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

OSHRC DOCKET
NO. 92-1429

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 10, 1993. The decision of the Judge will become a final order of the Commission on April 9, 1993 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 March 30, 1993 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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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

Ray H. Darling, Jr.

Date: March 10, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1429

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SECRETARY OF LABOR,
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v.

LUDVIK ELECTRIC,
Respondent.

OSHRC Docket No. 92-1429

APPEARANCES:

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U.S. Department of Labor, Kansas City, Missouri

Robert R. Miller, Esq., Stettner, Miller and Cohn, P.C.,
Denver, Colorado

Before: Administrative Law Judge James H. Barkley

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, Ludvik Electric (Ludvik), at all times relevant to this action maintained a place of business at 4414 Table Mountain Dr., Golden, Colorado, where it was engaged in construction (Answer ¶1). Ludvik admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Answer ¶2).

On January 16-17, 1992, two Compliance Officers (CO) with the Occupational Safety and Health Administration (OSHA), conducted an inspection of Ludvik's Golden worksite (Tr. 24-25, 51). As a result of the inspection, Ludvik was issued a

"repeat" citation, together with proposed penalty, alleging violation of 29 CFR §1926.500(d)(1). By filing a timely notice of contest Ludvik brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On December 3, 1992, a hearing was held in Denver, Colorado, on the contested citation. The parties have submitted briefs on the issues and this matter is ready for disposition.[1]

Alleged Violations

Repeat citation 1, item 1 alleges:

29 CFR 1926.500(d)(1): Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides.

a) Southwest corner of rice polishing room: Equipment support deck was not provided with guard rails.

The cited standard states:

Guarding of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder . . . .

Issues

I. Whether the Secretary showed, by a preponderance of the evidence, that Ludvik violated §1926.500(d)(1) on January 15, 1991.

a) Whether the cited equipment support deck is a "platform" and thus covered by §1926.500(d)(1).

b) Whether Ludvik had knowledge of the violative condition.

II. Whether Ludvik proved the multi-employer worksite affirmative defense.

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[1] Approximately nine (9) days after the Secretary filed her brief, Respondent moved to strike the brief as untimely or in the alternative, to be allowed to file a responsive brief inasmuch as Secretary's counsel was alleged to have read Respondent's brief prior to filing his in spite of an order calling for simultaneous briefs. Since Respondent's motion was received after the decision was drafted finding in favor of the Respondent, Respondent's motion is denied as moot without considering its merits.

Facts

On January 15, 1992, a Ludvik employee fell to his death from an elevated equipment deck (Tr. 11, 69).

The deck was 30 feet above the floor (Tr. 12). and was constructed to support two dust collection blowers (Tr. 150). There was no access to the deck except by manlift (Tr. 151). It is undisputed that the deck was partially unguarded (Tr. 13, 63; Exh. C-A through C-E, C-G, C-H), and that its open side was visible from almost any point in the rice polishing area where it was located (Tr. 73).

Ludvik's employee, Clayton Olson, had been assigned to the installation of the fire alarm system, but Olson independently determined his daily work schedule (Tr. 162). On January 15, Olson was installing a smoke and heat detector in a duct which could be reached only from the deck (Tr. 12, 26, 66, 68, 154; Ex. C-F). Installation of the duct detector takes approximately two hours (Tr. 155).

John Davis, Clayton Olson's supervisor, testified that he did not know that Olson would be working on the equipment deck on January 15, 1991 (Tr. 181). However, he never specifically told Olson not to go up on the equipment deck until railings were installed (Tr. 202). Neither Davis nor any other supervisors were in the area while Olson was on the deck (Tr. 156).

Curt Elliott, a Ludvik superintendent, testified that although Ludvik has no written safety rule specifically prohibiting employees from working on open-sided platforms (Tr. 131, 160, 169), employees had been instructed not to work on unguarded raised areas (Tr. 146, 150). Ludvik employees had previously complained that guardrails had not been installed around the site's mezzanine area (Tr. 145-46, 149, 174), and on January 2, 1992, at a meeting between the general and the subcontractors, it was agreed that the subcontractors would not work in those areas until guardrails were installed (Tr. 146). At their next regular weekly safety meeting, Ludvik employees were instructed not to work on the mezzanine or other unguarded areas (Tr. 146, 150). Clayton Olson was present at that meeting (Tr. 175).

Kenneth Arellano, Olson's partner, testified, however, that he understood Ludvik's safety policy to require only that employees be tied off when working on open-sided platforms without guardrails (Tr. 206, 208). Arellano also stated that he was never told not to work on any unguarded surfaces (Tr. 209)

Two other Ludvik employees, Jose Rodriguez and Larry Vigil, told COs Michael Kelly and Peter Dailey that they worked on a conduit or cable tray from the equipment deck during the week preceding the accident (Tr. 30-31). Donald W. VanderLaan, Ludvik's project manager, and Curt Elliott testified that Rodriquez and Vigil were ordered to finish the work from a lift (Tr. 122, 131, 147-48).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

It is undisputed that Ludvik's employee Olson had access to, and was working on the elevated equipment deck when he fell to his death.[2] Ludvik, however, disputes the applicability of the cited standard and its own knowledge of the violative conditions.

Applicability

The cited standard requires that open-sided "platforms" above six feet be provided with guardrails. Section 1926.502(e) defines "platform" 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."

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[2] Complainant does not maintain that the absence of guardrails was the proximate cause of Olson's fall, and stipulates that his presence on the equipment deck is relevant only to establish exposure (Tr. 13).

In its brief, Respondent cites cases cited dealing with the similar industry standard, §1910.21(a)(4), and Complainant's Instruction Std 1-1.13 (April 1984), interpreting §1910.21(a)(4). Those cases, and the instruction arising out of them, define a platform as a walking or working surface used on a "predictable and regular" basis. Section 1910.21(a)(4), however, is a general industry standard, intended to address the use of elevated surfaces in an industrial setting where operations, inspections, and maintenance are performed on a routine and repetitive basis. Section 1926 standards, on the other hand, regulate generally non-repetitive construction activities. Because of the unique and non-recurring nature of many construction tasks, the undersigned finds that the criteria set forth in §1910.21(a)(4) cases and instructions, are inapplicable to cases arising under §1926.

Nor has the Commission adopted the "predictable and regular" criteria in §1926 cases. *Williams Enterprises, Inc.*, 11 BNA OSHC 1410, 1417, 1979 CCH OSHD ¶26,542 (No. 79-843, 1983), *rev'd on other grounds*, 744 F.2d 170 (D.C. Cir. 1984).[3] In *Williams* the Commission merely held that the standard "must be given a reasonable interpretation based on the facts of each case," On appeal, the D.C. circuit stated that "[w]hat is required . . . is that some construction related task be performed *on* the [elevated surface] -- one that requires employees to work from [it] or to remain on it for some time." *Donovan v. Williams Enterprises, Inc.*, 744 F.2d 170, 176 (D.C. Cir. 1984). The D.C. circuit's interpretation of §1926.502(e), although dicta in that case, is applicable to the circumstances at bar.

The equipment deck cited in this matter, was not constructed for the purpose of providing a working surface for construction workers. It is clear, however, that Ludvik employees used the surface to work from. Specifically, the deck was used by Ludvik employees attempting to adjust a cable tray, and by Olson, for the unrelated

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[3] *See also*, discussion in *Brown & Root, Inc.*, 10 BNA OSHC 1837, 1840 fn.5, 1982 CCH OSHD ¶26,159, p. 32,966 fn.5 (No. 77-2553, 1982). In *Brown and Root*, the Commission found a working surface on a construction site fell under the definition of "platform" even though "employees were not on the surface on a regular and predictable basis." *Id.*

task of installing the duct detector, a task which took approximately two hours. The use of the equipment deck by Ludvik employees as a working surface is sufficient to bring it under the definition of a "platform" for purposes of §1926.500(d)(1).

Knowledge

Ludvik argues that it did not have the requisite knowledge to be in violation of the cited standard.

The record establishes, and Ludvik does not dispute that it's supervisory personnel were aware that the equipment platform was unguarded. Nor is it disputed that they knew that installation of the duct detector would have to be accomplished from the equipment deck. Ludvik argues, however, that it had given instructions warning employees not to work from ung elevated surfaces, and so could not have known that Olson would begin work detector prior to the installation of guardrails.

In order to show employer knowledge of a violation the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1965, 1986-87 CCH OSHD ¶27,651, p. 36,033 (No. 82-928, 1986). In this case, no Ludvik supervisory personnel had actual knowledge of Olsen's presence on the unguarded platform. Whether Ludvik had constructive knowledge of the violation depends upon whether its supervisory personnel exercised reasonable diligence in the supervision of employees and the formulation and implementation of training programs and work rules designed to ensure that employees perform their work safely. *Secretary of Labor v. Mosser Construction Co.*, 15 BNA OSHC 1408, 1991 CCH OSHD ¶29,546, p. 39,905 (No. 89-1027, 1991); *Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1054-55, 1991 CCH OSHD ¶29,344, pp. 39,451-52 (No. 86-1087, 1991).

The record demonstrates that Ludvik had no written rule prohibiting work from unguarded elevated surfaces. It had, on this project, encountered unguarded work surfaces on the mezzanine and stopped work in that area. The absence of guarding on the mezzanine had been discussed at a weekly safety meeting, and

employees were warned that they were not to work on open-sided work surfaces until guardrails were installed. However, it is clear from Arellano's testimony, and the presence of Rodriquez and Vigil on the equipment platform that the single admonition was insufficient to put employees on notice that the prohibition against working on raised work surfaces applied to areas other than the mezzanine. There is no evidence in the record that Ludvik took any further action to impress upon employees that working on *any* unguarded open-sided surface was prohibited, even after discovering Rodriquez and Vigil on the equipment platform.

Respondent assigned Olson a task which would require his presence on the equipment platform without specifically instructing him to avoid the platform until guards were installed. Having failed to adequately communicate a work rule prohibiting employees from working on the unguarded platform, Olson's presence there was foreseeable by Respondent.

The record, therefore, establishes Ludvik's failure to exercise due diligence in supervising its employees, and its constructive knowledge of Olsen's exposure to the cited hazard. The Secretary has met her burden of proof and has shown that Ludvik was in violation of §1926.500(d)(1) on January 15, 1991.

Multi-employer Worksite

In order to establish the limited multi-employer worksite defense, a subcontractor must show, by a preponderance of the evidence that:

1. It did not create the violative condition; and
2. It did not control the violative condition such that it could not realistically have abated the condition in the manner required by the standard; and
3. (a) It made reasonable alternative efforts to protect its employees from the violative condition; or
   (b) It did not have, and with the exercise of reasonable diligence could not have had, notice that the violative condition was hazardous.

Lee Roy Westbrook Construction Company, Inc., 13 BNA OSHC 2104, 2106, 1987-90 CCH OSHD ¶28,465, p. 37,695 (No. 85-601, 1989).

The Secretary concedes that Ludvik neither created nor controlled the violative condition (Complainant's Brief, p. 11). The Secretary maintains, however, that Ludvik failed to take reasonable alternative measures to protect its employees.

Initially the Secretary maintains that the only alternative measures available to Ludvik are the "equivalent" railings listed in paragraph (f)(1) of the cited section, citing *inter alia*, *Warnel Corp.*, 4 BNA OSHC 1034, 1975-76 CCH OSHD ¶20,576 (No. 4537, 1976). However, the holdings cited by Complainant are limited to the interpretation of "equivalent protection" provided for by the standard itself. The Commission has held, however, that "[a]n employer may substitute an alternative form of protection from that required by the standard if it can establish the elements of one of three defenses: impossibility of compliance or performance; greater hazard; or multi-employer worksite . . . ." (citations omitted). *Wander Iron Works, Inc.*, 8 BNA OSHC 1354, 1355, 1980 CCH OSHD ¶24,457, p. 29,859 (No. 76-3105, 1980).

The Secretary has conceded two of the three elements necessary to establish Ludvik's multi-employer worksite defense. It remains only for Ludvik to show that it made reasonable alternative efforts to protect its employees from the violative condition.

Ludvik maintains that it: 1) asked the general contractor to install guardrails on all raised work areas; 2) instructed its employees to avoid unguarded platforms; and 3) required all workers on exposed platforms be tied off with a safety belt and lanyard.

The record establishes that Ludvik's complaints to the general contractor about unguarded raised areas, as well as its warnings to its employees about working on such surfaces, were directed towards the mezzanine areas (Tr. 145-150, 174). Foreman Davis admitted that he never specifically discussed guarding the equipment platform with the general contractor (Tr. 200-201). Neither Ludvik's requests for handrails or its instructions to its employees, therefore, constitute reasonable alternative means of protection against the cited hazard.

The Commission has indicated, however, that safety belts and lanyards may be used as a reasonable alternative to guardrails where their use is effectively enforced. *Prestressed Systems, Inc.*, 9 BNA OSHC 1865, 1867, 1981 CCH OSHD ¶25,358, p. 31,498 (No. 16147, 1981).

Ludvik had its own safety policy as well as a "safety agreement" distributed by Ohbayashi, which all employees were required to read and sign upon hiring at the start of the project (Tr. 134). Ludvik's safety policy includes rule #8, under "PERSONAL PROTECTIVE EQUIPMENT, " which states that "[s]afety belts and life lines must be used when other safeguards, such as nets, planking, or scaffolding cannot be used." (Tr. 114; Exh. R-1, p. 5). In addition, under "GROUND[S] FOR IMMEDIATE DISCHARGE" the policy lists "1. Not using safety belts and lanyards when there is a potential fatal fall." (Exh. R-1 p. 3). Ohbayashi's rule #14 states that "[a]ny employee exposed to a fall of six feet must have a safety belt and lanyard" (Tr. 137; Exh. R-2).

Clayton Olson signed both a copy of Ludvik's safety policy and the safety agreement on October 4, 1991 (Tr. 137, 139). The use of safety belts and lanyards was discussed at a December 9, 1991 safety meeting (Exh. R-5). Ludvik provided safety belts and lanyards to employees who worked off the ground, including Mr. Olson, who had his belt with him at the time of the accident (Tr. 139).

Kenneth Arellano, Olson's partner, testified that he understood Ludvik's safety policy to require that employees be tied off when working on open-sided platforms without guardrails (Tr. 206, 209).

CO Kelly stated that during his investigation, both Rodriquez and Vigil told him they did not tie off while working on the equipment deck because it was not easy to find a place to tie off, even though they knew it was required (Tr. 36-39, 47-48). VanderLaan and Elliott, however, both testified at the hearing that both Rodriquez and Vigil were tied off when they were discovered working on the equipment deck (Tr. 123, 148).

The evidence establishes that Ludvik had a work rule requiring employees to use safety belts and lanyards when working on unguarded surfaces over six feet, and

that the rule was effectively communicated to its employees. Respondent maintains that the rule was enforced; Complainant contends that the statements of Rodriquez and Vigil establish that the rule was not enforced.

Rodriquez' and Vigil's out of court statements, repeated by CO Kelly are directly contradicted by VanderLaan and Elliott, who were eyewitnesses to the incident. Their testimony, given in court and subject to cross examination is preferred to the out of court statements given to Kelly. The undersigned concludes that Ludvik's safety rule was enforced and, therefore, that Ludvik took reasonable alternative steps to protect its employees on unguarded raised surfaces. Olson's violation of that rule was unforeseeable and unpreventable.

Ludvik has established its multi-employer worksite affirmative defense. The cited violation will be dismissed.

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

Serious citation 1, item 1, alleging violation of §1926.500(d)(1) is DISMISSED.

James H. Barkley
Judge OSHRC

Dated: February 26, 1993