United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Office of
Executive Secretary

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SECRETARY OF LABOR, Complainant, v. CATERPILLAR, INC., Respondent, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Authorized Employee Representative.	OSHRC Docket No. 94-0345

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 September 11, 1996. The decision of the Judge will become a final order of the Commission on October 11, 1996 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 October 1, 1996. 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
Occupational Safety and Health
Review Commission
1120 20th St., N.W., Suite 980
Washington, D. C. 20036-3419

Petitioning parties shall also mail a copy to:

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

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. /SKA

Date: September 11, 1996

Ray H. Darling, Jr.
Executive Secretary

96-0824

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. CATERPILLAR, INC., Respondent, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Authorized Employee Representative.	OSHRC DOCKET NO. 94-0345

APPEARANCES:

For the Complainant:
Steven E. Walanka, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois

For the Respondent:
Robert E. Mann, Esq., Franczek, Sullivan, Mann, Crement, Hein and Relias, P.C., Chicago, Illinois

For the Employees:
Jerome Schur, Esq., Eric Mennel, Esq., Katz, Friedman, Schur & Eagle, Chicago, Illinois

Before: Administrative Law Judge: James H. Barkley

AMENDED DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Caterpillar, Inc. (Caterpillar), at all times relevant to this action maintained a place of business at Route 29 North, Mossville, Illinois, where it was engaged in manufacture of heavy equipment. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On January 7, 1994 the Occupational Safety and Health Administration (OSHA) issued to Respondent citations alleging a violation of the 29 CFR 1910.20(e)(1)(i), together with proposed penalties. By filing a timely notice of contest Caterpillar brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 9, 1994, a hearing was held in Peoria, Illinois. At the hearing Complainant moved to amend the citation to conform to the evidence; as a result, an additional violation of §1910.20(e)(1)(ii) was added (Tr. 75-85; this judge's August 1, 1996 Order). A bench decision vacating the citation as amended was issued on the record (Tr. 94-98). On January 26, 1996, the Commission issued a Decision and Order finding that Complainant had made a *prima facie* showing of violations of §1910.20(e)(1)(i) and (ii). The Commission remanded the case to this judge with instructions to "reopen the record to give Caterpillar the opportunity to present additional evidence solely for the purpose of rebutting the Secretary's [showing]." In lieu of a second hearing, Caterpillar requested, and was permitted the opportunity to depose and submit the deposition of Jay Alexander, the industrial hygiene supervisor for Caterpillar's Mossville facility. The parties have briefed the issues and this matter is ready for disposition.

Alleged Violation of 1910.20(e)(1)(i) and (ii)

Section 1910.20(e)(1)(i) provides:

> Whenever an employee or designated representative requests access to a record, the employer shall assure that access is provided in a reasonable time, place, and manner. If the employer cannot reasonably provide access to the record within fifteen (15) working days, the employer shall within the fifteen (15) working days apprise the employee or designated representative requesting the record of the reason for the delay and the earliest date when the record can be made available.

Section 1910.20(e)(1)(ii) provides:

> *Access to records* -- (1) *General* . . . (ii) The employer may require of the requester only such information as should be readily known to the requester and which may be necessary to locate or identify the records being requested (e.g. dates and locations where the employee worked during the time period in question).

Facts

It is undisputed that in August 1993, medical records requested by Caterpillar employees were not provided within the required 15 days based on those employees' failure to use Caterpillar's record request form. Caterpillar's request form asked the requesting party to state the purpose of his or her request, and required the requester's signature below a non-admission clause that stated:

> I also understand that the granting of access to records is not to be construed as being an agreement, or admission, express or implied, that exposure to any toxic substance or harmful physical agent has in fact or probably occurred, or that such exposures as may have occurred were at toxic or harmful concentrations or durations. (Exh. C-2).

The Commission's remand order states that requiring the employee to state the purpose for his or her request violates §1910.20(e)(1)(ii) unless Caterpillar can show that it needed to know the purpose in order to locate or identify the records. At the November 1994 hearing, Jay Alexander stated that an employee requesting his medical or exposure records could obtain them without completing the purpose section of the request form (Tr. 10). Alexander admitted that no one told the employees that the section was optional, and that they did, in fact, fill the section out (Tr. 10-11).

Alexander stated that since 1987 all of an employee's medical and exposure records were maintained in the employee's medical folder (Tr. 36). To locate and identify the medical folder the employee's name, badge number, and social security number are required (Alexander's Deposition, p. 21). Alexander maintained that Caterpillar used the purpose section to help them identify whether medical or exposure records were being requested. According to Alexander, prior to 1987, exposure records were kept separately at its different facilities; employees who had worked at more than one facility might have exposure records in more than one location (Tr. 13-17). Alexander admitted, however, that the employee's job assignments were on Caterpillar's data base, and that all of an employee's records could be located without a statement of purpose (Tr. 15, 17-18).

Discussion

The Commission clearly states that Caterpillar may require of its employees only information which is necessary to locate or identify requested records. The evidence establishes that Caterpillar "required" employees to provide the purpose for their requests in that Caterpillar would not provide records to employees using request forms other than those provided by Caterpillar, and did not inform requesting employees that completion of the purpose section on that form was optional. Caterpillar's form thus required information which was not necessary for locating or identifying records. Alexander admitted that an employees records could be located with only his or her name, badge and social security number. Under the cited standard, Caterpillar's may legitimately require an employee to identify whether he or she is requesting medical or exposure records; however, asking the employee's purpose in requesting his or her records may or may not elicit that information. Because the purpose section was not tailored to elicit information necessary to locate or identify the employees' records its inclusion on Caterpillar's request

form violated §1910.20(e)(1)(ii)[1]. Because use of the Caterpillar form was not necessary to locate the requested records, Caterpillar was not justified in delaying its provision of the requested records based on the employees' failure to use Caterpillar's form. Caterpillar's failure to provide the records within the statutorily allowed 15 days was, therefore, not reasonable, and the violation of §1910.20(e)(1)(i) is also established.

Penalty

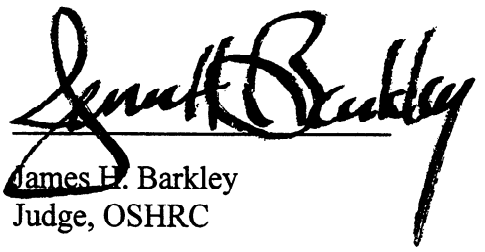
The citation is classified as "other than serious," yet Complainant has proposed a penalty of $7,000.00, the statutory maximum for a "serious" violation. The Employee Representative further requests that an additional penalty be assessed based on the amendment of the citation to allege a second violation.

The maximum penalty should be reserved for only those violations where the gravity is extremely high and the employer is not entitled to consideration for size, history or good faith. Caterpillar is a large employer; however, the gravity of the violation is extremely low. The case arose in the context of a labor-management conflict (Tr. 41-43). The requesting employees did receive their records without stating a purpose for their requests (Tr. 19-25, 68-70; Alexander's Deposition, p. 17). Moreover, Caterpillar has demonstrated its good faith in this matter, revising its request form to eliminate the objectionable section, substituting instead a check list for the employee to indicate whether medical or exposure records are being requested (Alexander's Deposition, p. 28).

Taking into consideration the relevant factors, I find that a penalty of $500.00 is appropriate.

ORDER

1. Other than serious citation 1, alleging violations of §1910.20(e)(1)(i) and (ii) is AFFIRMED and a penalty of $500.00 is ASSESSED.



James H. Barkley
Judge, OSHRC

Dated: August 30, 1996

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[1] The parties failed to discuss the inclusion of the non-admissions clause in the request form in their briefs. That issue is deemed abandoned.