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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 92-262
ARMSTRONG STEEL ERECTORS, INC.	:	
Respondent.	:	

DECISION

Before: WEISBERG, Chairman, and MONTOYA, Commissioner.

BY THE COMMISSION:

Armstrong Steel Erectors, Inc. (''Armstrong'') was widening and rehabilitating a bridge on Interstate 70 in Ohio when its worksite was inspected by a representative of the Occupational Safety and Health Administration (''OSHA''). As a result of the inspection, the Secretary of Labor (''the Secretary'') issued a citation alleging that Armstrong had violated various OSHA safety standards. Armstrong contested that citation, a hearing was held, and Administrative Law Judge Michael Schoenfeld issued his decision vacating one item and affirming the rest. Armstrong sought review of that decision by the Commission, and review was directed pursuant to 29 U.S.C. § 661(j), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (''the Act''). Four items are before the Commission on review. Three of them allege that Armstrong failed to use guardrails on various surfaces to protect its employees from falling, while the fourth alleges that the company failed to guard protruding reinforcing steel. For the reasons below, we affirm the judge's disposition of each of the items on review.

I.

When the inspection took place, the concrete piers which would support the bridge had been completed, and construction had reached the stage in which the steel support for the bridge deck was being installed. Large metal I-beams called girders were laid across the piers parallel to each other eight feet apart. The girders, which were eighteen inches wide and three feet high, had to be welded to metal ''rockers'' on top of the piers, and metal angle irons had to be welded between the girders to provide bracing.

Item 4 of the citation alleged a serious violation of 29 C.F.R. § 1926.500(d)(2)[1] for failure to install guardrails on runways between the girders. To carry the angle irons (''angles'') used as cross-bracing to the locations where they would be used,[2] Armstrong's employees walked along the girders eighteen feet above the ground. To get from one girder to another, the employees laid sixteen-foot-long 2 x 12 planks across the girders, with each end and the middle of the plank resting on a girder. The employees then walked along the planks. To gain access to the girders in the first place, the employees also rested one end of a 2 x 12 plank against the end of the girder, with the other end on the ground, and walked up the plank.

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 either 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);

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[1]Section 1926.500(d)(2) provides:

> **§ 1926.500 Guardrails, handrails, and covers.**
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> . . . .
>
> (d) *Guarding of open-sided floors, platforms, and runways.*
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> . . . .
>
> (2) Runways shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f) of this section, on all open sides, 4 feet or more above floor or ground level. Wherever tools, machine parts, or materials are likely to be used on the runway, toeboard shall also be provided on each exposed side.

[2]The ''angles'' were approximately eight feet long.

Astra Pharmaceutical Prods., Inc., 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The dispute is whether these planks are runways within the purview of the standard. ''Runway'' is defined in 29 C.F.R. § 1926.502(f) as ''A passageway for persons, elevated above the surrounding floor or ground, . . .'' The planks in question fit within that definition. We therefore find that the planks across the tops of the girders were runways. The standard applies and the planks must comply with all the requirements for runways, including the requirement for guardrails. Since the planks did not have guardrails, Armstrong's employees were exposed to this condition, and Armstrong's management officials were aware of the absence of guardrails, the Secretary has established a *prima facie* violation.

Armstrong presented evidence from a number of witnesses familiar with the bridge-building industry that they had never seen guardrails on a 2 x 12 plank. Even if this is true, it does not mean that the planks in question are not runways or that they are not required to comply with section 1926.500(d)(2). The fact that an employer's conduct is consistent with the normal practice of its industry is not relevant if the standard unambiguously prescribes a different course. *Carlisle Equipment Co. v. Secretary*, 24 F.3d 790, 793-94 (6th Cir. 1994); *Williams Enters.*, 13 BNA OSHC 1249, 1253, 1986-87 CCH OSHD ¶ 27,893, p. 36,585 (No. 85-355, 1987) (citing *Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1117, 1986-87 CCH OSHD ¶ 27,892, pp. 36,428-29 (No. 84-696, 1987) and cases cited therein). Armstrong's evidence that industry practice is not to put guardrails on surfaces used as runways is therefore irrelevant, because the cited standards clearly mandate the use of guardrails. Contrary to Armstrong's suggestion, there is no need here to look to industry practice to clarify any ambiguity in the standard, which unambiguously requires the use of guardrails on runways.[3]

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[3]We also find no merit to two other arguments Armstrong makes regarding the guardrail citations. General fall protection standards in 29 C.F.R. Part 1926 apply to steel erection activities when there is no steel erection standard that is more specifically applicable. *Bratton Corp.*, 14 BNA OSHC 1893, 1896, 1987-90 CCH OSHD ¶ 29,152, p.38,992 (No. 83-132, 1990). The general fall protection standards cited here are not preempted by a more specifically applicable steel erection standard and therefore are properly cited. Armstrong's argument regarding the burden of proof under 29 C.F.R. § 1926.28(a) is not relevant here because Armstrong has not been cited for a violation of that standard.

Infeasibility.

Armstrong asserts that compliance with this standard is infeasible. In order to establish the affirmative defense of infeasibility, an employer must prove that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection. *Gregory & Cook, Inc.*, 17 BNA 1189, 1190, 1995 CCH OSHD ¶ 30,757, p. 42,734 (No. 92-1891, 1995); *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1416, 1992 CCH OSHD ¶ 29,546, p. 39,907 (No. 89-1027, 1991). The employer is required to raise this and any other affirmative defense in its answer. Rule 34(b)(3) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.34(b)(3).[4] Failure to raise a defense in the answer may preclude its being raised later. Rule 34(b)(4), 29 C.F.R. § 2200.34(b)(4).[5] Armstrong did not raise this defense in its answer. Nevertheless, an employer may overcome this failure and have the merits of the defense considered if it can show that the pleadings should

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[4]Rule 34(b)(3) provides:

> **§ 2200.34 Employer contests.**
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> . . . .
>
> (b) *Answer.*
>
> . . . .
>
> (3) The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, "infeasibility," "unpreventable employee misconduct," and "greater hazard."

[5]Rule 34(b)(4) provides:

> **§ 2200.34 Employer contests.**
>
> . . . .
>
> (b) *Answer.*
>
> . . . .
>
> (4) The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.

be amended to conform to the evidence under Rule 15(b) of the Federal Rules of Civil Procedure.[6] The employer may accomplish this by showing that the issue was tried by the consent of the parties.

Under Federal Rule 15 (b), which applies to Commission proceedings under section 12(g) of the Act, 29 U.S.C. § 661(g), consent to try an unpleaded issue may be express or implied, but it occurs only when the parties squarely recognized that they were trying an issue not raised in the pleadings. *McWilliams Forge Co.*, 11 BNA OSHC 2128, 2129-30, 1984-85 CCH OSHD ¶ 26,979, p. 34,669 (No. 80-5868, 1984). Failure to object to evidence relevant to the unpleaded issue may indicate consent, but not if the evidence is also relevant to a pleaded issue. *Id.* 11 BNA OSHC at 2130, 1984-85 CCH OSHD at p. 34,669; *McLean-Behm Steel Erectors v. OSHRC*, 608 F.2d 580, 582 (5th Cir. 1979).

We find that the parties did not try the issue of the infeasibility of guardrails by consent. The record here indicates that Armstrong used the planks so that its ironworkers could transport the angle irons to the locations where they would be welded into place between the girders as braces. Armstrong presented evidence, much of it over the Secretary's objection, that its employees could not carry the angle irons with guardrails in place. A preponderance of the evidence indicates that, on 2 x 12 planks, this is so. However, the Secretary may rebut such

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[6]Rule 15(b) provides:

> **Rule 15. Amended and Supplemental Pleadings**
>
> . . . .
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> (b) **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

a showing with evidence of other feasible abatement methods. The Secretary attempted to explore whether it would be feasible to use guardrails if the runways were wider. Armstrong objected to this evidence, and the judge did not admit it. This evidence is relevant, however, because an employer cannot sustain the infeasibility affirmative defense if it has elected to use a particular kind of material or equipment that is inadequate to comply with the standards. Every employer has the duty to use equipment that permits it to comply with the Secretary's standards. *Williams Enters.*, 13 BNA OSHC at 1253, 1986-87 CCH OSHD at p. 36,585-86. The feasibility of using material that would accommodate guardrails was therefore relevant to an element of the infeasibility defense.[7] By objecting to this evidence, Armstrong prevented the Secretary from fully and fairly litigating all the elements of the affirmative defense.

The Secretary also attempted to explore an important element of the affirmative defense, that alternate means of protection were used or were not available. However, when he attempted to show that a "high line" cable could have been erected as a safety line to which Armstrong's employees could attach the lanyards connected to their safety belts, Armstrong again objected. That evidence was also excluded by the judge. Again, because the evidence was relevant to an element of the affirmative defense, Armstrong's objections prevented a full and fair exploration of the question. We therefore find that the affirmative defense was not tried by the parties. Consequently, we cannot amend the pleadings to assert that defense. Since no defense to the Secretary's *prima facie* case has been established, we find that a violation has been proved.

The Secretary alleged and the judge found that the violation was serious. A violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), if it creates a substantial probability of death or serious physical harm. The unguarded runways were 18 feet above ground level. The likely result of an eighteen-foot fall is serious injury. The violation is therefore serious.

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[7]On review, Armstrong argues that the width of the cited surface is a matter for the standards and that the standards do not require a wider surface. That argument overlooks the fact that the feasibility of using a wider surface is relevant rebuttal to Armstrong's evidence that it is not feasible to put guardrails on the narrow surfaces cited here. This is an issue Armstrong has attempted to raise as a defense to its failure to meet the standard's requirements. The Secretary is therefore entitled to explore Armstrong's assertion and offer rebuttal evidence.

The judge assessed a penalty of $1,000 for this violation. On review, neither party has challenged that assessment, and we find no reason to disturb the judge's assessment.

II.

Item 2 of the citation alleged a serious violation of 29 C.F.R. § 1926.451(a)(4)[8] for Armstrong's failure to install guardrails and toeboards on "painters' picks," the surfaces from which Armstrong's ironworkers worked when they welded angle irons into position as cross-braces between the girders. A "painters' pick" is made of boards joined in such a way that the length of the pick was adjustable. The picks were placed on the bottom flanges of the three-foot-high I-beams, and a nail was driven into the pick to keep it from closing unexpectedly. The Secretary asserts that the telescoping wooden "painters' picks" on which Armstrong's employees positioned themselves to perform work were scaffolds, a characterization Armstrong disputes.

The Commission has held that whether a surface is a platform is a question of fact to be answered by examining the characteristics of the surface and determining whether they fit within the definition of a platform. *Superior Elect. Co.*, 16 BNA 1494, 1496, 1994 CCH OSHD ¶ 30,286, p. 41,721 (No. 91-1597, 1993); *see also S.G. Loewendick & Sons*, 16 BNA 1954, 1956, 1994 CCH OSHD ¶ 30,558, p. 42,285 (No. 91-2487, 1994)(personnel platform). We now hold that the same is true of a scaffold: whether a surface constitutes a scaffold is a question of fact to be answered by comparing the definition of a scaffold to the characteristics of the surface in question. The term "scaffold" is defined in 29 C.F.R. § 1926.452(b)(27) as

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[8]Section 1926.451(a)(4) provides:

> **§ 1926.451 Scaffolding.**
>
> (a) *General requirements.* (1) Scaffolds shall be erected in accordance with requirements of this section.
>
> . . . .
>
> (4) Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor, except needle beam scaffolds and floats (see paragraphs (p) and (w) of this section). Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

''Any temporary elevated platform and its supporting structure used for supporting workmen or materials, or both.'' The term ''Platform'' is defined in 29 C.F.R. § 1926.502(e) as ''a working space for persons, elevated above the surrounding floor or ground, ...''

Here, the painters' picks clearly were working spaces for persons, elevated above the surrounding floor or ground. Consequently they fall within the definition of the term ''platforms.'' Because the painters' picks were moved frequently during the job and would be removed from the worksite when steel erection was completed, they were temporary. They therefore fit the definition of a scaffold. Accordingly, on this record, we find that the painters' picks were shown to be scaffolds.

We do not find that the painters' picks were excepted from the requirement to use guardrails as Armstrong claims. Although the standard excepts certain types of scaffold from this requirement, Armstrong does not claim, nor does it appear from the record, that its scaffolds are one of the types excluded. A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception. *Article II Gun Shop*, 16 BNA OSHC 2035, 2039, 1994 CCH OSHD ¶ 30,563, p. 42,302 (No. 91-2146, 1994) (consolidated). Armstrong has made no attempt to carry that burden.

We also find that Armstrong has not proven that alternate protection was used. Armstrong asserts, ''In all instances the employees are on these planks, they tie off with their safety belt [sic] to either install the braces or perform their welding operations.'' The record does not fully support that assertion, however. One of Armstrong's employees admitted to the compliance officer that he did not tie off when he was working on the painters' picks. Even if Armstrong's claim were correct, it would not negate a violation. Although the evidence of tying off might be relevant to the alternative means of protection element of an affirmative defense, safety belts are not ''equivalent protection'' when the standard requires guardrails. *Brown & Root Inc., Power Plant Div.*, 10 BNA OSHC 1837, 1840, 1982 CCH OSHD ¶ 26.159, p. 32,966-67 (No. 77-2553, 1982) (violation of 29 C.F.R. § 1926.500(d)(1) (citing *Warnel Corp.*, 4 BNA OSHC 1034, 1975-76 CCH OSHD ¶ 20,576 (No. 4537, 1976)).

Armstrong also argues that using guardrails on these surfaces would be infeasible, but the company did not raise that defense in its pleadings. As with item 4, we find that the

elements of the affirmative defense were not tried by consent of the parties. Although both parties introduced evidence on this question, each party objected to evidence offered by the other that was relevant to the elements of the affirmative defense. Because the affirmative defense of infeasibility was neither pleaded nor fully tried by consent of the parties, we need not decide whether that defense was proved.

The violation was alleged to be serious. Because it involved a potential fall of fifteen feet, we find that it was serious.

The judge assessed a penalty of $1,000 for this item. Neither party has disputed the appropriateness of that amount on review. Accordingly, we will not disturb the judge's assessment.

III.

Item 3 of the citation alleged a serious violation of 29 C.F.R. § 1926.500(d)(1)[9] for failure to have guardrails around the tops of the concrete piers supporting the bridge. Armstrong's employees worked from the tops of the piers, performing welding and other work. The issue in dispute is whether these surfaces are platforms.

The term "platform" is defined in 29 C.F.R. § 1926.502(e) as "a working space for persons, elevated above the surrounding floor or ground." The piers in question were ten feet long and 30 inches wide. They ranged in height from twelve to fifteen feet. Steel "rockers" were attached to the tops of the piers, and the girders were welded to the rockers. Armstrong's employees stood and walked atop the piers. To do the necessary welding, they would squat,

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[9]Section 1926.500(d)(1) provides:

> **§ 1926.500 Guardrails, handrails, and covers.**
>
> . . . .
>
> (d) *Guarding of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

kneel, or even lie on the piers, sometimes with their bodies extended over the edge. Both Armstrong's foreman and the union steward testified that they did not tie off when working atop the piers. The employees therefore had no protection from the possibility of falling.

We find that the piers were working spaces for Armstrong's employees and were elevated above the surrounding floor or ground. We do not accept Armstrong's claim that section 1926.500(d)(1) does not apply when employees are working over water. The standard applies to a fall to the adjacent floor or to ground level. It does not specify that the fall distance must be to the earth. Whether we consider the "ground level" to be the surface of the water or the bed of the river, which would be a greater distance, the intent of the standard is to prevent falls from platforms. We therefore hold that section 1926.500(d)(1) does apply when the surface below is water.

On review, Armstrong does not pursue its argument that it has established the infeasibility defense as to this item. The judge concluded with respect to this item that the defense was not properly before him but went on to find that it had not been proved. In view of Armstrong's failure to argue here the infeasibility of guardrails on the pier caps, we need not address that issue.

The violation was alleged to be serious. In view of the distance of the potential fall, we find that it was properly characterized as serious.

The judge assessed a penalty of $1,500 for this item. On review, neither party has disputed the appropriateness of that assessment. We therefore leave the judge's determination undisturbed.

IV.

The final item on review alleges that Armstrong violated 29 C.F.R. § 1926.701(b)[10] by

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[10]Section 1926.701(b) provides:

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

failing to guard the reinforcing rods that protruded upright from concrete below the planks at the ends of the girders giving access to the girders from the ground.

The exhibits show that there were two rows of steel reinforcing rods (''rebars'') approximately a foot apart, that protruded from a concrete footing. The rebars in one row were substantially longer than those in the other and were bent into a ''U'' shape in such a way that, for the most part, they overlapped the rebars in the shorter row, so the longer rebars not only guarded themselves but also partially guarded the other row. Although Armstrong believed that the longer rebars provided adequate guarding for the shorter ones, the compliance officer testified that, if an employee walking above the rebars were to fall, he could fall in such a way as to push aside the longer ones and land on the unbent rebars, possibly impaling himself. While this sequence of events appears remote, the record does support the compliance officer's opinion that it was technically possible. We therefore find that the shorter row of rebar was not adequately guarded to eliminate the hazard of impalement. Armstrong's employees did traverse the planks above this rebar, and the company knew of the situation, since it had made the decision to bend the rebar this way. The Secretary has therefore established the elements of a violation. The hazard addressed by the standard is impalement on the protruding rebar, a serious injury. The violation must therefore be characterized as serious.

The Secretary proposed a penalty of $1,750 for this violation, based on the factors established by the Secretary's internal procedures. The judge concluded that most of the rebar was guarded and that the likelihood of an accident was relatively slight. He therefore found that a penalty of $500 was appropriate. We agree with the judge's assessment. The likelihood of an accident is one of the factors to be considered in determining the gravity of a violation, along with the number of employees exposed, the duration of their exposure, and the precautions taken to prevent an accident. *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1007, 1995 CCH OSHD ¶ 30,635, p. 42,444 (No. 92-424, 1994). Armstrong had ten employees at this site. They walked briefly along the plank above the rebars, and one row of rebars was bent over in such a way that it not only was completely guarded itself, but also partially guarded the other row. The exhibits make it clear that it is unlikely that an employee would fall in such a way as to be impaled. Accordingly, we consider this a technical violation. We deem this violation to be of low gravity and affirm the judge's assessment of a $500 penalty.

V.

For the reasons above, we affirm items 2, 3, 4, and 5 of the citation as serious violations. We assess penalties of $1,000 for item 2, $1,500 for item 3, $1,000 for item 4, and $500 for item 5.

Stuart E. Weisberg
Chairman

Velma Montoya
Velma Montoya
Commissioner

Dated: September 20, 1995

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SECRETARY OF LABOR, Complainant,	:	
v.	:	Docket No. 92-262
ARMSTRONG STEEL ERECTORS, INC., Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 20, 1995. **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

Dated: September 20, 1995

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-262

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
ARMSTRONG STEEL ERECTORS, INC.
Respondent.

OSHRC DOCKET
NO. 92-0262

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 December 9, 1993. The decision of the Judge will become a final order of the Commission on January 10, 1994 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 December 29, 1993 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
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1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. / JKA

Date: December 9, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0262

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SECRETARY OF LABOR,

Complainant,

v.

ARMSTRONG STEEL ERECTORS, INC.,

Respondent.

OSHRC Docket No. 92-0262

Appearances:

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Office of the Solicitor
U.S. Department of Labor
For Complainant

Roger L. Sabo, Esq.
Schottenstein, Zox & Dunn
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by compliance officers of the Occupational Safety and Health Administration ("OSHA"), Armstrong Steel Erectors ("Respondent"), was issued one citation alleging 5 serious violations of the Act (Citation 1) and one citation alleging one other than serious violation of the Act (Citation 2). Penalties of $11,750 and $500 were proposed for the serious and other than serious violations, respectively. Respondent timely

contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in Columbus, Ohio. No affected employees sought to assert party status. Both parties have filed post-hearing briefs and proposed findings and conclusions.

Jurisdiction

Complainant alleges and Respondent does not deny that at all relevant times it was an employer engaged in steel erection. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent in an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

At the time of this inspection Respondent was a subcontractor engaged in structural steel placement on two bridges, one being built and the other being widened on Interstate 70 near Springfield, Ohio. The two bridges were known as the Mad River Bridge project. The bridges, when completed, were to consist of a road-bed laid on top of structural steel. The steel beams, in turn, spanned the river and were supported by a series of seven concrete "piers" across the width of the river. The inspection in this matter was initiated as a result of an accident involving an employee of the general contractor. It was conducted pursuant to a warrant the legitimacy of which has been extensively litigated.

Citation I, Item 1
29 C.F.R. 1926.404(f)(6)

In item 1 of Citation 1, the Secretary alleges that Respondent's employees used a Bosch drill which was connected to an orange extension cord which had a missing grounding

[1] Title 29 U.S.C. § 652(5).

pin. The Secretary maintains that such a condition fails to comply with the standard at 29 C.F.R. § 1926.404(f)(6) which provides, in pertinent part;

> (6) *Grounding Path.* The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

The Secretary alleges that the violation is serious and proposed a penalty of $2,500.

The Compliance Officer ("CO") who conducted the inspection testified that he observed an employee of Respondent working on a bridge pier using a drill which was plugged into two sets of orange extension cords and that he followed the cords to a gas powered generator which was the source of the electrical power. When he tested the receptacle of the cord into which the drill was plugged, he discovered that there was an open ground. Upon inspection of the cord where it plugged into the generator he found the grounding pin was missing from the plug of the extension cord (Tr. 30-31; Ex. 3, 4, 5)[2] (See also, Videotape, Ex. 2, as described Tr. 84). He opined that in addition to the hazard of shock, since the drill was being used on a bridge pier, there was the added hazard of a fall off the elevated pier (Tr. 34-5). When asked if the drill was double insulated, the C.O. conceded on cross examination that the drill was the "grounded type" (Tr. 149). Respondent's manager/estimator, Mr. Duskey testified that he purchased eight to ten new extension cords for this project (Tr. 393, Ex. F). He believed there were a sufficient number of cords at the site so there was no reason that an employee would have to use an extension cord with a missing ground pin (Tr. 394).

The missing grounding pin was on the extension cord which was plugged into the receptacle at the generator. In order to find out that the grounding pin was missing the extension cord had to be unplugged from the generator. Respondent argues that since the missing pin was not "readily apparent and visible," it has not been shown to have knowledge of the condition. On the other hand, the Secretary argues that with reasonable diligence Respondent could have known of the missing ground pin on the extension cord.

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[2] The record of the proceedings is referred to as follows: Tr. - Transcript of Proceedings; Ex. - Exhibits. Complainant's exhibits are numbered 1 - 23, inclusive while Respondent's exhibits are identified alphabetically, A - X inclusive.

In general, to prove a violation of a standard, whether or not it is alleged to be a serious violation, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

The evidence does not show that Respondent or any of its managers or supervisors actually knew that a defective plug was being used (or even on the site). The Secretary argues that "[n]o evidence was presented by Respondent of any program to check extension cords prior to use or even before bringing them out for work each day." (Brief, p. 6) (Emphasis added). While correct in maintaining that "it is appropriate to examine whether the employer has exercised reasonable diligence to discover and eliminate violative conduct," the Secretary did not do so in this case. It is incumbent on the Secretary to present at least some evidence in support of the proposition that Respondent should have known of the violative condition, such as the lack of an adequate safety program in general, or a lack of a reasonable effort to inspect work-site conditions for hazards. *See Automatic Sprinkler Corp.*, 8 BNA OSHC 1384, 1387-88, (No. 76-5089, 1980). In the absence of some evidence presented by the Secretary, the burden does not shift to Respondent to come forward with evidence as to the existence, nature or sufficiency of a program to discover hidden defects such as the condition cited. If it is the Secretary's contention that an adequate inspection program did not exist it should have presented some evidence to that effect. What evidence there is of a safety program shows that Respondent has a written program (Tr. 339, Ex. A) and that regular safety meetings were held at the site (Tr. 151, 208, 284). It cannot, as the Secretary claims, simply be assumed that because a hidden hazardous condition existed that no sufficient program to discover such conditions was in place. The evidence as a whole

does not show that Respondent knew or with the exercise of reasonable diligence should have known of the existence of this violative condition.

Accordingly, Item 1 of Citation 1 is VACATED.

Scaffolds and Platforms
Which is Which ?

Items 2 and 3 of the serious Citation issued to Respondent deal with alleged violations of standards which apply to scaffolds or platforms, or both. Respondent challenges the applicability of the cited standards to the cited conditions. A side-by-side comparison of the two standards is helpful in framing a coherent analysis under which it can be determined which of the similar standards might apply to a given fact situation.

Subpart L - Scaffolding

1926.451 Scaffolding

(a) General Requirements

(4) Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor, except needle beam scaffolds and floats (see paragraphs (p) and (w) of this section.) Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

Definitions applicable to Subpart L

1926.452 (b) Scaffolding

(27) Scaffold - Any temporary elevated platform and its supporting structure used for supporting workmen or materials, or both.

NOTE: There is no definition of platform.

Subpart M - Floor and Wall Openings

1926.500 Guardrails, handrails and covers.

(d) Guarding of open-sided floors, platforms, and runways

(1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is an entrance to a ramp, stairway, or fixed ladder.

Definitions applicable to Subpart M

1926.502

(e) Platform - A working space for persons, elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery and equipment.

NOTE: There is no definition of scaffold.

These two standards and their general industry counter-parts[3], have been the source of much litigation. The question has most often arisen in the context of employees being exposed to a fall from the top of a product being manufactured, *General Electric Co. v. OSHRC*, 583 F.2d 61 (2d Cir. 1978) (platform standard); *Brock v. Cardinal Industries*, 828 F.2d 373 (6th Cir. 1987) or from a piece of equipment used in the manufacturing process, *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315 (8th Cir. 1981).

The Commission, however, has discussed the difference between a platform and scaffold under general industry circumstances similar to those in this construction case. In *Fleetwood Homes of Texas, Inc.*, 8 BNA OSHC 2125 (No.76-2332, 1980), the Commission held that light, moveable "spanners"[4] used at various places along the assembly line in the manufacture of mobile homes, were within the general industry definition of scaffold.[5] The Commission reasoned that;

> [t]he Secretary's standards differentiate platforms and scaffolds based on whether they are permanent or temporary working surfaces.
>
> * * *

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[3] Under the general industry standards 29 C.F.R. § 1910.21(f)(27) defines scaffold as:

> *Scaffold.* Any temporary elevated platform and its supporting structure used for supporting workmen or materials or both.

The standard ar 29 C.F.R. § 1910.21(a)(4) defines platform as follows:

> *Platform.* A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment.

As is obvious, the general industry definition of scaffold is precisely the same as the construction standard definition.

[4] The "spanners" were described as aluminum planks approximately fourteen feet long and twenty-four to thirty inches wide.

[5] Title 29 C.F.R. § 1910.21(f)(27), supra, n.2.

> We conclude that the "permanent-temporary" distinction relates to the construction and placement of the device, not to the frequency or regularity of its use in the employer's operation.

The Commission reached its decision in the *Fleetwood* case by applying its "permanent-temporary" distinction stating;

> [T]he controlling fact here is the portability of the spanners; they are not fixed, permanent immovable parts of the assembly line. Thus, the evidence showing that the spanners are portable and are moved to fit the needs of the job establishes that they are scaffolds.

Id., at 2126. The Commission, over the dissent of one of its members, held that the spanners were scaffolds. Thus, the standard cited in that case which covers platforms,[6] was held not to be applicable. The citation was vacated.

The "permanent-temporary" distinction fashioned by the Commission for application to general industry is also called for under the definitions in the construction standards. By defining platform as virtually any elevated work space and scaffold as only those elevated work spaces which are temporarily elevated, the only consistent reading of the related standards is to conclude that scaffolds are meant to be a certain sub-specie of platform. Not only is the permanent-temporary distinction consistent with the definitions but when read in this manner it is logical that scaffolds, which are temporary in nature, are required to be more rigorously guarded than are the more permanent platforms.[7] The Commission's "permanent-temporary" distinction analysis in its decision in *Fleetwood* is somewhat more

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[6] The standard cited in *Fleetwood*, 29 C.F.R. § 1910.23(c)(1), provides, in pertinent part;

> Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder.

[7] Guarding requirements for scaffolds commence at a height of 4 feet (for narrow scaffolds) while those for platforms start at 6 feet. Scaffolds must be guarded by standard guardrails while platforms may be guarded by standard guardrails or the equivalent.

difficult to apply to construction situations inasmuch as conditions at construction sites are highly transitory. Nonetheless, on construction sites the elevated surfaces on which employees work can be categorized as either permanent or temporary. Those work surfaces which are or will eventually be part of the edifice under construction are "permanent." Those work surfaces which are removable and will not be part of the finished building are "temporary."

Based on the above, I conclude that the standard at 29 C.F.R. § 1926.451(a) applies to temporary, portable, moveable elevated working spaces while the standard at 29 C.F.R. § 1926.500(d)(1) applies to fixed, permanent, immoveable work surfaces.

Citation 1, Item 2
29 C.F.R. 1926.451(a)(4)

Item 2 of Citation 1 alleged that

> (a) On the Mad River Bridge area there was an employee working from wooden scaffold pick which was not protected by standard guardrails or equivalent, exposing the employee to an approximate 15' fall potential.

The cited standard reads:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor. . . . Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

A penalty of $ 2,500 was proposed.

Item 2 of the citation deals with wooden "picks," sometimes referred to as "painters planks." The facts surrounding the use of the picks are basically undisputed.

The bridge being built (as well as older bridge being rebuilt) consisted of a series of seven concrete piers placed along the width of the Mad River and the ravine in which it flowed. Spanning across the concrete piers was a series of parallel steel I-beams which were approximately eight feet apart. The steel beams were to be kept in parallel position by the welding of cross bracing and horizontal bracing between the steel I-beams (Tr. 104, 181, 287,

369). The cross bracing and horizontal bracing consisted of lengths of steel angle iron (also referred to as "angles") up to eight feet in length and weighing approximately sixty pounds (Tr. 195, 293). The employees would use an expandable "painter's plank" or "pick" inserted between the flanges along the bottom of the I-beams to physically install the braces and weld the angles (Tr. 114, 286, 378-379). A pick is a series of wooden strips one and one-half-by one-inch held together by a metal band on each end (Tr. 379; R. Ex. V). A pick is thus adjustable in length. The picks used by Respondent's employees were approximately twelve inches wide and expandable to accommodate the distance between the beams (Tr. 115, 177-178, 191, 290).

In setting the angles, the foreman used his blueprint to mark the beams to show the proper place for each of the angles (Tr. 293). The employees then carried the angles from where they had been placed by crane and set them in place (Id.). Employees would climb onto each end of the pick and place the angles (Tr. 380-81). The employees would utilize a "come along," a hook with a choker attached, to pull the beams plumb (Tr. 383-385). The angles were then tacked down and these employees moved to the next bay (Tr. 290). After the tacking of the angles into place, certified welders would get onto the pick and weld the angles at each location at which the angles touched the beams (Tr. 194, 387-88). When in use, the picks did not have guardrails on either side (Tr. 49) and were at a height of over fifteen feet above the ground or water surface (Tr. 48-50, 177-78, 181, 191-92, 307, 387). The pick would then be moved to a new location where the process would be repeated (Tr. 115). The pick had a rope attached to each end so it could be pulled up and moved (Tr. 191). The pick would be moved from three to twenty-six times a day (Id.).

The basis of the citation, claims the Secretary, is that the picks were, for the purposes of the cited standard, scaffolds which were required to have standard guardrails on both sides. Respondent disagrees. The initial issue regarding the cited picks is thus whether the cited standard is applicable.

The Secretary maintains that he has shown that the picks used by Respondent's employees meet the definition of a scaffold. He points to testimony by the CO that the pick is the most basic type of scaffold. The CO opined that a board placed between two tables could be considered a scaffold (Tr. 117-18) but conceded that the standards themselves do

not specifically define or identify painter's planks or picks (Tr. 118-19). There is no dispute in this case that the picks were moveable, temporary, and portable, that they were elevated and that they were platforms used for supporting workmen. Accordingly, as discussed at length earlier, they are within the definition of scaffolds and the cited standard applies.

Respondent, referring to other fall protection standards[8] and the pending proposed revisions to fall protection standards for construction,[9] maintains, in essence, that the Secretary's interpretation of its standards, including the applicability of those standards, must be reasonable. But, the burden is on Respondent to demonstrate, by a preponderance of the evidence, that the Secretary's interpretation of a standard is unreasonable. It has not done so here.

Whether the framers of the standard really had in mind to include as platforms such narrow, highly moveable, and adjustable items as the picks can only be conjecture. Neither party suggests detailed inquiry into the history of the standards nor is one to be undertaken where, as here, their meaning can be derived from their own terms. In this case, requiring the installation of guardrails on picks might make the job more difficult to perform or might interfere with other aspects of the work. Such evidence is, however, a matter of affirmative defenses to be pleaded and proved by Respondent. Unless Respondent shows that the Secretary's interpretation of a standard leads to results with which no reasonable person could agree or which would require actions contrary to those compatible with enhanced employee safety and health, it cannot be said that his interpretation is unreasonable or inconsistent with the standard. Merely because it might be the common practice in the industry not to have picks equipped with guardrails such evidence does not, by itself, render unreasonable the Secretary's position that the standard requires guardrails on painter's picks. It is not the affected industry which sets the criteria for reasonableness. Moreover, if it is Respondent's position that it would be impossible or infeasible for the industry as a whole to have guardrails on picks, the correct forum is the rulemaking proceedings. Citing

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[8] The standards referred to include; 1926 § § .28(a), .105(a), .500(d)(1) and .550.

[9] See, 51 Fed. Reg. 42718 (1986) and 57 Fed. Reg. 34656 (1992), Respondent's brief, p. 16.

Respondent under this standard is not, as Respondent claims, an attempt "to cite contractors based upon regulations that, upon review, have no applicability" (Resp. Brief, p. 17). The cited regulation clearly applies to the picks since they are undeniably "temporary elevated platform(s)... used for supporting workmen or materials, or both." On this basis, I conclude that the cited standard applies.

There is no dispute that employees worked from picks which lacked guardrails. Non-compliance with the requirements of a standard, employee access to the zone of danger created by the non-compliance, and Respondent's knowledge of the non-complying condition are not in issue. Accordingly, the Secretary has made out a prime facie showing of this alleged violation.

Respondent now maintains that requiring guardrails on painters planks would be infeasible. Infeasibility of compliance is recognized by the Commission as an affirmative defense. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHRC 1219 (No. 88-0821, 1991). The Commission has also held that an affirmative defense will only be considered if it has been pleaded or tried with the consent, express or implied, of the parties. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1023-24 (No.86-0521, 1991). While Respondent did raise an affirmative defense of employee misconduct in its Answer (Answer, ¶ 62, p.10) it did not raise the claim of infeasibility until it filed its pre-hearing statement seven days prior to the hearing. It continues the argument in its post-hearing brief. At the hearing, the Secretary consistently objected to testimony going to the defense of infeasibility, especially testimony as to the use of safety belts and lanyards as alternative protective measures. As shown by the Secretary's objections and argument in his post-hearing brief there was no trial by consent of the issue of infeasibility nor has Respondent, at any time, moved to amend its pleadings.[10] I am thus constrained to reject the defense of infeasibility.[11] Moreover, since

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[10] Nor has Respondent sought to demonstrate why it could not raise the defense earlier. Commission Rule 34(b)(4), 29 C.F.R. § 2200.34(b)(4).

[11] Had the issue of infeasibility been before me that I would have found that the overwhelming preponderance of the evidence demonstrates that requiring guardrails on painter's picks as used by Respondent was completely infeasible both in terms of the (continued...)

the defense of infeasibility is not before me, Respondent's assertion that the record shows that "equivalent protection" in the form of safety belts and lanyards was used is not relevant the alleged violation regarding the painter's picks.[12] Finally, even if Respondent did show that its employees were protected by safety belts and lanyards, and that such devices afforded "equivalent protection," the violation would stand because the scaffolding standard under which Respondent was cited requires standard guardrails and does not allow for equivalent protection. Item 2 of Citation 1 is thus affirmed.

The Secretary proposed a penalty of $2,500. The amount of penalty was based on a formula contained in the Field Operations Manual of OSHA which is not binding on the Commission. There is little direct evidence as to Respondent's size or history and it has not been shown to have lacked good faith in regard to employee safety and health as a general matter. I find that a penalty of $1,000 is appropriate.

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[11](...continued)
physical impossibility of compliance as well as the interference with the work which had to be done. See *Falcon Steel Co.*, 16 BNA OSHC 1179, 1186-87 (Nos. 89-2883, 89-3444, 1993). Indeed, this evidence so preponderates on this record that it rises to the level of showing that the Secretary's application of the standard to require guardrails on painter's picks might well be considered to be unreasonable. There appears, however, to be no precedent upon which such a conclusion of law can be predicated.

[12] The affirmative defense of infeasibility is established by an employer pleading and showing, by a preponderance of the evidence, that compliance with the standard's requirements were not practical or reasonable in the circumstances and that an alternative protective measure was used or that there was no feasible alternative measure. *Seibel Modern Manufacturing & Welding Corp.,* 15 BNA OSHC 1219 (No. 88-0821, 1991).

Citation 1 Item 3
29 C.F.R. 1926.500(d)(1)

Item 3 of Citation 1 alleges three instances of violation of the requirement that "[E]very open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent. . .on all open sides . . . ." 29 C.F.R. 1926.500(d)(1). The citation identified three instances (3a, 3b and 3c) in which employees were working on top of various concrete piers (approximately 30" wide and 10' long) which had no guardrails (Tr. 142). A penalty of $2500 was proposed.

The parties do not agree that the standard is applicable to work on concrete piers. The burden of demonstrating applicability is on the Secretary. The cited standard requires standard guardrails around the perimeter of "open-sided floor[s] or platform[s]". In turn, 29 C.F.R. § 1926.502(e) defines platform as "a working space for persons, elevated above the surrounding floor or ground...for the operation of machinery and equipment."

The pier caps are part of the permanent support structure of the bridge. They are clearly fixed, permanent and immoveable. The ironworker employees of Respondent were on the pier caps only to weld into place rocker panels which would allow for the expansion and contraction due to weather and temperature of the steel beams which spanned the river from pier to pier. While the surface was thus neither a regular nor a consistent work place, it is the nature of platform not the nature of the work performed thereon which controls the applicability of the platform and scaffold standards. *Fleetwood*, supra. The standard is applicable.

There is no factual dispute that employees of Respondent worked on the pier caps, at, near or leaning over the edge while getting into position to make welds. There is also no dispute that employees had, at times, done such work without any fall protection of any type (Tr. 84-5, 141, 321, 328) and at other times had safety belts tied off (Tr. 53, 56, 86, 296, 321-321). There is also no dispute that Respondent's foremen were aware of the work being conducted without fall protection (Tr. 320-321). In the one instance where the employee was using a safety belt and lanyard it was tied off to a piece of steel which had a break in it in such a manner that the hook could slide, pull free or dislodge negating any protection

it might have afforded in the event of a fall (Tr. 56-57, Ex. C-9). Finally, Respondent's assertion that it requires its employees to wear and use safety belts and lanyards is not supported by the evidence as a whole. Employees testified that they were in positions where they could have, but did not tie off (Tr. 199, 309) and there is evidence that neither a foreman nor an employee who were working together on a pier were tied off with the knowledge, thus implied permission of the foreman (Tr.53, 199, 321). Thus, the employees were not protected by either standard guardrails or equivalent protection. Based on this evidence, essentially unrebutted by Respondent, the Secretary has shown violations of 29 C.F.R. § 1926.500(d)(1) as alleged.

As with the previous item, although it so argues in its post-hearing brief, Respondent had not raised the affirmative defense in its answer. It is thus rejected.[13] Finally, Respondent's affirmative defense of employee misconduct is rejected on the grounds that the evidence already cited above shows that its supervisors not only condoned the non-use of safety belts and lanyards on the piers but also did the same. Item 3 of the serious citation is AFFIRMED.

The Secretary proposed a penalty of $2,500. Other factors being the same, it is noted that in at least one of these instances a foreman not only knew of the lack of safety protection but condoned it by not using one himself when aiding an employee. A penalty of $1,500 is appropriate.

Citation 1 Item 4
29 C.F.R. 1926.500(d)(2)

This item, alleges a violation of another Subpart M standard closely related to that cited in item 3. In this item, the Secretary alleged that in two places employees were moving

[13] In stark contrast to the testimony regarding the painter's picks, however, were the issue before me, I would find that Respondent has not, by a preponderance of the evidence, demonstrated the infeasibility of installing guardrails or assuring the use equivalent protection (safety belts and lanyards) on the piers.

around the site crossing over open spaces by walking along 2" x 12" boards.[14] A penalty of $2,500 was proposed.

Once again, the facts are not in dispute. The planks of 2" x 12" lumber of various lengths of over 8', were set down between the earth berm at the end of the bridge and the steel beams spanning the river as well as from beam to beam at various locations along the length of the bridge. Employees and supervisory personnel also used the planks when walking from ground level to the ends of the beams or from beam to beam (TR. 58-59, 63, Exs. C-14, 15, 16 & 17). There were no guardrails on the two by twelve boards nor were the employees using any other fall protection during their transit of the planks. The fall distances ranged from 50 inches (Tr. 65) to 18 feet.

The Secretary maintains that the employees were required to be protected by either guardrails or equivalent protection while walking these planks. The cited standard provides, in relevant part;

> Runways shall be guarded by a standard railing, or the equivalent....on all open sides, 4 feet or more above floor or ground level.[15]

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[14] More specifically the citation states:

> (a) On the Mad River Bridge area employees were observed gaining access from one beam to another by crossing 12" x 12" wooden plank runways which were not protected by standard guardrails or equivalent exposing employees to a fall potential in excess of 19'.
>
> (b) Employees were observed gaining access from the west end of the Mad River Bridge to structural steel beams on the bridge by crossing 2" x 2" (sic) wooden plank runways which were not protected by standard guardrails or equivalent exposing employees to falls of up to 67" (sic).

[15] Based upon the definitions sections of the standards (29 C.F.R. § § 1926 .502(e) and .502(f)) there seems little to distinguish "runways" from "scaffolds" except runways are passageways and scaffolds are working spaces. Such a difference might be logical and reasonable but, the standard requiring protection on runways also includes the sentence "[w]herever tools, machine parts, or materials are likely to be used on the runway, (continued...)

Respondent argues that application of the standard so as to require guardrails on the planks connecting beams and providing access to the steel beams from the end of the bridge would;

> present the ludicrous situation that employees are free to walk unprotected along an eighteen-inch (wide) beam, then suddenly require protection when utilizing a method of access.

(Resp. brief, p. 20). Whether "ludicrous" or not, as discussed in regard to the painter's picks, the degree of difficulty of compliance with a standard, whether in terms of alleged impossibility or infeasibility are matters of affirmative defense to be pleaded and proved by Respondent.[16]

The Secretary has made out a prime facie case by showing that employees walked the beams which were at a height of four feet or more and which were not equipped with guardrails and that equivalent protection was not used. Respondent has not pleaded and proved an affirmative defense.[17] As discussed in regard to item 3, I am constrained to find the violation. Item 5 is AFFIRMED. A penalty of $1,000 is appropriate.

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[15](...continued)
a toeboard shall also be provided on each exposed side." It is suggested that as soon as tools, machine parts or materials are used on a runway it would be a platform or scaffold depending upon whether it was temporary or permanent. The Secretary's claim of deference notwithstanding, any resolution of such a dilemma must remain for another day. There is no evidence or claim here that any tools, machine parts or materials were used on the runways.

[16] To the degree that Respondent's argument is viewed as a claim that the cited standard does not apply there is no need to resolve it. If the cited standard does not apply because the employees were working on the planks by carrying angle iron, the planks would then be covered by the scaffold standard which requires guardrails and does not allow the use of equivalent protection.

[17] As with the painter's picks, were the factual issue before me I would find that the preponderance of the evidence demonstrates the infeasibility of compliance with the use of either guardrails or, as suggested by the Secretary, overhead static lines. In summary, I would find that as with the steel erection standards requiring ironworkers to "tie off," employees who are in the process of moving about cannot tie off where there is virtually no structure above them. In addition, these ironworkers had to carry large, heavy steel cross braces on to various areas of the bridge, a task which could not be performed with guardrails in place on the runways.

Citation 1, Item 5
29 C.F.R. 1926.701(b)

The cited standard provides;

> All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

The Secretary alleges in the citation that along the west end of the Mad River Bridge, employees of Respondent were exposed to falling on unprotected protruding rebar when accessing the bridge. A penalty of $750 was proposed.

The CO described watching employees walking near or on ramps above unprotected protruding ends of reinforcing steel rods ("rebar") (Tr. 66, Ex. C-16, 17). He described the "hazard" as the possibility that employees "could fall and be impaled on the unprotected rebar" (TR. 67). The CO also described an employee walking along side protruding rebar while pushing the protruding steel rods aside as he walked (Tr. 135). He noticed that some, but not all of the protruding steel rods had been bent over but that an impalement hazard still existed because other, near-by rebar was not bent over (Tr. 68, 133-35, Ex. L, Videotape Ex. 2). He agreed that if an employee fell and landed on a bent over rod he would not be at risk of impalement. He further noted however, that he saw employees walking in the area push aside the bent over rebar, implying that it was of a certain degree of flexibility. He went on to state that a falling employee could fall between the bent over rebar landing on the shorter, protruding steel (Tr. 133-135). Falling on to the protruding steel rods would cause severe injuries (Tr. 68).

The Ironworker's union shop steward disagreed with the CO. In viewing the photograph (Ex. R), she stated that because the protruding rebar in the photograph were ends which were below the rebar which had been turned into inverted "U" shapes, there was no danger to employees (Tr. 203). Even she conceded, however, that only "most" of the unprotected rebar was underneath steel rods which had been turned over (Tr. 204). One of the ironworkers who had been on the job essentially agreed with the show steward. He stated that rebar which protrudes is not a danger to ironworkers if it is bent over into a "U" shape as shown in Respondent's Exhibit L and it is "tied pretty close together." (Tr. 294-5).

In its post-hearing brief Respondent maintains that the Secretary failed to show that any hazard with regard to rebar at the site. In addition, it maintains that since the standard simply tells employers that exposed rebar "shall be guarded" without specifying a means of abatement, that it is incumbent on Complainant to identify a specific means of feasible means of compliance as an element of a showing that a violation has occurred.

Complainant notes that while some of the rebar had been bent over so as to preclude that hazard, other had not. The Secretary points to Respondent's Exhibit L which, he claims, shows that some of the rebar had not been "turned over." The Secretary does not agree that he must present direct evidence of the existence of a hazard but maintains that such a hazard is presumed to exist where the requirements of a standard are not met. Relying on statements accompanying the publication of the revised standard, and referring to that interpretation as "the wisdom of the standard," Complainant argues that all it need do to show exposure to the hazard of impalement is to show that employees walked alongside rebar.

By taking the longer lengths of protruding rebar and bending them into inverted "U" shapes which covered shorter protruding rods, there was guarding of some of the shorter steel rods as required by the standard. While the evidence in this case shows that some of the cited rebar was in this condition, it does not show that all of the rebar was so guarded. First, some of the bent over rebar failed to cover other, protruding rods. Second, as the CO was concerned, if the taller rebar could be swayed by those just walking along side it, the bent over rebar which acted as guarding could also be brushed aside were a person to fall on top of it. The photographic evidence (Exs. K and L) shows that only some of the bent over rebar had been "tied" to the shorter bars. Other bent over rebar was thus free to move out of its protective position if a person fell on it from above. I thus find as fact that some protruding rebar on to which employees could fall, remained unguarded or ineffectively guarded. I find that the violative condition has been shown to have existed, at least to some extent.

Second, while somewhat miscast in terms of the "the wisdom of the standard," Complainant is essentially correct that it is presumed that a hazard arises where there is non-compliance with a standard. Nonetheless, the Secretary must show employee access to

the zone of danger created by the non-complying condition. Thus, if non-compliance with the requirements of a cited standard resulted in no hazard, the Secretary could not meet the burden of showing exposure. Here, the CO was concerned that employees walking on a ramp or beam which was above rebar, some of which was not guarded, created a hazard of impalement should a fall occur. Such is the type of hazard sought to be prevented by the standard. While it is arguable that little or no hazard was present as to those employees walking alongside rebar which they could brush against but on to which they could not fall, there is virtually no doubt that a fall from a beam or ramp on to unprotected rebar could result in impalement causing severe bodily injury. Respondent's claim that it was not shown how to abate, even if a correct statement of the Secretary's burden, is inconsequential since it did, in fact, appropriately guard some of the protruding rebar but not all of it. Finally, the fact that at least some of Respondent's supervisors or foremen were in the area in which the condition was in plain sight and readily apparent is sufficient to show that Respondent had the requisite knowledge of the existence of the cited condition. Accordingly, Item 5 of Citation 1 is AFFIRMED as a serious violation of the Act.

The Secretary proposed a penalty of $1,750.00. For the reasons set forth in regard to item 3, and considering that most of the rebar was effectively guarded and the likelihood of an accident was relatively slight, I find that a penalty of $500 is appropriate.

Citation 2
29 C.F.R. 1926.59(g)(1)

The sole other than serious violation alleged that Respondent did not have at the site a material safety data sheet (MSDS) for the welding rods (and fumes caused by using those rods) and the LP gas used at the site.

Respondent does not deny the violation. It its post-hearing brief it maintains that the evidence shows that its employees, for several reasons, were fully aware of the hazards associated with these items. On this basis, Respondent argues that the failure to have the MSDS sheets should be found to be a *de minimis* violation. While there is some testimony that at least one employee was somewhat familiar with the more common hazards associated

with welding rod fumes and the use of LP gas, Respondent's factual contention is not borne out by the record as a whole. Moreover, the MSDS sheets do more than identify the hazards but also provide ready reference of emergency phone numbers and treatments for overexposure. The lack of the proper MSDS sheets cannot be found to be "so trifling that an abatement order would not significantly promote the objectives of the Act." *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991). Item 1 of citation is AFFIRMED. The proposed penalty of $250 is appropriate.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant 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.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was not in violation of 29 C.F.R. § 1926.404(f)(6), as alleged.

4. Respondent was in violation of 29 C.F.R. § 1926.451(a)(4), as alleged. A penalty of $1,000 is appropriate therefor.

5. Respondent was in violation of 29 C.F.R. § 1926.500(d)(1), as alleged. A penalty of $1,500 is appropriate therefor.

6. Respondent was in violation of 29 C.F.R. § 1926.500(d)(2), as alleged. A penalty of $1,000 is appropriate therefor.

7. Respondent was in violation of 29 C.F.R. § 1926.701(b), as alleged. A penalty of $500 is appropriate therefor.

8. Respondent was in violation of 29 C.F.R. § 1926.59(g)(1), as alleged. A penalty of $250 is appropriate therefor.

ORDER

1. Item 1 of Citation 1 issued to Respondent on or about December 11, 1991 is VACATED.

2. Items 2, 3, 4 and 5 of Citation 1 issued to Respondent on or about December 11, 1992 are AFFIRMED as serious violations of the Act.

3. Item 1 of Citation 2 issued to Respondent on or about December 11, 1991, is affirmed as an other than serious violation of the Act.

4. Civil penalties totalling $4250 are assessed for the above violations.

SO ORDERED.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: DEC 9 1993
Washington, D.C.