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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY,
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. WEVA 86-250-R
Order No. 2711286; 3/19/86

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Blacksville No. 1 Mine

DECISION

Appearances: W. Henry Lawrence, Esq., Steptoe and Johnson,
Clarksburg, West Virginia, for the Contestant;
William T. Salzer, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This case concerns a Notice of Contest filed by the
contestant against the respondent pursuant to section 105(d) of
the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
815(d), challenging the legality of a section 104(d)(2) order
issued to the contestant at its Blacksville No. 1 Mine on March
19, 1986. The case was heard in Morgantown, West Virginia, and
while the contestant filed posthearing arguments, MSHA did not.
However, I have considered its oral argument's made during the
course of the hearing.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C.
301, et seq
2. Sections 104(a) and (d), and 105(d) of the Act.
3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Issues

The issues presented in this case are: (1) whether the conditions or practices cited by the inspector in his order constitute a violation of 30 C.F.R. 77.205, and (2) whether the violation was "significant and substantial." Additional issues raised by the parties are disposed of in the course of this decision.

Unwarrantable Failure Issue

At the conclusion of all of the testimony and evidence in this case, Inspector Magaiolo was recalled and asked whether he still believed the alleged violation resulted from contestant's unwarrantable failure to comply with the cited mandatory safety standard. Mr. Magaiolo stated that in light of the testimony presented by the contestant, particularly plant foreman Joe Fisher's testimony that he discovered the debris on the platform 2 hours before the issuance of the order and ordered it removed, he did not now believe that the violation was the result of an unwarrantable failure by the contestant to comply with the toeboard requirements of the cited standard. Mr. Magaiolo believed that the order should be modified to a section 104(a) citation, and MSHA's counsel agreed that this should be done. Counsel's motion in this regard was granted from the bench (Tr. 163-165).

Stipulation

1. The parties agreed that the contestant and the subject mine are subject to the Act and the jurisdiction of the Federal Mine Safety and Health Review Commission.

2. The parties agreed that assuming the contested order is affirmed, all of the pre-requisite statutory requirements for the existence of the "section 104(d) chain" have been met in this proceeding.

3. MSHA's counsel moved to modify the inspector's negligence finding from "high" to "moderate," and the motion was granted from the bench without objection.

Discussion

Section 104(d)(2) "S & S" Order No. 2711286, issued on March 19, 1986, cites an alleged violation of 77.205(e), and the condition or practice is described as follows:

On the surface of the prep plant area in the headhouse, on the No. 2 reclaim belt floor,

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there was approx. 13' of platform that requires toeboards. From this platform enormous amount of debris is accumulated and can be knocked to the below floor work areas. Citation 2711286 on 3/19 identified an entanglement of debris found this inspection. Toeboard was located on one side of the platform where a shovel and sledge hammer was laying partially over the edge. Due to the enormous amount of debris accumulated on this platform, it should have been obvious to management that a toeboard was needed.

MSHA's Testimony and Evidence

MSHA Inspector Joseph A. Migaiolo testified as to his background and experience, and he confirmed that he issued the contested order in question on March 19, 1986, and served it on mine management representative Patrick Wise who accompanied him during his inspection.

Mr. Migaiolo stated that he issued the order after finding that an elevated metal platform in the headhouse on the No. 2 reclaim belt floor did not have toeboards installed around its perimeter to prevent debris which was stored on the platform from falling off the end of the platform to the floor and ground below. He identified exhibit GÄ9, as a sketch of the platform which he made at the time he issued the order, and the debris which he observed is identified on the sketch. The debris consisted of conveyor belt strips, roof bolts, an 8 foot board, a metal platform plate weighing approximately 15 pounds, two pieces of metal plates weighing approximately 6 to 10 pounds, a 6 foot metal plate bent on one end, a bucket, a sledge hammer, and a shovel. The hammer and shovel were leaning against a toeboard which was installed along one side of the platform and they were protruding over the platform. The remaining items were located along the left and upper right side of the platform as shown in the sketch.

Mr. Migaiolo stated that a large drive motor was located on the platform, and the motor was used to drive the reclaim belt which passed under and by the end of the platform. The platform was approximately 10 to 12 feet above the belt floor, and access to the platform was by means of a walkway passing under it and up a stairway at the end of the platform.

Mr. Migaiolo stated that he asked Mr. Wise about the materials on the platform, and Mr. Wise advised him that the

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materials apparently became lodged in the reclaim belt and were taken off the belt and placed on the platform. Mr. Migaiolo marked his sketch, exhibit GÄ9, with green markings indicating the platform areas which lacked a toeboard. One area was 3 feet long and the other area was 9 feet long.

Mr. Migaiolo stated that the existing toeboards were from 4 to 8 inches in height and were welded to the side of the platform. In order to determine whether toeboards are required, one must first determine whether anyone would be passing or working under the platform. In his opinion, persons such as a cleanup man, an examiner, or a repairman would normally travel or work under or on the platform and would also go up the stairs to reach the platform. The platform was subject to vibration from the motor while the belt was running, as well as from the normal vibration of the headhouse, and he believed that it was reasonably likely that the vibration would cause the debris to fall off the platform to the floor below. If these materials struck someone, they would inflict serious injuries.

Mr. Migaiolo stated that he observed an unprotected 4 to 5 inch gap or opening between the edge of the platform and the belt below for a distance of 3 feet. Platform vibration could result in a roof bolt rolling over the edge of the platform where there was no toeboard, through the opening and to the ground some 40 feet below. The roof bolt could hit the windshield of an end loader which normally worked on the ground under the opening.

Mr. Migaiolo observed that the platform had been recently hosed down with water but the debris and materials had not been removed. He observed no coal dust accumulations on the platform. He described the area under the platform as a "vacant work area," and he did not believe that it was a "high traffic area." However, he still believed that the materials and debris on the platform could fall off the unprotected edges and strike someone in the work areas below. He also believed that anyone passing under the platform would not always use the travelway along the wall, and that they would have access to the stairway by passing under the platform from different directions.

Mr. Migaiolo described the mine operator as conscientious in the manner in which it examined the building, and indicated that the headhouse is inspected and cleaned up at least once a day. He confirmed that the platform had a 32 to 34 inch "double barrel" handrail installed around its perimeter. Although someone on the platform inspecting the motor would

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only be there for a few minutes, he believed that someone cleaning up coal in the work areas on the floor below would be there for 20 to 30 minutes and would be exposed to the hazard of the debris or material falling off because of the vibration or by someone inadvertently dropping something off the platform.

Mr. Migaiolo confirmed that he is the resident mine inspector and had previously inspected the mine. However, he could not recall previously inspecting the headhouse or platform. He stated that Mr. Wise advised him that the platform was used as a storage area for the debris from the belt, and he therefore concluded that the mine operator was aware of this. He also believed that the material and debris was collected over some period of time. Abatement was achieved within 3 hours after the order was issued, and toeboards were installed on the remaining portions of the platform (Tr. 5Ä40).

On cross-examination, Mr. Migaiolo stated that he looked over the edge of the platform through the opening between the platform and the belt below. He could see the ground through the opening but did not see an endloader. He believed that the endloader operated on the ground "swamp area" at least once a week cleaning up debris. He confirmed that he did not observe any of the material or debris on the platform moving or vibrating, and he did not ask anyone about how long the materials were there.

Mr. Migaiolo confirmed that he also issued a section 104(a) citation on March 19, 1986, because of the same debris and material on the platform. He believed the debris constituted a tripping and stumbling hazard to anyone on the platform, and he cited a violation of mandatory safety standard section 77.205(b), and made a finding of "moderate" negligence. When asked to explain and distinguish the difference between his section 104(a) citation and his section 104(d)(2) order, particularly since he found "moderate" negligence for both violations, he could not respond.

Mr. Migaiolo stated that since the plant had been in existence for a number of years, toeboards should have been installed on the platform. When asked to explain his prior testimony that toeboards are required only if persons working on the floor below are exposed to a hazard of being struck from falling objects, he reiterated that he believed that someone would be in the area at least once a day. He also explained that the platform was not previously cited because

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he probably did not observe any material or debris on the platform (Tr. 40Ä81).

Contestant's Testimony and Evidence

Joe Fisher, plant foreman, stated that he is the afternoon shift supervisor, and that he has supervisory authority over the reclaim belt headhouse. He stated that the platform in question holds a motor and speed reducer for the No. 2 reclaim belt. He identified exhibit CÄ4 as a sketch of the platform area in question, and he confirmed that a second short belt 36 inches wide, with 8 inches of extensions on either side passed directly under the platform in question. He stated that the area under the platform opposite the steps and the short belt was a rather cramped area where very little work was performed. He stated that belt idlers were changed in the area every 2 years, and that work on the ground "swamp area" under the headhouse was performed every 2 weeks by a payloader.

Mr. Fisher stated that normal access to the platform was along a travelway leading to the stairs next to the wall. He also stated that a second means of access was by a stairway located near the 36 inch toeboard depicted in exhibit CÄ4, and the platform was protected by a toeboard at that location. A 3 inch high toeboard was installed along the perimeter of the platform on either side of the motor and along the side extending to the stairs in order to abate the violation.

Mr. Fisher stated that maintenance on the belt motor is performed on the platform, and that debris which is caught in the short belt is removed after the belt is stopped and locked out. Since the short belt passes 15 inches under the platform close to the top, any debris or material removed from the belt is simply placed on the platform until it can be removed from the area with an endloader. He confirmed that a cleanup man and the shift foreman (himself) would have occasion to be on the platform at any given time and that the cleanup man would stand on the stairs to hose the area down.

Mr. Fisher stated that the platform is not used as a regular storage area, but is used only for the purpose of placing debris from the short belt there until it can be removed by an endloader. It is placed on the platform from the short belt because it is easy and convenient, and he does not want to throw the debris off the belt onto the floor below.

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Mr. Fisher confirmed that shortly before Inspector Migaiolo's inspection he went to the platform and observed some metal skirtboard material, strips of rubber, some roof bolts and a shovel on the platform. He instructed the cleanup man to hose down the platform with water and to remove the debris. He also confirmed that as the shift foreman, he is on the platform everyday.

Mr. Fisher stated that he did not believe additional toeboards were necessary on the platform because any debris falling off the platform along the edge where a new 30 and 48 inch long toeboard was installed for abatement would fall to the floor or the short belt below. It was his understanding that toeboards were only necessary where there was a possibility of something being kicked off the platform and striking someone below (Tr. 81Ä103).

On cross-examination, Mr. Fisher stated that the distance from the edge of the short belt to the stairs is approximately 16 inches, and that when he is on the platform to check the motor he is there for approximately 3 minutes. He confirmed that he was on the platform approximately 2 hours before the inspector arrived on the scene and observed the materials which he previously described. He did not observe the large board, but conceded that it could have been there. He picked up a roof bolt and placed it next to the existing toeboard.

Mr. Fisher confirmed that the platform vibrates, and he stated that the shovel is there to clean any coal that may be accumulated under the belt and the platform. He assumed that the sledge hammer was there to knock out any rock which may be lodged on the short belt chute. This work would be performed by someone standing on the short belt while it is stopped and locked out.

Mr. Fisher confirmed that he placed the materials on the platform shortly before the inspector's arrival and instructed the cleanup man to remove them and to hose down the platform. He also explained that if he is alone he cannot remove any debris taken from the belt by himself and must wait for the cleanup man who normally removes them with a payloader. He explained further that as a supervisor, he cannot perform any labor, and must rely on a union cleanup man to carry away any debris (Tr. 103Ä118).

Patrick Wise, dust foreman, stated that he sometimes serves as an escort for Federal inspectors, and he confirmed that he accompanied Inspector Migaiolo during his inspection of March 19, 1986. Mr. Wise stated that he observed a twisted

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roof bolt, a bucket, a shovel, a piece of steel, and a board on the platform in question. He also stated that a 6 inch high toeboard was in place near the stairs leading to the platform, and he circled the area on exhibit CÄ4. He stated that a 3 inch high toeboard was welded over the 6 inch toeboard which was in place to abate the violation.

Mr. Wise stated that Inspector Migaiolo asked him how long the debris had been on the platform, and that he informed the inspector that he did not know and that he was not responsible for the headhouse and did not usually go there to perform his dust foreman's duties. Mr. Wise denied that he told the inspector that the platform was used as a storage area. Mr. Wise agreed with Mr. Fisher's testimony concerning the short belt which ran under the platform (Tr. 121Ä130).

Robert W. Gross, Safety Supervisor, Blacksville No. 1 Mine, stated that his duties take him to the headhouse at least once a week while conducting his fire inspections. He stated that prior to the issuance of the order in question, he was not aware of the existence of the platform because it was isolated and hidden behind the reclaim belt. However, since the order was issued he inspects the platform regularly to insure that no debris has accumulated there. He confirmed that when he observed the platform prior to the abatement, a toeboard was in place adjacent to the top of the stairway.

Mr. Gross stated that he did not believe that the platform was a crossover, elevated walkway, elevated ramp, or stairway requiring toeboards. He confirmed that he discussed the matter concerning a roof bolt falling between the opening between the platform and the belt to the ground below where an endloader sometimes is working and that he informed the inspector that the machine had a canopy. The inspector took the position that the roof bolt could strike the windshield, but Mr. Gross believed that this was not likely since the windshield is straight rather than curved.

Mr. Gross stated that when he observed the platform the day after abatement, he noticed the difference in the height of the toeboard which was installed next to the steps to achieve abatement and the old one which was previously there.

Mr. Gross believed that it was unlikely that something could fall off the platform and injure someone because the area was not frequently travelled. He stated that the inspector was more interested in material falling from the corner of the platform to the ground where there was a space between the platform and the reclaim belt (Tr. 135Ä147).

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On cross-examination, Mr. Gross confirmed that while he could make decisions concerning the necessity for toeboards to be installed on the platform in question, he never considered this since he was unaware of the existence of the platform prior to the issuance of the violation. He confirmed that since the issuance of the violation in this case, more toeboards have been installed in elevated areas used to service equipment.

Mr. Gross confirmed that toeboards on the platform where there was prior access to the platform from another corner were installed when the plant was constructed prior to 1969 and he agreed that one could infer from this that the operator knew that an area around a stairway used for access to the platform presented a possible danger of material falling off the platform to the area below (Tr. 155). He also confirmed that no toeboards were installed along the cited perimeter of the platform above the short belt which passed under the platform. He stated that he did not know how the belt was constructed, and although a belt "extension" would lessen the likelihood of falling objects from the platform striking the belt and bouncing off, he conceded that such an occurrence was possible (Tr. 158).

Inspector Migaiolo was recalled by the Court, and he stated that he had no particular recollection of the existence of the short belt under the platform in question, but had no reason not to believe the testimony of the contestant's witnesses with respect to the existence of this belt. He also stated that he did not observe the 14-inch long toeboard installed by the stairway leading to the platform, and he confirmed that his principal concern was the fact that the missing toeboard along the perimeter of the platform as depicted at the upper left-hand corner of his sketch (exhibit GÄ9), presented a hazard of material such as a roof bolt falling between the opening to the ground below and striking the windshield of the front-end loader operating in the "swamp area" below (Tr. 160Ä164).

Contestant's Arguments

During the course of the hearing, contestant's counsel argued that subsection (e) of section 77.205, does not include platforms of the kind cited by the inspector in this case, and that it is inapplicable to the facts of this case. He pointed out that section 77.205 deals with "Travelways," and suggested that if the inspector were concerned that the platform were being used as a storage area, he should have cited section

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77.208(a), which requires the storage of materials "in a manner which minimizes stumbling or fall-of-material hazards." Counsel pointed out that if the materials in question should not have been on the platform, or if they simply presented a tripping hazard, there would be no need for toeboards. Counsel further pointed out that the contestant has installed toeboards in the plant as necessary, particularly over walkways where people are likely to be travelling or working, and that this is done to afford protection from falling objects. Counsel concluded that the only piece of equipment which would be operating below the platform was an end loader in the "swamp area" on the ground level under one corner of the platform, and that it was equipped with a roof and vertical windshield. He asserted that a roof bolt falling from the platform would hit the roof of the endloader, and that it was highly unlikely or foreseeable that it would strike the windshield and injure the operator. He also argued that the contestant's evidence established that no one travels or works under the platform, and that even if required by subsection (e), the contestant believed that toeboards are not necessary because no one is exposed to a falling object hazard (Tr. 167-168).

In his posthearing proposed findings and conclusions, contestant's counsel argues that the cited platform in question is not an elevated walkway in that it did not serve as an area over which workers travelled from one work area to another, and that subsection (e) of section 77.205 simply does not apply in this case. Except for an endloader with a steel roof and vertical windshield which operated in a "swamp area" on the ground below the platform approximately twice each month, counsel cites the absence of any evidence that any other individuals would be exposed to falling objects either inside or outside the slope headhouse containing the platform. With respect to the endloader, counsel asserts that it was highly unlikely that materials from the platform could fall through the 4 to 5 inch wide gap at one end of the platform to the "swamp area" some 40 feet below, and even if it did, it was highly unlikely, if not impossible, that falling debris would strike the operator because he is protected by a steel roof and the windshield is vertical. Assuming the applicability of subsection (e), counsel concludes that in these circumstances, a toeboard at the corner location of the platform where the gap existed was not necessary.

Counsel further argues that the inspector issued the citation on the mistaken and erroneous belief that the platform was used as a storage area and that employees worked or travelled under the edges of the platform where toeboards were not present. Counsel concludes that MSHA has presented

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no credible evidence to support these assumptions, and he points out that the evidence establishes that the debris taken from the belt and placed on the platform had existed there for approximately 2 hours, and that foreman Fisher had instructed an employee to remove the debris from the platform.

MSHA's Arguments

During oral argument, MSHA's counsel took the position that since subsection (e) is the only provision specifically referring to toeboards, the term "elevated walkways" as used in the standard encompasses work areas on elevated platforms on which individuals would be required to walk from one point to another, and that the requirement for toeboards where necessary is designed to prevent the type of hazards that would occur on platforms (Tr. 78).

MSHA's counsel also took the position that the question concerning the need for toeboards on the cited platform would depend on whether debris is placed there as a matter of practice, or whether it is a one-time occurrence (Tr. 150). He agreed that the installation of toeboards along some perimeter areas of the platform, and not along other locations, appeared to be based on judgments by mine management that some areas needed protection from falling objects, while others did not (Tr. 156). Counsel also concluded that the cited platform falls within section 77.205, and that the inspector's concern about objects falling off the edge to the ground floor below has been substantiated by the evidence and that the citation should be affirmed (Tr. 166).

Findings and Conclusions

The contestant in this case is charged with a violation of mandatory safety standard 30 C.F.R. 77.205(e), for failing to install toeboards along a 13-foot perimeter of an elevated metal platform located in the preparation plant headhouse. The platform contained a large motor used to drive a belt which passed under the platform, and access to the platform for purposes of servicing the motor is by a stairway at one end. The inspector issued the citation after finding that debris which had been taken from the belt and placed on the platform had not been removed or cleaned up. The inspector believed that the additional toeboards were required to prevent the debris from falling off the platform and striking people who he believed would be working or travelling or working under the platform.

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The inspector confirmed that he issued a second citation (exhibit CÄ3), at the same time, citing the same debris. The second citation was issued pursuant to subsection (b) of section 77.205, because the inspector believed it constituted a tripping or stumbling hazard to persons on the platform. That citation is not in issue in this case.

Section 77.205(e) provides as follows: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary toeboards shall be provided."

The critical question in this case is whether or not the cited platform area comes within the scope of section 77.205(e), and whether or not it may be considered a "crossover, elevated walkway, elevated ramp, or stairway" requiring toeboards "as necessary." Toeboards were in place at some locations on the platform, but not in others. The inspector was concerned that the debris found on the platform could fall off and strike someone walking or working under the platform.

There is no evidence in this case that the platform in question is a crossover, elevated ramp, or stairway. Even though the inspector described the area where the debris was found as a platform, and the standard makes no references to platforms, MSHA takes the position that the platform may be considered an elevated walkway for purposes of section 77.205(e). The contestant takes the position that the platform is not a walkway within the meaning of the cited standard. Even if it were, contestant takes the further position that toeboards would then only be required if it were necessary. On the facts of this case, contestant concludes that toeboards at the cited platform locations were not necessary.

In Sunbeam Coal Corporation, Docket No. PITT 79Ä213, 2 FMSHRC 192, 221 (January 29, 1980), I vacated a violation issued by an inspector who alleged that an elevated platform area used for maintenance purposes was a walkway within the meaning of section 77.205(a), and that safe access to the asserted walkway was not provided and maintained. In that case, MSHA attempted to amend its pleadings to cite a violation of subsection (e) of section 77.205, claiming that the platform area was a walkway within the meaning of that subsection. I ruled that the cited platform was in fact a platform work station used for maintenance purposes and not a walkway normally used by miners to travel in and through the plant, and the inspector candidly admitted that this was the case.

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In Climax Molybdenum Company, 2 FMSHRC 1884, 1887, July 25, 1980, Commission Judge Morris vacated a citation issued for an alleged violation of section 57.11Å2, a standard applicable to metal and nonmetal underground mines and identical in language to section 77.205(e). The operator was charged with a violation for failure to provide handrails on the top of the roof of a 10Åfoot high shed located inside a larger building. The inspector found empty cardboard boxes a foot from the edge of the roof of the shed and he believed the roof was used as a "storage area." Judge Morris vacated the citation on the ground that the top of the shed was not one of the areas described in the standard and was not a crossover, an elevated walkway, an elevated ramp, nor a stairway, as stated in the standard.

In Magma Copper Company, 1 FMSHRC 837, 857Å858, July 3, 1979, I vacated a citation for an alleged violation of section 57.11Å2, after finding that a work platform 100 feet above ground was not a "travelway" as defined by section 57.2. Section 57.2 defines a "travelway" as "a passage, walk or way used and designated for persons going from one place to another."

I take note of the fact that the inspector cited the same debris on the platform in support of a second citation issued at the same time the citation in issue here was issued. The second citation cited a violation of section 77.205(b) because the inspector believed that the debris also constituted a tripping or stumbling hazard to anyone on the platform. MSHA's attempts in this case to transform a platform into a walkway simply to support a violation of section 77.205(e) IS REJECTED.

On the facts of this case, I cannot conclude that MSHA has established that the platform in question was in fact a walkway as I understand the meaning of that term. While it is true that one person would have occasion to be on the platform in the normal course of any given day and would have to walk along the platform to reach the belt motor, the platform was not used as a regular and routine route of travel for miners travelling or working in the headhouse. It seems obvious to me that the inspector cited subsection (e) because it contains the only reference to toeboards, but does not include platforms among the locations encompassed by that standard. Subsection (b) refers to travelways and platforms and requires that they be maintained clear of extraneous material and other stumbling or slipping hazards. The inspector

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did not cite subsection (b) because it contains no requirements for toeboards.

It seems to me that after much litigation with respect to this standard, MSHA could easily cure the ambiguity by amending its standards to specifically include the term "platform" as part of subsection (e) and include a reference to toeboards as part of subsection (b). I conclude and find that the platform in question does not fall within the intent and meaning of subsection (e) of section 77.205, and the citation IS VACATED.

Assuming that I were to find that the platform area in question was an "elevated walkway" I would still vacate the citation on the ground that MSHA has failed to present any credible testimony or evidence that toeboards were necessary at the locations cited by the inspector. The regulatory language "where necessary" as found in section 77.205(e) obviously means that toeboards are not to be provided in every instance. Big Ten Corporation, 2 FMSHRC 2266, 2280 (August 15, 1980). In that case, former Commission Judge Stewart vacated a citation alleging a violation of section 77.205(e) on the ground that the walkway was sufficiently safe without toeboards since it was used approximately 1,500 times over a 5-year period and had never been previously cited for lack of toeboards. He concluded that the absence of any prior citations was indicative of the fact that the lack of toeboards did not constitute a violation of the standard.

The evidence in this case establishes that the platform in question is a "mezzanine area" located between the third and fourth floor of the headhouse, and that it is used to house a motor which drives a belt passing under the platform. Access to the platform is by means of a flight of steps located at one corner, and employees would have to pass under the platform to reach the stairway. The evidence also establishes that the normal route to the stairway is along a designated travelway beside a wall along and under one side of the elevated platform (Tr. 14-15). The inspector described the walkway area under the platform as a "vacant work area" and not a "high traffic area." However, he apparently believed that workers passing through this area to reach the stairway would be exposed to falling debris from the platform (Tr. 36). Although the inspector also believed that workers would pass under the platform at other locations, the contestant's credible testimony established that a belt was located under the platform and that it would block access to anyone passing under the platform. While the inspector could not recall the

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belt, he had no reason to dispute the testimony by the contestant in this regard, and I conclude that the belt did in fact pass under the platform and would serve as an impediment to anyone attempting to reach the stairway by walking under the platform.

MSHA has produced no credible testimony or evidence that anyone was exposed to any falling debris hazard in this case. I find the inspector's belief that a roof bolt could fall off the platform down between the small opening at the edge of platform and strike an endloader operating at ground level 40 feet below and cause injury to the equipment operator to be highly speculative. The contestant's credible testimony established that the endloader was protected by an overhead canopy and that the windshield is vertical. Further, the inspector conceded that the area under the platform is not a high traffic area and that any hazard would be limited to one person. Although he indicated that a repairman, cleanup man, or maintenance and examination personnel would be exposed to a falling debris hazard, these conclusions on his part are unsupported by any specific evidence establishing that this was in fact the case. The inspector did not contact or speak with any of these individuals, nor did he support his conclusions with facts.

Foreman Fisher confirmed that a toeboard was in place in the stairway area under the belt and platform to protect people using the stairway. With regard to the areas cited by the inspector, he confirmed that no toeboards were ever installed in those locations and that no inspectors had ever mentioned the need for toeboards in those areas during any prior inspections (Tr. 101). Mr. Fisher also stated that he can observe the platform area visually, and the only time he goes there is to check the belt motor oil and that this usually takes about 3 minutes (Tr. 109). Belt cleanup is performed under the platform, and the belt is greased twice a year (Tr. 113).

Dust foreman Wise stated that he spends little time in the platform area in question, but that the platform is "out of the way" and that prior to the citation he did not even know of its existence (Tr. 130). In his opinion, the likelihood of something falling off the platform and injuring someone was "one in a million" (Tr. 134).

Safety supervisor Gross testified that he normally walks through the headhouse once a week on Fridays, and that prior to the citation he was not even aware of the existence of the platform because "it 's hidden behind the belt." His normal

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route of travel while checking fire hoses and accumulations of combustible materials would take him under the belt and down the stairway along the back wall. However, since the issuance of the citation, he checks the platform for materials (Tr. 137Ä38). He did not consider the platform area as a "work area" and that people are not normally there (Tr. 138Ä139).

ORDER

In view of the foregoing findings and conclusions, the contest filed in this proceeding IS GRANTED, and the modified section 104(a) Citation No. 2711286, issued on March 19, 1986, charging a violation of 30 C.F.R. 77.205(e), IS VACATED.

George A. Koutras
Administrative Law Judge