



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

UNARCO COMMERCIAL PRODUCTS,

Respondent.

OSHRC Docket No. 89-1555

DECISION

BEFORE: FOULKE, Chairman, and MONTROYA, Commissioner.

BY THE COMMISSION:

Unarco Commercial Products ("Unarco") manufactures shopping carts in Wagoner, Oklahoma. The carts are electroplated with a nickel-chrome finish on an automated electroplating line. As the result of a complaint that employees were exposed to the hazard of falling into a tank filled with hot water and chemicals, the Secretary of Labor, acting through a compliance officer of the Occupational Safety and Health Administration ("OSHA"), inspected Unarco's plant. As a result of this inspection, the Secretary issued citations alleging, among other things, a willful violation of the safety standard found at 29 C.F.R. § 1910.23(c)(3), which requires employers to guard open-sided floors, walkways,

platforms, and runways with a standard guardrail.¹ The Secretary proposed an \$8000 penalty for this violation.

Unarco timely contested the citation and a hearing was held before an administrative law judge of the Occupational Safety and Health Review Commission ("the Commission"). The judge found that the surfaces on which Unarco's employees stood were not "platforms" within the definition of that term found at 29 C.F.R. § 1910.21(a)(4).² He therefore concluded that section 1910.23(c)(3) did not cover the situation cited and vacated the citation. The Secretary petitioned the Commission to review the judge's decision, and review was directed pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 661(j). Having reviewed the entire record in this case, we find that the judge did not err in vacating the citation. We therefore affirm his disposition.

BACKGROUND

Unarco employs approximately 500 employees at its Wagoner plant and has a number of electroplating operations, including two nickel-chrome-plating lines and a zinc-plating operation. The automated line at issue contains thirty-two different tanks, 6-8 feet deep and 6-7 feet wide, which are arranged in a "U" shape. Walkways or catwalks located on each side of the line approximately 42 inches below the tops of the tanks extend the length of the line. A safety cord to stop the machinery runs the length of the walkway.

¹ That standard provides:

§ 1910.23 Guarding floor and wall openings and holes.

.....
 (c) *Protection of open-sided floors, platforms, and runways.*

.....
 (3) **Regardless of height, open-sided floors, walkways, platforms, or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units, and similar hazards shall be guarded with a standard railing and toe board.**

² 29 C.F.R. § 1910.21(a)(4) provides:

§ 1910.21 Definitions.

(a) As used in § 1910.23, unless the context requires otherwise, floor and wall opening, railing and toe board terms shall have the meanings ascribed in this paragraph.

.....
 (4) *Platform.* 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.

A number of the chemicals used in the plating process can cause burns or skin irritation. Because various chemical reactions must occur or must be prevented from occurring in order for the plating process to be effective, the contents of some of the tanks must be kept at or near a particular temperature. The temperatures in some of the tanks range from 140-160° F. To protect its employees from the hot water and the chemicals used in the plating process, Unarco provides them with personal protective equipment, including rubber boots, protective aprons, gloves, and safety goggles. There are also drench showers and eyewash fountains located on the catwalks.

A part is cleaned and rinsed several times to prepare it to be plated. In fact, the first sixteen tanks in the automated line are all devoted to the cleaning process, including a soap cleaning tank, two acid cleaning tanks, two electro-cleaning tanks, a cyclex cleaning tank, and a number of rinse tanks. After a part has been cleaned, it is plated, first with nickel, then with chrome.

Most of the tanks in the automated line have a capacity of approximately 26,000 gallons, but the nickel-plating tank, which is the seventeenth tank in the line, comprises about 40 percent of the entire line and is by far the largest tank in the automated line. While a part may be in other tanks only briefly, it spends seventeen minutes in the nickel-plating tank. After a part comes out of the nickel-plating tank, it goes through two rinse tanks, then into the chrome-plating tank, which is followed by at least three additional rinse tanks. Some of the tanks, including the nickel tank, have PVC pipes extending over the side of the tank to the bottom of the tank. Air is forced through these pipes so that it will "bubble up" and agitate the chemicals in the tank. In the plating tanks there are 3 copper bars, called anode rails, whose purpose is to carry the electric current necessary for the plating process to occur. The anode rails run parallel to each other approximately 24-28 inches apart, with one rail running along each side of the tank and one running down the center of the tank.

Parts to be plated are placed on "carry arms" at the beginning of the line and transported on a conveyor system which lowers the parts into each tank, lifts them out, transports them to the next tank, and continues this procedure until the plating process is completed.

On occasion, parts fall off the carry arms into the tanks and have to be retrieved by Unarco's employees. Sometimes employees retrieve the parts by standing on the catwalk and leaning over the edge of the tank to fish the part out of the tank with a "J-hook," a 6-8-foot pole with a hook on the end. At other times, however, the employees cannot reach the fallen part from the catwalk. On those occasions, they climb up onto the tanks and stand on the anode rails, the PVC air pipes, or the carry arms. These surfaces are often wet and can be slippery. Consequently, Unarco's employees occasionally slip, and it is not uncommon for an employee's foot to slip into a tank. On one occasion, an employee actually fell into the chrome-plating tank and had his legs badly burned, requiring skin grafts that caused him to miss two and a half months' work.

On these facts, the Secretary concluded that the surfaces on which Unarco's employees stood during the retrieval process, that is, the PVC pipes, the copper anode rails, and the carry arms on which the items to be plated are hung, were "platforms" within the contemplation of the standard and must be equipped with standard guardrails, which, under the requirements of 29 C.F.R. § 1910.23(e), include a top rail 42 inches high, and an intermediate rail, and be capable of withstanding at least 200 pounds of pressure.

THE ELEMENTS OF A VIOLATION

In order to prove that an employer violated an OSHA standard, the Secretary must prove that: (1) the standard applies to the working conditions cited, (2) the terms of the standard were not complied with, (3) employees had access to the violative conditions, and (4) the employer knew of the violative conditions or could have known with the exercise of reasonable diligence. *Kulka Constr. Mgt. Corp.*, 15 BNA OSHC 1870, 1992 CCH OSHD ¶ 29,829 (No. 88-1167, 1992); *Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981), *aff'd*, 681 F.2d 69 (1st Cir. 1982). The first question we must decide, therefore, is whether the standard applies to the working conditions cited.

ARGUMENTS

The **Secretary** contends that the standard does apply, asserting that “the various surfaces employees were forced to stand on while retrieving fallen parts -- including carry arms, pipes, and railings” should be considered platforms. He claims, “that [t]here can be no question that each of these precarious vantage points was being used as a surface from which employees were either required or allowed to perform the parts retrieval task.” The Secretary notes recent Supreme Court precedent that “clearly establishes that the Secretary’s constructions of the statute are controlling if reasonable,” citing *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991) (“CF&I”). He points to OSHA Instruction STD 1-1.13 as the most specific articulation of his interpretation of a platform as:

1. 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.
2. Predictable and regular basis means employee functions such as, but not limited to, inspections, service, repair and maintenance which are performed:
 - a. At least once every 2 weeks, or
 - b. For a total of 4 man-hours or more during any sequential 4-week period (e.g., 2 employees once every 4 weeks for 2 hours = 4 man-hours per 4-week period).

OSHA Instruction STD 1-1.13, *Fall Protection in General Industry*, § F, (April 16, 1984). The Secretary asserts that he has reasonably determined that employee safety is better assured by requiring that employees who must routinely retrieve parts from the tanks be provided with a properly guarded platform from which to work. He contends that this determination is based on a longstanding construction of the applicability of the fall standard to working surfaces. The Secretary claims that to narrowly interpret the term platform would be to place the very worst of the conditions the standard was intended to correct outside the standard’s scope. He points to *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315 (8th Cir. 1981) a “factually similar case” in which the Eighth Circuit adopted the Secretary’s broad interpretation, noting that employee protection would be little served by a narrow interpretation.

The **Secretary** argues that while his interpretation has been longstanding and consistent, the **Commission** has been inconsistent. Citing the Commission's decisions in *General Elec. Co.*, 10 BNA OSHC 1144, 1145-46, 1981 CCH OSHD ¶ 25,736, p. 32,100 (No. 76-2879, 1981)("incongruous to characterize a narrow ledge less than two feet wide" as a platform) and *Globe Indus.*, 10 BNA OSHC 1596, 1982 CCH OSHD ¶ 26,048 (No. 77-4313, 1982)(conveyor not a platform), the Secretary laments that there is "[v]ery little if any conceptual framework under[lying] the Commission's alterations in its views." He also claims that reliance on these cases is no longer tenable in light of *CF&I Steel*.

In his reply brief, however, the Secretary has changed his position, putting forth a new argument, that the cited standard requires Unarco to establish proper platforms, complete with guardrails, from which the employees could perform parts retrieval. He submits that this explanation reflects a longstanding and carefully elucidated interpretation of the term platform. He claims that the necessity for such an interpretation is established by the long history of Unarco's employees' slipping, and the resultant partial immersion, which exposes them to the hazard of both thermal and chemical burns. The Secretary asserts that parts retrieval is an integral, predictable, and unavoidable part of the plating process which Unarco's supervisors not only know about but also assist in. The Secretary agrees with Unarco that the PVC pipes and "greasy struts" are "far removed from the ordinary conception of a working surface," but asserts that this merely emphasizes the need to apply the standard here, because it would be ludicrous and contrary to the intent of the Act to construe the standard so as not to reach the worst violations, where protection is needed most. The Secretary argues that the standard is not vague, that it gives the exact requirements for guarding platforms, and that any vagueness was cured by Instruction STD 1-1.13.

The Secretary quotes the Fifth Circuit's remarks in *Corbesco, Inc. v. Dole*, 926 F.2d 422 (5th Cir. 1991), that sources of information outside the standard may clarify the requirements and applicability of a standard, including a Commission interpretation, industry practice, the injury rate, and the obviousness of the hazard, asserting that the Secretary's litigation positions in the past should have put Unarco on notice of this interpretation.

APPLICABILITY OF 29 C.F.R. § 1910.23(c)(3)

Whether the cited surfaces are platforms within the meaning of the standard is a question of fact. *See Superior Elec. Co.*, No. 91-1597, slip op. at 5 (Dec. 8, 1993). Section 1910.23(c)(3) clearly requires that if employees are working from a platform over a galvanizing tank, the platform must be equipped with a standard railing or the equivalent. The term “platform” is defined in section 1910.21(a)(4) as “[a] working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform” From our review of the language and structure of section 1910.23(c)(3), we cannot discern how the standard can be read to apply to these “slick and greasy” anode rails, PVC pipes and carry arms, none of which are more than a few inches in diameter or width. These objects clearly cannot be considered platforms. They were neither built nor rigged to serve that purpose. They merely served on occasion as convenient footholds from which Unarco’s employees were able to retrieve objects from the tanks. While Unarco’s reliance on this practice to keep its plating process running smoothly may be ill-advised, particularly in light of the injuries received by employees who engaged in the practice, Unarco’s indifference to the safety of its employees does not render these footholds platforms. The Secretary’s citation here appears to be an attempt to push Unarco into halting a clearly unsafe practice by whatever means were available, but we see no likelihood that any of these objects could be fitted with guardrails or that the automated line could operate with guardrails in place. It is well established that a statute or, in this case, a standard must be construed so as to avoid an absurd result. *E.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982). Although we appreciate that the Secretary would like to use the widest possible net to expand the protection required by this standard, “[a]n elevated flat surface does not automatically become a “working space” and a “platform” merely because employees occasionally set foot on it while working.” *General Elec. Co. v. OSHRC*, 583 F.2d 61, 64, (2d Cir. 1978). We believe the Secretary would have been better advised to proceed under some other standard or provision of the Act, for example 29 C.F.R. § 1910.28 might provide a more appropriate remedy.

It is well settled that the test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose applicability

is questioned. If no determination can be reached, courts may then refer to contemporaneous legislative histories of that text. If this inquiry into the meaning of the text does not settle the question, the courts then defer to a reasonable interpretation developed by the agency charged with administering the challenged statute or regulation. *Securities Indus. Ass'n v. Federal Reserve Sys.*, 847 F.2d 890 (D.C. Cir. 1988), citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). Here, we believe that the language of the standard is sufficiently clear that it is unnecessary to look outside the standard itself.

The Secretary apparently recognized that there were substantial difficulties with his argument that the cited surfaces were platforms, because he put forth an alternative interpretation of the standard in his opening brief and relied solely on that second interpretation in his reply brief. In his reply brief, the Secretary states, "The essential dispute between Unarco and the Secretary is whether the company was required to erect platforms over its chemical plating tanks to protect workers from the fall hazard involved in retrieving fallen parts." Although the Secretary's second interpretation avoids the logistical absurdity of requiring that a guardrail be attached to a short section of plastic pipe, it finds no support in the language of the cited standard. Nowhere in section 1910.23(c)(3) do we find a requirement for employers to construct a platform; the standard merely requires that existing platforms be guarded. The Secretary's switch in interpretations is all the more remarkable because it is made in the same case in which he claims that the Commission's lack of a conceptual framework has resulted in inconsistent Commission decisions about the meaning of the term "platform." While the Secretary contends that the Commission's reliance on previous cases, in which for example, the Commission held that a conveyor belt was not a platform, is no longer tenable in light of *CF&I*, his contention fails to consider the words of the Supreme Court:

In situations in which "the meaning of [regulatory] language is not free from doubt," the reviewing court should give effect to the agency's interpretation so long as it is reasonable. *Ehlert v. United States*, 402 U.S. 99, 105 (1971).

CF&I, 499 U.S. 150-51. Here, we do not harbor any doubt that the surfaces the Secretary cited do not come within the term "platform." This determination and those we have made in other cases rely on the conceptual framework provided by the language of the cited

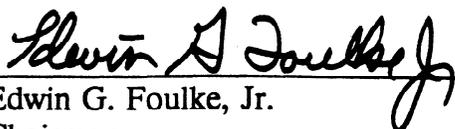
standard and the definitions of the standard's terms. The Commission has always looked to the language of the standard in determining whether a standard applies to the facts of a case. See *Superior Electric Co.*, (3-foot-wide catwalk is a platform); *Clement Food Co.*, 11 BNA OSHC 2120, 1984-85 CCH OSHD ¶ 26,972 (No. 80-607, 1984)(deck from which employees added materials to tanks was a platform); *Williams Enterp.*, 11 BNA OSHC 1410, 1983-84 CCH OSHD ¶ 26,542 (No. 79-843, 1983)(temporary metal decking that employees use to install next piece of decking not a platform), *aff'd*, 744 F.2d 170 (D.C. Cir. 1984); *Brown & Root, Power Plant Div.*, 10 BNA OSHC 1837, 1982 CCH OSHD ¶ 26,159 (No. 77-2553, 1982)(flat surface of air duct under construction is a floor or platform); *Globe Indus.* (conveyor belt not a platform); *General Electric Co.* (ledge on turbine shell is not a platform).

Anheuser-Busch, relied on by the Secretary, does not require a different result. There, the Eighth Circuit stated that the broad remedial purposes of the Act would not be achieved by a restrictive interpretation of the term "platform" and that the protection required by the standard should be extended to "those elevated surfaces where employees work and which in the reasonable judgment of the Secretary need protection from injury by guardrails." 666 F.2d at 327. The court also stated that standards should be given "a reasonable, commonsense interpretation." *Id.* at 326. The surfaces cited in that case, which were basically flat and which could have been equipped with guard rails, were clearly surfaces covered by the definition of "platform." Here, as we have already noted, Unarco is ill-advised to require its employees to continue to reach into the tanks by standing on these pipes, carry arms and anode rails. However, that fact does not make section 1910.23(c)(3) the applicable standard to protect those employees. Moreover, even if it were necessary to carry our analysis further, we would have no reluctance in holding that to call these objects platforms is not a "reasonable commonsense interpretation" of the term platform. Based on its text and structure, we can only conclude that section 1926.23(c)(1) does not apply to the cited rails, pipes and carry arms at Unarco's plant.³

³ The record yields no legislative history so we will omit the second part of the inquiry. In view of our holding, we also need not consider the Secretary's deference argument. See, e.g., *Howe v. Smith*, 452 U.S. 473, (continued...)

CONCLUSION

For the reasons given above, the decision of the administrative law judge vacating the Secretary's citation alleging a willful violation of 29 C.F.R. § 1910.23(c)(3) is affirmed.⁴


Edwin G. Foulke, Jr.
Chairman


Velma Montoya
Commissioner

Dated: December 16, 1993

³(...continued)

483 (1981)(when a statute is unambiguous, the inquiry goes no further). However, we conclude that even if we were to assume *arguendo* that the regulation was ambiguous, our holding would not change. The standard of review for arguments invoking deference is whether the Secretary's interpretation is reasonable, *i.e.*, whether it "sensibly conforms to the purpose and the wording of the regulation." *CF&I* at 150-51. We also consider whether the Secretary has consistently applied the interpretation. *Id.* at 157. It is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards. It need only be reasonable to warrant deference. *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524 (1991). As we have seen the Secretary's interpretation is not reasonable. The plain and natural meaning of the word platform or working surface does not include plastic piping and copper electrical conductors. The Secretary's reliance on two different interpretations in this case also detracts from the reasonableness of the interpretation.

⁴ In view of our disposition of this case, we need not address whether Unarco had fair notice or whether Unarco has properly raised and proven the affirmative defense of infeasibility.



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SECRETARY OF LABOR,

Complainant,

v.

UNARCO COMMERCIAL
 PRODUCTS,

Respondent.

Docket No. 89-1555

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on December 16, 1993. **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.

Ray H. Darling, Jr.
 Executive Secretary

December 16, 1993

Date

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
UNARCO COMMERCIAL PRODUCTS
Respondent.

OSHRC DOCKET
NO. 89-1555

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 18, 1992. The decision of the Judge will become a final order of the Commission on April 17, 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 7, 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
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Petitioning parties shall also mail a copy to:

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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

A handwritten signature in cursive script that reads "Ray H. Darling, Jr.".

Ray H. Darling, Jr.
Executive Secretary

Date: March 18, 1992

DOCKET NO. 89-1555

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

<hr/> SECRETARY OF LABOR,	:	
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Complainant,	:	
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v.	:	OSHRC DOCKET NO. 89-1555
	:	
UNARCO COMMERCIAL	:	
PRODUCTS,	:	
	:	
<hr/> Respondent.	:	

Appearances:

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For the Complainant.

David M. Curtis, Esquire
Dallas, Texas
For the Respondent.

Before: Administrative Law Judge E. Carter Botkin

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to § 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

On March 29-30, 1989, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's facility located in Wagoner, Oklahoma, pursuant to a complaint that employees were exposed to falling into tanks used in the facility's electroplating process. The inspection resulted in the issuance of three citations: one serious, one "other" and one willful. The parties settled all items of the serious and the "other" citation. Subsequently, a partial settlement agreement was filed which meets the requirements of the Commission. It is approved and incorporated by reference. A hearing was held January 30-31, 1990, in regard to the willful citation. This citation, which alleges a violation of 29 C.F.R. § 1910.23(c)(3), is discussed below.

The Evidence

The record shows that since early 1987, Respondent's facility has had an automated electroplating line which plates parts such as shopping cart handles and frames with nickel and chrome. The line has 32 separate tanks, arranged in a U-shape, which are six to eight feet deep and six to seven feet wide. They sit on the floor, and there is a railed walkway adjacent to them which goes all the way around the operation. The walkway is about 42 inches below the tank tops, and there are eyewash and shower facilities on the walkway on both sides of the operation. (Tr. 23-26; 33; 39-43; 48; 100; 138; 142; 161; 182; 217; 261-64; C-1-3; R-4).

The line operates by means of carry arms, designated "A" in C-2, which convey the parts to be plated through each of the tanks on the line. Employees hang the parts on racks on the arms at the beginning of the line, and the arms lower and raise the parts in and out of the solutions in the tanks as they proceed along the line. The parts go through cleaning, acid and rinse tanks, then through the nickel tank, through more rinse tanks and the chrome tank, and then through the final rinse tanks.¹ The operation can be shut down at any time by pulling the emergency stop cable that runs the entire length of the line. (Tr. 27-32; 63-66; 71-72; 76; 94-95; 100-03; 131; 139-42; 188-90; 214-20; 236-37; C-2; R-4).

Some of the tanks on the line are kept at temperatures between 140 and 160 degrees fahrenheit. The nickel tank, as shown in C-3, is a large U-shaped tank making up about 40% of the line.² It is kept between 140 and 156 degrees and contains, per each gallon of water, 35 ounces of nickel sulfate, ten ounces each of nickel and nickel chloride, six ounces of boric acid, one ounce of anti-brighteners and less than one ounce of sulfuric acid. (Tr. 26-27; 51-52; 168-69; 176-78; 192; 241-43; 261-67; 303; 312-13; 320).

C-1-2 depict a portion of the nickel tank, and C-2 shows a part, designated "E," hanging from one of the arms coming out of the nickel solution. C-2 also shows three green anode rails³ with hooks on them running the length of the tank; two are on the sides, and

¹The rinse tanks contain clear water. (Tr. 139-41).

²Parts are in the nickel solution for approximately 17 minutes. (Tr. 100).

³The anode rails carry the electrical current necessary to the electroplating process. (Tr. 103; 145; 313-14).

the other, designated "B," is in the center. The rails are copper and are 24 to 28 inches apart where they appear in C-2; they are somewhat farther apart at the curved part of the tank. The pipe marked "C" in C-2 is a discharge line, and those marked "C-prime" are PVC pipes which provide air agitation. (Tr. 73-77; 101-03; 107-10; 122-23; 182; 236-41; 271-72).

The record further shows that since the inception of the line's operation, parts have fallen from the arms into the tanks; when this happens, employees retrieve the parts. (Tr. 61-69; 99; 104; 107-08; 112-13; 162-66; 183-86; 245-47). Four employees who have worked on the line testified in this regard, as set out below.

Albert Gutierrez has worked as a racker and hoist operator on the line since June, 1988. He testified that parts can fall into tanks from zero to four or five times during an eight-hour shift. He also testified that while it can take less than four minutes to get one part out, it can take up to 30 minutes to retrieve all of the parts that have fallen into a tank. Gutierrez said he climbs up the metal grill or the PVC pipe shown in C-2 to retrieve parts; a ladder is not provided, and climbing is difficult because the cable is in the way and there is nothing on which he can balance himself. He then steps from the side of the tank to the anode rails or the carry arms, from which he uses a long hook to retrieve the part; again, there is nothing on which he can balance himself, and the arms have grease on them and may be moving. Gutierrez noted retrieval can be difficult, especially if several parts are tangled up together, and that a supervisor or another employee always helps him. (Tr. 57; 61-80; 93-95).

Gutierrez said he had never fallen into a tank when retrieving parts, but that he had slipped many times and had gotten both feet into the chrome tank. He noted employees were told to get to a shower and wash off if this occurred, that the hazards of the chemicals had been explained, and that protective equipment and instructions in its use were provided. He also noted he had never been told how to retrieve parts other than being told to get a hook, climb up on the tank and get the part out. Gutierrez said that while the machine was sometimes stopped for retrieval, he had been told by supervisors to get parts out when it was moving. He indicated there were boards provided for retrieval, but that he had never used them because the supervisors wanted the parts gotten out quickly and using the boards took

too long. He also indicated there was a platform, but that it was only used when the nickel tank was drained for maintenance. Gutierrez related that his duties had not changed since the inspection, that he had never been disciplined because of the way he retrieved parts, and that supervisors such as Craig Jewitt, Dino Vann and David Johnson had seen him perform this work. (Tr. 69; 80-97).

Dennis Korte is a maintenance technician at the facility; he has **been assigned** to the plating department since early 1987. He testified that he performs **maintenance** on the line⁴ when the arms get hung up, and that he retrieves parts by crawling up the tank, stepping on the side, straddling the anode rails and fishing the parts out with a six to eight-foot J-hook. Korte said the side and rails are wet and slippery, that the rails and arms can have grease on them, and that the footing on the tanks is not good. He also said getting a part out can be quite a struggle if it has hooked onto the mat at the bottom of the tank. Korte said parts have fallen into all of the tanks, and indicated retrieval occurs more or less daily. (Tr. 98-99; 104-09; 112-13; 117-18; 146).

Korte further testified that he had retrieved parts while the machine was moving, particularly when the supervisor was concerned about production, and that he had seen employees trying to do so on the nickel tank the evening before in the presence of Craig Jewitt. He said his duties had not changed since the inspection, that he had never been disciplined for the way he retrieved parts, and that supervisors such as Jewitt, Ernie Barnes, David Johnson and Dino Vann had both seen and helped him retrieve parts. He also said he knew employees had complained about the condition, but that there was usually no other way to retrieve parts. Korte noted he and other employees used two-by-twelve boards on occasion to retrieve parts, but that the hooks on the rails did not provide a level surface and using the boards was not always possible. He also noted a large railed platform was built after the inspection but was not feasible; it was only good for the nickel tank and was so heavy that four employees, two of which had to be on top of the tank, were required to lift it. (Tr. 99; 118-27; 131-33; 146-48).

Korte said he had seen an employee get his leg into the nickel tank up to his knee

⁴Korte referred to the line as both a nickel plating and nickel-chrome plating operation. (Tr. 100; 135).

shortly after the line began operating. He observed that although he did not view any injuries that might have resulted from that incident, he had seen rashes or redness caused by splashes from tanks on the line. He also observed that while he attended weekly safety meetings as a member of the facility's hazardous material team, he had never been trained about climbing up on top of the tanks other than being told to be careful. Korte knew employees working on the line were provided protective gear and safety instruction, including instructions about using the wash stations, but did not know if they were told parts retrieval was a two-person operation. (Tr. 111-12; 123-24; 127-30; 146-50).

Nugene Warren has worked at the facility since August 1, 1989; he is currently a laborer. He testified that on November 2, 1989, after having worked in the plating area for about a month, he was injured in Tank T-4. He explained that he was retrieving parts from the tank while standing on the anode rails when he fell in. His supervisor helped him out and he got under a shower within two to three minutes, but he was burned from the waist down; he required skin grafts and was off work until January 15, 1990. Warren did not know the specific chemicals in the tank, but he thought it was a cleaning tank; he knew its contents were kept at about 151 degrees because part of his job involved taking the temperatures of the tank solutions. (Tr. 159-70; 174-75).

Warren further testified that although Tank T-4 is at the beginning of the line, he worked the entire line and retrieved parts from any tanks into which they fell. He said this occurred about once per shift, when a regular employee was loading,⁵ and that he retrieved parts by climbing up the tank as best he could and standing on the carry arms or anode rails, which could have grease on them. He also said that no ladder was provided, and that he had never used or been aware of any boards to retrieve parts. Warren noted that when he retrieved parts, he was assisted by the employee loading parts or his supervisor, Reginald Vann. (Tr. 160-67; 171-74).

Lewis Hawley is currently a material handler in the facility's warehouse; he worked on the line⁶ as a racker, hoist operator and lead person from about March 30, 1989, to

⁵If a new number employee was loading, it would average once every 30 minutes to 2 hours. (Tr. 163).

⁶Hawley referred to the line as a nickel-chrome plating operation. (Tr. 181-82; 187-89; 193).

October 23, 1989. Hawley testified he was never instructed about how to get up on the tanks, but that he was told that pulling parts out was part of his job. He said he retrieved parts with a long hook from the anode rails, and that when he did so he was assisted by another employee or his supervisor, Craig Jewitt. Hawley noted that personal protective equipment was provided, but that its use was never enforced and he was not aware of it for his first several months on the line. He also noted he had attended a safety class which included a "right-to-know" video when he was first hired, but that he had attended no safety classes since then. (Tr. 181-85; 194-96).

Hawley further testified that one of his legs was injured when his legs slipped into Tank T-5, the second cleaning tank on the line; his foot also slipped into the nickel tank, but he stuck it into a rinse tank and it was not burned. Hawley was aware of no one else slipping into or being injured in the nickel tank. He said on one occasion, he and other employees spent almost three hours over the tank after a part hooked onto the mat and pulled it and the air lines up; the operation was shut down, but the nickel solution's temperature was maintained. (Tr. 186-87; 190-94).

Ronald Watkins is an OSHA compliance officer ("CO"); he participated in the inspection and the closing conference, at which David Curtis, Ben Smith and Terry Crawford, the facility manager, were present. Watkins testified that OSHA's position during the conference was that some type of platform with guard rails was needed, and that in discussing the hazard OSHA was addressing the whole process and not just one tank. Watkins said OSHA referred to the line as a nickel plating process during the conference, and that it was clear OSHA meant the entire process. (Tr. 151-55).

Gerald Durham has 20 years of experience in the metal finishing industry; his experience includes the design, manufacture, sales, installation and operation of electroplating equipment. He has a chemical engineering degree, and he has seen many plating operations throughout the United States. (Tr. 223-34).

Durham testified that he was familiar with Unarco's line, and that he had seen it in other facilities. He considers the line one machine, and said it could be called a nickel plating machine. He noted that Baker Brothers was the manufacturer, ~~that~~ the company had been in business for over 20 years, and that he had never known it to construct a

walkway or platform above a nickel plating tank. He also noted that he had never seen any electroplating operation with walkways, runways or platforms above the tanks. Durham said this was mainly for economic reasons, but that it had never created any safety problems. He described Unarco's line as very industry-typical. (Tr. 234-36; 241-45; 253; 261; 264-65; 278-79).

Durham further testified that parts falling into tanks is inevitable. He said parts could be clamped on the arms so they would not fall off, but that he had not seen this and doing so would interfere with production. He also said he was not aware of any operations using safety harnesses or belts. Durham observed that retrieval is typically done with a hooking mechanism from the adjacent catwalk, if possible, or from a portable catwalk over the tank. Durham knew Unarco provided employees with two-by-twelve boards, and noted he had seen small support platforms of various dimensions used for retrieval. (Tr. 245-48; 255-57).

Durham said he has never seen a platform with railings and toe boards used, and that installing a permanent platform above the nickel tank would keep it from functioning. His opinion was that it would not be possible to devise a mechanism to prevent falls during retrieval that would not interfere with the line's operation, and that a swing-out type platform with guard rails would interfere with material flow. However, Durham noted the operation should be shut down during retrieval. (Tr. 248; 254; 271-72; 279-80).

Durham stated he has never installed nickel plating operations with the subject standard in mind. He observed that there are no open-sided floors, walkways, platforms, or runways above the nickel tank, and that it is not a galvanizing tank. He also observed that a platform is something an employee would work or stand on, and that the arms and rails are not designed for that purpose. Durham said he has not seen employees working above tanks on a regular basis, and that the only reasons to be there would be for maintenance or retrieval. Durham has retrieved parts; he does not consider it life-threatening, but said it could possibly result in a fall into a tank and an injury. (Tr. 248-54; 257-60; 269-70).

Durham was familiar with the chemical makeup of the nickel solution, but did not know what the effects of ingestion would be other than a possible thermal burn. His opinion was that the solution itself is not hazardous, and that an employee could put a hand in it and rinse it off without any effect. Durham related that the buddy system is the most prominent

safety measure to protect employees, in that if an employee falls into a tank he can be gotten out immediately. He was not aware of Unarco's safety record or of employees falling into tanks, other than an occasional foot splash. Durham said he would be very surprised if employees were falling into the tanks on a regular basis and sustaining injuries, but that he would be concerned if there was a chronic problem with such instances. (Tr. 253-54; 265-68; 275-78).

Alan Segnar has 20 years of experience in occupational safety and health; he has an MS in environmental engineering, an undergraduate minor in chemistry and biology, and is a board-certified safety professional and industrial hygienist. He has been a safety consultant to Unarco for nine years. (Tr. 290-92; 303-04; 319).

Segnar identified R-1 as Unarco's procedure for removing parts from the plating tanks. He testified he recommended the procedure, that it has been in effect for about three years, and that it requires the operation to be stopped as well as the use of the buddy system and two-by-twelve walkways. Segnar said the arms and rails on the line are not designed as walkways, and that he could not recommend they be used as such. He also said the buddy system requires at least one other person in the area, and that while it would not prevent a fall it would allow an employee who had fallen in to be pulled out. (Tr. 295-99; 301; 316-17).

Segnar further testified he observes Unarco's nickel-plating operation about once a month for two to three hours at a time. Based on what he has seen, an average of five minutes per hour is spent in retrieval; in his opinion, retrieval is infrequent and not a regular part of the operation. Segnar said that while he and Unarco are familiar with the standard, he has never recommended compliance with it in regard to the nickel tank because he does not believe it applies to plating. He noted he has not seen the standard applied in any of the plating operations he has visited, and that he has not recommended that Unarco install a platform or walkway with toe boards or side rails because such a device would render the machine useless. (Tr. 299-302; 310-11; 318-20).

Segnar said he has observed the use of the wood platforms Unarco built after the inspection. In his opinion, they are functional but not feasible; they are heavy and cumbersome, and using them reduces maneuverability over the tanks and could cause back

injuries. Segnar noted the platforms could be made of aluminum, as long as they had a rubber bottom to prevent disturbing the plating process, and that they would be lighter than the wood platforms if not made of solid aluminum. (Tr. 308-09; 313-16).

Segnar related that Unarco conducts weekly meetings regarding hazardous materials, and that he himself had conducted "right-to-know" training before the line began operation; all employees received 16 hours of training, and those working in the plating area were given 24 additional hours of instruction. Segnar said the training had to do with the hazards of the plating process and the chemicals used, and the use of personal protective equipment, the buddy system and the showers and eyewashes. Segnar noted that Unarco requested the services of the Oklahoma (occupational safety and health) voluntary compliance program in approximately February, 1989, but that those services did not commence until after the inspection. (Tr. 292-94; 300-01).

Segnar observed that the primary hazard of contact with the nickel fluid would be thermal burns, but that the solution itself would be toxic if ingested. He noted that falling into the tank could cause third degree burns, and that even if the employee was not in the tank for long and got to a shower the solution trapped in his clothing could worsen the injury and create a much greater chance of absorption of the chemicals, which Segnar described as "not nice." Segnar was aware of one case in which an employee named Frank Whithers allegedly suffered thermal burns in the nickel tank. He did not talk to Whithers, but understood the burns to be second or third degree; he reviewed the doctor's report, which showed burns on the lower ankle or upper foot and injury to the fourth and fifth toes. Segnar indicated there was some question about the cause of the injury since the rest of Whithers' foot was not injured. (Tr. 302-08; 311-12; 320-25).

DISCUSSION

The Secretary has the burden of proving each element of her case by a preponderance of the evidence. Astro Pharmaceutical Products, Inc., 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981), aff'd in part, 681 F.2d 69 (1st. Cir.

1982).⁷ In this case, there is a failure of proof by the Secretary to establish that the cited standard applies to the factual situation. In pertinent part, the citation⁸ alleges a willful violation of 29 C.F.R. § 1910.23(c)(3)⁹ as follows:

Plant, department 1200; employees were exposed to the hazard of falling into the nickel plating tank(s) during operations where parts that had fallen from the conveyor were retrieved from the tanks.

The entire thrust of the Secretary's case is that employees were required to work on unguarded "platforms" adjacent to and above dangerous equipment.¹⁰ A "platform" is defined in 29 C.F.R. § 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.

The Secretary argues that the controlling definition of a platform is "an elevated surface used on a regular and predictable basis for a work central to the processes of the employer." (Secretary's Brief, pg. 2). In so doing, the Secretary relies on the holding of the Second Circuit in the case of General Electric Co. v. OSHRC, 583 F.2d 61(2d Cir. 1978).¹¹

⁷Those elements are that (i) the cited standard applies to the factual situation, (ii) there was a failure to comply with that standard, (iii) there was employee access to the violative condition, and (iv) the cited employer either knew or could have known of the violative condition with the exercise of reasonable diligence.

⁸In essence, the same charge is made in paragraph XXII of the complaint.

⁹The standard reads as follows:

Regardless of height, open-sided floors, walkways, platforms, or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units, and similar hazards shall be guarded with a standard railing and toe board.

¹⁰See Secretary's Brief, pgs. 2-3.

¹¹In that case, the object being considered was the top of an oven where two motors were located which required occasional maintenance. The top was L-shaped and flat, with approximate dimensions of 10'8" in height, 20 feet long and 12 feet wide.

While it is true that the Court emphasized that occasional maintenance functions were an insufficient basis for holding such a surface to be a platform, more importantly, it stressed one should not strain the natural meaning of words for the purpose of eliminating perceived safety hazards.¹² There was an expressed concern about employers receiving fair warning of conduct required or prohibited by a standard.

In recent years, the Review Commission has expressed exactly the same concern. In General Electric Co., 10 BNA OSHC 1144, 1981 CCH OSHD ¶ 25,736 (No. 76-2879, 1981),¹³ the Commission held that, despite employee exposure to a fall hazard, it would be “incongruous” to find that a narrow ledge, less than two feet wide, on a turbine shell was a “platform.” Thereafter, the Commission looked to the “common understanding” or toward a “commonsense interpretation” of what constituted a platform when rejecting such status for the tops of conveyor belts from which employees performed a weekly cleaning process. See Globe Industries, Inc., 10 BNA OSHC 1596, 1982 CCH OSHD ¶ 26,048 (No. 77-4313, 1982).¹⁴

The Secretary contends that the credible evidence shows the actual method of retrieving fallen parts from the tanks required that employers gain access by either climbing up and onto the outside edge of a tank or onto pipes (PVC or discharge) and stepping onto and/or straddling anode rails (rods) or carry arms of the machine in order to fish the fallen

¹²In so holding, the Court cited the language employed by the Fifth Circuit in the case of Diamond Roofing Co. v. OSHRC and Usery, 528 F.2d 645.

¹³This case involves the companion standard of 29 C.F.R. § 1910.23(c)(1).

¹⁴29 C.F.R. § 1910.23(c)(1) was also involved in this case.

parts out of a tank with hooks. (Secretary's Brief, pgs. 2-5).¹⁵ ¹⁶ The Secretary's reliance on the agreement by Durham that employees standing on rails and arms transformed them into platforms is misplaced. (Secretary's Brief, pg.2). A close reading thereof reflects that he qualified that statement, apparently realizing its syllogistic nature. (Tr. 259-60). Moreover, it would not matter who testified that the rails, arms, pipes and edge of tank were so transformed; one look at the photographic evidence in this case is more than adequate to overwhelmingly support a finding to the contrary. Any other holding would deprive Respondent of the required "fair notice."

Accordingly, for the above-stated reasons, I conclude that Respondent did not violate the subject standard.¹⁷

FINDINGS OF FACT

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law that are inconsistent with this decision are DENIED.

¹⁵To the extent that the Secretary's brief refers to violative conditions involving maintenance, it has not been considered as a determinative factor regarding the violation as cited. Nether the citation nor the complaint contain any charge related to maintenance. (Secretary's Brief, pgs. 2,5). Also see paragraph 1 of the Secretary's response to the prehearing order.

¹⁶Moreover, it has not been overlooked that the Secretary has shied away from the subject of "boards" for use in parts retrieval. Undoubtedly, this results from their nature as "scaffolds" under applicable Commission decisions. See Fleetwood Homes of Texas, Inc., 8 BNA OSHC 2125, 1980 CCH OSHD ¶ 24,837 (No. 76-2332, 1980); Cardinal Industries, 12 BNA OSHC 1008, 1989 CCH OSHD ¶ 28,510 (No. 82-0427, 1989).

¹⁷Due to this decision, it is unnecessary to rule on other issues presented by this case.

CONCLUSIONS OF LAW

1. At all time material thereto, Respondent was an employer within the meaning of § 3(5) of the Act, engaged in a business affecting commerce, and having employees.
2. The Commission has jurisdiction over the parties and subject matter of the proceedings.
3. Respondent was not in violation of 29 CFR § 1910.23(c)(3).

ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, it is ORDERED that:

1. To the extent that the parties' proposed findings of fact and conclusions of law are inconsistent with this decision, they are DENIED.
2. Item 1 of citation 3, alleging a willful violation of 29 CFR § 1910.23(c)(3) is VACATED.
3. The partial settlement agreement is approved and incorporated by reference.


E. CARTER BOTKIN
Administrative Law Judge

Date: **MAR 10 1992**