Secretary of Labor,	:
Complainant,	:
	:
v.	:
	:
Korte & Luitjohan, Inc.,	:
Respondent.	:

OSHRC Docket No. **97-2117**

EZ

APPEARANCES:

Linda Panko, Esquire
Office of the Solicitor
U. S. Department of Labor
Chicago, Illinois
For Complainant

Julie Emmerich, Esquire
Law Offices of Pellegrini and Emmerich
St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Korte & Luitjohan, Inc. (Korte), is a corporation engaged in construction activities with a jobsite located at St. Rose, Illinois. The Occupational Safety and Health Administration (OSHA) conducted an inspection of this jobsite on November 17, 1997. As a result of this inspection, OSHA issued a citation alleging a violation of 29 C.F.R. § 1926.501(b)(2)(i) with a proposed penalty of $875.00. Korte filed a timely notice contesting this citation and proposed penalty, and a hearing was held pursuant to EZ trial proceedings in St. Louis, Missouri, on May 21, 1998.

Citation

The citation, as amended, issued to the respondent following OSHA's inspection, alleges a serious violation as follows:

> 29 CFR 1926.501(b)(2)(i): Each employee who is constructing a leading edge six feet or more above a lower level was not protected from falling by guardrail systems, safety net systems, or personal fall arrest systems.

At the jobsite, the employer failed to provide conventional fall protection for up to 10 employees engaged in leading edge work. These employees were installing roof decking and were exposed to a serious fall hazard ranging from 16 to 22 feet.

Stipulation of Facts and Law

Prior to the hearing on May 21, 1998, the parties submitted a Stipulation of Facts and Law as follows:

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Occupational Safety and Health Act of 1970.

2. Respondent is and, at all times relevant to this proceeding, was a corporation with an office and place of business in Highland, Illinois 62249, engaged in construction activities.

3. Respondent is and at all times relevant to this proceeding, was engaged in a business affecting commerce in that Respondent was engaged in handling goods or materials which had been moved in interstate commerce.

4. Respondent at all times relevant is an employer employing employees at the worksite located at a New Truss Plant, St. Rose, Illinois 62230. The owner of the plant manufactures wood trusses and purlins, some of which were used in the construction of the New Truss Plant.

5. Ten (10) of Respondent's employees, including two foremen, were installing metal sheeting over wooden trusses and purlins, approximately 16 to 22 feet above the concrete floor. The metal sheeting was to serve as the roof of the building.

6. Respondent's carpenters, performing the work described in paragraph 5 above, were not using a guardrail, safety net or personal fall arrest systems on November 17, 1997.

7. This work and the working conditions, described in paragraphs 5 and 6 above, had been ongoing for approximately four (4) weeks up to and including November 17, 1997.

8. The building under construction was a non-tiered building made with steel beams and columns and was to be used for commercial purposes. Ironworkers had erected the steel framework prior to the carpenters work on the building described above.

9. The fall hazards, if any, presented on the project, as described by the conditions in paragraphs 5 through 8 above, are the same regardless of whether the work is described as "leading edge work" or "steel erection work" and regardless of the trade performing the work,

10. The July 10, 1995 memorandum titled, "Fall Protection in Steel Erection," authored by Mr. James W. Stanley, then Deputy Assistant Secretary of OSHA, has not been rescinded since it was issued. A copy of the memorandum is attached as Exhibit A.

Discussion

The Secretary has the burden of proving the violation:

> 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 (*i.e.,* 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).

The primary issue to be decided in this case is whether the work performed by respondent's employees is general construction work, as alleged by the Secretary, or steel erection as alleged by the respondent. The parties have stipulated to employee exposure, employer knowledge, and employer noncompliance with the terms of the cited standard. The only remaining issue is the applicability of the cited standard to the working conditions.

The Secretary argues that the work was leading edge work subject to the provisions of 29 C.F.R. § 1926.501(b)(2)(i) found in Subpart M of 29 C.F.R. Part 1926. Korte argues that this standard is not applicable to this particular work, and that the steel erection standards found in Subpart R of Part 1926 apply to these working conditions.

The scope of Subpart M of 29 C.F.R. Part 1926 is set forth in part in 29 C.F.R. § 1926.500(a)(2) as follows:

> (2) Section 1926.501 sets forth those workplaces, conditions, operations, and circumstances for which fall protection shall be provided except as follows:
>
> > (iii) Requirements relating to fall protection for employees performing steel erection work are provided in § 1926.105 and in subpart R of this part.

The provisions of Subpart M, which include 29 C.F.R. § 1926.501(b)(2), set forth general fall protection requirements for construction with certain exceptions. One such exception applies to employees performing steel erection work. Respondent has the burden of proving that the steel erection exception applies to the working conditions at issue. *StanBest, Inc.*, 11 BNA OSHC 1222, 1983-84 CCH OSHD ¶ 26,455 (No. 76-4355, 1983). Statutory construction requires that exceptions or exemptions from general rules be narrowly construed. Applicability of general standards, on the other hand, is broadly construed.

The first step in determining whether the steel erection exception applies here is to define "steel erection." Part 1926 does not define that term in either Subpart M or Subpart R. Steel erection is defined, however, by the Secretary in a July 10, 1995, memorandum titled "Fall Protection in Steel Erection." A copy of this memorandum was submitted by both parties as Exhibit A attached to the Stipulation of Facts and Law (Exh. C-2).

That memorandum states in part:

> 1. New Subpart M does not apply to steel erection activities. The term "steel erection activities" means the movement and erection of skeleton steel members (structural steel) in or on buildings and non-building structures. It includes initial connecting, moving point-to-point, installing metal floor or roof decking, welding, bolting, and similar activities. It does not mean the erection of steel members such as lintels, stairs, railings, curtain walls, windows, architectural metalwork, column covers, catwalks, and similar non-skeletal items, nor does it mean the placement of reinforcing rods in concrete structures.

This document is an official OSHA interpretation relating to Subpart R and "is a restatement

of the interim enforcement policy to be applied to fall hazards in steel erection activities" (Exh. C-2, A). That memorandum is currently in effect. It clearly states that the term "steel erection activities" means, in part, the movement and erection of skeleton steel members on buildings and includes installing metal roof decks.

I find the Secretary's memorandum, which includes her interpretation of Subpart R and her definition of "steel erection activities," is a reasonable interpretation of ambiguous standards and, therefore, entitled to substantial deference. *See Martin v. OSHRC*, 499 U.S. 144, 111 S. Ct. 1171 (1991).

The building under construction was a non-tiered building constructed with steel beams and columns. Wood trusses were placed on the steel framework. At the time of the inspection, employees were installing metal roof decking, attaching it to the wood trusses.

The Secretary argues that installing metal roof decking is steel erection when it is attached to steel, but it is not steel erection when the same decking is attached to wood trusses rather than steel. She seeks to further interpret her own official interpretation and to further narrow her definition of "steel erection activities" to address the type of material to which metal decking is attached.

The question before me is whether this additional interpretation is a reasonable interpretation of her own regulation entitled to substantial deference by a reviewing judge or court. The Supreme Court in *Martin* emphasized "that the reviewing court should defer to the Secretary only if the Secretary's interpretation is reasonable." *Martin v. OSHRC, supra,* 111 S. Ct. at 1180.

James Stanley was the Deputy Assistant Secretary for OSHA in July 1995. He currently works in private industry. He is the author of the July 10, 1995, memorandum titled "Fall Protection in Steel Erection," which interprets Subpart R and defines steel erection activities. Mr. Stanley testified at a posthearing deposition regarding the preparation of that document and his intentions as to the scope of the term "steel erection activities" in the memorandum. On cross-examination by the Secretary's attorney, he testified in part as follows:

Q. Wasn't the memo intended to cover structural steel?

(Objection)

A. This memo was intended to cover the connection of steel, the movement on -- during a steel erection process, the installation of flooring and decking, the welding that goes on, the bolting up that goes on, any similar activities. It was meant to be a broad definition to include all the activities involved in the erection -- steel erection process, that's what it was intended to do.

* * *

Q. Okay. Now, my next question is based on two sentences in your memo which states -- in there in paragraph 1, relative part it states, the term steel activities is the movement of steel members called structural steel, it includes the connection of or moving from point-to-point, the roof or floor decking. My question is based on a portion of paragraph 1.

My first question is, isn't it true that it's reasonable to interpret the phrase or the clause, installing a metal floor or roof decking as part of or attached to a structural steel member?

A. No, that is not reasonable. That's not the only time you would do it. Again, you can reasonably interpret it, I guess, anyway you want. But everybody that I know has always interpreted that when you put metal decking on a building that has steel columns and steel cross braces, that is steel erection.

Now, the fact that there is some wood trusses there, to me doesn't make one bit of difference. If it was gold, it wouldn't make any difference. If it was copper, it wouldn't make any difference. It's part of the steel erection process. That is the way it was intended, you can interpret it any way that you want, that's what I intended it to be.

Q. But when you say that the memo was intended to say that, isn't there more than one interpretation?

A. Not when I wrote it, it's not. I'm the one who wrote it, I know what I intended and that is the way I wanted it. (Stanley Deposition, Tr. 36-39)

The court in *Martin* stated clearly that ". . . the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." It found that interpretive rules and agency enforcement guidelines are entitled to some weight on

judicial review. It specified that:

> A reviewing court may certainly consult them to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor bearing on the reasonableness of the Secretary's position. See *Ehlert v. United States*, 402 U.S. at 105, 91 S. Ct., at 1323.

Martin v. OSHRC, supra, 111 S. Ct. at 1178, 1179.

The Secretary's interpretation in its July 10, 1995, memorandum is reasonable. Testimony by James Stanley, its author, is consistent with, and supports, the clear language of that memorandum. This document also gives OSHA compliance officers, employers, and employees notice of the requirements for fall protection when workers are engaged in steel erection activities.

The position taken by the Secretary in this proceeding, however, further narrows the definition of steel erection and gives insufficient and inadequate notice to those attempting to comply with OSHA standards. Furthermore, it is inconsistent with the 1995 interpretation in that it adds a new, previously undeclared element to its definition of steel erection.

The Secretary, acting through James Stanley, its Deputy Assistant Secretary for OSHA, did not consider this new element and did not intend that it be included in the definition of "steel erection activities" when this memorandum was issued in 1995. This interpretative memorandum remains in effect unchanged. The Secretary chose not to subsequently directly modify this definition. She now seeks to modify that definition indirectly by alleging a violation under the general fall protection standard and arguing that such activity is not steel erection activity. The Secretary's current interpretation of steel erection activities, as embodied in this citation, is more than just a newly stated position. It is inconsistent with the clear language of the Secretary's own interpretation and definition of "steel erection activities" and the intention of its author.

The Secretary's position in this case, which narrows the scope of "steel erection activities," has not been consistently applied. It fails to give this employer adequate notice as to which fall protection standard applies to the working conditions at issue, and it is inconsistent with the Secretary's current and long-standing official interpretation and enforcement policy statement relating to fall hazards in steel erection activities. This position is an unreasonable interpretation and, therefore, not entitled to deference. *See Martin v. OSHRC*, 111 S. Ct. at 1179, 1180.

After due consideration of all testimony and other evidence presented in this case, I conclude that the steel erection exception applies to the work performed. Respondent has carried its burden to prove its affirmative defense that the steel erection standards apply to these working conditions. Section 1926.501(b)(2)(i) is not applicable to the working conditions at issue in this case. Since the Secretary has failed to prove the applicability of the cited standard, the alleged violation of 29 C.F.R. § 1926.501(b)(2)(i) is vacated and no penalty is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

Item 1 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(2)(i), is hereby vacated and no penalty is assessed.

STEPHEN J. SIMKO, JR.
Judge