COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4445-07

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

UNITED PARCEL SERVICE, INC — RESPONDENT

* * * * * * * * * *

James R. Grider, Jr, Frankfort, for the secretary. Carla J. Gunnin Stone, William K. Principe, Atlanta, Lori Barker Sullivan, Frankfort, for UPS.

DECISION AND ORDER OF THE REVIEW COMMISSION

This case comes to us on respondent's petition for discretionary review of the hearing officer's recommended order. Section 48 (1), 803 KAR 50:010. In her order our hearing officer affirmed a serious citation alleging a violation of 29 CFR 1910.23 (c) (1) which says open sided platforms shall be guarded with a standard railing. The citation charges UPS with permitting an employee to stand on a platform to gain access to a cargo door control panel on an MD 11 aircraft. According to the citation the employee standing on the platform should have been protected from a fall by a "standard railing on all open sides." Exhibit 6, page 4. This serious citation carried a proposed penalty of $5,000, also affirmed by our hearing officer. While engaged in the door opening process, the employee slipped and fell eight feet to the concrete below.

KRS 336.015 (1) grants the commissioner of labor the authority to enforce the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an

inspection of an employer and discovers violations, the executive director of the office of occupational safety and health compliance issues citations. KRS 338.141 (1). If the cited employer notifies the executive director of his intent to challenge a citation, the Kentucky occupational safety and health review commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the review commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the review commission; the commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the commission takes a case on review, it may make its own findings of fact and conclusions of law. In Brennan, Secretary of Labor v OSHRC and Interstate Glass,[1] 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799, page 21,538, BNA 1 OSHC 1372, 1374, the eighth circuit said when the commission hears a case it does so "de novo." See also Accu-Namics, Inc v OSHRC, 515 F2d 828, 834 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299, 1302, where the court said "the Commission is the fact-finder, and the judge is an arm of the commission..."[2]

Our supreme court in Secretary, Labor Cabinet v Boston Gear, Inc, Ky, 25 SW3d 130, 133 (2000), CCH OSHD 32,182, page 48,639, said "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the

[1] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2001), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

[2] See federal commission rule 92 (a), 29 CFR 2200.

decision of the hearing officer." In Terminix International, Inc v Secretary of Labor, Ky App, 92 SW3d 743, 750 (2002), the court of appeals said "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another."

After the secretary filed his administrative complaint alleging a violation of the occupational safety and health standards, and the company filed its answer, we referred the case to the hearing officer for a trial on the merits. Sections 3 and 20 of our rules of procedure.[3] During the pretrial stage, labor moved to amend its complaint to include a violation of the general duty clause which the hearing officer permitted. Only an employer with employees is subject to Kentucky's occupational safety and health act. KRS chapter 338. An employer may be cited for a violation of the standards or, if circumstances permit, a violation of what has come to be known as the general duty clause.[4] Here is the statute mandating employer compliance with the act:

> **338. 031. Obligations of employers...**
>
> (1) Each employer:
>
> (a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> (b) Shall comply with occupational safety and health standards promulgated under this chapter.
>
> (emphasis added)

Most citations allege violations of the standards. KRS 338.031 (1) (b). But where a standard does not apply, the secretary may issue an employer a general duty clause citation if he

[3] We understand our administrative procedures are not rules but refer to them as such for convenience. KRS 13A.120 (5).

[4] The general duty clause is also known as the catch-all provision because it was written to fill gaps in the standards.

can prove either the employer or the employer's industry had knowledge of the hazard presented to the employee. KRS 338.031 (1) (a). If, however, a standard does apply, then a general duty clause citation will not lie. Usery v Marquette Cement Manufacturing Co, 568 F2d 902, 905, note 5 (CA2 1977), CCH OSHD 22,099, page 26,618, BNA 5 OSHC 1793, 1794. In footnote 5 the court said "The standards presumably give the employer superior notice of the alleged violation and should be used instead of the general duty clause whenever possible." [citations omitted] We agree with the reasoning in Marquette and adopt it as our own. While our hearing officer found labor proved a violation of the cited standard, she did not specifically dismiss the general duty clause citation the secretary added by amending his complaint. We dismiss the general duty clause citation.

In its briefs to the commission, actually UPS designated its petition for interlocutory review as its brief in chief, the company raised a number of defenses to the citation. Before examining those, however, we will first turn our attention to the citation affirmed by our hearing officer.

Facts

UPS utilizes motorized conveyors, what it calls belt loaders, to move cargo (individual packages) to and from its aircraft. At the trial the secretary introduced two photographs taken by the compliance officer during his inspection. These photographs are not re-creations of the accidental fall; rather we find the two photographs depict the types of equipment in use at the time of the fall: a belt loader and the injured employee's approximate position on the belt loader before he fell. Transcript of the evidence, pages 91 and 106 (TE 91 and 106). Exhibit 1 shows an employee, not the injured worker, seated behind the wheel of a belt loader. He is driving the loader; three airliners are shown in the background. In the next photograph, exhibit 2, an

employee, again not the injured worker, stands on the upraised end of a belt loader; the employee stands forward of a handrail which is to his right. TE 92.

A UPS employee, David Wampler, said he fell eight feet from the top of a belt loader while he was reaching to close the door. TE 22 and 36. He broke his arm, he had a metal plate installed in his arm with screws, and suffered a concussion. TE 22 – 23. He said it was raining and getting dark when he fell. TE 22. He said he was closing the P-section door. TE 22. Mr. Wampler's fall triggered Compliance Officer Bledsoe's partial inspection. TE 89.

Mr. Wampler worked the 3:00 PM to 7:00 PM shift. TE 21. UPS trained him to open and close the cargo doors. TE 31. To accomplish the loading and unloading of the MD 11, an employee drives the belt loader up to the air plane; once the loader was in position, an employee walks up the belt loader to reach the side of the aircraft. Mr. Wampler said he "Walked upright" when asked if he crawled up the belt loader. TE 26. Mr. Wampler was shown photographic exhibit 2 depicting an employee standing on the top of the raised belt loader with the aircraft in front and a hand rail behind him. Wampler said there was "like two and a half foot maybe" from the top end of the belt loader to the highest point of the hand rail and we so find. TE 29. Exhibit 2 confirms Mr. Wampler's estimate.

When asked what was in front of him at the top of the belt loader, he said "just the airplane – no rail, just the airplane's all that would be able to stop him from falling off the front." TE 29. Later in his testimony Mr. Wampler confirmed this: "you're outside of the, uh, enclosure of the handrails." TE 69.

In her first recommended order our hearing officer found:

> in opening and closing the cargo door, an employee is standing on a platform over 8' above a concrete parking pad. There is a handrail to the right behind the employee; there is a gap of 4" to 15" in front between the employee and the smooth fuselage

> of the plane; and there is nothing to the left of the employee to prevent a fall.
>
> I, Recommended Order, page 5 (I RO 5)

Mr. Wampler, looking at photographic exhibit 2, said there was nothing to an employee's left, no hand rail, to prevent a fall. TE 29. Wampler in answer to a question whether there was anything to hold onto while standing at the top end of the belt loader, what the citation refers to as a platform, said "Other than the handle that they're closing? (Shaking head no)." TE 37. We agree with our hearing officer's findings of fact and adopt them as our own. I RO. We find that, other than the fuselage of the plane itself, there was nothing to prevent Mr. Wampler's fall from the upper end of the belt loader.

At the time he fell, Mr. Wampler said he had closed the door and was securing "all latches and verify controls are stow – stowed properly." He said that was step nine of the process. TE 33.

I.

The citation and standard

Serious item 1 says:

> 29 CFR 1910.23 (c) (1) Every open-sided floor or platform 4 feet or more above adjacent floors or ground level was not guarded by a standard railing on all open sides:
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> a. On or about November 16, 2006, an employee fell 8 feet 3 inches from a "Tug 660" belt loader which was not guarded by standard railings while using the equipment to access the P-latch and cargo door control panel on an "MD 11" cargo plane.

The cited standard, 1910.23 (c) (1) says:

> **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 an entrance to a ramp, stairway, or fixed ladder...
>
> (emphasis added)

Labor in these cases has the burden of proof. Section 43 of our rules of procedure (ROP 43). For each case which comes before us, the labor secretary must prove the four elements set out in Ormet Corporation, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991); there, the federal review commission said:

> In order to prove that an employer violated a standard, the Secretary must show that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew,[5] or with the exercise of reasonable diligence, could have known of the violative conditions.

Element 3 is not at issue. Mr. Wampler, a UPS employee, fell eight feet to a concrete ramp. No standard railing was in place to prevent the fall. Elements 1, 2 and 4 are in contention. While UPS has raised a number of difficult issues and defenses, perhaps the most important is the question whether the space at the top end of the raised belt loader, the point from which Mr. Wampler fell, is a platform. Our hearing officer said it was; UPS disagrees. If it is not a platform, then the citation must be dismissed.

II.

Whether the standard applies to the cited condition, that is whether the top end of the belt loader is a platform?

[5] The comma should come after the word "or," not before it. Nevertheless this is how it is punctuated by OSHRC on line as well as CCH and BNA.

UPS has drawn our attention to several cases which, it argues, proves the top of the belt loader from which Wampler fell is not a platform.

In Unarco Commercial Products, CCH OSHD 30,294, BNA 16 OSHC 1499, 1502, 1503 (1993), the federal commission said anode rails and PVC pipes located above tanks of hot water and chemicals, used by employees to stand on to retrieve equipment which had accidentally fallen into the tank, was not a platform and so did not need standard guardrails. The definition for a platform says:

> *Platform.* A working space for persons, elevated above the surrounding floor or ground: such as a balcony or platform for the operation of machinery or equipment.
>
> 29 CFR 1910. 21 (a) (4) (emphasis added)

According to the facts of the Unarco case, the company made grocery carts which had to be electroplated, first with nickel and then chrome. As the parts moved through various cleaning, plating and rinsing tanks, a few parts would fall off the conveyor system and need to be retrieved by employees. Because the tanks were quite large, employees, to grab the parts, would have to stand on the "anode rails" and PVC pipes carrying air to make the tank contents bubble and thus stay properly mixed. Occasionally employees would slip off these pipes and rails and their legs, and once an employee, would slide into a tank.

At issue in Unarco, of course, was whether the pipes and rails were a platform; the commission said no and dismissed the citation:

> ...we cannot discern how the standard can be read to apply to these 'slick and greasy' anode rails, PVC pipes and carry arms, none of which are more than a few inches in diameter or width...[6]
> ...Nowhere in section 1910.23 (c) (3) do we find a requirement for employers to construct a platform; the standard merely requires that existing platforms be guarded...[7]

[6] CCH page 41,732, 16 OSHC at 1502 - 1503.

> ...we do not harbor any doubt that the surfaces the Secretary cited do not come within the term 'platform'

Unarco is illustrative because the employees standing on the pipes were not performing manufacturing work but were retrieving parts from tanks; they were not, in the language of the definition, operating "machinery or equipment" either. United Parcel's Mr. Wampler, however, when he fell was in the process of closing the cargo door for an MD 11 aircraft, work he and others performed repeatedly. As our hearing officer found, UPS "is a corporation that delivers packages on a world wide basis. It operates an air cargo hub out of Louisville..." I RO 2. If delivering packages by air was UPS's business at the Louisville's airport, then loading and unloading packages was an integral part of that business operation and we so find. We find opening and closing the cargo doors for the MD 11 aircraft, in addition to others, was a part of UPS's business as well.

UPS cites to General Electric Company, a federal review commission decision, CCH OSHD 25,736, BNA 10 OSHC 1144 (1981). GE makes turbine generator shells, casings which bolt around the actual turbine. These shells come in two parts. From of the facts of this case, we learn the shells were sitting on their bottoms, much like a single clam shell sitting on its rounded side with the interior exposed. These shell halves were bolted together to make the whole. When unbolted and sitting on the floor, the edge of the shell had a joint, a flange, where one half was bolted to the other. This flange was approximately 18 to 24 inches wide and was over eight feet off the floor.

The US department of labor cited GE for not having guardrails to protect an employee sitting on the flange with an electric grinder in his hands. Here the issue is whether this flange is a platform which will trigger the cited standard, the same issue for our case.

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[7] At CCH page 41,732, 16 OSHC 1503.

The federal commission said this flange was part of the manufactured product; and parts of a product, given the definition of a platform, are not platforms:

> ...it would be incongruous to characterize a narrow ledge less than two feet wide on a turbine shell as a 'platform' requiring guardrails...
>
> CCH page 32,100, 10 OSHC at 1146

Having said that, the commission said 1910.23 (c) (1) was not applicable.

While we agree with the federal commission's analysis, we would take it a step further. While there is no indication in the GE case how often a worker needed access to the flange, UPS's work regularly requires employees to stand on the belt loader to open or close cargo doors so packages may be loaded or unloaded as a part of the company's regular operation. Recalling Unarco, supra, where the retrieval of parts from dip tanks was an irregular task, the same cannot be said of opening and closing the cargo doors which as we have found was an essential part of the company's work process.

In Globe Industries, Inc, CCH OSHD 26,048, page 32,718, BNA 10 OSHC 1596, 1598 (1982), also cited by UPS, the federal commission said the tops (the surface) of conveyor belts are not platforms. Recall the UPS workers must walk up the belt loaders to get to the top where they could operate the control box to open the MD 11 cargo door. To reach their decision to dismiss the citation, the federal commission said:

> 'An elevated flat surface does not automatically become a 'working space' and a 'platform' merely because employees occasionally set foot on it while working...'[8]

According to the facts, Globe "employees walked across or stood on conveyors only during weekly cleaning of the guide roller" which kept asphalt covered insulation for vehicle parts in place on the belts. These workers stood in the middle of the conveyors to clean asphalt off the

[8] Citing to GE v OSHRC, 583 F2d 61, 64 (CA 2 1978).

rollers. In its decision the federal commission said the secretary's position the conveyor belts were platforms "would stretch that term [platform] beyond its plain meaning and lead to results that conflict with the common understanding of what a platform is." 10 OSHC 1598-99.

In a footnote to the Globe decision, the commission said the definition of a platform suggests an elevated surface is not a platform unless it is erected and designed for use by employees while operating machinery. CCH page 32,719 and 10 OSHC 1599, footnote 7. Contrast this footnote with the facts of our UPS case where the employee is assigned to stand at the upper end of the belt loader to operate the controls of the MD 11 cargo door.

Speaking of footnotes, Globe cites to a footnote it found in another cited case; it says in part:

> ...whenever a 'platform' has been found to exist, workers have been assigned to do work on that surface with some regularity and the nature of the work assigned has been central to the processes of the employer. We have found no case where a worker's presence on a flat surface merely for the performance of infrequent maintenance functions has been used as a basis for holding such a surface to be a 'platform.'[9]

We agree with the second circuit's analysis.

Even though UPS cited this case, and others, to us to show the top of the belt loader is not a platform, UPS regularly loads and unloads MD 11s using this motorized belt loader which is driven up to the plane, raised into position and used by the employee to walk up the unmoving conveyor belt to get to the top of the loader where he stands to operate the controls for the MD 11 door – controls which are built into the skin of the airplane.

Since unloading and loading MD 11s is a regularly performed, production task, we are persuaded the flat surface at the top end of the belt loader is a platform. UPS employees

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[9] Footnote 5 in the Globe decision is footnote 9 in General Electric Co v OSHRC, 583 F2d 61, 66-67 (CA 2 1978), CCH 22,945, page 27,748, BNA 6 OSHC 1868, 1872.

regularly use the space at the end of the belt loader to operate the MD 11 door which is either equipment or machinery. While UPS gamely argues the door on the MD 11 which opens or closes when an electric motor is turned on by the UPS employee is not machinery or equipment, it is certainly one or the other. Our dictionary says the rolling stock of a railroad is equipment as is a single piece of equipment - box car, tank car, engine.[10] By the same logic, a commercial aircraft is a piece of equipment UPS uses to move its packages.

American Airlines, Inc, CCH OSHD 30,992, BNA 17 OSHC 1552 (1996) is instructive. An employee fell 27 feet from a tail stand while working on the tail section of an airplane. This stand was used as a mobile work platform; it had sliders which, for lack of a better phrase, slid out from the floor of the platform to cover the distance between the platform and the aircraft. At the time of the fatal fall, these sliders were not in use and so a gap was sufficiently large for the employee to fall through. AA and UPS were both cited for a violation of 1910.23 (c) (2). The federal commission said the standard applied, meaning the tail stand was a working surface which is part of the platform definition. AA stands for the proposition this "tail stand" where mechanics regularly worked on the tail of an airplane is a platform. UPS would argue the employees are not on the top end of the platform for long; perhaps they are not individually but for a regular shift, employees spend considerable time on the top end of the belt loader.

The compliance officer said the belt loader, from side to side, measured 34 inches. TE 92-93 and 107. UPS's last witness said the "belt loader provides me two feet of area that I can stand on." TE 291. So that means the top of the loader is 24 inches in length by 34 inches in width, more than two feet by two feet or four square feet. This area at the time of the fall was

[10] Webster's II, New Riverside University Dictionary, The Riverside Company, page 440, 1988. See also Volume I, Webster's Third New International Dictionary, page 768, G & C Merriam Company, Springfield, Massachusetts, 1976.

some eight feet above the concrete below. Mr. Wampler, the injured employee, said it was raining and getting dark when he fell from the top of the loader.

When the CO on direct examination was asked how many employees were exposed to the unguarded platform at the top end of the belt loader on a daily basis, he said "from 6 to 30 depending on how many planes they load that day." TE 102.

Paula Blankenship, a UPS witness, said it takes approximately 30 seconds for the door to be closed. TE 292. She said approximately 150 planes are loaded, day and night, with three openings or closings of the door each. TE 212-213. So 150 times 3 equals 450 openings and closings per day.

UPS said this top end of the belt loader was not a platform – that is the issue. Various UPS employees stand on the four square foot surface every day planes are loaded and unloaded. Loading and unloading these aircraft is a regular part of the UPS package business. If a railroad car or train is a piece of equipment, so is an aircraft. An aircraft door is a part of the plane, the equipment, even though UPS, without presenting authority to support its assertion, argued otherwise. Here is the definition of platform again:

> *Platform.* A working space for persons, elevated above the surrounding floor or ground: such as a balcony or platform for the operation of machinery or equipment.
>
> 29 CFR 1910. 21 (a) (4) (emphasis added)

We know the top end of the belt loader is elevated above the surrounding concrete, some eight feet. We know the UPS employees were operating a piece of equipment. So the next question is whether the top end of the belt loader is a working space. For that we cite to Davy Songer, Inc, a federal administrative law judge decision, CCH OSHD 30,957, BNA 17 OSHC 1643, 1644 (1996). Construction workers stood on top of a ten foot tall shipping crate,

dismantling it. Although the company argued the top of a crate could not be a walking/working surface, the ALJ rejected the argument. Administrative Law Judge Nancy Spies said "a working surface is defined not by why it was built, but rather how it was actually used by workers."

UPS employees regularly used the top end of the belt loader to do their work. The top of the belt loader was a place where employees could comfortably stand on the flat, four foot square surface unlike the cases where employees stood on greasy, narrow pipes, occasionally stood on a flexible conveyor belt to clean rollers or sat on the flange edge of a turbine shell.

We find the top of the belt loader fits the definition of a platform. We conclude the standard applies. Ormet, supra, element 1. Standing on the top end of the belt loader to open and close cargo doors is an essential part of the UPS production efforts, loading and unloading cargo aircraft, so the packages may be moved around the world.

We have found the point where Mr. Wampler stood at the raised end of the belt loader to open the door of the MD 11 was a platform; at that point Mr. Wampler stood some 8 feet above the concrete below. To his left facing the airplane, to his right and to his front there was no guard rail. To his left, right and front there was no "ramp, stairway, or fixed ladder." We conclude labor proved Ormet element 2 – UPS violated the terms of the standard.

What remains is our consideration of element 4, whether labor proved employer knowledge, actual or constructive, of the violative condition? Ormet.

The requirement for proof of employer knowledge arises from the definition of a serious violation; the Kentucky and the federal definition read the same:

> ...a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists...unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

KRS 338.991 (11) and 29 CFR 666 (k) (emphasis added)

UPS had actual knowledge of the hazard from numerous sources. First of all, a UPS supervisor stood nearby when Mr. Wampler fell. Her name was Sarah Johnson. Wampler said she was standing next to the belt loader when he fell. TE 65-66. In addition to the first level supervisor who was present at the time of the fall, UPS's witnesses who understood the company's procedure testified employees were trained to open and close cargo doors using the same procedure as had Mr. Wampler: walk to the top end of the belt loader, beyond the right, raised hand rail, and reach out to the aircraft to access the door control switches which were beneath the outer skin. TE 171, 201-202, 219, 257-258, 289-290. We find the company knew its employees opened the cargo doors of MD 11 aircraft while standing at the upper, raised end of a belt loader without a standard railing for fall protection. See exhibit 2. In Action Craft, Inc,[11] CCH OSHD 30,170, BNA 16 OSHC 1389, 1389-1390 (1993), the administrative law judge said:

> The knowledge element of a charge relates to an awareness of the facts which constitute a violation of the standard and not the employer's knowledge of the standard's requirements. Shaw Construction, Inc., 6 BNA OSHC 1341, 1978 CCH OSHD 22,524 (No. 3324, 1978).

Action Craft, citing to Shaw Construction, states the rule it is an employer's awareness of the facts, here opening the cargo door while standing on a surface some eight feet above concrete below without fall protection, which proves employer knowledge. In Shaw, the ALJ says "Shaw is presumed to have knowledge of the standard itself by virtue of the standard's publication in the Federal Register."[12] At CCH 22,524, page 27,177, 6 OSHC 1343.

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[11] The complete ALJ decision is found at oshrc.gov; select final ALJ decisions for 1993, page 4.
[12] In Kentucky the standard is adopted by 803 KAR 2:303, section 3 (1) (a) 2.

Because company supervisors and trainers knew employees stood at the raised end of a belt loader, without fall protection, to open and close the MD 11 cargo door, we find their knowledge is imputed to the company. Halmar Corporation, CCH OSHD 31,419, page 44,410, BNA 18 OSHC 1014, 1016 - 1017 (1997). In addition to actual knowledge, imputed to the employer, we find UPS had constructive knowledge of the violation because the door opening operation is always performed in plain sight. Kokosing Construction Company, a federal review commission decision, CCH OSHD 31,207, page 43,723, BNA 17 OSHC 1869, 1871 (1996).

We conclude the secretary has established a violation of the cited standard. Ormet, supra.

It is at this point in the litigation, after the secretary has put on his proof, that an employer may raise its defenses to the citation. We have already held the place where Mr. Wampler stood was a platform; we shall now turn to UPS's remaining defenses.

III.

The affirmative defense of infeasibility of compliance.

UPS has pleaded the affirmative defense of infeasibility of compliance. In the 1970s, the federal commission recognized the defense of impossibility: an employer would have to prove compliance with the standard was, one, impossible or would interfere with the work and, two, alternative means to protect employees were unavailable or were in use. The employer had the burden of persuasion for both elements. M. J. Lee Construction Company, a federal review commission decision, CCH OSHD 23,330, BNA 7 OSHC 1140, 1144 (1979).

Then in 1986 the federal commission unanimously, with Commissioner Robert Rader concurring, held the employer must prove infeasibility rather than impossibility but then ordered the burden of persuasion would shift to the secretary to prove the existence of a feasible

alternative to safeguard employees. Dun-Par Engineered Form Co, CCH OSHD 27,650, BNA 12 OSHC 1949 (1986).

When the secretary appealed to the eighth circuit, he accepted the commission's determination an employer must prove infeasibility rather than impossibility. In his appeal the secretary focused on the commission's reallocation of the burden of persuasion, that is which party must prove the infeasibility of alternative methods of compliance. Brock v Dun-Par Engineered Form Co and OSHRC, 843 F2d 1135 (CA8 1988), CCH OSHD 28,178, BNA 13 OSHC 1652. The eighth circuit said the employer has the continuing duty to comply with the act[13] and standards and is presumed to know its own industry. 843 F2d at 1139, CCH page 37,167, 13 BNA 1655. Anticipating, perhaps, the US Supreme Court's opinion[14] which held courts of review must defer to the secretary who writes the standards and citations, rather than to the review commission, the eighth circuit rejected the commission's approach to the burden of proof and said "the Commission's reinterpretation of the impossibility defense is owed no special deference because 'it is the Secretary, not the Commission, who exercises policymaking and prosecutorial authority under the Act.'" At 843 F2d 1137, CCH page 37,165, 13 OSHC 1654. Then the court, placing on the employer the burden of persuasion on the issue of the infeasibility of alternative methods of compliance, said:

> Where an employer determines that the specified means of compliance is infeasible, it must affirmatively investigate alternative measures of preventing the hazard, and actually implement such alternative measures, to the extent feasible... An employer experienced in performing this duty adequately should possess knowledge of the alternative means of compliance existing in the industry. To the extent that the employer requires further assistance in discovering alternative

[13] KRS 338.031 (1) (b) and its federal equivalent 29 USC 654 (a) (2).

[14] Martin v Occupational Safety and Health Review Commission and CF&I Steel, 499 US 144, 146-147, 111 SCt 1171, 1173-1174, 113 LEd2d 117 (1991), CCH OSHD 29,257, BNA 14 OSHC 2097.

> means of protecting its employees, it may look to the OSHA standards...
> To permit the employer to evade its responsibility under the Act by, in effect, pleading ignorance, would in our view thwart the clear protective purposes of the Act...[which] imposes an obligation on employers to become aware of, and to actually implement, alternative means of compliance where feasible. (emphasis added)
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> 843 F2d at 1139, CCH pages 37,166-37,167, 13 OSHC 1655

We adopt the court's reasoning which sums up our thinking and specifies UPS's duties under the act.

Finally, in Armstrong Steel Erection, Inc, CCH OSHD 30,909, page 43,030, BNA 17 OSHC 1385, 1387 (1995), the federal commission set out all of the elements necessary for an employer to prove its infeasibility defense.

To prove infeasibility of compliance, an affirmative defense, the employer must prove:

> 1. the means of compliance prescribed by the standard would have been infeasible in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would be 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.

An employer must prove both elements to prevail in its affirmative defense. Although the parties did not come to grips with the specifics laid down by Armstrong Steel or the eighth circuit's Dun-Par decision, UPS argues compliance with the use of the left standard rail would make necessary work operations technologically infeasible because the rail would, one, damage the skin of the airplane and, two, prevent the opening of the cargo door.

UPS with few exceptions confined its infeasibility arguments to potential solutions raised by the compliance officer. This is an incorrect understanding of the law. In Dun-Par, supra, 843 F2d at 1139, CCH OSHD 28,178, page 37,166, BNA 13 OSHC 1655, the court said when it

raises the infeasibility defense, "it must affirmatively investigate alternative measures of preventing the hazard, and actually implement such alternative measures of preventing the hazard, to the extent feasible...[citations omitted]."

On this score, the court was very specific. In the Dun-Par case, the employer received a citation for not providing a guard rail at the perimeter (outer edge) of an open sided floor.[15] This is the same sort of standard cited for our case. For Dun-Par the court, writing about feasible abatement possibilities the employer must investigate, said:

> The fact that the specified means of abatement, guardrails, were infeasible, did not leave Dun-Par without guidance in performing its substantive duty to employ all feasible alternative means of abatement. Many regulations... address fall hazards. For example 1926.105 mentions safety belts, catch platforms and outriggers, and safety nets.

UPS according to the facts of our case made little or no search for "alternative means of compliance existing in the industry," other than countering the CO's suggestions. The court in Dun-Par said UPS had a duty to look further within is own industry for solutions to the fall protection problem.

Here is an example. Warren Malise, a twenty-five year UPS employee, recommends purchasing strategies. TE 216. He was asked whether a fall arrest system, a shoulder and leg body harness with a lanyard designed to stop a fall in progress, would provide fall protection for an employee standing on the top end of a belt loader. He said the arrest system would not work because a falling employee would strike a part of the belt loader before the six foot lanyard stopped the fall. TE 225. Given the eight foot height of the top end of the belt loader, we accept his testimony. Then on cross examination, Mr. Malise was asked about a fall restraint system

[15] Open sided floors are characteristically found when a building is under construction. First the floor is built but there are no sides yet erected; thus an employee can fall off the building which has no guard rails.

and whether it might work. He said a fall restraint was "a cage around someone." TE 227. This is telling because a fall restraint system is a harness with a lanyard short enough to prevent "the user from falling any distance." 29 CFR 1926.751.[16] Mr. Malise's mistaken characterization of a fall restraint system, a cage, reveals the company had given no thought to whether such a restraint system would work. This to us is proof the company failed in its attempt, in the course of establishing its infeasibility defense, to prove it had conducted a diligent search for alternative fall protection solutions. Dun-Par.

What could UPS have done at the trial to convince us it had affirmatively investigated alternative means of compliance, proving as it had compliance with the standard was infeasible?

One, while UPS had a fall protection program for its mechanics, it said it had none for the ramp workers who were exposed to the hazard of falling – Mr. Wampler fell from the top end of the belt loader, seriously injuring himself. At the hearing, UPS said its fall protection program was only for its mechanics even though the fall protection plan did not precisely say that. At the very least, UPS's insistence its fall protection plan was only for maintenance employees was proof the company had spent no time looking into the fall safety of its ramp employees.

Two, UPS at the hearing basically confined its proof to alternative fall protection options mentioned by the compliance officer who had suggested requiring a harness, moving the rails forward, using a snorkel lift. TE 96 and 112.

Three, American Airlines, supra, says the "tail stand" where mechanics worked on the tail of an airplane is a platform. This platform is placed next to the surface of the airplane. Since aircraft bodies are curved, AA uses a platform with slide out panels to accommodate the curved surface and provide fall protection. American Airlines and UPS are in the same industry. The AA case, featuring as it does the sliders, proves UPS has not looked within its industry to find

[16] 29 CFR 1926.760 (d) (2) says fall arrest systems, the harness and lanyard, are to be used for fall restrain devices.

better fall protection for its ramp employees. Admittedly, sliders might or might not work depending on the curvature of the aircraft's fuselage and the movement of the cargo door; but their existence and UPS's silence proves UPS has not been diligent about investigating within its own industry – or at least proving its diligence at the trial which Dun-Par and Armstrong Steel both require.

UPS had a duty to look at potential solutions and testify about them, either saying they would work or why they would not.

Four, UPS has not investigated all the various fall protection solutions found in the standards: fall restraint systems (a belt or harness with a short lanyard which prevents an employee from getting close enough to the edge to fall off) and nets. UPS would argue the employees are not on the top end of the platform for long; perhaps they are not individually but the collective time spent by employees on the belt loader is considerable.

UPS called several witnesses who testified about opening and closing the MD 11 cargo door. Through its own employee witnesses, UPS proved it was not feasible to open and close the MD 11 cargo with the left rail in the raised position because the rail would either prevent the opening and closing or would damage the plane.

Labor's compliance officer knew very little about the operation of the cargo door – he never asked to see it operated. UPS employees, however, proved the left guard rail could not be raised when the employee was opening or closing the door because the door while moving would strike the left guard rail. When raised, the left hand guard rail would either prevent the opening and closing of the door or damage the aircraft or both. UPS proved part (b) of the first element of the defense which says in part: "necessary work operations would be technologically...infeasible after its implementation." In other words, the left guard rail would

make it infeasible to open or close the door without damaging the door or preventing the opening and closing or both.

Timothy Craddick had been with UPS for 26 years; he has worked as a ramp operator and later a trainer. He said the left rail is not raised because the "door swings out" and could hit the left rail. TE 195. Tom Williams, a UPS employee for 23 years, worked as a ramp loader and then a trainer. He said employees are not trained about using the left guard rail because "there's more...cause to damage the aircraft." TE 202. He said one danger is a ramp employee could damage the lower part of the door and not necessarily notice the damage. TE 203. This, the witness suggested, could lead to catastrophic depressurization of the plane when it was aloft.

Paula Blankenship has six years with UPS; she worked as a second day air ramp handler. She loaded planes and opened and closed the cargo doors. She worked as a ramp employee trainer at the time of the trial. She said she did not think the door could be opened or closed with the left rail raised because the "left handrail would be in the way of...opening and closing." TE 289.

She also said she did not believe any fall protection would work; she said a stepladder would not work. TE 290. Actually, she said fall protection would not work when employees were "walking up and down on...the belt loader." TE 290. UPS was not cited for permitting its employees to walk up and down the belt loader without fall protection and so her testimony is not on point.

Given the testimony in this case, UPS proved the first element of its infeasibility of compliance defense. But because UPS mostly limited its testimony about alternative measures to those raised by the compliance officer and failed to investigate alternatives, it fell short of proving the second element of the defense. We deny UPS's infeasibility of compliance defense

because it had not shown it made an independent search for alternative means of protecting employees. Dun-Par, American Airlines and Armstrong Steel.

IV

UPS says labor's citation violated section 18 (c) (2)[17] of the federal occupational safety and health act.

a.

rulemaking

When congress passed the occupational safety and health act in 1970, it provided for state programs. Kentucky has a state program. KRS chapter 338. Section 18 of the act, 29 USC 667, sets out requirements which states must meet to obtain approval from the federal secretary of labor – funding, staffing, safety standards, that sort of thing. Kentucky has done that and we have had federal approval for several decades.

In its PDR to the commission, as well to the hearing officer, UPS argues when Kentucky cited 1910.23 (c) (1) and applied it to the top of a belt loader it was either improperly drafting a standard, UPS called it rulemaking, or violating section 18 (c) (2).

Rulemaking occurs when a state or federal agency wants to write an occupational safety and health standard. First it drafts a standard. Second it publishes the standard in its administrative register and asks for comments. Third it gets written comments about the draft. If there are enough, significant comments, the agency will hold a hearing where interested persons may come and testify about the draft of the standard, pro or con. Fourth, then the agency studies the comments and publishes in the same administrative register its analysis of the comments it receives and either stays with the original draft or makes changes in appreciation of the

[17] 29 USC 667.

comments it receives. In Kentucky, the draft of the standard goes to the regulatory review subcommittee which either accepts the draft and it becomes a regulation, we use regulation and standard interchangeably, or it rejects the draft regulation and the agency must start over or comply with the committee's objections.

UPS's attempted rulemaking defense is not coherent but we must respond because it is now at issue. In its brief to the commission, UPS confuses the promulgation of a standard (rulemaking) with enforcement of a standard; enforcement means inspecting to discover violations, issuing citations to employers and contesting citations before this commission. Kentucky's 1910.23 (c) (1) is identical to the federal standard which we adopted in toto.

The cited regulation, 1910.23 (c) (1), was adopted in Kentucky and became effective on December 15, 1989. See sections 3 (1) (a) 1 and 2, 803 KAR 2:303. This is rulemaking. Once Kentucky adopted the cited standard, the department of labor is by statute charged with its enforcement. See KRS 338.141 (1), issuance of citations for violations, and KRS 338.991 which prescribes penalties. Some time ago the US Supreme Court decided federal courts of appeals would defer to the secretary of labor's interpretation of a standard rather than to the review commission's interpretation. In Martin v Occupational Safety and Health Review Commission and CF&I Steel, 499 US 144, 157, 111 SCt 1171, 1179, 113 LEd2d 117 (1991), CCH OSHD 29,257, BNA 14 OSHC 2097, the court said labor was interpreting a standard every time it issued a citation. So for our case, the Kentucky department of labor interpreted 1910.23 (c) (1) to apply to the top end of the raised belt loader when it was used by an employee who stood on it to open and close the cargo door of an MD 11 aircraft.

Whether the top end of the belt loader is a platform is really an inquiry into whether the standard applies to the cited condition. Ormet, supra. Rulemaking is behind us; at issue are the interpretation and enforcement of the cited standard.

b.

section 18 (c) (2)
of the OSH act

Section 18 says in part:

> (c) The Secretary shall approve the plan submitted by a State... if such plan in his judgment...
>
> (2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment...as the standards promulgated under section 6 which relate to the same issues, and which standards when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce.

29 USC 667 (c) (2) (emphasis added)

UPS argues Kentucky violated this federal statute when it applied 1910.23 (c) (1) to the raised end of a belt loader, calling it a platform which must be guarded.

Since Kentucky has a state plan, any challenge to a citation issued by the secretary of labor must be grounded in Kentucky law. KRS 338.051 (3) authorizes the secretary to promulgate safety and health standards. Then the secretary by statute has the right to inspect to discover violations, issue citations and impose penalties. KRS 338.101 (1) (a), KRS 338.141 (1) and KRS 338.991. If an employer receives a citation, he may contest it within an administrative process which leads to a trial on the merits and subsequent appeals. KRS 338.141 (3), section 48 (1), 803 KAR 50:010 and KRS 338.091 (1).

UPS in its PDR says "Complainant is in effect attempting to promulgate its own standard and should therefore be required to comply with rulemaking procedures and be held to the requirements of the Section 18 (c) (2) Product Clause." PDR 16. Apparently UPS contends that when the secretary interpreted 1910.23 (c) (1) to apply to the raised end of the belt loader upon which its employees stand to operate the MD 11 cargo door, it was in effect enforcing the standard in such a way as to change its meaning and application. We have of course found the standard, which is identical to the federal, applies to the situation described in the citation the secretary issued to UPS. If UPS were correct in its assertion, which it is not, that Kentucky OSH had written a new standard, what steps might it have taken to seek relief. As one might expect, there is very little law on this subject.

In Florida Citrus Packers v State of California,[18] 549 FSupp 213 (DC ND Cal 1982), CCH OSHD 26,272, BNA 10 OSHC 2048, federal OSHA had a standard which limited exposure to ethylene dibromide (EDB), a toxic fumigant used to control med flies, to 20 parts per million. Because of an outbreak of the pest in California, Cal OSHA introduced an emergency standard limiting employee exposure to EDB to 130 parts per billion; this California standard was more stringent than the federal. Because this California emergency standard made it virtually impossible for Florida to market its citrus products in California, Florida Citrus Packers filed suit asking the US district court to decide whether the US department of labor must require pre-enforcement approval before California could promulgate a more stringent standard for EDB.

Section 18 (c) (2) is known as the product clause. Essentially, this clause says if a state wishes to draft a standard which is more stringent than the federal, it must make a case for

[18] See also 545 FSupp 216 (DC ND Cal 1982), CCH OSHD 26,157, 10 OSHC 1833, an earlier decision for the same case.

"compelling local conditions" to justify the change. Most state plans, including Kentucky's, adopt many federal standards word for word to avoid this problem; otherwise there would be endless litigation about state standards.

Before the Florida Citrus case could go to trial, California filed a motion to dismiss:

> This Court holds that Fed-OSHA...should decide whether the EDB standard change falls within the 'product standard' clause and, if so, whether that change is justified by compelling local conditions and not unduly burdensome on commerce...'questions of statutory interpretation are better left to an initial review by the agency itself for application of its specialized expertise in the area.' *Marshall,*[19] *supra*, at 513...Clearly, new standards and standard modifications must be submitted to Fed-OSHA to initiate the review mechanism, 29 CFR 1953. 41.[20]

549 FSupp at 215, CCH page 33,186, 10 OSHC 2049

In Florida Citrus, the court concluded it was not the proper forum. In an earlier decision for the same case, 545 FSupp at 220,[21] the court said it "should give deference in interpreting a statute to the interpretation of the agency charged with its implementation," citing to Skidmore v Swift Co, 323 US 134, 140 (1944). For our case it is the Kentucky secretary of labor who is implementing the standard and to whom deference is accorded.

Since Kentucky has a state program, the interpretation of the cited standard falls, in the first instance, on the Kentucky labor cabinet, the agency responsible for enforcing the occupational safety and health law. In CF&I Steel, supra, the US Supreme Court said federal OSHA interpreted a standard every time it issued a citation. The same reasoning applies to Kentucky's program.

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[19] Marshall v Burlington Northern, Inc, 595 F2d 511 (CA9 1979).
[20] Apparently, 29 CFR 1953.41 has been amended by federal osha. The citation is 29 CFR 1953.4 (d) (2).
[21] CCH OSHD 26,157, page 32,957, BNA 10 OSHC at 1836.

UPS's product clause defense fails because it relies on an interpretation which says federal OSHA has no standards which apply to an employee walking up or down the belt loader. Attached to UPS's motion for summary judgment, denied by the hearing officer in an order dated January 4, 2008, are two federal documents, neither of which we find apply to the case at bar. A March 1, 1977 interpretation letter to American Airlines, exhibit G to the motion, "concerns the installation of certain handrails on mobile belt loader conveyors for aircraft, when employees are walking on those conveyors..." While the March 1, 1977 letter states there are no standards applicable to walking on conveyors, UPS has not been cited for permitting its employees to walk on the conveyors. Rather, the secretary cited UPS for employee exposure to the hazard of falling, without protection, while standing on the raised end of a belt loader to operate the MD 11 cargo door.

Exhibit H, an unidentified document soliciting "additional comment," is about "tractor trailer trucks, hopper trucks and buses...and uncovered rail cars, hopper cars, tank cars and trailers." Belt loaders are not mentioned in exhibit H.

We agree with UPS to the extent it argues OSHA has no standards for walking up and down the belt loader. Kentucky OSH, however, has instead cited UPS for permitting its employees to stand on the top end of the belt loader to operate the cargo door without fall protection. UPS's argument is beside the point – it is irrelevant.

Perhaps if it felt so inclined, UPS could have filed suit to ask a court to order Kentucky OSH to submit a state initiated change supplement to federal OSHA. 29 CFR 1953.4 (d) (2). We presume UPS has not done so because Kentucky, one, has not rewritten 1910.23 (c) (1) and, two, it has correctly interpreted the regulation to fit the facts of the case before us.

Florida Citrus, supra, says OSHA "should decide" whether a standard falls within the products clause. CF&I Steel, supra, in turn says OSHA interprets a regulation every time it issues a citation. We agree; we deny UPS's products clause defense because the Kentucky standard is identical to the federal version and Kentucky OSH correctly interpreted 1910.23 (c) (1) when it applied the standard to the facts presented by the case.

Having demonstrated that UPS products clause defense fails, we will now take up the particulars of this alleged defense in an attempt to allay any concerns UPS might still retain. UPS, to buttress its 18 (c) (2) argument, cites two situations where states, unlike Kentucky, did write standards which were different than the federal and those states had to justify the differences.

Washington's state plan addressed a condition alleging "the failure to have a dual or secondary braking system on aerial man lift vehicles." This dual-secondary braking system went beyond what the federal standard required. An employer who received a citation raised section 18 (c) (2) of the act, the product clause, as a defense. The matter was resolved when Washington repealed its standard. There was no decision on the merits of the citation which apparently was withdrawn. Washington's standard was different than the federal, prompting the controversy.

In Oregon, the state attempted to write a standard which did not require roll over protection for track powered agricultural tractors. Again, the US secretary objected because Oregon's proposed regulation was different than the federal. After lengthy rulemaking hearings Oregon proved its conditions were local: flat terrain which would not cause a tractor to roll over. Oregon proved its regulation would not pose a problem with the distribution of interstate products – agricultural products. Both Washington and Oregon dealt with standards which were different than the federal. Kentucky's 1910.23 (c) (1) reads the same as the federal.

Both of these two situations, Washington and Oregon, involve the writing of standards. The Kentucky department of labor has not attempted to write a standard which is different than the federal and so the Washington-Oregon examples do not apply.

UPS argues Kentucky's citation of 1910.23 (c) (1) is a violation of the product clause because it did not have notice Kentucky would use the cited standard as it did: to allege what Kentucky says is a platform at the top of the belt loader which should have been guarded. Respondent would be in a better position to argue notice if the federal interpretation, exhibit G to its motion to dismiss, said federal OSHA did not have a standard covering the facts described by the instant citation. Of course, the interpretation did not say that – instead it said federal OSHA had no standards covering employees while they walked on the belt loader. Here again, UPS cites us to no authority, no case law supporting their position. UPS says "Section 18 (c) (2) of the Act is intended to address the promulgation of state plan safety...standards that are different from, or that *are enforced* in a manner that is completely different from, a corresponding, identical federal standard..." PDR at 16.

We find Kentucky OSH is not enforcing the standard in a different manner. When federal OSHA said it did not have a standard covering employees walking on a belt loader, it preserved its ability to apply the standard to an employee standing at the end of a belt loader to operate an MD 11 cargo door. The Kentucky department of labor enforces the same 1910.23 (c) (1) as does the federal system. Even though the US department of labor has an interpretation which says there is no standard for walking on the belt, the interpretation does not apply to standing at its raised end. The real issue is whether the top end of the belt loader is a platform which is an argument about whether the standard applies to the cited condition; we have found the standard does apply.

V

UPS said it did not have fair notice the platform standard applied to its employees standing on the belt loader.

UPS alleges it could not know the cited standard, 1910.23 (c) (1), applied to the belt loader, that approximately four square foot area at the top end of the raised loader where employees regularly stand to open and close the cargo door on an MD 11 aircraft and so cannot be cited. UPS says it did not have fair notice the standard would be applied to the opening and closing of the cargo door. Here again, this is really the threshold a question we always face in any OSH case: whether the standard applies. It does.

a

the federal standards interpretation

UPS points to a federal letter of interpretation which it says proves it did not have fair notice the cited standard applied. Even though it relies on the federal interpretation, UPS did not introduce it as an exhibit during the trial; rather, this exhibit is attached to its motion for summary judgment[22] which it filed with the hearing officer some months before the trial. Because the letter was not introduced, labor had no opportunity to object or to contradict it.

Our cases are decided before the commission on the record, meaning the evidence introduced during the trial: oral testimony and documents along with the occasional videotape of the inspection and sundry physical exhibits. Ordinarily we would disallow any reference to documents attached to a summary judgment motion. Having said that, even though the interpretation is not properly before the commission, it was not introduced and labor has not

[22] Tab 27, administrative record.

moved to strike, it can be found in the internet at osha.gov; in any event it is of no benefit to UPS as we shall see.

"Standard interpretation 03/01/1977 – Installation of handrails on mobile belt loader conveyors" is a letter to a lawyer with American Airlines. Appendix G to respondent's motion for summary judgment. Apparently American Airlines had asked for clarification about the "installation of certain handrails on mobile belt loader conveyors for aircraft, when employees are walking on those conveyors..." This letter says "there are no OSHA standards to cover the situation you describe..." (emphasis added) But, the letter says, AA could be found in violation of the general duty clause if it failed to provide handrails when "the height of the belt loader...creates a situation which constitutes a recognized hazard." To buttress its assertion walking on the conveyor could be seen as a general duty clause violation, the letter refers to an ANSI standard which states in part:

> No riding shall be permitted on a conveyor at any time, unless it is specifically designed to convey passengers or the operator.
>
> (emphasis added)

Then the letter says "Finally we wish to note that where employees utilizing the mobile belt loading equipment are not generally walking in an upright position but in a crouched position...a handrail approximately 18 inches to 24 inches above the belt would normally provide adequate employee protection." (emphasis added)

This interpretation says the standard cited in our UPS case does not cover walking on conveyors, whether in the crouched position or not. Then it adds a comment about riding on conveyors. But as the citation reveals, the Kentucky department of labor did not cite UPS for permitting employees to walk on or to ride conveyors without fall protection. Here is the citation:

> 29 CFR 1910.23 (c) (1) Every open-sided floor or platform 4 feet or more above adjacent floors or ground level was not guarded by a standard railing on all open sides:
>
> a. On or about November 16, 2006, an employee fell 8 feet 3 inches from a "Tug 660" belt loader which was not guarded by standard railings while using the equipment to access the P-latch and cargo door control panel on an "MD 11" cargo plane.
>
> (emphasis added)

Kentucky's secretary of labor used his citation to interpret the standard to apply to UPS employees standing on the belt loader to open and close the cargo door. The citation did not interpret the standard to apply to employees walking on the conveyor belt to reach the top of the loader. CF&I Steel. And so this interpretation is irrelevant.

b

Another GE case cited by UPS.

In General Electric Company v OSHRC, 583 F2d 61, 65-66 (CA2 1978), CCH OSHD 22,945, pages 27,745-27,746, BNA 6 OSHC 1868, 1869, the company had a large oven used to bake insulation onto small electric motors during the manufacturing process. This oven had two electrically powered fans on top which needed periodic maintenance. To reach these two electric fans when maintenance was required, mechanics would climb on top of the oven which was ten feet tall. Federal OSHA cited GE for not using a guardrail to protect the workers from the hazard of falling.

Because the cited standard in the GE case, 1910.23 (c) (1), said in part "Every...platform...shall be guarded," the issue was whether the top of the oven was a platform. For this GE case, the definition of platform reads the same as ours:

> 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.
>
> 29 CFR 1910.21 (a) (4)

Both the commission and its administrative law judge said the space was a platform because the employees periodically worked there. In its decision the second circuit reversed the commission; the court said:

> An elevated flat surface does not automatically become a 'working space' and a 'platform' merely because employees occasionally set foot on it while working...We do not believe that infrequent, periodic maintenance of machinery is equivalent to the 'operation' of that machinery, *cf.* Bethlehem Steel Corp v OSHRC and Marshall, supra, 573 F2d at 161 (phrase 'normal operating conditions' does not include maintenance operations)...[23]

According to the GE court, the operation of machinery or equipment, presumably as a part of the employer's regular business, is to be distinguished from periodic maintenance. If a GE employee stood on a platform to operate the oven during the manufacturing process, then the top would be a platform according to the cited standard which must be guarded. When, however, a mechanic climbs on top of the oven to perform maintenance which is not part of the employer's manufacturing process, then that space does not require guarding. In other words, the GE maintenance employees were not operating the oven.

Then the court said:

> Simply put, to apply this standard to the surface here in question would go too far – it would be inconsistent with the wording of the standard and it would create considerable doubt that the standard provides to employers fair warning of the conduct which it prohibits or requires.
>
> CCH OSHD page 27,749, 6 OSHC at 1873. (emphasis added)

[23] CCH page 27,747, 6 OSHC 1870.

In its brief to our commission UPS cites this GE case to support its argument it had no fair notice the cited standard applied to the top of the belt loader. UPS is mistaken. It cites to the March 1, 1997 federal interpretation which applies to walking or standing on belts even though the Kentucky secretary of labor did not cite the company for permitting its employees to walk on belts or perform maintenance without fall protection; rather, labor cited UPS for permitting its employees to stand on the top end of the belt loader to open and close cargo doors on its MD 11 aircraft. Loading and unloading aircraft is a part of UPS's regular business at the airfield in Louisville and is not maintenance activity. In the GE case, maintaining the fans on the top of its oven was not equivalent to the operation of machinery or equipment.

To give an example, if a belt on a belt loader in the raised position ceased to function and a UPS mechanic climbed to the top to fix the belt, the mechanic would not be operating machinery or equipment – he would be fixing it. And so UPS would not be cited for a violation of 1910.23 (c) (1).

UPS argues it did not receive fair notice the cited standard would be applied to an employee standing on the top of the belt loader, operating the cargo doors on aircraft. But the examples it supplies to us are inapplicable because they are about walking on the belts instead or, for the GE case, maintenance work.

In a reaction to the GE case which said 1910.23 (c) (1) does not apply to maintenance workers, federal OSHA issued "STD 01-01-013[24] – STD 1-1.13 – Fall Protection in General Industry 29 CFR 1910.23 (c) (1), (c) (3), and 29 CFR 1910.132 (a)." This federal interpretation cites to the GE case and then seeks to overcome it. First of all this interpretation says, in its background section, OSHA has been citing employers for violations of 29 CFR 1910.23 (c) (1) and the general duty clause where employees have been engaged in "inspections, service, repairs

[24] STD -1-01-013 is the new and improved standards interpretation number.

and maintenance on elevated surfaces such as...conveyers, tops of machinery and other structures not normally considered 'walking and working' surfaces."

When UPS employees stood on the top of the belt loader, they were operating the cargo door; they were not inspecting, servicing, repairing or maintaining anything. So this interpretation does not apply to the cargo door workers when so engaged.

STD 01-01-013 says in part:

> 1. Platforms are interpreted to be any elevated surface...upon which employees are required to walk or work while performing assigned tasks on a predictable and regular basis.
>
> 2. 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...

This interpretation is about performing assigned tasks; it does not discuss the operation of machinery or equipment or working spaces. If federal OSHA wanted to rewrite the platform definition it could have done so; what OSHA cannot do is expand the reach of a standard without rewriting it.

GE said the platform definition could not be applied to maintenance work but did apply to production work – for the UPS case we have found opening and closing the cargo door was production work.

GE makes a very good point: 1910.23 (c) (1) applies to production work but not to periodic maintenance. Whether UPS admits it here or not, its principal business is moving packages, whether by air or truck. For its air cargo business, UPS employees must regularly and predictably open and close the cargo doors for its MD 11 aircraft so its packages can be moved.

c

The Emery Air Freight settlement

UPS cites an Emery Air Freight settlement to prove it did not have fair notice the standard, 1910.23 (c) (1), applied to the top end of the belt loader on which UPS employees stand to open and close the cargo door. UPS said once it bought Emery, it is now "legally obligated to comply with the terms." Footnote 3 to UPS's brief. As we shall demonstrate, the Emery settlement, to the extent it can be understood from its expressed terms, is distinguishable from the case before us.

This settlement agreement, attachment C to UPS's motion for summary judgment, was not introduced into evidence at the trial and so it was not possible for the settlement to be tested, either by cross examination or the testimony of other witnesses. Nevertheless, because UPS has referred to this settlement in its brief to the commission and because the secretary did not move to strike the reference, we must consider it.

According to the company's brief in chief, the settlement says in part "compliance is achieved by ensuring that the right side rail remains in the elevated or 'up' position while employees are on the mobile belt loader."[25] Page 11. (emphasis added) What we do not know, what neither the settlement nor the brief tell us, is compliance with what? In other words, this settlement language comes to us without context. We do not know what the alleged hazards are for the numerous instances cited. We must assume, without more, the company and federal OSHA agreed the rail would be raised to protect employees from falls while they are on the conveyor belt. Stated another way, employees on the belt would have to be adjacent to the rail to receive any protection, otherwise there would be no point to the settlement language.

[25] Actually, the settlement says in part "abatement of Item a, Instances b...r is accomplished by ensuring that the rail on the right side of the belt loaders is in an elevated position while employees are on the conveyor of the belt."

These Emery settlement facts, so far as they may be perceived, do not square with those in the case at bar. In our case, an employee standing on the raised end of the belt loader is some two feet forward of the right rail in its raised position. With the employee facing forward toward the aircraft with the raised rail to his rear, the rail offers the employee no fall protection. This is confirmed by the testimony of the injured employee, David Wampler, and photographic exhibit 2. TE 29 and 69. We cannot believe that was the intent of the settlement: to provide no protection to employees doing the type of work which led to Mr. Wampler's injuries. We think it more likely the settlement was intended to protect employees as they walked the conveyor with the rail to one side or the other depending on the direction traveled.

Because the Emery settlement was designed to afford fall protection for an employee standing adjacent to the rail, we find its terms to not affect Kentucky OSHA's application of the cited standard to an employee standing on the raised end of a belt loader some two feet beyond the raised rail. Because we are not persuaded the Emery settlement applies to the case before us, we assign it no weight.

Within the same paragraph I, d of the settlement, the parties reached an agreement which in much more detail resolved instance s of the same item I a. Instance s says:

> 29 CFR 1910.23 (c): Open-sided floors or platforms 4 feet or more above the adjacent floor or ground level were not guarded by standard railings...on all open sides...
> Abatement of Item 1, Instance s has been accomplished in that all of the European-style dollies (over 500 total) were fitted with fenders that cover the openings around the wheels on dollies. The locks on the European-style dollies were retrofitted to significantly close the openings, and the walking areas on the dollies were treated with Wing Walk to reduce slipping hazards.
>
> (emphasis added)

Our case is not about European-style dollies, fenders around wheels, locks or a product called Wing Walk apparently used "to reduce slipping hazards." Having said that, however, we find ourselves wondering if perhaps Mr. Wampler would not have fallen off the top end of the belt loader if the surface upon which he stood had been treated with Wing Walk, although we admit we do not know what Wing Walk is except it was not mentioned by anyone who testified for UPS.

While we have found the Emery settlement is not persuasive and have therefore accorded it no weight, the settlement is logically connected to UPS's affirmative defense of infeasibility and is yet another reason why UPS failed to prove it had tried every abatement solution either it or its industry knew about. Dun-Par, supra. To prove it was searching for solutions to its belt loader problem and prevail on element two of its defense, a UPS witness, given the company's knowledge of the Emery settlement, would have had to say 'we tried Wing Walk but it didn't work' or 'Wing Walk cannot be used on a belt loader.' Dun-Par requires an employer who has raised the infeasibility defense to actively search for alternative solutions.

d

A prior inspection at UPS did not result in a citation. UPS argues this is proof it should not have been cited in our case. UPS said labor is estopped from issuing a citation because of the prior inspection.

Exhibit 8 is Compliance Officer Jesse Lewis's report of his 2004 inspection of the UPS facility at the Louisville airport. Labor had received a complaint alleging a fall hazard when

employees used a belt loader to gain access to a cargo aircraft door. At page 10 of Mr. Lewis's report it says no citation would be issued.

UPS in its petition for discretionary review argues this 2004 inspection raises what it describes as fair notice and equitable estoppel defenses to the instant citation, citing to Miami Industries, Inc, CCH OSHD 29,465, BNA 15 OSHC 1258 (1991). UPS says it cannot be held to have violated a standard when it "fails to receive prior fair notice of the conduct required of it." PDR 20. In the Miami case, the commission said:

> We find that OSHA misled Miami into believing that a hinged and removable panel guard that it had installed following an earlier citation was sufficient to comply with the terms of the standard. Accordingly, we conclude that Miami was denied fair notice that the Secretary considered its existing panel guards to be inadequate.
>
> At CCH page 39,736, 15 OSHC 1258.

For our purposes, the facts of the Miami case are easily stated. Federal OSHA inspected Miami Industries and found a large roller in a steel mill. A bearing on the roller had to be periodically lubricated. Miami had installed a small door which when open exposed the spinning bearing so it could be lubricated; when the small door was open, the rotating bearing was exposed and not guarded as required by the machine guarding standard. Federal OSHA investigated and issued Miami a letter telling them the door solution was acceptable. After sending out the letter OSHA inspected Miami periodically for ten years without citation. Then OSHA, without withdrawing or disavowing the letter, inspected again and issued a citation. The citation was dismissed. What the commission found critical was OSHA's issuance of a letter upon which Miami thereafter relied.

UPS has misconstrued Mr. Lewis's report. It says in part:

> ...According to the division of safety compliance the scaffolding

> standard would be applied to belt drive as it is not a fixed platform and the requirements for fall protection do not apply until the height exceeds ten (10) feet. The application of the standard is questionable in this situation.
>
> Exhibit 8, page 10 (emphasis added)

This report is about the potential for citing the scaffold standard. That is not our case: a citation issued under the authority of 29 CFR 1910.23(c) (1) which applies to protection of open-sided floors, platforms, and runways.

Mr. Lewis's report discusses the application of the scaffolding standard to the "belt drive." The citation before us is not about the belt drive but instead the area on the belt loader where UPS employees stand when opening and closing the cargo door on MD 11s. UPS was not cited for exposing its employees to falls while walking or standing on the belt drive.

Our review of exhibit 8 confirms labor did not write a letter to UPS about its 2004 inspection. We have three reasons to give no credence to the 2004 inspection and UPS's Miami arguments. One, the Kentucky department of labor did not issue a "Miami" letter. Two, the inspection was about the application of the scaffolding standard to the belt drive. Three, case law says an inspection without a citation will not prevent the issuance of a citation at a subsequent inspection unless labor has taken some affirmative step (a letter) to communicate its acceptance of the company's abatement of the hazard. Miami Industries, supra.

The general rule is labor is not ordinarily estopped from issuing a citation by the fact it did not issue a citation for the same condition in a previous inspection. Secretary of Labor v Daniel Marr and Son Company, 763 F2d 477, 484 (CA1 1985), CCH OSHD 27,313, page 35,312, BNA 12 OSHC 1361, 1366.[26] In Daniel Marr, the court said "An employer cannot...rely on the Secretary's failure to issue citations."

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[26] See Rabinowitz, 2d ed, chapter 6, page 161, footnote 79.

In Seibel Modern Manufacturing and Welding Corp, CCH OSHD 29,442, page 39,681, BNA 15 OSHC 1218, 1224 (1991), citing to Columbian Art Works, CCH OSHD 25,737, BNA 10 OSHC 1132 and Lukens Steel Co, CCH OSHD 25,742, BNA 10 OSHC 1115, the federal commission says an employer may not use a prior inspection where no citation was issued as a defense. [B]"ecause compliance with the Act is a continuing obligation, an employer cannot deny the existence of or its knowledge of a cited hazard by relying on the Secretary's earlier failure to cite the condition...In essence, the mere fact of prior inspections does not give rise to an inference that OSHA made an earlier decision that there was no hazard, and does not preclude the Secretary from pursuing a later citation."

> In any event, it is well-established that OSHA is not bound by the representations or interpretations of its compliance officers. L. R. Willson & Son v Donovan, 685 F2d 664, 675 (DC Cir 1982); Western Steel Co, CCH OSHD 21,054, BNA 4 OSHC 1640, 1643...
>
> Field and Associates, a review commission decision, CCH OSHD 32,330, page 49,547, BNA 19 OSHC 1379, 1381 (2001), footnote 8.

If this were not so, then a company would, inspection after inspection, be inoculated from being cited for hazards a CO had missed at a previous inspection.

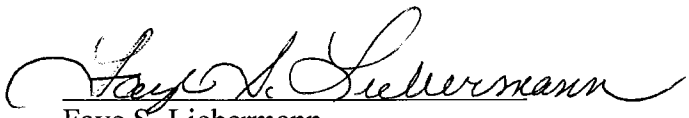
Daniel Marr, Seibel Modern Manufacturing, Columbian Art Works and Field Associates, supra, state the general rule. Miami Industries, supra, is distinguishable from our case because federal OSHA had sent Miami a letter saying the method of abatement was sufficient.

In our case the Kentucky department of labor did not issue UPS a Miami abatement letter.

We affirm the citation and, because it was not raised as an issue, the $5,000 penalty.

It is so ordered.

September 1, 2010.



Faye S. Liebermann
Chair

Michael L. Mullins
Commissioner

Paul Cecil Green
Commissioner

Certificate of Service

I certify a copy of this decision and order of the commission was served on September 1, 2010 on the following in the manner indicated:

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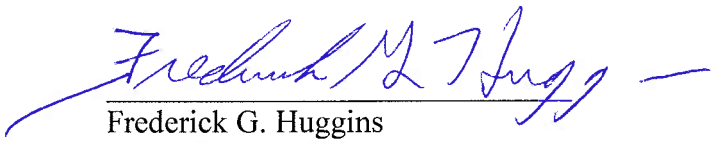

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