926.105(a), subsequent thereto the parties agreed that this was not a tiered building and that if any standard applied, it was that standard found at 29 C.F.R. 1926.105(a) and that was the alleged violation that was tried.

The standard reads as follows;

1926.105 Safety Nets. (a) Safety nets shall be provided when workplaces are more than 25 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 impractical.

The testimony adduced revealed that there was no fall protection whatsoever on the roof which was in excess of 25 feet above the ground. It was the argument of the respondent that the roof upon which it was working was a temporary floor. Respondent referred to two decisions of former Judge O'Connell as precedent for the position espoused

by the respondent. It also forwarded to this Tribunal a copy of a decision by former Review Commission Judge James P. O'Connell dated December 27, 1979 in which the respondent was *Nilsen-Smith Roofing & Sheet Metal Company* which is a company inextricably intertwined with State Sheet Metal Company. In fact Judge O'Connell entitled the case *Nilsen Smith Roofing & Sheet Metal Company* and the case bore Docket No. 77-2735. In his decision Judge O'Connell found that the floor upon which the respondent's employees were working was in fact a temporary floor and came within the purview of one of the exceptions in the standard.

The respondent and his counsel rely very heavily on that decision and another one of Judge O'Connell on the same subject with the decision of the Judge similar in content and result.

Unfortunately for the respondent that was an unreviewed decision of a Judge and has only the precedential value accorded to such a decision. Subsequent thereto, the Commission found that the standard mandates that if a workplace is more than 25 feet above the ground, an employer must furnish some form of fall protection. (See *Cleveland Consolidated* 649 F.2d at 1166.) The language of this section gave this respondent knowledge of his general duty.

Respondent however relied on both of Judge O'Connell's decisions. Respondent argues that the flat roof upon which the employees were working served as "a temporary floor" and thus it supplied one of the exceptions contained in the standard and therefor did not need nets. The language of section 1926.105(a) may well not be sufficiently specific to provide constructive notice that a safety net is required when roofers are working on material that they consider part of a flat roof, particularly when the respondent had Judge O'Connell's decisions to rely upon. Nevertheless the Commission and the Courts have frequently held that the regulation requires an employer to furnish either a safety net or one of the other enumerated safety devices if its employees are working near the perimeter of a flat roof more than 25 feet above the ground. The roof cannot serve as a temporary floor *Corbesco, Inc. v. Dole* 926 F.2d 422 (5th Cir. 1991). The Commission so stated as early as June 1978. *Hamilton Roofing Company* 6 BNA OSHC 1771, 1775 (June 23, 1978), *R.D.*

Bean, Inc. 6 BNA OSHC 2030 decided September 25, 1978; *Diamond Roofing Company* 8 BNA OSHC 1080, 1084 (February 29, 1980); *Universal Roofing & Sheet Metal Company* 8 BNA OSHC 1453, 1454 (May 28, 1980); *Midwest Steel Erection, Inc.* 8 BNA OSHC 1538 (September 12, 1980). As the Court said in *Corbesco, Supra* "...though the wording of the regulation remains imprecise, the Commission has now elucidated its meaning."

Those decisions of the Commission that issued subsequent to Judge O'Connell's decisions were constructive notice of the duties imposed upon the respondent. Certainly respondent's counsel had a duty to acquaint itself with the latest rulings. I find therefor that the knowledge requirement necessary for a serious violation exists in this case despite the decisions rendered by Judge O'Connell upon which the respondent incorrectly relies.

Insofar as the defenses of infeasibility are concerned the respondent cannot have his employees exposed to fall hazards by working on joists at the perimeter of a floor where the fall is in excess of 25 feet. He must have some type of fall protection. Here the respondent has none whatsoever.

I credit the respondent's testimony that in 35 years he has not seen nets utilized on a one story building. The compliance officer only saw such nets in one instance.

The respondent argues that protection against fall hazard is both economically infeasible and technically infeasible. I do not find it to be so. I find that the respondent could have leveled the ground and brought in ladders and raised the nets in the manner testified to by Mr. Marrinan. Unquestionably it was highly expensive and it might put the respondent at a competitive disadvantage. The respondent however, must find some means of protecting its employees from fall hazard. The standard gives several alternatives to netting. If respondent cannot devise and use one of the alternative protection devices than it must net.

In answer to inquiry the respondent admitted that approximately five years ago an employee was blown off a roof and killed and observing this gentlemen that testified for respondent, Mr. Smith, I believe that he was saddened and shocked by the loss of life of one of his employees. He testified that he was not cited for the accident and its results. If so it is because the fall was from a height of 15 feet rather than one over 25 feet. The standard only mandates protection when the height is in excess of 25 feet. The respondent

must devise some other means of fall protection if it believes that nets are not economically feasible. It must find some means of affording his employees protection from fall hazard, otherwise the standard is violated. I find that in this case the respondent was in violation of the standard. I do not find the arguments insofar as technical infeasibility viable. Insofar as economic infeasibility is concerned the respondent can find a manner and a means of protecting against fall hazard, if not nets, some other manner that is mentioned in the standard. If no such other protection is available, nets must be utilized.

It maybe the time to mention that the temporary floor referred to in the standard does not mean the floor upon which the men are working. They are working on what is going to be a roof and that which they are working upon is not protection against fall hazard. Once they work at the perimeter or at the edge they certainly can be blown off the edge. You can be blown off the edge at 25 feet or 30 feet just as a man was blown off at 15 feet. I find that it is probably true that it is not industry practice to use nets on a one-story building when laying down the roof. However the Commission has been upheld by the Courts in demanding fall protection for all employees who are aloft in excess of 25 feet and the respondent must provide it. I find the respondent in violation of the standard. I also find that he relied upon the decisions of Judge O'Connell which have been superseded by Commission and Court decisions and because of his reliance upon those decisions I find a minimum penalty of $100 reasonable and appropriate in the premises.

THE FINDS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law contained in this opinion are incorporated herein in accordance with Rule 52 of the Federal Rules of Civil Procedure.

ORDER

1. Serious citation number 1, item 1, alleging a violation of the standard set forth at 29 C.F.R. 1926.100(a) is affirmed and a penalty of $100 is assessed therefor.

2. Serious citation number 1, item 2, alleging a violation of the standard set forth at 29 C.F.R. 1926.500(b)(2) is vacated together with any penalty proposed therefor.

3. The allegation of violation by this respondent of the standard set forth at 29 C.F.R. 1926.105(a) is affirmed and a penalty of $100 is assessed therefor.

It is so ORDERED.

DAVID G. ORINGER, JUDGE, OSHRC

Dated: June 4, 1992
Boston, Massachusetts