United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. C.P. BUCKNER STEEL ERECTION, INC., Respondent.	OSHRC Docket No. 10-1021

ON BRIEFS:

Louise McGauley Betts, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Frank L. Kollman, Esq.; Kollman & Saucier, P.A., Timonium, MD
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

This case involves an other-than-serious recordkeeping citation issued to C.P. Buckner Steel Erection, Inc. ("Buckner") under the Occupational Safety and Health Act of 1970 ("Act"), 29 U.S.C. §§ 651-678. The Secretary alleged in three citation items that Buckner failed to have a "company executive" certify its annual summaries of workplace injuries and illnesses entered on its OSHA 300 Logs for 2007, 2008, and 2009, in violation of 29 C.F.R. § 1904.32(b)(4).[1] She

[1] Section 1904.32(b)(4) states as follows:

> (4) *Who is considered a company executive?* The company executive who certifies the log must be one of the following persons:
> (i) An owner of the company (only if the company is a sole proprietorship or partnership);
> (ii) An officer of the corporation;

proposed a penalty of $800 for each alleged violation. The case, assigned to Simplified Proceedings, was submitted to Judge Sharon D. Calhoun for decision on a stipulated record and briefs from the parties. The judge affirmed all three citation items as other-than-serious, but assessed no penalty. For the following reasons, we reverse the judge and vacate the citation in its entirety.

DISCUSSION

The Secretary's sole allegation in this case is that Buckner's Safety and Risk Manager ("safety manager") did not qualify as a "company executive" under § 1904.32(b)(4) when he certified Buckner's annual summaries for the years in question. The judge agreed, rejecting Buckner's contention that its safety manager fell within two of the categories of "company executive" listed under the cited regulation: (1) "[t]he highest ranking company official working at the establishment"; and (2) "[a]n officer of the corporation." 29 C.F.R. § 1904.32(b)(4)(ii), (iii). Buckner also contended that the phrase "highest ranking company official" is unenforceably vague, but the judge found that the company had waived this affirmative defense.[2]

On review, Buckner argues that each of the judge's rulings on these issues was erroneous. As a procedural matter, we conclude that the judge erred in determining that Buckner had waived its vagueness defense, though we reject this defense on the merits. Additionally, based on our review of the stipulated record, we conclude the judge properly found that the safety manager was not "[t]he highest ranking company official working at the establishment" for purposes of § 1904.32(b)(4)(iii), but she erred in finding the Secretary established that the safety manager was not "[a]n officer of the corporation" for purposes of § 1904.32(b)(4)(ii).

I. Highest ranking company official working at the establishment

Vagueness

Buckner argues that the phrase "highest ranking company official" in § 1904.32(b)(4)(iii) is unenforceably vague because the meaning of the words "highest ranking" may vary depending

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(iii) The highest ranking company official working at the establishment; or
(iv) The immediate supervisor of the highest ranking company official working at the establishment.

[2] Before the judge, Buckner argued that the violations alleged in two of the three citation items were issued outside of the six-month limitations period set forth in section 9(c) of the Act, 29 U.S.C. § 658(c). Given our decision to vacate all three citation items on other grounds, we need not address Buckner's claim on review that the judge erred in rejecting this argument.

on the nature of the organization at issue. As an example, Buckner notes that in a "paramilitary" organization, such as a police force or fire department, a defined ranking system is in place, whereas a corporation may have no meaningful ranking system. With respect to its own operations, Buckner asserts that its safety manager's word is "supreme on safety" matters, but its president "may be able to fire" the safety manager. Buckner seems to suggest that under these circumstances, it would be impossible to determine who qualifies as the highest ranking company official for purposes of compliance with § 1904.32(b)(4)(iii).

Raising the issue of waiver *sua sponte*, the judge concluded that Buckner had waived its vagueness argument by failing to include this affirmative defense in its notice of contest. We disagree. Ordinarily in a Commission proceeding, the parties are required to file pleadings and a respondent must include in its answer "all affirmative defenses being asserted." Commission Rule 34(a), (b), 29 C.F.R. § 2200.34(a), (b). But in a case assigned to Simplified Proceedings, as this one was, the parties generally are not required to file pleadings; instead, "[e]arly discussions among the parties and the Administrative Law Judge are required to narrow and define the disputes between the parties."[3] Commission Rule 201(b)(1), 29 C.F.R. 2200.201(b)(1); *see* Commission Rule 207, 29 C.F.R. § 2200.207 (providing that in Simplified Proceedings, judge must hold pre-hearing conference at which "the parties will discuss . . . any . . . pertinent matter" including "defenses," and that, "[e]xcept under extraordinary circumstances, any affirmative defenses not raised at the pre-hearing conference may not be raised later"). The Secretary does not dispute that Buckner mentioned the vagueness issue during their pre-hearing conference with the judge. And about nine days after the conference, Buckner explicitly raised the defense in its brief to the judge, but the Secretary never filed an objection with the judge even though, following the parties' simultaneous submission of briefs, she had more than one month to do so before the judge issued a decision. Under these circumstances, the requirements of applicable Commission procedural rules were met. Accordingly, we find that the judge erred in requiring Buckner to raise its vagueness challenge in its notice of contest and treating its failure to do so as a waiver of the affirmative defense.

Reaching the merits of Buckner's defense, we conclude that the phrase "highest ranking company official," as applied in this case, is not unenforceably vague. "To determine whether a

[3] Regardless of the type of proceeding, an employer has never been required by the Commission's rules to plead an affirmative defense in its notice of contest.

[regulation] is unenforceably vague, the Commission first examines the language of the [regulation] at issue, which is 'viewed in context, not in isolation.' " *Dayton Tire, Bridgestone/Firestone* ("*Dayton*"), 23 BNA OSHC 1247, 1251, 2010 CCH OSHD ¶ 33,098, p. 54,815 (No. 94-1374, 2010) (citation omitted), *rev'd in part on other grounds*, No. 10-1362 (D.C. Cir. Mar. 6, 2012). If the Commission concludes that the language is vague, then it considers whether "a reasonable person, examining the generalized [regulation] in the light of a particular set of circumstances, can determine what is required." *Id.* (citation and internal quotation marks omitted).

We agree with the Secretary that the phrase "highest ranking company official" plainly means the official with the "greatest overall authority." As appropriate to the context in which the words are being used here, the adjective "high" means "great, or greater than normal," and the superlative of that word therefore means "greatest"; the adjective "ranking" means "having a specified position in a scale of achievement or status"; and the noun "official" means "a person . . . having official duties, esp. as a representative of an organization." NEW OXFORD AMERICAN DICTIONARY 796, 1181, 1402 (2d Ed. 2005); *see Dayton*, 23 BNA OSHC at 1251, 2010 CCH OSHD at p. 54,815 (stating that language of standard is " 'viewed in context, not in isolation' " (citation omitted)). The "highest ranking company official" would thus be "a person" who has "official duties," particularly as a representative of the company, whose "specified position" in the company is of the "greatest" degree "in a scale of achievement or status."

In any company, including Buckner, the president would likely occupy such a position. But regardless, the company owner or top level management would know how the company is organized and should be able to determine which person has the greatest overall authority and is, therefore, the highest ranking company official. *Cf. J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207, 1991-93 CCH OSHD ¶ 29,964, p. 41,026 (No. 87-2059, 1993) (consolidated) (stating that even though "frequent" is nonspecific term, "a reasonable person familiar with the size of the worksite and the magnitude of the ongoing construction activity would understand how often inspections would have to be conducted to keep track of safety hazards at the site"). We therefore reject Buckner's argument that the phrase "highest ranking company official" is unenforceably vague.

Compliance

In the alternative, Buckner argues that the stipulated record shows its safety manager was the "highest ranking company official working at the establishment" for purposes of § 1904.32(b)(4)(iii). The judge rejected this argument, concluding that Buckner's president rather than its safety manager was the highest ranking company official working at corporate headquarters, the establishment at issue.

Based on our review of the stipulated record, we agree with the judge that Buckner's president was a higher ranking company official than its safety manager. The parties stipulated that the president, also one of three shareholders of the company that owns Buckner, was "the highest ranking company official" at Buckner's corporate headquarters with respect to all matters but safety. Although the parties also stipulated that the safety manager "outrank[ed]" the president with respect to safety matters, we find that the president's position in the company and his status as shareholder in a closely held corporation shows that he possessed more authority in the company, and at the establishment at issue, than the safety manager. Indeed, the parties stipulated that the president hired the safety manager and, as a shareholder, the president could certainly take steps to fire him or even eliminate his position. Under these facts, we conclude that Buckner's safety manager was not the "highest ranking company official working at the establishment" for purposes of § 1904.32(b)(4)(iii).

II. Officer of the corporation

Buckner, a North Carolina corporation, argues that its safety manager was an "officer of the corporation" under § 1904.32(b)(4)(ii), because the corporate shareholders' agreement allowed the three shareholders to create officers "at will," and the stipulated record shows that the company's president and shareholders believed they were creating the position of "corporate safety officer" when the safety manager was hired. The Secretary maintains, however, that under North Carolina law, the safety manager was not an officer of the corporation when he certified Buckner's annual summaries of its OSHA 300 Logs, because the stipulated record shows that the shareholders had taken no "affirmative action" to make him one. The judge agreed with the Secretary, noting that (1) Buckner's corporate documents listed only the positions of president, vice-president, and secretary as corporate officers; and (2) the parties stipulated that "Respondent's shareholders had not specifically voted or agreed to make [the safety manager] a corporate Officer of Respondent prior to [OSHA's] investigation."

Based on our review of the stipulated record and the Secretary's arguments, we conclude that she has failed to demonstrate that Buckner's safety manager was not an officer of the corporation under § 1904.32(b)(4)(ii). *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000) (noting that Secretary bears burden of proof to establish all elements of alleged violation). As the judge pointed out, the parties stipulated that the shareholders neither "specifically voted [n]or agreed" to make the safety manager a "corporate Officer of Respondent." But the parties also stipulated that Buckner's president "hired the [safety manager] and *the unanimous shareholders of the Corporation approved his appointment as safety officer of the Corporation*." (Emphasis added.) Additionally, the parties stipulated that the shareholders "informally directed" the safety manager to act as Buckner's "safety officer," and that the company president—one of the three shareholders—believed that the safety manager possessed "the powers and authority of a corporate officer under North Carolina law." Indeed, the parties stipulated that the "shareholders intended for [the safety manager] to have the full powers of the President and the Shareholders of the Corporation with respect to safety, including signing any reports or forms required by governmental organizations, such as OSHA."

These stipulations, considered together with the shareholders' agreement, rebut the Secretary's claim that Buckner's safety manager was not an officer of the corporation. Under the shareholders' agreement, "*[t]he unanimous shareholders may create additional corporate officers at will.*" (Emphasis added.) This provision of the agreement mirrors the parties' stipulation that "*the unanimous shareholders . . . approved [the safety manager's] appointment as safety officer of the Corporation*," which undermines the Secretary's claim that the shareholders had taken no action. (Emphasis added.) And we find no basis in the record to conclude that under North Carolina law the shareholders were specifically required to do anything more.[4] In these circumstances, we conclude that the Secretary has failed to establish

[4] The Secretary relies on N.C. Gen. Stat. § 55-8-40, which states as follows:

> (a) A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.
>
> (b) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors. . . .

This statutory provision does not address what limits, if any, are placed on the ability of shareholders to exercise authority under a shareholders' agreement. *See* N.C. Gen. Stat. § 55-8-

that Buckner's safety manager was not an officer of the corporation under § 1904.32(b)(4)(ii) at the time he certified the annual summaries for 2007, 2008, and 2009.

ORDER

We vacate Citation 1, Items 1, 2, and 3.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: April 25, 2012

31 (discussing shareholders' agreements). Moreover, it is not clear from the language of this provision what procedures must be followed to "appoint[]" an officer of a corporation.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. C. P. Buckner Steel Erection, Inc., Respondent.	OSHRC Docket No. 10-1021

DECISION AND ORDER

C. P. Buckner Steel Erection, Inc. (Buckner Steel), a North Carolina corporation with headquarters located in Graham, North Carolina, engages in steel erection and other activities throughout the Eastern United States (Stip. ¶4). Buckner Steel was conducting temporary construction work at a construction site at Eglin Air Force Base in Florida when, on April 21, 2010, Occupational Safety and Health Administration (OSHA) Compliance Officer Henry Miller conducted an inspection of the construction site (Stip. ¶5). As a result of Miller's inspection, on April 30, 2010, the Secretary issued a citation to Buckner Steel alleging three other-than-serious violations of the Occupational Safety and Health Act of 1970 (Act). Buckner Steel denies that it violated any of the cited standards. Respondent contested the citation and all proposed penalties, and this case was designated for the Commission's Simplified Proceedings.

By agreement of the parties, and with the approval of the Administrative Law Judge, the parties submitted this case for a decision on the record pursuant to Commission Rule 61, 29 C.F.R. § 2200.61.[1] The Secretary and Buckner Steel entered into stipulations of fact on July 13,

[1] Rule 61 provides as follows: "A case many be fully stipulated by the parties and submitted to the Commission or Judge for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof."

2010, and August 2, 2010. The Secretary and Buckner Steel stipulated that all evidence necessary to decide the case and which would have been presented at a hearing are presented in the Stipulations and Exhibits thereto (Add. Stip. ¶1).

For the reasons that follow, items 1, 2 and 3 are affirmed as other-than-serious violations with no penalties assessed for each item.

Jurisdiction

The parties stipulated that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The parties also stipulated that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5). (Stip. ¶¶ 1 and 2).

Stipulation of Facts

The following sets out the Stipulation of Facts submitted by the parties:

Stipulations[2]

The parties agree that the following are not in dispute:

1. Respondent is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act.

2. The Occupational Safety and Health Review Commission has jurisdiction over this matter.

3. The only element of the Secretary's prima facie case at issue that she must prove is whether the standard was violated. Classification and penalty are also at issue and the Respondent has the right to argue that any potential exposure and/or hazard are 'De Minimis' or otherwise minimal. Further, the Respondent has the right to argue with respect to the Secretary's prima facie case that the citation was critically defective for the reasons stated in Stipulation 6.

4. The Respondent is a North Carolina corporation with its headquarters located in Graham, N.C. Respondent, among other things, performs steel erection throughout the Eastern United States.

[2] Executed on July 13, 2010, and received by the undersigned on July 16, 2010.

5. The citation arose out of an inspection of a construction site at Eglin Air Force Base in Florida where Respondent was conducting temporary construction work that was to last less than one year. Mr. Pocock and the other managers located at Respondent's Graham, N.C., facility supervised the work being performed at the Florida location. The only citation issued to Respondent following a complete inspection of the construction site was the citation involved in this matter. The OSHA 300 forms at issue were for Respondent's entire operation at all construction and work sites throughout the company.

6. The citation was not signed by the Area Director. The citation contains the handwritten notation 'Jeff Romeo FOR' the Area Director.

7. Exhibit A is a true and accurate copy of the Surrender and Cancellation of Certificated Shares, Restatement of Corporate Records, and Corporate Resolutions of C. P. Buckner Steel Erection, Inc.; Share Exchange for Issuance of Shares of CPB, Inc.; and Shareholders Agreement of CPB, Inc., and Corporate Resolutions of CPB, Inc., and is Respondent's only relevant organic corporate document under North Carolina corporation law prescribing, among other things, the selection of officers of Respondent.

8. Exhibit B is a true and accurate copy of the Personal Professional Profile of George R. 'Chip' Pocock, Respondent's Safety and Risk Manager, the individual who signed the OSHA 300 forms on behalf of Respondent that are the subject of this action. The document contains the qualifications and experience of Mr. Pocock. Mr. Pocock has held the position of Safety and Risk Manager at all times material to this proceeding, and he has held the same duties, authority, and responsibilities during that time.

9. Doug Williams is President of Respondent and has been at all times material to this proceeding. Doug Williams' office is located at Respondent's Graham, N.C., location.

10. Although Respondent's shareholders had not specifically voted or agreed to make Mr. Pocock a corporate Officer of Respondent prior to the investigation, Doug Williams hired Mr. Pocock and the unanimous shareholders of the Corporation approved his appointment as safety officer of the Corporation, giving him the title Safety and Risk Manager. Williams and the other shareholders have designated Mr. Pocock as the highest ranking officer in the Corporation in matters of safety. In that respect, Mr. Pocock has the authority to make any decision relating to safety (or to override any other person's decision relating to safety), without restriction. He is the highest ranking officer of the Respondent with respect to safety matters, and while Buckner does not have a ranking' system like a military or paramilitary organization, he 'outranks' even Doug Williams with respect to matters of safety. The shareholders have informally directed Mr. Pocock to act as the corporation's safety officer and representative in all matters relating to safety, and Respondent's shareholders intended for him to have the full powers of the President and the Shareholders

of the Corporation with respect to safety, including signing any reports or forms required by governmental organizations, such as OSHA. As far as the shareholders are concerned, Mr. Pocock can and does lawfully sign such forms for the Corporation and its other officers and shareholders.

11. As for all matters other than safety, Doug Williams is the highest ranking company official for the location in Graham, N.C.

12. When Mr. Pocock is on a construction site where Respondent is doing work, he is the highest ranking official of Respondent, meaning that he has supervisory authority over every employee of Respondent at that construction site. Mr. Pocock had supervisory authority over every employee of Respondent at Eglin Air Force Base. As Respondent's corporate safety officer, Mr. Pocock visits Respondent's jobsites, including Eglin Air Force Base, but also has an office in Graham, N.C.

13. Prior to the issuance of the citation in this matter, Respondent (through Doug Williams and the other shareholders) did not take formal steps (such as creating minutes or other official documents) to create the corporate position of Safety Officer or to

appoint Mr. Pocock as an officer of Respondent.

14. Doug Williams would testify that it is his understanding that the shareholders intended Mr. Pocock to have all the powers and authority of a corporate officer under North Carolina law. He would further testify that Respondent never thought that there would come a time when it would have to contend and prove that it had created a corporate officer's position with respect to Mr. Pocock, thinking instead that Respondent would never claim that Mr. Pocock did not have plenary corporate officer authority as to all matters relating to safety.

15. Respondent's shareholders believe - based on legal advice - - that Respondent has other lesser corporate officers whose appointments are similarly not memorialized in minutes or other official corporate documents. With respect to safety, the shareholders agreed that Mr. Pocock outranks all officers of Respondent.

16. Following the issuance of the citation, the shareholders of Respondent designated Mr. Pocock 'Corporate Safety Officer,' and ratified all his actions since his hire, but did not memorialize those actions in a written document. Mr. Pocock's duties have not changed.

Additional Stipulations[3]

In addition to the Stipulations the parties previously filed, they further agree that:

1. All evidence necessary to decide this case, and which would have been presented had a hearing been held, is presented in this document and the parties joint document entitled 'Stipulations,' including exhibits thereto, which the parties agree are true and accurate and all admissible as evidence in this case.

2. The Federal Occupational Safety and Health Administration did not conduct an investigation of Respondent prior to the current investigation upon which this case is based and during which it requested and received the OSHA 300 logs for 2007, 2008 and 2009.

[3] Executed on August 2, 2010, and received by the undersigned August 7, 2010 .

3. Other than the evidence that state inspections occurred, there is no evidence that Complainant actually knew of the alleged violative conditions cited in this case. Further, there is no evidence that the state plan agencies shared OSHA 300 logs for 2007 and 2008 with the Federal Occupational Safety and Health Administration.

Background

Buckner Steel was performing temporary construction work of less than one year's duration at Eglin Air Force Base at the time of OSHA's inspection. The work activity was supervised by Buckner Steel's managers located at its Graham, North Carolina facility (Stip. ¶5). During OSHA's inspection of Buckner Steel, Compliance Officer Miller reviewed Buckner Steel's OSHA 300 forms for the years 2007, 2008 and 2009 for all Buckner Steel construction and work sites (Stip. ¶¶ 5, 8). The OSHA 300 forms for these years were signed by George R. "Chip" Pocock, Safety and Risk Manager for Buckner Steel (Stip. ¶8). Pursuant to the recordkeeping standards, Compliance Officer Miller determined that Mr. Pocock, as Safety and Risk Manager, was not the appropriate company executive to certify the OSHA 300 forms.

As a result of Miller's inspection, the Secretary issued the citation that gave rise to the instant case.

The Citation

The Secretary alleges that Buckner Steel violated OSHA's recordkeeping standard regarding the certification of OSHA Logs. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions. *Southwestern Bell Telephone Co.,* 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

The parties stipulated that the cited standards apply to the cited conditions, that employees had access to the violative conditions, and that Buckner Steel had actual or constructive knowledge of the violative conditions. (Stipulations). Left for decision is whether there was noncompliance with the terms of the cited standard.

Items 1, 2 and 3: Alleged Other-Than-Serious Violations of § 1904.32(b)(4)

Whether there was noncompliance with the terms of the cited standard.

The Secretary charges Buckner Steel with violating §1904.32(b)(4) of the standard, which provides:

> *Who is considered a company executive?* The company executive who certifies the log must be one of the following persons:
>
> (i) An owner of the company (only if the company is a sole proprietorship or partnership);
>
> (ii) An officer of the corporation;
>
> (iii) The highest ranking company official working at the establishment; or
>
> (iv) The immediate supervisor of the highest ranking company official working at the establishment.

The citation alleges that the company executive who certified the "OSHA 300 Log was not one of the persons listed in items (i) through (iv) of the standard," in that the OSHA 300A Annual Summaries for 2007, 2008 and 2009 "[were] signed by the Safety and Risk Manager." Buckner Steel contends there was no violation of the standard because the Safety and Risk Manager Pocock is a company executive who can certify the OSHA300A annual summary log pursuant to 29 C.F.R. § 1904.32(b)(4) (Respondent's Brief, p. 1).

The record before the undersigned shows that at the time of the inspection, Buckner Steel had three corporate officers: President, Doug Williams; Vice President, Eddie Williams; and Secretary, Carol B. "Pat" Williams. (Exh. "A," Stipulations).[4] The record also shows that the highest ranking official at Buckner Steel's establishment was Doug Williams. (Stip. 9). There is no evidence that Mr. Williams had an immediate supervisor at the establishment. Further, the parties stipulated that "Respondent's shareholders had not specifically voted or agreed to make Mr. Pocock a corporate Officer of Respondent prior to the investigation." (Stip. ¶10).

Respondent asserts that the fact that Mr. Pocock had not officially been made an officer is of no consequence because in actuality he is the "highest ranking officer" in charge of safety for the company, and that where safety is concerned, he surpasses Doug Williams, President of the Respondent. (Stip. ¶¶ 10

[4] Subpart (i) of the standard is not applicable since Buckner Steel is a corporation (Stip. ¶ 4).

, 11). The standard does not mandate certification by the highest ranking officer in charge of safety; rather, certification by the highest ranking official is required.

Respondent's argument is contrary to the purpose of the standard which is to assure accountability and accuracy of the OSHA Logs and Summaries by placing the responsibility for certification at the highest corporate level. Under the revised recordkeeping and reporting regulations, the Secretary imposed explicit obligations on high-level company executives to certify the annual log and summary. The preamble in the final rulemaking notice explained: "OSHA concludes that the company executive certification process will ensure greater completeness and accuracy of the Summary by raising accountability for OSHA recordkeeping to a higher managerial level . . . OSHA believes that senior management accountability is essential if the Log and Annual Summary are to be accurate and complete." *Id.* at 6,043. *Final Rule for Occupational Injury and Illness Recording and Reporting Requirements*, 66 Fed. Reg. 5,916 (January. 19, 2001) (codified at § 1904.32(b)(3), (4)). Safety and Risk Manager Pocock at the time of the inspection was not a corporate officer, was not the highest ranking company official at the establishment and was not the immediate supervisor of the highest ranking official at the establishment at the time he certified the annual summaries for 2007, 2008 and 2009. Accordingly, the Secretary has established that Buckner Steel failed to have an appropriate person certify the 300A Annual Summary as provided for by the standard.

Whether the citation should be vacated.

Buckner Steel contends that the citation should be vacated or partially vacated for several reasons arguing (1) that the statute of limitations applies to items 1 and 2 of the citation; (2) that the citation was not properly issued by the Area Director; and (3) that the Secretary never identified Graham, North Carolina, as the establishment for purposes of the regulation in either the citation or the complaint.

Items 1 and 2 of the citation are not time barred. Section 9(c) of the Act prohibits the issuance of a citation "after the expiration of six months following the occurrence of any violation." The Commission has rejected the argument that the date of violation from which the six-month period begins to run is the date on which the violative condition first came into existence. *See Kaspar Electroplating Corp*., 16 BNA OSHC 1517 (No. 90-2866, 1993) (for purposes of § 9(c), the key date is the date of discovery

of violation). The parties stipulated that OSHA had not conducted an investigation of Buckner Steel prior to the current investigation and that there is no evidence that OSHA knew of the alleged violative conditions cited here prior to the current investigation. (Add. Stip. ¶¶ 2, 3 and 4). Accordingly, OSHA could not have discovered the violations relating to the 2007 and 2008 logs prior to the date of the instant investigation. Respondent's argument is rejected.

Respondent's assertions that the citation was not properly issued and that the establishment was never identified are disingenuous and place the company's good faith in question. Jeff Romeo signed the citation on behalf of the Area Director. There is no evidence to suggest that Mr. Romeo did not have the authority to sign on behalf of the Area Director to issue the citation. As to the establishment, there is no requirement that the identity of the establishment be identified on the citation. Moreover, the parties stipulated that the work at the inspection site was to last for less than one year and was being supervised by the managers at the Graham, North Carolina, facility. (Stip. ¶ 5). This meets of the definition of an establishment as set forth in the standards at § 1904.46.

Whether the standard is vague.

Buckner Steel also contends that the term "highest ranking company official" in regulation 29 C.F.R. §1904.32 is vague and ambiguous (Buckner Steel's brief, p. 3). Vagueness is an affirmative defense that must be raised in the notice of contest or answer or it will be deemed waived. *Puterbaugh Enter., Inc*., 2 BNA OSHC 1030, (No. 1097, 1974). No answer was required to be filed in this case because it was designated under Simplified Proceedings. Buckner Steel, however, made no allegations regarding vagueness in its notice of contest, therefore the defense is waived.

Classification

Buckner Steel asserts that if a violation of 29 C.F.R. § 1904.32(b)(4) is found, it should be classified as a *de minimis* violation rather than an other-than-serious violation. The parties have submitted no evidence regarding the classification of the violation. The Commission has the authority to reclassify a violation as *de minimis*. *El Paso Crane and Rigging Co.,* 16 BNA OSHC 1419, 1427 (No. 90-1106, 1993). A *de minimis* violation carries no penalty and requires no abatement. *Erie Coke Corp*., 15 BNA OSHC 1561, 1571 (No. 91-3606, 1992). Since no abatement would be required with a *de minimis*

classification, this would be tantamount to giving Buckner Steel the option of not complying with the standard. See *Secretary of Labor v. Cornell & CO.* 15 BNA OSHC 1726, 1728 (OSHRC Docket No. 91-990, 1992).

A *de minimis* violation involves technical non-compliance with a standard and the non-compliance bears such a negligible relationship to employee safety as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Keco Industries, Inc.,* 11 BNA OSHC 1832, 1834 (No. 81-1976, 1984). Also *see Otis Elevator Co*., 17 BNA OSHC 1166, 1168 (No. 90-2046, 1995). Not all instances of noncompliance with OSHA's recordkeeping regulations can be classified as *de minimis,* however. *See General Motors Corp., Electro-Motive Div*., 14 BNA OSHC 2064, 2072 & n.20 (No. 84-816, 1991) (denial of employee access to medical and exposure records, inasmuch as use of such records in worker's compensation proceedings promotes occupational safety and health); *General Motors Corp. Inland Div.*, 8 BNA OSHC 2036, 2040-41 (No. 76-5033, 1980) (failure to record on OSHA Form No. 100 three instances of respiratory illness, inasmuch as such records "play a crucial role in providing the information necessary to make workplaces safer and healthier").

The Secretary argues that the purpose of the standard cited here is to raise the employer's awareness of safety and to have the highest level executives of an employer attest to the integrity of its recordkeeping process. The Secretary also points out that this corporate accountability improves safety awareness, thereby demonstrating a link between recordkeeping and employee safety (Complainant's Brief pp. 4, 8 and 10). This helps achieve the objectives of the Act. Certification of the annual summary entails an examination of the information therein for accuracy. This process of examination provides a direct and tangible relationship to employee safety and health. There is no evidence before the undersigned that this examination occurred here regardless of the presence of a signature. Therefore, the undersigned finds that Buckner Steel committed an other-than-serious violation of 29 C.F.R. § 1904.32(b)(4).

Penalty Determination

The Secretary states in her brief that "the CSHO found the severity of the violation minimal and the probability lessor. Respondent benefitted from a 20% penalty reduction for its small size" (Complainant's Brief, p. 11). Respondent contends that there should be no penalty (Respondent's Brief,

p. 10). However, neither party submitted any evidence as to the reasonableness of the penalty. The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). The Commission must determine a reasonable and appropriate penalty in light of § 17(j) of the Act and may arrive at a different formulation than the Secretary in assessing the statutory factors. Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria when assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. *29 U.S.C. § 666(j)*. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993).

The Commission has held that recordkeeping violations are generally of low gravity because such violations touch in only the most tangential way the factors that go to gravity. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178 (No. 87-922, 1993). Here, the evidence establishes that Buckner Steel, in an effort to comply with the standard, improperly allowed its Safety and Risk Manager to certify the annual summaries for at least three years, only tangentially affecting the gravity factors. Therefore, the gravity of the violations contained in items 1, 2 and 3 are found to be low. As to the other penalty assessment factors, Buckner Steel's cooperation during the inspection was not disputed, and it was conscientious in effecting corrections after the inspection. These good faith factors weigh against a large penalty. The parties submitted no evidence as to the size of Buckner Steel, however, the Secretary states in her brief that a 20% reduction for size was given. The undersigned takes official notice that OSHA's Field Operations Manual provides a 20% reduction for employers with 101 to 250 employees. This size factor weighs in favor of a low penalty. As to history, Buckner Steel's lack of a citation history with OSHA prior to the current investigation also weighs in favor of a low penalty. Considering these facts and the statutory elements, no penalty assessment for each item is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation 1, Item 1, alleging a violation of § 1904.32(b)(4), is affirmed, and a penalty of $0 is assessed;
2. Citation 1, Item 2, alleging a violation of § 1904.32(b)(4), is affirmed, and a penalty of $0 is assessed;
3. Citation 1, Item 3, alleging a violation of § 1904.32(b)(4), is affirmed, and a penalty of $0 is assessed.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Date: August 24, 2010
Atlanta, Georgia