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MN OSHD No. 4570
OSHI No. B0043-016-93

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Gary W. Bastian, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

v.

IBP, Inc.,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 8:30 a.m. on October 29, 1997, at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, in the City of Minneapolis, Minnesota. The record closed on January 20, 1998, the date on which the Department's Reply Memorandum was received.

Susan C. Gretz, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55101, appeared on behalf of the Commissioner of the Department of Labor and Industry ("Complainant"). Charles M. Chadd, Esq. and Jerome K. Bowman, Esq., of the firm of Ross & Hardies, 150 North Michigan Avenue, Chicago, Illinois 60601-7567, appeared representing the Respondent, IBP, Inc. ("Respondent" or "IBP").

NOTICE

Notice is hereby given that under Minn. Stat. § 182.664, subd. 5, this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following the service by mail of this decision. The procedures for appeal are set out at Minn. Rules Ch. 5215.

STATEMENT OF ISSUE

The issue in this contested case proceeding is whether the Respondent was in violation of OSH rules requiring either a railing or personal protective equipment for fall protection on raised platforms in the workplace, and if so, what penalty is appropriate.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent operates a plant in Luverne, Minnesota, which slaughters and prepares beef cattle for further processing at another IBP plant. The slaughter department of the plant contains four elevated work platforms from which employees perform various functions, including cutting, cleaning and transferring operations on beef carcasses. The carcasses are hung on an elevated rail and are moved from work station to work station by a chain.

2. On November 15-17, 1993, four Department OSH investigators conducted an inspection of the Respondent's Luverne, Minnesota plant. On March 11, 1994, the Department issued a citation to IBP alleging a violation of federal regulations requiring toeboards and protective equipment at four work stations, namely the McClure knife position, the transfer man position, the second legger position, and the high trim position. Department's Ex. 1. The penalty proposed was \$1,150, however, the parties subsequently agreed that an appropriate penalty in the event a serious violation is found is \$950.

3. The Respondent subsequently filed a Notice of Contest on April 1, 1994. A Summons and Complaint in this matter was served by the Department on the Respondent on June 27, 1994. The Respondent filed a Request for a Contested Hearing with the Department on April 18, 1997, and filed an Answer with the Department on April 21, 1997. The Department then served a Notice of and Order for Hearing in this matter on June 27, 1997. The hearing date was set for October 29, 1997.

4. Each of the four elevated work platforms in question are more than four feet above the ground. Tr. 18. The highest is approximately nine feet. Tr. 48. The work platforms have guardrailing on three sides. Tr. 133-34, 240. The fourth side is the work area that the beef carcasses pass by. Three of the four work platforms had four-inch toeboards on the side and one (the McClure knife position) did not. Tr. 21, Dept. Ex. 18. The toeboard on the McClure knife position had been removed for an ergonomic experiment. Tr. 151. Each platform is approximately 2 to 3 feet from front to back. Tr. 189, 193. Each work platform had a non-slip material on it, Tr. 133-34, and employees wear non-skid steel-toed boots. Tr. 144. The employees also wear hard hats, earplugs, rubber and mesh aprons, and gloves. Tr. 155.

5. None of the employees on the work platforms wore any personal protective equipment to guard against a fall, such as a belt and lanyard.

6. As the carcasses move along the side of the platforms, there is a distance of approximately three to five feet between the carcasses in order to prevent cross-contamination. Tr. 23, Dept. Exs. 15 and 16. Each carcass weighs approximately

1200-1300 pounds. Tr. 161. Employees are trained to step back on the platform when there is no carcass in front of them. Tr. 208.

7. One means of protecting against a fall would be for the employee to wear a safety belt attached to a lanyard which is then attached to an anchoring point behind the employee, such as the wall or ceiling. This restraint system would only allow the employee to go as far as the edge of the platform. Tr. 29.

8. After the citation was issued in 1993, IBP put a belt and lanyard on the transfer person and tied it off behind him to see if it was feasible. Tr. 162. Due to the length of the lanyard, the employee got tangled up in it and complained about getting sore ribs. Tr. 163.

9. During the 1970s, federal OSHA advised two meat packing companies that the use of a safety belt and lanyard for employees working on platforms over four feet from the ground was an acceptable means of complying with federal regulations. Dept. Ex. 4, pp. 3-7. Federal OSHA also advised its field staff that failure to provide a standard railing on an elevated work platform would be a *de minimus* violation if alternative protection such as a safety belt and lanyard, was provided. Dept. Ex. 4, pp. 8-9.

10. An OSH Division policy in effect at the time of the inspection also provided that the lack of the guardrail on work platforms over four feet could be considered a *de minimus* violation if guardrails were not feasible and alternative protections such as safety belts and lanyards was provided. Dept. Ex. 3.

11. In 1988, federal OSHA recommended to a medium-sized meat packer that its employees working on elevated platforms be provided with body belts with a lanyard attached via a sliding ring to an overhead rail. The employer installed the system and found that it did not slow production and that it was not uncomfortable or inconvenient for employees. Dept. Ex. 4, p. 2.

12. In 1990, federal OSHA published a proposed standard dealing with elevated work platforms. Dept. Ex. 5. The proposed standard has not been adopted. Tr. 41. The proposed standard exempted slaughtering facility platforms from the guardrail and fall protection requirements if access was limited to trained employees, toeboards are provided, and the non-working sides of the platform are guarded. Dept. Ex. 5, p. 21. The Luverne plant's elevated work platforms comply with the four elements listed in the proposed standard in order to qualify for an exemption. Tr. 169.

13. Under federal policy, if an employer complies with the proposed standard rather than the standard in effect at the time of the inspection and its action clearly provides equal or greater employee protection, any violation is classified as *de minimus* and no citation is issued. Respondent's Ex. 6, pp. 25-26, Tr. 246.

14. The Minnesota OSDH Field Manual provides that when a proposed OSHA standard is followed by the employer rather than the OSHA standard in effect at the time of the inspection, and employer's action clearly provides equal or greater employee protection, any violation will be considered *de minimus*. Dept. Ex. 6. In practice, however, the OSDH does not recognize *de minimus* violations. Tr. 45.

15. The Minnesota OSHD has a policy which provides that fall protection must be used with working platforms over four feet except if the carcasses passing the work station create a "wall" such as when the carcasses are hooked together with "C" hooks. If the inspector can see the body of an employee in-between carcasses, a citation must be issued. Dept. Ex. 7, p. 2.

16. The Minnesota Beef plant in Buffalo Lake, Minnesota, adopted a safety belt and lanyard fall protection system for its workers on elevated platforms in 1997 after being cited for a violation by Minnesota OSHD. Tr. 78--83, Dept. Ex. 10. The employees at Minnesota Beef wear the lanyard and safety belt outside of their rubber suits. Tr. 174, Dept. Ex. 10. The employees at Minnesota Beef have not had any increased incident of ergonomic injuries, or an increase in heat stress, nor have they gotten twisted up with each other on work platforms. Tr. 114-115.

17. In 1995, a worker on an elevated platform at the Caldwell Packing Company was using a safety belt and lanyard. Dept. Ex. 11, Tr. 84.

18. The IBP Plant in Luverne was previously inspected in 1988. At that time no citations were issued concerning inadequate fall protection. Tr. 90, Respondent's Ex. 4. After the 1988 inspection, the Commissioner of the Department of Labor and Industry wrote a letter to the local newspaper lauding the Luverne Plant's exemplary workplace safety program. Respondent's Ex. 5.

19. Swift & Company in Worthington, Minnesota, which operates a slaughter operation for hogs, requires safety belts and lanyards for employees working on platforms. Tr. 104. The employees at Swift & Company appear to have freedom of movement, do not get tangled up with each other, have not experienced an increase in ergonomic injuries, and have not had problems with heat stress. Tr. 104-106.

20. Since the time of the inspection in 1993, IBP has added a second employee to the second legger's position and the McClure knife position has been changed to two separate work stations. Tr. 128-129, Respondent Exs. 1 and 2.

21. The IBP Luverne plant has not had an injury in the slaughter department caused by a fall from an elevated work platform while the plant was in operation in the past 35 years. Tr. 136. One maintenance employee did fall from a work platform when he failed to hook up his chain. He suffered a bruise on his side. Tr. 183-184.

22. IBP operates 12 beef processing plants, one of which is in Canada. Tr. 233. Each plant has work platforms similar to that in Luverne. None of the plants have fall protection in place for those elevated work platforms. Tr. 236-240. Each plant complies with the proposed 1990 federal standard. Dept. Ex. 5.

23. In 1993, federal OSHA cited IBP's Lexington, Nebraska plant for lack of guardrails or personal protective equipment on elevated work platforms. Respondent's Ex. 7. In a 1995 settlement agreement, the citation was withdrawn and the penalty reduced to zero dollars. Respondent's Ex. 8, Tr. 248.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 182.661, subd. 3, 182.664 and 14.50.

2. The Department gave proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law or rule.

3. The Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7.

4. Minn. Stat. § 182.653, subd. 3, requires each employer to comply with Occupational Safety and Health Standards or Rules adopted pursuant to Ch. 182 of the statutes.

5. The Department has adopted the specific federal standard set out at 29 CFR § 1910.23, entitled, "Guarding floor and wall openings and holes" and subd. (c)(1), which states:

Protection of open-sided floors, platforms, and runways.

(1) Every open-sided floor or platform four 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. The railings shall be provided with a toeboard wherever, beneath the open sides,

- (i) persons can pass,
- (ii) there is moving machinery, or
- (iii) there is equipment with which falling materials could create a hazard.

6. That the Complainant has failed to prove a violation of 29 C.F.R. § 1910.23 by a preponderance of the evidence.

7. The Department has also adopted the federal standard set out at 29 CFR § 1910.132(a) which is the general requirement for personal protective equipment and states:

Application. Protective equipment, including personal protective equipment for eyes, face, head and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used and maintained in a sanitary and reliable condition whenever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation, or physical contact.

8. When proving violation of a general standard, the Complainant has the burden of showing that (a) a hazard exists which presents a significant risk of harm to employees, and (b) the employer had actual or constructive notice that the general standard required personal protective equipment, and (c) personal protective equipment is available and feasible which would eliminate the hazard. ConAgra Flour, 16 OSHC (BNA) 1137, 1140-42; 1993 OSHD (CCH) ¶ 30,045 (Rev. Comm. 1993).

9. The Complainant has proved that a hazard exists that presents a significant risk of harm to employees.

10. The Complainant has proved that personal protective equipment is available and feasible to eliminate the hazard.

11. The Complainant has failed to prove that the Respondent had actual or constructive notice that it was required to use personal protective equipment on the work platform in question.

12. That the Respondent has actual notice of the requirements of the standard as a result of this contested case proceeding and is therefore subject to reinspection and issuance of a subsequent citation if it fails to provide personal protective equipment to its work platform employees.

13. Under Minn. Stat. § 182.651, subd. 12, a "serious violation" is a violation of any standard other than a *de minimus* violation which creates a substantial probability that death or serious physical harm could result from a practice, operation or process adopted in a place of employment unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation.

14. The Complainant has not proved that the violation in this matter was serious within the meaning of the above definition since the Complainant has not shown that the Respondent could reasonably have known it was in violation.

15. Under Minn. Stat. § 182.666, subd. 6, the Commissioner has authority to assess fines giving due consideration to the appropriateness of the fine with respect to the size of the business and the employer, the gravity of the violation, the good faith of the employer and the history of previous violations.

16. The fine stipulated to by the Department and the Respondent would be appropriate if a violation were found.

17. A *de minimus* violation can be found where an employer is complying with a proposed standard as opposed to an existing standard and the employer's action clearly provides equal or greater employee protection.

18. The Respondent has demonstrated that it was in compliance with the proposed federal standard.

19. The Respondent has not proved that its action clearly provided equal or greater employee protection.

20. The foregoing Conclusions of Law are based on the reasons set out in the Memorandum which follows and which is incorporated into these Conclusions by reference.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

- (1.) The Citation is hereby VACATED.
- (2.) The penalty is hereby DISMISSED.

Dated this 4th day of February, 1998.

GEORGE A. BECK
Administrative Law Judge

Reported: Pat Carl & Associates, Transcript Prepared.

MEMORANDUM

The Complainant issued item number 2 of Citation 1 to the Respondent on March 11, 1994. It alleged violations at four elevated work platforms in the Respondent's Luverne plant on November 15-17, 1993. The citation described the violations as: "Open sided floors or platforms four feet or more above adjacent floor or ground level were not provided with toeboard where required and protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered". The citation alleged that two standards were violated, namely 29 C.F.R. §§ 1910.23(c)(1) and 1910.132(a).

The Department argues that because it has cited both a specific standard, which presumes the existence of a hazard, and a general standard, which does not, it should not have to prove the existence of a hazard in this case. The Commissioner cites *Connecticut Natural Gas Corp.*, 6 OSHC (BNA) 1796, 1978 OSHD (CCH) ¶ 22,874 (Rev. Comm. 1978) as authority for this proposition. In that case, however, the employer challenged a specific trenching standard on the grounds of vagueness and the Commission rejected the challenge because it concluded that other specific trenching standards when read together with the one at issue made clear what was required by the regulations cited by federal compliance officers. In this case, the Department cited a specific standard requiring guardrails and toeboards on elevated work platforms as well as the general personal protective equipment standard. The Commissioner has the burden to prove a hazard in the case of the general duty clause violation which is alleged. *Connecticut Natural Gas Corp.* does not create an exception to this rule. The citation of the specific standard related to toeboards would not provide any reason to ease the Commissioner's ordinary burden of proof for the general personal protective equipment standard.

The Complainant has failed to prove a violation of 29 C.F.R. § 1910.23(c)(1). The citation and the testimony of the investigator indicate that the citation only related to toeboards. Tr. 53. The Department admitted that the working side of these platforms could not be protected with a guardrail in light of the work being done. Although the citation does not allege any need for guardrails on the work platforms, the Commissioner does indicate in his brief that the Respondent is in violation of this guardrail requirement because the McClure knife position had no side guardrails at the time of the inspection. The citation, of course, does not allege any guardrail violation. However, even if such a violation had been alleged, neither the photographs nor the video introduced by the Complainant clearly show a lack of guardrails other than on the working side of the platform. The testimony of Respondent's employees is to the contrary and there was no specific testimony by the Complainant's employees on the absence of guardrails. The record indicates that only one work platform lacked toeboards. The uncontradicted testimony was that the toeboard on the McClure knife position had been temporarily removed for an ergonomic experiment. Finding of Fact No. 4. This work position was being reconstructed at the time of the inspection. Under this factual situation, a violation of the guardrail and toeboard standard has not been proved.

The Department also alleged a violation of the general standard at 29 C.F.R. § 1910.132(a) which requires personal protective equipment when necessary by reason of a hazard capable of causing injury. In proving a violation of a general standard such

as this, the Commissioner's burden is to show that a hazard existed which presented a significant risk of harm, that personal protective equipment was available and feasible which would eliminate the hazard and that the employer had actual or constructive notice that the personal protective equipment was required. *S & H Riggers & Erectors, Inc.*, 7 OSHC (BNA) 1260, 1266, 1979 OSHD (CCH) ¶ 23,480 (1979); *ConAgra Flour Milling Co.*, 16 OSHC (BNA) 1137, 1993 OSHD (CCH) ¶ 30,045 (Rev. Comm. 1993).

The Complainant argues that the existence of a hazard is proved by the height of the platforms (from five feet to eight and one-half feet), the testimony of the OSH investigators that they observed a hazard and the fact that many safety standards recognize fall hazards. IBP argues, however, that there is no fall hazard due, in part, to the safety precautions it has taken such as training employees to recognize and avoid hazards, nonskid surfaces on the platforms, the use of nonskid boots, the use of toeboards and the use of guardrails on the nonworking sides of the platforms. It also points out that there have been no injuries during 35 years of production. The absence of injuries is relevant to whether or not a hazard existed, but it is not determinative. *ConAgra, supra*.

The employer also argues that the proposed federal standard dealing specifically with slaughtering facilities' platforms shows the lack of a hazard because it does not require personal protective equipment. The proposed standard, first proposed in 1990, has not been adopted since. Federal policy provides that if an employer is in compliance with a proposed standard, a violation will be found to be *de minimis* if the employer's action clearly provides equal or greater employee protection.

The Commissioner has made an adequate demonstration in this record that a hazard existed at the time of the citation. The photographs and video of the work platforms demonstrate that danger. The platforms stand along a moving line of beef carcasses weighing in excess of 1200 pounds apiece. Were an employee to fall from the height of any of these platforms into the moving line of beef carcasses, a significant injury could occur. This conclusion is supported by the Department's experienced investigators who have been trained in this area. Additionally, the testimony concerning the operation of other plants indicates that a hazard exists and that steps were taken to meet the perceived hazard. *Inland Steel Co.*, 12 OSHC (BNA) 1968, 1971-73, 1986-87 OSHD (CCH) ¶ 27,647 at p. 35,998. The safety precautions employed by IBP may reduce the risk, but they also underline the fact that a hazard does exist. Nor do such measures ensure that there is no risk of harm to employees. For example, the video of the plant indicates that employees do not always step back from the front of the work platform when there is no beef carcass in front of them. Additionally, some platforms provide little room to step back. The evidence indicates that the working surface is wet and may sometimes have blood or fat on it. Additionally, the fact that a maintenance employee fell from a platform and sustained an injury when he failed to use a chain indicates the presence of a hazard. The Complainant has proved by a preponderance of the evidence that a hazard exists which presented a significant risk of harm to the employees on the work platforms.

The Complainant must also show that personal protective equipment is available to eliminate the hazard and that its use is feasible. The Complainant's investigator and its advisor to employers on how to abate safety hazards both testified that a safety belt

and lanyard or a body harness and retractable lanyard is a feasible means of protecting the employees in question. Tr. 87-90, Tr. 266. The evidence in this record, including the photographs, video and testimony as to the duties performed by the employees, supports the conclusion that either a belt and lanyard or a harness and lanyard would keep the employees from falling from the platforms and would be a workable solution. The feasibility of the proposed systems is supported by the testimony of an employee at Minnesota Beef where workers on platforms wear a lanyard and safety belt without problems. Tr. 114-15; Finding of Fact No. 16. Similar testimony was offered in regard to a Swift & Company plant in Worthington (Finding of Fact No. 19) and a worker on an elevated platform at the Caldwell Packing Company (Finding of Fact No. 17).

IBP's argument in regard to feasibility is that a lanyard which would prevent a fall would prevent the employee from reaching all points on the platform. Conversely, it argues that if the system allowed the employee to reach all of the required work area, it would be long enough to allow the employee to fall off the edge of the platform. IBP indicates that it tested a belt and lanyard system in 1993 but that the employee complained of comfort problems and tangling problems.

The testimony of the Department's investigator and expert, together with the experience of three Minnesota employers, is sufficient to overcome IBP's hypothetical assertions that an effective lanyard would not allow an employee to reach all work areas on the platform. The record indicates that this is not a problem in other plants and it was not specifically mentioned as a problem in 1993 when a belt and lanyard was tested at the Luverne plant. Earlier argument by the Respondent that personal fall protection would cause increased incidences of heat stress or "static load" have now been apparently abandoned. The employee's assertion that USDA non-contamination requirements precluded a belt and lanyard have also been abandoned since it appears that the belt or harness could be worn underneath the employee's work apparel. The fact that other similar plants have established fall protection in similar circumstances and found it to be workable outweighs the concerns raised by the employer. See also, *Madison Foods, Inc. v. Marshall*, 630 F.2d 628, 629 (8th Cir. 1980).

The Complainant must also prove that IBP had sufficient notice, either actual or constructive, that the standard required the use of fall protection at the Luverne plant. IBP points out that it was inspected in 1988 and no citation was issued in regard to the elevated work platforms. However, the determination of a compliance officer at a prior inspection does not necessarily preclude a later citation. This is not a case of estoppel where an investigator specifically advised an employer that its workplace complied with the Act. The fact that IBP had not been cited in a prior inspection is only one factor in determining whether it had constructive notice that fall protection was required. *Del Cook Lumber Co.*, 6 OSHC (BNA) 1362, 1364, 1978 OSHD (CCH) ¶ 22,544 (Rev. Comm. 1978).

The Complainant further argues that IBP had notice of the violation because it had previously litigated the issue of fall protection on elevated work platforms. *IBP, Inc.* 9 OSHC (BNA) 1246, 1248, 1981 OSHD (CCH) ¶ 25,123 (Rev. Comm. 1981). The outcome of that case, however, was that the citation was vacated on the grounds that compliance was impossible. The Commissioner further asserts that IBP is chargeable with notice of OSHA case law rejecting the "wall of beef" defense and that IBP knew

that a proposed federal regulation would have no effect in the state of Minnesota. The Respondent is not asserting in this proceeding, however, that the carcasses themselves constitute adequate protection. Although the employer should have known that the federal standard had no impact in the state of Minnesota, which has its own OSHA program, the question is whether or not it had actual or constructive notice that in Minnesota it was required to use fall protection on its work platforms.

IBP's argument that it had no actual notice is supported by the fact that it had no production injuries from the cited platforms in 35 years. A lack of injuries is relevant to the question as to whether an employer lacked constructive knowledge of the hazard. *ConAgra Flour Milling Company, supra*. The proposed federal standard, while not law, does seem to be some evidence that the federal OSHA did not consider fall protection to be necessary when other safety precautions were taken. IBP had been the subject of not only the 1988 Luverne inspection with no fall hazard citation, but also five other inspections at other plants without a fall hazard citation. Tr. 248. As noted above, it also defended a similar 1993 citation at its Lexington, Nebraska plant through a settlement agreement in which the citation was withdrawn and the penalty reduced to zero dollars. Finding of Fact No. 23.

A factor in determining the existence of constructive notice is whether or not the employer complies with industry practice. *Armour Food Company*, 14 OSHC (BNA) 1817, 1820 1987-90 OSHD (CCH) ¶ 29,088 (Rev. Comm. 1990). This record indicates that some other plants have employed fall protection in similar situations. However, there was no testimony of an industry-wide practice to use personal protective equipment on elevated work platforms in slaughter houses. Furthermore, the testimony concerning the Minnesota Beef plant described the situation in 1997, the Caldwell Packing Company testimony related to 1995, and the Swift & Company testimony apparently related to the situation at the time of the hearing. Tr. 103. None of these situations would have provided notice to IBP in 1993 at the time of the inspection in question. Due to the factors described above, it is concluded that the Complainant has failed to carry his burden to show that the employer had actual or constructive notice that it was required to use fall protection in its plant.

The Complainant argues that even if IBP did not have adequate notice of a violation, the proper disposition is not to vacate the citation, but to reclassify it as nonserious, modify the penalty and require abatement of the hazard. In *Tobin Packing Company*, 5 OSHC (BNA) 1685, 1686, 1976-77, OSHD (CCH) ¶ 20,953 (Rev. Comm. 1977), citations for open-cited platform guarding were affirmed, but reduced from repeated serious to nonserious where the employer was deemed to lack notice due to no citations being issued in six previous inspections. However, the more relevant precedent is *Miami Industries, Inc.*, 1991 OSHD (CCH) ¶ 29,465 (Rev. Comm. 1991), affirmed 15 OSHC (BNA) 2025, 1992 OSHD (CCH) ¶ 29,922 (6th Cir. 1992), where the Review Commission noted the general rule that an employer cannot be held in violation of the Act if it fails to receive prior fair notice of the conduct required of it (p. 39,739). The Commission indicated that the appropriate remedy for a lack of notice on the part of the employer is to vacate the citation rather than to reclassify it and require abatement of the hazard (p. 39,745 citing *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1339 (6th Cir. 1978)). The Commission in the *Miami Industries* case observed that the employer

would ordinarily be subject to a reinspection and issuance of a subsequent citation if it failed to provide the protection of which it now had notice (p. 39,745.)

Accordingly, the citation in this case is dismissed on the grounds of a lack of notice. This proceeding provides notice to IBP that the Commissioner interprets 29 C.F.R. § 1910.132(a) as requiring fall protection on elevated work platforms at beef processing plants.

G.A.B.