UNITED STATES OF AMERICA
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SECRETARY OF LABOR
Complainant,
v.
ARMCO STEEL CO., L.P.
Respondent.

OSHRC DOCKET
NO. 93-1010

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 January 7, 1994. The decision of the Judge will become a final order of the Commission on February 7, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before January 27, 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
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Review Commission
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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /SKA

Date: January 7, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-1010

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
Complainant,

v.

ARMCO STEEL COMPANY, L.P.,
Respondent.

OSHRC Docket No. 93-1010

APPEARANCES:

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

Robert A. Dimling, Esq., Frost & Jacobs, Cincinnati, Ohio.

Before: Administrative Law Judge Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 et seq.; hereafter called the "Act").

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

In February 1993 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Armco's Middletown worksite (Tr. 9). As a result of the inspection, Armco was issued a "serious" citation alleging violation of §§1910.23(c)(1)

and 1910.253(b)(2)(ii) of the Act, together with proposed penalties. By filing a timely notice of contest Armco brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Prior to the hearing citation 1, item 1 was amended to allege, in the alternative, a violation of §1910.132(a). On September 15, 1993, a hearing was held in Cincinnati, Ohio, on the contested issues. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violation of §1910.23(c)(1)

Serious citation 1, item 1 alleges:

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

(a)
Location: Cold Strip
Condition: There was no standard guardrailing or equivalent protection along the open-sided platform along the crane rails.

The cited standard provides:

> *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 . . .) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder . . . .

Facts

A crane runway runs along the wall for the length of Armco's Cold Strip Building, approximately 150 feet (Tr. 13, 90-91). The runway is 34 feet above the floor below, is between three and four feet wide and consists of steel girders which are supported by columns 40 feet apart (Tr. 14-15, 91). Building support columns interrupt the runway every 20 feet (Tr. 91). The rail on which Armco's overhead cranes run rests upon the crane runway, approximately six inches to a foot in from the runway edge (Tr. 14-15, 90, 93; Exh R-1). The clearance between the outside edge of the support columns and the crane as it travels on the rail is 18 inches (Tr. 94).

The primary purpose of the crane runway is to support the rail on which cranes ride (Tr. 90, 104). However, crane operators also use the runway for egress from their crane cabs in the event of breakdown or emergency (Tr. 19), and maintenance personnel use the runway for accessing cranes in need of repairs (Tr. 91). Crane operators and electricians testified that they had been on the crane runway less than six times in the last year (Tr. 67, 75, 82-83). Normally the cranes are accessed from a set of fixed stairs at either end of the runway (Tr. 19, 48).

The edge of the runway is unguarded (Tr. 15). A cable three and one half to four feet above the runway is strung between the columns and was used by employees on the runway as a handhold (Tr. 15-16, 70-71, 78).

Raymond Ferguson, Armco's cold strip section manager, testified that there was no way to install a guardrail on the crane runway and still be able to operate the overhead cranes (Tr. 94). CO Steve Brunette admitted that a guardrail which would allow the cranes to operate could probably not be installed on the crane runway; Brunette recommended the use of safety belts and lanyards as an alternative safety measure (Tr. 32, 52).

Discussion

In order to show a violation of §1910.23(c), the Secretary must demonstrate that Armco's crane runway is either an open-sided floor, a platform or a runway. The Secretary concedes that the runway was not an open floor or a "runway" as defined by §1910.21(a)(5). This judge finds that neither is the runway a "platform" as that term has been interpreted by the Commission, and Complainant itself.

The term "platform" is defined at §1926.502(e) 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 Commission has held that the term must be interpreted in a reasonable manner, consistent with a common sense understanding of its language, in order to provide employers with fair notice of what is required, *Globe Industries*, 10 BNA OSHC 1596, 1982 CCH OSHD ¶26,048 (No. 77-4313, 1982). OSHA Instruction STD 1-1.13 instructs inspection personnel to treat as "platforms":

> 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 . . . .
>
> 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 . . . .

The 150' x 3' crane runway which is the subject of this item does not fall within the common sense meaning of the term "platform," nor does it meet the definition of "platform" provided by Complainant. The runway was not designed primarily as a walking or working surface, but to support the overhead crane rail. Moreover, Armco's use of the runway as a means of access is limited to situations where a crane has broken down, and so is neither regular nor predictable. There is no evidence in the record that work was performed from the runway for more than four man hours during any four week period.

Moreover, even were the standard applicable, Armco has made out the affirmative defense of infeasibility. Armco's contention that guardrails could not be installed without interfering with the operation of the overhead cranes was undisputed. At the hearing Complainant's CO agreed that guardrails probably could not be installed.

As alternative fall protection, Armco provided a cable for employees to use as a handhold while moving along the runway. Complainant argues that the handhold was not adequate, and maintains that Armco must use the alternative protection it recommends, i.e. safety belts and lanyards.

This judge disagrees. There is no requirement that an employer providing alternative safety measures second-guess the Secretary as to which measures are most appropriate. The handhold supplied by Armco provides meaningful fall protection, substantially

similar to that of a safety belt; an employee walking along the runway has no other tasks to distract him and can maintain a hold on the cable at all times, except when passing a support cable; an employee wearing a lanyard would also have to unclip and clip the lanyard every time he passed a support (Tr. 34).

Complainant's alternative charge alleging a violation of §1910.132(a) must also fail. Section 1910.132(a) provides that:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, . . . shall be provided, used, and maintained in a sanitary and reliable condition whenever it is necessary by reasons of hazards of processes or environment . . . encountered in a manner capable of causing injury or impairment in the function of any part of the body through . . . physical contact.

Compliance with §1910.132(a), however, requires that personal protective equipment be provided only when the employer had actual knowledge of a hazard requiring the use of personal protective equipment, or a reasonable person familiar with the situation, including any facts unique to the particular industry, would recognize a hazard warranting the use of such equipment. *Armour Food Co.*, 14 BNA OSHC 1817, 1990 CCH OSHD ¶29,088 (No. 86-247, 1990). The Secretary introduced no evidence, other than the unsupported opinion of its CO, that a reasonable employer would have provided safety belts and lanyards to employees walking on the crane runway.

Complainant argues that Armco recognized the need for safety belts and lanyards, and points to its Safety Book (Exh. C-1) in which Armco requires employees who work above floor or ground level to tie off where guardrails do not provide full protection (Tr. 27, 97, 104). The fall hazard involved in working from raised surfaces, where employees have a task to attend to and cannot use their hands to grasp a safety line, is clearly different from that involved in this case, where employees can and do hold onto the cable provided while they are walking on the elevated runway. Armco's safety handbook is insufficient, therefore, to demonstrate knowledge of a need for additional safety equipment on the crane runway.

The Secretary has failed to carry her burden of proof, and the citation will be vacated.

Alleged Violation of §1910.253(b)(2)(ii)

Serious citation 1, item 2 alleges:

29 CFR 19.253(b)(2)(ii): Assigned storage places for cylinders was not located away from elevator, stairs, or gangways where cylinders could not be knocked over or damaged by passing or falling objects, or subject to tampering by unauthorized persons:

(a)
Location: Building #5263 Coil Distributing Bldg.
Condition: There was an acetylene cylinder standing unsecured and unprotected from being knocked over.

The cited standard provides:

> Inside of buildings, cylinders shall be stored in a well-protected, well-ventilated, dry location . . . . Cylinders should be stored in definitely assigned places away from elevators, stairs, or gangways. Assigned storage spaces shall be located where cylinders will not be knocked over or damaged by passing or falling objects, or subject to tampering by unauthorized persons . . . .

CO Brunette testified that he observed an acetylene cylinder standing between two crane bays in the coil distributing building (Tr. 35-36). The cylinder was not attached to a regulator and had a protective cap over the top of the valve (Tr. 36). An employee working in the area told Brunette that the cylinder belonged to the rigger shop, but that the riggers had not been in the area since the week before (Tr. 38). Glenn Rusk, Armco's rigger shop section manager, testified that the cylinder had been delivered to the coil distribution building the morning of the inspection for a job, and had not been stored at that location (Tr. 107).

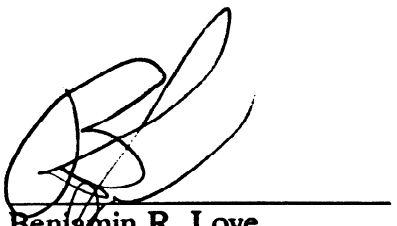
Rusk's first hand testimony is preferred to the CO's inference that the acetylene cylinder had been in the crane bay since the week before when the rigger shop had last worked in the area. Because Complainant failed to show that the cylinder was "in storage" the cited standard is not shown to be applicable, and citation 1, item 2 must be vacated.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

1. Serious citation 1, item 1, alleging violation of §1910.23(c)(1) is VACATED.
2. Serious citation 1, item 2, alleging violation of §1910.253(b)(2)(i) is VACATED.



Benjamin R. Loye
Judge, OSHRC

Dated: December 30, 1993