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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 89-2836
PEAVEY COMPANY,	:	
Respondent.	:	

DECISION

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

BY THE COMMISSION:

Peavey Company, a wholly owned subsidiary of ConAgra Corp., operates a grain elevator in Cando, North Dakota. At issue here are the merits of two items of a serious citation; one alleging a failure to cover a floor opening and the other alleging a failure to require the use of fall protection. Administrative Law Judge Sidney Goldstein affirmed both items. For the reasons stated below, we vacate the floor cover item and affirm the fall protection item.

I. *The Floor Hole*

A. *Item 2A serious violation of 29 C.F.R. § 1910.23(a)(8)*[1]

In item 2A the Secretary alleged that Peavey violated section 1910.23(a)(8)(ii) by failing to cover a floor hole in the Durum House scale floor. The compliance officer testified that the hole was in the area between the manlift and the scale floor landing. He testified that the employee would have to step over the hole in order to get in or out of the manlift. He agreed that a permanent cover could not be used because an access ladder, available for emergency escape, has to come through the hole. He suggested putting a hinged cover over the hole.

Wayne Bellinger, director of safety for ConAgra, testified that there was no hole in the area indicated by the compliance officer. However, he testified that there was a 30-inch by 12-inch floor hole on the opposite side of the manlift that was used as the ladder access.

B. *Judge's Decision*

Judge Goldstein affirmed the item. He held that, despite a difference of opinion regarding the precise location of the floor hole, the evidence was undisputed that there was an uncovered floor hole into which an employee could fall. The judge also discounted Bellinger's assertion that no employee worked in the area, holding that the two employees who entered the area were exposed to the floor hole. He therefore affirmed the item and assessed a $45 penalty.

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[1]The standard states:

> **§ 1910.23 Guarding floor and wall openings and holes.**
>
> (a) *Protection for floor openings.*
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> . . . .
>
> (8) Every floor hole into which persons can accidentally walk shall be guarded by either:
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> (i) A standard railing with standard toeboard on all exposed sides, or
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> (ii) A floor hole cover of standard strength and construction. While the cover is not in place, the floor hole shall be constantly attended by someone or shall be protected by a removable standard railing.

C. *Amendment*

Initially, we find that it is appropriate under Fed. R. Civ. P. 15(b) to amend the citation to correctly identify the location of the floor hole. The evidence clearly establishes that the floor hole described in the citation does not exist, but that there was a hole on the side of the manlift opposite the scale floor. Amendment under Federal Rule 15(b)[2] is appropriate when the parties squarely recognize they are trying an unpleaded issue. *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, p. 38,885 (No. 86-247, 1990). It is not necessary that a party expressly consent to the amendment. Rather, consent may be implied by the parties' words and conduct. *McWilliams Forge Co.*, 11 BNA OSHC 2128, 2130, 1984-85 CCH OSHD ¶ 26,979, p. 34,669 (No. 80-5868, 1984). Here, we find that the correct location of the floor hole was tried with the implied consent of Peavey. Not only did Peavey introduce testimony correctly identifying the location of the floor hole, it also introduced testimony regarding employee exposure. Accordingly, we find that the citation may properly be amended to state the proper location of the floor hole.

D. *Disposition*

We find the preponderance of the evidence fails to establish that Peavey's employees were exposed to the hazard of the unguarded floor hole. *See Carpenter Contracting*, 11 BNA at 2031, 1984 CCH OSHD at p. 34,564. Only two employees worked on the Durum House

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[2]The rule provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

scale floor and one of them worked part-time. The only evidence relevant to the exposure of these employees to the floor hole came from Wayne Bellinger.

Bellinger testified that the hole was necessary because it was where an employee would come out from the ladder. He stated that employees do not work in the area of the hole and that the only reason they would go near it would be to use the ladder. Since employees would be working on the opposite side of the manlift, they would not have to step over the hole in order to enter or exit the manlift. Bellinger testified that, to accidentally fall into the hole, an employee getting off the manlift would have to turn 180° from his normal exit point, get off the wrong side of the manlift, and walk an additional foot and a half to the floor hole.

There is nothing in the record to support a conclusion that an employee could be exposed to the floor hole either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces. *Id.* It may be theoretically *possible* that an employee could get off the wrong end of the manlift, but the possibility is speculative and remote, based on this record. The Secretary's argument that employees would be exposed to the floor opening while accessing the ladder is without merit. The purpose of the hole was to provide an opening for the escape ladder. In the event of an emergency escape, an employee would, of necessity, be exposed to the floor hole for, without such exposure, there would be no way for the employee to get to the ladder.

Accordingly, we reverse the judge and vacate the item.

II. *Falling From the Rail Cars*

A. *Item 3 serious violation of 29 C.F.R. § 1910.132(a)*[3]

In item 3, the Secretary alleged that Peavey failed to comply with section 1910.132(a) because it did not require employees working on top of railcars to tie off with safety belts. The cars, which are 14-15 feet high and have slanted roofs, are positioned under spouts that are connected to grain elevators. An employee gets on top of the rail car, lowers the spout into the car's hatch and starts the flow of grain into the car. Placing the spout takes about one minute. The cars usually have three to four compartments so an employee needs to move the car forward to fill each compartment. Once the process begins, it takes about an hour and a half to fill the car. The length of time employees stay on top of the railcars during this process was disputed. The compliance officer testified that the employee generally stays on top of the car and watches the loading. Bellinger, on the other hand, testified that the employee will get off the car and do other work while each compartment fills up.

B. *Commission Precedent and Evidence*

In order to establish the existence of a hazard that requires the use of personal protective equipment under section 1910.132(a), the Secretary must either establish that the employer had actual notice of a need for protective equipment or that a reasonable person familiar with the circumstances surrounding the hazardous condition would recognize a

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[3]The standard states:

> **§ 1910.132 General requirements.**
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> (a) *Application.* Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

hazard warranting the use of personal protective equipment. *ConAgra Flour Milling Co.* 16 BNA OSHC 1137, 1140, 1993 CCH OSHD ¶ 30,045, p. 41,232-3 (No.88-1250, 1993); *Armour Food Co.*, 14 BNA OSHC 1817, 1820, 1987-90 CCH OSHD ¶ 29,088, p. 38,881 (No. 86-247, 1990). External, objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a standard in a particular situation. *ConAgra*, 16 BNA OSHC at 1140, 1993 CCH OSHD at 41,232-3. Evidence that other employers in the industry actually provide the particular personal protective equipment satisfies this test. *Trinity Indus.*, 15 BNA OSHC 1481, 1485, 1992 CCH OSHD ¶ 29,582, p. 40,035 (No.88-2691, 1992). Also allowed for consideration is evidence of accidents, evidence of industrial safety standards or recommendations, or opinion testimony from persons experienced in performing the work or familiar with the working conditions. *Id.*

Evidence bearing on these factors came from a number of sources. Bruce Beelman, the OSHA Area Director for the Bismarck office, had personally investigated or supervised investigations of approximately ten incidents where employees were severely injured by falls from rail cars in the grain, railroad, foundry and other industries where rail cars are used for loading purposes.[4] Four of these accidents involved fatalities. In 1979, he investigated an incident in Kansas City, Kansas, where an employee, who was not wearing any fall protection, was killed when he fell from a hopper car during grain loading operations. The area director also testified that, since 1975, he personally lectured to approximately ten groups in Kansas, Nebraska, Iowa, North and South Dakota regarding the need to provide fall protection from rail cars. According to Beelman, these lectures were attended by representatives of hundreds of grain companies and facilities.

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[4]The Secretary also introduced what he claimed was a list of lost time accidents resulting from falls from hopper cars within North Dakota from 1975-1990. ConAgra senior risk analyst Darrel Neely, investigated four of the incidents in the exhibit. In one instance, the employee did not fall off the rail car but actually fell while climbing the ladder to the rail car. In another incident, the employee was not on the car, but fell from a platform, hinged to the building, that lead to the car. Thus, in half of the cases investigated by Neely, the employee did not fall from the railcar. Under these circumstances, we assign little weight to this exhibit.

The compliance officer testified that he has observed personal protective equipment, usually a safety belt and lanyard, being used by other employers to protect employees working on the tops of rail cars. In most cases, the belt and retractable lanyard are tied off to a structure by a bracket. He also testified that approximately ten other employers in North and South Dakota used either safety belts and lanyards or guardrails to protect employees while working on rail cars. Many of these employers installed fall protection only after either having been cited by OSHA or after a meeting with OSHA officials. The compliance officer could name only two operations that provided fall protection before they were required to do so by OSHA.[5] He also admitted that federal grain inspectors who often climb to the top of the rail cars to inspect the grain inside, occasionally fail to use fall protection.

The compliance officer also testified that most of those employers who use fall protection did so at the behest of OSHA. This underscores the Secretary's efforts to get the industry to provide fall protection to employees working on top of rail cars. He introduced into evidence a 1989 Harvest States newsletter "provided for member elevators compliments of the Terminal Agency." An article in the newsletter discusses a number of serious falls that had occurred when workers fell off the top of hopper cars. The article notes that, under § 1910.23, fall protection is required whenever the vertical drop exceeds four feet. The article goes on to state that "OSHA is requesting that whenever it is practical to do so, fall protection be provided for hopper cars, overhead loadout spouts or other forms of work that may expose someone to a fall hazard."

Peavey's safety director, Bellinger testified that, to the best of his knowledge, no employee had ever been injured in any Peavey or ConAgra facility as a result of fall from a rail car.

Peavey and its parent, ConAgra, have previously been cited for failing to provide fall protection to employees working on rail cars. One citation for a violation of § 1910.132(a) was affirmed by the judge, but after ConAgra's Petition for Discretionary Review was

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[5]In both instances, the employers built a platform surrounded by guardrails on the side of the building so the employees did not have to get on the rail car.

granted by the Commission, the Secretary withdrew the citation. Another citation, issued to Peavey, alleging noncompliance with § 1910.23(c)(1) was still being contested at the time of the hearing. In still another case, a citation against ConAgra for violating § 1910.23(c)(1) was vacated by the judge on the grounds that the brief use of a rail car catwalk was insufficient to bring the rail car within the definition of a "platform."

Thomas White, who works at a Peavey facility in St. Joseph, Missouri, testified that, prior to Peavey's purchase of that facility in 1989, it was owned by Pillsbury. Under Pillsbury, employees were required to wear a tied off safety belt when working atop rail cars. Employees continued to wear the belts when Peavey took over the facility. In 1990, Peavey instituted a new system for loading cars which uses hydraulic spouts controlled by an employee in a tower. This new system usually makes it unnecessary for employees to be on the rail car during loading. However, there are still occasions when the old system must be used. White testified that the last time he needed to work atop a rail car, he did not tie off because the available belt didn't fit. His supervisor did not require that he wear the belt, but instead offered to get him a new belt if he wanted one. White also testified that neither he nor anyone he knows had ever fallen from a rail car.

C. *Judge's Decision*

Judge Goldstein affirmed the violation and assessed a penalty of $280. Relying on the Harvest States newsletter, the OSHA seminars and the employers who did provide fall protection, the judge found that the industry recognized the hazard presented by requiring employees to work atop rail cars. The judge also found that the evidence established that Peavey knew of the hazardous condition of working atop rail cars. He relied on the use of safety belts at Peavey's Missouri facility. The judge also found that it was feasible to install safety belts. The judge rejected Peavey's argument that, because prior citations issued against it or ConAgra were either withdrawn or vacated, OSHA impliedly told the company that it need not provide fall protection. The judge found that the particular circumstances surrounding those other cases clearly distinguished them from the case at hand.

D. *Disposition*

Finding that a fall hazard requiring the use of personal protective equipment existed and that Peavey failed to require the use of such equipment,[6] we affirm the citation.

The preponderance of the evidence establishes that a reasonably prudent person familiar with the circumstances in the industry would recognize the need to provide fall protection for employees working on rail cars. The top of the rail cars, apart from a grate area in the middle, is a slanted surface approximately 14-15 feet off the ground on which employees load grain for at least some interval during that process. Thomas White, an employee who works in the Peavey facility in St. Joseph, Missouri testified that this surface can be slick, particularly during the winter months when there is ice and freezing rain. Similarly, the compliance officer noted that high winds which occur in North Dakota may also increase the risk of employees slipping.

The compliance officer, who has an extensive agricultural background, and the area director both testified that many companies in the area provide fall protection for employees working on top of rail cars.[7] Whether the use of such protection is a result of OSHA's prompting by citation or education, or through the employer's own initiative, it appears based on the record that a significant group of employers is using the kinds of fall protection

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[6]We also reject Peavey's assertion that the cited standard does not apply to fall hazards and does not require the use of safety belts and lanyards. Peavey raises this argument for the first time on review. Under Commission rule 92(c), 29 C.F.R. § 2200.92(c) the Commission will normally not review an issue like this that was not argued before the judge. Moreover, we have held that § 1910.132(a) can be interpreted to require fall protection. *Hackney, Inc.*, 16 BNA OSHC 1806, 1994 CCH OSHD ¶ 30,486, (No. 91-2490, 1994); *Bethlehem Steel Corp.*, 10 BNA OSHC 1470, 1982 CCH OSHD ¶ 25,982 (No. 79-310, 1982).

[7]The Chairman finds no merit in Peavey's assertion that the Secretary thus established that only a small percentage of the approximately one thousand grain elevators in North and South Dakota provide fall protection for employees working on rail cars. He notes that the testimony regarding the companies that provide protection was concededly based only on a sampling of the grain elevator population in the area and was not intended to be a comprehensive survey.

necessary to meet the requirements of the cited standard.[8] The fact that all employers do not utilize the protection against the hazard does not establish that a reasonably prudent employer in the industry, particularly in light of OSHA's efforts to inform employers of the hazard, should not have known of the hazard or the need to protect against it.[9]

We also note Peavey's experience at the St. Joseph facility as indicating that the company, as a whole, acknowledged the need to provide employees with protective equipment to prevent them from falling from rail cars. Peavey continued the practice of requiring employees there to tie off from February 1989 when they took over the facility from Pillsbury to September 1990 when a new loading system was installed. Both Mossman, the Peavey supervisor who replaced White's Pillsbury supervisor and Vinez, the Peavey supervisor who replaced Mossman, continued to require the use of safety belts.[10]

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[8]Most of these companies are substantial in size and stature in the grain industry although the record does not establish how consistent the use of fall protection is among their facilities.

[9]*See Voegele Co. v. OSHRC* , 625 F.2d 1075 (3rd Cir. 1980); *Cf. Donovan v. Missouri Farmers Assoc. d/b/a Odessa MFA Exchange*, 674 F.2d 690 (8th Cir. 1982).

[10]In affirming the judge's holding that Peavey violated §1910.132(a), Chairman Weisberg relies on the totality of the evidence to establish that a reasonably prudent person familiar with the circumstances in the industry would recognize the need to provide fall protection for employees working on rail cars. In this regard he notes in addition to those facts set forth above that, consistent with this standard and notwithstanding whatever the state of the evidence may have been when Peavey or its parent ConAgra were cited previously, this record shows that OSHA has made extensive efforts in the states where Peavey operates elevators to inform elevator operators concerning the fall hazard posed by working atop rail cars. Thus the OSHA area director in Bismarck testified that he conducted seminars with hundreds of representatives of different grain companies or facilities concerning hazards at grain handling facilities including the fall hazard at issue in this case. That OSHA's efforts have born fruit is shown by the Harvest States Safety Review bulletin placed in evidence. This bulletin, distributed not only to Harvest States' operating divisions but to all of its member elevators as well, included an article entitled *OSHA Focuses on Fall Protection.* It states, inter alia:

> Recently, a number of serious falls (some fatal) have occurred when workers have fallen off the top of hopper cars. Consequently, OSHA is requesting that whenever it is practical

(continued...)

There is no merit in Peavey's argument that, because prior citations issued against it or ConAgra were either withdrawn or vacated, OSHA impliedly told the company that it need not provide fall protection. The Secretary's decision to withdraw a citation is a matter of prosecutorial discretion which does not estop the Secretary from pursuing the matter at a later time. *Cf. Erie Coke Corp.*, 15 BNA 1561, 1568-69, 1994 CCH OSHD ¶ 29,653 at pp. 40,154-55 (No. 88-611, 1992) (Secretary's decision not to issue citation is a matter of prosecutorial discretion). Moreover, as the judge found, the particular circumstances surrounding those other cases clearly distinguished them from the case at hand.

We also find that the evidence establishes that the use of safety belts was feasible. We conclude that there is no merit in Peavey's contention that employees would spend an inordinate amount of time hooking and unhooking their belts because they get on and off the cars several times during loading. The videotape exhibit demonstrates that safety belts can be fastened and unfastened in seconds. Indeed, safety belt use under similar circumstances by other employers in the industry is strong evidence that the belts were

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[10](...continued)

> to do so, fall protection be provided for hopper cars, overhead loadout spout or other forms of work that may expose someone to a fall hazard.

The Chairman would not find the relevance or credibility of this newsletter diminished because it refers to § 1910.23 rather than the cited standard. It is not clear whether the reference to the standard was attributable to OSHA or the author of the article alone and, in any event, the characterization of the hazard itself is clear.

The Chairman further notes that the record does not establish the number of elevators in the region that are Harvest States members. However, when Peavey's witness Darrel Neely, senior risk analyst for ConAgra, Incorporated, was asked during cross-examination whether the area code and the name would be sufficient to obtain the phone number of a certain Harvest States Co-op purportedly located near Grafton, North Dakota, Neely responded, "Do you know how many Harvest States there are in North Dakota?" Likewise, the scope and integration of Peavey itself is not entirely clear. Wayne R. Bellinger, director of Safety and Product Purity for ConAgra Grain Processing Companies, testified that Peavey, as a wholly owned subsidiary of ConAgra, is a separate entity with its own structure. He also testified, however, that Peavey is one of the companies comprising ConAgra Grain Companies and that Peavey's Cando, North Dakota facility at issue here is one of the 100-150 such facilities that are his responsibility.

feasible here. *Trinity Industries, Inc.*, 15 BNA OSHC at 1485, 1991-93 CCH OSHD at p. 40,035. The record does not support Peavey's contention that railroad clearance requirements would preclude the attachment of lanyard anchors. The compliance officer testified that, based on his discussion with the railroad company, it would have no objection to the installation of a fall protection system alongside the elevator. Moreover, Wayne Bellinger, ConAgra's director of safety and product purity, testified that it was possible to install a safety belt system without coming into conflict with the railroad's height restrictions.

There is also no basis for Peavey's claim that height differentials between rail cars, and the employees' need to move between several cars makes the use of belts infeasible. Peavey contends that a belt long enough to permit movement between cars would present a tripping hazard and an anchored belt would restrict the necessary movement between cars. The Secretary, however, demonstrated that a system could be installed that would enable a lanyard attached to a line run between two anchors to slide along the line. Then, a belt known as a "Retract-A-Matic" is used so that only the amount of line necessary is let out. A videotape of such a system was introduced into evidence by the Secretary. Peavey introduced no evidence to indicate why a similar system could not be set up at its Cando facility.

We also reject Peavey's claim that no safety belt system is feasible when the employees are inspecting and cleaning the cars away from the elevators. This difficulty does not render the entire belt system infeasible. Where an employer cannot fully comply with the literal terms of a standard, it must nevertheless comply to the extent that compliance is feasible. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075, 1991-93 CCH OSHD ¶ 29,239, p. 39,159 (No.87-1359, 1991). Peavey's inability to provide protection during inspection and cleaning, does not excuse its obligation to provide adequate fall protection when otherwise feasible.

We therefore find that Peavey had reason to know that a fall hazard requiring the use of personal protective equipment was present in its Cando facility. Since the evidence also establishes that Peavey did not require the use of such equipment, and that its employees were exposed to the hazard, we find that Peavey failed to comply with section 1910.132(a).

E. *Characterization and Penalty*

The Secretary alleges the violation to be serious. The allegation is thoroughly supported by the record. The compliance officer testified without dispute that a fall from a rail car could result in injuries ranging from broken bones to death. His conclusion was supported by his testimony that he personally investigated an incident where an employee was killed after falling from a hopper car and by the evidence of several other similar incidents that resulted in fatalities.

The Secretary proposed, and the judge assessed, a penalty of $280. Peavey does not actively dispute the appropriateness of the judge's penalty assessment and there is no reason to disturb it.

III. *Order*

Accordingly, it is ORDERED that item 2A of the serious citation alleging a violation of 29 C.F.R. § 1910.23(a)(8) is vacated. Item 3 of the serious citation alleging a violation of 29 C.F.R. § 1910.132(a) is affirmed and a penalty of $280 is assessed.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Dated: September 26, 1994

MONTOYA, Commissioner, concurring and dissenting:

I agree with my colleagues' decision to vacate the alleged violation of section 1910.23(a)(8). As the majority opinion quite correctly points out, "there is nothing in the record to support a conclusion that an employee could be exposed to the floor hole" which was the subject of that citation. However, I must disagree with several conclusions reached by the majority in its decision to affirm the alleged violation of section 1910.132(a). Based on the following analysis, I would vacate this citation as well.

As the majority recognizes, the Secretary must establish either that the employer had actual notice of a hazard requiring the cited protective equipment or that a reasonably prudent employer, concerned about the safety of employees in the circumstances involved in a particular case, would recognize the existence of a hazardous condition and provide protection as required by the citation. *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1140, 1993 CCH OSHD ¶ 30,045, p. 41,232-3 (No. 88-1250, 1993). Whether a hazard is recognized is a matter of objective determination. *Ed Taylor Constr. Co. v. OSHRC*, 938 F.2d 1265 (11th Cir. 1991). Unlike the majority, I am simply not persuaded that the evidence here establishes the existence of the alleged hazard of falling from top of rail cars during grain loading operations, let alone that Peavey, as a reasonable member of the grain handling industry, should be held to have recognized that hazard.

I am particularly concerned by the majority's finding that Peavey had acknowledged the alleged hazard. This conclusion is based entirely on the testimony of Thomas White, an employee subpoenaed by the Secretary from another Peavey grain elevator, this one located in St. Joseph's, Missouri. From this record we know that Peavey owns at least 150 such grain elevators. According to Mr. White, Peavey acquired the St. Joseph's facility from Pillsbury in 1989. For the next few months, White continued to wear a safety belt while loading rail cars, as he had done as a Pillsbury employee, before Peavey changed loading procedures. From this single circumstance, which was geographically remote and otherwise entirely isolated from the North Dakota facility cited here, the majority has concluded that Peavey, on a company-wide basis, has acknowledged the need to provide employees with protective equipment to prevent falls from rail cars. This finding virtually ignores the principals of notice and knowledge, and brings the Commission perilously close to strict

liability. To me, the fact that all prior citations issued to Peavey under this theory were either vacated or withdrawn is a far firmer basis for concluding that Peavey knew fall protection was *not* required under § 1910.132(a) for employees working on top of rail cars. After all, the record includes no evidence of any employee at the cited facility ever being injured by slipping from a rail car or even that any employee from the cited facility had ever complained of a hazard or thought working on top of rail cars was hazardous.

Like the judge below, my colleagues also rely on other factors, including the testimony of Area Director Beelman, who supervises OSHA compliance officers throughout North and South Dakota. Beelman testified that he had personal knowledge of at least ten accidents involving falls from rail cars, four of which resulted in fatalities. The Secretary also introduced what he claimed was a list of lost time accidents resulting from falls from hopper cars within North Dakota from 1975-1990. Beelman did testify about one accident he personally investigated, where an employee died from injuries sustained in a fall from a rail car. However, the record is unclear as to whether any of the other instances involved falls from the top of hopper cars during grain loading operations. In fact, ConAgra Senior Risk Analyst Darrel Neely, who investigated four of the incidents mentioned in the exhibit, testified that one involved an employee who had fallen while climbing the ladder on a rail car while another involved an employee who fell from a platform that lead to a rail car.

My colleagues also rely on the record evidence indicating that at least ten employers either require fall protection or have initiated procedures that do not require employees to work on the rail cars. I find it particularly telling, though, that only two of these employers initiated such a policy without prompting from OSHA. It seems clear to me that the use of such protection is far from universal and that most, if not all, of the use that was established resulted from the efforts of the Secretary, either through citation or suggestion. *Cf. Donovan v. Missouri Farmers Assoc.*, 674 F.2d 690 (8th Cir. 1982) (expert opinion of hazard not communicated to the industry; 5(a)(1) citation vacated).

Chairman Weisberg separately stresses Beelman's testimony that, since 1975, he had personally lectured to approximately ten groups in Kansas, Nebraska, Iowa, and North and South Dakota regarding the need to provide fall protection from rail cars. According to the area director, these lectures were attended by representatives of hundreds of grain

companies and facilities. However, the Secretary's attempts to advertize and otherwise communicate his own concerns about fall protection are hardly a basis on which to establish recognition of the hazard alleged here, either by Peavey or the grain elevator industry. Without notice and comment rulemaking on this issue, the Secretary should simply have to show more to establish the existence of this hazard under § 1910.132(a) than the majority here has been willing to accept. Certainly more should be shown to establish that the hazard has been recognized by the Peavey or its industry.

Finally, Chairman Weisberg points to on an article published in the Harvest States newsletter as proof that Peavey's industry recognizes the hazard. However, that article refers to concerns of OSHA, not the grain elevator industry. Furthermore, the Commission was provided with no proof that this newsletter was sent to Peavey, or any other member of the industry beyond the Harvest State's own terminals. From this record, we do not even know what Harvest State's internal distribution might be. Therefore, I am not willing to infer any notice to Peavey whatsoever from the Harvest States newsletter.

Velma Montoya
Commissioner

Date: September 26, 1994

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 89-2836
PEAVEY COMPANY,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 26, 1994. **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.

September 26, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-2836

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
PEAVEY COMPANY
Respondent.

OSHRC DOCKET
NO. 89-2836

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 March 23, 1992. The decision of the Judge will become a final order of the Commission on April 22, 1992 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 April 13, 1992 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 23, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 89-2836

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

PEAVEY *COMPANY,

Respondent.

OSHRC DOCKET
NO. 89-2836

APPEARANCES:

For the Complainant:
Robert S. Milgrim, Esq., Office of the Solicitor,
U. S. Department of Labor, Kansas City, Missouri

For the Respondent:
Dean G. Kratz, Esq., McGrath, North, Mullin &
Kratz, P.C., Omaha, Nebraska

DECISION AND ORDER

Goldstein, Judge:

This is an action by the Secretary of Labor to affirm a series of citations served upon the Respondent by the Occupational Safety & Health Administration under the provisions of the Occupational Safety & Health Act of 1970.

The matter arose after a compliance officer for the Administration inspected a plant of the Respondent, concluded that it was in violation of Section 5(a)(1) of the Act, the so-called "General Duty Clause", and safety regulations adopted under the law and recommended that the citations be issued. The Company disagreed with the citations and filed a notice of contest. After a complaint and answer were filed with this Commission, a

*Corrected to "Company"

hearing was held in Kansas City, Missouri. At the hearing, the parties settled a number of issues, and the remaining concerns are addressed below.

Citation 1, Item 1

The first item of Serious Citation Number 1 alleges that the Respondent was in violation of Section 5(a)(1) of the law, which provides that the employer shall furnish a place of employment which is free from recognized hazards that were causing, or likely to cause, death or serious physical harm to employees. Specifically, the Respondent was charged with a violation of the Act in that employees operating manlifts in its plant in Cando, North Dakota were exposed to potential fall and crushing hazards since the manlifts were not provided with enclosures and guardrails.

At the hearing, the compliance officer testified that the Company operates a grain elevator and in the three buildings employs one full-time and one part-time worker. Each building is equipped with a manlift which can hold one person and occupies a space approximately thirty inches square. The mechanism is operated by placing one foot on a brake and pulling a rope. There are no enclosures or guard rails around this manlift or its landing areas. The compliance officer thought that a person could fall off the manlift or could step in the space where the manlift ascended or descended.

Upon more detailed examination, the officer admitted that the possibility of a fall was remote, and that a person would have to be under the manlift to be crushed. A worker would know if another employee was operating the manlift. He did not know when the manlift was constructed or details of its design and counterweight, if anyone ever fell off the mechanism or was crushed under it, or if there was ever a failure of the cable apparatus. So far as he knew, the manlift brake and rope operated properly.

The basis for the citation was an ANSI regulation; however, he understood that the code applied to new elevators only. In any event, ANSI regulations were not enforceable as OSHA standards. Despite the fact that there were no injuries over a ninety year period, the officer thought the hazard of falling off the manlift was reasonably foreseeable.

An OSHA regional administrator with experience in the elevator field testified that there was a hazard in permitting an employee to be in an unenclosed manlift. Although he was unable to recall any instance where a worker fell from a manlift, in his opinion, there

was a reasonable likelihood that a person could fall from or be struck by the type of manlift under consideration. The hazards could be eliminated by enclosures around the manlift and at the danger zone.

Currently, a section of the ANSI standards recommends that enclosures apply to existing elevators. This witness admitted that belt manlifts were more dangerous than the ones in question, yet OSHA has not issued any citations in connection with the belt types. Another problem was the possibility of a piece of machinery or tool to be knocked off a loading platform and land into the hoistway.

The Respondent's Director of Safety testified that ANSI recommendations in elevator operations applied to new installations only. In his opinion, there was no reasonable likelihood that anyone would fall from the manlift. The manlift platform was enclosed on two sides, and no one ever suffered injury during its operation. Further, when a manlift descended, employees were aware of its slow movement. No person had any work to do in the immediate area.

To prove that an employer violated Section 5(a)(1) of the Act, the Secretary must show (1) that the condition or activity in the employer's work place presented a hazard to employees; (2) that the cited employer or employer's industry recognized the hazard; (3) that the hazard was likely to cause death or serious physical harm; and (4) that feasible means existed to eliminate or materially reduce the hazard. To establish the existence of a hazard, the Secretary must prove that employees are exposed to a significant risk of harm.

In this case, the manlift was used once or twice a day for over ninety years without mishap. Only one other employee could be in the building when the manlift was in use. The Secretary was unable to show that anyone had ever fallen from a manlift; that there was a reasonable likelihood that an employee could be struck by a moving car; or that anyone had occasion to work in the manlift immediate area.

Since the preponderance of the evidence failed to establish the existence of a hazard, there was no need for protection of the manlift. This item of the citation is vacated.

Citation Number 1, Item 2A

Serious Citation 1, Item 2A charged that:

2A
29 CFR 1910.23(a)(8): Floor holes, into whi ersons could accidentally walk, were not guarded by standard railings with standar toeboards on all exposed sides or by floor hole covers of standard strength and construction:

> (a) Durum House, Scale Floor, the area between the manually operated manlift platform and the scale floor landing was not provided with a cover.

in violation of the regulation found at 29 CFR §1910.23(a)(8) which provides:

> (8) Every floor hold into which persons can accidentally walk shall be guarded by either:
>
> (i) A standard railing with standard toeboard on all exposed sides, or
>
> (ii) A floor hole cover of standard strength and construction. While the cover is not in place, the floor hole shall be constantly attended by someone or shall be protected by a removable standard railing.

In this item of the citation, the Administration declared that there was an uncovered floor hole in the Durum House, Scale Floor, the area between the manlift and the scale floor landing. In support of this item of the citation, the Complainant placed into evidence a photograph of the alleged infraction.

The Respondent's Safety Expert testified that the cited floor opening was not located where designated by the compliance officer. Instead, the floor opening was off to the side of the manlift at a point where one could not get into the opening by walking off the manlift. Furthermore, the floor hole was located in an area where no employee worked or walked.

We have, thus, a difference of opinion with respect to the location of the uncovered floor hole. However, there is no denial of the fact that there was an uncovered floor hole into which a person could walk. Although the Respondent's witness was of the opinion that no employee worked in the area, I believe that the two employees who entered the particular area were exposed to the floor hole. The portion of the citation is affirmed, together with a penalty of $45.00.

Citation Number 1, Item 2(c)

This portion of the citation charged that:

29 CFR 1910.23(b)(1)(i): Wall openings from which there was a drop of more than four (4) feet, were not guarded by a rail, roller picket fence, half door, or equivalent barrier:

> (a) Barley House, the midrails were missing on work floor bin openings.
>
> (b) Durum House, the midrails were missing on the scale floor bin openings.
>
> (c) Durum Annex, the midrails were missing on the bin openings located on the top floor.
>
> (d) South Barley House, Barley Annex, the wall openings to the bins were inadequately guarded in that the midrail was missing on the east side and no guardrail was provided on the west side below the drag conveyor.

in violation of the regulation found at 29 CFR §1910.23(b)(1)(ii) which provides:

> (1) Every wall opening from which there is a drop of more than 4 feet shall be guarded by one of the following:
>
> > (i) Rail, roller, picket fence, half door, or equivalent barrier. . ..

In this item, the Complainant charges that the Respondent was in violation of the regulation because there were no midrails guarding wall openings. As noted, the standard requires that wall opening shall be guarded by a rail. The Complainant interprets the term rail to be synonymous with railing. The latter term requires a top and intermediate rail. The Respondent asserts that it complied with the standard since a rail was provided to protect a fall through a wall opening.

The regulation defines the term "standard railing" and "railing", but there is no definition of the term "rail." The dictionary defines the word "rail" as a bar extending from one post or support to another and serving as a guard or barrier. Based upon this definition

of the word "rail", the Respondent was in compliance with the standard. This portion of the citation is vacated.

Citation 1, Items 2D(c), (d), (e) and (f)

This item alleged that open-sided floors or platforms 4 feet or more above the adjacent floor or ground level were not guarded by standard railings or their equivalent on all open sides in the Durham, Barley and South Barley Houses in violation of the regulation found at 29 CFR §1910.23(c)(1) which provides:

> (c) *Protection of open-sided floors, platforms, and runways.*
> (1) 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 as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides.

The areas in issue involve the unguarded shafts for the manually operated manlifts. There is no question that guardrails are missing in the contested areas, and the Complainant argues that, therefore, the citation should be affirmed. The Respondent asserts that, since the manlift is the only means of transportation to the upper floors, there can be no circumstance where an employee is working on an upper floor when the manlift is not occupying the cited floor opening.

As previously noted, the Respondent employs one full-time and one part-time employee in the three buildings of the particular plant. According to the testimony, there is no reason for the two employees to be on an upper floor of the same house of the elevator at the same time. The Complainant has not listed a single instance where two employees would be working on the same floor of the same building at any one time. Since there was no employee exposure to the hazard, either actual or through reasonably predictable or foreseeable access, these subitems are vacated.

Citation 1, Item 3

This item charges that:

> Protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered:

> (a) West side of complex, personal protective equipment (safety belts and lanyard) or an equivalent means of protection was not provided while employees are loading railroad covered hopper cars to protect employees from fall hazards.

in violation of the regulation found at 29 CFR §1910.132(a) which provides:

> (a) *Application.* Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

To establish a violation of the standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence.

The record discloses that Respondent's employees worked atop rail cars when loading took place. These workers had no personal protection equipment, such as safety belts and lanyards or guard rails. The compliance officer observed employees of other companies performing similar duties, utilizing this equipment. Such apparatus consisted of safety belts and lanyards tied off to a structure by use of a cable and bracket, a permanent bracket or a retractable lanyard. In his opinion, such equipment could be used by the Respondent at the Cando plant to prevent the hazard of falling off a rail car, a drop of 14 to 15 feet.

The area director of the Bismarck, North Dakota OSHA office testified that he conducted seminars in connection with grain handling facilities. Some employers provided protection for employees working on top of rail cars. Thus, the industry has recognized the hazard of falling off a rail car. He, himself, inspected a plant after the death of a worker

who fell from a hopper car. In the instant case, a fall protection system could be provided at the Respondent's facility by an attachment to a vertical support or a restraining device.

An employee of the Respondent at its St. Joseph, Missouri facility testified that he has been working there since 1978. One of his duties included loading rail cars. Until 1990 he utilized a personal protective loading system which required him to hook off with a safety belt. Respondent purchased the plant in 1989, but he continued to use the required safety belt. Both the predecessor owner of the plant and the Respondent required him to wear a safety belt on top of rail cars, and any failure to follow this safety rule would be called to his attention. He always tied off on railroad cars, and the procedure was especially useful in winter months.

The Respondent's Director of Safety & Product Purity testified that there have been other citations against the Company for failure to provide protective equipment atop rail cars but in each instance the citations were vacated or withdrawn. There has been no final OSHA order that required protective equipment on top of rail cars. The Respondent operates 15 elevators in North and South Dakota, but none has a tie off requirement while working on rail cars. He knows of no case where an employee fell from a railway car. Indeed, a NIOSH Safety guide for grain mills makes no mention of personal protective equipment for railway cars.

The standard requires that personal protective equipment be provided and used whenever necessary because of a hazard capable of causing injury. The protective equipment must be afforded if a reasonable person familiar with the circumstances would recognize a hazard warranting the use of protective equipment. Another criterion used is the actual knowledge test which considers an employer's understanding of the alleged hazard.

There can be no question that a fall of approximately 14 to 15 feet from a rail car can result in serious injury. A fall hazard warranting the use of personal protective equipment here is obvious. No special training or expertise is required to appreciate this hazard.

There is also no question that the employer knew of the hazardous condition of working atop rail cars. Although there have been no injuries in this connection so far as the

Respondent's operation is concerned, the company itself in its St. Joseph, Missouri facility required its employee to wear a safety belt while working on a railroad car.

The industry is also aware of the hazard in working atop railway cars. By a newsletter addressed to members of the industry, the hazard of working atop railway cars was called to the attention of employers.

Directly to the issue of industrial knowledge of the hazard is the fact that, at its St. Joseph, Missouri installation, the Respondent required an employee to wear a safety belt when working on a railroad car and admonished him for any infraction of this rule. That such a safety rule is feasible is proven by its actual use at the St. Joseph plant and by testimony that such an arrangement could be installed at the Condo mill.

The Respondent's brief calls attention to cases involving personal protective equipment aboard railroad cars where citations for failure to wear personal protective equipment were vacated. In one case, Judge Cronin held that ConAgra violated the regulation at 29 CFR §1910.132. After a petition for discretionary review was filed and granted, counsel for Regional Trial Litigation for the Department of Labor filed a motion to withdraw the citation. The motion to withdraw the citation with prejudice was granted by the Commission. From this action, the Respondent concludes that the Commission told ConAgra that it needn't provide protection for employees working on top of rail cars. I draw no such judgment inasmuch as the Commission made no such ruling.

In another case, Judge Cronin rendered a decision vacating a citation for failure to provide protection for employees working on the top of rail cars at Billings, Montana. There, *Secretary of Labor v. ConAgra, Inc., d/b/a ConAgra - Westfeeds*, 14 OSHC 1771 (OSHRC Docket No. 89-0017), the judge held that the occasional and brief use of the railcar catwalk on top of the car was insufficient to bring the catwalk within the definition of "platform" and, therefore, not within the purview of the standard. Even if applicable, the citation would be vacated based on record evidence that established compliance with the standard was infeasible. Neither of these conditions prevails in the case at bar.

Judge Child vacated a citation for failure to provide personal protective equipment to employees aboard rail cars in *Secretary of Labor v.Iowa Beef Processors, Inc.*, 9 OSHC 1246 (OSHRC Docket No. 80-1759), but there a lifeline lanyard arrangement would cause

an employee to collide with the side of the building if it, in fact, prevented him from impacting the ground. No such situation is involved in the case under consideration.

From the foregoing, I conclude that the Secretary has satisfied all the requirements necessary to establish a violation of 29 CFR §1910.132(a), and this portion of the citations and the $280.00 penalty are affirmed.

Citation 1, Item 4B and 4C

Items 4B(a), (b), (c), (d) and (e) and Items 4C(a), (b), (c), (d) and (e) charged that pulleys with parts seven feet or less from the floor or work platform and vertical or inclined belts were not enclosed by guards in violation of the requirements of 29 CFR §1910.219(d)(1) and 29 CFR §1910.219(e)(3)(i) which provide as follows:

> 1910.219(d)(1) - *Guarding*. Pulleys, any part of which are seven (7) feet or less from the floor or working platform, shall be guarded * * *.
>
> 1910.219(e)(3)(i) - *Vertical and inclined belts*. Vertical and inclined belts shall be enclosed by a guard * * *.

The compliance officer testified that pulleys and belts indicated in subitems (a) and (b) of Items 4B and 4C were not guarded. This testimony is confirmed by Complainant's exhibits C-33 and C-34, which disclose no guarding of the equipment noted in the citations although located less than seven feet from the ground level. Inasmuch as the Respondent did not conform with the requirements of the regulation and since its employees worked or had access to the areas where the machinery was located, there was a violation of the regulation. These portions of the citation are affirmed.

The penalty for these infractions is placed at $35.00.

The other subitems were cited because the machinery was not fully enclosed. The photographs indicate that there was partial guarding of the equipment. From an examination of this evidence, it does not appear that the Respondent's employees were exposed to any danger or hazard. Subitems 4B(c), (d) and (e) and 4C(c), (d) and (e) are vacated.

Corrected Page

In sum:

Citation 1, Item 1 is vacated.

Citation 1, Item 2A is affirmed with a penalty of $45.00.

Citation 1, Item 2C is vacated.

Citation 1, Item 2D is vacated.

Citation 1, Item 3 is affirmed with a penalty of $280.00.

Citation 1, Items 4B and 4C, subitems (a) and (b) are affirmed.*

Citation 1, Items 4B and 4C, subitems (c), (d) and (e) are vacated.*

Sidney J. Goldstein
Judge, OSHRC

Dated: March 13, 1992

*Corrected