SECRETARY OF LABOR, Complainant, v. BEAVER PLANT OPERATIONS, INC., Respondent.	OSHRC Docket No. 97-0152

Decision

Before: Rogers, Chairman; and Visscher, Commissioner.

BY THE COMMISSION:

Following a fatal fall at an electricity plant run by Beaver Plant Operations, Inc. ("Beaver"), Occupational Safety and Health Administration ("OSHA") compliance officer Edward T. Wells inspected the plant and issued one citation for a serious violation of a standard under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("OSH Act") and proposed a penalty of $7,000.00. Beaver contested the citation, which alleges that the "ladderway opening" in its emissions stack work platform was not guarded "to prevent employees from walking into the opening" in violation of 29 C.F.R. § 1910.23(a)(2). After a hearing, Administrative Law Judge Robert A. Yetman vacated the citation. For the reasons that follow, we reverse the judge's decision and affirm the citation.

I. Background

Beaver runs a wood-burning, electricity plant in Livermore Falls, Maine. The plant's "precipitator" building, which houses an emissions monitoring system, has a 140-foot tall emissions stack on its roof. A steel ladder is attached to the side of the stack. Approximately

seventy feet above the roof of the precipitator building, the ladder passes through a rectangular opening ("ladderway floor opening") in the floor of a platform that encircles the stack. The platform's perimeter railing and toeboard form the outer border of the ladderway floor opening, and the ladder and stack form its inner border. There are no guards or barriers at the adjacent sides of the ladderway floor opening. Beaver's employees utilized this platform several times each year to change filters in the stack and perform other routine maintenance. In addition, employees of contractor Eastmount Environmental ("Eastmount") utilized the platform four times per year to conduct certain emissions tests in accordance with EPA regulations.

On August 26, 1996, the body of David Ricci, an Eastmount engineer, was found in a crevice on the roof of the precipitator building, near the base of the stack. It was apparent that Ricci had fallen; however, the location from which he fell is unknown. There was no evidence that anyone witnessed the accident.

II. Discussion

The threshold issue before the Commission is whether section 1910.23(a)(2) applied to the ladderway floor opening in the floor of the platform that encircles Beaver's emissions stack. The judge viewed the Secretary's application of the standard as an attempt "to stretch the meaning of the language of the cited standard to provide protection against a hazard that . . . appears to be excluded from the guardrailing requirement." He also held that the "Secretary did not provide fair notice of its interpretation of the cited standard as applied in this case." We conclude that the standard did require Beaver to guard the entrances to its ladderway floor opening and that Beaver did not lack fair notice of this requirement.

A. Applicability of the Cited Standard

Section 1910.23(a)(2) requires that "[e]very ladderway floor opening or platform shall be guarded by a standard railing with standard toeboard on all exposed sides (except at entrance to opening), with the passage through the railing either provided with a swinging gate or so offset that a person cannot walk directly into the opening." Beaver's argument against the application of section 1910.23(a)(2) to openings such as the one at issue here

rests on two bases. One is that section 1910.23(c)(1)[1] applies instead. Although both standards can apply to platforms,[2] section 1910.23(a)(2) governs openings in floors, while section 1910.23(c)(1) governs open-sided floors, which, as the Secretary correctly notes, are "factually distinct." *See American Airlines,* 17 BNA OSHC 1552, 1995-97 CCH OSHD ¶ 30,992 (No. 93-1817, 1996) (consolidated) (Commission affirmed separate serious violations of section 1910.23(a)(7) where an elevated work station had openings in its floor surface and section 1910.23(c)(1) where it lacked railings around its edges). OSHA Instruction STD 1-1.13 (the "instruction") does not, as Beaver suggests, designate section 1910.23(c)(1) or any other standard as the only standard applicable to ladderway floor openings.[3] The instruction simply interprets the term "platform" as used in certain standards in section 1910.

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[1]29 C.F.R. § 1910.23(c)(1) provides:

> **§ 1910.23 Guarding floor and wall openings and holes.**
> * * *
> (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. . . .

[2]"Platform" is defined as "[a] working space for persons, elevated above the surrounding floor or ground[.]" 29 C.F.R. § 1910.21(a)(4).

[3]The instruction provides in relevant part:

> *Subject:* Fall Protection in General Industry: 29 C.F.R. 1910.23(c)(1), (c)(3) and 29 C.F.R. 1910.132(a)
> ***
> Platforms are interpreted to be 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. (See 29 C.F.R. 1910.21(a)(4) for definition of "platform".)

Memorandum from Assistant Secretary Auchter, dated 4/16/84.

Second, Beaver argues that the parenthetical in section 1910.23(a)(2) in effect exempts ladderway floor openings from any guarding requirements, rather than from the requirement for a "standard railing with standard toeboard." It is a more straightforward reading of section 1910.23(a)(2) to apply the parenthetical "(except at entrance to opening)" only to the words just preceding it -- "by a standard railing with standard toeboard"-- rather than to any guarding requirement around a ladderway floor opening. The rectangular ladderway floor opening was guarded by the stack on its inner edge and by the platform's perimeter railing on its outer edge. An employee climbing the ladder to the platform area would have to step to the right or left side of the ladder to access the platform. The standard requires these entrances onto Beaver's platform from the ladderway floor opening to have either a swinging gate or offset railings.

We do not find any reason to believe that the different requirements of other parts of section 1910.23 modify the cited provision's requirements. The judge concluded that the cited standard must be consistent with section 1910.23(c)(1), which governs open-sided floors, and section 1910.23(a)(1), which governs stairways, neither of which require guarding of entrances.[4] However, he provides no authority for this conclusion. His analysis is akin to questioning the wisdom of the standard, which the Commission has held impermissible. *See Fabricraft, Inc.*, 7 BNA OSHC 1540, 1542, 1979 CCH OSHD ¶ 23,691,

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[4]The "stairway" standard provides:

> **§ 1910.23 Guarding floor and wall openings and holes.**
> (a) *Protection for floor openings.* (1) Every stairway floor opening shall be guarded by a standard railing constructed in accordance with paragraph (e) of this section. The railing shall be provided on all exposed sides (except at entrance to the stairway). For infrequently used stairways where traffic across the opening prevents the use of fixed standard railing (as when located in aisle spaces, etc.), the guard shall consist of a hinged floor opening cover of standard strength and construction and removable standard railings on all exposed sides (except at entrance to stairway).

29 C.F.R. § 1910.23(a)(1). For the text of the open-sided floor standard, *see* n.1, *supra*.

p. 28,723 (No. 76-1410, 1979). Whatever the differing considerations and purposes behind the different guarding requirements, we agree with the Secretary that the fact that the swinging gate or offset railing requirement was explicitly incorporated into section 1910.23(a)(2) but not into other standards in section 1910.23 indicates that its inclusion was deliberate.

Having determined that the cited standard applies to Beaver's ladderway floor opening, we also conclude that Beaver had fair notice of the standard's requirements. Employers are entitled to fair and reasonable warning of what a standard requires. *American Bridge Co.,* 17 BNA OSHC 1169, 1172, 1993-95 CCH OSHD ¶ 30,731, p. 42,667 (No. 92-0959, 1995). Here, as discussed above, the language of the standard provides adequate notice that the ladderway floor opening must be guarded. *See J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2205, 1991-93 CCH OSHD ¶ 29,964, p. 41,024 (No. 87-2059, 1993) (employer must comply with requirements of which it has notice from the language of the regulation and surrounding circumstances).[5] The judge cited testimony of a design engineer in the employ of the designer of Beaver's stack that "there is no consensus within the chimney design and construction industry regarding the manner in which ladder openings should be guarded." Beaver, however, did not guard the stack's ladderway floor opening in any manner. The cited standard may not be perfectly clear, but it does provide fair notice

[5]There is some evidence that Beaver also had actual notice of the standard's requirements. Beaver's plant engineer Dale Dyer, who was "second in command" and who was in charge of safety and housekeeping, testified that he knew prior to the accident that the section of 29 C.F.R. "concerning ladderways and walkways" "requires a closure," such as an automatically closing gate or other device, on either side of Beaver's ladderway floor opening. *Cf. J.A. Jones,* 15 BNA OSHC at 2206, 1991-93 CCH OSHD at pp. 41,025-026 (employer's safety program was evidence of employer's actual notice of standard's requirements).

that employers are required to guard ladderway floor openings.[6] Reference to industry practice is not warranted where a standard prescribes employer conduct in specific terms and is not vague. *See Cleveland Consol.*, 13 BNA OSHC 1114, 1117, 1986-87 CCH OSHD ¶ 27,829, p. 36,428 (No. 84-696, 1987)

The record also fails to provide support for the judge's finding that identical "ambiguous" language in the construction fall standards was eliminated when those standards were revised.[7] Although changes were made to these standards, it is not clear that

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[6]The Secretary introduced a number of publicly available, "interpretive" letters that were issued by OSHA in response to various employers' questions about compliance with the cited standard. *See* letter from Director Clark, Directorate of Compliance Programs, dated 3/26/93; letter from Acting Deputy Assistant Secretary Stanley, dated 1/15/93; letter from Director Donnelly, Office of General Industry Compliance, dated 5/12/92; *cf.* letter from Chief Barto, Division of Occupational Safety Programming, dated 2/12/82. Contrary to Beaver's argument, we note that these letters seem consistent with the Secretary's application of the standard in this case. *See Union Tank Car Co.*, 18 BNA OSHC 1067, 1069-70, 1995-97 CCH OSHD ¶ 31,445, p. 44,472 (No. 96-0563, 1997) (citing *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150, 157-58 (1991)) (consistent application of an interpretation weighs in favor of finding it reasonable); *cf. Chesapeake Operating Co.*, 10 BNA OSHC 1790, 1791-93 1982 CCH OSHD ¶ 26,142, p. 32,915 (No. 78-1353, 1982) (letters are not binding on the Secretary or the Commission).

[7]29 C.F.R. § 1926.500 (1993) provides in relevant part:

> **§ 1926.500 Guardrails, handrails, and covers.**
> * * *
> (b) *Guarding of floor openings and floor holes.*
> * * *
> (2)Ladderway floor openings or platforms shall be guarded by standard railings with standard toeboards on all exposed sides, except at entrance to opening, with the passage through the railing either provided with a swinging gate or so offset that a person cannot walk directly into the opening.
> * * *
> (d) *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

(continued...)

this was done because the language of these standards was found to be ambiguous. OSHA provided a number of reasons for revising these standards, none of which included eliminating "ambiguous" language to clarify that guarding is required. 59 Fed. Reg. 40,672-753 (1994).[8] In addition, even if similar language in the former construction standards were found to be ambiguous, the cited standard is not necessarily ambiguous in this context and as applied to these facts. *See Ormet Corp.*, 14 BNA OSHC 2134, 2135, 1991-93 CCH OSHD ¶ 29,254, p. 39,200 (No. 85-531, 1991) (the purported vagueness of a standard is determined in light of the standard's application to the facts of the case, not from the face of the standard).

B. Failure to Comply with the Cited Standard

Having found that the standard applies and that Beaver was required to guard the ladderway floor opening, we turn to the remainder of the Secretary's case.[9] The second

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[7](...continued)

> 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. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

[8]While not dispositive, we note that the current fall protection standards for the construction industry treat various types of floor openings and open-sided floors differently. Ladderway holes in floors must be guarded by swinging gates or offset guardrails. *See* 29 C.F.R. § 1926.500(b) (defining "hole"); 29 C.F.R. § 1926.502(b)(13). Ladderway openings at sides or edges need not be protected. *See* 29 C.F.R. §1926.500(b) (defining "unprotected sides and edges"); 29 C.F.R. § 1926.501(b)(1). Employees working near openings in walls must be protected by guardrail systems, safety net systems, or personal fall arrest systems. 29 C.F.R. § 1926.500(b) (defining "opening"); 29 C.F.R. § 1926.501(b)(14).

[9]To prove a violation, 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." *Astra* (continued...)

element of a violation is noncompliance with a standard's terms. The judge found, and it is undisputed, that there were no guards of any type at the entrances to the ladderway floor opening. On the basis of our reading of the standard to require guarding of the entrances to the ladderway floor opening, we find that Beaver did not comply with the terms of the standard. Respondent's argument that it complied with section 1910.23(c)(1) is not a defense to its failure to comply with the cited standard. *See H.H. Hall Constr. Co.,* 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981) (an employer must comply with each standard applicable to its operations).

C. Exposure

The third element of a violation is exposure to the violative condition. "[I]n order for the Secretary to establish employee exposure to a hazard, she must show that it is reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.,* 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶ 31,463, p. 44,507 (No. 93-1853, 1997). The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Constr. Co.,* 17 BNA OSHC 1229, 1234, 1993-95 CCH OSHD ¶ 30,754, p. 42,729 (No. 91-2107, 1995).

It is undisputed that two Beaver employees, Caleb Bryant and Troy Hargreaves, were required to climb the stack and perform tasks on the platform several times each year and had done so approximately eight times within the six months preceding the accident. In its hearing brief, Beaver admits that these employees had access to the condition every six weeks, but characterizes this access as "infrequent and limited." Nevertheless, even this "infrequent and limited" access can constitute exposure to the hazard. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶ 29,239, p. 39,159 (No. 87-1359, 1991).

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[9](...continued)
Pharmaceutical Prods., 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

Respondent describes the location at which employees performed their tasks as being "far away from the entrance to the fixed ladder." We disagree. The facts show that Beaver's employees had to climb through the ladderway floor opening to enter or exit the platform and that they were required to change filters located approximately ten feet from the ladderway floor opening.[10] *Phoenix Roofing*, 17 BNA OSHC 1076, 1079, 1993-95 CCH OSHD ¶ 30,699, pp. 42,605-606 (No. 90-2148, 1995) (exposure was reasonably predictable where construction materials were stored approximately twelve feet from an open, unprotected skylight, and employees were expected to go into areas where the materials were stored); *compare RGM*, 17 BNA OSHC at 1234, 1993-95 CCH OSHD at pp. 42,729-730 (Secretary failed to establish exposure where employees walked along an unguarded bridge approximately the width of a traffic lane, and there was no evidence that the employees walked close to the edge or otherwise engaged in conduct that might endanger them).[11]

D. Employer Knowledge

The fourth element of a violation is employer knowledge. The test of an employer's knowledge is whether the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,583 (No. 87-692, 1992); *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,448 (No. 86-1087, 1991).

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[10]Because we find that Beaver's employees were exposed to the hazard, we find it unnecessary to address evidence and arguments regarding the alleged exposure of Eastmount's employees.

[11]Evidence of Beaver's oral rule requiring its employees to tie off when transferring between the ladder and platform does not require a different result. First, despite the rule, Bryant and Hargreaves did not always tie off when climbing onto or off of the platform. Second, they were not required to tie off while working on the platform and generally neither of them did. Moreover, even if we assume that they did tie off and remain tied off when they were on the platform, Beaver would still be in violation of the cited standard, which requires offset railings or a swinging gate at the entrances to the ladderway floor opening. *Cf. Power Plant Div., Brown & Root*, 10 BNA OSHC 1837, 1840, 1982 CCH OSHD ¶ 26,159, p. 32,967 (No. 77-2553, 1982) (safety belts are not equivalent to guardrails).

The evidence here demonstrates that both plant manager Peter Leavitt and plant engineer Dale Dyer were aware that Bryant and Hargreaves were required to perform tasks on the platform. However, Leavitt admitted that he never asked for a job hazard analysis of the stack or platform or performed a safety review of the stack or platform as he did for other locations. Dyer testified: "I have not climb[ed] the stack. I do not climb the stack, have not and likely will not," despite the fact that he was responsible for conducting safety and housekeeping inspections of the plant and examining the plant to find areas requiring guarding. Because Beaver required Bryant and Hargreaves to perform tasks on the platform, despite failing to inspect the platform to determine what hazards existed and failing to anticipate which hazards could arise there, we find that Beaver failed to exercise reasonable diligence. *See Automatic Sprinkler Corp.*, 8 BNA OSHC 1384, 1387, 1980 CCH OSHD ¶ 24,495, p. 29,926 (No. 76-5089, 1980); *Prestressed Systems*, 9 BNA OSHC 1864, 1869, 1981 CCH OSHD ¶ 25,358, p. 31,500 (No. 16147, 1981); *Gilles and Cotting Inc.*, 3 BNA OSHC 2002, 2004, 1975-76 CCH OSHD ¶ 20,448, p. 24,426 (No. 504, 1976). Beaver also failed to give specific and appropriate instructions to prevent exposure to unsafe conditions. *See Automatic Sprinkler*, 8 BNA OSHC at 1387, 1980 CCH OSHD at p. 29,926. Beaver's safety program did not address the stack or platform, yet, as Leavitt testified, Bryant and Hargreaves were relied on to report "if something is wrong or something needs to be corrected[.]" *See Paul Betty d/b/a Betty Bros.*, 9 BNA OSHC 1379, 1383, 1981 CCH OSHD ¶ 25,219, p. 31,151 (No. 76-4271, 1981) (citing *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243 (8th Cir. 1978)) (employer cannot fail to properly train and supervise employees and hide behind its lack of knowledge of dangerous working conditions). If Bryant and Hargreaves had been trained to recognize hazardous conditions, such as the unguarded floor hole, and bring them to Beaver's attention, the hazard could have been identified and abated. *Cf. Pride Oil*, 15 BNA OSHC at 1815, 1991-93 CCH OSHD at p. 40,584 (employer could have prevented violative conduct by sufficiently training its employees in the recognition of hazards and the proper procedures to be followed); *Kokosing Constr. Co.*, 17 BNA OSHC

1869, 1871-72, 1995-97 CCH OSHD ¶ 31,207, p. 43,723 (No. 92-2596, 1996) (citing *Pace Constr. Corp.,* 14 BNA OSHC 2216, 2222, 1991-93 CCH OSHD ¶ 29,333, p. 39,432 (No. 86-758, 1991)) (employer's failure to instruct its employees to report a hazard was relevant to its finding of constructive knowledge).

Beaver argues in its post-hearing brief that it exercised reasonable diligence by consulting "the drawings of the engineers and builder concerning the structure." Dyer testified that when the plant's builder made modifications to the structure of the platform and stack, it would supply Beaver with an "as-built" drawing that reflected the modification. At the hearing, Respondent introduced a large architectural drawing of its platform and stack which does indeed indicate that there is a "safety chain" in the vicinity of the ladder. Beaver's argument fails, however, because the evidence does not establish that Beaver relied on any drawings prior to the accident and inspection.[12] Dyer stated that the "drawings kind of trickled in over a period of years. On some of the earlier drawings, there was no chain in place. On later drawings, there were." He admitted that he *did not know* when Beaver obtained a drawing indicating the presence of chains around the ladderway floor opening or when he first saw such a drawing. Moreover, Dyer admitted that he did not review all of the drawings that Beaver received. He stated that he "was primarily responsible for replacing the revised drawings with the as-built. Sometimes that was just a matter of pull this one out. Put that one in." Dyer also testified that no one from Beaver took part in ensuring that the modifications reflected in the drawings had in fact been made.

Thus, we conclude that the Secretary has established a *prima facie* case of a violation.

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[12]In so deciding, we need not reach the legal issues regarding: (1) the sufficiency of reviewing drawings in lieu of inspecting a work area, or (2) the adequacy of chains as a method of guarding under the cited standard.

III. Infeasibility

Beaver argues that the methods of guarding required by the standard are not functionally feasible and would be a greater hindrance[13] to safety. To prove the affirmative defense of infeasibility, an employer must show that: (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that either (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation; and (2) either (a) an alternative method of protection was used or (b) there was no feasible alternative means of protection. *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1190, 1993-95 CCH OSHD ¶ 30,757, p. 42,734 (No. 92-1891, 1995); *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1416, 1991-93 CCH OSHD ¶ 29,546, p. 39,907 (No. 89-1027, 1991).

Respondent fails to make out the first prong of the defense. In regard to a swinging gate, Beaver relies on employee Hargreaves' testimony that a swinging gate would obstruct movement on the platform. Hargreaves' testimony, however, is not conclusive. First, we note that Hargreaves admitted that he had no experience with swinging gates on the platform. Moreover, he indicated that the use of a swinging gate would not interfere with his movement if he could push it with his body, rather than his hand. We also reject Beaver's argument based on the testimony of its power plant expert Richard Lizotte that "[t]his particular gate would get very little use" and "the elements to which a swinging gate would be exposed in Maine weather would cause it to malfunction, stick, and be hard to

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[13]Beaver raised the defense of greater hazard in its answer, but failed to address the elements of the defense. *See PBR, Inc. v. Secretary of Labor and OSHRC*, 643 F.2d 890 (1st Cir. 1981) (to prove the affirmative defense of greater hazard, "[t]he employer must demonstrate: (1) that the hazards of compliance are greater than the hazards of non-compliance, (2) that alternative means of protecting employees are unavailable and (3) the unavailability or inappropriateness of obtaining a variance"); *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1204, 1993-95 CCH OSHD ¶ 30,052, p. 41,304 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994).

open." Lizotte testified that the weather could be problematic; however, he admitted that he did not actually know if freezing conditions existed on Beaver's platform.[14] Additionally, Beaver failed to present material evidence relating to the cost of a swinging gate.

In regard to offset railings, Beaver argues that it is not clear from the standard how or where offset railings should be constructed.[15] However, its argument must fail because the record shows that Beaver did not lack fair notice of the standard's guarding requirements. *Cf. Caterpillar, Inc.*, 15 BNA OSHC 2153, 2162, 1991-93 CCH OSHD ¶ 29,962, p. 40,994-995 (No. 87-0922, 1993) (if employer needed to fill gaps in a vague regulation, it could have asked OSHA what criteria it should apply); *Ormet*, 14 BNA OSHC at 2136, 1991-93 CCH OSHD at p. 39,200 (employers can be expected at least to apply reasonable judgment to indefinite terminology). Moreover, there is no evidence that prior to these proceedings Beaver contemplated installing offset railings or was aware that offset railings were suggested by the standard. Beaver also argues that offset railings would only be functional, if at all, if the platform were much larger and if there was a "greater distance between the two offsetting rails," relying on Lizotte's testimony. A reading of Lizotte's testimony reveals that putting the offset railings farther apart would minimize any interference with work on the platform. Moreover, Lizotte failed to explain why railings could not be constructed in a size appropriate for Beaver's platform.

Beaver also fails to make out the second prong of the defense. The testimony unequivocally establishes that the ladderway was not guarded with any alternative method of protection, and it fails to establish that feasible means of guarding were unavailable. In fact, Respondent's experts both testified that safety chains are commonly used for guarding

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[14]Moreover, Hargreaves testified that the platform does not become coated with ice because the stack is hot. Bryantc testified that he had never been on the platform when it was coated with ice.

[15]We note that CO Wells explained and illustrated the placement of these railings at the hearing.

throughout the industry. We therefore find that Beaver failed to establish the affirmative defense of infeasibility.

IV. Penalty

The OSH Act mandates that the Commission give "due consideration . . . to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." OSH Act, 29 U.S.C. § 666(j). The Secretary proposed a penalty of $7,000.00, the maximum allowable for a serious violation.

The Secretary failed to present any direct evidence on Beaver's size, and there is no evidence in the record regarding Beaver's history. With respect to Beaver's good faith, the record shows that Beaver conducts safety meetings, provides personal protective equipment to its employees, and has shown its commitment to the safety and health of its employees.

Finally, we consider gravity. *See J.A. Jones*, 15 BNA OSHC at 2214, 1991-93 CCH OSHD at p. 41,033 (gravity is the primary element in penalty assessment, and it "depends on such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result"). We note that an employee would likely be fatally injured if he fell through the ladderway floor opening; however, only two Beaver employees were exposed to this hazard, and they were exposed for relatively short periods of time. In light of these four factors, we assess a penalty of $5,000.00.

V. Order

For the reasons set forth above, we affirm the citation as a serious violation of 29 C.F.R. § 1910.23(a)(2) and assess a total penalty of $5,000.00.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Date: September 29, 1999

SECRETARY OF LABOR,	:	
Complainant,	:	OSHRC Docket No. 97-0152
v.	:	
BEAVER PLANT OPERATIONS, INC.,	:	
Respondent.	:	

Appearances:

Christine T. Eskilson, Esq.
U.S. Department of Labor
Office of the Solicitor
For Complainant

Phillip D. Buckley, Esq.
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Bangor, Maine
For Respondent

Before Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This is a proceeding under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act") to review a citation issued by the Secretary of Labor pursuant to § 9(a) of the Act and a proposed penalty thereon issued pursuant to § 10(a) of the Act.

On December 16, 1996, Respondent, Beaver Plant Operations, Inc., was issued one Serious Citation alleging one violation of 29 C.F.R. § 1910.23(a)(2) with a proposed penalty of $7,000 as a result of an inspection of Respondent's worksite during the period August 27, 1996

to November 14, 1996. A timely notice of contest was filed by Beaver Plant and a complaint and answer have been filed with this Commission. Respondent admits the jurisdictional allegations that it is engaged in a business affecting commerce and generally denies the remaining allegations contained in the complaint.

Respondent is engaged in the business of generating electricity at its wood burning power generating plant located at Livermore Falls, Maine. Part of it's facility consists of a precipitator building and an emissions stack which extends approximately 140 feet above the roof of the precipitator building. The stack is round with a fixed steel ladder attached to the stack extending up to and through a platform located completely around the stack approximately seventy feet above the roof of the precipitator building. The ladder continues to the top of the stack. The precipitator building houses the dust collection system for the power plant. The stack contains filters and instrumentation to measure materials being emitted through the stack. Beaver plant employees are required to ascend the ladder to the platform approximately once a month to change filters. The only other persons required to climb the stack ladder are employees of Eastmount Environmental Company; an environment testing company which has a contract with Respondent to conduct emission tests on the stack as mandated by the Environmental Protection Agency. On August 26, 1996, Mr. David Ricci, an employee of Eastmount Environmental fell from the stack and sustained fatal injuries. No one witnessed this event and it is not known whether Mr. Ricci fell from the platform, the ladder or while attempting to get on or off the ladder. As a result of its investigation, Complainant issued a citation against Respondent alleging the following violation;

> 29 CFR 1910.23(a)(2): Ladderway floor opening(s) or platform(s) were not guarded by standard railings with toeboards on all exposed sides:
>
> > Work Site - On or about August 27, 1996 the ladderway opening on the precipitator stack work platform was not provided with standard guardrails, gate or cover to prevent employees from walking into the opening.

The standard set forth at 29 CFR 1910.23(a)(2) reads in its entirety as follows:

> Every ladderway floor opening or platform shall be guarded by a standard railing with standard toeboard on all exposed sides (except at entrance to opening), with the passage through the railing either provided with a swinging gate or so offset that a person cannot walk directly into the opening.

There is no dispute as to the configuration of the platform and the ladder attached to the stack. The steel platform surrounding the stack is four-feet wide and the ladder opening is 30" x 31" with the stack serving as the inner wall to the opening and a standard guardrail surrounding the perimeter of the platform as the outer barrier. There were no barriers on either side of the platform floor opening.

The ladder leading to the platform is approximately two-feet wide with a safety rail attached to its center and running the entire length thereof. Respondent's verbal safety rule requires all employees who ascend the ladder to wear a full body harness with a safety line which is attached to the safety rail. The safety line moves up or down on the rail as the individual climbs/descends the ladder and will prevent a fall in the event that the person slips off the ladder (Tr. 85, 86, 168, 169). Upon reaching the platform level, a second safety lanyard attached to the body harness must be secured to one of the handrails attached to each side of the ladder (Exh. R-4). The safety rail lanyard is detached and the employee steps onto the platform. The lanyard attached to the hand rail is released when the employee is standing on the platform. There is no requirement that employees must be secured by a safety belt and lanyard while working on the platform. Upon completion of the work on the platform, employees are required to first attach the safety lanyard to the handrail and step onto the ladder. At that point the second safety lanyard is secured to the ladder safety rail and the lanyard attached to the handrail is released and the employee descends the ladder (Tr. 87). Only two of Respondent's employees are required to perform work on the stack platform and each received training in the above described procedure (Tr. 88-89). However, Respondent does not provide safety instructions to employees of outside contractors who are required to climb the stack ladder (Tr. 167). Although Respondent has offered to provide safety equipment to outside contractors, that offer has been declined (Tr. 168).

DISCUSSION

In order to establish that Respondent failed to comply with the cited standard, the Secretary must prove that (1) the standard applies; (2) the employer failed to comply with the terms of the standard; (3) employees had access to the cited condition; (4) the Respondent knew, or with the exercise of reasonable diligence, could have known of the violative condition. *Astra Pharmaceutical Products, Inc.*, 1981 CCH OSHC ¶ 25,578, aff'd 681 F.2d 69 (1st Cir. 1982); *Secretary of Labor v. Gary Concrete Products*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29, 344 (1991). Notwithstanding the safety measures that Respondent requires its employees to follow while working on the stack platform, Complainant asserts that the standard cited in this case requires that guarding in the form of a swinging gate or offset railing must be provided at the point where an employee steps off the ladder onto the platform. Complainant reasonably argues that such safety devices would prevent an employee from inadvertently falling into the platform ladder opening. Respondent, on the other hand, vigorously argues that the standard cited (29 CFR 1910.23(a)) does not apply to the work activities and conditions which form the basis for this action. Although the basis for Respondent's belief that the wrong standard was cited is not clear in its posthearing memorandum of law, it appears that its position is based upon the fact that the cited standard and the standard set forth at 29 CFR 1910.23(c)(1)[16] both require fall protection for platforms.[17] Since the definition of "platform" set forth at 29 CFR 1910.21(a)(4) is applicable to the platform surrounding the emissions stack at Respondent's worksite under both of the aforesaid standards, and since the standard set forth at 1910.23(c)(1), in Respondent's view, does not require guarding for a fixed ladder entrance, that standard should apply to Respondent's worksite.

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[16]The standard set forth at 29 CFR 1910.23(c)(1) states:

> *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....

[17]"Platform" is defined at 29 CFR 1910.21(a)(4) as follows:

> *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.

The argument raised by Respondent highlights the difficulty in determining the meaning of the various safety standards set forth at 29 CFR 1910.21 *et seq*. (Walking-Working Surfaces). There is no doubt that 1910.23(a)(2) and 1910.23(c)(1) apply to platforms and there is equally no doubt that the structure surrounding Respondent's emissions stack fits the definition of "platform." Moreover, (c)(1) refers to "entrance to...fixed ladders" while (a)(2) refers to "ladderway floor openings." The distinction between these conditions, if any, is not readily apparent on the face of the standards. Complainant's expert witness, Mr. William Freeman, a highly qualified and experienced safety professional who is also the Area Director responsible for the issuance of the citation in this matter, testified that both standards apply to elevated platforms (Tr. 247); however, 1910.23(a)(2) refers to any ladder opening on the *interior* of the platform while 1910.23(c)(1) applies to a ladder opening on the *outside* perimeter of a platform (Tr. 239, 240). However, applying that analysis to Respondent's platform would lead to a conclusion that the outside perimeter of the platform could be open without guardrails as a ladder entrance pursuant to 1910.23(c)(1) if the ladder was secured away from the stack in such a manner that the ladder was attached to the outside perimeter of the platform. Moreover, there is nothing in the standard (1910.23(c)(1)) that prohibits an employer from creating a ladder entrance accessing the platform on both sides of the ladder nor is there any restriction as to the width of said openings. Thus, according to Complainant's interpretation of the standards, a ladder entrance on the outside perimeter of Respondent's platform need not be guarded pursuant to 1910.23(c)(1) while a ladder open at the interior of the platform must be guarded under 1910.23(a)(2). Such an interpretation provides inconsistent protection to employees working on said platform from inadvertent falls.

As previously stated, it is clear that Complainant is seeking to ensure that exposed employees working on Respondent's platform are protected against inadvertent falls through the ladderway entrance. Since section 23(a)(2) refers to "ladderway floor opening" while section (c)(1) refers to "open sided floor", Area Director Freeman's interpretation that 23(a)(2) applies to floor openings at the interior of Respondent's platform appears justified based upon the language of the standards. However, section 1910.23(a)(2) would clearly achieve the goal of the standard's intent, as interpreted by Mr. Freeman, if the parenthetical phase "(except at entrance to opening)" is deleted from the standard. In the absence of that language, the standard

unambiguously requires standard guardrails to guard ladderway floor openings with passage through the guardrails either by a swinging gate or offset.[18] The presence of the aforesaid parenthetical language in the standard could reasonably be interpreted to exclude the entrance to the ladderway from the guarding requirements. Such an interpretation is bolstered by the standard set forth at 1910.23(a)(1) which requires standard guardrails for "stairway floor opening." As with the standard cited herein, § 1910.23(a)(1), excludes, in parenthesis the stairway entrance from the guarding requirement. Thus, when read together, the standards set forth at 1910.23(a)(1) (stairways) 1910.23(a)(2) (ladderway floor openings) and 1910.23(c)(1) (open sided floors) must be interpreted consistently to exclude the entrance to stairways, ladderway floor openings and open sided floors from the standard guardrail requirement. Although this interpretation will not prevent inadvertent falls down stairway entrances, open sided floor entrances and ladderway floor openings, it is the only interpretation that can reasonably be applied to the language of these standards.

The ambiguous language of the guardrail standards set forth at § 1910.23 has also created confusion among the manufacturers of stacks and related structures including platforms. Respondent's expert witness, Arun Bhowmik, is a design engineer responsible for the design, construction, repair and maintenance of chimneys, stacks and related structures. His employer designed the stack located at Respondent's worksite. Mr. Bhowmik has impressive credentials and

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[18]It is understandable that the presence of the parenthetical language in the standard is a mystery to enforcement personnel;

> JUDGE YETMAN: Well, Mr. Freeman, take a look at (a)(2) and read that standard without the parenthetical language. In other words, except at entrance to opening.
> THE WITNESS: It says: Standard toe boards on all exposed sides with a passage through the railing, either provided with a swing gate or an offset.
> JUDGE YETMAN: All right. Now as I envision that, it means that somebody who wanted to gain access to the platform would go through a swing gate or through an offset.
> THE WITNESS: That is correct.
> JUDGE YETMAN: Any my question to you is: Why do they have the parenthetical language in there?
> THE WITNESS: I can't answer that, your Honor.

appears to be highly qualified (Tr. 183-188). He testified that there is no consensus within the chimney design and construction industry regarding the manner in which ladder openings should be guarded (Tr. 203, 204). Moreover, virtually identical language of the 1910.23 standards was contained in the former construction standards for walking-working surfaces. *See* § 1910.500(a)(2) and 1926.500(d) (1993). The ambiguous language of those regulations was eliminated as a result of the repeal of the old standards and adoption of new standards (*see* 59 FR 40730, August 9, 1994) *see* also *Superior Electric Co. v. OSHRC* 1997 CCH OSHD ¶ 31,446 (6th Cir. 1997).

It is clear that the Secretary is seeking to stretch the meaning of the language of the cited standard to provide protection against a hazard that, on the face of the cited standard, appears to be excluded from the guardrailing requirement. However, the Secretary has not provided fair notice of its interpretation of the cited standard as applied in this case. On that basis, the citation must be vacated. *See East Penn Mfg.,*894 F.2d 640; *Diebold, Inc.*, 585 F.2d 1327, 1335; *Diamond Roofing* 528 F.2d 645, 649; *Dravo Corporation* 613 F.2d 1227; *Bethlehem Steel* 573 F.2d 157.

FINDINGS OF FACT

All findings of fact 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. Proposed Findings of Fact that are inconsistent with this decision are denied.

CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.

2. Respondent, at all times material to this proceeding was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and the subject matter of this proceeding.

3. At the time and place alleged, Respondent was not in violation of the standard alleged in the Secretary's Complaint.

ORDER

Serious Citation No. 1 and the penalty proposed thereto are **vacated**.

ROBERT A. YETMAN
Judge, OSHRC

Dated: April 3, 1998
Boston, MA