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SECRETARY OF LABOR
Complainant,
v.
COMPUTER SCIENCE RAYTHEON
Respondent.

OSHRC DOCKET
NO. 93-0232

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 8, 1994. The decision of the Judge will become a final order of the Commission on January 9, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 28, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 8, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0232

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. COMPUTER SCIENCES RAYTHEON, Respondent.	OSHRC Docket No.: 93-232

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For Complainant

Mark S. Dreux, Esquire
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Washington, D.C.
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Computer Sciences Raytheon (CSR) contests a serious citation issued to it on December 9, 1992, under the Occupational Safety and Health Act of 1970 (Act).[1] The citation followed an inspection conducted by Occupational Safety and Health Administration (OSHA) Compliance Officer Keven Yarbrough from September 3 through October 29, 1992. The citation alleges that three serious violations occurred while employees worked on the Mobile Launch Platform (MLP) at the Kennedy Space Center (KSC), Florida, and participated in the nation's space shuttle program. CSR contracted with the United States

[1] At the hearing, the Secretary withdrew the alleged nonserious violation issued as Citation No. 2.

Air Force to, among other things, assist in retrieving the film taken of each shuttle launch (Tr. 412).

Specifically, OSHA charges that CSR violated § 1910.22(c), for failure to guard interior blast holes; § 1910.23(c)(1), for failure to guard the exterior perimeter of the top level of the MLP; and § 1910.23(c)(2), for failure to guard an access ramp to the MLP. Identical violations were alleged for other contractors as well as for NASA.[2]

CSR contends that the Secretary failed to prove that its employees were exposed to a zone of danger or that the standards apply. Additionally, CSR maintains that it established affirmative defenses.

Background--The Mobile Launch Platform

During an earlier stage of the launch process, one of the space shuttles was mounted onto the MLP at the vehicle assembly building. When fully prepared the MLP, with the shuttle in place, was driven to the launch pad. The Fixed Service Structure, a work staging area, sat beside the MLP on the launch pad (Exh. C-1). The Fixed Service Structure was also mobile and was moved to or away from the MLP depending upon the stage of the shuttle launch (Tr. 377, 378).

The Mobile Launch Platform itself is a large rectangular structure, approximately 165 feet by 140 feet, made of reinforced steel. It rises 45 feet above ground level.[3] The MLP has two interior levels; but the top of the MLP, the "zero level deck," was the work location at issue. Fall protection on the zero level deck consisted of "removable guardrails." The guardrails were designed to be removable because they were not "survivable," *i.e.*, they could not survive the fire and force of a shuttle launch (Tr. 35, 36, 45, 290).

Removable guardrails protected three large interior openings or blast holes on the zero level deck of the MLP. As part of preparation for the launch, these guardrails were

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[2] Decisions issued in the consolidated case, *Rockwell International Corp, U.S.B.I. Co., Martin Marietta Manned Space Systems*, and *Thiokol Corp.*, Docket Nos. 93-54, 93-228, 93-233 and 93-234 respectively; and *The Bionetics Corp.*, Docket No. 93-56, involved these asserted violations. Each decision was based on a separate record.

[3] In the early 1970s NASA built mobile launch platforms to launch spacecraft including, more recently, the space shuttle. NASA uses three mobile launch platforms. For purposes of this decision, the three are without significant differences (Tr. 42).

removed to accommodate the shuttle's main engine (positioned over the largest opening) and two solid rocket boosters (SRBs) (sitting over the two smaller, parallel openings). The three blast holes descended through the MLP into the trough of a "flame trench." The flame trench minimized damage from the rocket blasts. The distance from the zero level deck to the base of the flame trench measured 90 to 95 feet (Tr. 40).

Removable guardrails also protected the four sides of the perimeter of the MLP until the shuttle was readied for launch. The perimeter distance from the zero level deck to the ground level was 45 feet (Tr. 31).

Functioning much as a drawbridge, a ramp measuring 6 to 8 feet long and 5 feet wide was lowered between the Fixed Service Structure and the MLP (Tr. 29). Prior to the September 12 launch, there was a 3-foot gap in each side of the ramp guardrail.[4] The distance from the ramp to the ground was 45 feet (Tr. 31, 33).

Cameras were mounted on the MLP to photograph each shuttle launch. These were housed in permanent steel camera boxes, which were 33 inches high, 15 inches wide and 27 inches long (Tr. 295, 296). As soon after the launch as the NASA safety representatives gave the "all clear" signal, CSR employees, along with others in the scheduled sequence, went onto the MLP. CSR employees opened the faceplate of each camera box. Employees of another contractor, The Bionetics Corp. (Bionetics), followed CSR and actually retrieved the film from the box (Tr. 289, 290, 297, 333). While opening the camera boxes, CSR employees approached the perimeter and interior blast holes on the MLP. CSR employees also returned to the camera boxes after Bionetics retrieved the film (Tr. 273). Guardrails which protected the blast holes and the perimeter had been removed before the launch and would not be fully replaced post-launch until after CSR had completed its work there (Tr. 35).

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[4] Although CSR employee Hodge estimated the gap in the ramp guardrails to be no more than 1½ to 2 feet long, Hodge was confused about the configuration of these guardrails (Tr. 325, 338). Of greater probity was the testimony of other witnesses and photographs of the ramp which support a 3-foot gap (Exh C-2; Tr. 246).

ITEM 1: § 1910.22(c)--Falling into Pits

The Secretary contends that the unguarded blast hole openings presented a fall hazard to CSR employees in violation of § 1910.22(c).[5] CSR denies that the standard applies or was violated.

The Mobile Launch Platform is a Permanent Place of Employment

CSR argues that the MLP is not covered by the general scope provisions of § 1910.22, which applies to "permanent place(s) of employment." The MLP is permanent in the sense that it affords employees a fixed workspace. It has been used in approximately the same form for more than 20 years. Employees of many employers worked on the MLP for extended periods of time. Although the MLP is also "mobile" and is one of three which may be used at any given time for a particular shuttle launch, it is no less a "permanent" worksite. The argument is rejected.

Deletion from Source Standard Does Not Invalidate Standard

CSR contends that § 1910.22(c) was invalidly promulgated. It argues that "Material Handling and Storage" was the title for the source standard which became subsections § 1910.22(b) and (c). The title was not included when OSHA adopted the substantive portion of the source standard pursuant to § 6(a) of the Act. The fact that source standards were organized in a certain way or carried a title consistent with that organization is not considered a substantive limitation to the scope of the standard. Nonsubstantive omissions need not invalidate a § 6(a) promulgation of standards. *See Modern Drop Forge Co. v. Secretary of Labor*, 683 F.2d 1105, 1111 (7th Cir. 1980) (although note accompanying source standard's provision was excluded, the standard at issue was adopted verbatim and deletion was not a substantive difference). Further, the suggested "redundancy" between § 1910.22(c) and § 1910.23(a) does not exist since the latter standard specifically concerns

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[5] The standard requires:

> § 1910.22(c). *Covers and guardrails.* Covers and/or guardrails shall be provided to protect personnel from the hazards of open pits, tanks, vats, ditches, etc.

"stairway floor openings" rather than the more general coverage of "open pits" in § 1910.23(a).

The Blast Holes Are "Open Pits"

CSR argues that the blast hole openings were not "open pits" within the meaning of § 1910.22(c) as to cameras B-4 and B-8. Neither camera box was in issue. Further, the main engine and booster rocket blast holes presented unguarded or open "pits" (defined in *Random House Unabridged Dictionary*, 2d Ed., 1983, as a"hole or cavity") since they were not guarded on all sides.

The standard is valid and applies to the conditions cited.

Allegations of Exposure

Although thirty-two camera boxes were located on the zero level deck of the MLP, by stipulation, only camera boxes designated as B-13, B-16, O-1 and O-4 constituted fall hazards into the blast holes (Exhs. C-4, R-1; Tr. 50, 56-57, 289).

Exposure to a zone of danger exists when employees are in the immediate area of a hazard. As the parties agree, there is no established distance which automatically equates to being in an immediate area of hazard. That determination is specific to the facts.

The weather became stormy on June 25, 1992, one of the two launch dates at issue. Bionetics employee Steven Hills described the weather conditions during film retrieval that day as follows:

> When we got on top of the Fixed Service Structure at the 90-foot level, which is the MLP deck level, the wind was high and the deck was wet and water was--the deluge system was leaking like it always does.
>
> And, because there's solid residue left over from the solids, the deck is real slippery, and water was flowing vertically up through the solid rocket booster blast holes and from the main engine blast holes. And it was blowing from all different directions (Tr. 255).

On that day the wind was high and gusting (Tr. 271). The zero level deck, which was constructed of welded steel, had slightly varying elevations along the deck. Some areas of the zero level deck, particularly between the solid rocket and the main engine blast holes,

had pipes protruding along the surface. CSR employees shared the deck with as many as twenty other persons performing a variety of tasks. Often there was "high pressure or gas noises [from] different areas of the pad and on the deck or on top of the Fixed Service Structure" (Exhs. C-2, C-3; Tr. 36, 255). The conditions on that day heightened the potential for a fall into blast holes on the MLP.

Camera boxes B-13 and B-16 angled beside the northernmost corners of the main engine blast hole, one on the east side and one on the west. Each was within 6 feet of the 90-to 95-foot drop. Camera boxes O-1 and O-4 were located near the inside corners of each solid rocket blast hole on a ledge formed between them and the main engine blast hole. Employees were no more than 6 feet from the blast hole edges when they reached these cameras (Exhs. C-3, C-4; Tr. 50).[6]

On June 25 and July 31, 1992, one of two CSR employees opened the camera boxes by unscrewing eight bolts and laying open the box door (Tr. 290, 296). CSR employees routinely used safety belts or harnesses with double lanyards to provide fall protection after they reached the camera boxes on the MLP (Tr. 299). Thus, the Secretary's charge covers the time during which employees approached the camera boxes before they tied off.

Although CSR employees testified that by June 25, 1992, B-13 and B-16 had been removed from service, these camera boxes remain at issue because of the way employees approached boxes O-1 and O-4 (Tr. 317, 367). On June 25, CSR employees walked alongside a large pipe which "cuts off" behind B-13 and B-16 (Tr. 322). They then crossed under the pipe so that they could tie off to B-13 or B-16. Having connected to that camera box, employees were protected while approaching O-1 or O-4, where they tied their second lanyard. The employees then released the B-13 or B-16 lanyard, completed their work at O-1 or O-4, and reversed the process in leaving the area (Tr. 322, 323).

Since employees were tied off while approaching the more precarious positions at O-1 or O-4, they were not exposed as they serviced those cameras. In approaching B-13 or B-16, however, CSR employees came within 6 feet of the blast hole edge and were in the zone of

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[6] Yarbrough measured the distance from the nearest edge of the blast hole to the eye of the camera box, which was the tie-down point. He included in his measurement the length that his arm could extend while he reached for the eye of the camera box (Tr. 44).

danger on that date. The fact that there was a pipe along a portion of the approach route may have lessened the extent of the exposure, but it did not negate it. *See Hamilton Fixture,* 16 BNA OSHC 1073, 1094, 1993 CCH OSHD ¶ 30,034 at p. 41,189 (No. 88-1720, 1993)(short duration of exposure is no defense against evidence of a violation).

Knowledge

CSR's supervisor was on the MLP and had observed substantially identical work for four years (Tr. 360). He had knowledge of the work practices which resulted in exposure. His knowledge is imputed to CSR. *See e.g., Gary Concrete*, 15 BNA OSHC 1054, 1991-93 CCH OSHD ¶ 29,344 (No. 86-1087, 1991).

CSR's Multi-Employer Defense

CSR asserts that under the precedent of the *Anning-Johnson/Grossman* rule,[7] it established the multi-employer worksite defense.[8] That defense requires an employer, who did not create or control the violative condition, to establish that alternative protective measures were used or were unavailable. The burden of establishing each element of the defense rests with the employer. *See Seibel Mod. Mfg. & Welding Corp.,* 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991).

The Secretary suggests that the relationship of NASA to CSR is best analogized to that of a general contractor to its subcontractor on any multi-employer worksite. To the extent the analogy applies, it is with a significant caveat. The "general contractor" was NASA. NASA is responsible for launches of the nation's space shuttle, an achievement of monumental technical complexity. NASA asserts control over the precise timing and detailed sequencing of the myriad activities needed to launch and land the shuttle. This is especially true for the work on the MLP immediately before and after the launch. NASA strictly enforces what items can be taken onto the MLP and what activities can be performed

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[7] *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (No. 3694, 1976);.*Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976).

[8] Although the *Anning Johnson/Grossman* rule pertains to construction, it can be applicable in this general industry case because the fact situation presents such unusual similarities to construction worksites.

there. NASA monitors all post-launch operations on the MLP via consoles. Further, NASA has evidenced its overall concern for safety. It employs safety professionals throughout KSC and has implemented specific safety rules.

NASA's technical or safety expertise may logically impart a degree of confidence that when NASA required its contractors to perform activities on the MLP immediately after the launch, it was necessary that the task be performed at that time. It might also be inferred that NASA had considered safety when the task was assigned.

That assumption may have been bolstered by the fact that NASA previously delayed film retrieval to coincide with the guardrail installation (Tr. 388). However, the timing of the film retrieval was changed so that NASA could get a "quick look" at the launch film (Tr. 368-369). Likewise, although Lockheed had earlier suggested that permanent, survivable guardrails be installed around the perimeter of the MLP, NASA rejected the proposal (Tr. 151). NASA's motives in failing to develop launch-survivable guardrails or in changing the sequence of the film retrieval may not have been known to CSR, but it reasonably may have assumed that the decisions reflected necessity. Nevertheless, even recognizing NASA's unique status, NASA's contractors were not completely relieved of their obligation to protect their own employees on the MLP.

CSR did not create or control the hazard. NASA built the MLP. It established the time sequence under which guardrails were to be removed or reinstalled and when the film was to be retrieved (Tr. 376-378). CSR lacked authority or expertise to abate the violation by covering or guarding the flame holes. Such activity would be contrary to NASA's master sequencing plan. Further, extraneous materials could damage the shuttle and were not allowed on the MLP.

CSR's Alternative Measures. Did CSR undertake realistic alternative measures to protect its employees from the hazard? Realistic measures can be less than full compliance because "[w]hat is realistic depends upon a balance of the hazard involved with considerations of efficiency, economy, and equity." *Hayden Electric Servs.*, 4 BNA OSHC 1494, 1495, 1976-77 CCH OSHD ¶ 20,939, p. 25,149 (No. 4034, 1976). Although perhaps an employer could have done more, the conduct must be viewed in its totality and in terms of "whether a reasonable employer would have done more" under the

circumstances. *Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994), citing *Electric Smith, Inc. v. Secretary of Labor*, 666 F.2d 1267, 1273-74 (9th Cir. 1982).

CSR employees received training in the use of safety belts and lanyards (Tr. 300-301). CSR had a safety program which enforced the use of safety belts and lanyards on the MLP, although they were used after employees reached the camera boxes (Tr. 415). New employees toured the MLP with their supervisors and were instructed on potential hazards before they were allowed to work on the structure (Exhs. R-4, R-6; Tr. 300, 361-364).

Inertia Reel. CSR used a self-retracting, inertia reel on September 12, 1992. Thus, OSHA did not allege that a violation occurred on that date (Tr. 98). However, CSR did not again use inertia reels, claiming their use was unacceptable on the MLP. Lowell Jones, CSR's expert witness, contended that since there was no way for inertia reels to be attached overhead (without hardware--which CSR could not construct on the MLP), they were not effective or safe. The Secretary did not seriously assert that inertia reels should be used on the MLP. Although CSR did not consider use of an inertia reel before the September launch, it was not required to utilize ineffective measures.

As noted, NASA's overriding technical superiority and its reputation for safety affected what CSR reasonably must do to challenge a procedure. Balancing the degree of the hazard with the measures used to lessen the danger, CSR exercised reasonable care and diligence and undertook appropriate realistic alternative measures to protect its employees. CSR has established its defense. The alleged violation of § 1910.22(c) is vacated.

ITEM 2: § 1910.23(c)(1)--Perimeter Falls

The Secretary charges that the unguarded perimeter exposed CSR employees to a fall hazard in violation of § 1910.23(c)(1).[9]

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[9] The standard provides:

> § 1910.23(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. . . .

Applicability of § 1910.23(c)(1)

CSR argues that § 1910.23(c)(1) does not apply. Since the MLP has two interior levels and its zero level deck is open to the sky, CSR contends the zero level deck is a roof. The Secretary maintains that the zero level deck is a work platform. Whether the cited surface is a platform within the meaning of the standard is a question of fact. *Unarco Commercial Products*, 16 BNA OSHC 1499, 1502, 1993 CCH OSHD ¶ 30,294, p. 41,731 (No. 89-1555, 1993).

A "platform" is defined in § 1910.21(a)(4) as:

> (4) 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.

CSR relies on *Arkansas Rice Growers Coop.*, 10 BNA OSHC 1616, 1982 CCH OSHD ¶ 26,049 (No. 77-3974, 1982), for the proposition that a "roof" is not transformed into a "floor" or "platform" merely because machinery is used or work is performed on it. However, unlike *Arkansas Growers*, where the uppermost surface was both a roof *and* a walking/working surface, the zero level deck of the MLP is only a working surface. A "roof" is defined in *Arkansas Growers* as "a covering to protect against the weather and to complete the building." *Id.*, 10 BNA OSHC at 1620, 1982 CCH OSHD ¶ 26,049 at p. 32,724. The MLP, on the other hand, is a unique structure built to launch spacecraft. Even though the MLP has interior levels, its uppermost surface serves as the working and staging area. Its purpose is not to cover or protect the interior levels. The interior levels only incidentally facilitate the primary work activity taking place at the surface. The zero level deck is an elevated workspace and meets the definition of "platform" in the standard.

Specific Allegations

Camera boxes L-1, L-4, L-5 and L-6 are angled diagonally at the four corners of the zero level deck. Boxes L-2 and L-3 are located midway along its east perimeter side. Additionally, the Secretary alleges that when CSR employees crossed over the ramp between

the zero level deck and the Fixed Surface Structure, they were necessarily within the zone of danger of a perimeter fall.

Yarbrough measured the distances for the perimeter camera boxes and concluded that employees would have been within 6 feet of a perimeter fall by the time they tied off at the camera boxes (Tr. 44, 47). The distances were also measured by Hodge and Liford.[10] The distances Hodge measured from the tie-off point at the eyebolt of the camera box to the perimeter edge were (Tr. 315-316):

L-1	64 inches	(5 feet, 4 inches)
L-2	83 inches	(6 feet, 11 inches)
L-3	70 inches	(5 feet, 10 inches)
L-4	54 inches	(4 feet, 6 inches)
L-5	62 inches	(5 feet, 2 inches)
L-6	64 inches	(5 feet, 4 inches)

Some additional distance can also be implied from the fact that employees reached forward to tie the lanyard to the eyebolt. This distance would vary and would not be significant for all camera boxes.[11] Given the conditions existing on the zero level deck during film retrieval on June 25, 1992, CSR employees were exposed to a zone of danger while they approached the perimeter camera boxes. They were also exposed to an unprotected perimeter fall as they stepped off the ramp.

CSR's Multi-Employer Defense

For generally the same reasons discussed above, however, CSR meets its multi-employer defense for both the perimeter cameras and for the perimeter exposure which existed near the ramp. Although employees were exposed, the reasonableness of alternative

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[10] Liford was a confused witness, both vague and uncertain in his testimony. His testimony is accorded little credibility.

[11] CSR argues that an additional 2 feet (arm's length from the eyebolt) must be added to each measurement to account for the employee's reach as he tied off to the eyebolt. Where camera boxes and eyebolts are positioned at different angles (some facing forward and some away), however, it is not reasonable to assume that employees would extend their arms in some rigid posture as they approached the camera box.

protection is weighed against the lessened degree of exposure. Thus, the distances from the edges which employees maintained as they approached the cameras, the employees' training, and their use of safety belts and lanyards have been considered. Employees could use safety belts as they began work on the cameras, but such alternative protection was impossible when they walked off the ramp. At the perimeter near the ramp, only guardrails could abate the hazard. CSR could not install them. In light of the previous discussion of NASA's status, CSR utilized reasonable alternative measures in both alleged instances. CSR established its defense.

The violation is vacated.

ITEM 3: Alleged Violation of § 1910.23(c)(2)

After each launch, the Fixed Surface Structure was moved back beside the MLP. A ramp was lowered connecting the two structures. The ramp was only partially protected by guardrails. In preparation for the OSHA inspection on September 11, 1992, the compliance officer went to KSC and advised that the unguarded gap in the accessway guardrails presented a hazard. By the September 12 launch, an additional railing had been clamped over the guardrail opening, abating the hazard (Exh. C-1; Tr. 34). Alleging that the ramp guardrail gap existed during the June 25, 1992, and July 31, 1992 launches, the Secretary charged a violation of § 1910.23(c)(2).[12]

CSR employees were exposed to a fall of 45 feet from the unguarded portion of the ramp as they walked to the MLP during the two launches.[13] A fall would almost surely result in death. The existence of the gap was easily observable. CSR supervisor Elrod himself crossed the ramp on both launch dates.

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[12] The standard requires:

> §1910.23(c) *Protection of open-sided floors, platforms, and runways.* (2) Every runway shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides 4 feet or more above floor or ground level.

[13] The opinion of CSR's expert witness, Jones, that employees were not in a zone of danger as they crossed this ramp is contradicted by common sense.

CSR's Multi-Employer Defense

It is unclear whether CSR asserts the multi-employer worksite defense for this item. To the extent that it does, the defense is not met. These circumstances are unlike those which existed for the blast holes and for the perimeter hazards. Both of those latter conditions existed on the tightly controlled zero level deck of the MLP, and abatement involved obvious logistical and technological problems. The fall hazard on the ramp, on the other hand, could easily be evaluated and remedied, as it was, by clamping on an additional railing. It was also a more immediate hazard. Even if CSR would be required to secure NASA's agreement, abatement could have been technically accomplished by CSR itself. Also, unlike suggested abatement on the zero level deck, NASA predictably would not object. Only the post-launch access from the Fixed Surface Structure was at issue, not concerns for eliminating potential harm to the shuttle launch. NASA's "quick look" at the film taken of the launches would not be delayed. CSR did not seek or utilize alternative protection for its employees. CSR failed to seek permission to abate the violation or even to request abatement from NASA. This failure was not reasonable. The multi-employer defense is not met for this violation.

The violation is affirmed as serious.

Penalty

The Commission and its judges have final authority to assess penalties in all contested cases. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621-23, 1994 CCH OSHD ¶ 30,363, p. 41,881-83 (No. 88-1962, 1994). It must give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-691, 1992).

CSR is a joint venture partnership between two major corporations, Computer Sciences Corp., and Raytheon Service Corp. (Respnt.'s Motion For Additional Time to

Answer Complt.). The undersigned takes official notice that each of these corporations has tens of thousands of employees. The number of persons employed by CSR itself is unknown. Yarbrough knew only that it had more than 251 employees (Tr. 64). As to its history of previous violations, Yarbrough reviewed a computer scan of the company's OSHA history and allowed no credit for past history. However, he did not know if the data established that CSR had previous serious violations (Tr. 64, 65, 84). CSR's safety manager testified that CSR had never before received an OSHA citation (Tr. 428). CSR's testimony is credited.

Two technicians and a supervisor crossed the ramp and were briefly exposed to a 45-foot fall. Employees were within 2 feet of two unguarded edges as they carried light tools and safety equipment across the ramp. Considerations of the gravity of the violation also include the fact that no real precautions were taken against injury. Also, while the likelihood of a fall was moderate, the likelihood that a fall would result in death was high.

Weighing toward a finding of good faith is CSR's written safety and health program. Further, the asserted violation was abated even before the physical inspection was conducted (Tr. 405-410).

Having considered the above, a penalty of $1,000 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is ORDERED:

(1) Item 1, alleging a violation of § 1910.22(c), is vacated.

(2) Item 2, alleging a violation of § 1910.23(c)(1), is vacated.

(3) Item 3, alleging a violation of § 1910.23(c)(2), is affirmed as serious and a penalty of $1,000 is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: November 28, 1994