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JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

June 5, 1979

KOSHRC #521

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

WESTERN DRYWALL COMPANY, INC. — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman, UPTON and ROBERTS, Commissioners. Roberts Commissioner, for the Majority:

A Recommended Order of Hearing Officer John T. Fowler, Sr., issued under date of January 30, 1979, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Complainant.

At issue is an alleged serious violation of 29 CFR 1926.28(a); or 29 CFR 1926.105(c) and the proposed penalty of $750.

Hearing Officer Fowler has dismissed the citation against the Respondent and vacated the proposed penalty. We find no error in the Hearing Officer's decision, the evidence adequately supports his findings and conclusions.

IT IS THE ORDER of a majority of this Commission that the Recommended Order of the Hearing Officer be and it is hereby AFFIRMED.

s/John C. Roberts
John C. Roberts, Commissioner

s/Charles B. Upton
Charles B. Upton, Commissioner

STANTON, Chairman, Dissenting:

I dissent from the majority opinion in this case. I find that the Recommended Decision should be REVERSED. The serious violation should be sustained with a penalty of $750.

The evidence establishes that an area of approximately 14 feet under the scaffold, including the spot where the worker fell, could have been protected by nets while having sufficient clearance for the operator of the elevator.

A reasonable reading of the standard reveals that the 8 foot border reference is an optimum. The fact that particular conditions may prevent compliance with this 8 foot optimum does not relieve the employer of the duty under the standard to protect the employee by installing nets as fully as possible. This employer has not complied with the duty as required therefore a serious violation and the penalty should be sustained.

Merle H. Stanton, Chairman

DATED: June 5, 1979

DECISION NO. 730

Copy of this Decision and Order has been served by personal delivery or mailing on the following:

Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Hon. Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Cathy Cravens (Messenger Service)
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601

Mr. Roland Hawksley, President (P10 9761490 - Cert. Mail)
Western Drywall Co., Inc.
3905 Oaklawn Drive
Louisville, Kentucky 40219

Hon. William S. Bowman (P10 9761491 - Cert. Mail)
Attorney at Law
550 Starks Building
Louisville, Kentucky 40202

This 5th day of June, 1979.

Iris R. Barrett
Executive Director

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JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
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104 BRIDGE ST.
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MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

January 30, 1979

KOSHRC # 521

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

WESTERN DRYWALL COMPANY, INC. — RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:

Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Hon. Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
U. S. 127 - South
Frankfort, Kentucky 40601
Attention: Hon. Cathy Cravens
Assistant Counsel

Mr. Roland Hawksley, President (Certified Mail #676330)
Western Drywall Co., Inc.
3905 Oaklawn Drive
Louisville, Kentucky 40219

Hon. William S. Bowman (Certified Mail #676331)
Attorney at Law
550 Starks Building
Louisville, Kentucky 40202

This 30th day of January, 1979.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 521

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER

WESTERN DRYWALL COMPANY, INC. — RESPONDENT

* * * * * *

Hon. Cathy J. Cravens, Assistant General Counsel, Department of Labor, U. S. 127 South, Frankfort, Kentucky 40601, For the Complainant.

Hon. William S. Bowman, Attorney at Law, 550 Starks Building, Louisville Kentucky 40202, For the Respondent.

FOWLER, Hearing Officer.,

* * * * * *

As a result of an inspection of June 28, 29, 1978 and July 3, 1978, by Compliance Officers of the Department of Labor, Commonwealth of Kentucky of the construction site of the new Hyatt House Hotel at 300 West Jefferson Street in Louisville, Kentucky, which was a place of employment at which employees of the Respondent Company were working. A citation was issued against the Respondent Company alleging a serious violation as follows:

> "an alleged violation of 29 CFR 1926.28(a); or 29 CFR 1926.105(c) in that safety belts and lifelines and lanyards were not provided to protect two (2) employees working at the 17th floor of the atrium who were exposed to a fall of 160 feet to the concrete floor below; or, safety nets provided did not extend eight (8) feet beyond the edge of the work surface to protect two (2) employees working at the 17th floor of the atrium who were exposed to a fall of 160 feet to the concrete floor below."

The alleged violation was stated to be a serious violation,

and the proposed penalty was $750.00 with an abatement date set at July 12, 1978.

The aforesaid Hearing was held under the provisions of KRS 338.071(4), one of the provisions dealing with the safety and health of employees which authorizes the Review Commission to hear and rule on appeals from citations, notifications and variances issued under the provisions of this Chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the Hearings. Under the provisions of KRS 338.081, Hearing was authorized by provisions of said Chapter and such may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After Hearing and appeal, the Review Commission may sustain, modify or dismiss a citation or penalty.

The pertinent procedural information is as follows:

1. Inspection June 28 and 29, 1978 and July 3, 1978, at 300 West Jefferson Street, the construction site of the Hyatt House Hotel.

2. Citation issued July 7, 1978 citing one alleged serious violation in the alternative.

3. Notice of Contest was received July 31, 1978 contesting the citation.

4. Notice of Contest with copy of citation and proposed penalty was transmitted to the Review Commission August 1, 1978.

5. Notice of Receipt of Contest was mailed August 2, 1978 and Certification of Employer Form received August 7, 1978.

6. Complaint was received August 8, 1978, and, initially,

no formal Answer was filed, but Respondent tendered an Answer on the date of the Hearing October 27, 1978 which will be hereinafter discussed.

7. The case was assigned to a Hearing Officer August 31, 1978.

8. Hearing was scheduled October 6, 1978 and continued until October 27, 1978 when the Hearing was held in Louisville, Kentucky.

9. Notice of Receipt of the Transcript of the Hearing was mailed to the parties November 20, 1978 setting a briefing schedule.

10. Brief for the Complainant was received December 6, 1978; Brief for the Respondent was received December 18, 1978, and Reply Brief from the Complainant was received January 5, 1979.

11. Motions for Extension of Time and permission to file Reply Brief were issued by the Hearing Officer and all Briefs are considered herein.

DISCUSSION OF THE EVIDENCE

At the call of the case Respondent asked the Hearing Officer for permission to file an Answer which was objected to by the Department of Labor, and at the time of the objection by the Department of Labor the Hearing Officer offered to grant a continuance of the case if the Answer raised any questions or prejudiced the Complainant in any fashion, or to permit the Complainant to offer additional proof at the conclusion of the Respondent's testimony in order to counteract any such surprise or prejudice (TE 1 & 2); the Complainant

refused the offer to continue the case, and asked that the Hearing proceed.

Opening statements were made in which the Respondent states that the use of personal protective equipment was impractical or impossible under the circumstances in the case (TE 4).

Mr. Michael Shoulders was called as Compliance Officer, Department of Labor, and stated his qualifications (TE 7); that the prime contractor on the construction was J. A. Jones Construction Company and that Western Drywall was a subcontractor together with other companies not mentioned herein (TE 8 & 9); that on June 26, 1978 a fatality occurred at the construction site as a result of a fall of an employee of the Respondent from the 17th floor level of the atrium of the Hyatt House Hotel (TE 9).

The evidences discloses that opening, walk-around and closing conferences were held, and that no search warrant question exists (TE 10); the wordage of the standard is read into evidence (TE 11 & 12), and pictures were introduced (TE 13).

The evidences discloses that the employee was dismantling scaffolding after drywalling and painting the ceilings of the Hotel (TE 14); the scaffold was pickboard or hung scaffolding (TE 14); the testimony indicates that it was the opinion of the Compliance Officers that safety belts were not practical to be used in the factual situation in this case (TE 16).

A drawing of the area is introduced which shows the atrium of the Hotel to be 69 feet wide and 69 feet long, and that the pickboard scaffold was some 16 feet wide and 73 feet long (TE 18); the safety net, which is admitted was used throughout the entire

atrium, was about 4 feet short of the opening in the floor through which the employee fell (TE 19); the Compliance Officer states that compliance could be accomplished by stretching the nets which had been strung from the Western end up to four feet of the hole, and moving them to within the area covering or protecting the fall through the hole and that the employee would not have fallen to his death (TE 20); testimony of the Hearing Officer indicates that the exposure was obviously that the employee was exposed to a fall of 160 feet when removing the plywood planking and pickboards (TE 21); and that the opinion of the Compliance Officer was that the Respondent should have extended the nets past the surface where the side of the guardrail or the side of the scaffold ended and the guardrails had to be removed, the Compliance Officer states that there was not enough room for 8 feet, but that the net should have extended at least to a point where they would have had sufficient room for the elevator to operate and give the employees protection, and that he believes that this could have been done (TE 22).

The penalty formula is discussed and the method for arriving at it (TE 23-26).

On cross-examination the Compliance Officer admits that he was not present at the time of the fall, and that he had no knowledge of the length of time that the hole through which the employee fell had existed (TE 28); but states that he had determined from his investigation that the hole had existed only a second or so before the employee fell through (TE 29); and that the hole occurred when two (2) employees, one of whom is the deceased, picked up the board which was to be removed from the hanging scaffold (TE 34).

Further, evidence indicates that the net involved was stretched across very nearly the entire opening created by the atrium which was a portion of the structure of the hotel, and stretched from West to East, and the net covered the eastern portion and came within four feet of covering the scaffolding which was a portion of the boarding which was removed causing the void through which the employee fell (TE 36).

The Respondent testified by Mr. John Kaufer, who stated that he had been employed by Western since 1963 (TE 40) that he was, together with the deceased, dismantling the scaffolding, and that the guardrails had already been taken down (TE 41), and further states that there was no way to tie or anchor the net off in the East end completely because of the elevators going up and down, and that the elevator shaft protruded through the hole which would have caused a problem, and that that was the only way to take the net down.

The Respondent witness contends that because of the size of the pickboards and the need to lower them to the floor that no net on the East side was possible (TE 47), having previously testified that the pics, in the witnesses opinion, could not be moved to be lowered to an area where the nets were in place, since the pics had to be lowered to the floor through some opening in the net.

Evidence reveals that the elevators were in operation, and the extension of the net to cover the East side was, in the opinion of the witness, not possible (TE 48); the witness, Kaufer states that when he raised the board the deceased was on one end of the board and he was on the other, and when the board was raised, he stated, "Roger,

watch the hole," and that the deceased said, "Okay," and at that instant he had stepped into the hole (TE 49). The hole through which the deceased fell was approximately four feet off the East end of the scaffold which is shown by a picture (TE 49). The evidence shows that the method by which the scaffold was dismantled was that the plywood was picked up and carried from the solid scaffold of the deck to the 17th floor concrete walk, and then the pickboards were removed by lowering them through the opening at the far end of the net to the first floor (TE 52).

On redirect examination the Compliance Officer stated that the distance between where the net ended and the elevator point would be about 16 to 17 feet, and that the nets could have been repositioned under scaffolding in a manner that they would have not touched the elevator point and would have still been under the scaffold (TE 54), and that in order to get the net to have 8 feet overhanging would be necessary to hang the net right up against the elevator (TE 55).

Mr. Roland Hawksley testified that he is the President of Western Drywall and that there were special plans made in great detail for this rather unusual construction, and that they had evaluated the means of constructing the platform and a structural engineer had been retained and that much work and effort had gone into devising a safe method for the operation of the work which was to be performed (TE 58); that the scaffold had been in use some four months (TE 59 & 60), and that the removal of the boards was impossible without a hole over which there was no net (TE 61).

DISCUSSION OF THE CASE

Simply put, the evidence reveals that the area under which construction was being done was completely netted except for one end which, according to the Respondent, was impossible to have netted because of the elevator shaft interfering with the nets and because of the need to have some space through the pics which were the base of the hung scaffold, to be lowered.

The contention of the Complainant is that the pics could be moved laterally, and that they should have been moved to the other end of the atrium where they could have been lowered without necessity of creating a hole in the net since that the other end of the atrium work had been completed and the net was not in existence.

The difficulty seems to be that the hung scaffold and pick-boards were in place and in some fashion had to be moved and that the plywood flooring of the scaffold had to be moved before the pickboards could be lowered or shifted or anything done with them by way of removal. This unfortunate accident occurred while the plywood for the flooring of the scaffold was being removed which was a necessary item to be done at the place that the scaffold existed. This brings into sharp focus whether or not the nets could or should have been extended to cover the area underneath the plywood flooring of the scaffold, or whether they were stretched as close as they could have been because of the presence of the elevator and the need not to entangle the net in the elevator shaft.

It seems that the question concerning the lowering of the

pics is not really essential since the man fell to his death at the time he was removing the plywood floor from the scaffold and that the only relevancy of the lateral movement of the pics would have been to show that it was not necessary to have a space at the end where the scaffold was being removed in which to lower the pics, but that they could have been moved laterally to another area for such lowering. The Complainant contends that it would have been possible to do this and the Respondent states that the length and the size of the pics dictated that they be removed at the place at which they were removed.

Initially, the Hearing Officer wants to address himself to the question raised by the Complainant as to the correctness of permitting the Respondent to file an Answer at the Hearing. It is the feeling of the Hearing Officer that every opportunity was given to the Respondent to either continue the case to another hearing date or to perfect the evidence in any fashion after Respondent's case had been put in the record, if the Complainant desired to do so, and in fact Counsel for the Complainant stated that she would go ahead with the Hearing and then perfect the record. Evidently, the Complainant did not feel that it was necessary to perfect the record since no request was made of the Hearing Officer for any additional time or that any other additional witnesses would be required or needed for such purpose.

While it is true that the rules specifically state times in which Answers must be filed, it is also true that it is essential that the parties, both Complainant and Respondent, be given a fair

and equal opportunity to present their cases, and in the absence of a showing of prejudice or surprise, that the Complainant does not justify its position that the Answer should be stricken for the technical reason of not filing it in time, or for the reason that the answer asserted affirmative defenses, such as impossibility to perform or a greater hazard or whatever defense may be pleaded.

The rules seem to indicate that a concise statement of denial is sufficient, and I do not believe that it is necessary for the Respondent to specifically plead impossibility of performance or any other specific defense, except constitutionality of the provision or the standard or lack of a search warrant or some other such defense which would be of an affirmative nature. It appears to the Hearing Officer that it is the obligation of the Department of Labor to prove its case and that it is not necessary that it be advised prior to the testimony, that impossibility of performance is a defense upon which it relies. However, in the case at hand, the Department had every opportunity to either continue the case, to make a Motion that the answer be more specific, to inquire of the Defendant the nature of its defense, and in fact, the Respondent in his opening statement contended that the defense was going to be the impossibility of providing the protective measures required under the standard.

Therefore, it is concluded that the answer was properly permitted to be filed and that the Department of Labor has shown no prejudice or surprise as a result of the permitting of the answer

to be filed and that the ends of justice require that the answer be permitted to be filed and the procedural contention of the Department that the answer should be stricken is rejected.

This case presents an unusual construction project and problem. The Hyatt House Hotel, which was at that time being constructed in Louisville, has an atrium or open space which goes from the ground floor to the roof, and creates an open effect for the center of the building with the rooms leading off of a walkway which circles the perimeter of the building. Thus all of the rooms have views to the outside with entrances to the inside and views from all the levels down to the lobby floor. This is a familiar trademark of the Hyatt construction, but is a departure from normal construction process and presents problems not ordinarily encountered in normal construction work.

The hotel was constructed primarily of formed concrete, and the work which was being conducted in the ceiling and surrounding the ceiling by the Respondent Company could only have been adequately protected by safety nets as required under this citation. It is generally agreed by the parties that lifelines and belts would not have accomplished ~~compliance~~ with necessary safety precautions in this instance.

In hearing various cases of this type, involving safety protection for construction workers, it appears to this Hearing Officer that there are two critical areas which I do not find adequately covered under the regulations, and which no counsel has thus far quoted to me which address the problems referred to.

The two problems of which I speak are the erection of safety devices to be used in construction work and the dismantling of the same device.

The regulations provide for certain precautions to be made to workers who are working in certain areas and under certain conditions, but I find no criteria to determine what protection the persons should have, who are in fact constructing or bringing about the safety devices which are proper to use in the construction in question, as well as no direction in the dismantling of those same protective devices. It is academic to state that in order for nets, guardrails, or whatever protection are required, that someone put in place these nets and guardrails, platforms and scaffolds, or whatever may be required, and by necessary logic, the same protective material must be dismantled and removed. The two critical periods thus addressed are the construction of the safety features themselves for the protection of workers who will be working in the area, and the dismantling of those safety devices or equipment as the case may be.

Of necessity, there is a greater danger to any employee in initially installing the protective device that is called for, and in dismantling the device as opposed to the worker who is performing the construction work after the protective measures have been taken.

It is essential, and certainly the intention of the act, that employees be adequately protected while performing the tasks required of them. It is also necessary for some person or employee

to erect the safety equipment which will make it safe for those employees to work. A greater danger exists to the person installing and dismantling the protective measures than exists once they have been installed and workers are working in compliance and with the safety features installed. In hazardous work, such as we have in this case, the employer must use every reasonable means to protect his employees from danger, but in no case can he be an insurer of every danger that exists, but must only be required to comply with the standards, insofar as it is possible to do so, and to do what is reasonably necessary to insure the safety of his employees in conformity with the act.

There is much authority, both for the Complainant and the Respondent as to whether or not the Respondent had attempted to comply with the act in every reasonable way, or whether because of the conditions that existed it was impossible for him to do so in this case.

Complainant has cited Taylor Building Associates, as reported at OSHRC Docket #3735, CCH ¶21,592 (1977), and which is certainly in point and held essentially that it was erroneous for an Administrative Judge to find that safety nets would have interfered with movement of a crane which was raising steel beams into position. This decision was rejected because the employer could have used a derrick instead of a crane to raise the steel beams, and although it would have been more costly, it was decided that it would not have been impossible to have done so, and thus, there was a violation, contrary to the finding of the Administrative Judge.

The other case stated by Complainant of State Painting Company, Inc., as reported at OSHRC Docket #77-1086, CCH ¶22,678 (1978), is also pertinent in showing that mere interference with work is not enough, and that impossibility of compliance needs to be shown, in order to avoid compliance with the act.

On the other side, Respondent has cited some cases from the Federal Courts which are generally in line with his proposition concerning the reasonableness of the use of protective equipment and those cases do hold that there is a degree and standard of reasonableness which the Courts have followed in determining whether or not protective equipment should have been worn or used by employees (citing the cases in Respondent's Brief).

There have been cases which have held that other fall protection is sufficient in an alleged violation of 29 CFR 1926.105(a), in that, a plywood platform on which work was being performed constituted an alternative safety device, and that it was not necessary to provide safety nets for workers at heights of about 100 feet. This case cites the Circuit Appeals Court ruling in Ron M. Fiegen, which is reported at CCH ¶19,452, in which the Court held that 29 CFR 1926.105(a) was ambiguous and that failure to use the safety net was not a violation when employees were working on a scaffold on a temporary floor. That would seem to be a factual situation analogous to the facts in this case.

In Carr Erectors, Inc., CCH ¶20,773, it was held that the Judge properly vacated a charge of violating the safety net

requirements of 29 CFR 1926.105(a) where a pic or ladder like platform from which employees worked between roof beams served as an alternative protection contemplated by the standard. In this case, although a safety net was not provided two employees involved were working from a pic, described by Complainant as an aluminum ladder type platform, approximately 20 feet long and 20 to 25 inches wide. The Court held that inasmuch as the employees were provided with and used an alternative safety device contemplated by the standard, that a violation of the standard did not exist for failure to provide safety nets, and that that fact had not been established, citing cases from this split decision.

In Allied Structural Steel Company, CCH ¶19,184, the Commissioners reversed an administrative law Judge's decision that a violation of 29 CFR 1926.105(a) being the use of safety nets, may only be successfully alleged where the use of ladders, scaffolds, or safety belts are impractical.

In Isaacson Structural Steel Company, CCH ¶19,592, a Judge was affirmed in vacating charges of violation of 29 CFR 1926.28(a) and 1926.105(a) for failure to protect workmen erecting a log deck over water with safety belts and nets. An employee standing on top of an inverted a-frame support had no way in which to tie a safety belt and that there was no way that safety nets could have been strung. The Commissioners concluded that in this case there was no way that safety nets could be hung, and even if they could have been hung that the cables being used by the paper mill in pulling logs would have torn the nets, thus holding that

the nets would have to be placed so that work could have been performed in their presence.

In Albericii-Koch-Laumand, CCH ¶20,495, citations issued for failure to use protective equipment under 1926.28 and failure to erect safety nets under 1926.105(a) were vacated because the use of safety nets would have made the job impossible to perform. The reason for the impossibility was that it would have been impossible to raise steel through the net, and that safety belts were not used and that the safety nets could not be used because of this fact. Complainant, in this case, argues that the plywood board could have been removed and the pics then moved to the end of the building, at which no work was being performed, and at which no safety net was present. This overlooks the premise that the accident occurred because of the removal of the plywood boards and not the lowering of the pics.

The proof of the Complainant is that if the safety nets had been tied flush to the elevator shaft that it would have provided protection for this particular worker who happened to fall through this small hole caused by the removal of the plywood, but would not have extended 8 feet under the area, as described in the regulation, and that there was no way that the net could have in any instance extended to that point.

It appears from the facts in this case to your Hearing Officer, that the employer did everything that was reasonable to do to insure the safety of his employees. The employer carefully planned the operation, engaged a safety engineer, and devised a

method which it felt was the safest way in which to accomplish the task. The nets that were strung, were, according to my judgment of the testimony, hung as near to the elevator shaft as it could be, without impeding the operation of the elevators, or taking the chance that the elevator would entangle in the net, thus tearing down the net, and possibly causing failure of the elevator or some other accident to occur. It must be remembered that the accident occurred in the dismantling of the protective devices, and did not occur during the ordinary construction process which had been carried on for some four months.

It is the feeling of the Hearing Officer that it would have been impossible to have complied with the standard insofar as the use of safety nets was concerned in covering every area that it was necessary to cover to protect employees who were dismantling the scaffold or flooring which was used as a safety measure.

FINDINGS OF FACT

It is found as a matter of fact as follows:

1. That an employee of the Respondent Company did fall to his death as a result of falling through a hole which was opened by he and a fellow worker in dismantling a plywood flooring which was held in place by a hanging scaffold supported by pics.

2. That safety nets were hung to cover as much of the building as was possible in view of the elevator structure, and that it would not have been possible to have strung a net under the area in which the employee was working at the time of his unfortunate fall.

3. That in no event could the net have in anywise been hung so that it would have complied with the standard, to have been 8 feet beyond the area to be protected.

4. That the employer did all that could reasonably have been expected of him to do in attempting to provide a safe place to work, and in attempting to comply with the provisions of the standards cited.

CONCLUSIONS OF LAW

It is concluded as a matter of law as follows:

1. That jurisdiction of the subject matter and the parties exists.

2. That all proper procedural guarantees and standards were adhered to, and that proper procedure was used in arriving at the proposed penalty.

3. That it is not necessary for the Respondent to specifically plead impossibility of performance as an affirmative, but a general denial is sufficient under the existing rules.

4. That it is within the discretion of the Hearing Officer to permit filing of an Answer at the time of the Hearing, or beyond the time required by the rules, unless the Complainant can show some prejudice or surprise to his detriment in permitting such an Answer to be filed.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

That the citation against the Respondent herein may be

and the same is hereby dismissed, and the proposed penalty is hereby vacated.

JOHN T. FOWLER, SR.
Hearing Officer

DATED: January 30, 1979
Frankfort, Kentucky

DECISION NO. 668