SECRETARY OF LABOR,

Complainant,

v.

THE TIMKEN COMPANY,

Respondent.

UNITED STEEL WORKERS OF AMERICA, GOLDEN LODGE, LOCAL NO. 1123,

Authorized Employee Representative.

Docket No. 97-0970

DECISION

Before: RAILTON, Chairman; ROGERS, Commissioner.*

BY THE COMMISSION

This case is before the Occupational Safety and Health Review Commission under 29 U.S.C. § 661(j), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("the Act"). The facts are relatively undisputed. The Timken Company ("Timken") produces steel ingots in the Bottom-Pouring Department at its Faircrest Avenue steel plant in Canton, Ohio. In the Bottom-Pouring Department, ingot molds are moved from station to station on top of teeming cars. The teeming car is a flat railroad-

*Commissioner Stephens has recused himself from participation in this case.

type of car that is moved from station to station by a traverser. The traverser is an independent motorized unit that moves along rails in a seven-foot deep pit in a north-south direction within the Bottom-Pouring Department. The traverser has railroad tracks on top of it that allow teeming cars to move from slots onto the traverser. Once the traverser aligns with a slot, two sets of rails one on the traverser and one in the slot line up and the teeming car is moved into the slot along the rails. The distance between the end of the teeming car to the edge of the traverser pit is approximately 15 to 18 inches. In the Bottom-Pouring Department, there are ten slots and teeming cars, each associated with a different procedure in the ingot making process, and one traverser.

On February 6, 1997, a Timken mechanical maintainer was in a slot working alone repairing the underside of a teeming car. Because her feet were at the meshing point between the rails of the teeming car and those of the traverser, the employee's right foot and the toes of her left foot were amputated when the rails atop the traverser aligned with those of the teeming car as the traverser moved along the traverser pit perpendicular to the end of the slot where she was working.

The Secretary cited Timken for a serious violation of the lockout/tagout ("LOTO") standard at 29 C.F.R. § 1910.147(c)(4)(i).[1] This standard requires that certain industrial machines and equipment be shut down and disconnected from their power source for the duration of servicing or repair operations. The teeming car that the employee was repairing had been locked out and tagged out. However, the traverser was not locked out or tagged out. The citation specifically alleged that Timken violated the standard because, while the employee was repairing the drive bar on the teeming car in a slot adjacent to the traverser pit, "[t]here was no procedure in place to require the locking out of the traverser so as to prevent the employee from being exposed to the shear point created by the meshing of the rails atop the traverser with the rails in Slot #5." Timken contested the citation. Timken contended that the standard does not apply to the cited condition.[2]

---

[1]Section 1910.147(c)(4)(i) provides: "Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section."

[2]According to the LOTO scope provision, "This standard covers servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy[,] could cause injury to employees…." 29 C.F.R. § 1910.147(a)(1)(i) (emphasis in original).

The Secretary thereafter moved to amend the citation to allege, in the alternative, that Timken violated section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), which is commonly referred to as the general duty clause.[3] The basis for the alternative charge was that employees performing maintenance work, and particularly the employee repairing part of the drive bar on the teeming car, were "within close proximity" to the moving traverser and were thus exposed to the "[h]azards associated with this movement…includ[ing] the shear point created by the meshing of the rails atop the traverser with the rails in the slot…." Administrative Law Judge Covette Rooney granted the motion to amend the citation. Following a hearing and post-hearing briefs, the judge issued her decision vacating the citation. The judge found that the LOTO provision did not apply as cited, noting that the cited traverser functioned independently and was, therefore, not part of the same equipment as the teeming car being serviced.[4]

The judge also rejected the alternative section 5(a)(1) charge based on her finding that the record did not establish that Timken recognized the hazard.[5] The Secretary filed a petition for discretionary review of the judge's decision, which was granted. The issues on review, as noted in the briefing notice, are: (1) whether the cited LOTO standard,

---

[3]Section 5(a)(1) provides: "Each employer…shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

[4]The judge found that, because the traverser and teeming car functioned independently, they were distinguishable from the three examples relied on by the Secretary: the conveyor described in the Preamble to the Final Rule, 54 Fed. Reg. 36,644, 36,646 (September 1, 1989), as an operating component of the waste hogger being serviced; the group of machines described as involved in a single operation in the *August 12, 1994 Interpretive Letter to Ms. Joanne B. Linhard*; and the coal hopper bin considered so related to the car dumper as to constitute an appurtenance as discussed in the unreviewed administrative law judge's decision in *Armco Steel Co., L.P.*, 1993 OSAHRC LEXIS 198 (No. 93-0641, 1993 ALJ).

[5] To prove a violation of section 5(a)(1) of the Act, the Secretary must establish that: (1) a condition or activity in the employer's workplace presented a hazard to employees; (2) the cited employer or the employer's industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) feasible means existed to eliminate or materially reduce the hazard. *See, e.g., Waldon Health Care Center*, 16 BNA OSHC 1052, 1058, 1993-95 CCH OSHD ¶ 30,021, p. 41,151 (No. 89-2804, 1993) (consolidated).

section 1910.147(c)(4)(i), applies to the particular circumstances in this case; and (2) whether a violation of section 5(a)(1) was proven.

While agreeing that the LOTO standard does not apply, the two participating Commission members are divided on the appropriate disposition of the case on the merits regarding the section 5(a)(1) alternative charge. However, section 12(f) of the Act, 29 U.S.C. § 661(e), requires that official action of the Commission must have the affirmative vote of two members. To resolve this impasse, the Commission herein vacates the direction for review, thereby allowing the judge's decision and order to become the final appealable order of the Commission with the precedential value of an unreviewed judge's decision. *See, e.g., Texaco, Inc.*, 8 BNA OSHC 1758, 1760, 1980 CCH OSHD ¶ 24,634, p. 30,218 (Nos. 77-3040 & 77-3542, 1980); *Rust Engineering Co.*, 11 BNA OSHC 2203, 2205, 1984-85 CCH OSHD ¶ 27,024, p. 34,777 (No. 79-2090, 1984). *See also* sections 10(c), 11(a) and (b), and 12(j) of the Act, 29 U.S.C. §§ 659(c), 660(a) and (b), and 661(i). Accordingly, the direction for review is vacated.[6] However, the separate opinions of the two participating Commission members follow.

It is so ordered.

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: April 15, 2003

[6] Notwithstanding our action vacating the direction for review in this case, as the separate opinions of the Commission members make clear, this was an appropriate case for review. The order vacating the direction for review is entered in order to allow the parties to bring finality to this case. The decisions of some United States courts of appeals have rejected alternative forms of dispositions of our cases when only two members are available to decide cases. *See, e.g., Cox Brothers v. Secretary of Labor*, 574 F.2d 465 (9th Cir. 1978); *Shaw Construction, Inc. v. OSHRC*, 534 F.2d 1183 (5th Cir. 1976).

Separate Opinion of Commissioner Rogers

ROGERS, Commissioner:

I.

Commissioner Rogers agrees with the judge that the Secretary failed to prove that the cited LOTO standard at 29 C.F.R. § 1910.147(c)(4)(i) applies. Commissioner Rogers finds that "equipment" in this context lacks plain meaning. She therefore must consider whether the Secretary's interpretation of "equipment" to include the traverser here is reasonable and entitled to deference. Reviewing courts must defer to the Secretary's reasonable interpretation of an ambiguous regulation if it " 'sensibly conforms to the purpose and wording of the regulation[]' " taking into account "whether the Secretary has consistently applied the interpretation embodied in the citation," "the adequacy of notice to regulated parties," and "the quality of the Secretary's elaboration of pertinent policy considerations." *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144, 150-51, 157-58 (1991) (citation omitted). *See Union Tank Car Co.*, 18 BNA OSHC 1067, 1069, 1995-97 CCH OSHD ¶ 31,445, p. 44,472 (No. 96-0563, 1997).

The record shows that the traverser and the teeming cars operate independently. The sole function of the traverser is to transport the teeming cars. The traverser is not fixed nor permanently attached to a particular teeming car, but rather is continually moving. It is programmed to go to different points along the traverser pit to match up its top rails with the rails at different slots at different times. When, as in this case, repairs are done to a teeming car, Timken has a program for locking it out; as the judge found, Timken followed that procedure here. Timken also has a program for locking out the traverser when the traverser itself is being repaired, but that was not the case here.

Commissioner Rogers concludes that the Secretary falls far short in this case of demonstrating that her interpretation is reasonable. Commissioner Rogers agrees with the

judge that the documents on which the Secretary relies are distinguishable. In Commissioner Rogers' view, the machines described in those documents are more permanently interconnected in a single, integrated system distinctly different from the independently operated teeming car and traverser.

She also notes that the Secretary issued an interpretation subsequent to the citation in this case that casts doubt on the consistency of the Secretary's interpretation here. In an October 5, 1999 memorandum from Richard E. Fairfax, Director, OSHA's Directorate of Compliance Programs, to Michael Connors, Regional Administrator,[1] regarding 29 C.F.R. § 1910.147, the following question was addressed.

> **Issue No. 2:** The standard appears to apply only to the specific piece of equipment where the servicing and maintenance work is performed. However, when employees are working on a piece of equipment or machinery, additional hazards associated with adjacent or auxiliary equipment or machines may pose hazards to these employees. The standard does not appear to adequately address the issue.

The response is instructive: "[T]he machine guarding Subpart O requirements would apply in the scenario where an authorized employee is performing servicing or maintenance activities on one machine and is exposed to machine hazards from an adjacent machine or piece of equipment in the normal production mode of operation (without service or maintenance activities taking place)." The described scenario is strikingly similar to the facts here.

In Commissioner Rogers' view, a reasonable employer could conclude that, because the traverser was not the equipment being serviced nor was it a component of,

---

[1]Administrative notice can be taken of this document because it is available to the public on the Internet at www.osha.gov. *See, e.g.*, *Union Tank Car Co.*, 18 BNA OSHC at 1068 & n.6, 1995-97 CCH OSHD at p. 44,471 & n.6.

nor permanently attached to, the teeming car, the LOTO standard did not apply to the circumstances here. Commissioner Rogers therefore concludes that the Secretary's interpretation of "equipment" as including the traverser here is not reasonable and entitled to deference. For that reason, the Secretary has therefore not proven that the standard applies.

II.

Commissioner Rogers concludes that the Secretary did establish the alternative charge — a violation of section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1). To prove a violation of section 5(a)(1), the Secretary must establish that (1) a condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or the employer's industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard. *E.g.*, *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1058, 1993-95 CCH OSHD ¶ 30,021, p. 41,151 (Nos. 89-2804 & 89-3097, 1993).

As the judge found, the Secretary established that the condition presented a hazard because the injured employee working under the teeming car [2] was required to position herself in such a way that her feet would be in close proximity to the meshing point between the rails of the teeming car and those of the traverser as the traverser went by.[3] The record shows that the operator in the pulpit who controlled the traverser had an obstructed view of the slot in which the injured employee worked. Timken's operations coordinator for the department testified that he knew that repairs on the teeming cars were

[2]The record establishes that to perform such repairs the employees would need to lie on their stomachs or backs underneath of the teeming cars.

[3]Commissioner Rogers notes that the mechanical maintainer was 6 feet, 1 inch tall, and the part of the drive bar she was repairing was 36 to 42 inches from the closest edge of the traverser pit.

done "daily" in the slots "on or near the edge of the traverser pit." As the judge found, the serious nature of the employee's injuries established that the hazard caused serious physical harm. With respect to the feasibility of abatement,[4] the record includes unrebutted testimony that, following the accident, teeming cars were positioned so that the repair work would be done on the end facing away from the traverser. This was one of the feasible abatement methods suggested by the Secretary in the citation.

Regarding the main element of proof at issue here — employer recognition of the hazard, Commissioner Rogers concludes for the following reasons that it was established by the evidence as a whole.

Under section 5(a)(1), "[a] hazard is deemed 'recognized' when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry." *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2003, 1995-97 CCH OSHD ¶ 31,301, p. 44,014 (No. 89-0265, 1997) (citations omitted); *accord Continental Oil Co. v. OSHRC*, 630 F.2d 446, 448 (6th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). The Sixth Circuit, to which this case may be appealed under 29 U.S.C. § 660(a) and (b), has found evidence of employer safety efforts to be relevant in determining whether the employer recognized the hazard. *Duriron Co. v. Secretary*, 750 F.2d 28, 30 (6th Cir. 1984) (precautionary steps taken to protect employees from heat stress).

Commissioner Rogers finds Timken's recognition and actual knowledge of the hazard based on the presence on the traverser of a horn that sounds and a warning light that blinks whenever the traverser moves. She finds that the horn and light indicate Timken's recognition that the traverser, in its continuous movement along the pit, creates

---

[4]The judge did not specifically address the feasible abatement issue as she found no violation because, in her view, the hazard was not recognized.

a hazard and must be avoided by those in or near its path. Whether the horn and light were effective in alerting employees is another matter, as the videotape indicates the high noise level in the plant, and the record establishes that employees repairing teeming cars, as the injured employee was here, may be on their stomachs or backs with their heads underneath the cars.

The record establishes that Timken knew the traverser was operating where an employee performing such repairs would be working. Timken's operations coordinator for the Bottom Pouring Department testified that he "knew" that repairs on teeming cars by mechanical maintainers were "a daily event" on his shift, such repairs were done with the teeming cars in the slots, and the repairs were done "on or near the edge of the traverser pit." As a supervisory employee, his knowledge is imputable to his employer. *E.g.*, *Hamilton Fixture*, 16 BNA OSHC 1073, 1089, 1993-95 CCH OSHD ¶ 30,034, p. 41,184 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994).

The record also shows that Timken was actually aware of the vehicular nature of the hazard and the danger that posed. Timken's Principal Industrial Hygienist testified that he considered the traverser to be "a vehicular piece of equipment just like a truck or locomotive," and described it as "vehicular traffic and would have to be accounted for accordingly."[5] In light of this testimony, Commissioner Rogers finds that the Timken

[5]Employer recognition of vehicular traffic hazards posed to employees performing their assigned tasks triggers employer obligations to protect employees in several contexts. *See W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1236, 2000 CCH OSHD ¶ 32,216, p. 48,865 (No. 99-0344, 2000), *aff'd*, 285 F.3d 499 (6th Cir. 2002) (Commission found that "having its employees cross an active, multiple lane, high-speed highway poses an obvious hazard that was recognized as such by Fairfield" and triggered the obligation to instruct employees in recognition and avoidance of the hazard under 29 C.F.R. §§ 1926.20(b)(1) and 1926.21(b)(2)). As in *Fairfield*, the hazard here was recognized as such by the employer yet an experienced employee was put in harm's way without, in *Fairfield*, instruction, or, here,

work rules addressing such matters as clearing the way before operating equipment become more relevant and specific to what is essentially a vehicular hazard here. Work rules may appropriately be considered in determining hazard recognition. *See generally Secretary v. General Dynamics, Land Systems Div*, 15 BNA OSHC 1275, 1285, 1991-93 CCH OSHD ¶ 29,467, p. 39,757 (No. 83-1293, 1991), *aff'd without published opinion*, 985 F.2d 560 (6th Cir. 1993) (several company safety bulletins go toward showing recognition); *Ulysses Irrigation Pipe Co.*, 11 BNA OSHC 1272, 1275, 1983-84 CCH OSHD ¶ 26,462, p. 33,644 (No. 78-799, 1983) (instruction not to use unlighted, unprotected tractor at night goes toward recognition of hazard of unlit, obstacle-filled pipe storage yard).

For example, Timken work rule no. 69 directs employees to "[w]atch where you place your hands and feet when working with machinery, and don't get caught in a pinch point." This addresses the hazard here caused by the nearby moving traverser.[6] Work rule no. 70 tells employees to "[a]lways make sure all personnel are clear before operating any equipment." Here the traverser operator's view of some of the slots was obstructed while the traverser was moving. Work rule no. 67 advises employees that "[c]aution should be used at all RR crossings due to Radio Controlled Locomotives," to which the traverser may be analogized. Thus, these work rules show hazard recognition by Timken.

In addition, Commissioner Rogers notes that employer recognition of a hazard has been found "absent direct evidence of subjective belief," where a hazard is " 'obvious and glaring' " "without reference to industry practice or safety expert testimony." *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984), quoting *Tri-State*

---

implementation of a feasible means of abatement.

[6]Timken did not argue that the injured employee's conduct was unpreventable.

Roofing v. OSHRC, 685 F.2d 878, 880-81 (4th Cir. 1982) (unguarded platform 40 feet above concrete floor and no protective equipment). The Sixth Circuit, to which, as noted above, this case may be appealed, has acknowledged this as well. In *Southern Ohio Building Systems, Inc. v. OSHRC*, 649 F.2d 456, 460 (6th Cir. 1981) ("*So. Ohio*"), the Sixth Circuit stated that "[i]n cases where the evidence establishes that employees have been exposed to obvious danger the general duty clause may be the basis of a finding of violation. *E.g., Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871 (3d Cir. 1979)." While admitting that a hazard could be so obvious as to be the basis for a section 5(a)(1) charge, and thus could equate to actual knowledge, the Sixth Circuit in *So. Ohio* found that particular level of obviousness not to be present there because of deficiencies in the evidence. 649 F.2d at 459-60. Insofar as the judge indicated that the Sixth Circuit in *So. Ohio* required a showing of industry recognition before an obvious hazard could be found recognized by the employer, Commissioner Rogers respectfully concludes that the judge's reliance on that decision was misplaced.[7]

---

[7]Nowhere in *So. Ohio* does the court state that proof of industry recognition is required before obviousness can establish hazard recognition. The court throughout its decision in that case, but especially at 649 F.2d at 459, was particularly critical of the Secretary's failure of proof on several key points — one of them being her failure to prove that the wind was at such a velocity that it was an obvious danger. As the Sixth Circuit noted in *So. Ohio*, the court in *Bethlehem*, as a number of courts have done in cases involving obvious hazards, went on to find that the evidence there established as well that a recognized standard of the industry was violated. The Sixth Circuit then contrasted the proof of weather conditions in *Bethlehem* with those in *So. Ohio*. Commissioner Rogers considers the fact that the court did not contrast the industry recognition evidence in the two cases to underscore her reading of *So. Ohio* as not requiring such evidence for recognition where an obvious hazard has been found.

She also finds that the judge's reliance on *Davis-McKee, Inc. v. OSHRC*, 709 F.2d 1501 (6th Cir. 1983) (decision without published opinion) and *Kokosing Construction Co.*, 17 BNA OSHC 1869, 1873 n. 15, 1995-97 CCH OSHD ¶ 31,207, p. 43,725 n.15 (No. 92-2596, 1996), is also misplaced because those cases were tried and decided on evidence of industry

Having reviewed the record in this case and considered the testimony and exhibits, especially the videotape jointly entered into evidence, Commissioner Rogers concludes that the hazardous condition here was obvious, and strikingly similar to the "vehicular" hazard at issue in *Litton Systems, Inc.*, 10 BNA OSHC 1179, 1182, 1982 CCH OSHD ¶ 25,817, p. 32,270 (No. 76-900, 1981), where the Commission, like the circuit courts noted above, found that employer recognition under section 5(a)(1) "can be inferred from the obvious nature of the hazard," *citing Eddy's Bakeries Co.*, 9 BNA OSHC 2147, 2150, 1981 CCH OSHD ¶ 25,604, p. 31,940 (No. 77-1084, 1981) ("danger presented by the presence of gasoline vapors near a source of ignition is a matter of common knowledge" also confirmed by fire and safety expert testimony). The Commission's statements in *Litton* about the "obvious nature of the hazard" apply equally here: "The hazard in this case is a large vehicle moving with obstructed vision through areas commonly used by employees. The danger presented by this type of machinery is a matter of common knowledge." *Litton*, 10 BNA OSHC at 1182, 1982 CCH OSHD at p. 32,270. The operator in the cab of the "straddle carrier" in *Litton* had a 25 to 30 foot blind spot in front. Here, the traverser is programmed by an operator in the pulpit who had an obstructed view of some parts of some slots, including the one where the injured employee was working.[8]

In *Litton*, it was clear that the carrier operated in areas commonly used by employees. Here, as noted above, the evidence shows that Timken, through its operations coordinator for the department, knew that the traverser was operating where an employee

---

recognition, not on an obviousness theory.

[8]Unrebutted testimony established that the traverser operator at the time of the accident, who did not testify, had been told by the injured employee herself that she would be doing repair work in the slot.

would be performing repairs daily on or near the edge of the traverser pit. Thus, Commissioner Rogers also finds hazard recognition based on the obvious nature of the hazard here.

Based on all the facts above, taken together, Commissioner Rogers concludes that the Secretary established that the vehicular-type hazard here was actually known to Timken, and, in any event, was so obvious as to be equated with actual knowledge of a reasonable person, and thus recognized by Timken. She believes the evidence of obviousness, together with the other facts showing actual recognition, distinguish this case factually from *So. Ohio*. She thus finds that the Secretary has proven employer recognition of the hazard.

As discussed above, the Secretary has established the other requisite elements for proving a section 5(a)(1) violation, including evidence that: the hazard could, and did, cause serious physical harm; and abatement was not only feasible but easily implemented, as Timken instituted a new program following the accident providing that the end of the teeming car being repaired would be away from the traverser pit. Because she finds that, based on the record as a whole, the Secretary proved the requisite elements of the section 5(a)(1) charge, Commissioner Rogers would affirm the citation item on that ground.

Separate Opinion of Chairman Railton

RAILTON, Chairman:

I.

Chairman Railton agrees with the judge's determinations that the cited LOTO standard, section 1910.147(c)(4)(i), does not apply and that the Secretary failed to prove a violation of section 5(a)(1).

The Chairman agrees that the LOTO standard does not apply for the reasons given by the judge on pages 6 and 7 of her decision. The judge found, and the Chairman agrees, that the traverser functioned independently of the teeming cars. Indeed, on the day of the accident, after the teeming car was locked out in order to conduct repairs, the traverser continued to operate in a completely independent manner. Operations in the Bottom-Pouring Department, such as pouring of steel, the preparation of ingot molds, and the movement of the other teeming cars onto the traverser, continued.[1] Accordingly, as the traverser and teeming cars are not part of the same equipment, the LOTO standard does not apply to the cited condition.

Moreover, the Chairman finds that the standard does not apply because the Secretary has not proven that the movement of the traverser was "*unexpected*."[2] *See, e.g.,*

[1]The position asserted by the Secretary in this case is extreme. The Secretary would require the lockout of the traverser and thus would entirely shut down the teeming operation. The Secretary has failed to demonstrate that the result for which she advocates is reasonable in these circumstances. The traverser car operation appears to be similar to the role played by a switch engine in a railroad switchyard. Under the Secretary's line of argument, for example, the engine used to move railcars in a switchyard would have to be locked out whenever repairs are made to a freight car that had been shunted off onto a side track.

[2]The LOTO standard's scope provision limits the applicability of the standard to "the servicing and maintenance of machines or equipment in which the *unexpected* energization

Reich v. General Motors Corp., Delco Chassis Division, 89 F.3d 313, 315-16 (6th Cir. 1996).[3] In *Reich v. General Motors*, the Court of Appeals for the Sixth Circuit made the following observations about the term "unexpected" as used in the standard:

> We conclude that the plain language of the lockout standard unambiguously renders the rule inapplicable when an employee is alerted or warned that the machine being serviced is about to activate. In such a situation, "energization" of the machine cannot be said to be "unexpected" since the employee knows in advance that machine startup is imminent and can safely evacuate the area. The standard is meant to apply where a service employee is endangered by a machine that can start up without the employee's foreknowledge. In the context of the regulation, use of the word "unexpected" connotes an element of surprise, and there can be no surprise when a machine is designed and constructed so that it cannot start up without giving a servicing employee notice of what is about to happen.

Id. at 315.

In this case, unrebutted testimony established that the employee maintaining the teeming car was aware that the traverser would be operating as usual, as it had when the employee had done such repairs in the past. Each move of the traverser was programmed, specific, and intended. While the employee may not have been thinking about the traverser in the moment before the accident, her actions do not change the facts that the start up and movement of the traverser was not unexpected. Thus, as there is no "element of surprise," the activation and operation of the traverser would not fall under the standard's definition of "unexpected."

---

or start up of the machines or equipment, or release of stored energy could cause injury to employees." 29 C.F.R. § 1910.147(a)(1)(i) (emphasis in original).

[3]This case can be appealed to the Sixth Circuit because the principal office of Timken and the location of the alleged violation are in Ohio. 29 U.S.C. § 660(a) & (b). Where it is clear that the case can be appealed to a particular circuit, the Commission will apply the law of that circuit. *See, e.g., Farrens Tree Surgeons*, 15 BNA OSHC 1793, 1794-95, 1991-93 CCH OSHD ¶ 29,770, p. 40,489 (No. 90-998, 1992).

In sum, for the reasons set forth in the judge's decision and above in his separate opinion, the Chairman finds that the Secretary has failed to prove that section 1910.147(c)(4)(i) applies to the cited condition.

II.

Chairman Railton also agrees with the judge's conclusion, for the reasons she gave, that the Secretary failed to prove a violation of section 5(a)(1). The Secretary did not establish that the hazard was actually known to Timken. He also agrees with the judge's conclusion that the record here does not support or establish that the hazard should have been recognized because it was obvious.

"A hazard is deemed 'recognized' when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry." *Seward Motor Freight Inc.*, 13 BNA OSHC 2230, 2234, 1987-90 CCH OSHD ¶28,506, p. 37,787 (No. 86-1691, 1989). The Secretary asserts that Timken recognized the hazard associated with operating the traverser adjacent to the slots occupied by the teeming car. However, as the judge discussed, the safety rules cited by the Secretary in support of this contention are not persuasive. As the judge noted, Timken's generalized work rules that warn employees to "be alert for uneven spots, holes, chains, pinch points and other hazards or obstructions"; to "[not] get [your hands or feet] caught in a pinch point"; and to "make sure all personnel are clear before operating any equipment" do not establish recognition of the hazard created by the movement of the traverser while performing work upon the teeming car. While Timken does have other hazard specific work rules such as rules regarding cranes and hazardous materials, these rules neither explicitly address the traverser nor the cited hazard. The Chairman also believes that it is worth noting that the rules upon which the Secretary relies are corporate-wide; yet, Timken presented evidence that the design of the Bottom-Pouring Department at its Faircrest plant is unique; thus, they could not have been intended to be specific as to the particular operations in this department.

The Chairman also agrees with the judge's determination that the Secretary failed to prove an obvious hazard. Here, the Commission's job "is not to look for a proximate cause relationship between the accident which preceded the inspection and the specific violation charged, but to determine whether there is substantial evidence in the record supporting the charge that the employer maintained, at the time and place alleged, a recognized hazard to the safety of its employees." *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871, 874 (3d Cir. 1979). The Chairman finds that the Secretary failed to present such evidence. Rather, the Chairman finds that the Secretary's logic regarding the fact that an employee may face death or serious physical harm by getting caught in the shear point created by the meshing of the rails atop the traverser with the rails in a teeming car slot is exactly the type of logic the Court of Appeals for the Sixth Circuit cautioned

against in *Southern Ohio Building Systems, Inc. v. OSHRC*, 649 F.2d 456, 459-60 (6th Cir. 1981). In *Southern Ohio Building Systems*, the court noted that the fact that serious injury may occur, as it did in this case, is not proof of a hazard so obvious as to require recognition — in other words, it admonished the Secretary against "Monday morning quarterbacking." Here, this is exactly how the Secretary tries to persuade the Commission of the existence of an obvious hazard — she relies upon the fact that the proximate cause of the serious injuries suffered by the mechanical maintainer was the cited hazard and claims, in retrospect, that the employer should have foreseen the possibility of injury.

Yet, the Secretary presented no evidence that anyone in the Faircrest plant recognized that a hazard was presented by performing maintenance work adjacent to the traverser pit with the traverser in operation. For example, the record lacks evidence that there had been complaints from employees about working on the teeming car in the cited area and does not contain evidence that employees had discussed or that employees had been warned about the danger of positioning oneself in any particular manner with respect to the task of working on the teeming car. Despite the fact that Timken had an experienced safety department, which had developed many specific work rules evidencing a high concern for the safety of Timken's employees, the practice used by this mechanical maintainer was customary for repairing the teeming cars. The record demonstrates that she had previously repaired teeming cars in slots adjacent to the traverser pit knowing that the traverser was in operation. At the time the accident occurred, she knew that the traverser would be operating but unfortunately positioned herself so as to be exposed to injury. On this record, it is apparent that neither Timkin's safety department nor any of the persons working at the specific plant concluded that the hazard presented by the operation of the traverser car while performing repairs on teeming cars was obvious.

To call this lack of evidence into question, the Chairman concludes that something more is required than the mere claim by the Secretary that the hazard should have been obvious to the employer. While *Southern Ohio* recognized the possibility that a hazard can be so obvious to be the basis of a finding of a section 5(a)(1) violation, without specific industry knowledge and where there are contrary facts of record, additional proof of the hazard must be required.[4] *Bethlehem Steel* is illustrative of this point. In

[4]In reaching this conclusion, the Chairman does not need to address the issue of whether the judge was correct in her understanding that *Southern Ohio* requires proof of industry recognition before an obvious hazard would be enforceable under section 5(a)(1). However, the Chairman merely notes that, in failing to provide substantial evidence of an obvious hazard, the Secretary in this case presented no evidence of industry recognition of the hazard.

Bethlehem Steel, where an employer was charged with a violation of the general duty clause following an employee's fall from a crane resulting in death, the Court of Appeals for the Third Circuit found that there was substantial evidence of an obvious hazard where the employer operated a crane during high winds and a snowstorm causing 12 to 14 inches of accumulation. In establishing that the hazard should have been obvious to the employer, the Secretary presented not only evidence that there was limited visibility by the crane operator because the window of the cab had fogged up and the cab lacked wiper blades, but also evidence that gusts of wind exceeded the safe operating limit of the crane as established in two separate industry standards, which made it difficult for the operator to control the swing of the boom, and evidence that management was aware of the high wind conditions and made several calls regarding the weather that day. In addition, the Secretary presented testimony that other companies in the industry ceased operations during such conditions. *Id.* Thus, even though the danger of operating a crane in high winds and a snowstorm may appear obvious to the layperson, the Secretary adduced substantial evidence regarding the hazardous condition, such as industry standards and the practice of other crane operators, in addition to the facts of high winds and snow. Here, the Secretary has failed to do this;[5] thus, she has failed to meet her burden of establishing recognition of a hazard. For these reasons, the Chairman agrees with the judge's determination that the Secretary failed to prove a violation of section 5(a)(1).

[5]While the Secretary has cited several cases where the Commission or the courts have found a hazard so obvious that a recognized hazard was established, the Chairman finds these distinguishable from the instant case. He respectfully disagrees with his colleague's conclusion that the hazardous condition here was strikingly similar to the vehicular hazard at issue in *Litton Systems*, 10 BNA OSHC 1179, 1182, 1982 CCH OSHD ¶ 25,817, p. 32,270 (No. 76-900, 1981). In *Litton Systems*, the hazard was a large vehicle driven with obstructed vision through areas commonly used by employees as a walkway. Here, the traverser is not "driving around" like a vehicle. Employees know that once the traverser's next move is computer-programmed, the pulpit operator does not direct the traverser's movement. Once programmed, the traverser moves two ways in a pit: "back" and "forth." Employees do not use the pit as a walkway. Moreover, employees know that the traverser moves back and forth in the pit without a driver who could "brake" if an employee crossed its path. The Chairman, therefore, finds reliance upon *Litton Systems* to be misplaced.

SECRETARY OF LABOR,

Complainant,

v.

THE TIMKEN COMPANY,

Respondent,
and
USWA, GOLDEN LODGE, LOCAL NO. 1123,
Authorized Employee Representative.

DOCKET NO. 97-0970

Appearances : For Complainant: Heather A. Joys, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, OH.; For Respondent : William S. Cline, Esq. and Shannon L. Shinaberry, Esq., Day, Ketterer, Raley, Wright & Rybolt, Ltd., Canton, OH.; Authorized Employee Representative For USWA, Local No. 1123: Art Maurer, Vice-President Local 1123

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, the Timken Company, at all times relevant to this action maintained at a worksite at 4511 Faircrest Avenue, S.W., Canton, OH., where it was engaged in the business of producing steel ingots which were transferred to other areas of the plant for further processing. Respondent admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On February 6, 1997, accident which occurred in the Bottom-Pouring department of this job site. Compliance Officer ("CO") Edward Dill conducted an accident inspection of the subject job site on February 12, 1997. As a result of his inspection, on June 3, 1997, Respondent was issued a citation alleging a serious violation with a proposed total penalty in the amount of $7,000.00. By timely Notice of Contest, Respondent brought this proceeding before the Review Commission. A hearing was held before the undersigned on June 16, 1998, in Cleveland OH.

Counsel for the parties have submitted Post-Hearing Briefs and Reply Briefs, and this matter is ready for disposition.

Background

There are four different processes which occur at the Bottom-Pouring Department. The operations are continuous -24 hours, 7 days a week (Tr. 221, 257, 275)[1]. There is a prepping station, pouring station, stripping station, and a rolling area (Tr. 197). The prepping, pouring and stripping operations all occur in teeming cars.[2] In the prepping station, the molds are placed onto teeming cars by crane and are prepared to receive molten steel. After being prepped, the molds are transferred on a teeming car to the pouring station where another crane uses a ladle to fill the molds with molten steel. Once the steel is poured, it sits in the slot and cools. After it cools, the mold is stripped and the ingot is moved to the rolling-mill area by a crane (Tr. 189-98, 193-94, 222).

The ingot molds are moved from station to station on top of teeming cars. The teeming car is a flat railroad-type car which is moved from station to station by a traverser. The traverser is an independent motorized unit which moves along rails in a seven foot deep pit in a north-south direction within the Bottom-Pouring Department. There are ten teeming cars with one traverser. The traverser has railroad tracks on top of it which allow the teeming cars to move from slots onto the traverser. The traverser moves along rails in a seven foot deep pit. The traverser moves from one slot to another. When the traverser aligns with a slot, two sets of rails, one on the traverser and one in the slot, line up and the teeming cars is moved into the slot along the rails. The distance between the end of the teaming car to the edge of the traverser pit is approximately 15 to 18 inches (Tr. 227, 238). There are ten slots in the bottom pour area. Each

---

[1] The term "Tr." refers to the official transcript which began at page 180. The term "Ex" refers to the exhibits introduced into evidence at the hearing.

[2] The official transcript and the Secretary's brief refer to this car as the "teaming" car. The undersigned has utilized the Respondent's spelling of the term "teeming" in light of the fact that Respondent was responsible for the car.

slot is associated with a different procedure in the ingot making process (Tr. 194-96, 268, 276, 281; Joint Ex. 1, Exs. G-1-4).

Maintenance and repair work was performed on the teeming cars in any one of the slots. It was usually performed in the spare slot or in the side board deck area (Tr. 223). At the time of the subject inspection, Ms. Haney had just received an assignment from the previous shift to repair the hanger rod of a teeming car. This rod was a component of the car's drive bar located beneath the car. In order to preform the job she had to position herself on her stomach or back and slide back to the location of the drive bar (Tr. 227-28). The teeming car was located in the #5 W slot. The drive bar was approximately 36 to 42 inches from the edge of the traverser pit. Ms. Haney had just begun to set up the work and had positioned herself in such a matter that her feet hung over the edge of the traverser pit (Tr. 231, 262). Ms. Haney was seriously injured when the traverser moved past the slot in which she was working and amputated her feet (Tr. 267-68, 298).

Secretary's Burden of Proof

The Secretary has the burden of proving his case by a preponderance of the evidence. In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation 1, Item 1

29 C.F.R.§1910.147(c)(4)(i)"*Energy control procedure*" Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section - servicing/maintenance of equipment.

> In the Bottom Pouring Department, mechanical maintainers perform a variety of maintenance activities which include repairs on teeming cars while they are located in "slots" perpendicular and adjacent to the traverser, which moves the teeming cars from the "slots" in a north and south direction Such maintenance

activity would include repairs on the drive bar and replacement of plats or bumpers on the teeming cars. On or before February 12, 1997, an employee was engaged in such activity, preparing to repair the drive bar on the east end of a teeming car which was located in slot #5E.(sic). This activity placed the employee within close proximity to the movement of the traverser car. There was no procedure in place to require the locking out of the traverser so as to prevent the employee from being exposed to the shear point created by the meshing of the rails atop the traverser with the rails in Slot #5.

OR IN THE ALTERNATIVE[3]

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to:

The hazards associated with performing maintenance work adjacent to the traverser with that equipment in operation. In the Bottom Pouring Department, mechanical maintainers perform a variety of maintenance activities which include repairs on teeming cars while they are located in "slots" perpendicular and adjacent to the traverser, which moves the teeming cars from the "slots" in a north and south direction. Such maintenance activity would include repairs on the drive bar and replacement of plates or bumpers the teeming cars. On or before February 12, 1997, an employee was engaged in such activity, preparing to repair the drive bar on the east end of the teeming car which was located in Slot #5E.(sic). This activity placed the employee within close proximity (5 feet or less) to the traverser car. Hazards associated with this movement would include the shear point created by the meshing of the rails atop the traverser with the rails in the slot and/or falling into the traverser pit itself and being crushed by the machine.

The feasible and acceptable abatement methods to correct the hazard were:
1. To deenergize and lock out the traverser while the maintenance work was being performed, or,
2. To design and implement the use of a barricade to be used to protect the maintainer from inadvertently entering the danger zone created by the movement of the traverser, or,
3. To require that no maintenance activity be performed adjacent to the traverser, i.e., require that work performed at the end of a teeming car be done with the working end of the car positioned away from the traverser pit, or
4. To use a "spotter" with direct radio communication with the pulpit during maintenance activity performed adjacent to the traverser, the "spotter" would insure that the traverser does not

[3] The citation was amended to allege in the alternative by Order of the undersign dated January 28, 1998.

travel adjacent to the "slot" being worked in until the maintainer is specifically warned and both employees move to a safe location.
29 C.F.R.§1910.147(c)(4)(I)

The cited standard addresses practices and procedures that are necessary to disable machinery or equipment and to prevent the release of potentially hazardous energy while maintenance and servicing activities are being performed. *Control of Hazardous Energy Sources (Lockout/Tagout)*: Final Rule, 54 Fed. Reg. 36,644 (1989), as corrected by 55 Fed. Reg. 38,677 (1990). The standard's *"Scope, application and purpose"* provision sets forth that, "[t]his standard covers servicing and maintenance in general industry where the *unexpected* energization or start-up of machines or equipment or the release of stored energy could cause injury to employees." §1910.147(a). There is no dispute that the traverser was not locked out on the day of the accident. The record is clear that the equipment upon which maintenance work was being performed at the time of the accident was the teeming car. The teeming car had been properly locked out. It is the Secretary's position that the Respondent violated the cited standard when it failed to develop and implement procedures for the control of potentially hazardous energy on the traverser during maintenance operations on the teeming cars. Respondent contends that the cited standard is not applicable and that under Section 1910.147(c)(4)(I) the only piece of equipment that should have been locked out on the day of the accident was the teeming car upon which maintenance work was being performed.

It is the Secretary's position that under the cited standard, all related components of a single operating system, or related machines, which pose a hazard during maintenance or servicing, are subject to the requirements of the standard. The Secretary argues that the traverser and teeming cars functioned together to move product from one process to another, and the two parts were interconnected components for the functioning of the set up. The Secretary asserts that this interpretation is reasonable in light of the language of the standard and is entitled to substantial deference.[4] In support of its position, the Secretary cites several examples of setups

[4] *See Martin v. OSHRC,* 111 S. Ct. 1171, 1175 (1991).

involving more than one piece of equipment which had been found to be subject to the requirements of the standard (Secretary's Post-Hearing Brief, pp. 8-9).

The undersigned is not persuaded by the Secretary's arguments. The undersigned agrees that the standard addresses unanticipated movement of a component of a machine or equipment.[5] However, the undersigned finds that the record does not support a finding that the traverser was a component of the teeming car within the meaning of the standard. In the instant matter, the record discloses that both the teeming car and the traverser are controlled by a computer within a pulpit which was in a location elevated above the slots (Tr. 293). When the pulpit operator was informed of when a particular process had to be done, the assignment was punched into the computer and the movement of the cars automatically occurs. Thus, when a teeming car was to be moved, the pulpit operator assigned the traverser to go and get the car, via computer. The teeming car was then moved onto the traverser and moved to the agree upon location (Tr. 205-06, 217). The traverser continued to move as maintenance work was performed in a slot. Operations in the bottom pit such as the pouring of steel, the preparation of molds also continued as maintenance work was performed in a slot. Ms Haney acknowledged that on the day of the accident it was her expectation was that while performing the teeming maintenance work, the traverser would continue to travel (Tr. 269).

The undersigned finds that the evidence of record does not reveal a relationship of interconnected or appurtenant components of a machine or equipment. The function of the traverser was independent of the teeming cars. The traverser only moved the teaming cars, which held the ingot molds, from station to station for various processes. Once it had moved one teeming car into a particular slot, it moved on to another assignment (Joint Ex. 1). On the day of the accident, as the repairs were being performed upon the teeming car, which had been disabled so as to prevent the release o energy, the traverser continued to operate in a completely independent manner.

Additionally, each of the examples cited by the Secretary in support of her position involved equipment distinguishable from the equipment in the instant matter The undersigned

[5] *See* 54 Fed. Reg. at 36,647.

finds that the conditions cited in the Secretary's examples involved service was being performed upon adjacent or adjoining pieces equipment or machines. For example in the waste hogger accident, referenced in the Preamble to the standard, the undersigned finds that the conveyor was an operating component of the hogger upon which work was being performed, i.e. the adjacent conveyor fed the hogger during its operation.[6] The undersigned makes a similar finding with respect to the examples referencing "interconnected and nearby machines and equipment", a group of machines involved in a single operation - a brush cleaner and associated slump, a dryer, a conveyor and a stack up; or setups involving equipment so related as "to constitute an appurtenance"- a hopper bin into which the car dumper deposited its load of coal (Ex. C-7; Secretary's Post-Hearing Brief, Attachment 1). In view of the above, the undersigned finds that the cited standard is not applicable.

Section 5(a)(1)

The duty imposed by Section 5(a)(1) is to furnish employees with a workplace free from recognized hazards likely to cause death or serious physical injury, that could be materially reduced or eliminated by a feasible and useful means of abatement. To establish a violation of Section 5(a)(1), the Secretary must prove that: (1) a condition or activity in the employer's workplace presented a hazard to employees; (2) the cited employer or the employer's industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) feasible means existed to eliminate or materially reduce the hazard. *Waldon Healthcare Center*, 16 BNA OSHA 1052 (Nos. 89-2804 and 89-3097, 1993)*; Tampa Shipyards Inc.*, 15 BNA OSHA 1533 (Nos. 86-360 and 86-469, 1992)*; Kastalon, Inc.*, 12 BNA OSHA 1928, 1931,(Nos. 79-3561 and 79-5543, 1986); *Pelron Corp.*, 12 BNA OSHA 1833, 1835, (No. 82-388, 1986).

---

[6] (2) An employee was removing paper from a wast hogger. The hogger had been shut down, but the conveyor feeding the hogger had not been. The employee climbed onto the machine, fell onto the conveyor, was pulled into the hogger opening and was fatally crushed. There was no energy control procedure at this operation. (Failure to document and implement an effective energy control procedure - 1910.147 (c)(4). 54 Fed. Reg. At 36,646.

The Secretary alleges that the traverser created a hazard because it remained in operation while maintenance work was performed (Tr. 298). This condition created the hazard of working within close proximity to a pinch point such as the one created by the meshing of the rails in this instance (Tr. 302). The record establishes that while preparing to perform work, Ms. Haney positioned herself in such a way that her feet were at the meshing point between the rails of the teeming car and the traverser as the traverser ran by (Tr. 302, 305, 322). Accordingly, a hazard has been established. The serious nature of the injuries incurred by Ms. Haney establishes that the hazard created serious physical harm.

Existence of the hazard and recognition of the hazard are two separate elements of a general duty clause violation. "A hazard is deemed 'recognized' when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry" *Pepperidge Farm Inc*, 17 BNA OSHC 1993, 2003 (No. 89-0265, 1997) (citations omitted). A recognized hazard is defined in terms of conditions or practices over which the employer can reasonably be expected to exercise control. *Wiley Organics Inc.* ,17 BNA OSHC 1586, 1591(No. 91-3275, 1996). Review Commission precedent establishes that precautions taken by an employer and rules set forth in safety manuals addressing cited hazards can be used to establish recognition in conjunction with other evidence. *Walden Healthcare Center* 16 BNA OSHC 1052, 1061 (No. 89-2804, 1993)(employer's manual referenced the cite hazard).[7] The issuance of a work rule specifically addressing a cited hazard has been upheld to establish employer recognition of a hazard under Section 5(a)(1). *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012, 2016 (No. 13390, 1981)(employer provided and encouraged the use of a boom basket, and had a work rule which required the use of personal protective equipment when the basket was not used, indicates the employer recognized the existence of a hazard when an employee rides on and works from a crane boom without the protection of a boom basket and a tied -off safety

[7] See also *General Dynamics Land Systems, Div., Inc.*,15 BNA OSHC 1275, 1285 (No, 83-1293, 1991), *aff'd without published opinion,* No. 91-4052 [15 BNA OSHC 2218] (6th Cir. Jan. 26, 1993) (safety bulletins issued by employer regarding the cited hazard underscored actual recognition of the hazard).

belt). Thus, the initial inquiry in the instant matter is whether Respondent actually recognized the hazards associated with performing maintenance work adjacent to the traverser with the traverser in operation. The Secretary argues that the Respondent's Job Safety Descriptions for mechanical maintainers cites the hazards created by work on rail tracks (Tr. 295; Ex. C-5 at p. 3, Item 17). Additionally, the Secretary argues that Respondent's Job Safety Description established that Respondent recognized that the hazards of the pinch points created by the meshing of the rails, as well as the hazards presented without the proper clearance of personnel before operating equipment. The document warned employees to watch where hands and feet were placed while working on machinery and avoid pinch points. (Ex. C-5, p.7- Item 69). The Secretary asserts that whenever the traverser came by a slot, a pinch point was created by the meshing of the rails of the traverser and the slot (Tr. 296; Respondent's Post-Hearing Brief, p. 4). Another provision of the Job Safety Description warned employees to make sure all personnel were clear before operating equipment (Ex. G-5, p. 7-Item 70). The Secretary argues that this provision clearly addressed the constant movement of the equipment in the Bottom Pouring Area such as the traverser and the teeming cars. Furthermore, the Secretary argues that the hazard here was an obvious danger.

The undersigned finds that the cited provisions within the Respondent's Job Description do not establish Respondent's knowledge of the cited hazard. The Secretary has attempted to create this recognition by selecting certain generalized safety provisions within the Job Safety Description's Safety Instructions for the Operations of the Jobs, and argue their applicability to the instant situation. However, the undersigned finds that the Secretary's assertions fall short of proving that these safety measures were issued as a result of knowledge and recognition of the cited hazard - the movement of the traverser while performing work upon the teeming car. The undersigned notes that the Job Safety Description makes no reference to hazards associated with work in proximity to the moving traverser while working on equipment. However, the document does reference specific work activity such as work on the crane and hazardous materials in recognition of the hazards associated with said equipment or materials. The Secretary has failed to produce any evidence other than its own interpretation of Respondent's work rules in support

of its position. The evidence in the instant matter falls short of establishing any knowledge on the part of the employer which would support a finding of employer recognition of the hazard.

The Secretary has also argued that the hazard of working within five feet of a large automatic piece of equipment is an obvious hazard. The Secretary has cited several cases where the courts have found a hazard so obvious that a recognized hazard was established. However, the undersigned notes that the case law in the Sixth Circuit where the instant matter arose has held that the general duty clause enforceable for an obvious hazard only where "the particular activity referred to in the evidence" violated "a recognized standard of the industry". *See Kokosing Construction Co., Inc.* 17 BNA OSHC 1869, 1873, n. 15, citing *Southern Oil Bldg. Sys. Inc. v. OSHRC,* 649 F.2d 456, 460 [9 BNA OSHC 1848] (6th Cir. 1981)[8]. In applying the law of the Sixth Circuit, the undersigned finds that the Secretary has failed to carry her burden of proof. [9]

The undersigned finds that the Secretary has not met her burden of proof with regard to the recognized hazard element for the establishment of a general duty clause violation.

Findings of Fact and Conclusions of Law

---

[8] See also *Davis-McKee, Inc.*, 709 F.2d 1501; 1983 U.S. App. Lexis 13237 (6th Cir. 1983).

[9] The undersigned also finds that the record contains no evidence that there had been any complaints from employees about working on the teeming car in the cited area, nor had they ever been warned about the cited hazards. The record also indicates that no one from management directed the injured employee to position herself in any particular manner with respect to the assigned task. CO Dill acknowledged that his investigation revealed that the traverser operator and Ms. Haney had communicated about which slot the repair work was to be done. The traverser operator was fully aware of where that she was going to perform the repair job and Ms Haney was fully aware that the traverser would still be operating (Tr. 334-35). The undersigned finds that the record does not contains adequate evidence that additional precautionary measures should have been imposed by Respondent or that the cited hazard was foreseeable. The instant record differs from the circumstances established in cases such as *Litton Systems, Inc.*, 10 BNA OSHC 1179 (No. 76-900, 1981) which involved a large vehicle moving with obstructed vision - 20 to 30 foot blind spot- in an area where employees were commonly present; or in *Eddy's Bakery Company*, 9 BNA OSHC 2147 (No. 77-1084, 1981) where testimony of fire chief and OSHA area director established that employees engaged in refueling their own vehicles generally recognize the fire hazard presented when gasoline vapors are located near sources of ignition.

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

1. Citation 1, Item 1a, alleging a Serious violation of 29 C.F.R.§1910.146(c)(4)(i), or in the alternative Section 5(a)(1) is Vacated.

/s/
Covette Rooney
Judge, OSHRC
Washington, D.C.

Dated: September 21, 1998