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SECRETARY OF LABOR, Complainant, v. TRINITY INDUSTRIES, INC., Respondent.	OSHRC Docket No. 88-1545

DECISION

BEFORE: WEISBERG, Chairman, FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

This matter is before the Commission on remand from the United States Circuit Court of Appeals for the Eleventh Circuit for the sole purpose of assessing an appropriate penalty.

On April 22, 1992, the Commission issued its decision affirming two items of a citation issued by the Secretary to Trinity Industries, Inc. (Trinity). Item 1 of the citation alleged noncompliance with the noise standards at 29 C.F.R. § 1910.95(g)(5)(i) and (g)(6),[1]

[1]The standard provides:

> **§ 1910.95 Occupational noise exposure.**
> . . . .
> (g) *Audiometric testing program.*
> . . . .
> (5) *Baseline audiogram.* (i) Within 6 months of an employee's first exposure at or above the action level, the employer shall establish a valid baseline audiogram against which subsequent audiograms can be compared.
> . . . .

(continued...)

while the other item alleged noncompliance with 29 C.F.R. § 1910.95(d)(1).[2] Although the Secretary characterized both items as willful, the Commission found the evidence insufficient to justify the characterization and affirmed both items as nonwillful. 15 BNA OSHC 1579, 1992 CCH OSHD ¶ 29,662 (No. 88-1545, 1992).

On appeal, the court disagreed with the Commission's characterization of the violation and found them to be willful. The matter was remanded to the Commission to determine an appropriate penalty.

The Secretary proposed a $3000 penalty for each of the two violations. When determining an appropriate penalty, the Commission must consider the size of the employer, its safety history and good faith, and the gravity of the violations. Section 17(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 666(j).[3] As we found in our

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[1](...continued)

(6) *Annual audiogram.* At least annually after obtaining the baseline audiogram, the employer shall obtain a new audiogram for each employee exposed at or above an 8-hour time-weighted average of 85 decibels.

[2]The standard provides:

§ 1910.95 Occupational noise exposure.

. . . .

(d) *Monitoring.* (1) When information indicates that any employee's exposure may equal or exceed an 8-hour time-weighted average of 85 decibels, the employer shall develop and implement a monitoring program.

(i) The sampling strategy shall be designed to identify employees for inclusion in the hearing conservation program and to enable the proper selection of hearing protectors.

(ii) Where circumstances such as high worker mobility, significant variations in sound level, or a significant component of impulse noise make area monitoring generally inappropriate, the employer shall use representative personal sampling to comply with the monitoring requirements of this paragraph unless the employer can show that area sampling produces equivalent results.

[3] That section provides:

The Commission shall have the authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty

(continued...)

previous decision, Trinity is a large company with a substantial history of previous violations. Moreover, Trinity willfully instituted its own noncomplaint hearing protection program in lieu of that mandated by the Secretary.

Turning to the gravity of violations, we find that, despite the extensive nature of the hearing protection it provided, the failure to conduct audiometric testing prevented Trinity from verifying that its program was operating as designed. It also prevented Trinity from learning whether the hearing protectors it provided may have caused some employee hearing loss. Similarly, the failure to conduct the required noise monitoring prevented Trinity from obtaining the information necessary to detect new noise sources at its worksite. Overall, we find the gravity to be low.[4] Therefore, we find $3000[5] to be an appropriate penalty for each item.

Accordingly, a penalty of $3000 each is assessed for items 1 and 2 of willful citation no. 1.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

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[3](...continued)
with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

[4]Chairman Weisberg would find the gravity to be moderate.

[5]At the time this case arose, penalties were limited by statute to $10,000 for willful violations and $1000 for serious or nonserious violations.

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 88-1545
TRINITY INDUSTRIES, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on December 21, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

December 21, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 88-1545

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SECRETARY OF LABOR, Complainant, v. TRINITY INDUSTRIES, INC., Respondent.	OSHRC Docket Nos. 88-1545 and 88-1547

DECISION

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

BY THE COMMISSION:

These consolidated cases arise from an inspection of a facility operated by Trinity Industries in Jacksonville, Florida, where it manufactures Liquid Propane Gas (LPG) gas cylinders. As a result of that inspection, several citations were issued alleging violations of OSHA standards concerning both employee safety and health. Trinity contested the health citations and safety citations separately, and they were assigned different docket numbers. Each docket number was heard separately by Administrative Law Judge James D. Burroughs, with the stipulation that, for purposes of economy, the evidence adduced in one case could be used in the other. After the judge issued his decision, the cases were consolidated for review before the Commission. On review, the parties appeared before the Commission in oral argument on November 13, 1991.

The primary issues on review are whether the judge erred in (1) refusing to dismiss the citations when the Secretary refused to comply with the judge's discovery orders, (2) affirming items alleging a failure to comply with the audiometric testing and monitoring provisions of the noise standard at 29 C.F.R. § 1910.95, (3) affirming an item alleging a

failure to conduct a radiation survey, and (4) affirming several items alleging various machine guarding violations.

I.

The Warrant

The inspection involved in these cases was based on a warrant issued by a United States Magistrate on May 2, 1983. The magistrate's finding of probable cause for the warrant was based on the Secretary's administrative inspection plan for scheduled programmed inspections.

After obtaining the warrant, the Secretary sought to inspect the Jacksonville facility on May 4 and 5, 1983, but was refused entry by Trinity. On May 10, 1983, the Secretary applied to the United States District Court for the Middle District of Florida, Jacksonville Division, for an Adjudication in Civil Contempt. In its answer to the charge, Trinity contended that the warrant was invalid because the attempted inspection was part of a continuous program of repeated, "vexatious" inspections which constituted harassment. Trinity also counterclaimed for a declaratory judgment that the inspections were unreasonable and discriminatory, and that the warrant and the Secretary's inspection procedures were unconstitutional. In July 1987, the district court issued its order dismissing Trinity's counterclaim and holding it in civil contempt.

The Secretary again tried to inspect the Jacksonville facility and was refused entry. The Secretary then initiated civil contempt proceedings in the district court. Holding Trinity in contempt, the court ordered it to permit the inspection and imposed a $10,000 per day fine for each day Trinity refused to do so. Trinity delayed the inspection for one day, incurred a $10,000 fine and appealed the district court's order to the United States Court of Appeals for the Eleventh Circuit.

On appeal the United States Court of Appeals for the Eleventh Circuit upheld the district court's order holding Trinity in contempt. *In re Trinity Indus.*, 876 F.2d 1485 (11th Cir. 1989). The court held that: (1) the inspection plan was based on "neutral" criteria, as required by *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); and (2) the plan is not discriminatory just because a company in the "worst" industry ranking could escape inspec-

tion during its designated cycle if it is located in a county the name of which begins with a letter near the end of the alphabet. The court also held that the Secretary was not required to append to its warrant application documents to demonstrate that the process for selecting companies for inspection was fair and nondiscriminatory. It was sufficient, the court stated, for the application to contain a sworn affidavit by an OSHA supervisor declaring that the company was selected pursuant to a programmed inspection and detailing how the plans were executed, including how the relevant establishment lists and inspection registers were developed and how the company was chosen for inspection. The court stated that such information was sufficient for the magistrate to conclude that Trinity was selected by application of the plan's specific, neutral criteria.

While the aforementioned warrant enforcement proceeding was winding its way through the federal courts, the citations resulting from the inspections were being litigated before Judge Burroughs. During the proceeding before Judge Burroughs, Trinity did not challenge the warrant on Fourth Amendment grounds. Rather, it argued that the inspection plan, which was used to justify issuance of the warrant, discriminated against Trinity and violated its due process rights guaranteed by the Fifth Amendment. Therefore, Trinity argued, all evidence obtained as a result of the warrant should be suppressed.

In pursuit of this argument, Trinity sought a post-search evidentiary hearing on the design and operation of the inspection plan. At that point in the proceeding, the judge determined that he could rule on whether the plan is discriminatory and, on four separate occasions,[1] directed the Secretary to respond to five requests for admissions relating to the plan. The Secretary refused to comply[2] and, during the hearing, instructed her witness not

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[1] The judge sent orders dated October 14, 1988, December 7, 1988, and January 23, 1989, and he issued an order from the bench on January 24, 1989.

[2] The Secretary justified its refusal to comply primarily on the grounds that:

(1) The Constitutional propriety of the search is governed by the Fourth, not Fifth Amendment. Where the Fourth Amendment provides a right that governs the protected interest, due process rights under the due process clause do not afford additional protections;

(2) Under *Franks v. Delaware*, 438 U.S. 154 (1978), to mandate an evidentiary hearing when challenging a warrant under the Fourth Amendment, the challenger's attack must be more than conclusory

(continued...)

to answer questions related to the request for admissions. Despite the Secretary's refusal to comply with the judge's order, the judge neither dismissed the case nor imposed sanctions. Rather, the judge made it clear that he was conducting the hearing to comply with the Commission's preference that judges make a complete record because of the time and expense of reopening proceedings should the dismissal later be reversed. However, after the hearing, he warned the Secretary that her refusal to comply with his orders would probably result in dismissal.

In a lengthy order, dated June 16, 1989, Judge Burroughs denied Trinity's motion to dismiss the case. In his decision, the judge likewise denied Trinity's renewed motion. The judge reversed his earlier determination and held that the Commission has the authority to look behind a warrant only when the warrant is honored and is challenged in Commission proceedings. He concluded that, because Trinity chose to refuse to honor the warrant and to challenge the warrant in a contempt proceeding in district court, jurisdiction over the matter rested with the federal courts; it would be inappropriate for the Commission to intervene. Moreover, the judge noted, the ultimate review of the warrant issue rested with the Eleventh Circuit, regardless of the forum in which the challenge took place. Therefore, the judge concluded, Trinity would not be harmed by the Commission's refusal to entertain the issue. The judge also found that the Secretary's refusals to comply with his discovery orders were based on legal principles that have found support in the courts and were not the result of a callous disregard of either the constitutional rights of Trinity or the orders of the judge.

On review, Trinity does not challenge the validity of the warrant. Rather, Trinity argues that the judge erred by not imposing sanctions, including dismissal, on the Secretary for her refusal to comply with his discovery orders. Trinity claims that it was prejudiced by the Secretary's refusal to comply.

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[2](...continued)
and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. Trinity failed to meet the *Franks* test and its attempt to obtain an evidentiary hearing constituted a fishing expedition.

As Trinity correctly notes, the Secretary's failure to comply with Commission orders may result in dismissal when the employer is prejudiced or when the Secretary's conduct is contumacious in character. *Samsonite Corp.*, 10 BNA OSHC 1583, 1587, 1982 CCH OSHD ¶ 26,054, p. 32,736 (No. 79-5649, 1982); *Duquesne Light Co.*, 8 BNA OSHC 1218, 1222, 1980 CCH OSHD ¶ 24,384, p. 29,718 (No. 78-5034 *et al*, 1980); *see also Pittsburgh Forging Co.*, 10 BNA OSHC 1512, 1513-1514, 1982 CCH OSHD ¶ 25,974, p. 32,569 (No. 78-1361, 1982).However, under Commission rule of procedure 52(e),[3] 29 C.F.R. § 2200.52(e), a judge's authority to impose sanctions on any party for its refusal to comply with a discovery order is discretionary. *Pittsburgh Forgings*, 10 BNA OSHC at 1513, 1982 CCH OSHD at p. 32,569. Accordingly, the standard of review of a judge's actions in enforcing his discovery orders is one of "abuse of discretion." *Sealtite Corp.*, 15 BNA OSHC 1130, 1134, 1991 CCH OSHD ¶ 29,398, p. 39,582 (No. 88-1431, 1991); *Samsonite Corp.*, 10 BNA OSHC at 1587, 1982 CCH OSHD at p. 32,737; *Pittsburgh Forgings*, 10 BNA OSHC at 1514, 1982 CCH OSHD at p. 32,569. We find that, under the circumstances of this case, Judge Burroughs did not abuse his discretion in determining that the case should not be dismissed.

First, we agree with Judge Burroughs that Trinity was not prejudiced by the Secretary's refusal to comply with the judge's discovery orders. Generally, the courts have recognized two alternative forums in which employers can challenge warrants. If the warrant is honored and citations issued, the employer may seek to have the Commission suppress the evidence obtained in the inspection by establishing that the warrant was issued without probable cause. This requires that a factual record be made. The courts have recognized

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[3] 29 C.F.R. § 2200.52(e) states in pertinent part:

> If a Judge enters an order compelling discovery and there is a failure to comply with that order, the Judge may make such orders with regard to the failure as are just. . . . The orders may include any sanction stated in Fed.R.Civ.P. 37, including the following:
>
> . . . .
>
> (4) An order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

that the Commission is the proper forum for hearing such a challenge. *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1067 (11th Cir. 1982); *Babcock & Wilcox Co. v. Marshall*, 610 F.2d 1128 (3d Cir. 1979). A second option is for the employer to refuse to honor the warrant and challenge its validity in a contempt proceeding before an Article III court. *Sarasota*, 693 F.2d at 1066, *Babcock & Wilcox Co.*, 610 F.2d at 1136.

Trinity attempted to use both forums. After being held in contempt for refusing to honor the warrant, Trinity relented and allowed the search. This allowed it to pursue its challenge of the warrant in its appeal of the contempt charge at the same time as it challenged the validity of the warrant before the Commission. However, when the validity of a warrant is being challenged in an Article III court, the Commission cannot provide a forum for a collateral attack.[4] Rather, the Commission must defer to the decision of the circuit court of appeals that ultimately will hear any appeal from a Commission order contrary to the decision of that court. Regardless of whether the challenge is heard before the Commission or a federal district court, the ultimate decision (assuming the case is not appealed to the Supreme Court) on the validity of the warrant will be made by the appropriate federal circuit court of appeals. *See Sarasota*, 693 F.2d at 1066.

While the federal court proceedings are pending, the Commission must process a case such as this one in accordance with its regular procedures and, consistent with the doctrine of res judicata, must follow the ultimate determination of the federal courts regarding the validity of the warrant.[5] Therefore, Judge Burroughs' decision to proceed with the hearing was the correct course of action. Had the Eleventh Circuit ultimately found the warrant invalid, the evidence could have been excluded. On the other hand, with the warrant having been held valid, the Commission has before it a full record upon which to base a decision. Because Trinity was able to litigate the validity of the warrant in the federal courts, it was

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[4] The Commission recognizes that under section 11(a) of the Act, 29 U.S.C. § 660(a), the appellate courts may not entertain any issue not raised before the Commission. Therefore, while the Commission will not entertain a collateral attack on a challenge to a warrant pending in the federal courts, proper practice would require the party to raise the issue before the Commission for the record.

[5] We note that, had Commission proceedings concluded before the federal courts reached a final decision on the validity of the warrant, Trinity could have appealed this decision to the circuit court hearing the challenge to the warrant.

not prejudiced by its inability to make a factual record before the Commission due to the Secretary's failure to obey the judge's discovery orders. *See Id.* at 1067.

We also agree with the judge's conclusion that the Secretary's actions did not amount to contumacious conduct. Where a party's reason for refusing to comply with a discovery order has a substantial legal basis and its conduct does not indicate disrespect towards the Commission or the issuing judge, its failure to comply with a discovery order is not an indication of bad faith or contumacious conduct. *See Newport News Shipbuilding & Drydock Co.*, 9 BNA OSHC 1085, 1090, 1980 CCH OSHC ¶ 25,003, p. 30,891 (No. 76-171, 1980).[6] The Secretary based her refusal to comply on her belief that because the matter was before the federal courts, the Commission was not a proper forum for conducting a collateral attack on the warrant. As noted, the Secretary's position was vindicated. Under these circumstances, we find no error in Judge Burroughs' holding that the Secretary's refusal to comply did not amount to contumacious conduct.

Finally, we note that counterbalancing the Commission's obligation to enforce its orders is the principle that the public interest requires that cases be decided on their merits. *Pittsburgh Forgings*, 10 BNA OSHC at 1514, 1982 CCH OSHD at p. 32,569; *Duquesne Light*, 8 BNA OSHC at 1222, 1980 CCH OSHD at p. 29,719. Here, Judge Burroughs recognized the impropriety of conducting an evidentiary hearing on the validity of the warrant while the matter was pending before the United States Court of Appeals.[7] The record also strongly supports his findings that Trinity was not prejudiced by the Secretary's refusal to comply with his discovery orders and that the Secretary's refusal did not amount to contumacious

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[6] We would stress, however, that the Commission has a strong interest in preserving the integrity of its orders as well as in deterring future misconduct. *See Pittsburgh Forging*, 10 BNA OSHC at 1514, 1982 CCH OSHD at p. 32,569. Therefore, a party who fails to comply with a Commission order, even when based on a sincere belief that its position is legally justified, must be prepared to accept the consequences of noncompliance if its arguments do not ultimately prevail. To put it directly, any party who fails to comply with a Commission order, does so at its peril. *Cf. N.L. Indus.*, 11 BNA OSHC 2156, 2167 n.15, 1984 CCH OSHD ¶ 26,997, p. 34,734 n.15 (No. 78-5204, 1984)(Cleary, dissenting).

[7] When ruling on a discovery request, one of the factors the judge should consider is the need for the information sought. *N.L Indus.*, 11 BNA OSHC 2156, 2159, 1984 CCH OSHD ¶ 26,997, p. 34,728 (No. 78-5204, 1984). Having decided that the Commission should not hear the challenge to the warrant, the judge properly concluded that the information sought by Trinity was not necessary.

conduct. We therefore conclude that Judge Burroughs properly exercised his discretion to refuse to dismiss the case and to decide the matter on the merits.

II.

DOCKET NO. 88-1545

A. Background

Docket No. 88-1545 involves two citations alleging violations of OSHA health standards. Citation no. 1 alleges willful violations of several noise exposure standards promulgated at 29 C.F.R. § 1910.95. Item 1 of citation no. 2 alleges an other-than-serious violation of an ionizing radiation standard promulgated at 29 C.F.R. § 1910.96. For reasons that follow, the alleged violations of the noise standard, set forth in citation no. 1, are affirmed, but not as willful, and item 1 of citation no. 2 is vacated.

B. Audiometric Testing

1. The Alleged Violation

During the inspection, noise readings taken by the compliance officer established that two employees were exposed to noise levels in excess of an 8-hour time-weighted average (TWA) of 85 dBA. The compliance officer also learned that none of the employees were given annual audiograms.

The primary issue to be decided by the Commission, and the focus of the oral argument heard before it, is whether Trinity's hearing protection program was sufficient to relieve it of its obligation to comply with the audiometric testing provisions of the hearing protection standards promulgated at 29 C.F.R. § 1910.95(g)[8].

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[8] The standard provides:

> **§ 1910.95 Occupational noise exposure.**
>
> . . . .
>
> (g) *Audiometric testing program.*
>
> . . . .
>
> (5) *Baseline audiogram.* (i) Within 6 months of an employee's first exposure at or above the action level, the employer shall establish a valid baseline audiogram against which subsequent audiograms can be compared.

(continued...)

Jerry Riddles, Trinity's Corporate Environmental and Safety Director, conducted noise monitoring in 1976. A copy of the results of the monitoring was sent to OSHA, but later it was apparently discarded because of its age. As a result of that monitoring, certain engineering controls were implemented by Trinity. In 1982, Riddles conducted a spot test of noise levels in the plant using dosimeters and sound level meters. He testified that the test revealed peak noise levels exceeding 85 dBA. Riddles considered the results to be representative of noise levels in the plant. Because of the extensive 1976 survey, Riddles knew the type of noise involved and the type of hearing protection it necessitated.

As a result of the 1982 spot tests, Riddles established a hearing protection program for Trinity. Under the program, all employees who could possibly be exposed to a TWA of 82 dBA for 8 hours were required to wear approved hearing protection.[9] The protection ranged from foam plugs to muffs. Beginning in 1986-87, baseline audiograms were required for all new employees. Employees hired earlier were not given such audiograms. Neither did Trinity provide annual audiograms for any of its employees. Riddles explained that the purpose of the annual audiograms required by OSHA is to identify those employees who have a hearing attenuation of 10 dBA so that they can be placed in a hearing protection program. (See sections 1910.95(g)(10)(1) & (i)(B)). Riddles testified that because every employee at Trinity who could be exposed to 82 dBA for 8 hours went into the hearing protection program, an annual audiogram was not necessary.

Although Riddles considered Trinity's program to be superior to the OSHA program, he admitted that his program would not detect possible employee hearing loss. He testified, however, that, in his opinion, under OSHA standards, when an annual audiogram reveals

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[8](...continued)

. . . .

(6) *Annual audiogram.* At least annually after obtaining the baseline audiogram, the employer shall obtain a new audiogram for each employee exposed at or above an 8-hour time-weighted average of 85 decibels.

[9] The Secretary does not dispute that the hearing protection Trinity's employees were required to wear was appropriate for the noise to which they were exposed.

a threshold shift in hearing capacity, if the employee is already required to wear hearing protection, no further action is required by the employer.

Item 2 of the willful citation alleged that Trinity violated section 1910.95(g)(6) by not providing annual audiograms to employees found to be exposed to noise levels above the 85 decibel 8-hour TWA. At the hearing, the item was amended to also allege a violation of section 1910.95(g)(5)(i) for a failure to provide baseline audiograms within six months of an employee's first exposure to noise at or above the action level (*i.e.*, an 8-hour TWA of 85 decibels). The Secretary proposed a $3000 penalty for each of the two noise items.

Judge Burroughs affirmed the items as nonserious and assessed no penalty. He held that Trinity's hearing protection program did not excuse noncompliance with otherwise applicable hearing conservation standards. Quoting from *Hackney, Inc. v. Secretary of Labor*, 895 F.2d 1298 (10th Cir. 1990), he held that without implementation of the hearing conservation standards, the employer could not tell if its own program was effective.

Trinity points out that, by itself, audiometric testing does not alleviate or prevent hearing loss. Rather, it asserts that the only purpose of audiometric testing is to enable the employer to determine who should wear hearing protectors and who needs retraining and refitting. Under its program, Trinity argues, these purposes are fully met and exceeded by requiring all employees to wear hearing protectors that provide the maximum possible noise attenuation, and to undergo annual training emphasizing the need for such protectors and their proper use. Trinity concedes that one of the purposes of testing is to notify employees of hearing losses but it argues that because the hearing protectors reduced noise levels entering employees' ears to 70 dBA or less, there was, at most, a remote chance of employees ever suffering a hearing loss that would require employee notification.

The Secretary argues that without audiometric testing, Trinity has no way of verifying the propriety and efficacy of its hearing protection program. Without testing, Trinity can only assume that its employees have been properly fitted with personal hearing protection, that its training and enforcement programs are adequate, and that its employees have suffered no hearing loss. The Secretary further argues that, as Trinity does not know how well its program is working, it must rely solely on the reported attenuation capabilities of its hearing protection equipment as measured under laboratory conditions.

We agree with the Secretary. The record suggests that Trinity has instituted a hearing protection program that, for the most part, offers its employees hearing protection that is supposed to be equal or superior to that extended by the OSHA standards.[10] Nonetheless, Trinity's contention that the strictness of its program should exempt it from the applicability of OSHA's audiometric testing requirements is fatally flawed. Trinity has provided no basis for not complying with the terms of the standard. Once the threshold noise levels are reached, the audiometric testing standards are mandatory. It is well-settled that an employer must comply with applicable OSHA standards even if it has a good faith belief that its own policy is wiser. *Hackney, Inc.*, 895 F.2d at 1300; *RSR Corp. v. Brock*, 764 F.2d 355, 363 (5th Cir. 1985). Even if the Commission were persuaded by Trinity's argument, the Commission cannot decline to enforce a standard because it believes it imposes an unnecessary requirement. *Pace Constr. Co.*, 13 BNA OSHC 2161, 2162, 1989 CCH OSHD ¶ 28,522, p. 37,851 (No. 85-1362, 1989).

Moreover, adopting Trinity's position would be tantamount to creating an exception not found in the standard. Before creating such an exception, the Commission requires persuasive evidence that such an exception was mandated by the standard's overall purpose and was consistent with the standard's intent. *Schuylkill Metals Corp.*, 13 BNA OSHC 2174, 2178, 1989 CCH OSHD ¶ 28,520, p. 37,847 (No. 81-0856, 1989). Nothing in the record indicates that an exemption is either mandated by the standard's overall purpose or would be consistent with the standard's overall intent.

One of the main purposes for requiring baseline and annual audiometric testing is to enable the employer to determine if any employee is suffering a hearing loss. Even when employees are provided with quality hearing protection, the testing can reveal if any employee is wearing the protection improperly or whether the protection is defective. *Hackney*, 895 F.2d at 1301. Furthermore, the Secretary has recognized that certain employees could suffer from a pathological condition that could actually result in hearing

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[10] At oral argument, the Secretary conceded that, had Trinity instituted an audiometric testing program, its hearing conservation program would have fully satisfied OSHA requirements.

loss being caused by the wearing of noise protection. *See* section 1910.95(g)(8)(ii)(C).[11] Trinity's hearing conservation program provides no method of testing for such a circumstance.

Trinity argues that, at most, the audiometric testing items should be deemed *de minimis* because any violation had no appreciable effect on employee safety or health. Trinity argues that its program complied with the clear purpose of the standard, which is to prevent exposure to high noise levels and to protect against hearing loss. Trinity contends that the only difference between its program and the measures required by the standard is the notification to employees that have suffered a hearing loss. Trinity contends that because of the quality of the hearing protection used at its plant, noise levels entering employee ears do not exceed 70 dBA, which is below the level that can cause hearing loss. Trinity therefore argues that the likelihood of any hearing loss is remote and that the violations are properly classified as *de minimis*.

We find Trinity's arguments to be without merit. The Commission generally will find a violation to be *de minimis* when the infraction has no more than a negligible relationship to employee safety or health. *See Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1118, 1987 CCH OSHD ¶ 27,829, p. 36,429 (No. 84-696, 1987). Under the test, the record fully supports the judge's holdings in both cases that the violations were not *de minimis*. Trinity's hearing protection program falls short of the standard's requirements in several respects, all of which could have an impact on employee safety and health.

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[11] The standard provides:

> **§ 1910.95 Occupational noise exposure.**
> . . . .
> (g) *Audiometric testing program.*
> . . . .
> (8) *Follow-up procedures.*
> . . . .
> (ii) Unless a physician determines that the standard threshold shift is not work related or aggravated by occupational noise exposure, the employer shall ensure that the following steps are taken when a standard threshold shift occurs:
> . . . .
> (C) The employee shall be referred for a clinical audiological evaluation or an otological examination, as appropriate, if additional testing is necessary or if the employer suspects that a medical pathology of the ear is caused or aggravated by the wearing of hearing protectors.

First, Trinity's policy of requiring all employees to wear hearing protection lacks a means of determining whether the employees were properly wearing their hearing protection or whether the equipment was effective. Trinity's failure to conduct audiometric testing also deprives the employer and OSHA of information necessary to determine whether an employee's hearing remains undamaged by workplace noise. Finally, and perhaps of greatest importance, no matter how effective Trinity's program may be in protecting employee hearing under normal circumstances, the failure to conduct audiometric testing left Trinity with no means of detecting the possible pathological condition, discussed above, where the required hearing protection was actually causing an employee's hearing loss.

2. Characterization of the Violation

A violation is willful if committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256, 1987 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987); *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063, 1984 CCH OSHD ¶ 27,101, p. 34,948 (No. 79-3831, 1984). A willful violation is differentiated from a nonwillful violation by a heightened awareness that can be considered a conscious disregard or plain indifference to the standard. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated); *Williams*, 13 BNA OSHC at 1256-57, 1987 CCH OSHD at p. 36,589. There must be evidence that an employer knew of an applicable standard prohibiting the conduct or condition and consciously disregarded the standard. *Williams*, 13 BNA OSHC at 1257, 1987 CCH OSHD at p. 36,589. However, a violation is not willful if the employer had a good faith belief that it was not in violation. The test of good faith for these purposes is an objective one -- whether the employer's belief concerning a factual matter, or concerning the interpretation of a rule, was reasonable under the circumstances. *General Motors*, 14 BNA at 2068, 1991 CCH OSHD at p. 39,168.

The Secretary argues that the violations of the audiometric testing standards were willful. She points out that Trinity admitted that it was aware of the OSHA noise standards at the time of the inspections, but argues that its decision to ignore the requirements of the

standard was not justified by a good-faith belief that it was providing protection superior to that of the standard. The Secretary contends that an employer does not have the right to substitute its judgment for the provisions of the standard.

Trinity argues that it believed its own program was superior to that mandated by the standard. It argues that its conclusion was based on its belief that the purpose of the audiometric testing requirement was to determine which employees should be required to wear hearing protectors. Since all of its employees wore top-of-the-line protectors, Trinity claims that it considered audiometric testing to be a mere redundancy. The Secretary counters that because the Secretary had issued a citation to another Trinity facility prior to the inspection here, Trinity knew that its program was not acceptable to the Secretary. However, that citation was in litigation at the time of this inspection, with Trinity arguing, as it has here, that its program rendered audiometric testing unnecessary.

Judge Burroughs did not characterize the noise violations as willful. He held that, while there was an obvious difference of opinion as to how to comply with the standards, Trinity did not ignore the safety of its employees. Judge Burroughs found that, although Trinity knowingly chose to proceed at variance with the standard, there was no evidence to dispute Trinity's assertion that it proceeded on the belief that its hearing conservation program exceeded the requirements of the standard. Thus, he concluded that "Trinity did not disregard employee safety".

Considering the record as a whole, we agree with Judge Burroughs' conclusion that the evidence fails to establish that Trinity's failure to institute a proper audiometric testing program rose to the level of willfulness. Although Trinity knew that its hearing protection program did not comply literally with the Secretary's standards, there is nothing in the record to indicate that the failure to institute audiometric testing was the result of either a conscious disregard or plain indifference to the hearing protection standards. To the contrary, Trinity had a good-faith, though erroneous, belief that the only purpose of audiometric testing was to determine which employees had suffered a loss of hearing severe enough to require hearing protection. Because its program required hearing protection before any loss occurred, Trinity believed that its program provided protection superior to that required by the Secretary, thereby rendering audiometric testing redundant and, therefore, unnecessary.

While citations issued to another Trinity facility put the company on notice that the Secretary did not share its interpretation, the matter was in litigation. We cannot base a finding of willfulness on the mere fact that Trinity did not abandon its good-faith interpretation of a standard while the validity of that interpretation was being litigated.[12] *See General Motors*, 14 BNA OSHC at 2069, 1991 CCH OSHD at p. 39,169.

Moreover, we must also consider that, even though Trinity failed to comply with the audiometric testing requirements of the hearing protection standards, the interests of the employees have been largely protected. *Cf. RSR Corp. v. Brock*, 764 F.2d at 363 (whether employer's alternative to literal compliance protected employee interests considered a factor when determining if violation was willful). While the evidence establishes that the lack of audiometric testing *could* have resulted in undetected hearing loss, there is no evidence of any such loss in this record. The evidence also shows that Trinity's program provided employees with protective equipment for the noise they encountered on the job. Therefore, we find that Trinity's failure to institute an audiometric testing program was not willful.

The Secretary does not allege, nor is there evidence to support a conclusion, that there was a substantial probability that the failure to institute audiometric protection could have resulted in death or serious physical harm. Accordingly, the violation is affirmed as other-than-serious.

3. Penalty

The judge assessed no penalty for the violations based on the low gravity of the violations. We find, however, that a penalty is appropriate. Despite the extensive nature of its hearing protection program, the failure to conduct audiometric testing prevented Trinity from verifying that its program was operating as designed. It also prevented Trinity from learning whether hearing protectors were actually causing some employee hearing loss.

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[12] We note that Trinity's failure to implement audiometric testing did not grow out of a belief that the audiometric testing standards were invalid. Had this been the case, its failure to comply during litigation of the matter might well have risen to the level of willfulness. *See RSR Corp. v. Brock*, 764 F.2d 355, 363 (5th Cir. 1985)

Moreover, Trinity is a large corporation with a history of previous OSHA violations. Considering these factors, we find a penalty of $500 to be appropriate.

C. Monitoring

1. The Alleged Violation

During the OSHA inspection, Trinity failed to provide representative monitoring or survey information when requested by the compliance officer. Trinity also failed to provide information as to which employees were exposed to various levels of noise or any information regarding evaluation of feasible noise control methods.

As a result, the Secretary, in item 1 of the willful citation, alleged that Trinity violated 29 C.F.R. § 1910.95(d)(1)[13] by failing to develop and implement a monitoring program for employees found to be exposed to noise levels exceeding an 8-hour TWA of 85 decibels.

Although the compliance officer was told about the extensive 1976 noise monitoring, he found the information provided by Trinity to be insufficient to establish compliance with the monitoring requirements because he was not able to evaluate various employee exposure levels, i.e, who was exposed, to what levels they were exposed, where they were exposed, or what they were doing when exposed. Nor was he able to determine whether administrative or engineering controls were implemented. Riddles told the compliance officer that Trinity instituted extensive engineering controls as a result of the 1976 monitoring. Despite being given several opportunities, he failed to provide any written information about the results

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[13] The standard provides:

> **§ 1910.95 Occupational noise exposure.**
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> . . . .
>
> (d) *Monitoring.* (1) When information indicates that any employee's exposure may equal or exceed an 8-hour time-weighted average of 85 decibels, the employer shall develop and implement a monitoring program.
>
> (i) The sampling strategy shall be designed to identify employees for inclusion in the hearing conservation program and to enable the proper selection of hearing protectors.
>
> (ii) Where circumstances such as high worker mobility, significant variations in sound level, or a significant component of impulse noise make area monitoring generally inappropriate, the employer shall use representative personal sampling to comply with the monitoring requirements of this paragraph unless the employer can show that area sampling produces equivalent results.

of the monitoring. The compliance officer testified, however, that while the information sought might have been contained in OSHA files, "it had probably been destroyed a long time ago. That was eleven years ago." The compliance officer also testified that, although information was provided about the 1982 survey, it was just a statement of several spot check readings and did not provide sufficient information to comply with the monitoring standard.

Riddles testified that different types of noise at the plant were analyzed as part of the 1976 noise survey. This analysis formed the basis for recommending the specific types of hearing protection used at the site. Riddles further testified that, because of the results of the 1976 monitoring, engineering controls were instituted to reduce noise levels. He stated that as a result of the 1982 noise survey, all employees who could be exposed to noise levels in excess of 82 dBA were required to wear hearing protection. Riddles also testified that, with the information gained from the 1976 survey, Trinity already knew the type of noise involved and, therefore, the type of hearing protection required.

The judge found that, because of the noise levels at the plant, Trinity was required by the standard to conduct initial monitoring that complied with the requirements of 29 C.F.R. § 1910.95(d)(1). Although he recognized that, under 29 C.F.R. § 1910.95(m)(3)(i),[14] monitoring records are required to be kept for only two years, he concluded that, once the Secretary establishes noise levels that trigger the monitoring provisions, the burden shifts to the employer to establish compliance. The judge found that Riddles' mere assertion that Trinity conducted a survey, without any indication of sampling strategies, amounted to little more than a self-serving declaration and was not sufficient to establish compliance with the monitoring standard.

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[14] The standard provides:

> **§ 1910.95 Occupational noise exposure.**
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> . . . .
>
> (m) *Recordkeeping*
>
> . . . .
>
> (3) *Record Retention.* The employer shall retain records required in this paragraph (m) for at least the following periods.
>
> (i) Noise exposure measurement records shall be retained for two years.

Essentially reiterating the argument it made regarding audiometric testing, Trinity first contends that the purpose of the monitoring standards is to identify employees for inclusion in a hearing program and to enable the proper selection of hearing protectors. Because it is undisputed that all employees were included in the hearing conservation program and that the hearing protectors were suitable for the noise levels involved, Trinity contends that there was no need to conduct monitoring.

Trinity also argues that the judge improperly imposed on it the burden of establishing compliance with the standard by requiring it to produce records that it was not required to keep.

As is the case with the audiometric testing requirements, an employer's obligation to conduct monitoring is mandatory once a threshold noise level is reached. As stated above, the Commission cannot decline to enforce a standard because it believes it imposes an unnecessary requirement. *Pace Constr. Co.*, 13 BNA OSHC at 2162, 1989 CCH OSHD at p. 37,847. Trinity's belief that its hearing conservation program made monitoring redundant did not excuse it from compliance with a mandatory OSHA requirement. *See Sierra Constr. Corp.*, 6 BNA OSHC 1278, 1282, 1978 CCH OSHD ¶ 22,506, p. 27,159 (No. 13638, 1978). If it wanted relief from its obligation to conduct the requisite noise surveys, it should have applied for a variance. *Id.* at 1282 n.11, 1978 CCH OSHD at p. 27,159 n.11.

While the wording used by the judge may give the impression that he improperly allocated the burden of proof,[15] we find that the evidence does establish the violation. The Secretary established that employees at the plant were exposed to noise levels exceeding an 8-hour TWA of 85 dBA and, therefore, that Trinity was obligated to develop and implement a monitoring program fulfilling the requirements of section 1910.95(d)(1). The standard requires that the monitoring enable the employer to identify employees for inclusion in a

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[15] Reading his decision literally, it appears that the judge held that a violation is established when the Secretary shows that a standard is applicable and that the employer failed to present evidence of compliance. Such a conclusion would improperly place the burden of proof on the employer. The Secretary has the burden of proving each element of her case by a preponderance of the evidence. *All Purpose Crane, Inc.*, 13 BNA OSHC 1236, 1238, 1987 CCH OSHD ¶ 27,877, p. 36,549 (No. 82-284, 1987). Only after the Secretary establishes a prima facie violation does the burden shift to the employer to rebut the Secretary's showing.

hearing protection program and to enable the proper selection of hearing protectors. The record shows that the 1976 monitoring occurred before the current standard went into effect. Under the earlier monitoring requirements, although employers were obligated to determine whether their employees were exposed to noise levels above permissible levels, there were no explicit monitoring requirements. The new noise standard created new obligations, threshold levels and computation methods that were not applicable under the old noise standard. Therefore, any monitoring performed in 1976 could not have been conducted with the intent of fulfilling the various requirements of the current standard.

We find that this evidence is sufficient to establish a prima facie violation of the standard. The burden, therefore, shifted to Trinity to rebut the Secretary's showing. However, Trinity produced no evidence to establish that the monitoring fulfilled the specific requirements of the current noise standard. *See supra* note 13. Riddles' testimony[16] failed to establish that either Trinity's 1976 or 1982 monitoring fulfilled the particular requirements of the current standard. The 1982 spot check consisted of only four separate dosimeter readings, as well as several sound level readings, and was not intended to be a representative monitoring as required by the standard. The documents relating to the 1976 monitoring could have rebutted the Secretary's prima facie case, but they were unavailable. Moreover, Trinity adduced no testimony and produced no evidence to indicate that the 1976 monitoring met the requirements of the current monitoring standard.[17]

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[16] We note that the judge dismissed Riddles' testimony as self-serving. This conclusion is, in essence, a credibility determination. The Commission normally will not disturb a judge's credibility finding because it is the judge who has lived with the case, heard the witnesses, and observed their demeanor. *Kent Nowlin Constr. Co.*, 8 BNA OSHC 1286, 1980 CCH OSHD ¶ 24,459 (Nos. 76-191, 1980)(consolidated); *Otis Elevator Co.*, 8 BNA OSHC 1019, 1980 CCH OSHD ¶ 24,236 (No. 14899, 1980); *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1977-78 CCH OSHD ¶ 22,481 (No. 14249, 1978). However, because we find that Riddles' testimony did not rebut the Secretary's showing of noncompliance with the standard, we find it unnecessary to determine whether to defer to the judge's credibility determination.

[17] We stress that Trinity is not being penalized for failing to have documents it was not required to retain. It simply did not have documentation that could have rebutted the Secretary's prima facie showing of a violation.

2. Characterization of the Violation

As with the violations of the audiometric testing requirements, the Secretary argues that the failure to monitor was willful. She contends that Trinity knew of, but made a conscious decision to ignore, the requirement to monitor.

Under the terms of section 1910.95(d)(3),[18] an employer is required to remonitor its worksite whenever a change in production, process, equipment or controls could increase employee noise exposure. The record does not justify a finding that Trinity's failure to remonitor was the result of either intentional disregard of the standard or indifference to employee safety. Trinity could well have believed that because there had been no major changes in production, it was under no obligation to remonitor the worksite. Moreover, its hearing protection program partially fulfilled the dual purpose of the standard of identifying employees to be included in the hearing protection program and determining the proper protection to be provided to them. Therefore, we conclude that the violation was not willful.

As the judge properly found, there is no evidence to support a finding that there was a substantial probability that death or serious physical harm could result from Trinity's failure to remonitor. Therefore, we classify the violation as other-than-serious. The judge assessed no penalty for the violation and there is nothing in the record to indicate that his determination was not appropriate.

D. Radiation Survey

Trinity uses an x-ray machine to check the integrity of the welding seams of its liquid propane tanks. During the inspection, the compliance officer asked Safety Director Riddles

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[18] The standard provides:

> **§ 1910.95 Occupational noise exposure.**
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> . . . .
>
> (d) *Monitoring.*
>
> . . . .
>
> (3) Monitoring shall be repeated whenever a change in production, process, equipment or controls increases noise exposures to the extent that:
>
> (i) Additional employees may be exposed at or above the action level; or
>
> (ii) The attenuation provided by hearing protectors being used by employees may be rendered inadequate to meet the requirements of paragraph (j) of this section.

for a copy of the radiation survey that was required to be made under 29 C.F.R. § 1910.96(d)(1).[19]

A copy of the report from a state inspection conducted in December 1987 was provided, but the compliance officer was not given a copy of a company radiation survey. The compliance officer did testify, however, that dosimeter readings and employee radiation badges indicated that employees were exposed to low radiation levels. However, he stated that, without the survey, it would not be possible to discern the level of radiation in an area to which an employee may be exposed in the event of an accident. The Secretary subsequently cited Trinity for failing to comply with section 1910.96(d)(1) on the grounds that it failed to conduct a radiation survey as required by the standard. The violation was classified as other-than-serious. No penalty was proposed.

Greg McRae, Trinity's Quality Assurance Manager, testified that he personally conducted a radiation survey when the x-ray machine was installed in 1984. He testified that he performed the survey with a survey meter and that the results indicated a radiation output approximately one-tenth of permissible levels. McRae also testified that he performs a radiation survey at least once a year, but that he keeps no notes or records.

Judge Burroughs affirmed the item. He noted that evidence must be available to show compliance and that a written survey would be the best means of demonstrating compliance even though nothing in the standard requires that the survey be in writing. The judge was also concerned that, because McRae did not testify as to the actual readings taken during the survey, it was not possible to ascertain if Trinity was in compliance. In conclusion, the judge held that "[f]acts regarding actual readings are necessary to establish

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[19] The standard provides:

> **§ 1910.96 Ionizing radiation.**
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> . . . .
>
> (d) *Precautionary procedures and personal monitoring.* (1) Every employer shall make such surveys as may be necessary for him to comply with the provisions in this section. *Survey* means an evaluation of the radiation hazards incident to the production, use, release, disposal, or presence of radioactive materials or other sources of radiation under a specific set of conditions. When appropriate, such evaluation includes a physical survey of the location of materials and equipment, and measurements of levels of radiation or concentrations of radioactive material present.

compliance." In the absence of such evidence, the judge was unable to ascertain the accuracy of McRae's opinion that the machine's radiation output was low. He concluded that, "Trinity had the burden to show compliance. It has failed to meet that burden."

Trinity argues that the standard requires neither that the survey be written nor that it be made available to the Secretary. It requires only that a survey be made. Trinity contends that the evidence established that it conducted the required survey when the x-ray machine was installed in 1984. It points out that the evidence establishing that employees were exposed to radiation levels far below proscribed limits supports McRae's testimony that, when the machine was installed, he performed a radiation survey that revealed radiation levels far below permissible limits.

The Secretary argues that, contrary to Trinity's contentions, the judge did not affirm the item because the survey was not in writing. Rather, the judge found that the lack of a written survey together with Trinity's inability to adduce evidence as to any actual readings rendered Trinity's proof of compliance insufficient. The Secretary argues that the failure to credit McRae's testimony was a credibility determination that should not be disturbed.

We first note that the judge misapplied the burden of proof. His statement that "Trinity had the burden to show compliance," culminated a discussion in which he clearly seemed to place the burden of establishing prima facie compliance on Trinity. As previously noted, the burden is on the Secretary to establish a prima facie violation. The burden would then switch to Trinity to rebut the prima facie showing. The question, then, is whether the Secretary made the requisite prima facie showing. We find that the Secretary did not make such a showing.

If the standard required that the survey be reduced to writing, Trinity's inability to produce a written survey would have been sufficient to establish the violation. The Secretary properly points out, however, that the standard does not require that the survey be reduced to a written form. Nonetheless, an employer's inability to produce a written survey when requested by the Secretary is strong evidence that the requisite survey was not made and may be sufficient to establish a prima facie violation. Of course, the employer can then

rebut the prima facie showing by producing evidence that it conducted the requisite survey. We find that McRae's testimony[20] that he conducted a radiation survey was such a rebuttal.

When Trinity rebutted the allegation that it failed to conduct any survey, the burden was on the Secretary to show that the survey that was conducted failed to meet the requirements of the standard. *See All Purpose Crane*, 13 BNA OSHC at 1238, 1987 CCH OSHD at p. 36,549 (Secretary has burden of establishing each element of the violation). It is here that the Secretary failed to establish the violation.

Section 1910.96(d)(1) is not a model of clarity. It requires that the surveys be conducted in a manner sufficient to allow compliance with the remainder of section 1910.96, the long and complex standard on ionizing radiation.[21] In order to comply, an employer must sift through the standard's requirements to determine what information is necessary. When the Secretary alleges that a survey is not sufficient, the burden is on the Secretary to show why that survey was not sufficient. *See E.I. duPont de Nemours & Co.*, 10 BNA OSHC 1320, 1325, 1982 CCH OSHD ¶ 25,883, p. 32,381 (No. 76-2400, 1982) (Secretary failed to establish that shower facilities provided by employer were not "suitable" within meaning of the standard).

In her complaint, the Secretary alleged that Trinity did not "make such surveys as necessary to evaluate the radiation hazards incident to the production, use, release, disposal, or presence of radioactive materials or other sources of radiation under specific set of conditions . . . ."

The record established, however, that employees were required to wear badges and that those badges indicated radiation exposures within acceptable limits. Moreover, dosimeter readings taken by the compliance officer indicated radiation levels well within acceptable limits, and supported the findings of the survey taken by McRae. The Secretary

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[20] We do not agree with the Secretary that the judge's failure to accept McRae's testimony was a credibility determination. Rather, the judge, having placed the burden on Trinity to establish compliance, found that McRae's testimony failed to establish that the survey he conducted conformed to the requirements of the standard.

[21] Among the many requirements of the ionizing radiation standard are section 1910.96(b), which sets forth various exposure limits for different body parts and section 1910.96(l) which, based on exposure levels, sets forth various notification requirements.

has not alleged the "specific set of conditions" that should have been included in the survey, nor specified why the information obtained from the survey and the radiation badges was inadequate to satisfy the requirements of the standard. In short, neither the citation, complaint, nor information provided at the hearing provided Trinity with sufficient information on how its survey failed to meet the requirements of the standard. *See Meadows Indus.*, 7 BNA OSHC 1709, 1710-11, 1979 CCH OSHD ¶ 23,847, pp. 28,923-24, (No. 76-1463, 1979); *Gannett Corp.*, 4 BNA OSHC 1383, 1384, 1976-77 CCH OSHD ¶ 20,915, p. 25,114 (No. 6352, 1976). This left it unable to defend against the allegation.[22] *See Gold Kist, Inc.*, 7 BNA OSHC 1855, 1862, 1979 CCH OSHD ¶ 23,998 (No. 76-2049, 1979). We therefore reverse the judge and vacate the item.

III.

DOCKET NO. 88-1547

A. Forklift Mountings

During the safety inspection, the compliance officer observed a forklift with one of the two metal mounting straps used to secure the liquid propane cylinder unfastened. When the matter was brought to the attention of Safety Director Riddles, it was fastened. The next afternoon, it was loose again. Trinity determined that the strap was sprung, and ordered a new strapping system. Riddles testified that there was no danger that the tank would come loose with the remaining strap in place. However, Daniel Virgin, Trinity's plant manager, admitted that the system was designed for two straps. As a result Trinity was cited for an other-than-serious violation of 29 C.F.R. § 1910.110(e)(4)(iii).[23]

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[22] The standard also imposes certain other requirements that must be met "when appropriate." Neither the Secretary nor the standard set forth when it is "appropriate" to meet these additional requirements.

[23] The standard states in pertinent part:

> **§ 1910.110 Storage and handling of liquefied petroleum gases.**
>
> . . . .
>
> (e) *Liquefied petroleum gas as a motor fuel.*
>
> . . . .
>
> (4) *Installation of fuel containers.*

(continued...)

The judge affirmed the item, but assessed no penalty. He concluded that the system was designed with two straps to provide additional restraint to prevent the fuel container from jarring loose, slipping or rotating. He noted that there was no way that an employee could predict or anticipate when the remaining strap would break loose or become loosened to the point of allowing the container to jar loose, rotate, or slip.

Trinity argues that the judge erred in affirming the item on the grounds that "two straps are better than one." It argues that, under the terms of the standard, the test for compliance is whether the tank is "securely mounted to prevent jarring loose, slipping or rotating." Trinity contends that the evidence that the tank was so mounted was uncontroverted.

The Secretary argues that the standard requires that fastenings be designed and constructed to withstand a static load of twice the weight of the filled tank and provide a safety factor of four for the material used. She claims that it is logical to infer that the two straps were considered by the manufacturer to be necessary to comply with the standard. It was, therefore, reasonable for the judge to conclude that the integrity of the system was compromised and the standard violated when 50 percent of the holding power of the fastenings was lost through the failure of one of its two straps.

We affirm the judge's decision. The standard requires that tanks be "securely mounted to prevent jarring loose, slipping, or rotating." The restraining system was designed with two straps; one being located on either end of the tank. With one strap gone, the remaining strap only secured one end of the tank. Although the remaining strap may have been sufficient to keep the tank on the forklift while it was immobile, any jarring, or sharp movement could have increased the pressure on the unsecured end and loosened the entire tank. By showing that one of the two straps designed to secure the tank was broken, the

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[23](...continued)

. . . .

(iii) Permanent and removable fuel containers shall be securely mounted to prevent jarring loose, slipping, or rotating, and the fastenings shall be designed and constructed to withstand static loading in any direction equal to twice the weight of the tank and attachments when filled with fuel using a safety factor of not less than four based on the ultimate strength of the material to be used.

Secretary made a prima facie showing that the tank was not securely mounted. Although Trinity showed that the tank was secure while the forklift was not moving, it has adduced no evidence to indicate that the remaining strap was sufficient to restrain the tank should the forklift have encountered any foreseeable bumping, jarring, or sharp movement. Accordingly, Trinity has failed to rebut the Secretary's prima facie showing, and the item is affirmed.

We find no error either in the judge's characterization of the item or in his penalty assessment. Therefore, the item is affirmed as other-than-serious and no penalty is assessed.

B. Mechanical Power Press

During the inspection, the compliance officer observed that a Kling Brothers Engineering Works mechanical power press, located at the northeast end of the plant, did not have a point of operation guard or device as required by 29 C.F.R. § 1910.217(c)(1)(i).[24] The press is operated by a foot pedal, and is used to punch holes in tank cylinder heads. The tank heads are large, bowl-shaped cylindrical objects that weigh 35-40 pounds. The operator stands next to the machine and uses both hands to hold the tank head while the hole is being punched. The compliance officer testified that there was nothing to prevent an employee from getting his hand or fingers caught in the point of operation.

The judge affirmed the item. He noted that the only exception to the requirement that the press be guarded is when the point of operation opening is one-fourth inch or less. Section 1910.217(c)(1)(ii). Since the opening was greater than one-fourth inch, he concluded that a guard was required. The judge rejected Trinity's argument that it was not feasible to

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[24] The standard states:

> **§ 1910.217 Mechanical power presses.**
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> . . . .
>
> (c) *Safeguarding the point of operation.*--(1) *General requirements.* (i) It shall be the responsibility of the employer to provide and insure the usage of "point of operation guards" or properly applied and adjusted point of operation devices on every operation performed on a mechanical power press. See Table O-10.

guard the head punch. The judge observed that, although Riddles testified that guarding was infeasible, he gave little or no reason for his conclusion. Moreover, the judge found no evidence that Trinity explored other methods of abatement. The violation was affirmed as serious, and a penalty of $240 was assessed.

On review, Trinity argues that the evidence establishes that the punch press is not a hazard. According to Trinity, absent a deliberate act, an employee could not get his finger caught in the point of operation. Trinity points out that, because it takes both hands to steady the head while the material is inserted into the point of operation, the employee's hands do not get close to the point of operation. Therefore, Trinity argues that the Secretary failed to prove that the operator was exposed to a hazard.

The Secretary argues that the cited standard presumes that an unguarded mechanical power press constitutes a hazard. Therefore, the employer's obligation to comply does not depend upon the existence of a hazard. Rather, it requires every operation on a mechanical power press to be protected by a guard. She claims that the press did not have a point of operation guard and, therefore, was in violation of the standard.

Trinity submitted into evidence a film depicting the operation of the press. As Trinity claims, the film establishes that, when used in the cited operation, the operator cannot get any part of his hand into the point of operation. The film shows that it takes two hands to hold and steady the concave cylinder head while it is inserted into the machine and punched. The cylinder head is large and blocks the employee from getting any part of his body near the point of operation. When the cylinder head is placed into the press, the employee must hold the concave cylinder head with both hands. For the operator to get his hands in the point of operation, he would have to hold the cylinder head with one hand, reach across the cylinder head then move his hand up along the curve of the cylinder head and stick his hand underneath the ram. This would require a deliberate act.

The standard requires that the machine be equipped with either a point of operation guard or device. Under 29 C.F.R. § 1910.217(3)(i)(b), a "point of operation device" is one that prevents the operator "from inadvertently reaching into the point of operation." The cylinder head fulfills this requirement. Accordingly, we find that, when used to punch holes in the cylinder heads in the manner shown in Exhibit R-13, the tank heads act as a *de facto*

"point of operation device," thereby fulfilling the requirements of the cited standard. We therefore reverse the judge and vacate the item.[25]

C. The PA4 Press

Trinity's PA4 press is used to punch drainage notches out of the base ring that is later welded to the liquid propane tanks. The compliance officer testified that when the machine was turned on, it cycled twice without the foot pedal being activated and continued to cycle when the employee held his foot on the pedal. Based on these circumstances, Trinity was cited for serious violations of 29 C.F.R. §§ 1910.217(b)(3)(i) and 1910.217(b)(8)(iii).[26]

Plant manager Virgin testified that he saw an employee depress the pedal prior to activation and that was the reason why it cycled when activated. He denied that the machine cycled more than once. In its post-hearing brief, however, Trinity admits that the single-stroke mechanism was broken.

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[25] Trinity makes several additional arguments. It contends, for example, that compliance was infeasible and that, if there was a violation it was, at most, *de minimis*. In view of our disposition, however, we need not address these additional issues. Also, in vacating the item, we are not unmindful that, as the Secretary points out, the obligations of the standard are not predicated on the existence of a hazard. Rather, to make out a prima facie showing of a violation of section 1910.217(c)(1)(i), all the Secretary need show is that the point of operation on a press is unguarded. *F.H. Lawson Co.*, 8 BNA OSHC 1063, 1066, 1980 CCH OSHD ¶ 24,277, p. 29,574 (No. 12883, 1980). However, the item is not being vacated on the grounds that the press does not present a hazard. We are not finding, for example, that the unguarded point of operation did not present a hazard due to the method of operation. Rather, we find that, on this particular machine, in this particular operation, the material being placed into the press is so configured as to prevent an operator having any part of his body enter the point of operation, thereby constituting a *de facto* "point of operation device."

[26] The standards state:

> **§ 1910.217 Mechanical power presses.**
>
> . . . .
>
> (b) *Mechanical power press guarding and construction, general--*
>
> . . . .
>
> (3) *Machines using full revolution positive clutches.* (i) Machines using full revolution clutches shall incorporate a single-stroke mechanism.
>
> . . . .
>
> (8) *Electrical.*
>
> . . . .
>
> (iii) All mechanical power press controls shall incorporate a type of drive motor starter that will disconnect the drive motor from the power source in event of control voltage or source failure, and require operation of the motor start button to restart the motor when voltage conditions are restored to normal.

Based on this evidence the judge affirmed the violations. Because the hazard was the crushing or amputation of hands or fingers, he found the violation to be serious and assessed a $240 penalty for the violation of section 1910.217(b)(3)(i) and a $480 penalty for the failure to comply with section 1910.217(b)(8)(iii).

On review Trinity does not dispute that the press lacked a single-stroke mechanism, or that the machine could cycle without the foot pedal being depressed. However, it contends that these items should be vacated because the Secretary failed to establish that the machines presented a hazard. The argument is without merit. If a standard does not incorporate a requirement that a hazard be shown to exist, such a showing is not part of the Secretary's prima facie case because the hazard is presumed. *StanBest, Inc.*, 11 BNA OSHC 1222, 1231, 1983 CCH OSHD ¶ 26,455, p. 33,625 (No. 76-4355, 1983). The safety requirements set forth in the two standards are not predicated on the existence of a hazard. They are mandatory for a machine like the PA4 press, and are not dependent on the existence of a hazard.

Trinity further argues that if the standard does not require the Secretary to establish the existence of a hazard, the violation was *de minimis*. Trinity contends that the evidence indicates that it would require a deliberate act for an employee to get any part of his body into the point of operation. It contends that access is impossible from the front of the press and that from the top, the employee would have to reach over the guard, insert his hand down alongside the ram approximately 16 inches, then put his fingers up and under the point of the die. To get in from the rear, the employee would have to crouch down and reach around and up. Therefore, it contends that because an employee cannot get his hand in the point of operation, the inoperative single stroke mechanism would have no effect on employee safety.

As stated above, a noncomplying condition is deemed to be *de minimis* when the hazard involved bears such a negligible relationship to employee safety as to render

inappropriate imposition of a penalty or the entry of an abatement order. *Super Excavators*, 15 BNA OSHC 1313, 1314, 1991 CCH OSHD ¶ 29,498, p. 39,803 (No. 89-2253, 1991); *National Indus. Constructors, Inc.*, 10 BNA OSHC 1081, 1094, 1981 CCH OSHD ¶ 25,743, p. 32,135 (No. 76-4507, 1981). We find that, on these facts, the evidence establishes that the violations of the cited standard did have a significant relationship to employee safety.

Trinity stresses that, under normal operations, there was no likelihood of an accident. Even if Trinity is correct, however, the fact remains that accidents generally do not always occur during normal operations. Indeed, the very term "accident" implies that something abnormal has occurred. Standards are intended to protect against injury resulting from an instance of inattention or bad judgment as well as from risks arising from the operation of a machine. *Pass & Seymour, Inc.*, 7 BNA OSHC 1961, 1963, 1979 CCH OSHD ¶ 24,074, p. 29,238 (No. 76-4520, 1979).

Moreover, item 10(b), which was affirmed by the judge, alleged a point of operation guarding violation on this press because neither the top nor the back of the machine was guarded. Therefore, an employee could reach the point of operation by reaching in from the top or behind from the rear. Trinity does not dispute this holding. The lack of a single-stroke mechanism or an improperly operating foot pedal significantly increased the risk of injury to employees who might have had occasion to have a hand or other part of their body near the point of operation.[27] This additional hazard precludes a finding that the violations were *de minimis*.[28]

We agree with the judge that, because the hazard was the crushing or amputation of hands or fingers, the violation was properly categorized as serious. We also agree with the penalties assessed by the judge. Therefore, a $240 penalty is assessed for the violation of

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[27] Even assuming that, during proper operation the operator would have no occasion to have any part of his body near the point of operation, the fact remains that there are reasons why an employee may deliberately place a hand or finger into the point of operation. For example, the operator may need to clear the point of operation of some extraneous material or conduct some other maintenance work.

[28] The Secretary asserts that when a standard assumes that a condition constitutes a hazard, a finding that a violation is *de minimis* would constitute a challenge to the wisdom of the standard. Because we find that the violations were not *de minimis*, we need not address the argument.

section 1910.217(b)(3)(i), item 8(b) and a penalty of $480 is assessed for the violation of section 1910.217(b)(8)(iii), item 9.

ORDER

Accordingly, in Docket No. 88-1545, item 1 of citation no. 1, which alleged noncompliance with 29 C.F.R. § 1910.95(g)(5)(i) and (g)(6), is affirmed as other-than-serious; a penalty of $500 is assessed. Item 2 of citation no. 1, which alleged noncompliance with 29 C.F.R. § 1910.95(d)(1), is affirmed as other than serious; no penalty is assessed. Item 1 of citation no. 2, which alleged noncompliance with 29 C.F.R. § 1910.96(d)(1), is vacated.

In Docket No. 88-1547, items 8(b) and 9 of citation no. 1, which allege noncompliance with 29 C.F.R. § 1910.217(b)(3)(i) and (b)(8)(iii), are affirmed as serious. A penalty of $240 is assessed for item 8(b). A penalty of $480 is assessed for item 9. Item 10a of citation no. 1, which alleged a failure to comply with 29 C.F.R. § 1910.217(c)(1)(i), is vacated. Item 8 of citation no. 2, which alleged noncompliance with 29 C.F.R. § 1910.110(e)(4)(iii), is affirmed as other-than-serious; no penalty is assessed.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: April 22, 1992

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 88-1545 & 88-1547
TRINITY INDUSTRIES, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on April 22, 1992. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

April 22, 1992
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 88-1545 & 88-1547

NOTICE IS GIVEN TO THE FOLLOWING:

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