



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) 606-6050
FTS (202) 606-6050

SECRETARY OF LABOR
Complainant,
v.
ARMCO STEEL CO
Respondent.

OSHRC DOCKET
NO. 93-0608

**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 December 27, 1993. The decision of the Judge will become a final order of the Commission on January 26, 1994 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 January 18, 1994 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. / SHA
Ray H. Darling, Jr.
Executive Secretary

Date: December 27, 1993

DOCKET NO. 93-0608

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

Robert A. Dimling, Esq.
Frost and Jacobs
2500 P.N.C. Center
201 E. 5th Street
Cincinnati, OH 43202

Lori Freno-Engman, Esq.
Kircher, Robinson, Cook, Newman &
Welch
Suite 1000 125 East Court St.
Cincinnati, OH 45202

Benjamin R. Loye
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204 3582

00102592482:05



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.

ARMCO STEEL COMPANY, L.P.,
Respondent,

.....
ARMCO EMPLOYEES' INDEPENDENT
FEDERATION, INC.,
Authorized Employee
Representative.

OSHRC DOCKET
NO. 93-0608

APPEARANCES:

For the Complainant:
Elizabeth R. Ashley, Esq., Office of the Solicitor, U.S. Department of Labor,
Cleveland, Ohio.

For the Respondent:
Robert A. Dimling, Esq., Frost & Jacobs, Cincinnati, Ohio.

For the Authorized Employee Representative:
Lori Freno-Engman, Esq., Kircher, Robinson, Cook, Newman & Welch,
Cincinnati, Ohio.

Before: Administrative Law Judge Benjamin R. Loye

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, Armco Steel Company, L.P. (Armco), at all times relevant to this action maintained a place of business at 1801 Crawford Street, Middletown, Ohio, where it was engaged in the manufacture of steel. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

In February 1993, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Armco's Middletown worksite (Tr. 13). As a result of the inspection, Armco was issued citations alleging violations of the Act, together with proposed penalties. By filing a timely notice of contest Armco brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

At the hearing citation 1, item 5 was vacated (Tr. 7-8). Remaining at issue are citation 1, items 1 through 4 alleging violations of 29 C.F.R. §§1910.23(c)(1) and (c)(2), and of §§1910.305(a)(2)(iii)(g) and (c)(2) of the Act together with proposed penalties. On September 15, 1993, a hearing was held in Cincinnati, Ohio, on those issues. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violations of §§1910.23(c)(1)

"Serious" citation 1, item 1 alleges:

29 CFR 1910.23(c)(1): Open sided floor(s) or platform(s) 4 feet or more above the adjacent floor or ground level were not guarded by standard railings (or the equivalent as specified in 29 CFR 1910.23(e)(3)(i) through (v)), on all open sides:

a) At the Desulphurization Station at the BOF [Basic Oxygen Furnace], employees who retrieve thermocouples from the skids on the platform located west of the operator's pulpit, were exposed to falls of 7 feet from the unguarded north and west sides of the platform.

The cited standard provides:

Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent . . .) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder

Facts

The pulpit at the Middletown plant's desulfurization station sits on a raised pulpit approximately seven feet above the ground (Tr. 19, 21; Exh C-1). A six and 1/2 foot by eight foot section on one corner of the pulpit is unguarded (Tr. 21). Skids holding boxes of thermocouples and pin samplers are placed on the pulpit once every week or two (Tr. 88, 98, 110, 151). The station operators retrieve boxes from the skids on a daily basis (Tr. 24, 84-85, 98). David Chamberlain and William Kuth, the desulf operators, testified that when retrieving the last few boxes from the skids they would come "within inches" or "right on the edge" of the pulpit (Tr. 88, 98). Kuth stated that he had previously complained about the open-sided pulpit to management (Tr. 99). Compliance Officer (CO), William Wilkerson, testified that the probable result of a fall from seven feet would be broken bones (Tr. 23).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

The evidence regarding the violative condition, employee access and employer knowledge is uncontroverted. Armco argues, however, that the cited standard is inapplicable because the storage area of the operator's pulpit is not a "platform" for the purposes of the standard.

A platform is defined at §1910.21(a)(4) as "[a] working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment." OSHA Instruction STD 1-1.13 further interprets the term to include "any elevated surface designed or used primarily as a walking or working surface, and any other elevated surfaces upon which employees are

required or allowed to walk or work while performing assigned tasks on a predictable and regular basis.”

This judge finds that the Secretary’s interpretation of the definition of “platform” is reasonable here, and so is entitled to deference. *Martin v. OSHRC (CF&I Steel Corp.)*, 111 S.Ct. 1171, 1180 (1991). It is clear that “work” includes the retrieval of supplies necessary for the performance of an employee’s duties. An area where this task is performed on a regular and predictable basis, therefore, is properly classified as a working surface, and, if raised above ground level, as a “platform.”

In addition, this judge finds that a reasonable employer would understand the operator’s pulpit to be a “platform,” based on its appearance and function, and on the common sense meaning of the word. *See; Globe Industries, Inc.*, 10 BNA OSHC 1596, 1598, 1992 CCH OSHD ¶26,048, pp. 32, 718-19 (No. 77-4313, 1982).

The Secretary has established the cited violation.

Penalty

The Secretary has proposed a fine of \$2,000.00.

The gravity of the cited standard is moderately low. The CO’s uncontroverted testimony establishes that the cited violation could result in broken bones, and so is “serious” in nature. However, only two desulf operators were exposed to the fall hazard for a few seconds each shift as they retrieved thermocouples and pin samplers from the skid on the platform. The stacked skids prevented operators from approaching the open edge much of the time. Additionally, there was no need to approach the edge of the platform so long as more than a few boxes remained on the skids.

Complainant introduced no evidence of bad faith or of a prior history of OSHA citations.

Based on the relevant factors, this judge finds that the proposed penalty is excessive. A penalty of \$700.00 will be assessed.

Alleged Violations of §§1910.23(c)(2)

29 CFR 1910.23(c)(2): Runways were not guarded by standard railings (or the equivalent as specified in 29 CFR 1910.23(e)(3)(i) through (v)) on all open sides 4 feet or more above floor or ground level:

a) At the BOF, the crane access runway on the south side of the charging aisle was not protected by a standard guardrail on its north edge in that between the east and west crane access openings the runway was equipped only with a single steel cable at a height of approximately 42 inches.

The cited standard provides:

Every runway shall be guarded by a standard railing (or the equivalent . . .) on all open sides 4 feet or more above floor or ground level. Wherever tools, machine parts, or materials are likely to be used on the runway, a toeboard shall also be provided on each exposed side.

Runways used exclusively for special purposes (such as oiling, shafting, or filling tank cars) may have the railing on one side omitted where operating conditions necessitate such omission, providing the falling hazard is minimized by using a runway of not less than 18 inches wide

Facts

East and west from the desulfurization station, a walkway extends along the south wall of the building (Tr. 30, 158). The runway is approximately nine feet wide, 500-600 feet long and is 30 to 40 feet above the operating floor, and 60 to 80 feet above ground level (Tr. 29-31, 36, 156). Columns or girders extend through the runway approximately one and a half feet from the edge every 30-40 feet (Tr. 133). The runway is partially guarded with a standard railing equipped with gates; however, approximately 400 feet of the runway is guarded only with a single cable strung 42 inches above the runway between the columns (Tr. 30, 34-35, 42, 119-20; Exh C-3).

Two cranes ride on rails parallel to the walkway (Tr. 30). The crane operators use the runway several times daily to gain access to their cranes (Tr. 38-40, 118). Crane operator James Whitaker testified that he can stop the crane anywhere along

the walkway, and that he has accessed his cab from the portion of the walkway guarded only by a single cable (Tr. 118-121).

Maintenance personnel also use the walkway to access the cranes as well as for storage of equipment, including welders, hoses and electrical cables (Tr. 124, 156).

Whitaker stated that the walkway is frequently covered with "kish," metal flakes from the desulf operation, and that he has slipped and gone down on one knee while traveling the walkway (Tr. 124-125). CO Wilkerson testified that a fall to either the ground or the operating floor would probably result in death (Tr. 36-37).

Discussion

Armco does not dispute the existence of the violative condition, employee exposure to it, or its knowledge of the condition. Armco maintains that the cited standard is inapplicable to nine foot "aisles," and alternatively that the walkway is a "special purpose runway" excepted from §1910.23(c)(2)'s standard railing requirement. Armco also argues that the Secretary's Instruction STD 1-1.8 exempts the cited runway from application of §1910.23(c).

The undersigned finds that Armco's aisle is a "passageway for persons, elevated above the surrounding floor or ground level" and so is a runway as defined by §1910.21(a)(5) subject to the requirements of §1910.23(c)(2). *Atlantic Richfield Co.*, 1973-74 CCH OSHD ¶17,517, relied upon by Armco, digests an unreviewed administrative law judge's opinion, and is without precedential value.

The walkway is not, however, a special purpose runway, and is not excepted from the standard railing requirement. The walkway is used by maintenance personnel and for storage, and is not exclusively used by crane operators to access their cabs. Moreover, access to the cranes does not necessitate the omission of standard railings; Whitaker testified that he could access his cab from any point along the runway, including those portions where a standard rail had been erected. In addition, gates could be, and were, installed in the standard railing to facilitate crane access.

The Secretary has demonstrated a violation of the cited standard.

Though not argued as such in its brief, in its answer Armco raised the affirmative defense of greater hazard. Evidence was presented on the issue; Donald Farrell,

the BOF section manager, testified that installation of a standard railing would prevent the rapid exit of crane operators from their cabs in the event of an emergency (Tr. 155-159).

In order to establish the affirmative defense of a greater hazard, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991).

Because Armco introduced no evidence indicating that an application for a variance would have been inappropriate, it cannot establish its affirmative defense; the first two elements of the defense, therefore, need not be discussed here.

Penalty

The Secretary has proposed a penalty of \$5,000.00.

Armco points to OSHA Instruction STD 1-1.8 which states that open sides of runways "in areas where work is performed in preparation for, during, or in the completion of hot metal pouring operations" shall be considered *de minimis* violations of the Act.

The Commission has consistently rejected employers' attempts to hold the Secretary to internal guidelines, stating that OSHA enforcement guidelines are meant to promote efficiency and "do not have the force and effect of law, nor do they accord important procedural or substantive rights to individuals." *FMC Corp.*, 5 BNA OSHC 1707, 1710, 1977-78 CCH OSHD ¶22,060, p. (No. 13155, 1977); *See also, GAF Corp.*, 6 BNA OSHC 1206, 1977-78 CCH OSHD ¶22,391 (No. 77-616, 1977). The cited STD is, therefore, afforded no weight.

The cited violation was properly classified as "serious," since a fall from the cited walkway could result in death. However, the likelihood of an accident, and, correspondingly, the gravity of the violation, are low. The walkway was wide; there was no need for maintenance personnel or crane operators to walk near the edge, except when actually accessing the crane cabs. Moreover, the cable, though

technically not in compliance with the standard, served to warn employees to stay back behind the columns between which it was strung, a foot and one half from the edge.

Taking into consideration the relevant factors, the proposed penalty is considered excessive. A penalty of \$1,000.00 is considered appropriate.

Alleged Violations of §§1910.305(a)(92)(iii)(g)

29 CFR 1910.305 (a)(2)(iii)(g): Flexible cords and cables of temporary circuits were not protected from accidental damage:

a) At the Desulphurization Station at the BOF, an extension cord used to power heat lamps mounted above the lance indexing motors located east of the desulphurization unit, was laying on the floor exposed to accidental damage from pedestrian and truck traffic.

The cited standard requires that:

Flexible cords and cables shall be protected from accidental damage. Sharp corners and projections shall be avoided. Where passing through doorways or other pinch points, flexible cords and cables shall be provided with protection to avoid damage.

Facts

Radiant heat lamps on the floor at the desulfurization station were powered with extension cord plugged into an outlet 20 to 25 feet away (Tr. 47). The area through which the cords ran was used by pedestrians; Kuth testified that he was in the area about twice per shift cleaning the lance tip he uses in the desulfurization process (Tr. 54, 100). Kuth also testified that maintenance personnel would go through the area with a tow motor loaded with supplies (Tr. 101).

Armco's BOF manager, Donald Farrell, testified that there was no truck traffic in the area of the extension cord (Tr. 160), as did Thomas Johnson, shift manager of the BOF maintenance shop (Tr. 169). Johnson stated that the tow motor used by maintenance would not fit through the area because of the congestion of the desulf tanks (Tr. 174-76). Wilkerson observed neither truck traffic in the area, nor damage to the cord (Tr. 56). Johnson stated that he had never been requested to repair a damaged extension cord in the desulf area (Tr. 171).

CO Wilkerson testified that employees kicking the cord could damage the prongs by wrenching them from side to side in the socket. Damaged prongs, according to Wilkerson, could cause an employee removing the plug to sustain an electric shock (Tr. 52-53). Wilkerson also testified that industrial trucks running over the cord could break the insulation and expose the conductors, resulting in an electrocution hazard (Tr. 53).

Discussion

The cited standard requires employers to protect flexible cords and cables from accidental damage. The CO's testimony that pedestrian traffic could damage the prongs of the cited electrical cord was uncontradicted, as was the testimony regarding employee exposure and employer knowledge. The Secretary has made out her prima facie case.

However, the testimony that no industrial truck traffic was present in the area around the cord is credible, and this judge finds that the Secretary failed to prove the cord was subjected to pressures which might rupture the insulation.

Penalty

The Secretary has proposed a fine of \$2,500.00.

CO Wilkerson's testimony that bent prongs could result in a shock hazard is insufficient to sustain a finding that the proven hazard was "serious" in nature. The violation will, therefore, be affirmed as "other than serious." No penalty is deemed appropriate.

Alleged Violations of §§1910.305(c)(2)

29 CFR 1910.305(c)(2): Flush snap switches that were mounted in ungrounded metal boxes and located within reach of conducting floors of (sic)

- a) A snap switch mounted on the south wall adjacent to the east side of the door opposite the sub dumping area at the BOF Desulphurization Station, was not provided with a faceplate and live parts were exposed.

The cited standard provides:

Flush snap switches that are mounted in ungrounded metal boxes and located within reach of conducting floors or other conducting surfaces shall be provided with faceplates of nonconducting, noncombustible material.

Facts

At the time of the inspection, there was no faceplate on a dipole electrical switch four and one half feet above the cement floor on the south wall near the desulfurization station (Tr. 58, 60). The switch was not in use, as it was not attached to any equipment; however, exposed wiring inside the switch was energized (Tr. 58-60). An employee coming into contact with the wires or terminal connections on the switch could sustain an electrical shock (Tr. 79). Mr. Kuth testified that he was in the area near the switch five or six times a shift (Tr. 105).

Thomas Johnson testified that the terminal connections for the switch were on the back of the switch, opposite the snap switch (Tr. 173). Both Wilkerson and Johnson stated that concrete or cement is not a conductive surface (Tr. 172).

Discussion

It is clear from the express language of 1910.305(c)(2) that the standard applies only to ungrounded electrical boxes "located within reach of conducting floors or other conducting surfaces." There is no evidence in the record that the uncovered box on the south wall of the BOF was within reach of a conducting surface. The Secretary has failed to show the applicability of the cited standard; citation 1, item 4 must, therefore, be vacated.

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 1, alleging violation of §1910.23(c)(1) is **AFFIRMED**, and a penalty of \$700.00 is **ASSESSED**.
2. Serious citation 1, item 2, alleging violation of §1910.23(c)(2), is **AFFIRMED**, and a penalty of \$1,000.00 is **ASSESSED**.
3. Citation 1, item 3, alleging violation of §1910.305(a)(2) (iii)(g) is **AFFIRMED** as an "other than serious" violation, without penalty.
4. Citation 1, item 4, alleging violation of §1910.305(c)(2) is **VACATED**.



Benjamin R. Loye
Judge, OSHRC

Dated: December 17, 1993