UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. LTV STEEL COMPANY, INC., Respondent.	:	OSHRC DOCKET NO. 01-0599

Appearances: Mary Bradley, Esquire
Mary Anne Garvey, Esquire
U.S. Department of Labor
Cleveland, Ohio
For the Complainant

Mark D. Katz, Esquire
Ulmer & Berne, LLP
Cleveland, Ohio
For the Respondent

Before: Michael H. Schoenfeld
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). On October 3, 2000, an employee of Respondent LTV Steel Company, Inc. ("LTV"), suffered a fatal heart attack while working at LTV's steel mill located in Cleveland, Ohio. The Occupational Safety and Health Administration ("OSHA") conducted an inspection of the steel mill on January 10, 2001, at which time the agency learned about the fatality. As a result of the inspection, OSHA issued a citation to LTV, alleging a violation of the terms of 29

C.F.R.§ 1904.8, because the company had not reported the fatality to OSHA.[1] LTV timely contested the citation, a complaint and answer were filed, the hearing was conducted in Cleveland, Ohio, and both parties have filed post-hearing briefs.

Jurisdiction

At all times relevant to this proceeding, Respondent LTV operated a steel mill on Jennings Road in Cleveland, Ohio. The Secretary asserts and Respondent does not deny that LTV was an employer engaged in interstate commerce, and I so find. I accordingly conclude that the Commission has jurisdiction over the parties and the subject matter of this case.

Discussion

Citation 1, Item 1, the only item in this case, alleges an "other-than-serious" violation of 29 C.F.R. § 1904.8. In pertinent part, the cited regulation requires an employer to orally report to OSHA within eight hours the death of any employee from a work-related incident. For the reasons that follow, I find that the Secretary has failed to show that the employee's heart attack and resulting death were work-related.

At the time of his heart attack, the employee, Anthony Banaszak, was outside in the open air, standing on a furnace cover. He was in the process of hooking the cover to a crane when he suddenly went limp and fell to the ground. There was no evidence that Banaszak was performing a physically exerting task beyond the usual duties of a millwright at the time, or at any time during his work hours that day. Further, the furnace cover was not slippery or oily, there were no electrical wires or lines or other overhead hazards in the area, and there was no evidence of any environmental hazards in the area. There was, in fact, no evidence of any health or safety hazard in the vicinity. (Tr. 23-26, 33-

[1] OSHA simultaneously issued to LTV another citation that resulted in a second case, *Secretary of Labor v. LTV Steel Company, Inc.*, Docket No. 01-0600. The two cases were consolidated, but were then severed following the hearing. My decisions in both cases are being issued today.

38, 42, 55-56, 72). I therefore find that the Secretary has not established that the fatal heart attack was work-related. Accordingly, I conclude that the regulation does not apply in the circumstances of this case.[2]

The Secretary does not dispute that the fatality was not caused or aggravated by the employee's work activities or by an environmental factor present at the workplace. The Secretary argues, however, that LTV did not use reasonable diligence to determine the cause of the cardiac arrest and therefore did not know for certain that the death was not "work related." (Tr. 31-32). In support of her argument, the Secretary refers to an OSHA advisory report which suggests that an employer should report a fatality when in doubt of the occupational origin. *See* Exhibit G to the Secretary's cross-motion for summary judgment.

I am not persuaded by the Secretary's argument. The Secretary essentially seeks to shift her burden of proof to LTV, simply because Banaszak's heart attack occurred at the workplace. The preamble to the revised record-keeping regulation, however, makes it clear that under either the old or the new regulation, such a geographic presumption may be applied only where the illness resulted from an event or exposure at the workplace.[3] *See* 66 Fed. Reg. 5916, 5929 (2001). The only "event" or "exposure" shown by the evidence on this record was the heart attack itself. The Secretary submitted no proof of any "event" or "exposure" at the workplace having a nexus between the circumstance of Banaszak's employment and the heart attack, and she therefore failed to show that the geographic presumption applies to this case.

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[2] For the basic elements of the Secretary's prima facie case, see *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

[3] 29 C.F.R.§1904.8 was revised and incorporated into 29 C.F.R. §1904.39, the record-keeping regulation, with an effective date of January 1, 2002. The preamble to the revised regulation, which defines the term "work-related" for purposes of both the record-keeping and reporting requirements, describes the geographic presumption as follows: "(t)he general rule is that all injuries and illnesses which *result from events or exposures* to employees on the employer's premises are presumed to be work-related."66 Fed. Reg. 5916, 5928-5929 (2001) (emphasis supplied).

Moreover, a review of the record as a whole demonstrates, and I find that Respondent showed by a preponderance of the evidence, that LTV in fact used reasonable diligence to determine the cause of the employee's fatal cardiac arrest. LTV's medical staff reviewed the incident with the responding paramedics, and LTV's safety engineer conducted an investigation which included examining the area and the equipment Banaszak had used and interviewing the witnesses to the event. (Tr. 69-70, 92-94). Further, the OSHA compliance officer who recommended issuance of the citation testified that there was nothing else LTV could have done to investigate the cause of the heart attack. (Tr. 64).[4] Despite the allegation that the coroner delayed identifying the cause of death, the fact that the heart attack was unrelated to Banaszak's work activities was never in question.

Finally, the January 1, 2002 revisions specifically amended the regulation to provide that an employer must report any fatal heart attack which occurs at the workplace. *See* 66 Fed. Reg. 5916, 6063 (2001). The absence of such a provision in the cited regulation supports LTV's argument that, at the time of this incident, the Secretary had to show something more than simply that the cardiac arrest occurred at the workplace. Indeed, the language of the amendment, and, even though the Secretary may claim otherwise, its preamble, in effect concedes that a case such as this is not within the penumbra of the cited regulation as it was worded at the time this citation was issued. The Secretary is attempting to farcinate the new requirement into the old regulation. This citation item is vacated.

[4] I do not find that LTV's failure to conduct air testing was unreasonable because Banaszak was outside in the open air at the time of his cardiac arrest and there was no evidence of carbon monoxide or other toxic material anywhere in the vicinity.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of the Act.

2. The Commission has jurisdiction over the parties and the subject matter of this case.

3. Respondent was not in violation of the terms of 29 C.F.R. § 1904.8.

ORDER

1. Citation 1, Item 1 is VACATED.

/s/

Michael H. Schoenfeld
Administrative Law Judge

Dated: February 11, 2002
Washington, D.C.