



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

GENERAL DYNAMICS CORP.,
ELECTRIC BOAT DIVISION,
QUONSET POINT FACILITY,
Respondent,

STEPHEN C. PERRY,
Authorized Employee
Representative.

OSHRC DOCKET
NO. 87-1195

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on January 26, 1994. The decision of the Judge will become a final order of the Commission on February 25, 1994 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before February 15, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. SNA
Ray H. Darling, Jr.
Executive Secretary

Date: January 26, 1994

DOCKET NO. 87-1195

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 ELECTRIC BOAT DIVISION,
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 QUONSET POINT FACILITY,
 :
 :
 Respondent, and
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 :
 STEPHEN C. PERRY,
 :
 :
 Employee Representative
 :

Docket No. 87-1195

Appearances:

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 For Respondent

Edward J. Gorman, III, Esq.
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 For Employee Representative

Before: ADMINISTRATIVE LAW JUDGE JOHN H FRYE, III

DECISION AND ORDER

INTRODUCTION

This matter arose out of an inspection conducted by CSHO Ralph Gumpert at General Dynamics' Quonset Point, Rhode Island, facility in the winter and spring of 1987. The inspection was instituted in response to an employee complaint respecting access to

General Dynamics' injury-illness log. In the course of his inspection, Mr. Gumpert reviewed General Dynamics' summaries of injuries and illnesses for 1985 and 1986 and noticed that the number of recorded lost-workday injuries and number of recorded lost workdays were identical, an anomaly reflecting a single day lost for all injuries and illnesses involving any lost time. As a result, OSHA's Area Director for Rhode Island directed Mr. Gumpert to review General Dynamics' records of occupational injuries and occupational illnesses for those years in order to ascertain whether General Dynamics was in fact recording injuries and illnesses pursuant to the requirements of 29 C.F.R. Part 1904. This review focussed principally on General Dynamics' Log and Summary of Occupational Injuries and Illnesses, OSHA Form 200.

As a result of this inspection, OSHA issued two citations to Respondent. Citation 1 was characterized as willful. Item 1 of that citation alleged that General Dynamics had failed to record 121 separate injuries and illnesses in contravention of 29 C.F.R. § 1904.2(a). Item 2 alleged that General Dynamics failed to prepare a supplementary report of 53 injuries and illnesses in contravention of 29 C.F.R. § 1904.4. The Secretary proposed a total penalty of \$615,000. Citation 2 alleged an other-than-serious violation of 29 C.F.R. § 1904.2(a) on account of certain omissions from OSHA Form 200. The Secretary proposed no penalty.

A 22-day hearing was held before Judge David J. Knight from June through September, 1989. Following the hearing, Judge Knight issued a decision in which he dismissed the citations because they had not been filed within the six-month period provided by § 9(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, as

amended (Act). This decision was reversed by the Commission and the case remanded for the issuance of a decision on the merits of the citations.

Because Judge Knight was no longer available, the case was assigned to me. I held a conference of counsel in April, 1993, in which the Secretary and General Dynamics participated and subsequently permitted these parties to comment in writing on the effect of the Commission's decision in *Secretary v. Caterpillar, Inc.*¹ I have considered these arguments as well as the briefs which were filed at the conclusion of the hearing in reaching this decision. In this decision, I affirm both citations as other-than-serious and impose total penalties of \$47,450. In reaching this decision, I have not, as urged by General Dynamics, reviewed certain of Judge Knight's rulings, but have accepted them as the law of the case.

RESPONDENT'S RECORDKEEPING SYSTEM

The Secretary outlined General Dynamics' record keeping process that was in existence in 1985 and 1986 as follows. Except as noted below, General Dynamics does not take issue with the Secretary's account.

Using a random number table and General Dynamics' lists of current and severed employees, CSHO Gumpert selected the files of 99 employees to review.² He reviewed these files and compared them to the employer's injury-illness logs and work calendars for

¹15 OSHC 2153 (Rev. Com. 1993).

²Tr. 230-232. The CSHO also reviewed the files of some ten employees whose names were provided to him by the United Shipbuilding Crafts (USC), which was engaged in labor organizing and unionization attempts at Quonset, as examples of alleged misrecording. Mr. Gumpert did not seek access to employees' personal medical records, which could have contained information related to non-occupational medical matters. Instead Mr. Gumpert limited his review to records which were generated by the Respondent's dispensary, to which employees reported when injured or ill. These were kept in the Respondent's workers compensation office and concerned work-related matters only. Tr. 232-233.

1985 and 1986. Mr. Gumpert had numerous interviews with Mr. Gerald Preler, General Dynamics' recordkeeping supervisor, and his subordinates, Karen Romano and Betty Cave.³ As a result of this interview process Mr. Gumpert became familiar with General Dynamics' flow of information respecting injuries and illnesses and learned how and why log entries were and were not made.⁴

Employees with work related injuries or illnesses reported to the medical dispensary.⁵ The medical personnel at the dispensary wrote the medical reports and hospital visit reports, indicating what the employees or outside care providers had told them and the diagnosis of Dr. McKee, the dispensary director.⁶

These reports went first to Karen Romano, the workers compensation clerk, and then to Betty Cave, Mr. Preler's secretary, who maintained the OSHA 200 log.⁷ Ms. Romano separated the reports into three piles: (1) a lost workdays pile; (2) a medical only pile; and

³Ms. Romano kept the workers compensation records and Ms. Cave was Mr. Preler's secretary and actually entered data into the logs. Mr. Gumpert also interviewed the employees and their foremen, as well as Dr. McKee, the Respondent's dispensary director, and the dispensary nurses.

⁴See Tr. 102-220, 1920-1933. The Secretary detailed Respondent's specific alleged errors and omissions in OSHA Form 200 in Appendix 3 to his post-trial brief.

⁵Tr. 142.

⁶Tr. 190, 2371-72. The medical reports were made respecting initial visits or treatment and hospital visit reports were made respecting follow-up visits or treatment. The dispensary also generated medical reports and hospital visit reports respecting employees whose first contact with a health care provider may have occurred outside Quonset, e.g., an employee who initially went to a hospital emergency room or who saw an "outside" doctor.

⁷Tr. 117-121, 150. Neither Ms. Cave nor Ms. Romano had received training in OSHA recordkeeping requirements prior to December 1986. Tr. 116, 129.

(3) a first aid pile.⁸ These groupings were done for worker's compensation purposes. She sent these piles to Ms. Cave.

Ms. Cave disregarded the first aid cases and did not record them. Mr. Gumpert found that the first aid pile included restricted work and medical treatment cases.⁹ General Dynamics points out that, because Ms. Cave assumed that this pile contained only first aid cases which were not recordable, she made no affirmative decision not to record those cases which should have been recorded. General Dynamics further points out that this error in the system was revealed by an internal audit in November and corrected one month later in December, 1986.¹⁰

Ms. Cave took the medical only pile and segregated those cases she believed were recordable. She excluded entire categories of recordable cases such as flashburns. If Ms. Cave believed a matter was recordable she forwarded it to Mr. Preler, who would determine whether it was to be recorded. Those matters that Mr. Preler deemed recordable were investigated by the safety department.¹¹ Mr. Preler was both the safety chief and the recordkeeping supervisor, and was, according to the Secretary, evaluated on the basis of his

⁸Ms. Romano generated a form LS-202 when an employee was to be out of work and a compensation claim was expected. Tr. 2372-2373. A form LS-202A was generated when a bill was expected to be received from an outside vendor. Tr. 2373. If the injury was not expected to result in a lost time claim or a vendor bill, no form was made out. Tr. 2374-2375. The LS-202s constituted the lost work time pile, the LS-202As constituted the medical only pile, and the medical reports without an accompanying LS-202 or LS-202A constituted the first aid pile. Tr. 2375.

⁹Tr. 124-126, 127-128, 146-147, 151.

¹⁰Respondent's reply brief, pp.18-19.

¹¹Tr. 152-155.

ability to keep the injury rate low.¹² The Secretary sees an inherent conflict between this goal and the requirement to record all injuries and illnesses according to the BLS guidelines, although General Dynamics believes that there was no significant conflict.¹³

The lost workdays pile went from Ms. Romano directly to Mr. Preler, who alone determined what should be recorded.¹⁴ Even where subsequent information made it clear that an unrecorded incident was in fact recordable, e.g., notification that an employee who had been out of work due to injury was returning to work, the log was not corrected.¹⁵

Cases involving restricted work activities were recorded if they involved prior lost days. However, cases involving only restricted work days were not recorded.¹⁶ In addition, ~~the~~ General Dynamics stopped counting lost workdays after approximately ninety, reducing the severity index used by the Department of Labor to evaluate workplace safety.¹⁷ This practice, coupled with the nonrecording of restricted work cases, lowered General Dynamics' lost workday incidence rate (lost workdays per 100 employees).¹⁸

¹²See Exhibits C-20 and C-21.

¹³See Respondent's reply brief, pp. 24-25.

¹⁴Tr. 156-157.

¹⁵Tr. 194-196, 203-204, 211.

¹⁶Tr. 156-162, 168; Ex. C-8, December 28, 1986, General Dynamics interoffice memorandum which notes this defect in Respondent's system.

¹⁷Tr. 166-168.

¹⁸Tr. 168-169. The lost workday incidence rate (LWDI) is

[t]he number of ... lost workdays related to a common exposure base of 100 full-time workers.

*** The rate is calculated as:

$$N/EH \times 200,000$$

where:

(continued...)

General Dynamics also lacked a mechanism for recording second visits to the dispensary for the same injury. These could, depending on the treatment rendered or restrictions placed on the employee at that visit, remove the case from the first-aid category and make it recordable.¹⁹

As noted, supra, General Dynamics did not record flashburns even if prescriptions were written for them.²⁰ Flashburns are generally treated as illnesses under the Part 1904 and the BLS requirements published in 1978 and in 1986 and as such are recordable. Prescription of more than one dose of a drug constitutes recordable medical treatment. Dr. McKee acknowledged that the ophthalmologic drugs routinely used to treat flashburns and other eye-related matters were indeed prescription drugs.²¹

¹⁸(...continued)

N = number of lost workdays

EH = total hours worked by all employees during calendar year

200,000 = base for 100 full-time equivalent workers (working 40 hours per week, 50 weeks per year).

Recordkeeping Guidelines for Occupational Injuries and Illnesses, Ex C-4, p. 59.

¹⁹Tr. 176-177.

²⁰Tr. 179-185.

²¹Tr. 185-186, 191.

FAILURE TO PROPERLY RECORD THE INJURIES AND ILLNESSES SET OUT IN CITATION 1, ITEM 1.

In his complaint as amended at the hearing, the Secretary alleged that General Dynamics failed to record 118 injuries or illnesses. General Dynamics maintains that the Secretary failed to introduce evidence²² which demonstrated that these illnesses and injuries were required to be recorded under the Act, the Regulations set forth at 29 C.F.R. Part 1904, or the BLS Guidelines.²³

The Secretary's position with respect to the specific injuries and illnesses which should have been, but were not, recorded is set out in Appendix 3 to his Brief. General Dynamics has not addressed the evidence supporting each specific shortcoming set out in Appendix 3, but has attacked the record supporting the Secretary's position in more general terms.²⁴ Consequently, I have adopted that portion of Appendix 3 which sets forth these errors and omissions as findings of fact. It is attached to this Decision as Appendix A.

General Dynamics maintains that, to be recordable, the occupational injury or illness must be one where recording is mandated by the Act based upon certain resultant effects or necessary treatment. General Dynamics maintains that the Secretary has failed to adduce

²²Respondent notes that its objections to the introduction of testimony and exhibits at the hearing on various grounds, including hearsay, the medical access order, and the provisions of the LHWCA, were overruled. It again raises and preserves these objections and its exceptions to the rulings. However, I have not reexamined those rulings.

²³As set forth at pages 29 to 39 of its Initial Brief, and in Section 7 of its reply brief, Respondent maintains that the BLS Guidelines are not enforceable as a matter of law. However, nowhere in its briefs does Respondent indicate that the Secretary's application of the BLS Guidelines to it has resulted in injury to its interests. In fact, in attacking the Secretary's treatment of flashburns as illnesses rather than injuries, Respondent draws support from the Guidelines. Consequently, it is not necessary to address this argument.

²⁴See Respondent's reply brief at pp. 5-17.

the proof necessary to demonstrate recordability.²⁵ General Dynamics' positions are discussed below.

Lost Workdays. The Secretary appears to assert that 26 of the 118 failures to record involved lost work days.²⁶ General Dynamics notes that 29 C.F.R. § 1904.12 states that an occupational injury is recordable if the injury results in a lost workday. However, General Dynamics, pointing to §§ 8 and 24, urges that the Act makes no mention of lost workdays when defining what is recordable. Thus, according to Respondent, the regulation exceeds the scope of the statute and any alleged failure to record based upon lost workdays must be vacated.

General Dynamics goes on to urge that, even if the regulations do not exceed statutory authority, neither the Act nor the regulations in Part 1904 call for the number of lost workdays to be recorded. Therefore, General Dynamics believes that it complied fully with the Act and the regulations by recording an incident which resulted in lost workdays or restricted work activity, even if the precise number of days was erroneously noted, and that

²⁵Respondent notes that the Secretary has categorized violations by types of injuries, such as sprains or burns. Respondent, pointing to the Act and 29 CFR Part 1904, maintains that this categorization has little or nothing to do with the reasons various illnesses or injuries are recordable. In Respondent's view, those reasons devolve into the following categories, each of which may apply to injuries in more than one of the Secretary's categories.

1. Injuries which gave rise to:
 - a. lost workdays;
 - b. restricted work activity; or
 - c. medical treatment predicated upon (i) prescription drugs, (ii) stitches, (iii) application of steristrips, (iv) return visits, or (v) foreign bodies embedded in an eye.
2. Illnesses, such as flashburns.

²⁶These are enumerated in Appendix A as: A.1.c, h, j, k, n, p, r, s, and t; B.1.a, b, and f; C.1.a, b, e, and j; D.1.b; E.1.a; F.1.e; G.1.a, b, and c; I.1.a; K.1.e, i, and j.

any alleged violation based on the failure to record accurately the number of lost workdays must be vacated.

General Dynamics' position must be judged against the statutory authorization given the Secretary to collect data. As the Secretary points out,²⁷ Congress enacted the Act in response to millions of workplace accidents and occupational illnesses which it found excessively costly, both in terms of dollars and human suffering.²⁸ The Act's stated purpose is to provide "so far as possible every working man and woman in the nation safe and healthful working conditions."²⁹

Congress recognized a fundamental obstacle to accomplishment of its purposes was the lack of full and accurate data regarding occupational injuries and illnesses. Congress specifically rejected the notion that recordkeeping should be limited only to matters relating to enforcing standards. Although the House had attempted to limit the recordkeeping provisions of the Act solely to matters of ensuring compliance with standards, in conference it receded and agreed to the Senate bill, which authorized the Secretary to prescribe rules to develop information regarding the causes and prevention of occupational accidents and illnesses.

Recognizing that the line between occupational and nonoccupational disorders may be difficult to define, Congress adopted a policy of over inclusion, rather than under inclusion, and mandated a broad statistical reporting program, encompassing

²⁷See Secretary's brief, pp. 11-13.

²⁸*Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 444-445 (1977).

²⁹*Whirlpool Corp. v. Marshall*, 455 U.S. 1, 12 (1980).

all

work, illnesses and injuries which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.³⁰

Congress provided the Secretary with the rulemaking authority to support the program, authorizing regulations necessary or appropriate for both enforcement of the Act and for developing data on causes and prevention of occupational injuries and illnesses. Specifically, Congress mandated regulations requiring accurate records and periodic reports on all work-related deaths, injuries, and illnesses.³¹

Viewed in this light, General Dynamics' argument must fail. Clearly, the Congressional mandate granted the Secretary is broad enough to permit the collection of statistics on lost workdays. To read the Act as General Dynamics does would significantly impair the Secretary's ability to "develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics."³²

General Dynamics also cites the BLS Guidelines, asserting that they do not mention the number of days lost as a result of an injury. However, the guidelines clearly indicate that the number of days lost are to be recorded and give instructions on how to compute the number.³³

³⁰Section 24(a) of the Act, 29 U.S.C. § 673(a).

³¹Section 8(c)(2) of the Act, 29 U.S.C. §657(C)(2).

³²Section 24(a) of the Act, 29 U.S.C. § 673(a).

³³Guidelines of 1978, pp. 14-16 (Exhibit C-3); Guidelines of 1986, pp. 47-52 (Exhibit C-4).

Restricted Work Activity. Both the Act and the Regulations require recording an injury which has resulted in restriction of work.³⁴ The Secretary appears to assert that 35 of the 118 failures to record involved restricted work activity.³⁵

Respondent, pointing out that neither the Act nor the regulations define the term “restriction of work,” maintains that to show a restriction of work, the Secretary must demonstrate that all or some part of that employee’s normal job could not be performed because of the injury. General Dynamics believes that it is insufficient for the Secretary to rely on generalizations such as, for example, that welders must climb ladders or crawl into tanks. General Dynamics urges that the Secretary must show that each injured employee normally engages in the specific activity restricted.³⁶

General Dynamics notes that in most cases, the Secretary failed to establish the specific job duties of the injured employees. Because it has thousands of employees, General Dynamics points out that the activity engaged in and location of the accident does not necessarily reflect the employee’s normal job assignment.

³⁴Section 8(c)(2) of the Act, 29 U.S.C. § 657(c)(2); 29 C.F.R. § 1904.12(c)(3).

³⁵These are enumerated in Appendix A as: A.1.a, b, d, e, f, i, l, m, p, q, r, and s; C.1.c, d, g, i, and j; D.1.a and c; F.1.b and h; G.1.a and c; H.1.a; I.1. a; J.1.c, i, t, ee, hh, ii, and nn; K.1.d and q; and L.1.a.

³⁶Likewise, in Respondent’s view, a claim that the Company did not present contrary facts during the investigation is not satisfactory to support Complainant’s burden at the hearing, and the fact that an injury occurred while an individual happened to be performing an activity does not mean that the employee normally performed that activity. Respondent recognizes that on a few occasions, CSHO Gumpert testified that he spoke with an employee or a supervisor regarding the normal duties of a particular injured employee. However, Respondent asserts that Gumpert produced no documentary evidence of any such conversation, even those with Gerald Preler, Respondent’s Safety Supervisor. Respondent believes that it strains credibility to believe that Mr. Gumpert could specifically recall statements made more than one and one-half years prior to his testimony.

General Dynamics' argument in this respect proves too much. It is precisely because General Dynamics has thousands of employees that it is appropriate to place the burden on it to show that the restriction in question did not affect the employees normal work duties.³⁷ In most instances, General Dynamics originally classified the injury as work related and imposed the restrictions. General Dynamics is uniquely in a position to know whether the restrictions will affect an employee's ability to carry out his or her duties.

In these circumstances, to place the burden on the Secretary to show that each restriction had the requisite effect would defeat the Congressional purpose to gather full and accurate data regarding occupational injuries and illnesses. The Secretary met his burden by showing that the injury or illness was work related and resulted in restrictions being placed on the employee's activities. The burden then properly falls to the employer to show that the restrictions did not affect the employee's performance of his or her regular duties in order to justify not recording it.

Medical Treatment. Section 1904.12 of the regulations includes those occupational injuries and illnesses which require medical treatment in the class of those which must be recorded:

(c) "Recordable occupational injuries or illnesses" are any occupational injuries or illnesses which result in:

* * *

(3) Nonfatal cases without lost workdays which ... require medical treatment (other than first aid)

³⁷Appendix A reflects that each restriction has a rational relation to the duties which one would expect an employee in that job classification to perform, and that Mr. Gumpert accepted Respondent's representative's indications to the contrary when given.

Section 1904.12(d) defines “medical treatment” as “treatment administered by a physician or by registered professional personnel” other than first aid. Section 1904.12(e) defines “first aid” as “any one-time treatment ... of minor scratches, cuts, burns, splinters, and so forth which do not ordinarily require medical care.” The Secretary appears to assert that 49 of the 118 failures to record involved the rendering of medical care for injuries.³⁸

General Dynamics asserts that, on its face, the definition of medical treatment is too vague and the regulations are therefore unenforceable. However, General Dynamics has not made any attempt to show how the alleged vagueness may have impaired its efforts to comply with the regulations. Facially, the regulations provide an intelligible and workable definition. General Dynamics’ position in this regard is rejected.

General Dynamics’ principal defense focusses on the proposition that to be recordable because medical treatment was rendered, an injury must have required that treatment. General Dynamics maintains that the Secretary has not demonstrated that any particular treatment rendered to a worker was medically required.³⁹

General Dynamics points out that § 1904.12(c)(3) states that injuries are recordable if they require medical treatment. Thus, General Dynamics argues that the mere fact that medical treatment may have been rendered in the form of such things as prescription drugs, stitches, or steristrips does not necessarily prove the existence of a recordable injury. It is General Dynamics’ position that the Secretary also must prove that the specific occupational

³⁸These are enumerated in Appendix A as: A.1.g; B.1.c, d, and e; C.1.f; E.1.b; F.1.a, c, d, and g; and J.1.a, b, c, d, e, f, g, h, j, k, l, m, n, o, p, q, r, s, u, v, w, x, y, z, aa, bb, cc, dd, ff, gg, ii, jj, kk, ll, mm, oo, pp, qq, and rr.

³⁹See Respondent’s reply brief, pp. 10-14.

injury was one which required the medical treatment rendered. General Dynamics would have the Secretary prove, for instance, that a prescription was medically required rather than administered for prevention, peace of mind, or relief of discomfort.⁴⁰ General Dynamics asserts that the Secretary has failed to prove that any particular treatment was medically required treatment.

General Dynamics draws too fine a line. While the regulations issued by the Secretary define recordable injuries in terms of whether medical treatment was required, the fact that the treatment was thought necessary by medical personnel satisfies that requirement. To require the Secretary to offer independent proof that treatment prescribed by medical personnel was in fact medically required, rather than prescribed to satisfy some non-medical need, would defeat the purpose of the Act to provide for an effective statistical program.⁴¹ General Dynamics' position in this regard is rejected.

⁴⁰Respondent claims to find support for this position in the Guidelines, which state that the use of prescription medications is almost always recordable. Ex. C-4, p. 43. In Respondent's view, that can only mean that the use of prescription medication is recordable only when medically required.

⁴¹While it may be argued that treatment rendered for prevention, peace of mind, or the relief of discomfort might not always be medically required, these all appear to be legitimate goals of medical treatment. The Hippocratic oath provides in part:

I will prescribe regimen for the good of my patients according to my ability and judgement and never do harm to anyone.

Stedman's Medical Dictionary, p.647 (23d Ed. 1976). Moreover, the oath, which is required of physicians about to enter into practice, appears to provide assurance that unnecessary treatment will be avoided in that it requires the physician to do no harm.

Injury v. Illness. Section 8(c) of the Act⁴² requires employers to keep records of work-related illnesses. The Secretary appears to assert that 19 of the 118 failures to record involved occupational illnesses.⁴³

General Dynamics points out that neither the Act nor the Regulations define an "injury" or an "illness," but that the 1986 Guidelines define these terms as follows:

Injuries are caused by *instantaneous* events in the work environment. Cases resulting from anything other than instantaneous events are considered illnesses. This concept of illnesses includes acute illnesses which result from exposures of relatively short duration.

* * *

Occupational injury is any injury such as a cut, fracture, sprain, amputation, etc. which results from a work accident or from an exposure involving a single incident in the work environment.

* * *

Occupational illness of an employee is any abnormal condition or disorder, other than one resulting from an occupational injury, caused by exposure to environmental factors associated with employment. It includes acute and chronic illnesses or diseases which may be caused by inhalation, absorption, ingestion, or direct contact.⁴⁴

General Dynamics maintains that the concept of instantaneous exposure has been applied by the Secretary in such a way as to yield bizarre results. General Dynamics cites, for example, the classification of an infection that results over time from a laceration as an

⁴²29 U.S.C. § 657(c).

⁴³These are 17 cases of flashburns and two miscellaneous illnesses described at K and L.1.b., d. of Appendix A, respectively.

⁴⁴Exhibit C-4 at page 37.

injury.⁴⁵ In contrast, General Dynamics notes that the Secretary alleges in this case that a flashburn is an illness. General Dynamics states:

Gumpert testified that all flashburns are illnesses because they are not instantaneous; that is, exposure may be for a few seconds. Complainant appears to take the ridiculous position that a few seconds is "prolonged exposure" and thus there is a recordable illness. Even the Guidelines do not support that position nor the proposition that all flashburns are recordable. The 1986 Guidelines state that the "basic determinant is the single-incident concept." The 1986 Guidelines specifically define welding flashburns as "illnesses" *only* if they "result from *prolonged* or *repeated* exposure to ... welding flashes." The incidents involved in the Complaint involve welding flashburns which resulted from a one time instantaneous exposure to a single welding flash. Tr. 2503-2507.⁴⁶

General Dynamics misstates Mr. Gumpert's testimony. Mr. Gumpert did not testify that all flashburns are illnesses. Nor did he testify that "the incidents involved in the Complaint involve welding flashburns which resulted from a one time instantaneous exposure to a single welding flash."

Q [By Mr. Lyons] So OSHA's position, as you inspected, was that flashburns are an illness?

A [Mr. Gumpert] Usually. There's a possibility, if they're using a very, very strong, plating cutting type of a plasma arc, that a millisecond exposure will cause an injury that is considered a flashburn.

Q So then you're saying that not all flashburns are illnesses?

A There is a possibility that a very strong arc can instantaneously cause a flashburn at a certain distance. And I made sure that none of the cases were in the plate shop of flashburn.

Q But even under your definition, the possibility exists for a flashburn to be an illness --- * * * --- and an injury?

⁴⁵*Id.*, p. 37, Question/Answer D-1.

⁴⁶Respondent's reply brief, p. 16.

* * *

A It depends on the event. If it was a very, very strong arc, that I know from experience, exists at the Electric Boat Shipyard, in the plate shop where they are cutting thick plates with a very, very -- a plasma torch that has a very intense beam of light emitting from it, then its possible that a flashburn there would be considered an injury.⁴⁷

On redirect, Mr. Gumpert reiterated this:

BY MR. BASKIN:

Q Mr. Gumpert, let me draw your attention to flashburns. In your survey, did you find any flashburns that were the result of plasma arc welding?

A No.

Q And what's the latency or manifestation period for flashburns caused by welding other than arc plasma welding?

A For any flashburn, the minimum latency -- that means before you get any kind of symptoms from suffering from a flash is half an hour, and it can go up to twenty-four hours after the event occurred.

* * *

JUDGE KNIGHT: And what is plasma arc welding? ...

THE WITNESS: Its a method--

JUDGE KNIGHT: Is it [ionizing] or [nonionizing]?

THE WITNESS: Its [nonionizing] radiation and its a very strong intense - - the intensity of the radiation from -- from the cutting is very strong, and it may be that the flashburn, as a result of an exposure to such a high intensity UV source, could cause an instantaneous flashburn, but its -- that's located in -- from what Gerry Preler tells me -- the Plate Shop, and none of the welding flashes that came up in my survey or in the targeted employees involved flashburns in that shop.⁴⁸

⁴⁷Tr. 2507-09.

⁴⁸Tr. pp. 2753-56.

Moreover, OSHA clearly informed employers that it considers flashburns to be an illness. Instruction VI on OSHA Form 200 gives categories of occupational illnesses and lists typical examples under each category. Category 7e - "Disorders Due to Physical Agents (Other than Toxic Materials)" - includes as an example "effects of nonionizing radiation (welding flash, ultraviolet rays, microwaves, sunburn)."⁴⁹ Mr. Gumpert reiterated this position in his direct testimony.⁵⁰

Thus General Dynamics' position that the Secretary must prove that the examples of welding flashburn cited in this case resulted from prolonged and repeated exposure is not well taken. General Dynamics to the contrary notwithstanding, recording flashburns as illnesses is consistent with the definition of occupational illness and in full accord with the principles set forth in the BLS Guidelines. Moreover, the proposition that flashburns would most commonly result from prolonged or repeated exposure to a welding arc also accords with "... logic, common sense, and common usage of the English language."⁵¹

General Dynamics' position that the Secretary must establish that flashburns are illnesses rather than injuries appears to be based in its entirety on testimony elicited from Mr. Gumpert on cross that a flashburn could result from the striking of an arc in a period of one to two seconds. This is not sufficient to overcome the other testimony of Mr. Gumpert and the guidance furnished by OSHA. The latter represents the agency's considered conclusion that, in general, flashburns are to be regarded as resulting from

⁴⁹Exhibit C-4, p. 64.

⁵⁰Tr. 154, 179, 182-83, 1732-33.

⁵¹See Respondent's reply brief, p. 16-17.

prolonged or repeated exposure to an environmental factor present in the workplace. In these circumstances, it is incumbent on General Dynamics to offer more persuasive evidence that OSHA's approach, as applied to it, was in error. However, General Dynamics has furnished no citation to such evidence. Its objections are overruled.

ABSENCE OF A SUPPLEMENTARY RECORD FOR THE INJURIES AND ILLNESSES SET OUT CITATION 1, ITEM 2.

Citation 1, Item 2, charges a willful violation of § 1904.4 in that

A supplementary record for each occupational injury or illness, completed in detail as prescribed in the instructions accompanying the OSHA Form No. 101, was not available for inspection at the establishment within 6 working days after receiving information that a recordable case had occurred.

Item 2 lists 53 specific instances when this occurred, one of which (No. 19) was vacated at the hearing.⁵² Mr. Gumpert testified that his examination of the 52 instances revealed that the required supplementary record was absent, and that, as a result, certain required information was not available.⁵³ Apparently, there is no allegation that the required information was totally missing from General Dynamics' files, but rather that it was not readily available on one piece of paper.

General Dynamics notes that the Secretary's position is that all the information must be on the same form. General Dynamics takes the position that § 1904.4 does not require

⁵²See Tr. 1906, 1935.

⁵³Tr. 1905-37. Mr. Gumpert identified five items of information which are required by Form 101 but were missing from the Respondent's records. These are: 1. employer's mailing address, 2. employee's social security number, 3. name and address of treating physician, 4. whether the employee died, and 5. hospital's name and address if the employee was hospitalized. Tr. 1912-14. Exhibit 17 is a compilation of the records which Respondent maintained with respect to these cases. Under Respondent's recordkeeping system, the lack of a supplementary record resulted in the failure to make an entry on the Form 200 for these 52 injuries and illnesses. Tr. 1927-33.

that the information be on the same form. General Dynamics points to the last sentence of § 1904.4 which states in relevant part:

If no acceptable alternative record is maintained for other purposes, Form OSHA No. 101 shall be used or the necessary information shall be otherwise maintained.

General Dynamics asserts that nothing states the information must be maintained on one form. However, it is evident from the whole of § 1904.4 that one form is what is required. The first sentence requires each employer to have "... a supplementary record for each occupational injury or illness" This clearly contemplates that there shall be one record pertaining to each recordable instance, not that the information may be scattered among several records. The remainder of § 1904.4 deals with alternative forms for that one record. The language cited by General Dynamics simply provides the flexibility to use a blank piece of paper rather than a form. General Dynamics' position is rejected.

FAILURE TO PROPERLY MAINTAIN THE LOG AND SUMMARY OF OCCUPATIONAL INJURIES AND ILLNESSES (OSHA FORM 200) - CITATION 2, ITEM 1

Citation 2, Item 1, alleges an other-than-serious violation of § 1904.2(a), but proposes no penalty, based on a failure to:

1. record certain entries within the required six-day period;
2. indicate the employer's name and address on each page of the log; and
3. provide a file number for 45 entries.⁵⁴

⁵⁴See Tr. 1938-43.

General Dynamics does not deny the existence of these shortcomings. However, it asserts that § 1904.2 does not require the employer's name and address on each page nor does it require a file number for each entry. Thus General Dynamics questions the validity of the obligation.

The requirements that the employer's name and address be stated on each page and that a file number for each entry be provided is stated in the Guidelines and constitutes a reasonable interpretation of § 1904.2(a). General Dynamics' position that these requirements are not binding is rejected.

While General Dynamics admits that certain Log entries were not made within the six-day period, it offers two excuses for its tardiness. The clerical employee responsible for making the entries was busy preparing the annual summary and was out sick. In addition, the department was busy with employee meetings throughout the facility and responding to an employee's request for five years of logs. Further, snow storms had closed the facility. General Dynamics believes that this violation should be classified as *de minimis*.⁵⁵

General Dynamics is correct that there is not "... a direct, immediate nexus between noncompliance and employee safety and health ..." with respect to this Citation.⁵⁶ Nevertheless, it is important that the violation be abated, particularly with respect to bringing the entries up-to-date and providing file numbers. To classify the violation as *de minimis*

⁵⁵Tr. 2355-56. See Respondent's reply brief, pp.48-49.

⁵⁶*Donovan v. Daniel Construction Company, Inc.*, 692 F.2d 818, 821, 10 OSHC 2188, 2190 (1st Cir. 1982).

would remove the obligation to abate.⁵⁷ For that reason, General Dynamics' request to classify Citation 2, Item 1, as *de minimis* is denied.

ENFORCEABILITY OF THE RECORDKEEPING REGULATIONS

General Dynamics maintains that the recordkeeping regulations set forth in 29 C.F.R. Part 1904 are unenforceable for both statutory and constitutional reasons. General Dynamics urges first, that the Secretary must prove that regulations prescribed by the Secretaries of Labor and Health, Education and Welfare (HEW)⁵⁸ were violated, and second, that the regulations are too vague to pass Constitutional muster.

Congress specifically addressed recordkeeping obligations in Section 8(c) of the Act. In § 8(c)(1), Congress authorized the Secretary to prescribe by regulation the records which employers would be required to keep, and in § 8(c)(2) required the Secretary to prescribe regulations requiring employers to maintain injury and illness records. Both of these provisions explicitly require the cooperation of the Secretary of HEW in the formulation of the recordkeeping regulations. General Dynamics maintains that Congress clearly contemplated that the Secretary, with the assistance of the Secretary of HEW, would engage in a thoughtful process of rule making -- which allows public comment -- in order to devise specific standards, but that the Secretary did not do so.⁵⁹ General Dynamics does not indicate in what specific respect the Secretary failed to engage in a valid rulemaking

⁵⁷*Secretary v. Super Excavators, Inc.*, 15 OSHC 1313, 1315 (Rev. Com. 1991).

⁵⁸Now the Secretary of Health and Human Services.

⁵⁹See Respondent's brief, pp. 20-23.

proceeding. The Federal Register reflects that Part 1904 was promulgated over the signature of the Secretary of Labor after having been published for notice and comment⁶⁰ and, in the absence of evidence to the contrary, must be presumed to have been properly adopted. While that notice does not reflect whether the Secretary of HEW cooperated in the formulation of the regulations, the statutory direction that he do so is procedural and the possible failure of the Secretary to have followed that procedure does not invalidate the regulations.⁶¹ General Dynamics has failed to show that the regulations were not properly adopted; its argument is rejected.

In a related argument, General Dynamics asserts that the regulations exceed OSHA's statutory authority.⁶² Specifically, General Dynamics argues that the regulations create recordkeeping categories which are not found in the authorizing statute. The latter requires the reporting of deaths, illnesses, and injuries involving medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job. General Dynamics notes that the regulations create additional reporting categories: lost workday cases and cases involving termination of employment, neither of which was mentioned by Congress.

In response, the Secretary correctly notes that the Act authorizes the Secretary of Labor to prescribe such rules and regulations "as he may deem necessary to carry out [his] responsibilities under this chapter."⁶³ In addition to this general rulemaking delegation,

⁶⁰See 36 Fed. Reg. 12612, July 2, 1971; Secretary's reply brief, pp.15-16.

⁶¹*Cf. Brock v. Pierce County*, 476 U.S. 253, 258-66, 106 S. Ct. 1834, 1838-42 (1986).

⁶²See Respondent's brief, pp. 40-42.

⁶³Section 8(g)(2) of the Act, 29 U.S.C. § 657(g)(2).

Congress specifically authorized the Secretary to require employers to maintain records for purposes of the Act. Each covered employer was required to make, keep and preserve, and make available records relating to activities under the Act prescribed by regulation "as necessary or appropriate for the enforcement of this chapter or for developing information regarding the causes and prevention of occupational accidents and illnesses."⁶⁴ It is abundantly clear that Part 1904 does not exceed the authority granted the Secretary by Congress. General Dynamics' argument is rejected.

In General Dynamics' view, the regulations in Part 1904 provide few, if any, standards for recordability beyond those given in the statute. The operative definitions found in § 1904.12 simply reiterate the statutory requirements that fatalities, illnesses, and certain injuries be recorded. General Dynamics believes that they add no useful specific directions.

To support its position, General Dynamics relies on the so-called Miles Memorandum,⁶⁵ a memorandum prepared by John B. Miles, Jr., Director of OSHA's Office of Field Coordination, with responsibility for nationwide compliance with the Act.⁶⁶ General Dynamics points out that the Miles Memorandum begins by stating that the regulations, by themselves, lack clear-cut definitions of terms such as medical treatment and first aid, which are critical to defining what is or what is not recordable under the Act.

⁶⁴Section 8(c)(1), 29 U.S.C. § 657(c)(1).

⁶⁵Exhibit R-2.

⁶⁶Tr. 1213.

In General Dynamics' view, the Secretary seeks to cure this ambiguity by relying on the Bureau of Labor Statistics (BLS) Recordkeeping Guidelines.⁶⁷ General Dynamics attacks the guidelines on a number of grounds, including the proposition that they are not regulations promulgated in cooperation with the Secretary of HEW.⁶⁸

The difficulty with General Dynamics' position is that General Dynamics has not related it to any of the recordkeeping violations alleged by the Secretary. General Dynamics relies on the Miles Memorandum to support its vagueness argument. That Memorandum does point out several different ways in which the terms "occupational," "medical treatment," and "employer" may be interpreted. General Dynamics does not relate any of these differing interpretations to its problems in complying with the Act. Nor does General Dynamics make a showing that it adopted a reasonable interpretation which differs from the Secretary's. Indeed, General Dynamics does not make any showing regarding its interpretation of the Act and regulation.⁶⁹ Its arguments may be summarized as follows.

With respect to lost workdays, General Dynamics argues that the regulation exceeds the authority granted the Secretary by the Act and that, in any event, the Act and regulation require only that the fact that lost workdays were incurred be recorded, not the number of days actually lost. With respect to injuries resulting in work restrictions, General Dynamics argues that the Secretary must prove that each employee whose work was restricted

⁶⁷Exs. C-3 and C-4.

⁶⁸Respondent also attacks OSHA's Form 200 on this ground.

⁶⁹The Secretary correctly points out that "[t]here is nothing in the record of this proceeding which indicates, much less establishes, that the Respondent was at all legitimately confused about whether its Quonset facility was an establishment under 29 C.F.R. 1904.12(g)(1), whether its employees were *its* employees, or whether the categories of injuries and illnesses Respondent failed to record were recordable, or whether days of restricted work or days out of work had to be recorded." Secretary's reply brief, pp. 10-11.

normally was required to engage in the restricted activity. With respect to medical treatment, General Dynamics' principal argument is that the Secretary must show that the treatment rendered was medically necessary.⁷⁰ General Dynamics devotes substantial effort to attacking the Secretary's treatment of flashburns as illnesses based on the proposition that they resulted from short duration flashes from welding torches and therefore should be treated as injuries under the Secretary's guidelines.⁷¹

General Dynamics raises the vagueness point only with respect to medical treatment, and, in so doing, does no more than make the unsupported argument that the definition of medical treatment is too vague. General Dynamics makes no effort to show how the regulation, as applied in this case, is impermissible vague.

Vagueness challenges are not measured against the facial text of the standard, but are rather considered in light of the conduct to which they are applied. *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 897 [9 OSHC 1357] (1st Cir. 1981).⁷²

Having made no attempt to relate its charge of vagueness to the specific violations charged or to show that it had adopted and followed a reasonable interpretation of the regulation, General Dynamics may not be heard to complain that the regulation is too vague to be enforced against it.⁷³ For the same reason, General Dynamics' attacks on the BLS

⁷⁰Respondent also argues that the definition of medical treatment is overly vague, but does not support this argument by showing how the vagueness of the regulation resulted in compliance difficulties.

⁷¹Exhibits C-3 and C-4.

⁷²*Secretary of Labor v. L.E. Myers Co.*, 16 OSHC 1037, 1044 (Rev. Com. 1993).

⁷³*Cf. Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 359-60, 11 OSHC 1985, 1992 (3rd Cir. 1984).

Guidelines and Form 200 must also be rejected. General Dynamics simply has not shown that it has been prejudiced by the application of these documents to it.⁷⁴

RESPONDENT'S VIOLATIONS WERE NOT WILLFUL

The Secretary urges that the violations enumerated in Citation 1 were willful. He takes the position that they resulted from both a recklessly indifferent attitude toward and an intentional abnegation of General Dynamics' recordkeeping obligations.⁷⁵

In *Secretary v. Caterpillar Inc.*,⁷⁶ the Commission succinctly summed up the criterion to be applied in order to determine whether a violation is willful.

There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's or the provision's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally, that one can infer that if the employer had known of the standard or provision, the employer

⁷⁴The Secretary takes the position that the decision *Secretary of Labor v. Caterpillar, Inc.*, 15 OSHC 2153 (Rev. Com. 1993) requires that Respondent's arguments in this regard be rejected. See Secretary's post-hearing memorandum. In its response, Respondent argues that *Caterpillar* did not consider all of the arguments which Respondent has raised. It enumerates the following. The Guidelines: 1. were not promulgated as regulations after consultation with the Secretary of HEW; 2. exceed the scope of or are inconsistent with the regulations; 3. were designed to be over inclusive; and 4. are internally inconsistent or ambiguous. However, Respondent does not make any showing that it was prejudiced by the Secretary's application of the Guidelines in this case. In only one instance does the Respondent address the Secretary's application of the Guidelines. In that instance, involving the failure to record flashburns as illnesses, Respondent relied on the Guidelines to defend its position, arguing that the Secretary had misapplied them.

⁷⁵In large part, the same facts underlie these two arguments. The Secretary states that the following facts support the allegation that Respondent was recklessly indifferent toward its obligations:

1. Respondent was familiar with its recordkeeping obligations;
2. Respondent nonetheless failed to train the personnel responsible for recording data and failed to adopt a written policy; and
3. Respondent utilized an information flow system which insured that certain recordable injuries and illnesses would not be recorded.

The Secretary also points to the statistical evidence that Respondent's system vastly under reported as indicating a reckless indifference. See Secretary's brief, pp. 29-30.

⁷⁶15 OSHC 2153, 2173-74 (Rev. Com. 1993).

would not have cared that the conduct or condition violated it. It is therefore not enough for the Secretary simply to show carelessness or a lack of diligence in discovering or eliminating a violation on the part of the employer, nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete. *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27893, P. 36589 (No. 85-355 1987)

The Secretary has failed to adduce sufficient evidence to support the conclusion that the recordkeeping violations in this case were willful.⁷⁷

He supports his position that General Dynamics intentionally violated Part 1904 in large part by pointing to certain actions and statements of Mr. Preler and imputing those to Respondent. The Secretary begins by pointing out that, in the course of reviewing General Dynamics' Form 200 for 1985 and 1986, Mr. Gumpert noticed that General Dynamics' number of recorded lost-workday injuries and number of recorded lost workdays were identical, an anomaly reflecting a single day lost for each injury and illness involving any lost time. Mr. Preler, apparently in an attempt to forestall further inquiry, told Mr. Gumpert that the anomaly was meaningless.⁷⁸

The Secretary asserts that Mr. Preler was familiar with the 1978 and 1986 Guidelines interpreting Part 1904,⁷⁹ and admitted, after Mr. Gumpert began to review the records on

⁷⁷With respect to Respondent's failure to maintain a Form 101 or its equivalent in 52 instances (Item 2 of Citation 1), the Secretary has offered no evidence of willfulness. The Secretary's brief (pp. 40-41) refers to Mr. Gumpert's testimony at Tr. 1927-28 and 1932-33 as illustrating an indifferent attitude toward recordkeeping. However, Mr. Gumpert merely described the effect of the lack of an appropriate form and offered no insight into Respondent's motivation.

Similarly, the Secretary offered no evidence that each of the specific recordkeeping failures set out Item 1 of Citation 1 was willful.

⁷⁸Tr. 85-86.

⁷⁹Tr. 108. The Secretary relies on the Respondent's answers to interrogatories to establish this fact. These were not entered as evidence in the record but are attached to the Secretary's brief. In a motion to strike filed
(continued...)

which the Form 200 entries were based, that the company "screwed up" its recordkeeping obligations.⁸⁰ Mr. Preler also told Mr. Gumpert that the General Dynamics had audited its recordkeeping practices and was aware of the failures to record. When Mr. Gumpert asked for copies of the audit, Mr. Preler told him that nothing was in writing.⁸¹

In contrast, General Dynamics points out that Mr. Preler directly informed Mr. Gumpert that, as a result of audits conducted in April and November, 1986, the Company had found problems with its paper flow system used for recording and explained what the problems were. These problems were corrected by December 20, 1986.⁸² Mr. Gumpert recommended a 30 percent reduction in penalty for good faith based upon these changes.⁸³

In his brief, the Secretary takes a different view of Mr. Preler's actions than that taken by Mr. Gumpert and Mr. Miles, the Regional Administrator. Mr. Gumpert who, by virtue of his personal interviews with the individuals involved in operating the system, was

⁷⁹(...continued)

January 17, 1990, Respondent correctly objected to their use, and its objection is sustained. See Fed. R. Civ. P. 33(b): "... the answers [to interrogatories] may be used to the extent permitted by the rules of evidence;" see also 4A Moore's Federal Practice ¶¶ 34.02-34.22. However, assuming for the sake of argument that the fact asserted by the Secretary is true, that does not affect the result reached herein with regard to whether the recordkeeping violations were willful.

⁸⁰Tr. 241.

⁸¹Tr. 240-257. In fact, a written audit dated April 30, 1986, was in existence. See Exhibit C-6. In addition, numerous other written documents related to recordkeeping deficiencies and failures at Quonset also existed; they are Complainant's Exhibits C-7 - C-11. Mr. Preler's name appears on many of these documents.

⁸²Exhibits C-6 to 11; Tr. 2395-96. Many of the problems involved in this matter arose from the so-called first aid pile of reports which were never reviewed for recording purposes. Tr. 2376-2377. This flaw in the Company's system was found in November, 1986, and corrected in December, 1986, and did not exist when the inspection commenced on January 29, 1987. Tr. 2395-2397.

⁸³Tr. 2398.

in the best position to judge General Dynamics' motivation, concluded that a penalty reduction of 30% should be given General Dynamics for good faith.⁸⁴ Mr. Miles indicated that he was kept abreast of the course of the inspection and that General Dynamics had cooperated.⁸⁵ General Dynamics cannot have committed willful violations of the recordkeeping requirements and at the same time illustrated good faith in fulfilling those same obligations, nor can it have obstructed Mr. Gumpert's inspection and at the same time cooperated with it. Mr. Preler's statement that "we screwed up" is fully consistent with the results of the audits which General Dynamics conducted. Moreover, while it is understandable that he personally may have been reluctant to have Mr. Gumpert review records which those audits had found to be deficient and the audits themselves, the fact remains that Mr. Gumpert did review those records and that General Dynamics cooperated in that review.

The Secretary notes that, notwithstanding that the audit revealed recordkeeping deficiencies, Mr. Preler certified General Dynamics' 1986 summary of injuries and illnesses as true and complete.⁸⁶ The Secretary points out that even after the audits and Mr. Gumpert's review both confirmed errors in the log, but prior to the issuance of the citations, some of General Dynamics' officials, who presumably outranked Mr. Preler, refused to correct General Dynamics' recordkeeping failures.⁸⁷ Moreover, General Dynamics failed

⁸⁴See Tr. pp. 2397-99. This was based on Respondent's audit and correction of the recordkeeping system.

⁸⁵See Tr. pp. 1324, 1334.

⁸⁶See 29 C.F.R. § 1904.5(C); Ex. C-13. The certification was made in January, 1987.

⁸⁷See Tr. 1228-31. These officials included Robert Duesenberg, Vice President and General Counsel of General Dynamics Corporation, and Mr. Persky, the plant manager for Quonset Point. The Secretary notes
(continued...)

to train its clerical personnel, Ms. Romano and Ms. Cave, in recordkeeping⁸⁸ and utilized an information flow system which ensured that recordable injuries and illnesses would be overlooked.⁸⁹

General Dynamics notes that the certification referred to by the Secretary reads "Certification of Annual Summary Totals." General Dynamics maintains that the certification speaks only to the totals appearing on the OSHA 200 Log and, therefore, was proper because the summary accurately reflected the totals recorded on Form 200.⁹⁰ General Dynamics is correct that the certification of the totals complied with the requirements of the Form 200 and that nothing on that Form requires reexamination of the underlying entries.⁹¹

General Dynamics correctly notes that, first, there is no need to correct past recordkeeping errors while challenging the Secretary's position that they were in fact errors,

⁸⁷(...continued)

the proposition that post-citation corrective actions may indicate the absence of willfulness (*Brock v. Morello Bros Construction, Inc.*, 809 F.2d 161, 166 (1st Cir. 1987)) and argues that Respondent's refusal to correct its records indicates willfulness. However, that conclusion does not necessarily follow.

⁸⁸See Tr. 116, 129; Secretary's brief at p.29. The Secretary also relies on Respondent's answers to interrogatories to establish this fact. As noted in footnote 79, this use of Respondent's interrogatory answers, although improper, does not affect the result reached.

⁸⁹See, e.g., Tr. 1928-1930. Respondent asserts that the Secretary's position is contrary to Mr. Gumpert's testimony (Tr. 2388, 94) that the system was intended to capture recordable information but did not always work successfully. See Respondent's reply brief, p.19. Respondent reads too much into Mr. Gumpert's statements.

⁹⁰In addition, Respondent argues that the Secretary may not argue that Preler's conduct in signing and posting is significant evidence of willfulness without having issued a citation for this allegedly improper certification.

⁹¹While Respondent is correct with regard to the wording of the certification and Form 200, it is also true that the 1986 Guidelines advise verifying the accuracy of the underlying data before signing the certification. See Exhibit C-4, p.13.

and second, that Mr. Gumpert testified that changes in the recordkeeping system were made to avoid future problems before the inspection began. General Dynamics correctly urges that these changes evidence the lack of willfulness.

General Dynamics takes issue with the Secretary's assertion that its representatives refused to correct its erroneous records because of expense. It points out that Robert Duesenberg, Vice President and General Counsel of General Dynamics Corporation, directly contradicted the testimony of the Secretary's Regional Director, Mr. Miles, to this effect.⁹² The evidence being equally supportive of both positions, the Secretary has failed to carry his burden on this point.

General Dynamics attacks at some length the assertion that it intentionally failed to train the clerks who were responsible for the flow of paper in the recordkeeping system.⁹³ General Dynamics is correct that the Secretary has cited no evidence in the record to support the allegation that General Dynamics intentionally failed to train Ms. Romano and Ms. Cave. General Dynamics points out that the only testimony regarding training was provided by Mr. Gumpert who simply stated that these clerks were not trained.

The Secretary views Mr. Preler's conduct as indicating that he sought to ensure that General Dynamics' false and misleading records remained uninvestigated and uncorrected so that he and the company could continue to benefit from a low LWDI rate.⁹⁴ The

⁹²Tr. 3312-16. Respondent also urges that Mr. Miles was shown not to be a credible witness. Tr. 1278-90; Exhibit R-1.

⁹³See Respondent's reply brief, pp.20-22.

⁹⁴The Secretary believes that Respondent structured the environment in which Mr. Preler worked so as to provide motivation to keep the inadequate recordkeeping system in operation. Mr. Preler, as safety chief, was evaluated on the basis of his injury rate and was under some personal pressure to keep that rate low. See Exs. (continued...)

Secretary views the continued existence of this system in the face of all available knowledge as nothing other than intentional.⁹⁵

General Dynamics denies that it had an incentive to under record and thus keep the LWDI rate down. Because it is a member of a targeted high hazard industry, General Dynamics believes that a low LWDI would not result in fewer inspections by OSHA, a belief that was confirmed by Mr. Miles.⁹⁶ Moreover, General Dynamics notes that the argument that it benefited from good public and employee relations as a result of a low LWDI is sheer speculation.

Because the misfeasance of a supervisory employee is imputable to the employer,⁹⁷ the Secretary argues that General Dynamics cannot avail itself of the facts that it conducted an audit in 1985-1986 and sought to correct its recordkeeping errors in late 1986-early 1987. Moreover, the slowness of the audit process by which General Dynamics made changes in recordkeeping procedures indicates to the Secretary that either General Dynamics conducted

⁹⁴(...continued)

C-20 and C-21. Mr. Preler was also the injury/illness recording supervisor. Thus Mr. Preler had a conflict between his self-interest as safety chief and his legal obligation to record all injuries and illnesses.

Respondent, citing Mr. Preler's performance evaluation, (Exhibit C-21) takes issue with the argument that Mr. Preler's responsibilities included keeping the LWDI rate down and that this furnished an incentive to substantially under record. Respondent maintains that the recordkeeping function was not a significant matter in the evaluation.

⁹⁵The Secretary finds motivation for the Respondent to have so acted, and the employee representative concurs. See the latter's post hearing brief. During 1985-1986 the United Shipbuilding Crafts (USC) were trying to organize Quonset. During this period the Respondent continued to assert to the news media and its employees that the facility's LWDI was below the national average. Tr. 1040-42; Respondent's Admissions Nos. 7 and 8 (App. 1 to Secretary's initial brief). In its motion of January 17, 1990, Respondent objected to the use of its admissions. This objection is overruled. See Fed. R. Civ. P. 36(b).

⁹⁶Tr. 1308.

⁹⁷The Secretary cites *F. X. Messina Corp. v. OSHRC*, 505 F.2d 701 (1st Cir. 1974), for this proposition.

an outrageously inadequate review of its own procedures or General Dynamics knew exactly what was wrong but chose, for reasons of its own, to ignore the violations.

While the Secretary is correct that the misfeasance of a supervisory employee is imputable to the employer, that fact does not prevent the employer from correcting the misfeasance, thereby avoiding a willful violation. The Secretary's position would forever saddle the employer with the misfeasance and remove a substantial incentive to correct misfeasance once it became apparent. Surely General Dynamics must be given credit for correcting Mr. Preler's mistakes. The Secretary's argument that the General Dynamics was too slow in ferreting out Mr. Preler's mistakes and correcting them is entitled to greater weight. The amount of time General Dynamics devoted to this effort, when compared to Mr. Gumpert's review, is, to be charitable, most leisurely. However, it was effective in correcting the system prospectively, and, had it been more efficient, might have corrected many of the errors which Mr. Gumpert uncovered and thus substantially reduced the number of violations and the penalties imposed. The fact that it did not do so does not change the fact that General Dynamics corrected its recordkeeping system and thus should not be charged with willful violations.

Mr. Gumpert could not review records for all of General Dynamics' employees for 1985 and 1986. From the results of his survey of 99 randomly selected employees, he projected the total number of unrecorded injuries and illnesses for the period. Based on his calculations, the Secretary maintains that General Dynamics under reported by more than

6,000 instances. General Dynamics' LWDI, as recalculated by Mr. Gumpert, almost trebled.⁹⁸ The Secretary urges that the detailed statistical testimony further supports his contention that the actual number of recordkeeping violations during the survey period was far greater than the number disclosed in Gumpert's survey. Based on this testimony, he maintains that the actual number of recordable events was between 3.1 and 6.3 times the 1,341 injuries and illnesses which were recorded for the two-year period.⁹⁹ The Secretary submits that the sheer number of projected recordable injuries and illnesses¹⁰⁰ compared to the small number actually recorded indicates that the General Dynamics intentionally violated Part 1904.¹⁰¹

General Dynamics maintains that the Secretary's reliance on statistical data is misplaced because, first, his statistical conclusions are insupportable, and second, the degree of under reporting is immaterial to the question of willfulness.¹⁰² General Dynamics is correct that the magnitude of its recordkeeping errors says nothing regarding General

⁹⁸The Secretary maintains that Gumpert's projections are reasonable and consistent with other evidence of Respondent's true injury and illness experience. His calculation of the total number of recordable injuries and illnesses for the two year period, 7620, is virtually the same as the point estimate of Professor Lemeshow. Respondent's 1987 log, compiled under a corrected recordkeeping system, following the BLS Guidelines, reveals an even higher number of recordable events for one year, 6629. See Ex. C-25.

⁹⁹Tr. 3859-61. See generally Secretary's brief, pp.7-8.

¹⁰⁰No fewer than 4,145 and as many as 8,524. Tr. 3859.

¹⁰¹Citing Prof. Lemeshow's testimony (Tr. 3620-3621), the Secretary asserts that the chances that Respondent recorded accurately are minuscule. He states that such gross discrepancies can only be explained by intentional or reckless lack of care.

¹⁰²With regard to the second reason, Respondent notes that the complaint alleges separate, specific incidents of willful failures to maintain accurate records. The complaint did not allege any violations with respect to the system or the overall quantity of alleged errors in recordkeeping. Respondent believes that the Secretary must demonstrate that each and every one of the alleged violations is willful. Under this circumstance, use of statistical data to justify a willful violation is irrelevant. As reflected in note 77, the Secretary produced no evidence that each individual violation was willful.

Dynamics' intent. In particular, the Secretary's position that the fact that statistical analysis shows an extremely low probability that the under reporting errors could have happened by chance requires the conclusion that these errors were intentional is patently baseless. And while that low probability may evidence a reckless disregard for accurate reporting, that evidence is overcome by the fact that General Dynamics corrected the system which led to the under reporting.

Finally, the Secretary argues that General Dynamics' failure to offer any evidence refuting Mr. Gumpert's testimony or rebutting the Complainant's case regarding indifference, intent, and venality leads ineluctably to the conclusion that General Dynamics did not defend because no defense exists. Citing *Arthurs v. Stern*,¹⁰³ he urges that I draw inferences adverse to General Dynamics from those failures. The Secretary maintains that it is well established that when a party has evidence within its control which it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to it and that the silence itself becomes evidence of the "most convincing character."¹⁰⁴

In response, General Dynamics notes that the burden is on the Secretary to prove his allegations. General Dynamics does not believe that the Secretary's case was of such a nature as to require a greater evidentiary effort on its part.¹⁰⁵ The Secretary would,

¹⁰³560 F.2d 477, 478-479 (1st Cir., 1977).

¹⁰⁴The Secretary relies on *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208, 225-26, 59 S. Ct. 467, 474 (1939). The Secretary, relying on cases decided under the Fair Labor Standards Act, takes the position that Respondent's failure to offer any evidence rebutting his evidence of the actual number of injuries and illnesses which should have been recorded constitutes an admission that the Secretary's figures are correct.

¹⁰⁵Respondent regards Mr. Gumpert's testimony as suspicious at best and probably not creditable at all when he refers to statements by Quonset Point personnel because he had no notes documenting his testimony. Respondent also notes that the Secretary failed to produce Mr. K. Hartman, the Area Director for Rhode
(continued...)

through this reasoning, shift some of his evidentiary burden to Respondent. This he may not do.

I conclude that the Secretary has failed to introduce evidence that General Dynamics consciously disregarded the recordkeeping requirements or exhibited a reckless disregard for them. The fact that General Dynamics corrected its recordkeeping system before this inspection began and cooperated in the inspection negates the inference of willfulness drawn by the Secretary.¹⁰⁶ The Secretary's position that the violations should be regarded as willful in spite of General Dynamics' correction of the system¹⁰⁷ ignores not only the fact that General Dynamics corrected the system, but the facts that the Secretary introduced no evidence to establish that the individual recordkeeping failings were willful and failed to establish that the system itself was intentionally adopted in order to underreport injuries and illnesses as well. General Dynamics' failure to correct the 1985-86 recordkeeping errors does not substitute for evidence that the recordkeeping violations were themselves the result of General Dynamics' willful conduct.

¹⁰⁵(...continued)

Island, who issued the citation but failed to attend various meetings with Miles in Rhode Island and Washington, and suggests that an inference might be drawn concerning Mr. Hartman's support of the complaint.

¹⁰⁶*F.X. Messina Corp. v. OSHRC*, 505 F.2d 701, at 702, (1st Cir., 1974); *Brock v. Morello Bros Const., Inc.*, 809 F.2d 161 (1st Cir., 1987); and *McLaughlin v. Richland Shoe Corp.*, U.S. , 108 S. Ct. 1677 (1988) on which the Secretary relies do not require a different result.

¹⁰⁷See the Secretary's reply brief, pp.46-47. The Secretary's reliance on *Badaracco v. C.I.R.*, 693 F.2d 298 (3rd Cir. 1982), *aff'd* 464 U.S. 386, 104 S.Ct. 756 (1984) does not support his position. That case is distinguishable in that it involved statutory provisions limiting the IRS' ability to recover unpaid taxes.

CATEGORIZATION OF VIOLATIONS AND ASSESSMENT OF PENALTIES

The Secretary's Brief.

In his brief, the Secretary makes three basic points. First, he argues that he may issue separate citations and proposed penalties for each violation of the same standard.¹⁰⁸ He points out that he charged General Dynamics with individual violations of § 1904.2(a), which requires the employer to enter each recordable injury or illness on the Form 200, and that each of the instances here involved different injuries, illnesses, dates, and methods of treatment. Therefore, he believes that citation of each of the separate violations was within his prosecutorial discretion.¹⁰⁹

Second, the Secretary argues that Congress expressly intended the Secretary's enforcement authority to include encouraging compliance through the penalty-setting process. In his view, a decision resulting in all the violations being combined, for whatever purpose, would impermissibly infringe upon the enforcement policy set forth in the regulation.

Third, the Secretary urges that General Dynamics' huge size requires a large penalty,¹¹⁰ and that assessment of a small penalty would constitute a retroactive license to violate Part 1904.¹¹¹ The Secretary also focusses on what he views as the enormity of

¹⁰⁸The Secretary relies on *Hoffman Construction Co.*, 1977-1978 OSHD ¶ 22,489 (RC, 1978) and *RSR Corporation*, 1983 OSHD ¶ 26,429 (RC, 1983). In its reply brief (pp.39-42), the Respondent maintains that these cases do not support the Secretary's position.

¹⁰⁹He argues that OSHA's usual guidelines regarding grouping violations, as stated in its FOM, do not apply. Moreover, those guidelines are for internal use and not procedural or substantive rights to employers. The Secretary cites *FMC Corp.*, 1977-1978 OSHD ¶ 22,060 (RC, 1977).

¹¹⁰The Secretary cites *Desarrollos Metropolitanos, Inc. v. OSHRC*, 551 F.2d 874 (1st Cir., 1977).

¹¹¹The Secretary cites *Olin Constr. Corp. v. OSHRC*, 525 F.2d 464, at 467 (2d Cir., 1975).

General Dynamics' misconduct. To support this view, he relies on statistical evidence that it is reasonable to expect that the actual number of recordable injuries and illnesses was from 3.1 to 6.3 higher than the number actually recorded.¹¹² Thus, not only General Dynamics' corporate size but the size of its malfeasance mandate imposition of very severe penalties. Given the size of the Quonset facility, the Secretary believes that General Dynamics' under recording also obscured the true rates for its industry and the entire nation. Violations of this magnitude threaten the core purpose of the Act - to provide safer and healthier workplaces for the future through creation of an information system for research, enforcement and employee self-protection.

General Dynamics' Brief.

General Dynamics maintains that the penalties proposed in this case suffer from several flaws. First, a penalty should not be assessed for each alleged injury or illness which was not recorded. Second, the penalties are clearly excessive, given the trivial gravity of the violations and the minimal penalties assessed in similar cases. Third, it would be appropriate to classify the violations as *de minimis*, or, at most, other-than-serious. Fourth, the penalties were not served by certified mail, as required by the Act.¹¹³

General Dynamics points out that the Commission is required to consider the factors set forth in Section 17(j) of the Act, including the gravity of the violation alleged, and that there should be comparability, uniformity and consistency between penalties imposed for

¹¹²See note 99 and accompanying text; Ex. C-27; Tr. 3531-3543.

¹¹³See Respondent's brief, pp.54-65. Respondent's last argument, that the penalties were not served by certified mail, was decided adversely to it by the Commission in its Order remanding the case for a decision and will not be further considered. See 15 OSHC 2122, 2126-27 (Rev. Com. 1993).

similar offenses.¹¹⁴ General Dynamics states if it is not to be deemed both arbitrary and contrary to the requirements of § 17(j), the penalty assessed must bear a rational relationship to the violation alleged.

Assessment of a Penalty for Each Failure to Record an Injury or Illness

General Dynamics attacks OSHA's assessment of a penalty for each failure to record an injury or illness as inconsistent with Chapter VI(A)(8)(d) of its Field Operations Manual concerning grouping of violations.¹¹⁵ General Dynamics points out that in prior cases, multiple recordkeeping errors routinely have been grouped and penalized as a single violation.¹¹⁶ General Dynamics believes that the Secretary acted arbitrarily and inconsistently by segregating, rather than grouping, these recordkeeping violations.¹¹⁷

¹¹⁴Respondent cites *Chamberlain Mfg. Co.*, 2 OSHC 1482 (Rev. Comm. 1975); *Massachusetts Dep't of Educ. v. United States Dep't of Educ.*, 837 F.2d 536, 544 (1st Cir. 1988); *Miner v. FCC*, 663 F.2d 112 (D.C. Cir. 1980).

¹¹⁵That provision states:

Grouping. Violations of the posting and recordkeeping requirements which involve the same document (e.g., summary portion of the OSHA-200 Form was neither posted nor maintained) shall be grouped as an other-than-serious violation for penalty purposes. The unadjusted penalty for the grouped violations would then take on the highest dollar value of the individual items; e.g., the unadjusted penalty for not posting the OSHA-200 Form is \$200 and \$100 for not maintaining the OSHA-200 Form. The grouped unadjusted penalty would be \$200 rather than \$300.

¹¹⁶Respondent cites the following as precedent: *Dow Chemical Co.*, 1985 OSHD ¶ 27,335 (1985) (LEXIS, Labor Library), vacated on other grounds, 13 OSHD 1444 (1987); *Anoplate Corp.*, 12 OSHC 1678, 1687-88 (Rev. Com. 1986); *General Motors Corp., Inland Division*, 8 OSHC 2036 (Rev. Com. 1980); *Mantua Manufacturing Co.*, 1 OSHC 3070 (Rev. Com. Judge 1973). Respondent also argues that an employer's complete failure to maintain a log has been treated as a single violation of § 1904.2, citing *Automotive Products Corp.*, 1972 OSHD ¶ 15,348 (1972), 1974 OSHD ¶ 17934 (1974), 1 OSCH 1772 (1974), and *New Hampshire Provision Co., Inc.*, 1 OSHC 3071 (1974).

¹¹⁷Respondent notes that the Secretary has offered no justification for deviating from precedent and did, in fact, group the 52 recordkeeping violations in the Citation 1, Item 2, without explaining why Items 1 and 2 should be treated differently. Moreover, Respondent notes that the Secretary offered no evidence that the violations resulted from separate, independent decisions not to record. Rather, Respondent correctly notes that the violations resulted from an inadequate recordkeeping system. See Respondent's reply brief, pp.39-42.

Excessive Penalties

General Dynamics believes that the penalties proposed by the Secretary are many times greater than those levied in other recordkeeping cases. It points out that many decisions have declined to impose any penalty whatsoever for recordkeeping violations,¹¹⁸ and that these cases demonstrate that it is unreasonable to impose over \$600,000 in penalties in this case. Moreover, General Dynamics believes that in cases in which an employer completely failed to keep a log the penalties assessed have been far less severe.¹¹⁹

Section 17(j) of the Act requires the Commission to consider a number of factors in assessing a penalty. As applied by OSHA, "[t]he gravity of the violation is the primary factor in determining penalty amounts."¹²⁰ This, General Dynamics points out, is dependent on, first, the severity, and second, the probability of any possible injury or illness. General Dynamics asserts that it is clear that there is no probability of any injury or illness resulting from these recordkeeping violations. Thus, consistent with prior cases, the penalty imposed should be no more than \$100. Because no employee was exposed to any injury or illness as a result of the recordkeeping failures, the violations are at most other-than-serious.

¹¹⁸Respondent cites *J.R. Simplot Co.*, 13 OSHC 1313 (Rev. Com. Judge 1987); *Amatac Corp.*, 11 OSHC 1869 (Rev. Com. 1984); *Quality Stamping Products*, 10 OSHC 1010 (Rev. Com. 1981); *Chrysler Corp.*, 7 OSHC 1578 (Rev. Com. 1979); *Jenny Industries, Inc.*, 2 OSHC 3308 (Rev. Com. 1975); *Puterbaugh Enterprises*, 2 OSHC 1030 (Rev. Com. 1974); *Fort Hill Lumber Co.*, 2 OSHC 1013 (Rev. Com. 1974); *Mantua Manufacturing Co.*, 1 OSHC 3070 (Rev. Com. 1973); *William C. Bradley, Inc. of Virginia*, 1 OSHC 3041 (Rev. Com. 1973); *V.O. Hegsted*, 1 OSHC 1484 (Rev. Com. 1973).

¹¹⁹Respondent notes that in *Automotive Products* (note 116), for example, the employer was penalized only \$100 for failing to maintain a log and record work-related injuries, and in *New Hampshire Provision Co.* (note 116), the employer received a total penalty of only \$100 for failing to maintain a log of its injuries and post an annual summary documenting injuries.

¹²⁰FOM, Chapter VI, Section (A)(2)(d).

The Violations Should Be Classified as *De Minimis*.

Finally, General Dynamics believes that it would be appropriate to classify these violations as *de minimis*. General Dynamics relies on § 9(a) of the Act for the proposition that a notice of a *de minimis* violation rather than a citation should be issued for violations “which have no direct or immediate relationship to safety or health” and *William C. Bradley, Inc. of Virginia*,¹²¹ where failure to keep a log treated as *de minimis* violation.

The Secretary's Reply Brief.

The Secretary asserts that the penalties should effectuate Congress' recognition that false data impede safety and health enforcement,¹²² and that false records impair OSHA's ability to do its job, thereby directly affecting employees' safety and health.¹²³ The Secretary maintains that General Dynamics' recordkeeping failures resulted in serious physical harm in that they hid the illnesses and injuries at Quonset, and their causes, thus preventing OSHA from addressing hazards, particularly previously unrecognized ones. He points out that the Commission has recognized the relationship between recordkeeping and improvement of safety and health.¹²⁴

¹²¹1 OSHC 3041 (Rev. Com. 1973).

¹²²See Secretary's reply brief, p.40. The Secretary points to Congress' emphasis of the necessity of full and accurate information respecting occupational injuries, illnesses, and deaths. Sen. Rept. No. 91-1282, 91st Cong. 2d Sess., 1970 U. S. Code Cong. and Admin. News p. 5193.

¹²³The Secretary relies on the testimony of Eric Frumin, Director of Occupational Safety and Health for the Amalgamated Clothing and Textile Workers Union and Chair of the Labor Research Advisory Committee on Occupational Safety and Health Statistics to the U.S. Bureau of Labor Statistics, Tr. 827-828.

¹²⁴He cites *Thermal Reduction Corp.*, 1985 OSHD ¶ 27,248 (Rev. Com. 1985). According to the Secretary, the Commission there held that the relationship between a violation and a specific hazard is not a consideration in evaluating the gravity of recordkeeping violations and repudiated the respondent's theory that such violations are *de minimis*, trifling, or insignificant.

Moreover, the Secretary maintains that he is not bound to adhere to an ineffective enforcement policy.¹²⁵ Inasmuch as § 17 of the Act and 29 C.F.R. Part 1904 provide for citation of individual violations, and each failure to record is a discreet violation, the Secretary asserts that he may cite such violations individually. He believes that the Commission, as purely an adjudicative body, should not group the violations, because to do so would usurp the policy functions allocated to the Secretary by Congress.¹²⁶

He also views General Dynamics' argument that the fact that many injuries and illnesses were recorded entitles it to a reduction as baseless. In the Secretary's view, adoption of this position would reward the sophisticated violator by permitting it to hide serious hazards through a scheme of under recording and, if confronted, plead good faith. The Secretary submits that individual, large penalties are appropriate here, noting that the First Circuit has observed that large employers need large prods.¹²⁷

The Violations Are Other-Than-Serious.

In the *Caterpillar* decision, the Commission stated:

When the Secretary alleges that violations are willful in nature, but, as here, fails to establish willfulness, the Commission may find an other-than-serious violation. A serious violation may not be found unless the parties have

¹²⁵The Secretary notes that Respondent seeks to lock OSHA and the Commission into the penalty structure imposed in the past under the FOM and Commission decisions. He urges that the FOM is not material to this proceeding, and that penalties should be assessed on the basis of the record and the law. In his view, past penalty assessments are not binding.

¹²⁶The Secretary cites *Oil, Chemical & Atomic Workers v. OSHRC*, 671 F.2d 643, 649 (D.C. Cir., 1982) and *Marshall v. Sun Petroleum Products Co*, 622 F.2d 1174, 1176 (3rd Cir., 1980). He regards the decision to seek separate penalties for each violation as a matter of prosecutorial discretion. See Secretary's brief, pp.41-44. Respondent's reply is set out in its reply brief at pp.39-42.

¹²⁷*Desarrollos Metropolitanos, Inc. v. OSHRC*, 551 F.2d 874, 877 (1st Cir. 1977). "A \$100 fine might be an effective prod for a small business, but be ignored by a company ... doing \$10,000,000 worth of construction annually."

expressly or impliedly consented to try the issue, ... or the seriousness of the violation was evident.... Here, the Secretary has not alleged that each violation was serious nor is there any evidence of seriousness. Accordingly, we affirm the violations as other-than-serious.¹²⁸

This statement is fully applicable to this case. General Dynamics points out that it has not consented to try the issue of whether the violations were serious, and that the Secretary has not alleged that each violation was serious. Consequently, I may not classify these violations as serious unless their seriousness is evident.

Section 17(k) of the Act states that "... 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 ... in such place of employment" Although it is true, in at least a general sense, that inadequate records adversely affect OSHA's ability to do its job, the Secretary simply has not shown that General Dynamics' recordkeeping failures resulted or could have resulted in death or serious physical harm at Quonset by concealing illnesses and injuries. The Secretary failed to demonstrate that his ability to carry out his responsibilities under the Act was inhibited to that extent by General Dynamics' recordkeeping violations. Consequently, they are not serious.

General Dynamics' position that the violations should be classified as *de minimis* must also be rejected. That position, if adopted, would denigrate the recordkeeping requirements role in providing the information necessary to make workplaces safer and more healthful,¹²⁹ and would ignore the systematic under reporting that occurred in this case.

¹²⁸*Secretary v. Caterpillar, Inc.*, 15 OSHC 2153, 2176 (Rev. Com. 1993) (citations omitted).

¹²⁹*Secretary v. General Motors Division, Electro Motive Div.*, 14 OSHC 2064, 2070 (Rev. Com. 1991) citing *Secretary v. General Motors Division, Inland Div.*, 8 OSHC 2036 (Rev. Com. 1980).

A Separate Penalty for Each Violation Is Within the Secretary's Discretion.

General Dynamics may be correct that the Secretary's proposal of separate penalties is inconsistent with both the FOM and previous cases.¹³⁰ However, the Secretary's position that he need not adhere to an earlier enforcement policy but may properly cite individual violations in appropriate cases is correct. While the Secretary is given to a certain amount of hyperbole in his brief concerning the "enormity" of General Dynamics' transgressions, nonetheless he did establish that General Dynamics permitted an inadequate recordkeeping system to remain in effect for at least two years and that this system excluded certain categories of injuries and illnesses from reporting while under reporting others. In these circumstances, pursuit of individual violations permits the Secretary to tailor the size of the overall penalty to the scope of the recordkeeping failures generated by General Dynamics' inadequate system. He is well within his discretion as a prosecutor in pursuing each individual failure to record set out in Item 1. Grouping of the failures set out in Item 1 for penalty purposes would result in a penalty which is far too small to be meaningful.¹³¹

¹³⁰Respondent cites *Anoplate* and *General Motors Corp., Inland Div.* (note 116). These cases are distinguishable. In *Anoplate*, an employer with only about 38 employees was charged with failing to indicate the employee's job title and regular department on the Form 200. Similarly, *General Motors Corp., Inland Div.* involved a legal dispute concerning the employer's obligation to prepare Form 100 for illnesses contracted by three employees. Neither case involved recordkeeping violations on the same scale as this case. Thus, these cases presented considerations bearing on penalty assessment which are quite different from those present here.

Respondent also urges that its complete failure to maintain a log would result in a penalty far smaller than that proposed by the Secretary for a violation which would be far more severe than those with which it is charged. However, that case is not presented and Respondent's argument amounts to no more than speculation.

¹³¹Similarly, in *Caterpillar*, the Commission concluded that the Secretary acted within his discretion in issuing separate penalties for each recordkeeping failure and noted that the key question is not whether the penalties should have been grouped, but whether the overall penalty is appropriate. See 15 BNA OSHC at 2173.

Penalty Assessment.

In addressing the issue of penalties in his brief, the Secretary speaks of the “enormity of the misconduct” and supports this assertion with references to statistical evidence purporting to compute the number of injuries and illnesses which should have been reported.¹³² This presents two difficulties. First, the Secretary did not cite General Dynamics for having permitted an inadequate system to exist and did not seek to demonstrate that inadequacy through statistics. Rather, he chose to cite General Dynamics for individual recordkeeping errors and proceeded to offer proof of each error. As General Dynamics points out, nothing prevented the Secretary from reviewing all of General Dynamics’ records and documenting all of General Dynamics’ recordkeeping errors.¹³³ If accepted, the Secretary’s proposed use of statistical evidence would have the effect of imposing penalties on account of recordkeeping errors which are not individually documented in the record. That is not permissible.

Second, § 17(j) of the Act requires that I set penalties with due regard for General Dynamics’ size, the gravity of its violation, its good faith, and its history of previous violations. The Secretary’s use of statistical evidence neglects the factors which the Commission has generally considered in assessing the second factor, the gravity of a violation. These are: first, the number of exposed employees; second, the duration of the exposure; third, the existence of precautions; and fourth, the probability of injury or illness.

¹³²See Secretary’s brief, p.47.

¹³³See Respondent’s reply brief, pp.33-34.

In *Caterpillar*, the Commission noted that the tangential relationship between recordkeeping violations and these factors results in the conclusion that such violations are of low gravity.¹³⁴ The Secretary argues that "... rigid adherence to such an approach would constitute a departure from Congressional intent and established Commission doctrine."¹³⁵ The Secretary relies on *Thermal Reduction Corp.*¹³⁶ for this proposition, and seeks to distinguish *Caterpillar* for essentially the same reasons that he advanced in support of his characterization of the violations as willful.¹³⁷ Unfortunately, these reasons go to the intent of the Respondent, not the gravity of the violations.

Were it not for *Caterpillar*, I would, like the Secretary, conclude that the violations in this case are of high gravity. Here, the record clearly demonstrates that they resulted from an inadequate recordkeeping system that was allowed to remain in effect for at least two years. While the Secretary failed to show that this system resulted from the conscious choice or willful neglect of Respondent, he did show that it resulted in the exclusion from recording of certain categories of injuries and illnesses and inadequately recorded other categories. In my opinion, the Secretary is correct that the gravity of these violations should be judged in the context of the Congressional purpose behind the recordkeeping requirements, not the purpose behind the safety and health standards. Judged in the former

¹³⁴*Secretary v. Caterpillar, Inc.*, 15 OSHC at 2178.

¹³⁵See Secretary's post hearing memorandum (May 18, 1993), p.2.

¹³⁶See note 124. *Thermal Reduction Corp.* was decided by Commissioner Cleary in an opinion in which Chairman Buckley concurred. In his opinion, Commissioner Cleary rejected an argument that it would be improper to affirm a citation for failure to produce injury and illness records in the absence of proof that employees were endangered by that failure, noting that recordkeeping regulations are not intended to eliminate an existing and identified hazard. Chairman Buckley, concurring in result, did not address this argument.

¹³⁷See Secretary's post hearing memorandum (May 18, 1993), pp.5-8.

context, these are grave violations for which the imposition of a separate, substantial penalty for each violation documented in the record is appropriate.

However, I must assess penalties in the light of the approach taken by the Commission in *Caterpillar*. There, it appears that the violations resulted from inadequate recordkeeping criteria which resulted in the exclusion of recordable injuries. Here, in contrast, there was a systematic failure. This systematic failure to record certain categories of injuries and illnesses and the systematic under recording of others raises the gravity of the tangential relationship to employee safety and health to a higher level than in *Caterpillar*. By systematically excluding certain categories and systematically under reporting others, General Dynamics increased the probability that a serious injury could result from a hidden, uncorrected hazard which accurate reporting would have revealed. I conclude that the gravity of the recordkeeping violations stated in Citation 1, Item 1, was low to moderate.

In addition to the gravity of the violation, as noted § 17(j) requires me to consider the size of General Dynamics' business, its good faith, and its history of previous violations. There is no controversy with respect to the fact that General Dynamics' business is very large. Thus this factor weighs in favor of a large penalty. Similarly, there is no controversy with respect to the fact that previous inspections of General Dynamics' records had not resulted in the issuance of a citation.¹³⁸ This factor weighs against a large penalty.

Based on General Dynamics' correction of its recordkeeping system prior to the inspection, Mr. Gumpert recommended that General Dynamics be given a 30% penalty reduction for good faith, and Mr. Miles testified that General Dynamics had cooperated in

¹³⁸See Tr. 1307.

the inspection. The fact of General Dynamics' cooperation is not contested. However, notwithstanding General Dynamics' correction of its recordkeeping system in advance of the inspection, the fact remains that General Dynamics did so only after the faulty system had been in place for at least two years and took the better part of a year to accomplish the corrections. Given that some of the shortcomings of the faulty system were reasonably obvious, General Dynamics cannot be said to have been conscientious in effecting these corrections. I conclude that this factor is neutral, weighing neither for nor against a large penalty.

In *Caterpillar*, the Commission imposed penalties for individual recordkeeping failures which ranged between \$75 and \$550 and averaged \$153 where the factors of size and past history tended to cancel each other, good faith was weighed somewhat favorably to the company, and the gravity of the violations was regarded as low. In this case, the factors of size and past history tend to cancel each other, while good faith is neutral and the gravity of the violations argues in favor of a low to moderate penalty. Given that the maximum penalty for an other-than-serious violation is \$1000, I assess a penalty of \$400 for each violation enumerated in Citation 1, Item 1, for a total of \$47,200.

In Citation 1, Item 2, the Secretary grouped the violations, proposing one penalty. The § 17(j) factors, as applied to this item, all weigh in the same manner as they do applied to Item 1 with the exception of the gravity of the violation. In the case of Item 2, there is no evidence on which to conclude that there was a systematic failure which increased the probability that a serious injury could result from a hidden, uncorrected hazard which

accurate recordkeeping would have revealed. Consequently, the gravity of Item 2 is low. I conclude that a penalty of \$250 is appropriate.

CONCLUSIONS OF LAW

A. Respondent General Dynamics Corp., Electric Boat Division, Quonset Point Facility, was at all times pertinent hereto an employer within the meaning of Section 3(5) of the Occupational Safety & Health Act of 1970, 29 U.S.C. Section 651-678 (1970).

B. The Occupational Safety & Health Review Commission has jurisdiction of the parties and the subject matter.

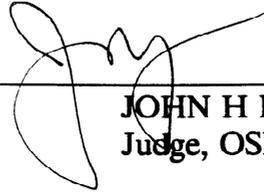
C. Respondent General Dynamics Corp., Electric Boat Division, Quonset Point Facility, committed an other-than-serious violation of the standard set out at 29 CFR § 1904.2(a) as charged in Citation 1, Item 1. A civil penalty of \$47,200 is appropriate.

D. Respondent General Dynamics Corp., Electric Boat Division, Quonset Point Facility, committed an other-than-serious violation of the standard set out at 29 CFR § 1904.4 as charged in Citation 1, Item 2. A civil penalty of \$250 is appropriate.

E. Respondent General Dynamics Corp., Electric Boat Division, Quonset Point Facility, committed an other-than-serious violation of the standard set out at 29 CFR § 1904.2(a) as charged in Citation 2, Item 1. A civil penalty of \$00 is appropriate.

ORDER

F. Citations 1 and 2 are affirmed. A civil penalty of \$47,450 is assessed.



JOHN H FRYE, III
Judge, OSHRC

Dated: JAN 25 1994
Washington, D.C.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 87-1195
	:	
GENERAL DYNAMICS CORP.,	:	
ELECTRIC BOAT DIVISION,	:	
QUONSET POINT FACILITY,	:	
	:	
Respondent, and	:	
	:	
STEPHEN C. PERRY,	:	
	:	
Employee Representative.	:	

APPENDIX A

TO

DECISION AND ORDER
DATED JANUARY 3, 1994

The Secretary introduced testimony which established that the following injuries and illnesses were not recorded on General Dynamics OSHA Form 200. Because General Dynamics did not contest the Secretary's factual account regarding these injuries and illnesses as set forth in Appendix 3 to his initial brief, this account has been adopted as findings of fact with respect to these injuries and illnesses. See the text accompanying note 24 of the Decision and Order.

A. Items 1(a)(1)-1(a)(20)

1. Sprains-Strains

a. Case 10, left knee sprain August 7, 1986, 5 restricted workdays (rwa) not recorded, Ex. C-16A-2(a)/1(a)(1)

An employee stated that while crawling in a tank he felt something pop and a lot of pain. He felt pain when bending or applying weight. The medical report quoting the employee was signed by a registered nurse (RN) employed by the Respondent, and by the employee. The Respondent marked the incident as an industrial accident on the report. The incident occurred in Respondent's building 2. Respondent's hospital visit reports for August 8 and August 12 show that five rwa were involved, such as no crawling, and the employee was a welder who normally crawled while working. The incident was not recorded on the log in any way. Under Part 1904 and the 1986 BLS requirements, Ex. C-4, at p. 43, injuries resulting in rwa must be recorded. Gumpert, T. 337-355.

b. Case 10, left knee sprain September 2, 1986 10 rwa not recorded, Ex. C-16A-2(b)/1(a)(2).

The Respondent's medical report states that an employee was climbing in a tank, injured his knee and was put on rwa for ten days. No entry at all appeared in Respondent's log. Rwa cases are the type of cases as to which Mr. Preler would admit that they would not survive Ms. Romano's "first cut" because she considered them first aid. While Mr. Preler did tell Mr. Gumpert that certain activity restrictions would not affect an employee's job activities (and hence not be recordable)

there was no objection by Preler respecting this matter. Under Part 1904 and the Ex. C-4, p. 43, the Respondent was legally obligated to record this matter. Gumpert, T. 355-362.

c. Case 23, neck strain, August 27, 1985, 244 lost workdays (lwd) recorded as 83 lwd. Ex. C-16A-2(c)/1(a)(3).

This incident was recorded in the 1985 log as lwd only until December 31, 1985. Mr. Preler told the CSHO that the Respondent only counted lwd until the end of a calendar year. Under Part 1904 and the 1978 BLS requirements, effective in 1985, an employer was legally obligated to record all lwd, estimate potential lwd at year's end, and record actual lwd on the next year's log. See Ex. C-3, p. 15. The Respondent neither estimated nor recorded. The employee was not able to return to work until September 22, 1986. Gumpert, T. 362-368.

d. Case 29, left shoulder strain May 22, 1985, 3 rwa not recorded, Ex. C-16A-2(d)/1(a)(4).

The employee told Respondent's nurse that he was working cutting up twelve-bys used for scaffolds and hurt his left shoulder the prior night. The Respondent diagnosed a left shoulder strain. The 1985 calendar indicated three rwa. The employee was restricted from doing lifting below the waist and doing overhead work for "this week", which amounted to a three-day restriction. Under Part 1904 and the 1978 BLS requirements, Ex. C-3, p. 3, the Respondent was legally obligated to record the matter. The Respondent did not record. Gumpert, T. 385-388.

e. Case 29 right shoulder strain October 10, 1985, 1 rwa not recorded, Ex. C-16A - 2(a)/1(a)(5).

The same employee suffered a strain on October 10, 1985 and the Respondent's LS-202A form stated that the incident was industrial. One rwa

was imposed. There was no log entry. Under the Part 1904 and the 1978 BLS requirements, Ex. C-3, p. 3, the Respondent was legally obligated to record the matter. Gumpert, T. 387-388.

f. Case 29, left ankle strain, April 22, 1986, 1 lwd and 5 rwa not recorded, Ex. C-16A-2(f)/1(a)(6).

The Respondent's medical report states that the employee slipped off a rung of a ladder. Respondent marked the matter as "industrial" and diagnosed a sprain. The employee, a rigger, was precluded from climbing; riggers must climb. The matter was not recorded on the Respondent's 1986 log. Gumpert, T. 390-398. Under Part 1904 and Ex. C-4, the Respondent was legally obligated to record lost and restricted workdays.

g. Case 30, shoulder sprain/strain June 27, 1986 not recorded medical treatment (prescription), Ex. C-16A-2(g)/1(a)(7).

An employee suffered a shoulder injury which the Respondent's medical report stated was industrial. Prescriptions for Naprosyn (an anti-inflammatory) and Tylenol 3 (contains codeine) were written by Respondent. Under Part 1904 and Ex. C-4, p. 43, prescription medication is medical treatment and recordable. The matter was not recorded on the 1986 log. Gumpert, T. 399-402.

h. Case 31, chest strain October 6, 1986 2 lwd not recorded, Ex. C-16A-2(h)/1(a)(8).

The Respondent's record states that the employee said he was moving materials and felt a sharp pain. The employee had pain when breathing in and when moving. The Respondent considered this an industrial matter. The Respondent's LS-210 indicated the employee was out of work two days, October

8-9. The employer's calendar showed these were workdays. The incident was not recorded in the 1986 log. Mr. Preler did not say anything about this matter. Gumpert, T. 404-405. Under Part 1904 and Ex. C-4 the Respondent was legally obligated to record the matter.

i. Case 39, back strain February 3, 1986, 4 rwa not recorded, Ex. C-16A-2(i)/1(a)(9).

The Respondent's report states that the employee said he was lifting a welding machine and suffered an acute "lbs" (low back strain). The incident occurred on a Monday and rwa of no lifting or bending were prescribed for the "rest of week." The incident and rwa were not recorded. Under Part 1904 and Ex. C-4, p. 43, the Respondent was legally obligated to record this matter. Gumpert, T. 405-408.

j. Case 60, muscle strain April 15, 1986, 3 lwd not recorded, Ex. C-16A-2(j)/1(a)(10).

According to the Respondent's medical report the employee fell on his back while on an I-beam. The Respondent considered it an industrial incident. The Respondent's LS-210 states the man was out of work April 16 and returned April 21. The Respondent's work calendar showed the employee missed Wednesday, April 16/Friday, April 18. The matter was not recorded. Gumpert, T. 408-411. Under Part 1904 and Ex. C-4 the Respondent was legally obligated to record.

k. Case 65, left knee strain, April 17, 1986, 2 lwd not recorded, Ex. C-16A-2(k)/1(a)(11).

The Respondent's medical report described this incident as industrial. The employee had stated he injured his knee descending a ladder.

The incident was not recorded in the log at all. Under Part 1904 and Ex. C-4, p. 43, lost workday injuries and the number of lost workdays must be recorded. The employee was out of work Friday, April 18 and Monday, April 21. Gumpert, T. 412-416. The Complainant amended the complaint to allege two rather than one day lwd not recorded. T. 417.

1. Case 68, neck strain June 4, 1986, rwa not recorded, Ex. C-16A-2(1)/1(a)(12).

A sheet metal worker suffered an acute strain while lifting dies. He was restricted from using his right arm, lifting over 10 pounds, and doing overhead work for one day. The restrictions would affect his ability to lift tools and materials. The 1986 log did not show this incident or the restriction. Mr. Preler told Mr. Gumpert that this type of matter (rwa) would not have survived the "second cut" (due to Respondent's information flow system). Under Part 1904 and Ex. C-4, p. 43, the Respondent was legally obligated to record the matter. Gumpert, T. 428-432.

m. Case 79, left thumb sprain July 25, 1985, 9 rwa not recorded, Ex. C-16A-2(m)/1(a)(13).

Respondent's medical report states a pipefitter hit his thumb with a crowbar. Respondent considered it an industrial matter. Reference to the Respondent's 1985 calendar showed the employee, who returned to work on August 7, 1985, was on restricted duty using a splint and receiving therapy. The employee's foreman told the CSHO that the employee was on restricted duty as stated in the exhibit pages which are the medical and hospital visit reports. The matter was not recorded. Gumpert 432-440. Under Part 1904 and Ex. C-3, p. 3, the Respondent was legally obligated to record this matter and the rwa involved.

n. Case 84, back strain July 30, 1985, 1 lwd not recorded, Ex. C-16A-2(n)/1(a)(14).

A welder suffered an acute back strain. The employee was a third shift employee. Injured on his shift, he like many third shift employees waited to see the company doctor on the day his shift ended which would be the day after he had started his shift. Thus, "no work tonight" means he is to refrain from starting working the day he saw the doctor, and he thus lost one day (i.e., starts work 11:00 p.m., July 29, 1985, injured on July 30, 1985, finishes work morning of July 30, 1985 and sees doctor, no work started July 30, 1985 but does start work 11:00 p.m. July 31, 1985; one day is lost - the July 30, 1985/July 31, 1985 shift day). The Respondent considered shifts begun at, e.g., 11:00 p.m. July 31, 1985 to be worked on August 1, 1985. The incident and lost day were not recorded. Gumpert, T. 442-456.

o. Case 92, groin strain August 20, 1985, 3 lwd not recorded, Ex. C-16A-2(o)/1(a)(15).

The Respondent's medical report states that a welder fell and suffered a groin pull. The employer's LS-210 and comparison with the calendar showed 3 lwd involved. The matter was not recorded. Gumpert, T. 458-461.

p. Case 100, neck strain April 3, 1985, 36 lwd and 39 rwa not recorded, Ex. C-16A-2(p)/1(a)(16).

A painter suffered neck strain and lost 36 days, according to the employer's records and calendar. He returned to work but was unable to lift over 60-70 pounds. Painters lift heavy staging. The man was also restricted from sweeping and overhead work. The restrictions lasted 39

days. The matter was not recorded. Mr. Preler did question this matter, suggesting it might not be recordable because the man had numerous injuries and illnesses, but Mr. Preler did not provide any information that the neck strain had not occurred. Gumpert, T. 461-476.

q. Case 100, muscle strain, March 17, 1986, 4 rwa not recorded, Ex. C-16A-2(q)/1(a)(17).

A painter suffered a muscle strain while lifting lead on a Monday. The Respondent prescribed four days without heavy lifting. The rest of the workweek was four days. Painters must lift staging and heavy painting guns. The matter was not recorded. Gumpert T. 481-483.

r. Case 101 back strain October 9, 1986, 16 lwd and 18 rwa not accurately recorded, Ex. 16A-2(r)/1(a)(18).

The Respondent's records stated that an industrial accident occurred respecting an employee considered by Respondent to be a maintenance mechanic/crane operator. Reference to the Respondent's calendar and its documents, as well as Mr. Gumpert's conversations with Mr. Preler, showed that the employee missed 16 days of work and then was restricted to "no heavy lifting" for 18 days. The Respondent's rescue unit classified him as a crane operator, but the Respondent's nurse classified him as a maintenance mechanic. The matter was not recorded in the log, Gumpert, T. 483-515. Mr. Preler could not explain the absence of an entry - when asked about it, he was silent. Gumpert, T. 515. Mechanics must lift heavy object, Gumpert, T. 522.

s. Case 104, left foot strain, January 25, 1986, 4 lwd and 9 rwa not recorded, Ex. C-16A-2(s)/1(a)(19).

A burner/grinder suffered an injury and lost four days followed by nine days of "no prolonged standing or walking." Gumpert, T. 523-528.

In this instance Mr. Preler told Mr. Gumpert that only the medical report, which did not refer to restrictions, would have been sent to Ms. Cave. The employee was on restricted duty January 25 to February 10, on February 11 he went out of work until February 18. Restricted duty cases did not survive the first cut and therefore neither that information nor the later reports respecting lost days which never even got to Ms. Cave, would have been recorded. Therefore, the entire matter was not recorded. Gumpert, T. 527-530. The Complainant amended to allege 9 rwa. T. 530.

t. Case 104, groin strain August 26, 1986, 9 lwd not recorded, Ex. C-16A-2(t)/1(a)(20).

A burner/grinder suffered a groin strain while lifting. The Respondent's records state nine lwd occurred, as cross-checked to their calendar. The matter was not recorded. Mr. Preler said that the non-recording could have occurred because of a lapse in time between when the injury occurred and the date a foreman learned of it. Gumpert, T. 536-542.

B. Items 1(b)(1)-1(b)6)

1. Lacerations

a. Case 31, head laceration, December 15, 1985, 67 lwd recorded as 11 lwd, Ex. C-16B-2(b)/1(b)(1).

A welder suffered a head laceration when angle iron fell on her. The Respondent's LS-208 states the welder was out of work from December 16, 1985 to March 23, 1986. The incident was recorded on the 1985 log but no lost days appeared on the 1986 log. The employer counted only days until December 31, 1985. Ms. Cave told Mr. Gumpert she counted lost days only until

a year's end. Mr. Gumpert determined the actual lost days by checking the LS-208 and the Respondent's work calendars. Under Part 1904 and the 1978 BLS requirements the Respondent was obligated to record all lost days, estimate potential lost days, and enter actual lost days if the lost time spanned the end of one year and the start of the next. See Ex. C-3, pp. 15-16. Gumpert, T. 561-565.

b. Case 48, forearm laceration December 27, 1986, 16 lwd recorded as an illness, Ex. C-16(c)-2(b)/1(b)(2).

In this case the employer did record the matter, but as an illness. A burner-grinder had suffered an injury - metal entered his forearm - and it became infected. Under Part 1904 and Ex. C-4, p. 37, such an incident must be recorded as an injury. Illnesses are not counted in development of lost workday injury rates, and therefore misrecording affects the real lwdi. Mr. Preler explained the error by saying "the clerical was not trained to know the difference in how to record it." Gumpert, T. 565-569.

c. Case 59, finger laceration June 25, 1985, medical treatment, stitches, not recorded, Ex. C-16B-2(c)/1(b)(3).

The Respondent's records state that the employee dropped a mig machine (a welding machine), suffered a 3/4 inch laceration and received four sutures. Sutures are medical treatment under Part 1904 and the BLS requirements, Ex. C-3. The matter was not recorded. Gumpert, T. 569-573.

d. Case 102, shoulder laceration, September 24, 1986 medical treatment, steristrips, not recorded, Ex. C-16B-2(d)/1(b)(4).

The Respondent's records show that the employee walked into an angle iron and suffered a shoulder laceration. Peroxide and an ice pack were

applied, and then steristrips. Under Part 1904 and Ex. C-4, p. 43, steristrips are medical treatment, and the Respondent was legally obligated to record the matter. There was no lost time or restricted activity. The matter was not recorded. See Gumpert, T. 579-583.

This matter exemplifies the Respondent's failure to record medical treatment cases which did not involve any lost or restricted days.

e. Case 105, hand laceration, September 23, 1986, medical treatment, steristrips, not recorded, Ex. C-16B-2(e)/1(b)(5).

The Respondent's records state that a grinder cut his hand and was given a betadine soak and steristrips. As noted, use of steristrips constitute medical treatment and is recordable. The matter was not recorded. According to Mr. Preler, see Gumpert, T. 589, the notation that steristrips were applied appears on Respondent's revisit form, which did not even come to Ms. Cave from Ms. Romano. Ms. Cave got only the medical report form and in cases like this that form did not state any recordable actions or incidents. Gumpert, T. 580-589.

This case exemplifies the effects of the Respondent's paper flow system deficiencies upon recording.

f. Case 110, elbow laceration, April 22, 1985, 28 lwd not recorded, Ex. C-16B-2(f)/1(b)(6).

An employee tripped over pallets and suffered a laceration, which became infected. The Respondent's records say that 28 lwd were involved. This matter was not recorded at all, not even erroneously as an illness. Mr. Preler was asked about the failure to record but could not explain it. Gumpert, T. 589-593.

C. Items 1(c)(1) - 1(c)(10)

1. Bruises, Contusions, and Crushing Injuries

a. Case 3, head contusion, September 18, 1986, 3 lwd not recorded, Ex. C-16C - 2(a)/1(c)(1)

The Respondent's records state an employee was hit in the head when a stack of shelves fell on him. The records and the 1986 work calendar show 3 lwd were involved. Although rwa of no climbing or work at heights were prescribed the CSHO did not consider the failure to record those as a violation because Mr. Preler asserted that the employee, a supply room attendant, did not climb or work at heights. However, the Respondent did not record the matter in any way at all. Gumpert, T. 597-599. The Complainant amended from two to three lost days, T. 599-600.

This case exemplifies OSHA's inspection policy of giving the Respondent the benefit of the doubt concerning whether rwa were recordable; if restrictions did not affect job performance the Complainant did not find that Respondent's nonrecording was violative.

b. Case 4, back bruise, October 30, 1985, 211 lwd, recorded as 2 lwd, Ex. C-16 C-2(b)/1(c)(2).

The Respondent's medical records state that an employee was hit in the back when a forklift tipped over. The Respondent classified the incident as industrial. The Respondent's leave of absence form states the employee was out of work "with back injury." Mr. Preler told Mr. Gumpert that the Respondent only counted lost days until an employee was put on long-term disability (at which point Respondent stopped counting). The Respondent only

entered two lost days on the 1985 log even though the employee was put on leave on March 9, 1986. See Ex. C-12, p. 38, the 1985 log. The employee was still out in July 1987. According to Mr. Preler, the Respondent's medical report, however, said "out of work till Monday." The accident occurred on a Wednesday and Ms. Cave counted only Thursday and Friday as lost. See Gumpert, T. 1851, also see T. 1853-1854.

Mr. Preler also told Mr. Gumpert that when an employee returned to work the Respondent would "change the days away" to reflect the total days out of work. See Gumpert T. 1854-1855. This employee had not returned, and Respondent never changed the original two day entry.

As Mr. Gumpert stated, if a case involved lost workdays starting at the day of injury itself, the Respondent would catch return to work cases. If there was no initial entry of a lost day, return-to-work cases (if the out of work period began after the injury day) were disregarded (an no information was entered on the log). See Gumpert, T. 1855. Here, in a case where there was no return-to-work at all, the Respondent did not change the initial entry.

The Respondent's policy was to place disabled employees on leave after 90 days. Gumpert T. 1857. The Respondent's insurer stated that the employee could work as of September 4, 1986. Thus, the employee was theoretically able to return to work 211 days after the injury. Under Part 1904 and the BLS requirements lost days must be recorded until an employee can return or is transferred or determined to be totally disabled. Gumpert, T. 1858-1861: See Ex. C-3, p. 14 and Ex. C-4, p. 16. The Respondent never even entered the September 1986 theoretical return day as a cut-off for lwd. Gumpert, T. 1863.

At the closing conference the Respondent defended its "90 days" policy, but it does affect the lwdi severity and also biases the apparent severity of the injury as it appears in Respondent's records. See Gumpert, T. 1864-1865.

Although the employee had not returned as of July 1987, or as of July 5, 1989, the Complainant accepted the Respondent's insurer's determination, received by OSHA after Mr. Gumpert developed the citation, see T. 1858, and amended to "211 lwd" not recorded. See T. 1867.

c. Case 8 knee contusion, June 12, 1985, 1 rwa not recorded, Ex. C-16 C-2(c)/1(c)(3).

A shipfitter was hit by a bolt on Thursday June 12 and was told No kneeling or excessive climbing was prescribed respecting Friday, June 13, 1985. Shipfitters climb and kneel in the course of their duties. The matter was not recorded. Mr. Preler explained that the restriction appears on a revisit form which never even got to "Safety" (Ms. Cave, for recording) under Respondent's paper-flow system. Gumpert, T. 606-611.

d. Case 11, thigh contusion, August 30, 1985, 5 rwa not recorded, Ex. C-16 C-2(d)/1(c)(4).

The Respondent's records, which classify the accident as "industrial", state that a shipfitter injured his thigh on August 30, 1985 when he slipped. He reported the incident on September 12, 1985 due to lumps which caused concern. The Respondent prescribed no climbing for one week; September 12 was a Thursday and one week would have included five workdays. Shipfitters must climb. The matter did not appear on the log. Mr. Preler

told Mr. Gumpert that Ms. Romano would have considered this a first-aid case and it "wouldn't have even been looked at by the Safety Clerical for recordkeeping purposes." Gumpert, T. 612-618.

e. Case 48, head contusion June 3, 1985, 4 lwd not recorded, Ex. C-16 C-2(e)/1(c)(5).

An employee carrying material fell and hit his head. The employee was out of work June 4 to June 10, four lost workdays according to Respondent's calendar. The incident was not recorded. Mr. Preler could not explain the Respondent's failure to record. Gumpert, T. 618-622.

f. Case 60, hand contusion, March 5, 1986, medical treatment - prescription not recorded, Ex. C-16C-2(f)/1(c)(6).

The Respondent's records state that a welder hit his hand. The Respondent considered it an industrial accident. The Respondent prescribed Tylenol 3. Tylenol 3 is a prescription drug, as the Respondent's nurse, Mr. Lage, told Mr. Gumpert, and as Mr. Gumpert found by checking the Physician's Desk Reference. The matter was not recorded. Gumpert, T. 622-630. Mr. Preler said that this would have been considered first aid. Gumpert, T. 630-634.

g. Case 63, knee contusion, February 3, 1986, 1 rwa not recorded, Ex. C-16C - 2(g)/1(c)(7).

The Respondent's records state that a welder's grinder (welders also grind) kicked back and hit his knee. The Respondent considered this an industrial accident. The Respondent's records state that Respondent restricted the employee from kneeling, squatting, or prolonged standing for

one day. This restriction would affect a welder's job activities. The matter did not appear in the log. Mr. Preler told Mr. Gumpert this case would have been considered first aid. Gumpert, T. 635-638.

h. The Complainant vacated item h in this section of the Complaint. See T. 639.

i. Case 104, finger contusion, April 22, 1986, 20 rwa not recorded, Ex. C-16C - 2(i)/1(c)(9).

The Respondent's records state an employee dropped an I-beam on his hand. The employee was a plate shop mechanic, but the Respondent's medical employees also classified the man as a burner-grinder. Plate shop mechanics do burn and grind. The Respondent prescribed light duty for one month, no heavy lifting and no repetitive activity with the right hand. Gumpert, T. 640-641. In Respondent's shipyard there are no strong delineations between trades, and an employee such as this one would burn, grind, move metal plates and beams, and cut plates. Gumpert, T. 651-653. The restrictions would have affected this employee's ability to do his job. This matter was not recorded. Mr. Preler told Mr. Gumpert that this incident would have been considered first aid. Mr. Gumpert checked the Respondent's work calendar for 1986 and found that restrictions for one month equalled twenty workdays, June 20 to July 20. Gumpert, T. 653-655, 664. Mr. Gumpert determined that the "May 15, 1989" date of injury, stated on one page of the Respondent's records, which Gumpert had examined in chronological order, was simply a misdating, Gumpert T. 668, 674-679.

The Complainant amended the complaint to allege that the Respondent did not record an injury, and the related rwa, which had occurred

on April 22, 1989 or on May 15, 1989. See T. 694-697.

j. Case 105, scalp contusion October 1, 1986, 4 lwd and 2 rwa not recorded, Ex. C-16 C-2(j)/1(c)(10).

The Respondent's records state that a welder was hit by an air pressure rig. He was out of work October 14 to October 17, Tuesday-Friday. The employee was in restricted work states, no climbing, October 2 and October 3, Thursday and Friday. Welders climb to weld at elevated sites. The matter was not recorded. Gumpert, T. 685-689.

D. Items 1(d)(1)-1(d)(3)

1. Fractures

a. Case 104, thumb fracture November 14, 1986, 16 rwa recorded as no lost time, Ex. C-16D-2(a)/1(d)(1).

The Respondent's medical report states that a plate shop machanic suffered a fractured thumb while rolling metal. The employee was restricted from full use of his right hand for two weeks. Plate shop mechanics must use their hands to manipulate metal plates. The Respondent recorded this incident as a "no lost time." Gumpert, T. 1397-1404. This non-recording of restricted days would minimize Quonset's lwdi rate and also would serve to deflect OSHA's attention from the incident. Gumpert, T. 1404-1405. Ms. Cave did not consider rwa cases to be recordable. Gumpert, T. 1409, 1415/1414.

The item was amended to allege only 16 rwa in 1986. See T. 1392, 1400-1401.

b. Case 108, finger fracture November 12, 1986, 1 lwd recorded as no lost time, Ex. C-16D-2(b)/1(d)(2).

The Respondent's records, which classify the matter as industrial, show that an employee suffered a fracture and was out of work on Thursday, November 13, 1986. The Respondent recorded this as a no lost time injury. See Gumpert, T. 1414-1422.

c. Case 109, finger fracture October 6, 1986, 14 rwa recorded as no lost time, Ex. C-16D-2(c)/1(d)(3).

An employee suffered a fracture when a block of metal fell on this left third finger. Use of the left hand was restricted and the restrictions, including the fact that "he was in a splint", made it very difficult to do his job as a production welder. The employee was on rwa until October 28, 1986, fourteen work days. The Respondent recorded this as "injury without lost work days." Gumpert, T. 1423-1430. This item was amended to 14 rwa from 21 rwa, see T. 1392-1393.

This instance, and the prior two, exemplify Mr. Gumpert's methodology of checking underlying medical records in order to check Respondent's logs' veracity, since fractures would normally result in restricted or lost days. The logs were found to be false. See Gumpert, T. 1430-1432.

E. Items 1(e)1-1(e)(2)

1. Abrasions

a. Case 7, ankle abrasion September 18, 1986, 6 lwd not recorded, Ex. C-16E-2(a)/1(e)(1)

The Respondent's records state that an employee suffered an abrasion when a steel plate fell onto his ankle. The records state that this

was an industrial accident. The employee was out of work from September 19 to September 29, six workdays. Although post-injury work restrictions were also imposed, Mr. Gumpert accepted Mr. Preler's position that they would not have interfered with the employee's job activities, and no unrecorded rwa were cited. The 1986 log did not have any entry respecting this matter. Gumpert, T. 1432-1437. The item was amended from seven lwd not recorded to six lwd not recorded. See T. 1391-1392.

b. Case 47, leg abrasion November 12, 1986, medical treatment - prescription, not recorded, Ex. C-16E-2(b)/1(e)(2).

The Respondent's records state that an employee's leg fell through planks while the employee was dragging a machine. The employee was given a prescription for Vicoden, a prescription painkiller. The matter did not appear in the Respondent's log. As noted earlier, prescription medication constitutes recordable medical treatment. This item exemplifies the Respondent's treating such cases as first-aid and not recording them. Gumpert, T. 1437-1441.

F. Items 1(f)(1) - 1(f)(8)

1. Burns

a. Case 20, 1st degree neck and back burn, May 21, 1986, medical treatment - two visits - not recorded, Ex. C-16F - 2(a)/1(f)(1).

The Respondent's records state that an employee suffered a burn when molten metal fell into his shirt and burnt his neck and back. The employee was treated with silvadene cream on May 21 and on May 22. More than one treatment with a prescription drug constitutes medical treatment and is

recordable. Gumpert, T. 1441-1444. The item was amended to refer to the neck and back rather than the employee's finger. T. 1444-1445.

b. Case 35, 2nd degree arm burn, September 23, 1986, 3 rwa not recorded, Ex. C-16 F-2(b)/1(f)(2).

The Respondent's records state that an employee burned his arm while welding. The employee was treated with silvadene and given a restriction of no heavy lifting for the rest of the week, which meant a three-day restriction. The restriction affected the employee's ability to do his job. This instance was not recorded on the Respondent's log in any way. Gumpert, T. 1448-1453.

c. Case 40, steam burn, eyes, July 23, 1986 medical treatment - prescription, not recorded, Ex. C-16F-2(c)/1(f)(3).

An employee suffered burns to both eyes due to radiator steam. He was given a prescription for AK spore, which is a prescription ophthalmological drug, multiple applications of every two hours for four days. The incident was not recorded in any way. Gumpert, T. 1456-1461.

d. Case 41, 2nd degree finger burn June 30, 1986 medical treatment - prescription, not recorded, Ex. C-16F(2)(d)/1(f)(4).

The Respondent's records state that hot metal fell into an employee's glove. The employee was treated with silvadene more than once. The matter was not recorded in any way. As noted earlier, use of a prescription drug more than once constitutes medical treatment. Gumpert, T. 1462-1465. The item was amended to note the medical treatment. T. 1464-1465.

e. Case 52, 1st degree forearm burn July 11, 1985, 11 lwd not recorded, Ex. C-16F-2(e)/1(f)(3).

An employee suffered burns when his welding torch burnt his arm. The employee was out of work July 12 through July 28, eleven workdays. Mr. Preler could not explain the absence of any entry in the log. Gumpert, T. 1467-1469.

f. Item (f), Ex. C-16F-2(f)/1(f)(6) was vacated by the Complainant. There is no documentary exhibit. T. 1469-1470.

g. Case 104, 2nd degree hot burn May 16, 1986, medical treatment not recorded, Ex. C-16F-2(g)/1(f)(7).

The Respondent's records show that an employee was burnt when a "hot piece" landed on his foot. The Respondent marked this as an industrial accident and diagnosed a second degree burn. The employee received silvadene twice. This was recordable due to more than one use of a prescription drug. The matter was not recorded. Gumpert, T. 1471-1474. The item was amended to delete a reference to five visits. T. 1471-1472.

h. Case 107, 3rd degree ankle burn August 7, 1986, 3 rwa not recorded, Ex. C-16F-2(h)/1(f)(8).

The Respondent's records show an employee suffered a burn, which Respondent marked as industrial. By October 1986 the ankle was inflamed and from October 16 to October 21, 1986 the employee was restricted by "no tank work and no climbing." Three workdays were involved and the restrictions did affect the employee's work activities. The matter was not recorded at all. Gumpert, T. 1475-1478.

Mr. Preler said that this matter would not have been recorded "because of the revisit." The revisit form, which stated the restrictions, never would have gotten to Ms. Cave in the Safety Department. This exemplifies the systemic deficiency of Respondent's recordkeeping methods. See Gumpert, T. 1478-1480.

Complainant notes that Mr. Preler told Mr. Gumpert that the Respondent's December 1986 "audit", which Preler said was not in writing, had noted this systemic deficiency. Gumpert, T. 1480. Nevertheless, Mr. Preler certified the 1986 log as accurate. Complainant notes again that the April 30, 1986 audit and the December 1986 and January 1987 "audit" memoranda, Ex. C-6/C-11, are written documents. Ex. C-8, the memorandum from Roger Foster, a Safety Representative, addresses this type of defect very clearly.

G. Items 1(g)(1)-1(g)(3).

1. Ankle Injuries and Synovitis.

a. Case 103, ankle injury, May 14, 1985, 1 lwd and 33 rwa not recorded, Ex. C-16G-2(a)/1(g)(1).

The Respondent's records state that an employee strained his ankle at work in Building 60. The Respondent classified the injury as "industrial." The employee lost days from work, July 22, 1985 through July 29, 1985. The employee also lost May 22, 1985. The employer only recorded six lost days. The employee was on restricted duty - no climbing or stooping - on May 20, May 21, May 23 to June 11, and June 30 to August 26, for a total of 33 days. The Respondent did not record any of the rwa days. Mr. Preler said the non-recordings were caused by "the revisits" - the hospital visits;

the hospital visit reports stating lost or restricted days never got to the Safety Department for recording. Even though a return to work form would include a revisit form, Ms. Cave did not record such cases. The restrictions in this case did affect the employee's ability to do his regular job.

Gumpert, T. 1977-1884.

The Complainant amended the item to refer to one lwd not recorded. T. 1884.

b. Case 103, ankle injury October 26, 1985, 64 lwd, not recorded, Ex. C-16G-2(b)/1(g)(2).

The Respondent's records state that an employee injured his ankle on October 26. The Respondent classified the case as "industrial." The employee had been working on and prior to October 26. The Respondent's records state that the employee was out of work October 27, 1985/February 3, 1986, 64 work days according to the Respondent's work calendar. Mr. Preler explained that because a hospital visit report triggered the lost work days, a report which never even got to Ms. Cave, the case was not recorded. The injury, an instantaneous event which occurred after the end of this employee's rwa noted in the prior item, was a separate recordable matter. The case was not recorded. Gumpert, T. 1884-1892.

c. Case 103, synovitis, February 3, 1986, 23 rwa and 157 lwd not recorded, Ex. C-16C-2(c)(g)/1(g)(3).

The Respondent's records state that the employee had synovitis, inflammation of the ankle tendon sheath. The employee returned to work on February 3, 1986, see item (b), but was under restrictions. However, the

employee was out of work February 6 through February 13, and then on rwa February 13 through March 14, a total of 23 rwa. The employee then was out March 15 until October 22, 1986, when the employee was transferred to another job. In total, the employee was out 157 lwd and on rwa for 23 days. The employee's condition was not the result of an instantaneous event, e.g., stepping of a "unit" and straining the ankle, but rather the combination of his prior injuries. The case was not recorded. Mr. Preler had no explanation. Gumpert, T. 1892-1902.

The Respondent placed the employee in "medical leave" on June 8, 1986 and the Respondent did not count any of the lost days before or after June 5, 1986 as lwd. Gumpert, T. 1901-1902.

The Complainant amended the item to refer to 23 rwa rather than 25 rwa. T. 1902-1903.

H. Item 1(h)(1)

1. Amputations

a. Case 53, index finger amputation August 16, 1985, 1 rwa not recorded, Ex. C-16H-2(a)/1(b)(1).

An employee who was cutting a template cut off his fingertip. The Respondent marked it as an industrial accident. The employee was put on rwa for three days but only one day was a workday. The restriction applied to use of the hand involved, which restricted the employee's ability to do his job of setting up plates and pieces of metal. This matter was not recorded. Gumpert, T. 1487-1490.

I. Items 1(i)(1)-1(i)(2)

1. Dermatitis

a. Case 94, dermatitis, July 25, 1985, 2 lwd and rwa not recorded, Ex. C-16I-2(a)/1(i)(1).

The Respondent's medical report states that an employee had a progressive rash on his arms, neck, and eyelids. The Respondent classified the matter as industrial and diagnosed an allergic reaction to fiberglass "contact dermatitis." This employee would contact fiberglass in his job. The Respondent's records show two lost workdays. The employee was allowed to return to work on August 5 with restrictions on exposure to fiberglass, but was fired after that one day rwa. Nothing was recorded on the Respondent's 1985 log respecting this matter. Gumpert, T. 1490-1496.

b. Case 100, dermatitis, November 13, 1985, not recorded, allergic reaction to paint thinner, Ex. C-16I-2(b)/1(i)(2).

An employee suffered a swollen hand after working with old paint thinner. The employee went to the dispensary on November 14. The Respondent diagnosed an allergic reaction to paint thinner. This employee would work with paint thinner. The Respondent's documents questioned the industrial nature of this matter, and Mr. Preler did so as well, but the Respondent never had investigated the matter. All illnesses, and dermatitis is an illness, must be recorded. This illness did not appear in the 1985 log. Gumpert, T. 1497-1500.

The Commission has held that if the work environment contributed to or aggravated an illness it must be recorded, General Motors

Corp., 1980 OSHD ¶24,743 (RC, 1980). If medical opinion, as here, is that a recordable disease exists, it must be recorded. Only if a physician finds no disease may an employer fail to record. See Amoco Chemicals, Corp., 1986 OSHD ¶27,621 (RC, 1986). Here, Mr. Preler substituted his opinion for that of a physician and Respondent did not record. Under General Motors and Amoco, Respondent should have recorded.

J. Items 1(j)(1) - 1(j)(44)

1. Embedded foreign objects and prescription drugs.

a. Case 9, foreign object in eye October 8, 1986 medical treatment-prescription, not recorded, Ex. C-16J-2(a)/1(j)(1)

The Respondent's medical report states that an employee got a foreign body in his eye. The Respondent classified the incident as "industrial". The Respondent diagnosed removal of a foreign body and prescribed Polysporin. Polysporin is an ophthalmological prescription drug, as Respondent's in-house physician, Dr. McKee, told Mr. Gumpert. The Respondent prescribed use for two days. Mr. Preler told Mr. Gumpert this case was not recorded because it would not have survived the "second cut." Under Part 1904 and the 1986 BLS requirements use of a prescription drug more than once constitutes recordable medical treatment; Ex. C-4, p. 43 (the 1978 BLS requirements contain an identical requirement). Gumpert T. 1517-1521.

The Complainant had amended this item to delete a reference to return visits. See T. 1514-1516.

b. Case 9, foreign object in eye October 8, 1986, medical treatment-prescription, not recorded, Ex. C-16J-2(b)/1(j)(2).

The Respondent's records state that an employee had a foreign body in his right eye, as disclosed by a medical examination. The Respondent

classified this as an "industrial" matter. The Respondent prescribed Polysporin every 2-3 hours for two days. The matter did not appear in the log. Gumpert, T. 1521-1527.

The Complainant had deleted a reference to return visits for this item. See T. 1514-1516.

c. Case 10, foreign object in eye January 28, 1986, 1 rwa not recorded, Ex. C-16J-2(c)/1(j)(3).

The Respondent's medical record states an employee suffered eye irritation from deburring or grinding. Respondent's examination disclosed an embedded object with rust. The object and the rust were removed and a prescription given. The Respondent was also restricted from grinding, welding, or burning for one day, January 29, 1986. There was no entry on the log for this matter. As noted respecting other rwa cases, they are recordable under Part 1904 and the BLS requirements. Gumpert, 1528-1534.

d. Case 10, foreign object in eye September 20, 1986, medical treatment - return visits and prescription, not recorded, Ex. C-16J-2(d)/1(j)(4).

The Respondent's records state that an employee was diagnosed as having a foreign body and rust in his right eye. The Respondent classified this as an "industrial" matter and the records state the accident location was "Building Two." The Respondent moved the material and prescribed Polysporin for two days. The matter was not entered on the Respondent's 1986 log. Gumpert T. 1535-1537.

The Complainant had deleted a reference to return visits. T. 1514-1516.

e. Case 20, foreign object in eye September 24, 1985, medical treatment-prescription, not recorded, Ex. C-16J-2(e)/1(j)(5).

The Respondent's records state that an employee got grit in his eye. The Respondent classified this as an "industrial" matter. The Respondent removed the grit and prescribed Ak spore, a prescription drug, three times a day for two days. Under Part 1904 and the 1978 BLS requirements. Ex. C-3, p. 2, this matter had to be recorded. The Respondent's log had no entry for this matter. Gumpert, T. 1543-1547.

f. Case 28, foreign object embedded in eye, January 25, 1985, medical treatment and prescription, not recorded, Ex. C-16J-2(f)/1(j)(6)

The Respondent's records state that an employee got grit in his eye while grinding. The Respondent diagnosed an embedded object in the left eye with residual rust. The Respondent classified this as an "industrial" matter. The Respondent removed material and prescribed Polysporin for two days. The Respondent's log had no entry for this matter. Gumpert, T. 1549-1551.

g. Case 28, foreign object in eye September 13, 1985, medical treatment-prescription, not recorded, Ex. C-16J-2(g)/1(j)(7).

The Respondent's records state that an employee was welding in a tank in Building One, a production area, got something in his eye, and went to a hospital. The Respondent classified this as an "industrial" matter. At the Respondent's dispensary residual rust was removed and Polysporin prescribed for two days. The matter was not recorded in the Respondent's 1985 log. Gumpert, T. 1552-1558. This is the type of case which would not survive the "first cut" (by Ms. Romano); documents would physically arrive on Ms. Cave's desk (Ms. Cave did the "second cut") but be disregarded. See Gumpert, T. 1559.

h. Case 28, foreign object in eye April 28, 1986, medical treatment - prescription, not recorded, Ex. C-16J-2(h)/1(j)(8).

The Respondent's records state that an employee suffered an industrial injury and that examination under a slit lamp disclosed a foreign body in the left eye. The Respondent removed it and prescribed Polysporin every 2-3 hours for two days. The Respondent's 1986 log had no entry. Gumpert, T. 1566-1568.

i. Case 28, foreign object in eye, June 5, 1986, 2 rwa not recorded, Ex. C-16J-2(i)/1(j)(9).

The Respondent's records state that an employee suffered an "industrial" accident; the Respondent diagnosed a foreign body in the right eye and prescribed single applications of AK taine and Neosporin. Restrictions of "no welding, burning, or grinding" were imposed, which would affect this employee's regular activities, for two days, Friday, June 6 and Monday, June 9. Mr. Preler did not argue that the case was not industrial nor did he argue that the restrictions had no affect on the employee's regular job activities. The Respondent's log had no entry. Gumpert, T. 1568-1572.

Although it is not alleged as a separate matter, the Respondent also prescribed more prescription drug usage. See T. 1570 and 1573-1574.

j. Case 28, foreign object in eye October 20, 1986, medical treatment - return visits, not recorded, Ex. C-16J-2(j)/1(j)(10).

The Respondent's records state that an employee got a small object in his eye. On October 22, the Respondent removed it, classified the matter as industrial, applied AK taine drops and applied AK trol drops also. On October 23 the employee received an application of Polysporin. The

employee had two visits for this incident. As Dr. McKee told Mr. Gumpert, all the medications used were prescription medications. Use of prescription medication more than once is recordable medical treatment, and return visits for application of such medications constitutes recordable medical treatment. The matter was not recorded in the Respondent's log. Gumpert, T. 1574-1580.

k. Case 31, foreign object embedded in eye, January 12, 1985, medical treatment not recorded, Ex. C-16J-2(k)/1(j)(11).

The Respondent's records state that an employee got an object in his right eye while deburring. The Respondent classified this as an "industrial" matter, removed the object, and applied Acutracin, a one time application of a prescription drug. However, removal of an embedded object from an eye is itself recordable medical treatment. Mr. Preler did not raise any objections to Mr. Gumpert's classifying (removal of) embedded foreign bodies as medical treatment. There was no entry in the Respondent's 1985 log. Respondent's medical employees, including Dr. McKee and nurses, said that the doctor removed embedded foreign bodies. Gumpert, T. 1580-1586. Also see Ex. C-3, p. 2, Ex. C-4, p. 43, and T. 1587-1588 respecting the fact that embedded object removal is recordable.

l. Case 31, corneal burn, medical treatment - prescription, not recorded, February 6, 1985, Ex. C-16J-2(l)/1(j)(12).

The Respondent's records state that an employee got something in his eye while grinding. The Respondent diagnosed a corneal burn, classified the incident as "industrial", and removed the exudate (fluid). Cold compress(es) and Polysporin every 2-3 hours for two days were prescribed. Mr.

Preler said that this (type of) case would have been considered first aid by Ms. Romano; Mr. Preler did not object to Mr. Gumpert's classifying this as recordable medical treatment. The matter was not recorded in the 1985 log. Gumpert, T. 1588-1591.

This item was amended to refer to a corneal burn rather than a foreign body in the eye. T. 1514-1516, 1588.

m. Case 31, foreign object in eye, March 28, 1985, medical treatment - return visits and prescription not recorded, Ex. C-16J-2(m)/1(j)(13).

The Respondent's medical records state that an employee got something in her left eye while deburring. The Respondent removed a foreign body and applied Neosporin, a prescription drug. A revisit occurred on March 28, 1985 at 1:55 p.m., the same date as the first visit of 8:00 a.m., and additional matter was removed and Polysporin applied. The Respondent classified this case as "industrial." The two instances of application of a prescription drug made this a recordable matter. Mr. Preler said this matter would not have been recorded because of the "first cut" (the one in which Ms. Romano made up the "first aid" pile which physically went to Ms. Cave but which she disregarded for recording purposes). Additionally, the second visit noted on Respondent's hospital visit report, would have never gotten to Ms. Cave. Gumpert, T. 1592-1595.

This case exemplifies both the Respondent's failure to train Ms. Romano and Ms. Cave, the effects of non-training, and way in which Respondent's paper flow led to recording violations. This case also

exemplifies how cases which were recordable due to second visits went unrecorded - Ms. Cave never even got the documents which triggered recordability.

Mr. Preler did not object to the classification of this matter as recordable medical treatment. The log had no entry. Gumpert, T. 1595-1596.

n. Case 31, foreign object in eye November 19, 1986, medical treatment, not recorded, Ex. C-16J-2(n)/1(j)(14).

The Respondent's records state that an employee got slag in her left eye while chipping. The Respondent classified the matter as industrial, examined the employee under a slit lamp, found the object and a corneal burn, and removed the object. Exudate was also removed and Polysporin prescribed for every 2-3 hours for two days. Mr. Preler said this would have been considered first aid under the Respondent's system and not recorded. Mr. Preler did not object to Mr. Gumpert's determination that the case was recordable. The matter was not recorded in the log. Gumpert, T. 1596-1599.

o. Case 33, foreign object embedded in eye, August 20, 1985, medical treatment, not recorded, Ex. C-16J-2(o)/1(j)(15).

The Respondent's records state that an employee got a foreign body in his left eye while sandblasting. This employee was referred to an ophthalmologist. The object was removed and Maxitrol prescribed. Removal of an embedded object is medical treatment and makes the injury recordable. Mr. Preler did not object to Mr. Gumpert's determination. There was no entry in the log. Gumpert, T. 1599-1602.

p. Case 35, foreign object in eye, August 5, 1986, medical treatment - prescription, not recorded, Ex. C-16J-2(p)/1(j)(16).

The Respondent's records state that an employee was burning (metal) and got a metal burr in his left eye. The Respondent classified the incident as "industrial", diagnosed a foreign body in the left eye (three pieces at "six o'clock") and prescribed AK Spore three times a day ("TID"). Mr. Preler did not object to the determination that this was a recordable matter. There was no entry in the Respondent's log. Gumpert, T. 1602-1607.

q. Case 39, foreign object embedded in eye May 20, 1986, not recorded, Ex. C-16J-2(q)/1(j)(17)

The Respondent's records state that an embedded foreign body was removed from an employee's left eye by Dr. McKee. The Respondent classified the matter as "industrial." As noted, both Dr. McKee and nurse Lage had told Mr. Gumpert that the doctor removed embedded foreign bodies from employees' eyes. As also noted earlier, an embedded foreign body constitutes a recordable injury. See Ex. C-4, p. 43. Mr. Preler did not object to the determination that the matter should have been recorded. The log had no entry for this matter. Gumpert T. 1607-1610.

r. Case 39, foreign object embedded in eye, June 27, 1986, medical treatment and prescription, not recorded, Ex. C-16J-2(r)/1(j)(18).

The Respondent's medical report states that an employee got something in his right eye. A foreign body with rust was removed. Polysporin was applied and later it was prescribed for two days' use. Mr. Preler did not object to the determination that this was a recordable matter. There was no entry in the Respondent's log. Gumpert, T. 1610-1613.

s. Case 41, foreign object in eye, April 21, 1986, medical treatment - prescription and return visits, not recorded, Ex. C-165-2(s)/1(j)(19).

The Respondent's medical records state that an employee said he got something in his right eye "yesterday." The Respondent classified this as an "industrial" matter and diagnosed two foreign bodies in the right eye with rust at the first visit, April 22 at 7:00 a.m. At 1:00 p.m. that date AK spore for two days was prescribed. The employee also received medical treatment at each visit, a second basis for recordability. Mr. Preler did not object to a determination of recordability. The log had no entry. Gumpert, T. 1614-1617.

t. Case 45, foreign object in eye, October 21, 1986, 1 rwa not recorded, Ex. C-16J-2(t)/1(j)(20).

The Respondent's records state that an employee got something in his right eye. The Respondent classified this incident as industrial and removed the object. Polysporin was applied once, first aid which did not make the injury recordable. However, on Thursday, October 23, 1986 the employee was restricted from burning, welding, or grinding. These restrictions would affect the employee's ability to do his job as a sheet metal mechanic. Mr. Preler did not object to the determination that the restrictions made the case recordable. There was no entry at all for this incident. Gumpert, T. 1617-1622.

u. Case 47, foreign object embedded in eye, February 28, 1986, medical treatment, not recorded, Ex. C-16J-2(u)/1(j)(21).

The Respondent's records state that an employee got something in his eye on February 28 while at work. The Respondent diagnosed an embedded

body and classified this as an "industrial" incident. The man was referred to an ophthalmologist. Mr. Preler did not object to the determination that this matter was recordable. The Respondent did not record this case in its log. Gumpert, T. 1622-1627.

The reference to a "referral" in the Complaint item itself was deleted. See T. 1514-1516.

v. Case 47, foreign objects in both eyes, December 2, 1986, medical treatment, prescription, not recorded, Ex. C-16J-2(v)/1(j)(22).

The Respondent's medical report state that an air pressure from a gouger blew fragments into an employee's eyes. The Respondent classified this as an "industrial" matter and diagnosed possible foreign bodies in both eyes. One of the Respondent's EMTs diagnosed this third shift accident. The Respondent prescribed Bacitracin four times a day. Bacitracin is a prescription drug, as Dr. McKee told Mr. Gumpert. Mr. Gumpert told Mr. Preler this matter was recordable and Mr. Preler said nothing. There was no entry in the Respondent's log. Gumpert, T. 1627-1630.

w. Case 52, foreign object in eye, June 27, 1985, medical treatment - prescription, not recorded, Ex. C-16J-2(a)/1(j)(23).

The Respondent's records state that an employee was diagnosed as having burns and foreign bodies in the right eye, as well as a burn in the left eye. Although the bodies were removed with a Q-tip, they were not

embedded, AK taine and AK spore, were applied and AK spore was prescribed for use every three-four hours. The Respondent classified the incident as industrial. The 1985 log had no entry. Gumpert, T. 1630-1632.

x. Case 52, foreign object embedded in eye, August 27, 1985, medical treatment, not recorded, Ex. C-16J-2(x)/1(j)(24).

The Respondent's medical records show that an employee had an object embedded in his eye. The Respondent classified the matter as industrial, removed the object and rust, applied AK taine drops and prescribed Polysporin for two days. As noted above, an embedded object in the eye is a recordable matter. The Respondent's log had no entry. Gumpert, T. 1632-1636.

y. Case 53, foreign object in eye, August 14, 1985, medical treatment - prescription, not recorded, Ex. C-16J-2(y)/1(j)(25).

The Respondent's records state that on August 14, 1985 an employee got something in his eye as a result of his walking by a grinding operation. On August 15, 1985 at 6:50 a.m. the employee went to the dispensary. The Respondent classified this injury as industrial, diagnosed rust in the eye, and applied Neosporin and AK taine. On August 15, 1985 at 7:20 a.m. the employee visited the Respondent's dispensary again. Residual rust was removed and the Respondent prescribed Polysporin for two days. Mr. Preler said that the first visit would have been considered first aid and that the document recording the second visit (the "revisit") and prescription would not have even gotten to the Safety Department. Gumpert, T. 1636-1641.

This case exemplifies "the revisits" defect in the Respondent's paper flow system, although the Complainant notes that the Respondent also failed to record injuries necessitating removal of embedded objects and/or prescription drugs regardless of whether "revisits" were involved.

The Respondent did not record this matter. Gumpert, T. 1639-1640.

z. Case 58, foreign object embedded in eye, medical treatment and prescription - not recorded, Ex. C-16J-2(z)/1(j)(26).

The Respondent's records state that an employee was burning (metal) and got something in his eye. The Respondent classified the injury as industrial, diagnosed an embedded body in the right eye, removed it, and prescribed Polysporin for two days. Mr. Preler stated that the Respondent considered embedded body removal as first aid (and therefore the injury was not recordable) and that the Respondent considered prescriptions to be first-aid (and therefore a related injury was not recordable). The case not was recorded. Gumpert, T. 1641-1644.

aa. Case 59, foreign object embedded in eye, March 29, 1985, medical treatment, not recorded, Ex. C-16J-2(aa)/1(j)(27).

The Respondent's medical report states an employee had an embedded body and rust in his left eye. The employee was treated with AK taine drops and Polysporin. He was also sent to see an ophthalmologist and received curettage of a corneal ulcer. The Respondent classified this injury as "industrial." Mr. Preler said that both Ms. Romano and Ms. Cave would consider this as a first-aid case. The Respondent did not record this injury in its 1985 log. Gumpert, T. 1644-1647.

bb. Case 59, foreign object embedded in eye, August 1, 1985, 1 lwd not recorded. Ex C-16J-2aa/1(j)(28).

The Respondent's medical records states that on Thursday, August 1, an employee got a foreign body in his right eye at 10:30 p.m. in Building 60, a production area. They classified the injury as industrial. The Respondent diagnosed a foreign body in the right eye but could not remove it. The employee was out of work on Friday, August 2. The employee returned on August 5, a Monday. The foreign body was removed by an outside physician (i.e., not Dr. McKee). The injury was not recorded. Mr. Preler could not explain the absence of an entry. Gumpert, T. 1647-1652.

cc. Case 60, foreign object in eye, October 7, 1986, medical treatment - prescription, not recorded, Ex. C-16J-2(cc)/1(j)(29).

The Respondent's records state that an employee who worked in Building 60, got a foreign body in the left eye. The Respondent removed it and some rust and applied Polysporin. However, a second visit resulted in a prescription for Polysporin to be used for two days. This is another example of the Respondent considering injuries necessitating use of prescription drugs more than once to be first-aid matters (and not recordable). It also exemplifies the information-flow deficiency under which a hospital visit report noting prescription and dosages ("the revisits") never even got to Ms. Cave. This injury was not recorded. Gumpert, T. 1652-1655.

dd. Case 60, foreign object in eye, December 1, 1986, medical treatment - return visits and prescription, not recorded, Ex. C-16J-2(dd)/1(j)(30).

The Respondent's records state that an employee got something in his eye while working in Building 60. The Respondent classified the injury

as "industrial," diagnosed rust in the eye and applied Neosporin, a one time application. However, a later visit resulted in removal of additional rust and a prescription for AK spore for two days. Mr. Preler explained the non-recording as being due to "the revisit(s)", which, as in this case, stated that use of prescription drug was prescribed for more than one dose; the revisit document never even got to Ms. Cave. Gumpert T. 1655-1659.

As Mr. Gumpert explained, only when an employee returned to work after being out of work would the Respondent attach a hospital visit report ("the revisits") to a return to work form, and only then, in those cases, would Ms. Cave get a hospital visit form. Gumpert, T. 1659.

Complainant notes, however, that as previously addressed items show, the Respondent failed to record information related to the hospital visit forms Ms. Cave did get if she had made no initial entry respecting the injury. Also, the Respondent failed to record prescription-related injuries which were noted on forms Ms. Cave did get - she considered them as first-aid cases even if more than one dose was involved.

ee. Case 65, foreign object in eye, October 10, 1985, 1 rwa not recorded, Ex. C-16J-2(ee)/1(j)(31).

The Respondent's records state that on Friday, October 10, an employee got material in his eye while grinding or deburring. The Respondent classified the case as "industrial" and diagnosed irritation of the eyelid. Irrigation and AK spore were used; irrigation is merely washing an object out and is first aid. However, on October 14, 1985, a Tuesday, employee was restricted to tank watch duty, rather than being able to weld, burn, and

grind, which were the employee's regular duties. This restriction appeared on a hospital visit form. Monday, October 13, was Columbus Day, a non-work day. Mr. Preler said that the failure to record was due to the fact that the hospital visit report (which stated the restriction) did not go to Ms. Cave. The case was not recorded. Gumpert, T. 1667-1671.

ff. Case 65, foreign object in eye, November 23, 1985, left corneal abrasion and prescription, not recorded, Ex. C-16J-2(ff)/1(j)(32).

The Respondent's records state an employee who worked in Building 2003 had an abrasion of the left eye. A paint chip may have caused it. Cortisporin was prescribed, which Dr. McKee had said was a prescription ophthalmological medication. An eye patch was also prescribed. The employee was told to stay out of work for three days; there was no evidence he did so and Mr. Gumpert did not determine this to be a lost day case. However, the treatment made the injury a recordable matter. Under Ex. C-3, the 1978 BLS requirements any use of prescription medicine makes an injury recordable; under Ex. C-4, the 1986 requirements use more than once makes the injury recordable. There was no entry for this injury on the Respondent's log. Gumpert, T. 1671-1680.

gg. Case 69, foreign object in eye October 9, 1986, medical treatment - prescription, not recorded, Ex. C-16J-2(gg)/1(j)(33).

The Respondent's records state that an employee working in Building 60 had an eye problem. The Respondent diagnosed rust in the eye, removed it, and prescribed Polysporin for two days. Gumpert, T. 1680-1683. This is the type of case which would get to Ms. Cave (it would not be "cut" by

Ms. Romano) but Ms. Cave would have reviewed it and considered it as first-aid because she considered prescription cases to be first aid and not recordable matters. Gumpert, T. 1683. There was no log entry for this case. Gumpert, T. 1684.

hh. Case 69, foreign object in eye November 17, 1986, 1 rwa not recorded, Ex. C-16J-2(hh)/1(j)(34).

The Respondent's records state that an employee got metal in his left eye while burning metal. The Respondent diagnosed a foreign body in that eye, removed it, and applied Neosporin and AK taine. The hospital visit report restricted the employee from welding, grinding, or burning on November 18. The restrictions affected the employee's ability to do his regular job. The restrictions were on a "revisit" form and Mr. Preler said that is why the case was not recorded. It was not in the Respondent's log. Gumpert, T. 1684-1687.

ii. Case 69, foreign object in eye, December 10, 1986, 2 rwa not recorded, Ex. C-16J-2(ii)/1(j)(35).

The Respondent's records state that an employee got a foreign object in his eye while in Building 60. The Respondent found residual rust and referred the employee to a Dr. Coughlin, ophthalmologist. The records also show subsequent rust removal, a prescription and photophobia. The Respondent restricted the employee from welding, grinding or burning for 48 hours. Mr. Gumpert counted December 12 and December 15 as rwa days, a Friday and a Monday. Gumpert, T. 1687-1691. Mr. Preler told Mr. Gumpert there were two reasons for non-recording; one was that the rwa cases did not survive the

"second cut" (by Ms. Cave) because they were not considered recordable.

Secondly, this was one of "the revisits", the "revisit" form which stated the second day of rwa - for Monday, December 15, would not even get to Ms. Cave.

There was no log entry. Gumpert, T. 1690-1691.

jj. Case 84, foreign objects in left eye, June 13, 1985, medical treatment - prescription, not recorded, Ex. C-16J-2(jj)/1(j)(36),

The Respondent's records state that an employee got something in his left eye. The Respondent diagnosed multiple grit in the left eye and conjunctivitis. The Respondent removed the grit, prescribed Neosporin every two hours, and classified the injury as industrial. This is a case which did not survive Ms. Romano's "first cut" - she considered it first aid. There was no entry in the log. Gumpert, T. 1691-1695.

The Complainant amended the item to refer to only the left eye. T. 1694.

kk. Case 100, foreign object in eye, August 1, 1985, medical treatment - prescription, not recorded, Ex. C-16J-2(kk)/1(j)(37).

The Respondent's records state that he got a foreign body in his eye while sandblasting. The Respondent classified the injury as industrial, diagnosed rust in the eye, removed the rust, and prescribed Polysporin for two days. The case was not recorded in the log. Gumpert, T. 1696-1698. Also see T. 1699 concerning the Polysporin prescription as being for "X2D."

ll. Case 100, foreign objects in both eyes, October 25, 1985, medical treatment - prescription and return visits, not recorded, Ex. C-16J-2(ll)/1(j)(38).

The Respondent's records state that an employee got objects in both eyes while at work. The employee went to the Warwick Emergency Room on

October 25 and October 26. The Respondent classified the injury(ies) as "industrial." The objects were removed. A prescription for "ophthstrep" (sic) and/or Opthane was given. The case was not recorded. While the bodies were not embedded, the need for a prescription drug made the injury(ies) recordable. Gumpert, T. 1698-1703. Under Part 1904 and Ex. C-3, the 1978 BLS Guidelines, even one use of prescription drug made an injury recordable.

mm. Case 100, foreign object embedded in one eye, foreign object in other eye, medical treatment - prescription, not recorded, Ex. C-16J-2(mm)/1(j)(39).

The Respondent's records state that an employee got objects in his eyes while blasting. The object in the left was embedded. The Respondent diagnosed multiple grit in both eyes and the objects were removed.

The Respondent prescribed Polysporin every three hours for two days. Gumpert, T. 1703-1706.

This is a case in which Ms. Romano would not have considered this as a recordable matter due to the absence of an LS202A form, while Ms. Cave considered it a first-aid case. There was no log entry. Gumpert, T. 1706.

nn. Case 100 foreign object in eye, December 17, 1985, rwa not recorded, Ex. C-16J-2(nn)/1(j)(40).

The Respondent's records state that an employee was blasting and got an object in his right eye. The Respondent diagnosed multiple grit in that eye and removed it at a December 20 revisit. The Respondent restricted the employee from blasting for 24 hours. Although one document in the

exhibit, p. 37 says the injury date was December 16 that is a clerical error, as Mr. Preler agreed. The restriction applied on December 20, a Friday, and restricted the employee from doing his normal job activities. The injury was not recorded. Gumpert, T. 1706-1711.

oo. Case 100, foreign object in eye, February 11, 1986, medical treatment - prescription, not recorded, Ex. C-16J-2(cc)/1(j)(41).

The Respondent's records state that an employee got something in his right eye while blasting. The Respondent classified the injury as industrial, diagnosed an object in the eye, removed it, and prescribed Polysporin every 2-3 hours for two days. Mr. Preler said the case was considered first aid. The injury was not recorded. Gumpert, T. 1711-1713.

pp. Case 102, foreign object embedded in eye, July 16, 1985, medical treatment - prescription, not recorded, Ex. C-16J-2(pp)/1(j)(42).

The Respondent's records state that an employee got something in his left eye while working in Building 488. A metal object was embedded in the left cornea. It was removed with an 18-gauge needle by an outside doctor. Four Percosset tablets were given. Gumpert, T. 1713-1716. Percosset is a prescription painkiller. The employer was also given a cortisporin ointment application and a patch. Cortisporin is a prescription drug. This injury was not recorded. Gumpert, T. 1716-1717.

qq. Case 102, foreign object in eye, June 19, 1986, medical treatment - return visits, first aid (drops), not recorded, Ex. C-16J-2qq(1(j)(43).

The Respondent's records state that an employee had a foreign body in his right eye. The Respondent diagnosed it, removed it, and applied AK taine drops. The Respondent classified the case as "industrial." The

injury occurred in Building 2. Return visits occurred on June 20. Drops were applied at visits one and two. This was a recordable injury because the employee got first aid twice (the drops). See Ex. C-4, p. 43. Mr. Preler said the case was not recorded because of "the revisit." The first visit would have been considered first aid, which it was, but the second one - noted in the revisit form - never got to Ms. Cave. There was no log entry.

Gumpert, T. 1717-1722.

rr. Case 110, foreign object embedded in eye, February 8, 1985, medical treatment, not recorded, Ex. C-16J-2(rr)/1(j)(44).

The Respondent's records state that an employee had an embedded object removed from his right corner by Pawtucket Valley Medical & Surgical Services. The Respondent's own medical report states that the object got into the eye on February 8, a Friday. The man got the object removed on February 9. Friday was a workday according to the Respondent's work calendar. The Respondent classified the injury at "industrial." Mr. Preler said that the injury was not recorded because the Respondent's medical report refers to a foreign body and this was considered a first aid matter. Pawtucket Valley's bill and report, which refer to an embedded object, did not even get to Ms. Cave, they went only to Ms. Romano. The Respondent's paper flow system did not track information from outside doctors, such as reports, diagnoses, and prescriptions, for Part 1904 recordkeeping purposes. The injury was not recorded. Gumpert, T. 1722-1725.

K. Items 1(k)(1)-1(k)(17)

1. Flashburns

a. Case 8, flashburns of eye, March 5, 1986, not recorded, Ex. C-16K2(a)/1(k)(1).

The Respondent's medical report states that an employee suffered a "flash" in the right eye. The Respondent classified the matter as "industrial." A flashburn is caused by a welding arc's ultraviolet light and develops over time. The symptoms appear after exposure to the light.

A flashburn is an illness under Part 1904. The 1986 BLS requirements, Ex. C-4, p. 64, state that a flashburn is an illness. This case should have been recorded as an illness. There was no entry at all. Gumpert, T. 1730-1734.

b. Case 8, flashburn of eye, April 30, 1986, not recorded, Ex. C-16K-2(b)/1(a)(2).

The Respondent's medical report states that an employee got something in his eye while working. The first diagnosis was a foreign body in the right eye, which was removed. However, a second visit, noted on Respondent's hospital visit report, states a diagnosis of a flashburn. Mr. Gumpert reminded Mr. Preler that flashburns are illnesses. Mr. Preler did not disagree. Mr. Preler also said that because the flashburn diagnosis appeared on the hospital visit report Ms. Cave would not have gotten notice of the matter, which Ms. Romano considered first aid. Mr. Preler noted the fact that Respondent's clericals were not trained. Gumpert, T. 1734-1741.

c. Case 28, flashburn of eye, January 28, 1986, not recorded,
Ex. C-16K-2(c)/1(k)(3).

The Respondent's medical report states that an employee had pain and something in his right eye. The Respondent diagnosed a red and tearing right eye and flashburns of that eye. The Respondent classified the matter as "industrial." Cortisporin drops were applied. Mr. Preler said that the "clerk" was not trained to recognize flashburns, which she treated as first aid cases. The case was not recorded. Gumpert, T. 1741-1743.

d. Case 28, flashburn of eye, May 7, 1986, rwa not recorded,
Ex. C-16K-2(d)/1(k)(4).

The Respondent's records state that an employee developed "flashes" as a result of "doing his job." The Respondent classified the matter as "industrial" and diagnosed a flash in the right eye. The employee was restricted to desk work, not his normal type of work. Mr. Preler agreed that to the extent that the documents for this item state two dates of injury or illness, they are explicable as clerical errors due to the employee being a third shift worker who starts at 11:00 p.m. on one day and finishes on the next calendar day. The documents also mention a first degree burn to the face, but such a burn is not inconsistent with a concurrent flashburn. Although the Respondent did generate an LS202A for this case Ms. Cave considered flashburns as first aid matters and not recordable. Gumpert, T. 1744 -1751.

The reference in the Complaint to a lost day was stricken at Complainant's motion. The employee did have one rwa day; because no light duty was available, the employee who was given five days' restriction, went

home. The Complainant only considers the one day rwa at issue, See T. 1752-1755 and C-4, p. 51, because the employee could not complete a full shift after the shift on which the symptoms of the flashburn became noticeable.

The matter was not recorded. Gumpert T. 1751.

e. Case 31, flashburns of both eyes, May 1, 1986, 1 lwd not recorded, Ex. C-16K-2(e)1(k)(5).

The Respondent's medical report states that an employee "got a flash yesterday at work" and saw an outside doctor. The diagnosis was flashburns in both eyes. The employee did not work on Friday, May 2. Mr. Preler could not explain the failure to record a lost workday case. The case was not recorded in the Respondent's log. Gumpert, T. 1756-1759.

f. Case 35, flashburns of both eyes, April 11, 1985, not recorded, Ex. C-16K-2(f)/1(k)(6).

The Respondent's medical report states that an employee developed a flashburn to both eyes while doing his job. The Respondent classified the matter as "industrial." A dressing, Neosporin, and AK taine were applied. Mr. Preler said that Ms. Romano would have considered this first-aid because she was not trained (and so it would have gone into the pile which Ms. Cave got but disregarded, it would not survive the "first-cut"). The case was not recorded. It was recordable under Part 1904 and the BLS requirements, Ex. C-3, pp. 2 and 13. Gumpert, T. 1759-1764.

g. Case 36, flashburn in both eyes, March 18, 1985, not recorded, Ex. C-16K-2(g)/1(k)(7).

The Respondent's records state that an employee developed flashburns in both eyes on March 18, 1985. The employee had worked near a

welder. The Respondent's hospital visit report also states this diagnosis as well as keratitis. Mr. Gumpert told Mr. Preler that flashburns are illnesses and must be recorded. Mr. Preler had no comment. The case was not recorded. Gumpert T. 1764-1767.

h. Case 46, flashburn of eyes, July 25, 1985, not recorded, Ex. C-16K-2(h)/1(h)(8).

The Respondent's medical report states that an employee said he "has a flash in left eye." The Respondent diagnosed a left eye flash. Mr. Preler agreed with Mr. Gumpert's statement that the illness was not recorded due to the clericals failure to "pick(ed) it up." The case was not recorded. Gumpert, T. 1765-1771.

i. Case 47, flashburns of both eyes, July 15, 1985, 1 lwd not recorded, Ex. C-16K-2(i)/1(k)(q).

The Respondent's medical report states that an employee said he was (doing his job) and got "flashed" in both eyes. The Respondent classified the case as "industrial" and diagnosed flashburns in both eyes. The employee was treated with both AK taine drops and AK spore ointment. The employee was "out of work tonight;" as a third shift employee he was out of work on the July 15/July 16 shift. The case was not recorded. Gumpert, T. 1771-1774.

j. Case 47, flashburns of both eyes, January 20, 1986, 1 lwd not recorded, Ex. C-16K-2(j)/1(k)(10).

The Respondent's medical report states that an employee stated he had a "MIG (metal inert gas) flash." The diagnosis noted red and tearing eyes. The employee also had a facial burn. The Respondent noted burns to the

face and eyes. This third shift employee missed the January 20/January 21 shift, Monday night to Tuesday morning. The case was not recorded. Gumpert, T. 1774-1777. The employee had worked the January 19/January 20 shift, Sunday, 11:00 p.m. to Monday morning. See T. 1778.

k. Case 47, flashburn of eye, March 18, 1986, not recorded, Ex. C-16K-2(k)/1(k)(11).

The Respondent's medical report states that an employee had a "flash - with grit in his left eye." The Respondent classified this as an "industrial" matter. Mr. Gumpert told Mr. Preler that "it's a flash burn, it's an illness that's recordable." Mr. Preler did not respond to that but did say that Ms. Romano considered it a first aid case. The case was not recorded. The grit was removed and Neosporin applied. Gumpert, T. 1778-1781.

l. Case 47, flashburns, both eyes, August 14, 1986, not recorded, Ex. C-16K-2(l)/1(k)(12).

The Respondent's records states that an employee was diagnosed as having developed "flash, both eyes." The Respondent classified the case as "industrial" and prescribed AK spore every two hours. The employee worked in Building 60, a production area. Although this case may have involved a lost workday OSHA (Mr. Gumpert) did not cite it as one because the Respondent failed to record the hour of the first visit. However, as an illness it was a recordable matter. It was not recorded. Gumpert, T. 1781-1785.

m. Case 47, flashburns of eye, October 2, 1986, not recorded, Ex. C-16K-2(m)/1(k)(13).

The Respondent's records state a diagnosis of a flashburn of the left eye. The Respondent classified the case as "industrial" and

prescribed Polysporin every three hours for two days. The case was not recorded. Gumpert, T. 1785-1787. As Mr. Gumpert told the judge, in response to his question, "there aren't any really (flashburns that are recorded). As the judge noted, there are two bases for recording this case, "medication more than once and flashburn." The Respondent recorded under neither. In fact, in 1986 the Respondent recorded only four entries respecting either illnesses or medication more than once (they are checked in the same column on the OSHA 200 log). See T. 1787-1791.

n. Case 59, flashburn of eye, April 8, 1986, not recorded, Ex. C-16K-2(n)/1(k)(14).

The Respondent's records state the employee was (doing his job) and his left eye was bothering him. It had bothered him upon awakening also. The Respondent classified the case as "industrial," noted photophobia, and diagnosed a "slight flash, OS "(left eye). AK ointment four times a day was prescribed for one day. There were two bases for recording, the illness and the prescription. The case was not recorded. Gumpert, T. 1791-1794.

Although the prescription is not alleged as a separate basis for recording this item, the Respondent's failure to record illnesses for which prescriptions were issued is relevant to the lack of training facet of Respondent's willful violations of the Act. See T. 1794-1796.

o. Case 60 flashburns of both eyes, June 3, 1985, not recorded, Ex. C-16K-2(o)/1(k)(15).

The Respondent's records state that an employee was diagnosed as having flashburns in both eyes. The Respondent classified the case as

"industrial." The employee said he was "flashed last night." The Respondent prescribed Polysporin for both eyes every 3-4 hours for two days. AK taine drops and AK spore ointment was applied at the dispensary. Mr. Preler said that Ms. Cave would have considered this a first aid case (Ms. Cave would have reviewed the case because it did involve a prescription). The illness was not recorded. Gumpert, T. 1796-1799.

p. Case 106, case 106, flashburn of eye, March 13, 1986, not recorded, Ex. C-16K-2(p)/1(k)(16).

The Respondent's medical report states that an employee said he got a flash in his left eye. The Respondent diagnosed a flashburn and conjunctivitis. A revisit resulted in the same diagnosis. Mr. Preler said the clerical considered it first aid. As Mr. Gumpert explained, this case had no prescription and so it would not have survived the "first-cut" by Ms. Romano. Ms. Cave would have gotten the papers but disregarded them entirely. The case was not recorded. Gumpert, T. 1799-1803.

q. Case 107, flashburn in both eyes, October 20, 1986, 1 rwa not recorded, Ex. C-16K-2(q)/1(k)(17).

The Respondent's medical report states that an employee said he was welding and got a flash. The Respondent classified the case as "industrial" and diagnosed a flashburn in both eyes. Neosporin and AK taine were applied, and the Respondent restricted the employee from working near welding for that day and the next. The restriction affected the employee's regular job activities. The second day counted as the rwa day. Mr. Preler said the clerical in the worker's compensation department considered it a

first-aid case (it did not survive the "first cut", it went into the pile Ms. Cave in Safety disregarded entirely). The case was not recorded. Gumpert, T. 1803-1806.

1. Items 1(1)(1) - 1(1)(5)

1. Miscellaneous Injuries and Illnesses

a. Case 36, conjunctivitis of both eyes, October 22, 1985, 6 rwa, not recorded, Ex. C-16L-2(a)/1(1)(1).

The Respondent's records state that the Respondent examined an employee who worked in Building 17, a production area, and who complained of irritation in both eyes. The Respondent diagnosed conjunctivitis and classified the matter as "industrial." The Respondent prescribed Polysporin every three hours for two days. The employee was restricted from welding, burning, or grinding for one week as of Friday, October 25, 1985. Therefore that day and five workdays the next week totalled six rwa days. The employee was a trainee-welder, but Mr. Preler confirmed that his regular duties did include the restricted activities. The case did not appear in the Respondent's log. Gumpert, T. 1808-1813.

b. Case 48, inhalation of contact glue, October 2, 1986 nausea and weakness, raised blood pressure, not recorded, Ex. C-16L-2(b)/1(1)(2).

The Respondent's medical report states that an employee, who had been working with glue in a closed environment for six hours, was "really high." The employee complained of nausea, weakness, and blurry vision. The Respondent classified the matter as "industrial," obtained elevated blood pressure readings (194/104, 184/104, 186/96) over an hour's time, diagnosed

fume inhalation, and prescribed "rest". The employee's condition constituted an illness and was recordable as an occupational condition. See Ex. C-4, p. 42 and Gumpert at T. 1822. Mr. Gumpert discussed the case with Mr. Preler and told him that the case was recordable unless the Respondent had conducted an investigation disclosing that the matter was not a work-related illness. Mr. Preler said there had been no investigation. The case was not recorded. Gumpert, T. 1822-1823.

Mr. Gumpert's position on the recordable nature of this illness is consistent with the Commission's decisions in General Motors Corp., 1980 OSHD ¶24,743 (RC, 1980) and Amoco Chemicals Corp., 1986 OSHD ¶27,621 (RC, 1986).

c. Case 102, broken tooth, December 11, 1985, extraction, not recorded, Ex. C-16L-2(c)/1(1)(3).

The Respondent's records state that an employee fractured a tooth while eating during a work break. This occurred in Building 488. The employee saw a dentist who extracted the tooth. The case was recordable because it occurred on the employer's premises, see Ex. C-3, p. 67. The case was not recorded. The employer did not investigate the matter and had no evidence that the incident had not occurred at work. Gumpert, T. 1824-1832.

d. Case 101, conjunctivitis of both eyes, June 17, 1986, not recorded, Ex. C-16L-2(d)1(1)(4).

The Respondent's records state that an employee was diagnosed as having conjunctivitis due to overexposure to diesel fumes. The Respondent classified the case as "industrial." Conjunctivitis is an illness and hence

recordable. Neosporin was prescribed for use every two hours. Mr. Preler said the employer had not investigated to determine whether the case was work-related. The Respondent did not record the case in its log. Gumpert, T. 1833-1837.

e. Case 106, acute anxiety, December 5, 1986, lwd not recorded.

The Complainant vacated this item. T. 1807.

The Complainant avers that the Respondent's admissions in its Answer to the Complaint, the Respondent's admissions in discovery, the Respondent's admissions during the investigation, and the trial record establish that each alleged violation did constitute a violation of 29 C.F.R. Part 1904.