UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 92-3868
DONLEY'S, INC., Respondent.	:	

DECISION

Before: WEISBERG, Chairman, FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

The issue in this case is whether Donley's, Inc. ("Donley's" or the "company") proved the affirmative defense of infeasibility that it raised to a serious citation alleging that it violated 29 C.F.R. § 1926.500(b)(1)[1] by not providing standard guardrails. Administrative Law Judge James H. Barkley decided it had proved the defense and vacated the citation.

[1] **§ 1926.500 Guardrails, handrails, and covers.**

. . . .

(b) *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.

. . . .

(f) *Standard specifications.* (1) A standard railing shall consist of top rail, intermediate rail, toeboard, and posts, and shall have a vertical height of approximately 42 inches from upper surface of top rail to floor, platform, runway, or ramp level.

For the reasons that follow, we reverse the judge, affirm the citation, and assess the proposed penalty of $5000.

Facts

On June 18, 1992, Donley's was engaged in the reconstruction of a parking garage in Columbus, Ohio. Donley's work consisted of cutting and removing portions of the garage's existing concrete floor each night and, starting at 6:30 a.m., replacing the floor with formwork topped with metal pans on which a new concrete floor would be poured. When the CO arrived at the worksite at 1:00 p.m., the north side of the garage's P-1 level had been demolished and largely replaced with formwork and metal pans into which concrete had been poured. According to Mark Sweat, one of Donley's carpenters, the panned-in area had been in place since at least the day before. Between this panned-in section and a 90-foot-long, 11-foot 6-inch-wide strip of the remaining concrete flooring (or "deck") was an area that opened onto the floor 12 feet below. Sawhorses had been set up along the northern edge of the deck to serve as a warning to employees. Donley's was cited for its failure to provide standard guardrails along the edge of this deck to protect employees who worked in the area from falling.

The pans measured 3-foot wide by 5-foot long and weighed about 110 pounds each. They had been installed on the north side of the deck by employees who either handed the pans up from the level below[2] or walked the pans out from the deck over 2-inch by 10-inch boards extending from the deck to the formwork set up for the pans. According to carpenter Sweat, "it would be almost impossible to get the pans and all the material that you needed" to where the pans were to be placed if there were guardrails along the existing strip of flooring. Sweat further testified, however, that a stack of pans could be slid under a guardrail that lacked a midrail because there was "enough of a hole there so that your stack of pans doesn't hit the center rail." He stated that it took him 15 to 20 minutes to erect a 16-foot section of standard railing and 10 to 15 minutes to take it down.

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[2] About 20 of the pans set on the P-1 level were handed up from the level below.

Discussion

To establish the affirmative defense of infeasibility, an employer must show that "(1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection." *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874, 1994 CCH OSHD ¶ 30,485, p. 42,109 (No. 91-1167, 1994).

The judge found that Donley's established its infeasibility defense and vacated the citation item. Specifically, he determined that Donley's "established that guardrails on the north side of the remaining P-1 level deck would have prevented the performance of its work, panning formwork in preparation for concrete pouring" and that the installation of guardrails "would unreasonably consume the employer's time and resources and is not required where the employer has instituted alternative protective measures." The judge found that the sawhorses Donley's set up along the northern edge of the floor deck "served as a reminder, warning employees away from the extreme edge of the floor" and constituted adequate alternative protection.

Was Compliance Infeasible?

A.

Donley's claim of infeasibility is based on the difficulties it allegedly would encounter in installing pans and formwork with standard guardrails in place. However, the evidence establishes that these difficulties were not present on the morning of the inspection. Thus, there was nothing to prevent the company from installing standard guardrails along the northern edge of the P-1 level deck between the 6:30 a.m. starting time of its day shift and the CO's arrival at 1:00 p.m. The testimony of carpenter Sweat establishes that the area to the north of the deck that was panned in when the CO arrived had been panned in at least since the day before. Yet, standard guardrails had not been erected along the northern edge of the deck to protect against falls into the open area between the panned section and the deck. Based on Sweat's testimony that it would have taken him approximately one and one-half hours to install 90 feet of standard guardrails, guardrails could have been installed about

five hours before the CO arrived at the worksite at 1:00 p.m. Instead, the company only put up sawhorses.

B.

We also find that Donley's failed to establish that there was "no way to use [guardrails] for [their] intended purpose without unreasonably disrupting" the installation of pans and formwork. *See Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1227, 1991-93 CCH OSHD ¶ 29,442, p. 39,683 (No. 88-821, 1991).[3] The evidence of infeasibility primarily relied on by Donley's and the judge was Sweat's testimony that "trying to lift a 110-pound pan between two handrails that are 20 inches apart is almost impossible." However, there is no clear evidence that Sweat or any other Donley's employee ever attempted to lift a pan through guardrails. As he explained in his testimony, it was not Sweat's job as a carpenter to carry the pans out to where they were set. That was a laborer's job. Sweat also testified that a stack of pans[4] could be slid under a top guardrail with no midrail attached. This suggests that individual pans could be passed through a standard guardrail setup if a slight modification was made in positioning the midrail so that a pan could either be passed between the midrail and toprail[5] or slid on the floor under the midrail with no toeboard in place. This is not literal compliance with the standard, but we expect an employer to comply to the extent feasible when it cannot comply with the literal terms of a standard. *Walker Towing*, 14 BNA OSHC 2072, 2075, 1991-93 CCH OSHD ¶ 29,239, p. 39,159 (No. 87-1359, 1991)(if limited guardrails were feasible, employer should have erected

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[3] Commissioner Montoya would not reach the feasibility issue because the Commission has adequately disposed of all liability issues in the preceding paragraph.

[4] Although the record does not reveal the height of an individual pan, it suggests that the pans must have been something less than 20 inches high because carpenter Sweat testified that trying to lift a pan between two handrails that were 20 inches apart was "almost" impossible.

[5] We note that since many of the 110-pound pans were handed up from the floor below, it does not appear to us that passing the pans through a toprail and midrail would be any less feasible than that. Also, since the lumber for the formwork was narrower than the pans, that too could be passed between rails. Commissioner Montoya does not join in this observation.

them to minimize exposure). *See Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1967, 1986-87 CCH OSHD ¶ 27,651, p. 36,033-3 (No. 82-928, 1986)(section of guardrail could have been removed during critical operation).

There is no merit to Donley's argument that sliding the pans underneath guardrails would require the employees receiving the pans on the other side to bend over while standing on wooden formwork only a few inches wide. The evidence shows that a walking surface of 2-inch by 10-inch boards was placed atop the formwork and between the deck and formwork for employees to walk on while carrying and setting pans.

We find that the record shows that Donley's had ample time to erect standard guardrails on the morning of the inspection, but did not do so and that it failed to establish that it could not have installed its panning and formwork with slightly modified guardrails in place. We therefore conclude that Donley's has failed to prove that compliance with section 1926.500(b)(1) was infeasible[6] and we affirm the citation item alleging a violation of that section.

Penalty

Donley's employed about 300 people, 15 of whom worked at the inspected worksite, four on the inspected shift. The gravity of the violation is moderate as a 12-foot fall to a concrete floor was involved. Donley's exhibited a measure of good faith in placing sawhorses along the edge of the deck. The record does not reveal any history of prior violations. Based on the statutory criteria in 29 U.S.C. § 666(j), we assess a penalty of $5000.[7]

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[6] Because we find that Donley's has failed to establish infeasibility, we need not address the merits of the Secretary's claim calling for Donley's to modify its pan-setting procedures, nor do we need to determine whether the sawhorses Donley's had placed along the edge of the deck constituted a feasible alternative means of protection.

[7] Commissioner Montoya notes that Donley's does not dispute the penalty on review.

Order

The Commission finds that Donley's violated section 1926.500(b)(1), affirms the pertinent citation item, and assesses a $5000 penalty.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: April 12, 1995

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 92-3868
DONLEY'S, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 12, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

April 12, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-3868

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Benjamin T. Chinni, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

F. Benjamin Riek, III
Roetzel & Andress
75 East Market Street
Akron, OH 44308

James Barkley
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204-3582

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR
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OSHRC DOCKET
NO. 92-3868

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 19, 1993. The decision of the Judge will become a final order of the Commission on December 20, 1993 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 9, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /skw

Date: November 19, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3868

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

William S. Kloepfer
Assoc. Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

F. Benjamin Riek, III, Esq.
55 Public Square
Illuminating Building - Suite 1604
Cleveland, OH 44113

James H. Barkley
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204 3582

00018013417:05

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 N. SPEER BOULEVARD
ROOM 250
DENVER, COLORADO 80204-3582

PHONE:
COM (303) 844-2281
FTS (303) 844-2281

FAX:
COM (303) 844-3759
FTS (303) 844-3759

SECRETARY OF LABOR,
Complainant,

v.

DONLEY'S, INC.,
Respondent.

OSHRC Docket No. 92-3868

APPEARANCES:

For the Complainant:
Kenneth Walton, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio

For the Respondent:
F. Benjamin Riek, III, Esq., Cleveland, Ohio

Before: Administrative Law Judge James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 et seq.; hereafter called the "Act").

Respondent, Donley's, Inc. (Donley's), at all times relevant to this action maintained a place of business at the Galleria parking garage at 20 South Third Street, Columbus, Ohio, where it was engaged in the reconstruction of a parking garage. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 18, 1992 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Donley's South Third Street worksite (Tr. 24). As a result of

the inspection, Donley's was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Donley's brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On July 20, 1993, a hearing was held in Columbus, Ohio. At hearing the parties stipulated to the settlement of "serious" citation 1, items 1 through 10 (Tr. 5); Donley's withdrew its contest to "other than serious" citation 2 (Tr. 13). Remaining at issue are "serious" citation 1, item 11 and 12(a), (b) and (c), alleging violations of 29 C.F.R. §§1926.500(b)(1). The parties have submitted briefs on the issues and this matter is ready for disposition.

Facts

Donley's work consisted of cutting and removing portions of the parking garage's concrete floor each night, and during the day, replacing the floor with forms, wooden shoring topped with pans, on which a new concrete floor would be poured. On the day of the inspection, Donley's was working on the P1 level of the Galleria garage (Tr. 27). The P1 level was approximately 12 feet above the P2 level below (Tr. 34). In the center of the level a strip of flooring 11 feet 6 inches wide remained; the rest of the concrete floor on the level had been removed (Tr. 27, 30, 70, 110). Approximately 45 feet on the south side of the remaining floor strip was completely open (Tr. 69-70). Pans had been installed on the north side of the strip in an area that ran about 90 feet (Tr. 27, 69). The south side of the floor was inadequately guarded; the guardrail had no mid-rail; the vertical members were, respectively, 16 feet, 16 feet and 13 feet apart; the top rail was incapable of supporting 200 pounds (Tr. 38, 40-42; Exh. C-4). Warning barricades had been set up along the north side of the floor strip (Tr. 33; C-2, C-3). OSHA Compliance Officer (CO), Charles Sampsel, testified that he saw workers walking through and working on the P1 level, one Donley's employee stood on the pans on the north side (Tr. 31, 36, 80, 96).

Demolition of the P1 level had been performed during the preceding night shift, between 6:00 p.m. and the 6:30 a.m. shift (Tr. 102, 172). Donley's project manager, William Maulding, testified that normally guardrails are not erected where the crew erecting the formwork is coming in right behind the demolition crew (Tr. 176). Three

foot by five foot pans, weighing about 110 pounds, are placed atop wood shoring erected on the floor below, and are walked out by laborers from the remaining P1 deck (Tr. 134-35). Handrails would obstruct the movement of the pans and must be removed prior to their installation (Tr. 181; *see also*; testimony of Alan Newman Tr. 118, 120; Mark Sweat Tr. 129, 138). Maulding stated that where the demolished area is not going to be panned the next day approved guardrails are installed (Tr. 176; *see also*; testimony of Mark Sweat Tr. 139).

Mark Sweat, a journeyman carpenter with Donley's, testified that it took him 15 to 20 minutes to erect a 16 foot section of standard railing, and 10 to 15 minutes to take it down (Tr. 148-49; Exh. R-2, R-4). Railings are installed after an area is panned (Tr. 144; Exh. R-2, R-5).

By the 1:00 p.m. inspection pans had been installed on the north side of the P1 level (Tr. 124, 161; Exh. C-2). Maulding stated that the south area was shored and panned by the end of the day June 18 (Tr. 182-83; *see also*, testimony of Alan Newman Tr. 111-12). Mark Sweat, although unsure whether panning had been completed on the south, testified that shoring had been installed by the end of his shift (Tr. 143-44, 153, 161, 164). CO Sampsel, however, who was on site until 4:00 p.m., stated that he did not see Donley's crew begin work on the south side (Tr. 39, 80, 124; Exh. C-4).

Maulding admitted he knew the railing on the south side was inadequate, but told the carpenters to leave it because it would have to be removed eventually by the crew panning the area (Tr. 182; *see also*, testimony of Mark Sweat, Tr. 155).

Citation 1, item 11

"Serious" citation 1, item 11 alleges:

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

a. Job site 20 South Third Street, Columbus, Ohio: Standard guardrailings were not provided for carpenters and laborers walking and/or working along a 90 foot north side floor opening of the P-1 level thereby exposing the employees to a fall hazard of approximately twelve feet to the level below.

The cited standard provides:

> (b) *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.

It is undisputed that the north side of the remaining P1 level was not guarded by a standard railing. Respondent argues that the cited standard is not applicable[1] because the P1 level constituted a special purpose runway as defined by §1926.500(d)(3). In the event §1926.500(b)(1) is found applicable, Respondent raises the affirmative defense of infeasibility.

Applicability

Subsection (d)(3) provides that:

> Runways used exclusively for special purposes may have the railing on one side omitted where operating conditions necessitate such omission, providing the falling hazard is minimized by using a runway not less than 18 inches wide.

A runway is defined at §1926.502(f) as "[a] passageway for persons, elevated above the surrounding floor or ground level, such as a footwalk along shafting or a walkway between buildings." The area in question was not a runway constructed for the passage of foot traffic or for some other particular purpose, as contemplated by .502(f); rather the 12 foot strip was what was left of the garage floor after portions of the floor had been removed. That the floor remnant was used as a work surface for Donley employees installing forms, or as an access route to other work areas does not make it a runway. The fall hazard here clearly falls within the definition of floor openings at §1926.502(b), "[a]n opening measuring 12 inches or more in its least dimension in any floor, roof or platform, through which persons may fall." The cited standard is applicable.

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[1] Donley's claim that subsection (d) *Guarding of open-sided floors, platforms, and runways* was more properly applicable to its Galleria worksite is specious. Section .500(d)'s requirements are identical to those at .500(b), requiring that "[e]very open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent. . .." Donley's failure to provide standard guard rails is in violation of either standard.

Infeasibility

The Commission has held that "[a]n abatement measure must be useable, during employees' activities, for its intended purpose of protecting employees. If there is no way to use a measure for its intended purpose without unreasonably disrupting the work activities, the mere fact that the measure's installation is physically possible does not in our view mean that we should compel the employer to install the measure. *Seibel Modern Mfg. & Welding Corp*, 15 BNA OSHC 1218, 1228, 1991 CCH OSHD ¶29,442, p. 39,685 (No. 88-821, 1991). "[An] 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." *Id.*

Donley's has established that guardrails on the north side of the remaining P1 level deck would have prevented the performance of its work, panning formwork in preparation for concrete pouring. The installation of semi-permanent guardrails, as specified in paragraph (f), in areas where panning is being performed, or will immediately commence, would unreasonably consume the employer's time and resources and is not required where the employer has instituted alternative protective measures. The warning barricades used by Donley on the north edge of the deck served as a reminder, warning employees away from the extreme edge of the floor. Where, as here, panning is being performed, temporary barricades amount to adequate alternative protection.

Donley's has proven its affirmative defense, and "serious" citation 11 will be vacated.

Citation 1, item 12

"Serious" citation 1, item 12a alleges:

29 CFR 1926.500(f)(1): The intermediate rail or guardrails was not halfway between the top rail and floor, platform, runway, or ramp:

a. Job site 20 South Third Street, Columbus, Ohio: The existing guardrailing along the south side floor opening of the P-1 level did not include an intermediate rail thereby exposing employees walking and/or working in this area to a fall hazard of approximately twelve feet.

"Serious" citation 1, item 12b alleges:

29 CFR 1926.500(f)(1)(i): The spacing of wood railing posts exceeded eight feet:

b. Job site 20 South Third Street, Columbus, Ohio: The spacing of wood railing posts of the guardrailing along the south side floor opening of the P-1 level exceeded eight feet. Post one to post two was sixteen feet, post two to post three was sixteen feet and post three to post four was thirteen feet. Because of this unsafe condition employees walking and/or working in this area were exposed to an approximate twelve foot fall hazard.

"Serious" citation 1, item 12c alleges:

29 CFR 1926.500(f)(1)(iv): The anchoring of posts and framing of members for railings was not of such construction that the completed structure was capable of withstanding a load of at least 200 pounds applied in any direction at any point on the top rail with minimum of deflection:

c. Job site 20 South Third Street, Columbus Ohio: The anchoring of posts and framing members of the guardrailing along the south side floor opening of the P-1 level was not of such construction that it would withstand a load of at least 200 pounds applied in any direction at any point on the top rail, thereby exposing employees walking and/or working in this area to a fall hazard of approximately 12 feet to level below.

Donley's argues that the Secretary has failed to demonstrate employee exposure to the fall hazard on the south side, and again raises the affirmative defense of infeasibility.

Amendment of the Pleadings

As a threshold matter, the undersigned notes that "serious" citation No. 12 is premised on the assumption that standard guardrails are required on the south side floor opening under §1926.500(b)(1). No stipulation to that effect is contained in the record. The issue of 500(b)(1)'s applicability was tried at the hearing, however, and the pleadings are hereby amended, in conformance to the evidence, to allege three instances in which Donley's failed to comply with 500(b)(1)'s requirement to provide standard railings "as specified in paragraph (f)."

Discussion

This judge finds that the presence of employees on the 12 foot strip, moving three by five foot pans weighing 110 pounds each, is sufficient to place those employees within the zone of danger created by the improperly guarded south side.

Moreover, the circumstances surrounding the floor hole on the south side of the remaining P1 deck differ substantially from those on the north side; under those facts, this judge finds both that installation of guardrails on the south side was feasible and that the alternative method of protection provided failed to provide protection from the cited fall hazard.

According to Donley's journeyman carpenter, installation of a guardrail on the 45 foot south side of the P1 level would have taken no more than 45 minutes to an hour, and less to remove. The expenditure of that amount of time is not excessive where employee exposure to the fall hazard exceeds a full shift. No work necessitating the removal of guardrails was performed on the south side from the time the night shift left at 6:30 a.m. until late in the afternoon. Donley's own practice, in fact, is to guard the edges of floor holes which will not be panned promptly. A temporary guardrail was installed on the south edge of the P1 deck. The guardrail, however, was, by Donley's own admission, inadequate. The guardrail served to alert employees to the open floor hole, but allowed employees access to the extreme edge and, by its appearance, which was much like a standard railing, could have given a false sense of safety to employees.

Donley's failed to establish that installation of a guardrail was infeasible. Even if Donley's had shown that erection of standard railings was infeasible, its assertion of the affirmative defense must fail based on its failure to provide adequate alternative protection.

Penalty

The Secretary has proposed a penalty of $5,000.00. Fifteen employees worked at the South Third Street site, four on the shift during which the inspection took place (Tr. 44). No evidence was introduced indicating that Donley's had either a record of prior OSHA citations, or that it exhibited any bad faith. Accordingly, these factors are considered neither in mitigation nor aggravation of the penalty amount.

Based on the relevant factors, this judge finds that the gravity of the violation is overstated. A penalty of $2,500.00 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.

ORDER

1. Serious citation 1, item 11, alleging violation of §1926.500(b)(1) is VACATED.

2 Serious citation 1, item 12a, b, and c, as amended, alleging three instances in violation of §1926.500(b)(1) is AFFIRMED, and a penalty of $2,500.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: November 12, 1993