



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,

Complainant,

v.

MONITOR CONSTRUCTION CO.,

Respondent.

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: OSHRC Docket No. 91-1807
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DECISION

BEFORE: FOULKE, Chairman, and MONTTOYA, Commissioner.

BY THE COMMISSION:

At the time of the inspection by representatives of the Occupational Safety and Health Administration (“OSHA”) in May 1991, Monitor Construction Company (“Monitor”) served as the subcontractor for the erection of the underlying formwork for a concrete parking garage at a shopping mall in Cincinnati, Ohio. Following the inspection, the Secretary of Labor issued a citation alleging numerous violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”). The parties settled all but the following two citation items: Repeat citation 2, item 1, in which the Secretary alleged a repeated violation of 29 C.F.R. § 1926.500(b)(1) for Monitor’s failure to guard or cover a floor opening; and Serious citation 1, item 5, in which the Secretary alleged a serious violation of 29 C.F.R. § 1926.500(d)(1) for the company’s failure to guard an open-sided floor. The judge affirmed both items, but reduced the characterization of the floor opening item to serious. Both parties petitioned for review.

FLOOR-OPENING ITEM - Section 1926.500(b)(1)

I. Merits of the Violation

Under the concrete formwork system used in this case, called the garage beam system (“GBS”) or Symons system, each section or bay consists of plywood decking laid between two long steel beam forms (“beam troughs”), spaced 20 feet apart. The 57-foot-long beam troughs separating the decked bays are 16 inches wide and 30 inches deep. Another contractor later places steel rebar in the troughs and another eventually pours concrete over the entire surface of the formwork, four bays at a time. The Secretary cited Monitor under the floor-opening standard, 29 C.F.R. § 1926.500(b)(1),¹ for failing to guard or cover the 30-inch-deep beam troughs.

Judge’s Decision

The judge affirmed the item. He rejected Monitor’s argument that section 1926.500(b)(1) is preempted by sections 1926.700-706, which govern concrete formwork. Relying on *John Quinlan, t/a Quinlan Enterp.*, 15 BNA OSHC 1780, 1992 CCH OSHD ¶ 29,765 (No. 91-2131, 1992), the judge found that because the concrete and masonry standards at sections 1926.700-706 did not address the hazardous conditions cited in this case, they did not preempt section 1926.500(b)(1) from applying. He affirmed the section 1926.500(b)(1) citation. The judge implicitly rejected Monitor’s argument that a floor opening must be bottomless for an employee to be able to “fall through” it as specified by the standard, citing *National Indus. Constr., Inc.*, 10 BNA OSHC 1081, 1981 CCH OSHD ¶ 25,743 (No. 76-4507, 1981) (“NIC”). The judge found the violation not to be “repeated” because the previous violation (an inadequate manhole cover) was not, in his view, substantially similar to the current violation. He recharacterized the violation as serious,

¹The standard provides:

§ 1926.500 Guardrails, handrails, and covers.

....

(b) *Guarding of floor openings and floor holes.* (1) Floor openings shall be guarded by a standard railing . . . or cover, as specified in paragraph (f) of this section.

“Floor opening” is defined at section 1926.502(b) as “[a]n opening measuring 12 inches or more in its least dimension in any floor, roof, or platform through which persons may fall.” Paragraph (f) sets forth standard material specifications for railings and covers.

noted that the likelihood of an accident was remote, and reduced the penalty proposed by the Secretary from \$3,000 to \$300.

Monitor's Arguments

Monitor claims that the cited standard, section 1926.500(b)(1), is not relevant to and does not apply to the beam troughs in this case, but maintains that this is not a question of "preemption." The company does not argue that sections 1926.700-706 are the exclusive source of regulation of concrete formwork. Monitor argues instead that it lacked fair notice that section 1926.500(b)(1) applied. It claims that a standard must give employers fair warning of the conduct which it prohibits or requires. *See, e.g., General Electric Co. v. OSHRC*, 583 F.2d 61, 67 (2d Cir. 1978) (not every elevated surface is a platform) and *Rexco Indus., Inc.*, 8 BNA OSHC 1227, 1980 CCH OSHD ¶ 24,376 (No. 15350, 1980) (same); *Lisbon Contrac., Inc.*, 11 BNA OSHC 1971, 1984-85 CCH OSHD ¶ 26,924 (No. 80-97, 1984) (a backhoe is not a crane); *Langer Roofing & Sheet Metal, Inc. v. Secretary of Labor*, 524 F.2d 1337 (7th Cir. 1975) (a roof is not a floor). Monitor argues, similarly, that concrete formwork is not a floor and the beam troughs are not floor openings.

Monitor contends that the standard is ambiguous and, without citing precedent, urges the Commission to look to industry custom and practice to determine what the standard requires. Monitor's witnesses, including James Vaughan, a consultant who was formerly an OSHA area director, testified that it was not industry practice to guard or cover beam troughs. Vaughan also stated that as a compliance officer, he had never cited beam troughs as floor openings. Monitor also claims that OSHA's stated intention to "clarify" the fall protection rules in 1986 reveals OSHA's own awareness of problems with sections 1926.500-502. Finally, acknowledging that the judge was bound to follow Commission precedent, Monitor urges the Commission nevertheless to reconsider and reverse its decision in *NIC* (opening need not be bottomless to pose a "fall through" hazard). The company adds that the Secretary's interpretation -- that openings at least knee-deep, such as the 25-inch-deep cylinders in *NIC* or the 30-inch deep beam trough in this case, constitute a hazard -- is inconsistent with his position that an open-sided floor does not constitute a hazard until it is 6 feet above the ground.

Monitor also asserts that installing guardrails along both sides of the trough would have been infeasible.

Secretary's Arguments

The Secretary casts Monitor's position that section 1926.500(b)(1) is "not relevant" as a claim that sections 1926.700-706 preempt sections 1926.500-502. The Secretary concludes that since sections 1926.700-706 say nothing² about falls from formwork and the company does not claim otherwise, the *Quinlan* case, relied on by the judge, requires that where, as here, the more specifically applicable standard makes no provision for the particular hazard at issue, there is no preemption of a standard that does. The Secretary maintains that the 1986 proposed amendments relied on by Monitor establish that sections 1926.700-706 were not among those sections designated as preempting sections 1926.500-502, and moreover, that an acknowledgement that greater clarity is desirable does not constitute a concession that the present standard is unenforceable. See *Power Sys. Div., United Tech. Corp.*, 9 BNA OSHC 1813, 1816, 1981 CCH OSHD ¶ 25,350, p. 31,467 (No. 79-1552, 1981).

With respect to Monitor's charge that the standard is ambiguous, the Secretary counters that Monitor is confusing breadth with ambiguity. He points out that the standard makes no distinctions among types or sizes of openings (other than the one size requirement that the opening be at least 12 inches in its least dimension),³ and that it was appropriate in issuing the standard to use a general term without attempting to produce an encyclopedic listing of every possible kind of opening, including beam troughs. Because the definition of floor opening, while broad, is not ambiguous, industry practice is irrelevant, he argues. See, e.g., *Ed Taylor Constr. Co. v. OSHRC*, 938 F.2d 1265, 1272 (11th Cir. 1991); *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1159, 1993 CCH OSHD ¶ 30,042, p. 41,225 (No. 90-1620, 1993) (consolidated cases).

²The only fall hazard addressed in sections 1926.700-706 is a fall while placing or tying reinforcing steel higher than 6 feet above the ground. Section 1926.701(f)(2).

³This means that if the 16-inch-wide beam troughs had been a few inches narrower, the standard would not have applied.

Discussion

1. Preemption

The Scope and Application subsection of the concrete formwork standards, section 1926.700(a), provides that “[i]n addition to the requirements in [this subpart], other *relevant* provisions in parts 1910 and 1926 apply to concrete and masonry construction operations” (emphasis added). According to Monitor, the floor opening standard at section 1926.500(b)(1) is “not relevant” in this case. It is not claiming, however, that sections 1926.700-706 are the exclusive source of regulation of concrete formwork operations or that they preempt sections 1926.500-502. Nor is Monitor arguing that some other standard is more specifically applicable, or even, as the Secretary suggests the company might be, that the concrete and masonry construction standards deliberately left the hazards in this case unregulated. Regardless of the nomenclature, Monitor’s contentions still amount to a “preemption” argument. As the judge pointed out, the *Quinlan* case⁴ reaffirmed that where general standards provide meaningful protection to employees beyond the protection afforded by the specific steel (or as here, concrete) construction standards, the specific standards do not preempt the general ones. *Id.* at 1782 (citing *Bratton Corp.*, 14 BNA OSHC 1893, 1987-90 CCH OSHD ¶ 29,152 (No. 83-132, 1990)). Since the general fall protection standard cited here does provide meaningful protection to employees beyond the protection afforded by the specific construction standards, we conclude that it is not preempted by the more specific concrete construction standards.

2. Notice

At the heart of Monitor’s argument is lack of notice. The cases Monitor cites all stand for the proposition that an employer lacking fair notice of a standard cannot be found in violation of the Act for failure to comply with that standard. Monitor claims that it had no notice that section 1926.500(b)(1) would apply to the beam troughs because they were not floor openings. Although this argument has a certain appeal, the definition of floor

⁴The Commission explained in *Quinlan* that “[a]n analysis of which of two standards is more specifically applicable appropriately begins with 29 C.F.R. § 1910.5(c), a regulation which codifies the principle that when more than one provision governs a particular hazard, the more specifically applicable provision prevails.” *Quinlan* at 1781.

opening at section 1926.502(b) clearly encompasses the beam troughs. It is true that the troughs were an integral part of the prefabricated garage beam system and that they would have to be open, uncovered and unguarded when they were fitted with rebar and filled with concrete. At the time of the inspection, however, Monitor's crew had not reached that stage of construction. The walking-working surface was the plywood decking alone, and the troughs presented openings in that surface.

Monitor urges the Commission to overrule the precedent established in the 1981 *NIC* case that a floor opening need not be bottomless to pose a "fall through" hazard. Monitor offers no legal or factual basis on which the Commission might base such a reversal. Moreover, the Commission recently reaffirmed the validity of that interpretation in *Ceco Corp. and McDevitt & Street Co.*, 1991 CCH OSHD ¶ 29,455 (No. 89-2514, 1991) (consolidated cases). In that case, the floor opening was a 10 x 12-foot pit, approximately 20 inches deep. In response to the employer's argument, accepted by the judge, that an employee could not "fall through" the cavity in question as required by the standard, the Commission remanded to the judge with instructions to take into account the effect of the *NIC* decision.

Monitor correctly notes that the Secretary alleges that floor openings only knee-deep pose a hazard while section 1926.500(d) requires guarding of open-sided floors only when they are 6 feet above the ground. However, the truth of this observation does not negate the requirements of section 1926.500(b)(1). As a practical matter, it is hardly unreasonable for the OSHA standards to reflect the likelihood that employees might have a heightened awareness, and thus be more careful, when they approach the very edge of an open-sided floor as compared to when they are moving forward from one spot to their destination in sight, on flat ground.

Monitor mentions, at the very end of its discussion of this citation, that if the company were to erect guardrails on both sides of the beam troughs, employees would be forced to "climb under or around" the guardrails to get back and forth. According to Monitor, this confirms that the standard was never meant to apply to the situation presented.

As described by Monitor, this particular arrangement does sound infeasible.⁵ Even if Monitor proved that one method of compliance, *i.e.*, installing two sets of guardrails the entire length of the troughs, was infeasible, however, it has said nothing about covering the troughs instead of erecting guardrails, the alternative specified in the standard. Nor is there evidence that other alternative measures were explored.

We therefore affirm the judge's decision finding a violation.

II. Characterization and Penalty

We now consider whether the violation was "repeated" under section 17(a) of the Act, 29 U.S.C. § 666(a)⁶. The Secretary alleged that the violation was repeated and proposed a penalty of \$3,000.

Judge's Decision

The judge declined to characterize the violation as repeated because he found that the previous citation and the current citation were not substantially similar violations, as required under *Potlatch Corp.*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979). Although the judge did not reveal in his decision precisely what factors he took into account in reaching this determination, he mentioned that the previous violation was "at a different site" and that the citation "dealt with Monitor's failure to provide an adequate temporary cover for a manhole," *i.e.*, "involv[ed] a weakened manhole cover," whereas the present citation involved Monitor's "failure to cover beam troughs in its formwork."

⁵Monitor never actually avers at the pleading stage that it is infeasible to comply with the guarding requirement of either section 1926.500(b)(1) or 1926.500(d)(1). However, the Secretary does not object that the defense was not properly pleaded, and Monitor did raise in its brief an infeasibility defense, at least to the section 1926.500(d)(1) open-sided floor violation. The judge found in connection with that item that Monitor failed to prove the alternative protection element of the defense, *see infra*. Monitor's infeasibility argument here fails for the same reason.

⁶That section provides in part that "(a) Any employer who willfully or *repeatedly* violates the requirements of section 5 of this Act, any standard, rule, or order . . . or regulations . . . may be assessed a civil penalty of not more than \$70,000 for each violation, but not less than \$5,000 for each willful violation" (emphasis added).

Parties' Arguments

Monitor contends that the judge properly refused to characterize the section 1926.500(b)(1) violation as repeated because the previous citation and the current citation were not substantially similar violations, as required under *Potlatch*. The previous citation was for a violation of 29 C.F.R. 1926.500(f)(5)(ii).⁷ Monitor emphasizes that the previous citation was not for an absolute failure to guard or cover, but for failure to have securely in place a sufficiently strong manhole cover, and that the placement or strength of any cover for the beam troughs in this case is not an issue because there were no beam trough covers.

The Secretary responds that in the law of repeated violations, any distinction between an inadequate cover and an absent cover is a distinction without a difference. The hazard addressed by both citations is stepping into an opening in a walking/working surface, and it is the similarity of the hazards that is important, so differences in the location and other circumstances are immaterial. *See, e.g., Kent Nowlin Constr. Co.*, 9 BNA OSHC 1306, 1308, 1981 CCH OSHD ¶ 25,206, p. 31,129 (No. 76-191, 1981) (consolidated cases); *Hamilton Fixture*, 16 BNA OSHC 1073, 1096-97, 1993 CCH OSHD ¶ 30,034, p. 41,190 (No. 88-1720, 1993), *appeal filed*, No. 93-3615 (6th Cir. June 7, 1993). The Secretary contends that the two citations, though not for violations of the identical standard, are for violations of interrelated standards. He argues that Monitor's previous citation for *ineffectively* guarding a floor opening apprised it of the guarding standard, providing heightened notice of the need to

⁷That standard provides:

1926.500 Guardrails, handrails, and covers.

.....

(f) *Standard specifications.*

.....

(5) Floor opening covers shall be of any material that meets the following strength requirements:

.....

(ii) The floor opening cover shall be capable of supporting the maximum intended load and so installed as to prevent accidental displacement.

After citing the standard, the previous citation stated:

Employees walking or working near a manhole in the area between the general contractors and plasterer's trailers, adjacent to parked cars, were exposed to the potential hazard of stepping on a split/partially broken plywood manhole cover, which was not secured in place.

abate hazards associated with *entirely* unguarded floor openings like the one in this case. See *Dun-Par Engd. Form Co. v. Marshall*, 676 F.2d 1333, 1337 (10th Cir. 1982). Any doubts, argues the Secretary, should be resolved in favor of employee safety. *Fluor Constr. v. OSHRC*, 861 F.2d 936, 942 (6th Cir. 1988) (if in doubt as to the nature of a requirement, employers should take the safer position, or at least make appropriate inquiries).

Discussion

The Secretary may establish substantial similarity in several ways. He may establish a prima facie case of similarity by showing that the prior and present violations are for failure to comply with the *same* standard, at which point the burden shifts to the employer to rebut that showing. *Potlatch*, 7 BNA OSHC at 1063, 1979 CCH OSHD ¶ at 28,171. The citations at issue in this case both fall within Subpart M, “Floor and Wall Openings,” but the current one is for a violation of one paragraph, section 1926.500(b)(1), specifying how and when floor openings must be guarded or covered, whereas the other was for a violation of another paragraph, section 1926.500(f)(5)(ii), specifying the strength and manner of installation for covers. The Secretary never explicitly argues that the two are “the same standard,” and the compliance officer admits that the previous violation was for “a different standard.” The Secretary does note, however, that “Monitor is in no way aided by the fact that § 1926.500(b)(1) was cited in the instant case while § 1926.500(f)(5)(ii) was cited previously. The two provisions are interrelated. Section 1926.500(b)(1) expressly requires that protection be afforded in accordance with the specifications of paragraph (f).” See *supra* note 1.

The two standards, while “interrelated” on their face, cannot in this case be characterized as being “the same standard.” When, as here, the current and previous violations are of different standards, the burden remains the Secretary’s to show substantial similarity. *Id.* It is true, as the Secretary points out, that the courts do not limit the concept of repeated violations to factually identical occurrences. See, e.g., *J.L. Foti Constr. v. OSHRC*, 687 F.2d 853, 856 (6th Cir. 1982). Furthermore, “under *Potlatch*, circumstances such as the geographical proximity of the violations, the commonality of supervisory control

over the violative condition, and the time lapse between the violations bear only on the size of the penalty to be assessed, not on the 'repeated' character of the infractions." *Id.* at 857.

Evidence on whether the two violations involve similar hazards, on the other hand, is relevant to a determination of substantial similarity. *Potlatch*, 7 BNA OSHC at 1063, 1979 CCH OSHD at p. 28,172. In this case, it is the disparity of the hazards and the means of abatement required that leads us to find that the present violation was not repeated. The hazard posed by the earlier violation (the danger of falling into a manhole when its cover breaks or shifts) is different from the hazard posed by this violation (the danger of stumbling into a beam trough). The first hazard is hidden. The actual hazardous area is so small that it could easily be overlooked, and the employee would expect the manhole cover to offer the same support as the ground. The second hazard is in plain view, a familiar aspect of the formwork design occurring at regular intervals, and obvious enough to test the very applicability of the floor opening standard. The actual hazardous area is so large, length-wise, that it is difficult to ignore, and so small, width-wise, that it is difficult to step into, the natural reaction being to step over the gap. We find that the two openings at issue, the hazards they pose, and the means of abatement they require are distinct -- the covering of one opening so common a safety precaution on a construction site as to be elementary, the covering of the other not routine at all, but technically required by the standard. This difference in the hazards underscores the fact that "unless the employer has previously been made aware that his safety precautions are inadequate, there is no basis for concluding that a subsequent violation indicates the employer requires a greater than normal incentive to comply with the Act." *George Hyman Constr. Co.*, 582 F.2d 834, 841 (4th Cir. 1978). *Accord J.L. Foti*, 687 F.2d at 857 (citing "adequate notice" considerations set out in *Hyman*). Accordingly, we find that the Secretary failed to establish that this violation was repeated with the meaning of section 17(a) of the Act.

Seriousness

The judge, who found that the violation was not repeated, nevertheless found the violation to be serious based on the compliance officer's uncontradicted testimony that a slip or fall approximately 30 inches into a beam channel could result in broken bones. Monitor claims that any violation found should be characterized as "other than serious" instead of

“serious” as alleged. We agree with the judge. The evidence establishes that should an accident have occurred, the likely result would be serious physical harm within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(k).

Although he found that the result of any accident that did occur would probably be serious, the judge found that the likelihood of an accident was remote because the employees were well aware of the presence of the beam troughs at their worksite. He reduced the Secretary’s proposed penalty of \$3,000, for a repeated violation, to \$300, for a serious violation. We concur with the judge’s determination that the violation was of low gravity in light of how unlikely it would be for a tripping or falling accident to happen.⁸ In view of Monitor’s size, history of violations, good faith and the low gravity of this violation, we find that a penalty of \$300 is appropriate.

OPEN-SIDED FLOOR ITEM - Section 1926.500(d)(1)

The construction plan used at the site in this case calls for plywood decking to be laid between two 57-foot-long steel beam troughs spaced 20 feet apart. Concrete is poured over the entire surface of the formwork, four bays at a time. Employees then erect capital forms and other structures at what the parties call the “leading edge” of the decking, place the next beam trough in the series, and continue to extend the plywood decking to form the next bay. As the name implies, the leading edge is considered a continually moving boundary only when employees are actively placing decking beyond that edge toward the next beam. At the time of the inspection, although there was some activity at the edge of the ramp, it was disputed whether employees were actively extending the ramp or were instead involved in completing the decked area upon which employees were walking and working. The next beam trough in the series had not yet been laid, nor had any plywood decking been installed as part of the next bay.

⁸The only accident any of the witnesses could recall occurred on another project when an employee working down in a beam trough setting decking bruised his knee as he was getting out. The absence of a history of accidents involving trips or falls into the beam troughs, while irrelevant to whether a violation exists, may be considered in determining gravity. *Brennan v. Smoke-Craft, Inc.*, 532 F.2d 843 (9th Cir. 1976). *Accord Allis-Chalmers Corp. v. OSHRC*, 542 F.2d 27 (7th Cir. 1976) (while not determinative, an employer’s accident-free record may be considered).

The hazard at issue here is that of falling off the open-sided floor at the north end of the deck to the ground nearly 10 feet below. Monitor was charged with a serious violation of 29 C.F.R. § 1926.500(d)(1)⁹ for failing to erect a standard guardrail to protect the open-sided edge of the deck.

Judge's Decision

After rejecting Monitor's applicability and preemption arguments, *see supra*, the judge considered Monitor's defense, that it was infeasible to install guardrails at the leading edge of construction. Never explicitly ruling that the north end constituted the leading edge at the time of the inspection, the judge found as a general principle that it is infeasible to install guardrails at the leading edge of construction, citing *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1949, 1959, 1986 CCH OSHD ¶ 27,650, p. 36,027 ("*Dun-Par I-A*"), *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988) ("[r]equiring an employer constantly to erect and tear down guardrails or to have its employees work outside the guardrails in order to complete their work is not a feasible method of complying with section 1926.500(d)(1)"). He further found, however, that Monitor failed to prove the second prong of the infeasibility defense: that alternative protective measures were used or were unavailable. *See Seibel Mod. Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 28,507 (No. 88-821, 1991). Monitor's evidence of industry practice -- giving employees no protection at all -- alone was found to be insufficient proof that alternative protection was unavailable.

The judge affirmed the violation as serious, but reduced the penalty from \$1,200 to \$960 to reflect a restoration of a good-faith adjustment.¹⁰

⁹The standard 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 . . . on all open sides. . . .

¹⁰The compliance officer testified that he withheld a good-faith adjustment to the penalty for *this* citation because the *other* citation was classified as "repeated," negating any entitlement to a good-faith adjustment to any penalty leveled against Monitor for *any* citation issued as a result of this inspection. Having found that the *other* citation was improperly classified as repeated, the judge determined that Monitor's good faith warranted a reduction in penalty.

Parties' Arguments

Monitor argues that the judge erred and that Monitor did establish the infeasibility defense. Citing an excerpt from OSHA's notice of proposed rulemaking for fall protection, Monitor claims that the Secretary has already conceded that guardrails, nets, and safety lines are infeasible at the leading edge. *See* 51 Fed. Reg. 42721 (Nov. 25, 1986).

The Secretary does not deny that guardrails generally can be infeasible at the leading edge,¹¹ and seems to accept Monitor's showing that neither safety belts nor nets were practical at this site in particular. The Secretary argues, however, that Monitor fell short of proving that there was "no feasible alternative measure," *Seibel*, 15 BNA OSHC at 1228, 1991 CCH OSHD at p. 39,685 (emphasis added), because *all* forms of protection must be considered and shown to be unavailable. *See State Sheet Metal Co.*, 16 BNA OSHC at 1161, 1993 CCH OSHD at p. 41,227, and *Brock v. Dun-Par Engd. Form Co.*, 843 F.2d at 1138-39. The Secretary suggests at least two compliance options -- safety monitoring systems and rolling scaffolds -- as unexplored alternatives.

Discussion

The parties dispute whether the unguarded, north end of the ramp was actively serving as the leading edge at the time of the inspection in this case. Resolving that factual issue is not necessary to determine the outcome here, however. Taking the facts in the light most favorable to Monitor, we assume that the north end *was* in fact the leading edge, *i.e.*, that employees were at the edge actively enlarging the deck, and assume further that the constant building and dismantling of guardrails would interfere with installation of the decking, rendering guardrails infeasible.

The Secretary essentially admits that guardrails, nets and lifelines are not feasible at the leading edge of the structure in this case, but maintains that even if Monitor has shown the infeasibility of certain abatement methods, it has failed to show "that there was *no* feasible alternative measure." *See Seibel*, 15 BNA OSHC at 1228, 1991 CCH OSHD at p. 39, 685 (emphasis added). We agree. The Secretary suggested a number of other methods

¹¹The Secretary, for his part, agrees that in this case guardrails are infeasible at the leading edge, but only when work is actually in progress to extend the decking.

of fall protection which are mentioned in other construction standards of which Monitor should have been aware.

We therefore affirm the judge's finding that Monitor failed to establish the affirmative defense of infeasibility because it failed to show that alternative means of protection were in use or unavailable.

The judge found the violation to be serious, noting the compliance officer's testimony that a fall from approximately 10 feet would, in all probability, result in broken bones. We agree with the judge. The evidence establishes that if an accident occurred the likely result would be serious physical harm within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(k).

In view of Monitor's size, history of violations, good faith and the gravity of this violation, we find that the judge's penalty assessment of \$960 is appropriate.

ORDER

Accordingly, we find as follows:

(1) The judge's decision affirming the floor-opening item, Repeat citation 2, item 1, as serious but not repeated is affirmed and a penalty of \$300 is assessed.

(2) The judge's decision affirming the open-sided floor item, Serious citation 1, item 5, is affirmed and a penalty of \$960 is assessed.

The total assessed penalty, attributable to the items on review, is \$1,260.


Edwin G. Foulke, Jr.
Chairman


Velma Montoya
Commissioner

Dated: February 8, 1994

Docket No. 91-1807

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
MONITOR CONSTRUCTION CO.
Respondent.

OSHRC DOCKET
NO. 91-1807

**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 November 16, 1992. The decision of the Judge will become a final order of the Commission on December 16, 1992 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before December 6, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

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

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Date: November 16, 1992

DOCKET NO. 91-1807

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SECRETARY OF LABOR,

Complainant,

v.

MONITOR CONSTRUCTION COMPANY,

Respondent.

OSHRC DOCKET
NO. 91-1807

APPEARANCES:

For the Complainant:

Kenneth Walton, Esq., Office of the Solicitor
U. S. Department of Labor, Cleveland, OH

For the Respondent:

Roger L. Sabo, Esq., Columbus, OH

DECISION AND ORDER

Loye Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq., hereafter referred to as the Act).

Respondent, Monitor Construction Company (Monitor), at all times relevant to this action maintained a worksite and place of business at 615 Elsinore, Cincinnati, Ohio where it was engaged in form work construction (Answer ¶3). Monitor does not dispute Complainant's contention that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Answer ¶4).

On May 3-6 1991 an Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) conducted an inspection of Monitor's Elsinore worksite (Tr. 23). Following the inspection, Monitor was issued citations alleging violations of the Act together with proposed penalties. Monitor filed a timely notice of contest, bringing this proceeding before the Occupational Safety and Health Review Commission (Commission).

On July 14, 1992 a hearing was held in Cincinnati, Ohio. At the hearing the parties stipulated to the settlement of all items but Citation 1, item 5, alleging a "serious" violation of 29 C.F.R. §1926.500(d)(1), and Citation 2, item 1, alleging a "repeat" violation of §1926.500(b)(1) (Tr. 6-7). The parties have filed briefs on the items remaining at issue and this matter is now ready for disposition.

Alleged Violations

Serious citation 1, item 5 states:

29 CFR 1926.500(d)(1): Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides.

(a) Along the second level northside of the parking garage form work platform there was an approximate 57" long open end which was not protected by standard guardrails exposing employee(s) working in the area to a fall potential of 9'10."

The cited standard provides:

(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. . .

Repeat citation 2, item 1 alleges:

29 CFR 1926.500(b)(1): Floor openings were not guarded by standard railings and toeboards or covers as specified in paragraph (f) of this section:

(a) On the 2nd level of the parking garage structure employees(s) (sic) were observed working beside or walking over approximately five 16" x 57" floor openings which were not protected by standard guardrails or secured covers.

The Monitor Construction Co. was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard 29 CFR 1926.500(b)(1): which was

contained in OSHA inspection number 101319440, citation number 01, item number 001, issued on 11/08/88.

The cited standard states:

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

FACTS

The facts regarding the alleged violations are undisputed.

On the dates of the OSHA inspection, Monitor was engaged in the construction of concrete form work for a "GBS" (garage beam system) parking garage ramp at the Forest Fair Mall (Tr. 25, 187; Ex. R-4). In GBS construction, a 57' long steel beam form is placed every 20' along the path of the ramp; high density plywood is placed between the beam forms and secured; steel rebar is placed within the hollow beam forms and across the plywood; concrete is then poured into the resulting form work (Tr. 26, 49, 68-69, 126).

A Monitor employee is required to work inside the beam channel when installing the plywood deck behind him, which takes a half hour to 45 minutes (Tr. 129-130, 170, 202, 250). Work then continues on the deck while the next beam form is being positioned: capital forms are aligned at the beam and nailed off (Tr. 128, 159); edgeforms are installed along the sides of the deck to restrain the concrete (Tr. 145, 169, 225); bulkheads are constructed across the width of the ramp approximately every four bays (Tr. 145, 233, 243). As the work on the deck is completed, the next beam form is being set in place (Tr. 249). Setting the beam takes approximately an hour (Tr. 247, 249).

Guard rails are installed on the outside edges of the ramp "within hours" of its completion (Tr. 196, 232), but no guarding is placed on the leading edge of the ramp while the work is in progress (Tr. 77, 233).

Monitor was the subcontractor only for the erection of the underlying formwork; the rebar and concrete work was performed by other subcontractors (Tr. 46-47, 71, 188). Between the time the plywood deck was completed and the rebar subcontractor began its work, the deck was used by Monitor employees as a walkway to transport materials to the work area and to descend from

the work area for breaks (Tr. 53, 143). Employees using the deck as a walkway were required to step over the 16" gaps between the plywood created by the beam channels (Tr. 28, 35-36, 45). The beam channels were 30-31" deep (Tr. 36, 73). The beam channels were not guarded in any way (Tr. 55).

At the time of the inspection, Monitor was five sections ahead of the rebar work (Tr. 50). The CO estimated that the ramp would remain open and available for use as a walkway for up to a "couple of days" (Tr. 50). Galbraith testified that it took three days for the rebar subcontractor to complete rebaring in a single pour area, the same amount of time it took Monitor to deck one floor (Tr. 123, 141); at the Forest Fair job, the pours were four "bays" or beams wide (Tr. 137).

At the time of the inspection, the GBS ramp had been completed about half way up the second level (Tr. 25). The edge of the ramp was 9'10" above the surface below (Tr. 39). There was no beam ready to receive the next decking sheet (Tr. 245). Employees were working on the deck, and one employee, Lester Kunkle, knelt on the unguarded front edge of the ramp while he worked on the capital column form (Tr. 33, 39, 124, 159; Ex. C-3).

Monitor claims that guarding the leading edge of the parking ramp is infeasible. James Vaughn, a safety and health consultant (Tr. 257), testified that the employer would constantly be putting up railings and taking them down, interfering with completion of the work (Tr. 279). Giles Galbraith, Monitor's superintendent of field construction (Tr. 121), testified that as soon as Kunkle was finished, they would begin setting the next form (Tr. 132). Galbraith knew of no other contractors using guardrails on the advancing edge in GBS construction (Tr. 136). Vaughn testified that guardrails are generally installed only when work is stopped for a long period (Tr. 274).

The investigating CO, Steven Medlock, admitted that OSHA does not necessarily require fall protection when construction is proceeding outward from a leading edge (Tr. 103), but noted that the employee he photographed was not engaged in extending the leading edge at the time of the inspection (Tr. 114).

Alleged Violation of §1926.500(d)(1)

Section 1926.500(d)(1) requires that open sided floors be guarded by a standard railing. Monitor admits that such guardrails were provided along the leading edge of the GBS ramp. Rather, Monitor raises the affirmative defenses of preemption and of infeasibility.

Preemption

Monitor argues that concrete form work is governed by Subpart Q, Concrete and Masonry standards at §1926.700 *et seq.*, and that the guardrail requirements of §1926.500 *et seq.* are preempted by the more specific standards set forth in that section (Tr. 264-65).

However, in a recent case, *John Quinlan, t/a Quinlan Enterprises*, 15 BNA OSHC 1780 1992 CCH OSHD ¶29,765 (No. 91-2131, 1992), the Commission recognized that general construction standards are applicable to specifically regulated industries to the extent that no specific standard applies to the condition or practice cited. Specifically, the Commission held that general construction guardrail standards at §1926.500 were applicable to steel erection where the general standards provided meaningful employee protection from specifically described hazards, i.e. open sided floors, which were not addressed by the industry specific standards. *Id.*

The undersigned finds *Quinlan* controlling here. Subsection Q does not address the hazard presented by open sided floors or work platforms, or by unguarded floor openings; §1926.500 *et seq.* is thus applicable where those conditions are present.

Monitor maintains that the GBS ramp is not a floor or platform; however, the undersigned finds this argument disingenuous. It is clear that the GBS ramp is used as both a walking and working surface, and that Monitor recognized the applicability of §1926.500 *et seq.*, when it erected guard rails on the outside edges of the ramp (Tr. 196, 232).¹

¹ Monitor's reliance on an unreviewed ALJ's decision, *Ceco Corp.*, 14 BNA OSHC 1287, 1989 CCH OSHD ¶28,633 (No. 88-655, 1989), is misplaced. In that case workers routinely walked on and worked from existing concrete or completed plywood decking, but were cited because employees occasionally stepped onto incomplete open formwork. The ALJ in that case held that such occasional use did not convert the formwork into scaffolding: a "temporary elevated platform and its supporting structure used for supporting workmen or materials or both." The ALJ went on to note, however, that plywood decking "constituted a formwork surface or floor." *Id.* at 1288.

Infeasibility

Monitor's principal defense is rather that installation of guardrails was infeasible. Monitor maintains that the leading edge of the formwork platform was continuously advancing as work progressed, and the erection and tearing down of guardrails would unduly hamper completion of Monitor's work.

The Commission examined an almost identical scenario in *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949, 1986-87 CCH OSHD ¶27,650 (No. 79-2553, 1986) *rev'd in part*, 843 F.2d 1135 (8th Cir. 1988). The Commission agreed in that case that the repeated installation and removal of guardrails on advancing concrete form work was an infeasible method of complying with §1926.500(d)(1). *Id.* at 1959-60. The Commission did not vacate the cited violation, however, but remanded the case to provide the Secretary with an opportunity to show the feasibility of alternative protective measures. *Id.* at 1960-61.

The recent Commission case, *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶28,507 (No. 88-821, 1991), specifically overrules that portion of the *Dun-Par* holding which places the burden of proof on the Secretary to show the existence of feasible alternative protection. *Id.* at 1228. The Commission there stated that:

[A]ny employer seeking to be excused from implementing a cited standard's abatement measure on the basis of its infeasibility has the burden of establishing either that an alternative protective measure was used or that there was no feasible alternative measure.

Although Monitor demonstrated that guardrails are an infeasible method of complying with §1926.500(d)(1), it did not show that it provided alternative protection for employees working at the unguarded leading edge of the ramp. Nor did Monitor introduce any evidence that alternative protection was unavailable or impractical. The evidence in the record, i.e. that no contractor using the GBS system utilizes guardrails, is clearly insufficient to meet Monitor's burden of proof.

Monitor has failed to make out its affirmative defense and the cited violation must be affirmed.

Penalty

The Secretary has proposed a penalty of \$1,200.00.

Monitor is a medium size employer with 45 workers total (Tr. 61). Only six employees were on the Forest Fair site (Tr. 24). Monitor has received other serious OSHA citations within

the past three years (Tr. 62). The record contains no other evidence of bad faith; the OSHA CO testified that Monitor did have a written safety program, together with weekly safety meetings and was cooperative in all respects during his inspection (Tr. 74, 105). The Secretary did not, however, allow credit for good faith based on its issuance of a "repeat" citation for violation of §1926.500 (b)(1) (Tr. 105-106).

The cited violation was properly cited as "serious." A fall from 9'10" would, in all probability, result in broken bones (Tr. 43). One employee was exposed to the hazard at the leading edge while aligning the capital column (Tr. 118). Taking into consideration the relevant factors, the undersigned finds the proposed penalty excessive. Monitor did not receive credit for good faith based solely on the "repeat" citation it received as a result of this inspection. As discussed below, however, the cited violation was improperly classified as repeated. Monitor is, therefore, entitled to a further reduction for good faith. A penalty of \$960.00 will be assessed.

Alleged Violation of §1926.500(b)(1)

§1926.500(b)(1) requires that floor openings be guarded by standard railings and toeboards or covers. It is admitted that the GBS beam troughs were unguarded. Monitor disputes only the applicability of the standard.

For the reasons discussed above, the undersigned finds that the GBS formwork constitutes a "floor," to which the cited standard is applicable.

In addition, the Commission has held that §1926.500(b)(1) applies to openings into which an employee can fall to the level of the knee. *National Industrial Constructors, Inc.*, 10 BNA OSHC 1081, 1981 CCH OSHD ¶25,743 (No. 76-4507, 1981).

The cited standard is, therefore, applicable to the GBS beam troughs.

Penalty

The Secretary proposed a penalty of \$3,000.00 for the cited violation.

Monitor was charged with a "repeat" violation based on a 1988 citation for violation of §1926.500(f)(5)(ii) (Tr. 58). The 1988 citation, however, dealt with Monitor's failure to provide an adequate temporary cover for a manhole at a different site (Tr. 80-83, 217; Ex. C-12).

The Commission has held that "[a] violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer

for a substantially similar violation." *Potlatch Corporation*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶23,294 (16183, 1979).

The undersigned finds that the current violation, involving Monitor's failure to cover beam troughs in its form work is not substantially similar to the 1988 violation involving a weakened manhole cover.

The violation will rather be classified as "serious," based on the CO's uncontradicted testimony that a slip or fall 30-31" into the beam channel could result in broken bones (Tr. 60). The likelihood of an accident occurring, however, is deemed remote. Monitor maintains that only one accident has ever been reported in connection with the beam channels, an accident which occurred when a Monitor employee was attempting to climb out of the channel he had been working in, which resulted in bruising (Tr. 84, 133, 173). Although all the Monitor employees were exposed to the hazard, they were well aware of the presence of the beam channels, which form an integral part of the GBS formwork structure.

Taking into consideration these factors, and those discussed above, the proposed penalty is deemed excessive. A penalty of \$300.00 will be assessed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law that are inconsistent with this decision are denied.

Order

Serious citation 1, item 1, alleging violation of §1926. 500(d)(1) is AFFIRMED and a penalty of \$960.00 is assessed.

Repeat citation 2, item 1, is AFFIRMED as a "serious" violation and a penalty of \$300.00 is assessed.



Benjamin R. Loye
Judge, OSHRC

Dated: November 6, 1992