

CCASE:  
AUSTIN POWER V. MSHA

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December 21, 1987  
AUSTIN POWER, INC.

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

Docket Nos. CENT 86-59-R  
CENT 86-60-R  
CENT 86-61-R

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

v.  
AUSTIN POWER, INC.

Docket No. CENT 86-40

BEFORE: Chairman Ford; Backley, Doyle, Lastowka and Nelson,  
Commissioners

DECISION

BY: Backley, Lastowka and Nelson, Commissioners

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), the issues presented include whether Commission Administrative Law Judge George A. Koutras erred in holding that Austin Power, Inc. ("Austin Power"), violated two surface coal mine safety standards: 30 C.F.R. § 77.1607(g) requiring equipment operators to be certain that all persons are clear before starting or moving equipment 1/ and 30 C.F.R. § 77.1710(g) mandating that employees be required to wear safety belts and

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1/ 30 C.F.R. § 77.1607(g) provides:

Equipment operators shall be certain, by signal or other means, that all persons are clear before starting or moving equipment.

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lines where there is a danger of falling. 2/ 8 FMSHRC 1671 (November 1986)(ALJ). The Commission granted Austin Power's petition for discretionary review. For the reasons that follow, we reverse the judge's conclusion that Austin Power violated section 77.1607(g) and affirm his finding that Austin Power violated section 77.1710(g).

This case arises out of a fatal accident that occurred on August 19, 1985, at the Big Brown Strip Mine located in Freestone County, Texas. The mine is a surface coal mine owned and operated

by Texas Utilities Company. Austin Power is an independent contractor and was engaged in erecting a cross-pit spreader at the mine. The spreader is an extremely large piece of tracked equipment that removes top soil from the area to be mined. Two separate conveyor belt booms extend horizontally from the spreader at different heights. The higher 70-meter conveyor belt boom and the lower 20-meter conveyor belt boom are designed to receive and transport topsoil that has been removed from the ground by the spreader's digging apparatus. Opposite these conveyor belt booms, another conveyor belt boom for discharging the topsoil extends horizontally from the spreader.

On the day of the events at issue, the electrical power to the spreader had not been connected and the booms were unable to be moved on their own. The 20-meter boom had been released from its shorings underneath the 70-meter boom and had been moved by a 518 Link-Belt crane laterally from west to east, so that five counterweights, each approximately 24,000 pounds in weight, could be installed. The counterweights balance the boom when in operation. In order to install the counterweights, two separate cranes were used. The 518 Link-Belt crane was connected to the receiving end of the 20-meter boom. The other crane, which was used to load the counterweights at the boom's discharge end, was near the boom's fulcrum.

After the loading of the counterweights was completed, the 20-meter boom was to be repositioned under the 70-meter boom. It was determined that the 518 Link-Belt crane's boom could not pass under the 70-meter boom and as a result, could not complete the procedure of repositioning the 20-meter boom underneath the 70-meter boom. Therefore, a cherry picker on the other side of the 70-meter boom was to swing the 20-meter boom from the point beyond which the crane could no longer proceed to the proper location under the 70-meter boom. Three employees of Austin Power were assigned to attach a wire-rope choker to the end of the 20-meter boom for the purpose of hooking it to the cherry picker. The three employees walked to the end of the 20-meter boom's covered walkway and stood on the walkway while the boom was being moved by the crane. The walkway was 36 feet above the ground and was equipped with guardrails and floor plates of metal grating.

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2/ 30 C.F.R. § 77.1710 provides in part:

Each employee working in a surface coal mine ... shall be required to wear protective clothing and devices as indicated below: ...

(g) Safety belts and lines where there is danger of falling....

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The three employees were wearing safety belts, but they did not "tie off," i.e., attach their lines to the boom.

One of Austin Power's employees, Steve Smith, was in the process of attaching the choker to the walkway frame near the end of the 20-meter boom while the other two employees were standing behind him. A rigging foreman for Austin Power, James Patterson, was on the ground, 35-40 feet from the end of the boom, observing the employees. While Smith was attaching the choker, an eyelet connecting a hydraulic device at the opposite end of the 20-meter boom broke.

The eyelet failure caused the end of the boom to jerk suddenly upwards in a "whiplash" motion. The three employees were propelled off the boom, and the metal floor grating separated from the walkway and fell to the ground. Smith fell to his death. The other two employees grabbed onto part of the boom as they fell and were not injured.

The following day, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Donald Summers, arrived at the mine to investigate the accident. As a result, Summers issued citations alleging violations of sections 77.1607(g) and 77.1710(g). Summers charged that because Smith and the other two employees were on the 20-meter boom while it was being moved by the crane, the crane operator "was not certain that all persons were in the clear before he put his machine into operation" and, consequently, that Austin Power had violated section 77.1607(g). Govt. Ex. P.1. Summers also charged that under 77.1710(g) the employees on the boom were required to have tied off their safety belts since they were exposed to a danger of falling. In addition, Summers found that both violations were "significant and substantial" and that Austin Power was negligent. The Secretary proposed civil penalty assessments in the amount of \$3,000 for each violation.

At the hearing before Judge Koutras, the Secretary contended that as applied to the facts of this case, section 77.1607(g) required the crane operator before starting or moving the crane to be certain that persons were not only clear of the crane, but also not on the crane's load, here the 20-meter boom. As to section 77.1710(g), the Secretary and the MSHA inspector conceded at the hearing that the two other employees present on the boom, but not involved in the actual installation of the choker, were not required to wear safety belts and to tie off. However, the Secretary asserted that a reasonable employer would have required Smith to tie off when assigning him to a task that required him to place his body between guardrails on an elevated walkway thereby creating a danger of falling. Austin Power responded that section 77.1607(g) did not apply to the circumstances that existed at the time of the accident. Austin Power argued that the employees were not riding the "load" of the crane and, in any event, were in the clear because the very

design and purpose of the 20-meter boom was to permit employee access. Austin Power further argued that section 77.1710(g) was not applicable, since working on the 20-meter boom did not involve a hazard of falling. Also, it argued that its employees were required to wear safety belts and lines where there was a danger of falling as evidenced by its safety rules.

The judge rejected Austin Power's arguments. He determined that section 77.1607(g) applied to the three employees "while on the moving boom which was being lifted and maneuvered about during the course of the

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workshift in question." 8 FMSHRC at 1716. He accordingly found that the crane operator had a duty to be certain that the employees were clear of the boom before the crane was ready to move the boom, that this duty was not met, and that section 77.1607(g) was therefore violated. *Id.* In concluding that Austin Power also violated 30 C.F.R. § 77.1710(g), the judge found that Smith's position on the walkway while in the process of installing the choker placed him in danger of falling. 8 FMSHRC at 1719-22. The judge found that "it should have been clear to a reasonably prudent person that a danger of falling existed and that Smith should have tied off." 8 FMSHRC at 1722. The judge rejected Austin Power's argument that its work rules regarding use of safety belts where a danger of falling is present were adequate to defeat the violation in this case. He found that an employee of Austin Power could reasonably have concluded that he was not required to tie off while performing work in an elevated walkway protected by handrails, 36 feet off the ground. 8 FMSHRC at 1724-25.

Finally, the judge concluded that the violations were "significant and substantial," and were the result of Austin Power's negligence. The judge assessed civil penalties of \$2,000 and \$2,500, respectively, for the violations. Austin Power challenges the judge's findings and conclusions regarding both violations. We hold that section 77.1607(g) requires the operator of equipment subject to the standard to be certain that all persons within the potential zone of danger are clear from reasonably foreseeable hazards resulting from the starting or moving of the equipment. We agree with the judge that the standard applied to the crane operator, but hold that the Secretary did not establish that the crane operator failed to make certain that all persons, including the three employees on the boom's walkway, were clear before he started or moved the equipment. Accordingly, we find no violation of the standard.

As contrasted with more detailed regulations, the requirement of section 77.1607(g) that "[e]quipment operators be certain ...

that all persons are clear before starting or moving equipment" is the kind of regulation made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). Generally, the adequacy of an equipment operator's efforts to comply with section 77.1607(g) is evaluated in each case with reference to an objective test of what actions would have been taken by a reasonably prudent person familiar with the mining industry, relevant facts, and the protective purpose of the standard. See, e.g., United States Steel Corp., 6 FMSHRC 1908, 1910 (August 1984); United States Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982). In this instance, such a determination requires consideration of what a reasonably prudent operator of the Link-Belt crane would have done under the circumstances to make certain that all persons were clear before he started or moved the crane.

Austin Power argues that the obvious purpose of the standard is to require an equipment operator to make certain that he does not hit bystanders with his equipment. According to Austin Power, the crane operator received proper signals and made certain that all bystanders were clear before starting or moving the crane and that the three employees were

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clear because the crane could not come into contact with them. A plain reading of section 77.1607(g) reveals that it does not limit the protection it affords to any particular class of persons, such as bystanders. It refers to "all persons" being clear. In addition, the language does not suggest that the hazard with which the standard is concerned is limited to situations in which people might be run over or hit by the equipment itself. Rather, the standard protects all persons within the potential zone of danger from all reasonably foreseeable hazards resulting from the starting or moving of the equipment. Under the standard, therefore, it was the duty of the crane operator to make certain that all persons within the potential zone of danger were clear of reasonably foreseeable hazards before he started or moved his equipment.

In this case, the 518 Link-Belt crane was being used to reposition a boom on the cross-pit spreader. As an integral part of the repositioning operation, the three Austin Power employees were assigned to go to the walkway of the boom. The walkway was intended by its very design to permit the presence and passage of workers during the operation of the spreader. Although the crane was to apply force to the boom in order to effectuate a lateral movement, the three employees were clear of any reasonably foreseeable hazard posed by that movement. They

were on a covered walkway that was protected by a fall protection system consisting of a top rail, mid-rail, and toe-board. Further, movement of the boom and its attached walkway was anticipated in the design and function of the spreader. The crane operator knew that the employees were on the walkway to transfer the 20-meter boom from his crane to the cherry picker on the opposite side and the employees knew that the boom was to be moved. The crane operator testified that he moved the rig upon receiving a signal from ground personnel. Tr. 154. The crane operator also testified that throughout the day of the accident he received signals and instructions from supervisory personnel. Tr. 133. Before the crane actually began to reposition the boom, the project general superintendent was actively involved in issuing instructions to the employees on the boom and to ground personnel. Tr. 249. James Patterson, the rigging foreman, was on the ground underneath the boom supervising the three employees and flagging the crane operator. Tr. 203. Thus, the crane operator was aware of the presence of the three employees on the protected walkway, was receiving signals, and made a determination that all persons were clear of any reasonably foreseeable danger resulting from the starting or moving of his equipment. Tr. 144. The record contains no proof that any of the employees on the walkway was in an unprotected position at the time the crane operator began to reposition the boom. Smith's attempt to attach the choker for hooking onto the cherry picker, placing him in a danger of falling as discussed below, appears to have occurred after the Link-Belt crane had begun to move the boom. Therefore, we find that the crane operator acted as a reasonably prudent person in similar circumstances would have and, therefore, met' the duty imposed by the standard. Consequently, we conclude that there is insufficient evidence to support the judge's finding of violation of section 77.1607(g). In concluding that Austin Power violated section 77.1710(g), which provides that employees "shall be required to wear ... safety belts and lines where there is a danger of falling," the judge determined that Smith

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was in danger of falling while attempting to attach the choker and he found the substance and enforcement of Austin Power's safety rules regarding the wearing of safety belts and lines to be lacking. 8 FMSHRC at 1722.25. In *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983), the Commission, construing the corollary safety belt standard applicable to underground metal and nonmetal mines, concluded that a danger of falling exists when "an informed reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." Further, in *Southwestern Illinois Coal*

Corp., 5 FMSHRC 1672, 1675 (October 1983), the Commission concluded that section 77.1710(g) mandates that an operator establish a program requiring the wearing of safety belts and lines where dangers of falling exist and enforce the requirement diligently.

The administrative law judge concluded that in the circumstances of the present case a reasonably prudent person would have recognized that a danger of falling existed and that Smith should have tied off. Our task on review is to determine whether substantial evidence supports the judge's finding. 30 U.S.C.

§ 823(d)(2)(A)(ii)(I). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). As recited by the judge, the evidence establishes that while attempting to attach the choker, Smith was on his knees near the end of the boom, reaching under the middle railing of the guardrail with at least his head outside the railing. 8 FMSHRC at 1722. His hands were occupied with swinging the choker cable under the walkway from one side and catching it on the other. This was occurring in a location 36 feet above ground. Given the circumstances and the work Smith was performing, we conclude that a reasonably prudent person would have recognized a danger of falling and would have tied off. Consequently, we hold that substantial evidence supports the finding of a violation of section 77.1710(g).

The judge also addressed Austin Power's safety rules concerning the use of safety belts and lines. The judge held that the safety rules were inadequate because under those rules an employee working 36 feet above ground on an elevated walkway protected by handrails could conclude that he was not required to tie off. In addition, the judge found the safety rules to be inadequate because under circumstances in which the employee reaches through the railings, the decision to tie off is left to the discretion of the employee. 8 FMSHRC at 1724-25. We agree with the Secretary that consideration of Austin Power's rules was unnecessary to a disposition of the case. In Southwestern, in response to the Secretary's argument that an operator must guarantee the wearing of safety belts, the Commission stated that "when an operator requires its employees to wear belts when needed and enforces that requirement, it has discharged its obligation under the regulation." 5 FMSHRC at 1675. In the instant case, the controlling issue is whether safety belts and lines were "needed," that is, whether there was a danger of falling, not whether Austin Power's program requiring the use of safety belts and lines was adequate. Austin Power did not regard Smith's failure to tie off under the circumstances he faced as a violation of its rules and policies because, in its view, no danger of falling was presented. The rigging foreman testified that Smith was not required to tie off,

Tr. 197, and this argument has been vigorously advanced on review. The issue of the adequacy of an operator's program and its enforcement is only relevant when an operator contends that an employee violated the

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requirements of its program due to the employee's disobedience or negligence. *Southwestern*, 5 FMSHRC at 1675 (quoting *North American Coal Corp.*, 3 IBMA 93, 107 (April 1974)). Because Austin Power does not contend that Smith violated its safety rules or that he was disobedient or negligent, but insists that Smith was not required to be tied off, *Southwestern Illinois* is inapposite. We conclude that substantial evidence supports the judge's finding that a danger of falling was present and we affirm his finding of a violation of section 77.1710(g).

Finally, we affirm the judge's finding that the violation of section 77.1710(g) was "significant and substantial" and was the result of Austin Power's negligence. A violation is properly designated significant and substantial "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981); *Youghiogheny s Ohio Coal Co.*, 9 FMSHRC 673, 677 (April 1987); see also, *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1078-79 (D.C. Cir. 1987). In *Mathies Coal Co.*, supra, 6 FMSHRC at 3.4 (January 1984), we explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The third element requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an injury producing event. Furthermore, it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984), and the violation itself "must be evaluated in terms of continued normal mining operations." *Youghiogheny & Ohio*, 9 FMSHRC at 677-78; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1575, 1574 (July 1984).

The discrete safety hazard contributed to by the violation of



section 77.1710(g) was the danger of falling. Based on the evidence recited above describing Smith's position on his knees with at least his head beyond the guardrails while attempting to attach the choker while 36 feet above ground, we conclude that even if the work had proceeded normally, a fall under the circumstances was reasonably likely. Accordingly, we affirm the judge's finding that the violation was of a significant and substantial nature.

Regarding the judge's finding of negligence in connection with this violation, the rigging foreman was directly supervising Smith's work from the ground and was able to observe Smith's body position and efforts to attach the choker. Tr. 195-97, 203. We agree with the judge that with the exercise of reasonable diligence, the foreman should have recognized the

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falling hazard to which Smith was exposed and should have instructed Smith to tie off. 8 FMSHRC 1730. The negligence of the foreman was properly imputed to the operator in determining the amount of civil penalty. Wilmot Mining Co., 9 FMSHRC 684, 687 (April 1987); Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-64 (August 1982). Accordingly, we reverse the judge's finding that Austin Power violated section 77.1607(g) and vacate the civil penalty assessed by the judge for the violation. In addition, we affirm the violation of section 77.1710(g) and the civil penalty assessed.

Richard V. Backley, Commissioner

James V. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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Chairman Ford and Commissioner Doyle, concurring in part and dissenting in part:

We join in the majority's decision to the extent that it reverses the administrative law judge's finding that Austin Power, Incorporated violated section 77.1607(g) and vacates the civil penalty assessed by the judge for that violation. We would, however, reverse the judge on a more basic ground, viz. that the standard does not apply to the facts presented in this case. We also respectfully dissent from the decision to the extent: that it affirms the judge's finding of a violation of section 77.1710(g) and the civil penalty assessed for that alleged violation.

30 C.F.R. §77.1607(g) provides:

Equipment operators shall be certain, by signal or other means, that all persons are clear before starting or moving equipment.

The Secretary asserts that this standard prohibits any employees from being on the boom of the spreader at any time while it is being moved. Tr. 46, 69, 257. He believe that the

plain meaning conveyed to a person of ordinary intelligence by the standard as drafted is far closer to that articulated by the crane operator at the hearing: "[I]t is your responsibility not to jump into a rig, crank it up and run over the mechanic that is changing your oil." Tr. 154. The hazard addressed in the crane operator's statement is that posed by self-propelled mobile equipment that is capable of injuring pedestrians or operators of nearby equipment who are not adequately forewarned of a start up or movement. Thus, the 518 Link-Belt crane operator was responsible for seeing that the ground around the crane and the path it was to take were clear before starting or moving the crane. His testimony indicates that he took those actions.

Section 77.1607(g) has been placed in Subpart Q - Loading and Haulage and contains as its own heading: "Loading and haulage equipment; operation." The record contains no evidence of the history or purpose of the section nor does it contain evidence of prior enforcement actions by the Secretary that would have put the operator on notice that this regulation prohibited anyone from being on the cross-pit spreader's boom at any time while it was being moved by the Link-Belt crane. On the contrary, another section" within Subpart O, subsection 77.1601(c), specifically deals with "Transportation of persons; restrictions" and specifically limits and prohibits riding or being transported outside the cabs and beds of mobile equipment, with no mention being made of the type

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of equipment at issue in this case. Further, section 77.1607(f) requires persons to notify the equipment operator before they get on or off loading and haulage equipment.

All of this leads us to the conclusion that, if it were the Secretary's intention to enjoin persons from riding on this spreader boom at any time that it was in motion, that intention was not adequately expressed in section 77.1607(g). See *Phelps Dodge Corporation v. FMSHRC, United Steelworkers of America, AFL-CIO, Local Union 616, Intervenor*, 681 F.2d 1189 (9th Cir. 1982).

"Laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Alabama By-Products*, 4 FMSHRC 2128, 2129 (December 1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)).

The majority, in finding coverage by the standard, characterizes it as one that is made "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981). However, such broad standards must afford reasonable notice of what is required or proscribed. *United States Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). We do not disagree that the adequacy of the operator's efforts to comply with those standards

that are designed to cover myriad circumstances is to be evaluated in each such case with reference to those actions that would have been taken by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purposes of the standard. However, in this case, the Secretary's position permits absolutely no latitude or discretion but, rather, asserts a very specific requirement: that no one be permitted on the boom of the cross-pit spreader while it is moving. If the Secretary's requirement is so specific, he could have, and should have, said so. See *Diamond Roofing Co., Inc.*, 528 F.2d 645 (5th Cir. 1976). As the Commission has held previously, broad standards "cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue [is] prohibited by the standard." *Mathies Coal Co.*, 5 FMSHRC 300, 303 (March 1983). Safety standards, if they are to ensure safety to miners and prevent accidents, must put the operator on notice beforehand of what is required of him.

We also dissent from the majority's affirmance of a violation by Austin Power of 30 CFR §77.1710(g) because the record fails to provide substantial evidence to support the judge's finding that a danger of falling existed.

30 CFR §77.1710(g) provides, in relevant part, as follows:

Each employee working in a surface coal mine ... shall be required to wear protective clothing and devices as indicated below: ...

(g) Safety belts and lines where there is danger of falling...

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Immediately prior to the accident, three employees were situated along a covered walkway that was attached to the 20-meter boom of the cross-pit spreader. The walkway was equipped with a guardrail that consisted of a top rail approximately 42 inches above the walkway surface, a mid rail and a toe board. The fatal accident occurred when an eyelet on the spreader broke and caused the 20-meter boom to jerk upwards, propelling the three employees upward from the walkway into the air. One of the employees, Steve Smith, fell to his death while the other two managed to regain a hold onto the structure. After initially charging that all three employees were in danger of falling, the Secretary conceded at the hearing that only Steve Smith was in danger of falling prior to the accident and, therefore, required to wear a safety belt and be tied off. The basis for the Secretary's allegation of violation was that Smith's work activity of installing a choker placed him in danger of falling. Therefore, analysis of whether Smith's work activity placed him in danger of falling must be made without consideration of the fact that Smith was propelled from the walkway as a result of the eyelet failure, an event

totally unrelated to his installation of the choker and, by all accounts, totally unforeseeable.

Four witnesses testified on the issue of whether Smith's installation of the choker placed him in danger of falling. MSHA inspector Donald Summers, who participated in the investigation of the accident, testified that there was a need for Smith to have a safety belt and be tied off if he was performing work "outside" the handrail. Tr. 105. However, Summers, who was not an eyewitness to the event and began the investigation two days after it occurred did not testify as to whether, by being "outside" the handrail, he meant one's entire body, a portion of the torso, or any body part extending beyond the handrail. The uncontradicted evidence was that Smith, who weighed 235 pounds, was on his knees installing the choker with only his hands and a portion of his head outside the railing, between the mid rail and the toe board. Tr. 163, 170, 171. Inspector Summers did not testify that this constituted being outside the railing, nor did he offer his opinion as to how Smith's actions would have put him in danger of falling. As mentioned, the inspector did not believe it was necessary to be tied off at all times when one was on the walkway. Indeed, Inspector Summers had traveled the very walkway in issue without being tied off with a safety line. Tr. 103-105.

The second witness was Russell Crowell, the operator of the 518 Link-Belt crane that was being used to move the spreader's 20-meter boom. Crowell was unable to observe Smith's position on the walkway at the time of the accident, but he testified that he and Smith had worked extensively on the spreader and he knew that Smith's practice was to tie off whenever there was a risk of falling. Tr. 143.

Jeffrey Arent, the third witness, was an eyewitness to the event, and was located on the same walkway as Smith when the eyelet failed. He testified that Smith was kneeling on the walkway at the time of the accident with his head "just barely out" and his hands "out there" (i.e. outside the guardrail) Tr. 163. Mr. Arent believed there was no need to tie off under those circumstances. Tr. 173.

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The last witness, James Patterson, rigging foreman at the site, was also an eyewitness. At the time of the accident he was on the ground some 35 to 40 feet from the end of the 20-meter boom. He observed Smith kneeling on the walkway, putting the choker around the framework. In his opinion Smith was not in danger of falling while performing that work. Tr. 197.

In order to establish substantial evidence that a danger of falling existed, the record must do more than create a suspicion of the existence of that fact. *Rivas v. Weinberger*, 475 F.2d 255, 257 (5th Cir. 1973). Anything in the record that "fairly detracts" from

the weight of the evidence must also be considered and a finding should not be sustained "merely on the basis of evidence which in and of itself justified it. without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn..." Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951). In this case, the testimony of the two eyewitnesses to the event, Arent and Patterson, that they did not believe that Smith's extension of his hands and part of his head beyond the guardrail placed him in any danger of falling, when coupled with the testimony of the crane operator that Smith was a careful individual who used his safety belt and line when exposed to a falling hazard, results in a record that provides formidable evidence that Smith was not exposed to such a hazard when he was installing the choker. This evidence must be considered along with the testimony of inspector Summers who was not at the scene at the time of accident, only 'understood' what Smith's position was while installing the choker, did not elaborate as to what he meant by being 'outside' the handrails and did not explain how Smith's actions would put him in danger of falling. Considering the entire record, we believe it fails to provide substantial evidence that a danger of falling existed prior to the totally unrelated, unforeseeable event of the eyelet failure.

There being no evidence to support the finding, the judge's determination that "Mr. Smith's position on the walkway while in the process of installing the choker in question placed him in danger of falling" is without foundation. 8 FMSHRC 1671, 1722 (November 1986). Similarly, the judge's statement that the railing afforded Smith "little protection a"nd that he [Smith] could have lost his balance while attempting to swing the choker under the walkway and fallen to the ground" are conclusions unsupported by the record. Id. at 1722. Accordingly, we would vacate the finding of a violation of 30 CFR \$77.1710(g).

Ford B. Ford, Chairman  
Joyce A. Doyle, Commissioner  
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