UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC DOCKET NO. 01-0600
LTV STEEL COMPANY, INC., Respondent.	:	
UNITED STEEL WORKERS OF AMERICA, DISTRICT 1, LOCAL UNION 188, Authorized Employee Representative.	:	

Appearances: Mary Bradley, Esquire
Mary Anne Garvey, Esquire
U.S. Department of Labor
Cleveland, Ohio
For the Complainant

Mark D. Katz, Esquire
Ulmer & Berne, LLP
Cleveland, Ohio
For the Respondent

Rick J. Dvorak, Chairman
USWA District 1, Local Union 188
Parma, Ohio
For the Authorized Employee Representative

Before: Michael H. Schoenfeld
Administrative Law Judge

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 (c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of the steel mill of Respondent LTV Steel Company, Inc. ("LTV") on January 10, 2001, pursuant to a complaint that one of LTV's two on-site medical dispensaries had ceased to provide 24-hour service to employees. As a result of the inspection, OSHA issued to LTV

a citation alleging a violation of the terms of 29 C.F.R. § 1910.151(b).[1] LTV timely contested the citation, a complaint and answer were filed, and the hearing in this matter was held in Cleveland, Ohio. All parties have filed post-hearing briefs.

Jurisdiction

At all times relevant to this proceeding, Respondent LTV operated a steel mill on Jennings Road in Cleveland, Ohio. The Secretary asserts and Respondent does not deny that LTV is an employer engaged in interstate commerce, and I so find. Accordingly, I conclude that the Commission has jurisdiction over the parties and the subject matter of this case.

Background

The steel mill LTV operated was a complex of numerous buildings separated into east and west sections by the Cuyahoga River. Prior to December 2000, LTV operated two around-the-clock medical infirmaries, one on each side of the river. Each was staffed by a combination of physicians, nurses and assistants, with at least one paramedic present at all times. Following the construction of a bridge over the river, LTV restricted the operation of the west side infirmary to 8:00 a.m. to 4:00 p.m. daily. The east side infirmary, however, continued to operate on a 24-hour basis, and, after the schedule change, the east side infirmary was to provide night-time medical services to the west side of the facility. (Tr. 179, 218-219, 262-264, 332-334, Exhs. R-1, C-5).

Outside the LTV steel mill, but within three miles of its west side, were two hospitals, three City of Cleveland emergency medical service posts and two Cleveland fire stations. (Exh. R-1). The Secretary contends that the No. 2 Finishing Department ("the Finishing Department"), which was located on the west side of the steel mill, was not in "near proximity" to an off-site infirmary, clinic or hospital in the evening hours and that there were no persons present who were adequately trained in first aid.

Discussion

Citation 1, Item 1, the only citation in this case, alleges a serious violation of the terms of 29 C.F.R. § 1910.151(b). The standard requires as follows:

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[1] OSHA simultaneously issued to LTV a citation that resulted in another case, *Secretary of Labor v. LTV Steel Company, Inc.*, Docket No. 01-0599. The two cases were consolidated but were severed following the hearing. My decisions in both cases are being issued today.

> In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid.

It is clear that, under the terms of the standard, there is no requirement for an employer to take action to ensure that a person at the workplace is trained to render first aid unless and until it is shown that there is no infirmary, clinic or hospital in "near proximity" to the workplace. Here, I find that the Secretary did not present sufficient evidence to establish that the Finishing Department was not in near proximity to an appropriate medical care facility. Limiting the operations at the west side infirmary to the day shift hours has not, on this record, been shown to have been the tenebrific event portrayed by the union. More importantly, the Secretary has failed to show that the standard applies.[2]

The Secretary asserts and LTV does not dispute that employees in the Finishing Department performed work involving exposure to serious or even life-threatening injuries. (Tr. 181-194). The Secretary failed, however, to present evidence establishing the geographical distance from the Finishing Department to any of the medical care facilities in the vicinity, even though one of the hospitals, Metro Health, could be seen from the west side of the mill. (Tr. 350-351, Exh. R-8). There was also no reliable evidence establishing how long it would take an emergency vehicle to reach the mill in the event of a life-threatening injury. In the absence of such evidence, the Secretary has failed to show that there was no clinic, infirmary or hospital in near proximity to the workplace.[3]

In support of the citation, the Secretary relied on (1) a summary of the average response times of the Cleveland EMS ("CEMS") to calls from LTV over a three-year period, and (2) a "timed run"

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[2] For the basic elements of the Secretary's prima facie case, see *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

[3] As indicated in my denial of the parties' pre-hearing motions for summary judgment, the issue of whether a workplace is in "near proximity" to a medical care facility requires an analysis of the facts of each case. The standard does not impose an inflexible time period, such as a *per se* three to four minute response time. *See Brennan v. OSHRC*, 505 F.2d 869 (10th Cir. 1974). *See also CMC Elec., Inc. v. OSHA*, 221 F.3d 861 (6th Cir. 2000), where the court applied similar reasoning to determine what constituted the "prompt medical attention" required under construction safety standard 29 C.F.R. § 1925.50(b). Material facts under *Brennan* and *CMC* include such considerations as geographical distance, travel distance, travel time and traffic.

from Metro Health to the LTV gate made by Rick Dvorak of the Union and two LTV safety engineers. As to (2), the timed run took 4 minutes, 13 seconds. (Exhs. C-3, C-4). The evidence demonstrated that the run was done in a non-emergency vehicle, sometime between 8:00 a.m. and 10:00 a.m., that the vehicle traveled, at its fastest speed, between 25-30 miler per hour on the roadway and 50-55 mile per hour on the freeway, and that two stops for red lights were made. The evidence also demonstrated that the time the vehicle was actually stopped at the two red lights was subtracted from the total, but there was no evidence about whether deceleration for stops or acceleration after stops was taken into account. (Tr. 211-215, 239). Regardless, an ambulance may travel with its emergency lights flashing and its sirens operating. An ambulance may also exceed the speed limit, ignore traffic controls if safe, and pass other vehicles, which must allow it right-of-way. I therefore find that the timed run was not probative evidence of the amount of time it would take an emergency vehicle responding to a high-priority call to reach the steel mill.

As to (1), the summary reported the average response time of the CEMS for over 200 calls for the years 1999, 2000, and 2001. The averages for these years ranged from 7 minutes, 5 seconds to 8 minutes, 46 seconds. (Tr. 161-163, Exhs. C-3, C-4). The summary, however, had little or no probative value in regard to "near proximity" as it showed only the average response times for all calls for each year. It did not distinguish or identify the response times for the more serious injuries, even though CEMS prioritizes calls and responds more quickly to life-threatening situations. Further, there was evidence that the highest-priority, life-threatening calls were made to the Cleveland Fire Department as well as to CEMS and that in half of those cases, the Fire Department responded more quickly to calls. (Tr. 157-158, Exh. C-4). The Secretary submitted no evidence of the response times of the Cleveland Fire Department or of any of the other medical facilities in the area.[4] (Tr. 157).

The Secretary also argues that LTV's procedures delayed the response time for emergency personnel. The only direct evidence submitted on this point was Dvorak's testimony that the

[4] The Secretary's post-hearing brief asserts that the CEMS administrator testified that "priority calls have only a slightly better response time than non-priority calls." (p.5). In fact, the CEMS administrator testified that the response times for life-threatening injures were "slightly higher." (Tr. 158). The Secretary made no effort at the hearing to quantify what the administrator meant, and I decline to adopt the implied assumption that the CEMS response times for life-threatening calls were therefore within or even close to the averages indicated in the summary .

procedures added ten to fifteen minutes. (Tr. 205-206). His testimony on this issue is not accorded significant weight, however, because it was in contradiction to the CEMS average response time summary. (Exh. C-4). Further, a reasonable inference may be made that many of the procedures the Secretary complains about, such as requiring that the security guard escort the ambulance to where it was needed or requiring that one employee station himself outside the building so as to direct the emergency personnel directly to where the injured person is located, would serve in some cases to shorten, rather than delay, the response time of the emergency personnel. (Tr. 205-206). I therefore find that the Secretary did not establish that the Finishing Department was not in "near proximity" to an appropriate medical care facility. Accordingly, I conclude that the standard does not apply. This citation is vacated.[5]

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of the Act.
2. The Commission has jurisdiction over the parties and the subject matter of this case.
3. Respondent was not in violation of the terms of 29 C.F.R. §1910.151(b).

ORDER

1. Citation 1, Item 1 is VACATED.

/s/

Michael H. Schoenfeld
Administrative Law Judge

Dated: February 11, 2002
Washington, D.C.

[5] All three parties raise arguments relating to whether the terms of the standard were violated. I decline to address those arguments as I have concluded that the standard does not apply to this case.