UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR, Complainant, v. HAMILTON FIXTURE, Respondent. OHIO CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, Authorized Employee Representative.	OSHRC Docket No. 88-1720

DECISION

Before: FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

Hamilton Fixture ("Hamilton") manufactures wooden store fixtures for displaying greeting cards, books, and tapes at its main plant in Hamilton, Ohio, where it employs approximately 350 workers. After inspecting that plant and its warehouse, the Occupational Safety and Health Administration ("OSHA") issued three citations, each containing a number of items alleging that Hamilton committed serious, repeat, and other violations of safety and health standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). After considering the testimony and exhibits presented for more than five days at the hearing, former Review Commission Administrative Law Judge Joe D. Sparks rejected Hamilton's preliminary motion for relief, in which it alleged that the inspection was not conducted "within reasonable limits and in a reasonable manner" as

required by section 8(a) of the Act, 29 U.S.C. § 657(a). After addressing the merits of the charges and taking into consideration the partial settlement agreement, he vacated nine items, or parts thereof, and affirmed the remainder. He assessed penalties totalling $6,050.

The issues on review are whether the judge erred in denying Hamilton's motion, and, if not, whether he erred in affirming thirteen serious, repeat, and other citation items, or parts thereof.

I. *Background*

In early March 1988, the collective bargaining agreement between Hamilton and the union representing its production employees, Local 415 of the Ohio Carpenters Industrial Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("the union")[1] expired. Hamilton's employees continued to work but engaged in a general work "slowdown" in all departments. According to the testimony, the situation was "tense." As a result of this labor dispute, non-management employees on the labor-management safety committee resigned during this time, and therefore the committee did not meet or inspect the plant during this time period.

A. *The Complaint*

On March 14, 1988, OSHA's Cincinnati Area Office received a typewritten, signed complaint on union letterhead, alleging that, against the union's objections, management employees[2] at the main plant were: (1) not using protective equipment for their eyes (throughout the plant), their ears (around machinery), and their feet (in restricted areas); (2) not using guards on mill machines in operation; and (3) operating tow motors without proper training. James Washam, OSHA Safety Supervisor in the Cincinnati Area Office, determined that the complaint, although signed, was too vague for further action. He told the duty officer in charge of complaints for that week, Jim Zucharo, a senior compliance officer, to contact the complainant and request the necessary additional information. After

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[1]The Ohio Carpenters Industrial Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO elected party status in this case. The union representative participated in the hearing, but the union did not file a brief in this case.

[2]During this period, management employees performed some of the jobs usually done by non-management employees.

Zucharo received information from the complainant that he deemed sufficient, he forwarded the complaint to Washam for processing.

Washam determined that the complaint had been filed in good faith and that there were reasonable grounds to believe that safety violations existed. According to Washam's testimony, he reasoned that, under those circumstances, section 8(f)(1) of the Act, 29 U.S.C. § 657(f)(1),[3] requires an investigation, even when only management employees are allegedly exposed to the conditions at issue. *See generally Dravo Corp. v. OSHRC*, 613 F.2d 1227, 1235 (3d Cir. 1980) (when complaint meets requirements of section 8(f)(1), the Secretary has little choice but to investigate).

Hamilton does not challenge the validity of the complaint and specifically acknowledges on review that it

> does not dispute that the March 14 complaint, as supplemented by the complaining party, may well have been a sufficient basis for the Secretary to conduct an inspection limited to the hazards alleged by the complainant.

B. *The Inspection*

Washam assigned senior compliance officer Ralph Cannon to inspect Hamilton's facility. Cannon, who had worked for OSHA since 1973 and performed about 1,900 inspections by the time of the hearing, was the most senior employee in OSHA's Cincinnati Office. Under the "Comments" section of the assignment sheet that supervisor Washam gave to Cannon, he had handwritten the following note: "Ralph--check prev[ious] files--may have to expand." Cannon testified that he interpreted that instruction to mean, "[i]f there

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[3]Section 8(f)(1) of the Act provides:

> Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary . . . of such violation or danger. . . . If upon receipt of such notification the Secretary determines there are *reasonable grounds* to believe that such violation or danger exists, he *shall* make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists.

(Emphases added). Employees involved in labor disputes can be proper complainants so long as the other criteria in section 8(f)(1) are met. *See, e.g., Rockford Drop Forge Co. v. Donovan*, 672 F.2d 626, 631-32 (7th Cir. 1982).

is a long enough period of time between the previous and this current inspection, we may have to expand it depending on what that lost work day injury rate is."

Cannon conducted an inspection of Hamilton's plant for five days during the period beginning April 20 and ending May 3, 1988. When he first entered the facility, Cannon introduced himself and had an opening conference with: Rick Maurer, Hamilton's plant engineer and safety committee director; David Mueller, Hamilton's plant foreman at the time, and later plant manager; and Dixie Kuykendoll, the union's representative. At that conference, Cannon stated that the purpose of his visit was to respond to a complaint, copies of which he gave to Maurer and Mueller. Cannon testified that he explained to them that he was:

> going to figure what we call a lost work day injury ["LWDI"] rate. If the lost work day injury rate was above the national average of 4.3, it would require that we do a wall-to-wall inspection of the facility.

Hamilton's representatives did not refuse Cannon access to inspect the records, nor did they request a warrant at any time. Based on his review of the records, Cannon calculated a LWDI rate of 13.7, which was approximately three times the national average.[4] Because of the high LWDI rate average, Cannon expanded the inspection from a limited one, based on the complaint, to a wall-to-wall inspection. Hamilton acknowledges on review that Cannon's understanding of his instructions to calculate the LWDI rate, and to conduct a wall-to-wall inspection if the national average were exceeded, is consistent with the OSHA Field Operations Manual ("*FOM*").

Based on Cannon's inspection, OSHA issued three citations to Hamilton for serious, repeat, and other violations. The judge vacated seven citation items and affirmed the remainder. Hamilton petitioned for review of the items affirmed, and review was directed "on all issues raised." The Secretary unilaterally withdrew five items when he filed his brief

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[4]The LWDI rate is calculated by dividing the number of hours employees worked in the reference years into the number of LWDI's multiplied by 200,000. *See* OSHA Field Operations Manual (*"FOM"*), Ch. III, § D.4.a.(5), *reprinted in* CCH ESHG, *Text of Manual Reissued by OSHA April 18, 1983*, at III-26 (1983). The "national average" to which Cannon refers was the most recently published Bureau of Labor Statistics national rate of lost workday injuries for manufacturing. *FOM*, Ch. III, § D.4.b., *id.* at III-27.

on review, leaving for our consideration thirteen citation items or parts thereof.[5] Before addressing the merits of each of these items, we must first consider certain preliminary issues that affect the entire case.

II. *Whether the Judge Erred in Denying Hamilton's Motion for Relief Claiming that the Inspection Was Unreasonable*

Less than a week before the hearing in this case, Hamilton filed a motion for relief[6] claiming that the inspection was not conducted "within reasonable limits and in a reasonable manner" as required by section 8(a) of the Act, 29 U.S.C. § 657(a), which provides:

> In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge is authorized--
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> (1) to enter without delay and *at reasonable times* any factory, plant . . . or other area . . . where work is performed by an employee of an employer; and
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> (2) to inspect and investigate during regular working hours and at other reasonable times, and *within reasonable limits and in a reasonable manner*, any such place of employment and all pertinent conditions . . . [,] and to question privately any such employer, owner, operator, agent or employee.

(Emphasis added). This claim is an affirmative defense, which we will consider in this case in light of the particular circumstances.[7] The party claiming an affirmative defense has the

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[5]Hamilton filed a motion for oral argument, which was denied by the order of the Commission majority on August 22, 1991.

[6]Hamilton labelled this a "motion to dismiss." However, rather than dismissal, "if any sanction is to be imposed for failure to comply with . . . section 8(a) . . . the proper remedy is to suppress evidence gained from the inspection." *E.g.*, *Environmental Utilities Corp.*, 5 BNA OSHC 1195, 1196-97, 1977-78 CCH OSHD ¶ 21,709, p. 26,073 (No. 5324, 1977) (footnote omitted). Therefore, we will consider Hamilton's motion as a request for the suppression of evidence obtained at the inspection.

[7]An affirmative defense ordinarily must be initially pleaded by the employer in its answer, according to Rule 36(b) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.36(b), which was in effect at the time that this case arose. Therefore, Hamilton should have raised this defense in its answer, because it appears that it had knowledge of the facts upon which it based its motion at the time that it filed its answer.

However, Hamilton did complain during the inspection about the manner in which it was conducted. Furthermore, neither the Secretary nor the judge has at any time moved to strike the allegation that the inspection was unreasonable because it was not timely raised. Indeed, the judge specifically discussed and ruled on this defense in his decision. Under these special circumstances, we will consider Hamilton's defense that the inspection was unreasonable in violation of section 8(a) even though it was not raised in the answer. *See* Rule 107 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.107 (Commission may waive any of its rules of procedure in special circumstances and for good cause shown).

burden of proving it. *See Sarasota Concrete Co.*, 9 BNA OSHC 1608, 1612, 1981 CCH OSHD ¶ 25,360, p. 31,531 (No. 78-5264, 1981), *aff'd*, 693 F.2d 1061 (11th Cir. 1982); section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (general rule that moving party has burden of proof in administrative proceedings). To establish this defense, Hamilton has the burden of proving that the inspection was unreasonable. However, we first address the Secretary's argument that Hamilton is precluded from proving this defense because it has not raised a Fourth Amendment claim.

A. *Whether a Section 8(a) Defense Can Be Established Where No Fourth Amendment Violation Alleged*

It is undisputed that Hamilton waived its Fourth Amendment rights by consenting to the inspection and not requesting a warrant.[8] Based on that fact, the Secretary argues that Hamilton cannot prove that the inspection was unreasonable under section 8(a) of the Act.

The Secretary relies on the following language by the Commission in *Laclede Gas Co.*, 7 BNA OSHC 1874, 1877, 1979 CCH OSHD ¶ 24,007, p. 29,153 (No. 76-3241, 1979):

> The Commission has stated that the rights granted by section 8(a) are coextensive with those granted by the [F]ourth [A]mendment, and that an employer's section 8(a) rights therefore are not violated unless the circumstances also show a violation of the [F]ourth [A]mendment. *Western Waterproofing Co.* . . . [,] 4 BNA OSHC 1301, 1976-77 CCH OSHD ¶ 20,805 (No. 1087, 1976), *rev'd on other grounds*, 560 F.2d 947 (8th Cir. 1977).

At issue in *Laclede* was whether photographs of an area open to public view taken by a compliance officer prior to his presentation of credentials should be suppressed as violative of the introductory portion of section 8(a) that provides that only "upon presenting credentials to the owner, operator, or agent" does the compliance officer have authority to enter and inspect.

However, in a more recent decision the Commission specifically found that there was no Fourth Amendment violation because the employer had consented to a warrantless inspection. It then went on to consider and rule on the employer's argument that the OSHA area office's actions made the inspection unreasonable under section 8(a) of the Act. *Adams*

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[8]Hamilton recognized in its brief that by consenting to the inspection, it cannot later claim that the inspection was conducted in violation of the Fourth Amendment, citing *Lake Butler Apparel v. Secretary*, 598 F.2d 84, 88 (5th Cir. 1975).

Steel Erection, Inc., 13 BNA OSHC 1073, 1076, 1079; 1986-87 CCH OSHD ¶ 27,815, pp. 36,401, 36,403 (No. 77-3804, 1987).

We agree with Hamilton that *Adams Steel* is the more specifically applicable precedent. Both Hamilton and Adams Steel, unlike Laclede, (1) had a reasonable expectation of privacy[9] in their work facilities but did not exercise their Fourth Amendment rights regarding them because they consented to the warrantless inspections, and (2) based their arguments that section 8(a) was violated on the part of that section requiring that inspections be "within reasonable limits and in a reasonable manner."

Laclede is factually distinguishable from this case for two reasons: (1) the area at issue there was open to public view, and therefore not subject to Fourth Amendment protection under the "open fields" doctrine, *see, e.g., Tri-State Steel Constr.*, 15 BNA OSHC 1903, 1909-10, 1992 CCH OSHD ¶ 29,852, p. 40,733 (No. 89-2611, 1992); and (2) the part of section 8(a) that was allegedly violated was the requirement in the introductory language for "presenting appropriate credentials." The Commission has stated that it "construe[s] section 8(a) concerning the presentation of credentials to be mandatory only when the Fourth Amendment would bar a warrantless search and thus when notice of authority is required." *Accu-Namics, Inc.*, 1 BNA OSHC 1751, 1755, 1973-74 CCH OSHD ¶ 17,936, p. 22,233 (No. 477, 1974), *aff'd*, 515 F.2d 828 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976). Therefore, the language in *Laclede* stating that section 8(a) is coextensive with the Fourth Amendment is accurate under the particular facts of that case. Because Laclede had no expectation of privacy in the particular work area, it could claim no Fourth Amendment rights in the area, and therefore section 8(a) was not violated.

For the reasons above, we conclude that Hamilton's consent to the inspection, and thus its waiver of a Fourth Amendment claim, does not preclude it from establishing the defense that the inspection was unreasonable under section 8(a) of the Act.

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[9]A reasonable expectation of privacy in the object of the search is necessary to invoke Fourth Amendment protection. *See Monfort of Colorado, Inc.*, 14 BNA OSHC 2055, 2059, 1991 CCH OSHD ¶ 29,246, p. 39,184 (No. 87-1220, 1991).

B. *Whether Hamilton Proved that the Inspection Was Unreasonable under Section 8(a) of the Act*

To establish the affirmative defense that an inspection is unreasonable under section 8(a) of the Act, the employer must introduce into the record sufficient evidence of unreasonable conduct. Hamilton argues that the inspection was unreasonable on the grounds that (1) OSHA supervisor Washam did not consider the effect of the labor problems at the plant, and (2) compliance officer Cannon was biased against Hamilton.

1. *Supervisor's Role*

Hamilton contends that Washam's written instructions authorizing Cannon to "check prev[ious] files--may have to expand" was unreasonable because Washam did not investigate the impact that labor problems at the plant might have on a possible expansive, wall-to-wall inspection, and vice versa. It contends that such an investigation was required under OSHA Instruction CPL 2.45A CH-12, Ch. III, § D.1.h.(2) (Sept. 21, 1987), *amending* the *FOM*. That provision, in effect at the time of the inspection, reads:

> h. Strike or Labor Dispute. Plants or establishments may be inspected regardless of the existence of *labor disputes involving work stoppages, strikes or picketing*. If the CSHO [Compliance Safety and Health Officer] identifies an unanticipated labor dispute at a proposed inspection site, the supervisor shall be consulted before any contact is made.
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> . . . .
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> (2) Unprogrammed Inspections. As a rule, unprogrammed inspections (complaints, fatalities, etc.) will be performed during strikes or *labor disputes*. However, the seriousness and reliability of any complaint shall be *thoroughly investigated by the supervisor* prior to scheduling an inspection to ensure as far as possible that the complaint reflects a good faith belief that a true hazard exists and is not merely an attempt to harass the employer or to gain a bargaining advantage for labor.

(Emphases added). Hamilton argues that section D.1.h.(2) applies because the circumstances at its plant constituted a "labor dispute," and that the section was violated because the decision to authorize the wall-to-wall inspection that might be called for by the LWDI rate was not "thoroughly investigated by the supervisor." According to Hamilton, in conducting such an investigation, the OSHA area office should have contacted Hamilton itself about the status of union-management problems, as well as the Federal Mediation and Conciliation Service or the National Labor Relations Board.

The judge rejected Hamilton's arguments and found that the lack of a pre-inspection investigation of Hamilton's labor-management problems did not establish that the inspection was unreasonable. First, he found that subsection h.(2) did not apply because section D.1.h. limits coverage to "labor disputes involving stoppages, strikes or picketing," while Hamilton's employees continued to work despite the lack of a collective bargaining agreement. The judge further concluded that, even if subsection h.(2) applied, OSHA complied with the requirement that "the seriousness and reliability of any *complaint* shall be thoroughly investigated by the supervisor prior to scheduling an inspection." (emphasis added). The judge noted that OSHA supervisor Washam, after initially receiving the complaint, asked duty officer Zucharo to obtain further verification. Zucharo requested and received additional information from the complainant and forwarded it for processing. Then Washam, according to his own testimony, determined that the complaint was filed in good faith and that there were reasonable grounds to believe that safety violations existed. Considering that this is all that subsection h.(2) requires, the judge concluded that OSHA's decisions to act on the complaint and then expand the scope of the inspection based on the LWDI rate were "entirely reasonable in light of the circumstances."

Even assuming that subsection h.(2) applies, we note that the *FOM* is only a guide to OSHA personnel to promote efficiency and uniformity; it is not binding on OSHA and does not accord any procedural or substantive rights or defenses to an employer. *E.g.*, *Consolidated Freightways*, 15 BNA OSHC 1317, 1323 n.10. 1991 CCH OSHD ¶ 29,500, p. 39,812 n.10 (No. 86-351, 1991); *H.B. Zachry Co.*, 7 BNA OSHC 2202, 2204-05, 1980 CCH OSHD ¶ 24,196, p. 29,424 (No. 76-1393, 1980), *aff'd*, 638 F.2d 812 (5th Cir. 1981). Hamilton acknowledges the non-binding nature of the *FOM*, yet it contends that the alleged failure to conduct such a pre-inspection investigation is a relevant consideration in determining whether the inspection was unreasonable.

We agree with the judge that Hamilton did not prove that Washam's actions prior to assigning Cannon to inspect Hamilton's plant rendered the inspection unreasonable. Washam testified that OSHA followed normal procedures in handling this complaint, and it was enough to verify that, as alleged in the complaint, employees were exposed to hazards

while working because they were not following safety rules. To have contacted Hamilton about the complaint, as Hamilton asserts should have been done, would have, as Washam testified, given Hamilton improper advance notice of the inspection.

Hamilton also argues that a union flyer in evidence shows that the authorization to expand the inspection was unreasonable. However, Washam could not have based his instruction to Cannon on the handbill because Washam testified that he did not recall ever seeing it until the hearing. Moreover, after reading it, he testified that, although the flyer did indicate a labor problem at Hamilton, it did not demonstrate an intent solely to harass, and thus it would not have given him any reason to take a different course of action. Nevertheless, Washam was not unmindful of the labor problems when assigning Cannon to inspect. According to Cannon, Washam told him before the inspection that Hamilton and its employees "are in negotiations. They may have some problems. Don't get tied up in the middle."[10] According to Washam, he normally instructs compliance officers assigned to investigate establishments with labor problems "not to become involved in the labor problem at all."

Although Hamilton takes issue with what it contends was an inadequate investigation by Washam, it does not dispute that Cannon's expansion of the scope of the inspection to wall-to-wall, upon finding the LWDI rate to be almost three times the national average, was in accordance with the *FOM*.

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[10]Such instructions would be in accordance with another portion of OSHA Instruction CPL 2.45A CH-12, Ch. III, § D.6.b., which was introduced into the record and provides:

> Labor Relations Disputes The CSHO [Compliance Safety and Health Officer] shall not become involved in labor relations disputes . . . between a recognized union and the employer.

We emphasize that it would be intolerable for compliance officers and other OSHA officials to become entangled in collective bargaining problems, because to do so places them at risk of losing the trust of both management and labor and is counterproductive to the objectives of the Act. The purpose of the Occupational Safety and Health Act is "[t]o assure safe and healthful working conditions for working men and women." Another statute, the National Labor Relations Act, addresses collective bargaining and "labor disputes," which may involve work slowdowns or other similar types of job action. *See* 29 U.S.C. §§ 151-57.

2. *Compliance Officer's Role*

Hamilton also contends that the inspection was unreasonable because compliance officer Cannon was biased by his membership and participation in another union. Hamilton further claims that Cannon conducted an excessive number of interviews and even "staged" a photograph of a cited condition.

At the outset, we note that the judge dismissed these charges based primarily on the following general credibility determination strongly in favor of Cannon:

> Hamilton has leveled a serious charge at Cannon, accusing him of compromising his professional integrity in order to implement his personal agenda. Cannon strongly denied the charges. Having considered the evidence, this Judge finds that Hamilton's attacks upon Cannon's character and professionalism are unsupported by the record.
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> Cannon has been employed by OSHA since 1973. In that time he has conducted approximately 1,900 inspections. He had inspected Hamilton's facility on several occasions prior to the one which gives rise to the instant case [transcript references deleted]. He has appeared in many proceedings before the Review Commission and has demonstrated an attitude of fairness and integrity. In this case, his conduct and testimony did not bear a trace of bias, prejudice, or animosity towards Hamilton, which, considering its assaults on his integrity, demonstrated considerable self-restraint. It is concluded that Cannon conducted a fair and impartial inspection as required by the tense circumstances.

The Commission generally defers to a judge's credibility determinations because the judge has "lived with the case, heard the witnesses, and observed their demeanor." *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297, 1977-78 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978). This is particularly true where, as here, the credibility finding "rested on matters peculiarly observable by [the judge]--the witnesses' demeanor on the stand and their manner of responding on cross-examination." *E.L. Jones and Son, Inc.*, 14 BNA OSHC 2129, 2132, 1991 CCH OSHD ¶ 29,264, p. 39,232 (No. 87-8, 1991). In evaluating credibility, a judge can properly consider whether the witness "exhibited a biased, hostile, or inflexible bent of mind." *Hughes Bros., Inc.*, 6 BNA OSHC 1830, 1837, 1978 CCH OSHD ¶ 22,909, p. 27,721 (No. 12523, 1978).

Evidence that a compliance officer conducted an inspection to harass an employer can be relevant to a section 8(a) defense. *See Quality Stamping Products Co.*, 7 BNA OSHC

1285, 1287 n.6, 1979 CCH OSHD ¶ 23,520, p. 28,504 n.6 (No. 78-235, 1979); *see also Electrocast Steel Foundry, Inc.*, 6 BNA OSHC 1562, 1563, 1978 CCH OSHD ¶ 22,702, p. 27,401 (No. 77-3170, 1978). However, the judge at the hearing has an opportunity to determine the validity of such a charge by observing the demeanor of the compliance officer and considering the other evidence presented by the employer. *Cf., In re Inspection of Workplace (Carondelet Coke Corp.)*, 741 F.2d 172, 177 (8th Cir. 1984) (magistrate's rejection of argument that complaint filed to harass was based on his observation of complainant's demeanor during warrant hearing).

Because the judge was able to observe Cannon and evaluate his demeanor and testimony firsthand, we defer to the judge's credibility determination in favor of the compliance officer. Against this background, we consider whether Hamilton has proven by sufficient facts in the record that the inspection was unreasonable under section 8(a).

a. *Cannon's Background*

Hamilton argues that Cannon was biased because of his union background. It is undisputed that Cannon has been a member of the Operative Plasterers and Cement Masons Union since 1954, and the recording secretary for Local 1 of that union since 1961. To fulfill the duties of his position as recording secretary, Cannon attends the monthly union meetings and takes the minutes. Furthermore, prior to joining OSHA in 1973, he worked at the AFL-CIO Labor Council. While Hamilton acknowledges that "it may be technically possible" for a compliance officer with such a background to be neutral and objective while conducting inspections, it contends that such was not the case here.

We note that, in describing the Cincinnati Area Office, supervisor Washam testified that "[a]ll of our people have [a] background in organized labor or management." Under these circumstances, selecting a compliance officer with a completely neutral background was generally difficult. Washam testified that Cannon was assigned to inspect Hamilton's facility because he was "the most senior person" in the office, and he had experience dealing with facilities with labor problems. Cannon testified that he received instructions to remain neutral, and that he attempted to do so.

Nevertheless, by *remaining active* in the Operative Plasterers and Cement Masons Union as recording secretary for Local 1, Cannon comes dangerously close to giving the "appearance of partiality," which the *FOM* warns against. That provision under the section describing the responsibilities of the compliance officer reads:

> Balanced Approach. OSHA policy is to remain neutral in dealing with management and labor. The CSHO is an agent of neither side but rather of OSHA and is, therefore, charged with ensuring a safe and healthful workplace. Bias or *even the appearance of partiality* toward one side or the other will lessen OSHA's ability to carry out this congressional mandate.

FOM, Ch. I, § E.2.d., *reprinted in* CCH ESHG, *Text of Manual Reissued by OSHA April 18, 1983*, at I-5 (1983) (emphasis added). Consistent with this section of the *FOM*, which, as noted above is not binding on OSHA, is the Commission's recognition that "the federal government should avoid conducting its enforcement proceedings in any way that may give the appearance of unfairness and result in unfairness." *Bland Constr. Co.*, 15 BNA OSHC 1031, 1043, 1991 CCH OSHD ¶ 29,325, p. 39,403 (No. 87-992, 1991) (belated introduction of new charge).

Based on the above, OSHA should recognize that it must be wary of giving the appearance of partiality by assigning an inspection of this type to a compliance officer who is a union member, and especially where the compliance officer is, like Cannon, an active officer in a union. In this particular case, the facts in evidence are insufficient to establish that, because of his background, Cannon was so biased against Hamilton as to render the inspection unreasonable under section 8(a) of the Act.

b. *Manner in Which Inspection Conducted*

Hamilton argues that the manner in which the inspection was conducted was unreasonable because compliance officer Cannon (1) conducted too many employee interviews, and (2) showed bias in inspecting at least one area of the plant.

Employee Interviews

As noted above, the employer raising the affirmative defense that the inspection was unreasonable bears the burden of proving that defense. In attempting to prove its claim that the number of employee interviews was so excessive as to be unreasonable, Hamilton relies on the testimony of Rick Maurer, Hamilton's plant engineer. According to Maurer, who

accompanied Cannon during the inspection, there were sixteen interviews the first day and sixteen prior to lunch on the second day. Maurer testified that he considered these interviews to be so disruptive of production that he consulted with Hamilton's counsel, who then held a discussion that included Maurer, Washam, and Cannon, among others.[11] After that discussion, there were "only a total of nineteen interviews" for the remainder of the five-day inspection, according to Maurer.

We conclude that Hamilton has failed to show that the number of interviews that Cannon conducted rendered the inspection unreasonable. No statute or regulation limits the number of interviews that may be conducted. Implicitly recognizing that the circumstances of each inspection are unique, the OSHA regulations concerning inspections are necessarily generally worded. For example, 29 C.F.R. § 1903.10 provides:

> Compliance Safety and Health Officers may consult with employees concerning matters of occupational safety and health *to the extent they deem necessary for the conduct of an effective and thorough inspection.* During the course of an inspection, any employee shall be afforded an opportunity to bring any violation of the Act which he has reason to believe exists in the workplace to the attention of the Compliance Safety and Health Officer.

(Emphasis added). One court has stated that compliance with section 8(a)(2) of the Act "necessarily means the interviews must be conducted so as to not create a substantial disruption of [the] workforce." *Dole v. Bailey*, 14 BNA OSHC 1534, 1537, 1987-90 CCH OSHD ¶ 28,898, p. 38,559 (N.D. Tex. 1990), *rev'd on other grounds sub nom. Trinity v. Martin*, 963 F.2d 795 (5th Cir. 1992). This is consistent with 29 C.F.R. § 1903.7(d), which reads: "The conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employer's establishment."

The only evidence that Hamilton introduces to support its claim that the interviews substantially interfered with production was Maurer's testimony that, in his opinion, such interference occurred for the first day and a half of the inspection. However, Maurer also

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[11]Hamilton relies on Maurer's testimony that he had accompanied OSHA compliance officers, including Cannon, during previous OSHA inspections at the plant, and that this inspection involved the most employee interviews and was the first time that he decided to call in counsel. However, there is no evidence that any of the prior inspections were wall-to-wall inspections, which by their nature are much more extensive and would probably require more interviews.

admitted that production had already been disrupted by the labor problems at the plant. Furthermore, for the majority of the inspection, the remaining three and a half days, Hamilton does not claim that the interviews, nineteen according to Maurer, were either unreasonable in number or substantially disruptive. We emphasize that the issue of whether the number of interviews for the first day and half was unreasonable is not before us. Rather, the issue is whether the inspection as a whole, not just part of it, was unreasonably conducted. We therefore conclude that, based on the scant record on this issue, Hamilton has not established that the employee interviews conducted during the course of the entire inspection created, what the court in *Bailey* called, a "substantial disruption of [the] workforce." Therefore, Hamilton has not proven that the number of interviews rendered the inspection unreasonable.

Other Conduct by Cannon

Hamilton also contends, relying on Maurer's testimony, that Cannon was involved in "staging" one condition that was cited, and that he gave "evasive" and "inconsistent and incredible" testimony at the hearing on that and other items.[12] Hamilton argues that the judge erred in crediting that testimony and particularly in referring to Cannon's demonstrated fairness and integrity in the many Commission proceedings in which he has appeared in the past.

Regarding the alleged "staging" of a photograph, we note that this particular claim by Hamilton was in large part the "serious charge" that the judge was referring to in his credibility determination in favor of Cannon. As discussed above, we defer to the judge's general crediting of compliance officer Cannon's testimony. We will discuss the *specific* credibility determinations questioned by Hamilton when we analyze each of the individual items on review below. Regarding Hamilton's argument against the judge's reference to Cannon's demonstrated fairness in past Commission proceedings, it is clear from his decision that the judge did not rely exclusively on this factor, but rather he considered it among a

[12]In its reply brief, Hamilton criticizes the Secretary for not sufficiently addressing what it characterizes as the compliance officer's "false testimony" on a number of matters, focussing on his testimony regarding citation no. 3, item 6. However, that item was *vacated* by the judge. Because the Secretary has not sought review of that item, it is not surprising that he has not discussed it on review.

number of others. Such limited reliance is not improper, because demonstrated past integrity would be relevant support for crediting a compliance officer's memory and ability to accurately communicate at the hearing what occurred at the inspection. *See Regina Constr. Co.*, 15 BNA OSHC 1044, 1049, 1991 CCH OSHD ¶ 29,354, p. 39,468 (No. 87-1309, 1991).

3. *Summary*

For the reasons stated above, we conclude that the facts presented in this case are not sufficient to show that the inspection was unreasonable. We therefore agree with the judge and find that Hamilton has not proven that the inspection was unreasonable under section 8(a) of the Act. We thus conclude that the judge did not err in denying Hamilton's motion for relief.[13]

III. *The Citation Items at Issue*

To establish a violation of a specific standard, the Secretary must prove by a preponderance of the evidence that the standard applies, the terms of the standard were not met, employees had access to the condition, and the employer either knew of the condition or could have known with the exercise of reasonable diligence. *E.g., Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). For most of the items on review, the only one of these elements at issue is whether the Secretary has met his burden of establishing that Hamilton knew or could have known with reasonable diligence of the cited conditions.

A. *Citation No. 1: Alleged Serious Violations*

1. *Item 1: Electrical Cord, Tripping Hazard*

In item 1, the Secretary alleged that Hamilton had committed a serious violation of 29 C.F.R. § 1910.22(a)(1)[14] because an electrical cord that ran across a 42-inch wide aisle,

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[13]Because Hamilton has not established that section 8(a) of the Act was violated, we have no grounds upon which to grant its motion. Therefore, we need not reach Hamilton's argument that it was prejudiced by the compliance officer's actions during the inspection. *See generally Duquesne Light Co.*, 8 BNA OSHC 1218, 1222, 1980 CCH OSHD ¶ 24,384, p. 29,719 (No. 78-5034, 1980).

[14]Section 1910.22(a)(1) provides:

(continued...)

and was taped down at each end, posed a tripping hazard due to the 18 inches of cord in the center of the aisle that were not secured to the floor.

The flexible cord powered a banding machine, used to band cartons packed with products for shipping. It was located in the hardware portion of the "Gibson area" of the plant, where greeting card displays were made. On one side of the aisle was the banding machine, located between two long tables. Employees packed products and accessories at one table and marked the banded cartons for identification at the other table. Across the aisle from the machine were metal shelves. Three or four employees worked in this area, packing products and accessories, and sometimes performing assembly work involving pneumatic rivet guns and drills. Compliance officer Cannon testified that the condition posed the potential for serious injury because employees could, after tripping on the portion of the cord not taped to the floor, strike their heads against the shelves on one side of the aisle or the banding machine on the other. He indicated that the condition could be abated by completely taping down the cord, relocating the cord, or using a drop cord or other device.

At issue is whether the judge erred in concluding that Hamilton had knowledge of the cited condition. Hamilton contends on review, as it did before the judge, that it could not have known of the condition because the compliance officer "staged" it.

Cannon's Testimony

In describing his inspection of the cited condition, Cannon testified on direct examination as follows:

> I walked into the area, I reached down and checked the cord. The cord was loose. It had been taped to the floor. Part of that tape had been worn away.

He testified that he lifted the cord "[a]bout an inch or two, yes, to see if it was loose." When asked if he had kicked the cord, he answered in the negative and stated that he "reached down and picked the cord up and down to see if it would move or not." When asked whether he had pulled the cord loose, Cannon responded in the negative and

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[14](...continued)

(a) *Housekeeping.* (1) All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

explained that "[i]t was loose when I came." Cannon testified that after he lifted the cord to check how loose it was and an employee then kicked the cord, plant engineer Maurer "took his foot and rubbed [the cord] back down and said, 'That's the way it should be.' " According to Cannon, it was after Maurer's actions that he took the photograph that is in evidence. Cannon stated that the photograph in evidence shows the cord in its original position, as it was when he first entered the area.

Cannon was questioned extensively by Hamilton's counsel on cross-examination, but the responses that Hamilton cites as inconsistent with Cannon's direct testimony or his earlier deposition are open to more than the narrow interpretation that Hamilton suggests. For example, Hamilton repeatedly asserted during the questioning that Cannon "pulled" or "grabbed" the cord off of the floor, while Cannon testified that he simply "lifted" or "raised" the cord just to see if it were loose.[15] Another example is Hamilton's allegation that Cannon's deposition and his testimony at the hearing were inconsistent, because "[c]ontrary to his deposition testimony, Mr. Cannon also testified at trial that he did in fact grab the cord to see if it would move." First of all, this is another situation where Hamilton alleged that Cannon "grabbed" the cord instead of "lifting" it. Secondly, Hamilton's counsel asked Cannon "you did not do that?" Hamilton would have us interpret "that" to refer to the somewhat non-responsive answer given by Cannon that an employee grabbed the cord. Rather, we interpret "that" to refer to the only action named in the series of questions asked: whether the tape over the cord had been kicked. Cannon has repeatedly denied

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[15]An example of this questioning is:

Q: Now, do you recall testifying at your deposition that it was an employee who reached down and pulled the cord up?

A: I do.

Q: Did you indicate at that time that you had reached down and *pulled* it up?

A: No, sir.

(Emphasis added). Hamilton points to this last answer as being inconsistent with Cannon's testimony at the hearing concerning what he did with the cord. However, as Cannon was forced to reiterate at least three times at the hearing, he did not "pull" the cord, rather he raised it enough to see if it was loose.

kicking the cord and his response to the question, if so interpreted, would be consistent with those denials.[16]

Other Testimony

Hamilton relies primarily on the testimony of Hamilton plant engineer Maurer, who accompanied Cannon during the inspection. Maurer testified that he observed Cannon "pull tape from a worn spot, pull or tug at it, kick the cord, and take a picture of it." According to Maurer, no one else could have kicked the cord, and no employee or management representative touched the cord. He testified that before Cannon's actions, "there was more tape on the cord" and "it was laying flush against the floor." He stated that the pulling and tugging on the cord raised it somewhat. Maurer also wrote a memorandum to Don Fairbanks, Hamilton's vice president for production, in which he recounts the inspection as follows:

> The cord . . . was taped to the floor. One section of the cord was exposed. Mr. Cannon kicked the exposed cord and positioned it differently with his hand before taking a picture of it. In my opinion he was staging the picture.

Hamilton also relies on the testimony of David Mueller, Hamilton's plant foreman at the time of the inspection, who also accompanied Cannon. Mueller testified that he observed that

> Mr. Cannon bent over and picked at the tape and pulled . . . the actual cord--pulled it up and tugged on it a number of times. At that point, he had kicked it around, he stepped back and took a photograph.

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[16]Hamilton also argues that it was inconsistent for Cannon not to mention at the hearing the employee statement that he had included in his deposition that "we trip over this thing constantly." However, Cannon was never specifically asked about this and some other statements that were allegedly inconsistent with his deposition; therefore, his lack of testimony on it is not surprising. The tripping hazard was established by other evidence anyway, including Cannon's own testimony and the photograph. Hamilton also claims that it was"paradoxical" for Cannon to allege a tripping hazard for this cord, yet find no such hazard was posed by the pneumatic cords on power hand tools used at the nearby tables. However, Cannon explained at the hearing why those particular cords did not present a tripping hazard. We have addressed most of Hamilton's attacks on Cannon's testimony and find it unnecessary to discuss them further, as the remaining contentions have less merit than the matters already considered. *See American Dental Association v. Secretary of Labor*, 984 F.2d 823, 829 (7th Cir. 1993), *reh'g en banc granted* ("[t]he dental association makes some other jabs at the rule, but they have less merit than those we have discussed so we move on").

Mueller testified that "no one else touched" the cord in any way but Cannon. Mueller also testified that the heavy silver duct tape over the cord "was maintained in a way that if there was a worn spot, the employees or foreman would instruct the employees to put another piece of tape over it." He stated that if the tape then became "bulky and looked messy, they would tear it up and put brand new tape on top of it."

Judge's Decision

As we noted earlier, in response to Maurer's "serious charge" that Cannon had conducted excessive interviews and staged the photograph of the cord, the judge specifically found that Cannon's "conduct and testimony did not bear a trace of bias, prejudice, or animosity towards Hamilton." In addition to this general crediting, the judge stated that "[a]s between Cannon and Maurer, Cannon's testimony is given more weight and credence." He also rejected Hamilton's argument that the cord did not pose a hazard. He found that Cannon's testimony and his photographic exhibit showed that the unsecured part of the cord created "a gap large enough in which an employee could catch his foot and be subjected to a fall injury." The judge therefore concluded that Hamilton had failed to comply with section 1910.22(a)(1).

Bases for Review

Hamilton contends that it could not have known of the cited condition because Cannon created it by pulling and kicking the cord. Hamilton argues that the judge erred in making a credibility determination in favor of Cannon because his testimony was "evasive and contradictory" and in direct conflict with what it characterizes as the credible and consistent testimony of its own witnesses. Hamilton further argues that, even if Cannon's testimony is considered more credible, the cord did not pose a hazard because the elevation was minimal and the Secretary has not shown that any employee had ever tripped over it.

Discussion

As discussed above, the Commission will ordinarily defer to a judge's credibility determination where it is "explained" and "carefully and impartially made in light of the entire record" because "it is the Judge who has lived with the case, heard the witnesses, and observed their demeanor." *C. Kaufman*, 6 BNA OSHC at 1297, 1977-78 CCH OSHD at p. 27,099. As long as summaries of pertinent testimony given by witnesses are included in the

decision, "if reasons are given for crediting the testimony of one witness, then reasons need not be given for failing to credit a witness whose testimony is contradictory." *E.L. Jones,* 14 BNA OSHC at 2132, 1991 CCH OSHD at p. 39,232; *cf. L.E. Myers Co.*, No. 90-945, slip op. at 19 n.17 (March 31, 1993) (credibility determination would not be deferred to where judge "totally ignored" testimony of contradicting witness).

As we noted above, the judge actually made two credibility determinations regarding this item. First, he presented a strong two-paragraph explanation for his crediting of Cannon in general. Second, he specifically credited Cannon over Maurer. We find that the judge adequately explained his credibility findings in favor of Cannon. While the judge did not particularly note foreman Mueller's testimony or make a specific credibility finding between Cannon and Mueller as well, it was not necessary under the special circumstances of this case because Mueller's testimony was almost the same as Maurer's anyway, and the general credibility determination quoted in Part II finds Cannon more believable than the witnesses giving conflicting testimony, such as Mueller does here.

Hamilton failed to introduce credible evidence to prove that the compliance officer "staged" the violative condition. Accordingly, as discussed above, we reject Hamilton's claim that the portions of Cannon's testimony that it cites were inconsistent. While the judge's findings could have been more detailed with regard to this item, Hamilton has not demonstrated why we should overturn the judge's credibility findings, and our review of the record has not revealed any adequate reason for doing so. Therefore, we accept the judge's credibility findings. *See, e.g., United States Steel Corp.*, 9 BNA OSHC 1641, 1644, 1981 CCH OSHD ¶ 25,282, pp. 31,251-52 (No. 76-5007, 1981).

We agree with the Secretary that Hamilton's reliance on the minimal elevation of the cord and the lack of tripping incidents is misplaced. As the Secretary notes, the Act is preventive in nature. "The fact that the hazard which the regulation protects against has never occurred is no defense to the violation." *Simplex Time Recorder Co. v. Brock*, 766 F.2d 575, 588 (D.C. Cir. 1985) ("*Simplex*").

Having deferred to the judge's crediting of Cannon's testimony concerning the loose condition of the cord where the tape had worn away and having rejected Hamilton's other

claims, we find that the Secretary has shown by a preponderance of the evidence that Hamilton could have known of the cited condition with the exercise of reasonable diligence. We thus conclude that the judge did not err in finding that Hamilton violated section 1910.22(a)(1).

Characterization and Penalty

The Secretary alleges that this violation was serious under section 17(k) of the Act, 29 U.S.C. § 666(k), because there was a substantial probability that serious physical harm could result from the condition.[17] Compliance officer Cannon testified that employees could trip on the portion of the cord not taped to the floor and strike their heads against the shelves on one side of the aisle or against the banding machine on the other. However, after examining the record, particularly the photograph of the condition taken by Cannon, we note that most of the cord was taped to the floor, and the untaped portion appears to be only slightly loose. While an employee could have tripped on the minimally elevated, untaped portion of the cord and then bumped against the metal shelves or the banding machine, or could have fallen to the floor, it is not substantially probable that in these circumstances the resulting injury would have been serious in nature. Based on the evidence, we conclude that the tripping hazard posed by the cord would not have resulted in death or serious physical harm. We therefore conclude that the violation was other-than-serious.

Taking into account the penalty determination factors listed in section 17(j) of the Act, 29 U.S.C. 666(j),[18] the judge assessed the $400 penalty proposed by the Secretary for the serious violation that he found. Based on our consideration of the penalty factors in

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[17]Section 17(k) of the Act provides:

> [A] serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists . . . .

[18]Section 17(j) of the Act provides that the Commission has authority to assess penalties that it deems appropriate upon considering the employer's size, the gravity of the violation, the employer's good faith, and the employer's history of violations.

section 17(j), particularly the low gravity of the violation, we find that it is appropriate to assess no penalty for this other-than-serious violation.

2. *Item 2: Ladder, Broken Rungs*

The Secretary alleges in this item that Hamilton committed a serious violation of 29 C.F.R. § 1910.27(f)[19] based on the unsafe condition of a ladder attached to a cement wall at the Nicolet warehouse, where fixtures from the main plant are stored and shipped. The warehouse is part of Hamilton's shipping department and is located about half a mile from the main plant.[20] The ladder had four rungs separated by about 12 inches, with the first rung located 5 inches above the ground. Compliance officer Cannon observed that the second and third rungs on the ladder had broken loose from the side rails on the right side. He testified that this could cause employees to slip down the ladder and possibly break an ankle or shin bone. He observed one employee attempt to use the ladder. Cannon also noted that the lower portion of the ladder was slightly bent.

Hamilton admits both that the condition existed and that there was employee exposure. At issue is whether the Secretary proved that Hamilton knew, or should have known with the exercise of reasonable diligence, of the violative condition.

The Secretary called as a witness Michael Herbers, who worked for Hamilton at the Nicolet warehouse at the time of the inspection but was no longer a Hamilton employee by the hearing date. Herbers testified that employees used the ladder at least twice a day to get in and out of the warehouse because it is the most accessible way to enter and exit the facility. He stated that, in addition to himself, his supervisor David Norvell and another employee used the ladder. Herbers stated that he had never been instructed by anyone at Hamilton not to use the ladder, nor had he ever been instructed to use the ramp to enter the warehouse. According to Herbers, the ladder had been in the cited condition for at least

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[19]Section 1910.27(f) provides:

> All ladders shall be maintained in a safe condition. All ladders shall be inspected regularly, with the intervals between inspections determined by use and exposure.

[20]The employees who worked at this warehouse checked in at the main plant at the beginning and close of their work shift each day. Another alleged violation at this location, citation no. 3, item 4, will be discussed *infra*.

two weeks, and perhaps as long as two months. When asked if the condition had been reported to management, he responded "we did [report it] to our supervisor" (Norvell) prior to the inspection, by telling him "he had better get the ladder fixed before somebody gets hurt."

Plant foreman Mueller, who visited the Nicolet warehouse once a month, testified that he had not received any employee report about the ladder being broken, and "to my knowledge, no other member of management knew that the ladder, in fact, was broken." He maintained that it was not obvious from a distance that the rungs of the ladder had broken loose from the weld, but rather it required a close look because the rungs themselves had not been bent back, although one of the side runners had.

After reviewing the testimony, the judge found that Hamilton knew of the broken ladder because the employees had reported the damaged condition of the ladder to their supervisor, and the supervisor's knowledge is imputed to Hamilton. He also stated that:

> Cannon, who was presumably not as familiar with the plant as Hamilton's management personnel, was able to discover the damage during the course of an expansive inspection. . . . In any event, Hamilton's failure to know of the damaged ladder demonstrated a lack of reasonable diligence on its part.

Having found that Hamilton had knowledge of the condition, the judge concluded that it had violated section 1910.27(f).

Hamilton contends that the judge erred in finding that it had knowledge that the ladder was broken because the condition was not obvious and plant foreman Mueller testified credibly that he was not aware of the condition. Hamilton argues that Herbers' testimony that he told his supervisor about the ladder is not credible because he could not remember whether that conversation occurred two months or two weeks before the inspection. It argues that Herbers was not credible for the additional reason that he had been discharged from Hamilton's employment for a safety violation, that of smoking in the warehouse. Hamilton also contends that, even if the condition had been reported, the labor problems could have delayed the supervisor's response.

Discussion

Relying on Herbers' testimony that he had taken part in notifying his supervisor of the ladder's defective condition and in asking him to fix it, the judge determined that the

supervisor had actual knowledge of the cited condition. He imputed the supervisor's actual knowledge to Hamilton. *See, e.g., Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1992 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992). Contrary to the Secretary's suggestion, the judge's reliance on Herbers' testimony was not based on an actual credibility determination, because there was no evidence in *direct* conflict. Mueller did not testify unequivocally that the ladder had not been reported to any supervisor. Rather, he qualified his statement by adding "to my knowledge." *See, e.g., Keco Indus., Inc.*, 13 BNA OSHC 1161, 1167, 1986-87 CCH OSHD ¶ 27,860, p. 36,476 (No. 81-263, 1987) (plant manager's testimony as to how much time needed did not rebut employee's testimony as to how much time actually spent). The person who probably would have been best able to contradict Herbers was supervisor Norvell, who was not called as a witness.[21]

In response to Hamilton's claim that Herbers' testimony was unreliable, we note, as the Secretary does, that although Herbers may not have been able to specify exactly when, between two weeks and two months, the defective condition had existed or when his supervisor had been notified, Herbers did not waver in his testimony that the ladder was unsafe and that Norvell had been informed of it prior to the inspection. We therefore conclude that the judge did not err in determining that the ladder's condition had been reported to the supervisor and that his knowledge is imputed to Hamilton.

As the Secretary contends, he has established that Hamilton had constructive knowledge of the ladder's condition. The judge stated that, if Cannon could observe the problem, then Hamilton's management, who would be much more familiar with the site, could have known about it with the exercise of reasonable diligence. Where the alleged "violations [were] based on physical conditions and on practices . . . which were readily apparent to anyone who looked," they "indisputably should have been known to management." *Simplex*, 766 F.2d at 589. *Accord National Industrial Constructors, Inc.*, 10 BNA OSHC 1081, 1097, 1981 CCH OSHD ¶ 25,743, p. 32,138 (No. 76-4507, 1981); *J.H. MacKay Electric Co.*, 6 BNA OSHC 1947, 1950, 1978 CCH OSHD ¶ 23,026, p. 27,824 (No.

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[21]When asked which other employees had used the ladder, Herbers named "Norvell" and another employee. Assuming the "Norvell" that he referred to is the same person as the supervisor, then knowledge is even more strongly shown because the supervisor himself was reported to have used the defective ladder.

16110, 1978); *Public Improvements, Inc.*, 4 BNA OSHC 1864, 1866, 1976-77 CCH OSHD ¶ 21,326, p. 25,612 (No. 1955, 1976). As the Secretary notes, an employer has a general obligation to inspect its workplace for hazards. *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387, 1980 CCH OSHD ¶ 24,495, p. 29,926 (No. 76-5089, 1980). That obligation "requires a careful and critical examination, and is not satisfied by a mere opportunity to view equipment." *Austin Commercial v. OSHRC*, 610 F.2d 200, 202 (5th Cir. 1979). Furthermore, the cited standard has its own specific requirement that "[a]ll ladders shall be inspected regularly." Plant foreman Mueller testified that he visited the warehouse only once a month. Norvell apparently worked there regularly but did not take action to correct the clearly visible problem with the ladder. Because Hamilton has not presented any specific evidence to support it, we reject Hamilton's claim that the ongoing labor problems could have delayed any response to a report that the ladder was damaged.

For the reasons stated above, we conclude that the Secretary proved by a preponderance of the evidence that Hamilton violated section 1910.27(f).

Characterization and Penalty

The Secretary alleges that serious physical harm could have resulted to employees using the ladder and therefore the violation was serious under section 17(k) of the Act, see *supra* note 17. Cannon testified that, because of the broken rungs, an employee could have slipped down the ladder and broken an ankle or shin bone. Without any evidence in the record to demonstrate otherwise, we agree with the judge and characterize this violation as serious.

The judge assessed the penalty of $300 proposed by the Secretary, finding that amount appropriate based on the penalty factors in section 17(j) of the Act. See *supra* note 18. We have considered the penalty factors set forth in section 17(j) and agree with the judge's penalty assessment of $300.

3. *Item 5a: Safety Gloves, Use of Mineral Spirits*

This item alleged a serious violation of 29 C.F.R. § 1910.132(a)[22] because, as

[22]Section 1910.132(a) requires:

(continued...)

compliance officer Cannon observed, an employee in the hardware area was not wearing protective gloves while wiping down parts with a cloth containing mineral spirits.

Cannon testified that "[t]he employee's foreman, or forewoman, was within about ten feet of the employee when we entered that location." Later, on redirect, when asked to "clarify for the record why the supervisor knew the employee was not wearing gloves," Cannon answered that

> when we walked into the area, the supervisor was standing--I think I said approximately ten feet from there at the most--looking directly at the operation, and I have no reason to believe they couldn't see what was going on.

Hamilton has a written policy that requires employees to wear gloves when using solvents like mineral spirits. Cannon testified that he reviewed the policy and found it to be adequate. Cannon stated that he was told that adequate gloves were available, and he acknowledged that there was another employee nearby who was wearing suitable gloves. Cannon also noted that, upon viewing the employee during the inspection, Mueller stopped the operation and told the employee about the glove requirement for that type of work. Cannon testified that he briefly examined the hands of the employee who was not wearing gloves and observed no signs of dermatitis or similar irritation; instead, he saw only redness.

According to the Material Safety Data Sheet ("MSDS") for mineral spirits provided to the Secretary by Hamilton, employees using mineral spirits should wear protective gloves to minimize exposure. The MSDS provides that "overexposure" to the substance can: irritate the eyes, skin, and respiratory system; cause nervous system depression; and, if there is "extreme overexposure," result in unconsciousness or death.

Plant foreman Mueller testified that the working supervisor, Brenda Chaffin, was in the hardware fabrication room when Mueller, along with Cannon, entered and observed the employee not wearing gloves. Mueller stated that Chaffin was probably within 10 to 15 feet of the employee and he did not know then why she did not tell the employee to put on the

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[22](...continued)

> [P]rotective clothing . . . shall be provided, used, and maintained . . . wherever it is necessary by reason of hazards of processes or environment [or] chemical hazards . . . encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

gloves. Mueller testified that he did not say anything to Chaffin at the time, but when he asked her about it later, "[s]he explained to me that she had just walked into the room, you know, moments before that happened." The Secretary did not object to this hearsay testimony. Mueller also testified, over the Secretary's objection, that the employee at issue was the second shift steward, representing the bargaining unit, and an active union member of the negotiating committee.

Hamilton's written policy on glove use was not entered into evidence. However, plant engineer Maurer, who developed the safety rules, testified that Hamilton's safety policies in general are posted on bulletin boards and issued to its foremen, who maintain safety manuals in which the policies are kept. According to plant foreman Mueller, Hamilton provides an adequate supply of gloves for all employees required to wear them, and the glove use rule is enforced, as are Hamilton's other safety rules, through Hamilton's normal disciplinary procedure, consisting of these steps: (1) a verbal warning, which may or may not be documented; (2) a written warning; (3) suspension; and (4) possible discharge.

The judge rejected Hamilton's argument that it had no knowledge of the cited condition and found a violation. He specifically relied on Cannon's testimony that the supervisor was within 10 feet of the employee when the inspection party entered and was looking directly at the operation. He summarily characterized the violation as serious and assessed a penalty of $400.[23]

Hamilton argues that the judge erred in finding that it had knowledge of the violation for the following reasons. First, it contends that the judge erred in relying on Cannon's testimony without addressing the evidence presented by Mueller that the supervisor had just arrived in the area moments before and thus had no time to become aware of the situation. Second, Hamilton argues that "this was a deliberate attempt by this employee to create a citable situation." Third, according to Hamilton, the protective glove policy that it had established and enforced through normal disciplinary procedures clearly showed that it exercised reasonable diligence.

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[23]Apparently the judge assessed this amount based on the proposed penalty in the citation of $400 for items 5a and item 5b together. The complaint clarified that $200 was proposed for each. Item 5b was settled prior to the hearing.

Discussion

At issue is whether the Secretary has proven employer knowledge by a preponderance of the evidence. The judge implicitly found that Hamilton had knowledge of the violative condition, based on Cannon's testimony that, when he walked into the hardware area, the supervisor was standing about 10 feet from the employee who was not wearing gloves, and she was *looking in the direction of that employee*. As we noted above, where such a physical condition or practice is "readily apparent to anyone who looked," a supervisor can be found to have at least constructive knowledge of it. *See Simplex*, 766 F.2d at 589. Furthermore, a supervisor's knowledge can be imputed to the employer. *See Pride Oil Well*, 15 BNA OSHC at 1814, 1992 CCH OSHD at p. 40,584. However, we agree with Hamilton that in his decision the judge should have addressed Mueller's testimony that the supervisor had later explained to him that "she had just walked into the room . . . moments before that happened." Nevertheless, the judge's failure to mention and articulate his views on this evidence does not render his decision insupportable. The Commission is the ultimate fact-finder. *E.g., Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 834 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *Astra Pharmaceutical*, 9 BNA OSHC at 2131 & n.18, 1981 CCH OSHD at p. 31,901 & n.18; *see J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2208, 1993 CCH OSHD ¶ 29,964, p. 41,027 (No. 87-2059, 1993). When the Commission exercises this authority to consider evidence not addressed by the judge, it must include findings and reasoned conclusions. *See, e.g., Duane Smelser Roofing Co. v. Marshall*, 617 F.2d 448, 449-50 (6th Cir. 1980). Therefore, we shall consider this testimony by Mueller and determine for ourselves whether it rebuts the Secretary's showing of knowledge.

We first note that the out-of-court statement of the supervisor to Mueller that she had just walked into the room "moments before that happened" does not directly conflict with Cannon's testimony that, when he entered the area, the supervisor was there and looking in the direction of the employee from a distance of about 10 feet. The supervisor did not deny that she was in the area when Cannon entered and was looking in the employee's direction. Rather, Chaffin maintains that she was in such a position only "moments before" his arrival. Assuming that was the case, we agree with the Secretary that

a reasonably diligent supervisor could immediately detect the employee's readily apparent failure to use gloves and direct him to comply with the glove rule.

Even if this account is considered to directly contradict Cannon's, however, the testimony of Cannon is more reliable because he gave his statement before the judge and was subject to cross-examination. The supervisor made the statement to Mueller *out-of-court* and therefore was not available for cross-examination. Such hearsay testimony is inherently less reliable, so much so that if the Secretary had objected to its admission into evidence, the judge would have had a basis to sustain the objection. However, because the Secretary did not object to it at the hearing, this hearsay evidence is admissible. *See* Rule 103(a) of the Federal Rules of Evidence; *Regina Constr.*, 15 BNA OSHC at 1049 n.7, 1991 CCH OSHD at p. 39,468 n.7. Had Hamilton called the supervisor as a witness, and had she given testimony at the hearing to the same effect as the hearsay evidence, we might have considered her statement more reliable. Having evaluated the hearsay testimony, we find that it does not rebut the Secretary's showing of constructive knowledge established by Cannon's testimony.

Hamilton also claims that it lacked knowledge of the violation because the employee deliberately did not wear gloves in order to harass Hamilton. The only evidence Hamilton introduces to support this assertion is testimony that the employee was an active union member. However, that fact alone does not prove that the failure to use gloves was deliberate. Had Hamilton introduced testimony from a witness with first-hand information that the gloves were purposefully not worn, its evidence might have outweighed that of the Secretary on this issue of knowledge. *See Astra Pharmaceutical Prods., Inc. v. OSHRC*, 681 F.2d 69, 74 (1st Cir. 1982) ("thin as the [Secretary's] underlying evidence was," it satisfied burden of proof because it was not rebutted by employer with full possession of the facts).

Hamilton also contends that it could not have known of the condition with the exercise of reasonable diligence because it has a work rule requiring glove use that even Cannon found adequate, and that it has communicated and enforced that rule. The

Commission and the Sixth Circuit, to which this case can be appealed,[24] have held that an employer may rebut the Secretary's showing of knowledge if it proves that it had "a thorough and adequate safety program which is communicated and enforced as written." *Towne Constr. Co. v. OSHRC*, 847 F.2d 1187, 1190-91 (6th Cir. 1988), *aff'g* 12 BNA OSHC 2185, 1986-87 CCH OSHD ¶ 27,760 (No. 83-1262, 1986) (quoting *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987)); *see Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1054-55, 1991 CCH OSHD ¶ 29,344, p. 39,452 (No. 86-1087, 1991).

While the existence of an adequate written work rule on glove use is not disputed, the evidence is insufficient to establish that Hamilton effectively communicated and enforced this *specific* rule. Mueller and Maurer testified that Hamilton's safety rules *in general* have been communicated and enforced. However, the only evidence in the record directly addressing enforcement of this specific glove rule is Cannon's testimony concerning his observation of the supervisor 10 feet from the employee not wearing gloves. This testimony is strong evidence that the rule was not adequately enforced. Therefore, we find that the record does not support Hamilton's claim that it exercised reasonable diligence.

We therefore conclude that the Secretary proved by a preponderance of the evidence that the supervisor knew, or at least could have known, of the violative condition with the exercise of reasonable diligence, and that her knowledge is imputable to Hamilton. Accordingly, we find that the judge did not err in concluding that Hamilton violated section 1910.132(a).

Characterization and Penalty

The Secretary contends that this violation of section 1910.132(a) was serious under section 17(k) of the Act, see *supra* note 17. The judge summarily characterized the violation as serious under section 17(k) after earlier noting the provisions of the MSDS, which the Secretary introduced into evidence. As mentioned above, the MSDS indicates that "overexposure" to mineral spirits can result in irritation to the eyes, skin, and respiratory

[24]This case can be appealed to the Sixth Circuit based on the location of the violation and Hamilton's principal office. See section 11(a) of the Act, 29 U.S.C. § 660(a).

system, and more serious injury or death could result from "extreme overexposure." The MSDS lists as a sign of "overexposure" to the skin "[r]edness *and* itching or burning sensation." (Emphasis added.)

As we read the MSDS, the serious injuries associated with mineral spirits are those resulting from prolonged and repeated exposure. The Secretary has not shown that this employee was exposed for such periods of time. Indeed, there is no evidence establishing how long the employee had been working without gloves.[25] Cannon testified that he observed only redness, and no dermatitis, on the hands of the employee not wearing gloves. The lack of evidence of itching or burning would tend to indicate a shorter exposure time. For these reasons, we characterize this violation as other-than-serious.

The Secretary proposed a penalty of $200, which is the amount assessed by the judge after he considered the penalty factors in section 17(j) of the Act, see *supra* note 18. Based on those factors, in particular the lower gravity of the violation, we determine that an appropriate penalty is $100 and assess that amount for the other-than-serious violation.

4. *Item 6: Eyewash, Access Blocked*

This item charged that Hamilton committed a serious violation of 29 C.F.R. § 1910.151(c)[26] because, as a photographic exhibit shows and Hamilton does not dispute, a storage cabinet[27] blocked access to the eyewash station located on a wall near the battery charging unit in the stockroom area. Compliance officer Cannon explained that the standard requires access to the eyewash "for immediate emergency use" because battery acid is an injurious corrosive material. According to Cannon, if employees working at the battery

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[25]We note that even if the employee had been using the mineral spirits without wearing gloves for only a short period of time, that does not negate finding a violation. *See, e.g., Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1386 (D.C. Cir. 1985); *Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶ 29,239, p. 39,158 (No. 87-1359, 1991); *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1232, 1981 CCH OSHD ¶ 25,129, p. 31,032 (No. 76-4627, 1981).

[26]Section 1910.151(c) provides:

> Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

[27]Mueller testified that the cabinet measured about 3 feet wide, 2 feet deep, and 2 feet high.

charging unit had gotten battery acid in their eyes, the cabinet would have impeded their access to the eyewash station and thereby caused serious eye injury.

To support his claim that Hamilton could have known of the condition with the exercise of reasonable diligence, the Secretary introduced evidence indicating a prior failure to exercise such diligence. He submitted into evidence a memorandum from plant engineer Maurer to vice president Fairbanks, listing the results of an advisory inspection of Hamilton's facilities conducted by the Industrial Commission of Ohio in October 1986, about a year and a half before the OSHA inspection at issue here. Included in the results of the inspection for the main plant is an entry under "Stockroom" reading "[a]ccess to eyewash station blocked." Plant foreman Mueller acknowledged that the document showed a prior instance in which that eyewash station had been blocked.

Hamilton maintains that it had no knowledge of the condition because hostile employees deliberately positioned the cabinet in front of the eyewash just prior to the inspection. As its only evidentiary support, Hamilton cites plant foreman Mueller's testimony that the cabinet was "always kept right by the stockroom office" and it was there the last time he saw it, although he could not recollect when that was. Mueller testified that the cabinet was empty and that there was no reason for it to be in front of the eyewash station.

The judge concluded that Mueller's testimony alone was insufficient to prove that the placement of the cabinet was the result of "employee sabotage." He concluded that Hamilton had committed a violation of the cited standard.

Hamilton argues that the Secretary failed to prove a violation because he did not establish how long the cabinet had been in that location, especially in light of the absence of employees working in the area at the time and Mueller's testimony that the cabinet was always kept elsewhere. It notes that blocked aisles were among the items checked by the safety committee during their inspections.[28] For these reasons, Hamilton contends that the

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[28]Hamilton cites to a particular exhibit in the record that consists of a very large collection of safety checklists that were completed for inspections beginning in October 1985 and ending in January 1989. These checklists are not indexed in any way and most of them either do not concern Hamilton's main plant and its warehouse, or do not address the work areas in the main plant that are at issue in this case. Of course, the checklists

(continued...)

cabinet was placed in the cited location by hostile employees, and the citation item should have been vacated.

Discussion

It is stipulated that the cabinet blocked access to the eyewash station. The record does not show how long the cabinet had been in the cited position. However, as the Secretary notes, even if the cabinet had been there only for a short time, that does not negate the presence of the hazard. *See, e.g., Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1386 (D.C. Cir. 1985); *Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶ 29,239, p. 39,158 (No. 87-1359, 1991); *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1232, 1981 CCH OSHD ¶ 25,129, p. 31,032 (No. 76-4627, 1981). The issue on review is whether Hamilton should have known of the blocked access with the exercise of reasonable diligence.

The Secretary maintains that Hamilton should have known of the blocked access to the eyewash station because the condition was in plain view of the compliance officer during the inspection. Where the cited condition is "readily apparent to anyone who looked," employers have been found to have constructive knowledge. *See Simplex*, 766 F.2d at 589. We note that the judge particularly questioned Cannon at the hearing as to whether he critically evaluated what he saw to determine whether the condition could have been a setup. Cannon responded that he tried to do that.[29] As the very strong general crediting of Cannon quoted earlier shows, the judge was satisfied with Cannon's demeanor and responses to his questions. Furthermore, some evidence of lack of due diligence in the past is

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[28](...continued)
made *after* the inspection dates (April 20 to May 3, 1988) are irrelevant to the issue of whether a violation existed.

[29]The interchange between the judge and Cannon went as follows:

> JUDGE SPARKS: Were there any of these alleged violations that you found in which you saw any evidence that they were setups?
>
> WITNESS: No, sir, I can't recall any incident that in my personal opinion would say that was a setup for my advantage.

evidenced by the state advisory inspection report showing that this eyewash station had been blocked in the past, although the cause of the blockage was not stated.

To support its contention that the cabinet had been deliberately placed to impede access to the eyewash station, Hamilton points to Mueller's testimony that the cabinet was usually kept elsewhere. However, his testimony is of little weight because he could not remember when he had last seen it there. To support its claim that it exercised reasonable diligence, Hamilton relies on general evidence that aisles were inspected but does not show that this occurred at regular intervals. Hamilton did not introduce evidence indicating that any alternative eyewash station was available for use in this area.

We therefore conclude that the Secretary proved by a preponderance of the evidence that Hamilton could have known of the violative condition with the exercise of reasonable diligence, and that the judge did not err in finding that Hamilton violated section 1910.151(c).

Characterization and Penalty

The Secretary alleges that the violation is serious under section 17(k) of the Act, see *supra* note 17. The judge characterized the violation as serious, noting Cannon's testimony that an employee with battery acid in his or her eyes who could not reach the eyewash station due to the blocking cabinet could suffer serious eye injury, including loss of sight. We agree with the judge that there was a substantial probability that serious physical harm could result from the violative condition, and we characterize this violation as serious.

The judge assessed the $500 penalty proposed by the Secretary based on the factors in section 17(j) of the Act. Having considered these factors, we assess a penalty of $500.

5. *Item 11: Stapler, Malfunctioning Guard*

In this item, Hamilton is charged with a serious violation of 29 C.F.R. § 1910.242(a)[30] because one of its employees in the finishing department was using an air-supplied stapler that could fire staples into the air because of a malfunctioning guard. When

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[30]Section 1910.242(a) provides:

> Each employer shall be responsible for the safe condition of tools and equipment used by employees, including tools and equipment which may be furnished by employees.

the stapler was removed from contact with a surface, the guard should have dropped down and prevented the stapler from firing. At issue on review is whether the Secretary proved by a preponderance of the evidence that Hamilton could have known of the stapler's condition with the exercise of reasonable diligence.

Compliance officer Cannon testified that he became aware of this condition when he randomly asked employees to check or tell him whether their equipment was working properly. One employee testified that she had been using the stapler to affix material to a surface, and it was not until the inspection that she realized that the stapler would fire without surface contact. It was not disputed that when she tested the stapler for Cannon, it fired into the air. The employee testified that she did not report the stapler to the maintenance department because she did not know until then that there was a problem. She further testified that she saw no evidence of tampering, but she had not been instructed in the use of the stapler and its guard, or in how to check the guard to see if it worked properly. According to the employee, the stapler had been obtained from the tool cabinet, and employees were sharing it up and down the line. When asked if he observed any sign of tampering when he examined the stapler after seeing it misfire for the employee, Cannon stated,

> I didn't see anything that looked like it was bent out of shape or out of line. The guard would raise up and down. It did not stick. If you turned it loose, it would fall back into position.

The Secretary argues that the evidence establishes that Hamilton could have known of the defective guard with the exercise of reasonable diligence. In addition to the testimony above, the Secretary relies on the 1986 citation that OSHA issued to Hamilton because staplers of the same model and another model were operated with the work contacting element, or guard, removed in violation of 29 C.F.R. § 1910.212(a)(3)(ii)[31] at another plant.

Hamilton contends that it had no knowledge of the malfunctioning guard because the condition was the result of a deliberate act of harassment and Hamilton had exercised

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[31]Cannon testified that this standard was cited in accordance with the OSHA directive that requires citing staplers using staples over a certain diameter under section 1910.212(a)(3)(ii), and those using staples with a smaller diameter (as is the instant case) under section 1910.242(a).

reasonable diligence. It notes that, consistent with his written report entered into evidence, Robert Murray, Hamilton's maintenance supervisor, testified that, when he was given the stapler to evaluate and repair after it was examined by Cannon, he observed that the extremely hard pin that holds the trigger and safety guard in place was "severely bent." Based on his familiarity with stapler repair, he opined that such a bend could have been caused by a screwdriver or pliers, but not by normal use. Murray testified that the number of damaged tools requiring repairs had increased during the period of the labor problems.[32]

Murray, as well as plant foreman Mueller, indicated that an employee who operates a stapler while knowing that it is defective is in violation of the company policy that such equipment is to be in working condition. According to Mueller, disciplinary action had resulted in one case where an employee had jimmied a stapler guard. After Hamilton received the 1986 citation described above, Mueller and Maurer issued a "Notice" to all employees stating that it is company policy to use safety guards on staple guns, unless expressly directed otherwise by the foreman, and that employees not complying "will be dealt with accordingly."

After noting Hamilton's 1986 citation for violating a similar standard, the employee's lack of instructions in using or checking the stapler guard, and evidence that the stapler had been obtained from the tool cabinet, the judge concluded that "[t]hese facts establish that with reasonable diligence Hamilton could have known of the hazardous condition of the stapler." He briefly mentioned Murray's testimony that he observed signs of tampering, as well as Cannon's and the employee's testimony that they saw no such evidence. He then concluded that "Murray's testimony is insufficient to establish that the stapler was deliberately rendered defective." After concluding that Hamilton violated the standard, he characterized the violation as serious, as the Secretary alleged, and assessed the penalty of $400 proposed by the Secretary.

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[32]However, Cannon testified that he questioned a maintenance supervisor who told him that, for the prior eight weeks, there had been no increase in maintenance.

Discussion

As noted above, the Secretary has the burden of proving that Hamilton had knowledge of the condition by a preponderance of the evidence. While the Secretary presented sufficient evidence to make a prima facie showing of knowledge, Hamilton introduced considerable evidence that it could not have known of the stapler's malfunctioning guard and that it had exercised reasonable diligence. The employee was not aware of the stapler's condition until the inspection;[33] therefore she had not reported the problem to Hamilton's maintenance department. Thus, Hamilton had no report that this stapler was defective, and it had a company policy prohibiting employees from using staplers that are not in working order.

Murray, who repaired staplers as part of his general duties, testified that the severely bent pin indicated tampering with the stapler guard. Cannon, whose experience with staplers is not established in the record, did not mention the pin in his description of what he observed, but instead referred to the stapler in general and the guard. Therefore, Cannon's testimony regarding tampering is not in direct conflict with Murray's because Murray focussed on the bent pin while Cannon did not. Thus, the judge's statement that Murray's testimony was insufficient is not a credibility determination that requires deference. *Cf. Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1589 n.16, 1992 CCH OSHD ¶ 29,662, p. 40,191 n.16 (No. 88-1545, 1992) (consolidated) (where testimony did not rebut Secretary's evidence, finding by judge not a credibility determination entitled to deference). Moreover, the employee's testimony that she saw no signs of tampering is entitled to little weight because she said that she did not know how to check to determine if the stapler guard was functioning properly.

We conclude that Hamilton's considerable rebuttal evidence presented in Murray's testimony, noted above, that it could not have known of the violative condition with the exercise of reasonable diligence outweighs the Secretary's evidence of knowledge.

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[33]We note that, as the Secretary suggests, the record indicates that at least one employee may not have been adequately instructed in the use of the stapler and detection of guard problems on it. However, we do not further discuss this matter in light of Murray's testimony on his examination of the stapler and Hamilton's evidence that its work rule was enforced, as well as the Secretary's failure to issue a citation for failure to instruct adequately.

Therefore, the Secretary has failed to meet his burden of proving knowledge by a preponderance of the evidence.[34] *See, e.g., Trinity Indus., Inc.*, 15 BNA OSHC 1788, 1789-90, 1992 CCH OSHD ¶ 29,773, pp. 40,493-94 (No. 89-1791, 1992). Because the Secretary has failed to make the requisite showing of knowledge, we vacate this item.

B. *Citation No. 2: Alleged Repeat Violations*

1. *Item 1: Fire Exit, Access Impeded*

This item charges that Hamilton committed a repeat violation of 29 C.F.R. § 1910.37(k)(2)[35] because access to what was marked as a "Fire Door" in the storage, or stock, room was blocked by various materials. As the photographic exhibits in evidence show, sitting on the floor in front of the door were boxes, buckets, and a barrel all containing screws and bolts, as well as a blanket and a plastic tray containing cabinet hardware. During the first shift, four employees would spend the majority of their time in the storage room. Cannon testified that smoke inhalation or other injuries could result if access to the door was blocked during an emergency.

Hamilton does not dispute that the condition existed, but it claims that it had no knowledge of it because employees had deliberately placed the materials there to create a violative condition. It claims that it therefore could not have known of the condition despite the reasonable diligence that it exercised during its "regular" checklist inspections, see *supra* note 28, that included ensuring that exits were free and clear for emergency use. It notes that the Secretary did not establish how long the materials had been there. Hamilton also argues that Cannon exaggerated the hazard posed by the blockage of the cited door. It asserts that, although Cannon recognized that there were other doors from the storage room into the mill and office areas of the plant, he did not consider that there was another door

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[34]Our inquiry here is limited to whether the Secretary proved Hamilton's knowledge by a preponderance of the evidence. We consider Murray's evidence of tampering only as one of several pieces of rebuttal evidence. We need not, and do not, make any finding as to whether employees did in fact tamper with the guard.

[35]Section 1910.37(k)(2) provides:

> Means of egress shall be continuously maintained free of all obstructions or impediments to full instant use in the case of fire or other emergency.

leading from the storage room directly to the exterior of the building, as Hamilton's diagrammatic and photographic exhibits show.

The judge found that the evidence did not support Hamilton's arguments and rejected them.

Discussion

We agree with the judge that Hamilton could have known of the condition with the exercise of reasonable diligence. As the Secretary notes, the blocked exit was in plain view and would have been "readily apparent" to a Hamilton supervisor. *See Simplex*, 766 F.2d at 589. The Secretary need not establish how long the condition existed in order to prove a violation. The short duration of exposure to a violative condition is no defense against evidence of a violation. *E.g., Walker Towing*, 14 BNA OSHC at 2094, 1991 CCH OSHD at p. 39,158. Hamilton attempts to rebut the Secretary's showing of knowledge by arguing that its "regular" checklist inspections demonstrated reasonable diligence. However, there is no evidence establishing exactly how regularly these checklist inspections were conducted or that they always included the stockroom. At most, the exhibit containing the checklists indicates that some inspections may have been conducted more than once a month.

Evidence showing Hamilton's past lack of reasonable diligence is contained in Maurer's report on the results of the 1986 Ohio Industrial Commission advisory inspection, which listed "[a]ccess to emergency exit blocked" among the conditions in the "Stockroom." This report supports the Secretary's contentions that Hamilton could have known of the blocked exit if it had exercised reasonable diligence, and that the condition was not the result of a deliberate act by employees.

Regarding Hamilton's claim that the hazard was exaggerated, we note that, although there was another door to the outside, as shown in Hamilton's exhibits, the existence of that door does not negate the finding that the blocked access to the cited door violated section 1910.37(k)(2). The hazard posed by the blockage of access to this door, which was marked for its intended use as a "Fire Door" and accordingly equipped with side hinges and a panic bar, is not diminished by the existence of another door. *Compare Hackney/Brighton Corp.*, 15 BNA OSHC 1884, 1886, 1992 CCH OSHD ¶ 29,815, p. 40,617 (No. 88-610, 1992) (door could be opened from inside and was intended as means of egress, violation of substantially

level egress requirement at 29 C.F.R. § 1910.37(j) found, despite presence of other exits) *with Spot-Bilt, Inc.*, 11 BNA OSHC 1998, 2001, 1984-85 CCH OSHD ¶ 26,944, pp. 34,550-52 (No. 79-5328, 1984) (cited door not intended for use as exit, as evidenced by removal of door's handle and exit sign).[36] For the reasons above, we conclude that the judge did not err in finding that Hamilton violated section 1910.37(k)(2).

Characterization and Penalty

The judge found that the violation was repeat, as alleged, based on a 1985 citation, that became a final order, alleging that Hamilton violated 29 C.F.R. § 1910.37(f)(1)[37] because an emergency exit door was "blocked by pallets of material." He relied on *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979), which provides:

> A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.

See, e.g., Stone Container Corp., 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, p. 38,819 (No. 88-310, 1990). The judge found that, even though a different standard was involved, the basis for the 1985 violation was a blocked exit, which is substantially similar to what is cited here. We agree with the judge that the violation is repeat.

The Secretary proposed a penalty of $800. After considering the penalty factors in section 17(j) of the Act, the judge assessed a penalty of $400. Having taken into account the section 17(j) factors, we agree with the judge that a penalty of $400 is appropriate.

2. *Item 3: Safety Shoes, Moving Pallets*

This item alleges that Hamilton committed a repeat violation of section 1910.132(a) because Hamilton's production expeditor was not wearing protective shoes while loading pallets onto a forklift truck in the shipping area. The standard requires that protective

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[36]We note that Hamilton's own exhibit on policy and procedure for "Emergency Evacuation" emphasizes the importance of the doors to the outside over the ones leading to the mill and office areas by providing that employees in this area are to "exit the building through the doors located on the East side of the Stock Room."

[37]This standard requires that "exit access shall be so arranged that exits are readily accessible at all times."

clothing be used "wherever it is necessary by reason of hazards of processes or environment . . . encountered in a manner capable of causing injury . . . ." See *supra* note 22.

Cannon testified that he estimated that the wooden pallets weighed from 25 to 35 pounds. According to Cannon, the employee told him that he also moved cabinets, and that he had not injured his feet while working in the shipping area. Plant foreman Mueller testified that the employee primarily did office work, but that once or twice every two or three weeks for five to ten minutes he lifted or carried objects that could drop on his feet. Mueller testified that, consistent with a 1985 letter from Hamilton to OSHA regarding abatement of a safety shoe citation, Hamilton's policy is that all production employees and foremen must wear safety shoes. He added that "any office employees who are going to be working in a work area *for a long period of time* would have to wear them." (Emphasis added).

The judge affirmed the citation item, particularly noting that, even though an employee's exposure may be of only short duration, the condition is properly charged as a violation under the Act.

Hamilton argues on review that "it has a reasonable and prudent policy requiring production employees, and other employees whose activities put them at significant risk to injury to their feet, to wear safety shoes." It contends that the employee's brief time spent doing this type of work and his lack of foot injuries show that "there was not a significant risk of foot injury" and protective footwear was not necessary, citing *General Motors Corp., GM Parts Division*, 11 BNA OSHC 2062, 1984-85 CCH OSHD ¶ 27,309 (No. 78-1443, 1984) (consolidated), *aff'd*, 764 F.2d 32 (1st Cir. 1985).

Discussion

We agree with the judge that the Secretary has made a prima facie showing of a violation based on his evidence that the employee was exposed to the hazard of foot injury. We conclude that Hamilton has not rebutted this showing by relying solely on evidence establishing the short duration of exposure and the employee's lack of foot injuries. As we have noted several times in this case, the brevity of exposure to a violative condition does not negate evidence of the violation. *E.g., Walker Towing*, 14 BNA OSHC at 2074, 1991 CCH

OSHD at p. 39,158. Furthermore, Cannon's testimony that the employee told him that he had not had any foot injuries is not sufficient evidence to rebut a showing of exposure to the hazard. In addition to being hearsay testimony and therefore generally less reliable, see *supra* citation no. 1, item 5a, the evidence that the employee had not had a foot injury would not alone establish that he was not exposed to the hazard. The Commission has observed that a "low number of recorded injuries has probative value regarding the existence of a hazard, but does not rebut the objective evidence of exposure to a hazard." *Dayton Tire and Rubber Co.*, 8 BNA OSHC 2086, 2092, 1980 CCH OSHD ¶ 24,842, p. 30,639 (No. 16188, 1980). *Accord Amforge Division, Rockwell International*, 8 BNA OSHC 1405, 1407, 1980 CCH OSHD ¶ 24,439, p. 29,814 (No. 76-3488, 1980) *and cases cited therein*; *see Arkansas-Best Freight Systems*, 2 BNA OSHC 1620, 1622, 1974-75 CCH OSHD ¶ 19,326, p. 23,105, *aff'd*, 529 F.2d 649 (8th Cir. 1976). The Commission has agreed with a judge's conclusion that "the Act does not prescribe any specific injury rate as a prerequisite for requiring the use of protective equipment." *Owens Corning Fiberglas Corp.*, 7 BNA OSHC 1291, 1296, 1979 CCH OSHD ¶ 23,509, p. 28,493 (No. 76-4990, 1979), *aff'd*, 659 F.2d 1285 (5th Cir. 1981).

We find *General Motors*, upon which Hamilton relies, to be distinguishable from this case on its facts. GM had a policy that its warehouse employees were not required to wear safety shoes, based on the type of work they did. Hamilton, on the other hand, bases its policy on the length of time that work is performed. Furthermore, unlike Hamilton, GM presented considerable evidence to support its claim that it had not violated section 1910.132(a), including statistics on injuries, testimony on the practice of GM warehouse employees who chose not to wear safety shoes despite the payroll deduction plan for them, and testimony by GM safety managers on industry practice. No comparable evidence was introduced by Hamilton in this case. For the reasons stated above, we conclude that the judge did not err in determining that Hamilton violated section 1910.132(a) by permitting its employee to move pallets in the shipping area without wearing adequate foot protection.

Characterization and Penalty

The judge characterized this violation as repeat, as alleged by the Secretary, after finding that it was substantially similar to the 1985 citation issued to Hamilton for violating

section 1910.132(a) regarding foot protection, which became a final order. That citation stated that "[e]mployees working in assembly areas and finishing areas were not protected against foot injuries from falling or shifting cabinets and drawers weighing up to 200 [pounds]."

As noted above, under *Potlatch*, the Commission would characterize a violation as repeat if there is a Commission final order against the same employer for a substantially similar violation. We find that, as the Secretary argues, the evidence of record establishes that the 1985 citation and the present one are substantially similar[38] because, in both cases, the form of personal protective equipment required was safety shoes, and employees were exposed to the hazard of objects sufficiently weighty to cause injuries falling on their feet. Therefore, we conclude that the judge did not err in finding that Hamilton committed a repeat violation of section 1910.132(a).

The Secretary proposed a penalty of $1,000. Based on the penalty factors in section 17(j) of the Act, the judge assessed a penalty of $500. Having considered those penalty factors, we agree with the judge that a penalty of $500 is appropriate.

3. *Item 5b: Table Saw, Damaged Guard*

This item alleges that Hamilton committed a repeat violation of 29 C.F.R. § 1910.213(c)(1)[39] in the mill department because the hood guard over the blade of table saw no. 4 had an area measuring about 2 inches high and 5 inches long on its left side that was open and would permit contact with the blade. Cannon testified that Mike Stitzel, the

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[38]Where the cited standard is a generally-worded one, like section 1910.132(a), the Secretary has the burden of showing that the prior violation and the present one are substantially similar in nature. *Edward Joy Co.*, 15 BNA OSHC 2091, 2092, 1993 CCH OSHD ¶ 29,938, p. 40,904 (No. 91-1710, 1993). *See Potlatch*, 7 BNA OSHC at 1063, 1979 CCH OSHD at p. 28,172 ("when the Secretary alleges a repeated violation of a general standard . . . , it is likely that he would introduce evidence of similarity other than . . . contravention of the same standard").

[39]Section 1910.213(c)(1) provides:

> Each circular hand-fed ripsaw shall be guarded by a hood which shall completely enclose that portion of the saw above the table and that portion of the saw above the material being cut. . . . The hood shall be made of adequate strength to resist blows and strains incidental to reasonable operation . . . and shall be so designed as to protect the operator from flying splinters and broken saw teeth.

main or general foreman in the mill department, whom Cannon initially referred to as "Steele," told him that the damaged hood had been brought to his attention a few days before the inspection by the area foreman, Jerry Hale. According to Cannon, at least one foreman told him that the guard had been in that condition for a couple of days, and that the saw had been used in that condition. Cannon also stated that plant foreman Mueller or plant engineer Maurer told him that such damage to the hood "happened quite often if the guard should come down and make contact with the blade."

General foreman Stitzel testified that he did not know how long the guard had been broken. He stated that he *first* became aware of it at the time of the compliance officer Cannon's inspection, when plant foreman Mueller told him privately to get the guard fixed.

After considering this evidence, the judge recognized that there was a direct conflict between Cannon's testimony and Stitzel's testimony concerning when the foreman knew of the condition. He resolved that conflict by finding that "[d]ue to his impartiality, Cannon's testimony is deemed more credible." Hamilton contends that because Cannon's testimony was so inconsistent, it must be "viewed with suspicion." It argues that Stitzel's "forthright" testimony should be credited instead.

Discussion

The judge made a credibility finding in favor of Cannon, which he did explain, albeit minimally, and that determination is entitled to deference. *See, e.g., E.L. Jones*, 14 BNA OSHC at 2132-33, 1991 CCH OSHD at pp. 39,231-32. It appears that what Hamilton refers to as the "inconsistencies" in Cannon's testimony, such as his initial reference to Stitzel as Steele, are not matters that affect the heart of his testimony on this item, which is that the damaged guard had already been brought to a foreman's attention. As for the alleged "forthrightness" of Stitzel, we note that the judge was able to evaluate that quality from his observation of the witness' demeanor, as well as his words. Having considered Stitzel's demeanor and testimony as compared to Cannon's, the judge specifically credited Cannon based on his "impartiality." Although we would have preferred more explanation of the judge's reasons for crediting Cannon, we defer to that credibility determination. *See C. Kaufman, Inc.*, 6 BNA OSHC at 1297, 1977-78 CCH OSHD at p. 27,099.

The credited testimony of Cannon establishes that, as the Secretary argues, the foreman actually knew of the damaged guard prior to the inspection, but failed to repair or replace the guard. The actual or constructive knowledge of the foreman can be imputed to the employer. *E.g., A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, 1991 CCH OSHD ¶ 29,223, p. 39,128 (No. 85-369, 1991). Even without considering the credited testimony, constructive knowledge would have been established because the damage to the guard was (1) as Mueller or Maurer told Cannon, not uncommon, and (2) clearly visible. *See Simplex*, 766 F.2d at 589. We therefore conclude that the judge did not err in finding that Hamilton violated section 1910.213(c)(1).

Characterization and Penalty

Cannon introduced into the record two final orders against Hamilton for violations of the same standard as here, section 1910.213(c)(1)--one in 1984 for not guarding all table saw operations, and one in 1985 for a gap between the guard and saw blade. The judge found that the violation was repeat. We agree that the violation here is substantially similar to the two former citations, and we therefore find that this violation is repeat under *Potlatch*.

The Secretary proposed a penalty of $700.[40] After considering the factors in section 17(j) of the Act, the judge assessed a penalty of $350. Taking into account those penalty factors, we agree with the judge that an appropriate penalty is $350.

4. *Items 7a and 7b: Shapers, Improperly Adjusted Guards*

Items 7a and 7b allege repeat violations of 29 C.F.R. § 1910.213(m)(1)[41] for failure to have guards adjusted properly to keep the operator's hands away from the cutting edges of two shapers. Item 7a alleged a violation because the guard for the shaper blade on machine no. 5 in the mill department was 3-1/2 inches above the table, while the material

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[40]A penalty of $1400 was proposed for parts 5(a) and 5(b) together. Item 5(a) was vacated and is not on review.

[41]Section 1910.213(m)(1) requires:

> The cutting heads of each wood shaper, hand-fed panel raiser, or other similar machine not automatically fed, shall be enclosed with a cage or adjustable guard so designed as to keep the operator's hand away from the cutting edge.

being cut was 3/4 of an inch thick. In that position, the guard did not prevent the operator's hand from getting under the rotating cutting edge, which could result in lacerations. The guard was taped to the head of the machine, which limited the operator's ability to adjust the guard. Item 7b charged a violation because the guard for the shaper blade on machine no. 9 was set 4 inches above the table, while a plastic jig, or template, 1-inch thick was being cut. The gap between the guard and the material being cut was large enough to expose employees' hands to the hazard of laceration from the blade. Each guard should have been moved closer to the material being cut and secured with the tension knob.

Based on this evidence, the judge concluded that the guards on both shapers did not comply with the standard. He summarily rejected Hamilton's claim that it lacked knowledge of the conditions, stating that "Hamilton failed to prove that it had a work rule requiring proper adjustment of the guards that was effectively communicated and enforced." He characterized the violations as repeat, as the Secretary alleged, based on a citation issued to Hamilton for a serious violation of the same standard in 1985, which became a final order. He assessed a combined penalty of $400, which was half of the penalty proposed by the Secretary.

In affirming items 7a and 7b, the judge apparently overlooked other relevant evidence. Plant foreman Mueller testified that Hamilton has a policy that the operator of a shaper must have the operation guarded, and the guard must be in working condition and set properly. To show that the policy had been communicated and enforced, Hamilton introduced into evidence a copy of a 1985 memorandum from Robert Egelston, Hamilton's plant manager at that time, to the top foremen in the mill department. In that memorandum, Egelston noted that earlier that day he had issued verbal warnings to two employees in that department for their failure to have shaper guards properly adjusted, resulting in exposed blades. The memorandum urged the foremen to have "serious discussions" with mill department employees on each shift because "[e]ither we have not communicated this strongly enough to our employees or they simply do not care and neither reason is good enough to prevent a repeat citation from OSHA." According to the memorandum, the policy is that all guards are to be in proper place on all machines unless the operator has specific permission from a supervisor to remove the guard. A handwritten

note on the bottom of the typed memorandum indicated that, when Egelston made a surprise visit to the second shift, the guards were in place.

Plant foreman Mueller testified that compliance with the shaper guard policy is enforced through Hamilton's general disciplinary procedures, which, as discussed above, consist of a verbal warning, a written warning, suspension, and possible discharge. Mueller also testified that Maurer and a safety committee member ensure that guards, or routers, are properly adjusted as part of their checklist inspection of the plant.

Hamilton acknowledges that the machine guards were not properly adjusted at the time of the inspection, but it contends that because there was a "complete absence of any evidence of knowledge of these circumstances by the Company or its supervisors, this citation must be vacated." It argues that, contrary to the judge's finding, it *does* have a work rule requiring proper guard adjustment that it has sufficiently communicated and enforced. It notes that at the hearing even Cannon agreed that an employee could create the citable condition by just leaving the guard in the "up" position, rather than properly adjusting it.

Discussion

We find that the Secretary has presented minimally sufficient evidence to make a prima facie showing of constructive knowledge because, as the Secretary asserts, the improperly adjusted guards would have been readily apparent to a supervisor. *See Simplex*, 766 F.2d at 589. However, as we noted above, an employer may rebut the Secretary's showing of knowledge if it proves that it had an adequate safety rule that was sufficiently communicated and enforced. *E.g., Towne Constr.*, 847 F.2d at 1190-91. Here, Hamilton has presented evidence sufficient to show that it exercised reasonable diligence. Mueller testified that Hamilton had a safety policy that guards were to be in working condition and adjusted properly. The 1985 memorandum from the plant manager showed that this specific policy had been communicated and enforced. While Hamilton's evidence is not overwhelming, when weighed against the Secretary's thin evidence, it is sufficient to prevent the Secretary from establishing knowledge by a preponderance of the evidence. We therefore conclude that the Secretary has not proven that Hamilton could have known of the cited conditions with the exercise of reasonable diligence. Because the Secretary has failed to meet his burden of proving knowledge, we vacate this item.

5. *Items 9a & 9b: Electrical Cords, Inadequate Strain Relief*

These items allege that Hamilton committed repeat violations of 29 C.F.R. § 1910.305(g)(2)(iii)[42] because flexible cords were not connected to devices or fittings so that strain relief was provided. The record establishes that a strain relief device, or cord grip, is a plastic or rubber sleeve, slightly larger in diameter than the cord itself, one end of which fits securely in the opening where the cord emerges from the fixture. Cannon testified that a strain relief device has two functions. First, it keeps the cord from putting a strain on, and pulling loose, the attachment points inside the fixture. Second, it provides insulation where the cable enters the opening to the fixture that prevents abrasion of the cord that could expose energized wires. Item 9a involves a directional light in the shipping area that had no strain relief device for the flexible cord where it entered the rear of the light. Item 9b alleges that the power cord of a shaper did not have the primary insulation of the cord held by the cord grip.

According to Cannon, the cited instances of inadequate strain relief devices exposed employees to energized parts that could shock or burn. Hamilton has maintained that the cited conditions posed no hazard, and that it could not have known of the cited conditions with the exercise of reasonable diligence.

The judge summarily rejected Hamilton's contentions, declaring that they were "not supported by convincing evidence," and he went on to find that Hamilton had committed violations of section 1910.305(g)(2)(iii).

Hamilton asserts that, because there was no damage to the insulation nor any smoking or sparking, there was no hazard. Hamilton also argues that, in light of the hundreds of strain relief devices and cord grips on electrical machines throughout the plant, the fact that Cannon found only two is testimony to its reasonable diligence in discovering such problems. Hamilton also contends that it makes its regular checklist inspections for strain relief devices and responds to reports of any problems. It argues that Cannon

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[42]Section 1910.305(g)(2)(iii) provides:

> Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

acknowledged that such actions constituted "reasonable diligence." However, plant engineer Maurer testified that Hamilton had no written safety rule on strain relief devices.

Discussion

We agree with the judge's rejection of Hamilton's argument that there was no violation because there was no evidence of damage to the insulation, sparking, or smoking. When faced with a similar argument, the court in *Simplex*, 766 F.2d at 588, disposed of it as follows:

> Simplex's primary contention is that these tools never previously sparked. The fact that the hazard which the regulation protects against has never occurred is no defense to the violation. Many of the Secretary's regulations are preventive in nature, and enforcement would be meaningless if Simplex's argument were accepted.

As another court stated in *Lee Way Motor Freight, Inc. v. Secretary*, 511 F.2d 864, 870 (10th Cir. 1975), "One purpose of the Act is to prevent the first accident." *See Ryder Truck Lines v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974). As the Secretary notes, the standard is aimed at preventing unrelieved repetitive strain on electrical cords that results in the wearing away of the cord's insulation. Therefore, the standard addresses a cumulative type of hazard.

We agree with the judge that Hamilton has not established that it exercised due diligence. Maurer admitted that there was no written work rule on strain reliefs, and the checklist used during Hamilton's inspections does not specifically mention checking for strain relief problems. We also note that Cannon's testimony concerning due diligence, upon which Hamilton relies, was in response to hypothetical questions, not in response to particular actions taken by Hamilton regarding these cited conditions. Furthermore, we find that Hamilton's observation that it was cited for only two of the many strain relief arrangements throughout the plant only indicates that it made an attempt to ensure that its strain reliefs were in compliance. It does not show that the two cited strain reliefs were in compliance. For the reasons stated above, we conclude that the judge did not err in concluding that Hamilton had violated section 1910.305(g)(2)(iii), and we affirm the two subitems.

Characterization and Penalty

In 1985, Hamilton was issued a two-item citation for violating the same standard cited here because two power cords were not held by cord grips, and that citation became a final order. The judge found that the violations at issue here are substantially similar to the violations in the 1985 citation, and he concluded that Hamilton was in repeat violation of the standard. We agree that the violations in these two subitems are repeat under *Potlatch.*

The Secretary proposed a combined penalty of $1200 for the two subitems. Having considered the penalty factors in section 17(j) of the Act, the judge assessed a penalty of $300 for both subitems together. We have taken into account those penalty factors and agree with the judge that a combined penalty of $300 for the two subitems is appropriate.

C. *Citation No. 3: Alleged Other-than-Serious Violations*

1. *Items 1a & 1b: Obstructed Aisles, Mechanical Handling Equipment*

These items alleged violations of 29 C.F.R. § 1910.22(b)(1)[43] because two aisles in the mill area were obstructed by pallets of material. Mechanical handling equipment was operated in both aisles, which were marked with yellow lines. Item 1a concerns a pallet of material located in the aisle behind the operator of a table saw. Cannon testified that management indicated to him that the material had been placed there by a forklift. Item 1b concerns pallets of material sitting in an aisle near a belt sander machine. Plant foreman Mueller testified that employees operated hand-powered pallet jacks or "walkers" in this aisle.

Cannon testified that the hazards posed by these obstructions in the aisles were that:

> *a forklift truck or any equipment* trying to get around that material could knock that material off onto an employee in the area, and they could be struck by the material.
>
> An employee who would be working . . . at one of those machines could very well be in danger of being struck by the truck if it tried to go around the material on that side.

(Emphasis added).

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[43]Section 1910.22(b)(1) provides:

> Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard.

The judge expressly rejected Hamilton's argument that the conditions did not present a hazard to its employees. He specifically found that the hazard described by Cannon was "reasonable and believable" and affirmed items 1a and 1b, assessing no penalty.

Hamilton argues that the Secretary has not proven by a preponderance of the evidence that there was a hazard posed to its employees.[44] Concerning item 1a, Hamilton asserts that to prove his case, the Secretary must introduce measurements of the distance between the saw operator and the pallet of material, particularly because the photos, in Hamilton's opinion, show "sufficient safe clearance." However, as Hamilton itself notes, the cited standard does not set any particular distances. Therefore, the Secretary is not required to introduce evidence of specific distances to make his prima facie case under this sentence of the standard. In light of this determination in his favor, we need not address the Secretary's contention that only the second sentence of the standard, requiring that aisles be kept clear, applies. Having viewed the photographic evidence, we consider the cited condition to pose a hazard to the employees whose assigned work involves being near the obstructed aisle.

Regarding item 1b, Hamilton argues that it is significant that no motorized forklifts operated in the aisle. We disagree. The standard refers to "mechanical handling equipment," not to "motorized" handling equipment or "forklifts." While neither the OSHA standard, nor its source standard, 41 C.F.R. § 50-204.3, appear to define the quoted term, we will consider the dictionary definition, which reads: "operated by machinery or a mechanism." *Webster's New World Dictionary* 880 (2d College ed. 1972). The walker and pallet jacks that Mueller testified were used in the aisle are clearly, under this definition, "mechanical handling equipment."[45]

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[44]Hamilton limits its arguments to contending that the Secretary failed to prove the alleged hazards. It does not raise the issue of whether the standard applies.

[45]Also concerning item 1b, Hamilton asserts that the area was not frequently used by employees. The record shows that the sander was used at most one to two times per month. As we have stated above, the brevity of exposure does not negate evidence of a violation. *E.g., Walker Towing*, 14 BNA OSHC at 2074, 1991 CCH OSHD at p. 39,158.

Hamilton also contends that the Secretary's case must fail because there was no evidence that employees exposed to the conditions described in items 1a and 1b had ever suffered any injuries from material falling off pallets or from being struck by equipment. Cannon admitted that he had not found any evidence of such injuries. However, the Secretary does not have the burden of proving that such injuries occurred in order to make his prima facie showing that this standard was violated; the OSHA standards are preventive in nature. *Ryder Truck Lines*, 497 F.2d at 233 ("the Act does not establish as a *sine qua non* any specific number of accidents or any injury rate"); *see Simplex*, 766 F.2d at 588; *Lee Way Motor Freight*, 511 F.2d at 870.

Based on the facts and considerations stated above, we agree with the judge that the Secretary proved, by a preponderance of the evidence, that the cited obstructions could force material handling equipment operators to go outside the aisles, thereby presenting employees working at the machines with the hazard of being struck by material knocked off the equipment or by the equipment itself.

Hamilton also argues that it could not have known of the condition because employees deliberately placed the materials in the aisles. Cannon testified that management had indicated to him that the pallet of material at issue in item 1a had been placed there by a forklift. Hamilton presents no evidence showing that the operator of that forklift deliberately placed the materials to harass Hamilton, or that he could have done so quickly enough that Hamilton could not have known of the condition before Cannon observed it. Concerning item 1b, Cannon testified that one pallet, which held banded boxes, "is the kind of thing, that in my opinion, an employee is not going to carry and s[e]t down there. It would have to be moved by a mechanical piece of equipment of some sort." He stated that, in his opinion, the pallets of materials were not placed in the citable locations quickly and easily, although it may have been possible. Again, Hamilton has presented no specific evidence that employees deliberately placed the pallets to harass it. Mueller testified that some materials in this aisle were boxes that employees could easily move with their hands, but he acknowledged that the pallet of material would require a hand-powered pallet jack. Based on these considerations, we conclude that the Secretary has established by a

preponderance of the evidence that Hamilton could have known of these conditions in items 1a and 1b with the exercise of reasonable diligence.

For the reasons stated above, we conclude that the judge did not err in finding that Hamilton committed an other-than-serious violation of section 1910.22(b)(1). The Secretary proposed no penalty, and we assess none.

2. Citation 3, Item 4: Washing Facilities, Warehouse

The Secretary alleged that Hamilton failed to comply with 29 C.F.R. § 1910.141(d)(2)(i)[46] because its employees who worked in the Nicolet warehouse area had no "lavatory," which is defined in 29 C.F.R. § 1910.141(a)(2) as "a basin or similar vessel used exclusively for washing of the hands, arms, face[], and head." It is undisputed that there was no lavatory at the Nicolet warehouse. At issue is whether, as Hamilton argues, the employees at the warehouse constituted a "mobile crew," which the standard exempts from its requirements.

The record established that Nicolet warehouse employees would report for work at the main Hamilton plant, punch the time clock, and then be driven in the shipping department's van to the warehouse, which is less than half a mile away. The van was available at the warehouse most of the time for employees to drive to the main plant. At the end of their shift, employees would be driven back to the main plant to punch out. The employees had half an hour for lunch and it would take a couple of minutes, depending on the traffic, to go to the main plant, where there were adequate lavatory facilities. According to former warehouse employee Herbers, warehouse employees ate their lunch at the warehouse about 90 percent of the time.

Hamilton contends on review, as it did before the judge, that the warehouse employees were a "mobile crew" because they punched the time clock at the main plant and then were driven to another location, the warehouse, to work, where transportation was

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[46] Section 1910.141(d)(2)(i) provides:

> Lavatories shall be made available in all places of employment. The requirements of this subdivision do not apply to mobile crews or to normally unattended work locations if employees working at those locations have transportation readily available to nearby washing facilities which meet the other requirements of this paragraph.

available back to the main plant. The judge rejected this argument and found a violation, declaring that he

> does not interpret "mobile crew" to include employees who travel from the main plant to the very same location day in and day out. Such employees report to a permanent work station and are not mobile.

The Secretary expresses his agreement with the judge that the term refers to something other than employees being moved to and from the *same* warehouse *every* workday.

We note that the burden of proving that the requirements of a standard do not apply is on the party seeking the exception. *E.g., Dover Elevator Co.*, 15 BNA OSHC 1378, 1381, 1991 CCH OSHD ¶ 29,524, p. 39,849 (No. 88-2642, 1991). Therefore, Hamilton must have established that its employees were a "mobile crew" for it to be exempt from the standard. Because "mobile crew" appears to be a term without a specific definition in the cited standard or its source, ANSI Z4.1-1968, we consider the dictionary definition of "mobile," which reads: "capable of moving or being moved from one place to another[:] . . . organized and equipped for ready movement," giving as examples "mobile fighting forces" and "mobile television units for on-the-spot reporting." *Webster's Third New International Dictionary* 1450 (unabridged 1971).

We agree with the judge and the Secretary that employees being transported to the *same*, permanent work location building *every* workday are not a "mobile crew." As the dictionary definition and examples of "mobile" suggest, in the context of the cited standard, a "mobile crew" is one that has continual, non-routine movement to any number of worksites. Based on the considerations above, we conclude that Hamilton has not proven that its warehouse employees were a "mobile crew." Therefore, we find that the judge did not err in concluding that Hamilton committed an other-than-serious violation of section 1910.141(d)(2)(i). The Secretary proposed no penalty, and we assess none.

3. *Item 7: Router, Damaged Power Cord*

This item alleged that Hamilton violated section 1910.242(a)[47] because a router being used by an employee had three damaged areas in the primary insulation of the power cord that exposed the secondary insulation. Cannon testified that the exposure of the secondary insulation posed the hazard of possible electrical shock and minor burns. The Secretary maintains that the cuts would have been readily apparent to a supervisor.

Hamilton contends on review, as it did before the judge, that it had no knowledge of the condition because the damaged areas in the power cord were the result of a deliberate employee act to create a citable condition. It particularly relies on Cannon's early testimony that it was *possible* for an employee to make such cuts with a knife within a short period of time, and that one of the cuts could *possibly* be due to the router itself.

While Cannon did present that testimony during cross-examination, later in the hearing he was questioned extensively by the judge on his ability to discern whether a condition could have been created to harass Hamilton. Cannon then testified that, in his opinion, based on his examination of the cord, the damaged areas on this particular cord did not result from knife cuts. That interchange proceeded as follows:

> JUDGE SPARKS: Did you try to look at it critically to see if that had been a setup?
> WITNESS: Tried. One of the questions I think was asked was, "Could those marks have been made by the router blade?"
> In my opinion, possibly one or two could have been.
> JUDGE SPARKS: Did you look at the time to see whether they were fresh cuts?
> WITNESS: In my opinion, they were not knife cuts, but looked more like snags where they might have got caught on the edge of the table when the cord was being brought across, and it sliced the insulation.

Early in his decision the judge reacted to this interchange as well as to Cannon's other testimony by crediting his testimony generally, as discussed above. The judge summarily disposed of this particular item by stating that "Hamilton's arguments are rejected

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[47]As we stated in note 30, *supra*, section 1910.242(a) requires:

> Each employer shall be responsible for the safe condition of tools and equipment used by employees, including tools and equipment which may be furnished by employees.

as without merit." However, implicit in that determination was his crediting of Cannon's testimony quoted above that the condition was not a deliberate act of harassment.

Hamilton claims that it exercised reasonable diligence because it conducts its own inspections of its facilities, after which supervisors report damaged equipment to the maintenance department, where it is repaired. Hamilton notes that Cannon acknowledged that there were hundreds of flexible electrical power cords at Hamilton, yet he found only one that had damage to the outer insulation. We note that while Hamilton's inspections and maintenance program might indicate that it made efforts to ensure that its power cords in general were in compliance, it does not show that *this* cord was in compliance. Lastly, Hamilton maintains that there was no significant risk to employees because there was no damage to the secondary insulation and "no signs of smoking, sparking, or the like that would indicate an electrical fault." Again we note that the purpose of the Act is to prevent the first accident. *See Lee Way*, 511 F.2d at 870. As we discussed above, the court in *Simplex*, 766 F.2d at 588, disposed of a similar argument by stating that "the fact that the hazard which the regulation protects against has never occurred is no defense to the violation."

Therefore, we conclude that the Secretary has established by a preponderance of the evidence that Hamilton could have known of the damaged cord with the exercise of reasonable diligence. We thus determine that the judge did not err in finding that Hamilton had committed an other-than-serious violation of section 1910.242(a). The Secretary proposed no penalty, and we assess none.

IV. *Order*

For the reasons stated above, we conclude that the inspection was not unreasonable under section 8(a) of the Act and therefore deny Hamilton's motion for relief, and we dispose of the citation items and assess penalties totalling $2,450 as follows:

Citation No. 1, Item 1, affirmed, changed to other-than-serious	$ 0
Citation No. 1, Item 2, affirmed, serious as alleged	$ 300
Citation No. 1, Item 5a, affirmed, changed to other-than-serious	$ 100
Citation No. 1, Item 6, affirmed, serious as alleged	$ 500
Citation No. 1, Item 11, vacated	---
Citation No. 2, Item 1, affirmed, repeat as alleged	$ 400
Citation No. 2, Item 3, affirmed, repeat as alleged	$ 500
Citation No. 2, Item 5b, affirmed, repeat as alleged	$ 350
Citation No. 2, Items 7a and 7b, vacated	---
Citation No. 2, Items 9a and 9b, affirmed, repeat as alleged	$ 300
Citation No. 3, Items 1a and 1b, affirmed, other-than-serious as alleged	$ 0
Citation No. 3, Item 4, affirmed, other-than-serious as alleged	$ 0
Citation No. 3, Item 7, affirmed, other-than-serious as alleged	$ 0

It is so ordered.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Dated: April 20, 1993

MONTOYA, Commissioner, concurring in substantial part and dissenting in part:

I agree with the majority's decision, except for the penalty assessed for citation no. 1, item 1, the violation based on the unsecured portion of the cord across an aisleway that posed a tripping hazard. The judge assessed the $400 penalty proposed by the Secretary for this item after finding a serious violation. While I agree with the majority that citation no. 1, item 1 should be affirmed and characterized as other-than-serious, I would assess a penalty of $100 for the violation based on the penalty factors in section 17(j) of the Act, in particular the gravity of the violation, or the type of injury that could result if an employee were to trip and fall against either the shelves or the banding machine. This amount is consistent with the Commission's assessment of a $100 penalty for the safety glove violation in citation no. 1, item 5a, *supra*, which, like item 1, the Commission characterized as other-than-serious rather than serious, as the Secretary alleged.

Velma Montoya
Commissioner

Dated: April 20, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR, Complainant, v. HAMILTON FIXTURE, Respondent. and OHIO CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHRHOOD OF CARPENTERS JOINERS OF AMERICA, AFL-CIO, Authorized Employee Representative.	Docket No. 88-1720

NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on April 20, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

April 20, 1993
Date

Docket No. 88-1720

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

William S. Kloepfer, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Edward S. Drosey, Esq.
Lindhorst & Dreidame
1700 Central Trust Center
201 East Fifth Street
Cincinnati, OH 45202

Jack Roese, Jr.
233 Southgate
Columbus, OH 43207

James Johnoff, Exec Secy-Treas
UBC 1217 Prouty Avenue
Toledo, OH 43609

Office of
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, N.W.
4TH FLOOR
WASHINGTON, D.C. 20006-1246

February 28, 1990

IN REFERENCE TO SECRETARY OF LABOR v.

Hamilton Fixture

OSHRC DOCKET NO. 88-1720

NOTICE IS GIVEN TO THOSE LISTED BELOW:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., N.W., Room S4004
Washington, D.C. 20210

William S. Kloepfer
Associate Regional Solicitor
Office of the Solicitor, USDOL
Federal Office Building, Rm. 881
1240 East Ninth Street
Cleveland, OH 44199

Edward S. Dorsey, Esq.
Lindhorst & Dreidame
1700 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

Jack Roese, Jr.
233 Southgate
Columbus, Ohio 43207

James Johnoff, Exec Secy-Treas
UBC 1217 Prouty Avenue
Toledo, Ohio 43609

Judge Joe D. Sparks
OSHRC
1365 Peachtree Street, N.E., Suite 240
Atlanta, GA 30309

NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on 2/28/90. The decision of the Judge will become a final order of the Commission on 3/30/90 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received on or before 3/20/90 in order to permit sufficient time for their review. See Commission Rule 91, 29 C.F.R. sec. 2200.91.*

All pleadings or other documents that may be filed shall be addressed as follows:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
Washington, D.C. 20006

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

*A copy of any petition for discretionary review must be served on the Counsel for Regional Trial Litigation, Office of the Solicitor, USDOL, 200 Constitution Ave., N.W., Room S4004, Washington, D.C. 20210. If a Direction for Review is filed the Counsel for Regional Trial Litigation will represent the Department of Labor.

(1/87)

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS 257-4086

FAX:
COM (404) 347-0113
FTS 257-0113

SECRETARY OF LABOR, Complainant, v. HAMILTON FIXTURE, Respondent, and OHIO CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, Authorized Employee Representative.	)	OSHRC Docket No. 88-1720

APPEARANCES:

Sandra B. Kramer, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant.

Edward S. Dorsey, Esquire, Lindhorst and Dreidame, Cincinnati, Ohio, on behalf of respondent.

Dixie Kuykendoll, Ohio Carpenters Industrial Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Hamilton, Ohio, on behalf of the authorized employee representative.

DECISION AND ORDER

SPARKS, JUDGE: Respondent, Hamilton Fixture ("Hamilton"), contests three citations issued to it on July 1, 1988, by the Occupational Safety and Health Administration ("OSHA"). The citations were issued pursuant to an inspection conducted by OSHA Compliance Officer Ralph Cannon at Hamilton's facilities from April 20, 1988, through May 3, 1988. At the beginning of the hearing, the parties entered on the record a partial settlement agreement (Tr. 16-18). A final written copy of the settlement agreement was submitted subsequent to the hearing. The agreement provides in pertinent part:

> (1) Citation 1, Item 5b and Citation 3, Item 2 shall be vacated;
>
> (2) As to Citation 1, Item 5b, the Respondent will continue to allow employees to use as many pairs of gloves as necessary for protection against exposure to lacquer thinner containing acetone.
>
> (3) The penalties for Citation 1, Item 7, 8, and 10 shall be amended as follows:
>
> | | |
> |---|---|
> | Citation 1, Item 7: | $200.00 |
> | Citation 1, Item 8: | $300.00 |
> | Citation 1, Item 10: | $300.00 |
>
> Respondent agrees to pay the penalties as amended.
>
> (4) Pursuant to Commission Rule 2200.100, Respondent hereby withdraws its notice of contest as to Citation 1, Items 7, 8, and 10 and the parties agree to the entry of a final order consistent with the terms of this Settlement Agreement.

Hamilton's principal place of business is located at 4805 Hamilton Middleton Road in Hamilton, Ohio, where it employs an average of 350 employees (Tr. 873). Hamilton manufactures wooden department store displays for records, tapes, videocassettes, greeting cards, etc. (Tr. 875).

HAMILTON'S MOTION TO DISMISS

In the early part of March 1988, Hamilton's collective bargaining agreement with Local 415 of the Ohio Carpenters Industrial Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, expired (Tr. 803). Although Hamilton's employees continued to come to work, the situation between labor and management was tense and hostile (Tr. 42-43, 60, 805-806). Employees engaged in work slowdowns and in-plant whistle blowing demonstrations. Employees on Hamilton's safety committee resigned, refusing to participate in the company's safety program (Tr. 42-43, 60-61, 806-808). Hamilton also alleges that employees engaged in sabotage and vandalism of Hamilton's materials and equipment.

In late March, employees distributed a handbill at the plant. The handbill was titled "415 COMBAT," and "REPORT FROM 415 NEGOTIATING COMMITTEE" (Ex. R-3). Paragraph four of the handbill states: "On March 14, 1988, charges were filed with OSHA, asking for an extended visit at the plant. This was caused by the Company's gross violation of their own work and safety rules" (Ex. R-3).

On March 14, 1988, the Cincinnati Area OSHA office received a complaint printed on Local 415 letterhead alleging safety and health violations by Hamilton (Ex. R-13). OSHA followed its normal procedure upon receipt of any complaint in handling this charge (Tr. 704, 711-712, 722). It assessed the information provided by the complaint as insufficient to schedule an inspection and asked the complainant to provide additional information about the specifics of the alleged hazards. When that information was provided, the matter was assigned for inspection to Ralph Cannon (Ex. C-75; Tr. 730-736).

Cannon was instructed to check Hamilton's previous files. He calculated the lost work day per injury rate (LWDI) and found it to be approximately three times the national average. OSHA's Field Operations Manual (FOM) instructs the compliance officer to conduct a comprehensive inspection if the LWDI is above the national average, which Cannon proceeded to do at Hamilton's facility (Ex. R-2; Tr. 167-168, 415-416, 746).

Prior to working for OSHA, Cannon worked for the AFL-CIO as a job placement director (Tr. 164). He first joined the Operative Plasterers and Cement Masons Union in 1954, and became the recording secretary for Local 1 of that union in 1961. At the time of the hearing, Cannon still retained that position (Tr. 406-407).

Hamilton moved to dismiss the complaint in the present case, alleging that the Secretary failed to fulfill her

obligation under § 8(a)(2) of the Act to conduct inspections "within reasonable limits and in a reasonable manner," to the prejudice of Hamilton. Hamilton argues that OSHA's inspection was unreasonable on two counts. First, OSHA converted the inspection from a complaint-based, hazard-specific investigation to a comprehensive wall-to-wall inspection. Second, Hamilton portrays Cannon as a union sympathizer who conducted his inspection with the intent to improperly assist Local 415 in its labor dispute.

Regarding its contention that OSHA was unreasonable in expanding the scope of the inspection, Hamilton argues that OSHA did so in derogation of its own FOM. On pages III-19 and III-20 of the manual, under the section headed "Unprogrammed Inspections," it is stated that "the seriousness and reliability of any complaint shall be thoroughly investigated by the supervisor prior to scheduling an inspection to ensure as far as possible that the complaint reflects a good faith belief that a true hazard exists. . ." (Ex. R-24).

First of all, as the Secretary points out, it does not appear that this section applies to the present situation. The section is entitled "Strike or Labor Dispute," and the introductory language refers to "labor disputes involving work stoppages, strikes or picketing." There was no stopping of work, or striking, or picketing in this case. Employees were continuing to come to work in the absence of a bargaining contract.

Second, OSHA complied with the FOM guidelines that Hamilton claims it ignored. OSHA supervisor James Washam handled the complaint in this case. Upon initially receiving the complaint, he believed that further verification was needed. Washam's office contacted the complainants and requested additional information, which he received (Tr. 704). The complainants actually came into the OSHA office and met with James Zucchero, whom Washam had assigned the verification of the complaint (Tr. 731-732). Having ascertained that there was a factual foundation to the complaint, Washam proceeded with the investigation, assigning Cannon to investigate the complaint.

As noted supra, Cannon determined that Hamilton's LWDI rate was almost three times the national average. Following FOM guidelines, Cannon expanded his investigation to a wall-to-wall inspection of Hamilton's facility. OSHA's decisions to act on the complaint and then to expand the scope of the investigation were entirely reasonable in light of the circumstances.

Turning to Hamilton's second justification for dismissing the Secretary's complaint, Hamilton charges that Cannon, as a life-long union sympathizer, joined forces with Hamilton employees to harass and victimize Hamilton. Hamilton alleges that Cannon conducted an excessive number of employee interviews, disrupting the work being performed in the plant. It also alleges that Cannon actually staged a photograph in

order to make it appear that an electric cord presented a tripping hazard.

Richard Maurer, Hamilton's plant engineer, accompanied Cannon on his inspection. On May 3, 1988, Maurer wrote a memo to his supervisor, Don Fairbanks, detailing his observations of Cannon's inspection (Ex. R-64; Tr. 816-818). The memo states in pertinent part (Ex. R-64, pp. 1, 3):

> There were 51 interviews conducted which represents 43% of the work force. There was 5 hours and 5 minutes lost time as a result of the interviews. The interviews conducted represented approximately 25% of the total length of the inspection.
>
> * * *
>
> . . . Mr. Cannon discovered an alledged [sic] tripping hazard in the Gibson hardware packing area . . . . The cord from the strapping machine was taped to the floor. One section of the cord was exposed. Mr. Cannon kicked the exposed cord and positioned it differently with his hand before taking a picture of it. In my opinion he was staging the picture.

Hamilton has leveled a serious charge at Cannon, accusing him of compromising his professional integrity in order to implement his personal agenda. Cannon strongly denied the charges. Having considered the evidence, this Judge finds that Hamilton's attacks upon Cannon's character and professionalism are unsupported by the record.

Cannon has been employed by OSHA since 1973. In that time he has conducted approximately 1,900 inspections. He had inspected Hamilton's facility on several occasions prior to the one which gives rise to the instant case (Tr. 164-165).

He has appeared in many proceedings before the Review Commission and has demonstrated an attitude of fairness and integrity. In this case, his conduct and testimony did not bear a trace of bias, prejudice, or animosity towards Hamilton, which, considering its assaults on his integrity, demonstrated considerable self-restraint. It is concluded that Cannon conducted a fair and impartial inspection as required by the tense circumstances.

Hamilton's charges of misconduct by Compliance Officer Cannon are rejected and its motion to dismiss the Secretary's complaint is hereby denied.

CITATION 1: THE SERIOUS VIOLATIONS

Item 1

Section 1910.22(a)(1) of 29 C.F.R. provides:

> All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

While in the Gibson area of the plant, Cannon observed an electrical cord that was taped to the floor across a 42-inch aisleway. The cord was connected to a portable banding machine (Tr. 169).

Employees in that area pack accessories and perform some assembly involving pneumatic rivet guns and drills. Three or four employees work in the area where two long tables are set a few feet in front of metal shelves. The banding machine is

located between the two tables and is used to wrap product (Ex. C-1; Tr. 883-885).

Cannon stated that the cord was only partially taped to the floor, leaving 18 inches of the cord unsecured, thus creating a tripping hazard. He testified that he reached down and picked up the cord to see if it would move. He stated that he did not pull the cord loose (Tr. 170).

Cannon testified that the tripping hazard created by the cord was serious because if an employee tripped on the cord, he risked striking his head on one of the nearby metal shelves, causing a potentially severe injury (Tr. 177).

Hamilton contends that the cord was completely taped to the floor with heavy duct tape; and that when Cannon first observed the cord, it lay flush with the floor, posing no tripping hazard (Tr. 861). Richard Maurer testified that Cannon kicked the exposed section of the cord loose from the floor and then photographed it (Ex. R-64; Tr. 861).

Cannon's version of the incident is that an employee kicked the cord, which was already loose, before he took the photograph. Maurer objected and placed the cord back in its original position. Cannon did not object to Maurer's action and proceeded to take the photograph (Tr. 630).

As between Cannon and Maurer, Cannon's testimony is given more weight and credence. Hamilton argues that even if Cannon's testimony is believed, the cord did not pose a hazard because its elevation was minimal. This argument is rejected.

Cannon's testimony and exhibit C-1 establish that the unsecured portion of the cord created a gap large enough in which an employee could catch his foot and be subjected to a fall injury. Hamilton was in serious violation of § 1910.22(a)(1).

Item 2

Section 1910.27(f) of 29 C.F.R. provides:

> All ladders shall be maintained in a safe condition. All ladders shall be inspected regularly, with the intervals between inspections determined by use and exposure.

The second and third rungs of a fixed ladder at the Nicolet warehouse were broken at their points of attachment to the side rail (Tr. 178). As part of his work record, Cannon took measurements of the ladder and diagrammed it, noting, "Ladder also beat as though hit by truck" (Ex. C-2; Tr. 180).

Michael Herbers, a former employee of Hamilton's, testified that he and other employees in that area used the ladder twice a day to get in and out of the warehouse. They had never been instructed not to use it. There was no other easily accessible means to enter and exit the warehouse. Herbers stated that the ladder had been in the described condition for a couple of months prior to Cannon's inspection (Tr. 82). Herbers said that he and his fellow employees

reported the condition of the ladder to their supervisor, David Norvell, prior to Cannon's inspection (Tr. 95).

Cannon testified that the loose rungs on the ladder failed to provide secure footing, which could result in an employee slipping to the next rung, breaking his ankle or shin bone (Tr. 180, 183-184).

Hamilton does not deny the condition of the ladder or that it exposed employees to a serious hazard, but argues that it had no knowledge of the hazardous condition. Hamilton's plant manager, David Mueller, stated that neither he nor any other member of management knew of the damaged ladder and argued that the damage was not readily apparent (Tr. 952). Mueller stated that he visits the Nicolet warehouse once a month (Tr. 1050).

The employees who used the ladder on a regular basis knew that it was damaged and had reported it to their supervisor. Cannon, who was presumably not as familiar with the plant as Hamilton's management personnel, was able to discover the damage during the course of an expansive inspection. The knowledge of the supervisor to whom the conditions were reported is imputed to the corporation. In any event, Hamilton's failure to know of the damaged ladder demonstrated a lack of reasonable diligence on its part. Hamilton was in serious violation of § 1910.27(f).

Item 3

Section 1910.37(g)(2) of 29 C.F.R. provides:

> Exterior ways of exit access shall have smooth, solid floors, substantially level, and shall have guards on the unenclosed sides.

The exit door at the Nicolet warehouse opens outward onto a 27-inch wide walkway. On one side of the walkway is the exterior wall of the warehouse. On the other side of the walkway is the loading dock driveway. The drop to the surface of the driveway from the walkway is 41 inches. There is a guardrail extending along the edge of the walkway adjacent to the dock driveway. Immediately across from the exit door is a gap in the railing measuring 37½ inches. The gap is to accommodate the outward swing of the door, which is 36 inches wide (Ex. C-3; Tr. 185-191).

The parties do not dispute the facts related to this item. Hamilton disputes the applicability of the cited standard, arguing that § 1910.37(g)(1) states "Access to an exit may be by a means of any exterior balcony, porch, gallery, or roof that conforms to the requirements of this section." Hamilton argues that the provisions of § 1910.37(g) apply only to the four specific categories listed, which would exclude the walkway in the present case. Hamilton claims that the applicable standard is § 1910.23(c), which requires guardrails on floors and platforms four feet or more above ground.

The Secretary points out that the cited standard refers to "exit access," which is defined in § 1910.35(b) as "that portion of a means of egress which leads to an entrance to an exit." She argues that rather than limiting the scope of § 1910.37(g) to those four categories listed in 37(g)(1), the standard is expanding the scope to include those means of access (as long as they meet the other requirements of the section) that might otherwise be excluded.

The Secretary's interpretation is supported by § 1910.37(g)(6), which provides: "Any gallery, balcony, bridge, porch, or other exterior exit access that projects beyond the outside wall of the building shall comply with the requirements of this section as to width and arrangement" (emphasis added). This section specifically lists three of the four categories listed in 37(g)(1) (omitting roof), and adds another one (bridge) not previously mentioned, and then concludes with "other exterior exit access."

The wording of 37(g)(6) indicates that 37(g) is not restricted to the categories listed in 37(g)(1). Because § 1910.37 applies to "means of egress," whereas § 1910.23 applies to "guarding floor and wall openings or holes," § 1910.37(g) is more specifically applicable to the situation at issue, which is the guarding of a walkway leading from an exit door.

Hamilton argues that even if the cited standard is applicable, the proposed abatement methods would subject

employees to greater hazards. Compliance Officer Cannon suggested that the exit door could be altered to swing inward rather than outward (Tr. 189). Hamilton, with some merit, objects to this alteration because, in the event of an emergency rush to the exit, employees who first reached the exit would be forced to back away from the door and into the people behind them in order to open the door (Tr. 436-437).

Cannon also proposed placing an offset in the railing with a metal floor to close the gap (Tr. 189). Hamilton argues that the offset would create a greater hazard because it would project into the driveway. Trucks backing down the driveway to the loading dock could hit the offset, splintering material and damaging the guardrail. This objection is not sufficient to warrant rejection of Cannon's proposed abatement. The projecting area could be sufficiently marked or guarded so as to provide warning to the truck drivers of its presence.

The hazard presented by a 41-inch fall to the concrete below is serious (Tr. 191). Hamilton was in serious violation of § 1910.37(g)(2).

Item 4

Section 1910.107(e)(9) of 29 C.F.R. provides:

> Whenever flammable or combustible liquids are transferred from one container to another, both containers shall be effectively bonded and grounded to prevent discharge sparks of static electricity.

Cannon observed an ungrounded drum of mineral spirits and an ungrounded drum of lacquer thinner in the paint storage/mixing area (Exs. C-4; C-5, C-6, C-7; Tr. 192-195). He testified that ungrounded transfers could cause serious injuries due to fire or explosion (Tr. 204).

Larry Gregory, a master painter for Hamilton, observed the transfer of lacquer thinner from an ungrounded drum into a metal container on the day of the inspection. He observed similar transfers from ungrounded drums on other occasions (Tr. 134, 137-138, 140-141, 149-150, 153).

Hamilton argues that Gregory is not a credible witness, but the argument is not convincing and is rejected. Hamilton also argues that it had no actual or constructive knowledge that transfers from ungrounded drums were being made. Gregory stated that he had never reported the transfers to anyone in management (Tr. 148).

The evidence indicates that these transfers from ungrounded drums were on-going occurrences performed by several employees. Cannon was able to observe that the drums were not grounded during the course of his inspection. His photographs establish that the drums' lack of grounding was easily observable (Exs. C-4, C-5, C-6, C-7). Had Hamilton exercised reasonable diligence, it would have known that its employees were making improper transfers.

Hamilton also argues that the improper transfers were the result of unpreventable employee misconduct. "In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that the action of its employee was a departure from a uniformly and effectively communicated and enforced work rule." H. B. Zachry Company, 80 OSAHRC 9/D8, 7 BNA OSHC 2202, 2206, 1980 CCH OSHD ¶ 24,196, p. 29,425 (No. 76-1393, 1980). Hamilton has a grounding policy that requires all flammable liquids to be grounded to a grounding source, and that any transfers of flammable materials be properly bonded (Tr. 952).

"The mere establishment of work rules, however, is not sufficient to avoid responsibility for a violation. The rules must also be effectively communicated and enforced." Id. In the present case, the record establishes that the grounding policy was not effectively communicated to Hamilton's employees. Gregory stated that he had never been instructed in grounding (Tr. 140). He observed several employees on several different occasions making transfers from ungrounded drums, taking it out of the realm of isolated incidents.

Hamilton was in serious violation of § 1910. 107(e)(9).

Item 5a

Section 1910.132(a) of 29 C.F.R. provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory

devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Cannon observed an employee wiping down parts in the hardware area with mineral spirits while not wearing gloves (Tr. 205-206). Hamilton had a material safety data sheet (MSDS) on mineral spirits that recommends the wearing of gloves when using the spirits (Ex. C-8). Hamilton also had a safety rule requiring the use of gloves when handling solvents (Tr. 210-211).

Exposure to mineral spirits is a serious hazard. According to its MSDS, mineral spirits can cause "[i]rritation of eyes, skin and respiratory system. May cause nervous system depression. Extreme overexposure may result in unconsciousness and possibly death" (Ex. C-8).

Hamilton claims that this violation was a result of unpreventable employee misconduct. But Cannon testified that the employee's supervisor "was within about ten feet of the employee when we entered that location" (Tr. 211). The supervisor "was looking directly at the operation . . ." (Tr. 634).

The Secretary has established that Hamilton was in serious violation of § 1910.132(a).

Item 6

Section 1910.151(c) of 29 C.F.R. provides:

> Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

During his inspection, Cannon observed that an eyewash station in the battery charging area was blocked by a cabinet (Exs. C-9, C-10; Tr. 212-214). The acid in the batteries constitutes injurious corrosive materials requiring an accessible eyewash in the area (Tr. 215). An employee attempting to use the eyewash in an emergency would have been prevented from reaching it because of the cabinet, possibly resulting in loss of sight (Tr. 216).

Hamilton argues that the cabinet was deliberately placed in front of the eyewash immediately before the inspection by hostile employees who wished to create a safety violation. The only evidence that Hamilton offers to support this charge is that the cabinet was last seen in the storage room (Tr. 965-968). This is insufficient to prove that the placement of the cabinet was the result of employee sabotage. Hamilton was in serious violation of § 1910.151(c).

Item 9

Section 1910.219(e)(3)(i) of 29 C.F.R. provides:

> Vertical and inclined belts shall be enclosed by a guard conforming to standards in paragraphs (m) and (o) of this section.

Cannon observed a V-belt on the backside of a joiner in the mill area of the plant (Exs. C-11; C-12, C-12; Tr. 218). He testified that the guard for the V-belt and pulley drive did not fully enclose the incoming nip points. The unenclosed area is a two-inch gap at the back of the machine. Cannon stated that the potential hazard is that employees could get their hands in the area of the unenclosed belt and pulley, resulting in amputations of hands or fingers, or possible fractures (Tr. 218-226).

Cannon did not observe the machine in operation. A Hamilton employee, Dan Tartar, testified as to the usage of the machine. He testified that when operating the machine, the operator stands on the side of the joiner opposite from the V-belt (Tr. 125).

The bottom portion of the V-belt is protected by a guard (Ex. C-12). The top portion of the V-belt is covered by a hood which extends out past the pulley (Ex. C-12; Tr. 450-451). Any employee access to the V-belt must be through the two-inch gap between the guard on the lower porion of the V-belt and the hood (Tr. 447-448). The in-running nip point is centered under the hood, further limiting employee access to the point of danger (Tr. 449-450).

> The mere fact that it was not impossible for an employee to insert his hands [into] a machine does

> not itself prove that the point of operation exposes him to injury. Whether the point of operation exposes an employee to injury must be determined based on the manner in which the machine functions and how it is operated by the employees.

Rockwell International Corporation, 80 OSAHRC 118/A2, 9 BNA OSHC 1092, 1097-1098, 1980 CCH OSHD ¶ 24,979 (No. 12470, 1980).

The Secretary has failed to establish employee exposure to the hazard. The record demonstrates that the manner in which the joiner is operated does not expose the hands and fingers of the operator to the nip points. Hamilton was not in violation of § 1910.219(e)(3)(i).

Item 11

Section 1910.242(a) of 29 C.F.R. provides:

> Each employer shall be responsible for the safe condition of tools and equipment used by employees, including tools and equipment which may be furnished by employees.

Cannon observed employee Deborah Little using a Senco Model K air-supplied stapler in the finishing department. The guard on the stapler was not functioning, resulting in staples being fired without the guard being pressed against the material being stapled (Tr. 31, 230). This hazard could result in inadvertently fired staples striking employees (Tr. 231).

Hamilton argues that it had no knowledge that the stapler's guard was malfunctioning. Hamilton had a previous citation (under a different standard) for a safety hazard relating to staplers (Ex. C-14). Little testified that she had never been instructed in the use of the guard or how to check it (Tr. 32-33). She had obtained the staples from the tool closet. These facts establish that with reasonable diligence Hamilton could have known of the hazardous condition of the stapler.

Hamilton also argues that the stapler was tampered with. Robert Murray, Hamilton's maintenance supervisor at the time of the inspection, testified that he thought it had (Tr. 896-897, 905-910). Employee Little testified that she saw no one tampering with the stapler. Cannon stated that he examined the stapler and saw no evidence of tampering (Tr. 232). Murray's testimony is insufficient to establish that the stapler was deliberately rendered defective. Hamilton was in serious violation of § 1901.242(a).

CITATION 2: THE REPEAT VIOLATIONS

Item 1

Section 1910.37(k)(2) of 29 C.F.R. provides:

> Means of egress shall be continuously maintained free of all obstructions or impediments to full instant use in the case of fire or other emergency.

Cannon observed various materials blocking a fire door in Hamilton's store room. Two or three employees were working in the area (Exs. C-15, C-16, C-17; Tr. 250-251). The material blocking the exit door consisted of a blanket, boxes of screws, a bucket of bolts, a plastic barrel of screws, hex cap bolts in a plastic bucket, a box of rivets and a plastic tray containing cabinet hardware. The hazard posed by this condition is smoke inhalation or other injuries resulting from not being able to exit the door in an emergency (Tr. 253).

Hamilton argues that employees placed the materials in front of the door to harass Hamilton, that Cannon exaggerated that hazards to employees posed by the blockage, and that, despite the exercise of reasonable diligence, Hamilton was unaware of the blockage of the exit. The evidence does not support respondent's assertion and these arguments are rejected as without merit.

"A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." Potlatch Corp., 79 OSAHRC 6/A, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979).

Exhibit C-18 is a copy of a previous citation issued to Hamilton for the violation of § 1910.37(f)(1), which became a final order of the Review Commission (Tr. 254-256). Although this citation is under a different subsection of the standard

at issue, it also involved material blocking an exit door. Cannon conducted the earlier inspection and testified that the two conditions were similar (Tr. 256). Hamilton was in repeat violation of § 1910.37(k)(2).

Item 2

Section 1910.107(c)(2) of 29 C.F.R. provides:

> There shall be no open flame or spark producing equipment in any spraying area nor within 20 feet thereof, unless separated by a partition.

Cannon observed a pedestal fan being operated 36 inches from a spray booth in Hamilton's assembly area (Exs. C-19, C-20, C-21, C-22, C-23; Tr. 259). John McGlosson, a master painter for Hamilton, testified that at the time of the inspection, he was using lacquer-based paint (Tr. 57, 66). Cannon's notes, however, indicate that he was told McGlosson was using water-based paint at that time (Ex. R-1).

Hamilton introduced evidence establishing that it had switched over from lacquer-based to water-based paints for virtually all applications in May of 1987, approximately ten months before the inspection at issue (Tr. 803). This changeover helped bring Hamilton into compliance with the Environmental Protection Agency's regulations on emissions of Volatile Organic Compounds (Tr. 974-975).

Because water-based paints dry much slower than do lacquer-based paints, Hamilton began using pedestal fans to

help circulate the air around the painted units (Tr. 461). The day of the inspection, McGlosson was spray-painting a unit, with a pedestal fan located approximately three feet away (Ex. C-23; Tr. 55).

The citation for this item is predicated on McGlosson's testimony that he had used the fan in proximity to units while spraying with lacquer-based paints. McGlosson was not a credible witness. He adamantly maintained that he was using a lacquer-based paint on the day of the inspection, despite more credible evidence that such paints had not been used for the two weeks prior to the inspection (Tr. 65-66, 70-72, 974-975, 1070-1073).

Furthermore, McGlosson did not know the location of the fan on those occasions he used lacquer-based paint. He could not say whether the fan was ten, twenty, or thirty feet from where he was spraying the paint. The Secretary has failed to establish that Hamilton was in violation of § 1910.107(c)(2).

Item 3

Hamilton was charged with violating § 1910.132(a) for failing to require an employee to wear safety shoes. David Martin, an office employee for Hamilton, was observed by Cannon loading pallets in the shipping area while not wearing protective shoes (Ex. C-25; Tr. 267, 271).

Maurer and Mueller told Cannon that company policy requires the use of protective footwear in certain areas of

the plant, including the shipping area (Tr. 269-270). Cannon estimated that the wooden pallets weighed 25 to 35 pounds (Tr. 269).

Exhibit C-26 is a copy of a previous citation issued to Hamilton involving a similar violation for failure to require protective footwear (Tr. 271-272).

Hamilton argues that this citation is not repeated because it is not substantially similar to the previous citation. It also argues that Martin only helped loading in the shipping area for five to ten minutes once or twice every two or three weeks (Tr. 977-978). The evidence meets the tests for repeat violations and the respondent's arguments are rejected. It is well established that violations of short duration of exposure are properly charged as violations of the Act. Hamilton was in repeat violation of § 1910.132(a).

Item 4

Section 1910.176(b) of 29 C.F.R. provides:

> Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse.

Cannon observed boxes and pallets stacked in tiers (Exs. C-27, C-28; Tr. 275, 277). The stack had a base of 32 inches by 38 inches, was approximately 11½ feet high, and was leaning out from a wall approximately 8 to 10 inches (Tr.

276). Based on his visual observation of the stack, Cannon concluded that the stack was unstable.

The stack was composed of three bundles of cardboard boxes, each on a separate skid (Tr. 275). Each of the three bundles was wrapped with black banding and some kind of shrink wrap, which would check any tendency of the material in the stack to slide (Tr. 476-478).

After Cannon commented on the stack, Mueller tested its stability by shoving a corner of the material with both hands. Mueller testified that he believed the stack was stable and not in danger of tipping unless he deliberately tried to pull it over (Tr. 979-980).

The Secretary has failed to establish a prima facie case proving that the stack of material was unstable. Hamilton was not in violation of § 1910.176(b).

Item 5a

Section 1910.213(c)(1) of 29 C.F.R. provides:

> (c) Hand-fed ripsaws. (1) Each circular hand-fed ripsaw shall be guarded by a hood which shall completely enclose that portion of the saw above the table and that portion of the saw above the material being cut. The hood and mounting shall be arranged so that the hood will automatically adjust itself to the thickness of and remain in contact with the material being cut but it shall not offer any considerable resistance to insertion of material to saw or to passage of the material being sawed. The hood shall be made of adequate strength to resist blows and strains incident to reasonable operation, adjusting, and handling, and shall be so designed as to protect the operator from flying splinters and broken saw teeth. It shall be made of material that

> is soft enough so that it will be unlikely to cause tooth breakage. The hood shall be so mounted as to insure that its operation will be positive, reliable, and in true alignment with the saw; and the mounting shall be adequate in strength to resist any reasonable side thrust or other force tending to throw it out of line.

This item refers to the wooden guard used to cover the blade of table saw No. 27 in the mill area. It has an opening of two and a quarter inches between the guard and the rip fence, and an opening in the front and rear of the guard which is six and three-quarters inches by four inches wide (Exs. C-30, C-31, C-32, C-33; Tr. 281-285).

One of the cuts that the saw is used to make requires the sawblade to be steeply angled. The standard guard cannot be used to cover the sawblade during this cut (Tr. 985-986). Hamilton claims that it designed a guard for this operation based on diagrams and literature supplied to it by OSHA in a previous inspection (Exs. R-9, R-10). Hamilton argues that the cited standard is not applicable to this saw, contending that § 1910.213(a)(15), which allows for alternative guarding, applies. That standard states: "Combs (featherboards) or suitable jigs shall be provided at the workplace for use when a standard guard cannot be used, as in dadoing, grooving, jointing, moulding, and rabbeting."

The Secretary contends that this alternative standard does not apply because the saw is not used for any of the purposes listed in it. The standard, however, only lists these purposes as examples, stating that alternative guarding

can be used "when a standard guard cannot be used." Hamilton has established that a standard guard complying with the cited standard cannot be used when making one of the saw's cuts, and it has provided alternative guarding for the saw. Hamilton was not in violation of § 1910.213(c)(1) as it relates to item 5a.

Item 5b

This item charges that Hamilton violated § 1910.213(c)(1) by failing to replace a damaged hood on a splitter guard on saw No. 4 in the mill area. The guard had a gap in it approximately two inches high and five inches long (Exs. C-34, C-35, C-36, C-37; Tr. 286-287).

Cannon testified that he was told by the area foreman that the foreman had been aware of the damaged condition of the guard for several days. The foreman also stated that the saw had been used with the damaged hood (Tr. 290-291, 498-501). Cannon identified the foreman as "Mike Steele." The foreman of the mill area is Mike Stitzel (Tr. 502, 990). Stitzel testified on the witness stand that he first learned of the damaged guard on the day of Cannon's inspection (Tr. 1122-1123).

Due to his impartiality, Cannon's testimony is deemed more credible. Hamilton was in repeat violation of § 1910.213(c)(1) as it relates to item 5b.

Item 6

Section 1910.213(h)(4) of 29 C.F.R. provides:

> Installation shall be in such a manner that the front end of the unit will be slightly higher than the rear, so as to cause the cutting head to return gently to the starting position when released by the operator.

Cannon checked a radial saw in the mill area to see if the arm would return to the rest position. It did not do so (Exs. C-38, C-39; Tr. 302-303). Cannon was told by management personnel that anyone working in the mill area could use it. He spoke with employee Dan Tartar, who stated that he had used the saw within the six months prior to the inspection, and that sometimes, the saw did not return properly (Tr. 304-306).

Hamilton's arguments denying a violation of this standard are without merit. A previous citation under this standard was issued to Hamilton and became a final order (Ex. C-40; Tr. 306-307). Hamilton was in repeat violation of § 1910.213(h)(4).

Item 7

Section 1910.213(m)(1) of 29 C.F.R. provides:

> (m) Wood shapers and similar equipment. (1) The cutting heads of each wood shaper, hand-fed panel raiser, or other similar machine not automatically fed, shall be enclosed with a cage or adjustable guard so designed as to keep the operator's hand away from the cutting edge. The

diameter of circular shaper guards shall be not less than the greatest diameter of the cutter. In no case shall a warning device of leather or other material attached to the spindle be acceptable.

Item 7a relates to machine No. 5 in the mill area. The guard for the shaper block on this machine was taped, preventing adjustment of the guard. Cannon testified that the guard did not keep the operator's hand away from the cutting edge (Exs. C-41, C-42; Tr. 308-311).

Item 7b relates to a shaper whose guard was set four inches above the material being cut (Exs. C-43, C-44, C-45; Tr. 312-313). The hazard created by the four-inch gap was exposure to possible lacerations and amputations (Tr. 316). Hamilton was previously cited for violation of this standard (Ex. C-46; Tr. 316-317).

Hamilton acknowledges the foregoing facts but argues that these items were the result of unpreventable employee misconduct. Hamilton failed to prove that it had a work rule requiring proper adjustment of the guards that was effectively communicated and enforced. Hamilton was in repeat violation of § 1910.213(m)(1).

Item 8

Section 1910.305(g)(1)(iii) of 29 C.F.R. provides:

> (iii) Unless specifically permitted in paragraph (g)(1)(i) of this section, flexible cords and cables may not be used:
> (A) As a substitute for the fixed wiring of a structure;

(B) Where run through holes in walls, ceilings, or floors;
(C) Where run through doorways, windows, or similar openings;
(D) Where attached to building surfaces; or
(E) Where concealed behind building walls, ceilings, or floors.

This item concerns the same electrical cord that was the subject of item one of citation one. The Secretary contends that it violated the cited standard under (D) because the cord was "attached to building surfaces" in that it was taped to the floor. The Secretary also contends that the standard is violated under (A) because it was used "as a substitute for the fixed wiring" of the building.

Hamilton argues that the cord fits into three of exceptions listed in § 1910.305(g)(1)(i), which provides:

(g) Flexible cords and cables--(1) Use of flexible cords and cables. (i) Flexible cords and cables shall be approved and suitable for conditions of use and location. Flexible cords and cables shall be used only for:
(A) Pendants;
(B) Wiring of fixtures;
(C) Connection of portable lamps or appliances;
(D) Elevator cables;
(E) Wiring of cranes and hoists;
(F) Connection of stationary equipment to facilitate their frequent interchange;
(G) Prevention of the transmission of noise or vibration;
(H) Appliances where the fastening means and mechanical connections are designed to permit removal for maintenance and repair; or
(i) Data processing cables approved as part of the data processing system.

Hamilton argues that the cord is excepted under (B) "wiring of fixtures," (C) "connection of portable lamps or appliances," and (F) "connection of stationary equipment to facilitate their frequent interchange." Hamilton's arguments for (B) and (F) are rejected as inapplicable to the portable banding machine.

There is merit, however, to the argument that the cord is exempted under (C) for connection of portable lamps or appliances.

The National Electric Code defines "appliance" as: "Utilization equipment, generally other than industrial, normally built in standardized sizes or types, which is installed or connected as a unit to perform one or more functions such as clothes washing, air conditioning, food mixing, deep frying, etc." (Ex. R-12).

The Secretary argues that the portable banding machine cannot be classified as an appliance because the definition refers to equipment "generally other than industrial." Although that phrase does give pause, it does not dictate the mandatory exclusion of industrial equipment (which the banding machine is). The remainder of the definition is clearly applicable to the banding machine.

It is this Judge's determination that the portable banding machine is a portable appliance within the meaning of § 1910.305(g)(1)(i) and is, therefore, an exception to the

requirements of § 1910.305(g)(1)(ii). Hamilton was not in violation of the cited standard.

Item 9

Section 1910.305(g)(2)(iii) provides:

> (iii) Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

Item 9a concerns a missing strain relief on a directional light in the shipping area (Exs. C-48, C-49; Tr. 326). Item 9b concerns a SCMI shaper that did not have the primary insulation of the cord held by the cord grip (Ex. C-50; Tr. 329-330). The hazard created was potential exposure to electrified parts, resulting in shocks and burns (Tr. 329, 332).

Hamilton received a previous citation under the same standard, which became a final order of the Commission (Ex. C-51; Tr. 334-335).

Hamilton's arguments that it exercised reasonable diligence and that no hazard existed are not supported by convincing evidence and are rejected. Hamilton was in repeat violation of § 1910.305(g)(2)(iii).

Item 10

Section 1910.1200(f)(5)(i) of 29 C.F.R. provides:

(f) Labels and other forms of warning. (1) The chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information:

(i) Identity of the hazardous chemical(s);

(ii) Appropriate hazard warnings; and

(iii) Name and address of the chemical manufacturer, importer, or other responsible party.[1]

Cannon testified that he observed employees in the assembly one area painting the bases of units. The employees were using lacquer paints contained in one-gallon cans which were not labeled with hazard warnings. Cannon was told that the employees were using, among others, a semi-gloss black lacquer paint (Ex. C-52; Tr. 336-337). The MSDS for semi-gloss black lacquer states in part: "Effects of overexposure: Inhalation: anesthetic, progression from irritation of respiratory tract through neurological problems to possible coma and can even be fatal (Ex. C-54; Tr. 338-339).

Hamilton argues that it is in compliance with the standard because it uses an alternative method permitted in § 1910.1200(f)(6), which provides:

(6) The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by paragraph (f)(5) of this

[1] The original amendment to the citation referenced §1910.1200(f)(4). The hazard communication standard has now been amended and renumbered, to the above cited standard.

section to be on a label. The written materials shall be readily accessible to the employees in their work area throughout each workshift.

Hamilton argues that its employees could identify the paints in the unmarked cans by color, and that MSDS sheets for the paints were available to them. This does not constitute compliance with § 1910.1200(f)(6). That standard allows the use of MSDS sheets in lieu of labeling "as long as the alternative method identifies the containers to which it is applicable." The standard requires the unlabeled containers to be specifically referenced in the MSDS sheets. Hamilton did not do this.

Hamilton received a previous citation for the same standard (Ex. C-57), and is in repeat violation of § 1910.1200(f)(5)(i).

CITATION 3: THE OTHER-THAN-SERIOUS VIOLATIONS

Item 1

Section 1910.22(b)(1) of 29 C.F.R. provides:

> (b) Aisles and passageways. (1) Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repairs, with no obstruction across or in aisles that could create a hazard.

Items 1a and 1b refer to aisleways which were blocked by material that had been placed or stored in the aisleways. The

aisleways were used for material handling purposes (Exs. C-60, C-61, C-62, C-63, C-64; Tr. 360-367). Cannon stated that the hazard posed by the obstructions was the possibility that an employee could be forced to go outside the aisleway while using material handling equipment and inadvertently strike an employee in the work area (Tr. 367).

Hamilton argues that the condition does not present a hazard. This argument is rejected as the hazard described by Cannon is reasonable and believable. Hamilton was in other violation of § 1910.22(b)(1).

Item 3

Section 1910.37(e) of 29 C.F.R. provides:

> (e) Arrangement of exits. When more than one exit is required from a story, at least two of the exits shall be remote from each other and so arranged as to minimize any possibility that both may be blocked by any one fire or other emergency condition.

The Nicolet warehouse is a separate facility from the rest of the plant, and measures approximately 170 feet by 205 feet (Ex. C-66). Generally three to five employees work in the warehouse (Tr. 103, 583, 1023). The Secretary contends that there is only one exit available in the warehouse (Tr. 368). Hamilton argues that there are two exits available, because there is an overhead door at the opposite end of the facility (Tr. 90).

Michael Herbers, who worked in the Nicolet warehouse, testified that the overhead door was used for loading trucks. When asked if it was accessible as an exit, Herbers replied no, because "[t]rucks were usually parked there" (Tr. 90).

Hamilton's arguments on this issue, therefore, are rejected. The Secretary has established that there was only one readily available exit in the Nicolet warehouse. Hamilton was in other violation of § 1910.37(e).

Item 4

Section 1910.141(d)(2)(i) of 29 C.F.R. provides:

> (2) Lavatories. (i) Lavatories shall be made available in all places of employment. The requirements of this subdivision do not apply to mobile crews or to normally unattended work locations if employees working at these locations have transportation readily available to nearby washing facilities which meet the other requirements of this paragraph.

No running water was available in the Nicolet warehouse area. Cannon observed employees eating lunch there (Tr. 381-383). Herbers testified that he was unable to wash his hands with water before he ate (Tr. 90-92). He stated that employees who worked in that area generally ate lunch there, because it was too time consuming to return to the main plant (Tr. 111).

Hamilton claims that the Nicolet area employees are a mobile crew within the meaning of the cited standard. It bases this argument on the fact that the employees must first

punch in at the time clock in the main plant before they are transported by van to the Nicolet warehouse (Tr. 104-105). The undersigned does not interpret "mobile crew" to include employees who travel from the main plant to the very same location day in and day out. Such employees report to a permanent work station and are not mobile.

Hamilton is in other violation of § 1910.141(d)(2)(i).

Item 5

Section 1910.212(b) of 29 C.F.R. provides:

> Machines designed for a fixed location shall be securely anchored to prevent walking or moving.

A Powermatic Shaper in the mill area was not secured to the floor. Cannon was able to move it (Tr. 385).

Hamilton contends that the shaper was not designed for a fixed location. The Secretary argues that Hamilton's witness, John Paola, a representative of the company that sold Hamilton the shaper, failed to establish that the shaper was not designed for a fixed location (Tr. 924-927). It is, however, the Secretary's burden to prove that the shaper was designed for that purpose, which she failed to do. Hamilton is not in other violation of § 1910.212(b).

Item 6

Section 29 C.F.R. §1910.213(m)(1) provides:

(m) Wood shapers and similar equipment. (1) The cutting heads of each wood shaper, hand-fed panel raiser, or other similar machine not automatically fed, shall be enclosed with a cage or adjustable guard so designed as to keep the operator's hand away from the cutting edge. The diameter of circular shaper guards shall be not less than the greatest diameter of the cutter. In no case shall a warning device of leather or other material attached to the spindle be acceptable.

This item involves the same shaper that was the subject of item six. The shaper had a 4½-by-½-inch plastic disc attached to the spindle (Tr. 389). The Secretary contends that this disc is a warning device of the kind prohibited by the standard.

Hamilton contends that it is not merely a warning device but is in fact a guard with the required ball bearing between the spindle and the disc (Exs. C-68, R-18, R-70, R-71, R-72, R-73; Tr. 601-606, 945-946).

Hamilton has successfully rebutted the Secretary's evidence that the disc functioned only as a warning device. Hamilton was not in violation of § 1910.213(m)(1).

Item 7

This item charges Hamilton with the violation of 29 C.F.R. § 1910. 242(a) for failing to ensure the safe condition of tools and equipment. Cannon observed a router being used by an employee. The router had three damaged areas in the primary insulation of the power cord (Exs. C-69, C-70, C-71; Tr. 391-395).

Hamilton's arguments are rejected as without merit. Hamilton is in other violation of § 1910.241(a).

PENALTY DETERMINATIONS

The Commission is the final arbiter of penalties in all contested cases. Secretary V. OSAHRC and Interstate Glass Co., 487 F.2d 438 (8th Cir. 1973). Under 17(j)(4) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of the previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the primary factor to be considered. Nacirema Operating Co., 72 OSAHRC 1/B10, 1 BNA OSHC 1001, 1971-1973 CCH OSHD ¶ 15,032 (No. 4, 1972). In addition, the unique circumstances of this case relating to the on-going labor problems at the facility will also be taken into consideration. Although allegations of employee sabotage have been rejected in this case, the court is aware that the then-current labor situation at the plant may have resulted in lower than normal standards of safety. While such a situation does not exempt the employer from compliance with OSHA's standards, it can have a mitigating effect on the penalties assessed.

Upon due consideration of the foregoing factors, it is determined that the following are appropriate penalties for the cited violations:

CITATION 1

For the serious violation of § 1910.22(a)(1) (Item 1), a penalty of $400.00 is assessed; for the serious violation of § 1910.27(f) (Item 2), a penalty of $300.00 is assessed; for the serious violation of § 1910.37(g)(2) (Item 3), a penalty of $400.00 is assessed; for the serious violation of § 1910.107(e)(9) (Item 4), a penalty of $200.00 is assessed; for the serious violation of § 1910.132(a) (Item 5a), a penalty of $400.00 is assessed; for the serious violation of § 1910.151(c) (Item 6), a penalty of $500.00 is assessed; and for the serious violation of § 1910.242(a) (Item 11), a penalty of $400.00 is assessed.

CITATION 2

For the repeat violation of § 1910.37(k)(2) (Item 1), a penalty of $400.00 is assessed; for the repeat violation of § 1910.132(a) (Item 3), a penalty of $500.00 is assessed; for the repeat violation of § 1910.213(c)(1) (Item 5b), a penalty of $350.00 is assessed; for the repeat violation of § 1910.213(h)(4) (Item 6), a penalty of $300.00 is assessed; for the repeat violation of § 1910.213(m)(1) (Items 7a and 7b), a penalty of $400.00 is assessed; for the repeat violation of §

1910.305(g)(2)(iii) (Items 9a and 9b), a penalty of $300.00 is assessed; and for the repeat violation of § 1910.1200(f)(5)(i) (Item 10), a penalty of $400.00 is assessed.

CITATION 3

No penalties are assessed for the other-than-serious violations of § 1910.22(b)(1), § 1910.37(e), § 1910.141(d)(2)(i), § 1910.212(b), and § 1910.242(a).

The foregoing constitutes the findings of facts in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

CONCLUSIONS OF LAW

1. Hamilton Fixture, at all times material to this proceeding, was engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970 ("Act").

2. Hamilton, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and the subject matter.

3. Hamilton was in serious violation of § 1910.22(a)(1) (Citation 1, Item 1).

4. Hamilton was in serious violation of § 1910.27(f) (Citation 1, Item 2).

5. Hamilton was in serious violation of § 1910.37(g)(2) (Citation 1, Item 3).

6. Hamilton was in serious violation of § 1910.107(e)(9) (Citation 1, Item 4).

7. Hamilton was in serious violation of § 1910.132(a) (Citation 1, Item 5a).

8. Hamilton was in serious violation of § 1910.151(c) (Citation 1, Item 6).

9. Hamilton was not in violation of § 1910.219(e)(3)(i) (Citation 1, Item 9).

10. Hamilton was in serious violation of § 1910.242(a) (Citation 1, Item 11).

11. Hamilton was in repeat violation of § 1910.37(k)(2) (Citation 2, Item 1).

12. Hamilton was not in violation of § 1910.107(c)(2) (Citation 2, Item 2).

13. Hamilton was in repeat violation of § 1910.132(a) (Citation 2, Item 3).

14. Hamilton was not in violation of § 1910.176(b) (Citation 2, Item 4).

15. Hamilton was not in violation of § 1910.213(c)(1) (Citation 2, Item 5a).

16. Hamilton was in repeat violation of § 1910.213(c)(1) (Citation 2, Item 5b).

17. Hamilton was in repeat violation of § 1910.213(h)(4) (Citation 2, Item 6).

18. Hamilton was in repeat violation of § 1910.213(m)(1) (Citation 2, Items 7a and 7b).

19. Hamilton was not in violation of § 1910.305(g)(1)(iii) (Citation 2, Item 8).

20. Hamilton was in repeat violation of § 1910.305(g)(2)(iii) (Citation 2, Items 9a and 9b).

21. Hamilton was in repeat violation of § 1910.1200(f)(5)(i) (Citation 2, Item 10).

22. Hamilton was in other violation of § 1910.22(b)(1) (Citation 3, Items 1a and 1b).

23. Hamilton was in other violation of § 1910.37(e) (Citation 3, Item 3).

24. Hamilton was in other violation of § 1910.141(d)(2)(i) (Citation 3, Item 4).

25. Hamilton was not in other violation of § 1910.212(b) (Citation 3, Item 5).

26. Hamilton was not in violation of § 1910.213(m)(1) (Citation 3, Item 6).

27. Hamilton was in other violation of § 1910.242(a) (Citation 3, Item 7).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED:

1. Item 1 of Citation 1 is affirmed as serious and a penalty of $400.00 is assessed.

2. Item 2 of Citation 1 is affirmed as serious and a penalty of $300.00 is assessed.

3. Item 3 of Citation 1 is affirmed as serious and a penalty of $400.00 is assessed.

4. Item 4 of Citation 1 is affirmed as serious and a penalty of $200.00 is assessed.

5. Item 5a of Citation 1 is affirmed as serious and a penalty of $400.00 is assessed.

6. Item 5b of Citation 1 is vacated in accordance with the partial settlement agreement.

7. Item 6 of Citation 1 is affirmed as serious and a penalty of $500.00 is assessed.

8. Item 7 of Citation 1 is affirmed as serious and a penalty of $200.00 is assessed in accordance with the partial settlement agreement.

9. Item 8 of Citation 1 is affirmed as serious and a penalty of $300.00 is assessed in accordance with the partial settlement agreement.

10. Item 9 of Citation 1 is vacated and no penalty is assessed.

11. Item 10 of Citation 1 is affirmed as serious and a penalty of $300.00 is assessed in accordance with the partial settlement agreement.

12. Item 11 of Citation 1 is affirmed as serious and a penalty of $400.00 is assessed.

13. Item 1 of Citation 2 is affirmed as a repeat violation and a penalty of $400.00 is assessed.

14. Item 2 of Citation 2 is vacated and no penalty is assessed.

15. Item 3 of Citation 2 is affirmed as a repeat violation and a penalty of $500.00 is assessed.

16. Item 4 of Citation 2 is vacated and no penalty is assessed.

17. Item 5a of Citation 2 is vacated and no penalty is assessed.

18. Item 5b of Citation 2 is affirmed as a repeat violation and a penalty of $350.00 is assessed.

19. Item 6 of Citation 2 is affirmed as a repeat violation and a penalty of $300.00 is assessed.

20. Items 7a and 7b of Citation 2 are affirmed as repeat violations and a penalty of $400.00 is assessed.

21. Item 8 of Citation 2 is vacated and no penalty is assessed.

22. Items 9a and 9b of Citation 2 are affirmed as repeat violations and a penalty of $300.00 is assessed.

23. Item 10 of Citation 2 is affirmed as a repeat violation and a penalty of $400.00 is assessed.

24. Items 1a and 1b of Citation 3 are affirmed as other violations and no penalty is assessed.

25. Item 2 of Citation 3 is vacated in accordance with the partial settlement agreement.

26. Item 3 of Citation 3 is affirmed as an other violation and no penalty is assessed.

27. Item 4 of Citation 3 is affirmed as an other violation and no penalty is assessed.

28. Item 5 of Citation 3 is vacated and no penalty is assessed.

29. Item 6 of Citation 3 is vacated and no penalty is assessed.

30. Item 7 of Citation 3 is affirmed as an other violation and no penalty is assessed.

Dated this 21st day of February, 1990.

Joe D. Sparks

JOE D. SPARKS
Judge