

# STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

## DEPARTMENT OF LABOR

P.O. BOX 21149  
JUNEAU, ALASKA 99802-1149  
PHONE: (907) 465-2700

### OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD

FAX: (907) 465-2784

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DONALD F. HOFF, JR.  
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HEARING OFFICER

STATE OF ALASKA,	)
DEPARTMENT OF LABOR,	)
	)
Complainant,	)
	)
vs.	)
	)
STEEL ENGINEERING	)
AND ERECTION, INC.,	)
	)
Contestant.	)

Docket No. 90-850  
Inspection No. Ku-9353-657-90

### DECISION AND ORDER

This case arises from occupational safety and health citations issued by the State of Alaska, Department of Labor (Department) to Steel Engineering and Erection, Inc. (SEEI) following the investigation of a fatal accident at SEEI's workplace in Unalaska on July 11-12, 1990.

As a result of the inspection, the Department cited SEEI for a "serious" violation of Alaska Construction Code 05.050(f)(1) for allowing employees to work on a large open skeletal steel structure at heights in excess of 25 feet without the protection of a safety net or safety belts and lines. A monetary penalty of \$1,000 was assessed.

SEEI timely contested the Department's citation. A hearing was held before the Board in Anchorage on April 23, 1991. The Department was represented by Assistant Attorney General Toby Steinberger. SEEI was represented by Construction Manager Dan Davidson. Both parties presented witness testimony and documentary evidence. Upon review and consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order.

#### FINDINGS OF FACT

1. On July 11, 1990, Department compliance officer Dick Kukowski was dispatched to investigate a fatal accident involving one of SEEI's employees at a construction site at Captain's Bay in Unalaska, Alaska.

2. At the construction site, SEEI was erecting a large steel structure to be used as a fish processing facility. The building under construction measured approximately 200 feet by 200 feet, with a sloped roof approximately 53 feet high at the apex and 34 feet high at the eaves. See Exhibits 1 and 5.

3. On the morning of July 11, 1990, SEEI's employees Monty Sambo and Don Smith were laying out sheets of galvanized metal roofing on top of the skeletal steel structure. The sheets weighed about 70 pounds each and were to be placed side by side prior to being welded onto the structural frame of the building. See Exhibits 2, 3 and 4.

4. Both Sambo and Smith were experienced ironworkers. Sambo had flown in on the previous day to work on the project. He was primarily responsible for laying the roofing sheets in place while Smith welded the sheets onto the frame. SEEI's superintendent Gary Swanson was supervising the work from the ground.

5. While laying a roofing sheet near the apex of the building, Sambo stepped on another sheet that had not yet been welded to the frame. The sheet gave way under Sambo's feet and he fell approximately 50 feet to the concrete floor below. Sambo died of injuries from the fall.

6. At the time of the accident, SEEI was not using either safety nets or safety belts attached to lines to protect employees from falling. SEEI had safety belts available but had not required employees to use them. After the accident, at the suggestion of compliance officer Kukowski, SEEI set up a safety line along the apex of the building and directed its employees to use safety belts tied off to the line.

7. SEEI did not use safety nets at the Unalaska worksite or at other construction sites because it felt that safety nets were impractical to cover such a large area and would interfere with such obstacles as beams and guy wires. SEEI supplied letters from other steel erection companies and unions indicating that it was not standard industry practice to use safety nets. Compliance officer Kukowski acknowledged that he had never seen safety nets at a steel erection worksite and had seen safety

lines used at only a small percentage of worksites. While it might be inconvenient or impractical to use safety nets or belts at the Unalaska worksite, Kukowski believed that either method of fall protection was feasible.

8. Instead of using safety nets or belts with lines, SEEI used what is known in the industry as the "leading edge method" to install roof decking. Under this method, each roofing sheet is laid out from the center to the edge of the roof and welded down to the supporting frame before a worker steps on that sheet. This method is designed to assure that there is a safe distance from the edge of the structure and that workers do not walk on unsecured sheets. The leading edge method, coupled with a safety monitor system, was adopted by the state of Washington in 1991 but apparently has not been adopted in any other jurisdiction. SEEI conceded that there was no designated safety monitor at its Unalaska worksite.

9. Apart from the leading edge method, SEEI maintained there are additional ways to protect workers on roofs, such as with a block and cable system allegedly approved by federal OSHA. SEEI asserted that using either the leading edge method or a block and cable system would be more practical than using safety nets or belts. SEEI further stated that for several years it has been seeking an amendment to the Alaska standard to allow for alternative methods of fall protection but has been unsuccessful.

10. It is undisputed that SEEI did not request the Department to issue a variance from the safety net requirement prior to work at the Unalaska construction site.

11. The Department's citation was classified as "serious" due to the significant potential for serious injury or death in the event of an accident, as evidenced by the death of SEEI's employee Monty Sambo. Furthermore, because a serious accident actually occurred, the maximum statutory penalty of \$1,000 was assessed against SEEI with no mitigation or reduction factors applied.

#### CONCLUSIONS OF LAW

Alaska Construction Code 05.050(f)(1) provides:

Safety nets shall be provided when work places 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 are impractical. In addition to rope nets, safety belts and safety lines shall be used on such structures as theaters, auditoriums, towers, and bridges. Safety belts may not be used in lieu of nets.

It is undisputed that SEEI's employees were working at heights in excess of 25 feet and that no safety nets or safety belts were used. SEEI was well aware of this situation, yet made no request for a variance from the requirements of this standard. Under these circumstances, we conclude that the Department has clearly made out a prima facie case that SEEI violated this standard.

In response, SEEI acknowledges that it did not comply with the standard but raises a number of affirmative defenses as

to why it would be inappropriate to enforce this violation. The employer has the burden of proving any affirmative defenses by a preponderance of the evidence. See Mississippi Valley Erection Co., 10 OSHC 1527, 1973-74 OSHD ¶ 17,098 (1973).

SEEI's basic defense is that the use of safety nets to protect employees working at heights over 25 feet is impractical, interferes with the performance of the work, and is not standard practice in the industry. However, cases decided under the federal OSHA Act, on which Alaska's OSHA law is based, indicate that these arguments have been rejected by both the federal OSHA review commission and the federal courts. See United States Steel Corp. v. OSHRC, 537 F.2d 780 (3rd Cir. 1976); Secretary of Labor v. Corbesco, Inc., 14 OSHC 1500 (Review Commission ALJ 1990).

We see no reason why the relevant federal case law should not be followed in this case. SEEI made no showing that it was functionally impossible to use safety nets at the worksite. While safety nets may have been cumbersome or inconvenient -- a fact acknowledged by the Department -- SEEI could have taken alternative means of protecting employees such as with safety belts and lines which were available for use. Indeed, the Department's accident prevention recommendation after the accident was that "[t]he employer should have installed stanchions on the rakes of the roof and strung a lifeline between them for employees to tie off with a lanyard and safety harness. This would have prevented the employee from falling to the ground." See Exhibit B.

SEEI also argues that the use of safety nets or belts would pose a greater risk to employees than not using them. Under OSHA law, the scope of the "greater hazard" defense has been quite limited. See Rothstein, Occupational Safety and Health Law, § 121 (3d ed. 1990). For this defense to prevail, the employer must prove that: (1) the hazards of compliance are greater than the hazards of noncompliance; (2) alternative means of protecting employees are unavailable; and (3) a variance application would be inappropriate. See Noblecraft Industries, Inc. v. Secretary of Labor, 614 F.2d 199, 205 (9th Cir. 1980). Despite SEEI's concerns about the hazards of erecting safety nets or tripping over safety lines, there was no showing that these hazards are greater than the danger of not using nets or belts at all. Tripping over a line attached to a safety belt is a minor hazard compared to falling 50 feet to the ground. Moreover, if SEEI truly believed that using nets or belts would create a greater hazard, it could have petitioned the Department for a variance but did not do so. SEEI clearly has not met its burden of proof as to the "greater hazard" defense.

While the use of safety nets or belts may be considered impractical or inconvenient by SEEI and others in the industry, we are especially troubled by the fact that SEEI took no reasonable measures at all to protect Monty Sambo from falling to his death. SEEI's superintendent at the worksite acknowledged to compliance officer Kukowski that he was aware that Sambo had not worked for some time prior to the accident and that Sambo might have had a

hearing or balance problem as evidenced by his wearing of a hearing aid. Despite these warning signs, SEEI took no special precautions with regard to Sambo working on the roof. In addition, the police report of Sambo's death further indicates that immediately prior to the accident, Sambo had stepped on unsecured sheeting a number of times, yet the SEEI superintendent on the ground failed to monitor the situation or take appropriate corrective action. From the facts and circumstances presented to us, we believe this accident was entirely preventable.

We further conclude that SEEI's proposals regarding alternative means of protection for employees working at heights of over 25 feet are outside the scope of this proceeding. This is an adjudicatory enforcement proceeding; it is not a forum for considering requests to change or amend OSHA standards. The current code provision requires the use of safety nets and belts; it is our responsibility to apply the law currently in effect. If SEEI and others in the industry believe the existing standard is inappropriate or ineffective, they may petition the Department to change the standard or grant a variance.

Finally, we have reviewed the Department's classification of the violation as "serious" and the assessment of the \$1,000 penalty. SEEI made no specific arguments with respect to either of these issues. We find no reason to disturb the Department's violation classification or proposed penalty amount.

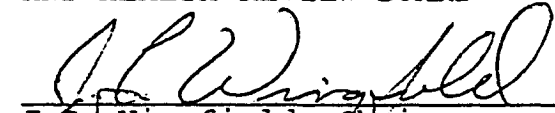


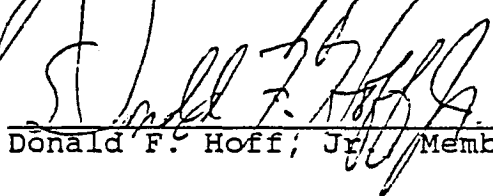
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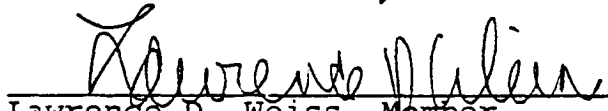
Based on the foregoing findings of fact and conclusions of law, the Board determines that the Department's citation and penalty should be AFFIRMED as cited.

DATED this 17<sup>th</sup> day of July, 1991.

ALASKA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

  
\_\_\_\_\_  
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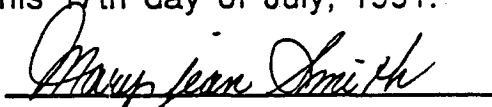
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P.O. BOX 21149  
JUNEAU, ALASKA 99802-1149**

**NOTICE TO ALL PARTIES**

A person affected by an Order of the OSH Review Board may obtain a review of the Order by filing a complaint challenging the Order in Superior Court. The affected person must file the complaint within 30 days from the date of the issuance of the Order by the OSH Review Board. After 30 days from the date of the issuance of the Order, the order becomes final and is not subject to review by any court. AS 18.60.097(a).

**CERTIFICATION**

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of the Alaska Department of Labor vs. Steel Engineering and Erection, Inc., Docket No. 90-850, filed in the office of the OSH Review Board at Juneau, Alaska, this 17th day of July, 1991.

  
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Mary Jean Smith  
OSH Review Board

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