

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 BOARD OF EDUCATION OF THE CITY OF :
 BUFFALO (BUFFALO PUBLIC SCHOOLS), :
 :
 Petitioner, :
 :
 To Review Under Section 101 of the Labor Law: A :
 Notice of Violation and Order to Comply issued on :
 January 16, 2009, citing violations of the Public :
 Employee Safety and Health Act, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PES 09-004

RESOLUTION OF DECISION

APPEARANCES

Alexander C. Collichio, Buffalo Public Schools Office of Legal Counsel, for Petitioner.
Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

Paul McDonnell, Associate Architect, Department of Applied Services and School Planning in the Buffalo Public Schools, for Petitioner.
Paul Shemkovitz, Safety and Health Inspector, NYS Department of Labor, for Respondent.

WHEREAS:

On March 18, 2009, Petitioner Board of Education of the City of Buffalo (Buffalo Public Schools) (Petitioner or the District) filed a Petition contesting a Notice of Violation and Order to Comply (NOV) issued by the Respondent Commissioner of Labor (Respondent or Commissioner) on January 16, 2009. The Commissioner answered the Petition on May 18, 2009.

Upon notice to the parties a hearing was held on November 12, 2009 in Buffalo, New York before Anne P. Stevason, Esq., Chairperson of the Board and the designated Hearing Officer in this matter and LaMarr Jackson, Esq., Member of the Board. Each party was afforded a full opportunity to present evidence, to examine and cross-examine witnesses, to make statements relevant to the issues and to file post-hearing briefs.

This case involves the placement of a "ship's ladder" at All High Stadium in Buffalo, New York, to provide access to the press box located on the roof of the stadium. The Commissioner cited Petitioner for failing to comply with five Public Employee Safety and Health (PESH) regulations relating to "industrial stairs." The Petition alleges that the regulations regarding industrial stairs do not apply to ship's ladders and that even if they did apply, proper use of a ship's ladder is only a *de minimis* violation of the regulations.

The citations are as follows:

"Citation 1 Item 1 Type of Violation: **Serious**

29 CFR 1910.24(d): Fixed stairway(s) were less than 22 inches wide:

- a) The width of the treads on the press box stairs at All High Stadium is 18 inches between the stringers."

"Citation 1 Item 2 Type of Violation: **Serious**

29 CFR 1910.24(e): Fixed stairs were installed at an angle to the horizontal greater than 50 degrees:

- a) The press box stairs at All High Stadium are installed at an angel to the horizontal of approximately 59 degrees."

"Citation 1 Item 3 Type of Violation: **Serious**

29 CFR 1910.24(f): The treads of fixed stairs were not reasonably slip-resistance with a nonslip finish on nosings:

- a) The top tread of the press box stairs in All High Stadium is constructed of plywood or a similar material. No slip resistant finish or surface treatment has been applied to the tread surface or nosing to make the tread reasonably slip resistant."

"Citation 1 Item 4 Type of Violation: **Serious**

29 CFR 1910.24 (h): Fixed industrial stairs were not provided with standard railings and handrails installed in accordance with 29 CFR 1910.23.

- a) Structural steel railings, posts and top and intermediate rails were not constructed of 2-inch by 2-inch by 3/8-inch angels or other metal shapes of equivalent bending strength with posts spaced not more than 8 feet on centers. The railings on both sides of the press box stairs at All High Stadium lack intermediate rails and are constructed of round steel bar approximately 3/4-inch in diameter."

"Citation 1 Item 5 Type of Violation: Serious

29 CFR 1910.24(i): Fixed stairs did not have at least 7 feet of vertical clearance between stair treads and overhead obstructions, as measured from the leading edge of the tread:

- a) The vertical clearance from the lower edge of the hatchway to the 7th tread from the bottom of the press box stairs is less than 7 feet. The clearance there is approximately 5 feet – 7 inches.
- b) The vertical clearance from the underside of the roof to the 6th tread from the bottom of the press box stairs is less than 7 feet. The clearance there is approximately 6 feet-11 inches."

We affirm the citations. The use of a ship's ladder is permitted only when there is insufficient space to install industrial stairs. The District failed to prove that it was not feasible to install stairs that complied with the regulations at the location in issue.

SUMMARY OF EVIDENCE

The following stipulation of facts was admitted into evidence:

"1. This appeal is based on the violations of the Public Employee Safety and Health Act of 1980 cited by the Public Employee Safety and Health Bureau ("PESH") against the District upon inspection of the stairway leading to the press box at All High Stadium ("All-High") located at 2885 Main Street, Buffalo, NY, 14214. The Petitioner's Grounds Department, which maintains All-High, are members of the bargaining unit, AFSCME Local 264.

"2. Paul Shemkowitz ("Shemkowitz"), inspector for PESH, was assigned on November 18, 2008 to inspect All-High. This assignment was due to a Referral Report from the Occupational Safety and Health Administration ("OSHA"), dated November 14, 2008.

"3. On November 19, 2008, Shemkowitz inspected All High, accompanied by Supervisor of Grounds at All-High, Richard Finnegan and Director of PLANT Operations, Susan Eager. In his investigation notes Shemkowitz wrote that the horizontal slope of the stairway to the press box was 59 degrees, 16'1" in length, the stairway's tread was 18" wide between the stringers, the handrail was 3/4" in diameter, vertical clearance from the sixth tread from the bottom was 6'11", and from the seventh tread was 5'7". Shemkowitz noted that fixed industrial stairs are governed by 29 CFR § 1910.24 and that under this Section the angle of fixed industrial stairs can be from 30-50 degrees. Shemkowitz further noted that ship's stairs with a slope of 50-70 degrees are de minimis violations. An opening conference was held between Shemkowitz, Richard Finnegan, and Susan Eager on November 19, 2008. Another opening conference was held between Shemkowitz and President of AFSCME Local 264, Bill Travis on November 24, 2008.

"4. On January 16, 2009 [the District] was issued a Notice of Violation and Order to Comply by PESH. This Notice cited violations of 29 CFR §§ 1910.24(d); 1910.24(e); 1910.24(f); 1910.24(h); 1910.24(i), and fixed the abatement date for compliance with the citations at July 18, 2009. 29 CFR § 1910.24 is entitled "Fixed Industrial Stairs" and is contained within Chapter XVII of Subpart B of Title 29, entitled "Occupational Health and Safety Administration, Department of Labor".

"5. Upon receipt of this Notice of Violation and Order to Comply, Michael J. Looby, Esq. ("Looby") Legal Counsel to the District, requested an informal conference to be held between District representatives and New York State Department of Labor/PESH representatives. This informal conference was held on March 5, 2009 and was conducted by supervising Safety & Health Inspector, David A. Frederick ("Frederick"). In attendance at this informal conference were Looby, Associate Superintendent Mel Alston, Associate Superintendent Joseph P. Giusiana, Associate Architect Paul J. McDonnell, Law Clerk Gary Wilson, and Shemkovitz. An information conference report was issued by Frederick, which upheld the violations issued.

"6. In response to the informal conference report, Looby sent a letter dated March 11, 2009 to Frederick, clarifying the District's position that it is inappropriate to apply the standards of a fixed industrial ladder to a ship's ladder. Frederick responded to this letter in a letter dated May 15, 2009 stating that it was feasible to install a proper stairway at All-High and therefore the violations cited cannot be considered de minimis.

"7. Prior to July 18, 2009 the District barricaded the stairway to the press box at All-High by creating an enclosure of plywood panels measuring 7 feet high and 4 feet wide fastened together with screws. This barricade was approved by PESH as an appropriate temporary abatement, as it effectively closed off access to the stairway, press box and roof. The District subsequently filed a Petition for Modification of the Abatement Date (SH-971)."

Testimony of School District Associate Architect McDonnell

The District owns All-High Stadium which was constructed in 1928 and is an outdoor athletic facility used for football games, soccer games and track events. The press box is located on the Stadium roof and is accessed by the ship's ladder that is the subject of the citations. It is used by coaches, reporters, and camerapersons. Since the renovation of the field in 2006, the press box is used almost daily by anywhere from 2 to 3 people for a small sporting event to 12 to 15 for a big meet or game.

The Stadium's original plans include the ship's ladder which provides access from inside the stadium to the roof. However, neither the walkway to the press box nor the press box itself are in the original plans. Renovations were made on the stadium in 2006 but all the dimensions concerning the ship's ladder remained the same. At that time of the 2006 renovations the District considered putting the press box on the floor below the roof but

decided against it. There was a desire to keep the press box on the roof since it provided a unique view of the field.

Mr. McDonnell testified that the All-High Stadium's ship's ladder meets the industry standard for ship's ladders. There are New York and federal regulations governing fixed industrial stairs. The difference between a ship's ladder and fixed industrial stairs is the steepness or angle from the horizontal. Fixed industrial stairs are between 30 and 50 degrees, and a ship's ladder is above that, up to 75 degrees.

Mr. McDonnell examined the blueprints for the stadium and based upon his examination determined that fixed industrial stairs could not have been installed in place of a ship's ladder because there would be insufficient vertical space to clear the trusses that hold up the roof. Since the ship's ladder is at a steeper angle, it was the only appropriate way to access the hatch on the roof that goes to the press box.

Mr. McDonnell did not look into alternative ways to access the roof nor did the District avail itself of the construction and consultation services of PESH to abate the alleged violation which were offered. When asked if the truss could be moved or replaced with something that would allow for the necessary clearance for an industrial stair, Mr. McDonnell responded that "Nothing is impossible." If the District wanted to redesign the stadium, they would have to hire outside consultants and no structural changes were made during the 2006 renovations.

Testimony of PESH Safety and Health Inspector Shemkowitz

The PESH investigation began when DOL received a referral from federal OSHA recommending an inspection of the stairs at All-High Stadium after the death of a Buffalo News reporter at the stadium involving use of the ship's ladder. On November 19, 2008, Mr. Shemkowitz, engineer and Certified Safety Professional, conducted a partial safety and health inspection at the stadium and took a series of photographs and measurements of the subject stairs which led from the top of the seating area to the roof in order to get to the press box. The measurements included the height and width of the stairs, the length of the run, the angle of the stairs and the overhead clearance from each step. The measurements are noted in Item 3 in the Stipulation of Facts, quoted above. An opening conference with Petitioner's representatives was also held November 19.

After the inspection, Mr. Shemkowitz returned to his office to review the relevant PESH standards and noted that there was an OSHA opinion letter which stated that the use of ship's ladders would be a *de minimis* violation if a compliant industrial stair would not fit and all other conditions of the proposed regulation on ship's ladders were met. He determined that the angle of rise allowed for fixed industrial stairs is 30 to 50 degrees. Ship stairs are fixed stairs that are installed at a steep angle and used in places where there is not enough room to put in standard stairs. They are a classification of industrial stairs. A U.S. DOL interpretation on ship stairs, in an opinion letter, issued after regulations were proposed

which allowed for the use of ship's stairs. Ship's ladders or stairs would be classified as having a vertical angle between 50 and 70 degrees.

Compliance with PESH standards must be feasible. Feasibility means that it can be accomplished. Mr. Shemkowitz testified that a "switchback" stairway could have been installed in place of the ship's ladder and would have met the standards for a fixed industrial stair. A switchback stair "starts off at one point, goes up a particular number of stairs, stops at a landing and then continues upward again in the opposite direction that it started off in." Mr. Shemkowitz testified that any stairway leading from one level to another is in violation of PESH standards if it is greater than 50 degrees. If nothing else can be put in because of a limited space, the employer should ask for a variance. A ship's ladder is inappropriate in the stadium because there is enough room, space and area to install a standard set of stairs. Mr. Shemkowitz's assessment is based on his view and measurements at the site and not on the blueprints. Mr. Shemkowitz testified that no one from the district ever explained to him why fixed industrial stairs were not feasible.

The citations were issued on January 16, 2009. All of the citations issued were determined to be serious. A violation is serious if the conditions that cause the citation to be issued are such that the condition could cause death or serious injury.

Mr. Shemkowitz searched OSHA's online inspection database and found that OSHA cited the Buffalo News, employer of the reporter who was fatally injured using the stairs, for serious violations of some of the same Industrial Stair standards that were used by Mr. Shemkowitz in his report, but the citations were resolved through informal settlement, and the Buffalo News paid only half of the amount assessed.

During the last meeting between PESH and the District, on March 5, 2009, PESH informed the District that its safety professionals were available to consult with the District on how to abate the citations. On July 20, 2009, Mr. Shemkowitz reinspected the facility and found that the District had constructed a plywood enclosure around the base of the stairway so that it could not be used.

I. STANDARD OF REVIEW

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in [the petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to the Board's Rules of Procedure and Practice (Rules) 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the NOV and Order are not valid or reasonable.

II. FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rule 65.39 (12 NYCRR 65.39).

OSHA Standards for Fixed Industrial Stairs

Fixed Industrial Stairs are governed by regulations regarding Walking-Working Surfaces at 29 CFR 1910.24. OSHA noted the regulations' purpose when it proposed additional rules relating to "Ship's Ladders" in 2003:

"Subpart D of 29 CFR part 1910, Walking and Working Surfaces, sets forth general industry requirements for employers to protect employees from slips, trips and falls that may cause serious or fatal injuries." (68 FR 23528)

As noted by both parties, regulations regarding ship's ladders were proposed in 1973, 1990 and 2003 but were never promulgated¹. Therefore, the only standard for fixed industrial stairs are the regulations at 29 CFR 1910.24. Petitioner argues that the standards are not applicable to the "ship's ladder" at issue here. Application of the requirements of 29 CFR 1910.24 is contained in subsection (a) as follows:

"This section contains specifications for the safe design and construction of fixed general industrial stairs. This classification includes interior and exterior stairs around machinery, tanks, and other equipment, and stairs leading to or from floors, platforms, or pits. This section does not apply to stairs used for fire exit purposes, to construction operations to private residences, or to articulated stairs, such as may be installed on floating roof tanks or on dock facilities, the angle of which changes with the rise and fall of the base support."

Subsection (b) of this section explains when fixed stairs are required:

"Fixed stairs shall be provided for access from one structure level to another where operations necessitate regular travel between levels, and for access to operating platforms at any equipment which requires attention routinely during operations. Fixed stairs shall also be provided where access to elevations is daily or at each shift for such purposes as gauging, inspection, regular maintenance, etc., where such work may expose employees to acids, caustics, gases, or other harmful substances, or for which purposes the carrying of tools or equipment by hand is

¹ On May 24, 2010, OSHA published a Notice of Proposed Rule (75 FR 28862, 28882) again proposing regulation changes regarding stairs at 29 CFR 1910.24 which including a provision allowing ship stairs but limiting their use to "special limited usage" which has been defined as "a space not more than 250 square feet in area and serving not more than five occupants or from galleries, catwalks and gridirons." The proposal also requires employers "to demonstrate that it is not practical to provide a standard stairway before using an alternate type of stairway in 'special limited use' situations"

normally required. (It is not the intent of this section to preclude the use of fixed ladders for access to elevated tanks, towers, and similar structures, overhead traveling cranes, etc., where the use of fixed ladders is common practice.) Spiral stairways shall not be permitted except for special limited usage and secondary access situations where it is not practical to provide a conventional stairway. Winding stairways may be installed on tanks and similar round structures where the diameter of the structure is not less than five (5) feet.”

The stairs in question at All-High Stadium provide access from the top seating level to the roof, another structural level. The District’s architect testified that anywhere from two to fifteen people use the stairs daily including employees of the District. Therefore, there is regular travel on the stairs. We, therefore, hold that the standards enunciated in 29 CFR 1910.24 apply to the stairs in question.

Mauler v Centaurus

The petitioners cite to *Mauler v Centaurus*, 1992 WL 510215 (W D Wash 1992) as controlling law for the proposition that 29 CFR 1910.24 does not apply to ship’s ladders. This is incorrect. The posture of the case was a motion for summary judgment in a civil negligence case and the issue in *Mauler* was whether installation of a ship’s ladder was *negligence per se*. The summary judgment was denied by the court given the fact that OSHA had opined in a letter and its proposed regulations that fixed industrial stairs do not cover ship’s ladders. However, the court did note that OSHA provides that ship’s ladders were appropriate only where “physical restrictions and limited access to elevation prevent installation of fixed industrial stairs.” *Id.* In denying the summary judgment motion the court found that it must defer to OSHA’s reasonable interpretation of its own regulation as provided in the 1990 proposed rule. However, since the court’s decision, OSHA has specifically stated that ship’s stairs are “industrial stairs” but that use of ship’s stairs under certain circumstances is only a *de minimis* violation. (See Letter from Richard Fairfax, Director of OSHA Enforcement Programs to Richard Viktora, Esq, dated February 10, 2006, Petitioner’s Exhibit 4).

OSHA opinion letter and the proposed regulations re: Ship’s Ladders

As an alternative argument, petitioner states that even if there were violations of the standards regulating industrial stairs, the violations were *de minimis*, according to two Opinion Letters, both issued by the United States DOL on February 10, 2006. As stated by petitioner, both letters state that where an employer is in compliance with a proposed standard, “it is OSHA’s general policy to treat the violation of an existing requirement as a *de minimis* violation.” However, both letters point out that it is a *de minimis* violation to install industrial stairs with a slope between 50 degrees and 70 degrees (ship’s ladder) only “in areas where conventional industrial stairs cannot be installed due to limited space.”

In its letter of February 10, 2006, *supra*, pertaining to Standard 1910.24 OSHA specifically states:

“Please note, the existing standard at 29 CFR Part 1910, Subpart D, *Walking-Working Surfaces*, does not have provisions for stairs with angles to the horizontal greater than 50 degrees. However, as noted in your letter, the 1990 Proposed Rule for Subpart D, *Walking and Working Surfaces*, addresses the issue at proposed § 1910.25, *Stairs*, paragraph (e)(1), which defines these types of stairs as ‘ship’s stairs’ and states, ‘Ship’s stairs shall be installed at a slope between 50 degrees and 70 degrees from the horizontal.’

“Therefore, in areas where conventional industrial stairs cannot be installed due to limited space availability, then OSHA should consider the installation of fixed industrial stairs with a slope between 50 degrees to 70 degrees from the horizontal to be a *de minimis* violation. Under the *de minimis* policy, an employer may comply with a proposed standard or amendment or a consensus standard, rather than with the standard in effect at the time of the inspection, only if the employer’s action clearly provides equal or greater employee protection or the employer complies with a written interpretation issued by the OSHA Regional or National Office.”
[Emphasis added.]

First of all, US DOL has defined a ship’s ladder as a fixed industrial stair with a slope between 50 degrees to 70 degrees from the horizontal. Second, there is a condition that must be met –there must be limited space so that conventional industrial stairs cannot be installed – before the use of a ship’s stair will be considered a *de minimis* violation.

Petitioner failed to meet its burden of proving that it was not feasible to meet the standard.

The employer bears the burden of establishing that it was not feasible to comply with a standard. It is an affirmative defense to a violation. An employer must at least attempt to adapt to the standard. Before an employer will be excused from ignoring a standard, it must show that it explored possible alternatives. *See* Rabinowitz (ABA Section of Labor and Employment Law) Occupational Safety and Health Law at 152-3 (2d ed 2003) (citations omitted).

Petitioner’s witness testified that no alternatives to the ship’s ladder were examined. Petitioner considered moving the press box from the roof to the top level but then decided that the rooftop view was preferable for the press box. The District, therefore, failed to sustain its burden of proving that compliance with the standard was not feasible.

The violations are serious and not *de minimis*.

A violation is serious “if there is a substantial probability that death or serious physical harm could result from a condition which exists. . . .” (29 USC § 666[k]).

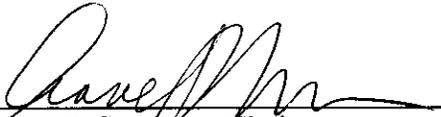
In general, a *de minimis* violation is a violation which has "no direct or immediate relationship to safety and health." 29 USC § 658 (a). As stated above, the purpose of the industrial stair standard is to prevent slips, trips and falls. The standards violated relate to: (1) the width of the stair (29 CFR 1910.24[d]); (2) the angle of the stairs (29 CFR 1910.24[e]); (3) the top tread was not slip resistant (29 CFR 1910.24[f]); (4) the railings were not properly constructed or spaced (29 CFR 1910.24 [h]); and (5) the amount of vertical clearance (29 CFR 1910.24[i]). All of these violations are directly related to the safety of the stairs and the standards were intended to minimize falls.

In addition, since petitioner failed to prove that the stairs came within the purview of the Opinion Letter, the Letter does not support a finding that these violations are *de minimis*.

Therefore, it was appropriate to find that these violations are serious.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

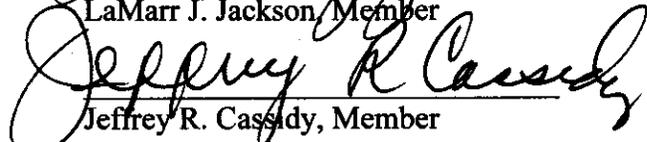
1. The order to comply and notice of violations issued January 16, 2009 is affirmed in all respects; and
2. The petition be, and the same hereby is, denied.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Jean Grumet, Member


LaMarr J. Jackson, Member


Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
April 27, 2011.